SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2444-16T1

SELCO BUILDERS, LLC,

Plaintiff-Respondent,

v.

STEVEN BAGLIVO,

Defendant-Appellant.

Argued March 5, 2018 – Decided March 26, 2018

Before Judges Sabatino and Ostrer.

On appeal from Superior Court of New Jersey, Law Division, Atlantic County, Docket No. L-6566-14.

Scott E. Becker argued the cause for appellant.

Ronald W. DiLeo argued the cause for respondent.

PER CURIAM

This residential construction case involves a claim for additional payment by a construction manager and a counterclaim by the developer-homeowner seeking damages caused by the construction manager's allegedly deficient work. After a two-day

bench trial, the trial court rejected the construction manager's claim for unpaid sums, and also rejected the homeowner's counterclaim for damages. During the course of the trial, the court disallowed the homeowner from testifying on his own behalf as an expert witness about the causes and extent of his damages.

The homeowner now appeals the disallowance of his designation as an expert and the rejection of his counterclaim. The construction manager does not cross-appeal the court's denial of his own affirmative claim.

We briefly summarize the pertinent facts and procedural history. Defendant Steven Baglivo purchased property in Margate for the purpose of building a custom home on the site apparently for resale. In April 2013, Baglivo entered into a one-page written contract with plaintiff, Selco Builders, LLC ("Selco"), to act as general contractor to supervise the building of a single-family house on the site. The agreed-upon contract price for Selco's services was $100,000, payable in installments. Selco performed various portions of the work, but it was done late and, according to Baglivo, defectively.

Baglivo terminated Selco's services in January 2014 after he had paid $50,000 to Selco and Selco had billed him an additional $10,000. Baglivo hired another construction manager to complete

the work. Baglivo estimated it cost him "roughly $86,000" to have the replacement contractor complete the job.

At the non-jury trial, Selco presented testimony from its principal, Mark Seligsohn, who described the parties' contractual relationship and his work on the project. Selco also presented three witnesses from various construction trades. Those witnesses included: (1) a lumber company representative who supplied materials for this project and who is licensed to perform construction work; (2) a plumber; and (3) a licensed electrician. The plumber and the electrician were qualified by the court as expert witnesses in their respective fields. Baglivo testified on his own behalf. He did not call any other witnesses. The parties also presented to the trial court over forty exhibits, consisting of their contract, various invoices and photographs, as well as other items.

After sifting through the proofs, the trial judge denied both Selco's claim and Baglivo's counterclaim. As to Selco's claim for payment concerning unpaid sheet rock and spackle work, the judge found no payment was earned because that work had not been completed when Seligsohn left the property. With respect to Selco's claim for unpaid concrete work, the judge found no right to payment because the concrete failed and had to be redone.

The judge rejected Baglivo's counterclaim on several grounds. In particular, the judge noted Baglivo had not presented appropriate expert testimony to support his claims. Moreover, the judge found Baglivo's proofs of liability and damages were speculative in various respects.

On appeal, Baglivo's sole point in his brief argues that the trial court erred in applying a per se prohibition to him being qualified as an expert because of his status as a party to the litigation. We agree that the court's decision was erroneous in this regard. Nonetheless, that error does not compel reversal or a new trial.

It is well established that if a party in a civil case has suitable credentials in a particular field, that party may be eligible under N.J.R.E. 702 to be qualified by the court to render expert testimony on his or her own behalf. See, e.g., Cast Art Indus., LLC v. KMPG LLP, 416 N.J. Super. 76, 100 (App. Div. 2010), rev'd on other grounds, 209 N.J. 208 (2012); Spiegle v. Seaman, 160 N.J. Super. 471, 478 (App. Div. 1978). All that is necessary is that the party-witness demonstrate he or she has sufficient "knowledge, skill, experience, training, or education" to be qualified as an expert in the field. N.J.R.E. 702. Of course, the litigant's expert testimony may be excluded on other grounds, such as unfair prejudice under N.J.R.E. 403. However, the dangers

of such unfair prejudice are lessened in the present context of a civil, non-jury trial.

Even though the trial court mistakenly ruled that Baglivo was per se disqualified as a party from offering expert opinions in his own case, Baglivo has failed to demonstrate he was substantially prejudiced by that evidentiary ruling. As the trial progressed, the judge did allow Baglivo to present extensive testimony and exhibits in an effort to establish defective work, causation, and damages. The problem is that the evidence Baglivo presented was often vague, unsubstantiated, or otherwise insufficient to establish Selco's liability and damages on his counterclaim.[1]

We generally must give considerable deference to the trial court's factual findings in a non-jury case, and do so here. Rova Farms Resort, Inc. v. Investors Ins. Co. of Am., 65 N.J. 474, 484 (1974). Although we agree with Baglivo that some of the

[1] As one example of this, we refer to Exhibit D-1, a March 2014 invoice from a ceramic tile company for a lump sum of $9,900. Although the invoice states the charges billed to Baglivo were for "[a]dditional labor and materials to correct sub floor issues (level off areas)," that hearsay opinion contained within this apparent business record is neither competent nor sufficient proof that defective work performed or overseen by Selco was the proximate cause of that condition, or that the unallocated charges quoted on the invoice were reasonable. See also N.J.R.E. 808 (disallowing certain hearsay opinions contained in documentary evidence).

photographs depicted arguably-deficient work, the trial court reasonably concluded that Baglivo did not carry his burden of proof in demonstrating causation of those defects and the quantum of damages claimed. For example, as Selco's witness in construction materials testified, the presence of gaps in siding may not necessarily be defective, but instead appropriate to allow for expansion and contraction of the structure.

We recognize Baglivo has decades of experience in certain aspects of home construction and thus seemingly was qualified to provide expert opinions on discrete topics within that general subject. However, Baglivo admittedly was not an expert in plumbing or electrical systems. Thus he could not refute the opinions of Selco's experts on those particular subjects. We defer to the trial court's assessment of the probative value of the other aspects of Baglivo's testimony.

Moreover, Baglivo did not proffer what other additional testimony he would have added to his proofs if he had been given a further chance to do so. See R. 1:7-3 (regarding the procedure for a party to proffer the substance of the excluded evidence it would have presented). Baglivo did not provide an expert report and there is no indication that his expert views were disclosed before trial.

In sum, although the trial court erred in its initial evidentiary ruling, appellant has not demonstrated the error itself was so severe as to be "clearly capable of producing an unjust result." R. 2:10-2.

Affirmed.