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NO. COA 02-1438

NORTH CAROLINA COURT OF APPEALS

Filed: 16 December 2003

DON FARRIS d/b/a FARRIS  
PIPING AND SUPPLY CO.,  
Plaintiff,

v.

Gaston County  
No. 00 CVS 2062

MODERN POLYMERS, INC.,  
Defendant.

Appeal by defendant from judgment entered 22 July 2002 by Judge Timothy L. Patti in the Superior Court in Gaston County. Heard in the Court of Appeals 26 August 2003.

*Thomas B. Kakassy, P.A., by Thomas B. Kakassy, for plaintiff-appellee.*

*Arthurs & Foltz, by Douglas P. Arthurs and Tara R. Sain, for defendant-appellant.*

HUDSON, Judge.

On 4 May 2000, plaintiff Don Farris d/b/a Farris Piping and Supply Co. ("Farris" or "plaintiff") sued defendant Modern Polymers, Inc. ("MPI") for breach of various contracts. On 22 July 2002, the trial judge granted plaintiff's motion for summary judgment, awarding plaintiff the sum of \$89,349.48, together with interest at the rate of 2% per month from 29 January 2000. MPI appeals, and for the reasons discussed here, we reverse.

Farris is a sole proprietorship engaged in the business of the

connection, disconnection, and installation of specialized textile machinery. MPI operates a polystyrene packaging facility. Don Farris, the owner of Farris Piping Supply Co., had a thirty-two-year business relationship with Richard Hilliard, MPI's president, during which time Farris performed a variety of services for MPI involving heavy equipment installations.

In late September or early October 1999, Farris and Hilliard met to discuss a potential project, which would consist largely of Farris moving certain machines, known as Kohler presses, out of MPI's North Carolina plant in Cherryville and installing their replacements. The parties orally agreed upon a price of \$58,000.00 for this work. Later, the parties modified the job details to include having Farris move MPI's equipment from its McBee, South Carolina plant to its Cherryville plant. As modified, the contract price increased to \$70,000.00. On 14 October 1999, Hilliard drafted an internal memorandum, which described the work Farris was to perform, and directed a purchase order to Farris for the work.

Shortly thereafter, Don Farris and his crew began removing the old equipment from the Cherryville plant. After about one week, however, only one Farris employee remained on the project. MPI's new equipment arrived at the Cherryville plant 2 November 1999, when Farris had not yet completely prepared for its installation.

On Sunday 7 November 1999, MPI shut down its Cherryville plant for installation of the new equipment. Farris and his crew, who had been out of town on another job, arrived at the plant early that Sunday evening, promising to work through the night to

complete the job. Although Farris assured Hilliard that the new machinery would be operational by the following morning, it was not, as work on some of the plumbing and service lines was not completed. Farris completed the installation of the new equipment in Cherryville the following week, but the McBee plant work had not been done (old machines were still in place at the McBee plant).

An MPI representative contacted Farris to ask when the old machines would be removed from the McBee plant and installed in Cherryville, to which Farris responded, "You'll be lucky to have it in by Christmas." On or about 17 November 1999, Hilliard contacted Farris and informed him that MPI was considering hiring another firm to move the old machinery from McBee to Cherryville. Farris agreed to this and informed Hilliard that he would deduct the cost to hire the alternate firm from his contract price. MPI paid Bryson Machine \$13,500.00 to remove the old machinery and paid Czerr Construction \$9,752.34 to complete other work remaining under the contract.

#### Analysis

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. R. Civ. P. 56(c).

An issue is material if the facts alleged would constitute a legal defense, or would affect the result of the action, or if its resolution would prevent the party against whom it is resolved from prevailing in the action. [T]he party moving for summary

judgment has the burden of establishing the lack of any triable issue of fact. Furthermore, the evidence presented by the parties must be viewed in the light most favorable to the non-movant.

*Adams v. Jefferson-Pilot Life Ins. Co.*, 148 N.C. App. 356, 358, 558 S.E.2d 504, 506 (2002) (internal citations and quotation marks omitted), *disc. review denied*, 356 N.C. 159, 568 S.E.2d 186 (2002).

Thus, the first step of our analysis is to determine whether there are any "genuine issues" of material fact. We believe that the record before us does reveal genuine issues of material fact as to: (1) whether all of the work for which Farris invoiced MPI was actually completed; (2) whether Farris gave MPI proper set-offs for work performed by other contractors; and (3) whether the contract included any implied deadlines. Thus, plaintiff was not entitled to judgment as a matter of law.

Indeed, the evidence of record is conflicting. According to Hilliard's deposition testimony, MPI was forced to hire a replacement contractor (Bryson) to remove the machinery from the Cherryville facility to make room for the new machinery MPI had purchased, and this work was a significant part of the work that Farris agreed to perform. Hilliard also testified that he had to engage a third contractor (Czerr) to complete other work that Farris agreed to perform, and that MPI's own employees completed other aspects of the contract between the parties. As noted above, MPI paid Bryson \$13,500.00 and Czerr \$9,752.34 for the work they performed. Although Don Farris testified that he deducted the \$13,500.00 paid to Bryson from the original \$70,000.00 contract

price, we are unable to determine from the record whether this or the \$9,752.34 paid to Czerr was also deducted. The Farris ledger sheet attached to the complaint also indicates a balance of \$89,235.01, and shows no offsets. Further, we are unable to determine what amount, if any, MPI should be credited for work performed by its own employees. Additionally, when asked how much MPI owes Farris, Hilliard responded:

I think we owe [Farris] for the work that he performed that has not been invoiced. And I don't really know what that is, because everything has been lumped into this one lump sum. I think if [Farris] sat down with our people or if we sat down together and he brought his records in showing us where he spent his labor that he has not been paid, then he should be entitled to that money.

We note that while the measure of damages is a question of law, the amount of damages is ordinarily a question of fact. *Olivetti Corp. v. Ames Business Systems, Inc.*, 319 N.C. 534, 548, 356 S.E.2d 578, 586, *reh'g denied*, 320 N.C. 639, 360 S.E.2d 92 (1987). Thus, we conclude that a genuine issue of material fact exists as to the amount, if any, of damages plaintiff is entitled to recover.

Further, there is a genuine issue as to whether there was an implied deadline for the completion of the work under the contract. Generally, "[i]f no time for the performance of an obligation is agreed upon by the parties, then the law prescribes that the act must be performed within a reasonable time." *Metals Corp. v. Weinstein*, 236 N.C. 558, 561, 73 S.E.2d 472, 474 (1952) (citations omitted). In *Rawls v. Lampert*, 58 N.C. App. 399, 293 S.E.2d 620 (1982), this Court stated that:

the determination of what constitutes a reasonable time for performance require[s] taking into account the

purposes the parties intended to accomplish. Such a determination involves a mixed question of law and fact, [a]nd, in this State, authority is to the effect that, where this question of reasonable time is a debatable one, it must be referred to the jury for decision.

*Id.* at 401, 293 S.E.2d at 621 (citations and quotation marks omitted).

Here, both parties agree that there was no definite time set for performance. Thus, performance was to be completed within a reasonable time. Given the many contradictory references throughout the deposition testimony of both Hilliard and Farris as to the timeliness of performance, we conclude that this question is a "debatable one" and that "it must be referred to the jury for decision." *Id.*

Next, defendant argues that plaintiff has charged an illegal rate of interest and urges this Court to declare a forfeiture thereof. We decline to reach this issue, however, as it was not brought forward by assignment of error, was not the subject of any motion or ruled upon by the court below, and thus is not properly before us. See N.C. R. App. P. 10(a) and (b)(1).

For the foregoing reasons, we reverse the trial court's order granting summary judgment in favor of plaintiff, and remand for further proceedings.

Reversed and remanded.

Judges WYNN and CALABRIA concur.

Report per Rule 30(e).