VIRGINIA: IN THE CIRCUIT COURT OF MECKLENBURG COUNTY

RICHARD M. CLONEY
VS. CASE NO.: CL06000301
BILLY G. DUNN
DUNN CONSTRUCTION COMPANY, INC.

DUNN CONSTRUCTION COMPANY, INC.
VS. CASE NO.: CL06000236
RICHARD M. CLONEY

DUNN CONSTRUCTION COMPANY, INC.
VS. CASE NO.: CL06000267
RICHARD M. CLONEY

ORDER

This day, April 7, 2008 came the parties with counsel to be heard on three cases among them styled as set forth above in this order numbers CL06000301, CL06000236, and CL06000267, which cases were consolidated for hearing by Order of this Court heretofore entered;

Whereupon came this day a jury, having been duly selected: Richard A. Graham, David B. Solomon, Jr., Janice Lee Lipscomb, Laverne Burchette, and Claire E. Grendall, and Jan T. Bowen, Foreman who were duly sworn to well and truly try the issues joined and render a true verdict according to the law and the evidence. Thereafter, the evidence of Dunn Construction vs. Cloney was presented, the evidence of Cloney in defense and Coney's evidence against Dunn and Dunn Construction was presented, and evidence of Dunn in defense of Cloney was presented.

The Court then accompanied the jurors on a view of the subject property; the parties' counsel made their respective arguments, and the jury retired for its deliberations and verdict. After some time the jury returned the following verdicts:

In the case of Richard M. Cloney against Billy G. Dunn and Dunn Construction Co., Inc., we the jury find for Richard M. Cloney against Billy G. Dunn and Dunn Construction Co., Inc., and fix his damages at $33,838.27, for compensatory damages, and $25,000.00, for punitive damages, with interest at 6% per annum from August 21, 2006 until paid on compensatory damages. $3,383.83 interest.

In the case of Dunn Construction Co., Inc. against Richard Cloney, we the jury find for Richard M. Cloney.

Upon delivery of the verdicts counsel for Dunn moved to set aside the verdicts as being contrary to the law and evidence, and more specifically also moved to set aside the verdict for punitive damages, which motion was overruled and defendant's counsel excepted.

Accordingly, it is ADJUDGED and ORDERED that the case of Dunn Construction Company, Inc. vs. Richard M. Coney for damages in the amount of $3,415.98 is dismissed; the case of Dunn Construction Company, Inc. vs. Richard M. Cloney being a suit to enforce a mechanic's lien for sums which the Court has found to be not due is dismissed.

In The case of Richard M. Cloney vs. Billy G. Dunn and Dunn Construction Company, Inc., it is ADJDUGED and ORDERED that Richard M. Cloney shall recover from Billy G. Dunn and Dunn Construction, Inc. jointly and severally the sum

of $58,838.27, together with interest in the amount of $3,383.83 to April 14, 2008, after which date this judgment shall bear interest at the judgment rate, and court costs of $163.00.

It is further ORDERED that the appeal bond of $5,000.00 given by Richard M. Cloney in the case of Dunn Construction Company, Inc. vs. Richard M. Cloney upon appeal from the General District Court to the Circuit Court shall be forthwith refunded.

ENTER: 6/2/08

Judge

I ASK FOR THIS:

George H. Bagwell, Counsel for Richard M. Cloney

SEEN AND OBJECTED TO: as grounds stated in record:

Tyler E. Williams, Counsel for Billy G. Dunn

George H. Bagwell
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I agree to entry of the attached Order dismissing the case of Dunn Construction Company, Inc. vs. Richard M. Cloney, thereby dismissing the Mechanic's Lien.

Date May 9, 2008

W. Alexander Burnette
Counsel for Bank of Charlotte County
Bobby A. Howard, Trustee
Mark C. Thaxton, Trustee

Copies To:
Pl. Atty: ✓ Def. Atty: ✓
JD&R Court ____ DCSE ____
C/A ____ Other ____
Deed # ____ JD # 08-934
Mailed/Hand Delivered Date: ____
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because the duties breached arose solely by reason of contract. *Richmond Metro* safeguards against letting plaintiffs dress every breach of contract up as a tort, just to collect punitive damages—precisely as Cloney has done here. And even if Cloney had established a fraud claim, he failed to show the malice or conscious disregard required to support an award of punitive damages.

The trial court erred by submitting Cloney's fraud and punitive damages claims to the jury and refusing to set its verdict aside. This Court should reverse and vacate the judgment on those claims, and enter final judgment.

Assignments of Error

I. Under *Richmond Metropolitan Authority v. McDevitt Street Bovis, Inc.*, 256 Va. 553, 507 S.E.2d 344 (1998), submitting a false payment application to receive a contractual payment is a breach of contract, not fraud, because the duties breached arose under the contract. Cloney sued for breach of contract and fraud, alleging that Dunn submitted a false contract document to receive a contractual payment. The trial court erred by submitting Cloney's fraud claim to the jury and refusing to set its verdict aside, because the evidence established a breach of contract, not fraud or any tort independent of the contract.

II. Punitive damages cannot be recovered for a breach of contract unaccompanied by an independent, willful tort. The trial court erred by submitting Cloney's punitive damages claim to the jury and refusing to set its verdict aside because the evidence

established only a breach of contract, not an independent, willful tort.

III. The trial court erred by submitting Cloney's punitive damages claim to the jury and refusing to set its verdict aside. The evidence was insufficient to support an award of punitive damages because it failed to show actual malice or a conscious disregard for Cloney's rights.

Statement of the Case

This appeal arises out of three individual cases which were consolidated for trial in Mecklenburg County. Two of the cases were filed by Dunn Construction against Cloney, and are not at issue in this appeal.

This appeal concerns the Complaint Cloney filed against Dunn Construction and Dunn individually, CL06-267. The four-count Complaint alleged breach of contract, negligence, and two counts of fraud. Cloney alleged that defendants breached the construction contract, negligently failed to construct the foundation wall, and negligently failed to furnish specified items required by the contract. Further, Cloney alleged that Dunn "fraudulently . . . represented himself to the Plaintiff as a contractor experienced in building houses," and fraudulently said that he had repaired the foundation