Circuit Court for Worcester County
Case No. C-23CV-19-000117

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1407

September Term, 2021

ELI A. DEL SOLAR

v.

DOUG VANN EXCAVATING, INC. ET AL.

Kehoe,
Arthur,
Wilner, Alan M.,
(Senior Judge, Specially Assigned)
JJ.

Opinion by Kehoe, J.

Filed: October 19, 2022

This appeal stems from a contract dispute between appellant/cross-appellee, Eli A. Del Solar, and appellees/cross-appellants, Doug Vann ("Vann") and Doug Vann Excavating, Inc. ("DVE"). In July 2021, the Circuit Court for Worcester County presided over a non-jury trial, found that DVE had breached a contract with Del Solar, awarded Del Solar damages in the amount of $24,780, and granted DVE's claim that it was entitled to a set-off against Del Solar's damages in the amount of $14,500. Neither party was happy with this result and between them they present six questions for our consideration, which we have consolidated and rephrased:

> 1. Did the trial court err in granting appellees' motion to dismiss the claims of negligence and negligent misrepresentation for failure to state a claim upon which relief can be granted?
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> 2. Did the trial court err when it found that DVE did not breach its contract as to the construction of the roads, swales, and pads?
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> 3. Did the trial court err when it found that DVE did not breach its contract as to the clearing and stacking of the trees and stumps?
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> 4. Did the trial court err in the calculation of damages by declining to award Del Solar lost profit damages and by finding that appellees were entitled to a recoupment against Del Solar's damages?[1]

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[1] Mr. Del Solar presents the issues as:

1. Whether the trial court erred when it dismissed Appellant's claims at the pleading stage of the case for negligence and negligent misrepresentation.
2. Whether the trial court erred when, after dismissing the negligence claims at the pleading stage, it applied a negligence standard of care in holding that, although the contractually promised roads, swales, and pads at the project had

5. Was the trial court's award of damages to Del Solar excessive?[2]

We will affirm the judgment of the trial court.

BACKGROUND

Del Solar is a poultry farmer in Worcester County. In 2015, he began the process of expanding his existing operation by building two additional chicken houses. Although Del Solar retained a civil engineer to prepare plans for the project, he acted as his own general contractor. He solicited bids from contractors, including DVE, for removing trees, constructing access roads and drainage swales, and performing the other site preparation work shown on the engineer's plans. DVE submitted a proposal based on its

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clearly failed, there could be no recovery by Appellant without standard of care evidence.

3. Whether the trial court erred in finding that the contractually promised roads, swales, and pads had failed, but allocating no contractual responsibility at all to Appellee for such failure.
4. Whether the trial court erred in assessing no liability to Appellee for improperly piling cleared trees in the wrong location, resulting in the need for them to be moved, and consequent project delays.
5. Whether the trial court erred in applying a time-barred and unsupported "set off" claim in Appellee's favor that had never been advanced or pleaded by Appellees, either as a defense or as a counterclaim, and in failing to award any lost profit damages.

[2] In their cross-appeal, Vann and DVE present one contention:

> Was Appellant entitled to an award of damages based on expenses which he did not and will not incur?

review of the plans. The record indicates that Vann made all of the decisions regarding Del Solar's project on behalf of DVE.

DVE provided three estimates to Del Solar. The first, delivered on October 23, 2015, was for $93,230. It stated that it was "good for 90 days." Del Solar accepted the estimate. The second, delivered on August 29, 2016, was for $96,030. This estimate did not contain an expiration date but noted that the "[p]lans are not very clear concerning the structures, surveyor advised that there are two & two animal guards[.]" Del Solar accepted this estimate as well. The third and final estimate, delivered on March 27, 2017, was for $106,030. In addition to the caveat regarding the plans, the third estimate stated that "[m]ore trees than previously anticipated [are] to be cleared & piled on site. Realized after survey layout was done." DVE submitted the final estimate to Del Solar after the latter's loan application had been approved. Del Solar was reluctant to agree to it but felt that he had no choice. At trial, he testified that he agreed to the price increase under duress.

The project did not proceed smoothly. In April 2017, at a pre-construction meeting between Del Solar, Vann, and representatives of the lender and the Maryland Department of the Environment, Vann committed to begin work by the end of the month. However,

DVE did not actually start work until May 18th.[3] DVE removed a number of trees and deposited the debris and stumps in a location identified by Del Solar. DVE then stopped work five days later so that a surveyor could place stakes on the property. Frustrated with the delays, Del Solar asked DVE to modify the contract to include a time-is-of-the-essence provision with penalties to be imposed upon DVE for further delays. DVE did not agree to this.

The surveyors finished their work on May 25th. It turned out that the refuse pile (which DVE had placed at a location identified by Del Solar) would interfere with the construction of the chicken houses. The debris pile had to be moved and DVE requested an additional $14,500 for that work. Del Solar agreed to this. DVE moved the debris pile to a new location, but Del Solar refused to pay the $14,500 immediately. Instead, he proposed to pay that sum to DVE out of the cash flow generated by the new chicken houses after they became operational. DVE did not agree to this.

The parties were unable to resolve this issue and, on June 24, 2017, DVE stopped work. At trial, Del Solar asserted that there was significant work that was not completed when DVE left the project. There was conflicting evidence as to this issue. The trial court found that, with one exception, DVE had completed all of the work listed in DVE's third and final estimate before it stopped working. The exception pertained to the construction

[3] The trial court found that "above-average rainfall in May 2017, prevented [DVE] from working during parts" of that month. The court also concluded that the delay was not a material breach of the contract.

of splash strips[4] along the sides of the chicken houses. Del Solar built the splash strips himself.

On April 16, 2019, Del Solar filed a civil action against DVE and Vann, alleging breach of contract against DVE (count 1); negligence against DVE (count 2); fraud/misrepresentation against Vann and DVE (count 3); negligent misrepresentation against Vann and DVE (count 4); and unjust enrichment against DVE only (count 5).

DVE and Vann filed a motion to dismiss counts 2 through 5. After a hearing, the trial court granted the motion as to the negligence, negligent misrepresentation, and unjust enrichment counts. The court denied the motion as to the fraud count. The court's order was without prejudice and with leave to amend within fifteen days. Within that time period, Del Solar filed an amended complaint, asserting claims of breach of contract, fraud, and unjust enrichment.

Following the completion of discovery, the court conducted a two-day bench trial. During the trial, Del Solar dismissed the fraud count and proceeded with his breach of contract and unjust enrichment claims against DVE only. After the conclusion of the trial,

[4] Poultry houses do not have gutters and downspouts. "Splash strips" typically refers to narrow strips of gravel running along the sides of poultry houses to prevent erosion that would otherwise occur from runoff from roofs. *See* STANDARD STORMWATER MANAGEMENT PLAN FOR POULTRY HOUSE DEVELOPMENT (SSDS-SP02) MARYLAND DEPARTMENT OF THE ENVIRONMENT — 2018 (available at /https://mde.maryland.gov/programs/Water/StormwaterManagementProgram/Documents/Poultry%20House%20SP2.pdf.)

the court issued a thorough and well-reasoned memorandum opinion which contained detailed findings of fact and conclusions of law. In summary, the court found that:

(1) DVE had breached its contract with Del Solar by failing to build splash strips for the chicken houses;

(2) Del Solar's remaining breach of contract claims were not supported by the evidence;

(3) Del Solar presented credible and unrebutted evidence that it would cost $24,780 to install the splash strips if the work were done by a qualified contractor;

(4) Del Solar had agreed to pay DVE $14,500 to move the debris pile to permit the work to proceed, that Del Solar's assertion that he did so under duress was not supported by the evidence, that DVE had relocated the debris pile as promised, and that the $14,500 had not been paid; and

(5) Del Solar's unjust enrichment claim failed because the remedy of unjust enrichment is not applicable in breach of contract cases.

Based on these findings, the trial court concluded that Del Solar was entitled to a damages award of $24,780 (the estimated cost of the splash strips) and that DVE was entitled to a recoupment against that award in the amount of $14,500 (what Del Solar owed DVE for moving the debris pile). The court entered judgment in favor of Del Solar in the amount of $10,280.

THE STANDARDS OF REVIEW

Addressing the parties' contentions requires us to employ three standards of review.

First, when reviewing a trial court's grant of a motion to dismiss a complaint for failure to state a claim upon which relief can be granted, the appropriate standard of review "is whether the trial court was legally correct." *Davis v. Frostburg Facility Operations, LLC*, 457 Md. 275, 284 (2018). In doing so, an appellate court:

> must assume the truth of, and view in a light most favorable to the non-moving party, all well-pleaded facts and allegations contained in the complaint, as well as all inferences that may reasonably be drawn from them, and order dismissal only if the allegations and permissible inferences, if true, would not afford relief to the plaintiff. . . . The universe of "facts" pertinent to the court's analysis of the motion is limited generally to the four corners of the complaint and its incorporated supporting exhibits, if any.

RRC Ne., LLC v. BAA Maryland, Inc., 413 Md. 638, 643 (2010) (cleaned up).

Second, in reviewing judgments entered as the result of a court trial, "the appellate court will review the case on both the law and the evidence. It will not set aside the judgment of the trial court on the evidence unless clearly erroneous, and will give due regard to the opportunity of the trial court to judge the credibility of the witnesses." Maryland Rule 8–131(c). When reviewing for clear error, this Court

> does not sit as a second trial court, reviewing all the facts to determine whether an appellant has proven his case. Nor is it our function to weigh conflicting evidence. Our task is limited to deciding whether the circuit court's factual findings were supported by substantial evidence in the record. And, in doing so, we must view all the evidence in a light most favorable to the prevailing party.

Liberty Mut. Ins. Co. v. Maryland Auto. Ins. Fund, 154 Md. App. 604, 609 (2004) (cleaned up).

Finally, when reviewing an award of damages, an appellate court examines the record to determine if there is an evidentiary basis for the trial court's award. *See, e.g.*, *Thomas v. Capital Medical Management Associates*, 189 Md. App. 439, 465 (2009).

ANALYSIS

1. Did the trial court err in dismissing the negligence and negligent misrepresentation claims?

In his initial complaint, Del Solar asserted that appellees owed him duties of care "to complete the agreed-upon scope of work in a good and workmanlike manner, free of defects and deficiencies, consistent with standards of care in the grading, site work, and excavation industry, and consistent with the terms of contractual specifications for the work." Further, he alleged that appellees "breached those duties of care," causing him to suffer losses.

On appeal, Del Solar contends that the trial court erred when it granted appellees' motion to dismiss the negligence and negligent misrepresentation counts because he was permitted to "plead in the alternative," that is, to assert claims of breach of contract and negligence. He points out that Md. Rule 2-303[5] and Maryland cases interpreting the rule

[5] Md. Rule 2-303(c) states in pertinent part that "[a] party may also state as many separate claims or defenses as the party has, regardless of consistency and whether based on legal or equitable grounds."

stand for the proposition that he is entitled to "advance claims . . . under alternative theories that may be inconsistent with one another[.]" This is correct insofar as it goes, but Del Solar misses the point: The problem is not that he asserted alternative theories of recovery in his complaint. The problem is that the alternative theory of relief that he asserted was legally untenable.

In Maryland, claims for negligent performance of a contract fail "absent a duty or obligation imposed by law *independent of that arising out of the contract itself*[.]" *Jones v. Hyatt Ins. Agency, Inc.*, 356 Md. 639, 654–55 (1999) (emphasis added). If, as Del Solar asserts, a duty of care can arise solely from a contractual obligation, "contract law would drown in a sea of tort." *Columbia Town Ctr. Title Co. v. 100 Inv. Ltd. P'ship*, 203 Md. App. 61, 76 (2012), *aff'd in part, rev'd in part on other grounds*, 430 Md. 197 (2013) (quoting *East River Steamship Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 866 (1986)); *see also Mesmer v. Maryland Auto. Ins. Fund*, 353 Md. 241, 253 (1999) ("A contractual obligation, by itself, does not create a tort duty. Instead, the duty giving rise to a tort action must have some independent basis.").[6]

[6] Other Maryland decisions to the same effect include *Wilmington Trust Co. v. Clark*, 289 Md. 313, 328-329 (1981) ("While a tort action in favor of a contracting party can be founded upon a duty arising out of the contractual relationship, . . . the duty giving rise to the tort cause of action must be independent of the contractual obligation. . . . *Mere failure to perform a contractual duty, without more, is not an actionable tort*.") (emphasis added); and *Heckrotte v. Riddle*, 224 Md. 591, 595–96 (1961). "The mere negligent breach of a contract, absent a duty or obligation imposed by law independent of that arising out of the contract itself, is not enough to sustain an action sounding in tort[.]"

There were no factual allegations in the complaint that point to the conclusion that DVE owed Del Solar any duty other than to perform its contract with him according to the contract's express and implied terms. Because Del Solar failed to allege facts showing that DVE and/or Vann owed him a duty based on something other than their contractual relationship, the trial court did not err in dismissing his negligence and negligent misrepresentation claims.

2. Did the trial court apply an incorrect legal standard in assessing DVE's performance of the contract?

As a corollary to his tort duty contentions, Del Solar asserts that the trial court

> erred when, after erroneously dismissing the negligence claims at the pleading stage, it construed the ambiguous contract in DVE's favor, effectively applied a negligence standard in holding that, although the contractually promised roads, swales, and pads had clearly failed (and therefore had not been effectively delivered by the contractor), there could be no recovery by appellant for such deficiencies.

This is not an accurate characterization of the trial court's reasoning. There was conflicting evidence as to whether the work performed by DVE was deficient. The court concluded that Del Solar did not prove that DVE had breached the contract in any manner other than by failing to provide splash strips adjacent to the locations where the chicken houses were to be built. Moreover, there was undisputed evidence before the trial court that the roads and swales constructed by DVE failed. The dispositive issue at trial was rather *why* they failed. In its memorandum opinion, the court explained:

> It is telling that Plaintiff's own witness, Sean Rayne,[7] did not testify that [DVE's] road installation failed to meet industry standards and could not identify anything that he would have done differently from [DVE]. In fact, Rayne concluded that the roads failed because the soils were overly saturated when traversed by loaded concrete trucks. The Court found Rayne to be knowledgeable, experienced, objective and credible.
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> Regarding the swales, the Court reaches the same conclusion that [Del Solar] has not met his burden of establishing a breach of contract … As with the roads, the fact that remedial work was necessary after many months and copious rainfall does not establish breach of contract.
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> * * *
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> There was [a] delay in the construction of the chicken houses after the site work was substantially complete. This delay, which was not attributable to [DVE], meant that the roads were not promptly compacted by construction traffic.

In short, the trial court did not apply a negligence standard in determining whether DVE had fulfilled its contractual obligations.

3. DVE's remaining contentions as to the trial court's findings

Del Solar asserts that the trial court erred when it concluded that: (1) the delays in DVE's performance of the contract were caused by circumstances outside of DVE's control and, in particular, unusually heavy amounts of rain during the period that DVE was working on the site; and (2) DVE did not breach the contract by initially placing the debris pile in a location that would "affect or impede" construction of the chicken houses.

[7] Rayne was the contractor hired by Del Solar to complete the project after DVE stopped work.

In its memorandum opinion, the trial court carefully considered the conflicting evidence as to these issues, resolved all relevant factual disputes, and concluded that the responsibility for these problems did not lie with DVE. The trial court's thorough and well-reasoned analysis speaks for itself. There was substantial evidence to support the trial court's conclusions and there is no basis for us to intrude upon the trial court's role as fact-finder.

4. The "set-off" against the damages

As we have explained, the trial court concluded that Del Solar should be awarded damages of $24,780 for DVE's breach of the contract but reduced that award by $14,500, which represented the unpaid balance on what was due to DVE under the contract.

Del Solar argues that DVE waived the right to seek a setoff[8] because it was not raised in DVE's answer to its complaint. We do not agree. Md. Rule 2-323(g) sets out

[8] The parties refer to DVE's assertion that it is entitled to a reduction in damages awarded to Del Solar up to the $14,500 balance owed to it by Del Solar as a "set-off." Although the distinction does not matter in the present case, "recoupment" is the more accurate term. Writing for the Court in *Imbesi v. Carpenter Realty Corporation*, 357 Md. 375, 380 (2000), Judge Rodowsky explained that:

> "recoupment" means a diminution or a complete counterbalancing of the adversary's claim based upon circumstances arising out of the same transaction on which the adversary's claim is based; "setoff" means a diminution or a complete counterbalancing of the adversary's claim based upon circumstances arising out of a transaction other than that on which the adversary's claim is based[.]

See also Pines Plaza Ltd. P'ship v. Berkley Trace, LLC, 431 Md. 652, 675 n.22 (2013) (distinguishing between a "recoupment" and a "set-off); *Beka Indus., Inc. v. Worcester*

affirmative defenses that are waived if not asserted in a party's answer. The remedies of setoff and recoupment are not among them. *See Bd. of Educ. of Worcester County v. BEKA Indus., Inc.*, 190 Md. App. 668, 730 (2010), *aff'd in part, rev'd in part*, 419 Md. 194 (2011) ("Accordingly, because this suit involved claims of breach of contract and tort, and because recoupment is not one of the affirmative defenses required to be specifically asserted as a defense, the recoupment defense was preserved by the Board's initial answer generally denying liability.")

Del Solar also asserts that DVE's setoff or recoupment claim is time-barred. In support of this contention, Del Solar cites *Imbesi v. Carpenter Realty Corporation*, 357 Md. 375 (2000). The issue in *Imbesi* was whether a debtor to an estate could assert a setoff to reduce the estate's recovery on an unrelated claim asserted by the estate. *Id.* at 378–79. In answering "no" to this question, the Court explained that the assertion of the setoff constituted a claim against the estate and was therefore time-barred pursuant to Md. Code, Est. & Trusts § 8-103.[9] 357 Md. at 391–92. Because Est. & Trusts § 8-103

County Bd. of Educ., 419 Md. 194, 223 (2011) (same) (citing *The Impervious Products Co. v. Gray*, 127 Md. 64, 68 (1915) ("In recoupment a defendant may show damages equal to some part of the whole of the plaintiff's claim and have it deducted from that claim, but can recover no affirmative judgment.")).

[9] Est. & Trusts § 8-103 states in pertinent part:

> a) Except as otherwise expressly provided by statute with respect to claims of the United States or the State, a claim against an estate of a decedent, whether due or to become due, . . . is forever barred against the estate, the

does not apply to this case, the Court's analysis in *Imbesi* is inapposite. The trial court did not err when it concluded that DVE was entitled to assert that the unpaid $14,500 should be set off against the court's award of damages to Del Solar.

This leaves us with DVE's argument that the trial court erred when it awarded Del Solar $24,780 in damages as recompense for DVE's failure to construct the splash strips. DVE acknowledges that Sean Rayne, the contractor who stepped in to finish the site preparation work after DVE stopped working, testified that he would charge $24,780 to install the splash strips. DVE points out that Del Solar performed the work himself at an out-of-pocket cost of $11,558. DVE argues that the proper measure of damages, therefore, was $11,558. Because this amount was less than the amount of DVE's claim for recoupment, $14,500, the damage award to Del Solar should be reduced to $0.

The trial court addressed this issue in its memorandum opinion:

> [DVE] does acknowledge that they did not build splash strips on the property even though this was required by the contract. This Court finds no legal justification for [DVE's] failure to complete this work. [Del Solar] received a quote from Mr. Rayne to conduct this work in the amount of $24,780.00 Although [DVE] argues in its closing memoranda that such damages amount to $11,558.00, [DVE] did not present evidence at trial

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> personal representative, and the heirs and legatees, unless presented within the earlier of the following dates:
> (1) 6 months after the date of the decedent's death; or
> (2) 2 months after the personal representative mails or otherwise delivers to the creditor a copy of a notice . . . notifying the creditor that the claim will be barred unless the creditor presents the claim within 2 months after the mailing or other delivery of the notice.
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> * * *

> disputing the appropriateness of Mr. Rayne's estimate. [Del Solar] testified that he constructed the splash strips himself without engaging Mr. Rayne, but this work does not provide an appropriate measure of damages given the difficult circumstances in which [Del Solar] found himself. Rather, the Court concludes that Mr. Rayne's estimate constitutes a fair and reasonable estimate for the work and is the proper measure of damages. Accordingly, this Court finds that [Del Solar] is entitled to damages in the amount of Mr. Rayne's estimate of $24,780.00.

In *Thomas v. Capital Medical Management Associates*, 189 Md. App. 439, 465 (2009), we explained that "damages can be ascertained 'by reference to some fairly definite standard, such as market value, established experience, or direct inference from known circumstances.'" The trial court did not err in concluding that Mr. Rayne's unchallenged estimate as to what it would cost Del Solar to hire a contractor to install the splash strips was an appropriate measure of damages.

THE JUDGMENT OF THE CIRCUIT COURT FOR WORCESTER COUNTY IS AFFIRMED.

COSTS TO BE APPORTIONED AS FOLLOWS: 80% TO APPELLANT AND 20% TO APPELLEE.