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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT

TRI VALLEY LAND DEVELOPMENT, INC.,

Plaintiff, Cross-defendant and Appellant,

v.

TURNER RANCH FAMILY DAIRY et al.,

Defendants, Cross-complainants and
Appellants;

WILLIAM VAN ERICKSON,

Cross-defendant and Appellant.

F061515

(Super. Ct. No. 07C0238)

OPINION

APPEAL from a judgment of the Superior Court of Kings County. Thomas DeSantos, Judge.

Doerksen Taylor and Charles L. Doerksen for Plaintiff, Cross-defendant and Appellant Tri Valley Land Development, Inc. and Cross-defendant and Appellant William Van Erickson.

Petrie Dorfmeier & Morris, J. David Petrie and Sean T. O'Rourke for Defendants, Cross-complainants and Appellants.

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These appeals arise from a contract to perform earthmoving work for the construction of two dairies. After the work was completed, plaintiff Tri Valley Land Development, Inc. (Tri Valley) filed the underlying complaint against defendants Turner Ranch Family Dairy, LLC (Turner Dairy) and Martin Ranch Family Dairy, LLC (Martin Dairy), to recover approximately \$262,000 that Tri Valley asserted remained unpaid under the contract. Tri Valley had been paid approximately \$1.7 million. Thereafter, Turner Dairy and Martin Dairy filed a cross-complaint against Tri Valley and Tri Valley's subcontractor, William Van Erickson (Erickson), seeking damages for breach of contract and negligence.

Following a bench trial, the court ruled in favor of Turner Dairy and Martin Dairy on the complaint. The court found that Tri Valley had been paid in full for the work it performed. The court then ruled in favor of Tri Valley and Erickson on the cross-complaint. The court concluded that Turner Dairy and Martin Dairy had not met their burden of proof on their request for damages.

Motions for attorney fees as costs were filed by all parties. The court granted fees to Turner Dairy and Martin Dairy on the complaint and to Erickson on the cross-complaint. The court denied fees to Tri Valley on the cross-complaint. In making this ruling, the court found that Tri Valley did not assign its claims under the contract to Erickson.

In the Tri Valley appeal, Tri Valley argues that the trial court erred in finding that its claim against Turner Dairy and Martin Dairy had been discharged by accord and satisfaction. According to Tri Valley, the dairies did not plead this affirmative defense and there is no evidence of such an agreement.

In their appeal, Turner Dairy and Martin Dairy assert that the court erred in finding that Tri Valley did not assign its claims under the contract to Erickson when the assignment agreement was not before it. They claim that this issue was not ripe.

The trial court did not make the asserted errors. On the complaint, the court ruled that the obligation was satisfied in full, not that an accord and satisfaction was reached. On the motion for attorney fees incurred by Erickson in defending the cross-complaint, the court did not err in finding that no assignment occurred. The issue was before the court. Accordingly, the judgment and order will be affirmed.

BACKGROUND

Turner Dairy and Martin Dairy are limited liability companies owned by Robin Martella. These companies each own a dairy that was constructed by Martella.

Martella, as the owner of Turner Dairy and Martin Dairy, entered into a contract with Tri Valley for earthmoving work. The contract was drafted by Tri Valley's owner, Ray Fox. This contract, dated September 19 and 20, 2005, provides that Tri Valley will furnish equipment and labor to do various items of earthmoving work at various prices per cubic yard for the two dairies. The contract states that it is anticipated the dairy grading can be completed within 12 weeks.

Tri Valley hired Ranchwood Contractors (Ranchwood) to provide equipment and labor to do the earthmoving work. Ranchwood began working for Tri Valley on September 22, 2005. However, Ranchwood did not provide all of the promised equipment and was therefore terminated. Ranchwood's last day of work was November 2, 2005. Ranchwood completed approximately 15 percent of the earthwork on the Martin Dairy property and approximately 5 percent of the earthwork on the Turner Dairy property.

Erickson took over from Ranchwood on November 5, 2005, providing equipment and labor to Tri Valley. Erickson shut down for the winter on December 31, 2005, and resumed work on May 24, 2006. The earthwork again shut down in late July 2006 due to problems caused by heat. The earthwork resumed in late September 2006 and was completed by November 14, 2006. The land leveling was completed in April 2007.

The original contract price was \$1,119,210 for the earthwork plus an amount to be determined for land leveling. However, various aspects of the work changed, including an increase in the yardage. Turner Dairy and Martin Dairy paid Tri Valley a total of \$1,721,099.

Ranchwood billed Tri Valley approximately \$233,814. However, at the time of trial, Tri Valley still owed Ranchwood between \$35,000 and \$85,000. Erickson billed Tri Valley \$1,120,982. At trial, Erickson testified that his business was still owed \$230,261 by Tri Valley.

The bills submitted by Tri Valley to Turner Dairy and Martin Dairy totaled approximately \$1,931,951. This was \$210,852 more than the amount actually paid by Turner Dairy and Martin Dairy to Tri Valley.

Shortly after the job was completed, Tri Valley filed the underlying complaint alleging that it was still owed approximately \$261,852 under the contract. Thereafter, Turner Dairy and Martin Dairy filed the cross-complaint against Tri Valley and Erickson alleging breach of contract based on the failure to complete the project on time. The cross-complaint also stated a cause of action for negligence against Erickson alleging that the slopes of the banks of the dairy drainage ponds were not as specified.

The case was tried by the court. After receiving trial briefs and proposed statements of decision, the court issued its “Judgment and Statement of Decision After Court Trial” on September 20, 2010. The court found that Turner Dairy and Martin Dairy had paid an amount to Tri Valley that exceeded the amount that was billed by Tri Valley’s subcontractors, Ranchwood and Erickson, by a minimum of \$366,302.26. The court concluded that the total payments made by Turner Dairy and Martin Dairy to Tri Valley “constitute[d] payment in full and satisfaction of the total obligation of [the dairies].” On the cross-complaint, the court found that Tri Valley breached the contract by not timely completing the earthwork but that Turner Dairy and Martin Dairy did not

meet their burden of proof on their request for damages. The court further found that Erickson was not in privity of contract with Turner Dairy and Martin Dairy.

A “Judgment in Favor of Defendants on Plaintiff’s Complaint and Judgment in Favor of Cross-Defendants on Cross-Complainants’ Cross-Complaint” was filed on November 10, 2010.

Following trial, all parties moved for an award of attorney fees. Turner Dairy and Martin Dairy were awarded approximately \$93,000 in attorney fees against Tri Valley as the prevailing parties on the complaint. Erickson’s motion was granted in part as the prevailing party on the cross-complaint. The court awarded Erickson \$62,515, which was 60 percent of what was requested. The court reasoned that a portion of those fees were incurred for the benefit of Tri Valley. The court noted that Martin Dairy and Turner Dairy had alleged in their cross-complaint that Erickson had expressly assumed the obligations of the 2005 contract between the dairies and Tri Valley. The court thereafter found that “Tri Valley did not assign its claims under the contract to Van Erickson” but, rather, that Erickson had asserted a lien for \$230,000 for work performed on the property owned by Turner Dairy and Martin Dairy.

DISCUSSION

1. *Tri Valley’s appeal.*

In its judgment and statement of decision, the trial court set forth its factual findings and legal conclusions. The findings of fact included that the total bills submitted to Tri Valley by its subcontractors, Ranchwood and Erickson, amounted to \$1,354,796.74 and the total amount paid to Tri Valley by Turner Dairy and Martin Dairy was \$1,721,099. The trial court then subtracted the amount that was billed by Ranchwood and Erickson from the total paid to Tri Valley and found that the amount paid by Turner Dairy and Martin Dairy exceeded the subcontractors’ bills by a minimum of \$366,302,26. The court noted that Ranchwood and Erickson were the only suppliers/contractors used on the job by Tri Valley. The court further observed that Tri Valley’s owner, Fox,

testified that he expected a profit margin of 15 percent and that the amount received by Tri Valley from Turner Dairy and Martin Dairy exceeded the anticipated 15 percent profit by \$108,137.41.

Under the heading “Issues of Law,” the court stated:

“... The Court bases its decision in this action on the legal issue of whether [Tri Valley] was paid or compensated in full for its work performed on the jobs, based upon the bills submitted by [Tri Valley] to [Turner Dairy and Martin Dairy] so as to constitute an extinguishment of the obligation of [Turner Dairy and Martin Dairy] *through payment in full or accord and satisfaction.*” (Italics added.)

The court then explained

“... The Court finds that the additional bills submitted by [Tri Valley] to [Turner Dairy and Martin Dairy] were ‘paid’ by [Turner Dairy and Martin Dairy] through [their] total payments to [Tri Valley] so as to constitute *payment in full and satisfaction of the total obligation of [Turner Dairy and Martin Dairy].*” (Italics added.)

The court then concluded

“... Having ruled that [Tri Valley] was compensated in full for all bills submitted by it to [Turner Dairy and Martin Dairy], and that [Turner Dairy and Martin Dairy] paid \$366,302.26 in excess of those bills, the Court need not make any further findings of fact and conclusions of law on the issues of what charges by [Tri Valley] to [Turner Dairy and Martin Dairy] were appropriate or not appropriate, what charges would be normally included by custom and practice, or course of conduct, within the bills submitted by [Tri Valley] to [Turner Dairy and Martin Dairy].”

Tri Valley argues that the trial court erred in finding an accord and satisfaction.

Tri Valley notes that Turner Dairy and Martin Dairy did not plead accord and satisfaction as an affirmative defense and therefore, Tri Valley asserts, accord and satisfaction was not available.

Turner Dairy and Martin Dairy first respond to this argument by pointing out that Tri Valley did not bring this alleged defect to the trial court’s attention by filing a specific

objection to the statement of decision. Therefore, Turner Dairy and Martin Dairy argue, Tri Valley forfeited its right to raise this issue.

Turner Dairy and Martin Dairy are correct that a party cannot complain on appeal of rulings to which it acquiesced in the lower court. (*Porterville Citizens for Responsible Hillside Development v. City of Porterville* (2007) 157 Cal.App.4th 885, 912.) Here, however, the trial court labeled its statement of decision “Judgment and Statement of Decision After Court Trial.” Thus, the effect of this ruling was ambiguous. In fact, counsel for Turner Dairy and Martin Dairy explained to the trial court that they “were uncertain as to whether the Court’s Judgment and Statement of Decision After Court Trial was a Judgment itself or the Statement of Decision, given how worded at the end.” Therefore, counsel forwarded a proposed judgment to the court for the court to execute if the court felt that the proposed judgment was appropriate. Thereafter, the separate judgment was executed and filed. Under these circumstances, we find that Tri Valley did not forfeit its right to raise this accord and satisfaction issue on appeal.

Nevertheless, Tri Valley’s argument fails on the merits. Although the trial court framed the legal issue as being whether the obligation was extinguished through payment in full *or* accord and satisfaction, it is clear that the court’s *finding* was that the payments made by Turner Dairy and Martin Dairy constituted payment in full and satisfaction of the *total* obligation. The trial court did not find there was an accord and satisfaction. Rather, the court found that Tri Valley was fully compensated for all of the bills it submitted to Turner Dairy and Martin Dairy. Thus, the error alleged by Tri Valley did not occur.

Tri Valley contends that Turner Dairy and Martin Dairy did not dispute the majority of the unpaid bills and that, but for the trial court’s application of the wrong legal standard, Tri Valley would have prevailed. However, contrary to Tri Valley’s position, Turner Dairy and Martin Dairy did dispute the bills. They took the position that

no further money was owed and, further, that Tri Valley owed money in damages to them. Moreover, the trial court did not apply the wrong legal standard.

Tri Valley additionally objects to the trial court's calculating Tri Valley's expenses based on the subcontractors' bills and, in doing so, assuming that Tri Valley had no additional expenses. According to Tri Valley, the court abandoned efforts to decide Tri Valley's claim for benefit of the bargain. However, the evidence was that Tri Valley's subcontractors provided the equipment, operators and repair and maintenance services. Tri Valley did not present any evidence of expenses beyond what the subcontractors charged Tri Valley. Further, the court decided that Tri Valley did receive the benefit of its bargain, i.e., what it contracted for, when it ruled that Tri Valley was fully compensated for all of the bills it submitted.

Tri Valley further asserts that the court made irrelevant findings of fact. Tri Valley questions the trial court's findings that Tri Valley expected a 15 percent profit margin and that Tri Valley offered no evidence on where the funds above the amounts billed by the subcontractors went. However, although the court noted that Tri Valley profited by more than 15 percent, the court did not base its ruling on a 15 percent profit margin. The trial court also did not rely on its observation that Tri Valley presented no evidence on what the proceeds were used for when it ruled that Tri Valley had been paid in full.

In sum, the trial court did not rule based on accord and satisfaction. Rather, the court found that Tri Valley was paid in full and thus the obligation of Turner Dairy and Martin Dairy under the contract was extinguished. The asserted error simply did not occur.

2. *The Turner Dairy and Martin Dairy appeal.*

In September 2008, during the pendency of the underlying action, Tri Valley served a notice of lien on Turner Dairy and Martin Dairy. This notice stated that, "by virtue of a written agreement entitled *Agreement for Assignment of Proceeds from Causes*

of Action” (original italics), dated May 27, 2008, between Tri Valley and Erickson, Tri Valley, as the debtor, “hereby pledges to [Erickson, as the secured party] a lien in all right, title and interest of [Tri Valley] in and to any and all proceeds obtained in the above-captioned proceeding, whether by way of judgment, settlement, or otherwise” provided that the amount of this lien shall not exceed \$234,661.25, plus interest and attorney fees and costs that may be advanced by Erickson for the benefit of Tri Valley to prosecute and/or defend this action.

In their first amended cross-complaint, filed October 7, 2008, Turner Dairy and Martin Dairy alleged that Erickson “expressly assumed the obligations for land excavation required under the September 20, 2005 written agreement.”

During the trial, counsel for Turner Dairy and Martin Dairy questioned Erickson about any agreements he entered with Tri Valley concerning his work on the Turner Dairy and Martin Dairy. Counsel asked, “At some point did you sign a separate agreement with Mr. Fox concerning his payment to you of outstanding amounts in exchange for your funding this litigation for a lien?” to which Erickson replied “We did sign paperwork.” However, counsel did not further pursue this line of questioning.

In ruling on the motion for attorney fees, the court found that Tri Valley did not assign its claims under the contract to Erickson but that Erickson had asserted a lien for \$230,000 for work performed on property owned by Turner Dairy and Martin Dairy. Turner Dairy and Martin Dairy moved for reconsideration requesting the court to examine whether there was a lien taken by Erickson or whether there really was an assignment of Tri Valley’s rights to Erickson. They argued that this would be the first time the issue had been before the court. Turner Dairy and Martin Dairy emphasized that a true lien holder does not advance funds for the prosecution of causes of action. The court denied this motion finding that the “‘lien versus assignment’ issue” was not new.

Turner Dairy and Martin Dairy argue that the trial court should not have made this finding on the ground that the issue was not ripe. They assert that the finding that Tri

Valley did not assign its claims to Erickson should be reversed because the May 27, 2008, agreement was not before the court. Turner Dairy and Martin Dairy posit that this 2008 agreement may have been an assignment and not a lien. They note that Tri Valley is a defunct, judgment proof corporation and that a general assignment might make Erickson liable for the attorney fees awarded against Tri Valley.

Contrary to Turner Dairy and Martin Dairy's position, the assignment issue was before the court and was relevant to the attorney fees award. Turner Dairy and Martin Dairy sued Erickson as an assignee of the 2005 earthwork contract. Based on this alleged assignment, the court found that attorney fees would have been recoverable against Erickson had Turner Dairy and Martin Dairy prevailed and, therefore, Erickson was entitled to attorney fees in defending the claims made in the cross-complaint.

However, the court determined that Tri Valley was not a prevailing party on the cross-complaint. The court found that the filing of the cross-complaint against Tri Valley was defensive in nature and therefore, as between Turner Dairy and Martin Dairy and Tri Valley, Turner Dairy and Martin Dairy were the prevailing parties. Thus, whether Erickson was the assignee of the 2005 contract was relevant to the decision of whether to award attorney fees to Erickson as the prevailing party on the cross-complaint. If Erickson were the assignee, Erickson would bear the burdens of the 2005 contract, i.e., be in the same position as Tri Valley, the assignor, with respect to attorney fees. (*Melchior v. New Line Productions, Inc.* (2003) 106 Cal.App.4th 779, 789-790.) Additionally, contrary to Turner Dairy and Martin Dairy's position, in this context it is clear that when the court stated that Tri Valley did not assign its claims under the contract to Erickson, it was referring to claims under the 2005 contract.

Moreover, Turner Dairy and Martin Dairy raised this assignment issue both before and during trial. They alleged Erickson was an assignee of the 2005 contract in their cross-complaint and, during trial, elicited testimony from Erickson regarding the May

2008 contract. The burden was on Turner Dairy and Martin Dairy to provide evidence of this alleged assignment.

Further, the evidence that was before the court supports the court's finding that Tri Valley did not assign its claims under the 2005 contract to Erickson. The notice of lien states that Tri Valley gave Erickson a lien in the *proceeds* from the claims, not an assignment of the claims. Based on this notice of lien, it can be inferred that the "Agreement for Assignment of Proceeds from Causes of Action" was not an assignment of the claims under the 2005 contract.

DISPOSITION

The judgment and order are affirmed. The parties shall bear their own costs on appeal.

LEVY, Acting P.J.

WE CONCUR:

GOMES, J.

DETJEN, J.