Cite as 2012 Ark. App. 328

ARKANSAS COURT OF APPEALS

DIVISION I
No. CA11-1241

DARRELL DELANCEY APPELLANT	Opinion Delivered May 9, 2012
V. DON QUALLS, DANNY QUALLS, and DAVID QUALLS, d/b/a QUALLS CONSTRUCTION COMPANY and JOHN DOE I and JOHN DOE II APPELLEES	APPEAL FROM THE WOODRUFF COUNTY CIRCUIT COURT [NO. CV-2009-125] HONORABLE L. T. SIMES II, JUDGE DISMISSED WITHOUT PREJUDICE

ROBERT J. GLADWIN, Judge

Appellant, Darrell Delancey, files this one-brief appeal of the August 25, 2011 order filed by the Woodruff County Circuit Court, which ordered appellees Don Qualls, Danny Qualls, David Qualls, all doing business as Qualls Construction Company (Qualls Construction), and John Doe I and John Doe II to (1) pay subcontractor Ivan Cummings Heat and Air (Cummings) the balance owed to it; (2) cure all defects in a good and workmanlike manner within forty-five days, at which time appellant would be required to pay the $4256.94 balance owed under the parties' agreement; and (3) pay to appellant $3500 in fees and costs. Appellant argues that the trial court erred in failing to consider the measure of appellant's damages in fashioning a remedy not authorized by law. We dismiss for lack of a final order.

In the spring of 2009, appellant engaged appellees to perform a total remodel of a residence in Woodruff County, Arkansas, including a complete gutting of the residence down

to the studs in the wall. The parties entered into an agreement that called for appellees to perform services set out in a written document titled "Job Estimate" dated May 4, 2009, and the parties do not dispute what was covered under the agreement. After negotiations, the parties agreed on a total cost of the project of $42,720.

It is undisputed that, after the parties entered into their agreement and throughout the work on the project, appellant made payments to appellees toward his obligation and also purchased certain items directly for which appellees were responsible. Specifically, appellant made two payments to appellees in the amounts of $10,000 each, on or about May 18, 2009, and on or about May 27, 2009. A third payment of $10,000 was made on June 6, 2009, when appellees were about to complete the final trim-work on the house. Don Qualls informed appellant that this payment was needed to finish paying Cummings, the subcontractor hired by appellees who installed the central heat and air system, and to pay labor costs. Appellant kept records of all expenditures and payments for the project, and the parties dispute neither the cost of the project nor the payments made toward the project, with an eventual remaining obligation to be paid by appellant amounting to $4256.94.

Appellant prepared three sets of "punch lists" that contained items to be completed by appellees before final payment would be made. Appellees' crew came to the worksite and crossed off items on the list, but appellant subsequently discovered that the items had not been completed. Despite appellant's pleas for appellees to complete the project and make necessary repairs and corrections, Don Qualls advised appellant that the project was completed and that

he was not coming back. As a result, appellant denied final payment to appellees and discharged appellees.

Upon moving into the residence, appellant realized that the finish work on the property was defective. Examples included a Jacuzzi tub that had been installed backwards in the master bathroom. The sheet-rock finish, the painting, and the trim were defective in many respects, as evidenced by photographs and a video. Painting was done over spiders and spider webs in certain spots and was otherwise defective. The sheet rock had not been sanded and cleaned before the application of paint. Areas of the trim work had wall paint on them, and areas of the wall had trim paint on them. Trim on the floor and around doors was not properly cut and did not fit. Places in the sheet rock had gouges or indentations that had been painted over. Some of the doors had been installed incorrectly, and many appeared crooked or had gaps between the flooring and the trim. Certain ceiling joints were visible in the house. Various walls had cracks running down them. Screws protruded from some areas of the ceilings and walls. The trim work and finishing work on a "fur down," a furrow space that runs from the ceiling and carries the duct work from the central heat and air unit, had not been built correctly. Trash, debris, used bricks, and human refuse were left in the yard. The yard of the residence was littered with used toilet paper despite the presence of a working bathroom in the residence.

Appellant brought suit in an action at law to recover money damages against the appellees for breach of contract for failing to complete the project and their work in a good and workmanlike manner. Appellant sought judgment against appellees for the cost to repair

the defective work performed by appellees and for the unpaid cost to Cummings for the central heat and air unit installed in his residence for which appellees were responsible. Appellees counterclaimed, alleging that appellant had failed to pay them the balance owed under the parties' agreement.

At the bench trial, appellee Don Qualls conceded that appellees' work was defective and not performed in a good and workmanlike manner. Qualls testified that he agreed with everything that appellant had listed in his check registry and stated that his figures were within a dollar of appellant's figures concerning the expenditures made on the project. Qualls acknowledged that appellees had contracted with Cummings for the installation of the central heat and air systems, but that they did not finish paying Cummings the remaining balance owed. The total cost of the central heat and air installation was $7400, and Qualls testified he paid $2500 to Cummings. It is undisputed that, because the heating and air unit has not been paid for in full, appellant does not have a warranty on the unit.

Tim Astin, an instructor at Crowley's Ridge Vo-Tech in Forrest City, Arkansas, and an experienced carpenter and contractor, reviewed appellees' work and testified as to his opinion of the quality of the work and the cost of repairing the many defects that existed. He testified that the finish work and painting was not done in a good and workmanlike manner. The trial court accepted Tim Astin as an expert in the field of construction.

Following a bench trial and the submission of posttrial briefs, the trial court entered an order and judgment finding that appellees breached their contract by failing to perform their construction work in a good and workmanlike manner. The trial court awarded appellant his

attorney fees incurred as a result of appellees' breach of contract, but rather than address the measure of monetary damages specifically pled by appellant, the trial court attempted to fashion an equitable remedy. The trial court directed appellees "to cure all defects in a good and workmanlike manner within forty-five days." The trial court conditioned appellant's payment of the balance owed under the parties' agreement of $4256.94, upon completion of the work in a good and workmanlike manner and also ordered appellees to pay the unpaid debt owed to the subcontractor, Cummings.

With the exception of those orders listed as immediately appealable under Ark. R. App. P.–Civ. 2 (2011), an appellate court's jurisdiction is not invoked until a final order has been entered. *See Epting v. Precision Paint & Glass, Inc.*, 353 Ark. 84, 110 S.W.3d 747 (2003). Whether an order is final and subject to appeal is a jurisdictional question that the appellate court will raise sua sponte. *See Farm Bureau Mut. Ins. Co. v. Running M Farms, Inc.*, 348 Ark. 313, 72 S.W.3d 502 (2002). As a general rule, a judgment or order is not final and appealable if the issue of damages remains to be decided. *Israel v. Oskey*, 92 Ark. App. 192, 212 S.W.3d 45 (2005). Because of the contingency related to the repair work to be completed by appellees, we hold that the August 25, 2011 order filed by the Woodruff County Circuit Court is not final. Accordingly, we do not have jurisdiction to hear this case and must dismiss this appeal without prejudice so that the circuit court may enter an appropriate order.

Dismissed without prejudice.

VAUGHT, C.J., and WYNNE, J., agree.

Glover, Roberts & Dooley, by: *Danny W. Glover*, for appellant.
No response.