

FOURTH DISTRICT COURT OF APPEAL

DCA NO.: 23-1765
LOWER CIRCUIT COURT CASE NO.: 50-2020-CA-11188-XXXX-MB

BEST FRENCH FRIES, INC. d/b/a

DOUGH DOUGH'S DONUTS,
Appellant(s),

v.

BEALECON CONSTRUCTION, INC.

Appellee.

INITIAL BRIEF

BROWN & ASSOCIATES, P.A.
712 US Highway 1, Suite 210-6
North Palm Beach, FL 33408
(561) 848-4306, Fax (561) 842-6845
lawmdbrown@aol.com

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ISSUES PRESENTED FOR REVIEW

- I. **WHETHER THE TRIAL COURT COMMITTED ERROR WHEN IT DETERMINED THAT THE PARTIES ENTERED INTO A VALID WRITTEN CONTRACT UNDER WHICH BEST FRENCH FRIES, INC. AGREED TO PAY BEALECON \$149,772.00 TO COMPLETE THE BUILDOUT OF ITS RESTAURANT?**
- II. **WHETHER THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT RULED THAT BFF WAS UNJUSTLY ENRICHED BY BEALCON'S WORK?**
- III. **WHETHER THE TRIAL COURT COMMITTEED REVERSIBLE ERROR WHEN IT DENIED BEST FRENCH FRIES, INC.'S MOTION FOR INVOLUNTARY DISMISSAL ON COUNT I BREACH OF AN "EXPRESS" WRITTEN AGREEMENT"?**
- IV. **WHETHER THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT DENIED BEST FRENCH FRIES, INC.'S MOTION FOR INVOLUNTARY DISMISSAL ON COUNT II "UNJUST ENRICHMENT"?**

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SCOPE OF REVIEW

The scope of review of a “Final Judgment” which determined that the parties through their actions entered into an express written agreement is “de novo”. Berlin v Pecora, 968 So. 2nd 47 (Fla. 4th DCA 2007); Kendall Imports, LLC v Diaz, 215 So. 3rd 95, 98-97 (Fla. 3rd DCA 2017).

The scope of review of the trial court’s denial of a Motion for Involuntary Dismissal is “de novo”. Town of Palm Beach v Palm Beach County, 460 So. 2nd 879 (Fla. 1984); Florida Power and Light Co. v Hayes, 122 So. 3rd 408, 411 (Fla. 4th DCA 2013).

STATEMENT OF FACTS

Best French Fries, Inc. (hereinafter “BFF”) is a Florida corporation located in Palm Beach County which operates a “food truck” business which sells French fries, gourmet hotdogs, donuts and offers catering services for parties, events, gatherings, and functions.

Bealecon Construction, Inc. (hereinafter “Bealecon”) is a Florida corporation which provides engineering and construction services.

This dispute arose between the parties because of a disagreement in the interpretation of a written proposal made by Bealecon to complete the buildout of a restaurant. Prior to trial BFF had been evicted from the premises that Bealecon sought to recover damages from BFF for work performed on the site.

Prior to locating the site which was the subject of this dispute, BFF operated the business from its owner’s home. When BFF determined that it could no longer operate the business from the owner’s home it located a potential site in a nearby shopping center which was previously a chiropractor’s office (SR 274-283).

BFF was introduced to Bealecon by another “food truck” operator and held itself out as a business which provided “one stop” engineering and construction services to its clients through its two related entities; “Bealecon Construction” and “Bealecon Engineering”. (SR 337, 338) It also represented that it had gained valuable experience it would use to help complete BFF’s buildout when it participated in constructing south Florida’s newly renovated “Hard Rock Casino”. (SR 285-289)

BFF and Bealcon began meeting at the site beginning in September

of 2018 to familiarize Bealcon with the site and BFF's method of operation so it could help BFF determine whether the site could be renovated in the manner that BFF desired. (SR 284, L. 22, through 310)

Bealecon advised BFF that it could complete the renovation within 120 (one hundred twenty) days in a manner which would allow it to function as a restaurant and "food prep" headquarters for its "food truck" operation. (SR 202, L. 12, 204).

Since a large portion of BFF's business operations require it to "blanche fry" three to four hundred pounds of potatoes daily, BFF needed to use natural or propane gas in its operations which was also used in all of its "food trucks". (SR 291-293).

Based in large part on Bealecon's confirmation of the suitability of the site, and its assurance that it could renovate the site in the manner and time period required by the proposed lease, BFF entered into a fifteen-year lease with the landlord on November 16, 2018. (Def. Exh. 16) BFF provided Bealecon immediate access to the property so that it could begin preparing engineering and other relevant construction drawings, and to begin demolition of the site which it began preparing in September of 2018. (SR 204, 337, L.22, 338)

The pre-construction drawings addressed the proposed installation of

gas lines, a fire suppression system, a functioning kitchen area, a floor drainage system, and two bathrooms. (Def.Exhbts.53,54,56) (SR 353-365)

On February 20, 2019, Bealecon forwarded a “proposal” to BFF to complete the buildout of the project for \$85,000.00 (Pltf. Ex. 120,121). The transmittal letter requested that if BFF accepted the terms of the proposal and returned it to Bealcon that it would forward a contract to BFF to be executed by both parties. (SR. 114-117)

BFF signed the “proposal” and returned it to Bealecon. Bealecon never forwarded BFF a contract and therefore the proposed written contract referenced in the letter and alleged to exist in Bealcon’s Amended Complaint was never entered into by the parties.

BFF admitted that it accepted Bealecon’s proposal to complete the work for \$85,000.00. It denied that it entered into an “open ended” contract which would have allowed Bealcon to unilaterally determine the amount of compensation it would be paid, or that it agreed to pay Bealecon \$149,552.00 to complete the renovation. (SR 392, L.22, 393)

Bealecon admitted that it did not know what its “final” bill would be in excess of an additional \$85,772.00 until it created the final invoice that it forwarded to BFF on March 19, 2020 (SR. 247, Ln3 through 15)

The sworn permit application submitted to the local government by

Bealecon valued the work it would do on the site at \$40,000.00 (forty thousand dollars). (Def. EX.23)

Bealecon did not complete the work within 120 days. The “Certificate of Occupancy” which allowed BFF to begin operations was not issued until March 20, 2020.

BFF paid Bealecon \$64,000.00 of the amount it agreed to pay and admitted that it owed Bealecon an additional \$21,000.00. (SR 392)

The first time that Bealcecon sent BFF a written invoice for \$85,372.00 was on March 1, 2020. (Pltff. Exh. 42) (SR 119-123)

BFF’s lease abated its payment of rent for 120 days from the date of its execution. The construction delays, expenditures made, and eviction caused BFF losses of more than \$500,000.00 (five hundred thousand dollars). (SR 394-397)

Because of the additional time it took for Bealecon to complete the buildout BFF was unable to open for business to generate enough revenue to pay the rent BFF was evicted from the property prior to trial.

BFF made a timely “Motion for Involuntary Dismissal” of Count I “Breach of Express Contract” and Count II “Unjust Enrichment” at trial. Both motions were denied. (SR 168-175; 510; 552 - 559)

SUMMARY OF ARGUMENT

The trial court committed a reversible error when it determined that the parties entered a valid written contract which obligated BFF to pay Bealecon \$149,552.00 to complete the renovations and that “BFF” was unjustly enriched by Bealcon’s work.

The trial court committed reversible error when it denied BFF’s “Motion for Involuntary Dismissal” of Count I “Breach of an Express contract”, and Court II “Unjust Enrichment.”

LEGAL ARGUMENT

I. THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT RENDERED A FINAL JUDGMENT THAT THE PARTIES ENTRED INTO AN EXPRESS ENFORCEABLE CONTRACT WHICH OBLIGATED BFF TO PAY BEALECON \$149,552.00 TO COMPLETE THE BUILDOUT.

The existence of a valid contract is a threshold question of law for a trial court to determine in an action for breach of contract. L&H Construction Company, Inc. v Circle Redmont, Inc., 55 So. 3rd 630 (Fla 5th DCA 2011). BFF and Bealecon did not enter into a written contract in which BFF agreed

to pay Bealecon whatever amount money Bealecon charged to complete the buildout.

In order to be an enforceable contract evidence must be presented that there was an offer, acceptance, consideration, and sufficient specification of terms of the contract so that the obligations of the parties involved can be ascertained. W. Construction, Inc. v Florida Blacktop, Inc., 88 So. 3rd 301(Fla. 4th DCA 2012). That did not occur in this case. A “proposal” does not evolve into a contract until a contract is executed by the parties. Hoon v Pate Construction Company, 607 So. 2nd 423 (Fla. 4th DCA 1992).

Bealecon did not present evidence at trial that BFF agreed to pay it \$149, 772.00 to complete the buildout. Since it did not introduce a “written” agreement executed by both parties into evidence at trial the court lacked the evidentiary basis to enter a Final Judgment in favor of Bealcon based on a contract that does not exist. City of Delray Beach v Sherman Williams American Legion Post 188, 358 So. 3rd 440 (Fla. 4th DCA 2023).

The making of a contract depends on the agreement of two parties having meant the same thing. Blackhawk Heating and Plumbing Company, Inc. v Data Lease Financial Corp, 302 So. 2nd 404 (Fla. 1974). BFF did not agree to allow Bealecon to charge it whatever amount it wanted to charge to complete the buildout. A proposal does not evolve into a contract simply by

one party making a proposal to another, until it is accepted by all parties. Hoon v Pate Construction Company, 607 So. 2nd 423 & 426 (Fla. 4th DCA 1992).

Since Bealecon sent BFF a “proposal” to BFF, not a contract as promised, the parties did not enter into an express written contract that allowed Bealecon to simply “fill in” the amount of compensation that it could solely determine to be due and obligate BFF to pay it.

BFF agreed that it entered into an agreement to pay Bealcon \$85,000.00 in exchange for the buildout of the restaurant. Since BFF paid \$64,000.00 before Bealecon initiated the litigation, BFF admitted at trial that it owed Bealecon \$21,000.00.

Since a valid written enforceable contract did not exist between the parties, the lower court was left with the task of determining whether an agreement of any kind existed between the parties, and if so, to determine the intent of the parties when they entered into that agreement. L&H Construction Company, Inc. v Circle Redmont, Inc., 55 So. 3rd 630 (Fla 5th DCA 2011).

In order to determine what agreement existed between the parties the court was required to rely on the “proposal” since it alone is the best document that provides credible written evidence of the parties’ intentions.

L&H Construction Company, Inc. v Circle Redmont, Inc., 55 So. 3rd 630 (Fla 5th DCA 2011). Although the trial court relied heavily on that case in reaching its decision, it appears that it may have misapplied the holding in that court to support the entry of a Final Judgment in favor of Bealecon.

A valid contract arises when the parties' intentions are manifested through written or spoken words or inferred in whole or in part from the parties' conduct. Commerce Partnership 809 LTD v Equity Contracting Company, 695 So. 2nd 383, 385 (Fla. 4th DCA 1997). In an attempt to ascertain whether an agreement of some type was reached by these parties the trial court was required to attempt to determine the intent of the parties during their negotiations. Blackshear Mfg. Company v Fralick, 102 So. 753, 754 (1925). Evidence presented at trial established that BFF's intent was to have the work completed within 120 days at a cost of \$85,000.00. No evidence was presented at trial that Bealcon advised BFF that the buildout would cost twice as much as the proposal.

The trial court made an error when it determined that BFF "verbally" modified the original proposal since there is no evidence that BFF did so.

Bealecon began creating construction plans and drawings in September of 2018 which included gas lines, a kitchen fire suppression and hood system, the floor drain, and two bathrooms which included the

complete layout of the restaurant. (Def. Exhibts. 52, 53, 56). BFF relied extensively on Bealecon's expertise to determine what was needed at the site to meet its operational needs. From the time that the parties visited and walked the property, the need for gas, a kitchen fire suppression system and hood system, a floor drain, and multiple bathrooms were discussed and provided for by the parties. Bealecon knew that all of BFF's "food trucks" used natural or propane gas for cooking. Because these matters were discussed from the beginning of the relationship, as is reflected in the construction drawings, it would have been unnecessary for BFF to make "change orders" to "add" matters previously discussed, planned for and which were included in the original drawings.

Furthermore, since the trial court relied on an unsigned "contract" introduced into evidence by Bealecon to support its finding of the existence of an express contract, even the language of the unsigned contract prohibited unwritten change orders. (Plf. Exhibts. 120, 121) Therefore the language of the unsigned contract regarding "change orders" does not support the court's conclusion that BFF made "verbal change orders" since oral "change orders" were not permitted.

An "express" agreement is one in which the parties reach an agreement by words, oral or written. Commerce Partnership 809 LTD v

Equity Contracting Company, 695 So. 2nd 383, 385 (Fla. 4th DCA 1997).
West Construction, Inc. v Florida Blacktop, Inc. 88 So. 3rd 301 (Fla. 4th DCA 2012). The only agreement that the parties clearly reached in this case is that Bealecon would complete the buildout as designed within 120 days and that BFF would pay it \$85,000.00 to do so.

The trial court's reliance on L&H Construction Company, Inc., supra, to support the Final Judgment is contrary to the law of that case. In that case the lower court found that the general contractor accepted the subcontractor's "proposal" which was erroneously attached to the contract as an exhibit and thereby created a valid enforceable contract between the parties. Furthermore, even though the general contractor did not sign the "final proposal" the court found, and both parties agreed, that an enforceable written contract existed between the parties. The only issue in that case was for the court to determine the "scope of the work" to be completed by the subcontractor, not the amount of compensation due.

In this case BFF denies that it entered a contract in which it agreed to pay Bealecon \$149,722.00 to complete the buildout.

The dispute in "L&H" arose when the "scope of work" to be performed by the subcontract or became an issue based on a unilateral mistake made by the subcontractor, even though both parties signed the contract. Unlike

this case, “price” was not an issue in that case since both parties agreed that the total contract price was \$268,200.00. The parties in L&H entered a valid express contract which included specific terms, conditions, scope of work and most importantly, the agreed upon amount of compensation. None of those elements exist in this case.

“L & H”, supra, supports BFF’s position that a valid contract did not exist between the parties. The court in that case found it significant that the contract included milestones, a completion date, a payment schedule, and the “price”. The inclusion of those factors solidified the existence of a valid enforceable contract, despite the ambiguity created by the unilateral mistake. The “proposal” Bealcon submitted to BFF did not include “milestones” for completion of work or a payment schedule.

Since Bealcon did not invoice BFF for the “additional” \$85,722.00 that it claimed to be due until March 19, 2020, the trial record does not establish a basis for its determination that BFF breached a contract to pay the additional amount. The parties could not have possibly known in February of 2019 when Bealcon sent the proposal to BFF that Bealcon would charge an additional \$85,722.00 from the amount included in the proposal for the work performed. Therefore the parties could not have entered into an agreement at that time in which BFF agreed to pay Bealcon

\$149, 772.00 to complete the buildout.

UNJUST ENRICHMENT

II. THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT DETERMINED THAT BFF WAS “UNJUSTLY ENRICHED” BY BEALCON’S WORK.

In order to prevail on a claim for “unjust enrichment” Bealecon would have to have proven that it conferred a benefit on BFF: that BFF accepted and continued to benefit from its work; that BFF’s retention of the benefit is inequitable; and, that Bealecon did not have a “adequate remedy at law” to seek redress for its claims. Pincus v American Traffic Solutions, Inc., 333 So. 3rd 1095 (Fla. 2022).

BFF was evicted from the premises prior to trial due to Bealecon’s failure to complete the renovation in a timely manner. It was not “enjoying the benefit” of Bealecon’s work prior to or during trial. The fact that BFF was unable to pay its rent because of Bealecon’s delay in completing the buildout demonstrates that BFF did not “inequitably” benefit in its dealings with Bealecon.

Further, “unjust enrichment” is a claim in “quasi contract”.

Bealecon's claim in Count I that it had an "express" written contract with BFF negates its claim in Count II for "unjust enrichment". Diamond S. Development v Mercantile Bank, 987 So. 2nd 696 (Fla 1st DCA 2008). Since A party cannot recover for "unjust enrichment", if an "express" contract exists concerning the same subject matter, the trial court committed reversible error when it ruled that alternatively, BFF was "unjustly enriched" by Bealecon's work.

III. THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT DENIED BEST FRENCH FRIES, INC.'S MOTION FOR DIRECTED VERDICT ON COUNT I, "BREACH OF CONTRACT".

There was no evidence presented at trial that Bealecon "offered" and BFF "accepted" and signed an "open ended" "express" contract which permitted Bealecon to fill in the amount of compensation that it felt it was entitled to receive for the buildout. The evidence presented at trial demonstrated that the parties did not reach an agreement on essential contract terms which are necessary for the formation of an "express" contract for the damages awarded by the trial court . Since Count I of Bealecons complaint is based on an "express" written agreement, its failure to produce a valid written agreement between the parties, as a matter of law, required

the trial court to grant BFF's Motion for Involuntary Dismissal of Count I.

IV. THE TRIAL COURT COMMITTED A REVERSIBLE ERROR WHEN IT FAILED TO GRANT BFF'S MOTION FOR DIRECTED VERDICT ON COUNT II – "UNJUST ENRICHMENT".

Evidence at trial established that Bealecon's failure to complete the construction in less than 120 days, and the delays in the construction resulted in BFF being unable to commence operations to generate revenue which could have been used to pay rent, thereby resulting in its eviction.

Since Bealecon did not meet the criteria set forth in Pincus v American Traffic Sol., Inc., 333 So. 3rd 1095 (Fla. 2022), the trial court committed reversible error when it denied BFF's Motion for Involuntary Dismissal to Count II – "Unjust Enrichment".

CONCLUSION

For the reasons stated above, BFF requests that this court reverse the trial court's decision as to Count I "Breach of Contract", Count II, "Unjust Enrichment", rendered in favor of Bealecon. BFF requests this court direct the trial court to render a Final Judgment in favor of BFF, on Count I and Count II of the Amended Complaint, offset by the \$21,000.00 that BFF

conceded that it owed Bealecon.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on **December 13, 2023**, a true and correct copy of the foregoing was filed with the Clerk of the Fourth District Court of Appeal by using the Florida Courts e-Filing Portal, which will send an automatic email message to the following parties registered with the e-Filing Portal system: Jerrod M. Maddox Esq., 66 West Flagler Street, Suite 400, Miami, Florida, 33130, Email Jerrod.Maddox@dunnlawpa.com and U.S. Mail on this 9th day of December 2023 to all parties, *Counsel for Appellee*.

BROWN & ASSOCIATES, P.A.
Attorneys for Plaintiff
712 US Highway 1, Suite 210-6
North Palm Beach, FL 33408
(561) 848-4306
Fax (561) 842-6845
Email: lawmdbrown@aol.com

/s/ Michael D. Brown
Michael D. Brown, Esquire
Fla. Bar No.: 0727180

CERTIFICATE OF COMPLIANCE

Pursuant to Fla. R. App. P. 9.045 and Fla. R. App. P. 9.130(e), as amended, I hereby certify that this brief was prepared using Arial 14-point font and complies with the applicable font and word count limit requirements.

/s/ Michael D. Brown
Michael D. Brown, Esq.
Florida Bar Number: 0727180