COLORADO COURT OF APPEALS

Court of Appeals No. 11CA0313
Moffat County District Court No. 09CV42
Honorable Thomas W. Ossola, Judge

Dawn Trucking Company,

Plaintiff-Appellee,

v.

Gadeco, LLC, a Colorado limited liability company; Universal Drilling Company, Inc., a Colorado corporation; Jack Grynberg; Grynberg Petroleum Company; Grynberg Production Company; and Grynberg Production Corporation,

Defendants-Appellants.

JUDGMENT AFFIRMED

Division IV
Opinion by JUDGE GRAHAM
Dailey and Gabriel, JJ., concur

NOT PUBLISHED PURSUANT TO C.A.R. 35(f)
Announced November 23, 2011

Dufford, Waldeck, Milburn & Krohn, L.L.P., Nathan A. Keever, Annie D. Murphy, Grand Junction, Colorado, for Plaintiff-Appellee

Roger Jatko, Parker, Colorado; Janice C. Orr, Denver, Colorado, for Defendants-Appellants

Defendants, Gadeco, LLC, Universal Drilling Company, Inc., Jack Grynberg, Grynberg Petroleum Company, Grynberg Production Company, and Grynberg Production Corporation, appeal the trial court's judgment in favor of plaintiff, Dawn Trucking Company. We affirm.

I. Background

The following facts are undisputed. In November 2008, defendants hired plaintiff to transport an oil rig from near Big Piney, Wyoming to Hiawatha, Colorado. Defendants also requested plaintiff to transport rigging parts to and from the Hiawatha well site for repair.

Plaintiff originally quoted defendants $350,000 for the cost of the transport. However, delays due to wind, lack of fuel, and a cable malfunction resulted in additional costs. After all the work was performed, plaintiff sent defendants a final invoice for $452,599.

Defendants, believing the charges to be excessive and unreasonable, did not timely pay the invoice. Consequently, plaintiff filed a mechanic's lien against defendants' well in Colorado.

After the lien was filed, defendants commenced an action for breach of contract, conversion, and fraud against plaintiff in Denver District Court. Shortly thereafter, plaintiff filed an action against defendants in Moffat County District Court alleging breach of contract, claim on account, quantum meruit, unjust enrichment, and foreclosure of its mechanic's lien.

Based upon a motion filed by plaintiff, the Denver District Court transferred defendants' complaint to Moffat County. Thereafter, the trial court consolidated the cases and set the matter for a trial to the court.

Following the trial, the court granted foreclosure of the lien and judgment was entered in plaintiff's favor in the amount of $333,500, plus interest at the rate of 1 1/2% per month, plus costs and reasonable attorney fees.

On appeal, defendants contend the trial court erred in (1) denying their request for a jury trial and (2) finding a course of conduct between the parties establishing an agreement for a higher rate of interest and attorney fees. We address each contention in turn.

II. Jury Demand

Defendants contend the trial court erred in striking their jury demand. We disagree.

In Colorado, there is no constitutional right to a jury trial in a civil action. *Kaitz v. District Court*, 650 P.2d 553, 554 (Colo. 1982); *see First Nat'l Bank v. Theos*, 794 P.2d 1055, 1059 (Colo. App. 1990) (there is no right to a jury trial in actions historically brought before courts of equity and no such right in actions at law except as derived from C.R.C.P. 38(a)). C.R.C.P. 38(a) governs when a party is entitled to a jury trial in a civil proceeding:

> Upon the filing of a demand and the simultaneous payment of the requisite jury fee by any party in actions wherein a trial by jury is provided by constitution or by statute, including actions for the recovery of specific real or personal property, with or without damages, or for money claimed as due on contract, or as damages for breach of contract, or for injuries to person or property, all issues of fact shall be tried by a jury.

It is the character of the original complaint that fixes the nature of the suit and determines whether it should be tried in equity or at law. *Miller v. Carnation Co.*, 33 Colo. App. 62, 65, 516 P.2d 661, 663 (1973). The determinative issue in the complaint is

the characterization of the nature of the relief sought. *Continental Title Co. v. District Court*, 645 P.2d 1310, 1316 (Colo. 1982); *Virdanco, Inc. v. MTS International*, 820 P.2d 352, 354 (Colo. App. 1991).

If the complaint joins or commingles legal and equitable claims, the court must determine whether the basic thrust of the action is equitable or legal in nature. *Citicorp Acceptance Co. v. Sittner*, 772 P.2d 655, 656 (Colo. App. 1989); *see Snow Basin, Ltd. v. Boettcher & Co.*, 805 P.2d 1151, 1154 (Colo. App. 1990) (if the basic thrust of the action is equitable, there is no entitlement to a jury trial even though plaintiff seeks the recovery of money damages).

"A lien action is presumptively equitable and is to be tried by the court." *Aspen Drilling Co. v. Hayes*, 876 P.2d 86, 89 (Colo. App. 1994) (citing *Federal Lumber Co. v. Wheeler*, 643 P.2d 31, 34 (Colo. 1981)); *see Selfridge v. Leonard-Heffner Machinery Co.*, 51 Colo. 314, 316, 117 P. 158, 159 (1911) ("Proceedings to foreclose mechanics' liens are in their nature equitable, and are necessarily governed by the rules pertaining to chancery practice.").

At oral argument, defendants clarified that it was plaintiff's complaint and its claim of breach of contract that afforded them the right to a jury trial. We agree with the trial court that this is a case sounding in equity and properly triable to the court.

Plaintiff's complaint requested five separate claims for relief: breach of contract, claim on account, quantum meruit, unjust enrichment, and foreclosure of liens. Three of these five claims rest solely in equity. Additionally, in its complaint plaintiff argued this was an action "affecting real property located in Moffat County" and "concern[ing] real property and contract work performed in Moffat County."

Indeed, the "basic thrust" of plaintiff's action was foreclosure of its mechanic's lien on defendants' well. In its prayer for relief, plaintiff requested the court enter judgment:

> 1. For a decree that [plaintiff] has valid liens for the principal sum, upon all supplies furnished, and upon all wells . . . owned or operated by [defendants] . . . on the above described real property and improvements . . . .
>
> . . . .
>
> 3. For an order foreclosing [plaintiff's] Liens and for an order of sale upon all supplies

> furnished, and upon all wells . . . owned or operated by [defendants] . . . and applying the proceeds of the sale to the payment of the judgment and liens of [plaintiff], together with attorney fees and costs.

Therefore, we conclude the trial court properly determined this case sounded in equity and was triable to the court. *See Federal Lumber Co.*, 643 P.2d at 34 (no right to a jury trial in a statutory proceeding to enforce rights under a mechanic's lien); *First Nat'l Bank*, 794 P.2d at 1059 (trial court committed reversible error by failing to strike jury demand in action seeking judicial foreclosure of lien).

Furthermore, defendants' counterclaims, while legal in nature, did not entitle them to a jury trial. *See, e.g.*, *Selfridge*, 51 Colo. at 316, 117 P. at 159 ("The fact that the answer or cross-complaint sought to recover damages[] does not change the cause of action as set forth in, and determined by, the complaint."). And defendants' contention that plaintiff's actions "subsequent to the decision [to strike the jury demand] make it clear that the foreclosure of the lien was not the gravamen of this case" is unpersuasive because we look only to the original complaint, and not to subsequent events, to determine the right to a jury trial. *See, e.g.*, *Carder, Inc. v. Cash*, 97

P.3d 174, 187 (Colo. App. 2003) (the original complaint fixes the nature of the action).

Accordingly, we conclude the trial court correctly struck defendants' jury request.

III. Interest and Attorney Fees

Defendants contend the trial court erred in finding a "course of conduct" between the parties sufficient to support the award of a higher interest rate and attorney fees. We reject this contention.

Initially, we determine that Article 2 of the Uniform Commercial Code (UCC), sections 4-2-101 to -725, C.R.S. 2011, applies to this case based upon the agreement of the parties at oral argument that the UCC applies and that they are both merchants dealing in goods of the kind. *See* § 4-2-104(1), C.R.S. 2011.

We review a court's judgment entered after a trial to the court as a mixed question of fact and law. *Lawry v. Palm*, 192 P.3d 550, 558 (Colo. App. 2008). We defer to the court's credibility determinations and will disturb its findings of fact only if they are clearly erroneous and not supported by the record. *Id.* When the evidence is conflicting, a reviewing court may not substitute its findings of fact for those of the trial court merely because there may

be credible evidence supporting a different result.[1] *Id.* We review de novo the court's application of the governing legal standards. *Id.*

On the question of interest and attorney fees the trial court held the following:

> Here, the parties had one prior dealing in which interest and attorney fee language appear[ed] on the invoice. In that case the invoice was timely paid and no interest or attorney fees accrued. Also here, a field employee of defendants signed off on the invoice prior to presentation. The Court concludes that the conduct of the parties was sufficient to establish a course of conduct supporting the award of the higher rate of interest and reasonable attorney fees.

It is undisputed that the parties did not execute a formal contract. Rather, based upon defendants' credit application, plaintiff performed under an open account with invoices sent to

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[1] We note defendants' argument that "[b]ecause of the errors in the recitation of facts in the record, the lower court erroneously applied the law" and remind defendants that an appellate court is not a fact finding court. *People v. Pascual*, 111 P.3d 471, 476 (Colo. 2005) ("As an appellate court, we are not to engage in fact finding and will give deference to a trial court's finding of historical fact where it is supported by competent evidence in the record."). Defendants also fail to cite where in the record any support for their version of the facts might be. "It is the duty of counsel to inform the court both as to specific errors relied upon and as to the grounds, supporting facts, and authorities therefor." *Westrac, Inc. v. Walker Field*, 812 P.2d 714, 718 (Colo. App. 1991).

defendants after work was completed. Thus, for us to determine the terms of the contract, we look to any writings between the parties as well as any course of performance, course of dealing, and usage of trade. *See* § 4-2-208, C.R.S. 2011; *Offen, Inc. v. Rocky Mountain Constructors, Inc.*, 765 P.2d 600, 601 (Colo. App. 1988); *see also* 1 William D. Hawkland, *Uniform Commercial Code Series* § 2-207:3 (2011) (terms of the contract created through exchange of forms).

The credit application signed by defendants states the following: "If approved, I (we) agree to pay the account upon receipt of monthly invoices. Finance charges may be assessed on any past due balance." Invoice No. 279832 sent by plaintiff to defendants for the work done at the Hiawatha well states: "Interest Charged at 1 ½ % PER MONTH or 18% PER ANNUM on Accounts Not Paid Within 30 Days. All Costs and Reasonable Attorney fees for Collection Will Be Paid By Purchaser."

Based upon this language, we conclude that the interest and attorney fees provisions provided in the credit application and invoice were additional terms of the contract agreed to by defendants.

Section 4-2-207, C.R.S. 2011 addresses additional terms in a contract between merchants created through an exchange of forms:

> (1) A definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time, operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to those additional or different terms.
>
> (2) The additional terms are to be construed as proposals for addition to the contract. Between merchants such terms become part of the contract unless:
>
> . . .
>
> (b) They materially alter it . . . .
>
> (3) Conduct by both parties which recognizes the existence of a contract is sufficient to establish a contract for sale although the writings of the parties do not otherwise establish a contract. In such case, the terms of the particular contract consist of those terms on which the writings of the parties agree, together with any supplementary terms incorporated under any other provision of this title.

A clause providing for interest on overdue invoices does not materially alter a contract and therefore becomes a term of the contract unless notice of objection is seasonably given. *Offen*, 765

P.2d at 601; *see* § 4-2-207 cmt. 5, C.R.S. 2011; *see also* 2 Richard A. Lord, *Williston on Contracts* § 6:22 (4th ed. 2011) ("[C]lauses providing for interest on overdue accounts or fixing standard credit terms within acceptable trade limits or otherwise limiting remedies in a reasonable manner, again within acceptable trade limits, are said not to constitute material alterations."). Because both plaintiff and defendants are merchants, *see* § 4-2-104(1), C.R.S. 2011, the interest provision became a term of the contract. *Offen*, 765 P.2d at 601.

Furthermore, when a course of dealing between the parties establishes that a term does not result in surprise or hardship, that term is also incorporated into the contract. *Id.*; *see* § 4-2-207 cmt. 3, C.R.S. 2011; 2 *Williston on Contracts* § 6:22 ("In general, whether an alteration is material is dependent upon whether it will 'result in surprise or hardship if incorporated without express awareness by the other party.'").

Here, the trial court found one prior dealing between the parties. Additionally, the court found that an employee of defendants approved plaintiff's invoice No. 279832. Sufficient evidence in the record supports these findings. Therefore, we defer

to the trial court's findings of fact on this issue and consequently reach the same conclusion of law. Once a course of dealing was established between the parties and defendants had notice through their employee of the terms contained on the invoice, no surprise or hardship can be claimed.

Furthermore, defendants never seasonably objected to the proposed interest or attorney fees. Indeed, in their complaint filed in Denver County, defendants failed to object to either the interest or attorney fees requested by plaintiff when it filed the lien, even though they alleged a breach of contract.

Therefore, the term did not materially alter the agreement and became a part of the contract after sufficient time to object passed. *See Offen*, 765 P.2d at 601; *American Ins. Co. v. El Paso Pipe & Supply Co.*, 978 F.2d 1185, 1189-90 (10th Cir. 1992) (the determination of whether an attorney fees provision materially alters a contract depends on the unique facts of every case; a single written confirmation and the absence of a prior course of dealing may not necessarily indicate that a party is unreasonably surprised by an attorney fees provision).

Accordingly, we conclude the trial court did not err in awarding plaintiff a higher rate of interest and attorney fees.

The judgment is affirmed.

JUDGE DAILEY and JUDGE GABRIEL concur.