

Commonwealth Of Kentucky

Court Of Appeals

NO. 2001-CA-001694-MR

AND

NO. 2001-CA-001811-MR

THE LOUISVILLE AND JEFFERSON COUNTY
METROPOLITAN SEWER DISTRICT

APPELLANT/CROSS-APPELLEE

APPEAL AND CROSS-APPEAL FROM JEFFERSON CIRCUIT COURT
v. HONORABLE LISABETH HUGHES ABRAMSON, JUDGE
ACTION NO. 99-CI-005043

3-D ENTERPRISES CONTRACTING
CORPORATION

APPELLEE/CROSS-APPELLANT

OPINION
REVERSING AND REMANDING
** ** * * * * *

BEFORE: COMBS, and McANULTY, Judges; and JOHN D. MILLER, Special Judge.¹

McANULTY, JUDGE: The Louisville and Jefferson County Metropolitan Sewer District (MSD) appeals that portion of the Jefferson Circuit Court's judgment which granted partial summary judgment to 3-D Enterprises Contracting Corporation (3-D) and

¹ Senior Status Judge John D. Miller sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution.

awarded judgment against MSD in the amount of \$184,214.28. 3-D cross-appeals from the portion of the judgment which denied it prejudgment interest. We reverse and remand.

The procedural and factual history of the claims resulting in this appeal is quite complex. However, the undisputed facts are as follows.

In June of 1992, MSD contracted with 3-D for the construction of two bioroughing towers, in accordance with specifications provided by MSD's consulting engineer, Camp, Dresser & McKee, Inc. (CDM). The towers consisted of two 30' concrete cylinders surrounding eleven layers of bioroughing media. The contract with 3-D expressly provided that the media supplier was required to furnish an extended warranty for a period of four years after expiration of the one-year general contract warranty. 3-D subcontracted the purchase and installation of the media to Javier Steel Corporation (Javier), a minority business enterprise. However, this contract was a direct pass-through to American Surfpac (Surfpac), the supplier of the bioroughing media.

In March, 1994, CDM advised 3-D that Surfpac was experiencing financial difficulty. At issue, was Surfpac's ability to pay its own suppliers, as well as its ability to honor the extended media warranty. As a result, 3-D withheld \$184,214.28 from the subcontract balance. Surfpac then filed a mechanic's lien with MSD against funds due to 3-D, pursuant to

Kentucky Revised Statutes (KRS) 376.210, et seq., the mechanic's lien statutes. On May 26, 1994, 3-D filed a protest in accordance with KRS 376.250(2). Pursuant to the statute, Surfpac then had 30 days from the date of 3-D's protest to institute suit for the enforcement of the lien, and to serve a copy of the complaint on MSD. Surfpac filed its claim on June 27, 1994, and MSD was served on June 28, 1994, (the Surfpac action).

In response to the lien action, 3-D filed a counterclaim against Surfpac, and a cross-claim against MSD. In the cross-claim, 3-D was seeking a declaration releasing its obligation for the warranty. While MSD filed answers to these claims, it made no additional claims on its own behalf.

On December 22, 1995, while the Surfpac action was pending, the interior of one of the bioroughing towers collapsed, destroying most of the media. MSD's investigation into the collapse included pursuit of discovery in the Surfpac action, in an attempt to discover whether Surfpac would be able to honor the media warranty. In August, 1996, with the Surfpac action still pending, MSD filed its own action against 3-D and CDM for the collapse of the tower (the MSD action). 3-D filed a counterclaim against MSD to recover contract balances.

Meanwhile, MSD began negotiations with Surfpac. Those negotiations resulted in a Mutual Release and Settlement Agreement (Surfpac settlement), on December 23, 1996. In the Surfpac settlement, Surfpac surrendered any remaining claims it

had to the liened funds, in exchange for MSD's release of any warranty claims against Surfpac. Neither Javier nor 3-D was a party to these negotiations.

On June 26, 1997, the trial court sua sponte dismissed the Surfpac action, without prejudice, for failure of the parties to prosecute. In accordance with KRS 376.250(4), MSD had continued to retain the \$184,214.28 liened by Surfpac, pending the outcome of the Surfpac action. MSD continued to retain the funds even after the Surfpac action was dismissed.

The parties to the MSD action reached settlement in April, 1999. The parties entered into a Release, Covenant Not to Sue, and Global Settlement Agreement (the MSD settlement). As part of the MSD settlement, MSD released all claims against 3-D regarding the construction of the bioroughing towers. However, as part of the settlement, 3-D retained its counterclaim against MSD for recovery of its contract balances. As a result, MSD's claims against 3-D were dismissed with prejudice, and 3-D's counterclaim was dismissed without prejudice.

On August 30, 1999, 3-D brought the action which is the subject of this appeal, in an attempt to collect the balance it alleged MSD still owed on the contract. Included in the balance of \$250,445.74 that 3-D claimed MSD still owed on the contract was the \$184,214.28 originally liened by Surfpac.

3-D filed a motion for partial summary judgment on July 19, 2000, claiming that the mechanic's lien statute controlled

the disposition of the \$184,214.28 and, pursuant to the statute, it was entitled to the funds. On October 6, 2000, MSD filed a response and a cross-motion for summary judgment, claiming that 3-D had been paid all funds due under the contract, and that the \$184,214.28 represented monies properly withheld for 3-D's failure to provide the five-year warranty on the bioroughing media as a result of the insolvency of Surfpac. MSD also argued that to award the monies to 3-D would result in a double recovery to 3-D, in that 3-D was not obligated to pay the money to Surfpac or Javier.

On July 2, 2001, the trial court rendered an Opinion and Order granting partial summary judgment to 3-D and denying MSD's motion. The trial court specifically found that KRS 376.250 et seq., controlled and that pursuant to KRS 376.250(4), once the Surfpac lien was released, the funds were due 3-D and there was no other allowable disposition under the statute other than for the funds to be paid to 3-D.

On July 11, 2001, 3-D filed a motion to enter a final and appealable judgment and to award 3-D prejudgment interest. On July 31, 2001, the court signed the order tendered by 3-D, granting partial summary judgment to 3-D but striking the portion awarding prejudgment interest. MSD filed a Notice of Appeal on August 3, 2001, and 3-D filed its Notice of Cross-Appeal on August 16, 2001.

Pursuant to Kentucky Rules of Civil Procedure (CR) 56.03, summary judgment is proper "if the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." The standard of review of a trial court's granting of summary judgment is "whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law." Scifres v. Kraft, Ky. App., 916 S.W.2d 779, 781 (1996). Where the relevant facts are undisputed and the dispositive issue becomes the legal effect of those facts, our review is de novo. Western Ky. Coca-Cola Bottling Co., Inc. v. Revenue Cabinet, Ky. App., 80 S.W.3d 787, 790 (2001). In the case sub judice, both parties admit that there is no material fact to be resolved. Both assert that they are entitled to judgment as a matter of law.

MSD argues on appeal that the trial court erred in its determination that KRS 376.250 et seq. controlled the disposition of the \$184,214.28. MSD argues that the case does not arise under the mechanic's lien statute and that by focusing solely on the statute, the court failed to address its contract claims. MSD claims that the funds awarded are not due under the contract because they have been deducted from 3-D's contract by proper change order and that the \$184,214.28 represents the value of the

media warranty that 3-D failed to procure and pay for as part of its contractual obligations.

3-D argues that the disposition of the funds must be determined under the mechanic's lien statutes because the funds were withheld pursuant to the statute, and the statute provides only for the funds to be released to the lien claimant or the contractor. 3-D argues in the alternative that MSD's claim to the funds is barred by waiver, release and res judicata.

3-D relies on KRS 376.250(4), which states, in pertinent part as follows:

If suit is not instituted by the lien claimant for the enforcement of the lien and summons in the suit is not served on the public authority or its chairman within thirty (30) days after the written notice of the protest is mailed to the claimant, then the lien shall automatically be released and the funds withheld pursuant to the filing of the lien statement shall be released and promptly paid to the contractor. If suit is filed and summons served within the time provided, the payment of the funds shall be withheld until ordered to be released or paid over by an order or judgment of the court, and then paid as directed by the order or judgment.

While it is true that the funds were withheld pursuant to the statute, and the statute would seem to require that the funds be paid to 3-D upon the release of the Surfpac lien, the question that the trial court failed to address was whether any funds were still due 3-D upon release of the lien, or whether, at the time the lien was released, MSD rightfully withheld the funds for 3-D's failure to procure or pay for a valuable warranty as

required by the contract. By focusing only on the mechanic's lien statute, the court failed to address the ultimate issue of whether 3-D is due any funds at all under the contract with MSD. The further question unanswered by the trial court was whether the MSD and Surfpac actions preclude MSD from making a claim on the funds.

The undisputed evidence shows that, as part of the contract with MSD, 3-D agreed to provide an extended warranty from Surfpac. 3-D argued to the trial court that any inability of Surfpac to satisfy the extended warranty did not constitute a failure on the part of 3-D to fulfill its contractual obligations. 3-D cites Thorpe v. Hammons Sheet Metal Co., 991 S.W.2d 157 (Mo. App. 1999), for the premise that generally a contractor is not liable on the express warranty of the manufacturer of goods installed by the contractor unless said contractor expressly adopts said warranty. However, this argument misses the point. MSD is not claiming that 3-D breached the contract because they breached the warranty. 3-D breached the contract by failing to provide a warranty with value. The analogy is not, as 3-D cites, that of a homebuilder being held liable for the financial wherewithal of Maytag or Westinghouse for warranty obligations extending past the builder's general warranty. The analogy is more one of the homebuilder's liability for agreeing to install a dishwasher and refrigerator, only installing a dishwasher, but expecting to get paid for both.

By providing a worthless warranty, 3-D failed to perform under the contract terms, the same as if Surfpac had only provided a portion of the media. 3-D cannot argue that had Surfpac only provided a portion of the media, that MSD would have been required to pay 3-D for all of the media. Donald Meyers, the Vice President for Operations for 3-D, testified that 3-D had been paid in full for the media and that payment included payment for the warranty. When 3-D failed to provide the warranty, it no longer was due the amount representing the value of the warranty. MSD could then, by proper change order, deduct that amount from funds due 3-D.

Because the trial court never reached the contract claims of MSD, it also failed to determine whether MSD's claims were barred by waiver, release or res judicata. 3-D argues that MSD waived its breach of contract claims by failing to file a cross-claim in the Surfpac action. We find this argument unpersuasive. When Surfpac instituted the lien action, 3-D filed a counterclaim against Surfpac, claiming that it was entitled to the funds because Surfpac would not be able to honor the extended warranty. 3-D also filed a cross-claim against MSD in the Surfpac action, seeking to be released from its warranty obligations. However, when Surfpac abandoned its claim on the liened funds, pursuant to the Surfpac settlement, 3-D failed to pursue its cross-claim against MSD in that same action. 3-D did not request dismissal under CR 41.02, which would have resulted

in an adjudication on the merits. Instead, the court, sua sponte, dismissed the action without prejudice for failure of the parties to prosecute. We cannot say that this operated as a waiver of the claim on MSD's part, any more than it did on 3-D's.

3-D next argues that MSD lost any right to assert its claim on May 21, 1999, when it executed the MSD settlement. The MSD action included claims for breach of warranty and breach of contract claims by MSD against 3-D. 3-D filed a counterclaim against MSD for contract balances it alleged were still due under the contract. As part of the settlement, 3-D specifically reserved its claim for recovery of contract balances. However, a careful reading of the MSD settlement does not support 3-D's claim that MSD's claims are barred by either waiver, release or res judicata. The "Obligations of Settling Defendants" portion of the settlement states,

. . . that MSD and CDM and 3-D agree that to the extent contract payments which may be due CDM and 3-D for acceptable work performed are unpaid, these contract claims will be resolved in the normal course. MSD agrees that it will not assert as a basis for denying payment of contract claims by CDM and 3-D any of the alleged deficiencies in the design, construction, or construction contract administration for which it sought damages in the Lawsuit, which matters are hereby resolved by accord and satisfaction. (Emphasis added.)

MSD is not denying payment of the contract claims by 3-D for any deficiency in the design, construction, or construction administration for which it sought damages, but is simply denying

payment for something that was never provided by 3-D. If 3-D made a contract claim that MSD owed it for providing 100 widgets when it only provided 95, MSD would not be required under the settlement agreement to pay for 100 widgets. The confusion seems to be based on the fact that what 3-D failed to provide was a warranty instead of a widget. As previously stated, providing a worthless warranty to MSD from Surfpac, was the same as providing no warranty at all.

Having determined that 3-D was not due funds representing the value of the warranty, the only question that remains is whether the amount withheld by MSD represents that value. The undisputed fact is that 3-D withheld \$184,214.28 from its contract with Surfpac, based upon 3-D's claim that Surfpac would be unable to honor its warranty. There is no question but that all of the media was delivered. 3-D admits that it was not required to pay any of Surfpac's suppliers. 3-D deducted the amount from the contract with Javier and Javier admitted that it was paid one-hundred percent of what it was due under the contract with 3-D. The change order prepared by MSD was specifically based on 3-D's claims in the Surfpac action that it was entitled to withhold the \$184,214.28 from the Surfpac contract, as representing the value of the warranty. The value of the warranty, thereby was admittedly \$184,214.28. MSD was, therefore, entitled to deduct this amount from the contract balances by change order.

For the foregoing reasons the order and judgment of the Jefferson Circuit Court granting partial summary judgment to 3-D is reversed and this matter is remanded to the trial court with instructions to enter summary judgment in favor of MSD on 3-D's claim under Count I of its Complaint. 3-D's cross-appeal is dismissed as moot.

ALL CONCUR.

BRIEF FOR APPELLANT:

Laurence J. Zielke
John H. Dwyer, Jr.
Pedley Zielke & Gordinier,
PLLC
Louisville, Kentucky

BRIEF FOR APPELLEE:

Thomas E. Roma, Jr.
Parker & O'Connell, PLLC
Louisville, Kentucky