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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

CENTER CIRCLE  
CONSTRUCTION CORP.,

Plaintiff, Cross-defendant and  
Appellant,

v.

652 CHAUTAUQUA, LLC,

Defendant, Cross-complainant and  
Respondent.

B226279

(Los Angeles County  
Super. Ct. No. SC091706)

APPEAL from a judgment of the Superior Court of Los Angeles County,  
Lisa Hart Cole, Judge. Affirmed.

Baker & Associates and Mark E. Baker for Plaintiff, Cross-defendant and  
Appellant.

Rehm & Rogari and Joanna Rehm for Defendant, Cross-complainant and  
Respondent.

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In this construction dispute, plaintiff, cross-defendant and appellant Center Circle Construction Corp. (Center), a contractor, appeals a judgment following a court trial of its action against defendant, cross-complainant and respondent 652 Chautauqua, LLC (652), a California limited liability company.

Center prevailed at trial solely on its cause of action for breach of contract and was awarded damages in the sum of \$278,135 plus prejudgment interest. The trial court denied 652 any recovery on its cross-complaint. The trial court issued an extensive statement of decision setting forth its findings of fact as well as conclusions of law.

Center does not challenge any of the trial court's factual findings. Center simply contends that given the trial court's factual findings, it is entitled to statutory penalties as a matter of law, and the trial court erred in refusing to award Center statutory interest at the rate of two percent per month plus attorney fees, pursuant to Civil Code section 3260.1.<sup>1</sup>

The trial court denied Center's request for statutory penalties on the ground Center's billing was "confusing at best," which made it impossible for the trial court to

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<sup>1</sup> Civil Code section 3260.1 states in pertinent part at subdivision (b): "Except as otherwise agreed in writing, the owner shall pay to the contractor, within 30 days following receipt of a demand for payment in accordance with the contract, any progress payment due thereunder as to which there is no good faith dispute between the parties. In the event of a dispute between the owner and the contractor, the owner may withhold from the progress payment an amount not to exceed 150 percent of the disputed amount. *If any amount is wrongfully withheld in violation of this subdivision, the contractor shall be entitled to the penalty specified in subdivision (g) of Section 3260.*" (Italics added.)

The incorporated section, Civil Code section 3260, subdivision (g), provides: "In the event that retention payments are not made within the time periods required by this section, the owner or original contractor withholding the unpaid amounts shall be subject to a charge of 2 percent per month on the improperly withheld amount, in lieu of any interest otherwise due. Additionally, in any action for the collection of funds wrongfully withheld, the prevailing party shall be entitled to his or her attorney's fees and costs."

All further statutory references are to the Civil Code, unless otherwise specified.

*“calculate the amount paid, amount due and the amount withheld. . . . Regardless, the plaintiff carries the burden of proving that progress payments due during the course of construction were withheld for more than 30 days following receipt of a demand for payment. Due to the state of the bills, Center . . . did not meet this burden.”*

(Italics added.)

Contrary to Center’s position, the trial court’s factual findings do *not* entitle Center to statutory penalties as a matter of law. The judgment is affirmed.

## **FACTUAL AND PROCEDURAL BACKGROUND<sup>2</sup>**

### *1. Facts.*

Center is a family-run framing and drywall contracting business, owned by Steve Ferreira (Ferreira) with 30 years of experience as a licensed contractor, specializing in high-end construction. 652 is a California limited liability company owned and managed by J. Blair Pence, II (Pence), established for the sole purpose of developing a 14,000 square foot home on a view lot in Pacific Palisades. Pence is an experienced real estate developer with licenses as a real estate broker, contractor, property manager and certified investment manager. 652 was an owner/builder project, the construction of which was financed entirely by Pence.

During the bidding process, Ferreira communicated with Tom Davidson (Davidson), project manager for 652. On April 13, 2004, Pence and Ferreira entered into a contract (the Contract) for Center to provide steel stud framing, drywall, interior doors, wood interior stairs and exterior Dow Stuccomate, for a net lump-sum price of \$290,066.00. Under the Contract, extra work was to be performed on a unit price basis at the cost of materials plus 20 percent markup, with labor rates being \$50 per hour “journeyman carpenter.”

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<sup>2</sup> The parties do not take issue with the trial court’s statement of facts. Therefore, this factual summary is derived in large part from the statement of decision. (*Taus v. Loftus* (2007) 40 Cal.4th 683, 690.)

Numerous structural and design changes were regularly made during construction. From the outset, issues arose that delayed Center's work. For example, in addition to the job starting two months later than scheduled, the foundation upon which the framing was placed was not square, tile had been laid too early, floor heaters had not been installed timely, and many design elements were revised.

Davidson was incompetent to handle supervision of this project and due to differences between him and Pence, Davidson ultimately left 652. Davidson's assistant, Isabelle Velasquez took over supervision of the project for a while, but ultimately she left as well. In the meantime, Center was competently performing on the Contract and often had to wait while necessary preliminary work was performed. Pence expected very high quality work and he was not disappointed in Center's performance. Ferreira assigned his son Jason Ferreira (Jason) to oversee the project. Because Jason frequently was on site and knowledgeable about construction, Pence hired him to take over supervision of the entire project after Davidson and Velasquez left. For the next several months, Jason acted as project supervisor in addition to his duties for Center, which billed 652 at the rate of \$50 per hour for Jason's services. Although Pence disputed that Jason was hired as the project supervisor, it was undisputed that no one, other than Jason, was in charge of the project after Davidson and Velasquez departed.

During the course of construction the parties agreed to over 250 changes, work beyond the scope of the Contract. The vast majority of the changes were performed on a "Time and Material" basis (T&M). When requested by 652 and Pence, Center performed the extra work based upon a fixed price, called an "Extra." The T&Ms and Extras were initially signed off by Davidson. At some point Davidson told Center that Pence was complaining the T&M written approval process was slowing down the work and he asked Center to proceed with requested changes based on his verbal approval only. Center agreed to this modification as an accommodation to 652 and Pence. As a result, there are numerous T&Ms and Extras on work that was performed but not authorized in writing by anyone from 652.

During this time, Center was billing 652 for payment on the Contract and the change orders on a somewhat regular monthly basis. 652 fell behind on payment of the bills but never contested the amount due at the time the bills were submitted, or within any reasonable time thereafter. The T&Ms were included with each bill. Neither 652 nor Pence raised any objection to the T&Ms or Extras as they were reflected on the bill even though it was clear that many were not approved in writing. Center contended that Pence chose not to pay the bills in order to negotiate a lesser amount at the end of the job, which appeared to be a correct analysis based on Pence's conduct at the end of the job.

When Center completed its work on the project, Pence began negotiating down the bill. Pence claimed that various T&Ms and Extras were not approved and he accused Center of double billing. Pence demanded production of all of Center's documentation on the job, pursuant to Article 9.1 of the Contract, which Center provided. When Center refused to negotiate the bill, Pence hired DACM, a construction project management firm, to audit Center's bills. Following DACM's expert review, the parties were unable to agree upon a reduced price. Pence thereafter refused to pay anything and this litigation followed.

## *2. Pleadings.*

Center's operative first amended complaint alleged four causes of action: (1) breach of contract against 652; (2) quantum meruit against 652; (3) fraud against 652 and Pence; and (4) foreclosure of mechanic's lien against 652 and Pence. Center alleged it had been paid \$461,752 for labor, equipment and materials, but was still owed \$330,024.

652, in turn, filed a cross-complaint against Center and Ferreira, alleging causes of action for (1) breach of contract; (2) fraud; and (3) negligent misrepresentation.

## *3. Trial.*

The matter came on for a bench trial and was tried over a period of days between January 28 and February 11, 2009.

4. *Statement of decision.*

a. *Violation of prompt pay statute.*

With respect to Center's contention that 652's failure to make timely payments violated section 3260, the "prompt pay" statute, the trial court ruled as follows:

Relying on section 3260, Center alleged that 652 was required to make payments due under the terms of the Contract, including any changes, additions and modifications, within 30 days following receipt of a demand from Center, and that any disputed amount could be withheld only pursuant to certain conditions.

652, in turn, contended the prompt pay statute did not apply for two reasons: (1) the Contract did not set forth any schedule for progress payments; and (2) Center received full payment for the work done under the Contract but was not paid for disputed charges for the extra work performed.

"Plaintiff relies on *Murray's Iron Works, Inc. v. Boyce* (2008) 158 Cal. App. 4th 1279, 1299, which holds, 'a progress payment is a payment other than a down payment that is to be made before the project is completed.' Since the 'Extra' and 'T&M' work arose directly from the contract, and were all made before the project was completed, plaintiff concludes that it would give owners license to abuse contractors by demanding that extra work be performed and then intentionally refuse to pay. As a result, plaintiff requests the allowed for penalty of 2% per month on all sums wrongfully withheld, plus attorney fees and costs.

"Defendant relies on the Contract (Exh. 1) which does not set forth any schedule for progress payments. As a result, defendant concludes that that there is no obligation to pay the contractor until the work is completed. Further, defendant contends that withholding of payments for 'extra' work does not implicate [section] 3260, relying on *McAndrew v. Hazegh* (2005) 128 Cal. App. 4th 1563.

"The Contract between the parties contemplated progress payments. Article 4 of the Contract, under the heading 'Progress Payments,' states:

‘The Owner shall make progress payments on account of the Contract Sum to the Contractor as provided below and elsewhere in the Contract Documents. The period covered by each Application for Payment shall be one calendar month ending on the last day of the month.’

“Section 3.1 of the Agreement states that the ‘Contract Sum’ is subject to ‘additions and deductions.’ A reasonable interpretation of the Agreement is that the T&M's and Extras should be included in the ‘Contract Sum,’ otherwise a new contract would have to be executed every time an owner added an item to the original scope of work. In theory, the plaintiff is correct.

*“Unfortunately, the invoices prepared by plaintiff are confusing at best. After careful examination of the invoices (Exh. 174), it is virtually impossible to determine when the defendant is receiving credit for payments made, what amount is outstanding and for what charges. The testimony of Rachel Ferreira, the Vice President, Treasurer and Accounts Payable Manager for Center Circle provided little insight into the bookkeeping method she used. The invoices on which Mrs. Ferreira made some notes for her own personal use explain a bit of how the payments made by the defendant were attributed and what balance was due. The defendant, however, did not have the benefit of these notes and until well after the job was completed and amount due was contested.*

*“To find that defendant failed to make timely progress payments, the court must be able to calculate the amount paid, amount due and the amount withheld. Surely, the billing on this job was difficult given the number of changes made. Since Center Circle prepared their bills by hand rather than computer, the format of the invoices was peculiar to their business rather than consistent with generally accepted accounting methods, which adds another layer of confusion. Regardless, the plaintiff carries the burden of proving that progress payments due during the course of construction were withheld for more than 30 days following receipt of a demand for payment. Due to the state of the bills, Center Circle did not meet this burden.*

“To the extent that plaintiffs claim under Civil Code §3620 is based solely on defendant’s failure to pay the final invoice of March 30, 2006 (Exh. 176.386), the court need look no further than *Murray Iron Works*. In *Murray*, the court grappled with the issue of whether a final payment is a progress payment within the meaning of [section] 3260. The court found, after careful analysis of the legislative history, that, ‘it makes no sense to say that a final payment due upon satisfactory completion of a project is a progress payment. . . .’ *Murray Iron Works, Inc. v. Boyce*, 58 Cal. App. 4th 1279 at 1299. Defendants’ failure to timely pay the final invoice cannot, therefore, be a violation of the prompt pay statute.” (Italics added.)

b. *Other issues at trial.*

(1) *Value of T&Ms and Extras.*

A major issue was more than 250 T&Ms and Extras requested by 652 and Pence and performed by Center. After reviewing the billing, Center found some duplicate bills and reduced its demand from \$330,000 to \$298,372. Center called a construction expert, Dr. Stephen Wexler to testify to the custom and practice of similar contractors in the industry and to analyze the pricing of the work performed. Dr. Wexler possesses eight engineering certifications and has extensive field experience spanning several decades. He opined that Center’s contract bid, costs for T&Ms and Extras, and job supervision were well within industry standards. The trial court found “Dr. Wexler’s analysis and opinion on these subjects to [be] well-founded and compelling.”

652’s construction expert at trial was David Spiegel. Spiegel was critical of the manner in which Center performed its work, its charges and its procedure in performing T&M and Extra work without written approval. Spiegel performed five different appraisals based on the same documents and scope of work, the first of which concluded that Pence owed Center Circle \$13,358 and the last of which concluded that Pence owed Center Circle \$145,535. The trial court found “Spiegel was not able to satisfactorily explain why each appraisal varied so significantly. It appeared to the court that he was either not qualified to render the opinions he gave or his opinions were so influenced by



what he thought Pence wanted him to say that they were not the result of his own independent evaluation. Regardless, Spiegel offered little to assist the court.”

*(2) Labor rate for journeymen.*

The Contract provided that “journeymen” would be used exclusively at the jobsite and billed at the rate of \$50 per hour. Pence contended that Center used non-journeymen workers and therefore breached the Contract, committed fraud and misrepresentation.

The trial court found that for purposes of this Contract, “journeyman” means a worker skilled and experienced in the trade he/she is performing. The trial court found that based on the testimony of Ferreira and Jason, it was clear that not all workers on the project would qualify as journeymen. However, failure to use journeymen for every aspect of the job, including assistance and clean-up, is not a material breach of the Contract, nor is it fraud or misrepresentation. The court reduced the billing rate for those workers who were not journeymen, so as to entitle 652 to a credit in the sum of \$20,237.

*(3) Center’s request for damages based on extended time of performance.*

Center sought additional damages on the theory the project took substantially longer than scheduled due to delays attributable exclusively to the owner. According to Wexler, because Center’s involvement with the job took several months rather than several weeks, 652 was liable for the overhead paid and profit lost for the extra time the job took to complete. Wexler admitted it is rare for a construction project to proceed on time, but stated that extended time of performance damages are common in the industry, and that Center’s damages for the delay amounted to \$425,400.

The trial court found an award of extended time of performance damages in this case “would be a windfall for Center Circle and punitive to 652 and Pence. The evidence shows that the plaintiffs did not lose any jobs nor suffer loss of profits, as a result of the extensive delays caused by the defendants. When the project was not ready for them, they left and went to work at other projects. According to the evidence, Center Circle did not turn down any other job due to their commitment to 652 and, in fact, enjoyed ample

profits for the period that it was employed by 652.” The trial court found there was no reasonable basis for imposing such damages under the facts of this case.

(4) *Damages for breach of contract.*

On the first cause of action for breach of contract, the trial court awarded Center damages in the sum of \$298,372, less the amount charged for non-journeymen workers in the sum of \$20,237, for a net judgment of \$278,135.13, plus ten percent prejudgment interest from October 20, 2006, the date Center recorded its mechanic’s lien.

Center accepted 652’s offer to pay the full judgment prior to the judgment becoming final in the amount of \$382,052.96, which included the stipulated costs, prejudgment and post-judgment interest. Therefore, the foreclosure of Center’s mechanic’s lien was deemed moot.

The trial court denied Center’s request for damages against Pence on an alter ego theory.

(5) *Other causes of action.*

Having found in favor of Center on its cause of action for breach of contract, the trial court found no basis for Center’s second cause of action for quantum meruit.

The trial court also found in favor of 652 and Pence on Center’s third cause of action for fraud. The trial court found Pence’s representations were not knowingly false at the time they were made, and “Pence appears to have taken every advantage to negotiate a lower price for the work performed, but he did not intend to defraud Ferreira or Center Circle at the time.”

As for 652’s cross-complaint, the trial court found no factual basis for 652’s claims for breach of contract, fraud and negligent misrepresentation.

5. *Judgment.*

On May 17, 2010, the trial court entered judgment in favor of Center on the complaint, and ordered that 652 recover nothing on its cross-complaint.

6. *Subsequent proceedings.*

On May 28, 2010, Center filed a motion for new trial, contending the trial court misconstrued section 3260.1. Center argued that based on the trial court's finding that 652 purposefully and by design had withheld its payments, the trial court was obligated to award Center statutory penalties, i.e., interest of two percent per month and attorney fees. On July 16, 2010, the trial court denied the motion for new trial.

On July 23, 2010, Center filed a timely notice of appeal from the judgment entered May 17, 2010.

### **CONTENTIONS**

Center contends: where an owner wrongfully withholds progress payments from a contractor, the contractor is entitled to an award of interest and attorney fees pursuant to section 3260.1; the trial court expressly found the criteria for an award of the interest charge and attorney fees were satisfied; even though the trial court found the owner had wrongfully withheld progress payment, the trial court refused to award the statutory interest and attorney fees to the prevailing party; the trial court improperly imposed criteria for recovery that are not found in section 3260.1; and the award of the statutory penalty and attorney fees under section 3260.1 will trigger the award of additional costs under Code of Civil Procedure section 998.

### **DISCUSSION**

1. *Trial court properly refused to award statutory penalties; trial court's factual findings do not entitle Center to award of statutory penalties as a matter of law.*

a. *Summary of Center's argument.*

Center emphasizes that it is *not* challenging the trial court's findings of fact. Rather, Center contends the appeal raises a pure question of law. Center asserts the trial court's factual findings mandated an award of statutory penalties pursuant to section 3260.1. Center cites, inter alia, the following sentence in the statement of decision: "[C]enter argues that Pence chose not to pay the bills in order to negotiate a lesser amount at the end of the job, which appeared to be a correct analysis based on Pence's conduct at the end of the job."

b. *Trial court properly denied statutory penalties based on Center's failure to establish the amount of any improperly withheld payments.*

Civil Code section 3260, subdivision (g), provides the interest penalty is to be calculated as follows: "In the event that retention payments are not made within the time periods required by this section, the owner or original contractor withholding the unpaid amounts *shall be subject to a charge of 2 percent per month on the improperly withheld amount*, in lieu of any interest otherwise due." (Italics added.) Thus, Center had the burden at trial to establish the specific amounts that 652 improperly withheld. The trial court ruled Center failed to meet its burden in that regard.

As noted, Center expressly does not challenge the trial court's findings of fact. The trial court's factual findings included a determination that Center's invoices were too confusing to determine what had been paid on a progress payment and what amount remained unpaid. To quote the statement of decision:

*"Unfortunately, the invoices prepared by plaintiff are confusing at best. After careful examination of the invoices (Exh. 174), it is virtually impossible to determine when the defendant is receiving credit for payments made, what amount is outstanding and for what charges.* The testimony of Rachel Ferreira, the Vice President, Treasurer and Accounts Payable Manager for Center Circle provided little insight into the bookkeeping method she used. The invoices on which Mrs. Ferreira made some notes for her own personal use explain a bit of how the payments made by the defendant were attributed and what balance was due. The defendant, however, did not have the benefit of these notes and until well after the job was completed and amount due was contested.

*"To find that defendant failed to make timely progress payments, the court must be able to calculate the amount paid, amount due and the amount withheld.* Surely, the billing on this job was difficult given the number of changes made. Since Center Circle prepared their bills by hand rather than computer, the format of the invoices was peculiar to their business rather than consistent with generally accepted accounting methods, which adds another layer of confusion. *Regardless, the plaintiff carries the burden of proving that progress payments due during the course of construction were withheld for*

*more than 30 days following receipt of a demand for payment. Due to the state of the bills, Center Circle did not meet this burden.” (Italics added.)*

To reiterate, Center does not challenge any of the trial court’s factual findings. Even assuming Center improperly withheld certain progress payments, the trial court found Center’s billing was “confusing at best,” which made it impossible for the trial court to determine which portion of the bills, if any, were subject to the two percent per month statutory penalty for nonpayment within 30 days of receipt of demand for payment. (§ 3260.1, subd. (b).) Center had the burden to establish its entitlement to statutory penalties and the amount thereof. The trial court, sitting as the trier of fact, determined Center failed to meet its burden.

*c. Trial court did not engraft an additional requirement onto section 3260.1.*

Center contends the trial court denied recovery on the ground Center failed to provide 652 with computerized periodic summaries of outstanding invoices and how any previous payments were applied to the outstanding balance.

Contrary to Center’s argument, the trial court did not condition a contractor’s entitlement to the two percent per month interest penalty upon providing its customer with computerized billing statements. The trial court simply made the observation that, “Since Center Circle prepared their bills by hand rather than computer, the format of the invoices was peculiar to their business rather than consistent with generally accepted accounting methods, which adds another layer of confusion.” In other words, the trial court merely suggested a more modern accounting system would have been helpful to Center in proving its case.

*d. Denial of related penalty of attorney fees.*

In addition to the two percent per month interest penalty on wrongfully withheld payments, Center contends it is entitled to statutory attorney fees pursuant to section 3260.1. Center’s failure of proof with respect to wrongfully withheld payments is dispositive of the issue of attorney fees.

“If any amount is wrongfully withheld in violation of this subdivision, the contractor shall be entitled to the *penalty specified in subdivision (g)* of Section 3260.” (§ 3260.1, subd. (b), italics added.) The incorporated statute, section 3260, subdivision (g), states that in addition to the two percent per month interest penalty, “in any action for the collection of funds wrongfully withheld, the prevailing party shall be entitled to his or her attorney’s fees and costs.” Generally, statutory attorney fees do not fit within the common meaning of penalty. (*Hinerfeld-Ward, Inc. v. Lipian* (2010) 188 Cal.App.4th 86, 98.) However, the legislative history of section 3260.1 discloses that both interest and attorney fees are recoverable as *penalties* for wrongfully withheld payments. (188 Cal.App.4th at p. 99.)

Here, Center prevailed on its common law cause of action for breach of contract and was awarded damages thereon. However, Center did not prevail on its claim under section 3260.1 for wrongfully withheld payments. Accordingly, the trial court properly denied Center’s request for the related penalty of statutory attorney fees.

#### **DISPOSITION**

The judgment is affirmed. The parties shall bear their respective costs on appeal.

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KLEIN, P. J.

We concur:

CROSKEY, J.

KITCHING, J.