

RENDERED: JANUARY 12, 2007; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky
Court of Appeals

NO. 2004-CA-000791-MR

J. MASON DEVELOPMENT, INC.; AND
JOHN I. MASON, JR.

APPELLANTS

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE JAMES M. SHAKE, JUDGE
ACTION NO. 97-CI-004439

CELESTINE HOMES, INC.; AND
PNC MORTGAGE OF AMERICA, INC.

APPELLEES

OPINION
AFFIRMING

** ** * * *

BEFORE: JOHNSON¹ AND TAYLOR, JUDGES; BUCKINGHAM,² SENIOR JUDGE.

JOHNSON, JUDGE: J. Mason Development, Inc. and John I. Mason (collectively "Mason") have appealed from an order of the Jefferson Circuit Court entered on February 4, 2004, upholding a mechanic's lien of Celestine Homes, Inc., awarding Celestine

¹ Judge Rick A. Johnson completed this opinion prior to the expiration of his term of office on December 31, 2006. Release of the opinion was delayed by administrative handling.

² Senior Judge David C. Buckingham sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

\$17,319.00, and dismissing Mason's counterclaim against Celestine. Having concluded that the trial court's decision is supported by substantial evidence, we affirm.

John I. Mason, Jr. is the sole shareholder of J. Mason Development, Inc., which was formed in 1994 as a real estate developer and general contractor. In 1996 Mason decided to build a personal home in Jefferson County, Kentucky. Prior to beginning construction, Mason met with Charles Priestap the owner and president of Celestine and offered Celestine the job of supervising the construction of Mason's home. Mason and Celestine, however, never entered into a written agreement regarding the construction of the home or the consideration to be paid to Celestine for its work on the project.

According to Mason, Celestine was to be the on-site construction supervisor and was to receive as its fee 15% of the hard costs of construction with the hard costs being capped at \$600,000.00. Celestine agrees that it was to be the on-site construction supervisor, but asserted that its fee was to be \$90,000.00 regardless of the hard costs of construction. Construction of the home began in April 1996, and continued until February 1997, when Mason terminated Celestine's services. Celestine notified Mason on March 3, 1997, that a mechanic's lien would be filed on the home. Celestine filed the lien on March 4, 1997, in the amount of \$17,319.00, which was the

difference between the amount previously paid by Mason to Celestine and \$90,000.00.

Celestine then filed a complaint against Mason seeking to recover the amount allegedly owed under the lien. Mason filed an answer and counterclaim against Celestine seeking damages for alleged delays in the construction and cost overruns. After discovery, both Mason and Celestine agreed to submit the case by brief to the Jefferson County Master Commissioner for a decision.

The Master Commissioner issued his report on January 29, 2004. As an initial matter, the Commissioner found that the basic elements of a contract were not present. As such, there was no basis for imposing a verbal contract between Mason and Celestine in regard to the construction of the home. The Commissioner thus held that Celestine's claim against Mason was for quantum meruit. The Commissioner then found that, although Mason and Celestine disagreed on how Celestine's compensation was to be determined, under both of their interpretations Celestine was entitled to \$90,000.00, if it fully performed. In regard to Mason's counterclaim, the Commissioner found that Mason was not entitled to any damages for Celestine's alleged delay in completing the project because Mason, as the general contractor of the project, was responsible for the completion date. Finally, the Commissioner found that the project was

substantially complete at the time Celestine's services were terminated, as only trim work, some painting, carpeting, and punch list type items remained, and Celestine was entitled to full payment of \$90,000.00.

On February 6, 2004, the trial court entered its judgment adopting the Commissioner's report, awarded Celestine \$17,319.00, and dismissed Mason's counterclaim. Mason then filed a motion to alter, amend, or vacate³ the February 4, 2004, order, which the trial court denied on March 19, 2004. This appeal followed.

Mason contends the judgment was not supported by substantial evidence and was clearly erroneous. Specifically, Mason alleges that the trial court (1) failed to consider offsets due him for the project not being completed within six months, (2) failed to reduce the judgment in favor of Celestine due to Priestap's alleged absence from the job for a month, and (3) failed to calculate Mason's damages for additional mortgage costs due to delay in the project's completion.

"Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses. The findings of a commissioner, to the extent that the court adopts them, shall be considered as the findings of

³ Kentucky Rules of Civil Procedure (CR) 59.

the court."⁴ "A factual finding is not clearly erroneous if it is supported by substantial evidence" [footnote omitted].⁵

"Substantial evidence' is evidence of substance and relevant consequence sufficient to induce conviction in the minds of reasonable people" [footnote omitted].⁶

All of Mason's allegations of error center around his contention that the Commissioner's ruling was clearly erroneous because it failed to consider evidence of damages Mason allegedly sustained as a result of Celestine's failure to complete the project on time. Mason does not, however, make any challenge to the trial court's findings which include: (1) that there was no contract between the parties; (2) that Mason, not Celestine, was the party responsible for the completion of the project; and (3) that the project was substantially complete when Celestine was fired. These adverse findings to Mason are fatal to Mason's other claims that he incurred damages as a result of Celestine's alleged delay in completing the project.

As shown by the trial court's detailed discussion concerning the existence of a contract between Mason and Celestine, the trial court considered all of the evidence

⁴ CR 52.01. See also Sherfey v. Sherfey, 74 S.W.3d 777, 782 (Ky.App. 2002); and Greater Cincinnati Marine Service, Inc. v. City of Ludlow, 602 S.W.2d 427, 429 (Ky. 1980).

⁵ Sherfey, 74 S.W.3d at 782.

⁶ Id.

presented to it by the parties. It found that no contract existed, that Celestine's claim was for quantum meruit, that Mason was responsible for the completion of the project, and that the project was substantially complete when Celestine was fired. This decision was supported by substantial evidence and was not clearly erroneous. The trial court properly ruled, based upon its findings, that Mason was not entitled to any offsets from the alleged delay in the project's completion.

Based upon the foregoing, the judgment of the Jefferson Circuit Court is affirmed.

BUCKINGHAM, SENIOR JUDGE, CONCURS.

TAYLOR, JUDGE, CONCURS IN RESULT ONLY.

BRIEF FOR APPELLANT:

Joseph E. Blandford, Jr.
Louisville, Kentucky

BRIEF FOR APPELLEE:

Janie Asher Hite
Bardstown, Kentucky