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NO. COA11-734
NORTH CAROLINA COURT OF APPEALS

Filed: 7 February 2012

MAINLINE SUPPLY COMPANY,
Plaintiff,

v.

Union County
No. 09 CVS 493

HILLCREST CONSTRUCTION, INC.,
CARMEL CONTRACTORS, INC.,
LOWE'S HOME CENTERS, INC.,
CUTHBERTSON RD I, LLC, and
BRIAN A. MANLEY,
Defendants.

Appeal by Plaintiff from order entered 13 January 2011 by Judge Christopher M. Collier and order entered 14 February 2011 by Judge W. David Lee in Union County Superior Court. Heard in the Court of Appeals 17 November 2011.

Vann & Sheridan, LLP, by James R. Vann and Chad J. Cochran, for Plaintiff-Appellant.

Johnston, Allison & Hord, P.A., by Greg C. Ahlum and John C. Lindley, III, for Defendants-Appellees.

BEASLEY, Judge.

Mainline Supply Company, (Plaintiff) appeals from an order granting summary judgment for Carmel Contractors, Inc. (Carmel)

and Lowe's Homes Centers, Inc. (Lowe's) (collectively Defendants) entered 13 January 2011, and from an order awarding Defendants attorneys' fees entered 14 February 2011. For the following reasons, we affirm both orders.

On 9 February 2009, Plaintiff filed a complaint against Defendants, Hillcrest Construction, Inc., Cuthbertson Rd I, LLC, and Brian A. Manly, asserting multiple claims arising out of a construction project in Waxhaw, North Carolina (the project). Defendants both moved for summary judgment on 2 August 2010. On 18 October 2010, Plaintiff filed a cross motion for summary judgment as to Defendants. After oral argument, the trial court entered summary judgment for Defendants on 13 January 2011. On 31 January 2011, Defendants filed a joint motion for attorneys' fees, pursuant to N.C. Gen. Stat. § 44A-35. On 7 February 2011, a hearing on this motion was held. Defendants were awarded attorneys' fees by order filed 14 February 2011. From these orders, Plaintiff now appeals.

I.

Plaintiff contends that the trial court erred in granting summary judgment to Defendants. We disagree.

Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and

admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2011). We review a trial court's decision on a summary judgment motion *de novo*. *Forbis v. Neal*, 361 N.C. 519, 524, 649 S.E.2d 382, 385 (2007). During this review, "all inferences of fact . . . must be drawn against the movant and in favor of the party opposing the motion." *Id.* (internal quotation marks and citations omitted).

Plaintiff asserts it had a right to a mechanic's lien upon the project, and the trial court erred when it entered summary judgment in favor of Defendants. As a second tier subcontractor, Plaintiff may assert a lien on a project in two possible ways. First, pursuant to N.C. Gen. Stat. § 44A-18(2) (2011) provides:

A second tier subcontractor who furnished labor, materials, or rental equipment at the site of the improvement shall be entitled to a lien upon funds that are owed to the first tier subcontractor with whom the second tier subcontractor dealt and that arise out of the improvement on which the second tier subcontractor worked or furnished materials.

This provision is inapplicable to the case *sub judice*, because Hillcrest, the first tier subcontractor, was paid in full by Carmel on 31 December 2008. Plaintiff's Notice of Claim

of Lien Upon Funds is dated 9 January 2009. Thus, the Notice was not even signed by Plaintiff's attorney until after the funds owed to Hillcrest were paid in full by Carmel. Because there were no remaining funds owed to the first tier subcontractor, Hillcrest, when Plaintiff gave notice of its claim of lien, there were no funds upon which to place the lien.

The second statutory provision from which second tier subcontractors can assert a lien is N.C. Gen. Stat. § 44A-23(b)(1) (2011), which provides, in pertinent part, that "[a] second . . . tier subcontractor, who gives notice of claim of lien upon funds as provided in this Article, may, to the extent of his claim, enforce the claim of lien on real property of the contractor[.]" This provision has been interpreted by our Supreme Court to mean that "the subcontractor may assert whatever lien that the contractor who dealt with the owner has against the owner's real property relating to the project." *Electric Supply Co. v. Swain Electrical Co.*, 328 N.C. 651, 661, 403 S.E.2d 291, 297 (1991). However, until the subcontractor commences such an action, "the contractor may prejudice the subcontractor's rights through waiver of the lien or acceptance of payment." *Id.*

Carmel signed a lien waiver with Lowe's prior to Plaintiff serving its Notice of Claim Upon Lien funds. Plaintiff acknowledges this fact, but asserts that the lien waiver was false and invalid. Plaintiff cites no relevant North Carolina law in support of the assertion that the lien waiver was false, simply stating that the waiver was false because Lowe's had not yet paid Carmel in full at the time of signing, and the lien waiver states otherwise. However, paragraph 8 of the lien waiver explicitly states "The undersigned is executing this Full Unconditional Waiver of Lien . . . for the express purpose of inducing and receiving final payment from the Owner (or lender or Landlord) for work or improvements to the Property." Thus, it is clear that the parties to the waiver recognized that full payment was still pending.

Plaintiff also points to paragraph 4 of the lien waiver, which states that "all contractors, subcontractors, laborers, suppliers and materialmen that have provided labor, materials or services to the undersigned . . . have been paid and satisfied in full. . . ." Plaintiff argues that this is a false statement because it had not been paid in full, but Plaintiff did not provide any materials or services to Carmel, the undersigned. Instead, Plaintiff provided materials to Hillcrest, who in turn

provided labor and materials to Carmel. It is undisputed that Hillcrest was paid in full by Carmel prior to the execution of the lien waiver.

Finally, Plaintiff argues that paragraph 6 of the lien waiver is also false. That paragraph states that "[t]he undersigned is not aware of any . . . claims for payment . . . which might constitute a lien upon the Property as of the date of this Full Unconditional Waiver of Lien." Plaintiff contends that Carmel was aware of its outstanding claim for payment, but the record shows that the lien waiver signed by Hillcrest on 2 January 2009 stated that all subcontractors who provided labor and materials to Hillcrest had been paid in full.

Plaintiff also asserts that the lien waiver was invalid because it was not supported by adequate consideration. In making this argument, Plaintiff overlooks the fact that execution of a lien waiver at the end of the project is a requirement of the original contract. The contract between Defendants, in clause 6.2.2, states that final payment shall be made "when the Contractor has achieved Final Acceptance, as defined in Division I, Section 1770 of the Specifications. . . ." Subsection 1.03Z of Division 1, Section 1770, provides that prior to final acceptance and application for payment of

outstanding retainage, the contractor must forward certain closeout documents to the owner, including two executed copies of the Full Unconditional Waiver of Lien. Thus, the record shows that the lien waiver was required under the original contract, and as such is supported by the consideration that supports the contract as a whole.

Because we affirm the grant of summary judgment to Defendants based upon the enforceable lien waiver, we do not address Plaintiff's alternative arguments.

II.

Plaintiff also argues that the trial court erred in awarding attorneys' fees to Defendants pursuant to N.C. Gen. Stat. § 44A-35. We disagree.

N.C. Gen. Stat. § 44A-35 (2011) provides, in pertinent part, that attorneys' fees can be ordered by the presiding judge "and be payable by the losing party upon a finding that there was an unreasonable refusal by the losing party to fully resolve the matter which constituted the basis of the suit or the basis of the defense." Thus, there are two requirements to be satisfied before an award of attorneys' fees is proper: (1) that the party receiving the award be a prevailing party and (2) that the losing party must have unreasonably refused to fully resolve

the matter. See *id.* "This Court reviews a trial court's award of attorney's fees pursuant to section 44A-35 for abuse of discretion. To demonstrate an abuse of discretion, the appellant must show that the trial court's ruling was manifestly unsupported by reason, or could not be the product of a reasoned decision." *Terry's Floor Fashions, Inc. v. Crown Gen. Contr'rs., Inc.*, 184 N.C. App. 1, 17, 645 S.E.2d 810, 820 (2007) (citations and internal quotation marks omitted).

The first requirement for an award of attorneys' fees is met here, as we affirm summary judgment for Defendants so they remain the prevailing party. Thus the only issue is whether the trial court abused its discretion by finding that Plaintiff unreasonably refused to resolve this matter. In its 14 February 2011 order awarding Defendants attorneys' fees, the trial court found that counsel for Defendants had "provided, both in the responsive pleadings and by way of correspondence and documentation to plaintiff's counsel, detailed and uncontroverted evidence, well grounded in fact, that the lien claims asserted in this action were without merit." Plaintiff's counterargument to this finding is that the evidence was not "uncontroverted," and the claims pursued in this action are not meritless. We disagree with Plaintiff's characterization.

Given our conclusion that there is no genuine issue of material fact in this matter, and that Defendants are entitled to judgment as a matter of law, *see* Part I, *supra*, we cannot conclude that the trial court abused its discretion by determining that Plaintiff unreasonably refused to resolve this action. The award of attorneys' fees to Defendants is affirmed.

Affirmed.

Judges ERVIN and THIGPEN, JR. concur.

Report per Rule 30(e).