IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
May 2, 2023 Session

GRESHAM, SMITH AND PARTNERS v. MIDDLEBURG REAL ESTATE PARTNERS, LLC

Appeal from the Chancery Court for Davidson County
No. 18-0372-I Patricia Head Moskal, Chancellor

No. M2021-01459-COA-R3-CV

In this breach of contract dispute between an engineering consulting firm and a real estate development company, we review the trial court's holding that the real estate development company breached the contract between the parties as well as the court's award of attorneys' fees to the engineering consulting firm. We affirm the court's decision in all respects. Because the parties' agreement states that the prevailing party in litigation arising from or related to the contract shall be entitled to attorneys' fees and costs, we remand the case to the trial court with instructions for the trial court to award the engineering firm its reasonable and necessary attorneys' fees and costs incurred in this appeal.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed and Remanded

ANDY D. BENNETT, J., delivered the opinion of the Court, in which FRANK G. CLEMENT, JR., P.J., M.S., and JEFFREY USMAN, J., joined.

David O. Huff, Nashville, Tennessee, and Christopher Michael Vukelich and William Garry Tiskhoff, Ann Arbor, Michigan, for the appellant, Middleburg Real Estate Partners, LLC.

Vic L. McConnell and Blake Ericson Creekmur, Nashville, Tennessee, for the appellee, Gresham, Smith and Partners.

OPINION

FACTUAL AND PROCEDURAL BACKGROUND

Middleburg Real Estate Partners, LLC ("Middleburg") is a Virginia limited liability real estate development company. In 2016, Middleburg was engaged in a project in

Nashville, Tennessee to develop and construct a multi-family apartment complex known as Millwood Commons ("the Project"). Gresham, Smith and Partners ("Gresham Smith") is a Tennessee general partnership that provides professional architectural and engineering consulting services. Middleburg sought to engage Gresham Smith to provide engineering and other related services for the Project.

By letter dated April 4, 2016, Gresham Smith proposed a contract "to render civil engineering services" for Millwood Commons ("April 4 Proposal"). The April 4 Proposal was sent to Matthew D. Evans, Director at Middleburg, and included the following attachments: 1) Exhibit B, a "scope of services" document clarifying details of the proposal's individual line items; 2) Exhibit D, a document entitled "Limitations on Phase I Environmental Site Assessment Services"; 3) Exhibit E, Gresham Smith's schedule of hourly rates for land planning consulting; and 4) a "Standard Form of Agreement Between Client and Engineer for Professional Design Services" ("Standard Form Agreement") that was signed by Michael D. Hunkler, Division Vice President of Gresham Smith. Gresham Smith's letter stated, "If the scope of services proposed above are satisfactory, please sign the attached . . . contract, and return a copy for our files."

The parties engaged in further negotiations, and on April 6, 2016, Gresham Smith and Middleburg entered into a "Consultant Agreement for Professional Services for Civil Engineering" ("Consultant Agreement"). The Consultant Agreement stated, on page one:

> This AGREEMENT (the "Agreement") is made and entered into this 5th day, of April, 2016 by MIDDLEBURG REAL ESTATE PARTNERS, LLC ("OWNER") and Gresham, Smith and Partners ("CONSULTANT").
>
> WHEREAS, OWNER has the need for certain civil engineering and related services as set forth in Exhibit A to this Agreement; and
>
> WHEREAS, CONSULTANT represents that the work to be performed as set forth in Exhibit A is within its particular sphere of expertise, and that it is qualified to perform such services and shall be fully responsible for the means and methods used in performing its work, OWNER has relied upon such representations.
>
> . . .
>
> *This Agreement, together with the attached Exhibits and/or Attachments, constitutes the entire agreement between the OWNER and the CONSULTANT and supersedes all prior written or oral understandings*. . . .

(Emphasis added). Exhibit A to the Consultant Agreement was the entire April 4 Proposal, including the aforementioned exhibits and Standard Form Agreement. The Consultant

Agreement was signed by Rachel Noone, Senior Vice President for Middleburg, and counter-signed by Michael Hunkler, Principal with Gresham Smith.

After the Consultant Agreement was executed, Mr. Evans continued to be Middleburg's point of contact for Gresham Smith. For example, Gresham Smith prepared "Professional Services Change Authorizations" for some services provided to Middleburg, and Mr. Evans signed the authorizations on behalf of Middleburg. To receive payment for the services performed, Gresham Smith regularly sent invoices to Middleburg, and Middleburg paid for the services rendered. However, the final three invoices—dated September 8, 2016 (sent to invoice@mdgc.com), October 8, 2016 (sent to Mr. Evans), and November 8, 2016 (sent to Mr. Evans)—went unpaid.[1] In November 2016, at Middleburg's request, Gresham Smith forwarded the final revised Planned Unit Development ("PUD") plans to two construction contractors.

Thereafter, Gresham Smith learned that Middleburg planned to sell Millwood Commons before construction on the Project began. Gresham Smith believed the unpaid invoices would all be paid before the closing on the sale. In June 2017, Middleburg paid the September 8, 2016 invoice, but Chris Finlay, Managing Partner at Middleburg, emailed Gresham Smith stating: "We have paid the only invoice that we have. The contract with Gresham clearly states that all invoices are to be sent to our office or through our email AP system. We have received no other invoices." Upon receipt of this email, Gresham Smith updated the October and November invoices that had been sent to Mr. Evans and re-submitted them to the invoice@mbdgc.com email address. Middleburg refused to pay the October and November invoices.

In April 2018, Gresham Smith filed a complaint against Middleburg in the Chancery Court for Davidson County alleging non-payment of invoices for civil engineering totaling $76,663.01. Gresham Smith alleged three causes of action: breach of contract, violation of the Tennessee Prompt Pay Act, and unjust enrichment. The trial court dismissed Gresham Smith's claims for unjust enrichment, and a four-day bench trial was held on the breach of contract and Tennessee Prompt Pay Act claims. Seventy-four exhibits were entered at trial through the testimony of the following five witnesses: Don C. Williams, civil engineer and principal with Gresham Smith; Chris Finlay, managing partner and chief executive officer of Middleburg; Mike Hunkler, senior civil engineer, senior vice president,

[1] With respect to "Payments to the Consultant," the Consultant Agreement states:

> Invoices shall be submitted monthly to be received by OWNER by the 25th of each month. A completed W-9 tax form must be submitted prior to payments being rendered. Invoices shall be sent:
>
> Electronically to: invoice@mdbgc.com
>
> Or
>
> Middleburg Real Estate Partners, LLC 3201 Jermantown Road, Suite 220 Fairfax, Virginia 22030 Attention: Rachel Noone

and former division vice president of Gresham Smith; Gay Osborn, senior operations assistant and manager of Gresham Smith, and Mark Spalding, principal and former project manager of Gresham Smith.

The trial court entered a memorandum and order on October 26, 2021, holding that: 1) the parties had a valid and enforceable contract that consisted of Middleburg's Consultant Agreement and Gresham Smith's incorporated April 4 Proposal (including all attachments); 2) Gresham Smith was entitled to an award of reasonable attorneys' fees and related costs; 3) The services provided by Gresham Smith included in the October 8 and November 8, 2016 invoices were within the scope of services described in the Agreement; 4) Matt Evans had apparent, if not actual authority, to instruct Gresham Smith regarding services to be provided and to bind Middleburg for payment; 5) submission of invoices to the "invoice" email address was not a condition precedent to payment; and 6) Middleburg committed a material breach of the Consultant Agreement when it failed to pay Gresham Smith's September 2016 invoice within thirty days after receipt. The trial court awarded $73,663.07 (the amount of the unpaid invoices) plus prejudgment interest as provided under the terms of the Consultant Agreement at 1.5% per month beginning thirty days after Middleburg's receipt of the invoices. By order entered December 3, 2021, the trial court awarded $122,995.79 in attorneys' fees and expenses under the parties' Consultant Agreement. Middleburg appeals.

STANDARD OF REVIEW

Because this is an appeal from a decision made by the trial court following a bench trial, Tenn. R. App. P. 13(d) governs our review. Thus, we review the record de novo and presume that the trial court's findings of fact are correct "unless the preponderance of the evidence is otherwise." TENN. R. APP. P. 13(d). "Evidence preponderates against a finding of fact if the evidence "'support[s] another finding of fact with greater convincing effect.'" *Vic Davis Constr., Inc. v. Lauren Eng'rs & Constructors, Inc.*, No. E2017-00844-COA-R3-CV, 2019 WL 1300935, at *8 (Tenn. Ct. App. Mar. 20, 2019) (quoting *Rawlings v. John Hancock Mut. Life Ins. Co.*, 78 S.W.3d 291, 296 (Tenn. Ct. App. 2001)). We review the trial court's conclusions of law, including its interpretation of a written contract, de novo on the record with no presumption of correctness. *Eberbach v. Eberbach*, 535 S.W.3d 467, 473 (Tenn. 2017). With respect the trial court's award of attorneys' fees, we review the decision under the abuse of discretion standard. *Wright ex rel. Wright v. Wright*, 337 S.W.3d 166, 176 (Tenn. 2011).

I. Elements of the Contract

Middleburg argues that the trial court erred by holding that the agreement between the parties "consisted of Middleburg's 'Consultant Agreement for Professional Services for Civil Engineering,' placed 'on top of' [Gresham Smith's] April 4, 2016 proposal letter and attachments." Gresham Smith asserts that its April 4 Proposal and attachments,

including the Standard Form Agreement were integrated with the Consultant Agreement. Before we determine whether the contract was breached, we must determine whether the trial court was correct in holding that the April 4 Proposal, including exhibits and attachments, was encompassed within the Consultant Agreement and constituted part of the parties' entire agreement.

The manner in which the parties compiled and entered into their contract may not reflect best practices, and the contract they pieced together is not a model of clarity. Nonetheless, we must construe the contract that is before us "so as to ascertain and give effect to the intent of the contracting parties." *Individual Healthcare Specialists, Inc. v. BlueCross BlueShield of Tenn., Inc.*, 566 S.W.3d 671, 697 (Tenn. 2019). The words of the contract are the best evidence of the parties' intent. *Id.* Our Supreme Court has also recognized that we "'are entitled to place [ourselves] in the same situation as the parties who made the contract, so as to view the circumstances as they viewed them, and so as to judge the meaning of the words and of the correct application of the language to the things described.'" *Id.* (quoting *Staub v. Hampton*, 101 S.W. 776, 785 (Tenn. 1907)).

By its terms, the Consultant Agreement referenced and incorporated exhibits and attachments:

> This Agreement, together with the attached Exhibits and/or Attachments, constitutes the entire agreement between the OWNER and the CONSULTANT and supersedes all prior written or oral understandings. This Agreement, including any Exhibits and/or Attachments, may only be amended, supplemented, modified, or canceled by a duly executed written instrument. In the event of any alleged discrepancy between the terms and conditions of this Agreement and any Exhibits and/or Attachments, the terms and conditions of this Agreement shall take precedence and govern.

The April 4 Proposal (which included Exhibit B, Exhibit D, Exhibit E, and the unsigned Standard Form Agreement) was attached to the Consultant Agreement as a collective Exhibit A. A representative from Gresham Smith and a Middleburg representative signed the Consultant Agreement on April 6, 2016. Therefore, the entirety of Exhibit A was included in the Consultant Agreement, and the Consultant Agreement together with Exhibit A constitutes the entire agreement between the parties.

In further support of this conclusion is Middleburg's answer to paragraph three of Gresham Smith's complaint. Paragraph three of the complaint states:

> On or about April 5, 2016, [Gresham Smith] entered into a written Consultant Agreement for Professional Services for Civil Engineering with Middleburg ("Agreement") to provide certain civil engineering and related services to Middleburg related to certain improvements to real property

> located at 1617 Bell Road, Nashville, Tennessee 37211 ("Property"). A copy of said Agreement is attached hereto as Exhibit A and is incorporated herein by reference.

In response, Middleburg states in its answer:

> Defendant admits that Defendant and Plaintiff entered into a consultant contract on April 5, 2016 ("April 5 Contract") and that the April 5 Contract contains provisions involving the subject matter of the allegations in Paragraph 3. Defendant admits that a copy of the April 5 Contract is attached as Exhibit A to Plaintiff's Amended Complaint. Defendant denies any allegations in Paragraph 3 which are inconsistent with the April 5 Contract, the terms of which speak for themselves.

"When the allegations in a complaint are admitted in the answer, the subject matter of the allegations is removed as an issue, and no proof is necessary." *Irvin v. City of Clarksville*, 767 S.W.2d 649, 653 (Tenn. Ct. App. 1988). Middleburg admitted that a copy of the parties' agreement, which was the Consultant Agreement and the entire April 4 Proposal as Exhibit A, was attached to Gresham Smith's complaint.

In addition, the trial court credited the testimony of Mr. Williams, project executive for Gresham Smith, who testified regarding the Consultant Agreement and the scope of Exhibit A:[2]

> Q. Mr. Williams, because of your involvement in the drafting of the contract, what was the purpose -- what was your understanding of the purpose of the -- let me go back to the top -- of the Consultant Agreement that was provided by Middleburg?
>
> A. We submitted to Middleburg the -- our proposal and proposed contract. Matt reviewed that. As I recall, there were a couple of minor things that were revised. Matt discussed with us that Middleburg would prefer to take their standard contract *and put it on top of* our proposal and agreement that I had sent to him and that's what he sent back to me as signed for us to execute.
>
> Q. Okay.
>
> A. So this was Middleburg putting their standard agreement on top of our proposal and agreement.
>
> . . .
>
> Q. Mr. Williams, did the Consultant Agreement that Middleburg sent back to Gresham Smith reference Exhibit A?
>
> A. Yes, it did.

[2] Middleburg does not assert any error with respect to the trial court's reliance on this testimony.

Q. Was it your understanding that Exhibit A, being the proposal of Gresham Smith, was incorporated into the Consultant Agreement?

A. It was my understanding that the Exhibit A attached was all part of the agreement.

Q. Okay. Did that include the Standard Form of Agreement

A. Yes.

Q. -- that was the last few pages of the proposal?

A. Yes, it did. *We would not have agreed to it had it not included that.*

(Emphasis added).

In light of the language in the Consultant Agreement incorporating the exhibits and attachments, Middleburg's answer admitting that all of the attachments were part of the contract, and Mr. Williams's testimony, we agree with the trial court that the Consultant Agreement included all of the documents attached as Exhibit A.

II. Breach of Contract

Middleburg argues that the trial court erred in finding that it committed the first material breach of the contract when it failed to timely pay the last three invoices Gresham Smith submitted. Middleburg presents a twofold argument in support of this assertion: 1) that Gresham Smith breached the contract by sending the October and November invoices to Matt Evans rather than to the email address specified in the contract, and 2) that the work billed in the October and November invoices was not covered under the scope of the construction services to be performed by Gresham Smith. Gresham Smith asserts that the trial court correctly held that Middleburg committed the first material breach and that the services billed on the October and November invoices were within the scope of the contract.

Our Supreme Court has explained that, "[i]n a breach of contract action, claimants must prove the existence of a valid and enforceable contract, a deficiency in the performance amounting to a breach, and damages caused by the breach." *Fed. Ins. Co. v. Winters*, 354 S.W.3d 287, 291 (Tenn. 2011) (citing *ARC LifeMed, Inc. v. AMC-Tenn., Inc.*, 183 S.W.3d 1, 26 (Tenn. Ct. App. 2005)). We clarified the existence and parameters of the parties' contract in the prior section of this opinion. Now we consider the second element—whether there was a deficiency in performance amounting to a breach. Pertinent to the issue at hand is this Court's previous holding that "[f]ailure to pay a progress payment on a construction contract is a material breach." *Vic Davis Constr., Inc.*, 2019 WL 1300935, at *8 (citing *Rhea v. Marko Constr. Co.*, 652 S.W.2d 332, 333 (Tenn. 1983)).

Article III, Section C of the Consultant Agreement pertains to Middleburg's obligations for payment for services to Gresham Smith and states, "Payment for Services will be remitted to CONSULTANT thirty (30) days after OWNER'S receipt of invoice."

Article III, Section B requires invoices to be submitted "electronically to: invoice@mdbgc.com." There is no dispute that Gresham Smith's September 2016 invoice was sent to the correct email address, and there is no dispute that Middleburg did not pay the September 2016 invoice within thirty days. Indeed, Middleburg did not pay the September 2016 invoice until June 2017, eight months late. Middleburg's failure to timely pay the September 2016 invoice constituted a deficiency in performance amounting to a material breach of the contract. *See id.*

Middleburg next argues that it should not be required to pay the October and November invoices because it eventually paid the September 2016 invoice, and Gresham Smith breached the agreement by failing to submit the invoices to the email address specified on the agreement. The evidence shows that Gresham Smith sent the October and November invoices directly to Matt Evans's email address. Regarding the email address to which the invoices were sent, the trial court held that submitting the invoices to the "'Invoice' email address . . . as specified in the Agreement was not a condition precedent to payment." For the reasons discussed below, we agree with the trial court.

This Court has summarized the law on conditions precedent as follows:

> "A contractual duty subject to a condition precedent is not required to be performed until the condition occurs or its nonoccurrence is excused. *Covington v. Robinson*, 723 S.W.2d 643, 645 (Tenn. Ct. App. 1986); *Strickland v. City of Lawrenceburg*, 611 S.W.2d 832, 837 (Tenn. Ct. App. 1980); RESTATEMENT (SECOND) OF CONTRACTS § 225(1) (1981). The existence of a condition precedent depends upon the parties' intention, which courts may discern from the contractual language and the circumstances surrounding the contract's execution. *Miller v. Resha*, 820 S.W.2d 357, 360 (Tenn. 1991); *Harlan v. Hardaway*, 796 S.W.2d 953, 957-58 (Tenn. Ct. App. 1990). Courts do not favor conditions precedent and will construe doubtful language to impose a duty rather than create a condition precedent. *Koch v. Construction Tech., Inc*., 924 S.W.2d 68, 71 (Tenn. 1996); *Harlan v. Hardaway*, 796 S.W.2d at 958; RESTATEMENT (SECOND) OF CONTRACTS § 227(3) (1981); 3A Arthur L. Corbin, CORBIN ON CONTRACTS § 635 (1960)."

Ensureus, LLC v. Oliver, No. M2014-00410-COA-R3-CV, 2015 WL 5157512, at *7 (Tenn. Ct. App. Aug. 31, 2015) (quoting *Holland v. Holland, Jr.*, No. M1999-02791-COA-R3-CV, 2001 WL 585107, at *3 (Tenn. Ct. App. June 1, 2001)).

After the September invoice went unpaid, Middleburg was in material breach of the agreement. Because Middleburg was in breach, and the September invoice remained unpaid, it was reasonable for Gresham Smith to submit the October and November invoices

directly to their main point of contact on the project—Matt Evans.[3] The evidence shows that Mr. Evans received the emailed invoices and was aware of Gresham Smith's requests for the invoices to be paid; Mr. Williams called and emailed Mr. Evans requesting payment of the outstanding invoices. Moreover, Gresham Smith ultimately re-submitted the invoices to the proper email address, even though the original invoices had already been received by Mr. Evans. We disagree with Middleburg's characterization of this resubmission as Gresham Smith submitting "altered" invoices. The fact that the October and November invoices were sent to Mr. Evans, rather that to the Invoice@mdbgc.com email address, did not extinguish Middleburg's obligation to pay the invoices. We agree with the trial court that submitting the October and November invoices to the invoice@mdbgc.com email address was not a condition precedent to payment.

Middleburg next argues that it should not be required to pay the October and November invoices because those invoices included work outside the scope of the parties' agreement. On this point, the trial court made the following findings:

> The Court concludes that the scope of services to be provided under the Agreement is broad and includes the provision of all documents or submittals requested by Middleburg or any governmental agency, such as Metro, having jurisdiction over the project. The Agreement further obligates GSP to comply with Middleburg's instructions and not cause any delays. The Court finds that the services provided by G[SP] and included in the October 8 and November 8, 2016 invoices came within the broad services described in the Agreement. The October 8, 2016 invoice included services for final site construction documents, agency approval, and reimbursable expenses in the amount of $32,832.83. The November 8, 2016 invoice included services described as preliminary services, offsite improvements and stormwater variance application through October 25, 2016, and reimbursable expenses in the amount of $40,830.24. GSP testified that those services were provided at the request and direction of Matt Evans, Middleburg's Director, who was the only Middleburg representative with whom GSP interacted during the course of the Agreement. As noted above, the Court credits the testimony of Don Williams, GSP's primary witness, who had personal knowledge and was fully informed about the Millwood Commons project, the services provided by GSP, and the invoices submitted for GSP's services. Mark Finlay, Middleburg's primary witness, had little personal knowledge about the Millwood Commons project and became involved only after Matt Evans was no longer employed by Middleburg, and Middleburg was in the process of

[3] Trial Exhibit 65, an invoicing summary which was admitted into evidence without objection, shows that an invoice dated May 8, 2016, was emailed directly to Matt Evans and was timely paid. Thus, the evidence shows that there was a prior occasion where Middleburg paid an invoice that was submitted to Mr. Evans directly.

selling the project to a third party. Mr. Finlay had no personal knowledge about the approvals required by Metro or the invoices submitted to Middleburg. Mr. Finlay acknowledged that he never discussed this project with Matt Evans.

The Court finds that Middleburg held out Matt Evans as its Director responsible for the Millwood Commons project. Mr. Evans had apparent authority, if not actual authority, to instruct GSP regarding the services to be provided for the project and to bind Middleburg for payment of those services. *See Milliken Group, Inc. v. Hays Nissan, Inc.*, 86 S.W.3d 564, 567 (Tenn. Ct. App. 2001) (citations omitted). GSP successfully obtained Metro's approval of the final revised PUD site plans. GSP delivered the final site plans and approvals to Middleburg. Although Middleburg argued that Matt Evans lacked authority to bind Middleburg and that written change authorizations were required for the services provided in October and November 2016, the trial testimony and exhibits establish that Middleburg held Matt Evans out as its authorized agent located in the Nashville office, who had all communications with GSP and instructions regarding the project. The Court concludes that the term of the Agreement requiring written authorization for "changes in Services," was limited to changes in the "scope of services to be performed" above and beyond those requested by Middleburg or required by governmental authorities having jurisdiction over the Millwood Commons project. The Court finds that those services included in the Agreement but subject to future cost proposals did not necessarily require written change authorizations if the services were requested by Middleburg or required by governmental authorities. In addition, there was testimony at trial that the parties used the written change authorizations for multiple purposes during the course of the parties' dealings, including documenting services already provided upon oral request by Matt Evans for Middleburg. Finally, Middleburg accepted the approved final site plans and directed GSP to send them to two construction contractors for bids and pricing, further evidencing Middleburg's requests and directives to GSP.

Again, we agree with the trial court. Article I of the Consultant Agreement, entitled "Scope of Services," is broad and states:

The CONSULTANT will provide a series of services (the "Services") as described in Exhibit A to this Agreement. The CONSULTANT shall provide the Services, including, without limitation, providing any documents or submittals requested by OWNER or any governmental entity having jurisdiction over the project. It is the intent of this Agreement that the CONSULTANT provide design, permitting and other technical civil engineering services to OWNER. The CONSULTANT does hereby agree to

> comply with OWNER instructions and to commit no act or omission that would result in delay or failure to obtain the desired result of the Services.

Article IV, subparagraph E of the Consultant Agreement states: "Responsibility of OWNER: As a party to this Agreement, OWNER shall designate a person to act with authority on OWNER'S behalf who shall respond in a reasonably timely manner to submissions by the CONSULTANT, providing approvals and authorizations as appropriate so that work may continue at a normal pace."

Mr. Williams testified that Matt Evans was the person Middleburg designated to act with authority on the Project. Although Middleburg maintains that Mr. Evans did not have authority to direct Gresham Smith to complete some of the work on the October and November invoices, Chris Finlay, Middleburg's Chief Executive Officer, testified that Mr. Evans was their "point person in that market" and was their "boots on the ground" in Nashville. Under Article I, Gresham Smith was to "comply with [Middleburg's] instructions" and provide documents or submittals requested by Middleburg or any governmental entity with jurisdiction over the project "without delay." The evidence and testimony show that Mr. Evans made requests of Gresham Smith on Middleburg's behalf and directed Gresham Smith to perform the work and obtain the approvals outlined on the October and November invoices. The trial court specifically credited the testimony of Mr. Williams (Gresham Smith's witness) over the testimony of Mr. Finaly (Middleburg's witness, who had very little knowledge about the Project) on this factual finding. "[A]ppellate courts routinely decline to second-guess a trial court's credibility determinations unless there is concrete, clear, and convincing evidence to the contrary." *Mitchell v. Archibald*, 971 S.W.2d 25, 29 (Tenn. Ct. App. 1998). Regarding the work billed on the invoices, Mr. Williams testified, "We're billing for the final construction documents and we're billing for the agency approval hours that were spent trying to gain approval of the project." The evidence does not preponderate against the trial court's findings that the work billed by Gresham Smith "came within the broad services described in the Agreement" and was not outside the scope of the contract as Middleburg asserts.

For these reasons, we affirm the trial court's holding that Middleburg breached the contract by failing to pay Gresham Smith for the work and services billed in the October and November invoices, and we affirm the trial court's award of compensatory damages to Gresham Smith in the amount of the two unpaid invoices, $73,663.07.

III. Award of Attorneys' Fees

Middleburg challenges the award of attorneys' fees to Gresham Smith on three grounds. First, it contends that the Consultant Agreement did not have a provision for attorneys' fees. Second, Middleburg argues that Gresham Smith was not a "prevailing party" because it did not prevail on all of its claims. Finally, Middleburg asserts the amount of the award was unreasonable. We will address each argument in turn.

With regard to attorney's fees, Tennessee follows the "American Rule," which provides that "a party in a civil action may recover attorney fees only if: (1) a contractual or statutory provision creates a right to recover attorney fees; or (2) some other recognized exception to the American Rule applies, allowing for recovery of such fees in a particular case." *Cracker Barrel Old Country Store, Inc. v. Epperson*, 284 S.W.3d 303, 309 (Tenn. 2009) (citing *Taylor v. Fezell*, 158 S.W.3d 352, 359 (Tenn. 2005); *John Kohl & Co. P.C. v. Dearborn & Ewing*, 977 S.W.2d 528, 534 (Tenn. 1998)). "Otherwise, litigants are responsible for their own attorney's fees." *Eberbach*, 535 S.W.3d at 474 (citing *Cracker Barrel*, 284 S.W.3d at 308)). Parties who prevail in litigation to enforce their contractual rights are entitled to recover reasonable attorneys' fees if the contract upon which their underlying claim is based contains a provision entitling them to attorneys' fees. *Id.*

A. Contractual Provision for Attorneys' Fees

In this case, the parties' contract is comprised of the Consultant Agreement and the incorporated attachments. As previously discussed, the Standard Form Agreement is incorporated as an attachment, and it states in section 6.09 subsection C as follows:

> In the event of litigation arising from or related to this Agreement or the services provided under this Agreement, the prevailing party shall be entitled to recover from the non-prevailing party all reasonable costs incurred, including staff time, court costs, attorneys' fees and all other related expenses in such litigation.

Middleburg asserts that this section should not be enforced, however, because the Consultant Agreement is silent on attorneys' fees, and states the following regarding "conflicts" between the parties:

> In the event that a conflict arises that cannot be resolved between the parties, such dispute shall be submitted to non-binding mediation by request filed in writing with the other party to this Agreement and shall include a list of no less than three nor more than six names, addresses and qualifications of industry-experienced mediators which the filing party will accept to conduct the mediation. Mediation shall proceed in advance of legal or equitable proceedings. The parties shall share the mediator's fee and any filing fees equally. The mediation shall be held in the place where the Project is located, unless another location is mutually agreed upon. Agreements reached in mediation shall be enforceable as settlement agreements in any court having jurisdiction thereof. If that conflict cannot be resolved in mediation, it shall be litigated before the courts of the jurisdiction where the project is located. ANY PROCEEDING COMMENCED IN ANY COURT SHALL BE TRIED BEFORE AND DECIDED BY A JUDGE WITHOUT A JURY,

> AND OWNER AND CONSULTANT EXPRESSLY WAIVE ANY RIGHT TO HAVE SUCH PROCEEDINGS DETERMINED BY A JURY TRIAL. The CONSULTANT must carry on with the performance of Services hereunder during the pendency of any claim dispute or other matter in question and the OWNER shall continue to make payments to the CONSULTANT in accordance with this Agreement for undisputed amounts.

Middleburg asserts that the provisions in the Consultant Agreement and Standard From are inconsistent and create a "discrepancy" between the contracts. Regarding "discrepancies," the Consultant Agreement states, "In the event of any alleged discrepancy between the terms and conditions of this agreement and any Exhibits and/or Attachments, the terms and conditions of this Agreement shall take precedence and govern."

In construing the parties' contract, we must consider all provisions of the contract "in harmony with each other" and strive to promote consistency to "avoid repugnancy between the various provisions of a single contract." *Guiliano v. Cleo, Inc.*, 995 S.W.2d 88, 95 (Tenn. 1999) (citing *Rainey v. Stansell*, 836 S.W.2d 117, 118-19 (Tenn. Ct. App. 1992)). In addition, "'[w]hen a contract contains both general and specific provisions relating to the same thing, the specific provisions control. Where uncertainty exists between general and specific provisions, the specific provisions will usually qualify the general.'" *Strategic Acquisitions Grp., LLC v. Premier Parking of Tenn., LLC*, No. E2019-01631-COA-R3-CV, 2020 WL 2595869, at *6 (Tenn. Ct. App. May 22, 2020) (quoting *Mark VII Transp. Co. v. Responsive Trucking, Inc.*, 339 S.W.3d 643, 648 (Tenn. Ct. App. 2009)). Our endeavor to promote a harmonious interpretation of the contract applies no less with respect to the attachments that are incorporated into the Consultant Agreement. In our view, the provisions can be read in harmony. Although the Consultant Agreement is silent on attorneys' fees and the Standard Form Agreement requires them, the terms of the Standard Form Contract are incorporated into the parties' final agreement and apply with no less force than the terms of the Consultant Agreement. Therefore, the provision for attorneys' fees is a part of the parties' agreement and is in full force and effect.

Middleburg alternatively argues that it should not have been responsible for any of GSP's "pre-legal action" attorneys' fees because the Consultant Agreement states that any conflict between the parties "shall be submitted to non-binding mediation by request filed in writing with the other party" and that "Mediation shall proceed in advance of legal or equitable proceedings." The Consultant Agreement undoubtedly contains this language; however, we find nothing in the record to show that Middleburg objected when Gresham Smith filed the litigation in the chancery court or requested that the parties move the forum for resolution to mediation at the time the case was filed. Because Middleburg did not raise this issue at the time the litigation was filed, it cannot now complain about it at the appellate level. *PNC Multifamily Cap. Inst. Fund XXVI Ltd. P'ship v. Mabry*, 402 S.W.3d 654, 660 (Tenn. Ct. App. 2012) (citing *Waters v Farr*, 291 S.W.3d 873, 918 (Tenn. 2009)) ("It is well settled that issues not raised at the trial level are considered waived on appeal.").

Moreover, the parties ultimately engaged in mediation subsequent to the filing of the complaint, and they were not able to resolve the issues. Middleburg's argument that all "pre-legal action" attorney's fees should be deducted from the amount of fees awarded is unavailing.

B. Prevailing Party

Next, we consider Middleburg's argument that Gresham Smith was not the prevailing party because Middleburg was successful on the unjust enrichment and Prompt Pay Act claims. To be a prevailing party in a lawsuit, one "need not attain complete success on the merits." *Fannon v. City of LaFollette*, 329 S.W.3d 418, 431 (Tenn. 2010). Instead, "a prevailing party is one who has succeeded 'on any significant issue in the litigation which achieves some of the benefit the parties sought in bringing the lawsuit.'" *Id.* (quoting *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983)). Here, Gresham Smith succeeded on the merits of its breach of contract claim and was awarded the remuneration it sought—payment of the invoices. We view this as a success on the merits on a significant issue in the litigation. Therefore, Gresham Smith was a prevailing party for purposes of the attorneys' fee provision under the agreement, and we affirm the trial court's determination that an award of fees was warranted under these circumstances.

C. Reasonable Award

Finally, we address Middleburg's assertion that the amount of the attorneys' fees awarded was "unreasonable." As we consider this assertion, we keep our standard of review at the forefront:

> [A] determination of attorney's fees is within the discretion of the trial court and will be upheld unless the trial court abuses its discretion. *Kline v. Eyrich*, 69 S.W.3d 197, 203 (Tenn. 2002); *Shamblin v. Sylvester*, 304 S.W.3d 320, 331 (Tenn. Ct. App. 2009). We presume that the trial court's discretionary decision is correct, and we consider the evidence in the light most favorable to the decision. *Henderson v. SAIA, Inc.*, 318 S.W.3d 328, 335 (Tenn. 2010); *Keisling v. Keisling*, 196 S.W.3d 703, 726 (Tenn. Ct. App. 2005). The abuse of discretion standard does not allow the appellate court to substitute its judgment for that of the trial court, *Williams v. Baptist Mem'l Hosp.*, 193 S.W.3d 545, 551 (Tenn. 2006); *Myint v. Allstate Ins. Co.*, 970 S.W.2d 920, 927 (Tenn. 1998), and we will find an abuse of discretion only if the court "applied incorrect legal standards, reached an illogical conclusion, based its decision on a clearly erroneous assessment of the evidence, or employ[ed] reasoning that causes an injustice to the complaining party." *Konvalinka v. Chattanooga-Hamilton Cnty. Hosp. Auth.*, 249 S.W.3d 346, 358 (Tenn. 2008); *see also Lee Med., Inc. v. Beecher*, 312 S.W.3d 515, 524 (Tenn. 2010).

Wright, 337 S.W.3d at 176; *see also 817 P'ship v. James Goins & Carpenter, P.C.*, No. E2014-01521-COA-R3-CV, 2015 WL 5609993, at *10 (Tenn. Ct. App. Sept. 24, 2015) (recognizing that "[a] trial court's calculation of a reasonable attorney's fee is a subjective judgment based on evidence and the experience of the trier of facts" and "appellate court[s] will normally defer to a trial court's award of attorney's fees unless there is a showing of an abuse of the trial court's discretion.") (quoting *Wright*, 337 S.W.3d at 176 and *Threadgill v. Threadgill*, 740 S.W.2d 419, 426 (Tenn. Ct. App. 1987)).

Rule 1.5(a) of the Rules of Professional Conduct ("RPC") provides ten factors to consider when determining the reasonableness of an attorney's fee:

> (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
> (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
> (3) the fee customarily charged in the locality for similar legal services;
> (4) the amount involved and the results obtained;
> (5) the time limitations imposed by the client or by the circumstances;
> (6) the nature and length of the professional relationship with the client;
> (7) the experience, reputation, and ability of the lawyer or lawyers performing the services;
> (8) whether the fee is fixed or contingent;
> (9) prior advertisements or statements by the lawyer with respect to the fees the lawyer charges; and
> (10) whether the fee agreement is in writing.

Tenn. Sup. Ct. R. 8, RPC § 1.5(a).

Here, the trial court delineated each of the factors in Tenn. Sup. Ct. R. 8, RPC § 1.5(a) and spelled out findings of fact to support its conclusion that Gresham Smith's fees were reasonable. Regarding the time and labor required, the court stated that Gresham Smith staffed the case efficiently with only one attorney at court appearances. The trial court further explained:

> [T]his lawsuit was aggressively litigated for multiple years with strong, conflicting positions taken by the parties. Comprehensive discovery was taken, voluminous documents produced; and the Court heard several discovery-related motions. Because of the technical nature of the engineering services provided and the approach and strategy taken by the parties during the litigation, the case required experienced, skilled attorneys in the subject matter area to represent the parties.

The court also noted that Gresham Smith's attorney charged lower hourly fees than those charged to other clients "because of his law firm's long-standing relationship with [Gresham Smith]" and that Middleburg did not contest the hourly billing rates of Gresham Smith's primary attorney or the other timekeepers providing services to Gresham Smith. *See* TENN. SUP. CT. R. 8, RPC § 1.5(a)(3), (6).

Middleburg chiefly complained that Gresham Smith's fees related to the unjust enrichment and Prompt Pay Act claims should be excluded and that other fees were duplicative or excessive. However, Middleburg did not provide the trial court with the corresponding amount of fees it believed should have been excluded from the award, and the trial court declined to "sift through" Gresham Smith's time entries and "guess at the basis for each objection." In determining that all of Gresham Smith's fees were reasonable, the trial court cited *G.T. Issa Construction, LLC v. Blalock*, E2020-00853-COA-R3-CV, 2021 WL 5496593, at *8 (Tenn. Ct. App. Nov. 23, 2021). In *G.T. Issa Construction*, the plaintiff pursued four causes of action arising out of a purchase and sale agreement and prevailed on only two of the claims. *G.T. Issa Const.*, WL 5496593, at *8. Nevertheless, this Court noted that there was a single contract at issue and determined that "[a]ll of [p]laintiff's claims were 'based on or related to' the Agreement, arose out of a common core of facts, or were based on related legal theories" and that the plaintiff was entitled to fees incurred in prosecuting all four claims. *Id.* at *9 (quoting *Crescent Sock Co. v. Yoe*, No. E2015-00948-COA-R3-CV, 2016 WL 3619358, at *8 (Tenn. Ct. App. May 25, 2016)). The same is true here. All three of Gresham Smith's claims and all of Middleburg's defenses arose out of or were related to the Consultant Agreement the parties executed. Likewise, the alternate legal theories Gresham Smith pursued were based on a common core of facts, and the relief sought by Gresham Smith under all three claims was co-extensive. The *G.T. Issa Construction* case is analogous to the case before us, and we cannot say the trial court abused its discretion in holding that, "[t]he time incurred relating to the alternate theories of relief based on a common core of facts was reasonably expended and properly included in GSP's fee application."

We find that the trial court properly identified and applied the relevant legal principles, and the court's decision is properly supported by evidence in the record. *See Lee Med., Inc.*, 312 S.W.3d at 524. For these reasons, the trial court did not abuse its discretion in determining that $122,995.79 is a reasonable award of attorneys' fees in this matter.

IV. Attorneys' Fees on Appeal

In the posture of appellee, Gresham Smith seeks an award of its attorneys' fees incurred on appeal. Contractual agreements for attorney's fees "must be enforced as written regardless of whether parties are before a trial court or an appellate court." *Eberbach*, 535 S.W.3d at 478. Courts must enforce "the terms of the parties' agreement govern[ing] the award of fees . . . to the extent the agreement

demands." *Id.* When awarding a party attorneys' fees incurred on appeal, we may grant the request and set the amount or grant the request and remand to the trial court to set the amount. *See Killingsworth v. Ted Russell Ford, Inc.*, 205 S.W.3d 406, 411 n.2 (Tenn. 2006).

As previously discussed, the Consultant Agreement incorporates the Standard Form Agreement, including its provision regarding attorneys' fees incurred:

> In the event of litigation arising from or related to this Agreement or the services provided under this Agreement, the prevailing party shall be entitled to recover from the non-prevailing party all reasonable costs incurred, including staff time, court costs, attorneys' fees and all other related expenses in such litigation.

The litigation before this Court "arises" out of the parties' agreement. Gresham Smith is the prevailing party on appeal. Accordingly, we remand this issue to the trial court to award Gresham Smith its reasonable and necessary attorneys' fees and costs incurred on appeal.

CONCLUSION

We affirm the trial court's judgment in all respects and remand for further proceedings consistent with this opinion. Costs of the appeal are assessed against the appellant, Middleburg, for which execution may issue if necessary.

_/s/ Andy D. Bennett_____
ANDY D. BENNETT, JUDGE