2012 IL App (5th) 110172-U

NO. 5-11-0172

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

DIANE SILL, Plaintiff and Counterdefendant-Appellee, v. DONNIE HANCOCK and BRIAN HANCOCK, Each Individually and d/b/a HANCOCK CONSTRUCTION, Defendants and Counterplaintiffs-Appellants.	)	Appeal from the Circuit Court of Marion County. No. 09-LM-93 Honorable Michael D. McHaney, Judge, presiding.

PRESIDING JUSTICE DONOVAN delivered the judgment of the court.
Justices Chapman and Spomer concurred in the judgment.

ORDER

¶ 1 *Held*: Given the substantial evidence of unworkmanlike performance, trial court correctly awarded plaintiff costs to repair and/or finish construction of plaintiff's new home and properly denied defendants' counterclaim under the parties' original contract.

¶ 2 Defendants and counterplaintiffs, Donnie and Brian Hancock, individually and doing business as Hancock Construction (defendants), appeal the judgment, entered after a bench trial in the circuit court of Marion County, in favor of plaintiff and counterdefendant, Diane Sill. We affirm.

¶ 3 The controversy before us arises out of plaintiff's desire to build a new home on property she owned near Odin, Illinois. Her goal was to move in by Christmas of 2008. In preparation to do so, she sold her current home, put her belongings in storage, and moved in with a friend while plans proceeded. Plaintiff decided to act as her own general contractor

and contracted verbally with defendants in June of 2008 to provide labor to frame her house and rough-in wiring. Defendants are carpenters and are engaged in the construction of new homes and remodeling of older homes. According to the agreement, for $24,200, for labor only, defendants were to construct and frame the house, install siding, complete the roofing, build the porches, and put up interior stud walls. In addition, defendants were to do the rough-in wiring for an additional $1,600. Plaintiff understood rough-in to mean all wiring would be done to the point where the finish contractor would just have to hook up outlets and switches. In mid-August, defendants submitted a written proposal describing the labor they were to perform and at what price. Plaintiff accepted the offer after notifying defendants that the price for the rough-in wiring had been added in twice.

¶ 4 As with many construction projects, things did not proceed as smoothly as planned. Plaintiff did not arrive at a final floor plan until July. She did not use the services of an architect but did have someone at RP Lumber develop the plan and order materials for her. Plaintiff asked defendants to get a price for putting in a basement in order to get a contractor's discount. After several revisions, a basement plan and bid price were confirmed by all parties. The basement contractor had an opening to start the basement on August 1, but no one reserved the spot on the concrete list. The basement was not poured until September 22. Construction of the new home finally began on October 6, 2008. Plaintiff was still hopeful that she would be able to move in by Christmas.

¶ 5 During the construction, several alterations and/or changes needed to be made to the floor plans. Some were necessary to accommodate certain doorways or stair landings; others were to add items. Plaintiff claimed the only change she made to the final bid floor plan was to enlarge one window opening. As work progressed, plaintiff made two payments to defendants. She refused to pay the final invoice of $8,700, however, because numerous issues had arisen by that time. Plaintiff submitted a punch list of concerns she had with the

services performed or the condition of the premises as built. For instance, according to plaintiff, the siding corners were buckled or waved, and on the sides of the home, there were large gaps between individual siding pieces where underlying silver backing was visible. Other concerns included such items as insulation in the attic which had gotten wet because walls had not been properly covered and roof vents that were not properly installed or were bent or missing. Much of the wiring was not finished, and, in fact, many of the wires in the attic were not even installed in junction boxes or taped off. Defendants refused to complete the punch list, and plaintiff heard nothing more from defendants until she filed suit against them. As a result of the problems and having to have work redone, plaintiff was not able to move into her home until April of 2009. According to plaintiff, the cost to remedy what she believed to be deficiencies or defects totaled $20,406.55. The court awarded plaintiff $24,406.25, after specifically finding that the evidence "overwhelmingly established that [defendants'] performance amounted to less than substantial performance in a workmanlike manner. This evidence was not even close."

¶ 6 On appeal, defendants claim that the court erred in entering judgment in favor of plaintiff and that the award of damages is against the manifest weight of the evidence. They further contend the court's decision to enter judgment in favor of plaintiff on their counterclaim, thereby denying them damages, is also against the manifest weight of the evidence. We disagree. There is substantial evidence in the record that defendants did not complete the work on plaintiff's house and that much of the work performed was not done in a workmanlike fashion. Plaintiff's finish carpenter pointed out several incomplete items and submitted a bid of $1,232 to finish them and an additional bid of $4,344 to correct numerous deficiencies. He further testified that the siding job was not workmanlike, and that with the type of siding plaintiff chose, the boards could not be replaced. The only way to remedy the problem was to tear off the old siding and replace it with new siding. The cost

of the siding alone was $8,023, not including labor. The labor costs to reside the home were an additional $4,000. Even defendants' own witness agreed on cross-examination that a reasonable homeowner would not find the siding job acceptable and that it was extremely difficult to replace individual boards for that type of siding. The electrical work was not code-compliant and cost an additional $2,697 to redo the rough-in. The cost to repair the concrete corner porch which did not match the roof line amounted to $3,100 for a wooden deck to cover it, a less expensive alternative than replacing the improperly sized porch. None of the findings of the court lacked evidentiary support. Given that a trial court's judgment will not be reversed on appeal unless that judgment is against the manifest weight of the evidence (see *Dargis v. Paradise Park, Inc*., 354 Ill. App. 3d 171, 177, 819 N.E.2d 1220, 1227 (2004)), we see no reason to disturb the court's determination in this instance. Again, the court found the credibility of plaintiff and her witnesses to be overwhelmingly greater than that of defendants and their witnesses. The trial court is in a superior position to observe the conduct of the witnesses while testifying to determine their credibility. *Eychaner v. Gross*, 202 Ill. 2d 228, 270-71, 779 N.E.2d 1115, 1141 (2002). Accordingly, we are not to reweigh the evidence or substitute our judgment for that of the trier of fact under such circumstances. *Eychaner*, 202 Ill. 2d at 251-52, 779 N.E.2d at 1130.

¶ 7 As for the denial of defendants' counterclaim, we again find no error. Defendants sought $12,545 for the remaining balance due under the original contract and an additional $2,245 for changes requested by plaintiff. The only change initiated by plaintiff, however, was to enlarge a bathroom window before framing. To recover on their counterclaim, defendants had to prove by clear and convincing evidence that any additional work performed was outside the scope of the original contract and was ordered by plaintiff. They must also establish that such extra work was not occasioned by any conduct on their part. See *Cencula v. Keller*, 180 Ill. App. 3d 645, 652, 536 N.E.2d 93, 97 (1989). This defendants

could not do. We further note that a contractor whose performance amounts to less than substantial performance in a workmanlike manner is not entitled to the contract price. *Folk v. Central National Bank & Trust Co. of Rockford*, 210 Ill. App. 3d 43, 47, 567 N.E.2d 1, 3 (1990).

¶ 8 For the foregoing reasons, we affirm the judgment of the circuit court of Marion County.

¶ 9 Affirmed.