[Cite as *Castrovinci v. Habeeb*, 2010-Ohio-6022.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94511

JOSEPH CASTROVINCI, D.B.A. J.C. HEATING & COOLING, LLC

PLAINTIFF-APPELLEE

vs.

GARY HABEEB

DEFENDANT-APPELLANT

JUDGMENT:
DISMISSED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-679501

BEFORE: Rocco, P.J., Stewart, J., and Sweeney, J.

RELEASED AND JOURNALIZED: December 9, 2010

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KENNETH A. ROCCO, P.J.:

{¶ 1} Defendant-appellant, Gary Habeeb, appeals from a common pleas court judgment in favor of plaintiff-appellee, Joseph Castrovinci, based upon a jury verdict as well as the court's order overruling his motion for a new trial. We find that the judgment is not final and appealable because the court has not disposed of appellant's counterclaim. Therefore, we must dismiss this appeal.

{¶ 2} The complaint in this case was filed December 18, 2008 and alleged that Castrovinci "provided certain labor and materials for HVAC[1] installation at 5869 Broadview Road, Parma, Ohio" and billed Habeeb for his work, but Habeeb failed to pay Castrovinci $7,970.46 that was due to him. Habeeb answered and counterclaimed that Castrovinci performed defective work and ultimately abandoned the project so that Habeeb had to retain another contractor to complete it. Habeeb also claimed the project was delayed and as a result he lost rental income from the prospective tenant.

{¶ 3} The case proceeded to a jury trial beginning August 3, 2009. Before jury selection began, the court noted that Castrovinci's counsel had submitted proposed jury instructions and copies of his exhibits but Habeeb's counsel had not. The court noted that "the jury instructions will be given as plaintiff has submitted them," and "[d]efendant will not be allowed [to] introduce any exhibits in the case."

{¶ 4} At trial, the jury heard the testimony of Castrovinci and Habeeb, as well as Edward Ripepi, the tenant of the premises, and Thomas Brown, who completed the HVAC work. Habeeb testified that he retained Brown to reinstall a furnace that had been installed backward and to reinstall diffusers and ductwork, all at a cost of $1,100. Habeeb also testified that he lost one

[1] "HVAC" is a common acronym for the phrase "heating, ventilation, and air conditioning." We will use this acronym throughout this opinion.

month's rent of $2,000 because the premises were not ready for the tenant to occupy.

{¶ 5} After the court instructed the jury on Castrovinci's claim, Habeeb's counsel objected that there was no instruction on the counterclaim. The court declined to provide the jury with any instruction, stating "[y]ou didn't give me any proposed jury instructions as ordered. And I think it's paragraph ten of the trial order. And again, as ordered this morning, I asked you. You had two and a half hours to prepare a jury instruction. Mr. Mausar [Castrovinci's counsel] did this in time. You didn't give me anything." The jury returned a verdict finding in favor of Castrovinci and against Habeeb in the amount of $7,970.46, upon which the court entered judgment.

{¶ 6} The trial court did not dismiss Habeeb's counterclaim, either orally at trial or in a written entry. The judgment in favor of Castrovinci did not preclude a judgment in favor of Habeeb on the counterclaim.[2] It is also clear that the counterclaim was not abandoned at trial: Habeeb presented evidence to support it. Cf. *F.A.R. Food, Inc. v. R. Fresh, LLC,* Mahoning App. No. 06 MA 149, 2007-Ohio-2758, ¶59; *Rosepark Properties, Ltd. v. Buess*, 167

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[2]Even the broadest reading of our en banc decision in *Snider-Cannata Interests, LLC v. Ruper*, Cuyahoga App. No. 93401, 2010-Ohio-5309, would not allow us to conclude that the trial court implicitly dismissed the counterclaim by granting judgment on the complaint. Castrovinci's and Habeeb's claims were not correlatives of one another.

Ohio App.3d 366, 2006-Ohio-3109, ¶52-53, 855 N.E.2d 140. Despite the court's statement that its judgment was "final," the counterclaim remains pending.

{¶ 7} Pursuant to Civ.R. 54(B), "the court may enter final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay." The court here did not find no just reason for delay. See, e.g., *Van Dyke v. Columbus*, Franklin App. No. 06AP-1114, 2007-Ohio-2088, ¶9. Therefore, we must dismiss this appeal for lack of a final, appealable order.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court 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.

KENNETH A. ROCCO, PRESIDING JUDGE

MELODY J. STEWART, J., and
JAMES D. SWEENEY, J.,* CONCUR
(*Sitting by assignment: Retired Judge of the Eighth District Court of Appeals)