2013 IL App (1st) 121632-U

SECOND DIVISION
June 4, 2013

No. 1-12-1632

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

ARCHON CONSTRUCTION COMPANY, INC.,	)	Appeal from
	)	the Circuit Court
Plaintiff-Appellant,	)	of Cook County.
	)	
v.	)	No. 08 CH 15325
	)	
U.S. SHELTER.,L.L.C., U.S. SHELTER GROUP, INC., JOHN SORENSON, OAK RIDGE OF ELGIN, L.L.C., and DARIUSZ and IWETTA CHLOPECKI, HANTAMA and UMRAN SHAMAS, MILAM ZMRZLY, LINDA SZYBEKO, STEVE and LISA FETTA, and UNKNOWN OWNERS and NON-RECORD CLAIMANTS,	)	
	)	Honorable
	)	Lisa Curcio,
Defendants-Appellees.	)	Judge Presiding.

U.S. SHELTER, L.L.C., and OAK RIDGE OF ELGIN, L.L.C.,	)
Counter-Plaintiffs,	)
	)
v.	)
	)
ARCHON CONSTRUCTION COMPANY, INC.,	)
Counter-Defendant,	)

No. 1-12-1632

U.S. SHELTER, L.L.C.,	)
	)
Third-Party Plaintiff-Cross Appellant,	)
	)
v.	)
	)
SPIES AND ASSOCIATES,	)
	)
Third-Party Defendant -Cross-Appellee. [1]	)

JUSTICE QUINN delivered the judgment of the court.
Presiding Justice Harris concurred in the judgment. Justice Connors dissented.

O R D E R

¶ 1 Held: The circuit court improperly granted summary judgment for both the defendant on the complaint and the third-party defendant on the third-party complaint where there existed material questions of fact. The two orders entering summary judgment are reversed and the cause is remanded.

¶ 2 I. INTRODUCTION

¶ 3 Archon Construction Company, Inc. (Archon) filed a complaint in circuit court seeking foreclosure of its mechanic's lien against U.S. Shelter, *et al.* as well as contract damages and equitable relief for the value of goods and services specifically related to the 2007 replacement of a section of pipe between manhole covers 108 and 110 in an Elgin subdivision. The work upgraded the PVC piping installed almost two years earlier to ductile iron piping. The filing of Archon's mechanic's lien suit caused U.S. Shelter to file a third party complaint against its civil engineering firm, Spies and Associates. The trial court granted U.S. Shelter's motion for summary judgment and, thereafter, released Archon's lien. On the basis of its entry of summary judgment in favor of

[1]The appellant's opening brief and the First District appellate court's clerk's office fact sheet do not mention the cross-appeal filed by U.S. Shelter against Archon and Spies and Associates. However, the record contains a notice of cross-appeal filed on May 23, 2012, and all parties' briefs address issues raised therein. Consequently, we have added the cross-appeal to our heading.

defendant, U.S. Shelter, it also granted Spies and Associates' motion for summary judgment in the third party complaint U.S. Shelter had filed against Spies and Associates. This appeal arises under Supreme Court Rule 303 and encompasses both the trial court's summary judgment order dated August 12, 2011, and its December 8, 2011 order releasing Archon's lien as well as the circuit court's final order dated April 12, 2012.

¶ 4 II. FACTS

¶ 5 The defendant, U.S. Shelter, is the owner/developer of a subdivision in Elgin, Illinois. It hired plaintiff, Archon, an underground utility contractor, to install a sanitary sewer system for its development. The contract between the two, dated January 5, 2005, specified material types and quantities to be used by Archon. The contract specified PVC piping and did not mention or require ductile iron piping or fittings. At the time the contract was executed, the Village of Elgin did not require or mandate the use of ductile iron piping as opposed to PVC piping for its sanitary sewer systems.

¶ 6 U.S. Shelter hired a civil engineering firm, Spies and Associates, to oversee the sanitary sewer system's installation by Archon and to ensure that the sewer system met both the contract specifications and the Village of Elgin's requirements. After Archon performed the installation, Spies and Associates confirmed to U.S. Shelter that Archon's work was completed in a satisfactory and workmanlike manner pursuant to the parties' contract plans and specifications.

¶ 7 Archon completed its work under the contract on or about August 8, 2005, and the sewer system was pressure-tested and found to be operational. After Spies and Associates confirmed to U.S. Shelter that Archon completed satisfactory work, U.S. Shelter then paid Archon the entire agreed-upon contract price with the exception of a small retention amount that was to be paid after

the Village of Elgin approved the subdivision project as a whole.

¶ 8 The contract between Archon and U.S. Shelter specifically excluded certain activities from Archon's scope of responsibilities and expressly provided that "any additional work items not listed will be completed on negotiated price or T&M" (time and materials). The contract also provided that the Village of Elgin would review Archon's work within one year of its completion. Archon would have been required to perform any work necessary to bring the sewer system into compliance with requirements stated by the Village of Elgin at that time.

¶ 9 After installation of the sewer system by Archon, other construction work proceeded. Roads were completed and a number of homes were built and connected to the sewer system. There was no indication that the sewer system failed to function appropriately.

¶ 10 Approximately two years after Archon completed its installation of the sewer system, the Village of Elgin, prior to assuming responsibility for its maintenance, had its engineering inspector review video footage of the interior of the sewer system which was recorded in March or April of 2007. The Village of Elgin engineering inspector believed he saw some cracks in the sewer piping located between manhole 108 and manhole 110. Both Messrs Liozza and Smetena, two managers of Archon, reviewed the same footage as well as still photographs and testified in their depositions that they disagreed with the finding and stated that they saw no cracks in the system. In a letter dated July 5, 2007, the Village of Elgin engineering inspector, Mr. Becker, informed U.S. Shelter that it must replace the sewer main piping between manhole 108 and manhole 110, as well as the joints and connected service lines, with ductile iron piping. This specification was not mandated by Village of Elgin standards and this specification was not part of the contract specifications between Archon and U.S. Shelter. In the letter to U.S. Shelter, the Village of Elgin engineering

inspector explained that he demanded this new standard for this area of piping after conducting research and determining that stronger material was needed for the sewer piping at the depths of this portion of the sewer system.

¶ 11 During the deposition testimony of Archon's general manager, Donald Loizza, he opined that there was above-ground settlement post-installation that caused any sewer pipe sagging. Additionally, the testimony of Omar Santos, an engineer with the Village of Elgin, opined that there were a number of possible causes besides a possiblity that Archon's work was faulty for the sewer pipe sagging that caused Elgin to request that the piping between manholes 108 and 110 be upgraded to ductile iron piping. After receiving the Village of Elgin's new requirement for ductile iron piping for the sewer line between manhole 108 and manhole 110, U.S. Shelter's representative, Mr. Chuck Mensik, contacted Archon to perform the work to comply with the Village of Elgin's new specification. Additionally, Mr. Mensik asked for an estimate from Archon's employee, Garry Sementa, for replacing this sewer piping with ductile iron piping and Archon provided U.S. Shelter with its estimate. Mr. Mensik also told Archon that U.S. Shelter should not have to pay for this additional work. Archon's director of field operations, Julio Liozzo, spoke with Mr. Mensik and stated that the ductile iron piping substitution insisted on by the Village of Elgin was caused by a change in ground conditions after the 2005 sewer installation which was not caused by Archon and this was additional work not listed in the original contract and, pursuant to the parties' original contract, was to be billed on a time and material basis. He sent Mr. Mensik a letter memorializing their conversation that Archon had nothing to do with the Village of Elgin's new requirement for ductile iron piping between manholes 108 and 110.

¶ 12 Archon completed the work as required by the Village of Elgin's engineering inspector and

it met with everyone's satisfaction. Archon sent U.S. Shelter its bill for the additional work totaling $247,432.41. U.S. Shelter refused to pay Archon's bill. Archon perfected its mechanic's lien and initiated this lawsuit to recover monies owed to it for the ductile iron replacement work it performed, as well as other equitable relief.

¶ 13 The filing of Archon's mechanic's lien suit caused U.S. Shelter to file a third party complaint against its civil engineering firm, Spies and Associates. U.S. Shelter subsequently filed a summary judgment motion as to Archon's claim that U.S. Shelter was responsible to pay Archon for the ductile iron substitution work between manhole 108 and manhole 110. The circuit court granted U.S. Shelter's motion for summary judgment. Spies and Associates filed a motion for summary judgment on the third party complaint which the circuit court granted. Archon's appeal is based on the trial court's ruling and argues that the court made certain critical and material factual findings that should have precluded entry of summary judgment. For the following reasons, we agree with Archon that there are valid disputes of material facts and reverse the circuit court's entry of summary judgment in favor of U.S. Shelter and remand this case for a trial on the merits. On remand, the trial court may also review the denial of U.S. Shelter's requests to recover consequential damages and attorney fees from Archon. Further, because the circuit court's entry of summary judgment in the third-party complaint in favor of Spies and Associates was based solely on the fact that it entered summary judgment in favor of U.S. Shelter against Archon in the main complaint, that order in favor of Spies and Associates is reversed and remanded, as well.

¶ 14 III. STANDARD OF REVIEW

¶ 15 The purpose of summary judgment is not to try a question of fact, but to determine if one

exists. *Adams v. Northern Illinois Gas Co.*, 211 Ill 2d 32, 42-43 (2004). Summary judgment should be granted only where the pleadings, depositions, admissions and affidavits on file, when viewed in the light most favorable to the nonmoving party, show that there is no genuine issue as to any material fact and that the moving party is clearly entitled to judgment as a matter of law. 735 ILCS 5/2-1005(c) (West 2008); *Adams v. Northern Illinois Gas Co.*, 211 Ill. 2d 32, 43 (2004). Summary judgment should not be granted if the material facts are in dispute or even if the material facts are not in dispute but reasonable persons might draw different inferences from the undisputed facts. *Id.* Although motions for summary judgment are to be encouraged as expeditious vehicles for disposing of lawsuits, they are drastic measures that should be allowed only where the right of the moving party is clear and free of doubt. *Id*. With these well-established standards in mind, we provide *de novo* review to the appeal filed by Archon, complaining that the circuit court entered summary judgment in favor of the defendant, U.S. Shelter, even though there were disputed issues of material facts and inferences that could be drawn from undisputed facts upon which reasonable minds could differ. *Stark Excavating, Inc. v. Carter Construction Services, Inc.*, 2012 IL App (4th) 110357 ¶ 21.

¶ 16 VI. ANALYSIS

¶ 17 The circuit court correctly cited the elements that Archon must prove in order to recover monies for extra work performed pursuant to its contract with U.S. Shelter. Those elements are:

(1) that the extra work was outside the scope of the original contract;

(2) that the extras were performed at the owner's request;

(3) that the owners, by words or conduct, agreed to compensate the contractor for the extra work;

(4) that the contractor did not undertake the extra work voluntarily; and

(5) that the extra work was not made necessary through the fault of the contractor. *Doornbos*

Heating and Air Conditioning, Inc. v. Schlenker, 403 Ill. App. 3d 468, 485 (2010), citing *Wilmette Partners v. Hamel*, 230 Ill App. 3d 248, 264 (1992).

¶ 18 The circuit court, in its August 12, 2011 order, made certain material factual findings from the evidence of record in holding that Archon failed to meet its burden of proving that the extra work was not made necessary through the fault of Archon. For instance, at paragraph 3 of its order, the court stated that "it is not clear from the evidence whether [Archon] complied with the terms and specifications of the plans ***." Archon argues that the testimony of both Messrs. Loizza and Sementa constituted evidence that Archon did, in fact, comply with the terms of its contract with U.S. Shelter. Further, Archon asserts that the fact that U.S. Shelter's own hired engineers, Spies and Associates, approved Archon's work back in August 2005 and that U.S. Shelter paid Archon in full for the work performed constituted material facts which supported that the additional work was not due to Archon's fault. The record contains evidence that Archon did, in fact, complete the contract installation in 2005 per the plans and specifications as agreed to by the parties. This precludes summary judgment as there is a dispute as to whether the extra work required by the Village of Elgin in 2007 was not the fault of the contractor and there is evidence that the extra work was outside the scope of the original contract. There is also evidence that the Village of Elgin's engineering inspector, Mr. Becker, conducted his own independent research and determined that stronger piping was required at the depths of this portion of the sewer between manholes 108 and 110.

¶ 19 The circuit court further held in paragraph 5 of its August 12, 2011 order that "[t]here is no evidence as to the cause of the damage [to the sewer piping] shown in the videotapes." The record demonstrates that not only is there evidence that changes to ground surfaces were possibly the cause of any cracking, there was a factual dispute among the experts who reviewed the videotapes and still

photographs as to whether there even existed any cracks in the system to warrant replacement.

¶ 20 Although other elements of Archon's case were not mentioned in the circuit court's order, we observe that there is evidence that the owner, U.S. Shelter, through its representative, Mr. Chuck Mensik, requested the modification be performed to the sewer system between manhole 108 and manhole 110. There is also evidence that Mr. Mensik, prior to requesting commencement of the modification, asked Sementa to provide U.S. Shelter with a rough estimate of the cost. Archon asserts that this interaction between the parties supports an inference that U.S. Shelter would compensate Archon for this extra work. *Stark Excavating, Inc v. Carter Construction Services, Inc.*, 2012 IL App (4th) 110357. These facts or inferences from these facts, when viewed in the light most favorable to Archon, the nonmovant, precludes summary judgment.

¶ 21 U.S. Shelter argues that, in the event we reverse the entry of summary judgment in their favor, we should also vacate the entry of summary judgment in favor of Spies and Associates. The circuit court based its order granting summary judgment to Spies and Associates on U.S. Shelter's third-party complaint solely on the ground that because the circuit court entered summary judgment in favor of U.S. Shelter, finding that it did not have to pay Archon any damages, U.S. Shelter could not seek damages from Spies and Associates. The order granting summary judgment in favor of U.S. Shelter on Archon's complaint and the order granting summary judgment in favor of Spies and Associates on U.S. Shelter's third party complaint are inextricably intertwined. In other words, the circuit court reasoned that Spies and Associates was entitled to summary judgment on the third party complaint filed against it by U.S. Shelter solely because the court was granting summary judgment in favor of U.S. Shelter and against Archon in the main complaint. If U.S. Shelter is required to pay Archon on remand, it is possible that Spies and Associates may become obligated to indemnify U.S.

Shelter. Because we reverse the circuit court order granting summary judgment in favor of U.S. Shelter against Archon, we also reverse the order granting summary judgment in favor of Spies and Associates based solely on that judgment and remand the case for a trial.

¶ 22 V. CONCLUSION

¶ 23 Because there are disputed questions of material fact and disagreement as to possible inferences from those facts which are undisputed, the circuit court erred in rendering its ruling on U.S. Shelter's's motion for summary judgment against Archon. This court reverses and remands the case, including U.S. Shelter's requests for compensatory damages and attorney fees, for trial on the merits. Because the circuit court granted summary judgment in Spies and Associates' favor solely because it granted U.S. Shelter's motion for summary judgment against Archon, that order is also reversed.

¶ 24 Reversed and remanded.

¶ 25 JUSTICE CONNORS, dissenting.

¶ 26 I respectfully dissent from the result reached by my colleagues. In my opinion, plaintiff's position in this case is fundamentally flawed because plaintiff has failed to produce sufficient evidence to support every element of its prima facie case.

¶ 27 It is important to recall that "[t]here are two types of summary judgment motions: (1) a motion affirmatively showing that some element of the case must be resolved in the defendant's favor, requiring the defendant to prove something that it would not be required to prove at a trial,

and (2) a motion of the kind recognized by the United States Supreme Court in *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265, 273 (1986) , in which a defendant points out the absence of evidence supporting plaintiff's position." *Willet v. Cessna Aircraft Co.*, 366 Ill. App. 3d 360, 368 (2006). This case involves the second kind of motion. In an "extra work" contract claim, a plaintiff must prove

> "by clear and convincing evidence, that: (1) the extra work performed or materials furnished was outside the scope of the original contract; (2) the extras were furnished at the owner's request; (3) the owner, by words or conduct, agreed to compensate the contractor for the extra work; (4) the contractor did not undertake the extra work voluntarily; and (5) the extra work was not made necessary through the fault of the contractor." *Doornboos Heating & Air Conditioning, Inc. v. Schlencker*, 403 Ill. App. 3d 468, 485 (2010).

¶ 28 But here, however, plaintiff has not produced any evidence regarding the fifth element. Indeed, the circuit court pointed out in its order that "[t]here is no evidence as to the cause of the damage discovered in the videotapes. No witness was able to offer an opinion as to the cause. All statements made by the witnesses as to possible causes were speculation." Not even plaintiff's own expert, Jack Murphy, could explain how the damage occurred. Although Murphy opined that the reason for the defects was that the City "changed its requirements," this opinion is not only completely unsupported by any facts in the record but has nothing to do with the defects in the pipes. It is certainly undisputed that the immediate reason for the extra work was that the City discovered cracks in the piping and demanded that the pipes be replaced. But the cause of the cracks themselves is unknown, and it was those cracks that in turn made the extra work necessary.

¶ 29 That is a problem for plaintiff because it means that plaintiff cannot establish its *prima facie* case for an extra-work claim without at least some evidence that the cracks were not plaintiff's fault. Defendant has carried its initial burden of production on summary judgment by pointing out the complete lack of evidence in the record supporting this element of plaintiff's claim. See *Willet*, 366 Ill. App. 3d at 369. In order to avoid summary judgment, plaintiff is obligated to "present some factual basis that would arguably entitle plaintiff to judgment." *Id*. As the circuit court pointed out, plaintiff has not provided any such basis in this case.

¶ 30 Although "[a] Celotex-type motion is appropriate only when the nonmovant has had an adequate opportunity to conduct discovery" (*id.*), plaintiff had ample time to uncover evidence in discovery to make out its prima facie case. Because plaintiff has failed to do so, summary judgment in favor of defendants is proper. I would therefore affirm the circuit court's judgment.