

IN THE COURT OF APPEALS 12/17/96

OF THE

STATE OF MISSISSIPPI

NO. 95-CA-00762 COA

J.D.B. CONSTRUCTION COMPANY, INC.

APPELLANT

v.

SMITH MECHANICAL, INC.

APPELLEE

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND
MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

TRIAL JUDGE: HON. JOHN B. TONEY

COURT FROM WHICH APPEALED: RANKIN COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:

MICHAEL P. YOUNGER

ATTORNEY FOR APPELLEE:

WINFORD C. ASHLEY

NATURE OF THE CASE: CONTRACT

TRIAL COURT DISPOSITION: JUDGMENT OF \$40,000 IN FAVOR OF APPELLEE
REDUCED TO \$24,158 ON REMITTITUR

BEFORE THOMAS, P.J., BARBER, AND McMILLIN, JJ.

McMILLIN, J., FOR THE COURT:

This case is before the Court on an appeal filed by J.D.B. Construction Company, Inc., the defendant at trial. The case was commenced as a breach of contract action by Smith Mechanical, Inc., a subcontractor on a construction contract J.D.B. Construction had entered into with the State of Mississippi for certain renovations at the State Hospital at Whitfield. Smith Mechanical complained that J.D.B. Construction was wrongfully withholding Smith Mechanical's portion of the contract retainage that had been paid to J.D.B. Construction by the State upon final acceptance of the project. Smith Mechanical's share of the retainage was \$21,498.00. Smith also sought recovery of the sum of \$2,660.00 for work it contended it did on the project at J.D.B. Construction's request that was beyond the scope of its subcontract. In its complaint, Smith Mechanical also sought additional damages for certain problems it claimed to have encountered due to J.D.B. Construction's failure to timely pay the amounts alleged to be contractually due.

J.D.B. Construction defended on the basis that Smith Mechanical had not fully performed some of its duties under the contract and had performed other aspects of the contract in an untimely manner, causing J.D.B. Construction to incur unnecessary added expenses to complete the general contract in a timely manner. As a result, J.D.B. Construction claimed in its combined answer and counterclaim, not only that the retainage amount was not due, but that Smith Mechanical was actually indebted to J.D.B. Construction because of its faulty performance.

The case was tried before a jury, and the jury returned a verdict in favor of Smith Mechanical in the amount of \$40,000.00. The jury denied any recovery to J.D.B. Construction on its counterclaim. J.D.B. Construction subsequently moved for a remittitur, or in the alternative, a new trial, on the basis that the verdict was against the overwhelming weight of the evidence. The trial court granted a remittitur that reduced the verdict to \$24,158.00. The law permitted Smith Mechanical, at that point, to either (a) reject the remittitur and obtain a new trial on damages only; (b) appeal on the ground that the remittitur should not have been granted or was granted in an excessive amount; or (c) accept the remittitur. *Odom v. Roberts*, 606 So. 2d 114, 121 (Miss. 1992). Though the record does not unequivocally demonstrate the fact, subsequent proceedings indicate that Smith Mechanical elected the third alternative and accepted a reduction of its judgment to \$24,158.00. A final judgment in that amount was entered, and J.D.B. Construction perfected this appeal.

J.D.B. Construction attempts to raise two issues on appeal, one being that the original jury verdict was against the weight of the evidence, and the other being that the remittitur ordered by the trial court was too small.

I.

The Amount of the Original Verdict

The issue of the alleged excessiveness of the original verdict is, at this point, moot. J.D.B. Construction asked for a remittitur, which the trial court allowed. The order of remittitur carried with it the necessary conclusion that the trial court determined the amount of the original verdict to be against the weight of the evidence. The remittitur is a method to cure such an error in the jury's verdict permitted by section 11-1-55 of the Mississippi Code of 1972. *See* Miss. Code Ann. § 11-1-55 (1972). The remittitur was accepted by the plaintiff and thus became the judgment in the case.

Where the plaintiff has accepted a remittitur, "the defendant's only procedural avenue is that it may . . . appeal . . . arguing that the trial court abused its discretion and that the remittitur was legally inadequate." *Odom*, 606 So. 2d at 121. Thus, the sole issue properly before this Court is whether the remittitur should have been in a larger amount.

II.

The Inadequate Amount of the Remittitur

The original jury verdict was clearly excessive and not supported by any credible evidence. This was purely a breach of contract action based upon a contractual obligation to pay a sum certain upon satisfactory performance of the contract provisions. The only evidence presented by Smith Mechanical in support of damages beyond what was actually due under the contract was testimony by the owner that he felt he was due attorney's fees and litigation expenses and that "I really think I deserve more; but just put me -- just about put me out of business into bankruptcy having to fight this for a couple of years." The contract did not provide for attorney's fees or litigation expenses, and, in any event, Smith Mechanical put on no proof as to any actual amounts expended.

On the other hand, as to the alleged retainage due of \$21,498.00 and the extra services performed of \$2,660.00, there was substantial proof offered to establish that these sums were owing. Certainly J.D.B. Construction presented evidence in support of its contentions regarding Smith's failings in performing the contract, but this evidence served only to frame an issue of fact to be resolved by the jury. The jury's verdict clearly indicated that it completely rejected J.D.B. Construction's assertions regarding Smith Mechanical's substandard performance. Such a conclusion does not appear to be so contrary to the weight of the evidence as to warrant judicial interference. The trial court's action in reducing the jury's verdict, which seems to have been inspired by sympathy for Smith Mechanical's travails, to an amount supportable under the law of damages for breach of contract was a proper exercise of the trial court's discretionary authority granted under 11-1-55 of the Mississippi Code of 1972. *See* Miss. Code Ann. § 11-1-55 (1972). We, therefore, conclude that the judgment should be affirmed.

THE JUDGMENT OF THE RANKIN COUNTY CIRCUIT COURT IS AFFIRMED. STATUTORY DAMAGES AND INTEREST ARE AWARDED TO SMITH MECHANICAL, INC. COSTS OF THIS APPEAL ARE ASSESSED TO THE APPELLANT, J.D.B. CONSTRUCTION COMPANY, INC.

FRAISER, C.J., THOMAS, P.J., BARBER, COLEMAN, DIAZ, KING, PAYNE, AND SOUTHWICK, JJ., CONCUR. BRIDGES, P.J., NOT PARTICIPATING.