

RENDERED: MAY 26, 2017; 10:00 A.M.
TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2015-CA-000825-MR

MID-SOUTH DRYWALL, INC.

APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE ERNESTO SCORSONE, JUDGE
ACTION NO. 09-CI-05917

2001 BRYANT ROAD, LLC; AND
THE BRISTOL GROUP, INC.

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: COMBS, DIXON, AND J. LAMBERT, JUDGES.

LAMBERT, J., JUDGE: Mid-South Drywall, Inc., appeals from the Fayette Circuit Court's granting of summary judgment to 2001 Bryant Road, LLC, and The Bristol Group, Inc. Mid-South also appeals from three subsequent orders entered by the circuit court in this litigation. We affirm.

The Fayette Circuit Court's September 10, 2014, order granting partial summary judgment succinctly lays out the factual background of this litigation, and we repeat it here:

Bristol worked as the Design-Builder for the construction project known as the Hyatt Place Hotel (the "Project") owned by Bryant Road. Bristol entered into a subcontract agreement with Mid-South Drywall to provide materials and services for the interior framing and drywall portion of the Project. Mid-South was unable to finish its portion of the Project, citing GC Interiors'¹ abandonment of its work and Project mismanagement on the part of Bristol as significant causes.

Litigation began when GC Interiors filed suit against Mid-South for nonpayment and against Bryant Road to enforce a mechanic's lien filed on the Project. Mid-South filed a counterclaim against GC Interiors for breach of contract. Bristol was eventually brought into the litigation and Mid-South asserted a breach of contract claim against Bristol. Bristol has filed a Counterclaim and Bryant Road has filed a Cross Claim against Mid-South for breach of the Subcontract.

Bristol and Bryant Road allege that Mid-South breached several of the Subcontract's provision[s] and argue that any one of these defaults entitles them to summary judgment as a matter of law. Their primary argument is that Mid-South failed to perform as required by the Subcontract and failed to remedy the default. Bristol and Bryant Road point to Mid South's Answers to GC Interiors' Interrogatories in which Mid-South admits that it defaulted on its obligations to the Project because GC Interiors abandoned the Project. Bristol and Bryant Road argue that these admissions alone entitle them to summary judgment. They further argue that, even without the admissions, the record establishes Mid-South

¹ Mid-South hired GC Interiors to assist in completing the Project. GC Interiors later sued Mid-South (and others) for non-payment of the \$70,637.48 remaining on its subcontract with Mid-South.

defaulted on its obligation to properly man the Project. Alternatively, Bristol and Bryant Road claim that Mid-South committed multiple other breaches of the subcontract that entitle them to summary judgment.

Mid South's position is that this case is not ripe for summary judgment because there are still issues of material fact. It maintains that the record indicates that Mid-South has continually disputed Bristol[']s and Bryant Road's claims that it defaulted on the Subcontract. Mid-South further argues that the Court should not dispense with its claims based on discovery answered before Bristol was a party to the lawsuit.

The circuit court, in that order, found in favor of Bristol and Bryant Road on the issue of liability but reserved the issue of damages for trial. The circuit court entered an order clarifying on November 12, 2014, an order granting Bristol's motion to alter, amend, or vacate on March 3, 2015, and another order clarifying and adding finality language on May 7, 2015. Bristol and Bryant Road elected not to pursue their claims for damages incurred by Mid-South's breach.² But Mid-South appealed from the four orders.

Mid-South first argues that it is "entitled to recover for work performed under its contract even if it is the breaching party." In so arguing, Mid-South concedes that it is the breaching party yet insists that the trial court erred in denying Mid-South the opportunity to present evidence of its damages. Mid-South insists that the proper remedy in this situation is to allow it to recover "for the work it performed subject to a just offset by Bristol Group for damages which it

² In September 2011, Mid-South was administratively dissolved by the Kentucky Secretary of State, and its principal declared bankruptcy. Bristol and Bryant Road in all likelihood would not have been able to collect any damages awarded in their favors.

sustained as a result of the breach by Mid-South.” It is also Mid-South’s contention that “nearly 80% of the contracted work” was complete.

Neither the record nor Kentucky case law supports any of Mid-South’s claims in this regard. The record clearly demonstrates (and Mid-South does not contend otherwise) that Mid-South was compensated for \$375,617.97 of the contract price of \$729,490.00. Mid-South abandoned the job on July 28, 2008, after receiving no less than six notices of deficiencies (in quality of work and scheduling defaults) from Bryant Road. “When a contract is not performed, the party who is guilty of the first breach is generally the one upon whom rests all the liability for the nonperformance.” *Hall v. Rowe*, 439 S.W.3d 183, 187 (Ky. App. 2014) (quoting *Blue Diamond Coal Co. v. Robertson* 235 Ky. 425, 427, 31 S.W.2d 701, 703 (1930)). See also *Fay E. Sams Money Purchase Pension Plan v. Jansen*, 3 S.W.3d 753, 759 (Ky. App. 1999). Bristol, relying on its contract with Mid-South, completed the work and did not pay Mid-South any further monies. The Fayette Circuit Court correctly determined the issue of damages.

Mid-South secondly argues that it is entitled to recover, under the substantial performance doctrine, in spite of the fact that it is the breaching party. Again, this argument is answered otherwise by *Sams* and *Hall, supra*, and we decline to address it further.

The orders of the Fayette Circuit Court are affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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BRIEF FOR APPELLEES 2001
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