[Cite as *Monroe v. Steen*, 2009-Ohio-5163.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF SUMMIT	)	

WALTER MONROE, et al. Appellees v. ROBERT STEEN, et al. Appellants	C.A. No. 24342 APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO CASE No. CV-2007-03-2215

DECISION AND JOURNAL ENTRY

Dated: September 30, 2009

BELFANCE, Judge.

{¶1} Appellants, Robert and William Steen d.b.a. Steen Electric, appeal from the judgment of the Summit County Court of Common Pleas. They argue that the trial court erred in failing to award damages on their counterclaim against Walter and Jodi Monroe d.b.a. Kids & Dads.

I.

{¶2} Appellees, Walter Monroe and his wife Jodi, operate a landscaping and commercial roofing business as a side project known as Kids & Dads (collectively "Monroe"). Robert and William Steen own and operate Steen Electric (collectively "the Steens"). As part of a larger renovation project of their commercial buildings at 1484 Main Street, Cuyahoga Falls, Ohio, the Steens sought bids for roof work on one of their two buildings. The roof had been leaking for several years before the Steens undertook repairs. Monroe submitted a bid that was

ultimately accepted by the Steens. The Steens paid $6,900 before the project began and were to tender the remaining $2,586.86 upon completion of the job.

{¶3} Pursuant to the contract of June 12, 2006, 1300 square feet of the existing roof was to be torn off, the rest was to remain, and then the new roof material applied to the entire roof. Monroe began work on the roof on July 3, 2006. Monroe and his crew worked only on the weekends and completed the project after a few weekends. However, before the job was completed, the Steens voiced concerns that Monroe did not remove 1300 total square feet of existing roof as the contract provided. Walter Monroe stated that he removed most of it, but the remainder was not damaged and did not need to be removed.

{¶4} Monroe completed covering the roof with the new material and applied a light coating of an aluminum material used to preserve the roof. At this point, many imperfections in the roof became evident. Monroe, the Steens, and a representative from the manufacturer of the roofing material inspected the roof and the decision was made to apply patches to the imperfections. The Steens subsequently marked all of the spots on the roof that they wanted to be patched. One of Monroe's employees applied patches to each of the marked areas.

{¶5} The Steens continued to experience leaks in the roof; some were in the same spots as before and others were new leaks. They did not tender the balance of the contract price, $2,586.86.

{¶6} Monroe filed a small claims action in the Cuyahoga Falls Municipal Court (now known as the Stow Municipal Court). The Steens filed a counterclaim alleging that the roof was not completed in a workmanlike manner and that it needed to be completely removed. The Steens' counterclaim sought damages in excess of the jurisdiction of the small claims court; thus, the case was transferred to the Summit County Court of Common Pleas.

{¶7} After a bench trial, the court found that Monroe did not install the roof in a workmanlike manner. Therefore, the trial court did not permit recovery of the balance due on the contract.

{¶8} Despite its finding that the work was completed in an unworkmanlike manner, the trial court dismissed the Steens' counterclaim. The Steens' counterclaim included two claims for failure to perform in a workmanlike manner – one sounding in tort and the other based on a provision in the parties' contract. However, the trial court did not address the issue of negligence, but focused on the breach of contract claim. Notwithstanding the filing of the tort claim, the court focused solely on damages associated with the breach of contract claim and found that the Steens did not present the appropriate evidence to permit recovery. The court reasoned that the proper award of damages was diminution in value, not restoration costs. As the Steens only presented evidence of restoration costs and no evidence of diminution of value, the trial court declined to award damages.

II.

{¶9} The Steens have appealed the trial court's ruling and argue that the trial court erred by: (1) allowing Monroe to admit hearsay into evidence; (2) failing to find additional contract breaches other than poor workmanship, and; (3) utilizing the incorrect measure of damages. We have rearranged the assignments of error to facilitate our review.

HEARSAY

{¶10} The Steens contend that the trial court should not have accepted into evidence testimony and documents demonstrating that the roofing material manufacturer issued a warranty on the material, and that the City of Cuyahoga Falls building inspector approved the roof project upon completion and returned Monroe's bond money. Monroe testified that money is posted as

bond at the beginning of the project and is returned after the building inspector "passes" the completed project. The Steens argue that this evidence was hearsay since neither a representative from the manufacturer nor from the office of the building inspector testified at trial. Monroe counters that the evidence was admissible pursuant to the business records exception to the hearsay rule because he maintained those records in his file for the project at Steen Electric in the course of conducting his roofing business.

{¶11} Generally "[a] trial court possesses broad discretion with respect to the admission of evidence." *State v. Patel*, 9th Dist. No. 24030, 2008-Ohio-4693, at ¶8. However, the trial court does not have discretion to admit hearsay into evidence. Moreover, if "a court's judgment is based on an erroneous interpretation of the law, an abuse-of-discretion standard is not appropriate." *Med. Mut. of Ohio v. Schlotterer*, 122 Ohio St.3d 181, 2009-Ohio-2496, at ¶13. Whether evidence is admissible because it falls within an exception to the hearsay rule is a question of law, thus, our review is *de novo*. *State v. Denny*, 9th Dist. No. 08CA0051, 2009-Ohio-3925, at ¶4.

{¶12} Pursuant to Ohio Rule of Evidence 801, "'[h]earsay' 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." "Hearsay is not admissible except as otherwise provided * * * by [the Ohio Rules of Evidence]." Evid.R. 802. The Rules of Evidence enumerate multiple exceptions to the rule that hearsay is inadmissible. Here, the issue is whether the evidence with respect to the manufacturer's warranty and the building inspection was admissible pursuant to the "business records exception." Evid.R. 803(6) provides that records of regularly conducted business activity are an admissible form of hearsay, stating in pertinent part:

> "A memorandum, report, record, or data compilation, in any form, of acts, events, or conditions, made at or near the time by, or from information transmitted by, a

> person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness or as provided by Rule 901(B)(10), unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness."

The theory supporting the business records exception is that such records are accurate and trustworthy because they are "made in the regular course of business by those who have a competent knowledge of the facts recorded and a self-interest to be served through the accuracy of the entries made and kept with knowledge that they will be relied upon in a systematic conduct of such business[.]" *Weis v. Weis* (1947), 147 Ohio St. 416, 425-426.

{¶13} The party seeking to admit the business records must provide the appropriate foundation for admission which indicates that the witness "possess[es] a working knowledge of the specific record-keeping system that produced the document." *State v. Aberle*, 5th Dist. No. 03 CA 96, 2004-Ohio-7093, at ¶¶24, 26. The witness must be "'familiar with the operation of the business and with the circumstances of the preparation, maintenance, and retrieval of the record in order to reasonably testify on the basis of this knowledge that the record is what it purports to be, and was made in the ordinary course of business.'" *State v. Baker*, 9th Dist. No. 21414, 2003-Ohio-4637, at ¶11, quoting *Keeva J. Kekst Architects, Inc. v. George* (May 15, 1997), 8th Dist. No. 70835, at *5.

{¶14} In the instant matter, Monroe argued that the evidence concerning the warranty, the inspection, and the bond money were business records of Kids & Dads, Monroe's roofing company. However, the records were only retained by Kids & Dads, they were not produced by Kids & Dads. The law allows business records to be admitted when the proper foundation is laid by a witness who has knowledge of the production, preparation, maintenance, and retrieval of the offered records. A witness who merely receives and retains records produced by another

business does not necessarily have a "working knowledge of the specific record-keeping system that produced the document." *Aberele* at ¶26. See *Moore v. Vandemark Co., Inc.*, 12th Dist. No. CA2003-07-063, 2004-Ohio-4313, at ¶18. (cellular telephone bills received by plaintiff and offered at trial by plaintiff not admissible to demonstrate calls made to the defendant when representative from cellular telephone company did not testify at trial because plaintiff as customer did not have sufficient knowledge of system that produced the bills). Thus, the evidence relating to the warranty and the building inspection were not admissible under the business records exception to the hearsay rule.

{¶15} Although we have determined that the trial court erred in the admission of this evidence, we may not disturb the court's ruling unless the error affected a substantial right of the parties. *O'Brien v. Angley*, 63 Ohio St.2d 159, 164. In so doing, we must consider whether the trier of facts would have entered the same judgment had the error not occurred. Id. at 164-165.

{¶16} The Steens argue that Monroe offered the evidence that the Cuyahoga Falls Building Inspector "passed" the roofing project, subsequently refunding Monroe's bond money, and that the roofing material manufacturer issued a warranty to show that the project was completed in a workmanlike manner. However, despite the admission of the hearsay evidence, the trial court ultimately found that the roof was not completed in a workmanlike manner. Accordingly, the admission of the evidence did not affect a substantial right of the Steens. In light of the above, the Steens' first assignment of error is overruled.

MEASURE OF DAMAGES

{¶17} The trial court declined to award Monroe the balance of the contract due because the court found that Monroe failed to complete the project in accordance with workmanlike standards. Despite this finding, the trial court dismissed the Steens' counterclaim seeking

recovery for failure to perform in a workmanlike manner. Using this Court's decision in *South Shore Cable Constr., Inc. v. Grafton Cable Communications, Inc.*, 9th Dist. No. 03CA008359, 2004-Ohio-6077, the trial court determined that the Steens' failure to demonstrate diminution in market value of the building as a result of the faulty roof was fatal to their claim. The Steens argue that the trial court should have awarded them the costs to repair the roof.

{¶18} The duty of a builder to perform in a workmanlike manner arises from the parties' contract, thus a claim alleging that a builder did not complete the job in a workmanlike manner is a contract claim. *Kishmarton v. William Bailey Constr., Inc.* (2001), 93 Ohio St.3d 226, 228. See, also, *Bosak v. H & R Mason Contractors, Inc.*, 8th Dist. No. 86237, 2005-Ohio-6732, at ¶14. The builder's services serve as consideration for the contract and "'the quality of the product will be governed by the language of the contract itself.'" *Kishmarton*, 93 Ohio St.3d at 228, quoting *Vistein v. Keeney* (1990), 71 Ohio App.3d 92, 105.

{¶19} In *South Shore*, we held that when the damage to real property is caused by the failure to perform a construction contract in a workmanlike manner, "diminution in value is the proper measure of damages, but restoration cost may be used as an alternative so long as it does not exceed diminution in value." *South Shore Cable Constr., Inc.* at ¶29. Further, "absent fraud, determination of diminution in value is effectively a prerequisite to awarding restoration costs." Id. Thus, in light of *South Shore*, in order to recover any damages at all, the party seeking damages must present evidence of the costs to repair the property and the diminution in market value, so that the two amounts may be compared to determine the appropriate monetary award. See id. at ¶33. Our decisions have applied this rule to contracts involving commercial building projects, as in *South Shore*, as well as contracts involving residential construction. See *Martin v. Design Constr. Services, Inc.*, 9th Dist. No. 23422, 2007-Ohio-4805.

{¶20} However, earlier this year, the Supreme Court of Ohio overruled our decision in *Martin*. *Martin v. Design Constr. Services, Inc.*, 121 Ohio St.3d 66, 2009-Ohio-1. In *Martin*, we held that the plaintiffs were not entitled to recover the cost of their repairs because they had failed to prove the diminution in value of their property that was attributable to the injury. *Martin v. Design Constr. Services, Inc.*, 9th Dist No. 23422, 2007-Ohio-4805, at ¶23. On review, the Supreme Court of Ohio held that a party seeking damages for a temporary injury to real property is not required to prove diminution in market value as a prerequisite to recover for restoration costs. *Martin v. Design Constr. Services, Inc.*, 121 Ohio St.3d 66, 2009-Ohio-1, at ¶12. Instead, either party may offer proof of the market value of the property before and after the alleged injury as a factor in the court's determination of the proper award. Id. at ¶24. Although in its syllabus the Supreme Court specified that its holding in *Martin* applied to noncommercial real estate, we take this opportunity to consider the ruling as it relates to commercial real estate.

{¶21} The Supreme Court recognized that our decision in *Martin* relied upon the rule enunciated in *Ohio Collieries Co. v. Cocke* (1923), 107 Ohio St. 238, a case that involved damage to property caused by the removal of coal located underneath the property. In *Ohio Collieries* the court held that the measure of damages for a repairable injury is the reasonable cost to repair, plus reasonable compensation for the loss of the use of the property between the time of the injury and the restoration. Id. at 248. However, if the cost of the restoration "exceeds the difference in the market value of the property before and after injury" then "the difference in market value becomes the measure." Id. at 249. Thus, under *Ohio Collieries*, it would appear that evidence of the market value of the property is a necessary prerequisite to proving damages. However, in *Martin*, the Supreme Court explained that several cases decided subsequent to *Ohio Collieries* have limited its holding. *Martin* at ¶17. In one case involving

non-residential property, the Supreme Court held simply that the proper measure of damages is the cost to repair the injury. *Northwestern Ohio Natural Gas Co. v. First Congregational Church of Toledo* (1933), 126 Ohio St. 140, 150. In essence, the *First Congregational* Court "excised the diminution-in-value portion of the *Ohio Collieries* rule and offered instead the unqualified rule that 'the measure of damages is the reasonable cost of restoration or repairs.'" *Martin* at ¶19, quoting *First Congregational*, 126 Ohio St. at 150. In the other case, the Supreme Court held that the injured party was entitled to recover damages for the cost to repair the property despite failing to demonstrate diminution in market value. *Apel v. Katz* (1998), 83 Ohio St.3d 11, 20. The *Martin* Court further recognized that the purpose of damages is to "'afford to the person damaged *compensation for the loss sustained*.'" (Emphasis in original.) *Martin* at ¶18, quoting *First Congregational Church of Toledo*, 126 Ohio St. at 150. To that end, the focus of the damages inquiry should be the reasonableness of the cost to repair, not strictly whether the cost to repair exceeds the difference in market value of the property. *Martin* at ¶20. Following this line of reasoning, the Supreme Court concluded that the diminution in market value figure is useful to determine if the damages sought are reasonable, but should not be an impediment to recovery. Id. at ¶25. As such, in evaluating the reasonableness of the damage award, either party may offer diminution in market value but is not required to do so. Id.

{¶22} Although *Martin* involved residential property, we find that the concepts enunciated in *Martin* apply equally to injury to commercial property and thus, we cannot discern a meaningful distinction between commercial and residential property that would limit the Supreme Court's holding in *Martin* to residential property. Additionally, other courts have stated that the measure of damages in the commercial setting is the cost to repair. See *Jarupan v. Hanna*, 173 Ohio App.3d 284, 2007-Ohio-5081, at ¶19 (cost to repair rental property is proper

measure of damages for contractor's failure to perform in a workmanlike manner); *Martin v. Miller* (Mar. 23, 2001), 11th Dist. No. 2000-T-0027, at *2 (trial court should have permitted owner of apartment complex to recover cost to repair roof); *United Methodist Church of Berea v. Dunlop Constr. Products, Inc.* (Apr. 16, 1992), 8th Dist. Nos. 60390, 60391, 60392, 60652, at *11-12 (court upheld award to church of cost to replace roof when testimony demonstrated replacement necessary to correct contractor's unworkmanlike performance).

{¶23} Accordingly, in light of *Martin*, we hold that failure to provide proof of the diminution of market value of the building is not fatal to the injured party's claim for restoration damages. As in *Martin*, either party may offer evidence of the reduction in market value occasioned by the alleged unworkmanlike conduct so that it may be considered by the trial court in rendering its ruling on the damage award. To the extent that our prior opinions have held otherwise, they are overruled.

{¶24} In light of the above, we conclude that the trial court erred in dismissing the Steens' counterclaim. Thus, we reverse the trial court's ruling with respect to its dismissal of the counterclaim and remand the matter for further consideration.

ADDITIONAL BREACHES OF THE CONTRACT

{¶25} In their second assignment of error, the Steens argue that the trial court committed reversible error in failing to find that Monroe breached other specific terms of the contract, namely, that he did not remove 1300 square feet of damaged, existing roof material, and that he did not remove the metal edges of the roof to install new material, then reattach the metal edges over the new roof material.

{¶26} Essentially, the Steens argue that the trial court erred in dismissing their counterclaim. Because we have determined above that the trial court erred in dismissing the Steens' counterclaim, their second assignment of error is moot.

III.

{¶27} The judgment of the Summit County Court of Common Pleas is affirmed in part and reversed in part. The matter is remanded to the trial court for consideration of the Steens' counterclaim.

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

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed equally to both parties.

EVE V. BELFANCE
FOR THE COURT

DICKINSON, P. J.
CARR, J.
CONCUR

APPEARANCES:

JAMES L. WAGNER, Attorney at Law, for Appellants.

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