[Cite as *HHL Group, Inc. v. Ken's Auto Serv. Ctr., Inc.*, 2011-Ohio-1153.]

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

HHL GROUP, INC. Appellant v. KEN'S AUTO SERVICE CENTER, INC. Appellee	C.A. No. 10CA0021-M APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF MEDINA, OHIO CASE No. 09 CIV 0486

DECISION AND JOURNAL ENTRY

Dated: March 14, 2011

DICKINSON, Presiding Judge.

INTRODUCTION

{¶1} Joe Kirgesner, who owns 70 percent of Ken's Auto Service Center, was an accountant for HHL Group Inc. until he had a falling out with its owner, Laurie Price. After Mr. Kirgesner left HHL Group, Ken's Auto received an invoice from it for $42,135 in unpaid accounting work. When Ken's Auto refused to pay, HHL Group sued it for breach of contract, money due on an open account, money due on an invoice, and unjust enrichment. Following a bench trial, the trial court determined that Ken's Auto did not owe HHL Group for the accounting work. HHL Group has appealed, arguing that the trial court incorrectly refused to allow Ms. Price to answer a question, that the court failed to rule on its unjust enrichment claim, and that the judgment was against the manifest weight of the evidence. We affirm because Ms. Price was eventually allowed to answer a similar question, the trial court ruled on each of HHL Group's claims, and the court's judgment is supported by some competent, credible evidence.

FACTS

{¶2} Mr. Kirgesner, along with Ken Younkins and Bill D'Amico, founded Ken's Auto in 2005. In 2007, he bought out Mr. D'Amico, giving him 70 percent ownership of the business. At some point, Stephanie Krammer, Ken's Auto's general manager, acquired Mr. Younkins' shares.

{¶3} At the time Mr. Kirgesner founded Ken's Auto, he was working for HHL Group, which is solely owned by Ms. Price. Mr. Kirgesner and Ms. Price were the only accountants at HHL Group, but it also had an administrative staff. Although Mr. Kirgesner considered himself a partner, Ms. Price characterized Mr. Kirgesner's relationship with HHL Group as that of an independent contractor. At some point in 2006, Mr. Kirgesner spoke with Ms. Price about HHL Group doing the bookkeeping for Ken's Auto.

{¶4} Mr. Kirgesner and Ms. Price did not enter into a written contract regarding the work HHL Group did for Ken's Auto, and they gave conflicting testimony about their oral agreement. According to Ms. Price, HHL Group did all of Ken's Auto's bookkeeping, payroll, and tax work for several years. Mr. Kirgesner did some of the work, and she did some of it. Both Mr. Kirgesner and she kept handwritten time sheets for their work, which they turned in to one of HHL Group's administrative assistants, who generated a monthly invoice for Ken's Auto. Because Mr. Kirgesner worked at HHL Group, Ms. Price billed Ken's Auto at a reduced rate. In addition, instead of mailing Ken's Auto's monthly invoices to the service center, the administrative assistant just hand delivered them to Mr. Kirgesner. Ms. Price testified that, because HHL Group had access to Ken's Auto's bank account, instead of sending her a check, Mr. Kirgesner would simply authorize her to withdraw a certain amount from Ken's Auto's account. According to Ms. Price, Mr. Kirgesner, however, regularly failed to authorize enough

withdrawals to fully compensate HHL Group for the work Mr. Kirgesner and she were doing for Ken's Auto. She did not consider the deficiency a problem until Mr. Kirgesner stopped working for her.

{¶5} According to Mr. Kirgesner, he asked Ms. Price to help do the bookkeeping for Ken's Auto while he worked on getting the business off the ground. He testified that their understanding was that Ken's Auto would pay HHL Group for the work Ms. Price did for Ken's Auto as well as for any administrative expenses. His work, however, would not be billed to the company. Mr. Kirgesner testified that, since he was the majority owner of Ken's Auto, it was absurd to think that he would pay another company for work he performed for it. Mr. Kirgesner testified that he completed time sheets, but he did so for "recordkeeping purposes only." He hoped that, once Ken's Auto had more income, he could get reimbursed for the number of hours he spent doing financial and consulting work for it.

{¶6} Mr. Kirgesner testified that, although he initially needed HHL Group to help with Ken's Auto's bookkeeping, he asked Ms. Price to train Ms. Krammer to do it so that they could bring those expenses in-house. According to Mr. Kirgesner, most companies the size of Ken's Auto do their own bookkeeping. He also testified that the reason Ken's Auto allegedly fell behind in its payments to HHL Group was because he only released enough money from its accounts to compensate Ms. Price and the administrative assistants for their time. Mr. Kirgesner further testified that he did not see any of the monthly invoices that the administrative assistant had prepared until after the lawsuit was filed.

{¶7} The trial court found that HHL Group failed to meet its burden of proof. It noted that it was unusual for an auto repair shop with only $1,000,000 in annual sales to have over $83,000 in accounting and bookkeeping expenses over a thirty-four month period, especially

since the work was only being billed at one-third of its normal rate. It found Mr. Kirgesner's testimony credible that Ken's Auto had never agreed to pay HHL Group for any work Mr. Kirgesner did for its benefit, and also found that HHL Group had been fully paid for the work it had contracted to perform. HHL Group has appealed, assigning four errors.

MANIFEST WEIGHT OF THE EVIDENCE

{¶8} Because HHL Group's first three assignments of error are related, this Court will consider them together. HHL Group's first assignment of error is that the trial court incorrectly ruled that it had been paid for all of the contracted work it performed for Ken's Auto. Its second assignment of error is that the court incorrectly found that Mr. Kirgesner kept track of the hours he worked for Ken's Auto for recordkeeping purposes only. Its third assignment of error is that the court incorrectly failed to rule on its claim for unjust enrichment.

{¶9} Regarding HHL Group's third assignment of error, the trial court noted in its judgment entry that HHL Group's "Complaint alleges (1) breach of contract, (2) money due on an open account, (3) money due on an invoice, and (4) unjust enrichment . . . ." It also wrote that "the Court finds that the Plaintiff has failed to meet its burden of proof on each of the four causes of action in its Complaint." We, therefore, conclude that the trial court ruled on HHL Group's claim for unjust enrichment. HHL Group's third assignment of error is overruled.

{¶10} Regarding HHL Group's first two assignments of error, HHL Group has argued that the trial court's factual findings were against the manifest weight of the evidence. In *State v. Wilson*, 113 Ohio St. 3d 382, 2007-Ohio-2202, at ¶26, the Ohio Supreme Court held that the test for whether a judgment is against the weight of the evidence in civil cases is different from the test applicable in criminal cases. According to the Supreme Court in *Wilson*, the standard applicable in civil cases "was explained in *C.E. Morris Co. v. Foley Constr. Co.*, 54 Ohio St.2d

279." *Id*. at ¶24. The "explanation" in *C.E. Morris* was that "[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." *Id*. (quoting *C.E. Morris Co.*, 54 Ohio St. 2d 279, at syllabus); but see *Huntington Nat'l Bank v. Chappell*, 183 Ohio App. 3d 1, 2007-Ohio-4344, at ¶17-75 (Dickinson, J., concurring in judgment only).

{¶11} Cases like this one, in which the appellant was the party that had the burden of proof in the trial court, demonstrate the flaw in the *Wilson* test. The trial court determined in this case that HHL Group failed to carry its burden of proof. Unless that determination was a manifest miscarriage of justice, this Court should defer to the trial court's determination. The *Wilson* test, however, requires us to determine whether there was competent, credible evidence supporting the judgment in favor of Ken's Auto even though Ken's Auto carried no burden of proof in the trial court. In this case Ken's Auto carried its non-existent burden by introducing competent, credible evidence.

{¶12} HHL Group's first claim was for breach of contract. "Generally, in order to establish a breach of contract, it must be shown by a preponderance of the evidence that (1) a contract existed, (2) one party fulfilled his obligations, (3) the other party failed to fulfill his obligations, and (4) damages resulted from that failure." *Blake Homes Ltd. v. FirstEnergy Corp.*, 173 Ohio App. 3d 230, 2007-Ohio-4606, at ¶77. HHL Group's second claim was for an open account and its third claim was for an account stated. "An action on an account is founded upon contract," therefore, the plaintiff must prove the elements of a contract action. *Asset Acceptance Corp. v. Proctor*, 156 Ohio App. 3d 60, 2004-Ohio-623, at ¶12. It must also prove that the contract involved "a transaction that usually forms the subject of a book account." *Id*.

{¶13} HHL Group's fourth claim was for unjust enrichment. "A successful claim of unjust enrichment requires that: (1) a benefit has been conferred by a plaintiff upon a defendant; (2) the defendant had knowledge of the benefit; and (3) the defendant retained the benefit under circumstances where it would be unjust to do so without payment." *Desai v. Franklin*, 177 Ohio App. 3d 679, 2008-Ohio-3957, at ¶14 (quoting *Chef Italiano v. Crucible Dev. Corp.*, 9th Dist. No. 22415, 2005-Ohio-4254, at ¶26). "Unjust enrichment of a person occurs when he or she 'has and retains money or benefits which in justice and equity belong to another.'" *Univ. Hosps. of Cleveland Inc. v. Lynch*, 96 Ohio St. 3d 118, 2002-Ohio-3748, at ¶60 (quoting *Hummel v. Hummel*, 133 Ohio St. 520, 528 (1938)).

{¶14} HHL Group has argued that the evidence showed that Ken's Auto agreed to pay for Mr. Kirgesner's work. It has argued that Ms. Price's testimony was corroborated by Ken's Auto's own financial statements. Notably, Ken's Auto's balance sheet for December 2008 listed a "Current Liabilit[y]" that was described as "Accounts payable – HHL Group." The amount of the liability matched the balance HHL Group's financial records showed that Ken's Auto owed it as of December 31, 2008.

{¶15} HHL Group has also argued that the trial court incorrectly found that Ken's Auto and Mr. Kirgesner never received any bills or invoices from it, noting that Ken's Auto paid it over $40,000 over a three year period. HHL Group has noted that Ms. Krammer testified that Mr. Kirgesner delivered Ken's Auto's financial statements to her. It has also argued that Ken's Auto failed to show that HHL Group's charges were unreasonable or that it objected to them as they were being accumulated. It has further argued that Mr. Kirgesner's testimony that he kept track of his hours on HHL Group's timesheets "for recordkeeping purposes only" defies logic.

{¶16} As Ken's Auto has noted, Ms. Price testified that she prepared Ken's Auto's monthly financial statements so the fact that those statements include a liability for HHL Group that matches HHL Group's own records is not remarkable. Ken's Auto has also noted that, if Mr. Kirgesner's time is excluded, it paid HHL Group more than enough to compensate it for the work Ms. Price and the administrative assistants did for it. Ken's Auto has further noted that the trial court had the opportunity to see and hear each of the witnesses and determined that Mr. Kirgesner's testimony was more credible than Ms. Price's about whether Ken's Auto agreed to pay HHL Group for Mr. Kirgesner's work.

{¶17} HHL Group has argued that Ken's Auto forfeited its right to challenge the account balance because it did not object to the monthly invoices that the administrative assistant allegedly delivered to Mr. Kirgesner and because it paid HHL Group for some of Mr. Kirgesner's work. It has further argued that, once an account stated is established, a party seeking to set it aside can do so only by showing mistake or fraud by clear and convincing evidence.

{¶18} "An account stated properly exists only where accounts have been examined and the balance admitted as the true balance between the parties, without having been paid." *Lichter v. S. T. Kenyon & Co.*, 101 Ohio App. 76, 79 (1956). If, however, "the acknowledgment or admission is qualified, and not absolute, or if there is but an admission that something is due, without specifying how much . . . there is no account stated." *Id.* The trial court could have determined from Ken's Auto's failure to pay HHL Group the entire amount invoiced each month that an account stated did not exist between the parties.

{¶19} We have reviewed the record and conclude that there is some competent, credible evidence to support the trial court's judgment. The trial court's finding that Mr. Kirgesner kept

track of his time for recordkeeping purposes only and its conclusion that HHL Group did not meet its burden of proof are not against the manifest weight of the evidence. HHL Group's first and second assignments of error are overruled.

HEARSAY TESTIMONY

{¶20} HHL Group's fourth assignment of error is that the trial court incorrectly excluded an admission from Jeff Lake, one of Ken's Auto's managers. Specifically, the trial court did not allow Ms. Price to testify about what Mr. Lake had told her because it determined that the statement was hearsay.

{¶21} Mr. Lake did not testify, but the testimony of Ms. Price and Ms. Krammer established that he is Ms. Krammer's father, that he advanced Ms. Krammer the money she used to buy her ownership interest in Ken's Auto, that he manages the day-to-day business at one of Ken's Auto's locations, and that he previously owned a muffler business. On direct examination, HHL Group attempted to ask Ms. Price about a conversation that she had with Mr. Lake after Mr. Kirgesner left HHL Group about the money Ken's Auto allegedly still owed it. The trial court did not allow Ms. Price to answer because Mr. Lake was only an employee of Ken's Auto and so the answer would have been hearsay.

{¶22} HHL Group has argued that Mr. Lake's statement was not hearsay under Rule 801(D)(2) of the Ohio Rules of Evidence. Under Rule 801(D)(2), a statement is not hearsay if it "is offered against a party and is (a) the party's own statement, in either an individual or a representative capacity, or (b) a statement of which the party has manifested an adoption or belief in its truth, or (c) a statement by a person authorized by the party to make a statement concerning the subject, or (d) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship, or

(e) a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy upon independent proof of the conspiracy." According to HHL Group, Mr. Lake's statement was not hearsay because he had authority to speak on behalf of Ken's Auto.

{¶23} The question HHL Group attempted to ask Ms. Price was "what did Mr. Lake tell you about the outstanding receivable owed by Ken's Auto?" HHL Group did not make an offer of proof, therefore, its argument is barred under Rule 103(A) of the Ohio Rules of Evidence. *State v. Brooks*, 44 Ohio St. 3d 185, 195 (1989). Furthermore, when Ken's Auto finished presenting its evidence, HHL Group recalled Ms. Price. After the parties' lawyers finished examining her, the court asked her a few questions, including one about what Mr. Lake had told her about the money that Ken's Auto allegedly owed HHL Group. According to Ms. Price, Mr. Lake "said that he knew that they owed us money and that they would get all of this taken care of." Accordingly, because Ms. Price was eventually allowed to testify about what Mr. Lake told her, we conclude that HHL Group has not demonstrated that the trial court's ruling resulted in any prejudice. See Civ. R. 61 (describing harmless error). HHL Group's fourth assignment of error is overruled.

CONCLUSION

{¶24} The trial court did not improperly exclude Ms. Price's testimony, and its judgment is not against the manifest weight of the evidence. The judgment of the Medina County Common Pleas Court is affirmed.

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 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 Appellant.

CLAIR E. DICKINSON
FOR THE COURT

BELFANCE, J.
CONCURS

WHITMORE, J.
CONCURS IN JUDGMENT ONLY, SAYING:

{¶25} I concur in the result reached by the majority with the exception of paragraph ¶11. Because I agree that all the assignments of error should be overruled and would affirm the judgment of the trial court, I concur in judgment only.

APPEARANCES:

TIMOTHY B. PETTORINI, and DURIYA DHINOJWALA, Attorneys at Law, for Appellant.

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