ARKANSAS COURT OF APPEALS

DIVISION II
No. CA07-1259

EUGENE SHEA APPELLANT V. LEONARD CORAN AND BERTHA CORAN APPELLEES	**Opinion Delivered** September 24, 2008 APPEAL FROM THE FAULKNER COUNTY CIRCUIT COURT, [NO. CV-02-614] HONORABLE CHARLES E. CLAWSON, JUDGE REVERSED AND REMANDED

SARAH J. HEFFLEY, Judge

Appellant Eugene Shea appeals a default judgment he obtained against appellees Leonard and Bertha Coran. The judgment was entered following a bench trial on the issue of damages, and for reversal appellant contends that the trial court erred in allowing testimony that contradicted the averments in the complaint. He also argues that the trial court's assessment of damages was clearly against the preponderance of the evidence. We reverse and remand on the second issue.

In December 1999, appellant purchased from appellees a house constructed by them for a price of $68,500. In June 2001, appellant obtained a loan of $150,000 and used the proceeds to pay off the purchase price, to buy contiguous land from appellees, and to build an addition at the rear of the existing home, which enlarged the structure from 1,400 to 2,990 square feet. Appellant subsequently spent an additional $30,300 for improvements, such as a hot tub, a fence, a driveway, a patio, a security system, landscaping, an air-conditioning

upgrade, flooring, wallpaper, and a storage room.

Appellant filed suit in July 2002, alleging that appellees were responsible for two defects in the property. He alleged that a hallway toilet in the original home would not function properly. He also alleged the existence of a drainage problem, unrelated to the toilet, that caused water to collect around the home. Appellees failed to file a timely answer to the complaint and thus were in default, so a hearing was convened to determine the amount of damages owed appellant.[1]

At the hearing, appellant testified that the toilet in question would not flush or hold water because the sewer line ran uphill. To correct this problem, he said that it would be necessary to rip the floor out of the home, but he stated that no one had been able to guarantee him that the problem could be solved because the line would still have to run uphill toward the street where the sewer connection was located.

John Woodard, a civil engineer, gave testimony that appellant's lot slopes gently from the street to the back of the property with a ten-foot difference in elevation. He discussed that the property remained wet and held standing water because it was situated on an aquifer. Woodard had observed mold growing both inside and on the exterior of the house, and he said that the mold could not be eradicated unless the water-seepage problem was corrected. One solution, which he said was not feasible, would be to raise the house. Otherwise, he estimated that it would cost upwards of $100,000 to cut off the water source. Photographs were introduced into evidence that showed the mold and standing water, as well as the toilet.

Glenda Hoyt, a real estate broker, testified that the mold, water, and sewer problems

[1] Appellant initially sought rescission of the sales contract but abandoned that request at the hearing.

would have to be disclosed to potential buyers. She was of the opinion that the condition of the house rendered it unmarketable.

In closing, appellant took the position that the home was uninhabitable and a total loss and that he was entitled to a return of the purchase money and all of the monies he had spent building the addition and making other improvements made to the property. After issuing a letter opinion, the trial court entered judgment for appellant, setting damages in the amount of $9,800, plus $4,000 for expert-witness fees, $4,821 in attorney's fees, and costs of $145. Appellant subsequently filed a motion for reconsideration that was not ruled on by the trial court.

Appellant first argues that the trial court erred by allowing appellees to offer testimony that contradicted averments made in the complaint. Appellant's complaint contained allegations that appellees had been made aware of the problem with the toilet and that appellees had taken no steps to repair the toilet. At the hearing, however, appellee Leonard Coran was allowed to testify that he had bought materials and the city had dug a bell hole to make the repair but that he had not been allowed to do the work. Appellant argues that, because appellees were in default, the testimony of Mr. Coran was impermissible. Appellant further contends that he was prejudiced by the testimony because the trial court noted in its letter opinion that appellees' efforts to repair the toilet had been rebuffed. Appellees respond that the testimony was proper because it was relevant to the issue of appellant's failure to mitigate his damages.

The general rule is, that in an inquiry of damages upon default, all of the plaintiff's material allegations are to be taken as true, and the determination of the amount of damages

to be awarded is all that remains to be done. *Gardner v. Robinson*, 42 Ark. App. 90, 854 S.W.2d 356 (1993). Although he is entitled to offer proof in mitigation of damages, a defaulting defendant may not controvert the plaintiff's right to recover as the default fixes the defendant's liability on the plaintiff's cause of action. *Id.* As was said by the supreme court in *B&F Engineering, Inc. v. Cotroneo,* 309 Ark. 175,181, 830 S.W.2d 835, 838-39 (1992):

> Under the Arkansas Rules of Civil Procedure, a default judgment establishes liability but not the extent of damages. Proof is still required to establish the amount of damages except in suits in which a verified account has been submitted. After default, the defendant has the right to cross-examine the plaintiff's witnesses, to introduce evidence in mitigation of damages, and to question on appeal the sufficiency of the evidence to support the amount of damages awarded. The defaulting defendant may not introduce evidence to defeat the plaintiff's cause of action.

In this case, the testimony appellant complains of does contradict the averments in the complaint that appellees made no effort to repair the toilet, but appellant does not explain the materiality of the allegation made in the complaint or why its contradiction works to defeat his cause of action. In other words, appellant has not favored us with an explanation as to how appellees' liability could possibly be defeated by testimony that appellees did take steps to make the repairs but that permission was refused.

We observe that Mr. Coran's testimony was not particularly germane to any issue in this case, although apparently offered to show the failure to mitigate. The doctrine of avoidable consequences limits the amount of recoverable damages in that a party cannot recover damages resulting from consequences that he reasonably could have avoided by reasonable care, effort or expenditure. *Taylor v. George,* 92 Ark. App. 264, 212 S.W.3d 17

(2005). There was no evidence presented in this case that any adverse consequences resulted from the toilet not being repaired on the front end. In the absence of any suggestion that the problem was made worse by the delay, we fail to see that failure to mitigate was an issue. Thus, testimony regarding appellant's refusal to allow appellees to repair the toilet would have no bearing on the damages in this case. Also, the trial court's letter opinion indicates that no damages were awarded for the toilet because appellant did not offer any proof as to the cost of repairs. We thus perceive no reversible error occurring as a result of this testimony.

Appellant next argues that the trial court's assessment of damages was clearly against the preponderance of the evidence, and for that reason, the trial court erred in denying his motion for reconsideration. We are not able to address any claim of error with regard to the denial of the motion for a new trial because appellant has not brought an appeal from the denial of the motion. Rule 3(e) of the Arkansas Rules of Appellate Procedure - Civil provides that a notice of appeal "shall designate the judgment, decree, or order" appealed from. Orders not mentioned in the notice of appeal are not properly before the appellate court. *Conlee v. Conlee*, 366 Ark. 398, 235 S.W.3d 899 (2006). Here, the only order mentioned in the notice of appeal is the judgment; the deemed denial of the motion for a new trial was not referenced in the notice. Therefore, the notice of appeal was insufficient to effect an appeal from the denial of the motion for a new trial. *Rawe v. Rawe*, 100 Ark. App. 90, ___ S.W.3d ___ (2007); *Daniel v. State,* 64 Ark. App. 98, 983 S.W.2d 146 (1998); *Arkansas Dep't of Human Services v. Shipman*, 25 Ark. App. 247, 756 S.W.2d 930 (1988).

Nevertheless, we are able to address appellant's contention that the trial court's decision is clearly against the preponderance of the evidence. Rule 59(f) of the Arkansas Rules of Civil

Procedure states that a party who has preserved for appeal an error that could be the basis for granting a new trial is not required to file a motion for a new trial as a prerequisite for appellate review of the issue. In a non-jury trial, a party who does not challenge the sufficiency of the evidence does not waive the right to do so on appeal. *$15,956 in U.S. Currency v. State,* 366 Ark. 70, 233 S.W.3d 598 (2006). Consequently, appellant's challenge to the trial court's findings is preserved in the timely appeal from the default judgment.

In its letter opinion, the trial court stated that appellant "paid $68,500 for the property in 1999, he subsequently added an addition which costs $30,300 and by his testimony the property debt at this time is $148,000." Also, in calculating appellant's damages, the trial court found that appellant "testified that he owed appropriately [sic] $148,000 on the property and in his opinion it was worth 60% of the debt which would make the property worth appropriately [sic] $88,000 which would mean that he has suffered a decrease in the value of his property." Appellant argues on appeal that the trial court misconstrued his testimony in both instances. Appellant points out that, contrary to the trial court's findings, it was his testimony that he used the loan proceeds to build the addition to the house and that the $30,300 figure represented the sums he expended for the other improvements he made to the property. Appellant further points out that he did not testify that he believed the property to be worth sixty percent of the existing debt, but rather he testified that "the amount of the mortgage at the present time is $148,000 and that is sixty percent of what it appraised for, which is $225,000."

In civil cases where the trial judge, rather than a jury, sits as the trier of fact, the standard of review on appeal is whether the judge's findings are clearly against the

preponderance of the evidence. *El Paso Production Co. v. Blanchard,* 371 Ark. 634, ___ S,W.3d ___ (2007). We agree with appellant that the trial court misstated the testimony in setting the amount of damages ,which renders his findings clearly against the preponderance of the evidence. We therefore reverse and remand for the trial court to recalculate the amount of damages on the record already made. *See Gardner v. Robinson,* 42 Ark. App. 90, 854 S.W.2d 356 (1993).

Reversed and remanded.

PITTMAN, C.J., and MARSHALL, J., agree.