STATE OF MINNESOTA
IN COURT OF APPEALS
A19-2015

Minnkota Architectural Products Co., Inc.,
Respondent,

vs.

Rice Lake Construction Group,
Appellant.

Filed June 29, 2020
Affirmed
Reilly, Judge

Crow Wing County District Court
File No. 18-CV-19-1549

Michael D. Barrett, Cousineau, Van Bergen, McNee & Malone, P.A., Minnetonka, Minnesota (for respondent)

Nathan R. Sellers, Fabyanske, Westra, Hart & Thomson, P.A., Minneapolis, Minnesota (for appellant)

Considered and decided by Reilly, Presiding Judge; Smith, Tracy M., Judge; and Florey, Judge.

U N P U B L I S H E D O P I N I O N

REILLY, Judge

Respondent-subcontractor brought this breach-of-contract action against appellant-general-contractor, seeking to recover unpaid retainage. On removal from conciliation court, appellant argues that the district court erred in granting summary judgment to respondent because (1) the retainage claim is time-barred under Minn. Stat. § 541.05, subd. 1(1) (2018); and (2) the claim is a compulsory counterclaim under Minn. R. Civ. P. 13.01 and should have been brought in appellant's earlier (unsuccessful) breach-of-contract action against respondent. Because the district court did not err in granting summary judgment to respondent, we affirm.

FACTS

In August 2009, appellant-general-contractor Rice Lake Construction Group (Rice Lake) contracted with project owner, the City of St. Peter (St. Peter), to construct a water treatment plant. Rice Lake subcontracted with respondent-subcontractor Minnkota Architectural Products Co. Inc. (Minnkota) for roof work on the water treatment plant. The subcontract agreement provided that:

> The Contractor shall, so long as the Sub-Contractor is not in default hereunder and upon receipt of payment from the Owner, promptly pay the Sub-Contractor for such work as the Engineer shall determine he has performed hereunder at the price set forth below, less **5%** thereof as a retainage until final payment. As is hereafter indicated, the contractor will be responsible to pay the Sub-Contractor such retainage only when final payment is received from the project owner **yes** (indicate yes or no). If it is agreed that the contractor shall pay such retainage prior to final payment by the Owner then such payment to the Sub-Contractor shall be made within **N/A** days following final completion, determination of quantities, and acceptance by Owner of the performance under this agreement.

In July, August, and September 2010, Rice Lake made payments to Minnkota based on the subcontract price of $224,644.[1] In November 2010, Rice Lake paid Minnkota the

[1] The original subcontract amount was $213,395.00. In February 2010, Rice Lake issued a change order, increasing the contract amount to $224,644.

full subcontract price, less 5% retainage, $11,232.20. On July 2, 2012, Minnkota sent Rice Lake a statement reflecting that the $11,232.20 was due and owing and was 90 days past due. St. Peter, the project owner, had not made final payment as of that date; and Rice Lake did not pay the retainage money owed to Minnkota.

After Minnkota installed the roofs, the water treatment buildings experienced moisture and condensation problems underneath the roofs. Minnkota made several attempts to fix the roofs between 2011 and 2014. But in September 2014, Minnkota informed Rice Lake that it would no longer attempt to remedy the moisture and condensation issues. In March 2015, the project engineer issued a field order, directing Rice Lake to perform repair work on the roofs. Rice Lake forwarded the field order to Minnkota, who declined to do the repair work. Rice Lake hired a replacement subcontractor to complete repair and replacement work on the roofs.

On November 28, 2016, the St. Peter Director of Public Works recommended that St. Peter authorize the release of retainage funds to Rice Lake because it completed the project to design standards. On December 12, 2016, the St. Peter City Council passed and adopted the "Resolution Accepting Water Systems Improvement Project As Completed and Authorizing Release of Project Retainage" and St. Peter paid Rice Lake the final payment for the project.

Months before Rice Lake received final payment from St. Peter, in March 2016, Rice Lake sued Minnkota, claiming breach of contract for failing to perform work in a good and workmanlike manner when it installed a defective roof. Minnkota included no counterclaim in its answer to Rice Lake's complaint. In April 2018, the parties tried the case to a jury. The jury found Minnkota did not breach its contract with Rice Lake. The district court accepted the jury's special verdict and issued findings of fact, conclusions of law, and order for judgment. The district court dismissed the complaint against Minnkota and concluded that Rice Lake had no right to damages. The district court entered judgment for Minnkota for taxable costs and disbursements and the judgment was satisfied in September 2018.

In October 2018, Minnkota commenced the current action in conciliation court against Rice Lake, claiming $11,232.20 in unpaid retainage under the subcontract. The conciliation court entered judgment for Minnkota. Rice Lake then filed a demand for removal from conciliation court to the district court and the parties filed cross-motions for summary judgment. Rice Lake argued that Minnkota's claim was time-barred by the statute of limitations and that it was a compulsory counterclaim that should have been brought during Rice Lake's earlier breach-of-contract action. The district court denied Rice Lake's motion for summary judgment, granted Minnkota's motion for summary judgment, and ordered judgment in Minnkota's favor in the amount of the unpaid retainage. The district court determined that Minnkota's suit was not barred by the statute of limitations and that its claim was not a compulsory counterclaim that should have been brought in the prior action. Rice Lake appeals.

D E C I S I O N

"A motion for summary judgment must be granted when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that either party is entitled to judgment as a matter of law." *Cargill Inc. v. Jorgenson Farms*, 719 N.W.2d 226, 232 (Minn. App. 2006) (citation omitted). "On appeal from summary judgment, we review whether there are any genuine issues of material fact and whether the district court erred in its application of the law." *STAR Ctrs., Inc. v. Faegre & Benson, L.L.P.*, 644 N.W.2d 72, 76 (Minn. 2002) (citation omitted). We review de novo whether the district court erred in its application of the law. *Riverview Muir Doran, LLC v. JADT Dev. Grp., LLC*, 790 N.W.2d 167, 170 (Minn. 2010). Because the facts here are not in dispute, the only issue on appeal is whether the district court erred as a matter of law.

I. Minnkota's claim is not barred by the statute of limitations.

Rice Lake argues that the district court erred when it determined Minnkota's breach-of-contract action for the unpaid retainage is not barred by the statute of limitations. The statute of limitations for "a contract or other obligation, express or implied" is six years. Minn. Stat. § 541.05, subd. 1(1). "The statute of limitations begins to run on a claim when the cause of action accrues." *Park Nicollet Clinic v. Hamann*, 808 N.W.2d 828, 832 (Minn. 2011). "A cause of action accrues when all of the elements of the action have occurred, such that the cause of action could be brought and would survive a motion to dismiss for failure to state a claim." *Id.* A breach-of-contract action "accrues immediately on a breach, though actual damages resulting therefrom do not occur until afterwards." *Bachertz v. Hayes-Lucas Lumber Co.*, 275 N.W.2d 694, 697 (Minn. 1937). "A breach of contract is a failure, without legal excuse, to perform any promise that forms the whole or part of the contract." *Lyon Fin. Servs., Inc. v. Ill. Paper & Copier Co.*, 848 N.W.2d 539, 543 (Minn. 2014) (citation omitted).

The district court determined that Minnkota's claim was not barred by the statute of limitations because "the retainage became available to Rice Lake for distribution" in 2016. Under the subcontract, Rice Lake had to pay the 5% retainage to Minnkota, "only when final payment is received from the project owner." St. Peter, the project owner, did not authorize release of the project retainage until December 12, 2016, when it passed and adopted the "Resolution Accepting Water Systems Improvement Project As Completed and Authorizing Release of Project Retainage."

Rice Lake contends the district court erred because Minnkota's breach-of-contract action accrued when Minnkota sent Rice Lake the statement showing the past-due balance on the subcontract on July 2, 2012, and Rice Lake failed to pay it in either July or August 2012. Rice Lake relies on *Mrozik Constr., Inc. v. Lovering Assocs., Inc.*, 461 N.W.2d 49 (Minn. App. 1990), arguing that, under that case, the subcontract lacks a condition precedent. Rice Lake contends that, with no condition precedent, it owed the unpaid retainage "within a reasonable period of time" after the project was completed, when Minnkota sent Rice Lake the invoice on July 2, 2012, showing the unpaid balance. Thus, Rice Lake asserts, Minnkota's cause of action accrued then, making its claim here untimely. We disagree.

Mrozik is similar to this case in that both cases involve a dispute between a general contractor and subcontractor over the general contractor's failure to pay a portion of the subcontract. But the similarities end there. In *Mrozik*, the general contractor failed to pay the subcontractor because the project owner was insolvent and didn't pay the general contractor. *Id.* at 50. There was no dispute that the subcontractor completed the work required under the subcontract. *Id*. Even so, the general contractor argued that it was excused from paying the subcontractor under the subcontract, which provided that "[a]t all times the Subcontractor shall be paid to the extent that the Contractor has been paid on the Subcontractor's account," because the subcontract established "payment by the owner to the general contractor as a condition precedent to payment to the subcontractor." *Id.*

Because Minnesota courts had not yet addressed the issue, this court looked to other jurisdictions. *Id.* at 51. We explained that the Restatement (Second) of Contracts, and other state and federal courts have held that "a subcontract will not be construed as having payment to the general contractor as a condition precedent to the general contractor's payment to the subcontractor, unless the parties express such intent in plain, unequivocal, and unambiguous language in the subcontract." *Id.* We recognized that, as a matter of policy, the general contractor bears the risk of loss when a project owner fails to pay and that the risk of loss should not be shifted to the subcontractor "absent unequivocal, unambiguous language to that effect." *Id*. at 51-52 (citing Restatement (Second) of Contracts § 227; *Thos. J. Dyer Co. v. Bishop Int'l Eng'g Co*., 303 F.2d 655 (6th Cir. 1962)). We concluded that the "parties' subcontract did not contain the unambiguous and unequivocal language necessary to shift the risk of the owner's insolvency to the subcontractor," and declined to construe the contract as creating a condition precedent to payment. *Mrozik*, 461 N.W.2d at 52.

In *Mrozik* we analyzed and answered the question *whether* a subcontractor is entitled to payment from a general contractor where their contract conditions that payment on payment by the project owner to the general contractor and the project owner fails to pay the general contractor. Here, the issue is one of timing, *when* does the contract require the general contractor to pay the subcontractor, assuming the project owner makes final payment to the general contractor. Because the project owner here was not insolvent and made the final payment to the general contractor, the policy considerations at play in *Mrozik* do not apply. As a result, we conclude that *Mrozik*—which did not address a statute-of-limitations question—does not answer the issue presented here.[2]

Moreover, even if *Mrozik* applies and the language in the subcontract did not "unequivocally express an intent of the parties to establish a condition precedent," *id*. at 52, the undisputed facts here include: (1) the solvency of the project owner, (2) Rice Lake's unhappiness with Minnkota's construction of the roof, (3) Rice Lake's hiring another subcontractor to fix the roof, (4) Rice Lake's commencement of a breach-of-contract action against Minnkota in March 2016 for failing to perform its roofing project in a good and workmanlike manner, and (5) St. Peter's acceptance of the project as completed and final payment of the retainage fee in December 2016. The undisputed facts and terms of the subcontract do not support a determination that Minnkota's cause of action for the unpaid retainage necessarily accrued in July 2012. We discern no error in the district court's conclusion that the statute of limitations did not bar Minnkota's claim. Rice Lake has not established that the claim accrued more than six years before the action commenced.

[2] Rice Lake also relies on *MidAmerica Constr. Mgmt., Inc. v. MasTec N.A., Inc.*, 436 F.3d 1257 (10th Cir. 2006) and *Tymeless Flooring, Inc. v. Rotolo Consultants, Inc.*, 172 So.3d 145 (La. App. 4 Cir. 2015) to discuss the differences between "pay-when-paid" and "pay-if-paid" clauses and the policy considerations we addressed before in *Mrozik.* Neither of these cases are precedential. Because we decline to apply our holding in *Mrozik* to the facts presented here, we conclude these cases are not helpful.

II. Minnkota's claim is not barred as a compulsory counterclaim.

Rice Lake also contends that Minnkota's breach-of-contract action is barred as a compulsory counterclaim under Minn. R. Civ. P. 13.01 because it should have been brought during Rice Lake's previous March 2016 breach-of-contract action against Minnkota. Minn. R. Civ. P. 13.01 provides that the pleadings "shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction that is the subject matter of the opposing party's claim." This rule "contemplates that a counterclaim is compulsory only if the claim is ripe, i.e., if the claim is mature in the sense that a cause of action exists for which a lawsuit may properly be commenced and pursued." *Leiendecker v. Asian Women United of Minn.*, 731 N.W.2d 836, 841 (Minn. App. 2007), *review denied* (Minn. Aug. 7, 2007).

Rice Lake argues that Minnkota's retainage claim is a compulsory counterclaim because Minnkota's "present action arises out of the transaction that [wa]s the subject matter of'" Rice Lake's complaint in the first district court action and the "very ills the Compulsory Counterclaim Rule is designed to prevent were occasioned here" given the length of the previous litigation. The district court determined that it would have been "improper and premature" for Minnkota to bring an action for the recovery of the retainage funds on March 2, 2016, because Rice Lake could not access the retainage funds until at least December 2016.

A counterclaim is compulsory only if it is ripe when the pleadings are served. *Id.* Rice Lake does not address whether Minnkota's cause of action for the unpaid retainage was ripe when the original action was filed in March 2016 and appears not to challenge the district court's conclusion that Minnkota's claim was not ripe at that time. Thus, Rice Lake has not proven as a matter of law that Minnkota's claim was ripe in March 2016. Based on the subcontract language and the undisputed facts, we discern no error in the district court's determination.

Affirmed.