COURT OF APPEALS
DECISION
DATED AND FILED

August 13, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2008AP389 **Cir. Ct. No. 2007SC4452**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

KENNY M. VOLBRECHT,

PLAINTIFF-RESPONDENT,

V.

AKIL C. JACKSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for KENOSHA County: BARBARA A. KLUKA, Judge. *Affirmed in part*, r*eversed in part and remanded with directions.*

¶1 BROWN, C.J.[1] This is an appeal of a small claims judgment for a builder of a spec home, Kenny M. Volbrecht, against the subcontractor who

[1] This appeal was decided by one judge pursuant to Wis. Stat. § 752.31(2)(d) (2005-06). All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

originally contracted to provide the drywall, Akil C. Jackson. The small claims court heard the evidence, examined the exhibits and found that Jackson had performed in an unworkmanlike manner, causing Volbrecht to have to hire a third party to repair and finish the job to his damage in the amount of $3875.

¶2 As we understand Jackson's appellate brief, he does not really dispute that there were defects in his work. Rather, he claims that he should have been given the opportunity to repair the defects and finish the job because Volbrecht so agreed. He asserts that Volbrecht breached this promise. Jackson further contends that, beyond repairing his work, the rest of the third party's job consisted of the same work that would have had to have been performed anyway—whether Jackson had completed the project or someone else finished it. Jackson cannot understand how he should be expected to pay for such work especially when he was never paid for that work.

Basic Facts Found by the Small Claims Court

¶3 We will first recite the facts as found by the small claims court and backed by the record. The record shows that there was an agreement for Volbrecht to purchase the drywall and Jackson would be paid $2500 to hang the drywall and another $2500 to finish the drywall by taping, mudding and sanding. The record also shows that Volbrecht testified how he believed Jackson was not hanging the drywall correctly. The small claims court placed great weight on the expert opinion of a person the court believed to be a neutral, unbiased expert, David Masi. Masi does inspections for construction draws and was performing this task on behalf of Volbreht's lender, the Community Bank. The court recounted Masi as having opined that he would not have accepted the dry wall put up by Jackson because there should be fewer seams, no tears and no extra holes.

The work was not done to industry standards. The court related how Masi said that there were many tears, many holes and more seams throughout the house. The court also placed great weight on the opinion of Masi that the problems could not be fixed and would have to be done over.

¶4 The small claims court also placed substantial weight on a series of photographs of the drywall after it had been taped, which verified Masi's testimony about shoddy workmanship. The court, with Masi's testimony as a guide, saw for itself the holes in the dry wall, the tears and the poorly installed corners. And the small claims court also accepted Volbrecht's testimony, again based on photo exhibits, that the trace ceiling had to be a complete tear off. Finally, the small claims court reviewed the work of the third party drywaller and found that this party had to redo parts of the job and then finish it.

Whether There Was an Agreement to Allow Jackson to Repair and Finish His Work

¶5 We will first address Jackson's complaint that Volbrecht made an agreement to allow him to come in and repair the work so that he could finish the job. During trial, Jackson, appearing pro se, cross-examined Masi. Jackson asked Masi whether it was true that Masi told him that he should talk to Volbrecht and come to an understanding what he "was going to do and to complete the job." Masi agreed that this true. Then, the following testimony took place:

> JACKSON: And when I—when I went to Mr. Volbrecht and we came to an understanding and a price and everything was worked out and I contacted you all, did I contact you all to say we came to an agreement and I will be going back to finish taping the drywall?

> MASI: Yeah, to the best of my recollection I remember something about you being back on the job. You could finish up.
>
> JACKSON: Do you have any recollection of Mr. Volbrecht telling me that I can not come back on the job and that he was going to hire someone else and which that he was terminating his—contract?
>
> MASI: Yeah, I do believe there was some discussion of that, Akil.

¶6 On redirect, Volbrecht established that Masi was not present during the discussions between Jackson and him. Then Volbrecht testified. When asked whether he terminated Jackson from performing the mudding and taping after the hanging, Volbrecht said:

> Yes. After we—we had tried to resolve it in two different ways, and neither of those ways were satisfactory to either of us; and so, I had no choice but to terminate.

On cross-examination by Jackson, Volbrecht emphatically denied that there was any agreement allowing Jackson to come back and repair and finish the job. Volbrecht did say that, pursuant to requests by the title company to "try to work it out" there were discussions about being able to finish but they broke down when, originally, Jackson had agreed to refund $1400 for the sheets of drywall that would be needed to repair the situation, but then Jackson refused to pay it. Volbrecht also talked about how Jackson's subcontractor, who actually did the labor, was not going to come back because of all the problems with the drywall.

¶7 Thus, Jackson and Volbrecht differed on whether there was an agreement to allow Jackson to continue on the job. The small claims court did not directly resolve this factual conflict, it is true. However, the small claims court *did* find that Volbrecht no longer allowed Jackson to complete his contract and hired someone else to complete it. An appellate court may assume that a missing

finding on an issue was determined in a manner that supports the final decision. ***State v. Pallone***, 2000 WI 77, ¶ 44 n. 13, 236 Wis. 2d 162, 613 N.W.2d 568.

¶8 We apply ***Pallone*** and assume that when the small claims court found that Volbrecht terminated the contract and had to hire someone else to fix the defects, it was by implication rejecting Jackson's testimony of some sort of accord and satisfaction. We get this from reading the bench decision of the small claims court where it is obvious that the small claims court believed Volbrecht, not Jackson. The small claims court was in the best position to find who was more credible. Our responsibility as an appellate court is solely to determine whether the findings of fact of the trial court are "clearly erroneous." WIS. STAT. § 805.17(2). By this we mean that the findings of fact will not be upset on appeal unless they are against the great weight and clear preponderance of the evidence. ***In the Interests of J.A.L.***, 162 Wis. 2d 940, 966, 471 N.W.2d 493 (1991). Here, while the testimony of Jackson and Volbrecht contradicted each other, it was up to the small claims court, as finder of fact, to decide who was telling the truth. Since the small claims court found that Volbrecht terminated Jackson for his shoddy work, we assume that, by implication, the small claims court also rejected Jackson's account that there had been an agreement to allow him to continue this work.

Damages

¶9 The other issue raised by Jackson is whether he should be responsible for the cost of finishing the project after repair. Jackson asserts that $3140 of the allowed damages did not come from any wrongdoing on his part. This amount, he claims, is the price of the taping that was done after he was fired. That taping and finishing, he argues, would have had to be done regardless of who did it and Volbrecht would have had to pay whoever did the taping.

¶10 We have to agree with Jackson in part. Somebody would have to do the taping, even if the hanging had to be redone. The taping and finishing was supposed to be done by Jackson for $2500. Jackson was never paid that money and he was not allowed to do that part of the job. The job was done, but by a third party. Had Jackson done everything in a workmanlike manner, Volbrecht would have had to pay $2500 to Jackson. The third party charged Volbrecht $3140 for work performed. If that $3140 was all for taping and finishing and not for hanging, then we could say that Volbrecht had to pay the third party $640 more than he would have had to pay Jackson. If these were the facts, that should be the amount of damages due on the taping and finishing due to Volbrecht for Jackson's breach.

¶11 But part of that $3140 may have been for hanging as well as taping and finishing. The record is unclear as to exactly what the $3140 was for. Also, Jackson was paid $2000 for the hanging, which—the court found—was done in an unworkmanlike manner. Should Jackson be responsible for repaying the entire $2000 paid to him for workmanship that turned out to be shoddy? We do not know. We only know from the evidence that the third party did not have to start from scratch. So, how much of the $2000 paid to Jackson should Jackson be allowed to keep? That is not our call to make.

¶12 A perhaps easier way to resolve the damages issue is to look at it this way: Jackson agreed to do the whole job—hanging, taping and finishing, for $5000 (the original contract price minus the money that Volbrecht had to pay for the drywall.) That is what Volbrecht was entitled to have at the end of the day—the contract completed for the original price. In reality, Volbrecht paid Jackson $2000 for his subpar hanging job and he paid the total of $3875 to get the taping done plus fix the problems with the hanging. After spending $5875 therefore,

Volbrecht had his house hung and taped. Since he originally had a contract to get the whole thing done for $5000, he needs to get $875 back from Jackson. He will then have been made whole. That, plus the court costs, should be the total judgment. So, in the end, Jackson ends up getting paid about a thousand dollars for his not-so-hot hanging job, which is reasonable, since it apparently did not cost as much to fix the hanging problems as it would have from scratch.

¶13 Whether the above analysis should be how damages are determined or whether some other analysis is better, is not for us to determine. That is a job for the small claims court on remand. We reverse and remand with directions that the court try the damages issue anew and issue new findings on damages. We repeat that, since Jackson admitted liability on appeal, only the damages issue shall be tried on remand.[2]

¶14 One loose item remains: Jackson also disputes the $360 bill from the third party for taping, coating and repairing the sheetrock on the second floor. He says that this was extra taping, the second part of the job and not for hanging—which was the part of the job that the court found to be defective work. He asserts that he is not responsible for this $360 bill. But the testimony is that this was part of the repair of the shoddy work and so this amount is properly attributed to Jackson.

[2] We took the unusual step of having an oral argument in a one-judge matter, albeit by telephone, on June 26, 2008. The lion's share of the argument was devoted to how the small claims court reached its damages decision and whether the record supported it. Suffice it to say, by the end of the argument, two things had been established: Jackson again accepted responsibility for the poor hanging job and Volbrecht understood that the damages award was not supported by the record and would have to be retried. The parties were given until July 21 to see if they could settle the damages issue. This court received word on August 4, 2008, that the parties were unable to settle and were prepared to try the damages issue anew.

¶15 Therefore, we affirm in part, reverse in part and remand with directions not inconsistent with this opinion.

By the Court.—Judgment affirmed in part, reversed in part and remanded with directions.

This opinion will not be published in the official reports.