

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
December 12, 2007 Session

**TEMPLE BAPTIST CHURCH, MANCHESTER, TENNESSEE v. C & H
COMMERCIAL CONTRACTOR, INC.**

**Appeal from the Chancery Court for Coffee County
No. 04-440 L. Craig Johnson, Judge**

No. M2006-02507-COA-R3-CV - Filed March 11, 2007

Claimant/Appellant Temple Baptist Church brought suit against Defendant/Appellee C & H Commercial Contractors, Inc. to enforce a provision for liquidated damages pursuant to a construction contract entered into by the parties. The contract contained a provision for liquidated damages at the rate of \$250.00 per day if the contractor failed to complete the work within the time required by the contract. Temple Baptist Church also sought awards for a credit due under the contract for sales tax and for the contractor's failure to obtain a bond. C & H Commercial Contractors filed an answer and counterclaim alleging that the church had wrongfully terminated the contract. The case was tried without a jury in March of 2006. The trial court found that both parties were mutually responsible for the delay in construction for a period of 220 days. The trial court found that the contractor was responsible for delays after this period and awarded liquidated damages in the amount of \$14,250.00. The trial court also awarded attorney fees in the amount of \$16,034.50, but denied the credits sought by the church. We affirm.

Tenn. R. App. P. Rule 3; Judgment of the Chancery Court Affirmed

JON KERRY BLACKWOOD, SR. J., delivered the opinion of the court, in which ALAN E. HIGHERS, P.J., W.S. and ANDY D. BENNETT, J., joined.

Gregory Lee Cashion and Kenneth S. Schrupp, Nashville, TN, for appellant, Temple Baptist Church Manchester, Tennessee.

Vanessa A. Jackson, Tullahoma, Tennessee, for appellee, C & H Commercial Contractors, Inc.

OPINION

Factual Background

Temple Baptist Church [hereinafter referred to as "Temple"] contracted with C & H Commercial Contractors, Inc. [hereinafter referred to as "C & H"] for the construction of a new building on its church property in Manchester, Tennessee. The contract provided for the

construction of a 'shell' metal building as a part of Temple's project to construct a gymnasium and classrooms for a private school. The bidding for the project was in January 2003. C & H was the low bidder and awarded the contract. The contract was a fixed price contract for \$350,227.50 and required C & H to complete the construction by January 31, 2004. Section 302 of the contract provided for liquidated damages in the amount of \$250.00 per day if the construction was not completed by January 31, 2004. There were two written change orders agreed upon by the parties that reduced the contract price to \$346,282.00.

C & H began construction in late May 2003 by removing topsoil from the site. However, it was determined two days later that a building permit from the City of Manchester had not been issued¹. Work on the project was halted until the building permit was issued which caused a delay of approximately two months. Another delay was occasioned when shop drawings had to be submitted to the architect and the State Fire Marshall for approval.

By January 31, 2004, C & H had not completed the construction. Numerous meetings were conducted by the parties in order to resolve the status of the project and completion date. Nevertheless, by July 19, 2004, C & H was no longer providing any services. On October 13, 2004, C & H was notified by letter that Temple was terminating the contract. Temple hired other contractors and subcontractors to finish the construction. The project was finally completed on November 3, 2004.

Standard of Review

Our review of the findings of fact by the trial court is *de novo* upon the record, accompanied by a presumption of correctness of the factual findings, unless the preponderance of the evidence is otherwise. Tenn. R. App. P. 13d. Questions of law are *de novo* with no presumption of correctness. *Carvell v. Bottoms*, 900 S.W.2d 23, 26 (Tenn. 1995).

Analysis

The term "liquidated damages" means a sum stipulated and agreed upon by the parties at the time they enter their contract, to be paid to compensate for injuries should a breach occur. 22 Am Jur Damages § 212 (1965); *See Railroad v. Cabinet Co.*, 104 Tenn. 568, 58 S.W.303 (1900). The reason for allowing the parties to stipulate the amount of damages is to create certainty where damages are likely to be uncertain and not easily proven. *Railroad, supra*. The amount stipulated should be reasonable in relation to the terms of the contract and the certainty with which damages can be measured, there must exist a reasonable relationship between the amount and what might reasonably be expected in the event of a breach. *Id.* If the provision is a reasonable estimate of the damages that would occur from a breach, then the provision is normally construed as an enforceable stipulation for liquidated damages. *See Bristol v. Bostwick*, 146 Tenn. 205, 240 S.W.774 (1922); 22 Am Jur Damages § 227 (1965). A party will not be allowed, however, to recover liquidated

¹ The architectural plans of Mr. Wayne Oakley, Temple's architect, were submitted to the City of Manchester, but had not been approved by the State Fire Marshall.

damages where he is responsible for or has contributed to the delay or non performance alleged as a breach. *Glassman Construction Co. v. Maryland City Plaza*, 1154 (D. C. Md 1974), aff'd 530 F.2d 968 (4th Cir. 1975); *V. L. Nicholson Co. v. Transcon Inv. & Financial, Ltd.*, 595 S.W.2d 474 (Tenn. 1980); *Guiliano v. Cleo, Inc.*, 995 S.W.2d 88, 97 (Tenn. 1999).

The trial court found that both parties were responsible for 220 days of delays, and denied an award of liquidated damages to Temple for those days. In determining those days of delay, the trial court implicitly found that the delays were occasioned by the failure of Temple's architect to obtain the Fire Marshall's approval for the building permit, as well as the delays for the shop drawings. The delay caused with the shop building plans prevented C & H from placing the order for the metal building until December 2003. The metal building manufacturer was closed for two weeks during Christmas causing further delay.

When a trial court has seen and heard witnesses, especially where issues of credibility and weight of oral testimony are involved, considerable deference must be accorded to either as to the trial court's factual findings. *Seals v. England/Corsair Upholstery Mfg. Co.*, 984 S.W.2d 912, 915 (Tenn. 1999). After a review of the record, we find that the evidence does not preponderate against the trial court's finding that both parties were mutually responsible for 220 days of delay.

The trial court found that C & H was responsible for the last 57 days of delays and awarded liquidated damages for that delay. C & H asserts that the trial court erred in this regard because the written contract amount specifying \$250.00 per day as liquidated damages was not reasonable.

Tennessee follows what is called the "prospective approach" when addressing the propriety of a liquidated damage clause. *See Guiliano*, 995 S.W.2d at 100. Under the prospective approach, Courts must focus on the intention of the parties based upon the language in the contract and the circumstances that existed "at the time of the contract formation." *Id.* Those circumstances include "[w]hether the liquidated sum was a reasonable estimate of potential damages and whether actual damages were indeterminable or difficult to measure at the time the parties entered into the contract." *Id.* at 100-101. If the provision satisfies these factors and reflects the parties' intention to compensate in the event of a breach, then the provision will be upheld as a reasonable agreement for liquidated damages. *Guiliano*, 995 S.W.2d at 100-101.

The pastor of Temple testified that the liquidated damages would reflect the loss of donations, tuition for the private school, and escalation of building costs. The pastor further testified that Temple was expecting donations to the church to increase as the building progressed. Again, it is implicit in the trial court's findings that the sum of \$250.00 was reasonable. After review of the record, we find that the evidence does not preponderate against the trial court's award of \$14,250.00 in liquidated damages.

Temple claims that the trial court erred in failing to award a \$9,605.00 credit under the contract due to a sales tax savings for materials directly purchased by Temple. It is undisputed that after the contract was signed, the parties agreed for Temple to purchase the building and insulation material in order to save sales tax. Temple paid A & S Metal Building Systems for the metal building and S & S Industries for the insulation. The sales tax calculations for those purchases was

\$9,605.00. In the fixed price contract signed by the parties, C & H calculated a sum for the purchase of the metal building and insulation which included sales tax. A credit was given Temple for this estimated figure. Further, Mr. Hershman of C & H testified that the parties never reached an agreement about how much money C & H was to deduct from the contract for those items. From a review of the record, we find that the parties never reached a “meeting of the mind” on this issue and therefore, we affirm the trial court’s refusal to award a credit under the contract for this amount.

Temple asserts that the trial court erred in failing to award a credit in the amount of \$5,277.00 for C & H’s failure to obtain a performance and payment bond. It is undisputed that C & H failed to provide this bond pursuant to the contract. However, the trial court found that the actual costs to complete the building after C & H was terminated was \$342,939.39. The adjusted contract price between Temple and C & H was \$346,282.00. Thus Temple was able to complete the project for less than the contract price had C & H performed. The trial court concluded that to award additional damages for C & H’s failure to obtain the bond would have placed Temple in a better position than if C & H had fully performed. We find that the evidence does not preponderate against this finding.

Finally, Temple asserts that the trial court erred in failing to award attorney fees and litigation expenses in the amount of \$68,263.89 as provided in the contract. The trial court awarded \$16,034.50 as attorney fees based upon the reduced award of liquidated damages and the “equities of the case.” When a contract provides for the recovery of attorney fees in a certain situation, the trial court has no discretion regarding whether to award attorney fees or not. Determining the reasonableness of the amount of an attorney fee is a discretionary inquiry by the trial court, however, to which appellate courts will defer, absent an abuse of discretion. *Keith v. Howerton*, 165 S.W.3d 251 (Tenn. Ct. App. 2004). A court abuses its discretion when it either applies an incorrect legal standard or reaches a clearly unreasonable decision, thereby causing an injustice to the aggrieved party. *Kline v. Eyrich*, 69 S.W.3d 197, 204, 209 (Tenn. 2002). The Tennessee Supreme Court has directed that when deciding attorney fees, the trial court should consider the guidelines as delineated in *Connors v. Connors*, 594 S.W.2d 672, 677 (Tenn. 1980). The trial court shall also consider the factors contained in Sup. Ct. Rule 8, DR 2-106. The *Connors* guidelines are: the time devoted to performing the legal service; the time limitations imposed by the circumstances; the novelty and difficulty of the questions involved; the skill requisite to perform the legal services properly; the fee customarily charged in the locality for similar services; the amount involved and the results obtained; the experience, reputation and ability of the lawyer performing the legal service. *Conner* 594 S.W.2d at 676.

The trial court made no further findings for the reduction other than the substantial reduction of the award and the equities of the case. Temple filed the affidavits of Gregory Cashion, Attorney at Law, expressing the opinion that the rate of \$240.00 per hour and an associate rate of \$165.00 per hour were reasonable for an attorney in Middle Tennessee. This was a non jury case requiring several days for trial. The legal questions, however, were neither novel or difficult. This case was commenced after the completion of the building. Therefore, there were no time limitations imposed by the circumstances. The record is silent regarding the experience, reputation and ability of the lawyer performing the legal service, and the skill requisite to perform the legal service. The results were not as favorable to Temple as the relief sought. From our review of the record, we find no abuse of discretion in the trial court’s award of attorney fees.

Conclusion

We affirm the judgment of the trial court with cost assessed equally between the parties.

JON KERRY BLACKWOOD, JUDGE