No. 21-124160-A

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

BENCHMARK PROPERTY REMODELING, LLC,
Plaintiff-Appellant

vs.

GRANDMOTHERS, INC.,
COREFIRST BANK AND TRUST,
KANSAS DEPARTMENT OF REVENUE,
ROBERT ZIBELL, AND STATE OF KANSAS,
Defendants-Appellees

BRIEF OF APPELLEES, GRANDMOTHERS INC. AND ROBERT ZIBELL

Appeal from the District Court of Shawnee County, Kansas
Honorable Mary Christopher, Judge
District Court Case No. 2019-CV-000008

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Oral Argument 15 minutes

TABLE OF CONTENTS

Nature of the Case 1

Statement of Issues 1

Statement of Facts 2

Arguments and Authorities 4

Issue I: Whether this Court has jurisdiction over this appeal arising from a journal entry of dismissal without prejudice 4

Woods v. Unified Gov't of Wyandotte County/KCK, 294 Kan. 292, 295, 275 P.3d 46 (2012) 4
K.S.A. § 60–254 4
Smith v. Welch, 265 Kan. 868, 967 P.2d 727 (1998) 5
Arnold v. Hewitt, 32 Kan App. 2d 500, 85 P.3d 220 (2004) 5
K.S.A. § 60-2102(a)(4) 5
Bain v. Artzer, 271 Kan 578 (2001) 5
Goldman v. Univ. of Kansas, 52 Kan. App. 2d 222, 365 P.3d 435 (2015) 5
Flores Rentals LLC v. Flores, 283 Kan. 476 (2007) 5
Arnold v. Hewitt, 144 P.3d 81 (Kan. Ct. App. 2006) 6
Prime Lending II, LLC v. Trolley's Real Est. Holdings, LLC, 48 Kan. App. 2d 847, 304 P.3d 683, (2013) 6
Cook v. Rocky Mountain Bank Note Co., 974 F.2d 147 (10th Cir.1992) 7

Issue II: Whether the district court erred in granting KDOR's motion for judgment on the pleadings based on the court's finding that no contract existed between KDOR and Benchmark 7

Issue III: Whether the district court erred in granting partial summary judgment in favor of Grandmothers based on the court's finding no legal basis existed to find Benchmark and Grandmothers had an enforceable contract 7

H.B. v. M.J., 315 Kan. 310, 508 P.3d 368 (2022) 8
Sanchez, ex rel. Sanchez v. Unified Sch. Dist. 469, 50 Kan. App. 2d 1185, 339 P.3d 399 (2014) 8
Van Brunt v. Jackson, 212 Kan. 621, 512 P.2d 517 (1973) 9
Stechschulte v. Jennings, 297 Kan. 2, 298 P.3d 1083 (2013) 9
Unified Sch. Dist. No. 446, Indep., Kansas v. Sandoval, 295 Kan. 278, 286 P.3d 542 (2012) 9

Lindsey Masonry Co. v. Murray & Sons Constr. Co., 53 Kan. App. 2d 505, 390 P.3d 56 (2017)....................10
Drywall Sys., Inc. v. A. Arnold of Kansas City, LLC, 57 Kan. App. 2d 263, 450 P.3d 379 (2019)....................11
K.S.A. § 16-1802....................11
K.S.A. § 16–1805....................12
Midwest Asphalt Coating, Inc. v. Chelsea Plaza Homes, Inc., 45 Kan. App. 2d 119, 243 P.3d 1106 (2010)....................12
K.S.A. § 16-1806....................12
K.S.A. § 60-1101....................14
In re Corbin Park, L.P., 441 B.R. 370 (Bankr. D. Kan. 2010)....................14
Kansas City Heartland Const. Co. v. Maggie Jones Southport Cafe, Inc., 250 Kan. 32, 824 P.2d 926 (1992)....................14
Haz-Mat Response, Inc. v. Certified Waste Servs. Ltd., 259 Kan. 166, 910 P.2d 839 (1996)....................14
Tradesmen Int'l, Inc. v. Wal-Mart Real Estate Bus. Tr., 35 Kan. App. 2d 146, 129 P.3d 102 (2006)....................15
K.S.A. § 60-1102....................15

Conclusion....................15

NATURE OF THE CASE

This case arises from a remodeling job completed by Appellant Benchmark Property Remodeling, on property owned by Appellee Grandmothers, Inc. and leased by Appellee Kansas Department of Revenue. Appellees entered into an amended lease agreement in which KDOR was to pay Grandmothers for remodeling work in exchange for Grandmothers to have such remodeling done on its building. The bids by Benchmark were utilized as a basis for the specific amount KDOR was to pay Grandmothers for the remodeling work. Benchmark completed the work and KDOR paid the amount agreed to in the amended lease agreement to Grandmothers. Grandmothers held back certain funds from Benchmark and paid certain subcontractors used by Benchmark. Benchmark subsequently sued both Grandmothers and KDOR for breach of contract, among other causes of action.

Grandmothers moved for summary judgment on all claims asserted by Benchmark on the basis no contract existed between Benchmark and Grandmothers. The district court granted summary judgment in favor of Grandmothers on Count I – Breach of Contract, Count IV – Private Fairness in Construction Act, Count V – Public Fairness in Construction Act, and Count VII – Foreclosure of Mechanic's Lien. Benchmark dismissed all remaining claims against Grandmothers to pursue this appeal.

STATEMENT OF THE ISSUES

ISSUE I: **Whether this Court has jurisdiction over this appeal arising from a journal entry of dismissal without prejudice.**

ISSUE II: **Whether the district court erred in granting KDOR's motion for judgment on the pleadings based on the court's finding that no contract existed between KDOR and Benchmark.**

ISSUE III: **Whether the district court erred in granting partial summary judgment in favor of Grandmothers based on the court's finding no legal basis existed to find Benchmark and Grandmothers had an enforceable contract.**

STATEMENT OF THE FACTS

1. Defendant/Appellee, Grandmothers, Inc., is the owner and lessor of real estate located at 300 SW 29th Street, Topeka, Kansas, 66611. (R. vol 3, p. 145).

2. Defendant/Appellee, Kansas Department of Revenue, is the Tenant in the building located at 300 SW 29th Street, Topeka, Kansas, 66611. (R. vol 3, p. 145).

3. Plaintiff/Appellant Benchmark Property Remodeling is a construction and remodeling company in Topeka, Kansas. (R. vol. 1, p. 215).

4. On August 27, 2018, Grandmothers, as Lessor, and KDOR, as Lessee, executed an amended lease agreement titled "Third Amendment to Lease". Benchmark is not a party to the Third Amendment to Lease. (R. vol 1, p. 62).

5. The Third Amendment to Lease states in part:

> "This Amendment governs construction contemplated per the quotes dated 05/28/2018, 06/04/2018, 08/01/2018, and 08/02/2018 from Benchmark Property Remodeling, LLC, attached hereto as Exhibit A and corresponding floor plans, attached as Exhibit B. The Lessee shall pay a lump sum payment of $136,052.39 to the Lessor for the satisfactory work completed upon successful installation. Payment by the Lessee is contingent on the Lessee's satisfaction of all work completed. The related items will become a fixture to the leased premises and will remain upon and be surrendered with the lease premises at the termination of the real estate lease." (R. vol 1, p. 62)

6. The estimates referenced in the Third Amendment to Lease were all provided by Benchmark to KDOR. (R. vol 1, p. 395-402). Benchmark never entered into a written contract for the remodeling with Grandmothers. (R. vol 1, p. 403-05)

7. KDOR retained sole authority to accept or reject the work described in the quotes provided by Benchmark. (R. vol 1, p. 402-05)

8. The Third Amendment to Lease does not require Grandmothers, as Lessor, to enter into any contract with Benchmark. (R. vol 1, 25-26)

9. The Third Amendment to Lease does not require Grandmothers, as Lessor, to pay any specific amounts to Benchmark. (R. vol 1, p. 25-26)

10. Benchmark did not know a Third Amendment to Lease was being negotiated between KDOR and Grandmothers. (R. vol. 1, p. 405-09)

11. The quotes provided by Benchmark to KDOR were never accepted by KDOR by way of a signature on the quotes. (R. vol 1, p. 25-26)

12. Grandmothers attempted to start construction work on the property. KDOR promptly notified Grandmothers it had authorized Benchmark to complete the remodeling work. (R. vol 2, p. 51)

13. A mechanic's lien was filed by Benchmark on January 21, 2019. (R. vol. 1, p. 256)

14. Benchmark alleges in its mechanic's lien that it entered into a contractual agreement with Grandmothers. (R. vol 1, p. 256)

15. Mr. McBeth, owner of Benchmark, testified that he did not discuss any of the quotes directly with Robert Zibell or Grandmothers. (R. vol 1, p. 402-04)

16. Mr. McBeth admitted that he did not have any written contract with KDOR or Grandmothers. (R. vol. 1, p. 402-09)

17. Mr. McBeth admitted that the Third Amendment to Lease did not state that the work was to be performed by Benchmark. (R. vol. 1, p. 402-09)

18. Grandmothers paid all funds owed to Benchmark, whether directly to Benchmark or its subcontractors, at the request of those subcontractors, other than the remaining amount of $15,805.48. (R. vol 1, p. 378)

19. Grandmothers made an offer of judgment of $15,805.48 for the remaining amount owed to Benchmark. Benchmark has refused to accept such offer of judgment. (R. vol. 1 p. 368, R. vol. 3, p. 144)

20. Both parties filed for summary judgment on Counts I, IV, and VII. The district court granted summary judgment on these causes of action in favor of Grandmothers. (R. vol 3, p. 144)

21. Benchmark filed a Motion to Dismiss without Prejudice to dismiss all remaining claims against Grandmothers for the express purpose of appealing the district court's ruling. (R. vol 3, p. 159-60) Grandmothers did not object but did not agree to dismissal of the claims. (R. vol. 4, p. 15-18)

ARGUMENT AND AUTHORITIES

Issue I: Whether this Court has jurisdiction over this appeal arising from a journal entry of dismissal without prejudice.

A. Standard of Review

Whether appellate jurisdiction exists is a question of law. "Kansas courts only have such appellate jurisdiction as is conferred by statute, and in the absence of compliance with the statutory rules, a court has the duty to dismiss the appeal." *Woods v. Unified Gov't of Wyandotte County/KCK*, 294 Kan. 292, 295, 275 P.3d 46 (2012). When more than one claim is involved, "the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. K.S.A. 60–254(b).

B. Argument and Authorities

Summary judgment was granted in favor of Grandmothers for Count I (Breach of Contract, Count IV (Private Fairness in Construction Act), Count V (Public Fairness in

Construction Act), and Count VII (Foreclosure of Mechanic's Lien). KDOR was dismissed from this litigation on its motion for judgment on the pleadings. Benchmark subsequently dismissed all remaining claims against the parties for the express purpose of appealing the district court's ruling.

This Court has requested all parties to brief the issue as to whether the Court has jurisdiction over this appeal, focusing on both *Smith v. Welch*, 265 Kan. 868, 967 P.2d 727 (1998) and *Arnold v. Hewitt*, 32 Kan App. 2d 500, 85 P.3d 220 (2004). Benchmark failed to address this jurisdictional issue in its brief. However, Grandmothers will address the arguments raised in Benchmark's response to the Court's Order to Show Cause.

Benchmark has brought this appeal pursuant K.S.A. 60-2102(a)(4). Under K.S.A. 60–2102(a)(4), appellate jurisdiction may be invoked as a matter of right as to a final order in an action. *Bain v. Artzer*, 271 Kan 578, 580 (2001). A final decision is "one which finally decides and disposes of the entire merits of the controversy and reserves no further questions or directions for the future or further action of the court." *Goldman v. Univ. of Kansas*, 52 Kan. App. 2d 222, 228, 365 P.3d 435, 439 (2015). Kansas courts have determined a final decision is "self-defining." It is an "order which definitely terminates a right or liability involved in the action, or which grants or refuses a remedy as a terminal act in the case." *Flores Rentals LLC v. Flores*, 283 Kan. 476. 482 (2007).

Smith v. Welch is not similar to this case as the court heard the case pursuant to K.S.A. 20-3018(c). *Arnold v. Hewitt* provides more analysis for the Court to consider whether it has jurisdiction in the present case. In *Arnold*, the trial court granted summary judgment in favor of the defendant except the remaining negligence claim. The plaintiff then dismissed the negligence claim without prejudice for the purpose of appealing the summary motion judgment. After it

appealed the order, the plaintiff refiled its remaining negligence claim in district court. The trial court dismissed the refiled claim and denied Plaintiff's request for relief. Plaintiff appealed the trial court's decision and this court refused to hear this appeal. This Court explained:

> "The plaintiffs had a simple option after the summary judgment motions were granted in the original action. They could have waited, received a final decision on the negligence action, and then appealed the entire case to this court. They chose not to do that. To accept an appeal of the negligence claim on its merits would be to reward the plaintiffs' attempt to bring a piecemeal appeal. We decline that opportunity." *Arnold v. Hewitt*, 144 P.3d 81 (Kan. Ct. App. 2006). *See Exhibit A.*

Benchmark could have pursued an appeal of this order through a request for K.S.A. 60-254(b) certification but failed to do so. K.S.A. 60-254 allows a court to direct entry of final judgment upon express determination there is no just reason for delay. "Otherwise, any order or other decision, however designated, that adjudicates fewer than all the claims ... does not end the action as to any of the claims...." *Id.* The Supreme Court has determined a trial court intending to enter a final judgment on less than all claims or all parties must make an affirmative and express determination that there is no just reason for delay and must expressly direct the entry of judgment in the record, "preferably by use of the statutory language." *Prime Lending II, LLC v. Trolley's Real Est. Holdings, LLC,* 48 Kan. App. 2d 847, 853, 304 P.3d 683, 687 (2013). The journal entry submitted by Benchmark did not include a determination by the court it was intended as a final judgment. Additionally, at no time did Benchmark request certification the judgment by the district court. (R. vol 3, p. 166)

The dismissal of the remaining claims against Grandmothers was not by agreement of both parties. (R. vol 4, 15-18) The journal entry of dismissal without prejudice was submitted by Benchmark alone. (R. vol. 3, p. 163) Benchmark filed a motion to dismiss the remaining claims against all parties without prejudice on March 11, 2021, for the express purpose of pursing this appeal. (R. vol. 3, p. 159). The dismissal of the remaining claims was not by agreement of the

parties and, at least by Grandmothers, was not intended to make the district court's decision a final judgment for purposes of an appeal. (R. vol. 4, p. 15-18)

Persuasive authority also suggests to this Court it does not have jurisdiction to hear this appeal. The Tenth Circuit Court of Appeals has addressed this issue, saying "when a plaintiff requests voluntary dismissal of her remaining claims without prejudice in order to appeal from an order that dismisses another claim with prejudice, we conclude that the order is not 'final' for purposes" of 28 U.S.C. 1291. *Cook v. Rocky Mountain Bank Note Co.,* 974 F.2d 147 (10th Cir.1992).

Accepting jurisdiction to hear this appeal would be against previous rulings of this Court. Hearing this appeal would be rewarding Benchmark for its disregard for appellate procedure, the rules of the court, and lack of respect and deference for judicial economy. Appellate courts do not have discretionary jurisdiction to hear all district court cases and may exercise jurisdiction only under circumstances allowed by statute. *Flores Rentals* at 480. This Court does not have jurisdiction in this matter and therefore dismissal of this appeal is appropriate for the reasons stated herein.

Issue II: Whether the district court erred in granting KDOR's Motion for Judgment on the Pleadings based on the court's finding that no contract existed between KDOR and Benchmark.

The district court did not err in granting KDOR's Motion for Judgment on the Pleadings because no contract existed between Benchmark, KDOR or Grandmothers. Grandmothers joins in the arguments and adopts by reference all arguments made by KDOR in its Reply Brief filed with this Court.

Issue III: Whether the district court erred in granting partial summary judgment in favor of Grandmothers based on the court's finding no legal basis existed to find Benchmark and Grandmothers had an enforceable contract.

A. Standard of Review

"An appellate court reviews the district court's denial of a motion for summary judgment de novo, viewing the facts in the light most favorable to the party opposing summary judgment." *H.B. v. M.J.*, 315 Kan. 310, 508 P.3d 368 (2022).

> "When the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law, summary judgment is appropriate. The district court is required to resolve all facts and inferences which may reasonably be drawn from the evidence in favor of the party against whom the ruling is sought. When opposing a motion for summary judgment, an adverse party must come forward with evidence to establish a dispute as to a material fact. In order to preclude summary judgment, the facts subject to the dispute must be material to the conclusive issues in the case. On appeal, the same rules apply; summary judgment must be denied if reasonable minds could differ as to the conclusions drawn from the evidence." *Sanchez, ex rel. Sanchez v. Unified Sch. Dist.* 469, 50 Kan. App. 2d 1185, 1191–92, 339 P.3d 399, 405 (2014).

B. Argument and Authorities

I. Benchmark failed to plead or otherwise prove a contract existed between the parties. For this reason, summary judgment should be granted in favor of Grandmothers.

Regardless of the arguments Appellant asserts, Benchmark simply did not meet the burden of proof necessary to establish a contract existed between Grandmothers or KDOR. Benchmark continually argues a contract existed between it and the Appellees. However, the evidence presented by Benchmark shows the court the purported contract simply does not exist. The district court correctly concluded no contract existed between the parties because there was no consideration and no meeting of the minds existed.

Benchmark's argument that summary judgment should have been granted in favor of itself is flawed. First, the district court expressly indicated it looked upon the facts most favorable towards Benchmark as it was Grandmother's motion for summary judgment that was granted. (R. vol 1, p. 13) Secondly, both Grandmothers and Benchmark filed motions for

summary judgment in favor the same claims the district court granted in favor of Grandmothers. (R. vol. 1, p. 370, R. vol. 2, p. 2) By implication, Benchmark decidedly proffered to the district court that no genuine issues of material fact remain. Benchmark failed to meet its burden to establish consideration existed to support the purported contract between it and Grandmothers. (R. vol 3, p. 155) It is a plaintiff's burden to show execution and existence of both the contract alleged in the petition and sufficient consideration to support such a contract. *Van Brunt v. Jackson*, 212 Kan. 621, 623, 512 P.2d 517, 520 (1973). The court determined Benchmark presented no evidence other than the lease amendment to support its contention. (R. vol 3, p. 124) Over the course of litigation, the court continually rejected allegations by Benchmark that a contract existed within the Third Amendment to Lease between Grandmothers and KDOR.

Grandmothers could not have breached a contract that does not exist. The elements of a breach of contract claim are: (1) the existence of a contract between the parties; (2) sufficient consideration to support the contract; (3) the plaintiff's performance or willingness to perform in compliance with the contract; (4) the defendant's breach of the contract; and (5) damages to the plaintiff caused by the breach. *Stechschulte v. Jennings*, 297 Kan. 2, 23, 298 P.3d 1083, 1098 (2013). Without establishing all elements necessary for a breach of contract claim and no genuine issues of material fact remain, summary judgment can only be granted in favor of Grandmothers.

Whether a contract has been formed depends on the intent of the parties and is a question of fact. *Unified Sch. Dist. No. 446, Indep., Kansas v. Sandoval,* 295 Kan. 278, 282, 286 P.3d 542 (2012). To form a binding contract, there must be a meeting of the minds on all essential elements. Contract formation requires an unconditional and positive acceptance. A conditional

acceptance is really a counteroffer, and no contract is formed. *Lindsey Masonry Co. v. Murray & Sons Constr. Co.,* 53 Kan. App. 2d 505, 511, 390 P.3d 56, 61 (2017).

At no time did Grandmothers and Benchmark have a meeting of the minds. No written agreements were ever signed by both parties. (R. vol 1, p. 402-09) Neither party agreed, expressly or implicitly, to nearly every essential element that forms the basis of the alleged contract. (R. vol 1, p. 402-09) Grandmothers did not intend to be bound with Benchmark. (R. vol. 3, p. 47) It merely wanted the work requested by KDOR to be completed and any contractor that could have completed the work for a reasonable price would have been acceptable to Grandmothers. (R. vol 3, p. 51) The fact no writing manifests an expression of acceptance by both parties to a single version of the contract supports Grandmothers' assertion.

Benchmark argues an oral agreement existed which is sufficient for enforcement by the court, but the actions of the parties clearly speak to the court's accurate conclusion a meeting of the minds did not occur between the parties. No meeting of the minds occurred as to essential elements of a contract, such as the contract price, payment terms, payment due dates, and the scope of work. The fact that Benchmark is bringing this litigation is evidence showing this Court no meeting of the minds on price existed, at the time of contracting or now. Nothing prohibited Grandmothers from paying the subcontractors directly. There was also no agreement as to how payment was to be made and when payment was due. Lastly, the email from KDOR to Mr. Zibell asking him to not complete work on the building shows no meeting of the minds existed as to the scope of work Benchmark was required to complete under its request from KDOR. (R. vol 3, p. 54) Because Benchmark failed to plead all elements of Count I for its breach of contract claim against Grandmothers, granting summary judgment in Grandmothers' favor was appropriate and should be upheld.

II. Summary judgment should be granted in favor of Grandmothers on Count IV because Benchmark's claims do not fall within the Kansas Fairness in Private Construction Act.

Because no contract existed between the parties, Benchmark cannot recover under Kansas Fairness in Private Construction Contract Act. The KFPCCA only allows recovery for amounts not owed under breach of a construction contract between the owner and the contractor. The goal of the KFPCCA was to encourage prompt payments of undisputed amounts as they come due under the contracts between the parties. *Drywall Sys., Inc. v. A. Arnold of Kansas City, LLC*, 57 Kan. App. 2d 263 at 265, 450 P.3d 379 at 381 (2019). Prompt payment is the primary goal of the KFPCCA. *Id.* at 265.

Under the KFPCCA, a contract is defined as "a contract or agreement concerning construction made and entered into by and between an owner and a contractor, a contractor and a subcontractor or a subcontractor and another subcontractor." Further, a Contractor under the Act means a "person performing construction and having a contract with an owner of the real property or with a trustee, agent or spouse of an owner." Lastly, an owner under the KFPCCA means "a person who holds an ownership interest in real property." K.S.A. 16-1802.

Therefore, in this case, a contract between a Contractor and Owner, as defined by this Act, must exist before a Contractor can recover any unpaid fees under the KFPCCA. In this case, no contract existed between Grandmothers, the owner, and Benchmark, the contractor. Only those who hold an ownership interest in a commercial property are considered an owner for purposes of the KFPCCA. *Drywall* at 268, K.S.A. 16-1802(e). It was at KDOR's request and with its specifications that the work was to be completed.

Additionally, violation of the Kansas Fairness in Private Construction Contract Act (KFPCCA) only occurs when *undisputed* amounts are not paid in the time as mandated by the Act. Grandmothers had paid all undisputed funds owed to Benchmark before the commencement

of the lawsuit. Benchmark correctly cites the KFPCCA but fails to show the court how its claims fall under this Act. Only undisputed amounts can be recovered, and the winning party shall be entitled to prejudgment interest and attorney's fees under the KFPCCA. K.S.A. 16–1805 states:

> "If any undisputed payment is not made within seven business days after the payment date established in a contract for private construction or in this act, the contractor and any subcontractors, regardless of tier, upon seven additional business days' written notice to the owner and, in the case of a subcontractor, written notice to the contractor, shall, without prejudice to any other available remedy, be entitled to suspend further performance until payment, including applicable interest, is made." *Midwest Asphalt Coating, Inc. v. Chelsea Plaza Homes, Inc.,* 45 Kan. App. 2d 119, 243 P.3d 1106, 1111-12 (2010).

The fact litigation is ongoing is proof positive that the amount owed to Benchmark was in dispute. The crux of this litigation is whether a contract existed between the parties and if a contract is found to exist, what the terms are of such contract. The fact the only unpaid amount left is the amount in dispute precludes Benchmark's claims from falling under the purview of the KFPCCA.

Even if the court finds a contract existed, it should not award Benchmark prejudgment interest and attorney fees. The party requesting attorney fees and costs bears the burden of establishing entitlement to such. *Midwest Asphalt* at 122.

Under KFPCCA, when a "contractor or subcontractor does not receive an undisputed payment within seven days of the date of payment established in the contract and is forced to bring suit after providing proper notice of the late payment, the contractor may recover attorney fees and costs from the defaulting party if the contractor prevails in the suit." K.S.A. § 16-1805, 16-1806. Kansas courts have found when the amount due under a contract is disputed in a commercial construction project, the contractor is not entitled to recover prevailing party attorney fees under KFPRCCA. K.S.A. § 16-1805, 16-1806, *Midwest Asphalt* at 126.

A court may not award attorney fees unless authorized by statute or there is an agreement between the parties allowing such. *Id.* at 122. KFPCCA allows courts to enter judgments which require the losing party to pay the court costs of the prevailing party. However, the claims asserted by Benchmark are not within the KFPCCA. Benchmark cannot recover a supposed breach of a contract that does not exist. For these reasons, Benchmark is not entitled to attorney fees and costs because this litigation did not arise out of a contract between Grandmothers, the owner of the property, and Benchmark, the contractor.

Benchmark is also not entitled to prejudgment interest. Prejudgment interest in Kansas is generally allowable on liquidated claims, which is defined as when both the amount due and the due date are fixed and certain or ascertainable by mathematical computation. *Lindsey Masonry* at 523. Here, there is no expression of acceptance to any version or terms of an agreement between Grandmothers and Benchmark. There is no evidence of consideration or that a meeting of the minds occurred regarding essential elements of the purported contract. There is no prior conduct of the parties for the court to consider when interpreting the parties understanding and intentions with each other.

Grandmothers entered into the Court an Order of Judgment in the amount of $15,805.48 on January 28, 2020. (R. vol 1, p. 368) Combined with the payment of $4,502.85 issued by Grandmothers, Grandmothers has now offered to pay Benchmark the amount it originally demanded, a total of $20,308.33. (R. vol. 3, p. 62-3) However, litigation continues to go on. This appeal is being brough in bad faith because the only issue to left to litigate is attorney fees. The cost of litigation by all parties at this point far exceeds the amount that was or is currently in dispute. It is against the interest of justice to allow unnecessary delay in resolution of

this case or for Benchmark to continue to pursue litigation and needlessly incur continued attorney fees over the issue of who is entitled to pay those attorney fees.

For these reasons stated herein, the district court's ruling should be upheld on Court IV of the Kansas Fairness in Private Construction Contract Act and summary judgment should be granted in favor of Grandmothers.

III. Summary judgment on Count VII of Foreclosure of Mechanics Lien should be granted in favor of Grandmothers based on stare decisis.

Lastly, Benchmark is not entitled to foreclose on the mechanics lien against Grandmothers because no contract exists between it and Grandmothers, the owner of the property. "Any person furnishing labor, equipment, material, or supplies used or consumed for the improvement of real property, ***under a contract with the owner or with the trustee, agent or spouse of the owner, shall have a lien upon the property***…" K.S.A. 60-1101. Under Kansas law, mechanic's lien requires proof of express or implied contract, written or oral, between lien claimant and owner of property to which lien is to attach; lien's lynchpin is contract with property owner. *In re Corbin Park, L.P.,* 441 B.R. 370 (Bankr. D. Kan. 2010). Tenants do not have ownership interests in property and do not have any estate in the land beyond a leasehold interest. *Drywall* at 264.

Additionally, a mechanic's lien is purely a creation of statute, and those claiming a mechanic's lien must bring themselves clearly within the provisions of the authorizing statute. *Kansas City Heartland Const. Co. v. Maggie Jones Southport Cafe, Inc.,* 250 Kan. 32, 34 824 P.2d 926 (1992). The statute must be followed strictly regarding the requirements upon which the right to lien depends. *Haz-Mat Response, Inc. v. Certified Waste Servs. Ltd.,* 259 Kan. 166, 170, 910 P.2d 839, 843 (1996). Equitable considerations do not ordinarily give rise to a mechanic's lien, and a mechanic's lien can arise only under the circumstances and in the

manner prescribed by the mechanic's lien statute. *Tradesmen Int'l, Inc. v. Wal-Mart Real Estate Bus. Tr.,* 35 Kan. App. 2d 146, 151, 129 P.3d 102, 106 (2006).

Benchmark's mechanic lien is not enforceable as amended because it does not fall within the requirements per statute. No contract existed between Benchmark and the property owner. The work Benchmark completed was at the request of KDOR. Benchmark was not a party to the Third Amendment to Lease. Benchmark could conceivably have a right to place a lien on the property to the extent of KDOR's leasehold estate, but any lien placed on KDOR's interest at this time would be invalid as it is far outside the time frame of four months from the last day labor was performed. K.S.A. 60-1102.

Without a contract between it and Grandmothers, Benchmark's mechanic lien is not valid or enforceable because it does not fall within the requirements per statute. For these reasons, Grandmothers asks the Court to uphold the district court's ruling and grant summary judgment on Count VII for Foreclosure of Mechanics Lien in favor of Grandmothers.

CONCLUSION

WHEREFORE, Appellees Grandmothers Inc. and Robert Zibell respectfully request the Court dismiss the appeal for lack of jurisdiction. If the Court finds it has jurisdiction, the Appellees ask the Court to uphold the district court's ruling and grant summary judgment in favor of the Appellees.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on July 8, 2022, he presented the foregoing to the Clerk of the Court for filing and uploading to the e-flex electronic court filing system, and provided a copy by email to:

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144 P.3d 81 (Table)
Unpublished Disposition
(Pursuant to Kansas Supreme Court Rule 7.04(f), unpublished opinions are not precedential and are not favored for citation. They may be cited for persuasive authority on a material issue not addressed by a published Kansas appellate court opinion.)
Court of Appeals of Kansas.

Carol N. ARNOLD, Maurice W. Bourquin, Dawn R. Lansing, and Douglas A. Lansing, Appellants,
v.
Pat HEWITT and Mid-Century Insurance Company, Appellees.

Nos. 94,058, 94,059.
|
Oct. 20, 2006.
|
Review Denied Feb. 13, 2007.

Appeal from Miami District Court; Stephen D. Hill and Richard M. Smith, judges. Opinion filed October 20, 2006. Appeal dismissed.

Attorneys and Law Firms

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Before GREENE, P.J., MARQUARDT and BUSER, JJ.

MEMORANDUM OPINION

PER CURIAM.

*1 Carol N. Arnold, Maurice W. Bourquin, and Dawn R. and Douglas A. Lansing (collectively, the plaintiffs) appeal the trial court's grant of summary judgment to Pat Hewitt and Mid-Century Insurance Company. The underlying case included questions of negligent failure to procure insurance, breach of an oral contract, and fraudulent misrepresentation. We dismiss.

This case arises out of an April 1996 car accident caused by Dawn Lansing's alleged negligence in which Wilma Bourquin, mother to Arnold and Maurice, was killed. The underlying issue involves the Lansings' attempt to procure automobile insurance coverage from Mid-Century. The Lansings believed they were covered by Mid-Century after alleged representations were made to that effect by Hewitt. However, after the accident, it was discovered that there was no coverage on the Lansings' vehicle. A separate negligence action after the accident resulted in a $1 million judgment in favor of Arnold and Maurice.

In December 1998, the plaintiffs filed a petition for damages. They sought judgments on issues of negligent procurement of insurance, breach of oral contract, and fraudulent misrepresentation. In December 1999, Hewitt responded by filing a motion for summary judgment. In the motion, Hewitt claimed that the plaintiffs' cause of action was barred by the statute of limitations. The motion was denied after the trial court found that the case was filed within the time limits allowed by statute.

Hewitt responded by filing another motion for summary judgment, limited solely to the plaintiffs' claims regarding breach of oral contract. This was followed by Hewitt's motion for summary judgment on the fraudulent misrepresentation claim. Both of these motions were granted by the trial court, leaving only the plaintiffs' negligence claim. The plaintiffs responded by filing a request for an interlocutory appeal. They specifically asked the trial court to make the summary judgment decisions final, which would allow an appeal to progress. This motion was denied by the trial court, which ruled that there were no controlling questions of law which would warrant an appeal.

The plaintiffs then submitted a motion to dismiss without prejudice the remaining negligence claim. The request was made so that the plaintiffs could immediately appeal the prior adverse rulings to this court. The motion was opposed by Hewitt, who alleged that the plaintiffs were trying to circumvent the trial court's denial of an interlocutory certification. The trial court granted the motion, and the negligence claim was dismissed without prejudice. However, the trial court raised concerns about a piecemeal trial and the difficulty that could create.

The plaintiffs filed a notice of appeal with this court, covering the grant of summary judgment on the contract and fraud claims. This court refused to consider the merits of the case,

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EXHIBIT
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finding that it did not have jurisdiction because there was no final, appealable order. See *Arnold v. Hewitt,* 32 Kan.App.2d 500, 505, 85 P.3d 220 (2004) (*Arnold I*).

***2** In 2003, while the appeal was pending, the plaintiffs refiled the negligence claim in a separate action. In a motion before the trial court, the plaintiffs suggested that their appeal had been prematurely filed. Accordingly, the plaintiffs asked the trial court to consolidate the 1998 case involving the fraud and contract claims, with the 2003 negligence action. This motion was strongly opposed by Hewitt, who argued that the two cases were so intertwined that they were effectively one action.

At some point, the trial court dismissed the refiled negligence claim. The trial court then denied the plaintiffs' request for relief, finding that it did not have jurisdiction over either the 1998 or 2003 case. The plaintiffs appeal that decision to this court.

After this case was docketed, Hewitt filed a motion to dismiss the appeal for lack of appellate jurisdiction. The parties were ordered to brief the issue of whether this appeal violated the doctrine of avoiding piecemeal trials and appeals, and the rule against splitting claims.

On appeal, the plaintiffs note that Hewitt was awarded summary judgment on all three claims, leaving nothing outstanding. Thus, they believe everything is at the stage where it may be considered a final order. The plaintiffs also believe that res judicata did not attach with the prior appeal because there was no decision by this court on the merits of the case. The plaintiffs again contend that K .S.A. 60-2102(a)(4) confers jurisdiction on this court, since there is an appealable final order.

Whether jurisdiction exists is a question of law over which this court's scope of review is unlimited. *Foster v. Kansas Dept. of Revenue,* 281 Kan. 368, 369, 130 P.3d 560 (2006).

The right to appeal is entirely statutory and is not contained in the United States or Kansas Constitutions. Subject to certain exceptions, Kansas appellate courts have jurisdiction to entertain an appeal only if the appeal is taken in the manner prescribed by statutes. *State v. Legero,* 278 Kan. 109, Syl. ¶ 2, 91 P.3d 1216 (2004). An appellate court has a duty to question jurisdiction on its own initiative. *State v. Wendler,* 280 Kan. 753, 755, 126 P.3d 1124 (2006). It is the appellate court's duty to dismiss an appeal when the record discloses a lack of jurisdiction. *In re Condemnation of Land v. Stranger Valley Land Co.,* 280 Kan. 576, 578, 123 P.3d 731 (2005).

This appeal involves two cases; the 1998 case which had three issues, and the 2003 case which only contained a negligence claim. In the prior appeal of this action, this court noted that a voluntary dismissal without prejudice does not constitute a final order. *Arnold I,* 32 Kan.App.2d at 504. Thus, the plaintiffs' assertion that they have presented this court with a final order is incorrect. There is no final order in the 1998 case, given the fact that the negligence claim was voluntarily dismissed without prejudice over Hewitt's objection.

***3** Nothing about the 1998 claim has changed since the prior appeal, and we refuse to consider either the contract or fraud claims on grounds of stare decisis. It is recognized that under the doctrine of stare decisis, once a point of law has been established by a court, that point of law will generally be followed by the same court and all courts of lower rank in subsequent cases where the same legal issue is raised. Stare decisis operates to promote stability and continuity by ensuring finality of decisions by a court. *Crist v. Hunan Palace, Inc.,* 277 Kan. 706, 715, 89 P.3d 573 (2004). We agree with the panel of this court in *Arnold I,* that having no final order, this court does not have jurisdiction to consider the contract or fraud claims. See K.S.A. 60-2102(a)(4).

This court still must address the possibility of an appeal from the grant of summary judgment to Hewitt on the negligence issue. Theoretically, the plaintiffs could offer a meritorious appeal by raising it under a new case number, as the negligence action is not controlled by the prior *Arnold I* decision.

Res judicata prevents relitigation of previously litigated claims. More important to our query here, res judicata also prevents relitigation of claims which could have been raised in the prior action. *Magstadtova v. Magstadt,* 31 Kan.App.2d 1091, 1093, 77 P.3d 1283 (2003).

Hewitt suggests that the plaintiffs are attempting to substitute the 2003 action for the negligence portion of the 1998 action and argues that is inappropriate. We agree. The 2003 action is a separate and distinct entity from the 1998 action. Although the subject matter is identical, this court cannot and will not substitute the 2003 refiling for the 1998 negligence claim

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which was voluntarily dismissed. To do so would be to ignore basic rules of civil procedure. It would also ignore the reality that the trial court lost jurisdiction over the 1998 claim once the negligence action was dismissed.

Moreover, this court's review of the 2003 negligence action is barred by res judicata. The doctrine of res judicata prevents the splitting of a single cause of action or claim into two or more suits. The doctrine of res judicata requires that all the grounds or theories upon which a cause of action or claim is founded be asserted in one action or they will be barred in any subsequent action. *Shelton v. DeWitte,* 271 Kan. 831, 837, 26 P.3d 650 (2001).

The plaintiffs had a simple option after the summary judgment motions were granted in the original action. They could have waited, received a final decision on the negligence action, and then appealed the entire case to this court. They chose not to do that. To accept an appeal of the negligence claim on its merits would be to reward the plaintiffs' attempt to bring a piecemeal appeal. We decline that opportunity.

We refuse to address the merits of the plaintiffs' claims on grounds that we do not have jurisdiction. The established doctrines of stare decisis and res judicata dictate the outcome here. This decision renders Hewitt's outstanding motion to dismiss moot.

*4 Appeal dismissed.

All Citations

144 P.3d 81 (Table), 2006 WL 3000480

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