IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

SHEA-CONNELLY DEVELOPMENT LLC, *Plaintiff/Appellant*,

v.

BLOUNT CONTRACTING INC., *Defendant/Appellee*.

No. 1 CA-CV 19-0716
FILED 10-29-2020

Appeal from the Superior Court in Maricopa County
No. CV2017-051671
The Honorable Theodore Campagnolo, Judge

AFFIRMED

COUNSEL

DKL Law PLLC, Tempe
By David W. Lunn
Counsel for Plaintiff/Appellant

Fuller & Stowell PC, Mesa
By Randal L. Stowell
Co-counsel for Defendant/Appellee

Sacks Tierney PA, Scottsdale
By James W. Armstrong, Gaye L. Gould
Co-counsel for Defendant/Appellee

MEMORANDUM DECISION

Presiding Judge Randall M. Howe delivered the decision of the Court, in which Judge Kent E. Cattani and Judge Cynthia J. Bailey joined.

H O W E, Judge:

¶1 Shea-Connelly Development, LLC ("SCD") appeals the denial of its motion for a new trial. For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 SCD is a general contractor that was hired to build a residential and commercial complex in Fountain Hills, Arizona in 2016. SCD solicited bids from various subcontractors and provided them with, among other things, a soil report for the property that indicated the type of dirt found at various depths. In September 2016, SCD contracted with Blount Contracting, Inc. ("BC") to perform the excavation and grading work on the project. BC's scope of work was to prepare the pads for two buildings, Building C on the west side and Building D on the east side, and export the excess dirt.

¶3 Two weeks after executing the contract, BC's project manager sent SCD's superintendent a preliminary schedule, showing that the excavation work would be completed by October 17, 2016. BC brought equipment to the construction site, tested the soil, and determined that caliche material, a natural cement, was found at a shallower depth than the soil report had indicated. Because the dirt had caliche chunks in it, BC could not sell the dirt like it had planned and requested a change order with SCD. Steve Shea, SCD's President, and BC's project manager executed a change order stating that BC would remove a maximum of 1110 loads of dirt at 13 yards per load for $45 per load. BC also agreed to provide SCD with a dump truck and operator to haul "loads of the better material to the pad between Building C and their office trailer[.]" BC further agreed to haul off "any amount in excess of the original 1110 loads at the same rate of $45" per load. BC then rented equipment from a vendor to excavate the caliche material and started excavation for Building C.

¶4 The same day that BC executed the change order, its project manager emailed Shea asking for permission to stockpile the larger caliche

chunks between Building C and SCD's office trailer, "separate from the good material." Shea responded that "[a]s for the larger caliche chunks, stockpiling in the vacant lot to the South of bld. C is permissible. We will have to look into the best way to utilize or dispose of them."

¶5 Because BC started excavating later than shown in the preliminary schedule, SCD was concerned that BC would not finish the excavation on time and hired a second subcontractor to complete the excavation work on Building D. SCD held a meeting with BC on October 10 and told BC that it had hired another excavation company to complete the excavation work on Building D while BC completed Building C.

¶6 Following the meeting, BC continued working, completed the excavation for Building C on October 20, and left the project. BC submitted a pay application for the work completed on Building C. A week later, SCD's attorney sent BC a letter alleging that it had committed multiple breaches of contract. The letter never listed leaving dirt on the site that was not "better material" as one of the breaches of the contract.

¶7 In a December 2016 email, SCD claimed that BC had "left over 18,000 cubic yards" of dirt on the pad next to Building C, thereby breaching the contract. A week later, SCD's counsel emailed BC's counsel stating that if BC removed the dirt that was not "better material," SCD would pay the amount requested in BC's pay application, but if not, SCD would pay BC only $122,500. SCD also requested that the parties mediate the dispute. BC's counsel responded that BC had completed its scope of work and refused to accept the $122,500 offer. SCD paid BC's equipment vendor about $40,000 on BC's behalf and subtracted that from the amount it owed BC under the contract. BC later filed a mechanic's lien on the project for the $118,546.59 SCD owed, after subtracting the amount SCD paid to the vendor. The project's owners, who hired SCD, told Shea to resolve the mechanic's lien or funding would end.

¶8 In January 2017, SCD sued BC for breach of contract and for improperly recording a mechanic's lien on the property. SCD alleged that BC had failed to remove 40,000 cubic yards of dirt and sought $542,000 in damages for the cost of having the dirt that was not "better material" removed from the construction site. A week after suing BC, SCD paid BC to remove the mechanic's lien to keep the project moving forward. When SCD paid to remove the mechanic's lien, BC waived any claims it had against SCD. A four-day jury trial was held in June and July 2019.

¶9 At trial, Shea testified that "better material" in the change order meant dirt that did not need to be processed and could be used for aggregate base course for fill under concrete or fill under asphalt. He testified that BC left only unusable material and not "better material." He further testified that he repeatedly told BC's project manager to remove the unusable dirt from the construction site. Shea admitted that aggregate base course material is generally created by crushing or screening dirt and that the contract did not require BC to crush or screen the dirt. He further admitted that SCD had crushed and created usable aggregate base course material using dirt left on a different part of the construction site.

¶10 Randy Blount, President of BC, testified that he believed SCD wanted the dirt stockpiled so it could crush the dirt later and use it for the parking lot or the buildings. He admitted that he did not know what "better material" meant but testified that the parties implied "that the better material was supposed to be screened or crushed" and that BC did not have to screen or crush the material under the contract. He further testified that BC was never told that the stockpiled dirt was not "better material."

¶11 During trial, SCD moved for a directed verdict arguing that BC had breached the contract by failing to remove the dirt that was not "better material" and that no evidence supported an accord and satisfaction defense. The trial court denied the motion. SCD renewed its directed verdict motion after the conclusion of evidence but before the jury deliberated. The court again denied the motion.

¶12 Following trial, the jury returned a general verdict in favor of BC. SCD moved for a new trial asserting that the trial court erred by denying its directed verdict motion because BC breached the contract by leaving dirt at the construction site that did not qualify as "better material" under the change order. It also argued that the court erred by denying its motion in limine to exclude evidence of accord and satisfaction. SCD argued last that the court erred by instructing the jury about BC's accord and satisfaction defense and BC's defense that SCD breached the contract first. The trial court summarily denied SCD's motion. SCD timely appealed.

DISCUSSION

¶13 SCD argues that the trial court erred by denying its new trial motion because BC did not leave "better material" on the construction site under the change order. We review the denial of a motion for a new trial for an abuse of discretion. *Keg Restaurants Ariz., Inc. v. Jones*, 240 Ariz. 64, 78 ¶ 49 (App. 2016). "[W]e view the evidence and all reasonable inferences

drawn from the evidence in a light most favorable to the non-moving party," and will reverse a court's denial only when no probative evidence supports the verdict. *Dawson v. Withycombe*, 216 Ariz. 84, 95 ¶ 25 (App. 2007). A trial court may grant a new trial if the evidence does not support the verdict. Ariz. R. Civ. P. 59(a)(1)(H). To succeed on a breach of contract claim, a party must prove the existence of a contract, a breach, and resulting damages. *First Am. Title Ins. Co. v. Johnson Bank*, 239 Ariz. 348, 353 ¶ 22 (2016).

¶14 Probative evidence supports the jury's verdict that BC did not breach the contract. The change order permitted BC to stockpile 790 loads of "better material" on the vacant lot between Building C and SCD's office trailer. While "better material" was not defined, the same day that BC executed the change order, SCD permitted it to stockpile caliche material on the same lot described in the change order. SCD also said that it would find "the best way to utilize or dispose of" the caliche material. Additionally, Blount and Shea testified that "better material" could be created by screening or crushing the dirt. Blount also testified that the parties implied "that the better material was supposed to be screened or crushed" and that SCD was going to crush the dirt later. Shea even testified that SCD had crushed and created usable aggregate base course material using dirt left behind on a different part of the project. Viewing these facts in the light most favorable to BC, probative evidence supports the jury's finding that "better material" included the dirt BC stockpiled.

¶15 SCD argues that because Shea was the only witness to testify about what "better material" meant, his testimony was undisputed, and no evidence was introduced to support a verdict that BC did not breach the contract. First, the jury was not compelled to believe SCD's uncontradicted evidence. *See Walsh v. Advanced Cardiac Specialists Chartered*, 229 Ariz. 193, 197 ¶ 12 (2012) ("[W]e have long recognized that a jury may appropriately discredit a witness's uncontradicted testimony for various reasons, including the witness's personal interest in the case."). The jury was therefore free to reject Shea's definition of "better material" based on his personal interest in the case.

¶16 Second, the jury could have relied on Shea's email permitting BC to stockpile the caliche material and his statement that SCD would find "the best way to utilize" the material as evidence that "better material" would be created by screening and crushing the dirt BC stockpiled. Blount's testimony that the parties implied that the "better material" would be created by screening or crushing the dirt, and Shea's testimony that he did not know how else "better material" was created other than screening and

crushing the material, supports this interpretation. Probative evidence supports the jury's verdict and we need not consider BC's breach of contract defenses. Therefore, the trial court did not abuse its discretion by denying SCD's new trial motion.

CONCLUSION

¶17 For the foregoing reasons, we affirm. BC requests its reasonable attorneys' fees incurred on appeal pursuant to Section 13 of the construction contract, which requires an award of attorneys' fees and costs to the prevailing party. We therefore award BC its reasonable attorneys' fees and costs incurred on appeal upon compliance with Arizona Rule of Civil Appellate Procedure 21.

AMY M. WOOD • Clerk of the Court
FILED: AA