[Cite as *Constr. Sys., Inc. v. Garlikov & Assoc., Inc.* , 2012-Ohio-2947.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Construction Systems, Inc. et al.,	:	
Plaintiffs-Appellees,	:	
		No. 11AP-802
v.	:	(C.P.C. No. 03CVH02 01983)
Garlikov & Associates, Inc. et al.,	:	(REGULAR CALENDAR)
Defendants-Appellants.	:	

D E C I S I O N

Rendered on June 28, 2012

McFadden, Winner, Savage & Segerman, LLP, James S. Savage, and *Douglas J. Segerman*, for appellees Construction Systems, Inc., and Colors, Inc.

Luper Neidenthal & Logan, and *Luther L. Liggett, Jr.*, for appellee NBBJ.

Zeiger, Tigges & Little, LLP, Marion H. Little, Jr., and *Bradley T. Ferrell*, for appellants.

APPEAL from the Franklin County Court of Common Pleas.

BROWN, P.J.

{¶ 1} Appellants, Garlikov & Associates, Inc., and Garlikov & Associates, LLC, ("appellants"), appeal from the judgment of the Franklin County Court of Common Pleas in favor of appellees, Construction Systems, Inc. ("CSI"), Colors, Inc. ("Colors"), and NBBJ East Limited Partnership ("NBBJ").[1] For the following reasons, we affirm the judgment of the trial court.

[1] NBBJ East Limited Partnership is named simply "NBBJ" in the complaint.

{¶ 2} Appellants are engaged in the business of providing insurance services and products and developing executive benefits that accumulate and manage wealth to high net worth individuals. Since 1986, the office has been located in the Huntington Center building in Columbus, Ohio. In 2001, appellants were occupying the 27th floor when another tenant exercised its option on the 27th floor, which precipitated a move on appellants' part. In February 2002, appellants entered into a sublease with Huntington Bank for office space which would include the entire 34th floor and a portion of the 33rd floor of the Huntington Center. The sublease provided that Huntington Bank would offer a cash allowance of $360,000 to offset the cost of renovating or improving the leased premises. Appellants intended to only occupy a portion of the leased premises, approximately 8,000 square feet of the 34th floor, and sublease the other approximately 19,000 square feet ("the adjacent space"). Appellants were initially required to vacate the 27th floor by July 1, 2002, although they received an extension to August 1, 2002.

{¶ 3} Originally, appellants retained Acock Associates Architects, LLC ("Acock") to provide some initial drawings of the renovations. Shortly thereafter, appellants retained NBBJ as the architect, owner's representative and construction manager for the design and construction of its relocated office space on the 34th floor, occupying approximately 8,000 square feet. CSI acted as the general trades contractor and Colors acted as the contractor specializing in finishes, including wall coverings and paint. Mid-City Electric, Inc. ("Mid-City") acted as the electrical contractor. URS Corporation, who was hired by Huntington Bank, designed the electrical, mechanical, and plumbing, but was never a party to the action. A conflict regarding personalities and payment arose and when the contractors for the renovation and construction project ("the project") were not paid, they left the job in mid-August 2002. In April 2004, Acock was again retained to perform architectural services for the remedial project to finish the space. Appellants moved to the adjacent space and the remedial project spanned from April 2004 through December 2005. Given that the issues are so fact-reliant, a more extensive discussion of the facts will be given throughout the assignments of error.

{¶ 4} On February 20, 2003, CSI, Colors, and Mid-City[2] filed a complaint against NBBJ and appellants for breach of contract. Appellants filed counterclaims for breach of

[2] All claims by or against Mid-City were resolved and Mid-City is no longer a party.

contract and tortuous interference with contractual relations against CSI, a counterclaim for breach of contract against Colors, and various cross-claims, including breach of contract against NBBJ. NBBJ filed cross-claims against appellants for breach of contract, indemnification, and contribution.

{¶ 5} The matter was tried to a magistrate for a jury-waived trial over the course of several, non-consecutive weeks in 2006 and 2007. The magistrate issued a decision on December 31, 2008. The magistrate concluded that CSI, Colors, and NBBJ were each entitled to judgment in their favor on their claims against appellants. Appellants filed objections to the magistrate's decision. On November 9, 2009, the trial court struck appellants' objections to the magistrate's findings of fact, overruled appellants' objections to the magistrate's conclusions of law, and adopted the magistrate's decision in its entirety. On November 25, 2009, the trial court entered final judgment in favor of: (1) NBBJ in the amount of $45,388, (2) CSI in the amount of $110,765, and (3) Colors in the amount of $33,550, non-inclusive of pre- and post-judgment interest. The court further rendered judgment, consistent with the magistrate's decision, in favor of CSI and Colors on appellants' counterclaims and in favor of NBBJ on appellants' cross-claims.

{¶ 6} Appellants filed a notice of appeal and this court rendered a decision on August 19, 2010, finding that the parties had improperly stipulated that the findings of fact by the magistrate would be final and not subject to objections. This court determined that the stipulation was contrary to amended Civ.R. 53 because the rule no longer provides for a stipulation as to the finality of a magistrate's findings of fact, and because the rule requires the filing of objections before a party is entitled to appeal the trial court's adoption of the magistrate's findings of fact or conclusions of law. However, we also determined that the stipulation was contrary to the clear import of former Civ.R. 53. Specifically, former Civ.R. 53 did not permit parties to stipulate that the magistrate's factual findings were final for purposes of review by the trial court but subject to appellate review once adopted by the trial court. Rather, the parties could either file objections to the magistrate's findings of fact in the trial court and, thus, preserve appellate review of those findings or the parties could stipulate that the magistrate's findings of fact were final in the trial court and for purposes of appellate review. Thus, we concluded that the proper remedy was to remand the matter to the trial court to rule on the properly filed objections

to the magistrate's findings of fact and, if necessitated by those rulings, to reconsider the objections to the magistrate's conclusions of law. *See Constr. Sys., Inc. v. Garlikov & Assoc., Inc.*, 10th Dist. No. 09AP-1134, 2010-Ohio-3893.

{¶ 7} On remand, the trial court overruled all the objections and approved and adopted the magistrate's decision in full.

{¶ 8} Appellants filed a timely notice of appeal and assert three assignments of error:

> [I.] The trial court erred in adopting the magistrate's decision and entering judgment in favor of NBBJ on (i) its breach of contract claim against Garlikov, and [ii] Garlikov's breach of contract claim against it.
>
> [II.] The trial court erred in adopting the magistrate's decision and entering judgment against Garlikov on its claim against NBBJ for breach of fiduciary duty.
>
> [III.] The trial court erred in adopting the magistrate's decision and (i) entering judgment in favor of CSI and Colors on their claims for breach of contract against Garlikov, and (ii) entering judgment against Garlikov on its claims against CSI and Colors for breach of contract.

{¶ 9} "When reviewing a trial court's disposition of objections to a magistrate's report, we will not reverse the trial court's decision if it is supported by some competent, credible evidence. * * * Our review of the trial court's findings is limited to whether the trial court abused its discretion in adopting the magistrate's decision." *O'Connor v. O'Connor*, 10th Dist. No. 07AP-248, 2008-Ohio-2276, ¶ 16, citing *State ex rel. Duncan v. Chippewa Twp. Trustees*, 73 Ohio St.3d 728, 730 (1995).

{¶ 10} In their first assignment of error, appellants contend that the trial court erred in adopting the magistrate's decision and entering judgment in favor of NBBJ on its breach of contract claim, and entering judgment against appellants on its breach of contract claim against NBBJ. The trial court found that NBBJ was not liable to appellants for breach of contract, and was entitled to the full amount of its unpaid contract balance.

{¶ 11} As stated above, appellants initially retained Acock to provide drawings of the renovations. Shortly thereafter, Garlikov Chairman, Donald E. Garlikov ("Mr. Garlikov"), consulted with his longtime friend, former Garlikov board member and owner

of NBBJ, Friedl Bohm, who told him that NBBJ could help since NBBJ had designed the executive floor and knew the building. Since Mr. Garlikov was under tremendous time pressure, Bohm discussed a faster process than a design and complete drawings and bid process ("design-bid-build") since the job would not be completed in time using that process. Bohm suggested the only way to meet the tight deadline was to do sketch drawings and bring in known subcontractors. Bohm felt confident that Mr. Garlikov fully understood the conditions before NBBJ was retained, and the fact that NBBJ could accomplish the project in the timeframe was probably the reason why Mr. Garlikov retained NBBJ. Mr. Garlikov retained NBBJ as the architect, owner's representative, and construction manager for the design and construction of the project. Bohm was not aware that Acock had already worked on the project.

{¶ 12} Bohm was not further involved with the project until the end when he attempted to mediate among the parties and conclude the project. Thomas Walsh was the project manager for NBBJ and Dave Lenox was NBBJ's lead architect, as well as the principal in charge of the project. In July, Walsh left for a one-month vacation and Scott Overturf took over as project manager.

{¶ 13} Mr. Garlikov and Edith Garlikov ("Mrs. Garlikov") were the decision makers on behalf of appellants. Mr. Garlikov concentrated on the financial aspects and Mrs. Garlikov concentrated on the aesthetics.

{¶ 14} NBBJ characterized the project as "fast-track," meaning the simultaneous preparation of the plans and construction. Each phase would lack traditional documentation and formality. Bohm testified that he was confident Mr. Garlikov understood that NBBJ would not be providing full services but would be providing, basically, sketch plans. There were advantages and risks to using this method. However, even this required an abbreviation of the design process, an elimination of many drawings, hiring subcontractors quickly, and keeping changes to a minimum to avoid delays. One of the risks was less sharing of information, requiring the contractors' knowledge of standards of the property. The magistrate found that all the parties involved in the project agreed to a fast-track approach in order to meet the deadline and any other methodology would have compromised the ability to meet the unusually tight deadline.

{¶ 15} The contractors testified that NBBJ chose them based on their previous experience working in the Huntington Center and ability to complete fast-track projects. Andrew Poczik from Colors testified that a quick job was not unusual for his company; a fast-track job was one of the reasons NBBJ called them. However, a deadline of approximately 90 days was unreasonable for a project similar to this one. The original deadline was July 1, later extended to August 1, 2002. Therefore, the contractors were handpicked and considered the best in the city. Colors had completed 10 to 12 jobs in the Huntington Center, and this was an important factor as the Huntington Center had specific requirements and building standards.

{¶ 16} Typical of fast-track jobs, NBBJ worked from a general set of drawings, but did not use complete documentation, including a project manual. Instructions and changes were typically verbal because decision-making was required to be quick, without waiting for formal writings due to the deadline. The Garlikovs were aware of the deadline and the need to make decisions timely and did not require signed change orders. Walsh, the project manager from NBBJ, testified that he e-mailed Mrs. Garlikov on April 3, 2002 to explain critical dates that needed to be achieved to meet the deadline, in particular: (1) signing off on the floor plan by April 8, (2) ordering the long lead items during the week of April 8, (3) starting wall framing by April 15, (4) completing engineering documents by April 22, and (5) submitting the permit documents by April 23.

{¶ 17} By May 7, 2002, the project was approximately seven days behind those milestone dates. Walsh informed the Garlikovs that plans and finishes needed to be approved. The Garlikovs did not meet deadlines and, after some decisions were made, Mrs. Garlikov changed her mind or would not remember decisions she had made. The magistrate cited one example given by Lenox regarding wall coverings. Walsh had developed a matrix with the different wall coverings and the relative costs and the time to order, and Mrs. Garlikov was provided with six to eight different types of wall coverings. Mrs. Garlikov could not make a decision and Lenox offered to help. They went to Mr. Garlikov's office and put five or six swatches on the wall. Mrs. Garlikov asked Lenox's opinion and he suggested one. She decided on another one and then she changed her mind and chose the one Lenox suggested. Mr. Garlikov arrived, and Mrs. Garlikov started to cry and complain about Lenox. After the wall covering was ordered and installed, Mrs.

Garlikov decided she did not like the selection. The magistrate cited this example as effectively serving "as a microcosm of the manner in which Mrs. Garlikov operated during the Project. She also failed to make timely design decisions regarding carpet, painting, other wall coverings and many additional areas." (Magistrate's Decision at 21.)

{¶ 18} Lenox testified to another example regarding the walls in Mr. Garlikov's office that were moved two or three times. A third example Lenox gave was the art wall, or gallery, which connected the two sides of the office adjacent to the monumental staircase. It was a series of niches to highlight the Garlikovs' artwork. After the studs were constructed, Mrs. Garlikov did not like them because they blocked her view. The studs were removed. Also, the back wall to the large conference room had to be moved several times. The wall was supposed to hold a large piece of art. When it was constructed, the Garlikovs determined they did not like the location of the wall because it could not be seen as one was walking up the stairs, so Lenox drew the detail on the wall in order that everyone would remember the conversation. Even after the wall was moved, the Garlikovs did not like the second location they had approved.

{¶ 19} The large conference room was a major issue of contention. After it was constructed according to the original drawings, the Garlikovs wanted the ceiling and soffits changed because it was not the same as the conference room ceiling on the 27th floor. After it was constructed, the Garlikovs expressed that it was still not acceptable and not what Mrs. Garlikov envisioned. Raymond Speakman, of Mid-City, testified he started on the project in early July 2002. He installed various receptacles, various switches, and can lights in soffits in the large conference room. Mrs. Garlikov approved the sequence of the light switches of the can lights because there were two switches that operated the lights. After installation, the number of can lights in the room changed so they had to all be removed; CSI had to reframe them because they had to be centered and then reinstalled. Mid-City lost approximately 16 man hours and CSI lost a minimum of 8 man hours. At that point, Speakman met with Mrs. Garlikov to discuss the light sequencing again, but he said she was very difficult to deal with at that point in the project. Mrs. Garlikov was not happy with the fact that the ceiling did not tier up in the same fashion that the soffits tiered in the 27th floor conference room. Changes were made repeatedly until the contractors walked off the job in August and the room was left in an unfinished

state. Lenox testified it was unfinished because of the changes in decisions and the designs made by the Garlikovs.

{¶ 20} Such changes in the decision-making process set back the construction process. The setbacks impacted the scheduling and pushed back the milestone dates. For example, Christopher Southwick from Colors testified that the Garlikovs never made a final decision on a paint color for the 33rd floor lobby and stairwell, so they were never painted. In late May and early June, there was a work stoppage for approximately two weeks or two and one-half weeks because decisions were not being made timely and the plans needed to be updated because of the many changes.

{¶ 21} A major issue at trial was whether NBBJ was hired to replicate the office space on the 27th floor or design a new space. Scott Overturf, the NBBJ construction manager during Walsh's absence, testified the Garlikovs did not want to replicate the 27th floor until the end of the project. NBBJ was hired "to design something, not to copy something." (Sept. 27, 2006 Tr. 79.) Walsh testified that NBBJ was not told to replicate the 27th floor and it would not be possible to do so because the layout of the floors was not identical. The 34th floor included a monumental staircase in the center. Lenox testified that the Garlikovs showed him the initial design from Acock and was told it was too similar to the 27th floor and they wanted more "design expertise." (Sept. 29, 2006 Tr. 116.) Teri Umbarger, an architect for NBBJ, did testify that the Garlikovs told her they wanted certain design concepts from the 27th floor copied to the 34th floor, such as a similar soffit ceiling in the large conference room. However, the magistrate found it unreasonable for appellants to expect an exact replication from one space to another since it was never effectively conveyed and not possible given the layout of the space. Mrs. Garlikov approved the plans for the space before the space was built and the plans were not a replication. We find no fault with this conclusion as the evidence clearly supports it.

{¶ 22} Other design issues in contention at trial included the designing and building of Mr. Garlikov's office. Lenox testified that, after the plans were approved by Mrs. Garlikov and construction significantly underway, Mrs. Garlikov expressed dissatisfaction that Mr. Garlikov's office was not exactly the same as on the 27th floor. There were issues regarding the door sizes, furniture being reused and fitting inside the office and walls being moved to accommodate the furniture. Again, the lay out of the

space was not the same as on the 27th floor because there was the addition of an administrative assistant, and the office on the 34th floor was larger. There was also an issue regarding the Garlikovs informing NBBJ what furniture was being moved from the 27th to the 34th floor so the walls could be built to accommodate the furniture. It was not possible to exactly replicate the office. Poczik testified that CSI was not made aware that the Garlikovs were trying to replicate space on the 27th floor until after rooms were built per the plans.

{¶ 23} Walsh testified that the Garlikovs were going to reuse materials in the Huntington Center. Garlikovs' expert, Scott C. Ritson, testified that this is a "fairly standard" or "routine" instruction that is an owner decision, but enacted by the construction manager. (July 24, 2007 Tr. Vol. II, 366.) Poczik from CSI testified that NBBJ communicated during the initial walk-through that certain doors would be reused and CSI knew that other materials would be reused, including trim, crown moldings, wood base, and door frame trim. Poczik questioned the reuse of the ceiling tiles and created a budget using new tiles, but was told the client wanted to use the old ceiling tiles. The Garlikovs testified at trial that they expected their finished space on the 34th floor to be "Class A" in quality. (July 25, 2007 Tr. Vol. III, 511.) The magistrate acknowledged the subjective nature of this designation and this issue at trial. Walsh testified that the 34th floor was generally in good condition, although dated. Mrs. Garlikov herself acknowledged the elegance of the 34th floor, yet expected an upgrade of its appearance. The Garlikovs approved the reuse of existing materials to save money yet, after they were reinstalled, complained that the materials did not meet their expectations and were unacceptable under Class A quality.

{¶ 24} The magistrate found that both NBBJ and the Garlikovs were responsible for design errors in the project. Overturf conceded that there were mistakes on the part of NBBJ with respect to the design. The Garlikovs inadequately conveyed their goal of replicating their space from the 27th to the 34th floor and did not communicate the reuse of built-in bookcases and casework in order for NBBJ to communicate such to the subcontractors. Given the amount of changes and the lack of decision-making, the magistrate found that NBBJ was frequently playing catch-up to Garlikovs' design intent during construction. The magistrate found NBBJ witnesses credible in their belief that

they were hired to design the space, not replicate the 27th floor, and Mrs. Garlikov contributed to this belief by not using Acock's original design and hiring NBBJ for their design expertise. As the magistrate found, if this amounts to a misunderstanding, it does not equate to a design error by NBBJ. Such determinations of credibility and the weight to be given to the evidence are for the trier of fact. *State v. DeHass*, 10 Ohio St.2d 230 (1967), paragraph one of the syllabus.

{¶ 25} Appellants argue that NBBJ failed to prepare accurate design drawings, and, thus, was liable to appellants as a matter of law for the additional construction costs that arose as a result of those design errors. Appellants cite *S. Union, Ltd. v. George Parker & Assocs., AIA, Inc.*, 29 Ohio App.3d 197 (10th Dist.1985), and *Centex-Rooney Constr. Co. v. Martin Cty*., 706 So.2d 20, 25-27 (Fla.App.1998), for the proposition that when a construction manager commits errors in managing the construction process, the construction manager is liable to the owner for the additional costs that result. Thus, appellants argue that since the magistrate found that NBBJ committed errors, it must be liable to them.

{¶ 26} Appellants argue that since NBBJ failed to prepare design plans that included accurate measurements and dimensions for the various offices, conference rooms, and other areas in the new office space for furniture, built-in cabinetry, and other items that were moved from the 27th floor, NBBJ failed in their duty and must be liable. Initially, the Garlikovs informed NBBJ that they were moving some furniture to the 34th floor but did not specify what furniture. The magistrate did find that supplemental information regarding built-ins, credenzas, and cabinetry to be moved was conveyed to NBBJ by a certain time. However, the magistrate found that Mrs. Garlikov's preferences were not fully communicated to NBBJ to the extent that she testified at trial. NBBJ did not relay some of the respective changes to the contractors, and walls were built without consideration of these items based on a lack of direction from NBBJ and had to be modified.

{¶ 27} In further support of their argument, appellants cite design errors the magistrate found that NBBJ committed with respect to the design of Mr. Garlikov's office, improperly locating electrical switches and outlets behind furniture, rebuilding the kitchenettes because of a lack of communication regarding the reuse of appliances, and

the large conference room design problems. Regardless of any mistakes the magistrate found NBBJ to have made, the magistrate did not find the NBBJ mistakes to be material because he found NBBJ substantially completed the project. More specifically, the magistrate held in pertinent part:

> Of the Design Development Deliverables listed by NBBJ in the March 26, 2002 proposal, NBBJ supplied most as promised. One exception is finishes, which Lenox effectively demonstrated NBBJ was precluded from completing. *NBBJ Exhibit 1.* Mr. Lenox acknowledged that part of NBBJ's services include taking individual customers and personalities into account, but in this case, NBBJ underestimated Mrs. Garlikov's propensity for indecision, drama, and insistence on replication far beyond what is illustrated in the Project plans she signed off on. At times, it was difficult to keep plans current, as changes were often "daily" or "constant" and included "changes of changes." Ms. Umbarger confirmed that the design development phase generated construction documents with more detail, but the breadth of changes by Garlikov were far more than could have reasonably been expected.

(Magistrate's Decision at 25-26.)

{¶ 28} In *Am. Sales, Inc. v. Boffo*, 71 Ohio App.3d 168, 175 (2d Dist.1991), the court set forth the elements of a cause of action for breach of contract as follows: (1) the existence of an enforceable contract, (2) the performance, or excuse from performance, of the contractual obligations by the party seeking relief, (3) breach by the other party, (4) damages suffered by the party seeking relief as a result of the breach, and (5) consideration.

{¶ 29} It is well-settled in Ohio that if a party has substantially performed its contractual obligations, then that party has not breached the contract and mere nominal, trifling or technical departures are not sufficient to breach the contract. *Ohio Farmers Ins. Co. v. Cochran*, 104 Ohio St. 427 (1922), paragraph two of the syllabus. Such application is to be confined to cases where the party has made an honest or good-faith effort to perform the contract terms. *Burlington Resources Oil & Gas Co. v. Cox*, 133 Ohio App.3d 543, 548 (4th Dist.1999), citing *Ashley v. Henahan*, 56 Ohio St. 559 (1897), paragraph one of the syllabus.

{¶ 30} The magistrate concluded that NBBJ "did commit several minor design and managerial errors * * *. However, these [errors] did not cause the demise of the Project or contribute to the material breach by Garlikov. Because NBBJ's errors constitute nominal, trifling, or technical departures, Garlikov's actions that led to its material breach were completely unwarranted." (Magistrate's Decision at 77.)

{¶ 31} Appellants cite *S. Union* to support their argument that they are entitled to damages. In *S. Union*, the plaintiff was granted approval by the United States Department of Housing and Urban Development ("HUD") to build an apartment complex, Surrey Hill. South Union then entered into a construction contract with Prime Builders of Pennsylvania, Inc. ("Prime Builders"). The principals of Prime Builders were Lawrence Maxwell and Charles Erdman. Maxwell and Prime Builders were also the managing general partners of South Union, so Prime Builders was wearing two hats, the managing general partner of South Union, and South Union's general contractor for Surrey Hill.

{¶ 32} After one year as general contractor for Surrey Hill, Prime Builders encountered financial difficulties and ceased construction at Surrey Hill. For one year, Index Developing Company became the unofficial general partner of South Union and was the construction manager for construction purposes before South Union entered into a second construction contract with Eller Enterprises, Inc. Extensive plans and specifications were provided to the general contractors and incorporated into the construction contracts. A material deviation was described as a significant change in the cost, time or design of the project and required a written change order. Change orders had to be submitted and approved by South Union, HUD, the lender, and the inspecting architect. It was not unusual for such changes to occur when the principals agreed to a particular change.

{¶ 33} During the time that Prime Builders folded and Eller became the general contractor, the rough electrical work was finished. The allegations were that the electrical system did not conform to the plans and specifications. This court, in *S. Union* at paragraph one of the syllabus, determined that the architectural firm failed to discharge its contractual duties "to inform the owner of deviating, nonconforming construction work, and to advise the owner of ambiguities and deficiencies in construction plans and

specifications [which constitutes a material breach and], entitles the plaintiff owner to damages resulting from the breach."

{¶ 34} Appellants' reliance on *S. Union* is misplaced because the factual differences are substantial. *S. Union* involved a typical HUD construction project and unauthorized deviations to the plans and specifications. The project in this case was not a typical design-bid-build project but, rather, as stated above, a fast-track project, meaning the building and design were simultaneous with each phase lacking traditional documentation and formality. The magistrate found there were advantages and risks associated with a fast track project that were communicated to the Garlikovs, and that all the parties understood the advantages and risks. The testimony supported such a finding that the approach requires less sharing of information because of the time restraints and a reliance on the contractor's knowledge of the standards of the property.

{¶ 35} In addition to the factual differences in the type of project from *S. Union*, this case differs in the magistrate's finding that the behavior of the Garlikovs presented challenges and created the demise of the project resulting in the termination of the contract. Although Mr. Garlikov initially had little involvement in the project other than paying bills, after the work stopped, he became accusatory. Walsh testified that he had to mediate disagreements between the Garlikovs. The disagreements also affected decision-making, such as the large bronze doors and wall coverings. Speakman from Mid-City testified he overheard Mr. Garlikov say, "we never pay our bills" and then Mr. Garlikov laughed. (July 26, 2007 Tr. Vol. IV, 1023.) Speakman also testified to an example regarding Mr. Garlikov's behavior when Speakman was attempting to put a louver into a light fixture in order to obtain the temporary occupancy permit. Mr. Garlikov saw them and told them he did not want that light fixture in that office. Speakman explained it was only temporary in order to obtain the permit, because every fixture had to be covered and it would be moved after they received the permit. Mr. Garlikov repeated himself three times and grabbed the louver from them, attempting to pull it away.

{¶ 36} The record supports the magistrate's finding that the demise of the project was primarily the result of Mrs. Garlikov's behavior. All of the NBBJ witnesses testified to her erratic and emotional behavior and the lack of decisions. Walsh testified that 75 percent of the time he dealt with her she was in a state of crying or negativity. He then

testified to an example where Mrs. Garlikov felt her life was being threatened and she asked him to accompany her to her car in the parking garage and look underneath the Mercedes to see if anything was attached to her exhaust. He also testified she told him she believed her staff was "out to get her." (Sept. 28, 2006 Tr. 87.)

{¶ 37} Appellants argue they were forced to pay tens of thousands of dollars demolishing and then rebuilding the large conference room, and tens of thousands more completing it with new contractors all because NBBJ failed to accurately implement the Garlikovs' intent. They also contend that a full account of their costs, totaling $366,192.36, can be found in the report of their expert, Scott Kobylski. Kobylski assembled a room-by-room recommendation of costs associated with repairs based on design or contractor issues or both. However, the magistrate found Kobylski's testimony unreliable since it was founded on discussions with Mrs. Garlikov, based upon what she wanted. The analysis overlapped in scope with the unrelated remedial project performed by Acock, and cross-examination revealed the report contained many instances of double-counting and mathematical errors.

{¶ 38} Given this evidence, the trial court did not err in adopting the magistrate's decision and entering judgment in favor of NBBJ on its breach of contract claim, and entering judgment against appellants on its breach of contract claim against NBBJ. The trial court found that NBBJ was not liable to appellants for breach of contract, and was entitled to the full amount of its unpaid contract balance. The magistrate found that the Garlikovs' behavior was the reason for the breakdown of the project and there is ample evidence to support that finding. Walsh testified that CSI and Mid-Ohio Air Conditioning would not return to the project because Mr. Garlikov had treated them so poorly. Lenox also testified that there were two reasons the contractors would not return: (1) because they were not being paid, and (2) because they did not like Mr. Garlikov. The transcript is full of examples of erratic behavior. The lack of decision-making brought the construction to a halt twice, and there is competent, credible evidence to support the finding that the behavior of the Garlikovs was the cause of the breakdown of the project and the termination of the contract. Appellants' first assignment of error is overruled.

{¶ 39} By the second assignment of error, appellants contend that the trial court erred in adopting the magistrate's decision and entering judgment against them on its

claim against NBBJ for breach of fiduciary duty. Appellants argue since NBBJ acted as their architect, owner's representative, construction manager, and agent on the project, it owed appellants a fiduciary duty as a matter of law. Appellants rely on *Swayne v. Beebles Invest., Inc.*, 176 Ohio App.3d 293, 2008-Ohio-1839 (10th Dist.), to argue that a principal-agent relationship always creates a fiduciary relationship.

{¶ 40} The magistrate found, pursuant to *Stone v. Davis*, 66 Ohio St.2d 74, 78 (1981), quoting *In re Termination of Employment*, 40 Ohio St.2d 107, 115 (1974), a fiduciary relationship is one in which "special confidence and trust is reposed in the integrity and fidelity of another and there is a resulting position of superiority or influence, acquired by virtue of this special trust." The role can arise by either contract or de facto from a special trust or confidence in a relationship. *Id*.

{¶ 41} The magistrate found no evidence of a formal fiduciary relationship. Appellants argued the special trust between a property owner and construction manager informally created a fiduciary relationship. The magistrate found no de facto relationship was established, and the trial court agreed. Appellants argue that a principal-agent relationship always creates a fiduciary relationship rather than a relationship in which the special trust and confidence is created. However, even though NBBJ may have acted as an agent for appellants to the subcontractors, NBBJ did not have decision-making authority on behalf of the Garlikovs. An " 'agency relationship' is a consensual fiduciary relationship between two persons where the agent has the power to bind the principal by his actions, and the principal has the right to control the actions of the agent." *Funk v. Hancock*, 26 Ohio App.3d 107, 110 (12th Dist.1985). In the present case, NBBJ acted as the go-between and the contact for the subcontractors and the Garlikovs, but NBBJ did not have decision-making power or authority, and thus a fiduciary relationship was not created.

{¶ 42} The magistrate also determined, alternatively, that even if NBBJ owed fiduciary duties to appellants, NBBJ's alleged fiduciary breach occurred after NBBJ had already terminated its services and severed its relationship. Because we have found that NBBJ did not breach a fiduciary duty, we need not reach that determination. Appellants' second assignment of error is overruled.

{¶ 43} By the third assignment of error, appellants contend that the trial court erred in adopting the magistrate's decision and entering judgment in favor of CSI and Colors on their claims for breach of contract and entering judgment against appellants on its claim against CSI and Colors for breach of contract. Appellants argue that CSI breached its contract with appellants by refusing to follow Garlikovs' directions on the project, abandoning the project, and failing to substantially complete its work. Appellants argue that Colors breached its contract by abandoning the project before substantially completing its work.

{¶ 44} The magistrate found that the Notices to Proceed constituted the contracts between the parties, and appellants concede as much. Appellants argue that the magistrate erred in finding that appellants breached its contracts with CSI and Colors.

{¶ 45} As stated above, the elements of a cause of action for breach of contract are as follows: (1) the existence of an enforceable contract, (2) the performance, or excuse from performance, of the contractual obligations by the party seeking relief, (3) breach by the other party, (4) damages suffered by the party seeking relief as a result of the breach, and (5) consideration. *Am. Sales* at 175.

{¶ 46} The magistrate found that the notices to proceed lacked clarity and completeness regarding several terms. The parties agreed that the notices did not contain payment terms. Appellants argue that because the contracts did not specify a time of payment, no payment was due until the work was completed. Consequently, CSI and Colors were not entitled to payment because they had not completed their work. However, the evidence at trial provided that the contractors and the Garlikovs agreed that they were to be paid periodic payments in accordance with invoices. Overturf testified that CSI was initially paid, then Mr. Garlikov stopped paying them. Other contractors on the project were paid. There was evidence provided at trial that the custom in Columbus, Ohio, was to provide periodic payments to finance continuing work by the contractors. Christopher Southwick, the owner and president of Colors, testified that progress payments were standard in the industry and typically a contractor was paid at the end of the month for a progress payment. Even appellants' expert, Scott Ritson, testified that it is customary in the industry that once payment is requested and approved, payment is made within 30 days. He was not familiar with the standard in Columbus.

{¶ 47} The magistrate found that waiver by estoppel precluded appellants from denying periodic payments. In general, " 'waiver by estoppel' exists when the acts and conduct of a party are inconsistent with an intent to claim a right, and have been such as to mislead the other party to his prejudice and thereby estop the party having the right from insisting upon it." *Mark-It Place Foods, Inc. v. New Plan Excel Realty Trust, Inc.*, 156 Ohio App.3d 65, 2004-Ohio-411, ¶ 57 (4th Dist.). In the instant case, the theory of waiver by estoppel was met as the evidence indicates the Garlikovs' conduct (i.e., submitting contractors' periodic invoices to Huntington Bank to access "reimbursement" from the cash allowance in a piecemeal fashion and making periodic payments) was inconsistent with their claim that no payment was due until all work was completed. *See Natl. City Bank v. Rini*, 162 Ohio App.3d 662, 2005-Ohio-4041 (11th Dist.).

{¶ 48} Overturf testified that CSI substantially performed and did exceptional work. Poczik testified that appellants owed CSI $112,765 minus $2,000 for the portion of the work that CSI did not complete. Southwick testified that they ordered the wall coverings, started priming walls, and started hanging wall coverings until there was no longer work for them to do because either paint selections had not been made or CSI had not completed the walls because of changes. Appellants did not pay Colors any money, despite being billed $33,555. Colors left the materials on site because they believed they would be returning to finish when the walls were ready and paint colors selected.

{¶ 49} The magistrate found that appellants breached its contract with CSI by ceasing its periodic payments relating to the project even though CSI continued to perform work in good faith. The magistrate also found that appellants breached its contract by failing to issue any timely payments to Colors after it sent invoices to appellants despite the fact that Colors had performed the majority of its work as agreed and remained available to return to complete the project. Further, the magistrate found that the Garlikovs' behavior breached the contract by creating gridlock and impossibility of performance by the parties; thus, the work could not advance since decisions were not made and morale was compromised.

{¶ 50} In a footnote, appellants argue that the trial court erred in looking to custom and usage in the industry, arguing that if a contract is missing an essential term such as the time when payment is to occur, the court first looks to whether the law supplies the

missing term before looking to extrinsic evidence such as usage or custom. Thus, appellants argue that CSI and Colors breached the contracts first by ceasing work, and that the trial court erred in finding that appellants breached the contracts by failing to make periodic payments. Appellants rely on *Larkin v. Buck*, 11 Ohio St. 561 (1860), to support its argument that when a contract does not specify a time for payment, the owner is not obligated to pay for the work until the work is completed.

{¶ 51} *Larkin*, however, is distinguishable from this case. *Larkin* involved a plaintiff agreeing to work on defendant's farm for an agreed set term, six months, and for a set amount per month, but no time was specified in the agreement as to when payment would be made. At the end of the first month, without cause, plaintiff terminated his services and brought suit to recover for the month's service. The court reduced the issue to the following: "The question, therefore, depends upon the effect which should be given to a stipulation of a specified rate per month, in an agreement to serve another for a fixed period of time." *Id.* at 565. The court recognized that the term of service was for labor on a farm for a fixed period and determined, as follows:

> It was for labor upon a farm, where the value of the service, and the amount of the compensation, vary with the season and the character of the work required, and a pro rata stipulation appended to an agreement, to render such service for six months or a year, could hardly have been intended as a precise and reasonable equivalent for any one month of that period, separate and disconnected from the other months; but would rather seem to have been stated, as an agreed average of the whole term, if fully served out. In other words, not as a stipulation to pay or receive that precise sum for any one month, but as a means of ascertaining the aggregate compensation for the whole term, expressed in a form simple, easily comprehended, and requiring no effort to compute or understand it.

Id. at 565-66.

{¶ 52} The agreement at issue here did not contain terms or substance similar to the one in *Larkin*. It was not for a set term. Certainly, the parties had a deadline that they hoped to meet but it was not for a time certain. The contract also did not set a rate or dollar amount. The contractors bid an estimated dollar amount, but the work changed with the daily decision changes.

{¶ 53} The trial court found that, given the fast-track nature of the project and the multitude of changes on this project with these specific circumstances, and with the silence of the contract as to the time for payment, the parties could offer evidence of custom or practice in the industry. *Mr. Mark Corp. v. Rush, Inc.*, 11 Ohio App.3d 167 (8th Dist.1983) (when parties have agreed to critical issues to transaction, courts will determine meaning of ambiguous terms according to parties' mutual understanding, custom and practice or other established legal principles).

{¶ 54} We find no fault with this determination. The evidence provides that the parties agreed to progress payments, and other contractors were paid. CSI was initially paid by progress payments and then payments ceased. Evidence of custom and usage was appropriate, and progress payments are standard in the area. The evidence supports a finding that appellants breached the contracts by failing to pay.

{¶ 55} Appellants also argue that CSI and Colors abandoned the project and breached the contracts by doing so. However, CSI and Colors only stopped working on the project after appellants breached the contracts by failing to make payments. As discussed, the trial court's finding that appellants breached first is fully supported by the evidence, and appellants' argument that CSI and Colors abandoned the project has no merit.

{¶ 56} Appellants argue that the trial court erred in finding that CSI and Colors substantially completed their work. It is well-settled in Ohio that if a party has substantially performed its contractual obligations, then that party has not breached the contract and mere nominal, trifling or technical departures are not sufficient to breach the contract. *Ohio Farmers* at paragraph two of the syllabus. Such application is to be confined to cases where the party has made an honest or good-faith effort to perform the contract terms. *Burlington Resources* at 548, citing *Ashley* at paragraph one of the syllabus.

{¶ 57} The record indicates that the contractors left the project in the second half of August 2002, after the Garlikovs had moved into the renovated space. At that time, demolition was completed. Drywall and acoustic were 99 percent complete, with the exception being the large conference room, which had been completed per the plans and rebuilt three times. The millwork was completed. The casework in the workroom was 99

percent completed, except for the hanging of a small valance and the tightening of the countertop on the island. The doors were 95 to 99 percent completed, and the sliders needed to be attached, some hidden doors completed, and some touch-up work performed on them. Overturf testified that CSI substantially completed their work and did it in an "exceptional manner." (Sept. 27, 2006 Tr. 49.)

{¶ 58} Colors also substantially completed the work under its Notice to Proceed or contract. However, Southwick testified that when Colors left the job in August there was no work for them to do because the drywall was not completed. Southwick testified Colors left the materials on site because they intended to return until it became clear in October that payment was an issue. While the painting on the 33rd floor was not completed, Mrs. Garlikov never chose a final color selection.

{¶ 59} Lenox also testified that the project was substantially completed, and that NBBJ typically does not issue a certificate of substantial completion. Appellants were issued a temporary occupancy permit and worked in the space until the remedial project began in April 2004. The space was functional for well over one year after the contractors left, indicating that it was substantially complete. As such, there is competent, credible evidence supporting the conclusion that CSI and Colors substantially completed their work.

{¶ 60} Finally, appellants argue that CSI breached their contract by refusing to take directions directly from the Garlikovs. Appellants argue that since the Notices to Proceed were between the Garlikovs and the contractors, CSI should have taken direction from the owner; further, because the general practice was to have all instructions run through the NBBJ foreman for consistency, appellants argue that CSI breached its contract.

{¶ 61} The magistrate found that all of the parties understood that NBBJ was to be the single point of contact for appellants. The written agreement did not impose limitations on NBBJ's authority as appellants' representative. NBBJ was responsible for supervising, coordinating, and controlling the contactors' work, as well as designing and supervising the space. Thus, the evidence supports the trial court's finding that CSI did not act unreasonably in accepting NBBJ's apparent authority as appellants' representative, and that it had no duty to take direction from the Garlikovs. Appellants' third assignment of error is not well-taken.

{¶ 62} For the foregoing reasons, we conclude that the trial court did not abuse its discretion in adopting the magistrate's decision, which was supported by reliable, competent, and credible evidence. Appellants' three assignments of error are overruled and the judgment of the Franklin County Court of Common Pleas is affirmed.

Judgment affirmed.

KLATT and FRENCH, JJ., concur.
