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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-798

Filed: 6 March 2018

Surry County, No. 14 CVS 1476

KEVIN NUNN (as an individual and as doing business as BEAR CREEK LOG HOMES), Plaintiff

v.

NATALIE BARO, Defendant

Appeal by defendant from judgments entered 28 October 2016 and 4 November 2016, and order entered 29 November 2016, by Judge Lindsay R. Davis, Jr., in Surry County Superior Court. Heard in the Court of Appeals 20 February 2018.

Hendrick Bryant Nerhood Sanders & Otis, LLP, by Benjamin C. McManus and W. Kirk Sanders, for plaintiff-appellee.

Kurtz Law, PLLC, by Paige C. Kurtz, for defendant-appellant.

CALABRIA, Judge.

Where defendant failed to demonstrate that the exclusion of evidence constituted prejudicial error, the trial court did not commit prejudicial error in excluding the evidence. Where defendant failed to demonstrate that the trial court's conduct "probably amounted to a substantial miscarriage of justice[.]" the trial court

did not abuse its discretion in denying defendant's motion for a new trial. Where the only errors committed in the trial court's order on remittitur inured to defendant's benefit, the trial court did not abuse its discretion in entering an award in favor of plaintiff.

I. Factual and Procedural Background

On 28 December 2012, Kevin Nunn ("Nunn"), doing business as Bear Creek Log Homes ("Bear Creek") (collectively, "plaintiff"), entered into a contract with Natalie Baro ("defendant"). The contract provided that plaintiff would construct a residential log structure and adjacent garage structure. On 25 November 2014, plaintiff filed a complaint against defendant, alleging that plaintiff performed under the contract, incurring significant expenses, but that defendant "unjustly terminated the subject contractual relationship prior to Plaintiff's completion of the project." Plaintiff alleged breach of contract, unjust enrichment, and quantum meruit, and sought \$99,268.66 in damages, to be declared as an enforceable lien on the property.

On 8 January 2015, defendant filed an answer and counterclaim. She alleged that she terminated the contract "as a direct result of the Plaintiff's material breach of the contract[,] specifically regarding numerous "defects and deficiencies" in the construction of the house. Defendant raised counterclaims of breach of contract and negligence, and sought dismissal of plaintiff's complaint, along with recovery of \$300,000.00 for breach of contract and \$10,000.00 for negligence.

On 12 September 2016, plaintiff filed a motion *in limine* which sought to exclude, *inter alia*, the testimony and reports of defendant's expert witnesses. The trial court entered an order on final pretrial conference, which noted that plaintiff's lien was timely filed and perfected, and defendant's negligence claim was dismissed with prejudice. It also permitted defendant to introduce the reports of her expert witnesses, while noting plaintiff's objections.

At the pre-trial conference, the trial court did not grant plaintiff's motion *in limine*. During defendant's case in chief, however, plaintiff renewed his objection. At this time, the trial court declined to preclude defendant's experts from testifying, but noted that they were not to rely upon any material that had not been previously disclosed. During the testimony of one of defendant's experts, David Young ("Young"), defendant attempted to introduce a photograph for illustrative purposes. Plaintiff objected once more, arguing that the photograph was not timely disclosed. The trial court sustained plaintiff's objection to the photograph, and noted that "[t]hat's going to guide the use of similar exhibits in the future[.]" Subsequently, defendant raised the issue of several exhibits she wished to introduce from her other expert, Stephen Peklenk ("Peklenk"); the trial court held that these exhibits were untimely submitted to plaintiff, and ruled that they should be excluded.

On 20 September 2016, the jury answered the issues presented to it by the trial court. The jury found that defendant breached the contract by failing to comply with

a material term, resulting in recoverable damages for plaintiff in the amount of \$180,540.00. The jury found that plaintiff did not breach the contract in failing to construct the residence properly, and that defendant was therefore not entitled to recover for breach of contract.

On 31 October 2016, the trial court entered its judgment with remittitur. It noted that, after the verdict, the trial court expressed some concern that the evidence might not support the jury's finding on damages, and asked whether plaintiff would accept a remittitur. Plaintiff consented to an entry of judgment in his favor in the amount of \$106,699.97. The trial court noted that defendant objected to remittitur, but that defendant's consent was not required. The trial court therefore entered judgment in favor of plaintiff in the amount of \$106,699.97, dismissed defendant's remaining counterclaim of breach of contract with prejudice, and noted that a hearing would be held at a later date on the matter of attorney's fees. The trial court later amended this judgment to correct a clerical error.

On 9 November 2016, defendant filed a motion for a new trial, alleging that "[e]xcessive damages appear to have been given under the influence of passion or prejudice." The motion alleged that, notwithstanding the trial court's subsequent remittitur, the jury's passion or prejudice precluded it from entering a proper verdict. The motion also alleged that "[t]he uncontroverted evidence presented at trial established that the residence constructed by the Plaintiff was constructed in

violation of the North Carolina Building Code,” which constituted a material violation of the contract, and that therefore the evidence presented was insufficient to justify a verdict in plaintiff’s favor. On 29 November 2016, the trial court denied this motion.

From the judgment with remittitur, the amended judgment, and the denial of motion for a new trial, defendant appeals.

II. Illustrative Exhibits

In her first argument, defendant contends that the trial court erred in excluding her illustrative exhibits. We disagree.

A. Standard of Review

“We review the trial court’s decision to exclude evidence for an abuse of discretion.” *Media Network, Inc. v. Long Haymes Carr, Inc.*, 197 N.C. App. 433, 458, 678 S.E.2d 671, 687 (2009).

“The exclusion of evidence constitutes reversible error only if the appellant shows that a different result would have likely ensued had the error not occurred.” *Forsyth Co. v. Shelton*, 74 N.C. App. 674, 678, 329 S.E.2d 730, 734, *appeal dismissed and disc. review denied*, 314 N.C. 328, 333 S.E.2d 484 (1985). “The burden is on the appellant not only to show error, but to show *prejudicial* error” *Responsible Citizens v. City of Asheville*, 308 N.C. 255, 271, 302 S.E.2d 204, 214 (1983).

Latta v. Rainey, 202 N.C. App. 587, 603, 689 S.E.2d 898, 911 (2010).

B. Analysis

The trial court excluded certain of defendant's exhibits, concluding that those which were not properly disclosed to plaintiff were inadmissible even for illustrative purposes. On appeal, defendant contends that the trial court improperly excluded this evidence.

On 29 August 2016, plaintiff deposed Peklenk. Peklenk was asked at the deposition whether he had made a written report in the matter, or intended to do so; he responded in the negative to both questions, noting that "[a]s far as I know, I've not been asked to do a report." Plaintiff argued, however, that, four days after the deposition, plaintiff received Peklenk's report, which was dated 2 August 2016, almost one month before the deposition. Upon plaintiff's renewed objection, the trial court noted that, had defendant responded to interrogatories and requests for production prior to that deposition, there would be no issue, but that Peklenk's deposition testimony precluded the subsequent introduction of the materials on which Peklenk now sought to rely.

Defendant contends that this exclusion was erroneous. Defendant offers several arguments in support of this position: first, that plaintiff mischaracterized the evidence as an "expert report," when in fact it was a binder of photographs; second, that the evidence was "seasonably" disclosed to opposing counsel prior to trial, the trial court's ruling notwithstanding; and third, that the evidence was an illustrative exhibit, and was relevant, probative, and not unfairly prejudicial.

Even assuming *arguendo* that this argument is entirely sound, and that defendant is correct in her assertions, the question remains whether this alleged error was prejudicial. Establishing prejudice is defendant's burden, as appellant, on appeal.

Defendant dedicates little, if any, time to addressing the issue of whether the error was prejudicial. After carefully scrutinizing defendant's brief, we find the only argument with respect to prejudice to be the following language:

The number of defects was so considerable the striking effect of the exhibit could not be replicated in testimony alone and likely would have portrayed [defendant]'s damages in a manner that would have changed the jury's opinion of her case.

Despite defendant's argument, both Young and Peklenk were permitted to testify at length about their observations. Young's testimony spanned roughly 49 pages of transcript, and Peklenk's spanned roughly 147 pages. Notably, defendant was able to introduce other photographs into evidence through both Young and Peklenk, presumably dealing with the same subject matter. Given the extensive detail of the testimony of Young and Peklenk, and the fact that they were able to introduce other illustrative exhibits, it seems unlikely that defendant's experts were unable to present their opinions and findings absent the challenged evidence. It appears to this Court that the function of the challenged evidence was merely to further illustrate positions that defendant's experts were perfectly able to make via their testimony

and those exhibits admitted at trial. As such, we hold that defendant has not shown prejudicial error, and that the trial court did not commit prejudicial error by excluding the challenged exhibits.

III. Motion for a New Trial

In her second argument, defendant contends that the trial court erred in denying her motion for a new trial. We disagree.

A. Standard of Review

“[A]n appellate court’s review of a trial judge’s discretionary ruling either granting or denying a motion to set aside a verdict and order a new trial is strictly limited to the determination of whether the record affirmatively demonstrates a manifest abuse of discretion by the judge.” *Worthington v. Bynum*, 305 N.C. 478, 482, 290 S.E.2d 599, 602 (1982). “[A]n appellate court should not disturb a discretionary Rule 59 order unless it is reasonably convinced by the cold record that the trial judge’s ruling probably amounted to a substantial miscarriage of justice.” *Id.* at 487, 290 S.E.2d at 605.

B. Analysis

Defendant argues that a new trial should have been granted because the jury’s verdict of damages was based upon insufficient evidence and was the product of “passion or prejudice.” Defendant further contends that the evidence at trial

established plaintiff's breach of contract. Specifically, by plaintiff admitting he made "mistakes," defendant argues that plaintiff conceded that he breached the contract.

In essence, although defendant contends that the trial court erred in denying the motion for a new trial, defendant is truly arguing that the jury relied on insufficient evidence, and failed to give sufficient weight to defendant's evidence. However,

It is the function of the jury alone to weigh the evidence, determine the credibility of the witnesses and the probative force to be given their testimony, and determine what the evidence proves or fails to prove. In weighing the credibility of the testimony, the jury has the right to believe any part or none of it.

Blackmon v. Bumgardner, 135 N.C. App. 125, 135, 519 S.E.2d 335, 341 (1999) (quoting *Smith v. Beasley*, 298 N.C. 798, 801, 259 S.E.2d 907, 909 (1979)). Moreover, despite defendant's contention that plaintiff offered no evidence to support his calculation of damages, the transcript reveals that plaintiff explained his itemization in detail; it was the province of the jury to consider those figures and reach its determination on damages. We will not intrude upon the province of the jury absent some evidence of misconduct. And despite defendant's allegations of "passion and prejudice," defendant has offered no actual evidence of such. Defendant did not poll the jury, nor engage in any other fact-finding of record, to determine what motivated this verdict. Instead, defendant offers the mere allegation that the award was excessive as proof that the jury's impartiality was compromised.

Ultimately, defendant's burden on appeal is to demonstrate that the conduct of the trial court in denying her motion for a new trial "probably amounted to a substantial miscarriage of justice." We hold that she has failed to meet this burden, and that the trial court did not abuse its discretion in denying the motion.

IV. Remittitur

In her third argument, defendant contends that the trial court erred in ordering a remittitur on the jury's verdict in favor of plaintiff. We disagree.

A. Standard of Review

"A ruling on a motion for additur or remittitur is within the discretion of [the] trial judge." *Overton v. Purvis*, 162 N.C. App. 241, 245, 591 S.E.2d 18, 22 (2004) (quoting *Lazenby v. Godwin*, 40 N.C. App. 487, 496, 253 S.E.2d 489, 493 (1979)).

B. Analysis

Defendant contends that the trial court's award of remittitur is not supported by competent evidence. Once again, however, this is not entirely accurate.

Plaintiff testified that, had he completed the project as agreed, defendant would have owed him \$241,552.89. Plaintiff totaled the credits owed defendant, and determined that value to be \$132,994.07. In subtracting the credits plaintiff owed defendant from the total contract value, plaintiff testified – and basic subtraction confirms – that defendant owed him \$108,558.82. Plaintiff further testified that he owed defendant \$1,800.00. Subtracting this value from \$108,558.82, we get

\$106,758.82. These values, and by extension this total, are all supported by competent evidence.

Although the jury returned a verdict for plaintiff in the amount of \$180,540.00, plaintiff consented to a remittitur in his favor of \$106,699.97, which is roughly \$60 less than that value supported by the evidence, and almost \$74,000 less than the jury verdict. Although the \$60 discrepancy is not supported by the evidence, it is an error which inures to defendant's benefit. We have long held that "[a]n appellant may not complain of a trial court's ruling which is favorable to him." *Prevette v. Bullis*, 12 N.C. App. 552, 554, 183 S.E.2d 810, 811 (1971). We therefore hold that the trial court's award on remittitur, absent any error favorable to defendant, was supported by competent evidence, and that the trial court did not abuse its discretion in awarding remittitur.

NO ERROR.

Judges DILLON and TYSON concur.

Report per Rule 30(e).