

IN THE COURT OF APPEALS OF TENNESSEE  
WESTERN SECTION AT NASHVILLE

NASHVILLE PAINTING CORP., )

Plaintiff/Appellee, )

VS. )

RAY BELL CONSTRUCTION CO., )  
INC. and INSURANCE COMPANY OF )  
NORTH AMERICA, )

Defendants/Appellants. )

Williamson Chancery No. 21816

Appeal No. 01A01-9510-CH-00491

**FILED**

August 21, 1996

Cecil W. Crowson  
Appellate Court Clerk

APPEAL FROM THE CHANCERY COURT OF WILLIAMSON COUNTY  
AT FRANKLIN, TENNESSEE  
THE HONORABLE HENRY DENMARK BELL, CHANCELLOR

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**AFFIRMED**

ALAN E. HIGHERS, J.

**CONCUR:**

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

DAVID R. FARMER, J.

This suit was brought by a subcontractor, Nashville Painting Corporation ("NPC"),

to recover for extra-contractual work allegedly performed and for the balance due under the subcontract. The trial court dismissed appellant's counterclaim for breach of contract and awarded \$137,002.00 to NPC. Appellant has raised four issues on appeal, which are: (1) whether the trial court erred in finding that NPC had completed all of the work that it was contractually obligated to perform by June 1, 1992; (2) whether the trial court erred in awarding NPC additional compensation for work performed after June 1, 1992; (3) whether the trial court erred in dismissing appellant's counter-claim; and (4) whether the trial court erred in finding that appellant had waived the written change order provision of the subcontract. After a careful review of the record, we do not find that the evidence preponderates against the trial court's findings of fact in this matter, and we therefore affirm.

Ray Bell Construction Company ("Bell") entered into a contract with the Georgia Building Authority to build a prison in Wilcox County, Georgia. This contract, which obligated Bell to construct a prison for \$17,935,000.00, was later assumed by the Georgia State Financing and Investment Commission. The Insurance Company of North America served as surety on the contract.

In February 1990, NPC subcontracted with Bell to perform painting work on the project. Following several delays, NPC began painting during the first week of May, 1991. By the time NPC arrived at the site to begin painting, the project was fraught with problems and delays. Inspectors representing the owner of the project and the state of Georgia had condemned much of the work, including masonry work, concrete slabs and ceilings, and steel frames. NPC painted according to the painting specifications from May until January 1991.

Due to numerous condemnation problems, in January 1992, Bell replaced the job superintendent with Dennis and Joe Howell. The Howells virtually shut down the project for two to three weeks in order to correct the condemned areas. During this time, a great deal of repair work was performed on items that had already been painted by NPC.

In March 1992, Dale Shaver, president of NPC, orally requested that Bell compensate him for the expenses of the unnecessary rework caused by the repairs. Keith Pyle, Bell's project manager, agreed to pay NPC an additional \$19,800.00, conditioned upon NPC's hiring additional painters and completing all of the work by May 29, 1992, so that the project could be inspected. Bell subsequently refused to pay NPC. The trial court awarded \$19,800.00 to NPC in accordance with the oral agreement, and Bell has not contested this aspect of the trial court's judgment on appeal.

Once NPC resumed work on the project, the Howells directed NPC as to how and where to paint. Bill Gibson, NPC's superintendent, testified that on many occasions, Bell's representatives ordered them to paint improperly prepared surfaces. Shaver testified that NPC employees encountered difficulty in performing their work because the areas in which they were instructed to paint were often inadequately lit, dirty, and damp.

In June 1992, Bell hired Kenneth Duncan, Inc. to supplement NPC's work force in order to complete the painting on the project. Bell alleges that part of Duncan's work consisted of painting areas that were NPC's contractual responsibility. Bell does not dispute, however, that at least some of Duncan's work was not encompassed by NPC's contract. In June, Bell notified Shaver by letter that the expenses incurred in hiring Duncan to complete the work would be deducted the balance of NPC's subcontract.

Between June and September, NPC remained on the site painting punch-list items. NPC alleges that between June and September, it was primarily repainting work that had been repaired due to others' defective workmanship. This testimony is consistent with one of Bell's witnesses, who stated that NPC was performing work on areas that had either been damaged, or for some other reason had to be repainted. It is NPC's position that it completed its contractual painting obligations on or about June 1, 1992. NPC submitted a claim for the extra work it had allegedly performed, but Bell refused to pay.

In contrast, Bell contends that NPC had not fulfilled its contractual obligations by the

first of June, and that by June 24, 1992, there remained many painting items that were NPC's responsibility that had not been completed.

NPC filed suit against Bell and the Insurance Company of North America in January 1993, alleging that it was entitled to the balance due under the subcontract (\$83,490.00) and additional expenses incurred in performing extra-contractual work for Bell. Bell denied that NPC was entitled to any amount, and counter-claimed for breach of contract.

After hearing the testimony of several witnesses for both sides, the trial court ruled in its memorandum opinion as follows:

It appears that it was BELL's policy that NPC was expected to paint when and where BELL said to paint. It also appears that contract requirements of written change orders were commonly ignored by both parties. The court concludes that the testimony of NPC's witnesses Gibson and Shaver is essentially credible and that conflicts in the testimony should be resolved generally in favor of NPC, and particularly as to the May, 1992 agreement by Bell to pay NPC \$16,800.00 [sic] for extra work part of which had been performed by NPC prior to the agreement and the remainder of which was performed prior to June 1, 1992. The court concludes that there were many instances of defective painting results because of BELL's job superintendent's administration of the "paint when and where BELL says paint" policy. This policy resulted in painting on damaged and insufficiently prepared surfaces and painting in unclean, insufficiently lighted and damp areas. Nonetheless, BELL apparently considered the painting to be acceptable. When condemnations were issued BELL's project managers, Peters and Pyle, and job superintendent Joe Howell all told NPC (Shaver) "don't worry about condemnations, they are our problem." The court concludes that BELL by his conduct waived the contract requirement of written change orders and accepted work performed by NPC at times and places and under conditions controlled by BELL. The court concurs in NPC's position that correction of defective painting results accepted by BELL and correction of paint-work damaged by BELL or by other subcontractors constitute extra contractual work for which NPC is entitled to compensation on a quantum meruit basis. The Court finds and concludes that the work done by Ken Duncan's painters was such extra contractual work not included in the May, 1992 agreement.

NPC claims compensation of \$16,889.00 for work done by NPC as a result of change orders issued by the owner which were not submitted by BELL to NPC for pricing of painting involved in the change orders. There probably was some such work done but the court concludes that the amount and value thereof is too speculative to justify an award in any amount.

The court finds and concludes that NPC is entitled to compensation as claimed of \$19,800.00 under the May, 1992

agreement and \$37,548.00 for extra work performed after June 1, 1992 and the balance due for the work under the subcontract in the amount of \$79,654.00.

Bell has appealed from this decree. Bell argues first that the evidence preponderates against the trial court's finding that NPC had completed all of its contractual obligations by June 1, 1992. According to Bell, therefore, NPC was not entitled to compensation for any work performed from June until September.

Pursuant to T.R.A.P.13(d), the trial court's findings of fact are entitled to a presumption of correctness, unless the evidence preponderates otherwise. Moreover, a trial court's determination as to the credibility of witnesses is entitled to great weight on appeal. In Bowman v. Bowman, 836 S.W.2d 563 (Tenn. App. 1991), the court explained:

The reason for this is that the trial judge alone has the opportunity to observe the manner and demeanor of the witness while testifying. Indeed, the trial judge, on an issue which hinges on witness credibility, will not be reversed unless there is found in the record concrete and convincing evidence, other than the oral testimony of the witnesses, which contradicts the trial court's findings.

Id. at 566.

The primary witnesses in this case were Bill Gibson, job superintendent for NPC, Dale Shaver, president of NPC, Joe Howell, job superintendent for Bell, and Keith Pyle, project manager for Bell.

Shaver testified on behalf of NPC that its painting was complete by the first part of June 1992, and that all painting performed between June and September was extra-contractual work. In contrast, Howell and Pyle testified that from June until September, NPC's painters were doing contract work.

The trial court expressly found that NPC's witnesses were essentially credible and that any conflicts in testimony should be resolved in favor of NPC. The trial court held that NPC was entitled to \$37,548.00 for work performed between June and September, plus

the balance due under the subcontract.

Because the trial court's findings of fact are entitled to a presumption of correctness and because those findings are afforded even greater weight when they hinge upon the credibility of witnesses, we affirm the trial court's decision to award NPC \$37,548.00 for work performed between June and September.

Bell's second contention on appeal is that the trial court erred in dismissing its counter-claim. Bell alleged in its counter-claim that NPC breached its subcontract by failing to perform its work adequately and in accordance with the painting specifications. Consequently, Bell alleges, it is entitled to recover from NPC the amount that it paid to Duncan.

We do not find that the evidence preponderates against the trial court's finding that much of the allegedly defective painting work arose from Bell's practice of telling NPC when and where to paint. Many times, NPC was instructed to paint over inadequately prepared surfaces. In addition, there is ample evidence in the record to support the conclusion that much of the work on this project was sloppy and unworkmanlike. These defects in construction resulted in NPC's having to paint items that NPC had previously painted.

For these reasons, we affirm the trial court's dismissal of Bell's counter-claim and its determination that NPC did not breach the terms of the subcontract.

Finally, Bell argues that NPC is not entitled to recover for any additional work because NPC did not comply with the subcontract's requirement of obtaining a written change order. The subcontract between NPC and Bell contains a written change order clause, which states:

Article XIII - Should alterations or actual work be hereunder required...no changes are to be made, however, except upon a written change order from contractor before the work is commenced, and contractor shall not be held liable to

subcontractor for any extra labor, materials, or equipment furnished without such written order.

Bell's argument must fail for the simple reason that the work performed between June and September was, as we have found, extra-contractual work. Consequently, the contract provision requiring written change orders is inapplicable because the work performed fell outside the subject matter of the written subcontract. The trial court based the theory of recovery on quantum meruit, which requires payment by a party that receives a benefit under circumstances where it would be inequitable for him to retain the benefit without paying compensation. Jaffe v. Bolton, 817 S.W.2d 19, 26 (Tenn. App. 1991). We hold that this was a proper basis upon which to afford relief to NPC.

Accordingly, we affirm the judgment of the trial court. Costs on appeal are taxed to appellants.

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HIGHERS, J.

CONCUR:

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CRAWFORD, P.J., W.S.

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FARMER, J.