STATE OF MINNESOTA
IN COURT OF APPEALS
A09-1845

Priester Construction Co.,
Appellant,

vs.

Catherine A. Hansen,
Respondent,

Wings Financial Federal Credit Union, et al.,
Defendants.

Filed August 3, 2010
Affirmed
Kalitowski, Judge

Ramsey County District Court
File No. 62-C6-07-003539

George L. May, May & O'Brien, LLP, Hastings, Minnesota (for appellant)

Joseph J. Dudley, Jr., Mark K. Thompson, Dudley and Smith, P.A., for respondent)

Considered and decided by Wright, Presiding Judge; Kalitowski, Judge; and Ross, Judge.

U N P U B L I S H E D O P I N I O N

KALITOWSKI, Judge

Appellant Priester Construction Co. challenges the district court order denying its mechanic's lien claim and granting judgment in favor of respondent Catherine Hansen. Appellant argues that the district court erred (1) by conducting a liquidated-damages

analysis and concluding that the termination provision in the parties' contracts was unenforceable; and (2) in calculating damages. We affirm.

D E C I S I O N

The district court's findings of fact regarding mechanics' liens and contractor disputes will not be overturned unless clearly erroneous. *Witcher Constr. Co. v. Estes II Ltd. P'ship*, 465 N.W.2d 404, 407 (Minn. App. 1991), *review denied* (Minn. Mar. 15, 1991). We will correct erroneous applications of law, but we accord the district court discretion in its ultimate conclusions, and we review such conclusions for an abuse of discretion. *Langford Tool & Drill Co. v. Phenix Biocomposites, LLC*, 668 N.W.2d 438, 442 (Minn. App. 2003).

I.

The termination provision included in the written contracts between appellant and respondent provided, in pertinent part:

> In the event the Owner terminates or breaches this Agreement, Owner agrees to pay Contractor in full on a time and material basis for all Services, labor, and materials provided by the Contractor, its subcontractors, and material suppliers, to the Owner or the Property, including time in preparing estimates, bids, plans, and drawings, plus an additional consulting fee equal to twenty (20%) of the total contract price, which represents Contractor's reasonable profit and overhead. Owner agrees to pay this service fee despite any statutes or law to the contrary and agrees it is not a penalty.

Appellant claims that this provision simply converts the contract from a fixed-price contract into a time-and-materials contract, and thus, the district court erred by

applying a liquidated-damages analysis and concluding that the provision was an unenforceable penalty. We disagree.

Liquidated-Damages Analysis

Appellant claims that the contract's termination provision is not subject to a liquidated-damages analysis, citing *St. Jude Medical, Inc. v. Medtronic, Inc.*, 536 N.W.2d 24, (Minn. App. 1995), *review denied* (Minn. Oct. 27, 1995). In that case, this court held that a termination provision in a contract is not subject to a liquidated-damages analysis when no party breached the contract. *St. Jude*, 536 N.W.2d at 28.

In *St. Jude*, St. Jude sought to acquire Electromedics under the condition that St. Jude would have an exclusive right to negotiate and would receive a termination fee in the event negotiations fell through. *Id.* at 26. After Electromedics accepted a higher bid by Medtronic, St. Jude sued to enforce the termination fee. *Id.* This court concluded that the termination fee was enforceable, and rejected the district court's liquidated-damages analysis because there was no breach of contract. *Id.* at 28-30.

But importantly, the *St. Jude* court characterized the termination fee as an "alternative contract," where St. Jude had the choice of performance, because "the merger agreement allowed Electromedics to choose a course of action: either accept St. Jude's offer or select another buyer and pay St. Jude the termination fee." *Id.* at 28. The court stated that a true alternative contract is one where the parties have agreed that either one of the two alternative performances is a proper exchange for the return performance. *Id.* at 29. Further, cases that have cited *St. Jude* have only applied its reasoning to termination provisions that are essentially alternative-performance contracts. *See, e.g.*,

Kauffman Stewart, Inc. v. Weinbrenner Shoe Co., 589 N.W.2d 499, 501-02 (Minn. App. 1999) (upholding a termination provision that allowed an appellant to terminate the agreement on 60 days' notice as long as it made fee payments during that period).

Courts in other jurisdictions have more fully explored this distinction. When a provision presents a party with a "true option or alternative" or a "realistic and rational choice" for fulfilling his or her obligations under the contract, the provision is not a liquidated-damages provision or penalty and does not implicate the liquidated-damages analysis. *Blank v. Borden*, 524 P.2d 127, 130-33 (Cal. 1974). On the other hand, if at the time of entering into the contract, no one would have considered the other option for performance a conceivable alternative, the provision is a liquidated-damages provision. *Id.* at 132 n.7. Where a "formal alternative conceals a penalty for failure to perform the main promise," courts find a termination provision unenforceable. *Id.* at 131-32.

Here, unlike the situation in *St. Jude* and *Kauffman*, the termination provision does not present a true option or alternative to performance of the contract. Instead, it provides an additional fee that respondent has to pay in the event of termination or breach. Moreover, neither of the provisions at issue in *St. Jude* or *Kauffman* contemplated breach as a possibility. Conversely, here, the termination provision specifically applies in the event of a breach by the owner. And although the district court determined that respondent's actions in terminating the contract did not constitute a breach, respondent's actions did not constitute alternative performance through the termination provision.

In addition, in *Gorco Const. Co. v. Stein*, the supreme court treated a clause in the contract as a liquidated-damages clause that applied in the event of a breach, even though it also applied in the event of cancellation. 256 Minn. 476, 481, 99 N.W.2d 69, 74 (1959). Similarly, the termination provision at issue here applies in the event of breach or termination by the owner. Thus, we conclude that it was appropriate for the district court to apply a liquidated-damages analysis.

Unenforceable Penalty

Appellant argues that even if the termination provision was subject to a liquidated-damages analysis, the district court erred in concluding that it was an unenforceable penalty. We disagree.

A penalty clause is usually unenforceable, whereas a liquidated-damages clause, if reasonable, is enforceable to determine the extent of liability. *Frank v. Jansen*, 303 Minn. 86, 90-91, 226 N.W.2d 739, 743 (1975). The controlling factor in a liquidated-damages analysis is not the parties' intent in agreeing to a clause, but whether the amount agreed upon is reasonable in light of the contract as a whole, the nature of the damages contemplated, and the surrounding circumstances. *Gorco Const.*, 256 Minn. at 482, 99 N.W.2d at 74. When the measure of damages resulting from a breach is susceptible to definite measurement, an amount greatly disproportionate is considered to be an unenforceable penalty. *Id*. at 483, 75. In *Gorco Const.*, the supreme court held that damages for sales commissions, advertising, and commitment of labor and equipment "were clearly and readily susceptible of definite measurement and proof by ordinary

rules" and thus the damages provision for an additional 15% of the contract price was in the nature of a penalty and unenforceable. *Id.* at 483-84, 75-76.

Following the reasoning in *Gorco Const.*, we conclude that the district court did not err in concluding that the termination provision here was an unenforceable penalty because the amount of damages respondent would have to pay is "unreasonable in the light of the contract as a whole, the nature of the damages contemplated, and the surrounding circumstances." *See id.* at 482, 74. Appellant claims that under the contract termination provision it is due a total of $72,753.27. This amount is almost $30,000 greater than the amount appellant would have received if it had completed the contract in full, and more than twice the district court's calculated value of the work that it had completed. Furthermore, as in *Gorco Const.*, the amount of damages here is readily susceptible to accurate estimation; the damages under the provision at issue is not an accurate estimation of the actual damages, but is "greatly disproportionate" to any actual damages, and is thus an unenforceable penalty. *See id.* at 483, 75. Therefore, the district court did not abuse its discretion in concluding that the termination provision was an unenforceable penalty. *See Langford*, 668 N.W.2d at 442 ("[W]e will correct erroneous applications of law, but accord the trial court discretion in its ultimate conclusions and review such conclusions under an abuse of discretion standard") (quotation omitted).

II.

Appellant argues that even if this court affirms the district court's decision that the termination fee provision was an unenforceable penalty, the district court erred in calculating damages. Appellant contends that Minn. Stat. § 514.03, subd. 2(a) (2008),

entitles appellant to a lien in an amount equal to the entirety of the fixed price amounts under the contracts, less any amount that respondent paid to appellant over the course of their working relationship. We disagree.

Appellant cites *Scott-Daniels Properties, Inc. v. Dresser*, 281 Minn. 179, 160 N.W.2d 675 (1968), and *E.C.I. Corp. v. G.G.C. Co.*, 306 Minn. 433, 237 N.W.2d 627 (1976), in arguing that he is entitled to a lien on respondent's property for the remaining monetary amounts left on the contracts. But those cases provide only that a contractor may receive a lien for the full amount of the contract if the contractor substantially performs in full. In *Scott-Daniels*, the supreme court determined that the value of the services the appellant received was "not less than the full amount to which [Dresser] would have been entitled" but for the appellant's breach. 281 Minn. at 187, 160 N.W.2d at 680. In *E.C.I.*, the supreme court determined that liens for unfinished work "may vary depending on whether the contract was for a specific price, whether the work is substantially complete, . . . and whether the contract is treated as at an end." 306 Minn. at 437, 237 N.W.2d at 630. Here, contrary to appellant's assertion, the district court did not find that appellant had substantially completed the contract work. Although the court found that work on certain individual contracts was substantially completed, the court expressly rejected appellant's claim that the project as a whole was 90% complete.

Moreover, even if appellant had substantially completed the work under the contracts, his recovery would be limited to the contract price minus the cost to cure the defects. *See Paving Plus, Inc. v. Professional Investments, Inc.*, 382 N.W.2d 912, 914-15 (Minn. App. 1986). The district court here measured damages by applying this standard.

The court calculated the cost of finishing the remaining work by taking the lower of the two bids for each remaining project from the estimates that respondent provided, and then subtracting the cost of finishing from the contract price. The total contract price was $47,180, and the cost of the remaining work totaled $21,367.77. Thus, the total work appellant performed was $25,812.23. Appellant provided no evidence regarding the value of its work or the cost to finish the work.

Because respondent paid appellant $32,890, appellant is not entitled to a lien on the property under statutes or caselaw. Rather, the district court properly determined that respondent is entitled to the $7,077.77 she overpaid appellant for the reasonable value of its work. We conclude that the district court's findings are supported by the evidence and are not clearly erroneous.

Affirmed.