No. 21-124160-A

IN THE
COURT OF APPEALS OF THE
STATE OF KANSAS

BENCHMARK PROPERTY REMODELING, LLC,
Plaintiff-Appellant

vs.

GRANDMOTHERS, INC.,
COREFIRST BANK & TRUST,
KANSAS DEPARTMENT OF REVENUE,
ROBERT ZIBELL, STATE OF KANSAS,
Defendants-Appellees

REPLY BRIEF OF APPELLANT TO BRIEF OF APPELLEE, STATE OF KANSAS, DEPARTMENT OF REVENUE AND BRIEF OF APPELLEE GRANDMOTHERS, INC.

Appeal from the District Court of Shawnee County, Kansas
Honorable Mary Christopher, Judge
District Court Case No. 2019-CV-000008

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Oral Argument Requested: 15 minutes

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Reply Argument and Authorities

Rule 6.05 Statement

This reply brief if made necessary by new material in the appellees' briefs. Specifically, the new material is:

(1) this Court has jurisdiction to hear this appeal because the *Arnold v. Hewett* case is distinguishable and not relevant to the facts of this case (Brief of Appellee KDOR ["K.Aple.Br."] 5-6)

(2) KDOR's argument that the district court could engage in contract interpretation and view pleadings in the light most favorable to KDOR in evaluating its motion for judgment on the pleadings (K.Aple.Br. 12)

(3) Grandmothers' argument that the district court could resolve a question of fact such as the meeting of the minds of the parties to a contract on a motion for summary judgment (Brief of Appellee Grandmothers ["G.Aple.Br."] 10)

(4) Grandmothers' argument that Benchmark's Kansas Fairness in Private Construction Contract Act claim fails because Benchmark did not have a contract with the owner when Benchmark alleged it had a contract with Grandmothers (G.Aple.Br. 11)

(5) Grandmothers' argument that the filing of the lawsuit or its self-serving filing of an Offer of Judgment were evidence of a good faith dispute to preclude interest and attorneys' fees under the Fairness Act (G.Aple.Br. 12-13)

I. This Court has jurisdiction over Benchmark's Appeal, as there are no further questions or actions for the district court, its dismissed claims have not been refiled, and there is no piecemeal litigation.

Benchmark is seeking review of only its most important claims in the simplest, most straightforward way possible, and has abandoned all of its other claims in pursuit of this singular goal. Benchmark's path to appeal does not create piecemeal litigation or piecemeal appeals and does not seek to circumvent any prior decision of any district or appellate court to obtain appellate review. This is Benchmark's only chance for compensation for the construction work it performed for KDOR and Grandmothers without receiving payment. There are no "further questions or directions for the future or further action of the court" that prevent the Judgments in this case from being a final decision. *See Bain v. Artzer*, 271 Kan. 578, 580 (2001). This court has jurisdiction over Benchmark's appeal.

Appellees' arguments regarding jurisdiction rely on cases that actually involved piecemeal litigation and circumvention of prior court orders to obtain jurisdiction. For example, this case is not analogous to *Arnold v. Hewitt*, 144 P.3d 81 (Kan. App. 2006) because in that case the appellant first filed an interlocutory appeal which was denied, then filed a motion to dismiss its negligence claim without prejudice in order to pursue an appeal. After filing its appeal, appellant deliberately pursued piecemeal litigation by refiling the same negligence claim it had just dismissed in the district court so it could simultaneously pursue an appeal on the dismissed and continue litigate an additional claim. *Arnold*, 32 Kan. App. 2d 500, 500-501. That is, the appellant sought to circumvent the court's initial decision denying an interlocutory appeal and to pursue all claims at once.

Unlike the *Arnold* case, Benchmark did not and cannot pursue its claims that were dismissed without prejudice. Benchmark's claims accrued in 2018 and were subject to a two-year

statute of limitations. Kansas' savings statute, K.S.A. § 60-518, permitted Benchmark to refile those claims within 6 months of the dismissal on April 19, 2021, which elapsed on October 19, 2021. This brief period of time allowed Benchmark to carefully assess its options before it chose to pursue appeal of its contract and Fairness Act claims. Benchmark did not refile any of the voluntarily dismissed claims and is exclusively pursuing this appeal. KDOR misconstrues Benchmark's intention, representing that Benchmark "would attempt to revive the dismissed claims." (K.Aple.Br. 6) This is false and not possible given the statutes of limitations and § 60-518. The claims Benchmark dismissed without prejudice are now time barred and will never, ever result in piecemeal litigation. The judgments and dismissals in this case "generally dispose[] of the entire merits of the case and leave[] no further questions or the possibility of future directions or actions by the court" as is contemplated by the Court in *Arnold*. 32 Kan. App. 2d 500.

Similarly, *Cook v. Rocky Mountain Bank Note Co.*, 974 F.2d 147 (10th Cir. 1992), is also not on point. In *Cook*, the appellant attempted to "subvert the requirements of Rule 54(b) by voluntarily dismissing [claims] ***when the district court would not grant certification of her third claim for relief***." *Cook*, 974 F.2d at 148 (emphasis added). Benchmark is not attempting to circumvent any procedure or decision of any other court. It has simply made the decision to only pursue its claims for breach of contract and the claims reliant on that contract. Benchmark cannot go back and refile any claims. Its only relief is this appeal, which is seeking review of final decisions on the merits of KDOR's Motion for Judgment on the Pleadings and Grandmothers' Motion for Summary Judgment.

KDOR's accusation that Benchmark was "manufacturing jurisdiction" or seeking a double benefit is the opposite of what actually occurred in this case. (K.Aple.Br. 7) There is no scenario where any party will be subjected to multiple lawsuits involving the facts of this case. Benchmark

has zero claims that have not been fully resolved at the district court level that could ever be refiled in this matter. It is for this reason that this case is identical to *Smith v. Welch*, 265 Kan. 868, 882-883 (1998). As in *Smith,* some of Benchmark's claims were resolved by the district court by Judgment on the Pleadings and Summary Judgement, and some were dismissed by Benchmark without prejudice and not refiled or pursued. The Court in *Smith* did not need to address jurisdiction because, as is the case here, there were no other claims pending and no possibility of piecemeal litigation.

Finally, Grandmothers' suggestion that Benchmark should have pursued a certification of the district court's Judgments on KDOR's Motion for Judgment on the Pleadings and Grandmothers' Motion for Summary Judgment under K.S.A. § 60-254(b) would not change where the parties are today. (G.Aple.Br. 6) Section 60-254(b) applies when other claims remain pending before the district court. Such is not the case here. Benchmark has dismissed all of its other claims and is not pursuing them. There is nothing left for the district court to consider or decide. This court has jurisdiction to consider Benchmark's appeal.

II. KDOR's arguments fail to accept all allegations pleaded in Benchmark's Section Amended Petition as admitted, fail to view the pleadings in the light most favorable to Benchmark, and are unsupported by Kansas law.

KDOR recites, then proceeds to ignore the legal standard for a motion for judgment on the pleadings, which unequivocally requires all allegations in Benchmark's Second Amended Petition to be deemed admitted. (K.Aple.Br. 8) *See, Mashaney v. Board of Indigents' Defense Services,* 302 Kan. 625, 639, 355 P.3d 667, 677 (2015). Instead of explaining why KDOR's own admission in its Answer that Grandmothers, KDOR, and Benchmark had a valid enforceable agreement (R1 at 220, ¶ 46) and its admission that KDOR *and* Grandmothers accepted Benchmark's quotes *and* agreed to pay Benchmark for its work (R1 at 216, ¶ 16), KDOR sets up a convoluted strawman

interpretation of its lease with Grandmothers whereby it argues that it never agreed in writing to pay Benchmark therefore Benchmark cannot seek payment from it now. (K.Aple.Br. 12-13)

To the contrary, taken as a whole, Benchmark alleged an extremely detailed breach of contract claim that includes all necessary elements of both the contract and the breach. Benchmark developed its remodeling quotes with KDOR and delivered the quotes to KDOR. (Aplt.Br. 5) Though KDOR may have intended to delegate the burden of payment to Grandmothers, KDOR completely fails to address Benchmark's point that it cannot unilaterally assign its obligation of payment without Benchmark's permission. (Aplt.Br. 20)

Taken to its logical conclusion, KDOR's tortured analysis is that, because there is no written contract term detailing the payment logistics, that Benchmark agreed to perform $136,052.39 in construction work without any reasonable expectation of payment from anyone. Moreover, KDOR's proposed interpretation is not supported by Benchmark's Second Amended Petition or KDOR's Answer, which are the only documents that matter in this legal analysis. *See, Mashaney,* 302 Kan. at 639. KDOR does not cite any legal authority supporting its attempt of detailed contract interpretation on a motion for judgment on the pleadings. (K.Aple.Br. 8-15) KDOR's analysis necessarily requires viewing Benchmark's Second Amended Petition in the light most favorable to KDOR, for which it also does not cite any legal authority. (K.Aple.Br. 8-15)

The only way KDOR can prevail on this appeal is by demonstrating that Benchmark did not even allege the elements of a contract in its petition. Not only does KDOR fail not do this, KDOR explicitly admitted in its Answer that a contract exists. Taking all of the facts alleged in Benchmark's Second Amended Petition as true and viewing them in the light most favorable to Benchmark, Benchmark has stated causes of action against KDOR. The district court erred in

granting KDOR's motion for judgment on the pleadings. This Court should reverse the district court's judgment.

III. The meeting of the minds of parties to a contract is a question of fact that must be determined by a jury and not by a judge who has not heard any witness testimony.

Grandmother's argument that there was no meeting of the minds underscores the fact that this claim could not be resolved on summary judgment in favor of Grandmothers. "[T]he controlling question as to whether a contract was entered into depends on the intention of the parties and is a question of fact." *Ard v. Ka-Tex Energies, Inc.*, 763 P.2d 18 (Kan. Ct. App. 1987). Though Benchmark believes there was sufficient evidence supporting the existence of the contract between Grandmothers, Benchmark, and KDOR, the district court considering conflicting evidence that has not heard testimony and assessed credibility of witnesses, and that is required to view all evidence in the light most favorable to the nonmoving party cannot make a finding on summary judgment that there was no meeting of minds. Such a factual determination is in blatant contradiction of the standard for summary judgment and requires reversal of the district court's judgment.

IV. *Drywall Sys., Inc. v. A. Arnold of Kansas City, LLC* is not applicable to this case.

Grandmothers' argument that Benchmark's Kansas Fairness in Private Construction Contract Act ("Fairness Act") claim fails under *Drywall Sys., Inc. v. A. Arnold of Kansas City, LLC*, 57 Kan. App. 2d 263, 450 P.3d 379 (2019) is without merit. The Court in *Drywall Sys., Inc.* concluded that for a Fairness Act claim to exist, a claiming party must have a contract with an "owner" of the property. 57 Kan. App. 2d at 267. Benchmark alleged that it had a contract with Grandmothers and KDOR for construction of improvements to the commercial property and payment of the same. Grandmothers has an ownership interest in the commercial property at issue in this case and is considered an owner for the purposes of the Fairness Act. Unlike the owner of

the property in *Drywall Sys., Inc.*, Grandmothers was fully aware of and participated in the contract for the remodeling work in its building at the behest of its tenant. Benchmark has met its burden to survive summary judgment.

For this same reason, Grandmothers' arguments that Benchmark is not entitled to foreclose on its mechanic's lien also fails. Benchmark has presented evidence of a valid, enforceable agreement between itself, Grandmothers as owner of the property and KDOR. Benchmark has presented proof of "express or implied contract, written or oral" between Benchmark and Grandmothers. This claim could not be resolved on summary judgment.

V. Grandmothers fails to identify any good faith dispute of the amount owed which would preclude application of the Kansas Fairness in Private Construction Act.

Grandmothers does not dispute any specific amount that Benchmark is claiming and fails to direct the Court to any good faith reason for its failure to pay Benchmark. (G.Aple.Br. 13-14). Instead, Grandmothers also wrongly claims that the existence of a lawsuit is proof of a dispute and argues that it offered to pay Benchmark the entire amount owed more than a year into litigation. Grandmothers' argument that these circumstances preclude interest in attorney fees under the Fairness Act is not correct, as the dispute must be in good faith. (Aplt.Br. 29) Under Grandmothers' proposed rule, every owner or general contractor would be incentivized to litigate every single claim by a contractor or subcontractor if for no reason other than to avoid KFPCCA interest and attorneys' fees. This is in direct contravention of the explicit purpose of the statute.

In response to the clear case law that requires a good faith basis for failing to pay amounts owed, Grandmothers does not identify a single reason it contends was a good faith basis not to pay Benchmark for its work. Grandmothers does not contend that the work was not completed. It does not contend that Benchmark charged an incorrect amount. It does not contend that Benchmark was

already paid. It does not contend that there were any defects in Benchmark's work. Grandmothers cannot identify a single reason why Benchmark is not entitled to payment in full for its work.

For this reason, Grandmothers' shocking accusation that Benchmark has brought this appeal in bad faith is likewise without merit. Grandmothers undisputedly did not pay Benchmark the full amount owed when it was due in December 2018. (Aplt.Br. 11-12; G.Aple.Br. 3 ¶ 18, 13) That is all that is required to trigger liability under the Fairness Act. Grandmothers now admits that Benchmark was owed the full $20,308.24 that Benchmark seeks in this lawsuit.[1] (G.Aple.Br. 3 ¶ 18, 13). Benchmark was owed this amount in December 2018 and there is not a shred of evidence presented in this case demonstrating that it was not owed at that time. Grandmothers would not admit that Benchmark was owed any money at all until the Offer of Judgment in January 2020, more than a year after the money was due. (G.Aple.Br. 13) The district court's grant of summary judgment on Benchmark's Fairness Act claim was not warranted and must be reversed.

VI. Grandmothers' Offer of Judgment is not admissible as evidence under K.S.A. § 60-2002(b) and underscores the fact that Grandmothers knew the full amount owed to Benchmark in December 2018.

Grandmothers wrongly points to its January 2020 Offer of Judgment of $15,805.48 "combined with the payment of $4,502.85" as evidence that it "offered to pay Benchmark the amount it originally demanded of $20,308.33. (G.Aple.Br. 13). Pursuant to K.S.A. § 60-2002(b), an Offer of Judgment not accepted "shall be deemed withdrawn and *evidence thereof is not admissible except in a proceeding to determine costs*." (Emphasis added). Grandmothers' self-serving Offer of Judgment more than a year after the money was due and after repeated demands for payment in full is absolutely not evidence that it is a good actor and this argument is explicitly prohibited by Kansas law.

[1] $114,759.72 was owed to Benchmark when the lawsuit was filed.

Though the Offer of Judgment is not evidence and is not admissible, Grandmothers' belated attempts to pretend that it tried to pay Benchmark what it was owed is in direct contradiction to Grandmothers' February 19, 2019, account statement given to Benchmark in which Grandmothers explicitly advised Benchmark that it was holding back the $20,308.24 for attorneys' fees, construction fees, and retainage. (Aplt.Br. 11) Though there is zero evidence of Grandmothers' "payment of $4,502.85" before the Court, Grandmothers fails to disclose to the Court that this small partial payment was not made until more than four months *after* Grandmothers' Offer of Judgment. (G.Aple.Br. 13) That is, Grandmothers' Offer of Judgment was not even for the correct amount owed at that time it was made.

Grandmother's self-serving Offer of Judgment more than a year after repeated demands for payment in full, if anything, shows that Grandmothers knows that it has absolutely no excuse for refusing to pay Benchmark in full in December 2018.

Conclusion

This Court has jurisdiction to hear Benchmark's appeals. This Court should reverse the district court's Judgment on the Pleadings in favor of Kansas Department of Revenue and reverse the district court's Summary Judgment in favor of Grandmothers, Inc., and remand this case for a trial on Benchmark's claims against KDOR and Grandmothers for breach of contract, violation of the Kansas Fairness in Private Construction Act, and foreclosure of its mechanic's lien.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I certify that on September 6, 2022, I electronically filed a true and correct 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:

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