No. 21-124160-A

IN THE
COURT OF APPEALS OF THE
STATE OF KANSAS

BENCHMARK PROPERTY REMODELING, LLC,
Plaintiff-Appellant

vs.

GRANDMOTHERS, INC.,
COREFIRST BANK & TRUST,
KANSAS DEPARTMENT OF REVENUE,
ROBERT ZIBELL, STATE OF KANSAS,
Defendants-Appellees

BRIEF OF APPELLANT

Appeal from the District Court of Shawnee County, Kansas
Honorable Mary Christopher, Judge
District Court Case No. 2019-CV-000008

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Oral Argument Requested: 15 minutes

Table of Contents

I. NATURE OF THE CASE

Benchmark Property Remodeling, LLC ("Benchmark") appeals from the district court's order granting defendant Kansas Department of Revenue's ("KDOR") Motion for Judgment on the Pleadings and the district court's order granting in part Grandmothers, Inc.'s ("Grandmothers") Motion for Summary Judgment. Benchmark filed this action against KDOR, the State of Kansas, Grandmothers, Corefirst Bank & Trust, and Robert Zibell to recover payment owed to Benchmark for remodeling work performed at property owned by Grandmothers and leased by KDOR. There is not, and never has been, any dispute that Benchmark performed all work requested of it. Grandmothers and KDOR simply did not pay Benchmark for its work. The State of Kansas is only a party because it is a necessary party in a suit against KDOR. CoreFirst Bank & Trust is a party because it has a mortgage interest in the property at issue and is thus a necessary party in the foreclosure of the mechanic's lien.

KDOR wanted improvements made to the building and negotiated a scope of work with Benchmark. Benchmark agreed to perform the work at a specific price which was set forth in detailed quotes. KDOR accepted Benchmark's quotes and on its own accord incorporated them into its lease with Grandmothers through an amendment ("Third Amendment to Lease"). KDOR determined it would pay Grandmothers for the construction work, and that Grandmothers would then pay Benchmark. The Third Amendment to Lease attached Benchmark's quotes, and KDOR agreed to pay the exact amount quoted to it by Benchmark. KDOR made it clear to Grandmothers that KDOR expected Benchmark to perform the work and Grandmothers was not to self-perform the work.

Benchmark fully performed all work in the negotiated scope, and KDOR paid Grandmothers 100% of Benchmark's price. When Grandmothers received the first payment from KDOR, it paid the entire amount to Benchmark as it was supposed to. But when Grandmothers received the second and final payment from KDOR, Grandmothers sent Benchmark only a partial payment, withholding nearly 15% of the overall contract price under the pretext of various kickbacks, withholdings, and retainage. After Benchmark was forced to file a mechanic's lien and file suit to collect the remaining amounts owed to it, Grandmothers went behind Benchmark's back, paid its subcontractors, and then finally made a partial payment to Benchmark. Grandmothers is still wrongfully holding $20,308.24 of Benchmark's contract funds.

Benchmark filed a valid Mechanic's Lien on the property and timely foreclosed the lien. Benchmark's Petition also alleged claims for Breach of Contract against Grandmothers and KDOR, and violation of the Kansas Fairness in Private Construction Contract Act ("Fairness Act") for failing to timely pay Benchmark, withholding excessive retainage after work is complete (other claims which have been dismissed are omitted for simplicity). Under the Fairness Act, Benchmark is entitled to prejudgment and post-judgment interest at the statutory rate of 18% and its attorneys' fees and costs.

KDOR filed a Motion for Judgment on the Pleadings regarding Benchmark's claims against KDOR and the State of Kansas. Even though KDOR admitted in its Answer that KDOR had a valid, enforceable contract with Benchmark (R1 at 347), the district court granted KDOR's Motion for Judgment on the Pleadings on the grounds that Benchmark was not a party to the lease amendment between Grandmothers and KDOR (which was not Benchmark's claim) and therefore did not have a contract with KDOR.

Later, Grandmothers filed a Motion for Summary Judgment. The district court granted the defendants' Motion for Summary Judgment with respect to Benchmark's claim for Breach of Contract on the grounds that there was "no consideration or meeting of the minds sufficient for a contract to form," in part because KDOR told Grandmothers not to perform the construction work because "[w]e've already contracted with Benchmark to do the work." Concluding that there was no contract for construction, the district court also granted summary judgment in favor of Grandmothers on Benchmark's claims of violation of Kansas Fairness in Private Construction Contract Act, and Foreclosure of Mechanic's Lien. Benchmark dismissed its remaining claims without prejudice which resulted in the two prior orders being final judgments on all claims and making the two issues ripe for appeal. Benchmark now appeals the district court's granting of the Defendants' Motion for Judgment on the Pleadings and Motion for Summary Judgment.

This appeal seeks review of the district court's Order of Judgment on the Pleadings, in favor of KDOR on Counts I – Breach of Contract, Count IV – Kansas Fairness in Private Construction Act, and Count VII – Mechanic's Lien, and the district court's Order of Summary Judgment in favor of Grandmothers on Counts I – Breach of Contract, Count IV – Kansas Fairness in Private Construction Act, and Count VII – Mechanic's Lien. This appeal: (1) challenges the district court's determination that Plaintiff Benchmark Property Remodeling, LLC did not have a contract with KDOR, which was the basis of the district court's ruling on KDOR's Motion for Judgment on the Pleadings; and (2) challenges the district court's determination that Benchmark did not have a contract with Grandmothers, which was the basis of the district court's ruling on Grandmothers' Motion for Summary Judgment.

Statement of the Issues

Issue I: The district court erred in granting KDOR's Motion for Judgment on the Pleadings because the district court incorrectly concluded that there was no contract between KDOR and Benchmark where KDOR admitted in its Answer that there was a contract between KDOR, Benchmark and Grandmothers. As all facts and inferences which may be reasonably drawn must be resolved in Benchmark's favor, KDOR's admission that it, Benchmark and Grandmothers had a contract must be accepted as true in evaluating KDOR's Motion for Judgment on the Pleadings. The district court's failure to recognize this admitted contract was reversible error.

Issue II: The district court erred in granting partial summary judgment in favor of Grandmothers, Inc. because it incorrectly concluded that there was no legal basis for finding a construction contract due to a lack of consideration and a lack of a meeting of the minds, where the undisputed facts demonstrated all elements of a contract.

Statement of Facts

1. Background

In May 2018 Benchmark worked with KDOR to draft a scope of work for construction remodeling work KDOR wanted performed at its offices, which were located in a building owned by Grandmothers. Benchmark provided written quotes to KDOR, agreeing to do the work for $136,052.39. KDOR accepted Benchmark's proposal and made arrangements with Grandmothers, pursuant to which KDOR agreed to pay money owed to Benchmark to Grandmothers. Benchmark was not a party to the payment agreement between KDOR and Grandmothers. By structuring the payment for the construction work as an Amendment to KDOR's existing lease with Grandmothers, KDOR avoided extra red tape in soliciting multiple bids for the project.

KDOR's time-saving procedure came at Benchmark's expense. Benchmark completed the construction remodeling work as agreed, and KDOR accepted Benchmark's work. At that time, Benchmark was entitled to payment in full. KDOR paid Grandmothers, but Grandmothers failed to pay Benchmark. Benchmark's arrangement with KDOR did not release KDOR from its obligation to pay Benchmark. Benchmark has a contractual obligation to ensure payment is

ultimately made. KDOR's remedy at this juncture is to seek reimbursement from Grandmothers, which it has done in its Crossclaim against Grandmothers and Robert Zibell.

Grandmothers is the owner of real estate located at 300 SW 29th Street, Topeka, KS 66611 ("Property"), per testimony of Robert Zibell. (R2 at 45) Robert E. Zibell is the only stockholder of Grandmothers and runs the business. (R2 at 41) Grandmothers leases all of the Property to the Kansas Department of Revenue ("KDOR"). (R2 at 45)

2. Benchmark Provided Quotes for Construction Work

Benchmark Property Remodeling is a construction and remodeling company in Topeka, Shawnee County, Kansas. (R2 at 35) Starting in January 2017 Benchmark provided estimates to KDOR for construction work to be done at the Property. (R2 at 35) KDOR and Benchmark finalized the quotes in August 2018, and Benchmark offered to perform construction work as specified. (R2 at 35) Benchmark agreed to perform the construction work in Quote 1 dated 05/28/2018 for $97,852.78, Quote 2 dated 06/04/2018 for $645.90, Quote 3 dated 06/05/2018 for $2,346.77, Quote 4 dated 08/01/2018 for $29,878.26, and Quote 5 dated 08/02/2018 for $5,328.68. (R2 at 35 and 71-76)

The quotes are extremely detailed and explain the exact work Benchmark was going to perform and a breakdown of the price for each task. Looking at a portion of Quote 1, for example:

ACTIVITY	QTY	RATE	AMOUNT
Construction:Metal Framing 740 sq ft framing Added blocking for the door frames Added the cost of renting a lift.	800	5.50	4,400.00
Drywalling:Drywall 37 ft. Ultra wall to deck - 700 sq ft drywall 5/8"	700	5.00	3,500.00
Change: additional cost was added for the additional height and for the work station areas. Cost for the rental of a lift.			
Carpentry:Interior Commercial Doors double doors locking doors. locking	2	2,500.00	5,000.00

Electrical Estimate on electrical work at the Department of Revenue Building, located at 29th and Topeka Blvd., (The Zibell Building), pertaining to the addition of equipment in the NE corner of building. Based on latest drawing we received from you on July 28 Surface mount wiring on existing walls. All new circuits to originate from existing electrical panels located in Electrical Room 128. Circuits for 2 - 7.5 ton RTU's, paper cutter, copier, punch, envelope slicer, and general use receptacles. Provide and install duct detectors on RTU's connected onto existing fire alarm system. All lighting and switching to remain the same. Not included: No door security wiring of any kind. Not providing any cords on equipment. We are assuming all equipment is cord and plug connected. We will provide receptacle at equipment locations. No roof penetrations or patching. No engineering fees.	1	35,000.00	35,000.00

(R2 71) There was absolutely no question as to the work Benchmark was going to perform and the cost for it to perform that work.

3. Benchmark's Quotes Were Incorporated into the Third Amendment to Lease

KDOR and Grandmothers modified their existing lease to add Benchmark's construction work and increase the rent amount in the "Third Amendment to Lease." (R2 at 44; R2 at 69-79) KDOR accepted Benchmark's proposed quotes, memorializing its acceptance by incorporating the quotes into the Third Amendment to Lease, stating:

> This Amendment governs construction contemplated per the quotes dated 05/28/2018, 06/04/2018, 08/01/2018, and 08/02/2018 from Benchmark Property Remodeling, LLC, attached hereto as Exhibit A and corresponding floor plans, attached as Exhibit B. The Lessee shall pay a lump sum payment of $136,052.39 to the Lessor for the satisfactory work completed upon successful installation. Payment by the Lessee is contingent on the Lessee's satisfaction of all work completed. The related items will become a fixture to the leased premises and will remain upon and be surrendered with the leased premises at the termination of the Real Estate Lease Agreement.

(R2 at 82; R2 at 69-79) Robert Zibell signed the Third Amendment to Lease on behalf of Grandmothers. (R2 at 43; R2 at 69-79) In the Third Amendment to the Lease, KDOR agreed to pay Grandmothers $136,052.39, the exact sum of Benchmark's five quotes (R2 at 69-79) and

KDOR expected Grandmothers to use the $136,052.39 to pay Benchmark. (R2 at 82) Grandmothers knew it needed to pay Benchmark with the $136,052.39 it received from KDOR. (R2 at 65) As consideration for passing this money to Benchmark, Grandmothers received the benefit that the improvements would become a fixture to the leased premises and an increase in quarterly lease payments due to increased utility costs. (R2 at 53; R2 at 69-79) KDOR received improved leased premises. (R2 at 69-79)

4. Benchmark Performed and Completed All Work on the Project

Grandmothers authorized Benchmark to commence work at the Property. (R2 at 65) Benchmark fully performed under the contract by completing all of the construction work in accordance with the five quotes dated 05/28/2018, 06/04/2018 (two), 08/01/2018, and 08/02/2018 to the satisfaction of KDOR. (R2 at 82; R2 at 65, R2 at 42 (13:8-11)) Grandmothers was aware that the work was complete and that KDOR had approved the work because Jim Forbes at KDOR told Mr. Zibell that all the work had been done at the Property. (R2 at 65)

5. Benchmark Demanded Payment from Grandmothers

On or about November 15, 2018, Benchmark submitted invoices for $2,992.67 ("Invoice 1") and $18,300.00 ("Invoice 2") to KDOR and Grandmothers. (R2 at 82; R2 at 92, ¶ 19; R2 at 106-107; R2 at 109-110) KDOR accepted Benchmark's work represented in Invoices 1 and 2, and, pursuant to the Third Amendment to Lease, issued payment of $22,192.67 to Grandmothers to pay Benchmark. (R2 at 82; R2 at 92, ¶ 20; R2 at 106-107; R2 at 109-110; R2 at 52)

Grandmothers received KDOR's payment of $21,292.67 on or about November 26, 2018. (R2 at 82; R2 at 92, ¶ 21; R2 at 52) Benchmark completed the work on or about December 4, 2018, before KDOR issued final payment to Grandmothers on December 11, 2018. (R2 at 35; R2 at 82) On or about December 4, 2018, Benchmark submitted its third invoice for $114,759.72 ("Invoice

3") to KDOR and Grandmothers for payment. (R2 at 82; R2 at 92, ¶ 24; R2 at 112-116) Also on or about December 4, 2018, Benchmark submitted its fourth invoice for $100.00 ("Invoice 4") to KDOR and Grandmothers for payment. (R2 at 82; R2 at 92, ¶ 26; R2 at 118-119) Grandmothers received KDOR's payment of $114,759.72 on or about December 11, 2018. (R2 at 82; R2 at 93, ¶ 28; R2 at 42; R2 at 121)

6. Grandmothers Received Full Payment from KDOR and Failed to Pay Benchmark

It was undisputed that KDOR paid Grandmothers in full for Benchmark's work in the amount of $136,052.39 in accordance with Benchmark's quotes incorporated into the Third Amendment to Lease on December 11, 2018. (R2 at 42; R2 at 69-79; R2 at 82; R2 at 93, ¶ 28) Mr. Zibell testified that he understood that Benchmark's completion of the work and payment from KDOR triggered Grandmothers' responsibility to pay Benchmark under the Third Amendment and Lease. (R2 at 65 [106:19-107:3]) Grandmothers paid $21,192.67 to Benchmark on December 9, 2018. (R2 at 52) The omission of $100 from Grandmothers' payment to Benchmark was a math error. (R2 at 52) When Grandmothers received the second payment from KDOR of $114,759.72 on or about December 11, 2018, it deliberately withheld money from Benchmark. (R2 at 52) Benchmark again demanded payment of $114,759.72 from Grandmothers on January 2, 2019. (E R2 at 63; R2 at 123-124) Grandmothers continues to refuse to pay Benchmark. (R2 at 35)

7. Grandmothers Attempted to Strongarm Benchmark in Accepting Less than it was Owed

Instead of paying Benchmark the entire $114,759.72, Grandmothers attempted to pay Benchmark only $94,551.39. (R2 at 52) Accompanying Grandmothers' check for $94,551.39 was a statement describing the withholdings:

DATE	DESCRIPTION	BALANCE	AMOUNT
NOV 26, 2018	Payment from State of Ks Dept of Revenue for Phase 2		$2,992.67
NOV 26, 2018	Payment from State of KS Dept of revenue for Phase 2		$18,300.00
DEC 11, 2018	Payment from State of KS Dept of Revenue for Phase 2		$114,759.72
		Total payments	$136,052.39
DEC 9, 2018	Paid to Benchmark Properties for Dept of Rev Phase 2	Check #5329	-$21,192.67
DEC 1, 2018	Legal bills from Bryan Smith for Phase 2 from Benchmark		-$1,900.00
NOV 1, 2018	Removal of wall in Lobby for Benchmark Remodeling		-$1,000.00
DEC 11, 2018	5% fee for Phase 2		-$6,802.62
		Total due Benchmark Properties	$105,057.10
Dec 11, 2018	Retaining 10% until all vendors are paid from remodel job		-$10,505.71
		Check due Benchmark	$94,551.39

CURRENT	1-30 DAYS PAST DUE	31-60 DAYS PAST DUE	61-90 DAYS PAST DUE	OVER 90 DAYS PAST DUE	AMOUNT DUE
					$94,551.39

(R2 at 52; R2 at 42; R2 at 121) In Grandmothers' prepared statement, it deducted $9,702.62 for legal bills, removal of wall in lobby, 5% fee, and $10,505.71 "retainage," and provided a check for only $94,551.39 instead of the $114,759.72 owed. Grandmothers received another demand for payment on January 2, 2019. (R2 at 52; R2 at 42; R2 at 121) Benchmark never agreed to pay Grandmothers' legal bills. (R2 at 52) KDOR explicitly told Grandmothers that Grandmothers was not authorized to perform the work on the Property, instructed Grandmothers not to perform Benchmark's work, and that would not pay Grandmothers for the work. (R2 at 51, R2 at 126) On October 2, 2018, KDOR told Grandmothers, through Bob Zibell, to stop work because the contract work was for Benchmark to perform:

Paul Fernkopf [KDOR]
Tue 10/2/2018 1:31 PM

Mark as

To: Bob Zibell <bob@zibell.com>;

Mr. Zibell,

The Kansas Department of Revenue does not authorize the construction work you have commenced at 300 SW 29th street location and we will not make payment for this construction. The bid and third amendment to the lease agreement was for Benchmark Property Remodeling, LLC.; to complete this project.

Thank you,

Paul Fernkopf
Facilities Operations Manager
Office of Financial Management
Kansas Department of Revenue
785-207-8167

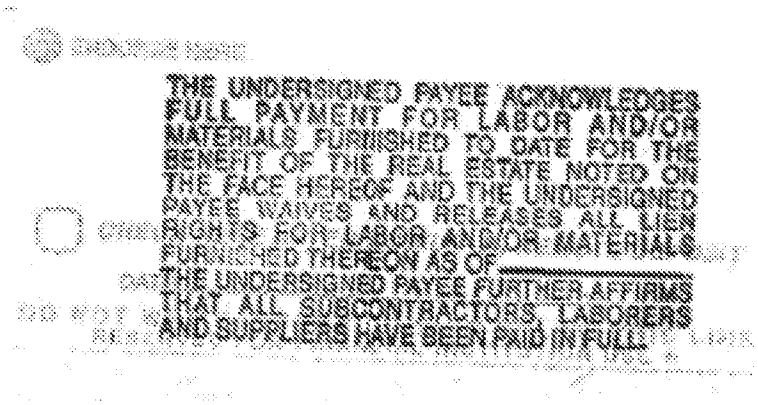
(R2 at 51; R2 at 126) Grandmothers did not have any written record of an agreement to withhold a 5% fee from the amounts due to Benchmark. (R2 at 44). Grandmothers does not have any evidence that it has ever received a 5% fee from Benchmark on any project. (R2 at 49) Benchmark negotiated and carefully itemized quotes to KDOR which were incorporated into the Third Amendment to the Lease, and those quotes do not provide for any fee to Grandmothers. (R2 at 35, R2 106-120; R2 at 130 [71:12-16]) The first time Benchmark learned that Grandmothers intended to withhold a 5% fee was in December 2018 when it received Grandmothers' Statement accompanying the $94,551.39 check. (R2 at 130 [71:17-72:8]) Benchmark would not have agreed to do construction work on the project for 5% less than the amount it quoted KDOR and Grandmothers. (R2 at 130 [72:9-11])

8. Grandmothers Purported to Withhold Retainage After Project was Complete

Grandmothers did not withhold retainage until after all of Benchmark's work on the Property was complete. (R2 at 54) Pursuant to the Third Amendment to Lease, KDOR would not pay Grandmothers until all work was complete. (R2 at 69-79) At the time Grandmothers first withheld retainage, Grandmothers did not inspect the Project and had no idea whether there was any work left that Benchmark still needed to do. (R2 at 54) KDOR never told Grandmothers to withhold money from Benchmark due to incomplete work. (R2 at 54) Grandmothers did not agree with KDOR or Benchmark that 10 percent retainage would be withheld. (R2 at 51)

9. Grandmother Attempted to Force Benchmark to Waive its Rights to the Remainder of the Amount Owed

Grandmothers stamped the check for $94,551.39 with a release stating:



(R2 at 52-53; R2 at 132) After Benchmark filed this lawsuit and its Mechanic's Lien, Grandmothers and Zibell paid some of Benchmark's subcontractors directly in the total amount of $54,248.33. (R2 at 59; R2 at 36) One of Benchmark's subcontractors refused Grandmothers' attempt to circumvent Benchmark. (R2 at 36) On February 19, 2019, Grandmothers attempted to pay Benchmark $40,303.06 as payment in full for the $60,611.30. (R2 at 58; R2 at 135-136) The February 19, 2019 check was accompanied by a statement detailing withholdings for attorneys' fees, wall removal, 5% fee, and 10% retainage, and again the check was stamped with language that Benchmark acknowledged full payment and waived all lien rights with respect to its work.

(R2 at 57; R2 at 135-136) On April 12, 2019, Grandmothers issued Benchmark a third check in the amount of $40,303.06, without the restricted language, and Benchmark could cash it without waiving its claims. (R2 at 59; R2 at 36) The only excuse Grandmothers ever suggested was non-payment of Benchmark's subcontractors. (R2 at 53) Benchmark offered lien waivers to present to Grandmothers once it was paid. (R2 at 53, R2 at 63; R2 at 138-140; R2 at 36) Lien waivers would have protected Grandmothers from claims of unpaid subcontractors; however, there was no requirement that Benchmark provide lien waivers. (R2 at 56; R2 at 36)

10. Benchmark Filed a Valid Mechanic's Lien and Timely Foreclosed on the Lien

Benchmark filed its valid Mechanic's Lien, containing all the requirements of § 60-1102(a). (R2 at 142-210) Benchmark's lien, Case No. 2019-SL-000020, was filed in Shawnee County, Kansas—where the Property is located—on January 21, 2019, which was within four months after the date when Benchmark last performed work on the Property on December 4, 2018. (R2 at 142-210; R2 at 35) After the lien and the lien foreclosure action were filed, Grandmothers paid some of Benchmark's subcontractors, and issued partial payment to Benchmark. (R2 at 59; R2 at 36) Benchmark filed its revised Mechanic's Lien on May 8, 2020, which deducted payments made by Grandmothers to Benchmark's subcontractors after the Lien was filed. (R2 at 212-280) Benchmark's revised Mechanic's Lien shows Benchmark's claim of $20,308.24. (R2 at 212-280) Benchmark timely filed this suit to enforce the Mechanic's Lien, adding its Mechanic's Lien claim in its First Amended Petition on March 13, 2019. (First Amended Petition filed herein)

11. The Lawsuit

Appellant filed this action on January 4, 2019, an Amended Petition on March 3, 2019, and Second Amended Petition on June 20, 2019 against Grandmothers, Robert Zibell, CoreFirst Bank & Trust, KDOR, and the State of Kansas in the District Court of Shawnee County, Kansas alleging

Count I – Breach of Contract against Grandmothers, KDOR and Kansas, Count II – Quantum Meruit/Unjust Enrichment against Grandmothers, Count III – Quantum Meruit/Unjust Enrichment for Extra Work against Grandmothers, Count IV – Violation of Kansas Fairness in Private Construction Contract Act against Grandmothers and KDOR and Kansas, Count V– Violation of Kansas Fairness in Public Construction Contract Act against Grandmothers and KDOR and Kansas, Count VI – Conversion against Grandmothers and Zibell, Count VII – Foreclosure of Mechanic's Lien against Grandmothers, KDOR, Kansas and CoreFirst, and Count VIII – Tortious Interference with a Contract against Zibell. (R1 at 214)

12. Motion for Judgment on the Pleadings

On July 1, 2020, the district court entered a Journal Entry granting KDOR and Kansas' Motion for Judgment on the Pleadings with respect to Benchmark's claims against KDOR and Kansas. (R3 at 121-126) The district court held that there was no contract between Benchmark and KDOR because there was no meeting of the minds between KDOR and Benchmark. (R3 at 124). The court determined that KDOR had an "exclusive agreement" with Grandmothers to make all payments regarding the work performed by Benchmark, and it would be contrary to the Third Amendment to Lease between KDOR and Grandmothers to conclude that KDOR had an obligation to make payments to Benchmark. (R3 at 124-125) The district court determined that KDOR had no obligation to pay Benchmark for work Benchmark performed for KDOR pursuant to Benchmark's quotes because of KDOR's written agreement with Grandmothers. (R3 at 124-125) The court stated that it would "not look beyond the lease" and concluded there was no contract between KDOR and Benchmark. The district court also found that because KDOR was not an "owner" and that there was no indication that Benchmark furnished services under a contract with KDOR, Benchmark could not maintain its mechanic's lien against KDOR. (R3 at 125)

13. Motion for Summary Judgment

On January 13, 2021, the district court entered a Journal Entry granting Grandmother's Motion for Summary Judgment with respect to Benchmark's claims for Breach of Contract, Violation of Kansas Fairness in Private Construction Contract Act, Violation of Kansas Fairness in Public Construction Contract Act, and Foreclosure of Mechanic's Lien. (R3 at 143-157) The district court concluded that there was no contract between Benchmark and Grandmothers. (R3 at 155, ¶4) Following oral argument on Grandmothers' Motion for Summary Judgment, the district court recited its decision on the record, which was incorporated into the January 13, 2021 Journal Entry. The court stated that its conclusion was based in part on the fact that KDOR told Grandmothers "no, hey, we didn't authorize this. We've already contracted with Benchmark to do the work." (R3 at 155, ¶4; R5 at 44[1]) The court concluded that Benchmark and Grandmothers could not have had a meeting of the minds on all essential elements of a contract because KDOR told Grandmothers that it had already contracted with Benchmark to perform the construction work.

After the January 13, 2021, Journal Entry, Benchmark's claims for Quantum Meruit/Unjust Enrichment, Quantum Meruit/Unjust Enrichment for Extra Work, Conversion and Tortious Interference with a Contract remained pending. (R3 at 166-169) Defendant Grandmothers' Counterclaim against Benchmark was disposed of with the summary judgment on Benchmark's breach of contract claim. With that posture, in order for Benchmark to seek appellate review of the two Journal Entries granting KDOR's Motion for Judgment on the Pleadings and Grandmothers' Motion for Summary Judgment, all remaining claims needed to be disposed of, either through trial on the merits or dismissal. As a trial on Benchmark's remaining claims (pleaded in the alternative

[1] The transcript of the July 29, 2020 hearing on Grandmothers' Motion for Summary Judgment has been requested to be added to the record, it is incorporated into the Court's Journal Entry. (R3 156)

to its preferred breach of contract claim) would have been duplicative and not an economical use of judicial resources, Benchmark dismissed the remainder of its claims without prejudice so it could pursue this appeal. (R3 at 166-169) All claims have been disposed of, and the claims are ripe for appeal.

14. The Appeal

On April 19, 2021, the district court entered a Journal Entry, granting Benchmark's Motion for Journal Entry of Dismissal Without Prejudice and providing final judgment on all claims. (R3 at 166) Benchmark filed a Notice of Appeal on May 17, 2021. (R3 at 143)

Arguments and Authorities

Issue I: **The district court erred in granting KDOR's Motion for Judgment on the Pleadings because the district court incorrectly concluded that there was no contract between KDOR and Benchmark where KDOR admitted in its Answer that there was a contract between KDOR, Benchmark and Grandmothers. As all facts and inferences which may be reasonably drawn must be resolved in Benchmark's favor, KDOR's admission that it, Benchmark and Grandmothers had a contract must be accepted as true in evaluating KDOR's Motion for Judgment on the Pleadings. The district court's failure to recognize this admitted contract was reversible error.**

Introduction

The district court granted KDOR's Motion for Judgment on the Pleadings finding that Benchmark had failed to state a cause of action against KDOR and dismissed all counts involving KDOR. (R3 at 121-126) The district court determined that Benchmark did not have a contract with KDOR because there was no meeting of the minds. (R3 at 124) Because KDOR admitted to the existence of a contract with Benchmark in its Answer, the district court erred in ruling in KDOR's favor on its Motion for Judgment on the Pleadings.

Standard of Appellate Review

"An appellate court's review of whether the district court properly granted a motion for judgment on the pleadings is unlimited. [Citations omitted.]" *Tillman v. Goodpasture*, 313 Kan. 278, 281, 485 P.3d 656, 661 (Kan. 2021). In evaluating a motion under K.S.A. § 60-212(c), a trial court is ***required*** to accept plaintiff's factual allegations as true. *Nora H. Ringler Revocable Family Tr. v. Meyer Land & Cattle Co.*, 25 Kan. App. 2d 122, 135, 958 P.2d 1162, 1170 (1998)(emphasis added). Kansas law is clear that:

> A motion for judgment on the pleadings under 60-212(c), filed by a defendant, is based upon the premise that the moving party is entitled to judgment on the face of the pleadings themselves and the basic question to be determined is whether, upon the admitted facts, the plaintiffs have stated a cause of action. The motion serves as a means of disposing of the case without a trial where the total result of the pleadings frame the issues in such manner that the disposition of the case is a matter of law on the facts alleged or admitted, leaving no real issue to be tried. ***The motion operates as an admission by movant of all fact allegations in the opposing party's pleadings***.

Clear Water Truck Co. v. M. Bruenger & Co., 214 Kan. 139, 140 (1974) (internal citations omitted) (emphasis added.) Further, Kansas is a notice pleading state; therefore, the petition is not intended to govern the entire course of the case. *Williams v. C-U-Out Bail Bonds, LLC*, 450 P.3d 330, 338 (Kan. 2019). Rather, "the pretrial order is the ultimate determinant as to the legal issues and theories on which the case will be decided." *Unruh v. Purina Mills*, 289 Kan. 1185, 1191, 221 P.3d 1130 (2009). Benchmark was not required to plead every detail in its Petition; it must plead enough to put Defendants on notice of the claims. Likewise, KDOR cannot argue interpretation of allegations or ultimate facts, or their application to legal theories in a motion under K.S.A. § 60-212(c). The court was required to view all facts in the light most favorable to Benchmark. Considering all facts alleged in Benchmark's Second Amended Petition as admitted and viewing

them in the light most favorable to Benchmark, Benchmark clearly stated a cause of action against KDOR.

KDOR Admitted It Entered into a Valid, Enforceable Agreement with Benchmark

Benchmark clearly alleged in paragraph 16 of its Second Amended Petition that ***KDOR*** and Grandmothers accepted Benchmark's quotes for the proposed construction work and **agreed to pay Benchmark** $136,052.39 for the work. (R1 at 216, ¶ 16). Significantly, KDOR expressly admitted these allegations in paragraph 2 of its Answer to Benchmark's Second Amended Petition. (R1 at 347) Benchmark also alleged, in paragraph 46 of its Second Amended Petition that "***Benchmark***, Grandmothers, ***and KDOR, entered into a valid, enforceable agreement pursuant to which Benchmark agreed to perform the work identified in Exhibit A to Exhibit 1, in exchange for payment for the same."*** (R1 at 220, ¶ 46) KDOR also admitted paragraph 46 in paragraph 2 of its Answer. (R1 at 347)

KDOR's admissions of the existence of a contract in its Answer constitute a "judicial admission," that is, a voluntary and "unequivocal concession of the truth of the matter," which removed the matter of whether there was a contract between KDOR and Benchmark as an issue in the case. *See Hanshew v. Watkins*, No. 114,642, 2016 Kan. App. Unpub. LEXIS 310, 2016 WL 173290, at *9 (Kan. App. 2016) (unpublished); 29A Am Jurisdiction 2d Evidence § 771 (Matters contained in a defendant's answer waive all controversy concerning the matter). Further, by virtue of filing a Motion for Judgment on the Pleadings under K.S.A. § 60-212(c), KDOR admitted all facts alleged in Benchmark's Second Amended Petition, including ¶¶ 16 and 46. See *Clear Water Truck Co. v. M. Bruenger & Co.*, 214 Kan. 139, 140 (1974) (The motion [for judgment on the pleadings pursuant to K.S.A. § 60-212] operates as an admission by movant of all fact allegations in the opposing party's pleadings.)

A "valid, enforceable agreement" is simply another way of saying "contract." KDOR admitted, in its Answer and by way of filing a motion under K.S.A. § 60-212(c), that it entered into a valid, enforceable agreement with Benchmark. (R1 at 216, ¶ 16, R1 at 220, ¶ 46) Benchmark alleged the existence of a contract between KDOR and Benchmark, KDOR has admitted to its existence, and under the rules governing Motions for Judgment on the Pleadings the district court was ***required*** to accept the existence of a valid contract in evaluating KDOR's Motion.

KDOR incorrectly claimed that the Third Amendment to Lease between KDOR and Grandmothers (Exhibit 1 to Benchmark's Second Amended Petition) was the contract that "forms the basis for [Benchmark's] allegations that KDOR and Benchmark were in contract." (R1 at 356-357) The Third Amendment to the Lease is not the contract that is the subject matter of Benchmark's claims, but it is a helpful document in identifying the understanding of the parties:

- Benchmark's quotes clearly and explicitly detail the exact construction work Benchmark offered to perform with the terms and price. (R1 at 216, ¶¶ 14, 15, 16; R1 at 220, ¶ 46).
- KDOR admitted in paragraph 2 of its Answer that "[o]n or about September 5, 2018, Benchmark, Grandmothers, and KDOR, entered into a valid, enforceable agreement wherein Benchmark agreed to perform the work identified in Exhibit A to Exhibit 1 [the estimates ultimately incorporated into the Third Amendment to Lease], in exchange for payment for the same," as alleged in ¶ 46 of Benchmark's Second Amended Petition, (R1 at 220, R1 at 347)
- KDOR further admitted offer, acceptance, and consideration in its answers to paragraphs 14, 15, and 16 of Benchmark's Second Amended Petition. (R1 at 216; R1 at 347)

- KDOR admitted in paragraph 2 of its Answer that "Benchmark completed all work on the Project on or about December 4, 2018," as alleged in ¶ 23 of Benchmark's Second Amended Petition. (R1 at 217, R1 at 347)
- KDOR admitted in paragraph 2 of its Answer that it paid to Grandmothers the exact amount for which Benchmark had agreed to perform the work, as alleged in paragraphs 20, 24, 25, 26, 27 of Benchmark's Second Amended Petition. (R1 at 217-218; R1 at 347)

A contract need not be in writing to be enforceable unless it is subject to the statute of frauds. *See,* K.S.A. § 33-106. No party has raised an argument that this agreement was subject to the statute of frauds. To show a contract and overcome KDOR's Motion for Judgment on the Pleadings, Benchmark need only show it alleged offer, acceptance, and consideration. *See, Peters v. Deseret Cattle Feeders, LLC*, 379 P.3d 1132, No. 113,563, *14 (Kan. Ct. App. 2016). Benchmark alleged in the Second Amended Petition that offered to KDOR to perform renovation work to property KDOR occupied and quoted a price. (R1 at 216, ¶¶ 12, 14, 15) The scope of work and price are memorialized in writing and undisputed. Grandmothers and KDOR accepted its quotes and agreed to pay Benchmark consideration of $136,052.39 in accordance with the quotes. (R1 at 216, ¶ 16; R1 at 347, ¶ 2) KDOR admitted all paragraphs in its Answer, by filing a motion under K.S.A. § 60-212(c). (R1 at 347, ¶ 2)

By way of its Answer and K.S.A. § 60-212(c), KDOR admitted it was supposed to pay Benchmark, and Grandmothers was supposed to pay Benchmark; KDOR and Grandmothers have failed to pay Benchmark all amounts owed. (R1 at 216, 220-221, ¶¶ 16, 31, 47, 48, 50, 52, 53, 54, 55, 56; R1 at 347s, ¶ 2) Further, although KDOR entered into the Third Amendment to Lease with Grandmothers whereby KDOR agreed to pay Grandmothers $136,052.39 for Benchmark's work,

there is no evidence that Benchmark agreed to receive payment only from Grandmothers or that Benchmark agreed that Grandmothers could be the arbiter of whether Benchmark was paid. There is no allegation that Benchmark agreed that Grandmothers would be the sole entity responsible for ensuring payment to Benchmark. These alleged facts do not appear *anywhere* in any pleading, cannot be assumed or read into alleged facts, and cannot be considered in a Motion for Judgment on the Pleadings. KDOR cannot ask this Court to interpret a contract in the course of resolving a Motion for Judgment on the Pleadings. (R1 at 216, ¶¶ 17, 47; R1 at 347, ¶ 2)

Even if KDOR decided to assign to Grandmothers its obligation to pay Benchmark for the work Benchmark performed, such an agreement does not release KDOR from its obligation to pay Benchmark and KDOR cannot avoid its debts by assigning them to another party: "A party to a contract may not assign an obligation so as to avoid liability on the contract and shift liability to the assignee, unless the assignee assumes the obligation of the assignor with the consent of the other party to the contract and the latter releases the assignor from further liability . . ." *Dondlinger & Sons' Constr. Co. v. Emcco, Inc.*, 227 Kan. 301, 305, 606 P.2d 1026, 1030 (1980) (quoting 6 Am. Jur. 2d, Assignments § 9, pp. 194-195). KDOR remains liable to Benchmark as the entity that accepted and directed Benchmark's work and negotiated its price and formed the original agreement. *Id.*, 227 Kan. at 304. Benchmark did not consent to release KDOR from liability for payment, and there is no allegation in any pleading to the contrary. KDOR cannot avoid liability to Benchmark by unilaterally delegating performance of payment to another party. Indeed, KDOR's remedy in this situation was to seek to enforce its agreement with Grandmothers, by virtue of its Crossclaim against Grandmothers. (R1 at 350)

All essential terms of the contract are undisputed – the work to be performed (in the quotes), the time when the work was to be performed (September through December 2018), the

entity to perform the work (Benchmark), and the amount for which Benchmark agreed to perform the work ($136,052.39) were undisputed. It is likewise undisputed that Benchmark timely completed all work, that it was accepted by KDOR, and that KDOR paid $136,052.39 for the work. To say that there was not a "meeting of the minds" as to who should receive the $136,052.39 for performing the work and therefore there is no contract defies logic and is contrary to Kansas law.

Considering all allegations in the Second Amended Petition as admitted and viewing them in the light most favorable to Benchmark, a contract existed between KDOR and Benchmark, and KDOR agreed to pay Benchmark $136,052.39 in accordance with Benchmark's quotes. The district court erred in granting KDOR's Motion for Judgment on the Pleadings and the judgment in favor of KDOR should be reversed and remanded to the district court for further proceedings.

Issue II: The district court erred in granting partial summary judgment in favor of Grandmothers, Inc. because it incorrectly concluded that there was no legal basis for finding a construction contract due to a lack of consideration and a lack of a meeting of the minds, where the undisputed facts demonstrated all elements of a contract.

Introduction

The district court granted Grandmothers' Motion for Partial Summary Judgment finding insufficient evidence to support Benchmark's Breach of Contract, Violation of the Kansas Fairness and Private Construction Act, and Mechanic's Lien claims. After concluding that Benchmark did not have a contract with KDOR for payment for its work pursuant to KDOR's Motion for Judgment on the Pleadings, the district court determined that Benchmark also did not have a contract with Grandmothers. Viewing the facts and drawing inferences in Benchmark's favor, Benchmark and Grandmothers had a valid enforceable contract, which Grandmothers breached. There is no requirement that the parties' contract be in writing or that acceptance be in writing for it to be enforceable. Nonetheless, other writings and the actions of the parties clearly establish the terms

of the parties' agreement. Grandmothers and Zibell were not entitled to summary judgment on those claims.

Preservation

This issue is fully preserved for appeal. The arguments are part of the record as contained in Benchmark's Motion for Partial Summary Judgment filed on May 8, 2020, Benchmark's Response in Opposition to Defendants Zibell and Grandmothers' Motion for Summary Judgment and Memorandum in Support Thereof filed on May 22, 2020, and Benchmark's Reply in Further Support of its Motion for Partial Summary Judgment filed on June 26, 2020.

Standard of Appellate Review

On appeal, the Court will review a grant of summary judgment independently, without any required deference to the district court. *Simpson v. City of Topeka*, 53 Kan. App. 2d 61, 67, 383 P.3d 165, 169 (Kan. 2016). A party moving for summary judgment has the burden to show "based on appropriate evidentiary materials, there are no disputed issues of material fact and judgment may, therefore, be entered in its favor as a matter of law." *Golden v. Den-Mat Corp.*, 47 Kan. App. 2d 450, 459-60, 276 P.3d 773 (2012)(citation omitted). "Summary judgment should not be used to prevent the necessary examination of conflicting testimony and credibility in the crucible of a trial." *Esquivel v. Watters*, 286 Kan. 292, 296, 183 P.3d 847 (2008). Summary judgment is only appropriate "when the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Shamburg, Johnson & Bergman, Chtd. V. Oliver*, 289 Kan. 891, 900 220 P.3d 333 (2009). "The trial court is required to resolve all facts and inferences which may reasonably be drawn from the evidence in favor of the party against whom the ruling is sought." *Id.* "When opposing a motion for summary judgment, an adverse party

must come forward with evidence to establish a dispute as to a material fact." *Id.* "In order to preclude summary judgment, the facts subject to the dispute must be material to the conclusive issues in the case." *Id.*

Benchmark Established the Existence of a Valid and Enforceable Contract Between it and Grandmothers, thereby Precluding Summary Judgment

A contract does not need to be in writing to be enforceable, and Benchmark's claims for breach of contract, violation of the Kansas Fairness in Private Construction Contract Act, and foreclosure of its Mechanic's Lien do not require written contracts. Grandmothers completely failed to address this key legal issue and instead argued only that there was not a written agreement between it and Benchmark. Grandmothers was not entitled to summary judgment based on that issue alone. Furthermore, Benchmark established the existence of a valid, enforceable contract in its Motion for Summary Judgment.

Contracts only need to be in writing to be enforceable unless subject to the statute of frauds. *See,* K.S.A. § 33-106. That is, if they charge a party to answer for the debt of another, charge an executor to pay damages out of his own estate, charge a person upon any agreement made upon consideration of marriage, upon a contract for the sale of land, or upon any agreement not to be performed within one year. None of those apply to the agreement at issue in this case. Mechanics' liens also require only a contract with the owner of the property and do not require a written contract signed by the contractor. *See*, K.S.A. § 60-1101. Accordingly, Benchmark's breach of contract claim and mechanic's lien claim were viable because the parties had a valid enforceable contract. Although not required, the key terms of the agreement—the work to be performed, the entity to perform the work, the amount of payment, and the event triggering payment—are clearly memorialized in writing even though it was not signed by Benchmark. (Benchmark's RIO MSJ UMF No. 7, 10)

The Kansas Fairness in Private Construction Contract Act ("Fairness Act"), K.S.A. § 16-1801, *et seq.* likewise does not require that a construction contract be in writing to be enforceable: "Contract. . .means a contract or agreement concerning construction made and entered into by and between an owner and a contractor." K.S.A. § 16-1802(c). The Kansas Court of Appeals enforced the Fairness Act in a remarkably similar situation without a written contract in *Hilton Plaster Co. v. Knoblauch*, 2016 Kan. App. Unpub. LEXIS 811 (Kan. App. September 30, 2016)(unpublished). The subcontractor provided a quote for $12,350 and performed the work, after which the contractor refused to pay and claimed that it had not signed a contract with the subcontractor and there was no documentary evidence showing it had hired the subcontractor. The trial court and the Kansas Court of Appeals saw right through the contractors' illogical and incredulous argument and awarded the subcontractor statutory interest and attorneys' fees under the Fairness Act. *Id.* at 10.

To have a valid contract, Benchmark must show offer, acceptance, and consideration. *See, Peters v. Deseret Cattle Feeders, LLC*, 379 P.3d 1132, No. 113,563, *14 (Kan. Ct. App. 2016): "The primary rule in construction of any contract is to ascertain the intent of the parties, and such intent may best be determined by looking at the language employed and taking into consideration all the circumstances and conditions which confronted the parties when they made the contract." *Rail Logistics, L.C. v. Cold Train, L.L.C.*, 54 Kan. App. 2d 98, 109, 397 P.3d 1213, 1222 (2017) [quoting *New Hampshire Ins. Co. v. Fox Midwest Theatres, Inc.*, 203 Kan. 720, Syl. ¶ 1, 457 P.2d 133 (1969)]. Acceptance of an offer can be shown in many ways and does not require a formal writing with a signature. Acceptance of an offer to form a contract can be demonstrated by an overt act such as conduct from which a promise may be inferred, by commencing performance. *See, e.g., N. Nat. Gas Co. v. Landon,* 212 F. Supp. 856, 860 (D. Kan. 1961) (Letters written by Plaintiff

constituted an offer in a contract for refund and Defendant's action in accepting and cashing checks constituted acceptance of the offer).

As set forth in Benchmark's Motion for Partial Summary Judgment, the undisputed material facts established that there was a contract between Benchmark and Grandmothers which Grandmothers breached. But, regardless of the outcome of that Motion, for the purposes of Grandmothers' Motion, Grandmothers failed to meet its burden.

In considering Grandmothers' motion, the "trial court is required to resolve all facts and inferences which may reasonably be drawn from the evidence in favor of the party against whom the ruling is sought." *Shamburg, Johnson & Bergman, Chtd.*, 289 Kan. 891, 900. The district court should have accepted the following as true:

- Benchmark offered to perform construction work on Grandmothers' property in accordance with five quotes specifying the work it was to perform and the price it would charge of $136,052.39. (R2 004, UMF No. 6)
- KDOR accepted Benchmark's proposed quotes, memorializing its acceptance by incorporating the quotes into the Third Amendment to Lease, stating:

> This Amendment governs construction contemplated per the quotes dated 05/28/2018, 06/04/2018, 08/01/2018, and 08/02/2018 from Benchmark Property Remodeling, LLC, attached hereto as Exhibit A and corresponding floor plans, attached as Exhibit B. The Lessee shall pay a lump sum payment of $136,052.39 to the Lessor for the satisfactory work completed upon successful installation. Payment by the Lessee is contingent on the Lessee's satisfaction of all work completed. The related items will become a fixture to the leased premises and will remain upon and be surrendered with the leased premises at the termination of the Real Estate Lease Agreement.

  (R2 005 UMF No. 10)

- Grandmothers accepted Benchmark's proposed quotes by authorizing Benchmark to commence work at the Property. (R2 006, UMF No. 17)

- KDOR and Grandmothers signed the Third Amendment to Lease, whereby Grandmothers accepted Benchmark's offer to perform the construction work in exchange for $136,052.39. (R2 005, UMF No. 10, 11)
- KDOR agreed to pay Grandmothers the exact amount Benchmark was charging to perform the work. (R2 005, UMF No. 12)
- KDOR expected Grandmothers to use the money to pay Benchmark, and Grandmothers knew it knew it needed to pay Benchmark with those funds. (R2 005, UMF No. 14)
- As consideration for passing this money to Benchmark, Grandmothers received the benefit that the improvements would become a fixture to the leased premises and an increase in quarterly lease payments due to increased utility costs. (R2 005, UMF No. 15) KDOR received improved leased premises. (R2 005, UMF No. 15)
- KDOR explicitly told Grandmothers that Grandmothers was not authorized to perform the work on the Property, instructed Grandmothers not to perform Benchmark's work, and stated that they would not pay Grandmothers for work. (R2 009 UMF No. 40)

Benchmark established the existence of a contract between Grandmothers and Benchmark; there is no other reason why Benchmark would perform the work in the quotes, and the only logical interpretation of these documents and circumstances is the parties expected that Grandmothers would pay Benchmark the full $136,052.39 it received from KDOR.

Benchmark needed only to show that it performed the contract above, that Grandmothers breached the contract, and that Benchmark was damaged. *Schumacher v. Morris*, 219 P.3d 1243 (Kan. App. 2009). Benchmark established these elements:

- Benchmark fully performed under the contract by completing the construction work in accordance with the quotes dated 05/28/2018, 06/04/2018, 08/01/2018, and 08/02/2018 to the satisfaction of KDOR on or about December 4, 2018. (Benchmark's RIO MSJ UMF No.18, 24)
- KDOR demonstrated its satisfaction with Benchmark's completed work and performed its obligation under the contract by paying Grandmothers $136,052.39 in accordance with the Third Amendment to Lease. (Benchmark's RIO MSJ UMF No. 29)
- Grandmothers received the first payment from KDOR in the amount of $21,292.67 on or about November 26, 2018, Grandmothers paid $21,192.67[2] to Benchmark to Benchmark in accordance with the contract on December 9, 2018. (Benchmark's RIO MSJ UMF No. 31, 32)
- Grandmothers received the second payment from KDOR in the amount of $114,759.72 on or about December 11, 2018. (Benchmark's RIO MSJ UMF No. 33)
- Instead of paying Benchmark the entire $114,759.72 Benchmark was owed, Grandmothers paid Benchmark only $94,551.39, withholding money for Grandmothers' legal bills, work it was instructed not to perform, an improper kickback, and improper retainage resulting in damage to Benchmark.

Benchmark clearly established all elements of its breach of contract claim against Grandmothers.

[2] The $100 difference in KDOR's payment to Grandmothers and Grandmothers' payment to Benchmark was a math error.

Grandmothers and Zibell did not state any uncontroverted statements of material fact or address any of the elements of Benchmark's claim under the Fairness Act or its Mechanic's Lien and did not provide any legal analysis on these issues other than to argue the lack of a written contract. For the reasons set forth in Benchmark's Motion for Partial Summary Judgment, Benchmark established all elements of its claims. As such, Grandmothers failed to meet its burden and was not entitled to summary judgment on Benchmark's claims for breach of contract, violation of the Fairness Act, or foreclosure of its mechanic's lien.

The Kansas Fairness in Private Construction Contracting Act Applies to Plaintiff's Claims

A contract clearly existed between Benchmark and Grandmothers and does not preclude recovery under the Fairness Act. Benchmark is entitled to interest and attorneys' fees under the Kansas Fairness in Private Construction Contracting Act ("Fairness Act") for two reasons: (1) because Grandmothers failed to pay the undisputed contract balance, and (2) because Grandmothers wrongfully withheld retainage after the project was complete. The only issue Grandmothers addressed in its Motion for Summary Judgment was whether the amount is "undisputed." Grandmothers completely failed to acknowledge, explain, or address why it wrongfully withheld and continues to withhold retainage.

Grandmothers owes Benchmark $20,308.24 and there is absolutely no good faith basis for Grandmothers to withhold any of it. Grandmothers alleged the existence of this lawsuit evidenced that amounts owed were disputed. (Grandmothers' Response, pg. 16) The Fairness Act exists to discourage and punish a willful failure to pay amounts rightfully owed. For a payment to be "disputed" with respect to Kansas Fairness in Construction Contracting Acts, K.S.A. § 16-1801 *et seq.* and K.S.A. § 16-1901 *et seq.*, "there must be some matter that can be disputed in good faith because Kansas contracts contain an implied covenant of good faith and fair dealing." *Lindsey*

Masonry Co. v. Murray & Sons Constr. Co., 53 Kan. App. 2d 505, 522-23 (2017); *VHC Van Hoecke Contr. v. Murray & Sons Constr. Co.*, 2012 Kan. App. Unpub. LEXIS 508, *9 (Kan. App. June 15, 2012)(unpublished).

The Kansas Court of Appeals soundly rejected the theory that a party could avoid penalties under the Fairness Act by disputing payment for any reason not in good faith. *Id.* In doing so, the Court reversed the matter and ordered the trial court to award interest and attorneys' fees. For example, a contract amount may be "disputed" in good faith when there is a dispute about whether the contractor completed the construction work. *See, e.g. Midwest Asphalt Coating, Inc. v. Chelsea Plaza Homes, Inc.*, 45 Kan. App. 2d 119, 126 (2010). Such is not the case here because KDOR had approved all of Benchmark's work and paid Grandmothers in full.

In this case, there is no good faith dispute excusing Grandmothers and Zibell from making payment in full. Grandmothers and Mr. Zibell were silent about the withholding of Grandmothers' $1,900 in legal fees and silent on the withholding of $1,000 for work performed against KDOR's instructions. Grandmothers and Zibell do not have a good faith basis for withholding 10% retainage, which is ***double*** the rate statutorily allowed "unless a higher rate is required to ***ensure performance of the contract***." K.S.A. § 16-1804(a) (emphasis added). "Retainage" withheld after performance of the contract is complete by its very nature and cannot be required to ensure performance of the contract. Finally, Grandmothers likewise totally failed to explain how it could have a good faith belief that it could skim 5% from a government contract. This is not a case where the parties dispute whether work was performed correctly or whether a change order was wrongfully rejected or whether the project was delivered on time. The work was completed and accepted and Grandmothers received full payment from KDOR. Grandmothers did not offer a shred of evidence that its deductions were in good faith; there is no good faith dispute as to the

amount owed, and Benchmark is entitled to attorneys' fees and statutory interest at 18% under the Fairness Act.

Grandmothers urged the district court to find that Benchmark performed $136,052.39 in construction work without any agreement to be paid for that work. Grandmothers claimed that "[i]t was at KDOR's request and with its specifications that the work was to be completed," and concluded that because the only agreement was between Benchmark and KDOR—a tenant and not an owner—Benchmark did not have Fairness Act remedies with respect to Grandmothers. This argument contradicted the district court's Order on KDOR's Motion for Judgment on the Pleadings, which concluded that KDOR and Benchmark did not have an enforceable agreement. It is illogical that Benchmark could fully perform a scope of construction work which priced at $136,052.39, that KDOR and Grandmothers could receive the benefit of the work, and yet neither had an obligation to pay Benchmark for the work. Grandmothers received $136,052.39 from KDOR for Benchmark's completed work and had a contractual duty to pay that amount to Benchmark in December 2018 when the work was finished and accepted. Indeed, the express purpose of the Fairness Act is to compel prompt payments of undisputed amounts that become due in these types of construction contracts. *Wheatland Contr., LLC v. Jaco Gen. Contr., Inc.*, 57 Kan. App. 2d 236, 238 (2019). Grandmothers' and Benchmark's contract falls within the Fairness Act and Benchmark is entitled pursue its claims for for attorneys' fees and statutory interest at 18%.

The only question in evaluating this Fairness Act claim is whether Grandmothers paid the amounts owed to Benchmark within 30 days of receipt of Benchmark's demand. It is undisputed that Grandmothers did not.

Benchmark's Foreclosure of Mechanic's Lien Claim is Not Precluded by Stare Decisis

The district court dismissed Benchmark's Mechanic's Lien claim again Grandmothers and KDOR asserting that no contract existed between Benchmark and Grandmothers and noting that *Drywall Sys. v. Arnold of Kan. City LLC,* 57 450 P.3d 379 (Kan. Ct. App. 2019) stands for the

proposition that the mechanic's lien statute does not include a leasehold interest within the definition of an ownership interest. The district court erred in drawing either conclusion.

As discussed above, there was a valid enforceable contract between Benchmark and Grandmothers; a genuine issue of material fact precluded granting summary judgment in Grandmothers' favor.

As to the issue of whether a leasehold interest can be construed as an ownership interest under the mechanic's lien statute, the *Drywall* Court, argues in the affirmative: without specific reference, the Fairness Act could not be construed to include tenants as owners. The Court determined this contradicted the mechanics lien statute under which courts have long interpreted "owner" as including the owner of a leasehold estate. *Id.* at 382 ("We cannot read anything into [the Fairness Act] as prior courts have done for mechanic's liens."). *Drywall* does not prevent a Fairness Act claim against Grandmothers because Grandmothers is an owner and had a contract with Benchmark. Furthermore, *Drywall* does not prevent a mechanic's lien claim against KDOR because, under the statute, owner does include a leasehold estate. See *Miller v. Bankers' Mortg. Co.*, 287 P. 618, 619 (Kan. 1930) ("A mechanic's lien may attach to, and be enforced against, a leasehold estate for labor or materials furnished under a contract with the lessee …").

Conclusion

This Court should reverse the district court's Judgment on the Pleadings in favor of Kansas Department of Revenue and reverse the district court's Summary Judgment in favor of Grandmothers, Inc., and remand this case for a trial on Benchmark's claims against KDOR and Grandmothers for breach of contract, violation of the Kansas Fairness in Private Construction Act, and foreclosure of its mechanic's lien.

Respectfully submitted,

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Certificate of Service

I certify that on March 9, 2022, I electronically filed a true and accurate Adobe PDF copy of the foregoing with the Clerk of the Court by using the electronic filing system, which will send notice of electronic filing to the following:

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Appendix

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CLERK OF THE SHAWNEE COUNTY DISTRICT COURT
CASE NUMBER: 2019-CV-000008

Court: Shawnee County District Court

Case Number: 2019-CV-000008

Case Title: Benchmark Property Remodeling LLC vs. Grandmothers Inc, et al.

Type: Journal Entry

SO ORDERED.

/s/ Honorable Mary E Christopher, District Judge

IN THE DISTRICT COURT OF SHAWNEE COUNTY, KANSAS

BENCHMARK PROPERTY REMODELING, LLC, Plaintiff/Counterclaim Defendant, v. GRANDMOTHERS, INC., Defendant/Counterclaimant, and COREFIRST BANK & TRUST, KANSAS DEPARTMENT OF REVENUE, ROBERT ZIBELL and STATE OF KANSAS, Defendants.	)	Case No. 2019-CV-000008 Division No.: 8 Chapter 60

JOURNAL ENTRY

ON March 3, 2020, the motion for judgment on the pleadings filed by the Defendant, Kansas Department of Revenue and State of Kansas (KDOR), came on for hearing before the Court. Counsel Diane Lewis appeared on behalf of the Plaintiff; Adam King appeared on behalf of the Defendant, the Kansas Department of Revenue and the State of Kansas; Bryan Smith appeared on behalf of Defendant, Grandmothers Inc. Defendant, Corefirst Bank and Trust did not appear.

After considering the pleadings, briefs and hearing arguments, the Court made findings of fact and conclusions of law on the record, which is incorporated as if fully set forth herein. The Court's findings of uncontroverted fact are summarized as follows:

1. Between May 2018 and August 2018, the Plaintiff provided quotes to the Defendants, the KDOR and Grandmothers Inc. (Grandmothers) regarding

renovations to the property located at 300 SW 29th Street, Topeka, Kansas 66611. (¶ 14 Second Amended Petition).

2. Upon agreeing to the scope of the work to be performed, KDOR and Grandmothers agreed to pay the Plaintiff a total of $136,052.39 for the work. (¶ 16 Second Amended Petition).
3. KDOR and Grandmothers agreed in their lease that the KDOR would make a lump-sum payment to Grandmothers upon satisfactory completion of the work by Plaintiff. (¶ 17 Second Amended Petition).
4. Between November 15, 2018 and December 4, 2018, the Plaintiff provided KDOR and Grandmothers four invoices totaling the sum of $136,052.39 for payment. (¶¶ 19, 24 and 26 Second Amended Petition).
5. KDOR paid Grandmothers the amounts of $21,192.67 for the first two invoices (¶ 20 Second Amended Petition), and on or about December 11, 2018, upon completion of the work, KDOR paid the remaining amount of $114, 759.72 for the third invoice (¶ 25 Second Amended Petition) and $100 for the fourth invoice (¶ 27 Second Amended Petition). The total amount KDOR paid Grandmothers was $136,052.39.
6. On or about December 10, 2018, the Plaintiff received $21,192.67 from Grandmothers. (¶ 22 Second Amended Petition).
7. The Plaintiff made numerous demands to Grandmothers for payment; however, Grandmothers refused to make payment for the remaining amount owed: $114,759.72. (¶¶ 29-31 Second Amended Petition).

The Court's conclusions of law are summarized as follows:

1. The standard of review for a motion for judgment on the pleadings is set out in *Purvis v. Williams*, 276 Kan. 182, 187 (2003). "If successful a motion for judgment on the pleadings can dispose of the case without a trial because the pleadings frame the issues in such a way that the disposition of a case is a matter of law on the facts alleged or admitted, leaving no real triable issue."
2. The standard of review is further set forth in *Clearwater Truck Company Inc. v. M. Bruegner & Co. Inc.*, 214 Kan. 139, 140 (1974). All facts and inferences which may be reasonably drawn are to be resolved in favor of the party against whom relief is sought.
3. Plaintiff claims that KDOR was a party to the contract and therefore had the obligation to ensure payment. Because the parties never provided documentation evidencing a contract between KDOR and Plaintiff, the existence of a contract between Plaintiff and KDOR is unbeknownst to the court. There was only a contract between KDOR and Grandmothers, contained in the third amendment to the lease agreement between those parties.
4. Kansas Courts have held that to form a binding contract there must be a meeting of the minds on all essential elements. There was no meeting of the minds between KDOR and Plaintiff. Plaintiff argues that the lease which states that the lessee, KDOR, shall pay a lump sum payment of $136,052.39 to the lessor for the satisfactory work completed constitutes a contract with KDOR, however it is clear according to the lease that the Kansas Department of Revenue has an exclusive agreement with Grandmothers Inc. to make all payments regarding the work performed by the Plaintiff. It would be contrary to the plain language of the lease

to find that the Kansas Department of Revenue had an obligation to make payments to Plaintiff. The obligation is between Plaintiff and Grandmothers. The estimates sent to both KDOR and Grandmothers do not evidence a contract because nowhere in the estimates is it specified that work is under contract with or accepted by KDOR.

5. Under the third amendment to the lease agreement, KDOR's obligation was to provide payment to Grandmothers upon satisfactory completion of the work by the Plaintiff. KDOR met its obligation. The Court will not look beyond the lease and will not conclude that the first paragraph of the lease creates a legally binding contract between KDOR and Plaintiff.
6. The Plaintiff has properly filed a mechanic's lien stating the required information under K.S.A. § 60-1102 against the property alleging Grandmothers as the owner and KDOR as a tenant (Count VII, Second Amended Petition). Under K.S.A. 60-1101 a lien is granted on the property for services provided if it is "under a contract with the owner, trustee, agent or spouse of the owner." The term "owner" does not include tenants of a leasehold estate. *Drywall Systems Incorporated v. A. Arnold of Kansas City LLC*, 57 Kan. App. 2d 263 (2019). There is no indication that the furnishing of the services by Plaintiff was under a contract with KDOR.
7. The Court finds that, viewing the pleadings as true and in the light most favorable to Plaintiff, the Plaintiff has failed to state a cause of action against KDOR as to Counts One, Four, Five and Seven, which are all the counts involving the Defendant KDOR.
8. The Court grants KDOR's motion for judgment on the pleadings.

IT IS SO ORDERED

THIS ORDER IS EFFECTIVE ON THE DATE AND TIME SHOWN ON THE ELECTRONIC FILE STAMP.

Submitted by:

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ELECTRONICALLY FILED
2021 Jan 13 PM 12:10
CLERK OF THE SHAWNEE COUNTY DISTRICT COURT
CASE NUMBER: 2019-CV-000008

Court: Shawnee County District Court

Case Number: 2019-CV-000008

Case Title: Benchmark Property Remodeling LLC vs. Grandmothers Inc, et al.

Type: Journal Entry

SO ORDERED.

/s/ Honorable Mary E Christopher, District Judge

IN THE DISTRICT COURT OF SHAWNEE COUNTY, KANSAS
DIVISION THREE

BENCHMARK PROPERTY REMODELING, LLC, A Kansas Limited Liability Company,	)	
	)	**Case No. 2019-CV-000008**
Plaintiff,	)	
v.	)	
GRANDMOTHERS, INC., COREFIRST BANK & TRUST, KANSAS DEPARTMENT OF REVENUE, and ROBERT ZIBELL.	)	
Defendants.	)	

JOURNAL ENTRY

NOW on this 29th of July 2020, comes before the court the above captioned matter. The Plaintiff, Benchmark Property Remodeling LLC., appears through counsel, Diane Lewis of Brown and Ruprecht, PC. Defendants Grandmothers Inc. and Robert Zibell appear [DL1]through their counsel Bryan W. Smith of the Smith Law Firm. Defendant CoreFirst Bank & Trust appears by and though counsel Patrick Riordan and Lauren Bartee of Riordan, Fincher & Beckerman, P.A. There are no other appearances.

The matter comes before the court for a pre-trial conference and for argument on motions filed by the various parties. The parties consent to conducting the hearing by Zoom video conference. Thereupon the Plaintiff presents argument on its [DL2]Motion for Summary Judgement. Thereafter, Defendant presents arguments and response to said motion and submits argument on its Motion for Summary Judgement.

The court, after hearing arguments of the parties, reviewing the pleadings, and otherwise being duly apprised and premises makes the following rulings.

1. The Plaintiff's Second Amended Petition includes 8 counts. Count 1 is for Breach of Contract, Count 2 is for Quantum Meruit, Count 3 is for Quantum Meruit and Unjust Enrichment for Extra Work, Count 4 is for Violation of the Kansas Fairness and Private Construction Act, Count 5 is an alternate to Count 4 if the lease was determined to be a public construction contract, Count 6 is a Claim of Conversion, Count 7 is for Foreclosure of Mechanic's Lien, Count 8 Tortious Interference with a Contract against Defendant Zibell, individually.

2. The court finds that the following facts are uncontroverted from the Defendants Robert Zibell and Grandmothers, Inc.'s Motion for Summary Judgement and Memorandum in Support Thereof filed with the Court on May 1, 2020:

a. The Defendant, Grandmothers, Inc., is the owner of real estate located at 300 SW 29th Street, Topeka, Kansas, 66611.

b. The Defendant, Kansas Department of Revenue, is the Tenant in the building located at 300 SW 29th Street, Topeka, Kansas, 66611.

c. On August 27, 2018, Grandmothers, Inc., as Lessor, and Kansas Department of Revenue (KDOR), as Lessee, entered into a document titled "Third Amendment to Lease". (See Exhibit 1 to Plaintiff's Amended Petition, attached as Exhibit A). The Plaintiff, Benchmark Property Remodeling, LLC, is not a party to the Third Amendment to Lease. Id.

d. The Third Amendment to Lease states in part:

> "This Amendment governs construction contemplated per the quotes dated 05/28/2018, 06/04/2018, 08/01/2018, and 08/02/2018 from Benchmark Property Remodeling, LLC, attached hereto as Exhibit A and corresponding floor plans, attached as Exhibit B. The Lessee shall pay a lump sum payment

of $136,052.39 to the Lessor for the satisfactory work completed upon successful installation. Payment by the Lessee is contingent on the Lessee's satisfaction of all work completed. The related items will become a fixture to the leased premises and will remain upon and be surrendered with the lease premises at the termination of the real estate lease."

e. The estimates referenced in the Third Amendment to Lease were all provided by Plaintiff Benchmark Property Remodeling, LLC to KDOR. (Mark McBeth deposition pg. 12-21; 40-4, attached as Exhibit B). The Plaintiff, Benchmark Property Remodeling, LLC, never entered into a written contract for the remodeling with Grandmothers, Inc.

f. The Plaintiff, Benchmark Property Remodeling, LLC, never entered into a contract with Robert Zibell personally. (Exhibit B pg. 40-46).

g. KDOR retained sole authority to accept or reject the work described in the quotes provided by Benchmark Property Remodeling, LLC. (See Exhibit A).

h. The Third Amendment to Lease does not require Grandmothers, Inc. as landlord to enter into any contract with Benchmark Property Remodeling, LLC. (Id.).

i. The Third Amendment to Lease does not require Grandmothers, Inc. as Lessor to pay any specific amounts to Benchmark Property Remodeling, LLC. (Id.).

j. The quotes provided by Benchmark Property Remodeling, LLC to KDOR were never accepted by KDOR by way of a signature on the quotes. (See Exhibit B pg. 12-21).

k. A mechanic's lien was filed by Benchmark Property Remodeling, LLC on January 21, 2019. (Id.).

l. Benchmark Property Remodeling, LLC alleges in its mechanic's lien that it entered into a contractual agreement with Grandmothers, Inc. (Id.)

m. In the mechanic's lien, there is no allegation that a contract was entered into with Robert Zibell personally. (Id.).

n. Mr. McBeth admitted that he did not have any written contract with KDOR or Grandmothers, Inc. (Id.).

o. Mr. McBeth admitted that the Third Amendment to Lease did not state that the work was to be performed by Benchmark Property Remodeling, LLC. (Id.)

3. The court makes the finding that the following facts are uncontroverted from the Plaintiff's Motion for Partial Summary Judgment filed with the Court on May 8, 2020.

a. Benchmark Property Remodeling is a construction and remodeling company in Topeka, Shawnee County, Kansas. (Ex. 1, Affidavit of Mark McBeth, ¶ 1)

b. Grandmothers is the owner of real estate located at 300 SW 29th Street, Topeka, KS 66611 ("Property"). (Ex. 2, Depo. R. Zibell, 26:10-13)

c. Robert E. Zibell is the only stockholder of Grandmothers and runs the business. (Ex. 2, Depo. R. Zibell, 9:6-9)

d. Grandmothers leases all of the Property to Kansas Department of Revenue ("KDOR"). (Ex. 2, Depo. R. Zibell, 26:14-21)

e. Starting in January 2017 Benchmark provided estimates to KDOR for construction work to be done at the Property. (Ex. 1, Affidavit of Mark McBeth, ¶ 3)

f. KDOR and Benchmark finalized the quotes in August 2018, and Benchmark offered to perform construction work in accordance with the five quotes specifying the work it was to perform and the price it would charge. (Ex. 1, Affidavit of Mark McBeth, ¶ 4)

g. Exhibit 3 attached hereto is a true and accurate copy of the Third Amendment to Lease. (Ex. 2, Depo. R. Zibell, 21:19-22:1; Ex. 3, Third Amendment to Lease)

h. Robert Zibell signed the Third Amendment to Lease on behalf of Grandmothers. (Ex. 2, Depo. R. Zibell, 20:2-4; Ex. 3, Third Amendment to Lease)

i. In the Third Amendment to the Lease, KDOR agreed to pay Grandmothers $136,052.39, which is the ***exact*** sum of the five quotes attached to the Third Amendment to Lease. (Ex. 3, Third Amendment to Lease)

j. KDOR received improved leased premises. (Ex. 3, Third Amendment to Lease)

k. Grandmothers was aware that the work was complete and that KDOR had approved the work because Jim Forbes at KDOR told Zibell that all the work had been done at the Property. (Ex. 2, Depo. R. Zibell, 106:20-23)

l. On or about November 15, 2018, Benchmark submitted its first invoice for $2,992.67 ("Invoice 1") and its second invoice for $18,300.00 ("Invoice 2") to KDOR and Grandmothers for payment. (Ex. 4, Answer of KDOR, ¶ 2; Ex. 5, Answer of Grandmothers, ¶ 19; Ex. 6, Invoice 1; Ex. 7, Invoice 2)

m. Invoice 1 and Invoice 2 attached hereto as Exhibits 6 and 7, and attached to Benchmark's Second Amended Petition as Exhibits 2 and 3, are true and accurate copies of the invoices Grandmothers received from Benchmark. (Ex. 5, Answer of Grandmothers, ¶ 19; Ex. 6, Invoice 1; Ex. 7, Invoice 2)

n. KDOR accepted Benchmark's work represented in Invoice 1 and Invoice 2 and, pursuant to the Third Amendment to Lease, issued payment of $22,192.67 to Grandmothers to pay Benchmark. (Ex. 4, Answer of KDOR, ¶ 2; Ex. 5, Answer of Grandmothers, ¶ 20; Ex. 6, Invoice 1; Ex. 7, Invoice 2; Ex. 2, Depo. R. Zibell, 53:10-54:10)

o. Grandmothers received KDOR's payment of $21,292.67 on or about November 26, 2018. (Ex. 4, Answer of KDOR, ¶ 2; Ex. 5, Answer of Grandmothers, ¶ 21; Ex. 2, Depo. R. Zibell, 53:10-54:10)

p. Benchmark completed the work on or about December 4, 2018, before KDOR issued final payment to Grandmothers on December 11, 2018. (Ex. 1, Affidavit of Mark McBeth, ¶ 6; Ex. 4, Answer of KDOR, ¶ 2)

q. On or about December 4, 2018, Benchmark submitted its third invoice for $114,759.72 ("Invoice 3") to KDOR and Grandmothers for payment. (Ex. 4, Answer of KDOR, ¶ 2; Ex. 5, Answer of Grandmothers, ¶ 24; Ex. 8, Invoice 3)

r. Also on or about December 4, 2018, Benchmark submitted its fourth invoice for $100.00 ("Invoice 4") to KDOR and Grandmothers for payment. (Ex. 4, Answer of KDOR, ¶ 2; Ex. 5, Answer of Grandmothers, ¶ 26; Ex. 9, Invoice 4)

s. Invoice 3 and Invoice 4 attached hereto as Exhibits 8 and 9 are true and accurate copies of the invoices Grandmothers received from Benchmark. (Ex. 4, Answer of KDOR, ¶ 2; Ex. 5, Answer of Grandmothers, ¶ 24, 26; Ex. 8, Invoice 3; Ex. 9, Invoice 4)

t. Grandmothers received KDOR's payment of $114,759.72 on or about December 11, 2018. (Ex. 4, Answer of KDOR, ¶ 2; Ex. 5, Answer of Grandmothers, ¶ 28; Ex. 2, Depo. R. Zibell, 14:22-15:9; Ex. 10, Statement (Zibell Depo. Ex. 1))

u. KDOR paid Grandmothers in full in the amount of $136,052.39 in accordance with the Third Amendment to Lease on December 11, 2018. (Ex. 2, Depo. R. Zibell, 13:12-17; 15:7-13; Ex. 3, Third Amendment to Lease; Ex. 4, Answer of KDOR, ¶ 2; Ex. 5, Answer of Grandmothers, ¶ 28)

v. Grandmothers was aware that under the Third Amendment and Lease that payment from KDOR triggered Grandmothers' responsibility to pay Benchmark. (Ex. 2, Depo. R. Zibell,106:24-107:2)

w. Grandmothers paid $21,192.67 to Benchmark on December 9, 2018. (Ex. 2, Depo.R. Zibell, 53:20-23)

x. The omission of $100 from Grandmothers' payment to Benchmark was a math error. (Ex. 2, Depo. R. Zibell, 53:20-13)

y. It was only when Grandmothers received the second payment of $114,759.72 on or about December 11, 2018 that it deliberately withheld money from Benchmark. (Ex. 2, Depo. R. Zibell, 55:17-56:7)

z. Benchmark again demanded payment of the $114,759.72 from Grandmothers on January 2, 2019. (Ex. 2, Depo. R. Zibell, 99:4-100:10; Ex. 11, January 2, 2019 Demand Letter (Zibell Depo. Ex. 10)

aa. Instead of paying Benchmark the entire $114,759.72 as Grandmothers had with the first installment, Grandmothers attempted to pay Benchmark only $94,551.39. (Ex. 2, Depo. R. Zibell, 55:17-56:6)

ab. Accompanying Grandmothers' check for $94,551.39 was a statement describing the amounts Grandmothers was keeping from Benchmark's payment ("Statement"): (Ex. 2, Depo. R. Zibell, 56:4-6; 13:24-21; Ex. 10, Statement)

DATE	DESCRIPTION	BALANCE	AMOUNT
NOV 26, 2018	Payment from State of Ks Dept of Revenue for Phase 2		$2,992.67
NOV 26, 2018	Payment from State of KS Dept of revenue for Phase 2		$18,300.00
DEC 11, 2018	Payment from State of KS Dept of Revenue for Phase 2		$114,759.72
		Total payments	$136,052.39
DEC 9, 2018	Paid to Benchmark Properties for Dept of Rev Phase 2	Check #5329	-$21,192.67
DEC 1, 2018	Legal bills from Bryan Smith for Phase 2 from Benchmark		-$1,900.00
NOV 1, 2018	Removal of wall in Lobby for Benchmark Remodeling		-$1,000.00
DEC 11, 2018	5% fee for Phase 2		-$6,802.62
		Total due Benchmark Properties	$105,057.10
Dec 11, 2018	Retaining 10% until all vendors are paid from remodel job		-$10,505.71
		Check due Benchmark	$94,551.39

CURRENT	1-30 DAYS PAST DUE	31-60 DAYS PAST DUE	61-90 DAYS PAST DUE	OVER 90 DAYS PAST DUE	AMOUNT DUE
					$94,551.39

ac. In Grandmothers' prepared Statement, it deducted $9,702.62 for legal bills, removal of wall in lobby, 5% fee, and $10,505.71 "retainage," and provided a check for only $94,551.39 instead of the $114,759.72 owed. Grandmothers received another demand for payment on January 2, 2019. (Ex. 2, Depo. R. Zibell, 56:4-6; 13:24-21; Ex. 10, Statement)

ad. Benchmark never agreed to pay Grandmothers' legal bills. (Ex. 2, Depo. R. Zibell, 54:18-21)

ae. KDOR explicitly told Grandmothers that Grandmothers was not authorized to perform the work on the Property, instructed Grandmothers not to perform Benchmark's work, and that would not pay Grandmothers for the work. (Ex. 2, Depo. R. Zibell, 50:20-52:20; Ex. 12, Email from KDOR to Grandmothers to Stop Work (Zibell Depo. Ex. 6))

af. On October 2, 2018, KDOR emailed Grandmothers, through Bob Zibell, and stated:

Paul Fernkopf [KDOR]
Tue 10/2/2018 1:31 PM

Mark as

To: Bob Zibell <bob@zibell.com>;

Mr. Zibell,

The Kansas Department of Revenue does not authorize the construction work you have commenced at 300 SW 29th street location and we will not make payment for this construction. The bid and third amendment to the lease agreement was for Benchmark Property Remodeling, LLC., to complete this project.

Thank you,

Paul Fernkopf
Facilities Operations Manager
Office of Financial Management
Kansas Department of Revenue
785-207-8167

(Ex. 2, Depo. R. Zibell, 50:20-51:18; Ex. 12, Email)

ag. Benchmark would not have agreed to do construction work on the project for 5% less than the amount it quoted KDOR and Grandmothers. (Ex. 13, Depo. M. McBeth, 72:9-11)

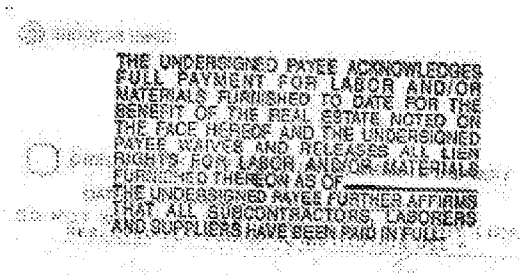
ah. Grandmothers did not withhold retainage until after all of Benchmark's work on the Property was complete. (Ex. 2, Depo. R. Zibell, 63:1-5) 48.

ai. Pursuant to the Third Amendment to Lease, KDOR would not pay Grandmothers until all work was complete. (Ex. 3, Third Amendment to Lease)

aj. KDOR never told Grandmothers to withhold money from Benchmark due to incomplete work. (Ex. 2, Depo. R. Zibell, 63:12-15)

ak. Grandmothers did not have any agreement with KDOR or Benchmark that 10 percent retainage would be withheld. (Ex. 2, Depo. R. Zibell, 51:11-14)

al. When Grandmothers stamped the check for $94,551.39 with a release stating:


THE UNDERSIGNED PAYEE ACKNOWLEDGES FULL PAYMENT FOR LABOR AND/OR MATERIALS FURNISHED TO DATE FOR THE BENEFIT OF THE REAL ESTATE NOTED ON THE FACE HEREOF AND THE UNDERSIGNED PAYEE WAIVES AND RELEASES ALL LIEN RIGHTS FOR LABOR AND/OR MATERIALS FURNISHED THEREON AS OF _____. THE UNDERSIGNED PAYEE FURTHER AFFIRMS THAT ALL SUBCONTRACTORS, LABORERS AND SUPPLIERS HAVE BEEN PAID IN FULL.

(Ex. 2, Depo. R. Zibell, 56:16-57:1, 59:5-20; Ex. 14, $94,551.39 Check (Zibell Depo. Ex. 7))

am. After Benchmark filed this lawsuit and its mechanic's lien, Grandmothers and Zibell went behind Benchmark's back and paid some of Benchmark's subcontractors directly in the total amount of $54,248.33. (Ex. 2, Depo. R. Zibell, 82:4-6; Ex. 1, Affidavit of M. McBeth, ¶8

an. One of Benchmark's subcontractors refused Grandmothers' attempt to circumvent Benchmark. (Ex. 1, Affidavit of M. McBeth, ¶ 9)

ao. On February 19, 2019, Grandmothers attempted to pay Benchmark $40,303.06 as payment in full for the $60,611.30 still owed to Benchmark. (Ex. 2, Depo. R. Zibell, 77:19-79:11; Ex. 15, Updated Statement (Zibell Depo. Ex. 8))

ap. The February 19, 2019 check was accompanied by a statement detailing withholdings for attorneys' fees, wall removal, 5% fee, and 10% retainage, and again the check was stamped with language that Benchmark acknowledged full payment and waived all lien rights with respect to its work. (Ex. 2, Depo. R. Zibell, 76:2-8; Ex. 15, Updated Statement)

aq. On April 12, 2019, Grandmothers issued Benchmark a third check in the amount of $40,303.06 without the restricted language which Benchmark could cash without waiving its claims. (Ex. 2, Depo. R. Zibell, 81:7-18; Ex. 1, Affidavit of Mark McBeth, ¶ 10)

ar. The only excuse Grandmothers ever suggested was non-payment of Benchmark's subcontractors. (Ex. 2, Depo. R. Zibell, 60:1-60:15)

as. Benchmark offered lien waivers to present to Grandmothers once it was paid. (Ex. 2, Depo. R. Zibell, 60:3-15, 100:23-101:24; Ex. 16, Zibell Text Messages, pg. 2 (Zibell Depo. Ex. 11); Ex. 1, Affidavit of M. McBeth, ¶ 11)

at. There was no requirement that Benchmark provide lien waivers in the first place. (Ex. 1, Affidavit of M. McBeth, ¶ 12)

au. Benchmark's lien, Case No. 2019-SL-000020, was filed in Shawnee County, Kansas—where the Property is located—on January 21, 2019, which was within four months after the date when Benchmark last performed work on the Property on December 4, 2018. (Ex. 17, Mechanic's Lien; Ex. 1, Affidavit of Mark McBeth, ¶ 6)

av. After the lien and the lien foreclosure action were filed, Grandmothers paid some of Benchmark subcontractors, and issued partial payment to Benchmark. (Ex. 2, Depo. R. Zibell, 82:4-6, 81:7-18; Ex. 1, Affidavit of Mark McBeth, ¶ 13)

aw. Benchmark filed its revised mechanic's lien on May 8, 2020, which was identical to the mechanic's lien except it deducts payments made by Grandmothers to Benchmark's subcontractors after the lien was filed. (Ex. 18, Revised Mechanic's Lien Statement1)

ax. Benchmark's revised mechanic's lien shows Benchmark's claim of $20,308.24. (Ex. 18, Revised Mechanic's Lien Statement)

ay. Benchmark timely filed this suit to enforce the mechanic's lien, adding its mechanic's lien claim in its First Amended Petition on March 13, 2019. (First Amended Petition filed herein)

4. The court concludes that there is not a legal basis for finding a construction contract agreement between Benchmark and Grandmothers. The court finds that there was not consideration or a meeting of the minds sufficient for a contract to form. Particularly because when Mr. Zibell and Grandmothers tried to take over some of the construction halfway through and then were told by the Lessee "no, hey, we didn't authorize this. We've already contracted with Benchmark to do the work."

5. As to Count 1, the court finds that there is sufficient evidence presented to grant summary judgement in favor of the Defendants. There is not sufficient evidence to support a claim that a contact existed between the Plaintiff and Defendants, and Plaintiff bears the burden to prove that a contract exists.

6. The court finds that Count 4, Kansas Fairness and Private Construction Act claim violation is dependent upon the existence of an underlying contact between the parties because the court finds that there was not a contract between the Plaintiff and Defendants, Grandmother's Inc. and Robert Zibell summary judgement is granted on Count 4.

7. As to Count 7, in the Mechanic's Lien claims, the court noted that case law indicates that again a mechanic's lien has to arise out of a a contract with the owner of the property, and did not include the lessee of the property. The court notes the Kansas Court of Appeals Case *Drywall Sys. v. Arnold of Kan. City LLC,* 57 Kan. App. 2d 263, cited by

Defendants, as *stare decisis* that if a leasehold interest is not included in the statutory language, it should not be construed by the Courts as an ownership interest to be included within the mechanic's lien statute. The Defendant is the owner of the building at issue. Because no contract existed, the court grants summary judgement in favor of the Defendant's on Count 7.

8. The court does not grant summary judgement on Counts 2, 3, 6, and 8. Summary Judgement is granted on counts 1, 4, 5, 7. The transcript from the hearing is attached hereto and incorporated herein as Exhibit A to be made part of the record of this case.

IT IS SO ORDERED.

THIS ORDER IS EFFECTIVE AS OF THE DATE AND TIME SHOWN ON THE ELECTRONIC FILE STAMP.

Submitted by:

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ELECTRONICALLY FILED
2021 Apr 19 PM 2:40
CLERK OF THE SHAWNEE COUNTY DISTRICT COURT
CASE NUMBER: 2019-CV-000008

Court: Shawnee County District Court

Case Number: 2019-CV-000008

Case Title: Benchmark Property Remodeling LLC vs. Grandmothers Inc, et al.

Type: Journal Entry of Dismissal Without Prejudice

SO ORDERED.

/s/ Honorable Mary E Christopher, District Judge

IN THE DISTRICT COURT OF SHAWNEE COUNTY, KANSAS

BENCHMARK PROPERTY REMODELING, LLC, a Kansas Limited Liability Company,	)	
Plaintiff,	)	
v.	)	Case No. 2019-CV-000008
GRANDMOTHERS, INC., COREFIRST BANK & TRUST, KANSAS DEPARTMENT OF REVENUE, ROBERT ZIBELL, STATE OF KANSAS,	)	Division No.: 3
	)	Chapter 60
Defendants.	)	

JOURNAL ENTRY OF DISMISSAL WITHOUT PREJUDICE

This matter comes before the Court on the agreement and stipulation of counsel. Plaintiff, Benchmark Property Remodeling, LLC, appears by and through counsel of record Diane Hastings Lewis of Brown & Ruprecht, P.C. Defendants Grandmothers, Inc. and Robert Zibell appear by and through counsel of record Bryan W. Smith.

Counsel stipulate and agree that all remaining claims asserted therein, as to these parties, are hereby dismissed, without prejudice, with each party to bear its own costs and attorneys' fees.

PREPARED AND APPROVED BY:

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Court of Appeals of Kansas

April 29, 2016, Opinion Filed

No. 114,642

Reporter
2016 Kan. App. Unpub. LEXIS 310 *; 369 P.3d 342; 2016 WL 1732900

DIANE HANSHEW d/b/a H & G PROPERTIES, Appellant, v. NATHAN W. WATKINS and SHERRY WATKINS, d/b/a BLUESTEM VENDING SERVICE, Appellees.

Notice: NOT DESIGNATED FOR PUBLICATION.

PLEASE CONSULT THE KANSAS RULES FOR CITATION OF UNPUBLISHED OPINIONS.

PUBLISHED IN TABLE FORMAT IN THE PACIFIC REPORTER.

Subsequent History: Decision reached on appeal by, Motion denied by Hanshew v. Watkins, 2017 Kan. App. Unpub. LEXIS 719 (Kan. Ct. App., Sept. 1, 2017)

Prior History: [*1] Appeal from Lyon District Court; DOUGLAS P. JONES, judge.

Disposition: Reversed and remanded.

Core Terms

lease, rent, statute of limitations, monthly rent, counterclaim, premises, judicial admission, tenancy, tenant, original lease, trial court, terms

Counsel: Thomas A. Krueger, of Krueger Law Offices, of Emporia, for appellant.

Monte L. Miller, of Miller & Miller, Chtd., of Emporia, for appellees.

Judges: Before MALONE, C.J., MCANANY and POWELL, JJ.

Opinion

MEMORANDUM OPINION

Per Curiam: The plaintiff-landlord, Diane Hanshew d/b/a H&G Properties, appeals from the trial court's adverse decision after a bench trial. The lease refers to the landlord as HAG Properties, but all the pleadings and other papers on file refer to the plaintiff as H&G rather than HAG. Accordingly, we will refer to the plaintiff-landlord as H&G.

The trial court determined that H&G's claim against its tenants, who did business as Bluestem Vending Service (Bluestem), was barred by K.S.A. 60-512(1), the 3-year statute of limitations for contracts not in writing.

Facts

The dispute centers on a commercial building in Emporia which H&G originally leased to Bird Distributors, Inc. on May 11, 1982. The written lease was for an initial 3-year term from June 15, 1982, to June 14, 1985, with a 1-year renewal option.

Bird exercised the renewal option. At the end of the renewal term Bird held over without a new written lease for an extended **[*2]** time but with H&G's consent. Then, on January 23, 1997, again with H&G's consent, Bird assigned its rights under the lease to Bluestem "under the same terms and conditions as presently in force."

H&G and Bluestem agreed to an initial extension of the lease and then extended the lease a second time by a written agreement for a 1-year term beginning June 15, 1998, and ending June 14, 1999. This extension agreement incorporated the terms of the 1982 lease but increased the rent to $1,000 per month with the rent due on the 15th of each month.

With H&G's apparent consent, Bluestem held over at the

expiration of this last written lease extension for a period of 10 years.

Then, on July 7, 2009, Bluestem gave H&G written notice that it intended to vacate the building on August 7, 2009. For whatever reason, Bluestem did not vacate the premises in August but continued in possession. According to the rent record included in trial exhibit 5, Bluestem first breached its obligation to pay rent when it failed to make the August 15, 2009, rent payment. Bluestem seems to concede this point when it states in its counterclaim that "[a]ll rents had been timely paid up until August 15, 2009."

Bluestem did not vacate **[*3]** the premises until December 16, 2009. It was 3 years later, in December 2012, when H&G finally submitted its final accounting to Bluestem showing the amounts H&G claimed in back rent and repair costs. In that final accounting, H&G contended that the monthly rent due was $1,080.

The Suit

The parties were unable to reach an agreement on what was owed. The dispute involved issues regarding the maintenance of and damage to the property and whether and to what extent Bluestem's personal property was damaged while being stored on the premises. There was no dispute about the monthly rent rate of $1,080.

H&G brought this action on October 22, 2013. Bluestem answered and counterclaimed for personal property stored on the premises, which it claimed was damaged due to H&G's failure to make roof repairs as required by the lease. After several rounds of pleadings, Bluestem eventually raised the defense that H&G's claim was barred by the 3-year statute of limitations, K.S.A. 60-512(1).

The trial court found that Bluestem's counterclaim was barred by K.S.A. 60-512(1), the 3-year statute of limitations, and Bluestem has not appealed that ruling.

H&G's claims were tried to the court. The court determined that the latest writing which **[*4]** memorialized the lease of the property was the lease extension that expired in June 1999. The court concluded that Bluestem's holding over thereafter created a month-to-month tenancy, apparently based on K.S.A. 58-2503. According to the court, this month-to-month tenancy ended on March 15, 2010, and H&G had 3 years thereafter to commence this action. Having failed to do so, H&G's claim was barred by K.S.A. 60-512(1), the 3-year statute of limitations that applied to contracts not in writing.

H&G's motion for reconsideration was unsuccessful, and this appeal followed. The sole issue on appeal is whether the district court erred in applying the 3-year statute of limitations to H&G's claim. The interpretation and application of a statute of limitations is a question of law over which we have unlimited review. *Smith v. Graham*, 282 Kan. 651, 655, 147 P.3d 859 (2006).

K.S.A. 84-2a-506(1)

H&G first argues that K.S.A. 84-2a-506(1) is the applicable statute of limitations. This provision is part of the Uniform Commercial Code and provides for a 4-year limitation period.

It is true that under this provision of the Uniform Commercial Code an action for breach of a lease contract is subject to a 4-year limitation period. But the Code defines a "lease" as "a transfer of the right to possession and use of *goods* for a term **[*5]** in return for consideration." (Emphasis added.) K.S.A. 2015 Supp. 84-2a-103(1)(j). It further defines "goods" as "all things that are movable at the time of identification to the lease contract, or are fixtures," *i.e.*, not real property. K.S.A. 2015 Supp. 84-2a-103(1)(h).

K.S.A. 84-2a-506(1), which applies to personal property rather than real property, clearly does not apply to an action for rent due under a lease of real property.

K.S.A. 60-511(1)

Alternatively, H&G contends that K.S.A. 60-511(1) is the applicable 5-year statute of limitations because the parties' agreement was in writing. H&G asserts: "The promise to pay rent, the amount of rent, the acknowledgement that rent was owed at the time of vacating the premises and the memo signed by the parties that all the terms and conditions of the original lease agreement shall continue in force, were all in writing."

It is true that the lease extension agreement incorporated by reference all the terms of the original lease, except for the amount of rent and the rent due date. "When a writing is incorporated by reference, it becomes part of the contract" to the extent that it effectuates the purpose of the contract. *Kincaid v. Dess*, 48 Kan. App. 2d 640, 650, 298 P.3d 358, *rev. denied* 297 Kan. ___ (2013). Here, the

lease extension and the incorporated original lease become, for our purposes, one written contract.

K.S.A. 60-511(1) provides **[*6]** a 5-year statute of limitations for "[a]n action upon any agreement, contract or promise in writing." For the 5-year statute of limitations to apply, there must be a writing that contains all the material terms of the contract. *Chilson v. Capital Bank of Miami*, 237 Kan. 442, 446, 701 P.2d 903 (1985). The writing "must be full and complete in itself so as not to require proof of extrinsic facts to establish all essential contractual terms." 237 Kan. at 446. A contract is, in legal effect, an oral contract for the purposes of applying the statute of limitations if it is partly in writing and partly oral. 237 Kan. at 446.

The written lease extension agreement between H&G and Bluestem incorporated all of the terms and conditions contained in the original written lease agreement. Between these two documents, the lease agreement identified the parties to the agreement; the leased property; the duration of the lease; the various terms of the lease regarding the amount and due date for rent; and the various other obligations of the parties, including the obligation to maintain the premises. The only hitch is with respect to the amount of monthly rent due. The amount of monthly rent now claimed by H&G is not the amount stated in the original lease agreement. The lease extension after the term that **[*7]** ended on June 14, 1999, provided for rent of $1,000 per month. But H&G now claims rent of $1,080 per month. The question is whether there is a writing attributable to Bluestem that confirms this rent obligation of $1,080 per month so as to satisfy the requirement of a writing in order for the 5-year statute of limitations to apply.

At trial, H&G calculated its lost rent at $1,080 per month. Its final accounting states: "Monthly rental rate: $1,080.00." In its counterclaim, denominated a "Counter Petition," Bluestem asserted that on January 5, 2010, it notified H&G that it had moved out of the premises and included with the notice a check for 2 months' additional rent. In its letter of February 4, 2013, H&G acknowledged this payment, without stating the amount. Bluestem further asserted in its counterclaim that it "withheld and offset the November and December, 2009, rent payments for a total of $2,160.00." Thus, in its written counterclaim filed with the court, Bluestem asserted that the monthly rent rate was $1,080 at the time of breach. In its suggested findings of fact and conclusion of law following the bench trial, H&G proposed as a finding: "The total amount of rent due would **[*8]** be 7 months at $1,080 per month or $7,560.00, less 2 months paid rent of $2,160, for a net of $5,400 due and payable. The amount of the rent is undisputed."

In order to satisfy the requirement of a writing for the 5-year statute of limitations to apply, all the terms must be contained in a writing so that there need be no recourse to external evidence or oral testimony to establish an essential term. The amount of rent is an essential term. So does the written assertion in Bluestem's counterclaim that it paid 2 months' rent at $1,080 per month satisfy the writing requirement of the statute? Or is external evidence or oral testimony required to prove that the monthly rent due at the time of breach was $1,080 and not $1,000 per month?

To answer these questions we must consider whether Bluestem's statement of the monthly rent rate in its counterclaim constituted judicial admission that relieves H&G from having to present oral testimony or external evidence to establish the monthly rent rate.

In *Lytle v. Stearns*, 250 Kan. 783, 798-99, 830 P.2d 1197 (1992), the court found no judicial admission when a plaintiff in a wrongful death action joined additional defendants and alleged that they were at fault after the principal defendant in his answer asserted **[*9]** the comparative fault of others. The principal defendant sought to use this claim from the plaintiff's amended petition as a judicial admission. Quoting McCormick on Evidence § 265, 781-82, the Supreme Court found otherwise, stating that such "'alternative and hypothetical forms of statement of claims and defenses, regardless of consistency. . . lack the essential character of an admission.'" 250 Kan. at 798-99. But that is not the case here. Bluestem's clear statement of the monthly rent rate in its counterclaim was not a hypothetical alternative but a clear admission of the monthly rent due.

Am. Jur. defines a judicial admission as follows: "A judicial admission is a party's unequivocal concession of the truth of a matter, and removes the matter as an issue in the case. It is a voluntary concession of fact by a party or a party's attorney during judicial proceedings." 29A Am. Jur. 2d, Evidence § 783.

A judicial admission is a substitute for evidence at trial. *Anonymous v. Vanconcellos*, 15 Neb. Ct. App. 363, 727 N.W.2d 708 (2007). A judicial admission dispenses with the need to produce evidence on the admitted fact. *Francis v. Richardson*, 978 S.W.2d 70 (Mo. App. 1998); see *Fletcher v. Eagle River Memorial Hosp., Inc.*, 156 Wisc. 2d 165, 456 N.W.2d 788 (1990).

Here, Bluestem's admission in its counterclaim that the

rent due H&G at the time of the breach was $1,080 per month constituted a writing which, taken together with the original lease and the **[*10]** lease renewal, sets forth all the essential terms involving Bluestem's lease of the property. It obviates the need for any oral testimony or external evidence on the amount of monthly rent due which otherwise would have taken H&G's claim outside of the 5-year statute of limitations applicable to claims based upon a written contract. Thus, we conclude that K.S.A. 60-511(1), the 5-year statute of limitations, applies to H&G's claim.

Bluestem's final lease extension agreement extended the lease term from June 15, 1998, to June 14, 1999. The trial court found that when Bluestem held over at the end of the lease with H&G's consent, Bluestem became a month-to-month tenant under K.S.A. 58-2503. But the tenancy upon which Bluestem held over was a tenancy from year-to-year. K.S.A. 58-2502 states: "When premises are let for one or more years, and the tenant with the assent of the landlord continues to occupy the premises after the expiration of the term, such tenant shall be deemed to be a tenant from year to year." This statute, which has often been applied to farm leases [see *Buckle v. Caylor*, 10 Kan. App. 2d 443, 444, 700 P.2d 979 (1985)], has applied equally for well over a century to the lease of commercial premises as well. See *Adams Express Co. v. McDonald*, 21 Kan. 680 (1879). Under this arrangement, Bluestem continued its year-to-year tenancy **[*11]** as a holdover tenant under the terms and conditions of its original tenancy. See *Becker v. McFadden*, 221 Kan. 552, 555, 561 P.2d 416 (1977). Thus, the final annual lease term was for the period June 15, 2009, to June 14, 2010.

A breach of contract claim "accrues when the contract is breached." *Nelson v. Nelson*, 38 Kan. App. 2d 64, 83, 162 P.3d 43 (2007), *aff'd* 288 Kan. 570, 205 P.3d 715 (2009). It appears that the contract was breached when Bluestem failed to pay rent as due on August 15, 2009, 2 months into the final term. In its ruling, the trial court considered the agreement to have been breached much later on March 15, 2010. But regardless of which date is used, when H&G commenced this action on October 22, 2013, it was within the 5-year limitation period of K.S.A. 60-511(1).

Thus, we conclude that the trial court erred in finding that H&G's claim was barred by K.S.A. 60-512(1), the 3-year statute of limitations.

Reversed and remanded.

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Hilton Plaster Co. v. Knoblauch

Court of Appeals of Kansas

September 30, 2016, Opinion Filed

No. 114,039

Reporter
2016 Kan. App. Unpub. LEXIS 811 *; 380 P.3d 720

HILTON PLASTER COMPANY, INC., Appellee, v. ROBERT L. KNOBLAUCH A/K/A BOBBY KNOBLAUCH, and WHEATLAND DRYWALL, INC., Appellants.

Notice: NOT DESIGNATED FOR PUBLICATION.

PLEASE CONSULT THE KANSAS RULES FOR CITATION OF UNPUBLISHED OPINIONS.

PUBLISHED IN TABLE FORMAT IN THE PACIFIC REPORTER.

Prior History: **[*1]** Appeal from Sedgwick District Court; DOUGLAS R. ROTH, judge.

Disposition: Affirmed.

Core Terms

subcontractor, hired, trial court, stonework, attorney's fees, contractor, Revision, e-mails, records, statutory interest, discovery

Counsel: James T. McIntyre, of Law Offices of James T. McIntyre, of Wichita, for appellant.

Keith D. Richey, of Law Office of Keith D. Richey, of Wichita, for appellee.

Judges: Before PIERRON, P.J., GREEN and BUSER, JJ.

Opinion

MEMORANDUM OPINION

Per Curiam: Wheatland Drywall (Wheatland) was hired as a subcontractor to do construction work. Wheatland contacted Hilton Plaster (Hilton) to do stonework on the same project. When Hilton was not paid, it sued Wheatland and its owner, Bobby Knoblauch. Wheatland and Knoblauch alleged that the general contractor had hired Hilton. Knoblauch eventually learned that the general contractor had paid Wheatland for work that Hilton had completed, but Wheatland and Knoblauch maintained that they did not hire Hilton as a subcontractor. The trial court ruled that Wheatland had hired Hilton to do stonework. On appeal, Wheatland and Knoblauch challenge the trial court's ruling, which served as the basis for the award of a statutory interest rate and attorney fees. Determining that substantial support existed for the trial court's factual finding, we affirm.

In 2012, Wheatland entered into a subcontractor agreement **[*2]** with Flynn Construction Management General Contracting, Inc. (Flynn). Flynn had been hired as a general contractor to build a Planet Fitness in Wichita, Kansas. Wheatland was hired as a subcontractor to perform framing and drywall. The owner of Wheatland, Bobby Knoblauch, later e-mailed Flynn's president with estimates for the additional services of Exterior Insulation and Finish System (EIFS), additional framing, and stonework, quoting a price of $12,800 for the stonework. The contract was revised to include EIFS and framing for the price of $35,100 that Knoblauch had

quoted. In fact, the contract was revised a total of seven times. Contract Revision 5 lists stonework at a price of $12,350. Unlike the first four revisions, Contract Revisions 5 through 7 were not signed by Knoblauch.

But Hilton—not Wheatland—performed the stonework on the Planet Fitness project. It sent Wheatland an invoice for the work with the price listed as $12,330. When Wheatland failed to pay, Hilton sued, naming both Wheatland and Knoblauch as defendants. Hilton's petition alleged that Wheatland and Knoblauch had hired it as a subcontractor. The petition also alleged that according to the *Kansas Fairness in Private [*3] Construction Contract Act, K.S.A. 16-1801 et seq.*, Hilton was entitled to interest on the unpaid amount at a rate of 18% per annum and also costs and attorney fees. Wheatland and Knoblauch, in their answer, denied that they had hired Hilton as a subcontractor. They also claimed that in any communication about the project with Hilton, Knoblauch was acting as a disclosed agent of Flynn and that Hilton was Flynn's subcontractor.

After Wheatland and Knoblauch failed to respond to discovery requests, Hilton moved to compel discovery and for sanctions. The trial court granted the motion, ordering Wheatland and Knoblauch to respond to Hilton's discovery requests and pay $500 in sanctions. They did respond to the discovery requests, but they evidently failed to turn over several of the documents that Hilton had requested. Included in those documents was a series of e-mails from Flynn to Knoblauch that Hilton's attorney had previously received from Flynn. In the e-mails, Flynn directed Knoblauch to pay Hilton and threatened to press charges for falsifying an affidavit. Knoblauch apparently never responded to any of the e-mails. Wheatland and Knoblauch also never turned over its bank records or Contract Revisions **[*4]** 5 through 7. Hilton moved a second time to compel discovery and for sanctions.

The trial court held a hearing on the motion and recessed until a later date to allow the parties time to obtain and review Wheatland's bank records, which the trial court had ordered the bank to produce. At the next hearing, Hilton stated that the bank records and the documents from Flynn were sufficient to prove that Wheatland had failed to produce documents that Hilton had requested and that it had received payment from Flynn for work that Hilton had completed. The parties agreed that the case should be set for an evidentiary hearing. The trial court ordered both Knoblauch and David Hilton (David), the owner of Hilton Plaster, to personally appear.

One day before the evidentiary hearing, Hilton's attorney received a letter from Wheatland and Knoblauch's attorney, stating:

> "Mr. Knoblauch has finally acknowledged to me after extensive review of the records you provided, that he did in fact receive $12,350 of money that should have gone to Hilton Plaster. I am therefore willing to agree to Entry of Judgement in the amount of $12,350, interest at a rate to be determined by the court, from June 2013 until paid, **[*5]** and for the court to determine the amount of attorney fees due."

The trial court read the letter into the record at the hearing. Wheatland and Knoblauch objected to the application of the statutory interest rate and the awarding of costs and attorney fees, arguing that the Kansas Fairness in Private Construction Contract Act did not apply because Hilton was not their subcontractor. The trial court then heard testimony from both Knoblauch and David.

Knoblauch testified that he had only recently realized that Wheatland had been overpaid and that he had not seen Contract Revision 5, which listed the stonework, until recently at his attorney's office. He also testified that there were no e-mails exchanged between David and him; that Wheatland and Hilton did not have a contract; and that he did not interpret Hilton as being a part of the contract with Flynn. On cross-examination, Knoblauch stated that Flynn's president directed him to seek bids for the stonework and that Hilton's bid was one of three. Further, he did not have any of the e-mails from Flynn because he had deleted them and he had not kept records from any of his jobs. Moreover, contrary to those e-mails, Knoblauch claimed that **[*6]** he had responded to Flynn's president about the issue. Although he was not aware of anyone else having contact with Hilton, Knoblauch stated that he had nothing to do with Hilton's work and had not even inspected the completed project. Finally, when David called asking for payment, Knoblauch told him to contact Flynn because he had nothing to do with Hilton.

According to David, Knoblauch first asked him over the phone to give a quote on stonework. David maintained that he had no contact with Flynn, or anyone else, and that all his contact was with Knoblauch. David also testified that Knoblauch visited the jobsite, speaking with Hilton employees, and that when the stone ran out, he contacted Knoblauch to obtain more. He had not dealt with nor did he have conversations with anyone else. According to David's understanding, Knoblauch had hired Hilton. David also stated that when he called Knoblauch about getting paid, Knoblauch initially said there was a dispute over the square footage but then stopped taking his calls.

After considering the credibility of the witnesses, the trial court found that Flynn had hired Wheatland as a subcontractor and that Wheatland had invited others, including **[*7]** Hilton, to bid on the stonework. The court also specifically found that Wheatland was not acting as Flynn's agent but was a subcontractor that hired another subcontractor, Hilton, and was paid for work that Hilton had performed. The trial court also noted that Knoblauch's failure to keep good records and his failure to realize that Flynn had overpaid Wheatland was not a defense to Wheatland's failure to pay Hilton for stonework it had completed. Finally, the trial court determined that the Kansas Fairness in Private Construction Contract Act statutory interest rate applied and awarded attorney fees to Hilton.

Was the Trial Court's Finding That Wheatland and Knoblauch Hired Hilton as a Subcontractor Supported by Substantial Competent Evidence?

Wheatland and Knoblauch maintain that because substantial competent evidence did not support the trial court's finding that Wheatland hired Hilton as a subcontractor, the trial court erred in awarding Hilton attorney fees and applying the statutory interest rate. In their brief, they seem to suggest that the trial court erred in interpreting or applying the Kansas Fairness in Private Construction Contract Act. There is no dispute that both Wheatland **[*8]** and Hilton were subcontractors. The remaining issue is whether they were both subcontractors for Flynn or whether Wheatland had hired Hilton as a subcontractor.

When reviewing a trial court's factual findings, an appellate court generally applies a substantial competent evidence standard. *Hamel v. Hamel, 296 Kan. 1060, 1078, 299 P.3d 278 (2013)*. Substantial evidence is evidence that "a reasonable person might accept as sufficient to support a conclusion." *Owen Lumber Co. v. Chartrand, 283 Kan. 911, 916, 157 P.3d 1109 (2007)*. An appellate court ignores conflicting evidence and other inferences that could be drawn from the evidence which do not tend to support the district court's findings. *Unruh v. Purina Mills, 289 Kan. 1185, 1196, 221 P.3d 1130 (2009)*. To the extent that statutory interpretation is necessary, an appellate court's review is unlimited. *Neighbor v. Westar Energy, Inc., 301 Kan. 916, 918, 349 P.3d 469 (2015)*.

K.S.A. 2015 Supp. 16-1803(g) states: "If the contractor fails to pay a subcontractor within seven business days, the contractor shall pay interest to the subcontractor beginning on the eighth business day after receipt of payment by the contractor, computed at the rate of 18% per annum on the undisputed amount." That section also applies to subcontractors and their subcontractors. *K.S.A. 2015 Supp. 16-1803(h)*. A subcontractor is defined as "any person performing construction covered by a contract between an owner and a contractor but not having a contract with the owner." *K.S.A. 2015 Supp. 16-1802(h)*. **[*9]** Contractors are persons "performing construction and having a contract with an owner of the real property or with a trustee, agent or spouse of an owner." *K.S.A. 2015 Supp. 16-1802(d)*. Also, the prevailing party in an action under *K.S.A. 2015 Supp. 16-1803* is entitled to costs and reasonable attorney fees. *K.S.A. 16-1806*.

David testified that Knoblauch initially contacted him over the phone and asked him for a quote. After some time, Knoblauch contacted David again and asked if he was still interested in doing the job. Hilton then began doing the stonework. David also testified that he had no contact with Flynn, all contact was through Knoblauch, and that he did not have any other contact about the job with anyone else. According to David's testimony, Knoblauch also visited the jobsite and spoke with Hilton employees, and when the workers ran out of stone, David called Knoblauch, who then ordered more. Finally, David testified that he had not dealt with anyone except for Knoblauch. He did not know of Flynn's involvement; from his understanding, Knoblauch had hired Hilton to do the stonework; and he did not have any conversations about the project with anyone else.

Wheatland and Knoblauch argue that the contract revision showing the stonework was not **[*10]** signed by Knoblauch and that no documentary evidence showing that Wheatland had hired Hilton as a subcontractor was presented. But as previously mentioned, when reviewing a trial court's factual findings, this court ignores any conflicting evidence. *Unruh, 289 Kan. at 1196*. Further, although no documentary evidence was presented, David's testimony, as shown, supported the trial court's finding that Wheatland had hired Hilton as a subcontractor. In making that finding, the trial court, as it specifically noted, determined the credibility of Knoblauch and David. Moreover, appellate courts do not redetermine the credibility of witnesses. See *Garvey Elevators, Inc. v. Kansas Human Rights Comm'n, 265 Kan. 484, 496-97, 961 P.2d 696 (1998)*.

Because a reasonable person would accept David's testimony as sufficient to support the trial court's conclusion that Wheatland had hired Hilton as a subcontractor, the trial court's factual findings were

supported by substantial competent evidence. Thus, the trial court properly awarded Hilton attorney fees and applied the statutory interest rate.

Affirmed.

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VHC Van Hoecke Contr. v. Murray & Sons Constr. Co.

Court of Appeals of Kansas

June 15, 2012, Opinion Filed

No. 106,603

Reporter
2012 Kan. App. Unpub. LEXIS 508 *; 278 P.3d 1001; 2012 WL 2326027

VHC VAN HOECKE CONTRACTING, INC., Appellant, v. MURRAY & SONS CONSTRUCTION CO., INC., ET AL., Appellees.

Notice: NOT DESIGNATED FOR PUBLICATION.

PLEASE CONSULT THE KANSAS RULES FOR CITATION OF UNPUBLISHED OPINIONS.

PUBLISHED IN TABLE FORMAT IN THE PACIFIC REPORTER.

Prior History: **[*1]** Appeal from Johnson District Court; JAMES F. VANO, judge.

Disposition: Affirmed in part and reversed in part.

Core Terms

district court, retainage, subcontractor, prejudgment interest, attorney's fees, contractor, construction contract, waivers, add-on, amounts, school district, change order, amounts due, quantum meruit, quantum-meruit, argues, covers, duct, percent interest, additional work, business day, due date, liquidated, disputed, billed, costs

Counsel: Scott C. Long and John R. Weist, of Long & Luder, P.A., of Overland Park, for appellant.

Michael L. Entz, of Entz, Entz & Laskowski, LLC, of Topeka, for appellees.

Judges: Before LEBEN, P.J., STANDRIDGE and ARNOLD-BURGER, JJ.

Opinion by: LEBEN

Opinion

MEMORANDUM OPINION

LEBEN, J.: To ensure fair treatment of subcontractors, the Kansas Fairness in Public Construction Contract Act provides that a general contractor must pay any subcontractor its share of the retainage—a percentage of the contract price withheld by the owner to assure completion of the project—within 7 business days of its receipt if there is no dispute as to the amounts due the subcontractor. In the case at hand, the contractor paid the subcontractor its share of the retainage long after that time frame, but the district court denied the subcontractor's claim for interest on this late payment. Here, the contractor said it delayed payment of the retainage because of the contractor's own confusion about the paperwork it had received—paperwork that wasn't even required under the contract. In this circumstance, we conclude that the retainage amount due the subcontractor **[*2]** was undisputed, and we reverse the district court's conclusion that the contractor

had not violated the Kansas Fairness in Public Construction Contract Act. We also remand for a consideration of appropriate attorney fees based on the subcontractor's successful claim.

The subcontractor also asks on appeal for prejudgment interest and attorney fees on three claims of additional work that the subcontractor had performed outside of the contract. We find no error in the district court's decision denying those requests. The district court granted amounts for the additional work based on a legal theory—urged by the subcontractor—that normally doesn't support a prejudgment-interest award (and certainly wouldn't support an award of attorney fees). The subcontractor has tried to assert a different legal theory in support of its requests on appeal, but we conclude it is limited by the arguments it made to the district court.

FACTUAL BACKGROUND

Murray and Sons Construction Co. ("Murray and Sons") was the general contractor for the building of a new elementary school, and VHC Van Hoecke Contracting, Inc. ("Van Hoecke") was awarded the subcontract to provide heating, ventilating, and air conditioning **[*3]** work. Like most construction contracts, Van Hoecke's contract with Murray and Sons provided for a scope of work and contemplated that additional work might be added through what are called change orders—written agreements that document the additional work. But there were four items of additional work Van Hoecke performed on this project that Van Hoecke and Murray and Sons never documented with a change order:

- The school district asked for some duct covers, and Van Hoecke sent a pricing proposal quoting the cost as "$400 each." Murray and Sons approved work for 32 orders, but it prepared a change order showing the cost as $400 in total, not $400 each. Van Hoecke refused to sign that change order but did provide the 32 duct covers.
- Van Hoecke repaired a vent cap damaged by the wind and billed Murray and Sons $305.89.
- Van Hoecke installed underfloor planning at Murray and Sons' request and billed $1,281.04.
- Van Hoecke repaired an air-handling unit and billed $3,308.

Except for a single payment of $400 that it said covered all the duct covers, Murray and Sons didn't pay any of these amounts.

Building owners generally hold back a retainage amount—paid at the end of the project—to ensure **[*4]** that the project is satisfactorily completed. Here, Murray and Sons' contract with the school district called for several retainage payments, but our dispute involves a 4-percent retainage paid near the end of the project. The school district paid the retainage to Murray and Sons in February 2010, but Murray and Sons didn't pay Van Hoecke its share of the retainage until November 2010. Murray and Sons explained that it thought Van Hoecke had failed to submit lien waivers, documents it said were necessary to authorize payment, but it later discovered that the waivers had been provided in January 2010.

By the time Murray and Sons received the retainage from the school district, Van Hoecke had already filed suit against Murray and Sons, a suit filed in November 2009. Van Hoecke presented claims for breach of contract, quantum meruit (a claim for the reasonable value of services), and breach of a payment bond. When the case came to trial in March 2011, Van Hoecke sought 18 percentage interest for the delay in paying its share of the retainage, a claim brought under the Kansas Fairness in Public Construction Contract Act, *K.S.A. 16-1901 et seq.* Van Hoecke also sought payment for the four **[*5]** add-on items along with prejudgment interest on each item. And Van Hoecke also asked for an award of the attorney fees it incurred from pursuing the suit.

The district court denied interest and attorney fees based on the delayed retainage payment. But the court awarded Van Hoecke judgment for the full amount of each of the four add-on items along with prejudgment interest on the duct covers; the court denied prejudgment interest related to the other three add-on items.

Van Hoecke has appealed to this court.

ANALYSIS

I. *The District Court Erred When It Refused to Award Prejudgment Interest and Attorney Fees on the Delayed Retainage Payment.*

We begin with an issue under the Kansas Fairness in Public Construction Contract Act that is squarely before us—whether the provisions of that statute apply on the facts of this case to Murray and Sons' failure to pay Van Hoecke its share of the retainage within 7 business days after Murray and Sons received it. This is a matter of statutory interpretation, which we review independently, without any required deference to the district court. See *Brennan v. Kansas Insurance Guaranty Ass'n, 293 Kan.*

446, 450, 264 P.3d 102 (2011).

The Kansas Fairness in Public **[*6]** Construction Contract Act ("the Act") provides that the contractor must pay the subcontractor its share of a retainage within 7 days if the subcontractor's request for payment isn't disputed: "A contractor shall pay its subcontractors any amounts due within seven business days of receipt of payment from the owner, including payment of retainage, if retainage is released by the owner, if the subcontractor has provided a timely, properly completed and undisputed request for payment to the contractor." K.S.A. 16-1903(f). If the contractor fails to do so, the subcontractor gets 18 percent interest "beginning on the eighth business day after receipt of payment by the contractor . . . on the undisputed amount." K.S.A. 16-1903(g).

We know that Murray and Sons didn't pay Van Hoecke its share of retainage until more than 8 months after the school district paid the retainage to Murray and Sons. So the question we must determine is whether Van Hoecke's request for payment was "undisputed."

At trial, Murray and Sons said it initially hadn't paid the retainage to Van Hoecke because Murray and Sons' personnel thought that Van Hoecke hadn't provided lien releases from itself and its own suppliers or **[*7]** subcontractors. Lien releases are often obtained in construction-contract settings to make sure that all of the parties that might claim payment *through* another contractor have already been paid (or at least have agreed not to file lien claims). But Murray and Sons' vice president Mike Gibson testified that he later learned that Murray and Sons had the lien waivers in hand in January 2010 and didn't need any further lien waivers from Van Hoecke when the school district paid the retainage in February 2010. So a lack of lien waivers wouldn't have been a valid reason to delay payment of Van Hoecke's retainage.

More important, perhaps, nothing in our record makes the provision of lien waivers a requirement of the contract between Murray and Sons and Van Hoecke. The parties' contract was introduced into evidence at trial, and section 3.5, which requires Van Hoecke to provide *receipts* showing it had paid its employees and suppliers, was noted:

> "Subcontractor [Van Hoecke], if required, shall submit receipts or other vouchers showing payment of labor and materials to the previous month[']s date of estimate for partial payment. In the event Subcontractor does not furnish receipts and vouchers **[*8]** upon Contractor's request, Contractor is authorized to pay said bills directly and deduct such sums from the estimate for partial payment."

Under this section, if Van Hoecke doesn't provide receipts or "other vouchers" showing payment, then the remedy provided by contract was that Murray and Sons could pay those amounts directly.

As a practical matter, parties may choose to handle this matter through lien waivers. But that wasn't required by parties' contract. Gibson, Murray's vice president, conceded that he couldn't find a requirement in the contract that lien waivers be provided before payment would be made to Van Hoecke.

In its ruling, the district court said that Murray and Sons would have been justified in withholding payment if Van Hoecke hadn't provided lien releases. Apparently based on that premise, the district court then concluded that Murray and Sons had a "good faith dispute over whether [Van Hoecke] had complied with the terms of the contract which would entitle [Van Hoecke] to payments," since Murray and Sons believed (albeit mistakenly) that it hadn't received lien waivers from Van Hoecke.

But the district court's premise was legally flawed because there was no contractual **[*9]** requirement for Van Hoecke to furnish lien waivers. And the district court's conclusion was factually wrong as well, since Van Hoecke had actually supplied Murray and Sons all the lien waivers it wanted before the school district paid the retainage to Murray and Sons. Murray and Sons can't create a "good-faith dispute" based on its own mishandling of paperwork that wasn't even contractually required. (We note that part of the contract—some American Institute of Architects standard contract documents—are incorporated into the contract by reference but not included in our record. While one of those might refer to lien waivers, no party cited to those provisions at trial or on appeal.)

The provision we've cited from the Kansas Fairness in Public Construction Contract Act, K.S.A. 16-1903(f), has a clear purpose—ensuring the prompt payment of subcontractors and suppliers. We think it clear as well that for a payment to be disputed, there must indeed be some matter that can, in good faith, be disputed. After all, except for at-will employment contracts, every contract entered into in Kansas contains an implied covenant of good faith and fair dealing. See Morriss v. Coleman Co., 241 Kan. 501, 514-15, 518, 738 P.2d 841 (1987); **[*10]** Bank of America v. Narula, 46 Kan. App. 2d 142, Syl. ¶ 11, 261 P.3d 898 (2011). Murray and Sons has not identified any basis on which it could properly

have disputed that it owed the retainage to Van Hoecke, and Murray and Sons in fact paid the retainage—in full—even though that payment came more than 8 months too late to comply with K.S.A. 16-1903(f).

In its appellate brief, Murray and Sons argues that it had not been able to match the dollar amount on the lien waiver it had received from Van Hoecke against the amount to be paid to Van Hoecke, and that Van Hoecke didn't help out by providing an explanation once it became clear Murray and Sons was confused about the matter. But the most Murray and Sons has shown is that it failed to understand paperwork that wasn't contractually required, which doesn't make the amount owed to Van Hoecke a disputed one.

Accordingly, the Act's provision for 18 percent interest applies—and so does the Act's provision awarding the attorney fees and costs incurred in enforcing the Act's requirements. Under K.S.A. 16-1906, "the court . . . shall award costs and reasonable attorney fees to the prevailing party" in any action to enforce K.S.A. 16-1903.

In this **[*11]** lawsuit, as we will discuss in the following section, Van Hoecke has not succeeded on all of its claims, and its claim for interest under another statute, K.S.A. 16-201, was not one on which attorney fees could have been awarded under K.S.A. 16-1906. Thus, some of the fees for the work done by Van Hoecke's attorneys is not subject to assessment against Murray and Sons. We will remand the case for the district court to determine the proper amount of attorney fees and costs to be assessed. See Hodges v. Johnson, 288 Kan. 56, 71, 199 P.3d 1251 (2009). In doing so, the district court will need to determine the appropriate award attributable to the pursuit of Van Hoecke's successful claim under the Act. See Werdann v. Mel Hambelton Ford, Inc., 32 Kan. App. 2d 118, Syl. ¶¶ 18-19, 79 P.3d 1081 (2003), *rev. denied 277 Kan. 928 (2004)*; DeSpiegelaere v. Killion, 24 Kan. App. 2d 542, Syl. ¶¶ 1-2, 947 P.2d 1039 (1997).

II. *We Find No Error in the District Court's Decision Not to Award Interest or Attorney Fees on the Add-Ons to the Construction Project That Weren't Documented with Change Orders.*

Van Hoecke separately asks that we reverse the district court and award prejudgment interest for each **[*12]** of the three add-on construction items for which the district court denied prejudgment interest. Van Hoecke also asks that we award it the attorney fees it has incurred to collect these amounts, as well as on collection of the amounts due for the vent covers (as to which the district court awarded prejudgment interest).

Van Hoecke asserts two legal bases in support of its claim. First, it argues that the Kansas Fairness in Public Construction Contract Act applies and authorizes both prejudgment interest and attorney fees. Second, even if that statute doesn't apply, Van Hoecke argues that prejudgment interest should have been awarded under K.S.A. 16-201 because the amounts due were liquidated and prejudgment interest is usually awarded on liquidated sums.

Murray and Sons argues that Van Hoecke's argument on appeal is different than the one it made to the district court. There, Van Hoecke sought recovery of the add-on amounts under *either* of two theories: breach of contract or quantum meruit. In a quantum-meruit recovery, the court awards reasonable compensation when the parties have agreed upon the work to be done but not about the price to be paid. See Campbell-Leonard Realtors v. El Matador Apartment Co., 220 Kan. 659, 662, 556 P.2d 459 (1976). **[*13]** Murray and Sons argues that a quantum-meruit recovery is awarded for work done outside the contract, and the Kansas Fairness in Public Construction Contract Act applies only to amounts due under the contract, so Van Hoecke cannot succeed under the Act if the court's award was based on quantum meruit. See K.S.A. 16-1903(c); 16-1902(c).

On appeal, Van Hoecke responds that the add-on work should be considered to have been part of a separate oral contract even though written change orders weren't signed and, thus, the work wasn't covered by the parties' written construction contract. But Van Hoecke doesn't cite any place in the record where it made that argument to the district court, and issues not raised before the district court generally can't be raised on appeal. Wolfe Electric, Inc. v. Duckworth, 293 Kan. 375, 403, 266 P.3d 516 (2011).

When it first filed suit, Van Hoecke asked the district court to grant relief to it for the amounts billed for these add-on projects either based on breach of contract or quantum meruit. The district court accepted Van Hoecke's position and awarded the sums based on quantum meruit. We think Van Hoecke is precluded from now arguing on appeal that the **[*14]** district court instead should have found that there was an implied oral contract, and that such a contract should qualify for the protections of the Kansas Fairness in Public Construction Contract Act.

First, a party may not invite error and then complain of that error on appeal. Butler Co. R.W.D. No. 8 v. Yates, 275 Kan. 291, 296, 64 P.3d 357 (2003). Nor may a party take or acquiesce in a position in the district court and

then urge that position as error on appeal. *Lee v. Fischer, 41 Kan. App. 2d 236, 242, 202 P.3d 57*, *rev. denied 289 Kan. 1279 (2009)*. The district court granted recovery on the quantum-meruit theory urged by Van Hoecke. Van Hoecke did not argue to the district court that the court should grant a quantum-meruit award only if it first rejected the breach-of-contract claim.

Second, we note that at least one court has decided that its state's prompt-payment act for construction projects did not apply to work done without a formal change order and thus "outside the scope of the contract." *G & T Conveyor Co. v. Allegheny County Airport Authority, 2011 U.S. Dist. LEXIS 71992, 2011 WL 2634161, at *4 (W.D. Pa. 2011)* (unpublished opinion). A similar construction of the Kansas statute would result in the **[*15]** denial of any claim under that statute for this work, which Van Hoecke referred to in its written brief in the district court as "work performed outside [the] contract" and "work . . . outside [Van Hoecke's] agreed upon scope of work." Indeed, the district court said that because the work involving the duct covers "was outside the contract," Van Hoecke could not recover under the Act.

We mention this second point because the rule against allowing a party to change its argument a bit on appeal is not invariably applied; thus, we have some discretion to overlook that rule and address the issue for the first time on appeal. But here, there appears a likelihood that the Act wouldn't provide the relief Van Hoecke seeks even if the invited-error rule did not apply. We see no reason to decide that issue when Van Hoecke received recovery in the district court on a theory it urged—quantum meruit—and did not specifically argue there that an implied-in-fact contract triggers application of the Act. We should wait for a case in which the question was squarely addressed to the trial court and fully briefed on appeal to decide whether the Kansas Fairness in Public Construction Contract Act might **[*16]** have some application to work performed beyond the initial contract's scope and done without a written change order.

Van Hoecke has made no argument that it would be entitled to attorney fees other than under the Kansas Fairness in Public Construction Act. Because Van Hoecke's recovery for the contract add-on items wasn't awarded under that Act, Van Hoecke is not entitled to recover attorney fees related to that recovery.

Even if the Act doesn't apply, though, Van Hoecke separately argues for prejudgment interest under another statute—*K.S.A. 16-201*, which provides for 10 percent interest on amounts due and unpaid "when no other rate of interest is agreed upon." Generally, prejudgment interest is awarded under this statute only on liquidated claims, meaning that both the amount due and the due date are fixed and certain. See *Owen Lumber Co. v. Chartrand, 283 Kan. 911, 925, 157 P.3d 1109 (2007)*. But prejudgment interest may also be awarded on unliquidated amounts under unique facts "where necessary to arrive at full compensation." *Lightcap v. Mobil Oil Corporation, 221 Kan. 448, Syl. ¶ 11, 562 P.2d 1 (1977)*. We review the district court's decision to award or to deny prejudgment interest **[*17]** only for abuse of discretion. *Owen Lumber Co., 283 Kan. at 925*.

Even if the amounts due were liquidated, due dates were not fixed and certain. Van Hoecke has suggested various due dates in 2009 for the three items, but the only document in our record reflecting those dates is Van Hoecke's worksheet figuring interest, which was compiled by its comptroller in preparation for this lawsuit. Nor were due dates agreed on by the parties or established by their written contract. So the sums were not liquidated and prejudgment interest ordinarily would not be awarded. All of the sums awarded were granted under Van Hoecke's quantum-meruit legal theory, and interest usually is not granted on a quantum-meruit recovery. *Miller v. Botwin, 258 Kan. 108, 119, 899 P.2d 1004 (1995)*.

While interest may still be awarded in rare cases under the rule in *Lightcap*, we find no abuse of discretion in the district court's decision not to do so on three of the four add-on items. The district court *granted* prejudgment interest on the largest claim (the $12,800 awarded for the duct caps), which suggests that the district court did exercise discretion in the matter. Like the other amounts awarded, the $12,800 award **[*18]** came based on quantum meruit, and the due date there wasn't certain, either. So it appears that the district court applied the *Lightcap* rule to award prejudgment interest in that case, apparently because Van Hoecke had clearly laid out the per-unit cost of $400 before Murray and Sons told Van Hoecke to do the work. With respect to the other awards, we think that a reasonable person could conclude that an award of prejudgment interest isn't necessary.

CONCLUSION

We reverse the district court's judgment denying an award of interest at 18 percent for the period of time that payment of the retainage was delayed. On remand, the district court shall award judgment for 18 percent interest from the eighth business day following February 15,

2010, until the date the retainage was received by Van Hoecke.

We also reverse the district court's judgment denying attorney fees and costs to Van Hoecke under K.S.A. 16-1906. On remand, the district court shall determine the appropriate amount of attorney fees and costs to be awarded based on Van Hoecke's successful claim and then shall enter judgment for those amounts.

The district court's judgment is otherwise affirmed.

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