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**STATE OF MINNESOTA
IN COURT OF APPEALS
A10-620**

The Church of Saint Victoria
d/b/a Saint Victoria Church,
Respondent,

vs.

Western Surety Company,
Intervenor as Surety for Westra Construction, Inc.
and Assignee of Claims from various Claimants,
Appellant.

**Filed January 11, 2011
Affirmed
Lansing, Judge**

Carver County District Court
File No. 10-CV-06-403

John C. Gunderson, Meier, Kennedy & Quinn, St. Paul, Minnesota (for respondent)

Joshua B. Levy (pro hac vice), Crivello Carlson, S.C., Milwaukee, Wisconsin; and

Sheldon R. Brown, Young Brown & Pagel, LLP, Annandale, Minnesota (for appellant)

Considered and decided by Lansing, Presiding Judge; Minge, Judge; and Crippen,
Judge.

UNPUBLISHED OPINION

LANSING, Judge

This appeal from posttrial motions in litigation over the terms of the payment and performance bonds for a failed construction project raises three issues: designation of prevailing-party status for assessment of costs and disbursements, allocation of attorneys' fees, and suspension of interest accrual on a judgment. Because the district court did not abuse its discretion by taxing costs, allocating attorneys' fees, and terminating the accrual of interest on the judgment when it was offset by a reciprocal judgment, we affirm.

FACTS

The Church of St. Victoria contracted with Westra Construction, Inc. in August 2003 to remodel its existing church and to construct an addition. The contract was for approximately \$6.7 million, subject to project changes. As part of the contract, St. Victoria obtained payment and performance bonds that were issued by Western Surety Company. The bonds incorporated, by reference, the entire construction contract. The construction contract and the surety bonds were standard forms supplied by the American Institute of Architects. Under the agreement Westra functioned as the general contractor, but the contract also conferred authority on the project architect to approve payment applications and to certify whether an owner had good grounds to declare a contractor in default.

The work on the project began in August 2003. Payment issues surfaced in December 2004 and carried into 2005. The issues grew out of Westra's misappropriation of St. Victoria's progress payments. As a result, subcontractors notified St. Victoria that

they were considering filing or had filed mechanics' lien claims. During this time St. Victoria kept Western informed of subcontractors' reports of Westra's late payments and defaults.

In April 2005 Westra misappropriated a \$484,751.51 payment. The project architect certified that grounds existed for St. Victoria to terminate its contract with Westra. The project architect also agreed with the amounts that St. Victoria computed for damages, costs, and fees caused by the misappropriation. St. Victoria declared Westra in default in June 2005 and timely notified Western of the default. When Westra ceased all operations in July, the project was incomplete. By that time, St. Victoria had paid Westra more than \$6.2 million in progress payments. The project architect certified the \$6.2 million amount computed by St. Victoria and also certified contract retainage of \$212,619.

The payment and performance bonds required Western, as surety, to step into the shoes of Westra and perform the remaining obligations under the construction contract. Despite this obligation, Western did not promptly hire an on-site manager, never provided an accounting of Westra's misappropriated payments, and failed to properly document pay applications as required for the architect to certify St. Victoria's progress payments. St. Victoria, citing Western's failure to provide adequate accounting and the architect's resulting inability to certify pay applications, made no further payments on the construction contract after Westra's default.

Western's suretyship also imposed an obligation to defend and indemnify St. Victoria against the mechanics' lien claims. From February 2005 through September

2005, St. Victoria tendered the mechanics' lien claims to Western for defense and payment. Western, however, did not defend St. Victoria against all of the liens, which resulted in unpaid subcontractors filing mechanics' liens and a lien-foreclosure claim against St. Victoria in April 2006. In December 2006 Western took assignment of the lien claims and intervened in the lien-foreclosure action brought by subcontractors against St. Victoria. Western also filed its own lien-foreclosure action and contract claims against St. Victoria, alleging St. Victoria had outstanding payments on the construction contract of at least \$572,219.56.

St. Victoria moved for summary judgment on the contract claims and for dismissal of the lien-foreclosure action. The district court denied St. Victoria's summary-judgment motion but realigned the parties by amending the caption to designate St. Victoria as the plaintiff and Western as the defendant. The mechanics' lien claims were effectively dismissed and not further litigated.

The action was tried to a jury in September 2008. The primary issues at trial were the date on which the project was substantially completed; the amount St. Victoria owed under the construction contract; the credits to which St. Victoria was entitled under the construction contract; the date that St. Victoria's payment on the construction contract became due, and whether Western failed to fulfill its construction-contract and performance-bond obligations, including providing St. Victoria with an accounting.

The jury returned a special verdict, finding that (1) St. Victoria owed Western \$551,554 on the construction contract; (2) St. Victoria was entitled to a credit of \$298,464 for modifications or changes to the contract and a credit of \$94,254 for

improper workmanship or construction; (3) St. Victoria was entitled to professional fees of \$106,046 incurred as a result of Westra's default; and (4) St. Victoria's payment to Western under the contract became due on September 28, 2009, the date of the verdict. Western and St. Victoria agreed to reserve the issue of additional attorneys' fees and the district court, accepting the reservation, entered judgment for Western in the amount of \$52,790.

Both Western and St. Victoria filed motions for costs and disbursements under Minn. Stat. §§ 549.02, 549.04 (2008). St. Victoria's motion also included a request for attorneys' fees. The district court determined that St. Victoria was the prevailing party, granted St. Victoria's motion for \$36,318.23 in costs and disbursements, and denied Western's motion for costs and disbursements. The district court found that St. Victoria was entitled to \$150,245.50 for reasonable attorneys' fees caused by Westra's default and Western's failure to perform and complete the construction contract as required by the bonds. Finally, the court offset Western's \$52,790 judgment against the costs, disbursements, and attorneys' fees owed to St. Victoria. The district court ordered that Western was entitled to one-and-a-half-percent monthly interest on the \$52,790 judgment from September 28, 2009, the date of the jury verdict, to February 10, 2010, the date of the order for fees, costs, and disbursements.

Western appeals, challenging the district court's prevailing party determination and the consequential costs and disbursements, the allocation of attorneys' fees, and the suspension of interest accrual on its \$52,790 judgment.

DECISION

I

We first address the district court's determination that St. Victoria, as the prevailing party, was entitled to costs and disbursements. Minnesota Statutes sections 549.02 and 549.04 authorize the district court to determine the prevailing party's costs and disbursements. A district court's determination of "which party, if any, qualifies as a prevailing party" is reviewed for abuse of discretion. *Benigni v. Cnty. of St. Louis*, 585 N.W.2d 51, 54-55 (Minn. 1998). Applying this standard, the district court's decision will be sustained on appeal unless it is an abuse of discretion, arbitrary or capricious, or based on an erroneous view of the law. *Montgomery Ward & Co. v. Cnty. of Hennepin*, 450 N.W.2d 299, 306 (Minn. 1990). When making a prevailing-party determination, the district court considers the "general result" and which party "in the view of the law, succeeded in the action." *Borchert v. Maloney*, 581 N.W.2d 838, 840 (Minn. 1998). A prevailing-party determination requires "a careful weighing of the relative success of the parties," which reserves "a certain amount of discretion in the district court." *Posey v. Fossen*, 707 N.W.2d 712, 715 (Minn. App. 2006).

Western argues that it prevailed at trial because the verdict and judgment were in its favor. The jury's special verdict, however, granted relief not only to Western, but also to St. Victoria. Additionally, the fact that Western obtained a \$52,790 judgment against St. Victoria does not conclusively determine that it is the prevailing party. *See Haugland v. Canton*, 250 Minn. 245, 253-54, 84 N.W.2d 274, 280 (1957) (rejecting argument that

litigant recovering money judgment was prevailing party when judgment resulted from losing “primary” claim).

We conclude that the district court properly considered the “overall posture” of the case from the “commencement of the mechanics’ liens filings until the jury’s verdict.” *See Borchert*, 581 N.W.2d at 840 (considering “general result” of litigation). We base this conclusion on three grounds.

First, the district court considered that this litigation began as a mechanics’ lien action, which is an action in equity. *See Northland Pine Co. v. Melin Bros.*, 136 Minn. 236, 237, 161 N.W. 407, 408 (1917) (noting that equitable principles are applicable in enforcing mechanics’ liens). In the initial equitable action, Western, the surety, took assignment of the mechanics’ lien claims against St. Victoria, the entity it was contractually obligated to defend and indemnify, and pursued the foreclosure action against St. Victoria. *See In re Gershcov’s Will*, 261 N.W.2d 335, 340 (Minn. 1977) (“A court sitting as a court of equity, in its discretion, may determine which party is the prevailing party.”). St. Victoria prevailed in its defense of the foreclosure action and took the necessary steps to address Western’s breach-of-contract claims.

Second, the district court took into consideration that Western failed to perform its surety obligations when it did not timely intervene to cure Westra’s default. It failed to promptly hire an on-site manager or organize completion of the project, which created significant project delays.

Third, the district court also took into account the full impact of the jury’s findings. Although the jury found that St. Victoria owed Western \$551,554 on the

construction contract, this amount was \$300,000 less than the amount Western claimed it was owed. Against this amount, the jury determined that St. Victoria was entitled to substantial credits for change orders and improper workmanship. Significantly, the jury determined that St. Victoria's payment for the amount it owed on the contract only became due on the date of the verdict. This is consistent with St. Victoria's argument that it was willing to pay, but could not reasonably pay until Western provided an accounting for Westra's misappropriated payments. At the end of the litigation, St. Victoria had received equitable relief, was successful on many of the issues disputed at trial, and had received substantial monetary relief. The district court's determination that St. Victoria was the prevailing party was not an abuse of discretion.

II

Western challenges St. Victoria's right to attorneys' fees. Attorneys' fees are recoverable only when authorized by contract or statute. *Dunn v. Nat'l Beverage Corp.*, 745 N.W.2d 549, 554 (Minn. 2008). We will not reverse an order for attorneys' fees unless the district court's determination is an abuse of discretion. *Becker v. Alloy Hardfacing & Eng'g Co.*, 401 N.W.2d 655, 661 (Minn. 1987).

The district court concluded that Westra's default and Western's failure to perform as obligated by the bonds caused St. Victoria to incur attorneys' fees to defend itself against Western's initial mechanics' lien claims and subsequent contract claims. It therefore granted St. Victoria reasonable attorneys' fees. Western asserts that neither the performance bonds nor the construction contract entitles St. Victoria to attorneys' fees. It bases its argument on five separate grounds.

First, Western contends that it fully performed its bond obligations and no attorneys' fees should be assessed for a failure of performance. The performance bond requires that Western pay for "legal . . . costs . . . resulting from the actions or failure to act of the Surety under Paragraph 4." Under paragraph 4 of the contract, four options are available to a surety when fulfilling its obligations after a contractor default. A surety must choose one option and act promptly at its own expense. The option Western chose was to perform and complete the construction contract. But Western failed to act promptly, provide financing for completion of the contract, or comply with all of the contract's requirements. Evidence in the record demonstrates that Westra did not provide accurate accounting and that Western, as surety, failed to address this default; Western failed to promptly hire an on-site project manager; Western did not provide the lien waivers from payments made to subcontractors, which were necessary for the architect to process subsequent pay applications; Western did not provide St. Victoria with an accounting on Westra's misappropriations; and Western never provided documentation to St. Victoria so that it could conduct its own accounting and determine what it owed on the construction contract. Because Western did not promptly undertake performance under the bonds and failed to complete the construction contract, it did not fulfill its surety obligations.

Second, Western contends that the performance bond does not entitle St. Victoria to attorneys' fees because the fees were incurred in pursuit of its contract claims, not as a result of Westra's default. The bond obligates Western to pay the "legal . . . costs resulting from the [c]ontractor's [d]efault." In light of Western's flawed performance as

surety, Western's attempt to separate the contract claims from the costs caused by the default is unconvincing. Western was obligated to defend and indemnify St. Victoria against the mechanics' lien claims but instead took assignment of two liens and prosecuted the foreclosure claim, forcing St. Victoria to defend itself against Western. Western's deficient performance in handling the lien claims and in performing and completing the construction contract cannot be separated from the interrelated contract claims.

Western argues that isolating the contract claims from the fees incurred because of the contractor default is supported by decisions in other jurisdictions that have interpreted the term "legal costs resulting from the contractor's default" that is used in the American Institute of Architects bond form. Specifically, that in *U.S. Fid. & Guar. Co. v. Braspetro Oil Servs. Co.* and *Tri-State Marine Constr., LLC v. Acuity*, the courts held that the surety was not obligated to pay the challenged attorneys' fees because the fees did not result from the contractor's default but from litigation with the surety itself. 369 F.3d 34, 83 (2d Cir. 2004); No. 3:03-0344 (M.D. Tenn. Apr. 21, 2006). These cases are distinguishable, however, because neither involved an allegation nor finding that the surety had failed to perform as obligated under paragraph 4 of the performance bond. In this action, the district court found that Western failed to perform its suretyship obligations under the bond, and the record supports this finding.

Third, Western alleges that the performance bond does not entitle St. Victoria to attorneys' fees because it refused to "commit the balance of the contract price," a condition precedent in the bond. The balance of the contract price is the "total amount

payable by [St. Victoria] to [Western] under the construction contract after all proper adjustments have been made.” We reject this argument because the record demonstrates that St. Victoria was willing to tender the amount it owed on the contract, but could not determine that amount until Western provided an adequate accounting for the misappropriated payments, numerous change orders, and improper workmanship credits.

Fourth, Western asserts that the construction contract does not entitle St. Victoria to attorneys’ fees because the contract only allows for attorneys’ fees paid in discharging a lien. This argument is unpersuasive because it requires separating St. Victoria’s contract claims from the initial lien claims, Westra’s default, and Western’s failure to satisfy its obligations as surety. The record does not support this division. Additionally, the district court’s basis for granting attorneys’ fees was not the construction contract, but the bonds.

Finally, Western erroneously alleges that St. Victoria is not entitled to additional attorneys’ fees because the jury’s verdict granted professional fees, which included some attorneys’ fees. The professional fees in the jury’s verdict included some of the legal fees incurred from Westra’s default and defending the mechanics’ liens that St. Victoria requested at trial. But the jury did not consider the issue of the additional attorneys’ fees, no evidence was presented on this issue, and St. Victoria and Western both agreed to reserve the issue for posttrial motions.

Because St. Victoria incurred legal fees defending itself in Western’s lien-foreclosure action and from litigating the contract claims that resulted from Westra’s

default and Western's failure to fulfill its suretyship obligations, we conclude the district court did not abuse its discretion by granting reasonable attorneys' fees to St. Victoria.

III

Western's last claim is that the district court's order suspending interest accrual on its \$52,790 judgment against St. Victoria is reversible error. Western contends that the interest, by law, accrues until the judgment is paid. On this ground Western also argues that it is entitled to postjudgment interest upon reversal. Western correctly states that interest accrues on a judgment from the time it is entered until it is paid. Minn. Stat. § 549.09, subd. 2 (2010). Western's judgment, however, was set off against the \$36,318.23 in costs and disbursements and the \$150,245.50 in attorneys' fees granted to St. Victoria by the district court's subsequent ruling. District courts may use the equitable doctrine of setoff at their discretion. *LaFleur v. Schiff*, 239 Minn. 206, 211, 58 N.W.2d 320, 324 (1953). The district court's setoff is not an abuse of discretion. Because we affirm the district court on all issues raised on appeal, we do not address Western's claim for postjudgment interest.

Affirmed.