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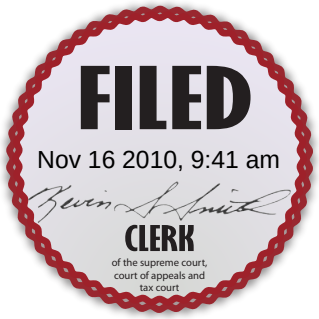

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IN THE COURT OF APPEALS OF INDIANA

CLARA BOVA and ANTONIO SIMEONE.	)	
	)	
Appellant, Defendants, Counter Defendants, and Third Party Plaintiffs,	)	
	)	
vs.	)	No. 49A02-1002-CP-177
	)	
SCHREIBER LUMBER, INC., DAVID T. BECK, d/b/a BECK CONSTRUCTION CO., And STEVEN MAY,	)	
	)	
Appellees, Plaintiffs, and Third Party Defendants.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Cale J. Bradford, Judge
And The Honorable David Dreyer, Judge
Cause No. 49D10-0410-CP-1929

November 16, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

Clara Bova and Antonio Simeone ("Bova and Simeone") appeal the trial court's judgment order, after a bench trial, on the action brought against Antonio Simeone, d/b/a Simeone Construction by Schreiber Lumber, Inc. ("Schreiber"); Simeone's counterclaim; Bova's third-party complaint against Schreiber and Dave Beck, d/b/a Beck Construction Co. ("Beck"); and the amended counterclaim and third-party complaint of Bova and Simeone against Schreiber and Beck.

We affirm.

ISSUES

1. Whether the trial court erred by granting Dave Beck's motion for summary judgment.

2. Whether the trial court erred by granting partial summary judgment to Schreiber on Bova's counterclaim for breach of contract.

3. Whether the evidence supports the trial court's judgment.

FACTS

Simeone had long worked both as a fireman and a self-employed builder. Bova and Simeone had a long-term relationship.[1] In the late 1990s, they co-owned a home built by Simeone, acting as the general contractor. At some point, Bova acquired ownership of a double lot, on which she wanted to build a multiple-story duplex ("the duplex"). She contacted Brian Weller, an architect, to draw up plans. In May of 1999, Bova and Simeone agreed that Simeone would act as general contractor for the construction. On June 30, 2009, Simeone applied for a building permit to build the duplex on Bova's lots.

Simeone had observed Beck's framing work on a residential construction in progress and spoke with him. In July of 2009, Simeone hired Beck, d/b/a/ Beck Construction Co., to perform the framing for the duplex.

When Simeone provided Beck the duplex drawings prepared by Weller, Beck found them inadequate – lacking necessary dimensions and detail. Beck recommended that Simeone contact Stephen May, who could provide plans adequate for obtaining a floor plan and a materials estimate. Simeone and Beck met with May and discussed with him the Weller drawings. Thereafter, Simeone alone met further with May for further discussions. May prepared several drawings, the final set of which did not include any third floor living space. Apparently, Bova was not present or involved in the discussions that took place.

[1] At her February 2004 deposition, she approximated the relationship as one of fifteen years. By the time of trial, in December of 2009, Bova and Simeone had married.

At Beck's recommendation, Simeone approached Schreiber concerning the provision of lumber and building supplies for construction of the duplex. In July of 2009, Simeone asked Joe Barber, a Schreiber employee, to provide an estimate. Simeone gave Barber the final May drawings, which did not include any third floor living space.

On August 27, 1999, Barber presented Simeone with an estimate, known as a "material take-off." The material take-off included pre-fabricated trusses on the third floor and a Georgia-Pacific TGI flooring system. Simeone reviewed the material take-off, and on September 2, 1999, as owner of Simeone Construction, he applied to Schreiber for a credit account; the application was approved.

Schreiber began delivering lumber for the duplex as specified on the material take-off, and Beck proceeded to frame it based upon the May drawings given to him by Simeone. Simeone found some of the lumber delivered to be unsatisfactory; when he complained, Schreiber credited his account therefor.

In mid-October of 1999, after the roof was covered with black paper sheeting, Simeone ordered Beck off the job. Schreiber was also told to collect its materials at the job site, and an October 18, 1999 invoice gave Simeone credit for the materials picked up. On October 19, 1999, the balance due Schreiber on the account was $8,564.29. On October 27, 1999, Simeone tendered to Beck a check in the amount of $6,500.00, and wrote "framing final payment" on it. (App. 490).

On July 5, 2000, Schreiber filed suit against Simeone and/or Simeone Construction, alleging the failure to pay $8,692.79 on account for lumber and building

supplies. Counterclaims and cross claims ensued,[2] involving Bova and Beck. An amended counterclaim by Simeone and complaint by Bova alleged the negligence of Schreiber with respect to the flooring system, the need for pre-engineered roof trusses, and allegedly defective trusses; negligence by Beck in performing the framing; and claims alleging constructive fraud by Schreiber and Beck. Schreiber and Beck filed motions for summary judgment.

On August 17, 2005, the trial court heard the parties' summary judgment arguments. It granted Schreiber's motion for summary judgment on Bova's claims for breach of contract and constructive fraud, and on Simeone's counterclaim for constructive fraud. It also granted Beck's motion "as to all claims brought by Bova and Simeone." (App. 17, 31). However, it denied summary judgment to Schreiber on Bova's claims for negligence and breach of warranty, and on Simeone's claims for breach of contract, negligence, and breach of warranty.

Bova and Simeone filed a motion to certify the summary judgment rulings for interlocutory appeal. The motion was granted. This court denied the request "to accept jurisdiction of interlocutory appeal." (App. 18).

A bench trial was held December 10-11, 2009. Simeone testified as to his experience, including a four-year apprenticeship at Ivy Tech, renovation of "some twenty homes," and having built two homes "from the ground up." (Tr. 39). Thus, he believed that he had "the construction knowledge" and "construction experience" to build the duplex. (Tr. 88).

[2] Some of these are not included in the appellate record.

Simeone testified that Barber told him that the duplex roof was "too large to stick frame" and would require pre-engineered trusses; whereupon he asked Barber whether it was possible to "incorporate . . . living space in these trusses," and was advised that it was not. (Tr. 50). However, Barber testified that he "did not tell" Simeone "that the third story attic space could not be accommodated by using pre-fabricated trusses." (Tr. 315). Further, exhibits admitted at trial established that the ultimate May drawings did not contain a third floor attic space, and Barber was given those drawings for preparation of the material take-off.

The May drawings given by Simeone to Barber did not specify a flooring system. Before installation of the flooring, Barber had recognized that a certain area would be over spanned. Barber contacted May, who advised the installation of a header. Barber added a notation to this effect on the plan and gave a copy to Beck. Beck testified that the notation was on the plans from which he worked at the site, and that the material for the header was delivered by Schreiber. Beck further testified that his framing job was "not 100%" complete when he was ordered off the job, and Barber opined that the header was not installed as "drawn on the plans" because "Beck was never allowed to completely finish the frame." (Tr. 427, 358). An expert testified that as installed, the flooring system was adequate after Simeone's addition of a second bearing point.

Simeone testified that much of the lumber delivered was "not really" satisfactory to him. (Tr. 59). However, the president of Schreiber testified that Simeone was given credit for all lumber about which he complained. There was no evidence to the contrary, and Simeone continued to accept deliveries of lumber after the credit was issued.

Simeone testified that he "had problems with" the trusses delivered, in that he believed their installation would foreclose the use of soldier bricking above the second story windows. (Tr. 63). However, he also testified that he had instructed a Beck worker how to perform work that would allow the inclusion of such brickwork, but that his instructions were not followed. Simeone testified that the "craftsmanship" of the trusses was "terrible," and that he had subsequently modified some. (Tr. 83). Nevertheless, Simeone admitted that he had allowed the trusses to be installed in the duplex, where they still remained on the day of trial. According to Schreiber's president and Barber, Simeone never complained about the trusses until Schreiber filed litigation to collect on the account.

Simeone testified that the allegedly defective lumber provided by Schreiber required him to incur significant expense in tearing it out and replacing it. However, his evidence of expenses in that regard included ambiguous receipts and cancelled checks -- evidence that did not clearly distinguish between expenses purported to arise from allegedly inferior lumber and those purported to result from his claim of Beck's allegedly inferior work.

On January 22, 2010, the trial court issued its judgment order. It ordered Simeone to pay Schreiber $8,564.29 plus interest, and held against Bova and Simeone on their claims.

DECISION

1. Summary Judgment to Beck

Bova and Simeone first argue that the trial court erred by granting summary judgment to Beck. They direct our attention to the statement in the trial court's judgment order of January 22, 2010, as follows:

> . . . . Beck was granted summary judgment based on a finding that Simeone voluntarily waived any future claims against Beck when he issued final payment for less than the amount owed to Beck. This is not a finding that Beck is without fault, but rather a finding that Simeone is barred by operation of law from further pursuing Beck for his alleged inferior work.

(App. 37-38). They note that Indiana Trial Rule 54 provides *inter alia* that

> any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and rights and liabilities of all the parties.

T.R. 54(B). Accordingly, they argue that the January 22, 2010 judgment order established accord and satisfaction as the sole grounds for judgment to Beck, because that order "supersedes the August 17, 2005 Order granting summary judgment to Beck." Appellants' Br. at 23. They acknowledge that the designated evidence presented at the summary judgment stage established Beck's acceptance of a check from Simeone on which Simeone had written "framing final settlement," *id.*, but they argue that in its judgment order the trial court erroneously held that this constituted a waiver of all claims against Beck.

We first note that the trial record does not support the inference that the trial court intended to "revis[e]" the August 17, 2005 order granting summary judgment to Beck in its January 2010 judgment order. T.R. 54(B). Nothing presented at trial (which was conducted by a different judge than the summary judgment proceedings) touched upon the initial summary judgment as to Beck; nor does the record reflect that there was any trial argument made in that regard by Bova and Simeone. Moreover, at trial, counsel for Bova and Simeone repeatedly represented the August 2005 order as having been a final one with respect to Beck. While questioning Simeone, counsel for Bova and Simeone asked him whether it was true (and Simeone confirmed that it was) that "at one time [he] had a claim against Mr. Dave Beck"; Beck "was let out of this case on summary judgment"; and Beck "was . . . ruled to have no liability." (Tr. 209). During testimony of their expert, Bova and Simeone objected to admission of an exhibit that their counsel "believe[d] . . . addresse[d] issues involving Mr. Beck[.] Mr. Beck was adjudicated as to does [sic] not have liability." (Tr. 270). Further, when Beck was called as a defense witness by Schreiber as to the third party claims of Bova and Simeone, their counsel objected to certain questions of Beck, asserting that he "was adjudicated as not having liability." (Tr. 442). Their counsel later stated, in a question to Simeone, that "Mr. Beck is out of this case. He got a judgment in his favor, ..." (Tr. 497).

We further note that a portion of Trial Rule 54(B) <u>not</u> quoted by Bova and Simeone states that when a case involves multiple claims and multiple parties,

> the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination

> that there is no just reason for delay and upon an express direction for the entry of judgment.

T.R. 54(B). Thus, the Rule provided a specific mechanism whereby Bova and Simeone could have appealed the trial court's grant of summary judgment to Beck in 2005. The CCS reflects that Bova and Simeone filed a "motion to certify summary judgment rulings for interlocutory appeal" on August 31, 2005, and on September 6, 2005, the trial court "approve[d the] order" and "certif[ied] for interlocutory appeal" its "orders of August 17, 2005." (App. 18). However, apparently Bova and Simeone did not seek to appeal the grant of summary judgment to Beck by invoking the specific certification procedure in that regard.

Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Bushong v. Williamson*, 790 N.E.2d 467, 474 (Ind. 2003). We apply the same standard as the trial court when reviewing decisions of summary judgment. *Filip v. Block*, 879 N.E.2d 1076, 1081 (Ind. 2008). Our review of a summary judgment motion is limited to those materials designated to the trial court. *Mangold v. Ind. Dep't of Natural Resources*, 756 N.E.2d 970, 973 (Ind. 2001). The moving party bears the burden of showing that there are no genuine issues of material fact and that the movant is entitled to judgment as a matter of law. *Dreaded, Inc. v. St. Paul Guardian Ins. Co.*, 904 N.E.2d 1267, 1270 (Ind. 2009). Once the movant satisfies this burden, the burden then shifts to the non-moving party to designate and produce evidence of facts showing the existence of a genuine issue of material fact. *Id.*

An "accord" denotes an express contract between two parties by means of which the parties agree to settle some dispute on terms other than those originally contemplated, and "satisfaction" denotes performance of the contract. *Wolfe v. Eagle Ridge Holding Co., LLC*, 869 N.E.2d 521, 525 (Ind. Ct. App. 2007). The question of whether a party claiming accord and satisfaction has met its burden is ordinarily a question of fact but becomes a question of law if the requisite controlling facts are undisputed and clear. *Id.*

With his motion for summary judgment, Beck designated evidence that established the following: Simeone ordered Beck off the job before the framing had been finished; Beck then presented Simeone with a bill for $14,383.51 for work he had completed before being ordered off the job; Simeone did not pay that amount but rather tendered to Beck a check for $6,500.00, on which he had written "framing final payment," which was accepted by Beck. (App. 318). According to Simeone's interrogatory answer, he admitted paying the $6,500.00 amount even though "I told Beck that I felt he owed me money back." (App. 428). Simeone's deposition testimony was that his tender of the check in the amount of $6,500.00 and Beck's acceptance of it meant that "we agreed" that the check represented the "final payment for what he had done on" the duplex, and that they had "reached a compromise as to what was due and owing." (App. 318, 319). Beck's deposition testimony was that at the time he received the check from Simeone, he "believed" they "had reached a settlement." (App. 371).

Bova and Simeone argued to the trial court, as they do on appeal, that there was no accord and satisfaction because "Beck's own testimony" was "that his acceptance of the check was not intended to settle everything." (App. 244; Appellants' Br. at 23). The

deposition testimony of Beck was that Simeone had not allowed him to "finish this project for him and complete my whole contract"; and that after being billed a "balance that was due of $14,383.51," Simeone tendered the check for $6,500" with the notation "framing final payment." (App. 371). Beck testified that he accepted it as "a final payment," and when asked whether it was "a final settlement in regard to everything though," Beck answered, "No, ma'am, because I didn't get to finish." *Id.* Hence, Beck did not testify as stated by Bova and Simeone, and their argument did not establish a genuine issue of material fact.

The designated evidence established that the parties had a dispute as to the amount due and owing. Despite Simeone's having ordered Beck off the job site and his belief that Beck owed him money, Simeone tendered to Beck a check for $6,500.00 -- when Beck had billed him for more than $14,000.00; Simeone wrote "final framing payment" on the check; and Beck accepted it. The designated evidence established as a matter of law that there had been an accord and satisfaction. Therefore, as the judgment order held, Simeone was "barred by operation of law from further pursuing Beck for his alleged inferior work." (App. 38).

2. Summary Judgment to Schreiber on Bova's Counterclaim

Bova and Simeone next argue that the trial court erred when it granted summary judgment to Schreiber on Bova's claims for breach of contract. Apparently conceding that Bova had no contractual relationship with Schreiber,[3] they argue the "undisputed"

[3] According to designated portions of Bova's deposition, she "never met" Barber until litigation commenced. (App. 385). Further, she "never signed anything" like a contract with Schreiber with respect to construction of the duplex. (App. 384). She never had "any discussions" with Barber "regarding how the home was to be built," and

fact that Simeone "was an agent for Bova." Appellants' Br. at 25. Unfortunately, such constitutes the entirety of their appellate argument.

We read the amended complaint and counterclaim of Bova and Simeone to assert as co-plaintiffs various claims against Schreiber. They jointly "pray[ed]" for judgment against Schreiber "in their favor in a sufficient amount to provide full, fair and adequate compensation for all damages resulting from the conduct of Schreiber . . . for failing to deliver proper quality building supplies . . . ." (App. 114). When summary judgment was granted to Schreiber as to Bova's breach of contract claim, it was denied as to Simeone's claims for breach of contract, negligence and breach of warranty.

We affirm unless the appellant shows "both error and that the error was 'prejudicial to the party complaining.'" *Cox v. Anderson*, 801 N.E.2d 775, 779 (Ind. Ct. App. 2004) (quoting *Mathews v. Droud*, 114 Ind. 268, 16 N.E. 599, 600, (1888)). Discerning no basis upon which to find that Bova suffered prejudice, we find no error in the summary judgment to Schreiber on Bova's breach of contract claim.

3. Sufficiency of the Evidence

Finally, Bova and Simeone argue that the trial court's judgment "is not supported by the evidence." Appellants' Br. at 26. They cite the standard of review for a trial court's findings of fact and conclusions thereon pursuant to Trial Rule 52(A): "whether the evidence supports the findings and whether the findings support the judgment." *Berkel & Co. Contractors v. Palm & Assoc.*, 814 N.E.2d 649, 658 (Ind. Ct. App. 2004).

Barber did not make "any representation to [her] about what could or could not be done" in the construction of the home. *Id.*

In *Berkel*, the "findings of fact and conclusions . . . pursuant to Ind. Trial Rule 52" were issued upon "a motion by Berkel." *Id.* However, there appears to have been no request for such here. *See* T.R. 52(A) ("Upon . . . written request of any party filed with the court prior to the admission of evidence, ..."). Where there is no such request, and the trial court elects *sua sponte* to make partial findings of fact and conclusions of law, we apply the provision of Trial Rule 52(D), to wit:

> . . . findings of fact with respect to issues upon which findings are not required shall be recognized as findings only upon the issues or matters covered thereby and the judgment or general findings, if any, shall control as to the other issues or matters which are not covered by such findings.

Ransburg v. Kirk, 509 N.E.2d 867, 871 (Ind. Ct. App. 1987) (quoting T.R. 52(D)).

Here, after stating that the trial court "finds as follows," the judgment order then articulates testimony and matters as to the "bench trial on issues" before ordering Simeone to "pay Schreiber" $8,564.29 and interest, and that Bova and Simeone "take nothing" by way of their claims. (Tr. 32, 38). The judgment order contains no denominated "conclusions of law." We hold that in this case, based upon the record and the order appealed, what we have before us is essentially a general judgment. On appeal, a general judgment may be affirmed on any theory supported by the evidence presented at trial. *Borovilos Rest. Corp. II v. Lutheran University Ass'n, Inc.*, 920 N.E.2d 759, 764 (Ind. Ct. App. 2010), *trans. denied*.

When reviewing a claim of insufficient evidence in a civil case, we will affirm when "considering the probative evidence and reasonable inferences, a reasonable [trier of fact] could have arrived at the same determination." *TRW Vehicle Safety Systems, Inc.*

and Ford Motor Co. v. Moore, No. 73A05-0710-CV-522 *3 (Ind. Oct. 13, 2010). We neither weigh the evidence nor judge witness credibility but consider only the evidence and inferences most favorable to the judgment. *Id.* We will reverse only if there is a lack of evidence or evidence from which a reasonable inference can be drawn on an essential element of the claim asserted. *Id.*

The trial court noted, and Bova and Simeone do not challenge, that Schreiber and Simeone had "a contractual relationship . . . whereby Simeone agreed to purchase lumber for consideration"; that "evidence . . . at trial . . . established that Simeone ordered and agreed to pay for lumber . . . supplied by Schreiber"; and that Schreiber supplied a grade and quality of lumber consistent" with that specified on the material take-off that was provided Simeone and "reviewed" by him. (App. 32). It also noted Simeone's admission that he inspected the trusses delivered to the job site before they were installed, and had written "okay" on the truss drawings, "thus approving the trusses." *Id.* at 33. It further noted Simeone's admission that when he discovered the trusses supplied did not allow the bricking he desired, he instructed a Beck worker how to install framing that would allow the bricking – but Beck's workers did not follow his instruction. The trial court found "no evidence . . . that Schreiber knew of, or had any role in, the installation of the trusses by Beck's crew," and that the trusses still remain part of the structure. *Id.* Finally, it found the evidence "established" that Simeone owed Schreiber a balance of $8,564.29, with interest accrued pursuant to "[t]he contractual agreement between Simeone and Schreiber." *Id.* Thus, the evidence supports the judgment for Schreiber on its breach of contract claim against Simeone.

Bova and Simeone argue that the trial court erroneously granted Schreiber its "full contractual damages" because Schreiber failed to honor the implied warranties of merchantability and fitness for a particular purpose. Appellants' Br. at 40 (citing I.C. §§ 26-1-2-314 and -315). They assert that the trusses provided "were clearly not in merchantable condition." *Id.* at 42. However, Simeone did not testify as to having found any defect in the trusses upon delivery. Bova and Simeone cite an expert's testimony of some sagging in the roof, but this was after Simeone had modified some of the trusses. They next assert the flooring system "was not properly designed and required remedial measures." *Id.* However, the expert opined that the designed flooring system, with the header as advised by May and noted on the plan by Barber, "was perfectly fine for this house." (Tr. 287).

Bova and Simeone also present a series of challenges to what they argue are "clearly erroneous and/or not true findings." Appellants' Br. at 27. Although not expressed (or organized) as such, their arguments appear directed toward their ultimate claim that they are entitled to a "set-off" against Schreiber for its "assumed duty" of "design[ing] a floor system and . . advis[ing] on the feasibility of constructing an attic," based on its "superior knowledge on these matters," and their claims for "breach of warranty and breach of contract." *Id.* at 46. On these claims, as co-plaintiffs, Bova and Simeone bore the burden of proof. Thus, they are appealing from a negative judgment and must

> demonstrate that the trial court's judgment is contrary to law. A judgment is contrary to law only if the evidence in the record, along with all reasonable inferences, is without conflict and leads unerringly to a

> conclusion opposite that reached by the trial court. In conducting the review, we cannot reweigh the evidence or judge the credibility of any witness, and must affirm the trial court's decision if the record contains any supporting evidence or inferences.

Borovilos, 920 N.E.2d at 764 (quoting *Infinity Products, Inc. v. Quandt*, 810 N.E.2d 1028, 1031-32 (Ind. 2004)).

They challenge various "findings" by the trial court, essentially asking that we reweigh evidence and assess witness credibility, which we cannot do. *Id.* Bova and Simeone emphasize Barber's role in recommending the truss and flooring systems, and they characterize such as an assumption of a duty in this regard by Schreiber. However, they provide no authority for their implicit proposition that as a matter of law, the facts here – including Simeone's experience and undisputed status as the general contractor for construction of the duplex – established a duty by Schreiber and its breach thereof.

We do not find that the evidence at trial was without conflict and led unerringly to the conclusion that Schreiber was liable to Bova and Simeone under a theory of negligence, breach of contract, or breach of warranty. *Borovilos*, 920 N.E.2d at 764. Therefore, Bova and Simeone have not demonstrated that the trial court's judgment order was contrary to law. *Id.*

We affirm.

MAY, J., and BROWN, J., concur.