IN THE COURT OF APPEALS OF IOWA

No. 6-440 / 05-1952
Filed October 25, 2006

MARQUART BLOCK CO.,
Plaintiff-Appellee,

vs.

DENIS DELLA VEDOVA, INC., MERCHANTS BONDING COMPANY (MUTUAL) and UNITED FIRE & CASUALTY COMPANY,
Defendants-Appellants,

BROOKLYN-GUERNSEY-MALCOM COMMUNITY SCHOOL DISTRICT, SMITH QUALITY RENTAL, INC., BROOKLYN BUILDING CENTER CO., STAR EQUIPMENT, LTD., RHINO BLOCK & MATERIALS, L.C., GILCREST/JEWETT LUMBER COMPANY, STORAGE AND DESIGN GROUP INC., RICH-CON, INC., d/b/a SERVICE MASTER OF NEWTON, INC., TWIN CITY CONCRETE PRODUCTS COMPANY and JASPER CONSTRUCTION SERVICES,
Defendants.

Appeal from the Iowa District Court for Poweshiek County, Dan F. Morrison, Judge.

Certain defendants appeal following judgment entry in favor of plaintiff in an action to adjudicate rights to retained funds on a public improvement project. **AFFIRMED**.

Stephen D. Marso of Whitfield & Eddy, P.L.C., West Des Moines, for appellant.

William D. Olson of Brierly Charnetski L.L.P., Grinnell, for appellee.

Heard by Mahan, P.J., and Miller and Vaitheswaran, JJ.

MILLER, J.

Defendants Denis Della Vedova, Inc., Merchants Bonding Company (Mutual), and United Fire and Casualty Co., appeal following a district court judgment entry in favor of plaintiff Marquart Block Company on its Iowa Code chapter 573 (2005) action to adjudicate rights to retained funds on a public improvement project. We affirm the district court.

I. Background Facts and Proceedings.

Brooklyn-Guernsey-Malcom Community School District (BGM) entered into a written contract with Denis Della Vedova, Inc. (DDVI), whereby DDVI agreed to be the general contractor for a construction project at BGM High School. The project was a public construction project subject to chapter 573. DDVI executed a performance bond through United Fire and Casualty Company (United Fire), as required by section 573.2.

DDVI subcontracted the masonry portion of the project to Blattner Masonry (Blattner). Blattner then subcontracted with five other entities, including Marquart Block Company (Marquart), to provide materials and equipment for the masonry portion of the project. However, Blattner failed to complete the masonry portion of the project according to the terms of its agreement with DDVI, and abandoned the project prior to finishing its work.

On June 20, 2001, John Thiele, the vice president and general manager of Marquart, sent a letter to Dennis Della Vedova of DDVI. The letter, which was received by DDVI some time prior to June 25, and supported by itemized invoices, gave DDVI notice of the amounts due and owing for materials Marquart had supplied to Blattner for the masonry portion of the project between February

1 and June 8, 2001. The letter also confirmed an oral agreement between DDVI and Marquart whereby Marquart would provide additional materials for completion of the masonry portion of the project directly to DDVI.

On July 23, 2001, Marquart filed a chapter 573 claim with BMG for the unpaid balance of the February 1 through June 8, 2001, invoices. As allowed by section 573.16, DDVI executed a bond through Merchants Bonding Company (Mutual) (Merchants) for double the amount of all the chapter 573 claims properly filed with BMG.

Marquart filed the current action in March 2005, seeking an adjudication of its rights to the retained funds of the project, as well as judgment against the principals and sureties on the bonds issued by United Fire and Merchants to the extent such a judgment was necessary to satisfy any established claims.[1] In their answer DDVI, United Fire, and Merchants (hereinafter collectively referred to as DDVI) asserted that Marquart was not entitled to judgment because it had failed to comply with the requirements of chapter 573. DDVI then moved for summary judgment, which was overruled by the district court.

In October 2005, Marquart and DDVI agreed to submit the matter to the district court upon stipulated facts. DDVI asserted that Marquart was not entitled to judgment because it had failed to comply with the notice requirements of section 573.15. The district court rejected DDVI's assertion, and found that Marquart was entitled to the claimed amounts owed from the retained funds because it had provided notice to DDVI, as required under section 573.15,

[1] The delay in filing is presumably due to a dispute that arose between DDVI and BMG regarding DDVI's right to any retainage. That dispute was settled on May 26, 2005, the same date the entire construction project was completed and accepted.

"during the progress of the work." The court ordered Marquart to provide a judgment entry in compliance with the court's ruling. Before judgment was entered, DDVI filed a notice of appeal.[2]

On appeal, DDVI once again asserts that Marquart did not comply with section 573.15.[3] Specifically, it contends the district court misinterpreted the requirement that certain notices be provided "during the progress of the work."

II. Scope of Review.

Because the relevant facts are undisputed, and this matter is limited to a question of the correct interpretation of section 573.15, our review is for the correction of errors at law. *Jensen v. Sattler*, 696 N.W.2d 582, 585 (Iowa 2005).

III. Discussion.

Pursuant to section 573.15:

> No part of the unpaid fund due the contractor shall be retained as provided in this chapter on claims for material furnished, other than materials ordered by the general contractor or the general contractor's authorized agent, *unless such claims are supported by a certified statement that the general contractor had been notified within thirty days after the materials are furnished or by itemized invoices rendered to contractor during the progress of the work*, of the amount, kind, and value of the material furnished for use upon the said public improvement . . . .

(Emphasis added). *See also* Iowa Code section 573.6 (providing the principal and surety on the bond shall not be liable on a claim under chapter 573 unless the claim has first been established against the percentage of the contract price required to be retained until the project is completed).

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[2] The appellants have, without objection, treated this appeal as from a final judgment. We therefore do the same.

[3] DDVI also challenges the district court's denial of its motion for summary judgment. However, a ruling denying a motion for summary judgment is interlocutory, and merges with a trial on the merits. *Kiesau v. Bantz*, 686 N.W.2d 164, 174 (Iowa 2004). Accordingly, it is no longer appealable or reviewable. *Id*.

DDVI admits Marquart is entitled to retained funds for materials it furnished to Blattner within the thirty days prior to the notice it provided to DDVI. The dispute is over Marquart's entitlement to retained funds for materials furnished prior to that thirty days. DDVI asserts that, although it received itemized invoices of the materials furnished between February and May 2001, those invoices were not received "during the progress of the work."

Our supreme court interpreted this portion of section 573.15 in *Lumberman's Wholesale Co. v. Ohio Farmers Insurance Co*., 402 N.W.2d 413 (Iowa 1987). There, Lumberman's, a material supplier to a subcontractor, filed a chapter 573 claim prior to completion of the final project by the general contractor, but after "the portion of the project involving Lumberman's materials was completed . . . ." *Lumberman's*, 402 N.W.2d at 416. The supreme court agreed with the conclusion reached by both the district court and this court, "that the words 'during the progress of the work' refer to progress of that portion of the work in which the materials for which claim is made are utilized." *Id*.

The court noted,

> Although the statutory language is not a model of clarity, we believe that the court of appeals interpretation more nearly accords with the apparent purpose of the statute than the interpretation proposed by Lumberman's. If a claimant who furnishes materials during a project's early stages is permitted to await the completion of the entire project before giving notice under section 573.15, this would add little to the protection already afforded the general contractor by the statutory period for filing claims.

Id.

In finding that Marquart had given DDVI timely notice, the district court relied on the *Lumberman's* decision. The court concluded that notice was given during "that portion of the work in which materials for which claim is made are

utilized" because "[t]he portion of the project requiring Marquart's blocks was ongoing as of June 2001, and thereafter." In other words, the district court concluded Marquart's notice was timely because the masonry portion of the project had not yet been completed.

DDVI asserts this is an overly-broad interpretation of section 573.15 and *Lumberman's*, and runs counter to the supreme court's concern that delayed claims would erode a general contactor's protection under the statute. Focusing on the supreme court's use of the words "in which the materials . . . are utilized," DDVI asserts materials are "utilized" when they are "installed," and Marquart has failed to affirmatively demonstrate that, when the invoices were supplied in June 2001, the materials noted on the invoices were in the process of being installed. DDVI accordingly suggests that notice will be timely only if an invoice is submitted to the general contractor at the time each individual shipment is made.

Marquart counters that *Lumberman's* cannot be read so narrowly. It asserts "that portion of the work in which the materials . . . are utilized" simply refers to the subproject for which those materials were supplied. It accordingly contends, consistent with the district court's ruling, that a notice will be timely provided the overall subproject is not yet complete.

We appreciate DDVI's concerns that the interpretation adopted by Marquart and the district court gives rise to the possibility that a general contractor could, under a particular set of facts, incur double liability. However, DDVI's interpretation requires this court to impose limitations that are not apparent in the plain language of section 573.15 or the *Lumberman's* decision—limitations that do not lend themselves to uniform application and that, under

certain circumstances, would be impractical, unworkable, and render the thirty-day-notice alternative virtually meaningless. *See General Elec. Co. v. Iowa State Bd. of Tax Review*, 702 N.W.2d 485, 489 (Iowa 2005) (setting forth rules of statutory construction).

We agree with the district court that, under *Lumberman's*, "itemized invoices rendered to contractor during the progress of the work" are those invoices that are rendered to the general contractor prior to completion of the particular subproject for which those material were supplied. Here, it is undisputed that the portion of the project for which Marquart supplied materials, the masonry portion of the project, was ongoing when the invoices for those materials were submitted to DDVI. Accordingly, Marquart's notice was timely under section 573.15.

IV. Conclusion.

The district court did not err in concluding that Marquart had complied with section 573.15, and was accordingly entitled to claim amounts owed from the retained funds. The district court ruling is affirmed.

AFFIRMED.