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Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-002604-MR

CLASSIC TRUSS WOOD COMPONENTS, INC. APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE MARTIN F. MCDONALD, JUDGE
ACTION NO. 02-CI-009798

LANDIS LAKES PATIO HOMES, LLC;
and STEPHEN T. COX BUILDER, INC. APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: VANMETER AND WINE, JUDGES; KNOPF,[1] SENIOR JUDGE.

VANMETER, JUDGE: Classic Truss Wood Components, Inc. appeals from an order of the Jefferson Circuit Court finding, as a matter of law, that Classic is liable to appellees Landis Lakes Patio Homes, LLC, and Stephen T. Cox Builder, Inc., for damages arising out of the breach of a contract. For the reasons stated hereafter, we affirm.

[1] Senior Judge William L. Knopf 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.

The parties entered into a contract in April 2002 whereby Classic agreed to provide the rough framing and the installation of a roof truss package for a residential duplex. The final contract price was $69,061. The contract did not include any references to the expected date of completion. Classic began work on the project on or about May 20, 2002.

A dispute subsequently arose between the parties regarding the project. After receiving payment of $58,426 from appellees, Classic obtained a mechanic's lien for the remainder of the contract price and then filed the underlying complaint seeking the remaining amount which it claimed was due and payable. Appellees filed an answer and counterclaim, asserting that Classic had failed to replace the "defective roof truss," and seeking compensation for damages including those resulting from Classic's alleged breach of contract.

Although Classic stated in the mechanic's lien that it had supplied labor and materials through July 31, it claimed during the May 2005 bench trial that its job was substantially completed on June 14, and that a punch list was completed on June 19. Classic asserted that all of its tasks were performed in a workmanlike manner.

Appellees, by contrast, asserted that Classic did not substantially complete its work until late June or early July 2002, and that several major items listed on the punch list were completed by independent subcontractors after Classic failed to do so. Appellees also claimed that because Classic's contractual obligations were not completed in a workmanlike manner, there were multiple defects in the garage and interior floors,

the walls, and the ceilings and rafters. Appellees introduced photographs and the testimony of the independent subcontractors to support their claims.

The trial court granted appellees' motion to amend the pleadings to conform to the evidence and dismissed Classic's complaint. Appellees were awarded the $15,229.05 difference between the unpaid portion of the contract price and the amount paid to the subcontractors to "correct the defects and complete the job." This appeal followed.

First, Classic contends that the court erred or abused its discretion by permitting appellees to amend their pleadings and adduce evidence at trial concerning issues not raised in their counterclaim. We disagree.

CR[2] 15.02 provides:

> When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleading as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. *If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that admission of such evidence would prejudice him in maintaining his action or defense upon the merits.* The court may grant a continuance to enable the objecting party to meet such evidence.

(Emphasis added.)

[2] Kentucky Rules of Civil Procedure.

Here, Classic asserts that although appellees' counterclaim alleged that the roof truss was defective and unusable, the "alleged framing construction problems and broken concrete drive way" were not raised in appellees' pleadings and therefore should not have been addressed during the trial. However, this claim must be viewed in light of the responses appellees provided to Classic's interrogatories some two years before the trial. When asked in Interrogatory No. 4 to provide the facts supporting their claim of a defective and unusable roof truss, appellees stated:

> The roof truss system was not properly supportive, it swayed back and forth, nor was it properly alined [sic] with the walls. As a result, the installation of the house package was poor. The walls were out of square, Classic Truss cracked cement floor requiring its removal and repouring of same, and defective studs.
>
> As to Unit [A,] truss sagged one inch between great room and entrance way, hallway one inch out of plumb, bow in soffit, nailers over front door (both Unit A and Unit B), closet door in master bedroom to bath, take header out of one side of fireplace, add stud near pocket door in wall.
>
> As to Unit B door to garage and laundry room insufficient room for trim, no drywall nailer, right side stairway 45 degree drywall nailer missing, bad stud on stairway wall, pocket door improperly installed, stud missing in garage wall, plate and stud missing in closet, most corners one-half inch to one inch out of plumb, front entrance wall should be 2 X 6, tray ceiling in master bedroom needed repair, floor in kitchen not flush, extend wall in kitchen, take out wall in fireplace, closet door in master bed and bath, door in garage needed to be moved three inches, and add header lining closet next to pocket door.

In response to Interrogatory No. 5, appellees alleged that Classic had failed to replace the defective roof trusses, and that Classic's "defective work and the need to correct same" had resulted in a 60-day delay in the delivery of possession to the buyers.

Classic complains that the court erred by admitting evidence of any defects relating to any part of the construction other than the roof truss, as such defects were neither "raised by the pleadings" nor "tried by express or implied consent." CR 15.02. However, we must agree with the trial court that Classic was not surprised or prejudiced by the evidence or the amended pleadings, as the issues and claims therein were "set forth in sufficient notice in [appellees'] counterclaim and response to Interrogatories and all issues were properly before the court" some two years prior to the trial. Given the record, we cannot say that the court abused its discretion by permitting appellees to amend their pleadings, or that it erred by allowing evidence relating to the amended pleadings.

Next, Classic contends that the trial court erred by admitting photographs and various documents as evidence of appellees' damages. We disagree.

Classic asserts that because the photographs showed alleged building defects other than those that were part of the roof truss, they were inadmissible as irrelevant. However, given our conclusion that the other alleged building defects were properly before the court for its consideration, photographs of such defects clearly were relevant and admissible.

Moreover, we are not persuaded by Classic's assertion that the court erred by allowing appellees, pursuant to the business records exception to the hearsay rule, to introduce evidence of invoices provided to appellees by various subcontractors. KRE[3] 803(6) provides as follows:

> ***Records of regularly conducted activity.*** A memorandum, report, record, or data compilation, in any form, of acts,

[3] Kentucky Rules of Evidence.

> events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

Here, appellees' superintendent testified regarding the steps various subcontractors took to repair and complete Classic's allegedly defective work. Classic objected to the introduction of the subcontractors' invoices into evidence, as those invoices were created by third parties rather than by appellees. However, we agree with the trial court that the invoice records were admissible, pursuant to the business records exception to the hearsay rule, to show the expenses appellees incurred in correcting the errors and defects that allegedly resulted from Classic's failure to properly complete the terms of the parties' contract. Clearly, the invoices collected by appellees from the subcontractors constituted a "record, or data compilation" of "acts, events, conditions, opinions, or diagnoses" that were "made at or near the time" of the work, as part of a "course of a regularly conducted business activity," by "or from information transmitted by" subcontractors with knowledge of the work performed for appellees. KRE 803(6). Further, after appellees received such invoices from the subcontractors, those invoices evidently were kept as part of their regular business activity in working with the subcontractors and clients. *Cf.* Robert G. Lawson, *The Kentucky Evidence Law*

Handbook §§ 8.65(4) and 8.65(5) (4th ed. 2003). Although Classic certainly was entitled to dispute whether some of the claimed expenses were accurate or related to the work it had contracted to perform, such disputes went to the weight of the evidence rather than to the admissibility of the invoices. Under these circumstances, the trial court did not err by admitting the invoice records into evidence.

Next, we are not persuaded by Classic's assertion that because it substantially completed its work, the court erred by failing to award it the remainder of the payment due under the contract. In *Weil v. B.E. Buffaloe & Co.*, 251 Ky. 673, 65 S.W.2d 704, 706 (1933), Kentucky's highest court described the applicable rule as being that "substantial performance of a building contract will support a recovery of the entire contract price, where it was undertaken to be performed in good faith; *damages for incompleteness or damages being allowed and deducted*." (Emphasis added.) *See also Regalbuto v. Grant,* 473 S.W.2d 833, 839 (Ky. 1971). Given the evidence and the court's findings regarding damages for noncompletion and repairs, the court did not err by failing to award Classic the remainder of the contract price.

Next, Classic contends that the trial court erred by admitting parol evidence of the parties' alleged discussions regarding the work's anticipated date of completion. We disagree.

Parol evidence may not be used to vary or contradict the terms of a written contract which embodies the parties' entire agreement. *See, e.g., Stallard v. Adams,* 312 Ky. 532, 228 S.W.2d 430, 431 (1950); *Caudill v. Acton,* 175 S.W.3d 617, 620 (Ky.App. 2004). However, parol evidence may be used to supplement a writing which is not an

integrated or complete contract. *See Kovacs v. Freeman,* 957 S.W.2d 251, 256 (Ky. 1997). Moreover, if a contract is "ambiguous or silent on a vital matter, a court may consider parol and extrinsic evidence involving the circumstances surrounding" the contract's execution, subject matter, and intended results, as well as regarding the parties' conduct. *Cantrell Supply, Inc. v. Liberty Mut. Ins. Co.,* 94 S.W.3d 381, 385 (Ky.App. 2002). As stated in *KFC Corp. v. Darsam Corp*., 543 F.Supp. 222, 224 (D.C.Ky. 1982), there are three primary exceptions to the parol evidence rule: "that the evidence will show the contract subject to condition precedent which did not occur; that the evidence provides an additional portion of a contract which existed alongside the writing; or that the evidence provides a term on which the contract is silent."

Here, the record shows that on April 25, 2002, the parties executed a contract which was drafted on Classic's letterhead and listed eight separate construction tasks. Also on Classic's letterhead were a change order dated May 29, and a change order/punch list dated June 26, 2002. Nowhere in any of these documents was there either a reference to an anticipated date of completion, or any statement that the document contained the parties' entire agreement. As the parties' written agreement was entirely silent as to the expected time of completion, the trial court properly admitted parol evidence on that subject.

Finally, Classic asserts that the trial court's judgment was not supported by substantial facts or law. We disagree. Having reviewed the record as well as the arguments rejected above, we conclude that the trial court's judgment for appellees was supported by substantial evidence.

The judgment of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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