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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-916

Filed: 16 May 2017

Brunswick County, No. 12 CVS 1454

BLANTON SUPPLIES OF LITTLE RIVER, INC., a South Carolina Corporation,
Plaintiff,

v.

WILLIAM BARBER, INC. CUSTOM HOME BUILDER, a North Carolina Corporation; and TERRENCE G. VICKERS and wife, NANCY VICKERS; and WILLIAM G. BARBER, Individually, Defendants.

Appeal by defendants from order entered 31 March 2016 by Judge James Gregory Bell in Brunswick County Superior Court. Heard in the Court of Appeals 7 February 2017.

Trest & Twigg, by Roy D. Trest, for plaintiff-appellee.

Benedict J. Del Ré, Jr. for defendants-appellants.

DIETZ, Judge.

This dispute involves funds paid by Nancy and Terrence Vickers to the general contractor working on their home, despite a claim of lien on those funds by Blanton Supplies of Little River, Inc., a subcontractor who never got paid. The trial court

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entered summary judgment in favor of Blanton Supplies for \$27,031.29, the full amount claimed on the lien, and the Vickers appealed.

As explained below, we reject the Vickers' argument that they owe nothing to Blanton Supplies because they obtained a default judgment against the general contractor. That argument is precluded both by the text of the lien statutes and by precedent from our Supreme Court.

But the record before this Court does not support the trial court's award of \$27,031.29 in damages. The applicable statute provides that a homeowner who improperly pays out funds to a general contractor after receiving notice of a subcontractor's lien "shall be personally liable . . . upon funds up to the amount of such wrongful payments." N.C. Gen. Stat. § 44A-20. The only payment from the Vickers to the general contractor that occurred after Blanton Supplies filed and served its claim of lien is a single payment of \$14,600. With respect to the remaining portion of the \$27,031.29 claim, there are genuine issues of material fact that preclude summary judgment (at least, on the record before this Court). We therefore vacate the trial court's judgment and remand for further proceedings.

Facts and Procedural History

In June 2010, defendants Nancy and Terrence Vickers contracted with William Barber, Inc. Custom Home Builder for the construction of their home. Barber subcontracted with plaintiff Blanton Supplies of Little River, Inc. for various

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materials for the construction. Blanton Supplies provided \$27,031.29 worth of materials to Barber for the project but never got paid.

In early May 2012, Blanton Supplies filed and served a claim of lien on funds in the amount of \$27,031.29, establishing a lien on any funds that the Vickers owed Barber for the construction of their home. Blanton Supplies subsequently filed a claim of lien on real property for the same amount. Later that month, after receiving notice of the company's liens, the Vickers paid \$14,600 to Barber for work on their home.

On 9 July 2012, Blanton Supplies filed suit against Barber for breach of contract and breach of guaranty, and against the Vickers for enforcement of the claim of lien on funds and the claim of lien on real property. The Vickers crossclaimed against Barber for breach of contract, fraud, punitive damages, unfair and deceptive trade practices, and indemnity. Both Blanton Supplies and the Vickers later obtained default judgments against Barber, who failed to timely appear and defend the claims against him.

On 26 February 2016, Blanton Supplies moved for summary judgment on its claim against the Vickers. On 31 March 2015, the trial court granted summary judgment in favor of Blanton Supplies for \$27,031.39. The Vickers timely appealed.

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Argument

I. The Vickers' Default Judgment Against the General Contractor

The Vickers first argue that, because they obtained a default judgment against Barber (the general contractor), Blanton Supplies is not entitled to recover in this action. The Vickers contend that the lien only applies to funds that the Vickers owe to Barber and, because the trial court determined that the Vickers owe no funds to Barber (due to the default judgment), there are no funds to which Blanton Supplies' lien could attach. As explained below, this argument is precluded by the text of the statute and precedent from our Supreme Court.

“The critical time for determining whether an amount is owed for purposes of N.C.G.S. § 44A–18(1) is when the obligor receives the notice of lien.” *O & M Indus. v. Smith Eng'g Co.*, 360 N.C. 263, 270, 624 S.E.2d 345, 350 (2006). What amount is owed at a later time is irrelevant.

[T]he necessary determination under section[s] 44A–18 and 44A–20 is whether a ‘sum of money’ is owed to the contractor at the specific point the obligor receives proper notice. If so, the lien attaches to those funds or that specific obligation to pay. Whether that sum or obligation is still the same amount at the completion of the project is of little consequence to this type of lien, so long as when the obligor was noticed, there were funds owed at the time or funds were paid to the contractor after that point.

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Carolina Bldg. Servs. Windows & Doors, Inc. v. Boardwalk, LLC, 178 N.C. App. 561, 631 S.E.2d 893 (2006) (unpublished), *rev'd in part sub nom. Carolina Bldg. Servs.' Windows & Doors, Inc. v. Boardwalk, LLC*, 362 N.C. 262, 658 S.E.2d 924 (2008).

Additionally, section 44A–23 of the General Statutes provides that “[n]o action of the contractor shall be effective to prejudice the rights of a first tier subcontractor without its written consent once the first tier subcontractor has perfected its claim of lien on real property in accordance with G.S. 44A–11.” Our Supreme Court, examining similar language from an earlier version of the statute, held that a general contractor’s failure to appear and defend a lawsuit, resulting in default, “constituted an ‘action’ which prejudiced the rights” of the subcontractor. *Carolina Bldg. Servs.*, 362 N.C. at 264, 658 S.E.2d at 926. Thus, the entry of default against the general contractor did not prevent the subcontractor from pursuing recovery on its lien on the property. *Id.*

Likewise, here, Blanton Supplies perfected its lien by filing and serving it before the Vickers obtained their default judgment against Barber. Accordingly, under N.C. Gen. Stat. § 44A–23 and *Carolina Building Services*, the trial court properly rejected the Vickers’ argument that the default judgment against Barber extinguished the lien.

II. Amount of the Judgment

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The Vickers next make a series of arguments concerning the amount of the judgment and discrepancies in the amount claimed on the lien. As explained below, we agree that the record before this Court does not support summary judgment in the amount awarded by the trial court. We therefore vacate and remand for further proceedings.

On appeal, the only grounds on which Blanton Supplies defends the award of summary judgment are the subcontractor lien provisions of N.C. Gen. Stat. §§ 44A–18 and 44A–20. The company argues that the Vickers are liable to them based on the wrongful payment provision in section 44A–20. That statute addresses the liability of an obligor who wrongfully pays a contractor against whose interest a claim of lien has been filed. In other words, as it applies to this case, that statute permits a subcontractor to recover against a homeowner who, after receiving notice of a properly filed claim of lien against funds owed to the general contractor, makes payments to the general contractor instead of retaining those funds. The statute provides that “the obligor shall be personally liable to the person or persons entitled to liens upon funds up to the amount of such wrongful payments.” N.C. Gen. Stat. § 44A–20. Additionally, when the obligor is also the property owner—as is the case here—the wrongful payment triggers the subcontractor’s right to enforce a claim of lien on the obligor’s real property up to the amount of the wrongful payments. *Id.*

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Here, the parties concede that Blanton properly filed and served notice of a claim of lien on funds in the amount of \$27,031.29 in early May 2012, which established a lien on any funds that the Vickers owed Barber for work on their home. In addition, after Blanton Supplies filed and served that claim of lien on funds, the Vickers paid Barber \$14,600 by personal check for work on their home.¹ By making the \$14,600 payment, the Vickers acknowledged that they owed at least that amount to Barber. *See O & M Indus. v. Smith Eng'g Co.*, 360 N.C. 263, 270, 624 S.E.2d 345, 350 (2006). Thus, the record supports entry of summary judgment in the amount of \$14,600, because the statute provides that the Vickers are “personally liable . . . up to the amount of such wrongful payments.” N.C. Gen. Stat. § 44A–20.

But this theory of liability does not support summary judgment for the full \$27,031.29 that Blanton Supplies seeks in this action. Several weeks after Blanton Supplies filed its claim of lien on funds for \$27,031.29, it also filed a claim of lien of real property for \$27,031.29. From the record before this Court, we cannot discern whether that real property lien is a converted claim of lien on funds under section 44A–20 or a subrogation lien under section 44A–23. *See Elec. Supply Co. of Durham*

¹ The Vickers argue in their brief that “[t]here is nothing that was submitted to [the trial court] by the Plaintiffs, in the form of pleadings or affidavits that would indicate that the Defendant Vickers paid the Contractor Barber any sum after the date the lien was filed.” But the Vickers’ \$14,600 check to Barber, dated after the lien was filed and served, is contained in the record. Moreover, at the summary judgment hearing, the Vickers’ counsel conceded that the Vickers paid that amount to Barber: “We don’t doubt and we agree that we paid a total of \$14,000—I think it was \$600.00 . . . I think it was served one day and they made the payment the next day. So, technically, that \$14,600.00 was paid a day after they received notice of the lien.”

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v. Swain Elec. Co., 328 N.C. 651, 660, 403 S.E.2d 291, 297 (1991) (discussing the distinctions between the two liens). Regardless, under either theory, there is insufficient evidence in the record to support a judgment in the full amount of the lien.

If Blanton Supplies intended the lien to be a converted claim of lien on funds under section 44A–20, the claim of lien on the property is effective only up to the amount of payments wrongfully made after perfection of the claim of lien on funds. As explained above, on this record, that amount is only \$14,600, not \$27,031.29.

By contrast, if Blanton Supplies intended the lien to be a subrogation lien under section 44A–23, it is only entitled to a lien on amounts owed by the Vickers to Barber, the general contractor. But Blanton Supplies did not present undisputed evidence that the Vickers owed any funds to Barber. Indeed, the Vickers submitted an affidavit stating that there was no outstanding balance on their contract with Barber. And although Blanton Supplies points to the construction contract and to various checks and receipts as evidence that the Vickers must still owe money on the contract, nothing in the record suggests that those are the *only* checks and receipts that exist.

Simply put, on this record, Blanton Supplies has not shown that there are no genuine issues of material fact and that it is entitled to an award of \$27,031.29 as a matter of law. Accordingly, we hold that the trial court's entry of summary judgment

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in the amount of \$27,031.29 was erroneous. We vacate the judgment and remand for further proceedings consistent with this opinion.

Conclusion

For the reasons stated above, we vacate the judgment and remand for further proceedings.

VACATED AND REMANDED.

Judges BRYANT and HUNTER, JR. concur.

Report per Rule 30(e).