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Commonwealth Of Kentucky

Court Of Appeals

NO. 2000-CA-000907-MR

MARY ANN ANZELMO d/b/a
PERFORMANCE TECHNOLOGY HOMES — APPELLANT

APPEAL FROM MARION CIRCUIT COURT
v. HONORABLE DOUGHLAS GEORGE, JUDGE
CIVIL ACTION NO. 97-CI-00044

REWARD WALLS SYSTEMS, INC. — APPELLEE

AND

NO. 2000-CA-001225-MR

MARY ANN ANZELMO d/b/a
PERFORMANCE TECHNOLOGY HOMES — APPELLANT

APPEAL FROM MARION CIRCUIT COURT
v. HONORABLE DOUGHLAS GEORGE, JUDGE
CIVIL ACTION NO. 97-CI-00044

KENNETH M. CHILDERS, SARAH
CHILDERS, GREAT FINANCIAL BANK,
F.S.B. and FARMERS NATIONAL BANK — APPELLEES

AND

NO. 2000-CA-001334-MR

KENNETH M. CHILDERS and
SARAH CHILDERS — CROSS-APPELLANTS

CROSS-APPEAL FROM MARION CIRCUIT COURT
v. HONORABLE DOUGHLAS GEORGE, JUDGE
CIVIL ACTION NO. 97-CI-00044

MARY ANN ANZELMO d/b/a
PERFORMANCE TECHNOLOGY HOMES — CROSS-APPELLEE

OPINION

AFFIRMING IN PART,

REVERSING IN PART AND REMANDING

** ** ** ** **

BEFORE: DYCHE, EMBERTON and HUDDLESTON, Judges.

HUDDLESTON, Judge: These consolidated appeals come before us as a result of a contract between Mary Ann Anzelmo, doing business as Performance Technology Homes, and Kenneth M. Childers and Sarah Childers under which Anzelmo was to construct a home for the Childerses. Anzelmo appeals a summary judgment granted against her in her suit against Reward Walls Systems, Inc., the maker of the forms used by Anzelmo in pouring the basement walls of the Childerses' home, asserting that genuine issues of material fact exist regarding her claim that Reward's forms were defective. Anzelmo also appeals from a judgment based on a jury's award of damages to the Childerses. The Childerses cross-appeal claiming, inter alia, that the circuit court erred in finding Anzelmo's lien against their home valid and in not granting their motion for a directed verdict.

The Childerses and Anzelmo entered into a contract pursuant to which Anzelmo was to construct a home for the Childerses. The contract provided that the building of the home would be a "lock and key" job and that the Childerses were to "pay [Anzelmo] the sum of $140,000, payable in installments, upon certificate of Builder[.]" During construction several changes and upgrades were made to the home. It is disputed as to whether these changes were requested and approved by the Childerses. During the

period of construction, the Childerses and Anzelmo frequently conferred regarding the selection of items for the home, such as windows and trim. In June 1996, with two months of construction still to be completed, Anzelmo presented the Childerses with a statement showing that the Childerses were already obligated for costs in excess of $140,000.00. This information apparently came as a shock to the Childerses, as they believed that they were not obligated to pay any more than the contract price upon completion of the home.

Anzelmo went on to complete the home, although testimony reveals that many features included in the final architectural plan were not included in the finished home. Upon moving into the home, the Childerses complained of several defects in their home. A primary complaint was that the basement leaked. Anzelmo responded by alleging that she was owed over $76,000.00 in addition to the $140,000.00 contract price. In response to the Childerses refusal to pay the additional amount, Anzelmo filed a mechanics and materialman's lien against the Childerses' home in the amount of $76,452.99.

On March 11, 1997, the Childerses sued Anzelmo alleging defective workmanship, a breach of contract and warranty. They also aserted that Anzelmo's lien was defective and constituted a slander of the Childerses' title to their property. Anzelmo counterclaimed alleging that the Childerses breached the construction contract by failing to pay for additional costs and upgrades to the home.

Anzelmo's lien claim was referred to the circuit court's master commissioner who submitted recommended findings of facts and conclusions of law on September 26, 1997. The commissioner's report, however, only dealt with whether the Childerses' "motion to dismiss Count II of the counterclaim alleging that [Anzelmo's] statement of lien filed in the office of the Marion County Court Clerk [was] defective." The commissioner recommended that the Childerses' motion be denied, as it appeared the lien was properly "subscribed and sworn to" in accordance with Kentucky Revised Statutes (KRS) 376.080(1). Absent from the report was any finding as to the validity of the lien. The circuit court adopted the master commissioner's recommendation on November 4, 1997.

On June 25, 1999, Anzelmo filed a third-party complaint against Reward Wall Systems, alleging that Reward had manufactured and sold to Anzelmo defective "stay-in-place" forms used in constructing the basement which did not hold concrete when used as instructed, resulting in leaks, and that Reward breached its warranty that the forms were fit for their intended purpose.

On October 22, 1999, Reward moved for summary judgment asserting that there was no evidence to support Anzelmo's third-party complaint. On December 3, 1999, the circuit court granted Reward's motion for summary judgment.[1] The summary judgment was entered nunc pro tunc, effective November 8, 1999. The court

[1] Reward did not participate in the trial held on November 11, 12 and 13, 1999.

dismissed with prejudice all claims by Anzelmo against Reward which related to alleged water damage to the Childerses' basement.[2]

A jury trial was held on all other claims on November 10, 11 and 12, 1999. The jury returned a verdict in favor of the Childerses in the sum of $25,600.00, representing damages resulting from defects in the home. The jury awarded Anzelmo $37,042.33, which represented amounts unpaid and still owed by the Childerses. The result was a net award of $11,442.33 to Anzelmo. Judgment based on the verdict was entered on March 28, 2000. These appeals followed after the circuit court denied post-trial motions to alter, amend or vacate the judgment.

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Anzelmo contends on appeal that (1) the circuit court erred in dismissing her claim on the merits when she allegedly voluntarily dismissed her claim pursuant to Kentucky Rule of Civil Procedure (CR) 41.01(2); and (2) that the circuit court erred in finding that no genuine issues of material fact existed as to Anzelmo's claim against Reward.

Anzelmo insists that the court erred in dismissing her claim against Anzelmo with prejudice because she voluntarily dismissed her claim pursuant to CR 41.01(2). CR 41.01(2), relating to the voluntary dismissal of civil actions, provides, in relevant part, that:

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[2] Anzelmo's claims against Reward related to aesthetic damages to the Childerses' basement allegedly caused by defective Reward forms, Anzelmo's claims for costs allegedly expended to correct "blow outs" in the forms, the cost of the alleged defective forms and Reward's counterclaim were, according to the circuit court, to be pursued in a separate proceeding.

> [A]n action, or any claim therein, shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper . . . . Unless otherwise specified in the order, a dismissal under this section is without prejudice.

The record does not disclose a CR 41.01(2) motion made by Anzelmo. Anzelmo claims to have moved for a voluntary dismissal in her response to Reward's motion for summary judgment and during an informal conference call between the circuit judge and the attorneys involved in this case. Assuming arguendo that Anzelmo attempted to voluntarily dismiss her claim against Reward, her attempts were insufficient for that purpose. CR 7.02(1) provides that "[a]n application to the court for an order shall be by motion which, unless made during a hearing or trial, shall be made in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought." Anzelmo did not comply with CR 7.02(1) in her attempt to voluntarily dismiss her claim.

In her response to Reward's motion for summary judgment, Anzelmo stated that she "withdraws her claim for indemnification for any damages as a result of leaks in the basement of the Childers' home" and that she did "not believe that the use of the stay-in-place forms could in any way be related to the structural integrity of the home or the leak in the basement." Although "[i]t is not necessary to make a motion for relief that has been

demanded in a pleading,"[3] a response to a motion for summary judgment is not a pleading.[4] Even if Anzelmo properly moved to voluntarily dismiss her claim for indemnification, the circuit court did not rule on the motion and Anzelmo did not insist on a ruling. Anzelmo argues that the circuit court converted her motion for voluntary dismissal into a dismissal on the merits. This is not the case. The circuit court ruled in favor of Reward on its motion for summary judgment. If Anzelmo wanted the court to rule on her "motion," she should have timely and specifically requested the court to do so.

Anzelmo next argues that the court erred in granting Reward's motion for summary judgment as a genuine issue of material fact exists as to her claim for indemnification for the damages as a result of the leaks in the basement of the Childerses' home. Summary judgment is only proper "where the movant shows that the adverse party could not prevail under any circumstances."[5] However, "a party opposing a properly supported summary judgment motion cannot defeat that motion without presenting at least some affirmative evidence demonstrating that there is a genuine issue of material fact requiring trial."[6] The circuit court must view the

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[3] Rives v. Pettit, Ky., 513 S.W.2d 475, 485 (1974).

[4] Ky. R. Civ. Proc. (CR) 7.01. The oral motion allegedly made by Anzelmo during the informal conference call does not qualify as a hearing as this conference is not a part of the record available for review.

[5] See Steelvest, Inc. v. Scansteel Service Center, Inc., Ky., 807 S.W.2d 476, 480 (1991), reaffirming Paintsville Hosp. v. Rose, Ky., 683 S.W.2d 255 (1985).

[6] Hubble v. Johnson, Ky., 841 S.W.2d 169, 171 (1992).

record "in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor."[7] "The trial judge must examine the evidence, not to decide any issue of fact, but to discover if a real issue exists."[8]

This Court has said that the standard of review on appeal of a summary judgment is "whether the trial court correctly found that there were no genuine issues of material fact that the moving party was entitled to judgment as a matter of law." "There is no requirement that the appellate court defer to the trial court since factual findings are not at issue."[9]

Because the order granting summary judgment was entered nunc pro tunc, we must view the record at the effective issuance of the order, November 8, 1999. Although both parties argue that the evidence presented at trial support their respective arguments, we must review the evidence that was in the record before trial, on November 8, 1999, and ignore any evidence that was presented at the trial. "In the analysis, the focus should be on what is of record rather than what might [have been] presented at trial."[10]

Anzelmo responded to Reward's motion for summary judgment by unequivocally stating that:

> Based on recent discovery depositions, Anzelmo withdraws her claim for indemnification for any damages as a result

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[7] Steelvest, supra, n. 5.

[8] Id.

[9] Scifres v. Kraft, Ky. App., 916 S.W.2d 779, 781 (1996).

[10] Welch v. American Publishing Co., Ky., 3 S.W.3d 724, 730 (1999).

> of leaks in the basement of the Childers' home. Anzelmo does not believe that the use of the stay-in-place forms could in any way be related to the structural integrity of the home or the leak in the basement.

Although Anzelmo did point to deposition testimony in an attempt to establish that a genuine issue of material fact existed in order to defeat Reward's motion for summary judgment, none of this evidence was sufficient to meet the causation element needed to prove that the forms were defective. In short, Anzelmo produced no relevant testimony, expert or otherwise, to establish causation in her claim against Reward.

Anzelmo argued below that the doctrine of res ipsa loquitur bridged the gap between the alleged defective nature of the forms and the leaking basement in the Anzelmo's home.

> To invoke the doctrine of res ipsa loquitur, three essential elements must be met: 1) the instrumentality must be under the control or management of [Reward]; 2) the circumstances, according to common knowledge and experience, must create a clear inference that the accident would not have happened if [Reward] had not been negligent; and 3) [Anzelmo's] injury must have resulted from the accident.[11]

Anzelmo's argument that res ipsa loquitur bridges the causation gap fails upon an analysis of the first essential element. The forms

[11] Helton v. Forest Park Baptist Church, Ky. App., 589 S.W.2d 217, 219 (1979), citing Commonwealth, Dept. of Highways v. Burchett, Ky., 419 S.W.2d 577 (1967).

were not under the control or management of Reward after the forms left its plant: individuals not associated with Reward were in control of the forms at the work site. Reward did not pour the concrete to form the walls, nor was Reward in any other way connected with the building of the home. The doctrine of res ipsa loquitur does not apply, and the court did not err in granting summary judgment in favor of Reward.

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Anzelmo alleges two errors on appeal: that the jury's award of damages to the Childerses to correct "defects" in the home was not supported by the evidence and the jury should not have been permitted to determine the damages to which Anzelmo was entitled after the master commissioner had determined that Anzelmo had a valid lien on the Childerses' home.

Anzelmo argues that the jury erroneously based its award to the Childerses on the testimony of the Childerses' expert witness, David Clements. In estimating the cost to repair the damage done by the leaking basement, Clements gave what he classified as an "educated guess" and estimated the cost of repairs would be $25,000.00

Anzelmo correctly points out that "[j]uries should not be permitted to indulge in speculation and guesswork as to the

probable damages resulting from an alleged act of negligence[.]"[12] "[F]acts must be shown which afford a basis for measuring or computing damages with reasonable certainty."[13] Two other cases, Bryan v. Gilpin[14] and Welch v. L.R. Cooke Chevrolet Co.,[15] are cited by Anzelmo for this proposition. However, these cases speak not to the certainty of damages, but to the certainty of liability; therefore, Anzelmo's reliance on these two cases is misplaced.

Anzelmo argues that because Clements classified his opinion of the cost to repair the damages as an "educated guess," the jury impermissibly relied on his testimony in awarding damages to the Childerses. However, a review of Clements's testimony shows that his opinion was more than a mere guess. Clements testified to having over twenty-five years' experience in residential construction. He recited numerous, detailed steps that he would recommend in correcting the problems with the home. Such steps included digging around the perimeter of the house, digging up and cleaning a pipe from the basement to a ditch, checking the foam blocks and checking the foundation drain system for silt.

Kentucky's highest court has explained the nature of the term "guess."

> The term "guess" is not regarded as being a mere conjecture or speculation but as a colloquial way of

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[12] Louisville & N. R. Co. v. Lankford, 304 Ky. 192, 200 S.W.2d 297, 298 (1947).

[13] Kentucky West Virginia Gas Co. v. Frazier, 302 Ky. 642, 195 S.W.2d 271, 273 (1946).

[14] Ky., 282 S.W.2d 133 (1955).

[15] 314 Ky. 634, 236 S.W.2d 690 (1950).

> expressing an estimate or opinion. It is a word frequently used where a witness is called upon to make estimates of speed or distance or size or time. Like the words "suppose" or "think", it is commonly used as meaning the expression of a judgment with an implication of uncertainty.[16]

Clements expressed his expert opinion as to the cost of repairing the damage. The fact that he referred to his opinion as an "educated guess" is inconsequential. The fixing of damages is this case was within the exclusive province of the jury.[17] We will not reverse a judgment on the ground that the damages are excessive unless the award is so excessive as to indicate it was fixed under the influence of passion or prejudice.[18] Because the jury's award in this case was supported by substantial evidence, we will not disturb it.

Anzelmo's next argument is that the circuit court erred in having the jury determine the amount owed Anzelmo by the Childerses, as the master commission had determined this amount by finding that Anzelmo had a valid lien. Esentially, Anzelmo argues that the issue was res judicata because the master commissioner had found her lien to be valid and the court had adopted the commissioner's finding.

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[16] Smith v. Commonwealth, Ky., 282 S.W.2d 840, 842 (1955), citing WEBSTER'S INTERNATIONAL DICTIONARY and Collier v. Commonwealth, 303 Ky. 670, 198 S.W.2d 974 (1947).

[17] See Vinson v. Chadwick, Ky., 507 S.W.2d 181, 183 (1974).

[18] See De Buyser v. Walden, Ky., 255 S.W.2d 616, 618 (1953).

The master commissioner stated in his report and recommendation that he would "deal only with [the Childerses'] motion to dismiss [the lien] alleging that [Anzelmo's] statement of lien filed in the office of the Marion County Clerk is fatally defective." Contrary to Anzelmo's contention, the issue of the validity of the lien was never actually adjudicated before the master commissioner. Further, the parties agreed that referral to the master commission of the validity of the lien would be waived.

Even if the master commissioner implicitly found that Anzelmo's lien was valid, Anzelmo's res judicata argument is without merit. "[T]he doctrine of res judicata applies only to a final judgment which is rendered "upon the merits" of the underlying action."[19] The circuit court's November 5, 1997, order overruling the Childerses' exceptions to the master commissioner's report and confirming the report was not a final and appealable order. Hence, the court was at liberty to alter its decision regarding the confirmation of the commissioner's report and submission of the amount of damages to the jury, rather than relying on the amount of the lien.[20] Because the order confirming the master commissioner's report was not a final and appealable order, Anzelmo's res judicata argument is without merit, and the circuit court did not err in submitting the issue of damages to the jury.

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[19] Davis v. Powell's Valley Water Dist., Ky. App., 920 S.W.2d 75, 77 (1995), citing Dennis v. Fiscal Court of Bullitt County, Ky. App., 784 S.W.2d 608, 609 (1990).

[20] See Massey v. Fischer, Ky., 243 S.W.2d 889, 890 (1951); see also Kramer v. Kramer, 276 Ky. 504, 124 S.W.2d 744 (1939).

The Childerses argue that the circuit court erred in not directing a verdict on Anzelmo's claim for additional compensation because no evidence was introduced to counter the express terms of the building contract. At the core of this issue is the meaning of the term "lock and key" contract. The contract specified that the job was considered to be a "lock and key" job, however no definition of this term was set forth in the contract. The Childerses contend that "lock and key" is a common term of art in the construction industry and means that the contractor is required to build the home for contract price. Anzelmo argues that "lock and key" is not an accepted term of art in the construction industry, that its meaning is subject to interpretation, and that the issue was properly submitted to the jury.

The Childerses cite several cases from other jurisdictions and one Kentucky case to support their argument that "lock and key" is a widely accepted industry term. The Kentucky case cited by the Childerses does not say that. In Wright v. Monroe Lumber Co.,[21] the Court simply stated that the contract for the building of a house was a "lock and key" job.[22] The issue was not the meaning of a "lock and key" job, and the terms of the contract were not in dispute. We have uncovered no cases in Kentucky that interpret the term "lock and key" job. Although the

[21] 156 Ky. 83, 160 S.W. 788 (1913).

[22] Id., 160 S.W. at 789.

term has been defined by other jurisdictions, we are under no obligation to adopt those definitions.[23]

Unfortunately, none of the changes made to the contract at issue was reduced to writing. The contract did provide that "certain changes will be allowed up until final approval of AFS-prepared blueprints. After that time, structural changes will not be allowed. Other changes and upgrades will be at the owner's expense on a cost plus 20% basis." This clause could easily lead one to believe that Anzelmo was entitled to costs plus a 20% surcharge on any changes made to the home. Inasmuch as the contract was ambiguous as to the amount Anzelmo was to receive in constructing the home, the issue was properly submitted to the jury.

In ruling on a motion for a directed verdict, the circuit court is to consider the evidence in the strongest possible light in favor of the party opposing the motion. A directed verdict must not be granted unless there is "a complete absence of proof on a material issue in the action, or if no disputed issue of fact exists upon which reasonable [people] could differ."[24] Because reasonable persons could differ as to the interpretation of the contract at issue, the circuit court did not err in denying the Childerses' motion for a directed verdict.

The Childerses next argue that the circuit court erred in denying their motion for a directed verdict with respect to certain

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[23] See Roman Catholic Diocese v. Secter, Ky. App., 966 S.W.2d 286, 289 (1998).

[24] Everley v. Wright, Ky. App., 872 S.W.2d 95, 96 (1993), quoting Taylor v. Kennedy, Ky. App., 700 S.W.2d 415, 416 (1985).

credits due for items bought for the home. Allegedly, the construction cost for cabinets, closets, baths and flooring was $2,730.42 less than the contract's allowance for these items. The Childerses assert that Anzelmo conceded in her testimony that these credits were owed. Unfortunately, this assertion cannot be tested as the taped portion of the trial with Anzelmo's alleged concession is blank. Because we have no record of this evidence, we presume that the omitted evidence sustains the court's findings.[25] Thus, we must presume that sufficient evidence existed to support a finding that the Childerses were not entitled to these credits.

The Childerses next argue that the circuit court erred in granting Anzelmo interest from the date of the verdict rather that from the date of entry of the judgment. The verdict was rendered on November 12, 1999. The circuit court did not enter judgment on the verdict until March 28, 2000. Following the entry of judgment, the circuit court awarded interest to Anzelmo on the net judgment amount retroactive to the date the jury rendered its verdict, November 12, 1999.

KRS 360.040 provides that: "A judgment shall bear twelve percent (12%) interest compounded annually from its date."[26] Although Anzelmo argues that the term "date" under the statute is ambiguous, the statute is clear. The date of the judgment is indisputably March 27, 2000, and this is the date from which interest on the judgment may accrue. Accordingly, the award of

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[25] See Burberry v. Bridges, Ky., 427 S.W.2d 583, 585 (1968), citing Wells v. Wells, Ky., 406 S.W.2d 157 (1966) and Hamblin v. Johnson, Ky., 254 S.W.2d 76 (1952).

[26] Emphasis supplied.

interest is reversed, and this case is remanded to the circuit court for entry of an amended judgment awarding interest from and after March 27, 2000, rather than November 12, 1999, at the rate of 12% compounded annually.

The Childerses' last argument is that the circuit court erred in finding that Anzelmo had a valid lien on their home. They argue that the lien was invalid as a matter of law because the requirements of KRS 376.080 were not met. The argument lacks merit. It is clear from the record that the lien was properly signed by Anzelmo, and her signature was verified by a notary public.

The judgment is affirmed in part, reversed in part and this case is remanded to Marion Circuit Court for entry of an amended judgment.

ALL CONCUR.

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