RENDERED: MAY 16, 2003; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NOS. 2002-CA-000650-MR & 2002-CA-000941-MR

DANIEL L. HEER — APPELLANT/CROSS-APPELLEE

v.

APPEAL AND CROSS-APPEAL FROM CHRISTIAN CIRCUIT COURT
HONORABLE JOHN ATKINS, JUDGE
ACTION NO. 97-CI-01143

DEBORAH GAMBLIN TOMBERLIN AND
RICHARD TOMBERLIN — APPELLEES/CROSS-APPELLANTS

OPINION
AFFIRMING
** ** ** ** **

BEFORE: DYCHE, HUDDLESTON, AND KNOPF, JUDGES.

KNOPF, JUDGE: In August 1996, Daniel Heer purchased a house and lot in Hopkinsville from Deborah Gamblin (now Deborah Tomberlin). The purchase agreement included Gamblin's promise to correct a moisture problem in the basement crawl space as well as her warrant that the house was free of defects in materials and workmanship. The parties closed their transaction September 6, 1996. Because at that time the crawl space still leaked and did not drain well, Gamblin renewed her promise to

fix it “no later than September 15, 1996.” Gamblin was relying for repairs on the builder of the house, Richard Tomberlin, from whom she had purchased it. In mid-October 1996, with the crawl-space problem still not resolved, Tomberlin himself promised Heer to address it as well as other problems Heer had discovered since moving in. The crawl-space problem proved intractable, however, and Heer was dissatisfied with other of Tomberlin’s repairs, so on December 11, 1997, he filed suit against both Gamblin and Tomberlin and sought an order compelling them to provide the house they had allegedly contracted to provide.

On February 18, 1999, the trial court canceled the upcoming jury trial and referred the parties to arbitration. Construction Arbitration Services convened a hearing at the Heer residence on July 8, 1999. Heer alleged some fifty-four defects in the house. The arbitrator viewed the alleged defects and in early August ordered some twenty-four repairs, including repair of the crawl space, of improperly installed foundation anchor bolts, of the improperly graded patio, and of the entryway’s poorly-finished and ill-fitting hardwood floor. Tomberlin objected to certain aspects of the arbitrator’s award, and by letter dated September 17, 1999, the arbitrator overruled the objections pertinent to this appeal.

On October 27, 1999, Heer moved the circuit court to confirm the award. He also requested leave to hire someone

other than Tomberlin to make the repairs. The court confirmed the award, but assigned the repairs to Tomberlin, which assignment the award seems to contemplate. There ensued nearly two years of bickering over the adequacy of Tomberlin's efforts. The upshot was a hearing on December 10, 2001, at which Heer sought damages to effect repairs awarded at arbitration but, he claimed, never provided by Tomberlin. By judgment entered February 28, 2002, the circuit court awarded Heer a total of $16,500.00, including $5,000.00 for attorney fees. Both parties have appealed; Heer contends that the award is inadequate, Tomberlin that it is excessive. For the reasons that follow, we affirm.

KRS 417.180 provides that once an arbitration award has been confirmed, it may be enforced like a judgment. We shall assume, inasmuch as the parties have not raised the question, that a monetary award such as the one at issue is an appropriate means to enforce an award of specific performance that the defendant has proved either unable or unwilling to satisfy.[1] This Court's review of damage awards, of course, is deferential. We attempt not to reweigh the evidence, but only

[1] *See* CR 70 and *cf.* Columbia Gas Transmission Corporation v. Mangione Enterprises of Turf Valley, 964 F. Supp. 199 (D.C. D. Md. 1996).

to ensure that substantial evidence supports the fact-finder's determinations.[2] The trial court's findings meet this standard.

Heer contends that the court erred by awarding $7,500.00 to correct the crawl-space problem when one of his experts testified that it would cost nearly twice as much to install a subsurface exterior drain system guaranteed to keep water out. The same expert testified, however, that a less expensive interior system would more than adequately control moisture in the crawl space. Heer's other expert testified, moreover, that exterior drains would not help much because Heer's problem was surface-water drainage, not sub-surface infiltration. This evidence substantially supports the trial court's finding that Heer can meaningfully address the crawl-space problem for $7,500.00.

Heer next contends that the court awarded too little for repairs to the wood floor. The arbitrator referred only to mis-spaced boards in the entry way, but Heer maintains that, since the arbitration, excessive moisture in the crawl space has essentially ruined the entire floor. He sought nearly $4,000.00 to have both the floor and the subfloor replaced. The court awarded $1,500.00. There was testimony contrary to Heer's that repairs to the subfloor would not be required and that $1,500.00

[2] Cole v. Gilvin, Ky. App., 59 S.W.3d 468 (2001).

would purchase ample replacement flooring for the entryway and other damaged areas. This testimony adequately sustains the court's award.

The arbitrator noted that foundation anchor bolts along the back of the house had been mis-installed between the foundation and the brick facia rather than within the foundation wall. Tomberlin addressed this problem by installing nineteen metal straps within the back foundation wall and attaching them to a new sill plate. The trial court deemed this repair adequate and so awarded Heer nothing for anchor bolts. Heer contends that anchor bolts would have been better than straps and that Tomberlin mis-installed the straps as well. Heer did not introduce expert testimony on this issue or in any other way adequately establish that the strap installation violated local standards. He conceded that straps sometimes substitute for anchor bolts, and it was apparent that anchor bolts could not be installed without first breaking holes in the foundation wall or attaching them to the floor in an unconventional manner. The trial court did not err by deeming the straps an acceptable response to the arbitration order.

Finally, Heer contends that the trial court awarded too small an attorney fee. He bases his claim on a "reasonable fee" provision of the purchase agreement. Heer sought a fee of approximately $20,000.00, but the court awarded $5,000.00. Not

only was the award too small, Heer contends, but the court did not adequately account for it despite Heer's motion pursuant to CR 52.04 for additional explanation. Heer correctly notes that CR 52.01 requires the court, on issues tried without a jury, to "find the facts specifically and state separately its conclusions of law thereon." The trial court's conclusory attorney-fee ruling made no pretense of complying with this rule.

Nevertheless, we are mindful that a principal reason for CR 52.01 is to ensure an adequate record for subsequent review. When meaningful review is possible notwithstanding a trial court's noncompliance with the rule, the reviewing court may waive the requirement.[3] Meaningful review is possible here notwithstanding the lack of findings in large part because the scope of our review is limited. A trial court enjoys broad discretion to determine a "reasonable" attorney fee; its award will not be overturned if there is any reasonable basis for it.[4] Although the amount of attorney fees need not in all circumstances bear any particular relationship to the

[3] Clark Mechanical Contractors v. KST Equipment Company, Ky., 514 S.W.2d 680 (1974).

[4] Capitol Cadillac Olds, Inc. v. Roberts, Ky., 813 S.W.2d 287 (1991).

plaintiff's recovery,[5] the size of the recovery is an important factor the trial court is entitled to consider, especially where, as here, the parties are of roughly equal standing and no public policy favors the plaintiff's access to litigation. The trial court's fee award amounted to about a third of Heer's total recovery. Limiting the fee to a third of the benefit the attorney provided was not an abuse of the trial court's discretion.

By way of cross-appeal, Tomberlin contends that the court should have awarded Heer nothing to repair the hardwood floor. Following the arbitration, Tomberlin applied filler to gaps in the flooring, and that, he maintains, is all the arbitration award required. Heer insists that the gaps in the floor are still unsightly and that in several areas the finish has deteriorated and the surface has detached from the subfloor. The trial judge visited the residence and determined that the floor did not yet satisfy the arbitrator's award. This Court is in no position to gainsay that determination.

Tomberlin also contends that the court erred by awarding Heer an amount to replace the patio. Apparently the patio drains toward the foundation and thus is apt to contribute to the crawl space problem. Tomberlin maintains that even if the patio does drain into the crawl space, installation of the

[5] Meyers v. Chapman Printing Company, Ky., 840 S.W.2d 814 (1992).

contemplated crawl-space drainage system will make the patio problem moot. We agree with the trial court, however, that Heer is entitled to a properly installed patio, one that works for, not against, a dry house.

At one point during the struggle to solve the crawl-space problem, the trial court ordered Tomberlin to consult an engineer. The court assigned the engineer's fee to Tomberlin as part of the action's costs. Tomberlin contends, without citation to a legal standard, that the fee is excessive and that the court abused its discretion by upholding it. We disagree. The trial court has discretion to make use of extraordinary services and to include their expense in the award of costs.[6] The court did not abuse its discretion by ordering Tomberlin to get help with the crawl-space problem, when, after nearly four years of trying, he had proved incapable of solving it alone. Testifying at the December 10, 2001, hearing, the engineer described his efforts inspecting and conducting tests at the Heer residence and drafting his report. The fee awarded, considerably less than the fee the engineer sought, is consistent with that testimony. The trial court did not abuse its discretion by assigning this fee to Tomberlin.

Finally, Heer claimed that Tomberlin's failure to make timely repairs resulted in various consequential or supplemental

[6] CR 54.04.

damages. The trial court essentially dismissed this portion of the claim as "not countenanced in our case or statutory law." Tomberlin asks us to rule that this dismissal precludes Heer from seeking similar damages in a companion suit predicated on Tomberlin's alleged fraud. This we may not do. The general rule, of course, is that courts are not authorized to give advisory opinions.[7] The preclusive effect, if any, of the trial court's ruling in this case will be for the trial court to determine when and if it is confronted by a subsequent claim, a claim concrete rather than hypothetical. This Court will then be available for review of that determination.

Neither party having shown that the Christian Circuit Court erred or abused its discretion in enforcing the appellant's arbitration award, we affirm that court's judgment of February 28, 2002.

ALL CONCUR.

BRIEFS FOR APPELLANT/CROSS-APPELLEE:	BRIEF FOR APPELLEES/CROSS-APPELLANTS:
Kenneth W. Humphries Hopkinsville, Kentucky	David L. Cotthoff Fletcher, Cotthoff, Willen & Redd Hopkinsville, Kentucky

[7] Philpot v. Patton, Ky., 837 S.W.2d 491 (1992); Sullivan v. Tucker, Ky. App., 29 S.W.3d 805 (2000).