

IN THE COURT OF APPEALS OF TENNESSEE

AT KNOXVILLE

FILED

March 15, 2000

Cecil Crowson, Jr.
Appellate Court Clerk

STEVE W. KILLIAN,

Plaintiff-Appellee,

vs.

TABOR CONSTRUCTION
COMPANY, INCORPORATED,

Defendant-Appellant.

) C/A NO. E1999-01782-C0A-R3-CV

)

) KNOX CHANCERY

)

) HON. SHARON BELL,

) CHANCELLOR

)

) AFFIRMED

) AND

) REMANDED

C. PAUL HARRISON, LONG, RAGSDALE & WATERS, Knoxville, for Plaintiff-Appellee.

THOMAS R. HENLEY, Knoxville, for Defendant-Appellant.

OPINION

Franks, J.

Defendant Tabor Construction, Inc., in this contract action, appeals to this Court for the second time.

Plaintiff contracted with defendant for the construction of a house, and during the construction, plaintiff removed defendant from the job on breach of contract grounds. Plaintiff then filed this action, and defendant counterclaimed also alleging breach of contract by plaintiff and seeking damages. At the conclusion of the trial, the Trial Judge opined that “both and neither of the parties prevailed in their lawsuit” and that no damages were proven, and no damages or attorney’s fees were awarded.

Defendant’s first appeal presented the issue of damages and the issue of whether defendant was entitled to an award of attorney’s fees pursuant to the construction contract between the parties. This Court determined that defendant was entitled to a judgment of nominal damages and costs, but since defendant had filed no transcript or statement of the evidence, “we must resolve all issues relative to compensatory damages and attorney’s fees adverse to the appellant.” This Court modified the trial court’s judgment by awarding nominal damages to the defendant of \$100.00, and assessing costs to the plaintiff.

Upon remand to the Trial Court for entry of the modified judgment, defendant filed a Motion for Attorney Fees and Costs, pursuant to the parties’ construction contract. The contract is not in the record, but defendant’s Motion purportedly quotes from the contract section entitled “Attorney Fees” stating that the “prevailing party” in any “action, proceeding or arbitration arising out of this agreement” is entitled to reasonable attorney’s fees. The Motion was denied, and this appeal ensued.

The defendant insists that the Trial Court erred in not awarding attorney’s fees pursuant to the contract. This is precisely the same issue raised by the defendant in the first appeal of this case. Since this Court’s adjudication in that case was not appealed from, the ruling became the law of the case. *Pierce v. Tharp*, 457 S.W.2d 529 (Tenn. 1970); *Watson v. Cleveland Chair Co.*, 789 S.W.2d 538 (Tenn. 1989).

Plaintiff seeks an award of costs and expenses pursuant to Tenn. Code Ann. §27-1-122, on the basis that defendant’s appeal is frivolous.

Successful litigants should not have to bear the expense and vexation of groundless appeals. *Davis v. Gulf Ins. Group*, 546 S.W.2d 583, 586 (Tenn. 1977). The Supreme Court has also recognized that legitimate appeals should not be discouraged, but where a case is “so lacking in justiciable issues” it may be adjudged frivolous. *Id.* The Supreme Court has also explained that an appeal with “no reasonable chance of success” would likewise be deemed frivolous and costs assessed therefor. *Liberty Mutual Ins. Co. v. Taylor*, 590 S.W.2d 920, 922 (Tenn. 1979).

In this case, the defendant’s issue on appeal had already been adjudicated by this Court in the first appeal. From the outset, this appeal had no reasonable chance of success, and we conclude that the plaintiff should be awarded costs pursuant to Tenn. Code Ann. §27-1-122.

The judgment of the Trial Court is affirmed, and upon remand the Trial Court will determine an award of costs to plaintiff, pursuant to Tenn. Code Ann. §27-1-122.

The cost of the appeal is assessed to appellant.

Herschel P. Franks, J.

CONCUR:

Charles D. Susano, Jr., J.

D. Michael Swiney, J.