Opinion issued July 9, 2020

In The

Court of Appeals

For The

First District of Texas

NO. 01-19-00041-CV

T&C CONSTRUCTION, LTD., Appellant

V.

BROWN MECHANICAL SERVICES, INC., Appellee

On Appeal from the County Civil Court at Law No. 3
Harris County, Texas
Trial Court Case No. 1011682

MEMORANDUM OPINION

Brown Mechanical Services, Inc. ("Brown Mechanical") sued T&C Construction, Ltd. ("T&C") for the balance owed on a construction contract. T&C counterclaimed, alleging that it had overpaid Brown Mechanical on a prior contract. A jury found both that T&C had failed to pay Brown Mechanical money

owed on a contract and that T&C had overpaid Brown Mechanical on an earlier contract. The trial court granted Brown Mechanical's motion for judgment notwithstanding the verdict, concluding that T&C's counterclaim was barred by limitations. The court rendered judgment in favor of Brown Mechanical on its breach-of-contract claim, awarding $8,325.71 in contract damages as found by the jury, $39,202.15 in prejudgment interest, approximately $40,000 in trial attorney's fees, post-judgment interest, and conditional appellate attorney's fees.

On appeal, T&C raises ten issues, challenging (1) the trial court's ruling that its counterclaim for overpayment was barred by limitations, (2) the award of attorney's fees to Brown Mechanical, and (3) the award of prejudgment interest. We conclude that T&C's counterclaim for overpayment was barred by limitations. We reverse the award of attorney's fees and the award of prejudgment interest in the amount of $39,202.15, and we render judgment awarding $6,584.37 in prejudgment interest. We affirm the remainder of the trial court's judgment.

Background

I. Brown Mechanical was a subcontractor for T&C on two construction projects.

T&C, a construction company that builds municipal facilities is owned by Thomas Norton Rumney, who is a professional engineer, and his wife. Rumney has operated T&C for more than 30 years. Because T&C does public work, Rumney obtains contracts by filing sealed bids and being selected by public

entities. T&C obtains construction bonds to guarantee payment to suppliers, and it hires subcontractors to perform the construction tasks. When T&C pays the subcontractors' invoices it reserves ten percent "retainage" to be paid upon satisfactory completion of the work.

Willie Earl Brown is the owner and president of Brown Mechanical Services, Inc., which is a heating, ventilation, and air conditioning ("HVAC") contractor that T&C hired as a subcontractor for two jobs.

The first job ("Project 1") was a contract to construct Pump Station No. 1 for the West Harris County Regional Water Authority. Brown Mechanical was hired to perform the HVAC work on this project. At trial, Rumney testified that he uses written contracts with subcontractors, and a written contract dated July 2006 was admitted into evidence. Neither party signed the contract. Rumney testified that because T&C had agreed to guarantee payment to Brown Mechanical's suppliers, T&C issued checks jointly endorsed to Brown Mechanical and the vendor to whom the money was owed.

Brown Mechanical began work on Project 1 around August 2006 and concluded its work early in 2008. Rather than waiting until it was paid by West Harris County Regional Water Authority, T&C advanced Brown Mechanical's retainage because the work was finished and because Rumney felt sympathetic toward Brown as a "small businessman." According to Rumney, after T&C made a

final retainage payment to Brown Mechanical, Knape and Associates, a vendor who had supplied equipment to Brown Mechanical for Project 1, approached T&C for payment of an invoice. T&C paid the invoice to ensure that Knape and Associates would not seek recourse against T&C's construction bond.

The second job ("Project 2") was a contract to construct the Woodlands Water Plant No. 5 for the San Jacinto River Authority. Brown Mechanical was hired to perform the HVAC work on this project. A contract for this work was signed by Brown for Brown Mechanical on January 10, 2008 and by Rumney for T&C on January 11, 2008. The contract provided:

> This contract and the Contract Documents, insofar as they relate in any part or in any way to the work undertaken herein, constitute the entire agreement between the parties hereto, and it is expressly understood and agreed that there are no agreements or promises by and between said parties, except as aforesaid, and that any additions thereto or changes therein shall be in writing.

There was no joint check agreement for payment of Brown Mechanical's suppliers for Project 2, but Rumney testified that at least one of Brown Mechanical's suppliers was paid by a joint check from T&C.

II. T&C withholds payment on Project 2 to compensate for an alleged overpayment on Project 1.

In February or March 2008, Rumney discovered that T&C had overpaid Brown Mechanical on Project 1 by more than $14,000. Rumney testified that Brown was informed that the amount of the overpayment on Project 1 would be

deducted from his payments for Project 2. However, Rumney did not personally tell Brown about this plan to compensate for the overpayment. At trial, Rumney testified that Julius Lindberg, who was T&C's project manager for Project 1 and Project 2, "told me that he was going to tell Mr. Brown" about the plan to deduct the overpayment from Project 2. Rumney also testified that he did not "personally observe" Lindberg telling Brown, nor did he follow up to confirm that it happened. T&C and Brown Mechanical did not sign an addendum to the contract for Project 2, and by the time of trial, T&C's invoices, checks, and other paper records from Projects 1 and 2 had been destroyed. T&C withheld the retainage from Project 2, but it maintained that the overpayment had not been fully returned. Rumney admitted at trial that T&C did not comply with the payment provisions of the contract with Brown Mechanical on Project 2.

Brown testified that he was not aware of an overpayment on Project 1 until 2013, and he said that Knape and Associates "never did approach me about money that was owed to them." When Project 2 was completed, Brown was told that his retainage was withheld to cover an overpayment, but Brown maintained that he was not told at that time that the overpayment was related to Project 1. He testified that he learned that the overpayment was related to Project 1 only after he filed suit.

III. Brown Mechanical sues T&C for breach of contract.

In March 2012 Brown Mechanical filed suit against T&C for breach of contract.[1] T&C answered and filed a counterclaim for the remaining alleged overpayment, $6,609.75. T&C also pleaded for attorney's fees under chapter 38 of the Texas Civil Practice and Remedies Code. In response to T&C's counterclaim, Brown Mechanical pleaded the affirmative defense of the statute of limitations.

The jury trial. The case was tried to a jury, which found that T&C failed to comply with the contract, its failure to comply was not excused, and Brown Mechanical suffered contractual damages of $8,325.71. The jury also found that T&C overpaid Brown Mechanical on Project 1 in the amount of $14,981.48. Finally, the jury found the following reasonable attorney's fees for Brown Mechanical: (1) $30,635.00 for trial; (2) $19,365.00 for appeal through the court of appeals; (3) $5,000 for a petition for review in the Supreme Court of Texas; (4) $10,000 for merits briefing in the Supreme Court of Texas; and (5) $10,000 for oral argument and completion of proceedings in the Supreme Court of Texas. The jury found the same amounts as reasonable attorney's fees for T&C.

---

[1] Brown, however, attempted to appear pro se on behalf of Brown Mechanical. In October 2012, the trial court dismissed the case for want of prosecution, but the following month, the court conditionally reinstated the case with the requirement that Brown engage an attorney within thirty days. Within thirty days, Emil Sargent filed an appearance on behalf of Brown Mechanical, and later David Harvey appeared on behalf of Brown Mechanical.

Post-verdict motions. T&C filed a motion for entry of judgment on the jury's verdict asserting that it was the prevailing party on the contract claim because the jury found that the amount of overpayment to Brown Mechanical exceeded Brown Mechanical's contract damages. T&C sought judgment for $6,655.77, plus $33,435.00 in trial attorney's fees and contingent appellate attorney's fees.

Brown Mechanical filed a motion for judgment notwithstanding the verdict requesting court disregard the jury's answers to questions 4, 5, and 7. These questions asked whether T&C overpaid Brown Mechanical (question 4), the amount of the overpayment (question 5), and the amount of reasonable and necessary attorney's fees (question 7). Brown Mechanical argued that T&C's counterclaim sought equitable relief for the overpayment on Project 1 and was subject to the four-year residual limitations period.[2] At trial Rumney testified that he first learned of the overpayment in February or March of 2008, and Brown Mechanical, therefore, argued that the counterclaim would have been barred by limitations after March 2012. Because the counterclaim was first raised in

[2] *See* TEX. CIV. PRAC. & REM. CODE § 16.051.

February 2013, Brown Mechanical argued that the counterclaim was time barred and that T&C was not entitled to damages or attorney's fees.[3]

Final Judgment. In its final judgment, the trial court found that T&C's counterclaim was barred by the statute of limitations, and it disregarded the jury's answers to questions 4, 5, and 6.[4] The court awarded Brown Mechanical damages of $8,325.71, "prejudgment interest on that sum compounded at a rate of 1-½ percent per month from January 2009, and as of October 2018, in the sum of $39,202.15, post-judgment interest on the total sum of $47,527.86 at the annual rate of 5%, and court costs." In addition, the court awarded Brown Mechanical attorney's fees.

Post-judgment motions. About two weeks later, T&C filed a motion to reform and correct the judgment. In it, T&C argued that the counterclaim was timely filed because its claim arose from the same occurrence as Brown Mechanical's breach-of-contract claim, and therefore a statutory exception to the application of the statute of limitations applied. T&C also argued that the court erred in its calculation of prejudgment interest by applying chapter 28 of the Texas Property Code. T&C argued that the facts adduced at trial conclusively established

---

[3] In a supplemental motion for judgment notwithstanding the verdict, Brown Mechanical asserted additional legal reasons why T&C was not entitled to recover attorney's fees.

[4] This is likely a mistake because question 6 asked about attorney's fees for representation of Brown Mechanical not T&C.

that the owners of both projects were governmental entities, and, therefore, the Property Code did not govern the prejudgment interest award.

In response, Brown Mechanical conceded error in the trial court's rendition of prejudgment interest: "T&C correctly argues that [Brown Mechanical's] prejudgment interest is properly calculated at 6% per year." Brown Mechanical prayed for the trial court to sign the properly reformed final judgment, and award it "$8,325.71 plus prejudgment interest of $6,584.37 for a total of $14,910.08."

Several weeks later, T&C filed a supplement to its motion to reform and correct the judgment in which it argued that Brown Mechanical was not entitled to any prejudgment interest under chapter 2251 of the Government Code because the contract damages were in dispute. T&C also argued that Brown Mechanical was not entitled to an award of attorney's fees under Civil Practice and Remedies Code chapter 38 because that statute does not provide for an award of attorney's fees against a limited partnership like T&C. It further argued that attorney's fees were improper under chapter 28 of the Property Code because both contracts were with governmental entities. The trial court did not make a written ruling on the post-judgment motions, which were later denied by operation of law, and T&C appealed.

Analysis

On appeal, T&C raises ten issues that address three areas of concern: (1) limitations, (2) attorney's fees, and (3) prejudgment interest. T&C's first two issues assert that (a) the trial court should have entered judgment in its favor (issue 1) and (b) the trial court erred by finding that T&C's counterclaim was barred by limitations (issue 2). In issues three through six, T&C challenges the trial court's award of attorney's fees to Brown Mechanical. T&C asserts that the award was: (a) not supported by the pleadings (issue 3); (b) not authorized under chapter 38 of the Civil Practice and Remedies Code or chapter 28 of the Property Code (issue 4), because (c) chapter 38 does not authorize an award of attorney's fees against a limited partnership (issue 5), and because (d) chapter 28 does not apply when the contract involves a governmental entity (issue 6). Finally, issues seven through ten challenge the trial court's award of prejudgment interest. T&C asserts that the prejudgment interest award was: (a) not supported by the pleadings (issue 7); (b) precluded by chapter 28 of the Property Code because the contract involved a governmental entity (issue 8); (c) precluded by chapter 2251 of the Government Code because the claim was disputed (issue 9); and (d) erroneously calculated because prejudgment interest is calculated as simple interest and not compounded (issue 10).

I. T&C's counterclaim for overpayment is barred by limitations.

A judgment notwithstanding the verdict is "proper when a legal principle precludes recovery." *See JSC Neftegas-Impex v. Citibank, N.A.*, 365 S.W.3d 387, 396 (Tex. App.—Houston [1st Dist.] 2011, pet. denied). When a trial court grants judgment notwithstanding the verdict based on a legal question, we review that ruling de novo. *Id.* (citing *In re Humphreys*, 880 S.W.2d 402, 404 (Tex. 1994) ("[Q]uestions of law are always subject to de novo review.")).

In response to T&C's counterclaim for the overpayment, Brown Mechanical pleaded the affirmative defense of limitations. Although no question relevant to limitations was submitted to the jury, Brown Mechanical maintains that the facts necessary to the determination of its affirmative defense were conclusively proven at trial. Brown Mechanical argued that the four-year residual limitations period applied and that the counterclaim was filed more than four years after T&C learned that it had overpaid on Project 1. T&C contends that its counterclaim was not untimely because it arose from the same transaction or occurrence that was the basis of Brown Mechanical's claim.

In its counterclaim, T&C pleaded:

> T&C Construction, Ltd. says that the Plaintiff [Brown Mechanical] received from T&C $14,935.39 more than that to which it was entitled on the West Harris County Regional Water Authority Pump Station 1 Project [Project 1]. Plaintiff was informed that a condition of the award of the San Jacinto River Authority Woodlands Water Plant #5 Project subcontract was that $14,935.39 would be deducted from

> amounts due to make up for the overpayment on Pump Station 1. T&C has recouped only $8,325.64 of the amount owed it by Plaintiff and hence is entitled to recover from Plaintiff in this action the balance of its overpayment, which it asserts is $6,609.75.

In determining the nature of a pleading, we look to its substance. *See Green Tree Servicing, LLC v. Woods*, 388 S.W.3d 785, 795 (Tex. App.—Houston [1st Dist.] 2012, no pet.). "A claim for 'money had and received' is equitable in nature." *Plains Expl. & Prod. Co. v. Torch Energy Advisors Inc.*, 473 S.W.3d 296, 302 n.4 (Tex. 2015). "Money had and received is a category of general assumpsit to restore money where equity and good conscience require refund." *MGA Ins. Co. v. Charles R. Chesnutt, P.C.*, 358 S.W.3d 808, 813 (Tex. App.—Dallas 2012, no pet.). A claim for money had and received does not require proof of wrongdoing; rather, a plaintiff must show that the "defendant holds money which in equity and good conscience belongs to him." *Plains Expl. & Prod.*, 473 S.W.3d at 302 n.4 (quoting *MGA Ins.*, 358 S.W.3d at 813).

T&C did not allege any wrongdoing by Brown Mechanical, only that it held money that belonged to T&C. Thus, we construe T&C's pleading as stating a claim for money had and received.[5] The statute of limitations for money had and received

---

[5] Although T&C used the word "recoup," its pleading for affirmative relief goes beyond the affirmative defense of recoupment. *See Southern Pac. Co. v. Porter*, 160 Tex. 329, 331 S.W.2d 42, 45 (1960). While "in some circumstances, overpayments under a valid contract may give rise to a claim for restitution or unjust enrichment," *Sw. Elec. Power Co. v. Burlington N. R.R. Co.*, 966 S.W.2d 467, 469 (Tex. 1998), the pleading does not allege that Brown Mechanical acted wrongfully in obtaining and retaining the alleged overpayment. *See Eun Bok Lee*

is two years. *Peregrine Oil & Gas, LP v. HRB Oil & Gas, Ltd.*, No. 01-17-00180-CV, 2018 WL 4137026, at *9 (Tex. App.—Houston [1st Dist.] Aug. 30, 2018, pet. denied) (mem. op.) (citing *Merry Homes, Inc. v. Luc Dao*, 359 S.W.3d 881, 884 (Tex. App.—Houston [14th Dist.] 2012, no pet.) (holding claims for money had and received governed by two-year statute of limitations applicable to unjust-enrichment claims)); *see* TEX. CIV. PRAC. & REM. CODE § 16.003 (a) (two-year limitations period). "Generally, a cause of action accrues and limitations begins to run when facts exist that authorize a claimant to seek judicial relief." *Schneider Nat'l Carriers, Inc. v. Bates*, 147 S.W.3d 264, 279 (Tex. 2004). The date a cause of action accrues is normally a question of law. *Exxon Corp. v. Emerald Oil & Gas Co.*, 348 S.W.3d 194, 202 (Tex. 2011).

However, Civil Practice and Remedies Code section 16.069 provides an exception to the running of the statute of limitations applicable to compulsory counterclaims:

> (a) If a counterclaim or cross claim arises out of the same transaction or occurrence that is the basis of an action, a party to the action may file the counterclaim or cross claim even though as a separate action it would be barred by limitation on the date the party's answer is required.

---

v. Ho Chang Lee, 411 S.W.3d 95, 111 (Tex. App.—Houston [1st Dist.] 2013, no pet.) ("Unjust enrichment occurs when a person has wrongfully secured a benefit or has passively received one which it would be unconscionable to retain."). Therefore, we do not characterize the counterclaim as one for unjust enrichment.

> (b) The counterclaim or cross claim must be filed not later than the 30th day after the date on which the party's answer is required.

TEX. CIV. PRAC. & REM. CODE § 16.069. "The statute is a savings clause, 'intended to prevent a plaintiff from waiting until an adversary's valid claim arising from the same transaction was barred by limitations before asserting his own claim.'" *Pitts & Collard, L.L.P. v. Schechter*, 369 S.W.3d 301, 323–24 (Tex. App.—Houston [1st Dist.] 2011, no pet.) (quoting *Hobbs Trailers v. J.T. Arnett Grain Co.*, 560 S.W.2d 85, 88 (Tex. 1977) (interpreting predecessor statute substantially similar to section 16.069)). We apply a logical relationship test to determine whether counterclaims arise out of the same transaction or occurrence. *Id.* at 324; *Commint Tech. Servs., Inc. v. Quickel*, 314 S.W.3d 646, 653 (Tex. App.—Houston [14th Dist.] 2010, no pet.). "The logical relationship test is met when the same facts, which may or may not be disputed, are significant and logically relevant to both claims." *Pitts & Collard*, 369 S.W.3d at 324.

T&C argues that "the facts in this case are a classic example of a §16.069 same transaction," and that its claim was not untimely because it arose from the same occurrence on which Brown Mechanical's breach-of-contract claim was based. But Project 1 and Project 2 were separate and independent jobs. Although the contract for Project 1 that was admitted into evidence at trial was not signed by the parties, other evidence and testimony conclusively proved that T&C's contract with West Harris County Regional Water Authority (Project 1) was separate and

distinct from its contract with the San Jacinto River Authority (Project 2). Likewise, Brown Mechanical made separate bids for each subcontracting job, and the contract between T&C and Brown Mechanical on Project 2 made no mention of Project 1 or any alleged overpayment. Rumney testified that his project manager, Julius Lindberg, had intended to tell Brown Mechanical that the overpayment on Project 1 would be taken out of Project 2. But Rumney could not verify that Lindberg communicated that plan to Brown Mechanical. Rumney testified that he did not observe that communication and he did not ask Lindberg if he had communicated that information to Brown Mechanical. In addition, the subcontract for Project 2 was signed in early January 2008, before Rumney first learned about the overpayment on Project 1 in February or March 2008.

Project 1 and Project 2 overlapped in time by about two months, but Rumney testified that the projects were distinct enough that Lindberg would have known which invoices were associated with which project. Rumney said:

> At the time they [the invoices] were presented, it was—the two jobs really did not overlap as far as—they did contractually about 60 days. The work that was done and deliveries that were made were distinctly in two time periods. In knowing our work the project manager knows the work. He knows what HVAC equipment is needed on each particular job because the jobs were quite different. It's obvious to us in the business what that invoice is for.

T&C's claim for unjust enrichment depended on evidence regarding the payments made on Project 1. Brown Mechanical's claim for breach of contract depended on

evidence about payments made for a separate job: Project 2. Under the circumstances presented here, the logical relationship test is not satisfied because the same facts are not significant and logically relevant to both claims. *See id.* Therefore, we conclude that section 16.609 does not apply in this case.

At trial Rumney testified that he became aware of the overpayment to Brown Mechanical on Project 1 in February or March 2008. We therefore conclude that the cause of action for money had and received accrued in March 2008. T&C filed its counterclaim on February 14, 2013, nearly five years later. Therefore T&C's claim is barred by the two-year statute of limitations. We hold that the trial court did not err by granting Brown Mechanical's motion for judgment notwithstanding the verdict and by not rendering judgment in T&C's favor on its counterclaim. We overrule T&C's first two issues.

II. The trial court erred by awarding Brown Mechanical attorney's fees.

In issues 3 through 6, T&C argues that the trial court erred by awarding Brown Mechanical attorney's fees because the pleadings do not support such a recovery. Specifically, T&C argues that neither chapter 38 of the Civil Practice and Remedies Code nor chapter 28 of the Property Code authorize an award of attorney's fees in this case. Brown Mechanical argues that these issues are not preserved for appellate review.

A. The overruling by operation of law of T&C's motion to reform the judgment preserved error for appeal.

Ordinarily, to preserve a complaint for appellate review, a party must make a timely request, objection, or motion in the trial court with sufficient specificity to make the court aware of the complaint and obtain a ruling from the trial court. TEX. R. APP. P. 33.1(a). However, "[i]n a civil case, the overruling by operation of law of a motion for new trial or a motion to modify the judgment preserves for appellate review a complaint properly made in the motion, unless taking evidence was necessary to properly present the complaint in the trial court." TEX. R. APP. P. 33.1(b).

In the trial court, T&C timely filed a motion to reform the judgment on December 10, 2018 and a supplement to the motion to reform the judgment on January 11, 2019. In the supplement to the motion to reform the judgment, T&C argued that section 38.001 of the Civil Practice and Remedies Code "does not apply to limited partnerships like T&C Construction, Ltd." and that section 28.005 of the Property Code does not apply to the contract for Project 2 because the San Jacinto River Authority is a governmental entity. The trial court did not rule on the motion to reform the judgment, and it was denied by operation of law on February 21, 2019. *See* TEX. R. CIV. P. 329b(c).

First, T&C's argument for denying Brown Mechanical's attorney's fees under section 38.001 presents only a question of law because the parties do not

dispute that T&C is a limited partnership. *See* TEX. BUS. ORGS. CODE § 5.055(a) (establishing that name of limited partnership "must contain: (1) the word 'limited'; (2) the phrase 'limited partnership'; or (3) an abbreviation of that word or phrase").

Second, T&C's argument for denying Brown Mechanical's attorney's fees under section 28.005 of the Property Code presents only a question of law because the evidence at trial established that the San Jacinto River Authority was a governmental entity. At trial Rumney testified that T&C "builds municipal facilities." He also testified that T&C does not do any residential construction work. He also testified about his clients: "I work for municipalities, MUDs, small cities. I choose not to work for the City of Houston. I've worked for Pearland, Pasadena, Galveston, Sugar Land, primarily what people call MUDs, municipal utility districts." He also testified about the municipal bid process generally and the use of retainage for payment of contractors and subcontractors. And he testified that he was "not familiar with commercial work." No evidence at trial indicated that the San Jacinto River Authority was anything other than a governmental entity. *Cf. Wickham v. San Jacinto River Auth.*, 979 S.W.2d 876, 879 (Tex. App.—Beaumont 1998, pet. denied) (referring to San Jacinto River Authority as a "governmental entity").

Because T&C's motion to reform the judgment did not require the taking of evidence, its overruling by operation of law preserved error for appeal. *See* TEX. R. APP. P. 33.1(b).

B. Section 38.001 of the Civil Practice & Remedies Code does not support the award of attorney's fees.

T&C argues that the trial court erred by awarding attorney's fees to Brown Mechanical based on section 38.001 of the Civil Practice and Remedies Code because T&C is a limited partnership. "A person may recover reasonable attorney's fees from an individual or corporation, in addition to the amount of a valid claim and costs, if the claim is for . . . an oral or written contract." TEX. CIV. PRAC. & REM. CODE § 38.001. "Under the plain language of section 38.001, a trial court cannot order limited liability partnerships (L.L.P.), limited liability companies (L.L.C.), or limited partnerships (L.P.) to pay [attorney's] fees." *TEC Olmos, LLC v. ConocoPhillips Co.*, 555 S.W.3d 176, 188 (Tex. App.—Houston [1st Dist.] 2018, pet. denied) (quoting *Varel Int'l Indus., L.P. v. PetroDrillbits Int'l, Inc.*, No. 05-14-01556-CV, 2016 WL 4535779, at *7 (Tex. App.—Dallas Aug. 30, 2016, pet. denied) (mem. op.)). Because T&C is a limited partnership, the trial court erred by awarding Brown Mechanical attorney's fees on the basis of section 38.001. *See* TEX. CIV. PRAC. & REM. CODE § 38.001; *TEC Olmos*, 555 S.W.3d at 188. We sustain issues 3 and 4, in part, and we sustain issue 5.

C. Section 28.005 of the Property Code does support the award of attorney's fees.

T&C argues that the trial court erred by awarding attorney's fees to Brown Mechanical based on section 28.005 of the Property Code because San Jacinto River Authority is a governmental entity. Chapter 28 of the Property Code requires owners to promptly pay contractors for work performed, and it requires contractors to promptly pay subcontractors for their work upon receipt of payment from the owner. *See* TEX. PROP. CODE § 28.002. The statute defines "owner" as "a person or entity, *other than a governmental entity*, with an interest in real property that is improved, for whom an improvement is made, and who ordered the improvement to be made." *Id.* § 28.001(4) (defining "owner") (emphasis supplied). In an action to enforce the right to prompt payment under chapter 28, "the court may award costs and reasonable attorney's fees as the court determines equitable and just." *Id.* § 28.005.

Brown Mechanical pleaded for attorney's fees based on section 28.005. But with respect to the subcontract for Project 2, the owner was San Jacinto River Authority, a governmental entity. Because the owner is a governmental entity, chapter 28 of the Property Code does not apply. *See id.* §§ 28.001(4), 28.002. We sustain issues 3 and 4, in part, and we sustain issue 6.

* * *

In its live pleading, Brown Mechanical pleaded for attorney's fees based on section 38.001 of the Civil Practice and Remedies Code and section 28.005 of the Property Code. We have concluded that neither statute authorizes the award of attorney's fees in this case. We therefore hold that the trial court erred by rendering judgment for Brown Mechanical for attorney's fees. *See* TEX. R. CIV. P. 301 (trial court judgment must conform to pleadings); *see also Petroleum Analyzer Co. LP v. Olstowski*, No. 01-09-00076-CV, 2010 WL 2789016, at *18 (Tex. App.—Houston [1st Dist.] July 15, 2010, no pet.) (mem. op.) (party must plead basis for award of attorney's fees). We sustain issues 3 through 6, and we reverse the award of attorney's fees.

III. The trial court incorrectly calculated prejudgment interest.

In issues 7 through 10, T&C challenges the prejudgment interest award. In the final judgment, the trial court awarded Brown Mechanical contract damages of $8,325.71 and "prejudgment interest on that sum compounded at a rate of 1-½ percent per month from January 2009, and as of October 2018, in the sum of $39,202.15 . . . ." This calculation of prejudgment interest corresponds to statutory prejudgment interest under chapter 28 of the Property Code, which provides: "An unpaid amount bears interest at the rate of 1 ½ percent each month." TEX. PROP. CODE § 28.004(b).

"Prejudgment interest is compensation allowed by law as additional damages for lost use of the money due as damages during the lapse of time between the accrual of the claim and the date of judgment." *Ventling v. Johnson*, 466 S.W.3d 143, 153 (Tex. 2015) (quoting *Johnson & Higgins of Tex., Inc. v. Kenneco Energy, Inc.*, 962 S.W.2d 507, 528 (Tex. 1998)); *Anglo-Dutch Petroleum Int'l, Inc. v. Greenberg Peden, P.C.*, 522 S.W.3d 471, 482 (Tex. App.—Houston [14th Dist.] 2016, pet. denied); *see Brainard v. Trinity Universal Ins. Co.*, 216 S.W.3d 809, 812 (Tex. 2006) ("Prejudgment interest is awarded to fully compensate the injured party, not to punish the defendant."). Prejudgment interest may be awarded based on common law equitable principles or an enabling statute. *Johnson & Higgins*, 962 S.W.2d at 528. Common law prejudgment interest is calculated as simple interest and is based on the post-judgment interest rate applicable at the time of the judgment. *Id.* at 532; *see* TEX. FIN. CODE § 304.103 (statutory prejudgment interest rate). "Generally, a plaintiff is required to plead for prejudgment interest sought in equity as an element of damages." *Fortitude Energy, LLC v. Sooner Pipe LLC*, 564 S.W.3d 167, 188 (Tex. App.—Houston [1st Dist.] 2018, no pet.). A general prayer for relief does not support a claim for common law prejudgment interest. *Benavidez v. Isles Constr. Co.*, 726 S.W.2d 23, 25 (Tex. 1987).

In issue 7, T&C asserts that Brown Mechanical failed to plead for prejudgment interest. Brown Mechanical pleaded for prejudgment interest "in compliance with Texas Property Code § 28.004, or other applicable statutory provision, at the maximum legal rate." We overrule issue 7.

In issue 8, T&C asserts that Brown Mechanical could not recover prejudgment interest under Chapter 28 of the Property Code because San Jacinto River Authority was a governmental entity and chapter 28 does not apply to governmental entities. In issue 10, T&C asserts that the trial court erred by awarding compounded prejudgment interest because prejudgment interest is calculated as simple interest. We have already explained that the evidence at trial conclusively proved that San Jacinto River Authority was a governmental entity and that chapter 28 does not apply to governmental entities. However, because Brown Mechanical pleaded for prejudgment interest as an element of damages and recovered only on its breach-of-contract claim, it is not precluded from an award of common law prejudgment interest. *See Fortitude Energy*, 564 S.W.3d at 188 (prejudgment interest not authorized by an enabling statute is governed by equitable principles).

In the trial court, Brown Mechanical agreed that the trial court had erred in calculating the award of prejudgment interest. In its response to T&C's motion to reform the final judgment, Brown Mechanical stated: "T&C correctly argues that

[Brown Mechanical's] prejudgment interest is properly calculated at 6% per year." Clerk's Record 277. It concluded that it was "entitled to recover $14,910.08 calculated as a jury award of $8,325.71 plus prejudgment interest at 6% of $6,584.37." Brown Mechanical then asked the trial to court "to sign the properly reformed final judgment filed herewith, holding that . . . [Brown Mechanical] be awarded $8,325.71 plus prejudgment interest of $6,584.37 for a total of $14,910.08 . . . ." Clerk's Record 278.

We agree with both T&C and Brown Mechanical and hold that the trial court improperly calculated prejudgment interest in accordance with chapter 28 of the Property Code. We sustain issues 8 and 10.

In issue 9, T&C asserts that chapter 2251 of the Government Code governs prompt payment of claims when the owner is a governmental entity and that a statutory exception precludes Brown Mechanical's recovery of prejudgment interest. *See* TEX. GOV'T CODE § 2251.029(a). But Brown Mechanical did not plead or prove a violation of chapter 2251 of the Government Code. In its live pleading, Brown Mechanical pleaded breach of contract, quantum meruit, and violation of the Texas Property Code Prompt Payment Act, and only breach of contract was submitted to the jury. We overrule this issue.

Conclusion

We reverse the award of attorney's fees to Brown Mechanical and render judgment that it take nothing on its claim for attorney's fees. We also reverse the portion of the judgment that awarded prejudgment interest in the amount of $39,202.15, and we render judgment awarding $6,584.37 in prejudgment interest. We affirm the remainder of the trial court's judgment.

Peter Kelly
Justice

Panel consists of Chief Justice Radack and Justices Kelly and Goodman.