Reverse in part and Render, and Affirmed in part and Opinion Filed June 6, 2018

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-15-01303-CV

NU-BUILD & ASSOCIATES, INC., Appellant
V.
SOONERS GROUP, L.P., Appellee

On Appeal from the 298th Judicial District Court
Dallas County, Texas
Trial Court Cause No. DC-09-00973

MEMORANDUM OPINION ON REHEARING

Before Justices Francis, Myers, and Whitehill
Opinion by Justice Whitehill

We overrule Appellant Nu-Build & Associates, Inc.'s motion for rehearing. On our own motion, we withdraw our opinion of October 31, 2017, and vacate the judgment of that date. The following is now the Court's opinion.

Nu-Build was the general contractor on a construction project owned by appellee Sooners Group, L.P. Sooners fired Nu-Build before the project was finished, Nu-Build sued Sooners for nonpayment, and Sooners counterclaimed for the cost to complete the project. After a bench trial, the trial court rendered judgment that voided Nu-Build's lien on the project, awarded Sooners $3.6

million in damages, and ordered Nu-Build to take nothing. Nu-Build appeals, raising eleven issues. We affirm in part and reverse and render in part.[1]

I. ANALYSIS

A. Propriety of Findings and Conclusions

Nu-Build's first issue first asserts that the trial court improperly adopted Sooners' proposed findings of fact and conclusions of law; but this is not improper. *Cf. Vickery v. Comm'n for Lawyer Discipline*, 5 S.W.3d 241, 253 (Tex. App.—Houston [14th Dist.] 1999, pet. denied). Nu-Build next argues that the findings force it to guess the reasons for the judgment, but we conclude that the findings are sufficiently specific. Nu-Build also complains that it did not have a fair opportunity to request additional findings, but we cured this complaint by abating the appeal and allowing Nu-Build to make that request. We thus overrule Nu-Build's first issue.

B. Sooners' Judgment on Its Counterclaim

Nu-Build's issues two, four, six, eight and eleven attack Sooners' $3.6 million judgment. We discuss only one argument in issue four—there was no evidence that $3.6 million was the "reasonable cost of completion." We agree because (i) a party seeking completion cost damages must prove that those costs are reasonable; and (ii) proof of amounts charged and paid, alone, is no evidence the payment was reasonable. *Mustang Pipeline Co., Inc. v. Driver Pipeline Co., Inc.*, 134 S.W.3d 195, 200–01 (Tex. 2004) (per curiam); *701 Katy Bldg., L.P. v. John Wheat Gibson, P.C.*, No. 05-16-00193-CV, 2017 WL 3634335, at *9 (Tex. App.—Dallas Aug. 24, 2017, pet. denied) (mem. op.). Because Sooners adduced no evidence that the $3.6 million it paid to complete project was reasonable, we sustain Nu-Build's fourth issue and do not address issues two, six, eight, and eleven.

[1] Sooners moved to dismiss part of this appeal because Nu-Build forfeited its corporate existence in 2012. Sooners later conceded that the defect had been cured. We previously denied Sooners' motion and denied as moot Nu-Build's cross-motion to strike Sooners' motion.

C. The Take Nothing on Nu-Build's Contract Breach Claim

Nu-Build's third issue posits that the trial court erred by denying Nu-Build a recovery on its contract claim because there is legally and factually sufficient evidence to support that claim. We disagree for several reasons.

1. The trial court reasonably rejected Nu-Build's contract claim because there was evidence that (i) Nu-Build finished only half the project and (ii) Sooners paid Nu-Build more than half the contract price.

Nu-Build urges primarily that Sooners breached by not paying for work Nu-Build did on the project. Our original opinion concluded that the trial court could reasonably have determined that Nu-Build did not prove a breach because there was evidence that (i) the job was only 85–86% complete when Nu-Build left the job and (ii) Nu-Build's tenth draw request, which recited that the job was 86% complete, was fully paid. On rehearing, Nu-Build refers to evidence that the retainage, amounting to about $290,000, was never paid. It argues that Sooners breached the contract by not paying Nu-Build the retainage.

We reject that argument for two reasons. First, although some evidence indicated that the job was 86% complete when Nu-Build left the job, there was also evidence that the job was only 50% complete. Specifically, Sooners' general partner testified that the building was 50% complete when Nu-Build stopped work, and that another contractor charged Sooners $3.6 million to complete the building.[2] Second, there was also evidence that the contract price for the project was $4,927,600 and that Sooners paid Nu-Build about $4,124,000 over the course of their relationship. The trial court could have credited Sooners' evidence and concluded that the $4,124,000 Nu-Build received fully paid it for all the work it did on the project—although it was not paid the retainage—because (i) the building was only half finished after all of Nu-Build's work on it and (ii) Sooners paid Nu-Build more than half the contract price.

[2] Another Sooners witness also testified that 50% of the work was done, but the trial court sustained a hearsay objection to this testimony.

2. The trial court reasonably rejected Nu-Build's contract claim because there was evidence that Nu-Build was not entitled to the retainage under the contract's terms.

The parties disagree as to the conditions necessary for Nu-Build to receive the retainage. According to Nu-Build, it was entitled to the retainage in three circumstances: (i) when Nu-Build completed the project, (ii) upon notice of termination, or (iii) if termination was for cause, upon completion of the project by another within a reasonable time. Nu-Build provides no explanation supporting its position—only a general citation to contract paragraphs 5 and 6, which have multiple subparagraphs and together are almost two pages long. We have reviewed those provisions and see nothing there that supports Nu-Build's contention. (Included among those paragraphs is paragraph 5.2.1, which we discuss specifically later in this section.)

Nu-Build also relies on article 14 of AIA201-1997, which the contract incorporated by reference. But we reject Nu-Build's argument because that document was not admitted into evidence and does not appear in the record. *See Ostrovitz & Gwynn, LLC v. First Specialty Ins. Co.*, 393 S.W.3d 379, 392 (Tex. App.—Dallas 2012, no pet.) (appellate court cannot rely on document not in appellate record).

Furthermore, according to Sooners' motion for rehearing response, contract paragraph 5.2.1 means that Nu-Build was entitled to the retainage only if Nu-Build completed the project. Nu-Build did not address paragraph 5.2.1 in its opening or motion for rehearing briefs.[3]

Paragraph 5.2.1 provides:

> **5.2.1** Final payment, constituting the entire unpaid balance of the Contract Sum, shall be made by the Owner to the Contractor when:
>
> **.1** the Contractor has fully performed the Contract except for the Contractor's responsibility to correct Work as provided in Subparagraph 12.2.2 of AIA Document A201-1997, and to satisfy other requirements, if any, which extend beyond final payment; and
>
> **.2** a final Certificate for Payment has been issued by the Architect.

[3] Neither party provided a meaningful analysis regarding paragraph 5.2.1's proper construction, and only Sooners actually referred to that paragraph in any brief

> 30 Days after the final certificate of occupancy and upon completion of punch list provided by Owner and Archi [sic][4]

The typewritten addition to paragraph 5.2.1 presents a potential ambiguity because it is not immediately obvious whether the reader should interpolate an "and" or an "or" before the typed addition. But "courts construe contracts from a utilitarian standpoint bearing in mind the particular business activity sought to be served, and will avoid when possible and proper a construction which is unreasonable, inequitable, and oppressive." *Hackberry Creek Country Club, Inc. v. Hackberry Creek Home Owners Ass'n*, 205 S.W.3d 46, 56 (Tex. App.—Dallas 2006, pet. denied).

Here, the business activity sought to be served was Nu-Build constructing a building for Sooners. To that end, paragraph 5.2.1., subparts .1 and .2 combine to mean that no payment is due Nu-Build unless Nu-Build ("the Contractor") fully performs the contract (except for its duty to correct work) and the Architect has issued a final Certificate of Payment. It would, however, defeat the parties' business purpose—and thus be unreasonable—to construe the typewritten addition to entitle Nu-Build to final payment without fully performing the contract. Thus, paragraph 5.2.1's only reasonable interpretation is that Nu-Build was entitled to final payment (and thus the retainage) only if all three conditions were satisfied. Because Nu-Build identifies no evidence that it fully performed the contract except for its duty to correct work, it has not shown trial court error.

Along these lines, to the extent paragraph 5.2.1 is ambiguous on this point, the trial court resolved that question against Nu-Build by finding that, "[u]nder the terms of the Contract, no retainage need be paid to Nu-Build until the Work on the Project was complete[;]" and concluding that (i) "Sooners is not liable to Nu-Build for any damages[;]" and (ii) "Nu-Build shall take nothing

[4] This last paragraph appears to have been typed into the otherwise pre-printed form contract.

by its claims against Sooners." Notably, Nu-Build did not challenge the legal or factual sufficiency of the "no retainage need be paid" finding and thus is bound by that finding. *See May v. Buck*, 375 S.W.3d 568, 573 (Tex. App.—Dallas 2012, no pet.) ("Unchallenged findings of fact are binding on the parties and the appellate court.").

Finally, even if the typewritten addition to paragraph 5.2.1 were an alternative circumstance under which Nu-Build was entitled to full payment (rather than a third requirement in addition to .1 and .2), Nu-Build does not argue that there was evidence a final certificate of occupancy was issued.

3. The trial court reasonably rejected Nu-Build's alternative contract breach theories.

Nu-Build's third issue also argues that Sooners breached the contract by not providing a competent project manager and not securing necessary permits or plans. But Nu-Build cites no evidence that Sooners promised to do either of those things, so Nu-Build has not shown that those alleged failures were contract breaches. *See Gaspar v. Lawnpro, Inc.*, 372 S.W.3d 754, 757 (Tex. App.—Dallas 2012, no pet.) ("A breach of contract occurs when a party fails to perform an act it has explicitly or impliedly promised to perform.").

4. Conclusion

We overrule Nu-Build's third issue. Accordingly, we do not address its seventh issue (attacking the denial of its attorneys' fees claim) or its ninth issue (attacking adverse findings of certain Sooners' affirmative defenses).

D. The Lien

Nu-Build's issue five attacks the voiding of its lien. A basis for that ruling was a finding that Nu-Build never sent a "notice of filed affidavit to Sooners." Nu-Build attacks the sufficiency of the evidence to support that finding.

By statute, a lien's supporting affidavit must be sent "by registered or certified mail to the owner or reputed owner at the owner's last known business or residence address" by a specified deadline. TEX. PROP. CODE § 53.055(a). But, "[i]f notice is sent by registered or certified mail, deposit or mailing of the notice in the United States mail in the form required constitutes compliance with the notice requirement." *Id*. § 53.003(c).

Here the trial court was free to weigh the evidence and conclude that Nu-Build failed to prove mailing by a preponderance of the evidence because the evidence of mailing was equivocal. At first, Nu-Build's president testified that he saw someone mail the lien affidavit; but he later said it was actually in "interoffice" mail. Then he was asked, "In fact, you don't know whether or not this has ever been put in the mail, correct?" He answered, "You're correct." In its appellant's brief, Nu-Build also cites some other purported evidence of mailing, but that evidence was filed during summary judgment proceedings and was not admitted at trial.

Nu-Build's rehearing motion acknowledges that its president's testimony "did not establish that the lien affidavit was mailed." It argues, however, that other evidence showed that Nu-Build's attorney T. Craig Sheils mailed the lien affidavit to Sooners. We disagree for the following reasons.

First, Nu-Build relies on Plaintiff's Exhibit 2, which purports to be a copy of a June 12, 2008 letter from Sheils to Sooners enclosing the lien affidavit. But the lien affidavit itself is not part of the exhibit, and a blank certified mail receipt appears in the lower right-hand corner of the one-page letter. Sheils did not testify at trial, and Nu-Build acknowledges that its president "could not have personal knowledge of the actual placing of the letter in the mail." Finally, no other witness testified that Plaintiff's Exhibit 2 was actually mailed. We thus conclude that Plaintiff's Exhibit 2 did not compel the trial court to find that the lien affidavit was actually mailed to Sooners. *See Kaldis v. Aurora Loan Servs.*, 424 S.W.3d 729, 736 n.8 (Tex. App.—Houston [14th Dist.]

2014, no pet.) ("The creation of a letter that has a date at the top of it does not, by itself, show that the letter was mailed on or before that date. A letter may be drafted and then not sent at all.").

Nu-Build also relies on Plaintiff's Exhibit 3, which consists of (i) a June 12, 2008 letter by Sheils addressed to Sooner's lawyer, (ii) a fax cover page, and (iii) a copy of the contract between Nu-Build and Sooners. Plaintiff's Exhibit 3, however, does not help Nu-Build because (i) the lien affidavit is not part of that exhibit and (ii) nothing indicates that the exhibit was sent by registered or certified mail to Sooners at its last known address.

Nu-Build further argues that Sooners' lawyer testified that "the lien" was attached to the June 12, 2008 letter contained in Plaintiff's Exhibit 3. This is correct, but that letter was addressed to Sooners' lawyer. The testimony does not show that the lien affidavit was ever sent to Sooners in the statutorily required manner.

Next, Nu-Build cites several cases for the premises that the lien statute should be liberally construed and that substantial compliance with the statute is sufficient. *E.g.*, *First Nat'l Bank in Dallas v. Whirlpool Corp.*, 517 S.W.2d 262, 269 (Tex. 1974). However, none of those cases are factually similar to this one, in which the trial court could reasonably have concluded that Nu-Build failed to show that the lien affidavit was actually mailed to Sooners. We conclude on this record that the evidence was sufficient to support the trial court's finding against Nu-Build.

We overrule Nu-Build's fifth issue.[5]

E. The Partial Summary Judgment

Finally, Nu-Build's tenth issue attacks a partial summary judgment order dismissing Nu-Build's quantum meruit claim before trial. Sooners challenged that claim by a traditional and a no-evidence summary judgment motion. Nu-Build's appellate brief, however, addresses only one

[5] The parties do not discuss the possibility that the failure of Nu-Build's contract claim also justified voiding its lien, so we do not discuss that possibility either.

traditional ground without addressing the no-evidence grounds or one traditional ground on which summary judgment could have been granted. Thus, we must affirm the summary judgment on the quantum meruit claim. *See Malooly Bros., Inc. v. Napier*, 461 S.W.2d 119, 121 (Tex. 1970).

Nu-Build's motion for rehearing argues that we should have allowed Nu-Build to file supplemental briefing on the summary judgment grounds it failed to address in its original brief. We have recently rejected this position. *See St. John Missionary Baptist Church v. Flakes*, No. 05-16-00671-CV, 2018 WL 1531122, at *1 (Tex. App.—Dallas Mar. 29, 2018, no pet. h.) (en banc).

We overrule Nu-Build's tenth issue.

II. CONCLUSION

For the foregoing reasons, we reverse the trial court's judgment to the extent it awards Sooners $3.6 million in damages, and we render judgment that Sooners take nothing on its counterclaims for damages. We affirm the remainder of the judgment.

/Bill Whitehill/
BILL WHITEHILL
JUSTICE

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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

NU-BUILD & ASSOCIATES, INC., Appellant

No. 05-15-01303-CV V.

SOONERS GROUP, L.P., Appellee

On Appeal from the 298th Judicial District Court, Dallas County, Texas
Trial Court Cause No. DC-09-00973.
Opinion delivered by Justice Whitehill.
Justices Francis and Myers participating.

We **WITHDRAW** our opinion and **VACATE** our judgment of October 31, 2017. This is now the judgment of the Court.

In accordance with this Court's opinion of this date, the judgment of the trial court is **AFFIRMED** in part and **REVERSED** in part. We **REVERSE** that portion of the trial court's judgment that awards appellee Sooners Group, L.P. $3,600,000 from appellant Nu-Build & Associates, Inc., and we **RENDER** judgment that appellee Sooners Group, L.P. take nothing from appellant Nu-Build & Associates, Inc. on appellee Sooners Group, L.P.'s claims for damages. In all other respects, including the decree that a specified lien is void and of no effect, the trial court's judgment is **AFFIRMED**.

It is **ORDERED** that each party bear its own costs of this appeal.

Judgment entered June 6, 2018.