2013 IL App (1st) 120496-U

No. 1-12-0496

FIFTH DIVISION
June 7, 2013

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

SUNRISE CONCRETE, INC. Plaintiff-Appellee, v. BONNIE D. HANNA, MICHAEL M. HANNA, JOHN BANK OF AMERICA, f/k/a LASALLE BANK, N.A., SANDRA FOREMAN, CITICORP SAVINGS OF ILLINOIS, an Illinois banking institution, MARTIN WOJTOWICZ, a/k/a MARCIN CHOJNIAK, individually and d/b/a CMPACTOR, INC., PIOTR CHOJNIAK, MEYER MATERIAL CO., SCORPIO EXCAVATING INC., an Illinois corporation, UNKNOWN NECESSARY PARTIES, UNKNOWN OWNERS AND NONRECORDED CLAIMANTS, Defendants-Appellants,	)	Appeal from the Circuit Court of Cook County. No. 09 CH 31887 Honorable Lisa R. Curcio, Judge Presiding.

JUSTICE HOWSE delivered the judgment of the court.
Justices Palmer and Taylor concurred in the judgment.

ORDER

¶ 1 ***HELD:*** Circuit court order entering judgment of foreclosure for plaintiff subcontractor is affirmed where the owners of property paid the general contractor without requiring a verified statement of all subcontractors as required by section 5 of the Mechanics Lien Act; in the property owner's cross claim against the contractor, the trial court's order finding the existence of a contract and a breach of the contract is affirmed; however, the trial court's finding that the owner did not prove damages on the cross claim is contrary to the evidence and is reversed.

¶ 2 Following a bench trial, the circuit court entered judgment in favor of plaintiff, Sunrise Concrete, Inc., on its second amended complaint to foreclose a subcontractor's mechanic's lien against defendants Bonnie D. Hanna, Michael M. Hanna, and John M. Hanna (the Hannas). Sunrise also sought to foreclose the interests of lenders Sandra Foreman and Peter Foreman, Citicorp Savings of Illinois, and Bank of America; as well as lien claimants Meyer Material Co. and Scorpio Excavating, Inc. On appeal, the Hannas contend that Sunrise's subcontractor's mechanic's lien is invalid and unenforceable because Sunrise is a contractor and not a subcontractor. Alternatively, the Hannas contend that if Sunrise was a subcontractor of Impactor, Inc., the trial court erred in dismissing defendants' cross claims against Impactor. For the following reasons, we affirm in part, reverse in part and remand with directions.

¶ 3 BACKGROUND

¶ 4 The evidence at trial showed that the Hannas were the owners of residential property located at 902 Keystone Avenue in Northbrook, Illinois. The dispute between Sunrise and the Hannas arose out of demolition and construction work Sunrise performed during construction of a new home on the property. The Hannas collectively agreed to demolish the current home and build a new home. Impactor is an Illinois corporation engaged in the construction business. Michael, on behalf of the Hannas, entered into a verbal contract with Marcin Wojtowicz of

Impactor to demolish the existing structure on the property, excavate the site, and pour the foundation for the new home at a cost of $85,000. Daniel Tonyan, owner of Sunrise, submitted a written proposal to Impactor to perform the concrete work to be performed at the property and after negotiation, Marcin accepted Sunrise's proposal to perform concrete work at the property. Marcin's signature appears on the last page of the revised proposal, dated May 12, 2009, just above the word "owner." Additionally, Sunrise submitted a payout statement, dated June 5, 2009, to Impactor, regarding the project site of the Hanna residence in Northbrook. The body of the payout statement provided that Sunrise would do construction work as designated in the Sunrise contract for the owner, Hanna. There was a signature line for Sunrise, "Sunrise Concrete, Inc., Daniel Tonyan, Owner," and a signature line for "Martin Chojniak[1]/Mike Hanna" with the words "Contractor/Owner" typewritten below their names. Only Daniel and Marcin signed the document.

¶ 5 Sunrise's proposal provided for the work to be completed in two phases. Phase one called for Sunrise to furnish the foundation footings and walls, stone, damproofing/tiling materials and labor. The second phase called for Sunrise to lay the floors and stoops. The total contract price for both phases of the work was $56,000, payable in two draws. The first payout of $39,135 was due after the completion of phase one and the remaining $16,865 was due after the floors and stoops were finished. Sunrise completed all work under phase one of its subcontract between May 13, 2009, and June 18, 2009. Sunrise was prepared and able to continue construction into phase two but did not because it was not paid by Impactor.

[1]Martin Chojniak is the same person as Marcin Wojtowicz.

¶ 6 Meanwhile, the Hannas paid $60,000 to Impactor for work on the premises. However, the Hannas made payments to Impactor without obtaining a subcontractor's statement and affidavit listing the names and addresses of and amounts due or to become due to subcontractors. Impactor did not pay Sunrise for any of the work Sunrise performed on the property. Sunrise stopped work on the property when it was not paid as scheduled in their agreement. Sunrise then filed a subcontractor's mechanic's lien and sent a subcontractor's Notice of Lien pursuant to section 24 of the Mechanics Lien Act to the Hannas on June 18, 2009. The Mechanics Lien Act (Act), 770 ILCS 60/24 (West 2010).

¶ 7 Impactor did not complete the back filling of the foundation or any of the work that was part of phase two of Impactor's contract with Sunrise. Michael hired others to complete that work and paid $17,000 for the work that Sunrise had contracted to complete in phase two. However, Michael could not testify how much he paid for the back filling because he hired one person to complete that work and to do other work that was not part of Impactor's contract. The bill from that person did not break out how much was attributable to the back filling.

¶ 8 The parties stipulated that Sunrise properly perfected its lien against the property, and the Hannas did not dispute that Sunrise properly completed the work required under the contract. The Hannas, however, argued that there was no contract between Sunrise and Impactor but instead the Sunrise agreement was between Sunrise and the Hannas. Consequently, Sunrise was a contractor rather than a subcontractor and the subcontractor’s lien Sunrise filed is unenforceable. They argue the agreement contained the term "owner" under the signature block used by Marcin to approve the proposal. The Hannas suggest that "owner" refers to themselves

and that Marcin attempted to bind them as the owners of the property to the terms of the agreement between Sunrise and Impactor. The Hannas also argued that the agreement between Sunrise and Impactor contained conditions precedent, namely choosing a specific bank and drafting an approval letter, that were never met; and that they never had a contract with Impactor.

¶ 9 At trial, Daniel, owner of Sunrise, testified as to all of the work that was done, the materials used, the time spent in performing the work, and that $39,135 was the value of the work performed by Sunrise to complete phase one of the contract. He also testified that Impactor directed Sunrise's work.

¶ 10 The trial court noted that there was no dispute that Impactor was a contractor or that Sunrise was a contractor. The trial court found that the Hannas' theory that they had a contract with Sunrise, and consequently Sunrise was a general contractor and not a subcontractor, was contrary to the clear and unambiguous language of the agreement. The court found there is no legal significance to the word "owner" appearing under Marcin's signature on the last page of the agreement between Sunrise and Impactor. Additionally, the trial court found that the proposal was clearly addressed to Marcin of Impactor for approval by Impactor; that the testimony was clear and undisputed that Daniel and Marcin signed the agreement that bound Sunrise to perform concrete foundation work on the property in exchange for a total price of $56,000; that it was logical to infer that Marcin signed the document on behalf of Impactor; and that the evidence demonstrated that Marcin worked for Impactor and bound Impactor to the terms contained in that agreement. The trial court further found that there was no evidence presented to support the Hannas' claim that the amount to be paid under the contract for the first phase reflected an

amount in excess of the value of work actually performed in the first phase, and accepted the valuation testified to by Daniel of $39,135 for the work that Sunrise completed in the first phase of construction.

¶ 11 Regarding the Hannas' argument that the agreement between Sunrise and Impactor contained conditions precedent that were never met, the trial court found that the express language of the contract did not indicate any intention that the agreement was subject to choosing a bank or drafting an approval letter. The trial court again reiterated that the agreement between Sunrise and Impactor was unambiguous on its face - Sunrise entered into a contract with Impactor for concrete work and their mutual assent was unqualified by any contractual provision.

¶ 12 Finally, regarding the Hannas' argument that they did not have a contract with Impactor, the trial court found that the evidence was clear that Impactor submitted a bid to Michael, which was verbally accepted. Because the bid contained all of the terms in a sufficiently definite manner, the trial court found that there was sufficient evidence to conclude that an excavation and construction contract existed between the Hannas and Impactor, and its terms were definite and clear.

¶ 13 The Hannas invoked the doctrine of equitable estoppel as an affirmative defense against Sunrise based on their theory that Sunrise led the Hannas to believe that they were actually Impactor employees and that it failed to correct their mistaken belief that Impactor was performing the work. The trial court rejected the Hannas' affirmative defense, finding that they failed to establish the required elements for a claim of equitable estoppel against Sunrise.

¶ 14 The Hannas also filed cross claims against Impactor in an attempt to recover the

funds they paid to Impactor under the theories of conversion, unjust enrichment and breach of contract. The trial court rejected each theory, finding that the Hannas failed to elicit any evidence to prove the elements of conversion; that while it was unjust for Impactor to retain the funds, because an express contract existed between the Hannas and Impactor, unjust enrichment is inappropriate; and that there was no evidence presented to show that funds were paid for work that was never completed. The trial court specifically noted that the Hannas will have to pay extra for work that it paid Impactor to perform, but it cannot be addressed under contractual or quasi-contractual theories because payments were made under the Act and the risk of wrongful payment is borne by the owner.

¶ 15 The trial court determined that the evidence presented justified Sunrise's decision to leave the project as they had not been paid for services rendered and found in favor of Sunrise in the amount of $39,135 for the original lien and $9,272.82 accrued interest for a total of $48,407.82. Judgment was entered under section 28 of the Mechanics Lien Act and the trial court found that Sunrise was entitled to entry of a judgment of foreclosure and sale in that amount. The court reserved the determination of the priority of liens.

¶ 16 This timely appeal followed.

¶ 17 ANALYSIS

¶ 18 We turn to a determination of whether the trial court properly enforced Sunrise's subcontractor's mechanic's lien. The Mechanics Lien Act (Act) (770 ILCS 60/1 *et seq.* (West 2010)) is a comprehensive statutory enactment that sets forth the rights, remedies, and responsibilities of the parties to construction contracts, including property owners, contractors

and subcontractors. *Doornbos Heating and Air Conditioning, Inc. v. James D. Schlenker, M.D., S.C.*, 403 Ill. App. 3d 468, 481 (2010). The purpose of the Act is to permit contractors and subcontractors that furnish labor and materials, thereby increasing the value or condition of a property, to assert a lien upon that property and recover the monetary benefits the party has conferred upon the property's owner. *Doornbos*, 403 Ill. App. 3d at 481. Because the remedies provided for in the Act are statutory and in derogation of common law, a lien-claimant must strictly comply with the technical requirements of the Act in order to be eligible for relief. *Doornbos*, 403 Ill. App. 3d at 481.

¶ 19 A subcontractor may give the owner written notice of its claim (and thereby protect itself against subsequent disbursements) any time after the subcontractor enters into its contract with the general contractor, but no later than 90 days after the subcontractor's completion of the contract. 770 ILCS 60/24 (West 2010); *Alliance Steel, Inc. v. Percy*, 277 Ill. App. 3d 632, 635 (1996). Even if the subcontractor never gives notice to the owner, it is the owner's duty, before making any payments, to require the general contractor to provide a sworn written statement listing the subcontractors and amounts due or to become due each. 770 ILCS 60/5, 21 (West 2010); *Alliance Steel*, 277 Ill. App. 3d at 635. When an owner is notified of a subcontractor's claim, he must retain from any money due the contractor an amount sufficient to pay the subcontractor. 770 ILCS 60/27 (West 2010); *Weather-Tite, Inc. v. University of St. Francis*, 383 Ill. App. 3d 304, 307 (2008). If an owner pays a contractor and does not retain sufficient funds to pay a subcontractor after receiving notice that a subcontractor is owed, such payment shall be considered illegal and made in violation of the subcontractor's rights. 770 ILCS 60/27 (West

2010); *Weather-Tite*, 383 Ill. App. 3d at 307.

¶ 20 The Hannas contend that the judgment of foreclosure should be reversed because Sunrise's mechanic's lien is invalid and unenforceable. Specifically, the Hannas contend that: (1) the clear and unambiguous language of Sunrise's contract established that Sunrise was a contractor not a subcontractor, and thus, its subcontractor's lien was invalid; (2) that the terms of Sunrise's contract were unconscionable because the interest rate was too high; and (3) Sunrise's failure to satisfy a condition precedent renders its contract void and the lien invalid. Alternatively, the Hannas argue the trial court erred when it entered judgment in favor of Impactor on their cross claim.

¶ 21 Our first inquiry is whether the trial court properly concluded that Sunrise contracted with Impactor as a subcontractor rather than as a general contractor with the Hannas. The Hannas argue the signature line on Sunrise's contract proves that Sunrise contracted directly with the Hannas and were, therefore, contractors and not subcontractors. We noted earlier there was a signature line for Sunrise, "Sunrise Concrete, Inc., Daniel Tonyan, Owner," and a signature line for "Martin Chojniak/Mike Hanna" with the words "Contractor/Owner" typewritten below their names. The Hannas argue that the word "owner" refers to them and that proves Sunrise's contract was between Sunrise and the Hannas, not Sunrise and Impactor. The Hannas argue Sunrise is, therefore, a general contractor and their subcontractor's lien is invalid. The trial court made the finding that the Hannas' argument is contrary to the clear and unambiguous language of the agreement and there was no legal significance to the presence of the words under the signature line. Where the trial court has determined the construction of a contract as a matter of

law, this court's standard of review is *de novo* and we may interpret the contract independently of the trial court's judgment. *Pennsylvania Life Insurance Co. v. Pavlick*, 265 Ill. App. 3d 526, 529 (1994).

¶ 22 The court's primary objective in construing the provisions of a contract is to give effect to the intent of the parties at the time the contract was made. *Pavlick*, 265 Ill. App. 3d at 529. When the terms of the contract are clear and unambiguous, the parties' intent must be ascertained from language of the contract itself. *Pavlick*, 265 Ill. App. 3d at 529. A contract term will only be found to be ambiguous if it is reasonably or fairly susceptible to more than one interpretation. *Pavlick*, 265 Ill. App. 3d at 529. A provision in a contract is not rendered ambiguous simply because the parties do not agree on its meaning. *Pavlick*, 265 Ill. App. 3d at 529.

¶ 23 After reviewing Sunrise's proposal, we conclude that Sunrise contracted with Impactor as a subcontractor and not with the Hannas directly as a general contractor. The signature line for the acceptance of the proposal bears the signature of Marcin of Impactor. There is no signature of the Hanna's. Daniel testified that he learned of the construction project from Marcin. The proposal was addressed to Impactor in care of Marcin, and Marcin signed the proposal on behalf of Impactor to pay Sunrise $56,000 for completion of the concrete work at the property. There is no evidence in the record that the Hannas authorized Marcin to enter into and sign contracts for them. None of the contract terms expressly bind the Hannas and the Hannas do not argue that they secured Sunrise's services.

¶ 24 We conclude that Sunrise's contract was with Impactor as a subcontractor, thus, it properly brought a subcontractor's mechanic's lien action against the Hannas.

¶ 25 The Hannas next argue that the 30% monthly interest rate provision for unpaid bills in the Sunrise contract are unconscionable and unenforceable because it violates the Illinois Interest Act. 815 ILCS 205/1 *et seq.* (West 2010). However, the Illinois Interest Act does not apply to transactions between corporations. *Computer Sales Corp. v. Rousonelos Farms, Inc.*, 190 Ill. App. 3d 388, 392 (1989). Here, the contract was between Sunrise and Impactor, both corporations, thus the Illinois Interest Act does not apply, and the Hannas' argument is without merit.

¶ 26 We next address the Hannas argument that the plaintiff's failure to satisfy the conditions precedent contained in their contract renders the contract void and the lien invalid. Specifically, the Hannas argue that the contract required payment from a specific bank and with a letter of approval for Sunrise to do the work as conditions precedent. We disagree.

¶ 27 A condition precedent is one that must be met before a contract becomes effective. *Catholic Charities of Archdiocese of Chicago v. Thorpe*, 318 Ill. App. 3d 304, 307 (2000). Whether an act is necessary to formation of the contract or to the performance of an obligation under the contract depends on the facts of the case. *Catholic Charities*, 318 Ill. App. 3d at 307. If a condition goes solely to the obligation of the parties to perform, existence of such a condition does not prevent the formation of a valid contract. *Catholic Charities*, 318 Ill. App. 3d at 307.

¶ 28 Here, the plain language of the contract does not support the Hannas' contention that these were conditions precedent to the formation of the contract between Sunrise and Impactor. At best, they were specification of payment terms for Sunrise from Impactor. We find this argument to be without merit.

¶ 29 Alternatively, the Hannas contend that if Sunrise was a subcontractor of Impactor, the trial court erred when it entered a judgment for Impactor on their cross claim for breach of contract on the basis that the Hannas failed to prove damages. We agree.

¶ 30 In their cross claim filed in the trial court, the Hannas originally asserted the theories of conversion, unjust enrichment and breach of contract against Impactor in their attempt to recover funds they paid to Impactor. The trial court rejected each theory, finding that the Hannas failed to elicit any evidence to prove the elements of conversion; that while it was unjust for Impactor to retain the funds, because an express contract existed between the Hannas and Impactor, unjust enrichment is inappropriate; and that there was no evidence presented to show that funds were paid for work that was never completed.

¶ 31 However, the trial court found that the Hannas showed that Impactor breached the contract by not completing the work. However, the court found the Hannas did not prove damages and entered judgment for Impactor. The trial court also noted that although the Hannas will have to pay extra for work that it paid Impactor to perform, it cannot be addressed under contractual or quasi-contractual theories because payments were made under the Act and the risk of wrongful payment is borne by the owner.

¶ 32 Under the Act, a *bona fide* owner is protected from having to pay out twice as long as he follows the terms of the Act. See 770 ILCS 60/21(d) (West 2010). However, if an owner does not abide by the provisions of the Act, " 'he acts at his peril.' " *Weather-Tite*, 383 Ill. App. 3d at 308 (citing *Capital Plumbing & Heating Supply Co. v. Snyder*, 2 Ill. App. 3d 660, 666 (1971)).

¶ 33 An owner is not entitled to a credit for payments made in derogation of a subcontractor's

rights, even if the general contract has been paid in full in a mechanic's lien action. *Luczak Bros., Inc. v. Generes*, 116 Ill. App. 3d 286, 302 (1983).

¶ 34 Although the Hannas are not entitled to a credit for funds paid to a contractor in derogation of a subcontractor's right, none of the authorities cited prevents the Hannas from pursuing their common law claims against Impactor. The Hannas' claims are separate and apart from Sunrise's mechanic's lien. The record shows that Impactor breached their contract with the Hannas by failing to perform the work they contracted to do and instead contracted with Sunrise to do the work. The Hannas had paid Impactor all sums then due and owing pursuant to the terms of the contract but Impactor did not pay Sunrise, causing liens to be placed on the property. Consequently, the Hannas argue that they suffered damages because they are required to pay twice for the work performed by Sunrise.

¶ 35 We agree with the trial court's finding that the Hannas have shown that Impactor breached its contract with the Hannas by not performing the work it promised to perform and then hiring subcontractors to do the work. However, we find the Hannas proved they have been damaged by Impactor's breach because a judgment has been entered to pay the subcontractor, Sunrise, $39,185 plus interest and costs for work that was included in the Impactor contract. The Hannas' do not seek a credit from Sunrise for payments made in derogation of the subcontractor's rights. They seek damages against Impactor because they paid Impactor for work done by Sunrise and as a result of Impactor's breach of contract, they have become liable to Sunrise for payment for the same work it already paid for. The Hannas have proven damages. The trial court's determination that the Hannas can prove no damages is contrary to the manifest

weight of the evidence. We, therefore, direct the trial court to enter judgment in favor of the Hannas on their cross claim for breach of contract against Impactor and to direct the court to conduct a new trial solely on the issue of damages. See *Deerfield Electric Co., Inc. v. Herbert W. Jaeger & Associates, Inc.*, 74 Ill. App. 3d 380, 386 (1976).

CONCLUSION

¶ 36 For the foregoing reasons, the judgment of the circuit court in favor of Sunrise on its subcontractor's mechanic's lien is affirmed; the judgment in favor of Impactor on the Hannas cross claim for breach of contract is reversed and the cause remanded with directions.

¶ 37 Affirmed in part; reversed in part; remanded with directions.