

Commonwealth of Kentucky
Court of Appeals

NO. 2007-CA-001566-MR

MARVIN KING

APPELLANT

v. APPEAL FROM MEADE CIRCUIT COURT
HONORABLE SAM H. MONARCH, JUDGE
ACTION NO. 99-CI-00071

G.D. MEDLEY AND SONS

APPELLEES

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: CAPERTON AND VANMETER, JUDGES; GUIDUGLI,¹ SENIOR JUDGE.

CAPERTON, JUDGE: Marvin King brings this appeal from a July 31, 2007, order of the Meade Circuit Court, whereby the court adopted the special commissioner's findings of fact, conclusions of law, and judgment which awarded G.D. Medley

¹ Senior Judge Daniel T. Guidugli sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

and Sons (Medley) \$3,162.87 against King. After a thorough review, we affirm the judgment of the trial court.

King entered into a contract with Medley to construct a new house. King was to provide all material. The entire contract price had been paid to Medley excluding \$3,162.87 when a dispute arose between King and Medley. Medley filed suit to collect the amount due under the contract. King countersued for a breach of contract, asserting that the concrete porch attached to his house was not constructed in a good and workmanlike manner as agreed to in the contract. The court then assigned the case to a special commissioner who heard the evidence and issued the findings of fact and conclusions of law, which the court ultimately adopted in full.

On appeal King argues two errors. First, that the court erred and abused its discretion by appointing a special commissioner to hear the case. Second that the court erroneously awarded judgment to Medley and erred when the court failed to consider King's evidence of damages. In response, Medley argues that both parties agreed to the special commissioner, likening this case to that of binding arbitration or mediation. Medley also argues that the issue concerning the appointment of the special commissioner was not properly preserved for review, that the court properly found that Medley completed the home in accordance with the terms of the contract, and that the court did not err in denying King's claim for damages.

King's first argument, that the court erred in appointing a special commissioner, is unpreserved. The authority of the trial court to appoint a commissioner is found first in CR 53.01, second, in CR 53.02 and last, in the Administrative Procedures of the Court of Justice (AP) Part IV, Section 4.² Since a circuit judge's authority to appoint a special commissioner is found in AP, Part IV, Section 4, which defines the authority in terms of CR 53.02, we shall address AP, Part IV, Section 4 under the CR 53.02 argument.

First, CR 53.01 addresses the appointment of a commissioner. "Each circuit court may appoint a master commissioner and a receiver as authorized by statute. Other commissioners, deputy commissioners, receivers, and their assistants may be appointed only upon express authority of the Chief Justice." *Id.* Our review of the record has failed to produce the approval of the appointment of the special commissioner by the Chief Justice of the Kentucky Supreme Court.

Second, CR 53.02(3) addresses the use of a "special" commissioner.

All other references to commissioners shall be warranted only in special cases. Cases may be regarded as special due to complexity of issues, damages which are difficult to calculate, a multiplicity of claims the priority of which must be established, matters of account involving complex or numerous transactions, or similar exceptional circumstances. A commissioner performing this function shall be qualified as an attorney.

² AP, Part IV, Section 5 sets out the requirements for a master commissioner's report in special proceedings and follows CR 53.06, which requires a report by the commissioner in a special proceeding to be filed with the clerk of court, and also provides the amount of time for parties to object to the report.

A review of the record does not reflect that the order appointing the special commissioner contained the “special” circumstances justifying the need for a special commissioner. Case law in the Commonwealth addressing appointment of a special commissioner is sparse as the issue has infrequently arisen. The facts in this case are more akin to a line of cases discussed in *Jacobs v. Commonwealth*, 947 S.W.2d 416 (Ky.App. 1997).

In *Jacobs*, this Court undertook an analysis as to whether the failure to object to a special judge at the trial level waived the error. In concluding that the failure to object was fatal to the claimed error, this Court accepted the reasoning in *Vandever v. Vandever*, 3 Met. 137, 1860 WL 5102 (Ky. 1860). In *Vandever*, the court held that failure to object to a local attorney appointed as a special judge constituted a waiver of the objection.

Similarly, in *Salyer v. Napier*, 51 S.W. 10, 11 (Ky. 1899) the court followed *Vandever* and stated that:

It is true that the record fails to show that the special judge was selected according to statutory provisions, or was selected by express agreement of parties to try the action; but it is sufficient answer to say that there appears to have been no objection by any of the parties in the lower court to trial by the special judge. Appellants participated in the trial of the action, filing many pleadings and introducing much proof, and this court will not now for the first time entertain the objection as to the authority of the special judge to render judgment. *Vandever v. Vandever*, 3 Met. 137 (Ky. 1860).

We find the reasoning of this line of cases to be persuasive. While the appointment of the special commissioner in the case *sub judice* failed to comply

with the established protocol, we agree with Medley that as both parties consented to the special commissioner, participated in the hearing, filed objections to the special commissioner's findings with the trial court, but never objected to the appointment of the special commissioner, King cannot now raise for the first time on appeal an issue that should have been properly presented to the trial court for consideration. *See Kennedy v. Commonwealth*, 544 S.W.2d 219 (Ky. 1976); *Shelton v. Commonwealth*, 992 S.W.2d 849 (Ky.App. 1998). Thus, the issue has been waived, and we will not consider it further herein.

King's second argument, that the court erroneously awarded judgment to Medley and failed to consider King's evidence of damages, was properly preserved, as King objected to the proposed findings of the special commissioner.

King correctly notes that the interpretation of a contract is reviewed *de novo* by this Court. *Cantrell Supply, Inc. v. Liberty Mut. Ins. Co.*, 94 S.W.3d 381 (Ky.App. 2002).³ However, the interpretation of the contract is not an issue before this Court. It is undisputed that the contract required Medley to provide the labor and complete the project in a good and workmanlike fashion. King was to provide the materials. The issue is whether the court erred in awarding a judgment to Medley and whether the court considered King's evidence of damages. These issues must be considered separately because different standards of review apply.

³ We note that if a question of law had presented itself, then the application of the law to the trial court's findings of fact would be reviewed *de novo*. *See Carroll v. Meredith*, 59 S.W.3d 484 (Ky.App. 2001).

First, the trial court awarding a judgment in favor of Medley is a legal conclusion and is adjudged under an abuse of discretion standard. *Fischer v. MBNA America Bank, N.A.*, 248 S.W.3d 567 (Ky.App. 2007). Abuse of discretion is that which is arbitrary, unreasonable, unfair, or unsupported by sound legal principles. *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999). A review of the record presents sufficient evidence for the trial court to base its decision to award the judgment in favor of Medley and thus the judgment was not an abuse of discretion.

At the hearing, the subcontractor responsible for the concrete testified that concrete could crack and could not be guaranteed. Further, he testified that on the day the concrete was delivered it had to be poured, and only 60-75% of the rebar was available at that time.⁴ The evidence produced by King in an attempt to prove unworkmanlike construction were photographs depicting the cracks in the concrete. Based on the evidence, we do not find an abuse of discretion by the court entering a judgment in favor of Medley.

King's argument that the trial court failed to consider his evidence of damages, arises from the trial court's finding which states: "although [King] presented evidence in a form of photographs indicating defective workmanship in the porch floor, no evidence was presented as to the damages resulting from these defects."

⁴ Note the contract indicated that King was responsible for providing the materials, and on the date the concrete was to be poured there was insufficient rebar provided by King.

CR 52.01 provides that the factual findings of a trial court are binding upon the appellate courts unless clearly erroneous. Findings of fact are not clearly erroneous if supported by substantial evidence. *Janakakis-Kostun v. Janakakis*, 6 S.W.3d 843, 852 (Ky.App. 1999) citing *Ky. State Racing Comm'n v. Fuller*, 481 S.W.2d 298, 308 (Ky. 1972). Substantial evidence is that when taken alone, or in the light of all the evidence, has sufficient probative value to induce conviction in the minds of reasonable men. *Janakakis*, 6 S.W.3d 852.

King argues that evidence as to damages was presented through his testimony as well as the subcontractor who poured the concrete. King concludes that based on the testimony of the subcontractor, his amount of damages would be at least \$3,162.87. Medley argues that the amount of damages is not contained in the record.

In order for King to recover, it was necessary that he establish his claim of damages. In a defective construction case, the measure of damages is the cost of remedying the defect as long as it is reasonable to do so or the diminution in the value of the building by reason of the defect. *See State Property & Buildings Comm'n of Dep't of Finance v. H.W. Miller Const. Co.*, 385 S.W.2d 211 (Ky. 1964). Our review of the record reveals only limited references to damages, and even fewer references to the cost of remedying the defect. The relevant evidence in the record shows that the subcontractor testified that it would take one to two days to complete the repairs. This is reflected in the trial court's findings of

fact. Further, the subcontractor could not testify as to the dollar amount this repair would cost.

The “cost” of repair is the amount that King seeks and thus, was his burden to prove. While King submitted pictures of the alleged defect, this is not sufficient to prove damages. The amount of damages must be reasonably ascertainable from the record and expressed in a monetary figure.⁵ Insofar as King failed to prove monetary damages, his claim for damages must fail. The trial court’s findings of fact make it clear that the testimony of the subcontractor concerning the repair work was considered. It was King’s burden to prove his case, and as such, it was he who bore the risk associated with his failure to persuade the trier of fact.⁶ *See Purcell v. Mich. Fire & Marine Ins. Co. of Detroit*, 173 S.W.2d 134 (Ky. 1943).

Ultimately, after thorough consideration of the record before us, we cannot conclude that trial court’s finding “no evidence was presented as to the damages resulting from these defects” was clearly erroneous.

For the aforementioned reasons we affirm the judgment of the Meade Circuit Court.

ALL CONCUR.

⁵ Our case law routinely cites the amount of damages as expressed in a monetary figure and often refers to the amount as the “sum” of damages. Thus, King was required to provide a calculable dollar amount. *See Univ. of Louisville v. RAM Eng. & Constr., Inc.*, 199 S.W.3d 746, 748 (Ky.App. 2005); *Young v. Vista Homes, Inc.*, 243 S.W.3d 352 (Ky.App. 2007)

⁶ King cites *Byerly Motors, Inc. v. Phillips Petroleum Co.*, 346 S.W.2d 762 (Ky. 1961) to support his argument that the amount of damages may be determined on probable and inferential proof. However, in *Byerly* the court stated “[w]here there is certainty of the right of recovery but uncertainty of the amount, appellate courts view liberally its determination by the trial court.” *Id.* at 765. Based on the record, we must affirm the trial court.

BRIEF FOR APPELLANT:

Mark T. Scott
Brandenburg, Kentucky

BRIEF FOR APPELLEE:

Steven R. Crebessa
Brandenburg, Kentucky