

Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2008-248

VERMONT SUPREME COURT
FILED IN CLERK'S OFFICE

FEBRUARY TERM, 2009

FEB 4 2009

Stephen Howard and Jerri Howard	}	APPEALED FROM:
	}	
v.	}	Orange Superior Court
	}	
David Curtis & Vermont Modular Homes, Inc.	}	DOCKET NO. 102-5-07 Oecv
	}	
		Trial Judge: Theresa S. DiMauro

In the above-entitled cause, the Clerk will enter:

Plaintiffs appeal from the trial court's order in this breach-of-contract dispute. They argue that the court erred in finding that they did not suffer any damages from defendants' breach of contract. We affirm.

The record indicates the following. David Curtis is the owner, president, and sole shareholder of Vermont Modular Homes. In November 2006, plaintiffs entered into a written agreement with Vermont Modular for the erection of a modular home. The parties agreed that the total cost of the project would be \$134,473. In March 2007, Mr. Curtis, who was acting as general contractor for the project, told plaintiffs that he would not be able to finish the project and that he would be dissolving his company. Plaintiffs finished the project on their own. In April 2007, plaintiffs filed suit against defendants, alleging breach of contract and other related claims.

Following a bench trial, the court issued a written opinion. It found that defendants had breached the parties' agreement, but that plaintiffs had not suffered any damages given that they were able to complete the project for less than the agreed-upon contract price. More specifically, the court found as follows. At the time Mr. Curtis walked off the job in March 2007, defendants had been paid \$84,597.28, and the project was approximately halfway finished. There was no heat, hot water heater, or boiler system in the home, but no money had yet been paid for this work. Mr. Howard oversaw the completion of the home. He took time off from work, made arrangements for materials and labor, and hired others to complete the project. Mr. Howard claimed \$3118.50 in gross lost income for time spent on the project. The court found that Mr. Howard had not lost any actual wages, however, because he had been able to use accumulated sick time and personal time. By May 2007, the house was completed, and the Howards moved in.

The court found that the cost of the materials from East Montpelier Home Center necessary to complete the electrical work and insulation totaled \$894.47. Labor and materials

from Allways P&H, a plumbing, heating and air conditioning contractor, totaled \$1,587.96. Materials from Allen Lumber Company totaled \$3521.26. Plaintiffs also presented a bill from Ayers Brook for excavation work for \$5057.92. Finally, plaintiffs' claimed approximately \$5000 for a mechanical air exchanger that was not installed for a grand total of \$19,180.11 in damages.

The court reasoned that even assuming that all of the money expended by plaintiffs in fact constituted their damages, they had still paid less for the house than contemplated in their contract with defendants. The contracted-for price of the house was \$134,473, and in the end, plaintiffs' paid, at most, \$103,777.39. The court thus concluded that, although defendants had breached the contract, plaintiffs failed to prove that they were damaged by the breach. It rejected the remainder of plaintiffs' claims, and found it unnecessary to consider whether it should "pierce the corporate veil" and render judgment against Mr. Curtis, personally. This appeal by plaintiffs followed.

Plaintiffs argue that the trial court erred in finding that they suffered no damages. They maintain that they completed the house at a cost of \$19,180.11 over the contract price. They rely on Mr. Howard's testimony to this effect, as well as the trial court's recognition of Mr. Howard's testimony in its findings. Plaintiffs also challenge several of the court's specific findings as clearly erroneous.

We review the trial court's findings of fact for clear error, and thus, we will not disturb the court's findings unless there is no credible evidence in the record to support them. See V.R.C.P. 52(a)(2); Mullin v. Phelps, 162 Vt. 250, 260 (1994). As discussed below, we find no basis to disturb the court's ultimate finding that plaintiffs' expenses were less than the agreed-upon contract price, and thus, they were not entitled to damages.

The confusing nature of plaintiffs' claims was evident at trial. By his own testimony, Mr. Howard indicated that his damages added up to approximately \$20,000, more than twenty-five percent higher than the damages of \$14,180 set forth by plaintiffs in their proposed findings of fact and conclusions of law. Defendants' attorney repeatedly asked Mr. Howard to explain how the \$20,000 figure was "above and beyond" the contract price. Plaintiffs' position at trial appears to have been that because plaintiffs took out a \$185,000 construction loan (approximately \$35,000 of which was spent on real property), it necessarily followed that they spent the \$134,000 contract price for the construction of their home as well as \$20,000 in expenses above and beyond the contract price. Yet plaintiffs provided no proof that they actually paid the approximately \$50,000 balance of the contract price as well as an additional \$20,000 to complete construction of their home. Instead, their evidence showed costs of approximately \$20,000 in addition to the approximately \$84,000 paid to defendants.


Plaintiffs point to Mr. Howard's testimony that these costs were "above and beyond" the contract price, but they identify no documentary proof in the form of invoices or other evidence that this is so. The fact that certain items were included as "line items" in the contract does not establish that they were necessarily paid. And while the trial court acknowledged Mr. Howard's testimony noted above, it did not find, as plaintiffs suggest, that plaintiffs in fact spent an additional \$70,000 to complete this project. To the contrary, it found that the total cost to finish the project, including the cost of the mechanical air exchanger and lost wages, was far less than

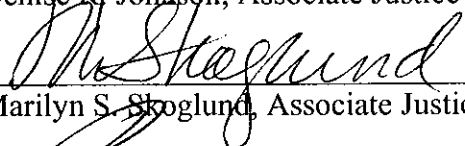
the agreed-upon contract price for the home. The record supports this finding. Plaintiffs failed to prove that they were entitled to damages for defendants' breach of contract. See VanVelsor v. Dzewaltowski, 136 Vt. 103, 105-06 (1978) (where contractor breaches construction contract by failing to complete work, owner "can get a judgment for damages measured by the reasonable cost of . . . completion in accordance with the contract" (citation omitted)).

Because the record shows that the claimed damages were well below the contract price, we need not address plaintiffs' argument that the court committed clear error in finding that they had paid defendants \$84,597.28 rather than \$82,807.48. We similarly need not address whether Mr. Curtis should be held personally responsible for any judgment. Finally, we reject plaintiffs' argument that they are entitled to attorney's fees as the prevailing party.

Affirmed.

BY THE COURT:


Denise R. Johnson, Associate Justice


Marilyn S. Skoglund, Associate Justice


Brian L. Burgess, Associate Justice