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See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE



DIVISION ONE
FILED: 07/12/2011
RUTH A. WILLINGHAM,
CLERK
BY: DLL

CANADA VERDE CONSTRUCTION) 1 CA-CV 10-0648
COMPANY,)
)
) DEPARTMENT B
Plaintiff/Appellee,)
)
) **MEMORANDUM DECISION**
v.) (Not for Publication -
) Rule 28, Arizona Rules of
KIM and VALERIE GODWIN, husband) Civil Appellate Procedure)
and wife,)
)
)
Defendants/Appellants.)
_____)

Appeal from the Superior Court in Maricopa County

Cause No. CV2007-000445

The Honorable Richard J. Trujillo, Judge

The Honorable Dean M. Fink, Judge

AFFIRMED IN PART, VACATED IN PART, REMANDED IN PART

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S W A N N, Judge

¶1 Kim and Valerie Godwin ("Kim" and "Valerie," and collectively "the Godwins") appeal from a partial summary judgment in favor of Canada Verde Construction Company ("Canada Verde"). The Godwins assert the partial summary judgment is inconsistent with a subsequent jury verdict and therefore must be vacated. They further appeal from the trial court's award of attorney's fees to Canada Verde. For the following reasons, we affirm the trial court's grant of the motion for partial summary judgment, but vacate the attorney's fee award and remand for a new determination of attorney's fees in a manner consistent with this decision.

FACTS AND PROCEDURAL HISTORY

¶2 Tri-Chord Builders, Inc. ("Tri-Chord") was incorporated in 2003, with Kim as its president and director, and Valerie as its secretary and chief financial officer.¹ Valerie was also employed by Tri-Chord as its controller. In that role she billed customers, decided what monthly bills Tri-Chord would pay, and supervised Tri-Chord employees responsible for processing payroll.

¹ Valerie was listed as Tri-Chord's secretary in the annual report filed with the Arizona Corporation Commission on February 28, 2005. But that report stated she took office in 2003. Valerie was listed as Tri-Chord's chief financial officer ("CFO") in Tri-Chord's 2006 annual report. But that report stated she took office in 2003.

¶13 In January 2005, Canada Verde and the U.S. Department of Housing and Urban Development ("HUD") entered into a contract for the construction of multiple-story housing units in Arizona. In May, Tri-Chord submitted a bid, signed by Kim as president, to "furnish all labor and material necessary" to complete framing on the project, and to pay "HUD wages." In July, Canada Verde subcontracted with Tri-Chord; Kim signed the subcontract as Tri-Chord's president.

¶14 Paragraph 9 of the subcontract required that Tri-Chord -- as the "Sub" -- "warrant[] all labor, materials and equipment furnished" and that

[t]he cost of materials and labor shall be paid by Sub and shall not be due from or chargeable to Contractor. Sub warrants and represents that all work and materials shall be free from asbestos, urea formaldehyde, PCBs, or any other hazardous or toxic materials. The individual signing this Subcontract on behalf of the Sub warrants and represents that he is authorized to bind Sub to this Subcontract and shall be personally liable to Contractor and Owner if Sub fails to fully comply or is in default under this paragraph.

Paragraph 17 required Tri-Chord to "comply fully with all applicable Federal, State or Local legislation relating to the employment of persons." In a rider to the subcontract executed the same day, Tri-Chord agreed to pay "HUD wages" to its employees. The rider further specified that "[t]his agreement is based on the subcontractor meeting all his payroll

requirements, as well as any additional requirements of the job's prevailing scale wage and certified payroll requirements."

¶15 A flier posted at the job site listed the prevailing HUD wage for each worker classification. To document compliance with HUD wages, Tri-Chord completed weekly Certificates of Compliance and provided them to Canada Verde to submit to the U.S. Department of Labor ("DOL"). The names of Tri-Chord employees, their work classification, total hours worked, rate of pay, and gross amount earned were hand-written on the Certificates. Valerie or Kim signed the Certificates; their signature certified that the payroll was "correct and complete" and that the wage rates paid were "not less than" the applicable HUD rate.

¶16 A month or two after Tri-Chord began work, its employees complained to J.B., the Canada Verde site superintendent, that their wages did not correspond to the HUD rates. The superintendent told Kim about the problem and Kim explained he was "working it out with HUD."

¶17 J.B. also noticed that Tri-Chord employees clocked into the Canada Verde site in the morning but the Tri-Chord foreman took them to unrelated work sites during the day, and they returned to the Canada Verde site at the end of the day to clock out. That practice put the HUD project behind schedule and J.B. confronted the Tri-Chord foreman about it. But J.B.

did not tell Kim about the problem; instead, J.B. generally informed Kim there were "other issues" on site.²

¶18 The DOL investigated the wage discrepancy. In November 2006 it informed Canada Verde and the Godwins that its investigation revealed that Tri-Chord had underpaid 158 employees in the amount of \$452,124.35. Tri-Chord disputed the findings and requested a hearing.³ The DOL reviewed the investigation report and concluded a reasonable basis existed to support the back wage findings, and alerted Tri-Chord that it would ask HUD to withhold project funds to satisfy the back wages.

¶19 In December, the DOL notified the Godwins of its intent to "debar[]" them from future HUD contracts, and explained they could request a hearing or make restitution in the amount of \$452,124.35. Tri-Chord disputed the DOL's classification of 120 specific employees and claimed that the DOL findings were not supported by reliable evidence; it requested a hearing.

² In his deposition, Kim testified that he was unaware of this situation until J.B. told him after the fact. He also testified that these other jobs were not Tri-Chord projects.

³ Canada Verde also requested a hearing "to the extent that any findings, recommendations, withholdings, or decisions have been made that may negatively impact" the company.

¶10 The DOL also notified Canada Verde that it would withhold \$452,124.35 from the project. Canada Verde requested a hearing, asserting that the DOL results were erroneous because DOL ignored sworn statements or relied on unsworn information. Canada Verde attached sworn affidavits from "onsite people" swearing to the inaccuracy of time records because they knew that workers were clocking in but "actually not working on our job site, which appears to be the major basis for the erroneous determination by the DOL."

¶11 In January 2007, Canada Verde filed a complaint naming Tri-Chord and "Kim and Valerie Godwin, husband and wife," as defendants. The complaint alleged, *inter alia*, that Tri-Chord failed to complete its work in a timely fashion, which required Canada Verde to incur the cost of hiring additional subcontractors; failed to pay costs of materials as required by the subcontract; and violated federal law concerning payment of wages, as evidenced by the DOL investigation that resulted in the DOL withholding \$452,124.35. The complaint claimed in pertinent part:⁴

⁴ The complaint also included claims for breach of contract, unjust enrichment, and constructive trust against Tri-Chord only. On March 9, 2009, Tri-Chord filed a petition for Chapter 7 bankruptcy, which effectively stayed proceedings against it but did not affect Canada Verde's lawsuit against the Godwins. The Arizona Corporation Commission administratively dissolved Tri-Chord effective October 08, 2009. The Godwins do not

- Breach of contract against Kim and Valerie, alleging they were "separately liable for Tri-Chord's breach" of contract, or alternatively that Kim agreed to guarantee Tri-Chord's performance and is liable for all damages resulting from Tri-Chord's breach;
- Fraud based on Tri-Chord's duty to comply with federal regulations and supply accurate information about the wages paid, alleging that "Defendants" made false representations on the Certificates of Compliance; and
- Negligent misrepresentation, alleging that "Defendants" owed a duty to exercise reasonable care in reporting wage information.

¶12 In February 2008, Kim admitted during a deposition that he was aware of the HUD rates when Tri-Chord started the project and that the subcontract required Tri-Chord to pay those rates to meet its "payroll requirements." However, Kim also testified that he did not review the Certificates of Compliance completed by his employees before he signed them. He also denied understanding when he signed the subcontract that he was personally liable if Tri-Chord failed to comply or defaulted

challenge the claims against Tri-Chord, so we decline to address them.

under paragraph 9, believing instead that the phrase "shall be personally liable" meant that Tri-Chord was "personally liable."

¶13 Canada Verde continued negotiating with HUD regarding payment of the \$452,124.35 wage discrepancy. It asked HUD to accept a bond or simply withhold the amount from its final payment, but HUD refused and would not schedule a project closing date until the money was paid. Each month that the closing was delayed, Canada Verde incurred \$26,000 in extension fees. In July 2007, Canada Verde paid the money to a non-interest bearing DOL "lockbox" account. The HUD project closed the next month.

¶14 On December 11, 2008, Canada Verde filed a motion for partial summary judgment against Tri-Chord and Kim, asserting that Tri-Chord had breached the subcontract by failing to pay HUD wages, which resulted in a project underpayment of \$452,124.35 that Canada Verde had to pay in order to obtain HUD approval to finalize the project.⁵ The motion also asserted that Kim was personally liable under the subcontract for the payment.

¶15 Tri-Chord and the Godwins responded that a genuine issue of fact existed whether Tri-Chord had failed to pay the HUD wages and the amount, if any, Tri-Chord might owe the DOL. Additionally they explained that, without their knowledge, an

⁵ Canada Verde noted that satisfaction of the underpayment was necessary to avoid additional extension fees.

employee supervisor was taking framers from the HUD project to work on unrelated job sites, raising a question of what work the framers did on the project site and how much they should have been paid. They further claimed that the DOL's investigative findings were inoperative until the administrative appeal process concluded. They also asserted that the personal guarantee was unenforceable against the Godwins' community property.

¶16 Canada Verde replied that regardless of a final judgment by the DOL, it had paid the amount that should have been paid by Tri-Chord and therefore had been damaged. Canada Verde acknowledged that it was asserting personal liability only against Kim, not Valerie or their community property, for Tri-Chord's failure to pay HUD wages.

¶17 On February 12, 2009, the trial court granted Canada Verde's motion against Tri-Chord and Kim. Noting that the issue presented was "fairly narrow," the court found that "the relevant facts are essentially uncontested by the Defendants even though the exact sum owed by the Defendants may change in the event they are successful in their administrative appeal." The other claims in Canada Verde's complaint remained viable.

¶18 On February 25, 2009, Canada Verde, Tri-Chord, and the Godwins ("the parties") stipulated to certain consent findings regarding "[d]isputes concerning the payment of prevailing wage

rates and proper classification" of employees on the HUD project ("consent order"). Tri-Chord and the Godwins admitted that they "violated the provisions of the National Housing Act, the Davis Bacon Act, the [DOL] Secretary's regulations . . . and the contract." They also admitted that they failed to pay HUD wages "as required by the contract" and submitted payroll records that "were falsified to show compliance" with HUD rates. In response to their "aggravated and willful violations" of the Davis Bacon Act, Tri-Chord Builders, Kim and Valerie consented to a three-year period of ineligibility to receive HUD contracts or subcontracts. The parties agreed to pay \$285,000 in back wages, and Canada Verde authorized DOL to release that sum from the lockbox; DOL agreed to release the remainder of the lockbox funds to Canada Verde as soon as practicable. The consent order specified that Canada Verde retained its right to recover from Tri-Chord and the Godwins all amounts paid to DOL, including attorney's fees and costs, and interest from the date Canada Verde paid the money. But the parties waived "[a]ny right to challenge or contest the validity of the [consent] order." Kim signed the consent order in his capacity as Tri-Chord's president and as "an individual"; Valerie signed the order as "an individual."

¶19 In August 2009, Valerie moved for partial summary judgment on the breach of contract, fraud, and negligent

misrepresentation claims, asserting no legal or factual basis existed for her personal liability because she had acted as a Tri-Chord employee. Canada Verde responded that Valerie supervised the payroll staff and signed the Certificates of Compliance, and individually admitted in the consent order that she failed to pay HUD wages, falsified payroll records, and committed "aggravated and willful violations" of federal law. The court denied Valerie's motion.

¶20 The court held a four-day jury trial to adjudicate the breach of contract claim against Kim ("Count 1"), fraud claims against Valerie ("Count 2") and Kim ("Count 3"), and negligent misrepresentation claims against Kim ("Count 4") and Valerie ("Count 5"). Kim and Valerie testified during the defense case-in-chief. After deliberations, the jury found in favor of Kim on Counts 1 and 3, and in favor of Valerie on Count 2. But it found in favor of Canada Verde on Counts 4 and 5, and awarded damages against Kim in the amount of \$94,050 for the DOL payments and \$104,000 for loan extension fees. Damages in the same categories and amounts were imposed against Valerie.

¶21 Canada Verde filed an application for attorney's fees and costs pursuant to A.R.S. §§ 12-341 and -341.01, asserting it was the successful party because it was granted partial summary judgment on the contract claim, and the jury found Kim and Valerie were separately liable for negligent misrepresentation.

The Godwins opposed the fee application, asserting that the partial summary judgment was inconsistent with the jury's verdict. Therefore, they argued, Canada Verde did not prevail on the contract claim, and the claim for negligent misrepresentation could not support an award of attorney's fees under A.R.S. § 12-341.01.

¶122 The court entered judgment against Kim and Valerie, jointly and severally, for negligent misrepresentation in the amount of \$208,000 for loan extension fees and \$188,100 for DOL damages. The court also awarded damages against Kim, in his sole and separate capacity, in the amount of \$96,900, which represented the difference between the DOL damages awarded by the court on partial summary judgment and the DOL damages awarded by the jury against Kim and Valerie for negligent misrepresentation. The court awarded attorney's fees of \$176,000 and costs of \$3,342.36 against Kim and Valerie, jointly and severally.

¶123 The Godwins timely appeal. We have jurisdiction pursuant to A.R.S. § 12-2101(B).

DISCUSSION

¶124 The Godwins challenge the trial court's grant of partial summary judgment and award of attorney's fees and costs.

I. MOTION FOR PARTIAL SUMMARY JUDGMENT

¶125 The Godwins contend that the trial court's grant of partial summary judgment against Kim cannot stand because that ruling was inconsistent with the jury's finding in Kim's favor on Count 1.

¶126 Summary judgment may be granted when "there is no genuine issue as to any material fact and [] the moving party is entitled to judgment as a matter of law." Ariz. R. Civ. P. 56(c). In reviewing a motion for summary judgment, we determine de novo whether any genuine issues of material fact exist and whether the trial court properly applied the law. *Eller Media Co. v. City of Tucson*, 198 Ariz. 127, 130, ¶ 4, 7 P.3d 136, 139 (App. 2000). We view the facts and the inferences to be drawn from those facts in the light most favorable to the party against whom judgment was entered. *Prince v. City of Apache Junction*, 185 Ariz. 43, 45, 912 P.2d 47, 49 (App. 1996). Our review is limited to evidence presented to the court at the time the motion is heard; we do not consider evidence later introduced at trial. *GM Dev. Corp. v. Cmty. Amer. Mort. Corp.*, 165 Ariz. 1, 4, 795 P.2d 827, 830 (App. 1990); *Payne v. M. Greenberg Constr.*, 130 Ariz. 338, 343, 636 P.2d 116, 121 (App. 1981).

¶127 Here, we find no inconsistency between the court's grant of partial summary judgment and the jury's verdict on

Count 1.⁶ The partial summary judgment was limited to the HUD wage issue, but the breach of contract claim was also based on Tri-Chord's alleged failures to timely complete the project and pay suppliers. Whether the jury found that Tri-Chord had not breached the other provisions of the contract or that Kim was not liable for such breaches under Paragraph 9 has no bearing on the trial court's earlier partial summary judgment determination.⁷

¶128 We also disagree with the Godwins' unsupported contention that the Count 1 verdict could have been reached only if the jury believed that "¶ 9 of the contract was not a guaranty of the whole contract but was only a guaranty on warranty." Even assuming *arguendo* that the jury had come to this conclusion, our review of that finding would not have resulted in relief for Kim.

¶129 The interpretation of a contract is a question of law subject to de novo review. *Rand v. Porsche Fin. Servs.*, 216

⁶ On Count 1, the jury was instructed that Canada Verde had to prove that Kim agreed to be personally liable for Tri-Chord's performance under Paragraph 9, that Tri-Chord breached Paragraph 9, and that Kim breached his obligation to be personally liable for that breach.

⁷ The Godwins have not cited to the record or provided a trial transcript to aid us in determining whether the jury's verdict was based on specific facts or arguments that might benefit them on appeal. See ARCAP 11 (defining record on appeal and appellant's duty to provide "all evidence relevant"), 13 (defining briefing standards).

Ariz. 424, 434, ¶ 37, 167 P.3d 111, 121 (App. 2007). Where the contract language is clear and unambiguous we enforce the contract as written. See *Mining Inv. Group, LLC v. Roberts*, 217 Ariz. 635, 639, ¶ 16, 177 P.3d 1207, 1211 (App. 2008).

¶30 Here, the subcontract imposes personal liability on the "individual signing this Subcontract on behalf of the Sub."⁸ Kim signed the contract as Tri-Chord's president. Kim was therefore personally liable under Paragraph 9, which provided that "[t]he cost of materials and labor shall be paid by Sub and shall not be due from or chargeable to Contractor." (Emphasis added.) The motion for partial summary judgment pertained to Tri-Chord's failure to pay labor costs that were consequently charged to Canada Verde. Under the plain language of Paragraph 9, Kim was personally liable for the payment of those wages.

¶31 Additionally, the Godwins make no argument that the trial court's decision granting partial summary judgment was erroneous based on the evidence and arguments presented to the court at the time the motion was heard. We therefore conclude that the trial court did not err in granting partial summary judgment.

⁸ The relevant portion of Paragraph 9 provided: "The individual signing this Subcontract on behalf of the Sub warrants and represents that he is authorized to bind Sub to this Subcontract and shall be personally liable to Contractor and Owner if Sub fails to fully comply or is in default under this paragraph."

II. ATTORNEY'S FEES

¶132 Finally, the Godwins contend there was "no basis" on which to award attorney's fees against them pursuant to A.R.S. § 12-341.01. We agree in part.

¶133 The applicability of a fee statute is a question of law that we review de novo. *Schwab Sales, Inc. v. GN Constr. Co.*, 196 Ariz. 33, 36-37, ¶ 9, 992 P.2d 1128, 1131-32 (App. 1998); *Phoenix Newspapers v. Dep't of Corrs.*, 188 Ariz. 237, 244, 934 P.2d 801, 808 (App. 1997). A.R.S. § 12-341.01(A) allows the court to award reasonable attorney's fees to the successful party in a "contested action arising out of a contract." A tort claim may "arise out of contract" for purposes of the statute if "the cause of action in tort could not exist but for the breach of the contract." *Sparks v. Republic Nat'l Life Ins. Co.*, 132 Ariz. 529, 543, 647 P.2d 1127, 1141 (1982).

¶134 But "it is clear that fees may not be awarded in every case that merely involves or relates to a contract." *Dooley v. O'Brien*, 226 Ariz. 149, 152, 244 P.3d 586, 589 (App. 2010). See also *Ramsey Air Meds, L.L.C. v. Cutter Aviation, Inc.*, 198 Ariz. 10, 15, ¶ 27, 6 P.3d 315, 320 (App. 2000), ("The existence of a contract that merely puts the parties within tortious striking range of each other does not convert ensuing torts into contract claims."). When the duty breached is one

implied by law or is purely statutory, the claim is a tort and does not arise out of contract under A.R.S. § 12-341.01. *Id.* "The test is whether the defendant would have a duty of care under the circumstances even in the absence of a contract." *Ramsey*, 198 Ariz. at 16, ¶ 27, 6 P.3d at 321.

A. Negligent Misrepresentation

¶135 We agree with the Godwins' contention that the negligent misrepresentation claim did not arise out of contract and that the trial court therefore could not have awarded fees under A.R.S. § 12-341.01.

¶136 The cause of action was based on the breach of the Godwins' "duty . . . to exercise reasonable care in reporting information concerning the wages paid to [Tri-Chord's] employees." In the consent order, Valerie and Kim admitted that they, as "individuals," falsified the Certificates of Compliance to reflect HUD wages. While it is true that the subcontract required Tri-Chord to pay federally-imposed wage amounts -- which necessitated submission of Certificates of Compliance to Canada Verde -- Valerie and Kim's duty to report accurate information arose from their relationship with Tri-Chord⁹ and the

⁹ Kim signed the Certificates as Tri-Chord's president and Valerie signed as Tri-Chord's controller. Claims against Tri-Chord were effectively stayed when the corporation filed for Chapter 7 bankruptcy. Kim and Valerie signed the consent order as "individual[s]," which supports the jury's findings on Counts 4 and 5 -- a finding the Godwins do not challenge on appeal.

requirements of federal law. Indeed, the Certificate clearly states that "willful falsification" of information can subject "the *contractor or subcontractor* to civil or criminal prosecution" pursuant to "Section 1001 of Title 18 and Section 231 of Title 31 of the United States Code." (Emphasis added.) The subcontract therefore served merely to place Valerie and Kim, as individuals, "within tortious striking range" of Canada Verde. Any individual, with or without a contract, who falsified such statements could have been held liable for negligent misrepresentation, and we therefore conclude that the negligent misrepresentation claim did not "arise out of contract."

B. Partial Summary Judgment

¶137 The trial court's grant of partial summary judgment against Kim, however, does arise from contract because the motion was based on Kim's personal liability under Paragraph 9 that labor costs "shall not be due from or chargeable to" Canada Verde. Under A.R.S. §§ 12-341 and -341.01, the trial court has discretion to award fees on that claim because the cause of action arises from contract.

¶138 We therefore remand for the trial court to determine whether such fees and costs should be imposed in relation to Canada Verde's motion for partial summary judgment.

CONCLUSION

¶139 For the foregoing reasons we affirm the trial court's grant of partial summary judgment, but vacate its award of attorney's fees. We remand to the trial court for a determination of attorney's fees on the motion for partial summary judgment.

¶140 In the exercise of our discretion, we decline Canada Verde's request for attorney's fees and costs on appeal pursuant to A.R.S. §§ 12-341 (allowing prevailing party to recover costs) and -341.01 (allowing successful party attorney's fees when contested matter arises out of contract).

/s/

PETER B. SWANN, Presiding Judge

CONCURRING:

/s/

DANIEL A. BARKER, Judge

/s/

PATRICIA K. NORRIS, Judge