

NO. COA14-836

NORTH CAROLINA COURT OF APPEALS

Filed: 17 March 2015

BROWN'S BUILDERS SUPPLY,
INC.,
Plaintiff,

v.

Durham County
No. 12 CVS 5467

JOHN SCOTT JOHNSON AND
ANGELA R. JOHNSON, jointly and
severally,
Defendants.

Appeal by Defendants from judgment entered 13 December 2013
by Judge Paul C. Ridgeway in Durham County Superior Court. Heard
in the Court of Appeals 3 December 2014.

*Vann Attorneys, PLLC, by Joseph A. Davies and James R. Vann,
for the Plaintiff-Appellee.*

*Law Office of Robert B. Jervis, P.C., by Robert B. Jervis,
for the Defendant-Appellants.*

DILLON, Judge.

John S. Johnson and his wife, Angela R. Johnson
("Defendants"), appeal from a judgment awarding Brown's Builders
Supply ("Plaintiff") damages and attorneys' fees. We affirm in
part and reverse and remand in part.

I. Background

The evidence at trial tended to show the following: Defendants engaged Jimmy Allen as a general contractor to remodel their home. Mr. Allen contacted Plaintiff to perform certain work involved in the remodel of the kitchen area of the home. To save on the expense of management, Defendants retained Mr. Allen at an hourly rate and paid individual subcontractors on the project directly, including Plaintiff.

Plaintiff supplied Defendants with a wooden hood to sit atop their stove and installed it for them. Defendants discovered that the wooden hood had been seriously damaged sometime after its installation and requested that Plaintiff install a new one, free of charge. Plaintiff refused, contending that it was not responsible for damages caused either by other subcontractors or by environmental conditions such as heat and humidity.

Plaintiff thereafter demanded payment and threatened to sue for the amount due and outstanding on Defendants' account, notifying Defendants of its intention to seek costs, interest, and attorneys' fees if timely payment was not received. Plaintiff also claimed a lien on Defendants' real property to secure payment.

Plaintiff filed suit in Durham County Superior Court when payment was not forthcoming, seeking damages for breach of contract or recovery in *quantum meruit* in the alternative. The matter came

on for trial before Superior Court Judge Paul C. Ridgeway on 21 August 2013.

Following a two-day bench trial, the court entered judgment in favor of Plaintiff, awarding Plaintiff damages of \$17,737.66 plus interest at the legal rate from 9 May 2012 until paid in full for breach of contract, attorneys' fees of \$5,912.55, and costs of \$2,986.80. Defendants entered written notice of appeal.

II. Analysis

Defendants make two arguments on appeal, which we address in turn.

A. General Contractor Licensure Requirement

Defendants first contend that the trial court erred in entering judgment in favor of Plaintiff because the price of Defendants' contract with Plaintiff exceeded \$30,000.00 and Plaintiff was not a licensed general contractor. Specifically, Defendants contend that Plaintiff's failure to hold a valid general contractor's license absolutely bars Plaintiff's recovery. We disagree.

N.C. Gen. Stat. § 87-1 (2011) defines "general contractor," in relevant part, as "[a] firm or corporation who . . . undertakes to . . . construct . . . any improvement or structure where the cost of the undertaking is thirty thousand dollars (\$30,000) or

more[.]’” Unlike subcontractors, general contractors must be licensed. *Vogel v. Reed Supply Co.*, 277 N.C. 119, 131-32, 177 S.E.2d 273, 281 (1970). The purpose of the licensure requirement “is to protect the public from incompetent builders.” *Id.* at 130, 177 S.E.2d at 280. Accordingly, unlicensed general contractors are prohibited from recovering in contract or *quantum meruit*. *Reliable Properties, Inc. v. McAllister*, 77 N.C. App. 783, 785, 336 S.E.2d 108, 110 (1985).

What distinguishes a general contractor from a subcontractor is “the degree of control to be exercised by the contractor over the construction of the *entire project*.” *Harrell v. Clarke*, 72 N.C. App. 516, 517, 325 S.E.2d 33, 35 (1985) (emphasis added). When the written agreement setting forth the terms of the parties’ relationship is in the record, we review its terms “to determine the degree of control exercised[.]” *Signature Development, LLC v. Sandler Commercial at Union, L.L.C.*, 207 N.C. App. 576, 584-90, 701 S.E.2d 300, 306-10 (2010). Without the benefit of the parties’ agreement in the record, we review the evidence at trial to determine whether a particular contractor exercised the requisite control to be considered a general contractor, thus becoming subject to the licensure requirement and corresponding

prohibitions on recovery. *Spears v. Walker*, 75 N.C. App. 169, 171-72, 330 S.E.2d 38, 40 (1985).

In the present case, we do not believe the scant written evidence suggests that Plaintiff exercised more than minimal control over the remodel project. Defendants' written agreement with Mr. Allen is not in the record. Evincing the terms of an agreement between Plaintiff and Defendants is a recital on one invoice and three sales orders, which states as follows:

All work to be completed in a workmanlike manner according to standard practices. Any alteration or deviation from above specifications involving extra cost will be executed upon written orders and billed as an additional cost. All agreements are contingent upon strikes, accidents, acts of God, or delays beyond our control. Purchaser to carry all necessary property or casualty insurance for the jobsite.

The invoice and sales orders also list the materials supplied to Defendants and the prices of those materials, briefly describing them.

Nor do we believe the other evidence indicated that Plaintiff exercised more than minimal control over the project. Instead, it tended to show that Plaintiff's involvement in the remodel of Defendants' home was limited to the sale and installation of kitchen cabinets, several countertops, a wooden hood to sit atop Defendants' stove, and a sink. Plaintiff did not oversee, direct,

or manage the work of the other subcontractors. Instead, the evidence indicated that it was Mr. Allen who oversaw the construction, ordered various building materials, and coordinated the work of the various subcontractors, including Plaintiff.

Based on this evidence, we believe the degree of control exercised by Plaintiff was minimal and concerned only certain aspects of the kitchen, not the *entire project*. Plaintiff was, therefore, not subject to the licensure requirement applicable to general contractors, nor the corresponding bars on recovery. Accordingly, Defendants' first argument is overruled.

B. Attorneys' Fees

Defendants next challenge the trial court's award of attorneys' fees. First, Defendants contend that the court abused its discretion in awarding attorneys' fees without first finding, as required, that Defendants unjustifiably refused to resolve the matter out of court. We disagree.

We review an award of attorneys' fees for an abuse of discretion. *Terry's Floor Fashions, Inc. v. Crown General Contract'rs, Inc.*, 184 N.C. App. 1, 17, 645 S.E.2d 810, 820 (2007), *aff'd per curiam*, 362 N.C. 669, 669 S.E.2d 321 (2008).

N.C. Gen. Stat. § 44A-35 (2013) provides:

[T]he presiding judge may allow a reasonable attorneys' fee to the attorney representing

the prevailing party. This attorneys' fee is to be taxed as part of the court costs 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[.]

"The statute does not mandate that the trial court award attorneys' fees, but instead places the award within the trial court's discretion." *Barrett Kays & Assocs., P.A. v. Colonial Bldg. Co., Inc.*, 129 N.C. App. 525, 530, 500 S.E.2d 108, 112 (1998).

Defendants' contention that the trial court abused its discretion in awarding attorneys' fees without finding that Defendants unjustifiably refused to resolve the matter out of court mischaracterizes the court's judgment. Specifically, the trial court found that there was "an outstanding balance due and owing to the Plaintiff from the Defendants"; that Plaintiff "caused a demand letter to be sent to the Defendants, which included notice . . . that the Plaintiff would seek to recover attorneys' fees"; that "Plaintiff filed a claim of lien on Defendants' real property"; that "Plaintiff filed this action to enforce its lien rights"; and finally, that "Defendants' *refusal to resolve the lien [was] unreasonable.*" (Emphasis added.) Not only did the court specifically find that there was "an unreasonable refusal by the losing party to fully resolve the matter which constituted the basis of the suit," as statutorily required, see N.C. Gen. Stat.

§ 44A-35, "[t]hese findings of fact indicate, on their face, that the trial court's award of attorneys fees was the product of a reasoned decision[.]" *Terry's Floor Fashions, Inc.*, 184 N.C. App. at 18, 645 S.E.2d at 821. Accordingly, Defendants' first contention regarding the award of attorneys' fees is overruled.

Defendants next contend that the trial court's award of attorneys' fees must be reversed because the record does not contain the findings required to support the award. We agree.

"As a general rule, in the absence of some contractual obligation or statutory authority, attorney fees may not be recovered by the successful litigant as damages or a part of the court costs. . . . [However,] [b]y allowing the recovery of attorneys' fees, N.C. Gen. Stat. § 44A-35 creates an exception to the general rule that attorneys' fees are not recoverable." *Martin & Loftis Clearing & Grading, Inc. v. Saieed Const. Systems Corp.*, 168 N.C. App. 542, 546, 608 S.E.2d 124, 127 (2005).

In an opinion affirmed *per curiam* by our Supreme Court, we held that an award of attorneys' fees is only appropriate where the trial court makes "findings of fact as to the time and labor expended, the skill required, the customary fee for like work, and the experience or ability of the attorney."¹ *N.C. Dep't of Corr.*

¹ In 1992, our Supreme Court seemingly approved an award of

v. Myers, 120 N.C. App. 437, 442, 462 S.E.2d 824, 828 (1995) (internal marks omitted), *aff'd per curiam*, 344 N.C. 626, 476 S.E.2d 364 (1996). Where a statute authorizes the award of only reasonable fees, these findings are necessary to support the reasonableness of the award. *Cobb v. Cobb*, 79 N.C. App. 592, 595-96, 339 S.E.2d 825, 828 (1986). Without these findings, the reviewing court is "effectively preclude[d] . . . from determining whether the trial court abused its discretion[.]" *Williamson v. Williamson*, 140 N.C. App. 362, 365, 536 S.E.2d 337, 339 (2000).

In the present case, the trial court found as follows:

The Plaintiff' [s] attorney has expended 96.30 hours in pursuit of this matter, as well as 33.40 hours of paralegal time. Costs and expenses incurred by the Plaintiff were \$2,986.80. The Court finds that reasonable attorney's fees in this matter are one-third of the amount recovered, namely \$5,912.55, and that Plaintiff should also be entitled to

attorneys' fees that apparently did not include express findings concerning the attorney's skill and ability or the customary rate for similar work. *Dyer v. State*, 331 N.C. 374, 378, 416 S.E.2d 1, 3 (1992). However, *Dyer* predates our Supreme Court's approval of our opinion in *Myers* by four years. Since *Myers*, this Court has required the trial court to make such or similar findings for virtually every type of attorneys' fee award. See, e.g., *Simpson v. Simpson*, 209 N.C. App. 320, 324, 703 S.E.2d 890, 893 (2011) (award under N.C. Gen. Stat. § 50-13.6); *Dunn v. Canoy*, 180 N.C. App. 30, 49, 636 S.E.2d 243, 255 (2006) (award as a Rule 11 sanction); *Porterfield v. Goldkuhle*, 137 N.C. App. 376, 378, 528 S.E.2d 71, 73 (2000) (award under N.C. Gen. Stat. § 6-21.1); *Brockwood Unit Ownership Ass'n v. Delon*, 124 N.C. App. 446, 449-50, 477 S.E.2d 225, 227 (1996) (award under N.C. Gen. Stat. § 47C-4-117).

recover costs of this action in the amount of \$2,986.80.

While the affidavit for attorneys' fees and client ledger included in the record on appeal support this finding by the trial court, the court's finding omits any mention of (1) the skill required to provide the services rendered; (2) a customary rate for similar work in the area; or (3) the experience or ability of Plaintiff's attorney. Although our review of the record reveals evidence in support of these facts, the order itself does not contain these findings, as required. *See Myers*, 120 N.C. App. at 442, 462 S.E.2d at 828. Accordingly, we must reverse and remand for further findings. On remand, the trial court may but is not required to award attorneys' fees provided it determines that the evidence in support of the necessary findings is competent and the court makes those findings, as required.²

III. Conclusion

For the reasons stated herein, we affirm the portion of the trial court's judgment awarding Plaintiff damages and reverse and remand the portion awarding Plaintiff attorneys' fees, with

² Relying on an affidavit from an officer of the court is appropriate in these circumstances. *See Dyer v. State*, 331 N.C. 374, 378, 416 S.E.2d 1, 3 (1992) (upholding award of attorneys' fees based on statements by attorney as to "the amount of time he devoted to the case").

instructions to the trial court to conduct further proceedings consistent with this opinion.

AFFIRMED in part and REVERSED AND REMANDED in part.

Judges BRYANT and DIETZ concur.