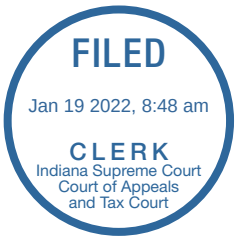
MEMORANDUM DECISION



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IN THE COURT OF APPEALS OF INDIANA

Brian D. Gibbs,
Appellant-Defendant,

v.

MG IRA, LLC,
Appellee-Plaintiff

January 19, 2022

Court of Appeals Case No. 21A-PL-1679

Appeal from the Cass Superior Court

The Honorable Lisa Swaim, Judge

Trial Court Cause No. 09D02-1908-PL-46

Riley, Judge.

STATEMENT OF THE CASE

[1] Appellant-Defendant, Brian Gibbs (Gibbs), appeals the trial court's summary judgment, determining that there were no genuine issues of material fact precluding judgment in favor of Appellee-Plaintiff, MG IRA, LLC (MG).

[2] We affirm in part, reverse in part, and remand for further proceedings.

ISSUE

[3] Gibbs presents one issue on appeal which we restate as follows: Whether the trial court erred by granting a complete judgment rather than a partial summary judgment.

FACTS AND PROCEDURAL HISTORY

[4] On September 18, 2017, MG, a limited liability company, bought real estate at 7928 East Division Road, Logansport, Indiana, (Property). The parties orally agreed that Gibbs would pay certain sums on a monthly basis to acquire "an interest in the [P]roperty." (Transcript Vol. II, p. 4). MG and Gibbs also orally agreed on how to develop and improve the Property: Gibbs agreed to provide the labor for building the home, and MG agreed to supply the materials and machinery.

[5] Sometime thereafter, and pursuant to the oral agreement, Gibbs improved the Property and started building the home. Gibbs also lived in a camper on the Property. MG supplied lumber, other materials, and machinery. At some point, Gibbs asked MG to reduce the agreement of him acquiring an interest in

the Property in writing, but MG refused to sign a written agreement because "[a]s a necessary pre-condition to reducing the contract for sale of real estate to writing, MG [] insisted that [] Gibbs repay a loan that MG . . . had made to him to purchase a pick-up truck" loan. (Appellant's App. Vol. II, p. 12). In December 2018, Gibbs underwent heart surgery. On February 10, 2019, Gibbs halted all improvements on the home, he took photographs of the work he had performed to that date and moved out of the camper.

[6] On April 4, 2019, Gibbs filed a mechanic's lien against the Property, seeking $63,035 for the improvements to the home. On August 14, 2019, MG filed a complaint against Gibbs, seeking to quiet title to the Property, and it further alleged that Gibbs had slandered MG's title to the Property by filing a mechanic's lien. On October 2, 2019, Gibbs filed an answer and counterclaim. The counterclaim alleged the following:

> 1. That [MG] and [Gibbs] entered into an oral agreement under which [Gibbs] was to provide the labor for construction of a house at 7928 E. Division Road, Logansport, Cass County, Indiana and at completion of the work, [MG] would sell the property to [Gibbs], with the price being reduced by the money owed to [MG] for work performed at a property on High Street as well as the value of the [Gibbs's] labor on the subject property;
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> 2. That, on multiple occasions, [Gibbs] requested [MG] reduce the oral agreement to written form, which [MG] failed to do;
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> 3. That [Gibbs] last performed services on or about February 10, 2019, and was thereafter ordered off the property;

> 4. That [MG] has failed to pay [] [Gibbs] a reasonable value of [Gibbs's] services in the amount of $63,035.00.

(Appellant's App. Vol. II, pp. 68-69). On October 24, 2019, MG answered Gibbs' counterclaim. The following year, on September 3, 2020, MG filed a motion for summary judgment, confining its motion and supporting memorandum to the validity and timeliness of Gibbs's mechanic's lien. On November 5, 2020, Gibbs submitted a short supporting affidavit from himself in opposition to summary judgment stating, "Gibbs hereby denies that [MG's] timeline of when the work was completed on the project and will provide witnesses to testify at trial regarding the timeline of work on the real estate." (Appellant's App. Vol. II, p. 244).

[7] On February 5, 2021, the trial court held a hearing on the motion for summary judgment. Gibbs was not present at the hearing, and his lawyer attended by phone. At the hearing, MG's counsel argued the timeliness of the mechanic's lien. MG's counsel then made the following argument:

> [T]he [m]echanic's [l]ien . . . was untimely filed. He does not have a right to that [m]echanic's [l]ien and, therefore, improperly filing a [m]echanic's [l]ien slanders my client's title. And he can't, you can't predicate a [m]echanic's [l]ien on an issue that's not, that there's been no meeting of the minds. There was no meeting of the minds with respect to a labor rate. They hadn't even discussed the, that labor would be a subject of payment. Now, if he thought it was, the appropriate remedy is not a [m]echanic's [l]ien. It'd be a far different action. Unjust enrichment, something of that nature. But certainly not a [m]echanic's [l]ien and certainly not one that's been filed in an untimely manner. Thank you.

(Tr. Vol. II, p. 7). Gibbs's counsel then responded as follows:

> Yes, Your Honor. I, I think Mr. Miller is correct in the fact that we're talking here about whether or not the action was timely. I would like to point the [c]ourt to the designated evidence by Mr. Miller, Tab 3, the 14th page of that, which is page 41 of the deposition, which very clearly shows that the testimony, which is to be construed in favor of my client, was that February 10th was the last day that he stopped working on the property. If we look at that testimony, he testified on several occasions during the deposition that February 10th was in fact the last day that he stopped working. So, February 10th is within 60 days of April the 4th []when the [m]echanic's [l]ien was filed. I think, I think it's pretty clear here that MG designated the evidence here, and the evidence in this case is to be construed in favor of my client in the situation where summary judgment is at issue[,] and I think it very clearly shows that there are genuine issues of fact.

(Tr. Vol. II, pp. 7-8). At the end of the hearing, the trial court granted summary judgment in favor of MG "dispos[ing] all liability issues" between MG and Gibbs. (Appellant's App. Vol. II, p. 3). On March 9, 2021, Gibbs timely filed a motion to correct error, arguing that MG's motion for summary judgment was a motion for partial summary judgment on the validity of the lien only and that the trial court should not have granted summary judgment on all issues of liability between the parties, especially because Gibbs's pleaded all the operative facts of an unjust enrichment theory of recovery in his counterclaim. The trial court denied the motion to correct error, finding that Gibbs did not adequately plead an unjust enrichment theory of recovery in his counterclaim, specifically stating that

> [i]f [Gibbs] wanted to plead unjust enrichment because he performed work on the house but never made an agreement as to payment other than the house contract deal, he could have. Even when the other attorney specifically pointed that out in argument, [Gibbs] didn't adopt the unjust enrichment argument or even refer to it's as an alternate theory prior to the [c]ourt's ruling.

(Appellant's App. Vol. III, p. 44).

[8] Gibbs now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

[9] Gibbs appeals the trial court's grant of summary judgment in favor of MG. Indiana Trial Rule 56 allows a party to move for summary judgment on "all or any part" of a claim. When reviewing a grant of summary judgment, our standard of review is the same as that of the trial court. *Dreaded, Inc. v. St. Paul Guardian Ins. Co.*, 904 N.E.2d 1267, 1269 (Ind. 2009). Considering only those facts that the parties designated to the trial court, we must determine whether there is a "genuine issue as to any material fact" and whether "the moving party is entitled to a judgment as a matter of law." Ind. Trial Rule 56(C); *Dreaded*, Inc., 904 N.E.2d at 1269-70. In answering these questions, the reviewing court construes all factual inferences in the nonmoving party's favor and resolves all doubts as to the existence of a material issue against the moving party. *Dreaded, Inc.*, 904 N.E.2d at 1270. The moving party bears the burden of making a *prima facie* showing that there are no genuine issues of material fact, and that the movant is entitled to judgment as a matter of law; once the movant satisfies the

burden, the burden shifts to the nonmoving party to designate and produce evidence showing the existence of a genuine issue of material fact. *Id*.

[10] Gibbs argues that the trial court erred as a matter of law in granting a complete judgment rather than partial summary judgment. In support of his claim, Gibbs relies on *Reiswerg v. Statom*, 926 N.E.2d 26 (Ind. 2010). In *Reiswerg*, Statom, sued Cohen, Garelick & Glazier, and Reiswerg—another attorney who shared office space and performed contract work for the firm—for legal malpractice. *Id*. Statom underwent surgery at the Veterans Affairs Hospital in Indianapolis and retained Reiswerg to pursue a medical malpractice action against the Department of Veterans Affairs (VA). The VA denied Statom's claim after it determined that her Tort Claims Notice had not been filed in a timely fashion. *Id*. After Statom filed her complaint, the law firm and Reiswerg filed their answer and set forth the statute of limitations as an affirmative defense. *Id*. at 28. Thereafter, Statom moved for partial summary judgment, seeking a determination that the law firm and Reiswerg were "negligent as a matter of law." *Id*. Neither of the defendants raised the statute of limitations in responding to the motion for summary judgment. *Id*. Reiswerg and the law firm then moved for summary judgment, asserting that the statute of limitations for legal malpractice had expired before Statom filed her complaint. *Id*. Statom moved to strike the motion for summary judgment, arguing that both of the defendants had waived the statute of limitations defense because that issue was not addressed in their response to the motion for partial summary judgment.

Id. The trial court granted the motion to strike. *Id*. In reversing, our supreme court determined that

> [a] party responding to a motion for summary judgment is entitled to take the motion as the moving party frames it. The defendants were under no obligation to raise their affirmative defenses in response to the motion for partial summary judgment that Statom presented. A non-movant is not required to address a particular element of a claim unless the moving party has first addressed and presented evidence on that element. In the case before us today, the affirmative defense of statute of limitations is one on which the non-moving defendants had the burden of proof, but this does not alter the plaintiff's obligation to put in play the issue upon which the plaintiff seeks relief. Here, Statom did not do that. The statute of limitations was asserted as an affirmative defense in the defendants' answers to the complaint. If Statom wished to resolve all issues as to liability by summary judgment, it was her burden to seek summary judgment on liability. She could also have addressed the statute of limitations directly. If she had done either of these, the limitations defense would have been waived if not presented in response to her motion. But she did neither, and therefore did not raise the raise the adequacy of the defendants' affirmative defenses.
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> [No case] holds that a motion for partial summary judgment on an issue less than liability requires the responding party to assert affirmative defenses or any other issue beyond those raised by the relief sought by the moving party.
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> * * *

> Waiver of a contention is effected by the contention's being placed in issue by the movant and the non-movant's failure to raise it. When Statom moved for partial summary judgment on the issue of negligence, neither [defendant] asserted the statute of limitations in response. A non-movant's choice not to assert an affirmative defense as a response to a motion for partial summary judgment that does not implicate the affirmative defense does not bar later assertion of the defense.

Id at 30-31, 33. (internal citations omitted). Gibbs uses *Reiswerg* to argue that, because MG raised only the issue of the timeliness of the mechanic's lien, the trial court was bound to only consider that issue and could not consider whether genuine issues of material fact existed regarding his unjust enrichment claim as pleaded in his counterclaim. We find *Reiswerg* applicable here.

[11] The key issue cited in MG's summary judgment motion was whether Gibbs timely filed the mechanic's lien. As framed by MG, Gibbs's response to the motion was confined only as to that issue. In its brief, MG now argues that if "Gibbs genuinely believed he had a legitimate claim for unjust enrichment, he had the burden of proving it" at the summary judgment hearing. (Appellee's Br. p. 20). As our supreme court stated in *Reiswerg*, "[w]hen a party moves for summary judgment on the issue of liability, the nonmovant is thereby placed on notice that all arguments and evidence opposing a finding of liability must be presented to properly resolve that issue." *Reiswerg*, 926 N.E.2d at 32. We disagree with MG's contention that its motion for summary judgment for the mechanic's lien was sufficient to trigger Gibbs' duty to raise his unjust enrichment claim absent a proper motion for summary judgment seeking to

establish liability. If MG wanted to move for summary judgment on liability, it should have done so. *See Reiswerg*, 926 N.E.2d at 32 (holding that a party cannot "claim a victory greater than [it] sought and greater than [it] placed in issue.")

[12] Like *Reiswerg*, MG did not request summary judgment on liability, rather it only sought to eliminate the mechanic's lien. Gibbs was therefore under no obligation at that point to address or present evidence in support of his unjust enrichment claim. Since Gibbs unjust enrichment claim as pleaded in the counterclaim was not properly before the trial court for disposition on summary judgment, the trial court's grant of summary judgment on Gibbs unjust enrichment claim was erroneous. While we affirm the trial court's order eliminating the mechanic's lien, we hold that the trial court's entry of summary judgment on Gibbs's counterclaim was erroneous, and we reverse that portion of the Order, and remand for further proceedings.

CONCLUSION

[13] Because Gibbs's counterclaim concerning unjust enrichment was not properly before the trial court on summary judgment, we hold that the trial court's entry of summary judgment on Gibbs's counterclaim was error. Thus, we reverse, in part, and remand this matter for further proceedings.

[14] Affirmed in part, reversed in part, and remanded for further proceedings.

[15] Robb, J. and Molter, J. concur