

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-000560-MR

TERRY E. FORCHT; NELDA L.
BARTON-COLLINGS; HEALTH
SYSTEMS, INC. AND CORBIN
NURSING HOME, INC.

APPELLANTS

v. APPEAL FROM WHITLEY CIRCUIT COURT
HONORABLE JERRY D. WINCHESTER, JUDGE
ACTION NOS. 96-CI-686, 96-CI-702, 96-CI-703

J. M. BURNS & ASSOCIATES, INC.
AND TOTAL COMFORT CORPORATION

APPELLEES

AND

NO. 1998-CA-000598-MR

J. M. BURNS & ASSOCIATES

CROSS-APPELLANT

v. CROSS-APPEAL FROM WHITLEY CIRCUIT COURT
HONORABLE JERRY D. WINCHESTER, JUDGE
ACTION NOS. 96-CI-686, 96-CI-702, 96-CI-703

TERRY E. FORCHT; NELDA L.
BARTON-COLLINGS; CORBIN
NURSING HOME, INC. AND
HEALTH SYSTEMS, INC.

CROSS-APPELLEES

OPINION

AFFIRMING

** ** * * * * *

BEFORE: GARDNER, KNOFF AND McANULTY, JUDGES.

GARDNER, JUDGE: Appellants appeal from a judgment of the Whitley Circuit Court for the appellees in this breach of contract action. J. M. Burns and Associates (Burns) has filed a cross-appeal. After reviewing the issues raised by the parties, this Court affirms the circuit court's judgment.

The owners of the Corbin Nursing Home which include Terry Forcht, Nelda L. Barton-Collings and Health Systems, Incorporated, hired Burns to serve as general contractor for construction of a new nursing home in Whitley County, Kentucky. In February 1996, the parties entered into a contract wherein they agreed that the date of substantial completion of the project would be November 6, 1996. Substantial completion was defined as the date when a certificate of occupancy would be obtained from the Kentucky Department of Housing, Buildings and Construction.

Problems between the owners and Burns began developing after commencement of the project. Burns apparently fell behind schedule in the spring of 1996, because of very wet weather. Burns requested that additional days be added to the completion date, but the owners refused. Burns has claimed that the owners refused to change the order and design for a range hood which the state would not approve, and that the owner failed to have an adequate water supply provided for the project. The owners have maintained that Burns was back on schedule during the summer of 1996 and should have completed the project on time.

On October 25, 1996, Burns submitted a draw request to the owners' architect for work already performed. According to the request, the project was ninety percent complete and there remained \$1,110,347.07 due under the contract, of which \$730,633.90 was requested. The architect approved the request for \$730,633.90 on November 5. Burns maintains that the owners failed to pay the request when due and as a result, it twice notified the owners that pursuant to the terms of the contract it would stop work at the close of business on November 25, 1996, if the amount was not paid.

On November 22, 1996, Burns claims that without giving it notice, the owners placed a cable across the road leading to the project and locked out Burns and its subcontractors. The owners subsequently hired another contractor to complete the job. Burns maintains that the owners attempted to force as many of its subcontractors as possible to return to the project and finish their work.

Burns subsequently filed suit against the owners, initially alleging \$1,068,068.70 in compensatory damages. It also sought punitive damages, but this claim was later dismissed by summary judgment. The jury reached a verdict of \$602,550 for Burns. The circuit court additionally granted Burns interest at the rate of eight percent per annum from and after November 8, 1996, until such sums were paid in full. The owners have appealed, and Burns has filed a cross-appeal.

The owners first contend that the trial court incorrectly denied their motion for a directed verdict and

judgment notwithstanding the verdict (JNOV). They specifically maintain that even assuming weather-related delays were permissible under the parties' agreement, Burns never satisfied the two requirements of the agreement concerning weather delays. They also argue that Burns failed to prove the damages that it was awarded on the breach of contract claim. After reviewing the arguments raised by the owners, we have found no error and thus affirm on those issues.

In general, upon review of the evidence supporting a judgment entered based upon a jury verdict, an appellate court's role is limited to determining whether the trial court erred in failing to grant a motion for directed verdict. Lewis v. Bledsoe Surface Mining Co., Ky, 798 S.W.2d 459, 461 (1990). The reviewing court must take all evidence which favors the prevailing party as true, and the court must not determine credibility or the weight which should be given to the evidence. Id. The prevailing party also is entitled to all reasonable inferences which may be drawn from the evidence. Id. "Upon completion of such an evidentiary review, the appellate court must determine whether the verdict is palpably or flagrantly against the evidence so as to indicate that it was reached as a result of passion or prejudice." Id., at 461-62, quoting National Collegiate Athletic Association, By and Through Bellarmine College v. Hornung, Ky., 754 S.W.2d 855, 860 (1988). If the reviewing court concludes affirmatively, it will find that the trial court erred in denying the motion for directed verdict; otherwise the court must affirm the judgment. Id., at 462.

We first turn to the owners' argument that Burns failed to produce evidence meeting the requirements for permitting the substantial completion date to be changed based upon weather related conditions. The contract at paragraph 29 stated that it was understood that the contract for construction would not have a penalty clause for late completion. It also provided that the substantial completion date was November 6, 1996, with due allowances for adverse weather conditions. The owners maintain that the contract also provided that if adverse weather conditions were the basis for a claim of additional time, such a claim would be documented by data substantiating that weather conditions were abnormal for the period of time and could not have been reasonably anticipated.¹ They maintain pursuant to O'Bryan v. Massey-Ferguson, Inc., Ky., 413 S.W.2d 891, 893 (1966), and other authorities, that in the absence of an ambiguity, a written instrument will be enforced strictly according to its terms. Because of the many added and conflicting conditions in the contract at issue, we do not believe that it is clear and unambiguous. Nevertheless, Burns presented ample evidence below to withstand a motion for directed verdict on this issue. Evidence from David Hall, an architect

¹The contract contains contradictory provisions regarding weather-related delays. The two provisions cited above allow delays based upon weather-related conditions. Two later provisions state that there shall be no increase in the length of the contract due to weather-related conditions and that the contractor in submitting its bid certified that weather conditions were taken into account and accommodated in its proposed completion days. The owner seems to maintain that the provision requiring Burns to meet two conditions in order to receive an extension for weather-related conditions controls.

with Eiche and Associates who was project manager for the nursing home construction, and others was presented showing that in the early stages of the project, far above normal rainfall had occurred, thus preventing the setting of the foundation and delaying the project. Additionally, evidence was presented that the owners' own actions, such as refusing to allow modification of a range hood so that state approval could result and their failure to have an ample water supply at the construction site, delayed the project as well. Sufficient evidence was also presented which showed that Forcht, the primary owner, refused to consider any extensions based upon weather-related delays and refused to meet with Burns to discuss such issues. Thus, there was evidence to support the verdict regarding weather-related delays.

The owners' claim that Burns failed to prove the damages that it was awarded on the breach of contract claim also lacks merit. It has long been held that a jury should not be allowed to engage in speculation or guesswork as to the probable damages resulting from a breach of contract. Commonwealth of Kentucky, Dept. of Highways v. Jent, Ky., 525 S.W.2d 121, 122 (1975), Barley's Adm'x. v. Clover Splint Coal Co., 286 Ky. 218, 150 S.W.2d 670 (1941); Union Cotton Co. v. Bondurant, 188 Ky. 319, 222 S.W. 66 (1920). "Loss of anticipated profits as an element of recoverable damages for breach of contract is fully recognized in Kentucky." Illinois Valley Asphalt, Inc. v. Harry Berry, Inc., Ky., 578 S.W.2d 244, 245 (1979). Mere uncertainty as to the amount will not necessarily preclude recovery. Id. A

party however must present sufficient evidence from which a reasonable inference as to the amount of damages can be based. Id., at 246. "The measure of damages under an ordinary contract, where the defendant has prevented the plaintiff from performing any part thereof, is the net profit which would have been made; that is, the difference between the contract price and the reasonable cost of performance." Koplin v. Faulkner, Ky., 293 S.W.2d 467, 469 (1956).

In the instant case, Burns presented ample evidence to support an award of damages based upon a breach of contract by the owners. Burns presented evidence that the total construction cost was \$2,337,555 and that it had spent \$1,776,349 up to the date that it was shut out, and still owed subcontractors \$53,416. The contract balance after the draw request was \$1,110,350. Thus, there was evidence to support the \$602,560 that was awarded to Burns. We decline to disturb the trial court's decision not to grant a directed verdict for the owners.

The owners next contend that the trial court erroneously denied their motion for a new trial. They assert three grounds for a new trial: (1) the trial court improperly instructed the jury on weather-related excuses for Burns's nonperformance; (2) the trial court improperly instructed the jury on liability and damages; and (3) the trial court improperly excluded videotape evidence displaying the incomplete and defective nature of the project in late November of 1996.

This Court has uncovered no error regarding the instructions provided to the jury. First, the owners' argument

regarding the instructions addressing weather-related delays is basically a rehashing of their prior argument wherein they maintained that Burns failed to produce evidence to meet the requirements under the contract for weather-related delays. Second, the owners' argument regarding alleged improper instructions on liability and damages also is unfounded. They maintain that the trial court failed to present their theory of the case in the instructions and that the court should have given the jury a setoff instruction. We have reviewed the instructions and the authorities cited by the owners, including Shreve v. Biggerstaff, Ky. App., 777 S.W.2d 616 (1989), and 2 John S. Palmore and Ronald W. Eads, Kentucky Instructions to Juries, §38.05 (1989), but believe these authorities do not apply to the instant case and have found no error. The trial court in this case was presented with a complex case in which fault was being claimed on both sides. The court presented the jury with a series of alternative instructions by which the jury could decide whether the November 22, 1996, work stoppage was caused primarily by the owners or Burns, and whether Burns had substantially complied with the contract. The jury was also permitted to determine whether damages were due to Burns or the owners. This was more than a mere setoff case. After hearing the evidence and considering the instructions, the jury found in favor of Burns. We decline to disturb the judgment based upon the jury's verdict.

The owners have also failed to present any reversible error concerning the trial court's decision not to allow them to present the entire videotape depicting alleged incomplete and

defective conditions at the project in late November 1996. Relevancy of evidence is a determination which rests largely in the discretion of the trial court. Green River Electric Corp. v. Nantz, Ky. App., 894 S.W.2d 643, 645 (1995). An appellate court must not disturb a trial court's ruling absent an abuse of discretion. Id. Kentucky Rule of Evidence (KRE) 103(a) states that error may not be predicated upon a ruling which admits or excludes evidence unless a substantive right of the party is affected. Id.

The owners at trial did not present the excluded videotape evidence by avowal. Thus, we do not know whether the evidence would have added to their case, and we will not presume that it would. See Williams v. Payne, Ky., 515 S.W.2d 618, 619 (1974). Further, we have found no abuse of discretion by the trial court. The court permitted the owners to show part of the videotape which depicted alleged outright defects but would not permit them to show uncompleted items that would have been finished or corrected had Burns not been shut out. The trial court appeared to be very diligent in attempting to be fair to both parties.

The owners finally argue that the trial court erroneously denied their motion to amend the judgment, because it had incorrectly awarded Burns prejudgment interest. This Court has found no clear error or abuse of discretion by the trial court on this issue.

In certain instances, interest may be an appropriate part of consequential damages. Nucor Corp. v. General Electric

Co., Ky., 812 S.W.2d 136, 143 (1991). The decision whether to award interest rests with the trial court, primarily because it involves a matter of equity. Id. A court is not as much concerned with whether the claim is liquidated or unliquidated as it is with whether justice and equity demand an allowance of interest to the injured party. Id.; quoting Dalton v. Mullins, Ky., 293 S.W.2d 470 (1956). See also Friction Materials Co. v. Stinson, Ky. App., 833 S.W.2d 388, 392 (1992). An award of interest is within the judicial discretion of the trial court. Nucor Corp. v. General Electric Co., 812 S.W.2d at 143. See also Murray v. McCoy, Ky. App., 949 S.W.2d 613, 615 (1996). The Supreme Court adopted the rule set out in Restatement (Second) of Contracts §354,

(1) If the breach consists of a failure to pay a definite sum in money or to render a performance with fixed or ascertainable monetary value, interest is recoverable from the time for performance on the amount due less all deductions to which the party in breach is entitled.

(2) In any other case, such interest may be allowed if justice requires on the amount that would have been just compensation had it been paid when performance was due.

Nucor Corp. v. General Electric Co., 812 S.W.2d at 144.

In the instant case, the trial court properly acted within its discretion in awarding prejudgment interest to Burns. Specifically, it awarded Burns interest at eight percent per annum from and after November 8, 1996, until such sums were paid in full. The contract in this case provided at paragraph 7.2 that payments due and payable under the contract shall bear interest from the date payment is due at the rate of eight

percent. The amount of damages in this case could be ascertained without too much difficulty based upon the contract, the agreed upon price, the amounts already paid and still owed to Burns, and the amounts Burns owed subcontractors. The evidence shows that the owners locked out Burns and did not permit it to complete the project. The circuit court carefully weighed the facts and the applicable law in setting the interest, and we decline to disturb its ruling.²

For the foregoing reasons, the Whitley Circuit Court's judgment is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANTS/CROSS
APPELLEES:

Byron E. Leet
Louisville, Kentucky

Wesley R. Tipton
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BRIEF FOR APPELLEE/CROSS-
APPELLANT:

Michael R. Eaves
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²In its cross-appeal, Burns raises the issue of punitive damages. It concedes that under existing law, punitive damages are not warranted unless this Court determines that Forcht's conduct and bad faith rises to the level of a tort. We have uncovered no error by the trial court on this issue and thus, affirm.