Kelley C. Rush, Appellant

v.

Jo Ann Goodwin, Appellee

No. 10-06-00001-CV

Court of Appeals of Texas, Tenth District

November 14, 2007

From the County Court Robertson County, Texas Trial Court No. 05-12CV

Before Chief Justice Gray, Justice Vance, and Justice Reyna (Chief Justice Gray concurs only in the judgment of the court. A separate opinion will not be issued.)

MEMORANDUM OPINION

Bill Vance, Justice.

Appellant Kelly Rush entered into a landscaping agreement with JoAnn Goodwin to remove trees and perform yardwork at Goodwin's residence. After completing work at Goodwin's home, Rush complained that he was not paid in full. Rush filed suit pro se against Goodwin in justice of the peace court, seeking relief of $1,600 but being awarded $4,500 plus court costs. Goodwin appealed to county court, where in a bench trial de novo the trial court awarded Rush only $200 with interest. In this appeal, Rush complains that the court erred when it awarded him only $200 in damages, arguing that its award was against the great weight of the evidence. We will affirm.

Factual and Procedural Background

On August 5, 2007, Goodwin requested a landscaping bid from Rush. The request involved three parts: tree removal, landscaping, and construction of a French drain system.

Tree Removal

The heart of this dispute lies in how many trees Rush and Goodwin agreed to have cut down as part of the tree removal agreement. On August 5, Rush arrived at Goodwin's residence and both walked the property marking trees for their removal. During the walkthrough, both parties agreed to have 26 trees cut down. However, Rush argues that after the initial agreement was made the number of trees to be cut down repeatedly changed. Rush claims that the final agreement consisted of Rush removing 36 large trees, 14 small trees, and 1 large limb from Goodwin's property. The agreed upon price was $200 for each large tree, $100 for each small tree, and $100 for removal of the large limb, bringing the total price to $8,700. To prove this agreement, Rush presented an original contract signed by himself and initialed by Goodwin stating that 26 trees were to be cut down and removed at $200 each and a large limb removed for $100, showing a total of $5,300. He then presented two more documents. The first, signed only by Rush, reflects a request for removal of 36 large trees at $200 each, 14 small trees at $100 each, and removal of a large oak branch at $100. The second, signed by Rush, and initialed in part by Goodwin, shows an agreement to cut and remove 33 trees at $6,600.

Goodwin argues that she only agreed to have 26 large trees removed from her property at $200 per tree. She also argues that after counting the stumps, only 26 trees were removed and that even if more than 26 trees were removed, she never agreed to their removal. She contends that Rush overcharged her $1,400 to remove trees that she claims were not removed.

Landscape Agreement and Extras

In addition to tree removal, the agreement also included various landscaping projects. Rush agreed to remove vegetation and growth, spread dirt, brush hog, and remove fences. Both Rush and Goodwin agreed that the cost of that project would be $3,600. Goodwin paid Rush $1,000 on the landscape agreement and owed $1,600 for the project's completion. Goodwin argues that because she overpaid $1,400 on the tree removal and other projects that she does not owe the $1,600 balance.

In addition to the landscape agreement, Rush also argues that after starting the project, Goodwin began to request that extra side projects be performed around the property. Rush argues that the cost of these projects came to total of $749.94, none of which Goodwin paid. He argues on appeal that his damages total in the lower court should have been for $4,990.62.

Standard of Review

Rush claims that he was underpaid for his work and essentially argues in this appeal that the $200 damage award was against the great weight and preponderance of the evidence.[1]

When seeking review of the factual sufficiency of the evidence supporting an adverse finding on which the party had the burden of proof, the appellant must show that "the adverse finding is against the great weight and preponderance of the evidence." *Dow Chem. Co. v. Francis*, 46 S.W.3d 237, 242 (Tex. 2001); *Long v. Long*, 196 S.W.3d 450, 466 (Tex. App.—Dallas 2006, no pet.). The reviewing court must consider and weigh all the evidence and may set aside the finding only if the evidence is so weak or the finding is so against the great

weight and preponderance of the evidence that it is clearly wrong and unjust. *Dow Chem*., 46 S.W.3d at 242. We, as an appellate court, cannot act as a fact-finder. We are not permitted to pass on the credibility of witnesses or substitute our judgment for that of the trial court. *See Golden Eagle Archery, Inc. v. Jackson*, 116 S.W.3d 757, 761 (Tex. 2003); *DallasCountyv. Holmes*, 62 S.W.3d 326, 329 (Tex. App.—Dallas 2001, no pet.).

Discussion

During the bench trial, Rush referred to the various documents allegedly establishing the terms of the tree removal and landscape agreement. However, Rush failed to formally offer and have the court admit any documents into evidence. For us to consider the documents on appeal, they must have been introduced and admitted at trial. *Noble Exploration, Inc. v. Nixon Drilling Co.*, 794 S.W.2d 589, 592 (Tex. App.—Austin 1990, no writ). Therefore, the only evidence that we may look at to determine whether the damage award is against the great weight of the evidence is the parties' trial testimony.

Because the parties' oral testimony is directly conflicting, it was the role of the trial court as the trier of fact to determine which party's testimony was more credible. The court's award of only $200 in damages is not overwhelmingly against the great weight of the evidence especially when the alleged contracts were not in evidence. *See Noble*, 794 S.W.2d at 592; s*ee also*, Tex. R. Evid. 103(a); Tex. R. App. P. 33.1, 33.2.

Consequently, we decide that the trial court's damage award was not so against the great weight of the evidence as to be clearly wrong and unjust. We overrule Rush's issue and affirm the trial court's judgment.

Affirmed

Notes:

[1] Both parties are pro se, and neither of their briefs complies with Rule of Appellate Procedure 38. In the interest of justice, we suspend Rule 38 and will consider their briefs. Tex. R. App. P. 2.
