REL: May 29, 2020

ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2019-2020

2180300

Autauga Creek Craft House, LLC, and John Stewart

v.

Eddie Brust

2180344

Eddie Brust

v.

Autauga Creek Craft House, LLC, and John Stewart

Appeals from Autauga Circuit Court
(CV-17-900026)

DONALDSON, Judge.

Autauga Creek Craft House, LLC, and John Stewart (hereinafter referred to collectively as "Craft House") appeal from a judgment entered by the Autauga Circuit Court ("the trial court") awarding damages plus interest to Eddie Brust. Brust cross-appeals the order of the trial court denying him an award of attorney fees. We affirm the judgment as to Craft House's appeal. We reverse the denial of attorney fees to Brust and remand the cause.

Facts and Procedural History

John Stewart describes himself as an owner of Autauga Creek Craft House, LLC, which has two locations, one in Prattville and one in Wetumpka.[1] Stewart's wife, Paige Stewart, and Brust's wife, Trina Brust, are sisters. Beginning in May 2016, Brust performed work to help Craft House open an establishment in Prattville ("the Prattville location"). Brust also performed some work to open an establishment in Wetumpka ("the Wetumpka location") until he was asked to stop working and leave the premises.

[1]We note that Stewart's wife participated at trial and testified that she was a co-owner of Autauga Creek Craft House, LLC.

On January 27, 2017, Brust filed a complaint against Craft House and fictitiously named defendants who were never identified later.[2] In his complaint, Brust alleged that Craft House hired or contracted with him and that Craft House did not fully compensate him for his carpentry, remodeling, and renovation services. Brust attached to the complaint a copy of a handwritten invoice ("the invoice") with various items of work and monetary amounts listed. Brust sought "the amount of $20,660.00, less applicable credits," along with interest and attorney fees, alleging claims of breach of contract, account stated, and quantum meruit.

Craft House filed an answer generally denying Brust's allegations but admitting that Brust performed some carpentry and manual-labor work for Craft House. Craft House alleged "that [Brust] was justly compensated for the work completed, and in accordance with the oral agreement between the parties." Craft House further pleaded the affirmative defense of unclean hands.

Craft House filed a "counter-complaint" seeking an award of attorney fees and litigation expenses under the Alabama

[2]No issue has been raised regarding Stewart's individual liability.

Litigation Accountability Act, § 12-19-210 et. seq. ("the ALAA"). In its counter-complaint, Craft House alleged, among other allegations, that, "[i]n 2016, [Brust and Craft House] entered into an oral agreement for [Brust] to complete some carpentry work. [Brust] was compensated in money, goods and services, for the work completed, as per and in accordance with the oral agreement." Brust filed an answer to the counter-complaint admitting that the parties had entered into an oral agreement, denying that he had been fully compensated, and denying the other allegations in the counter-complaint.

On October 25, 2017, Craft House filed a motion for a summary judgment contending that there were no genuine issues of material fact and that it was entitled to a judgment as a matter of law. Craft House stated that its motion was supported by the following assertions:

> "1. [Brust] failed to answer the thirty one discovery questions provided to him, claiming [Craft House] had exceeded the limit of interrogatories under [Ala. R. Civ. P.,] Rule 33. [Craft House's] interrogatories asked thirty one questions, in compound form, each specifically related to a specific claim of [Craft House].
>
> "2. Of the questions that were answered, one through nine, [Brust] was unable to provide any dates or times that he did the work he claims. On question nine [Brust] merely provided that he began work on

> November 13, 2016. No completion date or hours worked were given. No dates or times were provided for the other answered questions requesting such information.
>
> "3. Furthermore, in his answer to Question 5, [Brust] admits that 'I did not perform work on the lights at the Wetumpka location. I performed demolition only to lights and switches on the walls torn down.' No dates or hours are given for this work as requested in [Craft House's interrogatory]. [Brust] has claimed in his initial filing that $1,000 is owed to him by [Craft House] for Lights at the Wetumpka location.
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> "....
>
> "5. Furthermore, in his answer to Question 7 [Brust] admits 'I did not perform any work on the cooler, other than cutting an opening for taps, because no cooler had been purchased at that time.' [Brust] claims $500 for work done on the cooler at the Wetumpka location in his initial claim.
>
> "6. Furthermore, in his answer to Question 8, [Brust] admits 'I did not perform electrical work at the Wetumpka location. I removed old plugs during demolition so that the dry wall could be hung.' [Brust] claims $1,500 for 'Electrical' work done at the Wetumpka location."

Despite the references to interrogatories, Craft House's motion for a summary judgment did not contain any attachments. Brust filed a reply arguing that Craft House had not attempted to resolve the discovery dispute regarding the unanswered interrogatory questions pursuant to Rule 37, Ala. R. Civ. P., and that there was no evidence presented to support Craft

House's motion. Craft House filed a response to Brust's reply in which it reiterated the assertions in its motion for a summary judgment but still did not provide any attachments. On December 14, 2017, the trial court entered an order denying Craft House's motion for a summary judgment.

On January 5, 2018, Brust filed a motion for a summary judgment, presenting arguments for each of the claims alleged in his complaint. Brust asserted that the parties had agreed for him to perform work at the Prattville and Wetumpka locations in return for compensation for the work. Brust asserted that, after the parties agreed to terminate their relationship, Brust delivered an invoice for services rendered and Craft House did not provide adequate compensation for the work performed. Brust credited Craft House for partial compensation that it had provided and stated that he sought the remaining total owed of $20,660, plus interest and attorney fees. Brust asserted that he performed the following work from February 2016 to May 2016 at the Prattville location:

"• designed multiple carpentry projects;

"• painted walls, cut in edges and trim for paint;

> "• cut lumber for the chairs and pallet wood that was to go on the walls, for the large wooden Alabama flag that hangs on the wall;
>
> "• cut trim and lumber to build the bar that runs the length of the restaurant;
>
> "• sanded, stained, and lacquered tables and bar several times;
>
> "• rewired the coolers, boxes, plugs under the bar;
>
> "• ran new wire from power box to the cooler through the ceiling;
>
> "• wired a new breaker for cooler and shelves in dishwashing area;
>
> "• hung TV brackets and installed two televisions;
>
> "• installed new door hinges, cut holes for cooler taps (See Exhibits 2-15, attached)."

Brust asserted that he performed the following work at the Wetumpka location:

> "• demolition services to prepare for the building renovations,
>
> "• built the bathroom walls and hung drywall,
>
> "• cut openings for cooler taps,
>
> "• took out electrical plugs before demolition."

In support of his motion, Brust attached, among other things, a copy of the invoice, screenshots of social-media postings,

an affidavit from himself, and an affidavit from his wife, Trina Brust.

On June 8, 2018, Brust filed a motion asking the trial court to rule on his motion for a summary judgment. Craft House filed a response to the motion, arguing that Brust had not produced sufficient evidence to substantiate his claims and reiterating some of the assertions made in its motion for a summary judgment. No attachments were provided. Brust filed a reply stating that Craft House had not submitted any evidence to show a genuine issue of material fact.

On July 4, 2018, the trial court entered an order granting a partial summary judgment in favor of Brust, stating, in relevant part:

> "The Plaintiff, Eddie Brust, was hired in 2016 by Defendants, Autauga Creek Craft, LLC, et al., to complete carpentry, plumbing, renovation, and remodeling services. The Plaintiff alleges he was not fully compensated for the work he performed at request of Defendants.
>
> "The Plaintiff alleges he performed services as requested by Defendants from February 2016 to opening day in May 2016. Plaintiff sent an invoice for the total outstanding amount for services rendered. The exhibit that purports to be an invoice looks like figures written on notebook paper torn from a notebook, with no proof of being sent prior to the case being opened. Plaintiff alleges that the total amount owed, after giving credit for partial

> compensation, is $20,660.00, for electrical, plumbing, renovation, and construction work performed at the defendants' properties. Plaintiff filed a Motion for Summary Judgment on January 5, 2018. Defendants failed to file a response to the Motion for Summary Judgment.
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> "....
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> "Here, Defendant[s] [have] submitted no evidence to contradict the Plaintiff's motion for summary judgment. The Defendant[s] in essence [have] repeatedly denied allegations set forth in the Plaintiff's motion, treating their response as a mere answer to a complaint. Upon consideration thereof, it is ORDERED, ADJUDGED AMD DECREED as follows: Summary Judgment therefore shall be granted in part to the Plaintiff."

(Capitalization in original.) The trial court set a hearing to determine damages, finding that there was an issue as to the amount in controversy.

On August 4, 2018, Craft House filed a motion to "reconsider" the partial summary judgment. Among other assertions, Craft House argued that Brust had not substantiated his claims with sufficient evidence and that the terms of the agreement between the parties were ambiguous. Brust filed a response to the motion, arguing that he had submitted sufficient evidence in support of each of his claims and that Craft House had submitted no evidence to contradict his claims.

On August 22, 2018, the trial court conducted a hearing during which it received testimony. Brust testified that Stewart had asked him to help with the remodeling and renovation work at the Prattville and Wetumpka locations. Both Stewart and Brust testified that Brust and Craft House did not have a written contract, that Brust and Stewart had talked about the work and compensation, but that nothing was written down. Brust testified that the parties had stated that Brust would be reimbursed when the establishments became open for business and started generating revenue.

Stewart testified that the agreement was for an exchange of goods and services and that Brust had told him that he did not want a record that would show that he was generating extra income due to a child-support obligation. Brust denied that he had requested for Stewart to pay him in cash and services to conceal the income or that he was worried about having to pay more in child support with the extra income. Stewart testified that a number of friends, relatives, and contractors had contributed to the work; that only contractors were given checks; and that the arrangement with everyone else was an exchange of services. James Wisenhunt, a friend of Stewart's

and whose wife works at the Prattville location, testified that he worked about 40 hours at the Wetumpka location and did not receive payment but received food while working and services to fix his telephone. Trina Brust testified that the arrangement was for Brust to be compensated with payments and not gifts after Craft House began making money because Stewart did not have the money to pay up front after using funds from his retirement account to finance the business.

Brust testified that he performed work at the Prattville location from February to May 2016 and submitted pictures to show the work that he had done. According to Brust, the work included building the bar, cutting a hole in the wall for the beer taps, running electrical wiring for televisions and a cooler, painting walls, replacing the lighting, helping to build 10 to 11 tables, helping to build a wall out of burnt pallet wood, designing and installing a ledge or bar rail along the walls for people to set drinks on, replacing a cabinet and flooring near a sink, helping to install holders for drink glasses and wine glasses, helping to cut wood for a chalkboard, helping to build and mount a wooden flag, installing and running the wiring for a cooler for beer kegs,

and replacing the toilet, sink, vanity, and flooring in a bathroom. Brust testified that he owned a chop saw with which all the wood cutting was done.

Stewart testified that, at the Prattville location, Trina Brust and Paige Stewart did the painting; that both he and Brust did the electrical work; that he, Brust, and Paige's brother did the work for the cooler; that he and Brust did the plumbing work; that he and Brust did flooring work; that he did the bar rail himself; and that Brust had cut out the tops for only some of the tables. According to Stewart, Brust did not do all the work himself on any of the projects; Brust was one of eight people who helped to do the work; and either he or Brust directed the work at the location. Paige Stewart, a joint owner of Autauga Creek Craft House, LLC, testified that she had stained and sanded the bar at the Prattville location, that Trina Brust had helped her with the tables, and that she had done all the work with the floors. Stewart testified that the work at the Prattville location was completed on May 18, 2016.

Stewart testified that Craft House began leasing the property at the Wetumpka location in September 2016. Brust

testified that, at the Wetumpka location, he participated in the demolition of a wall, cut and taped electrical wires in the wall, helped remove stucco off a wall, took down a wall and reframed it, did drywall work on a back wall, built a bar that was twice as long as the one at the Prattville location, and helped direct people who were working at the Wetumpka location. Stewart testified that, from his recollection, Melissa Tucker did all the painting at the Wetumpka location, that Brust hung drywall, that Brust helped him form some walls and tear down some walls, that Brust might have done a little electrical work, and that Brust might have removed a toilet. Stewart testified that Brust did not do any of the work for the lighting or for the cooler, flooring, or tables.

Regarding the bar in the Wetumpka location, Stewart testified that he, Brust, and another person had discussed how they were going to build it. Stewart testified that he went to Orlando, Florida, to purchase a motorcycle that he intended to give to Brust while Brust met with the city inspector regarding the location and size of the bar. Stewart testified that Craft House's architect had told them to wait on the drawings for the bar before building it and that he had told

Brust to wait on the drawings. Brust testified that he met with the city inspector as Stewart had instructed, that the city inspector said that the bar had to be a certain number of feet away from the wall, but that Stewart wanted the bar closer to the wall. Brust testified that he built the bar where Stewart wanted it. Stewart testified that, after the fire inspector saw the bar, Craft House had to take down sections of the bar and move it to meet the requirements of the fire code.

Stewart testified that he and Brust had been close, but, he said, they had a breakdown in their relationship in November 2016. Brust testified that, on November 27, 2016, Stewart asked him for his bill and told him to remove his belongings at the Wetumpka location, to leave the premises, and to not return to either establishment. Brust testified that, on that day, he presented Stewart with the invoice with a list of work items and charges. According to Brust, Stewart took the invoice and said "give me 30 days and I'll have you paid." Stewart testified that he promised to review the invoice but did not promise that he was going to pay. Brust testified that the invoice requested $20,660, which

represented the total amount that he was going to charge Craft House had he been allowed to finish the work. Craft House did not pay the amount requested in the invoice.

Brust testified regarding the following amounts he charged in the invoice for work that he performed at the Prattville location: $3,000 for building the bar; $1,000 for painting; $1,500 for electrical work; $1,000 for lighting; $500 for installation and wiring for a cooler; $1,000 for plumbing; $350 for flooring; $1,500 for building the bar rail; and $500 for constructing tables. The total amount of charges for the Prattville location was $10,350. Brust testified regarding the following amounts listed on the invoice that were credited to Craft House for items Stewart provided to him or his family: $500 for beers; $1,000 for gravel; $1,000 for tires for Trina Brust's car; $250 for a rear main seal on Brust's truck; and $500 for a cooler. The total amount of credit to Craft House was $3,250. Brust testified that Craft House owed him a total of $7,100 for the work he performed at the Prattville location.

Brust testified that the invoice included work items at the Wetumpka location that he performed, partially performed,

or did not perform at all. According to Brust, he had anticipated performing all the work items, but he was abruptly asked to leave and did not have time to change the list on the invoice. Brust testified that he had completed building the bar and charged Craft House the amount of $7,500 for that work. Brust testified that he sought a reduced amount for the following work items that he only partially performed: $500 for painting, $100 for electrical work, $150 for cutting a hole in the wall for a cooler, and $100 for plumbing work in removing a toilet. According to Brust, he was unable to work on other items listed on the invoice, such as lighting, flooring, and tables. Brust testified that he gave Craft House credit for the following amounts and items that Stewart had provided: $700 for a $500 payment and $200 in cash; $40 for gas; and $200 paid to Brust's son. The credits totaled $940, for a total of $7,410 that Brust testified he was seeking for his work at the Wetumpka location.

Brust presented the testimony of Russell Miller as an expert in the field of construction and renovation without any objection. Miller's company conducts new construction and remodeling projects for residential and commercial properties.

Miller testified that he had reviewed the pictures and had visited the Prattville and Wetumpka locations and that the compensation Brust sought for the work items were mostly less than fair price and that a couple of the requested compensation amounts were a fair price. According to Miller, he would have charged significantly more than what Brust requested. Miller testified that the evaluation of compensation depended on work completed and not on the hours expended.

Stewart testified that there was no estimate beforehand for the work Brust performed. According to Stewart, the parties did not agree that Craft House would pay Brust $3,000 for his work on the bar in Prattville. Stewart testified that he would not have agreed to that amount because he could not have afforded to pay it and that he had used funds from his retirement account and money from savings and bonuses to finance the business and to purchase materials. Brust testified that Stewart had not expressed an agreement to the amounts on the invoice but that the amounts are what he would have charged anyone for the work he performed.

Brust testified that he had worked for Craft House from February to November 2016 on his days off and after his shifts at his regular employment as a truck driver. Brust testified that he was not a licensed contractor, carpenter, or plumber but that he had worked for two years doing plumbing and pipe-fitting work in a previous job. Brust testified that a contractor's license was not required for plumbing and electrical work in the historic part of downtown Prattville. There was no evidence introduced at trial that the work performed by Brust was required to be performed by a licensed contractor. Brust testified that it took over a week to build the bar in the Wetumpka location. Brust could not recall the hours expended or the dates that he had worked on other items. Brust testified that sometimes he worked by himself and that sometimes others helped but that the amounts he charged in the invoice was his total price even with the help he received.

Stewart testified that, although Brust did work for him at the Prattville and Wetumpka locations, he fully compensated Brust for the work. Brust testified that the items he credited to Craft House on the invoice did not adequately compensate him for the work he performed. According to Stewart, in

addition to those items, Stewart provided Brust with $340 in meals over 20 days, his work on Brust's deck, his help with Brust's move to Prattville, and his work on Brust's septic tank. Stewart testified that he had claimed the meals as business expenses for tax purposes. Brust denied receiving meals worth $340. According to Brust, Stewart's son, and not Stewart, worked on Brust's deck, and, he said, he paid Stewart's son for that work. Stewart testified that he had helped with the septic tank when Brust moved to Prattville before any work had begun at the Prattville location. Brust testified that Stewart had helped him move to Prattville long before the work at the establishments. Stewart testified that he sold the motorcycle he had purchased in Orlando for Brust after Brust sued him.

Brust presented several witnesses regarding attorney fees. An attorney testified that $200 an hour was a fair rate for this type of case and that a total of $9,659.21 in attorney fees and expenses was a fair amount for litigation over a year and a half in this type of case. The attorney testified that he regularly billed for his paralegal's time spent working on cases. Another witness testified regarding a

document listing Brust's counsel's attorney fees and expenses that totaled $9,659.21 but did not include the fees for the hearing that day. After the conclusion of testimony, Brust's counsel presented caselaw and sections of § 8-29-1 et seq., Ala. Code 1975 ("the Prompt Pay Act"), regarding his claim for interest on damages and attorney fees. The trial court allowed the parties to provide posttrial briefs on the issue.

On September 1, 2018, Craft House filed a motion asking the trial court to deny Brust's request for attorney fees. Among other arguments in its motion, Craft House argued that the trial court should deny an award of attorney fees to Brust because the parties lacked a written contract containing terms of agreement regarding compensation. On the same day, Brust filed a posttrial brief, arguing that he was entitled to attorney fees pursuant to § 8-29-6, Ala. Code 1975, a provision within the Prompt Pay Act. In his brief, Brust described the billed hours and hourly rates for the amount of attorney fees requested. The attachments to the brief included an affidavit of Brust's counsel in support of $11,909.21 as the amount of attorney fees requested.

On October 22, 2018, the trial court entered an order granting Craft House's motion to deny attorney fees to Brust, stating: "[Brust] is not entitled to attorneys fees in a breach of contract action when there was no written contract providing for attorney's [fees] in the event of a breach." On that same day, the trial court entered a judgment in favor of Brust awarding him $14,660 in damages plus interest in the amount of $3,406.87 that had accrued at a rate of 12% per annum. The judgment also ordered Craft House to pay Brust's legal expenses in the amount of $11,909.21. In the judgment, the trial court stated that it had entered a partial summary judgment in favor of Brust that withheld a ruling on the amount of damages and that the hearing on August 22, 2018, was on the issue of damages. The trial court found that Craft House did not fairly and reasonably compensate Brust for the work he had performed. In the judgment, the trial court recited provisions of the Prompt Pay Act, including § 8-29-6, Ala. Code 1975, and factual findings pertaining to those provisions.

On November 5, 2018, Craft House filed a motion for clarification. In its motion, Craft House noted that, on

October 22, 2018, the trial court had entered an order denying Brust's request for attorney fees but then entered a judgment that contained a provision granting the request for attorney fees. On November 5, 2018, the trial court entered an order granting Craft House's motion, stating: "Request for Attorney fees is denied." Later that day, Brust filed a motion to set aside the November 5, 2018, order. On November 19, 2018, the trial court entered an order allowing the parties to submit written responses in regard to following statement:

> "The Court has reviewed the pleadings, and [states] the following:
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> > "The General Rule is that attorney's fees are recoverable only when authorized by statute, provided in contract, or in an equitable proceeding when efforts of an attorney create a fund out of which fees may be paid. Peseau v. Civil Service Board of Tuscaloosa County, 401 So. 2d 79 (Ala. Civ. App. 1981).
>
> "In the present case, because there was an implied contract, there were no provisions in a contract providing for the award of attorney's fees. The issue becomes, does the Miller Act in its entirety constitute a statute that allows for the recovery of attorney's fees where there was no contract provision for attorney's fees?"

Craft House and Brust each filed a response.

On November 20, 2018, Craft House filed a motion to alter, amend, or vacate the judgment or, in the alternative, for a new trial. In the motion, Craft House reiterated its arguments that allegations in its answer and references to Brust's answers to interrogatories demonstrated genuine issues of material fact, thus precluding the entry of the partial summary judgment. Craft House argued that Brust did not meet the definition of a general contractor pursuant to § 34-8-1, Ala. Code 1975, and that, therefore, there was no valid contract between the parties. Craft House also argued that the award of 12% interest per annum under § 8-29-3(d), Ala. Code 1975, of the Prompt Pay Act was not appropriate because Brust was not a general contractor and because the parties' contract did not contain a date of payment as required by § 8-29-2, Ala. Code 1975. Craft House further argued that the award of damages was not appropriate because, it asserted, the parties could not have foreseen the amount awarded, Brust was not a licensed contractor, and the parties' arrangement consisted of several independent agreements pursuant to which Brust performed labor and was compensated in cash, goods, and services.

On December 2, 2018, the trial court entered an order denying Brust's motion to set aside and another order denying Craft House's motion to alter, amend, or vacate the judgment or, in the alternative, for a new trial.

On January 4, 2019, Craft House filed a notice of appeal to this court.[3] On January 18, 2019, Brust filed a notice of appeal to this court. The appeals were consolidated ex mero motu. This court has jurisdiction pursuant to § 12-3-10, Ala. Code 1975.

Discussion

I.

Craft House contends that the partial summary judgment in favor of Brust should be reversed because, it asserts, the record contains genuine issues of material fact about the

[3]Although the judgment did not specifically address Craft House's claim for attorney fees under the ALAA or generally deny all other claims not addressed specifically in the judgment, the ALAA claim was implicitly denied, and Craft House has appealed from a final judgment. See Klinger v. Ros, 33 So. 3d 1258, 1260 (Ala. Civ. App. 2009) ("Our supreme court has held that, when a trial court enters an otherwise final judgment on the merits of a case but fails to address a pending ALAA claim or to reserve jurisdiction to later consider that claim, the ALAA claim is implicitly denied by the judgment on the merits.").

agreement between Craft House and Brust.[4] We generally apply the following standard of review to a summary judgment:

> "This Court's review of a summary judgment is de novo. Williams v. State Farm Mut. Auto. Ins. Co., 886 So. 2d 72, 74 (Ala. 2003). We apply the same standard of review as the trial court applied. Specifically, we must determine whether the movant has made a prima facie showing that no genuine issue of material fact exists and that the movant is entitled to a judgment as a matter of law. Rule 56(c), Ala. R. Civ. P.; Blue Cross & Blue Shield of Alabama v. Hodurski, 899 So. 2d 949, 952–53 (Ala. 2004). In making such a determination, we must review the evidence in the light most favorable to the nonmovant. Wilson v. Brown, 496 So. 2d 756, 758 (Ala. 1986). Once the movant makes a prima facie showing that there is no genuine issue of material fact, the burden then shifts to the nonmovant to produce 'substantial evidence' as to the existence of a genuine issue of material fact. Bass v. SouthTrust Bank of Baldwin County, 538 So. 2d 794, 797–98 (Ala. 1989); Ala. Code 1975, § 12-21-12. '[S]ubstantial evidence is evidence of such weight and quality that fair-minded persons in the exercise of impartial judgment can reasonably infer the existence of the fact sought to be proved.' West v. Founders Life Assur. Co. of Fla., 547 So. 2d 870, 871 (Ala. 1989)."

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[4]Although the partial summary judgment was an interlocutory order, Craft House has appealed from a final judgment and may raise issues regarding the partial summary judgment on appeal. See Rule 4(a)(1), Ala. R. App. P. ("On an appeal from a judgment or order a party shall be entitled to a review of any judgment, order, or ruling of the trial court."); Shades Ridge Holding Co. v. Cobbs, Allen & Hall Mortg. Co., 390 So. 2d 601, 612 (Ala. 1980) (reviewing partial summary judgment in appeal of a final judgment).

Dow v. Alabama Democratic Party, 897 So. 2d 1035, 1038-39 (Ala. 2004).

In this case, the trial court entered a partial summary judgment in favor of Brust and conducted a trial on the remaining issue of the amount of damages. Rule 56(d), Ala. R. Civ. P., provides:

> "If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly."

Craft House notes that it filed a motion to "reconsider" the partial summary judgment and asserts that the motion was not effectively denied until after testimony was taken at the August 22, 2018, hearing and the entry of the final judgment.

> "A partial summary judgment on the issue of liability, permitted under Rule 56(c)(3), Ala. R. Civ. P., is not a final judgment, but is instead an interlocutory order. See Rule 56(c)(3) (stating that

> a summary judgment on the issue of liability alone is interlocutory); see also Zimzores v. Veterans' Admin., 778 F.2d 264, 266 (5th Cir. 1985) (stating that a summary judgment on the issue of liability alone is interlocutory, based on the express reference to the interlocutory character of such an order in Rule 56(c), Fed. R. Civ. P.). An interlocutory order is subject to revision at any time before the court enters a final judgment that disposes of all the issues. See Simmons Mach. Co. v. M & M Brokerage, Inc., 409 So. 2d 743, 759 (Ala. 1981) (stating that a partial summary judgment is an interlocutory order and as such is 'subject to revision at any time before the entry of judgment adjudicating all the parties' claims, rights, and liabilities'); Thomas [v. Swindle], 676 So. 2d [333,] 334 [(Ala. Civ. App. 1996)] (same)."

Lanier v. Surrett, 772 So. 2d 1187, 1188 (Ala. Civ. App. 2000). This court will not overturn a trial court's decision on a motion to reconsider a partial summary judgment unless the trial court has exceeded its discretion. See id. at 1189; Bon Harbor, LLC v. United Bank, 53 So. 3d 82, 94 (Ala. 2010) ("'Whether a trial court revises a partial grant of summary judgment ... is a matter of discretion which, absent an abuse, we will not disturb.'" (quoting Simmons Mach. Co. v. M & M Brokerage, Inc., 409 So. 2d 743, 759 (Ala. 1981))).

Craft House argues that its pleadings presented genuine issues of material fact through the denials of Brust's claims

and the allegation that Brust was justly compensated for the work he completed in accordance with their oral agreement.

> "'A motion for summary judgment tests the sufficiency of the evidence. ... [W]hen a motion for summary judgment is made and supported as provided in Rule 56, [Ala. R. Civ. P.,] the nonmovant may not rest upon mere allegations or denials of his pleadings, but must set forth specific facts showing that there is a genuine issue for trial. Proof by substantial evidence is required.'"

Thornbury v. Madison Cty. Comm'n, 274 So. 3d 294, 296 (Ala. Civ. App. 2018) (quoting Sizemore v. Owner-Operator Indep. Drivers Ass'n, Inc., 671 So. 2d 674, 675 (Ala. Civ. App. 1995)). We note that Craft House does not argue that Brust's prima facie showing was insufficient, and, thus, Craft House had the burden to produce substantial evidence of a genuine issue of material fact. Because the denials and allegations in Craft House's pleadings do not constitute evidence, Craft House has not demonstrated that it presented a genuine issue of material fact through its pleadings.

Craft House next argues that it demonstrated genuine issues of material fact through references to answers that, it asserts, were provided by Brust to interrogatories it had propounded. According to Craft House, the answers to interrogatories indicated that Brust was unable to provide

dates and times that he worked, that Brust performed demolition work on lights and not installation of lights at the Wetumpka location, and that Brust did limited work on the cooler at the Wetumpka location. Although Craft House referred to the answers to interrogatories, it does not appear that it submitted those answers to the trial court in opposition to Brust's motion for a summary judgment. It is well settled that

> "'"[m]otions and arguments of counsel are not evidence." "[S]tatements in motions are not evidence and are therefore not entitled to evidentiary weight." "[B]riefs submitted in support of motions are not evidence to be considered by the Court in resolving a summary judgment motion."'"

Ex parte Coleman, 861 So. 2d 1080, 1084 (Ala. 2003) (quoting Fountain Fin., Inc. v. Hines, 788 So. 2d 155, 159 (Ala. 2000)); see Ex parte Russell, 911 So. 2d 719, 725 (Ala. Civ. App. 2005) ("The unsworn statements, factual assertions, and arguments of counsel are not evidence."). Therefore, Craft House's references to answers to interrogatories did not constitute evidence that could have demonstrated any genuine issues of material fact.

Craft House further argues that evidence produced at the trial on the issue of damages presented genuine issues of material fact as to its liability. Craft House refers to

Stewart's testimony that the agreement was for Brust to be compensated through a trade of goods and services, that Stewart's work on Brust's deck was part of the goods-and-services exchange, that the parties' agreement did not include a $3,000 payment to Brust for building the bar at the Prattville location, that Stewart did not recall Brust doing any painting at the Prattville location, that Stewart built the bar rail in the Prattville location, and that Brust did not do any of the work with the lights, the flooring, the cooler, and the tables and did only a little of the work with the plumbing at the Wetumpka location. The partial summary judgment and the final judgment, however, both indicate that the trial court had considered the hearing at which it received testimony to be on the issue of damages. The record does not show that this argument against the partial summary judgment based on Stewart's testimony during that hearing was ever presented to the trial court. "This Court cannot consider arguments raised for the first time on appeal; rather, our review is restricted to the evidence and arguments considered by the trial court." Andrews v. Merritt Oil Co., 612 So. 2d

409, 410 (Ala. 1992). We therefore decline to further consider this argument.

II.

Craft House contends that "the award of damages in the amount of $14,660.00 is in error as breach of contract damages, because there was no meeting of the minds or mutual assent to the terms of the alleged verbal agreement, Brust was not a licensed contractor, and because Brust was thoroughly compensated throughout the course of the relationship with Crafthouse through goods and services." In his complaint, Brust alleged a claim based on the theory of quantum meruit, and, in its November 19, 2018, order, the trial stated a finding of an implied contract between the parties.

> "Recovery on a theory of quantum meruit arises when a contract is implied. Brannan & Guy, P.C. v. City of Montgomery, 828 So. 2d 914 (Ala. 2002).
>
> > "'There are two kinds of implied contracts--those implied in fact and those implied in law. Contracts implied in law are more properly described as quasi or constructive contracts where the law fictitiously supplies the promise [to pay for the labor or services of another] to prevent a manifest injustice or unjust enrichment, etc.'

> "Green v. Hospital Bldg. Auth. of Bessemer, 294 Ala. 467, 470, 318 So. 2d 701, 704 (1975). This Court has stated:
>
> > "'It is the settled law of this State that where one knowingly accepts services rendered by another, and the benefit and the result thereof, the law implies a promise on the part of the one accepting with knowledge the services rendered by another to pay the reasonable value of such services rendered.'
>
> "Hendrix, Mohr & Yardley, Inc. v. City of Daphne, 359 So. 2d 792, 795 (Ala. 1978)."

Mantiply v. Mantiply, 951 So. 2d 638, 656 (Ala. 2006). We note that the trial court did not specify whether it found a contract implied in fact or implied in law.

Craft House argues that, because there was no evidence indicating that the parties had agreed on the figures that Brust presented within his invoice before the performance of the services, there was no mutual assent to the terms of the oral agreement. The legal authority regarding implied contracts that Craft House cites is Stacey v. Peed, 142 So. 3d 529, 531 (Ala. 2013), in which our supreme court stated:

> "'The basic elements of a contract are an offer and an acceptance, consideration, and mutual assent to the essential terms of the agreement.' Hargrove v. Tree of Life Christian Day Care Ctr., 699 So. 2d 1242, 1247 (Ala. 1997). Proof of an implied contract requires the same basic elements as an express

> contract. Steiger v. Huntsville City Bd. of Educ., 653 So. 2d 975, 978 (Ala. 1995)(explaining that '[n]o contract is formed without an offer, an acceptance, consideration, and mutual assent to terms essential to the contract' (citing Strength v. Alabama Dep't of Fin., 622 So. 2d 1283, 1289 (Ala. 1993)))."

We note that "'[a] contract implied in fact requires the same elements as an express contract, and differs only in the "method of expressing mutual assent." Implied contracts normally arise in situations where there is a bargained-for exchange contemplated by the parties, but no overt expression of agreement.'" Ex parte Jackson Cty. Bd. of Educ., 4 So. 3d 1099, 1104 (Ala. 2008) (quoting Ellis v. City of Birmingham, 576 So. 2d 156, 157 (Ala. 1991), quoting in turn Berry v. Druid City Hosp. Bd., 333 So. 2d 796, 799 (Ala. 1976)). It is undisputed that the parties had reached an agreement that Brust would perform services for Craft House and would be compensated for those services. As asserted by Craft House, the monetary value of those services was not expressly settled when the parties began operating under their agreement. Craft House, however, also asserts that the exchange for Brust's services was for future goods and services, and there is no indication that those goods and services were determined

before the parties had reached the agreement for Brust to provide services. We have recognized such agreements in which the terms of compensation were not fixed as implied contracts. See Evans v. Dominick, Fletcher, Yielding, Acker, Wood & Lloyd, P.A., 494 So. 2d 657, 658 (Ala. Civ. App. 1986) ("It is well settled that 'damages for the reasonable value of services rendered under an implied contract, the terms of which were not fixed by the parties, is merely an open account.'" (quoting White v. Sikes, Kelly, Edwards & Bryant, P.C., 410 So. 2d 66, 69 (Ala. Civ. App. 1982))). We conclude that the parties did not lack mutual assent to their agreement merely because there was no express agreement as to the value of Brust's services before they were performed.

Stewart provided testimony that Brust had been compensated for his services with the goods and services he provided to Brust. Brust presented testimony that he was not fully compensated for his services.

> "'It is well established that "[w]hen a trial court hears ore tenus testimony 'its findings on disputed facts are presumed correct and its judgment based on those findings will not be reversed unless the judgment is palpably erroneous or manifestly unjust.'"' Black Diamond Dev., Inc. v. Thompson, 979 So. 2d 47, 52 (Ala. 2007) (quoting New Props., L.L.C. v. Stewart, 905 So. 2d 797, 799 (Ala. 2004),

> quoting in turn Philpot v. State, 843 So. 2d 122, 125 (Ala. 2002))."

Jewett v. Boihem, 23 So. 3d 658, 660–61 (Ala. 2009). The trial court received testimony and other evidence regarding the work Brust performed, the amounts he requested, and what Craft House had provided to Brust. Because the trial court could have concluded from the evidence that Brust has not been fully compensated for his work, we decline to substitute our judgment for the trial court's on this factual matter. See McIver v. Bondy's Ford, Inc., 963 So. 2d 136, 143 (Ala. Civ. App. 2007).

Craft House also argues that the damages awarded in the amount of $14,660 under a theory of quasi-contract must be reversed because "Brust completed several independent agreements with Crafthouse, whereby he was paid in cash, goods and services." Craft House does not refer to evidence establishing that there were several independent agreements rather than an ongoing agreement between the parties or to legal authority to support those assertions as reasons to reverse the damages award. "Rule 28(a)(10)[, Ala. R. App. P.,] requires that arguments in briefs contain discussions of facts and relevant legal authorities that support the party's

position. If they do not, the arguments are waived." White Sands Grp., L.L.C. v. PRS II, LLC, 998 So. 2d 1042, 1058 (Ala. 2008).

Craft House also argues that Brust cannot enforce a contract for services because he is "not a licensed contractor, carpenter, electrician, or plumber." Craft House does not provide legal authority regarding licensing requirements and how those requirements would apply to Brust except if he were acting as a "general contractor." A contract involving work performed by an unlicensed party is unenforceable if the work required a licensed general contractor as defined in § 34-8-1, Ala. Code 1975. Dabbs v. Four Tees, Inc., 36 So. 3d 542, 555 (Ala. Civ. App. 2008). According to Craft House, "[a] contractor not licensed in Alabama may not enforce in Alabama Courts a contract valued at

more than $1,000.00."[5] Section 34-8-1(a), Ala. Code 1975, however, provides:

> "For the purpose of this chapter, a 'general contractor' is defined to be one who, for a fixed price, commission, fee, or wage undertakes to construct or superintend or engage in the construction, alteration, maintenance, repair, rehabilitation, remediation, reclamation, or demolition of any building, highway, sewer, structure, site work, grading, paving or project or any improvement in the State of Alabama where the cost of the undertaking is fifty thousand dollars ($50,000) or more, shall be deemed and held to have engaged in the business of general contracting in the State of Alabama."[6]

See Dabbs v. Four Tees, Inc., 36 So. 3d at 555 (holding that party was performing work as a general contractor because the cost of the undertaking exceeded $50,000). Brust never sought

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[5]We note that Alabama Law of Damages § 17:18 (6th ed.), states: "A contractor not licensed in Alabama may not enforce in Alabama courts a construction contract valued at more than $1,000.[19]" Footnote 19 lists the same citations that Craft House cites for the same proposition: KLW Enters., Inc. v. West Alabama Commercial Indus., Inc., 31 So. 3d 136, 137 (Ala. Civ. App. 2009); Dabbs v. Four Tees, Inc., 36 So. 3d 542, 552 (Ala. Civ. App. 2008); and White-Spunner Constr., Inc. v. Construction Completion Co., 103 So. 3d 781, 794 (Ala. 2012). The authorities cited, however, do not support the proposition.

[6]We note that our supreme court has held that a defense based on a party's not being a licensed contractor as required by § 34-8-1 et seq., Ala. Code of 1975, is not an affirmative defense that is required to be specially pleaded pursuant to Rule 8(c), Ala. R. Civ. P. Brown v. Mountain Lakes Resort, Inc., 521 So. 2d 24 (Ala. 1988).

an amount that equaled or exceeded $50,000 for his services, and, even though Stewart testified that he had supplied the materials, Stewart never testified as to the amount of the costs involved. The record does not demonstrate that Brust met the statutory definition of a general contractor or that Brust was required to have a license in order to enforce the parties' agreement.

III.

Craft House contends that the trial court's "award of twelve percent (12%) interest on the judgment is in violation of § 8-8-10, Code of Alabama, (1975)," which states, in relevant part:

> "(a) Judgments for the payment of money, other than costs, if based upon a contract action, bear interest from the day of the cause of action, at the same rate of interest as stated in the contract; all other judgments shall bear interest at the rate of 7.5 percent per annum, the provisions of Section 8-8-1 to the contrary notwithstanding; provided, that fees allowed a trustee, executor, administrator, or attorney and taxed as a part of the cost of the proceeding shall bear interest at a like rate from the day of entry."

"However, this section provides for post-judgment interest only." Rhoden v. Miller, 495 So. 2d 54, 58 (Ala. 1986) (citing Burgess Mining & Constr. Corp. v. Lees, 440 So. 2d 321 (Ala.

1983)). In the judgment, the trial court awarded an amount for prejudgment interest as follows:

> "The Defendants are ordered to pay the amount of $14,660.00 (fourteen thousand six hundred sixty 00/100 dollars) to the Plaintiff, plus interest in the amount of $3,406.87 (three thousand four hundred six 87/100 dollars) which accrued at a rate of 12% per annum from the date this action was filed, within 30 (thirty) days of the date of this order."

It is clear from the judgment that the trial court awarded an amount of interest pursuant to the Prompt Pay Act. Section 8-29-3(d), Ala. Code 1975, a part of the Prompt Pay Act, provides:

> "If the owner, contractor, or subcontractor does not make payment in compliance with this chapter, the owner, contractor, or subcontractor shall be obligated to pay his or her contractor, subcontractor, or sub-subcontractor interest at the rate of one percent per month (12% per annum) on the unpaid balance due."

Craft House does not provide any arguments regarding the applicability of the Prompt Pay Act to this case and, therefore, have waived any such argument. See Boshell v. Keith, 418 So. 2d 89, 92 (Ala. 1982) ("When an appellant fails to argue an issue in its brief, that issue is waived."). We further note that Brust does not challenge the amount awarded as interest and has therefore waived any such issue on appeal.

See id. Because neither party has presented an argument establishing a ground for reversal, we affirm the trial court's award of interest.

IV.

In his cross-appeal, Brust contends that he was entitled to attorney fees pursuant to § 8-29-6 of the Prompt Pay Act. It appears that courts refer to Section 8-29-1 et seq. sometimes as "the Miller Act" and sometimes as "the Prompt Pay Act."

> "Sections 8-29-1 through 8-29-8, Ala. Code 1975, compose a chapter of the Alabama Code entitled 'Timely Payments to Contractors and Subcontractors,' and are sometimes referred to as 'the Deborah K. Miller Act,' see Tolar Constr., LLC v. Kean Elec. Co., 944 So. 2d 138, 142 (Ala. 2006), or 'the Prompt Pay Act,' see R.P. Indus., Inc. v. S & M Equip. Co., 896 So. 2d 460, 461 (Ala. 2004).
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> > "'The Miller Act was enacted in 1995 and serves as Alabama's equivalent of the "prompt-payment acts" enacted in many other states. See John W. Hays, Prompt Payment Acts: Recent Developments and Trends, 22 Constr. Law. 29 (2002). The Miller Act affords contractors, subcontractors, and sub-subcontractors special remedies against owners, contractors, and subcontractors, respectively, when the latter improperly withhold payment.'
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> "Tolar Constr., LLC v. Kean Elec. Co., 944 So. 2d at 147."

Rogers & Willard, Inc. v. Harwood, 999 So. 2d 912, 919 (Ala. Civ. App. 2007). We note, however, that the provisions of § 8-29-1 et seq. should not be confused with the provisions of § 39-1-1 et seq., Ala. Code 1975, "commonly referred to as Alabama's little Miller Act. [That] Alabama statute is patterned after the Federal Miller Act, now codified at 40 U.S.C. §§ 3131–3133." Safeco Ins. Co. of Am. v. Graybar Elec. Co., 59 So. 3d 649, 655 (Ala. 2010) (citation omitted). "'The purpose of the [little Miller] act is to provide security for those who furnish labor and material in performance of government contracts as a substitute for unavailable lien rights ....'" Id. at 656 (quoting Headley v. Housing Auth. of Prattville, 347 So. 2d 532, 535 (Ala. Civ. App. 1977)).

Section 8-29-6 of the Prompt Pay Act provides:

> "A contractor, subcontractor, or sub-subcontractor may file a civil action solely against the party contractually obligated for the payment of the amount claimed to recover the amount due plus the interest accrued in accordance with this chapter. If the court finds in the civil action that the owner, contractor, or subcontractor has not made payment in compliance with this chapter, the court shall award the interest specified in this chapter in addition to the amount due. In any such civil action, the party in whose favor a judgment is rendered shall be entitled to recover payment of reasonable attorneys' fees, court costs and reasonable expenses from the other party."

An award of attorney fees pursuant to § 8-29-6 "is not tethered to provisions conditioning the award upon a showing of some sort of bad faith." Tolar Constr., LLC v. Kean Elec. Co., 944 So. 2d 138, 150 (Ala. 2006).

In the judgment, the trial court specifically stated findings of fact in conjunction with an application of the Prompt Pay Act. It is readily apparent that the judgment relied on the Prompt Pay Act for its award of damages and interest. As previously noted, Craft House has not challenged the trial court's reliance on the Prompt Pay Act, and, therefore, we analyze the judgment in the manner in which it is written. Because the trial court entered the judgment in favor of Brust and awarded him damages and interest pursuant to the Prompt Pay Act, § 8-29-6 mandates that Brust is also entitled to attorney fees. As a result, Brust has demonstrated a ground for reversing the order denying him attorney fees.

Conclusion

For the foregoing reasons, we reverse the order denying Brust attorney fees and affirm all other aspects of the judgment. The cause is remanded for further proceedings consistent with this opinion.

2180300 -- AFFIRMED.

2180344 -- REVERSED AND REMANDED.

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

Moore and Edwards, JJ., concur in the result, without writing.