

Opinion issued May 15, 2008



In The
Court of Appeals
For The
First District of Texas

NO. 01-06-00846-CV

ARCO CONSTRUCTION COMPANY, INC., Appellant

V.

AMERICON SERVICES COMPANY, INC., Appellee

**On Appeal from County Civil Court at Law No. 2
Harris County, Texas
Trial Court Cause No. 825,594**

MEMORANDUM OPINION

Appellant, general contractor ARCO Construction Company, Inc., hired appellee, subcontractor Americon Services Company, Inc., to perform site work on

a commercial construction project, pursuant to a written contract. When Americon did not receive payment as expected, it sued ARCO for breach of contract, failure to comply with payment obligations under Texas Property Code section 28.002 (“the Prompt Payment Act”), quantum meruit, sworn account, and trust fund violations. A jury found that ARCO violated the Prompt Payment Act by failing to timely pay sums due and awarded Americon: \$61,417.70, plus interest and attorney’s fees. *See* TEX. PROP. CODE ANN. § 28.002 (Vernon 2000). The jury found that Americon breached the contract but that its breach was excused, and the trial court rendered judgment that ARCO take nothing by its counterclaims.

In five issues, ARCO contends that the trial court erred (1) by granting relief under the Prompt Payment Act; (2) by “fail[ing] to award ARCO the damages awarded by the jury for Americon’s breach of contract”; (3) by “allowing Americon to draw adverse inferences” from ARCO’s redactions to its admitted bills for attorney’s fees; (4) by failing to properly apply the parties’ stipulated attorney’s fees; and (5) by concluding that Americon was entitled to recover on its alternative theories.

We affirm.

Facts and Procedural History

In 2003, TMT Properties hired ARCO, a Missouri-based commercial general contractor, to construct offices and a warehouse on property owned by TMT in Houston, Texas, for \$5,100,000 (“the Project”). ARCO subcontracted with Americon to perform the site work on the Project for \$359,000.

Pursuant to the terms of the subcontract between ARCO and Americon (the “Contract”), Americon was required to, inter alia, identify its subcontractors and material suppliers; to provide valid lien waivers prior to payment; and to “protect and fully indemnify [TMT and ARCO] against all liability for claims and liens for labor, materials, appliances, equipment, and supplies whatsoever, including any costs, attorney’s fees, and incidental and consequential damages resulting therefrom.”

Americon subcontracted with C.M. Nunez Trucking Company (“Nunez”) to haul dirt for the Project. At the conclusion of the Project, in November 2003, Americon submitted payment to Nunez in exchange for a lien waiver. Americon drafted the lien waiver for \$72,096, the amount it owed Nunez on the Project; however, Americon drafted its check to Nunez for only \$55,800. Americon took a set-off of \$16,296 from its payment to Nunez because Nunez allegedly owed this sum to Americon on a prior, unrelated project. Nunez signed the lien waiver and then discovered the discrepancy in the amount of the check. On December 29, 2003,

Nunez sent to ARCO a notice of intent to file a lien on the TMT property.

Nunez had obtained the dirt it hauled to the Project from Prime Tree & Landscaping, Inc., d/b/a Mulch Matters (“Mulch”). Americon was unaware of Mulch’s participation in the Project and therefore did not identify Mulch as a subcontractor in the Contract. ARCO and Americon believed that Nunez was providing the dirt for the Project. By the end of the Project, Nunez had failed to pay Mulch the sum of \$53,161.48. On January 6, 2004, Mulch sent to ARCO a notice of intent to file a lien on the TMT property.

By January 15, 2004, both Nunez and Mulch had filed liens with Harris County on the TMT property. On January 26, 2004, Mulch filed suit against ARCO and TMT to foreclose its lien.

On February 19, 2004, ARCO sent written assurances to TMT that ARCO would defend and indemnify TMT against the liens and lawsuit, pursuant to the general contract. In addition, ARCO, through its Missouri legal counsel, sent a demand to Americon that Americon protect and indemnify ARCO from the liens and lawsuit, pursuant to the Contract. ARCO also notified Americon that it was incurring legal expenses and that these expenses would substantially increase over time.

On February 20, 2004, Americon, through its counsel, Christian, Smith, & Jewell (“Christian”), responded that it was “evaluating whether [it] will assume the

defense of ARCO in those matters involving Mulch Matters and Nunez Trucking.”

On March 4, 2004, ARCO, through its Texas counsel, Beirne, Maynard & Parsons, L.L.P. (“Beirne”), answered the Mulch lawsuit. On March 8, 2004, ARCO, requested “bond-around relief” from Americon, in addition to the defense and indemnity under discussion. On March 16, 2004, ARCO sent a letter to Mulch confirming that Mulch would not attempt extra-judicial foreclosure of its lien. On March 17, 2004, ARCO emailed Americon to confirm that Americon had everything it needed to assume the defense of ARCO and again requested bond-around relief. On March 30, 2004, ARCO demanded written notification that Americon would assume the defense of ARCO and would provide indemnity and bond-around relief. In addition, ARCO inquired regarding where to send Beirne’s fee billing.

On March 31, 2004, Americon notified ARCO that it was “not disputing its obligation to indemnify or to defend under the [Contract],” that it was working to resolve the matter, and that it anticipated that it would be able to resolve the matter by April 5, 2004.

On April 6, 2004, Americon sent a letter to Nunez, indicating that Americon would send payment for the \$16,296 that had been withheld, to be held in trust by Nunez’s counsel, in exchange for the release of the Nunez and Mulch liens and the dismissal of the Mulch suit. In addition, Americon notified ARCO that the liens

would be released “within ten days.”

Several times in the days that followed, ARCO contacted Americon regarding the release of the liens and advised that, if the liens were not released as promised, ARCO would be forced to proceed to protect its interest at Americon’s expense. Again, ARCO asked for firm acceptance of the defense and inquired where to send the attorney’s fees billing.

On April 19, 2004, Americon sent payment of \$16,296 to counsel for Nunez. Nunez, however, could not pay the \$53,161.48 owed to Mulch, so Mulch did not release its lien or dismiss its suit.

On May 24, 2004, ARCO again demanded that Americon secure the release of the liens and execution of a notice of non-suit with prejudice; give instructions on where to send fee billing, and give a written basis for Americon’s continued failure to formally assume the defense and indemnification of ARCO. ARCO advised Americon that it was being forced to bond around the liens to mitigate damages associated with the imminent refinancing of the construction loan and that ARCO would seek to hold Americon liable for these costs and any associated damages arising from the delay. ARCO also advised Americon that TMT was holding the \$510,000 retainage under the general contract because of the liens and that Americon may be held responsible for any loss of the retainage, as well as associated damages.

On May 26, 2004, Americon agreed to bond around the liens by the following day, and Nunez offered to try to pay the \$53,161.48 it owed to Mulch in exchange for Mulch's release of lien and dismissal of suit. The next day, however, Americon had not bonded around the liens, and Nunez had not paid Mulch. In the days that followed, ARCO sent correspondence to Americon, Nunez, and Mulch to ascertain the status of the bond and of the settlement with Mulch.

On June 1, 2004, by Rule 11 Agreement, Americon agreed to pay, on behalf of Nunez, the \$53,161.48 owed to Mulch in exchange for the release of the Mulch lien and dismissal of the Mulch suit. On June 2, 2004, Americon paid Mulch, and Nunez and Mulch released their liens on the TMT property. On June 9, 2004, Mulch dismissed its suit.

On June 18, 2004, Americon demanded the balance owed from ARCO under the Contract. ARCO responded that the defense and indemnity matters remained outstanding. Specifically, ARCO contended that it had "incurred approximately \$10,200 thus far in the defense of the liens filed" by Mulch and Nunez, and had incurred \$6,000 in extra financing costs as a result of the liens. Americon demanded detailed billing statements, contending that the fees were excessive for "filing two general denials to a suit to foreclose a mechanic's lien." Americon asserted that its own counsel, Christian, had negotiated the release of liens and that "no real work

needed to be expended by ARCO in defense of this case.”

On August 27, 2004, ARCO responded that the remainder due to Americon under the Contract was \$61,417.70; however, because Americon had declined to defend and indemnify ARCO in these matters, ARCO would withhold \$32,444.93 in reasonable and necessary attorney’s fees, as well as costs, yielding \$28,972.77. ARCO wrote, “Upon receipt from [Americon] of a final waiver of lien letter, ensuring [ARCO] that there are no other outstanding liens or unpaid debt related to this project,” ARCO would forward a check for \$28,972.77. ARCO attached partially redacted copies of billing from its Missouri counsel and from Beirne. On September 24, 2004, ARCO sent a check for \$28,972.77 to Americon, with a letter stating, “ARCO is more than willing to send you this balance, provided you sign a final waiver of lien and warrant that there are no other claims outstanding.” In addition, ARCO stated that the enclosed check was in “full satisfaction of ARCO’s subcontract with Americon.”

On October 11, 2004, Americon responded that, pursuant to the Prompt Payment Act, ARCO was required to immediately release payment of the undisputed sum owed on the Contract and that ARCO could not condition Americon’s receipt of that sum on Americon’s total release of any further claim to the disputed portion. Americon offered to give a partial lien waiver, covering only the \$28,972.77. On

October 27, 2004, Americon sued ARCO, asserting claims for breach of contract, breach of payment obligation under the Prompt Payment Act, quantum meruit, sworn account, and trust fund violations.

On November 3, 2004, ARCO responded that Americon could cash the check without providing lien waivers because the time period for filing liens, under the Texas Property Code, had expired; however, the payment of \$28,972.77 would be considered in full satisfaction of the debt.

On May 1, 2006, the matter was tried to a jury. The jury found that ARCO had failed to comply with its obligations under Prompt Payment Act, which was not excused by a good-faith dispute; had failed to comply with the terms of the Contract by failing to pay Americon the undisputed portion of the amount owed; had misapplied trust funds, which was not excused; and that Americon was entitled to recover from ARCO \$61,417.70 in damages.

In addition, the jury found that, although Americon had failed to comply with the Contract by failing to provide lien waivers, its failure was excused by ARCO's waiver of compliance, which was not barred by Americon's unclean hands. The jury found that ARCO was entitled to recover \$16,222.47 as reasonable and necessary attorney's fees incurred in defending against the Mulch litigation and liens; \$1,370.00 as incidental damages; and \$6,753.00 in consequential damages. However, the jury

also found that Americon's failure to defend and indemnify was excused by substantial performance. The jury did not find that Americon's failure to comply was material.

The trial court entered judgment that Americon recover from ARCO the sum of \$61,417.70; pre-judgment interest on that amount at 18 percent; post-judgment interest at 8 percent; attorney's fees of \$85,699.74 plus interest, together with appellate attorney's fees as set forth in the record, to be awarded to Americon if Americon is successful on appeal. In addition, the trial court ordered that ARCO take nothing by its claims against Americon.

Subsequently, ARCO filed a motion for judgment notwithstanding the verdict and motion to disregard the jury's answers, which the trial court denied. Further, ARCO filed a motion for new trial and motion to modify the judgment, which the trial court denied. This appeal ensued.

Prompt Pay Act

The jury found that ARCO failed to comply with its prompt payment obligations and that its failure to comply was not excused by a good-faith dispute. In its first issue, ARCO contends that the trial court erred by entering judgment on the jury's verdict granting Americon relief under the Prompt Payment Act. ARCO contends that the Act, "applies only when the right to receive payment is undisputed

and when the delay in payment does not result from a good faith dispute.” ARCO first contends that, here, although it is undisputed that Americon performed its site work satisfactorily, there is a good faith dispute concerning Americon’s failure to comply with the terms of the Contract requiring it to defend and indemnify ARCO from any liens or claims, and this dispute rendered the Act inapplicable. Next, ARCO contends that it fully complied with the Prompt Payment Act.

A. Applicability of the Prompt Payment Act

This case involves interpreting the Prompt Payment Act, and, therefore, we apply a de novo standard. *City of San Antonio v. City of Boerne*, 111 S.W.3d 22, 25 (Tex. 2003). We construe the statute as written and must, if possible, determine the legislature’s intent from the language that was used in the statute. *Id.* When determining legislative intent, the entire act, not isolated portions of the act, must be considered. *Id.* We look to the plain meaning of the words used in the statute and, if the meaning is unambiguous, interpret the statute so that it comports with the plain meaning expressed. *Id.*

Texas Property Code section 28.002 provides for prompt payment to contractors and subcontractors, as follows:

- (a) If an owner or a person authorized to act on behalf of the owner receives a written payment request from a contractor for an amount that is allowed to the contractor under the contract for properly performed

work or suitably stored or specially fabricated materials, the owner shall pay the amount to the contractor, less any amount withheld as authorized by statute, not later than the 35th day after the date the owner receives the request.

(b) A contractor who receives a payment under Subsection (a) or otherwise from an 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 required by this subsection must be made not later than the seventh day after the date the contractor receives the owner's payment.

(c) A subcontractor who receives a payment under Subsection (b) or otherwise from a contractor in connection with a contract to improve real property shall pay each of its subcontractors the portion of the 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 required by this subsection must be made not later than the seventh day after the date the contractor receives the owner's payment.

TEX. PROP. CODE ANN. § 28.002. The plain language of section 28.002 demonstrates that its purpose is to ensure that contractors and subcontractors are promptly paid for valuable services and materials provided. *See Interstate Contracting Corp. v. City of Dallas*, 135 S.W.3d 605, 620 (Tex. 2004) (noting that Texas contractors are statutorily required to promptly pay subcontractors proportionately from any amount paid by owner and attributable to work performed under subcontract).

Section 28.003 provides, in relevant part, that a good-faith dispute suspends these deadlines, as follows:

(b) If a good faith dispute exists concerning the amount owed for a payment requested or required by this chapter under a contract for construction of or improvements to real property, excluding a detached single-family residence, duplex, triplex, or quadruplex, the owner, contractor, or subcontractor that is disputing its obligation to pay or the amount of payment may withhold from the payment owed not more than 100 percent of the difference between the amount the obligee claims is due and the amount the obligor claims is due. A good faith dispute includes a dispute regarding whether the work was performed in a proper manner.

TEX. PROP. CODE ANN. § 28.003(b). The plain language of section 28.003(b) demonstrates that its purpose is to protect a party from having to make payment under a contract when there is a good faith dispute regarding the obligation. *See id.* Such dispute includes, but is apparently not limited to, issues regarding work performance. *Id.*

The Act also provides that an amount withheld under this chapter begins to accrue interest on the day after the date on which the payment becomes due and bears interest at one-and-one-half percent each month. *Id.* § 28.004. A person may bring an action to enforce rights under this chapter, and the court may award costs and reasonable attorney's fees as the court deems equitable and just. *Id.* § 28.005. Finally, the Act provides that it may not be interpreted to void a subcontractor's

entitlement to payment for properly performed work. *Id.* § 28.007.

Construing the Prompt Payment Act as a whole, as we must, its purpose is not only to ensure that contractors and subcontractors are promptly paid for valuable services and materials provided, but also to allow certain sums to be withheld from payment when those sums are the subject of a “good-faith dispute,” pending resolution of that dispute. Otherwise, for instance, a contractor could enjoy delayed payment of a substantial sum owed under a subcontract by raising dispute with a smaller portion of the subcontractor’s work. Clearly, this is the type of danger that the Prompt Payment Act is designed to protect against. *See id.* §§ 28.003 (permitting contractor to withhold only those sums that are subject of good-faith dispute), 28.007 (providing that Act may not be interpreted to void subcontractor’s entitlement to payment for properly performed work).

We conclude that the dispute at issue in the instant case, namely, whether there was a failure by ARCO to comply with the terms of the Contract, does not render the Prompt Payment Act inapplicable; rather, the situation presented herein represents the type of circumstance that the Act contemplates. The Act governs the timing of payment of undisputed funds to Americon and provides relief for ARCO in the form of allowing it to withhold funds that are the subject of a “good-faith dispute,” pending resolution of the dispute.

B. Compliance with the Prompt Payment Act

Next, ARCO contends that it fully complied with the Prompt Payment Act. ARCO presents its contention as a challenge to the legal sufficiency of the evidence to support the jury's finding that ARCO failed to comply with its obligations under the Prompt Payment Act. Specifically, ARCO contends that the evidence conclusively establishes the opposite of a vital fact; namely, it establishes that ARCO complied with its obligations under the Prompt Payment Act.

In deciding a legal-sufficiency challenge, we determine whether there is evidence that would enable reasonable and fair-minded people to reach the verdict under review. *City of Keller v. Wilson*, 168 S.W.3d 802, 827 (Tex. 2005). To make this determination, we (1) credit all favorable evidence that reasonable jurors could believe; (2) disregard all contrary evidence, except that which they could not ignore; (3) view the evidence in the light most favorable to the verdict; and (4) indulge every reasonable inference that would support the verdict. *Id.* If the evidence allows only one inference, we may not disregard it. *Id.* at 822.

A no-evidence point will be sustained when (a) there is a complete absence of evidence of a vital fact; (b) the court is barred by rules of law or of evidence from giving weight to the only evidence offered to prove a vital fact; (c) the evidence offered to prove a vital fact is no more than a mere scintilla; or (d) the evidence

conclusively establishes the opposite of the vital fact. *Uniroyal Goodrich Tire Co. v. Martinez*, 977 S.W.2d 328, 334 (Tex. 1998). A matter is conclusively established by the evidence only if reasonable people could not differ in their conclusions. *City of Keller*, 168 S.W.3d at 816.

a. The undisputed funds

Under the Prompt Payment Act, ARCO was required to pay Americon the undisputed portion of the amount due under the Contract “not later than the seventh day after the date [ARCO] receive[d] [TMT’s] payment.” *See* TEX. PROP. CODE ANN. § 28.002(b). The trial court’s judgment seems to reflect that it found that payment was due on July 1, 2004.

ARCO contends that it complied with the Prompt Payment Act when it tendered the undisputed portion of the sums due, which was \$28,972, to Americon in September 2004. *See id.* § 28.002. The record shows that, on September 24, 2004, ARCO tendered to Americon a check for \$28,972. However, ARCO placed a condition on cashing the check, namely, that Americon first provide ARCO with a final total lien waiver. The record shows that, on November 3, 2004, ARCO granted permission for Americon to cash the check without the necessity of providing a lien waiver because the time to file a lien under the Property Code had expired; however, ARCO maintained that the check would be considered by ARCO to be full

satisfaction of ARCO's debt to Americon under the Contract. ARCO contends that nothing in the Act prevented it from conditioning payment of the undisputed funds on a total release by Americon of the disputed funds. We disagree.

We have concluded that a contractor is statutorily required under the Prompt Payment Act to timely pay its subcontractors and that the Act permits a contractor to withhold only those sums that are the subject of good-faith dispute. *See* TEX. PROP. CODE ANN. §§ 28.002, .003. Further, contractors are prohibited from using Chapter 28 to void a subcontractor's entitlement to payment for properly performed work. *Id.* § 28.007.

We cannot conclude, as ARCO urges, that the Act should be construed to permit a contractor to use its statutorily required payment of undisputed sums under section 28.002 as leverage to force the relinquishment of any claim that the subcontractor may have to the disputed funds—those purportedly withheld by the contractor under the good-faith dispute exception in section 28.003—without any resolution of the dispute.

The record shows that, at the time of trial, in May 2006, the total sum owed to Americon under the Contract remained outstanding. With regard to the undisputed portion, we cannot conclude, as ARCO urges, that the evidence conclusively shows that it complied with the Act or that reasonable people could not differ in their

conclusions. *See City of Keller*, 168 S.W.3d at 816. We conclude that the evidence supports the jury's verdict and the judgment entered by the trial court on that verdict that ARCO did not comply with the deadlines under the Prompt Payment Act regarding payment of the undisputed \$28,972.70 due to Americon under the Contract.

b. The disputed funds

ARCO contends that it complied with section 28.003 of the Prompt Payment Act when it withheld from Americon \$32,444.93, or 100 percent of the difference between the amount Americon claimed was due and the amount that ARCO claimed was due, because this sum was the subject of a "good-faith dispute." *See* TEX. PROP. CODE ANN. § 28.003(b).

The record shows that Americon acknowledged that it had a duty to protect and indemnify ARCO under the Contract, and that Americon owed ARCO reasonable and necessary attorney's fees and costs. The parties dispute whether the sum that ARCO withheld for its attorney's fees and costs is fully the subject of a "good-faith dispute," as required to support withholding under section 28.003. *See id.* The jury answered that it was not. ARCO challenged the jury's finding in its motion for judgment notwithstanding the verdict and motion for new trial.

Section 28.003(b) permits the withholding of "*not more than* 100 percent of the difference between the amount the obligee [here, Americon] claims is due and the

amount the obligor [here, ARCO] claims is due.” *Id.* (emphasis added). The record shows that, at the time of trial, ARCO had not successfully paid to Americon any portion of the \$61,714.70 owed under the Contract. From this evidence, the jury could have reasonably concluded that ARCO withheld more than 100 percent of the funds in dispute and, therefore, did not comply with the Prompt Payment Act.

ARCO contends that it did not withhold more than 100 percent of the amount in dispute because it tendered the undisputed portion to Americon, but Americon refused to accept the funds. As discussed above, the record shows that ARCO tendered payment to Americon for \$28,972.70, but initially conditioned its tender on Americon providing a lien release covering the entire \$61,714.77. Americon offered a partial lien waiver, to cover only the \$28,972.70, which ARCO did not accept. Shortly thereafter, with the time period for filing a lien having expired, ARCO asserted that its tender would be considered “full satisfaction” of the \$61,714.70 debt. Americon contends that, by cashing the check under ARCO’s condition of satisfaction, Americon risked waiving its claim to the disputed funds. We agree. *See, e.g., Ostrow v. United Bus. Machs., Inc.*, 982 S.W.2d 101, 104 (Tex. App.—Houston [1st Dist.] 1998, no pet.) (discussing accord and satisfaction, and explaining that when check is tendered with conditions regarding existing obligation or dispute, contract to discharge debt forms upon cashing check). From this evidence, we

conclude that the jury could have reasonably concluded that, by withholding more than section 28.003(b) allows a contractor to withhold, ARCO did not comply with the Prompt Payment Act with regard to the disputed funds.

Further, the record shows that the Nunez and Mulch liens were released on June 2, 2004 and that the Mulch lawsuit was dismissed June 9, 2004. Weeks later, on June 25, 2004, ARCO stated that it had “incurred approximately \$10,200 thus far in defense of the liens filed by Nunez Trucking and Mulch Matters against the above-mentioned property,” and that, “[a]lso outstanding is the reimbursement of \$6,000 in extra financing costs incurred as a result of the liens filed.” The record shows, however, that two months later, on August 27, 2004, ARCO asserted that its attorney’s fees and costs for Americon’s “conduct” and “failure to defend and indemnify” had tripled to \$32,444.93.

Gregory Ancel, Regional Manager of the St. Louis Division of ARCO, testified that the amount withheld was for ARCO’s attorney’s fees, litigation expenses, bonds, and Americon’s failure to produce lien waivers. Andrew Parma, attorney for Americon, testified that these amounts would have been known by the June 25, 2004 letter and that there was no legal work left to be done between June 25, 2004 and August 27, 2004. Viewing this evidence in the light that supports the verdict, we conclude that the jury could have reasonably concluded that the sum withheld by

ARCO, \$32,444.93, was not the subject of a dispute in “good-faith.”

We cannot conclude, as ARCO urges, that the evidence conclusively shows that it complied with the Act or that reasonable people could not differ in their conclusions. *See City of Keller*, 168 S.W.3d at 816. We conclude that the evidence supports the jury’s verdict and the judgment rendered by the trial court on that verdict.

In sum, we hold that the evidence is legally sufficient to support the trial court’s rendition of judgment on the jury’s finding that ARCO failed to comply with the Prompt Payment Act.

Accordingly, ARCO’s first issue is overruled.

Breach of Contract

In its second issue, ARCO contends that the trial court erred “when it failed to award ARCO the damages awarded by the jury for Americon’s breach of contract.” Specifically, ARCO contends that, “[i]n response to Question No. 5, the jury found that Americon had failed to comply with [the Contract] in five respects, and that ARCO was entitled to damages in its answer to Question No. 7.” ARCO contends that the judgment, however, “erroneously fails to award ARCO any damages under this finding” and that “as a matter of law, ARCO is entitled to an award of damages under these jury findings.” A close reading of the jury’s answers, however, shows the

contrary.

First, in question number five, the jury found that Americon failed to comply with the Contract, as follows:

Did Americon fail to comply with the Subcontract Agreement as set forth below?

.....

- (a) Did Americon fail to pay all of its subcontractors or material suppliers as required by the subcontract agreement? No
- (b) Did Americon fail to furnish all suppliers' lien waivers under paragraph 1(h) of the Subcontract Agreement? Yes
- (c) Did Americon fail to furnish lien waivers for itself or for all its material suppliers and subcontractors for material and labor under paragraph 7 of the Subcontract Agreement? Yes
- (d) Did Americon fail to supply ARCO with all proper material and/or subcontractor affidavits or lien waivers under paragraph 13, Exhibit A of the Subcontract Agreement? Yes
- (e) Did Americon fail to protect and indemnify T.M.T. Properties and ARCO against all liability for claims and liens for labor and materials whatsoever including any costs, attorneys' fees and incidental and consequential damages resulting therefrom under paragraph 4 of the Subcontract Agreement? Yes
- (f) Did Americon fail to list or provide written changes to list all material suppliers and subcontractors in paragraph 13; Exhibit A to the Subcontract Agreement? Yes

The jury did not find that Americon's failure to comply was material.

In question number five, subparts (b), (c), and (d), the jury found that Americon failed to comply with the Contract by failing to supply ARCO with lien waivers. In question number six, however, the jury answered that Americon's failure to comply with the Contract, as found in question five, subparts (b), (c), and (d), was excused

by ARCO's waiver of compliance in these matters. ARCO does not challenge these findings on appeal.

In question number seven, the jury was asked to consider what sums, if any, would fairly and reasonably compensate ARCO for its damages, if any, that resulted from Americon's failure to comply. The remaining compliance issues from question number five were subpart (e), failure to defend and indemnify, and subpart (f), failure to list all suppliers. The jury was asked to consider the element of attorney's fees for defending the Mulch litigation and lien disputes, to which it answered \$16,222.47. Next, the jury was asked to consider the element of incidental damages, including ARCO's loss of interest on the late payment of retainage due from TMT, to which the jury answered \$1,370.00. Finally, the jury was asked to consider the element of consequential damages, including ARCO's lost profits on the Contract, extra administrative expenses, and expert fees, to which the jury answered, \$6,753.00. ARCO contends that it is entitled to these amounts as damages.

In question number eight, however, the jury was instructed that, if it answered "yes" to *any of the subparts in question number five*, it should consider whether "Americon's failure to comply with the [Contract] was excused." The jury answered, "Yes." Hence, the jury's answer to this question eliminated the underlying liability in question number five, subparts (e) and (f), that supported the damages awarded in

question number seven.

ARCO contends that the jury's finding in question number eight "is immaterial" because it constitutes an erroneous application of the law. ARCO contends that Americon's conduct could not have been "excused by substantial performance" because "substantial performance is an equitable cause of action, not a legal excuse that forgives a party's breach of contract." ARCO maintains that it is entitled to offset Americon's recovery with the damages awarded to ARCO in question number seven.

First, as Americon contends, ARCO does not, on appeal, complain about the sufficiency of the evidence to support the jury's determination regarding substantial performance. ARCO complains only that substantial performance cannot, as a matter of law, be a defense to a breach of contract action.

The doctrine of substantial performance may be asserted as a defense by contractors in a breach of contract action. *See, e.g., Gentry v. Squires Constr., Inc.*, 188 S.W.3d 396, 403 n.3 (Tex. App.—Dallas 2006, no pet.) (citing *Smith v. Smith*, 112 S.W.3d 275, 278–79 (Tex. App.—Corpus Christi 2003, pet. denied)). We hold that the trial court did not err by rendering judgment in accordance with the jury's findings.

Accordingly, ARCO's second issue is overruled.

Attorney's Fees

In its third issue, ARCO contends that “[t]he trial court committed harmful error by allowing improper comments and attacks on ARCO’s attorneys’ fees.” Specifically, ARCO contends that, during discovery, it provided Americon with redacted attorney’s fees statements and produced a privilege log that established the basis for its privilege claims. Americon filed a motion to compel, but never obtained a ruling on its motion. Consequently, the trial court never ordered that unredacted billing statements be produced and did not rule that ARCO was prohibited from asserting attorney-client privilege with respect to the billing statements from Beirne. ARCO contends that, at trial, Americon violated Texas Rule of Evidence 513 by repeatedly attacking ARCO’s redaction of its attorneys’ bills at trial. *See* TEX. R. EVID. 513.

Having concluded in ARCO’s second issue that it is not entitled to the attorney’s fees awarded in question number seven, we need not reach whether those fees were improperly reduced through a violation of Rule 513.

Accordingly, ARCO’s third issue is overruled.

Stipulated Attorney's Fees

In its fourth issue, ARCO contends that “the trial court’s judgment erroneously ignores the parties’ stipulations regarding attorneys’ fees.” ARCO contends that “as

the prevailing party on its breach of contract counterclaim, ARCO is entitled to \$109,152.80 in attorney's fees under Texas Civil Practice and Remedies Code 38.001 and paragraph 4 of [the Contract].”

The availability of attorneys' fees under a particular statute is a question of law for the court. *Holland v. Wal-Mart Stores, Inc.*, 1 S.W.3d 91, 94 (Tex. 1999). Under Texas Civil Practice and Remedies section 38.001, the award of reasonable attorneys' fees to the prevailing party in a breach of contract case is mandatory if there is proof of the reasonableness of the fees. See TEX. CIV. PRAC. & REM. CODE ANN. § 38.001 (Vernon 1997); *Hassell Constr. Co. v. Stature Commercial Co.*, 162 S.W.3d 664, 668 (Tex. App.—Houston [14th Dist.] 2005, no pet.). The amount of the award lies within the discretion of the court but it does not have the discretion to deny attorney's fees if they are proper. *Hassell Constr. Co.*, 162 S.W.3d at 668.

Paragraph number four of the Contract provides, in pertinent part, “Subcontractor further agrees: To protect and fully indemnify [TMT and ARCO] against all liability for claims and liens for labor, materials, appliances, equipment, and supplies whatsoever, including any costs, attorney's fees, and incidental and consequential damages resulting therefrom.” The record shows that Americon paid Nunez the sum in dispute and that Americon paid Mulch on behalf of Nunez, thereby achieving the release of the Nunez and Mulch liens, and the dismissal of the Mulch

suit. The jury initially answered that Americon had failed to comply with certain terms of the Contract and that ARCO was entitled to damages. The jury did not find that Americon's failure to comply was material, however, and the jury subsequently answered that Americon's failure to comply was excused. In sum, the trial court did not award any damages to ARCO on its breach of contract counterclaims.

To recover attorney's fee under section 38.001, a party must (1) prevail on a cause of action for which attorney's fees are available and (2) recover damages. *Green Intern., Inc. v. Solis*, 951 S.W.2d 384, 390 (Tex. 1997). Having determined that ARCO did not prevail on its breach of contract counterclaim, ARCO is not entitled to attorney's fees under section 38.001 or paragraph four of the Contract. *See Cytogenix, Inc. v. Waldroff*, 213 S.W.3d 479, 489–90 (Tex. App.—Houston [1st Dist.] 2006, pet. denied); *see also Sw. Bell Mobile Sys., Inc. v. Franco*, 971 S.W.2d 52, 56 (Tex. 1998) (concluding that plaintiff who recovered no damages could not recover attorney's fees); *Burgmann Seals Am., Inc. v. Cadenhead*, 135 S.W.3d 854, 860–61 (Tex. App.—Houston [1st Dist.] 2004, pet. denied) (“The controlling issue for the recovery of attorney's fees is not whether the plaintiff is a prevailing party, but whether the judgment reflects that the plaintiff obtained meaningful relief on his claims.”).

Accordingly, ARCO's fourth issue is overruled.

Alternative Theories

In its fifth issue, ARCO contends that Americon is not entitled to recover under its alternative theories of recovery. Having concluded that Americon is entitled to recover under the Prompt Payment Act, we do not reach this issue.

Conclusion

We affirm the judgment of the trial court.

Laura Carter Higley
Justice

Panel consists of Justices Nuchia, Hanks, and Higley.