RENDERED: AUGUST 22, 2014; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-001599-MR

PINSON DRILLING, INC. APPELLANT

v.

APPEAL FROM BOYD CIRCUIT COURT
HONORABLE GEORGE W. DAVIS, III, JUDGE
ACTION NO. 10-CI-00751

DAVID WILLIAMS APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: LAMBERT, MOORE, AND NICKELL, JUDGES.

MOORE, JUDGE: Following a bench trial, the Boyd Circuit Court dismissed a breach of contract action that Pinson Drilling, Inc. (Pinson), filed against appellee, David Williams. Pinson now appeals. We affirm.

FACTUAL AND PROCEDURAL HISTORY

The background of this case and the reasons underpinning why it was ultimately dismissed are largely explained in the findings of fact and conclusions of law detailed in the circuit court's judgment. They are as follows:

FINDINGS OF FACT

> The Court having considered the evidence presented, hereby finds as follows:
>
> David Williams and Cary Williams are the owners of a parcel of real estate and house located at 1806 Lexington Avenue, Ashland, Boyd County, Kentucky. While renovating the house, the Williams planned to install a geothermal heating and cooling system. The components of the geothermal system included two water wells which were to be drilled on the property. One of the wells was to be used as an intake or production well and the other was to be used as a disposal or dump well. It is important that the wells used in the geothermal system be sand-free to avoid damage to the pumps which move water through the system.
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> David Williams contacted John Hatfield, the owner of Pinson Drilling concerning the drilling of the two water wells. Mr. Hatfield recommended to Mr. Williams that to ensure that the two water wells be sand-free the two wells should be drilled to bedrock and that a 10 feet length section of screen be installed in each well.
>
> Pinson Drilling and Mr. Williams entered into an oral contract the terms of which provided that Pinson would drill two water wells. The first well would be drilled in the back yard of the residence and the second well would be drilled in the front yard. The terms of the oral contract between the parties provided that Pinson Drilling would drill the two wells to bedrock and that Pinson would install a 10 feet length of screen in each well.

Prior to the two wells being drilled, Rick Stephenson [an employee of Pinson Drilling] visited the Williams' property to inspect the job site. While at the Williams' residence, Mr. Williams told Mr. Stephenson that the two water wells were to be drilled to bedrock. Mr. Hatfield did not visit the job site until after the two wells had been drilled.

The two wells were drilled on consecutive days in December, 2009. On the first day a well was drilled in the front yard. The Pinson drill crew drilled until they had used all of the sections of drill rod which they had brought to the property and then installed a screen. However, the well drilled in the front yard was not drilled to bedrock as agreed. Furthermore, the drill crew installed in the first well 8 foot of screen instead of the 10 feet called for by the parties' oral contract.

Mr. Williams called Mr. Hatfield at the end of the first day and complained that the first well had not been drilled to bedrock and that less than 10 feet of screen had been installed. Mr. Hatfield promised Mr. Williams that the well which was to be drilled on the following day in the back yard would be drilled to bedrock.

On the morning of the second day, Mr. Williams called his wife who was at home and asked to speak by phone with Scott Heiser who was operating the drill rig for Pinson Drilling. Mr. Williams told Mr. Heiser that the well in the back yard was to be drilled to bedrock. The drill crew brought the same amount or length of drill rod to the job site as they had on the first day. The drill crew drilled until they had used all of the drill rod on site and then installed a screen. However, as with the first well, the second well was not drilled to bedrock as agreed. Mr. Williams called Mr. Hatfield at the end of the second day of drilling and complained that the second well was not drilled to bedrock.

Pinson Drilling sent Mr. Williams an invoice for $10,540.00 after the two wells had been drilled. Defendant refused to pay the invoice.

Mr. Hatfield and Mr. Williams met at Mr. Williams's property to discuss the wells after the invoice had been sent. At that meeting, Mr. Hatfield admitted that the two wells had not been drilled to bedrock. Mr. Hatfield told Mr. Williams that the elevation of Mr. Williams's property was higher than he had anticipated.

Ultimately, David Williams did not install the geothermal heating and cooling system. The two wells drilled by Pinson are not being used for any purpose.

CONCLUSIONS OF LAW

Under Kentucky law, a material breach by one contracting party to a contract gives the other contracting party the right not to perform without being liable for breach. Dalton v. Mullins, 293 S.W.2d 470 (Ky. 1956). A party who first breaches a contract is deprived of the right to complain when the other party to the contract refuses to perform, if the first party's breach is material or substantial. Dalton v. Mullins, Ky. 293 S.W.2d 470 (1956) and Fay E. Sams Money Purchase Pension v. Jansen, Ky. App., 3 S.W.3d 753 (1999). No benefits should be obtained by the party who is guilty of the first breach. Dalton v. Mullins, Ky. 293 S.W.2d 470 (1956).

The Court finds that the failure of Pinson Drilling to drill the two wells to bedrock constituted a material or substantial breach of the terms of the parties' oral contract. The Court also finds that Pinson Drilling's failure to install 10 feet of screen in the first well also constituted a material or substantial breach of the parties' oral contract. Because Pinson Drilling first breached the terms of the parties' oral contract, and that breach constituted a material breach, Pinson Drilling is deprived of the right to complain when the Defendant refused to perform. Mr. Williams was relieved of his obligation to pay the invoice because Pinson Drilling first breached the terms of the parties' oral contract and that breach was material.

Thereafter, Pinson moved the circuit court, pursuant to Kentucky Rule of Civil Procedure (CR) 59.05, to alter, amend, or vacate the judgment. In relevant part, it argued:

> 1. With all due respect to the Trial Court, the testimony of Mr. Williams indicated that, although knowing the first well was drilled outside of his "specifications", he instructed the plaintiff to continue to drill the second well. Thus, at a minimum, the Plaintiff is entitled to payment for the first well which, as shown by exhibits entered in the Court, would be approximately half.
>
> 2. The Court should also reverse its Judgment and award the amount requested to the Plaintiff, as the Plaintiff substantially performed the contract. Kentucky courts have historically followed the doctrine of substantial performance, rather than the doctrine of strict or literal performance of the contract, subject to the right of recoupment in respect to those deviations between the performance called for in the contract and the performance actually received. *All States Investors, Inc. v. Banker's Bond Co.*, 34[3] F.2d 618 (1965). The law looks at the spirit of the contract and not whether a party has literally complied with it, but substantially complied. In this case, the Plaintiff testified that the wells, as drilled, would meet the needs of the Defendant. The Defendant, not being an expert on water wells, could testify to nothing different.
>
> Mr. Williams was charged the amount of screen used, and the amount of screen used was what was necessary in the judgment of a well-driller with decades of experience, as opposed to Mr. Williams, who has no experience with water wells in this area whatsoever.
>
> In other words, the difference in what Mr. Williams wanted and what he got provides only slight damage to him, if any at all, and it is unfair and unjust[[1]] for him to

[1] When Williams responded to Pinson's CR 59.05 motion, he pointed out that Pinson's motion also appeared to assert a claim of unjust enrichment that had never been raised. We agree that such a claim was never raised; as noted below, Pinson's complaint only asserted a breach of

> have reaped the benefit of the wells in full measure and pay nothing.
>
> With all due respect, there is nothing in the record which indicates that the wells, as drilled, would not perform exactly to the specifications of Mr. Williams. There is only his worry and concern and nothing more. For whatever reason, Mr. Williams did not hire an expert witness to investigate the wells, nor did he allow the Plaintiff to come to the property and develop the wells and show him that they would perform as desired.
>
> With all due respect, the Court is also reminded that the first well was a "discharge" well. As such, the length of screen in the discharge well is quite immaterial. It merely needs to accept the amount of water drawn in by the geothermal system and does not need to have water drawn from it. In fact, Mr. Williams admitted to the Court that the discharge well is on the "down river" side and so it makes logical sense that it would be the discharge well and always the discharge well.

The circuit court considered Pinson's motion, along with Williams' response, and overruled it. This appeal followed. Additional relevant details regarding this case will be discussed within the context of our analysis.

STANDARD OF REVIEW

This appeal concerns the review of a judgment resulting from a bench trial. Therefore, we will not disturb the trial court's findings of fact absent clear error. *Brenzel v. Brenzel*, 244 S.W.3d 121, 124 (Ky. App. 2008). "Findings of fact are only clearly erroneous when they are manifestly against the weight of the evidence." *Burton v. Burton*, 355 S.W.3d 489, 493 (Ky. App. 2011). It is the role of the fact finder to determine the proper weight to give the evidence. *Drummond*

contract theory based upon full performance. Regardless, this is not an issue on appeal because Pinson has offered no argument in its brief regarding unjust enrichment.

v. Todd County Bd. of Educ., 349 S.W.3d 316, 322 (Ky. App. 2011) (citation omitted). In performing this function, the trial court "may choose to believe or disbelieve any part of the evidence presented to it." *K.R.L. v. P.A.C.*, 210 S.W.3d 183, 187 (Ky. App. 2006) (citing *Caudill v. Maloney's Discount Stores*, 560 S.W.2d 15, 16 (Ky. 1977)). To the extent that this appeal concerns purely legal issues, however, our review is *de novo*. *Cinelli v. Ward*, 997 S.W.2d 474, 476 (Ky. App. 1998).

ANALYSIS

Pinson's first argument on appeal is roughly the same argument it offered in paragraph "1" of its CR 59.05 motion; it is that Williams approved of the first of the two wells, and that Williams should therefore pay for at least the first of the two wells (which it values at half of the contract price).

With that said, the first problem with this argument is one of preservation. Pinson claims to have asserted this theory of partial payment for partial performance when it moved per CR 50.01 for a directed verdict at the conclusion of the bench trial and again in its CR 59.05 motion. However, CR 50.01 and CR 59.05 are not vehicles for asserting new theories of recovery; the former is a means of summarily deciding a claim that has already been presented for adjudication, and the latter is a means for having a court alter, amend, or vacate a *judgment*.

To the contrary, the place for asserting a theory of recovery is the *complaint*. And, a plaintiff may not assert a new cause of action during the

pendency of the proceeding that was not set out in the complaint unless it was tried by the express or implied consent of the opposing party. *See generally* CR 15.02; *Traylor Bros., Inc. v. Pound*, 338 S.W.2d 687 (Ky. 1960). Here, Pinson only alleged in its complaint that it had completed the *entirety* of its contractual obligations, and that it was entitled to the *entirety* of the contract price; it pled nothing in the alternative. Furthermore, Pinson makes no argument that its claim for partial payment for partial performance was tried with Williams' express or implied consent. Accordingly, the circuit court did not err in failing to grant Pinson relief in this respect. Indeed, judgments must conform to the pleadings. *See Williamson v. Romans*, 258 S.W.2d 455, 457 (Ky. 1973).

Even if Pinson had properly raised this theory of recovery below, however, the evidence of record does not compel a finding that Williams promised to pay for only one well. As the circuit court explained, the geothermal heating and cooling system required two wells in order to function at all: a supply well and a dump well. It was undisputed at trial that Williams emphasized to Pinson, through Hatfield, that Pinson's first task was to establish that a layer of bedrock existed underneath his property and, if so, to drill the supply well into that layer of bedrock. It was also undisputed that Williams informed Pinson that absent a supply well drilled directly into the bedrock, he would be unwilling to risk installing the geothermal heating and cooling system. Stated differently, Williams told Pinson—before any work had been completed on either of the two wells—that a dump well would only be of any kind of benefit or value if it was paired with a

supply well drilled directly into the bedrock. This was why Pinson was initially required to dig the supply well first.[2]

After the first well was not drilled to bedrock, Williams agreed with Hatfield that the first well could instead be used as the dump well and that it was not as important for the dump well to be drilled down to the bedrock. However,

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[2] Williams elaborated further on this point at trial:

WILLIAMS: I expressed to John my disappointment that we did not establish, did not drill to bedrock and establish that there was this dense, dense gravel bed, thickness, that he had eluded to and, presented it as something typical that he would see going down drilling, that that they had failed to put the ten feet of screen in that we had agreed to.

COUNSEL: Did Mr. Hatfield dispute your statement that the wells had not been drilled to bedrock?

WILLIAMS: He did not.

COUNSEL: Did he in fact offer you an explanation as to why they weren't drilled to bedrock?

WILLIAMS: He did. He said that there was a subcontractor used on the job, that he had to use a subcontractor and that, um, evidently there was a message that evidently did not get communicated to him, apparently, and that he was taking full responsibility for that, but that it would not happen on the second well.

COUNSEL: So he assured you what would not happen on the second well?

WILLIAMS: He assured me that they would hit, they would hit bedrock on the second well and establish that they would embed this into the gravel layer that is predominantly in along the Ohio River basin if we want to call it that.

COUNSEL: Did you call… excuse me, after he made that statement, did you go ahead and then agree to have the second well drilled?

WILLIAMS: Based on John, John Hatfield's commitment and guarantee that they would hit bedrock and embed this in that gravel aquifer that he had stated all along was the only means of being able to establish sand-free wells, I said, I felt very uneasy but John said "We will get, we will hit bedrock and we will get this into this bed of gravel." And I, at that point, committed and said "Okay, let's drill this second well," based on the fact that I knew that the well that was drilled would never be the supply well. It would be, it would only be the dump well. It would never be the supply well.

COUNSEL: So you now could no longer switch back and forth between them?

Williams reemphasized to Pinson, through Hatfield, that without establishing that a layer of bedrock existed underneath his property, and without drilling down into the layer of bedrock to establish the supply well, he could not and would not risk installing the geothermal heating and cooling system on his property. In short, Williams allowed Pinson an opportunity to correct an error, but nothing indicates Williams changed his mind and decided that a dump well would have any kind of value if it was not paired with a supply well drilled directly into the bedrock. And, as indicated previously, the precondition for Williams' approval of the dump well was never met; ultimately Pinson decided not to drill the second well to the bedrock.

For its next argument, Pinson concedes that the wells it drilled for Williams were not exactly what Williams wanted. Pinson asserts that it was nevertheless entitled to its full contractual expectancy because the state of the wells demonstrates that Pinson substantially complied with its contractual obligations.

As the circuit court correctly explained, the party seeking to enforce a contract has the burden of proving that he has substantially complied with all material terms of the contract. *See Dalton v. Mullins*, 293 S.W.2d 470, 476 (Ky. 1956); *see also Hart v. Hart*, 201 S.W.3d 457, 460 (Ky. 2006) (explaining that insured, a layman, could only have been deemed to have "substantially complied" with a material contractual duty if he had "done all he could do under the

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WILLIAMS: Could no longer switch back and forth. I was all in on the second well being drilled and that the first well would only be a dump well and could never be used for anything other than that, just a dump well.

circumstances; all he believed necessary to effect the [duty] or what an ordinary layman would believe was all that was necessary to accomplish the [duty]." (Citation omitted)). A material term of any contract is, of course, the work to be done.[3] And, Williams' brief identifies evidence that unequivocally supports the trial court's factual findings of what that work was in the context of this case: "The terms of the oral contract between the parties provided that Pinson Drilling would drill the two wells to bedrock and that Pinson would install a 10 feet length of screen in each well."[4]

The thrust of Pinson's argument is, therefore, that all it was required to do to fulfill those terms was to drill two wells that were not drilled into the bedrock, and to install eight feet of screen in each well instead of ten. This, it asserts, is because such wells would function in the same manner and have the same level of quality. In support, Pinson points out: 1) Hatfield testified that the two wells Pinson drilled, in his opinion, would be sand-free, supply the requisite amount of water for Williams' geothermal system, and that for the purpose of making a supply well sand-free, drilling all the way down to the bedrock was unnecessary; 2) Hatfield testified that it would have been detrimental to drill the wells down to the bedrock because the drill reached a layer of shale before reaching it, and drilling into the shale would have "smeared off and plugged" the

[3] *See, e.g.*, BLACK'S LAW DICTIONARY 999-92 (7th ed. 1999) (defining "material terms" as "Contractual provisions dealing with significant issues such as subject matter, price, payment terms, quantity, quality, duration, or *the work to be done*." (Emphasis added)).

[4] Williams and John Hatfield both offered testimony to this effect.

permeable sand and gravel formation that supplied water to the wells; and 3) Williams offered no expert testimony to contradict Hatfield's opinions.

The first and third of these points must be immediately qualified, however. Contrary to what Pinson insinuates in its brief, Pinson never sought to admit Hatfield or any of its other witnesses as experts on drilling wells or in any other field, and the trial court never did admit Hatfield or any of Pinson's other witnesses as experts. No evidence of record reflects that Williams authorized Pinson to unilaterally modify the work they had agreed upon, irrespective of Pinson's purported expertise in drilling wells. Williams had no affirmative obligation to rebut any of Pinson's evidence, much less with expert testimony of his own, because the burden of proof and risk of non-persuasion regarding whether Pinson substantially complied with its contractual obligations ultimately rested with Pinson, not Williams. *See* CR 43.01. And, notwithstanding the above, the trial court was free to disbelieve any testimony offered by Pinson's employees which, as an obvious matter, was biased.

Pinson's second point is also flatly contradicted by the record. During his testimony, Hatfield read from a portion of a drilling log that another Pinson employee had prepared, and the drilling log noted that "pieces of blue shale" had been discovered at a depth of 85 feet while the first well was being drilled. This, in turn, prompted Hatfield to testify at trial that the reason both wells had not been drilled any deeper was that drilling through the shale would have otherwise "smeared off and plugged" the permeable sand and gravel formation that supplied

water to the wells. On cross examination, however, Hatfield conceded he had previously testified in his deposition that the *only* reason both wells had not been drilled to bedrock (and had instead both been drilled to a depth of exactly eighty-five feet) was that Pinson had only brought eighty-five feet of drill rods to Williams' property, and that Pinson had underestimated the elevation between Williams' property and the layer of bedrock underneath it.

Also, the drilling log only mentions that "blue shale" was discovered in the course of digging the first well, not the second.[5] The Pinson employee who completed the drilling log and made the "blue shale" entry never testified or explained what this entry meant or what its significance was. And, in any event, Williams, his wife, and his wife's father each testified that they had either watched the drilling as it took place on the property, or had cleaned up what Pinson had dug out of the two well holes, and that they had each seen only sand and bits of gravel, but nothing resembling clay (*e.g.*, shale).

Lastly, Pinson asserts Williams knew that the two wells would have functioned adequately, but that the actual reason Williams did not want to pay for the two wells was that Williams and his wife no longer wanted to live at the property because recent drug-related activity in the area made it unsafe for Williams and his wife to raise their recently-adopted daughter there.

[5] Regarding the second well, the drill log states that "bigger gravel, rock 'red' pieces" were discovered at a depth of eighty-five feet. At trial, Pinson conceded that this statement does not indicate the second well reached bedrock.

Aside from simply taking Pinson's word for it, though, Pinson does not explain how Williams would have known that the two wells would have functioned adequately, let alone like a well drilled down to bedrock. Also, Williams did testify that he and his wife recently adopted a daughter, that drug activity had recently occurred in the vicinity of their property, and that his family now resides at a different address. But, Williams and his wife still own the property where the two wells are located, and they both testified that their recent adoption and any drug activity in the area were not their reasons for ultimately choosing not to install the geothermal system on their property. Whether or not Pinson believes them is irrelevant; the trial court did, and weighing the credibility of the witnesses was exclusively the trial court's prerogative.

CONCLUSION

Pinson has failed to demonstrate that the Boyd Circuit Court committed clear error in assessing the evidence adduced during the bench trial of this matter, or that the circuit court otherwise erred as a matter of law. Therefore, we AFFIRM.

ALL CONCUR.

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