

{¶ 3} Novum subcontracted with Long to perform the electrical work on Kiley's home for a total bid of \$19,139, and the two companies entered into a contract for the services discussed in Long's bid. Throughout the construction, Kiley chose approximately \$200,000 worth of extras and changes to the original plans, specifications, and standards. As a result of the additional changes, Long performed additional work not included in its original bid, including electrical work on a pool Kiley chose to install. Kiley paid Novum the \$200,000 in extras, but Long was never paid for the extra work it performed.

{¶ 4} Long contacted Kiley and requested payment for the extra work, which totaled approximately \$10,000. Kiley and her boyfriend, Lawrence Jaffe, who was involved in the choices made during construction of Kiley's home, worked with Long to settle the dispute for \$8,500. Jaffe called Long with the credit card payment for the agreed upon \$8,500 settlement. However, approximately three months later and once the time to place a mechanics lien on the property had passed, Kiley called her credit card company and challenged the charge. The \$8,500 was credited back to Kiley, and Long's invoices remained unpaid. Long eventually filed suit against Kiley, claiming damages of approximately \$10,000 in unpaid invoices.

{¶ 5} Meanwhile, relations between Kiley and Novum broke down regarding the payment for extras, what amounts were still due and owing, and what tasks Novum still had to complete in regard to the house's construction. Kiley demanded portions of the money she paid Novum be returned to her, and Novum alleged that it had claims against Kiley for unpaid work. Kiley and Novum entered into an agreement wherein the parties acknowledged that two subcontractors had filed suit against Kiley for unpaid invoices, including Innovative Flooring for approximately \$6,200 and Long for approximately \$10,000. Kiley and Novum referred to the lawsuits by Innovative Flooring and Long as "Debt Disputes," and included in the settlement an agreement to address the "Disputes."

{¶ 6} As a result of the agreement, Novum paid Kiley \$75,000, and Kiley agreed to "take responsibility to resolve the Debt Disputes as are currently pending, either through payment or settlement." The agreement further provided that Novum "shall have no financial responsibility for any payments or settlements made by Kiley in resolution of or related to the Debt Disputes." The agreement also included an "Indemnification of Kiley" section in which the parties agreed that any further or additional debts or invoices, *excluding the Debt Disputes*, incurred or received in the construction of Kiley's home would be paid by Novum. Although Kiley clearly understood that Long's \$10,000 suit was a part of the agreement and she acknowledged that she would pay or settle the dispute with the \$75,000, Kiley denied that she owed Long any money for unpaid invoices and she refused to pay Long. Eventually, the matter proceeded to trial.

{¶ 7} During the trial before a magistrate, the following witnesses testified: Robert Long, the owner of RG Long & Associates, Inc.; Andrew McGuire, an employee of Long and the electrician who performed the work at Kiley's home; Douglas Pund, an employee of Novum and the general contractor for Kiley's construction project; Lawrence Jafee, Kiley's boyfriend; and Kiley herself. The parties submitted multiple exhibits, and the magistrate heard testimony about the agreements in place regarding the construction of Kiley's home. Kiley argued that because she paid Novum in full, she was not liable to Long for the unpaid invoices. Among other arguments, Long argued that it had not been paid for its invoices and that Kiley was unjustly enriched.

{¶ 8} The magistrate found in favor of Long, and ordered Kiley to pay Long \$10,031 in unpaid invoices. Kiley objected to the magistrate's decision, and those objections were overruled by the trial court. Kiley now appeals the trial court's decision overruling her objections and adopting the magistrate's decision, raising the following assignments of error. Because Kiley's first and third assignments of error are interrelated, we will address them

together for ease of discussion.

{¶ 9} Assignment of Error No. 1:

{¶ 10} THE TRIAL COURT ERRED IN CONCLUDING DEFENDANT-APPELLANT HAS BEEN UNJUSTLY ENRICHED.

{¶ 11} Assignment of Error No. 3:

{¶ 12} THE TRIAL COURT ERRED IN ENTERING A JUDGMENT IN THE AMOUNT OF \$10,031.00 IN APPELLEE'S FAVOR.

{¶ 13} Kiley argues in her first and third assignments of error that the trial court erred in finding in favor of Long and ordering judgment in the amount of \$10,031 because that amount is not supported by the record.

{¶ 14} The doctrine of unjust enrichment states that a person should not be allowed to profit or enrich himself inequitably at another's expense, and should be required to make restitution to the party suffering the loss. *Richards v. Newberry*, 12th Dist. Clermont No. CA2014-08-061, 2015-Ohio-1932, ¶ 13. The party asserting a claim of unjust enrichment must demonstrate that (1) he conferred a benefit upon a defendant, (2) the defendant had knowledge of the benefit, and (3) the defendant retained the benefit under circumstances where it would be unjust to do so without payment. *Estate of Everhart v. Everhart*, 12th Dist. Fayette Nos. CA2013-07-019 and CA2013-09-026, 2014-Ohio-2476, ¶ 46.

{¶ 15} Among other arguments, Kiley asserts that an unjust enrichment claim cannot stand because she did not know about the terms of the agreement between Long and Novum, and that she has not retained a benefit because she paid Novum more than the full price required under the contract she had with Novum. Despite these arguments, the record is clear that the trial court did not err in finding that unjust enrichment occurred.

{¶ 16} Regarding the elements of unjust enrichment, the record establishes first that Long conferred a benefit upon Kiley by performing the electrical work on her home. During

the hearing, the magistrate heard evidence that Long performed additional work on Kiley's home that was not originally included in Long's \$19,000 bid. Robert Long testified that he spoke to Kiley about the additional work she was requesting, and informed her that her requests were not included in the original proposal. McGuire also testified that during the time he performed work on Kiley's home, Kiley would often ask questions, want something different than what was planned for the electrical work, and then request extra work or change the work so that it was different than the original work included in Long's bid to Novum. McGuire testified that the changes and extras Kiley made were "considerable."

{¶ 17} Pund also testified that during the construction of Kiley's home, she requested changes and extras. For example, Pund indicated that Long performed electrical work near Kiley's pool that was not included in Long's original bid with Novum. Despite the extra work Long performed, Pund testified that Long was only paid \$17,000 for its work, leaving over \$10,000 in unpaid invoices. Therefore, the record indicates that Long conferred a benefit upon Kiley for which it has not been paid.

{¶ 18} Regarding the second element of unjust enrichment, we find that Kiley had knowledge of the benefit conferred upon her by Long. During Robert Long's testimony, he stated that he and Kiley discussed the extra work and he directly informed her that the extra work would require her to pay additional funds. Robert confirmed during his testimony that Kiley agreed to pay for the extra work, some of which was reduced to writing and some of which was not. Despite the agreements being either oral or in writing, Robert testified that Long submitted invoices for all of the work performed above and beyond the original bid. Robert also testified to his belief that Kiley knew she would have to directly pay for the extras, rather than have the payments channeled through Novum, including all of the work done on the pool. When asked whether Kiley authorized the extra work and expense, Robert responded "oh, yeah." McGuire later testified that he also explained to Kiley that extras and

changes would increase the price, and that Kiley decided to make the changes or add extras. McGuire also testified that he showed Kiley a list of extras during the time he was working on the house.

{¶ 19} Robert testified to several exhibits in which the extras and their costs were recorded, and to several credits Long gave to Kiley for work she decided to remove from the original bid. The exhibits included invoices for the extras that Kiley requested and confirmed that she would pay, and Robert testified that Kiley saw and agreed with the documents. Robert also testified that Kiley paid portions of the invoiced amount on which the extra amounts are clearly listed, and that Kiley watched as Long's employees performed the extra work on her pool and home. In total, Robert confirmed invoices totaling \$10,541 that were still due and owing for the extra work performed in Kiley's home.¹

{¶ 20} Robert also testified that he had a conversation with Jaffe where Kiley was heard participating in the background. During this conversation, Kiley, Jaffe, and Robert negotiated a settlement of \$8,500 to satisfy the unpaid invoices, thus indicating that Kiley knew of the unpaid invoices and the amount Long was demanding.

{¶ 21} Pund also testified that he shared the invoices submitted by Long with Kiley, including those for the extra work done on the pool area. Pund was asked whether he explained to Kiley that the pool work was going to be an "extra amount over and above the original contract amount," and Pund responded, "Yes."² Pund later testified that he explained to Kiley that the extras would have to be paid for, and verified that Kiley was told she would be responsible for payment on the extras. During Pund's testimony the following exchange

1. The amount of damages and how the trial court calculated its order will be further discussed near the end of this assignment of error.

2. The record indicates that Kiley and Novum agreed through the construction contract that there would be a \$30,000 pool allowance. However, Pund's testimony indicates that despite the allowance, there was still extra work performed for which Long was never paid.

occurred.

[Q] So [Kiley] was aware that these things were - - were going to all cost extra money?

[A] Yes.

[Q] And did you talk to her about whether that was going to be paid by you or by her?

[A] By her.

{¶ 22} During Jaffe's testimony, he indicated that he and Kiley were both aware that Long was claiming unpaid invoices in excess of \$10,000 and that Long agreed to accept a \$8,500 settlement payment via Kiley's credit card. Jaffe testified that neither he nor Kiley ever disputed that money was owed to Long, only that Novum should have paid it. Moreover, Kiley admitted during her testimony that the only reason she withdrew her \$8,500 payment was because Novum did not agree to reimburse her for it and because Long did not agree to move an electrical box by the pool. However, Kiley never alleged that Long did not perform extra work for which it went unpaid. The testimony and evidence presented during trial clearly indicate that Kiley was aware of the benefit conferred upon her, as well as the exact amount requested by Long to satisfy the unpaid invoices.

{¶ 23} Lastly, Kiley retained the benefit under circumstances where it would be unjust to do so without payment. The record is undisputed that Kiley paid Novum the full contract price to build her home, as well as approximately \$200,000 in extras. Kiley therefore argues that she has not unjustly retained any benefit because she paid Novum in full. Under normal circumstances, Kiley's argument would have merit because a "subcontractor does not have a claim for unjust enrichment against a property owner who has already paid a portion of the contract price to a defaulting general contractor." *Apostolos Group, Inc. v. Josephson*, 9th Dist. Summit No. 20733, 2002-Ohio-753, 2002 WL 242111, *1. However, the facts of this case do not fit within the general rule because Novum and Kiley specifically agreed that Kiley

was solely responsible to resolve the dispute with Long either "through payment or settlement."

{¶ 24} The record clearly indicates that Kiley and Novum entered an agreement wherein she agreed to resolve the dispute with Long. Despite Kiley's argument that she is not unjustly enriched because she paid Novum the full contract price plus \$200,000, the record is undisputed that Kiley was reimbursed \$75,000 from Novum and that Kiley agreed to "resolve" the two disputes in return. One of the two disputes was Long's claim, and Kiley had a duty according to the agreement with Novum to "resolve" that dispute.

{¶ 25} The agreement is patently clear that Kiley agreed to "resolve" Long's suit and agreed that Novum "shall have no financial responsibility for any payments or settlements made by Kiley in resolution of or related to the" Long suit. Novum agreed to pay further or additional debts that arose in relation to finishing the house, but expressly excluded the amount due and owing Long and Innovative Flooring from that agreement. Kiley further released and forever discharged Novum from claims involving the Disputes. In fact, the entire purpose of the agreement, as stated by Novum and Kiley, was "to resolve the Disputes without the expense inherent in litigation."

{¶ 26} When asked about her agreement with Novum, Kiley admitted to entering the agreement. Kiley testified that through the agreement, she took responsibility for the "pending debt disputes" and confirmed that, "it was my dispute with the two issues to resolve." Kiley also admitted that the way she hoped to resolve the dispute with Long was to use the defense that she had no contract with the company. During her testimony, Kiley stated, "I didn't have contracts with either of these two people. And in discussions, I thought that the way I would settle is to say, 'I don't have a contract with you.'" Kiley never challenged the amount of the unpaid invoices, nor did she challenge that the amounts were due and owing to either Long or Innovative Flooring. Instead, Kiley accepted \$75,000 from

Novum in exchange for resolving her dispute with Novum, as well as the debt disputes with Long and Innovative Flooring. Her legal theory for avoiding the responsibility for payment was that she did not have to pay Long and Innovative Flooring because she had not entered into contracts with either company.

{¶ 27} Kiley was mistaken in her belief that a lack of a contract between herself and Long alleviated her duty to resolve the dispute according to the agreement or that she does not owe for electrical work simply because she did not sign a contract with Long. Kiley's intent to avoid paying Long is clear from the record, despite her never challenging the fact that Long did work for her above and beyond the original bid and that the extra invoices were never paid. While Kiley was correct that she and Long did not have a contract, the law will not permit Kiley to retain a benefit conferred upon her for which Long has not been paid. As such, and in the absence of a contract between the parties, the trial court properly applied the equitable doctrine of unjust enrichment, and did not err in ordering judgment in favor of Long.

{¶ 28} Regarding the amount of the invoices, the record supports the trial court's order. During the hearing, Long supplied invoices to the trial court for work that had been performed above and beyond its original contract bid with Novum. The total of the invoices submitted by Long for the extra work it performed totaled \$10,541, and Long testified to the accuracy of the invoices. However, when submitting the total accounting to the trial court as Plaintiff's Exhibit 12, Long neglected to include one individual invoice for \$510. As such, the invoices contained on Long's final accounting to the trial court totaled \$10,031. This amount, therefore, was supported by the record so that the trial court's judgment was not rendered against the manifest weight of the evidence.

{¶ 29} After reviewing the record, we find that Kiley was unjustly enriched for \$10,031 worth of work performed by Long. As such, the trial court did not err by granting Long's

unjust enrichment claim or in ordering Kiley to pay Long \$10,031. Therefore, Kiley's first and third assignments of error are overruled.

{¶ 30} Assignment of Error No. 2:

{¶ 31} THE TRIAL COURT ERRED IN CONCLUDING THAT THE HOME SOLICITATION SALES ACT DOES NOT APPLY TO BAR APPELLEE'S UNJUST ENRICHMENT CLAIM.

{¶ 32} Kiley argues in her second assignment of error that the trial court in determining that the Home Solicitation Sales Act was inapplicable to bar Long's unjust enrichment claim.

{¶ 33} The Home Solicitation Sales Act "seeks to decrease high-pressure sales tactics that are sometimes employed during in-home solicitations by providing consumers with a cooling-off period within which the transaction may be cancelled." *Garber v. STS Concrete Co.*, 8th Dist. Cuyahoga No. 99139, 2013-Ohio-2700, ¶ 12. The Act applies to all "home solicitation sales," and requires that such sales be evidenced by a written agreement and include a statement of the buyer's right to cancel the contract until midnight of the third business day after the day on which the buyer signs the contract. R.C. 1345.22 and 1345.23. If the agreement does not include a statement of the buyer's right to cancel, the buyer has the right to cancel until three days after the seller complies with this requirement. R.C. 1345.23(C).

{¶ 34} According to R.C. 1345.21(A), a home solicitation sales is

a sale of consumer goods or services in which the seller or a person acting for the seller engages in a personal solicitation of the sale at a residence of the buyer, including solicitations in response to or following an invitation by the buyer, and the buyer's agreement or offer to purchase is there given to the seller or a person acting for the seller, or in which the buyer's agreement or offer to purchase is made at a place other than the seller's place of business.

{¶ 35} We agree with the trial court that the Act is inapplicable for several reasons.

First, while the Act applies to home improvement contracts, there is no case law in Ohio that the Act applies to the construction of a new home in the process of being built. Moreover, there is no indication in the record that Long solicited Kiley in order to sell her services or goods. Instead, the record is patently clear that Novum accepted Long's bid for the original electrical work and that Kiley thereafter asked for upgrades and extras from Long rather than Long soliciting upgrades and extras from Kiley. However, and *even if* we were to find that the Act somehow applies, Kiley cannot use the Act as a way to dissolve her liability for services that she requested, never complained of, and otherwise accepted.

{¶ 36} As stated by various courts, the Act "is not to be used as a sword by the buyer to take advantage of a seller's failure to inform the buyer of his right to cancel, but rather, is meant to shield the consumer from deceptive practices." *McGill v. Image Scapes, LLC*, 9th Dist. Medina No. 10CA0043-M, 2010-Ohio-6246, ¶ 12. *See also White v. Allstate Ins. Co.*, 8th Dist. Cuyahoga No. 92648, 2009-Ohio-5829, ¶ 17 (noting that the Act "is intended to be a 'shield' for the consumer, not a 'sword'").

{¶ 37} At no time prior to the suit did Kiley assert that she had been deceived by Long, that she was unhappy with its services, or that she ever wanted to cancel its services. As stated by the trial court, "there was nothing in Long's dealings that were in any way deceptive. * * * Kiley's position is thus - - - I'll take the contract with Novum (who has incurred a loss) but apply the provisions of [the Act] to what I owe subcontractors." We agree with the trial court that even if the Act applies to new home construction, Kiley is not entitled to use its protections as a sword to overcome the unjust enrichment claim. This is especially true where the equitable principle of an unjust enrichment claim is specifically designed to permit recovery when there is no contract in place, and where one had maintained a benefit to another's detriment. *Garber*, 2013-Ohio-2700.

{¶ 38} Having found that Kiley cannot use the Act to preclude Long's recovery, her

second assignment of error is overruled.

{¶ 39} Judgment affirmed.

HENDRICKSON and M. POWELL, JJ., concur.