IN THE COURT OF APPEALS OF IOWA

No. 3-1067 / 13-0467
Filed January 9, 2014

BIERMANN ELECTRIC,
Plaintiff-Appellant,

vs.

LARSON & LARSON CONSTRUCTION, LLC and MERCHANTS BONDING COMPANY (MUTUAL),
Defendants-Appellees.

Appeal from the Iowa District Court for Polk County, Dennis J. Stovall, Judge.

Biermann Electric appeals from the district court's ruling that Biermann's retainage claim is not ripe for determination and in its award of attorney fees to the defendants. **AFFIRMED IN PART AND REVERSED IN PART.**

Thomas P. Murphy of Hopkins & Huebner, P.C., Adel, for appellant.

Jeffrey D. Stone and Amos E. Hill of Whitfield & Eddy, P.L.C., West Des Moines, for appellees.

Heard by Danilson, C.J., and Vaitheswaran and Potterfield, JJ.

DANILSON, C.J.

Biermann Electric appeals,[1] claiming error in the district court's finding that Biermann's claim for retainage pursuant to Iowa Code chapter 573 (2007) is not ripe and in the award of attorney fees to the defendants Larson & Larson. The time for filing this action has not yet come, and we affirm the dismissal on that basis. We reverse the award of attorney fees because the parties' contract does not unambiguously provide for attorney fees under these circumstances.

I. Background Facts and Proceedings.

Biermann Electric provides electrical services on construction projects throughout the state of Iowa. Larson & Larson provides general contracting services for construction projects. This action involves a contract dispute related to a public improvement project by the city of Ankeny for its new police headquarters between Biermann Electric, as a subcontractor, and Larson & Larson. The city was the owner, Wilson Estes Police Architects (WEPA) was the architect, and Larson & Larson was the general contractor for the project.

Larson & Larson entered into a subcontract with Biermann in April 2007. The subcontract was for $1,478,600 and provided for a retention amount of five

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[1] Iowa Rule of Appellate Procedure 6.905(10) states, "Trial briefs shall not be included in the appendix unless necessary to establish preservation of error on an issue argued on appeal. When included to establish an error was preserved, relevant portions of an unfiled trial brief shall be made a part of the record pursuant to rule 6.807." As there is no issue of error preservation, there was no reason to have included the parties' full trial briefs in the appendix.

We note our review has been made more difficult by violation of appellate procedure rule 6.905(7)(e), which states, "The omission of any transcript page(s) or portion of a transcript page shall be indicated by a set of three asterisks at the location on the appendix page where the matter has been omitted."

percent ($73,930.00).[2] The project was to be substantially completed sixty-five weeks from its start date of April 17, 2007. The subcontract expressly incorporated specific portions of Larson & Larson's general contract with the city.

Biermann brought this action seeking $243,100 in delay damages and return of the contractor's retainage.

At trial, evidence was presented showing Larson & Larson was in arbitration with the city over the project. The city manager for Ankeny testified, "We have not finally accepted the project."

Following trial, the court entered its findings of fact, conclusions of law, and order in which it rejected Biermann's delay claim[3] and found Biermann's retainage claim for $77,612.35 was not ripe. The court also awarded attorney fees to Larson & Larson pursuant to a contract term that reads: "Should Subcontractor employ an attorney to enforce any provision hereof, Subcontractor and his surety agree to pay Contractor reasonable attorneys' fees."

Biermann now appeals, challenging the conclusion this matter was not ripe and the award of attorney fees to Larson & Larson.

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[2] Iowa Code section 573.12(1) provides:

> Retention. Payments made under contracts for the construction of public improvements, unless provided otherwise by law, shall be made on the basis of monthly estimates of labor performed and material delivered, as determined by the project architect or engineer. The public corporation shall retain from each monthly payment not more than five percent of that amount which is determined to be due according to the estimate of the architect or engineer.
>
> The contractor may retain from each payment to a subcontractor not more than the lesser of five percent or the amount specified in the contract between the contractor and the subcontractor.

[3] The district court ruled against Biermann on its claim for delay damages. That ruling has not been appealed.

II. Scope and Standard of Review.

This is an equity action, *see* Iowa Code § 573.16, and therefore our review is de novo. Iowa R. App. P. 6.907.

III. Discussion.

A. *Ripeness*. The district court relied upon the parties' contract to determine the claim for retainage was not yet ripe, writing:

> With respect to Larson & Larson's obligation to make final payment to Biermann, this Court finds further that such payment is also not yet due under the terms of the Biermann Subcontract. The "Payment Provisions" of the "Terms and Conditions," in the Biermann Subcontract provide that payment shall be made "including any retained amount, after completion and acceptance of the Work and after Owner has made the final payment to the contractor." See, e.g., Exhibit B, at p. 2. Because these two conditions precedent of acceptance and final payment from the City of Ankeny to Larson & Larson have not yet been occurred (since those parties are still in arbitration), the time for performance by Larson & Larson with respect to its final payment to Biermann has not yet ripened, thereby precluding judgment on Biermann's claim.

We do not disagree, but note a more fundamental problem, which the contract apparently incorporates.

Iowa Code chapter 573 governs contracts for public improvements. Section 573.16 sets forth the procedure for claimants to bring an action to judicially enforce liability on the bond or to enforce rights to a fund. *See Emp'rs Mut*. *Cas*. *Co*. *v*. *City of Marion*, 577 N.W.2d 657, 659 (Iowa 1998). Section 573.16 establishes a strict time frame for bringing such an action. *Id*. at 662. The section provides that such an action can only be brought after the expiration of thirty days, but not later than sixty days, *following the completion and final*

acceptance of the project. Iowa Code § 573 .16 (emphasis added); *see Nw*. *Limestone Co*. *v*. *State Dep't of Transp*., 499 N .W.2d 8, 10 (Iowa 1993).

At trial, the city manager testified the city of Ankeny had not finally accepted the project and there remains a pending arbitration action related to the project. Steve Pigneri of Larson & Larson testified the arbitration action related to the city's complaints, which included work performed by Biermann.

Though neither party discusses section 573.16 directly, it supports the district court's ruling that this matter is "not ripe."

Section 573.16, states:

> The public corporation, the principal contractor, any claimant for labor or material who has filed a claim, . . . may, *at any time after the expiration of thirty days*, *and not later than sixty days*, *following the completion and final acceptance of said improvement*, bring action in equity in the county where the improvement is located to adjudicate all rights to said fund, or to enforce liability on said bond.

In *Employers Mutual*, 577 N.W.2d at 657-58, the supreme court was presented with the question of whether several subcontractors' claims were untimely. The court noted, "Whether the subcontractors filed their claims and brought them in a timely manner depends on the interpretation and interplay of three statutory provisions." *Emp'rs Mut*., 577 N.W.2d at 659.

> Iowa Code section 573.10(1) provides the time limitations for subcontractors to file claims involving public improvements. This provision provides:
>
> > Claims may be filed with [officers authorized by law to let contracts for public improvements] as follows:
> >
> > 1. At any time before the expiration of thirty days immediately *following the completion and final acceptance* of the improvement.
>
> Iowa Code § 573.10(1) (emphasis added).

> Iowa Code section 573.16 is the statute of limitations for filing suit on the claims and it provides in relevant part:
>
> > The public corporation, the principal contractor, *any claimant for labor or material who has filed a claim*, or surety on any bond given for the performance of the contract, may, at any time after the expiration of thirty days, and *not later than sixty days*, *following the completion and final acceptance of said improvement*, bring action in equity in the county where the improvement is located to adjudicate all rights to said fund, or to enforce liability on said bond.
>
> (Emphasis added.)
>
> At a minimum, subcontractors must file claims within thirty days of completion and final acceptance of the improvement. To judicially enforce their claims, subcontractors must file suit no sooner than thirty days and no later than sixty days following completion and final acceptance of the improvement.
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> Iowa Code section 573.23 comes into the picture if the contractor abandons the work or is legally excluded from it:
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> > When a contractor abandons the work on a public improvement or is legally excluded therefrom, *the improvement shall be deemed completed for the purposes of filing claims as herein provided*, *from the date of the official cancellation of the contract*. The only fund available for the payment of the claims of persons for labor performed or material furnished shall be the amount then due the contractor, if any, and if said amount be insufficient to satisfy said claims, the claimants shall have a right of action on the bond given for the performance of the contract.
>
> (Emphasis added.)

Emp'rs Mut., 577 N.W.2d at 659.

The supreme court stated, "[T]he language of section 573.23 has no effect on section 573.16 because 573.23 deals only with filing claims and says nothing about suing on claims." *Id*. at 661. The court thus distinguished between when a *claim* can be filed with the officer in charge of the public improvement project (governed by Iowa Code sections 573.10 and 573.23), and when an *action* in equity can be brought on the claim (governed by section 573.16). *See id*. at 662.

The question before us is not whether Biermann's *claim* was timely, but whether its *suit on its claim* can be brought in the district court at this time. A court has jurisdiction to hear a claim when the claim is ripe for adjudication. *Iowa Coal Mining Co. v. Monroe Cnty.*, 555 N.W.2d 418, 432 (Iowa 1996). "To judicially enforce their [chapter 573] claims, subcontractors must file suit *no sooner than* thirty days and no later than sixty days *following completion and final acceptance of the improvement*." *Emp'rs Mut.*, 577 N.W.2d at 659. There is uncontested evidence there has been no final acceptance of the project here even though Larson & Larson posted bond to release the funds to them. Biermann seeks an exception because it is not a party to the arbitration, but provides no authority for this argument. "If a claim is not ripe for adjudication, a court is without jurisdiction to hear the claim and must dismiss it." *Iowa Coal Mining*, 555 N.W.2d at 432.

We therefore affirm the district court's conclusion this action is not yet ripe.[4]

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[4] Biermann argues section 573.16 has no application here because the city has paid the retainage to Larson & Larson, arguing that section 573.12(2)(b) governs instead.

> Section 573.12(2)(b) provides, in part, a "final payment to a subcontractor for satisfactory performance of the subcontractor's work shall be made no later than . . . seven days after the contractor receives payment for the subcontractor's work." However, this argument ignores subparagraph (2)(a), which authorizes the contractor to retain five percent—the amount at issue. This statutory provision, too, is apparently incorporated into the parties' contract in the second paragraph of the section entitled, "Payment Provisions." The second sentence of the second paragraph of the payment provisions states: "The Architect/Engineer and Owner will pay final payment, including any retained amount, after completion and acceptance of the Work and after Owner has made the final payment to the Contractor." While the city/owner has paid the retainage to Larson & Larson, it was subject to conditions:
>
> > [T]he City's counter-claim and cross-petition for discharge pursuant to Iowa [Rule of Civil Procedure] 1.252 and 1.253 and Motion Regarding Iowa Code Chapter 573 Retainage and Motion for Discharge . . . is

B. Attorney fees. Biermann asserts the court erred in awarding Larson & Larson attorney fees. We agree.

Larson & Larson relies upon a provision of the contract, which is embedded under the heading, "Termination of Subcontract" provisions. The section provides:

> Should Subcontractor, at any time, breach this Agreement, Contractor may, on three (3) days' written notice, proceed as follows:
>
> a.) Provide such materials, supplies, equipment, and/or labor as may be necessary to complete the work, and deduct the amount so paid from any money due Subcontractor, or
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> b.) Terminate this Agreement and enter upon the premises and take possession, for use in completing the work, all of the materials, supplies, tools, equipment, and appliances of the Subcontractor thereon and complete the Work, or have the same completed by others, and be liable to Subcontractor for no further payment under this Subcontract Agreement until final payment is due and then only to the extent the unpaid balance of the amount to be paid under this Agreement exceeds the damages and expense arising from finishing the Work, or
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> c.) Require the surety to complete the Work in accordance with the plans and specifications, and be liable to the Subcontractor for no further payment under this Agreement until final payment is

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GRANTED. However, rather than paying the retainage to the Court, the Court directs that the retainage of $624,831.84[*] be paid to Defendant Larson & Larson, *who has filed or will file an Iowa Code [section] 573.16 bond* in this case. The bond shall acknowledge and consent to the release of the retainage funds to Defendant Larson & Larson as set forth herein, and the amount of the bond shall be double the amount of the claim in controversy, or $417,318.18, and *conditioned to pay any final judgment rendered for the claims filed*.

[*]This amount ($624,831.84) is the total combined amount of payment to be made to Larson & Larson in this case and Polk County Case EQCV064018, a related case, wherein a similar Ruling On Motion Regarding Iowa Code Chapter 573 Retainage And Motion For Discharge Pursuant To Iowa R. Civ. P. 1.252 And 1.253 and Order For Discharge has been agreed to by the parties on this date.

(Emphasis added.)

There has been no acceptance of the work. Final payment awaits the arbitration proceeding. And no final judgment has been rendered on the claims noted in the court's order.

> due, and then only to the extent the unpaid balance to be paid under this Agreement exceeds any damages or expenses arising from so finishing the Work.
>
> If the damages and amount expended by the Contractor exceeds the unpaid balance of the Subcontract price, Subcontractor or his sureties shall pay Contractor such excess within a thirty (30) day period after submission of an invoice.
>
> Should Subcontractor at any time fail to pay for all labor, materials, or supplies in the Work when due, Contractor may pay for same and charge Subcontractor, without Subcontractor's consent.
>
> *Should Subcontractor employ an attorney to enforce any provision hereof, Subcontractor and his surety agree to pay Contractor reasonable attorneys' fees.*
>
> Should Subcontractor be wrongfully terminated under this Agreement, the Subcontractor shall be entitled only to be paid a pro-rata percentage of the total Subcontract price, equal to its percent of completion and not for anticipatory profit, damages, or consequential damages.

(Emphasis added.)

Larson & Larson contends the italicized language grants it an unambiguous right to seek attorney fees here. We do not find the language unambiguously provides the contractor a right to attorney fees under these facts. It is not at all clear what the phrase "employ an attorney to enforce any provision hereof" means. Any provision of the "termination of subcontract"? Any provision of the entire contract? Does "enforce" imply a final adjudication of a contract right?

> Generally, attorney fees are not allowable unless authorized by statute or contractual agreement. *W.P. Barber Lumber Co. v. Celania,* 674 N.W.2d 62, 66 (Iowa 2003). Iowa Code section 625.22 authorizes a court to award attorney fees in an action where "judgment is recovered upon a written contract containing an agreement to pay an attorney's fee." A written contract must contain a clear and express provision regarding attorney fees and litigation expenses in order for a court to be authorized to add attorney fees and litigation expenses to a favorable judgment.

> *EFCO Corp. v. Norman Highway Constructors, Inc.,* 606 N.W.2d 297, 301 (Iowa 2000).

FNBC Iowa, Inc. v. Jennessey Grp., L.L.C., 759 N.W.2d 808, 810 (Iowa Ct. App. 2008).

Here, the district court concluded that "[b]ased on its plain language, the contract provides that if Biermann elects to employ an attorney to resolve a dispute regarding the contract, it is required to pay the attorney fees incurred by Larson & Larson." However, clearly, the fact the attorney fee provision relied upon falls under the contract heading "Termination of Subcontract" calls into question its applicability to this action as Biermann was never terminated.

Larson & Larson contends Biermann never raised the issue that this particular provision of the contract was not applicable to the facts. However, we decline to blindly apply an attorney fee contract provision without considering the contract headings or the entire contract itself. "Generally, contracts are interpreted based on the language within the four corners of the document." *Clinton Physical Therapy Servs., P.C. v. John Deere Health Care, Inc.*, 714 N.W.2d 603, 615 (Iowa 2006); *see Smidt v. Porter*, 695 N.W.2d 9, 21 (Iowa 2005) ("It is a fundamental and well-settled rule that when a contract is not ambiguous, we must simply interpret it as written."). "In interpreting contracts, we give effect to the language of the entire contract according to its commonly accepted and ordinary meaning. Moreover, particular words and phrases are not interpreted in isolation. Instead, they are interpreted in a context in which they are used." *Hartig Drug Co. V. Hartig*, 602 N.W.2d 794, 797-98 (Iowa 1999) (citations omitted).

The subject matter of this litigation was the untimely payment of monies and retainage allegedly owed to the subcontractor from the contractor and does not involve the termination of the subcontract. Moreover, if we were to disregard contract headings, another provision in the contract under the heading of "Jobsite Harmony," provides each party shall pay its own attorney fees where a controversy involving more than $5000 arises between the contractor and subcontractor *"with respect to any matter or thing involved in this Agreement."* (Emphasis added.) Yet another provision under the same heading "Jobsite Harmony," allows the contractor attorney fees where the subcontractor's "employees cause or threaten to cause delay in the progress of the construction." Thus, even if we could conclude the provision relied upon was intended to provide an additional remedy to the contractor where a favorable judgment is entered, the provision's applicability to these facts appears incredulous. Accordingly, we conclude in reviewing the entire contract that an award of attorney fees is not supported by a clear and express provision under these facts.

Especially inasmuch as the district court ruled this matter was not ripe for adjudication, we reverse the award of attorney fees to Larson & Larson.

AFFIRMED IN PART AND REVERSED IN PART.