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APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2022-10T1

RATIONAL CONTRACTING, INC.,
d/b/a RATIONAL ROOFING,

Plaintiff-Respondent,

v.

DISCOVERY PROPERTIES 78, LLC,
ANTHONY LAM, and LAM DEVELOPMENT,
LLC,

Defendants-Appellants,

and

BOILING SPRINGS SAVINGS
BANK, EXTECH BUILDING MATERIALS
CORP., f/k/a EXTECH INDUSTRIES,
INC., P.J. DEGRACIA CONTRACTING,
INC., FEDERAL, INC., t/a FEDERAL
IRONWORKS,

Defendants.

Submitted February 6, 2012 - Decided February 28, 2012

Before Judges Parrillo, Skillman and Hoffman.

On appeal from the Superior Court of New Jersey, Law Division, Hudson County, Docket No. L-3556-09.

Piekarsky & Associates, LLC, attorneys for appellants (Domenica D. Hart, on the brief; Scott B. Piekarsky, of counsel and on the brief).

Venino & Venino, attorneys for respondent (Joanne Venino and Thomas M. Venino, Jr., on the brief).

PER CURIAM

In this breach of contract action, defendants Discovery Properties 78, LLC, Anthony Lam, and Lam Development, LLC, (defendants), appeal from entry of judgment, following a bench trial, awarding plaintiff Rational Contracting, Inc. (Rational) $63,000 for services rendered and $18,573.35 in attorney's fees. We affirm.

Collectively, defendants own property at 76-78 Palisades Avenue in Jersey City and operated as the general contractor on development of this site. Rational installs roofs and siding on buildings. Henry Bilge is the president and owner of Rational as well as Allied Metals/Allied Specialty Group, Inc. (Allied), an affiliated company.

Sometime prior to April 2007, Anthony Lam, principal of the defendant entities, contacted Allied to provide the material and installation of metal façade paneling for the project. Allied provided an estimate for the small amount of metal roofing to be done at the project, in the amount of $10,704.50, which Lam accepted. Allied also prepared an estimate for the fabrication and installation of the metal façade paneling in the amount of $145,890. That estimate was eventually rejected as too high.

In the meantime, Lam instructed Allied to commence working on the standing metal roofing, but to prepare shop drawings of

the proposed façade panels for approval by defendants' architects, Lindemon Winckelmann Deupree Martin Russell & Associates, P.C. (Lindemon). Lindemon's architect on the project, Ronald Russell, who had specified a certain type system, rejected Allied's first submission with detailed comments and when resubmitted, rejected the revised version as well.

Two days later, on August 1, 2007, Lam spoke with Bilge, expressing concern over the cost of Allied's proposal. Bilge offered, as an alternative, that the work be done by Allied's sister company, Rational, at a lesser price because no shop drawings would be involved, the attendant engineering costs would be eliminated, and material from a different manufacturer would be used.[1] Lam agreed and that day signed a contract with Rational for the roof and paneling work in the amount of $110,000 — $45,000 less than the price quoted by Allied.

The contract called for three installation payments: "40% deposit[,] 35% at the mid[]way point, balance to be paid upon completion." On August 15, 2007, Lam paid Bilge $30,000. Rational then immediately began work and continued working on

[1] According to Bilge, Rational had the material in stock and would not be using Tyvek for the metal façade as it was "not 100% necessary." Lam, however, disputed the fact that shop drawings would not be used or his architect not consulted.

the project for four to six weeks until about September 10, 2007. During this time, James Lindemon, principal of the architectural firm, stopped by the project site once a week and Russell, the project architect, stopped by the site two or three times each week. Moreover, Lindemon performed scheduled inspections of the project approximately once every three weeks.

As of September 10, 2007, when Rational ceased working, the project was not yet fully finished, although the metal roof was complete and the installation of the panels was 80% done. By then, Rational had called upon defendants for the payment that was due at the midway point. Responding to the September 10 invoice, on September 13, 2007, Lam wrote that "[w]e are working with the bank diligently regarding the funding of the work you completed for the project. We hope to resolve this issue with them shortly and make a payment available to you soon. Sorry for the delay and thank you for your patience." Despite this assurance, Rational refused to continue work on the project until the second installment was paid.

Defendants next communicated with Rational on September 28, 2007 when they forwarded a September 18, 2007 letter from their architect detailing deficiencies in Rational's paneling work, which the architect estimated was 75% completed. In this correspondence, Lindemon stated that the panels were not

installed in accordance with the architect's comments on the shop drawings and specifically found fault with the lack of "weather/moisture protection beneath the panels." Rational responded in writing, stating:

> [w]e were never required to perform any installation and/or repairs of exterior sheathing (Dens Glass or other), exterior weather barrier (Tyvek or other) and all door/window flashing. Any repairs and/or changes to the exterior sheathing, exterior weather barrier, and door/window flashing are the responsibility of the company that installed those systems. . . .
>
> . . . [W]e encountered many problems due to improper construction of the wall and brick façade, and installation of the windows. . . . This required addition[al] work in the engineering and fabrication of the Aluminum Composite Panel System. This will result in additional charges.
>
> The contract . . . is now void, due to late payments. To proceed with this project, we require the outstanding debt of $50,000.00 to be paid in full, with interest. . . .

While the parties communicated thereafter, Rational never did any more work on the project since defendants did not make any further payments as requested by Rational required under the contract. Both parties agreed that by the time Rational ceased work, the project was 75% to 80% completed. Up until then, neither defendants nor their architect ever complained about the work being done by Rational, even though they were present on

site several times a week. The first complaint voiced was the September 18, 2007 letter from the architect, which Rational received on September 28.

When Rational ceased work on the project, waterproofing was not yet completed as this was, according to Bilge, the last stage of the project, as was removal of the plastic sealer, usually taken off at the very end. As to the latter, Rational informed defendants that

> when the outside temperature reaches 70-75 degrees, this plastic will adhere to the panels more tightly because of the heat. This will make the plastic much more difficult to remove. . . .
>
> If we receive payment in advance, we will take off the plastic from the panels. Otherwise, you should immediately arrange to have that done.

According to Lindemon, due to the unfinished condition of the project, there were water infiltration problems which required the floors to be replaced. According to Lam, defendants had to replace the sheet rock and "finish the carpentry and the door, trim" inside the building, and completely remove the outside panels because the plastic was left on. Lindemon testified that there was no value to the building without the waterproofing. Lam estimated the repair cost to be $145,000.

After filing a construction lien against defendants for $50,000, Rational filed a complaint in the Chancery Division to foreclose on the construction lien and recover monies due under the construction contract as well as attorney's fees. Defendants answered and counterclaimed, and when bonds were substituted for security for the lien, the matter was transferred to the Law Division, where a two-day bench trial was conducted. At the close of evidence, and crediting Rational's proofs, the court entered judgment in favor of Rational and against the Discovery defendants in the amount of $63,000, plus attorney's fees of $18,573.35. As to the defendants' liability, the judge concluded:

> From my review of the testimony and the exhibits in this matter it is clear to me that the plaintiff and the defendant entered into this contract for the roofing and the panel work fully aware that they were proceeding without approved shop drawings. The plaintiff testified that the defendant wanted to do the job as cheaply as possible. The plaintiff attempted to accommodate that request and thus the contract[,] P7, came in at a price of $110,000 for the paneling and the roofing work, representing a reduction of $45,890.
>
> As the defendant testified either he or someone from his company was on site everyday that the plaintiff performed his work. Not one complaint was made during that time as to the progress of the work or the quality of the workmanship. Even after the plaintiff sent the demand for the second payment, the defendant's response was that

> he was working with the bank, apologized for the delay, and expected payment promptly.
>
> Here again no issue was raised as to the plaintiff's entitlement to payment. Pursuant to the contract more than half of the work was done and payment was due. Five days later, after the defendant's letter to the plaintiff addressing the expected payment, the defendant received a letter from the architect detailing his observations of the 75% completed panel project. This is the very architect who made two to three onsite inspections per week, along with Mr. Lindem[o]n's one time per week inspections.
>
> It is not credible that the plaintiff's work proceeded for five to six weeks, was 75% complete and the defendant's architect suddenly discovered that it is not in conformity with the plans and has proceeded without approved shop drawings. What happened here is that the defendant knowingly cut corners and did not cooperate with the architect in ensuring that the plans were followed.
>
> I find that the plaintiff performed the fabrication and installation work as having been contracted for in P7.

In calculating Rational's damages at $63,000, the judge reasoned:

> So of the $100,000 for the panels, the contract price for the panels, $65,000 was for fabrication all of which was completed, and $35,000 was for installation. And the plaintiff testified that 80% of the installation was done. So he was seeking $65,000 for the fabrication; $28,000 for the installation; and $10,000 for the roof which was complete coming to a total of $103,000

> less what the defendant had previously paid, $30,000, or $73,000 plus fees and costs.
>
> . . . .
>
> I am accordingly awarding the plaintiff $73,000 less $10,000 for the unfinished caulking and unfinished waterproofing, and resulting water damage. The $10,000 is for whatever damage resulted from the water infiltration. And I don't find that all of the damage is due to that.

Regarding attorney's fees, the judge ruled:

> Finally, P7 the contract does provide, I find, that the client is responsible for costs and fees incurred in the collection of outstanding balances. This case clearly falls into that category. So I will award the plaintiff the cost of suit plus a reasonable attorney's fees which I'll fix upon my review of the plaintiff's attorney's certification of services as to which defendant's attorney will have an opportunity to respond.

On appeal, defendants raise the following issues:

> I. THE TRIAL COURT ERRED IN AWARDING PLAINTIFF $63,000 AS PAYMENT FOR SERVICES AND IN DENYING [DEFENDANTS'] COUNTERCLAIM FOR BREACH OF CONTRACT AND BREACH OF WARR[A]NTY.
>
> A. THE TRIAL COURT OVERLOOKED THE SHORTCOMINGS IN PLAINTIFF'S WORK, DECIDING THAT DEFENDANT WAS NOT JUSTIFIED IN STOPPING PAYMENT.
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> B. THE TRIAL COURT ERRED IN DENYING THE COUNTERCLAIM.
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> C. ASSUMING THE TRIAL COURT WAS CORRECT IN AWARDING DAMAGES, THE

TRIAL COURT ERRED IN THE CALCULATION OF DAMAGES.

II. THE TRIAL COURT ERRED IN AWARDING ATTORNEY'S FEES TO PLAINTIFF UNDER THE CONTRACT.

A. THE SUBJECT CONTRACT PROVISION DOES NOT PROVIDE FOR THE COLLECTION OF COST AND FEES BY RATIONAL.

B. THE SUBJECT CONTRACT PROVISION IS AMBIGUOUS AND MUST BE CONSTRUED AGAINST THE DRAFTER.

C. THE SUBJECT CONTRACT PROVISION IS AGAINST THE NEW JERSEY PUBLIC POLICY DISFAVORING THE SHIFTING OF ATTORNEY['S] FEES.

We find no merit to these contentions.

I

At the outset, we note that a trial court's findings will not be disturbed when they are supported by "adequate, substantial and credible evidence." Rova Farms Resort, Inc. v. Investors Ins. Co., 65 N.J. 474, 484 (1974). We will only disturb the findings if they are so wholly unsupportable that it will result in a denial of justice. Id. at 483-84. Deference to the trial court is especially appropriate when the evidence is mostly testimonial and involves questions of credibility because a trial judge has the opportunity to observe characteristics of the witnesses not apparent in the transcript. Cesare v. Cesare, 154 N.J. 394, 412 (1998).

There is substantial credible evidence to support the trial court's finding that by the time Rational stopped work, the project was 80% complete; Rational had performed the work contracted for; despite this, defendants had not paid Rational the second installment required under the contract; and neither defendants nor their architects voiced any concerns over the quality or progress of Rational's work. To be sure, "[w]hen a party contracts to build a building . . . the law reads into the contract a stipulation that the building shall be erected in a reasonably good and workmanlike manner." Aronsohn v. Mandara, 98 N.J. 92, 98 (1984) (quotations omitted). However, there is no credible evidence that Rational performed in an unworkmanlike manner. Indeed, the judge specifically found Lam's testimony that Rational was required to follow the shop drawings and that the "shop drawings were the most important factor to him to be unworthy of belief." So too, the court found "the timing of defendant[s]' objection . . . very suspect[,]" given that "[Rational's] work proceeded for five to six weeks . . . and the defendant[s]' architect suddenly discovered that it is not in conformity with the plans and . . . proceeded without approved shop drawings."

Having found that Rational performed in accordance with the contract and that defendants breached their obligation to pay

thereunder, the judge concluded that Rational was justified in abandoning the project. We agree. "While . . . not . . . every delay in payment will justify a contractor in terminating performance under an installment contract," when "there was a substantial underpayment for a prolonged period of time[,]" a party is "justified in discontinuing performance." Zulla Steel, Inc. v. A & M Gregos, Inc., 174 N.J. Super. 124, 131-32 (App. Div. 1980). In Zulla, where the contract provided for periodic installment payments of "90% of the value of the work completed . . . by . . . the fifteenth day of each succeeding month[,]" we held that "plaintiff's covenant to perform was dependent on defendant's performance of its covenant to pay for approved work in accordance with the agreement and that defendant's breach of contract justified plaintiff in terminating performance." Id. at 128, 132.

Similarly here, we find the covenants to be dependent. Unquestionably, defendants' breach was material in that $50,000 of the $110,000 contract price was long overdue at the time Rational stopped work, and remained unpaid thereafter. Moreover, defendants' failure to pay was not justified by any alleged deficiencies or shortcomings in Rational's performance. As noted, the trial judge found that defendants' claims that Rational improperly performed was neither credible nor

substantiated, and we defer to that finding. Rova Farms Resort, supra, 65 N.J. at 483-84. Under the circumstances, we find no warrant to interfere with the trial judge's determination that defendants breached the contract, and consequently, with his dismissal of defendants' counterclaim.

II

Neither do we find error in the court's calculation of damages, which was based on the percentage of the contract work completed as to both fabrication and installation, while taking into account the lack of waterproofing, resulting damage, and the payments already made by defendants. Specifically, of the $110,000 contract price, the court credited Rational's testimony that fabrication represented 65% of the work, all of which was completed and therefore Rational was owed $65,000 for this component of the project. It appears undisputed that $10,000 was attributed to the metal roofing and properly due Rational since this work was completed as well. Therefore, the remaining 35%, worth $35,000, was allocated to installation. However, since only 80% of this work was completed, the court awarded Rational $28,000 of the $35,000 otherwise due, totaling, for all three components, $103,000. From this amount, the court subtracted the $30,000 deposit made by defendants and another

$10,000 due to Rational's failure to caulk and waterproof the panels, for an ultimate award to Rational of $63,000.

When dealing with compensatory damages, the goal "is to put the injured party in as good a position as he would have been in if performance were rendered as promised." St. Louis, L.L.C. v. Final Touch Glass & Mirror, Inc., 386 N.J. Super. 177, 188 (App. Div. 2006). And when calculating compensatory damages, it is not necessary to follow specific rules as they are "'subordinate to this broad purpose'" and would "'defeat[] a common sense solution.'" Ibid. (quoting 525 Main St. Corp. v. Eagle Roofing Co., 34 N.J. 251, 254 (1961)). We find the court's approach entirely reasonable. We discern no error in breaking down the overall contract price into its various opponents, and ascribing a fair cost for the work performed on each one, less, of course, the cost of any work not performed as well as any damages as a result of incomplete performance.

III

Defendants argue that the contract entered into with Rational did not provide for the collection of costs and fees incurred by Rational but rather by Allied, a distinct, but related, company. Rational counters that the reference to Allied instead of Rational was a mere clerical error. We agree with Rational.

"Although New Jersey generally disfavors the shifting of attorneys' fees, N. Bergen Rex Transp., Inc. v. Trailer Leasing Co., 158 N.J. 561, 569 . . . (1999), a prevailing party can recover those fees if they are expressly provided for by statute, court rule, or contract." Packard-Bamberger & Co. v. Collier, 167 N.J. 427, 440 (2001). "When the fee-shifting is controlled by a contractual provision, the provision should be strictly construed in light of our general policy disfavoring the award of attorneys' fees." Litton Indus., Inc. v. IMO Indus., Inc., 200 N.J. 372, 385 (2009). However, "[a] basic principle of contract interpretation is to read the document as a whole in a fair and common sense manner." Hardy ex rel. Dowdell v. Abdul-Matin, 198 N.J. 95, 103 (2009). Further, the "fee determinations by trial courts will be disturbed only on the rarest of occasions, and then only because of a clear abuse of discretion." Rendine v. Pantzer, 141 N.J. 292, 317 (1995). We discern no abuse of discretion here.

Before the contract at issue was executed, a similar proposal was sent to defendants from Allied on May 2, 2007 containing the identical provisions, "[t]he client is responsible for all costs and fees incurred by Allied [S]pec[i]alty [G]roup[,] Inc. in the collection of outstanding balances." Thus, not only were defendants familiar with the

attorney fee provision, which never appeared to be an issue during negotiations or even at trial for that matter, it is also entirely reasonable to assume that when Rational was later substituted for Allied, the inclusion of "Allied" in the newly negotiated contract was mistaken. Such an assumption does not detract from the parties' otherwise clearly expressed intention to compensate the contractor on the project for any costs incurred in the collection of outstanding balances. Indeed, when reading the contract in its entirety, it defies reason and common sense to insist that defendants intended Allied to benefit from the attorney fee provision since there existed no contract between the two.

"'Where fairness and justice require, even though the parties to a contract have not expressed an intention in specific language, the courts may impose a constructive condition to accomplish such a result when it is apparent that it is necessarily involved in the contractual relationship.'" Onderdonk v. Presbyterian Homes of N.J., 85 N.J. 171, 182 (1981) (quoting Palisades Prop., Inc. v. Brunetti, 44 N.J. 117, 130 (1965)). Moreover,

> [e]vidence of the circumstances is always admissible in aid of the interpretation of an integrated agreement. This is so even when the contract on its face is free from ambiguity. The polestar of construction is the intention of the parties to the contract

> as revealed by the language used, taken as an entirety; and, in the quest for the intention, the situation of the parties, the attendant circumstances, and the objects they were thereby striving to attain are necessarily to be regarded.
>
> [Atl. N. Airlines, Inc. v. Schwimmer, 12 N.J. 293, 301 (1953).]

The circumstances surrounding the contract in issue make abundantly clear that the naming of "Allied" was a mere technical error and that Rational was the intended beneficiary of the attorney fee provision. Accordingly, we find no abuse of discretion in either the award of counsel fees or the amount fixed.

Affirmed.