IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on brief June 24, 2004 Session

ALBERT WILSON v. PATRICK MALONE AND CHASE CREEK, LLC,

An Appeal from the Circuit Court for Maury County
No. 9344 Stella Hargrove, Judge

No. M2003-00040-COA-R3-CV - Filed October 26, 2004

This case involves a dispute between partners. A builder and a realtor were partners in building and selling homes in Davidson County, Tennessee. Disputes arose over the profits and losses arising from five of the properties. The builder sued the realtor for a share of profits on certain properties and for builder's fees on all five properties. The realtor countersued for profits on certain properties. The trial court found the builder's proffered written agreement to be fraudulent and refused to admit it into evidence. The trial court heard testimony and reviewed documents as to the five properties, found the realtor's evidence to be credible, and granted a judgment in favor of the realtor. The builder appeals. We affirm the decision of the trial court, finding that the weight of evidence preponderates in favor of the realtor.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court is Affirmed

HOLLY M. KIRBY, J., delivered the opinion of the Court, in which W. FRANK CRAWFORD, P.J., W.S., and ALAN HIGHERS, J., joined.

William C. Barnes, Jr., Columbia, for the appellant Albert Wilson.

T. Turner Snodgrass, Nashville, for the appellee Patrick Malone.

OPINION

Plaintiff/Appellant Albert Wilson ("Wilson") and Defendant/Appellee Patrick Malone ("Malone") entered into a business arrangement to develop and sell single family residential properties in Davidson County, Tennessee. Wilson was a licensed contractor and Malone was a licensed real estate agent. The parties built five houses together that are the subject of this dispute. Two of the five transactions resulted in a profit and three of the transactions resulted in a loss.

Wilson sued Malone for a 12% builder's fee on all five properties, in addition to a share of any profits.[1] Malone countersued, arguing that he and Wilson were equal partners in the development of the properties and agreed to share in the profits and losses equally. Malone sought his share of the profits from two of the five properties, as well as expenses he had incurred.

The bench trial was held on September 9, 2002. The primary testimony at trial came from the parties.[2] Both parties testified that they were partners in the construction of the five homes.

During the course of the testimony, Wilson sought to introduce into evidence a photocopy of a purported written agreement governing the business relationship between the parties. Wilson's attorney initially sought to introduce it into evidence through the testimony of Malone, who denied ever having seen it, and denied that the signature on the document was his. The purported agreement was not dated, and the signatures were neither witnessed nor notarized. With grammatical, spelling and other errors intact, the alleged agreement stated:

> This is A contract between Pat Malone and Albert Wilson .Mr. Wilson agree to let Pat Malone use his line of credit to buy lots In Chase Creek. In return Malone would pay the intrest and put Wilson on the deed.Mr. Malone also agree to pay Wilson Construction 12% on all houses he built in Chase Creek. The other agreements is for Malone not to sell lots to other people without Wilson Construction building the houses.He also agree to do construction loans in his name to build the houses If we do A speck house the loan will be put in Malone and Wilson onely.Malone also agree to pay all legal fee if needed between Wilson and Malone.
>
> s/ Patrick Malone
>
> s/ Albert Wilson

The signature lines containing the alleged signature of both parties were at a slant, out of alignment with the text of the purported agreement. The writing on both signatures appeared similar. Wilson testified that he typed the document on his computer, adding, "I'm not an attorney. I just done the best I could." He did not save the document on a hard drive or a floppy disk. Wilson asserted that Malone had the original of the alleged agreement, and that that was why Wilson could produce only a photocopy. Wilson testified that the slanted signature lines were done at the same time he typed the body of the purported agreement; Wilson said he "[j]ust punched a button." When asked why

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[1]Wilson also named Chase Creek LLC, a land development company partially owned by Malone, as a defendant. All claims against Chase Creek LLC were dismissed.

[2]Wilson proffered the testimony of a couple of subcontractors and a bank officer, regarding peripheral matters.

the signature lines were not in line with the body of the alleged agreement, Wilson replied, "Don't have any idea." The trial judge had the proffered agreement marked for identification only.

Both parties testified in detail about the homes, referred to as Lots 4, 8, 16, 18 and 23.

As to Lot 4, both parties agreed that they were partners on the project and would share any profits from the final sale of the property. Wilson originally paid $19,900 as a down payment for the lot and the parties obtained a construction loan for $307,000. After the construction was complete, the house remained unsold for approximately one year. As a result, the parties came to an agreement in which Wilson quitclaimed his interest in the property to Malone. In turn, Malone released Wilson from any further obligations relating to this property. Malone then obtained a personal loan and bought the house to use as his personal residence. Wilson claimed that, in addition to their written agreement, Malone orally agreed to reimburse him for the cost of the lot and pay him a profit on the home. Malone testified that the quitclaim deed covered all agreements and that no oral agreements existed.

On Lot 8, Wilson and the homeowners, named Sampson, became involved in a dispute with Wilson over funds from the construction loan. Malone mediated a settlement agreement between Wilson and the Sampsons in which the Sampsons paid Wilson $8,500 in profit for the property.

On Lot 16, Wilson claimed that Malone was not a party to the contract with the homeowners, named Huggins. However, Wilson also acknowledged that Malone signed the contract with Huggins. Both parties agreed that the transaction resulted in a profit. Malone testified that he never received a share of the profit and paid for warranty repair work to the home after the Huggins had closed the sale and taken possession.

On Lot 18, both parties agreed that this was a joint venture to build a house for a customer named Garner. Upon depletion of the construction loan proceeds, Malone paid approximately $150,000 from his personal funds to complete the home. Malone provided numerous invoices and receipts to prove his claim. Wilson claimed that he paid for and was not reimbursed for hardwood floors, insulation, and the HVAC system. Wilson testified that he could not produce evidence of these payments because the bank had lost his checks. The property sold after Wilson filed suit. The proceeds of the sale included a promissory note for $92,800, plus interest, from Garner and $23,533.28 paid by Garner directly to the court clerk at the closing.

On Lot 23, Wilson again claimed that Malone was not a partner on this project and that Malone only signed the contract with the lot owner as a witness. However, Wilson later testified that Malone controlled the money on this project and that Malone did contractor type work on the project. Again, Wilson claimed that he was not reimbursed for certain expenses yet could not provide any evidence for these claims. In particular, Wilson claimed that he had done $6,000 in bulldozer work on the property. Malone denied that Wilson had done any significant amount of bulldozer work on the lot. Malone testified to expenses that he personally paid on this transaction and provided proof for each one.

At the conclusion of the trial, the trial judge took the case under advisement. Both parties submitted proposed findings of fact and conclusions of law. On November 5, 2002, the trial court entered detailed findings of fact and conclusions of law.

At the outset, the trial judge discussed Exhibit 10, marked for identification only, the photocopied purported agreement between Malone and Wilson that Wilson sought to introduce into evidence. The trial judge stated:

> The Court finds that this instrument is a total fraud. Wilson testified that the document was prepared by him and printed out from his computer with slanted signature lines. He stated that he did not save a copy on his hard drive or on a floppy disk. He testified that both parties executed the document, with Malone keeping and never producing the original. The Court finds that this testimony is outrageous and incredible. Further, the Court finds that because he did not have an oral agreement or written contract that might offer him some protection or argument as to his 12% builder's fee, Wilson conjured up one. This fraudulent instrument greatly diminishes the credibility of Wilson.

Based on the evidence at trial, the trial judge held overall that Wilson and Malone were partners, that the partners agreed to share profits and losses on each property, and that Wilson was not entitled to a 12% builders fee.

As to lot 4, the trial court specified that it did not find credible Wilson's assertion that, after Wilson quitclaimed his interest to Malone, Malone orally agreed to pay him a profit on the home or reimburse him for the $19,900 down payment. The trial court found that Wilson was owed nothing on Lot 4.

On Lot 8, the trial court rejected Wilson's attempt to obtain 100% of the builder's fee, and found that he was bound by the terms of the settlement he and Malone entered into with the Sampsons. The trial court concluded that Malone was entitled to half of the profit on construction of the house.

On Lot 16, the trial court found that Malone had paid Huggins for repairs that Huggins contended were covered by the warranty in order to keep his neighbor, Huggins, happy, and not because of an agreement with Wilson. The trial judge found that Malone was not entitled to recover these expenses, but awarded Malone half of the profit on the construction of the house.

On Lot 18, the trial court entered detailed findings on numerous expenses claimed by each party. After crediting some expenses and disallowing others, the trial court awarded Malone the principal and interest on the promissory note from Garner, the monies paid by Garner to the clerk of the court at closing, and an additional award of approximately $5,000.

On Lot 23, the trial court noted that, after Wilson abandoned the project, Malone resolved the dispute by mediation. Crediting each party's documented expenses and disallowing Wilson's undocumented claim for $6,000 in bulldozer work, the trial court awarded Wilson approximately $4,500.

In total, the trial court awarded Malone a net judgment in the amount of $27,489.16, plus the $21,533.28 deposited on Lot 18 with the clerk of the court and the $92,800 in principal, plus interest from the promissory note executed on Lot 18. From this order, Wilson now appeals.

Our review of this case is governed by T.R.A.P. 13(d), which provides that appellate review of findings of fact by the trial court shall be *de novo* upon the record of the trial court, accompanied by a presumption of the correctness of the factual findings, unless the evidence preponderates otherwise. T.R.A.P. 13(d); ***Union Carbide Corp. v. Huddleston***, 854 S.W.2d 87, 91 (Tenn. 1993). When the resolution of the issues in a case depends upon the truthfulness of witnesses, the trial judge who has the opportunity to observe the witnesses in their manner and demeanor while testifying is in a far better position than this Court to decide those issues. ***McCaleb v. Saturn Corp.***, 910 S.W.2d 412, 415 (Tenn. 1995); ***Whitaker v. Whitaker***, 957 S.W.2d 834, 837 (Tenn. App. 1997).

On appeal, Wilson first argues that the trial court erred in not admitting into evidence Exhibit 10, which had been marked for identification only. Wilson notes that the two parties had entered into a similar type of agreement for prior transactions and asserts that it was not unreasonable that the parties would enter into this type of agreement for future transactions. Wilson contends that Exhibit 10 was admissible as a copy under Rule 1004 of the Tennessee Rules Evidence, since Wilson testified that Malone had taken the original agreement and would not produce it.[3]

The trial court is afforded wide discretion in the admission or rejection of evidence, and the trial court's action will be reversed on appeal only when there is a showing of an abuse of discretion. ***Otis v. Cambridge Mut. Fire Ins. Co.***, 850 S.W.2d 439, 442 (Tenn. 1992); ***Davis v. Hall***, 920 S.W.2d 213, 217 (Tenn. App. 1995). The trial court here found that Exhibit 10 was a "total fraud," and that Wilson's testimony was preposterous. With appropriate deference to the trial court's determinations of credibility, we find ample support in the record for the trial court's conclusion. We find no error in the trial court's ruling that the document was a fraud and its refusal to allow it into evidence.

Wilson also argues that the trial court erred in finding that the evidence preponderated in favor of an award of damages to Malone, and that the trial court improperly calculated the damages. Wilson essentially argues at length that he should have been awarded a builder's fee pursuant to the fabricated Exhibit 10, and that the trial court should have credited his testimony on the understandings between he and Malone, as well as the numerous undocumented expenses claimed

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[3]In a somewhat puzzling argument, Wilson asserts that the trial court erred in not allowing the document to be admitted into evidence, even if it would later disregard it on the basis that it was a forgery. This argument is without merit.

by Wilson. This argument is also without merit. Overall, the trial court credited Malone's testimony and discredited Wilson's testimony; as discussed above, there is ample support in the record for this credibility determination. In addition, the trial court made detailed findings on the expenses claimed by each party, splitting the profits between the parties and calculating expenses, profits and losses of each property separately. The trial court gave each party credit for expenses incurred to the extent that the party provided documentation. Malone entered numerous receipts into the record. Wilson entered few receipts and testified that he did not keep receipts on several of the properties. Based on the record on appeal, we find no error in the trial court's calculation of damages or in its conclusion that the evidence preponderated in favor of its award of damages to Malone.

The decision of the trial court is affirmed. Costs are taxed to Appellant Albert Wilson, for which execution may issue, if necessary.

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HOLLY M. KIRBY, JUDGE