

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In Case No. 2008-0809, Kathy Walsh Real Estate, Inc. v. Sewall Farms Realty, LLC & a., the court on October 28, 2009, issued the following order:

Sewall Farms Realty, LLC (Sewall Farms) appeals an order of the superior court, following a trial on the merits, that found Sewall Farms in material breach of its contract with the appellee and cross-appellant, Huaxin You. Sewall Farms argues that the trial court erred by: (1) ruling that Mr. You's conduct was not an anticipatory repudiation of the contract; (2) finding that Sewall Farms' failure to timely obtain a certificate of occupancy was a material breach of the contract; and (3) relying upon the Uniform Commercial Code. In his cross-appeal, Mr. You argues that the trial court erred by not awarding consequential damages, and requests that we award him attorney's fees pursuant to Supreme Court Rule 23. We affirm.

A breach of contract occurs when there is a failure without legal excuse to perform any promise which forms the whole or part of a contract. Lassonde v. Stanton, 157 N.H. 582, 588 (2008). Only a breach that is sufficiently material and important to justify ending the whole transaction is a total breach that discharges the injured party's duties. McNeal v. Lebel, 157 N.H. 458, 465 (2008). An anticipatory breach occurs when a promising party repudiates his obligations either through words or by voluntarily disabling himself from performing them before the time for performance. Id. at 462. The non-breaching party may then treat the repudiation as an immediate breach and maintain an action at once for damages. Id. If, however, "the apparent repudiation is not sufficiently clear and unequivocal," the other party's nonperformance will not be excused. Id. (quotation omitted).

Whether a party has breached or anticipatorily repudiated a contract, and whether a breach of contract is material, are questions of fact. See Fitz v. Coutinho, 136 N.H. 721, 725 (1993). We will uphold the trial court's findings of fact and rulings of law unless they lack support in the evidence or constitute a clear error of law, McNeal v. Lebel, 157 N.H. at 461; we defer to the trial court's judgment on such issues as resolving conflicts in testimony, assessing the credibility of witnesses, and determining the weight to be given evidence. Cook v. Sullivan, 149 N.H. 774, 780 (2003). Our standard of review is not whether we would rule differently than the trial court, but whether a reasonable person could have reached the same decision as the trial court based upon the same evidence. Id.

Based upon the record before us, we conclude that the trial court's ruling that Mr. You's conduct did not constitute an anticipatory breach was neither lacking in evidentiary support nor a clear error of law. After the parties agreed to extend the closing date, Mr. You asserted that the contract allowed him a right of rescission which he intended to exercise; Sewall Farms disputed that interpretation of the contract. Mr. You inquired whether Sewall Farms would be willing to release him from his obligations under the contract to avoid a legal dispute over his contractual entitlement to rescind. The trial court found that Sewall Farms did not respond to these communications by declaring Mr. You to be in default, but instead asserted that it was moving forward with the project, that it deemed the contract as amended binding upon Mr. You, and that it intended to close on the new closing date. Mr. You testified that he told Sewall Farms that he would close if it completed construction of the building housing his unit by the new closing date. Accordingly, the trial court could have found that Mr. You's communications and conduct were not so clear and unequivocal as to have constituted an anticipatory breach.

We are unpersuaded by Sewall Farms' argument that Mr. You "signaled his intent not to perform his duties under the Agreement by voluntarily disabling himself from further performance." Such a finding was not compelled by the evidence, and we defer to the trial court's weighing of the evidence and contrary conclusion. Nor was the trial court bound by the assertions of Sewall Farms that its agent lacked authority to communicate to Mr. You that it intended to proceed with the transaction. See 93 Clearing House Inc. v. Khoury, 120 N.H. 346, 350 (1980) (finder of fact not bound by uncontroverted evidence).

Sewall Farms also argues that the trial court erred in finding that its failure to obtain a certificate of occupancy was a material breach of contract. The original contract specifically provided that time was of the essence and the amendment further specified that "construction . . . be completed and a certificate of occupancy . . . obtained by July 20, 2007, with all town inspections completed" so that Mr. You could complete the home inspection process prior to the July 27, 2007 closing. Moreover, the amendment was negotiated as a direct consequence of Sewall Farms' failure to meet the earlier closing date required under the original terms of the contract and both Mr. You and his agent testified to continuing concerns about Sewall Farms' ability to meet the amended deadline. The record reflects that, as of July 24, 2007, the building inspector had visited the property but had not yet issued a certificate of occupancy due to certain concerns, and that a certificate of occupancy was not issued until several months after the amended July 27, 2007 closing date. Given this evidence, the trial court could have found that the failure to obtain a certificate of occupancy was sufficiently material to justify terminating the contract. See McNeal, 157 N.H. at 465.

Sewall Farms also argues that the trial court erred “by giving undue consideration of the Uniform Commercial Code in a case involving a real estate transaction.” Sewall Farms does not cite any portion of the record in which it raised this issue before the trial court; see Sup. Ct. R. 16(3)(b); cf. Mahmoud v. Irving Oil Corp., 155 N.H. 405, 405-07 (2007) (failure to specify where in record appealing party raised issue grounds to dismiss appeal), but, rather, asserts that “[t]his issue of law [was] raised by trial court sua sponte.” As the appealing party, Sewall Farms bears the burden of demonstrating that it raised each of its arguments before the trial court. See Bean v. Red Oak Prop. Mgmt., 151 N.H. 248, 250 (2004). If the trial court raises an issue and commits an error that could not have been anticipated prior to its ruling on the merits, it is the appealing party’s obligation to raise the issue in a motion for reconsideration. See Starr v. Governor, 151 N.H. 608, 611 (2004). The record does not reflect that Sewall Farms filed a motion to reconsider before the trial court, or otherwise brought the issue to its attention. It has therefore failed to demonstrate that it has preserved the issue for appeal.

We turn then to Mr. You’s cross-appeal. He argues that the trial court erred in not awarding him consequential damages of \$9500 for the loss of his employer-provided relocation benefits. “Consequential damages are reasonably foreseeable losses that flow from a breach of contract.” Drop Anchor Realty Trust v. Hartford Fire Ins. Co., 126 N.H. 674, 678 (1985). They are recoverable only if they were reasonably foreseeable at the time the parties entered into the contract, and were reasonably ascertainable in amount. See Hydraform Prods. Corp. v. American Steel & Alum. Corp., 127 N.H. 187, 197 (1985). In reviewing an award of damages, we consider the evidence in the light most favorable to the prevailing party, and will not overturn the trial court’s determination absent clear error. See McNeal, 157 N.H. at 466.

Even if we assume that Sewall Farms was aware of Mr. You’s relocation benefit prior to executing the original purchase and sale agreement, the trial court correctly noted that the benefit, as set forth in the contract amendment, was not \$9,500, but was the payment of closing costs “up to \$9,500.” While we do not require mathematical certainty in computing damages, see id., the record in this case contains no evidence from which the trial court could have reasonably ascertained the amount of closing costs that Mr. You’s employer would have paid had a closing timely occurred. We therefore affirm the trial court’s finding that Mr. You failed to meet his burden of proof as to consequential damages. See Bailey v. Sommovigo, 137 N.H. 526, 531 (1993) (party seeking damages bears burden of proving extent and amount of such damages).

Because we conclude that Sewall Farms' appeal was neither frivolous nor brought in bad faith, we deny Mr. You's request for an award of attorney's fees pursuant to Supreme Court Rule 23.

Affirmed.

DUGGAN, HICKS and CONBOY, JJ., concurred.

**Eileen Fox,
Clerk**