Cite as 2022 Ark. App. 349

ARKANSAS COURT OF APPEALS

DIVISION III
No. CV-21-261

BRAD STONE	APPELLANT	**Opinion Delivered** September 21, 2022
V.		APPEAL FROM THE PULASKI COUNTY CIRCUIT COURT, FIFTH DIVISION [NO. 60CV-17-1085]
MARY READ	APPELLEE	HONORABLE WENDELL GRIFFEN, JUDGE
		REVERSED AND REMANDED FOR PROCEEDINGS CONSISTENT WITH THIS OPINION

KENNETH S. HIXSON, Judge

Appellant Brad Stone (Stone) appeals from the Pulaski County Circuit Court's final judgment filed after a bench trial wherein appellee Mary Read (Read) was awarded $34,000 in damages for her breach-of-construction-contract claim and dismissing Stone's counterclaim. On appeal, Stone argues in relevant part that the circuit court erred in finding that he had breached the parties' construction contract and awarding Read damages because his obligations to perform were released after Read first breached the contract.[1] Therefore, Stone argues that the judgment should be reversed and remanded for an entry of judgment in his favor. We agree and reverse and remand.

[1]Alternatively, Stone also argues that the circuit court committed reversible error when it admitted certain US Bank documents over his objection and found that Read had established damages without requiring that she provide any specific proof of damages at trial.

I. *Relevant Facts*

Read owned a residence in North Little Rock, Arkansas, insured by Farmers Insurance Company (Farmers Insurance). Read's residence was destroyed by fire in 2014. Farmers Insurance paid $142,000 for the loss, and the funds were deposited by Read into an escrow account held by US Bank, who was the lienholder on Read's residence. Read contacted Stone to construct a new residence. Read and Stone subsequently entered into a written construction contract on January 1, 2015, in which Stone agreed to remove the remaining structure and debris and construct a new residence for Read. The contract specifically stated that the "price of this residence will be $132,000 for turnkey construction," and the contract contained various terms and items regarding construction. Of particular importance, the contract did not provide any information on interim payments or draws or even when the "$132,000 contract price" of the residence would be paid. As one might anticipate, a dispute subsequently arose over payments, or perhaps more accurately, nonpayments.

Recall that the $142,000 insurance proceeds were deposited into an escrow account with lienholder US Bank. Over the course of the construction, US Bank issued two checks made payable to both Read and Stone. On March 9, 2015, US Bank issued a joint check in the amount of $105,038.01.[2] Stone endorsed the joint check upon Read's request, and Read deposited the check into her personal bank account at Arvest Bank.

While the contract was silent concerning the payment terms, Read introduced dozens of text messages between Stone and herself. Many of these text messages are relevant

[2]A second check from US Bank in the amount of $7,600.70 is discussed below.

to the payment dispute.[3] On the same day that Read deposited the $105,038.01 US Bank joint check into her Arvest account, Read turned around and obtained a cashier's check payable to Stone in the amount of $44,000. Read testified that this payment was made prior to, or at the beginning of, construction, and Stone testified that this payment was for materials and supplies to commence construction. Construction commenced.

Approximately four months later, on July 27, 2015, Stone texted Read and stated: ". . . I need to get a check for the second draw." Later that same day, Read replied in pertinent part: "Ok you are right, I can get that to you in the morning, I'm running behind today if that is okay." Stone replied: "That will be fine." On July 29, 2015, Read obtained and delivered a second cashier's check from Arvest Bank payable to Stone in the amount of $44,000. Construction continued.

Approximately three months later, on November 2, 2015, Stone requested a third payment.[4] Read replied in a text: "How much money were you wanting?" Stone responded: "$30,800. That is holding out 10% of the total cost of the house which I'll get when it's complete." Read replied in pertinent part: "I can't do that the bank has the money[.] I can get you a draw of $10,000 and rest when it's done." This series of texts marks the beginning of the end of the relationship between Read and Stone. The ensuing texts reveal that Stone reluctantly agreed to accept the $10,000, and Stone texted: ". . . but, I will [need] the other $20,800 when you get back or you get it from the bank whichever comes first." The following day, Read asked Stone to meet her at Arvest Bank, and Read

[3]These texts are discussed more fully below.

[4]The actual request is not in the record.

obtained and delivered, through her parents, a third cashier's check from Arvest Bank payable to Stone in the amount of $10,000.

The relationship between Read and Stone continued to deteriorate, and no other payments were made from Read to Stone. For reasons discussed below, Stone did not complete construction of the residence; in fact, construction of the residence is still not complete.

On March 1, 2017, Read filed her complaint for breach of contract, breach of warranty of habitability, strict liability, and negligence.[5] Read specifically prayed that the circuit court grant her damages to cure the defects and delays in the construction of her home; to complete the construction of her home; and to award her prejudgment interest, costs, and attorney's fees.

On April 3, 2017, Stone filed his answer denying that he breached the contract and denying that Read was entitled to any relief under her complaint. Stone also filed a counterclaim for breach of contract and unjust enrichment. Stone alleged that although the written contract did not include a payment schedule, the parties had verbally agreed to the following payment schedule:

> a) The first draw in the amount of $44,000.00 (1/3 of the Project Cost) to be received at the beginning of the Project;
>
> b) The second draw in the amount of $44,000.00 to be received when the Project was approximately one-third (1/3) finished;

[5]The circuit court subsequently dismissed all of Read's causes of action except for breach of contract, and that ruling is not on appeal.

c) The third draw in the amount of $30,800.00 ($44,000.00 minus 10% of the total Project Cost) to be received when the Project was approximately two-thirds (2/3) finished; and

d) A final draw in the amount of $13,200 upon final completion of the Project.

Stone alleged that "[a]lthough the parties had established a course of dealing consistent with the Payment Schedule," Read did not pay him the full amount for the third draw and was only willing to pay him $10,000. He also alleged that Read refused to pay him any further funds from the $7,600.70 check[6] she received from the bank. Stone further alleged that as a result of Read's failure to make payments in accordance with the payment schedule, her failure to provide assurances that she intended to perform under their agreement, and her interference with his subcontractors and suppliers, he ceased working in July 2016 in order to mitigate his damages. Stone alleged that he had incurred several thousand dollars in construction expenses since the last payment, and moreover, Stone alleged that he continued to pay the monthly utility bills to protect the residence from exterior climate conditions. Therefore, he prayed that the circuit court award him damages for the amount owed to him for the value of the work performed, award him damages for the amount he paid toward the utility bills, and award him costs and attorney's fees. Read filed an answer asking that Stone's counterclaim be dismissed.

A bench trial was held on December 4, 2019. At trial, only Read and Stone testified. In addition to the parties' testimony, copies of the written construction contract, text messages exchanged between Stone and Read, checks, and several US Bank documents were admitted into evidence.

[6]This refers to the second check from US Bank discussed more fully below.

Read testified that she entered into a written contract with Stone as already set out above for the negotiated price of $132,000 for a "turnkey home." Read further explained US Bank had required that she submit certain documents the bank needed in order for her to utilize the bank's escrow services including, but not limited to, a contractor's statement, the contractor's taxpayer identification number, a certificate of liability insurance for the contractor, a residential contractor's licensure, and a homeowner's insurance policy. Stone provided the contractor-required documents. Read testified that it was her understanding that US Bank would "oversee the money" and perform inspections in order to ensure she "didn't get taken advantage of."

Read openly admitted that she intended to provide the three payments she gave to Stone for the construction of the home. Read testified that she gave Stone three payments over the course of the construction totaling $98,000, i.e., the initial $44,000 payment; the July 29, 2015, $44,000 second payment; and the November 3, 2015, $10,000 third payment. She explained that she had made the third "extra draw" for $10,000 because Stone stated that he needed it for material.

Again, it was apparently the request and payment/nonpayment of the third draw that either created or exacerbated the deterioration of the relationship between Read and Stone. There was no dispute that Stone requested the third payment in the amount of $30,800. Read replied by text: ". . . I can't do that, the bank has the money[.] I can get you a draw of $10,000 and rest when it's complete." However, other factors came into play during this time frame.

As previously mentioned, US Bank required Read to provide certain documents in order for US Bank to act as an escrow agent. After US Bank agreed to act as escrow agent and after US Bank had issued its first draw of $105,038.01 made payable to both Read and Stone, US Bank somewhat belatedly mailed a document to Read that included instructions on how to effectuate a draw from the US Bank escrow account. Over Stone's objection, during Read's testimony, the court admitted the US Bank document into evidence.[7] The document stated that US Bank would monitor the repairs, issue funds as the repairs were completed, and perform periodic inspections to verify completion of the repairs. It further provided the following regarding submitting and receiving draws:

> TO RECEIVE THE FIRST DRAW
>
> In order for the first draw to be released we must receive these items:
>
> - The endorsed claim check.
> - A copy of the estimate of damages (aka adjuster's worksheet) from the insurance company.
> - A copy of the signed contract for repairs.
> - A copy of the contractor's license.
> - A copy of the contractor's liability insurance.
> - An IRS W9 form completed and signed by the contractor.
>
> Upon receipt of these items, we will release a portion of the claim funds payable to you and your contractor. A "Contractor Release" and a "Statement of Completion and Satisfaction" will be sent to you with this draw check. These items must be completed and returned to our office prior to the final draw being issued.
>
> TO RECEIVE THE SECOND DRAW

[7]Stone strenuously objected to the admissibility of this document; however, due to the disposition of this appeal, a discussion of that issue is moot.

The following items are required to issue the 2nd draw:

- Inspection confirming the work is 2/3 completed; your contractor can advise you when your work will be at this point.
- Copy of applicable building permits secured. If a permit is not required, a written statement from your contractor can be provided.

TO RECEIVE THE FINAL DRAW

The final draw is released upon receipt of the following items:

- An inspection confirming all repairs are completed.
- Completed, signed, and notarized "Contractor Release."
- Completed and signed "Statement of Completion and Satisfaction."
- If additional funds are due to your contractor over the amount paid by your insurance carrier, please provide proof you have paid this amount due to your contractor.
- Occupancy Certificate is also required if a total loss was sustained.

One of the requirements for Read to receive a US Bank "second draw" was that US Bank would inspect the construction site and determine that the construction was at least two-thirds completed, to-wit: "The following items are required to issue the 2nd draw: Inspection confirming the work is 2/3 completed; your contractor can advise you when your work will be at this point."

While the record is sparse and sometimes incomplete, the record is clear that a US Bank representative did, in fact, inspect the construction and declared the construction was 79 percent completed. Neither Stone nor Read disagreed, and US Bank subsequently issued a second draw check made payable to Read and Stone jointly for $7,600.70.[8]

[8]This second US Bank draw of $7,600.70, when combined with the $105,038.01 initial draw, approximates 79 percent of the escrow funds and approximately corresponds

The evidence regarding the $10,000 payment and the payment or negotiation of the $7,600.70 joint check is somewhat convoluted. It is clear from the record that Stone did request a third draw in the amount of $30,800. It is equally clear that Read did, in fact, procure and deliver to Stone a third payment in the amount of $10,000, and that Stone did, in fact, continue to request the balance of $20,800 from the third draw. While this dispute was ongoing, US Bank issued its second draw check of $7,600.70 made payable to both Read and Stone. Read demanded that Stone endorse the $7,600.70 escrow check. Stone refused to endorse the check unless Read immediately delivered at least a $5,000 payment in return. Read refused to make the $5,000 payment, and communication between Read and Stone virtually ceased.

Read testified that when communication from Stone ceased, her residence was about 79 percent complete according to the last inspection completed by US Bank. Read testified that she could not live in the residence at that time. She explained that the toilets and plumbing faucets still had not been installed; the kitchen cabinet doors, the keys for the safe room, and screens for the windows were still missing; the garage door remotes "were not on there"; the water heater, door knobs, and door locks had not been installed; the unit for the fireplace and tile around the fireplace had not been completed; the jacuzzi tub had not been finished; the culvert had not been put in for the driveway to be poured; the wiring had not been completed; and the front yard had not been leveled and sod had not been laid. Read additionally testified that she did not "fire" Stone or instruct the workers to stop

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to US Bank's determination that the construction project was 79 percent completed. Read did not call a witness from US Bank to testify.

working on her home. Instead, she stated that after she did not pay him any more money, and after she had repeatedly texted him regarding the status and asked when he would complete construction, he did not answer and "ghosted" her. Read testified that she contracted for a "turnkey" residence where everything would be complete for her to move in. However, to her knowledge, she still did not have a certificate of occupancy.

Read testified that she now lives in the residence and that she had to spend her own money to make the residence livable without the benefit of the money from US Bank to do so. She stated that although she lives in the home, construction was still not complete. There was no sod and the driveway was not poured. Read testified that she believed the payments she had made to Stone "were in accordance with the payment schedule from US Bank" and that she was entitled to the relief she sought in her complaint. Read did not introduce any evidence regarding either the amount of money she paid to make the residence livable after Stone left or the amount of money it would cost to complete construction.

Stone testified that he had written the contract he entered into with Read to construct a "turnkey home," which he admitted meant a "complete home." He acknowledged that the total price for the residence according to the contract was $132,000 and admitted that he did not include any payment schedule in the written contract. However, Stone claimed that he "had never had a problem with anybody paying and had just not put it into the contract." Stone further testified that Read had verbally agreed to the payment schedule before they entered into the written contract as outlined in his counterclaim. Stone acknowledged that he knew the money Read was paying for the

construction was coming from US Bank and that US Bank would be making periodic inspections.

Stone testified that the last inspection the bank performed was in October 2015. At that time, the residence was 79 percent complete. Stone explained that Read gave him three payments totaling $98,000. The first two payments were for $44,000 each, which corresponded with their verbal payment schedule. Stone claimed that he was owed his "third draw" after the October inspection in the amount of $30,800, "which was the $44,000 less the 10 percent retainage, 10 percent of the total house retainage, total cost retainage."[9] However, Read gave him only $10,000 leaving a balance of $20,800.

Stone testified that Read contacted him about the new US Bank joint escrow check in the amount of $7,600.70 and that she requested that he endorse the check over to her. Stone testified that he thought Read had agreed that she would give him another $5,000 from the $7,600.70 escrow check. However, when Read indicated that she would not pay him the $5,000 at the time he endorsed the check, he refused to meet with her unless she agreed to give him his money. Stone never endorsed the check.

Thereafter, Stone stopped communicating with Read. When asked at trial why he chose to stop communicating with Read, Stone responded that he did so because he "felt she had breached the contract." Stone further explained that he "had been waiting for payment for a long amount of time and did not feel that she was going to ever perform on that[.]" Stone admitted, however, that he never told her that he had thought she breached

[9]The contract price was $132,000; 10 percent of the contract price is $13,200; and 10 percent retainage would be $132,000 less $13,200, or $30,800.

the contract but instead simply stopped responding to any of the texts she sent him. The last text Read sent Stone asked, "What is it going to take to get you to finish my house?" Stone admitted that he did not respond.

Stone testified that he had completed additional construction on the residence after the bank had last inspected the home. Therefore, instead of the 79 percent completion estimated by the bank, he estimated that it was approximately 90 percent complete when he stopped construction. Stone also explained that his costs alone without calculating any profit was $125,153.96. Normally, his profit margin would be approximately 15 percent, but in Read's case, Stone stated that he was calculating only a 5 to 10 percent profit margin. Stone testified that he did not file a lawsuit himself or try to put a lien on the property because he did not have the money to do so. Stone claimed that he "had basically spent all the savings [he] had and all the money that [he] had to complete the house to that point."

At the conclusion of the trial, the circuit court provided the following relevant oral findings:

> It is alleged that the parties entered into an oral agreement post-contract with regard to a payment schedule. I do not recall Read admitting there was an oral agreement about a payment schedule. I heard Stone say it. I heard Read testify about a US Bank schedule.
>
> Now, when I took contracts, you can have an oral contract, but whether you have an oral contract or written contract, you have to have an agreement between the parties. Read never testified in this trial she agreed to the payment schedule that Stone testified about. And absent that testimony, there can be no finding that there was an oral contract because to have an oral contract, there has to be a meeting of the minds between the parties. There was simply put no proof that Read and Stone agreed to the payment schedule Stone testified about.
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> Read has testified about one deal, US Bank. Stone testified about another deal and neither of them are the same. Thus, on Stone's counterclaim, judgment is for

the defendant because you don't have a contract. You can't recover on the counterclaim based on an oral contract if you don't prove your contract.

The Court finds for the defendant, Read, on the counterclaim. With regard to the complaint, the contract calls for a, quote, turnkey job, a turnkey construction. According Stone, turnkey construction means the house is complete. By Stone's own testimony, the house is not complete. By his account, it's 90 percent complete. 90 percent is only 100 percent of 90. It's not 100 percent of 100. By her testimony, it's 79 percent complete, but that's not 100 percent of 100. 79 percent of 100 percent is 79. Thus, by the testimony of both Stone and Read, the standard of completion required for the contract prepared by Stone, turnkey was not met.

Stone testified that he was convinced Read was not going to comply with the payment based upon the, quote, oral contract, but as the Court mentioned, there was no oral contract. And I made a note, Stone says "whenever I quit the project." There's no testimony that Read kept him from completing the work. There's no testimony that Read fired him. There's no testimony that Read says she wouldn't pay him when he completed the work. There's no testimony that Read said "If you complete the work, you will get paid or you won't get paid."

And absent a payment schedule in the contract and absent proof of an agreement of the mind on the oral contract that Stone talked about, there is no basis for an anticipatory repudiation. If you agree to do a turnkey job and you quit the job before you have the turnkey job completed, you're not quitting the job upon anticipatory repudiation if there was no repudiation.

Read testified that she is unable to obtain the difference between the amount that has been disbursed by US Bank and the $105,000 that's in escrow. That's one aspect of damages.

There has been -- and I tried to find – go through the exhibits to see there was any proof about the cost of the construction that Read has done or had done. I don't find note of that proof.

What is clear is that Read's ability to get the amount left in escrow is dependent on what has been received into evidence as Plaintiff's Exhibit 8, which included the $7,600.70 check, but -- no, that's Plaintiff's 7.

Plaintiff's 8 included information regarding the draws. To receive the first draw, US Bank told Read we must receive these items, endorsed claim check, copy of the estimate of damages, copy of the signed contract for repairs, copy of the contractor's license, copy of the contractor's liability insurance, IRS W-9 form signed by the contractor.

> And Plaintiff's 8 reads upon receipt of these items, we will release a portion of the claim funds available to you and your contractor, a contractor release and a statement of completion and satisfaction -- this is to receive the final draw. These items must be completed and returned to our office prior to the final draw being issued.
>
> The following items are required to receive the second draw. Inspection confirming the work is two-thirds completed. The contractor can advise you when your work will be at this point. A copy of the applicable building permits secured. If a permit is not required, a written statement from your contractor can be provided.
>
> To receive the final draw, Read's information from US Bank, the final draw is released upon receipt of the following items: Inspection confirming all repairs are completed; signed, completed and notarized contractor release; signed and completed statement of completion and satisfaction.
>
> If additional funds are due your contractor over the amount paid by your insurance carrier, please provide proof that you paid this amount due to your contractor.
>
> I refer to this not to indicate that the parties had an agreement about a draw schedule. I said they didn't have one. I refer to it because it corroborates the reasons for Read not being able to come up with more money. And the reason I refer to it is that from the outset, both parties knew that she had to go to US Bank to get the money that was on escrow and that if she could not get the money on escrow until the project was at a certain rate, level of completion. . . . The bottom line is there was no agreement between Stone and Read with regard to a draw schedule.
>
> . . . .
>
> Thus, the Court finds that the plaintiff has met her burden of proof that there's a breach of contract. She made a deal for turnkey construction. She didn't get it. She made a deal for a $132,000 house and she didn't get it. And the last part of this issue is damages. The Court is awarding damages based upon the testimony of $98,000 having been paid on $132,000 contract. The Court is awarding damages of $34,000, which is the difference between 132,000 and 98,000.

Thereafter, the circuit court filed its written judgment on February 24, 2021, which made the following relevant findings:

> 1. That the Defendant's Counterclaim is denied and dismissed with prejudice.

2. That Plaintiff's claims of the Breach of the Warranty of Habitability, Strict Liability, and Negligence are denied and dismissed with prejudice.

3. That Plaintiff, Mary Read, is entitled to judgment against the Defendant, Brad Stone, for Breach of Contract in the amount of Thirty-Four Thousand dollars and no cents ($34,000.00).

4. That the current federal reserve primary credit rate is 2.75% and pursuant to A.C.A. § 16-65-114 awards interest until paid at the rate of 4.75% per annum.

5. That Plaintiff's request for costs and attorney's fees is denied.

6. That pursuant to A.C.A. § 16-66-221 Defendant Brad Stone, is hereby ordered to file with the Clerk of this Court a schedule, verified by affidavit, all of his properties, both real and personal, including moneys, bank accounts, rights, credits, and choses in action held by the Defendant himself. Defendant shall specify the particular property which he claims as exempt under the provisions of law.

This appeal followed.

II. *Standard of Review*

In order to prove a breach-of-contract claim, one must prove "the existence of an agreement, breach of the agreement, and resulting damages." *Barnes v. Wagoner*, 2019 Ark. App. 174, at 3, 573 S.W.3d 594, at 595 (quoting *Keith Capps Landscaping & Excavation, Inc. v. Van Horn Constr., Inc.*, 2014 Ark. App. 638, at 5–6, 448 S.W.3d 207, 210). In appeals from civil bench trials, our standard of review on appeal is not whether there is substantial evidence to support the findings of the court but whether the court's findings were clearly erroneous or clearly against the preponderance of the evidence. *Summers Drilling & Blasting, Inc. v. Goodwin & Goodwin, Inc.*, 2020 Ark. App. 194, 598 S.W.3d 853. A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire evidence is left with a firm conviction that a mistake has been made. *Id.* Where the issue is one of law, our review is de novo. *Barnes*, *supra*. Furthermore, in a bench trial, a party who

does not challenge the sufficiency of the evidence at trial does not waive the right to do so on appeal. *Bohannon v. Robinson*, 2014 Ark. 458, 447 S.W.3d 585.

III. *Breach of Contract*

Stone argues that there was insufficient evidence to support the circuit court's finding that he had breached the parties' contract. Stone argues that the overwhelming evidence presented at trial established that the parties had an "oral agreement supplementing the written construction contract as to the draw schedule for payment." He further argues that because Read first breached their agreement by failing to pay him as agreed, he was released from performing his contractual obligations. We agree.

On a breach-of-contract claim, when performance of a duty under a contract is contemplated, any nonperformance of that duty is a breach. *Ark. Realtors Ass'n v. Real Forms, LLC*, 2014 Ark. 385, 442 S.W.3d 845; *Reynolds Forestry Consulting & Real Est., PLLC v. Colbey*, 2019 Ark. App. 209, 575 S.W.3d 176. As a general rule, the failure of one party to perform his contractual obligations releases the other party from his obligations. *Stocker v. Hall*, 269 Ark. 468, 602 S.W.2d 662 (1980). However, a relatively minor failure of performance on the part of one party does not justify the other in seeking to escape any responsibility under the terms of the contract; for one party's obligation to perform to be discharged, the other party's breach must be material. *Ark. Realtors Ass'n*, *supra*; *Chambers v. McDougald*, 2017 Ark. App. 357, 520 S.W.3d 740. A material breach is a failure to perform an essential term or condition that substantially defeats the purpose of the contract for the other party. *Dye v. Diamante*, 2017 Ark. 42, 510 S.W.3d 759.

Stone had the burden of proving the existence of the parties' verbal contract in order to prove his breach-of-contract claim. *Grisanti v. Zanone*, 2010 Ark. App. 545, 336 S.W.3d 886. The essential elements of a contract include (1) competent parties, (2) subject matter, (3) legal consideration, (4) mutual agreement, and (5) mutual obligations. *DaimlerChrysler Corp. v. Smelser*, 375 Ark. 216, 289 S.W.3d 466 (2008). We keep in mind two legal principles when deciding whether a valid contract was entered into: (1) a court cannot make a contract for the parties but can only construe and enforce the contract that they have made; and if there is no meeting of the minds, there is no contract; and (2) it is well settled that in order to make a contract there must be a meeting of the minds as to all terms, using objective indicators. *Grisanti*, *supra*. A meeting of the minds does not depend upon the subjective understanding of the parties but instead requires only objective manifestations of mutual assent for the formation of a contract. *Hagans v. Haines*, 64 Ark. App. 158, 984 S.W.2d 41 (1998). The meeting of minds, which is essential to the formation of a contract, is determined by the expressed or manifested intention of the parties. *Id.* Whether or not there was a meeting of the minds is an issue of fact, and we do not reverse a circuit court's fact-finding unless it is clearly erroneous. *DaimlerChrysler Corp.*, *supra*.

Stone argues that the parties' verbal agreement regarding the payment schedule as alleged in his counterclaim was reached prior to the commencement of the written contract. "It is a general proposition of the common law that in the absence of fraud, accident or mistake, a written contract merges, and thereby extinguishes, all prior and contemporaneous negotiations, understandings and verbal agreements on the same subject." *Ultracuts Ltd. v. Wal-Mart Stores, Inc.*, 343 Ark. 224, 232, 33 S.W.3d 128, 134 (2000) (quoting *Farmers Coop.*

Assoc. v. Garrison, 248 Ark. 948, 454 S.W.2d 644 (1970)). "This is simply the affirmative expression of the parol evidence rule." *Id.* at 952, 454 S.W.2d 646; *see Barnett v. Mountain View Sch. Dist.*, 2010 Ark. App. 333, 374 S.W.3d 851. Where a contract is plain, unambiguous, and complete in its terms, parol evidence is not admissible to contradict or add to the written terms. *Barnett*, *supra*. Parol evidence may be admitted, however, to prove an independent, collateral fact about which the written contract was silent. *Id.* (citing *Ultracuts Ltd.*, *supra*).

We find the facts of this case similar to those in *Blount v. McCurdy*, 267 Ark. 989, 593 S.W.2d 468 (Ark. App. 1980), in which our court held that parol evidence regarding payments was admissible where a contract was silent as to when payments were to begin.

> The contract is silent on the matter of at what period of time the buyer's obligation to make insurance payment began—was it October 21, 1977 or October 21, 1978? McCurdy's testimony reveals she understood perfectly she was to assume the insurance payments but she also understood the payments would not begin until the policy dated October 21, 1977 through October 21, 1978 expired. *Exactly when she was to begin the insurance payments is not covered in the contract. The parol evidence rule was not violated because any testimony related to when she was to begin payments is obviously concerned with a collateral, independent fact, or with an ambiguity about which the contract is uncertain. The testimony concerning the obligation to assume sellers' insurance premiums clause of the contract was not introduced to vary or contradict the written document but was concerned with matters not embraced within the language of the covenant and to explain uncertainties in the document.*

Blount, 267 Ark. at 992, 593 S.W.2d at 470 (emphasis added).

We find *Blount* persuasive. In this case, the written contract stated that the "price of this residence will be $132,000 for turnkey construction." However, similar to the facts in *Blount*, the contract did not encompass the parties' entire agreement in that the contract was silent as to how and when payments were to be made for the construction. Therefore, parol

evidence of the verbal agreement regarding the parties' payment schedule was properly admitted.

After receiving evidence and hearing the testimony admitted at trial, the circuit court found that the parties did not have a verbal agreement regarding any payment schedule and that Read was therefore not the first party to breach. In its oral findings, the circuit court specifically found that, absent Read's testimony that she agreed to Stone's payment schedule, "there can be no finding that there was an oral contract because to have an oral contract, there has to be a meeting of the minds between the parties." It further found that there was "no proof that Read and Stone agreed to the payment schedule[.]" We disagree.

Upon review, the record does contain compelling evidence that Read and Stone did have a meeting of the minds, and Read agreed to the terms of Stone's verbal payment-schedule agreement. Stone's payment schedule was generally one-third, or $44,000, up front; one-third, or $44,000, upon one-third completion; one-third less 10 percent retainage, or $30,800, upon two-thirds completion; and the balance on completion. Read testified that she intended to make the first two $44,000 payments. The first $44,000 payment was paid up front on the same day Read deposited the insurance company check into her Arvest account. Read admitted that this payment was made prior to, or at the beginning of, construction. This is consistent with Stone's testimony. Read's conduct in making a $44,000 payment to Stone prior to, or at, the commencement of the project is evidence that Read had previously agreed with Stone's verbal payment schedule. The second payment was made approximately four months later. When Stone requested the second one-third $44,000 payment, texts introduced by Read corroborate Stone's version

of the verbal agreement. On July 27, 2015, Stone texted Read and stated: ". . . I need to get a check for the second draw." Later that same day, Read replied in pertinent part: "Ok you are right, I can get that to you in the morning, I'm running behind today if that is okay." Stone replied: "That will be fine." On July 29, 2015, Read obtained and delivered a second cashier's check from Arvest Bank payable to Stone in the amount of $44,000. It is important to note that Read did not deny that she owed $44,000; rather she simply replied that she could make the payment "in the morning," and she did follow up and make the payment. Again, Read's conduct in making a $44,000 payment to Stone as a second draw is evidence that Read had previously agreed with Stone's verbal payment schedule. Even the third payment request corroborates the verbal payment schedule. In October 2015, US Bank inspected the project and estimated the project to be 79 percent complete. Thereafter, on November 2, 2015, Stone requested the third one-third $44,000 payment less 10 percent retainage in the amount of $30,800. Read replied by text: ". . . I can't do that, the bank has the money[.] I can get you a draw of $10,000 and rest when it's complete."[10] Again, it is important to note that Read did not disagree with Stone that he was entitled to a third draw as per his verbal payment schedule. Instead, Read's reply was: "I can't do that, the bank has the money." Read's conduct in not disputing the amount of the third draw, $44,000, to Stone is evidence that Read had previously agreed with Stone's verbal payment schedule.

[10]When Stone requested the third draw in the amount of $30,800, the record indicates that Read had paid Stone only $88,000 of the $105,038.01 initial escrow payment by US Bank, leaving an approximate remaining balance of $17,038.01 in her Arvest account.

Under these facts, the evidence clearly supports Stone's claim that the parties agreed to the verbal payment schedule to which he testified, and the circuit court's finding that there was no meeting of the minds was therefore clearly erroneous.

Read admitted that she did not pay Stone $30,800 after US Bank had determined that the construction was 79 percent complete. This was the required third draw according to the terms of the verbal payment schedule. Therefore, because Read materially breached the contract first when she failed to pay Stone $30,800, Stone was released from his obligation of completing construction. *See Ark. Realtors Ass'n*, *supra*; *Reynolds Forestry Consulting & Real Est., PLLC*, *supra*. Thus, the circuit court clearly erred in finding that Stone had breached the parties' contract, and we reverse the judgment of the court and remand for the circuit court to enter a judgment in Stone's favor and to determine damages based on the evidence presented in the record.

IV. *Stone's Other Arguments for Reversal*

Because we reverse and remand in Stone's favor for the reasons stated herein, it is unnecessary for us to address his other points for reversal.

Reversed and remanded for proceedings consistent with this opinion.

KLAPPENBACH and BARRETT, JJ., agree.

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William L. Owen, P.A., by: *William L. Owen*; and *Hale & Young, P.L.L.C.*, by: *Paul A. Young*, for appellee.