

COURT OF APPEALS
TUSCARAWAS COUNTY, OHIO
FIFTH APPELLATE DISTRICT

JON HARMON ENTERPRISES LTD, ET AL	:	JUDGES: Hon. W. Scott Gwin, P.J. Hon. Julie A. Edwards, J. Hon. Patricia A. Delaney, J.
Plaintiffs-Appellants/ Cross-Appellees	:	
-vs-	:	Case No. 2008 AP 12 0074
DAVID KINSEY, ET AL	:	<u>OPINION</u>
Defendant-Appellee/ Cross-Appellants	:	

CHARACTER OF PROCEEDING: Civil appeal from the Tuscarawas County Court of Common Pleas, Case No. 2007CV110871

JUDGMENT: Affirmed

DATE OF JUDGMENT ENTRY: October 20, 2009

APPEARANCES:

For Plaintiffs-Appellants/
Cross-Appellees

For Defendant-Appellee/
Cross-Appellants

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Gwin, P.J.

{¶1} Plaintiffs-appellants Jon Harmon Enterprises, Ltd. and Jon Harmon, hereinafter referred to collectively as Harmon, appeal a judgment of the Court of Common Pleas of Tuscarawas County, Ohio, entered on their claim for money due and owing for construction of a home. Harmon assigns a single error:

{¶2} “I. THE TRIAL COURT EMPLOYED AN IMPROPER MEASURE OF DAMAGES TO APPELLANTS’ CLAIM OF QUANTUM MERUIT.”

{¶3} Defendants-appellees David and Linda Kinsey cross appeal, assigning a single error:

{¶4} “I. THE TRIAL COURT ERRED AS A MATTER OF LAW IN FAILING TO AWARD DAMAGES TO DEFENDANTS/APPELLEES AND IN AWARDING DAMAGES TO PLAINTIFF/APPELLANT BY USING THE WRONG AMOUNTS IN ITS CALCULATIONS.”

{¶5} The trial court conducted a bench trial, and its judgment entry of December 15, 2008, set out the background of the case. In the fall of 2006 Harmon and the Kinseys embarked on a joint venture of sorts, to build a residential home in Tuscarawas County, Ohio. The initial agreement between Harmon and the Kinseys was to build a “spec” house and sell it for a profit. It appears the margin of profit would be in the \$25,000 to \$50,000 range. Shortly after beginning construction of the home, the Kinseys expressed their intention to purchase the finished home. The construction thus evolved into a “custom” home rather than a “spec” home.

{¶6} The parties borrowed \$233,000 and \$100,000 from First Federal Community Bank, for a total of \$333,000 for the construction of this home. Although the

Kinseys state Harmon borrowed the second loan of \$100,000 individually, the judgment entry confirming the foreclosure sale lists both loans in all parties' names

{¶7} Differences arose between Harmon and the Kinseys and Harmon ceased work on the home. The Kinseys then invested considerable additional funds to continue work on the home. Before the work was completed, the parties defaulted on the loans from First Federal Community Bank, and the property was sold at public auction. The Kinseys purchased the home in the foreclosure action for \$353,000.

{¶8} Harmon initially sued the Kinseys for additional monies for materials and labor he alleges he invested in the construction of the home up to the point where his involvement in the construction ceased. In turn, Kinseys sued Harmon seeking repayment of monies they have invested in the construction of the home over and above the time and material Harmon invested as contractor/builder. They included as damages the cost of purchasing the home in the foreclosure action.

{¶9} Based upon this background, the trial court made findings of fact. The court found the testimony and other evidence presented by the parties relative to an alleged contract between them to construct the home in question and purchased by the Kinsey's cannot be reconciled on any of the fundamental aspects of such a contract, i.e. cost of construction, time period for completion, etc. The court found the actual cost of construction is essential to the issues implicated by the litigation, but the cost cannot be ascertained or determined with any specificity based on the evidence presented by the parties. Because of its inability to come to a factual conclusion as to the actual cost of construction, the court found the fairest barometer of the cost of construction should be

the fair market value of the home and free standing garage. The court found the fair market value to be \$450,000.

{¶10} The court found Harmon received \$225,947.39 from the proceeds of the loans from First Federal Community Bank. The parties submitted a copy of the final entry from the foreclosure action. It shows First Federal Community Bank received \$344,383.78, in discharge of its two mortgages which totaled \$333,000.00. The record does not show how the remainder of the loan funds was dispersed. Kinseys invested \$215,260.82 of their own money over and above the money Harmon put into the construction. Kinseys also paid Harmon an additional \$3,000.00 at some point. The court found Harmon was the principal contractor in the construction of the home and garage.

{¶11} The trial court made conclusions of law. The court found the parties never entered into a legally binding contract for the construction of the home because there was no “meeting of the minds” between the parties on the fundamental terms of the proposed agreement. The court found because it could not ascertain with any specificity the terms of any agreement between the parties, the cost of construction is the fair market value of the structures and land at the time Harmon ceased participation in the construction. The cost of construction is therefore \$450,000.00, the fair market value of the property at the time of the sale of property in the foreclosure action, notwithstanding the fact that the Kinseys purchased the property for \$353,000.00.

{¶12} Using the fair market value of the property as the starting point, the court subtracted the \$225,947.39 received by Harmon from the two loans from the First Federal Community Bank. The court also subtracted the \$3,000.00 payment Kinseys

made to Harmon. The court subtracted the \$215,260.82 invested by the Kinseys. The court concluded a balance of \$5,791.79 remains owed by the Kinseys to Harmon.

{¶13} Harmon alleged he had \$40,873.61 out-of-pocket expenses, expended in addition to the draws from the two loans. He also claimed he had earned but not been paid wages of \$25,980. The trial court made no findings of fact regarding these expenses, but did not include these amounts in its calculations.

{¶14} The Kinseys claimed an additional \$353,000.00 as damages due from Harmon, which is the final purchase price at the foreclosure sale. The trial court did not include the \$353,000.00, but rather, based its decision on the value of the home at the time the joint venture dissolved, which was prior to the foreclosure.

{¶15} Both parties dispute the court's calculations. We will address Harmon's assignment of error first.

{¶16} Essentially, Harmon argues the measure of damages should not have been based on the fair market value of the buildings, but rather on the reasonable value of Harmon's labor. Harmon correctly cites *Reid Johnson Downes v. Lansberry* (1994), 68 Ohio St. 3d 570, for the proposition the equitable doctrine of quantum meruit is based on an implied promise on the part of the defendants to pay the plaintiffs as much as they reasonably deserve to be paid. Quantum meruit is generally awarded when one party confers a benefit upon another without receiving just compensation for the value of the services rendered. *Aultman Hospital Association v. Community Mutual Insurance Company* (1989), 46 Ohio St. 3d 51.

{¶17} The trial court found the most equitable value was the fair market value of the home because it could not ascertain the construction cost from the evidence

presented. Harmon testified at some length about his services, and his expenses. The trial court included only \$228,947.39, which represents the money expended from the two construction loans. According to Joint Exhibit AA, Harmon's claimed expenses were \$214,617.51, but he had receipts for only \$111,272.51.

{¶18} Janice S. Roseberry, a Certified Residential Real Estate Appraiser and Licensed Real Estate Broker, testified regarding the appraisal she prepared for the foreclosure action. In Roseberry's opinion, the fair market value of the property was \$400,000.00, and the cost of building the house and garage was \$552,004.00, including the price of the land and the improvements to the site. She further testified because there are many considerations there is no set price per square foot, but generally, the price is \$88.74. Roseberry adjusted the rate to \$98.09 per square foot for the property in question. Harmon testified he believed the cost per square foot was \$150.

{¶19} Our standard of reviewing a trial court's decision is the abuse of discretion standard. *Sandusky Properties v. Aveni* (1984), 15 Ohio St. 3d 273, 473 N.E. 2d 798. The Supreme Court has defined the term "abuse of discretion" as demonstrating the court was unreasonable, arbitrary, or unconscionable, see, e.g., *Blakemore v. Blakemore* (1983), 5 Ohio St. 3d 217, 219, 450 N.E. 2d 1140, citations deleted.

{¶20} The trial court was finder of fact in this bench trial, and was free to accept or reject any of the figures submitted, either because it found the evidence insufficient or not credible. The testimony of Harmon, the Kinseys, and Roseberry varied widely. We find the trial court did not err in using the fair market value of the property as its starting point.

{¶21} Harmon had the burden of proving his damages in quantum meruit and the trial court found it could not make a determination based upon the evidence before it. The trial court was not required to accept all of Harmon's figures as being accurate, particularly in light of the fact he could not produce receipts for everything. The trial court elected to fashion an equitable remedy, and this court cannot say on the record before us the trial court's judgment was unreasonable, arbitrary or unconscionable.

{¶22} Harmon's assignment of error is overruled.

{¶23} We will address the Kinseys' cross-assignment of error, which challenges the trial court's award of damages. Essentially, Kinseys argue the trial court should have included the \$353,000.00 they paid at the foreclosure sale as part of their expenditures for the house.

{¶24} The issue before the court was to determine the result of the parties' actions in constructing of the home and garage. The foreclosure action is essentially outside the construction of the home. The Kinseys were not obligated to purchase the property at the foreclosure sale, but when they did, they acquired the property free of the construction loans and the various liens filed against it. We conclude the trial court was correct in not including the purchase price at the foreclosure sale as part of Kinseys' damages in the construction of the home.

{¶25} The cross assignment of error is overruled.

{¶26} For the foregoing reasons, the judgment of the Court of Common Pleas of Tuscarawas County, Ohio, is affirmed.

By Gwin, P.J.,

Edwards, J., and

Delaney, J., concur

HON. W. SCOTT GWIN

HON. JULIE A. EDWARDS

HON. PATRICIA A. DELANEY

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