

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA14-1127

Filed: 7 April 2015

Surry County, No. 14 CVS 33

R & L CONSTRUCTION OF MT. AIRY, LLC, Plaintiff,

v.

JAVIER DIAZ, Defendant,

and

F. EUGENE REES, JR., Third-Party Defendant.

Appeal by plaintiff from order entered 4 August 2014 by Judge L. Todd Burke in Surry County Superior Court. Heard in the Court of Appeals 18 February 2015.

Royster & Royster, by Mark S. Royster, for plaintiff-appellant.

Smith Law Group, PLLC, by Steven D. Smith and Matthew L. Spencer, for defendant-appellee.

TYSON, Judge.

R & L Construction of Mt. Airy, LLC (“Plaintiff”) appeals from order awarding attorneys’ fees to Javier Diaz (“Defendant”). We affirm.

I. Factual Background

In June 2012, Plaintiff entered into a contract with Defendant to provide labor and materials for the renovation of a residence located in Surry County, North

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Carolina. Plaintiff performed its contractual obligations between 9 July 2012 and 24 August 2012.

Defendant failed to pay the balance due. Plaintiff filed a claim of lien on Defendant's real property in the amount of \$11,175.49 on 7 December 2012. Plaintiff subsequently filed a complaint to perfect the lien against Defendant on 20 February 2013.

Plaintiff asserted claims against Defendant for breach of contract and for satisfaction of its lien on real property. Plaintiff alleged it furnished labor and materials in accordance with the contractual specifications for a total value of \$16,175.49. Defendant made one payment of \$5,000.00. Plaintiff repeatedly demanded Defendant pay the remaining balance due pursuant to the parties' contract. Defendant refused to pay the balance of the outstanding debt. Defendant filed an answer and third party counterclaim against F. Eugene Rees, Jr., a manager of Plaintiff.

On 27 November 2013, the parties entered into court-ordered mediation. During mediation, Plaintiff reduced its demand from \$11,175.49 to \$9,000.000. Defendant rejected Plaintiff's final settlement offer. Nothing before us shows any further settlement discussions took place after that date.

On 12 March 2014, Defendant filed a motion for summary judgment. On 9 June 2014, the trial court granted Defendant's motion for summary judgment,

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dismissed Plaintiff's claims against Defendant, and cancelled Plaintiff's claim of lien on the real property.

On 25 June 2014, Defendant filed a motion for an award of attorneys' fees pursuant to N.C. Gen. Stat. § 44A-35. Defendant alleged he "made multiple good faith attempts to fully resolve the matter, including but not limited to a settlement offer at mediation, which the Plaintiff has unreasonably refused."

After hearing Defendant's motion for attorneys' fees, on 4 August 2014 the trial court entered an order awarding attorneys' fees to Defendant in the amount of \$8,823.00. In its order, the trial court made the following findings of fact:

1. The Plaintiff filed a claim of lien in the amount of \$11,175.49 . . . pursuant to Chapter 44A of the North Carolina General Statutes and filed a lawsuit to collect same.
2. Plaintiff made a final settlement demand of \$9,000.00 at the mediation of this matter *which was thereby rejected by the Defendant*, constituting an unreasonable refusal to fully resolve the matter and in light of Defendant being granted summary judgment on Plaintiff's claims against the Defendant and the Plaintiff receiving no recovery. Therefore, Defendant was and is the prevailing party of this case pursuant to N.C. Gen. Stat. §44A-35 due to the amount of the claim of lien filed by the Plaintiff.
3. Defendant incurred \$8,823.00 of attorney time, up and until November 30, 2014, defending and prosecuting his claims [based on the affidavit submitted by counsel for Defendant].

(emphasis supplied).

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Plaintiff timely appealed to this Court. Defendant filed a motion with this Court seeking an award of attorneys' fees incurred on appeal.

II. Issues

Plaintiff argues the trial court made an improper finding that Plaintiff unreasonably refused to resolve the matter at mediation and erred by granting Defendant's motion for attorneys' fees.

III. Standard of Review

This Court reviews a trial court's award of attorneys' fees under N.C. Gen. Stat. § 44A-35 for abuse of discretion. *Martin Architectural Prods. Inc. v. Meridian Constr. Co.*, 155 N.C. App. 176, 182, 574 S.E.2d 189, 193 (2002). "To demonstrate an abuse of discretion, the appellant must show that the trial court's ruling was manifestly unsupported by reason, or could not be the product of a reasoned decision." *Nationwide Mut. Fire Ins. Co. v. Bourlon*, 172 N.C. App. 595, 601, 617 S.E.2d 40, 45 (2005), *aff'd per curiam*, 360 N.C. 356, 625 S.E.2d 779 (2006) (citations omitted).

IV. Analysis

Pursuant to N.C. Gen. Stat. § 44A-35,

[i]n any suit brought or defended under the provisions of Article 2 or Article 3 of this Chapter, the presiding judge may allow a reasonable attorneys' fee to the attorney representing the prevailing party . . . payable by the losing party upon a finding that there was an unreasonable refusal by the losing party to fully resolve the matter which constituted the basis of the suit or the basis of the defense. For purpose of this section, "prevailing party" is a party . .

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. who obtains a judgment of at least fifty percent (50%) of the monetary amount sought in a claim or is a party . . . against whom a claim is asserted which results in a judgment of less than fifty percent (50%) of the amount sought in the claim defended.

N.C. Gen. Stat. § 44A-35 (2013).

N.C. Gen. Stat. § 44A-35 permits a trial judge to award attorneys' fees provided two elements are satisfied: (1) the party awarded attorneys' fees is the prevailing party; and (2) the party required to pay the attorneys' fees unreasonably refused to resolve the matter. *S. Seeding Serv., Inc. v. W.C. English, Inc.*, __ N.C. App. __, __, 735 S.E.2d 829, 835 (2012).

In this case, the trial court made the following finding of fact in its order, which awarded attorneys' fees to Defendant:

2. Plaintiff made a final settlement demand of \$9,000.00 at the mediation of this matter *which was thereby rejected by the Defendant*, constituting an unreasonable refusal to fully resolve the matter and in light of Defendant being granted summary judgment on Plaintiff's claims against the Defendant and the Plaintiff receiving no recovery. Therefore, Defendant was and is the prevailing party of this case pursuant to N.C. Gen. Stat. §44A-35 due to the amount of the claim of lien filed by the Plaintiff.

(emphasis supplied).

Plaintiff does not dispute Defendant was the prevailing party. Plaintiff contends no competent evidence exists to support the trial court's finding of fact that

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Defendant's rejection of Plaintiff's final settlement offer at mediation constituted an unreasonable refusal to settle.

Plaintiff has failed to meet its burden of showing "the trial court's ruling was manifestly unsupported by reason, or could not be the product of a reasoned decision." *Bourlon*, 172 N.C. App. at 601, 617 S.E.2d at 45. Plaintiff failed to appeal the trial court's order granting Defendant's motion for summary judgment of the underlying action. Plaintiff also failed to include in the record on appeal any transcript from either the hearing on Defendant's motion for summary judgment or the hearing on Defendant's motion for attorneys' fees. Without a review of the transcripts, this Court cannot determine what arguments were made at the hearings on either of these two motions.

The evidence in the record before this Court, including the order awarding attorneys' fees to Defendant, shows the trial court found and concluded Plaintiff's refusal to settle was unreasonable. Because no transcript of the hearing was filed with the record on appeal, this Court is also unable to ascertain how statutorily confidential information under N.C. Gen. Stat. § 70A-38.1, such as an offer to settle in a court-ordered mediation procedure, was entered into evidence and considered by the trial judge.

The trial court made the requisite findings of fact, based upon the stated actions at mediation *and* "the affidavits, including affidavit of fees and other evidence

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submitted by the parties and the arguments and authorities presented by counsel and a full review of the file,” to support its conclusions of law and its order awarding attorneys’ fees to Defendant. Plaintiff failed to show the trial court’s award of attorneys’ fees was manifestly unsupported by reason. This argument is overruled.

V. Defendant’s Motion for Attorneys’ Fees Incurred on Appeal

Defendant moves for the imposition of attorneys’ fees incurred on appeal, pursuant to Rule 35 and Rule 37 of the North Carolina Rules of Appellate Procedure. Rule 35(a) allows costs to be taxed against the appellant if a judgment is affirmed, “unless otherwise ordered by the court.” N.C.R. App. P. 35(a). “Any costs of an appeal that are assessable in the trial tribunal shall, upon receipt of the mandate, be taxed as directed therein and may be collected by execution of the trial tribunal.” N.C.R. App. P. 35(c). Assessable costs include “counsel fees, as provided by law.” N.C. Gen. Stat. § 7A-305(d)(3) (2013).

The trial court determined Defendant was entitled to an award of attorneys’ fees under N.C. Gen. Stat. § 44A-35 and entered an order thereon. In his motion submitted to this Court, Defendant contends he is likewise entitled to an award of attorneys’ fees incurred in defending the trial court’s order on appeal.

As stated previously, neither party filed any transcripts or presented any evidence, other than the order appealed, to allow us to decipher how statutorily

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confidential information was admitted into evidence, or what other evidence the trial court considered.

In the absence of a transcript, or other evidence in the record to review, we reject an additional award to Defendant of attorneys' fees incurred on appeal.

VI. Conclusion

The trial court's order granting Defendant's motion for attorneys' fees is affirmed. Neither party included transcripts or other evidence of the hearing on the underlying action or the hearing on Defendant's motion for attorneys' fees. Defendant's motion for attorneys' fees incurred on appeal is denied.

AFFIRMED.

Judges STEPHENS and HUNTER, JR. concur.