[Cite as *Fleischer v. George*, 2010-Ohio-3941.]

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

CHRIS M. FLEISCHER	C. A. No. 09CA0057-M
Appellee	
v.	APPEAL FROM JUDGMENT ENTERED IN THE
ALAN R. GEORGE	COURT OF COMMON PLEAS COUNTY OF MEDINA, OHIO
Appellant	CASE No. 07CIV0386

DECISION AND JOURNAL ENTRY

Dated: August 23, 2010

BELFANCE, Presiding Judge.

{¶1} Defendant-Appellant, Alan George, appeals the decision of the Medina County Court of Common Pleas, which granted judgment against him. Upon careful review of the arguments and the record, this Court renders the following opinion.

BACKGROUND

{¶2} Plaintiff-Appellee, Chris Fleischer hired Defendant-Appellant, Alan George, d.b.a. A.G. Construction (collectively "George") to complete a major, residential construction project at his home in Medina, Ohio. The parties signed a contract on June 3, 2006, that specified that George would finish construction of a pool house already framed on Fleischer's property, build an addition to Fleischer's home connecting it to the pool house, and complete some related renovations to Fleischer's home. The final cost of the project was $370,388. Pursuant to the contract, Fleischer agreed to pay an initial deposit of $52,500 and tender monthly payments corresponding to the progress of the work.

{¶3} George requested, and Fleischer paid, two progress payments following the initial deposit, resulting in a total amount of $171,000 paid toward the contract price. Upon receiving each payment, George provided Fleischer with affidavits stating that George, as general contractor, had paid the subcontractors in full for services provided to date and that none of the subcontractors had outstanding claims for payment.

{¶4} In December 2006, George requested a third progress payment. Fleischer became concerned that the percentage of the contract price he had paid so far did not accurately correspond to the percentage of the contract completed. Fleischer believed that, contrary to the parties' contract, George sought payment for work not yet completed. After further investigation, George admitted that he billed Fleischer for work George *anticipated* would be performed on the heating and cooling system in the coming months. Fleischer also discovered that bills from some of the subcontractors were months overdue, creating the chance that liens would be filed against Fleischer's home. George said he was running out of money and needed more payments from Fleischer. Fleischer refused to make the third progress payment and demanded a refund from George. George stopped work on the project and filed a mechanic's lien on the Fleischer home. A mechanic's lien was also placed on Fleischer's home by a material supplier.

{¶5} Fleischer obtained estimates from other construction firms to complete the pool house project.

{¶6} On March 7, 2007, Fleischer filed a cause of action against George asserting claims for breach of contract, fraud, slander of title, violations of the Consumer Sales Practices Act ("CSPA"), and seeking a declaratory judgment. George filed an answer, including a

counterclaim essentially seeking to collect outstanding payment and alleging that Fleischer violated the CSPA.

{¶7} After a trial, the magistrate found in favor of Fleischer as to his claims[1] and George's counterclaims. George filed objections to the magistrate's decision. The trial court overruled each of George's objections and scheduled a hearing to determine the award of attorney's fees. Before the hearing was held, George filed a notice of appeal. We dismissed the appeal for lack of a final, appealable order. After the trial court issued another order that included the award of attorney's fees, George again appealed. Due to deficiencies in the judgment entry, we dismissed the appeal for lack of a final, appealable order. On August 5, 2009, the trial court issued a corrected judgment entry from which George appealed.

{¶8} The trial court determined that Fleischer prevailed on his claims for CSPA violations, breach of contract and fraud and that George did not prevail on any of his counterclaims. The court declared George's mechanic's lien on Fleischer's home to be invalid and ordered it discharged. In order to avoid a duplicative award of damages, the magistrate ordered Fleischer to elect a single claim upon which to collect damages. Fleischer sought damages only for his CSPA claim. The trial court awarded trebled damages in the amount of $433,371, $2,312.50 for expert expenses, and $54,686.32 for attorney's fees.

{¶9} On appeal, George argues that the trial court erred by: (1) admitting hearsay into evidence; (2) awarding treble damages on the CSPA claims; (3) awarding attorney's fees; (4)

[1] Fleischer withdrew his claim for slander of title during the trial.

finding proof of fraud; (5) finding a breach of contract, and; (6) dismissing George's counterclaims.

HEARSAY

{¶10} In his first assignment of error, George argues that the evidence admitted in support of Fleischer's damages, specifically, the cost to complete the project, was inadmissible hearsay. One of the general contractors Fleischer contacted to secure an estimate to finish the pool house was John Galehouse, the President of Galehouse Construction Co., Inc. Galehouse was not available for the trial, so Fleischer filed his deposition testimony and offered his written estimate as an exhibit during the trial. Galehouse stated during his deposition that he had personally visited the work site and reviewed the plans. Galehouse Construction's employee prepared the estimate that Galehouse reviewed. Galehouse reviewed each item of work and its corresponding cost with his employee and reviewed all the specifications and estimates. Galehouse indicated that "[w]e put everything by phase, so we went through our job cost estimate, and sat down, and just went through it." The estimate contained thirty-five items that Galehouse Construction would complete. The itemization of the work to be completed included insulation and painting. Galehouse itemized that work and referred to the pricing by way of attaching estimates from certain subcontractors for painting and insulation work. The quote excluded the costs for plumbing, electric, and environmental controls because Fleischer planned to retain those subcontractors that had been previously hired by George. Thus, Galehouse Construction's ultimate quote for the cost to complete the project included in part pricing that was known to Galehouse based upon estimates submitted by subcontractors. Galehouse testified at his deposition that the cost to complete the project was $298,500 and that the quote was

reasonable based on his years of experience in the construction industry and as a project estimator.

{¶11} According to George, Galehouse's deposition testimony and the quote from Galehouse Construction were inadmissible hearsay, the admission of which was prejudicial error because they were the only basis for the calculation of damages. By extension, George claims, the damages award should be overturned because it was based on inadmissible hearsay.

{¶12} 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, 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.

{¶13} Pursuant to Evid.R. 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.

{¶14} At the outset, we note that George argues that Fleischer relied on Galehouse's deposition testimony in order to prove damage. However, George does not direct us to any part of the record where Galehouse's deposition testimony was discussed during the trial. Accordingly, we will address George's argument that Galehouse Construction's written quote was improperly admitted at trial. The written quote from Galehouse Construction was marked

for trial as Exhibit 27. George objected to Exhibit 27 when it was offered into evidence by Fleischer, however, he did not raise an objection when Exhibit 27 was introduced during Fleischer's testimony on direct examination. During his direct examination, Fleischer explained that he received three quotes from general contractors to complete the pool house. He said that he based his calculation of damages on Exhibit 27. On at least two occasions during his testimony, Fleischer stated the dollar amount of Exhibit 27. George did not object to these statements by Fleischer.

{¶15} George contends that the written quote from Galehouse Construction was inadmissible hearsay. George has not provided any legal precedent to support his contention that a quote of a general contractor that contains pricing estimates of subcontractors that it may use to complete the work is inadmissible hearsay. Notwithstanding, assuming without deciding that Exhibit 27 was hearsay, this Court determines that admission of the exhibit was not prejudicial. Exhibit 27 was offered to demonstrate the cost to Fleischer to hire another general contractor to finish the construction project. The trial court combined the dollar amount of Exhibit 27 with the additional cost of the plumbing, electrical, and heating and cooling for which Fleischer was separately paying, then, subtracted from that figure the original contract price of $370,388 to determine Fleischer's increased cost on the project due to George's conduct. Because Fleischer referenced Exhibit 27 during his testimony and testified as to the cost to hire Galehouse Construction, admission of Exhibit 27 duplicated evidence already before the court. *Kissell v. Gold* (May 16, 1990), 9th Dist. No. 89CA004586, at *1-2. George did not object when Fleischer testified concerning Exhibit 27, thus, we need not consider whether the testimony was properly admitted. See id. Accordingly, we find no reversible error in the trial court's admission of

Exhibit 27, the estimate from Galehouse Construction, as the admission did not prejudice George. George's first assignment of error is overruled.

CSPA DAMAGES

{¶16} "The Consumer Sales Practices Act prohibits unfair or deceptive acts and unconscionable acts or practices by suppliers in consumer transactions." (Internal citations omitted.) *Einhorn v. Ford Motor Co.* (1990), 48 Ohio St.3d 27, 29. "In general, the CSPA defines 'unfair or deceptive consumer sales practices' as those that mislead consumers about the nature of the product they are receiving, while 'unconscionable acts or practices' relate to a supplier manipulating a consumer's understanding of the nature of the transaction at issue." *Whitaker v. M.T. Automotive, Inc.*, 111 Ohio St.3d 177, 2006-Ohio-5481, at ¶10, quoting, *Johnson v. Microsoft Corp.*, 106 Ohio St.3d 278, 2005-Ohio-4985, at ¶24. In the case at bar, George is the supplier and Fleischer is the consumer. R.C. 1345.01(C), (D).

{¶17} As a remedy for violations of the CSPA, the consumer may rescind the transaction or seek actual economic damages. R.C. 1345.09(A). Statutory damages of $200 are recoverable in the absence of actual economic damages, or if such damages are less than $200. R.C. 1345.09(B). In some cases, the damage award may be trebled. Id. Treble damages may be awarded if (1) the Attorney General has promulgated a regulation that declares the specific act or practice to be deceptive or unconscionable, or (2) an Ohio court has issued a decision, made available for public inspection, that determines that the specific act or practice violated R.C. 1345.02 or 1345.03. *White v. Hornbeck*, 9th Dist. No. 01CA0057, 2002-Ohio-3037, at ¶8. The Attorney General must make available for public inspection rules and written policies issued by that office and court decisions issued that determine that acts or practices violate the CSPA. R.C. 1345.05(A)(3).

{¶18} Whether treble damages are appropriate is a question of law. *White* at ¶8. Questions of law are reviewed de novo, with no deference to the trial court's determination. *Renacci v. Evans*, 9th Dist. No. 09CA0004-M, 2009-Ohio-5154, at ¶13.

{¶19} In his second assignment of error, George argues that the trial court erred in awarding treble damages for his violations of the CSPA. George identifies Fleischer's CSPA treble damage request as one based on acts or practices deemed violations by a court. Fleischer does not dispute this characterization. George specifically argues that the cases Fleischer submitted to the trial court do not present situations substantially similar to the instant matter so as to put George on notice that his actions violate the CSPA. In support of this contention, George cites *Marrone v. Phillip Morris USA, Inc.*, 110 Ohio St.3d 5, 2006-Ohio-2869.

{¶20} *Marrone* involved a class action of smokers who alleged that a cigarette manufacturer violated the CSPA. Id. at ¶3. The manufacturer appealed the certification of the class and the appellate court affirmed the class-action certification. Id. at ¶6. On appeal to the Supreme Court of Ohio, the Court considered the narrow question of "how similar the defendant's conduct must be to the conduct that was previously determined to be deceptive in order for a consumer *to qualify for class-action certification* * * *." (Emphasis added.) Id. at ¶2. The *Marrone* Court determined that "[a] consumer may *qualify for class-action certification* under [the CSPA] only if the defendant's alleged violation of the [CSPA] is substantially similar to an act or practice previously determined to be deceptive by one of the methods identified in R.C. 1345.09(B)." (Emphasis added.) *Marrone* at syllabus. Additionally, courts applying the "substantially similar" requirement of *Marrone* have done so in cases involving class-action claims. See, e.g., *Faralli v. Hair Today Gone Tomorrow* (Jan. 10, 2007), N.D.Ohio No.

1:06CV504, unreported; *Nessle v. Whirlpool Corp.* (July 25, 2008), N.D.Ohio No. 1:07CV3009, unreported.

{¶21} Fleischer's claim against George is not a class action. George has not provided this Court with case law in which a court has applied the "substantially similar" requirement to a case that is not a class action and our research has not revealed any such cases. Thus, we will apply the language of the statute to determine if the acts of which Fleischer complains were "determined by a court of this state to violate [the CSPA]," R.C. 1345.09(B), without employing the "substantially similar" requirement for class action certification contained in *Marrone*.

{¶22} Fleischer claims that George violated the CSPA by failing to complete work in a timely manner, billing for more work than was actually completed, failing to pay subcontractors, using Fleischer's payments to pay personal debt, filing an invalid lien, and wrongfully stopping work on the project. The trial court found that the magistrate did not err in finding that George represented that he had completed 63% of the project when he had actually completed only 33.69% as of December 2006, resulting in billing Fleischer for work that had not yet been completed; that George did not pay subcontractors as required resulting in a mechanic's lien being placed on Fleischer's property; and that George filed an invalid lien on Fleischer's property; thus, violating the CSPA.

{¶23} At trial, the court admitted as exhibits copies of five court cases offered by Fleischer supporting his CSPA claim. George has argued that these exhibits were not admitted, however, his assertion is not supported by the record. Each exhibit also contained a certification from the Attorney General's office averring that each court case was part of the Attorney General's CSPA public inspection file. Fleischer's Exhibit 38, *State ex rel. Montgomery v. Summit Home Services, Inc.* (Apr. 21, 1999), Summit C.P. No. CV 98 10 4094, unreported,

supports the finding below that George violated the CSPA by billing for work that had not yet been completed. Exhibit 35, *Celebrezze v. Am. Custom Homes, Inc.* (July 17, 1984), Cuyahoga C.P. No. 993829, unreported, supports the finding below that George violated the CSPA by failing to pay subcontractors for work completed on the project resulting in a mechanic's lien being placed on the property. Accordingly, the trial court did not err in finding that George violated the CSPA by committing acts that a court had previously determined to be violations of the CSPA.

{¶24} George next argues in his second assignment of error that Fleischer failed to demonstrate actual damages from George's violations of the CSPA, thus, Fleischer's recovery should be limited to statutory damages.

{¶25} In *Whitaker v. M.T. Automotive, Inc.*, the Supreme Court of Ohio decided whether noneconomic damages were included in the recovery available to consumers pursuant to the CSPA. *Whitaker* at ¶10. In so doing, the Court examined the concept of "actual damages." Id. at ¶16, quoting R.C. 1345.09(B). The Supreme Court stated that actual damages compensate the plaintiff for his real loss or injury and should be "precisely commensurate with the injury suffered, neither more nor less * * *." Id. at ¶18, quoting *Birdsall v. Coolidge* (1876), 93 U.S. 64, 64. The Court reiterated that "'[t]he fundamental rule of the law of damages is that the injured party shall have compensation for all of the injuries sustained.'" Id. at ¶14, quoting *Fantozzi v. Sandusky Cement Products Co.* (1992), 64 Ohio St.3d 601, 612.

{¶26} The agreement between Fleischer and George provided that George would complete construction and renovations at Fleischer's residence during a period of approximately six months for a total cost of $370,388. George did not complete the project within the timeframe contemplated by the contract, committed various violations of the CSPA, eventually

stopped work on the project, and filed an invalid lien on the property. Due to George's unfair and deceptive acts, Fleischer was required to have the project architect review the job's progress and seek estimates from other general contractors to complete construction. He has also paid George $171,000, but has not received $171,000 worth of work, in contravention of the parties' agreement.

{¶27} Fleischer presented evidence below that he paid the architect $2,312.50 to evaluate the progress of the project and draft reports, which was beyond the scope of the architect's original duties. He further demonstrated that it will cost him $298,500 to hire a new general contractor and that that cost does not include work for plumbing, electric, and environmental controls. Fleischer has chosen to retain the subcontractors for those services hired by George; however, Fleischer is now responsible for paying those subcontractors the remainder of the money owed to them pursuant to the contract with George. The subcontractors testified as to the amounts still owed to them for their work. Once the job is completed, Fleischer will have paid in excess of $500,000 to complete a project for which he should have only paid $370,388. It is this excess amount that represents Fleischer's actual damages that will compensate him for the monetary injuries he sustained because of George's violations. *Inserra v. J.E.M. Bldg. Corp.* (Nov. 22, 2000), 9th Dist. No. 2973-M, at *2 (concluding that when builder failed to complete plaintiff's home on time, the proper measure of damages was the cost to the plaintiff to hire another builder to complete the home and the cost of storage for the plaintiff's belongings while the construction was completed). See, also, *Lawson v. Mack* (Apr. 19, 1991), 6th Dist. No. L-90-230, at * (holding that the proper award of damages under the CSPA where contractor failed to complete the job is the cost to complete). The trial court correctly found that the measure of Fleischer's actual damages included the cost for the new general contractor, plus the remaining

money due to the plumbing, electrical, and heating and cooling subcontractors as stated in the original contract. The trial court awarded the architect's additional fees as incidental damages that were not trebled.

{¶28} Although we agree with the trial court's measure of damages, we have found error in its mathematical calculation of the damages figure. At trial, Fleischer presented exhibits and testimony from the electrical subcontractor that finishing the electrical work will cost Fleischer $12,250. Likewise, the plumbing subcontractor stated that finishing the plumbing will cost $4,928. In its judgment entry, the magistrate found the following costs to complete: electrical, $9,800; plumbing, $16,145; however, there is no evidence in the record to support its findings. The trial court did not adjust the magistrate's calculation. Accordingly, we sustain George's second assignment of error in part and remand the matter for the court below to consider the sole issue of the cost to complete plumbing and electric and, hence, the calculation of the total damages in this matter.

ATTORNEY'S FEES

{¶29} With respect to the court's award of attorney's fees to Fleischer, George contends that: (1) Fleischer's expert on fees was not qualified to testify; (2) recovery was not limited to fees stemming from CSPA violations, and; (3) no evidence was presented that George knowingly violated the CSPA.

{¶30} The Supreme Court of Ohio has stated,

> "'It is well settled that where a court is empowered to award attorney fees by statute, the amount of such fees is within the sound discretion of the trial court. Unless the amount of fees determined is so high or so low as to shock the conscience, an appellate court will not interfere.'" *Bittner v. Tri-County Toyota, Inc.* (1991), 58 Ohio St.3d 143, 146, quoting *Brooks v. Hurst Buick-Pontiac-Olds-GMC, Inc.* (1985), 23 Ohio App.3d 85, 91.

This is true because the trial judge has presumably presided over the entire course of litigation, is familiar with the work performed by the attorneys, and is in a better position than the court of appeals to evaluate the value of the attorneys' services. Id. Thus, an award of attorney's fees will not be reversed absent an abuse of discretion. *Bittner*, 58 Ohio St.3d at 146. An abuse of discretion "implies that the court's attitude is unreasonable, arbitrary, or unconscionable." *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219. In conducting our review, we cannot substitute our judgment for that of the trial court. Id.

{¶31} George contends that Fleischer's expert who concluded that the fees charged were reasonable was not qualified to render such an opinion because he lacked experience with CSPA claims. George has not questioned the expert's qualification in general as an attorney. Once the trial court has determined that a witness is qualified to testify as an expert, the admissibility of the expert's opinion is with the court's discretion. *Yoder v. Bernier* (1976), 49 Ohio App.2d 369, 370. Furthermore, "there is no requirement that a specialist within the field be called." Id. Thus, the trial court correctly determined that the expert's lack of familiarity with CSPA claims goes to weight of the testimony rather than admissibility. Id. The trial court also had the discretion to ascribe the appropriate weight to the testimony.

{¶32} George next asserts that the trial court erred by failing to limit recovery of attorney's fees to fees attributable to work on the CSPA claim only. George is correct that Fleischer is only entitled to recover fees associated with the CSPA claim. *Bittner*, 58 Ohio St.3d at 145. The trial court is only required to separate the fees if the claims for which fees are allowable are distinct from claims for which fees are not awarded. Id. However, the court may award fees for the total work performed if the prevailing party's claims present "a common core of facts and related legal theories." *Parker v. I&F Insulation Co., Inc.* (Mar. 27, 1998), 1st Dist.

No. C-960602, at *6. Accord *Moore v. Vandemark Co., Inc.*, 12th Dist. No. CA2003-07-063, 2004-Ohio-4313, at ¶30; *Luft v. Perry Cty. Lumber & Supply Co.*, 10th Dist. No. 02AP-559, 2003-Ohio-2305, at ¶34; *Budner v. Lake Erie Homes* (Sept. 28, 2001), 11th Dist. No. 2000-P-0108, at *2.

{¶33} In the instant matter, Fleischer asserted claims for fraud, breach of contract and CSPA violations. All claims related to George's contract to complete a pool house and other renovations to Fleischer's home. Each of the claims dealt with a common set of facts: that George misrepresented the degree of completion of the project and did not bill according to the contract terms, that he did not submit lien waivers as required, that the lien waivers he did submit were inaccurate, and that he did not timely pay subcontractors. George's expert testified on cross-examination that George's CSPA violations were related to the broader issues concerning the construction project. Given the common core of facts of this case, it was permissible for the trial court to find that the entirety of the attorney's fees claimed were reasonable to award to Fleischer.

{¶34} Finally, George argues that an award of attorney's fees was not warranted because the evidence did not show that he knowingly violated the CSPA. The CSPA grants the trial court discretion to award attorney's fees to the prevailing party when "[t]he supplier has knowingly committed an act or practice that violates [the CSPA]." R.C. 1345.09(F)(2). The CSPA defines knowledge as, "actual awareness, but such actual awareness may be inferred where objective manifestations indicate that the individual involved acted with such awareness." R.C. 1345.01(E). The Supreme Court has interpreted that language to mean, "the supplier need only intentionally do the act that violates the Consumer Sales Practices Act. The supplier does not have to know that his conduct violates the law for the court to grant attorney fees." *Einhorn*, 48

Ohio St.3d at 30. George does not point to evidence in the record that demonstrates he acted without volition when he billed in excess of the physical progress of the job or failed to pay subcontractors when billed. See App.R. 16(A)(7). His argument on this issue implies that he was not aware that his actions constituted violations of the CSPA. However, as noted above, such proof is not required. Accordingly, we find that this argument lacks merit.

{¶35} The trial court's award of attorney's fees is substantiated by the evidence presented at the hearing and in accord with controlling law. George's third assignment of error is overruled.

FLEISCHER'S OTHER CLAIMS

{¶36} In his fourth and fifth assignments of error, George alleges that the trial court's findings that George committed fraud and breach of contract were erroneous because Fleischer did not offer sufficient evidence of these claims.

{¶37} We reiterate that this matter was heard by a magistrate and each party filed objections to the magistrate's decision. George did not raise an objection with respect to the finding that he breached the parties' contract. Pursuant to Ohio Civil Rule of Procedure 53(D)(3)(b)(iv), except for plain error, "a party shall not assign as error on appeal the court's adoption of any factual finding or legal conclusion * * * unless the party has objected to that finding or conclusion as required by Civ.R. 53(D)(3)(b)." Having failed to raise this argument in the court below, George has forfeited his right to assign it as error before this Court. *Ilg v. Ilg*, 9th Dist. No. 23987, 2008-Ohio-6792, at ¶6. Accordingly, we overrule George's fifth assignment of error.

{¶38} The trial court also found George liable for fraud. George was not ordered to pay any damages in connection with the finding of fraud because Fleischer chose to have the court

award damages pursuant to the CSPA. On appeal, George begins his argument by stating that there can be no judgment for fraud because Fleischer elected CSPA damages. George has failed to develop this argument or cite this Court to relevant law on this point. In addition, when the parties were before the trial court, Fleischer specifically stated that he was entitled to a judgment on all three counts but a single monetary award. George did not object and in fact agreed that Fleischer was limited to a single monetary award. Thus, we conclude that George's argument is not well taken.

{¶39} George also contends that the elements of fraud were not supported by the weight of the evidence. Pursuant to the civil manifest-weight-of-the-evidence standard "[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." *C.E. Morris Co. v. Foley Constr. Co.* (1978), 54 Ohio St.2d 279, syllabus.

> "The Ohio Supreme Court has clarified that[] when reviewing a judgment under a manifest-weight-of-the-evidence standard, a court has an obligation to presume that the findings of the trier of fact are correct. This presumption arises because the trial judge had the 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. 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." (Internal citations and quotations omitted.) *Westphal v. Cracker Barrel Old Country Store, Inc.*, 9th Dist. No. 09CA009602, 2010-Ohio-190, at ¶14, quoting *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202, at ¶24.
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> "The Supreme Court of Ohio has identified the elements of fraud as: (1) a representation, or where there is a duty to disclose, concealment of a fact; (2) which is material to the transaction at hand; (3) made falsely, with knowledge of its falsity, or with such utter disregard and recklessness as to whether it is true or false that knowledge may be inferred; (4) with the intent of misleading another into relying upon it; (5) justifiable reliance upon the representation or concealment; and (6) a resulting injury proximately caused by the reliance." *L.E.*

Sommer Kidron, Inc. v. Kohler, 9th Dist. No. 06CA0044, 2007-Ohio-885, at ¶28, citing *Cohen v. Lamko, Inc.* (1984), 10 Ohio St.3d 167, 169.

{¶40} In support of his claim for fraud, Fleischer offered his testimony and that of the project architect, Martin Caruso. Fleischer explained that after his initial deposit, he was to make monthly payments to George in accordance with the amount of work completed on the project. Each payment request from George indicated the amount of work completed, expressed as the dollar amount of work completed in relation to the entire contract price. A second page listed several categories of work, such as masonry or plumbing, identified the total amount of the contract price assigned to that work, and showed the percent of that category completed and the percent remaining to complete. In addition, George was to provide Fleischer with a lien wavier with each request for payment. In the lien waiver, George was required to aver that all subcontractors had been paid for work completed on the project, or identify any who had not yet been paid, which could result in a mechanic's lien filed by an unpaid subcontractor against Fleischer's property.

{¶41} Upon receipt of the third request in December 2006, Fleischer became concerned that the amount of work completed per the payment request documents did not correspond to the amount of work visibly complete on the job site. Also, George failed to submit a lien waiver with the December request. With respect to the amount of work completed, Fleischer believed that the figure for work completed in the Electric/Heating/Plumbing category was much less than what had actually been done. When he confronted George with his belief, George replied that he included amounts for work that would be done within the next month. Despite the parties' agreement to have payments match the amount of work actually done as of the date of the request, George refused to reduce the amount of the payment request.

{¶42} Fleischer examined George's records for the pool house project to determine where the money Fleischer had paid was allocated. Fleischer discovered numerous discrepancies, including at least $23,000 worth of Fleischer's payments that had apparently not been directly allocated to the project. Unable to resolve these issues with George, Fleischer contacted the project architect, Caruso. Caruso reviewed George's December payment request and viewed the job site to determine what percentage of the total contract was completed. According to Caruso's analysis, the project was approximately 36% complete as of January 2007. In contrast, George represented in his December 2006 payment request that the project was 63% complete. Caruso's testimony was unrebutted by other expert testimony. In total, Fleisher had paid approximately 46% of the total contract price. George did not offer to refund any money to Fleischer or withdraw the December payment request. Fleischer subsequently learned that George had not paid subcontractors in a timely fashion; therefore, the lien waivers in which George averred that all subcontractors had been paid were false.

{¶43} Fleischer presented competent, credible evidence at trial to support the court's finding that George committed fraud. The parties' contract provided that Fleischer was to pay for work that had been completed and that George was to pay subcontractors in a timely manner to avoid liens. In reliance on George's payment requests and lien waivers, Fleischer made payments in excess of the amount of work completed. Fleischer demonstrated that George misrepresented the amount of work actually completed on the project, that George requested and received payments for work not yet completed, and that George misrepresented in lien waivers that subcontractors were paid for their work. George retained Fleischer's payments after it was apparent that George misrepresented the amount of work actually finished on the project. The trial court did not err in finding fraud, thus, George's fourth assignment of error is overruled.

GEORGE'S COUNTERCLAIMS

{¶44} Although George's answer contained multiple counterclaims, on appeal he confines his argument to the propriety of the trial court's decision to dismiss his counterclaim for breach of contract and to collect on his mechanic's lien. Thus, we shall confine our review to those arguments.

{¶45} After hearing all of the evidence presented by both parties, the magistrate found that George failed to support the causes of action in his counterclaims by a preponderance of the evidence. The trial court agreed, and dismissed George's counterclaims, including the counterclaim for breach of contract. In order to demonstrate a breach of contract, George must demonstrate that: "(1) a contract existed, (2) [George] fulfilled his obligations, (3) [Fleischer] failed to fulfill his obligations, and (4) damages resulted from this failure." *Second Calvary Church of God in Christ v. Chomet*, 9th Dist. No. 07CA009186, 2008-Ohio-1463, at ¶9.

{¶46} Fleischer refused to pay George's December 2006 payment request. In January 2007, George submitted a revised payment request seeking approximately $65,000. In light of the parties' disputes concerning the work completed on the project, Fleischer did not tender any portion of the $65,000. On January 12, 2007, George sent a letter to Fleischer notifying him that he was shutting down the job, in part because Fleischer never paid the December payment request. He further stated that he intended to file a mechanic's lien. In late February 2007, George filed a mechanic's lien in the amount of $65,015.

{¶47} George argues that Fleischer breached the contract by failing to make payment and that he should be able to collect on his lien. We do not find this argument to be well taken. The evidence at trial demonstrated that, until December 2006, George requested and received money for work that had not been completed, in contravention of the contract. George did not

present evidence that $65,000 was actually due him based on work completed on the pool house. Additionally, George failed to produce evidence to refute Fleischer's claim that he had already paid George more money than he was entitled to collect. Accordingly, George did not demonstrate that he fulfilled his obligations pursuant to the contract, and that Fleischer failed to fulfill his obligation to pay. The court below did not err by determining that George did not support his cause of action by a preponderance of the evidence. We overrule George's sixth assignment of error.

CONCLUSION

{¶48} In light of the above analysis, this Court sustains in part the second assignment of error of Alan George, d.b.a. A.G. Construction, and overrules all other assignments of error. The judgment of the Medina County Court of Common Pleas in favor of Chris Fleischer is affirmed in part, reversed in part, and remanded for proceedings consistent with this opinion.

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 Medina, 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 both parties equally.

EVE V. BELFANCE
FOR THE COURT

CARR, J.
MOORE, J.
CONCUR

APPEARANCES:

MARK H. LUDWIG, Attorney at Law, for Appellant.

MARK L. RODIO, Attorney at Law, for Appellee.