

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-000866-MR

BRIAN DEWITT AND
DANA DEWITT

APPELLANTS

v. APPEAL FROM ADAIR CIRCUIT COURT
HONORABLE JAMES G. WEDDLE, JUDGE
ACTION NO. 03-CI-00018

WILLIAM BALL, III,
D/B/A B & B EXCAVATING

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: DYCHE, SCHRODER, AND VANMETER, JUDGES.

DYCHE, JUDGE: Appellee, William Ball, III, agreed by contract to install a septic system upon the property of appellants Brian and Dana Dewitt for the sum of \$3680.00. Financing was to be through the Lake Cumberland Area Development District, with payment to Ball upon final inspection and approval by the local health department. The Dewitts were not satisfied with the system, as installed, and refused to authorize payment, and Ball

initiated this action to collect the amount he claimed was due him. The Dewitts counterclaimed, seeking money damages for correcting the alleged improper installation, and for consequential damages they claimed they suffered.

The Adair Circuit Court, following transfer from the Adair District Court, conducted a bench trial and issued findings of fact, conclusions of law, and a judgment granting Ball the amount due under the contract; the counterclaim was dismissed as being unsupported by any evidence. This appeal followed.

On appeal, the Dewitts make three arguments, all couched in terms of the trial court abusing its discretion. We are unaware of any issue or any ruling on any issue herein which involves the use of the trial court's discretion. This case was practiced and decided as a simple contract action. The court was required to make findings on the factual issues; the standard of review is whether those findings are clearly erroneous. Ky. R. Civ. Pro. 52.01. Miller v. Eldridge, 146 S.W.3d 909, 915 (Ky. 2004). The confusion is not uncommon, and we will review the findings under the clearly erroneous standard.

The Dewitts first argue that the trial court erred in finding that Ball had fulfilled his obligations under the contract, in that the system installed did not meet state code

requirements. Although the trial court made no explicit finding on this specific issue, implicit in its findings and supported by the evidence was that Dewitt had acquiesced to any variance in the system in order to save money. In addition, the system had been approved by a local health department official. We find no clear error.

The second, and related, argument is that the trial court should have ordered Ball to bring the system into compliance with the regulations, or, alternatively, pay damages to the Dewitts. Again, implicit in the trial judge's findings was that the system met what Dewitt desired and agreed upon, and that approval by the local health department official obviated the necessity for damages, as there was no breach.

The third argument is but a rehash of the first two, and meets the same fate. We find no clear error in the trial court's findings, and affirm its judgment.

ALL CONCUR.

BRIEF FOR APPELLANTS:

Sean P. Lohman
Louisville, Kentucky

BRIEF FOR APPELLEE:

Rodger G. Cox
Cox & Hall
Campbellsville, Kentucky