2018 IL App (2d) 170985-U
No. 2-17-0985
Order filed September 28, 2018

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

RB SERVICES AND HAULING, LLC, Plaintiff-Appellant, v. HUNTER 1011-1012 HILLCREST, LLC; INLAND BANK AND TRUST; HUNTER DeKALB PROPERTIES, LLC; HUNTER RIDGEBROOK PROPERTIES, LLC; D.R. DeKALB, LLC; TIFFANY MEADOWS; and INSIGHT SERVICES, LLC, Defendants-Appellees.	)	Appeal from the Circuit Court of De Kalb County. No. 15-LM-4 Honorable Bradley J. Waller, Judge, Presiding.

JUSTICE SPENCE delivered the judgment of the court.
Justices Hutchinson and Zenoff concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court did not abuse its discretion in denying plaintiff attorney fees on its partially successful mechanic's lien claim: plaintiff cited no authority to establish that defendants lacked "just cause or right" to refuse to pay when plaintiff's claim was only partially valid, and in any event plaintiff's inflation of its claim permitted the court to exercise its discretion to deny plaintiff fees.

¶ 2 RB Services and Hauling, LLC (RB), the plaintiff in an action on a mechanic's lien, appeals from a judgment largely in its favor, contending that the court improperly denied it

attorney fees. It asserts that, because the primary defendants, Hunter 1011-1027 Hillcrest LLC; Hunter DeKalb Properties, LLC; Hunter Ridgeback Properties, LLC; and D.R. DeKalb, LLC (the Hunter Companies), admitted that they had not paid it what they owed for asphalt work, the court lacked discretion to deny it attorney fees. (The other defendants were Inland Bank and Trust, the priority of whose mortgage lien was at risk in the action; Tiffany Meadows, an agent for the Hunter Companies; and Insight Services, LLC, also an agent for the Hunter Companies.) We hold that the matter of fees was within the court's discretion and that, because RB's errors had made the suit unnecessarily complicated, the court did not abuse that discretion by denying fees.

¶ 3 I. BACKGROUND

¶ 4 RB, an asphalt contractor and dumpster services provider, contracted to provide both asphalt work and dumpster services to the Hunter Companies, a group of limited liability companies controlled by Sam Okner. Meadows, either personally or through Insight Services, LLC, acted as a property manager for the Hunter Companies and hired RB. A dispute arose over payment; among other things, the Hunter Companies believed that RB had billed them for dumpsters used by a roofing contractor. On October 30, 2014, RB recorded a claim under the Mechanics Lien Act (Act) (770 ILCS 60/1 *et seq*. (West 2014)) against certain Hunter Company properties. The claimed lien amount was $22,181.86, an amount that included "extras" of $6152.20 for "dumpsters." The statement of claim specified that RB and Okner entered into the contract on August 1, 2014. The job was completed on August 29, 2014. The original contract amount was $68,735. After the Hunter Companies' payments, $25,618.61 was due, with a further $3436.75 for materials held back.

¶ 5 On March 13, 2015, RB filed a suit based on those claims. The complaint's first count

was for the mechanic's lien foreclosure, and the lien amount included the money that RB claimed the Hunter Companies owed it for dumpsters.

¶ 6 RB filed a second amended complaint on December 21, 2016. In this complaint, unlike the first, it conceded that charges for dumpsters could not be part of the lien amount: dumpster services are not an improvement to a property, and, under section 1(a) of the Act (770 ILCS 60/1(a) (West 2014)), only money owed for improvements becomes a lien on the property. However, RB alleged that its lien was nevertheless valid for the $16,029.66 that it claimed was due it for asphalt work. RB also sought attorney fees under the Act. The complaint continued to include a breach-of-contract claim relating to both the dumpsters and the asphalt work.

¶ 7 The Hunter Companies admitted that they owed $16,029.66 for asphalt work. They disputed some of the dumpster charges.

¶ 8 The matter went to bench trial. The Hunter Companies conceded that RB would have been entitled to a lien for the $16,029.66 due for the asphalt work. However, they argued that the existing lien was invalid in any amount, due to the inclusion of the dumpster-related charges in the lien claim.

¶ 9 One of RB's owners testified that he had learned during the course of the litigation that including the amount owed for dumpster services in the lien claim was not legally justifiable; he said that he had assumed that the attorney who filed the claim for RB knew the law. He had not attempted to correct the filing. The parties did not agree about what attempts had been made to resolve the dispute. Meadows suggested that the Hunter Companies were unwilling to pay RB until it corrected the amount in the lien claim. However, her testimony was not particularly clear on the point and left the impression that she had not necessarily been a party to all the relevant discussions. The testimony suggested that the dispute had arisen because the Hunter Companies

believed that RB had delivered dumpsters for the use of a contractor working on the properties but had billed the Hunter Companies for those services.

¶ 10 The court initially ruled that RB had no valid lien in any amount, but entered judgment for RB on the breach-of-contract claim. The court expressed frustration that the parties had been unable to settle the matter short of trial: "I just don't understand for the life of me *** why this couldn't have been resolved outside of hiring attorneys and coming in front of someone like me." On reconsideration, it ruled that RB had a valid lien for $16,029.66. However, it denied RB's claim for attorney fees, finding that it had "heard no credible evidence to support a claim for costs/fees under & pursuant to 770 ILCS 60/17(b)." RB filed a timely notice of appeal on the issue of fees.

¶ 11 II. ANALYSIS

¶ 12 On appeal, RB contends that the Hunter Companies' admission that they had not paid it what they owed for asphalt work was sufficient in itself to require that the court award attorney fees to it. Citing section 35(a) of the Act (770 ILCS 60/35(a) (West 2014) (providing for $2500 in damages plus costs and fees to a lienee if the lienor fails to release a mechanic's lien upon payment)), it argues that the Hunter Companies would have retained adequate protection from the improper part of its lien if they had paid the proper part:

> "[T]he failure of RB to release its lien once payment was made by Hunter[] would subject [RB] to substantial monetary penalties under the Act. [Therefore, the situation here] was not akin to a 'Mexican Standoff' wherein one side was waiting for the other to 'blink first.' In this case, the Act makes it clear that it was incumbent upon Hunter to not just make a promise to pay the amount owed for the asphalt work but to actually pay it before it was entitled to receive a release or waiver."

It does not address the effect of its error in its lien filing. It asks us to remand the matter "for a determination of reasonable fees and costs."

¶ 13 All the defendants have joined in filing one response brief. They contend, "RB did not present any evidence for the court to consider as a basis for awarding attorney fees and was left with no alternative but to deny the relief sought." In reply, RB asserts that the evidence for awarding fees was the Hunter Companies' admission that they owed RB money for asphalt work.

¶ 14 We may reverse a trial court's decision concerning the award of attorney fees under section 17 of the Act only if the decision is an abuse of discretion. *Father & Sons Home Improvement II, Inc. v. Stuart*, 2016 IL App (1st) 143666, ¶ 47 (applying this standard to a decision under section 17(a) (770 ILCS 60/17(a) (West 2014)); see also *Roy Zenere Trucking & Excavating, Inc. v. Build Tech, Inc.*, 2016 IL App (3d) 140946, ¶ 53 (applying this standard to section 17(b) (770 ILCS 60/17(b) (West 2014)).

> "Under this standard, a trial court does not abuse its discretion unless, in view of all the circumstances, its decision so exceeded the bounds of reason that no person would take the view adopted by the trial court. [Citation.] The rationale for this standard is that a party challenging a trial court's decision regarding attorney fees is actually challenging the trial court's discretion in determining what is reasonable. [Citations.]" (Internal quotation marks omitted.) *Father & Sons Home Improvement II, Inc.*, 2016 IL App (1st) 143666, ¶ 47.

Under section 17(b), "[i]f the court specifically finds that the owner who contracted to have the improvements made failed to pay any lien claimant the full contract price *** without just cause or right, the court may tax that owner, but not any other party, the reasonable attorney's fees of

the lien claimant who had perfected and proven his or her claim." 770 ILCS 60/17(b) (West 2014).

¶ 15 We are not persuaded by RB's argument. RB starts from a position of low plausibility: it seeks attorney fees in the face of its admission that its attorney acted unreasonably by including improper claims in its lien filing. Because RB does not address this particularly salient fact, RB fails to meet its burden of persuasion.

¶ 16 RB conceded that its inclusion of dumpster charges in its lien filing had no basis in the law. Section 1(a) of the Act (770 ILCS 60/1(a) West 2014)) provides that a party that contracts with the owner of real property or the owner's agent "to improve the lot or tract of land" has, by operation of law, a lien "for the amount due to him or her for the material, fixtures, apparatus, machinery, services or labor." Dumpster services are indisputably not improvements, so to include charges for them in the lien filing was not reasonable. RB's analysis assumes that this fact is immaterial to its entitlement to attorney fees. We disagree. RB's improper filing was relevant in two ways. One, it was relevant to whether the Hunter Companies had just cause or right to withhold payment on the undisputed claims. Two, it was relevant to whether the court could properly exercise its discretion to decline to award fees, even if the Hunter Companies lacked just cause or right to withhold payment.

¶ 17 We first consider how RB's actions were relevant to whether the Hunter Companies had just cause or right to withhold payment. The trial court stated that it had denied fees because it had "heard no credible evidence to support a claim for costs/fees under & pursuant to 770 ILCS 60/17(b)." Given (1) that the court found that the Hunter Companies had not paid the part of the lien claim that was due and (2) that the court talked about the state of the evidence, not how it would exercise its discretion, we conclude that the court deemed both that RB had the burden to

show that the nonpayment was without just cause or right and that RB had not met that burden. RB does not contest the court's assignment of the burden, so we assume here for the sake of argument that it was correct. RB, citing *O'Connor Construction Co., Inc. v. Belmont Harbor Home Development, LLC*, 391 Ill. App. 3d 533, 540-41 (2009), argues that the mere admission that money was owed for an improvement was, by itself, sufficient. That assertion is an overstatement. RB's evidence did not explain how what seems to have started as a dispute over whether dumpsters were for the use of a building or a roofer devolved into such a stalemate. The evidence does show that whatever happened, happened rapidly. According to RB's "Statement of Claim for Mechanics Lien," the lien claim was filed approximately 62 days after the completion of the asphalt work. Further, the claim for dumpsters was approximately 28% of the total lien claim. Thus, fairly early in the dispute, RB recorded a lien statement that significantly inflated its lien claim. The Hunter Companies might have simply balked at that.

¶ 18 Whether balking at payment of an improperly inflated lien claim constitutes just cause or right is a separate issue. The authority that RB provides is not helpful on that point. *O'Connor* is inapposite. In *O'Connor*, the trial court denied fees after finding that all of the lienor's charges were justified. That does not tell us whether withholding payment would be justified as a response to lien charges that are not even colorable. We have also considered a related decision, *Roy Zenere*, 2016 IL App (3d) 140946, ¶¶ 55-57, that RB did not cite. In *Roy Zenere*, the reviewing court held that the trial court had abused its discretion in denying attorney fees to a lienor when the lienee refused to pay anything on a contract and only the lienor's entitlement to payment for "extras" was at issue. However, the dispute over "extras" was an ordinary contract dispute over a colorable claim, not a case in which a lienor maintained an indefensible lien claim. *Roy Zenere* thus provides only limited guidance here. Further, although RB is correct that, had

the Hunter Companies chosen to pay the undisputed portion of the lien claim, section 35(a) of the Act would have allowed it to sue if RB improperly failed to release its lien, that does not mean that withholding payment in the face of the improper lien claim was necessarily without just cause or right. Nothing in the section indicates that it is a lienee's sole path when part of a lien claim is patently improper.

¶ 19 In any event, we deem that a trial court has discretion to deny fees in response to the lienor's improper conduct.[1] Section 17(b) specifies that the court "*may* tax [the] owner *** the reasonable attorney's fees of the lien claimant" if "the court specifically finds that the owner *** failed to pay any lien claimant the full contract price *** without just cause or right." (Emphasis added.) 770 ILCS 60/17(b) (West 2014). Generally, when a statute uses the word "may," we interpret the statute to be permissive (*e.g.*, *In re Estate of Ahmed*, 322 Ill. App. 3d 741, 746 (2001)); that is, use of the word "may" implies that the entity that "may" do a thing has discretion to do it (*e.g.*, *Kingdomware Technologies, Inc. v. United States*, 579 U.S. __, ___, 136 S. Ct. 1969, 1977 (2016)). Thus, the ordinary reading of section 17(b) is that the court need not always award attorney fees even when the lienee failed to pay "without just cause or right." To be sure, *O'Connor Construction* and *Roy Zenere* suggest that the court essentially *must* award fees when the lienor has made only good faith, colorable claims and the lienee has failed to pay without just cause or right. If that is so, does that mean that the court actually lacks discretion to deny fees? We think not. Rather, that discretion will generally come into play in cases in which

[1] A party is generally bound by the mistakes or negligence of its counsel. *E.g.*, *R.M. Lucas Co. v. Peoples Gas Light & Coke Co.*, 2011 IL App (1st) 102955, ¶ 18. Therefore, although RB's former counsel filed the improperly inflated claim for a mechanic's lien, we treat the action as RB's.

the lienor, despite being the prevailing party, has acted improperly in some way. This case is in that category.

¶ 20 III. CONCLUSION

¶ 21 For the reasons stated, we affirm the judgment of the circuit court of De Kalb County.

¶ 22 Affirmed.