

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
August 5, 2008 Session

HOMEBUILDERS McGEE & STORY, LLC v. HENRY BUCKNER

**Appeal from the Circuit Court for Davidson County
No. 01C-2411 Barbara N. Haynes, Judge**

No. M2008-00291-COA-R3-CV - Filed August 21, 2008

This is the second appeal of a contract dispute between a homeowner and the contractor he engaged to make improvements to his home. The homeowner contends that the trial court erred by awarding the contractor attorney's fees on remand following the first appeal because the contractor waived its claim of attorney's fees, the contractor is judicially estopped to claim attorney's fees, and the trial court lacked jurisdiction to award attorney's fees following remand. We have determined the contractor had not waived its claim and it was not judicially estopped to assert a claim for attorney's fees. We have also determined that the trial court had jurisdiction to award attorney's fees pursuant to the contract following remand of the first appeal.

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

FRANK G. CLEMENT, JR., J., delivered the opinion of the court in which ANDY D. BENNETT, J., joined. PATRICIA J. COTTRELL, P.J., M.S., not participating.

Jean Dyer Harrison, Nashville, Tennessee, for the appellant, Henry Buckner.

G. Kline Preston, Nashville, Tennessee, for the appellee, Homebuilders McGee & Story, LLC.

OPINION

Henry Buckner, the owner of a home and spacious lot in Forest Hills, Tennessee, desired to make significant improvements to his home. In furtherance thereof, he met with a representative of Homebuilders McGee & Story, LLC, in early May 2000 to discuss an addition to the garage, renovation of the existing kitchen and bathroom, expansion of the living room, construction of a patio, and the eventual construction of a pool and a substantial retaining wall. Shortly thereafter, Mr. Buckner entered into a written "Construction Management Agreement" with Homebuilders. Pursuant to the Agreement, Homebuilders was to complete the scope of the work pursuant to drawings referenced in the Agreement on an agreed budget of \$175,000. The Agreement also provided that the fee to Homebuilders for the services of managing and "providing completion of the building of the specified home [would] be a total of Cost Plus 17%."

Litigation between the parties arose after Mr. Buckner unilaterally terminated the services of Homebuilders when the project was only 30% complete.¹ After Mr. Buckner fired Homebuilders, Homebuilders submitted its final bill. When Mr. Buckner refused to pay any portion of the final bill, Homebuilders filed a Complaint against Mr. Buckner for breach of contract in the circuit court. For his part, Mr. Buckner filed a Complaint in chancery court against Homebuilders and its principals for fraud, breach of contract, violations of the Tennessee Consumer Protection Act, negligent misrepresentation, negligence, and breach of fiduciary duty. The two cases were soon consolidated into the circuit court action. Following a three-day bench trial, the trial court dismissed the parties' respective breach of contract claims on a finding the Construction Management Agreement was not enforceable because the parties did not have a meeting of the minds. The trial court also dismissed all other claims of each party, including Mr. Buckner's claims for fraud, violations of the Tennessee Consumer Protection Act, negligent misrepresentation, negligence, and breach of fiduciary duty.

Within a week of the foregoing judgment being entered by the trial court, Homebuilders filed a motion seeking to recover its attorney's fees. Prior to that motion being heard, Mr. Buckner filed his notice of appeal. Immediately thereafter, the trial court entered an order stating that the motion for attorney's fees would be taken under advisement pending the appeal. Thus, Homebuilders' motion for attorney's fees remained unresolved while Mr. Buckner pursued his first appeal.²

In the first appeal, both parties contended the Construction Management Agreement was a valid and enforceable contract and that each was entitled to damages due to the other's breach. We determined in the first appeal that the Agreement constituted an enforceable contract because it sufficiently identified the scope of the work and the price of the work, which was an agreed budget of \$175,000 with a management fee of "Cost Plus 17%." *Homebuilders McGee & Story, LLC v. Buckner*, No. M2005-02643-COA-R3-CV, 2007 WL 969395, * 4 (Tenn. Ct. App. March 30, 2007) (perm. app. denied Aug. 13, 2007). We also found that Homebuilders was entitled to damages resulting from Mr. Buckner's breach of the contract in the amount of \$25,328. *Id.* at *5.

Following remand to the trial court, Homebuilders filed another motion to recover its attorney's fees and for discretionary costs. The motion was filed on August 31, 2007. A week later, on September 7, 2007, Homebuilders filed an amended motion for attorney's fees, which was accompanied by an affidavit of its attorney to support the claim for fees. On September 14, 2007, Homebuilders filed a supplemental brief in support of the amended motion for attorney's fees along with an affidavit in support thereof from a principal of Homebuilders. Mr. Buckner resisted the motion contending it was not timely filed, that Homebuilders was judicially estopped from seeking

¹By October, Mr. Buckner asked for an accounting of the project from Homebuilders and was provided with a document titled "Cost Estimate" showing the total cost to complete construction would be \$289,204. Homebuilders explained the increase was due to the addition of the retaining wall and other changes that were requested and authorized by Mr. Buckner. Insisting he had not authorized additional expenses, Mr. Buckner terminated Homebuilders' services on October 31, 2000.

²This court was unaware the order from which the first appeal was taken adjudicated fewer than all the claims between the parties and thus was not a final appealable order.

more than \$16,606.98 in fees, that the matter was *stare decisis*, that the court lacked jurisdiction, and that the fees were unreasonable. On October 4, 2007, the trial court granted Homebuilders' motion for attorney's fees and awarded fees in the amount of \$63,903.

Thereafter, Mr. Buckner filed a motion asking the court to state findings of fact. The trial court directed the parties to submit proposed findings of fact. Thereafter, the court entered an order in which it set forth its findings of fact. Thereafter, Mr. Buckner filed this appeal.

In this second appeal, Mr. Buckner sets forth eight issues for our review. He contends, *inter alia*, that Homebuilders waived the issue of attorney's fees, that the trial court lacked jurisdiction to award attorney's fees on remand, and that Homebuilders is judicially estopped to claim attorney's fees.

We have determined that Homebuilders had not waived its claim for attorney's fees and that it was not judicially estopped to assert its claim for attorney's fees. We have also determined that the trial court had jurisdiction to award Homebuilders its attorney's fees pursuant to the contract following remand of the first appeal.

ANALYSIS

We first note that Homebuilders had filed a motion to recover its attorney's fees prior to the first appeal. The motion for attorney's fees filed prior to the first appeal was based on a statutory right to recover attorney's fees. The motion was based on the fact that Homebuilders had been the prevailing party on Mr. Buckner's claims based on the Tennessee Consumer Protection Act. Homebuilders had not filed a motion for attorney's fees pursuant to the contract because the court found there was no enforceable contract between the parties. Thus, at that time, there was no contractual basis upon which Homebuilders could recover its attorney's fees. It was not until this court had respectfully disagreed with the trial court's conclusion on the contract claim that Homebuilders was in a posture to file a motion to recover its attorney's fees based on contract.

In fairness to both parties, we did not expressly state in our first opinion that Homebuilders could recover its attorney's fees on remand. This omission, however, did not preclude Homebuilders from pursuing its contractual claim to recover its attorney's fees following remand. This is because the record reveals that Homebuilders had expressly stated in the Complaint a claim to recover its attorney's fees, the contract expressly provides that it is entitled to recover its attorney's fees as the prevailing party, and Homebuilders' motion to recover its attorney's fees was filed prior to Mr. Buckner perfecting his appeal and was still pending when the case was remanded to the trial court. Moreover, this court did not rule on the unresolved issue in the first appeal.

It is significant that the order from which the first appeal was taken was not a final appealable order. The reason it was not a final appealable order is because it adjudicated fewer than all the claims between the parties. A party is entitled to an appeal as of right *only after the trial court has entered a final judgment*. Tenn. R. App. P. 3(a); *King v. Spain*, No. M2006-02178-COA-R3-CV,

2007 WL 3202757, at *8 (Tenn. Ct. App. October 31, 2007) (no Tenn. R. App. P. 11 application filed). A final judgment is a judgment that *resolves all the claims between all the parties*, “leaving nothing else for the trial court to do.” *State ex rel. McAllister v. Goode*, 968 S.W.2d 834, 840 (Tenn. Ct. App. 1997). Had we known it was not a final appealable order at the time, we would have dismissed the appeal and remanded the case to the trial court to address all unresolved issues. Unfortunately, however, the parties failed to notify the court of this important fact and the record did not reveal the fact that Homebuilders’ motion for attorney’s fees was pending when the first appeal was taken.³

An order that adjudicates fewer than all the claims between all the parties is subject to revision any time before the entry of a final judgment and is not appealable as of right. Tenn. R. App. P. 3(a). Homeowners’ claim for attorney’s fees had not been adjudicated by the trial court, and therefore its claim for attorney’s fees was subject to revision any time before the entry of a final judgment. As a consequence, the trial court retained jurisdiction over the issue concerning attorney’s fees and thus had jurisdiction over that issue following remand.

Mr. Buckner also contends that Homebuilders did not provide adequate grounds for an award of fees and that the motion was not properly filed. We respectfully disagree. We have determined that Homebuilders filed detailed information that was more than sufficient for the trial court to make a determination of the fees and legal services that were reasonable and necessary. We also find no deficiency in the manner in which the motion for attorney’s fees and discretionary costs was filed, realizing that any deficiency with the motion as initially filed was cured by the amended motions.

As for the other issues raised by Mr. Buckner, we find no error by the trial court and thus affirm the trial court on those issues.

For its part, Homebuilders contends that the notice of appeal was untimely. It also contends this appeal is frivolous and, therefore, it is entitled to recover its costs pursuant to Tenn. Code Ann. § 27-1-122.⁴ We respectfully disagree.⁵

“An appeal is deemed frivolous if it is devoid of merit or if it has no reasonable chance of success.” *Wakefield v. Longmire*, 54 S.W.3d 300, 304 (Tenn. Ct. App. 2001) (citations omitted).

³This court has a protocol by which it vigorously endeavors to ascertain whether the judgment from which a party or parties appeal is a final judgment. If the judgment at issue on appeal is not a final judgment, and that is brought to the attention of this court, either by our examination of the record or by motion of the appellee to dismiss the appeal for lack of a final judgment, we generally dismiss the appeal and remand the case to the trial court.

⁴“When it appears to any reviewing court that the appeal from any court of record was frivolous or taken solely for delay, the court may, either upon motion of a party or of its own motion, award just damages against the appellant, which may include, but need not be limited to, costs, interest on the judgment, and expenses incurred by the appellee as a result of the appeal.” Tenn. Code Ann. § 27-1-122.

⁵Homebuilders also contends the appeal was not timely. We have determined that it was timely filed and our affirmance of the trial court on all substantive issues raised by Mr. Buckner renders the issue moot as well.

Although we affirmed the trial court on each issue raised by Mr. Buckner, we did not find the issues raised devoid of merit. To the contrary, some of the issues raised had a reasonable chance of success. Accordingly, we do not find the appeal to be frivolous.

IN CONCLUSION

The judgment of the trial court is affirmed. This matter is remanded to the trial court for further proceedings consistent with this opinion, including the determination of reasonable and necessary attorney's fees and costs incurred by Homebuilders on appeal, which it may be entitled to recover pursuant to the contract as the prevailing party. Costs of appeal are assessed against Mr. Buckner and his surety.

FRANK G. CLEMENT, JR., JUDGE