



In the Missouri Court of Appeals Eastern District

DIVISION THREE

ALMAT BUILDERS	)	No. ED108784
AND REMODELING, INC.,	)	
	)	
Appellant,	)	Appeal from the Circuit Court
	)	of Perry County
v.	)	
	)	
MIDWEST LODGING, LLC,	)	Honorable Benjamin F. Lewis
and	)	
MONTGOMERY BANK, N.A.,	)	
and	)	
SHRINAY CONSTRUCTION, LLC,	)	
	)	
Respondents.	)	FILED: December 8, 2020

OPINION

Plaintiff Almat Builders and Remodeling, Inc. (Almat), appeals from the circuit court's entry of summary judgment in favor of Defendants Midwest Lodging, LLC, and Montgomery Bank, N.A. (Midwest Lodging and Montgomery Bank, respectively), in this action arising out of Almat's work on a hotel construction project. Almat asserted both an action to enforce a mechanics' lien, and a quantum meruit action to recover amounts allegedly due Almat for its work on the project. We hold that Almat's mechanics' lien statement is not a just and true account, and thus the circuit court properly granted summary judgment for Midwest Lodging and Montgomery Bank on Almat's mechanics' lien action. We therefore affirm the circuit court's judgment as to that count. We reach a different result regarding the quantum meruit action,

however. To the extent the circuit court relied on the agency and contractual grounds advanced by Midwest Lodging and Montgomery Bank in granting summary judgment on Almat's quantum meruit claim, the circuit court erred. Further, the factual assertions contained in the summary-judgment record are insufficient to entitle Midwest Lodging and Montgomery Bank to summary judgment. We therefore reverse the circuit court's judgment as to Almat's quantum meruit count and remand the cause to the circuit court for further proceedings.

Factual and Procedural Background

Midwest Lodging contracted with general contractor Shrinay Construction, LLC, to build a hotel on property owned by Midwest Lodging. Shrinay in turn contracted with Almat to furnish and install drywall for the project. Almat worked on the project through November 6, 2017. Almat then left the project without completing all of its work. Midwest Lodging eventually terminated its contract with Shrinay. Almat contended it was owed for work performed under the contract, for requested work performed outside the scope of the contract, and for costs associated with lodging. Almat ultimately filed an action against Shrinay, Midwest Lodging, and Montgomery Bank, seeking recovery of amounts allegedly due.¹ Almat advanced four counts, only two of which are now at issue: its action to enforce a mechanics' lien, and its action for quantum meruit.²

¹ Montgomery Bank financed the project and holds a deed of trust on the property.

² Almat also asserted a breach-of-contract action against Midwest Lodging and Shrinay. Though Midwest Lodging moved for summary judgment on the breach-of-contract count (Count I), and the circuit court entered summary judgment "on all counts," the breach-of-contract action is no longer at issue. On January 8, 2019, Almat filed a motion to dismiss the breach-of-contract count without prejudice. Later, in summary-judgment proceedings (its sur-reply memo opposing motion for summary judgment), Almat pleaded that it had dismissed the breach-of-contract count, stating specifically that: "The court does not need to rule on Count I as Plaintiff has already dismissed its Count I for Breach of Contract as to Midwest Lodging." Almat then requested that the circuit court "rule in its favor and deny Defendants joint motion for summary judgment on Counts II, III, and IV of Plaintiff's petition...." On appeal, Almat does not expressly include Count I in its point relied on. Instead, it alleges generally that the circuit court "erred in granting the motion for summary judgment." Almat also does not include Count I in its prayer for relief. Instead, Almat stated: "Midwest Lodging is not entitled to summary judgment on Counts II – IV of Plaintiff's petition." Almat then requested that this Court "reverse the judgment of the Court on Counts II – IV of Plaintiff's petition...."

Midwest Lodging and Montgomery Bank jointly moved for summary judgment.³ As to Almat's action to enforce its mechanics' lien, Midwest Lodging and Montgomery Bank asserted a right to summary judgment on grounds that Almat had waived its right to assert a mechanics' lien for its work on the project. Alternatively, Midwest Lodging and Montgomery Bank asserted that Almat's mechanics' lien was void and unenforceable because Almat's mechanics' lien statement failed to provide a just and true account of amounts due Almat "after all just credits have been given," as required by Section 429.080. As to Almat's breach-of-contract and quantum meruit claims, Midwest Lodging and Montgomery Bank asserted a right to summary judgment on these two counts because Shrinay was not an authorized agent of Midwest Lodging, and Midwest Lodging did not enter into a contract with Almat. By agreement of the parties, the summary-judgment motion was submitted to the circuit court on the briefs and memoranda of counsel, without argument. The circuit court entered summary judgment for Midwest Lodging and Montgomery Bank, on both counts, without providing any reasons for its decision. Almat now appeals, contending that the circuit court erred as a matter of law in granting summary judgments on both counts.

Standard of Review

This Court reviews the grant of summary judgment *de novo*. *ITT Commercial Fin. Corp. v. Mid-Am. Marine Supply Corp.*, 854 S.W.2d 371, 376 (Mo. banc 1993). The criteria on appeal

Almat also asserted a declaratory-judgment action, seeking a determination of priority of interests (Count IV). This action is not at issue on this appeal. To begin, this action is derivative to Almat's mechanics' lien action. Almat sought a judgment declaring its mechanics' lien to be "prior, superior, and paramount to the lien of any other interest that may appear." This action, then, is mooted by both the circuit court's ruling and our decision affirming that ruling. Moreover, though Midwest Lodging moved for summary judgment on this count, and the circuit court entered summary judgment "on all counts," and Almat, as appellant in this appeal, alleged generally that the circuit court erred in granting the motion for summary judgment, Almat advanced no argument regarding this count. Almat has thus abandoned any argument or claim or error it may have regarding the circuit court's ruling on this count. *Carlisle v. Rainbow Connection, Inc.*, 300 S.W.3d 583, 585 (Mo. App. E.D. 2009).

³ Shrinay did not answer Almat's petition. The circuit court entered an interlocutory default judgment, and then ultimately final judgment in favor of Almat and against Shrinay on the breach-of-contract and quantum meruit counts, the two counts Almat asserted against Shrinay.

for determining the propriety of summary judgment are no different from those which should be employed by the circuit court to determine the propriety of sustaining the motion initially. *Id.* Thus, as the circuit court’s judgment is founded on the record submitted and the law, an appellate court need not defer to the circuit court’s order granting summary judgment. *Id.* We review the summary-judgment record “in the light most favorable to the party against whom judgment was entered.” *Id.* “Facts set forth by affidavit or otherwise in support of a party’s motion are taken as true unless contradicted by the non-moving party’s response to the summary-judgment motion.” *Id.* “We accord the non-movant the benefit of all reasonable inferences from the record.” *Id.*

This being said, our review is confined to the summary-judgment record.⁴ *Cowgur v. Murphy*, 587 S.W.3d 717, 719 (Mo. App. S.D. 2019); *Pemiscot Cnty. Port Auth. v. Rail Switching Servs., Inc.*, 523 S.W.3d 530, 532 (Mo. App. S.D. 2017). Facts come into a summary-judgment record *only* via the numbered-paragraphs-and-responses framework set out in Rule 74.04(c).⁵ *Id.*; *Green v. Fotoohigham*, 606 S.W.3d 113, 117 (Mo. banc 2020); *accord Davis v.*

⁴ The statement of facts set forth by Almat in its brief to this Court does not comply with Rule 84.04, which sets forth the requirements for an appellant’s brief. Rule 84.04(c) requires that an appellant’s brief contain “a fair and concise statement of the facts relevant to the questions presented for determination....” The questions presented for determination in this appeal are whether the circuit court properly entered summary judgment for Midwest Lodging and Montgomery Bank. To make such a determination, we must scrutinize the facts established by the Rule 74.04 summary-judgment procedure. *Pemiscot Cnty. Port Auth. v. Rail Switching Servs., Inc.*, 523 S.W.3d 530, 532 (Mo. App. S.D. 2017). Almat should have set forth those facts in its statement of facts. *Id.* It did not. Instead, Almat set forth an account of the facts that was largely intermixed with matters outside the established facts. Almat’s statement of facts was not only confusing, falling short of fulfilling its essential purpose of providing an immediate, complete, and unbiased understanding of the facts of the case, but critically it did not allow us to ascertain what facts had been established in the summary-judgment proceedings, or what established facts were material and relevant to the questions presented for determination on appeal. Almat did not set out any of the established facts, and it did not indicate what facts, if any, it properly denied during summary-judgment proceedings. Almat’s failings could be fatal to its appeal. *See Id. at 534* (holding that appellant’s failure to identify the relevant facts established per Rule 74.04 violates Rule 84.04 and justifies dismissal or denial of appellant’s point on appeal). We do not condone Almat’s brief. However, we prefer to decide this case on the merits, rather than on technical deficiencies. Given that Midwest Lodging supplemented the statements of facts, and given that meaningful appellate review is possible without becoming Almat’s advocate, we exercise our discretion to review this appeal, despite the deficiencies of Almat’s brief.

⁵ Summary judgment practice in Missouri is governed by Rule 74.04 and *ITT Commercial Fin. Corp. v. Mid-Am. Marine Supply Corp.*, 854 S.W.2d 371 (Mo. banc 1993). *Green v. Fotoohigham*, 606 S.W.3d 113, 116 (Mo. banc

Johnson Controls, Inc., 549 S.W.3d 32, 37 (Mo. App. E.D. 2018). The circuit court “grants or denies summary judgment based on those facts established by the summary-judgment motion and responses thereto.” *Cowgur*, 587 S.W.3d at 719 (internal quotation omitted); *Green*, 606 S.W.3d at 118. In turn, “our review is confined to the same facts and does not extend to the entire record....” *Id.* (internal quotation omitted); *Pemsicot Cnty. Port Auth.*, 523 S.W.3d at 532. The right to summary judgment “boils down to *certain* facts, established per Rule 74.04(c), that legally guarantee one party’s victory *regardless of other facts or factual disputes.*” *Pemsicot Cnty. Port Auth.*, 523 S.W.3d at 533 (emphases in original).

Summary Judgment Standard

Summary judgment is appropriate when the moving party has demonstrated, on the basis of facts as to which there is no genuine dispute, a right to judgment as a matter of law. *ITT Commercial Fin. Corp.*, 854 S.W.2d at 377-78; Rule 74.04. A movant’s right to judgment as a matter of law differs significantly depending upon whether that movant is a “claimant” or a “defending party.”⁶ *ITT Commercial Fin. Corp.*, 854 S.W.2d at 381; *Vantage Credit Union v. Chisholm*, 447 S.W.3d 740, 745 (Mo. App. E.D. 2014). “Where a ‘defending party’ will not

2020). Rule 74.04(c) sets out a numbered-paragraphs-and-responses framework by which facts come into the summary-judgment record. That framework begins with the movant’s filings. A movant must attach to its motion for summary judgment a statement of uncontroverted material facts that “state[s] with particularity in separately numbered paragraphs each material fact as to which movant claims there is no genuine issue, with specific references to the pleadings, discovery, exhibits, or affidavits that demonstrate the lack of a genuine issue as to such facts.” Rule 74.04(c)(1). After the movant makes this submission, the non-movant is required to file a response either admitting or denying each of movant’s factual statements. Rule 74.04(c)(2); *Green*, 606 S.W.3d at 117. The non-movant “may also set forth additional material facts that remain in dispute, which shall be presented in consecutively numbered paragraphs and supported in the manner prescribed by Rule 74.04(c)(1).” Rule 74.04(c)(2). If the non-movant sets forth such additional facts, the movant must file a reply either admitting or denying those factual statements. Rule 74.04(c)(3). In turn, the movant “may file a statement of additional material facts as to which movant claims there is no genuine issue,” again presented “in consecutively numbered paragraphs and supported in the manner prescribed by Rule 74.04(c)(1).” *Id.* If movant so files this statement of additional facts, then the non-movant is required to file a sur-reply, admitting or denying those additional facts. Rule 74.04(c)(4). No further statements of fact may be filed without leave of the court. Rule 74.04(c)(5).

⁶ It may be self-evident, but “a claimant is one who seeks to recover either by claim, counterclaim, cross-claim or request for declaratory judgment. A defending party is one against whom recovery is sought.” *Vantage Credit Union v. Chisholm*, 447 S.W.3d 740, 745 (Mo. App. E.D. 2014); *ITT Commercial Fin. Corp.*, 854 S.W.2d at 380; Rule 74.04(b).

bear the burden of persuasion at trial, that party need not controvert *each* element of the non-movant's claim in order to establish a right to summary judgment." *ITT Commercial Fin. Corp.*, 854 S.W.2d at 381 (emphasis in original). Rather, as is relevant to the case at bar, a "defending party" may establish a right to judgment as a matter of law by showing facts that negate *any one* of the claimant's required proof elements.⁷ *Id.*

"The showing required of the non-movant in the face of a properly-pleaded summary-judgment motion is the same regardless of whether the non-movant is a claimant or defending party." *Vantage Credit Union*, 447 S.W.3d at 745. Once the movant has made a *prima facie* showing of lack of genuine issue of material fact, and thereby entitlement to judgment as matter of law, the burden shifts to the non-movant, to show that one or more of the material facts shown by the movant to be above any genuine dispute is, in fact, genuinely disputed. *ITT Commercial Fin. Corp.*, 854 S.W.2d at 381. "The non-movant never needs to establish a right to judgment as a matter of law; the non-movant need only show that there is a genuine dispute as to the facts underlying the movant's right to judgment." *Id.* at 381-82. "For purposes of Rule 74.04, a 'genuine issue' exists where the record contains competent materials that evidence two plausible, but contradictory, accounts of the essential facts." *Id.* at 382. "A 'genuine issue' is a dispute that is real, not merely argumentative, imaginary or frivolous." *Id.* To put a fact in genuine dispute, the non-movant may not rely on a general denial, but, instead, must support that denial with specific references to the discovery, exhibits or affidavits that demonstrate the specific facts showing that there is a genuine issue for trial." *Cowgur*, 587 S.W.3d at 720; Rule 74.04(c)(2).

⁷ A defending party may also establish a right to summary judgment by showing: (1) that the non-movant, after an adequate period of discovery, has not been able to produce and will not be able to produce evidence sufficient to allow the trier-of-fact to find the existence of any one of the claimant's required proof elements; or, (2) that there is no genuine dispute as to the existence of each of the facts necessary to support the movant's properly pleaded affirmative defense. *ITT Commercial Fin. Corp.*, 854 S.W.2d at 381. However, Midwest Lodging and Montgomery Bank did not rely on these options, nor do we find that they are applicable in this case.

Enforcement of Mechanics' Lien

Almat sought to enforce a mechanics' lien for material and labor provided to the hotel project. Midwest Lodging and Montgomery Bank moved for summary judgment, asserting that Almat's mechanics' lien was void and unenforceable because Almat's mechanics' lien statement failed to provide a just and true account of the amount due Almat.⁸

Relevant to this appeal, to make a *prima facie* showing of a right to summary judgment on a mechanics' lien, Section 429.080 requires a lien claimant to file "a just and true account of the demand due him ... after all just credits have been given..." "Filing a 'just and true account' is the very foundation of the right to maintain the suit and is a condition precedent to the right of any lien claimant to establish his lien." *Bremer v. Mohr*, 478 S.W.2d 14, 18 (Mo. App. 1972); *Zundel v. Edge, Inc.*, 705 S.W.2d 113, 114 (Mo. App. E.D. 1986); *Midwest Floor Co. v. Miceli Development Co.*, 304 S.W.3d 243, 247 (Mo. App. E.D. 2009)(a "just and true account" forms the basis of the right to maintain a suit to enforce a mechanics' lien"). Though the mechanics' lien law is remedial in nature, and should be literally construed to benefit those it seeks to protect, the law also requires that a lien claimant substantially comply with the statute in order to avail himself of its benefits, and a substantial compliance requires the filing of a just and true account of the demand due him. *Bremer*, 478 S.W.2d at 17; *Grgic v. Cochran*, 740 S.W.2d 358, 359 (Mo. App. E.D. 1987).

What constitutes a "just and true account" is not statutorily defined, but instead depends on the facts of each case. *Midwest Floor*, 304 S.W.3d at 247. In moving for summary judgment, Midwest Lodging and Montgomery Bank argued that Almat's lien statement failed to provide a

⁸ Midwest Lodging and Montgomery Bank also asserted a right to summary judgment on grounds that Almat had waived its right to assert or enforce a mechanics' lien for its work on the project when Almat executed a certain lien waiver after it stopped work on the project. Almat admitted in summary-judgment proceedings that it had executed the lien waiver, but argued that the lien waiver is ambiguous. Given our disposition, affirming on the just-and-true-account grounds, we need not address the lien waiver.

just and true account of the amounts due Almat because Almat failed to provide any credit for the work that Almat failed to complete under its subcontract.⁹ Almat admitted that its lien did not provide a credit for the work that it did not perform. Almat also admitted that it did not complete its work on the project.

A lien statement may be regarded as just and true, so as not to vitiate the entire lien, if it contains mistakes, errors of omission, non-lienable items, or fails to give all of the credits to which the account is entitled, as long as the inaccuracies are unintentional and are the result of honest inadvertence, accident, or oversight, and do not result from deliberate intention or design. *R.K. Matthews Inv., Inc. v. Beulah Mae Hous., LLC*, 379 S.W.3d 890, 899 (Mo. App. W.D. 2012); *A. E. Birk & Son Plumbing & Heating, Inc. v. Malan Const. Co.*, 548 S.W.2d 611, 617–18 (Mo. App. 1977); *Dave Kolb Grading, Inc. v. Lieberman Corp.*, 837 S.W.2d 924, 933 (Mo. App. E.D. 1992). Once Midwest Lodging and Montgomery Bank showed facts negating Almat’s required element of a just and true account, the burden shifted to Almat to show a genuine dispute. *ITT Commercial Fin. Corp.*, 854 S.W.2d at 381. Particularly here, the burden shifted to Almat to show that Almat’s failure to give credit was the result of honest inadvertence, accident, or oversight. Almat did not do so. Almat cited to nothing in the record, such as specific references to discovery, answers to interrogatories or admissions on file, that established the existence of a genuine issue. Nor did Almat file an affidavit demonstrating that its failure to give credit for work not completed was inadvertent or an honest mistake. Rather, Almat admitted it failed to give credit, and stood on that admission, without more. Contrasting this to Almat’s response regarding its inclusion of lodging expenses in its lien, Almat admitted that it had included the lodging charges in its lien, but then filed an affidavit explaining that inclusion

⁹ Almat filed a mechanics’ lien in the amount of \$182,300.00 against the hotel property owned by Midwest Lodging. Almat calculated the amount of its lien by taking its total subcontract amount (\$275,000.00), adding 8 alleged items of extra work/change order work (\$46,700.00), and subtracting payments received (\$139,400.00).

of the non-lienable lodging charges was an inadvertent and honest mistake. Almat provided no such affidavit or explanation regarding its failure to give all credits for work not completed. Though we are to accord Almat the benefit of all reasonable inferences from the record, given the differing responses here, it is not reasonable to infer that Almat's failure to give credit was the result of honest inadvertence, accident, or oversight.

Under the circumstances here, we hold that Almat's lien statement is insufficient and failed to provide a just and true account of the amount due Almat. Almat's failure to provide such just and true account defeats Almat's right to establish and enforce its lien. See *R.K. Matthews*, 379 S.W.3d at 898 (noting lien statement not a just and true account where statement included charges for work that was never performed); see also, *Hoffman v. Walton*, 36 Mo. 613 (Mo. 1865)(holding that a failure by lien claimant to give all just credits worked a forfeiture of the lien); *Bremer*, 478 S.W.2d at 18 (holding lien claimant not entitled to lien because lien statement was stated in a lump sum and comingled unfurnished and non-lienable items, and because claimant did not demonstrate that the excessive account resulted from inadvertence and mistake). Midwest Lodging and Montgomery Bank negated a required element of Almat's action, thus summary judgment for the Midwest Lodging and Montgomery Bank on Almat's action to enforce a mechanics' lien is proper.

Quantum Meruit Claim

Almat also sought recovery from Midwest Lodging under a theory of quantum meruit. While we affirmed summary judgment against Almat on its action to enforce its mechanics' lien, the mechanics' lien statute is not an exclusive remedy; a plaintiff may pursue both a mechanics' lien and a quantum meruit remedy. *Webcon Group, Inc. v. S.M. Properties, L.P.*, 1 S.W.3d 538, 542-43 (Mo. App. E.D. 1999). Midwest Lodging and Montgomery Bank asserted a right to

summary judgment on grounds that the general contractor, Shrinay, was not an authorized agent of Midwest Lodging, and because Midwest Lodging did not enter into a contract with Almat.

Almat on appeal alleges the circuit court erred in granting summary judgment for Midwest Lodging and Montgomery Bank as a matter of law because Shrinay was indeed an agent for Midwest Lodging when Shrinay contracted with Almat to provide labor and material to improve the property. Midwest Lodging and Montgomery Bank, in response, chose not to address Almat's agency argument, but instead argue that this Court should affirm the entry of summary judgment in their favor because Midwest Lodging was not unjustly enriched by Almat's work.

The trial court granted summary judgment on Almat's quantum meruit claim without specifying the reason for its order. We thus presume that the trial court based its decision on grounds specified in the motion for summary judgment. *Phillips v. Drury Sw., Inc.*, 524 S.W.3d 228, 230 (Mo. App. E.D. 2017). However, because our review is *de novo*, we may affirm the circuit court's order on a different basis than that posited at trial, provided that basis is supported by the summary-judgment record. *Watson v. Wells Fargo Home Mortg., Inc.*, 438 S.W.3d 404, 406 (Mo. banc 2014); *ITT Commercial Fin. Corp.*, 854 S.W.2d at 387–88; *A.T. by R.T. v. Satterfield*, 597 S.W.3d 797, 800 (Mo. App. S.D. 2020). But we cannot affirm here, either on the agency and contractual grounds asserted in Midwest Lodging and Montgomery Bank's summary-judgment motion, or on record and argument of unjust enrichment now advanced on appeal.

Quantum meruit is a remedy for the enforcement of a quasi-contractual obligation. *Green Quarries, Inc. v. Raasch*, 676 S.W.2d 261, 264 (Mo. App. W.D. 1984). "The doctrine of quasi-contract, also known as a contract implied in law, is based primarily on the principle of

unjust enrichment.” *Id.* A claim for quantum meruit does not require the existence of an express agreement between the parties. *County Asphalt Paving, Co., Inc. v. Mosley Const., Inc.*, 239 S.W.3d 704, 710 (Mo. App. E.D. 2007). “The principal function of this type of implied contract is the prevention of unjust enrichment....” *Id.*; *Green Quarries*, 676 S.W.2d at 264 (explaining that “[t]he duty which engenders a quasi-contractual obligation is most often based upon the principle of unjust enrichment). “Unjust enrichment occurs where a benefit is conferred upon a person in circumstances in which retention by him of that benefit without paying its reasonable value would be unjust.” *Green Quarries*, 676 S.W.2d at 264.

The essential elements of a quasi-contract or quantum meruit claim are: “(1) a benefit conferred upon the defendant by the plaintiff; (2) appreciation by the defendant of the fact of such benefit; (3) acceptance and retention by the defendant of that benefit under circumstances in which retention without payment would be inequitable.” *Id.* Stated another way, the essential elements of a quantum meruit claim “are that the plaintiff provided to the defendant materials or services at the defendant’s request or with the acquiescence of the defendant, that the materials or services had reasonable value, and that the defendant, despite the demands of the plaintiff, has failed and refused to pay the reasonable value of such materials or services.” *County Asphalt Paving*, 239 S.W.3d at 710 (quotation omitted). The most significant requirement is that the enrichment to the defendant be unjust. *Green Quarries*, 676 S.W.2d at 264.

Midwest Lodging and Montgomery Bank moved for summary judgment on agency and contractual grounds. They argued that the undisputed facts established that “Midwest Lodging did not enter into a contract with Almat,” that Almat “performed its work on the project pursuant to a contract with Shrinay,” and that “Shrinay did not have actual authority to act as an agent of Midwest Lodging and enter into contracts on its behalf because Midwest Lodging never gave

that authority to Shrinay.” Lastly, they argued that “Almat cannot establish that Shrinay had implied or apparent authority to act as an agent of Midwest Lodging because an agent [Shrinay] cannot create its own authority – it must be created by the acts or representations of the principal, in this case Midwest Lodging.” For support, Midwest Lodging and Montgomery Bank noted Almat’s answers to interrogatories, where Almat was asked to identify the factual basis for its allegation that Shrinay acted as an agent for Midwest Lodging. Midwest Lodging and Montgomery Bank argued that Almat only identified acts by Shrinay, and did not identify any action taken by Midwest Lodging that would suggest or imply that Shrinay had authority to contract on behalf of Midwest Lodging.

Midwest Lodging and Montgomery Bank’s argument in moving for summary judgment was clearly directed to a contract claim, and the purported lack of a contractual relationship between Midwest Lodging and Almat. Midwest Lodging and Montgomery Bank provided no authority or explanation as to why or how the lack of a contract and/or an agency relationship defeated Almat’s quantum meruit claim as a matter of law. Critically, at no time did Midwest Lodging and Montgomery Bank address Almat’s quantum meruit claim, or any of the elements of that claim, much less negate any of those elements, as they must to prevail on a motion for summary judgment. A claim for quantum meruit does not require the existence of an express agreement between the parties. *County Asphalt Paving*, 239 S.W.3d at 710. Though a contract is not necessary, the summary-judgment record supports a finding that Shrinay was Midwest Lodging’s agent, and that Midwest Lodging kept control over Shrinay. But this is not dispositive of a quantum meruit claim. “[A] landowner’s retention of the benefit from improvement to his property by materials supplied by a subcontractor without paying the reasonable value thereof, is inequitable and the mere absence of privity will not defeat the subcontractor’s right to recover

the reasonable value of such materials.” *Int’l Paper Co. v. Futhey*, 788 S.W.3d 303, 306 (Mo. App. E.D. 1990). To the extent the circuit court relied on the agency and contractual grounds advanced by Midwest Lodging and Montgomery Bank in granting summary judgment, the circuit court erred.

We turn next to Midwest Lodging and Montgomery Bank’s argument on appeal that they are entitled to summary judgment on Almat’s quantum meruit claim because Midwest Lodging was not unjustly enriched by Almat’s work. In resolving the issue whether a landowner has been unjustly enriched by a subcontractor’s improvements on the owner’s real estate, the courts have repeatedly looked to whether the landowner has paid the full amount due under the contract. *Green Quarries*, 676 S.W.2d at 264. If a landowner has indeed paid the full contract price, the owner’s retention of materials and supplies without further payment does not constitute unjust enrichment because the owner has paid for what he received. *Id.*; *Int’l Paper*, 788 S.W.3d at 306. Although the subcontractor may remain unpaid and thus suffer detriment, equity will not require the owner to pay twice. *Id.* Therefore, it has been consistently held that non-payment by the owner is an essential element that must be pleaded and proved by a subcontractor seeking to establish a cause of action for quantum meruit. *Green Quarries*, 676 S.W.2d at 265; *Int’l Paper*, 788 S.W.3d at 306; *County Asphalt Paving*, 239 S.W.3d at 712. In *Green Quarries*, this Court found that a subcontractor’s petition failed to state a cause of action based upon unjust enrichment where the petition failed to allege that the property owners had not paid the general contractor. *Green Quarries*, 676 S.W.2d at 266. Such allegations are required to protect the property owner from being required to pay for the same benefit twice. *Id.*

Courts have long-held that a subcontractor may not recover in quasi-contract from a landowner where the landowner has already paid the full contract price. *Id.* Payment of the

contract price by the landowner is crucial to the disposition of a quantum meruit claim. *County Asphalt Paving*, 239 S.W.3d at 712; *Int'l Paper*, 788 S.W.3d at 306. The Western District in *Seiferts* rejected a subcontractor's quantum meruit claim, holding that the property owner was not enriched unjustly when it was undisputed that the property owner had paid the general contractor the full amount of the contract price, even though the general contractor had not paid the subcontractor. *Roy A. Scheperle Const. Co. v. Seiferts, Inc.*, 687 S.W.2d 222, 223 (Mo. App. W.D. 1984). Also instructive is *County Asphalt Paving*. In that case, this Court rejected a subcontractor's quantum meruit claim against a property owner and held that the property owner was not enriched unjustly by retaining work and materials provided by the subcontractor where the property owner fully paid the contract price and provided those funds to a title company. *County Asphalt Paving*, 239 S.W.3d at 712. We noted that the subcontractor may have had a cause of action against the title company, which had misappropriated the escrow funds, but that the subcontractor did not have a claim for quantum meruit against the property owner. *Id.*

Midwest Lodging and Montgomery Bank rely on *International Paper* as controlling. In that case, this Court held that a supplier could not recover from property owners under quantum meruit where the property owner had paid the full contract price. *Int'l Paper*, 788 S.W.3d at 306-07. The supplier had sued after the general contractor failed to pay the supplier for materials provided for construction of a home. *Id.* at 304-05. The property owners entered into a contract with a general contractor for construction of a house, and obtained a loan to finance the construction. *Id.* at 304. The terms of the mortgage required the property owners to enter into a disbursing agreement with an escrow company and place the funds into an escrow account. *Id.* The escrow company then distributed funds to the general contractor, or on its behalf, during the course of construction. *Id.*

The general contractor purchased lumber products from the supplier. *Id.* The supplier delivered the lumber, which was then used in the construction of the house. *Id.* The general contractor ultimately defaulted on its obligation to pay the supplier and abandoned construction on the property owners' home. *Id.* The property owners were forced to complete the construction of their house at their own, additional, expense. *Id.*

After failing to collect the balance due from the general contractor, the supplier approached the property owners and requested payment. *Id.* at 305. The property owners refused, and the supplier filed a mechanics' lien in response. *Id.* Upon learning of the lien, the escrow company required the property owners to provide additional money to satisfy the suppliers' lien. *Id.* The property owners provided the additional funds. *Id.* The escrow service then executed a final affidavit to the bank stating that all bills were paid or provided for, which permitted the property owners to close on the purchase of their home. *Id.*

The supplier sued the property owners, and the claim for quantum meruit was ultimately submitted to a jury which found in favor of the supplier and returned a verdict directing the property owners to pay the balance due. *Id.* This Court reversed the jury's verdict. *Id.* at 306-07. Payment of the contract price by the landowner was crucial to the disposition of the case. *Id.* We explained:

The question of unjust enrichment focuses not upon what the contractor has received, but rather what the owner has paid. After paying the full contract price to [the escrow company] under the escrow agreement, the [property owners] no longer owed the money and retained no interest therein other than that the funds be disbursed pursuant to the terms of the agreement. Having paid the amount they were required to pay under the construction contract in the manner specified in the contract, the [property owners] were entitled to receive a completed residence in return. No unjust enrichment accrued to the [property owners] because [the general contractor] defaulted forcing them to expend additional sums in order to obtain what they were entitled to under the contract.

Id. at 306.

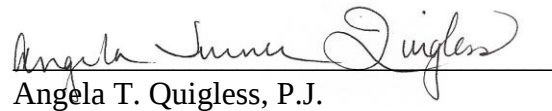
These cases are all instructive, and clearly show that Midwest Lodging and Montgomery Bank are not entitled to summary judgment in this case. Admittedly the facts of *International Paper* are similar to the facts here. However, there is a critical distinction. The disposition of all these cases rested on proof of full payment of the contract price by the property owner. Here, however, the summary-judgment record contains no such proof of full payment by Midwest Lodging.

Midwest Lodging and Montgomery Bank challenged the payment aspect of Almat's cause of action. For Almat to prevail, it must prove non-payment of the full contract price by Midwest Lodging. To negate this, Midwest Lodging and Montgomery Bank must show that Midwest Lodging fully paid the contract price, in the manner specified in the contract with Shrinay. See *County Asphalt Paving*, 239 S.W.3d at 712; *Int'l Paper*, 788 S.W.3d at 306-07. This they have not done. In arguing for summary judgment in their favor, Midwest Lodging and Montgomery Bank rely solely on their asserted material fact that Midwest Lodging "paid more to complete the project and to correct defective work performed by Shrinay and Shrinay's subcontractors than Midwest Lodging would have been required to pay under its contract with Shrinay had Shrinay fully performed its obligations under the contract." Almat admitted this fact during summary-judgment proceedings. However, though Midwest Lodging and Montgomery Bank have established this as one of their uncontroverted material facts, a material fact in the context of summary judgment is one from which the right to judgment flows, and Midwest Lodging and Montgomery Bank's established fact here is too general and vague to entitle them to summary judgment on this claim. *Haley v. Bennett*, 489 S.W.3d 288, 293 (Mo. App. W.D. 2016)(defining "material fact"). Midwest Lodging and Montgomery Bank's relied-upon statement is insufficient to prove full payment as specified in the contract. It infers only that

Midwest Lodging and Montgomery Bank have paid some amount of money, above the contract price, to some unspecified person or persons, to complete the project. It does not infer full payment by Midwest Lodging for the work performed by Almat under the contract. Indeed, full payment remains a disputed fact. It is uncontroverted that as part of its loan to Midwest Lodging for the project, Montgomery Bank required Midwest Lodging to disburse payment for work on the project through a title company. But, unlike in *County Asphalt Paving and International Paper*, Midwest Lodging and Montgomery Bank have not shown that Midwest Lodging fully paid the contract price and provided those funds to the title company.

That Midwest Lodging paid more than the contract price to complete the project does not establish that Midwest Lodging has paid the full amount it was required to pay under the contract with Shrinay, such that it is not unjustly enriched by Almat's work. That Midwest Lodging expended additional sums is not dispositive. The property owners in *International Paper* were forced to expend additional sums of money, above the original contract price, to complete the construction of their house after the general contractor abandoned the project. *Int'l Paper*, 788 S.W.3d at 304-5. The quantum meruit analysis, however, did not turn on the fact that the property owners had paid additional funds, but rather it turned on the fact that the owners had fully paid the amount they were required to pay under the construction contract with the general contractor, in the manner specified in that contract. *Id.* at 306. The owners had paid the full contract price to the escrow company and no longer owed the money. *Id.* We have no such proof here in the summary-judgment record. Midwest Lodging and Montgomery Bank have not established that Midwest Lodging has fully paid for the materials and services provided by Almat, such that Midwest Lodging is not unjustly enriched by retaining those materials and services without further payment.

Midwest Lodging and Montgomery Bank advanced no other established material fact – nor do we see any – that aids them in their quest for summary judgment on this claim. A motion for summary judgment must be denied if the factual assertions are not sufficient to entitle movant to judgment as a matter of law. *Jordan v. Peet*, 409 S.W.3d 553. (Mo. App. W.D. 2013). Such is the case here. We hold that the factual assertions contained in the summary-judgment record are insufficient to entitle Midwest Lodging and Montgomery Bank to summary judgment on Almat’s quantum meruit claim. We thus reverse the circuit court’s entry of summary judgment on that claim, and remand this cause back to the circuit court for further proceedings.


Angela T. Quigless, P.J.

Kurt S. Odenwald, J. and
James M. Dowd, J., concur.