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IN THE COURT OF APPEALS OF INDIANA

DON GRUBB EXCAVATING, INC.,	)	
	)	
Appellant-Plaintiff,	)	
	)	
vs.	)	No. 53A01-0704-CV-162
	)	
WINTERWOOD PROPERTIES, LLC,	)	
JAMES M. LANDWERLEN,	)	
IRVING MATERIALS, INC.,	)	
WICKES LUMBER, INC., and,	)	
BLOOMFIELD STATE BANK,	)	
	)	
Appellees-Defendants.	)	

APPEAL FROM THE MONROE CIRCUIT COURT
The Honorable Elizabeth N. Mann, Judge[1]
Cause No. 53C04-0307-CC-01235

December 13, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

[1] Judge Mann presided over this case and issued the order that is being appealed herein on December 13, 2004. On December 31, 2004, Judge Mann retired, at which time the Honorable Mary Ellen Diekhoff assumed jurisdiction over the case.

BAKER, Chief Judge

Appellant-plaintiff Don Grubb Excavating, Inc. (DGE), appeals the trial court's order granting partial summary judgment in favor of appellee-defendants Winterwood Properties, LLC (Winterwood), James M. Landwerlen, Irving Materials, Inc., Wickes Lumber, Inc., and Bloomfield State Bank (collectively, the appellees) on DGE's complaint against the appellees for, among other things, breach of contract and foreclosure on a mechanic's lien. DGE argues that the trial court erroneously found that it waived its right to pursue these claims and that a promissory note executed by a nonparty adequately compensates DGE. Finding a genuine issue of material fact regarding DGE's installation of a septic system and that the promissory note is irrelevant to determining the appellees' potential liability for DGE's services on the septic system project, and finding no other error, we affirm in part, reverse in part, and remand with instructions.

FACTS

In early 2002, five entities and individuals contracted to purchase and develop a number of acres in Monroe County: Buyers Only, Larry Scites, Doug Schmidt, Winterwood, and Landwerlen. At that time, Scites was the managing partner of Winterwood and the President of Buyers Only. The acreage was to be developed into six buildings with twenty-four units and was to be named Technology Park Crossing (Tech Park). Pursuant to the operating agreement—which is not included in the record—Buyers Only was responsible for developing the property.

In July 2002, Scites contacted Don Grubb (Grubb), the owner of DGE, and asked for an estimate for the excavation-related work on the acreage that was to become Tech Park. Scites and Grubb engaged in a number of discussions and ultimately reached an oral agreement, pursuant to which DGE agreed to excavate the property in exchange for an agreement to pay on a "time and materials" basis. Appellant's App. p. 96.

In the fall of 2002, Scites stepped down as Winterwood's managing partner and Landwerlen assumed the role. On October 4, 2002, DGE provided Landwerlen with an estimate in the amount of $58,760 for installing the water and sewer line, street cut, and fire hydrant. In December 2002, DGE billed Winterwood $59,100 for work that had been performed.

On January 9, 2003, Winterwood made a payment of $25,000 to DGE. In response, Grubb executed a Partial Waiver of Lien (the First Waiver). The First Waiver lists the Contract Price as $59,100 and notes that following the payment of $25,000, the remaining balance was $34,100. The First Waiver then includes the following provisions:

> For value received the undersigned hereby waives and releases any and all statutory or equitable liens or rights to liens as to the above described premises to the extent of the total payments received as shown above for work, material and services furnished.
>
> The undersigned hereby waives any and all legal or equitable defenses that might defeat this waiver and waives any right to liens for work, material or services not covered by the contract price.
>
> The undersigned warrants that the work, material or services used to date in the construction of improvements on the premises are equal in value to the total of all payments received as shown above.

Appellant's App. p. 75. According to Grubb, following the execution of the First Waiver, DGE continued to work on the property's water and sewer lines, occasionally billing Winterwood. Indeed, Grubb alleges that at some point in January 2003, Landwerlen asked that DGE pay for the water meters, to be reimbursed later by Winterwood. DGE did so at a cost of $30,720.

At some point in January 2003, DGE installed a septic system on a property known as Red Oak, which was owned by Buyers Only. Grubb attested that Landwerlen asked him to install the septic system, though neither Landwerlen nor Winterwood held any ownership interest in Red Oak.[2] On January 8, 2003, Buyers Only obtained a permit for the installation of a septic system and on January 21, 2003, the Health Department approved the installation. The cost of the installation of the Red Oak septic system was $6,500.

On February 7, 2003, Winterwood made a $35,000 payment to DGE. In exchange, DGE executed a Waiver of Lien (the Second Waiver), which provides, in pertinent part, as follows:

> The real estate is owned by # [sic], and the services, labor, material or equipment were ordered by # [sic]. [Typed in:] WINTERWOOD PROPERTIES, LLC[.]
>
> IN CONSIDERATION of the sum of # ($#) [sic], receipt of which is hereby acknowledged, and in order to procure one or more payments for services, labor, material, or equipment provided in such construction, the undersigned does hereby waive, release and quit claim in favor of the owner of the real estate and the lender or lenders providing funds with which payment of construction costs is or is to be made . . . , all lien or

[2] According to the appellees, "Landwerlen may have had an interest in the finished construction of the home on this property [Red Oak] because [Winterwood], which is owned by Mr. Landwerlen, was making the loan for the purchasers of the home. However, Mr. Landwerlen did not have an ownership interest in Red Oak Lot 6." Appellant's App. p. 66-67.

> claim or right to lien upon the land or improvements above described which the undersigned may now have for services, labor, material, or equipment furnished in respect of such land or improvements to and including the date hereof. The undersigned warrants that he has not and will not assign any claim for payment nor any right to perfect a lien against the real estate, and that he has the right to execute this waiver and release of liens.
>
> ***
>
> Material, labor, services or equipment furnished: EXCAVATION, SEWER, WATER[.]

Appellant's App. p. 77. DGE allegedly continued to perform work at Tech Park following the execution of the Second Waiver. Grubb alleges that at some point after April 2003, Landwerlen acknowledged that more money was owed to DGE.

During early 2003, Scites began to experience severe financial difficulties. He contacted Grubb regarding "his outstanding account." Id. at 79. Grubb attested that at that time, Scites owed DGE approximately $35,000. Thus, on February 14, 2003, "as payment for the outstanding liability," Scites executed a promissory note in the amount of $108,000, which was secured by a mortgage on three parcels of real property. Id. Scites executed the document in the name of Better Builder of Southern Indiana, Inc., and signed as its President. At some point after Scites executed the Promissory Note, he and his "numerous business entities became insolvent and ultimately bankrupt." Id.

At some point, DGE demanded payment from Winterwood for the work that it had performed that was not covered by the contract price of $59,100 contained in the First Waiver. Winterwood refused. Thus, on June 18, 2003, DGE filed a notice of intention to hold a mechanic's lien on Tech Park in the amount of $56,696.40. On July 16, 2003, DGE

filed a complaint raising the following claims: breach of contract against Winterwood for $56,696.40, foreclosure on the mechanic's lien, breach of contract against Landwerlen for the Red Oak septic system in the amount of $6,500, and account stated against Landwerlen for the Red Oak septic system in the amount of $6,500. On September 8, 2003, among other things, Winterwood and Landwerlen filed a counterclaim against DGE, raising claims for malicious prosecution, abuse of process, set off, slander of title, and breach of waiver. On October 6, 2003, Winterwood and Landwerlen voluntarily dismissed the claims for malicious prosecution and abuse of process.

On July 28, 2004, Winterwood and Landwerlen filed a motion for partial summary judgment, seeking to have DGE's claims against them dismissed. They argued that the First and Second Waivers prevented DGE from succeeding on its complaint and that the Promissory Note will recompense DGE for any work it has completed and not been paid for. Following a hearing, the trial court granted the motion for partial summary judgment, issuing the following relevant conclusions:

> 4. As sophisticated participants in the areas of construction and development, DGE, Don Grubb, Landwerlen and Scites knew and understood the significance of the First and Second Waivers.
>
> ***
>
> 13. The First and Second Waivers are clear, unambiguous, complete in their terms and enforceable pursuant to their terms.
>
> 14. Since the terms of the two Waivers are clear, unambiguous and conclusive this Court will simply apply the Waiver provisions and will not construe the Waivers or look to extrinsic evidence.
>
> 15. The same applies to the Promissory Note which is also clear, unambiguous and conclusive.

16. The Court, therefore, concludes that the parties agreed that the [First] Waiver:

    a. established the contract price to be $59,100;

    b. acknowledged payment of $25,000;

    c. defined the remaining contract balance due to be $34,000;

    d. waived and released any and all legal or equitable defenses that might defeat the [First] Waiver;

    e. waived any right to record a Mechanic's Lien for any work not covered by the $59,100 contract price and agreed to waive any defense against the terms of the [First] Waiver; and

    f. warranted that the work, material or services used to the date of the [First W]aiver in the construction of the project are equal in value to the total of all payments received as shown on the Waiver.

17. That the parties agreed that the Second Waiver:

    a. is binding and enforceable as executed by Kenny Whitehead[, an authorized agent of DGE]; and,

    b. acknowledges the payment of $35,000 which was the remaining contract balance due DGE for work performed on Tech Park.

18. As a result of the two payments, the contract price was satisfied.

19. The Mechanic's Lien recorded by DGE is contrary to the terms and conditions of the waivers and is void and unenforceable.

20. That Promissory Note:

    a. Included full payment for the work performed by DGE on Red Oak Lot 6; and

    b. Included full payment for all monies owed by Larry Scites to DGE, including any remaining amount due on Tech Park.

Appellant's App. p. 159-61. On January 12, 2005, DGE filed a notice of appeal but permitted it to lapse after it realized that the partial summary judgment motion was not a final order. The trial court denied DGE's subsequent motion to certify the order for interlocutory appeal and set the remaining claims—the counterclaims—for trial. Following a bench trial, the trial court found in DGE's favor on the counterclaims on March 9, 2007. DGE now appeals the trial court's order granting partial summary judgment in favor of the appellees.

DISCUSSION AND DECISION

DGE contends that the First and Second Waivers are vague, missing necessary terms, and do not prevent it from seeking compensation for work that it performed that was not covered by those documents. DGE also argues that Landwerlen ordered the installation of the Red Oak septic system and that, consequently, Landwerlen is liable for the cost of that installation. Finally, DGE argues that the Promissory Note executed by Scites does not relieve the appellees of their liability for the work performed by DGE at their behest and to their benefit.

I. Standard of Review

As we consider DGE's contention that the trial court improperly granted partial summary judgment in the appellees' favor, we observe that summary judgment is appropriate only if the pleadings and evidence considered by the trial court show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Owens Corning Fiberglass Corp. v. Cobb, 754 N.E.2d 905, 909 (Ind. 2001); see also Ind. Trial Rule 56(C). On a motion for summary judgment, all doubts as to the existence of

material issues of fact must be resolved against the moving party. Owens Corning, 754 N.E.2d at 909. Additionally, all facts and reasonable inferences from those facts are construed in favor of the nonmoving party. Id. If there is any doubt as to what conclusion a jury could reach, then summary judgment is improper. Id.

An appellate court faces the same issues that were before the trial court and follows the same process. Id. at 908. The party appealing from a summary judgment decision has the burden of persuading the court that the grant or denial of summary judgment was erroneous. Id. When a trial court grants summary judgment, we carefully scrutinize that determination to ensure that a party was not improperly prevented from having his or her day in court. Id. Where, as here, the trial court enters specific findings of fact and conclusions of law, they do not bind us but merely aid our review by providing us with a statement of reasons for the trial court's actions. Crawford County Cmty. Sch. Corp. v. Enlow, 734 N.E.2d 685, 689 (Ind. Ct. App. 2000). We may affirm on any theory supported by the record. Id.

II. The Waivers

DGE argues that the First and Second Waivers are invalid because they are ambiguous, missing a material term, and based on a mutual mistake. DGE did not, however, raise these arguments to the trial court in response to the appellees' motion for partial summary judgment. Consequently, it has waived the arguments. See Poulard v. Lauth, 793 N.E.2d 1120, 1123 (Ind. Ct. App. 2003) (holding that a nonmovant who failed to raise an

argument in response to a summary judgment motion at trial had waived the argument on appeal).

Waiver notwithstanding, we note that when interpreting a contract, our paramount goal is to ascertain and effectuate the intent of the parties. Crawford County, 734 N.E.2d at 689. This requires that the contract be read as a whole and the language construed so as not to render any words, phrases, or terms ineffective or meaningless. Id. When the language of a contract is clear and unambiguous, the parties' intent is determined from the four corners of the instrument, giving the words contained therein their plain, usual, and ordinary meaning. Id. In such a situation, the terms are conclusive and we will neither construe the contract nor look at extrinsic evidence, instead merely applying the contractual provisions. Id.

An ambiguity is not established simply because the parties disagree as to the proper interpretation of the terms of the contract. Shorter v. Shorter, 851 N.E.2d 378, 383 (Ind. Ct. App. 2006). If, however, a portion of the contract is susceptible to more than one reasonable interpretation, then it is ambiguous. Id. If the document is ambiguous, we will consider all relevant evidence, including extrinsic evidence, to discern the meaning of the instrument's provisions. Id. Ultimately, our goals are to determine the parties' intent in crafting those provisions and to effectuate that intent. Id. at 383-84.

DGE argues that there was a mutual mistake at the time the parties entered into the contracts. To succeed in making such an argument, a party must establish that both parties shared a common assumption about a vital fact, upon which they based their bargain, and that assumption was false. Jackson v. Blanchard, 601 N.E.2d 411, 416 (Ind. Ct. App. 1992).

Here, the only evidence to which DGE directs our attention in support of this argument is Grubb's testimony that neither he nor the appellees intended for the contract price included in the First Waiver to represent the total contract price or for the Second Waiver to be a full and final release. Appellant's App. p. 129-30. Initially, we note that Grubb has no personal knowledge of the appellees' intentions in entering into these agreements. Moreover, he has not alleged that there was a mutual mistake as to a vital fact. Consequently, he has failed to establish a mutual mistake rendering the Waivers unenforceable.

Turning to the First Waiver, we observe that it contains several significant declarations. It defines the contract price as $59,100, acknowledges DGE's receipt of the payment of $25,000, and delineates the balance due on the contract as $34,100. Id. at 75-76. DGE waived and released any and all liens or rights to liens as to the Tech Park project to the extent of the total payments received—$25,000. Furthermore, DGE waived any and all legal or equitable defenses that might defeat the First Waiver and waived any right to lien "for work, material or services not covered by the contract price." Id. Finally, DGE warranted that the work, material, and services used to the date of the First Waiver are equal in value to the total of all payments received—$25,000. We see nothing in the First Waiver that is ambiguous, nor is the document missing a material term. Thus, we decline DGE's invitation to consider extrinsic evidence supporting his argument that the parties executed two other contracts for DGE's work on the Tech Park project.

As for the Second Waiver, we acknowledge that it is missing a price term. The document states that DGE executed it in consideration for an unspecified sum. To clarify

this ambiguity, therefore, we turn to extrinsic evidence, which establishes that on the date the parties executed the Second Waiver, DGE received a payment of $35,000—slightly more than the balance due on the contract price established by the First Waiver. Id. at 5-6, 73. Aside from the price term, the document is unambiguous. It provides that DGE waived all liens or rights to lien upon the project that DGE "may now have for services, labor, material, or equipment furnished in respect of such land or improvements to and including the date hereof." Id. at 77. Thus, DGE unambiguously waived its right to a mechanic's lien for any work, services, or material provided prior to the date on which the parties executed the document—February 7, 2003. Under these circumstances, we find that DGE unambiguously received the full contract price and, in exchange, waived its right to a mechanic's lien for any other work it may have done on Tech Park prior to February 7, 2003.

If there was evidence in the record creating a genuine issue of material fact as to whether DGE continued to perform time and materials work on Tech Park after February 7, 2003, DGE would certainly be entitled to be compensated for those services. The only designated evidence in the record regarding such work is found in Grubb's interrogatory answers. During Grubb's deposition, however, he attested that as of February 14, 2003, there was no time and materials debt remaining on Tech Park. Grubb also attested that the time and materials work is irrelevant to this lawsuit because "[t]he only thing we've got in dispute is the contract." Id. at 120. Inasmuch as a genuine issue of material fact cannot be created through a witness's own inconsistent testimony, Miller v. Martig, 754 N.E.2d 41, 46 (Ind. Ct. App. 2001), we cannot conclude that there is a genuine issue of material fact regarding

DGE's services on Tech Park after February 7, 2003, such that summary judgment in the appellees' favor was improper.

III. Red Oak and the Promissory Note

DGE argues that it is entitled to $6,500 for the septic system it installed on the Red Oak property. Grubb has consistently maintained that it was Landwerlen, not Scites, who hired him to complete that project:

> Q. Was [the promissory note] meant to cover all of the indebtedness. . .
> A. Yes.
> Q. . . . with Mr. Scites?
> A. Yes.
>
> ***
>
> Q. . . . if you, if Mr. Scites owed you for the septic system for Red Oak, Lot 6 . . .
> A. That didn't include that, because I had never done any, I never done no work for Larry [Scites] down there.
>
> ***
>
> Q. If . . . You dispute who you did the work for?
> A. Right.
> Q. Mr. Landwerlen says that you did it for Mr. Scites. You say you did it for Mr. Landwerlen?
> A. Okay.
>
> ***
>
> Q. But if, if you had done the work for Mr. Scites would the promissory note, would it have included payment for Red Oak 6?
> A. No. No, because that wasn't billed to Scites. That was billed to Jim [Landwerlen].

Appellant's App. p. 132. In response, the appellees argue that DGE has waived this argument because it did not raise it before the trial court. To the contrary, however, DGE specifically argued that the Promissory Note did not include the Red Oak project and it designated the above deposition testimony in support of its argument. We find that this was sufficient to warrant consideration of this argument on appeal. Aside from waiver, the

appellees simply point out that neither Landwerlen nor Winterwood had an ownership interest in Red Oak. They do not, however, dispute Grubb's central contention that Landwerlen hired DGE to do the job. At the least, therefore, there is a genuine issue of material fact regarding the identity of the person who hired DGE to install the septic system on the Red Oak property.

Notwithstanding that unanswered question, the appellees insist that the existence of the Promissory Note means that they cannot be held liable for the Red Oak project. Essentially, they argue that Scites has accepted liability for this project and that if DGE were permitted to recover from the appellees, it could potentially see a windfall double recovery—from the appellees and from Scites pursuant to the Promissory Note. We cannot agree. If a factfinder concludes that Landwerlen contracted with DGE to perform this work, then Landwerlen and/or Winterwood are liable for the cost of that work regardless of the role played or responsibility accepted by Scites. See Cline v. Rodabaugh, 97 Ind. App. 258, 179 N.E. 6, 12 (1931) (holding that "an obligation alleged to have been entered into by two or more persons and a third persons is presumed to be joint"). In no way does this conclusion entitle DGE to a double recovery; to the contrary, it is entitled to the value of its services and no more. Thus, we do not find that the existence of the Promissory Note in any way resolves the issue of the appellees' liability to DGE for the installation of the Red Oak septic system. We remand, therefore, for trial to determine whether Landwerlen—individually or on behalf of Winterwood—played a part in hiring DGE to install the Red Oak septic system such that Landwerlen and/or Winterwood is liable for DGE's services.

The judgment of the trial court is affirmed in part, reversed in part, and remanded for trial regarding the installation of the Red Oak septic system.

SHARPNACK, J., and RILEY, J., concur.