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Fraser v. Baybrook Bldg. Co., Inc.
Tex.App.-Houston [1 Dist.],2003.
Only the Westlaw citation is currently available.
SEE TX R RAP RULE 47.2 FOR DESIGNATION AND SIGNING OF OPINIONS.
MEMORANDUM OPINION ON REHEARING
Court of Appeals of Texas,Houston (1st Dist.).
George and Beth FRASER, Appellants,
v.
BAYBROOK BUILDING CO., INC., Appellee.
No. 01-02-00290-CV.

June 12, 2003.

Homeowners sued contractor for breach of contract, fraud, conversion, trespass, violations of residential construction disclosure statement, and violations of Deceptive Trade Practices Act (DTPA), and contractor counterclaimed for breach of contract, breach of the duty of good faith and fair dealing, unjust enrichment, and tortious interference with the construction contract, claimed a lien on house, and sought judicial foreclosure. The 212th District Court, Galveston County, Susan Elizabeth Criss, J., entered judgment on jury in favor of contractor and ordered judicial foreclosure on lien to satisfy judgment. Homeowners appealed. The Court of Appeals, Elsa Alcala, J., held that: (1) evidence supported finding that contractor complied with proposal to construct residence; (2) evidence was factually sufficient to support the jury's finding that contractor's failure to complete construction in a good and workmanlike manner did not proximately cause homeowners' damages; (3) contractor could not seek judicial foreclosure on lien that it assigned to lender; and (4) homeowners were not entitled to award of attorney fees.

Affirmed as modified.
West Headnotes
[1] Contracts 95 ⚷322(4)

95 Contracts
95V Performance or Breach
95k322 Evidence
95k322(4) k. Sufficiency of Evidence as to Building Contracts. Most Cited Cases
Evidence that contractor complied with proposal to construct residence for homeowners was not so weak or jury's verdict in favor of contractor on its breach of contract claim so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust.

[2] Damages 115 ⚷189

115 Damages
115IX Evidence
115k183 Weight and Sufficiency
115k189 k. Breach of Contract in General. Most Cited Cases
Evidence was factually sufficient to support the jury's finding that, although contractor did not complete construction of home in a good and workmanlike manner, this failure did not proximately cause homeowners' damages.

[3] Appeal and Error 30 ⚷215(1)

30 Appeal and Error
30V Presentation and Reservation in Lower Court of Grounds of Review
30V(B) Objections and Motions, and Rulings Thereon
30k214 Instructions
30k215 Objections in General
30k215(1) k. Necessity of Objection in General. Most Cited Cases

Appeal and Error 30 ⚷216(2)

30 Appeal and Error
30V Presentation and Reservation in Lower Court of Grounds of Review
30V(B) Objections and Motions, and Rulings Thereon
30k214 Instructions

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30k216 Requests and Failure to Give Instructions
30k216(2) k. Further or More Specific Instructions. Most Cited Cases
Homeowners, who neither objected to jury charge nor submitted a written instruction to the trial court, waived on appeal claim that trial court erred by not including an instruction on the proper measure of damages in the charge to the jury. Rules App.Proc., Rule 33.1.

[4] Mechanics' Liens 257 ⚷205

257 Mechanics' Liens
257V Assignment of Lien or Claim
257k205 k. Operation and Effect of Assignment of Lien. Most Cited Cases
Any mechanic's or materialman's lien that contractor may have fixed to homestead was assigned to lender in exchange for lender's commitment to provide interim construction financing and, thus, contractor could not seek judicial foreclosure on lien that it did not possess and therefore could not enforce. V.T.C.A., Property Code § 53.254.

[5] Costs 102 ⚷194.32

102 Costs
102VIII Attorney Fees
102k194.24 Particular Actions or Proceedings
102k194.32 k. Contracts. Most Cited Cases
Homeowners failed to show how or why they were entitled to judgment as a matter of law and, therefore, failed to show that they prevailed in lawsuit against contractor, as was required to be entitled to award of attorney fees. V.T.C.A., Civil Practice & Remedies Code § 38.001; V.T.C.A., Bus. & C. § 17.50(d).

On Appeal from the 212th District Court, Galveston County, Texas, Trial Court Cause No. 99CV0688, Susan Elizabeth Criss, Judge.

George A. Kurisky, Johnson, Finkel, DeLuca & Kennedy, P.C., Jill D. Schein, Houston, for appellants.

A.G. Crouch, Alvin, for appellee.

Panel consists of Justices HEDGES, JENNINGS, and ALCALA.

MEMORANDUM OPINION ON REHEARING
ELSA ALCALA, Justice.
*1 We grant appellee's, Baybrook Building Co., Inc.'s, motion for rehearing, withdraw our previous opinion dated March 13, 2003, and substitute this opinion in its place; however, our disposition and judgment do not change.

Appellants, George and Beth Fraser (the Frasers), sued Baybrook Building Company, Inc. (Baybrook) for breach of contract, fraud, conversion, trespass, violations of the Texas Residential Construction Disclosure Statement, and violations of the Texas Deceptive Trade Practices Act (DTPA) [FN1] in connection with a contract to construct a house. Baybrook counterclaimed for breach of contract, breach of the duty of good faith and fair dealing, unjust enrichment, and tortious interference with the construction contract. Baybrook also claimed a lien on the house and sought judicial foreclosure. A jury found in favor of Baybrook and awarded $81,551 in actual damages and $35,000 in attorney's fees, and the trial court ordered judicial foreclosure on Baybrook's lien to satisfy the judgment.

FN1. Tex. Bus. & Comm.Code Ann. § 17.41-.63 (Vernon 2002).

In seven issues, the Frasers contend that the evidence was factually insufficient to support two of the jury's findings and that the trial court erred by declining to submit a proper jury instruction on damages, ordering a judicial foreclosure on an invalid lien, allowing the proceeds of the foreclosure sale to secure attorney's fees awarded to Baybrook, and declining to award attorney's fees to the Frasers. We modify the judgment and affirm as modified.

Factual & Procedural Background

On June 11, 1998, the Frasers entered into an

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agreement with Baybrook to have a house built in Galveston County. The plans for the house were drawn up by the Frasers and called for a construction material known as "Rastra" and for steel wall supports, trusses, and roofing shingles. The Frasers hired Saaduddin Ahmed to engineer the plans. Under the proposal, Baybrook agreed to furnish the materials and labor necessary to complete the contemplated construction. Thereafter, on August 7, 1998, Baybrook entered into a mechanic's and materialman's lien contract with the Frasers by which Baybrook agreed to complete construction by July 31, 1999. The Frasers negotiated a loan with Colonial Savings (Colonial) in the amount of $259,500 to secure Baybrook's services.

After experiencing several delays, Baybrook was unable to complete construction by the July 1999 deadline. The Frasers sued Baybrook, seeking damages for the loss of a loan commitment at a favorable interest rate, the cost of completing the construction in a good and workmanlike manner, mental anguish, diminished market-value of the property, and attorney's fees. Baybrook counterclaimed, seeking damages for the unpaid balance due under the contract, interest on the unpaid balance, and attorney's fees. The case was tried to a jury.

The jury found that (1) Baybrook complied with its proposal with the Frasers, (2) Baybrook did not complete construction of the house in a good and workmanlike manner, (3) Baybrook's failure to complete construction in a good and workmanlike manner was not the proximate cause of the Frasers' damages, (4) the Frasers were not entitled to recover attorney's fees, (5) Baybrook substantially performed under the June 11, 1998 proposal, (6) Baybrook was entitled to recover $81,551 under the June 11, 1998 proposal, and (7) Baybrook was entitled to recover $35,000 in attorney's fees. The trial court entered judgment in accordance with the jury's findings and ordered judicial foreclosure of Baybrook's mechanic's and materialman's lien to satisfy the judgment. The Frasers subsequently filed this appeal.

Factual Sufficiency

***2** In their sixth and seventh issues, the Frasers argue that the judgment should be reversed because the evidence was factually insufficient to support the jury's findings that (1) Baybrook complied with the June 11, 1998 proposal and (2) Baybrook's failure to complete construction in a good and workmanlike manner was not the proximate cause of the Frasers' damages.

We will sustain a factual sufficiency challenge only if, after viewing all the evidence, the evidence is so weak or the verdict so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. *Cain v. Bain,* 709 S.W.2d 175, 176 (Tex.1986). As we examine the evidence, we remain mindful that the jury is the sole judge of witness credibility and the weight to be given testimony. *McGalliard v. Kuhlmann,* 722 S.W.2d 694, 697 (Tex.1986). The jury may believe one witness and disbelieve another and resolve inconsistencies in any testimony. *Id.* This Court cannot substitute its opinion for that of the trier of fact or determine that it would have weighed the evidence differently or reached a different conclusion. *Hollander v. Capon,* 853 S.W.2d 723, 726 (Tex.App.-Houston [1st Dist.] 1993, writ denied).

A. Compliance Under the June 11, 1998 Proposal

[1] Seventeen witnesses testified at trial. There was some testimony that (1) the house was not completed in a timely manner, (2) the house failed inspection, (3) the house had various construction problems, and (4) the Frasers were forced to hire additional contractors to correct and complete Baybrook's faulty work. The Frasers contend that this testimony established that Baybrook did not comply with the June 11, 1998 proposal.

Other testimony, however, reflects that (1) the Frasers prevented Baybrook from obtaining a final inspection on the house, (2) the Frasers would not allow Baybrook to install a water heater in accordance with the Frasers' design, (3) the Frasers prevented Baybrook from obtaining a gas permit,

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(4) the Frasers discharged Baybrook before it could complete construction, (5) the Frasers prevented Baybrook from passing the final inspection of the house, (6) Baybrook "basically finished" construction on the house, and (7) problems existed with the Frasers' house design calling for "Rastra" in combination with a steel truss system. Baybrook contends that this testimony established that any faulty construction resulted from the Frasers' substandard plans and their interference with Baybrook's completing the house.

In finding that Baybrook complied with the June 11, 1998 proposal, the jury reconciled the divergent views from a variety of witnesses. We decline to circumvent the jury's role as the sole judge of witness credibility and the weight to accord testimony in order to arrive at a different result. *See McGalliard,* 722 S.W.2d at 697. After reviewing the record, we hold that the evidence that Baybrook complied with the June 11, 1998 proposal was not so weak or the jury's verdict so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. *Cain,* 709 S.W.2d at 176.

***3** We overrule issue six.

B. Proximate Cause of the Frasers' Damages

[2] In issue seven, the Frasers contend that the evidence at trial was factually insufficient to support the jury's finding that, although Baybrook did not complete construction in a good and workmanlike manner, this failure did not proximately cause the Frasers' damages. The Frasers reiterate here the same arguments that were raised in their previous factual-sufficiency challenge. For the reasons stated above, we reject these arguments.

We overrule issue seven.

Jury Instruction on Damages

[3] In their fifth issue, the Frasers contend that the trial court erred by not including an instruction on the proper measure of damages in the charge to the jury. To preserve error based on an omitted instruction in a jury charge, a party must object to the charge and tender a substantially correct instruction to the trial court. *Mason v. Southern Pac. Transp. Co.,* 892 S.W.2d 115, 117 (Tex.App.-Houston [1st Dist.] 1994, writ denied). The Frasers neither objected to the charge nor submitted a written instruction to the trial court. Their complaint is therefore waived on appeal. Tex.R.App. P. 33.1.

We overrule issue five.

Mechanic's and Materialman's Lien

[4] In their first and second issues, the Frasers contend that the trial court erred in ordering judicial foreclosure on Baybrook's mechanic's and materialman's lien. The Frasers assert that the lien was invalid because it did not adhere to constitutional and statutory prerequisites for perfecting a lien on a homestead.[FN2] *See* Tex. Const. art. XVI, § 50(a)(5); Tex. Prop.Code Ann. § 53.254 (Vernon Supp.2003). Alternatively, the Frasers contend that, to the extent that Baybrook did perfect a lien on their homestead, Baybrook cannot enforce the lien because the lien was assigned to Colonial.

FN2. Baybrook does not contest that the Frasers' house is a "homestead" under Texas law. *See* Tex. Const. art. XVI, § 50.

Homesteads are generally protected from forced sale for the payment of debts, except for those debts specifically enumerated in the Constitution, which include debts incurred for purchase money on the homestead, for taxes owed thereon, and for work or services performed thereon. Tex. Const. art. XVI, § 50(a)(1), (2), (5); *CVN Group, Inc. v. Delgado,* 47 S.W.3d 157, 164 (Tex.App.-Austin 2001), *rev'd on other grounds,* 95 S.W.3d 234 (Tex.2002). Because the homestead protection does not extend to debts incurred for improvements made to the homestead, laborers may secure a valid mechanic's and materialman's lien against the homestead on which work was performed, but only by following certain constitutional and statutory procedures. Tex. Const.

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art. XVI, § 50(a)(5); Tex. Prop.Code Ann. § 53.254 ; *CVN Group,* 47 S.W.3d at 164. To fix a lien on a homestead, the Property Code requires that (1) the person who is to furnish material or to perform labor and the owner execute a written contract setting forth the terms of the agreement, (2) the contract be executed prior to the furnishing of materials or performance of labor, (3) the contract be signed by both spouses, if the owner is married, (4) the contract inure to the benefit of all persons who perform labor or furnish materials for the original contractor, if the contract is made by an original contractor, and (5) the contract be filed with the county clerk of the county in which the homestead is located. Tex. Prop.Code Ann. § 53.254 . A contractor must satisfy the requirements of section 53.254 if he is to attach a valid lien on a homestead. *See CVN Group,* 47 S.W.3d at 164-65.

*4 In this case, the only contract that arguably satisfies section 53.254 was the mechanic's-and-materialman's-lien contract entered into on August 7, 1998. However, a careful reading of that contract reveals that Baybrook assigned any lien that it may have acquired under the contract to Colonial. The contract provided:
This Mechanic's Lien Contract is made ... between the undersigned owner [the Frasers] and Contractor [Baybrook] and provides for a transfer of lien to Colonial Savings, F.A.

In addition, paragraph 5 of the contract states:5. Assignment of Mechanic's Lien Contract. In consideration of Lender's [Colonial's] advance of all or a portion of the Contract Price, Contractor hereby transfers and assigns to Lender ... all of Contractor's rights and liens in this Contract and Lender is subrogated to all the rights and equities of Contractor.

Because of these assignment provisions, we need not decide whether Baybrook fixed a valid lien on the Frasers' homestead because any lien that Baybrook may have fixed to the homestead was assigned to Colonial in exchange for Colonial's commitment to provide interim construction financing. Baybrook was free to assign any rights or liens that it acquired under the August 7, 1998 contract. *See State Farm Fire & Cas. Co. v. Gandy,* 925 S.W.2d 696 (Tex.1996). After the assignment, Colonial obtained the exclusive right to foreclose on any liens that may have been created by the August 7, 1998 contract. Accordingly, Baybrook could not seek judicial foreclosure on a lien that it did not possess and therefore could not enforce.[FN3]

FN3. Baybrook alternatively argues that, even if it did assign its statutory lien under the August 7, 1998 contract, it still possessed a constitutional lien. Baybrook cites several cases for the proposition that contractors may possess valid constitutional liens without following statutory requirements. *See Hayek v. W. Steel Co.* ., 478 S.W.2d 786, 790 (Tex.1972); *Apex Fin. Corp. v. Brown,* 7 S.W.3d 820,830 (Tex.App.-Texarkana 1999, no pet.). These cases, however, do not involve homestead protections and are therefore distinguishable. To attach a lien to a homestead, a contractor must have a written contract that complies with section 53.254 of the Property Code. Tex. Prop.Code Ann. § 53.254 (Vernon Supp.2003); *CVN Group, Inc. v. Delgado,* 47 S.W.3d 157, 164 (Tex.App.-Austin 2001), *rev'd on other grounds,* 95 S.W.3d 234 (Tex.2002). Because Baybrook assigned its rights under the only contract that arguably satisfied section 53.254, Baybrook did not possess a valid lien.

Baybrook has pointed us to no other document in the record that would establish a valid mechanic's and materialman's lien on the Frasers' homestead. Because Baybrook relies on the August 7, 1998 contract as its sole basis in claiming lienholder status, and because Baybrook assigned its liens under that contract to Colonial, we hold that the trial court erred in ordering judicial foreclosure of the Frasers' homestead to satisfy the judgment in favor of Baybrook.

We sustain issues one and two. Because we sustain these issues, we need not address the Frasers' third issue, which challenges the trial court's allowance of proceeds from the foreclosure sale to secure

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attorney's fees awarded to Baybrook.

Attorney's Fees

[5] In their fourth issue, the Frasers contend that the trial court erred by declining to award their claim for attorney's fees. The Frasers assert that, because they were entitled to judgment as a matter of law, and because they are a prevailing party, they must be awarded attorney's fees. *See* Tex. Civ. Prac. & Rem.Code Ann. § 38.001 (Vernon Supp.2003); Tex. Bus. & Comm.Code Ann. § 17.50(d).

The Frasers have not shown how or why they were entitled to judgment as a matter of law and, therefore, have not shown that they prevailed in this lawsuit. Thus, we hold that the trial court did not err by declining to award attorney's fees to the Frasers.

***5** We overrule issue four.

Conclusion

We modify the judgment of the trial court by deleting all portions that order judicial foreclosure of a mechanic's and materialman's lien in favor of Baybrook.

We affirm the judgment as modified.

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Not Reported in S.W.3d, 2003 WL 21357316 (Tex.App.-Hous. (1 Dist.))

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