

ARKANSAS COURT OF APPEALS

DIVISION I

No. CA07-1161

C & C TRUCKING & EQUIPMENT,
INC.,

APPELLANT

V.

JAMES NOLEN and DIAMOND STATE
BANK

APPELLEES

Opinion Delivered MAY 28, 2008

APPEAL FROM THE PIKE COUNTY
CIRCUIT COURT,
[NO. CV-2004-92]

HONORABLE TED C. CAPEHEART,
JUDGE

AFFIRMED

ROBERT J. GLADWIN, Judge

Appellant C & C Trucking & Equipment, Inc. appeals the order of judgment filed in Pike County Circuit Court on July 11, 2007, finding that C & C was not entitled to compensation for work performed for appellee James Nolen. The sole issue raised on appeal is whether the trial court's conclusion was clearly erroneous. We find that the trial court's conclusion was not clearly erroneous and affirm.

Jerry Cox, owner of C & C, bid on performing the dirt work necessary to construct the pads for two chicken houses built by Nolen. Nolen accepted Cox's bid to construct the pads for \$22,500. The chicken houses were to be built on a steep slope, and each house would be constructed on a fifty-foot wide pad and would measure 630 feet in length. Cox claims that Nolen changed the distance between the chicken houses, forcing a steeper incline. Nolen claims that the distance between chicken houses was bid at 80 feet and that figure

never changed. Cox finished the job in August 2003, and the chicken houses were constructed in February 2004. Payment for the 2003 work is not an issue for this court.

Nolen contacted Cox in the Spring of 2004 when dirt began sliding off the bank of the houses and asked him to come back with a bulldozer to push dirt back up on the pad. Nolen informed Cox that he believed the dirt work was defective because the dirt had not been properly compacted. Cox told Nolen he did not think compaction was the problem because the dirt had been compacted the way it had always been done by him. Cox charged Nolen a reduced rate to perform the new dirt work. Cox claims that Nolen agreed to pay him, and Nolen claims that he told Cox he would pay him if the job was done correctly. When Cox completed the job, Nolen refused to pay. The condition of the dirt continued to deteriorate over time, and one of the chicken houses collapsed to the ground.

C & C filed this action to recover damages for work it did in 2004. At the bench trial, Cox testified that Nolen never mentioned compaction when he was hired to build the pads. Cox said that he had been in the excavation business for thirty-five years and the dirt on this job was the worst he had ever worked with. He claimed he did not know why the pad failed and the chicken house fell. He did not perform soil testing, and no one required that testing be done.

Nolen's expert witness, Bobby Joe Bunn, an excavator, testified that the construction failed because there was no compaction and the slope was not great enough. He acknowledged there were no specifications from an engineer that required compaction. Nolen testified he had never supervised the building of chicken houses before, and he was

relying on the specifications provided by Del Mesa, the company with whom Nolen would partner in the chicken-house operation. He admitted that Del Mesa provided no specifications for compaction of the site. He claimed he relied on the dirt contractor, C & C. He testified that Cox never told him the dirt would not work or that the location for the pads would not work.

The trial court also considered the deposition of Dr. Edward Grubbs, a civil engineer. Grubbs testified the soil was a highly-expansive clay that would have low-shear strength and absorb a lot of water. He opined that the fault lay with Nolen because he did not specify the compaction which should have been used and did not test the soil to find out if he was getting proper compaction. Everyone agreed the work performed to shore up the pad was a wasted effort.

The trial court's order of July 11, 2007, states:

The plaintiff [C & C] is not entitled to any award for compensation for work performed for James Nolen between June and September of 2004 due to the fact a reasonable dirt contractor would have known the work being performed would be a wasted effort.

This appeal timely followed.

In bench trials, the standard of review on appeal is not whether there is substantial evidence to support the finding of the circuit court, but whether the judge's findings were clearly erroneous or clearly against the preponderance of the evidence. *Omni Holding & Dev. Corp. v. C.A.G. Invs., Inc.*, 370 Ark. 220, __ S.W.3d __ (2007). A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire evidence is left with a firm conviction that an error has been committed. *Id.* Facts in dispute

and determinations of credibility are within the province of the fact-finder. *Id.* Where the pivotal issue is the credibility of interested parties whose testimony is in direct conflict, we defer to the trial judge's judgment. *Taylor v. George*, 92 Ark. App. 264, 212 S.W.3d 17 (2005).

Cox argues the trial court's conclusion that he should not be paid for his work on Nolen's property is clearly erroneous and should be reversed. He claims he was hired to "make an attempt" to stop the erosion of the pad in an effort to save the chicken house. He admits the work performed did not save the chicken house. However, he argues he was not hired to save it. He contends he was hired to push some more dirt up on the sides of the pad in hopes that would solve part of the problem. The work was performed. Cox now asks to be paid for his labor at the rate the parties agreed to before the work was performed.

Cox argues the parties entered into a contract for him to try various things in an effort to stop the further deterioration of the pad in exchange for an \$85-per-hour fee. The essential elements of a contract are (1) competent parties, (2) subject matter, (3) legal consideration, (4) mutual agreement, and (5) mutual obligations. *Youree v. Eshaghoff*, 99 Ark. App. 4, ___ S.W.3d ___ (2007). Consideration is any benefit conferred or agreed to be conferred upon the promisor to which he is not lawfully entitled, or any prejudice suffered or agreed to be suffered by the promisor, other than such as he is lawfully bound to suffer. *Id.* Cox contends that all the elements of a contract were in place. He argues Nolen did not pay him when it became apparent that what Nolen told him to do was not going to work. However, he argues that permanently repairing the pad was not part of the bargain.

Therefore, he claims the trial court's decision the work was "of no benefit" to Nolen is irrelevant to the parties' contract. He maintains there is no evidence he guaranteed his extra work would solve the problem with the chicken-house pad.

Nolen argues that Cox failed to fulfill the contract. He testified a term of the contract was that payment would be granted only if C & C were able to fix the problem. He argues the failure of C & C's work to be of any benefit to him causes C & C to not have satisfied its obligations under the contract. Cox, Nolen, and both experts testified that the effort of pushing dirt back up the sides to the pad were wasted. In other words, Nolen claims that C & C did not fix the problem and, therefore, is not entitled to payment.

Whether the parties agreed that C & C would be paid if the problem was not remedied by the work performed was a question of fact for the trial judge to determine. Where the pivotal issue is the credibility of interested parties whose testimony is in direct conflict, we defer to the trial judge's judgment. *See Taylor, supra*. The trial court's judgment was that C & C had not performed under the contract and no payment was due. Accordingly, we hold the trial court's determination that C & C was not entitled to compensation for the work performed for Nolen was not clearly erroneous.

Affirmed.

HART and MARSHALL, JJ., agree.