MISSOURI COURT OF APPEALS
WESTERN DISTRICT

NEWELL MACHINERY CO., INC.

APPELLANT-RESPONDENT,

v.

PRO CIRCUIT, INC.

RESPONDENT-APPELLANT.

DOCKET NUMBER WD82327 Consolidated with WD82364

DATE: February 25, 2020

Appeal From:

Jackson County Circuit Court
The Honorable Sandra C. Midkiff, Judge

Appellate Judges:

Division Two: Cynthia L. Martin, Presiding Judge, Thomas H. Newton, Judge and Gary D. Witt, Judge

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Attorneys:

Robert M. Pitkin, Kansas City, MO, for appellant-respondent.

Benjamin N. Hutnick, Overland Park, KS, for respondent-appellant.

MISSOURI APPELLATE COURT OPINION SUMMARY

MISSOURI COURT OF APPEALS
WESTERN DISTRICT

NEWELL MACHINERY CO., INC., APPELLANT-RESPONDENT,
v.
PRO CIRCUIT, INC., RESPONDENT-APPELLANT.

WD82327 (Consolidated with WD82364) Jackson County

Before Division Two Judges: Cynthia L. Martin, Presiding Judge, Thomas H. Newton, Judge, and Gary D. Witt, Judge

Appellant Pro Circuit, Incorporated ("Pro Circuit") appeals from the Circuit Court of Jackson County's judgment, following a bench trial, which awarded Respondent Newell Machinery Company Incorporated ("Newell") $87,424.70 on its claim for unjust enrichment. The circuit court entered judgment in favor of Pro Circuit on Newell's second claim denominated as a "Delay Claim." Both parties appeal.

Ingredion Incorporated ("Ingredion") entered into a contract to make improvements at its North Kansas City plant. Newell was the general contractor for the project and Pro Circuit was the electrical subcontractor. The parties agreed to perform the work for a lump sum of $149,500.00 and that any additional work would be done at an agreed upon price. After completion of the project, Newell paid the $149,500.00 and a sum for one approved change order. Pro Circuit alleged Newell had agreed to ten additional change orders and claimed it was owed an additional sum of $87,424.70. Newell disputed that it had agreed to these change orders or extra charges.

More than six months after completing its work, Pro Circuit filed an untimely mechanics' lien for the $87,424.70. Ingredion demanded the lien be removed, pressured Newell to discharge the lien, and indicated it would pay the lien and backcharge Newell. Newell had contracted to indemnify Ingredion for its attorneys' fees for disputes arising with subcontractors. Newell paid Pro Circuit the sum of $87,424.70 under protest threatening to pursue legal action against Pro Circuit for the entire sum if it was not returned. Pro Circuit released its lien against Ingredion's property.

Newell filed a claim for unjust enrichment alleging the $87,424.70 that it paid to satisfy the lien and a claim that Pro Circuit's delay in securing specific equipment caused a delay of the entire project and caused Newell to incur additional costs in equipment rentals and labor costs. On the eve of trial, Pro Circuit made two motions for continuances and a motion for leave to amend its petition. The circuit court overruled all of these motions.

Following trial, the circuit court found that none of the ten change orders had been approved by Newell and that Pro Circuit had been unjustly enriched by the payment for those charges. The circuit court also found that Newell had not met its burden to demonstrate that Pro Circuit was the cause of the delay in the completion of the project. The court rejected the claim for prejudgment interest.

WE MODIFY THE JUDGMENT TO AWARD PREJUDGMENT INTEREST BUT AFFIRM THE JUDGMENT IN ALL OTHER RESPECTS.

Division Two holds:

(1) The circuit court did not abuse its discretion in overruling Pro Circuit's Motion for a Continuance because the motion was untimely made under the local rule. In the same motion, Pro Circuit asserted that it needed additional time to conduct discovery and to secure the attendance of witnesses for the trial, but the circuit court did not abuse its discretion because Pro Circuit had not conducted any discovery or subpoenaed any witnesses in the eleven months the case had been pending.

(2) The circuit court did not abuse its discretion in overruling Pro Circuit's Motion for Reconsideration of Pro Circuit's Motion to Continue the trial alleging that trial counsel was required to attend a hearing in another jurisdiction because Pro Circuit had sufficient notice of the hearing and "the unavoidable absence of a party or his attorney due to an engagement elsewhere . . . does not compel a continuance." *D.A.T. v. M.A.T.*, 413 S.W.3d 665, 670 (Mo. App. E.D. 2013). Furthermore, because trial counsel actually attended the trial, Pro Circuit was not prejudiced.

(3) The circuit court did not err in overruling Pro Circuit's Motion to Amend its Petition to include new counterclaims for defamation and commercial disparagement because, although Pro Circuit faced hardship in being denied the opportunity to bring these compulsory counterclaims in the future, this hardship was outweighed by the untimeliness of the request, its unpersuasive reasons for failing to include the matter in the original pleadings, and the hardship to Newell.

(4) The circuit court did not err in entering judgment against Pro Circuit for unjust enrichment because its judgment was supported by the evidence.

(5) The circuit court did not err in finding that the voluntary payment doctrine did not bar recovery for unjust enrichment because the circuit court had sufficient evidence to conclude Newell's payment was made under duress rendering the payment involuntary.

(6) The circuit court erred in failing to award prejudgment interest because the letter accompanying the payment stating that it was made under protest together with the surrounding circumstances was sufficient to find that it constituted a demand of repayment for a liquidated sum had been met.

(7) The circuit court did not err in entering judgment in favor of Pro Circuit on Newell's "delay claim" because evidence supported a finding that Newell contributed to the delay by failing to provide Pro Circuit necessary specifications in a timely manner, which delayed Pro Circuit's ability to timely secure the proper materials for the project.

Opinion by: Gary D. Witt, Judge February 25, 2020

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