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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

FLOYD A. SAMPSON,

Plaintiff and Appellant,

v.

THE RICHARDSON GROUP, INC., et al.,

Defendants and Respondents.

G046234

(Super. Ct. No. 30-2010-00384267)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, David T. McEachen and Geoffrey T. Glass, Judges. Affirmed.

Floyd A. Sampson, in pro. per., for Plaintiff and Appellant.

Troutman Sanders, Dan E. Chambers and Meghan C. Sherrill, for Defendants and Respondents.

* * *

Plaintiff Floyd A. Sampson, doing business as Sampson Electric, sued defendants The Richardson Group, Inc. (TRG), Kimm A. Richardson, the County of Orange (County), and Insurance Company of the West (ICW). The first amended complaint alleged plaintiff subcontracted with TRG to perform a portion of the electrical work of a County construction project and was not paid the balance due for his services on it. Plaintiff also sought interest alleging TRG failed to timely disburse progress payments and retention proceeds. He claimed Kimm A. Richardson, TRG's president, was personally liable under an alter ego theory. ICW was named because it issued both a license bond to TRG and a labor and materials bond indemnifying County on the project.

While this case was pending, TRG filed two declaratory relief actions. (*The Richardson Group, Inc. v. Sampson* (Super. Ct. Orange County, 2010, No. 30-2010-00411946); *The Richardson Group, Inc. v. Sampson* (Super. Ct. Orange County, 2011, No. 30-2011-00471350).) The first action was dismissed on procedural grounds. After a hearing in the second action, the court ruled that of the \$202,222.47 plaintiff sought in his stop notice, the parties did not dispute he was owed \$141,201.99 and TRG was entitled to a credit for its authorized disbursements of \$40,033.39 to plaintiff's material suppliers, leaving a balance of \$20,986.68 as the amount in dispute.

Before trial, Kimm A. Richardson successfully moved for summary judgment, resulting in his dismissal as a party. County was also dismissed. A court trial was held covering all or part of 10 days. The court entered judgment for TRG and ICW, declared them to be the prevailing parties, and awarded costs to them.

Plaintiff moved to vacate the judgment while TRG sought its costs and an award of over \$140,000 in attorney fees. The court denied plaintiff's motion and granted TRG's request, but limited the fee award to \$6,000.

Plaintiff appeals from the judgment. He attacks the court's dismissal of Kimm A. Richardson, several of its evidentiary and procedural rulings at trial, the finding that defendants were the prevailing party, plus the denial of his motion to vacate the

judgment. We reject his trial and posttrial claims on the merits and affirm the judgment. As a result, the propriety of the pretrial dismissal of Kimm A. Richardson is moot.

FACTS

In early 2009, TRG entered into a contract with County to rehabilitate and expand an industrial building and build a compressed natural gas station as part of a relocation of County's operations and maintenance facility. The agreement provided "[a]ll labor, materials, tools, equipment, and services shall be furnished and work performed and completed under the general direction and subject to the acceptance of [the County] or its authorized representatives." It required TRG to complete the project in approximately 11 months.

The contract directed TRG to submit requests for progress payments in the last week of each month "on a form prescribed by [County]" and to "furnish a breakdown of the total contract price showing the amount included therein for each principal category of work, to provide a basis for determining progress payments." Clause 18 of the General Conditions provided "[t]he cost or credit to the County resulting from a change in the work shall be calculated by using the unit prices in the Contract Documents, if there are any, otherwise it shall be determined . . . [¶] . . . [b]y mutual acceptance of a lump sum cost properly itemized and supported by sufficient substantiating data as the County Project Manager may require to permit evaluation." Further, "[p]ending resolution of [disputes concerning performance of the work or payment or nonpayment for it], [c]ontractor shall continue the work diligently to completion as directed by [County]" and "will neither rescind this [c]ontract nor stop the progress of the work."

TRG subcontracted with plaintiff to perform part of the electrical work on the project. Under it, plaintiff "agree[d] to do the [w]ork in conformity with requirements

of all . . . regulations and to comply with all terms, conditions, and obligations set forth in the prime contract” and “the General Conditions” The subcontract required payments invoices be submitted on TRG’s form by the 25th day of each month with the amounts charged for work under the subcontract and work authorized by change orders billed separately. In addition, it declared: “Subcontractor hereby acknowledges that process payments to it are sometimes conditioned, in whole or in part, upon the receipt of progress payments by the [c]ontractor from the [o]wner, and hereby specifically agrees that if the progress payments due and owing to the [c]ontractor from the [o]wner are delayed for any reason, that the [c]ontractor is not obligated to pay the statements of the [s]ubcontractor until five (5) days after receipt of such payments from the [o]wner and that any such delay will not be considered a breach of this [s]ubcontract [a]greement.”

Work on the project began in February 2009. Don Johnson was County’s project manager for this work of improvement. He testified that if the contractor or a subcontractor believed additional work not specified in the plans needed to be performed, that party had to file a change order request documenting the work and its projected cost. The request would be submitted to the architect for review and if the architect approved the proposed change, a change order would be issued. When the architect disagreed about the scope or cost of the proposed change, the matter would be returned to the requesting party for additional information. In addition, the architect occasionally issued bulletins requiring substantial changes to the original plans.

Several disputes arose between plaintiff and TRG concerning plaintiff’s work on the project. According to Johnson these disputes delayed completion of the project, forcing the County to push back its occupancy of the facility by a month. Even then, the electrical work on the project had not been completed.

Plaintiff claimed TRG provided him with incorrect information on some tasks and then charged him with the cost of correcting the errors. In addition, he claimed TRG and the County ordered him to perform work on the project not contained in either

the plans or authorized by the County, threatening to declare him in breach of his contract if he refused. He also testified TRG promised to pay him the cost of the labor, materials, plus a 15 percent markup for this work. To document the monies sought, plaintiff introduced nine invoices for work on change orders and his applications for progress payments for the months of November and December 2009 and January 2010.

Defendants presented evidence the delays resulted from plaintiff's failure or refusal to perform work on the project and his failure to properly document his work. Through Steve Richardson, TRG's manager on the project, defendants presented documentary evidence plaintiff did not always timely submit payment applications, failed to present separate billings for contract work and work performed on change orders, and billed for work TRG either performed itself or had another subcontractor complete. The defense also introduced evidence plaintiff failed to comply with the contract requirement that he specify the parts installed by him.

Richardson testified plaintiff repeatedly billed for work without providing the information necessary to obtain the County's approval for it. He denied TRG asked plaintiff to perform work not required by either the contract, a change order, or a bulletin. However, in two instances, with the County's agreement, TRG authorized plaintiff to perform work specified in a bulletin with the requirement he document his time and materials for later submission to County. Richardson testified County still had the final say on the costs for the work. He denied TRG agreed plaintiff could charge a 15 percent markup for his work.

Johnson testified he believed plaintiff was responsible for the delays. He claimed plaintiff's submittal for one change order request contained substantial discrepancies. On a second change order request, the architect asked for additional documentation for the amount billed by plaintiff. County never received the requested information. Johnson testified the instances of authorizing plaintiff to perform work under a change order without advance agreement as to the cost was "[h]ighly unusual."

Although plaintiff was directed to specifically document his hours and the materials supplied, the documentation for it was never provided.

The County recorded a notice of completion on the project in April 2010. At that time, TRG and plaintiff had still not reached agreement on payments for change order requests. Plaintiff filed a stop notice claiming he was still owed \$202,222.47. Further attempts at negotiating a resolution of the amounts still owed failed and plaintiff filed this action.

After trial, the court issued an oral tentative decision. It found plaintiff's breach of contract cause of action lacked merit, rejecting plaintiff's argument the subcontract was an unenforceable "pay if paid" agreement. The court held plaintiff failed to establish he was entitled to recover the amount he billed, finding he never submitted the documentation necessary to support the value of his work. In addition, the court rejected plaintiff's assertion TRG agreed to pay him on a time, materials, plus 15 percent basis. It also found TRG and the County did not engage in collusion, describing plaintiff's attitude towards performing work and billing for it on the project as "fairly obstinate . . . and unchanging." While acknowledging plaintiff might be able to recover in quantum meruit, the court held any such recovery would be barred for the same reasons it rejected his contract claim. It ruled plaintiff's cause of action for breach of the implied covenant of good faith and fair dealing was inapplicable in this case.

On the causes of action for unlawful withholding of funds and statutory interest under Business and Professions Code section 7108.5 and Public Contract Code section 7107, the court held there was no proof TRG failed to timely pay plaintiff before he filed the stop notice and the failure to make further payments thereafter resulted from the stop notice filing. The court further found it was TRG's declaratory relief actions that resulted in plaintiff receiving the \$141,201.99 pretrial payment of the balance owed to him.

DISCUSSION

1. Standard of Review

Because of the nature of plaintiff's appellate arguments and the format of his briefs, we set forth the scope of our review on this appeal.

“It is well settled that all presumptions and intendments are in favor of supporting the judgment or order appealed from, and that an appellant has the burden of showing reversible error, and that, in the absence of such showing, the judgment or order appealed from will be affirmed. [Citations.]’ [Citation.]” (*Walling v. Kimball* (1941) 17 Cal.2d 364, 373; see also *Keener v. Jeld-Wen, Inc.* (2009) 46 Cal.4th 247, 261.) “This is not only a general principle of appellate practice but an ingredient of the constitutional doctrine of reversible error.’ [Citations.]” (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564.)

In addition, “an appellate court is bound to view the evidence in the light most favorable to the party securing the verdict” (*Hauter v. Zogarts* (1975) 14 Cal.3d 104, 111.) “The rule as to our province is: ‘In reviewing the evidence . . . all conflicts must be resolved in favor of the respondent, and all legitimate and reasonable inferences indulged in to uphold the verdict if possible. . . . When two or more inferences can be reasonably deduced from the facts, the reviewing court is without power to substitute its deductions for those of the trial court.’ [Citation.]” (*Estate of Bristol* (1943) 23 Cal.2d 221, 223.)

When reviewing evidentiary rulings, “an appellate court applies the abuse of discretion standard’ [Citation.]” (*San Lorenzo Valley Community Advocates for Responsible Education v. San Lorenzo Valley Unified School Dist.* (2006) 139 Cal.App.4th 1356, 1414.) “A trial court’s exercise of discretion in admitting or excluding evidence . . . will not be disturbed except on a showing the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a

manifest miscarriage of justice’ [Citations.]” (*Id.* at p. 1419.) The same rule applies where the court sanctions a party for not complying with discovery requests. (*In re Marriage of Michaely* (2007) 150 Cal.App.4th 802, 809.)

The California Rules of Court require an appellate brief to “[s]tate each point under a separate heading or subheading summarizing the point, and support each point by argument and, if possible, by citation of authority,” plus “[s]upport any reference to a matter in the record by a citation to the volume and page number of the record where the matter appears. . . .” (Cal. Rules of Court, rule 8.204(B) & (C).) An “appellate court is not required to search the record on its own seeking error.’ [Citation.]” “Thus, ‘[i]f a party fails to support an argument with the necessary citations to the record, . . . the argument [will be] deemed to have been waived. [Citation.]’ [Citations.]” (*Nwosu v. Uba* (2004) 122 Cal.App.4th 1229, 1246.) The fact that plaintiff is representing himself does “not exempt [him] from the foregoing rules” (*Ibid.*)

2. *The Rulings at Trial*

Plaintiff presents a series of arguments concerning the court’s rulings during trial. All of these claims lack merit.

First, he attacks the ruling he “could not use documents . . . placed into his rebuttal/impeachment [file]” Plaintiff fails to specify the documents in question or provide a citation to the record where the court excluded them. Defendants’ brief, however, does provide this information. They note their pretrial discovery requests asked plaintiff to identify the documents on which he relied to support the amended complaint’s allegations and he failed to specify many of them until after trial began. The court held an extended midtrial hearing on the issue and concluded, “I have considered other sanctions, monetary sanctions, a continuance, a mistrial, and really don’t see any avenue for me to moderate the effect of these exhibits other than to exclude them.” Furthermore, as defendants note, nine of the documents in question were admitted during plaintiff’s

case-in-chief, while they introduced three other documents either by stipulation or without plaintiff's objection.

Next, plaintiff raises two claims relating to Johnson's trial testimony. He argues the trial court violated Evidence Code section 776, subdivision (b)(2) by allowing defendants to question him "as a defense witness first called by [defendants] under direct." We note plaintiff did not interpose an objection to defendants calling and questioning Johnson on direction examination. Thus, he waived any objection to the scope of the questioning. (Evid. Code, § 353.) What's more, Evidence Code section 776 concerns the examination of "[a] party to . . . any civil action, or a person identified with such a party" who is "called and examined . . . by any adverse party . . . during the presentation of evidence by the party calling the witness." (Evid. Code, § 776, subd. (a).) Subdivision (b) of the statute applies to "[a] witness examined by a party under this section" Johnson was a County employee. Although County was dismissed from the case before trial, plaintiff had originally named it as a defendant. Consequently, Johnson did not constitute "a person identified with . . . a party" adverse to defendants.

Plaintiff also claims he was "surprised" by defendants questioning Johnson about two exhibits, identified as 307 and 308, and argues he "was never given the opportunity to examine the witness on the two documents." Plaintiff suggests exhibits 307 and 308 "may have . . . persuaded" the court to rule in defendants' favor. This contention misstates what occurred at trial. Exhibits 307 and 308 were copies of bulletins issued by the architect. Defendants first presented the documents to plaintiff while cross-examining him. The defense also questioned Johnson about these bulletins. But neither exhibit 307 nor exhibit 308 was ever admitted at trial.

Another argument plaintiff asserts is that the court prevented him from presenting rebuttal. Again, he misstates the record. Defendants note, the court allowed plaintiff to reopen his case to present additional evidence. Furthermore, after both parties

rested the court asked plaintiff, “rebuttal, Mr. Sampson?” to which he responded, “Rebuttal to what, your honor?” There was no error.

Plaintiff argues the court based its judgment on the premise TRG was not obligated to pay him unless and until it received payment from the County. This argument misstates both the law and the appellate record.

The Civil Code bars the parties to construction contracts from limiting a contractor or subcontractor’s right to payment through the use of a “pay if paid” clause. (Civ. Code, §§ 8122, 8132, 8134, 8136, 8138; see also *Wm. R. Clarke Corp. v. Safeco Ins. Co.* (1997) 15 Cal.4th 882, 886.) However, this rule does not apply where a contract provision limiting a subcontractor’s right to payment is construed “as merely fixing the usual time for payment to the subcontractor, with the implied understanding that the subcontractor in any event has an unconditional right to payment within a reasonable time. [Citations.]” (*Wm. R. Clarke Corp. v. Safeco Ins. Co.*, *supra*, 15 Cal.4th at p. 885; see also *Yamanishi v. Bleily & Collishaw, Inc.* (1972) 29 Cal.App.3d 457, 462.)

Contrary to plaintiff’s contention, the court recognized this distinction and applied it here. “What the law says is a contract that says, ‘We will pay you if the owner pays us’ is not enforceable What is enforceable is when a contract between a contractor and a subcontractor says we’re going to submit your . . . bills through our process to the owner, when we’re paid by the owner we’ll pay you. And that is acceptable.” Furthermore, the court found the delay in paying plaintiff resulted from his failure to adequately document his work as requested by the County. “I see both the County and [TRG] trying to close this up. I think, given the amount of money that was involved in the entire matter and the amount of dispute here, they just wanted it closed. [¶] . . . [T]hat’s why the County said, listen, . . . just do the work and, as long as you’re not [making]. . . a false claim, we’ll pay the hours that . . . you actually spent on it and the materials. [¶] But you never provided that information. At least not from what I saw. Maybe you did. But you didn’t prove it to me.”

Plaintiff claims the architect was not the “sole authority to make a legal interpretation of the subcontract.” While true, the point is irrelevant. Under the contract, County had authority to require adequate documentation of work performed on the project before making a payment. Johnson testified he relied on the architect’s expertise in reviewing payment requests on change orders. The court found plaintiff’s failure to timely provide the requested documentation caused the delay in payments to him.

Another argument by plaintiff is that TRG paid an unlicensed subcontractor to complete work he refused to do. This claim is apparently based on documents the court excluded because of plaintiff’s discovery violations. As discussed above the court did not err in excluding the evidence.

Plaintiff also attacks the court’s rejection of his causes of action seeking statutory interest for TRG’s alleged failure to timely make progress payments and to pay him the retained proceeds under the subcontract. Business and Professions Code section 7108.5, subdivision (a) declares “[a] prime contractor . . . shall pay to any subcontractor, not later than seven days after receipt of each progress payment, unless otherwise agreed to in writing, the respective amounts allowed the contractor on account of the work performed by the subcontractors, to the extent of each subcontractor’s interest therein.” Public Contract Code section 7107, subdivision (d) provides “within seven days from the time that all or any portion of the retention proceeds are received by the original contractor, the original contractor shall pay each of its subcontractors from whom retention has been withheld, each subcontractor’s share of the retention received. . . .” Both statutes subject the contractor to a penalty of 2 percent per month of the amount due to the subcontractor for a failure to timely make the required payments. (Bus. & Prof. Code, § 7108.5, subd. (b); Pub. Contract Code, § 7107, subd. (f).)

Contrary to plaintiff’s argument, the court considered these statutes and found them factually inapplicable. “It looks like the progress payments made up until the stop notice had been distributed to [plaintiff] in accordance with the contract and

the . . . agreed-upon change orders. [¶] In other words, the [2] percent only applies if there are progress payments, that's progress on the contract and change orders, agreed-upon change orders, or retention payments, neither of which occurred. . . ." Furthermore, the court found "it was impossible for those code sections to kick in once the stop notice was sent. . . . [T]he law says the [c]ounty shall withhold the amount of the stop notice."

As an alternative to the contract cause of action, plaintiff argues "the extra work provided by him . . . entitled him to the reasonable value of the extra work, which is based on his certified payroll for labor, services, materials, equipment, plus 15% for overhead and profit" Plaintiff did not allege a common count as a basis for recovery in this action. Even so, the court gave him the benefit of the doubt and considered, but rejected recovery on this basis. "I am inferring from your complaint . . . a cause of action for quantum meruit, that you're entitled to get paid . . . the value of your work . . . even if you had no contract and no agreement. [¶] . . . I don't see any proof under which I can grant that. I see your estimates. But I don't know how much time you actually spent on it. And that is what I told you the very first day I wanted to see. [¶] And that's what [TRG] told you they wanted to see. And I think it is a perfectly reasonable request for both of us."

Finally, plaintiff claims the court violated Code of Civil Procedure section 631.8 by considering defendants' motion for judgment after they "had already presented" evidence in the form of "numerous exhibits" Again, plaintiff misstates what occurred at trial. When he initially rested his case, defendants made a motion for judgment under Code of Civil Procedure section 631.8. The court did not deny the motion, but ruled he would "decline to render any judgment until the close of all the evidence, and I will allow [plaintiff] to reopen . . . in order to address the argued factual inadequacies in the motion" The court never gave a final ruling on the motion, but rather issued a decision based on all of the evidence introduced at trial.

We conclude plaintiff has failed to show the court committed any error at trial, much less any prejudicial error. Since the court ruled for defendants, the propriety of the pretrial dismissal of Kimm A. Richardson as a party is moot.

3. The Posttrial Rulings

After trial, plaintiff filed a motion to vacate the judgment under Code of Civil Procedure section 663. Other than citing the statute and arguing he should have been declared the prevailing party, his sole appellate argument is that the court's oral ruling at the end of trial constituted a statement of decision and under Code of Civil Procedure section 634 we cannot infer the court found in favor of defendants. First, the court did not issue a statement of decision. Rather, it gave an oral tentative decision. In its judgment the court noted, "having given a ruling after trial . . . , and there being no timely request for statement of decision, [it] render[ed] . . . judgment" for defendants. We conclude the court properly denied plaintiff's motion to vacate the judgment.

Plaintiff also attacks the court's finding defendants were the prevailing parties in this action. In support of this argument, plaintiff cites his purported success in the prior declaratory relief actions filed by TRG.

This argument lacks merit. The term "'Prevailing party' includes . . . a defendant in whose favor a dismissal is entered, a defendant where neither plaintiff nor defendant obtains any relief, and a defendant as against those plaintiffs who do not recover any relief against that defendant." (Code Civ. Proc., § 1032, subd. (a)(4).) The court entered judgment for defendants in this action. That made them the prevailing party. (*Hsu v. Abbara* (1995) 9 Cal.4th 863, 876 [in action governed by Civil Code section 1717, where "the judgment [i]s a 'simple, unqualified win . . . for [the defendants] on the only contract claim between them and the [plaintiff,] . . . the trial court ha[s] no discretion to deny the [defendants] attorney fees".])

The declaratory relief actions were never consolidated with this action and thus those cases are not relevant. The court recognized this fact when it reduced defendants' attorney fees request from over \$140,000 to only \$6,000, finding "[t]he fees incurred in pursuing the declaration of rights were not incurred to pursue recovery in this case."

Consequently, we reject plaintiff's attacks on the posttrial rulings.

DISPOSITION

The judgment is affirmed. Respondents shall recover their costs on appeal.

RYLAARSDAM, ACTING P. J.

WE CONCUR:

MOORE, J.

THOMPSON, J.