

COURT OF APPEALS FOR THE SEVENTH DISTRICT OF TEXAS AT
AMARILLO

Danny Vaughan and Kathleen Vaughan v. Ross Phillips d/b/a Ready-Built Homes and On-Site Construction

Vaughan · No. 07-06-0208-CV · Decided April 30, 2008

SUMMARY

In this concurring opinion, Justice Pirtle agrees that the Vaughans were not entitled to attorney’s fees because they did not prevail on their contract claim. The opinion clarifies that, if Phillips establishes the Vaughans’ breach on remand, his damages should be based on the contract price less amounts paid and expenses avoided, rather than the Vaughans’ cost of completing the construction project.

CASE DETAILS

COURT	Court of Appeals for the Seventh District of Texas at Amarillo
WRITING FOR THE COURT	Patrick A. Pirtle; Quinn, Chief Justice; Campbell, Justice; Pirtle, Justice
JURISDICTION	Texas
DECIDED	April 30, 2008
DOCKET	07-06-0208-CV
DISPOSITION	other
PROCEDURAL POSTURE	Appeal from a judgment of the 110th District Court of Briscoe County involving breach-of-contract claims, attorney's fees, and the measure of damages after partial performance.
PRECEDENTIAL VALUE	Published opinion; the extracted text is a concurrence in the result.
PARTIES	Danny Vaughan, Kathleen Vaughan v. Ross Phillips d/b/a Ready-Built Homes and On-Site Construction

TOPICS

- material breach
- breach of contract
- damages
- remedies
- appellate procedure

PRACTICE AREAS

- contracts
- construction law
- damages
- remedies
- appellate procedure

QUESTIONS PRESENTED

1. Whether the Vaughans were entitled to attorney's fees under section 38.001 of the Texas Civil Practice and Remedies Code after the jury found that they materially and without excuse breached the contract.
2. Whether the cost of completion incurred by the Vaughans is equivalent to Phillips's cost of completion or otherwise establishes the amount of Phillips's contractual recovery after partial performance.

HOLDINGS

1. Because the Vaughans were found to have materially and without excuse breached the contract, they did not prevail on their contract claim and were not entitled to recover attorney's fees under section 38.001 of the Texas Civil Practice and Remedies Code.
2. If Phillips establishes the Vaughans' breach on remand, Phillips's recovery should be measured by the contract price, less amounts already paid and expenses Phillips will avoid because he is excused from further performance; the Vaughans' cost of completion is not necessarily the same as Phillips's cost of completion.

KEY QUOTATIONS

"It is a fundamental principle of contract law that when one party to a contract commits a material breach of that contract, and the breach is not otherwise excused, the other party is discharged or excused from further performance." (Vaughan's Appeal—Issue Two)

"In a suit for breach of contract after partial performance, the party who has partially performed the contract is entitled to recover an amount that would place the party in a position equivalent to that which he would have occupied if the contract had been fully performed." (Phillips's Appeal—Issue One)

"Phillips's cost of completing the construction project is not the same thing as Vaughan's cost of completion because Vaughan's 'cost of completion' would necessarily include a reasonable profit, including a reasonable return on investment to the completing contractor." (Phillips's Appeal—Issue One)

FACTUAL BACKGROUND

The Vaughans and Phillips entered into a construction contract. The jury found that the Vaughans breached the contract, that the breach was material, and that it was unexcused. Phillips had partially performed the contract, and the appeal concerned, among other matters, the Vaughans' entitlement to attorney's fees and the proper measure of any recovery available to Phillips.

PROCEDURAL HISTORY

The case was appealed from the 110th District Court of Briscoe County. The jury found that the Vaughans materially and without excuse breached their contract with Phillips. The concurrence states that the majority overruled the Vaughans' second issue concerning attorney's fees and joined the majority's result, while clarifying the proper conceptual distinction between the parties' costs of completion and Phillips's contractual damages.

DISPOSITION

other

REMAND INSTRUCTIONS

The concurrence indicates that, if the matter is remanded and Phillips proves breach, the damages analysis should distinguish Phillips's avoided expenses from the Vaughans' cost of completion and should not treat the Vaughans' completion cost as Phillips's cost of completion.

CASES CITED

- Mustang Pipeline Co., Inc. v. Driver Pipeline Co., Inc., 134 S.W.3d 195, 196 (Tex. 2004)
- Mays v. Witt, 387 S.W.2d 688 (Tex. App.—Amarillo 1965, no writ)
- Arthur Andersen & Co. v. Perry Equipment Co., 945 S.W.2d 812, 817 (Tex. 1997)

OPINION

PER CURIAM.

NO. 07-06-0208-CV IN THE COURT OF APPEALS FOR THE SEVENTH DISTRICT OF TEXAS AT AMARILLO PANEL D APRIL 30, 2008 _____
DANNY VAUGHAN AND KATHLEEN VAUGHAN, Appellants v. ROSS PHILLIPS d/b/a
READY-BUILT HOMES AND ON-SITE CONSTRUCTION, Appellee
_____ FROM THE 110TH DISTRICT COURT OF BRISCOE
COUNTY; NO. 3100; HON. JOHN R. HOLLUMS, PRESIDING
_____ Before QUINN, CJ. and CAMPBELL and PIRTLE, JJ.
CONCURRING OPINION Concurring in the result reached by the majority, I write to clarify what I perceive to be a misconception by the parties concerning the “costs of completion” as it relates to the remedies to which they may have shown, or on remand might show, themselves entitled to receive.

Vaughan’s Appeal - Issue Two The Vaughans contend the trial court erred in denying them attorney’s fees because they were effectively awarded damages when the trial court found that the “costs of completion” should be deducted from the contract price in determining the amount owed to Phillips under the contract. It is a fundamental principle of contract law that when one party to a contract commits a material breach of that contract, and the breach is not otherwise excused, the other party is discharged or excused from further performance.

Mustang Pipeline Co., Inc. v. Driver Pipeline Co., Inc., 134 S.W.3d 195, 196 (Tex. 2004). The jury found the Vaughans breached their contract with Phillips, the breach was material, and the breach was unexcused. Based upon those findings, the Vaughans were not entitled to a recovery upon their contract claim.

Having failed to prevail on that claim, the Vaughans simply are not entitled to recovery of attorney's fees under § 38.001 of the Texas Civil Practices & Remedies Code. What the trial court did or did not do in determining the remedy to which Phillips was entitled has nothing to do with the Vaughans' right to recover attorney's fees.

As stated by the majority, the fact that the trial court did not grant Phillips recovery of damages does not equate to the trial court granting them a recovery pursuant to their contract claim. I agree with the majority opinion finding that Vaughan's issue two should be overruled. Phillips's Appeal - Issue One My real concern comes with the submission of Question 4 and my perception that the parties consider Vaughan's "cost of completion," reasonable or otherwise, as having anything to do with the remedy to which Phillips may be entitled.

In a suit for breach of contract after partial performance, the party who has partially performed the contract is entitled to recover an amount that would place the party in a position equivalent to that which he would have occupied if the contract had been fully performed. *Mays v. Witt*, 387 S.W.2d 688 (Tex.App.—Amarillo 1965, no writ).

The typical measure of damages in such a situation is the "benefit-of-the-bargain" or expectancy measure, by which the recovery would be calculated by subtracting the value received by the non-breaching party (both actual and incidental) from the value the party expected to receive when the contract was made. *Arthur Anderson & Co. v. Perry Equipment Co.*, 945 S.W.2d 812, 817 (Tex.

1997). Assuming that on remand the jury finds the Vaughans breached the contract, Phillips would be entitled to receive the contract price (the value Phillips expected to receive), less the sum of (1) any amounts already paid and (2) any expenses that Phillips will not have to incur as a result of being excused from further performance (the value Phillips actually received).

Phillips's cost of completing the construction project is not the same thing as Vaughan's cost of completion because Vaughan's "cost of completion" would necessarily include a reasonable profit, including a reasonable return on investment to the completing contractor.

To assume that Vaughan's cost of completion is equivalent to Phillips's cost of completion is to deny Phillips the benefit of their original bargain. To the extent that the parties might construe this Court's opinion as agreeing with the measure of damages as presented by the submission of Question 4, they would be incorrect. With that clarification, I join the majority.

Patrick A. Pirtle Justice