

FILED

08/31/2023

Clerk of the
Appellate Courts

IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
June 21, 2023 Session

PAUL LEBEL v. CWS MARKETING GROUP, INC.

**Appeal from the Chancery Court for Hamblen County
No. 2018-CV-261 Douglas T. Jenkins, Chancellor**

No. E2022-01106-COA-R3-CV

The plaintiff purchased a home at an auction. The home was sold “as is.” The plaintiff sued the defendant marketing firm which had advertised the property for auction, alleging that it had actual knowledge of mold issues but did not disclose them to bidders, and that it misrepresented the acreage of the real property. The plaintiff’s claims for breach of contract, fraudulent concealment, and reckless misrepresentation proceeded to a jury trial. The defendant moved for a directed verdict at the close of the plaintiff’s proof, which the court denied, but did not renew its motion for a directed verdict at the close of all the proof. After the jury returned a verdict for the plaintiff, the defendant did not file a post-trial motion seeking a new trial. On appeal, we conclude that the defendant waived its right to contest the trial court’s denial of its motion for a directed verdict by failing to file a motion asking for a new trial as required by Tennessee Rule of Appellate Procedure 3(e). We further conclude that the defendant waived appellate review of whether the evidence was sufficient to support the jury’s verdict on the fraudulent concealment, breach of contract, and reckless misrepresentation claims by failing to renew its motion for a directed verdict at the close of all proof in the jury trial. We grant the plaintiff’s request for reasonable attorney fees pursuant to Tennessee Code Annotated section 27-1-122.

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

JOHN W. MCCLARTY, J., delivered the opinion of the Court, in which D. MICHAEL SWINEY, C.J., and KRISTI M. DAVIS, J., joined.

Troy L. Bowlin, II, and Brett Arthur Cole, Knoxville, Tennessee, for the appellant, CWS Marketing Group, Inc.

T. Dillon Parker and Denise S. Terry, Morristown, Tennessee, for the appellee, Paul LeBel.

OPINION

I. BACKGROUND

The underlying action concerns real property located on Nelson School Road in Morristown, Tennessee. Defendant-appellant CWS Marketing Group, Inc. (“CWS”) markets and facilitates auctions for seized government property. CWS advertised the property, which had been seized by the Internal Revenue Service, as a four-bedroom home, with another basement bedroom, sitting on a lot of 35.5 ± acres. The Internal Revenue Service had provided CWS with a plat map indicating that the property was actually 29.5 acres. The flyer distributed by CWS stated:

The bidder understands and agrees that the property is offered, purchased, and accepted by the buyer “AS IS” and “WITH ALL FAULTS.” The Government and its agent make no warranties or guarantees whatsoever whether written, oral, or implied as to quality, condition, or habitability.

CWS’s flyer invited interested bidders to inspect the property during three-hour time slots held on two separate dates ahead of the auction. Plaintiff-appellee Paul LeBel was the winning bidder at the public auction of the property conducted by CWS on May 26, 2016. Accordingly, Plaintiff as buyer entered into a contract for sale of government real property with the Internal Revenue Service as seller. The contract identified CWS as “acting as agent of the Government” with respect to the sale of the property. The contract stated that the property was being “sold in ‘As-Is’ condition with all faults” and that the seller had “disclosed all known defects.” The sale of the property closed in early January 2017.

On December 14, 2020, Plaintiff filed the operative amended complaint against CWS and another defendant, RJP Auctioneering, Inc. The amended complaint alleged causes of action for breach of contract, fraud, and fraudulent concealment. Later, upon Plaintiff’s motion, the Hamblen County Chancery Court (“trial court”) dismissed RJP Auctioneering from the lawsuit. In his amended complaint, Plaintiff alleged that in the month prior to the auction “a contractor hired by [CWS] discovered that there was mold above the bamboo plank ceiling” in one of the rooms of the home on the property. Plaintiff further alleged that, in the weeks before the auction, CWS’s contractor invoiced CWS for repairing the bamboo ceiling and for treating and removing mold from the ceiling. Plaintiff alleged that by approving the invoice, “prior to the auction, [CWS] had actual notice that there was a defect in the ceiling allowing moisture in and onto the ceiling that caused the formation of mold.” He additionally alleged that CWS had actual knowledge of mold issues but did not disclose them to bidders, and that CWS represented to bidders that the

property consisted of 35.5 acres despite “having good reason to believe” that it was actually 29.5 acres.

Prior to Plaintiff’s filing of the amended complaint, CWS unsuccessfully moved to dismiss the claims against it for failure to state a claim upon which relief can be granted. Tenn. R. Civ. P. 12.02(6). Following discovery but before the filing of the amended complaint, CWS moved for summary judgment. The trial court denied summary judgment as to the claims of breach of contract, fraudulent concealment, and reckless misrepresentation. The case proceeded to a jury trial. At the close of Plaintiff’s evidence, CWS moved for a directed verdict on all issues. The trial court denied the motion. CWS then presented its evidence. At the close of its proof, CWS did not renew its motion for a directed verdict. Following deliberation, the jury found that Plaintiff proved breach of contract, fraudulent concealment, and reckless misrepresentation. The jury returned a unanimous verdict in Plaintiff’s favor on July 15, 2022, and awarded damages of \$93,000.¹ On July 29, 2022, the trial court entered judgment against CWS. CWS did not file a motion for a new trial or a post-trial motion seeking entry of judgment in accordance with its motion for directed verdict made at trial. CWS timely appealed.

II. ISSUES

CWS raises the following issues on appeal which we quote from his brief:

- A. “Whether the trial court erred in denying [CWS’s] motion for a directed verdict because no material evidence supported the assertion that CWS was a party to the contract at issue, breached that contract, or fraudulently concealed or recklessly misrepresented any material facts.”
- B. “Whether there was sufficient evidence to support the jury verdict on the fraudulent concealment, breach of contract, and reckless misrepresentation claims.”

In the posture of appellee, Plaintiff raises the additional issues of:

- C. “Whether, by failing to file a motion for a directed verdict at the close of all proof and by failing to file a post-trial motion for a new trial, [CWS] waived any challenge to the sufficiency of the evidence on appeal.”

¹ The jury’s award of damages included \$50,000 for the missing six acres of land plus \$43,000 for demolition and reconstruction costs.

D. Whether Plaintiff should be awarded reasonable attorney fees pursuant to Tennessee Code Annotated section 27-1-122.

III. STANDARD OF REVIEW

On appeal, “our review of a jury’s factual findings in a civil action is limited to determining whether any material evidence supported the verdict.” *Potter v. Ford Motor Co.*, 213 S.W.3d 264, 268 (Tenn. Ct. App. 2006) (citing *In re Estate of Brindley*, No. M1999-02224-COA-R3-CV, 2002 WL 1827578, at *2 (Tenn. Ct. App. Aug. 7, 2002); Tenn. R. App. P. 13(d)). Appellate courts are not empowered “to weigh the evidence, to determine the credibility of the witnesses, or to resolve conflicts in the testimony.” *Duran v. Hyundai Motor Am., Inc.*, 271 S.W.3d 178, 210 (Tenn. Ct. App. 2008). When determining whether the record contains material evidence to support a jury’s verdict, “the appellate court must review the record and ‘take the strongest legitimate view of all the evidence in favor of the verdict, assume the truth of all evidence that supports the verdict, allow all reasonable inferences to sustain the verdict, and discard all countervailing evidence.’” *Borne v. Celadon Trucking Servs., Inc.*, 532 S.W.3d 274, 298 (Tenn. 2017) (quoting *Akers v. Prime Succession of Tenn., Inc.*, 387 S.W.3d 495, 501 (Tenn. 2012)). If there is any material evidence to support the verdict, we must affirm it; otherwise, the parties would be deprived of their constitutional right to trial by jury. *Crabtree Masonry Co. v. C & R Const., Inc.*, 575 S.W.2d 4, 5 (Tenn. 1978).

IV. DISCUSSION

CWS assigns as general error the trial court’s denial of its motion for directed verdict made at the close of Plaintiff’s proof. Plaintiff argues that CWS waived its right to appeal the trial court’s denial of its motion for a directed verdict. CWS did not file a reply brief in response to this argument. “It has long been the rule in this state that in order to preserve errors for appeal, the appellant must first bring the alleged errors to the attention of the trial court in a motion for a new trial.” *Fahey v. Eldridge*, 46 S.W.3d 138, 141 (Tenn. 2001) (citing *Memphis St. Ry. Co. v. Johnson*, 88 S.W. 169, 170 (Tenn. 1905)). Pursuant to Tennessee Rule of Appellate Procedure 3(e),

[I]n all cases tried by a jury, no issue presented for review shall be predicated upon error in the admission or exclusion of evidence, jury instructions granted or refused, misconduct of jurors, parties or counsel, *or other action committed or occurring during the trial of the case*, or other ground upon which a new trial is sought, unless the same was specifically stated in a motion for a new trial; otherwise such issues will be treated as waived.

Tenn. R. App. P. 3(e) (emphasis added).

Here, CWS moved for a directed verdict on all issues at the close of Plaintiff's evidence, and the trial court denied the same. CWS did not file a motion for a new trial or a post-trial motion seeking entry of judgment in accordance with its motion for directed verdict made at trial. A panel of this Court addressed the same procedural scenario in *Carman v. Kellon*, No. M2019-00857-COA-R3-CV, 2020 WL 7422071 (Tenn. Ct. App. Dec. 18, 2020). In *Carman*, the defendants moved for a directed verdict at the close of the plaintiffs' evidence, which the trial court denied. *Id.* at *1. The jury returned verdicts against the defendants. *Id.* Neither defendant filed any post-trial motions. *Id.* One of the defendants appealed from the judgment and argued, as CWS does here, that the trial court erred as a matter of law in denying her motion for a directed verdict. *Id.* at *2. We concluded that the defendant-appellant in *Carman* "waived her right to appeal the trial court's denial of her motion for a directed verdict by failing to file a motion for a new trial, as required by Tenn. R. App. P. 3(e)." *Id.* at *3.

In *Mires v. Clay*, a breach of contract action tried by a jury, the defendant raised on appeal the issue of whether the trial court erred in failing to direct a verdict in the defendant's favor. *Mires v. Clay*, 3 S.W.3d 463, 466 (Tenn. Ct. App. 1999). At trial, the defendant moved for a directed verdict when the plaintiff rested her case, and he renewed his motion after the presentation of his proof. *Id.* at 468. The defendant failed, however, to file a post-trial motion for judgment notwithstanding the verdict or for a new trial. *Id.* We concluded that the defendant waived his right to appeal the trial court's denial of his motion for directed verdict, explaining that "when the alleged error is the failure of the trial court to grant a directed verdict, either a motion for a new trial or a post-trial motion seeking entry of judgment in accordance with a motion for directed verdict made at trial (judgment n.o.v.) is sufficient to preserve the issue for appeal." *Id.* (citing *Cortez v. Alutech, Inc.*, 941 S.W.2d 891, 894–95 (Tenn. Ct. App. 1996)). "Failure to file either of these post-trial motions," we reasoned, "denies 'the trial judge the opportunity to consider or reconsider alleged errors committed during the course of trial' and precludes appellate review of that issue." *Id.* (quoting *Cortez*, 941 S.W.2d at 894–96).

We hold that CWS waived its right to appeal the trial court's denial of its motion for a directed verdict by failing to file a motion for a new trial, as required by Tennessee Rule of Appellate Procedure 3(e).

As its next issue, CWS argues that there was insufficient evidence to support the jury verdict on Plaintiff's claims for fraudulent concealment, breach of contract, and reckless misrepresentation. In support of this argument, CWS points out that it did not sign the contract for sale of government real property and that "there is no reserved space in the

signature blocks [of the contract] to show any intention of including CWS as a party to the agreement.” Throughout this litigation, CWS’s main contention has been that no contract existed between Plaintiff and CWS. “The existence of an enforceable contract” is an essential element to be proven by one asserting a breach of contract claim. *See, e.g., BancorpSouth Bank, Inc. v. Hatchel*, 223 S.W.3d 223, 227 (Tenn. Ct. App. 2006). For this reason, CWS maintains that Plaintiff’s breach of contract claim “fails as a matter of law” and that “a directed verdict should have been granted on this issue.” Likewise, CWS argues that Plaintiff’s fraudulent concealment claim should have failed as a matter of law “because CWS was not a party to the sales contract [so] there was no contractual duty to disclose” a material fact such as a structural defect in the property. *See, e.g., Rural Devs., LLC v. Tucker*, No. M2008-00172-COA-R3-CV, 2009 WL 112541, at *6–7 (Tenn. Ct. App. Jan. 14, 2009) (essential elements of a fraudulent concealment claim include that the defendant was under a duty to disclose a material fact to the plaintiff). Finally, CWS argues that “there was insufficient evidence” for the jury to decide Plaintiff’s reckless misrepresentation claim. At the conclusion of its brief, CWS requests that we reverse the trial court’s ruling denying its motion for a directed verdict. Plaintiff counters that CWS waived the ability to challenge on appeal the “sufficiency of the evidence” by failing to renew its motion for a directed verdict at the close of all evidence. CWS did not file a reply to this argument.

“A motion for a directed verdict provides a vehicle for deciding questions of law; the question presented is whether the plaintiff has presented sufficient evidence to create an issue of fact for the jury to decide.” *Brown v. Christian Bros. Univ.*, 428 S.W.3d 38, 49 (Tenn. Ct. App. Aug. 5, 2013) (citing *Burton v. Warren Farmers Co-op.*, 129 S.W.3d 513, 520 (Tenn. Ct. App. 2002)). Stated differently, “[t]he question of whether evidence is sufficient to support a jury verdict is tested by a motion for a directed verdict.” *Steele v. Columbia/HCA Health Care Corp.*, No. W2001-01692-COA-R3-CV, 2002 WL 1000181, at *3 (Tenn. Ct. App. May 13, 2002). Tennessee Rule of Civil Procedure 50.01 instructs:

A motion for a directed verdict may be made at the close of the evidence offered by an opposing party or at the close of the case. The court shall reserve ruling until all parties alleging fault against any other party have presented their respective proof-in-chief. A party who moves for a directed verdict at the close of the evidence offered by an opponent may offer evidence in the event that the motion is not granted, without having reserved the right so to do and to the same extent as if the motion had not been made. A motion for a directed verdict which is not granted is not a waiver of trial by jury even though all parties to the action have moved for directed verdicts. The order of the court granting a motion for a directed verdict is effective without any assent of the jury.

Tenn. R. Civ. P. 50.01. Tennessee Rule of Civil Procedure 50.02 provides:

Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Within thirty (30) days after the entry of judgment a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with the party's motion for a directed verdict; or if a verdict was not returned, such party, within thirty (30) days after the jury has been discharged, may move for a judgment in accordance with such party's motion for a directed verdict. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned, the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial.

Tenn. R. Civ. P. 50.02. As for a party preserving its chance to challenge on appeal the sufficiency of the evidence, we have held that “[f]or this Court to review the sufficiency of the evidence on appeal, a motion for a directed verdict must have been made at the conclusion of all of the proof and renewed in a post judgment motion following the jury's verdict.” *McLemore ex rel. McLemore v. Elizabethton Med. Invs, Ltd. P'ship*, 389 S.W.3d 764, 778 (Tenn. Ct. App. 2012); *see also Cortez*, 941 S.W.2d at 894 (“Once Appellants moved for a directed verdict at the close of Appellees' proof, it was incumbent upon them to renew their motion at the close of all the proof as an initial step to preserving the issue for review on appeal.”); *Boren v. Hill Boren PC*, No. W2021-00478-COA-R3-CV, 2023 WL 3375623, at *5, *9 (Tenn. Ct. App. May 11, 2023); *Steele*, 2002 WL 1000181, at *3 (“[I]n order for this Court to review the sufficiency of the evidence on appeal, the motion for a directed verdict must have been made at the conclusion of all of the proof and renewed in a post judgment motion following the jury's verdict.”).

This issue came up recently in the case of *Parker v. Epstein Enterprises, LLC*, No. W2019-00311-COA-R3-CV, 2020 WL 2731234 (Tenn. Ct. App. May 26, 2020). In *Parker*, a jury returned a verdict finding the owner and management company of an apartment complex liable in a dog bite case. *Parker*, 2020 WL 2731234, at *6. At trial, the defendants moved for directed verdict at the close of the plaintiff's proof, but they did not renew the motion at the close of all the evidence. *Id.* at *12. On appeal, the defendants urged this Court to reverse the trial court's ruling on their motion for directed verdict because the evidence was not sufficient to show that the owner of the apartment complex

had knowledge of the dogs' vicious propensities. *Id.* at *11. The plaintiff responded that the defendants waived the right to appeal the trial court's denial of the motion for a directed verdict because they did not renew their motion at the close of all the proof. *Id.* at *12. Citing, among other cases, *McLemore*, *Cortez*, and *Steele*, we held that "[b]ecause the defendants moved for directed verdict only at the close of Plaintiff's proof and did not renew their motion at the close of all the proof, the defendants waived review on appeal of the denial of their motion for directed verdict." *Id.* at *12–13.

In consideration of the foregoing precedent, we conclude that because CWS did not renew its motion for a directed verdict at the close of all proof in the jury trial, it waived appellate review of whether the evidence was sufficient to support the jury's verdict on the fraudulent concealment, breach of contract, and reckless misrepresentation claims.

Frivolous Appeal

Finally, Plaintiff contends that because CWS failed to preserve the issues it raised on appeal and those issues were waived CWS has filed a frivolous appeal, rendering it liable for damages to him on appeal pursuant to Tennessee Code Annotated section 27-1-122, which provides as follows:

When it appears to any reviewing court that the appeal from any court of record was frivolous or taken solely for delay, the court may, either upon motion of a party or of its own motion, award just damages against the appellant, which may include but need not be limited to, costs, interest on the judgment, and expenses incurred by the appellee as a result of the appeal.

Tenn. Code Ann. § 27-1-122.

The decision whether to award damages for a frivolous appeal rests solely in our discretion. *Chiozza*, 315 S.W.3d at 493. Appellate courts exercise their discretion to award fees under this statute "sparingly so as not to discourage legitimate appeals." *Eberbach v. Eberbach*, 535 S.W.3d 467, 475 (Tenn. 2017) (quoting *Whalum v. Marshall*, 224 S.W.3d 169, 181 (Tenn. Ct. App. 2006)). "Successful litigants should not have to bear the expense and vexation of groundless appeals." *Whalum*, 224 S.W.3d at 181 (quoting *Davis v. Gulf Ins. Grp.*, 546 S.W.2d 583, 586 (Tenn. 1977)). "A frivolous appeal is one that is 'devoid of merit,' or one in which there is little prospect that it can ever succeed." *Indus. Dev. Bd. v. Hancock*, 901 S.W.2d 382, 385 (Tenn. Ct. App. 1995).

This appeal had no prospect of success. Plaintiff directs us to previous opinions awarding attorney fees pursuant to the above statute under similar factual circumstances. *See Pye v. Opryland USA, Inc.*, No. 01A01-9302-CV-00074, 1993 WL 541115, at *2

(Tenn. Ct. App. Dec. 29, 1993); *O'Neil v. Harrell*, 1991 WL 25944, at *1 (Tenn. Ct. App. Mar. 4, 1991). In both cases, the issue raised on appeal was waived pursuant to Tennessee Rule of Appellate Procedure 3(e) because the party appealing had not raised the issue in a motion for new trial. With the above considerations in mind and exercising our discretion, we grant Plaintiff's request for attorney fees incurred on appeal, the amount of which the trial court shall determine upon remand.

V. CONCLUSION

For the reasons stated above, we affirm the trial court's July 29, 2022 judgment entered on the jury's verdict. The case is remanded for a determination of the proper amount of appellate attorney fees and such further proceedings as may be necessary and consistent with this opinion. Costs of the appeal are taxed to the appellant, CWS Marketing Group, Inc.

JOHN W. McCLARTY, JUDGE