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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA23-914

Filed 18 June 2024

Mecklenburg County, No. 21 CVS 9185

CONSOLIDATED DISTRIBUTION CORP., Plaintiff,

v.

HARKINS BUILDERS, INC. and FEDERAL INSURANCE COMPANY, Defendants.

Appeal by Defendants from judgment entered 23 March 2023 by Judge George C. Bell in Mecklenburg County Superior Court. Heard in the Court of Appeals 16 April 2024.

Vann Attorneys, PLLC, by James R. Vann, and Fox Rothschild, LLP, by Troy D. Shelton, for Plaintiff-Appellee.

Windle Terry Bimbo, by Don R. Terry, for Defendant-Appellant.

GRIFFIN, Judge.

Defendants, Harkins Builders, Inc. and Federal Insurance Co., appeal from the trial court's judgment entered in favor of Plaintiff Consolidated Distribution Corp. Defendants raise numerous issues on appeal. Upon reviewing these issues, we hold the trial court did not err.

I. Factual and Procedural History

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On 29 October 2018, Defendants (“Harkins”) entered into a contract with Freedom Apartments, LLC, to build the Freedom Drive Apartments in Charlotte, North Carolina. On 4 January 2019, Harkins entered into a subcontract with Plaintiff (“CDC”), pursuant to which CDC agreed to provide, among other things, cabinet/countertop assemblies for Type B Units. While CDC was originally contracted to provide and install the cabinet/countertop assemblies, Harkins later hired C&R Carpentry to do the installations.

On 6 November 2019, CDC began to deliver the assemblies to Harkins. Harkins began making payments to CDC in February 2020. All assemblies were delivered by 24 August 2020.

On 16 October 2020, Harkins’ Project Manager, P. Ritz, emailed CDC concerning an ADA inspection which revealed the aggregate height of the cabinets and countertops were between 36 inches and 36.5 inches in some Type B Units. On 23 October 2020, Harkins was notified the cabinets would be approved for ADA compliance regardless of whether they measured 36.5 inches due to an industry standard tolerance at 0.5 inch. Nonetheless, Harkins withheld payment from CDC.

On 15 July 2021, CDC filed a breach of contract claim. On 19 July 2021, Harkins filed its answer, affirmative defenses, and counterclaims. On 10 September 2021, CDC filed an answer. On 21 February 2021, Harkins filed motions *in limine*.

On 27 February 2023, the matter came on for trial in Mecklenburg County Superior Court. Following a bench trial, the trial court entered judgment in favor of

CDC requiring Harkins pay CDC \$112,999.09 for the assemblies furnished.

On 31 March 2023, Harkins filed notice of appeal.

II. Standard of Review

Insofar as Harkins' contentions concern the trial court's interpretation of the subcontract between Harkins and CDC, we review the matter de novo. *See Harris v. Ray Johnson Constr. Co.*, 139 N.C. App. 827, 829, 534 S.E.2d 653, 654 (2000) (stating issues concerning the trial court's interpretation of a contract involve questions of law and are to be reviewed de novo). We review Harkins' remaining contentions as to the trial court's findings of fact to determine whether those findings are supported by competent evidence. *State v. Ashworth*, 248 N.C. App. 649, 651, 790 S.E.2d 173, 176 (2016). "Competent evidence is evidence that a reasonable mind might accept as adequate to support the finding." *State v. Chukwu*, 230 N.C. App. 553, 561, 749 S.E.2d 910, 916 (2013) (citation omitted). Findings of fact supported by competent evidence are binding on appeal, even where contrary evidence exists. *State v. Barden*, 356 N.C. 316, 332, 572 S.E.2d 108, 120–21 (2002) (citation omitted).

III. Analysis

Harkins raises numerous issues on appeal, contending the trial court erred where it failed to: strictly enforce the written contract between Harkins and CDC; strictly enforce the sub-contractual waiver and release; and strictly construe the subcontract documents. Moreover, Harkins argues the trial court erred in finding CDC did not breach the contract, as well as, in Findings of Fact 6, 8, 9, 10, 12, and

14. We consolidate Harkins' contentions for clarity and address them in relevant order below.

A. Harkins' "Pass" to Install Cabinet/Countertop Assemblies up to 36.5 Inches

Harkins contends the trial court erred in Finding of Fact 12 where it erroneously found Harkins had been given a "pass" to install cabinet/countertop assemblies up to 36.5 inches as there was not competent evidence which could support such a finding.

Finding of Fact 12 specifically states:

[] Harkins had been given a "pass" to install a cabinet/countertop assembly up to 36.5 inches, which considering all of the evidence, weighed in the favor of CDC providing conforming goods to Harkin[s].

Although Harkins argues this Finding of Fact is not supported by competent evidence, substantial evidence tended to show:

- The subcontract between Harkins and CDC incorporated by reference certain contract documents including the North Carolina Housing Finance Agency ("NCHFA") Field Guide ("Field Guide"). The Field Guide specified the aggregate height of the cabinets and countertops in Type B Units should not exceed 36 inches.
- On 21 September 2020, the project architect, S. Blakesley, received a report from an ADA consultant who stated the aggregate height of the cabinets and countertops in some of the Type B Units was 36 inches while others measured at 36.25 inches or 36.5 inches. The report further stated "[m]any federal and state accessibility regulations allow for the application of conventional industry tolerances for construction."
- Blakesley then reached out to T. Barthelmess, the Chief Accessibility Code Consultant for the North Carolina Department of Insurance, and asked about the

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height requirements in Type B Units. Barthelmess sent Blakesley the code which required the aggregate height of the cabinets and countertops be, at a maximum, 36 inches. The code also noted the dimensions were not absolute but were instead subject to conventional industry tolerance. Barthelmess recognized the conventional industry tolerance was 0.5 inch.

- Blakesley also spoke with R. Griffin, NCHFA's Senior Construction Analyst, who wrote the Field Guide. Blakesley called Griffin to discuss the cabinet and countertop height requirements. Griffin recognized the Field Guide required the height be no more than 36 inches but noted the industry tolerance had always been 0.5 inch. After speaking with Griffin, Blakesley sent an email to Griffin to summarize their conversation stating: "[36.5] maximum height is the ABSOLUTE MAXIMUM ALLOWED if the receptacle IS MOVED to the side of the vanity." Griffin responded to Blakesley's email: "Yes. The information below is good. You're receiving a pass on Freedom Drive only."

This evidence unequivocally indicates Harkins was given a "pass" to install cabinet/countertop assemblies up to 36.5 inches. Therefore, the trial court's Finding of Fact 12 is supported by substantial evidence.

Still, Harkins further contends the trial court erred as it failed to strictly enforce the written contract between the parties which required CDC furnish products in strict conformance with the subcontract requirements—cabinet/countertop assemblies measuring no more than 36 inches.

As noted, the aggregate height requirements for cabinets and countertops in Type B Units were only mentioned within the Field Guide which was incorporated in the subcontract. Because Griffin emailed Blakesley stating Harkins was receiving a "pass" as to the strict 36-inch requirement for cabinets and countertops in Type B Units on the project, the installation was in conformance with the subcontract requirements and the trial court did not err.

B. The Materials Furnished and Harkins' Failure to Inspect and Reject the Materials

Defendant contends the trial court erred in Findings of Fact 8-10 which state:

8. The [c]ourt finds that Harkins [] failed to do a thorough investigation of each cabinet that may or may not have been conforming, and Harkins did not present evidence of exactly how many items were allegedly nonconforming.

9. [A]fter weighing all the evidence, the [c]ourt finds that the cabinets were conforming goods that could not be rejected.

10. [E]ven if a handful of cabinets were nonconforming, Harkins already accepted the goods and could not reject said goods.

The Uniform Commercial Code provides the acceptance of goods occurs when, among other things, the buyer, after having a reasonable opportunity to inspect the goods: (a) signifies the goods are conforming or that he will retain them regardless; (b) fails to make an effective rejection under N.C. Gen. Stat. § 25-2-602 (2023); or (c) acts inconsistent with the seller's ownership. *See* N.C. Gen. Stat. § 25-2-606 (2023); *see also Williams v. Hyatt Chrysler-Plymouth, Inc.*, 48 N.C. App. 308, 316, 269 S.E.2d 184, 189 (1980) (stating a failure to reject nonconforming goods constitutes acceptance when buyer has knowledge of nonconformity yet uses the goods).

While the UCC provides for rejection within a reasonable time after inspection, the provisions included in the original contract between Freedom Apartments and Harkins, which apply also to CDC, generally state: CDC shall promptly correct any work rejected before substantial completion. However, these provisions applied to

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the rejection of “work” only. CDC was not doing any “work” for Harkins, but instead solely furnished materials for the project which were installed by C&R Carpentry.

Even still, evidence at trial included:

- Harkins had a substantial completion date in or around October 2020 as Ritz sent an email stating Harkins had to be “out” of the project by 16 October 2020.
- The issues related to the measurements of the cabinet/countertop assemblies first became apparent after the ADA inspection, of which Harkins was aware, in September 2020. However, Ritz was instructed not to reach out to CDC about the issue until all the assemblies had been delivered. The assemblies were all delivered by August 2020 and Ritz reached out to CDC on 16 October 2020. At that time, Ritz stated 100 assemblies had been installed by C&R Carpentry—which required the screwing, gluing, and cutting of the cabinets and countertops—but that several of them did not meet the 36-inch height requirement provided by the Field Guide. In reaching out to CDC, Harkins never rejected the assemblies, but instead, inquired as to a pass, such that the cabinets would still be in compliance where there was a 0.5-inch tolerance. In March 2021, after installation was complete, Harkins attempted to reject the assemblies.
- Ritz specifically testified he did not inspect any of the cabinet/countertop assemblies and had no information as to whether anyone else inspected them to ensure the measurements were correct before installation.
- CDC’s owner, J. Whitford, testified as to the materials furnished stating the aggregate height of the cabinet/countertop assemblies was 36 inches as the materials include a 34.5-inch base with a 1.5-inch countertop. Whitford noted the cabinet/countertop assemblies were built by machinery in a controlled environment, therefore allowing for little variance in the materials produced.

This evidence serves not only as competent evidence of the goods being delivered in conformance with the subcontract, but also of Harkins having failed to inspect the materials when delivered. Moreover, regardless of whether Harkins was to reject the goods within a reasonable time after inspection or before substantial completion, the evidence at trial indicated Harkins did not attempt reject the materials from CDC

until long after they had been delivered and accepted. Thus, the trial court did not err in Findings of Fact 8-10.

C. Breach of Contract and Breach of Warranties

Harkins contends CDC breached the contract where it did not remove and replace the cabinet/countertop assemblies which exceeded the 36-inch height requirement. Further, Harking argues the trial court erred in Finding of Fact 6 which states: “The [c]ourt was not convinced by the greater weight of the evidence that any warranties were breached by CDC.”

Harkins specifically cites to a provision in the subcontract stating CDC breached certain warranties including:

[A]ll materials of any kind supplied [] shall be supplied with good and marketable title, free and clear of any and all liens encumbrances whatsoever, suitable for the use intended, and in strict compliance with the subcontract documents.

[and]

[CDC] guarantees that its [w]ork is and shall be in strict conformance with the requirements of the [s]ubcontract [d]ocuments[.]

As noted above, CDC did not perform any “work” for Harkins, as it only delivered the cabinet/countertop assemblies which were then installed by C&R Carpentry. Further, evidence at trial indicated CDC furnished materials which were either 36 inches, or no more than 36.5 inches after C&R’s installation. Although the Field Guide imposed an aggregate height requirement at no more than 36 inches, Griffin

granted Harkins a 0.5-inch tolerance increasing the maximum height requirement for cabinet/countertop assemblies to 36.5 inches. Thus, any installation which measured 36.5 inches was in conformance with the subcontract documents and CDC was not required to remove and replace them.

The trial court neither erred in finding CDC did not breach the contract nor its Finding of Fact 6.

D. Waiver and Release

Harkins contends the trial court erred as it erroneously failed to enforce the waiver and release contained in the subcontract by allowing CDC to recover on claims against Harkins where CDC failed to properly give notice of claim as required by the subcontract. Likewise, Harkins argues the trial court erred in Finding of Fact 14 which states, “CDC is owed \$112,999.09 for the materials furnished to the [p]roject.”

The subcontract states any claim arising out of or related to the subcontract or other subcontract documents shall be submitted by CDC to Harkins through written notice within seven days after CDC becomes, or should have become, aware of the basis of the claim. The subcontract further states, a claim includes any demand or request by the subcontractor for *additional* compensation, time, or other relief. The subcontract also notes, failure of CDC to provide written notice of claim within seven days shall constitute an unconditional waiver and release of the claim. Notice, per the subcontract, is to be “either hand delivered or sent by certified mail, postage prepaid, or by telecopy[.]” The subcontract’s Exhibit A, containing additional terms

and conditions to the subcontract, includes a section titled “PROCORE” which states if Harkins elected to use Procore, an electronic construction management software, on the project, it would be used for all communication with CDC.

CDC’s claim is based on Harkins’ nonpayment of goods and services within the terms and scope of the subcontract. Whereas the subcontract provided only for notice of claim for additional compensation, CDC was not required to notify Harkins of claim for payments required by the subcontract. Nonetheless, evidence at trial indicated CDC provided such notice by telecopy.

Specifically, Whitford testified CDC submitted payment applications to Harkins through the Procore system, which Harkins required CDC to use, including payment application eight on 18 September 2020 and payment application nine on 17 December 2020. Moreover, CDC sent Harkins email notification of nonpayment and other matters involving billing on 12 and 13 November 2020, 10 and 15 December 2020, and 1 March 2021.

CDC was not required to provide notice of claim against Harkins for payment of goods and services CDC contracted to provide from the beginning. Nevertheless, CDC’s submission of payment applications and email correspondences with Harkins as to nonpayment serve as notice of claim by telecopy. Therefore, the trial court did not err where it declined to enforce the waiver and release contained within the subcontract nor in its Finding of Fact 14 requiring Harkins to pay CDC \$112,999.09 for the materials furnished to the project.

IV. Conclusion

For the aforementioned reasons, the trial court did not err in its judgment order.

AFFIRMED.

Chief Judge DILLON and Judge TYSON concur.

Report per Rule 30(e).