

**IN THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
TRUMBULL COUNTY, OHIO**

W. THOMAS JAMES, et al.,	:	O P I N I O N
Plaintiffs-Appellees,	:	
- vs -	:	CASE NO. 2010-T-0116
SKY BANK, et al,	:	
Defendant-Appellant.	:	

Civil Appeal from the Trumbull County Court of Common Pleas, Case No. 2006 CV 01619.

Judgment: Reversed and remanded.

Victor A. Mezacapa, III, Licata & Toerek, 6480 Rockside Woods Blvd. South, Suite 180, Independence, OH 44131 (For Plaintiffs-Appellees).

Shawn W. Maestle, Weston Hurd, LLP, 1301 East Ninth Street, Suite 1900, Cleveland, OH 44114-1862 (For Defendant-Appellant).

MARY JANE TRAPP, J.

{¶1} This case involves a construction loan dispute. The trial court found the bank breached the contractual terms in its disbursement of funds to the general contractor, and awarded plaintiff property owner damages equal to the funds expended to complete the construction, after the contractor stopped work on the project. While we agree with the trial court's determination that the bank breached the terms of the loan agreement, we also find that the trial court erred in its determination of damages caused by the breach. The amount of damages awarded by the trial court and the magistrate

were not proved by the requisite degree of reasonable certainty, or evaluated under the requisite “benefit-of-the-bargain” standard for determining contract damages; thus, we reverse and remand this matter to the trial court for further proceedings consistent with this opinion.

Substantive Facts and Procedural History

{¶2} W. Thomas James’ family operated the James Funeral Home in Newton Falls, Trumbull County since 1922. He took over ownership of the funeral home in 1984. Unfortunately, in 2000, a fire destroyed the funeral home. In 2002, Mr. James entered into a contract with New Horizon Building and Remodeling, Inc., (hereafter “New Horizon” or “the contractor”) to construct a new funeral home. The contract amount was \$859,000. His brother, Ronald James, was an employee at New Horizon and was the company’s representative for the funeral home project.

{¶3} To finance the project, Mr. James secured a loan of \$690,000 from Second National Bank, predecessor in interest to Sky Bank, which, in turn, was the predecessor in interest to Huntington National Bank, the appellant in this appeal (hereafter referred to as “the bank”).

{¶4} Mr. James’s contact at Second National was Gregory T. Yurco, a vice president and commercial loan officer. In a September 10, 2002 letter to Mr. James confirming the approval of the loan, Mr. Yurco stated the following regarding the terms of disbursements:

{¶5} “Disbursement for construction may occur only after insurance proceeds of \$444,643 have been contributed and the original architect inspects the work for progress and gives a percentage of completion on which basis funds will be advanced.

General contractor must sign and notarize an affidavit indicating that all subcontractors and material suppliers have been paid. Updated title work including mechanics lien update must be performed at each draw request.”

{¶6} These conditions were also stated in the loan agreement between Mr. James and Second National. Page two of the agreement contains a section titled “DISBURSMENT PROCEDURE.” It stated the following:

{¶7} “1. Disbursement of loan proceeds will be made after insurance proceeds of \$444,643.00 have been contributed.

{¶8} “2. Original architect inspects the work for progress and/or completion and gives a percentage of completion.

{¶9} “3. General contractor signs and notarizes an affidavit that all the subcontractors have been paid.

{¶10} “4. Title updated, insuring we are in first position.”

{¶11} The funeral home construction began shortly after the loan agreement was entered into on October 28, 2002. Between November 2002 and June 2003, New Horizon sent seven applications to Mr. Yurco for disbursement of funds, which included requests for funds for change orders. These applications for payment were signed by Ronald James, New Horizon’s representative on the project, who attested in the applications that construction work was performed entitling New Horizon to the payment requested. However, none of these applications complied fully with the terms of funds disbursement specified in the loan agreement as they lacked the required notarized affidavit by the general contractor and certification by the original architect, Edward Jakubick, regarding the progress and the parentage of work completed. Yet, Mr. Yurko

authorized each of the seven payments requested. A total of \$635,000 of the \$690,000 approved loan amount was paid to New Horizon.

{¶12} It was not until July 2003, when New Horizon submitted application no. 8, that Mr. Yurco learned various mechanic's liens had been filed against the property, and, as a result, he refused to authorize payment for application no. 8. Thereafter, Mr. James terminated the construction contract and New Horizon left the project. Mr. James acquired three additional loans from Second National and finished constructing the funeral home himself.

{¶13} On June 29, 2006, Mr. James, his wife, and James Funeral Home, Inc. (hereafter "Mr. James" or "plaintiffs") filed a complaint against Sky Bank, successor in interest to Second National, New Horizon, Mr. Yurco, and Ronald James, alleging breach of contract, conversion, unjust enrichment, tortious interference with business relationship, fraud, negligent supervision, aiding and abetting, and fraudulent conveyance. Mr. James subsequently amended the complaint, adding a count of breach of fiduciary duty against the bank.

{¶14} His primary claim was that the bank breached the loan agreement by disbursing requested funds to New Horizon without complying with the terms of conditions for disbursement, and that this breach caused him to incur additional obligations and make further expenditures to complete the construction.

{¶15} Prior to trial, Mr. James dismissed all other defendants except for the bank. The matter was tried before a magistrate in May 2008.

The Plaintiff's Case

{¶16} Mr. James testified he had to take out three additional loans to complete the project after New Horizon stopped work, expending a total of \$415,535.32. The architect, Mr. Jakubick, testified he had not been asked to inspect the project for progress or completion percentage, and that the only time he went to the construction site was when he was contacted by the contractor regarding an improperly installed staircase. Bassem Markus, the plaintiffs' expert, who had prepared a report, testified regarding (1) lost profits incurred by Mr. James due to the construction delay, and (2) interest costs on the additional loans taken out by Mr. James to complete the project himself. John Kinsley, a drywall subcontractor, testified he was owed \$17,000 for the drywall work he did on the funeral home.

The Bank's Defense

{¶17} Mr. Yurco testified for the bank, admitting that he authorized payments for seven applications submitted by New Horizon even though the applications did not comply with the terms of the loan agreement. Gary Tharp, a real estate appraiser who had prepared a report regarding the value of the funeral home after its completion, also testified for the bank. He valued the funeral home at \$1,050,000, based on a sales comparison approach and income capitalization approach; he did not employ a cost approach for his valuation, however.

The Magistrate's Decision

{¶18} After trial, the magistrate found that the bank breached its contract by failing to adhere to the terms of the loan agreement's disbursement procedures. Specifically, he found the bank breached the contract by failing to obtain the requisite progress and percentage completion reports from the original architect. The magistrate

concluded that, as a direct result of the failure of the bank to follow the proper disbursement procedures, Mr. James incurred damages, in that he spent additional funds to complete the construction project. The magistrate, however, rejected Mr. James' claim for consequential damages of lost profits.

{¶19} The magistrate awarded compensatory damages in the amount of \$574,121.32, which represented (1) \$405,535.32, the amount Mr. James testified he had incurred to complete the project; (2) \$55,435, funds he alleged he would incur in the future to repair and/or complete certain parts of the construction; and (3) \$113,151, the amount of interest he paid on the three additional loans from the date of the loans through November 27, 2007. In addition, the magistrate awarded future interest Mr. James would pay on the three loans (reduced to present value), as well as post-judgment interests on the award of damages.

{¶20} The bank filed objections to the magistrate's decision. After a hearing, the court overruled the objections and adopted the magistrate's decision. The bank now appeals, assigning the following errors for our review:¹

{¶21} "[1.] The trial court erred in failing to conduct a de novo independent examination of Huntington Bank's objections and instead deferred to and "rubber stamped" the magistrate's defective decision."

{¶22} "[2.] James failed to establish that the bank's actions actually and directly caused damages. Thus, the trial court erred in not issuing judgment for the bank on James' breach of contract claim."

1. Mr. James did not attempt to file an appellees' brief until March 12, 2012, the day before the oral argument, when he filed a motion for leave to file appellees' brief *instanter*, which we struck for untimeliness.

{¶23} “[3.] James failed to prove their alleged damages to the requisite standard of reasonable certainty by expert testimony.”

{¶24} “[4.] Alternatively, the magistrate erred in his calculation of damages.”

{¶25} We address the second, third, and fourth assignments of error first, and address them together, as they are interrelated.

Standard of Review

{¶26} “Judgments supported by some competent, credible evidence going to all the essential elements of the case will not be reversed by a reviewing court as being against the manifest weight of the evidence.” *C. E. Morris Co. v. Foley Constr. Co.*, 54 Ohio St.2d 279 (1978). We will not reverse judgments supported by competent, credible evidence as being against the manifest weight of the evidence. *Gerijo, Inc. v. Fairfield*, 70 Ohio St.3d 223, 226 (1994).

Plaintiffs’ Theory of Recovery

{¶27} Mr. James’ theory of recovery is that he would not have incurred additional obligations or made additional expenditures if the bank had disbursed the funds in compliance with the disbursement procedure. He maintained the bank’s continual release of the funds without the original architect’s certification of work progress and completion percentage allowed the contractor to continue to be paid for deficient work or for work not completed. He claimed the bank’s failure to follow the disbursement procedure caused damages equal to the amount of funds he expended to complete the construction after the contractor left the project.

{¶28} Mr. James testified he understood that the original architect would inspect the construction work and would provide a percentage of completion before the bank

released the funds. He had also personally discussed with Mr. Yurco the necessity of the bank's adherence to the loan agreement prior to funds disbursement. Mr. Yurco assured him that all of the requirements would be met prior to any funds disbursements.

{¶29} Mr. Yurco admitted to authorizing seven payments to the contractor even though the applications were not in compliance with the procedure set forth in the loan agreement. In all, the bank disbursed \$635,000 to the contractor out of the \$690,000 loan before the payment stopped and the contractor left the project, around July of 2003. There is no testimony from the original architect, Mr. Jakubick, as to whether he would or would not have rejected the contractor's work and prevented payment of funds. Regarding the deficiency in the construction, Mr. Jakubick testified about a defectively installed staircase and some problems regarding the electrical work.

{¶30} The magistrate found there was extensive evidence showing the bank was fully aware of the terms of the loan agreement – having drafted the document itself – but proceeded to disburse the funds to New Horizon in contravention of the agreement. Our review of the record affirms the finding. The evidence supports the trial court's finding that the bank breached the loan agreement and improperly released the funds, and that Mr. James was damaged as a result of the bank's payments without requiring the architect's certification of progress and completion percentage. However, as we explain below, the evidence does not contain competent and credible evidence to support the amount of damages Mr. James claimed and the trial court awarded.

Damages and Proof

{¶31} It is well established that “the purpose of damages for breach of contract is to restore the benefit of the bargain to the plaintiff by placing plaintiff in the position he

or she would have been in had defendant performed the contract.” *Knight v. Hughes*, 10th Dist. 86AP-1106, 1987 Ohio App. LEXIS 8786, *9 (Sept. 17, 1987), citing McCormick, Law of Damages 560, Section 137 (1935). See also *F. Enterprises v. Kentucky Fried Chicken Corp.*, 47 Ohio St.2d 154 (1976); *Garofalo v. Chicago Title Ins. Co.*, 104 Ohio App.3d 95, 108 (8th Dist.1995); *Homes by Calkins, Inc. v. Fisher*, 92 Ohio App.3d 262, 270 (12th Dist.1993).

{¶32} A party’s recovery for damages is limited to “the loss he has actually suffered by reason of the breach, and he is not entitled to be placed in a better position than he would have been in had the breach not occurred.” *Brads v. First Baptist Church of Germantown, Ohio*, 89 Ohio App.3d 328, 339 (1993).

{¶33} Moreover, “a party seeking damages for breach of contract must present sufficient evidence to show entitlement to damages in an amount which can be ascertained with reasonable certainty.” *Tri-State Asphalt Corp. v. Ohio Dept of Transp.*, 10th Dist. No. 94API07-986, 1995 Ohio App. LEXIS 1554, *14 (Apr. 11, 1995), citing *Kinetico, Inc. v. Independent Ohio Nail Co.*, 19 Ohio App.3d 26, 30 (8th Dist.1984). “Contract damages must be shown with certainty and not be left to speculation.” *Samson Sales v. Honeywell, Inc.*, 8th Dist. No. 51139, 1986 Ohio App. LEXIS 9341, *19 (Dec. 18, 1986), citing *Rhodes v. Baird*, 16 Ohio St. 573 (1866). “Courts have generally required greater certainty in proof for damages for breach of contract than for tort.” *Homes* at 269 (12 Dist.1993), citing *Kinetico, supra*, at 30, citing Restatement of the Law 2d, Contracts 144, Section 352 (1981).

Evidence of Damages Presented by Plaintiffs

{¶34} Mr. James maintained the true and accurate cost to rebuild the funeral home was \$859,000, the contract price set in the construction contract with New Horizon. To finance the project, he obtained a \$690,000 loan. He terminated the construction contract when he was notified of New Horizon's payment application no.8. By that time, the bank had already disbursed \$635,000 of the \$690,000 loan. He hired subcontractors and purchase materials himself to complete the unfinished work as well as to remedy work not performed correctly. To cover these expenditures, he took out two additional loans from Second National, in the amounts of \$150,000 and \$160,000, respectively, and a third loan from Chase Bank, in the amount of \$150,000.

{¶35} The three additional loans totaled \$460,000. Mr. James testified that \$44,464.68 of that amount was not attributable to expenses relating to completing the construction project and, therefore, he estimated he expended additional funds of \$415,535.32 (= \$460,000 - \$44,464.68) to complete the project after New Horizon left the project.

{¶36} To support the amount of damages he claimed, Mr. James produced at trial a voluminous exhibit, which contained pictures depicting different parts of the partially constructed funeral home in August 2003 (when the contractor left the project) and in September 2004, when the funeral home was fully constructed. The exhibits contained 370 or so unorganized receipts, dated in different times in 2002, 2003, and 2004, showing payments for various materials and labor costs. They totaled \$515,806.32.

{¶37} An examination of these receipts reveals that some of the receipts for materials and labor showed dates before the departure of New Horizon from the project.

In addition, five checks totaling \$106,500 were paid to New Horizon as “deposit” prior to the commencement of the project. In addition to these receipts showing payments already made by Mr. James, the exhibit also listed estimated costs needed to properly finish the basement, attic, and the front porch of the funeral home. The total of these estimated funds needed for future work was \$55,435.

The Magistrate’s Calculation of Damages

{¶38} The magistrate explained how he arrived at the compensatory damages in paragraph 58-62 of his decision, as follows:

{¶39} “59. Defendant Yurco authorized two separate loans of \$150,000 and \$160,000 to Mr. James so that he could complete the construction project.

{¶40} “60. Mr. James secured additional funds in the amount of \$150,000 from Chase Bank.

{¶41} “61. Mr. James had already paid the sum of \$100,000 to the contractor prior to the start of the project.^[2]

{¶42} “62. Mr. James claims to have incurred additional economic expenses of \$415,535.32 to complete the project. However, this Magistrate finds that Plaintiffs has failed to prove with reasonable certainty that the amount of ‘materials’ that Plaintiffs claim to have incurred on October 27, 2002 is a proper item of damages. Accordingly, this Magistrate finds that Plaintiffs have actually additional economic expenses of \$405,535.32. Mr. James will also incur expenses of \$55,435.00 to complete or repair the existing construction done incorrectly.

{¶43} “* * *.

2. The magistrate could be referring to the \$106,500 of “deposits” shown in the aforementioned exhibit, but we are unable to ascertain it with any certainty.

{¶44} “65. Mr. James claims he has incurred excess cost of borrowing on the additional loans he was forced to take to complete the project totaling \$113,151.00 plus additional pre-judgment interest of \$10,127.00 through 2007.”

{¶45} Based on these findings, the magistrate awarded compensatory damages in the amount of \$574,121.32, which represented (1) \$405,535.32, the amount Mr. James testified he had incurred (\$415,535.32) minus \$10,000 in the expenditure dated October 27, 2002 that the magistrate found unrelated to the project,³ (2) \$55,435, funds Mr. James will incur in the future to repair and/or complete some parts of the construction, and (3) \$113,151, the amount of interest he paid on the three additional loans from the date of the loans through November 27, 2007.

{¶46} In addition to \$574,121.32 in compensatory damages, the magistrate also awarded future interest Mr. James would pay on the three loans (reduced to present value), and post-judgment interest on the award of damages.

Award of Damages Was Not Proven to a Reasonable Degree of Certainty

{¶47} We agree with the trial court that, when a bank makes disbursements under a construction loan agreement without following the procedure pursuant to the agreement, the bank may be liable to the borrower for damages incurred. However, we find the amount of compensatory damages as determined by the magistrate and approved by the trial court in this case unsupported by the evidence.

{¶48} Mr. James’s theory for recovery was that had the architect reviewed New Horizon’s requests for payments pursuant to the loan agreement, he would not have

3. The magistrate referred to an October 27, 2002 receipt in the amount of \$10,000. However, our review of the exhibit shows the check paid by Mr. James purportedly for materials dated October 27, 2002 was actually for the amount of \$15,000, not \$10,000.

incurred additional obligations and made additional expenditures totaling \$415,535.32. However, based on the evidence contained in the record, we are unable to link the entire amount Mr. James claimed he expended to complete the project, i.e., \$415,535.32, to the bank's failure to seek the architect's certification of progress and completion percentage.

{¶49} First of all, the additional amount of \$415,535.32 was only testified to by Mr. James, and the evidentiary materials presented to support that testimony were the several hundred unorganized receipts (totaling \$515,806.32), which purportedly showed what he paid in labor and materials after New Horizon stopped work. As we noted above, these receipts included many items paid prior to the commencement of the project. There was no itemization of post-New Horizon payments to corroborate the amount of \$415,535.32 claimed by Mr. James.

{¶50} Second, the magistrate based the damages amount on the amount Mr. James testified he had expended after the contractor stopped working on the project, without taking into account the following: (1) what Mr. James had originally expected to pay himself, i.e., the difference between the contract price of \$859,000 and the loan amount of \$690,000; (2) various change orders accompanying New Horizon's requests for payments; (3) the possibility that some expenditures may have been for items beyond the specifications of the original construction contract, (4) evidence that some of the additional expenditures appeared to be for furnishing and marketing;⁴ and (5)

4. The first loan (\$160,000), dated September 4, 2003 from Second National, stated that the specific purpose of the loan was to "[f]urnish and decorate the new funeral home." The second loan (\$150,000), dated June 3, 2004 and also from Second National, stated that the specific purpose of the loan was for "[w]orking capital, advertising & marketing."

testimony by Mr. James that the painting and vinyl siding of the new building were never part of the construction contract.

{¶51} In other words, we are unable to find competent, credible evidence in the record which proved, to a reasonable degree of certainty, that *all* of the additional expenditures testified to by Mr. James stemmed from the bank's failure to comply with the disbursement requirements.

Proper Measure of Damages: Benefits of the Bargain

{¶52} More importantly, additional expenditures after the contractor stopped work are not the proper measure of damages caused by the bank's improper disbursement of funds.

{¶53} The purpose of damages for a breach of contract is to place the plaintiff in the position he or she would have been in had the defendant not breached the contract. Applying the benefit-of-the-bargain rule, therefore, it would appear that the proper measure of damages under the circumstances of this case would be the difference between the funds the bank improperly released to the contractor (\$635,000) for the work the contractor claimed it had performed, and the actual value of that work (in materials and labor).

{¶54} The inference from the magistrate's determination that Mr. James incurred damages of \$405,535.32 in additional expenditures⁵ would be that the work performed by the contractor (in materials and labor) was only worth \$229,464.68 before it left the project, while the bank had already paid the contractor \$635,000 out of the total loan of \$680,000 (\$635,000 - 405,535.32 = \$229,464.68). There is no evidence in the record

5. Although Mr. James testified that he incurred \$415,535.32, the magistrate found \$10,000 of the funds unrelated to the project, and therefore deducted \$10,000 from it. See ¶46, *infra*.

supporting this figure. The evidence for damages presented by Mr. James consisted of (1) Mr. James' testimony that he expended \$41,535.32, (2) hundreds of disorganized receipts showing payments for materials and labor dated 2002, 2003, and 2004, and (3) pictures of the building taken at the time the contractor left and when it was fully constructed. It is unclear whether the difference between the funds released to New Horizon and the actual value of the work completed by New Horizon could be ascertained from the evidence presented.

{¶55} Therefore, while we agree with the trial court's finding of a breach of the loan agreement by the bank, and while the record reflects competent and credible evidence to allow the trier of fact to proceed to a consideration of damages, the record lacks competent, credible evidence proving the damages awarded by the trial court to a reasonable degree of certainty under *any* measure of damages. More importantly, the trial court applied an improper measure of damages, as we have explained above.

{¶56} The second, third, and fourth assignments are sustained to the extent indicated above.

{¶57} Regarding the first assignment of error, we note that "[o]n appeal, a trial court's adoption of a magistrate's decision will not be overruled unless the trial court abused its discretion in adopting the decision." *Brown v. Gabram*, 11th Dist. No. 2004-G-2605, 2005-Ohio-6416, ¶11, citing *Lovas v. Mullett*, 11th Dist. No. 2000-G-2289, 2001 Ohio App. LEXIS 2951, *5-6 (July 29, 2001). See also *In the Matter of Gibbs*, 11th Dist. No. 97-L-067, 1998 Ohio App. LEXIS 997, *12 (Mar. 13, 1998) (an appellate review of the trial court's decision under Civ.R. 53 is limited to a determination of whether the court abused its discretion in adopting the magistrate's decision).

{¶58} As this court recently stated, the term “abuse of discretion” is one of art, “connoting judgment exercised by a court, which does not comport with reason or the record.” *State v. Underwood*, 11th Dist. No. 2008-L-113, 2009-Ohio-2089, ¶30, citing *State v. Ferranto*, 112 Ohio St. 667, 676-678 (1925). The Second Appellate District also recently adopted a similar definition of the abuse-of-discretion standard: an abuse of discretion is the trial court’s “failure to exercise sound, reasonable, and legal decision-making.” *State v. Beechler*, 2d Dist. No. 09-CA-54, 2010-Ohio-1900, ¶62, quoting Black’s Law Dictionary (8 Ed.Rev.2004) 11. When an appellate court is reviewing a pure issue of law, “the mere fact that the reviewing court would decide the issue differently is enough to find error (of course, not all errors are reversible. Some are harmless; others are not preserved for appellate review). By contrast, where the issue on review has been confined to the discretion of the trial court, the mere fact that the reviewing court would have reached a different result is not enough, without more, to find error.” *Id.* ¶67.

{¶59} In this case, the trial court held a hearing on the defendants’ objections to the magistrate’s decision. In its judgment overruling the objections, the trial court stated it independently examined and analyzed the magistrate’s decision. Thus, the record reflects a proper review of the magistrate’s decision by the trial court and Mr. James’ claim that the trial court failed to conduct a de novo independent review is without merit.

{¶60} However, as we have concluded above, the magistrate’s award of damages in this case is not supported by competent, credible evidence under any measure of damages and, in fact, was determined under an improper measure of

damages, and thus, the trial court abused its discretion in adopting that award. The first assignment of error is sustained to the extent noted.

{¶61} Therefore, we reverse and remand the case for further proceedings consistent with this opinion. On remand, the trial court is to recalculate damages applying the proper measurement set forth in this opinion based on the evidence contained on the record.

{¶62} Judgment of the Trumbull County Court of Common Pleas is reversed, and the case remanded for further proceeding consistent with this opinion.

TIMOTHY P. CANNON, P.J.,

THOMAS R. WRIGHT, J.,

concur.