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Notice of Judgment and Disposition

December 22, 2016

Docket Number: 2016 - CA - 0536

Kenneth C. Savage, Sharon Savage and David Wilbur
versus
Scottsdale Insurance Company

Consolidated with the following:

2016 - CA - 537

David Wilbur
versus

Port Louis Owners Association and the Port Louis Board of Trustees

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In accordance with Local Rule 6 of the Court of Appeal, First Circuit, I hereby certify that this notice of judgment and disposition and the attached disposition were transmitted this date to the trial judge or equivalent, all counsel of record, and all parties not represented by counsel.


RODD NAQUIN
CLERK OF COURT

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2016 CA 0536

**KENNETH C. SAVAGE, SHARON SAVAGE
AND DAVID WILBUR**

VERSUS

SCOTTSDALE INSURANCE COMPANY

Consolidated With

2016 CA 0537

DAVID WILBUR

VERSUS

**PORT LOUIS OWNERS' ASSOCIATION
AND THE PORT LOUIS BOARD OF TRUSTEES**

Judgment Rendered: DEC 22 2016

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On Appeal from the Twenty-Second Judicial District Court
In and for the Parish of St. Tammany
State of Louisiana
No. 2010-16317

Honorable Reginald T. Badaeux, Judge Presiding

* * * * *

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* * * * *

BEFORE: WHIPPLE, C.J., GUIDRY, AND McCLENDON, JJ.

McCLENDON, J.

Plaintiffs appeal a trial court judgment that dismissed their claims with prejudice following a bench trial on the merits. For the reasons that follow, we affirm.

FACTS AND PROCEDURAL HISTORY

On January 29, 2004, a fire originated in the common wall between adjoining townhomes located in the Port Louis townhome complex in Madisonville, Louisiana, causing severe damage to both townhomes. In January 2005, Kenneth and Karen Savage, owners of one of the townhomes, filed suit against Scottsdale Insurance Company for damages resulting from the fire.¹ Scottsdale was the insurer of the Port Louis Owners' Association (PLOA), a non-profit corporation charged with ownership of designated portions of the common areas of the townhome complex. The plaintiffs alleged that Scottsdale had previously issued the PLOA an insurance policy providing property damage coverage for their damaged townhome, and that the plaintiffs had been inadequately compensated by receiving only \$89,000.00 for their losses occasioned by the fire.² Plaintiffs later added the PLOA and its members as defendants.

In March of 2010, the plaintiffs settled their claims with Scottsdale and the PLOA and its members, and executed a release for settlement of their claims. The settlement obligated Scottsdale to fund the rebuilding and required the PLOA to have the townhome rebuilt in accordance with the PLOA's Act of Dedication and Articles of Incorporation. Plaintiffs received \$102,000.00 in "general damages" from the settlement and a construction contract for \$195,759.00 was made a part of the release agreement, with the funds being placed into a trust account for restoration of the townhome. In accordance with the settlement agreement, the PLOA entered into a contract with DeGeorge Construction, LLC to rebuild plaintiffs' townhome.

Following the settlement in March 2010, various issues arose that delayed reconstruction of plaintiffs' townhome. On February 18, 2011, the plaintiffs filed a motion to enforce the settlement agreement against the PLOA. The plaintiffs

¹ David Wilbur, owner of the adjoining townhome, also filed suit.

² The plaintiffs purchased the townhome in 2003 for \$150,000.00 and spent approximately \$50,000.00 in renovations prior to the fire.

contended that the PLOA had failed to satisfy the obligations required by the receipt and release and by the Act of Dedication, including failing to rebuild the townhome to its pre-fire condition and failing to appoint a licensed architect or licensed professional engineer to oversee the construction. Following a hearing, the trial court, in a May 10, 2011, judgment ordered the PLOA to comply with the terms of the settlement agreement within 120 days of April 12, 2011, or by August 12, 2011.

On August 19, 2011, the plaintiffs filed a supplemental and amending petition seeking damages against the PLOA and its insurer, Atain Specialty Insurance Company f/k/a Cranbrook Insurance Company, for the delay in completing construction.

On February 24, 2012, plaintiffs filed a second supplemental petition, asserting that DeGeorge Construction, LLC, with the knowledge of the PLOA, installed interior sheetrock over mold, which had been caused by rainwater and other moisture infiltrating the exterior siding. Plaintiffs asserted that because the exterior was not properly sealed, the moisture would continue to damage all new construction on the interior. Plaintiffs sought additional damages for expenses for remediating the work that had already been performed.

In February 2012, plaintiffs' mortgage holder initiated foreclosure proceedings, alleging that the plaintiffs had not made mortgage payments on the townhome since January 2011. The townhome was later sold at a sheriff's sale on May 23, 2012 for \$157,479.72, plus costs and fees.

The plaintiffs' Motion to Enforce Settlement Agreement, as well as the claims asserted in the two supplemental and amending petitions, proceeded to a three-day bench trial between May 20 and 22, 2015. At trial, plaintiffs sought damages totaling \$1,112,475.00 representing rental replacement costs, moving costs, storage fees, mortgage payments, the loss of their townhome in foreclosure, general damages, and attorneys' fees.

Following trial, the trial court dismissed plaintiffs' claims against the PLOA and Atain Specialty Insurance Company with prejudice. Plaintiffs have appealed, asserting that the trial court erred in rejecting all of their claims for monetary relief arising from the PLOA's failure to timely rebuild their townhome.

Atain Specialty Insurance Company f/k/a Cranbrook Insurance Company has also appealed herein. Atain notes that the trial court determined that coverage existed for plaintiffs' claims under a Non Profit Professional Liability Policy of Insurance issued by Atain to the PLOA. Atain avers that in the event this court finds merit in plaintiffs' appeal and plaintiffs are entitled to an award of damages, this court should address whether coverage is afforded under Atain's policy.

DISCUSSION

Plaintiffs contend that the trial court erred in rejecting their claims arising from the PLOA's delay in rebuilding their townhome. Plaintiffs note that the March 2010 Settlement Agreement incorporated the terms of the PLOA's Act of Dedication. The Act of Dedication required the PLOA to rebuild the townhome "promptly."³ Because the PLOA possessed the funds to rebuild the townhome, plaintiffs claim that a special fiduciary relationship existed between them and the PLOA such that the PLOA had a legally imposed duty to handle the matter "as though it was [its] own affair." Plaintiffs assert that not only did the PLOA fail to rebuild their townhome promptly, but no certificate of completion or occupancy was ever issued.

Plaintiffs note that the PLOA hired DeGeorge Construction, LLC to rebuild the townhome. Plaintiffs aver that the PLOA instructed Krass DeGeorge, owner of DeGeorge Construction, LLC, when to start and stop work. Plaintiffs note that Mr. DeGeorge estimated that the townhome could be completed within six months, with reasonable delays figured therein. As such, plaintiffs submit that the townhome should have been completed by January 2011, or before plaintiffs filed their motion to enforce the settlement.

In opposition, the PLOA contends that the plaintiffs failed to show that the PLOA breached any obligation in rebuilding the plaintiffs' townhome. The PLOA avers that initial construction was delayed for six months due to code issues surrounding stairs and the location of an electrical panel. The PLOA also notes that an issue regarding mold remediation arose during this time. The PLOA avers that none of these issues

³ However, the settlement agreement did not provide a deadline for completion.

were part of the settlement agreement and were outside of the scope of Mr. DeGeorge's work. Additionally, the PLOA notes that Mr. Savage recognized that reconstruction could not proceed until the issue with the stairs was addressed and admitted at trial that the mold issue may have caused a delay.

Moreover, despite the allegations in their February 2011 petition that the PLOA failed to hire an architect, the PLOA avers that it notified plaintiffs in November 2010 that it was in the process of hiring an architect, and an architect was ultimately hired in January 2011. Mr. Savage testified that the delay in hiring the architect was because the PLOA was not sure if it needed one, whereas the PLOA suggests that the delay may have been attributable to finding an architect who was willing to work with property involved in litigation.

In addition to the delays mentioned above, Mr. DeGeorge indicated that plaintiffs requested extra work outside of the scope of the contract, including restoration of a rear porch and additional work on a sunroom, which delayed the construction schedule. Plaintiffs also changed the kitchen cabinet design, causing further delay and requiring additional plumbing and electrical work that was outside of the scope of the agreement. Mr. DeGeorge also testified that plaintiffs further slowed the process by refusing to communicate with him regarding the selection of building materials, including flooring, appliances, countertops, colors, carpeting, plumbing, and electrical fixtures.

Also, Mr. DeGeorge testified that he was ordered to stop working for a period of time because plaintiffs, believing that water intrusion was harming ongoing interior work, obtained an injunction to stop the interior work. Specifically, on August 29, 2011, plaintiffs filed a motion for injunctive relief, requesting and obtaining a stop work order that remained effective until November 14, 2011.⁴ In its judgment⁵ rescinding the injunctive relief, the trial court ordered DeGeorge Construction, LLC to complete the interior build-out of plaintiffs' townhome within sixty working days, excluding weekends and legal holidays.

⁴ Mr. DeGeorge testified that according to the dollar amounts set forth in the contract, approximately 42.2 percent of work had been completed by August 20, 2011, prior to the injunction being issued.

⁵ The judgment was rendered orally on November 14, 2011, and reduced to writing on December 13, 2011.

The PLOA notes that on December 21, 2011, plaintiffs notified Mr. DeGeorge that a mortgage company had secured their property and that he was not to enter the unit. Mr. DeGeorge indicated that the locks on the townhome were changed. However, Mr. DeGeorge testified that he cut the locks off the door and kept working, finishing as much of the townhome as he could.

Mr. DeGeorge testified that he knew of no delays that were chargeable to the PLOA. Similarly, Mr. Savage admitted that he knew of no delays attributable to Mr. DeGeorge during the course of rebuilding the townhome. The PLOA submits that considering the foregoing, the trial court was reasonable in concluding that the PLOA breached no duties owed to the plaintiffs, specifically including that the PLOA did not purposefully or negligently cause delays in the reconstructing of the plaintiffs' townhome.

The burden of proof in an action to recover damages for breach of contract is on the party claiming rights under the contract. **Hornbeck Offshore Operators, LLC v. Cross Group, Inc.**, 16-0174 (La.App. 1 Cir. 10/31/16), --- So.3d ---, 2016 WL 6427732, p. 3. When findings are based on determinations regarding the credibility of witnesses, the manifest error standard demands great deference to the trier of fact's findings. **Id.** The manifest error standard of appellate review is a two-part test: 1) the appellate court must find from the record whether there is a reasonable factual basis for the finding of the fact finder; and 2) the appellate court must further determine whether the record establishes the finding is not manifestly erroneous (clearly wrong). **Mart v. Hill**, 505 So.2d 1120, 1127 (La. 1987). Factual findings should not be reversed on appeal absent manifest error. **Rosell v. ESCO**, 549 So.2d 840, 844 (La. 1989). If the trial court's or jury's factual findings are reasonable in light of the record reviewed in its entirety, the court of appeal may not reverse. **Sistler v. Liberty Mutual Ins. Co.**, 558 So.2d 1106, 1112 (La. 1990). Consequently, when there are two permissible views of the evidence, the factfinder's choice between them cannot be manifestly erroneous. **Stobart v. State, Through Department of Transportation & Development**, 617 So.2d 880, 883 (La. 1993).

In finding that the plaintiffs failed to meet their burden of proving that the PLOA was at fault in delaying construction of the townhome, the trial court reasoned:

Though there were a few inconvenient delays associated with the reconstruction of Plaintiffs' townhome, the evidence does not support a conclusion that the PLOA is liable for purposefully or negligently contributing to the delays. The reconstruction began five months after the signing of the settlement documents of the previous litigation. Any delay was primarily due to the Board having to acquire an architect to sign off on the construction design. This in and of itself is not an unreasonable delay. Another delay was at the behest of Plaintiffs who issued a change order to the contractor, who testified that plumbing and electrical plans had to be reconfigured. Yet another delay attributable to Plaintiffs who enjoined the PLOA and the contractor from completing the construction due to a leaking exterior wall, a condition that the contractor (DeGeorge) testified would not have affected ongoing repairs to the interior.

Following our review of the record, including the parties' contentions, we cannot conclude that the trial court was manifestly erroneous in its finding that the PLOA did not cause any unnecessary delays in rebuilding plaintiffs' townhome.

Even so, plaintiffs contend that the PLOA breached its duty to act reasonably by expending all the funds set aside for the rebuilding of their home without ever finishing the construction. The plaintiffs submit that their home sold for less than its true value at the foreclosure sale due to repairs not having been completed.

Under Louisiana Civil Code article 2003, an obligee may not recover for damages when his own bad faith has caused the obligor's failure to perform, or his damages may be reduced when his negligence contributes to the obligor's failure to perform.⁶ In this case, the plaintiffs stopped making mortgage payments in January 2011. The trial court found that there "is no evidence to support the claim that Plaintiffs were forced into a financial hole that precluded them from continuing mortgage payments. Taking into account the amount of money Plaintiffs received not only for the previous settlement but also from prior refinancing of this townhome, the Court is of the opinion

⁶ Louisiana Civil Code article 2003 provides:

An obligee may not recover damages when his own bad faith has caused the obligor's failure to perform or when, at the time of the contract, he has concealed from the obligor facts that he knew or should have known would cause a failure.

If the obligee's negligence contributes to the obligor's failure to perform, the damages are reduced in proportion to that negligence.

that Plaintiffs' decision to forgo the mortgage payments was purely voluntary and well calculated." We find no manifest error in these findings.

Further, the plaintiffs, despite knowledge that their property was being foreclosed on, stopped communicating with Mr. DeGeorge regarding interior finish selections. Even so, the entirety of the settlement funds were ultimately used on rebuilding the plaintiffs' townhome. Although plaintiffs agreed to pay for change orders requested by them, they failed to do so. This necessitated the expenditure of some of the funds on said change orders. Considering the record, we find no error in the trial court's denial of plaintiffs' claim that they were entitled to an additional sum for the diminished value of their townhome.

Plaintiffs' assignment of error is without merit. Because we find no merit in plaintiffs' appeal, we dismiss Attain's appeal as moot.

CONCLUSION

For the foregoing reasons, we affirm the trial court's June 30, 2015 judgment. Plaintiffs are to bear the costs of their appeal. Attain is to bear the cost of its appeal.

AFFIRMED.