

[Cite as *Fiorilli Constr., Inc. v. A. Bonamase Contracting, Inc.*, 2011-Ohio-107.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94719

FIORILLI CONSTRUCTION, INC.

PLAINTIFF-APPELLANT/
CROSS-APPELLEE

vs.

A. BONAMASE CONTRACTING, INC., ET AL.

DEFENDANTS-APPELLEES/
CROSS-APPELLANTS

**JUDGMENT:
AFFIRMED IN PART, REVERSED IN PART,
AND REMANDED**

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-683295

BEFORE: Jones, J., Blackmon, P.J., and Celebrezze, J.

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ATTORNEYS FOR APPELLANT/CROSS-APPELLEE

Thomas J. Connick
Nicole D. LeClair
Dubyak Connick Thompson & Bloom, LLC
3401 Enterprise Parkway
Suite 205
Cleveland, Ohio 44122-7341

ATTORNEYS FOR APPELLEES/CROSS-APPELLANTS

Ronald V. Rawlin
Rawlin, Gravens Co., L.P.A.
55 Public Square
Suite 850
Cleveland, Ohio 44113

Douglas W. Ross
1129 Niles-Cortland Road, S.E.
Warren, Ohio 44484

LARRY A. JONES, J.:

{¶ 1} Plaintiff-appellant/cross-appellee, Fiorilli Construction, Inc. (“FCI”), appeals the jury verdicts and the trial court’s denial of its post-trial motions for new trial and judgment notwithstanding the verdict. Defendants-appellees/cross-appellants, A. Bonamase Contracting, Inc., et al. (“ABC”), appeals the trial court’s denial of its motion for prejudgment interest. For the reasons that follow, we affirm in part and reverse in part.

{¶ 2} FCI contracted to redevelop a portion of the strip plaza at Southland

Mall Shopping Center and to construct a Giant Eagle grocery store on the property. In 2007, FCI subcontracted with ABC to perform the site demolition, building demolition, and site utilities portion of the work. ABC worked for less than two months before FCI fired the company, alleging that ABC, among other deficiencies, caused delays and damage to the job site by failing to disconnect water lines.

{¶ 3} FCI sued, claiming breach of contract, breach of express and implied warranties, negligence, intentional and negligent misrepresentation, fraud, indemnification, and piercing the corporate veil. ABC filed a counterclaim, alleging breach of contract, breach of express and implied warranties, unjust enrichment, and a violation of Ohio's Prompt Pay Act.

{¶ 4} The matter proceeded to trial, at which the following evidence was presented.

{¶ 5} FCI hired ABC in June 2007. ABC began work for FCI on June 26, 2007, but the parties waited until July 6 to execute a Subcontract Agreement ("Agreement") that detailed the rights and obligations of each party. In the ensuing weeks, multiple issues and changes arose concerning the scope and execution of the project. Additionally, both parties admitted to personality conflicts between FCI's site supervisor, Brian Long ("Long"), and ABC's president and superintendent, Scott Bonamase. By July 25, 2007, ABC had completed most of the building demolition and was set to cut the portion of the roof of the demolished building next to the roof of an adjacent operating store. Scott

Bonamase testified that Long directed him to cut the roof along the wall of the adjacent retail store, even though Bonamase suggested his crew cut the roof a few feet away from the store to create an overhang. Long insisted, and Bonamase, following Long's directive, cut the roof along the wall of the retail store, leaving no overhang. It rained, and the store was flooded.

{¶ 6} The next day, Long told Scott Bonamase to leave the work site and accused him of negligent management. Bonamase complied and left another ABC superintendent to supervise. On August 7, an additional superintendent, Mike Marshall arrived to supervise. At this time, Long informed Marshall he was looking to replace ABC on the job and accused ABC of breaking several water lines. Long also began to issue safety violation notices to ABC.

{¶ 7} On August 8, another store adjacent to the project site was flooded. ABC argued at trial that the flooding was due to a torrential rainstorm that occurred the day prior. Long testified that the flooding was caused by ABC's failure to perform proper dewatering, which allowed water to fill up into the excavated basement area his crew dubbed "Lake Bonamase."

{¶ 8} On August 31, 2007, FCI told ABC not to return to the jobsite. As of this date, FCI had already hired another replacement contractor. The same day, David Bonamase, Scott's brother and ABC's project manager, met with FCI's president, Carmen Fiorilli ("Fiorilli"). David Bonamase testified that he and Fiorilli executed a "walkaway agreement" by which each party agreed not to sue the other — ABC agreed not to pursue any overcharges or money for change orders,

and FCI agreed not to backcharge ABC. The next week, ABC sent FCI a letter requesting payments as part of their settlement agreement.

{¶ 9} On October 26, 2007, David Bonamase executed a Final Waiver of Lien that provided that ABC could not file any liens against the property. Unbeknownst to him, one of the waivers he signed included language reserving FCI's right to file claims against ABC.

{¶ 10} Fiorilli testified that David Bonamase acknowledged and assented to the letter of termination and there had never been an agreement to "walk away" from the contract. Scott Bonamase testified that both he and his brother thought that the agreement was for FCI to pay ABC's subcontractors what was due and owing to them and to walk away from the Agreement.

{¶ 11} During trial, FCI argued that it terminated ABC for cause in accordance with the Agreement because ABC defaulted on the contract. Sections 9.1 and 9.1.2 allowed for termination by default if ABC failed to do the work, caused a delay, or interfered with FCI's work. FCI's expert testified that FCI rightfully terminated ABC because the subcontractor had defaulted on the contract. The expert further opined that \$300,000 was a reasonable cost estimate of what the new subcontractor needed to do to remedy problems ABC caused.

{¶ 12} After FCI presented its case in chief, ABC moved for directed verdict on FCI's claims for fraud, intentional and negligent misrepresentation, indemnification, and piercing the corporate veil. The trial court granted the

motion on all but the claim for negligent misrepresentation.

{¶ 13} ABC's expert testified that ABC did not delay the project and that any delays were caused by the shopping plaza owner's failure to approve addendums to the work and make timely decisions, and by unsuitable soils in the affected store's basement pad. Therefore, the expert opined, it was FCI who breached the contract by firing ABC.

{¶ 14} ABC also presented evidence to show that it had completed \$144,602.27 worth of work for FCI under the Agreement, for which FCI refused to pay. ABC further argued that FCI owed it over \$96,000 for claims for additional compensation beyond the original Agreement that included overages and change orders that FCI had orally approved.

{¶ 15} The jury rendered a verdict against FCI and in favor of ABC in the amount of \$240,000, finding that FCI terminated ABC for convenience, not for default. In its jury interrogatories, the jury specifically found that FCI failed to prove that ABC breached the Agreement.

{¶ 16} After the verdict, FCI moved for a new trial or, in the alternative, judgment notwithstanding the verdict ("JNOV"). The trial court denied the motion.

ABC moved for prejudgment interest, which the trial court also denied.

{¶ 17} FCI now appeals, raising the following four assignments of error for our review:

{¶ 18} "I. The trial court erred by not granting judgment notwithstanding the verdict in favor of FCI.

{¶ 19} "II. The trial court erred by allowing appellee's counterclaim to go to

the jury where the contract precluded the claims and where ABC did not present competent evidence to substantiate its counterclaim as required by Ohio law.

{¶ 20} “III. The verdicts upon the complaint and cross-complaint are against the manifest weight of the evidence.

{¶ 21} “IV. The trial court erred by not granting FCI’s motion for a new trial.”

{¶ 22} ABC filed a notice of cross appeal, raising the following assignment of error for our review:

{¶ 23} “I. The trial court committed error as a matter of law by denying cross-appellant’s motion for prejudgment interest.”

Standard of Review

{¶ 24} Civ.R. 50 sets forth the standard for granting a motion for a directed verdict:

{¶ 25} “When a motion for directed verdict has been properly made, and the trial court, after construing the evidence most strongly in favor of the party against whom the motion is directed, finds that upon any determinative issue reasonable minds could come to but one conclusion upon the evidence submitted and that conclusion is adverse to such party, the court shall sustain the motion and direct a verdict for the moving party as to that issue.”

{¶ 26} The same standard applies to a motion for judgment notwithstanding the verdict. *Chem. Bank of New York v. Neman* (1990), 52 Ohio St.3d 204, 207, 556 N.E.2d 490. Our test is whether the evidence, construed most strongly in favor of the non-moving party, is legally sufficient to sustain the verdict. *Environmental Network Corp. v. Goodman Weiss Miller, L.L.P.*, 119 Ohio St.3d

209, 2008-Ohio-3833, 893 N.E.2d 173, ¶23.

{¶ 27} A motion for directed verdict or judgment notwithstanding the verdict presents questions of law, not factual issues; thus, we employ a de novo standard of review. *Nationwide Mut. Fire Ins. Co. v. Guman Bros. Farm* (1995), 73 Ohio St.3d 107, 108, 652 N.E.2d 684; *Grau v. Kleinschmidt* (1987), 31 Ohio St.3d 84, 90, 509 N.E.2d 399. That being said, we do note that in deciding either motion, it is necessary to review and consider the evidence. See *O'Day v. Webb* (1972), 29 Ohio St.2d 215, 280 N.E.2d 896, paragraph three of the syllabus. But neither the weight of the evidence nor the credibility of the witnesses is considered when undertaking this review. *Texler v. D.O. Summers Cleaners & Shirt Laundry Co.* (1998), 81 Ohio St.3d 677, 679, 693 N.E.2d 271.

{¶ 28} Where substantial evidence is presented such that reasonable minds could come to differing conclusions, the court should deny the motion. *Posin v. A.B.C. Motor Court Hotel, Inc.* (1976), 45 Ohio St.2d 271, 275, 344 N.E.2d 334. “The ‘reasonable minds’ test of Civ.R. 50(A)(4) calls upon the court only to determine whether there exists any evidence of substantial probative value in support of that party’s claim.” *Ruta v. Breckenridge-Remy Co.* (1982), 69 Ohio St.2d 66, 69, 430 N.E.2d 935.

{¶ 29} A motion for judgment notwithstanding the verdict may be evaluated on all evidence presented at trial, while a motion for a directed verdict may be evaluated only on the evidence presented during the plaintiff’s case-in-chief. *Chem. Bank of New York v. Neman* (1990), 52 Ohio St.3d 204, 206-207, 556

Judgment Notwithstanding the Verdict

{¶ 30} First, we note that FCI's brief fails to comply with App.R. 12 and App. R. 16 as FCI combined its arguments under the first and second assignments of error into one section. App.R. 12(A)(2) states that "[t]he court may disregard an assignment of error presented for review if the party raising it fails to identify in the record the error on which the assignment of error is based or fails to argue the assignment separately in the brief, as required under App.R. 16(A)." Although we often combine assignments of error when they involve the same standard of review, the appellant is required to separately argue each assignment of error.

{¶ 31} Additionally, in its first assignment of error, FCI argues that the trial court erred by denying its motion for judgment notwithstanding the verdict. In its motion, FCI claimed that the jury erred when it entered judgment in favor of ABC on ABC's cross-claim for breach of contract. More specifically, FCI argued: 1) ABC failed to establish to a reasonable degree of certainty that they were entitled to any actual damages related to FCI's breach of contract; 2) ABC failed to comply with the subcontract agreement and thereby waived the right to assert a claim for damages; and, 3) FCI was entitled to judgment notwithstanding the verdict on ABC's claim for unjust enrichment. On appeal, however, FCI initially claims that the trial court should have granted its motion for judgment notwithstanding the verdict on its breach of contract claim against ABC. That claim was not made in FCI's motion for judgment notwithstanding the verdict; therefore, we find they have

waived the claim on appeal.

{¶ 32} Even if we were to address their argument, we would not find that the trial court erred in denying FCI's judgment notwithstanding the verdict motion. A review of the evidence shows that reasonable minds could disagree on which party breached the Subcontract Agreement.

{¶ 33} Therefore, the first assignment of error is overruled.

Directed Verdict

{¶ 34} In the second assignment of error, FCI argues that the trial court erred in denying its motion for directed verdict on ABC's counterclaim.

{¶ 35} FCI maintains that ABC failed to produce any expert testimony establishing the amount of its (ABC's) damages. But as noted by both the trial court in its opinion denying FCI's motion for directed verdict and in ABC's appellee brief, there is no requirement that ABC prove damages through an expert.

{¶ 36} The uncertainty that prevents a recovery of damages is generally uncertainty as to the fact of the damages, not the amount. *Bemmes v. Public Emp. Retirement Bd.* (1995), 102 Ohio App.3d 782, 658 N.E.2d 31, citing 22 American Jurisprudence 2d (1988, Supp.1995), Damages, Section 25. If it is certain that damages have resulted, mere uncertainty as to the amount will not preclude the right of recovery. *Id.* As to the amount of damages, only a reasonable certainty is required, which has been defined as "that degree of certainty of which the nature of the case admits." *Id.* at Section 23.

{¶ 37} ABC submitted into evidence that it had completed \$351,195 worth of

work up until the day FCI fired ABC. That amount was verified through ABC's application for payment that had been submitted to FCI, invoices, and the testimony of the company president and the site supervisors. The amount of damages that the jury awarded was offset by payments FCI had already made. Thus, the jury found that ABC was entitled to \$144,602.27 for work that ABC had completed under the original Agreement.

{¶ 38} We find that sufficient evidence was shown from which the jury could award damages; it was up to the jury to determine the amount, and we find that amount was determined with reasonable certainty.

{¶ 39} The second assignment of error is overruled.

Manifest Weight of the Evidence

{¶ 40} In its third assignment of error, FCI argues that the jury verdicts on its complaint and ABC's cross-claim are against the manifest weight of the evidence.

{¶ 41} In a civil case, "[j]udgments supported by some competent, credible evidence going to all the essential elements of the case will not be reversed by a reviewing court as being against the manifest weight of the evidence" and must be affirmed by a reviewing court. *C.E. Morris Co. v. Foley Constr. Co.* (1978), 54 Ohio St.2d 279, 376 N.E.2d 578, syllabus. "A reviewing court should not reverse a decision simply because it holds a different opinion concerning the credibility of the witnesses and evidence submitted before the trial court. A finding of an error in law is a legitimate ground for reversal, but a difference of opinion on credibility of witnesses and evidence is not." *Seasons Coal Co., Inc. v. Cleveland* (1984), 10

Ohio St.3d 77, 81, 461 N.E.2d 1273.

{¶ 42} FCI argues that the undisputed evidence showed that ABC breached the Agreement and that the express terms of the contract prohibited oral modifications; thus, any evidence ABC presented of alleged oral modifications was insufficient to alter the express terms of the contract. According to FCI, trial testimony by ABC's own witnesses established that ABC breached the Agreement, as David Bonamase acknowledged termination of the contract; thereby precluding a finding that additional monies were owed to ABC.

{¶ 43} FCI further argues that the verdict on the counterclaim was against the manifest weight of the evidence because ABC's claims were based on unsigned writings that were not presented in accord with the terms of the contract.

{¶ 44} We find that the jury's verdicts were not against the manifest weight of the evidence. As discussed under the second assignment of error, there was ample evidence to sustain an award for damages pursuant to ABC's cross-claim. As to which party breached the original Agreement, the jury found that it was FCI that breached the Agreement by repeatedly refusing to address issues that ABC tried to bring to its attention. Although there was evidence that FCI did not approve change orders in writing, ABC showed that FCI orally agreed to the change orders. And even after ABC, to protect itself, issued written work changes, FCI admitted that it ignored those written requests because it had already determined it was going to replace ABC on the job.

{¶ 45} It is within the province of the jury to weigh the credibility of each

party's witnesses and evidence presented at trial, and we will not usurp the role of the jury in this case. Simply put, the jury found that ABC's witnesses were more credible than FCI's, and we find that there is competent, credible evidence going to all the essential elements of the case.

{¶ 46} Therefore, the third assignment of error is overruled.

Motion for New Trial

{¶ 47} In the fourth assignment of error, FCI argues that the trial court erred in denying its motion for a new trial.

{¶ 48} As it pertains to the case at bar, Civ.R. 59(A) provides that "[a] new trial may be granted to all or any of the parties and on all or part of the issues upon any of the following grounds:

"(1) Irregularity in the proceedings of the court, jury, magistrate, or prevailing party, or any order of the court or magistrate, or abuse of discretion, by which an aggrieved party was prevented from having a fair trial; * * *

"(6) The judgment is not sustained by the weight of the evidence; however, only one new trial may be granted on the weight of the evidence in the same case;

"(7) The judgment is contrary to law; * * *."

{¶ 49} As to Civ.R. 59(A)(1), FCI maintains that the trial court showed so much bias against its witnesses and attorney that the company was prevented from having a fair trial. FCI cites to instances in the record where the trial court discussed settlement with the parties after trial began, times when the trial court displayed its impatience with FCI's counsel, and an instance where the trial court prevented counsel from continuing to cross-examine David Bonamase.

{¶ 50} To support its position, FCI cites our decision in *Bambeck v. Berger*,

Cuyahoga App. No. 89597, 2008-Ohio-3456, in which we ordered a new trial based on the judge's actions during trial. But this case is easily distinguishable from *Bambeck*. In *Bambeck*, the trial court made its comments and displayed obvious disdain for the plaintiff and plaintiff's counsel in front of the jury. In the case at bar, the trial court's comments were made outside the presence of the jury. Moreover, the comments the trial court made in *Bambeck* far outnumber those made in this case, in both numerosity and severity. We further find that the trial court did not inappropriately curtail counsel's cross-examination of David Bonamase.

{¶ 51} Next, FCI maintains that a new trial should have been ordered because the jury's verdict was against the manifest weight of the evidence. Civ.R. 59(A)(6) provides that a new trial may be granted when the judgment is not sustained by the weight of the evidence. "Because a trial court has broad discretion in determining whether a jury verdict is against the manifest weight of the evidence, a trial court's ruling on a motion for a new trial based upon the weight of the evidence will not be reversed absent an abuse of discretion. *Osler v. Lorain* (1986), 28 Ohio St.3d 345, 351, 504 N.E.2d 19; *Antal v. Olde Worlde Prod., Inc.* (1984), 9 Ohio St.3d 144, 145, 459 N.E.2d 223. We addressed this claim in the third assignment of error, and FCI makes no new argument for us to consider.

{¶ 52} Finally, FCI claims that the jury verdict was contrary to law because ABC violated the subcontract agreement pursuant to Civ.R. 59(A)(7). But FCI did

not claim that the jury verdict was contrary to law in its motion for a new trial. Therefore, FCI has waived claiming this ground on appeal.

{¶ 53} Accordingly, the fourth assignment of error is overruled.

Cross Appeal

{¶ 54} In the first cross-assignment of error, ABC argues that the trial court erred in denying its motion for prejudgment interest.

{¶ 55} The award of prejudgment interest as to claims arising out of breach of contract is governed by R.C. 1343.03(A). *Waina v. Abdallah*, Cuyahoga App. No. 86629, 2006-Ohio-2090, citing *Bain Builders, Inc. v. Rockport Retirement Ltd. Partnership* (July 22, 1999), Cuyahoga App. Nos. 74486 and 74672. R.C. 1343.03(A), which governs interest on judgments, provides: “* * * when money becomes due and payable upon any bond, bill, note, or other instrument of writing, * * * for the payment of money arising out of * * * a contract or other transaction, the creditor is entitled to interest at the rate per annum determined pursuant to section 5703.47 of the Revised Code, unless a written contract provides a different rate of interest in relation to the money that becomes due and payable, in which case the creditor is entitled to interest at the rate provided in that contract.”

{¶ 56} Prejudgment interest acts as compensation and serves ultimately to make the aggrieved party whole. *Wasserman v. The Home Corp.*, Cuyahoga App. No. 90915, 2008-Ohio-5477, citing *Royal Elec. Constr. Corp. v. Ohio State Univ.* (1995), 73 Ohio St.3d 110, 652 N.E.2d 687. The Ohio Supreme Court has stated that when determining whether to award prejudgment interest pursuant to R.C.

1343.03(A), a court need only ask one question: “Has the aggrieved party been fully compensated?” *Royal Elec. Constr. Corp.* at 116.

{¶ 57} In a breach of contract case between private parties where liability is established, such as in the case at bar, the trial court does not have discretion in awarding prejudgment interest. *Waina*, citing *Reminger & Reminger Co., L.P.A. v. Fred Siegel Co.* (Mar. 1, 2001), Cuyahoga App. No. 77712; see, also, *Zeck v. Sokol*, Medina App. No. 07CA0030-M, 2008-Ohio-727; *Zunshine v. Cott*, Franklin App. No. 06AP-868, 2007-Ohio-1475. Accordingly, where a party has been granted judgment on an underlying contract claim, that party is entitled to prejudgment interest as a matter of law. *Waina*.

{¶ 58} In determining whether to award prejudgment interest pursuant to R.C. 1343.03(A), an aggrieved party should be compensated for the lapse of time between accrual of the claim and judgment. *Waina*, citing *Royal Elec. Constr. Corp. v. Ohio State Univ.*, 73 Ohio St.3d 110, 116, 1995-Ohio-131, 652 N.E.2d 687. Thus, the only issue for resolution by a trial court in claims made pursuant to R.C. 1343.03(A) is how much interest is due the aggrieved party. *Id.* So while the right to prejudgment interest in a contract claim is a matter of law, the amount awarded is based on the court’s factual determination of an accrual date and interest rate. *Waina*, citing *Dwyer Elec., Inc. v. Confederated Builders, Inc.*, (Oct. 29, 1998), Crawford App. No. 3-98-18.

{¶ 59} That being stated, we have recognized that “[a]lthough the terms of R.C. 1343.03(A) clearly allow interest to run from every breach of contract

judgment, prejudgment interest is not an entitlement in every breach of contract action. * * *. Prejudgment interest under R.C. 1343.03(A) is based on the premise that a party to a contract should not retain the use of money owed under a contract when that amount is due and payable to the other contracting party.” (Internal citations and quotations omitted). *Wasserman* at ¶7, quoting *RPM, Inc. v. Oatey Co.*, Medina App. Nos. 3282-M and 3289-M, 2005-Ohio-1280.

{¶ 60} ABC claims that the trial court erred as a matter of law when it summarily denied its claim for prejudgment interest. Our review, therefore, is de novo.

{¶ 61} FCI argues that Sections 4.8 and 9.2 of the Agreement preclude recovery for prejudgment interest. Section 4.8 provides that “[u]nless otherwise provided in the Subcontract Documents, payments due to the Subcontractor shall bear no interest and the Subcontractor shall not be entitled to recover interest, statutory or otherwise.” Section 9.2 provides that “[i]n the event any termination of the Subcontractor for Default is later determined to have been improper, the termination shall automatically convert to a termination for convenience, and the Subcontractor shall be limited in its recovery strictly to the compensation provided for in this Paragraph.”

{¶ 62} ABC maintains that Sections 4.8 and 9.2 cover contractual payments made by FCI to ABC under the Agreement, but does not include payments due pursuant to a court judgment.

{¶ 63} Based on our review of the case law and the Agreement, we find

nothing in the contract that prohibits the award of prejudgment interest in this case. And other than its assertions, FCI cannot support its argument that the provisions of this contract trump the Revised Code. We find that the award of prejudgment interest is mandated by statute under the facts of this case. Therefore, the trial court erred in denying ABC's motion. Since the only issue that remains is a factual one, that being the issue of the amount of prejudgment interest, the case is remanded for a determination of the amount of prejudgment interest owed to ABC.

{¶ 64} The cross-assignment of error is sustained.

{¶ 65} Accordingly, judgment is affirmed in part and reversed in part, and the case is remanded to the trial court for proceedings in accordance with this opinion.

It is ordered that appellees/cross-appellants recover of appellant/cross-appellee their 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 Cuyahoga County Court of Common Pleas to carry this judgment into execution.

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

LARRY A. JONES, JUDGE

PATRICIA A. BLACKMON, P.J., CONCURS;
FRANK D. CELEBREZZE, JR., J., CONCURS
IN JUDGMENT ONLY

