ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
KAREN R. BAKER, JUDGE

DIVISION IV

CA06-1281

June 13, 2007

HUNTERS GREEN DEVELOPMENT CO., LLC
APPELLANT
v.
STEVE GOLDMAN
APPELLEE

AN APPEAL FROM PULASKI COUNTY CIRCUIT COURT
[No. CV2002-12205]

HONORABLE WILLARD PROCTOR, JR.
CIRCUIT JUDGE

AFFIRMED

This is a breach-of-contract case. Hunter's Green Development Co., LLC, appeals from a judgment awarding damages to appellee Steve Goldman. On appeal, appellant challenges the trial court's finding that it breached the parties' contract and the amount of damages awarded. We affirm.

In late 2001, the parties entered into a contract wherein appellee agreed to buy land from appellant, which would build a house on the property. David Carl was the developer for the fifty-unit development in west Little Rock. Construction began in January 2002 and was to be completed by August 21, 2002. Appellant stopped construction after appellee refused to make further draws on the construction loan in May. Appellee based his refusal

on appellant's purported failure to pay subcontractors and suppliers and to secure lien releases as required in paragraph 2(a) of the contract, which provided:

> The Contractor will obtain lien waivers for all checks over the amount of $500 paid to the subcontractor and materialmen used to construct the residence to be located at 19 Hunter's Green Circle, and maintain said lien waivers in the office with the corresponding paid bills. The Contractor shall furnish to the Owner two (2) Acknowledgement [sic] of Payments Affidavit Against Liens during the course of construction, and a final lien waiver and clear title at the time of closing on the house.

Appellee finished construction of the house on his own and sued appellant, Carl, and Construction Management, Inc., for breach of contract. Appellant filed a counterclaim for breach of contract.

Following the bench trial where appellee, Carl, John Ford (who installed the house's wiring), and Gloria Hopkins (appellee's next-door neighbor) testified, the trial court dismissed appellee's claims against Carl and Construction Management but entered judgment against appellant Hunter's Green Development Co. The trial court held that paragraph 2(a) was an essential term or condition of the contract and stated:

> 4. Where a contractor commits a material breach of contract, the owner is entitled to recision [sic] of the contract and restitution of any payments. *See Economy Swimming Pool Co. v. Freeling*, 236 Ark. 888, 370 S.W.2d 438 [(1963)].
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> 5. In the alternative, if the owner wishes to have construction completed, he is entitled to the cost of hiring a third party to complete the work that the breaching party had contracted to do. *See MDH Builders, Inc. v. Nabholz Construction Co.*, 70 Ark. App. 284, 17 S.W.3d 97 (2000). Steve Goldman is entitled to the cost expended by him in completing the work that Hunter's Green Development, LLC had contracted to do.
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> 6. Damages are measured as the difference between the unpaid portion of the contract price, which the owner has saved, and the reasonable cost of completing the structure. *See Mason v. Russenberger*, 260 Ark. 561, 542 S.W.2d 745 (1976). In this case, the remaining balance of the Contract at the time of Hunter's Green Development, LLC's breach of contract was *$50,225*. The Contract also required

> Hunter's Green Development, LLC to pay accrued interest on Mr. Goldman's construction loan. This amounted to $8,071.71. The difference between the unpaid portion of the contract, *$50,225*, and the cost of completing the structure including payment of interest, is *$12,558.04*. Therefore, the reasonable cost incurred by Mr. Goldman in completing the home and the amount that he is entitled to in damages is $12,558.04.
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> 7. In this case, the Hunter's Green Development Company, LLC attempted to mitigate and correct the breach by providing some, but not all, of the requested lien waivers. Hunter's Green Development, Company LLC's [sic] substantially performed under the contract. Although Hunter's Green Development, LLC materially breached its contract with Steve Goldman and is not entitled to consideration of damages under the doctrine of substantial performance, the Court does find that it would be appropriate to modify the damages. *Prudential Ins. Co. v. Stratton*, 14 Ark. App. 145, 685 S.W.2d 818 (1985).
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> 8. The plaintiff's damages are reduced by $3,656.71. This amount represents a credit for the amount of interest that plaintiff would be entitled to as of June 17, 2002 - - the date of substantial performance of the contract. The plaintiff is entitled to recover a total of $8,901.33 in damages. The plaintiff is entitled to recover costs and the plaintiff is entitled to recover an attorney's fees [sic] in the amount of $3,000.00.

This appeal followed.

Appellant argues that its actions did not amount to a material breach of the contract and that the trial court made errors in the calculation of damages. We will reverse the circuit court's findings of fact if they are clearly erroneous or clearly against the preponderance of the evidence. *Smith v. Eisen*, 97 Ark. App. 130, __ S.W.3d __ (2006). We give due deference to the trial court's superior position to determine the credibility of the witnesses and the weight to be given their testimony. *Id.*

Appellant argues that, even if one accepted the trial court's findings of fact as correct, its actions did not amount to a material breach of contract. It states that it gave appellee an acknowledgment-of-payments affidavit on June 12, 2002, and that only one

supplier—Windows Doors & More, Inc.—actually filed a lien, which it never paid, because appellee would not accept its windows. In an attempt to discredit appellee's testimony on this issue, appellant lists in its brief the subcontractors and vendors for which it claims to have introduced lien releases into evidence. Although appellant concedes that it failed to obtain a lien release from Harris Concrete Pump, which was paid $607.50, it argues that the releases that appellee claimed were not supplied were in fact supplied and are in the record.

Whether a breach of contract occurred is a question of fact, and the trial court's findings on this issue will not be set aside unless clearly erroneous. *Worch v. Kelly*, 276 Ark. 262, 633 S.W.2d 697 (1982). When performance of a duty under a contract is contemplated, any nonperformance of that duty is a breach. *Taylor v. George*, 92 Ark. App. 264, 212 S.W.3d 17 (2005). As a general rule, the failure of one party to perform his contractual obligations releases the other party from his obligations. *Id.* Forfeitures, however, are not favored in the law, and a relatively minor failure of performance on the part of one party does not justify the other in seeking to escape any responsibility under the terms of the contract; for one party's obligation to perform to be discharged, the other party's breach must be material. *Id.* An influential circumstance in the determination of the materiality of a failure fully to perform a contract is the extent to which the injured party will obtain the substantial benefit that he reasonably anticipated. *Id.*

This case, therefore, turns on whether the trial court clearly erred in crediting appellee's testimony over that of Carl, who testified that he had obtained lien releases for all of the work that was done. Appellee presented evidence that, before the parties signed the contract, he told Carl of his serious concerns about the possibility that suppliers or

subcontractors might place liens on his house and discussed what had happened to a friend who, because of such liens, had to pay for his house "twice." Carl, he said, reassured him that this would not happen because of the relevant provision in their contract. He stated that the electrician told him early in construction that he had had a hard time getting paid by appellant in the past; ultimately, appellee, Carl, and the electrician agreed that appellee would pay the electrician directly. Appellee testified at length about subcontractors and suppliers who threatened to put liens on the property during construction. He said that Carl reassured him whenever he related his concerns about the threats. Appellee stated that he continually requested lien waivers from Carl to no avail. He presented evidence that, by March 2002, a roofing material supplier informed appellee that Carl would not pay its bill and that it was going to place a lien on the house; when appellee informed Carl about this, Carl said he would take care of it. Appellee also testified that, in April 2002, the sheetrock finisher informed him that it was having a hard time getting paid by appellant, even though appellee had already given appellant a draw that covered that service.

On April 22, 2002, appellee's attorney sent Carl a letter asking for an acknowledgment-of-payments affidavit for all work performed through that date and lien waivers for all work performed after that date. Carl's response was inadequate, according to appellee's attorney in a letter dated April 24, 2002. Appellee testified that, between April 24, 2002, and May 10, 2002, he received no lien waivers from appellant. At that time, appellee testified, he believed that appellant was in breach. His attorney sent another letter to Carl on May 10, 2002, asking for an acknowledgment-of-payments affidavit and stating that, until a complete affidavit was supplied, appellee would not fund any further draws.

The sheetrock finisher sent a letter to appellant, with a copy to appellee, on May 14, 2002, stating that it had not been paid for work completed on April 5, 2002, and threatening to file a lien. Again, appellee stated, he expressed his concerns to Carl and requested lien waivers, and Carl promised to provide them. Appellee also stated that, even though he had given Carl a draw of $7000 for the cabinets, Arnold Cabinets notified him after their installation that Carl's check for cabinets in appellee's house and the house he was building next door had bounced and that it was going to put a lien on his house. After Arnold Cabinets contacted appellee's attorney about invoices that had been unpaid for almost sixty days, the attorney wrote another letter to Carl on June 12, 2002, requesting an acknowledgment-of-payments affidavit and stating that, unless it was given within five days, appellee would deem appellant in breach of contract, obtain another general contractor to complete the house, and hold it responsible for any difference in cost. Although Carl responded that day with some lien waivers, appellee testified, he did not supply all of them. In a June 17, 2002, letter to appellant, appellee's attorney listed seven suppliers from whom appellee had not received lien waivers and again asked for waivers from all subcontractors. Carl did not respond to this letter.

There is nothing in the record to support appellant's contention that all of the lien waivers in the record were produced before litigation began or that they were the only missing waivers. In fact, appellee testified that appellant did not supply all of the waivers before he declared a breach, and the trial court believed him. As the finder of fact, it is within the trial court's province to believe or disbelieve the testimony of any witness. *Taylor v.*

George, *supra*. Where the pivotal issue is the credibility of interested parties whose testimony is in direct conflict, we defer to the trial court's judgment. *Id*.

Appellee testified extensively that it was of great importance to him that no liens be placed on his house, and Carl obviously understood that. Although ultimately, only one lien was placed on the property and appellant eventually produced lien waivers, it is readily apparent from the testimony and the exhibits that appellant did not produce them in a timely fashion and that, by the time it did produce the waivers, it was already in breach. When a contract does not provide a specific date for performance, the law implies that it must be within a reasonable time. *Taylor v. George*, *supra*. What would be a reasonable time depends upon the intention of the parties at the time the contract was made, the facts and circumstances surrounding its making, or, in general, what was contemplated by the parties at the time. *Id*. Because construction began in January and was to be completed in August, it was reasonable for appellee to expect appellant to produce lien waivers for work done before June 12, 2002.

In light of this evidence, the trial court's findings that appellant breached the contract by failing to perform in accordance with paragraph 2(a) and that this breach was material are not clearly erroneous, and we affirm on this issue.

Appellant argues that, even if the trial court's finding of material breach was correct, appellant would be owed $804.86 by appellee, according to the measure of damages selected by the court. In its brief, appellant lists the amounts that appellee paid to finish the house, as adjusted according to appellant's calculations. This tally results in appellee purportedly owing appellant $804.86. According to appellant, the following six payments (set forth in appellee's

exhibits) should have been altered as a result of appellee's testimony or the terms of the contract: (1) the payment of $10,632.74 to Carpet One for flooring - adjusted amount: $5,750.00; (2) appellee's payment of $5,748 to the electrician - adjusted amount: $4,232.18; (3) the $1,658 payment to appellee's new painter, Paul LaMarche - adjusted amount: $1,428.81 (based on an attached tape); (4) appellee's payments totaling of $6,144.05 to Natural Stone - adjusted amount: $3,700; and (5) the $885 payment for the alarm system - adjusted amount: $0.

Appellant concludes its argument by asking us, if we find that there was no material breach, to set aside any credits to appellee for the Pella windows and Middleton Heating. Appellant points out that appellee's objection to the first set of windows was that they were not casement windows; however, the windows that appellee ultimately installed (with one exception) were not that type. Appellant also asks us to set aside the credit to appellee of $2,049.72 for the payment to Middleton Heating, which got the air-conditioning working, because only $1,500 remained on the balance due the original air-conditioning supplier.

In general, damages recoverable for breach of contract are those damages that would place the injured party in the same position as if the contract had not been breached. *Deck House, Inc. v. Link*, ___ Ark. App. ___, ___ S.W.3d ___ (Feb. 14, 2007). Exactness on the proof of damages is not required, and the finder of fact has some latitude in awarding damages when arriving at a figure. *Bank of Am., N.A. v. C.D. Smith Motor Co.*, 353 Ark. 228, 106 S.W.3d 425 (2003). The question of damages, both as to measure and amount, is a question of fact. *Quality Truck Equip. Co. v. Layman*, 51 Ark. App. 195, 912 S.W.2d 18 (1995).

Appellee responds that a review of the relevant invoices and the abstract demonstrates that appellant's list omits four expenses incurred by appellee and reflects incorrect amounts paid to at least five other suppliers. Appellee states that the trial court actually awarded him $413.03 less than he spent. In his brief, appellee sets forth all of his additional expenses for which he claims a credit from appellant, along with explanations and citations to the supporting evidence. According to appellee, the following four expenses were omitted from appellant's list: (1) the $2,000 allowance for landscaping; (2) the $450 allowance for the kitchen sink; (3) the $1,200 allowance for lighting fixtures; and (4) $1,279.50 to All Natural Stone for materials for the fireplace. The errors noted by appellee are: (1) appellant omitted an additional $50 to Nelson Electric for a security connection; (2) appellant omitted $.75 from the amount paid to the painter; (3) the adding machine tape does not include all of the invoices for the painter's supplies costs; (4) appellant approved the estimate from Carpet One prior to installation; and (5) appellant transposed two numbers in stating appellee's payment to Cannon Remodeling ($641.18, not $614.18).

As for the Pella windows, appellee explains that he selected a cheaper alternative than casement windows after he began personally paying to finish construction. He also points out that there was no testimony that the remaining balance owed on the contract for air-conditioning directly reflected the amount of work that was left to be done; that, once appellant breached its contract, appellee could recover the reasonable cost of hiring a third party to complete the work;[1] and that there was no evidence that Middleton's charges were excessive.

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[1] *See Mason v. Russenberger*, 260 Ark. 561, 542 S.W.2d 745 (1976).

We hold that appellee established his damages with sufficient certainty. Because the outcome of this issue also turns on the credibility of Carl and appellee, the trial court's findings are affirmed.

Affirmed.

PITTMAN, C.J., and ROBBINS, J., agree.