NOT DESIGNATED FOR PUBLICATION

No. 124,160

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

BENCHMARK PROPERTY REMODELING, LLC,
Appellant,

v.

GRANDMOTHERS, INC., COREFIRST BANK & TRUST,
KANSAS DEPARTMENT OF REVENUE, ROBERT ZIBELL, STATE OF KANSAS,
Appellees.

MEMORANDUM OPINION

Appeal from Shawnee District Court; MARY E. CHRISTOPHER, judge. Opinion filed June 2, 2023. Reversed and remanded.

Diane Hastings Lewis, of Brown & Ruprecht, PC, of Kansas City, Missouri, for appellant.

Christine Caplinger and *Bryan W. Smith*, of Smith Law Firm, of Topeka, for appellees Grandmothers, Inc., and Robert Zibell.

Adam D. King, of Kansas Department of Revenue, for appellees Kansas Department of Revenue and State of Kansas.

Before ISHERWOOD, P.J., ATCHESON, J., and TIMOTHY G. LAHEY, S.J.

PER CURIAM: Benchmark Property Remodeling, LLC (Benchmark), sued Grandmothers, Inc. (Grandmothers), and its president, Robert Zibell, CoreFirst Bank & Trust, the Kansas Department of Revenue (KDOR), and the State of Kansas for numerous claims arising out of a remodeling project Benchmark satisfactorily completed but was not compensated for in the manner agreed upon. The district court granted

KDOR's motion for judgment on the pleadings because it found that no contract existed between KDOR and Benchmark. It also partially granted Grandmothers' motion for summary judgment because, in its view, there was likewise no contract between Grandmothers and Benchmark. Benchmark voluntarily dismissed its remaining claims in order to pursue this appeal. Following a thorough review of the claims raised, their respective governing legal standards, and the record before us, we conclude the district court erred in granting KDOR's motion for judgment on the pleadings and likewise erred in awarding partial summary judgment to Grandmothers. Accordingly, it is necessary to reverse the case and remand it for further proceedings.

FACTUAL AND PROCEDURAL BACKGROUND

In 2018, KDOR requested estimates from Benchmark for the cost of various renovations required for the building it leased from Grandmothers. Benchmark divided the amount for the repairs into five general categories but provided an overall total expense estimate of $136,052.39.

On August 27, 2018, KDOR and Grandmothers executed an amended lease agreement titled "THIRD AMENDMENT TO LEASE" which stated, in part:

> "This Amendment governs construction contemplated per the quotes dated 05/28/2018, 06/04/2018, 08/01/2018, and 08/02/2018 from [Benchmark]. . . . [KDOR] shall pay a lump sum payment of $136,052.39 to [Grandmothers] for the satisfactory work completed upon successful installation. Payment by [KDOR] is contingent on [KDOR's] satisfaction of all work completed. The related items will become a fixture to the leased premises and will remain upon and be surrendered with the leased premises at the termination of the Real Estate Lease Agreement."

Its terms reflect that the amount KDOR agreed to pay Grandmothers mirrors the total estimate Benchmark submitted to KDOR. But the agreement does not contain any language related to specific payments Grandmothers or KDOR would make to Benchmark. Even so, there is no dispute that Grandmothers authorized Benchmark to begin working on the building, and the renovations were completed by December 2018.

In November 2018, KDOR submitted payments to Grandmothers totaling $21,292.67 and a month later Grandmothers dispersed $21,192.67 to Benchmark. The $100 difference between the two amounts was due to flawed arithmetic. On December 11, 2018, KDOR paid Grandmothers the remaining $114,759.72, bringing its total payments to $136,052.39. It is undisputed that KDOR paid Grandmothers the full estimated amount of the improvements performed on the building as contemplated under the Third Lease Amendment. But Benchmark did not receive the remaining $114,859.72 from Grandmothers. Instead, Grandmothers tried to pay Benchmark only $94,551.39, a figure it arrived at by taking the estimated total of $136,052.39 and subtracting the $21,192.67 it already paid. And even without any agreements among the parties for the same, Grandmothers deducted an additional $1,900 for legal bills, $1,000 for the removal of a wall in the lobby, $6,802.62 as 5% of the contract price that Benchmark purportedly promised Grandmothers it would receive, and $10,505.71 as a 10% retainage until all subcontractors were compensated.

Benchmark did not accept the $94,551.39 check from Grandmothers. Notably the back of that instrument also contained the following language:

> "The undersigned payee acknowledges full payment for labor and/or materials furnished to date for the benefit of the real estate noted on the face hereof and the undersigned payee waives and releases all lien rights for labor and/or materials furnished thereon as of ___. The undersigned payee further affirms that all subcontractors, laborers and suppliers have been paid in full."

The next month Benchmark sent Grandmothers a demand letter for the outstanding balance. A few days later, Benchmark filed its original petition, which only asserted claims against Grandmothers. Later that same month, Benchmark filed a mechanic's lien against Grandmothers, claiming it still owed $114,859.72 for work completed on the building.

At some point after Benchmark filed the lawsuit and mechanic's lien, Grandmothers opted to directly pay a total amount of $54,248.33 to some subcontractors and then subtracted that figure from the $94,551.93 it believed it still owed Benchmark. It then sought to pay Benchmark the difference of $40,303.06. Again, Benchmark did not accept this payment, based in part on the fact the back of the check contained the same language as the earlier check. Benchmark later accepted a separate payment from Grandmothers for $40,303.06 because there was an agreement Benchmark could cash the check without waiving any claims.

In March 2019, Benchmark filed its first amended petition, which asserted claims against Grandmothers and its president, Robert Zibell, CoreFirst Bank & Trust (the mortgage lender), and KDOR. It also added a claim for the foreclosure of the mechanic's lien that was not included in the original petition.

A few months later, Benchmark filed its second amended petition and asserted eight causes of action against Grandmothers, Zibell, CoreFirst, KDOR, and the State of Kansas. Count I alleged breach of contract against Grandmothers, KDOR, and the State; Count II alleged quantum meruit or unjust enrichment against Grandmothers; Count III alleged quantum meruit or unjust enrichment for extra work against Grandmothers; Count IV alleged a violation of the Kansas Fairness in Private Construction Contract Act against Grandmothers, KDOR, and the State; Count V alleged a violation of the Kansas Fairness in Public Construction Contract Act against Grandmothers, KDOR, and the State; Count VI alleged conversion against Grandmothers and Zibell; Count VII alleged

foreclosure of mechanic's lien against Grandmothers, KDOR, the State, and CoreFirst; and Count VIII alleged tortious interference with a contract against Zibell.

In November 2019, KDOR and the State filed a motion for judgment on the pleadings and set forth two general claims. First, KDOR asserted that no contract existed between itself and Benchmark. It then advanced an alternative claim that if the district court construed the Third Lease Amendment to create a duty from KDOR to Benchmark, then KDOR had satisfied that duty. The district court ultimately agreed that no contract existed between KDOR and Benchmark and granted the motion.

The district court later granted Grandmothers' motion for summary judgment for Counts I, IV, V, and VII in that motion, finding that no contract existed between Benchmark and Grandmothers. Benchmark then filed a motion for entry of dismissal without prejudice on the remaining claims, which the district court ultimately granted.

Before submitting its notice of appeal, Benchmark filed a revised mechanic's lien against Grandmothers. It reflected a deduction for the payments Grandmothers made to the subcontractors and Benchmark for a total outstanding balance of $20,308.24.

Benchmark timely appeals.

LEGAL ANALYSIS

Before we delve into the substantive meat of the claims, we must resolve whether we actually have jurisdiction over the matter. KDOR and Grandmothers are of the opinion we do not because, in their view, Benchmark did not appeal from a final judgment or order.

Whether jurisdiction exists is a question of law over which this court's scope of review is unlimited. *Via Christi Hospitals Wichita v. Kan-Pak*, 310 Kan. 883, 889, 451 P.3d 459 (2019). Kansas courts only have judicial power to hear matters over which they have jurisdiction. That jurisdiction derives from article 3, sections 1, 3, and 6 of the Kansas Constitution. *In re A.A.-F.*, 310 Kan. 125, 135, 444 P.3d 938 (2019). The right to appeal is entirely statutory and Kansas appellate courts have jurisdiction to entertain an appeal only if it is taken in the manner prescribed by statutes. *Wiechman v. Huddleston*, 304 Kan. 80, 86-87, 370 P.3d 1194 (2016). In an earlier order issued by this court, the parties were directed to brief the jurisdiction issue, and this court highlighted two cases for their review: *Smith v. Welch*, 265 Kan. 868, 869-70, 872, 967 P.2d 727 (1998), and *Arnold v. Hewitt*, 32 Kan. App. 2d 500, 503-05, 85 P.3d 220 (2004).

Again, the landscape of this case is that Benchmark filed a second amended petition which alleged eight causes of action. The district court granted KDOR's motion for judgment on the pleadings in all counts against KDOR and then granted Grandmothers' motion for summary judgment but only for Counts I, IV, V, and VII. Benchmark requested to voluntarily dismiss their remaining contentions in order to pursue this appeal and the request was granted.

The *Smith* case we highlighted involved a situation where the plaintiff advanced several claims, and the district court granted the defendant's motion for summary judgment as to a portion of those allegations. The plaintiff then voluntarily dismissed their remaining contentions in order to pursue an appeal. Our Supreme Court granted review of the case pursuant to K.S.A. 20-3018(c) without specifically addressing the jurisdictional issue. 265 Kan. at 869-70.

In *Arnold*, the plaintiffs sued their insurance company and agent for breach of contract, negligent failure to procure insurance, and fraudulent misrepresentation. The district court later granted the defendants' motion for summary judgment on the first and

third claims, thus only the allegation that they negligently failed to procure insurance remained. The plaintiffs did not seek an entry of final judgment on the issues the district court dismissed under K.S.A. 2003 Supp. 60-254(b) but moved for an interlocutory appeal under K.S.A. 60-2102(b), which the district court denied. They then sought to dismiss the remaining negligence claim without prejudice pursuant to K.S.A. 2003 Supp. 60-241(a)(2), and the district court granted the same over the defendants' objection. The plaintiffs pursued an appeal to this court and after doing so, refiled their negligence claim, and it remained pending at the time of oral argument. 32 Kan. App. 2d at 501. On appeal, this court reiterated that "'[t]here is a strong policy against piecemeal appeals in Kansas.'" 32 Kan. App. 2d at 504 (quoting *AMCO Ins. Co. v. Beck*, 258 Kan. 726, 728, 907 P.2d 137 [1995]). After summarizing the rather problematic procedural history of the case, the court found it lacked jurisdiction to consider the appeal:

> "To allow the plaintiffs to proceed in this fashion would render meaningless the statutory provisions invoking the jurisdiction of this court. Since a 'final decision' must dispose of the entire merits of the case, it is impossible to conclude that a final decision has been rendered in district court to allow this appeal. Part of this case is pending in district court, while the remaining claims are before this court. Although the district court sought to avoid a 'piecemeal trial,' the plaintiffs have created the potential for a 'piecemeal appeal.' Under the facts presented, we conclude that this court is without jurisdiction to consider the appeal pursuant to K.S.A. 60-2102(a)(4)." 32 Kan. App. 2d at 505.

Grandmothers and KDOR urge us to follow the pathway of *Arnold* with respect to the instant appeal, while Benchmark contends the two are not analogous and directs us to the statute of limitations and K.S.A. 60-518 as support for its assertion that the appeal may proceed. It specifically argues that the statute of limitations has expired, and K.S.A. 60-518 permitted it to refile the dismissed claims six months after the entry of dismissal in April 2021.

We note that more than six months have passed since the district court's journal entry of dismissal without prejudice, and there is no indication Benchmark sought to revive the dismissed claims. See K.S.A. 60-518; *Arnold*, 32 Kan. App. 2d at 501. Similarly, even though Benchmark never requested findings for the entry of a final judgment pursuant to K.S.A. 2020 Supp. 60-254(b), there are no pending claims in the district court. Thus, we find that we may properly exercise jurisdiction over this appeal.

The district court erred in granting KDOR's motion for judgment on the pleadings.

The first claim of error Benchmark brings to us for resolution concerns the district court's decision to grant KDOR's motion for judgment on the pleadings.

> "'A motion for judgment on the pleadings under 60-212(c), filed by a defendant, is based upon the premise that the moving party is entitled to judgment on the face of the pleadings themselves and the basic question to be determined is whether, upon the admitted facts, the plaintiffs have stated a cause of action. The motion serves as a means of disposing of the case without a trial where the total result of the pleadings frame the issues in such manner that the disposition of the case is a matter of law on the facts alleged or admitted, leaving no real issue to be tried. The motion operates as an admission by movant of all fact allegations in the opposing party's pleadings.'
>
> "'An appellate court's review of whether the district court properly granted a motion for judgment on the pleadings is unlimited. [Citations omitted.]'" *Tillman v. Goodpasture*, 313 Kan. 278, 281, 485 P.3d 656 (2021) (quoting *Mashaney v. Board of Indigents' Defense Services*, 302 Kan. 625, 638-39, 355 P.3d 667 [2015]).

To put it succinctly, whether a contract exists is the central topic for both issues Benchmark raises in this appeal.

> "Whether a contract exists depends on the intentions of the parties and is a question of fact. However, when the legally relevant facts are undisputed, the existence and terms of a contract raise questions of law for the court's determination. . .
>
> "In order to form a binding contract, there must be a meeting of the minds on all the essential elements. . .
>
> "[T]he plaintiff bears the burden of proving the existence of the contract alleged in the petition.
>
> "The terms of an oral contract and the consent of the parties may be proven by the parties' acts and by the attending circumstances, as well as by the words that the parties employed. It is not necessary that a party expressly declare an admission of entering into an oral contract. [Citations omitted.]" *U.S.D. No. 446 v. Sandoval*, 295 Kan. 278, 282, 286 P.3d 542 (2012).

In arriving at its conclusion on KDOR's motion, the district court reasoned that, in its view, the parties never provided documentation illustrating a simple meeting of the minds or contract between KDOR and Benchmark, thus the existence of a contract between the two was "unbeknownst to the court." Accordingly, KDOR was entitled to a favorable ruling on its motion for judgment on the pleadings in every count in which it was involved.

In evaluating a motion under K.S.A. 2022 Supp. 60-212(c) the court is required to view all facts in the light most favorable to Benchmark. *Nora H. Ringler Revocable Family Trust v. Meyer Land and Cattle Co.*, 25 Kan. App. 2d 122, 135, 958 P.2d 1162, *rev. denied* 265 Kan. 886 (1998). Our ability to resolve this issue is somewhat hindered by the lack of any sort of writing which serves to memorialize the terms of an alleged contract between Benchmark and any other party to this appeal. While the Third Lease Amendment between KDOR and Grandmothers would qualify as such a writing it speaks solely to any terms agreed upon between those two parties alone; Benchmark is not a

party to that agreement. Admittedly, the document contains references to Benchmark but does so only in the context of the quoted estimates for the cost of the renovations. Benchmark's name is wholly absent otherwise and there are no signatures from anyone associated with Benchmark at the end of that agreement.

Nevertheless, when adhering to the lens through which we are to review the facts it reveals the district court erred in granting KDOR's motion for judgment on the pleadings. First, KDOR's answer to Benchmark's second amended petition includes an admission to paragraphs 14-16 which evidences acknowledgement of the offer, acceptance, and consideration components of a contract. Specifically, through paragraph 14 KDOR accepted Benchmark's assertion that between May and August 2018 Benchmark provided quotes to KDOR and Grandmothers to perform certain renovations to the property. By accepting paragraph 15, KDOR acknowledged that Benchmark's quotes detailed the scope of the work Benchmark would perform and their respective costs. Finally, admitting to paragraph 16 meant conceding that KDOR and Grandmothers accepted Benchmark's quotes and agreed to pay Benchmark $136,052.39 for the work in accordance with the quotes. The significance of these admissions is that they essentially serve to remove any question of whether there was a contract between KDOR and Benchmark as an issue to be resolved in this case. Thus it is unclear how, from the pleadings, the existence of a contract was "unbeknownst" to the district court.

KDOR also admitted to paragraph 46 of Benchmark's petition, which alleged that "[o]n or about September 5, 2018, Benchmark, Grandmothers, and KDOR, entered into a valid, enforceable agreement pursuant to which Benchmark agreed to perform the work identified in Exhibit A to Exhibit 1, in exchange for payment for the same." The exhibit to which it refers is the Third Lease Amendment between KDOR and Grandmothers. Again, the pertinent portion of that exhibit states:

> "This Amendment governs construction contemplated per the quotes dated 05/28/2018, 06/04/2018, 08/01/2018, and 08/02/2018 from [Benchmark]. . . . [KDOR] shall pay a lump sum payment of $136,052.39 to [Grandmothers] for the satisfactory work completed upon successful installation. Payment by [KDOR] is contingent on [KDOR's] satisfaction of all work completed. The related items will become a fixture to the leased premises and will remain upon and be surrendered with the leased premises at the termination of the Real Estate Lease Agreement."

Benchmark relies on each of the admissions outlined above to support its claim the district court reached its conclusion regarding KDOR's motion in error. For its part, KDOR contends that Benchmark's appellate brief differs from its second amended petition in that Benchmark purportedly alleged in the latter of the two that the terms of the contract were readily identifiable from the lease amendment language quoted above. We note that in paragraph 17 of Benchmark's second amended petition, it stated that "KDOR and Grandmothers memorialized the agreement by executing the Third Amendment to Lease." But on appeal, Benchmark clarifies that this Third Amendment is not the contract at the root of its claims. Even so, the only language set out above that speaks to KDOR's obligations is that which acknowledges it would pay Grandmothers $136,052.39 once Benchmark finished the agreed upon tasks on the property.

A motion for judgment on the pleadings erects a very high hurdle for KDOR to clear in order to prevail. Essentially, under this chosen avenue of relief, the factual assertions set out in the pleadings are reviewed in the light most favorable to Benchmark, and dismissal is only justified when those pleadings fail to disclose any potential dispute surrounding one or more material facts. We disagree with the district court's assessment that KDOR successfully carried its heavy burden. To the contrary, KDOR admitted to the existence of a contract with Benchmark and, in our view, such an admission runs contrary to an award for relief under the pleadings here.

An additional matter arises from the fact that any contract between Benchmark and KDOR was arrived at orally and, as such, their respective actions must be analyzed to tease out the precise terms contemplated by such an agreement. See *U.S.D. No. 446*, 295 Kan. at 282. For example, in paragraph 2 of its answer, KDOR admitted that Benchmark completed all work on the project and that it paid Grandmothers the exact amount for which Benchmark agreed to do the work. But nowhere in the pleadings is it evident that Benchmark ever agreed to receive payment from Grandmothers or that it consented to release KDOR from liability once KDOR submitted payment to Grandmothers. Thus, reviewing the pleadings in a light most favorable to Benchmark, as we are required to do, seemingly indicates that where KDOR was the sole entity with whom Benchmark negotiated and was the singular party responsible for determining whether Benchmark's work was performed satisfactorily, then it was KDOR who remained liable to Benchmark. Thus, there are significant fact issues surrounding the parties' intent that cannot be reconciled with the district court's ruling on KDOR's motion.

From the record before us it is evident that Benchmark arguably stated a cause of action against KDOR. Thus, the district court's decision to the contrary must be reversed and the matter remanded for further proceedings.

The district court erred in its assessment that no contract existed between Grandmothers and Benchmark and in partially granting Grandmothers' motion for summary judgment.

In its next claim of error, Benchmark challenges the district court's decision to grant Counts I, IV, V, and VII from Grandmothers' motion for summary judgment. As to Count I, the district court concluded "[t]here is not sufficient evidence to support a claim that a contract existed between the Plaintiff and Defendants, and Plaintiff bears the burden to prove that a contract exists." After concluding that no contract existed, it employed the same rationale to grant summary judgment on Counts IV, V, and VII.

> "Summary judgment is appropriate when the pleadings, depositions, answers to interrogatories, admissions on file, and supporting affidavits show that no genuine issue exists as to any material fact and the moving party is entitled to judgment as a matter of law. The district court must resolve all facts and reasonable inferences drawn from the evidence in favor of the party against whom the ruling is sought. When opposing summary judgment, a party must produce evidence to establish a dispute as to a material fact. In order to preclude summary judgment, the facts subject to the dispute must be material to the conclusive issue in the case. Appellate courts apply the same rules and, where they find reasonable minds could differ as to the conclusions drawn from the evidence, summary judgment is inappropriate. Appellate review of the legal effect of undisputed facts is de novo." *GFTLenexa, LLC v. City of Lenexa*, 310 Kan. 976, 981-82, 453 P.3d 304 (2019).

This issue bears some similarity to that which precedes it in that Benchmark argues a contract existed, and Grandmothers denies one ever did. Thus, we need not delve into each specific claim on which the district court granted summary judgment. Rather, because the court's underlying rationale for granting summary judgment was the fact no contract existed, we need only determine whether that initial decision was erroneous.

Once again, the pertinent portion of the Third Lease Amendment states:

> "This Amendment governs construction contemplated per the quotes dated 05/28/2018, 06/04/2018, 08/01/2018, and 08/02/2018 from [Benchmark]. . . . [KDOR] shall pay a lump sum payment of $136,052.39 to [Grandmothers] for the satisfactory work completed upon successful installation. Payment by [KDOR] is contingent on [KDOR's] satisfaction of all work completed. The related items will become a fixture to the leased premises and will remain upon and be surrendered with the leased premises at the termination of the Real Estate Lease Agreement."

As stated above, Benchmark is not a party to this lease amendment. That said, it is counterintuitive to conclude that no agreement existed between Benchmark and

Grandmothers. The work Benchmark planned to complete is outlined in the estimates submitted. Those estimates served as the basis for the project's total estimated cost of $136,052.39.

Between November and December 2018, KDOR paid Grandmothers a total of $136,052.39. Zibell acknowledged during his deposition that Grandmothers provided Benchmark authorization to begin work at the property, that KDOR notified him once the renovations were completed, and that he understood Grandmothers was obligated to pay Benchmark for the work it performed. Similarly, Zibell agreed there was no dispute about the nature of the tasks Benchmark agreed to take on or the compensation due once the work was satisfactorily completed.

Again, "[w]hether a contract exists depends on the intentions of the parties and is a question of fact." *U.S.D. No. 446*, 295 Kan. at 282. Benchmark endeavors to convince us that an oral contract existed.

> "The standard of proof for demonstrating the existence of an oral contract is the preponderance of the evidence. In an action based on contract, the plaintiff bears the burden of proving the existence of the contract alleged in the petition.
>
> "The terms of an oral contract and the consent of the parties may be proven by the parties' acts and by the attending circumstances, as well as by the words that the parties employed. It is not necessary that a party expressly declare an admission of entering into an oral contract. [Citations omitted.]" *U.S.D. No. 446*, 295 Kan. at 282.

In December 2018, Grandmothers paid Benchmark $21,192.67, but failed to pay the remaining balance of $114,859.72. It opted to instead attempt to merely pay Benchmark $94,551.39. As earlier stated, it arrived at this figure by taking the estimated total of $136,052.39 and subtracting the $21,192.67 it already paid, minus another $1,900 for legal bills, $1,000 for the removal of a wall in the lobby, the 5% or $6,802.62 it

claimed Benchmark promised, and $10,505.71 as a 10% retainage until all subcontractors' fees were satisfied.

At some point after Benchmark filed its initial petition, Grandmothers paid a combined total of $54,248.33 to a portion of the subcontractors. Benchmark then accepted a check from Grandmothers for $40,303.06 which brought the total amount Grandmothers paid directly to Benchmark to $61,495.73. When that sum was added to the compensation Grandmothers provided to the subcontractors and the various fees it withheld as outlined above, as well as its prior $100 miscalculation, it brought the total amount disbursed or withheld by Grandmothers to $136,052.39.

But in Zibell's deposition, he admitted that he did not have an agreement with KDOR or Benchmark about the retainage, the payment of legal fees, or the $1,000 deduction borne of the wall removal. Zibell claimed that the 5% fee was promised by Benchmark, but Benchmark denied this assertion. Rather than refute the existence of a contract, these facts appear to support an allegation that Grandmothers breached a contract.

> "The elements of a breach of contract claim are: (1) the existence of a contract between the parties; (2) sufficient consideration to support the contract; (3) the plaintiff's performance or willingness to perform in compliance with the contract; (4) the defendant's breach of the contract; and (5) damages to the plaintiff caused by the breach." *Stechschulte v. Jennings*, 297 Kan. 2, 23, 298 P.3d 1083 (2013).

Taking the facts in a light most favorable to Benchmark, it offered to remodel the building and estimated the total cost would be $136,052.39. Grandmothers eventually authorized Benchmark to do the work, and Benchmark completed the work. KDOR paid Grandmothers a total of $136,052.39 for the work done but Grandmothers failed to uphold its end of the bargain and, for various reasons, only paid Benchmark a portion of the total $136,052.39 it owed.

In sum, Benchmark alleged that a contract existed and its terms could be proven by Grandmothers' actions throughout the case. See *U.S.D. No. 446*, 295 Kan. at 282. Resolving all facts and reasonable inferences in favor of Benchmark, the district court erred when it concluded that no contract existed between Grandmothers and Benchmark and then compounded the error in granting summary judgment for Grandmothers on Counts I, IV, V, and VII.

Reversed and remanded.