[Cite as *Ferrara v. Vicchiarelli Funeral Servs.*, 2015-Ohio-2273.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 102048

MICHAEL FERRARA, SR., ET AL.

PLAINTIFFS-APPELLANTS

vs.

VICCHIARELLI FUNERAL SERVICES, ET AL.

DEFENDANTS-APPELLEES

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-13-807280

BEFORE: S. Gallagher, J., Keough, P.J., and McCormack, J.

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SEAN C. GALLAGHER, J.:

{¶1} Following a jury trial, counterclaim defendants Michael Ferrara, Sr., Louise Ferrara, Nicholas Ferrara, and Carmen Ferrara (collectively the "Ferraras") appeal the judgment in favor of the counterclaim plaintiffs Vicchiarelli Funeral Services, Inc., Karen Vicchiarelli, and Lori Sperling Vicchiarelli (collectively "Funeral Home"), as against Louise Ferrara[1] in the amount of $2,398 for the unpaid portion of a funeral services contract. For the following reasons, we affirm.

{¶2} At the onset, we note that most of the arguments raised on appeal are disjointed and overly generalized with few citations to the record. We shall do our best to untangle any legal arguments in order to address the merits of the matter.

{¶3} The Ferraras filed a complaint claiming the Funeral Home mishandled the final arrangements for the Ferraras' relative, Michael Ferrara, Jr. Further, they claimed the Funeral Home orally agreed to offer Louise a two-for-one type deal on cremation services, for which Louise would pay around $5,000 for her son's funeral and her own arrangements following her death. The contract signed by Louise only indicated it was for her son's funeral arrangements. The Ferraras initially preferred to have Michael, Jr., embalmed, rather than cremated. The Funeral Home was allegedly incorrect in its assertion that cremation was the only option. The Ferraras asserted five claims in their complaint: abuse of a corpse, negligence, breach of contract, negligent misrepresentation,

[1]Only Louise appears to have standing to prosecute the appeal. The final judgment appealed was against her, and the remaining plaintiffs dismissed their affirmative claims for relief. This perplexity does not impact the resolution of the appeal.

and infliction of emotional distress. Before trial, the Ferraras dismissed their complaint pursuant to Civ.R. 41(A)(1).[2]

{¶4} The Funeral Home filed a counterclaim seeking recovery for the unpaid portion of the funeral services contract signed by Louise. The case proceeded to trial on the breach of contract counterclaim, in which the Ferraras asserted several defenses in the nature of recoupment. *Continental Acceptance Corp. v. Rivera*, 50 Ohio App.2d 338, 344, 363 N.E.2d 772 (8th Dist.1976), fn. 17 (recoupment is a demand that arises from the same transaction from which the opposing party's claim arises, but under which no affirmative recovery is sought). At the close of evidence, the trial court directed a verdict in favor of the Ferraras with the exception of Louise. On the claims against her, the jury found her in breach of the funeral services contract, and a judgment was accordingly entered in the Funeral Home's favor in the amount of $2,398. The claims for recoupment, incidentally based on the same claims advanced in the dismissed complaint, were necessarily rejected by the jury's verdict in favor of the Funeral Home.

{¶5} The Ferraras advance seven assignments of error, all but two of which, the third and the fifth, were dismissed before oral argument.

{¶6} In the third assignment of error, the Ferraras claim the trial court erred by instructing the jury on agency law and by failing to instruct the jury on unilateral mistake. "In examining errors in a jury instruction, a reviewing court must consider the jury

[2]The propriety of such a course of action, in light of the compulsory counterclaim, is not at issue in the current appeal.

charge as a whole and 'must determine whether the jury charge probably misled the jury in a matter materially affecting the complaining party's substantial rights.'" *Kokitka v. Ford Motor Co.*, 73 Ohio St.3d 89, 93, 652 N.E.2d 671 (1995), quoting *Becker v. Lake Cty. Mem. Hosp. W.*, 53 Ohio St.3d 202, 208, 560 N.E.2d 165 (1990).

{¶7} We decline to reach the merits of the Ferraras' argument that the agency instruction was given in error. The argument is limited to the error and fails to explain or present any arguments demonstrating how the error materially affected the Ferraras' substantial rights. App.R. 16(A)(7). Although it is not entirely clear, the Ferraras complain that an individual outside of the Funeral Home should not have been allowed to sign the funeral services contract on behalf of the Funeral Home and, therefore, the agency jury instruction was not appropriate. The Funeral Home demonstrated its intent to be bound by the services agreement by the fact that it filed a breach of contract action against the Ferraras. Whether the signatory was an agent outside the Funeral Home's leadership structure is irrelevant. The Funeral Home indicated that the signatory was an agent and the Funeral Home was bound by the terms of the contract. Any error in providing the superfluous instruction in this case was harmless error. Civ.R. 61.

{¶8} Further, the trial court did not err in declining to instruct the jury on unilateral mistake. "[A] trial court has discretion whether to give a requested jury instruction based on the dispositive issues presented during trial." *Renfro v. Black*, 52 Ohio St.3d 27, 30, 556 N.E.2d 150 (1990). Nevertheless, the trial court has a duty to submit an essential issue to the jury when there is sufficient evidence relating to that issue to permit

reasonable minds to reach different conclusions on that issue. *Id.* There is no evidence supporting Louise's claim, nor is there any citation to the record demonstrating any facts tending to support a claim, of unilateral mistake. Louise believed that the contract was altered to remove a handwritten condition that provided the two-for-one deal. Apparently, Louise believed that the signed contract introduced at trial differed from the one she actually signed. According to a review of her testimony, the contract was not signed under a mistaken belief of an underlying fact, but instead was the product of an unproven, fraudulent alteration of the contract. There are no facts supporting the theory of unilateral mistake of an underlying fact, and accordingly, the third assignment of error is overruled.

{¶9} In the fifth assignment of error, the Ferraras claim the Funeral Home was precluded from recovering on the breach of contract claim because of the doctrine of accord and satisfaction. The Ferraras are essentially seeking to reverse the jury's verdict based on a weight-of-the-evidence argument.

{¶10} "[A] court of appeals should affirm a trial court when the evidence is legally sufficient to support the jury verdict as a matter of law." *Bryan-Wollman v. Domonko*, 115 Ohio St.3d 291, 292, 2007-Ohio-4918, 874 N.E.2d 1198. Further, even if the evidence is sufficient as a matter of law, courts should affirm a jury's verdict, as not being against the manifest weight of the evidence, if the verdict is supported by some competent, credible evidence. *Id.* As the Ohio Supreme Court has explained, under the civil manifest weight of the evidence standard, courts must "presume that the findings

of the trier of fact are correct. This presumption arises because the [trier of fact] had an opportunity 'to view the witnesses and observe their demeanor, gestures and voice inflections, and use these observations in weighing the credibility of the proffered testimony.'" *Corrigan v. Illum. Co.*, 122 Ohio St.3d 265, 2009-Ohio-2524, 910 N.E.2d 1009, ¶ 24, quoting *Seasons Coal Co., Inc. v. Cleveland*, 10 Ohio St.3d 77, 80, 461 N.E.2d 1273 (1984), and *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202, 865 N.E.2d 1264.

{¶11} The Ferraras failed to demonstrate that the affirmative defense of accord and satisfaction applied. They claimed the use of checks and cash payments satisfied the outstanding debt owed.

{¶12} The claimed use of a check as final satisfaction of a debt implicates Uniform Commercial Code Section 3-311 codified in R.C. 1303.40, which requires the Ferraras to prove that the check, or written communication accompanying the instrument, contained a conspicuous statement to the effect that the check was tendered as full satisfaction of the claim. At trial, no evidence was presented satisfying that burden, much less did the Ferraras even mention the implications of R.C. 1303.40.

{¶13} As to the cash component, there are "[t]wo essential safeguards built into the doctrine of accord and satisfaction [to] protect creditors from overreaching debtors: '[1] there must be a good-faith dispute about the debt and [2] the creditor must have reasonable notice that the check is intended to be in full satisfaction of the debt.'" *Allen v. R.G. Indus. Supply*, 66 Ohio St.3d 229, 232, 611 N.E.2d 794 (1993), *superseded on other*

grounds, quoting *AFC Interiors v. DiCello*, 46 Ohio St.3d 1, 12, 544 N.E.2d 869 (1989). The Ferraras offered no evidence that the Funeral Home had reasonable notice that the cash payments were meant to be in full and final settlement of the outstanding debt. The sole arguments pertained to the Funeral Home's delay in seeking the final payment. The doctrine of accord and satisfaction does not require the party to whom the debt is owed to affirmatively seek the outstanding sum beyond what is required by the applicable statute of limitations. Any claims that the jury's verdict in favor of the Funeral Home is against the weight of the evidence are overruled.

{¶14} The judgment of the trial court is affirmed.

It is ordered that appellees recover from appellants 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 common pleas court 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.

SEAN C. GALLAGHER, JUDGE
KATHLEEN ANN KEOUGH, P.J., and
TIM McCORMACK, J., CONCUR