IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
May 2, 2011 Session

SPRING CRESS REALTY, LLC v. LARRY E. BROWN DBA S&B ASSOCIATES ET AL.

Appeal from the Chancery Court for Knox County
No. 168870-2 Daryl R. Fansler, Chancellor

No. E2010-00615-COA-R3-CV - FILED - MAY 16, 2011

This is an action by an owner/developer of real property, Spring Cress Realty, LLC, against its excavation contractor, Larry E. Brown dba S&B Associates. The primary factual allegation is that the excavator intentionally hid approximately 40,000 cubic yards of unsuitable soil in an "engineered fill." The complaint included a claim that Brown violated the Tennessee Consumer Protection Act ("the TCPA"), Tenn. Code Ann. § 47-18-101 et seq.(2001). After a bench trial, the court awarded Spring Cress a judgment against Brown for compensatory damages of $551,295, trebled under the TCPA to $1,653,885. Brown appeals raising issues as to the preponderance of the evidence and the statute of limitations applicable to the TCPA claim. We affirm.

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

CHARLES D. SUSANO, JR., J., delivered the opinion of the Court, in which HESCHEL P. FRANKS, P.J., and D. MICHAEL SWINEY, J., joined.

Curtis W. Isabell, Clinton, Tennessee, for the appellant, Larry E. Brown dba S&B Associates.

Steven E. Schmidt and Michael S. Kelly, Knoxville, Tennessee, for the appellee, Spring Cress Realty, LLC.

OPINION

I.

A.

Spring Cress is the owner of approximately 45 acres of land that borders interstate 75 in Loudon County. Spring Cress hired an engineering firm to prepare a "grade plan" necessary to transform the property into a commercial development. Part of that plan included removal of topsoil and debris, and placement of suitable fill to bring the topography to the desired final grade. The grade plan called for the fill to be compacted so that it would be suitable for commercial buildings. Graded fill suitable for commercial development is commonly called "engineered fill." Spring Cress contracted with Brown, who does business under the trade name of S & B Associates, to do the grading work. Spring Cress also contracted with S&ME, Inc., an engineering firm, to perform compaction tests on the engineered fill on an as-needed basis. Typically, Brown communicated directly with S&ME. On November 18, 2005, Brown advised S&ME that no further testing would be needed as all the fill work had been done. After Brown completed his work, Spring Cress had problems with the engineered fill and hired a second contractor, Earthworks, Inc., to perform remediation work. During the remediation, Spring Cress found approximately 40,000 cubic yards of unsuitable material and debris buried several feet deep in what was supposed to have been an engineered fill.

Spring Cress filed this action against Brown[1] to recover the cost of remediation as well as some fines levied by the Department of Environment and Conservation. Spring Cress alleged that Brown's actions amounted to breach of contract, gross negligence, breach of the implied warranty of workmanship, and a violation of the TCPA. Brown filed a motion to dismiss. He asserted as the bases for his motion "the following reasons:"

> 1. Failure to state a claim for which relief can be granted[.]
>
> 2. The statute of limitations bars any claim under [the TCPA].
>
> 3. The Plaintiff has failed to plead with particularity a violation of [the TCPA].
>
> 4. [The TCPA] is not applicable to this commercial transaction.

[1]Spring Cress amended its complaint to add S&ME as a defendant, but the case went to trial only against Brown.

Spring Cress responded to Brown's motion, but the motion was never scheduled for hearing. Brown proceeded to file an answer and counterclaim. The answer did not articulate any affirmative defenses, but the counterclaim purported to adopt "all statements and allegations set forth in [Brown's] Motion to Dismiss." The statute of limitations defense was never argued based on the motion or on the merits before, during or after trial.

B.

The case went to trial before the trial court sitting without a jury. After three days of proof and receipt of post-trial briefs, the court issued a memorandum opinion with provides a relatively concise and useful rendition of the facts:

> It is undisputed that everyone knew that this was a commercial development. It is further undisputed that Spring Cress anticipated that there would be retail stores, office condominiums, restaurants and hotels placed on the property. It is further undisputed that everyone knew that as fill dirt was moved onto the site it would be necessary that it meet certain compaction requirements that would qualify this site as an engineered fill.
>
> It was further agreed by everyone, including [Brown], that soil that contains too much moisture will not compact to the density required for a commercial development. It was further agreed by all that engineered fills should contain no wet soils, no construction debris, no organic material such as trees, grass or topsoil containing any organic matter, nor any rocks or boulders.
>
> It was further agreed by all that soil compaction tests were not necessary to determine whether soil was too wet for compaction. Grading contractors can use a method known as "proof roll" to determine whether the soil will "pump". In essence, a loaded dump truck or other heavy equipment is driven over the fill to ascertain whether there is any observable movement in the soil. Alexander Carter, the owner of Earthworks, the excavating company hired to do remedial work on this site, testified that if the soil is pumping it will move back and forth "like a waterbed." It was further undisputed that if wet soil is placed in a fill area it must be removed and dried before it can be returned and properly compacted.

It is undisputed that SME performed periodic compaction tests on the fill. The dirt was moved onto the property to raise the grade in layers 8-12 inches deep which are referred to as lifts. As a lift was completed, SME would, when called by Brown or requested by Brown, conduct compaction studies to determine whether the required density level had been met. It is undisputed that the last compaction test done by SME was on November 18, 2005.

After the construction entrance roads, silt fences and tracts were installed, the grading contractor next goes about denuding the site. This requires the clearing and grubbing of all trees, disposal of brush and stumps, the stripping and stock piling of topsoil, and basically the removal of all organic matter from the site prior to fill dirt being introduced. In this case, the parties agreed that along the northwest portion of the development a rather huge pile of dirt consisting of rocks, trees, and topsoil was stockpiled. Witnesses identified the location of this stockpile on Exhibit No. 1 with a blue "X" and throughout the testimony this huge pile of dirt was referred to as "Pile X." Different accounts were given regarding the size of Pile X. Ros Kingery, a civil engineer and supervisor for SME, testified that this mound of dirt was 100-200 feet square and 20-30 feet tall. All agreed that any topsoil, soil containing organic matter, and soil containing huge rocks that were in that pile were unsuitable for an engineered fill.

* * *

As of November 18, 2005, so far as [Spring Cress] or SME knew, [Brown] had performed according to specifications that qualified the fill as an engineered fill. Mr. McCallister[, of SME] testified that SME did no further compaction tests because he was told [by Brown] no further compaction would be done on that site.

The parties may not completely agree as to a number of facts but the Court finds that the following facts have been proven by a preponderance of the evidence. First, [Brown] completed his work in early January 2006. Shortly thereafter, Tracy Roy, one

of the principles [sic] in Spring Cress, observed a seeder truck and bulldozer literally sink into the mud in an area that had supposedly been compacted.

Shortly thereafter, an individual named Junior Thacker, who was formerly employed by Brown and served as the superintendent on the . . . project, contacted Roy and advised him that he would find wet soil in certain areas in the fill. In fact, according to Roy's testimony, Thacker took him around the site and pointed out several places where he warned Roy that the soil was not properly compacted.

Thereafter, Roy contacted SME, Brown and Urban Engineering to discuss the problem. SME agreed to do further tests on the site. Ros Kingery testified that he inserted a probe rod into the soil until he reached an area that was properly compacted. He found several areas where he suspected that proper compaction had not taken place. Thereafter, Thacker was hired to operate a backhoe and numerous test pits were dug anywhere from 1-5 feet deep revealing that there was a fairly wide-spread area of improperly compacted fill placed on the site.

An additional meeting was conducted with all of the principal parties. Brown again was present. It was agreed that in order to remediate this wet, improperly compacted or uncompacted soil it would have to be removed, dried and recompacted. Initially, . . . Brown agreed to the remediation. However, after a couple of weeks he demanded that SME contribute to the cost of the remediation. When they were unable to agree on SME's contribution Brown left and never returned. Thereafter, [Spring Cress] hired Earthworks to remove and dry the unsuitable soil. Testimony from Alex and Cullin Carter indicated they removed and replaced 40,000 cubic yards of wet or otherwise unsuitable soil in areas that were supposed to have been previously compacted.

* * *

It is [Spring Cress's] position that [Brown] performed work in an unworkmanlike manner and purposefully concealed deficient

work warranting compensatory damages and treble damages and attorneys fees under the Tennessee Consumer Protection Act.

It is [Brown's] position that the unsuitable soil all came from Pile X. Mr. Brown testified that he was told by Mr. Roy to spread this unsuitable soil over the site. Brown contends that he warned Roy that the soil would not compact and that it would have to be removed later. It is Brown's position that Roy, knowing full well the consequences of spreading that soil, nevertheless directed him to do so.

[Brown] prevails in this case only if the Court finds that Roy directed Pile X be spread despite warnings against doing so, and if the Court concludes that the only unsuitable soil found on site came solely from Pile X.

* * *

SME did not inspect every lift. There were numerous days when SME was not on the project at all. Further, [Brown], as a highly experienced excavator, possessed the capability of determining soil would pump by simply employing a proof roll.

[Brown]'s former employee located the areas for SME to dig test pits and the majority of those test pits revealed unsuitable and/or uncompacted soil.

Subsequent to the discovery of the problem, [Brown] engaged in at least two meetings where the owner, SME, and civil engineer, Larry Bulliner, from Urban Engineering were present. [Brown] engaged in remedial work for approximately two weeks. Throughout this time there was never an assertion by Brown that the remediation was due to Roy's directive.

When the remediation began it was soon discovered that the scope of remediation might be far greater than that originally anticipated by SME. At that point, [Brown] made demand upon SME to contribute toward the costs of remediation. This position is totally inconsistent with [Brown]'s current position that the remedial work resulted solely from the spreading of Pile

X at Roy's direction. [Brown] acknowledged during the trial that he dismissed SME because no further compaction would be done on the site. If [Brown] knew at that time that the problem was caused by spreading Pile X onto the site, then he should have also known that SME could not have any responsibility because SME was dismissed from the site prior to the spreading of Pile X.

* * *

In response to . . . the Complaint, [Brown] simply denied the allegations. [Brown] did not at that point, nor at any other point in the Answer, raise the possibility that Roy's own actions were the cause of Spring Cress' problem.

Further, Dr. Thomas Koenig, a principle [sic] in Spring Cress, testified that [Brown] had contacted him two to three months before the trial to try to set up a meeting regarding this case. Even then, Brown did not blame Roy for the problems.

Furthermore, Earthworks discovered bad soil as deep as seven feet in some areas. Additionally, test pits showed problems in tracts A, E and B north. Brown testified that none of Pile X was spread on tract E or A but, nevertheless, significant problems were discovered in both of those tracts.

* * *

[Brown's] actions subsequent to the discovery of the improper fill simply are not consistent with his present position. It is inconceivable that, when faced with such a large amount of remedial excavation, all which was to be borne at his expense, [Brown] would not object to responsibility being placed on him. It is inconceivable that sometime between January and March of 2006, Mr. Brown would not have reported to someone that the problem was caused by Mr. Roy and not be his unworkmanlike conduct. It is inconceivable that as late as two to three months prior to the trial, when Mr. Brown contacted Dr. Koenig, he still did not lay blame on Mr. Roy. It is further inconceivable that in

> responding to the Complaint in this case . . . [Brown] would not have raised the issue of Roy's responsibility for the problems.
>
> On the other hand, Mr. Roy concedes that he ordered topsoil placed on the compacted fill. He denies directing that Pile X be distributed across the site. His actions after observing the seeder truck sink, and after his conversations with Mr. Thacker, are consistent with his current position that he never directed Pile X spread over the land.
>
> The Court concludes that Spring Cress has sustained damages in the amount of $551,295 to repair the defective work performed by [Brown]. The Court disallows the $99,466.90, claimed for remedial work in fines and penalties to resolve the TDEC citation.
>
> It is obvious that unsuitable fill was placed on this site and it was not properly compacted. This fill was unobservable to [Spring Cress]. Although [Brown] says he relied upon SME, it is clear that the soil removed was so wet that a proof roll would have detected it. Thus the defective work was concealed from [Spring Cress]. Accordingly, the Court finds this is an appropriate case for treble damages and the award of attorney's fees.

II.

Brown timely filed a notice of appeal from the judgment, which judgment incorporated the above-quoted memorandum opinion. He has raised the following issues which we have rephrased in our own words:

> Whether the trial court should have dismissed the TCPA claim as barred by the applicable statute of limitations.
>
> Whether the evidence preponderates against the trial court's finding of a willful and knowing violation of the TCPA.
>
> Whether the evidence preponderates against any award of damages to Spring Cress.

III.

The trial court's factual findings are presumed to be correct and will not be disturbed unless they are contrary to the preponderance of the evidence. Tenn. R. App. P. 13(d); ***Randolph v. Randolph***, 937 S.W.2d 815, 819 (Tenn. 1996). Where the factual findings are based on determinations of credibility after seeing and hearing the witnesses, those findings will not be overturned absent "clear, concrete and convincing evidence to the contrary." ***Tennessee Valley Kaolin Corp. v. Perry***, 526 S.W.2d 488, 490 (Tenn. Ct. App. 1974); *see also* ***Wells v. Tennessee Bd. of Regents***, 9 S.W.3d 779, 783 (Tenn. 1999). The trial court's legal conclusions are reviewed *de novo* with no presumption of correctness. ***Reed v. Hamilton***, 39 S.W.3d 115, 117 (Tenn. Ct. App. 2000).

IV.

Brown argues that the trial court should have dismissed the Consumer Protection Act claim as time-barred pursuant to Tenn. Code Ann. § 47-18-110, which requires that "[a]ny action commenced pursuant to [the TCPA] shall be brought within one (1) year from a person's discovery of the unlawful act or practice." Spring Cress argues that the issue was never properly pleaded or brought to the court's attention, therefore it was waived. We agree with Spring Cress. Pursuant to Tenn. R. Civ. P. 8.03, "a party shall set forth affirmatively facts in short and plain terms relied upon to constitute . . . [the affirmative defense of the] statute of limitations." The failure to adequately plead such an affirmative defense results in a waiver of the defense. ***George v. Building Materials Corp***., 44 S.W.3d 481, 486-87 (Tenn. 2001). The most that Brown did was to plead the statute of limitations defense in the motion to dismiss in a conclusory, abstract sense without alleging any facts. He purported to incorporate the "statements and allegations" of the motion into his counterclaim. However, there are no factual allegations to incorporate. Brown's pleadings did not put Spring Cress on notice that it would need to put on proof to refute an expiration of the statute of limitations defense.

Even if we assume that the limitations defense was adequately pleaded, we would still hold that it was waived by Brown's failure to prosecute the defense at any time after filing the motion. As we stated in ***Ingram v. Phillips***, 684 S.W.2d 954 (Tenn. Ct. App. 1984),

> "[t]his Court considers only such matters as were brought to the attention of the Trial Court and acted upon or pretermitted by the Trial Court." ***Cooper v. Queen***, 586 S.W.2d 830, 834 (Tenn. App. 1979)(citations omitted). The defense of the statute of limitations was not brought to the attention of the trial court or acted upon and pretermitted by the trial court.

Id. at 959(brackets in original). The same can be said of the present case. Brown did not bring the defense of the statute of limitations to the attention of the trial court, and it was neither acted upon nor pretermitted by the trial court. The issue was waived.

Spring Cress also argues that, even assuming the statute of limitations defense had been brought to the attention of the trial court, the court would have found that the defense is not applicable. Although we agree with the thrust of the argument, we are more comfortable rephrasing it to consider whether, assuming the issue had been raised by motion at the conclusion of the proof, the trial court would have been obligated to find, as a matter of law, that the claim was time-barred. This rephrasing is more in line with what Brown is arguing, and takes us further from the realm of prophecy into the function of the judiciary. Brown's argument is based entirely on the trial court's finding that he, Brown, finished his work in early January 2006, and the complaint was not filed until January 26, 2007. The statute of limitations includes a discovery provision; it does not begin to run until the "person's discovery of the unlawful act or practice." Tenn. Code Ann. § 47-18-110. Brown argues that his unlawful acts were necessarily discovered once the seeder truck got stuck in the fill on some unspecified January date. This argument assumes far too much and is in direct conflict with the trial court's findings. The trial court specifically found that (1) Brown lied about one of the principals of Spring Cress instructing him to scatter a pile of topsoil and debris into the fill, and (2) Brown intentionally hid the bad fill under several feet of otherwise good fill material. Also, there is ample evidence in the record to show that one soft spot in an engineered fill does not automatically equate with deceptive action on the part of the grade contractor. One soft spot is not inconsistent with a simple mistake or oversight. It was not until February 2006 that test holes and samples showed that Brown had hid a substantial quanity of bad, wet fill under several feet of dirt. In short, we reject Browns argument that the trial court was obligated to dismiss the TCPA claim based upon the statute of limitations.

We will consider the second and third issues, *i.e.*, whether the evidence preponderates against any finding of damages and whether the evidence preponderates against the finding that Brown intentionally hid the bad fill from Spring Cress, together. Both arguments are based upon the proposition that Brown testified truthfully when he stated that all the bad fill came from the "infamous and huge Pile X" that was buried per the directions of one of the owners of Spring Cress. However, the trial court specifically credited the testimony of the Spring Cress witness and part-owner, Tracy Roy, who admitted that he told Brown to spread some of "Pile X" as topsoil on a specific area, and rejected the testimony of Brown as "inconceivable" in light of the totality of the evidence. As we have previously noted, we can overturn factual findings based on credibility determinations only when there is "clear, concrete and convincing evidence to the contrary." ***Perry***, 526 S.W.2d at 490. We have reviewed the record and find that the evidence does not preponderate against the trial court's

findings. Certainly there is not "clear, concrete and convincing evidence" to overturn the trial court's factual determinations. We hold that the trial court did not err in awarding damages, and that it did not err in awarding treble damages based on a finding of willful misconduct.

V.

The judgment of the trial court is affirmed *in toto*. Costs on appeal are taxed to the appellant, Larry E. Brown dba S&B Associates. This case is remanded, pursuant to applicable law, for enforcement of the trial court's judgment and for the collection of costs assessed below.

_____
CHARLES D. SUSANO, JR., JUDGE