IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
November 8, 2007 Session

DAVID LAVY d/b/a DL CONSTRUCTION v. JOAN CARROLL

Appeal from the Circuit Court for Hickman County
No. 05-5014C Jeffrey S. Bivins, Judge

No. M2006-00805-COA-R3-CV - Filed December 26, 2007

This is a home construction case in which the homeowner appeals the trial court's decision finding her liable to the contractor for the amount remaining due under their original agreement as well as for subsequently authorized modifications. The homeowner contended below that the contractor's work was defective, but the trial court ruled that she was required to have given the contractor notice of any defects in his work and then afforded him a reasonable opportunity to cure these alleged deficiencies. On appeal, the homeowner argues that the trial court erred both in finding that she had not done this and in holding that these actions were required of her as a matter of law. We affirm.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed and Remanded.

WALTER C. KURTZ, SP. J., delivered the opinion of the court, in which ANDY D. BENNETT, J., and DONALD P. HARRIS, SR. J., joined.

Charles G. Blackard, III, Brentwood, Tennessee, for the appellant, Joan Carroll.

Douglas Thompson Bates, III, Centerville, Tennessee, for the appellee, David Lavy d/b/a DL Construction.

OPINION

I

In this case, the appellant, Joan Carroll, appeals from the entry of a judgment against her in the amount of $50,685.27. A summary of the evidence presented at trial is contained in a statement

of the evidence, which was prepared by the appellee, David Lavy d/b/a DL Construction, and approved by the trial judge. *See* Tenn. R. App. P. 24. No transcript has been provided.[1]

In the spring of 2004, Ms. Carroll contracted with Mr. Lavy for construction of a residence in Pleasantville, Tennessee. While this work was being performed, Ms. Carroll's daughter, Mary Ann Waite, and Ms. Waite's husband, Jack Waite, acted as agents for Ms. Carroll.[2] The original contract price was $286,375.00, but modifications later approved by the Waites added $9,153.53 to the cost of the project. Ms. Carroll does not dispute that the Waites approved these modifications, nor does she argue that they lacked the authority to approve changes during the home's construction.

On January 21, 2005, Mr. Lavy presented his final bill to Mr. Waite, who said simply that he would give it to Ms. Carroll. That final bill comprised the balance still due on the original contract ($39,500.00) plus the amount owed for modifications ($9,153.53). The following day Mr. Lavy returned to the work site with his associate, Kenneth Underhill, and observed Mr. Waite stealing some of his equipment.[3] Ms. Waite then instructed Messrs. Lavy and Underhill to leave the premises and never return.

Mr. Lavy filed suit on February 8, 2005. On February 25, 2005, Ms. Carroll filed an answer and countercomplaint. Ms. Carroll alleged, among other things, that there were defects in the construction of the home and that the work was otherwise unsatisfactory. A bench trial was held on March 15 and 16, 2006. At the end of the first day of trial, the court inquired of Ms. Carroll whether she intended to offer evidence that Mr. Lavy had been afforded an opportunity to cure the alleged defects in his work.[4] The next day Ms. Carroll presented live testimony from Ms. Waite, who stated that she had told Mr. Lavy that he could return to address these problems. The trial court, however, found that this testimony was not credible and then concluded that Mr. Lavy had not been extended an opportunity to cure as required by Tennessee law. Having made these determinations, the court, however, ruled that Ms. Carroll would still be allowed to present evidence on the reasonableness of

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[1] Because the statement of the evidence does not have the detail and flow of a transcribed hearing, it may contribute to this Court's somewhat disjointed description of the proceedings at trial.

[2] Ms. Carroll is disabled due to a stroke.

[3] According to the statement of the evidence, Mr. Waite was later convicted of "larceny." The crime, however, is now called "theft."

[4] The trial court also provided counsel copies of the two cases upon which it was relying. Although Ms. Carroll's reply brief appears to assert in passing that the court erred by interjecting this issue when–according to her–Mr. Lavy had not previously mentioned it, there is no indication that she made a contemporaneous objection below and, moreover, this matter is not raised in her statement of the issues presented for review. *See* Tenn. R. App. P. 27(a)(4).

Mr. Lavy's charges, which she declined to do.[5] The court then found for Mr. Lavy and granted him a judgment against Ms. Carroll in the amount of $50,685.27.[6]

II

This case was tried without a jury. "Accordingly, the standard of review is *de novo* upon the record with a presumption of correctness as to the findings of fact, unless the preponderance of the evidence is otherwise." *Bowden v. Ward*, 27 S.W.3d 913, 916 (Tenn. 2000); *see* Tenn. R. App. P. 13(d). No such presumption, however, attaches to the trial court's conclusions of law. *See Bowden*, 27 S.W.3d at 916; *Hillsboro Plaza Enters. v. Moon*, 860 S.W.2d 45, 47 (Tenn. Ct. App. 1993); *see also Campbell v. Florida Steel Corp.*, 919 S.W.2d 26, 35 (Tenn. 1996).

III

Ms. Carroll has submitted to this Court a brief whose statement of the issues purports to challenge multiple aspects of the action below. In the body of her brief, however, she only presents argument on the questions related to Mr. Lavy's opportunity to cure the alleged problems in his work. The Court will therefore confine its review to those questions actually argued by Ms. Carroll in her brief, and any other issues are deemed abandoned. *See* Tenn. R. App. P. 27(a); *see also Hawkins v. Hart*, 86 S.W.3d 522, 531 (Tenn. Ct. App. 2001); *Branum v. Akins*, 978 S.W.2d 554, 557 n.2 (Tenn. Ct. App. 1998) ("Where a party makes no legal argument and cites no authority in support of a position, such issue is deemed to be waived and will not be considered on appeal.").

A. Credibility of Ms. Waite

Ms. Carroll first asserts that the trial court erred in finding that the she had not in fact afforded Mr. Lavy an opportunity to cure. The only argument she makes to support this, however, is her contention that the trial court improperly discounted Ms. Waite's testimony at trial. Mr. Lavy took the position below that Ms. Waite's trial testimony was contradicted by the testimony previously given by her in a deposition.[7] On appeal, Ms. Carroll asserts that Ms. Waite's live

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[5] Ms. Carroll made no offer of proof on the alleged defects in Mr. Lavy's work. *See* Tenn. R. Evid. 103(a)(2). This may in part have been related to a sanction imposed upon her by the court before trial for not disclosing her expert witnesses in accordance with a prior scheduling order. As a result of this failure, the court ruled in an order entered on December 20, 2005 that she would "not be allowed to put any evidence on from third persons who will give any opinion in the trial of this cause." Ms. Carroll has made no challenge to this ruling.

[6] This included an award of prejudgment interest.

[7] Of course, there being no transcript of the trial, what precisely Ms. Waite said is not memorialized.

testimony was not contradicted by her deposition and that the court should have therefore accredited her trial testimony.[8]

Because this matter was tried without a jury, the trial court acted as the finder of fact. It is well-established that "[w]hen issues regarding credibility of witnesses and the weight to be given their testimony are before a reviewing court, considerable deference must be accorded the trial court's factual findings." *Houser v. Bi-Lo, Inc.*, 36 S.W.3d 68, 71 (Tenn. 2001); *see In re Estate of Walton*, 950 S.W.2d 956, 959-60 (Tenn. 1997); *Wright v. City of Knoxville*, 898 S.W.2d 177, 181 (Tenn. 1995). "The trial court is uniquely positioned to observe the manner and demeanor of witnesses, and appellate courts accord particular deference to trial court findings that depend upon weighing the value or credibility of competing oral testimony." *Fell v. Rambo*, 36 S.W.3d 837, 846 (Tenn. Ct. App. 2000); *see Whitaker v. Whitaker*, 957 S.W.2d 834, 837 (Tenn. Ct. App. 1997).

Even if we were to assume that Ms. Waite's deposition testimony did not actually impeach her testimony at trial, Ms. Carroll's argument on appeal would still be unavailing. Mr. Lavy testified that he was prohibited from ever returning to Ms. Carroll's property after the incident on January 22, 2005. Testimony from Mr. Underhill corroborated Mr. Lavy's account of these events. Thus, there was certainly evidence from which the trial court could have concluded that Mr. Lavy had not been provided a reasonable opportunity to cure. Put simply, the trial court believed Messrs. Lavy and Underhill rather than Ms. Waite. Because the evidence does not preponderate against the trial court's findings, *see* Tenn. R. App. P. 13(d), we conclude that Ms. Carroll's argument here is without merit.

B. Reasonable Opportunity to Cure

Ms. Carroll next argues that the trial court erred as a matter of law in requiring her to have extended Mr. Lavy a reasonable opportunity to cure the alleged deficiencies in his work. The court based its ruling on two prior opinions from this Court: *McClain v. Kimbrough Construction Co., Inc.*, 806 S.W.2d 194 (Tenn. Ct. App. 1990), and *Carter v. Krueger*, 916 S.W.2d 932 (Tenn. Ct. App. 1995). In the first of these, *McClain*, this Court held that a contractor was obliged to give its subcontractor "notice and a reasonable opportunity to correct its defective work before terminating [their] contract." 806 S.W.2d at 198. In that decision, we explained the rationale behind such a requirement:

> Notice ought to be given when information material to the performance of a contract is within the peculiar knowledge of only one of the contracting parties. In the absence of an express notice provision, the courts will frequently imply an obligation to give notice as a matter of common equity and fairness. Requiring notice is a sound rule designed to allow the defaulting party to repair the defective work, to reduce the damages, to avoid additional defective performance, and to promote the informal settlement of disputes.

[8] It is important to note that Ms. Carroll is not arguing that the trial court erred in its application of the Tennessee Rules of Evidence.

McClain, 806 S.W.2d at 198 (internal citations omitted).

If there had ever been any thought that the holding of *McClain* would not apply in the context of an agreement between a contractor and one not regularly engaged in the business or trade of construction, it should have been dispelled by this Court's decision in *Carter v. Krueguer*, 916 S.W.2d 932 (Tenn. Ct. App. 1995). Even though *Carter* involved a dispute between a contractor and an individual property owner, we nevertheless applied the rule from *McClain*. *Id.* at 935. When the property owner in *Carter* attempted to argue that, since her case did not arise within a contractor-subcontractor relationship, *McClain* should not control, we disagreed and concluded that this factual distinction was not meaningful. *Id.* Instead, we reiterated our prior holding and stated unambiguously that the owner was under a duty "to give notice of the claimed defects [to the contractor] and afford [the contractor] a reasonable opportunity to cure the defects." *Id.* at 936; *see also Coleman v. Daystar Energy, Inc.*, No. E2007-00226-COA-R3-CV, 2007 WL 4117776, at *3 (Tenn. Ct. App. Nov. 19, 2007); *Custom Built Homes by Ed Harris v. McNamara*, No. M2004-02703-COA-R3-CV, 2006 WL 3613583, at *5 (Tenn. Ct. App. Dec. 11, 2006).

Before this Court, Ms. Carroll attempts to argue that these two cases are distinguishable from the one at bar because here Mr. Lavy presented her with his final bill and also filed a notice of completion as well as a sworn lien statement with the Hickman County Register of Deeds.[9] She further argues that he never requested an opportunity to cure. We are not persuaded.

The trial court did not find that Mr. Lavy had been previously notified of any problems with his work, nor did it find that Mr. Lavy had ever refused to address any issues that had been brought to his attention. It did find, however, that, soon after he made his request for final payment, Ms. Carroll's agents prohibited him from reentering the property. While Ms. Carroll contends that Mr. Lavy's requesting payment and making filings with the Register of Deeds relieved her of the obligations imposed by *McClain* and *Carter*, she has failed to cite any law which would support this proposition. Likewise, the Court is unaware of any such authority. Filings under the lien law would have no effect on her duty to first give the contractor notice of the claimed defects and then allow him a reasonable opportunity to cure.

Furthermore, there is no reference in the statement of the evidence to this notice of completion, which is now relied upon by Ms. Carroll, nor does it appear to have been made an exhibit at trial. This document was merely attached to Ms. Carroll's reply brief on appeal, and thus it is not properly before the Court. *See King v. State*, No. M2004-01371-CCA-R3-PC, 2005 WL 1307802, at *3 n.3 (Tenn. Crim. App. June 1, 2005) ("Documents attached to briefs are not cognizable as part of an appellate record."), *perm. app. denied* (Tenn. Dec. 19, 2005); *State v. Matthews*, 805 S.W.2d 776, 783-84 (Tenn. Crim. App. 1990); *Patterson v. Hunt*, 682 S.W.2d 508, 518 (Tenn. Ct. App. 1984).

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[9] These filings relate to lien law. They are meant to protect the interests of the property owner from untimely liens and give the lienholder priority over other possible creditors. *See* Tenn. Code Ann. § 66-11-112; *id.* at § 66-11-143; *see also* 16 William Houston Brown et al., *Tennessee Practice: Debtor-Creditor Law and Practice* § 3.12, at 116-18 (1998); *id.* § 3.15, at 123-24.

Accordingly, Ms. Carroll, through her agents, failed to comply with the requirements imposed by Tennessee case law upon a party in her position.

C. Frivolity of Appeal

Mr. Lavy has moved this Court to find Ms. Carroll's appeal frivolous under Tenn. Code. Ann. § 27-1-122. "A frivolous appeal is one that is 'devoid of merit,' or one in which there is little prospect that it can ever succeed." *Indus. Devel. Bd. of the City of Tullahoma v. Hancock*, 901 S.W.2d 382, 385 (Tenn. Ct. App. 1995) (citations omitted). We have also said, though, that "[t]his statute 'must be interpreted and applied strictly so as not to discourage legitimate appeals.'" *Knowles v. State*, 49 S.W.3d 330, 341 (Tenn. Ct. App. 2001) (quoting *Davis v. Gulf Ins. Group*, 546 S.W.2d 583, 586 (Tenn. 1977)).

We do not find that this appeal is so lacking in merit as to be frivolous. Thus, we conclude that the motion is not well taken.

IV

For the reasons expressed above, the decision of the trial court is affirmed in all respects, and this matter is remanded for further proceedings not inconsistent with this opinion. Costs of this matter are taxed to the appellant, Ms. Carroll, and her surety for which execution shall issue if necessary.

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WALTER C. KURTZ, SPECIAL JUDGE