IN THE COURT OF APPEALS OF TENNESSEE
AT JACKSON FEBRUARY 1999 SESSION

RELEASE COATINGS, INC.,	)	
	)	SHELBY CIRCUIT
Plaintiff/Appellant	)	
	)	Appeal No. 02A01-9805-CV-00143
v.	)	
	)	
M & M MECHANICAL CONTRACTORS, INC.,	)	
	)	
Defendant/Appellee	)	

FILED

March 05, 1999

Cecil Crowson, Jr.
Appellate Court Clerk

APPEAL FROM THE CIRCUIT COURT OF SHELBY COUNTY
AT MEMPHIS
THE HONORABLE JAMES F. SWEARENGEN, JUDGE

For the Appellant:
Hal Gerber
Gerber Law Office
80 Monroe Avenue, Suite 410
Memphis, TN 38103

For the Appellee:
Robert A. Cox
Glassman, Jeter, Edwards & Wade
26 North Second Street
Memphis, TN 38103

MODIFIED

WILLIAM H. INMAN, Senior Judge

CONCUR:

W. FRANK CRAWFORD, JUDGE

DAVID R. FARMER, JUDGE

The appellant is engaged in the cleaning and coating of commercial bakery pans, for which it uses kerosene, hexaline, glycol, bleach and silicone. Kerosene and glycol are stored in above-ground tanks, having a capacity of 6,000 and 2,000 gallons respectively. After these tanks were installed, the appellant contracted with the appellee to install the plumbing to pipe the liquids from the tanks for use in the building.

The contract was informal, and not reduced to writing. It is not disputed that two-inch galvanized piping would be used. The appellee started the job on December 2, 1991, and finished one week later. The kerosene tank was filled with 4,091 gallons of kerosene on December 17, 1991, of which 200 gallons was immediately used. On that day, an employee of the appellant discovered a major leak in a piping union which they reduced to a drip by quick action with a wrench. The appellee was immediately summoned, and their employee, using a larger wrench, stopped the leak.

Kerosene was spilled over an area of 1,200 to 2,000 square feet. Investigation revealed that the spillage was 1,203 gallons, which contaminated the ground.

Subsequent investigation revealed that the appellee had not run a pressure test of the line, and when pressured by the Fire Department to do so, the appellee discovered another six leaks in the system it had installed.

It is not disputed that the reasonable costs of the clean-up were $33,630.00, which the appellant seeks to recover in this action. The trial judge allowed a recovery of only $12,000.00, holding that the appellant had failed to mitigate its damages because "once they discovered the leak they didn't call M & M, but they attempted to tighten the union themselves and in doing so, they admit that they didn't stop it, that it continued to leak."

The plaintiff appeals as inadequate the award of the Court, and this is the issue presented for review.[1] Our review of the findings of fact made by the trial Court is *de novo* upon the record of the trial Court, accompanied by a presumption of the correctness of the finding, unless the preponderance of the evidence is otherwise. TENN. R. APP. P., RULE 13(d); *Campbell v. Florida Steel Corp.*, 919 S.W.2d 26 (Tenn. 1996).

The facts are not in material dispute. The appellee does not seriously question the issue of its negligence. Appellee argues that because the appellant (1) operated the system without first checking it for leaks, (2) did not immediately notify appellee of the leaks but attempted to remedy them instead, and (3) allowed the system to operate for two days before discovering the leak, the appellant thereby failed to mitigate its damages.

The appellant agrees that the law in Tennessee is well-settled that the victim of a breach of contract is bound to mitigate damages sustained, *Gilson v. Gillia,* 321 S.W.2d 855 (Tenn. App. 1958), but argues that it reacted to the discovery of the leakage as quickly as possible.

We find that the proof does not demonstrate that the appellant failed to mitigate its damages. The appellee cannot transfer the onus of testing the integrity of its workmanship to its contractees. *See, Action Ads., Inc. v. Wm. B. Tanner Co.*, 592 S.W.2d 572 (Tenn. App. 1989), and it cannot reasonably be said that the appellant should somehow be penalized for taking action to stop the leak upon its discovery.

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[1]The plaintiff charged the defendant with negligent installation of the pipes and with breach of contract. The trial court apparently treated these theories of recovery jointly, without using precise language. We will do likewise, and pretermit discussion of the appellee's argument that since the trial court did not rule on the issue of breach of contract, this appeal is premature.

We find the evidence preponderates against the judgment, which is modified to award the appellant the entire amount of the damages it sustained, which are $33,630.00, together with interest from the date of the filing of the complaint. Costs are assessed to the appellee.

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William H. Inman, Senior Judge

CONCUR:

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W. Frank Crawford, Judge

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David R. Farmer, Judge