Cite as 2024 Ark. App. 111

ARKANSAS COURT OF APPEALS

DIVISION II
No. CV-22-554

		Opinion Delivered February 14, 2024
PAUL GUNN	APPELLANT	APPEAL FROM THE PULASKI COUNTY CIRCUIT COURT, SIXTEENTH DIVISION [NO. 60CV-21-5289]
V.		
STEVE WORTMAN	APPELLEE	HONORABLE MORGAN E. WELCH, JUDGE
		REVERSED

MIKE MURPHY, Judge

Appellant Paul Gunn of Paul E. Gunn & Associates Consulting (Gunn) brings this appeal from an order of the Pulaski County Circuit Court finding that he breached a contract in which appellee Steve Wortman was a third-party beneficiary. On appeal, Gunn argues that substantial evidence does not support the verdict. We agree and reverse.

Wortman owns property in Marianna, Arkansas. The property is used as a hunting club, and Wortman was interested in building three cabins on the land. Wortman hired Jackie Stevens d/b/a Stevens Commercial Contractors, Inc. (Stevens), to perform the work. Gunn had surveyed the land in 2015 for a previous owner, and Stevens reached out to Gunn about the project.

At trial, Wortman testified that all he "really wanted to begin with was can we get

three 60-foot cabins on here." Several emails were exchanged between Gunn and Stevens and admitted into the record, serving as snapshots into the impressions and actions of the parties over a few months. Nowhere in the emails is the agreement lined out.

A March 26, 2021 email between Stevens and Gunn was entered into evidence that showed Stevens knew Gunn was going to travel to the property. On March 30, Gunn emailed Stevens, saying,

> Jackie, Yes, we went there yesterday. A lot of our corners have been destroyed. I'm having to set up a new traverse to relocate the original points. I'll let you know when I have something figured out.

An April 19 email from Gunn to Stevens said,

> Jackie, Have you been able to go to the Battle Axe property and see the property lines? My guys said the Northeast property comer is off the top bank on the river side. Also, the property is pretty grown up with vegetation. It would be helpful to get the property cleared off before we try to layout the building areas. Would you be able to meet us down there later this week to see the property with us? Thanks, Paul

On Monday, May 3, Stevens wrote,

> Wanted to make sure you got the information I sent you regarding the owners expectations on the lot sizes and setback requirements if you could verify you got that and give me a timeline I would appreciate it we're getting ready to start drilling for the [piers] and start [ ] foundations.

There were more emails pertaining to details of lot lines and how far buildings should be set back from the river or spaced with one another. Several drawings and revisions were sent between Gunn and Stevens. On May 24, Stevens emailed Gunn, "Do you know when you'll be there to layout. We're good to go." On May 28, Gunn wrote, "Jackie, We are through with the layout. Who do I send the invoice to? Thanks, Paul."

On June 1, 2021, Gunn sent Stevens an invoice that provided:

Professional Services:

Survey and layout work in PT. W ½, Section 3, T1N-R5E, Lee County, Arkansas	
Fieldwork – 34 hrs @ $200/hr	$6800.00
Office, Comp., etc. 10 hrs @ 100/hr	$1000.00
Total	$7800.00

Stevens, in a June 11 email acknowledging receipt of the invoice, said,

> I did receive it and I am about to turn in a draw to the owner. I have to admit I was a little surprised at 34 hours of fieldwork. How does that break down?

Gunn replied four days later:

> Jackie, We went to the property on March 29 & 30, April 12 & 20. We had to do a completely new traverse because the original property corners and control points had been destroyed. After determining where the property corners were and re-setting them, we met with Doyle and showed him the boundaries so they could begin the clearing. We went back on May 13 to do the bldg, layout, but the site wasn't cleared off enough and our control points were again destroyed. We had to re-set new control points and re-figure where you wanted the bldgs. We went back on May 26 and did the bldg, layout and set offsets for Doyle. Our fieldwork time includes travel time to and from the site and onsite work. This totaled 34 hrs. All other work was office work which included computer input of the field data, computer analysis, etc. This totaled 10 hrs. Thanks, Paul

Stevens paid the invoice on August 24.

On August 27, 2021, Wortman brought suit against Gunn alleging Gunn was inadvertently paid an inflated sum for work that was not even performed. Wortman asserted that Stevens and Gunn entered into an agreement to draw two lots on the existing survey

for the property.

He sought damages under theories of breach of contract, breach of contract brought by a third-party beneficiary, fraud in the inducement, and fraud. He further sought punitive damages.

At trial, in addition to the correspondence between Gunn and Stevens, the court also heard testimony from Wortman and what he perceived as going on at the time. Of note, Wortman testified he knew Gunn was working on some drawings of the property, and he knew that Gunn was traveling to the property to perform some work. Wortman explained that he had a potential buyer who was interested in one of the cabins coming to look at the property, and Wortman needed the cabin corners marked for the buyer—he knew Gunn was traveling to the property to mark the corners.

When asked about the final drawing that he did receive, Wortman said that it accomplished what he needed:

WORTMAN COUNSEL:	Okay. And, so, let's look at Gunn 30. This is the 7800-dollar final layout. Did it accomplish what you needed?
WORTMAN:	Yes. Which was, I can't get three full-size buildings. I can only get two-and-a-half. And the potential buyer declined the smaller building.
WORTMAN COUNSEL:	All right.
WORTMAN:	This is what we were asking for to begin with.

At the conclusion of Wortman's evidence, Gunn moved for a directed verdict to all the claims, and they were granted save for the claim for breach of contract brought by a third-

party beneficiary.[1]

When it was Gunn's turn to present evidence, he explained that he was contacted to do layout work, and the bulk of the charges stemmed from thirty-four hours of fieldwork. Gunn testified to what he was asked to provide:

WORTMAN COUNSEL: What is it that – did you provide a construction layout?

GUNN: Pardon?

WORTMAN COUNSEL: The layout you provided, was it a construction layout? Is that your testimony?

GUNN: Yes. He wanted to lay the buildings out.

WORTMAN COUNSEL: All right. And a construction layout – you tell me if you agree with this definition. Okay? A construction layout, also known as staking or site land layout survey, is the process of making – or the process in which the contractor reads the building plans, the blueprints, and then marks with stakes the locations of all elements on the site – on the build site. Do you agree with that definition?

GUNN: That's pretty much what we do. We mark the four corners of the building.

At the close of all the evidence, the court concluded that Wortman was the beneficiary of a contract between Gunn and Stevens; Gunn was paid by Stevens to perform a survey on land owned by Wortman; and Wortman never received a survey. Wortman was awarded $7800, the price charged by Gunn for the services.

[1]In a bench trial, a motion for directed verdict is really a motion to dismiss, but the standards for evaluation are the same at the circuit court and appellate level. Ark. R. Civ. P. 50(a).

Gunn now appeals. On appeal, Gunn argues that substantial evidence does not support the finding for a claim of a breach of contract by a third-party beneficiary.

Following a bench trial, an appellate court asks whether the circuit court's findings were clearly erroneous or clearly against the preponderance of the evidence and reviews questions of law de novo. *AgriFund, LLC v. Regions Bank*, 2020 Ark. 246, at 6, 602 S.W.3d 726, 730. 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.* We must give recognition to the circuit court's superior opportunity to determine the credibility of witnesses and the weight to be given to their testimony. *S. Bldg. Servs., Inc. v. City of Ft. Smith*, 2013 Ark. App. 306, 427 S.W.3d 763. This court reviews the circuit court's conclusion of law de novo. *Houston v. Houston*, 67 Ark. App. 286, 999 S.W.2d 204 (1999). So, though Gunn argues that substantial evidence does not support the verdict, we will review his arguments against the standard following a bench trial: clear error.

Two elements are necessary in order for the third-party-beneficiary doctrine to apply under Arkansas law: (1) there must be an underlying valid agreement between two parties, and (2) there must be evidence of a clear intention to benefit a third party. *Robinson Nursing & Rehab. Ctr., LLC v. Phillips*, 2019 Ark. 305, at 7, 586 S.W.3d 624, 630. There is no dispute that there was an agreement between Gunn and Stevens to perform work, nor is there any dispute that Wortman was the beneficiary of that work. Thus, if Wortman can establish that Gunn breached the agreement with Stevens, Wortman may recover under the theory of a third-party beneficiary.

In order to prove a breach-of-contract claim, one must prove "the existence of an agreement, breach of the agreement, and resulting damages." *Keith Capps Landscaping & Excavation, Inc. v. Van Horn Constr., Inc.*, 2014 Ark. App. 638, at 5, 448 S.W.3d 207, 210. Gunn's position is that he provided Stevens all that was agreed he would do pursuant to his agreement with Stevens. To determine if an agreement was breached, Wortman must establish Gunn's obligation under the agreement. *See Ballard Grp., Inc. v. BP Lubricants USA, Inc.*, 2014 Ark. 276, at 7–8, 436 S.W.3d 445, 450.

In the resulting order, the court found the following:

> 7. Jackie Stevens, a commercial contractor, hired [Gunn] to do work for [Wortman] and [Wortman] was a disclosed beneficiary of that work.
>
> 8. [Wortman] wanted [Gunn] to take the January 15, 2015 Higginbotham survey and superimpose the proposed buildings to see if they would fit on the property.
>
> 9. [Gunn] never disclosed the charges or asked for parameters. He knew he was dealing with a contractor for the owner.
>
> 10. [Gunn] testified that he could have done the superimposing for $100. Instead he billed $7,800 for the project.
>
> 11. [Gunn] made no disclosures regarding his bills to the participating parties.
>
> 12. [Gunn] provided a drawing and contended it was a survey. It was not a survey as it does not bear a seal, the licensee signature, or license number. Nor did [Gunn] provide full disclosure of compensation for services and other disclosures required under a survey to all interested parties.
>
> 13. The Court finds in favor of [Wortman] as a third party beneficiary for breach of contract by [Gunn] in the amount of $7,800.

None of these findings establish the obligation Gunn owed Stevens. It recites what

the owner wanted; however, what a beneficiary testifies he wanted is not the same as what is established by agreement between the contracting parties.

The order says that Wortman wanted Gunn to superimpose proposed buildings onto an existing survey but then faults Gunn for not providing a survey—two different things. On appeal, Wortman points heavily to the invoice, saying that "Gunn invoiced Wortman for a survey," but this inference fails to take into consideration the more colloquial use of the word. Even Wortman's trial counsel acknowledges there are different uses for the word "survey" in the industry, including that a construction layout is "also known as staking or site land layout survey."

Furthermore, at one point during trial, Wortman even conceded that "there was a back-and-forth, cabin size changes" and that the job was "a fluid project." Wortman explained what he wanted but that he "had no intimate knowledge about exactly what Mr. Stevens and Mr. Gunn contracted to do."

We have given the record exhaustive review, and the evidence in this record simply does not establish with any specificity what Gunn's obligations were under the contract between him and Stevens such that it can then be determined that he breached those obligations. In fact, a preponderance of the evidence establishes that Gunn contracted to do something other than provide a survey as the circuit court defined it.

Absent evidence of a specific promise made by Gunn to Stevens that was breached, the breach-of-contract claim by a third-party beneficiary must fail. *See generally Farris v. Conger*, 2017 Ark. 83, at 7, 512 S.W.3d 631, 635 (discussing necessity of specific promises in breach-

of-contract actions); *Barrows/Thompson, LLC v. HB Ven II, LP*, 2020 Ark. App. 208, at 15–16, 599 S.W.3d 637, 647–48 ("HBVII correctly argues that Barrows cannot identify any provision under the lease agreement that obligated HBVII to remove the holding tanks or sludge contained therein.").

A preponderance of the evidence establishes that the agreed work was something different than just what Wortman "wanted," and we are left with a definite and firm conviction that a mistake was made.

Reversed.

KLAPPENBACH and BARRETT, JJ., agree.

Hilburn & Harper, Ltd., by: *Zachary L. Nicholson*, for appellant.

James, House, Swann & Downing, P.A., by: *Patrick R. James* and *Zachary D. Wilson, Jr.*, for appellee.