[Cite as *Lynda Hughes Dawson Lumber, Inc. v. Hummel,* 2010-Ohio-4918.]

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
DARKE COUNTY

LYNDA HUGHES DAWSON LUMBER, INC	:	Appellate Case No. 09-CA-07
Plaintiff-Appellee	:	Trial Court Case No. 08-CV-64339
v.	:	
CHAD A. HUMMEL	:	(Civil Appeal from Common Pleas Court)
Defendant-Appellant	:	

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O P I N I O N

Rendered on the 8th day of October, 2010.

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JOHN F. MARCHAL, Atty. Reg. #0066432, Marchal & Marchal, Ltd., 116 West Fourth Street, Greenville, Ohio 45331
Attorney for Plaintiff-Appellee

PAUL WAGNER, Atty. Reg. #0067647, 1400 North Broadway, Greenville, Ohio 45331
Attorney for Defendant-Appellant

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FAIN, J.

{¶ 1} Plaintiff-appellee/cross-appellant Lynda Hughes Dawson Lumber, Inc., (Dawson Lumber) was awarded damages on its contract claim against defendant-appellee C & L Steel Fabricators, Inc. and its owner, Chad Hummel. From that judgment, Dawson Lumber cross-appeals, contending that the trial court erred by

failing to award prejudgment interest and by not accepting its expert's testimony regarding damages.

{¶ 2} Defendant-appellant/cross-appellee Chad Hummel appeals from the judgment rendered against him. Hummel contends that the trial court erred by finding that he was liable with regard to a personal guarantee in the form of a mortgage Lien Agreement. Hummel also contends that the trial court miscalculated the damages owed to Dawson Lumber.

{¶ 3} We conclude that the trial court did not err with regard to the amount of damages awarded to Dawson Lumber. We further conclude that the trial court did not err with regard to its decision that the Lien Agreement was binding. However, the court's opinion is silent with regard to prejudgment interest, despite Dawson Lumber's request therefor. Thus, we cannot determine whether the trial court abused its discretion by failing to award prejudgment interest.

{¶ 4} The judgment of the trial court is Reversed to the extent that it fails to address the subject of pre-judgment interest; the judgment is Affirmed in all other respects; and this cause is Remanded for further proceedings with regard to the issue of prejudgment interest.

I

{¶ 5} Lynda Hughes Dawson is the owner and president of a lumber sawmill company, Dawson Lumber. Chad Hummel is the owner and president of C & L Steel Fabricators, Inc. (C & L), an Indiana company, engaged in the business of designing, manufacturing and installing equipment for use in lumber mills.

{¶ 6} In 2005, Hummel approached Lynda Hughes Dawson in an attempt to sell her equipment for her sawmill located at Fall Branch, Tennessee. The parties signed a contract in September 2005. The contract was for materials only and provided for a purchase price of $200,000 with a down payment of $40,000. In November, the parties entered into a second contract, which provided that C & L would provide additional machinery for the sum of $82,536. Eventually, by June 2006, the parties amended the agreement to what they refer to as "turnkey price" for an expanded, installed project. The price for the project was $727,722.

{¶ 7} In December 2006, Lynda Hughes Dawson was unhappy with the pace of the project, and traveled to C & L's headquarters in Indiana to meet with Hummel. While in Indiana, Lynda Hughes Dawson, on behalf of Dawson Lumber, was given a Lien Agreement and Mortgage to secure the completion of the project, for which C & L had already been paid the sum of $532,382.72. The Lien Agreement and Mortgage granted Dawson Lumber a mortgage interest on a Darke County, Ohio farm owned by Chad Hummel and his wife, Linda Hummel. The Lien Agreement is dated December 20, 2006.

{¶ 8} Several weeks thereafter, in early 2007, the parties agreed to move the resaw project to another sawmill owned by Lynda Hughes Dawson. This sawmill, known as the "Horton Highway" sawmill, is approximately eight miles from the Fall Branch facility. Lynda Hughes Dawson and Hummel agreed to change the project to the Horton Highway facility without any change in contract price. This modification was not reduced to writing.

{¶ 9} Some of the steel structures that had already been installed by C & L at the Fall Branch site were removed and moved to the Horton Highway site. However, by

September 2007 the project remained incomplete, and Dawson had paid the sum of $600,643.02 to C & L. Lynda Hughes Dawson suspended work on the project, and on January 24, 2009 Dawson Lumber filed suit against Chad Hummel, Linda Hummel and C & L Steel.

{¶ 10} The matter was tried, without a jury, on June 2 and 3 of 2009. Following trial, the trial court awarded judgment in the amount of $198, 660.98 to Dawson Lumber. The trial court further found the Lien Agreement and Mortgage to be binding upon Chad Hummel; however, the trial court found that they were "no longer collateral as to Linda Hummel's interests in the [Darke County property]."

{¶ 11} Hummel appealed from the judgment of the trial court; Dawson Lumber cross-appealed.

II

{¶ 12} Dawson Lumber's First Assignment of Error states as follows:

{¶ 13} "THE TRIAL COURT ERRED AS A MATTER OF LAW BY FAILING TO GRANT PREJUDGMENT INTEREST."

{¶ 14} Dawson Lumber contends that the trial court was required to award it prejudgment interest pursuant to R.C. 1343.03. Hummel contends that Dawson is not entitled to prejudgment interest because there was "no money due from [C & L or Hummel] under [the terms of the contract,] and thus no debt due under the terms of the contract."

{¶ 15} A trial court's authority to award prejudgment interest on a breach-of-contract claim is governed by R.C. 1343.03(A), which provides that a creditor is

entitled to interest at the statutory rate "when money becomes due and payable upon any * * * instruments of writing * * * and upon all judgments * * * of any judicial tribunal for the payment of money arising out of * * * a contract or other transaction."

{¶ 16} The Ohio Supreme Court has stated that "the award of prejudgment interest is compensation to the plaintiff for the period of time between the accrual of the claim and judgment, regardless of whether the judgment is based on a claim which was liquidated or unliquidated and even if the sum due was not capable of ascertainment until determined by the court." *Royal Elec. Constr. Corp. v. Ohio State Univ.* (1995), 73 Ohio St.3d 110, 117. In determining whether to award prejudgment interest pursuant to R.C. 1343.03(A), a court must consider whether the aggrieved party has been fully compensated. Id. at 116. If the plaintiff has been otherwise fully compensated, then an award of prejudgment interest may not be indicated. *Wasserman v. The Home Corp.,* Cuyahoga App. No. 90915, 2008-Ohio-5477, ¶ 5 - 9. A trial court's determination whether to award prejudgment interest is subject to an abuse of discretion standard of review. *Damario v. Shimmel*, Cuyahoga App. Nos. 90760, 90875, 2008-Ohio–5582, ¶ 55.

{¶ 17} Hummel relies on the case of *RPM, Inc. v. Oatey Co.*, Medina App. Nos. 3282-M, 3289-M, 2005-Ohio-1280 for the proposition that "there must in fact be a debt due under the terms of the contract for the prejudgment provision of R.C. 1343.03(A) to apply." Id. at ¶ 64 - 69. In reaching this conclusion, the *RPM* court noted that "there was not a question in [*Royal Electric,* supra] as to whether there was in fact money owed under the explicit terms of that contract, for there clearly was." Id. at ¶ 67. However, this ignores the fact that the *Royal Electric* decision upheld an award of prejudgment interest on damages other than for a specific debt due. *Royal Electric*, supra at 117.

{¶ 18} In this case, we cannot determine whether the trial court abused its discretion with regard to the issue of prejudgment interest, since the decision is silent with regard thereto. It may be that the trial court determined that Dawson Lumber was fully compensated by the damages award, so as to make an award of prejudgment interest unnecessary. See, *Wasserman,* supra wherein the Court of Appeals held that prejudgment interest was unnecessary to fully compensate the plaintiff. Or, given that the contract at issue did not set forth a specific date for completion of the Horton Highway project, along with the conflicting testimony regarding the date for completion, the trial court may have determined that it could not set a date of the breach of the contract for purposes of deciding the dates for calculating interest; in other words, the date of breach was determined to be the date of the judgment. Finally, it is possible that the trial court simply failed to consider Dawson Lumber's request for prejudgment interest.

{¶ 19} We conclude that the record does not demonstrate that the trial court used a sound reasoning process leading to its failure to award pre-judgment interest. Or, in other words, the absence in the record of any explanation for this failure prevents meaningful appellate review of the decision. See *Matter of Adoption of Aiken* (June 24, 1991), Montgomery App. No. 12522. Therefore, the issue of pre-judgment interest is remanded to the trial court for further proceedings.

{¶ 20} Dawson Lumber's First Assignment of Error is sustained.

III

{¶ 21} Dawson Lumber's Second Assignment of Error is as follows:

{¶ 22} "THE TRIAL COURT ERRED IN REDUCING PLAINTIFF/APPELLANT'S DAMAGES CLAIM IN LIGHT OF THE ABSENCE OF CREDIBLE TESTIMONY

REFUTING PLAINTIFF/APPELLANT'S DAMAGES EVIDENCE."

{¶ 23} Dawson Lumber contends that the trial court should have given it a larger award of damages. In support, the company contends that the only evidence regarding damages was presented by its expert whose testimony established the following damages: (1) $337,000 to complete the manufacture of the contracted items; (2) $119,000 to manufacture additional equipment to make the facility operational; (3) $10,000 for engineering costs; (4) $212,000 for the cost of mechanical installation; and (5) $74,000 for the cost of electrical installation. Therefore, Dawson Lumber contends that it was entitled to damages in the sum of $752,000.

{¶ 24} A review of the judgment shows that the trial court awarded the sum of $80,700 as damages for the cost to complete the project items. It also awarded the sum of $119,000 for the manufacture of additional needed equipment. Finally, the trial court awarded the sum of $126,000 as damages for the necessary engineering costs as well as the mechanical and electrical installation. The total of these amounts is $325,740, which the trial court then reduced by the sum of $127,079.70, representing the sum still owed by Dawson Lumber under the terms of the contract resulting in a total damage award of $198,660.98.

{¶ 25} The general measure of damages for a breach of contract is calculated by determining the amount necessary to place the non-breaching party in the position that party would have been had the breaching party provided full performance pursuant to the governing contract. *F. Enterprises, Inc. v. Kentucky Fried Chicken Corp.* (1976), 47 Ohio St.2d 154, 159.

{¶ 26} "It is well settled in Ohio that judgments supported by some competent,

credible evidence going to all essential elements of the offense will not be reversed by a reviewing court as against the manifest weight of the evidence." *C.E. Morris v. Foley Construction Co.* (1978), 54 Ohio St.2d 279, syllabus. As the fact finder, the trial court was entitled to evaluate the credibility of the witnesses and weigh the evidence presented. A reviewing court will not disturb a trial court's assessment of damages without an affirmative finding of passion and prejudice or a finding that the award is manifestly excessive or inadequate. *Moskovitz,* 69 Ohio St.3d at 655, 635 N.E.2d 331. Otherwise, the assessment of damages is thoroughly within the province of the trial court. Id.

{¶ 27} A review of the record demonstrates support for the trial court's decision regarding the award of damages. The trial court, as the trier of fact, was free to believe all, some or none of the witnesses presented. Evidently, the trial court chose not to accept all the testimony of the expert witness presented by Dawson Lumber. The expert testified that thirteen pieces of the equipment contracted for was missing from the Horton Highway property. He also provided his estimates of the cost of finishing those parts.

{¶ 28} It appears that the trial court gave more credence to the testimony of Keith Johnson, whose testimony supports the trial court's findings with regard to the missing equipment. Specifically, it supports the finding that only four pieces of equipment were not provided by C & L. We find no error in the trial court's having found Johnson's testimony more credible. Johnson's testimony was not inherently incredible.

{¶ 29} Furthermore, we cannot say that the trial court erred in looking to the terms of the contract for guidance concerning the cost of the missing equipment, rather than to the testimony of Dawson Lumber's expert. Finally, we cannot say that the trial court erred with regard to the amount awarded for the engineering or the mechanical and

electrical installation costs, even though that amount is lower than the amount cited by the expert for Dawson Lumber.

{¶ 30} Dawson Lumber's Second Assignment of Error is overruled.

IV

{¶ 31} Hummel's Second Assignment of Error states as follows:

{¶ 32} "THE TRIAL COURT MISCALCULATED THE DAMAGES AFTER THE PARTIES ABANDONED THEIR AGREEMENT."

{¶ 33} In this assignment of error, C & L and Hummel contend that the original contract for the Fall Branch sawmill site was abandoned and that the trial court therefore erred in its calculation of the damages due by relying upon the terms of the abandoned contract.

{¶ 34} The evidence in this record does not support the claim that the Fall Branch contract was abandoned. The record supports the trial court's finding that the parties "entered into various agreements which resulted in the duty of C & L Steel Fabricators to install a 48" resaw system for [Dawson Lumber] at the Horton Highway location for $727, 722.72." The trial court went on to state that the parties "agreed to move the [Fall Branch] sawmill improvements to [the Horton Highway sawmill] location and to redesign the sawmill for [the Horton Highway] facility and site."

{¶ 35} Lynda Hughes Dawson testified that she and Chad Hummel met and subsequently agreed to complete the sawmill project at the Horton Highway site rather than the Fall Branch site. She testified that the Horton Highway project was considered a "continuation" of the Fall Branch project. Kevin Ewers, an accountant whose firm provided services for Dawson Lumber, testified that Hummel assured him that the

modification in location for the project would not affect the contract price. The trial court found Ewers to be especially credible.

{¶ 36} Chad Hummel claimed in his testimony that the Horton Highway project was a separate and new agreement, under which Lynda Hughes Dawson agreed to pay for "time and materials" rather than the amount called for under the original contract. But Hummel admitted that in his prior deposition he had testified that Horton Highway was not a separate project, but that it was a "carryover from just a mixed up mess."

{¶ 37} The trial court chose to credit the testimony of Lynda Hughes Dawson and Kevin Ewers over that of Hummel. The record supports a finding that the parties agreed, orally, to amend or modify the contract to change the sawmill construction site from Fall Branch to Horton Highway. In other words, the parties agreed that the forty-eight inch resaw system manufactured at C & L's facility in Indiana would be installed at the Horton Highway location rather than at the Fall Branch site. The record does not evidence an intent to abandon the contract for the resaw system. To the contrary, it demonstrates an intent to alter some of the terms of the contract; specifically, the parties amended the installation site of the resaw system. This finding is corroborated by the fact that the parties continued to perform under the terms of the contract as though all terms, except for the location, remained the same. Thus, we conclude that the trial court did not err in finding that the parties did not abandon the original contract, but modified the terms of their existing contract.

{¶ 38} As stated in Part III, above, we conclude that the record supports the trial court's decision with regard to the calculation of the amount of damages. The damages were based upon the terms of the contract by which C & L was obligated to provide a

resaw system to Dawson Lumber.

{¶ 39} Hummel's Second Assignment of Error is overruled.

V

{¶ 40} Hummel's First Assignment of Error is as follows:

{¶ 41} "THE TRIAL COURT ERRED IN FINDING THAT DEFENDANT, CHAD A. HUMMEL, WAS LIABLE ON A PERSONAL GUARANTEE."

{¶ 42} Hummel contends that the trial court erred by finding that the Lien Agreement he signed was binding. In support, he argues that the Agreement applies only to the construction project at the Fall Branch site, and is not applicable to the later Horton Highway project.

{¶ 43} The Lien Agreement provides in part as follows:

{¶ 44} "WHEREAS, C & L is presently performing services for Lynda involving the making and installing of new sawmill equipment to an existing sawmill at 3016 Hwy. 81 North, Fall Branch, Tennessee, and:

{¶ 45} "WHEREAS, Lynda has provided to C & L advancements towards the work being performed by C & L which shall not exceed the sum of Seven Hundred Fifty Thousand and No/100 Dollars ($750,000.00), and;

{¶ 46} "WHEREAS, Lynda has requested security from C & L in return for those advancements until the project in Tennessee is completed; and

{¶ 47} "WHEREAS, C & L through one of its main stockholders, Chad A. Hummel, along with his wife, Linda M. Hummel, own real estate in Darke County, Ohio, which they

agree to provide as security for the advancements to C & L until the project is completed,

{¶ 48} "THEREFORE, in consideration of the financial accommodation given and to be given to C & L, not to exceed the sum of Seven Hundred Fifty Thousand and No/100 Dollars ($750,000.00), Chad A. Hummel and Linda M. Hummel hereby agree and do hereby provide as security for the advancements to C & L, a mortgage on real estate owned by them in Darke County, Ohio, until such time as C & L has completed the work for Lynda. It is further agreed that at the time the performance of the work by C & L is completed, that Lynda shall release the mortgage securing this Lien Agreement, provided by Chad A. Hummel and Linda M. Hummel.

{¶ 49} "In the event of a default by C & L in the performance of its work to Lynda, Lynda shall notify, in addition to C & L, Chad A. Hummel and Linda M. Hummel of said breach.

{¶ 50} "The occurrence of any of the following shall be a default under this agreement: (a) Failure to perform the work under the Construction Agreement between C & L and Lynda * * * .

{¶ 51} "This is a continuing Agreement and all rights, powers and remedies hereunder shall apply to the present and future advancements to C & L by Lynda.

{¶ 52} "This Lien Agreement shall remain in full force and effect until such time as C & L completes the performance of its work at the sawmill located at Fall Branch, Tennessee.

{¶ 53} " * * * * *

{¶ 54} "Upon the completed performance of C & L of the creation and installation of the new equipment required by the Contract between C & L and Lynda, Lynda shall

release the mortgage and this Lien Agreement shall be null and void."

{¶ 55} The trial court found that, despite the language referring to Fall Branch contained in the above-quoted Lien Agreement, the parties entered into an oral agreement to change the project site. The trial court further found that, as part of that modification, the parties also agreed, orally, to modify the Lien Agreement to cover the project at the new site. The parties then continued to perform under the terms of the contract as modified. Thus, the trial court found that the Lien Agreement remained in full force and effect.

{¶ 56} We agree. There is evidence in the record, in the form of testimony from Lynda Hughes Dawson, that she and Hummel agreed to the new contract and agreed that the Lien Agreement would remain in effect and would provide security for the contract as modified.

{¶ 57} As stated previously, Hummel admitted that the Horton Highway project was a continuation of the Fall Branch resaw project. Indeed, equipment installed at Fall Branch was removed and taken to Horton Highway. Furthermore, when asked why Lynda Hughes Dawson made some of her payments to C & L suppliers, rather than directly to C & L, after the Horton Highway phase was started, Hummel stated that he believed she was continuing to "micro manage" the project despite the fact that he had provided her the Lien Agreement as security for the completion of the project. As Dawson Lumber argues, this could reasonably be construed as corroboration that the parties intended for the Lien Agreement to remain as security for the modified contract.

{¶ 58} As noted, the trial court as the trier of fact was in the best position to determine the credibility of the parties. Thus, we cannot say that the trial court erred by

finding the testimony of Lynda Hughes Dawson more compelling than that of Hummel. After reading the transcript, we find no error in the trial court's determination.

{¶ 59} Hummel's First Assignment of Error is overruled.

VI

{¶ 60} The judgment of the trial court is Reversed to the extent that it does not address the issue of pre-judgment interest; it is Affirmed in all other respects; and this cause is Remanded for further proceedings concerning the issue of pre-judgment interest, in accordance with this opinion.

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DONOVAN, P.J., and VUKOVICH, J., concur.

(Hon. Joseph J. Vukovich, Seventh District Court of Appeals, sitting by assignment of the Chief Justice of the Supreme Court of Ohio).

Copies mailed to:
John F. Marchal
Paul Wagner
Hon. Jonathan P. Hein