IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-568

Filed: 1 September 2020

Durham County, No. 16 CVS 3850

GAMEWELL MECH, LLC d/b/a GAMEWELL MECHANICAL, Plaintiff,

v.

LEND LEASE (US) CONSTRUCTION, INC., Defendant.

Appeal by defendant from order entered 6 March 2019 by Judge Edwin G. Wilson, Jr., in Durham County Superior Court. Heard in the Court of Appeals 7 January 2020.

Meynardie & Nanney, PLLC, by Joseph H. Nanney, for plaintiff-appellee.

Kilpatrick Townsend & Stockton LLP, by Dustin T. Greene, and Holland & Knight, LLP, by Jennifer S. Lowndes, admitted pro hac vice, for defendant-appellant.

BRYANT, Judge.

Where the trial court properly determined defendant Lend Lease (US) Construction, Inc., ("defendant") breached the parties' written contract, we affirm. Thus, the trial court's award of damages for defendant's improper denial of plaintiff's request for a change order and defendant's failure to address an open request for a

change order after plaintiff had performed as requested is upheld. However, where the record does not fully support the trial court's damage award of $100,000.00, we vacate that portion of the award.

On 19 July 2016, Gamewell Mech, LLC, d/b/a Gamewell Mechanical, ("plaintiff") filed suit against defendant in Durham County Superior Court alleging failure to pay for labor and materials provided in connection with a construction project located in Durham. Plaintiff sought compensatory damages and to enforce lien rights based on theories of breach of contract, quantum meruit/unjust enrichment, foreclosure of lien upon real property, and lien upon funds.[1] On 24 March 2017, then Chief Justice Mark Martin deemed the matter "exceptional" and assigned the case to the Honorable Edwin G. Wilson, Jr., a Senior Resident Superior Court Judge. The parties agreed to a bench trial, and on 3 December 2018, the matter came to be heard during a Special Session of Superior Court before Judge Wilson.

The evidence at trial tended to show that defendant was the general contractor on a building project to construct three buildings in Research Triangle Park. On 3 December 2013, plaintiff, who specialized in high-tech work, negotiated and entered into a lump-sum subcontract with defendant and agreed to provide the labor and materials to construct the mechanical and plumbing portions of the project, as well

[1] At trial, following the close of plaintiff's evidence, the trial court granted defendant's motion for involuntary dismissal of plaintiff's claim for quantum meruit/unjust enrichment. [R. p. 125]. The record is silent as to plaintiff's remaining claims other than breach of contract.

as other specified labor and services. The final agreed-upon contract amount was $9,190,471.00. Plaintiff was scheduled to complete its work by 10 September 2015. The contract provided all work to be performed strictly in accordance with the requirements of the subcontract and contract documents. In order to receive periodic payments during the course of the project, plaintiff was required to submit payment applications, which included a partial waiver and lien release. The waiver and release stated that plaintiff agreed to

> waive, release, and relinquish any and all rights, claims, demands, liens, claims for relief, causes of action and the like, whether arising at law, under a contract, in tort, in equity or otherwise, which the undersigned has now or may have had arising out of the performance of work or the furnishing of labor or materials by the undersigned.

The waiver and release clauses contained an exception for any claim currently unresolved for which written notice had been provided. Also included with the payment application was a Schedule A form, in which plaintiff could specifically reserve its rights relative to any unresolved claim including claims for extra work outside the scope of the contract.

The subcontract contained a section titled, "Change Orders," which laid out a process for documenting changes or adjustments to the scope of the work for the project. If the parties could not agree on the amount to be paid for additional work, any adjustments made to the price or amount of time required to complete the work contracted, were subject to an ultimate determination in accordance with the

subcontract. If the dispute was unresolved, "either party [could] seek redress of its grievances as to such disputes at law or in equity in a court of competent jurisdiction in the state in which the Project [wa]s located."

After receiving the plans for the project, plaintiff's project manager discovered that the plans contained thousands of conflicts, such that the buildings could not be constructed in accordance with the plans. Plaintiff experienced repeated delays and lost profits because of the continual adjustments that were required to resolve the conflicts in the building plans. The parties executed numerous change orders throughout the project. The majority of the change orders were accepted and paid by defendant, and plaintiff executed the releases and waivers.

Plaintiff last furnished materials to the project on 21 January 2016 and submitted a payment application ("Pay App 28") in March 2016 seeking $31,542.06 for work completed through 31 March 2016. Pay App 28 included a signed waiver and release. Plaintiff, however, never submitted the final pay application for one-half of the retainage[2] ($479,368.84) as plaintiff had been told defendant was not going to pay the retainage. On 5 April 2016, plaintiff sent defendant a claim letter, seeking payment of $2,706,228 for additional work performed and delays that occurred before

[2] "Retainage" is defined as "a percentage of a contract price retained from a contractor as assurance that subcontractors will be paid and that the job will be completed." *Retainage*, Merriam-Webster.com, https://www.merriam-webster.com/legal/retainage (last visited Aug. 18, 2020).

21 January 2016. On 13 May 2016, plaintiff filed a lien on the property and a lien upon the funds. On 19 July 2016, plaintiff filed its complaint in this action.

Following the trial, on 6 March 2019, Judge Wilson entered judgment in part in favor of plaintiff in the amount of $826,429.79[3] plus interest. Defendant appeals.

On appeal, defendant argues that the trial court erred by (I) awarding plaintiff sums in excess of the unpaid contract balance and (II) calculating damages based on a standard not supported by the evidence.

Standard of Review

"The standard of review on appeal from a judgment entered after a non-jury trial is 'whether there is competent evidence to support the trial court's findings of fact and whether the findings support the conclusions of law and ensuing judgment.' " *Cartin v. Harrison*, 151 N.C. App. 697, 699, 567 S.E.2d 174, 176 (2002) (quoting *Sessler v. Marsh*, 144 N.C. App. 623, 628, 551 S.E.2d 160, 163 (2001)). "[F]indings of fact made by the trial judge are conclusive on appeal if supported by competent evidence, even if . . . there is evidence to the contrary." *Tillman v. Comm. Credit*

[3] The $826,429.79 damage award was comprised of the following amounts:

- $479,369.84 for an unpaid contract balance (retainage);
- $100,000.00 for additional labor and material caused by the redesign of the drawings, which had not been waived be the execution of any payment application;
- $122,280.95 for change order work improperly denied by defendant;
- and $124,779.00 for change order work defendant neither approved nor denied.

Loans, Inc., 362 N.C. 93, 100–01, 655 S.E.2d 362, 369 (2008) (alteration in original) (citation omitted).

I

Defendant argues that the trial court erred by awarding plaintiff sums in excess of the unpaid contract balance after the court found that plaintiff had waived and released the right to seek any sums in excess of the outstanding contract balance pursuant to that provision. We disagree.

The trial court's award included a $479,369.84 retainage due to plaintiff pursuant to the written contract. Defendant does not challenge that portion of the award of the retainage. Defendant challenges only the remaining $347,059.00 award, a sum defendant contends exceeds the unpaid contract balance. Defendant argues that plaintiff signed a waiver and release of the right to seek any sums in excess of the outstanding contract balance with the submission of each payment application where plaintiff failed to give notice of unresolved claims.

Lien waivers and releases are contractual in nature and are "interpreted according to the principles applied to contracts in general." *Wachovia Bank Nat'l Ass'n v. Superior Constr. Corp.*, 213 N.C. App. 341, 348, 718 S.E.2d 160, 165 (2011) (citation omitted); *see also Chemimetals Processing, Inc. v. Schrimsher*, 140 N.C. App. 135, 138, 535 S.E.2d 594, 596 (2000) ("The scope and extent of the release should be governed by the intention of the parties, which must be determined by reference to

the language, subject matter and purpose of the release." (citation omitted)). "If the plain language of a contract is clear, the intention of the parties is inferred from the words of the contract." *Walton v. City of Raleigh*, 342 N.C. 879, 881, 467 S.E.2d 410, 411 (1996) (citation omitted). An ambiguity exists if the relevant contractual language can be reasonably interpreted in several different ways. *St. Paul Fire & Marine Ins. Co. v. Freeman-White Assoc.*, 322 N.C. 77, 83, 366 S.E.2d 480, 484 (1988). Further, if "only one reasonable interpretation exists, the court must enforce the contract as written[.]" *Gaston Cnty. Dyeing Machine Co. v. Northfield Ins. Co.*, 351 N.C. 293, 300, 524 S.E.2d 558, 563 (2000) (quoting *Woods v. Nationwide Mut. Ins. Co.*, 295 N.C. 500, 505–06, 246 S.E.2d 773, 777 (1978)) (citations omitted).

In *Cleveland Constr., Inc. v. Ellis-Don Constr., Inc.*, 210 N.C. App. 522, 709 S.E.2d 512 (2011), a subcontractor filed suit against a general contractor for an outstanding contract balance, extra/changed work, delay/disruption, and inefficiency damages. The general contractor filed for summary judgment claiming that because the subcontractor had signed express waivers pertaining to these claims as part of a payment application, he was not entitled to relief. *Id.* at 526, 709 S.E.2d at 517. The waiver contained in the payment application stated that "[u]pon receipt of the sum of $_____ , the mechanic and/or materialman waives and releases any and all liens or claims of lien it has upon the foregoing described property through the date of _____[.]" *Id.* at 529–30, 709 S.E.2d at 519. The trial court granted the general

contractor's motion for summary judgment. This Court affirmed the trial court's ruling holding that "under the terms of the payment application, [the subcontractor] received periodic payments under the subcontract with [the general contractor] in exchange for its certified 'acknowledg[ment]' that, when it submitted its application, it had 'no unsettled change order requests or claims against [the general contractor].' " *Id.* at 530, 709 S.E.2d at 520 (third alteration in original). Further, the Court noted that because the subcontractor received periodic payments based on the applications, the subcontractor was "precluded from asserting the claims which it expressly 'acknowledge[d]' that it did not have as a condition of payment." *Id.* (alteration in original).

Here, citing *Cleveland Constr., Inc.*, 210 N.C. App. 522, 709 S.E.2d 512, the trial court determined that "the majority of [plaintiff]'s claims for alleged work or cost done [sic] outside the scope of the [s]ubcontract are precluded through their submission for the Waiver and Release Forms and the Change Orders throughout the project." The court also found that the waiver and release was required by the subcontract as a condition precedent to defendant processing plaintiff's payment applications and were, thus, enforceable. Because plaintiff received payment on each payment application, plaintiff could not receive payment without signing the waiver and release. The payment application's waiver and release clause contained an exception for any unresolved claim for which written notice had been provided.

Included with the payment application was the aforementioned Schedule A form, on which plaintiff could specifically reserve its rights to any unresolved claim, including claims for extra work outside the scope of the contract.

The trial court made extensive findings regarding the numerous change orders that were executed by the parties relating to costs and damages due to delays. The trial court found that per the "no-damages-for-delay" provision of the contract, plaintiff "assumed the risk of absorbing any monetary impacts resulting from delays on the [p]roject" and that plaintiff's claims for damages amounting to nearly $1.3 million were due in part to plaintiff's own "inefficiencies, productivity issues or other self-inflicted problems."

Defendant argues that because plaintiff did not give written notice of any unresolved claims utilizing the Schedule A form, plaintiff had no right to recover for any "facts, acts, events, circumstances, changes, constructive or actual delays, accelerations, extra work, disruptions, interreferences and the like which have occurred, or may be claimed to have occurred, prior to [March 2016]." Nevertheless, the trial court determined that defendant had breached the contract where "the waiver and release documents submitted with each pay application could not cover claims not readily apparent due to daily changes on the job." In support thereof, the trial court made the following pertinent findings of fact both as to the request for

change orders ("RFCs") that were "improperly rejected" by defendant and to the RFCs that were "never resolved" with defendant:

> 256. [Plaintiff] installed all of the items in Item 2, but [defendant] refused to pay for them (Trial Testimony, pp.245-250).
>
> 257. All of the work and materials included in Item 2 were outside the scope of the Subcontract. *Id.*
>
> . . . .
>
> 259. Mark Johnson testified that vacuum piping work included in Item 2 does not appear on any as-built drawings. However, he explained the piping work was done by [plaintiff] at the direction of [defendant]. It was not within the original scope of work. *Id.*
>
> 260. The cryostop was to prepare a valve that was not within [plaintiff's] scope of work (Trial Testimony, pp.309-310).
>
> 261. The HHW branch valves were not within [plaintiff's] scope of work. (Trial Testimony, pp.245-250).
>
> 262. Although [plaintiff] did the work, [defendant] refused to pay for it (Trial Testimony, 310).
>
> C. Item 3 [Plaintiff] Spreadsheet
>
> 263. The third item on the spreadsheet contains RFCs that were never resolved with [defendant] (J. Batchelor Testimony, p. 63; Plft Ex 58).
>
> 264. [Plaintiff] presented evidence that each [sic] the work and materials provided in Item 3 were provided at the direction of [defendant]. (Vol. II—252 19-25; 253-256).

> 265. This work was not within the scope of the Subcontract. *Id.*
>
> 266. Ross Weyman acknowledged that he was not surprised by the claims made in Item 3 because, prior to [plaintiff] sending the Claim Letter, there had been months of discussion between [plaintiff] and [defendant] regarding an open change log. (IV. –535; 7-25).
>
> 267. All of the work performed by [plaintiff] on the Project was done at the direction of, and with full knowledge of, [defendant].

The trial court then made the following detailed conclusions regarding its ultimate conclusion that plaintiff was entitled to a partial award of damages:

> 23. . . . [T]his [c]ourt finds that the majority of [plaintiff]'s claims for alleged work or cost done outside the scope of the Subcontract are precluded through their submission of the Waiver and Release Forms and the Change Orders throughout the project.
>
> 24. However, it is undisputed that there were delays, numerous Change Orders issued, re-sequencing, and coordination issues occurring throughout the project. Given the daily problems that arose as a result of these issues, [plaintiff]'s failure to reserve claims regarding the day-to-day miscellaneous items done in the field at the direction of [defendant] is not a material breach-of-contract.
>
> 25. The waiver and release documents submitted with each pay application could not cover claims not readily apparent due to daily changes on the job.
>
> 26. [Plaintiff] never submitted the Final Pay Application, including final waiver and release documents, because [defendant] informed [plaintiff] in the summer of 2016 that they were denying [plaintiff]'s claims.

> 27. [Defendant] has breached the Subcontract for failure to pay [plaintiff] for miscellaneous labor and materials provided by [plaintiff] at the direction of [defendant], and outside the scope of the Subcontract, as described in Item 1, in the amount of $100,000.00.[4]

Defendant argues that the trial court's award of the remaining $247,059.00 ($347,059.00 - $100,000.00 = $247,059.00) for change order work that was improperly denied and change order work that was neither approved nor denied was not based on competent evidence.

At trial, plaintiff presented Exhibit 69—a spreadsheet intended to quantify plaintiff's damages. On the spreadsheet, plaintiff categorized its damages into three items. Item 1, mentioned above, will be discussed in Issue II. Item 2 reflects line items which describe vacuum piping work and materials provided, which were outside the scope of the contract. The trial court found that plaintiff performed the work in Item 2 at the direction or with full knowledge of defendant, but defendant rejected plaintiff's Request for Change (RFC) and refused to pay plaintiff. Item 3, which was based on work and materials provided at the direction of defendant but not within the scope of the contract, describes damages incurred from work and materials provided by plaintiff that were never acknowledged and never paid.

[4] We analyze the trial court's award in the amount of $100,000.00 ("as described in Item 1") in Issue II.

As to Item 2, the trial court concluded that defendant was "in breach of the Subcontract for improperly denying [plaintiff] the $122,280.95 owed for this work." As to Item 3, the trial court concluded defendant was "in breach of the [s]ubcontract [] for improperly denying [plaintiff] payment in the amount of $124,779.00 owed for this work." Upon review of the record, we hold the trial court's award to be based on competent evidence. Accordingly, defendant's argument as to the component of the trial court's award to plaintiff, which amounts to $247,059.00 (representing Items 2 and 3), is overruled.

II

Next, defendant argues that the trial court's award must be reversed where the standard by which the trial court measured damages was erroneous and that the award is not otherwise supported by competent evidence. We disagree.

Defendant contends that the award of $100,000.00 for additional labor and material caused by the redesign of the drawings (Item 1 of plaintiff's spreadsheet) was erroneous as a matter of law and not supported by competent evidence. Defendant alleges that plaintiff used the total cost method[5] to determine the damages

[5] Using the total cost method, "a contractor seeks the difference between its total costs incurred in the performance of the contract and its bid price." *Biemann & Rowell Co. v. Donohoe Cos.*, 147 N.C. App. 239, 245, 556 S.E.2d 1, 5 (2001) (citation omitted). The total cost method can only be used when no other way to compute damages is feasible. *Id.* In order to recover under the total cost method, plaintiff must show "(i) the impracticability of proving actual losses directly; (ii) the reasonableness of its bid; (iii) the reasonableness of its actual costs; and (iv) the lack of responsibility for the added costs." *Id.* at 245, 556 S.E.2d at 5.

presented on its spreadsheet (Exhibit 69), but the record evidence does not support the use of this method. Defendant urges that the damages alleged under Item 1 reflect additional costs related to ASIs[6] and were based on an improper use of the total cost method.

Defendant's challenge here, as it was at trial, is essentially to the admission and use of the spreadsheet. The admission or exclusion of evidence under Rule 403 rests within the trial court's sound discretion, and the trial court's ruling will only be reversed for abuse of discretion "upon a showing that it[] . . . was so arbitrary that it could not have been the result of a reasoned decision." *State v. Thompson*, 314 N.C. 618, 626, 336 S.E.2d 78, 82 (1985) (citation omitted). The trial court admitted the spreadsheet into evidence and allowed plaintiff's witness Mark Johnson to testify as to how the spreadsheet was compiled. Johnson testified that damages were calculated by using a "side-by-side takeoff," using the engineer's drawings to determine whether the quantity of material affected by the revised plans decreased or increased. Where the quantity of materials decreased, defendant received a credit; where the quantity of materials increased, plaintiff submitted a request for compensation.

[6] As the trial court found, "ASI" is a construction term meaning "architectural supplemental instruction" and occurs when an owner or engineer makes a change to the plans. An ASI can involve a small change or a major redesign of the project.

As previously noted herein, the spreadsheet contained three main Items. We have held that the trial court's damage award based on Items 2 and 3 was properly based on competent evidence in the record. We will not now entertain defendant's argument that the trial court's use of the spreadsheet was reversible error. Defendant has shown no abuse of discretion from the trial court's admission of the spreadsheet. Defendant's argument that the trial court used an inappropriate methodology in makings its findings of fact and conclusions of law is also without merit. However, defendant's argument that the trial court's award of $100,000.00 for "additional labor and materials caused by the redesign of drawings" does have merit.

Upon review, there is no clear evidence in the record to support the $100,000.00 award that was based on Item 1 of the spreadsheet. The trial court's findings of fact as to this award—that the costs requested by plaintiff were in relation to ASI 11 and ASI 16, that plaintiffs were fully compensated for ASI 11 and ASI 16, and that testimony by plaintiff's employees as to Item 1 was contradictory—do not support the trial court's conclusion of law. Therefore, we reverse the trial court's award of $100,000.00 for additional labor and material caused by the redesign of the drawings, payment of which was not waived in any pay application, and vacate that portion of the award. We remand this matter for further findings of fact and conclusions of law on this issue.

AFFIRMED IN PART; VACATED IN PART; AND REMANDED.

Judges ZACHARY and COLLINS concur.

Report per Rule 30(e).