

STATE OF MICHIGAN
COURT OF APPEALS

TREELAND DEVELOPMENT CO.,

Plaintiff-Appellee,

V

TARGET ELECTRIC INC.,

Defendant-Appellant.

and

KENNETH J. DAVIS,

Defendant.

UNPUBLISHED

January 18, 2002

No. 224596

Macomb Circuit Court

LC No. 98-002542-CK

Before: Hood, P.J., and Murphy and Markey, JJ.

PER CURIAM.

Defendant Target Electric Co. (hereinafter “defendant”) appeals by right from the trial court’s opinion and order awarding plaintiff \$21,181.34 in damages for breach of a construction contract. We affirm.

Defendant’s contention on appeal is that the judgment is legally invalid because it is based on insufficient evidence of breach, insufficient evidence and/or lack of causation, and clearly erroneous findings of fact arising out of inherently implausible and internally inconsistent testimony that no reasonable finder of fact would credit. Defendant essentially makes four arguments. Although defendant frames its issue in terms of the sufficiency of the evidence, this is not the crux of defendant’s arguments. Essentially, in defendant’s first three arguments, it takes issue with the trial court’s findings of fact. No exception need be taken to a finding or decision. MCR 2.517(A)(7). Therefore, these arguments were properly preserved. Defendant’s final argument is that plaintiff failed to meet its burden of proving that any delay damages exist because a simple list of damages fails to meet the burden of proving damages with reasonable certainty. Defendant has not raised this argument in its question presented. As a result, it has failed to preserve the issue for appellate review, and we will not review it. MCR 7.212(C)(5); *Phinney v Perlmutter*, 222 Mich App 513, 564; 564 NW2d 532 (1997); *Marx v Dep’t of Commerce*, 220 Mich App 66, 81; 558 NW2d 460 (1996).

“Findings of fact by the trial court may not be set aside unless clearly erroneous.” MCR 2.613(C). “A finding is clearly erroneous when although there is evidence to support it, the reviewing court is left with the definite and firm conviction that a mistake has been made.” *Silver Creek Drain Dist v Extrusions Division Inc*, 245 Mich App 556, 569; 630 NW2d 347 (2001).

As noted, defendant’s three preserved arguments address the trial court’s findings of fact. The trial court found:

The parties substantially performed their obligations without significant incident through the first two phases of the project. However, during phase three of the project, defendant Target failed to provide services in a timely manner.

Richard Sable testified the project was to have been completed by August 1997. Sable said defendant Target received twenty checks between July 1996 and October 1997 totaling \$131,645 for work performed during that time period. James Lafata stated defendant Target began to have scheduling problems in May or June 1997 (well before payment problems occurred in October 1997), delaying completion of the project until early January 1998.

First, defendant relies on *In the Matter of the Dissolution of F Yeager Bridge & Culvert Co*, 150 Mich App 386, 401; 389 NW2d 99 (1986), for the proposition that the trial court erred in utilizing the August 1997 date to measure timely performance instead of reasonableness. However, there is nothing in the court’s statement indicating that the court did not use reasonableness in relying on the August 1997 date. James Lafata testified that the project was scheduled to be completed in the summer of 1997; Charles Kirby testified that the project was scheduled to be completed in June, July, or August 1997; and Richard Sable testified that the project was scheduled to be completed in August 1997. Therefore, assessing the entire record, the trial court did not err in utilizing the August 1997 date to measure timely performance, and defendant’s argument is without merit.

Second, defendant argues that the trial court erred when it found that there were no payment problems until October 1997. Essentially, defendant argues that the trial court erred because the witnesses on whom the trial court relied were not credible. MCR 2.613(C) states that “[f]indings of fact by the trial court may not be set aside unless clearly erroneous.” In the application of this principle, regard shall be given to the special opportunity of the trial court to judge the credibility of the witnesses who appeared before it.” In addition, Michigan courts have repeatedly held that “[a]ssessing credibility and weighing testimony is the prerogative of the trier of fact.” *Kelly v Builders Square Inc*, 465 Mich 29, 40; 632 NW2d 912 (2001). In any event, the material point the court made regarding the cause for the delay was that the payment problems began when defendant started to have scheduling problems, thus causing delay down the line. Certainly, evidence supports the court’s finding that defendant began to have scheduling problems in May or June of 1997. Lafata testified that defendant’s scheduling problems began in late spring of 1997 because of insufficient manpower that caused a delay in the project and resulted in a “trickle down effect.” Although Kirby testified that he did not believe that defendant caused a four-to-five-month delay, it was the trial court’s duty to weigh and assess the testimony. Therefore, defendant’s argument is without merit.

Finally, defendant argues that the trial court erred when it found that defendant caused the delay because the records submitted by the Shelby Township electrical inspector directly contradict any credible claim that defendant was the cause of the delay. Defendant asserts that these records show numerous instances of both the plumbing and mechanical contractors having their work inspected and approved long after defendant completed the work. Defendant also argues that it did not cause the delay because a structural defect in the last building was not resolved until September 1998, and the electrical work was completed in January 1998. As noted, the trial court found that defendant caused a delay in phase three of the project by failing to provide timely services.

In *Alliance for the Mentally Ill of Michigan v Dep't of Community Health*, 231 Mich App 647, 656; 588 NW2d 133 (1998), this Court stated that “deference is given to a trial court’s findings when facts are in dispute.” In *Forton v Laszar*, 239 Mich App 711, 717; 609 NW2d 850 (2000), this Court stated that “it is for the trier of fact to weigh disputed testimony.”

Defendant’s first argument on causation is without merit. Although the record indicates instances where the electrical inspection came before other subcontractors’ inspections, and Kirby testified that the date of the inspection would provide the approximate timeframe regarding when the work was performed, Lafata testified that when an inspection was completed had nothing to do with when the work was actually finished. As a result, the facts were in dispute, and defendant has offered no persuasive reason for this Court to contradict the trial court on this disputed fact. Therefore, its argument is without merit.

Defendant’s second argument on causation is also without merit. Initially, we note that merely because a cause or resolution of a structural defect was not resolved until September 1998 is not evidence that defendant did not cause a delay. Also, although there was testimony that defendant did not cause the structural defect in building one and that there was no relationship between the structural defect and defendant’s delay, there was also testimony that the “domino effect” of the delay caused the structural defect. Again, this fact was in dispute, and defendant has offered no persuasive reason that this Court should not defer to the trial court on this disputed fact. Therefore, its argument is without merit. The trial court’s findings of fact were not clearly erroneous.

We affirm.

/s/ Harold Hood
/s/ William B. Murphy
/s/ Jane E. Markey