

IN THE COURT OF APPEALS OF TENNESSEE
WESTERN SECTION AT NASHVILLE

DOUGLAS B. YOUNG d/b/a)
CITY TILE,)
)
Plaintiff/Appellee,) Rutherford Chancery No. 90CV-297
)
VS.) Appeal No. 01A01-9508-CH-00343
)
JAMES BROWN,)
)
Defendant/Cross-)
Plaintiff/Appellee,)
)
VS.)
)
JIMMY C. POPE, and wife,)
JANICE E. POPE,)
)
Defendants/Cross-)
Defendants/Appellants.)

FILED

March 15, 1996

Cecil W. Crowson
Appellate Court Clerk

APPEAL FROM THE CHANCERY COURT OF RUTHERFORD COUNTY
AT MURFREESBORO, TENNESSEE
THE HONORABLE ROBERT E. CORLEW, III, JUDGE

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Murfreesboro, Tennessee
Attorney for Appellee, Douglas Young d/b/a City Tile

AFFIRMED AS MODIFIED

ALAN E. HIGHERS, J.

CONCUR:

W. FRANK CRAWFORD, P.J., W.S.

HEWITT P. TOMLIN, JR., Sr. J.

The plaintiff, Douglas B. Young, d/b/a City Tile, sued the defendants, Jimmy and

Janice Pope, and their contractor, James Brown, to recover the balance due on materials furnished for the construction of the Popes' home and to enforce a mechanic's lien on the Popes' property. Brown cross-claimed against the Popes for the balance allegedly due on the construction contract. Following a hearing on the matter, the trial court entered judgment in favor of Young against Brown in the amount of \$6,457.52, held that the Popes were jointly and severally liable to Young for \$4,948.30, and held that the Popes were liable to Brown for \$7,250.00. The Popes have appealed, alleging that the trial court erred in calculating damages. For the reasons stated below, we affirm the judgment of the trial court.

I. Facts

The basic facts are largely undisputed. On January 8, 1989, the Popes entered into a contract with Brown for the construction of a house. The contract price was \$76,000.00, which was to be paid in four installments--the first to be paid when Brown completed the foundation, the second to be paid upon completion of the framing and the roof, the third to be paid upon completion of the outside doors and windows, and the last to be paid upon completion of construction. The contract did not specify the time by which the house was to be completed. Rather, the contract provided that the "contractor agrees to use due diligence in the completion of the work within a reasonable amount of time." The contract also afforded to the Popes the right to terminate the contract upon thirty days' written notice to Brown in the event that Brown failed to perform under the contract. The stipulated damage clause provided that if Brown did not perform under the contract, the Popes could complete or rectify the deficiencies and deduct the cost from any payment due to Brown.¹

Brown was obligated under the contract to furnish all materials and labor necessary for construction. An addendum to the contract allowed the Popes to select items for the house such as carpet, lighting, flooring, wallpaper, and cabinets.

At trial, Brown claimed that a reasonable time for completion of the house would have been about four months. Mr. Pope testified that Brown said that it would take about

¹ The damage clause provides in part, "[I]f the unpaid balance of the Contract Sum exceeds the expense of finishing the work, such excess shall be paid to the Contractor, but if such expense exceeds the unpaid balance, the Contractor shall pay the difference to the Owner."

three months. Brown began construction in April of 1989. Initially, Brown's work on the house progressed well. In accordance with the contract, the Popes paid several installments to Brown. In September of 1989, however, the Popes began to have concerns about the delay in progress of the construction. As of September 2, 1989, the Popes had paid \$55,000.00 to Brown.

The Popes told Brown that they would not pay him any further installments until the house was complete. Brown stated that as of August 1, 1992, the house was two-thirds complete and he had been paid about three-fourths of the contract price. Brown testified that at the time he ceased working on the house, it was 97% complete. In accordance with the contract, on January 13, 1990, the Popes gave Brown 30-days' written notice that they were terminating the contract because Brown failed to complete the work within a reasonable amount of time and because there existed other defects in Brown's performance. The Popes terminated the contract approximately nine months after construction commenced.

Although the Popes made efforts to employ another contractor to complete the house, they were unable to do so. Consequently, the Popes undertook to complete the house. They purchased and installed several items, including railing, coating and sealant on the basement, water pipes, lighting fixtures, wallpaper, steps, and a heat and air-conditioning system. The Popes documented the sums they had expended, which totalled approximately \$14,500.00.

At trial, expert witnesses testified on behalf of both parties as to the cost of completion. Brown's expert was Leonard Norris, who stated that the cost of completion could be as much as \$6,100.00. Dan Ross, who testified for the Popes, stated that the cost of completion would be approximately \$9,575. 00.

The trial court ultimately held that Young was entitled to recover \$5,238.10, plus interest, from Brown because Brown acknowledged his liability to Young. The lower court also held that the Popes were jointly and severally liable to Young in the amount of

\$4,012.00,² and entered a mechanic's and materialmen's lien against the Popes' property to secure the indebtedness. The court found as fact that "Mr. Brown spent far longer on the construction than was reasonable." The chancellor further stated in his opinion as follows:

The testimony as to the amounts necessary to complete the home range from a high of \$9,575 estimated by Dan Ross down to less than \$2,000 suggested by Mr. Brown in his testimony. Mr. and Mrs. Pope presented proof that they had expended some \$9,909.64 prior to 1991, and then another \$1,629.57....Considering all of the proof, the Court finds that the original contract price was \$76,000, but from this sum of \$3,5000 should be deducted, that price representing the allowance for air conditioning and heating which the parties agreed would be installed by Mr. Pope. Further, the Court finds that \$55,000 had been paid toward the contract price, leaving a remaining balance of \$17,500 owed on the contract. Noting the large amount of money expended by Mr. and Mrs. Pope on the residence, some of which appear to have been contemplated by the original contract, and some outside the scope of the contract, and further resolving the issues of reasonableness and necessity, the Court finds that \$6,250 of the sums expended by Mr. Pope should further be subtracted from the sums owed by Mr. and Mrs. Pope to Mr. Brown....[I]t further appears to the Court that the sum of \$4,000 is further necessary for the completion of the residence. Thus, it appears that Mr. Brown is entitled to recover the sum of \$7,250 from Mr. and Mrs. Pope....

Finally, the trial court held that the Popes were not entitled to any incidental or consequential damages.

It is from this judgment that the Popes appeal. They have stated the issues for our consideration as follows: Whether the trial court erred in calculating damages and adjusting the financial obligations among the parties, specifically in the following respects: (a) the cost of completion of the Pope residence; (b) the amounts owing to original Plaintiff Douglas Young d/b/a City Tile and the source of such payment; (c) incidental and consequential damages.

II. Cost of Completion

The evidence at trial regarding the cost of completion ranged from Brown's estimate of \$2,175.00 to the Popes' expenditures of \$14,500.00. The trial court found that some of the Popes' expenditures were outside the scope of the contract with Brown. Accordingly, the trial court took the contract price of \$76,000 and subtracted from that \$3,500.00 for the

²The difference in the amounts recovered by Young is due to the fact that there were defects in Brown's installation of the carpet, hardwood, and tile flooring. The trial court held that these deficiencies merited an offset against the amount that the Popes owed to Young.

cost of the heat and air-conditioning, \$6,250.00, representing part of the sums expended by the Popes, and \$4,000.00, which the court found to be the cost of completion. These calculations left the Popes with indebtedness to Young in the amount of \$7,250.00.

Our standard of review of this case is *de novo* upon the record of the trial court, accompanied by a presumption of the correctness of the finding, unless the preponderance of the evidence is otherwise.

The testimony in this case concerning the cost of completion was contradictory. Thus, the credibility of the witnesses was of great significance in this case. On matters turning upon the credibility of witnesses, this Court will afford great weight to the trial judge's determination because he had the opportunity to observe the manner and demeanor of the witnesses as they testified. Balsinger v. Town of Madisonville, 435 S.W. 2d 803, 807 (Tenn. 1968).

Based upon the foregoing testimony, it is apparent that the trial court's assessment of the costs of completion was well within the scope of the evidence submitted at trial. We find that the evidence does not preponderate contrary to this assessment. The trial court's judgment was both reasonable and supported by the evidence.

III. Mechanic's Lien

The Popes contend that they owe no financial obligation to Young because the contract specified that Brown was liable to all material suppliers.

Tennessee Code Annotated § 66-11-115(a) provides in pertinent part as follows:

(a) Every journeyman or other person contracted with or employed to work on the buildings, fixtures, machinery, or improvements, or to furnish materials for the same, whether such journeyman, furnisher or other person was employed or contracted with by the person who originally contracted with the owner of the premises, or by an immediate or remote subcontractor acting under contract with the original contractor, or any subcontractor, shall have this lien for such work or material; provided, that the subcontractor, laborer or materialman satisfies all of the requirements set forth in § 66-11-145, if applicable.

T.C.A. § 66-11-115 (1993).

It has long been the rule in Tennessee that if a materialman complies with the statutory requirements, he is entitled to a lien on the property of an owner who has contracted for construction with a contractor to whom the materialman has furnished materials for the structure. Bain-Nicodemus, Inc. v. Bethay, 292 S.W. 2d 234, 241 (Tenn. Ct. App. 1953). There is no requirement of a contract between the owner and the subcontractor in order for the materialman to possess such a lien. McCrary Bros. v. Bristol Bank & Trust Co., 97 Tenn. 469, 37 S.W. 543 (1896); Reeves v. Henderson, 90 Tenn. 521, 18 S.W. 242 (1891).

The record indicates that Young satisfactorily complied with the statutory requirements necessary to establish a mechanic's lien. Therefore, this issue is without merit and we affirm the trial court's imposition of a lien on the Popes' property. The Popes assumed no personal liability for the cost of the materials supplied by Young. However, Brown conceded that he was contractually obligated to pay for all materials furnished in the construction of the house. Consequently, we hold that the Popes are not personally liable to Young, but rather, are liable only to the extent of the materialman's lien.

IV. Consequential Damages

The Popes assert that the trial court erred in electing not to award to them consequential damages. The Popes testified that they borrowed money in an attempt to complete construction of the house, and they seek to have this Court award them either interest on the money that they borrowed or sums representing the rental value of the house that they were unable to rent because Brown did not complete construction.

Consequential damages are special damages and are recoverable if they are reasonably shown to have been within the contemplation of the parties at the time the contract was executed. Tennessee Fertilizer Co. v. International Agricultural Corp., 146 Tenn. 451, 243 S.W. 81 (1921). In the present case, the contract contained a stipulated damages clause, which provides:

If the Contractor defaults or neglects to carry out the work in accordance with the Contract Documents or fails to perform any provision of the Contract, the Owner may, after thirty (30)

days written notice to the Contractor and without prejudice to any other remedy he may have, make good such deficiencies and may deduct the cost from the payment then or later due the Contractor...

Our task is thus to determine whether the parties contemplated the inclusion of consequential damages within that clause. We hold that based upon the contract language, there is no intent evinced by the parties to include such damages in the stipulated damages clause.

Young's request that this be declared a frivolous appeal pursuant to Tenn. Code Ann. § 27-1-122 is denied. We are of the opinion that this is not an appropriate case for the imposition of sanctions for a frivolous appeal.

For the reasons stated above, we affirm the trial court's judgment in part and modify in part. Costs incident to this appeal are taxed against appellants.

HIGHERS, J.

CONCURS:

CRAWFORD, P.J., W.S.

TOMLIN, Sr. J.