2011 IL App (3d) 100827-U

Order filed October 3, 2011

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2011

FIRST CONSTRUCTION GROUP, INC.,	)	Appeal from the Circuit Court
	)	of the 9th Judicial Circuit,
Plaintiff-Appellee,	)	Hancock County, Illinois
	)	
v.	)	
	)	
NAUVOO INVESTMENT COMPANY,	)	
INC., THOMAS M. HOLLIDAY,	)	
BONNIE G. HOLLIDAY, STATE	)	Appeal No. 3--10--0827
CENTRAL BANK, LEE COUNTY BANK	)	Circuit No. 09--CH--3
& TRUST, N.A., CHARLES SCHWAB	)	
BANK, N.A., and UNKNOWN	)	
OWNERS AND RECORD CLAIMANTS,	)	
	)	Honorable David F. Stoverink,
Defendants-Appellants.	)	Judge, Presiding.

JUSTICE SCHMIDT delivered the judgment of the court.
Presiding Justice Carter and Justice Holdridge concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court properly granted summary judgment where no questions of material fact exist with regard to the existence of a contract for costs plus 8% or

the amount of damages. However, the trial court miscalculated damages by $104.37. We reduce the trial court order's award of damages, affirm as modified and remand for the trial court to make any necessary modifications in conformance with this order.

¶ 2 Defendants, Nauvoo Investment Company, Inc., Bonnie Holliday, and Thomas Holliday, president of Nauvoo Investment Company, appeal the grant of summary judgment on behalf of plaintiff, First Construction Group, Inc., on 6 counts of a 12-count complaint. Defendants raise two issues on appeal: first, whether genuine issues of material fact exist regarding the existence of a cost plus 8% contract between the parties; second, whether genuine issues of material fact exist regarding the amount of damages. We hold that no questions of material fact exist regarding the existence of a "cost-plus" contract between the parties or the amount of damages. However, we find the amount of damages to be $104.37 less than the damages awarded by the trial court. We modify the trial court's order, affirm as modified and remand.

¶ 3 FACTS

¶ 4 Defendant, Nauvoo Investment Company, contracted with plaintiff to do work on three separate construction projects referred to as "Phase I," "Phase II" and "Grandma's Cottage." Defendants, Thomas and Bonnie Holliday, contracted with plaintiff to do work on a project referred to as "Holliday Residence." On February 23, 2009, plaintiff filed a 12-count complaint for amounts due on each of the four projects. Counts I through III relate to Phase I and are not at issue in this appeal. The remaining counts were:

Count IV - breach of contract (Phase II);

Count V - quantum meruit (Phase II);

Count VI - enforcement of mechanic's lien (Phase II);

Count VII - breach of contract (Cottage);

Count VIII - quantum meruit (Cottage);

Count IX - enforcement of mechanic's lien (Cottage);

Count X - breach of contract (Holliday);

Count XI - quantum meruit (Holliday); and

Count XII - enforcement of mechanic's lien (Holliday).

¶ 5 On November 9, 2009, plaintiff served defendants with written discovery requests to which defendants partially responded on January 29, 2010. On February 8, 2010, the trial court entered an agreed order compelling defendants to respond fully and without objection to plaintiff's discovery requests by February 17, 2010. In response to the requested discovery, defendants admitted that plaintiff was to be paid for the cost of the work on the three projects, plus an 8% contractor's fee. Defendants also admitted that all of the work on the Phase II, Cottage and Holliday projects was complete and adequate.

¶ 6 Plaintiff filed a motion for summary judgment on counts IV, VI, VII, IX, X and XII, the breach of contract and mechanic's lien counts for the Phase II, Cottage and Holliday projects. In support of its motion, plaintiff attached the affidavit of Stephen Freese, president of First Construction Group, Inc. The affidavit stated that Freese was personally involved in the negotiation of the contracts at issue, and that he oversaw performance of the work. He also participated in tracking and reviewing the job costs of each project. The affidavit indicated that

the total cost plus 8% fee for the Phase II project was $859,858 and that the balance owing under the contract was $104,641.85. The affidavit further stated that the amount due on the Cottage project was $6,588.97. The amount due on the Holliday project was $9,618.11. The affidavit indicated that the costs associated with each project were incurred only in work done on the project for which they were billed; no double billing occurred. Plaintiff attached to its motion a copy of the final certificate for payment on the Phase II project and final invoices for the other two projects.

¶ 7 Defendants argued that questions of material fact existed with regard to the existence of a contract as there was no meeting of the minds as to the terms of the contract. They also argued that questions of material fact existed regarding the amount of damages. In support of their argument to deny summary judgment, defendants attached the affidavit of Thomas Holliday, president of Nauvoo Investment Company, Inc. His affidavit stated that he "believe[d]" that he was over-billed.

¶ 8 The trial court granted the motion for summary judgment as to each of the counts and awarded interest and attorney fees. Subsequently, plaintiff dismissed the *quantum meruit* claims related to the Phase II, Cottage and Holliday projects. Defendants filed a timely notice of appeal.

¶ 9 ANALYSIS

¶ 10 We review a grant of summary judgment *de novo*. *Forsythe v. Clark USA, Inc.*, 224 Ill. 2d 274, 280 (2007). "Section 2-1005 of the Code of Civil Procedure provides for summary

judgment when the pleadings, depositions, and admissions on file, together with any affidavits, show that there is no genuine issue as to any material fact." *Id.*; 735 ILCS 5/2-1005 (West 2008). We review the record in the light most favorable to the nonmoving party. *Forsythe*, 224 Ill. 2d at 280.

¶ 11 I. Existence of a Contract

¶ 12 Defendants argue that even though they admit the contracts concerning the three projects at issue were for costs plus 8%, and plaintiff agrees that the contracts between the parties were for costs plus 8%, there was no meeting of the minds. Their argument is that even though plaintiff says it agreed to costs plus 8%, its actions indicate it thought the contract was for a fixed cost. Defendants note that the certificate for payment submitted by plaintiff for work done on the Phase II project indicates the contract was for a fixed cost as the certificate lists: a contract price, original contract sum, references change orders, but does not contain a line item for the 8% fee. With regard to the Cottage and Holliday projects, they note that the invoices for those projects contained a contractor's fee of 8.7%, not 8%.

¶ 13 Defendants cite to only one case, *Midland Hotel Corp. v. Reuben H. Donnelley Corp.*, 118 Ill. 2d 306 (1987), to support their claim that even though both parties agree that the contracts were for costs plus 8%, no meeting of the minds existed. The *Midland* court held that where the parties disagree as to the terms of the agreement, conduct of the parties indicating an agreement to the disputed terms is sufficient to show a meeting of the minds; "[o]therwise, a party would be free to avoid his contractual liabilities by simply denying that which his course of

conduct indicates." *Id.* at 314. *Midland* does not support defendants' theory that even though both parties agree to what the terms of the contract were, they should be allowed to show no contract existed due to the actions of plaintiff. If defendants believe that plaintiff did not do what it agreed to do in the contracts, then the correct course of action is to argue that plaintiff breached the contracts, not that no contract existed. We hold that no questions of material fact exist with respect to the existence of contracts between the parties for costs plus 8%.

¶ 14 II. Amount of Damages

¶ 15 Defendants argue that even if summary judgment is granted with regard to the existence of a contract, summary judgement with respect to damages should not be granted since questions of material fact exist regarding the amount of damages. Plaintiff responds that defendants have done nothing more than assert they "believe" plaintiff over-billed them, and that this is inadequate to create an issue of material fact.

¶ 16 Defendants make a general argument that they believe the bills presented by plaintiff are incorrect. This is supported by the affidavit of Holliday, which indicates he "believes" the amount billed by plaintiff is wrong. Defendants provide no evidence of improper billing with respect to the Phase II project. The only error they establish with regard to the Cottage and Holliday projects is that the contractor's fees billed are 8.7% of the costs of those projects, instead of 8%. They do not argue that the costs presented in the invoices are incorrect, only the contractor's fee. Defendants' belief alone that the bills presented by plaintiff are incorrect is insufficient to create an issue of material fact; " '[m]ere speculation, conjecture, or guess is

insufficient to withstand summary judgment.' [Citation.]" *Benson v. Stafford*, 407 Ill. App. 3d 902, 912 (2010). In their reply brief, defendants claim "Holliday could have stated in his affidavit that he 'was' over-billed. However, due to the fact that discovery had not been completed, he could not make that assertion without the proper evidence." If "a party cannot sufficiently respond to a motion for summary judgment because it believes additional discovery is necessary, it may file a Rule 191(b) affidavit. [Citations.]" *Kane v. Motorola, Inc.*, 335 Ill. App. 3d 214, 224 (2002); Ill. S. Ct. R. 191(b) (eff. July 1, 2002). Defendants did not file a motion under Rule 191(b). They cannot now argue that they would have responded to the motion for summary judgment differently had they been allowed more time to conduct discovery.

¶ 17 With regard to the Holliday and Cottage projects, defendants point out that the invoices in plaintiff's motion for summary judgment were for costs plus 8.7%. This is true. A review of the invoices shows that plaintiff added 8.7% to these projects instead of the agreed 8%. The total amount invoiced on the Holliday project, without the contractor's fee, was $8,848.31. Eight percent of this amount is $707.86. The fee included on the invoice is $769.80 or 8.7%, an over-billing of $61.94. A similar inconsistency is found in the invoice for the Cottage project. The invoice shows total costs to the plaintiff as $6,061.61. Eight percent of this amount is $484.93. The fee included on the invoice is for $527.36, an over-billing of $42.43. The invoices show that defendants were overcharged by $104.37. This does not create a question of fact. Since defendants raise no issues regarding the costs of the Cottage or Holliday project, the

amount of damages is readily determined by adding an 8% contractor's fee to the undisputed costs.

¶ 18 As no issues of material fact exist, we find that summary judgement is proper with regard to damages in this case. However, as explained above, the trial court awarded damages on the Cottage and Holliday projects that exceeded the contractual 8% term. Pursuant to our authority under Illinois Supreme Court Rule 366(a)(5) (eff. Feb. 1, 1994), we reduce the trial court's award of damages on the Holliday project by $61.94, on the Cottage project by $42.43, affirm as modified and remand for the trial court to make any necessary modifications in conformance with this order.

¶ 19 CONCLUSION

¶ 20 For the foregoing reasons, the judgment of the circuit court of Hancock County is modified, and the cause is remanded.

¶ 21 Modified, affirmed as modified and remanded.