NO. COA07-963

NORTH CAROLINA COURT OF APPEALS

Filed: 19 August 2008

WHITE FOX CONSTRUCTION
COMPANY, INC.,
Plaintiff,

v. Caldwell County
No. 04 CVS 67

MOUNTAIN GROVE BAPTIST
CHURCH, INC., formerly known
as and successor-in-interest
To MOUNTAIN GROVE BAPTIST
CHURCH and MOUNTAIN GROVE
BAPTIST CHURCH, an
unincorporated association,
Defendant.

Appeal by defendant from judgment entered 29 June 2006 and order entered 6 December 2006 by Judge W. Robert Bell in Caldwell County Superior Court. Heard in the Court of Appeals 3 March 2008.

Sigmon, Clark, Mackie, Hutton, Hanvey & Ferrell, P.A., by Forrest A. Ferrell, Stephen L. Palmer, and Jason White, for plaintiff-appellee.

Poyner & Spruill LLP, by Lee A. Spinks and Thomas L. Ogburn III, for defendant-appellant.

GEER, Judge.

Defendant Mountain Grove Baptist Church, Inc. ("the Church") appeals from the trial court's decision holding the Church liable to plaintiff White Fox Construction Company, Inc. for breach of contract. The Church contends that the trial court erroneously concluded that White Fox timely filed suit within the applicable

three-year statute of limitations. We hold that the governing contractual provisions unambiguously provided that final payment by the Church was due upon receipt of White Fox's final application for payment, which occurred on 22 December 2000. As White Fox did not file suit until 16 January 2004, the trial court erred in concluding that White Fox's suit was timely, and we accordingly reverse.

Facts

In 1992, the Church began planning an expansion of its sanctuary and the construction of a gym. It sought quotes from different contractors for the project. In 1994, White Fox sent the Church a letter proposing to complete the work at a cost not to exceed $2,200,000.00. The parties entered into a written contract two years later, on 6 March 1996, for the expansion of the sanctuary at a total cost of $2,178,847.00. The contract, which White Fox prepared, consisted of two parts, with the second part being expressly incorporated by reference in the first part. Both parts were form agreements of the American Institute of Architects ("AIA"), with Part 1 being AIA Document A101, a "Standard Form of Agreement Between Owner and Contractor where the basis of payment is a stipulated sum," and Part 2 being Part 2 of AIA Document A191, "Owner-Designer/Builder Agreement."

White Fox started construction on the sanctuary expansion in July 1996. In addition, on 7 October 1997, the parties executed a written change order providing for the construction of a gym at a

cost of $406,747.00, bringing the total contract price to $2,585,594.00.

When White Fox sought approvals and permits from the North Carolina Department of Insurance and the Caldwell County Building Inspector, they required White Fox to make changes to the original plans in order to comply with building codes. The increased costs included: (1) $705,545.00 in costs associated with wind load requirements, (2) $62,140.00 in costs related to fire ratings and materials, (3) $10,205.00 in costs for installation of a grease-trap interceptor, (4) $31,124.00 in increased costs as a result of relocation of transformers, and (5) $8,600.00 for emergency lighting.

Between September 1996 and November 1999, White Fox submitted 16 payment applications to the Church for interim payments on the project. The Church paid a total of $2,012,914.00 with respect to those payment applications. In early 2000, White Fox failed to pay subcontractors, resulting in claims of lien being filed against the Church. The Church, therefore, with the consent of White Fox, paid the subcontractors directly for the work performed. A dispute also arose between the parties regarding the increasing cost of the project.

On 7 July 2000, a certificate of occupancy was issued, and the Church began limited use of the sanctuary, although White Fox continued to perform work on the site. White Fox did not submit another payment application until 27 July 2000. The Church refused to pay that application because it did not reflect the amounts the

Church had paid to the subcontractors. After a July 2000 meeting with the Church, White Fox acknowledged that the payment application was incorrect and stated that it would recalculate and resubmit the application. White Fox did not do so before completion of the project.

In November 2000, White Fox finished construction. The company tendered to the Church its "Final Application and Certificate for Payment" on 22 December 2000. The payment application listed the written change orders White Fox had submitted to the Church during construction, reflected credits for payments already made by the Church, and demanded additional payment of $754,684.00. The Church refused to pay the amount sought on the grounds that it exceeded the contract price and that the Church was not responsible for the increased costs resulting from bringing the plans into code compliance.

On 16 January 2004, White Fox filed suit against the Church for breach of contract seeking $1,113,964.00 in damages, interest, and attorneys' fees. After a bench trial, the trial court entered a judgment and order on 29 June 2006, concluding that the Church had breached the contract and awarding White Fox $865,835.96 in damages, interest of 18% from 21 January 2001 until paid, and attorneys' fees in the amount of $129,875.39. The Church moved to amend the judgment, or, alternatively, for a new trial. The trial court denied both motions in an order entered 6 December 2006. The Church timely appealed to this Court from both the trial court's 29 June 2006 judgment and the 6 December 2006 order.

Discussion

The Church first contends that the trial court erroneously concluded that White Fox timely filed suit within the three-year statute of limitations provided by N.C. Gen. Stat. § 1-52(1) (2007). With respect to the statute of limitations defense, the trial court reviewed the terms of the parties' contract to determine when final payment was due. The trial court noted that Part 1 and Part 2 of the contract each contained relevant provisions, but concluded that "[t]he contractual provisions with regard to final payment are not in conflict and are not ambiguous." The court then concluded:

> 16. Under Section 5.2.2 Part 2 of the contract, final payment is due upon the owner's receipt of the final payment application when the work has been completed and the contract fully performed.
>
> 17. Under Article 6 Part 1 of the contract, final payment is due thirty days after issuance of the architect's certificate of final payment and the contractor's final payment application.
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> 18. David Gray, principal of the Plaintiff, is designated project architect in the March 6, 1996 contract.
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> 19. Section 5.2.2 Part 2 and Article 6 Part 1 of the contract can be read together so as to require final payment upon receipt of the architect's "Final Application and Certification for Payment," but, in any event, not more than 30 days thereafter.
>
> 20. David Gray tendered to [the Church] the Plaintiff's final payment application on December 22, 2000. Final payment was due from [the Church] within 30 days of the

> submission of Plaintiff's final payment application on December 22, 2000.

Based on its construction of the contract, the trial court concluded that no cause of action arose until 21 January 2001 and, since White Fox filed suit on 16 January 2004, its action was timely.

"'[T]he question of whether a cause of action is barred by the statute of limitations is a mixed question of law and fact.'" *Pharmaresearch Corp. v. Mash*, 163 N.C. App. 419, 424, 594 S.E.2d 148, 151-52 (quoting *Pembee Mfg. Corp. v. Cape Fear Constr. Co.*, 313 N.C. 488, 491, 329 S.E.2d 350, 353 (1985)), *disc. review denied*, 358 N.C. 733, 601 S.E.2d 858 (2004). When, however, the facts are not in conflict, the issue becomes a question of law. *Rowell v. N.C. Equip. Co.*, 146 N.C. App. 431, 434, 552 S.E.2d 274, 276 (2001). In addition, in this case, the issue hinges on interpretation of the parties' contract, also a question of law. *Lee v. Scarborough*, 164 N.C. App. 357, 360, 595 S.E.2d 729, 732, *disc. review denied*, 359 N.C. 189, 607 S.E.2d 273, 274 (2004).

In construing the parties' contract, the trial court overlooked a key provision of Part 2 of that contract, contained in paragraph 11.10.1:

> Part 2 represents the entire agreement between the Owner and Design/Builder *and supersedes Part 1 and prior negotiations, representations or agreements.* Part 2 may be amended only by written instrument signed by both Owner and Design/Builder.

(Emphasis added.) This clause unambiguously specifies that to the extent Part 1 and Part 2 of the contract contain provisions

addressing the same issue, the provisions in Part 2 "supersede" or override those in Part 1. Thus, the terms of the parties' contract included all of the terms of Part 1 and Part 2 except where the parts had overlapping provisions and, as to those issues, the parties agreed to be governed by the terms of Part 2.

Part 1, Article 6, is titled "Final Payment" and states:

> Final payment, constituting the entire unpaid balance of the Contract Sum, shall be made by the Owner to the Contractor when (1) the Contract has been fully performed by the Contractor except for the Contractor's responsibility to correct nonconforming Work as provided in Subparagraph 12.2.2 of the General Conditions and to satisfy other requirements, if any, which necessarily survive final payment; and (2) a final Certificate for Payment has been issued by the Architect; *such final payment shall be made by the Owner not more than 30 days after the issuance of the Architect's final Certificate for Payment* . . . .

(Emphasis added.) Part 2, paragraph 5.2.2, also addresses final payment:

> Final payment constituting the entire unpaid balance due shall be paid by the Owner to the Design/Builder *upon the Owner's receipt of the Design/Builder's final Application for Payment* when the Work has been completed and the Contract fully performed except for those responsibilities of the Design/Builder which survive final payment.

(Emphasis added.) In short, under Part 1, final payment is due within 30 days of issuance of the Architect's final Certificate for Payment, while under Part 2, final payment is due upon receipt of the final Application for Payment.

White Fox does not dispute that if the contract provided that payment was due upon receipt of the final Application for Payment,

as provided in Part 2 of the contract, and no waiver occurred, its lawsuit was barred by the statute of limitations. Instead, it contends that the trial court properly construed the provisions of both parts together to allow for payment within 30 days. While the trial court in effect attempted to merge the two clauses, "[i]f a contract is unambiguous, it must be enforced as it is written." *Marcuson v. Clifton*, 154 N.C. App. 202, 204, 571 S.E.2d 599, 601 (2002) (internal quotation marks omitted). When confronted with an unambiguous contract, courts "cannot, under the guise of interpretation, 'rewrite the contract or impose [terms] on the parties not bargained for and found' within the contract." *Crider v. Jones Island Club, Inc.*, 147 N.C. App. 262, 266, 554 S.E.2d 863, 866 (2001) (quoting *Woods v. Nationwide Mut. Ins. Co.*, 295 N.C. 500, 506, 246 S.E.2d 773, 777 (1978)), *cert. denied*, 356 N.C. 161, 568 S.E.2d 192 (2002).

The two provisions address precisely the same issue: final payment. "Due upon receipt" cannot be reconciled with payment "not more than 30 days" after receipt. Since Part 2, paragraph 11.10.1, provides that Part 2 "supersedes" Part 1, Part 2's "final payment" provision controls. As a result, final payment by the Church was due upon its receipt of White Fox's final Application for Payment.

White Fox points to the parties' course of conduct regarding the interim payment applications as indicating the parties' intent that payment not be due for 30 days. It is, however, well established that a trial court may consider extrinsic evidence of the parties' intent, including their prior course of conduct, only

when the contract is ambiguous. *Patterson v. Taylor*, 140 N.C. App. 91, 96-97, 535 S.E.2d 374, 378 (2000). A contract is ambiguous if its language is "'fairly and reasonably susceptible to either of the constructions asserted by the parties.'" *Crider*, 147 N.C. App. at 267, 554 S.E.2d at 866 (quoting *Barrett Kays & Assoc., P.A. v. Colonial Bldg. Co., Inc. of Raleigh*, 129 N.C. App. 525, 528, 500 S.E.2d 108, 111 (1998)). Paragraph 11.10.1 of Part 2 — stating that Part 2 supersedes Part 1 — is unambiguous, as are the terms of paragraph 5.2.2 of Part 2, providing that final payment is due upon receipt of the final Application for Payment. A prior course of conduct is, therefore, immaterial.

White Fox contends alternatively that it waived the contractual requirement that payment was due upon receipt by continually allowing the Church to pay within 30 days of receipt of the interim payment applications. While we are doubtful that the waiver doctrine can be relied upon to extend a statute of limitations in this manner, we need not address that issue as the interim payments were governed by the contract's "Progress Payments" provisions, which allowed for payment within 10 days of receipt. Thus, any possible waiver of those payment terms did not constitute a waiver of the terms regarding final payment.

It is undisputed that White Fox submitted its final payment application, which stated that payment "is now due," to the Church on 22 December 2000. The three-year statute of limitations began running on that date, and, therefore, White Fox's lawsuit — filed on 16 January 2004 — was barred by the statute of limitations.

Because we conclude that the trial court should have entered judgment in favor of the Church on this ground, we need not address the Church's remaining arguments. We reverse the trial court's judgment and order and remand for entry of judgment in the Church's favor.

Reversed and remanded.

Chief Judge MARTIN and Judge STROUD concur.

Report per Rule 30(e).