

**IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

COMPLETE TITLE OF CASE

BROOKE DRYWALL OF COLUMBIA, INC.,

Respondent,

v.

BUILDING CONSTRUCTION ENTERPRISES, INC., et al.,

Appellants.

DOCKET NUMBER WD73355

**MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

DATE: November 8, 2011

APPEAL FROM

The Circuit Court of Jackson County, Missouri
The Honorable David M. Byrn, Judge

JUDGES

Division Three: Mitchell, P.J., and Smart and Witt, JJ.

CONCURRING.

ATTORNEYS

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**MISSOURI APPELLATE COURT OPINION SUMMARY
MISSOURI COURT OF APPEALS, WESTERN DISTRICT**

**BROOKE DRYWALL OF COLUMBIA,)
INC.,)
)
Respondent,)
v.)
BUILDING CONSTRUCTION)
ENTERPRISES, INC., et al.,)
)
Appellants.)**

**OPINION FILED:
November 8, 2011**

WD73355

Jackson County

Before Division Three Judges: Karen King Mitchell, Presiding Judge, and
James M. Smart, Jr., and Gary D. Witt, Judges

This is a surety bond case. The surety guaranteed payments due from the contractor to its subcontractors. Under the agreement between the contractor and one of its subcontractors, attorneys' fees were due the "prevailing party" in any litigation arising from the agreement. A dispute arose over payments to the subcontractor. After lengthy litigation, the contractor and the surety settled with the subcontractor for the entire principal sum in dispute. The parties then submitted to the court the issues of whether the subcontractor was owed attorneys' fees and/or interest on the principal sum.

The primary issues here are whether the subcontractor was the "prevailing party," and, if it was, whether the surety is liable for attorneys' fees, given that the bond did not specifically mention them. The subcontractor's entitlement to interest on the principal amount is also at issue.

AFFIRMED.

Division Three holds:

Under the plain terms of the subcontract, the subcontractor was due interest on the principal amount.

A “prevailing party” is one who obtains a judgment from the court, regardless of the amount of damages. *Buckhannon Bd. & Care Home v. W. Va. Dep’t of Health & Human Res.*, 532 U.S. 598, 603 (2001). A party need only obtain “some relief” from the court in order to be deemed the “prevailing party.” *Id.*

Here, although the parties settled for the principal amount, they litigated the issue of interest, and the subcontractor prevailed on that issue. That is sufficient to render the subcontractor the “prevailing party” in this matter, thus triggering the subcontract’s attorney fee clause.

Pursuant to the terms of the bond, the surety was liable for the subcontractor’s attorneys’ fees if (1) the contractor failed to perform any covenant contained in its contract with the owner; and (2) the subcontractor’s attorneys’ fees qualify as “such payment . . . due.” Both conditions were met, and therefore the surety was also liable for attorneys’ fees.

Opinion by: Karen King Mitchell, Presiding Judge

November 8, 2011

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