Rel: March 22, 2024

SUPREME COURT OF ALABAMA

OCTOBER TERM, 2023-2024

SC-2023-0612

NSH Corporation

v.

City of Calera

Appeal from Shelby Circuit Court
(CV-15-900920)

MITCHELL, Justice.

"The Enclave" is a new residential subdivision in Calera. Development began in 2005, but just a few years into construction, the Enclave's developer went bankrupt, and progress on the project slowed

to a halt. One particular difficulty had to do with the Enclave's roads: the developer had installed the roads' foundational layers during the early stages of construction but went out of business before it could finish. Eventually, the City of Calera joined with two other entities -- the bank that had financed the development and a building company that had purchased several of the development's lots -- to create a plan to revive the Enclave. Together, the City, the bank, and the builder signed a three-way contract that, among other things, required the bank to finish the roads and pay for the cost of doing so, up to a maximum of $58,000, and required the builder to pay for any costs above that amount.

But the bank never followed through on its obligation to complete the roads. To this day, they remain unfinished. The City eventually brought this breach-of-contract suit against the builder, arguing that the builder should have either finished the roads on its own or else compelled the bank the finish them. The trial court ruled in the City's favor and awarded it $138,797 in damages. The builder now appeals, arguing that it did not violate any of its own obligations and that the trial court erroneously saddled it with responsibility for the bank's breach. We agree and reverse.

Facts and Procedural History

Back in 2005, a father-son development team ("the developer") set out to create a new subdivision in Calera. The developer named the planned subdivision "the Enclave" and financed it through a loan from BancorpSouth Bank ("the bank"). In keeping with the usual process, the developer created a preliminary plat to divide the land into individual lots and to connect those lots to each other via several roads.

One year later -- after the developer had installed the foundational layers of the subdivision's roads -- the City approved a final plat. When that plat was recorded, the City executed a resolution dedicating the Enclave's roads to the public, conditioned on the developer's promise to complete the roads and maintain them in proper condition for one year thereafter. In accordance with that obligation, the developer provided the City with a letter of credit from the bank worth about $43,000 -- 1.5 times the then-estimated cost of completing the roads -- to protect the City in case the developer failed to complete the roads within one year of the date of the resolution, as required. The bank's letter of credit expired in October 2007.

But by October 2007, the developer still had not completed the roads. The City, for reasons not explained in the record, never sought to enforce the $43,000 letter of credit (nor did it secure alternate funding for the roads). Meanwhile, the developer continued selling lots, the City continued issuing building permits, and new Enclave residents began building houses. But before most of the lots were sold or the roads finished, the developer went bankrupt, at which point the City found itself with no developer, no valid letter of credit, and unfinished streets.

The bank foreclosed on the remaining lots and sold them. NSH Corporation, another residential development company, purchased several of those lots from the bank in 2009 and began building houses on some of them, which it hoped to turn around and sell to prospective homeowners.

Not long after NSH's purchase, the City stopped issuing building permits to NSH. The parties dispute the City's motivation for that decision. NSH insists that the City was "improperly us[ing] its building permit process as leverage" in order to "extort[] payments from NSH that were not otherwise required." NSH's brief at 33. The City, for its part, maintains that its decision to stop issuing permits was a neutral response

based on legitimate concerns about the viability of the subdivision in the aftermath of the developer's bankruptcy and the letter of credit's expiration. City's brief at 5. Whatever the reason, permits were halted, leaving NSH -- and the bank -- with several empty lots.

In response to this untenable situation, the City, the bank, and NSH entered into a three-way contract in January 2010 ("the 2010 agreement"), aimed at "reviv[ing] the subdivision." That agreement provided as follows:

> "This Agreement is made this 19th day of January, 2010 by and between BancorpSouth Bank ('Bank'), NSH Corp., and the City of Calera ….
>
> "….
>
> "1. Bank shall provide the final overlay of asphalt on the [Enclave's] road[s] ....
>
> "2. Bank shall be responsible for the cost of the final overlay of asphalt up to a maximum of Fifty Eight Thousand no/100 Dollars ($58,000.00). NSH Corp. shall be responsible for the payment of any additional costs in excess of $58,000.00.
>
> "3. Bank shall provide an Irrevocable Stand-By Letter of Credit in the amount of Fifty Eight Thousand and no/100 Dollars ($58,000.00) to the city of Calera ....
>
> "4. Upon completion of the final overlay of asphalt the City of Calera shall accept dedication of the road[s], subject

> to the maintenance responsibilities of NSH hereafter specified.
>
> "5. NSH Corp shall maintain the road[s] … for one year from the date of completion of placing the final overlay of asphalt on the road[s].
>
> "....
>
> "13. This Agreement constitutes the entire agreement between the parties."

As soon as the 2010 agreement had been signed, the City issued building permits to NSH and the bank issued a new letter of credit in the amount of $58,000 to secure completion of the roads. Over the next couple of years, NSH built houses on its lots, sold those houses to new Enclave residents, and then, once the last house had been sold, left the project. During that time, the bank never finished the roads -- and neither did the City or NSH.

In August 2013, the City wrote a letter to NSH informing it that the bank had not yet completed the roads and asking NSH to "coordinate" with the bank to have them completed. As explained below, this letter played a major role in the City's suit against NSH, so we reproduce it in full here:

"Dear [NSH representative],

> "Pursuant to the Agreement dated January 19, 2010 between [the bank], [NSH] and [the City], the City of Calera is hereby notifying [NSH] that the streets within the subject development are at the point to which they shall be completed.
>
> "Please coordinate with [the bank] to have this work completed at the earliest convenience. Prior to beginning work, please notify my office so that any required remedial work can be marked in the field by my staff for your completion prior to the placement of the asphalt wearing course.
>
> "[The City] shall continue to hold the letter of credit provided by [the bank] until such time that the roads have been dedicated to the City. At that time, the City shall release the letter of credit. Be reminded that [NSH] is financially responsible for any costs over and above the letter of credit value and for also maintaining the roads within the development for one year after the road[s'] dedication.
>
> "If you have any questions, please contact me at your convenience.
>
> "Sincerely,
>
> "[The City Engineer]"

NSH did not respond to this letter, and the bank likewise made no effort to finish the roads. The record does not contain details about the communications that followed between the City and the bank, but, in June 2015, the City and the bank signed an agreement titled "Mutual General Release and Receipt," in which the City promised to "release" the bank from its contractual obligations in exchange for a $58,000 check,

which reflected the bank's maximum liability under the original 2010 agreement. For reasons that remain unclear, the City never used that money to complete the Enclave's roads.

Several months passed, during which time the unfinished roads continued to deteriorate. Then, in October 2015 -- over two years after the City's letter to NSH -- the City filed this breach-of-contract suit against NSH, arguing that "NSH ha[d] breached the [2010] Agreement by failing to pay the additional costs of the final overlay of asphalt in excess of the $58,000 paid by [the bank]." The City demanded $138,797 in damages, plus interest and costs.

The litigation that followed dragged on for the better part of a decade. NSH initially moved to dismiss the City's suit -- arguing, among other things, that the 2010 agreement was invalid for want of consideration, that NSH did not breach that agreement, that the City's discharge of the bank and delays in enforcing its own rights had made performance impossible, and that the bank was an indispensable party -- but that motion was denied. The judge to whom the case was initially assigned held a bench trial in July 2022. But he retired before issuing a ruling, so the case was reassigned to a different judge, who held a second

bench trial (which more or less duplicated the first one) in December 2022.

The sole witness at both trials was the City Engineer, who recounted the history given above. He explained that the $138,797 damages figure in the City's complaint had come from a 2015 estimate and that the cost of completing the roads as of 2021 would be over $300,000.

The trial court ultimately ruled for the City. In its judgment, the trial court held that NSH had breached its payment obligation in August 2013, when it failed to respond to the City's "written demand." The court awarded the City $138,797 in damages, plus $98,025.38 in prejudgment interest. NSH timely appealed.

Standard of Review

We review legal questions, including questions involving the effect of unambiguous contract terms, de novo. Classroomdirect.com, LLC v. Draphix, LLC, 992 So. 2d 692, 701 (Ala. 2008). Factual questions, on the other hand, are within the trial court's domain. Id. And where, as here, the trial court heard evidence ore tenus -- that is, through oral testimony -- we presume the correctness of the court's conclusions on issues of fact,

and its determination will not be disturbed unless it is clearly erroneous, without supporting evidence, manifestly unjust, or against the great weight of the evidence. Id. But when the trial court improperly applies law to facts, we do not extend any presumption of correctness to the court's judgment. Id.

Analysis

To prevail on a breach-of-contract claim, a plaintiff must prove (1) that there was a valid contract between the parties, (2) which the plaintiff honored, (3) but which the defendant breached, and (4) that the defendant's breach damaged the plaintiff. Shaffer v. Regions Fin. Corp., 29 So. 3d 872, 880 (Ala. 2009).

NSH argues that the City failed to make its case with respect to three of those four elements. First, NSH contends that the 2010 agreement is invalid for lack of consideration. Second, NSH argues that it could not have breached its duty to "be responsible for the payment of any additional costs in excess of $58,000" in August 2013 because the existence and amount of those additional costs were not known at that time. Finally, NSH argues that the City did not adequately plead or

prove damages. We disagree with NSH's first argument but agree with its second, and therefore have no need to reach its third.

A. Consideration

We begin our discussion of the consideration issue by clearing up some procedural confusion. NSH's brief on appeal opens by arguing that -- since the City carries the burden of establishing the existence of a contract -- the City must also bear the burden of showing that the contract was supported by adequate consideration. NSH further argues that the trial court should not have allowed the City to offer parol evidence showing consideration and that, absent such evidence, the City cannot meet its burden of proof. NSH is mistaken on both fronts.

Alabama law presumes that contracts are supported by consideration, so a party challenging the existence or adequacy of consideration carries the burden of "affirmatively" rebutting that presumption. See Lovejoy v. Franklin, 426 So. 2d 841, 843 (Ala. Civ. App. 1983) (citing Rule 8(c), Ala. R. Civ. P.; § 12-21-112, Ala. Code 1975); see also McCormick v. Badham, 204 Ala. 2, 8, 85 So. 401, 406 (1919). Here, that party was NSH.

In addition, this Court's precedents have permitted parties to use parol evidence to establish that consideration has already been given in support of a written contract -- though such evidence cannot be used to vary a contract's terms. Joseph v. Hopkins, 276 Ala. 18, 22, 158 So. 2d 660, 664 (1963). The trial court's reliance on parol evidence appears to be consistent with the principles set out in Joseph. Here, the trial court heard testimony from the City Engineer, who explained that the City had agreed to issue building permits in exchange for NSH's promise to pay and said that the City had fulfilled that portion of the 2010 agreement when that agreement was signed. In short, the City Engineer's testimony was used to establish that the 2010 agreement was valid because it had already been supported by "true consideration," but his testimony was not used to alter "the legal operation and effect of the contract" by varying its terms or imposing new duties going forward. 276 Ala. at 22-23, 158 So. 2d at 664.

This brings us to NSH's argument that the City's promise to issue building permits was illusory. According to NSH, the City was already required by law to issue building permits to NSH. And since a promise to fulfill a preexisting legal obligation is "'of no value,'" NSH contends

that the City's promise to issue building permits cannot serve as "'"sufficient consideration for a promise given in return."'" Gloor v. BancorpSouth Bank, 925 So. 2d 984, 992 (Ala. Civ. App. 2004) (citations omitted); accord Armstrong Bus. Servs., Inc. v. AmSouth Bank, 817 So. 2d 665, 675 (Ala. 2001) (explaining that the "'"test of good consideration for a contract is whether the promisee at the instance of the promisor"'" has "'"done something he was not bound to do"'" (citations and emphasis omitted)).

The problem with NSH's theory is that NSH has not pointed to any law requiring the City to issue building permits to it. Nor did NSH introduce evidence at trial showing that it had satisfied otherwise applicable building-permitting regulations or that the City had singled it out for unequal treatment.[1] As a consequence, NSH has not met its

[1]In its brief on appeal, NSH asserts that "[a]ll other third-party owners in the Enclave received building permits from the City without any condition that they provide, or contribute any money for, the final overlay of asphalt." NSH's brief at 12. But the portion of the record cited by NSH does not support that assertion. Those pages simply contain testimony by the City Engineer in which he states that building permits were granted to other third-party owners "before [the developer] bankrupted," which is consistent with the City's position that its decision to withhold permits was a neutral response to the developer's bankruptcy.

burden of demonstrating that the 2010 agreement is invalid for want of consideration.

B. Breach

The 2010 agreement between the City, the bank, and NSH was straightforward. As noted above, it required the "Bank [to] provide the final overlay of asphalt" and to "be responsible for the cost" of the overlay "up to a maximum" of $58,000. NSH's obligations were limited to covering "any additional costs [of providing the overlay] in excess of $58,000" and to maintaining the roads for one year thereafter.

The City argued below, and the trial court found, that NSH breached its payment obligation in August 2013 when it did not respond to the City's letter asking NSH to "coordinate with [the bank] to have th[e road] work completed at the earliest convenience." At trial, the City characterized the August 2013 letter as a "written demand" to "do the [road] work and to pay for it," which, the City argued, triggered NSH's payment obligations under the 2010 agreement. The trial court accepted the City's theory and determined that NSH fell into breach "in August 2013," when it failed to promptly pay out the costs of final overlay in response to NSH's "written demand."

NSH challenges the trial court's determination. It emphasizes that, contrary to the City's characterization, the August 2013 letter did not "demand" any specific sum from NSH, did not list any costs associated with the final overlay, and did not ask NSH to take any action at all apart from "coordinat[ing] with [the bank]" to help the bank fulfill its own obligation to "have th[e road] work completed at the earliest convenience." NSH argues that it could not have responded to the City's letter in a way that either fulfilled or breached its obligation to pay its share of the final cost, because the final cost was not then known.

We agree with NSH. The August 2013 letter could not have triggered NSH's obligation to pay "any additional costs [of providing the overlay] in excess of $58,000," because neither that letter nor any communications leading up to it indicated what those "additional costs" were. Indeed, the letter does not even suggest that the City thought costs were likely to exceed $58,000. If anything, it appears that the City expected the opposite: the City Engineer testified that, at the time of the 2013 letter, the most recent formal estimate of the cost to finish the roads was around $38,667 -- two-thirds of the $58,000 that the bank had put

forward in its 2010 letter of credit and well below the trigger for NSH's payment obligation.

We are mindful of the "great deference" owed to the trial court's factual determinations under the ore tenus standard of review. Hope Devs., Inc. v. Vandiver, 665 So. 2d 910, 914 (Ala. 1995). But even after reviewing the entire record -- including the briefing below and the full transcripts from both trials -- and drawing all inferences in favor of the City, we still cannot tell what amount of money the City thinks NSH should have paid it in response to the August 2013 letter, or how it believes NSH could have calculated that sum.

The City's brief on appeal does little to clarify its position. The City devotes much of its brief to arguing that the 2010 agreement did not expressly make "completion of the streets" a condition precedent to NSH's payment. That may be true, but it is beside the point. Even if NSH's payment obligation was not conditioned on physical completion of the roadwork, it necessarily was conditioned on NSH's knowing "the cost" of that work. That is because, without knowing the cost, NSH could not have calculated -- let alone paid -- the difference between the total cost and the bank's $58,000 obligation. Yet the City cannot point to, and we

cannot find, any evidence suggesting that either the City or the bank informed NSH that the cost of completion would exceed $58,000 in (or before) August 2013.

Perhaps recognizing the difficulty of its primary theory, the City turns to an alternative one. It asks us to hold that NSH and the bank should be "considered partners or at least one party as far as the [2010] agreement is concerned," because NSH and the bank shared common goals in completing the development, such that "what benefitted one benefitted the other." City's brief at 30. Accordingly, the City argues, NSH was required to respond to the August 2013 letter either by coercing the bank's specific performance (though the City does not explain how it thinks NSH could have done that) or by affirmatively undertaking "the bank's duty to complete the roads" itself. City's brief at 30-31.

It is understandable why the "one party" theory appeals to the City. If correct, it would shift to NSH both the bank's specific-performance obligation and the responsibility for failing to fulfill that obligation within a reasonable time. And, in this case, the consequences of failing to complete the roads within a reasonable time are stark: because the roads were not promptly sealed, they have "deteriorated so bad[ly]" as to

require extensive repair. Thanks in part to that deterioration and in part to inflation, the estimated cost of completing the roads has ballooned from around $38,667 (the estimated cost in 2010) to over $300,000 (the 2021 estimate given by the City Engineer at trial).

But whatever its practical advantages, the "one party" theory is meritless. The bank and NSH are independent entities, and the 2010 agreement reflects that reality. That agreement begins by stating that it is "by and between" three separately named parties (the City, the bank, and NSH); goes on to assign unique duties to each of those three parties; and ends by requiring separate signatures from each party's representative. There is simply no support -- in either the 2010 agreement itself, the record below, or general principles of contract law -- for the City's belief that it could unilaterally transfer the bank's obligations to NSH.

In the end, the City has not shown that NSH breached the 2010 agreement or even provided a viable theory as to how that breach could have occurred. The trial court's determination that NSH violated its payment obligation in August 2013 was clear error, and we reverse its

judgment on that basis. We have no need to reach NSH's alternative challenges to the trial court's damages award.

Conclusion

The judgment of the trial court is reversed.

REVERSED AND REMANDED.

Parker, C.J., and Shaw, Bryan, and Mendheim, JJ., concur.