

IN THE COURT OF APPEALS OF OHIO  
SIXTH APPELLATE DISTRICT  
HURON COUNTY

D & M Drywall, Inc.

Court of Appeals No. H-08-034

Appellant

Trial Court No. CVH 20070305

v.

Grande Maison Construction  
Co., LLC, et al.

**DECISION AND JUDGMENT**

Appellees

Decided: January 15, 2010

\* \* \* \* \*

Robert W. Gentzel, for appellant.

Richard D. Panza, Paul R. Phillips, and Amy L. DeLuca,  
for appellees.

\* \* \* \* \*

OSOWIK, J.

{¶ 1} This is an appeal from a judgment of the Huron County Court of Common Pleas which granted judgment in favor of appellee, Grande Maison Construction Company ("Grande Maison") in the amount of \$24,294.99 against appellant, D & M

Drywall, Inc. ("D & M") in a breach of contract construction case. For the reasons set forth below, this court affirms the judgment of the trial court.

{¶ 2} Appellant, D & M, sets forth the following four assignments of error:

{¶ 3} "FIRST ASSIGNMENT OF ERROR. THE TRIAL COURT'S JUDGMENT AWARDING DAMAGES AGAINST APPELLANT AND IN FAVOR OF APPELLEE WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE CONSTITUTING REVERSIBLE ERROR.

{¶ 4} "SECOND ASSIGNMENT OF ERROR. THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY AWARDING DAMAGES TO APPELLEE ON ITS COUNTERCLAIM WHEN IT WAS UNCONTROVERTED THAT APPELLEE WAS NOT A REAL PARTY IN INTEREST AT THE TIME OF COMMENCEMENT OF ITS CAUSE OF ACTION.

{¶ 5} "THIRD ASSIGNMENT OF ERROR. THE TRIAL COURT'S JUDGMENT FOR DAMAGES IN FAVOR OF APPELLEE AND AGAINST APPELLANT WAS REVERSIBLE ERROR AS THERE WAS NO COMPETENT CREDIBLE EVIDENCE PRESENTED OF ANY CAUSATION BETWEEN APPELLANTS' WORKMANSHIP AND THE PURPORTED DAMAGES OF APPELLEE.

{¶ 6} "FOURTH ASSIGNMENT OF ERROR. BY FAILING OR REFUSING TO MITIGATE ITS DAMAGES, APPELLEE WAS NOT ENTITLED TO THE

DAMAGES WHICH IT WAS AWARDED CONSTITUTING REVERSIBLE ERROR BY THE TRIAL COURT IN ITS JUDGMENT."

{¶ 7} The following undisputed facts are relevant to the issues raised on appeal. In July 2006, D & M subcontracted for approximately \$21,000 with Grande Maison to furnish the requisite drywall related labor and materials in connection with the construction by Grande Maison, the general contractor, of an approximately 5,000 square-foot luxury residential home in Norwalk, Ohio.

{¶ 8} This home was being constructed to serve as the personal residence, model home and office of Grande Maison's president and primary shareholder, Gary Kalizewski. During the course of construction, Kalizewski observed numerous defects in the drywall work that had been performed by D & M. The substandard conditions observed included failed seams, nail pops, improperly fastened drywall, gapping, cracking, and other plainly visible defects.

{¶ 9} At the time the defects were discovered, Grande Maison had paid \$11,355.35 to D & M towards its drywall construction work at the premises. Faced with a multitude of defects in the work, Grande Maison refused to pay the balance owed to D & M of approximately \$9,727.35. The defective workmanship necessitated various substitute contractors to remediate the conditions. In order to remediate the defects, Grande Maison incurred expenses of approximately \$17,000.

{¶ 10} On February 22, 2007, D & M filed suit against Grande Maison to collect the balance owed on the drywall contract. On March 23, 2007, Grande Maison

counter-claimed for breach of contract, negligent performance of work, and breach of merchantability and fitness for purpose intended.

{¶ 11} On July 31, 2008, the case proceeded to bench trial. The trial was bifurcated and completed on September 4, 2008. On October 28, 2008, the trial court issued judgment in favor of appellee in the amount of \$24,294.99, which included an offset in favor of appellant equivalent to the claimed \$9,727.35 owed on the underlying contract. Timely notice of appeal was filed.

{¶ 12} Appellant's first and third assignments of error are substantively analogous and will be considered simultaneously given their common legal premise. In these assignments, appellant asserts that the trial court judgment in favor of appellee was against the manifest weight of the evidence and not supported by competent, credible evidence.

{¶ 13} A judgment supported by competent, credible evidence will not be reversed by a reviewing court unless it is against the manifest weight of the evidence. *C.E. Morris Co. v. Foley Constr. Co.* (1978), 54 Ohio St.2d 279. Trial court findings are presumed correct and are reviewed with great deference by the appellate court. *Seasons Coal Co. v. Cleveland* (1984), 10 Ohio St.3d 77, 80. The rationale underlying this deferential standard of review is based upon the principle that the trial court directly views the opposing witnesses, observes their demeanor, and utilizes first-hand observations in weighing the credibility of opposing evidence and testimony in reaching its determination. *Springfield Twp. Bd. of Trustees v. Anderson*, 6th Dist. No. L-06-1014,

2006-Ohio-1530; see, also, *Yoder Machinery Sales Co. v. Weldon F. Stump & Co., Inc.*, et al., 176 Ohio App.3d 668, 893 N.E.2d 522, 2008-Ohio-72.

{¶ 14} In support of its position, appellant relies primarily on challenging the credibility of the testimony and documentation of witness Kalizewski, Grande Maison's president who was having the home underlying this case constructed as his personal residence, model home, and office.

{¶ 15} In support of its claim against D & M, Grande Maison presented and determinatively relied upon several primary witnesses and their corresponding documentation. Grande Maison's first witness, Kalizewski, furnished lengthy and detailed testimony.

{¶ 16} Kalizewski conveyed that he has owned and operated a residential home construction business since 1974. During his 35-year construction career, Kalizewski has been responsible for serving as general contractor in the construction of in excess of 50 private homes. In that capacity, he has both supervised and personally performed all aspects of drywalling work. Kalizewski had successfully utilized D & M for drywalling some of his other construction projects which prompted him to contract with them for his personal residence. However, he significantly noted that the specific work crew that performed the drywalling of his home included some workers with whom he had no past dealings and was not familiar with their skills.

{¶ 17} During the course of construction, as the general contractor, Kalizewski examined the progress of the construction of his home. He personally observed an array

of plainly visible defective drywalling conditions and brought them to the attention of D & M's on-site head finisher, Tim Cunningham.

{¶ 18} Some of the defective conditions observed included nail pops, failed seams, gaps, and improperly fastened drywall. These defective conditions were extensively photographed and documented. Kalizewski testified that after bringing these defective issues to the attention of Cunningham, Cunningham reacted adversely, left the site abruptly, and no further drywalling work was performed at the site by D & M.

{¶ 19} In conjunction with the above scenario, Kalizewski testified in great detail regarding the specific repairs that were necessitated and performed, as well as furnished accompanying documentation and invoices totaling approximately \$17,000. These monies were expended in remediating the defective drywall conditions.

{¶ 20} Kalizewski's testimony and documentation were further bolstered by the testimony of expert witness Michael Witte. Witte, a registered architect in Ohio, conducted a site visit on February 13, 2008. Following the visit, Witte reached certain conclusions regarding the drywall craftsmanship based upon the visit, his professional experience, credentials and first-hand observations.

{¶ 21} Witte observed and noted defects in the drywalling including, "shadowing at corner bead, tape bond failure at the joint between the walls and sloped ceilings and a vertical interior corners on angled walls, and insufficient topping compound applied to the interior corners." Witte opined in detail regarding the causation between various defective conditions and defective workmanship. Lastly, Witte testified to his opinion

that the repair costs undertaken and documented were reasonable under the facts and circumstances of the case.

{¶ 22} In opposition to the above evidence and testimony, D & M offered the testimony of Cunningham and an opposing expert witness. Cunningham testified regarding his significant drywalling experience and his impression that at the time he left this construction project it was his understanding that there were no outstanding issues with the quality of the work performed. D & M's expert witness, John Waite, a local contractor, testified to his belief that the drywalling work had been properly performed and that the defects materializing were caused by improper framing of the structure. Interestingly, Waite's own moisture content testing of the structure's framing yielded results well within normal range.

{¶ 23} The court weighed the opposing witness testimony and documentary evidence and ultimately ruled in favor of Grande Maison, awarding it \$24,294.99 in damages for breach of contract in deficient performance of the drywalling work. It should be noted that the trial court ruled partially in favor of D & M, partially offsetting its liability to Grande Maison in the amount of the \$9,727.35 owed on the original contract.

{¶ 24} We have carefully reviewed and considered the record of evidence in this matter. Given ample precise testimony of defective drywalling by the general contractor and ultimate owner of the residence at issue, Kalizewski, supporting expert testimony of architect Witte, extensive photographic evidence, and documented expenses incurred in

remediation of the defective drywall conditions, we find that the trial court judgment in appellee's favor was clearly supported by competent, credible evidence and not against the manifest weight of the evidence. By contrast, the record shows that the evidence and testimony on D & M's behalf was more speculative in nature and lacked a clear, objective factual basis. We find appellant's first and third assignments of error not well-taken.

{¶ 25} In appellant's second assignment of error, it asserts that the trial court erred in awarding damages to Grande Maison as it was not the real party in interest. In support, appellant relies predominantly upon the notion that because legal title to the premises had been transferred from Grande Maison directly to Kalizewski by the time suit was commenced, Grande Maison was no longer a real party in interest for purposes of this litigation.

{¶ 26} Civ.R. 17 unequivocally defines "Real party in interest" to include a party with whom a contract has been made. In this case, the underlying contract was entered between D & M and Grande Maison. As such, assertions that contracting party Grande Maison should be construed as not a real party in interest are wholly unpersuasive. We find appellant's second assignment of error not well-taken.

{¶ 27} In its fourth assignment of error, appellant raises the heretofore unmentioned assertion and affirmative defense that Grande Maison failed in its duty to mitigate damages and was not entitled to judgment in its favor.

{¶ 28} It is well-established that the failure to raise an issue before the trial court, even an error of constitutional magnitude, results in the waiver of such issue on appeal.



*State v. Williams* (1977), 51 Ohio St.2d 112, 117. As such, appellant waived its right to argue failure to mitigate on appeal based upon its failure to do so to the trial court below. We find appellant's fourth assignment of error not well-taken.

{¶ 29} On consideration whereof, the judgment of the Huron County Court of Common Pleas is affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J.

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JUDGE

Mark L. Pietrykowski, J.

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JUDGE

Thomas J. Osowik, P.J.  
CONCUR.

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JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:  
<http://www.sconet.state.oh.us/rod/newpdf/?source=6>.