

RENDERED: DECEMBER 31, 2008; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-001718-MR

TALMADGE CANTRELL

APPELLANT

v. APPEAL FROM JOHNSON CIRCUIT COURT
HONORABLE JOHN DAVID PRESTON, JUDGE
ACTION NO. 03-CI-00486

NATION FUNDING GROUP

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CLAYTON, MOORE, AND STUMBO, JUDGES.

STUMBO, JUDGE: Talmadge Cantrell appeals from Findings of Fact, Conclusions of Law and Judgment of the Johnson Circuit Court in an action filed by Nation Funding Group alleging breach of contract. Cantrell, acting *pro se*, apparently is contending that the judgment was not supported by substantial evidence. He also claims that he was improperly denied the opportunity to file a counterclaim. For the reasons stated below, we affirm the judgment on appeal.

On September 23, 2002, U.S. Buildings, LLC entered into a “Home Improvement and Retail Installment Contract” with Cantrell. The contract provided that U.S. Buildings would deliver to Cantrell a 35’ x 18’ x 50’ metal building with hardware, which would be assembled by Cantrell. It also contained a promissory note requiring Cantrell to pay to U.S. Buildings the sum of \$158.35 per month for 60 months, representing the purchase price of \$7,132.85 plus \$2,368.15 interest. The contract provided that U.S. Building’s rights under the contract were assigned to Nation Funding Group, which occupied the same physical address in North Carolina.

On December 5, 2003, Nation Funding Group filed an action against Talmadge and Norma Cantrell in Johnson Circuit Court alleging breach of contract based on the Cantrells’ failure to make payments under the promissory note. It was alleged that the Cantrells made two payments on the note, and that the second payment was returned for non-sufficient funds.

Talmadge Cantrell filed an answer to the complaint, after which the matter languished during a long period of dormancy. On April 12, 2007 - more than three years after the filing of the complaint - the matter was scheduled for a bench trial. About three weeks before trial, Cantrell unsuccessfully sought leave to file a counterclaim.

The matter proceeded to a bench trial on July 25, 2007, and Cantrell defended the action *pro se*. Testimonial and documentary evidence was tendered, after which the court rendered its Findings of Fact, Conclusions of Law and

Judgment. The court found in relevant part that the Cantrells breached the contract by failing to make payments under the promissory note. It rendered a judgment in favor of Nation Funding Group in the amount of \$11,322.01 plus interest. This appeal followed.¹

Cantrell now argues *pro se* that the trial court erred in rendering a judgment in favor of Nation Funding. Though inartfully drafted, and while not expressly so stating, Cantrell's written argument might be construed as contending that the findings of fact, conclusions of law and judgment were not based on substantial evidence of record. Cantrell's argument certainly focuses, however, on the arguments which he unsuccessfully sought to raise in a counterclaim, to wit, that the building he received was used rather than new and that it leaked badly when it rained. In response, Nation Funding contends that the judgment is supported by substantial evidence, and that the trial court properly denied the motion to file a counterclaim.

We have closely examined the record and find no basis for reversing the judgment on appeal. Evidence was adduced at trial which reasonably supports the circuit court's finding that Cantrell breached the contract by failing to make payment as required by the promissory note. Specifically, the Vice-President of Nation Funding, Leslie Marsh, testified that Cantrell made only two payments on the note, and that the second payment was returned with the notation "NSF" for "not sufficient funds." He further testified that no additional payments were made,

¹ The judgment was rendered against both Talmadge Cantrell and Norma Cantrell. Norma's signature does not appear on the contract, however, and she is not a party to this appeal.

and that the outstanding balance on the note was \$11,322.01.² Other defense witnesses also testified, including Norma Cantrell, Ricky Dorton, and Ray Allen, who gave an estimate regarding the cost of repair of the building.

Substantial evidence is evidence of substance and relevant consequence, having the fitness to induce conviction in the minds of reasonable people. *Smyzer v. B.F. Goodrich Chemical Co.*, 474 S.W.2d 367, 369 (Ky. 1971). Marsh's testimony constitutes such evidence. Taken alone, it forms a sufficient basis for supporting the circuit court's finding that the parties entered into a contract, that Cantrell failed to make payment on the note, and that the amount of damages was \$11,322.01. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses. CR 52.01. Accordingly, we find no error on this issue.

Cantrell also argues that the circuit court improperly denied his motion to file a counterclaim. We also find no error on this issue. The trial court may act within its discretion to deny a motion to file a belated counterclaim when the failure to file it in a timely manner has resulted from neglect or the failure to seek legal representation. *Barnes v. Barnes*, 415 S.W.2d 602 (Ky. 1966). In the matter at bar, some 42 months elapsed between the filing of the complaint and the date of the bench trial. During that period, Cantrell was represented by counsel of record on two separate occasions, neither of whom sought to prosecute a

² It merits noting that the building was actually delivered the year *before* the contract was signed. The reason for this is not addressed by either the parties or the court.

counterclaim. Furthermore, and as Nation Funding properly notes, Cantrell was allowed to elicit testimony at trial in support of the arguments he sought to prosecute in the counterclaim, which included his assertion that the building he received was not new and that it leaked. In the court's Findings of Facts, it noted that Cantrell also produced photographic evidence at trial, which in the court's opinion showed "some bent places in the building, but they appear to be more the result of use of the building over time than construction flaws." Given the totality of the record, we find no error in the circuit court's denial of Cantrell's belated motion to file a counterclaim.

For the foregoing reasons, we affirm the Findings of Fact, Conclusions of Law and Judgment of the Johnson Circuit Court.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Talmadge Cantrell, *pro se*
Red Bush, Kentucky

BRIEF FOR APPELLEE:

Michael S. Endicott
Paintsville, Kentucky