IN THE COURT OF APPEALS
AT KNOXVILLE

FILED

February 9, 2000

Cecil Crowson, Jr.
Appellate Court Clerk

		E1999-02432-COA-R3-CV
DAVID LEFEMINE and DAVID SANDERS	)	WASHINGTON COUNTY 03A01-9904-CH-00136
Plaintiffs-Appellants	)	
v.	)	HON. G. RICHARD JOHNSON, CHANCELLOR
PHILLIPS & JORDAN, INCORPORATED	)	
Defendant-Appellee	)	VACATED AND REMANDED

MICHAEL A. EASTRIDGE OF JOHNSON CITY FOR APPELLANTS

J. CHADWICK HATMAKER OF KNOXVILLE FOR APPELLEE

OPINION

Goddard, P.J.

This is a suit by Plaintiffs David Lefemine and David Sanders seeking damages for breach of contract against Defendant Phillips & Jordan, Incorporated, which alleges that Defendant

Phillips & Jordan failed to provide the Plaintiffs an access road as it had by written contract agreed to do. The Trial Court dismissed the Plaintiffs' suit on the Defendant's motion at the conclusion of the Plaintiffs' proof resulting in this appeal which insists the evidence preponderates against the action of the Trial Court. We vacate the Trial Court's judgment and remand the case for further proceedings.

At the outset we point out the standard used to review motions to dismiss at the conclusion of the Plaintiffs' proof is stated by Mr. Justice Brock, in City of Columbia v. C.F.W. Construction Co., 557 S.W.2d 734, 740 (Tenn. 1977), as follows:

> The motion authorized by this rule is not to be confused with a motion for directed verdict which is authorized by Rule 50, Tennessee Rules of Civil Procedure. Motions for a directed verdict are neither necessary nor proper in a case which is being tried without a jury. Motions for dismissal in non-jury cases under Rule 41.02(2), Tennessee Rules of Civil Procedure, and motions for directed verdicts in jury cases under Rule 50, Tennessee Rules of Civil Procedure, are somewhat similar, but, there is a fundamental difference between the two motions, in that, in the jury case, the judge is not the trier of facts while in the non-jury case he is the trier of the facts. In the jury case he must consider the evidence most favorably for the plaintiff, allow all reasonable inferences in plaintiff's favor and disregard all counteracting evidence, and, so considered, if there is any material evidence to support a verdict for plaintiff, he must deny the motion. But in the non-jury case, when a motion to dismiss is made at the close of

> plaintiff's case under Rule 41.02(2), the trial judge must impartially weigh and evaluate the evidence in the same manner as though he were making findings of fact at the conclusion of all of the evidence for both parties, determine the facts of the case, apply the law to those facts, and, if the plaintiff's case has not been made out by a preponderance of the evidence, a judgment may be rendered against the plaintiff on the merits, or, the trial judge, in his discretion, may decline to render judgment until the close of all the evidence. The action should be dismissed if on the facts found and the applicable law the plaintiff has shown no right to relief.

The Plaintiffs' are the owners of an approximately 3.2 acre tract of land which contained a quantity of shale which the Defendant desired to obtain for the purpose of providing a base in connection with the building of a Johnson City school for which it had the contract. To this end the parties entered into an agreement styled "Borrow Agreement" which enabled the Defendant to remove shale from the Plaintiffs' land.

As pertinent to this appeal the contract provided the following:

> 1. PROPERTY: Owners agree to permit and hereby give Contractor the right to obtain fill material from Owners' property, such property being more particularly described as follows:
>
> BEING a portion of that tract of land described in Deed Book 54, page 2043. The said Deed Book being located in the Clerk's office of Washington County,

Tennessee. Said property being more specifically shown outlined in yellow on the attached drawing which is specifically incorporated herein.

. . . .

15. CONSIDERATION: For and in consideration of Owner allowing Contractor to remove borrow material from Owners' property, Contractor agrees to provide Owners with an access road into the property. The location and construction of said access road shall be determined by Contractor.

The Plaintiffs' proof shows without contradiction that the access road provided by the Defendant was inaccessible except by a four-wheel drive vehicle and sometimes not even then. In addition, the proof also shows by the testimony of Mr. both Lefemine and Mr. Sanders the following:

MR. LEFEMINE'S TESTIMONY

Q. Is that the map that you were discussing with Phillips and Jordan?

A. Yeah. We actually had given them two maps, this obviously being one. And than I think there was another one that was strictly just black and white that had just the boundary and just topo lines without the building overlay.

Q. And what was their response initially when you showed them that map?

A. We had met – of course it had been two months into the project, and we met down in Jim Horton's office, both with Jim Horton [Surveyor employed by

Plaintiffs] and myself, Dave Sanders [Acting Superintendent for building school and removing shale], Fred Hedstrom who is a civil engineer [employed by Plaintiffs], and Robert Bryant. And he said he was going to take the two sets of plans and take it back to Phillips and Jordan. It was on a holiday weekend, Memorial Day, and go over it with them to voice the concerns about the grade of the road. And then get back to us after the holiday to tell us what the plans ere to take care of it.

Q. Up to that point had anyone from Phillips and Jordan told you that they would not return to lower the grade of that road?

A. No.

Q. What did they tell you?

A. We had been informed through the whole process of the borrow pit agreement that they were going to make the road compatible so that we could develop the property. And that was–otherwise, I guess, if it was just a means of scraping off the top, then we would have, ourselves, years ago, spent a couple of thousand dollars and just taken a grader and just run up to the top of the hill. We could have achieved the same goal. Our main concern was to develop it. For the consideration of the amount and volume of the shale they were going t o pull out of there, it seemed like a reasonable trade-off for both parties.

Q. And did they ever return to grade the road?

A. Oh, no. It still stayed at the 1590 elevation. No, they've never; they have not lowered the grade.

. . . .

THE COURT: If one was looking at Exhibit 5 that you have in your hand and one wanted to enter the property via this access road, by your finger show me which direction they would be going.

A. Okay, the -- some of this material that you see piled right here, some of this material was actually built as a rampway coming out into the road itself. And what they had done is built a ramp in order to get a little bit more length in distance. And then after they left the property they took the material that was here, put it up above as well as that asphalt that peeled up. The opening would have been probably from that point to that point right there.

THE COURT: So between your thumbs would be the actual mouth of the access road.

A. Right.

THE COURT: Can a vehicle transverse the area between your thumbs there, the mouth of the access road?

A. Could not when they left the site at all.

THE COURT: Can it now?

A. Well, they've removed some barricades that they had up there and have smoothed over all the ruts and things like that that were in the road. A four-wheel drive vehicle can probably get up there.

. . . .

Q. Did Phillips and Jordan ever tell you while they were on the site that they would lower the grade of that road?

A. Oh, absolutely. Many times.

Q. Okay. Did they ever tell you that the road that exists today would be the access road that you agreed to?

A. No.

Q. Okay. How did you ever go visit the site?

A. Many times.

Q. Okay. How often?

A. Lots of times daily. Almost on a daily basis. I might have missed a day or two or three, but...

Q. Okay. And why did you go to the site so often?

A. Well, they were moving so much dirt at the time. I mean, they was -- they moved a mountain in a short period of time. And my concern from the beginning was that we got an access road in there. And I was concerned about that access road. And from the very Day One, I was there the day they started the road in. And, you know, they had the right to determine where the road went. And I had disagreements on where the road should go in and where it shouldn't, but, you know, they had the final say and they put it where they wanted to. And I watched them open it up. They spent a prior day just getting it ready; and then a day later -- the trucks were sitting out there one morning and they were finishing the road and getting it ready to start hauling. The track-hoe was on top of the hill.

Q. Did you express to anyone there your concerns about the road?

A. Yes. Yes, I did.

Q. And what did you express to them?

A. Well, that very first day when I was watching them, the trucks getting ready to go in, there was twelve trucks parked all the way up and down Arrowhead; and it was a parade of trucks. And they had a lot of equipment out there and the trucks were getting ready to go up the hill. And they'd go halfway up and they'd just bounce, spin, couldn't even get in. They'd back down the hill, take a running go and go up through there. Still, just halfway up, a third of the way up the hill, they couldn't even make it up there. It got to be they had about three or four different

subcontractors. They weren't Phillips and Jordan's trucks; these were subcontractors. And it got to be a challenge, watching them, that one of them, "My Mack truck or your Ford truck, we'll see which truck's the best, which will make it to the top of the mountain." They spent a whole morning without ever getting a single truck up there. Those trucks were just sitting there, wasn't hauling a thing, couldn't even get up on the property. And they would take -- brought a compactor in to compact the dirt down, make it hard as asphalt or concrete as much as they could, worked hours. And they were frustrated I could see because trucks were sitting there. They were paying so much dollars an hour per truck and they weren't getting anything done. And finally they got it so hard and so packed, and a truck would back all the way down almost to Princeton Road, get a running go, and they'd get to the top of the hill.

Q. Could you show to the Court -- I believe it's Exhibit No. 4 to Plaintiff's testimony -- a photograph of the road. does that show what you're talking about?

A. This was what it was somewhat when they was working it. But to get the trucks up there, they had to actually bring dirt out into the existing Arrowhead Road to make the slope less slope so their old trucks could get up through there. And they had to come out a pretty good ways, almost half the distance of the road.

Q. Okay. And with whom did you speak about your concern about the grade of that road?

A. This was Robert Bryant, the very--and he had a rough day that day. I mean, he was under a lot of pressure and he wasn't getting anything done. And I was concerned that if he can't get his own heavy equipment up through there, I know I can't get a car up through there. And he said, "David, don't worry. We're going to have to re-work this road some. Our main concern is now to just get some--we've got to get shale out there on the site." It was wintertime. "They can't use any other fill except brown shale. We've got the trucks here ready. Our main concern is moving dirt, and that's the only thing we're trying to

accomplish right now. We'll -- you'll be happy with what we leave you with." And...

Q. Did he -- oh, I'm sorry. Go ahead.

A. I went to David that day. I said, "David, I don't like this road," from Day One. And I mean we proceeded talking with Robert Bryant. And he said, "Don't worry." We're getting the dirt out. You're going to be happy with what we leave you."

Q. Did he ever tell you that they would lower the grade of that road?

A. Yes. And as a matter of fact, they did. They actually changed the road some from what they originally started with. They moved it down the hill some; and that enabled them more to get their own trucks up in there easier.

Q. Okay. And was that still a problem? Did you still raise that issue with Robert Bryant?

A. Oh, yeah. I still did. I mean, I said, "You've got your trucks up in there, but this is not going to work for us." He says again, "Our main concern is to move this dirt out of here. We've got to get that over there on the school site. And we can't go in there and work on the roads and keep these trucks from not rolling to build you the road. The road, we can do that later when the trucks are out of the way, and we can make this road that will be to your liking." The words was, "You'll be happy with it."

Q. Did you -- how many times did you meet with Robert Bryant to discuss specifically the grade of the road?

A. Many times. right on up through until they left. Four or five times. He wasn't on the site all the time.

Q. And at anytime did he indicate to you that they would not change the grade of the road?

A. No. No. And they've never said that even when we had partial settlement. I was led to believe they was going to make the -- do what they intended to do.

. . . .

Q. And prior to entering into the borrow agreement you didn't give Phillips and Jordan any drawings or any maps which showed how the access road should be built, did you?

A. No, because, again, I understood it was to their total discretion. I was there the day and put my input in to what I thought where the road should go in. They did not put it the way I thought it should; and that was fine. As long as I had an access into that property where we could develop it, I didn't care where they put it.

. . . .

Q. And you didn't make any attempt to revise that paragraph, did you?

A. No, because I -- if they put the road in to where we could develop the property, I didn't care how we got into it, just as long as they put us a road in that we could develop the property. And they could take as much fill as they wanted to. Again, as testimony was entered today, they could take one load or they could take it right down to road level; we didn't care if they took it down to road level. That was fine. If they took it down to road level and we could get into the property and develop it, they could take that much fill out of there.

. . . .

Q. And the only damages that you claim in this lawsuit is the loss of the raw land value. Is that correct?

A. My whole intentions was, from the beginning to the end of this thing, I wanted an access road in. I don't care what the amount of damages is, Phillips and

Jordan can put the road in. If they can do it for ten thousand ($10,000.00) dollars and put it in, I'm happy. Or if they hire somebody else to put it in. Whatever they pay, I just want the road in. I don't care about the damages. The bottom line, from the beginning to the end of this thing, was all I wanted was an access road in so I could develop the property.

Q. You remember giving your deposition in this matter, don't you, sir?

A. Yes, I do.

Q. August 26th of '98?

A. Right.

Q. And at Page 8 of your deposition beginning at Line 12 the question was put to you: "Question: Mr. Sanders, do you have any claims for dollar damages other than the loss of use damages that Mr. Lefemine outlined during his testimony?"

A. Uh-huh.

Q. "Answer: We have loss of use of the property because we didn't have a road that we could get in and use the property with. Okay," was the next question, "and that's the nature of the damage claim that's been asserted in this lawsuit. Answer: Yes." You testified accurately in your deposition, sir, and truthfully?

A. To my best ability. But, again, my bottom line on this whole thing -- my whole thinking wasn't even thinking in terms of dollars. My whole thinking was I wanted a road into the property so that we could develop it. I didn't care what it cost or who did it. I wasn't thinking in terms of dollars, and I still don't think in terms of dollars. All I'm after is to get a road into that property that we can develop the property just like all our neighbors around there have done with their condos and things. That was the bottom line. That was the reason why we put the slope agreement for the utilities, so the utilities would slope from the rear of the property to the front. So

> if they take down the front first and leave the rear, that's fine. We didn't care how much dirt they took out. Again, they could take it right down to the asphalt as long as we had positive grading sloped from the rear of the property to the front. Never was thinking in terms of dollars or amounts. We weren't thinking about selling the fill dirt to them. None of that cared--mattered. The bottomline was that we got a road into the property.

There is also testimony in the deposition of Mr. Bryant, which was introduced by the Plaintiffs, that no representation was made by him as to lowering the grade, although he did not deny statements that the Plaintiffs would be happy with the road.

It is the Defendant's insistence that the Plaintiffs wanted the access road to meet city requirements for developing the property. However, Plaintiff Sanders testified otherwise:

> Q. Just to settle this issue real quickly, Mr. Sanders, what are you and Mr. Lefemine asking the Court to do today?
>
> A. What we intended from Day One is to put a road that we can develop the property.
>
> Q. Would that include the cost of building such a road?
>
> A. Building such a road. We're not asking them to gravel it; we're not asking them to pave it; we're not asking them to curb it. We just want a rough grade that we can come in there. We can do the graveling. I

> never intended for them to gravel it or pave it, put sidewalks in, nothing of that; I just wanted a rough grade that a car could drive up in it. Not a four-wheel drive, not a dozer, a regular car a woman or any driver could just drive up in there with their car to the project.

Our review of the record convinces us that absent a specific finding by the Trial Court that the deposition testimony of Mr. Bryant negated the testimony of both Plaintiffs, the evidence preponderates in favor of the Plaintiffs' insistence, which would require the Defendant to go forward with its defense.

In this regard we point out that the Plaintiffs under the present record would at the very least be entitled to the road described by Mr. Sanders in the last quotation from his testimony.

For the foregoing reasons the judgment of the Trial Court is vacated and the cause remanded for further proceedings not inconsistent with this opinion. Costs of appeal are adjudged against Phillips & Jordan, Incorporated.

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Houston M. Goddard, P.J.

CONCUR:

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Herschel P. Franks, J.

_____
Charles D. Susano, Jr., J.