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Missouri Court of Appeals

WESTERN DISTRICT
1300 OAK STREET
KANSAS CITY, MO. 64106-2970

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March 29, 1994

IN RE: R. Eugene McGannon, et al., d/b/a Hoskins, King, McGannon and Hahn
vs. Russell Nugent
WD# 47861

TO THE ATTORNEYS OF RECORD:

Be advised that the enclosed Opinion was handed down on the above date. MOTION FOR REHEARING AND/OR TRANSFER TO THE SUPREME COURT IS DUE 15 (FIFTEEN) DAYS FROM THE DATE THE OPINION WAS FILED AND MUST BE SERVED ON THE ADVERSE PARTY WITHIN THAT TIME.
See Rule 84.07 and 84.17. Rule 44.01(e) does not apply to extend the time for filing Motions for Rehearing and/or Transfer to the Supreme Court.

Our Court requires an ORIGINAL AND ELEVEN COPIES of same. (See Missouri Rules of Court, Western District, Special Rules XII (C).) Please attach any SUGGESTIONS IN SUPPORT to the Motion.

We also need an ORIGINAL AND ELEVEN COPIES OF THE SUGGESTIONS IN OPPOSITION TO THE MOTION FOR REHEARING AND/OR TRANSFER TO THE SUPREME COURT, should the opposing counsel wish to respond.

Please feel free to call upon us should you need further assistance.

PEGGY STEVENS MCGRAW
Clerk-Docket Attorney

mba

P.S. Papers and Documents which are not presented in the proper form, content and number required by these rules cannot be accepted for filing and will be returned. (Missouri Rules of Court, Western District Special Rules, XII (H).)

cc: Geoff Hetley
William Marshall, II

NOTICE
THIS OPINION IS NOT FINAL UNTIL
ALL POST HANDDOWN MOTIONS HAVE
BEEN DISPOSED OF AND THE MANDATE
ISSUED AND RECEIVED.

IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

R. EUGENE McGANNON, et al. d/b/a HOSKINS, KING, McGANNON & HAHN, Respondents, v. RUSSELL NUGENT, Appellant.	)	WD 47861 ORDER FILED: March 29, 1994

APPEAL FROM THE CIRCUIT COURT OF JACKSON COUNTY
The Hon. Vernon E. Scoville, Judge

BEFORE BERREY, C.J., P.J., KENNEDY and ELLIS, JJ.

PER CURIAM

O R D E R

Russell Nugent appeals an order assessing damages against him after interlocutory order of default.

Affirmed. Rule 84.16(b).

IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

R. EUGENE McGANNON, et al.
d/b/a HOSKINS, KING,
McGANNON & HAHN,

Respondents,

v.

RUSSELL NUGENT,

Appellant.

WD 47861
ORDER FILED:
March 29, 1994

MEMORANDUM SUPPLEMENTING ORDER AFFIRMING JUDGMENT PURSUANT TO RULE 84.16(b)

This memorandum is for the information of the parties and sets forth the reasons for the order affirming the judgment.

THIS STATEMENT DOES NOT CONSTITUTE A FORMAL OPINION OF THIS COURT. IT IS NOT UNIFORMLY AVAILABLE. IT SHALL NOT BE REPORTED, CITED OR OTHERWISE USED IN UNRELATED CASES BEFORE THIS COURT OR ANY OTHER COURT. IN THE EVENT OF THE FILING OF A MOTION TO REHEAR OR TRANSFER TO THE SUPREME COURT, A COPY OF THIS MEMORANDUM SHALL BE ATTACHED TO ANY SUCH MOTION.

Russell Nugent appeals the trial court's order entering judgment against him in the sum of $43,245.92, with 9% annual interest from April 28, 1992 (the date the underlying suit was filed), plus court costs. We affirm.

The facts are not in dispute. Nugent is the president and sole shareholder of On Top Roofing, Inc. (hereinafter "OTR"), a

Missouri corporation engaged in the construction, maintenance and repair of residential roofs. In October, 1990, Nugent, OTR, and others were indicted by the federal government for their alleged criminal participation in an illegal price-fixing scheme. On January 7, 1991, after representing himself at a few pretrial hearings, Nugent formally engaged the Hoskins, King, McGannon & Hahn law firm (hereinafter "the Hoskins firm") to defend him. Their written fee agreement required that Nugent pay a $50,000 retainer up front and also made him responsible for payment of any legal fees incurred in excess of that amount. The agreement, which was signed by Nugent both individually and in his capacity as president of OTR, also contained this statement: "We have discussed the possibility that On Top should have a separate attorney at trial. Our fee agreement does not apply to any additional attorney."

As trial approached, Nugent requested that the Hoskins firm enter its appearance on behalf of both himself and OTR, which the firm did. Nugent paid the retainer, and, along with OTR, was ultimately acquitted of criminal antitrust charges after a six-day jury trial.[1] However, when the Hoskins firm presented its bill for $43,245.92 in additional attorney's fees, he refused to pay it.

On April 28, 1992, the Hoskins firm filed a two-count petition in an attempt to collect those fees. OTR was not a party to the

[1] Nugent and OTR were the only defendants who went to trial. The other corporate and individual defendants indicted along with them entered pleas and paid large fines, served prison sentences, or both.

suit, nor was its name mentioned in the petition. Nugent failed to file a timely answer, so on March 9, 1993, the trial court entered an interlocutory order of default against him and scheduled a hearing on the sole issue of the amount of damages.

At the damages hearing, which took place on April 13, 1993, the Hoskins firm presented a variety of evidence relating to the balance due from Nugent. Even though his new attorney obviously expected him to be there, Nugent did not appear in person and presented no witnesses or evidence of any kind.

On April 19, 1993, the trial court entered judgment against Nugent for $43,245.92 (the entire amount prayed in the petition),[2] with 9% annual interest from April 28, 1992, and costs. This appeal followed.

As acknowledged by the parties, our standard of review in this court-tried case is set forth in **Murphy v. Carron**, 536 S.W.2d 30 (Mo. banc 1976). Accordingly, the judgment entered by the trial court will be affirmed on appeal unless it is not supported by substantial evidence, it is against the weight of the evidence, or it erroneously declares or applies the law. **Id.** at 32; **Champion Turf, Inc. v. Rice, Papuchis Constr. Co.**, 853 S.W.2d 323, 325 (Mo. App. 1993).

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[2] There is no question this figure includes the legal fees related to the defense of OTR. Daniel Harrington, a Hoskins associate who was assigned primary responsibility for OTR's defense and whose fees were included in Nugent's bill, testified at the damages hearing that he had entered his appearance on behalf of OTR perhaps ten days before trial and estimated he had spent a total of 80 hours (at $95 per hour) representing OTR.

Nugent briefed three points on appeal. His first point is based on something the trial judge said at the conclusion of the damages hearing:

> Thank you, gentlemen. If [Nugent] had decided to show up and testify . . . we might have more of an argument, but a party can assume a debt. And it is -- From listening to the [Hoskins firm's] witnesses . . . I'm sure that he did ask that representation be made for his company; and, by Plaintiff's Exhibit No. 1 [the written fee agreement] and his actions, assumed liability for that debt.

Nugent argues the trial court erred in entering judgment against him for the full amount requested in the petition because this "voluntary finding"[3] is against the weight of the evidence and is unsupported by substantial evidence in the record. We disagree.

A default admits the truth of the allegations of the petition constituting the plaintiff's cause of action and the defendant's liability thereunder. **Fawkes v. National Refining Co.**, 341 Mo. 630, 636, 108 S.W.2d 7, 10 (1937); **Sumpter v. J. E. Sieben Constr. Co.**, 492 S.W.2d 150, 153 (Mo. App. 1973). Here, Count I of the Hoskins firm's petition alleged that the legal services rendered were "provided all at [Nugent's] special instance and request," that the prices charged for those services were fair and reasonable and were "the prices which [Nugent] promised and agreed to pay," and that "[a]fter all just credits and setoffs, there is a principal balance of $43,254.92" remaining on Nugent's account. Count II restated the allegations of Count I and included the elements of quantum meruit. In particular, it was alleged that

[3] We refer to this statement as a "voluntary finding" because neither party requested findings of fact or conclusions of law.

Nugent was unjustly enriched by $43,245.92 in that he had "refused to pay for the valuable legal services provided at his request." Attached to the petition as Exhibit A was a set of itemized monthly billing statements sent to Nugent at OTR's address.

The petition thus alleged that Nugent was liable for all legal services rendered by the Hoskins firm at Nugent's request, including, by obvious implication, those related to OTR's defense. The trial court's "voluntary finding" was, therefore, merely gratuitous, because once the interlocutory order of default was entered against Nugent, no further proof of his liability under either legal theory of recovery advanced in the petition (contract in Count I and quasi-contract[4] in Count II) was necessary. **Fawkes**, 341 Mo. at 635-36, 108 S.W.2d at 10; **Sumpter**, 492 S.W.2d at 153. The only issue remaining was the precise amount owed the Hoskins firm. Indeed, the trial court said as much in its order of March 9, 1993: "[A]n interlocutory judgment of default is hereby entered against Defendant Russell Nugent with respect to all issues of liability on Plaintiff's Petition [and] . . . evidence [will] be heard on the issue of the amount of damages [at a later date]."

Nugent also reminds us that "[a]ny obligation undertaken to pay the debt of a third party must be in writing or it violates the statute of frauds [§ 432.010, RSMo 1986] and is unenforceable."

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[4] "Quantum meruit or unjust enrichment occurs where a benefit is conferred upon a person under circumstances in which retention by him of that benefit without paying its reasonable value would be unjust. The principle of unjust enrichment has given rise to the doctrine of quasi-contract, also known as a contract implied in law, as a theory of recovery." **Associate Eng'g Co. v. Webbe**, 795 S.W.2d 606, 608 (Mo. App. 1990) (internal citation omitted).

Since no such writing was ever introduced into evidence, he reasons, the trial court erred in entering judgment against Nugent for OTR's legal fees even if Nugent did in fact agree to pay them. However, the statute of frauds is not available as a defense on appeal unless it appears from the record that it was brought in some way to the attention of the trial court. **Walker v. Cooper**, 97 Mo.App. 441, 447, 71 S.W. 370, 371 (1902); **State ex rel. Place v. Bland**, 353 Mo. 639, 651, 183 S.W.2d 878, 886 (banc 1944). Since the record is utterly silent concerning the statute of frauds, we will not permit Nugent to raise it as a defense now. Furthermore, to permit him to interpose the statute of frauds or any other defense to liability at this stage would defeat the very purpose of the interlocutory judgment procedure, which "is to preclude a defendant in default from answer or defense to the pleaded right of recovery." **Smith v. Sayles**, 637 S.W.2d 714, 717 (Mo. App. 1982).

Finally, Nugent contends the trial court erred in piercing OTR's corporate veil. Nugent misunderstands the trial court's "finding." The trial court did not say Nugent was liable for OTR's legal fees because OTR was Nugent's "alter ego . . . and had no true separate existence," as Nugent claims. It merely said Nugent had agreed to assume what otherwise would have been OTR's liability for those fees. Point denied.

In his second point, Nugent claims the judgment entered by the trial court was erroneous in that it obligated him to pay OTR's legal fees in the absence of any proof he derived a benefit from the legal services rendered to OTR, as required for a recovery in

quasi-contract under Count II of the petition. We do not know for certain if quasi-contract was the basis for the trial court's judgment.[5] However, because our primary concern on appeal of a court-tried case "is the correctness of the result, not the route taken to reach it," **Corrigan v. Armstrong, Teasdale, Schlafly, Davis & Dicus**, 824 S.W.2d 92, 94 (Mo. App. 1992), this is not important. The trial court's judgment will be affirmed, if correct, on any reasonable legal theory supported by the evidence. **Safeco Ins. Co. v. Stone & Sons, Inc.**, 822 S.W.2d 565, 567 (Mo. App. 1992).

Missouri courts generally recognize that the essential elements of quasi-contract are: (1) A benefit conferred upon the defendant by the plaintiff; (2) Appreciation by the defendant of the fact of such benefit; and (3) Acceptance and retention by the defendant of that benefit under circumstances in which retention without payment would be inequitable. **Webbe**, 795 S.W.2d at 608.

Contrary to Nugent's assertion, there is ample evidentiary support in the record for the conclusion that Nugent was liable to the Hoskins firm for OTR's legal fees under this theory. At the damages hearing, the uncontroverted testimony of Daniel Harrington established that all communications between the Hoskins firm and OTR were made through Nugent. In fact, he testified that "Russell Nugent was On Top [Roofing]." Harrington further said Nugent

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[5] The trial court's April 19, 1993 order says only that "the allegations of Plaintiff's Petition are true and correct" and that "judgment for Counts I and II be entered for Plaintiff against the Defendant."

specifically requested that the Hoskins firm enter its appearance on behalf of OTR after a discussion in which it was explained to Nugent that the firm's dual representation of Nugent and OTR would give Nugent "two bites" at the government's evidentiary apple, thereby increasing the chance he would be acquitted. As Harrington put it: "Our primary concern was an acquittal for him [Nugent]. That's what my work went towards. The only reason that I was designated as attorney of record for On Top was to get a second bite at the apple. And as far as my work went, that primarily went towards Russell Nugent."

Harrington also testified that when Nugent made this decision, he was told there were "going to be additional fees" and he would be responsible for paying them since the prior written fee agreement didn't cover OTR's legal representation.

Finally, according to Harrington, the legal services provided by the Hoskins firm on behalf of both Nugent and OTR were quite extensive: many witnesses were interviewed; literally thousands of documents were reviewed; legal research was conducted, and exhaustive trial preparation was completed. And, of course, both Nugent and OTR were acquitted of the charges against them.

This testimony constitutes sufficient evidence from which the trial court could reasonably have concluded that OTR's legal fees should be included in the judgment against Nugent under the doctrine of quasi-contract. Point denied.

In his final point, Nugent contends there was not sufficient evidence to allow the trial court to determine the amount of

damages attributable to Nugent and the amount of damages attributable to OTR. Since the trial court properly determined that all the damages claimed by the Hoskins firm were attributable to Nugent, and Nugent does not contend in his brief that the total damage figure was unsupported by substantial evidence or was not proven with reasonable certainty during the damages hearing, this point is also denied.

The trial court's judgment was not the product of an erroneous declaration or application of Missouri law. As it was also supported by substantial, uncontroverted evidence, we affirm.