STATE OF MINNESOTA
IN COURT OF APPEALS
A11-1863

General Contracting and Design Services, Inc.,
d/b/a Dusty Johnson General Contracting and Design, et al.,
Respondents,

vs.

Robert T. Fryberger, et al.,
Appellants.

Filed September 10, 2012
Affirmed
Hooten, Judge

St. Louis County District Court
File No. 69-DU-CV-09-3334

John F. Hedtke, Hedtke Law Office, Duluth, Minnesota (for respondents and cross-appellants)

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Considered and decided by Wright, Presiding Judge; Worke, Judge; and Hooten, Judge.

U N P U B L I S H E D O P I N I O N

HOOTEN, Judge

Appellant homeowners argue that the district court erred by applying the wrong evidentiary standard and abused its discretion by denying damages for the breach of their construction agreement with respondent building contractor. Because the district court

applied the correct preponderance of the evidence standard in evaluating appellant homeowners' damages and because we defer to the district court's findings of fact and credibility determinations, we affirm.

FACTS

On December 20, 2006, appellants and cross-respondents Robert and Susan Fryberger entered into a construction agreement with respondent and cross-appellant, General Contracting and Design Services, Inc., d/b/a Dusty Johnson General Contracting and Design ("Johnson"), for the construction of a home in Duluth, Minnesota for the contract price of $900,000, which was to be paid in periodic bank draws. Signed change orders increased the contract price owed to Johnson upon completion to over $914,000. Of this amount, the Frybergers ultimately paid Johnson about $834,000.

The Frybergers moved into the home in the late fall of 2007. As set forth in the construction agreement, they created several punch lists of unfinished items, reconstructions, and repairs needed in the home. Under the construction agreement, Johnson was responsible for addressing the concerns identified by the Frybergers prior to receiving final payment. Johnson worked towards addressing these incomplete items and repairs, but the Frybergers were unsatisfied and refused to tender final payment. The Frybergers claim that they will have to spend an additional $165,000 to correct defects remaining in the home after having already spent over $78,000 for the construction or repair of items in the home that were either left undone or were defectively constructed by Johnson.

Because final payment was not made, Johnson filed suit against the Frybergers, alleging breach of contract and unjust enrichment for approximately $80,000 which was still due and owing on the construction contract. The Frybergers answered and counterclaimed for an amount in excess of $50,000, alleging breach of contract, breach of express warranty, breach of statutory warranty, and breach of implied warranty of fitness. The Frybergers also served discovery on Johnson.

Because Johnson failed to answer the Frybergers' counterclaims and failed to respond to the Frybergers' discovery requests, the Frybergers scheduled a hearing and motion to compel. To resolve the discovery dispute, the parties entered into a written stipulation whereby Johnson agreed to respond to discovery and the district court entered an order adopting the stipulation of the parties. However, when Johnson failed to comply with the discovery order, the district court, on the Frybergers' motion, granted default judgment on Frybergers' counterclaims and dismissed Johnson's breach of contract and unjust enrichment claims without prejudice. The district court ordered the Frybergers to "obtain a court setting from Court Administration for the purposes of proving up damages and addressing any other remaining issues."

At the damages hearing on March 16, 2011, the district court allowed Johnson to fully participate, deeming the hearing "a full blown trial." The hearing continued on May 4, 5, and 13, 2011, and the district court visited the home with the attorneys and the Frybergers on May 19, 2011. On August 19, 2011, the district court found that the Frybergers "claim, and the evidence supports, just over $78,000 in credits and reductions for amounts paid directly by them" for the correction or construction of items on their

punch lists. Johnson has not appealed this finding of fact. However, the district court declined to actually award that amount because of Johnson's outstanding claims for breach of contract and unjust enrichment for approximately $80,000 against the Frybergers under the construction agreement. Relative to any other damages, the district court concluded that the Frybergers "failed to prove damages by a preponderance of evidence" and that such other claimed damages were either "de minimis or undetectable." In a later order, the district court denied attorney fees for either party. The Frybergers appealed the district court's denial of their damages.[1] Johnson appealed the district court's denial of attorney fees.

D E C I S I O N

I. Did the district court err in determining the Frybergers' damages?

The Frybergers initially argue that, because the damages hearing came after a default judgment, the district court erred in requiring them to prove their damages by a preponderance of the evidence. In the alternative, the Frybergers contend that they sufficiently proved their damages even under that standard of proof. Johnson claims that the district court correctly applied the preponderance of the evidence standard to the damages issue in this case and correctly decided that the Frybergers did not prove their claims for damages.

[1] At oral argument, the Frybergers' counsel explicitly stated that this appeal does not include the district court's denial of damages relating to the heating system in the home. Accordingly, in light of their waiver of damage claims relating to the heating system in the home, only the Frybergers' other damage claims are considered in this appeal.

A. Evidentiary Standard

The Frybergers claim that, because the damages hearing was conducted as a result of the default judgment on liability, the district court should have applied a lower evidentiary standard, at least to evidence they claim was uncontested by Johnson. The cases cited by the Frybergers for this argument, however, are either inapposite or directly contradictory to their point. *See Hovelson v. U.S. Swim & Fitness, Inc.*, 450 N.W.2d 137, 142–43 (Minn. App. 1990) (affirming a damage award on default that "is not based on speculation, but on evidence which was appropriate to a default proceeding; no preponderance of evidence issue arises inasmuch as there was no contradictory evidence"), *review denied* (Minn. Mar. 16, 1990); *Hill v. Tischer*, 385 N.W.2d 329, 332 (Minn. App. 1986) ("Hill had the burden of proving every essential element of [her] case, including damages by a fair preponderance of the evidence." (quotation omitted)); *Elk River Enterp., Inc. v. Adams*, 357 N.W.2d 139, 140–41 (Minn. App. 1984) (reversing a damage award on default because the "evidence of both liability and damages was established in a cursory manner," was "supported only by two sentences of partisan testimony," and was based in part "on an off-the-cuff estimate"). Unlike the factual situations in these cases, Johnson contested the damage claims of the Frybergers, cross-examined their experts, and questioned the credibility of their claims.

Under these circumstances, the district court's application of the preponderance of the evidence standard is not erroneous. *See Canada ex rel Landy v. McCarthy*, 567 N.W.2d 496, 507 (Minn. 1997) ("In an ordinary civil action, the plaintiff has the burden of proving damages caused by the defendant by a fair preponderance of the evidence.").

As a result, we conclude that the district court did not err by requiring the Frybergers to prove their contested damages by a preponderance of the evidence.

B. District Court's Decision

"The district court has broad discretion in determining damages and will not be reversed except for a clear abuse of discretion." *West St. Paul Fed'n of Teachers v. Indep. Sch. Dist. No. 197*, 713 N.W.2d 366, 378 (Minn. App. 2006); *see also Reiling v. City of Eagan*, 664 N.W.2d 403, 407 (Minn. App. 2003). This court "will not set aside a damage award unless it is manifestly and palpably contrary to the evidence." *West St. Paul Fed'n of Teachers*, 713 N.W.2d at 378 (quoting *Levienn v. Metro. Transit Comm'n*, 297 N.W.2d 272, 273 (Minn. 1980)).

"Findings underlying [damage] awards will not be set aside unless they are clearly erroneous." *In re Trusteeship of Trust of Williams*, 631 N.W.2d 398, 407 (Minn. App. 2001), *review denied* (Minn. Sept. 25, 2001); *see also* Minn. R. Civ. P. 52.01 ("Findings of fact, whether based on oral or documentary evidence, 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."). Evidentiary "weight and the credibility of the witnesses is usually for the trier of fact to determine, and it is not compelled to believe any witness merely because his testimony is uncontradicted." *Costello v. Johnson*, 265 Minn. 204, 211, 121 N.W.2d 70, 76 (1963). Determinations of witness credibility remain exclusively the province of the factfinder, even when they are made implicitly. *Pechovnik v. Pechovnik*, 765 N.W.2d 94, 99 (Minn. App. 2009).

The Frybergers argue that the district court abused its discretion in denying their damages for uncorrected defects because they submitted the only evidence on the record in regards to most of the claimed defects. In particular, the Frybergers point to the extensive report from an architect and general contractor, Robert Bergquist, which detailed the costs of repairing specific items on the punch lists. These defects include misplaced or misaligned windows, stucco cracks, water damage, nail pops, paint drops, sheetrock cracks, stains and marks on woodwork, mismatched shades of paint and other items. Further evidence to support these claimed defects came from Robert Fryberger's testimony.[2] In contrast, on behalf of Johnson, Dusty Johnson testified that one of the windows was misaligned and could be fixed for approximately $5,000, but that the cost seemed unreasonable in light of the fact that "the average person that enters the home would never see" the misalignment. While there was minimal or no specific testimony offered as to the remaining defects alleged by the Frybergers, Johnson's primary defense throughout the trial was that the claimed construction defects were either non-existent or barely noticeable by a reasonable person.

However, the question is not which party presented the most evidence but whether that evidence was considered credible by the finder of fact. Here, the district court found Johnson's argument that the defects were "de minimis and undetectable" to be credible and persuasive. The district court viewed the property, from which it could assess the credibility of Bergquist and Robert Fryberger's testimony about the impact of the defects.

[2] Both the Frybergers and Johnson called heating contractors to testify in regards to defects in the heating system, but because the Frybergers are not appealing the district court's decision relating to the heating system, we do not address that issue here.

In finding Johnson's argument that the defects were de minimis and undetectable, the district court also implicitly found the testimony of Robert Fryberger and Bergquist to lack credibility in depicting the actual condition of the home. We defer to this credibility determination.

Because we defer to the district court's findings of fact and implicit credibility determinations unless they are clearly erroneous, we conclude that the district court did not abuse its discretion in declining to award damages for any remaining defects in the home.

II. Does the district court's decision preclude future claims regarding the construction agreement through res judicata and collateral estoppel?

The application of res judicata, or claim preclusion, is a question of law that is reviewed de novo. *Hauschildt v. Beckingham*, 686 N.W.2d 829, 840 (Minn. 2004). "Res judicata precludes parties from raising subsequent claims in a second action when" the facts, issues, and parties are the same or similar; when the first action resulted in "a final judgment on the merits"; and when "the estopped party had a full and fair opportunity to litigate the matter." *Brown-Wilbert, Inc. v. Copeland Buhl & Co., P.L.L.P.*, 732 N.W.2d 209, 220 (Minn. 2007). The elements of collateral estoppel, or issue preclusion, are similar. *Nelson v. Am. Family Ins. Grp.*, 651 N.W.2d 499, 511 (Minn. 2002).

The Frybergers request that this court declare that Johnson has "fully and fairly litigated all of [its] claims or potential claims with respect to the Construction Agreement." Essentially, the Frybergers are asking this court to declare the litigation between the parties completed because the district court found Johnson's claim is only

for approximately $2,200 remaining due and owing on the construction contract after the $78,000 offset is applied.

While such an efficient approach may be undertaken by the parties in order to resolve their dispute without incurring further litigation costs, this appellate court is unable to grant such a request. The doctrines of res judicata and collateral estoppel preclude "subsequent claims in a second action" and inherently require a comparison of the current action to an earlier action in which a resolution has been reached. *See Brown-Wilbert, Inc.*, 732 N.W.2d at 220.

A second action may be brought by Johnson against the Frybergers for the amounts due and owing under the construction contract, but that case is not before us. Therefore, it would be improper for this court to preclude, or even apply an offset against, claims that are not before it. Should Johnson pursue its claims for breach of contract and unjust enrichment against the Frybergers, the district court in that action will be confronted with the res judicata and collateral estoppel effect of the findings reached by the district court in this case.

III. Did the district court err by denying Johnson costs and disbursements?

After the district court's decision regarding appellants' damages, both parties requested taxation of costs and disbursements under Minn. Stat. §§ 549.02 and .04 (2010). The district court denied both parties' motions on the grounds that neither party had prevailed in the action because Johnson's claims were dismissed procedurally and the Frybergers were not awarded a money judgment on their claims.

Johnson now argues that the district court erred in deciding that it was not a prevailing party and that, as the prevailing party, it should be awarded costs and disbursements, as well as attorney fees pursuant to the construction agreement's fee-shifting provision. The Frybergers argue that Johnson did not prevail for the purposes of being awarded statutory costs and disbursements or attorney fees under the construction agreement and that Johnson's attorney fee claim is waived because it was not made to the district court.

While the construction agreement clearly authorizes an award of attorney fees, the Frybergers are correct that Johnson failed to bring a motion for attorney fees pursuant to the contract. *See* Minn. R. Gen Pract. 119.01 ("[A]pplication for award or approval of fees shall be made by motion."). Because that motion was not brought, and the issue of attorney fees is raised for the first time on appeal, that argument is waived. *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988).

Johnson's motion for costs and disbursements as "the prevailing party" is, however, properly before us. A prevailing party "shall be allowed reasonable disbursements paid or incurred." Minn. Stat. § 549.04, subd. 1. In addition, $200 is allowed to a plaintiff "[u]pon a judgment in the plaintiff's favor of $100 or more in an action for the recovery of money only," and to a defendant "[u]pon discontinuance or dismissal or when judgment is rendered in the defendant's favor on the merits." Minn. Stat. § 549.02, subd. 1. "[T]he district court has discretion to determine not only the amount of an award of costs and disbursements, but also who the prevailing party is for purposes of such an award." *Posey v. Fossen*, 707 N.W.2d 712, 714 (Minn. App. 2006).

"The party challenging the district court's exercise of discretion has the burden of proof—a burden which is met only when it is clear that no reasonable person would agree with the trial court's assessment of sanctions." *Id.* (quotation omitted).

To determine whether a party has prevailed in an action, "the general result should be considered, and inquiry made as to who has, in the view of the law, succeeded in the action. The prevailing party in any action is one in whose favor the decision or verdict is rendered and judgment entered." *Elsenpeter v. St. Michael Mall, Inc.*, 794 N.W.2d 667, 673 (Minn. App. 2011) (quotations and citation omitted). "A prevailing party is one who prevails on the merits in the underlying action, not one who was successful to some degree. A plaintiff must receive at least some relief on the merits of his claim before he can be said to prevail." *Id.* (quotations and citation omitted).

The district court found that while Johnson "was successful to some degree" as to appellants' damages claim, the Frybergers were given a default judgment on their underlying claims. Also, the Frybergers were found to be entitled to almost $78,000 in credits and reductions for amounts they had already paid to complete and correct items and defects in the home. As a result, the district court did not err in deciding that Johnson was not completely successful in defending the Frybergers' claims. Moreover, Johnson initiated legal action between the parties, but its own claims were dismissed without prejudice. On these facts, we cannot conclude that the district court abused its discretion in determining that neither party prevailed for the purposes of taxation of costs and disbursements.

IV. Conclusion

The district court found that the Frybergers were entitled to "just over $78,000 in credits and reductions for amounts paid directly by them" for the completion and correction of unfinished or defective items in the home. However, the district court, in correctly applying the preponderance of the evidence standard, did not abuse its discretion by declining to award any additional damages to the Frybergers for the correction of any other alleged defects in the home. Because the Frybergers obtained a default judgment on their underlying causes of action and successfully proved some of their damages, the district court did not abuse its discretion in refusing to award costs and disbursements to Johnson as the prevailing party.

Affirmed.