DIVISION IV

ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
ROBERT J. GLADWIN, Judge

CA05-1330

SEPTEMBER 13, 2006

EARL DEAN McWHORTER
APPELLANT

V.

L. J. PEROT
APPELLEE

APPEAL FROM THE PULASKI COUNTY CIRCUIT COURT
[NO. CV 04-13762]

HON. BARRY SIMS,
JUDGE

AFFIRMED

This appeal arises from a lawsuit filed by appellee L. J. Perot against appellant Earl McWhorter for breach of contract and unjust enrichment. Subsequent to filing his answer to the complaint, appellant filed a counterclaim against appellee alleging unjust enrichment. Following a bench trial, the trial court awarded appellee $10,901.83, and dismissed appellant's counterclaim. On appeal, appellant asserts that the trial court erred by awarding excessive damages on the breach-of-contract claim and by dismissing his counterclaim against appellee. Finding no error, we affirm.

On or about May 30, 2002, the parties entered into a contract for appellant to provide construction services related to the deck/patio area at appellee's residence. Although part of the work was completed, the project was never finished. During the time work was being

performed on the contracted project, appellant and appellee had several other unwritten agreements for appellant to complete various additional improvements around the property. Payment for work on certain of those improvements appears to be the subject of appellant's counterclaim in this matter.

While it is undisputed that the contract did not specify a date for completion of the contracted project, the parties discussed the progress on numerous occasions over the two years of activity. Communication between the parties became contentious on or about May 2, 2004, during a phone conversation in which appellant explained that, due to a shortage of laborers, he could not finish the contracted project prior to appellee's requested date of May 28, 2004.[1] That conversation abruptly halted all negotiations and work between the parties.

Appellee filed her complaint on December 22, 2004. Appellant filed his answer on January 19, 2005, and his counterclaim on March 16, 2005. A bench trial was held on August 10, 2005, and the trial court entered an order in favor of appellee and dismissing appellant's counterclaim on August 24, 2005. Appellant filed his notice of appeal on September 19, 2005.

When a case is tried with the circuit court sitting as the trier of fact, the standard of review on appeal is not whether there is substantial evidence to support the finding of the court, but whether the circuit court's findings were clearly erroneous. *See White v.*

[1]Appellee had an event scheduled at her home on that date, for which she eventually had to rent other space at a cost of $1,000.00.

McGowen, __ Ark. __, __ S.W.3d __ (Jan. 12, 2006). A finding is clearly erroneous when, although there is evidence to support it, the reviewing court, after reviewing the entire evidence, is left with a firm conviction that a mistake has been committed. *See id*. Resolution of disputed facts and determinations of credibility are within the province of the fact-finder. *See id.*

I. Breach-of-Contract Damages

Where an award of damages is alleged to be excessive, this court reviews the proof and all reasonable inferences most favorably to the appellee and determines whether the verdict is so great as to shock the conscience of the court or demonstrate passion or prejudice on the part of the trier of fact. *Health Facilities Mgmt. Corp. v. Hughes*, __ Ark. __, __ S.W.3d __ (Feb. 9, 2006). Remittitur is appropriate when the compensatory damages awarded are excessive and cannot be sustained by the evidence. *Id*. The standard of review in such a case is that appropriate for a new trial motion, *i.e.*, whether there is substantial evidence to support the verdict. *Id.* (citing Ark. R. Civ. P. 59(a)(5) (stating a new trial may be granted on the ground that there was error in the assessment of the amount of recovery, whether too large or too small)). Moreover, Arkansas Rule of Civil Procedure 59(a)(4) provides as one ground for a new trial "excessive damages appearing to have been given under the influence of passion or prejudice."

This court has held that when a contractor refuses to perform, damages may be recovered against him for the difference between his bid and the cost of having the work

performed by others. *MDH Builders, Inc. v. Nabholz Constr. Corp.*, 70 Ark. App. 284, 17 S.W.3d 97 (2000). This court has also determined that where a contractor failed to complete work on a project, the property owners were entitled to the cost of reasonable repairs as an appropriate measure of damages for breach of construction contract. *Jocon, Inc. v. Hoover*, 61 Ark. App. 10, 964 S.W.2d 213 (1998).

Appellant asserts that the judgment awarded in this case was not supported by the evidence and is subject to remittitur. While he acknowledges that the entire $15,000.00 price of the contract was paid to him by appellee, he contends that the work he performed was worth far more than the $4,098.17 net amount he was left with after the circuit court's judgment. He testified that it would only cost him between three and four thousand dollars to complete the remaining work on the contract and that the only other findings made with regard to cost related to the completion of the contract were the $427.25 appellee paid to Staley Electric and the $193.00 she paid for lights. Appellant asserts that appellee is entitled merely to the contract rate of completing the contracted project rather than the inflated price charged by a third party. He claims that damages in a breach-of-contract case are those that would place the injured party in the position they would have been if the contract had not been breached. He testified that he was willing to complete the work without additional charge and now requests that the judgment should be reversed and remanded with instructions for remittitur.

Not surprisingly, appellee had no interest in appellant completing the contracted project. Appellant failed to complete the patio, did not put in steps or drains for the hot tub, and hauled off only part of the trash and debris from the site. He poured concrete over the location for the drains and performed faulty electrical work that had to be fixed by someone else. Appellee provided two witnesses that testified as to what it would cost to complete the project: (1) Mr. Rowland quoted a cost of completion of $8,891.25, based primarily on the cost of the stone and the labor to install it over the concrete slab, and (2) Mr. McKissick quoted a cost of $10,500.00 to finish the patio, not what it would have cost to build it from the beginning.

The two bids presented by appellee's witnesses were roughly close in amount, and justifiable based upon similar cases; accordingly, we hold that the trial court's award was not clearly erroneous. While it is difficult to determine exactly what figures the trial judge included in his specific award of $10,901.83, appellant failed to request further findings pursuant to Rule 52(b), which governs situations where a party requests that a court amend its findings or make further findings. While such a request is not mandatory in this case because it was a bench trial,[2] the failure to request further findings makes it difficult to determine the exact basis for the award. Consequently, appellant faces a more difficult challenge in his attempt to prove that the award was excessive. Numerous dollar amounts

[2]*See Cogburn v. Wolfenbarger*, 85 Ark. App. 206, 148 S.W.3d 787 (2004) (stating that, in a bench trial, the sufficiency of the evidence to support the trial court's findings may be raised whether or not any objection was made below).

were presented by both parties as well as their witnesses, including Mr. McKissick's testimony that the contract slab work done by appellant as part of the contract would be worth approximately $4,500.00. Based upon our review of the evidence and all reasonable inferences most favorable to the appellee, we determine that the damages award is not so great as to shock our conscience or demonstrate passion or prejudice on the part of the trier of fact.

II. Dismissal of Counterclaim

Appellant contends that he performed work that was separate and apart from the contract in the amount of $8,103.75. He claims that he was never paid for his materials or labor and filed a counterclaim against appellee for unjust enrichment. To make such a finding in appellant's favor, the circuit court would have had to find that appellee received something of value from appellant, to which she was not entitled. Our supreme court has stated that one who is free from fault cannot be held to be unjustly enriched merely because one has chosen to exercise a legal or contractual right. *See Rigsby v. Rigsby*, 356 Ark. 311, 149 S.W.3d 318 (2004). Appellant points out that his testimony regarding the counterclaim was not disputed or rebutted and asserts that it therefore must be given strong weight by the court. At the very least, he claims that he is entitled to a set-off of $8,103.75 and requests that the judgment be reversed and remanded for an appropriate determination of damages and/or set-off.

Appellee admitted that, in addition to the previously discussed contract, she and appellant entered into several valid oral agreements for additional home improvements during the same time period. She explained several amounts that she paid to appellant, including: $2,025.00 for work completed on her gutters; $100.00 for work on her kitchen cabinets; $800.00 for additional fence work around the back yard.[3] The invoice for $8,103.75, dated January 24, 2005, was prepared by appellant and received by appellee after she filed suit against appellant, and appellant admitted on cross-examination that he prepared the invoice because she sued him. Appellee asserts that some of the items included in the amount sought by appellant were either: (1) not agreed upon by the parties; (2) agreed upon by the parties but not completed by appellant; (3) part of the $15,000.00 contract; (4) agreed upon by the parties, not fixed by appellant, and eventually fixed by someone else at appellee's expense; (5) duplicated expenses for which he had been paid. Appellee contends that appellant's counterclaim was wholly unsubstantiated and that the trial court made the correct decision in dismissing it.

Given the great deal of conflicting testimony between the parties in this case, and that the findings of disputed facts and the determination of the credibility of witnesses are within the province of the trial judge who has the opportunity to observe the witnesses during trial, *see White v. White*, __ Ark. App. __, __ S.W.3d __ (May 24, 2006), we cannot say that the

[3]Appellant stated that the $800.00 was for tree-removal, but he produced no supporting documentary evidence to support that assertion.

trial court erred in dismissing appellant's counterclaim. Accordingly, we affirm on this point as well.

Affirmed.

PITTMAN, C.J., and GLOVER, J., agree.