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RONALD BORRELLI ET AL. *v.* H AND H  
CONTRACTING, INC., ET AL.  
(AC 25905)

Flynn, C. J., and Gruendel and Peters, Js.

*Argued September 21, 2006—officially released April 17, 2007*

(Appeal from Superior Court, judicial district of  
Middlesex, Aurigemma, J.)

*J. Michael Sulzbach*, for the appellants (plaintiffs).

*Gregory J. Kycia*, with whom, on the brief, was *Sean  
E. Donlan*, for the appellee (named defendant).

*Opinion*

PETERS, J. In this case about the installation of a septic system, the parties dispute whether the installer, in breach of contract or negligently, failed to construct the system in accordance with the plans of the designated architect. Resolving a number of factual disputes against the plaintiff landowners, the trial court rendered judgment holding them liable for unpaid bills for services rendered by the defendant installer. The plaintiffs' principal claim is that the judgment should be set aside because the trial court failed to assign dispositive significance to the defendants' pleadings. Because we are not persuaded that a fair reading of the record sustains this claim, we affirm the judgment of the trial court.

On July 9, 2001, the plaintiffs, Ronald Borelli and Stephanie Borelli, brought an action against the defendant H & H Contracting, Inc.,<sup>1</sup> alleging that in June, 1999, the parties had entered into a construction contract. This contract included a number of projects associated with the construction of a house, including a commitment by the defendant to install a septic system according to plans prepared by Bascom Magnotta, Inc. (Bascom Magnotta).<sup>2</sup> The defendant admitted this allegation but denied that it had failed to do so. In a counterclaim, the defendant alleged that the plaintiffs had failed to pay \$4820 at the stipulated hourly rate for services rendered in accordance with their contract. After a court trial, the court found for the defendant, both on the complaint and the counterclaim, and rendered judgment for the defendant in the amount of \$3520. The plaintiffs have appealed.

The plaintiffs have raised two issues on appeal. They maintain that, as a matter of law, the trial court improperly failed to conclude that the defendant was obligated to install the plaintiffs' septic system in accordance with the plans prepared by Bascom Magnotta. They further maintain that, as a matter of fact, the court improperly failed to find that the septic system was not operating properly. We are not persuaded.

I

The plaintiffs' principal disagreement with the court's judgment in favor of the defendant stems from their dissatisfaction with the statement in the court's memorandum of decision that the sanitarian of Middletown approved the installation of the plaintiffs' septic system. The plaintiffs construe this statement as a legal ruling by the court that the sanitarian's approval was dispositive of the defendant's compliance with its contract obligation. The court's ruling was improper, according to the plaintiffs, because it disregarded the pleadings filed by the parties. We disagree with this construction of the record.

In the plaintiffs' complaint, they alleged that the defendant was obligated to install the septic system in

accordance with a blueprint prepared by their architect, Bascom Magnotta. In the defendant's counterclaim, on which the court based its judgment, the defendant alleged nonpayment of bills presented to the plaintiffs that purported to represent work performed in compliance with the specifications in the blueprint. The plaintiffs rely on this pleading by the defendant as a judicial admission on its part that the court improperly failed to enforce.

Standing alone, the plaintiffs' argument may be plausible, although it would be surprising to have an experienced trial court judge ignore the pleadings presented to her. We note that the plaintiffs did not avail themselves of the opportunity to file a motion for articulation to clarify this conundrum. See Practice Book § 66-5. Our examination of the record, however, leads to a different explanation for the court's statement.

The plaintiffs are correct that the defendant agreed to comply with the Bascom Magnotta blueprint in installing the septic system for the plaintiffs. The plaintiffs are also correct that the defendant was not entitled to recover on its counterclaim without establishing that it had complied with these specifications. The defendant never argued to the contrary. Its contention was, instead, that it was entitled to be paid because it had followed the specifications of the Bascom Magnotta blueprint. As we read the record, the trial court found that the defendant was entitled to be reimbursed for the unpaid portion of its bills because the defendant had sustained its burden of proof on this issue.

The standard of review that governs a trial court's findings of fact is well established. "Questions of fact are subject to the clearly erroneous standard of review. . . . A finding of fact is clearly erroneous when there is no evidence in the record to support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. . . . Because it is the trial court's function to weigh the evidence . . . we give great deference to its findings." (Internal quotation marks omitted.) *Reiner, Reiner & Bendett, P.C. v. Cadle Co.*, 278 Conn. 92, 107, 897 A.2d 58 (2006).

The factual issue that the trial court resolved in favor of the defendant relates to the defendant's compliance with the blueprint specification that stated: "This work shall not be done within 2 days of a rainstorm, or if there is standing water in the fill area." In their complaint, the plaintiffs had alleged that persistent wet grounds on their property in the vicinity of the septic system were attributable to the defendant's failure to prepare the grounds in accordance with this specification at the time when it installed the system.<sup>3</sup>

Accordingly, the plaintiffs' expert, Frank Magnotta,

opined at trial that the septic system had drainage problems because it had been installed when the ground was too wet. Magnotta acknowledged that the defendant had used the proper materials for the fill. Even with proper materials, however, the placement of septic fill when the ground is too wet, he testified, results in sealing the fill off so that water and effluent can be trapped, and the septic area can become flooded. In his view, the defendant had failed to comply with the specification related to when the work was to have been done because the defendant's work schedule showed that the defendant had started on February 22, 2000, but did not place any sand until March, 4 2000, a week and one half later. During that period, Magnotta testified, a substantial amount of rain fell. According to Magnotta, the defendant should have waited for a different time of year,<sup>4</sup> particularly because that area "ha[d] marginal soil to begin with . . . ."

Magnotta was not at the work site when the defendant completed the installation of the septic system in March, 2000. In the absence of direct observations of the defendant's performance, Magnotta based his criticism of the defendant's installation on subsequent test borings, on his appraisal of a schedule of the dates on which the defendant had worked on the installation and on inferences he drew from rainfall data.

Without challenging Magnotta's expert opinion about how a septic system should be installed, the defendant disputed Magnotta's factual representations about what had transpired at the work site. It offered testimony that the work site had been prepared properly and that the fill had been installed properly. It challenged the accuracy of Magnotta's weather data. Finally, the defendant relied on the fact that the Middletown sanitarian had conducted repeated timely on-site inspections when the condition of the ground was visible to the naked eye and had approved the work.

Magnotta discounted the significance of the sanitarian's inspection. Whatever the sanitarian's view, Magnotta was persuaded that "something was done very wrong and . . . there were just too many difficulties associated with this time of year and this type of soil to eliminate the problems that basically have occurred there with getting that material worked properly." Asked whether he found the sanitarian incompetent, he answered, "Generally, yea."

On this state of the record, it was appropriate for the trial court to consider the probative value that it should assign to the sanitarian's inspection. As the fact finder, the court had the authority to decide, contrary to Magnotta's view, that the sanitarian's contemporaneous approval of the septic system work site at the time that it was visible to the naked eye was evidence that the defendant had in fact complied with the applicable contract specifications.

There is no suggestion anywhere in the record that the Bascom Magnotta blueprint was unusual in requiring the installer of the septic system in this case to take possibly adverse weather conditions into account. Viewed from this perspective, the statement in the trial court's opinion that the plaintiffs' challenge properly may be construed as an evidentiary finding rather than as a description of the pleadings. The court stated that "the city of Middletown required that its sanitarian approve the installation of any septic system before the city would issue a certificate of occupancy on a residence. The sanitarian of the city of Middletown did approve the septic system installed by [the defendant]. The city also issued a certificate of occupancy."

That these statements reasonably may be read as evidentiary observations relevant to whether the defendant has met its burden of proof is borne out by the undisputedly evidentiary nature of the court's immediate next sentence, in which it found that "[t]he plaintiffs offered no evidence that the system is not operating properly." Although the plaintiffs dispute this characterization of the record, their dispute does not turn a factual finding into a conclusion of law. As it had the authority to do, the court made a finding that the sanitarian's approval was evidence of proper installation of the septic system and found that the plaintiffs offered no persuasive evidence to the contrary. In the absence of a contrary articulation by the court, we construe the record in favor of affirmance rather than reversal. *State v. Medina*, 228 Conn. 281, 292 n.10, 636 A.2d 351 (1994).

## II

The plaintiffs' alternate claim is that the trial court improperly failed to find that the septic system was not operating properly. As the plaintiffs recognize, to prevail on this claim, they must establish that the court's findings were clearly erroneous. *Carroll v. Perugini*, 83 Conn. App. 336, 339–40, 848 A.2d 1262 (2004). We are not persuaded.

In its memorandum of decision, the trial court stated: "The plaintiffs offered no evidence that the system is not operating properly. The only evidence offered was that the system had 'failed' because samples taken on the property in an area near the septic system contained the presence of coliform bacteria. However, Ronald Borelli admitted that he has sued one of his neighbors, claiming that runoff from the neighbor's property was the cause of the presence of coliform bacteria on the property." The court concluded that "[b]ased on the foregoing, the court cannot find that [the defendant] failed to install the septic system properly, and judgment may enter in favor of the defendants on paragraph 4f of the complaint."

In their challenge to the court's finding as to the presence of coliform bacteria, the plaintiffs point once

again to the testimony of Magnotta, their expert witness. In his view, “the site was set up and graded in such a way that all this surface water was either being diverted around the septic area, and any of the subsurface water would have been intercepted with the curtain drain that was present to protect the septic system from any uphill water.”

The trial court found, however, that the premise for the expert’s opinion had not been established. It found that the curtain drain, which had been constructed by the plaintiff Ronald Borelli, did not function properly. “[The] functional failure of the curtain drain exacerbated the drainage problems on the property. However, there was no evidence that the conduct of [the defendant] caused or increased such problems.” The plaintiffs’ appeal does not challenge the validity of this finding.<sup>5</sup>

We conclude, therefore, that the trial court’s judgment in favor of the defendant must be sustained. As the finder of fact, the court had the authority to resolve two disputed issues in favor of the defendant. It found that the defendant established that the septic system that it had installed for the plaintiffs conformed to the specifications to which the parties had agreed, so that the defendant was entitled to recover on its counterclaim for unpaid bills. It further found that the plaintiffs failed to establish that difficulties that they had experienced on their property were attributable to defects in the defendant’s construction of the septic system. We are persuaded that neither finding was clearly erroneous.

The judgment is affirmed.

In this opinion GRUENDEL, J., concurred.

<sup>1</sup> Robert Madore, Sr., also was named as a defendant in the plaintiffs’ complaint. The court found that “[o]ther than his signature on the permit for the septic system, there was no evidence presented that the defendant Robert Madore, Sr., participated in any way in the work performed on the plaintiff’s property or that he had any contractual obligation whatsoever to the plaintiffs.” The plaintiffs do not challenge the court’s finding with regard to Madore, and that finding is not before us on appeal. We therefore refer to H & H Contracting, Inc., as the sole defendant in this appeal.

<sup>2</sup> Paragraph 3 of the complaint alleges that “[i]n June of 1999, plaintiffs and defendants entered into a contract whereby defendants would perform site work at [Brooks Road, Middletown, Connecticut] including . . . d. install septic system according to plans prepared by Bascom Magnotta, Inc. . . .”

<sup>3</sup> In a related allegation of negligence, the plaintiffs claimed that the defendant negligently permitted “the leaching fields [to be left] open for long periods of time and during periods of precipitation and/or . . . had failed to install gravel and sand properly resulting in compromise of the leaching fields and septic system.”

<sup>4</sup> Indeed, it was his view that there was no time within February or March, 2000, when the septic system could have been scarified and installed properly.

<sup>5</sup> We are not persuaded by the plaintiffs’ contention, in their reply brief, that it was improper for the defendant to rely on this finding without having filed a statement of issues pursuant to Practice Book § 63-4 (a) (1). The connection between the trial court’s various findings was plain on the face of the record.