IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
November 5, 2009 Session

TIMOTHY BOWEN, ET AL. v. SAMUEL E. RASNAKE

Appeal from the Circuit Court for Unicoi County
No. 6670 Thomas J. Seeley, Judge

No. E2009-00353-COA-R3-CV - FILED DECEMBER 28, 2009

Timothy Bowen and his wife Leanne Bowen ("the Buyers") contracted to purchase a house from Samuel E. Rasnake ("the Seller") that was still under construction. The Buyers experienced numerous problems with the house and filed their complaint against the Seller for defective construction, breach of warranty and misrepresentation. After a bench trial, the court awarded the Buyers judgment against the Seller in the amount of $42,300. The Seller appeals. We affirm.

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

CHARLES D. SUSANO, JR., J., delivered the opinion of the court, in which D. MICHAEL SWINEY and JOHN W. MCCLARTY, JJ., joined.

James D. Culp, Johnson City, Tennessee, for the appellant, Samuel E. Rasnake.

Thomas C. Jessee, Johnson City, Tennessee, for the appellees, Timothy Bowen and Leanne Bowen.

OPINION

I.

On or about July 6, 2001, the Buyers entered into a contract to purchase a house and lot located at 107 Sunset Drive, Unicoi, Tennessee. It was a "spec" house still under construction by the Seller. The Seller is not a licensed contractor and never has been. To get around the licensure requirement, he has for years built two or three houses at a time as his own and immediately listed them for sale. The Seller typically does very little of the actual work. With limited occasional exceptions, he subcontracts the work to others. The only actual work he performed on the subject house was in preparing the footers and the basement floor for concrete. The Seller is not a licenced engineer and his only credentials are his field experience in the type of construction used on the subject house.

The Buyers' realtor prepared the contract that the Seller and the Buyers signed on July 6, 2001. The contract was amended or supplemented in August and again in September 2001. The initial contract has language indicating, on the one hand, that the sale was "as is" and, on the other hand, that the house was subject to a one-year builder's warranty. The July contract is trial exhibit 1. It sets a closing date of August 4, 2001. Paragraph 8(B) states that

> [B]uyer accepts the Property in its presents [sic] condition. All parties acknowledge and agree that the Property is being sold "AS IS" with any and all faults. The Sellers shall have no obligations for repairs or replacements noted in any inspection(s) made by or for the Buyer. Such repairs or replacements shall be the sole responsibility of Buyers.

Paragraph 8(B) is initialed by the Buyers and the Seller. However, paragraph 11 provides the two options of either a warranty or "warranty waived." The option of "ONE-YEAR WARRANTY" is checked and the paragraph is initialed by the Seller and Buyers. Paragraph 19 sets forth handwritten "Special Stipulations," including the following:

> Home will be finished to Southern Building Code Specifications and according to attached request lists.
>
> * * *
>
> Seller to provide [a] one year builders warranty.

(Capitalization in original.) Paragraph 19 is initialed by the parties. The "attached request lists" referenced in paragraph 19 is the punch list of items noted by the Buyers at their pre-closing inspection; the list is dated September 21, 2001. Leanne Bowen testified that most of the items on the punch list were never corrected. Other than as noted on the list, problems with the house were orally mentioned to the Seller, who lives next door to the Buyers. According to Mrs. Bowen, the Seller either came and made a half-hearted effort at correcting problems or promised to repair them and never did.

The August amendment to the July contract extends the August closing date to September 21, 2001. Additionally, it provides: "Due to the fact that Mr. Rasnake is not required to be a licensed contractor to build in Unicoi County,[1] Mr. Rasnake agrees to warrant and guarantee construction for one year from closing as if he were a licensed contractor in Unicoi County." The final amendment dated the day of closing did not make any substantive changes to the contract. Its primary significance is in noting that the Buyers, while closing, were still expecting items on the punch list to be corrected.

[1]The reader should not assume that we agree with the language used by the parties in the contract they made. We are unaware of any "Unicoi County exception" to the general rule regarding builder licensing.

Not long after closing, the Buyers experienced standing water in the basement. According to the Seller it was just an East Tennessee humidity problem and maybe some stains left over from being exposed to the weather before the house was dried in. He advised the Buyers, and so testified at trial, that they needed to use de-humidifiers to remedy the situation. The Seller testified that he had workmen paint the basement wall with a moisture barrier called "dry-lock" to cover up water stains on the wall to appease Mrs. Bowen. The Seller admitted that putting a moisture barrier on the inside of walls is ineffective to prevent moisture seepage through walls. The Seller could not explain at trial why he would have covered up some stains with the moisture barrier and not covered up others in the same area that were visible in photographs made trial exhibits. According to Mrs. Bowen, the moisture barrier was the Seller's idea to cure the water seepage and was not done in response to any request by her to cover up stains. She testified that the Buyers did install de-humidifiers, which did not control the water coming through the wall. The water problems continued to the date of trial.

A second problem area was tile failure in two rooms of the house. According to Mrs. Bowen, ceramic flooring tiles cracked and grout failed in the kitchen and bathroom. The Seller sent workmen to repair the tile not long after closing and they replaced some tiles and grout. This did not cure the problem. According to the Buyers, the floors were uneven and could be felt moving underfoot at times, especially with a concentration of weight in one place.

These unresolved problems led the Buyers to consult a professional engineer, Alan E. Rommes, to "offer an opinion" as to the causes and potential cures. According to Rommes, the moisture problems in the basement were caused by substandard waterproofing. He testified that building codes and acceptable practices require that waterproofing be applied to the outside of basement walls on any surface that is going to be below final grade. That this was not done to the subject house is evidenced by photographs taken of numerous sections of outside basement wall dug below grade. Also, even though the subject house was finished with brick veneer, Rommes testified that brick is porous and must also be waterproofed. The only acceptable cure, according to Rommes, was to excavate the walls and waterproof them. This meant removing and reinstalling any heat and air units, sidewalks and such that would interfere with the excavation.

The Seller claimed that the basement walls were waterproofed on the outside by a tried and true method employed by his subcontractor. The subcontractor appeared as a witness at trial and testified that he waterproofed the Buyers' basement walls to final grade by the same method he used in every other house in the subdivision. His method is to lay the basement wall out of twelve-inch wide concrete block until he reaches the elevation of final expected grade. At that point he switches to eight-inch wide block so as to leave a ledge for the brick. When he begins a wall, the subcontractor lays the block up a few runs from the bottom, applies mortar as a stucco, and when the mortar dries, he hand applies an asphalt-based waterproofing agent. At the bottom of the wall, he installs a french drain to carry away water that would otherwise remain trapped against the wall. The stucco and asphalt process continues to the height of expected final grade. Both the Seller and the subcontractor stated that they had never applied waterproofing to an area that was being bricked. The subcontractor admitted that if there was water making its way into the basement, it was finding

a way in though the walls. Even though he claimed to have applied the waterproofing to all sub-grade surfaces, the subcontractor admitted that photographs taken of the basement walls in several places did not show evidence of having been waterproofed and he could not explain why.

Rommes attributed the problems with the floor primarily to two sources. One source was that the trusses were installed improperly so that some were higher than others on the same span. Rommes based his opinion on observation and photographs which showed that the bottoms of some floor trusses protruded lower than others. Since the trusses are of a uniform height, this meant that the top chords of the trusses were not level and thus made the floor unlevel. In the same area, Rommes noted that the direction of the run of the trusses was abruptly changed which would change the nature of the underlying support for the floor with the result that some sections of the floor would handle stresses differently. Rommes could not identify a cure for these problems that would do less harm that good. The other problem, which was a serious structural problem, was improper placement and support for a larger girder that ran from one side of the house to the other in direct contact with the bottom chord of the floor trusses. The posts supporting the girder were untreated and too far apart. The maximum acceptable span for the posts would be eight feet, but the posts were installed more like twelve feet apart. Because of the improper placement, the wood girder had a visible sag. The posts were imbedded in the concrete floor and therefore should have been treated. The cure for this problem was to temporarily support the girder and install steel columns on eight-foot centers. Also, since the existing posts were imbedded in concrete, the holes in the floor left by their removal would need to be patched. A second problem with the support girder was that it was not properly placed under the load bearing point on the floor trusses. The result was that the bottom chord of the trusses rested on the girder at a point where the trusses were unreinforced. The result was a visible deflection in the bottom chord of the trusses. According to Rommes, this could probably be repaired by reinforcing the trusses at the point where they rested on the girder, but would need to be done in consultation with the truss manufacturer. Rommes surmised that the entire post and girder system had been added as an afterthought to deal with the considerable weight of the two-story structure.

The Seller claimed that the floor trusses were designed to be free-standing and that the intent of the girder was not to support weight. He claimed that the girder and other corresponding framing was put in place because Mr. Bowen first wanted a wall in the basement in that location and then changed his mind. According to the Seller, the wall was to run with the girder. Mr. Bowen denied ever asking for a wall in the basement and stated that the Seller may have proposed putting a wall there.

Rommes also noted that the steps to the second story of the house were below code in that the top and bottom steps departed from standard spacing. The primary run of the steps used standard height spacing of 7-3/4 inches. However, the bottom step was approximately ten inches from the floor and the top was approximately five inches from the floor. This posed a safety problem and would need to be corrected by rebuilding the steps. The Seller proposed to simply build a short landing to correct the bottom spacing, but admitted that the steps were not properly spaced.

Rommes also examined a visible dip in the roof over the garage. He concluded that the dip was not the fault of the builder, but a result of the inherent nature of the lumber in the trusses. It could be fixed simply by backing the plywood roof decking away from the roof truss and nailing a straight board along the side of the truss as necessary to correct the dip.

Rommes identified other areas of concern including substandard headroom at the top of the basement steps, and various trim and finish items. He identified some areas as merely cosmetic, some as safety concerns, and others as structurally substandard construction that could result in failure or additional damage if not addressed. Rommes' report, which tracked his testimony, was made an exhibit.

Rommes did not prepare a bid or estimate of the cost to make the needed repairs. That was supplied by Roger Southerland of RSE, Inc. Southerland is a licensed general contractor who does building and remodeling in the area. Southerland testified regarding the problems he observed, the repairs needed and the cost to make the repairs. In his estimate received as trial exhibit 13, he identified 15 specific repair measures that needed to be taken. According to Southerland, the total repair cost was $57,300. Since the Seller, for the most part, denied any problems or blamed them on the Buyers, the Seller did not present an alternative repair estimate. To questions from the court, Southerland admitted that if he left off the cosmetic repairs and concentrated on the major problems of floor support and water in the basement, he could reduce the cost to something like $50,000.

In announcing its ruling from the bench, the court noted that, despite the "as is" provision in the contract, it did provide for a one-year builder's warranty. Also, the written contract required that the house be built to the standard of the Southern Building Code. The two major problems with the house – being the water in the basement and the structural problems with the trusses and supporting girder – would not have been evident immediately according to the court. The court believed the Buyers' testimony that they had standing water in their basement, and believed the photographic evidence and testimony showing that areas of the basement wall below grade were not waterproofed. As to the structural issues, "The Court was impressed by what Mr. Rommes said." The trial court adopted Mr. Rommes' report as part of its findings of fact. The trial court specifically found that "there were violations of the Southern Building Code and that there [were] defects over and above the Southern Building Codes . . . caused by workmanship which did not meet the standards of building contractors who build . . . in this area." The court found that the house was defective and the Seller did not fulfill his obligations under the contract. The court disallowed $5,000 of Mr. Southerland's estimate and further reduced it to $42,300 based on problems that the court viewed as "minor" and "cosmetic" and possibly unreported to the Seller. The court also addressed an argument made by the Seller that the Buyers had listed their home for sale with a realtor for $315,000 after having paid only $199,000. According to the Seller, the Buyers therefore had no damages. The court viewed the inflated asking price as "typical" and not dispositive given testimony by the Buyers that they had disclosed the problems with their home and had gotten no offers. Since there was no proof of the market value of the house if it had been built "as . . . it should have been," the proper measure of damages was the cost of repair. Had the alternative measure of damages of diminution in value been used, "the damages may well have exceeded $42,300." Based on its

findings the trial court entered judgment in favor of the Buyers in the amount of $42,300.[2] The Seller filed this timely appeal.

II.

The Seller identifies one issue stated as follows:

> Did the trial court err in entering judgment in favor of the [Buyers] for alleged defects in the construction of the home in dispute.

III.

The standard of review of a trial court's findings of fact is *de novo* with a presumption of correctness unless the preponderance of the evidence is otherwise. Tenn. R. App. P. 13(d); ***Rawlings v. John Hancock Mut. Life Ins. Co.***, 78 S.W.3d 291, 296 (Tenn. Ct. App. 2001). Considerable deference is accorded the trial court's findings with regard to credibility because the trial court has seen and heard the witnesses. ***Seals v. England/Corsair Upholstery Mfg. Co.***, 984 S.W.2d 912, 915 (Tenn. 1999); ***B & G Const., Inc. v. Polk***, 37 S.W.3d 462, 465 (Tenn. Ct. App. 2000). The trial court's conclusion of law are reviewed *de novo* and are accorded no presumption of correctness. ***Campbell v. Florida Steel Corp.***, 919 S.W.2d 26, 35 (Tenn. 1996); ***Presley v. Bennett***, 860 S.W.2d 857, 859 (Tenn. 1993).

IV.

The Seller first makes a general argument without any citation of a specific problem with the proof that the Buyers failed to carry their burden of proof. The Seller characterizes the case as a "wonderful demonstration of the, 'he said, she said' phenomenon." For the most part, we disagree. There was considerable proof that the Seller did not refute. He admitted that he did not intend for the stairs to be built with a tall bottom step and short top step, nor did he intend for the basement steps to have a point of low headroom. The Seller did not dispute that the girder is sagging between the supports, nor did he refute the engineer's finding that the bottom chord of some of the trusses is bowed upward because it rests on the girder in a place unreinforced for weight bearing. The Seller's claim that the girder is not for weight bearing makes little common sense. The Seller did not perform the waterproofing, and his subcontractor could not explain why the photographs submitted as exhibits showed areas of the outside basement wall that were not waterproofed. For the most part, the Seller did not establish the expertise in either himself or his witnesses to refute the testimony of Rommes, a licensed professional engineer, and Southerland, a licensed general contractor. The Seller did not offer proof as to what it would cost to make the repairs; he simply minimized the problems or testified that the repairs were simple.

[2]The Seller asserted a counterclaim which the trial court dismissed for lack of proof.

The Seller also asserts implicitly that the delay in reporting and complaining about the problems somehow weighs against the Buyers' claims. This assertion is outweighed by the fact that the subject problems are not the types of problems that necessarily become immediately apparent.

The Seller next argues that this sale was "as is" and that it is "plain that [the Seller] undertook to sell the subject property 'as is.' " If that had been the case, one could reasonably expect the Seller to offer evidence that he so intended, but there is no such proof. In fact, the Seller's limited actions to correct problems weigh against the argument that the sale was "as is." The Seller's proof was more to the effect that the Buyers' problems were trivial and that they did not need to be corrected. Nevertheless, we agree with the Buyers that the "as is" provision does not control over the other provisions of the contract that extended a one-year warranty and required the construction to be compliant with the Southern Building Code. Any arguable ambiguity is removed in the August amendment which unambiguously sets forth and explains the one-year warranty.

Next, the Seller argues that the Buyers cannot recover because they failed to mitigate their damages. This argument is based on the Buyers' admission that they had not made most of the repairs to the time of trial. The Seller asserts, "There is no proof in the record indicating what effect, if any, a delay of seven (7) years may have had on the repairs." This assertion is remarkable given that the burden to present such proof was on the Seller. ***Hailey v. Cunningham***, 654 S.W.2d 392, 396 (Tenn. 1983). There is no merit to this argument.

The Seller argues that the Buyers waived most of the defects by their walk through inspection of the home before closing. For the most part, this is simply a rephrasing of the "as is" argument which we are not inclined or required to rehash. To the extent it is not, we agree with the trial court that the major problems for which it awarded damages would have required some time to be discovered and were therefore not waived.

The Seller argues that there is no "clear proof" of damages. This argument is based primarily on the asking price of $315,000 for which the Buyers listed their home for sale. The Buyers testified that they made disclosure of their problems in the listing and had not received even one offer. We agree with the trial court that there is little meaning to the asking price without proof of what the market value of the home would have been had it not been defective. We further agree with the trial court that an acceptable and legal measure of damages is the cost of repairing the home. ***GSB Contractors, Inc. v. Hess***, 179 S.W.3d 535, 543 (Tenn. Ct. App. 2005). In fact, the reasonable repair cost is generally the preferred measure. ***Id.*** A home buyer or homeowner may prevail against a builder and recover the cost of repairs without proving a diminution of value; "[t]he burden is on the [Seller] to show that the cost of repairs is unreasonable when compared to the diminution in value . . . ." ***Id.***

The "damages" argument also asserts that Mr. Southerland's "blanket" estimate is overly inclusive and fails to account for items that were accepted by the Buyers in their inspection. Without holding that the Buyers waived anything, it is clear to us that the trial court reduced Mr. Southerland's estimate by approximately $15,000 to delete charges for items that the trial court

viewed as minor or waived by the Buyers. The trial court's reduction is reasonably based on Mr. Southerland's response to the trial court's own questions. We also note that the Seller did not offer any proof to refute Mr. Southerland's estimate other than to try to minimize the problems or the nature of the repairs.

We also note that to the extent the phrase "clear proof" has any special meaning in the Seller's argument, the Seller offers no authority for the proposition that damages must be proven to some standard other than a preponderance of the evidence. Accordingly, we reject the argument that the Buyers did not prove damages and hold that the evidence does not preponderate against the damages awarded by the trial court.

The Seller's final argument is that the trial court read the contract too broadly to require that the whole house, rather than just the part that was not completed on the date of the contract, was to be done in obedience to the Southern Building Code. The Seller argues that the contract only states that the "[h]ome will be *finished* according to the Southern Building Code, [(emphasis added)]" therefore "there was no contractual undertaking that any work done prior to the day of contracting would conform to the Southern Building Code." This argument defies logic, and we reject it. It assumes, for example, that someone would be willing to buy a house if the siding and paint were properly applied, regardless of the state of the foundation or framing.

The Seller also argues that while "[t]here are some indirect comments by Mr. Rommes and Mr. Southerland concerning items violating the code, . . . there is not a single word in that Record that specifies what provisions of the Southern Building Code were violated by what features of the home and in what specifics any of those features violate those provisions." The Seller offers no authority for the proposition that a plaintiff must offer up the chapter and verse of a building code in order to prove violations. At numerous points in the record, the trial court interjected its own questions as to whether particular problems were violations of the Southern Building Code and numerous times Rommes confirmed that they were a code violation. Rommes proceeded to discuss the substance of the code requirement. We concur in the trial court's reading of the contract and the evidence, and hold that the evidence does not preponderate against the judgment entered by the trial court.

V.

The judgment of the trial court is affirmed. Costs on appeal are taxed to the appellant, Samuel E. Rasnake. This case is remanded, pursuant to applicable law, for enforcement of the trial court's judgment and for collection of costs assessed below.

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CHARLES D. SUSANO, JR., JUDGE