RENDERED: NOVEMBER 14, 2003; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2001-CA-002572-MR

MELBA COWAN — APPELLANT

v.

APPEAL FROM CRITTENDEN CIRCUIT COURT
HONORABLE TOMMY W. CHANDLER, JUDGE
ACTION NO. 98-CI-00054

ONTRACT, INC., D/B/A
BLITZ BUILDERS, INC. — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: DYCHE, JOHNSON AND SCHRODER, JUDGES.

JOHNSON, JUDGE: Melba Cowan has appealed from an order of the Crittenden Circuit Court entered on August 17, 2001, granting the appellee's motion for summary judgment. Having concluded that the trial court did not err in granting the motion for summary judgment, we affirm.

On or around March 5, 1998,[1] Cowan and Ontract, Inc.,

[1] In Cowan's complaint filed with the trial court, he lists March 5, 1998, as the approximate date of the contract. Similarly, in Blitz's brief to this Court, it states the date of the contract as being March 5, 1998. However,

d/b/a Blitz Builders, Inc. (Blitz), entered into a contract which called for Blitz to construct a metal-sided building on land owned by Cowan.[2] The building was completed on March 12, 1998, and Cowan signed a "Building Completion Certificate" on that same day. Around three weeks after the building was completed, Cowan claims that he first noticed defects in the building's construction. According to Cowan, "the metal had started to crimp all along one side of the building, about 19" from the bottom," and the roof panels were "about 6" too short," which allowed rain and sunlight to pour through. Cowan further claims that representatives from Blitz agreed to repair the alleged defects in the building, but the repairs were never made.

On July 20, 1998, Cowan filed his complaint in the Crittenden Circuit Court, alleging: (1) that Blitz failed to construct the building in a workmanlike manner; (2) that Blitz failed to use materials reasonably suited for the intended purposes; (3) that Blitz failed to repair the defects under the warranty as promised; and (4) that Blitz's actions constituted a

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in Cowan's brief to this Court, he lists the date of the contract as occurring a year earlier on March 5, 1997. Similarly, a "Building Completion Certificate" and what appears to be a customer satisfaction survey indicate that the contract was entered into on or around March 5, 1997. As neither party has taken issue with these discrepancies, we proceed on the assumption that the date of the contract as listed in Cowan's complaint is correct.

[2] According to Cowan's brief, the purpose of the building was to aid Cowan in his hobby of housing and raising "unusual" animals, such as emus, miniature horses, pea fowl, geese, turkeys, sporting fowl, and donkeys.

violation of Kentucky's Consumer Protection Act.[3] On August 14, 1998, Blitz filed its answer and denied all of the material allegations in Cowan's complaint.

Following the filing of Blitz's answer, the case was dormant until October 11, 1999, when the trial court entered a notice to dismiss for lack of prosecution pursuant to CR[4] 77.02(2). Thereafter, per Cowan's request, the trial court permitted the case to remain on the active docket. However, no further action was taken by Cowan to move the case forward. On August 2, 2000, the trial court entered an order stating that the case would be dismissed on October 17, 2000, unless "good cause" could be shown to keep the case on the docket. On October 5, 2000, Cowan filed a motion to set a date for trial. The trial court granted Cowan's motion and scheduled a bench trial for November 16, 2000. On November 3, 2000, Blitz filed a motion objecting to the scheduled trial date. No response was filed by Cowan, and on November 21, 2000, the trial court vacated its order scheduling a bench trial for November 16, 2000, "until either party moves to reset this action for trial or until further order of [the court]."

Approximately seven months later, on June 18, 2001, Blitz filed a motion for summary judgment. In Blitz's

[3] See Kentucky Revised Statutes (KRS) 367.170.

[4] Kentucky Rules of Civil Procedure.

memorandum in support of its motion for summary judgment, it argued, inter alia, that Cowan "has not produced even a scintilla of evidence" to support the allegations in his complaint. In addition, Blitz filed two documents signed by Cowan, which indicated that he was satisfied with the building after its completion. Blitz also filed an affidavit from Doug Bolin, Blitz's construction superintendent for the Cowan project, who stated (1) that the building materials were not damaged; (2) that the building was constructed in a workmanlike manner; (3) that Cowan seemed satisfied with the work upon completion; and (4) that Cowan admitted to damaging a portion of the building with his tractor and hay wagon.

On August 17, 2001, after Cowan did not file a response to Blitz's motion for summary judgment, the trial court granted Blitz's motion. On August 28, 2001, Cowan filed a motion to alter, amend or vacate the trial court's order granting Blitz's motion for summary judgment. Attached to this motion was an affidavit from Cowan, which supported the claims made in his complaint.

Blitz responded to Cowan's motion, and argued that summary judgment was proper because, among other things, Cowan had failed to file a response to its motion for summary judgment within the time period provided in the local rules. On October

25, 2001, the trial court entered an order denying Cowan's motion to alter, amend or vacate.[5] This appeal followed.

Cowan argues that the trial court erred in denying his motion to alter, amend or vacate the order granting summary judgment. Specifically, Cowan argues:

> After the [s]ummary [j]udgment was entered, [Cowan] filed a [m]otion to [v]acate with an affidavit from [Cowan], stating his position on the issues. Apparently, this affidavit was ignored by the [t]rial [c]ourt.

Thus, Cowan argues that his affidavit was filed in a timely manner and should have been considered by the trial court in ruling on Blitz's motion for summary judgment. We disagree.

Rule 13 of the Local Rules of the Fifth Judicial Circuit[6] reads in full as follows:

> Local Rule 13 SUMMARY JUDGMENT
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> Motions for summary judgment shall not be noticed for hearing, but shall be accompanied by a memorandum of law supporting the motion. Opposing memoranda may be submitted within thirty (30) days with fifteen (15) days allowed for reply, after which the motion will stand submitted. The Court will consider any party's request for oral argument or may request same on its own [emphasis added].[7]

[5] The trial court's order denying Cowan's motion to alter, amend or vacate does not state the grounds upon which the motion was denied.

[6] The Fifth Judicial Circuit is comprised of Crittenden, Union, and Webster Counties. The Local Rules for the Fifth Judicial Circuit were approved by an order of the Supreme Court of Kentucky on June 10, 1998.

[7] See Rules of the Supreme Court (SCR) 1.040(3). SCR 1.040(3) provides that the chief judge of each judicial circuit shall:

In the case sub judice, it is not disputed that Cowan failed to file a response to Blitz's motion for summary judgment within the 30-day deadline set by the local rules. Further, Cowan has not argued that Local Rule 13 is invalid or that the rule was not binding upon him. Accordingly, the trial court was under no obligation to consider Cowan's supporting affidavits which were submitted after the time period for responding to a motion for summary judgment had expired.

We now turn to the issue of whether the trial court erred in granting Blitz's motion for summary judgment. Summary judgment is only proper "where the movant shows that the adverse party could not prevail under any circumstances."[8] The trial court must view the record "in a light most favorable to the

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> (a) Prepare with the assistance of appropriate committees such proposed local rules as are consistent with the Rules of Civil Procedure, Rules of Criminal Procedure, and Rules of the Supreme Court, and as are required to expedite and facilitate the business of the court, including the establishment of times for conducting regular sessions of the court within the circuit or district; submit such proposed rules for consideration by the judges of the circuit or district and, upon tentative approval by a majority of such judges, have the proposed rules published and submitted to the local bar and circuit court clerk(s) for consideration and recommendations; and after a majority of the judges have finally recommended the rules, submit copies to the Chief Justice for review and final approval. No local rules shall be of binding effect unless in writing, approved by the Chief Justice, and filed with the Supreme Court Clerk who shall compile such rules and make them available for general distribution.

[8] Steelvest, Inc. v. Scansteel Service Center, Inc., Ky., 807 S.W.2d 476, 480 (1991) (citing Paintsville Hospital Co. v. Rose, Ky., 683 S.W.2d 255 (1985)).

party opposing the motion for summary judgment and all doubts are to be resolved in his favor."[9] However, "a party opposing a properly supported summary judgment motion cannot defeat that motion without presenting at least some affirmative evidence demonstrating that there is a genuine issue of material fact requiring trial."[10] This Court has previously stated that "[t]he 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. There is no requirement that the appellate court defer to the trial court since factual findings are not at issue" [citations omitted].[11] In the case at bar, we conclude that Blitz was entitled to summary judgment on all of the allegations made in Cowan's complaint.

As we previously mentioned, Cowan made the following claims in his complaint: (1) that the building was not constructed in a workmanlike manner; (2) that the materials used were not reasonably suited for the intended purposes; (3) that Blitz failed to repair the defects under the warranty as

[9] Steelvest, 807 S.W.2d at 480 (citing Dossett v. New York Mining & Manufacturing Co., Ky., 451 S.W.2d 843 (1970)).

[10] Hubble v. Johnson, Ky., 841 S.W.2d 169, 171 (1992)(citing Steelvest, supra at 480).

[11] Scifres v. Kraft, Ky.App., 916 S.W.2d 779, 781 (1996).

promised; and (4) that Blitz's conduct constituted a violation of Kentucky's Consumer Protection Act.

In support of its motion for summary judgment, Blitz submitted a "Building Completion Certificate" and a customer satisfaction survey, both of which were signed by Cowan. In these documents, Cowan stated that the construction was completed in accordance with the purchase agreement, that the roofing and siding had been inspected, and that the roof, siding, doors, and roof trusses were completed in "good" condition. Doug Bolin, Blitz's construction superintendent for the Cowan project, also stated in his affidavit that the building materials were not damaged and that the construction was done in a workmanlike manner. Further, in what appears to be his own handwriting, Cowan stated on the customer satisfaction survey that "I had about 10 people to come look at [the building.] They sure like it[.]" This evidence proffered on behalf of Blitz was not timely rebutted by Cowan. Hence, Cowan has failed to timely present any affirmative evidence opposing Blitz's properly supported motion for summary judgment which would demonstrate a genuine issue of material fact. Accordingly, we affirm the granting of summary judgment in favor of Blitz on these issues of whether the building was constructed in a workmanlike manner and whether the materials used were suited for the intended purposes.

Next, Bolin stated in his affidavit that after Cowan complained of damage to the building, Bolin inspected the building and opined that the damage was probably done by Cowan's livestock. Further, Bolin stated that Cowan admitted to damaging a portion of the building with his tractor and hay wagon. Once again, this evidence was not timely rebutted by Cowan. Hence, even if Blitz had at one time promised to repair the alleged defects in the building, Bolin believed, based on his inspection, that there were no defects for which Blitz would be liable. Accordingly, Blitz was entitled to summary judgment on the issue of whether Blitz failed to make any repairs as promised.

Finally, in Craig v. Keene,[12] this Court held that homeowners could not maintain a cause of action against a homebuilder under the Consumer Protection Act for alleged fraudulent conduct. Similarly, the Consumer Protection Act does not provide a cause of action for Cowan against Blitz as the builder of his metal building. Thus, since there are no genuine issues of material fact, Blitz was entitled to judgment as a matter of law on Cowan's Consumer Protection Act claim.

Based on the foregoing, the order of the Crittenden Circuit Court is affirmed.

[12] Ky.App., 32 S.W.3d 90, 91 (2000)(stating that "we do not believe that the Kentucky Consumer Protection Act applies to real estate transactions by an individual homeowner").

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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