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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2004-CA-001898-MR
AND
NO. 2004-CA-001999-MR

B.G. JESSUP BUILDERS, LLC;
GARY JESSUP; BYRON JESSUP;
AND WANDA JESSUP

APPELLANTS/CROSS-APPELLEES

APPEAL AND CROSS-APPEAL FROM FAYETTE CIRCUIT COURT
v. HONORABLE JOHN R. ADAMS, SPECIAL JUDGE
ACTION NO. 03-CI-02985

MICHAEL J. KRUSZEWSKI
AND SANDRA K. KRUSZEWSKI

APPELLEES/CROSS-APPELLANTS

OPINION AND ORDER
(1) AFFIRMING IN PART,
REVERSING IN PART,
AND REMANDING
(2) DENYING MOTION TO STRIKE

** ** * * *

BEFORE: BARBER, HENRY, AND KNOPF, JUDGES.

KNOPF, JUDGE: B.G. Jessup Builders, LLC, Gary Jessup, Byron L. Jessup, and Wanda Jessup (collectively, Jessup Builders) appeal from a judgment of the Fayette Circuit Court denying its claim for damages against Michael J. Kruszewski and Sandra K. Kruszewski (the Kruszewskis) for breach of a construction

contract. The Kruszewskis cross-appeal from this judgment. Jessup Builders contends that the trial court erred by finding that both parties breached their obligations under the contract. Jessup Builders asserts that the Kruszewskis breached the contract, and therefore it was entitled to damages from them. We find that the trial court's findings and conclusions were supported by substantial evidence and were not clearly erroneous. However, we agree with Jessup Builders that the trial court's findings did not support the award of damages to the Kruszewskis beyond return of their down-payment. Hence, we affirm in part, reverse in part, and remand for entry of a new judgment.

On September 8, 2002, the Kruszewskis entered into a "Construction and Purchase Agreement" with Jessup Builders. The Agreement provided that Jessup Builders would construct a home for the Kruszewskis on a lot in the Beaumont subdivision in Fayette County, Kentucky. The Kruszewskis made a down-payment of \$113,850.00, and agreed to pay the balance of the \$759,000.00 purchase price upon completion of the house. Under the Agreement's "Addition Provisions" section, there was a reference to an "Addendum to Contract Dated September 9, 2002 Between Builder & Buyer." The parties agree that the addendum was to incorporate the plans and specifications for construction of the

house. However, the addendum form was never completed or executed by the parties.

Nevertheless, construction on the house began in the fall of 2002 and continued until April of 2003. The parties reached an impasse during the spring of 2003 when Jessup Builders informed the Kruszewskis that it could not proceed further with construction unless the Kruszewskis executed change orders and agreed to pay additional amounts. Jessup Builders contends that the Kruszewskis failed to make timely decisions necessary to complete construction, and that the Kruszewskis' choices of building materials and features substantially increased the cost of construction. The Kruszewskis took the position that the items were included in the purchase price and declined to execute the change orders. Thereafter, Jessup Builders ceased construction work on the house.

On July 18, 2003, after unsuccessful attempts at mediation, the Kruszewskis brought this action against Jessup Builders. The Kruszewskis alleged that Jessup Builders had breached the contract by ceasing construction, and sought specific performance and other damages. The Kruszewskis also filed a *lis pendens* notice against the property. Jessup Builders denied the breach of contract in its answer, and also asserted a counterclaim against the Kruszewskis for breach of contract.

The matter proceeded to a bench trial on December 17, 2004. Jessup Builders initially argued that no valid and enforceable contract existed because the parties failed to execute the plans and specifications addendum. In its findings of fact, conclusions of law and order entered on March 3, 2004, the trial court rejected this argument, finding,

The statute of frauds is satisfied by the cumulative evidence of the existence of the contract, including, but not limited to the existence of a four (4) page signed writing that reasonably specifies the parties' mutual promises. The conduct of the Defendants [Jessup Builders] from and after the date of the making of the contract estops Defendants from denying the existence of the contract. The Court finds that Defendants were the drafters of the contract and failed in their obligation to complete the preparation of the contract's addendum.

The trial court found that the evidence supported both parties' claims of breach of contract, and that specific performance by both parties would be the preferred remedy in light of the facts and circumstances. However, the court also noted specific performance would only be an effective remedy if the contract was reformed to include the plans and specifications. Consequently, the court ordered the parties to complete the addendum setting forth the plans and specifications for construction of the house.¹

¹ The trial court further found that the parties' respective claims alleging fraud were not supported by the evidence, and the

Upon re-consideration, the trial court determined that reformation of the contract was not an appropriate remedy. As a result, the court found that it could not order specific performance, but the matter should proceed forward only on the issue of damages. Jessup Builders argued that the contract provided only for the return of the Kruszewskis' down-payment in the event of a breach by Jessup Builders. The Kruszewskis contended that this provision was unconscionable and should not be enforced.

Following an evidentiary hearing on the damages issues, the trial court issued findings of fact, conclusions of law and an order on June 3, 2004. The court found that the contract's limitation on damages was not unconscionable. However, the court also found that the Kruszewskis' damages were not limited to return of their down-payment. The court concluded that the Kruszewskis were entitled to recover interest on the down-payment, as well as rents paid and storage and inspection fees incurred as a result of Jessup Builders' breach. The court declined to award any additional damages to either party, holding:

The Court finds by clear and convincing evidence that each party, by its own breach, is estopped to claim the other damages

court dismissed those claims. Neither party appeals from this ruling.

sought. The complete and utter failure of these parties to consummate the fulfillment of this contract has been a mutual loss and equitable expense to each. Both parties have suffered financially and otherwise, one no more than the other. The mutuality of fault (breach) has occasioned their own financial loss. They shall not be heard to complain.

This appeal and cross-appeal followed. Regarding the appropriate standard of review, this Court stated in Bealert v. Mitchell:²

[I]n any case that is tried without the intervention of a jury, the findings of fact of the trial court should not be reversed unless they are determined to be clearly erroneous. In making such consideration the appellate court must keep in mind that the trial court had the opportunity to hear the evidence and observe the witnesses, so as to judge their credibility, and therefore, is in the best position to make findings of fact. 7 W. Clay, Kentucky Practice, CR 52.01.³

On the other hand, the trial court's conclusions of law, including its interpretation of the written contract, are subject to independent appellate determination.⁴

Jessup Builders does not challenge the court's finding that a valid and enforceable contract existed despite the

² 585 S.W.2d 417 (Ky.App. 1979).

³ Id. at 418

⁴ A&A Mechanical, Inc. v. Thermal Equipment Sales, Inc., 998 S.W.2d 505, 509 (Ky. App. 1999).

parties' failure to execute the addendum. However, Jessup Builders does object to the trial court's finding that it had the duty to complete the plans and specifications addendum, and that its failure to do so constituted a breach of the contract. Jessup Builders points out that the contract does not specify any such duty on its part. Rather, Jessup Builders argues that the Kruszewskis' failure to execute the addendum and their subsequent failures to make timely decisions and sign the change orders were the primary reasons for the collapse of the agreement. Consequently, Jessup Builders asserts that the Kruszewskis, rather than it, breached the contract.

Although the contract clearly referred to the plans and specifications addendum, that addendum was never completed or executed by the parties. This failure presents the central issue in this case: which party had the primary duty to ensure completion and execution of the addendum? Jessup Builders contends that the trial court found that the addendum was not an essential part of the contract. Therefore, according to Jessup Builders, the trial court could not reasonably find that Jessup Builders breached the contract by failing to complete the non-essential addendum.

But the trial court's written findings do not state that the addendum was not an essential part of the contract. Rather, the court found that the written contract reasonably

specified the parties' mutual promises. To the extent that the plans and specifications which were to be set forth in the addendum were essential to performance of the contract, the trial court found that Jessup Builders was estopped from denying the existence of an enforceable contract due to its conduct from and after the date of the making of the contract.⁵

Generally, ambiguities in contracts are construed against the drafter.⁶ Since Jessup Builders prepared the contract and since Jessup Builders was the party charged with building the house, the trial court concluded that Jessup Builders had the duty to complete the addendum. Given the unique circumstances of this case, we agree.

However, both parties' failure to execute the addendum precipitated the ultimate collapse of the agreement. The agreement specifically referenced the "addendum to contract stated September 9, 2002 between builder and buyer". This additional provision to the agreement was initialed by both parties, but Jessup Builders provided the Kruszewskis with only an uncompleted and unexecuted copy of the addendum. While Jessup Builders had the duty to ensure that the addendum was

⁵ See Stewart v. Siddens, 687 S.W.2d 536, 539 (Ky.App. 1984).

⁶ Friction Materials Co., Inc. v. Stinson, 833 S.W.2d 388, 391 (Ky.App. 1992); *citing* Warfield Natural Gas Company v. Clark's Adm'x, 257 Ky. 724, 734, 79 S.W.2d 21 (1934).

executed before it began construction, the omission of the addendum should have been equally obvious to the Kruszewskis.

Moreover, the parties' failure to execute the addendum did not entitle the Kruszewskis to insist that Jessup Builders include more expensive features in the house. Furthermore, the Kruszewskis' refusal in April 2003 to make timely decisions about features or to agree to the plans and specifications addendum made it impossible for Jessup Builders to perform its obligations under the contract. Hence, both parties were responsible for the collapse of the agreement and both breached their obligations under the contract.

This conclusion complicates the determination of damages. The trial court declined to award any damages to Jessup Builders and only limited damages to the Kruszewskis. For the most part, we agree with this determination. Jessup Builders notes that Section 14 of the agreement allows it to recover consequential damages, including attorney fees, in the event of the buyer's default. With the termination of the contract, Jessup Builders was entitled to retain the lot and the uncompleted house. Jessup Builders can mitigate its other damages by completing the house and selling it to another buyer. Most of Jessup Builders' other consequential damages were caused as much by its own breach as by the Kruszewskis.

Likewise, the trial court limited the Kruszewskis' damages to return of their down-payment, as provided by the Section 14 of the contract. In their cross-appeal, the Kruszewskis urge that the contract's limitation of their damages is unconscionable.

Jessup Builders has moved to strike the portion of the Kruszewskis' brief which raises this argument, arguing that the Kruszewskis failed to specifically identify this issue in their pre-hearing statement. CR 76.03(8) clearly provides that a party is limited on appeal to issues identified in the pre-hearing statement.⁷ However, the crux of the rule is to ensure that the appellate court and the opposing party are aware of the issues raised on appeal. Therefore, substantial compliance is sufficient.⁸

In this case, the Kruszewskis' pre-hearing statement identified two issues, including, "[w]hether the Fayette Circuit Court erred in failing to award the Kruszewskis additional damages as a result of the Defendants' breach of the above referenced contract." Although the issue of unconscionability is not specifically listed, the trial court's decision to limit

⁷ See also Osborne v. Payne, 31 S.W.3d 911, 916 (Ky. 2000); and Cabinet for Human Resources v. Kentucky State Personnel Board, 846 S.W.2d 711, 714 (Ky.App. 1992).

⁸ Capital Holding Corp. v. Bailey, 873 S.W.2d 187, 196-97 (Ky. 1994).

the Kruszewskis' damages includes its ruling that Section 14 of the contract is not unconscionable. Consequently, we find that the Kruszewskis have substantially complied with CR 76.03(8), and Jessup Builders will not be unfairly prejudiced by our consideration of the issue.

Furthermore, the trial court correctly found that the limitation of damages provision was valid and enforceable as applied to the facts of this case.

A fundamental rule of contract law holds that, absent fraud in the inducement, a written agreement duly executed by the party to be held, who had an opportunity to read it, will be enforced according to its terms. . . . The doctrine of unconscionability has developed as a narrow exception to this fundamental rule. The doctrine is used by the courts to police the excesses of certain parties who abuse their right to contract freely. It is directed against one-sided, oppressive and unfairly surprising contracts, and not against the consequences per se of uneven bargaining power or even a simple old-fashioned bad bargain. . . .

An unconscionable contract has been characterized as "one which no man in his senses, not under delusion, would make, on the one hand, and which no fair and honest man would accept, on the other." . . . Unconscionability determinations being inherently fact-sensitive, courts must address such claims on a case-by-case basis.⁹
. . .

⁹ Conseco Finance Servicing Corp. v. Wilder, 47 S.W.3d 335, 341-42 (Ky. App. 2001).

Contrary to the Kruszewski's argument, Section 14 is reasonably clear in its terms and it is not hidden within the text of the contract. We agree that the provision is weighted more heavily in Jessup Builders' favor than in the Kruszewskis'. Under different circumstances, we might agree that the provision could be manifestly unfair to the Kruszewskis. In this case, however, the trial court ruled that both Jessup Builders and the Kruszewskis are estopped to claim additional consequential damages due to their own conduct causing the failure to consummate the contract. Consequently, the operation of the limitation-of-damages provision in this case is not unconscionable.

Jessup Builders also contends that the trial court erred by awarding the Kruszewskis additional damages beyond return of the down-payment. In addition to return of the down-payment, the trial court awarded the Kruszewskis \$10,484.50 interest on the down-payment through June 23, 2004, \$19,306.00 for rent and storage fees which they incurred from June 21, 2003 through May 1, 2004, and \$1,102.00 in inspection fees.

With respect to the inspection fees, we find no error. Jessup Builders asserts that the trial court awarded the Kruszewskis costs for their expert witnesses, but the record proves otherwise. In its initial order, the trial court found

that reformation of the contract and specific performance were appropriate remedies to enable both parties to complete the contract. To that end, the court granted the Kruszewskis the right to inspect the property to determine what work remained to be completed.

Subsequently, the court determined that reformation and specific performance were no longer feasible remedies. Nevertheless, the Kruszewskis had incurred the inspection fees in an effort to carry out the court's order. The trial court did not abuse its discretion by allocating those costs to Jessup Builders.

We agree with Jessup Builders, however, that the trial court erred by awarding interest and rental and storage fees to the Kruszewskis. As previously noted, the trial court found that both Jessup Builders and the Kruszewskis were estopped to claim consequential damages due to their mutual failures to consummate the contract. The Kruszewskis incurred these damages primarily due to their own failure to take reasonable steps which would have allowed Jessup Builders to complete its obligations under the contract. We conclude that the trial court erred by awarding these additional amounts to the Kruszewskis.

Furthermore, pre-judgment interest is required only when damages are liquidated. Otherwise, pre-judgment interest

may be awarded as consequential damages.¹⁰ In this case, the Kruszewskis were seeking specific performance under the contract. Because the trial court determined that they were only entitled to damages under the contract, their right to return of the deposit did not accrue until the entry of the judgment. Since the trial court concluded that consequential damages were not appropriate based upon the parties' mutual breaches, we find the court erred by awarding pre-judgment interest on the down-payment.

Accordingly, the June 28, 2004, judgment of Fayette Circuit Court is reversed insofar as it awarded the Kruszewskis interest on the down-payment, and rent and storage fees, and this matter is remanded for entry of a new judgment excluding those amounts. In all other respects, the judgment is affirmed.

IT IS FURTHER ORDERED that the motion by Jessup Builders to strike portions of the Kruszewskis' brief is DENIED.

ALL CONCUR.

ENTERED: March 17, 2006

/s/ Wm. L. Knopf
JUDGE, COURT OF APPEALS

¹⁰ Nucor Corp. v. General Electric Co., 812 S.W.2d 136, 142 (Ky. 1991).

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