

Commonwealth Of Kentucky

Court Of Appeals

NO. 1997-CA-002285-MR

JAMES D. MCNEVIN, and
KIM MCNEVIN

APPELLANTS

v. APPEAL FROM HARDIN CIRCUIT COURT
HONORABLE HUGH ROARK, JUDGE
ACTION NO. 95-CI-001467

DEAN PEARMAN, d/b/a PEARMAN
BROTHERS & SONS, and
RICHARD PEARMAN

APPELLEES

OPINION
REVERSING AND REMANDING
** **

BEFORE: EMBERTON, KNOFF AND KNOX, JUDGES.

KNOX, JUDGE: Appellants, James and Kim McNevin (the McNevins), appeal an order of the Hardin Circuit Court dismissing their complaint with prejudice upon appellees' (collectively "Pearman") motion for summary judgment. Having reviewed the record and applicable law, we reverse and remand.

In May 1994, the McNevins entered into a contract with Dean Pearman for the construction of a new home. The contract called for a completion cost of \$216,375.00, inclusive of materials and labor completion cost. Sometime shortly after executing the contract, Pearman commenced construction on the

project. Several months later, the parties began disputing with regard to the McNevins' dissatisfaction with the quality of Pearman's workmanship, and Pearman's irritation with the McNevins' failure to finance the construction costs as such costs were incurred. In September or October 1994, Pearman ceased performing under the contract. The record does not adequately reflect whether the termination of performance was the result of a unilateral or bilateral breach of contract.

In January 1995, Pearman filed a mechanic's lien upon the McNevins' property, stating a claim in the amount of \$34,200.00 for labor and materials expended prior to his having ceased performance under the contract. In turn, the McNevins filed a complaint against Pearman alleging, inter alia, breach of contract. Pearman counterclaimed, similarly seeking damages for breach of contract.

On April 11, 1997, Pearman moved the trial court for summary judgment. Suffice it to say that several hearings on the summary judgment motion were scheduled, then rescheduled, until Pearman renewed his motion on August 27, 1997. The trial court entered its order dismissing the McNevins' complaint with prejudice on September 4, 1997.

"The standard of review on appeal of a summary judgment is whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law." Furthermore, the trial court must view the evidence in a light most favorable to the party opposing the summary judgment motion, and summary judgment should be granted only if it "appears impossible for the nonmoving party to produce evidence at trial warranting a judgment in his favor."

Leslie v. Cincinnati Sub-Zero Prod., Inc., Ky. App. 961 S.W.2d 799, 804 (1998) (citations omitted). In reviewing the propriety of a judgment as a matter of law there is no requirement that the appellate court defer to the trial court since the factual findings are not at issue. Goldsmith v. Allied Bldg. Components, Inc., Ky., 833 S.W.2d 378 (1992). We believe the record is entirely too denuded of sufficient facts in order to ascertain whether any genuine issues even exist. Principally, we believe the issue of damages alone has been inadequately addressed by the parties, hence, rendering the matter unripe for summary judgment.

Both below and on appeal, the McNevins argue the contract was a "lock and key" arrangement whereby Pearman would be paid the entire contract amount upon completion of construction. On the other hand, Pearman contends he was to receive progress payments at particular stages of construction. The contract itself is silent concerning any payment provision. It is our opinion the nature of the contract payment terms gives rise to an issue of material fact since it would assist in identifying the breaching party. Once the party in breach is known, the issue of damages can be undertaken.

Pearman, citing Graves v. Winer, Ky., 351 S.W.2d 193 (1961), asserts the proper measure of damages is "the difference between the contract price and the actual value of land." Application of Graves is misplaced. Graves addresses the measure of damages with respect to a breach of contract for the sale of land. Under the sale scenario "the quantum of damages is the difference between the contract price and the actual value of the

land on the date of the breach, provided the actual value is less than the contract price.'" Id. at 195. (Citations omitted).

Obviously, Graves is unsuitable to the matter sub judice.

Similarly, the McNevin's' position is that the measure of damages is the difference between the value of the home as constructed and the value it would have retained had it been constructed according to the contract. While Totten v. Stewart, Ky., 286 S.W.2d 539 (1955), does state this general principle, more is involved.

The effect of a building contract is to make the contract price the measure of the value of the work as done according to the terms. That is the true measure of recovery by the contractor less the damage sustained by a failure to perform the contract, as by not completing it or doing defective work. The usual and often approved measure of the owner's damages where there has been a failure of substantial performance of the contract, as distinguished from defects that are remedial at a reasonable cost without doing the work over, is the difference between the value of the building as constructed and its value had it been constructed according to the contract. This same measure [has been] expressed . . . as being the difference between the value of the house the owner got and the house he should have had.

Id. at 541-42. (Citations omitted).

In other words, under the doctrine of substantial performance,

a builder, upon substantial performance, is entitled to recovery of the contract price notwithstanding the work may have been defective or incomplete. The remedy of the owner is the recovery of damages on account of incomplete or defective work.

Meador v. Robinson, Ky., 263 S.W.2d 118 (1953) (citation omitted). See also Shreve v. Biggerstaff, Ky. App., 777 S.W.2d 616, 618 (1989). Conversely, the owner's damages where there has been a failure of substantial performance of the contract, as distinguished from defects that are remedial at a reasonable cost without doing the work over, is the difference between the value of the building as constructed and its value had it been constructed according to the contract terms. Totten, 286 S.W.2d at 541-42.

Our review of the record indicates there is insufficient information to ascertain the status of the contract at the time of breach or the actual circumstances giving rise thereto. These many unanswered facts render this action inappropriate for summary judgment.

Accordingly, for the reasons above-stated, the judgment of the Hardin Circuit Court is reversed and remanded.

ALL CONCUR.

BRIEF FOR APPELLANTS:

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