IN THE SUPREME COURT OF THE STATE OF NEVADA

TUTOR-SALIBA CORPORATION, A CALIFORNIA CORPORATION,
Appellant,
vs.
CONTINENTAL FIRE SPRINKLER COMPANY, A DELAWARE CORPORATION,
Respondent.

No. 81822

FILED

SEP 06 2023

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

*ORDER OF REVERSAL AND REMAND*

This is an appeal from a district court judgment and a post-judgment award of attorney fees and costs in a contract action. Eighth Judicial District Court, Clark County; Nancy L. Allf, Judge.

Non-party Wynn Las Vegas, LLC, contracted with appellant Tutor-Saliba Corporation (TSC) to be Wynn's general contractor for the construction of the Encore Hotel & Casino. TSC in turn subcontracted with respondent Continental Fire Sprinkler Company (Continental) to design and install nearly one-hundred fire sprinkler systems throughout the Encore. Three years after construction finished, a leak was discovered in one of the systems and attempts to repair it caused a flood on the dance floor of an Encore nightclub. A preliminary inspection by third-party defendant, Victaulic, the manufacturer of the systems' couplings, determined that Continental did not comply with Victaulic's specifications when installing many of the couplings. TSC asked Continental to inspect the systems it installed and fix any faulty installations, but it refused. TSC then hired non-party Dessert Fire Protection (DFP) to inspect the sprinkler systems and complete any necessary repairs. TSC thereafter sued Continental, seeking more than $5 million in damages.

Following a lengthy bench trial, the district court found that both parties breached the subcontract, awarded TSC only a fraction of its requested damages, dismissed TSC's claims related to thirty-two of the fire sprinkler systems entirely, and awarded Continental post-offer attorney fees and costs under NRCP 68. After a careful review of the arguments, the law, and the record, we reverse and remand for the reasons below.[1]

*The district court misinterpreted the subcontract*

TSC challenges the district court's interpretation of its subcontract with Continental, including the parties' respective quality control obligations and Continental's obligation to complete its work in conformance with the manufacturer's installation specifications. Where the facts are not in dispute, "contract interpretation is a question of law, which this court reviews de novo." *Lehrer McGovern Bovis, Inc. v. Bullock Insulation, Inc.*, 124 Nev. 1102, 1115, 197 P.3d 1032, 1041 (2008). When a contract's language "is clear and unambiguous . . . the contract will be enforced as written." *Am. First Fed. Credit Union v. Soro*, 131 Nev. 737, 739, 359 P.3d 105, 106 (2015) (quoting *Davis v. Beling*, 128 Nev. 301, 321, 278 P.3d 501, 515 (2012)).

We conclude that the district court erred in interpreting the subcontract. First, the district court misinterpreted the parties' respective quality control obligations under the subcontract. Second, the district court improperly relied on expert testimony in interpreting the subcontract's terms. Third, the district court erred in finding that TSC failed to mitigate

[1]We address only the primary arguments in this order. While we have carefully considered the remaining arguments in light of the record and the law, we conclude they are without merit or do not affect our disposition.

its damages. Finally, the district court's refusal to award certain costs contravened the subcontract's warranty provision.

*The district court erred in finding that the subcontract imposed quality control obligations on TSC alone*

The district court found that only TSC had quality control obligations under the terms of the subcontract. However, this contradicts the terms of the subcontract. Under Section 2.1(A)(10) and Exhibit D of the subcontract, Continental was required to employ a full-time quality control engineer as part of its project management and supervision. Section 2.2(10) obligated TSC to "develop, implement, and manage a [quality control] program for all the work incorporated into the project" and "designate a full-time [quality control] Manager." It also "required [Continental] to comply and respond properly to the [quality control] Manager's directives." Exhibit D to the subcontract provided that Continental would prepare and submit its own quality control program for TSC to review and approve, which would ultimately be "implemented in conjunction" with TSC's quality control provisions. Fulfilling this obligation required Continental to implement preconstruction inspection guidelines, coordination meetings, initial field inspections, and follow up and close out inspections.

Furthermore, TSC's obligations under the subcontract do not nullify Continental's obligations under Sections 3.2.4 and 4.9 of the subcontract. Section 3.2.4 provides that "[n]o inspection, or failure to inspect, by [TSC] or the independent testing companies or [Wynn] shall be construed as approval or acceptance of the Work or as a waiver of [Continental's] obligations to perform the Work in full compliance with the Contract Documents." Section 4.9 of the subcontract's Special Conditions empowered TSC, "in its sole discretion," to accept work "not in accordance with the requirements of the contract documents" but that such acceptance

"shall not waive or otherwise affect [TSC's] right to demand [Continental] correct any other defects or areas of non-conforming Work."

In sum, the district court erred in its interpretation of the subcontract. We conclude the subcontract terms unambiguously imposed quality control obligations on both TSC and Continental, and Continental was obligated to perform its work in compliance with the contract documents and Victaulic's specifications regardless of any quality control obligations pertaining to TSC.

*The district court abused its discretion by allowing the defense's expert witness to provide testimony interpreting the contract terms*

TSC argues the district court abused its discretion in relying on Continental's expert, William Koffel, to interpret the subcontract—particularly Koffel's testimony that TSC breached its quality control obligations based only on his reading of the subcontract's language. "This court reviews a district court's decision to allow expert testimony for [an] abuse of discretion." *Hallmark v. Eldridge*, 124 Nev. 492, 498, 189 P.3d 646, 650 (2008).

We agree with TSC. During Continental's case in chief, Koffel testified as to his own interpretation of the subcontract's terms. Koffel's testimony relating to the parties' subcontract does not "assist the trier of fact to understand the evidence or determine a fact in issue" because it related only to a legal conclusion rather than a factual issue. NRS 50.275 (defining the scope of expert testimony); *Lehrer McGovern Bovis, Inc.*, 124 Nev. at 1115, 197 P.3d at 1041 (explaining that contract interpretation is a question of law). Further, it cannot be said that contract interpretation is within the scope of Koffel's knowledge, as he was certified as an expert regarding fire protection and the installation and design of fire suppression systems, not how to interpret the language in contracts. *See Buzz Stew,*

*LLC v. City of North Las Vegas*, 131 Nev. 1, 8, 341 P.3d 646, 651 (2015) (providing that generally, "expert witnesses may not testify as to their opinion on the state of the law") (quotation omitted). Thus, to the extent the district court relied on Koffel's testimony to interpret the subcontract's meaning, we conclude that it was an abuse of discretion. *See Hallmark*, 124 Nev. at 498, 189 P.3d at 650.

*The district court erred in finding TSC failed to mitigate its damages*

TSC also argues the district court erred in finding that TSC failed to mitigate its damages when it did not perform quality control inspections of Continental's work. Under the mitigation of damages rule, "a party cannot recover damages for loss that he could have avoided by reasonable efforts." *Conner v. S. Nev. Paving, Inc.*, 103 Nev. 353, 355, 741 P.2d 800, 801 (1987).

We conclude that TSC did not fail to mitigate its damages. The district court found the evidence at trial demonstrated that TSC "would have reasonably avoided the damages it now seeks had it not breached the quality control provisions of the contract." However, the district court erred in not recognizing that Continental had its own quality control obligations, as well as obligations to perform its work in conformance with the contract documents and the manufacturer's specifications. TSC provided Continental with multiple opportunities to inspect and repair its work before TSC ultimately hired DFP to inspect the work and complete the necessary repairs. Moreover, TSC did not discover Continental's breach until Victaulic notified it years after construction concluded. Thus, the district court cannot rely on TSC's conduct *before* discovering Continental's breach as justification to impose penalties for failing to mitigate damages. *See Conner*, 103 Nev. at 355, 741 P.2d at 801 ("[M]itigation of damages begins when the breach is discovered.").

*The district court erred by eliminating some categories of damages*

TSC next challenges the district court's decision to exclude certain costs from its damages award because doing so was contrary to the subcontract's plain language. Specifically, TSC argues that the district court improperly excluded costs for TSC's project managers and preparing updated CAD drawings.

In calculating TSC's damages, the district court concluded that several costs related to DFP's remediation work were improper to award as damages, including project manager costs, CAD drawings, bonuses for an unrelated 2014 Reno project, a duplicative charge for the purchase of four trailers, and DFP's planning and permitting costs. But Section 4.7 of the subcontract includes a warranty provision stating where, as here, Continental had already been paid fully under the subcontract, Continental was obligated, upon TSC's demand, to pay for "all costs incurred by [TSC] in correcting such defective Work, including but not limited to, additional costs for redesigns by the Architect/Engineer and other design consultants, replacement Subcontractors, materials, equipment and all services provided by [TSC]'s personnel." While the district court properly excluded the bonus for the unrelated project and the duplicate fees, we conclude that the district court erred when it refused to award TSC's remaining damages that were expressly provided for in the subcontract. *See Soro*, 131 Nev. at 739, 359 P.3d at 106 (explaining that this court will enforce an unambiguous contract as written). Accordingly, we reverse the district court's damages award, in part, with instructions for the district court to award TSC its damages as outlined above.

*The district court abused its discretion by dismissing TSC's claims as to thirty-two systems*

TSC next challenges the district court's dismissal of claims related to thirty-two of the fire sprinkler systems, arguing that dismissal was an improper discovery sanction. Continental contends that the district court properly dismissed TSC's claims related to the thirty-two systems as a judgment on partial findings under NRCP 52(c) because TSC produced insufficient evidence to support its claims as to those systems at trial.

Following the parties' cases in chief, the district court found that DFP created "paperwork, including inspection logs and repair logs" while completing its remediation work at the Encore. Based on testimony from Radu Tiana, DFP's NRCP 30(b)(6) representative, the district court found that DFP maintained inspection and repair logs for thirty-two of the systems, but that TSC failed to produce those logs. The district court further found that the missing logs were "critical to examine [TSC]'s claims for damages," and that, because such evidence formed the foundation for the testimony of TSC's witnesses, Continental was prejudiced by not having access to it. The district court then entered partial judgment and dismissed TSC's claims related to the thirty-two systems whose inspection and repair logs it found were not produced.[2]

This court reviews the district court's factual findings for an abuse of discretion and will not set aside those findings unless they are

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[2]While the district court's order indicated that it dismissed TSC's claims pursuant to NRCP 52(c), the record supports TSC's contention that the district court dismissed those claims as a discovery sanction. Indeed, the district court noted that the missing logs were discoverable under NRCP 16.1 (outlining mandatory disclosures), NRCP 26 (concerning the duty to supplement discovery), NRCP 34 (regarding producing documents), and NRCP 45 (concerning subpoenas to third parties).

clearly erroneous or not supported by substantial evidence. *Ogawa v. Ogawa*, 125 Nev. 660, 668, 221 P.3d 699, 704 (2009). While the district court suggested that only the inspection and repair logs supported TSC's claims, Tiana testified that DFP created or maintained five different categories of documents to track its remediation work on the Encore. In addition to written inspection and repair logs, DFP also collected various drawings for each system, photos of failed couplings and pipes in each system,[3] digital logs compiling information from the first three document categories, and tracking logs summarizing DFP's work on all systems, the categories of documents collected for each system, the total number of couplings and pipes inspected and replaced, and other tasks necessary to complete the remediation work. Moreover, it appears that some of the missing information for the thirty-two systems may have been contained in other supporting evidence which was produced and admitted at trial. For example, while an individual system may have been missing certain categories of documentation, it may not have been missing all categories of documents necessary to evaluate TSC's claims.

Thus, there were various forms of written and digital evidence from which TSC supported its claims, and the district court failed to properly analyze each of the thirty-two claims individually and explain the evidentiary basis for its decisions. The district court's broad finding that only inspection and repair logs formed the basis of TSC's claims was therefore clearly erroneous. *See Unionamerica Mortg. & Equity Tr. v. McDonald*, 97 Nev. 210, 211-12, 626 P.2d 1272, 1273 (1981) ("A finding is

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[3]DFP's photo records also contained the assigned coupling number, the date of inspection, the size and model of the coupling, the inspector's name, and the results of the inspection and/or repair.

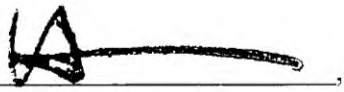
'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.") (quoting *United States v. Gypsum Co.*, 333 U.S. 364, 395 (1948)); *see also Ellis v. Carucci*, 123 Nev. 145, 149, 161 P.3d 239, 242 (2007) (holding that substantial evidence is that which a reasonable person may accept as adequate to sustain a judgment). Because we conclude the district court's findings surrounding TSC's inspection and repair logs were clearly erroneous, we conclude that the district court abused its discretion in dismissing TSC's claims related to the thirty-two systems. *See Ogawa*, 125 Nev. at 668, 221 P.3d at 704. Accordingly, we reverse and remand with instructions for the district court to properly analyze each system, explain what evidence TSC produced for each, and then address the resulting prejudice to Continental, if any, due to TSC's alleged discovery violations.

*The award of attorney fees and costs must be reversed*

TSC also challenges the district court's award of attorney fees and costs to Continental. Because we reverse the district court's judgment, the award of attorney fees and costs to Continental based on that judgment must also be reversed. *See Frederic & Barbara Rosenberg Living Tr. v. MacDonald Highlands Realty, LLC*, 134 Nev. 570, 579, 427 P.3d 104, 112 (2018) ("Because we reverse the district court's order granting summary judgment . . . , we necessarily reverse the attorney fees and costs awarded . . . ."); *Bower v. Harrah's Laughlin, Inc.*, 125 Nev. 470, 494-95, 215 P.3d 709, 726 (2009) ("[I]f we reverse the underlying decision of the district court that made the recipient of the costs the prevailing party, we will also reverse the costs award.").

Accordingly, we

ORDER the judgment of the district court REVERSED AND REMAND this matter to the district court for proceedings consistent with this order.



_____, J.
Herndon

_____, J.
Lee

_____, J.
Parraguirre

cc: Hon. Nancy L. Allf, District Judge
Paul M. Haire, Settlement Judge
Lewis Roca Rothgerber Christie LLP/Las Vegas
Bremer Whyte Brown & O'Meara, LLP/Las Vegas
Nida & Romyn, P.C.
Lemons, Grundy & Eisenberg
Claggett & Sykes Law Firm
Lee Landrum & Ingle
Eighth District Court Clerk