

RENDERED: JANUARY 23, 2015; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-000330-MR

JASON DEITZ D/B/A
D&D BUILDERS, INC.
A/K/A D&D BUILDERS

APPELLANT

v.

APPEAL FROM CARROLL CIRCUIT COURT
HONORABLE STEPHEN L. BATES, JUDGE
ACTION NO. 09-CI-00058

AMY OWEN; CARROLLTON
FEDERAL BANK; AND COUNTY
OF CARROLL

APPELLEES

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: KRAMER, TAYLOR, AND VANMETER, JUDGES.

VANMETER, JUDGE: Jason Deitz d/b/a D&D Builders, Inc. a/k/a D&D Builders
appeals from the Carroll Circuit Court's January 23, 2012, judgment ordering
Deitz to pay Amy Owen \$89,053.32 stemming from Deitz's breach of the parties'
construction contract and from his overall faulty workmanship. On appeal, Deitz

challenges the trial court's calculation of damages. Upon review of the record and applicable law, we affirm.

On August 9, 2007, Deitz and Owen entered into a contract for Deitz to build a home for Owen on her property. Deitz drafted the contract, which states that D&D Builders, Inc. will "commence and complete the construction" of the residence within 180 calendar days (6 months) of the date construction commences. Construction began in August 2007, which set the completion date for the home at mid-February 2008.

Under the contract, Deitz was to be compensated on a "cost plus contract" basis, i.e. cost of construction plus 10% thereof. The contract set forth the total estimated price of construction as follows: estimated cost of construction (\$95,000) plus estimated 10% contractor's fee (\$9,550) equals total estimated price of \$105,050. The contract specified that Deitz would be compensated by Owen's lending institution, Carrollton Federal Bank, with payment to be made in draws as negotiated by the lending institution. Carrollton Federal Bank employed a local appraiser to assess the percentage of the home completed before any draws would be paid to Deitz, who would be compensated in accordance with the progress of construction.

The construction loan on the home is and continues to be with Carrollton Federal Bank. During the course of construction, Deitz received periodic draws totaling \$57,900. In mid-November 2008, after 15 months of construction, the home still was not completed. Frustrated with the lack of progress and poor

quality of the workmanship, Owen informed Deitz that his services were no longer needed. Deitz performed no work on the home after November 17, 2008. Owen subsequently hired other contractors to repair Deitz's work and complete construction of the home.

After Owen dismissed Deitz from the work site, he filed a mechanic's lien against her property for approximately \$38,000, for sums he believed were due and owing from the construction project. In response, Owen filed this action alleging breach of contract, violation of building codes, breach of implied warranty of habitability, and slander of title. With respect to slander of title, Owen maintained that Deitz knowingly and maliciously filed a mechanic's lien for money he was not owed and thus in turn disparaged her title.

Deitz filed a counterclaim alleging breach of contract and foreclosure based upon a mechanic's lien interest. Carrollton Federal Bank joined the action as a third-party defendant, asserting its right to a superior lien should the court foreclose on Deitz's mechanic's lien on the home. The court conducted a bench trial over the course of three days, after which it ordered Deitz to pay Owen \$89,053.12 for the following expenses: \$23,432 for the cost of repairing Deitz's work and to bring the home up to code compliance; \$41,598.56 for amounts Owen paid to other contractors and suppliers to make the home minimally habitable; \$4,976.66 for expenses Owen paid prior to Deitz leaving the project that should have been paid by Deitz under the terms of the contract; \$15,000 in attorney's fees;

and \$4,046.10 in costs. The court declined to award Owen damages for her slander of title claim and removed the mechanic's lien Dietz placed on the property.

Deitz now appeals, arguing the court erred in its damage calculation. He asserts that the proper award of damages was simply the cost to repair the defects in his work. In light of this limitation on damages, he contends the award for attorney's fees should be re-considered.

Following a bench trial, the factual findings of the trial court shall not be set aside unless clearly erroneous; that is, not supported by substantial evidence. *Moore v. Asente*, 110 S.W.3d 336, 354 (Ky. 2003). Substantial evidence is evidence which, when taken alone or in light of all the evidence, has sufficient probative value to induce conviction in the mind of a reasonable person. *Id.* The trial court's conclusions of law are reviewed *de novo*. *Gosney v. Glenn*, 163 S.W.3d 894 (Ky. App. 2005).

In Kentucky, damages for breach of contract are normally a sum which would put an injured party into the same position it would have been in had the contract been performed. *Hogan v. Long*, 922 S.W.2d 368, 371 (Ky. 1995). *See also State Prop. & Bldg. Comm'n of Dep't of Fin. v. H.W. Miller Constr. Co.*, 385 S.W.2d 211, 214 (Ky. 1964) (damages in a case involving a breach of contract for defective construction is the amount that is reasonably necessary in order to make the building conform to the requirements of the contract).

Deitz claims the contract with Owens is a cost-plus 10% contract, not a contract for a finished home, and therefore he should not have to pay the cost to

complete the home pursuant to the contract. With respect to contract interpretation, the language of a contract, if susceptible to two meanings, will be construed against the drafter. *Weinberg v. Gharai*, 338 S.W.3d 307, 313 (Ky. App. 2011). No one disputes that Deitz drafted the contract and filled in all the terms. Thus, any ambiguities and discrepancies must be resolved against him.

The fact that the estimated price of construction was determined on a “cost plus” basis does not negate the fact that Deitz assumed a contractual obligation to complete construction of the home. The trial court construed any discrepancies in the language of the contract against Deitz, determined the contract as contemplated was for a finished home, and the home was at most 50% complete at the time Deitz ceased working on it. The court concluded that Deitz had breached his contractual obligation in numerous respects, mainly by failing to timely complete the project. The court noted that Deitz had not submitted any change orders or modifications to the contract agreed upon by the parties that would explain the delay in completing the project or accrual of additional costs.

The court further found the home was riddled with poor workmanship and building code violations. KRS¹ 198B.130 provides for a private right of action for costs incurred in bringing property up to code compliance with the Uniform State Building Code. The award may include damages, cost of litigation, and attorney’s fees. Recovery under this statute is compensable as a matter of law beyond a breach of contract. *Real Estate Mktg., Inc. v. Franz*, 885 S.W.2d 921, 925 (Ky.

¹ Kentucky Revised Statutes.

1994), *overruled on other grounds by Giddings & Lewis, Inc. v. Indus. Risk Insurers*, 348 S.W.3d 729 (Ky. 2011).

In its judgment, the court enumerated the specific building code violations resulting from Dietz's poor workmanship. The court determined the cost to fix the faulty workmanship and bring the property up to code compliance amounted to \$23,432. The court concluded that the code violations were so prevalent that they were intertwined with other damages in this case and therefore declined to apportion attorney's fees and costs awarded under KRS 198B.130. *See Young v. Vista Home, Inc.*, 243 S.W.3d 352 (Ky. App. 2007) (if a plaintiff's claims arise from the same nucleus of facts and the claims are inextricably intertwined with the other claims, an apportionment of attorney's fees is unnecessary).

The court also itemized the amount Owen paid to contractors and suppliers to make the home habitable after Deitz left the project. *See Franz*, 885 S.W.2d 921 (in the sale of a new dwelling by the builder, an implied warranty exists that in its major structural features, the dwelling was constructed in a workmanlike manner and using suitable materials). That amount totaled \$41,598.56. Lastly, the court documented the expenses Owen incurred, prior to Deitz leaving, to pay for items which Deitz was obligated to supply under the terms of the contract. That amount totaled \$4,976.66.

Deitz now asserts that the court's award resulted in a windfall to Owen and does not place her in the same position contemplated by the contract. We disagree. The court found Deitz was entitled to keep the \$57,900 he was paid for his work.

The court ordered Deitz to pay Owen a total of \$89,053.32 to repair his work and to place Owen in the same position she would have been in had the contract been performed. This resulted in Deitz being out of pocket \$31,153.32 for this construction job ($\$89,053.32 - \$57,900 = \$31,153.32$). Not taking into account the attorney's fees and costs awarded (totaling \$19,046.10), Deitz would have been out of pocket \$12,107.22 to repair his defective work, bring the property up to code compliance, and complete construction of the home as contemplated by the contract ($\$31,153.32 - \$19,046.10 = \$12,107.22$). We believe an award of \$12,107.22 in these circumstances is reasonable and supported by the evidence.

In addition, we note that an award of attorney's fees and costs lies within the discretion of the trial court and will not be disturbed absent a showing that the trial court abused its discretion. *Sexton v. Sexton*, 125 S.W.3d 258, 272 (Ky. 2004). Owen's counsel submitted fees and costs for this action totaling \$24,656.61, which the court reduced to \$19,046.10. Deitz has failed to show this award was arbitrary, unreasonable, unfair or unsupported by sound legal principles so as to amount to an abuse of the court's discretion. *Woodard v. Commonwealth*, 147 S.W.3d 63, 67 (Ky. 2004). In sum, we find no merit in Deitz's claimed errors and uphold the trial court's award of damages.

The judgment of the Carroll Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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BRIEF FOR APPELLEE:

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