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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-000097-MR

MOREL CONSTRUCTION COMPANY, LLC — APPELLANT

v.

APPEAL FROM MEADE CIRCUIT COURT
HONORABLE ROBERT A. MILLER, JUDGE
ACTION NO. 10-CI-00123

RICHARDSON BULLDOZING, LLC — APPELLEE

OPINION
AFFIRMING IN PART
AND REVERSING IN PART

** ** ** ** **

BEFORE: CLAYTON, MAZE AND NICKELL JUDGES.

CLAYTON, JUDGE: This is an appeal from a decision of the Meade Circuit Court after a bench trial on the issue of breach of contract and a mechanics' lien. Based upon the following, we affirm in part and reverse in part.

BACKGROUND SUMMARY

The Appellee, Richardson Bulldozing, Inc., (Richardson) brought this action against the Appellant, Morel Construction Company, LLC, (Morel) to enforce a mechanics' lien. At the beginning of the case, Morel moved the case be dismissed due to improper venue. The trial court held that the statute at issue set forth that the trial must be held in the county which was the situs of the property and, consequently, that Meade County was the proper forum. The contract between the parties, however, provided that any disputes would be heard in Jefferson County. The trial court found this was overridden by the statute. After the motion to dismiss was denied, Morel brought a counterclaim against Richardson for breach of contract.

Morel was hired by the Meade County Board of Education to construct the Flaherty Primary School located in Meade County. Morel was the general contractor. Morel entered into a subcontract with Richardson whereby Richardson would oversee, among other things, site grading and storm drain installation. The subcontract provided for written work orders prior to Richardson performing any work, but the parties did not adhere to this provision.

A dispute arose after Richardson billed Morel the amount of $38,888.75 for mass rock busted and removed between November 9 and 13, 2009. On November 24, 2009, Morel sent a letter to Richardson which provided, in part, as follows:

> We disagree with the quantity of rock removal billed and there is no verification for the quantity of rock removed, nor is there a written direction or signed extra work order to perform this work. By your own admission it took 3 – days (24 hours) to break out the rock between the two (2) schools (311.11 c.y.). While we question the quantity of rock, this equates to breaking 13 c.y./hr. Therefore, the total hours to break out the 374.75 c.y. of rock in question would total 29 hours. At your November 17, 2009 hourly rates for track hoe and 4000 lb. rock hammer, this translates to 29 hours @ 305.00/hour = $8,845.00. The high lift and truck time would have been required by contract to cut to subgrade if no rock was present, so no extra charges for this equipment should apply.

After this letter, Morel did not pay other invoices for work that, it admitted at the bench trial, was legitimate. On November 20, 2009, Morel verbally instructed Richardson to cease any further rock removal. A letter dated December 1, 2009, confirmed this directive and instructed Richardson to proceed with its subcontract work.

Morel shut down the exterior job site from late December 2009 until March 18, 2010. On March 18, 2009, Morel directed Richardson to proceed with completion of the storm sewer work and final grade on excavation. By letter dated March 19, 2010, Richardson, through counsel, informed Morel of its readiness to proceed but that rock existed that had to be hammered and removed before storm drain pipes could be laid. Richardson informed Morel that re-digging after the winter was not in its contract and asked for additional compensation for "duplicate work." Morel ordered Richardson to perform final grading and storm sewer work and to deliver all owner purchased materials to the job site. Richardson replied

that due to Morel's failure to pay for authorized extra work, persistent direction that Richardson complete work outside the scope of the contract without additional compensation, and failure to bust and remove rock that impeded its ability to perform its storm sewer work under the contract, Richardson was withdrawing from further work on the project.

On April 9, 2010, Richardson delivered all materials that had been purchased by the owner to the project site as directed by Morel. On April 16, 2010, Morel terminated Richardson's contract and accepted bids on the remainder of the work.

Richardson filed a lien pursuant to Kentucky Revised Statutes (KRS) 376.240 against Morel on February 6, 2010. On March 29, 2010, Richardson filed suit in Meade Circuit Court. A bench trial was held and the trial court found that Morel had breached the contract and was not entitled to damages caused by its own breach. Richardson was awarded $52,959.90 with prejudgment interest compounded annually at the rate of 8% per annum as well as attorneys' fees.

Morel then brought this appeal.

STANDARD OF REVIEW

We review questions of law *de novo*. *Commonwealth v. Reinhold***,** 325 S.W. 3d 272 (Ky. 2010). A trial court's findings of fact shall not be set aside unless clearly erroneous. Findings are clearly erroneous if they are not supported by substantial evidence. *Moore v. Asente*, 110 S.W. 3d 336, 354 (Ky. 2003). Substantial evidence is evidence of sufficient probative value that permits a

reasonable mind to accept as adequate the factual determinations of the trial court. *Id*. A reviewing court must give due regard to the trial court's judgment regarding the credibility of the witnesses. *Id*.

DISCUSSION

I. VENUE.

Before addressing the merits of the case before us, we must determine whether the trial court had proper venue to entertain the action. The contract between the parties set forth that all claims related thereto would be brought in Jefferson County. Morel argues that this forum selection clause should have been enforced in this case.

The language set forth in the contract provided as follows:

> Any dispute between the SUBCONTRACTOR and MOREL arising out of or relating to this Agreement or a breach thereof, and which is not resolved by the parties, shall be submitted to a judicial court of competent jurisdiction within Jefferson County, Kentucky.

In determining that venue was proper in Meade County, the trial court relied upon KRS 376.250(5) which provides that:

> All suits for the enforcement of these liens on public funds shall be instituted in the Circuit Court of the county in which is located the property on which the improvement is made, except where the proper owner is a public university. Where the property is owned by a public university, the suit shall be instituted in the Circuit Court of the county in which is located the main campus of the public university. This court shall have exclusive jurisdiction of the enforcement of liens asserted against the public funds due the contractors, subject to the same rights of appeal as in other civil cases.

The trial court found that Morel sought to enforce a forum selection clause that violated the express provisions of KRS 376.250 and the process which must be satisfied in order to pursue the lien on a public project pursuant to KRS 376.240. The trial court also found that, while the holding set forth in *Prezocki v. Bullock Garages, Inc.*, 938 S.W. 2d 888 (Ky. 1997), was that a forum selection clause should be enforced as prima facie valid, it would be unreasonable to do so in light of the statutory mandate.

Morel argues that the language of the statute does not preclude enforcement of the contract's forum selection clause. It cites a New York case, *A.C.E. Elevator Co. v. J.B. Constr. Corp.*, 746 N.Y.S.2d 361, 362 (N.Y. Sup. Ct. 2002), in support of its position. In that case, however, there was a specific statute which set forth that a forum selection clause would be enforced if a change of venue motion was made. Kentucky, on the other hand, does not have such a statute.

KRS 376.250(5) provides that exclusive jurisdiction resides with the county in which the property is situated. In this case, that was Meade County. Thus, the trial court did not err in dismissing Morel's motion for a change of venue.

II. MATERIAL BREACH OF CONTRACT.

Morel next argues that the evidence in the record does not support a finding that it "materially breached" the subcontract. In determining that Morel materially breached the subcontract, the trial court held as follows:

> The [subcontract] is very one sided in favor of Morel. As such, Morel chose not to follow its terms and

> attempted to unilaterally modify its requirements. Morel acted in bad faith and fraudulently withheld payment of valid invoices to (1) Richardson initially, upon billing; (2) then continued until Richardson was forced to file a lien; (3) then throughout the course of litigation (including denial of liability in its pleadings in relation thereof); and (4) finally on the date of bench trial acknowledged its actions.

Morel contends that all breaches are not material breaches.

A "material breach" is one that goes to the essence of the contract and makes it impossible for the other party to perform. 23 Williston on Contracts § 63:3 (4th ed.) A "non-material breach" does not allow a party to abandon performance under the contract. *Id*. Under Kentucky law, however, the withholding of payments unconditionally owed is a material breach of a contract. *See Clark Engineering & Construction Co., Inc. v. Cotton*, 514 S.W.2d 121, 123 (Ky. 1974).

In this case, the trial court found that Morel deliberately withheld payments on multiple invoices for no legitimate reason under the subcontract. It also found that Morel materially breached the subcontract when it ordered Richardson to perform additional work without compensation, perform duplicate work, and intentionally withheld funds it admitted were owed in order to pressure Richardson to negotiate a lesser claim on a large rock invoice. The trial court found these actions on the part of Morel were a material breach of the subcontract. We agree.

Morel asserts that while it withheld payment on the large invoice, it paid other invoices and that, therefore, it did not act in bad faith. As set forth above, however, our review of a trial court's findings and conclusions is limited. "[D]ue

regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses" and doubt as to the correctness of a finding is not enough to justify our reversal of the trial court's decision. *Moore v. Assente*, 110 S.W. 3d 336, 354 (Ky. 2003).

Morel also argues that Richardson waived any claim for breach by continuing to work and by accepting progress payments. It asserts that Richardson elected its remedy when it filed its lien against the disputed funds. Richardson, however, contends that its election to file a lien does not demonstrate or imply an intentional relinquishment of a known right.

While it is possible that an injured party may waive a material breach (Williston, *supra*), Richardson's actions do not indicate that it did so. In this action, Morel withheld payment from Richardson even though the contract provided for the work to be completed and billed as Richardson had done. Richardson continually asked for payment and continued to work. Morel then requested additional, duplicate work from Richardson. Based upon these actions, the trial court determined that Morel materially breached the contract and we agree. As to Richardson's decision to proceed with a lien, that action was taken after the material breach. Thus, we affirm the decision of the trial court.

III. ATTORNEYS' FEES.

The final issue before us is the award of attorneys' fees to Richardson by the trial court. Attorneys' fees are not ordinarily allowed absent a statute or contract

provision which provides for them. *Aetna Casualty & Surety Co. v. Commonwealth of Kentucky*, 179 S.W. 3d 830, 842 (Ky. 2005).

In this case, the trial court found that Morel acted in bad faith in withholding the payments which were due. The trial court also held that the litigation was unnecessary and its costs would reduce the damages Richardson would receive.

In *Bell v. Commonwealth,* 423 S.W.3d 742, 749 (Ky. 2014), the Kentucky Supreme Court held that "the only appropriate award of attorneys' fees as a sanction comes when the very integrity of the court is in issue." (Emphasis in original). Based upon the holding in *Bell*, in this case the trial court abused its discretion in making the determination of bad faith and awarding attorneys' fees based upon it. Therefore, we reverse. The award of attorneys' fees is vacated.

ALL CONCUR.

BRIEF FOR APPELLANT:

J. Mark Grundy
Steven A. Brehm
Louisville, Kentucky

BRIEF FOR APPELLEE:

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