WILSON v. KAPETAN

25 Conn. App. 529 (1991) | Cited 4 times | Connecticut Appellate Court | August 20, 1991

The defendant, Kapetan, Inc., appeals from thejudgment of the trial court awarding damages to theplaintiffs[1] for breach of a construction contract.Kapetan claims that the trial court was incorrect (1)in finding that it had wrongfully terminated thecontract between it and Wilson, (2) in holding thatWilson had substantially performed the subject contractdespite his alleged refusal to follow Kapetan's instructionsand his failure to perform the work in a timely manner,and (3) in awarding damages to Wilson in the amount of$42,838.29. In a cross appeal, Wilson asserts that thedecision of the trial court was improper in its failure(1) to find that Kapetan had wrongfully rescinded the

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contract, (2) to award damages for that rescission inquantum meruit based on the reasonable value of theservices rendered, and (3) to award prejudgment interestto Wilson. We conclude that the trial court's finding thatKapetan breached the contract is not clearly erroneous, andthat its assessment of damages is legally and logicallycorrect. We affirm the judgment of the trial court.

In its memorandum of decision, the trial court foundthe following facts. On June 5, 1989, Kapetan, a generalcontractor, engaged Wilson as a subcontractor forall site work, including drainage, septic and pavingwork required for the construction of the Valley PresbyterianChurch in Brookfield. Under the terms of the writtensubcontract, Wilson was to furnish all labor and materialsto complete the site work for which he was to be paid$93,188. In addition to the original subcontract there wasa change order in the amount of $3616, and additional workperformed in the amount of $4922.50, bringing the totalcontract price to $101,726.50. Although the contract outlinedthe progression that the various phases of the work shouldtake, it contained no completion date and no scheduledictating when each phase was to begin or end.

Wilson began work in May, 1987, and substantiallycompleted the contract by the middle of December, 1987,when he was discharged by Kapetan before completing thefinal paving phase of the contract. While Wilson wasstill on the job, his progress was impeded by Kapetan'simperfect direction, its failure to coordinatesubcontractors, and its inability to provide modifieddrainage plans and accurate benchmarks in a timelymanner. Due to the resulting delay, Wilson could notbegin the paving phase of the project before December,1987. The wet soil conditions and the inclementclimatic factors combined to prevent Wilson from paving.

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Because Wilson was required by the terms of thesubcontract to warranty the paving for one year, he wasunwilling to perform this phase of the contract inDecember, despite Kapetan's insistence that he do so.

When Wilson refused to proceed with the paving,Kapetan terminated their contract and engaged anotherexcavation contractor to complete the work. Inaddition, Kapetan paid for certain materials onWilson's behalf. Wilson brought the underlying actionagainst Kapetan for breach of contract and Kapetanfiled a counterclaim seeking recompense for additionalexpenses incurred as a result of Wilson's failure toperform his obligations under the contract.

The court found that Kapetan had wrongfully terminatedthe contract and, on the counterclaim, that Wilson was notin breach. Accordingly, the court awarded Wilson $42,838.29,a sum that represents the total contract price includingadditions and change orders minus a credit to Kapetan of$58,888.21 representing the amount Kapetan paid for materialon Wilson's behalf and the scheduled value of the pavingphase of the contract not completed by Wilson.

I

On appeal, our review of Kapetan's first two claimsare limited to a determination of whether the trialcourt's conclusions that Kapetan breached the constructioncontract with Wilson and that Wilson had substantiallyperformed the contract are clearly erroneous inlight of the evidence and pleadings contained in thewhole record. Practice Book 4061; Pandolphe's AutoParts, Inc. v. Manchester, 181 Conn. 217, 221-23,435 A.2d 24 (1980); Metropolitan District v. HousingAuthority, 12 Conn. App. 499, 510, 531 A.2d 194, cert.denied, 205 Conn. 814, 533 A.2d 568 (1987).

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"Whether a building contract has been substantiallyperformed is ordinarily a question of fact for thetrier to determine. . . . The resolution of conflictingfactual claims falls within the province of the trialcourt. . . . The trial court's findings are binding uponthis court unless they are clearly erroneous in lightof the evidence and the pleadings in the record as awhole. . . .' We cannot retry the facts or pass on thecredibility of the witness." (Citations omitted.)Nor'easter Group, Inc. v. Colossale Concrete, Inc.,207 Conn. 468, 472-73, 542 A.2d 692 (1988).

Upon reviewing the entire record, we find no reasonto disturb the trial court's findings that Kapetanbreached its contract with Wilson and that Wilson hadsubstantially performed. The trial court's factualfindings and ultimate conclusions are supported by therecord and are not clearly erroneous.

II

Kapetan next asserts that under the formula setforth by our Supreme Court in Young v. Shetucket Coal &Wood Co., 97 Conn. 92, 94-95, 115 A. 672 (1921), theproper measure of damages when the contractor has beenprevented from completing the contract work is the costincurred in performing the subcontract work plus thelost profit on the subcontract. Kapetan maintains thatbecause Wilson failed to carry its burden of proving attrial its costs or its lost profits, it is entitled onlyto nominal damages for the work performed. We disagree.

In general, when a party is awarded damages based ona breach of contract, he is entitled to compensationthat will place him in the same position he would haveoccupied had the contract been fully performed. Fuessenichv. Dinardo, 195 Conn. 144, 153, 487 A.2d 514(1985); Bertozzi v. McCarthy, 164 Conn. 463, 468,

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323 A.2d 553 (1973). It is well settled that this measureof damages requires a factual inquiry to determine theloss the plaintiff has sustained in the form of (1)expenditures incurred toward performance of thecontract, and (2) the lost profit that would have beenrealized had the entire contract been performed. Youngv. Shetucket Coal & Wood Co., supra; Tompkins v.Bridgeport, 94 Conn. 659, 682, 110 A. 183 (1920).

In the case before us, there was ample evidenceadduced at trial to provide the finder of fact with abasis for awarding the damages that it did award. Inits memorandum of decision, the court relied on thecontract and the change order that was offered as theplaintiffs exhibits F and I to determine a basecontract price of $96,804. To that price, the courtadded the additional work reflected by the plaintiff'sexhibit R of $4922.50 to determine the total grossprice of the contract of $101,726.50. From that grossfigure the trial court deducted credits in favor of thedefendant amounting to $58,888.21, which it was ableto determine from the plaintiff's exhibit P. The$58,881.21 credit figure was arrived at by deducting$28,800 of prior payments by Kapetan, $2921 in credits forwork done by others and $27,188 for the paving work not done.

There was evidence before the court that the valueof the work, in costs and in profits, was divided intofour separate segments, and the cost and allocation ofprofit for the paving segment was $27,188. In itsbrief, Wilson admits that it failed to claim lostprofits on the uncompleted paving segment at trial. Thetrial court properly awarded no damages for lostprofits on that segment of the contract. The trialcourt had substantial evidence from which it made areasonable determination of damages.

III

Wilson's claims on cross appeal are equally unpersuasive.The revised complaint set forth two alternative

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theories on which the court could assign liabilityto Kapetan for its breach of contract. The court properlychose one of those theories and awarded damages toWilson based on what Wilson asked in the ad damnumclause of its complaint.

Although a plaintiff is entitled to allege separatetheories of liability in the alternative, he is notentitled to recover twice for the same elements ofdamage. Jonap v. Silver, 1 Conn. App. 550, 561,474 A.2d 800 (1984). Wilson tried the case on a theory ofbreach of contract and that is the basis on which thecourt found for Wilson. "Where . . . a case is triedupon a certain theory, [a reviewing court] will dispose ofthe case on the theory on which it was tried and on whichthe trial court decided it." Crozier v. Zaboori,14 Conn. App. 457, 463, 541 A.2d 531 (1988). "A plaintiff cannottry his case on one theory and appeal on another." McNamarav. New Britain, 137 Conn. 616, 618, 79 A.2d 819 (1951).

Wilson's assertion that the court incorrectly failedto award prejudgment interest under General Statutes37-3a is also without merit. "The allowance of interestas an element of damages is primarily an equitabledetermination and a matter within the discretion of thetrial court." Nor'easter Group, Inc. v. Colossale Concrete,Inc., supra, 482; see also Metcalfe v. Talarski,213 Conn. 145, 160, 567 A.2d 1148 (1989); West HavenSound Development Corporation v. West Haven, 207 Conn. 308,321, 541 A.2d 858 (1988).

Our careful review of the record discloses no abuseof discretion by the trial court in refusing to awardprejudgment interest.

The judgment is affirmed.

In this opinion the other judges concurred.

1. The plaintiffs in this case are Harry and MargaretWilson, who were doing business as Harry Wilson Excavating.We will refer in this opinion to the plaintiffs as Wilson.Page 536