Reverse and Render in part; Affirm in part and Opinion Filed October 31, 2017

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-15-01303-CV

NU-BUILD & ASSOCIATES, INC., Appellant
V.
SOONERS GROUP, L.P., Appellee

On Appeal from the 298th Judicial District Court
Dallas County, Texas
Trial Court Cause No. DC-09-00973

MEMORANDUM OPINION

Before Justices Francis, Myers, and Whitehill
Opinion by Justice Whitehill

Appellant Nu-Build & Associates, Inc. was the general contractor on a construction project owned by appellee Sooners Group, L.P. Sooners fired Nu-Build before the project was finished, Nu-Build sued Sooners for nonpayment, and Sooners counterclaimed for the cost to complete the project. After a bench trial, the trial court rendered judgment that voided Nu-Build's lien on the project, awarded Sooners $3.6 million in damages, and ordered Nu-Build to take nothing. Nu-Build appeals, raising eleven issues. We affirm in part and reverse and render in part.[1]

Nu-Build's first issue first asserts that the trial court improperly adopted Sooners'

[1] Sooners moved to dismiss part of this appeal because Nu-Build forfeited its corporate existence in 2012. Sooners now concedes that the defect has been cured. We deny Sooners' motion, and we deny as moot Nu-Build's cross-motion to strike Sooners' motion.

proposed findings of fact and conclusions of law; but this is not improper. *Cf. Vickery v. Comm'n for Lawyer Discipline*, 5 S.W.3d 241, 253 (Tex. App.—Houston [14th Dist.] 1999, pet. denied). Nu-Build next argues that the findings force it to guess the reasons for the judgment, but we conclude that the findings are sufficiently specific. Nu-Build also complains that it did not have a fair opportunity to request additional findings, but we cured this complaint by abating the appeal and allowing Nu-Build to make that request. We thus overrule Nu-Build's first issue.

Nu-Build's issues two, four, six, eight and eleven attack Sooners' $3.6 million judgment. We discuss only one argument in issue four—there was no evidence that $3.6 million was the "reasonable cost of completion." We agree because (i) a party seeking completion cost damages in tort and contract cases must prove that those costs are reasonable; and (ii) proof of amounts charged and paid, alone, is no evidence the payment was reasonable. *Mustang Pipeline Co., Inc. v. Driver Pipeline Co., Inc.*, 134 S.W.3d 195, 200–01 (Tex. 2004) (per curiam); *701 Katy Bldg., L.P. v. John Wheat Gibson, P.C.*, No. 05-16-00193-CV, 2017 WL 3634335, at *9 (Tex. App.—Dallas Aug. 24, 2017, no pet. h.) (mem. op.). Because Sooners adduced no evidence that the $3.6 million it paid to complete project was reasonable, we sustain Nu-Build's fourth issue and do not address issues two, six, eight, and eleven.

Nu-Build's third issue posits that legally and factually insufficient evidence supports the take-nothing judgment on its contract breach claim. We disagree because the trial court could reasonably have decided that Nu-Build did not prove by a preponderance of the evidence that Sooners breached the contract. Nu-Build urges primarily that Sooners breached by not paying for work Nu-Build did on the project; however, there was conflicting evidence as to how much work Nu-Build did. Nu-Build's eleventh draw request, which was unpaid, recited that the project was 94% complete, but Nu-Build's president testified that the job was only 85–86% complete when Nu-Build left the job. And the tenth draw request, which was fully paid, recited

that the project was 86% complete. The trial court thus reasonably could have concluded that Nu-Build did not prove that it did any work for which Sooners did not pay.

Nu-Build's third issue also argues that Sooners breached the contract by not providing a competent project manager and not securing necessary permits or plans. But Nu-Build cites no evidence that Sooners promised to do either of those things, so Nu-Build has not shown that those alleged failures were contract breaches. *See Gaspar v. Lawnpro, Inc.*, 372 S.W.3d 754, 757 (Tex. App.—Dallas 2012, no pet.) ("A breach of contract occurs when a party fails to perform an act it has explicitly or impliedly promised to perform."). Because we reject Nu-Build's third issue, we do not address its seventh issue (attacking the denial of its attorneys' fees claim) or its ninth issue (attacking adverse findings of certain Sooners' affirmative defenses).

Nu-Build's issue five attacks the voiding of its lien. A basis for that ruling was a finding that Nu-Build never sent a "notice of filed affidavit to Sooners." Nu-Build attacks the sufficiency of the evidence to support that finding. By statute, a lien's supporting affidavit must be sent "by registered or certified mail to the owner or reputed owner at the owner's last known business or residence address" by a specified deadline. TEX. PROP. CODE § 53.055(a). But, "[i]f notice is sent by registered or certified mail, deposit or mailing of the notice in the United States mail in the form required constitutes compliance with the notice requirement." *Id*. § 53.003(c).

Here the trial court was free to weigh the evidence and conclude that Nu-Build failed to prove mailing by a preponderance of the evidence because the evidence of mailing was equivocal. At first, Nu-Build's president testified that he saw someone mail the lien affidavit; but he later said it was actually in "interoffice" mail. Then he was asked, "In fact, you don't know whether or not this has ever been put in the mail, correct?" He answered, "You're correct." Nu-Build also cites some other purported evidence of mailing, but that evidence was filed during summary judgment proceedings and was not admitted at trial. We overrule Nu-

Build's fifth issue.[2]

Finally, Nu-Build's tenth issue attacks a partial summary judgment order dismissing Nu-Build's quantum meruit claim before trial. Sooners challenged that claim by a traditional and a no-evidence summary judgment motion. On appeal, however, Nu-Build addresses only one of Sooners' traditional motion grounds without addressing the no-evidence grounds or one of the traditional grounds on which summary judgment could have been granted. Thus, we must affirm the summary judgment on the quantum meruit claim. *See Malooly Bros., Inc. v. Napier*, 461 S.W.2d 119, 121 (Tex. 1970). We overrule Nu-Build's tenth issue.

Accordingly, we reverse the trial court's judgment to the extent it awards Sooners $3.6 million in damages, and we render judgment that Sooners take nothing on its counterclaims for damages. We affirm the remainder of the judgment.

/Bill Whitehill/
BILL WHITEHILL
JUSTICE

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[2] The parties do not discuss the possibility that the failure of Nu-Build's contract claim also justified voiding its lien, so we do not discuss that possibility either.

Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

NU-BUILD & ASSOCIATES, INC., Appellant

No. 05-15-01303-CV V.

SOONERS GROUP, L.P., Appellee

On Appeal from the 298th Judicial District Court, Dallas County, Texas
Trial Court Cause No. DC-09-00973.
Opinion delivered by Justice Whitehill.
Justices Francis and Myers participating.

In accordance with this Court's opinion of this date, the judgment of the trial court is **AFFIRMED** in part and **REVERSED** in part. We **REVERSE** that portion of the trial court's judgment that awards appellee Sooners Group, L.P. $3,600,000 from appellant Nu-Build & Associates, Inc., and we **RENDER** judgment that appellee Sooners Group, L.P. take nothing from appellant Nu-Build & Associates, Inc. on appellee Sooners Group, L.P.'s claims for damages. In all other respects, including the decree that a specified lien is void and of no effect, the trial court's judgment is **AFFIRMED**.

It is **ORDERED** that each party bear its own costs of this appeal.

Judgment entered this 31st day of October, 2017.