[Cite as *Povroznik v. Mowinski Builders, Inc.*, 2010-Ohio-1669.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93225

ANATOLY POVROZNIK, ET AL.

PLAINTIFFS-APPELLEES

vs.

MOWINSKI BUILDERS, INC., ET AL.

DEFENDANTS-APPELLANT

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Common Pleas Court
Case No. CV-653726

BEFORE: Sweeney, J., McMonagle, P.J., and Blackmon, J.

RELEASED: April 15, 2010

JOURNALIZED:

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FOR APPELLEES

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief per App.R. 26(A), or a motion for consideration en banc with supporting brief per Loc.App.R. 25.1(B)(2), is filed within ten days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. 2.2(A)(1).

JAMES J. SWEENEY, J.:

{¶ 1} Defendant-appellant, Mowinski Builders, Inc. ("defendant"), appeals the trial court's awarding $57,800 in damages to plaintiffs-appellees, Anatoly and Dorota Povroznik ("the Povrozniks"), in this breach of contract case. After reviewing the facts of the case and pertinent law, we affirm.

{¶ 2} In the spring of 2006, defendant and the Povrozniks entered into a contract under which defendant was to complete the rough construction of the Povrozniks' house at 7626 State Road, in Parma, Ohio. Defendant's obligations under the contract included excavation, concrete footers and floors, footer drain and stone, foundation walls, rough lumber, brick facing, electrical, plumbing, heating and air conditioning, sewers, and water lines. The contract detailed six installments the Pavrozniks were to pay defendant upon completion of various construction stages. It is undisputed that the Povrozniks were responsible for finishing the home after defendant's work was complete.

{¶ 3} According to the Povrozniks, the parties agreed that defendant's work would be done by the end of 2006. Defendant did not meet this time frame. Eventually, the Povrozniks became unhappy with the quality of defendant's work and its inability to complete the job in a timely manner.

{¶ 4} In March 2007, the Povrozniks dismissed defendant from the job. In response, defendant sent the Povrozniks an invoice for $17,015, claiming that they owed $10,450, which defendant alleged was the balance of the second-to-last installment payment under the contract, plus $6,565 for various additional items.

Nothing was mentioned in this invoice about the final installment of $12,000. Defendant also filed a mechanic's lien against the property, claiming that the Povrozniks owed $24,515 for work performed under the contract.

{¶ 5} As the Povrozniks began the finish work on the house, they encountered the following issues: there were seven front steps, rather than two as depicted in the blueprints; the roof-line of the front entrance overhang blocked a second story window, causing it to be inoperable; there was a water problem starting at the inoperable window, running down to the first story and into the basement; and defendant did not excavate as required under the contract.

{¶ 6} On March 13, 2008, the Povrozniks filed suit against defendant for breach of contract, among other claims. Defendant filed a counterclaim against the Povrozniks, alleging that they owed $24,515 under the contract. After a bench trial, the court found in favor of the Povrozniks, awarding them $57,800. The court ordered defendant to withdraw the mechanic's lien.

{¶ 7} Defendant appeals and raises one assignment of error for our review:

{¶ 8} "I. The trial court erred by failing to include the amount of the appellant's damages for breach of contract as a set off against the damages awarded to appellees."

{¶ 9} Specifically, defendant argues that "it is entitled to have the damages adjusted to reflect the amounts [the Povrozniks] failed to pay on the contract."

{¶ 10} Defendant cites two legal authorities on appeal, both of which address the same rule of law. First, *Allied Erecting & Dismantling Co., Inc. v. Youngstown* (2002), 151 Ohio App.3d 16, 31-32, 783 N.E.2d 523, stands for the proposition that "the general measure of damages in a contract action is the amount necessary to place the nonbreaching party in the position he or she would have been in had the breaching party fully performed under the contract." Second, defendant cites *State ex rel. Stacy v. Batavia Local School Dist. Bd. of Educ.,* 105 Ohio St.3d 476, 481, 2005-Ohio-2974, 829 N.E.2d 298, which states that "'[m]oney damages awarded in a breach of contract action are designed to place the aggrieved party in the same position it would have been in had the contract not been violated.'" (Internal citations omitted.)

{¶ 11} In the instant case, the court did not find that the Povrozniks breached the contract; therefore, it did not award defendant damages. It is common sense that we cannot review the amount of a damage award when there is no damage award.

{¶ 12} We assume, for the sake of argument, that the essence of defendant's appeal is that the court erred by not finding that the Povrozniks breached the parties' agreement when they failed to pay defendant the contract

balance. In other words, the issue is whether the court erred when it found for the Povrozniks on defendant's breach of contract counterclaim.[1]

{¶ 13} To succeed on a breach of contract claim, a party must prove the existence of a contract, that party's performance under the contract, the opposing party's breach, and resulting damages. See *On Line Logistics, Inc. v Amerisource Corp.,* Cuyahoga App. No. 82056, 2003-Ohio-5381, at ¶39. In reviewing the trial court's decision, we apply the standard that judgments supported by competent, credible evidence in the record must not be reversed as being against the manifest weight of the evidence. *C.E. Morris Co. v Foley Construction Co.* (1978), 54 Ohio St.2d 279, 376 N.E.2d 578. In addition, we give deference to the trial court's findings. See *Seasons Coal Co., Inc. v City of Cleveland* (1984), 10 Ohio St.3d 77, 461 N.E.2d 1273.

{¶ 14} At trial, in the instant case, two expert witnesses on home construction and restoration presented evidence that defendant negligently constructed the structure of the house at the front entranceway. The experts testified that the elevation of the front steps and main entrance was one to four feet

[1]We make this assumption because defendant must prove he is entitled to damages on his counterclaim before the amount of damages comes into question. Additionally, a "set off" as related to damage awards is limited to an undisputed amount owed under an independent contract that is not the subject of the underlying litigation. See *Walter v. National City Bank of Cleveland* (1975), 42 Ohio St.2d 524, 330 N.E.2d 425. In the instant case, any amount allegedly owed defendant is both disputed and the subject of this litigation; therefore, defendant's argument regarding a "set off" is misplaced.

higher than called for in the blueprints. This caused a gutter to run into a second story window, which in turn, caused water damage to the interior of the house. The evidence in the record also shows that defendant did not properly excavate the lot, which contributed to the front elevation problem. Both experts testified that they had never seen anything similar to this during their combined 56 years in the construction industry.

{¶ 15} Two estimates to remove and rebuild the front entranceway of the house and repair the resulting damage were entered into evidence. One estimate was for $69,720 and the second estimate was for $58,700.

{¶ 16} In addition, there was inconsistent evidence regarding cash payments the Povrozniks made to defendant, which were not credited under the installment payment plan. Defendant testified that the Povrozniks paid $3,118.99 in cash. The Povrozniks, on the other hand, testified that they paid defendant as much as $10,000 in cash.

{¶ 17} Furthermore, the evidence in the record showed that defendant did not comply with R.C. 1311.07, which requires a party filing an affidavit for a mechanic's lien to serve the affidavit on the property owner. Defendant filed an affidavit for the mechanic's lien on April 17, 2007 but did not serve the Povrozniks with a copy.

{¶ 18} We find that the above evidence is competent and credible, and it corroborates the court's judgment. Accordingly, we cannot say that the court erred by finding for the Povrozniks on defendant's counterclaim.

{¶ 19} Defendant's sole assignment of error is overruled.

{¶ 20} Judgment affirmed.

It is ordered that appellees recover from appellant their costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Court of Common Pleas to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

JAMES J. SWEENEY, JUDGE

PATRICIA A. BLACKMON, J., CONCURS;
CHRISTINE T. McMONAGLE, P.J., CONCURS
IN JUDGMENT ONLY