[Cite as *Gillard v. Green*, 2001-Ohio-2644.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
WASHINGTON COUNTY

JOHN GILLARD,	:	
Plaintiff-Appellee,	:	Case No. 00CA54
vs.	:	
THOMAS ROBERT GREEN, et al.,	:	DECISION AND JUDGMENT ENTRY
		RELEASED: 12-28-01
Defendants-Appellants.	:	

APPEARANCES:

COUNSEL FOR APPELLANTS: Norman L. Folwell, 215 Second Street, Marietta, Ohio 45750

COUNSEL FOR APPELLEE: Paul G. Bertram, Jr., Bertram & Halliday, L.L.C., 412 Third Street, Marietta Ohio 45750

ABELE, P.J.

This is an appeal from a Washington County Common Pleas Court judgment in favor of John Gillard, plaintiff below and appellee herein, on his claim against Thomas Robert Green and Marjorie Ellen Adams, defendants below and appellants herein. The following errors are assigned for our review:

FIRST ASSIGNMENT OF ERROR:

"THE COURT'S FINDING THAT THE APPELLEE HAD COMPLIED WITH THE WORK STOPPAGE REQUIREMENT OF SECTION 14.1 IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

SECOND ASSIGNMENT OF ERROR:

"THE COURT'S FINDING THAT THE APPELLEE HAS COMPLIED WITH THE NOTICE OF TERMINATION PROVISION OF SECTION 14.1 OF THE CONTRACT IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

THIRD ASSIGNMENT OF ERROR:

"THE COURT'S IMPLICIT FINDING THAT THE DELAYS WHICH ULTIMATELY CAUSED APPELLEE TO TERMINATE THE CONTRACT WERE THROUGH NO FAULT OF THE CONTRACTOR IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

FOURTH ASSIGNMENT OF ERROR:

"THE TRIAL COURT'S GRANTING OF AN $80,000.00 JUDGMENT AGAINST THE APPELLANTS IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

FIFTH ASSIGNMENT OF ERROR:

"THE TRIAL COURT COMMITTED PREJUDICIAL ERROR IN FAILING TO CONSIDER THE APPELLANTS COUNTERCLAIM."

Appellant Thomas Green and his wife, Appellant Marjorie Adams, purchased approximately 120 acres of land in 1992. In the fall of 1995, they contacted Steven Gegner (a local architect) and asked him to design a home for them. Gegner spent one and one half (1½) years designing the house and, eventually, came up with plans that satisfied them.[1] Appellants put the project up for bid and Appellee John Gillard, d/b/a Gillard Construction, submitted the only "fixed bid" for the project.[2] On June 26, 1997, the parties entered into a contract wherein appellee agreed

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[1] Gegner testified that it was highly unusual to spend this much time designing a home, but that appellants wanted "a very special house."

[2] Gegner indicated that another bid was submitted but that it was for "cost plus ten percent." Appellants were apparently seeking a fixed bid cost basis.

to build the house pursuant to Gegner's design and specifications. Appellants agreed to pay appellee the base sum of $506,727.

Construction began on August 31, 1997, and, for the most part, the project progressed smoothly through the end of the year. During the winter and spring of 1998, however, various problems arose with respect to the interior work. These problems reached the point when, on August 25, 1998, appellee's attorney sent a letter to appellants to notify them that appellee decided to terminate the contract and that appellee would no longer work on the house.

Appellee commenced the action below on January 13, 1999, alleging, inter alia, that appellants owed him $89,994.90 under the construction contract.[3] Appellants denied liability and asserted a variety of defenses. Appellants also filed a counterclaim and alleged that appellee "abandoned work" on the project and, thus, breached his obligations under the construction contract. Appellants further averred that it was necessary to hire other contractors to "complete the job." Thus, they demanded compensatory damages in an amount "not yet

[3] Appellee's original complaint also sought the foreclosure of a mechanic's lien. However, appellee later filed an amended complaint which deleted that claim and pursued only monies allegedly due him under the construction contract.

discernable" to pay for the completion of the house as well as punitive damages, pre-judgment interest and attorney fees. Appellee denied liability on the counterclaim.

The matter came on for a bench trial over four days in July and August of 2000. It is clear from the voluminous transcripts (which span nearly one thousand pages) that many conflicts exist between the parties. However, for the sake of brevity, we address only a few of the more contentious problem areas.[4]

The first area was the construction of cabinetry. The evidence reveals that the construction contract was "turn key," or all inclusive. In other words, appellee was to build the house "everything complete" including the cabinets. Appellee testified that the contract's terms provided that he build the cabinetry. Gegner (the architect) corroborated this interpretation.[5] Nevertheless, the uncontroverted evidence showed that appellants hired "Huck's Cabinets" to construct the

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[4] We do not diminish the seriousness of the many other construction related disputes. The transcripts reveal that the parties were at odds over many other items including: (1) the installation of a large and unusual skylight; (2) construction of an attached greenhouse; (3) installation of electrical wiring; (4) selection of paint; (5) selection of a front door, and (6) a request for financial reassurances that appellee sought from appellants pursuant to terms of the contract. We focus on the areas highlighted above because they involved an inordinate amount of testimony and because they appear to have included some of the chief complaints between everyone concerned.

[5] The contract makes no specific reference to cabinetry but generally provides, in article 2, that "[t]he contractor shall execute the entire Work described in the Contract Documents, except to the extent specifically indicated in the Contract Documents to be the responsibility of others." There appears to be nothing in the contract relegating cabinetry to anyone other than appellee.

cabinetry. It is not clear from either of appellants' testimony why they breached this part of the contract. Appellants asserted that appellee "threatened" them and warned that he would not make any further cabinets for them unless they approved ones he made for a bathroom.[6]

[6] The basis for this alleged threat appears to have been a memo wherein appellee offered to build a bathroom cabinet and, if it was not to their satisfaction, he would let them "get somebody else to do it." Because of this "threat," and because he allegedly would not cooperate with them, Appellant Green explained that they hired another contractor to build the cabinetry.

The masonry work formed another major area of contention. Appellee testified that his workers tried four times to build a stone wall around a fireplace. Each time, appellants were unsatisfied with the work and told the workers to tear the wall down and to start over. Finally, after receiving the order to tear down a fourth wall, appellee refused to comply with appellants' demand. Appellant Adams conceded that she was "not completely satisfied with the mortar joints" or with "the orientation of some of the stones." In the end, she and her husband were "very dissatisfied with the aesthetics of the fireplace."[7]

[7] Another example of these masonry disputes concerned the stone facade on the outside of the home. Appellee testified that Appellant Adams did not like certain stones that were used in the outside wall, and that she would leave "stick-up notes" on individual stones asking that these stones be removed from the wall and replaced with new ones. Appellee stated that it was impossible to take single stones out of an entire wall and replace them.

The final straw was appellants' failure or refusal to choose stains for the wood trim and for the hardwood floors. Appellee requested that appellants make their decision soon after the materials arrived at the construction site. However, appellants apparently could not decide and select a particular stain. The reason for their indecision is not entirely clear from the record, but it appears that they were dissatisfied with the samples that appellee provided.[8] In any event, appellee testified that their indecision caused other work to stop on the house for more than a month. Appellee stated that, although he had "never walked off a job in [his] life," and hoped that it would never happen again, his frustration culminated in his decision to terminate the contract for this, and for various other reasons.[9]

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[8] It should be noted at this juncture that we had some difficulty understanding appellants' testimony. Much of what they said was delivered in a "stream of consciousness" fashion and was not necessarily tied to any particular question put to them. To the extent that they did answer particular questions, their answers frequently consisted of several pages and jumped from topic to topic.

[9] Gegner (the architect) testified during rebuttal that, with "fixed bid contracts," time is money. Thus, a longer

construction time results in a smaller profit margin.

Perhaps the most telling evidence adduced during the trial was not about the time that appellee worked on the house but, rather, the time period after he left. Appellee terminated the contract on August 25, 1998. By the time this case came to trial, nearly two years later, the house was not completed. Appellant Adams testified that despite spending in excess of $240,000 since appellee left the construction project, the kitchen had not yet been completed, and the base trim and window casings had not been completely installed. Indeed, Tom Moran, the contractor they hired to complete the project after appellee terminated his contract, testified that the only completed parts of the house were a bedroom, a laundry room and the exterior. Appellants were essentially living in two rooms as they attempted to construct a dream house to their satisfaction.

One explanation for the slow-paced work was provided by Bruce Ideseko. Ideseko was hired to complete the hardwood floor installation. He explained how appellants tended to micromanage his company's work as follows:

> "Q. Okay. Now, when you started the project, when you actually got it ready to go, what happened?
>
> A. After we got started, after we brought the wood back, being planed down and everything, and we got started, we were explaining to the Greens that there is a clear set and then there was a heavy grain and there was select grade or a lesser grade and, when we started laying the boards out, we had to position them a certain way.
>
> Q. Okay. And you positioned them in a certain way.
>
> A. I did for a while, but then the Greens were directing each board--

Q. They were directing you which boards to put where?

A. Yeah, basically.

Q. They didn't even let you use your expertise?

A. It just got to the point-- it just got to the point where we were waiting so that the boards-- she can look at the boards over four or five pieces to find out which is the next one to go in.

Q. Okay. Okay. So was this a fixed bid contract?

A. Yes.

Q. Okay. How long did it-- let's -- let's skip to the job itself. How long did it-- had you measured the for, for your labor?

A. About-- four days.

Q. Okay. How long did it actually take you?

A. A little bit over two weeks.

Q. Okay. Why?

A. Well, the initial installation took a lot longer because of the-- determining which boards were going into next.

Q. Okay.

A. And then--

Q. Have you ever had a job before where the homeowner told you-- picked out the boards and said, 'You shall put this board beside of this board'?

A. No."[10]

The trial court rendered its decision on October 24, 2000. The court found in appellee's favor and awarded him $80,000 in damages. The court found that appellee was "justified" in

[10] Ideseko also revealed that his partner got so fed up during this process that he refused to go to the construction site and finish the job.

terminating the construction contract "because there was no way that he could finish the job with the numerous indecisions being evidenced by [appellants] in the construction of their home." Although appellee had asked, pursuant to the construction contract, for damages in excess of $89,000, the court opined that $80,000 would do "substantial justice." This appeal followed.

I

We jointly consider appellants' first four assignments of error as they all challenge various trial court findings as being against the manifest weight of the evidence.

Our analysis begins with the well-settled principle that reviewing courts will not reverse trial court judgments as being against the manifest weight of the evidence so long as those judgments are supported by some competent, credible evidence. See Shemo v. Mayfield Hts. (2000), 88 Ohio St.3d 7, 10, 722 N.E.2d 1018, 1022; Vogel v. Wells (1991), 57 Ohio St.3d 91, 96, 566 N.E.2d 154, 159; C.E. Morris Co. v. Foley Construction Co. (1978), 54 Ohio St.2d 279, 376 N.E.2d 578, at the syllabus. This standard is highly deferential and even "some" evidence is sufficient to sustain the judgment and to prevent a reversal. Barkley v. Barkley (1997), 119 Ohio App.3d 155, 159, 694 N.E.2d 989, 992; also see Living Waters Fellowship, Inc. v. Ross (Oct. 23, 2000), Scioto App. No. 00CA2714, unreported; Simms v. Heskett (Sep. 18, 2000), Athens App. No. 00CA20, unreported.

Moreover, we acknowledge that the weight to be afforded the evidence and the determination of witness credibility are

generally issues for the trier of fact. See Cole v. Complete Auto Transit, Inc. (1997), 119 Ohio App.3d 771, 777-778, 696 N.E.2d 289, 293; Reed v. Smith (Mar. 14, 2001), Pike App. No. 00CA650, unreported; also see generally State v. Frazier (1995), 73 Ohio St.3d 323, 339, 652 N.E.2d 1000, 1014; State v. DeHass (1968), 10 Ohio St.2d 230, 277 N.E.2d 212, at paragraph one of the syllabus. A trier of fact is free to believe all, part or none of the testimony of any witness who appeared before it. Rogers v. Hill (1998), 124 Ohio App.3d 468, 470, 706 N.E.2d 438, 439; Stewart v. B. F. Goodrich Co. (1993), 89 Ohio App.3d 35, 42, 623 N.E.2d 591, 596; also see State v. Nichols (1993), 85 Ohio App.3d 65, 76, 619 N.E.2d 80, 88; State v. Harriston (1989), 63 Ohio App.3d 58, 63, 577 N.E.2d 1144, 1147. With these caveats in mind, we turn our attention to appellants specific arguments.[11]

Appellants' first argument is that the trial court mistakenly concluded that appellee had complied with the "work stoppage requirements" of the construction contract so as to properly terminate the agreement. We disagree.

Our analysis begins with Section 14.1.3 of the contract which states:

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[11] We parenthetically note that several of the assignments of error set forth in appellants' brief do not cite any authority. It is axiomatic that the failure to cite case law or statutes in support of an argument, as required by App.R. 16(A)(7), constitutes grounds to disregard the assignment of error pursuant to App.R. 12(A)(2). Meerhoff v. Huntington Mtge. Co. (1995), 103 Ohio App.3d 164, 169, 658 N.E.2d 1109, 1113; State v. Riley (Dec. 29, 1998), Vinton App. No. 98CA518, unreported; Hiles v. Veach (Nov. 20, 1998), Pike App. No. 97CA604, unreported. Nevertheless, in the interests of justice we will fully consider these assignments of error.

> "If the Work is stopped for a period of 60 days through no act or fault of the Contractor or a Subcontractor or their agents or employees or any other persons performing portions of the Work under contract with the Contractor because the Owner has persistently failed to fulfill the Owner's obligations under the Contract Documents with respect to matters important to the progress of the Work, the Contractor may, upon seven additional days' written notice to the Owner and the Architect, terminate the Contract and recover from the Owner . . ." (Emphasis added.)

Common sense dictates that a homeowner's primary responsibility, during the construction phase, is to make prompt decisions as to materials or processes to be used in completing the home. Indeed, Section 2.2.4 of the construction contract speaks to that responsibility. The contract states that "[i]nformation or services under the Owner's control shall be furnished by the Owner with reasonable promptness to avoid delay in orderly progress of the work." (Emphasis added.)

We agree with the trial court's conclusion that sufficient evidence exists to show that appellants failed to furnish "information" (e.g. choice of wood stain, etc.) to appellee in a reasonably prompt manner so that the construction could continue. Thus, appellants breached one of their obligations under the contract. If that breach caused a work stoppage for a sixty (60) day period, appellee would be entitled to terminate the contract.

Appellee testified that appellants' various actions and indecisions "delayed construction well over sixty days." Gegner corroborated this testimony when he stated that the delay "was far more than sixty days." We readily acknowledge that appellants submitted contrary evidence. However, the existence

of conflicting evidence is not a sufficient reason to overrule and disregard a trier of fact's finding. The trial court apparently determined that appellee and Gegner were more credible and we will not disturb that determination. We therefore find no error in the trial court's conclusion that the necessary requirements had been met for appellee to terminate the construction contract.

Appellants also argue that appellee failed to comply with the contract's procedural requirements to terminate their relationship. Specifically, appellants point to Section 14.1.3 and argue that appellee did not give them the required "seven additional days' written notice" before he terminated the contract. Appellants argue that the trial court erred by not taking this fact into consideration when it held that appellee had justifiably terminated the construction contract. We are not persuaded.

First, it is not entirely clear to us, after our review of the transcripts, appellants' written closing argument as well as appellants' proposed findings of facts and conclusions of law, that appellants raised this particular issue during the trial court proceeding. If not, the issue has been waived and we should not consider it for the first time on appeal. See e.g. State v. Kerns (Mar. 21, 2000), Washington App. No. 99CA30, unreported; Farmer v. Meigs Ctr. (Mar. 30, 1998), Meigs App. No. 96CA12, unreported; State ex rel. VanMeter v. Lawrence Co. (Jun. 29, 1994), Lawrence App. No. 93CA27, unreported.

However, even if appellants had properly raised this issue, we would still find no merit to this argument. Although appellee's termination letter stated that the contract was terminated effective that day (August 25th), and while appellee testified that this was the day he considered the contract to be terminated, the evidence also revealed that appellee stayed on the job after that date. Appellee testified as follows:

> "Q. Did they come to you in that seven days and say, 'Look, John, we're sorry. We know we've not done timely selections of stain and paint and kitchens and all the rest'? Did they ever come to you and say, 'Stay on the job and let's go with it'?
>
> A. No. They--according to contract, we give them this notice, they had seven days to-- to answer, and they neglected (sic) again to avoid the issue rather than to make a decision. They just ignored it. So after seven days, we figured they accepted the termination. They no longer needed our services, so we turned the keys over to Mr. Gegner.
> Q. Okay. Now, what did you do in termination? Just run out the door, or how did you treat this termination process?
>
> A. Well, there is still a valuable piece of property there and we-as we did all through the project-protected it to the best of our ability, maintained it. And so when we left, all the material that we had in our possession, we took to the house, we inventoried it, stacked it in the house where it would be protected." [(sic) in original transcript.] (Emphasis added.)

This evidence is sufficient for the trial court to find that appellee complied with the spirit, if not the technical letter, of the contract's seven day notice provision. It is clear that appellee did not abandon the site within that time, but stayed on the site to wrap up the matter. During that time, appellants could have attempted to resolve their many impasses. They did

not. Further, appellants cite us to no evidence to suggest that they would have acted any differently had the termination letter explicitly stated that seven days notice was being given. This was, at most, a mere technical breach that worked no prejudice against appellees and, consequently, can be disregarded. See e.g. Bogan v. Progressive Casualty Ins. Co. (Aug. 21, 1986), Franklin App. No. 86AP-26, unreported; Davis v. Erie Ins. Group (Jan. 28, 1985), Franklin App. No. 84AP-594, unreported. A party does not breach a contract when that party substantially performs the terms of the contract. See Burlington Resources Oil & Gas Co. v. Cox (1999), 133 Ohio App.3d 543, 548, 729 N.E.2d 398, 402. Thus, nominal, trifling or technical departures from the contract terms are not sufficient to constitute a breach. See Ohio Farmers' Ins. Co. v. Cochran (1922), 104 Ohio St. 427, 135 N.E. 537, at paragraph two of the syllabus. We therefore find no error in the trial court's implicit finding that appellee did not materially breach the contract's notice provisions.

Appellants also assert that the trial court's implicit finding that the construction delays "were through no fault of the contractor" was against the manifest weight of the evidence. Again, we disagree.

The record reveals considerable evidence to show that appellants' inability or refusal to make necessary decisions regarding a wide variety of items, not the least of which was the wood trim and hardwood floor stain, caused the construction delays. The record is also replete with testimony to suggest

that appellants' desire to micro-manage the project delayed construction even beyond the delays caused by their indecision(s). This fact was established not just by the testimony of appellee or Gegner, but also by accounts from Moran (who appellants hired to complete the house), Ideseko (who installed the floors), and the fact that the house had not been completed nearly two years after appellee terminated the contract. Although appellants introduced evidence to show that they had not delayed the construction, the trial court obviously found the other evidence more credible and afforded it more weight. We find no error in that determination.

Finally, appellants argue that the $80,000 in damages the court ordered them to pay appellee was against the manifest weight of the evidence. We are not persuaded.

Section 14.1.3 of the contracts states, inter alia, that the contractor may terminate the contract after a work stoppage of sixty days caused by the owner and "recover from the [o]wners as provided in [section] 14.1.2." Section 14.1.2 states that the contractor may recover from the owners "for Work executed and for proven loss with respect to materials, equipment, tools and construction equipment and machinery, including reasonable overhead, profit and damages." (Emphasis added.)

Appellee testified that he sought to recover $89,286.18 which represents labor and materials that he had invested in the house. His "Plaintiff's Exhibit 18" breaks that sum down as follows:

$18,695.89	8/4/98 payment not made
$23,734.25	9/3/98 payment not made
$42,430.14	Sub-total materials and labor furnished to appellants
$46,856.04	retainage
$89,286.18	Total claimed due by appellee[12]

[12] The contract does not appear to define the term "retainage," but Gegner testified that this refers to an amount of money (10%) retained by appellants from previous payments to ensure that appellee would satisfactorily complete the contract, including "punch list" items. This retainage was money already earned by appellee and was thus claimed by him as due and owing upon termination.

This evidence sufficiently depicted the damages due and owing to appellee under the contract's terms. Once again, although appellants introduced evidence to challenge these figures, the trial court obviously found appellee's evidence to be more credible. We further acknowledge that the trial court awarded appellee $80,000 rather than the $89,286.18 that he requested. If the evidence supported the larger amount, and we find that it did, the evidence obviously supports the smaller amount.[13]

For all these reasons, appellant's first, second, third and fourth assignments of error are without merit and are hereby overruled.

II

Appellants argue in their fifth assignment of error that the trial court erred in not considering their counterclaim. We disagree with appellants and find this argument to be factually incorrect.

The trial court's November 7, 2000 judgment clearly and unequivocally shows that the court considered appellants' counterclaim and determined that it was "without merit." To the extent that appellants argue that the trial court erred in that determination, we disagree. The gist of appellants' counterclaim was that appellee breached the contract when he walked off the job. We have previously concluded that the trial court's finding

[13] We note that appellee filed no cross-appeal to challenge the trial court's decision to award less damages than he requested.

that appellee properly and justifiably terminated the contract is supported by competent and credible evidence. Thus, appellee did not breach the contract and the counterclaim must fail. Appellants' fifth assignment of error is therefor without merit and is hereby overruled.

Accordingly, based upon the foregoing reasons we overrule appellants' assignments of error and affirm the trial court's judgment.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the judgment be affirmed and that appellee recover of appellant costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Washington County Common Pleas Court to carry this judgment into execution.

A certified copy of this entry shall constitute that mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

Exceptions.

Kline, J. & Evans, J.: Concur in Judgment & Opinion

For the Court

BY:_____
Peter B. Abele
Presiding Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.