Filed 12/4/13 Armet's Landscape v. Bethel Properties CA2/6

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

ARMET'S LANDSCAPE, INC.,

Plaintiff and Respondent,

v.

BETHEL PROPERTIES, LLC et al.,

Defendants and Appellants.

2d Civil No. B241956
(Super. Ct. No. CV118019)
(San Luis Obispo County)

Bethel Properties, LLC, Matt Talbert and Veris Cellars (Appellants) appeal from a judgment after a bench trial awarding respondent Armet's Landscaping, Inc., (Armet) $28,659.40 for breach of contract plus prejudgment interest and attorneys' fees of $36,061.50. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Appellants Talbert and Veris hired Armet to install landscaping and related improvements at Veris Cellars. The written contract specified a total price of $53,843. Talbert and Veris made progress payments totaling $25,000 but refused to pay the balance. Armet sued Talbert and Veris for breach of contract and common counts and Bethel (the owner of the Veris property) for foreclosure of a mechanic's lien. Appellants' defense was Armet's nonperformance. The trial court

found that Armet had either fully or substantially performed under the contract and that Talbert and Veris were responsible for any nonperformance by Armet. The trial court denied recovery on the remaining causes of action, finding that the common counts were duplicative of the breach of contract claim. The judgment was only against Veris; there was insufficient evidence to hold Talbert personally liable. The trial court did not, however, enter a defense judgment for Talbert, although it did enter judgment for Bethel. Neither Bethel nor Talbert filed a memorandum of costs. The trial court found Armet to be the prevailing party and awarded attorneys' fees.

DISCUSSION

Standard of Review

We review the factual findings of the trial court for substantial evidence. On substantial evidence review, we examine the evidence in the light most favorable to the prevailing party and give that party the benefit of every reasonable inference. We accept all evidence favorable to the prevailing party as true and discard contrary evidence. We do not reweigh the evidence or reconsider credibility determinations. (*In re Marriage of Calcaterra & Bakakhsh* (2005) 132 Cal.App.4th 28, 34.) We review questions of law de novo. (*Monterroso v. Moran* (2006) 135 Cal.App.4th 732, 736.)

Judicial Admission

Appellants contend that the written contract attached as Exhibit 1 to Armet's complaint is a judicial admission of the contract terms that prevents Armet from introducing evidence of other terms. (*Valerio v. Andrew Youngquist Construction* (2002) 103 Cal.App.4th 1264, 1271.) The complaint did not, however, allege that Exhibit 1 represented the sole agreement between the parties. Although the complaint alleges that Rick Armet presented Exhibit 1 to Talbert, it also alleges that Talbert made changes to Exhibit 1 before he signed it. Because the complaint does not allege that Exhibit 1 was the contract that governed the work

that was to be performed, there was no judicial admission. (*Faigin v. Signature Group Holdings, Inc.* (2012) 211 Cal.App.4th 726, 737-738.)[1]

Evidentiary Issues

Appellants contend unpersuasively that Veris should be excused from payment of the contract price because of three failures of performance by Armet. To recover damages for breach of contract a plaintiff must prove, among other things, that it "did all, or substantially all, of the significant things that the contract required [it] to do or that [it] was excused from doing those things." (CACI No. 303.)[2] Appellants' contentions have no merit.

Fountain

The plans originally called for a fountain and electrical wiring and a water line to serve it. Rick Armet testified that Talbert eliminated the fountain to save costs. Armet did not install the water line and wiring and Appellants claim that this was a failure of performance. The trial court found that Talbert's unclear instructions resulted in elimination of the wiring and water supply to the fountain, not any failure by Armet. Substantial evidence, specifically the testimony of Rick Armet, supports this finding.

Pavers

The plans called for installation of pavers on a walkway to end at a parking lot. Armet installed pavers to a point, but finished the walkway with decomposed granite. Appellants seek a set-off for the pavers that were paid for but not installed and the cost of labor for the installation. Although the trial court found

---

[1] We have not considered the Form Interrogatories and Answers to Form Interrogatories that are included in Respondent's Appendix. Those discovery documents are not part of the record on appeal.

[2] Appellants claim they are entitled to "set-offs," but provide no authority for a contractual right to "set-off." Appellants' only legally cognizable argument for the three areas of nonperformance is that Armet did not perform as the contract required and therefore is not entitled to recover.

that Armet did fail to install certain pavers, it also found that Appellants "received essentially what the contract called for because [Armet's] failures, were trivial or unimportant and could have been easily fixed or paid for." (Invoking, without citation, CACI No. 312, "Substantial Performance.") The cost of the missing pavers and the labor for installing them was $1,670. The trial court did not abuse its discretion in finding that Armet substantially performed and that appellants received essentially what the contract called for.

Appellants provide no authority for their assertion that Armet cannot recover based on substantial performance without paying the difference between substantial performance and full performance. Appellants' interpretation would impermissibly nullify the concept of "substantial performance."

Payment to Third Party Contractor

In July 2010 appellants hired Rick Elisarraras to complete the paving of the parking lot, which was part of Armet's work. Appellants seek a set-off for the payments made to Elisarraras. The trial court found that Armet was not responsible for Appellants' decision to bring in another contractor. Substantial evidence supports this finding.

Trial Court's Failure to Enter Judgment for Talbert

The trial court found that the evidentiary record was insufficient to hold Talbert personally responsible for Armet's damages, yet did not enter a defense judgment for Talbert. This was harmless error. Talbert's only concern about the error is that he is unable to recover costs absent entry of judgment in his favor. As explained below, Talbert is not entitled to costs because he failed to timely file a memorandum of costs.

Costs

Both Talbert and Bethel argue that they are entitled to costs as prevailing parties. Both were prevailing parties because both are defendants against whom Armet did not recover relief. (Code Civ. Proc., § 1032 subd. (a)(4).) Both have waived their claims of costs, however.

"A prevailing party who claims costs must serve and file a memorandum of costs within 15 days after the date of mailing of the notice of entry of judgment . . . or the date of service of written notice of entry of judgment . . . or within 180 days after entry of judgment, whichever is first." (Cal. Rules of Court, rule 3.1700 (a)(1).) A prevailing party who fails to timely file a memorandum of costs waives the right to costs. (*Hydratec, Inc. v. Sun Valley 260 Orchard & Vineyard Co.* (1990) 223 Cal.App.3d 924, 928-929 [failure of party to file a cost bill "is fatal to its claim for costs"].) Judgment was entered on April 11, 2010. Because neither Talbert nor Bethel filed a memorandum of costs, they have waived their right to costs.

Talbert's assertion that he is entitled to costs because of the trial court's failure to enter judgment in his favor prevented him from filing a memorandum of costs has no merit. Nothing in California Rules of Court, rule 3.1700 states that the 15-day deadline applies only to parties named in the judgment. Moreover, the "appropriate remedy [for an error in the judgment] is to timely file a cost bill in the trial court despite the error . . . . The trial court will then have an opportunity to evaluate the issue on a motion to strike the cost bill or to tax costs, if either is filed, or on the prevailing party's motion to amend the judgment, if its memorandum of costs is not challenged." (*Hydratec, Inc. v. Sun Valley 260 Orchard & Vineyard Co., supra,* 223 Cal.App.3d at p. 929.) Accordingly, the trial court's failure to enter a defense judgment for Talbert did not relieve him of the duty to file a memorandum of costs and he has waived his right to claim costs.

Attorneys' Fees

The contract provides that the prevailing party in a lawsuit necessary "to enforce payment of a delinquent account" is entitled to attorneys' fees. Although the language of the attorneys' fee clause, even as amended, is ambiguous, both Talbert and Armet testified that the amendment was intended to provide for attorneys' fees to the prevailing party in an action under the contract. The party prevailing on a contract is the party who recovered a greater relief in the action on

the contract. (*Zintel Holdings, LLC v. McLean* (2012) 209 Cal.App.4th 431, 439.) The trial court has broad discretion in making that determination. (*Ibid.*) The trial court found Armet to be the prevailing party, based on Armet's "unqualified victory." As explained above, substantial evidence supports the trial court's findings. Therefore, Armet is entitled to attorneys' fees under the contract.

Amount of Attorneys' Fees

Appellant's contention that the fee award should be reduced for time expended on Armet's unsuccessful common count and foreclosure of mechanic's lien claims is unavailing. Apportionment is not necessary when fees are "'incurred for representation on an issue common to both a cause of action in which fees are proper and one in which they are not allowed.' [Fn. omitted.]" (*Acree v. General Motors Acceptance Corp.* (2001) 92 Cal.App.4th 385, 404-405.) The unsuccessful foreclosure of mechanic's lien and common count causes of action were different theories of recovery premised on the contractual relationship between the parties. The trial court thus did not abuse its discretion by failing to apportion the attorneys' fees.

The judgment is affirmed.

O'DONNELL, J.*

We concur:

GILBERT, P. J.

YEGAN, J.

* (Judge of the Superior Court of Los Angeles County, assigned by the Chief Justice pursuant to art. 6, § 6 of the Cal. Const.)

Jac A. Crawford, Judge

Superior Court County of San Luis Obispo

Hutkin Law Firm, Maria L. Hutkin, for Defendants and Appellants.

P. Terence Schubert for Plaintiff and Respondent.