[Cite as *Summit Tree & Landscaping v. Stow Contracting, L.L.C.*, 2009-Ohio-5794.]

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

SUMMIT TREE & LANDSCAPING	C.A. No. 24515
Appellant	
v.	APPEAL FROM JUDGMENT ENTERED IN THE
STOW CONTRACTING, LLC	COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO
Appellee	CASE No. CV 2007-07-5124

DECISION AND JOURNAL ENTRY

Dated: November 4, 2009

BELFANCE, Judge.

{¶1} Appellant, Summit Tree & Landscaping, appeals from the judgment of the Summit County Court of Common Pleas. Summit Tree & Landscaping seeks to reverse the judgment against it arguing that the invoices it issued were merely offers, which expired when not accepted before March 18, 2007, and that the trial court did not determine the balance of the purchase price in awarding damages. Ohio's Uniform Commercial Code applies because the agreement in this case involved the sale of goods. The sale involved more than five hundred dollars worth of goods, which typically requires a writing to memorialize its terms. However, because the oral contract in this case was partially performed no writing was required to enforce its terms. For reasons set forth below, we affirm.

FACTS

{¶2} Following a bench trial, the court below found the following relevant facts and entered judgment in favor of Stow Contracting, LLC. Peter Senuta originally owned both

Summit Tree & Landscaping ("Summit Tree") and Stow Contracting, LLC ("Stow Contracting"). David Stephenson was an employee of Stow Contracting and purchased Stow Contracting on December 18, 2006. Prior to the consummation of the sale of Stow Contracting to Stephenson, Senuta and Stephenson had worked out a sale agreement for a John Deere 650 bulldozer and a Bobcat S250 Loader skid steer (skid steers of all makes are commonly referred to as "Bobcats"). Under the agreement, the purchase price for the bulldozer was $77,000 and the purchase price for the skid steer was $33,000. Stow Contracting had possession of the equipment and it was agreed that Stow Contracting would pay Summit Tree $3,500 per month for the bulldozer and $2,000 per month for the skid steer. The payments would be allocated 70% to principal and 30% to Summit Tree as a carrying cost. These payments were to be credited against the purchase price.

{¶3} After Stephenson purchased Stow Contracting, Stephenson, on behalf of Stow Contracting, and Senuta, on behalf of Summit Tree, orally finalized the contract for the sale of the bulldozer and skid steer. Summit Tree then sent two invoices to Stow Contracting. One invoice was for the sale of the skid steer reflecting a balance of $22,850 and one invoice was for the sale of the bulldozer reflecting a balance of $61,425. While the two invoices do not total the $110,000 sales price, the disparity between the invoices and the higher original price reflects prior payments that were credited at the rate of 70% to principal. Stow Contracting then made a $5,500 payment in January of 2007 but did not make any further payments. Each party treated the transaction as a sale for tax purposes.

{¶4} Stephenson began working on a loan to pay off the balance of the purchase price. By April of 2007, Stow Contracting was capable of meeting the conditions to close on a loan for up to $85,000. This capability was demonstrated by the testimony of a bank loan officer, as well

as a business checking account with an average daily balance of $50,000 and a money market account with a balance of $40,000 as of April 25, 2007. However, the parties were unable to agree as to the exact amount owed at that time. In particular, they disputed how the January payment was to be allocated. Stow Contracting claimed the same 70% principal, 30% carrying cost split applied. Senuta believed the payment was to be allocated as 50% principal, 50% carrying cost. As a result of the disagreement, the balance was never paid because Stow Contracting could not close on the loan without an exact amount. Summit Tree repossessed the bulldozer on May 15, 2007. After repossession, Stow Contracting abandoned its efforts to close the loan. Stow Contracting maintains possession of the skid steer.

PROCEDURAL HISTORY

{¶5} The trial court found that Summit Tree's refusal to accept the agreed upon payment and its seizure of the bulldozer constituted a breach of the sales contract. As a result of the repossession, Stow Contracting had to pay $6,000 to rent a similar bulldozer to complete an unrelated contract. Stow Contracting later purchased a bulldozer for $101,376, which the trial court found to be a reasonable price.

{¶6} The trial court awarded $48,401 in damages to Stow Contracting as a result of Summit Tree's breach of contract. It then awarded the skid steer to Stow Contracting and subtracted the remaining price of the skid steer, which it found to be $22,039.88 including interest. Accordingly, the trial court awarded Stow Contracting a final amount of $26,361.12 in compensatory damages, plus post-judgment interest and court costs.

APPLICATION OF THE UCC TO THE TRANSACTION

{¶7} In its first assignment of error, Summit Tree argues that because the transaction in this case involves the sale of goods Ohio's Uniform Commercial Code ("UCC") applies and

requires that the contract be in writing. Summit Tree further argues that the invoices that reflected the remaining amount due for the purchase of the equipment were merely an offer to purchase the equipment, which could be accepted within a reasonable time, but in any case no more than three months after the date on which they were created, December 18, 2006. Summit Tree argues that in order to accept its offer, Stow Contracting was obligated to pay the balance reflected in the invoices within a reasonable period of time. Because Stow Contracting failed to tender payment, Summit Tree contends no contract exists. We agree that Ohio's UCC applies; however, the oral contract was partially performed thereby removing the Statute of Frauds as a bar to enforcement.

{¶8} "'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 of consideration.'" *Kostelnik v. Helper*, 96 Ohio St.3d 1, 2002-Ohio-2985, at ¶16, quoting *Perlmuter Printing Co. v. Strome, Inc.* (N.D.Ohio 1976), 436 F.Supp. 409, 414. Other essential terms of a contract include the identity of the parties to be bound, quantity and price. *Alligood v. Proctor & Gamble, Co.* (1991), 72 Ohio App.3d 309, 311. "A contract is binding and enforceable if it encompasses the essential terms of the agreement." *Allen v. Bennett*, 9th Dist. Nos. 23570, 23573, 23576, 2007-Ohio-5411, at ¶12, citing *Mr. Mark Corp. v. Rush, Inc.* (1983), 11 Ohio App.3d 167, 169.

{¶9} R.C. 1302.04(A) provides that:

> "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. A writing is not insufficient because it omits or incorrectly states a term agreed upon but the

> contract is not enforceable under this division beyond the quantity of goods shown in such writing."

{¶10} Ohio's UCC defines "goods" to mean "all things (including specially manufactured goods) which are moveable at the time of identification to the contract for sale other than the money in which the price is to be paid, investment securities, and things in action." R.C. 1302.01(A)(8).

{¶11} Summit Tree argues that the parties could not have entered into an enforceable oral agreement in light of the Statute of Frauds. It further contends that the written invoices tendered to Stow Contracting were not a contract but merely an offer to sell the equipment at the stated price in the invoices. Given the lack of specificity in the invoices for acceptance of the offer, Summit Tree contends that Stow Contracting could accept its offer by tendering payment within a reasonable period of time. Thus, Summit Tree contends that Stow Contracting's failure to pay the remaining cost of the bulldozer and skid steer within a reasonable time constitutes a lack of acceptance under the UCC. Essentially, Summit Tree argues that no enforceable contract exists.

{¶12} Summit Tree's argument that Ohio's UCC applies to the transaction in this case is correct. The skid steer and bulldozer in question constitute goods as defined in R.C. 1302.01 and the transaction was a sale in excess of five hundred dollars. Accordingly, the writing requirement of R.C. 1302.04(A) applies, which generally makes the contract unenforceable without a writing. *Royal Doors, Inc. v. Hamilton-Parker Co.* (Apr. 29, 1993), 10th Dist. No. 92AP-938, at *5.

{¶13} However, partial performance as embodied in R.C. 1302.04(C), may operate as an exception to the requirement of a writing. Although the trial court did not discuss the Ohio UCC and its Statute of Frauds in its judgment entry, "[w]e are nevertheless required to affirm the trial

court's judgment if any valid grounds are found on appeal to support it." *McKay v. Cutlip* (1992), 80 Ohio App.3d 487, 491, citing *Joyce v. Gen. Motors Corp.* (1990), 49 Ohio St.3d 93, 96. Thus, we must now examine whether there was competent, credible evidence to support the trial court's factual finding that the parties entered into an oral contract and whether Stow Contracting satisfied the requirements of partial performance under the UCC.

ORAL CONTRACT

{¶14} The existence and terms of an oral contract are issues for the trier of fact. *Coyne v. Hodge Constr., Inc.*, 9th Dist No. 03CA0061-M, 2004-Ohio-727, at ¶8. We review a trial court's judgment based on factual determinations for some competent, credible evidence. See *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202, at ¶26; *Shemo v. Mayfield Hts.* (2000), 88 Ohio St.3d 7, 10. "This particular standard of review is highly deferential and even 'some' evidence is sufficient to support a court's judgment and prevent reversal." *Cox Paving, Inc. v. Indell Constr. Corp.*, 4th Dist. No. 08CA11, 2009-Ohio-1383, at ¶8.

{¶15} Upon review of the entire record, including the testimony, invoices and the parties' tax treatment of the equipment, we conclude that there was some competent, credible evidence to support the trial court's determination that the parties entered into an oral contract. The parties did not dispute that they agreed to a starting price of $110,000 for both pieces of equipment. Similarly, there is no dispute that on December 18, 2006, the remaining balance on the bulldozer was $61,425 and the remaining balance on the skid steer was $22,850. Richard Weidrick, a certified public account who used to work for both Summit Tree and Stow Contracting, but now works only for Stow Contracting, testified that both parties treated the transaction as a sale for income tax purposes.

{¶16} The trial court found that there was an oral contract for the sale of the bulldozer and the skid steer finalized in December of 2006. Stow Contracting agreed to buy a bulldozer for $77,000 and a skid steer for $33,000 for a total of $110,000. Summit Tree agreed to apply previous monthly rental payments with 70% of each payment allocated to principal and 30% allocated to a rental fee as Summit Tree's carrying cost. The rental payments were $3,500 per month for the bulldozer and $2,000 per month for the skid steer. Upon applying these prior payments, on December 18, 2006 the balance remaining on the purchase of the bulldozer was $61,425 and the balance remaining on the skid steer was $22,850. The interest rate for the sale was 1.5% (18% per year) per month as evidenced by the invoices, which were submitted as exhibits. Senuta testified that simple, rather than compounding, interest was to apply. Stephenson stated that the interest rate was to be 11%. The trial court believed Stephenson's testimony on every point except for the interest rate.

{¶17} Although Senuta testified that there was no contract but instead an offer, which was never accepted, we observe that "the trier of fact is in the best position to 'view the witnesses and observe their demeanor, gestures and voice inflections, and use these observations in weighing the credibility of the proffered testimony.'" *Calame v. Treece*, 9th Dist. No. 07CA0073, 2008-Ohio-4997, at ¶15, quoting *Seasons Coal Co., Inc. v. Cleveland* (1984), 10 Ohio St.3d 77, 80-81.

{¶18} Taken together, the evidence at trial provided "some competent, credible evidence" supporting the trial court's determination of the oral contract's existence and its terms. *Wilson*, at ¶26.

PARTIAL PERFORMANCE OF ORAL CONTRACT

{¶19} R.C.1302.04(C) provides that:

> "A contract which does not satisfy the requirements of division (A) of this section but which is valid in other respects is enforceable:
>
> "* * *
>
> "(3) with respect to goods for which payment has been made and accepted or which have been received and accepted in accordance with section 1302.64 of the Revised Code."

{¶20} R.C. 1302.64(A) provides that:

> "Acceptance of goods occurs when the buyer:
>
> "* * *
>
> "(3) does any act inconsistent with the seller's ownership; but if such act is wrongful as against the seller it is an acceptance only if ratified by him."

{¶21} This Court has previously recognized the partial performance exception to compliance with the writing requirement. See, e.g., *N. Olmsted Auto Paint & Supply Co. v. Lettieri* (July 22, 1992), 9th Dist. No. 91CA005211, *3-4; *Beery v. Kohler* (Nov. 1, 1978), 9th Dist. No. 2673, *3.

{¶22} Stow Contracting was already in possession of the two pieces of equipment. Stephenson and Senuta both testified that, subsequent to the December 2006 oral agreement, Stow Contracting made another payment of $5,500. Stephenson testified that although he believed 100% of the payment should have been applied to principal, he compromised with Traci Companelli (a Summit Tree employee) and allowed Summit Tree to apply that payment in the 70% principal, 30% carrying cost split that was applicable during the period that Stow Contracting was making rental payments to Summit Tree for the use of the equipment. Additionally, there is no question that Stow Contracting accepted the equipment and treated it as its own, including claiming ownership for tax purposes. Notably, Summit Tree's accountant

testified that even Senuta advised him to treat the transaction as a sale for accounting purposes. There was testimony that Stow Contracting paid sales tax in excess of $5,000 on the equipment to the State of Ohio. Stow Contracting retained possession of the skid steer even after Summit Tree repossessed the bulldozer.

{¶23} Stow Contracting's acceptance of the equipment, its partial payment in January and its payment of thousands of dollars in sales tax to the State of Ohio are acts inconsistent with Summit Tree's ownership. Accordingly, there was some competent, credible evidence that Stow Contracting partially performed the contract. *Wilson*, at ¶26. Due to the partial performance of the oral contract and the trial court's determination that an oral contract existed between the parties, Summit Tree cannot prevail on the theory that Stow Contracting failed to accept its offer or that the Statute of Frauds bars enforcement of the contract terms. R.C. 1302.04(C); *N. Olmsted*, 9th Dist. No. 91CA005211, at *2-3.

EXPLICIT DETERMINATION OF PURCHASE PRICE

{¶24} In its second assignment of error, Summit Tree argues that even if a contract existed, the trial court erred in failing to determine the actual purchase price of the bulldozer and skid steer in order to properly award damages. Summit Tree has failed to cite any authority to support this argument as required by App.R. 16(A)(7). We have repeatedly held that "[i]f an argument exists that can support this assignment of error, it is not this court's duty to root it out." *Rosen v. Chesler*, 9th Dist. No. 08CA009419, 2009-Ohio-3163, at ¶11, quoting *Cardone v. Cardone* (May 6, 1998), 9th Dist. No. 18349, at *8. This Court "will not guess at undeveloped claims on appeal." *State v. Wharton*, 9th Dist. No. 23300, 2007-Ohio-1817, at ¶42. Regardless, the trial court's order was sufficiently clear to establish the parties' obligations and did, in fact,

state the actual purchase price of each piece of equipment both before and after application of all payments.

CONCLUSION

{¶25} In light of the foregoing, we affirm the judgment of the Summit County Court of Common Pleas.

Judgment affirmed.

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 to Appellant.

EVE V. BELFANCE
FOR THE COURT

DICKINSON, P. J.
WHITMORE, J.
CONCUR

APPEARANCES:

SIDNEY N. FREEMAN, Attorney at Law, for Appellant.

JON A. OLDHAM and CARYN L. PETERSON, Attorneys at Law, for Appellee.