

Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-000402-MR

JEAN ACTON

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE GEOFFREY P. MORRIS, JUDGE
ACTION NOS. 03-CI-009362 & 03-CI-010598

WILLIAM GEARY

APPELLEE

OPINION
AFFIRMING IN PART AND
REVERSING AND REMANDING IN PART

** ** * * *

BEFORE: BARBER, HENRY, AND KNOPF, JUDGES.

BARBER, JUDGE: Appellant, Jean Acton (Acton), filed suit against Appellee, William Geary (Geary), claiming breach of contract and warranty on four separate roofing jobs performed by Geary. Geary completed roofing work between 1995 and 1998 on four homes which were Acton's rental properties.

On April 10, 1995, the parties signed a written contract for repair work to be performed on the roof of a home located at 996 Goss Avenue for a cost of \$2,000.00. On March

10, 1996, the parties signed a written contract for work to be performed to the roof of a home located at 994 Goss Avenue for a cost of \$2,500.00. On April 14, 1998, the parties signed a written contract for repair work to be performed at 1131 Reutlinger Avenue for a cost of \$800.00. The other written contract signed by the parties was undated and was for roof repair work to be performed at 1012 Ash Street for \$775.00. Each of these contracts provide a labor warranty of five (5) years and a material warranty of twenty (20) years to Acton. Also, Geary handwrote on each contract that Geary's Home Improvement¹ would provide liability and workers' compensation insurance on each job. Acton claimed she had serious problems with each of the four roofing jobs performed by Geary.

Acton first filed suit against Geary on June 13, 2002, in Jefferson District Court for damages incurred at 1131 Reutlinger Avenue.² Acton alleged that the roof leaked due to inferior materials used and poor workmanship. Acton claimed she was forced to replace a section of the roof on the back of the house and incurred damage to the interior of the home from the leak.

¹ Geary's Home Improvement was not incorporated at the time the work was performed. In the original actions, Acton did include Geary's Home Improvement, but the appeal is limited to William Geary, individually.

² Acton claimed damages of \$1,890.00 exclusive of legal costs and fees incurred.

Acton's complaint was amended on June 10, 2003 to add damages allegedly incurred to the home located at 996 Goss Avenue.³ Acton claimed the roof at 996 Goss Avenue suffered from a leak caused by Geary's use of inferior materials and poor workmanship. The parties reached a settlement related to this home in January 2002. However, what the settlement actually covered is one of the issues raised in this appeal. Also contained in the amended complaint was a claim for other damages at other properties, but it failed to specifically list the properties.⁴ Acton filed a more definitive statement related to this claim July 11, 2003 which added the 1012 Ash Street property to her claim. Acton alleged Geary placed tar into a box gutter that resulted in the front interior of the home being flooded.⁵ On November 10, 2003, Acton filed a motion that the action be transferred to Jefferson Circuit Court. The court sustained said motion November 14, 2003.⁶

Prior to the above transfer, Acton had filed a second suit against Geary in Jefferson Circuit Court October 27, 2003

³ Acton claimed damages of \$1,650.00 plus the cost of emergency temporary repairs, cleaning and painting, exclusive of legal costs and fees incurred.

⁴ Geary filed a motion for a more definitive statement related to these two additional claims June 16, 2003 which was granted by the court June 20, 2003.

⁵ Acton claimed damages of \$1,227.39 exclusive of legal costs and fees incurred.

⁶ The matter was transferred to circuit court and was assigned the case number, 03-CI-10598.

claiming damages incurred to her 994 Goss Avenue property.⁷ Acton claimed Geary failed to install the roof in a workmanlike manner in compliance with competent roofing practices and the parties' written contract.⁸ Also included in this suit was a claim for punitive damages based upon fraud related to Geary's failure to maintain liability insurance during the four roofing jobs.⁹ On January 28, 2004, Acton filed a motion to consolidate this suit with her other pending action (03-CI-10598). The court ordered the consolidation of the two matters February 2, 2004.

A bench trial was held September 24, 2004. On September 29, 2004,¹⁰ the trial court entered an order granting Geary a directed verdict on Acton's punitive damage claim.¹¹ Acton then filed a motion requesting the trial court to alter, amend or vacate its order granting the directed verdict to Geary. The trial court issued its findings of fact, conclusions of law, and judgment on January 27, 2005. The trial court again denied Acton's punitive damage claim. The only property the

⁷ This matter was assigned the case number 03-CI-9362.

⁸ Acton claimed damages of \$2,000.00 plus consequential damages exclusive of legal costs and fees incurred.

⁹ Acton alleges she was induced to enter into the contracts based upon his written representations that he was fully insured and that she incurred damages that would have been covered by liability insurance had it existed.

¹⁰ The order was entered by the clerk on September 29, 2004.

¹¹ Trial court had made its ruling orally at the conclusion of the September 24, 2004 bench trial.

trial court awarded damages to Acton for was 1131 Reutlinger Avenue.¹² All of Acton's claims on the three other properties were denied. Acton then appealed to our court.¹³

Acton makes ten arguments in her appeal as follows:

(1) The trial court was clearly erroneous in finding that a partial settlement of some of the damages constituted settlement as to all damages to 996 Goss Avenue.

(2) The trial court was clearly erroneous in finding that Acton did not meet her burden of proof as to damages to 994 Goss Avenue.

(3) The trial court was clearly erroneous in finding that the claim for damages to 1012 Ash Street was time barred.

(4) The trial court was clearly erroneous and abused its discretion in finding that Geary had liability and workers' compensation insurance, hence, not fraudulent when no proof of insurance was produced.

(5) Geary perpetrated fraud on Acton when he intentionally performed roofing jobs in a substandard and unworkmanlike manner and not in conformity with the written contracts.

(6) It was fraudulent for Geary to represent he had returned to the properties and made repairs to correct his original roofing work that was performed in an unworkmanlike manner and not, in fact, make the promised repairs or any repairs.¹⁴

¹² The trial court awarded \$1,812.97 plus costs expended.

¹³ Acton's appeal is limited to the claims on the three remaining properties. Geary did not appeal the damage award on 1131 Reutlinger Avenue.

¹⁴ No text or additional argument was offered by Acton below this heading.

(7) Acton was entitled to recover for consequential damages that occurred when Geary did not make any of the repairs he represented that he made to correct his original work that was performed in an unworkmanlike manner.¹⁵

(8) The trial court was clearly erroneous in its refusal to find that Geary was grossly negligent and violated the building and housing code.¹⁶

(9) It was clearly erroneous and an abuse of discretion for the trial court to refuse to award Acton attorney fees where there was evidence that Geary violated the building and housing code.

(10) The trial court erred and abused its discretion in refusing to award punitive damages against Geary.

A trial court decision will not be reversed unless it has abused its discretion or renders a decision which is clearly erroneous. A trial court's decision cannot be clearly erroneous if it is supported by substantial evidence. Substantial evidence has been conclusively defined by Kentucky courts as that which, when taken alone or in light of all the evidence, has sufficient probative value to induce conviction in the mind of a reasonable person. Secretary, Labor Cabinet v. Boston Gear, Inc., a Div. of IMO Industries, Inc., 25 S.W.3d 130, 134 (Ky. 2000). Additionally, the test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles. Commonwealth

¹⁵ The body of the argument was another fraud claim related to punitive damages.

¹⁶ No text or additional argument is offered by Acton below this heading.

v. English, 993 S.W.2d 941, 945 (Ky. 1999). We will now address each of Acton's arguments.

Acton first argues that the trial court was clearly erroneous in finding that a partial settlement of some of the damages constituted a full settlement to all damages related to 996 Goss Avenue. The trial court found that the parties settled all damages to the property for \$1,000 relying upon a taped conversation of the parties¹⁷ and the memo of the check tendered by Geary.¹⁸ The trial court concluded that Acton's "acceptance and cashing of the check, along with her failure to repay the \$1,000 pursuant to KRS 355.3-311(3)(b), clearly fits within the Morgan¹⁹ test of accord and satisfaction."²⁰

The Morgan test the trial court referred to is derived from KRS 355.3-311, which states in pertinent part:

(1) If a person against whom a claim is asserted proves that:

(a) That person in good faith tendered an instrument to the claimant as full satisfaction of the claim;

(b) The amount of the claim was unliquidated or subject to a bona fide dispute; and

¹⁷ Acton recorded a telephone conversation related to this property she had with Geary on January 12, 2002.

¹⁸ On January 18, 2002, Geary sent a check for \$1,000 and indicated in the memo portion "Refund on job."

¹⁹ The trial court was referring to Morgan v. Crawford, 206 S.W.3d 490 (Ky.App. 2003).

²⁰ Taken from the January 27, 2005 findings of fact, conclusion of law, and judgment.

(c) The claimant obtained payment of the instrument, the following subsections apply.

(2) Unless subsection (3) of this section applies, the claim is discharged if the person against whom the claim is asserted proves that the instrument or an accompanying written communication contained a conspicuous statement to the effect that the instrument was tendered as full satisfaction of the claim.

(3) Subject to subsection (4) of this section, a claim is not discharged under subsection (2) of this section if either of the following applies:

. . . .

(b) The claimant, whether or not an organization, proves that within ninety (90) days after payment of the instrument, the claimant tendered repayment of the amount of the instrument to the person against whom the claim is asserted.

(4) A claim is discharged if the person against whom the claim is asserted proves that within a reasonable time before collection of the instrument was initiated, the claimant . . . knew that the instrument was tendered in full satisfaction of the claim.

Following the parties' January 12, 2002 telephone conversation,²¹ Geary delivered check number 4488 in the amount of \$1,000.00 to Acton on January 12, 2002.²² In the memo section

²¹ A transcript of the telephone conversation was submitted into evidence as Acton's Exhibit 19.

²² The check was Geary's Exhibit 4 in the bench trial.

of the check, Geary wrote "Refund on job."²³ Acton cashed the check the same day. Acton sent a letter to Geary dated January 18, 2002²⁴ which stated as follows:

This letter confirms that the \$1,000 check you issued today constitutes payment of \$650.00 for repairs to the front section of the top portion of the roof at [996 Goss Avenue]. The remaining \$350.00 is to cover our estimated cost of repairing the interior damages resulting from leaking.

At the bench trial, each party testified regarding this payment. Acton stated that the \$1,000.00 represented settlement for repairs to the top portion of the front section of the roof in the amount of \$650.00 and repairs to the upper interior only from the roof leak in the amount of \$350.00.²⁵ She further testified that she offered to give Geary a receipt reflecting the same, but he did not want one, so she prepared the January 18, 2002 letter as confirmation of their partial settlement. Geary stated that it was his understanding the \$1,000.00 paid by him settled all issues related to 996 Goss Avenue.

Kentucky Rule of Civil Procedure 52.01 states in pertinent part, for actions tried without a jury, "[D]ue regard

²³ Compare with Morgan, in which the check offered stated "Payment in full-1150 Powell Taylor Driveway" on both the memo line on the front of the check and above the endorsement line on the back of the check.

²⁴ The letter was Acton's Exhibit 20 in the bench trial.

²⁵ During Acton's testimony, the trial court also noted the ambiguity contained in the January 18, 2002 letter related to the interior damage.

shall be given to the opportunity of the trial court to judge the credibility of the witnesses." In circumstances of conflicting testimony, a reviewing court may not and will not disturb the findings of the trial court so long as it is supported by substantial evidence. Bentley v. Bentley, 500 S.W.2d 411, 412 (Ky.App. 1973), (citing Sharp v. Sharp, 491 S.W.2d 639 (Ky. 1973) and Adams v. Adams, 412 S.W.2d 857 (Ky. 1967)).

Each party provided the trial judge with substantial explanation as to their intention with the \$1,000.00 check. The trial court relied upon Geary's testimony and the January 12, 2002 telephone conversation in deriving the meaning of the check. As such, the trial court concluded the \$1,000.00 constituted settlement of all claims related to 996 Goss Avenue and Acton's cashing of the \$1,000.00 check satisfied the Morgan test for accord and satisfaction.

The trial court could have relied on Acton's testimony and reached a different result. The fact that the trial court chose not to does not provide evidence of error warranting a reversal on appeal. Because the trial court's finding related to the \$1,000.00 check was supported by substantial evidence, the holding fails to satisfy the clearly erroneous standard and must be affirmed.

Acton next argues that the trial court was clearly erroneous in finding that she did not meet her burden of proof as to damages to 994 Goss Avenue. The trial court held as follows:

On March 10, 1996, [Acton] hired [Geary] to place a new roof on this residence. It called for the addition of two vents, the replacement of 200 feet of "rotten wood" and the repair of flashing as needed. [Geary] was paid \$2,500.00 for this work. The evidence at trial indicated that [Geary] did what he was hired to do. There was a five year warranty on this job. Despite [Acton's] complaints to [Geary] regarding the 996 Goss Avenue residence, this property's problems were not brought to [Geary's] attention until after the warranty expired. [Acton] has failed to make her case for an entitlement to \$2,000 for repairs to the property. Not only is the claim untimely, but [Acton's] self-serving statement that she was told repairs would cost \$2,000.00 lacks the proper foundation, even given her personal knowledge of rentals and their maintenance costs. This Court finds for [Geary] on this claim and awards no damages.

We disagree with the trial court that Acton's claim relating to 994 Goss Avenue was time barred. KRS 413.090(2) is the appropriate statute of limitation for claims based upon breaches of the parties' written contract. That statute requires that an action upon a written contract shall be commenced within fifteen years after the cause of action first accrued. Simply because a warranty expires, does not mean that an individual's right to sue diminishes as well. See: Nucor

Corp. v. General Electric Co., 812 S.W.2d 136, 145-146 (Ky. 1991).

Testimony was received by each party relating to the performance of this contract. Acton testified that the roof had two vents prior to the repair work and that the parties' contract was to add two additional vents to the roof. Acton further testified that she had received an estimate on replacement of the roof in the amount of \$2,000.00, but she did not provide any additional proof of this estimate. James Wilson, an expert witness on behalf of Acton, testified that the shingles on the roof of 994 Goss Avenue buckled because of the heat accumulation due to an insufficient number of vents on the roof.²⁶ Geary testified that he did what he agreed to do on this property pursuant to the parties' contract. Geary also testified that initially the roof of 994 Goss Avenue was a tin roof which meant that when he replaced the roof with a different material the vent type also differed. As a result, he had to remove the two tin roof vents and replace with two new vents on the replacement roof. Geary offered no testimony as to whether he believed two vents provided sufficient ventilation or whether the roof damage was directly related thereto.

The trial court relied upon the testimony provided by Geary and found for him accordingly. Because there was no

²⁶ Mr. Wilson also testified there should have been at least four vents in his opinion.

ambiguity in the parties' contract, the trial court's finding is clearly erroneous.

If an ambiguity exists in a contract term, a court will gather, if possible, the intention of the parties from the contract as a whole, and in doing so will consider the subject matter of the contract, the situation of the parties, and the conditions under which the contract was written. Frear v. P.T.A. Industries, Inc., 103 S.W.3d 99, 106 (Ky. 2003), (citing Whitlow v. Whitlow, 267 S.W.2d 739, 740 (Ky. 1954)). In the absence of ambiguity, a written instrument will be enforced strictly according to its terms. Id., (citing O'Bryan v. Massey-Ferguson, Inc., 413 S.W.2d 891, 893 (Ky. 1966)). In such cases, a court will interpret the contract's terms by assigning the language its ordinary meaning and without resort to extrinsic evidence. Id., (citing Hoheimer v. Hoheimer, 30 S.W.3d 176, 178 (Ky. 2000)). We turn now to the contract executed in relation to 994 Goss Avenue.

The contract specifically stated "We agree to add 2 vents." This term is not ambiguous or warranting parol evidence to determine the intent of the parties. As such, the term will be enforced strictly according to its terms. Both Acton and Geary testified that 994 Goss Avenue had two vents on the roof prior to Geary's repairs being made. Based on the contract, Geary agreed to add two vents to the roof, resulting in a total

of four vents being present at 994 Goss Avenue at the end of his repair work. Geary's interpretation of the contract was to replace the existing vents which is contrary to the clear wording of the contract. Acton, Mr. Wilson, and Geary each testified that only two vents were present at 994 Goss Avenue at the conclusion of Geary's repair work. Therefore, Geary breached the contract related to the vents at 994 Goss Avenue.

In addition, Mr. Wilson provided uncontradicted expert testimony that the curled shingles were a direct result of heat damage from the roof not having a sufficient number of vents. Geary would be liable for all damages incurred as a direct result of his contract breach. We reverse the trial court related to this issue and remand for a determination of the value to be attributed to Geary's breach of this contract term. Specifically, the trial court shall take additional proof to determine the repair cost to the roof of 994 Goss Avenue.²⁷

Acton's third argument is that the trial court was clearly erroneous in finding that the claim for damages to 1012 Ash Street was time-barred. The trial court held in relation to 1012 Ash Street the following:

The parties signed an undated contract on this property. The evidence indicated that this work was done in 1995. As in the other contracts, a five-year "labor" warranty was in place in this \$750.00 contract. During a

²⁷ We agree with the trial court that Acton's recitation of an estimate she received would be insufficient.

1998 rainstorm, the gutter was stopped up by tar in the downspout. This resulted in \$1,333.96 in damages to the interior of the unit. [Acton] maintained that she saw [Geary] with some tar on the roof, and [Geary] denies placing tar in the downspout. The Court finds that this claim was made outside of the warranty period, and the evidence is also insufficient to indicate that [Geary] is responsible for the damage. This Court finds for [Geary] and awards no damages on this claim.

Using the trial court's own finding that the contract related to 1012 Ash was entered in 1995 and the alleged damages occurred in 1998, it is clear that the alleged damages occurred within the five year labor warranty. We note that the trial court did have an additional basis for its denial of damages to Acton. It found the evidence to be insufficient to indicate that Geary was responsible for the damage. Acton failed to argue to the contrary in her brief. However, in the interest of justice, we will examine the same.

At the bench trial, Acton testified she did not actually see Geary place the tar in the box gutter in the front, but she did see him carry a bucket of tar up on the roof.²⁸ Acton continued by testifying that after this repair, the front interior of the rental property was flooded during the first rain. Geary testified that he recoated the box gutter in the front with fiber-coating using a brush. Geary further testified

²⁸ Acton testified the same on both direct and cross examination.

that he did not pour a bucket of tar into the box gutter. Geary was not questioned by Acton about the alleged repair work to 1012 Ash Street during cross-examination. Based on the testimony and evidence presented, we believe it was neither clearly erroneous or an abuse of discretion for the trial court to attribute no liability to Geary in relation to 1012 Ash Street.

Acton's fourth, fifth, sixth, seventh, and tenth arguments are each fraud claims involving punitive damages. The fifth, sixth, and seventh fraud arguments were never raised in prior proceedings, and will not be addressed at this time. The fourth and tenth arguments are directly related to Geary's insurance coverage during the repair projects. The trial court granted a directed verdict to Geary on Acton's punitive damages claim. Acton filed a motion to reconsider. As a result, the issue of punitive damages was included in the court's Findings of Fact, Conclusions of Law, and Judgment. The trial court stated in relevant part:

Findings of Fact

Each contract for repair contained a handwritten clause similar to this:
"Geary's Home Improvement is responsible for Liability insurance and Workman's Comp."
[Geary's] insurance, if he had any, did not cover the work performed. [Acton] maintains that this misrepresentation constituted fraud, and, hence, she is entitled to punitive damages. [Geary] maintains that

this clause or a similar clause was added at [Acton's] request so that she would not be liable for any injuries suffered by [Geary] or his employees. At trial [Geary] furnished to the court a "Commercial General Liability Section" (Defendant's Exhibit 3), which indicates that from December 10, 1995, through June 18, 1996 he had coverage with Action Insurance Agency, Inc.

Conclusions of Law

Punitive Damages

After reviewing the record and the parties' testimony, the Court still believes that [Acton] has failed to prove her entitlement to punitive damages. The evidence was clear that either [Geary] had insurance which covered liability to individuals who might be working for him, or, in the alternative, that the parties had informally agreed to the nature of [Geary's] "liability." It is important to note that [Acton's] status both as a multi rental homeowner and an attorney places her in a better position to judge whether the person she is hiring has sufficient insurance coverage for her intended purposes. The Court is assisted in interpreting the liability provision of the contracts by referring to the 1998 contract on the house at 1131 Reutlinger, which states in the warranty section that "Geary's Home Improvement is responsible for all damages and injuries to workers." There was no testimony regarding further inquiry into the nature of [Geary's] "coverage" before the work was done.

The burden rests squarely on [Acton] to prove her claim of fraudulent misrepresentation. . . . The Court cannot find that [Geary] acted fraudulently in this action.

In an action for fraud, the party claiming harm must establish six elements of fraud by clear and convincing evidence as follows: (a) material representation; (b) which is false; (c)

known to be false or made recklessly; (d) made with inducement to be acted upon; (e) acting in reliance thereon; and (f) causing injury. United Parcel Service Company v. Rickert, 996 S.W.2d 464, 468 (Ky. 1999), (citing Wahba v. Don Corlett Motors, Inc., 573 S.W.2d 357, 359 (Ky.App. 1978)).

Acton testified she required an insurance clause be added to each contract, but she did not offer an explanation concerning the type of coverage intended. Geary testified Acton was concerned about potential liability from his employees.²⁹ Each contract had a handwritten clause about insurance as follows:

994 Goss Avenue

"Geary's Home Improvement will provide work comp and liability insurance."

996 Goss Avenue

"We are resonable [sic] for liability [sic] insurance and workman comp."

1012 Ash Street

"Geary's Home Improvement is responsible [sic] for Liability [sic] insurance and workman comp."

1131 Reutlinger Avenue³⁰

"Geary's Home Improvement is reasonable [sic] for all damages and injuries to workers."

²⁹ Geary's testimony was the same on direct and cross examination.

³⁰ This property is not part of the appeal but was relied upon the court in its judgment in relation to the punitive damages matter.

Following a review of the record and trial video, we believe there was substantial evidence to support the trial court's conclusion that the inserted insurance clauses were added due to potential liability from Geary's employees. As such, we believe Acton failed to prove the injury element of her fraud claim. No proof was entered as to injuries to Geary or any of his workers resulting in Acton's liability. Therefore, we agree with the trial court that Acton failed to satisfy her burden of proof on her fraud (i.e. punitive damages) claim.

Acton's final arguments, eight and nine, are related to alleged building and housing code violations in relation to 996 Goss Avenue.³¹ Acton argues that the trial court was clearly erroneous in its refusal to find that Geary was grossly negligent and violated the building and housing code. Acton also argues that it was clearly erroneous and an abuse of discretion for the trial court to refuse to award her attorney fees where there was evidence that Geary violated the building and housing code.

³¹ Acton failed to make a claim of a violation of the building codes and KRS 198B in her original complaints, amended complaint, and more definitive statement. The first mention of this claim was in her Pretrial Compliance Supplement filed May 13, 2004.

At trial, the only evidence submitted to support Acton's claim of code violations came in the form of Acton's submission of the housing code into evidence.

Acton's expert witness who was to testify regarding the alleged violations, Brian Miller, was not allowed to testify on this issue because of untimely notice to Geary.³² The trial court made no mention of these alleged code violations in its order, because it found that the parties had settled as to this particular property. However, we will again examine Acton's arguments in the interest of justice.

At trial, Acton admitted that Geary did not cause the joists to be unconnected to the house, but as her roofer, Geary should have repaired the structural defect or told her it needed to be repaired. We do not agree with Acton that Geary could be liable for another's faulty construction. Therefore, we believe there is no merit to this claim.

For the reasons set forth above, we believe the trial court was neither clearly erroneous nor abused its discretion in its judgment as to 996 Goss Avenue, 1012 Ash Street, or Acton's claim of punitive damages. However, we believe the trial court did err in its judgment as to 994 Goss Avenue. Therefore, we affirm the Jefferson Circuit Court's denial of recovery to Acton as to 996 Goss Avenue, 1012 Ash Street, and her punitive damages

³² Acton failed to list Mr. Miller as a potential expert witness.

claim. We reverse and remand for additional proof on Acton's damage claim on 994 Goss Avenue and for the court to enter a judgment in accordance with this opinion.

ALL CONCUR.

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