[Cite as *Kime Design, L.L.C. v. Aouthmany*, 2012-Ohio-3183.]

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

Kime Design, LLC	Court of Appeals No. L-11-1162
Appellee	Trial Court No. CVI-09-13756
v.	
Moustafa M. Aouthmany, M.D.	**DECISION AND JUDGMENT**
Appellant	Decided: July 13, 2012

* * * * *

Jack J. Brady, for appellee.

Moustafa M. Aouthmany, pro se.

* * * * *

YARBROUGH, J.

{¶ 1} Defendant-appellant Dr. Moustafa Aouthmany appeals from the judgment of the Toledo Municipal Court, Small Claims Division, finding him in breach of contract, and awarding $3,000 plus $750 in attorney fees to plaintiff-appellee Kime Design, LLC. We affirm, in part, and reverse, in part.

I. Facts and Procedural Background

{¶ 2} On July 10, 2009, appellee filed a five-paragraph complaint alleging that appellee and appellant "entered into an agreement whereby [appellee] would provide certain architectural services for [appellant]. * * * [Appellee] provided all architectural services and submitted invoices accordingly. * * * [Appellant] has failed to pay pursuant to their agreement and [appellant] continues to refuse to pay." Appellee stated that the amount due is $3,500 plus attorney fees, court costs, and interest. Appellant, appearing pro se, filed his answer denying the allegations on July 30, 2009. The matter ultimately proceeded to a bench trial before a magistrate on April 21, 2010.[1]

{¶ 3} The background facts are straightforward. In early 2006, appellant met with appellee to discuss the preparation of architectural designs for appellant's new residence. The parties met several times, working through a series of preliminary designs. Around July 2008, appellee created a finalized set of construction drawings and blueprints that was sent to the builder. Appellant, however, never used the finalized drawings. Starting in October 2008, appellee began emailing appellant, seeking $3,500 as payment for the design. Appellant has never responded to the emails, nor paid the requested amount due.

[1] The matter was originally set for trial on August 10, 2009. On that date, appellee and its counsel failed to appear and the magistrate recommended the case be dismissed without prejudice. Subsequently, appellee filed an objection to the magistrate's recommendation, arguing that "due to inadvertence, counsel's runner did not make sure counsel knew there was a court date and consequently the court date was not placed on counsel's calendar." On February 2, 2010, the trial court overruled the magistrate's decision and re-set the case for trial.

At some point the builder delivered the drawings to appellant, and in early 2009, appellant returned the drawings to appellee by mail.

{¶ 4} At issue in this case is whether the parties entered into a contract for the production of the finalized construction drawings and blueprints. Todd Kime was called as a witness for appellee, and the following testimony was taken:

> A Back in early 2006 [appellant], his wife and son asked me to prepare architectural designs for a new residence that they were going to be building.
>
> Q And describe for the Court what you did in regard to preparing a residential design for them?
>
> A We worked through a series of preliminary designs, typically based upon criteria that the client requests as far as size, look, style, architecture, things of this nature, working through, I think in this case we went through five or six different preliminary designs up to a point where they are happy with the design on paper at which point we are kind of given the okay to finalize construction drawings and final blueprints for what would be the project.
>
> Q Did you prepare final construction drawings?
>
> A Yes, we did.

{¶ 5} The rest of Kime's testimony on direct examination related to his efforts to invoice appellant for the design work, and his observation that appellant has not paid the amount due.

{¶ 6} On cross-examination by appellant, the following exchange occurred:

Q Do we have a contract that if I don't like the design I still have to buy it?

A We did in my mind have a verbal agreement for you contracting us to do your design. We do work through preliminary designs with you to get to a point where you do like the design and then ultimately a yes when you authorize final construction drawings, we feel that at that point you are happy with the design before we commit all that time and energy to complete the drawings. So that's why the process is kind of set up that it's a series of preliminary designs until you are happy, then you go and you say yes, please finish these drawings and then we commit the time and energy to do so. So I guess, you know, you did authorize the, you know, approval of the design by having us complete them.

* * *

Q Do you have a proof that I authorize the design? [sic]

A I do not have proof in writing, but I can assure you that we would have not gone on with final drawings had you not authorized us doing so.

* * *

Q Do you have proof?

* * *

A Proof in writing, no. It was probably a verbal go ahead.

{¶ 7} After cross-examination, appellee rested and moved to submit the drawings and the collection emails and letters as evidence.[2]

{¶ 8} Appellant then testified in his own behalf, and stated that he did not authorize final approval of the design, and that "[t]here is no contract to say that I have to buy it if I don't like it." On cross-examination, the following was elicited:

Q You admit that you met with Kime Design and asked them to prepare drawings for you, correct? Yes or no, sir?

A Yes.

Q You admit that you met with Kime Design on several occasions and, in fact, multiple preliminary drawings were done; isn't that true?

A I met with him three times.

Q Then that would be a yes.

A Yes.

Q All right. And you admit that he prepared final construction drawings for you, correct?

A I didn't ask for it.

Q You admit he prepared them; isn't that true?

A This is on his own.

[2] The transcript indicates that a collection letter written by appellee's attorney was admitted into evidence. However, that letter was not included in the record.

{¶ 9} Based on this evidence, the magistrate concluded, "[appellee] clearly established the existence of the oral contract. [Appellee] also established that [appellant] breached the contract." The magistrate entered judgment in favor of appellee for $3,000 plus attorney fees of $750 and court costs and statutory interest. Appellant filed written objections to the magistrate's decision, which were ultimately overruled by the trial court's final judgment entered on June 2, 2011.[3]

{¶ 10} Appellant now appeals, raising 15 assignments of error.

II. Analysis

{¶ 11} For ease of discussion, appellant's numerous assignments of error will be combined where possible.

A. The Trial Court's Monetary Jurisdiction Limit was Not Exceeded

{¶ 12} Appellant argues in his first assignment of error that the trial court lacked jurisdiction over this case:

> 1. The trial Court erred when it accepted a case outside its jurisdiction.
>
> The appellee suit was for $3,500.00. This amount is clearly outside the jurisdiction of the small claims court.

{¶ 13} In support of his assignment, appellant relies on R.C. 1925.02(A)(1), which provides, "Except as provided in division (A)(2) of this section, a small claims division

[3] Appellant's objections were first overruled by the trial court on September 15, 2010. Appellant timely appealed from that decision; however, we dismissed the appeal because the September 15, 2010 judgment was not a final, appealable order since it did not separately set out the relief granted. Following a complaint for a writ of mandamus, a final appealable order was finally entered on June 2, 2011.

established under section 1925.01 of the Revised Code has jurisdiction in civil actions for the recovery of taxes and money only, *for amounts not exceeding three thousand dollars, exclusive of interest and costs*." (Emphasis added.) Appellant concludes that because the original complaint prayed for an award of $3,500.00, the trial court was without jurisdiction. Appellee disagrees, noting, "[T]he trial court granted a judgment in favor of Plaintiff/Appellee in the amount of $3,000.00 which is within its jurisdictional amount." Upon review, we hold that the trial court had jurisdiction over this case.

{¶ 14} We start with the rule that, contrary to appellee's assertion, "[I]t is the amount sought to be recovered as set forth in the complaint that determines jurisdiction, not the amount the court decides to award after the case has gone to trial." *Staffilino Chevrolet, Inc. v. Balk*, 158 Ohio App.3d 1, 2004-Ohio-3633, 813 N.E.2d 940, ¶ 11 (7th Dist.) (interpreting R.C. 1907.03(A), the analogous monetary jurisdiction provision for county courts). Thus, since the complaint sought a recovery award in excess of $3,000, it would appear that the trial court was without jurisdiction. However, R.C. 1925.09 provides that, "The court, before judgment or upon vacation of judgment, may allow any claim to be amended." Here, near the beginning of the trial, the court allowed appellee to amend its prayer for relief to seek only $3,000 plus costs, interest, and attorney fees, so it would comply with the jurisdictional limit. Therefore, the trial court had jurisdiction to hear this case. *See Leitschuh v. Allen*, 2d Dist. No. 16392, 1997 WL 566115 (Sept. 12, 1997) (small claims court did not err in allowing appellee to amend his claim so that it fell within the monetary limits of the court's jurisdiction).

{¶ 15} Accordingly, appellant's first assignment of error is not well-taken.

B. Appellant Breached An Oral Contract For Services

{¶ 16} Appellant's second, third, fourth, and fifth assignments of error challenge the trial court's finding that a contract existed between the parties:

> 2. Trial court erred when it concluded that there is an implied contract between the appellant and appellee.
>
> 3. Trial court erred when it assumed "meeting of minds," of the appellant and appellee, and the plaintiff/appellee proved that a contract exists.
>
> 4. Trial court erred in its conclusion of law, because it contradicts its finding of facts.
>
> 5. Trial court erred when it adopted the appellee's hearsay about the presence of a verbal contract between the appellee/plaintiff and appellant/defendant, and overlooked the fact that the plaintiff/appellee claimed he "has verbal agreement to do the design," (appellee did not say to buy the design) * * *, furthermore, the appellee admitted that he did not have authorization to finish the design "so I guess, you know, you did authorize the, you know, approval of the design by having us complete them" * * *. Appellee had no written authorization to continue the 'prints'* * *. The appellee also admitted in the least confident manner "Proof in writing, no. it was probably a verbal go ahead" * * *. Plaintiff admitted that he gave the drawings in question to a third party (a builder

who was billed by plaintiff), also the conclusion of the law of the trial court contradict the finding of facts.

{¶ 17} "A contract is generally defined as a promise, or a set of promises, actionable upon breach. Essential elements of a contract include an offer, acceptance, contractual capacity, consideration (the bargained for legal benefit and/or detriment), a manifestation of mutual assent and legality of object and consideration." *Kostelnik v. Helper*, 96 Ohio St.3d 1, 2002-Ohio-2985, 770 N.E.2d 58, ¶ 16. "A meeting of the minds as to the essential terms of the contract is a requirement to enforcing the contract." *Id.* "Terms of an oral contract may be determined from 'words, deeds, acts, and silence of the parties.'" *Id.* at ¶ 15.

{¶ 18} Based on the evidence presented in this case, we hold that the trial court did not err in finding that appellant breached an oral contract between the parties for the rendering of architectural services. "Upon appellate review, the existence of a contract raises a mixed question of fact and law. We accept the facts found by the trial court on some competent, credible evidence, but freely review application of the law to the facts." *McSweeney v. Jackson*, 117 Ohio App.3d 623, 632, 691 N.E.2d 303 (4th Dist.1996). "A reviewing court should be guided by a presumption that the findings of a trial court are correct, since the trial judge is best able to view the witnesses and observe their demeanor, gestures and voice inflections, and use their observations in weighing credibility of the proffered testimony." *Id.*

{¶ 19} Here, the testimony revealed that the parties had met on several occasions to discuss drawing preliminary designs for appellant's house. Kime testified that at some point appellant gave him the verbal "go ahead" to complete the final design. Those finalized drawings were entered into evidence. Further, although no definite price term existed, "[w]hen a price term is missing from a contract, particularly a service contract, the amount of compensation is ordinarily a reasonable amount since the exact amount cannot ordinarily be determined until the services are performed." *Culp v. Lancaster*, 150 Ohio App.3d 112, 2002-Ohio-6098, 779 N.E.2d 827, ¶ 18 (10th Dist.). Evidence was later admitted establishing the amount of compensation at $3,500. Therefore, we find that competent, credible evidence exists to support the trial court's findings, and we hold that an oral contract existed between the parties. Moreover, we agree with the trial court that appellant breached that contract by not paying for the services.

{¶ 20} Appellant also argues that the trial court impermissibly relied on hearsay evidence to reach its conclusion. However, under Evid.R. 101(C)(8), the rules of evidence do not apply to "[p]roceedings in the small claims division of a county or municipal court." Further, even if they did, the trial court did not err. "'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Evid.R. 801(C). Appellant takes exception specifically with Kime's statement, "we did in my mind have a verbal agreement." This statement is not hearsay, though, because it was made by Kime while testifying at the trial.

{¶ 21} Accordingly, appellant's second, third, fourth, and fifth assignments of error are not well-taken.

C. Statute Of Frauds Does Not Apply

{¶ 22} In his sixth assignment of error, appellant argues that the contract fails to satisfy the statute of frauds:

> 6. Trial court err [sic] in enforcing a presumed contract in which the Statute of Frauds apply. There is no contract of any sort between the appellee and appellant: written, verbal or implied. But for the sake of argument, if such an agreement existed, the value of the presumed contract more than $500.00 with a period of time to perform/deliver the service in almost 3 years is unenforceable—(Statute of Frauds)

{¶ 23} Appellant presents two arguments why the statute of frauds should apply: (1) the contract was for more than $500, and (2) the contract took more than three years to perform.

{¶ 24} Appellant's first argument is grounded in Ohio's codification of the Universal Commercial Code, in particular R.C. 1302.04(A), which provides, "Except as otherwise provided in this section a contract for the sale of goods for the price of five hundred dollars or more is not enforceable by way of action or defense unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought or by his authorized

agent or broker." Here, however, the contract at issue is for architectural design services, not goods, and therefore R.C. 1302.04(A) does not apply.

{¶ 25} Appellant's second argument is based on R.C. 1335.05, which does apply to contracts for services. R.C. 1335.05 provides in relevant part,

> No action shall be brought whereby to charge the defendant * * * upon an agreement that is not to be performed within one year from the making thereof; unless the agreement upon which such action is brought, or some memorandum or note thereof, is in writing and signed by the party to be charged therewith or some other person thereunto by him or her lawfully authorized.

Appellant argues that since performance of the contract took nearly three years, the statute of frauds was not satisfied. However, "the 'not to be performed within one year' provision of the Statute of Frauds * * * applies only to agreements which, by their terms, cannot be fully performed within a year, and not to agreements which may possibly be performed within a year. Thus, where the time for performance under an agreement is indefinite, * * * the agreement does not fall within the Statute of Frauds." *Sherman v. Haines*, 73 Ohio St.3d 125, 127, 652 N.E.2d 698 (1995). Here, no evidence was presented indicating the contract had terms relating to time for performance. Therefore, because performance of the architectural design services was able to be completed within one year, even though in this case it took longer, the statute of frauds does not apply.

{¶ 26} Accordingly, appellant's sixth assignment of error is without merit.

D. Award Of Attorney Fees Was Improper

{¶ 27} In his seventh assignment of error, appellant challenges the trial court's award of attorney fees:

> 7. The trial court erred when it granted the plaintiff/appellee's lawyer attorney fees. The plaintiff/appellee's lawyer did not request attorney fees when the complaint was filed. Instead, the attorney fees were offered to the plaintiff /appellee's lawyer by magistrate Smith during the trial proceeding.

{¶ 28} Contrary to appellant's assertion, appellee did request attorney fees in the complaint. Nevertheless, the trial court's award of attorney fees was improper. Ohio adheres to the "American rule" with respect to recovery of attorney fees, under which a prevailing party generally may not recover attorney fees as part of the costs of litigation. *Wilborn v. Bank One Corp.*, 121 Ohio St.3d 546, 2009-Ohio-306, 906 N.E.2d 396, ¶ 7. However, as exceptions to this rule, "[a]ttorney fees may be awarded when a statute or an enforceable contract specifically provides for the losing party to pay the prevailing party's attorney fees, * * * or when the prevailing party demonstrates bad faith on the part of the unsuccessful litigant." (Internal citations omitted.) *Id.* Here, the parties do not point to any statue that authorizes attorney fees, and no evidence was entered showing that the contract had a provision for attorney fees. Further, the trial court did not find that appellant had acted in bad faith. Therefore, the trial court erred when it imposed attorney fees. *See Wright v. Fleming*, 1st Dist. No. C-070121, 2008-Ohio-1435, ¶ 5

(reversing trial court's award of attorney fees in breach of contract action under similar circumstances).

{¶ 29} Accordingly, appellant's seventh assignment of error is well-taken.

E. Appellant's Substantial Rights Were Not Affected

{¶ 30} Appellant's eight, ninth, tenth, eleventh, twelfth, thirteenth, and fourteenth assignments of error challenge various procedural irregularities:

> 8. Trial court erred when it did not rule on the appellant's objection dated 8/20/2010 to the Magistrate David E. Smith decision, dated June 23, 2010, journalized July 1, 2010, and never answered that objection until June 2011; (almost a year later).
>
> 9. Trial court erred when it failed to issue a final appealable order, and merely adopted the decision of the Magistrate signed 8/18/2010 and stated that "the defendant's objection(s) to the magistrate decision is/are denied."
>
> 10. Trial court erred when it ruled on the objection to Magistrate Blaufuss's decision dated 8/18/2010. The appellant never filed any objection to the Magistrate Blaufuss's decision dated 8/18/2010. On the contrary, the Appellant filed objection dated 8/20/2010 to the Magistrate David E. Smith decision, signed June 23, 2010, journalized July 1, 2010. This proves that the Trial Court ruled on the appellant objection without reading it.

11. Trial court erred when it issued a PIAI [sic] form to Appellate [sic] and scheduled court appearance day for execution of the judgment.

12. Trial court erred when it issued PIAI [sic] form to Appellate [sic] and scheduled court appearance day for execution of the judgment.

13. Trial court erred when it denied the appellant's motion to halt collection until a final judgment: and stated "The court adopts the magistrate's decision of 7/1/2010 motion to halt collection deemed moot."

14. Trial court erred when it merely adopted the magistrate's decision and failed to issue a final appealable judgment.

{¶ 31} The record indicates there was some difficulty obtaining a final, appealable order in this case, which required us to dismiss one appeal, and ultimately to issue an alternative writ of mandamus. Nevertheless, a final, appealable order was eventually entered, and we have considered the merits of appellant's arguments. Further, the record does not indicate that the judgment has been executed against appellant. Therefore, appellant's substantial rights have not been prejudiced, and any error of the trial court is harmless. Civ.R. 61 ("The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.")

{¶ 32} Accordingly, appellant's assignments of error eight through fourteen are not well-taken.

F. A Presumption Of Regularity Exists In Trial Court Proceedings

{¶ 33} Finally, in his fifteenth assignment of error, appellant challenges the trial court's categorical denial of his objections to the magistrate's report:

> 15. Trial court erred when it abused its power to categorically deny all the appellant's objections without looking to the merit and validity of these objections individually.

{¶ 34} Under Civ.R. 53(D)(4)(d), "In ruling on objections, the court shall undertake an independent review as to the objected matters to ascertain that the magistrate has properly determined the factual issues and appropriately applied the law."[4] It is generally presumed that the trial court conducted its independent review of the magistrate's decision. *See Inman v. Inman*, 101 Ohio App.3d 115, 118, 655 N.E.2d 199 (2d Dist.1995); *see also Hartt v. Munobe*, 67 Ohio St.3d 3, 7, 615 N.E.2d 617 (1993) ("An appellate court reviewing a lower court's judgment indulges in a presumption of regularity of the proceedings below.") As a result, the party asserting error must affirmatively demonstrate the trial court's failure to perform its Civ.R. 53(D)(4)(d) duty. *Id.* Here, appellant has pointed to nothing in the record that would indicate the trial court failed to independently review the magistrate's decision; therefore, appellant's argument is without merit. *Compare Inman*, *supra*, at 119-120, 655 N.E.2d 199 (generic language

[4] "A trial judge who fails to undertake a thorough independent review of the referee's report violates the letter and spirit of Civ.R. 53, and [the Ohio Supreme Court] caution[s] against the practice of adopting referee's reports as a matter of course, especially where a referee has presided over an entire trial." *Hartt v. Munobe*, 67 Ohio St.3d 3, 6, 615 N.E.2d 617 (1993).

in order and speed at which the referee's report was adopted were sufficient to overcome presumption of regularity in the trial court's proceedings).

{¶ 35} Accordingly, appellant's fifteenth assignment of error is not well-taken.

III. Conclusion

{¶ 36} For the foregoing reasons, the judgment of the Toledo Municipal Court, Small Claims Division, is affirmed, in part, and reversed, in part. The trial court's award of attorney fees is reversed and vacated. The remainder of the judgment is affirmed in all respects. Costs are to be split evenly between the parties pursuant to App.R. 24.

Judgment affirmed, in part,
and reversed, in part.

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, J. _____
JUDGE

Arlene Singer, P.J. _____
JUDGE

Stephen A. Yarbrough, J. _____
CONCUR.
JUDGE