

Cite as 2009 Ark. App. 599

ARKANSAS COURT OF APPEALS

DIVISION II

No. CA09-305

MISTY RENEE CARROLL
APPELLANT

V.

UV PROPERTIES, LLC and
VALWOOD HOMES, LLC
APPELLEES**Opinion Delivered** September 16, 2009APPEAL FROM THE SEBASTIAN
COUNTY CIRCUIT COURT,
[NO. CIV-2008-191-G]HONORABLE JAMES O. COX,
JUDGE

AFFIRMED

WAYMOND M. BROWN, Judge

Appellant Misty Renee Carroll appeals the December 3, 2008 order of the Sebastian County Circuit Court, which awarded attorney's fees plus costs to appellees UV Properties and Valwood Homes. Appellant argues that appellees were not the prevailing party pursuant to Ark. Code Ann. § 16-22-308 (1999). We affirm.

The parties entered into a Real Estate Contract on September 12, 2007. The contract was amended by several addenda. The last addendum was entered into on October 5, 2007. In that addendum, appellant authorized the release of all earnest money to appellees in the sum of \$133,140.61. The addendum also provided that appellant would pay the balance by October 19, 2007. All additional funds were to be paid directly to appellees. Appellant moved into the home without paying the balance of the purchase price.

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On or about July 23, 2008, appellees filed a second amended complaint. In that complaint, appellees alleged that appellant had committed a material breach of contract by failing to pay the remaining balance on the contract. Appellees sought to have the contract rescinded or in the alternative, they sought specific performance and “any and all damages” suffered due to appellant’s breach. Appellant filed her answer and counterclaim on August 11, 2008. Appellant denied breaching the contract. She sought specific performance of the contract. Appellant alleged that appellees had breached express warranties in that: the backyard was in need of a French Drain to prevent the yard from flooding; the bricks in the garage were falling apart; the garage floor had paint and spackling debris on it; two electrical outlets on top of the fireplace mantle needed to be installed; the Jacuzzi in the master bedroom did not work; the paint was peeling off four of the interior doors; two lights needed to be installed in the master bedroom; and the electrician failed to install two dimmer switches in the kitchen and two dimmer switches in the living room. Appellant sought rescission in the alternative.

The parties’ actions were heard on September 4, 2008. Judgment was filed on October 10, 2008. In that judgment, the court denied appellees’ action for rescission. The judgment stated that appellant’s action for specific performance was granted, providing that appellant paid the amount due and owing, plus interest, to appellees. The court found that appellees were entitled to consequential damages due to appellant’s breach; appellant was entitled to damages as a result of appellees’ breach of warranty. The court awarded appellees \$6,290.61, \$1,895.85 of which was the remaining balance due on the contract. The court

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granted appellant's warranty claims for the four interior doors, the brick step in the garage, and the cleaning of the garage floor to include the removal of paint and spackling. Appellees could either fix these problems or pay appellant \$659.36. The court denied appellant's other warranty claims.

Appellees petitioned the court for attorney's fees on October 10, 2008. Appellant filed a response to appellees' petition on October 15, 2008, denying that appellees were the prevailing party. Appellant filed a motion for attorney's fees the same day. The court wrote a letter to the parties on December 2, 2008, stating that appellees were the prevailing party. An order was entered on December 3, 2008, granting appellees attorney's fees in the amount of \$5,115, plus costs in the amount of \$190. Appellant timely filed a notice of appeal on January 2, 2009.

Appellant argues that the trial court erred by awarding appellees attorney's fees when she was the prevailing party. According to appellant, the trial court granted her "relief on the merits on every cause of action." Appellant contends that the "only area of success for Appellees is that the Court found that the Appellant was in breach of contract and awarded the Appellees damages totaling \$6,290.61." Appellant argues that the judgment appellees received was far less than the \$143,973.01 they sought. Appellant cites *CJ Bldg. Corp. v. TRAC-10*, 368 Ark. 654, 249 S.W.3d 793 (2007), to support her position that she is the winning party. According to appellant, since she was successful in reducing appellees' judgment, she is the prevailing party. Appellees contend that appellant's reliance on *Trac-10*

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is misplaced. Appellees argue that unlike the parties in *Trac-10*, there was no finite amount of money at issue that had to be distributed between the parties.

We review fee awards for an abuse of discretion. *Perry v. Baptist Health*, 368 Ark. 114, 243 S.W.3d 310 (2006). Arkansas law authorizes an award of attorney's fees to the prevailing party on a contract claim. See Ark. Code Ann. § 16-22-308 ("In any civil action to recover [for] ... breach of contract, ... the prevailing party may be allowed a reasonable attorney's fee to be assessed by the court and collected as costs.") Under Arkansas law, the prevailing party is determined by analyzing each cause of action and its subsequent outcome. *CJ Bldg. Corp. v. TRAC-10, supra*. In essence, we must look at the case as a whole to determine whether there was a prevailing party and who that party is. *Id.* In order to be a "prevailing party," one must prevail on the merits of the lawsuit, and we have construed the "prevailing party" in terms of the entire case and not in terms of particular issues or actions therein. *Id.* A party that successfully defends against a contract action may be a prevailing party under § 16-22-308. *Id.* Ultimately, under Arkansas law, the prevailing party is determined by who comes out "on top" at the end of the case. *Id.* (quoting *Marcum v. Wengert*, 344 Ark. 153, 40 S.W.3d 230 (2001)).

In this case, appellees asserted a breach-of-contract claim against appellant and appellees prevailed on that claim. As remedies, appellees sought either rescission of the contract or specific performance plus damages. Appellant sought specific performance in her counterclaim as well as damages for appellees' breach of express warranties. Appellant sought rescission as an alternative remedy. The court granted appellant specific performance under

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the condition that she pay the remaining balance due on the contract plus other costs.¹ The court granted appellant damages for appellees' breach of warranty concerning the garage steps, the garage floor, and the four interior doors. The court denied the other breach of warranty claims. The court awarded appellees damages totaling \$6,290.61; appellant's damages totaled \$659.36.

Looking at the case as a whole, appellees came out "on top" at the end of the case. The court found in favor of appellees in their breach-of-contract action. And the court essentially gave appellees their alternate remedy (specific performance plus damages) despite stating that it was granting appellant's request for specific performance. The trial court correctly determined that appellees were the prevailing party even though appellant received some of the damages she sought. Accordingly, the trial court did not abuse its discretion by awarding appellees attorney's fees as the prevailing party.

Affirmed.

PITTMAN and KINARD, JJ., agree.

¹Appellees contend that appellant's claim to have prevailed on her cause of action for specific performance is logically impossible. However, appellees did not appeal from that judgment granting appellant specific performance and cannot now argue it on appeal. We do not consider arguments raised for the first time on appeal. See *Jones v. Flowers*, 373 Ark. 213, 283 S.W.3d 551 (2008).