FILED
FEB 25 '94
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 3-643 / 93-0112

FARRELL CONSTRUCTION COMPANY,
Plaintiff-Appellant/Cross-Appellee,

vs.

GOLF, INC., and FIRST GOLF CORPORATION,
Defendants-Appellees/Cross-Appellants,

and

THE CITY OF CARTER LAKE, IOWA,
Defendant-Appellee.

Appeal from the Iowa District Court for Pottawattamie County, Glen M. McGee, Judge.

Plaintiff Farrell Construction Company sought to foreclose a mechanic's lien and requested attorney fees. Defendants sought attorney fees. Farrell appeals claiming the court erred in: (1) failing to award reasonable attorney fees, and (2) failing to foreclose on its mechanic's lien. Croft appeals claiming the court erred in failing to award it reasonable attorney fees. We affirm as modified. **AFFIRMED AS MODIFIED.**

Jack E. Ruesch of Telpner, Smith, Sawatzke & Ruesch, Council Bluffs, for appellant/cross-appellee.

Scott H. Peters of the Peters Law Firm, P.C., Council Bluffs, for appellees/cross-appellants.

John P. Churchman, Council Bluffs, for appellee Carter Lake.

Heard by Oxberger, C.J., Sackett, J., and Critelli, S.J.*

*Senior judge from the 5th Judicial District serving on this court by order of the Iowa Supreme Court.

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SACKETT, J.

The issues in this appeal are: (1) whether the trial court had discretion to deny all claims for attorney fees made in litigation involving a written contract between a contractor and subcontractor that made provisions for an award of attorney fees to a successful party in litigation; (2) whether the trial court had discretion to deny all claims for attorney fees in an action by the subcontractor to foreclosure a mechanic's lien; and, (3) whether the trial court should have foreclosed the mechanic's lien in addition to entering judgment against the contractor. We affirm the trial court on the denial of attorney fees on both petitions. We remand to the trial court to address the issue of foreclosure of the mechanic's lien. We do not retain jurisdiction.

This litigation follows the construction in 1988 and 1989 of a golf course. The City of Carter Lake (Carter Lake) leased the land to First Golf Corporation (First Golf). First Golf contracted with Golf, Inc. to construct the course. Golf, Inc. subcontracted with Farrell Construction Company (Farrell) to install a sprinkler system.

Subsequently, Farrell claimed it had not received payment for work performed and filed a mechanic's lien for $54,730.84, and then sued Golf, Inc., First Golf, and Carter Lake to foreclose the mechanic's lien. Farrell's suit for foreclosure of the mechanic's lien claimed attorney fees. Carter Lake filed a general denial of the

allegations of the petition for foreclosure. Golf, Inc. and First Golf answered affirmatively alleging Farrell's failure to perform under the contract and seeking attorney fees. Farrell brought a second suit against Golf, Inc. contending Golf, Inc. breached the written subcontract and seeking damages of $54,730.84 plus attorney fees that Farrell claimed were due according to the subcontract. Golf, Inc. counterclaimed against Farrell for $74,654 plus attorney fees Golf, Inc. claimed were due according to the subcontract.

The two cases were consolidated for trial. There were amendments to pleading and discovery. The matter was set for trial and, after hearing the evidence, the trial court entered a judgment in favor of Farrell and against Golf, Inc. for $24,676.71. Farrell advances its claim its mechanic's lien should be foreclosed against all the defendants was not addressed in the trial court's order. No attorney fees were awarded. A 179(b) motion was filed by Farrell seeking attorney fees and pointing out to the trial court it had not addressed Farrell's action to foreclose its mechanic's lien. A 179(b) motion and motion for a new trial was filed by all the defendants asking they be awarded attorney fees. Golf, Inc.'s attorney filed an affidavit swearing attorney fees and expenses of $33,585.34 were incurred. Farrell's attorney filed an affidavit swearing it incurred attorney fees and expenses of $21,669.83.

The trial court denied all requests for attorney fees and did not address Farrell's request to foreclose the mechanic's lien.

Farrell appeals contending the trial court should have awarded it reasonable attorney fees, and the court should have entered a decree foreclosing the mechanic's lien as requested. Golf, Inc. contends the trial court should have awarded it attorney fees.

Farrell sought to foreclose a mechanic's lien against all the defendants and was a party to the written contract with Golf, Inc. The contract contained a provision for attorney fees. Farrell, therefore, contends by virtue of Iowa Code section 572.32 the court must award attorney fees as court costs against all defendants and by virtue of Iowa Code section 625.22 the court must award attorney fees as part of the court costs against Golf, Inc. Golf, Inc. claims it is a party to the same written contract for fees and also contends by virtue of section 625.22 the court must award attorney fees as part of the court costs against Farrell.

Generally, attorney fees are not recoverable by a successful litigant against the losing party. See Rauch v. Senecal, 253 Iowa 487, 491, 112 N.W.2d 886, 888 (1962). The right to recover attorney fees as part of costs does not exist at common law. Thorn v. Kelley, 257 Iowa 719, 726, 134 N.W.2d 545, 548 (1965). They cannot be allowed in the absence of a statute or agreement expressly authorizing recovery, and in order that they may be taxed as costs in a

case, the case must come clearly within the terms of the statute or agreement. Id. Attorney fees are not awarded as part of court costs unless they are clearly authorized by statute. Keeney v. Iowa Power & Light Co., 250 Iowa 887, 889, 96 N.W.2d 918, 920 (1959).

Iowa Code section 572.32 provides:

> In a court action to enforce a mechanic's lien, if the plaintiff furnished labor or materials directly to the defendant, the plaintiff, if successful, shall be awarded reasonable attorney fees.[1]

Iowa Code section 625.22 provides, in relevant part:

> When judgment is recovered upon a written contract containing an agreement to pay an attorney's fee, the court shall allow and tax as a part of the costs a reasonable attorney's fee to be determined by the court.
> . . . .

The contention from both sides is because section 572.32 uses the word "shall"[2] as does section 625.22, it

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1. This section was first enacted in 1983.

2. Section 573.21 also provides for attorney fees for a claimant for labor or materials and provides:
The court may tax, as costs, a reasonable attorney fee in favor of any claimant for labor or materials who has, in whole or in part, established a claim.
In Sheer Constr., Inc. v. W. Hodgman and Sons, Inc., 326 N.W.2d 328, 334 (Iowa 1982), the court in addressing a claim that attorney fees should be awarded under section 573.21 said, "Sheer concedes that under the above statute the award of fees is discretionary, not mandatory, and is reviewed only for abuse of discretion.
Sheer predated the enactment of section 572.32 in 1983. However, in 3 S Inc. v. Zarek, 504 N.W.2d 153, 156-57 (Iowa App. 1993), we cited Sheer, 326 N.W.2d at 334, for the proposition that Iowa trial courts have considerable discretion in awarding fees under a statute when addressing a claim for fees under Iowa Code sections 677.5 and 677.10.

was mandatory the trial court award attorney fees in that the other elements of the two statutes were met.

We recognize the use of the word "shall" in a statute is ordinarily persuasive evidence the statute is obligatory; thus excluding the idea of discretion. See State v. Lohr, 266 N.W.2d 1, 5 (Iowa 1978); Schmidt v. Abbott, 261 Iowa 886, 890, 156 N.W.2d 649, 651 (1968).

While using the word "shall" in both section 572.32 and section 625.22, the legislature also provided the fee should be reasonable. In determining the reasonableness of an attorney fee, a trial court is afforded considerable discretion. See Crawford v. City of Des Moines, 254 Iowa 769, 771, 119 N.W.2d 187, 188 (1962); In re Marriage of Kern, 408 N.W.2d 387, 390 (Iowa App. 1987); In re Marriage of Castle, 312 N.W.2d 147, 150 (Iowa App. 1981).

This appears to be an issue of first impression. In Federal Land Bank v. Woods, 480 N.W.2d 61, 69 (Iowa 1992), the supreme court was asked to decide if a trial court erred in denying to fix attorney fees for a plaintiff suing on a note. The note contained a provision for attorney fees and plaintiff's claim for attorney fees was made under section 625.22. The trial court found reasonable attorney fees should not be allowed because defendant successfully defended himself on a substantial portion of the note. In Federal Land Bank, the court passed on the question of

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whether the district court could deny attorney fees completely when there has been a successful partial defense against the note because under their result there was no successful partial result. See Federal Land Bank, 480 N.W.2d at 69-70.

The question is whether, when a statute provides attorney fees shall be fixed but also provides attorney fees be reasonable, the trial court's refusal to award any fees is error or whether we review the denial for an abuse of discretion.

We find we review for an abuse of discretion. The use of the word "reasonable" dictates the trial court use reason in fixing fees. Where the trial court is vested with power to fix reasonable fees, it would be absurd to hold it could not entirely deny fees if it was reasonable to do so.

We look, therefore, to see if the trial court abused its discretion and was unreasonable in denying fees.

This case involved a number of issues which were submitted to the trial court to decide. The trial court's decision on these issues has not been appealed. The trial court, therefore, had knowledge of the merit of the issues raised by each party that is not available to us. We give deference to this knowledge.

Our review of what is before us shows the matters were extensively litigated by both parties. There were claims and counterclaims, requests to take fifteen depositions, a

confession of judgment and a settlement offer close to the ultimate resolution that were rejected as well as a lengthy trial. The trial court made a specific finding that "this case was needlessly extended by all kinds of discovery and should have been resolved by the parties long ago. The court cannot in good conscience and fairness order an award of attorney fees to either party in view of its feeling that the case was unnecessarily and unreasonably protracted." Looking at the record and the finding of the trial court who was in the best position to analyze the issue, we cannot find the trial court abused its discretion in denying fees to both parties, and we affirm on the trial court's refusal to award attorney fees.

Farrell's last contention is the mechanic's lien should have been foreclosed. The trial court granted Farrell a money judgment against Golf, Inc. Farrell contends it was also entitled to a foreclosure of its mechanic's lien pursuant to Iowa Code chapter 572. First Golf, Golf, Inc., and Carter Lake argue the judgment against Golf, Inc. constitutes a lien against the property in Farrell's favor, therefore, the issue of a foreclosure of a mechanic's lien is not important because there are no other encumbrances on the land holding a prior position.

The trial court entered judgment against defendant, Golf, Inc. Farrell had sued all three defendants in the equity action to foreclose the mechanic's lien in the amount of $54,730.84 and defendant Golf, Inc. in a petition

at law seeking judgment on the same account in the amount of $54,730.84.

The matters were consolidated for trial and when the trial court decided the case, it filed in Farrell Construction Company under the heading (consolidated) what it termed a "Judgment Entry" and in Farrell Construction Company v. Golf, Inc., First Golf Corporation, and the City of Carter Lake, Iowa, under the heading (consolidated) no other heading. The trial court then found "judgment is entered in favor of plaintiff and against defendant for $24,676.71, plus interest from 11-6-90, with costs taxed equally to plaintiff and defendant."

The filings by the trial court support a finding there is a judgment against Golf, Inc. and no one else. Golf, Inc. does not own the land and, consequently, there would be no lien on the real estate.

The mechanic's lien action sought only an in rem judgment and attorney fees. The suit against Golf, Inc. sought personal judgment. We agree with Farrell that the trial court should have addressed its claims to foreclose the mechanic's lien and to establish, among other things, an in rem judgment against any interests of all defendants to the real estate where it supplied labor and material. We remand to the trial court to act on Farrell's petition for foreclosure of the mechanic's lien. We do not retain jurisdiction.

AFFIRMED AS MODIFIED.