UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1740

September Term, 2014

ERIC UNDERWOOD

v.

MEYERS CONSTRUCTION COMPANY, INC.

Eyler, Deborah S.,
Graeff,
Hotten,

JJ.

Opinion by Graeff, J.

Filed: September 24, 2015

Meyers Construction Company, Inc., appellee/cross-appellant ("Meyers"), filed a petition to establish and enforce a mechanic's lien in the Circuit Court for Baltimore County against Eric Underwood, appellant/cross-appellee. The petition sought the unpaid balance of $80,868.55 for restorative work that it had completed on Mr. Underwood's home after it was damaged by a falling tree and an order directing that the property be sold unless the mechanic's lien was paid and satisfied. Mr. Underwood filed a counter-claim against Meyers for breach of contract and negligence, seeking damages caused when an unknown criminal broke into his home, as well as costs to repair Meyers' alleged deficient work.

The court granted Meyers' mechanic's lien petition and entered judgment in its favor in the amount of $80,868.55. The court also granted Meyers' oral motion for judgment as to Mr. Underwood's claim for breach of contract. The court denied Meyers' motion for judgment with respect to the negligence claim, and submitted the issue to the jury, which found that Meyers was negligent and awarded Mr. Underwood $47,263.82. Following the jury's verdict, Meyers filed a motion for judgment notwithstanding the verdict and/or to reduce the verdict. The court granted Meyers' motion and reduced the jury award to $12,587.

On appeal, Mr. Underwood raises four questions for our review, which we have modified slightly, as follows:

1. Did the trial court err in granting Meyers' complaint to establish a mechanic's lien where the home improvement contract was neither sold nor ratified by a licensed home improvement contractor or salesman, and where the contractor failed to maintain and produce for the homeowner at the alleged time of payment in full, signed lien releases from each

subcontractor and material supplier who performed work or furnished materials under the contract?

2. Did the trial court err in refusing to submit Mr. Underwood's breach of contract claim to the jury and dismissing it altogether on the ground of res judicata/collateral estoppel after making a finding that Meyers did not breach the contract for purposes of establishing a mechanic's lien?

3. Did the trial court err by finding that Mr. Underwood was not entitled to enforcement of the collateral source rule on evidence nor instruction to the jury for purposes of obtaining the full measure of property damage caused by the negligence of Meyers?

4. Did the trial court err in refusing to allow Mr. Underwood's expert to testify to the percentage cost of repairs to complete the job in a workmanlike manner after determining that 37% of the contract was either not performed or performed in an unworkmanlike manner?

Meyers filed a cross-appeal, raising two additional questions:

1. Should the trial court have granted Meyers' motions for judgment and JNOV on the negligence count in Mr. Underwood's Counter-Claim when Mr. Underwood failed to demonstrate the existence of a duty or a breach thereof?

2. Should the trial court have granted Meyers' motion for judgment and JNOV as to the negligence count in Mr. Underwood's Counter-Claim based on the principles of *res judicata* and collateral estoppel?

For the reasons set forth below, we shall dismiss the appeal and cross-appeal.

FACTUAL AND PROCEDURAL BACKGROUND

On June 29, 2012, a tree fell on Mr. Underwood's property, located at 2118 Northland Road, Gwynn Oak, Maryland. On September 13, 2012, after the tree was removed, Mr. Underwood entered into a contract with Meyers to repair the damage.

On July 23, 2013, Meyers filed its petition to establish and enforce a mechanic's lien against Mr. Underwood's property. The petition contained two counts: Count I,

Mechanic's Lien, and Count II, Breach of Contract. In Count I, Meyers asserted that, during the period of October 1, 2012 to February 11, 2013, Meyers furnished labor and materials to Mr. Underwood pursuant to the contract, resulting in improvements, but Mr. Underwood wrongfully refused to pay for the services. Meyers sought an order establishing a mechanic's lien in the amount of $80,868.55 for the unpaid services that Meyers had performed on the property. In addition, Meyers requested that the court enter an order enforcing the mechanic's lien and directing that the property be sold unless the mechanic's lien was paid and satisfied on or before a date specified by the court. In Count II, Meyers asserted that it had furnished materials and services to Mr. Underwood pursuant to the contract, and Mr. Underwood had breached the contract by refusing to pay. Meyers sought damages in the amount of $80,868.55, plus attorneys' fees and costs.

Mr. Underwood filed a counter-complaint on August 12, 2013, and an amended counter-complaint and demand for jury trial on August 29, 2013. Count I alleged Negligence, stating that Meyers breached its duty to protect his premises "from negligent workmanship or foreseeable criminal conduct" while the property was in Meyers' control, and as a result of its breach, his home was burglarized and flooded with oil. Mr. Underwood alleged that, on October 22, 2012, while his home was in Meyers' exclusive possession, a "strange person" came onto the premises with Meyers' permission to "inspect and inquire about collecting and disposing of [Mr. Underwood's] property unbeknownst to [Mr. Underwood]," and Meyers did not inform him about the incident. The following day, Meyers "noticed that [Mr. Underwood's] heating unit located in the rear of his home was missing," and Mr. Underwood's basement was "flooded with oil." When police

responded to Meyers' report of a burglary, they noted that "the home was not properly secured and that some copper piping was cut from the home's heating oil tank," which caused oil to spill from the tank and to flood Mr. Underwood's basement.

Count III alleged Breach of Contract, stating that Meyers failed to perform the terms of the contract in a workmanlike manner.[1] Mr. Underwood asserted that performing the contract in a workmanlike manner included securing the premises when unattended and insuring that major systems of the premises were sound.

On September 16, 2013, the court ordered Mr. Underwood to show cause why a lien on his property should not be attached. On December 17, 2013, the court held a show cause hearing. On January 6, 2014, it issued an order establishing an interlocutory mechanic's lien in the amount of $80,868.55 against Mr. Underwood's property.

On September 3, 2014, a jury trial began on Meyers' petition and Mr. Underwood's counter-complaint. At the conclusion of evidence, the court granted Meyers' petition to establish mechanic's lien in the amount of $80,868.55, and it entered a judgment in that amount.[2]

[1] Mr. Underwood's amended counter-complaint also included a count alleging *res ipsa loquitor*. On September 11, 2013, Meyers filed a motion to dismiss the amended counter-complaint. After a hearing, the court granted the motion to dismiss as to the *res ipsa loquitor* count, but denied it as to the breach of contract and negligence counts.

[2] The court did not enter an order enforcing the mechanic's lien and directing that the property be sold unless the mechanic's lien was paid and satisfied on or before a date specified by the court, as Meyers had requested in its petition. Moreover, neither party directs us to a specific ruling regarding the breach of contract claim, and we did not find one in the record.

The court also considered Meyers' oral motions for judgment as to Mr. Underwood's counter-claims for negligence and breach of contract. The court granted Meyers' motion on the breach of contract claim, on the ground that Mr. Underwood had failed to produce any evidence that Meyers had breached its duties under the contract, and in any event, he had failed to produce evidence regarding damages for the allegedly defective work. The court denied Meyers' motion with respect to the negligence claim, stating that it was a jury question whether Meyers was negligent for the criminal acts of a third party, and if so, the amount of damages Mr. Underwood suffered as a result.

The jury found in favor of Mr. Underwood on the negligence claim, and it awarded $47,263.82. Meyers filed a motion for judgment notwithstanding the verdict or, alternatively, to reduce the jury's verdict. In its motion, Meyers argued that Mr. Underwood's damages should be capped at $12,587 because the evidence at trial established that the cost of repairs was $43,787, but Mr. Underwood had received $11,700 from his home insurer and $19,500 from the Maryland Department of the Environment. Meyers also argued that the $47,263.82 award included $3,476.82 in "loss of use" damages, which the jury improperly considered in contravention of the court's instructions.[3]

[3] Other than what is included in the record extract and supplemental extract, the parties did not provide this Court with transcripts of the trial, as required by Md. Rule 8-411. Neither party points to any place in the record containing the jury instructions or a ruling on a motion related to "loss of use" damages. The only discussion we found in the record regarding "loss of use" as an element of damages is the court's statement that "there's no loss of use damages in this case," followed by a colloquy regarding the verdict sheet.

After hearing arguments, the court reduced the jury's verdict to $12,587. It entered judgment for Mr. Underwood in that amount.

DISCUSSION

Before addressing the issues presented by the parties, we address whether this appeal is properly before us. As Meyers recognizes, there is a question whether this Court has jurisdiction to decide this appeal.

On April 3, 2015, Meyers filed a motion to dismiss the appeal on the ground that there was no final judgment. This Court denied the motion, with leave to raise the issue in the brief. Meyers did not, however, reiterate that motion in its brief. Instead it asked this Court to "correct" the lack of a final judgment. As explained herein, we agree with Meyers' initial contention, i.e., that the appeal (and cross-appeal) must be dismissed because there is not a final judgment.

The Court of Appeals "has often stated that, except as constitutionally authorized, appellate jurisdiction 'is determined entirely by statute,'" and "'therefore, a right of appeal must be legislatively granted.'" *Gruber v. Gruber*, 369 Md. 540, 546 (2002) (quoting *Kant v. Montgomery County*, 365 Md. 269, 273 (2001)); *Gisriel v. Ocean City Bd. of Sup'rs of Elections*, 345 Md. 477, 485 (1997), *cert. denied*, 522 U.S. 1053 (1998). Subject to limited exceptions that do not apply here, a party may appeal only "from a final judgment entered in a civil or criminal case by a circuit court." Md. Code (2014 Supp.) § 12-301 of the Courts and Judicial Proceedings Article ("CJP."). *See* CJP § 12-303 (listing interlocutory orders that are immediately appealable). It is a "very basic precept[]" of appellate jurisdiction that, subject to delineated exceptions, none of which are applicable here,

"appeals from orders or decisions that do not resolve or complete the resolution of the entire case, and are therefore interlocutory in nature, are not only not *favored*, they are not *allowed*." *Silbersack v. AC&S, Inc.*, 402 Md. 673, 683-84 (2008).

This Court recently discussed what constitutes a final judgment for purposes of appeal:

> For there to be an entry of a final judgment that triggers the time for filing an appeal, the following must be present in the record: a final judgment that has the effect of putting the parties out of court, set out in a separate document that specifies the judgment and that is a document separate from the docket entry. *Hiob v. Progressive Am. Ins. Co*., 440 Md. 466, 503 (2014). The document must declare judicial action that grants or denies specific relief in an unqualified way. *Id.* Further, the document must have been signed by the judge or the clerk, and, finally, the clerk must have docketed the judgment in accordance with the practice of the court. *Id.* To be a final judgment in the traditional sense, an order must not only settle an entire claim but also must "be intended by the court as an unqualified, final disposition of the matter in controversy[.]" *Rohrbeck v. Rohrbeck*, 318 Md. 28, 40 (1989). An order is an "unqualified final disposition" if it determines and concludes the rights involved, or denies the appellant the means of further prosecuting or defending his rights and interests in the subject matter of the proceeding. *Schuele v. Case Handyman & Remodeling Servs., LLC*, 412 Md. 555, 570-71 (2010).

Kona Properties, LLC v. W.D.B. Corp., Inc., ___ Md. App. ___, Nos. 696, 697, 698, Sept. Term, 2014, slip op. at 20-21 (filed Aug. 28, 2015).

Here, there is no final judgment for us to review. This is so for two reasons.

First, the record reflects that Meyers' breach of contract claim has not been resolved and remains pending. The initial petition included two counts. Count I sought a mechanic's lien, and Count II asserted breach of contract. The court's oral ruling and the docket entries, however, indicate that the court ruled only on the mechanic's lien claim. *See Hiob*, 440 Md. at 503 (for a ruling of the court to constitute a final and appealable

judgment, it must be entered on the docket). Accordingly, no final judgment pursuant to Maryland Rule 2-602 has been entered.[4]

In *Winkler Constr. Co., Inc. v. Jerome*, 355 Md. 231 (1999) the Court of Appeals addressed a similar issue. In that case, where claims remained after the court ordered a mechanic's lien, the Court stated:

> The order establishing the lien is therefore an interlocutory one, and, if the order had done nothing more than establish the lien, it would not have been immediately appealable. The order in question did much more, however. It not only established a lien but, as noted, ordered that the property be sold if the amount of the lien was not paid by a specific date and appointed a trustee to sell the property in that event. By reason of those additional provisions, which, on their face, were self-executing without the need for further involvement by the court, the order is appealable under § 12-303(3)(v) of the Courts and Judicial Proceedings Article, permitting an immediate appeal from an interlocutory order for the sale, conveyance, or delivery of real or personal property.

Id. at 245. *Accord T.W. Herring Investments, LLC v. Atlantic Builders Group, Inc.*, 186 Md. App. 673, 678 n .2 (2009) (where appeal was from a final order establishing a mechanic's lien and directing the sale of property, the order was appealable because it was for the sale of property, even though the order did not constitute a final judgment because there were other open issues in the case).

[4] Maryland Rule 2-602(a) provides:

> [A]n order or other form of decision . . . that adjudicates fewer than all of the claims in an action (whether raised by original claim, counterclaim, cross-claim, or third-party claim), or that adjudicates less than an entire claim, or that adjudicates the rights and liabilities of fewer than all the parties to the action: (1) is not a final judgment; (2) does not terminate the action as to any of the claims or any of the parties; and (3) is subject to revision at any time before the entry of a judgment that adjudicates all of the claims by and against all parties.

Here, as Meyers points out, there was an order establishing a lien, but there was not an order that the property be sold if the lien was not paid by a specific date. Accordingly, unlike in *Winkler*, the appeal from the mechanic's lien in this case was not proper as an interlocutory order for the sale of property. And because the record and the docket entry do not indicate a ruling on the breach of contract claim filed by Meyers, there is not a final judgment subject to appeal.

Second, even if the record could be construed to reflect that the court decided the breach of contract claim, there is not a final judgment on the mechanic's lien claim. Although the court entered a judgment establishing a lien, s*ee* Md. Rule 12-304; RP § 9-106(b), the court did not enter an order directing that the land be sold, despite Meyers' request.[5] Accordingly, Meyers cannot proceed with the sale of property to enforce the judgment.

In *Simmons Self-Storage Partners v. Rib Roof, Inc.*, 247 P.3d 1107, 1109 (Nev. 2011), the Supreme Court of Nevada addressed the issue presented here and concluded that, to constitute a "final judgment in a mechanic's lien enforcement action, the judgment must include language that the property is to be sold, so the prevailing party can enforce the judgment." The Court explained that, "[b]y including sale language in the final

[5] For the lien to be enforced, the lien must not only be established by a judgment, but the lienholder must also file a "motion in the original action within one year after the date on which the complaint to establish the lien was filed." Md. Rule 12-305(a). As it was in this case, the motion to enforce "may be included in the original complaint to establish the lien." *Id.* Pursuant to Md. Rule 12-305(b), an order granting a motion to enforce "shall direct that the land be sold unless the amount found to be due is paid on or before a date specified in the order, which shall be not more than 30 days after the date of the order."

judgment, the merits of the complaint are finally resolved, leaving no question as to whether the foreclosure can proceed . . . yet aggrieved parties can appeal (and seek a stay) before the property is actually sold." *Id.* *Accord McCormack v. Moore*, 117 S.W.2d 952, 957 (Ky. Ct. App. 1938) (because a final judgment "must confer some right that may be enforced without further orders of the court, and which puts an end to the litigation," an order determining the lien's existence, "without going further and directing the enforcement of the liens, was only an interlocutory one that the court might ignore before entering enforcement orders and determining the rights of the parties."); *Massasoit-Pocasset Nat'l Bank*, 117 N.E. 911, 912 (Mass. 1917) ("The final judgment in a lien suit is the decree of sale which establishes the lien for a certain amount and orders a sale of the premises.").

Pursuant to this authority, which we find persuasive, we hold that there is no final judgment in a mechanic's lien action until the court orders that the property be sold if the lien is not paid by a specific date. Here, as Meyers recognizes, the absence of an order of sale means that there is not a final judgment. Meyers suggests, however, that this is a "ministerial error," and it requests that we correct the record by directing the trial court to enter a final order.[6]

To be sure, Maryland Rule 8-414(a) provides: "On motion or on its own initiative, the appellate court may order that an error or omission in the record be corrected." Generally, however, correction to the record by an appellate court refers to errors in

[6] Mr. Underwood did not respond to this argument in his reply brief.

transcription or other minor omissions. *See Owens-Corning Fiberglas Corp. v. Garrett*, 343 Md. 500, 531 (1996) (discretion exercised to review settlement agreements that were sealed by the trial court and not made part of the record on appeal); *Owens-Illinois, Inc. v. Zenobia*, 325 Md. 665, 668 (1992) (discretion exercised to include exhibits attached to a motion for reconsideration that had not been transmitted); *King v. State Roads Comm'n of the State Highway Admin.*, 284 Md. 368, 374 (1979) (discretion exercised to correct transcript where bench conference was not properly recorded). Here, the court did not enter a final order, which is not an "error" that we can correct.

Because there is no final judgment in this case, and there is no applicable exception to the general rule that we cannot address a case where there is not a final judgment, we do not have jurisdiction to consider this appeal. Accordingly, we shall dismiss it.

APPEAL AND CROSS-APPEAL DISMISSED. COSTS TO BE PAID 67% BY APPELLANT AND 33% BY APPELLEE.