IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA15-202

Filed: 1 December 2015

Mecklenburg County, No. 13 CVS 10994

ANTHONY M. FUSCO and PILAR M. FUSCO, Plaintiffs,

v.

ALLEN DESIGN ASSOCIATES, INC., and ROBERT HARRISON ALLEN, JR., Defendants.

Appeal by defendants from order and judgment entered 10 October 2014 by Judge William R. Bell in Mecklenburg County Superior Court. Heard in the Court of Appeals 24 August 2015.

*Asheville Law Group, by Michael G. Wimer and Jake A. Snider, for plaintiffs-appellees.*

*Griffin, Brunson & Wood, LLP, by Gregory J. Wood, for defendants-appellants.*

DAVIS, Judge.

Allen Design Associates, Inc. ("Allen Design") and Robert Harrison Allen, Jr. ("Allen") (collectively "Defendants") appeal from the trial court's 10 October 2014 order and judgment requiring Defendants to pay $51,375.00 in attorneys' fees along with various litigation-related costs to Anthony M. Fusco and Pilar M. Fusco (collectively "Plaintiffs"). On appeal, Defendants argue that the trial court erred in

(1) concluding that Defendants breached a settlement agreement between the parties; and (2) awarding attorneys' fees to Plaintiffs. After careful review, we affirm.

**Factual Background**

In August 2007, Plaintiffs entered into a construction contract with Allen Design involving a significant renovation of their home, which entailed adding a second story to the house, increasing the home's square footage from 1,300 square feet to 4,500 square feet, and approximately doubling the footprint of the home's foundation. On 20 December 2010, Plaintiffs filed an action against Defendants in Mecklenburg County Superior Court, asserting claims for breach of contract, negligence and gross negligence, and breach of warranty based on allegations that Defendants had failed to complete the remodeling work in a proper manner resulting in damage to the foundation and other structural components of the home. On 3 May 2011, Defendants filed an answer, counterclaim, and third-party complaint against U.S. Masonry, Inc. ("U.S. Masonry"), a North Carolina corporation that had been subcontracted by Defendants to perform work on the home.

Prior to trial, the parties entered into a Remediation and Settlement Agreement ("the RSA") in June of 2012. Pursuant to the terms of the RSA, the parties agreed that (1) Plaintiffs' claims and Defendants' counterclaim would be dismissed without prejudice; and (2) Defendants would "complete, in a good and workmanlike manner, all of the foundation set forth on the Scope of Work attached to this

Agreement." The RSA stated that the foundation work would be completed by 8 August 2012 at no additional cost to Plaintiffs and "will not be considered complete until approved by a representative of Amicus Engineering." The RSA also provided that "[a]ny party who materially breaches this Agreement shall pay the non-breaching party reasonable attorneys['] fees incurred by the non-breaching party."

On 26 June 2013, Plaintiffs filed the present action against Defendants, reasserting the claims alleged in their first lawsuit as well as bringing a new claim for breach of the RSA in which they asserted that Defendants had failed to complete the agreed-upon foundation work. Defendants filed an answer and counterclaim along with a third-party complaint against U.S. Masonry on 2 October 2013. The parties settled the case prior to trial, entering into a Final Settlement Agreement on 14 July 2014.

Under the Final Settlement Agreement, Defendants agreed to (1) complete the foundation work on Plaintiffs' home in compliance with "a) the sealed foundation plan of Kenneth Howler, dated 9-21-2007; and b) the sealed foundation plan of Sustainable Engineering and Efficient Designs dated 12-15-2011; and c) the sealed foundation plan prepared by Nick Parker dated 6-1-2012"; and (2) make several additional repairs to the home that were described in an attached exhibit. The Final Settlement Agreement also noted that Plaintiffs were seeking attorneys' fees based on their

contention that Defendants had materially breached the RSA, stating in pertinent part that

> [t]o resolve the issue of whether [Defendants] materially breached the Remediation and Settlement Agreement, as well as the amount of attorney fees to be awarded, court costs and expert fees, the parties agree those issues will be resolved by motion. [Plaintiffs] will file a motion for attorney fees, with supporting evidence and brief, on or before August 1, 2014. [Defendants] shall file a responsive brief and any supporting evidence on or before August 15, 2014. The parties will set the matter for hearing on the first available date after August 18.
>
> . . . . Within five business days after the execution of this Agreement, the claims and counterclaims in the Litigation shall be dismissed **with prejudice**.

Plaintiffs filed a motion for attorneys' fees and costs on 31 July 2014. The matter came on for hearing on 11 September 2014 before the Honorable William R. Bell. On 10 October 2014, Judge Bell entered an order and judgment in favor of Plaintiffs, determining that Defendants had materially breached the RSA and that Plaintiffs were entitled to recover $51,375.00 in attorneys' fees along with certain litigation-related costs from Defendants. Defendants gave timely notice of appeal from the trial court's order and judgment.

**Analysis**

On appeal, Defendants contend that the trial court erred in its award of attorneys' fees because Defendants did not materially breach the RSA and even assuming such a material breach had occurred, no statutory basis existed for an

award of attorneys' fees. Defendants then argue that if an award of attorneys' fees was permissible, the amount of fees awarded was excessive. We address each of Defendants' contentions in turn.

**I. Material Breach of RSA**

Defendants first argue that the trial court erred in determining that they materially breached the RSA. We disagree.

A material breach of a contract has been described by this Court as "one that substantially defeats the purpose of the agreement or goes to the very heart of the agreement, or can be characterized as a substantial failure to perform." *Supplee v. Miller-Motte Bus. Coll., Inc.*, ___ N.C. App. ___, ___, 768 S.E.2d 582, 593 (2015) (citation and quotation marks omitted). Generally, whether a party's breach of the contract is material or immaterial is a question of fact. *McClure Lumber Co. v. Helmsman Constr., Inc.*, 160 N.C. App. 190, 198, 585 S.E.2d 234, 239 (2003). Consequently, "[w]hen reviewing a trial court's determination that a party has materially breached a contract, the appellate courts are bound by the trial judge's findings of fact if there is some evidence to support them, even though the evidence might sustain findings to the contrary." *Id.* (citation and quotation marks omitted).

Here, the trial court made a finding that "Defendants did not complete a significant portion of the repairs required under the Remediation and Settlement Agreement." It then concluded that "Defendants' failure to complete the work set

forth in the Remediation and Settlement Agreement constituted a material breach of the Remediation and Settlement Agreement." Accordingly, we must determine whether there was competent evidence before the trial court showing that Defendants failed to complete a significant portion of the repairs required under the RSA.

The RSA required Defendants to install additional foundation piers, add projection to the existing footing in order to construct the additional foundation piers, and make the repairs "per the remediation plan developed by Sustainable Engineering and Efficient Designs," which was designed by Matthys Barker ("Barker") and dated 15 December 2011. It also required the foundation work to be completed "in a good and workmanlike manner" and "approved by a representative of Amicus Engineering."

The record contains affidavits from Nicholas Parker ("Parker") of Amicus Engineering, P.A., who was hired by Plaintiffs to assist in addressing the deficiencies in their home's foundation, and Hank Baumstark ("Baumstark"), a general contractor who performs home remediation projects and examined the foundation of Plaintiffs' home to assess the defects. Baumstark testified that when he visited the house in July of 2014, there were significant defects in the crawlspace of the home, a foundation pier was still missing, and due to inadequate support the floor beneath the fireplace was "sagging" and constituted "a danger to [Plaintiffs'] safety." Parker's affidavit stated that the work Defendants had performed did not comply with the 15

December 2011 Sustainable Engineering and Efficient Designs ("SEED") plan in the following ways:

> a. The new 8"x16" CMU pier called out by SEED at the marriage wall between the existing house and addition has not been installed;
>
> b. The 16"x16" pier underneath the steps has not been built up to support said steps;
>
> c. The wood shims under the new internal piers were not replaced with metal shims (in most locations);
>
> d. The two piers called out beneath the fireplace were not installed. Due to access limitations, it could not be confirmed that the double joist was installed;
>
> e. The two pier extensions called out by SEED at the side porch to support the steel angle iron were not installed;
>
> f. The three rows of double joists called out in the addition terminate at the middle interior girder and do not extend to the rear foundation wall as shown on the plans;
>
> g. The 2-ply 2x10 girder was not installed at the marriage wall[.]

Parker further testified that his "professional opinion of the foundation currently is that the work from Matthys Barker's engineering plan was largely left undone." Indeed, in the Final Settlement Agreement, Defendants themselves admitted that "at least one foundation pier required by the Remediation and Settlement Agreement was not installed." Given that the RSA required Defendants to perform the foundation work described in the SEED plan and there was competent

evidence before the trial court that the work was not done in conformity therewith, we conclude that there was competent evidence supporting the trial court's determination that Defendants failed to complete a significant portion of the work required under the RSA and that this failure constituted a material breach of that contract.

**II. Award of Attorneys' Fees**

Defendants next argue that even assuming the trial court properly determined that they materially breached the RSA, it nevertheless erred by awarding attorneys' fees to Plaintiffs because no statutory basis existed for doing so. However, Defendants failed to make this argument before the trial court. Instead, they merely contended that (1) attorneys' fees should not be awarded because they did not materially breach the RSA; and (2) the *amount* of fees sought by Plaintiffs was unreasonable.

It is well established that "issues and theories of a case not raised below will not be considered on appeal," *Westminster Homes, Inc. v. Town of Cary Zoning Bd. of Adjustment*, 354 N.C 298, 309, 554 S.E.2d 634, 641 (2001), and that "the law does not permit parties to swap horses between courts in order to get a better mount before an appellate court," *Geoscience Grp., Inc. v. Waters Constr. Co.,* ___ N.C. App. ___, ___, 759 S.E.2d 696, 703 (2014) (citation, quotation marks, and alteration omitted). Consequently, we decline to address Defendants' argument on appeal concerning the

legal basis for the trial court's award of attorneys' fees. *See Warren v. Warren*, ___ N.C. App. ___, ___, 773 S.E.2d 135, 137 (2015) (refusing to consider appellant's argument because he "failed to raise this argument at the trial court level").

Defendants also contend that the amount of attorneys' fees awarded was unreasonable and therefore an abuse of the trial court's discretion. They assert that the amount of the awarded fees was excessive in light of the "amount in controversy," "the results obtained," and the lack of "unique issues of fact or law . . . that would set this matter apart from other residential real estate construction contracts." We are not persuaded.

"The reasonableness of attorney's fees in this state is governed by the factors found in Rule 1.5 of the Revised Rules of Professional Conduct of the North Carolina State Bar." *Ehrenhaus v. Baker*, 216 N.C. App. 59, 96, 717 S.E.2d 9, 33 (2011), *appeal dismissed and disc. review denied*, 366 N.C. 420, 735 S.E.2d 332 (2012). "When a trial court uses its discretion to determine the amount of attorney's fees, its award will not be disturbed without a showing of manifest abuse of its discretion." *Bryson v. Cort*, 193 N.C. App. 532, 540, 668 S.E.2d 84, 89 (2008).

Here, the trial court reviewed the affidavit and supplemental affidavit of Plaintiffs' counsel, which documented the hours expended by his firm with regard to both lawsuits filed on behalf of Plaintiffs against Defendants and the rates charged by the attorneys and paralegal who worked on the cases. In its order and judgment,

the trial court determined that Plaintiffs had incurred reasonable attorneys' fees of $51,375.00 "as a result of Defendants' material breach of the Remediation and Settlement Agreement" and did not include the attorneys' fees Plaintiffs had incurred in the litigation prior to the RSA. Furthermore, in making its award, the trial court found that

> the time and labor expended by Plaintiffs' counsel were appropriate, given the complexity of the matter and the date upon which it was settled; the various hourly rates charged by Plaintiffs' counsel were appropriate, given the experience and skill levels of the attorneys; and the hourly rates charged by Plaintiffs' counsel are commensurate with the customary rates charged by firms['] attorneys of similar skill levels within this locality for performing like work. The Court also considered the factors set forth in North Carolina General Statute section 6-21.6(c) and Rule 1.5 of the North Carolina Rules of Professional Conduct and determined the fees are reasonable under those factors.

Thus, the trial court considered the evidence before it and applied appropriate reasonableness factors in determining the amount of attorneys' fees to award. We therefore hold that the court did not abuse its discretion in its fee award. Defendants' argument is overruled. *See Belcher v. Averette*, 152 N.C. App. 452, 457, 568 S.E.2d 630, 633-34 (2002) (concluding that trial court did not abuse its discretion regarding award of attorneys' fees based on its finding that it considered "the usual and customary rates and charges, hourly rate, time spent and efforts expended by [c]ounsel" in making the award).

**Conclusion**

For the reasons stated above, we affirm the trial court's 10 October 2014 order and judgment.

AFFIRMED.

Chief Judge McGEE and Judge ELMORE concur.

Report per Rule 30(e).