

[Cite as *Portage Roofing v. Coates Constr.*, 2017-Ohio-5710.]

STATE OF OHIO, MAHONING COUNTY
IN THE COURT OF APPEALS
SEVENTH DISTRICT

PORTAGE ROOFING, INC.	)	
	)	
PLAINTIFF-APPELLANT	)	
	)	CASE NO. 15 MA 0175
VS.	)	
	)	OPINION
COATES CONSTRUCTION, INC., et al.	)	
	)	
DEFENDANTS-APPELLEES	)	

CHARACTER OF PROCEEDINGS: Civil Appeal from the Court of Common
Pleas of Mahoning County, Ohio
Case No. 11 CV 1539

JUDGMENT: Affirmed.

APPEARANCES:

For Plaintiff-Appellant

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For Defendants-Appellees

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JUDGES:

Hon. Mary DeGenaro
Hon. Gene Donofrio
Hon. Carol Ann Robb

Dated: June 21, 2017

[Cite as *Portage Roofing v. Coates Constr.*, 2017-Ohio-5710.]
DeGENARO, J.

{¶1} Plaintiff-Appellant, Portage Roofing Inc., appeals the Mahoning County Court of Common Pleas judgment granting summary judgment and awarding attorney's fees to Defendants-Appellees, Mike Coates Construction, et al. As these arguments are meritless, the trial court's judgment is affirmed.

{¶2} This appeal involves a construction contract dispute between Coates, a general contractor, and Portage, a roofing subcontractor, regarding two separate projects: The Robert G. Hyre Community Learning Center in Summit County and the YWCA in Mahoning County.

{¶3} Relative to this appeal, on January 5, 2011, American Builders & Contractors Supply Co. (ABC) filed suit in Summit County regarding the Hyre project against four defendants including Coates, which was the general contractor on that project and Portage a subcontractor. The claim against Portage alleged that Portage ordered roofing materials from ABC and never paid for them. The claim against Coates alleged it was jointly liable for the amount owed by Portage for those materials.

{¶4} Coates filed a cross-claim against Portage for indemnification. On May 2, 2011, Coates sought leave to amend its cross-claim against Portage so that all disputes between Coates and Portage regarding the Hyre and YWCA projects "can be resolved in a single hearing," which Portage opposed on May 9, 2011. As to the Hyre project, Coates sought to assert claims for Portage's failure to comply with the project specifications and the costs Coates incurred to replace the defective work and complete the project. On May 26, 2011, the trial court in the Summit County action denied this request.

{¶5} In the meantime, on May 16, 2011, Portage filed a complaint in Mahoning County against Coates alleging breach of contract, fraud, violation of the Ohio Prompt Pay Act, unjust enrichment and foreclosing on a mechanic's lien filed, all based solely upon the YWCA project. On June 14, 2011, Coates filed an answer that denied all claims and asserted various affirmative defenses. Further, Coates asserted four counterclaims against Portage. Regarding the YWCA project, Coates

asserted breach of contract and unlawful affidavit of mechanic's lien. Relative to the Hyre project, Coates argued breach of contract and that Portage filed an unlawful attested account.

{¶16} Portage filed an answer to Coates' counterclaim on June 22, 2011, denying the two YWCA project counterclaims and pursuant to the jurisdictional priority rule, moved to dismiss the two Hyre project counterclaims as those claims were being litigated in Summit County. Coates replied, arguing that the specific claims for the Hyre project were not part of the Summit County case; the trial court there having denied Coates' request to amend its cross-claim to assert those claims.

{¶17} The parties filed reciprocal motions for summary judgment. On April 9, 2012, the magistrate granted Coates motion and entered judgment on the counterclaims in the amount of \$125,384.70, plus reasonable attorney fees. Further, the magistrate granted Portage summary judgment on its complaint in part for work performed regarding the YWCA project in the amount of \$37,081.27. This figure was set off against the money owed to Coates from Portage's breach of contract relating to the Hyre project.

{¶18} Portage filed objections to the magistrate's decision arguing that the portion awarding Portage judgment should be upheld and that the trial court had no jurisdiction over claims related to the Hyre project; and as such, judgment in Coates' favor should be set aside. Coates opposed the objections and also filed an application for attorney fees.

{¶19} On June 12, 2012, the trial court overruled Portage's objections and upheld the magistrate's decision in its entirety. Portage appealed. On August 8, 2012, this Court stayed the appeal and remanded the matter for determination of reasonable attorney fees. After a hearing in 2012 and a 2014 motion by Coates requesting a ruling, the magistrate awarded Coates the requested \$42,630.50 in reasonable attorney fees and Portage filed timely objections. On September 9, 2015, the trial court overruled the objections and upheld and adopted the magistrate's decision in its entirety.

Jurisdictional Priority Rule

{¶10} In its first of three assignments of error Portage asserts:

The Mahoning County trial court erred as a matter of law in granting summary judgment in favor of Coates when a Summit County trial court with the same case had exclusive jurisdiction under the "jurisdictional priority rule" defined by the Ohio Supreme Court.

{¶11} Regarding the jurisdictional priority rule the Supreme Court of Ohio has stated:

Under the jurisdictional-priority rule, however, " '[a]s between [state] courts of concurrent jurisdiction, the tribunal whose power is first invoked by the institution of proper proceedings acquires jurisdiction, to the exclusion of all other tribunals, to adjudicate upon the whole issue and to settle the rights of the parties.' " *State ex rel. Racing Guild of Ohio v. Morgan*, 17 Ohio St.3d 54, 56, 476 N.E.2d 1060 (1985), quoting *State ex rel. Phillips v. Polcar*, 50 Ohio St.2d 279, 364 N.E.2d 33 (1977), syllabus.

To be sure, it is a condition of the jurisdictional-priority rule that the claims and parties be the same in both cases, so "[i]f the second case is not for the same cause of action, nor between the same parties, the former suit will not prevent the latter." See *State ex rel. Judson v. Spahr*, 33 Ohio St.3d 111, 113, 515 N.E.2d 911 (1987).

Nevertheless, we have also recognized that the jurisdictional-priority rule can apply even when the causes of action and relief requested are not exactly the same, as long as the actions present part of the same "whole issue." *State ex rel. Otten v. Henderson*, 129 Ohio St.3d 453, 2011-Ohio-4082, 953 N.E.2d 809, ¶ 29; *State ex rel. Sellers v. Gerken*,

72 Ohio St.3d 115, 117, 647 N.E.2d 807 (1995).

State ex rel. Dunlap v. Sarko, 135 Ohio St.3d 171, 2013-Ohio-67, 985 N.E.2d 450, ¶ 9-11.

{¶12} The action in Summit County was initiated by ABC against Coates, Portage, and other defendants. Relative to the claims against Portage and Coates, ABC alleged it was owed money by Portage and Coates for materials supplied to Portage on the Hyre project. Coates attempted to bring in all of its claims against Portage in Summit County, which was opposed by Portage and rejected by the trial court.

{¶13} After Portage filed a complaint against Coates in Mahoning County seeking damages arising from the YWCA project, Coates filled a counterclaim asserting the all claims it had against Portage including those regarding the Hyre project and the YWCA. None of these claims were at issue in the Summit County action. It is disingenuous for Portage to now contend Coates' claims were pending in Summit County when Portage opposed Coates' efforts to amend its answer to include these cross-claims. Thus, the jurisdictional priority rule is not applicable and the trial court did not err in refusing to apply the rule here. Accordingly, Portage's first assignment of error is meritless.

Summary Judgment

{¶14} Portage asserts in its second of three assignments of error:

The Mahoning County trial court erred as a matter of law in granting summary judgment in favor of Coates even if it had jurisdiction where Portage Roofing's summary judgment evidence raised genuine issues of material fact with respect to Coates' claim.

{¶15} When reviewing a trial court's decision to grant summary judgment, an appellate court review is de novo. *Comer v. Risko*, 106 Ohio St.3d 185, 2005-Ohio-4559, 833 N.E.2d 712, ¶ 8. Summary judgment will be granted when the movant

demonstrates, viewing the evidence most strongly in favor of the nonmovant, that reasonable minds can find no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Doe v. Shaffer*, 90 Ohio St.3d 388, 390, 2000-Ohio-186, 738 N.E.2d 1243. A material fact is one that affects the outcome of the suit under the applicable substantive law. *Bank v. Miller*, 7th Dist. No. 13 MA 119, 2015-Ohio-2325, ¶ 26.

{¶16} Coates moved for summary judgment asserting the undisputed evidence established Portage breached the Hyre project contract by installing non-conforming roofing materials. Coates contends the contract required that the fascia was to be fabricated from aluminum .080 inches thick, and Portage installed fascia that measured .040 inches thick.

{¶17} Portage opposed summary judgment asserting, inter alia, there remained genuine issues of material fact demonstrated by the attached affidavit of its president Leroy Devitt. In his affidavit, Devitt acknowledged that Portage installed non-conforming fascia, but stated that the owner's specifications changed several times and the thickness of the fascia used was approved by the owner's representative. Portage further contended that the fascia used was of an adequate thickness and thus, substantially complied with the contract.

{¶18} Days later Coates moved to strike Devitt's affidavit on the basis that Devitt did not have personal knowledge and that the affidavit directly contradicted prior deposition testimony. The magistrate agreed stating:

Averments lacking in personal knowledge will be disregarded. Likewise, Mr. Devitt's averments relating to "the owner's representative" lack specific facts and appear to be substantially in conflict with his deposition testimony, and therefore will not be considered.

{¶19} Without Devitt's affidavit, Portage has failed to create an issue of material fact precluding summary judgment; further, Portage fails to direct our attention to any surviving portion of the affidavit that demonstrates an issue of fact.

Although the parties disagree as to whether the contract was amended to change the thickness of the fascia, this is irrelevant. Portage asserted that the contract was amended to reduce the fascia thickness from .080 to .050 inches thick, but admitted that it installed fascia only .040 inches thick. Regardless of which fascia thickness standard Portage's performance is measured against, Portage still failed to meet the requirement. Accordingly, there is no genuine issue of material fact and Portage's second assignment of error is meritless.

Attorney's Fees

{¶20} In the third and final assignment of error, Portage asserts:

The Mahoning County trial court erred as a matter of law in granting attorney fees to Coates on Coates' summary judgment even if it had jurisdiction where Coates' attorney admitted that 70% of his fees were incurred in the Summit County case.

{¶21} We review a trial court's decision on whether to award attorney's fees under an abuse of discretion standard. *Bittner v. Tri-Cty. Toyota, Inc.*, 58 Ohio St.3d 143, 146, 569 N.E.2d 464 (1991). "An abuse of discretion means the trial court's decision is unreasonable based upon the record; that the appellate court may have reached a different result is not enough to warrant reversal." *Smith v. Smith*, 7th Dist. No. 14 CA 0901, 2016-Ohio-3223, ¶ 13.

{¶22} The scope of Portage's argument merely restates the assigned error; that Coates' attorney testified that 70 percent of the fees were actually from the Summit County case.

{¶23} Coates responds that not only is this an inaccurate representation, Portage also failed to support its argument with any citation to the record. Coates' attorney testified that the Summit County case and this case were separate matters, were assigned different identifying file numbers, and were billed separately from the beginning; none of the time billed in the Mahoning County case was related to the Summit County case. Further, Coates submitted an itemized billing substantiating

this testimony.

{¶24} Portage is attempting to confuse the issue by equating time spent on the Hyre project as time spent on the Summit County case. Two of Coates' counterclaims in the Mahoning County case dealt exclusively with the Hyre project; as such, litigating those counterclaims generated billable time. A review of the record demonstrates that the issues involved with the Hyre project were more time intensive than the YWCA project. Thus, counsel would have expended more time on Coates' claims arising from the Hyre project.

{¶25} Accordingly, the trial court did not abuse its discretion in awarding the requested attorney fees to Coates, and Portage's final assignment of error is meritless.

{¶26} In sum, the judgment of the Mahoning County Court of Common Pleas that granted summary judgment and awarded attorney's fees to Mike Coates Construction is affirmed.

Donofrio, J., concurs.

Robb, P. J., concurs.