IN THE COURT OF COMMON PLEAS FOR THE STATE OF DELAWARE IN AND FOR NEW CASTLE COUNTY

DELAWARE EXPRESS SHUTTLE, INC., a Delaware Corporation)
Plaintiff,)
v.) C.A. No.: CPU4-10-000005
SAM WALTZ & ASSOCIATES, LLC. D/B/A SAM WALTZ & ASSOCIATES COUNSEL,))))
Defendant.	ý –

Submitted: May 27, 2013 Decided: July 1, 2013

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DECISION AFTER TRIAL

Plaintiff Delaware Express Shuttle ("Express Shuttle") brought this action against Defendant Sam Waltz & Associates, LLC ("Waltz") for breach of a marketing agreement entered into between the parties. Trial was held on April 16, 2013, on Express Shuttle's breach of contract claim and Waltz's counterclaim seeking payment for additional services rendered.

The parties agree that a contract existed between Express Shuttle and Waltz, whereby Waltz would perform certain marketing and business development services for Express Shuttle,

including the creation and delivery of a Strategic Marketing Plan ("Marketing Plan"). The parties also agree that a final, bound Marketing Plan was never delivered.

It is Express Shuttle's position that Waltz breached the agreement by failing to deliver a final and complete Marketing Plan. It is Waltz's position that it did provide a Marketing Plan as required under the agreement, and that the deficiencies in the delivered Marketing Plan were purely aesthetic. Waltz also contends that it performed additional work for Express Shuttle valued at \$23,600.00, for which it was never paid.

Trial was held on April 16, 2013, and the Court reserved decision. At trial, the Court heard testimony from two witnesses: Gerard Frenze ("Frenze"), president and CEO of Express Shuttle, and Samuel Waltz, founder of Sam Waltz and Associates, LLC. Documentary evidence was submitted by both parties.¹ At the conclusion of the trial, the Court reserved decision and the parties were afforded the opportunity to submit supplemental briefing to the Court.² This is the Court's Final Decision and Order.

FACTS

On April 23, 2007, Express Shuttle entered a written agreement (the "Agreement") with Waltz for marketing services. The Agreement set forth two separate marketing phases as follows:

Phase I Deliverables:

- 1. Strategic Marketing Plan, approximately 15 25 pages in length
- 2. Logo Adaptation, "quick turnaround," to meet your deadlines
- 3. Customer Promise "Value Matrix," based upon our research/experience/knowledge "asset"

¹ Plaintiff's Exhibits 1 through 9 and Defendant's Exhibits 10 through 29 were admitted into evidence.

² The Court requested an opening brief on the defense's theory of recovery on the counterclaim, *quantum* meruit, which was first raised at closing.

Inside the Phase I Plan, you will find a basis – including the budget – to guide you for execution and implementation and related decisions with regard to Phase II Tactical Implementation, including . . . ³

The Agreement, drafted by Waltz, emphasized an understanding between the parties of the importance of the Strategic Marketing Plan.⁴ The Agreement provided for a 30-day turnaround on Phase I. The Agreement also provided that Waltz would complete the work at a fixed fee of \$10,000.00 for the Marketing Plan and \$1,500.00 for the Logo Adaptation and Value Matrix.⁵ Express Shuttle was to tender \$7,500.00 up-front, with the balance due upon completion of the work.⁶

Frenze, president and CEO of Express Shuttle, testified as follows: Sharon Williams ("Ms. Williams"), an employee of Express Shuttle, was the contact person for the dealings with Waltz. Ms. Williams was ultimately terminated, in part because of her "lack of oversight" of the Waltz contract. Express Shuttle paid Waltz the requisite \$7,500.00 up-front, and Waltz delivered the Logo Adaptation and Value Matrix as required, both of which were satisfactory; however, the final, bound Marketing Plan was never delivered. Despite numerous demands for delivery, Waltz tendered only an incomplete draft of the Marketing Plan, which was submitted well after the 30-day turnaround required by the Agreement. According to Frenze, the Marketing Plan that was submitted did not give direction for the implementation of Phase II, which was promised in the Agreement. Frenze could not recall the specific date on which he received the incomplete draft; however, emails between agents of Express Shuttle and Waltz, which were admitted into evidence, show that as late as February 4, 2008–over eight months after performance was due

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³ Pl.'s Ex. 1 at 3.

⁴ Pl.'s Ex. 1 at 2: "I'm [Sam Waltz] attaching our approach to Strategic Marketing Planning, which, by your comments Tuesday, I know that you value and understand."

⁵ Pl.'s Ex. 1 at 2.

⁶ PL's Ex. 1 at 2.

under the Agreement-Express Shuttle requested delivery of the final Marketing Plan.7 Nonetheless, Express Shuttle paid Waltz the \$4,000.00 balance on June 21, 2007.8 Frenze maintained that Express Shuttle inadvertently issued the payment as the result of an accounting error. Neither parties' testimony, nor the exhibits entered into evidence suggest that Waltz was made aware of the erroneous nature of the payment.

Frenze conceded that "some work" was performed by Waltz under Phase II of the Agreement; however, Frenze was of the understanding that Phase II could not be completed prior to Phase I. Frenze testified that Express Shuttle "likely overspent" on marketing efforts in the absence of the final Marketing Plan. Frenze did not identify which marketing efforts were financially disadvantaged, nor did he specify what additional costs were incurred as a result of Waltz's failure to timely deliver a finished product. Frenze did not receive any invoice from Waltz for work performed under Phase II until after litigation had commenced.

Sam Waltz, founder of Sam Waltz and Associates, LLC, testified that the Marketing Plan submitted to Express Shuttle was complete, and it merely lacked binding and editing. Waltz testified that he delivered the unbound Marketing Plan to Express Shuttle in May 2007. According to Waltz, the Marketing Plan was not bound because, at Ms. Williams' insistence, the project moved into Phase II before Waltz had an opportunity to complete Phase I. Waltz opined that it would have taken a few hours, valued at about \$1,000.00, to edit and bind the Marketing Plan. Waltz stated that Phase I involves the "think tank" and research, while Phase II is the tactical implementation. In other words, Waltz explained, Phase I is the "ready, aim" portion of the marketing efforts, while Phase II is the "fire." Payment for the completion of Phase I was made on June 21, 2007, before Waltz sent Express Shuttle an invoice for the \$4,000.00 balance.

⁷ Pl.'s Ex. 6(e). ⁸ Pl.'s Ex. 5.

Waltz testified that he prepared a pricelist for Phase II, which he reviewed with Ms. Williams; however, there is no date on the pricelist, and Waltz did not recall exactly when the Phase II pricelist was created and reviewed with Ms. Williams. According to Waltz, the project moved into Phase II implementation in early June, the details of which were regularly communicated to Ms. Williams. In mid-September 2007, Waltz hand-delivered an invoice to Frenze for the Phase II work completed. Waltz routinely sent invoices to Ms. Williams via email, but hand-delivered this invoice because he had prepared it prior to a meeting at Express Shuttle. Although Waltz never received any payments on the invoice from Express Shuttle, he did not contact anyone at Express Shuttle regarding the outstanding balance. Waltz explained that when Express Shuttle demanded the return of \$10,000.00 for the Marketing Plan, Waltz felt that he was being "extorted" and ceased all communication with Express Shuttle.

DISCUSSION

A. Damages as to Express Shuttle

The first issue before the Court is whether Waltz's failure to provide a final, bound Marketing Plan entitles Express Shuttle to damages equivalent to the contract price of \$10,000.00.

To prevail on a claim for breach of contract, the plaintiff must prove, by a preponderance of the evidence, that: (1) a contract existed between the parties; (2) breach by defendant of an obligation imposed by the contract; and (3) as a result of that breach plaintiff suffered damages.¹⁰

There is no dispute that a contract existed between the parties for the services listed in Phase I of the Agreement. Based on the testimony presented and the documents received into evidence, it is clear that Waltz breached the contract by delivering a Marketing Plan that was

⁹ Def.'s Ex. 25.

¹⁰ VLIW Technology, LLC v. Hewlett-Packard Co., 840 A.2d 606, 612 (Del. 2003); Gregory v. Frazer, 2010 WL 4262030, *1 (Del. Com. Pl. Oct. 8, 2010).

untimely and incomplete. Pages were left blank, illegible handwritten notes abounded, and substantial editing remained undone. Waltz's contention that the breach was a result of Express Shuttle's demanding to move into Phase II is not persuasive. The Agreement was executed on April 23, and required delivery within 30 days. By Waltz's own account, Phase II was initiated in June, after Waltz was in breach. Thus, the Court must turn to the third step of the breach of contract analysis: the calculation of damages. To satisfy the third requirement, "plaintiffs must show both the existence of damages provable to a reasonable certainty, and that these damages flowed from defendant's violation of the contract."

Express Shuttle seeks damages in the amount of \$10,000.00, which is the total amount it paid Waltz to provide the Marketing Plan. Express Shuttle offers no legal basis for the type of damages it seeks to recover. It appears that Express Shuttle is seeking restitution damages—that is, damages "to return the parties, as nearly as is practicable, to the situation in which they found themselves before they made the contract." However, such a remedy is not appropriate where the plaintiff does not return the performance tendered by the defendant. The record indicates that Express Shuttle gleaned some benefit from the unfinished Marketing Plan and, accordingly, the Court sees no basis for granting restitution damages.

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¹¹ LaPoint v. AmerisourceBergen Corp., 2007 WL 2565709, at *9 (Del. Ch. Sept. 4, 2007) (citations omitted).

¹² The contract attributed \$1,500.00 of the \$11,500.00 total to the Logo Adaptation and the Customer Promise/Value Matrix. Plaintiff calculated the amount of damages sought by subtracting \$1,500.00 from the contract price of \$11,500.00.

¹³ Restatement (Second) of Contracts § 384 cmt. A; see R.M. Williams Co., Inc. v. Frabizzio, 1993 WL 54423, *14 (Del. Super. Feb. 8 1993).

¹⁴ R.M. Williams Co., Inc. v. Frabizzio, 1993 WL 54423, *14 (Del. Super. Feb. 8 1993) (citing Restatement (Second) of Contracts § 373 cmt a., which provides: "If ... the breach is by non-performance [as opposed to repudiation], restitution is available only if the breach gives rise to a claim for damages for total breach and not merely to a claim for damages for partial breach.... A party who has lost the right to claim damages for total breach by, for example, acceptance or retention of performance with knowledge of defects (§ 246), has also lost the right to restitution."

It is well established in Delaware law that expectation damages are the standard remedy for breach of contract:

[T]he standard remedy for breach of contract is based upon the reasonable expectations of the parties ex ante. This principle of expectation damages is measured by the amount of money that would put the promisee in the same position as if the promisor had performed the contract. Expectation damages thus require the breaching promisor to compensate the promisee for the promisee's reasonable expectation of the value of the breached contract, and, hence, what the promisee lost. 15

To recover expectation damages the plaintiff "must show that the injuries suffered are not speculative or uncertain, and that the Court may make a reasonable estimate as to an amount of A plaintiff can recover only damages that can be proven with reasonable damages.",16 certainty.17

There is no dispute that the incomplete Marketing Plan delivered was still of some value to Express Shuttle. It is also clear from the record that Express Shuttle was disadvantaged by the Waltz's failure to complete the Marketing Agreement. Frenze testified that Express Shuttle "likely overspent" on subsequent marketing endeavors because it did not have the direction and strategy of a final Marketing Plan. Waltz likewise testified that Phase I-which included the Marketing Plan-was essential to the implementation of Phase II. The language of the Agreement itself states: "[i]nside the Phase I Plan, you will find a basis-including budget-to guide you for execution, implementation, and related decision . . ." The problem lies in determining, with reasonable certainty, what damages would put Express Shuttle in the position it would be in had Waltz fully performed by delivering a final, bound Marketing Agreement.

¹⁵ Duncan v. Theratx, Inc., 775 A.2d 1019, at 1022 (Del. 2001); see also Comrie v. Enterasys Networks, Inc., 837 A.2d 1 (Del. Ch. 2003).

¹⁶ LaPoint v. AmerisourceBergen Corp., 2007 WL 2565709, at *9 (Del. Ch. Sept. 4, 2007).

¹⁷ Pharmathene, Inc. v. SIGA Technologies, Inc, 2010 WL 4813553, at *11 (Del. Ch. Nov. 23, 2010) (citation omitted).

Express Shuttle offered only speculation that it "likely overspent" as a result of the breach. The only reasonably certain measure of damages presented to the Court was from Waltz's uncontroverted testimony that the remaining editing and binding required to finish the Marketing Plan would require a few hours of work, valued at \$1,000.00. In the Court's perception, the Marketing Plan submitted appeared far more incomplete than Waltz suggests; however, the Court has been given no other barometer to assess damages. Express Shuttle failed to introduce any evidence that the damages which flowed out of Waltz's breach of the contract amount to more than the cost of editing and binding the project. Accordingly, the Court has no basis to award Express Shuttle damages exceeding \$1,000.00.

B. Waltz's Counterclaim

In its counterclaim, Waltz seeks to recover \$23,600.00 for services it provided under Phase II; however, the legal framework appropriate for the counterclaim is unclear. At trial, it appeared as though Waltz was seeking recovery on a breach of contract theory. During oral arguments, however, Waltz's attorney, Donald L. Gouge, Esquire, articulated *quantum meruit* as the defense's legal theory for recovery. The Court requested that Mr. Gouge submit an opening brief on the defense's *quantum meruit* theory of recovery. Mr. Gouge filed an opening brief with this Court on May 13, 2013, requesting that the brief be considered a formal request to amend the pleadings to add a claim for *quantum meruit*. After citing case law in support of his position that such a request is permissible, Mr. Gouge stated "[i]n the case at hand, the evidence presented was consistent with a claim for breach of contract." Mr. Gouge also offered the Black's Law Dictionary definition of *quantum meruit*, and quoted language regarding unjust enrichment from *Abacus Sports v. Casale Construction*. 18

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¹⁸ 2012 WL 1415603, at *2 (Del. Super. Feb. 14, 2012).

The supplemental brief submitted by Mr. Gouge adds uncertainty as to which particular legal theory he intended to plead: breach of contract, quantum meruit, or unjust enrichment. However, for the reasons discussed below, none of the legal theories suggested provide Waltz a basis for recovery.

a. Waltz's Counterclaim on a Breach of Contract or Quantum Meruit Theory

To prevail on a claim for breach of contract, the plaintiff must prove, by a preponderance of the evidence, that: (1) a contract existed between the parties; (2) breach by defendant of an obligation imposed by the contract; and (3) as a result of that breach plaintiff suffered damages.¹⁹ Even if the Court were to find that a contract existed between the parties, and that Express Shuttle breached an obligation imposed by the contract, Waltz's cannot prevail on the counterclaim because he failed to prove damages.

Quantum meruit, on the other hand, allows a party to recover in the absence of an express agreement.²⁰ To prove a claim for quantum meruit, a plaintiff must establish that (1) the party performed the services with the expectation that the recipient of the benefit would pay for them; (2) that the services were performed, absent a promise to pay; and (3) the circumstances were such that the recipient should have known that the party expected to be paid.²¹ "Quantum meruit literally means 'as much as he deserves'; it is the reasonable worth or value of services rendered for the benefit of another."²² Waltz will not be able to recover under a quantum meruit theory because he failed to establish the reasonable value of the services rendered.

¹⁹ VLIW Technology, LLC v. Hewlett-Packard Co., 840 A.2d 606, 612 (De. 2003); Gregory v. Frazer, 2010 WL 4262030, *1 (Del. Com. Pl. Oct. 8, 2010).

²⁰ C & C Drywall Contractor, Inc. v. Milford Lodging, LLC, Young, J., 2010 WL 1178233, at *3 (Del. Super.).

²¹ C & C Drywall Contractor, Inc. 2010 WL 1178233 at *3; Petrosky v. Peterson, 859 A.2d 77, 79 (Del. 2004).

²² Marta v. Nepa, 385 A.2d 727, at 730 (Del. 1978) (citations omitted).

In support of its position on counterclaim for damages, Waltz relied heavily on its August 31, 2007 invoice for Phase II work performed. The invoice fails to provide a reasonably certain basis for the calculation of damages for a number of reasons. First, in the invoice, the balance due is listed as \$15,920.00. Waltz attributes this \$7,680.00 difference between the invoice price and the amount sought in the counterclaim to a discount applied for an "ongoing relationship" and "prompt payment." However, there is nothing in the invoice to suggest that the balance due was contingent on an ongoing relationship or prompt payment.²³

Second, the invoice fails to identify what particular services were actually performed for Express Shuttle. The invoice reads as follows:

1.	Implementation of Marketing Communications	\$6,750.
2.	Graphic Design Services	\$2,970.
3.	OnGoing Strategic Marketing Counsel	\$1,000.
4.	Retainer, Design & Production Management, WA&A, forecast for Sept, for remaining collateral ²⁴	\$5,200.

Both Waltz and Frenze testified that some services were performed under Phase II. Specifically, Frenze conceded that Waltz performed services for Express Shuttle related to the Delaware Auto Show, a Hockessin Newsletter, and production of promotional materials. Waltz also maintains that, among other things, it participated in a photo shoot at the University of Delaware and created advertisements for Express Shuttle. However, none of the services that

²³ In fact, the invoice provided for a 2% interest charge for payment outstanding 10 days after submission—not for a surcharge of \$7,680.

²⁴ Pl.'s Ex. 8. It is clear from the testimony presented at trial that the business relationship broke down in September 2007. In fact, during closing arguments, Waltz's attorney, Donald L. Gouge, stated "work performed in September clearly can't be awarded." Thus, it is clear from the evidence that at least \$5,200.00 worth of services accounted for in line 4 were never performed.

either party testified to are listed in the invoice; rather, the invoice assigns numerical value to vague categories, with no explanation as to what services were provided in each category.

Waltz testified that he was unable to provide a further breakdown or billing summary for the services allegedly rendered. Absent a correlation between the services allegedly performed and the invoice, the Court cannot calculate damages based on the invoice.

In sum, it is clear from the record that Waltz did perform services for Express Shuttle under Phase II, and that the services were of some value. However, Waltz has not given the Court an adequate basis on which to calculate damages; thus, no damages can be awarded on the counterclaim, under either a breach of contract or a *quantum meruit* theory.

b. Waltz's Counterclaim on an Unjust Enrichment Theory

To prevail on a claim of unjust enrichment, the following elements must be proven: (1) an enrichment; (2) an impoverishment; (3) a relationship between the enrichment and the impoverishment; (4) no justification; and (5) the absence of remedy at law.²⁵ "The operative difference between a claim for *quantum meruit* and for unjust enrichment is unjust enrichment focuses on the retention of a benefit or money. In contrast, *quantum meruit* allows plaintiffs to recover the reasonable value of services rendered, not the value of a benefit received." Thus, in an unjust enrichment claim, damages awarded are based on the benefit received.

Even if the Court were to find that Waltz established the elements of unjust enrichment, Waltz cannot recover under this theory because he failed to prove the value of the benefit received by Express Shuttle. During cross-examination, Frenze conceded that Express Shuttle's business benefitted from Waltz's ideas; however, that benefit was never quantified. Mr. Gouge

²⁵ Caldera Properties-Lewes/Rehoboth VII, LLC v. Ridings Development, LLC, at *31 (Del. Super. May 29, 2009) (citations omitted).

²⁶ Hercules, Inc. v. Tomaszewski, 2011 WL 6951839, at *4 (Del. Com. Pl. Dec. 29, 2011) (citations omitted).

even stated during closing arguments that there was no expert testimony presented on behalf of plaintiff as to the value of the work performed. Absent testimony on the value of the benefit conferred, Waltz cannot recover on an unjust enrichment theory.

CONCLUSION

As stated previously stated, to prevail on a claim, the claimant and cross-claimant must prove each element by a preponderance of the evidence.²⁷ Damages must be proven to a reasonable certainty.²⁸ It is clear that Waltz breached the agreement entered into with Express Shuttle on April 23, 2007, and that the damages incurred are within the range of \$1,000.00 and \$10,000.00. The only measure of damages presented to the Court was the \$1,000.00 figure provided by Waltz. Therefore, damages in the amount of \$1,000.00 are all that were proven to a reasonable certainty.

On the counterclaim, it is clear that Waltz rendered services from Phase II, and that those services were of benefit to Express Shuttle; however, Waltz fails to provide any measurable basis for calculating damages. The counterclaim was unsupported by the invoice upon which Waltz relies. The invoice is not reliable in that it contained admittedly uncollectable items for service never performed. Furthermore, the invoice failed to adequately specify services rendered. Waltz offered nothing to establish damages to a reasonable certainty, and thus, no damages can be awarded.

²⁷ VLIW Technology, LLC, 840 A.2d 606, 612 (Del. 2003). ²⁸ LaPoint, 2007 WL 2565709, at *9 (Del. Ch. Sept. 4, 2007).

<u>ORDER</u>

For the foregoing reasons, judgment is hereby entered in favor of Delaware Express Shuttle and against Sam Waltz & Associates, LLC, in the amount of \$1,000.00, plus prejudgment interest from the date of the suit until today, court costs, and post-judgment interest at the legal rate.

IT IS SO ORDERED, this 1st day of July, 2013.

The Honorable Carl C. Danberg

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cc: Tamu White, Supervisor, Civil Division