19-121184-A

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

IN RE A PURPORTED LIEN AGAINST PROPERTY OF THE DISTRICT AT CITY CENTER, LLC,

HAREN & LAUGHLIN CONSTRUCTION COMPANY, INC.,
Movant / Appellee,

vs.

KANSAS CITY STEEL WERX, INC.,
Claimant / Appellant.

On Appeal from the District Court of Johnson County
Honorable James F. Vano, District Judge
District Court Case No. 2018-ML-275

REPLY BRIEF OF THE APPELLANT

JONATHAN STERNBERG, Kan. #25902
Jonathan Sternberg, Attorney, P.C.
2323 Grand Boulevard, Suite 1100
Kansas City, Missouri 64108
Telephone: (816) 292-7000
Facsimile: (816) 292-7050
jonathan@sternberg-law.com

COUNSEL FOR APPELLANT
KANSAS CITY STEEL WERX, INC.

Table of Contents

Reply Argument and Authorities

Rule 6.05 Statement

This reply brief is made necessary by new material contained in the appellee's brief. Specifically, that new material is the appellee's arguments:

(1) that the appellant could not claim "retainage" as a portion of its mechanic's lien (Brief of the Appellee ["Aple.Br."] 8);

(2) conceding the district court erred in holding that the Rules of Civil Procedure do not apply to this case, but arguing it is not reversible (Aple.Br. 12-15);

(3) that the appellant improperly relies on legislative history behind K.S.A. 58-4301 (Aple.Br. 15);

(4) analogizing this case to *In re Mechanic's Lien Against City of Kan. City*, 37 Kan.App.2d 440, 154 P.3d 515 (2007) (Aple.Br. 15-16);

(5) that the law of Kansas "requires strict compliance with the procedure prescribed in the statute in order to perfect a mechanic's lien" (Aple.Br. 13);

(6) that the portions of two Texas decisions on which the appellant relied in its opening brief were "dicta" (Aple.Br. 18); and

(7) that the appellant's lien statement was not amendable below under K.S.A. § 60-1105(b) because the action below was not one for enforcement of the lien (Aple.Br. 23-24).

* * *

I. The law of Kansas allows claiming retainage as part of the amount owed in a mechanic's lien.

Standard of Appellate Review

Whether the law of Kansas allows a particular charge to be claimed as an amount due in a mechanic's lien is a question of law subject to unlimited review. *Gleason & Son Signs v. Rattan*, 50 Kan.App.2d 952, 957, 335 P.3d 1196 (2014).

* * *

Noting that a portion of the amount Subcontractor claimed Contractor owed it in its mechanic's lien was for retainage, in its statement of facts – but not its argument – Contractor argues this somehow was unlawful because Subcontractor's work on the Property was not yet complete (Aple.Br. 4) (citing R2 at 207).

This is improper argument in an appellee's statement of facts. Rule 6.03 requires an appellee's statement of facts to be "A statement, *without argument*, of the facts …" (Emphasis added).

Moreover, Contractor is wrong: the law of Kansas allows claiming retainage as an amount due in a mechanic's lien. Under K.S.A. § 60-1103, a subcontractor may obtain a lien for the amount of the contract between it and the contractor for the full value of labor, materials, and incidentals, whatever that amount is, with the sole limitation being that the subcontractor cannot seek to recover expenses beyond the contract price. *Gleason & Son Signs v. Rattan*, 60 Kan.App.2d 952, Syll. ¶ 5, 961, 335 P.3d 1196 (2014)

Retainage is a standard part of such a contract. "Building owners generally hold back a retainage amount – paid at the end of the project – to

ensure that the project is satisfactorily completed." *VHC Van Hoecke Contracting, Inc. v. Murry & Sons Constr. Co., Inc.*, No. 106,603, 2012 WL 2326027 at *2 (Kan. App. June 15, 2012) (unpublished).

Because of this, retainage commonly is part of a lien amount, because it represents money owed for work already provided and which has enhanced the value of the owner's property. *See, e.g.*, *id.*; *cf. Thomas Group, Inc. v. Wharton Senior Citizen Housing, Inc.*, 163 N.J. 507, 518-22, 750 A.2d 743 (2000) (holding trial court should not have discharged general contractor's lien claim as prematurely filed before complying with conditions stated in the retainage clause, but should have stayed the lien foreclosure proceeding until the finder of fact determined the amount owing under the contract) (citing, among other things, *In re Schiavone Constr. Co.*, 581 N.Y.S.2d 322, 323 (App. Div. 1992) (holding that mechanic's lien statute permitted lien claim to be filed before payment was due)).

Subcontractor's claim for retainage therefore has nothing to do with the validity or enforceability of its lien. Retainage only affects the distribution of contract funds, not the validity of a mechanic's lien.

II. While not reversible, the trial court's error in concluding that K.S.A. Chapter 60 "doesn't apply" to a motion to review a lien under K.S.A. § 58-4301 cements that this Court has jurisdiction over this appeal.

Standard of Appellate Review

Whether the Court has jurisdiction over this appeal is subject to unlimited review. *Mundy v. State*, 307 Kan. 280, 290, 408 P.3d 965 (2018).

* * *

In its first issue in its opening brief, Subcontractor explained that the district court was wrong to conclude K.S.A. Chapter 60 "doesn't apply" to a motion to review a lien under K.S.A. § 58-4301 (Brief of the Appellant ["Aplt.Br."] 14-21). It explained that both its post-judgment motion under K.S.A. § 60-259 and its appeal under K.S.A. § 60-2103 were timely and proper, and so this Court has jurisdiction over this appeal (Aplt.Br. 14-21).

Contractor concedes that the district court erred in holding Chapter 60 does not apply to this case, Subcontractor's post-judgment motion and appeal were timely and proper, and this Court has jurisdiction (Aple.Br. 10).

But Contractor goes on to argue that this, alone, did not constitute reversible error (Aple.Br. 10-11). Subcontractor never said it did. To the contrary, Subcontractor's first issue on appeal merely that this Court has jurisdiction of this appeal (Aplt.Br. 14-21). An issue on appeal need not necessarily be couched in terms of reversible error, but instead need only argue an "issu[e] to be decided in the appeal." Rule 6.02(a)(4).

The first issue to be decided in this appeal is whether the Court has jurisdiction of this appeal (Aplt.Br. 14-21). Contractor concedes that it does (Aple.Br. 10). More need not be said.

III. Even if Subcontractor's mechanic's lien is invalid and unenforceable for failure to include a sufficiently itemized lien statement, the law of Kansas still recognizes it as a mechanic's lien, albeit a possibly flawed (and amendable) one, and so is not a "fraudulent" document that the law does not recognize.

Standard of Appellate Review

Review of a judgment entered under K.S.A. § 58-4301(e) that the district court based solely on written or documentary evidence is entirely unlimited, without any deference to the district court. *In re Mechanic's Lien Against City of Kan. City*, 37 Kan.App.2d 440, 443, 154 P.3d 515 (2007).

* * *

In its second issue on appeal, Subcontractor explained that under K.S.A. § 58-4301(e)(1), in which a lien only is "fraudulent" if it "is a document or instrument" that is not "provided for by the constitution or federal or state law", as a matter of law its mechanic's lien was not fraudulent (Aplt.Br. 22-36). This is because regardless of whether the lien's statement ultimately was not sufficiently itemized to be valid and enforceable, Subcontractor's mechanic's lien still was in the form of a mechanic's lien and satisfied all the strictures for attaching a mechanic's lien, and therefore *was* a document "provided for by … the laws of this state" (Aplt.Br. 26-36). Even if the lien statement itself was insufficient, K.S.A. § 60-1105(b) simply would allow it to be amended when Subcontractor sought to enforce the lien (Aplt.Br. 34-36). None of this would render it *not* a mechanic's lien, only an unenforceable one (Aplt.Br. 34-36).

A. K.S.A. § 58-4301(e)(1) is unambiguous, and *Mark One*, which only addressed § 58-4301(e)*(2)*, has no application to this case.

Contractor initially argues that Subcontractor's argument "relies heavily on the legislative history behind K.S.A. 58-4301" and so "assumes that the statute is ambiguous" (Aple.Br. 15). Contractor further argues this is untrue, as this Court held in *In re Mechanic's Lien Against City of Kan. City* (to which both parties' briefs refer as "*Mark One*"), 37 Kan.App.2d 440, 154 P.3d 515 (2007) (Aple.Br. 15-16). Contractor also faults Subcontractor for citing unpublished cases as examples of the application of § 58-4301(e)(1) rather than *Mark One*, and attempts to analogize this case to *Mark One* instead, arguing that per *Mark One*, "[e]ven in a commercial setting such as this, the statute has been properly utilized to nullify a fraudulent lien" (Aple.Br. 17-18).

This is without merit. First, Subcontractor does not "rely" on the legislative history behind § 58-4301. To the contrary, Subcontractor merely used the history as an illustration of the statute's purpose and prior usage (Aplt.Br. 26-27) (quoting *Mark One*, 37 Kan.App.2d at 444). But Subcontractor then analyzed and applied only the statute's plain language and never once argued that it was in any way ambiguous. Lest there be any confusion, Subcontractor concedes that § 58-4301(e) is unambiguous.

Contractor's reliance on *Mark One* as any force or authority in this case is equally without merit. In *Mark One*, the lien document at issue was held "fraudulent" under § 58-4301(e)**(2)** – that it was "not created by implied or express consent or agreement of the obligor, debtor or the owner of the real or personal property or an interest in the real or personal property or by implied

or express consent or agreement of an agent, fiduciary or other representative of that person …." 37 Kan.App.2d at 447.

This is because the problem with the lien document in *Mark One* was that it was not a mechanic's lien at all: there was no evidence that the property owner ever had consented to any work on the property for which a mechanic's lien was filed, nor was there any evidence of any contract for the alleged work. *Id.* Accordingly, this Court held it was fraudulent under § 58-4301(e)(2). *Id.* But there was ***no*** claim of "fraudulence" under § 58-4301(e)**(1)**, which is the issue here. *Id.*

Here Contractor claimed that Subcontractor's lien was "fraudulent" under § 58-4301(e)(2), but the district court ***disagreed*** and rejected this claim (R1 at 201). Instead, the district court relied *solely* on § 58-4301(e)(1) (R1 at 201), which was not at issue in *Mark One*.

In its opening brief, Subcontractor explained that as Contractor does not cross-appeal from this determination adverse to it, this precludes Contractor from arguing that the district court *should* have held in its favor under § 58-4301(e)(2), rather than § 58-4301(e)(1) (Aplt.Br. 25-26). (Moreover, that argument would fail, as Contractor admitted to the parties' contract below (R2 at 2).)

Contractor offers no response to this at all, tacitly conceding that it cannot argue the mechanic's lien here was invalid under § 58-4301(e)(2) and is limited to arguing "fraudulence" under (e)**(1)**. And the unpublished decisions Subcontractor cited in its opening brief are the only Kansas decisions involving § 58-4301(e)(1), which *Mark One* did not.

B. Strict compliance in Kansas only applies to lien attachment requirements under K.S.A. §§ 60-1101 and 60-1103 that Contractor concedes Subcontractor's lien met, not the lien enforcement requirements under K.S.A. § 60-1102 at issue here, which are construed liberally in favor of the lien claimant.

Contractor then argues that because the law of Kansas "requires strict compliance with the procedure prescribed in the statute in order to perfect a mechanic's lien", Subcontractor's putative failure to include a sufficiently itemized lien statement means its mechanic's lien never constituted a mechanic's lien at all (Aple.Br. 13) (quoting *Buchanan v. Overley*, 39 Kan.App.2d 171, 173, 178 P.3d 53 (2008); also citing *Manhattan Mall Co. v. Shult*, 254 Kan. 253, 257, 864 P.2d 1136 (1993)).

What Contractor omits from its discussion of this authority is the difference between what is required for a lien to be perfected *attach*, versus what is required for that lean to be fully enforceable after attachment. While, as in *Mark One*, failing the basic requirements to attach a lien might make it fail to constitute a lien recognized by law, once it does attach its requirements are no longer strict, but are liberally construed, and any remaining failures are only an insufficiency of enforceability, not of being a lien in the first place, and are amendable.

Contractor omits the full quotation from this Court's decision in *Buchanan*: "*While we liberally construe our mechanic's lien statute once a lien has attached*, Kansas law requires strict compliance with the procedure prescribed in the statute in order to perfect a mechanic's lien." 39 Kan.App.2d at 173 (emphasis added). For a mechanic's lien to *attach*, the itemization of the lien statement, which appears in K.S.A. § 60-1102, is not

an element. *Nat'l Restoration Co. v. Merit Gen. Contractors, Inc.*, 41 Kan.App.2d 1010, 1010-11, 208 P.3d 755 (2009). Instead, only those requirements in K.S.A. §§ 60-1101 and 60-1103 must be fulfilled: having a contract, stating the name of the contractor in the lien, filing the lien timely, and serving the lien properly. *Id.* Once that occurs, the lien attaches, and the remainder of the lien is liberally construed. *Id.*; *Buchanan*, 39 Kan.App.2d at 173. The question of whether the lien statement is sufficient after attachment goes to the lien's enforceability, not its attachment to the property. § 60-1102.

Contractor does not contest that any of the elements necessary for Subcontractor's lien to *attach*, which is all that is subject to strict compliance, rather than be *enforceable*, which is subject to liberal construal (because § 60-1105 allows it to be amended if insufficient), were met. Contractor admitted below that it had entered into the contract with Subcontractor that Subcontractor attached to its lien (R2 at 2). *See* § 60-1101. The lien properly named Contractor (R1 at 4-5). *See* § 60-1103(b). The lien was filed timely within three months of when the labor was last performed (R1 at 4-5). *See* § 60-1103(a)(1). Subcontractor caused the lien to be served personally on both Contractor and the owner, certified with return receipt requested (R1 at 199). *See* § 60-1103(c). That is all that was required to *attach* the lien and make it a lien. *Nat'l Restoration*, 41 Kan.App.2d at 1010-11.

To this end, *Mark One* further does not help Contractor. There, the Court held that because there was no proof of any contract at all, the lien failed § 60-1101 itself at the outset. 37 Kan.App.2d at 447. No mechanic's

lien ever attached, so there was nothing for the law to recognize. *Id.* The same is true for all the other decisions on which Contractor relies:

- In *Manhattan Mall Co.*, no lien attached because it was not filed within the statutory time limit. 254 Kan. at 257.
- In *Buchanan*, no lien attached because it was not properly served on the contractor. 39 Kan.App.2d at 173.
- In *Alliance Steel, Inc. v. Piland*, 39 Kan. App. 2d 972, 976, 187 P.3d 111 (2008) (Aple.Br. 15), no lien attached because it did not identify the contractor correctly.
- In *Huber Co. v. DeSouza*, 32 Kan.App.2d 614, 615, 86 P.3d 1022 (1986) (Aple.Br. 21), no lien attached because there was no evidence that the contract was for the work allegedly performed.
- And in *Logan-Moore Lumber Co. v. Black*, 185 Kan. 644, 651, 347 P.2d 438 (1959) (Aple.Br. 24), no lien attached because it was filed after the statutory limitation period.

Conversely, in *Trane Co. v. Bakkalapulo*, 234 Kan. 348, 352, 672 P.2d 586 (1983), which Contractor also cites (Aple.Br. 13), the lien was construed liberally and held sufficient when it was signed by an attorney for the corporate subcontractor, which did not affect its attachment.

C. The Texas decisions that Subcontractor cited, which analyzed an identical question under identical statutes, did so with the full force of authority, not as "dicta", and are directly on point.

Contractor acknowledges the two Texas decisions Subcontractor cited, *Cardenas v. Wilson*, 428 S.W.3d 130, 132-33 (Tex. App. 2014); *In re Purported Liens or Claims Against Samshi Homes, L.L.C.*, 321 S.W.3d 665, 667-68 (Tex.

App. 2010) and concedes that they held that "[a] document filed in the form of a mechanic's lien", even if ultimately incorrectly so, "is provided by the … laws of this state and thus cannot be presumed to be fraudulent under" Texas's identical version of § 58-4301(e)(1) (Aple.Br. 18) (quoting *Samshi Homes*, 321 S.W.3d at 667).

But without any explanation, Contractor states these holdings were "in dicta" (Aple.Br. 18). This is without merit: they were not "dicta." "Dicta" means a statement that is "by definition no part of the doctrine of [a] decision" being cited. BLACK'S LAW DICT. 569 (11th ed. 2019). The point to *Samshi Homes* was – just as here – that *even if* the lien opponent was correct, and the lien was invalid and unenforceable for failure to include a sufficient lien itemization statement, this did not render the lien fraudulent for being a document unrecognized by state law, as it still was in the form of a mechanic's lien, only a potentially unenforceable one. 321 S.W.3d at 667.

This was not "no part of the doctrine of the decision", but instead was the crux of the decision: "Whether" the lien statement was "sufficiently specific to meet the requirements of" Texas's similar version of § 60-1102 "is beyond the scope of a Motion for Judicial Review filed under" Texas's identical version of § 58-4301(e)(1). *Samshi Homes*, 321 S.W.3d at 667 n.4. Either way, "the documents filed by [the contractor were] instruments 'provided by the ... laws of this state' and [were] therefore not presumed to be fraudulent under" Texas's identical version of § 58-4301(e)(1). *Id.* at 667-68.

Contractor's argument that this is in any way different from Kansas is without merit. Contractor points out correctly that Texas only requires

"substantial compliance" with its lien statement requirements (Aple.Br. 20). *See Nova Mud, Inc. v. Staley*, No. 08-17-00147-CV, 2019 WL 850980 at *6 (Tex. App. slip op. Feb. 22, 2019). (Contractor cites an outdated case for this that relied long-repealed statutes, *Texcalco, Inc. v. McMillan*, 524 S.W.2d 405, 407 (Tex. App. 1975) (Aple.Br. 20), but the same remains true today.) It argues this is unlike Kansas, where "strict compliance" is required (Aple.Br. 13) (citing *Buchanan*, 39 Kan.App.2d at 173). But Kansas's strict compliance only applies to determine whether a lien attached, not whether it is enforceable post-attachment. *Buchanan*, 39 Kan.App.2d at 173; *Nat'l Restoration*, 41 Kan.App.2d at 1010-11.

Once the lien has attached, as Subcontractor's lien did here, then just as in Texas the lien is reviewed liberally. Moreover, the point to *Samshi Homes* and *Cardenas* is that regardless of the standard used, sufficiency of the lien statement is not at issue in a motion for judicial review of "fraudulence" under § 58-4301(e).

The issue here is one of post-attachment compliance as in *Samshi Homes*, not pre-attachment as in the decisions Contractor cites. Once the lien attaches, as Subcontractor's did here, Kansas and Texas have the same requirements. *Samshi Homes* and *Cardenas* are just as applicable to the question in this case in Kansas as they were in Texas. Just as there, the identical law of Kansas is and must be that technical (amendable) failures of a mechanic's lien post-attachment do not render the document something unknown to Kansas law.

D. While the lien amendment statute in K.S.A. § 60-1105(b) may not have been activatable in the case below, it further makes the lien here a recognized document in Kansas: an otherwise correct mechanic's lien with an insufficiently itemized lien statement.

Regardless, Contractor's argument is self-defeating. The law of Kansas plainly and expressly recognizes as a document an attempted mechanic's lien that is invalid and unenforceable for failure to include a sufficiently itemized lien statement. Section 60-1105(b) provides, "Where action is brought to enforce a lien the lien statement may be amended by leave of the judge in furtherance of justice, except to increase the amount claimed."

While Contractor is correct that the district court *here* could not order the amendment of the lien, because this was not an action by Subcontractor to enforce the lien (Aple.Br. 23-24), that is not the question before the Court. Rather, the question under § 58-4301(e)(1) is whether what Subcontractor filed "is a document or instrument" that is "provided for by the constitution or federal or state law." Even under Contractor's argument that the lien's itemization statement was insufficient, § 60-1105(b) still provides for exactly that type of document: a mechanic's lien otherwise correctly filed but with an incorrect lien statement, which can be amended in an enforcement action.

Subcontractor's mechanic's lien remains a mechanic's lien, only perhaps one that the law will not allow to be enforced in its current form. But it is not "fraudulent" for being a document that the law of Kansas does not recognize.

The district court erred in holding otherwise.

Conclusion

This Court should reverse the district court's judgment.

Respectfully submitted,

Jonathan Sternberg, Attorney, P.C.

by /s/Jonathan Sternberg
Jonathan Sternberg, Kan. # 25902
2323 Grand Boulevard, Suite 1100
Kansas City, Missouri 64108
Telephone: (816) 292-7000 (x7020)
Facsimile: (816) 292-7050
jonathan@sternberg-law.com

/s/Jaclyn S. Maloney
Jaclyn S. Maloney, KS Bar #22899
REAL Law, LLC
301 SE Douglas Street, Suite 201
Lee's Summit, MO 64063
Telephone: (816) 621-7906
Jackie@REALLawKC.com

and

HUNTER LAW GROUP, PA

/s/Mandi R. Hunter
Mandi R. Hunter, KS Bar #21109
1900 W. 75th Street, Suite 120
Prairie Village, Kansas 66208
Telephone: (913) 320-3830
mrh@huntergrouppa.com

COUNSEL FOR APPELLANT
KANSAS CITY STEEL WERX, INC.

Certificate of Service

I certify that on July 31, 2019, I electronically filed a true and accurate Adobe PDF copy of the foregoing with the Clerk of the Court by using the electronic filing system, which will send notice of electronic filing to the following:

Mr. Scott C. Long
Mr. Colin M. Quinn
1800 Baltimore Avenue, Suite 500
Kansas City, Missouri 64108
Telephone: (816) 541-2100
Facsimile: (816) 542-2111
slong@longrobinson.com
cquinn@longrobinson.com

Counsel for Movant / Appellee Haren & Laughlin Construction Company, Inc.

/s/Jonathan Sternberg
Attorney

Appendix

278 P.3d 1001 (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.

VHC VAN HOECKE CONTRACTING, INC., Appellant,
v.
MURRAY & SONS CONSTRUCTION CO., INC., et al., Appellees.

No. 106,603.
|
June 15, 2012.

Appeal from Johnson District Court; James F. Vano, Judge.

Attorneys and Law Firms

Scott C. Long and John R. Weist, of Long & Luder, P.A., of Overland Park, for appellant.

Michael L, Entz, of Entz, Entz & Laskowski, LLC, of Topeka, for appellees.

Before LEBEN, P.J., STANDRIDGE and ARNOLD–BURGER, JJ.

MEMORANDUM OPINION

LEBEN, J.

***1** To ensure fair treatment of subcontractors, the Kansas Fairness in Public Construction Contract Act provides that a general contractor must pay any subcontractor its share of the retainage—a percentage of the contract price withheld by the owner to assure completion of the project—within 7 business days of its receipt if there is no dispute as to the amounts due the subcontractor. In the case at hand, the contractor paid the subcontractor its share of the retainage long after that time frame, but the district court denied the subcontractor's claim for interest on this late payment. Here, the contractor said it delayed payment of the retainage because of the contractor's own confusion about the paperwork it had received—paperwork that wasn't even required under the contract. In this circumstance, we conclude that the retainage amount due the subcontractor was undisputed, and we reverse the district court's conclusion that the contractor had not violated the Kansas Fairness in Public Construction Contract Act. We also remand for a consideration of appropriate attorney fees based on the subcontractor's successful claim.

The subcontractor also asks on appeal for prejudgment interest and attorney fees on three claims of additional work that the subcontractor had performed outside of the contract. We find no error in the district court's decision denying those requests. The district court granted amounts for the additional work based on a legal theory—urged by the subcontractor—that normally doesn't support a prejudgment-interest award (and certainly wouldn't support an award of attorney fees). The subcontractor has tried to assert a different legal theory in support of its requests on appeal, but we conclude it is limited by the arguments it made to the district court.

FACTUAL BACKGROUND

Murray and Sons Construction Co. ("Murray and Sons") was the general contractor for the building of a new elementary school, and VHC Van Hoecke Contracting, Inc. ("Van Hoecke") was awarded the subcontract to provide heating, ventilating, and air conditioning work. Like most construction contracts, Van Hoecke's contract with Murray and Sons provided for a scope of work and contemplated that additional work might be added through what are called change orders—written agreements that document the additional work. But there were four items of additional work Van Hoecke performed on this project that Van Hoecke and Murray and Sons never documented with a change order:

- The school district asked for some duct covers, and Van Hoecke sent a pricing proposal quoting the cost as "$400 each." Murray and Sons approved work for 32 orders, but it prepared a change order showing the cost as $400 in total, not $400 each. Van Hoecke refused to sign that change order but did provide the 32 duct covers.

- Van Hoecke repaired a vent cap damaged by the wind and billed Murray and Sons $305.89.

- Van Hoecke installed underfloor planning at Murray and Sons' request and billed $1,281.04.

***2** - Van Hoecke repaired an air-handling unit and billed $3,308.

Except for a single payment of $400 that it said covered all the duct covers, Murray and Sons didn't pay any of these amounts.

Building owners generally hold back a retainage amount—paid at the end of the project—to ensure that the project is satisfactorily completed. Here, Murray and Sons' contract with the school district called for several retainage payments, but our dispute involves a 4–percent retainage paid near the end of the project. The school district paid the retainage to Murray and Sons in February 2010, but Murray and Sons didn't pay Van Hoecke its share of the retainage until November 2010. Murray and Sons explained that it thought Van Hoecke had failed to submit lien waivers, documents it said were necessary to authorize payment, but it later discovered that the waivers had been provided in January 2010.

By the time Murray and Sons received the retainage from the school district, Van Hoecke had already filed suit against Murray and Sons, a suit filed in November 2009. Van Hoecke presented claims for breach of contract, quantum meruit (a claim for the reasonable value of services), and breach of a payment bond. When the case came to trial in March 2011, Van Hoecke sought 18 percentage interest for the delay in paying its share of the retainage, a claim brought under the Kansas Fairness in Public Construction Contract Act, K.S.A. 16–1901 *et seq.* Van Hoecke also sought payment for the four add-on items along with prejudgment interest on each item. And Van Hoecke also asked for an award of the attorney fees it incurred from pursuing the suit.

The district court denied interest and attorney fees based on the delayed retainage payment. But the court awarded Van Hoecke judgment for the full amount of each of the four add-on items along with prejudgment interest on the duct covers; the court denied prejudgment interest related to the other three add-on items.

Van Hoecke has appealed to this court.

ANALYSIS

I. *The District Court Erred When It Refused to Award Prejudgment Interest and Attorney Fees on the Delayed Retainage Payment.*

We begin with an issue under the Kansas Fairness in Public Construction Contract Act that is squarely before us—whether the provisions of that statute apply on the facts of this case to Murray and Sons' failure to pay Van Hoecke its share of the retainage within 7 business days after Murray and Sons received it. This is a matter of statutory interpretation, which we review independently, without any required deference to the district court. See *Brennan v. Kansas Insurance Guaranty Ass'n,* 293 Kan. 446, 450, 264 P.3d 102(2011).

The Kansas Fairness in Public Construction Contract Act ("the Act") provides that the contractor must pay the subcontractor its share of a retainage within 7 days if the subcontractor's request for payment isn't disputed: "A contractor shall pay its subcontractors any amounts due within seven business days of receipt of payment from the owner, including payment of retainage, if retainage is released by the owner, if the subcontractor has provided a timely, properly completed and undisputed request for payment to the contractor." K.S.A. 16–1903(f). If the contractor fails to do so, the subcontractor gets 18 percent interest "beginning on the eighth business day after receipt of payment by the contractor ... on the undisputed amount." K.S.A. 16–1903(g).

***3** We know that Murray and Sons didn't pay Van Hoecke its share of retainage until more than 8 months after the school district paid the retainage to Murray and Sons. So the question we must determine is whether Van Hoecke's request for payment was "undisputed."

At trial, Murray and Sons said it initially hadn't paid the retainage to Van Hoecke because Murray and Sons' personnel thought that Van Hoecke hadn't provided lien releases from itself and its own suppliers or subcontractors. Lien releases are often obtained in construction-contract settings to make sure that all of the parties that might claim payment *through* another contractor have already been paid (or at least have agreed not to file lien claims). But Murray and Sons' vice president Mike Gibson testified that he later learned that Murray and Sons had the lien waivers in hand in January 2010 and didn't need any further lien waivers from Van Hoecke when the school district paid the retainage in February 2010. So a lack of lien waivers wouldn't have been a valid reason to delay payment of Van Hoecke's retainage.

More important, perhaps, nothing in our record makes the provision of lien waivers a requirement of the contract between Murray and Sons and Van Hoecke. The parties' contract was introduced into evidence at trial, and section 3.5, which requires Van Hoecke to provide *receipts* showing it had paid its employees and suppliers, was noted:

> "Subcontractor [Van Hoecke], if required, shall submit receipts or other vouchers showing payment of labor and materials to the previous month[']s date of estimate for partial payment. In the event Subcontractor does not furnish receipts and vouchers upon Contractor's request, Contractor is authorized to pay said bills directly and deduct such sums from the estimate for partial payment."

Under this section, if Van Hoecke doesn't provide receipts or "other vouchers" showing payment, then the remedy provided by contract was that Murray and Sons could pay those amounts directly.

As a practical matter, parties may choose to handle this matter through lien waivers. But that wasn't required by parties' contract. Gibson, Murray's vice president, conceded that he couldn't find a requirement in the contract that lien waivers be provided before payment would be made to Van Hoecke.

In its ruling, the district court said that Murray and Sons would have been justified in withholding payment if Van Hoecke hadn't provided lien releases. Apparently based on that premise, the district court then concluded that Murray and Sons had a "good faith dispute over whether [Van Hoecke] had complied with the terms of the contract which would entitle [Van Hoecke] to payments," since Murray and Sons believed (albeit mistakenly) that it hadn't received lien waivers from Van Hoecke.

But the district court's premise was legally flawed because there was no contractual requirement for Van Hoecke to furnish lien waivers. And the district court's conclusion was factually wrong as well, since Van Hoecke had actually supplied Murray and Sons all the lien waivers it wanted before the school district paid the retainage to Murray and Sons. Murray and Sons can't create a "good-faith dispute" based on its own mishandling of paperwork that wasn't even contractually required. (We note that part of the contract —some American Institute of Architects standard contract documents—are incorporated into the contract by reference but not included in our record. While one of those might refer to lien waivers, no party cited to those provisions at trial or on appeal.)

***4** The provision we've cited from the Kansas Fairness in Public Construction Contract Act, K.S.A. 16–1903(f), has a clear purpose—ensuring the prompt payment of subcontractors and suppliers. We think it clear as well that for a payment to be disputed, there must indeed be some matter that can, in good faith, be disputed. After all, except for at-will employment contracts, every contract entered into in Kansas contains an implied covenant of good faith and fair dealing. See *Morris v. Coleman Co.,* 241 Kan. 501, 514–15, 518, 738 P.2d 841 (1987); *Bank of America v. Narula,* 46 Kan.App.2d 142, Syl. ¶ 11, 261 P.3d 898 (2011). Murray and Sons has not identified any basis on which it could properly have disputed that it owed the retainage to Van Hoecke, and Murray and Sons in fact paid the retainage—in full—even though that payment came more than 8 months too late to comply with K.S.A. 16–1903(f).

In its appellate brief, Murray and Sons argues that it had not been able to match the dollar amount on the lien waiver it had received from Van Hoecke against the amount to be paid to Van Hoecke, and that Van Hoecke didn't help out by providing an explanation once it became clear Murray and Sons was confused about the matter. But the most Murray and Sons has shown is that it failed to understand paperwork that wasn't contractually required, which doesn't make the amount owed to Van Hoecke a disputed one.

Accordingly, the Act's provision for 18 percent interest applies—and so does the Act's provision awarding the attorney fees and costs incurred in enforcing the Act's requirements. Under K.S.A. 16–1906, "the court ... shall award costs and reasonable attorney fees to the prevailing party" in any action to enforce K.S .A. 16–1903.

In this lawsuit, as we will discuss in the following section, Van Hoecke has not succeeded on all of its claims, and its claim for interest under another statute, K.S.A. 16–201, was not one on which attorney fees could have been awarded under K.S.A. 16–1906. Thus, some of the fees for the work done by Van Hoecke's attorneys is not subject to assessment against Murray and Sons. We will remand the case for the district court to determine the proper amount of attorney fees and costs to be assessed. See *Hodges v. Johnson,* 288 Kan. 56, 71, 199 P.3d 1251 (2009). In doing so, the district court will need to determine the appropriate award attributable to the pursuit of Van Hoecke's successful claim under the Act. See *Werdann v. Mel Hambelton Ford, Inc.,* 32 Kan.App.2d 118, Syl. ¶¶ 18–19, 79 P.3d 1081 (2003), *rev. denied* 277 Kan. 928 (2004); *DeSpiegelaere v. Killion,* 24 Kan.App.2d 542, Syl. ¶¶ 1–2, 947 P.2d 1039 (1997).

II. *We Find No Error in the District Court's Decision Not to Award Interest or Attorney Fees on the Add–Ons to the Construction Project That Weren't Documented with Change Orders.*

Van Hoecke separately asks that we reverse the district court and award prejudgment interest for each of the three add-on construction items for which the district court denied prejudgment interest. Van Hoecke also asks that we award it the attorney fees it has incurred to collect these amounts, as well as on collection of the amounts due for the vent covers (as to which the district court awarded prejudgment interest).

***5** Van Hoecke asserts two legal bases in support of its claim. First, it argues that the Kansas Fairness in Public Construction Contract Act applies and authorizes both prejudgment interest and attorney fees. Second, even if that statute doesn't apply, Van Hoecke argues that prejudgment interest should have been awarded under K.S.A. 16–201 because the amounts due were liquidated and prejudgment interest is usually awarded on liquidated sums.

Murray and Sons argues that Van Hoecke's argument on appeal is different than the one it made to the district court. There, Van Hoecke sought recovery of the add-on amounts under *either* of two theories: breach of contract or quantum meruit. In a quantum-meruit recovery, the court awards reasonable compensation when the parties have agreed upon the work to be done but not about the price to be paid. See *Campbell–Leonard Realtors v. El Matador Apartment Co.,* 220 Kan. 659, 662, 556 P.2d 459 (1976). Murray and Sons argues that a quantum-meruit recovery is awarded for work done outside the contract, and the Kansas Fairness in Public Construction Contract Act applies only to amounts due under the contract, so Van Hoecke cannot succeed under the Act if the court's award was based on quantum meruit. See K.S.A. 16–1903(c); 16–1902(c).

On appeal, Van Hoecke responds that the add-on work should be considered to have been part of a separate oral contract even though written change orders weren't signed and, thus, the work wasn't covered by the parties' written construction contract. But Van Hoecke doesn't cite any place in the record where it made that argument to the district court, and issues not raised before the district court generally can't be raised on appeal. *Wolfe Electric, Inc. v. Duckworth,* 293 Kan. 375, 403, 266 P.3d 516 (2011).

When it first filed suit, Van Hoecke asked the district court to grant relief to it for the amounts billed for these add-on projects either based on breach of contract or quantum meruit. The district court accepted Van Hoecke's position and awarded the sums based on quantum meruit. We think Van Hoecke is precluded from now arguing on appeal that the district court instead should have found that there was an implied oral contract, and that such a contract should qualify for the protections of the Kansas Fairness in Public Construction Contract Act.

First, a party may not invite error and then complain of that error on appeal. *Butler Co. R.W.D. No. 8 v. Yates,* 275 Kan. 291, 296, 64 P.3d 357 (2003). Nor may a party take or acquiesce in a position in the district court and then urge that position as error on appeal. *Lee v. Fischer,* 41 Kan.App.2d 236, 242, 202 P.3d 57, *rev. denied* 289 Kan. 1279 (2009). The district court granted recovery on the quantum-meruit theory urged by Van Hoecke. Van Hoecke did not argue to the district court that the court should grant a quantum-meruit award only if it first rejected the breach-of-contract claim.

***6** Second, we note that at least one court has decided that its state's prompt-payment act for construction projects did not apply to work done without a formal change order and thus "outside the scope of the contract." *G & T Conveyor Co. v. Allegheny County Airport Authority,* 2011 WL 2634161, at *4 (W.D.Pa.2011) (unpublished opinion). A similar construction of the Kansas statute would result in the denial of any claim under that statute for this work, which Van Hoecke referred to in its written brief in the district court as "work performed outside [the] contract" and "work ... outside [Van Hoecke's] agreed upon scope of work." Indeed, the district court said that because the work involving the duct covers "was outside the contract," Van Hoecke could not recover under the Act.

We mention this second point because the rule against allowing a party to change its argument a bit on appeal is not invariably applied; thus, we have some discretion to overlook that rule and address the issue for the first time on appeal. But here, there appears a likelihood that the Act wouldn't provide the relief Van Hoecke seeks even if the invited-error rule did not apply. We see no reason to decide that issue when Van Hoecke received recovery in the district court on a theory it urged—quantum meruit—and did not specifically argue there that an implied-in-fact contract triggers application of the Act. We should wait for a case in which the question was squarely addressed to the trial court and fully briefed on appeal to decide whether the Kansas Fairness in Public Construction Contract Act might have some application to work performed

beyond the initial contract's scope and done without a written change order.

Van Hoecke has made no argument that it would be entitled to attorney fees other than under the Kansas Fairness in Public Construction Act. Because Van Hoecke's recovery for the contract add-on items wasn't awarded under that Act, Van Hoecke is not entitled to recover attorney fees related to that recovery.

Even if the Act doesn't apply, though, Van Hoecke separately argues for prejudgment interest under another statute —K.S.A. 16–201, which provides for 10 percent interest on amounts due and unpaid "when no other rate of interest is agreed upon." Generally, prejudgment interest is awarded under this statute only on liquidated claims, meaning that both the amount due and the due date are fixed and certain. See *Owen Lumber Co. v. Chartrand,* 283 Kan. 911, 925, 157 P.3d 1109 (2007). But prejudgment interest may also be awarded on unliquidated amounts under unique facts "where necessary to arrive at full compensation." *Lightcap v. Mobil Oil Corporation,* 221 Kan. 448, Syl. ¶ 11, 562 P.2d 1 (1977). We review the district court's decision to award or to deny prejudgment interest only for abuse of discretion. *Owen Lumber Co.,* 283 Kan. at 925.

Even if the amounts due were liquidated, due dates were not fixed and certain. Van Hoecke has suggested various due dates in 2009 for the three items, but the only document in our record reflecting those dates is Van Hoecke's worksheet figuring interest, which was compiled by its comptroller in preparation for this lawsuit. Nor were due dates agreed on by the parties or established by their written contract. So the sums were not liquidated and prejudgment interest ordinarily would not be awarded. All of the sums awarded were granted under Van Hoecke's quantum-meruit legal theory, and interest usually is not granted on a quantum-meruit recovery. *Miller v. Botwin,* 258 Kan. 108, 119, 899 P.2d 1004 (1995).

***7** While interest may still be awarded in rare cases under the rule in *Lightcap,* we find no abuse of discretion in the district court's decision not to do so on three of the four add-on items. The district court *granted* prejudgment interest on the largest claim (the $12,800 awarded for the duct caps), which suggests that the district court did exercise discretion in the matter. Like the other amounts awarded, the $12,800 award came based on quantum meruit, and the due date there wasn't certain, either. So it appears that the district court applied the *Lightcap* rule to award prejudgment interest in that case, apparently because Van Hoecke had clearly laid out the per-unit cost of $400 before Murray and Sons told Van Hoecke to do the work. With respect to the other awards, we think that a reasonable person could conclude that an award of prejudgment interest isn't necessary.

CONCLUSION

We reverse the district court's judgment denying an award of interest at 18 percent for the period of time that payment of the retainage was delayed. On remand, the district court shall award judgment for 18 percent interest from the eighth business day following February 15, 2010, until the date the retainage was received by Van Hoecke.

We also reverse the district court's judgment denying attorney fees and costs to Van Hoecke under K.S.A. 16–1906. On remand, the district court shall determine the appropriate amount of attorney fees and costs to be awarded based on Van Hoecke's successful claim and then shall enter judgment for those amounts.

The district court's judgment is otherwise affirmed.

All Citations

278 P.3d 1001 (Table), 2012 WL 2326027

End of Document