FILED
JAN 26 1983
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

| | |
|---|---|
| **JOHN J. SCHUMACHER** d/b/a **SCHUMACHER HOME BUILDERS,** | ) |
| Plaintiffs-Appellants, | ) |
| vs. | ) Filed January 26, 1983 |
| **PARK TOWNE COMMUNITY PARTNERSHIP,** | ) |
| Defendant-Appellee. | ) 2-358 / 2-68074 |
| **PARK TOWNE COMMUNITY PARTNERSHIP,** | ) |
| Cross-Petitioner, | ) |
| vs. | ) |
| **DOUGLAS D. HOLLINGSWORTH,** | ) |
| Third-Party Defendant. | ) |

Appeal from Linn District Court, William L. Thomas, Judge.

Plaintiff building contractor appeals from a judgment for defendant, owner of a large apartment complex, in this suit to obtain payment for remodeling services. AFFIRMED.

Gregory J. Epping and Richard D. Raymon, Cedar Rapids, for plaintiff-appellant.

Peter C. Riley of the Tom Riley Law Firm, P.C. Cedar Rapids, for defendant-appellee.

Considered en banc.

**OXBERGER, C.J.**

Plaintiff, materialman, appeals judgment for defendant, property owner, seeking restitution on the theory of unjust enrichment. We affirm.

Defendant Park Towne Community Partnership sold an apartment complex on contract to Sun Development Co., a California corporation which intended to convert it into condominiums. Douglas D. Hollingsworth directed Schumacher the materialman to renovate four of the apartments into condominiums. Hollingsworth had previously engaged Schumacher for remodeling work. Hollingsworth was manager of Park Towne apartments and also an officer of Sun Development Co. He was also the broker in the sale of the property to Sun. Schumacher was aware that Hollingsworth was an officer in the Sun Corporation. The parties stipulated the fair and reasonable value of the work done by Schumacher was $17,688.56. A decree of forfeiture of Sun's contractual interest was entered by the court on August 18, 1980. This is not an action to foreclose a mechanic's lien.

The issue in this case is whether the defendant-property owner should be required to pay for improvements to his property. We hold the owner is not required to pay and affirm the trial court.

The trial court said: "The court having found that there existed no contract express or implied, between Schumacher and Park Towne Community Partnership, it is unnecessary to deal with the plaintiff's claim that the defendant was unjustly enriched." While we affirm the trial court we do so on a different basis than that found by the trial court.

A number of Iowa cases recognize the common law doctrine of restitution for unjust enrichment where there is no privity of contract. Shadle v. Borrusch, 255 Iowa 1122, 1126, 125 N.W.2d 507, 510 (1963), Gard v. Razanskas, 248 Iowa 1333, 1336, 85 N.W.2d 612, 614 (1957, Guldberg v. Greenfield, 259 Iowa 873, 146 N.W.2d 298 (1966)).

However, we are unable to find in our research of Iowa case law a case that holds that a property owner is liable to a materialman, when the owner has not requested improvements on his property but nevertheless receives the benefits of such improvements when he forfeits the contract of sale of the property.

In Paschall's Inc. v. Dozier, 407 S.W.2d 150, 155 (Tenn. 1966), the court said: "...We hold that where a materialman or subcontractor furnishes labor or materials which benefit the property of a person with whom there is no privity of contract, an action on quantum meriut may be against the landowner to recover the reasonable value of said labor and materials so furnished."

The Tennessee court also held that loss of the right to a mechanic lien does not abrogate the right to the common remedy of unjust enrichment. We take note that the person ordering the improvement lived in defendant's home and was his daughter.

In the case at bar there is no familial relationship. Nor is there an agency relationship between Park Towne Community Partnership, the property owner and Sun Development Company, the party ordering the improvement.

Schumacher, the materialman, knew at all times relevant that Hollingsworth was ordering the improvements in his capacity representing Sun Development Company. Schumacher promised to issue mechanic lien waivers to Park Towne but failed to do so. However, Schumacher in this action does not seek a mechanic lien remedy.

The Paschall's Inc. court went on to say: "[T]he most significant requirement for a recovery on quasi contract is that the enrichment to the defendant be unjust." Id. at ;55/

We find that the equities are not with the materialman. We reject a finding that merely because a materialman cannot be paid for his work he should be entitled to recover from a property owner who receives benefits from his labors.

In Gard v. Razanskas, 248 Iowa 1333, 85 N.W.2d 612 (1957) the court cited with approval a comment to Restatement of the Law Restitution, Section 1: "A person is enriched if he has received a benefit. A person is unjustly enriched if the retention of the benefit would be unjust."

Schumacher was not led by any words or actions by Park Towne or Hollingsworth to believe that Park Towne would be ultimately liable for the improvements.

In some cases the materialman may reasonably expect a property owner to be ultimately liable for improvements to his property but any presumption created by ownership has been rebutted in this case by the affirmative acts of Park Towne.

The day the improvement work started Steven C. Nelson, one of the partners in Park Towne, went to the job site to stop the work. The next day Schumacher promised to sign the lien waivers for Park Towne. Schumacher knew he was to look to Sun Development Co. for payment and he proceeded to perform the work at his own risk.

AFFIRMED.