

IN THE COURT OF APPEALS OF IOWA

No. 3-763 / 12-2195
Filed August 21, 2013

GIESE SHEET METAL CO., INC.,
Plaintiff-Appellant,

vs.

**PRAIRIE CONSTRUCTION CO., INC.,
UNITED FIRE & CASUALTY COMPANY,
and THE UNION COMMUNITY SCHOOL
DISTRICT,**
Defendants-Appellees.

Appeal from the Iowa District Court for Tama County, Stephen B. Jackson
Jr., Judge.

A subcontractor appeals the ruling of the district court entering summary
judgment in favor of the defendants. **AFFIRMED.**

Stephen J. Juergens and P. Christopher Williams of Fuerste, Carew,
Juergens & Sudmeier, P.C., Dubuque, for appellant.

Mark S. Rolinger and Brandon J. Gray of Redfern, Mason, Larson &
Moore, P.L.C., Cedar Falls, for appellees Prairie Construction Co., Inc., and
United Fire & Casualty Company.

Natalie Burris of Swisher and Cohrt, P.L.C., Waterloo, for appellee The
Union Community School District.

Considered by Eisenhauer, C.J., and Vaitheswaran and Doyle, JJ.

DOYLE, J.

A subcontractor on an elementary school renovation project appeals from the district court's entry of summary judgment in favor of the general contractor, surety, and public corporation on its claim for unpaid labor and materials against the project's Iowa Code chapter 573 (2011) bond. We affirm.

I. Background Facts and Proceedings

For purposes of our review of this summary judgment ruling, we find the relevant undisputed facts to be as follows.

In 2009, the Union Community School District (District) hired Prairie Construction Company, Inc. (Prairie) as its general contractor for a public improvement project at two elementary schools. Pursuant to the contract, Prairie purchased from United Fire & Casualty Company (United) an Iowa Code chapter 573 public improvement bond for the project.¹ The first three pages of the bond document were entitled "Performance Bond," and the next three pages were entitled "Payment Bond." Specifically, in regard to payment, page five included the following provision: "The Contractor and the Surety, jointly and severally, bind themselves, their heirs, executors, administrators, successors and assigns to the Owner to pay for labor, materials and equipment furnished for use in the

¹ The bond (Bond No. 54177636), issued on May 19, 2009, in the amount of \$4,014,000.00, was for "Remodeling, Additions and Miscellaneous Improvements for Union Community School District." On July 16, 2009, United issued another performance and payment bond to Prairie with nearly identical terms (Bond No. 54178688), in the amount of \$1,026,000.00, for "2009 Union Athletic Field Renovations for the Union CSD, LaPorte City, IA." Although Giese initially filed its claim seeking payment under Bond No. 54178688, it later amended the petition to raise the claim under Bond No. 54177636. At this juncture, there is no dispute the bond at issue is Bond No. 54177636, despite occasional mistaken references by the parties and the district court as to the bond number or issue date.

performance of the Construction Contract, which is incorporated herein by reference.”

Prairie contracted with R & S Plumbing, Inc. (R & S) to provide certain services as a subcontractor. R & S, in turn, contracted with Giese Sheet Metal Company, Inc. (Giese) to provide labor and materials as a subcontractor. Giese performed under the contract from December 2009 through June 2010, and submitted various applications for payment to R & S for the labor and materials it provided during that time. Although Prairie paid R & S in full pursuant to the subcontract, R & S failed to pay Giese.

On March 21, 2011, the District voted to accept final completion of the project.

On August 10, 2011, Giese filed an action against Prairie and United seeking recovery under the bond in the amount of \$74,472.39, the “total outstanding balance” owed to it by R & S. Giese subsequently filed two amended petitions, adding the District as a defendant and clarifying the bond it was requesting recovery under.

The defendants filed a motion for summary judgment,² alleging that because Bond No. 54177636 “was issued to comply with the bonding requirements of Iowa Code chapter 573, Giese’s claim is subject to the

² The defendants initially raised this claim in a motion to dismiss, alleging Giese failed to state a claim upon which relief could be granted because the bond was issued pursuant to Iowa Code chapter 573, and Giese failed to: “plead compliance with the provisions of Iowa Code Chapter 573,” and bring the claim within the time period “prescribed by Iowa Code § 573.16.” Following a hearing, the district court denied the motion to dismiss, finding “the Court simply does not have enough facts or all critical facts” “to determine the respective types of bonds, the impact of those bonds, and the potential applicability of Iowa Code chapter 573 to any of those bonds, the parties and the facts in this case.” The court stated, however, that “as the facts are more fully developed and established, it may be that these issues are revisited on summary judgment request.”

procedural requirements contained therein.” As the defendants further alleged, Giese’s claim was barred because it was filed on August 10, 2011, and “pursuant to the special statute of limitations contained in Iowa Code § 573.16, any [claim] filed to recover against the statutory bond must have been commenced between April 20, 2011, and May 20, 2011.” Giese responded that the bond at issue was actually two separate bonds (a payment bond *and* a performance bond) and chapter 573 only mandated a performance bond for the project. Giese further alleged that because its claims were based on the payment bond, its failure to comply with chapter 573 had no bearing on the vitality of its claims.

Following a hearing, the district court entered an order granting summary judgment in favor of the defendants, finding “[t]here was only one bond issued by Prairie (with United as surety) . . . for performance of the contract for construction of the public improvement at elementary schools in the Union district,” and that bond is “subject to the provisions of Iowa Code chapter 573, including § 573.16.” See Iowa Code § 573.16 (“[A]ny claimant for labor or material who has filed a claim . . . may, *at any time after the expiration of thirty days, and not later than sixty days, following the completion and final acceptance of said improvement,* bring action in equity in the county where the improvement is located to adjudicate all rights to said fund, or to enforce liability on said bond.” (emphasis added)). The court concluded, in relevant part, “Because it is undisputed that Plaintiff did not file an action in equity in Tama County at any time after the expiration of thirty days, and not later than sixty days, following the completion and final acceptance of the improvement at issue in this case, Plaintiff’s claim is untimely pursuant to § 573.16.”

Giese now appeals.

II. Standard of Review

We review the district court's grant of summary judgment for correction of errors at law. *Sallee v. Stewart*, 827 N.W.2d 128, 132 (Iowa 2013). A party is entitled to summary judgment when the record shows no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law. Iowa R. Civ. P. 1.981(3). The burden is on the moving party to demonstrate that it is entitled to judgment as a matter of law, and we view the evidence in the light most favorable to the nonmoving party. *Sallee*, 827 N.W.2d at 132.

III. Discussion

Giese contends the district court erred in granting summary judgment when genuine issues of material fact existed as to “whether the payment bond and performance bond in this case are one and the same,”³ and “whether, even if construed as only one bond issued in accordance with the statute, the inclusion of a separate payment bond component provided coverage beyond the requirements of the statute.” Alternatively, Giese claims the district court erred in determining the performance bond and payment bond are “one and the same.” Giese further claims the district court improperly “decided the merits of the case” and “weighed the evidence” in granting summary judgment.

³ The defendants claim Giese did not preserve error on this issue because Giese “did not present a single fact to controvert any of the facts supporting judgment in favor of Prairie and United,” “did not make this argument on summary judgment,” and did not file a post-judgment motion requesting a ruling on the issue. *Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002) (observing that an issue is preserved for review if it has been raised and decided by the district court). We elect to bypass this error preservation concern and proceed to the merits. See *State v. Taylor*, 596 N.W.2d 55, 56 (Iowa 1999) (bypassing error preservation problem and proceeding to the merits of the appeal).

The facts of this case are simple and straightforward. Iowa Code chapter 573 sets forth bond requirements for public improvement contracts equal to or exceeding \$25,000. See Iowa Code § 573.2. A chapter 573 public improvement bond must ensure performance and payment. See *id.* § 573.2, .6. Section 573.6 sets forth provisions to be included in “every bond given for the performance of a contract for the construction of a public improvement, whether said provisions be inserted in such bond or not,” including:

The principal and sureties on this bond hereby agree to pay to all persons, firms, or corporations having contracts directly with the principal or with subcontractors, all just claims due them for labor performed or materials furnished, in the performance of the contract on account of which this bond is given, when the same are not satisfied out of the portion of the contract price which the public corporation is required to retain until completion of the public improvement, but the principal and sureties shall not be liable to said persons, firms, or corporations unless the claims of said claimants against said portion of the contract price shall have been established as provided by law.

Id. § 573.6(1).

There is no dispute the construction project at issue here was the product of a public improvement contract and subject to chapter 573. There is also no dispute Prairie, as general contractor of the project, obtained Bond No. 54177636 in order to comply with chapter 573 bond requirements.⁴

Bond No. 54177636 is a single six-page document, consecutively paginated and set forth on a standard American Institute of Architects “Document A312A” performance and payment bond form. The first three pages are entitled “Performance Bond” and the next three pages are entitled “Payment Bond.” Both

⁴ As Giese submitted in its statement of disputed and undisputed material facts, “Prairie issued the Performance Bond and Payment Bond in order to comply with the public improvement bond requirements of Iowa Code Chapter 573.”

parts of the bond provide that when the bond is issued to comply with a statute, the statutory provisions are incorporated into the bond and supersede any conflicting provisions. Specifically, paragraph 13 of the payment part of the bond provides in part:

When this Bond has been furnished to comply with a statutory or other legal requirement in the location where the construction was to be performed, any provision in this Bond conflicting with said statutory or legal requirement shall be deemed deleted herefrom and provisions conforming to such statutory or other legal requirement shall be deemed incorporated herein.

The district court, upon its analysis of the relevant statutory provisions and the undisputed facts of the record, determined the payment part of the bond was not a separate and distinct bond. In reaching this conclusion, the court observed:

There was only one bond issued by Prairie (with United as surety). The entire bond . . . has been divided into two separate components, to secure two categories of risks, but both components fall under one Bond number. It is clear that the Payment Bond in this case is intended to secure Prairie's performance of the project (as required by § 573.2), and to secure payment for all persons, firms, or corporations having contracts with Prairie ([as required by § 573.6]). The Bond was drafted on an American Institute of Architects form that is entitled "Performance Bond and Payment Bond." [A United senior claim representative] has offered affidavit testimony that the form document for the Bond is the most common form document used to satisfy the Iowa public improvement bonding requirement. This affidavit testimony is undisputed. The Bond is consecutively paginated. The Power of Attorney accompanying the Bond authorizes United to execute only a single Bond. The Bond only secures the risks required to be secured by chapter 573. A single premium was paid for the Bond. There is [] specific language in the Payment Bond regarding payment for labor and material provided by workers, subcontractors and suppliers if the general contractor fails to pay them.

We agree with the district court that the undisputed material facts of this case, when viewed in the light most favorable to Giese, support the conclusion that the bond at issue constitutes a single bond issued pursuant to chapter 573.

Moreover, we do not find the bond provided coverage “beyond the requirements of the statute.” To be clear, in reaching this conclusion, we are not required to weigh contradicting evidence or make factual findings beyond those that are undisputed and set forth in the record. *Cf. Pillsbury Co., Inc. v. Wells Dairy, Inc.*, 752 N.W.2d 430, 436 (Iowa 2008) (“When the interpretation of a contract depends on the credibility of extrinsic evidence or on a choice among reasonable inferences that can be drawn from the extrinsic evidence, the question of interpretation is determined by the finder of fact.”).

Our conclusion on this issue is dispositive of Giese’s appeal. Because the bond at issue is a chapter 573 public improvement bond, Giese was subject to the chapter 573 statute of limitations in filing a claim against it. Section 573.16 sets forth the procedure for claimants to bring an action to judicially enforce liability on the bond. *See Emp’rs Mut. Cas. Co. v. City of Marion*, 577 N.W.2d 657, 659 (Iowa 1998). Section 573.16 establishes a strict time frame for bringing such an action. *Id.* at 662. The section provides that such an action can only be brought after the expiration of thirty days, but not later than sixty days, following the completion and final acceptance of the project. Iowa Code § 573.16; *see Nw. Limestone Co., Inc. v. State Dep’t of Transp.*, 499 N.W.2d 8, 10 (Iowa 1993).

Here, it is undisputed Giese’s action was commenced 142 days after the date of completion and final acceptance of the project. Accordingly, Giese failed to comply with the statute of limitations in section 573.16 for bringing an action on its claim, and its claim is time-barred. *See, e.g., Emp’rs Mut. Cas. Co.*, 577 N.W.2d at 662 (“In clear language, section 573.16 gives subcontractors sixty days following the completion and final acceptance of the improvement’ in which to

bring suit on their claims.”); *Nw. Limestone Co., Inc.*, 499 N.W.2d at 10 (finding claim time-barred by section 573.16 when it was filed 111 days after completion and final acceptance of a highway surfacing project).

AFFIRMED.