2015 IL App (3d) 130849-U

Order filed March 4, 2015

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2015

JACLYN S. PATTEN and DANIEL O. PATTEN, Plaintiffs-Appellants, v. DEBORAH C. SKILES and MARK D. SKILES, Defendants-Appellees, and CHAD HOVEY, HENDERSON-WEIR AGENCY, INC., WILLIAM J. EMBRY, EASTERN TAZEWELL DEVELOPMENT CO. Defendants.	)	Appeal from the Circuit Court of the 10th Judicial Circuit Tazewell County, Illinois Appeal No. 3-13-0849 Circuit Nos. 10-L-166 11-L-24 Honorable Paul Gilfillan Judge, Presiding

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JUSTICE O'BRIEN delivered the judgment of the court.
Presiding Justice McDade concurred in the judgment.
Justice Wright concurred in part and dissented in part.

ORDER

¶ 1 *Held*: Trial court erred in finding plaintiffs failed to mitigate their damages when Defendants did not participate in trial. The trial court also improperly failed to award damages for future flooding prevention and for mold remediation.

¶ 2 Plaintiffs Jaclyn Patten and Daniel Patten brought this multi-count action against defendants Deborah Skiles and Mark Skiles, and other defendants not part of this appeal, seeking money damages and rescission based on flooding in the yard and basement of the house the Pattens bought from the Skiles. The trial court entered a default judgment as to liability against the Skiles, and following a bench trial, granted the Pattens damages in the amount of $86,510. The trial court denied the Pattens' request for rescission. They appealed. We reverse the trial court's damages determinations and award the Pattens additional damages but affirm the trial court in all other issues.

¶ 3 FACTS

¶ 4 Plaintiffs Jaclyn Patten and Daniel Patten bought a house from defendants Deborah Skiles and Mark Skiles in October 2008. The Skiles had bought the newly-built home in 2005 from defendant Paul O'Neal, whose company, defendant Paul O'Neal Construction, Inc., built the house and graded the lot. O'Neal bought the property from defendant Eastern Tazewell Development Co., which obtained the site from defendants William Embry and Diana Embry. The land had been cultivated farmland prior to the subdivision planned by the Embrys, with a natural drainage course and flood route running through the Patten property.

¶ 5 After buying the house, the Skiles added a privacy fence, a deck on the house's east side, a swimming pool on the east side of the yard, a storage shed in the northeast corner of the lot, and a doghouse. They also added a French drain in the northeast corner of the property, which connected to an underground pipe running along the north edge of the property to Park Trail Road. The Skiles submitted insurance claims for basement flooding in March 2007 and June 2008.

¶ 6 In the summer of 2008, the Skiles listed the property for sale. The Pattens visited the property on three occasions and did not see any evidence of flooding on the property or in the

residence. The Skiles did not inform them of any flooding problems during their visits. The Skiles filled out a residential real property disclosure report in August 2008. They checked "yes" to the statement: "I am aware of flooding or recurring leakage problems in crawlspace or basement." In the explanation portion of the report, the Skiles stated: "Had water in the basement due to grading issue in 2005. Had it regraded and never have had a problem with it since."

¶ 7 On September 4, 2008, the Pattens and Skiles entered into a real estate contract, which provided that the premises were sold in an "as-in condition." The Pattens initialed that they had received a copy of the disclosure report. The parties closed on October 3, 2008. After they moved in, the Pattens added a cement slab under the doghouse and another one by the shed. In March 2009, the basement flooded. The Pattens contacted their insurance company and called Servicemaster to clean up the flood. The insurance company issued a check in the amount of $6,187 to the Pattens and paid a total claim of $9,003 for the March 2009 flood. After the flood, Jaclyn contacted Embry who had a ditch dug immediately east of the Pattens' property to improve the drainage.

¶ 8 The basement flooded again on June 23, 2010. Servicemaster cleaned it up and the insurance company paid a total claim of $11,241. In August 2010, the Pattens' insurance company did not renew their coverage and the Pattens were unable to obtain flood insurance.

¶ 9 The yard flooded in June 2010 but water did not enter the basement. The property and basement flooded again on May 13, 2011; June 27, 2011; April 10-11, 2013; April 17-18, 2013; and May 31, 2013. In December 2010, the Pattens filed the instant action against Deborah Skiles, Mark Skiles, Chad Hovey, Henderson-Weir Agency, Inc., William Embry and Eastern Tazewell Development Co. (No. 10-L-166). Defendants Embry and Eastern Tazewell Development Co. were later dismissed with prejudice. In February 2011, the Pattens filed an

action against defendant O'Neal and O'Neal Construction, alleging an implied warranty of habitability (No. 11-L-24). The cases were consolidated and the Pattens filed an amended complaint in April 2011. The complaint included the following counts against the Skiles: common law fraud (counts I and II); violations of the Consumer Fraud and Deceptive Business Practices Act (815 ILCS 505/1 *et seq.* (West 2010)) (counts III, IV); breached of implied warranty of habitability (counts V, VI); and rescission (counts VII, VIII).

¶ 10 The Skiles moved to dismiss the complaint, and in June 2011, the trial court dismissed the consumer fraud counts (counts III, IV) with prejudice and the warranty counts (counts V, VI) with leave to refile. The trial court denied the motion to dismiss regarding the other counts against the Skiles. The Skiles answered and asserted affirmative defenses. As to the fraud counts, the Skiles argued they were not builders, and argued the rescission counts (VII, VIII) were untimely. In August 2011, the Pattens amended the warranty counts (V, VI), asserting that the Skiles changed the drainage path when they put in the pool. In December 2011, the Pattens filed a first amended complaint, which added counts asserting that mold resulted from the flooding and its effects additionally damaged them. Counts XV, XVI claimed personal injury, disability, pain and suffering, loss of normal life, mental distress, and medical expenses. Counts XXI, XXII claimed loss of consortium.

¶ 11 The Skiles filed affirmative defenses to the new counts, asserting that the Pattens failed to mitigate the mold. Their counsel withdrew in September 2012, arguing that the Skiles would not respond to him. The Pattens filed a rule to show cause in December 2012 on the basis of the Skiles' failure to respond to discovery requests. In January 2013, the trial court entered a default judgment as to liability against the Skiles. The cause proceeded to a bench trial against the other defendants and on damages.

¶ 12 Witnesses for the Pattens included John Muhs, James Barnes, Michael McDermont,

Owen Arvin, Timothy Beccue, Michael Schopp, and the Pattens. Jaclyn and Daniel testified that the basement would flood after water built up in the northeast corner of the property and then flowed to the east wall of the house, accumulating in the northernmost egress window. A second stream flowed south from the northeast corner, east of the swimming pool, and drained to the southwest toward the street. From time to time, the water from the south stream would back up to the foundation on the southeast corner of the house. The majority of the water entered the basement through the northernmost window well, with some water entering through the other window wells and through the foundation. Jaclyn and Daniel both testified that after the March 2009 and June 2010, their insurance company took care of the clean-up, hiring water treatment professionals. After their flood coverage ended, they did the post-flood cleaning themselves.

¶ 13 Owen Arvin, an appraiser, testified that the value of the house, considering the flood problems and including the cost of flood and mold remediation, was $74,000. John Muhs, a civil engineer, testified that the existing drainage was inadequate and proposed two solutions. The first solution involved adding a pipe across the property and connecting to the storm sewer on the street at a cost of $45,500. After the village objected to the plan, Muhs offered a second proposal, which piped the water across the lot to the existing ditch on the east end of the property and directed south. The second option was not cost-effective and he estimated the project would cost $86,000. Exhibits that Muhs used in his testimony included exhibit 12, which was a pre-development flood route map he created based on topographical elevations; and exhibit 15, which detailed the two drainage solution options with associated costs for each project. Michael Schopp, the public works director for the Village of Mackinaw, where the house is located, testified that the village would approve a plan diverting the water into the ditch but not into the existing sewer lines at the street.

¶ 14 James Barnes and Michael McDermont testified regarding the mold problem. They both

inspected the property and found mold. Barnes stated that the mold contamination resulted from the flooding and that it was a health hazard. McDermont described the process to remediate the mold and estimated it would cost $32,500.

¶ 15 Thomas Stoltz, a civil engineer who testified for defendants Hovey and Henderson-Weir, proposed a solution to install culverts to divert the water to the existing ditch. He also recommended regrading the ditch and lot, building up dirt against the foundation and blocking the window well. He did not offer an estimated cost for his proposals. Witnesses for the other defendants also included Chad Hovey, William Embry, and Timothy Weir.

¶ 16 In August 2013, the trial court entered a judgment order finding the other defendants not liable and awarding the Pattens $70,333.88 in damages against the Skiles. The award included $15,000 in punitive damages. The Pattens filed a postjudgment motion, seeking costs of $1,176, a ruling on its rescission claim, attorney fees added into the punitive damages award, and damages for the diminution in value of the house, for a total of $267,550. The trial court granted the Pattens' request for costs in the amount of $1,176 and added $15,000 to the punitive damages award. It affirmed the rest of its August 2013 order, adding that it relied, in part, on its finding that the Pattens failed to mitigate following the second flood in June 2010. The Pattens timely appealed.

¶ 17 ANALYSIS

¶ 18 On appeal we consider whether the trial court erred in finding that the Pattens failed to mitigate their damages and whether the damages award was inadequate.

¶ 19 We begin with the Pattens' challenge to the trial court's mitigation finding. They argue that the trial court erred when it found that they failed to mitigate their damages and assert that the Skiles did not prove their failure to mitigate. According to the Pattens, there is no dispute about the cause of the flooding or their efforts to remediate its effects. They submit the trial

court's finding is contrary to the evidence, and further assert that the earlier floods set up the conditions that caused the mold to develop later and injure them.

¶ 20 An injured party has a duty to mitigate damages. *Montefusco v. Cecon Construction Co.*, 74 Ill. App. 3d 319, 324 (1979). The duty requires the "injured party to ' "exercise reasonable diligence and ordinary care in attempting to minimize his damages after injury has been inflicted." ' " *Amalgamated Bank of Chicago v. Kalmus & Associates, Inc.*, 318 Ill. App. 3d 648, 658-59 (2000) (quoting *Tsoukas v. Lapid*, 315 Ill. App. 3d 372, 377 (2000), quoting *Black's Law Dictionary* 904 (5th ed. 1979)). The theory of mitigation of damages provides that an injured party cannot recover the damages he should have foreseen and could have avoided without undue risk, burden, or humiliation. *East St. Louis School District No. 189 v. Hayes*, 237 Ill. App. 3d 638, 644 (1992).

¶ 21 Mitigation of damages is an affirmative defense. *Rozny v. Marnul*, 43 Ill. 2d 54, 73 (1969); 735 ILCS 5/2-613(d) (eff. Sept. 20, 1985). The party pleading the affirmative defense bears the burden of proof. *In re Marriage of Jorczak*, 315 Ill. App. 3d 954, 957 (2000). The plaintiff is not required to disprove an affirmative defense. *Oh Boy Grocers v. South East Food & Liquor, Inc.*, 79 Ill. App. 3d 252, 259 (1979). Without proof of the extent of non-mitigation, there is no basis to determine the set-off amount to which a defendant is entitled due to a plaintiff's failure to mitigate. *Washington Courte Condominium Association-Four v. Washington-Golf Corp.*, 267 Ill. App. 3d 790, 822 (1994).

¶ 22 The Skiles answered the Pattens' complaint and asserted the affirmative defense of failure to mitigate the mold (counts XXI, XXII). They did not, however, appear at trial to present any evidence regarding the Pattens' failure to mitigate. The trial court relied, in part, on the testimony of Daniel, who admitted he failed to take various remedial action for fear of affecting his chances at trial. Both Pattens also testified that they could not afford to implement

the proposals to correct the flooding problem. The Pattens, however, were not required to present evidence to disprove the Skiles' affirmative defense. The Skiles did not attend the trial and did not present any evidence to support their affirmative defense of failure to mitigate. We find that the trial court's determination that the Pattens failed to mitigate their damages is against the manifest weight of the evidence and cannot stand. Accordingly, we vacate the trial court's finding that the Pattens failed to mitigate.

¶ 23 The next issue concerns the damages award. The Pattens argue that the trial court failed to award the damages that were demonstrated by the evidence they presented at trial. They maintain that the trial court improperly rejected or ignored evidence regarding the diminished value of the property, the price to prevent future floods, mold remediation expenses, and expert witness fees.

¶ 24 It is the plaintiff's burden to prove damages to a reasonable degree of certainty. *Beasley v. Pelmore*, 259 Ill. App. 3d 513, 523 (1994). The plaintiff is not required to prove the exact amount of his loss but must present evidence sufficient to provide a basis to assess damages with a fair degree of probability. *Beasley*, 259 Ill. App. 3d at 523. Where uncontradicted evidence that is not inherently unbelievable is presented, a finding contrary to the evidence cannot stand. *Gold v. Ziff Communications Co.*, 196 Ill. App. 3d 425, 433 (1989). A damage award is in error where the amount awarded is manifestly inadequate or does not bear a reasonable relationship to the plaintiff's losses. *Hollis v. R. Latoria Construction, Inc.*, 108 Ill. 2d 401, 407 (1985). We will not reverse the trial court's determination of damages unless it is against the manifest weight of the evidence. *Royal's Reconditioning Corp. v. Royal*, 293 Ill. App. 3d 1019, 1022 (1997).

¶ 25 The trial court awarded the following damages: $9,502.99 for the March 2009 flood; $16,896.80 for the June 2010 flood; $139.09 and $170 for sump pumps; $1,600 for Daniel's lost salary; $2,149.50 for James Barnes' analysis; $22,500 for future flood prevention and loss of use

up to June 2010; $1,875.50 for Muhs' pretrial work; $500 for Jaclyn's personal injuries; $1,176 for costs; and $30,000 in punitive damages. The trial court did not award damages for the diminution of value of the house due to the flooding problems; Owen Arvin expert investigation/testimony (appraiser); mold remediation; Daniel's loss of consortium claim; or the claims for mental distress and emotional injury.

¶ 26 The Pattens point to the testimony of their appraiser, who valued the property at $74,000, considering the flood problems. Arvin's estimated value included the cost to prevent future flooding and to remediate the mold. They paid $205,000 and sought $131,000 in damages for the diminution in value. They maintain that their evidence on the value is uncontroverted and must be accepted by the trial court. The trial court rated Arvin's credibility a 4 of out a possible 10 points. The trial court found Arvin and/or his valuation inherently unbelievable. As fact-finder, it was in the best position to assess Arvin's credibility. *Helping Others Maintain Environmental Standards v. Bos*, 406 Ill. App. 3d 669, 688 (2010). We find the trial court did not err when it denied the Pattens' request for diminished value.

¶ 27 To establish the cost to remediate the flooding, the Pattens presented the testimony of civil engineer Muhs, who determined the existing drainage was inadequate and proposed two solutions. The first proposal involved adding a storm sewer on the property and attaching it to the municipal storm sewer at a cost of $45,500. The Village rejected that proposal and Muhs' second solution, which would cost $86,000, redirected the water to the existing ditch. The trial court awarded the Pattens $22,500 for future flood prevention and loss of use until June 2010. The figure bears no reasonable relationship to the evidence presented at trial. The trial court relied on the testimony of Thomas Stoltz, but he failed to estimate the cost of his remediation proposal. While he opined that it would be less to build a swale on the east side of the property than to implement a plan involving storm sewers, his proposed remediation included a number of

other aspects besides the swale. For some aspects of the proposal, he admitted he was not sure what needed to be done. Importantly, Stoltz's plan involved and would affect the neighboring properties, which adds another level of cost and complication to implementing his proposal.

¶ 28 The dissent maintains that the trial court may reject witness testimony based on its knowledge, common sense and experience. However, where an issue is one which the factfinder lacks the proficiency to reach a conclusion without the assistance of an expert, the finder of fact cannot " 'reasonably come to a conclusion different than that' of the expert" and employ its own interpretation of the evidence to reach an ultimate conclusion on the issue. *Morus v. Kapusta*, 339 Ill. App. 3d 483, 492 (2003), citing *O'Keefe v. Greenwald*, 214 Ill. App. 3d 926, 936 (1991). Expert witnesses Muhs and Stoltz, both licensed engineers, testified to matters outside the realm of average factfinder's knowledge, common sense and experience. The trial court reached a conclusion on the cost of a remediation plan that differed substantially from the evidence presented at trial. Estimates for Muhs' two proposals were $45,000 and $86,000. Stoltz did not offer a cost estimate. Contrary to the view of the dissent, the trial court was not free to reject the conclusions of the only expert witness who provided the cost for his remediation plan.

¶ 29 The dissent relies on the exhibits as support for the trial court's rejection of the expert testimony. After careful reviewing the exhibits, we are unable to agree that they support the trial court's calculation of damages. The trial court expressly found that "with relatively minimal expense and effort[,] the problems could be ameliorated and likely eliminated" by building a berm and removing certain improvements on the property, including a shed, ramp and dog run. There was no evidence to support the trial court's conclusion or that of the dissent, which submits that "part of the unnatural accumulation of water near the house resulted, in[ ] part, from modifications the Pattens made." There was no evidence presented to contradict the $86,000 estimate offered by Muhs and the trial court should have accepted his estimated cost. The dissent

also relies on *People v. Sherman*, 110 Ill. App. 3d 854 (1982), and *People v. Jackson*, 89 Ill. App. 3d 461 (1980), which involve criminal defendants challenging the sufficiency of the evidence to convict them, the presumption of guilt, and the trier of fact's responsibility to weigh the evidence and make reasonable inferences from it regarding whether a defendant was proved guilty beyond a reasonable doubt. *Sherman* and *Jackson* do not warrant a different finding. The Pattens should have been awarded an additional $63,500 in damages to remediate the flooding problem.

¶ 30 The trial court rejected the Pattens' claim for mold remediation. It found that the "evidence of 'black mold' and the need for its remediation is scant and suspect." It also inferred that insurance coverage may have factored into the finding of black mold. Significantly, it factored into its denial of mold damages its improper determination that the Pattens failed to mitigate. At trial, the Pattens offered two expert witnesses, who both concluded that the house was contaminated with mold. Witness Barnes testified the mold was a human health hazard. In his opinion, the mold contamination was due to repeated flooding in the basement. The second expert, Michael McDermont, estimated it would cost $32,500 to remediate the mold problem. Both Barnes and McDermont testified that it would not make sense to remediate the mold until the flooding problem was resolved.

¶ 31 Based on this evidence, the trial court should have allowed the damages for mold remediation. The trial court noted that it is not required to accept witness testimony at face value, a statement with which the dissent agrees. However, "disbelief of oral testimony cannot support an affirmative finding that the reverse of that testimony is true, that is, it cannot supply a want of proof." *Gold*, 196 Ill. App. 3d at 433. There was no controverting evidence presented negating the mold testimony. The Pattens' mold experts testified to the presence of mold, opined that it resulted from the basement flooding, and offered an estimated cost to fix the mold

problem. We thus find the trial court erred in failing to award the Pattens $32,500 for mold remediation.

¶ 32 The Pattens also sought damages for the cost of Arvin's investigation and testimony and other expert expenses. They sought $10,752 in expert fees but the trial court only awarded them $2,150 for the testimony of Barnes. Each party is responsible for the fees of its Illinois Supreme Court Rule 213(f)(3) expert witnesses. Ill. S. Ct. R. 208(e) (eff. Oct. 1, 1975). The Pattens do not argue that a manifest injustice would result but maintain that because the defendants at trial did not argue the fees were not recoverable, they are entitled to them. Their argument fails. They are required to pay their own fees. We find the trial court did not err in denying the expert expenses challenged on appeal.

¶ 33 Lastly, the Pattens challenge the trial court's failure to grant their request for rescission as a remedy, in addition to monetary damages. Rescission is an equitable remedy which disaffirms the transaction and restores the parties to the status quo. *Newton v. Aitken*, 260 Ill. App. 3d 717, 719 (1998). Rescission may be awarded where there is fraud but it should not be granted where the status quo cannot be restored. *Newton*, 260 Ill. App. 3d at 719 . As an equitable remedy, rescission is not available where an adequate remedy at law exists. *Newton*, 260 Ill. App. 3d at 720. The remedy of rescission, which is based on disaffirmance of a contract, is inconsistent with damages, which is a remedy that arises out of the affirmance of the contract. *Newton*, 260 Ill. App. 3d at 720.

¶ 34 We find that rescission is not an appropriate remedy under the circumstances of this case. The parties executed the sales contract in 2008, more than six years ago. At this stage, it is impossible to restore the parties to the status quo due to the lapse of time. Moreover, monetary damages are an appropriate remedy and serve to compensate the Pattens for their losses. We find there was no error in the trial court's denial of the Pattens' request for the remedy of rescission.

¶ 35 For the foregoing reasons, the judgment of the circuit court of Tazewell County is reversed in part, modified in part, and affirmed in part.

¶ 36 Reversed in part, modified in part, and affirmed in part.

¶ 37 JUSTICE WRIGHT, concurring in part and dissenting in part.

¶ 38 I concur with the majority's view that the trial court did not err when it denied the Pattens' request for rescission as requested in counts VII and VIII. I also agree with the majority's view that the trial court did not err by denying the request for damages based on diminished value.

¶ 39 However, I would affirm the trial court's determination of the amount of actual damages as ordered by the court on Counts I and II. In support of my view, which differs from the majority's view, I would like to make two points. First, the trial court characterized the Pattens' evidence concerning mold to be "scant." Second, after receiving the evidence, the court tactfully expressed concerns that "insurance coverage" may have precipitated a request for damages in excess of $30,000 for mold remediation. A trial court must be vigilant to make sure the requested actual damages are reasonable and have not been artificially inflated, whether the Skiles participated in the trial or not.

¶ 40 The case law provides that the trial court is allowed to reject testimony of any witness, even uncontradicted testimony, based on its knowledge, common sense, and experience. *People v. Sherman*, 110 Ill. App. 3d 854, 860 (1982); *People v. Jackson*, 89 Ill. App. 3d 461, 467-68 (1980). Based on the vast number of exhibits presented to the court by the Pattens and other defendants, the court concluded part of the unnatural accumulation of water was "exacerbated" by the Pattens' action of "blockading the flow of water at the shed with dirt, plywood and railroad ties." I contend the trial court did its best to provide some measure of damages in an

amount the court felt would be fair and reasonable and directly attributable to the Skiles' fraud. I would affirm the trial court's finding regarding actual damages on this basis.

¶ 41 Finally, I wish to address the Pattens' view that the trial court should have treated the Skiles more harshly due to their refusal to participate in the evidentiary proceedings. Again, I wish to make two points in support of the trial court's judicious neutrality. First, the trial court imposed serious consequences due to the Skiles' failure to appear beyond the preliminary stages of this proceeding. For example, the trial court entered a default judgment establishing the Skiles' liability on all eight counts, but later entered a finding in favor of all other named defendants in these cases. Second, the trial court imposed significant punitive penalties of $15,000 based on the fraud counts and then doubled that punitive amount to $30,000 following an unopposed motion for reconsideration. Thus, I write separately to express my view that the appellant's inference that the trial court acted improperly, and even may have favored the Skiles in their absence, does a great disservice to the trial court in my view.

¶ 42 Based on the court's findings, it is evident to me that the trial court wisely doubted the veracity of some of the Pattens' witnesses and had valid concerns that some of the actual damages requested by the Pattens were unreasonable. Therefore, rather than increasing the damages award, I would respectfully affirm the trial court on all issues, including the court's determination of actual damages.