

Rel.: June 28, 2019

Notice: This opinion is subject to formal revision before publication in the advance sheets of Southern Reporter. Readers are requested to notify the **Reporter of Decisions**, Alabama Appellate Courts, 300 Dexter Avenue, Montgomery, Alabama 36104-3741 ((334) 229-0649), of any typographical or other errors, in order that corrections may be made before the opinion is printed in Southern Reporter.

ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2018-2019

2171099

Construction Services Group, LLC

v.

MS Electric, LLC

2171124

MS Electric, LLC

v.

Construction Services Group, LLC

Appeals from Jefferson Circuit Court
(CV-17-900918)

2171099; 2171124

DONALDSON, Judge.

In case no. 2171099, Construction Services Group, LLC ("Construction Services"), appeals from a judgment of the Jefferson Circuit Court ("the trial court") insofar as it found in favor of MS Electric, LLC ("MS Electric"), with respect to its unjust-enrichment claim against Construction Services. In case no. 2171124, MS Electric cross-appeals from that judgment insofar as it found in favor of Construction Services with respect to its negligent-misrepresentation counterclaim against MS Electric. Because the damages awarded by the trial court's judgment, exclusive of interest and costs, do not exceed \$50,000, this court has jurisdiction pursuant to § 12-3-10, Ala. Code 1975.

In case no. 2171099, we reverse the trial court's judgment insofar as it found in favor of MS Electric with respect to its unjust-enrichment claim against Construction Services. In case no. 2171124, we affirm the trial court's judgment insofar as it found in favor of Construction Services on its negligent-misrepresentation counterclaim against MS Electric.

Facts and Procedural History

2171099; 2171124

Construction Services entered into an agreement with the Alabama Public School and College Authority and the Shelby County Board of Education; that agreement provided, among other things, that Construction Services would act as the general contractor on a construction project ("the Montevallo project") pursuant to which additions and alterations to Montevallo Middle School would be made. MS Electric submitted a bid to perform the electrical work on the Montevallo project to Construction Services; Construction Services accepted MS Electric's bid. In its judgment, the trial court made the following pertinent factual findings:

"The total amount of [MS Electric's] bid to perform electrical work on the Montevallo project was \$198,831.10. It is undisputed that [MS Electric] possessed a valid electrical contracting license from the Alabama Board of Electrical Contractors at the time it submitted its bid to [Construction Services] for this job. However, it is also undisputed that, on jobs the size of the Montevallo project (i.e., jobs over \$50,000.00), electrical subcontractors like [MS Electric] are required to have an additional license from the State Licensing Board for General Contractors.^[1] It is undisputed that [MS Electric] did not have this additional electrical subcontractor license when it performed work for [Construction Services] on the Montevallo project. ...

¹See §§ 34-8-1(c) and 34-8-7(c), Ala. Code 1975.

2171099; 2171124

"[MS Electric] performed work on the Montevallo [project] for about 12 days. ... [MS Electric] seeks a recovery of \$23,650.00 for some 430 'man hours' it claims it expended on the Montevallo [project].

"After [MS Electric] left the Montevallo [project], [Construction Services] hired Dobbs Electric Co., Inc. (which had in place all appropriate licenses) to complete the electrical work. Dobbs'[s] contract was for \$209,800.00 -- \$10,968.90 higher than what [Construction Services] was going to pay [MS Electric] for the same work. ...

"[Construction Services'] misrepresentation counterclaim is based on the allegation that [MS Electric] stated in its written bid that it had an appropriate Alabama license in place when it in fact did not have the proper license at that time. As damages on its misrepresentation claim, [Construction Services] seeks \$10,968.90 for the extra amount it had to pay Dobbs Electric to finish the electrical work on the [project] as well as an unspecified amount of punitive damages on grounds that [MS Electric] intentionally or wantonly misrepresent[ed] that it had an electrical subcontractor license from the State Licensing Board for General Contractors at the time [MS Electric] started work on the Montevallo project. The specific factual basis for [Construction Services'] counterclaim is that the bid [MS Electric] submitted for the Montevallo [project] was well in excess of \$50,000.00, yet contained an 'Alabama State License Number 05097,' which was not the correct or appropriate license for a job of this size. [MS Electric's vice president] freely admitted that [MS Electric] did not have the additional license required by the [State Licensing Board for General Contractors] at the time [MS Electric] bid the job or when it performed the work at issue. He also testified, however, that he did not know [MS Electric] was supposed to have that additional

2171099; 2171124

license until [Construction Services] provided a draft contract for the Montevallo Middle School project. Because [MS Electric] did not have the additional license, [MS Electric's vice president] never signed the Montevallo contract."

In March 2017, MS Electric commenced the present action by filing a complaint against Construction Services stating claims of open account, account stated, and breach of contract and seeking damages in the amount of \$23,650 plus interest. Construction Services denied that it owed MS Electric any money and asserted various affirmative defenses. One of the affirmative defenses asserted was that MS Electric was barred from recovering any money from Construction Services because, Construction Services asserted, the contract pursuant to which MS Electric performed work on the Montevallo project was an illegal contract and the transaction pursuant to which MS Electric performed its work was an illegal transaction. Construction Services also filed a counterclaim in which it stated against MS Electric claims of breach of contract; fraud by misrepresentation of a material fact made willfully, recklessly, negligently, or innocently; bad faith; and deceit by making a willful misrepresentation of a material fact.

2171099; 2171124

In June 2017, Construction Services filed a motion for a summary judgment with respect to MS Electric's claims against Construction Services. Construction Services asserted that, because the cost of the electrical work on the Montevallo project was \$50,000 or more, Alabama law required that a subcontractor who performed the electrical work on the Montevallo project be licensed by the State Licensing Board for General Contractors; that MS Electric had not been licensed by the State Licensing Board for General Contractors when MS Electric submitted its bid or when it performed its work on the Montevallo project; and that, therefore, the subcontract pursuant to which MS Electric had performed its work on the Montevallo project and that work itself were illegal. Construction Services further asserted that, because Alabama law did not permit a party to profit from an illegal contract or an illegal transaction, Construction Services was entitled to a summary judgment with respect to MS Electric's claims.

Following a hearing, the trial court, in July 2017, entered a summary judgment in favor of Construction Services with respect to MS Electric's claims because it was undisputed

2171099; 2171124

that MS Electric had not been issued a license by the State Licensing Board for General Contractors when it performed its work on the Montevallo project. The trial court also pointed out that, although a motion challenging Construction Services' breach-of-contract counterclaim was not then pending, the illegality of the subcontract would also necessitate the dismissal of Construction Services' breach-of-contract counterclaim and granted both parties time to amend their pleadings.

In August 2017, MS Electric filed an amended complaint against Construction Services stating claims of unjust enrichment, misrepresentation, suppression, conversion, and bad faith. In October 2017, MS Electric filed a motion to dismiss Construction Services' breach-of-contract counterclaim, which the trial court granted.

In May 2018, Construction Services filed a motion for a summary judgment ("the May 2018 summary-judgment motion") with respect to the claims stated in MS Electric's amended complaint. Among other grounds, Construction Services asserted that it was entitled to a summary judgment with respect to the all the claims stated in MS Electric's amended complaint

2171099; 2171124

because, Construction Services said, Alabama law did not permit a party to an illegal subcontract to circumvent the defense of illegality of the contract by seeking recovery based on theories other than breach of contract. Also in May 2018, MS Electric filed a motion for a summary judgment with respect to Construction Services' remaining counterclaims. As grounds, MS Electric asserted that Construction Services could not recover on its remaining counterclaims because, MS Electric said, those claims were based on an illegal bid and Alabama law did not permit a party to profit from an illegal bid.

After holding two hearings regarding the parties' cross-motions for a summary judgment, the trial court, in June 2018, entered an order granting Construction Services' summary-judgment motion with respect to all of MS Electric's claims except its unjust-enrichment claim and granting MS Electric's summary-judgment motion with respect to all of Construction Services' counterclaims except its negligent-misrepresentation counterclaim.

On July 13, 2018, the trial court held a bench trial at which it received evidence ore tenus on the remaining claims.

2171099; 2171124

The record does not contain a transcript of the trial. The record does contain a written motion we construe as a motion for a judgment on partial findings pursuant to Rule 52(c), Ala. R. Civ. P., filed by Construction Services on July 17, 2018.² That same day, the trial court entered an order denying Construction Services' Rule 52(c) motion and a final judgment. In its final judgment, the trial court (1) found in favor of MS Electric with respect to its unjust-enrichment claim and awarded it damages in the amount of \$15,968.90 and (2) found in favor of Construction Services with respect to its negligent-misrepresentation counterclaim and awarded it damages in the amount of \$10,968.90. Thereafter, Construction Services timely appealed from the trial court's judgment, and MS Electric timely cross-appealed. This court consolidated the appeal and the cross-appeal.

Standard of Review

²That motion purported to be a "motion for a judgment as a matter of law," filed pursuant to Rule 50, Ala. R. Civ. P.; however, because the trial court held a bench trial rather than a jury trial, that motion was a Rule 52(c) motion for a judgment on partial findings rather than a Rule 50 motion for a judgment as a matter of law. See Burkes Mech., Inc. v. Ft. James-Pennington, Inc., 908 So. 2d 905, 910 (Ala. 2004).

2171099; 2171124

"Because the relevant facts of this case are undisputed and this court is presented with issues regarding the correct application of the law to those undisputed facts, the standard of review is de novo, and no presumption of correctness is accorded to the trial court's judgment. See Ex parte Graham, 702 So. 2d 1215 (Ala. 1997); Roberts Health Care, Inc. v. State Health Planning & Dev. Agency, 698 So. 2d 106 (Ala. 1997); State Dep't of Revenue v. Garner, 812 So. 2d 380, 382 (Ala. Civ. App. 2001); and State Dep't of Revenue v. Taft Coal Sales & Assocs., Inc., 801 So. 2d 838, 839 (Ala. Civ. App. 2001)."

HealthSouth Corp. v. Jefferson Cty. Tax Assessor, 978 So. 2d 737, 739-40 (Ala. Civ. App. 2006).

Analysis

I. Construction Services' Appeal

One of the arguments of Construction Services is that the trial court erroneously denied its May 2018 summary-judgment motion with respect to MS Electric's unjust-enrichment claim. Ordinarily, an appellate court does not review the denial of a summary-judgment motion after there has been a trial on the merits, see, e.g., Mitchell v. Folmar & Assocs., LLP, 854 So. 2d 1115, 1116 (Ala. 2003) ("[An appellate court] do[es] not review a trial court's denial of a summary-judgment motion following a trial on the merits."), and Construction Services has not argued that the denial of its May 2018 summary-

2171099; 2171124

judgment motion falls within an exception to that general rule.³ Therefore, we will not consider Construction Services' first argument.

Construction Services also argues that the trial court erroneously denied its Rule 52(c) motion for a judgment on partial findings because, Construction Services says, MS Electric did not introduce sufficient evidence to establish either the essential elements of its unjust-enrichment claim or its damages.

"Alabama law is well settled that appellate courts do not presume error. 'In order for this court to consider an error asserted on appeal, that error must be affirmatively demonstrated by the record.'" Beatty v. Beatty, 991 So. 2d 761, 765 (Ala. Civ. App. 2008) (quoting Elliott v. Bud's Truck & Auto Repair, 656 So. 2d 837, 838 (Ala. Civ. App. 1995)). As noted previously, the record on appeal does not contain a transcript of the ore tenus hearing, and [Construction Services] did not attempt to supply this court with a statement of the evidence pursuant to Rule 10(d), Ala. R. App. P.⁴ An appellate court is confined in its review to the appellate record; that record 'cannot be changed, altered, or varied on appeal by statements in briefs of counsel,' and the court 'cannot assume error or presume the existence of facts as to which the

³For an example of an exception to that general rule, see Housing Authority of the Birmingham District v. Paul Davis Systems, Inc., of Birmingham North and East, 701 So. 2d 32, 33-34 (Ala. Civ. App. 1997).

2171099; 2171124

record is silent.' Quick v. Burton, 960 So. 2d 678, 680-81 (Ala. Civ. App. 2006).

"Accordingly, when, as in this case, "oral testimony is considered by the trial court in reaching its judgment and that testimony is not present in the record as either a transcript or Rule 10(d), [Ala.] R. [App.] P., statement, it must be conclusively presumed that the testimony [was] sufficient to support the judgment." Quick v. Burton, 960 So. 2d at 680 (quoting Rudolph v. Rudolph, 586 So. 2d 929, 930 (Ala. Civ. App. 1991)).

⁴Rule 10(d), Ala. R. App. P., provides, in pertinent part:

"If no report of the evidence or proceedings at a hearing or trial was made, or if a transcript is unavailable, the appellant may prepare a statement of the evidence or proceedings from the best available means, including the appellant's recollection. ... The statement, either as approved by the court or as issued by the court after its ruling, shall be filed with the clerk of the trial court, who shall include it in the record on appeal."

Cockrell v. Cockrell, 40 So. 3d 712, 716-17 (Ala. Civ. App. 2009). Accordingly, because the oral testimony heard by the trial court is not present in the record as either a transcript or a Rule 10(d) statement, we must conclusively presume that the testimony was sufficient to support the judgment, see id.; therefore, we cannot reverse the trial court's judgment with respect to MS Electric's unjust-

2171099; 2171124

enrichment claim based on Construction Services' insufficiency-of-the-evidence arguments.

In addition to its arguments regarding the denial of its May 2018 summary-judgment motion and the alleged insufficiency of the evidence to support MS Electric's unjust-enrichment claim, Construction Services argues that the trial court erroneously found in favor of MS Electric with respect to its unjust-enrichment claim because, Construction Services says, the undisputed evidence established that the accepted bid pursuant to which MS Electric performed its work on the Montevallo project was an illegal contract because MS Electric had not been issued a license by the State Licensing Board for General Contractors when it submitted its bid and when it performed its work on the Montevallo project. This is so, Construction Services says, because Alabama law provides that, if a party is precluded from maintaining a breach-of-contract claim because that claim is based on an illegal contract, that party may not circumvent the law precluding him, her, or it from maintaining a breach-of-contract claim by stating a different claim based on another theory of recovery.

2171099; 2171124

The trial court's judgment indicates that the undisputed evidence established that, because the cost of the electrical work on the Montevallo project was \$50,000 or more, MS Electric was required to have a license issued by the State Licensing Board for General Contractors in order to legally perform that electrical work and that MS Electric did not have such a license when it submitted its bid and when it performed electrical work on the Montevallo project. Those undisputed facts establish, as a matter of law, that the accepted bid pursuant to which MS Electric performed that work was an illegal contract and that the work itself was illegal. Alabama law prohibits MS Electric from recovering for that illegal work regardless of whether it seeks to do so by means of a breach-of-contract claim or by means of a claim based on some other theory of recovery. See Cooper v. Johnston, 283 Ala. 565, 569, 219 So. 2d 392, 397 (1969) (holding that a party to an illegal contract cannot recover under a theory of express or implied contract, conversion, or estoppel); White v. Miller, 718 So. 2d 88, 90 (Ala. Civ. App. 1998) (holding that a "contractor cannot circumvent the licensing statute by asserting claims for fraud and deceit when the facts

2171099; 2171124

surrounding his claims are grounded in contract"). As this court has observed, "'current Alabama law does not recognize any exceptions to the rule that public policy will not permit recovery by an unlicensed contractor regardless of the conduct of the other party.'" KLW Enters., Inc. v. West Alabama Commercial Indus., Inc., 31 So. 3d 136, 138 (Ala. Civ. App. 2009) (quoting trial court's summary judgment). Accordingly, the application of the law to the undisputed facts in this case compels us to reverse the trial court's judgment insofar as it found in favor of MS Electric on its unjust-enrichment claim against Construction Services.

II. MS Electric's Cross-Appeal

MS Electric argues that the trial court erroneously denied its summary-judgment motion with respect to Construction Services' negligent-misrepresentation counterclaim. As noted above, however, ordinarily an appellate court does not review the denial of a summary-judgment motion after there has been a trial on the merits. See, e.g., Mitchell v. Folmar & Assocs., LLP, 854 So. 2d at 116. MS Electric has not argued that the denial of its summary-judgment motion with respect to Construction Services'

2171099; 2171124

negligent-misrepresentation counterclaim falls within any exception to that general rule. Therefore, we will not consider MS Electric's argument that the trial court erroneously denied its summary-judgment motion with respect to Construction Services' negligent-misrepresentation counterclaim.

MS Electric does not argue that the trial court's judgment is not supported by sufficient evidence insofar as it found in favor of Construction Services on its negligent-misrepresentation counterclaim; however, if MS Electric had made that argument, we would have to conclusively presume that the testimony was sufficient to support that aspect of the judgment because the record does not contain either a transcript or a Rule 10(d) statement of the evidence. See Cockrell, 40 So. 3d at 716-17. Accordingly, we affirm the trial court's judgment insofar as it found in favor of Construction Services on its negligent-misrepresentation counterclaim.

2171099 -- REVERSED AND REMANDED.

2171124 -- AFFIRMED.

Thompson, P.J., and Moore and Hanson, JJ., concur.

2171099; 2171124

Edwards J., concurs in the result, without writing.