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STATE OF MINNESOTA
IN COURT OF APPEALS
A11-695

Rock Creek Designers and Builders, LLC,
Respondent,

vs.

Brian Bellows, et al.,
Appellants,

Citizens Independent Bank, et al.,
Defendants,

and

Brian Bellows, et al.,
Third Party Plaintiffs,

vs.

Custom Home Builder Title,
Third Party Defendant.

Filed February 6, 2012
Affirmed as modified
Peterson, Judge

Hennepin County District Court
File No. 27-CV-07-20306

Timothy J. Peters, Peters Law Firm, PLLC, Minneapolis, Minnesota (for respondent)

Michael D. Schwartz, Michael D. Schwartz P.A., Chanhassen, Minnesota (for appellants)

Considered and decided by Peterson, Presiding Judge; Connolly, Judge; and Stauber, Judge.

U N P U B L I S H E D O P I N I O N

PETERSON, Judge

On appeal after remand in this mechanics' lien dispute, appellant-property owners argue that (1) the amount of the lien claimed by respondent mechanic's lienor is excessive because, after respondent breached the construction contract, appellants made payments directly to subcontractors that exceeded the contract price; (2) the district court erred in not awarding attorney fees to appellants for respondent's breach of contract; and (3) no fees should have been awarded to respondent because it failed to prevail on its mechanic's lien claim. We affirm as modified.

FACTS

Respondent Rock Creek Designers and Builders, LLC, and appellants Brian and Tracy Bellows entered into a contract, under which respondent agreed to provide the labor, skill, and materials necessary to construct a single-family home according to plans approved by appellants at a price of $947,195. During construction, the parties approved 64 change orders that increased the price to $1,026,179.15. Appellants made an initial deposit and five progress payments to respondent that totaled $853,474.45.

When respondent submitted its next payment request, appellants failed to place the balance due in escrow with the escrow agent as required by the contract and escrow agreement, claiming that respondent had breached the contract and escrow agreement by failing to complete necessary work and provide certified construction statements and lien

waivers. Respondent stopped work and brought this action to establish and foreclose a mechanic's lien against the property. Respondent brought breach-of-contract and unjust-enrichment claims against appellants. The unjust-enrichment claim was based on unsigned change orders. Plymouth Plumbing filed a cross-claim to establish and foreclose a mechanic's lien.

Following trial, the district court determined that respondent breached its contract with appellants by failing to provide documents required by the contract, including lien waivers, but that the breach was not material. The district court determined that appellants were liable for breach of contract and awarded respondent breach-of-contract damages calculated as follows:

ADJUSTED CONTRACT PRICE	
Original Contract Price	$947,195.00
Approved Change Orders	$78,984.15
Adjusted Contract Price	$1,026,179.15
COST OF COMPLETION AT TIME ROCK CREEK STOPPED WORK	
Work Removed From Contract Per [Appellants]	($45,851.65)
Remaining Contract Work	($16,990.00)
	($62,841.65)
TOTAL PAYMENTS BY [APPELLANTS]	($853,474.45)
TOTAL DAMAGES	$109,863.05

The district court denied respondent's unjust-enrichment claim because it was based on change orders that had not been approved by appellants. The court awarded respondent $68,339.58 in attorney fees. The district court found that Plymouth Plumbing

"proved a claim against [respondent] for account stated in the amount of $9,750" and that appellants and respondent were jointly and severally liable for that amount.

In the first appeal, this court concluded that the district court erred in finding that respondent's "failure to provide information relating to work completed and, in particular, lien waivers was not a material breach of the escrow agreement." *Rock Creek Designers & Builders, LLC v. Bellows*, No. A09-1551, slip op. at 3 (Minn. App. July 20, 2010) (order opinion), *review denied* (Minn. Sept. 21, 2010). Notwithstanding the material breach, this court determined that respondent was entitled to the value of services provided to appellants. *Id.* at 4 (citing Minn. Stat. § 514.01 (2008) (stating that whoever "contributes to the improvement of real estate by performing labor, or furnishing skill, material or machinery" shall have a lien on such improvement)). This court remanded the issue of damages and instructed the district court to "reevaluate damages, if any, to reflect the amounts paid by [appellants] directly to subcontractors and ensure that double payments are not being made" and to "also determine whether it is proper to award attorney fees up to the time of [respondent's] breach of contract." *Id.* This court affirmed the denial of respondent's unjust-enrichment claim. *Id.* at 5. This court explained:

> As the district court found, the contract governed the parties' relationship, and there were no change orders signed by both parties indicating that [appellants] had received any labor, materials, or discounts for additional agreements. Thus, any enrichment received by [appellants] was not unjust. Similarly, any interference [appellants] had with the progress of the home was either contrary to an irrelevant oral agreement or came after [respondent] breached the contract.

Id.

On remand, the district court found that $51,647.36 of the $201,500 paid by appellants directly to subcontractors was paid for work included in respondent's mechanic's lien, and the district court reduced respondent's lien by that amount.[1] The original attorney-fee award was based on respondent prevailing on two of its three claims, the breach-of-contract and mechanic's lien claims. Because this court reversed the judgment for respondent on the breach-of-contract claim, the district court reduced the attorney-fee award to $33,485.83, one-third of the attorney fees claimed by respondent. The district court awarded respondent an additional $3,000 for attorney fees incurred on remand.

This appeal followed.

D E C I S I O N

I.

We defer to the district court's credibility determinations and will set aside the district court's factual findings only if they are clearly erroneous. *Patterson v. Stover*, 400 N.W.2d 398, 400 (Minn. App. 1987) (citing Minn. R. Civ. P. 52.01). "If there is reasonable evidence to support the [district] court's findings of fact, a reviewing court should not disturb those findings." *Fletcher v. St. Paul Pioneer Press*, 589 N.W.2d 96, 101 (Minn. 1999). "Findings of fact are clearly erroneous only if the reviewing court is

[1] The original lien amount was $103,803.34. After the reduction that the district court made on remand, the lien amount was $52,155.98.

left with the definite and firm conviction that a mistake has been made." *Id.* (quotation omitted).

Appellants argue that the district court's failure to deduct from respondent's damages the payments that appellants made to certain subcontractors resulted in appellants paying twice for the same labor and/or materials. The district court considered three pieces of evidence to determine whether the payments made by appellants were payments for items for which respondent claimed a lien. The first piece of evidence was a lien itemization prepared by respondent, which showed the cost of work and/or materials provided by individual subcontractors for appellants' home. The total amount charged by the subcontractors minus the amount respondent received in payments from appellants is the amount for which respondent claimed a lien against the home. The second piece of evidence was the sworn construction statement prepared by respondent, which itemized the work performed and identified (a) the subcontractor that performed each item, (b) the actual cost of the item and any cost yet to be incurred, and (c) the amount paid by respondent to the subcontractor and any outstanding balance. The third piece of evidence was an account ledger prepared by appellants, which showed amounts that appellants paid to individual subcontractors but did not identify the work for which a payment was made.

The district court used this evidence to determine whether respondent had paid subcontractors for work performed on the home and not received payment from appellants for that work. To determine whether respondent had a valid lien for work done by a particular subcontractor, the district court examined the sworn construction

statement to determine whether respondent had paid the subcontractor for work performed on the home and then checked the account ledger to determine whether appellants made any payments to the subcontractor. If appellants had made a payment to the subcontractor, the court determined whether the payment was for the same work that had been paid for by respondent. If the evidence showed that appellants' payment was for the same work that had been paid for by respondent or that respondent had not paid for work done by a subcontractor, the district court did not allow respondent to claim a lien for that work. Because appellants contracted directly with subcontractors for additional work, the fact that the account ledger showed a payment by appellants to a subcontractor was, by itself, insufficient to show that the payment by appellants was a double payment for the same work paid for by respondent.

Phase Electric

Appellants argue that the full $12,000 payment that they made to Phase Electric must be deducted from respondent's lien. The district court found:

> The Lien Itemization includes $29,772 for services provided by Phase Electric. The Ledger shows a direct payment by [appellants] to Phase Electric in the amount of $12,000. The Construction Statement shows the amount paid by [respondent] to Phase Electric as $18,900 with an outstanding balance of $10,872. Given these figures, the amount of the mechanic's lien should be reduced by $10,872, which is the outstanding balance shown on the Construction Statement and the differential between (1) the amount of Phase Electric's services included in the mechanic's lien and (2) the amount actually paid to Phase Electric according to Construction Statement.

Because the evidence presented by appellants does not show that the entire $12,000 was a duplicate payment for work included in respondent's mechanic's lien, rather than a payment for the $10,872 outstanding balance due from respondent to Phase Electric and $1,128 for additional work requested by appellants, the district court did not err by reducing respondent's lien by $10,872, rather than $12,000.

United Wall Systems

The district court found:

> The Lien Itemization includes $36,500[2] for services provided by United Wall Systems. The Ledger shows a direct payment by [appellants] to United Wall System in the amount of $2,500. The Construction Statement shows the amount paid by [respondent] to United Wall System as $18,900[3] with an outstanding balance of $13,050. The amount of the mechanic's lien should be reduced by the full amount of [appellants'] direct payment since it exceeds the outstanding balance set forth in the Construction Statement.

Appellants argue that United Wall Systems has been paid in full and, therefore, the entire $13,050 must be deducted. But $13,050 is the outstanding amount stated in the construction statement, which was executed on November 6, 2006. At trial, Tracy Bellows testified that appellants paid United Wall Systems $2,500. The account ledger shows that the $2,500 payment was made on April 25, 2008. A release of United Wall Systems' mechanic's lien was executed on April 30, 2008. The release, however, does not show the total amount paid to United Wall Systems and, therefore, does not show that

[2]The lien itemization actually includes $36,550 for services provided by United Wall.
[3]The sworn construction statement actually shows a payment of $23,500 by respondent to United Wall.

appellants paid in full the $13,050 outstanding balance. Appellants have not shown that the district court erred by reducing respondent's lien by $2,500.

Matthew Daniels

The district court found:

> The Lien Itemization includes $31,229 for services provided by Matthew Daniels. The Ledger shows a direct payment by [appellants] to Matthew Daniels in the amount of $11,500. The Construction Statement shows the amount paid by [respondent] to Matthew Daniels as $22,297.50 with an outstanding balance of $8,931.50. The amount of the mechanic's lien should be reduced by $8,931.50, which is the outstanding balance and the differential between (1) the amount of Matthew Daniels' services included in the mechanic's lien and (2) the amount actually paid to Matthew Daniels according to Construction Statement.

Appellants argue that the entire $11,500 should be deducted but, again, appellants fail to cite evidence showing that the entire amount represented a payment for work included in respondent's mechanic's lien. The district court did not err in deducting $8,931.50 from respondent's lien.

H&H Hardwood Floors

The district court found:

> The Lien Itemization includes $11,797.50 for services provided by H&H Hardwood Floors. The Ledger shows a direct payment by [appellants] to H&H Hardwood Floors in the amount of $11,797.50. The Construction statement shows the amount paid by [respondent] to H& H Hardwood Floors as $11,797.50. Although [appellants'] direct payment is identical in amount to [respondent's] payment, duplicate payments should not be inferred because the invoice from H&H Hardwood Floors is for $23,595, which is $11,797.50 times two. Since there was no duplicate payment, the direct payment does not warrant any reduction.

Appellants argue that the failure to deduct the $11,797.50 resulted in appellants paying double because the money respondent used to pay H&H Hardwood came from progress payments four and five that appellants made to respondent. But, to determine the lien amount, the total amount of the progress payments that appellants made to respondent was deducted from the total of the costs shown in the lien itemization, which demonstrates that the lien amount reflects the payments appellants made to respondent. The lien itemization shows $11,797.50 as the amount that respondent paid H & H Hardwood. Appellants acknowledge that H & H did additional work that also cost $11,797.50, and appellants directly paid H & H for this work. The $11,797.50 that respondent paid H & H was included in the lien amount, and the $11,797.50 that appellants paid H & H was for additional work that was not included in the lien amount. The evidence does not show that appellants were charged twice for the same work.

Final Grade

Appellants argue that $9,202.44 of the $31,375.13 that the lien statement shows respondent was owed for labor and materials provided by Final Grade was the result of unsigned change order 114. Appellants also make the same argument that they made regarding the payment to H&H, that they were charged twice because the money came from progress payments. Respondent denied including any amounts from unsigned change orders in its mechanic's lien, and appellants do not cite evidence showing that the $9,202.44 amount on the change order was for work that was included in the $31,375.13. Consequently, appellant's have not shown that the district court clearly erred by failing to deduct the $9,202.44 from the $31,375.13 when determining the lien amount.

Concrete Arts/Graf Concrete

Appellants argue that the construction statement shows that Concrete Arts was owed $5,850 for materials and labor, and the account ledger shows that appellants paid this amount to Concrete Arts. In spite of this payment, however, the district court included in respondent's lien $5,840 for services provided by Concrete Arts. Therefore, appellants contend, they have been required to pay twice for Concrete Arts' services.

The district court found:

> The Lien Itemization includes $5,840 for services provided by Concrete Arts. The Ledger shows a direct payment by [appellants] to Concrete Arts in the amount of $5,850. In the Foundation and Flatwork section, the Construction Statement shows the amount paid by Rock Creek to Concrete Arts as $5,840. In the Cabinetry and Countertops section, the Construction Statement shows another entry for Concrete Arts – namely, costs to be incurred in the amount of $5,850. Given the similar but distinct amounts, the only reasonable inference is that [appellants'] direct payment to Concrete Arts was for the cost to be incurred and not for the services included in the mechanic's lien.

The evidence cited by the district court supports the inference that it made. Concrete Arts provided two different services, one that cost $5,840 and was paid for by respondent and another that cost $5,850 and was paid for by appellants.

Scherer Brothers

The construction statement shows a $2,011.26 outstanding balance that respondent owed to Scherer Brothers and a $4,135 amount[4] to be incurred with Scherer Brothers.

[4] The district court found the amount to be incurred was $2,700, but a separate entry shows an additional $1,435 amount to be incurred.

The account ledger shows that appellants made two payments to Scherer Brothers in the total amount of $7,923.59. Appellants argue that the district court erred by failing to deduct any of the $7,923.59 from the lien amount.

The district court found:

> The Lien Itemization includes $196,001.67 for services provided by Scherer Brothers Lumber. The Ledger shows a direct payment by [appellants] to Scherer Brothers Lumber in the amount of $7,923.59. The Construction Statement shows the amount paid by [respondent] to Scherer Brothers Lumber as $203,530.08 with an outstanding balance of $2,011.26 and $2,700 yet to be incurred. [Appellants'] direct payment to Scherer Brothers Lumber does not warrant any reduction because the Construction Statement shows payments exceeding the amount included in the mechanic's lien and also show an outstanding balance and costs yet to be incurred.

The evidence does not show that the district court's failure to deduct the $7,923.59 resulted in double payments. Even if none of the $2,700 that was expected to be incurred was ever actually incurred, the total amount that respondent paid or owed to Scherer Brothers was $205,541.34 ($203,530.08 + $2,011.26 = $205,541.34). Subtracting the $7,923.59 that appellants paid Scherer Brothers from $205,541.34 leaves $197,617.75 that respondent paid Scherer Brothers, which is more than the amount that respondent claims in its lien for materials provided by Scherer Brothers.

Plymouth Plumbing

Appellant argues that the district court erred in failing to deduct $9,750 paid to Plymouth Plumbing. That is the amount that the district court found respondent owed Plymouth Plumbing and for which it found appellants and respondent jointly and

severally liable. On remand, appellants submitted the stipulation and dismissal of Plymouth Plumbing's claim and the satisfaction of its mechanic's lien to the district court as attachments to an October 13, 2010 supplemental affidavit by Michael D. Schwartz, and appellants' memorandum of law regarding the redetermination of damages, which requests that that amount be deducted from respondent's lien. Because that evidence showed that appellants paid the judgment for Plymouth Plumbing, the district court erred in not deducting $9,750 from respondent's damages. Appellants cite no authority supporting their request for an additional deduction for costs and attorney fees allegedly incurred as a result of respondent's failure to pay Plymouth Plumbing from progress payments made by appellants and respondent's denial of Plymouth Plumbing's claim. Accordingly, we subtract $9,750 from respondent's lien of $52,155.98, resulting in a lien of $42,405.98.

II.

Attorney fees are recoverable when authorized by contract or statute. *Dunn v. Nat'l Beverage Corp.*, 745 N.W.2d 549, 554 (Minn. 2008). "The interpretation of a contract is a question of law if no ambiguity exists, but if ambiguous, it is a question of fact and extrinsic evidence may be considered." *City of Va. v. Northland Office Props. Ltd. P'ship*, 465 N.W.2d 424, 427 (Minn. App. 1991), *review denied* (Minn. Apr. 18, 1991). The determination whether a contract is ambiguous is a question of law. *Carlson v. Allstate Ins. Co.*, 749 N.W.2d 41, 45 (Minn. 2008). "A contract is ambiguous if it is reasonably susceptible to more than one construction." *Blackburn, Nickels & Smith, Inc.*

v. Erickson, 366 N.W.2d 640, 644 (Minn. App. 1985), *review denied* (Minn. June 24, 1985).

In denying appellants attorney fees, the district court stated, "The next issue on remand is whether [appellants] are entitled to recover attorney fees for [respondent's] breach of the Escrow Agreement." The district court concluded that respondent's breach of the escrow agreement did not trigger the fee-shifting provision in the construction contract because the construction contract and escrow agreements are separate contracts. But the construction contract also requires work certifications and lien waivers. It states: "The parties agree that all payments made by Owner to Builder shall be held in escrow at a title company satisfactory to Owner pending receipt of certification of each completion stage and receipt of lien waivers for each completion stage."

The fee-shifting provision in the construction contract states:

> In the event of default under this Contract, the non-defaulting party shall have the right, in addition to all other available rights and remedies, to recover damages for all costs and expenses incurred by the non-defaulting party in the construction of the improvements under this Contract, together with applicable profit and overhead and the costs, disbursements and reasonable attorney fees incurred by the non-defaulting party.

The contract does not define the term default. Citing the different definitions of breach and default, the district court determined that default meant only a failure to satisfy a payment obligation. *See The American Heritage Dictionary of the English Language* 233, 488 (3d ed. 1992) (defining "breach" as "[a] violation or infraction, as of a law, a legal obligation, or a promise" and "default" as "[f]ailure to perform a task or

fulfill an obligation, especially failure to meet a financial obligation"); *see also Black's Law Dictionary* 213, 480 (9th ed. 2009) (defining "breach of contract" as "[v]iolation of a contractual obligation by failing to perform one's own promise" and "default" as "[t]he omission or failure to perform a legal or contractual duty; esp., the failure to pay a debt when due" or "[t]o be neglectful; esp., to fail to perform a contractual obligation").

Although the definition of default emphasizes payment obligations, it is ambiguous because it is broad enough to apply to respondent's conduct. Accordingly, interpretation was a question of fact for the district court to resolve. The district court explained its finding that default applied only to financial obligations as follows:

> The Construction Contract does not define "default," but it is clear from the language of the contract and its fee-shifting provision that "default" refers to a failure to satisfy a payment obligation rather than any type of breach. . . . The balance of the fee-shifting provision establishes that "default" refers to a failure to satisfy a payment obligation because the recovery of attorney fees is supplemental to the right to recover "all costs and expenses incurred by the non-defaulting party in the construction of improvements under the Contract." It is thus evident that the fee-shifting provision contemplates a failure to satisfy payment obligations.

The court also noted:

> In this respect, the fee-shifting provision is arguably unilateral in operation. However, if the dispute had been arbitrated in accordance with Section 39 of the Construction Contract, the arbitrator would have authority "to allocate costs, disbursement[s] and legal fees as the arbitrator deems fair and equitable." Section 39 refers to breach of contract, further establishing that "default" and breach are not synonymous.

The district court did not err in construing the contract and declining to award appellants attorney fees.

Appellants argue that this court held that respondent was in "material default" and that the plain and ordinary contract language requires that they be awarded fees. This court's opinion does not use the term default and only addresses attorney fees awarded to respondent.

III.

Appellant's argument that respondent should not be allowed to recover fees under Minn. Stat. § 514.14 (2010) is contrary to this court's instructions on remand. In a mechanic's lien case, "[j]udgment shall be given in favor of each lienholder for the amount demanded and proved, with costs and disbursements to be fixed by the court at the trial." Minn. Stat. § 514.14 (2010). In this context, "costs and disbursements may include attorney fees." *T.A. Schifsky & Sons, Inc. v. Bahr Constr., LLC*, 773 N.W.2d 783, 788 (Minn. 2009). In determining whether to award attorney fees, a district court may consider the "time and effort required, novelty or difficulty of the issues, skill and standing of the attorney, value of the interest involved, results secured at trial, . . . taxed party's ability to pay, customary charges for similar services, and certainty of payment." *Jadwin v. Kasal*, 318 N.W.2d 844, 848 (Minn. 1982). "On review, this court will not reverse a [district] court's award or denial of attorney fees absent an abuse of discretion." *Becker v. Alloy Hardfacing & Eng'g Co.*, 401 N.W.2d 655, 661 (Minn. 1987).

The district court awarded respondent one-third of the attorney fees claimed because respondent prevailed on one of three claims. The district court did not reduce the

fee award based on respondent not being entitled to the full lien amount claimed. Although the result obtained may be a proper factor to consider in awarding fees, the authority cited by appellants does not show that the district court abused its discretion by declining to reduce the fee award on that basis. The party seeking reversal has the burden of showing error. *Bloom v. Hydrotherm, Inc.*, 499 N.W.2d 842, 845 (Minn. App. 1993), *review denied* (Minn. June 28, 1993). Because appellants have not shown error, we affirm the award of attorney fees to respondent.

Affirmed as modified.