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



DIVISION ONE
FILED: 11/29/2011
RUTH A. WILLINGHAM,
CLERK
BY: DLL

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

SANDOR DEVELOPMENT COMPANY, an) 1 CA-CV 10-0736
association; and CROWLEY REALTY,) 1 CA-CV 10-0867
L.L.C., an Indiana limited liability) (Consolidated)
company,)
Plaintiffs/Counterdefendants/Appellees,) DEPARTMENT A
v.) **MEMORANDUM DECISION**
ALLIED ACOUSTICS, INC., an Arizona) (Rule 28, Arizona Rules
corporation,) of Civil Appellate Procedure
Defendant/Counterclaimant/Appellant.)
_____)
)
)
)
)

Appeal from the Superior Court in Maricopa County

Cause No. CV2008-019208

The Honorable J. Richard Gama, Judge

REVERSED AND REMANDED

Engleman Berger, P.C. Phoenix
By Thomas R. Nolasco
Attorneys for Plaintiff/Counterdefendants/Appellees

Curtis Ensign, P.L.L.C. Phoenix
By Curtis Ensign
Attorneys for Defendant/Counterclaimant/Appellant

B A R K E R, Judge

¶1 Allied Acoustics, Inc. ("Allied") appeals from the judgment entered in favor of plaintiffs Sandor Development Company and Crowley Realty, L.L.C. after a bench trial. Allied challenges various rulings and orders made by the trial court, but we need substantively address only one, which we find dispositive: Whether the court erred in effectively granting plaintiffs summary judgment before trial on the issue of whether a lien recorded by Allied on plaintiff's property was invalid. Because we find the court erred on this issue, we reverse the court's order granting plaintiffs summary judgment, we vacate the judgment entered in plaintiffs' favor after trial, and we vacate the fee award to plaintiffs. This matter is remanded for further proceedings.

Background

¶2 Sandor Development Company is a real estate company that has an office in a multi-unit commercial building (the "Building") in Scottsdale. Sandor Development Company established Crowley Realty, L.L.C., as the single asset entity that owns the Building. Accordingly, we hereinafter refer to plaintiffs collectively as "Sandor."

¶3 Allied is a contractor that installs acoustical ceilings. On March 7, 2008, Sandor and Allied executed a contract ("Contract") requiring Allied to install an acoustical tile ceiling in the Building's east-west corridors (the "Work")

for \$3840.¹ The parties agree that Allied properly completed the Work on or around March 13, 2008. The parties also agree that Allied provided Sandor with invoices on March 13 and March 20, 2008, stating that the Work was "100% complete to date" and payment was due either April 12 or April 19, 2008. Pursuant to another agreement between the parties, Allied installed in May 2008 a ceiling in one of the building's suites. Sandor paid Allied in full for work Allied completed in that suite.

¶14 Sandor, however, did not pay Allied for the Work. Consequently, Allied instructed its agent, RCS Preliminary Lien Service, Inc. ("RCS"), to prepare a mechanic's lien regarding the Work ("Lien"). RCS did so the following day, July 25, 2008. RCS sent Sandor a copy of the Lien on August 1, 2008.

¶15 On August 7, 2008, Mr. Smith of Sandor arrived at Allied's office with a company check for \$3840 and an unconditional lien release form. Mr. Smith explained he would give Allied the check if Allied would sign the release. Allied refused unless Sandor also reimbursed Allied for the \$300 Allied had paid to have the Lien recorded.² Instead, Allied agreed to accept the check in return for a conditional lien release, which

¹ The original contract price of \$4227 was reduced to \$3840 for reasons that are not relevant to this appeal.

² The Contract requires Sandor to pay Allied "for any and all fees, costs, . . . incurred by Allied in connection herewith"

would be replaced with an unconditional release after the check cleared and Sandor paid Allied the \$300. Sandor refused to pay the \$300 because, according to Sandor, the Lien was untimely recorded under Arizona law and was therefore invalid.

¶16 On August 12, 2008, Sandor filed a complaint in superior court seeking to quiet title in the Building and an award of statutory damages. Sandor specifically alleged the Lien was untimely because Arizona law requires a lien to be recorded within 120 days of "completion of the improvements," and based on the March 13 invoice indicating the Work was "100% complete to date," the July 25 recording was too late.³ See Ariz. Rev. Stat. ("A.R.S.") § 33-993(A) (2007).

¶17 Allied answered and denied the alleged impropriety of the Lien. According to Allied, although the Work was finished on March 13,⁴ it was not "complet[ed]" on that date for purposes of determining the 120-day lien period. In support, Allied referenced the May ceiling installation in the Building's suite

³ Thus, Allied alleged that RCS's avowal in the Lien that "not more than One Hundred Twenty days (120) has elapsed since the completion of the improvements on the . . . [P]roperty" constituted a "material misstatement and a false claim" rendering the Lien "groundless."

⁴ The complaint and answer both refer to March 18, 2008 as the date Allied completed the Work; however, the joint pretrial statement indicates the parties subsequently agreed that the date was March 13, 2008. The disparity in dates is not material for our purposes.

and “[d]enies that [the Work] was the last work that Allied did in the [B]uilding.” Further, Allied raised as an “Affirmative Defense” its belief that “completion” of the Building had not occurred on March 13 because “there has been no final inspection or written final acceptance of the . . . [B]uilding by the City of Scottsdale” Allied also asserted a counterclaim for breach of contract based on Sandor’s failure to pay Allied for the Work.⁵

¶18 Allied subsequently moved for summary judgment on its counterclaim, arguing Sandor had failed to produce evidence that Allied was not entitled to payment for the Work. In response, Sandor argued it had performed on the Contract because Mr. Smith had attempted to tender payment, which Allied refused.⁶ Finding the existence of a genuine issue of material fact and that Allied was not entitled to judgment as a matter of law, the

⁵ Allied has apparently abandoned its additional counterclaim of unjust enrichment. See, e.g., *Trustmark Ins. Co. v. Bank One, Arizona, NA*, 202 Ariz. 535, 541-43, ¶¶ 30-37, 48 P.3d 485, 491-93 (App. 2002) (noting claim for equitable relief properly dismissed because remedy was available under breach of contract claim); see also *Brooks v. Valley Nat. Bank*, 113 Ariz. 169, 174, 548 P.2d 1166, 1171 (1976) (“[W]here there is a specific contract which governs the relationship of the parties, the doctrine of unjust enrichment has no application.”).

⁶ Sandor also argued it was entitled to a right of setoff because its damages resulting from the improper Lien “far exceeds” Allied’s breach of contract damages.

superior court, without further explanation, denied Allied's motion.

¶19 In their cross motions for summary judgment on Sandor's claims, the parties reiterated the arguments raised in the complaint and answer. The court denied both motions. However, the court expressly rejected Allied's argument that the Lien was timely recorded because the Work was not completed until May 2008 when Allied finished installing the ceiling in the suite. Accordingly, the court found the Lien was untimely and defective and granted Sandor's request for clear title. Allied moved for reconsideration, pointing out that the court did not address whether the Lien was timely recorded because the Work was not "complete" on March 13, 2008, due to the absence of a final inspection performed by Scottsdale. See A.R.S. § 33-993(C)(1). The court denied Allied's motion "for the reasons stated in its" order denying the parties' summary judgment motions.

¶10 Consequently, the remaining issues for trial were the amount of damages Sandor was entitled to recover based on the late-filed Lien and whether Sandor breached the Contract by failing to pay for the Work. Regarding damages, the specific issue was whether Allied knew or should have known that the 120-day lien period had expired when the Lien was recorded. See A.R.S. § 33-420(A).

¶11 After a one-day bench trial, the court found Allied and RCS had "superior intelligence to infer the untimeliness of the [L]ien. . . . because it is undisputed that the project under this distinct contract was completed on March 12, 2008 and the [L]ien was not filed until July 25, 2008." Accordingly, the court awarded judgment to Sandor in the amount of \$5000 including attorneys' fees and costs. See A.R.S. § 33-420(A). With respect to Allied's counterclaim, the court did not enter judgment in favor of either party. Instead, the court found that Sandor "fully performed [its] contractual obligations by tendering the full invoice amount of \$3,840.00 to [Allied]." Consequently, although the court ordered the counterclaim "dismissed upon tender by [Sandor] . . . in the principle sum of \$3840, together with interest[,]" the court determined interest accrued at the contractual rate of 1.5% from April 12, 2008 (the payment due date) to and including August 6, 2008 (the day before Sandor attempted to tender payment). Allied unsuccessfully moved for a new trial, and the court subsequently awarded Sandor \$22,500 in attorneys' fees. Allied appealed.⁷ We

⁷ Allied's first notice of appeal was filed before it realized the court had awarded Sandor attorneys' fees. The superior court granted Allied's motion to extend time to file another notice of appeal, and Allied did so on November 9, 2010. This court consolidated the matters.

have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") section 12-2101(B) (2003).

Discussion

¶12 The parties agree that the trial court's ruling denying them summary judgment in effect granted Sandor summary judgment on the issue as to whether the Lien was untimely recorded. See *supra*, ¶ 9. We find the court's ruling to be in error because a question of material fact exists regarding whether a building permit was issued and whether Allied provided uncontroverted evidence that Scottsdale had not inspected or issued a written final acceptance in connection with any such permit.

¶13 We review *de novo* the grant of a motion for summary judgment. *Tierra Ranchos Homeowners Ass'n v. Kitchukov*, 216 Ariz. 195, 199, ¶ 15, 165 P.3d 173, 177 (App. 2007). The moving party must establish that "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Ariz. R. Civ. P. 56(c)(1); *Accord Nat'l Bank of Ariz. v. Thruston*, 218 Ariz. 112, 114-15, ¶ 12, 180 P.3d 977, 979-80 (App. 2008).

¶14 Regarding the time limits applicable to perfecting mechanics' and materialmen's liens, Arizona law requires the lien be recorded "within one hundred twenty days after completion of a building, structure or improvement, or any

alteration or repair of such building, structure or improvement" A.R.S. § 33-993(A). For purposes of determining when the 120-day lien period commences, § 33-993 further provides:

C. For the purposes of subsection A of this section, "completion" means the earliest of the following events:

1. *Thirty days after final inspection and written final acceptance by the governmental body which issued the building permit for the building, structure or improvement.*

2. Cessation of labor for a period of sixty consecutive days, except when such cessation of labor is due to a strike, shortage of materials or act of God.

D. *If no building permit is issued or if the governmental body that issued the building permit for the building, structure or improvement does not issue final inspections and written final acceptances, then "completion" for the purposes of subsection A of this section means the last date on which any labor, materials, fixtures or tools were furnished to the property.*⁸

A.R.S. § 33-993 (emphasis added).

¶15 The parties' dispute is essentially over when "completion," as defined by § 33-993, occurred; namely, whether (C) or (D) applies. The parties agree that Allied completed

⁸ Based on Sandor's belief that the completion date occurred on or about March 13, 2008 - the last day Allied provided labor or materials - Sandor could have limited the lien period to sixty days after that date by properly recording a "notice of completion" pursuant to A.R.S. § 33-993(E). See A.R.S. § 33-993(A). Nothing in the record, however, indicates Sandor attempted to do so.

work on the east/west corridor of the building by March 13, 2008, that Allied completed work on Suite 105 on May 15, 2008, and that the lien was filed on July 25, 2008. The parties do not agree, however, as to whether a building permit issued for the work was open.

¶16 Allied included with its second summary judgment motion a copy of its credit manager's declaration that, a day or two before the Lien was recorded, she was informed by Scottsdale representatives the Building was not complete because Scottsdale, based on the lack of a request for a final inspection, had not issued a certificate of occupancy regarding the Building. A reasonable inference from these facts is that Scottsdale had issued a permit regarding construction activity at the Building that had not been completed. In response, Sandor included a copy of a Certificate of Occupancy dated May 17, 2006, issued by Scottsdale regarding "fire sprinklers" in "unit 195" of the Building.

¶17 In its response to Sandor's motion for summary judgment, Allied argues that while Sandor "assume[s] that no building permit was issued and that Scottsdale does not issue final inspections and written final acceptances, [n]o proof of that has been shown." Rather than offer proof as to a permit, Sandor maintained its position that "[b]uilding permits and certificates of occupancies are not relevant for purposes of

this case because the completion date is well established by the facts." When the court considered the cross motions for summary judgment it did not address whether the absence of a certificate of occupancy or final inspection in connection with the Building rendered the Work "completed" pursuant to § 33-993(C)(1). Instead, the court disposed of the issue by focusing on the parties' agreement that Allied had completed the Work.

¶18 Because the issuance of a permit is material to whether § 33-993(C)(1), (C)(2), or (D) applies and the record is unclear as to (1) whether a permit was issued by Scottsdale in connection with the work and (2) if so, whether it remained open, the record below is inadequate to support a grant of summary judgment. Accordingly, we vacate the superior court's grant of summary judgment and remand for further proceedings. Further, we vacate the judgment entered against Allied pursuant to A.R.S. § 33-420, and we vacate the award of attorneys' fees and costs to Sandor. Based on our resolution of these issues, we need not address other claims of error raised by Allied.

¶19 Finally, Sandor requests its attorneys' fees on appeal pursuant to A.R.S. § 12-341.01(A). As Sandor is not the successful party, we deny its request. Allied requests a fee award based on Sandor's agreement set forth in the Contract to pay Allied's legal fees. We agree that Allied is entitled to an award of its reasonable fees incurred on appeal pursuant to the

Contract. The superior court is instructed to take into account Allied's reasonable appellate fees at the conclusion of this matter.

Conclusion

¶20 This matter is remanded for further proceedings consistent with this decision.

/s/

DANIEL A. BARKER, Judge

CONCURRING:

/s/

PATRICK IRVINE, Presiding Judge

/s/

PATRICIA K. NORRIS, Judge