GENE E. TIDWELL, dba GENE TIDWELL CONSTRUCTION COMPANY, Plaintiff/Appellee, v. MORRIS D. ALEXANDER and DEBRA ALEXANDER, Defendants/Appellants.	)	Appeal No. 01-A-01-9508-CV-00378 Williamson Circuit No. 93367

FILED

January 31, 1996

Cecil W. Crowson
Appellate Court Clerk

COURT OF APPEALS OF TENNESSEE

MIDDLE SECTION AT NASHVILLE

APPEAL FROM THE CIRCUIT COURT FOR WILLIAMSON COUNTY

AT FRANKLIN, TENNESSEE

THE HONORABLE HENRY DENMARK BELL, JUDGE

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AFFIRMED AND REMANDED

SAMUEL L. LEWIS, JUDGE

OPINION

Defendants, Dr. Morris D. Alexander and Debra Alexander, appeal from the trial court's finding that they breached their contract with plaintiff, Gene E. Tidwell dba Gene Tidwell Construction Company, and the court's resulting judgment for plaintiff in the sum of $15,980.00.

This case arose out of a written contract, entered into between the parties on 24 August 1992, wherein plaintiff agreed to construct a residence on defendants' property in rural Williamson County for $357,000.00. It was a "lock and key" contract.

In June 1993, plaintiff filed his complaint. He alleged that defendants breached the contract by interferring with plaintiff's performance. Specifically, he stated that the defendants interferred with deliveries of materials and supplies and with the work of plaintiff's subcontractors, refused to cooperate with plaintiff with respect to change orders, locked plaintiff and his subcontractors off the job site, and refused to allow plaintiff to continue performance under the terms of the contract. Plaintiff alleged that, as of the filing of the complaint, defendants had paid him $94,974.74 and that they owed him an additional payment of $15,980.00. Plaintiff also sought damages for "loss of overhead and profit."

Defendants' answer denied all the material allegations in the complaint. As affirmative defenses, defendants asserted that plaintiff unjustifiably abandoned the contract or that he waived the contract breaches and that plaintiff failed to provide notice and a reasonable opportunity to correct the "alleged" interferences.

Defendants also alleged that plaintiff breached the contract by performing much of the work in a negligent manner and by abandoning the project. They sought a judgment awarding them the amount of damages necessary to repair the alleged deficiencies in plaintiff's work and to complete the contract. Defendants alleged that an inspector with the Williamson County Codes Department inspected plaintiff's work and informed defendants that the Department would not perform any of the legally required inspections unless and until defendants employed a licensed, structural engineer to evaluate and devise a plan to remedy the numerous structural and other defects which the inspector observed.

In his answer to the counter-claim, plaintiff admitted that structural deficiencies/defects probably existed, but that they were the result of deficiencies in the architectural plan submitted by defendants. Also, plaintiff denied that he breached the contract and abandoned the project. He took the position that defendants were in total breach of the contract and that plaintiff had no legal duty to continue to perform under the contract.

The trial court found, in part, as follows:

> The court finds and concludes that Tidwell has carried the burden of proof as to his claim for $15,980.00 which had become due under the agreement of the parties before either party had attempted to terminate the contract. The acts of interference complained of cannot be found to constitute actionable breach of contract because of Tidwell's failure to give [the] Alexanders notice and reasonable opportunity to desist. An additional reason that Tidwell's claim of loss of overhead and profits must be dismissed is that the preponderance of the evidences does not establish that Tidwell would have made a profit if he had completed the project.
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> There is no question that there were many items of construction which were defective and in violation of building codes. Most of these were correctable without undue expense. Probably the most serious defect, the erection of an interior wall unsupported by girder, beam or piers was done in accordance with the architectural plans. Ron Jones, structural engineer and licensed contractor,

made the corrections of the structural defects under contract with [the] Alexanders. Mr. Jones testified that this was a complicated and complex house, that the Davis architectural plans were not sufficient to build the house, and that most contractors would not attempt to build this house with only the Davis architectural plans. Mr. Jones further testified to the effect that the architect should have advised [the] Alexanders that they should procure separate structural plans in the event their contractor was not an engineer. The preponderance of the evidence establishes that Tidwell's reliance upon and conformity to the Davis plans caused a substantial structural defect for which Tidwell is not responsible under the contract. The architect Davis was neither party nor witness in this litigation.

By January of 1993 the relationship of the parties had deteriorated to the extent that they agreed not to communicate with each other except in writing. This agreement was adhered to until March 16, 1993 when Dr. Alexander and Mr. Tidwell had a telephone conversation in which they agreed to a meeting the next day to see if they could resolve their communication problem. In the March 16 telephone conversation Mr. Tidwell stated that, if their communications problem could not be resolved, he would be glad to be paid what he had in the job and to be released. At the April 17 meeting there appears to have been little or no discussion of communication problems. Tidwell repeated the proposal made the day before and told [the] Alexanders that the amount he had in the job was $105,104.64. From the testimony of Doctor Alexander and Mr. Tidwell, the court finds that the parties both thought they had an agreement to rescind the contract. On March 19, 1995, one of Tidwell's employees went to the job site to pick up a ladder needed at another job site. He discovered the lock on the gate had been changed. Tidwell called [the] Alexanders who unlocked the gate for Tidwell's employee. On and after that occasion, [the] Alexanders did not offer to furnish a key to Tidwell and Tidwell did not request a key. Tidwell contends that the change of locks was a repudiation of the contract. [The] Alexanders contend that Tidwell by not returning to the site thereafter had abandoned the project. The court concludes that the evidence preponderates in favor of Tidwell on this issue. This conclusion is reached after a consideration of all the circumstances including the following sequence of events. By letter dated March 3 Tidwell requested payment of draw. By letter of March 4 [the] Alexanders refused to arrange draw until repairs and corrections [were] completed. Sunday, March 14, and Monday, March 15, contractor Gardner was on job site with Dr. Alexander to inspect and estimate cost of repairs and corrections. On Tuesday, March 16, contractor Frasch was on job site with Dr. Alexander for the same purpose and there was the telephone conversation between Dr. Alexander and Mr. Tidwell. On Wednesday, March 17, 1993 Tidwell made rescission offer as above set out. On March 18,

> 1993 county codes inspector was on job site with contractor Frasch and Dr. Alexander; Mrs. Alexander called Mr. Tidwell and requested copies of invoices to provide SECOR (Mr. Tidwell declined to provide same); and Mr. Tidwell wrote [a] letter to [the] Alexanders stating that rescission offer must be accepted not later than March 24. On Friday, March 19 Doctor Alexander called Tidwell and requested copies of invoices to provide SECOR [Bank] and Mr. Tidwell again insisted that this was not necessary.
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> On March 31 Tidwell's lawyer wrote [the] Alexanders a letter which is not in evidence as an exhibit but it is inferred by the court from the evidence that the letter stated in effect, that [the] Alexanders had committed actionable breach of contract. In response, [the] Alexanders' lawyer by letter of April 9 denied breach by [the] Alexander[s], asserted breach by Tidwell, and requested that Tidwell "return to the site and proceed to finish the project....however, his ongoing work must be reviewed and approved by a licensed engineer and/or architect". From a consideration of all the circumstances, the court finds and concludes that this request was made for the purpose of positioning [the] Alexanders for anticipated litigation and does not affect Tidwell's right to recover to the extent herein before set out. The decree will award judgment in favor of Tidwell for $15,980.00 with interest at 7% per anum from June 9, 1993. [The] Alexanders' counter-claim will be dismissed. Court costs will be assessed one-half to Tidwell and one-half to [the] Alexanders. Discretionary costs will not be awarded to either party.

It is the opinion of this court that the record supports the trial judge's findings and conclusions.

The parties presented a total of five issues for our review. Defendants framed their issue as follows: "Whether Mr. Tidwell's subjective 'assumption,' unsupported by other evidence, is sufficient to sustain the conclusion that the Alexanders repudiated their contract with him." Plaintiff presented the following four issues: 1) "Whether the evidence at trial supports the finding of the trial court that the Alexanders repudiated their contract with Mr. Tidwell"; 2) "Whether the Alexanders proved their alleged damages related to the cost of completing the construction of their home"; 3) "Whether the Alexanders breached the parties' contract by interfering with Mr. Tidwell's performance of the work"; and 4)

"Whether Mr. Tidwell should have been awarded lost profits of $31,806.78." We discuss defendants' and plaintiff's issues together.

"[A] well recognized rule [in this state is] that a cause of action arises when the acts and conduct of one party evince an intention no longer to be bound by the contract." ***Church of Christ Home for Aged, Inc. v. Nashville Trust Co.***, 184 Tenn. 629, 642, 202 S.W.2d 178, 183 (1947). In a later case, this court stated: "In order to serve as an anticipatory breach of contract or repudiation, the words and conduct of the contracting party must amount to a total and unqualified refusal to perform the contract. In the alternative, a party may breach a contract by committing a voluntary act which renders the party unable or apparently unable to perform the contract." ***Wright v. Wright,*** 832 S.W.2d 542, 545 (Tenn. App. 1991)(citations omitted).

It has been said that "full performance is excused where the builder is prevented by the owner from continuing the work, or is ousted by him from the premises on which it is to be done...." 17A C.J.S. *Contracts* § 468 (1963)(footnotes omitted). "The party who is prevented by the other party from performing, or whose performance is made impossible by him, may treat the contract as broken or breached, or as repudiated, or rescinded, and may recover whatever damages he may have sustained, as if he had performed...." ***Id.*** § 469 (footnotes omitted). In building and construction contracts, a contractor may regard the contract as breached and recover the damages sustained when the other party prevents him from completing the contract. ***See Brady v. Oliver***, 125 Tenn. 595, 621-22, 147 S.W. 1135, 1141 (1911). "Whether the words and/or actions of the contracting party have risen to the level of repudiation is normally a question of fact to be determined by the

[trier of fact]." ***Wright,*** 832 S.W.2d at 545.

As pointed out by plaintiff, this case presents an illustration of the old adage that "actions speak louder than words." Although defendants denied that they repudiated the contract with plaintiff, their conduct was another story. On 1 March 1993, plaintiff sent defendants a draw request which defendants never paid. Further, defendants wrote plaintiff a letter and informed him that they would not pay the draw request. On 15 March 1993, defendants had Carl Gardner come to the construction site to give an estimate on completing the construction of the home, and on 16 March, they called Bill Frasch, the contractor who ultimately finished the project, and had him come out to inspect the home and to give an estimate on its completion. On 18 March, defendants had Mark McMillan of the Williamson County Codes Department come to the construction site and conduct a "courtesy inspection" of the structure. On 19 March, Ron Jones, a structural engineer with GEC in Brentwood, Tennessee, inspected the home. Defendants did not inform plaintiff of these outside inspections, did not invite plaintiff to participate in them, and did not ask him to consult with any of the inspectors. In addition, they did not provide him with copies of any of the reports generated by the inspections. Clearly, defendants were not going to allow plaintiff to participate in completing the work on the structure.

On the Monday following the engineer's inspection, Dr. Alexander bought the wire used for the temporary electrical hookup from one of plaintiff's employees, Jim Potts. On the same date as the engineer's inspection, defendants changed the lock on the gate leading to the work site. They did not inform plaintiff of the new lock nor did they provide plaintiff or his workmen with a key. Dr. Alexander attributed the lock change to security concerns over

missing tools. When asked about the tools, however, the doctor could not state with any certainty when they were stolen or lost. Further, he admitted that he did not report the theft to either the police or to his insurance company.

When confronted with the fact that neither plaintiff nor his subcontractors could access the site without a key to the new lock, Dr. Alexander suggested that one could simply drive around the gate to get onto the property. This explanation, however, negates any purported security reasons for changing the lock and any reason Dr. Alexander would have had to go to the site to let Jim Potts, plaintiff's carpenter, into the gate. There is evidence, however, from defendants' expert, Bill Frasch, that the locked gate secured the property and kept a person from entering.

We are of the opinion that the trial court's decision was correct in every respect. The evidence does not preponderate against the finding of the trial court that defendants repudiated the contract of August 1992. We also agree with the judge's finding that defendants' request of 9 April 1993 for plaintiff to return to the job was a tactile device intended to favorably position them for litigation. To explain, Dr. Alexander testified that he thought plaintiff had made a mess of the job from the beginning and that he had no confidence in plaintiff. Defendants made no effort whatsoever to involve plaintiff in the corrective process involving the other contractors, engineers, and co-representatives. The April 1993 request that plaintiff return to the job was made approximately three weeks after Dr. Alexander changed the locks, and defendants did not seem to know the contents of the request. The evidence also preponderates in favor of the trial court's finding that defendants breached the contract and that plaintiff was entitled to recover the sum of $15,980.00. Moreover, the trial court correctly found that the preponderance of

the evidence did not support plaintiff's claim of loss of overhead and profits. There is no proof in the record that Mr. Tidwell would have made a profit if he had completed the project.

Therefore, it results that the judgment of the trial court is in all things affirmed, and the cause is remanded to the trial court for the enforcement of its judgment and any further necessary proceedings. Costs on appeal are taxed to defendants/appellants, Dr. Morris D. Alexander and Debra Alexander.

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SAMUEL L. LEWIS, JUDGE

CONCUR:

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HENRY F. TODD, P.J., M.S.

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BEN H. CANTRELL, JUDGE