

STATE OF MICHIGAN
COURT OF APPEALS

DAVID ANTHONY and HOLLY ANTHONY,

Plaintiffs-Appellees,

v

DELAGRANGE REMODELING, INC.,
GREGORY DALMAN, DENNIS YODER, and
DELAGRANGE HOMES, INC.,

Defendants-Appellants.

UNPUBLISHED

June 19, 2007

No. 267577

Branch Circuit Court

LC No. 00-008579-CK

Before: Kelly, P.J., and Markey and Smolenski, JJ.

PER CURIAM.

In this contract dispute arising out of the construction of a new home, defendants appeal as of right the trial court order awarding damages in favor of plaintiffs, following remand from this Court. We affirm, but remand for entry of an order consistent with this opinion.

Defendants first argue that the trial court exceeded the scope of this Court's earlier remand order by awarding additional damages not part of the original judgment.¹ Specifically, defendants contend that the trial court was limited to reconsidering whether a proper basis existed for the award of the \$104,534.04 management fee to plaintiffs. However, defendants failed to properly preserve this argument by raising it with the trial court. *Polkton Charter Twp v Pellegroni*, 265 Mich App 88, 95; 693 NW2d 170 (2005). Therefore, our review is for plain error. *Kloian v Schwartz*, 272 Mich App 232, 242; 725 NW2d 671 (2006).

When an appellate court remands a case with specific instructions, it is improper for a lower court to exceed the scope of the order. *K & K Constr, Inc v Dep't of Environmental Quality*, 267 Mich App 523, 544; 705 NW2d 365 (2005). The lower court must strictly comply with the mandate of the appellate court, *id.* at 544-545, but possesses the authority to take action

¹ This Court previously issued an opinion and order of remand following an appeal as of right from the trial court's judgment. See *Anthony v Delagrang Remodeling, Inc*, unpublished opinion per curiam of the Court of Appeals, issued March 15, 2005 (Docket No. 252644).

consistent with the appellate court's opinion and order, *Hadfield v Oakland Co Drain Comm'r*, 218 Mich App 351, 355; 554 NW2d 43 (1996).

Contrary to defendants' assertion, the trial court specifically addressed whether a proper basis existed for the award of the entire management fee. The trial court admitted that it generated confusion when it inadvertently used terms of equity in its initial award of the entire management fee to plaintiffs, despite the fact that their claim was grounded in breach of contract. The trial court indicated that its earlier award of the entire management fee was intended to constitute damages as opposed to restitution, and that the award was an attempt to put plaintiffs in the same position they would have been in if they had gotten the benefit of their bargain. After considering the management fee award on remand, the trial court determined that it was more appropriate to award damages based on specific instances where defendants breached their contractual obligation.

In ordering a remand, this Court clarified that the proper measure of damages was "the cost of completing the construction plus any additional expenses the owner incurs because of the default." *Anthony, supra*, slip op at 11. On remand, in lieu of the award of the full \$104,534.04 management fee, the trial court awarded specific amounts of damages which corresponded directly to the monetary amounts associated with each individual breach of the contract: \$19,534.39 for a refund of double billings; \$3,447.01 for a refund of management fee on double billings; \$19,001.39 for a refund of amounts paid by plaintiffs for which there were no supporting invoices; \$8,916.18 for the doubled management fee; and \$6,980 credit for lights purchased by plaintiffs. This award accurately reflects the trial court's original finding that defendants engaged in some work, and plaintiffs derived some benefit from defendants' efforts.

The trial court's award on remand comported with this Court's clarification that damages should consist of the cost of completing the construction plus any additional expenses incurred due to default. Here, the trial court initially awarded damages and restitution. On remand, it properly awarded damages consisting of the cost of completion (\$134,000—affirmed by this Court and not at issue here), plus the additional expenses incurred by plaintiffs because of the default. Because it reconsidered the award of the management fee and comported its damage award to this Court's clarification as to a proper measure of damages, we find that the trial court took action consistent with this Court's prior opinion and order. *Hadfield, supra*.

To the extent defendants argue that the trial court's award was precluded by res judicata, "[t]he proceeding at issue here resulted from this Court's remand order and is thus part of a continuous action and not a separate lawsuit." *Vandenberg v Vandenberg*, 253 Mich App 658, 663; 660 NW2d 341 (2002). Accordingly, the doctrine of res judicata did not bar the trial court's award of damages on remand.

To the extent defendants argue that the trial court's award was precluded by the law of the case doctrine, it applies "only to issues actually decided, either implicitly or explicitly, in the prior appeal," *Grievance Administrator v Lopatin*, 462 Mich 235, 260; 612 NW2d 120 (2000), and an order vacating and remanding a case for reconsideration is not a decision which can establish the law of the case. *Hill v Ford Motor Co*, 183 Mich App 208, 212; 454 NW2d 125 (1989). In the prior appeal, this Court clarified that the apparent award of \$104,534.04 under a restitution theory was improper. However, this Court left open the possibility that the \$104,534.04 award might be proper under a different theory. Therefore, under the facts of this

case, the law of the case doctrine did not apply to bar the trial court from explaining the basis underlying the award and revising the amount on remand.

However, defendants correctly point out that the trial court's award of \$19,534.39 for a refund of double billings is both a mistaken amount as well as a duplicate of the award in the original judgment. The amount for billing statement errors stated by the trial court in its original oral opinion on the record was \$19,135.39. This amount (\$19,135.39) was included in the original judgment amount of \$327,412.33. Therefore, the trial court's inclusion of the refund for double billings on remand resulted in an improper double recovery. *Great Northern Packaging, Inc v General Tire and Rubber Co*, 154 Mich App 772, 781; 399 NW2d 408 (1986). Accordingly, we remand this case to the trial court for entry of a revised order reducing the award of damages on remand to \$38,344.58 (\$57,878.97 less \$19,534.39).

Affirmed, but remanded for entry of an order reducing the damages awarded on remand to \$38,344.58. We do not retain jurisdiction.

/s/ Kirsten Frank Kelly

/s/ Jane E. Markey

/s/ Michael R. Smolenski