[Cite as *Allen v. McElrath*, 2009-Ohio-5422.]

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

TRUMBULL COUNTY, OHIO

DANUTA ALLEN,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2009-T-0001**
- vs -	:	
DAVID McELRATH,	:	
Defendant-Appellant.	:	

Civil Appeal from the Trumbull County Court/Central Division, Case No. 2006 CVF 276.

Judgment: Reversed and remanded.

George E. Gessner, Gessner & Platt Co., L.P.A., 212 West Main Street, Cortland, OH 44410 (For Plaintiff-Appellee).

Michael D. Rossi, Guarnieri & Secrest, P.L.L., 151 East Market Street, P.O. Box 4270, Warren, OH 44482 (For Defendant-Appellant).

COLLEEN MARY O'TOOLE, J.

{¶1} David McElrath appeals from the judgment of the Trumbull County Court, Central Division, awarding Danuta Allen $9,540, with 8% interest annually from April 27, 2007, on her claim for breach of contract in waterproofing her basement. We reverse and remand.

{¶2} Ms. Allen filed her complaint September 8, 2006. In it, she alleged she had entered into a contract with Mr. McElrath requiring him to waterproof her basement. She alleged she continued to have the same dampness problems after his completion

of the contract as before, and demanded the return of the entire contract price: $7,250. She further alleged that Mr. McElrath had damaged her air conditioner while excavating, and that she was entitled to another $2,959.95 to replace it. Finally, she alleged that he had failed to replace the concrete he cut in her attached garage to get at the foundation properly, and that she expended $150 to replace shrubbery. Altogether, she prayed the trial court for damages in the amount of $10,359.95.

{¶3} Mr. McElrath filed his answer October 31, 2006, substantially denying the complaint. He later amended his answer. The matter came on for bench trial August 31, 2007. Ms. Allen testified on her own behalf. In autumn 2004, she was renovating her house in contemplation of a possible job change. Her basement was bad, with damp spots on the walls, and moisture around the perimeter of the floor. A contractor referred her to Mr. McElrath. Mr. McElrath completed the job in late October 2004. Ms. Allen paid him the $7,250 owed under the contract October 25, 2006.

{¶4} Shortly thereafter, she noticed new problems. While admitting there was no further moisture along the base of the walls, and that the north wall was trouble-free, she had wet spots in some other places, including the northeast and southwest corners, and particularly, the southeast corner. Mr. McElrath came to look at the situation. It being November, and cold, he promised to correct the situation in the spring, when he did return, and re-waterproofed part of the foundation.

{¶5} Ms. Allen further testified that Mr. McElrath had to move her central air conditioning unit to excavate, and that when she attempted to use it the following spring or summer, it ran, but never cooled her house. She testified that Joe McElhaney, a friend of Mr. McElrath's, who was familiar with air conditioners, came out and attempted

over a lengthy period of time to fix the machine. Eventually, without her permission, Mr. McElhaney actually replaced the unit with a new one purchased by Mr. McElrath – which also did not work. Finally, Mr. McElhaney concluded she required a new A-coil in the furnace, but Ms. Allen refused him further permission to work on the problem.

{¶6} Ms. Allen submitted into evidence numerous photographs of her basement, and the concrete Mr. McElrath poured in her garage, to refill the excavation of the wall beneath it. She further submitted two estimates for new air conditioning units she had obtained.

{¶7} Mr. McElrath testified in his defense. He stated that even with waterproofing, basements tend to get wet, and that most of the dark spots noticed by Ms. Allen did not indicate a problem, or were simply old stains. He testified that the large spot at the southeast corner seemed to be caused by a downspout problem, since the water damage was at the top of the wall, and narrowed toward the bottom. He indicated that downspouts lead out from a house to the sewer at a higher level. He admitted that the problem might have originated with settlement occurring after he completed the waterproofing job, causing the pipe from the downspout to break a connection.

{¶8} Regarding the air conditioner, Mr. McElrath testified that a contractor hired by Ms. Allen stated that a line connecting the unit to the house was damaged, and the Freon had drained, causing the unit to run, but not cool. That contractor had offered to fix the problem for $300 to $400. Mr. McElrath stated he told Ms. Allen that was too high, which was the reason he had his friend Mr. McElhaney look at the unit. Mr. McElrath testified that when Mr. McElhaney could not get the machine to work, he

authorized the latter to purchase a new unit, and try that. When the new unit did not function, Mr. McElhaney suggested that the stress from running the old machine without Freon had possibly damaged the A-coil in the furnace, but that Ms. Allen refused Mr. McElhaney further access to her house.

{¶9} Mr. McElrath further testified he spent some $3,000 on gravel to backfill the excavation at Ms. Allen's house.

{¶10} November 7, 2008, the trial court filed its judgment. That provides, in relevant part:

{¶11} "Now therefore, having again reviewed all the evidence and the records of the proceedings including the tape of the proceedings, the court hereby rules in the favor of the Plaintiff, and awards her judgment against the defendant in the amount of $9,540.00 plus 8% annual interest thereon from April 27, 2007, and costs of this action.

{¶12} "Judgment is based refund (sic) of the funds paid for waterproofing which as (sic) obviously ineffective, and replacement of the air conditioner which was damaged in the process."

{¶13} December 5, 2008, Mr. McElrath timely noticed this appeal, assigning a single error:

{¶14} "The trial court erred in entering judgment in [appellee's] favor for $9,540, together with 8% interest from 4/27/07."

{¶15} Under this assignment of error, Mr. McElrath advances three issues. First, he contends that the remedy of rescission, applied by the trial court in returning to Ms. Allen the entire contract price paid, is unwarranted when she is unable to tender restoration to him of benefits received under the contract. Second, he argues that the

air conditioning unit in question was personal property, for which the proper measure of damages is the property's value immediately before, and immediately after, the injury, rather than cost of restoration, as applied by the trial court. Third, he argues that the proper date for interest to run on the judgment against him is from the date of judgment.

{¶16} We consider the first two issues in reverse order.

{¶17} We respectfully disagree with Mr. McElrath's contention that Ms. Allen's central air conditioning unit was personal property. Rather, such large units are considered at Ohio law to be fixtures. See, e.g., *Bissell v. Vogel* (May 22, 1991), 3d Dist. No. 11-90-10, 1991 Ohio App. LEXIS 2538, at 1-2, 4; *Accutemp, Inc. v. Longview State Hosp.* (1983), 10 Ohio App.3d 223, 225. Consequently, any damages flowing from the loss of the air conditioning unit are calculated by the same measure as those flowing from any failure in the waterproofing contract: i.e., the reasonable cost of restoring this noncommercial property. Cf. *Martin v. Design Constr. Servs., Inc.*, 121 Ohio St.3d 66, 2009-Ohio-1, at ¶21-25.

{¶18} In this case, Ms. Allen introduced evidence that a new air conditioning unit could be installed for $2,290. However, Mr. McElrath testified that Mr. McElhaney believed the unit he purchased for her, could be restored by fixing the A-coil in her furnace unit, but that Ms. Allen refused to let him try. In sum, nothing in the record indicates her unit could not be restored at a lesser cost than complete replacement. To allow Ms. Allen recovery on the claim for an air conditioner would place her in a better position than she was prior to the parties entering their agreement.

{¶19} Further, as the foregoing discussion indicates, the trial court erred in applying rescission to the waterproofing contract, as such. As Mr. McElrath points out,

the purpose of rescission is to place the parties in the same positions they occupied before the commencement of the contract. *Trajcevski v. Bell* (1996), 115 Ohio App.3d 289, 292. It cannot be applied when one party is not in a position to return a benefit he or she received from the contract. Id.; see, also, *Celinski v. Benke* (Feb. 25, 1994) 11th Dist. No. 93-A-1773, 1994 Ohio App. LEXIS 718, at 9. In this case, there is unrefuted testimony that Mr. McElrath performed, at least partially. The north wall of the basement was dry after he completed his work; the other walls have some problems, but these appear largely confined to the corners. There are the thousands of dollars Mr. McElrath spent on gravel for backfill. Ms. Allen is in no position to return these benefits she received under the contract. Consequently, it was error for the trial court to order rescission.

{¶20} Rather, the remedy was to determine what measure of damages would restore Ms. Allen's property to the condition contemplated by the contract. Cf. *Martin*, supra, at ¶21-25. Unfortunately, there is nothing in the record by which this calculation may be made: i.e., testimony or evidence indicating what a complete waterproofing job would cost. Due to this failure in proof of damages, it was error for the trial court to enter judgment in favor of Ms. Allen on the waterproofing contract. This issue has merit.

{¶21} Under his third issue, Mr. McElrath argues that the trial court should have commenced statutory interest running on the judgment against him from the date that judgment was entered. R.C. 1343.03(B). We agree. The third issue has merit.

{¶22} The judgment of the Trumbull County Court, Central Division, is reversed, and this matter is remanded for further proceedings consistent with this opinion.

{¶23} It is the further order of this court that appellee be assessed costs herein taxed.

{¶24} The court finds there were reasonable grounds for this appeal.

CYNTHIA WESTCOTT RICE, J., concurs,

TIMOTHY P. CANNON, J., concurs in part and dissents in part with Concurring/ Dissenting Opinion.

TIMOTHY P. CANNON, J., concurring in part and dissenting in part.

{¶25} I respectfully concur in part and dissent in part.

{¶26} I concur with the majority's disposition of the first and third issues presented for review, and the application of *Martin v. Design Center Constr. Servs., Inc.*, 121 Ohio St.3d 66, 2009-Ohio-1, to determine the appropriate measure of damages.

{¶27} I also concur with the determination, under the second issue presented for review, to apply the measure of damages applicable to fixtures to the air conditioning unit. I dissent from the portion of the opinion that remands this second issue to the trial court for further disposition. Appellee had a duty to mitigate her damages. While the burden was on appellee to submit evidence of the appropriate measure of damages, the record reveals an absence of testimony or evidence upon which the trial court could have calculated damages. Appellant testified that, subsequent to installing a new air conditioning unit, in order to restore appellee's air conditioning unit to proper working order, the A-coil in her furnace would have to be replaced. However, she refused to allow him to perform this task; she never attempted this repair; and she never

introduced any testimony as to what this repair would have cost. Instead, in an effort to prove her damages, the sole testimony she tendered was an estimate for yet another new air conditioning unit. This would have resulted in her having two new air conditioning units.

{¶28} This remedy has potentially placed appellee in a much better position than she was prior to execution of the agreement between the parties, with a three-year-old air conditioning unit. She has a new air conditioning unit that may work well with repair to the A-coil of the furnace, *plus* a money judgment for the value of another new air conditioning unit. I would enter final judgment in favor of appellant on appellee's claim regarding the air conditioning unit.