

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

**CURTIS COILA dba QUALITY
ELECTRIC,**

Respondent,

v.

**NORMA ZUG, Individually, and
NORMA ZUG, as Personal
Representative of the Estate of BRIAN
ZUG, deceased,**

Appellants.

No. 26008-9-III

Division Three

UNPUBLISHED OPINION

Schultheis, J. — Curtis Coila, a registered electrical contractor doing business as Quality Electric, brought a lien forfeiture action against a property owner. The property owner argued that because the work was not complete, payment was not due. The trial court held that the contractor was entitled to payment. The property owner brought a motion for new trial and reconsideration, which was denied. On appeal, we conclude that the court did not abuse its discretion in denying a new trial or reconsideration. Affirmed.

FACTS

Mr. Coila entered into an agreement to perform electrical work for Brian Zug, who passed away during the course of these proceedings. Mr. Coila agreed to furnish the

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necessary labor and materials to improve and repair the electrical system on Mr. Zug's Walla Walla, Washington, residence that had been converted into five apartments. Mr. Coila's written estimate for the job, dated August 17, 2004, was \$4,075 plus sales tax. The estimate noted: "labor could vary with unknown items. Payment in full at time of completion." Clerk's Papers (CP) at 33 (Finding of Fact 2); Ex. 1. On September 28, 2004, Mr. Coila obtained an electrical work permit for a "400 amp altered service" on the multi-family residence. CP at 33 (Finding of Fact 3); Ex. 2.

Quality Electric relocated the main electrical service panel and installed five power meters at a common location, five 100 amp panels, and smoke detectors, and performed related work. The work was slowed by substantial obstacles that were not visible from the surface of the old structure, including fire blocking and angle bracing inside the walls and an abandoned stairway that had been covered over. Other hazards were encountered, including dangerous cross-wiring in the existing system, which Quality Electric brought up to code. Quality Electric also had to install more conduit in a porch roof with open rafters and construct a raceway with a cable splice box to get the power cable to the fifth apartment, converted garage space, which was attached to the main structure by a roof over a walkway. Mr. Zug was kept informed of these complications and the progress of the job. Mr. Zug also requested additional work during the course of the project, including the installation of eight smoke detectors.

On October 12, 2004, three corrections were required by the Department of Labor and Industries inspector. An inspection was performed on October 18, the result of which was “Approved Complete.” CP at 34 (Finding of Fact 12). Mr. Coila did not charge Mr. Zug to make the corrections. A two-person crew from Quality Electric spent more time working on wiring problems than that reported to Mr. Coila, for which Mr. Zug was not billed. Mr. Coila submitted a bill to Mr. Zug on December 8 for \$7,269.84, including sales tax.

When Mr. Zug had not paid the bill by April 14, 2005, Mr. Coila recorded a claim of lien with the Walla Walla County Auditor and gave proper notice to Mr. Zug and his mother, Norma Zug. On June 6, Mr. Zug paid \$5,464, the undisputed amount of the bill.

Mr. Coila filed a complaint against the parties to foreclose the lien on November 17, 2005. After Mr. Zug’s death, the complaint was amended to substitute Norma Zug, as personal representative of her son’s estate.

The matter proceeded to bench trial on November 30, 2006, and the trial court found the facts set forth above. The trial court concluded that the parties entered into a contract for electrical work; Mr. Coila provided all of the services, labor, and materials to properly complete the project; the job was substantially completed; and Mr. Coila was entitled to the remaining contract balance of \$1,805.84. Mr. Coila was also awarded prejudgment interest, costs, and reasonable attorney fees.

Ms. Zug filed a motion to reconsider and for a new trial along with a declaration that stated that Mr. Coila did not complete the finish work required by a final inspection by the department inspector until after trial. Because the work had not been completed, she argued, the payment was not due until after trial. The trial court denied the motion in a letter decision, stating that the final inspection was a ministerial act, the performance of which did not render the contract due until it was complete.

DISCUSSION

Ms. Zug challenges the trial court's denial of the motion for reconsideration or new trial under CR 59. We review a trial court's decision to deny a motion for reconsideration for an abuse of discretion. *Rivers v. Wash. State Conference of Mason Contractors*, 145 Wn.2d 674, 685, 41 P.3d 1175 (2002).

CR 59(a)(4) authorizes the grant of a motion for reconsideration or new trial upon the discovery of material evidence, which the party could not have discovered through diligent efforts and produced at trial. A new trial may be granted on the basis of newly discovered evidence only if “the evidence (1) will probably change the result of the trial; (2) was discovered since the trial; (3) could not have been discovered before trial by the exercise of due diligence; (4) is material; and (5) is not merely cumulative or impeaching.” *Holaday v. Merceri*, 49 Wn. App. 321, 329, 742 P.2d 127 (1987) (quoting *State v. Evans*, 45 Wn. App. 611, 613, 726 P.2d 1009 (1986)). “Failure to satisfy any one

of these five factors is a ground for denial of the motion.” *Id.* at 330.

At trial, Mr. Coila testified that he had just become aware that a final inspection had not been performed. He had to obtain a new permit the day before trial in order to obtain the inspection because the previous permit had expired. The new evidence was that additional work had been performed in response to the inspection. Ms. Zug argues that Mr. Coila had not performed the contract until those corrections were made and payment was not due. The trial court held that the evidence presented was not material because the final inspection was a ministerial act. We agree.

Ms. Zug also argued for a new trial under CR 59(a)(7). That rule provides that a reconsideration or new trial may be granted on the grounds that “there is no evidence or reasonable inference from the evidence to justify the verdict or the decision, or that it is contrary to law.” CR 59(a)(7). Ms. Zug argues that the completion of the work was a condition precedent to the performance of payment.

“Whether a provision in a contract is a condition, the nonfulfillment of which excuses performance, depends upon the intent of the parties, to be ascertained from a fair and reasonable construction of the language used in the light of all the surrounding circumstances.” *Jones Assocs., Inc. v. Eastside Props., Inc.*, 41 Wn. App. 462, 466, 704 P.2d 681 (1985) (quoting *Ross v. Harding*, 64 Wn.2d 231, 236, 391 P.2d 526 (1964)). Intent can also be ascertained by the parties’ subsequent conduct and the reasonableness of

the parties' respective interpretations. *Id.* at 467.

Here, Mr. Zug paid a portion of the balance. And he did not refuse the remainder because of the failure to obtain a final inspection. He did so because he thought the bill included work that was outside of the estimate and was not agreed to by him. The court did not abuse its discretion by concluding that the parties did not intend to make the inspection a condition precedent to payment.

Moreover, even when there is an express contract term that requires a certificate of completeness from another party, which is a condition precedent to recovery of the final payment, substantial completeness may suffice. *See Wash. Bridge Co. v. Land & River Improvement Co. of Everett*, 12 Wash. 272, 276-77, 40 P. 982 (1895) (requiring only substantial completeness when the work is so near to completion that a small amount of effort and money would complete it and it was impossible to finish the work at the time because of high water). The contract here was substantially completed and payment was due.

Affirmed. Ms. Zug's request for attorney fees is denied.

A majority of the panel has determined that this opinion will not be printed in the Washington Appellate Reports but it will be filed for public record pursuant to RCW 2.06.040.

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WE CONCUR:

Sweeney, C.J.

Kulik, J.