2019 WL 2494782
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Court of Appeals of Minnesota.

MEYER CONTRACTING, INC., Respondent,
v.
Scott FOWLER, Defendant,
Graham Construction Services, Inc.,
Defendant and Counterclaimant, Appellant,
v.
Brian A. Goudge, et al., Counterclaim Defendants.

A18-0785
|
A18-1302
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Dakota County District Court, File No. 19HA-CV-16-2326

Attorneys and Law Firms

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Considered and decided by Worke, Presiding Judge; Florey, Judge; and Cochran, Judge.

UNPUBLISHED OPINION

WORKE, Judge

***1** In these consolidated appeals arising from a commercial-construction dispute, appellant-general contractor challenges the district court's grant of judgment as a matter of law (JMOL) to respondent-subcontractor on its prompt-payment claim under Minn. Stat. § 337.10, subd. 3 (2018); an award of attorney fees and interest; and the denial of appellant's claims for attorney fees, interest, and costs. We affirm in part, reverse in part, and remand.

FACTS

This action involves a dispute between appellant-general contractor, Graham Construction Services Inc. (Graham), and respondent-subcontractor, Meyer Contracting Inc. (Meyer), regarding a project to construct an airport in Minot, North Dakota. The principal dispute pertains to payment for geotextile fabric supplied by Meyer for the project, which was installed by Meyer and another subcontractor, Cormican's Inc. (Cormican's).

On July 16, 2014, Meyer submitted a bid to Graham for earthwork, which Graham accepted and incorporated into its bid to the City of Minot on July 17, 2014. The parties then entered into a subcontract, which Meyer signed on August 28, 2014, and Graham signed on October 6, 2014. Under the terms of the subcontract, Meyer agreed to supply and install geotextile fabric at the unit price of $2.20 per square yard. The subcontract provided that if Graham "prevail[s]" in any litigation between the parties, Meyer is obligated to pay Graham's reasonable costs, expenses, and attorney fees.

During the course of construction, Meyer submitted three payment applications to Graham, which Graham paid in full. On December 9, 2014, Meyer submitted a fourth payment application for the period of November 13 – December 7, 2014, in the amount of $49,749.73. Graham only paid $18,979.78.

Construction on the first phase of the project ended in November 2014 due to weather. Graham approached Meyer about the phase-two subcontractor, Cormican's, finishing the work on Meyer's subcontract in the spring, because there was only approximately $40,000-$50,000 of work remaining on phase one. Meyer indicated that if it was paid the outstanding $30,000 on payment-application four, it was fine not returning to the project in the spring.

On January 29, 2016, Graham contacted Meyer regarding alleged overbilling by Meyer in the amount of $168,000, of which only $50,564.37 was in dispute at the time of trial.

On June 30, 2016, Meyer filed a complaint against Graham for the recovery of amounts outstanding, which included a prompt-payment claim pursuant to Minn. Stat. § 337.10, subd. 3. In its answer Graham asserted counterclaims against a former employee, Cormican's, and Meyer.

Following a jury trial, the jury found that, relevant to this appeal, Graham breached its contract with Meyer, causing Meyer $41,822.29 in damages, and that Meyer violated the contract by overbilling Graham by $37,364.37. The jury also found that Graham did not "fail to perform pursuant to its subcontract with Meyer with respect to Meyer's labor, materials, and other equipment," and that the City of Minot did not "pay Graham retainage for undisputed services that Meyer performed but for which Meyer was not paid."

***2** Despite these findings, the district court granted Meyer JMOL on its statutory prompt-payment claim, awarding it damages of $36,300 for 16,500 square yards of geotextile fabric it supplied but was not paid for, along with its attorney fees, costs, and prejudgment interest. The district court also determined that Meyer was the prevailing party, and on that basis, awarded Meyer its costs and disbursements, and denied Graham's application for costs, disbursements, and contractual attorney fees. These consolidated appeals followed.

DECISION

JMOL

Graham argues that the district court erred in granting Meyer JMOL on its statutory prompt-payment claim. A district court's grant of JMOL presents a question of law that we review de novo. *Longbehn v. Schoenrock*, 727 N.W.2d 153, 159 (Minn. App. 2007). "The evidence must be considered in the light most favorable to the prevailing party and an appellate court must not set the verdict aside if it can be sustained on any reasonable theory of the evidence." *Pouliot v. Fitzsimmons*, 582 N.W.2d 221, 224 (Minn. 1998).

Minn. Stat. § 337.10, subd. 3, requires the prime contractor

> to promptly pay any subcontractor ... within ten days of receipt by the party responsible for payment of payment for undisputed services provided by the party requesting payment .... The contract shall be deemed to require the party responsible for payment to pay interest of 1-1/2 percent per month to the party requesting payment on any undisputed amount not paid on time.... A party requesting payment who prevails in a civil action to collect interest penalties ... must be awarded its costs and disbursements, including attorney fees....

In order to prevail on its claim, Meyer must have proven at trial that it requested payment from Graham for undisputed services, and that Graham failed to pay Meyer for the undisputed services within ten days of receiving payment.

The jury answered two special verdict questions regarding Meyer's prompt-payment claim. To the question: "Did the City of Minot pay Graham retainage for undisputed services that Meyer performed but for which Meyer was not paid?" the jury answered "No." To the question: "Did Graham fail to pay Meyer within ten days after receiving payment from the City of Minot?" the jury also answered "No." The district court set these answers aside and awarded Meyer damages, [1] interest, and attorney fees on its prompt-payment claim.

1 The jury awarded Meyer $41,822.29 in damages for breach of contract. The district court erred as a matter of law in awarding contractual damages in its JMOL prompt-payment award, as the statute provides for an award of interest, costs, and attorney fees *only*. *See* Minn. Stat. § 337.10, subd. 3 ("A party requesting payment who prevails *in a civil action to collect interest penalties* from a party responsible for payment must be awarded its costs and disbursements, including attorney fees incurred in the bringing of the action." (emphasis added)). "The interpretation of a statute is a question of law that we review de novo." *Cocchiarella v. Driggs*, 884 N.W.2d 621, 624 (Minn. 2016).

"An answer to a special verdict question should be set aside only if it is perverse and palpably contrary to the evidence, or where the evidence is so clear as to leave no room for differences among reasonable persons." *Moorhead Econ. Dev. Auth. v. Anda*, 789 N.W.2d 860, 888 (Minn. 2010) (quotation omitted). The district court set aside the jury's determination that Meyer did not prove the elements of its prompt-payment claim on the basis that "Meyer's prompt payment claim is viable when it is undeniable that Meyer

supplied the materials[,]" and that "[n]o reasonable jury could or should have found that Meyer did not supply 46,500 square yards of geotextile fabric .... and no dispute exists that Meyer was not paid for 16,500 square yards of that fabric."

***3** The district court's analysis overlooks two crucial elements of Meyer's prompt-payment claim: the services for which the subcontractor requests payment must be undisputed, and the subcontractor must request payment. While it was undisputed that Meyer provided 16,500 square yards of geotextile fabric for which it was not paid, the parties disputed the value of Meyer's services, and it is unclear when, if ever, Meyer requested payment for 16,500 square yards of fabric. Meyer's fourth payment request includes a charge for 46.67 square yards of geotextile fabric for $102.67. Meyer conceded at oral argument that no specific payment request was made for 16,500 square yards of geotextile fabric, but maintained that it would necessarily have been included in its demand for full and final payment when the contract was terminated.

Under the plain language of Minn. Stat. § 337.10, subd. 3, it is not sufficient that there is no dispute that the subcontractor provided services—in this matter, the supplying of geotextile fabric—the services themselves must be undisputed. The district court's order granting JMOL does not address this element of the claim, and evidence presented at trial sufficiently supports the jury's answer on the special verdict form that Meyer did not provide undisputed services.

Meyer relies on an email exchange from February 2016 to establish that there was no dispute regarding the geotextile fabric. The first email, from Meyer to Graham, sought to clarify on what basis Graham asserted that Meyer overbilled by $168,000. Next, in an internal Graham email, Graham's district manager stated: "Looks like what is in dispute is the GeoFabric they supplied, and [project manager] verify that they did not install? We would need to determine the value of the fabric they supplied." Graham's project manager responded: "As I recall and have confirmed ... Meyer had 4 rolls left on site (Spring of 2015) which they are owed.... [L]ooks like 18,000 [square yards] x 2.20 [per square yard] = $39,600. 191k deduct and add of $39,600 = ($151,400)." Graham's district manager then wrote to Meyer, "I have verified that you left 4 rolls of material onsite that Cormican['s] installed. Crediting you the full supply and install amount, which in reality you would not be entitled to the install component for the leftover fabric, the amount you are owed additionally is [negative $151,400]."

When viewed in the light most favorable to the verdict, these emails do not establish that Meyer requested payment for undisputed services. The amount owed for geotextile fabric is specifically referred to as "in dispute." Graham offered to credit Meyer the full amount for the leftover fabric, or $39,600, in order to reduce the amount that Meyer owed Graham for overbilling to $151,400. The record does not include a response from Meyer indicating whether it accepted Graham's offer.

At trial, Graham's district manager testified that "Meyer is owed, in my mind, the supply because [they] supplied it but [they do not] get the full amount because Cormican's actually installed most of it and the actual quantities that they did install were on the pay applications and were certified by another party." The dispute over the value of the geotextile fabric centered upon the nature of a unit-price contract, which Meyer's project manager testified is comprised of "pieces of equipment and manpower and material and its subcontractors[;]" and is also comprised of profit, overhead, insurance, and miscellaneous costs.

While Meyer sought, and the district court awarded, the full unit-price value of the geotextile fabric of $2.20 per square yard, Graham disputed Meyer's entitlement to the full unit price because Meyer only supplied the geotextile fabric—which Cormican's installed—and the unit price included the equipment, manpower, and overhead of its installation.

***4** Because the record supports the jury's answer on the special verdict form that Meyer did not provide undisputed services, the district court's grant of JMOL on Meyer's prompt-payment claim is reversed and the issue of costs, disbursements, and fees is remanded because Meyer's entitlement to prejudgment interest and attorney fees was predicated upon its prompt-payment claim.

Prevailing party

Graham argues that the district court erred in determining that Meyer was the prevailing party for the purpose of awarding costs, fees, and disbursements. Under the terms of the parties' subcontract, if Graham "prevail[s]" in litigation against Meyer, it is entitled to recover its attorney fees. The district court retains discretion to determine which party, if any, qualifies as a prevailing party when considering a request for costs. *Benigni v. County of St. Louis*, 585 N.W.2d 51, 54-55 (Minn. 1998).

The jury awarded Meyer $41,822.29 for breach of contract, and awarded Graham $37,364.37 on its overpayment claim. The district court accordingly entered judgment in favor of Meyer in the amount of $4,457.92. Despite the fact that judgment was entered in favor of Meyer, Graham argues that the district court erred in determining that Meyer was the prevailing party. Graham asserts that because it recovered more of its desired damages on a percentage basis than Meyer recovered against it, it was the prevailing party.

In order to determine who qualifies as the prevailing party, "the general result should be considered .... The prevailing party in any action is one in whose favor the decision or verdict is rendered and judgment entered." *Borchert v. Maloney*, 581 N.W.2d 838, 840 (Minn. 1998) (quotation omitted). At trial, Meyer sought damages of $386,703.75 for breach of contract, of which the jury awarded only $41,822.29, or 10.8%. Graham sought overpayment damages of $50,564.37, of which the jury awarded $37,364.37, for a 73.9% recovery.

While it is true that under Graham's characterization it was more successful than Meyer when recovery is measured on a percentage—as opposed to absolute—basis, appellate review of the district court's determination of the prevailing party is limited to an abuse of discretion. Because Meyer received a net recovery from Graham, and because judgment was entered in favor of Meyer, the district court did not abuse its discretion in determining that Meyer was the prevailing party.

Affirmed in part, reversed in part, and remanded.

All Citations

Not Reported in N.W. Rptr., 2019 WL 2494782