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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA24-240

Filed 17 December 2024

Guilford County, No. 19CVS7928

WYNNEFIELD PROPERTIES, INC., Plaintiff,

v.

EMERGENCY RESTORATION EXPERTS, LLC, Defendant.

Appeal by defendant from order entered 17 August 2023 by Judge Tonia A. Cutchin in Guilford County Superior Court. Heard in the Court of Appeals 29 October 2024.

Rossabi Law Partners, by Amiel J. Rossabi, for the plaintiff-appellee.

Beacon Legal PLLC, by Gavin J. Reardon, for the plaintiff-appellee.

Bennett Guthrie PLLC, by Joshua H. Bennett, and Mitchell H. Blankenship, for the defendant-appellant.

TYSON, Judge.

Emergency Restoration Experts, LLC (“Defendant”) appeals from orders of the trial court after multiple jury trials. We find no error on the jury’s verdict, but vacate the order in part, and remand.

I. Background

Defendant is a North Carolina limited liability company, which specializes in

restoring, remediating, and repairing buildings damaged due to disasters. Wynnefield Properties, Inc. (“Plaintiff”) is a North Carolina corporation, which owns the Parkview Apartments in Greensboro.

Ten of the buildings of the Parkview Apartments suffered extensive water and wind damage from a severe storm on 15 April 2018. Plaintiff retained Defendant to perform repair and restoration work on these buildings and entered into a written contract requiring the work to be completed on 15 June 2018. The contract’s price and scope of work were determined by an estimate approved by Plaintiff’s insurance carrier, Nationwide Mutual Insurance Company. The contract specifically provided: “Special Terms *** This estimate is based on the total price of the attached [N]ationwide approved estimate. As various aspects of the scope have been revised, this estimate is to be used as a price point, not a scope outline.” The contract defined and limited the cost estimate as a starting point, subject to price adjustments in the event additional or different change orders were necessary: “Additionally, work beyond the scope will not be performed without pre-approval from Nationwide. This may include code upgrades, unforeseen damage as the building envelope is exposed, etc.”

Defendant commenced work on the project. A third-party engineering firm indicated one of the buildings, Building 405, had sustained damages greater than those initially provided for under the original cost estimate in August 2018. The report found Building 405 had been exposed to the elements of wind and rain for an

extended period of time and suffered extensive moisture intrusion issues. The report recommended Defendant to remove all second-floor wall framing and subfloor from the second floor and dry and treat any mold found on the first floor, and reconstruct Building 405 to its previous layout.

Plaintiff assigned Defendant to approach Nationwide to secure approval of a cost estimate supplement to cover the engineer's recommended repairs to Building 405. Nationwide formally denied the request for a supplement for the engineer's recommended repairs to Building 405 on 14 December 2018. Nationwide denied the requested supplement as not covered, because they alleged it was caused by a failure to secure and mitigate the original damages sustained. The same day Nationwide approved a supplement for Defendant's work on another building at the Parkview Apartments, Building 407. Plaintiff requested Defendant suspend all work on the Parkview Apartments on 19 December 2018. Nationwide approved a supplement payment for Building 405 in June 2019.

Plaintiff filed a complaint on 16 August 2019, alleging claims for breach of contract and unjust enrichment and later amended its complaint on 22 April 2020. Defendant answered and counterclaimed for breach of contract and breach of implied covenants of good faith and fair dealing. Defendants filed a motion to compel terms of any supplement payment resolution reached between Nationwide and Plaintiff on Building 405 on 10 August 2020. Following a hearing on 26 August 2020, the trial court denied Defendant's motion to compel.

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Plaintiff and Defendant both filed motions for summary judgment on their respective claims. The trial court heard both motions and granted partial summary judgment in favor of Plaintiff on its breach of contract claim of \$112,669.26. The trial court awarded summary judgment to Defendant on its claims for Plaintiff's breach of contract and breach of the implied covenant of good faith and fair dealing. The trial court ordered a trial to determine damages Defendant was to recover from Plaintiff. Any amount Defendant was awarded at trial was to be used as a set-off against the \$112, 669.26 Plaintiff was awarded, with any excess becoming a judgment in favor of Defendant. Plaintiff did not appeal.

The first trial resulted in a hung jury. A second trial was held and the jury awarded Defendant \$1.00 in damages for Plaintiff's breach of contract.

Plaintiff and Defendant both filed post-verdict motions for attorney's fees and costs. The trial court granted Plaintiff's motion and denied Defendant's motion for attorney's fees and costs by order dated 17 August 2023. Defendant appeals.

II. Jurisdiction

Jurisdiction lies in this Court pursuant to N.C. Gen. Stat. § 7A-27(b)(1) (2023).

III. Issues

Defendant argues the trial court erred by: (1) denying its motion to compel; (2) granting summary judgment to Plaintiff; (3) instructing the jury on liquidated damages; and, (4) granting attorney's fees and costs to Plaintiff.

IV. Defendant's Motion to Compel

Defendant argues the trial court erred in denying their motion to compel.

A. Standard of Review

“Whether or not the party’s motion to compel discovery should be granted or denied [rests] within the trial court’s sound discretion and will not be reversed absent an abuse of discretion.” *Wagoner v. Elkin City Schools’ Bd. of Education*, 113 N.C. App. 579, 585, 440 S.E.2d 119, 123 (1994). “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.” *Nationwide Mut. Fire Ins. Co. v. Boulton*, 172 N.C. App. 595, 601, 617 S.E.2d 40, 45 (2005) (internal citation omitted), *aff’d per curiam*, 360 N.C. 356, 625 S.E.2d 779 (2006).

B. Analysis

Defendant argues the trial court erred by denying their motion to compel discovery, because they needed to know the specific terms of the settlement agreement in order to prove damages. Defendant argued the communications between Plaintiff and Nationwide before the settlement agreement “came into existence” because Defendant was wanting to counter Plaintiff’s claim they had breached the contract by failing to obtain Nationwide’s approval for the building 405 cost repair supplement. Defendant sought the communications between Plaintiff and Nationwide before the settlement agreement.

Defendant did not argue it needed the specific terms of the settlement agreement to prove its damages. “[W]here a theory argued on appeal was not raised

before the trial court, the law does not permit parties to swap horses between courts in order to get a better mount in the appellate courts.” *State v. Holliman*, 155 N.C. App. 120, 123, 573 S.E.2d 682, 685 (2002) (citations and internal quotation marks omitted). Defendant has waived appellate review of this argument. Respondent’s argument is dismissed.

V. Summary Judgment

Defendant argues the trial court erred in awarding Plaintiff summary judgment. Defendant asserts the parties’ competing claims, which alleged a material breach, were mutually exclusive.

A. Standard of Review

North Carolina Rule of Civil Procedure 56(c) allows a moving party to obtain summary judgment upon demonstrating “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits” show they are “entitled to a judgment as a matter of law” and “there is no genuine issue as to any material fact.” N.C. Gen. Stat. § 1A-1, Rule 56(c) (2023).

A material fact is one supported by evidence that would “persuade a reasonable mind to accept a conclusion.” *Liberty Mut. Ins. Co. v. Pennington*, 356 N.C. 571, 579, 573 S.E.2d 118, 124 (2002) (citation omitted). “An issue is material if the facts alleged would . . . affect the result of the action.” *Koontz v. City of Winston-Salem*, 280 N.C. 513, 518, 186 S.E.2d 897, 901 (1972).

Our Court has held:

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A defendant may show entitlement to summary judgment by (1) proving that an essential element of the plaintiff's case is non-existent, or (2) showing through discovery that the plaintiff cannot produce evidence to support an essential element of his or her claim, or (3) showing that the plaintiff cannot surmount an affirmative defense.

Draughon v. Harnett Cty. Bd. of Educ., 158 N.C. App. 208, 212, 580 S.E.2d 732, 735 (2003), (Tyson, J.), *aff'd per curiam*, 358 N.C. 131, 591 S.E.2d 521 (2004) (citation and internal quotation marks omitted).

When reviewing the allegations and proffers at summary judgment, “[a]ll inferences of fact from the proofs offered at the hearing must be drawn against the movant and in favor of the party opposing the motion.” *Boudreau v. Baughman*, 322 N.C. 331, 343, 368 S.E.2d 849, 858 (1988) (citation omitted). Summary judgment is not appropriate where matters of credibility and determining the weight of the evidence exist. *Moore v. Fieldcrest Mills, Inc.*, 296 N.C. 467, 470, 251 S.E.2d 419, 422 (1979).

“[O]nce the party seeking summary judgment makes the required showing, the burden shifts to the nonmoving party to produce a forecast of evidence demonstrating specific facts, as opposed to allegations, showing that he can at least establish a *prima facie* case at trial.” *Pacheco v. Rogers and Breece, Inc.*, 157 N.C. 448, 445, 579 S.E.2d 505, 507 (2003) (citation omitted).

On appeal, “[t]he standard of review for summary judgment is *de novo*.” *Forbis v. Neal*, 361 N.C. 519, 524, 649 S.E.2d 382, 385 (2007) (citation omitted).

B. Analysis

Defendant argues the trial court erred in awarding summary judgment. Defendant asserts the parties' competing claims, which alleged a material breach, were mutually exclusive, citing *Crosby v. Bowers*. A prior panel of this Court held "[r]egarding the alleged antecedent breach of the agreement by plaintiff, the general rule governing contracts requires that if either party commits a material breach of the contract, the other party should be excused from the obligation to perform further." *Crosby v. Bowers*, 87 N.C. App. 338, 345, 361 S.E.2d 97, 102 (1987) (citing *Coleman v. Shirlen*, 53 N.C. App. 573, 281 S.E.2d 431 (1981)).

Plaintiff and Defendant each asserted different theories of the other's breach. Plaintiff asserted a breach of contract for failing to complete the work on the Parkview Apartments and refusing to reimburse to Plaintiff \$112,669.26 it was owed. Defendant asserted a breach of contract and a breach of the implied covenant of good faith and fair dealing for being improperly being excluded from the additional work on Buildings 405 and 407 at the Parkview Apartments. Defendant did not assert there was an antecedent breach of contract. Plaintiff and Defendant's theories of breach of contract were not mutually exclusive. *Id.* Defendant's argument is overruled.

VI. Jury Instruction on Liquidated Damages

Defendant argues the trial court erred in instructing the jury on liquidated damages.

A. Standard of Review

When reviewing a trial court's ruling on requested jury instructions, this Court is "required to consider and review [the] jury instructions in their entirety." *David v. Balser*, 155 N.C. App. 431, 433, 574 S.E.2d 177, 179 (2002) (citation omitted). The burden of proof rests upon the party assigning error to demonstrate the jury instruction misled the jury or otherwise affected the verdict. *Id.* (citation omitted). This Court will hold the jury instructions as valid if the instruction "present[ed] the law of the case in such manner as to leave no reasonable cause to believe the jury was misled or misinformed." *Id.* (citation omitted).

B. Analysis

Defendant argues the trial court erred by instructing the jury on liquidated damages because it was not supported by the evidence.

Section 13 of the agreement provides:

13 CANCELLATION OF THIS CONTRACT. The client has 72 hours to cancel this contract in writing without penalty expect (sic) in the event any special order materials have been ordered. If the materials cannot be returned, then the client agrees to pay the costs of said materials plus a 30% handling charge. If the materials can be returned but the contractor is charged a restocking fee, then the client agrees to pay the restocking fee, then the client agrees to pay the restocking fee plus a 30% handling fee. If the contract is cancelled in writing by the client after 72 hours the client agrees to pay all time and material spent by ERX at a rate of \$75 per hour. The hours spent shall include all site visits, clerical, administrative, time, permits and materials. An invoice shall be created with the total time spent and the costs the invoice payment is

due upon cancellation of this contract.

Defendant asserts this is not a liquidated damages provision because it is not a “certain sum.” However, our Supreme Court has held a “formula for ascertaining the amount of damages, contained in [the clause] of the contract, affords a mathematical method of making certain that which otherwise is very uncertain.” *Knutton v. Cofield*, 273 N.C. 355, 362, 160 S.E.2d 29, 35 (1968). Defendant’s argument is overruled.

Defendant further argues the trial court erred by instructing the jury on liquidated damages, specifically by instructing:

Finally, as to the issue from which the plaintiff has the burden of proof, if you find by the greater weight of the evidence the amount of stipulated damages to which the plaintiff is entitled by reason of the damage—excuse me—by reason of the defendant’s breach of contract, then it will be your duty to write that amount in the blank space provided. If, on the other hand, you fail to so find, then it will be your duty to write a nominal amount such as “one dollar” in the blank space provided.

Defendant fails to cite to any authority to support this argument. Rule 28(b)(6) provides “Issues . . . in support of which no reason or argument is stated, will be taken as abandoned.” N.C. R. App. P. 28(b)(6). Defendant’s argument is abandoned. *See, e.g., Fairfield v. Wakefield*, 261 N.C. App. 569, 575, 821 S.E.2d 277, 281 (2018) (holding a plaintiff abandoned an issue where they “do not cite to any legal authority in support of this argument”).

VII. Attorney’s Fees

Defendant argues the trial court erred in allowing Plaintiff's motion and denying their motion for attorneys' fees and costs.

A. Standard of Review

In order to award attorney's fees, a court must find facts "to support the court's conclusion that this was a reasonable fee such as the time and labor expended, the skill required to perform the legal services rendered, the customary fee for like work, or the experience and ability of the attorney." *Morris v. Bailey*, 86 N.C. App. 378, 387, 358 S.E.2d 120, 125 (1987) (citations omitted). Whether the statutory requirements for attorney's fees are met is a question of law, which is reviewed *de novo* on appeal. *Cox v. Cox*, 133 N.C. App. 221, 228, 515 S.E.2d 61, 66 (1999) (citations omitted). The trial court must make "additional findings of fact upon which a determination of the requisite reasonableness can be based, such as findings regarding the nature and scope of the legal services rendered, the skill and time required, the attorney's hourly rate, and its reasonableness in comparison with that of other lawyers" to enter an award of attorney's fees. *Cobb v. Cobb*, 79 N.C. App. 592, 595-96, 339 S.E.2d 825, 828 (1986) (citations omitted). "[T]he trial court's findings of fact are conclusive on appeal if supported by substantial evidence, even if . . . sufficient evidence. . . supports contrary findings." *Peters v. Pennington*, 210 N.C. App. 1, 12-13, 707 S.E.2d 724, 733 (2011) (citation omitted).

If the statutory requirements for attorney's fees "have been satisfied, the amount of the [attorney's fee] award is within the discretion of the trial judge and

will not be reversed in the absence of an abuse of discretion.” *Smith v. Barbour*, 195 N.C. App. 244, 255, 671 S.E.2d 578, 586 (2009) (citation, internal quotation marks, and alternations omitted). “Whether a trial court has properly interpreted the statutory framework applicable to costs is a question of law reviewed *de novo* on appeal.” *Peters*, 210 N.C. App. at 25, 707 S.E.2d at 741 (citation omitted).

B. Analysis

Defendant asserts the trial court erred by denying their motion for attorney’s fees and costs because it found the affidavit did not provide an “itemized” hourly statement. The motion contains no delineation of partners, associates, or paralegal hours spent or rates billed, only one-set hourly rate. *See* 27 N.C. Admin. Code 2.1.05; 2007 Formal Ethics Opinion 13. The hourly rates submitted by Defendant’s counsel’s fee affidavit were substantially less than the rates submitted by Plaintiff’s counsel and approved by the trial court as reasonable.

In *Rock v. Ballou*, our Supreme Court held: “it is not a prerequisite to such a finding that the attorney introduce evidence [of] a detailed, itemized statement of the time spent by him in rendering the service[.]” *Id.* 286 N.C. 99, 105, 209 S.E.2d 476, 479 (1974). The denial of Defendant’s motion for attorney’s fees and costs as a prevailing part by the jury’s verdict and as agreed under the contract is vacated and remanded for additional proceedings. N. C. Gen. Stat. §§ 6-20; 21.6 (2023). The trial court may seek and consider clarifications and allocations of the submitted affidavit. *Id.*

VIII. Conclusion

We affirm the trial court's denial of Defendant's motion to compel, the granting of both party's summary judgment motions in part as prevailing parties. We also affirm the jury instructions on liquidated damages.

The trial court's denial of Defendant's motion for attorney's fees and costs is vacated and remanded for additional proceedings consistent with this opinion. *It is so ordered.*

NO ERROR IN PART, VACATED IN PART, AND REMANDED.

Chief Judge DILLON concurs.

Judge MURPHY concurs in result only.

Report per Rule 30(e).