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Midling Constr., Inc. v. Reilly

Court of Appeals of Arizona, Division One, Department B

May 13, 2008, Filed

1 CA-CV 07-0495

Reporter

2008 Ariz. App. Unpub. LEXIS 792 *

MIDLING CONSTRUCTION, INC., an Arizona corporation, Plaintiff/Counterdefendant/Appellee, v. HELENA W. PEREZ REILLY, Defendant/Counterclaimant/Appellant.

Notice: THIS DECISION IS SUBJECT TO FURTHER APPELLATE REVIEW. MOTIONS FOR RECONSIDERATION OR PETITIONS FOR REVIEW TO THE ARIZONA SUPREME COURT MAY BE PENDING. COUNSEL IS CAUTIONED TO MAKE AN INDEPENDENT DETERMINATION OF THE STATUS OF THIS CASE.

(Not for Publication - [Rule 28, Arizona Rules of Civil Appellate Procedure](#))

Prior History: [*1] Appeal from the Superior Court in Coconino County. Cause No. CV 2005-0072. The Honorable A. Fred Newton, Judge.

Disposition: VACATED AND REMANDED.

Core Terms

trial court, final bill, drywall, new trial

Counsel: Dale H. Itschner, Flagstaff, Attorney for Plaintiff/Counterdefendant/Appellee.

Law Office of **John Trebon** PC, By John J. Trebon, Flagstaff, Co-Counsel for Defendant/Counterclaimant/Appellant.

Stephen G. Campbell PC, By Stephen G. Campbell, Phoenix, Co-Counsel for Defendant/Counterclaimant/Appellant.

Judges: DANIEL A. BARKER, Presiding Judge. PATRICK IRVINE, Judge, DIANE M. JOHNSON, Judge,

concurring.

Opinion by: DANIEL A. BARKER

Opinion

MEMORANDUM DECISION

BARKER, Judge

P1 Defendant/Counterclaimant/Appellant Helena W. Perez Reilly appeals a jury verdict in favor of Plaintiff/Counterdefendant/Appellee Midling Construction, Inc. ("Midling") and the trial court's denial of her motion for new trial. For the following reasons, we vacate the judgment and remand this matter to the trial court for further proceedings consistent with this decision.

Factual and Procedural Background

P2 Reilly contracted with Midling for the construction of a new home on a lot she owned. The parties agreed that Midling would be paid the actual costs of the construction plus a fee of 10% of the construction costs. The [*2] parties estimated the construction costs would be \$177,106, and the total contract price therefore \$204,025 after Midling's fee and sales tax. They agreed Reilly would pay Midling the \$204,025 fee in five installments of \$38,005 each plus an initial \$14,000 payment. If the construction cost for any individual item was greater than estimated, Reilly would pay the overage, or if a cost was less than estimated, she would receive the benefit of that savings. Reilly claims that while she agreed to pay cost overages, she expected that any such expenses would be offset by savings on

other items and that the total contract price would not exceed \$204,025.

P3 Construction commenced in April 2003, and Midling left the job in November 2003. Reilly did not pay Midling's final bill. In February 2005, Midling filed this lawsuit against Reilly for breach of contract. Reilly counterclaimed, alleging that Midling had not performed its obligations under the contract.

P4 At trial, Larry Midling, the owner of Midling Construction, testified that when Midling left the job the only significant work that remained unfinished was the driveway, which he claimed Reilly had agreed to have another contractor complete. **[*3]** Midling sought damages of \$63,148.40, the amount of its final bill to Reilly, which included the final \$38,005 installment payment plus \$20,488 in overages, \$1,082 in additional sales tax, and \$3,574.40 in interest charges.¹ Reilly claimed that Midling "abandoned" the job, leaving substantial work unfinished.

P5 The jury returned a verdict in favor of Midling, awarding it damages in the amount of \$45,479.84. Reilly moved for new trial on the grounds that two exhibits numbers 10 and 154 - were erroneously and prejudicially admitted in evidence. She also argued that a new trial was warranted because Mr. Midling had falsely testified that Midling's license had never been suspended when, in fact, it had twice been suspended. The superior court denied the motion.

P6 Reilly timely appealed. We have jurisdiction pursuant to [Arizona Revised Statutes \("A.R.S."\) section 12-2101\(B\)](#) and [\(F\)\(1\)](#) (2003).

Issues

P7 On appeal, Reilly challenges the trial court's admission of Exhibits 10 and 154 in evidence and the court's denial **[*4]** of her motion for new trial on the grounds that Mr. Midling testified falsely at trial. She also argues that the verdict was not supported by the evidence.

Discussion

P8 Reilly complains that the trial court erroneously

admitted Exhibit 154 in evidence at trial. We will affirm the trial court's "admission or exclusion of evidence absent a clear abuse of discretion or legal error and resulting prejudice." [Yauch v. Southern Pac. Transp. Co., 198 Ariz. 394, 399, ¶ 10, 10 P.3d 1181, 1186 \(App. 2000\)](#).

P9 During Reilly's presentation of her case, she testified that Midling's final bill was unsupported by the documentation Midling had disclosed. As an example, Reilly pointed out that Midling's final bill stated that drywall expenses for the project were \$11,700, whereas the invoice Midling had provided showed only a \$4,700 expense for drywall. The following day, Mr. Midling testified as a rebuttal witness that he had paid the drywall contractor one payment of \$7,000 and an additional payment of \$4,700, which totaled the \$11,700 charge listed on his final bill. In support of his testimony, Mr. Midling produced Exhibit 154, a cancelled check payable to the drywall contractor for \$7,000. Reilly objected **[*5]** to the admission of Exhibit 154 on the basis that it had not previously been disclosed. The court overruled the objection, stating that it would admit Exhibit 154 because Midling had offered it as rebuttal to Reilly's testimony.

P10 [Rule 26.1\(a\)\(9\), Arizona Rules of Civil Procedure](#), requires a party to disclose a list of documents, whether or not in that party's possession, "which that party believes may be relevant to the subject matter of the action, and those that appear reasonably calculated to lead to the discovery of admissible evidence." A party that fails to disclose the information required by [Rule 26.1](#) is prohibited from using that information as evidence at trial, except by leave of the court for good cause shown. [Rule 37\(c\), Ariz. R. Civ. P.](#) Midling argues, and the trial court ruled, that Exhibit 154 could properly be admitted as rebuttal evidence despite its non-disclosure. We disagree.

P11 Evidence that is otherwise relevant pursuant to [Rule 26\(b\)\(1\)](#) is discoverable and must be disclosed even if the disclosing party does not plan to offer it as affirmative evidence at trial. [Zimmerman v. Superior Court, 98 Ariz. 85, 92-93, 402 P.2d 212, 217 \(1965\)](#) (holding defendant was **[*6]** required to respond to interrogatory asking if defendant had conducted any surveillance of plaintiff even though defendant only intended to use such evidence for impeachment at trial). Exhibit 154 was directly relevant to Midling's case because it was a cancelled check evidencing a payment Midling allegedly made for drywall work on Reilly's project; the check directly supported Midling's final bill.

¹The total amount of Midling's final bill, \$63,148.40 is one dollar less than the sum of the bill's component charges. This discrepancy does not materially affect our analysis.

That Midling did not plan to use the cancelled check at trial and, in fact, did not introduce it as part of its case-in-chief does not affect the document's relevance. Because Exhibit 154 was directly relevant to Midling's claim, it was required to timely disclose the cancelled check, but admittedly failed to do so. [*Ariz. R. Civ. P. 26\(b\)\(1\), 26.1\(a\)\(9\); Zimmerman, 98 Ariz. at 92-93, 402 P.2d at 217.*](#)

P12 A trial court may permit the use of untimely-disclosed evidence at trial only if the court finds a lack of prejudice or good cause for the untimely disclosure. [*Ariz. R. Civ. P. 37\(c\)\(1\); Allstate Ins. Co. v. O'Toole, 182 Ariz. 284, 288, 896 P.2d 254, 258 \(1995\).*](#) The record contains no indication that the trial court conducted a good cause analysis, let alone determined that good cause existed [*7] to allow Midling to introduce Exhibit 154 at trial. Further, we discern no good cause in the record, as the only excuse Midling offered for its last-minute production of Exhibit 154 was that it only intended to use the document as rebuttal evidence. As discussed, Arizona's rules require a party to disclose *all* relevant evidence, not simply the evidence the party intends to use in its affirmative presentation at trial.² [*Ariz. R. Civ. P. 26.1\(a\)\(9\); Norwest Bank \(Minnesota\), N.A. v. Symington, 197 Ariz. 181, 185, ¶ 15, 3 P.3d 1101, 1105 \(App. 2000\).*](#)

P13 Moreover, Midling's disclosure of Exhibit 154 during the final hours of trial, after Reilly had concluded her defense, was highly prejudicial. See [*Zimmerman v. Shakman, 204 Ariz. 231, 236, ¶ 16, 62 P.3d 976, 981 \(App. 2003\)*](#) ("[I]f a trial is set and imminent, the possibility of prejudice increases."); *Allstate, 182 Ariz. at 288, 896 P.2d at 258* (stating that delay is prejudicial if it is detrimental either to the opposing party or to the justice system). Reilly had no opportunity to investigate this surprise information, which contradicted and undermined her testimony regarding the true cost of the

drywall, and likely affected the jury's perception of her overall credibility. Accordingly, the trial court erred in admitting Exhibit 154 in evidence at trial. The error was not harmless. Although we cannot discern precisely how the jury calculated the damages it awarded Midling, we note that its award of \$45,479.84 is within a few hundred dollars of the amount of the final installment payment, \$38,005, plus \$7,000. The check admitted as exhibit 154 was for \$7,000. Thus, it appears [*9] as though the jury may have very well used this corroborating evidence to increase its award by that amount. We therefore vacate the jury verdict and the trial court judgment and remand this case for a new trial.

P14 Based on our determination that this matter must be remanded because the trial court erroneously admitted Exhibit 154, we need not reach Reilly's additional assignments of error regarding the admission of Exhibit 10 and Mr. Midling's trial testimony concerning his contractor's license. We also deem moot Reilly's argument that the evidence did not support the verdict.

Conclusion

P15 For the foregoing reasons, we vacate the judgment and remand this matter to the trial court for further proceedings consistent with this decision. Both parties request an award of costs and attorneys' fees on appeal. When the trial court determines the prevailing party, it is authorized to consider the fees and costs incurred by the prevailing party on appeal in determining whether and how much to award as reasonable attorneys' fees.

DANIEL A. BARKER, Presiding Judge

CONCURRING:

PATRICK IRVINE, Judge

DIANE M. JOHNSON, Judge

²Midling contends the trial court did not abuse its discretion in admitting Exhibit 154 as rebuttal evidence, citing our statement in *Jansen v. Lichwa*, that, "[t]estimony will not be precluded from being made part of rebuttal just because it might have been made part of the case in chief." [*13 Ariz. App. 168, 170-71, 474 P.2d 1020, 1022-23 \(1970\).*](#) In *Jansen*, however, there was no dispute that the witness the plaintiff sought to call as a rebuttal witness had been properly disclosed. *Id.* Nevertheless, we affirmed the trial court's discretionary refusal to allow the plaintiff to call the witness as a rebuttal expert, as the trial court found [*8] that the witness's testimony concerned matters the plaintiff needed to establish in his case in chief. *Id.*