

Commonwealth of Kentucky
Court of Appeals

NO. 2005-CA-002266-MR

SAMUEL GRAYSON

APPELLANT

v. APPEAL FROM MASON CIRCUIT COURT
HONORABLE JOHN W. MCNEILL, III., JUDGE
ACTION NO. 04-CI-00235

RANDY LEE CARPENTER

APPELLEE

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: ABRAMSON AND STUMBO, JUDGES; KNOPF,¹ SENIOR JUDGE.

STUMBO, JUDGE: Samuel Grayson, d/b/a Samuel Grayson Construction, appeals from findings of fact, conclusions of law and judgment of the Mason Circuit Court in his action to enforce the terms of a residential construction contract. Grayson argues that he is entitled to the contract price without deduction for set-offs, that the circuit court's calculations and findings were erroneous, and that the court improperly relied on hearsay evidence. For the reasons stated below, we affirm the judgment on appeal.

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 KRS 21.580.

On October 31, 2003, Grayson entered into a written contract with Randy Lee Carpenter providing that Grayson would build a house on a parcel of real property owned by Carpenter. Under the terms of the contract, Grayson was to provide and supervise all labor and obtain all materials necessary for the project. The contract set forth a list of building materials to be supplied by Grayson, and reflected a 5% building charge to compensate Grayson for purchasing and delivering the materials to the site. Carpenter was required to pay Grayson by the 10th day of each month for building materials that Grayson had purchased. The total cost of the project was \$164,464, which was payable in two installments. Grayson also was entitled to payment for the costs of any unanticipated "extras". The contract further provided that Carpenter would pay \$200 for every day between the date of Carpenter's possession and the date of full payment. Grayson was to complete the project based on a picture and floor plan that Carpenter had torn from a magazine or other publication.

Construction on the project commenced, after which it was later alleged that the parties entered into various oral agreements to alter the specifications. One such agreement, for example, provided that Carpenter would procure certain building materials and provide them to Grayson or the subcontractors for inclusion in the project.

Carpenter took possession of the house on or about August 8, 2004. It was Grayson's belief that the house had been completed and accepted by Carpenter in accordance with the terms of the contract and that his work was done. Carpenter,

however, maintained that there existed multiple defects and that his possession did not constitute acceptance of those defects.

The contract price for the project was \$164,464. Carpenter maintained that he paid \$19,002 directly to the subcontractors, which by agreement of the parties should be deducted from the contract price. He also claimed certain costs related to the alleged construction defects. Ultimately, Carpenter paid \$142,924, and the parties were unable to agree whether the contract price was owed by Carpenter or whether the price should be amended.

On September 9, 2004, Grayson filed the instant action against Carpenter in Mason Circuit Court. Grayson alleged that Carpenter breached the contract by failing to make payment in accordance with its terms. Specifically, he claimed that Carpenter did not make the final payment of \$23,322, and refused to pay for certain materials, contract labor and the 5% material charge in the amount of \$16,928. Grayson sought a judgment in the amount of \$40,280, plus a charge of \$200 per day for late payment in accordance with the terms of the contract.

Carpenter responded with a general denial and counterclaim. He asserted that his payments to the subcontractors were properly deducted from the contract price, and argued that he was entitled to a set-off for the construction defects. His counterclaim alleged entitlement to \$35,000 representing his out-of-pocket costs and a diminution in value to the house arising from the defects.

The matter went before the circuit court, which conducted a bench trial on July 12, 2005. After taking proof, the court rendered its findings of fact, conclusions of law and judgment on September 13, 2005. The court noted that the lack of proper plans and specifications was “the first ingredient of a predictable disaster,” and found that “the evidence that followed was such a mish-mash of numbers, of bills and statements, and of general complaints that it is hard to make out exactly what the parties believed the contract meant at the outset of the transaction” It nevertheless found that Grayson was entitled to a total contract payment of \$180,935 representing all materials and labor, including the 5% surcharge for materials purchased by Grayson and some additional work performed on two or more barns. From that sum, the court deducted Carpenter's payment of \$152,824 and an allowance of \$10,087 for remedial work to repair defects. Grayson was awarded \$18,024, plus interest, accruing from the date of judgment.

After entry of the judgment, Grayson filed a motion to vacate on September 22, 2005. He alleged a general lack of evidence in the record to support Carpenter's affirmative defenses and counterclaim, and again claimed entitlement to \$40,280 plus the surcharge of \$200 per day after the date of possession. The motion was denied by way of an order rendered on October 4, 2005, wherein the court noted that the parties agreed to the admission of certain evidence which otherwise would have been inadmissible. Though not specifically referenced in the order, the court was referring to a purported agreement to stipulate as to the nature and amount of bids to perform repair work on defects, without calling the bidders to testify.

On October 14, 2005, Grayson filed a renewed motion to vacate, or in the alternative for specific findings related to the October 4, 2005 order. Grayson argued that the parties had not stipulated as to the nature and amount of work necessary to perform repairs, and maintained that the introduction of said evidence without calling the bidders to testify ran afoul of Kentucky Rules of Evidence provisions on expert testimony and hearsay.

On November 2, 2005, and prior to the circuit court's ruling on Grayson's October 14, 2005 motion, Grayson filed a notice of appeal. The court then rendered an order on October 28, 2005 setting aside numerical paragraph 10 of its judgment relating to the objectionable hearsay testimony on the remedial work. A supplemental hearing was conducted on November 1, 2005 to allow Carpenter to produce evidence in support of his claim of entitlement to set-offs for remedial work. And finally, on November 23, 2005, additional findings and amendment of judgment were rendered addressing the evidence tendered at the November 1, 2005 hearing.² The court enumerated additional findings on Carpenter's claim of entitlement to set-offs arising from construction defects, and rendered an amended judgment in favor of Grayson in the amount of \$19,633. This appeal followed.

Grayson now argues that the circuit court erred in rendering a judgment of less than \$40,280 plus the \$200 daily surcharge for late payment. He maintains that the court's calculations and findings of fact are clearly erroneous, and that the court

²The October 28, 2005 and November 23, 2005 orders were entered by the clerk of court on December 1, 2005.

erroneously relied on its own knowledge and on hearsay evidence to support its findings of fact and judgment. Grayson also argues that the court's final order was an improper attempt “to obfuscate its reversible errors, and create the deception” that the September 13, 2005 judgment was proper. He seeks an order reversing the judgment and remanding the matter for additional proceedings.

We have closely examined the record and the law, and find no basis for reversing the judgment on appeal. Grayson first maintains that the court's findings of fact and calculations are clearly erroneous. In support of this argument, he recites a few of the calculations relied on by the circuit court in reaching its findings, and offers the general assertion that Carpenter failed to tender competent evidence of damages for the alleged defective work.

We find no error on this issue. Though Grayson cites to a handful of the calculations relied on by the circuit court in reaching its conclusion, his thesis is that the evidence was insufficient to support the judgment. We are not persuaded by this argument. The circuit court studied what it properly described as the “mish-mash of numbers, of bills and statements” before endeavoring to distill from this mish-mash the cost of materials, which materials were purchased by Grayson and which by Carpenter, the 5% surcharge, the labor costs and so forth. These findings, and the calculations which gave rise thereto, are set forth in a clear and understandable manner in the judgment on appeal. Our duty is not to enter into these calculations *de novo*, but rather to determine if the findings of fact are supported by substantial evidence. *Leveridge v.*

Leveridge, 997 S.W.2d 1 (Ky. 1999). Substantial evidence is evidence of substance and relevant consequence sufficient to induce conviction in the minds of reasonable people.

Kentucky State Racing Commission v. Fuller, 481 S.W.2d 298 (Ky. 1972). The bills and statements contained in the record, in conjunction with the testimony of the parties, constitute substantial evidence sufficient to support the circuit court's findings. As such, we find no error on this issue.

Grayson also argues that the court erroneously relied on its own knowledge and on hearsay evidence to support its findings of fact, conclusions of law and judgment. This argument centers on a claim raised in Grayson's post-judgment motions that the circuit court improperly accepted hearsay evidence from the parties, in the form of written estimates, on the issue of the amount of remedial work necessary to repair construction defects. Carpenter argued, and the circuit court agreed, that the parties had stipulated (outside the courtroom) to the admission and authenticity of these written estimates, without requiring witnesses to testify. Grayson, in his motion to vacate, maintained that there was no stipulation or other agreement and that the court's reliance on this evidence constituted reversible error.

The court ultimately agreed in its October 28, 2005 order that the testimony at issue “was objectionable under the rules of evidence”. It set aside the findings arising from this testimony and later conducted a hearing where additional evidence was adduced. Error, if any, in the introduction of the alleged hearsay, was corrected by way of the order setting aside the findings on this issue. A hearing on the matter was

conducted where evidence in conformity with the Kentucky Rules of Evidence was tendered, and ultimately the findings based on the contested evidence were set aside and held for naught. We find no error on this issue.

Lastly, Grayson briefly argues that the circuit court improperly rendered its final order rejecting the hearsay evidence after previously stating that the hearsay evidence was considered admitted but could be impeached by Grayson. He maintains that the entry of the final order “entirely contradicts the ruling from the bench” and represents the court's attempt “to obfuscate its reversible errors, and create the deception” that the September 13, 2005, judgment was proper.

Grayson's argument on this issue is specious and we may summarily dispose of it. The court's October 28, 2005 order states in clear and unambiguous language that the findings arising from the alleged hearsay evidence were stricken. A hearing was conducted pursuant to this order and the amended judgment subsequently was rendered. Accordingly, we find no error.

For the foregoing reasons, we affirm the findings of fact, conclusions of law and judgment of the Mason Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

Donald L. Wood
John F. Estill
Maysville, Kentucky

BRIEF FOR APPELLEE:

Danny Merrill Newman, Jr.
Cincinnati, Ohio