IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
August 16, 2007 Session

KIRK WENZEL, ET AL. v. MARK ORREN, ET AL.

Appeal from the Circuit Court for Blount County
No. E-18663 W. Dale Young, Judge

No. E2006-01228-COA-R3-CV - FILED OCTOBER 15, 2007

In this action for fraud and breach of contract, Kirk and Janice Wenzel ("Buyers") agreed to purchase a house from Mark and Alesia Orren ("Sellers"), subject to a satisfactory inspection. During a pre-closing walk-through of the property, Buyers noticed a puddle of water on the basement floor. The parties executed an "Inspection Letter," which included a clause requiring Sellers to repair the water leak at their expense. The closing occurred and Sellers repaired a leak on the water heater, which they contended was the source of the water in the basement. Buyers later experienced drainage and water problems, and Sellers refused to make further repairs. Buyers filed suit seeking $12,665.86 in compensatory damages, $10,000 in punitive damages, and costs. Despite receiving notice of the trial setting from opposing counsel, Sellers failed to appear at the trial, and the Trial Court entered a judgment against the Sellers for $30,000 in compensatory damages and $3,642.29 for discretionary costs. The Trial Court declined to award punitive damages. On appeal, Sellers raise multiple issues regarding the Trial Court's findings, the denial of Sellers' motion for summary judgment, and the denial of Seller's motion to vacate the judgment. We find no error with the Trial Court's rulings on these issues. However, the Trial Court awarded damages in excess of the *ad damnum* clause in Buyers' complaint, and, therefore, we modify the judgment to $12,665.86 in compensatory damages plus $3,642.29 for costs. We affirm as modified.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed as Modified; Case Remanded

D. MICHAEL SWINEY, J., delivered the opinion of the court, in which CHARLES D. SUSANO, JR., J., and SHARON G. LEE, J., joined.

M.J. Hoover, III, Knoxville, Tennessee, for the Appellants, Kirk Wenzel and Janice Wenzel.

Jason C. Rose, Maryville, Tennessee, for the Appellees, Mark Orren and Alesia Orren.

OPINION

I. Background

On April 18, 1999, Buyers entered into a contract to purchase a house from Sellers.[1] The contract provided that the sale was "subject to a complete satisfactory home inspection to be completed . . . at Buyers [sic] expense." The contract also contained the following clause:

> PROPERTY PURCHASED "AS IS." It is expressly understood and agreed that this Contract contains the entire agreement between the parties and that, except as noted within this Contract, there are no oral or collateral conditions, agreements, or representations, all having been incorporated and resolved into this agreement. Unless otherwise specified in this Contract, or new construction is involved, this property is purchased "as is" on closing date and neither the SELLER nor Agent(s) makes or implies any warranties as to the condition of the premises.

During a pre-closing inspection of the home, Buyers discovered a puddle of water on the basement floor. The parties executed the Inspection Letter confirming that Buyers had inspected the property and found it to be in satisfactory condition. However, the Inspection Letter also included the following handwritten provision:

> Purchasers found during walk-thru [sic] standing water on floor in basement bath. Seller agrees to repair water leak at Sellers [sic] expense to correct water problem in basement. This repair will be done ASAP. No longer than 30 days.[2]

The parties proceeded with the closing on May 6, 1999. Sellers did complete a residential property condition disclosure at the time of closing. This disclosure indicated no flooding, drainage, or grading problems. Two days later, a plumbing company repaired a leak on the flex line on top of the water heater at Sellers' expense. Sellers took no further action to correct any water problems in the basement. Buyers allege that they began experiencing "considerable water leaking in the basement" almost immediately after they purchased the home and that Sellers refused to make any additional repairs.

Buyers filed this lawsuit against Sellers asserting claims of breach of contract and

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[1]The residence is at 3141 Hardy Boulevard in Louisville, Tennessee.

[2]The handwritten portion of the Inspection Letter originally indicated that the Sellers would repair the "water heater" instead of the "water leak." In their statement of undisputed facts in support of their motion for summary judgment, Sellers admit they were aware of the change to that paragraph, even though neither they, nor the Buyers, initialed the new wording.

fraud. Buyers claimed that Sellers had failed to satisfy the terms of the Inspection Letter by not properly repairing the drainage problems that resulted in water pooling in the basement. Buyers also alleged that Sellers fraudulently promised to make repairs to induce Buyers to complete the purchase. Buyers' complaint sought $12,665.86 in compensatory damages, $10,000.00 in punitive damages, and costs. Sellers answered the complaint denying any fraud on their part and also denying that they were contractually obligated to make further repairs after they had fixed the water heater, asserting that the drainage problems described by Buyers developed after the sale and were not Sellers' responsibility.

Sellers filed a Motion for Summary Judgment or to Dismiss for Failure to State a Claim. Buyers replied to the motion asserting that summary judgment was inappropriate, and they attached an affidavit of an engineer who investigated the drainage problems at the house and recommended extensive repairs. After considering the record and arguments of counsel, the Trial Court denied Sellers' motion.

The Trial Court conducted a trial of this matter on January 6, 2005, following issuance of a Notice of Trial filed by Buyers on September 1, 2004. Sellers claimed that they were not consulted about the trial date selected by Buyers. Sellers, however, did receive notice of this trial date. Sellers did not appear in court for the trial. The Trial Court specifically found that "the Defendants properly filed an Answer to the Complaint on January 8, 2001, and had actual notice of the proceedings, but failed and refused to appear for the trial." Following a bench trial, the Trial Court awarded Buyers $30,000 in compensatory damages and $3,642.29 for discretionary costs, and declined to award punitive damages against Sellers. Sellers filed a Motion to Set Aside Judgment, which was denied by the Trial Court. Sellers appeal.

II. Issues Presented

Sellers present the following issues on appeal:

1. Whether the Trial Court erred in finding that Buyers were in the business of buying and selling houses.

2. Whether the Trial Court erred in finding that Sellers had made warranties as to water leakage in the residence.

3. Whether the Trial Court erred in finding that the Inspection Letter was incorporated into the contract for the sale of the residence.

4. Whether the Trial Court erred in denying Sellers' motion for summary judgment.

5. Whether the Trial Court erred in granting judgment for Buyers when a notice of trial was sent to Sellers' counsel by Buyers' counsel.

III. Analysis

A. Findings of the Trial Court

The first three issues raised by Sellers all suffer the same fatal flaw. Sellers' first three issues generally question the sufficiency of the evidence supporting the Trial Court's findings and resulting judgment. On appeal, however, we have been furnished neither a transcript nor a statement of the evidence. Because there is no transcript of the trial and the Trial Court refused to approve the statement of evidence offered by Sellers, our ability to conduct a proper appellate review of this case is severely constrained. *See Taylor v. Allstate Ins. Co.,* 158 S.W.3d 929, 931 (Tenn. Ct. App. 2004) ("This Court's authority to review a trial court's decision is limited to those issues for which an adequate legal record has been preserved."). In *Coakley v. Daniels*, we stated that if the appellant fails to provide us with a transcript or a complete statement of evidence, "there is a conclusive presumption that there was sufficient evidence before the trial court to support its judgment, and this Court must therefore affirm the judgment." 840 S.W.2d 367, 370 (Tenn. Ct. App. 1992) (citing *McKinney v. Educator & Executive Insurers, Inc.,* 569 S.W.2d 829, 832 (Tenn. Ct. App. 1977)). Consistent with our holding in *Coakley*, and as we have been furnished with neither a transcript nor a statement of the evidence, there is a conclusive presumption that there was sufficient evidence before the Trial Court to support its findings and its resulting judgment. Accordingly, we find Sellers' first three issues to be without merit.

B. Summary Judgment

Sellers also argue that the Trial Court erred in denying their motion for summary judgment. We disagree. In *Teter v. Republic Parking System, Inc.*, 181 S.W.3d 330 (Tenn. 2005), our Supreme Court reiterated the standards applicable when appellate courts review a motion for summary judgment. The Court stated:

> The purpose of summary judgment is to resolve controlling issues of law rather than to find facts or resolve disputed issues of fact. *Bellamy v. Fed. Express Corp.*, 749 S.W.2d 31, 33 (Tenn. 1988). Summary judgment is appropriate only when the moving party demonstrates that there are no genuine issues of material fact and that he or she is entitled to judgment as a matter of law. *See* Tenn. R. Civ. P. 56.04; *Penley v. Honda Motor Co.*, 31 S.W.3d 181, 183 (Tenn. 2000); *Byrd v. Hall*, 847 S.W.2d 208, 210 (Tenn. 1993). In reviewing the record, the appellate court must view all the evidence in the light most favorable to the non-moving party and draw all reasonable inferences in favor of the non-moving party. *Staples v. CBL & Assocs., Inc.*, 15 S.W.3d 83, 89 (Tenn. 2000). And because this inquiry involves a question of law only, the standard of review is de novo with no presumption of correctness attached to the trial court's conclusions. *See Mooney v. Sneed*, 30 S.W.3d 304, 306 (Tenn.

2000); *Carvell v. Bottoms*, 900 S.W.2d 23, 26 (Tenn. 1995).

Teter, 181 S.W.3d at 337.

After a careful review of the record, we are convinced that the Trial Court did not err in denying Sellers' motion for summary judgment. The parties clearly disagreed as to whether Sellers had committed to repair the cause of the basement water leak (as opposed to just the leak in the water heater) and if so, whether Sellers satisfied their responsibilities under the terms of the sales agreement and the Inspection Letter. The parties also disputed whether the Sellers acted fraudulently in concealing the longstanding drainage problems associated with the house. There were genuine issues of material fact relevant to these issues presented to the Trial Court and, therefore, the Trial Court did not err in denying Sellers' motion for summary judgment. We find no error in the trial court's denial of Seller's motion for summary judgment.

C. Notice of Trial Date

Sellers also argue that the Trial Court should have set aside its judgment and ordered a new trial because Buyers' attorney set the trial date without consulting with Sellers' attorney, arguing "defenses of surprise" and violation of their rights to due process and notice as justification for vacating the judgment. A trial court is vested with wide latitude in ruling on a motion for a new trial, and we will not disturb the trial court's decision unless it has abused its discretion. *Loeffler v. Kjellgren*, 884 S.W.2d 463, 468 (Tenn. Ct. App. 1994). Our Supreme Court discussed the abuse of discretion standard in *Eldridge v. Eldridge*, stating:

> Under the abuse of discretion standard, a trial court's ruling "will be upheld so long as reasonable minds can disagree as to [the] propriety of the decision made." A trial court abuses its discretion only when it "applie[s] an incorrect legal standard, or reache[s] a decision which is against logic or reasoning that cause[s] an injustice to the party complaining." The abuse of discretion standard does not permit the appellate court to substitute its judgment for that of the trial court.

Eldridge v. Eldridge, 42 S.W.3d 82, 85 (Tenn. 2001) (citations omitted).

Although Sellers allege that Buyers unilaterally set a trial date, they concede that they did receive notice of the trial date. In their Motion to Set Aside Judgment and their Amended Motions To Set Aside Judgment, Sellers stated that they received the Notice of Trial on July 7, 2004. In its order awarding judgment to Buyers, the Trial Court found that Buyers filed a Notice of Trial on September 1, 2004, and that Sellers "had actual notice of the proceedings, but failed and refused to appear for the trial." Even using the Trial Court's later date of September 1, 2004, Sellers still received notice of the trial date more than four months before the January 6, 2005, trial date. In *Williams v. National Grange Mutual Insurance Company*, we stated as follows regarding a litigant's motion for a new trial:

> Generally speaking, the mere absence from the trial of the unsuccessful party ordinarily is not sufficient ground for granting a new trial. However, a party's right to attend the trial of his case and to be heard in person is a very valuable right, and a new trial may be granted because of the absence of the unsuccessful party where it is apparent that failure to take such action would result in injustice. Ordinarily, before a new trial will be granted on such ground, *it is necessary for the complaining party to show that his absence was attributable to accident or adventitious circumstances, and was not due to fault or negligence on his part or on the part of his attorney*.

Williams v. Nat'l Grange Mut. Ins. Co., 1989 WL 9563, at *4 (Tenn. Ct. App., Feb. 10, 1989) (quoting 66 C.J.S. *New Trial* § 85 at 264-65 (1950 & Supp. 1988)) (footnotes omitted) (emphasis added).

Sellers admit, as found by the Trial Court, that they received notice of the trial date. However, rather than requesting a continuance or notifying the Trial Court and/or opposing counsel that they wanted a different trial date, Sellers did nothing. They failed to appear at the trial, and then attempted to have the judgment set aside when they were unhappy with the outcome of the trial. These facts do not justify a new trial, and the Trial Court correctly refused to grant one.

D. Ad Damnum Clause

The trial court awarded Buyers a judgment of $30,000 in compensatory damages and $3,642.29 for discretionary costs. However, the *ad damnum* clause of Buyers' complaint sought only $12,665.86 in compensatory damages, $10,000.00 in punitive damages, and costs. The Tennessee Supreme Court has held that "[a] judgment or decree in excess of the amount pleaded is void to the extent of the excess." *Gaylor v. Miller*, 59 S.W.2d 502, 504 (Tenn. 1933) (citing *Murphy v. Johnson*, 64 S.W. 894, 895) (Tenn. 1901); *accord Cross v. City of Morristown*, No. O3A01-9606-CV-00211, 1996 WL 605248, at *3 (Tenn. Ct. App. E.S., Oct. 23, 1996). We have acknowledged that "[t]his rule is based on considerations of fairness because the purpose of a complaint is to provide an adverse party with sufficient notice of the allegations the party is called on to answer." *Harrison v. Laursen*, No. 01A01-9705-CH-00238, 1998 WL 70635, at *5 (Tenn. Ct. App., Feb. 20, 1998).

The Trial Court awarded Buyers nearly three times the amount of compensatory damages they requested in their complaint. This is impermissible under Tennessee law. We find nothing in the record even indicating, let alone showing, that Buyers requested and were granted permission to increase their *ad damnum*. Furthermore, the Trial Court specifically referenced Buyers' original complaint, which asked for only $12,665.86 in compensatory damages, in its order granting Buyers a judgment.

We, therefore, reduce Buyers' judgment to the amount they requested in their

complaint, and do so even though Sellers did not raise this issue on appeal.[3] The Trial Court expressly refused to award punitive damages against Sellers. As such, we decline to include the $10,000 in punitive damages pleaded in the complaint when calculating the maximum judgment permitted by law. Accordingly, we modify the Trial Court's judgment to $12,665.86 in compensatory damages and $3,642.29 in costs, for a total of $16,308.15.

V. Conclusion

We hold that the Trial Court did not err in denying Sellers' motion for summary judgment, awarding judgment to Buyers, and denying Sellers' motion to set aside the judgment. However, we modify the Trial Court's judgment to $16,308.15, which includes $12,665.86 in compensatory damages and $3,642.29 in costs. We affirm the judgment of the Trial Court as modified and remand for further proceedings consistent with this opinion. The costs on appeal are taxed against the Appellants, Mark Orren and Alesia Orren, and their surety.

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D. MICHAEL SWINEY, JUDGE

[3] While our review generally extends only to those issues presented by the parties for review, we may in our discretion consider other issues. Tenn. R. App. P. 13(b).