

RENDERED: SEPTEMBER 23, 2005; 2:00 P.M.  
NOT TO BE PUBLISHED

## Commonwealth Of Kentucky

### Court of Appeals

NO. 2004-CA-001262-MR

MARAMAN & SONS EXCAVATING, INC.

APPELLANT

v.

APPEAL FROM BULLITT CIRCUIT COURT  
HONORABLE THOMAS L. WALLER, JUDGE  
ACTION NO. 03-CI-00302

JANETTE A. MAHONEY

APPELLEE

OPINION  
AFFIRMING IN PART,  
REVERSING IN PART and REMANDING

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BEFORE: KNOFF AND TACKETT, JUDGES; ROSENBLUM, SENIOR JUDGE.<sup>1</sup>

ROSENBLUM, SENIOR JUDGE: This is an action filed by Janette A. Mahoney against Maraman & Sons Excavating, Inc. for the negligent excavation of a basement and installation of a septic system and for the wrongful filing of a mechanic's lien against her property. Following a bench trial, the circuit court

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<sup>1</sup> Senior Judge Paul W. Rosenblum sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

awarded Mahoney damages in the amount of \$7,550 and costs. No damages were awarded Maraman as the result of a default judgment entered on its counterclaim. Maraman appeals alleging that it should have been awarded damages plus interest and that the award of damages to Mahoney was not based on the evidence and contrary to law.

Mahoney purchased land in Bullitt County for the purpose of building her residence and, with the assistance of her father, James, acted as her own contractor. After receiving Maraman's estimate, Mahoney entered into an oral contract with Maraman to dig her basement and install a gravity flow septic system. The estimate for the septic system was \$3,000 and \$800 for the excavation of the basement. The underground gravity flow septic system to be installed required that the basement be dug to a specific depth that would permit the system to function properly.

Maraman began the job of excavating the basement but hit rock. Leonard Maraman, owner and president of the company, advised Mahoney and her father that a one-foot layer of rock would have to be removed so the basement would be at the depth required for proper functioning of the septic system and that the cost would be an additional \$3,050. Mahoney paid the \$3,050 and the excavation of the basement was completed.

Maraman then began the installation of the septic system. After the tank and lateral lines were installed, Mahoney and her father noticed that because of the position and depth of the tank, it would protrude above the ground by approximately eighteen inches. James testified that he approached Abraham Maraman, Leonard's son who was working at the site, regarding the elevation of the tank and Abraham told him that the house was approximately one foot too low. James recalled that when he asked why Maraman was paid \$3,050 to dig the basement deeper, he received no response.

Upon completion of its installation, the health department approved the system. Although it functions properly, the tank remains partially above the ground. Mahoney testified that the tank is an "eyesore" and, because it protrudes above the ground, she could not build a rear patio as planned but was required to build a deck. To cover the tank, she submitted an estimate for \$4,896.16 to build an addition to the existing deck and requested that the court award her that amount. Although it is possible to remove the existing tank and install a pump and holding tank for a cost of \$2,500, Mahoney testified that was an undesirable option because of the increased maintenance and reliability issues associated with a pump tank. Covering the tank with additional topsoil was impossible without covering the basement windows, another undesirable result.

Leonard Maraman testified that it was his responsibility to establish the depth of the basement and that when he removed the rock he intended to only take out six inches, but instead broke off approximately one foot. Although he could have leveled the basement with additional gravel which would have allowed the septic system to work properly and the tank to have been covered with dirt without covering the basement windows, he testified that Mahoney's father told him he would hire a plumber to fill in the basement. James denied any conversation with Maraman about adding gravel to raise the basement floor and denied that he suggested that a plumber put additional gravel in the basement.

On January 13, 2003, Maraman filed a mechanic's lien on the property alleging that \$3,950 remained owed by Mahoney for material and labor for the installation of the septic system and topsoil. Leonard testified that the increase from the \$3,000 estimated was due to price increases and topsoil provided but not included in the original estimate.

In March 2003, Mahoney filed this action against Maraman seeking damages for the negligent excavation of the basement and installation of the septic system. She also alleged that Maraman misrepresented the amount owed when it filed the lien against her property. Maraman filed a timely answer and counterclaim reciting the facts alleged in the

mechanic's lien. No response was filed by Mahoney and, on the day of trial, over Mahoney's objection, the court entered a default judgment reserving the damage issue until after the trial.

After hearing the evidence, the court found that Maraman was responsible for insuring that the basement was at the proper depth for the foundation to be poured. It also found that the basement was dug too deep, causing the house to be too low, with the undesirable result that the septic tank protrudes from the ground. The court further found that:

[T]he Defendant never needed to pound out rock in order to excavate Plaintiff's basement. A witness of the Plaintiff, JAMES MAHONEY, testified that the Defendant stated they needed to dig out a foot of rock to get the basement to the proper depth. The Defendant later admitted to Mahoney that the basement had been dug a foot too deep. Additionally, Defense witnesses testified that they dug out four feet of dirt before ever hitting rock on the Plaintiff's property. They further testified that the entire basement needed to be excavated to a depth of four feet, making it completely unnecessary for the Defendant to have excavated rock on the Plaintiff's property at an expense of Three Thousand Fifty (\$3,050) Dollars.

The court entered judgment in favor of Mahoney on her negligence claim and awarded her \$4,500 representing the amount needed to build a deck sufficient to cover the tank and \$3,050 representing the unnecessary cost for the rock removal.

Damages were not awarded on Mahoney's claim that Maraman wrongfully filed the mechanic's lien or on Maraman's counterclaim.

The circuit court's findings of fact can be set aside only if the findings are clearly erroneous. CR 52.01. Mahoney hired Maraman to excavate the basement and install an underground septic system. Although the system was approved by the health department and functions properly, the tank protrudes above the ground resulting in an eyesore on Mahoney's property. Crucial to the court's decision was the testimony of Leonard Maraman that he was responsible for the making sure the basement was at the proper depth for the installation and functioning of the septic system. The finding that Maraman is liable for any damages caused by the improper excavation of the basement and resulting improper installation of the septic system is not clearly erroneous and is affirmed.

Maraman contends that the award of \$4,500, the cost of an addition to the existing deck, is not recoverable. In Murray v. McCoy, 949 S.W.2d 613, 614-615 (Ky.App. 1996), the court held that the proper measure of damages for faulty construction of a building is as follows:

If it could reasonably have been repaired, then the measure of damage is different from the measure if the jury determines that it cannot be repaired. The law in this situation was fully discussed in State

Property & Buildings Commission, etc. v. H.W. Miller Construction Company, Inc., Ky., 385 S.W.2d 211, wherein we pointed out that if the structure can reasonably be repaired 'the real measure of damages for defective performance of a construction contract is the cost of remedying the defect, so long as it is reasonable.' We then pointed out that if the structure cannot be repaired, or if the expense of repair is unreasonable, the test is the difference between market value of the building as it should have been constructed and the market value as it actually was constructed. (Citations omitted)."

The problem with the septic tank arose because of Maraman's failure to dig the basement to the proper depth. Although it is possible to cover the septic tank with additional topsoil, the basement windows would be covered which is an option neither aesthetically nor economically feasible. The installation of a pump system, Mahoney testified, is not a reasonable solution to the problem. The only reasonable remedy that will put Mahoney in the same position as she would have been in had the basement been excavated to the proper depth is to award Mahoney the cost of the deck addition. Although not underground, the purpose of eliminating the tank from plain view is served.

Mahoney contends that the motion for default judgment was untimely. CR 55.01 requires that a motion for a default judgment against a party who has appeared in the action be

served with written notice of the motion at least three days prior to the hearing. There is no dispute that Mahoney, through counsel, appeared in the action. However, this court is unable to grant relief to Mahoney because she did not file a cross-appeal seeking to have the default judgment vacated. See Carrico v. City of Owensboro, 511 S.W.2d 677 (Ky. 1974).

We agree with Maraman that it is entitled to have deducted from the amount awarded Mahoney the remaining unpaid amount owed for material and labor furnished for the installation of the septic system and topsoil. The estimate for the excavation and the installation of the septic system was a combined total of \$3,800 and Mahoney was billed \$3,950. She has not paid any portion of that amount. Although she paid \$3,050, that amount was for the excavation of the rock which the circuit court found unnecessary and, therefore, required that amount to be paid back by Maraman. Thus, under the result reached by the circuit court, in addition to being awarded \$7,550, Mahoney will pay nothing for the excavation of the basement, a fully functional septic system, and topsoil.

Under the doctrine of substantial performance, a builder who has substantially performed is entitled to "recovery of the contract price notwithstanding the work may have been defective or incomplete. The remedy of the owner is the recovery of damages on account of incomplete or defective

work." Shreve v. Biggerstaff, 777 S.W.2d 616, 618 (Ky.App. 1989), quoting Meador v. Robinson, 263 S.W.2d 118 (Ky. 1953). As the circuit court's judgment now exists, Mahoney will be unjustly enriched. For this reason, this case is remanded for entry of a judgment on Maraman's counterclaim.

The judgment is affirmed as to the award to Mahoney but reversed and remanded for entry of a judgment in favor of Maraman on its counterclaim awarding the amount owed for the installation of the septic system and topsoil.

ALL CONCUR.

BRIEF FOR APPELLANT:

Mark E. Edison  
Shepherdsville, Kentucky

BRIEF FOR APPELLEE:

Lora S. Morris  
Louisville, Kentucky