

AFFIRMED; Opinion Filed May 15, 2020



**In The
Court of Appeals
Fifth District of Texas at Dallas**

No. 05-18-01529-CV

**ALBERTELLI CONSTRUCTION, INC., Appellant
V.
RAM INDUSTRIES ACQUISITIONS, LLC D/B/A RAM WINDOWS, LLC,
Appellee**

**On Appeal from the 382nd Judicial District Court
Rockwall County, Texas
Trial Court Cause No. 1-18-1563**

OPINION

Before Justices Whitehill, Schenck, and O'Neill¹
Opinion by Justice Schenck

Albertelli Construction, Inc. (“ACI”) appeals the trial court’s order granting summary judgment in favor of Ram Industries Acquisitions, LLC d/b/a Ram Windows, LLC (“Ram”), intervenor plaintiff below, on Ram’s claims of breach of contract and violation of the Prompt Payment Act.² In a single issue, ACI urges the

¹ The Honorable Michael J. O’Neill, Justice, Assigned

² Ram also asserted claims of quantum meruit, breach of fiduciary duty, violation of the Trust Fund Statute, and unjust enrichment. After the trial court granted Ram summary judgment on some, but not all, of Ram’s claims, Ram amended its petition and dropped its quantum meruit and unjust enrichment claims, and the trial court severed Ram’s breach of contract and Prompt Payment Act claims, making the summary judgment a final judgment.

trial court erred in granting Ram summary judgment because (1) Ram failed to establish that it was contractually entitled to payment for work performed, and (2) genuine issues of material fact exist precluding summary judgment. We affirm the trial court's order granting Ram summary judgment.

FACTUAL AND PROCEDURAL BACKGROUND

This lawsuit arises from Ram's provision of windows for the construction of a SpringHill Suites by Marriott Hotel in Rockwall, Texas, at the request of ACI, the general contractor. On April 12, 2016, ACI and Ram entered into an agreement³ providing Ram would furnish windows per the plans and specifications for the hotel at a total cost not to exceed \$84,067. As to payment, paragraph 9b of the agreement provided:

[r]eceipt of payment by [ACI] from the owner (or the general contractor or sub-contractor or construction manager, if applicable) for the goods purchased hereunder shall be a condition precedent to the obligation of [ACI] to pay [Ram] the amount due hereunder for such goods. Furthermore, [Ram] shall have no claim or cause of action against [ACI] (or its surety under any payment bond) unless and until such condition precedent has been satisfied.

In September 2016, a dispute arose between Lakefront Trail Rockwall Hotel, L.P. ("Lakefront"), the owner of the SpringHill Suites by Marriott Hotel, and ACI over alleged delays in the project's schedule. Beginning in October, Lakefront began withholding ACI's overhead and profit from ACI's monthly draw payments.

³ The agreement is memorialized in a purchase order.

On October 18, ACI submitted an Application and Certificate for Payment to Lakefront seeking payment of \$672,069.23. Among the items listed in the payment request were “Doors, Windows & Hardware,” in the amount of \$21,750 for work completed from a previous application and \$84,006 for work completed during the application period, and overhead and profit in the amount of \$81,560. Lakefront remitted \$590,509.24 to ACI on October 24, withholding payment for ACI’s overhead and profit. Rather than forgo payment to itself due to Lakefront’s withholding of payment on ACI’s account, ACI chose to pay itself first and then to pay only “select” subcontractors. Ram was not one of them.

In November, ACI submitted another application for payment to Lakefront. In doing so, it certified that “all amounts have been paid by the Contractor for Work for which previous Certificates of Payment were issued and payments received from the Owner” On November 9, Lakefront advised ACI that it had discovered that many subcontractors had not been paid from the previous application, despite ACI’s certification that all amounts had been paid, and that this discovery was troubling, to say the least. Lakefront further advised ACI that, starting with the November application, it would be “joint checking the subcontractors directly off their Applications for Payment.” Thereafter, in March 2017, Lakefront terminated ACI as general contractor, for cause.

Lakefront sued ACI asserting claims of breach of contract, breach of warranty, fraud, conversion, theft, and conspiracy. Ram intervened in the suit and asserted,

against ACI, claims of breach of contract, violation of the Prompt Payment Act, quantum meruit, breach of fiduciary duty, violation of the Construction Trust Fund Act, and unjust enrichment. Ram asserted that all conditions precedent to its claim for relief had been performed or had occurred. ACI answered and asserted various defenses including estoppel “to the extent [Lakefront] failed to pay for the labor and materials provided by [ACI].”

Ram moved for summary judgment on its breach of contract, violation of the Prompt Payment Act, violation of the Trust Fund Act, and quantum meruit claims. On October 4, 2018, the trial court entered an order granting Ram’s motion for summary judgment on its breach of contract and violation of the Prompt Payment Act claims and awarding Ram \$84,006 in actual damages, prejudgment interest at the rate of 1 1/2 percent per month pursuant to the Prompt Payment Act, court costs of \$1,001.92, and post judgment interest at 5 percent as permitted by the Finance Code. *See* TEX. PROP. CODE ANN. § 28.005; TEX. FIN. CODE ANN. § 304.006. On November 21, the trial court entered orders awarding Ram attorney’s fees and severing Ram’s breach of contract and violation of the Prompt Payment Act claims from the remainder of the case. This appeal followed.

STANDARD OF REVIEW

The standard of review in a traditional summary judgment case is well established. *See* TEX. R. CIV. P. 166a(c); *Black v. Victoria Lloyds Ins. Co.*, 797 S.W.2d 20, 23 (Tex. 1990). In reviewing a summary judgment, evidence favorable

to the non-movant will be taken as true. *Nixon v. Mr. Prop. Mgmt. Co.*, 690 S.W.2d 546, 548–49 (Tex. 1985). Every reasonable inference in favor of the non-movant is allowed, and all doubts are resolved in its favor. *Id.* Once the movant has established a right to summary judgment, the non-movant has the burden to respond to the motion for summary judgment and present to the trial court any issues that would preclude summary judgment. *City of Houston v. Clear Creek Basin Auth.*, 589 S.W.2d 671, 678–79 (Tex. 1979). If the party opposing summary judgment relies on an affirmative defense, it must present evidence sufficient to raise a fact issue on each element of the affirmative defense. *Brownlee v. Brownlee*, 665 S.W.2d 111, 112 (Tex. 1984).

DISCUSSION

A party is generally entitled to pursue damages through alternative theories of recovery. *Waite Hill Servs., Inc. v. World Class Metal Works, Inc.*, 959 S.W.2d 182, 184 (Tex. 1998). If a party receives favorable findings on two or more theories, it has a right to judgment on the theory entitling it to the greatest relief. *Boyce Iron Works, Inc. v. Sw. Bell Tel. Co.*, 747 S.W.2d 785, 787 (Tex. 1988). Ram’s breach of contract and violation of the Prompt Payment Act claims are alternative theories of recovery upon which Ram received favorable findings via its motion for summary judgment.⁴

⁴ We recognize that not all breaches of contract are violations of the Prompt Payment Act. In this case, Ram relies on the same set of facts to support both theories and pleaded them as alternative theories.

In this case, the trial court awarded Ram what appears to be a recovery under the Prompt Payment Act: actual damages, attorney's fees, and prejudgment interest at the rate provided by the Prompt Payment Act. Because the prejudgment interest rate under the Prompt Payment Act is greater than the prejudgment interest rate on a breach of contract claim, Ram is afforded a greater recovery under its violation of the Prompt Payment Act claim. Accordingly, we address ACI's challenges to the grant of summary judgment on Ram's violation of the Prompt Payment Act claim and pretermitted discussion of Ram's breach of contract claim unless we find in favor of ACI on Ram's Prompt Payment Act claim.

The Prompt Payment Act provides:

A contractor who receives a payment [from the owner] . . . in connection with a contract to improve real property shall pay each of its subcontractors the portion of the owner's payment, including interest, if any, that is attributable to work properly performed or materials suitably stored or specially fabricated as provided under the contract by that subcontractor, to the extent of that subcontractor's interest in the owner's payment. The payment . . . must be made not later than the seventh day after the date the contractor receives the owner's payment.

PROP. § 28.002(b). The only exception to paying pursuant to section 28.002(b) of the Property Code is when there is a good faith dispute concerning the obligation to pay or the amount of payment. *Id.* § 28.003(b); *St. Paul Mercury Ins. Co. v. Steward Builders, Ltd.*, No. 01-09-00276-CV, 2011 WL 944377, at *8 (Tex. App.—Houston [1st Dist.] Mar. 17, 2011, no pet.) (mem. op.). In that case, the obligor may withhold part of the funds as outlined in section 28.003. PROP. § 28.003(b).

To establish a violation of the Prompt Payment Act, Ram had to prove ACI received a payment from Lakefront, a portion of which was attributable to materials Ram specially fabricated pursuant to the agreement between ACI and Ram. *Id.* § 28.002(b). The summary judgment record contains the following evidence that conclusively establishes ACI violated the Prompt Payment Act. ACI and Ram entered into an agreement whereby Ram agreed to provide windows for the hotel as set forth in the specifications for the project. Ram was the only provider of windows for the hotel, and Ram delivered the windows to the project site. On September 26, 2016, Ram sent ACI an invoice for the windows. The amount invoiced was \$84,067.37.⁵ On October 18, 2016, ACI sent a payment application to Lakefront requesting payment of \$672,069.24. The application contained a line item for “doors, windows & hardware.” It indicated work completed for that line item during the application period totaled \$84,006. On October 24, 2016, Lakefront sent payment of \$590,509.24 to ACI via wire transfer. It withheld payment of ACI’s overhead and profit in the amount of \$81,560. ACI decided to pay itself and “select subs.” Ram was not one of them. Tom Kirkland, a Lakefront employee, testified he “was shocked that Albertelli did not pay the subcontractors with the money we

⁵ Two additional invoices were sent to ACI in connection with some re-working of the windows, making the total owed \$89,487.52. Those invoices are not implicated in this appeal. Ultimately, Ram limited its requested recovery to \$84,006 because this was the amount specified in the October payment application.

wired to them. That certainly wasn't my agreement with [ACI employee] Ken Jones and certainly wasn't what Ken Jones told me was going to happen to the money."

On March 1, 2017, Lakefront notified ACI, in writing, that it was terminating ACI's employment as the general contractor for cause. In doing so, Lakefront identified various breaches of the contractor agreement, including ACI's failure to pay various subcontractors, including Ram. More particularly, Lakefront stated "Thru Pay Application 10, [the October pay application] period to 9/30/16, ACI drew for Item 10 Doors, Windows & Hardware of \$105,756.00 and was paid \$105,756.00.⁶ ACI has failed to pay Ram Industries \$89,487.52 for windows. Ram Industries had filed a lien notice. Therefore, [ACI] is responsible and liable to pay Ram Industries any and all amounts owed, and [Lakefront] herein demands that [ACI] pay the same immediately."

ACI did not controvert this evidence Lakefront paid ACI for the windows. In fact, ACI admitted that, in connection with the October payment application, Lakefront paid for everything except its overhead and profit. Accordingly, the evidence conclusively established ACI received a payment from Lakefront, a portion of which was attributable to the windows Ram supplied, and that ACI failed to pay Ram within the statutory time frame.

⁶ The \$105,756 represents \$21,750 from a previous application plus \$84,006 for the current application.

Notwithstanding this evidence, ACI urges Ram is not entitled to recover on its violation of the Prompt Payment Act claim because a fact issue exists concerning when Ram delivered the windows.⁷ ACI contends that, if the windows were delivered after November, it was Lakefront's responsibility to pay, rather than ACI's, because Lakefront had taken it upon itself to pay the subcontractors directly. Because the summary judgment evidence conclusively established ACI received payment for the windows, absent a good faith dispute concerning the obligation to pay or the amount of payment, ACI was obliged to pay Ram regardless of when the windows were delivered. ACI did not establish a good faith exception to its obligation to pay. Moreover, unless there is an express contractual provision to the contrary, a contractor is ultimately responsible for payment of its subcontractors. *Interstate Contracting Corp. v. City of Dallas*, 135 S.W.3d 605, 618 (Tex. 2004). ACI and Ram's agreement provided ACI, not Lakefront, would pay Ram.

ACI further urges that, pursuant to Section 162.031(b) of the Property Code, a section of the Construction Trust Fund Act, it was entitled to utilize the funds paid by Lakefront to pay its overhead and profit. Section 162.031(b) provides,

It is an affirmative defense to prosecution or other action *brought under section 162.031(a)* that the trust funds not paid to the beneficiaries of the trust were used by the trustee to pay the trustee's actual expenses

⁷ Ram's invoice indicated the windows were shipped on Ram's truck on September 26, 2016, and David Albertelli testified the windows were at the project in September. While ACI offered testimony from ACI's assistant superintendent, Chris Talamantez, concerning the delivery of the windows, he was not able to remember specifically the date on which they were delivered. On this record, there is no genuine issue concerning Ram's performance and entitlement to payment.

directly related to the construction or repair of the improvement or have been retained by the trustee, after notice to the beneficiary who has made a request for payment, as a result of the trustee's reasonable belief that the beneficiary is not entitled to such funds or have been retained as authorized or required by statute.

PROP. § 162.031(b) (emphasis added). Section 162.031(a) provides, "A trustee who, intentionally or knowingly or with intent to defraud, directly or indirectly retains, uses, disburses, or otherwise diverts trust funds without first fully paying all current or past due obligations incurred by the trustee to the beneficiaries of the trust funds, has misapplied the trust funds." *Id.* § 162.031(a). For the following reasons, ACI's reliance on Section 162.031(b) in connection with Ram's Prompt Payment Act claim is misplaced.

First, ACI has failed to cite any authority establishing that the defense to a claim under the Construction Trust Fund Act applies to a claim under the Prompt Payment Act, and we have found none. Second, while the Prompt Payment Act and Construction Trust Fund Act are both codified in the Texas Property Code, they are separate statutes. *See id.* §§ 28.001–.010, 162.001–.033. The Construction Trust Fund Act is a remedial statute enacted to protect subcontractors. *In re T.S.C. Seiber Servs., L.C.*, 771 F.3d 246, 250 (5th Cir. 2014). It was enacted to supplement the remedies available to laborers and materialmen. *Id.* The Construction Trust Fund Act protects subcontractors without requiring notice or other action. *Id.* In addition, it imposes fiduciary responsibilities on contractors to ensure subcontractors, mechanics, and materialmen are paid for work completed. *Kelly v. Gen. Interior*

Constr., Inc., 262 S.W.3d 79, 84–85 (Tex. App.—Houston [14th Dist.] 2008), *rev'd in part on other grounds*, 301 S.W.3d 653 (Tex. 2010).

Finally, general rules of statutory construction militate against application of Section 162.031(b) to Prompt Payment Act claims. Statutory construction presents a question of law that we review *de novo*. *E.g.*, *State v. Shumake*, 199 S.W.3d 279, 284 (Tex. 2006). Our primary objective in statutory construction is to give effect to the legislature's intent. *Id.* We seek that intent "first and foremost" in the statutory text. *Lexington Ins. Co. v. Strayhorn*, 209 S.W.3d 83, 85 (Tex. 2006). We rely on the plain meaning of the text, unless a different meaning is supplied by legislative definition or is apparent from context, or unless such a construction leads to absurd results. *City of Rockwall v. Hughes*, 246 S.W.3d 621, 625–26 (Tex. 2008) (citing *Tex. Dep't of Transp. v. City of Sunset Valley*, 146 S.W.3d 637, 642 (Tex. 2004); *Taylor v. Firemen's & Policemen's Civil Serv. Comm'n of City of Lubbock*, 616 S.W.2d 187, 189 (Tex. 1981); *Univ. of Tex. Sw. Med. Ctr. v. Loutzenhiser*, 140 S.W.3d 351, 356 (Tex. 2004)). When a statute's language is clear and unambiguous, it is inappropriate to resort to rules of construction or extrinsic aids to construe the language. *See St. Luke's Episcopal Hosp. v. Agbor*, 952 S.W.2d 503, 505 (Tex. 1997).

Section 162.031(b) is clear and unambiguous. It acts as a defense to claims of misapplication of funds the contractor holds in trust for beneficiaries. It does not apply to a claim the contractor failed to promptly pay subcontractors.

We overrule ACI's issue as to Ram's violation of the Prompt Payment Act claim. Because we affirm the trial court's grant of summary judgment on Ram's violation of the Prompt Payment Act claim, we pretermitt discussion of ACI's issue as it pertains to Ram's breach of contract claim. TEX. R. APP. P. 47.1.

CONCLUSION

We affirm the trial court's order granting summary judgment.

/David J. Schenck/

DAVID J. SCHENCK
JUSTICE

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**Court of Appeals
Fifth District of Texas at Dallas**

JUDGMENT

ALBERTELLI CONSTRUCTION,
INC., Appellant

No. 05-18-01529-CV V.

RAM INDUSTRIES
ACQUISITIONS, LLC D/B/A RAM
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On Appeal from the 382nd Judicial
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Trial Court Cause No. 1-18-1563.

Opinion delivered by Justice
Schenck. Justices Whitehill and
O'Neill participating.

In accordance with this Court's opinion of this date, the judgment of the trial court is **AFFIRMED**.

It is **ORDERED** that appellee RAM INDUSTRIES ACQUISITIONS, LLC D/B/A RAM WINDOWS, LLC recover its costs of this appeal from appellant ALBERTELLI CONSTRUCTION, INC.

Judgment entered this 15th day of May, 2020.