TIMMY AND JILL RICHARD
v.
EDGAR ALLEMAN, JR., INDIVIDUALLY AND D/B/A INDEPENDENT HOME BUILDERS
NUMBER 2011 CA 1770
STATE OF LOUISIANA COURT OF APPEAL FIRST CIRCUIT
Dated: May 2, 2012

NOT DESIGNATED FOR PUBLICATION
Appealed from the23rd Judicial District Court

In and for the Parish of Assumption, Louisiana

Trial Court Number 27,667
Honorable Alvin Turner, Judge

Ricky Babin
Gonzales, LA

Attorney for
Plaintiff - Appellee
Timmy and Jill Richard

Frank J. Judycki
Morgan City, LA
and
Blaine M. Hebert
Marrero, LA

Attorneys for
Defendant - Appellant
Edgar Alleman, Jr., Individually
and d/b/a Independent Home Builders

BEFORE: PETTIGREW, McCLENDON AND WELCH, JJ.

WELCH, J

Defendant, Edgar Alleman, Jr., individually and d/b/a Independent Home Builders (Alleman), appeals a judgment finding he entered into a construction contract with plaintiffs, Timmy and Jill Richard, and finding the plaintiffs are entitled to damages pursuant to the Louisiana New Home Warranty Act. We affirm.

BACKGROUND

On May 19, 2003, the Richards filed this lawsuit against Mr. Alleman, seeking to recover damages for breach of contract and the warranties contained in the New Home

Warranty Act. In the petition, the Richards alleged that in early 2002, they contacted Mr. Alleman, a builder, about constructing their new home. The Richards claimed that they entered into a construction contract with Mr. Alleman to construct a new home for them pursuant to a "turn key" package. They claimed that from the outset of the construction, they experienced a multitude of problems with the home resulting from Mr. Alleman's having used substandard building materials or substandard methods in construction. They sought to recover, among other things, the costs of repairs necessary to bring their home to industry standards, nonpecuniary damages, and costs of filing the lawsuit, including attorney's fees. Mr. Alleman filed a reconventional demand in which he claimed that the Richards failed to pay him for labor, materials, and services provided in the construction of the home in the amount of $12,838.80.

The trial court ordered the bifurcation of the issues of liability and damages. On October 23, 2007, the court held a bench trial on the issue of whether Mr. Alleman and the Richards entered into a construction contract and whether the New Home Warranty Act applied. Thereafter, on April 3, 2008, the trial court signed a judgment decreeing that there was a building contract between the Richards and Mr. Alleman for the construction of the Richards' new home in the amount of $124,781.80. The court further decreed that the Richards had a claim under the New Home Warranty Act and that the claim of damages would be heard at a later date. Mr. Alleman did not take an appeal of this judgment.

On October 25, 2010, a bench trial was held on the issue of damages. On April 27, 2011, the trial court signed a judgment decreeing that the Richards did comply with the notice provisions of the New Home Warranty Act and were entitled to damages in the amount of $36,977.11. Mr. Alleman's motion for a judgment notwithstanding the verdict or a new trial was denied by the trial court in open court on May 23, 2011, and a judgment to that effect was signed on August 8, 2011. On June 27, 2011, the court signed a second judgment incorporating the April 27, 2011 rulings, and awarding costs and attorney's fees in the amount of $18,355.59. Mr. Alleman filed a motion for an appeal of the judgments signed on April 27, 2011 and June 27, 2011.

DISCUSSION

In his first assignment of error, Mr. Alleman contends that the trial court erred in determining that the New Home Warranty Act applied to the Richards' claims. In particular, he urges that the court erred in finding that he and the Richards entered into a building contract. However, this issue was decided by the trial court in the separate liability trial, following which the court signed a judgment on April 3, 2008, decreeing that the Richards and Mr. Alleman entered into a construction contract to which the provisions of the New Home Warranty Act applied. As the trial judge ordered that the issues of liability and damages be tried separately, the April 3, 2008 judgment was a final appealable judgment pursuant to La. C.C.P. art. 1915(A)(5). See **Andreasen v. City of Houma,** 515 So.2d 649, 650 (La. App. 1st Cir. 1987). Mr. Alleman did not appeal the judgment within the delays set forth in La. C.C.P. art. 2087. Because Mr. Alleman did not appeal the judgment decreeing that he and the Richards entered into a building

contract for the construction of a new home subject to the provisions of the New Home Warranty Act, this court is precluded from considering this assignment of error.

In his second assignment of error, Mr. Alleman contends that the trial court erred in finding that the Richards complied with the notice provisions of the New Home Warranty Act. The Act provides that, before instituting an action for breach of warranty, the owner must give the builder written notice, by registered or certified mail, within one year of the knowledge of the defect, advising the builder of all defects and giving the builder a reasonable opportunity to comply with the provisions of the Act. La. R.S. 9:3145. Mr. Alleman contends that although the Richards' attorney sent him a letter asking that he complete items listed on a "punch list," the Richards deprived him of the opportunity to comply with the correction provisions of the Act.

The record reflects that on July 10, 2002, the Richards' attorney sent Mr. Alleman a four-page "punch list" of items that needed to be repaired and completed before the Richards would pay the remainder owed on the contract by certified mail. Mr. Alleman testified that he went over to the Richard residence to fix a problem with a beam support. He testified that when he arrived at the home, Mr. Richard was on the telephone and Mrs. Richard told him to get off of the property and not to come back or she would have him arrested. Mr. Alleman testified that he never returned to the home thereafter and stated that he never received any correspondence from the Richards saying anything was wrong with the home. On rebuttal, Mrs. Richard denied ever telling Mr. Alleman to get off of her property. She did acknowledge that her husband informed her that he had an argument with Mr. Alleman. Mr. Richard was questioned at trial with respect to an argument he and Mr. Alleman had regarding Mr. Richard's requests for repairs on the home. He was asked whether he ever told Mr. Alleman to get off of his land and that Mr. Alleman was trespassing and he would have him arrested. Mr. Richard did not recall saying that he would have Mr. Alleman arrested, but stated that he could have told Mr. Alleman to stay off his property after Mr. Alleman told him he had completed the house and was not doing anymore. Mr. Richard stated that Mr. Alleman never came back to the home after they had this heated discussion, but could not recall exactly when the discussion occurred. He indicated that it could have occurred a few months before July 2001, when he and his wife moved into their home.

The trial court made a factual determination that the Richards complied with the notice provisions of the Act. In so doing, it is obvious from the court's written reasons for judgment that the court accepted the testimony of Mr. Richard that he made verbal demands on Mr. Alleman to repair the home, followed by sending a letter by certified mail detailing the items needing repair, but those demands went unanswered. Although the trial court did not make an explicit finding in its reasons for judgment, it is also apparent that the trial court simply chose not to believe Mr. Alleman's claim that he attempted to make repairs on the home and was denied the opportunity to do so by the Richards. On review, this court may only overturn the trial court's factual finding that the Richards complied with the notice provisions of the Act if we find a reasonable factual basis does not exist for the finding and the finding is manifestly erroneous. **Stobart v. State, Department of Transportation and Development,** 617 So.2d 880, 882 (La.

1993). We find no manifest error in the trial court's determination that the Richards complied with the notice provision of the New Home Warranty Act.

In his third assignment of error, Mr. Alleman contests the trial court's award of $7,178.51 for the replacement of ceramic tile flooring. Mr. Alleman challenges the award on three grounds: (1) he was not given notice of the alleged defect in the flooring because the notice provided by the Richards did not specifically mention cracked floor tiles and he was not given the opportunity to repair the damaged floor tiles; (2) the Richards hired the flooring subcontractors, not Mr. Alleman; and (3) the damage award is inconsistent with the trial court's rejection of the Richards' claim that the slab itself was defective.

On this issue, according to Mr. Richard, at some point after he sent Mr. Alleman the punch list, he was sitting in his recliner watching television when he heard a sound like a "rifle shot" through his house. Mr. Richard's dog ran to the front of the home and put its nose to the ground. Mr. Richard stated that he followed the dog and then observed an 8-12 foot crack in the ceramic tile. Mr. Richard believed that the slab underneath the tiles had cracked, causing the tiles to crack. Mr. Richard stated that he had suspected there was a problem with the slab because he did not observe internal footings when the slab was poured and because of all of the cracks he had noticed throughout the house. Mr. Richard hired an engineer to do a complete evaluation of the home to see if the building codes had been complied with and if the home was structurally sound. Mr. Richard also obtained an estimate from Structural Solutions for slab repair in the amount of $42,000.00.

L.J. St. Pierre, the owner of a flooring company that provided the original ceramic tile installation on the Richard home, prepared a quote for the replacement of the ceramic tile in 2007. He testified that he has been in the construction and ceramic tile business since the 1960s and has observed ceramic tile installed hundreds or thousands of times. Although Mr. St. Pierre did not observe the tile installation in the Richard home, he testified regarding the general installation process used by his company to install tile. According to Mr. St. Pierre, oftentimes after a concrete slab is poured, there are small "spider web" or topical cracks on the slab that do not go through the slab and that do not require that the tile installers seal the cracks before installing the tile. However, if there are deeper cracks in the slab and the installer does not use crack suppression techniques to seal the cracks, there could be cracks in the tile. Mr. St. Pierre stated that in such a situation, his installers would have installed some type of membrane to seal the cracks. The trial court then asked Mr. St. Pierre if that had been done when the tile was installed, what would cause the ceramic tile to crack. Mr. St. Pierre responded that after examining the crack in the tile at the Richard home, and hearing Mr. Richard's explanation of how that crack came about, he felt that the crack was not a normal fissure crack from the topical of the concrete but was a much deeper crack than topical.

Mike Stein, a civil engineer who performed the structural evaluation on the Richard home, testified as an expert in civil engineering with a specialty in structural engineering. Mr. Stein visited the home in May 2002. He observed some slab

deficiencies, including some settlement in the foundation. However, in a report he prepared in June 2002, he concluded that as of that time, the foundation slab was in good condition and that the presence and the foundation of the home was structurally acceptable in its current condition. His report further observed that the presence of or the lack of footings on the interior of the slab had not caused any settlement in this area, but that there was some settlement along the exterior footing on the left side of the home that was within acceptance criteria. The report noted that the settlement of a home can occur for a few years after the initial construction and that if additional foundation settlement occurred, foundation repairs may be warranted at that time.

Mr. Stein was asked about the cracking in the ceramic tile running across the kitchen in light of Mr. St. Pierre's testimony. Mr. Stein stated that the cracking, several years after he evaluated the home, indicated that the house was continuing to move. He noted that the continuing appearance of additional cracks and the lengthening of the cracks is an indication that there had been additional movement of the foundation. The court asked Mr. Stein what he attributed the movement of the foundation to. Mr. Stein answered that it was a combination of either the fill soil not being compacted properly in combination with Louisiana soils in combination with not having stiffening footings through the interior of the home based on statements made to him by Mr. Richard at the time he inspected the home. Mr. Stein was unable to determine what percentage of the home's movement he would attribute to not having proper footings.

After examining the record, we find no manifest error in the trial court's award of damages for cracked ceramic tiles. Although there is no evidence that the Richards gave Mr. Alleman an additional specific written notification of the tile damage, we find that such was not fatal to their recovery of this element of damages. Mr. Richard indicated that the cracking in the tiles occurred after he sent the four-page punch list to Mr. Alleman by certified mail. Mr. Alleman failed to perform any of the demanded repairs. Despite being on notice of the list of defects and that the home was in need of repair, Mr. Alleman refused to make any of the repairs. Under similar circumstances, a court held that where a builder told the homeowners he was not coming back to their home and ignored their verbal and written demand containing a list of 33 items needing repair, the fact that the written demand did not contain each and every defect ultimately proven at trial did not render the notice given insufficient for the purposes of the New Home Warranty Act. **Thorn v. Caskey,** 32,310 (La. App. 2nd Cir. 9/22/99), 745 So.2d 653, 659-60.

Moreover, we find that the record reasonably supports the trial court's award for ceramic tile replacement. The court noted that there was a conflict in the testimony regarding whether internal footings had been installed by Mr. Alleman prior to the pouring of the slab. Mr. Richard testified that there were no internal footings for the home; however, Mr. Alleman and his son testified there were internal footings placed in the home. Mr. Stein related the absence of internal footings, as told to him by Mr. Richard, to the cracking of the ceramic tile. In finding the Richards are entitled to an award for damage to the ceramic tile, the court must have accepted the testimony of Mr. Stein and in so doing, made a credibility determination. We find no manifest error therein.

Nor do we find the award to be inherently inconsistent with the trial court's denial of the Richards' claim that the foundation itself was structurally defective. The court made it clear that the Richards' expert, Mr. Stein, testified that at the time he inspected the home in May 2002, he would not have recommended any remediation to the slab/ foundation and that his inspection report specifically stated that the foundation of the home was structurally acceptable. Although the court noted that there may have been additional settling in the home since the inspection occurred, it found that the Richards did not provide the court with competent evidence to show that the home had structural issues requiring foundation repair. However, based on Mr. Stein's testimony, the court could have found that the continued settlement of the home after the inspection in part caused the cracking of the tiles based on Mr. Stein's testimony. Therefore, we find no inherent inconsistency in the court's ruling warranting a reversal thereof.

In his last assignment of error, Mr. Alleman contends that the trial court erred in not awarding him a credit for the retainage held by the Richards in awarding damages. Mr. Alleman filed a reconventional demand seeking to recover the sum of $12,838.80, which he claimed represented the retainage he claimed had been held by the Richards. While we note that the certified letter sent to Mr. Alleman by the Richards' attorney referred to a retainage, at trial, Mr. Alleman failed to prove the amount of the retainage. Because Mr. Alleman did not put forth affirmative proof at trial to establish this claim, the trial court correctly declined to award Mr. Alleman a credit against the amount of the damages.

CONCLUSION

For the foregoing reasons, the judgment appealed from is affirmed. All costs of this appeal are assessed to appellant, Edgar Alleman, Jr., individually and d/b/a Independent Home Builders.

AFFIRMED.

2011 CA 1770

TIMMY AND JILL RICHARD

v.

EDGAR ALLEMAN, JR., INDIVIDUALLY AND D/B/A INDEPENDENT HOME BUILDERS

McCLENDON, J., dissents in part and assigns reasons.

I dissent to the extent the majority concludes that there is no inherent inconsistency in the trial court's award of damages for replacement of ceramic tile flooring and its denial of the Richards' claim for damages arising from the alleged structurally defective foundation.