

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

Jeff J. Gaillard dba Quality Painters

Court of Appeals No. OT-11-029

Appellant

Trial Court No. 08-CVH-463

v.

Gill Construction Co. aka Gill
Construction Co. Incorporated,
an Ohio Corporation

DECISION AND JUDGMENT

Appellee

Decided: October 26, 2012

* * * * *

Michael L. Thal, for appellant.

Daniel F. Lindner, for appellee.

* * * * *

YARBROUGH, J.

{¶ 1} Plaintiff-appellant, Jeff Gaillard, appeals from a judgment of the Ottawa County Court of Common Pleas, following a bench trial, which found that he committed a substantial anticipatory breach of his contract with defendant-appellee, Gill Construction Co., and ordered him to pay \$347.50 in damages. We reverse, and remand the cause to the trial court to provide separate findings of fact and conclusions of law.

I. Facts and Procedural Background

{¶ 2} In April 2008, Gaillard, doing business as Quality Painters, submitted a bid to provide paint and painting services on a house that Gill Construction was building in Danbury Township. The bid offered to paint the inside of the 4,555 square foot home for \$1.80 per square foot, or \$8,199. The bid also offered to paint the exterior of the house for \$1,905, for a total project cost of \$10,104. Gill Construction accepted the bid. At some point, Gaillard and Gill agreed that Gaillard would also paint the garage for an additional \$660. Further, the parties agreed that Gill Construction would pay an additional \$1,400 to compensate for 14 color changes.

{¶ 3} Painting began on the house. Testimony at trial revealed that the painting process experienced several delays. On the one hand, Gaillard testified that the delays were caused by the color changes, by poor drywall work, and by other trades working in the house. On the other hand, the project manager for Gill Construction, Andrew Schuster, testified that the delays resulted from Gaillard not showing up to work during the two weeks that he had unobstructed access to the house with no other trades present, or showing up with only one bucket of paint and leaving when it was empty. Schuster further testified that it became necessary to bring in the other trades, such as tile layers, before painting was done so that the home would be completed by the project deadline.¹

¹ The contract between Gill Construction and the landowner provided that Gill Construction would face a penalty of \$150 per day for every day that the home was unfinished following July 4, 2008. This deadline was later extended until July 15, 2008.

{¶ 4} On or around June 23, 2008, Gaillard sent an invoice to Gill Construction. It included a charge of \$9,565.50 for painting the interior of the house at \$2.10 per square foot, instead of the original \$1.80 per square foot, a charge of \$1,400 for the color changes, a charge of \$1,200 for “Stain Paint splits,” and a charge of \$660 for painting the garage, for a total balance of \$12,825.50. At trial, Gill Construction submitted a copy of this invoice with handwritten notations from Schuster and Dave Gill that “okayed” the interior painting at the original \$1.80 per square foot (\$8,199) instead of \$2.10 per square foot, the \$1,400 charge for color changes, and the \$660 charge for painting the garage. The \$1,200 charge for “stain paint splits” was noted “not okay.” In addition, the original total balance was crossed out, and changed to \$10,529. Finally, Schuster and Gill noted that painting the exterior was not listed on the invoice or completed, but that it had a quoted cost of \$1,905.

{¶ 5} On or around July 2, 2008, the parties agreed that Gaillard would receive a partial payment for the job. The testimony diverges as to what happened next. Gaillard testified that, at that point, “we finally finished the job, everything, exterior, the inside [of] the house, we finished everything and we were done.” Gaillard further testified that when he went to pick up the payment, Gill Construction presented a check for \$2,500, which he refused. It was then that he got into an argument with Dave Gill. Gaillard recounted,

He wrote me a check out for \$2,500, and I wouldn't accept that. I mean, it didn't cover the materials or the labor or expenses. It was just

insufficient funds. He got irate. He got upset with me. He threw me off the job. He fired me and swore he would never pay me a cent.

{¶ 6} Schuster's testimony, in contrast, indicated that when Gaillard arrived to pick up the check, Gill Construction offered him \$5,000, which Gaillard refused. Further, Schuster verified as accurate his earlier statement,

When [Gaillard] came in to pick up his check, he refused the partial payment, and demanded payment in full, or he would not go back and complete the job. He was told that day that when the job was 100% complete and the painting punch list signed off by the customer, he would receive his final payment within 30 days of the original invoice date.

[Gaillard] did not take the partial payment and has not been back to complete the job or the punch list created at the walk through with customer.

{¶ 7} In either event, the parties agree that Gaillard did not return to the job following July 3, 2008, despite Gill Construction sending a fax to Gaillard including the list of painting fixes that needed to be made, and noting "Work day scheduled to finish: Tuesday, July 15, 2008 9:00 a.m." Schuster testified that Gill Construction hired another painting company to complete the items on the punch list, at a cost of \$347.50. Additionally, Schuster spent 14-16 hours of his time also working to complete the painting punch list. Ultimately, the house was completed by the July 15, 2008 deadline, and the homeowner was "very happy" with the overall construction.

{¶ 8} On July 14, 2008, Gill Construction received a second invoice from Gaillard dated July 2, 2008, which listed charges for painting the interior of the home at \$2.10 per square foot (\$9,565.50), color changes (\$1,400), stain paint splits (\$1,200), painting the garage (\$660), painting the exterior of the home (\$1,935), and upgrades to the interior such as repainting ceilings and walls due to poor drywall work (\$1,831). The total balance due on this invoice was \$16,591.50.

{¶ 9} Gaillard also faxed a letter on July 14, 2008, which stated, “It is my belief that the painting services to sub lot 15 have been completed. Any other service that may be required shall be considered after payment of the July 2nd Invoice has been paid.”

{¶ 10} Having received no payment from Gill Construction, Gaillard filed the present action on August 12, 2008. In his complaint, Gaillard asserts claims of breach of contract, promissory estoppel, unjust enrichment/quantum meruit, and bad faith. Gill Construction answered and denied the allegations. It also asserted counterclaims for breach of contract, declaratory judgment and specific performance, and commercial bad faith. After mediation failed, a bench trial was held on June 30, 2011. Eight days before the trial, Gaillard moved for findings of fact and conclusions of law.

{¶ 11} Following the trial, the court entered its judgment on August 17, 2011, the entirety of which states,

The matter before the Court is Decision after Bench Trial, jury having been waived. Plaintiff brings suit on a contract for painting services rendered as a subcontractor. Defendant is the general contractor for a new

home construction in Danbury Township of Ottawa County, Ohio.

Defendant counterclaims for breach of the same contract and other allied claims. Upon conclusion of trial the parties were invited to file post trial briefs and the Court has received and reviewed each of them.

Based upon the evidence and arguments of counsel, the Defendant has proved by a preponderance of the evidence that Plaintiff has engaged in substantial anticipatory breach of his contract with Defendant whereby the Defendant is excused from performance. Plaintiff's cause is further compromised by his lack of credibility as a witness.

Accordingly, Plaintiff shall recover nothing of the Defendant. Defendant is entitled to recover on its counterclaim from Plaintiff the sum of \$347.50 and costs.

Judgment is entered for Defendant and against Plaintiff in an amount of \$347.50 and costs.

II. Assignments of Error

{¶ 12} Gaillard timely appealed and asserts five assignments of error:

I. The trial court has failed to issue adequate findings of fact and conclusions of law because multiple key findings and issues were conspicuously absent from its opinion.

II. The trial court erred by finding that there was a material breach excusing Gill's entire performance despite the fact that Gaillard had almost completely performed his end of the contract.

III. The trial court erred as a matter of law in refusing to award quantum meruit or unjust enrichment damages to Gaillard based on his purported breach despite the large uncompensated benefit Gaillard provided to Gill.

IV. The trial court's finding that Gaillard breached the contract was erroneous because the lack of a payment due date and other deviations made the contract invalid.

V. The trial court erred in determining that Gill was not liable under promissory estoppel.

III. Analysis

{¶ 13} In his first assignment of error, appellant argues that the trial court failed to issue adequate findings of fact and conclusions of law, despite his Civ.R. 52 motion. Civ.R. 52 provides,

When questions of fact are tried by the court without a jury, judgment may be general for the prevailing party unless one of the parties in writing requests otherwise before the entry of judgment pursuant to Civ.R. 58, or not later than seven days after the party filing the request has been given notice of the court's announcement of its decision, whichever is

later, in which case, the court shall state in writing the conclusions of fact found separately from the conclusions of law.

When a request for findings of fact and conclusions of law is made, the court, in its discretion, may require any or all of the parties to submit proposed findings of fact and conclusions of law; however, only those findings of fact and conclusions of law made by the court shall form part of the record.

{¶ 14} Here, Gaillard timely moved for findings of fact and conclusions of law by filing his motion eight days before the trial. Further, at the end of the trial, the court ordered the parties to file proposed findings of fact and conclusions of law by July 15, 2011, which both parties did. Thus, since Gaillard complied with Civ.R. 52's procedural requirements, the trial court is obligated to issue its findings of fact and conclusions of law.

{¶ 15} “The provisions of Civ.R. 52 are mandatory in any situation in which questions of fact are tried by the court without intervention of a jury.” *Werden v. Crawford*, 70 Ohio St.2d 122, 124, 435 N.E.2d 424 (1982). “The purpose of the rule is therefore clear: to aid the appellate court in reviewing the record and determining the validity of the basis of the trial court’s judgment.” *Id.* “Generally, * * * the findings and conclusions must articulate an adequate basis upon which a party can mount a challenge to, and the appellate court can make a determination as to the propriety of, resolved

disputed issues of fact and the trial court's application of the law." *Kroeger v. Ryder*, 86 Ohio App.3d 438, 442, 621 N.E.2d 534 (6th Dist.1993).

{¶ 16} In *Kroeger*, the plaintiff sued her brother's estate for payment of services she rendered during his final illness. After trial, the trial court found in favor of the plaintiff and awarded the prayed for amount, \$32,400, in damages. The court's decision stated,

“The care provided to decedent from the period of March 15, 1987 to June 16, 1989 was complete, comprehensive and competent. Decedent promised to pay plaintiff for such services but died before he was able to effect payment. Decedent provided plaintiff with an opportunity to ‘draw down’ his checking and savings accounts in satisfaction of his promise to pay, but plaintiff declined on grounds of propriety. The burden of proof required of plaintiff upon her complaint is by a preponderance of the evidence and in satisfaction of that burden established damages well in excess of her prayer of \$32,400. However, plaintiff is limited to recovering the amount claimed in the complaint, and judgment will be granted accordingly, with interest and costs.” *Id.* at 441.

{¶ 17} On appeal, the executor of the estate assigned as error the trial court's failure to issue findings of fact and conclusions of law. Upon review, this court affirmed, holding that the trial court's decision contained findings of fact and conclusions of law sufficient to satisfy the requirements of Civ.R. 52. *Id.* at 444. Specifically, we concluded

that, as to the theory of liability, the trial court's finding that the decedent "promised to pay plaintiff for [her] services" clearly meant that the court found in her favor on the basis of breach of an express oral contract, as opposed to quantum meruit or breach of an implied contract. *Id.* at 443. Additionally, as to damages, we concluded that (1) the court's finding that the care "was complete, comprehensive and competent" sufficiently resolved against the executor his defense that there were time "gaps" in the care provided, (2) the court's finding that the decedent "died before he was able to effect payment" sufficiently resolved against the executor his defense that the decedent had already compensated the plaintiff, and (3) the court's award of \$32,400, when considered together with the other parts of the record, formed an adequate basis to determine that the court determined from the testimony of the expert witnesses that the value of the plaintiff's services was either \$7.50 or \$8.50 per hour, as opposed to \$6.09 per hour or \$500 a month. *Id.* at 443-444.

{¶ 18} In contrast, here the trial court provided no findings of fact or conclusions of law that enable us to make a determination as to the propriety of its decision. For example, we do not know what the court found to be the terms of the contract, or on what grounds the court determined that Gaillard committed a "substantial anticipatory breach" of the contract, thereby excusing Gill Construction from performance. *See generally Kersh v. Montgomery Dev. Ctr., Ohio Dept. of Mental Retardation and Dev. Disabilities*, 35 Ohio App.3d 61, 62, 519 N.E.2d 665 (10th Dist.1987) ("A breach of one of several

terms in a contract does not discharge the obligations of the parties to the contract, unless performance of that term is essential to the purpose of the agreement”).

{¶ 19} Likewise, we do not know on what grounds the trial court relied to find that Gaillard was not entitled to damages under his claims for unjust enrichment/quantum meruit, promissory estoppel, or bad faith. *See generally Murray v. Marbro Builders, Inc.*, 53 Ohio App.2d 1, 3, 371 N.E.2d 218 (1st Dist.1977) (agreeing with the “modern rule” that “permits defaulting contractors, where their work has contributed substantial value to the other contracting party’s property, to recover the value of work and materials on a quantum meruit basis, the recovery being diminished, however, to the extent of such damage as the contractor’s breach causes the other party”); *Lamberjack v. Gyde*, 6th Dist. No. 92-OT-034, 1993 WL 476313 (Nov. 19, 1993) (“assuming arguendo, the jury decides that [plaintiff] only partially performed on the express agreement, it could still determine that he is entitled to the reasonable value of the benefits conferred on [defendants] less any damages for his own breach of the oral agreement”); *Technical Constr. Specialties v. Shenigo Constr.*, 6th Dist. No. E-03-004, 2004-Ohio-1044, ¶ 27 (contractor breached its contract and was further not entitled to recover the reasonable value of work performed because no evidence existed that the work contributed substantial value to the property).

{¶ 20} Therefore, we hold that the trial court did not meet its requirement under Civ.R. 52 to issue its findings of fact and conclusions of law. Accordingly, Gaillard’s first assignment of error is well-taken.

{¶ 21} Further, given this determination of Gaillard's first assigned error, we are unable to review his assignments of error two through five at this time.

III. Conclusion

{¶ 22} The judgment of the Ottawa County Court of Common Pleas is reversed. This cause is remanded to that court for the purpose of providing separate findings of fact and conclusions of law. In following our order on remand, the trial judge must vacate his previous judgment and reenter that judgment as of the same date that the findings of fact and conclusions of law are entered. *Meyers-Decator v. Decator*, 6th Dist. No. WM-08-028, 2009-Ohio-4920, ¶ 12, *citing Kennedy v. City of Cleveland*, 16 Ohio App.3d 399, 401, 476 N.E.2d 683 (8th Dist.1984) (“When a trial court’s judgment has been reversed and remanded solely for findings of fact and conclusions of law, it is incumbent upon the trial judge to vacate his previous judgment and reenter the same as of the date of the filing of the findings of fact and conclusions of law. This procedure is followed to reserve to the parties their respective rights of appeal after such findings have been made.”) Gill Construction is ordered to pay the costs of this appeal pursuant to App.R. 24.

Judgment reversed.

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

Mark L. Pietrykowski, J.

JUDGE

Thomas J. Osowik, J.

JUDGE

Stephen A. Yarbrough, J.
CONCUR.

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:
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