IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

LAWLESS CONSTRUCTION CORPORATION, a Washington corporation,	)	No. 66762-9-I
	)	DIVISION ONE
Appellant,	)	UNPUBLISHED OPINION
v.	)	
TUYEN DINH NGUYEN and MAI TUYET VAN, residents of King County, Washington,	)	
	)	
Respondents.	)	FILED: May 14, 2012
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Appelwick, J. — After Lawless Construction Corporation rested at trial, the trial court dismissed its claims for breach of contract, promissory estoppel, and lien foreclosure. It awarded the Nguyens $82,740 in attorney fees, even though the amount in controversy was less than $10,000. We affirm the dismissal. However, the trial court did not enter adequate findings to enable appellate review of its fee award. We vacate the attorney fee award and remand for the trial court to enter appropriate findings in support of any attorney fee award.

FACTS

Tuyen Nguyen and Mai Van (the "Nguyens") sued their homebuilder for construction defects. Then, the Nguyens brought a legal malpractice claim against the attorneys that represented them in that case. On September 25, 2008, Mark Lawless, the vice president of Lawless Construction Corporation (LCC), testified for the defense in the malpractice case.

After inspecting the Nguyens' home, Lawless testified that he would charge $26,200 plus tax to repair the Nguyens' floor and front door. The Nguyens' attorney, C. Nelson Berry, III, attempted to bind Lawless to that claim: "You are under oath. Would you do this work today for this price?" Lawless responded that he had "already contacted somebody who's prepared to start" for "[t]his price, this work."

Later, Berry tried to get Lawless to sign a contract:

> I am drafting an agreement here. It says, "I agree to repair the marble floor and the front door of the Nguyen home, particularly described in my trial testimony in King County Cause No. 07-2-04479-5 SEA, for $22,500, plus $3,700, plus Washington State sales tax. If Tuyen Nguyen and Mai Van are compelled to sue me to enforce this contract, I agree to pay their reasonable attorney fees and costs for doing so. Work to be commenced within 30 days of my signing this agreement."
>
> Are you prepared to sign this agreement?

Lawless responded that he would perform the work "[u]nder my contract, yes; not that one." Ultimately, Lawless stated, "I will commit to what I discussed here today using my contract terms and I will reiterate that one more time." They did not discuss the terms of Lawless's contract.

Over the next several months, Berry and Lawless attempted to negotiate acceptable contract terms. On October 10, Berry sent a letter to Lawless memorializing

a conversation in which Lawless agreed to provide a proposed contract within 30 days. On October 15, Lawless responded and pointed out an omission in Berry's letter. Specifically, that Berry neglected to mention that they had discussed a "special contract that will be required due to the nature of [the Nguyens]." Lawless reiterated that he said at trial that he would perform the work under his own conditions, instructed Berry to provide a $5,000 deposit so an attorney could begin drafting a contract, and stated that all payments must be made in advance. Lawless also raised other conditions, including that the contract include an indemnity provision, that the Nguyens provide an interpreter, and that the Nguyens vacate the premises during construction.

Two days later, on October 17, Berry responded that the Nguyens did not agree to the "new term" that they deposit $5,000 to have an attorney draft a contract. At the end of the letter, Berry threatened that "if we do not receive your contract within 30 days of our conversation of October 10, 2008, to do this work in the manner and at the price to which you testified, my clients have instructed me to pursue their legal remedies against you."

On October 20, Lawless wrote that "[y]our current threat only confirms my suspicion about the nature of your clients and makes the terms of any contract that we engage in that much more important. I discussed this with you on October 10, 2008, but you seem unwilling to address any prerequisite." Lawless confirmed that he was ready to perform the work under the terms expressed at trial, but that using his own contract terms was part of the agreement. Lawless did not understand how Berry could express disbelief about new terms, when they had never discussed specific terms.

On November 3, Berry wrote to Lawless that the Nguyens agreed to some of

Lawless's minor terms, such as providing an interpreter and vacating the premises. Berry proposed that the Nguyens pay in full by placing funds in escrow to be withdrawn as the work progressed, but reiterated that they would not provide a $5,000 deposit for Lawless to draft a contract. Berry closed the letter by threatening to pursue legal remedies if Lawless did not provide a contract within 30 days of the October 10 conversation.

Lawless replied on November 5, and again demanded $5,000 to draft the contract. He stated that Berry's proposal to place the funds in escrow was unacceptable. Lawless also stated there would be a $1,500 charge to meet with the Nguyens and pick their tile. Lawless expressed disappointment that Berry continued to make legal threats despite the fact that negotiations were progressing and none of Lawless's specific contract terms were discussed at trial.

On November 7, Berry responded that the Nguyens agreed to Lawless's indemnity term and agreed to provide a cashier's check upon execution of the contract. Rather than meet to discuss the tile, Berry instructed Lawless to include in the contract that he would install the same or similar tile to what was already in the home. His clients again refused to pay $5,000 for the contract, and he closed the letter with a legal threat.

Lawless responded the same day, asserting that they appeared to have an agreement. But, he explained that the 30 day deadline could not be met because it had taken so long to agree on terms. Lawless informed Berry, "[S]hould your clients not execute the [contract] as we have agreed, LCC reserves its right to claim for lost profit and administrative fees in negotiating the terms of the contract. The administrative

fees now approach $2,500 and will increase as we have the attorney draft the language."

Berry confirmed receipt of Lawless's letter and asked for a price break down for different portions of the work. On December 17, Lawless sent Berry a contract. The contract included terms that the parties had not discussed, such as a requirement that the Nguyens purchase a $250,000 insurance policy for the benefit of LCC. Berry wrote to Lawless on December 22 that he passed the contract on to his clients, and reiterated that he would like a price breakdown. Lawless responded on December 24 that the trial testimony had a sufficient price breakdown, and that the Nguyens did not need to know LCC's profit margin.

On February 7, 2009, Lawless sent a letter to Berry inquiring about the status of the contract. Lawless stated that, as the contract provided, he had a crew ready to begin work on February 15. He was concerned because he could not order the tile until he received a signed contract. On February 18, Lawless sent another letter indicating the start date had come and gone and his scheduled crew had nothing to do. He informed Berry that the Nguyens had not lived up to the bargain they agreed to and that if he did not hear from Berry by February 28 he would be record a lien on the Nguyens' property. Lawless offered to walk away from the agreement for $3,500, the expenses he claimed he had incurred to that date. The Nguyens apparently decided to use hardwood floors instead of tile and chose another contractor, but did not communicate that decision to Lawless.

On March 13, LCC recorded a lien on the Nguyens' property for $3,500. It listed that performance began September 26, and the last date of performance was

December 19, 2008. Lawless believed that he had provided $3,500 in professional services, including the costs of his attorney to review the contract and his own preparation of the plans and specifications.

LCC sued for breach of contract and to foreclose the lien. In addition to the $3,500 lien, it sought to recover $6,000 in anticipated profits. Eventually, LCC filed an amended complaint, adding a promissory estoppel claim.[1]

After LCC rested at trial, the trial court granted the Nguyens' CR 41(b)(3) motion to dismiss. It determined that there was no contract, that there was no meeting of the minds on essential terms, that the Nguyens did not make a legally binding promise, and that the lien was frivolous. The court awarded the Nguyens costs and fees. LCC appeals.

DISCUSSION

The Nguyens argue that LCC failed to include verbatim the challenged findings of fact as required by RAP 10.4(c), and that the LCC did not properly assign error to conclusions of law. They argue that we must treat the findings as verities on appeal, and treat the conclusions of law as the law of the case. But, we may waive compliance with RAP 10.4(c) in order to serve justice. RAP 1.2(c); In re Marriage of Zeigler, 69 Wn. App. 602, 606, 849 P.2d 695 (1993). And, there is no appellate rule that requires an appellant to formally assign error to specific conclusions of law. Here, LCC challenged findings by number, and argued at length regarding challenged findings and conclusions. The Nguyens suffered no prejudice, and even articulated in their

[1] LCC argues it asserted both equitable estoppel and promissory estoppel. The amended complaint only mentions promissory estoppel. But, LCC also argued equitable estoppel in its briefing below.

response which findings LCC was challenging. We will proceed on the merits.

I. Dismissal

The trial court may grant a motion to dismiss at the close of the plaintiff's case, either as a matter of law or as a matter of fact, when there is no evidence, or reasonable inferences therefrom, that would support a verdict for the plaintiff. Commonwealth Real Estate Servs. v. Padilla, 149 Wn. App. 757, 762, 205 P.3d 937 (2009). When the trial court acts as a fact finder, as it did here, appellate review is limited to whether substantial evidence supports the trial court's findings and whether the findings support its conclusions of law. Id.

LCC argues that the evidence does not support the trial court's findings. It argues that the trial court erred by concluding that there was no meeting of the minds on the essential terms necessary to form a contract, that the Nguyens did not make a legally binding promise that LCC could justifiably rely upon, and that the lien was invalid.

First, LCC argues that there is not substantial evidence to support the trial court's findings and conclusions that there was no meeting of the minds on the essential terms necessary to form a contract. While Lawless was under oath, he agreed to price and performance. But, it is clear from the lengthy negotiation period that followed that the parties had not agreed on all of the terms Lawless deemed essential. Lawless repeatedly asserted that he needed special protections due to the Nguyens' litigious nature. After the Nguyens consented to some of Lawless's requests, Lawless sent the Nguyens a contract. That contract, however, contained terms that the parties had not discussed. The Nguyens decided not to sign. The trial court's finding

that the parties did not reach a meeting of the minds is supported by substantial evidence.

Next, LCC argues that the Nguyens should have been estopped from denying the existence of the contract. It argues that where the Nguyens attempted to bind Lawless to a contract under oath, threatened to sue if he did not perform, and indicated they wanted to start within 30 days of signing a contract, that it was reasonable to begin drafting plans and specifications and making arrangements with subcontractors. But, the parties explicitly did not agree on material terms. As demonstrated by the negotiation period that followed Lawless's testimony, their agreement was a quintessential agreement to agree. During the negotiation process, Lawless and the Nguyens disagreed about numerous contract terms. LCC could not have, during that time period, justifiably considered the contract to be a done deal. And, when the negotiation process was nearing an end, Lawless sent the Nguyens a contract that contained terms that had not been discussed. The Nguyens never agreed to the new terms contained in the written contract. Rather, Berry indicated that he sent the contract to the Nguyens for review, and that the Nguyens still wanted a more detailed price breakdown. There was substantial evidence to support the trial court's findings that the LCC did not justifiably provide professional services. That finding, in turn, supports the trial court's conclusion that the Nguyens did not make a binding promise and that LCC's estoppel claims should be dismissed.

Finally, LCC challenges a series of findings that are relevant for purposes of determining whether the lien was invalid or frivolous. Under RCW 60.04.021, a lien is authorized "for the contract price of labor, professional services, materials, or

equipment furnished at the instance of the owner" when there is an improvement of real property. The statute provides that professional services rendered in preparation for construction, repair, or remodeling activities on real property are considered an improvement. RCW 60.04.011(5). But, the existence of a contract is essential to claiming a lien. Colo. Structures, Inc. v. Blue Mountain Plaza, LLC, 159 Wn. App. 654, 664, 246 P.3d 835 (2011).

Here, the trial court concluded, "In the absence of an enforceable contract or a legally binding promise to do work on the [Nguyens'] property, [LCC] was not entitled to assert a Claim of Lien, and [its] claim for lien foreclosure should be dismissed." In its judgment, the trial court declared that the lien was invalid. There is substantial evidence to support the trial court's findings and conclusions that there was no meeting of the minds and that the Nguyens did not make a legally binding promise. Consequently, it was proper for the trial court to conclude that LCC was not entitled to record a lien on the Nguyens' property.

Nevertheless, the parties expended a great deal of energy debating whether the trial court was entitled to further declare that the lien was frivolous. LCC correctly argues that a lien can be invalid without being frivolous. W.R.P. Lake Union Ltd. P'ship v. Exterior Servs., Inc., 85 Wn. App. 744, 752, 934 P.2d 722 (1997). But, LCC does not articulate what additional relief it would obtain if we declared that the trial court erred by concluding that the lien was frivolous. RCW 60.04.081(4) provides that, if a lien is frivolous and made without reasonable cause, the court shall release the lien and award costs and fees against the claimant. Here, in addition to determining that the lien was frivolous, the trial court properly determined that the lien was invalid. The

Nguyens were awarded attorney fees pursuant to RCW 60.04.181(3), RCW 4.84.250, and RCW 4.84.330. None of those statutes require that the lien be frivolous in order for attorney fees to be awarded. RCW 4.84.250, .330; 60.04.181(3). LCC does not argue that the Nguyens were not entitled to fees pursuant to those statutes. Thus, the Nguyens obtained nothing additional from the determination that the lien was frivolous, and we need not consider the propriety of that conclusion.

II. Attorney Fees Dispute

After the Nguyens filed their motion to dismiss, they filed a motion for fees and costs. LCC articulated numerous complaints about the Nguyens' request. For instance, LCC argued that the hourly rates were too high, and that the requested award of over $80,000 was unreasonably high for a lawsuit where the amount in controversy was under $10,000.

In addition to general claims that the Nguyens requested an unreasonable amount, LCC argued there were problems with many specific charges. It asserted that there were duplicative charges, charges for unrelated cases, and charges for motions and theories that the Nguyens did not prevail on.

LCC claimed that many more problems arose from Berry's role as trial counsel. During the pendency of its lawsuit, LCC identified Berry as a material witness. Nevertheless, Berry continued to represent the Nguyens. Eventually, LCC filed a successful motion to disqualify him, and Berry was replaced by Guy Beckett. LCC argued that it was unreasonable to award fees for all of Berry's work because he should have known he was a material witness in the case, and that the Nguyens were seeking significant fees incurred by Berry after he was identified as a material witness,

but before he was formally disqualified. LCC also argued that there was unreasonable billing incurred for time that Berry spent getting Beckett up to speed on the case, and that Berry could have avoided that expense by realizing from the outset that he was a material witness. Further, LCC argued that, in one instance, Berry and Beckett each charged for a deposition when Berry had already been disqualified and was not even taking the deposition.

Despite the extensive argument about the fees, the trial court signed the order prepared by the Nguyens that included only one finding on fees and costs:

> Applying the principles set forth in RPC 1.7, the attorney fees incurred by the Defendants in the amount of $82,740 and costs and expenses in the amount of $4,665.60 are reasonable and were necessarily incurred.

The amount of $82,740 is only $90 less than the Nguyens requested, apparently reflecting the fact that the Nguyens conceded in their reply that the original request contained $90 of duplicative billing.

On appeal, LCC argues that the fee award was grossly excessive and that the trial court did not enter sufficient findings to create an adequate record for appeal. We note first that, while the size of an award in relation to the amount in controversy may be a relevant factor for the trial court to consider, that consideration is not dispositive. Mahler v Szucs, 135 Wn.2d 398, 433, 957 P.2d 632, 966 P.2d 305 (1998). But, "[c]ourts must take an *active* role in assessing the reasonableness of fee awards, rather than treating cost decisions as a litigation afterthought. Courts should not simply accept unquestioningly fee affidavits from counsel." Id. at 434-35. To establish an adequate record for appellate review of fee awards, the trial court must enter findings of fact and conclusions of law. Id. at 435.

Here, despite detailed challenges to the fees claimed, the trial court signed the Nguyens' proposed findings of fact and conclusions of law, which contained only one finding regarding attorney fees. It filled in a blank space for the amount of attorney fees. It only deducted $90 from the requested amount, apparently recognizing the Nguyens' explicit concession that there was $90 of duplicative billing. In light of the size of the fee award in comparison with the amount in controversy, and the number and nature of charges disputed, the trial court's solitary finding that the fees were reasonable and necessary is insufficient to create a record for appellate review. We remand for the trial court to enter appropriate findings.

III. Attorney Fees on Appeal

The Nguyens request reasonable attorney fees and costs incurred for purposes of this appeal pursuant to RAP 18.1 and RCW 60.04.181(3), 4.84.250, and 4.84.330, the three bases under which the trial court awarded fees. LCC does not contest the Nguyens' request. Accordingly, we award the Nguyens reasonable fees and costs.

Appelwick, J.

WE CONCUR:

Grosse, J.