STATE OF MICHIGAN

COURT OF APPEALS

CHERRY OAK LANDSCAPING, LLC,

Plaintiff-Appellee,

v

OPV PARTNERS, LLC, doing business as AUTUMN RIDGE TOWNHOMES AND APARTMENTS,

Defendant-Appellant.

UNPUBLISHED
June 20, 2024

No. 364789
Ingham Circuit Court
LC No. 20-000064-CB

Before: O'BRIEN, P.J., and M. J. KELLY and FEENEY, JJ.

PER CURIAM.

Defendant, OPV Partners, LLC, appeals as of right the trial court's judgment awarding plaintiff, Cherry Oak Landscaping, LLC, $52,321 in damages for nonpayment of landscaping work, $64,524 in attorney fees, $8,872 in supplemental attorney fees, $33,953 in interest, and $1,502 in costs. OPV Partners also appeals the trial court's earlier orders granting Cherry Oak Landscaping's motion for partial summary disposition, denying reconsideration of that decision, and denying OPV Partners' motion for summary disposition. Because we conclude that the trial court did not err, we affirm.

I. BASIC FACTS

OPV Partners contracted with Cherry Oak Landscaping to perform landscaping services at one of its apartment complexes. Starting on March 1, 2019, Cherry Oak Landscaping performed lawn services, including spring clean-up, mowing, fertilizing, weeding, pruning, edging, and mulching. However, because OPV Partners had not paid any of the invoices Cherry Oak Landscaping had submitted, was not communicating with Cherry Oak Landscaping, and was not paying other vendors, Cherry Oak Landscaping stopped providing services after September 3, 2019. Thereafter, it filed suit against OPV Partners, alleging that OPV Partners breached its contract by refusing to pay it for the services that it performed under the contract.

Cherry Oak Landscaping moved for partial summary disposition, arguing that the terms set forth in "Attachment A" were fully incorporated in the master contract between the parties. In response, OPV Partners asserted that the contract only incorporated "the scope of services" set forth in Attachment A. Following oral argument, the trial court granted Cherry Oak Landscaping's motion and it subsequently denied OPV Partner's motion for reconsideration.

OPV Partners then moved for summary disposition, arguing that Cherry Oak Landscaping had not complied with the terms of the contract because it had not submitted sworn statements and lien waivers with its invoices. In response, Cherry Oak Landscaping provided an affidavit from its principal, who averred that he had submitted the required documentation. Because the affidavit created a genuine issue of material fact, the trial court denied OPV Partners' motion for summary disposition.

Subsequently, a bench trial was held. Following the presentation of the evidence, the trial court found that Cherry Oak Landscaping had not provided the required sworn statements and lien waivers when it submitted its invoices. However, the court also found that OPV Partners had waived that requirement by failing to reject the submitted invoices or returning them to Cherry Oak Landscaping for revision. Additionally, the court reasoned that OPV Partners forfeited its right to that condition of the contract by failing to object to the omission of the sworn statements and lien waivers when it communicated with Cherry Oak Landscaping regarding the submission of invoices. Ultimately, the court concluded that OPV Partners had breached the contract, and it awarded Cherry Oak Landscaping damages. In addition, the court granted Cherry Oak Landscaping's motions for attorney fees, supplemental attorney fees, interest, and costs. This appeal follows.

II. CONTRACT INTERPRETATION

A. STANDARD OF REVIEW

OPV Partners argues that the trial court erred by granting Cherry Oak Landscaping partial summary disposition and by denying its motion for reconsideration of that order. The trial court granted partial summary disposition after concluding that the master contract for landscaping included the entirety of Attachment A. OPV Partners contends that that decision was erroneous because, based upon the language of the contract, only the scope-of-service provisions in Attachment A were incorporated into the master contract. We review de novo a trial court's decision on a motion for summary disposition. *Barnard Mfg Co, Inc v Gates Performance Engineering, Inc*, 285 Mich App 362, 369; 775 NW2d 618 (2009). Likewise, "[t]he construction and interpretation of a contract presents a question of law that is reviewed de novo." *AFSCME v Detroit*, 267 Mich App 255, 262; 704 NW2d 712 (2005). We review for an abuse of discretion a trial court order denying reconsideration. *St John Macomb-Oakland Hosp v State Farm Mut Auto Ins Co*, 318 Mich App 256, 261; 896 NW2d 85 (2016).

B. ANALYSIS

Resolution of this issue involves contract interpretation. The goal of contract interpretation "is to determine and enforce the parties' intent on the basis of the plain language of the contract itself." *AFSCME*, 267 Mich App at 262. "If the contract language is clear and unambiguous, its

meaning presents a question of law for the courts to determine." *Id*. (quotation marks and citation omitted). "[T]he law presumes that the parties understand the import of a written contract and had the intention manifested by its terms." *Zurcher v Herveat*, 238 Mich App 267, 299; 605 NW2d 329 (1999) (quotation marks and citation omitted).

Attachment A to the master contract is predominantly composed of a five-page "scope of work" section detailing the landscaping activities that Cherry Oak Landscaping agreed to perform, including the frequency of, and unit price for, each service. It set forth the total price of the service for the season. The final page stated the full contract price, and provided:

> Any balance not collected within 30 days of due date is subject to a finance charge of 1.5% per month or 18% per annum. [OPV Partners] is responsible for all collection and attorney fees as necessary.

Finally, it stated, "This contract contains all the terms and conditions agreed on by the parties hereto."

The master contract refers to Attachment A multiple times. The trial court determined that the first reference to Attachment A, which was in the opening paragraph, incorporated the entirety of the attachment. That paragraph provides:

> This contract [between the parties is] for the monthly service of "Seasonal Landscaping" at Autumn Ridge Town Homes and Apartments, from the Estimate/Quote dated, April 1, 2019 "Attachment A" in the amount of Sixty-One Thousand Seven Hundred and Twenty-Five Dollars ($61,725.00) paid in 7 monthly payments of $10,287.50. All work must be executed based upon the specifications provided [in Attachment B.]

Additional references to Attachment A are included in Section III(A), which addresses the scope of services to be provided. First, Section III(A) provides that Cherry Oak Landscaping "agrees to furnish all labor, materials and equipment necessary to perform the work . . . . See attached vendor Estimate/'Attachment A.' " Second, in a heading, the contract states "Autumn Ridge Townhomes and Apartments Seasonal Landscaping Proposal—See 'ATTACHMENT A' FOR THIS DOCUMENT." The third and final references provide that the parties agree "that the scope of work detailed in 'Attachment B' will result in complete maintenance of the grounds as specified in 'Attachment A' and 'Attachment B' " and that "[t]he scope of work will result in the maintenance [of the property] in the described areas in 'Attachment A' and 'Attachment B.' "

On appeal, OPV Partners contends that the trial court erred by construing the initial paragraph as incorporating the entirety of Attachment A. We disagree. The initial paragraph states that the contract is "from the Estimate/Quote" set forth in Attachment A. It also includes reference to the bid price and the method of payment. Although OPV Partners maintains that this is merely an introductory recital that does not expand the master contract's reference to Attachment A beyond its scope-of-work provisions, the plain language in the paragraph defines what is included in the contract. In doing so, it relies heavily upon the contents of Attachment A to provide the details on what services are included in the contract, as well as the financial details of the

agreement between the parties. Thus, the plain language of the initial paragraph defined the contract to include the entirety of Attachment A.

The fact that the other references to Attachment A are made in the section of the master contract addressing the scope of services does not negate the plain language of the opening paragraph. Rather, the references only reflect that when considering the scope-of-work, both Attachments A and B should be referenced. There is no language indicating that the other provisions of Attachment A—including the attorney-fees provision and the financial details of the agreement—should be omitted from the contract. In essence, OPV Partners asserts that we should insert such a limitation into the contract by inferring that the references to Attachment A were meant to refer only to part of that document. We cannot, however, read such a limitation into the contract if there is no such limiting language included in the contract. See *Hastings Mut Ins Co v Safety King, Inc*, 286 Mich App 287, 292; 778 NW2d 275 (2009) (stating that unambiguous contract language must be enforced as written).

In sum, because the language of the master contract incorporates the entirety of Attachment A into the contract, the trial court did not err by granting Cherry Oak Landscaping partial summary disposition, nor did the court abuse its discretion by denying OPV Partners' motion for reconsideration.

III. TERMS OF THE CONTRACT

OPV Partners next argues that the trial court should have granted its motion for summary disposition because Cherry Oak Landscaping failed to submit with its invoices sworn statements and lien waivers. Because that condition precedent to payment was not satisfied, OPV Partners contends that it did not breach the contract by failing to pay Cherry Oak Landscaping for the services that it performed under the contract.

A condition precedent is "a fact or event that the parties intend must take place before there is a right to performance," and when "the condition is not satisfied, there is no cause of action for a failure to perform the contract." *Harbor Park Market, Inc v Gronda*, 277 Mich App 126, 131-132; 743 NW2d 585 (2007) (quotation marks and citations omitted). Here, it is undisputed that, in order to be entitled to payment, Cherry Oak Landscaping was required to submit sworn statements and lien waivers with each invoice. OPV Partners asserted that it was entitled to summary disposition because Cherry Oak Landscaping had not submitted the required sworn statements and lien waivers. In support of its motion for summary disposition, it attached an affidavit from one of its principal members, who averred that only the first invoice submitted had an attached lien waiver and that sworn statements were not attached to any invoices. However, Cherry Oak Landscaping submitted an affidavit from its principal, who averred that he had submitted six invoices to OPV Partners and that each "included a 'sworn statement and lien waiver[] . . . as required by the master contract," but that he could not provide copies because he had not saved paper or electronic copies of the submissions.

On appeal, OPV Partners argues that the affidavit from Cherry Oak Landscaping's principal was "defective and barren of anything that would have created an issue of material fact." It also complains about the limited documentation submitted by Cherry Oak Landscaping. However, given that one party averred that the required documentation was not provided and the

other party averred that it had been provided, there was a genuine question of material fact. See *White v Taylor Distributing Co, Inc*, 275 Mich App 615, 625; 739 NW2d 132 (2007) (stating that "courts may not resolve factual disputes or determine credibility in ruling on a summary disposition motion" (quotation marks and citation omitted)). Summary disposition, therefore, was not appropriate.

IV. WAIVER

A. STANDARD OF REVIEW

OPV Partners argues that the trial court erred by finding at trial that it had waived the requirement that Cherry Oak Landscaping submit lien waivers and sworn statements with its invoices. "Following a bench trial, we review for clear error the trial court's factual findings and review de novo its conclusions of law." *Ligon v Detroit*, 276 Mich App 120, 124; 739 NW2d 900 (2007). Findings of fact are clearly erroneous if this court is left with a definite and firm conviction that the trial court made a mistake. *Harbor Park Market*, 277 Mich App at 130.

B. ANALYSIS

A party may waive its contractual rights. *Nexteer Auto Corp v Mando America Corp*, 314 Mich App 391, 395; 886 NW2d 906 (2016). In order to do so, the party must intentionally relinquish or abandon a known right. *Id*. Because the parties retain the freedom to contract as they see fit, "mutuality is the centerpiece to waiving or modifying a contract." *Kelly-Stehney & Assoc, Inc v MacDonald's Indus Products, Inc*, 265 Mich App 105, 117; 693 NW2d 394 (2005). When a contracting party's course of conduct clearly and convincingly shows that the contracting party knowingly waived the enforcement of the terms of the contract, "the requirement of mutual agreement has been satisfied." *Quality Products & Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 373-374; 666 NW2d 251 (2003).

Here, Cherry Oak Landscaping's principal testified that the master contract provided for six lump-sum payments. He stated that he was provided with several instructions regarding how to invoice OPV Partners for the services provided. First, he was instructed to mail bills to OPV Partners' property manager, Real Estate Services Solution Company (RESSCO). Later, he was directed to process the invoices through a service called AvidXchange. Two weeks later, he was told to submit the invoices through a service called Yardi. Cherry Oak Landscaping's principal testified that he was never informed the reason why he was not paid despite asking OPV Partners about it several times, both in person and via e-mail. He explained that OPV Partners' manager told him that she did not write the checks. In turn, RESSCO responded that it could not find the invoices he had submitted. In an e-mail to OPV Partners, Cherry Oak Landscaping's principal stated that Cherry Oak Landscaping might stop work because of nonpayment. OPV Partners responded that it would forward the invoices. In a later e-mail, OPV Partners informed Cherry Oak Landscaping's principal that it had received and submitted two of Cherry Oak Landscaping's invoices. Additionally, the manager of OPV Partners' apartment complex, Janeen Dinnyes, sent an e-mail to RESSCO stating:

> I am meeting with Cherry Oak Landscaping for Autumn Ridge. They began services in May of this year and have yet to receive payment. They were instructed to send invoicing to [AvidXchange] and Yardi. Are you able to give me status on payment for this vendor?
>
> How should he process his payments moving forward? Continue doing both?
>
> He is going to halt services till he [receives payment] since he has yet to receive May's invoice.
>
> Let me know if you need anything else on my end.

One week later, Dinnyes emailed RESSCO's accounts-payable employee asking for a response to her earlier e-mail. That employee sent the following response:

> Tia and I checked both systems and did not find any invoices. Therefore, would you be able to email all invoices with services prior to June 1st to me? I will upload those into Avid for processing. Any invoices with services after June 1st would need to be emailed to Yardi. I have attached the vendor packet needed with instructions for the vendor on how to submit invoices. Thanks.

On the same day, Dinnyes sent Cherry Oak Landscaping's May and June invoices to RESSCO. The accounts-payable employee responded that she had "received both invoices and . . . submitted them for processing." Approximately five weeks later, Cherry Oak Landscaping's principal e-mailed Dinnyes:

> I am inquiring into the ongoing matter of non-payment with our lawn care services. As of today, September 9th 2019, I have yet to receive one payment from Autumn Ridge/Ressco Management and am halting further services until a payment arrangement or payment has been made. I am concerned that Cherry Oak Landscaping will not be receiving payment as I have already delivered invoices and sent requests to communicate on this matter. The Lawn care season is now ending in one month. Can you please take the appropriate time to get in touch with me so arrangements can be made? Or inform me of the status of any payment and when I can expect to have a check in a PO BOX? Thank you in advance. I look forward to hearing from you.

Dinnyes responded that she had "just sent your email over to my corporate office regarding your past due invoices. I am so sorry this has not been handled yet. As soon as I hear word, I will update you." Dinnyes also emailed RESSCO that Cherry Oak Landscaping had discontinued working. She also resubmitted the unpaid invoices and asked if there was anything she could do to help expedite payment.

Dinnyes e-mailed Cherry Oak Landscaping's principal and advised:

> I know that accounting is working on getting payment to you. We had a software change and they have come across several roadblocks that they are working through.

Finally, the record reflects that within minutes of receiving another e-mail from Cherry Oak Landscaping's principal, Dinneys responded that she would "continue to follow up on payment for you and keep you posted."

At trial, Cherry Oak Landscaping's principal testified that, after Cherry Oak Landscaping filed its complaint, he learned from its lawyer that OPV Partners was asserting that it did not pay the invoices because the invoices were not submitted with lien waivers and sworn statements. He resubmitted the invoices with lien waivers and notarized statements asserting that the services invoiced had been performed. He also sought, unsuccessfully, to ascertain what specific language RESSCO and Yardi wanted to be included in the lien waivers.

RESSCO's vice president of accounting testified that she found only one invoice from Cherry Oak Landscaping, dating from May 2019, and its attached lien waiver. She did not know why Cherry Oak Landscaping had not been paid. She added that she had not seen the resubmitted invoices with lien waivers and sworn statements, but she believed that the lien waivers and sworn statements were acceptable if they had gone through the approval process.

Based upon the foregoing, the trial court did not clearly err by finding that OPV Partners, through its communications with Cherry Oak Landscaping, waived its right to receive lien waivers and sworn statements with the invoices. Despite the numerous communications between Cherry Oak Landscaping and OPV Partners regarding the failure to pay the submitted invoices, OPV Partners did not mention the missing documentation until it moved for summary disposition in July 2021. Rather, it relied on other entities to process the invoices, advocated for Cherry Oak Landscaping to receive payment, and actively attempted to facilitate payment to Cherry Oak Landscaping. The trial court did not clearly err by finding that the communications, coupled with OPV Partners' silence as to the need for lien waivers and sworn statements, constituted a waiver of the provisions regarding lien waivers and sworn statements.[1]

IV. ATTORNEY FEES

A. STANDARD OF REVIEW

OPV Partners next argues that the trial court erred by awarding attorney fees and supplemental attorney fees to Cherry Oak Landscaping. We review for an abuse of discretion a

[1] Given our determination that the trial court did not clearly err by finding waiver, we need not address OPV Partners' argument that the trial court erred by finding that it forfeited its right to receive lien waivers and sworn statements.

trial court's decision to award attorney fees and its determination as to the reasonableness of the fees awarded. *In re Temple Marital Trust*, 278 Mich App 122, 128; 748 NW2d 265 (2008).

B. ANALYSIS

"Contractual provisions for payment of reasonable attorney fees are judicially enforceable." *Fleet Business Credit v Krapohl Ford Lincoln Mercury Co*, 274 Mich App 584, 589; 735 NW2d 644 (2007). When evaluating the reasonableness of requested attorney fees, the court should consider:

> (1) the skill, time and labor involved; (2) the likelihood, if apparent to the client, that the acceptance of the employment will preclude other employment by the lawyer; (3) the fee customarily charged in that locality for similar services; (4) the amount in question and the results achieved; (5) the expense incurred; (6) the time limitation imposed by the client or the circumstances; (7) the nature and length of the professional relationship with the client; (8) the professional standing and experience of the attorney; and (9) whether the fee is fixed or contingent. [*In re Temple Marital Trust*, 278 Mich App at 138.]

In this case, Cherry Oak Landscaping initially sought $85,342 in attorney fees, $33,366 in interest, and $1,502 in costs. In support of its request, it submitted an affidavit from its lawyer and an itemized billing statement. OPV Partners opposed the request, contending that a "further detailing of time" was necessary to determine the amount of fees that would be reasonable. Following a hearing, the court awarded $64,526 in attorney fees. In doing so, the court discussed several relevant factors it used to determine the award, including the attorney's qualifications, the difficulty of the case, the expenses, the history of the relationship between client and lawyers, the limits that representing the client would place on the lawyer's ability to perform other work, and the fee arrangement. It also reduced the hours from 73 to 37, stating that even that sounded "like too much time."

On appeal, OPV Partners does not challenge any specific finding by the trial court. Rather, it asserts that because the court stated that the number of hours seemed excessive, that the award of attorney fees was likewise excessive. However, the court clarified that it was not reducing the hours further because "the court is mindful of the fact that the trial one prepared for by necessity is not always the trial one has." Thus, the court's reflection that the hours, after being reduced, still seemed excessive was not a finding that the fees were unreasonable.

Additionally, OPV Partners suggests that the award of a total of $73,338 in attorney fees and supplemental attorney fees is excessive because this was a simple collections case involving a $52,321 judgment. OPV Partners points out that no depositions were taken and the case culminated in a one-day bench trial with three witnesses. Indeed, the trial court found that it was a straight forward case that was not novel. Yet, the court also found puzzling that OPV Partners "seemed determined not to pay for the legitimately provided service," and the court noted that OPV Partners' lawyer "did nitpick and challenge anything possible." Based upon the court's statements, it is clear that it attributed some of the hours billed to OPV Partners' conduct, which increased Cherry Oak Landscaping's need for legal assistance. See *Beach v Kelly Auto Group,*

Inc, 482 Mich 1103; 757 NW2d 868 (2008) (YOUNG, J., concurring) (stating that the defendant's unreasonable approach to the litigation resulted in a "disproportionate amount of time on the case" and increased legal fees). The award of attorney fees in this case is, therefore, not unreasonable simply because the damages for the breach of contract were less than the amount of attorney fees awarded.

Next, OPV Partners argues that any attorney fees owed should not accrue until Cherry Oak Landscaping completed its billings with sworn statements in March 2021. However, the trial court concluded that OPV Partners waived the contractual obligation that Cherry Oak Landscaping submit lien waivers and sworn statements. As a result, Cherry Oak Landscaping was entitled to collect on its invoices without such delay and it is entitled to attorney fees that accrued prior to it resubmitting its invoices during the pendency of the case.

OPV Partners also contends that the trial court should not have awarded any supplemental attorney fees because such fees were attributable to Cherry Oak Landscaping's efforts to obtain the initial award of attorney fees. But the contract provided that OPV Partners was "responsible for *all* collection and attorney fees as necessary." (Emphasis added.) Thus, the language of the contract allowed Cherry Oak Landscaping to receive reasonable attorney fees made necessary by OPV Partners' opposition to the initial request for attorney fees. Moreover, although OPV Partners argues that the unreasonableness of the initial award of attorney fees renders the award of supplemental attorney fees unreasonable, as noted above, the initial award of attorney fees was not unreasonable.

Finally, Cherry Oak Landscaping requests that we remand to the trial court for a determination of reasonable appellate attorney fees. OPV Partners has not opposed this request. As noted *supra*, the contract provides that "[OPV Partners] is responsible for all collection and attorney fees as necessary." The attorney-fees provision is clearly broad and does not exclude the award of appellate attorney fees. Consequently, we remand to the trial court to determine what appellate attorney fees are reasonable in this case.

Affirmed, but remanded for a determination as to the reasonableness of appellate attorney fees. Cherry Oak Landscaping may tax costs as the prevailing party. MCR 7.219(A). We do not retain jurisdiction.

/s/ Colleen A. O'Brien
/s/ Michael J. Kelly
/s/ Kathleen A. Feeney