

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2011-CA-000987-MR

VISTA HOMES, INC., D/B/A VISTA  
REALTY & AUCTION AND  
FRED BRAMBLETT

APPELLANTS

v. APPEAL FROM HARDIN CIRCUIT COURT  
HONORABLE KELLY MARK EASTON, JUDGE  
ACTION NO. 08-CI-02429

LEE MASONRY PRODUCTS, INC.

APPELLEE

OPINION  
AFFIRMING

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BEFORE: COMBS AND THOMPSON, JUDGES; LAMBERT,<sup>1</sup> SENIOR JUDGE.

COMBS, JUDGE: Vista Homes, Inc., d/b/a Vista Realty & Auction (“Vista Homes”) appeals from the judgment of the Hardin Circuit Court following a bench trial concerning a dispute over an alleged debt. On appeal, Vista Homes argues

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<sup>1</sup> Senior Judge Joseph E. Lambert sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

that the trial court erred by failing to find that it was entitled to certain credits against a debt that it allegedly owed to Lee Masonry Products, Inc., d/b/a Lee Brick + Block (“Lee Masonry”). Following our review of the record, the arguments of counsel, and the applicable law, we affirm.

Vista Homes is a homebuilder in Hardin County. Lee Masonry supplies bricks and other masonry products to homebuilders. In 2001, Lee Masonry began extending credit to Vista Homes. In 2007, Lee Masonry delivered brick to several lots in the Vineland Park subdivision, a development project undertaken by Vista Homes. Vista Homes did not keep its credit account current. However, in early 2008, as an accommodation, Lee Masonry agreed to continue supplying Vista Homes with brick prospectively – but only on a non-credit basis. In June 2008, Fred Bramblett, the vice president of Vista Homes, executed a personal guaranty agreement acknowledging an outstanding debt of \$46,241.51 to Lee Masonry. A new account was opened to segregate the old debt of \$46,241.51 from the newly accrued amounts due.

On November 5, 2008, Lee Masonry filed an action against Vista Homes and Fred Bramblett, individually, to collect more than \$48,000.00 -- the outstanding balance on the old credit account. Bramblett and Vista Homes answered the complaint and denied that Vista Homes owed the amount that Lee Masonry sought to collect. Bramblett also denied that he was bound by his personal guaranty of the alleged indebtedness.

On March 22, 2011, after a review of the parties' arguments with respect to their cross-motions, the trial court granted a partial summary judgment in favor of Lee Masonry. The court concluded that Bramblett's personal guaranty was valid and enforceable as a matter of law. The remaining issues were tried to the court on April 21, 2011.

After reviewing the evidence, the court found that Lee Masonry had established the amount owed on the credit account through a series of work orders, 39 invoices, and the payment history of Vista Homes. It rejected the contention of Vista Homes that it was entitled to a substantial credit against the invoices as a result of having been shorted 17,444 bricks. Judgment was entered in favor of Lee Masonry in the amount of nearly \$70,000.00. The motion of Vista Homes to alter, amend, or vacate the judgment was denied, and this appeal followed.

Our rules of civil procedure provide that when a case is tried upon the facts without a jury, the "findings of fact shall not be set aside unless clearly erroneous." Kentucky Rule[s] of Civil Procedure (CR) 52.01. Moreover, "due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." *Id.* A finding of fact is not clearly erroneous if it is supported by substantial evidence. *Owens-Corning Fiberglas Corp. v. Golightly*, 976 S.W.2d 409 (Ky. 1998). The court's conclusions of law are subject to our *de novo* review. *Gosney v. Glenn*, 163 S.W.3d 894 (Ky.App. 2005).

On appeal, Vista Homes argues that the trial court's findings of fact were not supported by the evidence. We disagree.

Vista Homes contends that the court was required to accept its proof that showed a significant discrepancy between the number of bricks allegedly delivered to its nine home sites and the number of bricks actually used in the construction of its homes. Vista Homes argues that the evidence was uncontroverted that it should have been billed only \$25,866.39 for the bricks that were actually used in the construction of the homes.

The evidence presented at trial indicated that Lee Masonry generated and mailed to Vista Homes an invoice whenever an order of bricks was sold and delivered. A statement of all outstanding invoices was mailed to Vista Homes on a monthly basis. All of the invoices and monthly statements prepared by Lee Masonry were received and reviewed by Vista Homes. The invoices and monthly statements reflected an outstanding balance of \$48,030.68.

The evidence also showed that Bramblett suspected that his on-site superintendents were dishonest and that they may have been engaged in a kick-back scheme with the mason laying the bricks at the various home sites. However, there was no evidence presented to suggest that Lee Masonry had any control over the brick after it was delivered.

The trial court's findings of fact were supported by the evidence. The trial court accepted the witness testimony and documents submitted by Lee Masonry in support of its claim that Vista Homes was properly billed for the bricks that were delivered to its home sites. It was within the court's discretion to believe these witnesses and to accept the invoices and statements of account to the exclusion of

the other evidence presented. Because this evidence was sufficient to support the trial court's findings, we can find no reversible error.

In a different version of the same argument, Vista Homes argues that the trial court erred by failing to require Lee Masonry to prove that the bricks were actually delivered based upon a preponderance of the evidence. Vista Homes contends that the trial court was required to accept its argument concerning the number of bricks used in the construction of its homes – a number based exclusively upon calculations made by Vista Homes. In view of the evidence summarized above, the trial court was not required to accept this contention but was at liberty to exercise its discretion in choosing which evidence to believe.

Finally, Vista Homes contends that the partial summary judgment entered upon the basis of the personal guarantee provisions was erroneously granted. We disagree.

In the partial summary judgment entered on March 22, 2011, the trial court concluded that Bramblett's personal guaranty "is legally valid and enforceable based upon the requirements of KRS 371.065." On appeal, Bramblett contends that the guarantee that he executed on June 19, 2008, ended by its express terms 6 months later. He argues that "any amount incurred after that termination date cannot be assessed against [him] as part of this personal guarantee." Appellant's Brief at 9-10.

Kentucky Revised Statute[s] (KRS) 371.065 provides as follows:

(1) No guaranty of an indebtedness which either is not written on, or does not expressly refer to, the instrument or instruments being guaranteed shall be valid or enforceable unless it is in writing signed by the guarantor and contains provisions specifying the amount of the maximum aggregate liability of the guarantor thereunder, and the date on which the guaranty terminates.

***Termination of the guaranty on that date shall not affect the liability of the guarantor with respect to:***

***(a) Obligations created or incurred prior to the date;*** or

***(b) Extensions or renewals of, interest accruing on, or fees, costs or expenses incurred with respect to, the obligations on or after the date.***

(2) Notwithstanding any other provision of this section, a guaranty may, in addition to the maximum aggregate liability of the guarantor specified therein, guarantee payment of interest accruing on the guaranteed indebtedness, and fees, charges and costs of collecting the guaranteed indebtedness, including reasonable attorneys' fees, without specifying the amount of the interest, fees, charges and costs. (Emphasis added.)

There is no indication that Bramblett has been held liable with respect to obligations created or incurred *after* the termination date of his personal guarantee. The express terms of the statute provide for his liability under those circumstances. Consequently, we can find no error in the trial court's decision to grant partial summary judgment with respect to the provisions of the personal guaranty.

The judgment of the Hardin Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANTS:

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BRIEF FOR APPELLEE:

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