

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2010 CA 1885

PATRICK AND BRENDA O'CONNELL

VERSUS

DALE BRAUD D/B/A DALE'S BUILDERS AND REMODELING

Judgment Rendered: **AUG 10 2011**

Appealed from the
Twenty-Third Judicial District Court
In and for the Parish of Ascension
State of Louisiana
Suit number 90,266

Honorable Thomas J. Kliebert, Jr., Presiding

M. Brent Hicks
Katherine G. Eckert
Baton Rouge, LA

Counsel for Plaintiffs/Appellees
Patrick and Brenda O'Connell

Barbara Lane Irwin
Timothy E. Pujol
Matthew Pryor
Gonzales, LA

Counsel for Defendant/Appellant
Dale Braud d/b/a Dale's Builders and
Remodeling

BEFORE: PARRO, GUIDRY, AND HUGHES, JJ.

JP
RHP by JP
JOH by JP

GUIDRY, J.

Dale Braud d/b/a Dale's Builders and Remodeling (Braud) appeals from a trial court judgment awarding Patrick and Brenda O'Connell damages pursuant to the New Home Warranty Act, La. R.S. 9:3141, et seq. For the reasons that follow, we affirm.

FACTS AND PROCEDURAL HISTORY

Patrick and Brenda O'Connell entered into a builder's contract with Braud on February 28, 2000, to construct a new home along the Amite River in Maurepas, Louisiana. Because of the location of the home, it was designed to be raised approximately eight feet off of the ground and to sit on concrete piers. Construction of the home was completed in November 2000, and the O'Connells moved into the home immediately thereafter.

In 2003, the O'Connells began experiencing water intrusion at the French doors leading to the balcony on the north side of the home. The O'Connells contacted Braud, who made repairs to the home. Thereafter, the O'Connells also began experiencing problems with the screened porch on the west side of the home, which was holding water in the middle of the porch floor. The O'Connells contacted Braud, who adjusted the pitch of the porch and installed a drain and drainage system.

In November 2007, after noticing debris behind a loose soffit panel on the underside of where the screened porch met the deck, the O'Connells contacted Brett Lukehart, a contractor. Upon removing all of the soffit panels along the west side of the home, Lukehart discovered extensive damage to the beams supporting the porch and deck. Thereafter, the O'Connells contacted Braud by telephone several times, informing him of the beam damage. Braud, however, failed to respond to the O'Connells' requests to examine the damage. In late November or December 2007, Lukehart began making repairs to the home.

On March 11, 2008, counsel for the O'Connells sent a letter to Braud, notifying Braud of the alleged deficiencies in the home. When Braud failed to respond to the letter, the O'Connells filed a petition for damages against Braud on August 29, 2008, asserting that there were deficiencies in the home, which included, but were not limited to: (1) water penetration into the home on the west side of the home causing damage to the outer beam and cantilever beam, which could have been prevented if treated lumber had been used for the beams; (2) beam supporting screened porch and balcony/deck on main floor was rotten and deteriorated, putting the structure in danger of collapse, due to the failure to use treated lumber as required; (3) beam supporting porch and running across the outer perimeter of the kitchen called for treated lumber, but untreated lumber was used, resulting in total deterioration of that beam and sagging of the porch, which would have led to its collapse. The O'Connells asserted that Braud was liable in fraud for all damages suffered and attorney's fees, and that he was also liable for the deficiencies pursuant to the terms and conditions of the New Home Warranty Act (NHWA). The O'Connells claimed that they incurred actual repair expenses totaling \$97,582.30 as a result of the deficiencies and prayed for judgment in their favor in an amount reasonable under the premises, plus attorney's fees and costs, as well as for all general and equitable relief.

Thereafter, Braud filed an exception raising the objections of no cause of action and prescription. Braud asserted that the O'Connells' claims were governed exclusively by the NHWA, which exclusivity precluded the O'Connells from having a cause of action against Braud for fraud, and that their claims had prescribed. By judgment dated January 13, 2009, the trial court denied Braud's exception raising the objection of no cause of action, and partially granted the exception raising the objection of prescription with regard to all claims except those claims arising from damages related to the porch-area beams and other beams under points three and four

of paragraph five of the O'Connells' petition (i.e., claims related to the beams supporting the porch), which were referred to the merits.

Following a bench trial, the trial court signed a judgment on May 13, 2010, in favor of the O'Connells in the amount of \$57,214.00, plus attorney's fees, to be fixed at a later date.¹ Braud subsequently filed a motion for new trial, which was denied. Braud now appeals from the trial court's judgment.²

DISCUSSION

Standard of Review

The trial court's factual findings in cases involving the NHTSA are subject to manifest error review. Hutcherson v. Harvey Smith Construction, Inc., 08-1046, p. 3 (La. App. 1st Cir. 2/13/09), 7 So. 3d 775, 778. An appellate court cannot set aside the trial court's findings unless it determines there is no reasonable factual basis for the findings and the findings are clearly wrong. Stobart v. State, Through Department of Transportation and Development, 617 So. 2d 880, 882 (La. 1993). Thus, if the findings are reasonable in light of the record reviewed in its entirety, this court may not reverse even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. Rosell v. ESCO, 549 So. 2d 840, 844 (La. 1989). Furthermore, when we review a damage award made pursuant to the NHTSA, we may not set aside the award made by the trier of fact absent an abuse of discretion.

¹ On June 10, 2010, the O'Connells filed a rule to fix attorney's fees. Following a hearing on the O'Connells' rule, the trial court signed a judgment on August 18, 2010, in favor of the O'Connells and against Braud for the stipulated amount of \$18,000.00. Braud has separately appealed from this judgment.

² On January 27, 2011, this court issued a rule to show cause, ordering the parties to submit briefs as to why the appeal should not be dismissed due to the apparent defect in the May 13, 2010 judgment, which specifically excluded a ruling on attorney's fees. By order dated March 14, 2011, the rule to show cause was referred to the panel hearing the appeal.

After reviewing the matter, we find that the apparent defect was cured when the trial court rendered the August 18, 2010 judgment adjudicating the remaining claim between the parties, i.e. fixing the amount of attorney's fees. See R.G. Claitor's Realty v. Rigell, 06-1629, p. 3 n.3 (La. App. 1st Cir. 5/4/07), 961 So. 2d 469, 471, writ denied, 07-1214 (La. 9/21/07), 964 So. 2d 340; see also In re Succession of Grimmett, 31,975, pp. 5-6 (La. App. 2nd Cir. 3/5/99), 738 So. 2d 27, 31. Accordingly, we recall the show cause order.

Liability Under the NHTWA

The NHTWA provides the exclusive remedies, warranties, and prescriptive periods as between builder and owner relative to construction defects in new homes. La. R.S. 9:3150.³ Louisiana Revised Statute 9:3144(A) sets forth the mandatory warranties owed by a builder to an owner as follows:

Subject to the exclusions provided in Subsection B of this Section, every builder warrants the following to the owner:

(1) One year following the warranty commencement date, the home will be free from any defect due to noncompliance with the building standards or due to other defects in materials or workmanship not regulated by building standards.

(2) Two years following the warranty commencement date, the plumbing, electrical, heating, cooling, and ventilating systems exclusive of any appliance, fixture, and equipment will be free from major structural defect due to noncompliance with the building standards or due to other defects in materials or workmanship not regulated by building standards.

(3) Ten years following the warranty commencement date, the home will be free from major structural defects due to noncompliance with the building standards or due to other defects in materials or workmanship not regulated by building standards.

Louisiana Revised Statute 9:3143(5) defines a “major structural defect” as:

[A]ny actual physical damage to the following designated load-bearing portions of a home caused by failure of the load-bearing portions which affects their load-bearing functions to the extent the home becomes unsafe, unsanitary, or is otherwise unlivable:

- (a) Foundation systems and footings.
- (b) *Beams*.
- (c) Girders.
- (d) Lintels.

³ Because the O’Connells first occupied their home in November 2000, all references to the NHTWA in this opinion are to the provisions of the NHTWA in effect at that time. See Hutcherson, 08-1046 at p. 4, 7 So. 3d at 778.

- (e) Columns.
- (f) Walls and partitions.

- (g) Floor systems.

- (h) Roof framing systems.

(Emphasis added.)

Braud contends that the trial court erred in finding that the O'Connells' claims for damages with regard to the rotten, wooden beams supporting the porch arise from a "major structural defect" as that term is defined in La. R.S. 9:3143(5) and, therefore, are subject to a ten-year prescriptive period. Rather, Braud asserts that the O'Connells' claims are for defective workmanship for Braud's alleged improper flashing and waterproofing of the home, which claims are subject to a one-year prescriptive period, and therefore, are prescribed.

However, from our review of the record, we find no error in the trial court's determination. Brett Lukehart, the contractor who performed the repairs to the O'Connells' home, testified that, upon removing all the soffit panels on the underside of the porch, he immediately noticed a tremendous amount of damage to the beams. Lukehart stated that the beams were devoid of any structural integrity, that the porch floor was sagging approximately 1¼ to 1½ inches, and that collapse of the porch was imminent. According to Lukehart, the damage to the beams was the result of water penetration, caused by the lack of flashing and waterproofing and the lack of transition between the interior and exterior framing of the house. Further, Lukehart stated that though the plans specifically required all wood coming in contact with masonry to be treated, the beams at issue, which rested directly on concrete piers, were not constructed out of treated lumber. Finally, Lukehart stated that if these beams, which were crucial to the overall structural integrity of the home, would have been made from treated lumber, they would not have suffered damage from rot.

Additionally, Harry Huey, an Ascension Parish building official who inspected the O'Connells' home, stated that the Ascension Parish Building Code requires treated lumber to be used when located within 18 inches of contact with the ground, but that the Code does not otherwise state that lumber has to be treated, unless it is specified in the building plans itself.

The building contract and building plans were admitted into evidence at the trial. The building plans state that "all wood members in contact with concrete shall be treated." Additionally, the building contract states that "The Contractor agrees to ... erect, build, finish and deliver ... a custom home as shown on the drawings and described in the specifications ... which said drawings and specifications are by reference made a part thereof, and together with this agreement, form the contract."

After reviewing the record in its entirety, we find that the record reasonably supports the determination that the beams are load-bearing, and that the failure of the beams due to their rotten condition affected their load-bearing functions to the extent that the home was unsafe, thereby constituting a major structural defect. Further, the evidence also reasonably establishes that the existence of this major structural defect was due to noncompliance with the building standards, by failing to use treated lumber as agreed to and required by the building plans,⁴ and due to defects in workmanship, by improperly constructing the porch.

Further, we find no merit to Braud's argument that the defects are excluded from the builder's warranty because they are "caused by ... materials or work supplied by anyone other than the builder, or any employee, agent, or subcontractor

⁴ Louisiana Revised Statute 9:3143(2) defines "[b]uilding standards" as "the standards contained in the building code, mechanical-plumbing code, and electrical code in effect in the parish, city, or other local political subdivision where a home is to be located, at the time construction of that home is commenced, or, if the parish, city, or other local political subdivision has not adopted such codes, the Standard Building Code, *together with any additional performance standards, if any, which the builder may undertake to be in compliance.*" (Emphasis added.) This court has previously found the plain wording of this statute to be broad enough to include the contractual undertakings of the builder, including those contained in building plans and specifications. See *Graf*, 97-1143 at pp. 8-9, 713 So. 2d at 689-690.

of the builder.” See La. R.S. 9:3144(B)(6). Braud asserts that the lumber at issue was “supplied by” someone other than Braud, because the O’Connells paid Purpera Lumber Company directly, and Purpera supplied the necessary lumber and delivered it directly to the home site.

However, from our review of the record we find no error in the trial court’s determination that this exclusion does not apply in the instant case. The building contract at issue provides that “[t]he Contractor agrees to furnish all materials ... as shown on the drawings and described in the specifications.” Further, according to Braud’s own testimony, he brought the building plans and specifications to Purper Lumber Company and got a breakdown on the house. When he was ready, he called Purpera and told them to send out different packages, i.e., plumbing, flooring, etc. Therefore, not only did Braud have a contractual obligation to supply the materials, but he acted in furtherance of the contract by facilitating the acquisition of the materials. The fact that the O’Connells paid Purpera directly, pursuant to the terms of the cost plus contract, is of no moment. Therefore, we find no error in the trial court’s determination that the exclusion in La. R.S. 9:3144(B)(6) does not apply.

Damages

Louisiana Revised Statute 9:3149(A) provides:

If a builder violates this Chapter by failing to perform as required by the warranties provided in this Chapter, any affected owner shall have a cause of action against the builder for actual damages, including attorney fees and court costs, arising out of the violation. The damages with respect to a single defect shall not exceed the reasonable cost of repair or replacement necessary to cure the defect, and damages with respect to all defects in the home shall not exceed the original purchase price of the home.

In an action on a contract to build, the appropriate measure of damages resulting from the contractor’s breach of the implied warranty of good workmanship is generally the cost of repairs when the thing can be repaired. Graf, 97-1143 at p. 11, 713 So. 2d at 691. Under La. R.S. 9:3149(A), the measure is “reasonable cost of

repair or replacement necessary to cure the defect.” See also Graf, 97-1143 at p. 11, 713 So. 2d at 691.

At trial, the O’Connells admitted several documents into evidence to show the costs to the repair the home as a result of the defects, including a spreadsheet prepared by Brenda O’Connell detailing the expenses incurred in the repair of the home, as well as the invoices to support those expenses. Additionally, Lukehart testified regarding the invoices for materials and his invoices for the labor performed in effectuating the repairs to the home, and identified the amounts specifically related to repair and/or replacement of the beams.⁵ From our review of the record, we cannot find that the trial court abused its discretion in awarding \$57,214.00 in damages for the repairs necessary to cure the defects.

CONCLUSION

For the foregoing reasons, we affirm the judgment of the trial court. All costs of this appeal are assessed to the defendant, Dale Braud d/b/a Dale’s Builders and Remodeling.

RULE TO SHOW CAUSE RECALLED; AFFIRMED.

⁵ Braud asserts on appeal that the trial court erred in admitting certain pieces of evidence and by not giving him an opportunity to view certain documents. However, counsel for Braud did not object to the introduction of any evidence at the trial and was given an opportunity to view documents utilized by Lukehart during his testimony. Therefore, we find this argument to be without merit.