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ARKANSAS COURT OF APPEALS

DIVISION IV

No. CV-21-332

ELLEN BROWN

APPELLANT

V.

KAREN SHIPLEY

APPELLEE

Opinion Delivered May 25, 2022

APPEAL FROM THE SALINE
COUNTY CIRCUIT COURT
[NO. 63CV-20-672]

HONORABLE JOSH FARMER,
JUDGE

AFFIRMED IN PART; DISMISSED
IN PART

BART F. VIRDEN, Judge

Ellen Brown appeals the circuit court’s denial of her motion to modify the judgment and the court’s decision granting Karen Shipley’s motion for contempt. We affirm in part and dismiss with prejudice in part.

I. Relevant History

On January 3, 2020, Karen Shipley filed a complaint against Ellen Brown alleging that Brown had refused to honor their verbal agreement to sell Shipley her home and a portion of the surrounding land located at 1200 Lafkin Lane in Hensley.¹ Shipley asserted that in June or July 2019, she and Brown began discussing her purchase of Brown’s home. Shipley contended that she moved her belongings into the house that summer and began

¹Shipley originally filed her complaint with the Pulaski County Circuit Court. After a dispute over venue, the case was transferred to the Saline County Circuit Court.

paying taxes, insurance, and utilities. Shipley explained that in early August 2019, Brown agreed to sell the property for \$55,000 to be paid over several months, and she gave Brown \$15,000 as a down payment. Shipley asserted that in October 2019, the kitchen floor cracked, and when she pulled up the flooring, she discovered black mold. Shipley stated that she spent \$7000 on new flooring, other repairs, and improvements. That month, Brown told Shipley that she would not sell the property to her and told her to move out. Brown refused to reimburse Shipley's down payment, travel and moving expenses, and costs of repairs and improvements or, alternatively, accept payment less the cost of repairs and deliver the deed to Shipley. Shipley requested specific performance of a verbal agreement, compensatory damages for breach of contract or fraud, punitive damages for fraud, and restitution for promissory estoppel.

Brown responded and counterclaimed for unlawful detainer, alleging that she was entitled to immediate possession of the property. Brown stated that she had given Shipley notice to vacate the home, but she had refused to leave. She argued that Shipley was renting the home from her, and in July 2019, she ceased making rental payments and was \$2400 in arrears. Moreover, Brown claimed, Shipley had failed to pay the rent amount into a registry while the proceedings were pending. In addition to the arrearage, Brown requested that the court assess any damage to the home and award her both costs incurred for removing Shipley's belongings and attorney's fees.²

²Both parties filed a series of motions to strike that were all denied. None of those motions are relevant to this appeal.

At the bench trial, Shipley testified that in April 2019, at her mother's funeral, she talked with Brown about buying her manufactured home. Shipley testified that she offered Brown \$55,000 for the purchase of the home and surrounding land. Shipley stated that she moved in that summer and immediately began paying the electric bill. She recalled that she paid Brown \$10,000 from her disability settlement as a down payment and then paid another \$5100 shortly thereafter. Shipley stated that she and Brown verbally agreed that when her mother's estate was probated, she would pay the remaining purchase price. Shipley explained that in August, Brown gave her a stack of papers that included Brown's documentation of the purchase price of the manufactured home, information about the appliances, repairs that had been done, and the survey of the property. Brown also presented Shipley with a purchase agreement. The terms of the agreement included a sale price of \$55,000, a description of the manufactured home, and a note that a description of the land would follow. The agreement stated that Shipley would pay \$8500 on execution of the agreement, with monthly installments of \$9100. Shipley did not sign the agreement because she objected to the monthly installments. She explained that they had agreed to lump-sum payments as she received her disability payments and inheritance. Shipley testified that in September, she told Brown that she had the remainder of the purchase price and was ready to pay and take the title and survey and that Brown "kind of laughed at me and she said, 'what if I don't want to sell it?'" Shipley insisted that they had an agreement and obtained a cashier's check for \$21,000, dated September 27, 2019. Brown refused payment. Shipley recalled instructing Brown to return the down payments and that Brown refused, explaining that the money was gone. Shipley testified that while she lived in the home, she replaced

the water heater, renovated the bedroom, replaced the floors and lighting, and took down a wall. Shipley testified that she found black mold under the kitchen floor and remediated the mold. Additionally, Shipley hired someone to trim and remove trees, maintain the yard, and fix the leaks in the roof as well. Shipley explained that she never asked Brown to pay for any of the repairs and provided documentation of the costs of the repairs to the court.

Brown rejected Shipley's assertion that they had an agreement to sell the property. She explained that she presented Shipley with a contract for sale and related paperwork, but she would not sign the contract, and that ended their negotiation for the sale of the home and land. Brown stated that she had paid the insurance and taxes on the property and that she and Shipley had a rental agreement for \$800 a month. Brown explained that Shipley's lump-sum payments were for rent and utilities, repayment for furniture, food, Shipley's gambling debt, and prepayment of future rent. Brown contended that Shipley's repairs to the home were poorly executed, and she denied approving any of the renovations.

On December 2, the court entered an order finding that there was no meeting of the minds concerning the purchase of the property at 1200 Lafkin Lane and ordered Shipley to pay Brown the rental amount of \$800 a month, from June 2019 to November 2020, totaling \$14,400. Additionally, Shipley was ordered to vacate the property by December or pay \$800 in rent. The court ordered Brown to reimburse Shipley \$3500 for roof repair, \$3800 for flooring repair, \$1000 for the purchase and installation of a new water heater, and \$15,100 for the initial payment, totaling \$23,000. After offsetting the amounts due to each party, Shipley was awarded a judgment of \$9000, to be paid by December 31. Each party was ordered to bear the cost of her attorney's fees. The parties were ordered not "to harass,

threaten, hurt or come in contact with the other party or to otherwise damage any property.”

On January 19, 2021, Brown moved to modify the judgment pursuant to Arkansas Rule of Civil Procedure 60(a), requesting a hearing to present evidence of damage Shipley had done to the home. Brown also asserted that Shipley owed her \$800 in rent because she occupied the property until December 22, 2021.

Shipley responded, arguing that she left the home in immaculate condition as evidenced by the photographs taken before she vacated the property. In the motion, Shipley noted that Brown failed to specifically identify the damage done to the home and did not provide photographs of any damage. Shipley requested that the court hold Brown in contempt for failing to pay the judgment by December 31 as ordered.

Brown moved for default judgment, claiming that Shipley filed a response to her motion to modify judgment but did not deny the allegations therein. Brown contended that the time to respond had passed; thus, the court should grant default judgment. Additionally, Brown denied the allegations of nonpayment.

A hearing was held on March 23. Brown presented estimates for repairs she made to the home, receipts for repairs she had completed, and photographs of the damage she asserted Shipley did to the home. The photographs, taken by Brown’s sister after Shipley had moved out of the home, showed damage to the floor, walls, cabinets, and shelves; paint on the refrigerator and fixtures; cracked electrical outlets; and holes in the ceiling where skylights used to be. At the beginning of opposing counsel’s cross-examination of Brown, the circuit court asked, “Ms. Brown, are you saying that Ms. Shipley did all of this damage

after December 2 of last year?” Brown explained that she had not been able to enter house since October 2019, so she was not sure when the damage was done, but she stated that it occurred while Shipley lived there. The court stated that

[a]ll of this evidence that you put forth appears from—the things that happened prior to when the bench trial occurred December 2nd. So considering this motion, it looks like you’re now trying to retry all of the issues that should have been tried back in last fall whenever that trial happened.

. . . .

I mean, the damages on both sides were ordered, and then the defendant was behind in the damages amount by \$9000 and ordered to pay that to Ms. Shipley. And so then coming in after Ms. Shipley left and say, “Whoa, whoa, whoa. We don’t owe these damages,” because there’s flooring issue, there’s paint on the bathtub and these other things, I don’t think that’s appropriate under the rules. You know, it appears that there were concerns, and obviously she had concerns in 2019 about paint and about flooring and other things. That’s when the unlawful detainer probably should have been filed. She’s let this go on now for more than a year and a half knowing that there were potential damages, so I just—I don’t think it’s appropriate to come in now and say, “Well there’s all these things we need to do.”

Shipley asserted that Brown could have gained legal access to the property by requesting an inspection under Arkansas Rule of Civil Procedure 34, and she failed to do so; thus, the motion to modify judgment should be denied. The circuit court entered an order denying the motion to modify judgment and for default judgment and granting Shipley’s motion for contempt, though no fines or penalties were imposed. The court found that Shipley was entitled to execute judgment on the December 2 order, and a writ of execution followed. Brown timely filed her notice of appeal.

II. Discussion

A. Standard of Review

We review a circuit court's actions taken pursuant to Arkansas Rule of Civil Procedure 60 under the abuse-of-discretion standard. *Stautzenberger v. Stautzenberger*, 2013 Ark. 148, at 4, 427 S.W.3d 17, 21.

B. Issues on Appeal

1. *Motion to modify the judgment pursuant to Arkansas Rule of Civil Procedure 60(a)*

Under Rule 60(a) of the Arkansas Rules of Civil Procedure, within ninety days of entering an order, a trial court has broad authority to correct errors or mistakes or prevent miscarriage of justice by modifying the order or vacating it. Here, the original order was entered on December 2, 2020, and on January 19, 2021, Brown moved to modify the judgment pursuant to Rule 60(a). In her motion, Brown argued that she was unable to present evidence of damages at the trial because she was barred from entering her home until Shipley vacated the property in December; thus, the damage to her property was not discovered until after the judgment was entered. Brown asserted that on inspection, she found unauthorized and poorly executed repairs. Brown claimed an unspecified amount of damages but offered more specific evidence of damage at the hearing.

Brown argues on appeal that the circuit court abused its discretion when it denied her motion to modify the judgment because Arkansas Code Annotated section 18-60-302 (Repl. 2015) prevented her from “simply barging in, inspecting and making repairs to the property.” Her argument is not well taken. Arkansas Code Annotated section 18-60-302 describes the cause of action for unlawful detainer and prescribes the procedure for carrying

out the rights and remedies of the affected parties. The statute provides that “[n]o person shall enter into or upon any lands, tenements, or other possessions and detain or hold them *except when an entry is given by law*, and then only in a peaceable manner.” (Emphasis added.) See *Gorman v. Ratliff*, 289 Ark. 332, 712 S.W.2d 888 (1986). In propounding her argument, Brown ignores the legal process available to permit entry onto land or other property for the purpose of inspection. In her counterclaim for unlawful detainer and request for a writ of possession, Brown asserted she was entitled to payment for any damage Shipley had done to the home. On appeal, she concedes that she did not attempt to gain legal entry to her property for inspection pursuant to her claim for damages. As a result of not having inspected the property, she did not present evidence regarding her claim at the trial; therefore, her argument has no merit.

Brown cites Arkansas Code Annotated section 18-60-307(d)(1)(B)(ii) (Supp. 2021) of the unlawful-detainer statutes for the proposition that the circuit court’s December 2 order was not a final adjudication of the parties’ rights. Arkansas Code Annotated section 18-60-307(d)(1)(B) governs preliminary hearings to determine whether the landlord is entitled to an immediate writ of possession. Section 18-60-307(d)(1)(B) provides,

(B)(i) If the court decides upon all the evidence that the plaintiff is likely to succeed on the merits at a full hearing, then the court shall order the clerk forthwith to issue a writ of possession to the sheriff to place the plaintiff in possession of the property described in the complaint, subject to the provisions of subsection (e) of this section.

(ii) No such action by the court shall be final adjudication of the parties’ rights in the action.

The trial of this matter was not a preliminary hearing, and the statute is inapplicable here.

This case is controlled by the doctrine of res judicata. In *Perkins v. Henry*, 2012 Ark. App. 707, at 5, 425 S.W.3d 802, 805, our court held that

[t]he doctrine of res judicata bars subsequent litigation of questions of law that were not litigated but could have been determined in the original litigation. Under res judicata, relitigation in a subsequent suit is barred when (1) the first suit resulted in a judgment on the merits; (2) the first suit was based on proper jurisdiction; (3) the first suit was fully contested in good faith; (4) both suits involve the same claim or cause of action that was litigated, or could have been litigated but was not; and (5) both suits involve the same parties or their privies. The purpose of res judicata is to put an end to litigation by preventing a party who had one fair trial on a matter from relitigating the matter a second time.

In her counterclaim for unlawful detainer, Brown identified property damage as a potential issue. At the trial, Brown stated that she suspected Shipley had damaged the home. Brown does not make a compelling argument explaining why the issue of damages could not have been determined in the original litigation. Accordingly, we affirm.

Brown also asserts that the circuit court erred by failing to reduce the \$9000 award by \$800, as required by the December 2 order, which provides that Shipley “must vacate the subject property by December 31, 2020. If Plaintiff remains in possession during December 2020, she will owe an additional \$800.00 in rent to Defendant.” In the April 8 order, the circuit court did not rule on Brown’s argument that the rental amount should have been deducted for December. It is well settled that a party’s failure to obtain a ruling is a procedural bar to this court’s consideration of the issue on appeal. *Dale v. White*, 2018 Ark. App. 172, at 5, 545 S.W.3d 812, 816.

2. Contempt

Brown reiterates her argument that she was unable to present evidence of damage at the trial, framing it as an appeal from the court’s decision to hold her in contempt for not

paying the judgement as ordered. An appeal may be taken from a civil or criminal contempt order, which imposes a sanction and constitutes a final disposition of the contempt matter. Ark. R. App. P.–Civ. 2(a)(13) (2021). Here, the circuit court specifically refused to impose sanctions, though it granted the motion for contempt. Because the court’s order does not reflect that any sanctions were imposed, there was a complete remission of the contempt and therefore no basis for appellate relief. *See Jolly v. Jolly*, 290 Ark. 352, 719 S.W.2d 430 (1986); *Taylor v. Taylor*, 26 Ark. App. 31, 759 S.W.2d 222 (1988). The motion for contempt was ruled on and was not pending and does not affect the finality of the remaining issues.

3. *Remaining issues*

Brown asserts that the court failed to weigh the credibility of the witness and the evidence presented, arguing that the court “shut down Appellant Brown’s attempts to pursue damages against Appellee Shipley. The factual dispute at issue—whether Appellee Shipley did commit injury to Appellant’s property—was glossed over and never considered by the trial court.” Here, in addition to reiterating her argument that she was not allowed to present evidence of damage, Brown essentially requests that we reweigh the evidence, which this court will not do. It is the function of the finder of fact, and not the reviewing court, to evaluate the credibility of witnesses and to resolve any inconsistencies in the evidence. *Pop-A-Duck, Inc. v. Gardner*, 2022 Ark. App. 88, at 18, 642 S.W.3d 220, 232. Resolution of conflicts in testimony and assessment of witness credibility is for the finder of fact. *Id.* The court, as the fact-finder at a bench trial, may accept or reject any part of a witness’s testimony, and its conclusion on credibility is binding on this court. This court will not second-guess the fact-finder’s credibility determinations. *Id.* It will disregard

testimony that the fact-finder has found to be credible only if it is so inherently improbable, physically impossible, or so clearly unbelievable that reasonable minds could not differ about it. *Id.* Here, Brown had a chance to present evidence of damage to the property but failed to do so, and the circuit court did not fail to exercise its discretion by considering the evidence and testimony presented.

For the first time on appeal, Brown asserts the following: (1) Shipley did not have “clean hands” rendering the court’s award of damages inequitable; (2) the court violated the doctrine of judicial economy when it refused to allow her to proceed with her damages claim at the motion hearing; and (3) Shipley was unjustly enriched by the award compensating her for repairs she made to the home. Because none of the specific arguments that Brown raises on appeal were argued and ruled on by the circuit court, we will not consider them for the first time now. *See Hodges v. Gravel Hill Cemetery Comm.*, 2016 Ark. App. 360, 498 S.W.3d 746. We affirm.

Affirmed in part; dismissed in part.

HARRISON, C.J., and VAUGHT, J., agree.

Nobles Law Firm, PLLC, by: *Ethan C. Nobles*, for appellant.

Niswanger Law Firm PLC, by: *Stephen B. Niswanger*, for appellee.