REL: May 17, 2019

ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2018-2019

2171146

The Crest Homeowners Association, Inc.

v.

Onsite Wastewater Maintenance, LLC

Appeal from Jefferson Circuit Court
(CV-15-903424)

EDWARDS, Judge.

The Crest Homeowners Association, Inc. ("TCHA"), appeals from a judgment entered by the Jefferson Circuit Court disposing of TCHA's claims against Onsite Wastewater Maintenance, LLC ("OWM"). The judgment also disposed of

TCHA's claims against Integrated Wastewater Management, Inc. ("IWM"), an alleged alter ego of OWM; Keith Hattaway, the sole member and manager of OWM and an alleged shareholder of IWM; David Hereford, an alleged service provider for OWM; and Terry White, an alleged shareholder of IWM. IWM, Hattaway, Hereford, and White will hereinafter be referred to collectively as the "other defendants." TCHA has appealed, challenging only the disposal of its claims against OWM.

On September 4, 2015, TCHA filed a complaint against OWM and the other defendants in the trial court; the complaint was subsequently amended to correct an error regarding OWM's alleged name. According to TCHA's complaint, as amended, TCHA "is the owner of the private onsite sewage-disposal system that serves The Crest Subdivision located in Trussville, Alabama," and OWM is "the company responsible for the maintenance of [TCHA's] private onsite sewage-disposal system." TCHA alleged that it had entered into a maintenance agreement with OWM and that the maintenance agreement required OWM to make all necessary repairs to the sewage-disposal system. According to TCHA's complaint, OWM and the other defendants failed to fulfill their obligations under the

maintenance agreement. TCHA alleged that OWM and the other defendants made "material representations, including statements that all required repairs would be made to the system and that they would perform all necessary maintenance on the onsite sewage disposal system on a monthly basis"; that OWM and the other defendants "willfully, wantonly, fraudulently, mistakenly or recklessly suppressed material facts from [TCHA]"; that OWM and the other defendants breached the maintenance agreement with TCHA; that OWM and the other defendants negligently or wantonly breached the duties they owed to TCHA; that OWM and the other defendants engaged in deceptive trade practices, see Ala. Code 1975, § 8-19-5; and that OWM and the other defendants had created a private nuisance. TCHA sought damages, including the "cost to repair or replace the onsite sewage-disposal system and ... punitive damages." TCHA later filed a witness list, an exhibit list, and an itemization of damages "representing witnesses, exhibits and damages that may or may not be offered into evidence in the trial of this cause" and indicating that the cost of "[c]onsulting, [e]ngineering and installation of [n]ew [s]ystem" was $90,000.

OWM filed an answer denying that it had agreed "to make all repairs to the onsite sewage-disposal system and to perform all monthly maintenance service on the onsite sewage disposal system." Instead, OWM alleged that it had agreed to perform certain repairs chosen by TCHA and to provide "maintenance service for pump station at the onsite sewage-disposal system ... and 24/7 monitoring for the pump station ... for a total monthly fee of $364.00." OWM denied that it had engaged in any of the alleged wrongful acts alleged in TCHA's complaint. The other defendants likewise filed answers denying the pertinent allegations in TCHA's complaint.

OWM and the other defendants filed motions for a summary judgment, and TCHA opposed those motions. On November 22, 2016, the trial court entered an order granting Hereford's motion for a summary judgment, but denying the motions for a summary judgment filed by OWM, IWM, Hattaway, and White.

After an ore tenus proceeding, the trial court entered a final judgment on May 2, 2018. The May 2018 judgment includes extensive findings of fact and specific discussions regarding why OWM was entitled to a judgment in its favor as to TCHA's claims of breach of contract, negligence, and wantonness. The

August 2018 judgment further states that "[a]ny and all claims asserted against the Defendants are hereby DISMISSED with prejudice." (Capitalization in original.)

TCHA timely filed a postjudgment motion, and the trial court denied that motion. TCHA timely filed a notice of appeal to the Alabama Supreme Court, which transferred the appeal to this court, pursuant to § 12-2-7(6), Ala. Code 1975.

TCHA argues that the trial court erred in determining that OWM did not breach the maintenance agreement and in dismissing TCHA's fraud claim and denying its wantonness claim. Regarding the denial of TCHA's claim alleging breach of the maintenance agreement, TCHA argues that "(a) the trial court contravened Alabama law by looking beyond the four corners of the agreement; (b) the trial court contravened Alabama law by failing to follow the rules for resolving ambiguities in contracts; and (c) the trial court's determination was not supported by its own stated findings of facts."

In the May 2018 judgment, the trial court stated that the sewage-disposal system at issue consisted of "thirteen (13) septic tanks (one for each home), two (2) lift pumps, four (4)

peat filtration treatment tanks, and field lines." The trial court continued:

> "In 2011, [TCHA] contacted [OWM] to address an alarm on the [sewage-disposal] system. [OWM] provided [TCHA] with a proposal to make the necessary repairs, and [TCHA] paid [OWM] for those repairs. [TCHA] also requested a proposal from [OWM] to provide ongoing maintenance for the entire [sewage-disposal] system. [OWM] submitted a proposal to provide 'Monthly maintance [sic] service treatment system' for $325/month and '24/7 monitoring' for $39/month .... A second option was also provided to [TCHA] called the 'Worry Free Maintenance Contract' that provided pump out service on an as needed basis and a 5-year warranty for a cost of $624/month, but with no additional services. ...
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> "....
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> "... The optional services available was the maintaining of the septic pump outs, which would be reviewed on the completion of drain issues and control upgrades. These options were not selected by [TCHA]. To the contrary, [TCHA] specifically informed [OWM] that it did not have the available funds to perform the required prerequisite pump outs necessary.
>
> "The Court finds that [OWM] did not breach its contract with [TCHA]."

As our supreme court has stated:

> "Alabama law requires the trial court to determine whether a contract is ambiguous, and if it is not, to determine the force and effect of the terms of the contract as a matter of law. Extrinsic evidence may be admitted to interpret a contract

> only if the trial judge finds as a matter of law that the contract is ambiguous."

Wigington v. Hill-Soberg Co., 396 So. 2d 97, 98 (Ala. 1981) (citations omitted). As this court stated in Van Allen v. Van Allen, 812 So. 2d 1276, 1277 (Ala. Civ. App. 2001),

> "'[a]n ambiguity exists if the agreement is susceptible to more than one meaning. However, if only one reasonable meaning clearly emerges, then the agreement is unambiguous.'
>
> "R.G. v. G.G., 771 So. 2d 490, 494 (Ala. Civ. App. 2000). 'Where an ambiguity exists, parol evidence may be admitted to clarify or explain the ambiguity.' Curry v. Curry, 716 So. 2d 707, 709 (Ala. Civ. App. 1998)."

Contrary to TCHA's argument on appeal, the trial court could not understand the meaning of "'[m]onthly maint[en]ance service treatment system'" and "'24/7 monitoring'" without reference to extrinsic facts, and the ambiguity of the maintenance agreement is illustrated by its reference to a "second option," not chosen by TCHA, namely a "'Worry Free Maintenance Contract.'" More importantly, however, this case does not allow for resolution of TCHA's claims, as a matter of law, without reference to the underlying evidentiary basis for each element of those claims. For the reasons discussed

infra, we therefore will pretermit further discussion of TCHA's arguments.

The present case was tried in the trial court without a court reporter present. The record on appeal includes no transcript of the trial, no statement of the evidence pursuant to Rule 10(d), Ala. R. App. P., and no agreed statement of the case in lieu of the record on appeal pursuant to Rule 10(e), Ala. R. App. P. Thus, this court has no way of determining what evidence was offered at trial, by whom, or for what purpose it was offered. We likewise have no way of determining what evidentiary objections were made at trial or how the trial court ruled on those objections. Thus, this court cannot evaluate whether TCHA introduced the evidence necessary for it to succeed on its claims or whether the trial court committed any reversible error in this case. See Rule 45, Ala. R. App. P. ("No judgment may be reversed or set aside, nor new trial granted in any civil ... case on the ground of ... the improper admission or rejection of evidence, nor for error as to any matter of pleading or procedure, unless in the opinion of the court to which the appeal is taken or application is made, after an examination of the

entire cause, it should appear that the error complained of has probably injuriously affected substantial rights of the parties.").

In Ford v. Lines, 505 So. 2d 1229, 1229-30 (Ala. Civ. App. 1986), this court stated:

> "The record does not contain the court reporter's transcript, a statement of the evidence or an agreed statement of the case under Rules 10(d) and 10(e), A[la]. R. A[pp]. P., as to that April 17, 1986[,] hearing. Consequently, we are required to conclusively presume that the judgments with which this appeal is concerned were supported by the testimony which was presented before the trial court on April 17, 1986."

See also, e.g., Powell v. Vanzant, 557 So. 2d 1225, 1227 (Ala. 1990). Likewise, we must conclusively presume that the May 2018 judgment is supported by the testimony that was presented at the bench trial in the present case, and, thus, the May 2018 judgment in favor of OWM must be affirmed.

AFFIRMED.

Thompson, P.J., and Moore and Hanson, JJ., concur.

Donaldson, J., recuses himself.