ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
JUDGE DAVID M. GLOVER

DIVISION III

CA08-370

November 5, 2008

LENNON WHITFIELD and MARY WHITFIELD
APPELLANTS

V.

SEMINOLE CONTRACTING, INC.
APPELLEE

APPEAL FROM THE MISSISSIPPI COUNTY CIRCUIT COURT, [CV-2006-48 (DL)]

HONORABLE DAVID N. LASER, JUDGE

REVERSED AND REMANDED

Appellants, Lennon and Mary Whitfield, sustained damage to their house as a result of a fire. In working through their insurance company, they came into contact with appellee, Seminole Contracting, Inc., and reached an agreement for appellee to perform the fire-repair work on their house. However, appellee subsequently filed a complaint against appellants to enforce a materialman's and laborer's lien. Appellants filed their answer and a counterclaim for breach of contract. Appellee then filed a motion for summary judgment, contending that there were no genuine issues of material fact and that appellants owed appellee $15,488.68. The motion was accompanied by an affidavit from the company's president, James Kennemore; a copy of the agreement between the parties; and a statement showing the amount of the unpaid balance. Appellants responded to the

motion and supported the response with their affidavit. Following a hearing, the trial court granted the motion in part and entered summary judgment in favor of appellee for $11,308.68.[1] Summary judgment was also entered in favor of appellee on appellants' counterclaim. This appeal followed. We reverse and remand for a trial on the merits.

Standard of Review

On appellate review, we determine if summary judgment was appropriate based on whether the evidentiary items presented by the moving party in support of the motion leave a material fact unanswered. *State ex rel. Arkansas Dep't of Parks & Tourism v. Jeske*, 365 Ark. 279, 229 S.W.3d 23 (2006). We view the evidence in a light most favorable to the party against whom the motion was filed, resolving all doubts and inferences against the moving party. *Id.* Our review focuses not only on the pleadings, but also on the affidavits and other documents filed by the parties. *Id.*

Rule 56 of the Arkansas Rules of Civil Procedure provides in pertinent part:

> (2) The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, shows 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 on the issues specifically set forth in the motion. A partial summary judgment, interlocutory in character, may be rendered on any issue in the case, including liability.

[1]The trial court denied appellee's motion for summary judgment to the extent that it sought payment for an additional $4,180 for labor and materials that were outside the contract, and granted appellee's request that this portion of their claim be dismissed without prejudice.

. . . .

(e) *Form of Affidavits; Further Testimony; Defense Required.* Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleadings, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

In this appeal, appellants contend that the trial court erred in 1) granting appellee's motion for summary judgment, 2) concluding that appellants' affidavit was conclusory, and 3) dismissing appellants' counterclaim. The points are sufficiently interrelated that they can best be discussed together.

James Kennemore's affidavit, supporting the motion for summary judgment, provided in pertinent part:

1. My name is James Kennemore. ... On July 15, 2005, Seminole entered into an agreement with the defendants Lennon Whitfield and Mary Whitfield (the "Whitfields") whereby Seminole agreed to repair fire damage to the Whitfields' home. A true and correct copy of this agreement is attached to the Motion for Summary Judgment as Exhibit B.

2. During the period of construction and repair of the Whitfields' residence, Seminole performed work in addition to the work anticipated by the agreement, including adding additional insulation, drywall, doors and trim, which increased the overall cost of the project.

3. The Whitfields told me that they have received all funds they are due from their homeowners' insurance carrier, State Farm Insurance Company, for construction and repair following the fire in their residence.

4. The Whitfields have refused to pay the final amount due and owing under their agreement with Seminole. The amount due and owing is $15,488.68. I have asked the Whitfields to pay this account, but to date payment in full has not been received by myself or any other employee of Seminole.

5. I have reviewed the Counterclaim filed in this case by the Whitfields, in which they allege that Seminole failed to provide materials and labor with regard to the construction of improvements to the Whitfields' home, and in which they alleged that Seminole failed to furnish labor in a workmanlike or adequate manner.

6. I was never given any opportunity to correct any alleged problems with the repairs to the Whitfields' home. Based on my review of the improvements made to the Whitfields' home, there are no such problems with either labor or materials.

The agreement that appellee attached to its motion is entitled, "PROPOSAL," lists the work to be done and states a total amount of $40,546.72. It is signed by Kennemore and by Mary Whitfield.[2] Appellee also attached a statement, which showed a total amount due of $15,488.68, broken down as follows: "Final draw on balance of contract – $11,308.68" and, apparently, the difference of $4,180 was for "additional work done not covered." See footnote 1, *supra*.

In responding to the motion for summary judgment, appellants' affidavit provided in pertinent part:

3. It was our understanding that the contract amount was $29,538.04 for repair work on our home.

4. Seminole Contracting did not perform additional work of adding insulation, drywall, doors or trim.

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[2]Appellant Lennon Whitfield did not sign the proposal, but any consequences of the absence of his signature were not argued below.

5. Seminole Contracting is not due $15,488.68.

6. We have paid Seminole Contracting $29,538.68 for labor and material which were unworkmanlike and of substandard quality.

7. Furthermore, Seminole Contracting, Inc. failed to perform work and/or provide materials that it promised in regard to repairing the damage to our home.

8. Moreover, we informed Seminole Contracting of various problems and defects with the work and poor quality of the materials.

9. Seminole Contracting did not correct any of the problems or defects.

In addition, in their discovery responses concerning their counterclaim, appellants stated:

> ANSWER: Mr. Kennemore did not supervise his workers. He refused to communicate with the Defendants regarding their concerns that the workers present on the jobs were inadequate and that the work was of a poor quality. The repairs were "cover ups" instead of being damaged materials being removed or replaced. The workers were removing property from the site. Defendants are aware of at least two (2) of the laborers were jail inmates with little or no experience who were left unsupervised.

In its November 16, 2007 order granting appellee partial summary judgment, the trial court stated that appellee established that there were no genuine issues of material fact concerning whether appellants breached their construction agreement with appellee by failing to pay appellee the sum of $11,308.68. The trial court determined that Kennemore's affidavit and other attached documents established that a contract existed, that the agreed sum of money to be paid by appellants was set forth in the contract, and that appellants failed to pay the agreed amount. The trial court further found that the appellants' responsive affidavit did not establish a genuine issue of material fact because it was conclusory rather than factual.

In challenging the trial court's entry of summary judgment, appellants contend that appellee failed to satisfy its initial burden of establishing its entitlement to summary judgment because Kennemore's affidavit was conclusory and provided no proof of performance under the contract whatsoever. Appellants additionally argue that the trial court erred in concluding that their responsive affidavit was conclusory.

In examining Kennemore's affidavit, the first paragraph asserts the existence of an agreement to repair the house. Paragraph two states that additional work, beyond that contemplated by the agreement, was performed, which increased the cost of the project; however, this paragraph does not assert that the *agreed upon* work was completed. The third paragraph claims that he was told by appellants that they had received all of the insurance funds allocated for the fire repair. Paragraph four asserts that appellants had refused to pay him the amount due and owing under the agreement, $15,486.68. Paragraph five states that Kennemore had reviewed appellants' counterclaim, and paragraph six asserts that he was never given any opportunity to correct any alleged problems, but that based on his review of the improvements, there were no such problems with either labor or materials.

Appellants' responsive affidavit challenges the amount of money that was agreed upon for the project; asserts that appellee did not perform additional work involving insulation, drywall, doors, or trim (which claim by appellee was dismissed by the trial court without prejudice); denies that appellee was due $15,488.68; asserts that they had already paid appellee $29,538.68 for unworkmanlike and substandard labor and material;

contends that appellee failed to perform the work and to provide the promised materials; asserts that they informed appellee of various problems and defects concerning the work and the materials; and states that appellee did nothing to correct those problems. In addition, in their answer to an interrogatory, appellants asserted that Kennemore did not supervise his workers; that he refused to communicate with them about their concerns; and that the "repairs" were merely "cover-ups" because the damaged materials were not being removed and replaced. They also asserted that workers were removing property from the work site and that they were aware of at least two workers who "were jail inmates with little or no experience who were left unsupervised."

We disagree with the trial court's conclusion that appellants' responsive affidavit was too conclusory to survive summary judgment. Appellee claimed to be owed an amount stated under an agreement to perform fire-repair work on appellants' house, which appellants denied. By counterclaim, appellants alleged that appellee had breached the agreement by not providing labor or materials in a workmanlike or adequate manner. Kennemore's affidavit stated that he was never given an opportunity to correct any alleged problems and that based on his review there were no such problems. However, appellants' affidavit and answers to interrogatories sufficiently refuted that assertion. We have concluded that, at a minimum, a material issue of fact remained regarding the quality of the work performed by appellee, and that the trial court therefore erred in granting summary judgment in favor of appellee.

Reversed and remanded.

ROBBINS and HEFFLEY, JJ., agree.