No. 2—10—0499
Order filed June 27, 2011

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

KALSI BUILDERS, INC., an Illinois Corporation,	)	Appeal from the Circuit Court
	)	of Du Page County.
Plaintiff-Appellee,	)	
	)	
v.	)	No. 08—CH—2829
	)	
NATIONAL CITY MORTGAGE, NURUL MOBIN, AMIN SHAMSUDDIN, and Unknown Owners and Non-Record Lien Claimants,	)	Honorable
	)	Neal W. Cerne,
Defendants-Appellants.	)	Judge, Presiding.

JUSTICE HUDSON delivered the judgment of the court.
Presiding Justice Jorgensen and Justice Hutchinson concurred in the judgment.

ORDER

Held: Purported contract between the parties under which plaintiff was to manage construction of a house for defendants was too indefinite to be enforced; *quantum meruit* was proper and adequately supported by the evidence; plaintiff was not entitled to foreclose on improperly filed mechanics lien, but defendants were not entitled to attorney fees based on the improper filing.

The basis of this appeal is an agreement between, plaintiff, Kalsi Builders, Inc., and a group of investors that included defendants Nurul Mobin Madusi and Amin Shamsuddin as well as two other individuals who are not parties to this action. The agreement pertained to the construction of a house at 29 West Armitage Avenue in Villa Park. Discussion between the parties began in early

2006, and, in May 2006, defendants purchased property on which plaintiff was to build a house. Plans for the house were completed in the summer of 2006 and construction began in October. By June 12, 2007, the house received a certificate of occupancy. Construction came to an end on August 1, 2007. Plaintiff spent $307,708.38 building the home, but defendants had only paid $261,664 to plaintiff. Defendants refused to pay the difference, arguing that a document dated May 17, 2006, set a contract price of $230,000. Sometime between the end of construction and July of 2008, plaintiff filed two mechanics liens against the property under the Illinois Mechanics Lien Act (Act) (770 ILCS 60/1 et seq. (West 2008)). In July of 2008, plaintiff filed a two count complaint against defendants, seeking foreclosure on the mechanics liens and damages for breach of contract. Eleven months later in June of 2009, plaintiff amended the complaint to include a third count seeking relief under the equitable theory of *quantum meruit*. After a bench trial in late 2009, the court denied plaintiff relief under counts one and two, which involved the mechanics liens and breach of contract, but granted relief under the *quantum meruit* count. The court awarded plaintiff $46,044.38 in damages, the difference between the amount plaintiff had received and the actual cost of construction. Defendants appeal this ruling. For the reasons that follow, we affirm.

I. Background

The parties to this litigation are not strangers. Harpreet Kalsi of Kalsi Builders, Inc., and defendants had a relationship dating back over 10 years to when the parties attended high school together. When defendants decided to build a house and sell it for a profit, they turned to someone they knew who had experience with this type of investment. By the time the house was finished the relationship of the parties had soured, culminating in this litigation.

The facts leading up to this case begin near the end of 2005 or sometime in early 2006 when a group of investors (including defendants) approached Harpreet Kalsi about building them a home

for investment purposes. Defendants planned to build a house and sell it at a profit. Defendants would buy the lot and hire plaintiff to build a house there. Plaintiff showed defendants a few houses that it had built in the area, and told defendants that the cost to build a similar house would be around $100 per square foot. To construct a house, plaintiff charged a construction management fee of 10% of the value of the house.

Defendants began looking for a suitable location in early 2006, and Harpreet Kalsi helped defendants select a lot. When defendants found two suitable lots adjacent to each other in May 2006, they applied for a loan to buy the property and build a house. In order to qualify for the loan, the bank required defendants to present a construction contract, conditions for payout, and a draw schedule for the builder to receive payments from the proceeds of the loan. Defendants met with plaintiff. They signed a document on May 17, 2006, and submitted that document to the bank as a construction contract, along with a draw schedule. This document was labeled "Construction Contract" and provided as follows:

> "The SUBCONTRACTOR [(plaintiff)] and GENERAL CONTRACTOR [(defendants)] for good and valuable consideration Agree to the terms set forth below:
>
> CONTRACT DOCUMENTS
>
> The contractor documents for this contract consist of this agreement. The agreement between the owner(s) and Contractor the drawing and specifications including changes made prior to construction and changes made during construction between the owners(s) and contractor and agreed upon by the parties to this contract. All of these documents from this contract are fully part of the contract.
>
> Labor and materials provided for construction of new home, a two story four bedroom, Lot 54 and 55 Armitage Ave addition to the town of Villa park, Illinois. Structure to have four

bedrooms, living room, family room, study/library, kitchen/dinette, four baths, one powder room, unfinished full basement and garage. (Subject to change upon subcontractor's approval).

CONDITIONS OF PAYOUT

KALSI BUILDERS to receive:

The balance of the contract to be paid in (4) separate draws:

(See Attachment: Draw Schedule)

Any alteration of deviation of the original contract shall be signed off on work authorizations and paid separately from the draws

General contractor to pay all fees, excluding permits, and to secure insurance certificates from all subcontractors and all partial and final waivers of liens. Insurance certificates must be submitted on week after signing of contract. General Contractor shall have liability insurance." [*Sic* throughout.]

The attached draw schedule states:

"20% ($41,000)	Complete excavation and foundation.
35% ($72,450)	Upon completion of sub-flooring exterior walls, rough enclosed under roof, all windows and exterior doors installed
30% ($62,100)	Roughed-in plumbing, roughed-in electrical, roughed-in heating, cabinets, interior doors, drywall and plaster
15% ($31,050)	Upon completion of property per plans". [*Sic* throughout.]

The bank accepted the documents for the purpose of the loan.

On May 25, 2006, defendants closed on the property. From the proceeds of the loan, plaintiff received $23,000, and defendants contributed an additional $12,000 for plaintiff to begin

construction. Plaintiff first hired an architect, Ansari Associates, and the first draft of the plans for the house was completed on June 30, 2006. Plaintiff received a building permit on October 19, 2006, and construction began soon thereafter. In the meantime, between June 30, 2006 and October 19, 2006, defendants did not select any finishes for the home. From the time construction began, plaintiff made periodic draws from the bank loan when each phase of the home was completed. During this time, plaintiff also received payments of $2,451 and $6,000 from defendants out of their personal funds.

In March of 2007, plaintiff asked defendants to sign a document that included a provision that plaintiff would be paid a management fee of ten percent of the value of the house for its services as construction manager on the project. The document lists responsibilities of the construction manager, but makes no mention of labor or materials, nor does the document list a contract price for the cost of constructing the house. It specifies that the lot price is not included in the value of the house. Defendants contend that they signed the document unwillingly, but returned the document one week after receiving it with no proposed changes or objections. The parties back-dated the document to read "October 1, 2006." This document, which is titled "Contract Agreement" reads:

> "I, Surinder S. Kalsi Owner of Kalsi Builders, Inc, Managing the project on above address which includes the following:
>
> - Hiring the Sub contractors
> - Ordering the Material
> - Making sure everything being done by the blueprints
> - If any change to the project: change will be discussed with the owners
> - Meet with the owners and discuss the project on owners and my convenient time if any question

The final set price for managing the project above is 10% of the house value, which does not include the lot price.

Kalsi Builders, inc will also perform work at above address, any work done by Kalsi Builders, Inc, the description and price of work will be given to the owner prior to performance of work."

Shortly after the second agreement dated October 1, 2006 was signed, the relationship between the parties began to sour. In April of 2007, the parties met at plaintiff's home to add up the costs of the house to that point, but they were unable to produce a final document itemizing costs. On May 10, 2007, plaintiff took the final draw from the construction loan, $31,050 and continued work on the house until it was completed on August 1, 2007. In order to receive the final draw, plaintiff was required to sign a document verifying that construction had been completed "per plans." On June 12, 2007, before construction had come to an end, the house was deemed suitable for occupancy and the parties met to discuss payment and the bond paid to the village of Villa Park. At this meeting, plaintiff told defendants that it would keep the bond refund, over their objections. Plaintiff received a bond refund from the village of Villa Park for $11,213 on August 14, 2007, which plaintiff kept as payment.

With the bond refund included, plaintiff received total payments of $261,664. The cost of building the home totaled $307,708.83. Hence, unpaid construction costs, or the remaining bill, reached $46,044.38. Plaintiff had received no payments under the construction management agreement and calculated that, pursuant to that agreement, plaintiff is owed an additional $43,089. Defendants told plaintiff they could not pay until the house sold.

Defendants put the house on the market on June 12, 2007, for $629,000, but the house did not sell. Three months later, defendants reduced the asking price by $20,000 to $609,000. The

house still did not sell, and, in December 2007, after six months on the market defendant Nurul Mobin Madusi moved his family into the house. Having not received payment for the remaining construction costs or for managing construction of the house, plaintiff filed two mechanics liens against the property, one on behalf of Kalsi Builders, Inc., and one on behalf of Surinder Kalsi personally, the owner of Kalsi Builders, Inc. Defendants discovered the liens on the property when they attempted to refinance the construction loan.

Plaintiff filed a two count complaint in July of 2008. The first count was to foreclose on the mechanics liens, and the second count was for breach of contract. In June 2009, plaintiff amended the complaint to add a third count for recovery on the theory of *quantum meruit.*

A bench trial was conducted late in the fall of 2009. Witnesses for both parties testified at trial, and on January 14, 2010. In its ruling, the trial court denied plaintiff relief on count one for foreclosure of the mechanics lien, finding that the liens were improperly filed. Relief was denied on the second count, breach of contract, because the trial court found that the document dated May 17, 2006, did not contain terms that were definite and certain, and therefore that document was not enforceable as a contract. Likewise, the court found that the Oct. 1, 2006, document was missing a material term and was therefore not a contract. Because no binding contract existed between the parties, the court found that the equitable solution under *quantum meruit* was to award plaintiff the balance of the unpaid construction costs because defendants had received value in the form of a house, and awarding unpaid construction costs to plaintiff prevented defendants from receiving such a windfall.

II. Analysis

On appeal, both parties ask us to find that a contract exists. According to defendants, the May 17, 2006, document is a binding contract between the parties and that document set construction

costs at $230,000. As a result, defendants are not obligated to pay more than $230,000 under the contract, and plaintiff should bear any costs of construction over the contract price of $230,000. Furthermore, defendants argue that because a contract existed, and that contract controls the obligations of the parties, the trial court erred in granting plaintiff relief under *quantum meruit*. Additionally, defendants argue that the amount of the award under *quantum meruit* is not supported by the evidence. Finally, defendants argue that they should be awarded attorneys fees under section 17(c) of the Act (770 ILCS 60/17(c) (West 2008)) because the liens filed by plaintiff against the property were without just cause or right, per the statute.

Plaintiff also argues that a contract existed, but contends that the contract between the parties is embodied in the October 1, 2006, document, not the May 17, 2006, document. Plaintiff argues that the October 1, 2006, document requires defendants to pay the cost of construction and a construction management fee of 10% of the value of the home, which plaintiff calculates to be an additional $43,089. Plaintiff thus asks that we find the October document to be a contract and remand the cause to the trial court for a determination of damages pursuant to this purported contract. In the alternative, plaintiff argues that, even in the absence of a contract, the *quantum meruit* award is supported by evidence regarding the appraised value of the house and the costs of construction. Lastly, plaintiff argues that the trial court did not abuse its discretion when it refused to shift attorneys fees under the Act.

Before proceeding further, we note that we cannot grant plaintiff's request to remand the cause for a determination of further damages even if we agree with plaintiff that the October document is a valid contract. Plaintiff has not filed a cross appeal. Generally, preservation of issues pertaining to "findings adverse to the appellee require a cross-appeal if the judgment was in part against the appellee." *Mortgage Electronic Registration Systems, Inc. v. Thompson*, 368 Ill. App.

3d 1035, 1040 (2006). Here, the trial court ruled against plaintiff on the first and second counts of its complaint. Indeed, the second count of the complaint, a contractual claim based on the October document, is directly implicated by plaintiff's request for a remand. The trial court rejected this claim. As the judgment of the trial court was, in part, adverse to plaintiff, plaintiff had to file a cross appeal to raise this issue before this court. *General Auto Service Station v. Maniatis*, 328 Ill. App. 3d 537, 545 (2002) ("In sum, while the trial court ruled in favor of the [appellee] it did not award the [appellee] all that it sought. As the [appellee] did not file a cross-appeal, this court's review is limited to a consideration of the errors raised by *** appellant"). As plaintiff did not file a cross appeal, we are precluded from considering plaintiff's request.

Ultimately, we affirm the ruling of the trial court with respect to Count I for foreclosure of the mechanics liens and find that the trial court did not abuse its discretion when it refused to shift attorneys fees under statute. In regards to Count II, we find that the document dated May 17, 2006, is not a contract and, for the reasons stated above, we will not consider whether the document dated October 1, 2006, is a contract. Finally, we hold that the trial court's application the equitable theory of *quantum meruit* was appropriate and the award based upon it was adequately supported by the evidence. We therefore affirm this portion of the trial court's ruling as well.

A. Breach of contract

Where, as here, facts are not disputed, as in this case, the question of whether those facts create a contract is reviewed *de novo*. *Bank of Benton v. Cogdill*, 118 Ill. App. 3d 280, 288 (1993). As such, we determine whether a contract exists independent of the judgment of the trial court. *Bank of Ravenswood v. Polan*, 256 Ill. App. 3d 470, 474 (1993).

A valid contract must have an offer, an acceptance, and consideration. *Steinberg v. Chicago Medical School*, 69 Ill. 2d 320, 329 (1977). Consideration is the bargained-for exchange of promises

or performances, and may consist of a promise, an act, or a forbearance. *McInerny v. Charter Golf*, Inc., 176 Ill. 2d 482, 487 (1997). In order for a contract to be enforceable, the essential terms of a contract must be definite and certain. *Midland Hotel Corp. v. Rueben H. Donnelly Corp.*, 118 Ill. 2d 306, 314 (1987). A contract is definite and certain if the terms of the contract and the proper rules of construction allow the court to determine what the parties have agreed to do. *Academy Chicago Publishers v. Cheever*, 144 Ill. 2d 24, 29 (1991). If the terms of the agreement are not definite and certain, then no contract is formed, even if the parties had the intent to make a contract. *Academy Chicago Publishers*, 144 Ill. 2d at 29. A court may enforce a contract where some terms may be missing or have yet to be agreed upon, but if the essential terms are so uncertain that there is no basis for deciding whether the agreement has been kept or broken, then there is no contract. *Academy Chicago Publishers*, 144 Ill. 2d at 30; see also *A.S. & W. Club of Waukegan*, *Illinois v. Drobnick*, 26 Ill. 2d 521, 525 (1962) ("The law is clear that where the material terms and conditions are not ascertainable no enforceable contract is created"). Courts will not supply missing terms to make a contract sufficiently certain as to be enforceable. *McCutcheon v. Chicago Principals Ass'n*, 159 Ill. App. 3d 955, 959 (1987). A contract must include mutual assent of the parties about the meaning of the contract in order to be enforceable. *Academy Chicago Publishers*, 144 Ill. 2d at 30. With these principles in mind, we examine both the May 17, 2006, and the October 1, 2006, documents to determine if either creates an enforceable contract.

The document dated May 17, 2006, that defendants rely upon is simply too vague and indefinite. Defendants are named as the "General contractor" and plaintiff as the "subcontractor." This document purports to incorporate other documents, but it is unclear what exactly those documents are or if they even existed. Labor and materials for a new home are mentioned, but there is no mention of the cost of materials or the cost of labor, anticipated or otherwise, nor any indication

of who bears what costs. The document provides some details of the house by listing the number of bedrooms and bathrooms, along with a few other rooms, but did not include the size of the house or any specifications, when construction was to take place, or plans for construction. It did not contain a contract price for construction of the house when the parties signed it, only the draw schedule for the loan. The draw schedule does not list a final contract price, and both parties testified that no contract price was written on any page when they signed the document. Payments totaling $207,0000 were outlined in the draw schedule, and another document directed a payment of $23,000 to plaintiff to begin construction. The total amount of the loan was $427,450, with $171,000 being used to purchase the real property. The balance of the contract was to be paid in four separate draws from the bank loan. To receive each draw plaintiff had to meet certain requirements, and the final draw could be received upon completion of the property "per plans."

According to defendants, the document dated May 17, 2006, created a contract in which plaintiff agreed to construct a house for defendants at a cost of $230,000. Defendants contend that $23,000 is 10% of the construction cost. The contract price as determined by the draw schedule was a term definite and certain enough to be enforced, according to defendants. Beyond this, defendants argue that the conduct of the parties indicates an agreement to build the house at a specified amount of $230,000.

Plaintiff does not dispute that the basic ingredients of a contract are present, but takes issue with the content of the document, arguing that the fact that no price or plans appear in the document renders the terms of any purported contract indefinite and uncertain. Thus, plaintiff argues, any such contract would be unenforceable. Plaintiff also contends that $230,000 was the amount of payment to be received from the construction loan, but not the agreed upon cost of construction for the house.

Considering the principles of contract law, the arguments of the parties, and the content of the document, we conclude that the document dated May 17, 2006, is not an enforceable contract because the terms of the document are indefinite and uncertain. As a result the court cannot ascertain terms to which the parties purportedly agreed. We reach this conclusion for two main reasons. First, because the cost of construction is not provided in the document, the contract is missing a material term. Second, plans for the house did not exist at the time the document was signed.

As noted in the preceding paragraph, the May 17, 2006, document does not set forth the cost of construction. This dispute hinges on whether or not the plaintiff was obligated to build the house at a certain price. That price is not included in the document. While the document sets the amount to be drawn from the loan at $230,000, it does not specify whether this is the price the parties agreed upon for construction costs of the home, or whether the loan was but one source of funding for the project. Without the cost of construction included, it is uncertain as to what the plaintiff's obligation is with respect to cost. The cost of construction is an essential term of a contract. See *Kellner v. Bartman*, 250 Ill. App. 3d 1030, 1036 (1993) (identifying price as a material term of a contract). If a contract is missing a material term, no enforceable contract is created. *A. S.& W. Club*, 26 Ill. 2d at 525. Furthermore, where an essential term is missing, as it is here, a court will not supply a term to make the contract certain enough to be enforced. *McCutcheon*, 159 Ill. App. 3d at 959.

Defendants argue that the conduct of the parties can indicate agreement to the terms of the contract. However, the conduct of the parties in this case does not indicate an agreement to build a house at a specified price. *Steinberg*, 69 Ill. 2d at 330. The actions of defendants in seeking out plaintiff, applying for a loan, and executing the May 17, 2006, agreement, and the actions of plaintiff in executing the same agreement and building the house are consist with an agreement to build a house, but do not show that the parties agreed to build the house at a certain cost. Nothing in these

actions, nor in the May 17, 2006, document, indicates that the parties had agreed that the house would be constructed for a specific price.

We also note that there were no plans for the house in existence when the May 17, 2006, document was executed. Plaintiff was required to complete construction "per plans" to receive the final draw, but with no plans in existence at the time of the contract, the court is unable to ascertain what plaintiff had agreed to do in order to receive the final draw from the loan. In similar cases, courts have held that no enforceable contract exists. See *A. S. & W. Club*, 26 Ill. 2d at 525; see also *Academy Chicago Publishers*, 144 Ill. 2d 24. In *A .S. & W. Club*, 26 Ill. 2d at 525, the court found that the material terms of a contract to construct a building were not ascertainable where the contract gave no indication of when construction would be performed, the size of the structure, plans or specifications for the structure, cost, or a means of identifying the building. Like *A. S.& W. Club*, the terms of the May 17, 2006, document do not indicate when construction is to be performed, the size of the house, any specifications, plans, or cost. Accordingly, we too find that the material terms of the May 17, 2006, document are not ascertainable under these circumstances and consequently no enforceable contract was created by the May 17, 2006, document. We thus agree with the trial court that the May 17, 2006, document is not an enforceable contract. Accordingly, we reject defendants first argument.

B. *Quantum Meruit*

Defendants next contend that plaintiff failed to prove the damages that were the basis of the *quantum meruit* award. *Quantum meruit* is an equitable theory permitting a party to recover the reasonable value of services it has rendered. *Paradise v. Augustana Hospital and Health Care Center*, 222 Ill. App. 3d 672, 677 (1991). Thus, proof of the value of the services is an element of a *quantum meruit* claim. See *In re Estate of Callahan*, 144 Ill. 2d 32, 40-41 (1991).

Defendants' argument depends on the fact that plaintiff, to receive its final draw from the bank under the financing agreement, signed a document indicating construction was complete and that he had been fully paid. Defendants acknowledge that plaintiff "submitted a volume of receipts, statements, bills, and lien waivers to the court documenting its expenditures of labor and material." Thus, the document submitted to the bank, at most, created a conflict in the evidence. It is, of course, primarily a matter for the trial court to resolve conflicts in the evidence. *Raintree Homes, Inc. v. Village of Long Grove*, 3898 Ill. App. 3d 836, 865 (2009). Defendants do not explain why the trial court's resolution of the conflict was erroneous, save for asserting in a conclusory manner that "[s]ome effect should certainly be given to the builder's own signed admission that everything had been paid to him upon completion of the house." Defendants continue, "Again, equity would demand that the court give effect to the admission." Defendant does not explain why either of these statements are true.

Indeed, defendants' argument, rather than being an attack on the sufficiency of the evidence, appears to be more in the nature of estoppel, *i.e.*, plaintiff represented a fact and now is estopped from denying it. Estoppel, however, has a number of elements. Our supreme court set them forth thusly in *Geddes v. Mill Creek County Club, Inc.*, 196 Ill. 2d 302, 313-14 (2001):

> "(1) the other person misrepresented or concealed material facts; (2) the other person knew at the time he or she made the representations that they were untrue; (3) the party claiming estoppel did not know that the representations were untrue when they were made and when they were acted upon; (4) the other person intended or reasonably expected that the party claiming estoppel would act upon the representations; (5) the party claiming estoppel reasonably relied upon the representations in good faith to his or her detriment; and (6) the

party claiming estoppel would be prejudiced by his or her reliance on the representations if the other person is permitted to deny the truth thereof."

It is difficult to discern how defendants could satisfy the latter three elements, given that the statement at issue was made by plaintiff to the bank that financed the project.

In sum, the statement relied upon by defendants was not so compelling as a matter of fact that it precluded the trial court from ruling the way it did, and defendants do not adequately set forth any legal argument based upon the statement that would allow them to prevail here.

C. Attorneys fees

Defendants contend that the trial court abused its discretion in refusing to award attorneys fees to them under section 17(c) of the Act (770 ILCS 60/17(c) (West 2008)) because the mechanics liens were improperly filed by plaintiff. Parenthetically, we note that defendants title this argument in a manner that suggests that they should have been allowed a hearing on the issue of attorney fees. The text of the argument, however, is clearly an attack upon the merits of the trial court's decision, and we will treat it as such. Plaintiff responds that it had a colorable claim for filing the mechanics liens and therefore the trial court was within its discretion when it refused to shift attorney's to plaintiff. On appeal, we review the decision of the trial court with respect to attorneys fees using the abuse-of-discretion standard. *Wittekind v. Rusk*, 253 Ill. App. 3d 577, 581 (1993). It is well established that an abuse of discretion occurs only when no reasonable person could agree with the position taken by the trial court. *Slovinski v. Elliot*, 237 Ill. 2d 51, 66 (2010).

Under section 17(c), the decision to shift attorneys fees is left to the discretion of the trial court. The trial court may shift attorneys fees if it finds that a lien has been filed without just cause or right. A claim is filed "without just cause or right" if the claim is not well grounded in fact or

existing law or a good faith argument that the law should be extended, modified, or changed. 770 ILCS 60/17(d) (West 2008).

We agree that the mechanics liens in this case were improperly filed. However, improper filing is not enough on its own entitle defendants to attorneys fees under the statute. See *Roberts v. Adkins*, 397 Ill. App. 3d 858, 866 (2010). The claim must be made without just cause or right, and in this case plaintiff performed lienable work for defendants and had not received payment. 770 ILCS 60/17(d) (West 2008). Regardless of whether the liens were properly filed, we find that plaintiff had a claim well grounded in fact under these circumstances. We find that the trial court did not abuse its discretion in refusing to award attorneys fees to defendant because plaintiff's claim was not made without just right or cause. We therefore affirm the ruling of the trial court denying defendants' request for attorney fees.

III. CONCLUSION

In light of the foregoing, the judgment of the circuit court of Du Page County is affirmed.

Affirmed.