

Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.

ATTORNEY FOR APPELLANT:

A.J. MANION
Kinney Kasha Buthod, LLP
Evansville, Indiana

ATTORNEY FOR APPELLEES:

JEFFREY W. HENNING
Rudolph, Fine, Porter & Johnson, LLP
Evansville, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

PEYRONNIN CONSTRUCTION CO., INC., and)

Appellant-Defendant/Counter-Claimant,)

vs.)

INNOVATIVE MASONRY SYSTEMS, INC.,)

CATHOLIC DIOCESE OF EVANSVILLE,)

INDIANA,)

Appellees-Plaintiffs/Counter-Defendants.)

No. 82A01-0507-CV-332

APPEAL FROM THE VANDERBURGH SUPERIOR COURT

The Honorable J. Douglas Knight, Judge

Cause No. 82D03-0310-PL-4561

October 30, 2006

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAKER, Judge

Appellant-defendant/ counter-claimant Peyronnin Construction Co., Inc. (Peyronnin) appeals the judgment entered in favor of appellees-plaintiffs/counter-defendants Innovative Masonry Systems, Inc. (IMS), and Catholic Diocese of Evansville, Indiana (Catholic Diocese) on IMS's breach of contract claims against it and its counter-claim against IMS. Peyronnin first contends that the trial court erred in ordering a foreclosure on real estate owned by the Catholic Diocese that was the subject of a mechanic's lien that IMS had perfected. Additionally, Peyronnin argues that the judgment against it must be set aside because the evidence established that IMS had breached the terms of a construction contract. In essence, Peyronnin claims that the evidence showed that IMS prepared deficient drawings of the project and that IMS delivered faulty materials that did not conform to the contract specifications. Hence, Peyronnin contends that it is entitled to a judgment on its counterclaim against IMS for damages. Concluding that Peyronnin's challenge to the foreclosure order with regard to IMS's mechanic's lien is moot and further finding that the evidence supported the determination that Peyronnin breached the contract, we affirm the judgment of the trial court.

FACTS

On February 14, 2002, IMS, a materials vendor located in Evansville, submitted a price quote in the amount of \$179,000 to Peyronnin to furnish a substance known as aerated autoclaved concrete (AAC) material¹ for a construction project at the Catholic Diocese. AAC panels are specifically engineered for each project, and an analysis is required to

¹ AAC is a concrete product consisting of Portland cement, Quicklime, sand, aluminum powder, and water. AAC is available in both block and panel form. Appellant's App. p. 282.

determine whether the panels will be able to withstand the loads and stresses they will face as a component of the building. For this particular project, the AAC panels had to be engineered to withstand wind and snow as well as stresses from the movement of the structural steel to which they were attached.

The project involved demolition and remodeling work to the Holy Redeemer School (Holy Redeemer) that was owned by the Catholic Diocese, as well as the construction of a new, attached two-story building. Peyronnin entered into a contract with the Catholic Diocese that named Peyronnin as the general contractor for the project. In correspondence dated March 5, 2002, Peyronnin accepted IMS's quote for the AAC panels. In part, the written acceptance stated "please accept this letter of intent as your notice that Peyronnin . . . intends to purchase AAC products for this project per your quote of February 14, 2002. This is subject to Peyronnin . . . receiving a contract for the work." Appellant's App. p. 248.

At some point, Peyronnin advised IMS personnel that it needed the AAC material for the existing school building first because that work had to be completed before the beginning of school in fall 2002. The new building did not have to be completed until the 2003-04 school year.

As set forth in the contract, drawings for the project that were prepared by an architect called for a structural steel building with an AAC-coated exterior. The drawings also provided for the incorporation of AAC material into the existing building. In addition to the architectural drawings, IMS had AAC shop drawings prepared. The purpose of that process was to clarify and define details not shown or not adequately addressed in the initial contract

drawings. The shop drawings were submitted to Peyronnin personnel so that any identified issues could be addressed and commented on by Peyronnin, the architect, and the project engineer. Any identified issues had to be resolved in the shop drawing process before the AAC panels could be produced.

The initial set of drawings was received from AAC's manufacturer, BABB International, Inc. (BABB), on April 26, 2002. The drawings identified numerous issues that would impact the production of the AAC materials for the project. Apparently, the original contract drawings did not contain sufficient details that related to the application of the AAC such as the number of panels and how they were to be installed. Peter Townsend, an AAC engineer with BABB, wrote:

[A]fter reviewing the area, I have concluded that due to the magnitude and eccentricity of the load, the AAC panels are not capable of supporting the structure. Nor should they be expected to. The AAC for this project is a cladding system and was designed as such. The engineer of record, not the specialty engineer, should design all load-bearing portions of this building.

Appellees' App. p. 108-10. It was also discovered that while the architectural drawings called for the presence of AAC panels, the corresponding structural drawings failed to provide any structural steel to which the AAC could attach. Appellant's App. p. 37-38, 409-11. Peyronnin returned the first two sets of AAC shop drawings to IMS, with the second set marked "accepted-note markings." Id. at 29-30. However, the marked shop drawings did not adequately address the issues of connection details, panel layout and configuration, structural steel details, panel capacities, and dimensions detail. Id. at 35-36. A representative of IMS was of the belief that the unresolved issues would impact the makeup of the panel

system. Moreover, Townsend acknowledged that it would be difficult to produce the panels if those issues were not addressed.

A third set of shop drawings was submitted to Peyronnin on September 9, 2002. Following Peyronnin's review of these documents, the drawings were returned to BABB in October 2002. In accordance with these drawings, BABB proceeded with the final engineering and manufacture of the AAC panels.

IMS furnished the AAC material for the existing school building in June and August 2002. The AAC material for the existing school building was primarily used as "infill" and did not involve any custom made panels. Thereafter, on October 30, 2002, the first load of AAC materials for the new building arrived at the construction site, and the last load was delivered on November 15, 2002.

Following the delivery of the AAC material in June 2002, IMS submitted an invoice to Peyronnin in the amount of \$22,500. An invoice was also submitted to Peyronnin following the delivery of the material in August 2002 in the amount of \$20,090. Following the delivery of the material in October 2002, IMS's invoice was for \$28,650, and the November 2002 delivery resulted in an invoice for \$107,760. The four invoices totaled \$179,000. Peyronnin submitted several partial payments totaling \$101,871, leaving an outstanding balance of \$77,129. As of February 7, 2005, the outstanding balance on the foregoing invoices, including principal and interest, was \$115,330.02.

During the course of the project, IMS furnished to Peyronnin a band saw at a monthly rental price of \$750 for a total amount of \$4,512.38. Peyronnin failed to pay IMS for the

saw, and as of February 7, 2005, the outstanding balance on the saw rental, including principal and interest, was \$6,633.37. Additionally, IMS furnished structural steel that was incorporated into the new building. The value of that steel was \$4,933.21, for which IMS had not been paid.

Peyronnin made partial payments toward the AAC materials, but a balance in the amount of \$115,330.02 remained as of February 7, 2005. According to Delbert Stevens, the project architect, there were not enough crewmembers at the site to install the AAC material. It was later determined that Peyronnin's resources were being used to complete another project. Thereafter, on January 9, 2003, IMS filed a notice of a mechanics lien. IMS then sent a notice of personal liability to the Catholic Diocese. When the notice was received on April 22, 2003, the Catholic Diocese was indebted to Peyronnin in the amount of approximately \$120,000. Thereafter, IMS filed its complaint to enforce the mechanic's lien.

On October 23, 2002, IMS filed an action against Peyronnin, the Catholic Diocese, and others for breach of contract, alleging that Peyronnin failed to pay IMS the amounts that were due for the materials and related goods that were furnished at the construction site. IMS further alleged that on January 9, 2003, within ninety days of the last day on which IMS provided the materials, IMS filed a notice to impose a mechanic's lien for the amount of \$145,434.74. Thus, IMS also sought to foreclose its lien on the real estate and asserted that it was entitled to recover from the Catholic Diocese.

On January 8, 2004, Peyronnin asserted a counterclaim against IMS and a cross-claim against the Catholic Diocese. Peyronnin claimed damages against IMS in excess of \$150,000

because of the alleged late delivery of the AAC material and the faulty installation of the product. Peyronnin subsequently dismissed its cross-claim against the Catholic Diocese on February 4, 2005. Following a bench trial that concluded on February 9, 2005, the trial court ruled in favor of IMS on its breach of contract and mechanics lien claims and against Peyronnin on its counterclaim. On March 23, 2005, the trial court entered the following findings of fact and conclusions of law in favor of IMS:

22. The issues encountered in the shop drawing process delayed the manufacturing of the AAC materials, not the action or inactions of IMS. Peyronnin acknowledged it was responsible for coordinating the AAC shop drawing process. The supplementary conditions contained in Peyronnin's contract with Holy Redeemer state, "[Peyronnin] shall have the sole responsibility and obligation in regard to Shop Drawings" . . . (Exhibit 34).
23. Peyronnin acknowledged its representative responsible for the AAC shop drawings did not have experience reading such drawings.
24. Once the AAC material for the new building was able to be put in production, the material was delivered to the construction site in a reasonable time.
25. The field modifications performed by Peyronnin relating to the installation of the AAC were typical and should have been expected.
26. Peyronnin is claiming IMS was responsible for expenses Peyronnin allegedly incurred in using through bolts relating to the installation of the AAC material. The use of through bolts to connect the AAC material was depicted in the shop drawings. There was also testimony the bid prepared by Peyronnin for the subject construction project contemplated the use of the through bolts.
27. Peyronnin did not use reasonable efforts to install the AAC panels on the new building prior to severe cold weather. Peyronnin choose [sic] to have only one (1) crew installing the AAC panels. Peyronnin could have used a second crew to speed up the installation process.

28. Peyronnin claims it was justified in discontinuing the installation of the AAC panels for the new building because the product data sheet for the thinbed mortar used in connection with the installation of the AAC panels stated that temperatures must be higher than 40 [degrees] F for a period of 24 hours. It is customary and usual for masonry work to continue in cold weather. In fact, Peyronnin installed AAC panels in November 2002 when the temperature fell below 40 [degrees] F. Peyronnin's records reflect they performed AAC cladding work during each work week day in November 2002.
29. In 2002, Peyronnin was also serving as the general contractor for another construction project referred to as the State Hospital project. Peyronnin acknowledged the State Hospital project was the largest construction project it had ever undertaken. The State Hospital project also involved the application of AAC material. This was Peyronnin's first project involving AAC material. Peyronnin had five (5) crews installing AAC material at the State Hospital project from May 2002 to November 2002.
30. Peyronnin acknowledged it underbid the Holy Redeemer project. By underbidding the job, it had a direct impact on Peyronnin's job cost analysis.
31. Peyronnin also acknowledged it underbid the State Hospital project.
32. Following the completion of the Holy Redeemer and State Hospital projects, Peyronnin eliminated its Masonry Division. One of the reasons for this was because the division lost money for Peyronnin. Presently, Peyronnin subcontracts its masonry work.

CONCLUSIONS OF LAW

7. IMS has satisfied the requirements of the mechanic's lien statute. IMS was a material supplier who furnished materials and equipment used for the Holy Redeemer construction project. IMS was not paid in full for the furnished materials and equipment and IMS filed in duplicate a sworn statement and notice of mechanic's lien with the office of the Recorder . . . within ninety (90) days of furnishing said material. IMS brought suit to foreclose on its lien within one (1) year of recording the lien. IMS has a valid and enforceable mechanic's lien on the Real Estate.
8. The value of the materials and equipment furnished by IMS is as follows:

AAC materials:	\$77,129.00
AAC band saw rental:	\$4,512.38
Structural steel materials:	<u>\$4,933.21</u>
	\$86,574.59

9. IMS is also entitled to the recovery of reasonable attorneys' fees and prejudgment interest as part of its mechanic's lien claim.
10. The total amount of IMS' mechanic's lien is \$114,670.04. This amount is calculated as follows:

Furnished material and equipment:	\$86,574.59
Pre-judgment interest at 8% per annum From 12/25/02 to 02/07/05:	\$14,701.75
Reasonable attorneys' fees and costs:	\$13,393.70

11. IMS is entitled to an order of foreclosures on its mechanic's lien on the Real Estate and the right of redemption of Holy Redeemer is forever barred and foreclosed.
12. Pursuant to the personal liability statute, Ind. Code § 32-28-3-9, IMS is entitled to recover \$86,574.59 from the approximate \$120,000.00 in proceeds Holy Redeemer is currently withholding and which proceeds are due from Holy Redeemer to Peyronnin.
13. Peyronnin breached its contract with IMS by not paying IMS in full for the materials and equipment IMS furnished. As a result of Peyronnin's breach, IMS sustained damages in the amount of \$126,896.60.

ENTRY OF JUDGMENT

1. That the mechanic's lien of [IMS] be, and hereby is, foreclosed and the equity of redemption of Holy Redeemer Catholic Church and Catholic Diocese of Evansville, and all persons claiming under and through them, is hereby foreclosed on the Real Estate, and that [IMS] be, and hereby is, given Judgment against the Defendants, Holy Redeemer Catholic Church and Catholic Diocese of Evansville, in the amount of \$114,670.04, plus post-judgment interest at the rate of eight percent (8%) until the date of sale of said Real Estate, all without relief from evaluation and appraisal laws.
2. That the Real Estate shall be sold by the Sheriff of Vanderburgh County, Indiana to

satisfy the sum found to be due [IMS] as soon as said sale can be had under the laws of this jurisdiction governing the sale of property under foreclosure.

3. That [IMS] is hereby given Judgment against the Defendant, Peyronnin Construction Co., Inc., in the amount of \$126,896.60, plus post-judgment interests at the rate of eight percent (8%).
4. That any and all amounts paid in satisfaction of the Judgments entered herein against Holy Redeemer Catholic Church and Catholic Dioceses of Evansville or Peyronnin Construction Co. Inc. shall reduce, dollar for dollar, each of the respective judgments, regardless of whether [IMS]'s remedy is equitable or legal.
5. That Peyronnin Construction Co., Inc. shall recover nothing by way of its Counter-Claim against [IMS].

Appellant's App. p. 16-22. The Catholic Diocese fully paid and satisfied the judgment entered against it, and a release and satisfaction of judgment was filed on March 31, 2005.

Peyronnin now appeals.

DISCUSSION AND DECISION

I. Mechanic's Lien and Judgment Against the Catholic Diocese

Peyronnin first contends that the judgment against the Catholic Diocese with regard to IMS's mechanic's lien cannot stand. In essence, Peyronnin argues that it is entitled to appeal this judgment because the Catholic Diocese withheld Peyronnin's money and then used those funds to partially satisfy the judgment. In other words, Peyronnin maintains that the judgments entered for IMS with regard to the Catholic Diocese and Peyronnin were "inter-related because Peyronnin's dealing with IMS were the origin of the lien . . . and, ultimately, the Trial Court's rationale for the Judgment against the Diocese." Appellant's Br. p. 2.

In resolving this issue, we initially observe that a mechanic's lien is a distinct,

statutory remedy, totally separate from the common law remedy that addresses a breach of contract claim. Kokomo Med. Arts Bldg. P'ship v. William Hutchens and Assoc., 566 N.E.2d 1093, 1094 (Ind. Ct. App. 1991). In other words, "it is the law, and not the contract, which gives the lien." Davis and Rankin Bldg. and Mfg. Co. v. Vice, 43 N.E. 889, 890 (Ind. Ct. App. 1896). Additionally, a mechanic's lien provides a remedy in rem, while a breach of contract is in personam. Kokomo Med. Arts, 566 N.E.2d at 1094. Defenses and set-offs, which are creatures of contract, cannot be used to diminish, qualify, or determine the amount recoverable under the statutory provisions governing a mechanic's lien. Id.

In this case, the trial court determined that IMS satisfied the requirements of the mechanic's lien statute and entered judgment accordingly. The Catholic Diocese subsequently paid the judgment in full and, in accordance with Indiana Trial Rule 67(B), a Release and Satisfaction of Judgment was filed with the trial court.

In general, the payment and satisfaction of a judgment operate to extinguish the judgment and put an end to its validity for all purposes. Id. Because the judgment against the Catholic Diocese has been completely satisfied and released, no live controversy exists with respect to that judgment. Thus, Peyronnin is barred from challenging the judgment entered against the Catholic Diocese because the issue is moot. See Ind. High Sch. Ath. Assoc., Inc. v. Durham, 748 N.E.2d 404, 410 (Ind. Ct. App. 2001) (holding that an issue becomes moot when it is no longer live and the parties lack a legally cognizable interest in the outcome or when no effective relief can be rendered to the parties).

II. Breach of Contract

Peyronnin next contends that the judgment entered against it on IMS's breach of contract action cannot stand because the trial court's findings were not supported by the evidence. Specifically, Peyronnin maintains that the judgment was erroneous because the evidence established that IMS caused the delays in the project and supplied inadequate and nonconforming materials.

In resolving this issue, we first note that when the trial court has entered findings of fact and conclusions of law, we apply the following two-tiered standard of review: whether the evidence supports the findings and whether the findings support the judgment. Clark v. Crowe, 778 N.E.2d 835, 839 (Ind. Ct. App. 2002). The trial court's findings and conclusions will be set aside only if they are clearly erroneous, that is, if the record contains no facts or inferences supporting them. Id. at 839-40. A judgment is clearly erroneous when a review of the record leaves us with a firm conviction that a mistake has been made. Id. at 840. We neither reweigh the evidence nor assess the credibility of witnesses, but consider only the evidence most favorable to the judgment. Id. We review conclusions of law de novo. Bass v. Bass, 779 N.E.2d 582, 588 (Ind. Ct. App. 2002).

In this case, the record reflects that IMS prepared the AAC shop drawings as part of its contractual responsibilities. Appellant's App. p. 246. Those drawings noted the issues that had to be resolved before the AAC panels could be engineered and produced for the project. However, as was established at trial, issues remained in the second set of drawings that were not addressed during the shop drawing review process. Moreover, Peyronnin acknowledged that it was responsible for coordinating the shop drawing process as the

general contractor. Appellee's App. p. 106-07.

The evidence further established that IMS was unable to begin engineering and manufacturing the AAC panels until issues impacting the AAC connection and other details were adequately addressed in the shop drawing review process. And when the second set of shop drawings was returned following the review process, those issues had not been resolved.

With respect to the engineering of the AAC panels, the evidence showed that the panels were properly constructed to withstand stresses and loads that would be encountered as a component of the building. At trial, the project architect testified as follows:

Q. Was the material IMS supplied incorporated into the building?

A. Yes.

Q. Are you aware of any problems or defects with the material IMS supplied that is now part of the building?

A. No.

Appellee's App. p. 83-84. As the evidence showed, the AAC panels were properly engineered and installed in the building. Thus, we decline to disturb the trial court's conclusion that IMS did not breach its contractual obligation with respect to the engineering of the panels.

In a related issue, Peyronnin argues that it was entitled to judgment on its counterclaim because the evidence demonstrated that "IMS delivered product materially different from the Contract Documents." Appellant's Br. p. 24. In other words, Peyronnin contends that because it had to perform various field modifications on the materials, the AAC

panels were necessarily nonconforming and, thus, it was entitled to a judgment on its counterclaim against IMS.

Notwithstanding these claims, the AAC shop drawings reviewed by Peyronnin called for field cutting and coring. Joan English, a witness for IMS, testified that although vertical panels can be cored during the manufacturing process, coring for horizontal panels must be performed in the field for greater accuracy. Appellant's App. p. 117-19. While Peyronnin attempted to refute the evidence that field modifications are typical through the testimony of Drew Peyronnin, one of the company's principals, he admitted on cross-examination that he is not a mason and has never installed AAC. *Id.* at 101. Also, a union mason of twenty-six years who served as Peyronnin's field superintendent acknowledged that performing field modifications to AAC is "nothing unusual." *Id.* at 163, 166. During cross-examination, Ward Peyronnin—another principal of the company—acknowledged that all non-90-degree corners for AAC material must be cut in the field. Appellees' App. p. 105. In light of this evidence, we reject Peyronnin's argument that the product was non-conforming because certain modifications had to be conducted in the field. Therefore, the trial court properly determined that IMS was not in breach of the contract.

Finally, Peyronnin attacks the validity of finding of fact number twenty-two which stated that "the issues encountered in the shop drawing process delayed the manufacturing of the AAC materials, not the actions or inactions of IMS." Appellant's App. p. 16. As noted above, the evidence established that the AAC panels could not be produced until the issues noted in the AAC shop drawings were resolved. In essence, the evidence established that the

issues arose because of discrepancies and inconsistencies in the project drawings, and those issues were to be addressed in the shop drawing review process. However, when the second set of drawings was returned to IMS, the issues had not been adequately resolved. Once the issues were ultimately addressed in the third set of shop drawings, the manufacturing of the AAC materials began and the materials were delivered to the site, and there is no dispute that once the AAC went into production it was delivered to the construction site within a reasonable time. In light of this evidence, we conclude that the evidence at trial supported the trial court's finding that IMS was not responsible for the delays in manufacturing.

CONCLUSION

In light of the issues discussed above, we conclude that Peyronnin's attempt to appeal the judgment entered on IMS's mechanic's lien complaint is barred by the doctrine of mootness. We also note that the evidence supported the trial court's findings that IMS complied with the terms of the contract in supplying Peyronnin with the proper AAC panels, and the issues regarding the construction delays on the project and nonconforming materials arose because of the discrepancies and inconsistencies in the project drawings through no fault of IMS. Thus, Peyronnin has failed to establish that the judgment entered against it was clearly erroneous.

The judgment of the trial court is affirmed.

VAIDIK, J., and CRONE, J., concur.