

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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G & S RAPID INVESTMENTS, L.L.C.,  
Plaintiff-Appellee,

UNPUBLISHED  
May 10, 2011

v

BRADLEY SILVERSTEIN,  
Defendant-Appellant.

No. 294124  
Oakland Circuit Court  
LC No. 2008-088662-CK

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Before: SAAD, P.J., and JANSEN and K. F. KELLY, JJ.

PER CURIAM.

Defendant appeals by right the trial court's orders entering partial judgment in favor of plaintiff and denying defendant's motions for a new trial, judgment notwithstanding the verdict (JNOV), and disqualification of the trial court judge. We affirm.

Plaintiff alleged that it loaned money to defendant, and defendant claimed that the money was an investment in his business venture of rehabilitating houses in Detroit. Plaintiff put on its proofs, and defendant and both of plaintiff's members testified in the plaintiff's case in chief. All of the exhibits on both exhibit lists were admitted into evidence. At the close of plaintiff's proofs, the trial court issued its opinion from the bench, finding in favor of plaintiff and granting partial relief in the amount of \$15,000. Defendant's counsel pointed out that the defense did not have an opportunity to put on its proofs before the court issued its ruling, and the trial court concurred that it had erred. At that point, the trial court set aside its opinion and reopened proofs, stating that any additional proofs must not be cumulative and that any exhibits offered must be on the exhibit list. Defendant, claiming prejudice, refused to put on any proofs. The court then reissued an opinion and order, finding for plaintiff in the amount of \$15,000. Subsequently defendant filed motions for JNOV, a new trial, and disqualification of the trial court judge. The trial court denied defendant's motions.

Defendant first argues that the trial court erred by finding that a contract had been formed between the parties and by requiring him to prove that a contract existed. A contract requires a meeting of the minds on all essential terms. *Kamalnath v Mercy Memorial Hosp Corp*, 194 Mich App 543, 548; 487 NW2d 499 (1992). The burden of proof to show the existence of a contract is on the plaintiff. *Id.* at 549.

There is no question that the parties did not have a meeting of the minds on all critical issues, and the trial court did not make such a finding. Plaintiff's two members testified that the

\$35,000 check plaintiff gave to defendant was a loan, and the \$20,000 that defendant paid to plaintiff was a partial repayment of the loan, although one of the members testified that the money was owed for a different venture. Defendant, the stepbrother of one of plaintiff's members, testified that the \$35,000 check was an investment in his business of rehabilitating homes in the city of Detroit. He gave plaintiff \$20,000, although he did not owe it, to help "ease the pain on what was going on with his investment." The agreement between the parties was not reduced to writing, and no collateral was given. The parties did not specify a particular property that the money would be used for. Plaintiff's members did not view any of the homes that were being rehabilitated, did not determine whether there were any liens on the properties, and did not make inquiries about other investors. The two members testified that they would have taken such actions if plaintiff had been investing in defendant's project. However, they also acknowledged that plaintiff had never loaned money to anyone before. Plaintiff was suing for repayment of the entire \$35,000.

The trial court did not find a meeting of the minds. Instead, the court based its decision on the equitable theory of unjust enrichment, which was pleaded in plaintiff's complaint. In reviewing a grant of equitable relief, the trial court's findings of fact are reviewed for clear error while its ultimate grant of relief is reviewed de novo. *McDonald v Farm Bureau Ins Co*, 480 Mich 191, 197; 747 NW2d 811 (2008). Even though no contract existed between the parties, equitable relief may be available when a complete remedy at law is not. In an equitable action, a trial court considers the entire matter and grants relief as dictated by good conscience *In re Estate of Moukalled*, 269 Mich App 708, 719; 714 NW2d 400 (2006). The granting of equitable relief is ordinarily a matter of grace, and the propriety of affording relief is within the sound discretion of the court under the circumstances of a particular case. *Tkachik v Mandeville*, 487 Mich 38, 45; 790 NW2d 260 (2010).

To establish a claim of unjust enrichment, a plaintiff must establish that the defendant received a benefit from the plaintiff and that an inequity would result to the plaintiff if the defendant retained the benefit. *Barber v SMH (US), Inc*, 202 Mich App 366, 375; 509 NW2d 791 (1993). If this is established, the law will imply a contract in order to prevent unjust enrichment. *Id.* Nothing in the lower court record supports defendant's argument that the burden of proof was shifted to him. The trial court considered all of the evidence and made its finding.

We cannot conclude that the trial court clearly erred in its findings of fact. Nor can we conclude that the court impermissibly imposed the burden of proof on defendant. The parties did not dispute the payment by plaintiff of \$35,000 to defendant. The sole factual issue in the case was whether the parties intended the \$35,000 check given to defendant to be a loan or an investment. The trial court had the opportunity to hear the testimony of all the parties and review the documentation admitted into evidence before finding (1) that the parties had intended the \$35,000 check to serve as a loan from plaintiff to defendant, and (2) that defendant had repaid \$20,000 of the loan. These findings were not clearly erroneous.

Defendant also argues that the trial court erred by denying his motions for JNOV, a new trial, and disqualification of the trial judge. A trial court's decision on a motion for JNOV is reviewed de novo on appeal. If reasonable persons could honestly have reached different conclusions about whether the nonmoving party established his claim, the question was for the

trier of fact. *Taylor v Kent Radiology*, 286 Mich App 490, 499; 780 NW2d 900 (2009). Here, there is no question that reasonable minds could have differed concerning whether plaintiff established that it was entitled to relief. Therefore, we cannot conclude that the trial court erred by denying defendant's motion for JNOV.

A new trial may be granted whenever the substantial rights of all or some of the parties are materially affected by an irregularity in the proceedings, which denied the moving party a fair trial. MCR 2.611(A)(1)(a). The trial court's decision on a motion for new trial is reviewed for an abuse of discretion. *Poirier v Grand Blanc Twp (After Remand)*, 192 Mich App 539, 547; 481 NW2d 762 (1992). It is true that an irregularity in the proceedings occurred when the trial court rendered its verdict before both parties rested. However, the trial court acknowledged its error, reopened the file, and gave defendant the opportunity to put on his proofs (provided the proofs involved evidence that had not already been presented). Defendant did not have any additional exhibits that had not already been admitted, and declined to present any further witnesses. We note that defendant had already testified as part of plaintiff's case in chief, and defendant's attorney had the opportunity to cross-examine him at that time. Defendant has not shown that either party was denied the right to a fair trial. MCR 2.611(A)(1)(a). In fact, although the trial court found in favor of plaintiff, it only granted partial judgment in plaintiff's favor. Although the trial court erred, it did everything possible to correct the error and allow the trial to continue. The trial court did not abuse its discretion by denying defendant's motion for new trial under these circumstances.

Nor can we conclude that the trial court judge erred by failing to disqualify herself. There was no showing of actual, personal prejudice or appearance of impropriety on the part of the trial judge under MCR 2.003, and defendant has failed to overcome the strong presumption that the trial judge was impartial. See *People v Wade*, 283 Mich App 462, 470; 771 NW2d 447 (2009).

Affirmed. As the prevailing party, plaintiff may tax costs pursuant to MCR 7.219.

/s/ Henry William Saad  
/s/ Kathleen Jansen  
/s/ Kirsten Frank Kelly