

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
September 14, 2007 Session

**ROBERT G. O'NEAL, d/b/a R & R CONSTRUCTION CO. v. PAUL E.
HENSON, ET AL.**

**Direct Appeal from the Chancery Court for Sequatchie County
No. 1875 Jeffrey F. Stewart, Chancellor**

No. M2006-02118-COA-R3-CV - Filed November 15, 2007

This is a construction contract dispute. The trial court entered judgment in favor of Defendants Buyers/Counter-Plaintiffs in the amount of \$72,418, less an offset in the amount of \$48,713.15 for payments due to Plaintiff Builder; attorney's fees; and costs. Plaintiff Builder appeals. We affirm.

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

DAVID R. FARMER, J., delivered the opinion of the court, in which HOLLY M. KIRBY, J. and STEVE R. DOZIER, SP. J., joined.

Edward L. Boring and Keith Harding Grant, Pikeville, Tennessee, for the appellant, Robert G. O'Neal.

Keith S. Smartt, McMinnville, Tennessee, for the appellees, Paul E. Henson and Patricia Nell Henson.

MEMORANDUM OPINION¹

This case arises from a February 2000 contract executed by Builder Robert G. O'Neal d/b/a R & R Construction Co. (Mr. O'Neal) and Paul E. Henson and Patricia N. Henson ("the Hensons") to construct a log home to buyers' specifications. The contract provided a completion date of June 30, 2000, and included a provision for attorney's fees upon default or breach. The contract price was

¹Rule 10 of the Rules of the Court of Appeals of Tennessee provides:

This Court, with the concurrence of all judges participating in the case, may affirm, reverse or modify the actions of the trial court by memorandum opinion when a formal opinion would have no precedential value. When a case is decided by memorandum opinion it shall be designated "MEMORANDUM OPINION", shall not be published, and shall not be cited or relied on for any reason in any unrelated case.

actual cost plus ten percent. Difficulties arose between the parties during the course of construction, and in September 2000 Mr. O’Neal left the job site unfinished.

In February 2001, Mr. O’Neal filed a complaint in the Chancery Court of Sequatchie County alleging he had performed all obligations under the contract in a timely and workman-like fashion, and that the Hensons had breached the contract by failing to pay amounts due. He prayed for a judgment in the amount of \$48,713.15, plus prejudgment interest, costs, and attorney’s fees. The Hensons answered and counter-complained in April 2001, alleging construction defects and failure to complete the contract according to schedule. They prayed for actual and punitive damages, attorney’s fees, and treble damages under the Tennessee Consumer Protection Act.

The matter was heard in the trial court in May and July, 2005 and the trial court made oral findings of fact in April 2006. Final judgment was entered in September 2006. The trial court found Mr. O’Neal had committed no fraudulent or deceptive practices that would justify an award of treble damages under the Tennessee Consumer Protection Act. Based on the testimony of experts for both the Hensons and Mr. O’Neal, the trial court found that the work performed by Mr. O’Neal was defective and substandard. It determined the Hensons has sustained damages in the amount of \$72,418, including \$30,000 arising from substandard and defective workmanship; \$20,000 for completion of work not completed by Mr. O’Neal; and \$22,418 for replacement of a defective roof. The trial court ordered “[s]uch judgment shall be allowed as an offset against the amount claimed and allowed to Plaintiff of \$48,713.15, resulting in a net judgment” to the Hensons in the amount of \$23,704.85. It further awarded attorney’s fees and costs to the Hensons as the prevailing parties. Mr. Henson filed a timely notice of appeal to this Court. We affirm.

Issues Presented

The following issues, as presented by Mr. O’Neal, are raised for our review:

- (1) The trial court erred in awarding damages to the Appellees despite the fact that the Appellees initially breached the contract.
- (2) The trial court erred by charging finishing costs to the Appellant when the Appellee[s] initially breached the contract by refusing to pay the amount due under the contract
- (3) The trial court erred by failing to grant attorney[’s] fees for the Appellant[s’] attorney[] pursuant to the contract and the partially favorable ruling, or, in the alternative, Appellees should not have been granted attorney[’s] fees.

Standard of Review

Our standard of review of a trial court sitting without a jury is *de novo* upon the record. *Wright v. City of Knoxville*, 898 S.W.2d 177, 181 (Tenn. 1995). We review the trial court’s findings

of fact with a presumption of correctness unless the evidence preponderates otherwise. Tenn. R. App. P. 13(d). Thus, we may not reverse the trial court's factual findings unless they are contrary to the preponderance of the evidence. We review the trial court's conclusions on matters of law *de novo*, with no presumption of correctness. Tenn. R. App. P. 13(d); *Bowden v. Ward*, 27 S.W.3d 913, 916 (Tenn. 2000).

Analysis

The issues raised on appeal essentially require a determination of which party was initially and primarily responsible for the failure of this contractual relationship. Mr. O'Neal does not dispute the trial court's factual finding of defective or substandard workmanship. Rather, he asserts that the Hensons initially breached the contract by failing to pay invoices due, and that he therefore had no choice but to discontinue work on the home. He asserts that because the Hensons initially breached the contract, they could not thereafter assert damages against Mr. O'Neal where Mr. O'Neal was given no opportunity to cure and no written documentation of alleged defects prior to the filing of his complaint. He further asserts the Hensons may not recover costs to finish where the contract was a cost-plus contract and where Mr. O'Neal was forced off the job site by the Hensons' refusal to pay. Mr. O'Neal finally submits that the trial court erred in awarding the Hensons attorney's fees under the contract where the Hensons initially breached and, in the alternative, where they only partially prevailed on their counterclaim.

The Hensons, on the other hand, assert Mr. O'Neal initially breached by failing to complete the job by June 30, 2000, as specified in the contract. They further assert they brought quality problems to Mr. O'Neal during construction, and that Mr. O'Neal failed to correct the problems. They contend that they ceased making payments to Mr. O'Neal after he failed to complete the job on time; failed to "carry out his assurances to correct the defects"; and after they became aware of "substantial defects" in the home.

As the trial court observed, the dispute over which party breached first is essentially a "he said/she said" determination. Ultimately, however, the trial court found the Hensons had brought construction defects to Mr. O'Neal's attention during the course of construction, that Mr. O'Neal's work had been, in fact, substandard and/or defective, and that the Hensons were the prevailing party. The question of which party initially breached is, in this case, a matter of credibility. We review a trial court's determinations on matters of witness credibility with great deference and will not re-evaluate a trial judge's credibility determinations unless they are contradicted by clear and convincing evidence. *Wells v. Tenn. Bd. of Regents*, 9 S.W.3d 779, 783 (Tenn. 1999). Finding no clear and convincing evidence to contradict the trial court's determination on this matter, we affirm the award of damages to the Hensons arising from Mr. O'Neal's breach.

We next turn to Mr. O'Neal's assertion that the trial court erred in awarding the Hensons the costs of finishing construction on the home where the contract was a cost-plus contract and where the Hensons essentially forced him off the job site by refusing to pay installments due. Mr. O'Neal's rather brief argument to this Court on this issue essentially reiterates his position that, because the

Hensons were the initial breaching party, the award of damages was in error. As noted above, we find no evidence to disturb the trial court's determinations on this matter.

Finally, Mr. O'Neal asserts the award of attorney's fees to the Hensons was in error where the Hensons only partly prevailed on their claims and where the court also awarded Mr. O'Neal the damages asserted in his complaint. The contract provision providing for attorney's fees states:

Upon the default of either party or breach of the terms of this contract, the non-defaulting party shall be entitled to recover any and all expenses incurred by the non-defaulting party in conjunction with the enforcement of this contract, or the rights hereunder, including reasonable attorney's fees and other associated expenses of litigation.

The trial court awarded attorney's fees to the Hensons as the "prevailing parties." However, although we agree with Mr. O'Neal that he "prevailed" on his claim, the determination of who is entitled to attorney's fees under the plain language of the contract again requires a determination of which party "defaulted" and which party was the "non-defaulting" party.

The interpretation of a contract is a matter of law which we review *de novo*, with no presumption of correctness for the determination of the trial court. *Barnes v. Barnes*, 193 S.W.3d 495, 498 (Tenn. 2006). The "cardinal rule" of contract construction is to ascertain the intent of the parties and to effectuate that intent consistent with applicable legal principles. *Frizzell Constr. Co. v. Gatlinburg, L.L.C.*, 9 S.W.3d 79, 85 (Tenn. 1999). When the language of the contract is plain and unambiguous, courts determine the intentions of the parties from the four corners of the contract, interpreting and enforcing it as written. *Int'l Flight Ctr. v. City of Murfreesboro*, 45 S.W.3d 565, 570 (Tenn. Ct. App.2000). A contract is not rendered ambiguous simply because the parties disagree as to the interpretation of one or more of its provisions. *Id.* at n. 5. The court must seek to ascertain the parties' intent in light of the context of the entire agreement. *Burns v. Temperature Control Co.*, 371 S.W.2d 804, 806 (Tenn. Ct. App.1963) (citations omitted). Additionally, we must construe any ambiguity in a written contract against the drafter. *E.g., Spiegel v. Thomas, Mann & Smith, P.C.*, 811 S.W.2d 528, 531 (Tenn. 1991).

Although the Hensons' claim for damages was offset by amounts which the trial court determined were owed to Mr. O'Neal for work done, the performance of substandard and defective work by Mr. O'Neal preceded the Hensons' refusal to pay him. Mr. O'Neal clearly "defaulted" under the terms of the contract. We affirm the award of attorney's fees.

Holding

The judgment of the trial court is affirmed. Costs of this appeal are taxed to the Appellant,

Robert G. O'Neal d/b/a R & R Construction Co., and his surety, for which execution may issue if necessary.

DAVID R. FARMER, JUDGE