Court of Appeals No. 48626-1-II
Superior Court No. 12-2-02585-3

COURT OF APPEALS, DIVISION TWO
OF THE STATE OF WASHINGTON

F.P.H. CONSTRUCTION, INC., a Washington Corporation,

Respondent,

v.

ESHMAIL SHAHREZAEI,

Appellant,

and

JANE DOE SHAHREZAEI; MAHMOUD SHAHREZAEI and JANE DOE SHAHREZAEI, husband and wife; and C&SH ENTERPRISES, LLC, a Washington Limited Liability Company,

Defendants.

BRIEF OF APPELLANT

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I. ASSIGNMENTS OF ERROR

1. The trial court erred when it granted the plaintiff's motion for summary judgment against defendant/appellant Eshmail Shahrezaei ("Eshmail"), because there was a genuinely disputed material fact, as admitted by the plaintiff, that defendant Eshmail has been denying that he had joined his brother co-defendant Mahmoud Shahrezaei in signing the construction contracts.

2. The trial court erred when it considered plaintiff F.P.H.'s new argument based on the theory of quantum meruit for the first time on F.P.H.'s motion for summary judgment because F.P.H. failed to plead quantum meruit in its complaint or amended complaint.

3. The trial court erred or abused its discretion when it struck portions of defendant/appellant Eshmail's declaration submitted in opposition to F.P.H.'s motion for summary judgment where Eshmail stated that he "never entered into any contract or agreement" with the plaintiff construction company, and that he has "not benefitted from any work or services provided by Plaintiff," while the plaintiff construction company never alleged that the defendants had any ownership interest in the building on which the construction work was done which primarily benefitted the building

owner.

4. The trial court erred or abused its discretion when it allowed the plaintiff construction company (F.P.H.) to amend its complaint to add two Jane Doe spouses of the two defendants (Mahmoud and Eshmail) as additional defendants and to add a second claim for breach of contract, after the arbitration hearing was completed and the defendants were the only parties to request a trial de novo.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the trial court err when it accepted plaintiff/respondent F.P.H.'s new claim under the theory of quantum meruit, struck portions of defendant/appellant Eshmail's declaration, and granted summary judgment against Eshmail, where there was a genuinely disputed material fact because even plaintiff F.P.H. admitted that Eshmail always denied the allegation that he had joined his brother/co-defendant Mahmoud Shahrezaei in signing the construction contracts? (Assignments of Error Nos. 1, 2, and 3.)

2. Did the trial court err or abuse its discretion when it allowed the plaintiff construction company (F.P.H.) to amend its complaint to add two Jane Doe spouses of the two defendants

(Mahmoud and Eshmail) as additional defendants and to add a second breach of contract claim, **long after the arbitration hearing was completed** and the defendants were the only parties to request a trial de novo? (Assignments of Error No. 4.)

III. STATEMENT OF THE CASE

During the relevant times, defendant Mahmoud Shahrezaei ("Mahmoud") was operating a restaurant called "Old Town Bistro" in Silverdale, Washington, (under a business entity called C&SH ENTERPRISES, LLC, a Washington Limited Liability Company), renting the Seaport building there, on Byron Street. (CP at 4.)

Defendant/Appellant Eshmail Shahrezaei ("Eshmail") is a brother of Mahmoud and, for a limited period of time, was helping Mahmoud, as a family member, with the restaurant's daily business activities.

The plaintiff, F.P.H. Construction, Inc., ("F.P.H.") apparently entered into a written contract with Mahmoud to make improvements to the building such as installation of a sprinkler system and a restaurant grease trap. (CP at 4.) Later, Eshmail left the area and went back to Florida. Admittedly, Mahmoud paid to the plaintiff a substantial portion of the contract price. (CP at 167.) However, Mahmoud's restaurant later went out of business, he lost

everything (including his house) and he was evicted from the building (Seaport Building). And, Mahmoud left the area and moved to California.

Plaintiff F.P.H. Construction company brought this court action against Mahmoud for breach of the construction contract for the unpaid part of the monies owed, and included Eshmail as Mahmoud's wife as a co-defendant. (CP at 3.) There is no evidence that plaintiff F.P.H. Construction Company has ever filed a mechanic's lien, or a construction lien, against the building or owner of the building for any claims including a claim under the theory of unjust enrichment.

Plaintiff F.P.H.'s complaint asked for relief of $38,652.24 as unpaid portion "due under the Contract." The complaint did not state a claim under the theory of quantum meruit as a cause of action and did not ask for any relief of the reasonable value of the services performed. (CP at 3–5.)

Plaintiff F.P.H. alleged in its complaint that Mahmoud and Eshmail were husband and wife as co-defendants. Earlier, all invoices were sent to Mahmoud or C&SH LLC only and none to Eshmail. The complaint was verified by a sworn affidavit of the president of F.P.H. (CP at 6.) Eshmail filed his pro se sworn answer

from his residence in Florida and declared in his answer (under penalty of perjury), among others, that he was not involved in the execution of any contracts with the plaintiff construction company. (CP at 18–19.) It is significant to note here that Mahmoud and Eshmail are brothers, not husband and wife. And Eshmail had been helping his brother in daily business of the restaurant.

Despite Eshmail's answer, plaintiff F.P.H. made no effort to amend its complaint at that time, and instead proceeded to arbitration. During the arbitration hearing, it became obvious that Mahmoud and Eshmail were both males when they testified, (neither one of them were females), and they were not husband and wife.

After plaintiff F.P.H. prevailed in arbitration, in 2014, Eshmail and Mahmoud requested a trial de novo and demanded a trial by a jury.

In 2015, long after the arbitration and before the trial, plaintiff F.P.H. moved to amend its complaint (over two years after filing the original complaint) to change Mahmoud and Eshmail from the designation as husband and wife to being separate defendants and, under that pretext, to add both of their spouses as Jane Doe additional and new defendants; and also to add a new

contract claim for which monies were allegedly owed. (CP at 22.) Plaintiff F.P.H. had the pretext of "correcting the mistake" to amend its complaint that Mahmoud and Eshmail were brothers, not husband and wife. Yet, it added both of their wives as new additional defendants — **long after the arbitration hearing had been completed**. The trial court granted the motion, (CP at 57), even though Eshmail and Mahmoud opposed it due to the fact that it was long after the arbitration hearing, their wives were being denied the benefit of the arbitration, a subversion of the mandatory arbitration process, unnecessary delay, and unfair prejudice (CP at 51). Meanwhile, Mahmoud withdrew his request for a trial de novo after the arbitration hearing and Eshmail remained to proceed to the trial de novo. (CP at 268.) A judgement was also entered against Mahmoud, which is not on appeal.

Next, (long after the arbitration was completed), plaintiff F.P.H. moved for a summary judgment with declarations alleging that Eshmail had joined Mahmoud in signing the contract. In its motion, plaintiff F.P.H. also argued for the first time that it was also entitled to relief under the theory of quantum meruit. (CP at 84.) Eshmail provided his declaration denying that he had joined his brother in signing the contracts, entering into any agreement with

F.P.H., or benefitting from any work done by F.P.H. (CP at 263.)

The trial court granted summary judgment against Eshmail under the claim of breach of contract and the theory of quantum meruit, after striking portions of Eshmail's declaration in opposition to the motion for summary judgment. (CP at 279.)

IV. ARGUMENT

Standard of Review

The trial court's grant of summary judgment is **reviewed de novo**. Summary judgment is appropriate only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits," show that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. CR 56(c). The burden is on the party moving for summary judgment to demonstrate there is no genuine dispute as to any material fact. *Folsom v. Burger King,* 135 Wn.2d 658, 663, 958 P.2d 301 (1998). When making this determination, the Court considers all facts and makes all reasonable, factual inferences in the light most favorable to the nonmoving party. *Scrivener v. Clark College,* 181 Wn.2d 439, 444, 334 P.3d 541 (2014). "[C]redibility determinations are solely for the trier of fact." *Morse v. Antonellis,* 149 Wn.2d 572, 574, 70 P.3d 125 (2003).

1. Summary judgment should be reversed and must be denied because whether Eshmail had joined his brother in signing the written contracts is a genuinely disputed material fact, which is for the trier of fact to determine.

Plaintiff F.P.H. argued that Eshmail had joined his brother, Mahmoud, in signing two written contracts with F.P.H., but Eshmail denied joining his brother in signing the contracts in his written declaration submitted in opposition to F.P.H.'s motion for summary judgment. (CP at 263.) Eshmail also denied in his pro se answer (sworn by affidavit) that he was an officer or partner in the restaurant, nor had joined his brother in signing the contracts. (CP at 18–19.) Additionally, plaintiff F.P.H. admitted in its Declaration of Michael Brown, submitted in support of its motion for summary judgment, that at the arbitration hearing, Eshmail denied signing the contracts. (CP at 167.) Testimony at the arbitration hearing was made under oath. See MAR 5.3(a). Furthermore, plaintiff F.P.H. also admitted in its Declaration of David Weibel (F.P.H.'s attorney), in support of its motion for summary judgment, that Eshmail denied signing the contracts in response to discovery requests. (CP at 230.)

Moreover, there is strong evidence supporting Eshmail's

position that he was not a party to the contracts and did not sign them: First, plaintiff F.P.H.'s original complaint (verified by sworn affidavit of the president of the company), listed Mahmoud and Eshmail as husband and wife, not as brothers. (CP at 3.) This is significant because if Eshmail had actually been a party to the contracts as F.P.H. later alleges, F.P.H. would have known that Eshmail was not the wife of Mahmoud. Second, attached to F.P.H.'s verified complaint is an unsigned promissory note that lists only Mahmoud as the promissor, and makes no mention of his brother Eshmail. (CP at 16.) Again, if Eshmail was a party to the contracts, the promissory note would have also included Eshmail. In addition, none of the invoices submitted by F.P.H. as demand for payment were addressed to or submitted to Eshmail. All bills or invoices demanding for payment were made to defendant Mahmoud and/or C&SH Enterprises, LLC. This is strong evidence that Eshmail was not a party to the construction contract. And therefore a genuine issue of material fact exists to preclude a summary judgment.

In support of its motion for summary judgment, plaintiff F.P.H. provided declarations from a purported document examiner expert and from an individual allegedly familiar with Eshmail's signature, and argued that the signatures on the contracts are

identical to Eshmail's signatures. (CP at 161; 95.) This claim is far from being the truth because there is hardly even a signature allegedly signed by Eshmail on the documents. Those purported signatures are far different than signatures of Eshmail on his pleadings, or other documents.

Moreover, plaintiff F.P.H. conceded in its motion for summary judgment that **"[t]he weight of such testimony is, of course, for the jury."** (CP at 91) (quoting *State v. Brunn,* 144 Wash. 341, 345, 258 P. 13 (1927)). Additionally, plaintiff F.P.H. fails to realize that if the signature was forged then it is inconsequential how closely the signature on the contract resembles Eshmail's signature. The issue must be left to the trier of fact for a determination, not decided on a motion for summary judgment.

One of the signatures on one contract appears to be superimposed on another signature, without a clear signature allegedly from Eshmail. On another contract the alleged signature of Eshmail is nothing but a little mark which is quite different than Eshmail's signatures demonstrated in the payroll checks.

Since Eshmail is the nonmoving party in this motion for summary judgment, Eshmail's assertion that he did not join his brother in signing the contract must be taken as true. Eshmail is

entitled to have the jury to decide whether or not he was a party to the contract and whether he signed it. The summary judgment must be vacated.

Quantum Meruit

Plaintiff F.P.H.'s alternate claim based on the theory of quantum meruit was not properly before the trial court and it should be denied.

First, plaintiff F.P.H.'s claim was not properly before the trial court because F.P.H.'s Amended Complaint for Monies Owed makes no mention of the theory of quantum meruit. CR 8 pleading requirements are **reviewed de novo.** *Estate of Dormaier v. Columbia Basin Anesthesia, PLLC,* 177 Wn. App. 828, 853, 313 P.3d 431 (2013). The only claim in the amended complaint is one for monies owed on two written contracts. Plaintiff F.P.H. did not ask for relief of the reasonable value of the work done, which is the cornerstone of the theory of quantum meruit. *See Young v. Young,* 164 Wn.2d 477, 485, 191 P.3d 1258 (2008) (holding that quantum meruit "is a method of recovering the reasonable value of services provided under a contract implied in fact"). In fact, the only relief requested in plaintiff F.P.H.'s amended complaint is for the specific amount of money allegedly owed on the written contracts. (CP at

62.) Plaintiff F.P.H. cannot plead only breach of contract but then later raise quantum meruit theory as a new cause of action in its motion for summary judgment:

> A complaint must at least identify the legal theories upon which the plaintiff is seeking recovery. . . . A party who does not plead a cause of action or theory of recovery cannot finesse the issue by later inserting the theory into trial briefs and contending it was in the case all along.

Dewey v. Tacoma School District No. 10, 95 Wn. App. 18, 25–26, 974 P.2d 847 (1999).

Therefore, the trial court erred when it considered plaintiff F.P.H.'s new claim for quantum meruit for the first time on F.P.H.'s motion for summary judgment.

Second, in the alternate, even if plaintiff F.P.H.'s claim for quantum meruit was properly before the trial court, the trial court erred when it granted summary judgment on this basis because Eshmail denied in his declaration and in his sworn pro se answer of having entered into any agreement with F.P.H. or having benefitted from any services performed by F.P.H. (CP at 263; 17.)

An essential element of quantum meruit is that the parties entered into an agreement where the plaintiff performed work for the benefit of the defendant. *See Young v. Young,* 164 Wn.2d 477, 485–486, 191 P.3d 1258 (2008). The trial court erred or abused its

discretion when it struck the following portion of Eshmail's declaration submitted in opposition to plaintiff's motion for summary judgment:

> I have never entered into any contract or agreement with Plaintiff or anyone acting on Plaintiff's behalf. I also have not benefitted from any work or services provided by Plaintiff or anyone acting on Plaintiff's behalf.

(CP at 263.)

Moreover, the plaintiff never alleged that the defendants had any ownership interest in the building. And there is no evidence that the plaintiff ever filed a construction lien against the building or its owner, who would have benefitted from the beneficial work done by the plaintiff on the building.

The factual assertions of Eshmail should not have been stricken as "conclusory," (CP at 280), because they are made to directly contradict plaintiff F.P.H.'s arguments — that Eshmail had "agreed with F.P.H. for work to improve the restaurant" and that F.P.H. performed the work for the benefit of Eshmail. (CP at 274.) Plaintiff F.P.H. cannot first make a broad assertion that Eshmail entered into a contract or agreement with F.P.H. and benefitted from its work, but then strike Eshmail's denial of that factual assertion. Ironically, plaintiff F.P.H. argued in its motion for

summary judgment that Eshmail's statements are conclusory, (CP at 273–275). Plaintiff F.P.H. itself never alleged specific facts demonstrating that Eshmail entered into an agreement with F.P.H., other than the allegation that he signed the written contracts, which F.P.H. admits that Eshmail denies. Nor did F.P.H. allege any specific facts demonstrating that Eshmail benefitted from plaintiff F.P.H.'s work. Most significantly, F.P.H. never alleged that the defendants had any ownership interest in the building on which the construction work was done for the benefit of the building owner. Thus, it is clear that any benefit from F.P.H.'s work must have been received by the owner of the building, not the defendants.

Another essential element of the theory of quantum meruit is that the defendant requests work from the plaintiff. *Young v. Young,* 164 Wn.2d 477, 485–486, 191 P.3d 1258 (2008). Here, plaintiff F.P.H. Construction Company has not alleged any specific facts showing that Eshmail requested work from plaintiff F.P.H., other than the contested allegation that Eshmail signed the written contract. Plaintiff F.P.H. cannot do an end run around the genuinely disputed material fact of whether Eshmail signed the written contract by vaguely arguing that Eshmail nonetheless requested work from F.P.H. Thus, F.P.H.'s claim for quantum

meruit fails and the trial court erred when it granted summary judgment on this basis also.

On plaintiff F.P.H.'s motion for summary judgment, the evidence must be interpreted most strongly in Eshmail's favor as the nonmoving party. Plaintiff F.P.H. has failed to meet its burden of demonstrating the absence of a genuinely disputed material fact. For the foregoing reasons, the trial court's grant of summary judgment must be reversed. Whether Eshmail signed the contracts must be decided at the trial by the jury.

2. The trial court erred or abused its discretion when it allowed plaintiff F.P.H. Construction Company to amend its complaint to add two Jane Doe spouses of the two defendants (Mahmoud and Eshmail) as additional defendants and to add a second breach of contract claim, after the arbitration hearing was completed and the defendants Mahmoud and Eshmail Shahrezaei were the only parties to request a trial de novo.

This court action was filed in 2012. In their Answers, both defendants (**Mahmoud and Eshmail Shahrezaei)**, denied that they are husband and wife. Yet, plaintiff F.P.H. set the case for arbitration with no effort to correct the alleged "mistake." And the parties went through an arbitration without any effort to add the spouses as party defendants. Later, Plaintiff F.P.H. alleged that it had made a motion to amend the complaint during the arbitration

proceedings, but there is no record of such a motion being made or granted. More importantly, the arbitrator had no authority to consider such a motion. MAR 3.2(b)(1) provides in pertinent part that motions to add parties shall be decided by the court, not the arbitrator.

After plaintiff F.P.H. prevailed in the arbitration, Eshmail and Mahmoud requested a trial de novo. F.P.H. did not request a trial de novo. In 2015, over two years after filing of the complaint, under the pretext of "correcting a mistake," plaintiff F.P.H. simply added the wives of Eshmail and Mahmoud as additional party defendants for the trial de novo — which only the defendants had requested. (CP at 22.) To its amended complaint, for the trial de novo, plaintiff also added a second written contract and increased the amount of money allegedly owed, all under a pretext of correcting a mistake. The trial court abused its discretion in granting all of these amendments because those amendments were a subversion of the mandatory arbitration process, plaintiff F.P.H. failed to demonstrate excusable neglect, and the defendants were prejudiced by undue delay and unfair surprise.

Plaintiff F.P.H. erroneously claimed in its complaint that defendants Mahmoud and Eshmail were husband and wife. (CP at

3.) Mahmoud and Eshmail denied this in their answers almost two years before the plaintiff moved to amend. (CP at 17–19.) This is inexcusable neglect which is sufficient grounds for denying a motion to amend the complaint. *Haberman v. Washington Public Power Supply System,* 109 Wn.2d 107, 174, 744 P.2d 1032 (1987). Inexcusable neglect for the purpose of determining the propriety of a request to amend the complaint exists when no reason for the initial failure to name the party appears in record; if the parties are apparent, or are ascertainable under reasonable investigation, failure to name them will be held to be inexcusable. *Id.* Plaintiff F.P.H. has not explained why it could not have made a motion to amend the complaint during the prior two years and before the arbitration.

Factors which may be considered in determining whether permitting amendment would cause prejudice to the nonmoving party include undue delay and unfair surprise, both of which are applicable here. *Wilson v. Horsley,* 137 Wn.2d 500, 505–506, 974 P.2d 316 (1999). Plaintiff F.P.H. waited almost two years after the defendants denied being husband and wife before moving to amend its complaint with a pretext of correcting a "mistake." This is undue delay. It was also unfair surprise to the defendants and to their

wives because the trial de novo was only a few months away and is supposed to only cover the same issues as the arbitration. Allowing the amendment and adding the wives as additional defendants would also frustrate the policy of reducing the time and expense of litigation by having cases resolved through arbitration. *Id.* at 507.

If plaintiff F.P.H. is allowed to add parties after the arbitration, then it has effectively circumvented the requirement of mandatory arbitration with respect to the new parties.

Furthermore, plaintiff F.P.H. did not request a trial de novo. It should not be permitted to add parties when only the opposing parties requested a trial de novo.

For the foregoing reasons, the trial court erred or abused its discretion when it granted plaintiff F.P.H.'s motion to amend its complaint to add the two wives as additional defendants and to add an additional contractual claim. The order should be reversed and the order granting summary judgment should be vacated.

V. CONCLUSION

The order striking portions of Eshmail's declaration and granting summary judgment should be vacated, and the order allowing plaintiff F.P.H. to amend its complaint to add both wives as new party defendants and a second written contract should be

reversed.

Plaintiff F.P.H. still has a huge judgement against defendant Mahmoud Shahrezaei, which is not on appeal.

Respectfully submitted on this 10th day of May, 2016.

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