

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
ERIE COUNTY

Daniel M. Bertsch & Linda Bertsch

Court of Appeals No. E-09-021

Appellees

Trial Court No. 08 CVF 00141

v.

Lee's Granite, LLC

DECISION AND JUDGMENT

Appellant

Decided: November 20, 2009

* * * * *

David H. Cullis, for appellees.

Daniel L. McGookey, for appellant.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} This is an accelerated appeal from the May 9, 2009 judgment of the Erie County Municipal Court which, following a bench trial, granted judgment in favor of appellees, Daniel and Linda Bertsch. For the reasons that follow, we affirm the trial court's judgment.

{¶ 2} On June 12, 2008, appellees filed a complaint against defendant-appellant, Lee's Granite, LLC, alleging breach of contract, breach of express and implied warranties, and negligence in connection with appellant's installation of a granite countertop and backsplash in appellees' kitchen.

{¶ 3} On October 29, 2008, the matter proceeded to a trial to the court. The following relevant testimony was presented. Appellee, Daniel Bertsch, testified that he and his wife signed a contract with appellant to remove their Formica kitchen countertop and to install a granite countertop and backsplash. The contract price was \$6,000, which was paid in full on October 3, 2007, upon completion of the job. Mr. Bertsch testified that he was not satisfied with the job; Bertsch spoke with Mark Lee and an employee of appellant about parts of the job that were unsatisfactory. According to Mr. Bertsch, Lee came back to the house and applied a darkener to the granite. Mr. Bertsch testified that it did not work. Bertsch also stated that Lee indicated that he would return to the house and move the countertops around in an attempt to cure the overhang issue; Lee never returned.

{¶ 4} Mr. Bertsch testified regarding several photographs that he and his wife had taken of the completed job. The photographs depicted a variation in the countertop overhang, wide seams, noticeable color variation, and a chipped backsplash.

{¶ 5} During cross-examination, Mr. Bertsch clarified that Lee offered to return to the house but that he and his wife did not want him to return to their home. Regarding the color variation, Bertsch stated they were promised that the slabs would be within

three color variations of each other; he acknowledged that he never saw the lot numbers. Finally, Bertsch acknowledged that the granite countertop on the kitchen desk was acceptable.

{¶ 6} Appellee, Linda Bertsch, testified that the first day that the installers were at their home, they telephoned Mark Lee that the granite slabs did not match. According to Mrs. Bertsch, Lee told them to wait until the job was finished and "see how it looks."

{¶ 7} Mrs. Bertsch testified that she complained to Lee about the color variation, the chipped backsplash, and the wide seam. Bertsch testified that appellant's employees returned twice to put darkener on the granite but that it did not work.

{¶ 8} Bertsch stated that on November 3, 2007, Lee told her that the company would "make it right" but that they never heard from him again. The Bertschs proceeded to get three estimates to redo the kitchen; the estimates ranged from \$5,200 to \$6,000. The estimates were admitted into evidence.

{¶ 9} Mark Lee testified that he is owner of Lee's Granite, LLC. Lee stated that the job at appellees' home began on September 14, 2007; there was a two-week break because appellees wished to paint prior to the installation of the back-splash. The job was completed on October 3, 2007, and two days later Lee received a complaint about the job. Lee testified that Mrs. Bertsch called and expressed her dissatisfaction with the color and the seams. Around October 26, 2007, Lee sent his employees to fix the problems. On October 28, 2007, the Bertschs called and again expressed their

dissatisfaction. Lee went to the home and attempted to dye the granite and touched up some seams.

{¶ 10} Lee testified that on November 3, 2007, Mrs. Bertsch telephoned him and was still not satisfied with the color of the stone. According to Lee's notes, the Bertschs did not want them to come back to the house.

{¶ 11} During cross-examination, Lee was questioned about the dye; he stated that generally the dye is left on the counter anywhere from one day to a few days. Lee testified that the Bertschs removed the dye the same day. He believed that they were informed of the dye instructions.

{¶ 12} On May 9, 2009, the trial court filed its judgment entry granting judgment in favor of appellees for \$5,400. The court arrived at this sum valuing the satisfactorily completed desktop at \$600, and deducting the amount from the \$6,000 contract price based on the determination that the remaining countertops would need replacement. This appeal followed.

{¶ 13} Appellant now raises the following assignment of error for our review:

{¶ 14} "Assignment of Error: The trial court's finding that defendant/appellant breached the contract by failing to perform in a workmanlike manner is contrary to law and against the manifest weight of the evidence."

{¶ 15} In its sole assignment of error, appellant contends that the trial court's judgment that it breached the contract with appellees by failing to perform in a workmanlike manner was against the manifest weight of the evidence. Appellant

disputes the court's findings regarding the color variation and the countertop overhang. Specifically, appellant argues that the color variation was known to appellees prior to commencement of the job and, in any event, expert testimony was needed regarding granite color number variation. As to the "overhang issue," appellant argues that appellees failed to mitigate their damages by either allowing appellant to return and move the granite around or quoting the cost of another installer to move the granite around.

{¶ 16} At the outset we note that upon review of a trial court's judgment following a bench trial, an appellate court is "'guided by a presumption' that the trial court's findings are correct." *Patterson v. Patterson*, 3d Dist. No. 17-04-07, 2005-Ohio-2254, ¶ 26, quoting *Seasons Coal Co. v. Cleveland* (1984), 10 Ohio St.3d 77, 80. "Accordingly, a judgment supported by some competent, credible evidence will not be reversed on appeal unless it is against the manifest weight of the evidence." *Id.*, citing *Seasons Coal Co.* and *C.E. Morris Co. v. Foley Constr. Co.* (1978), 54 Ohio St.2d 279; App.R. 12(C). Further, a reviewing court "will not disturb a decision of the trial court as to a determination of damages absent an abuse of discretion." *Roberts v. U.S. Fid. & Guar. Co.*, 75 Ohio St.3d 630, 634, 1996-Ohio-101, citing *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶ 17} A contract to perform work imposes a duty on the contractor to perform the work in a workmanlike manner. *McKinley v. Brandt Constr., Inc.*, 168 Ohio App.3d 214, 2006-Ohio-3290, ¶ 10, citing *Lin v. Gatehouse Constr. Co.* (1992), 84 Ohio App.3d 96, 101. A "workmanlike manner" has been defined as the way work has been customarily done in the community. (Citations omitted.) *Id.*

{¶ 18} As set forth above, at the October 29, 2008 trial in this matter appellees testified about the aspects of the work that they believed were unsatisfactory. Appellees admitted photographs of the alleged defects into evidence. Upon review of the testimony and accompanying photographs it is clear that expert testimony was not required as the alleged defects were not highly technical or scientific in nature. Upon further review, we must conclude that the trial court's judgment was supported by some competent, credible evidence and was not against the weight of the evidence. Testimony was presented regarding the color variation, overhang issue, uneven seams, and chipped backsplash. Further, the photographs support the testimony. Accordingly, appellant's assignment of error is not well-taken.

{¶ 19} On consideration whereof, we find that substantial justice was done the party complaining and the judgment of the Erie County Municipal Court is affirmed. Pursuant to App.R. 24, appellant is ordered to pay the costs of this appeal.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, P.J.

JUDGE

Mark L. Pietrykowski, J.

JUDGE

Arlene Singer, J.

CONCUR.

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
<http://www.sconet.state.oh.us/rod/newpdf/?source=6>.