[Cite as *ABLE Roofing v. Pingue*, 2011-Ohio-2868.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

ABLE Roofing,	:	
Plaintiff-Appellee,	:	
		No. 10AP-404
v.	:	(C.P.C. No. 07CVH-01-236)
Joseph A. Pingue, Sr.,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on June 14, 2011

Brian J. Bradigan, Inc., and *David W. Orlandini*, for appellee.

Zacks Law Group LLC, Benjamin S. Zacks, James R. Billings, *Susan B. Gellman*, and *Robin L. Jindra*, for appellant.

APPEAL from the Franklin County Court of Common Pleas.

BROWN, J.

{¶1} This is an appeal by defendant-appellant, Joseph A. Pingue, Sr., from a decision and entry of the Franklin County Court of Common Pleas overruling appellant's objections to a magistrate's decision and adopting the magistrate's recommendation that judgment be entered in favor of appellant on the complaint of plaintiff-appellee, ABLE Roofing ("Able"), and that appellant be awarded damages in the amount of $9,717 on his counterclaim.

{¶2} This case arises out of a contract between Able and appellant, under which the parties contracted for Able to install a new roof on an office building owned by appellant. The case was tried before a magistrate of the trial court, and the following factual background is taken from the transcript of the proceedings before the magistrate, as well as from the magistrate's findings of fact. Appellant is the owner of a one-story, six-unit commercial office building, located at 710 Worthington Woods Boulevard, Worthington, Ohio. The building has a truss roof system with six dormers built on top of the existing decking; the roof measures approximately 14,000 square feet.

{¶3} Appellant and Able entered into a contract in July 2003 for the roof installation. Under the terms of the contract, Able agreed to remove the existing shingles, install a felt underlayment, install dimensional shingles, and perform other listed work. All work was to be completed in a "substantial workmanlike manner," and Able guaranteed a ten-year warranty on all workmanship. The final contract price, including additions for wood replacement, totaled $18,384. Appellant made an initial payment to Able in the amount of $9,191, leaving an unpaid balance of $9,193.

{¶4} Able performed roof installation work over several days in August 2003, replacing 960 square feet of wood substrate. While the work was being performed, appellant and his son, Michael Pingue, visited the building; appellant testified that, during the installation, he observed the work crew was not properly overlapping the shingles, and that there were exposed nails and uneven shingles. On August 26, 2003, appellant faxed a letter with a list of complaints to Able's supervisor, Scott Henderson.

{¶5} On September 30, 2003, Able sent appellant an invoice for the balance of the contract price ($9,193). Ross Appeldorn, Able's vice-president of sales and

marketing, testified that Able completed the work under the contract in a workmanlike manner, and that the project passed Able's quality control inspection. On January 8, 2004, appellant sent Henderson another letter expressing dissatisfaction as to the work performed by Able, including a claim that the dormers needed to be reinforced. At trial, appellant testified that the roof apexes were soft, and that the plywood was not sufficiently sturdy for the installation of shingles. Appeldorn testified that appellant's complaint regarding the softness of the apexes was a structural problem that would require interior carpentry work. According to Appeldorn, Able did not contract to address problems involving the structure supporting the roof decking.

{¶6} In February 2004, the parties met to discuss outstanding issues. The parties then signed a payment agreement, dated February 17, 2004, whereby Able agreed to repair the "dormer valley apexes" and complete any "legitimate" workmanship warranty repairs. Under the payment agreement, such work was to be completed no later than May 30, 2004. The parties also created a final punch list proposal. Appellant agreed that, upon completion of the work, the remaining balance of the contract would be paid.

{¶7} Appeldorn testified that Able completed the work specified in the final punch list prior to the agreed deadline. On June 4, 2004, Able sent a letter to appellant requesting payment of the balance due. Appellant sent a letter to Able on June 14, 2004, stating that the contract balance had been forfeited because the punch list work had not been properly completed. On June 23, 2004, Able responded by letter stating that the punch work list had been completed. On July 1, 2004, appellant sent another letter to Able with a list of concerns.

{¶8} On September 30, 2005, Able filed a complaint against appellant in the Franklin County Municipal Court, alleging breach of contract and requesting damages in the amount of $9,193. On December 14, 2005, appellant filed an answer and counterclaim, asserting in the counterclaim causes of action for breach of contract and breach of warranty.

{¶9} The case was subsequently transferred to the Franklin County Court of Common Pleas, and a bench trial was conducted on June 9, 2008 before a magistrate of the trial court. The magistrate issued a decision on July 30, 2008, concluding that appellant was entitled to judgment on Able's complaint, and that appellant was entitled to recover damages on his counterclaim. More specifically, the magistrate found that Able breached the contract by failing to install the roof in a substantial workmanlike manner, and that the initial measure of damages was $18,910 (based upon testimony as to an estimate for the cost of a new roof). The magistrate further determined that there should be a reduction of the damages by the amount of the contract price that appellant did not pay ($9,193), and that appellant was therefore entitled to damages in the amount of $9,717. The magistrate rejected appellant's request for attorney's fees and expert witness costs, and the magistrate further found insufficient evidence to support appellant's damages claim for lost rental income.

{¶10} On August 6, 2008, appellant filed a motion requesting findings of fact and conclusions of law. On September 9, 2008, the magistrate issued a decision concluding that appellant had failed to show that additional findings of fact were necessary. On March 9, 2009, appellant filed objections to the magistrate's decision. By decision and

entry filed March 30, 2010, the trial court overruled appellant's objections and adopted the magistrate's decision, entering judgment in favor of appellant in the amount of $9,717.

{¶11} On appeal, appellant sets forth the following two assignments of error for this court's review:

> ASSIGNMENT OF ERROR NO. 1: The trial court committed reversible error by overruling Defendant's objections to the Magistrate's denial of Defendant's request for findings of fact and conclusions of law.
>
> ASSIGNMENT OF ERROR NO. 2: The trial court committed reversible error by overruling Defendant's objections to the Magistrate's Decision and Adopting the Magistrate's Decision.

{¶12} Under the first assignment of error, appellant argues that the trial court erred in overruling his objections to the magistrate's denial of a request for findings of fact and conclusions of law. As noted, following the magistrate's decision on July 30, 2008, appellant filed a motion, pursuant to Civ.R. 52 and 53, for findings of fact and conclusions of law. In his memorandum in support, appellant argued that the magistrate's decision contained merely a summary of the evidence, and that the decision failed to address legal issues and causes of action.

{¶13} On September 9, 2008, the magistrate issued a decision on appellant's motion, in which the magistrate noted that the decision rendered on July 30, 2008 contained 15 pages of findings of fact and conclusions of law addressing "the terms of the contract, the roof installation work, the problems with the work, the Payment Agreement and final punch list, the roof inspections and photographs, the opinions of the expert witnesses, and damages," and that those findings "identify the testimony found to be credible." The magistrate determined that appellant's motion failed to identify any factual

issues appellant "believes were not addressed," and the magistrate concluded that appellant "failed to show that additional Findings of Fact are necessary." The magistrate did, however, supplement the earlier decision "to expressly state that both parties' unjust enrichment claims are inapplicable because of the express contracts."

{¶14} In his objections to the magistrate's decision, appellant again asserted that the magistrate's July 30, 2008 decision contained only a summary and general overview of the evidence, and that it did not contain specific or enumerated findings. Appellant further argued that the magistrate failed to use the proper legal standard to determine whether to issue findings of fact and conclusions of law, contending that the failure to issue a timely request for findings of fact and conclusions of law constituted reversible error. The trial court overruled appellant's objections.

{¶15} Similar to his argument before the trial court, appellant contends on appeal that a court's failure to issue findings of fact upon a timely request is reversible error. In support, appellant cites to the provisions of Civ.R. 52 and 53.

{¶16} Civ.R. 52 provides in relevant part: "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." Civ.R. 53(D)(3)(a)(ii) states in part:

> [A] magistrate's decision may be general unless findings of fact and conclusions of law are timely requested by a party or otherwise required by law. * * * If a request for findings of fact and conclusions of law is timely made, the magistrate may require any or all of the parties to submit proposed findings of fact and conclusions of law.

{¶17} In the context of Civ.R. 53, this court has previously noted: "The purpose of setting forth findings of fact and conclusions of law is to permit a reviewing court to assess the validity of the trial court's judgment," and "[a] decision that recites various facts and legal conclusions is sufficient when, considered with the rest of the record, it forms an adequate basis to decide the issues on appeal." *McNeilan v. Ohio State Univ. Med. Ctr.*, 10th Dist. No. 10AP-472, 2011-Ohio-678, ¶43, citing *Ferrari v. Ohio Dept. of Mental Health & Mental Retardation* (1990), 69 Ohio App.3d 541, 545. Similarly, courts have held that "no precise rule has been or should be set forth as to what is required of the trial court in order to comply with Civ.R. 52," but in general "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* (1993), 86 Ohio App.3d 438, 442.

{¶18} In the instant case, the trial court, in overruling appellant's objections, held in part: "The Magistrate's 'summary' demonstrates that he conscientiously considered all of the evidence that was presented," and that "[t]he specific findings of fact supporting his legal conclusions are plainly evident within the Decision." Upon review of the magistrate's decision, we agree. The magistrate's July 30, 2008 decision, containing more than ten pages of findings of fact and five pages of conclusions of law, provided sufficient detail for appellant to challenge by way of objections the basis for that decision, as well as for this court to review and decide the issues on appeal. *McNeilan* at ¶43. Thus, the trial court did not err in overruling appellant's objections to the magistrate's denial of his motion for

findings of fact and conclusions of law. Accordingly, appellant's first assignment of error is without merit and is overruled.

{¶19} Under the second assignment of error, appellant asserts that the trial court erred by overruling appellant's objections to the magistrate's decision with respect to the award of damages. Appellant first contends that he was entitled to the full value of the replacement roof as damages.

{¶20} In general, " '[t]he essential elements of a cause of action for breach of contract are the existence of a contract, performance by the plaintiff, breach by the defendant and resulting damage to the plaintiff.' " *Winner Bros., LLC v. Seitz Elec., Inc.*, 182 Ohio App.3d 388, 2009-Ohio-2316, ¶31, quoting *Flaim v. Med. College of Ohio*, 10th Dist. No. 04AP-1131, 2005-Ohio-1515, ¶12. This court has recognized that the common law "imposes a duty upon contractors and builders to perform in a workmanlike manner." *Custer v. Commercial Builders & Floor Coverings* (Sept. 26, 1989), 10th Dist. No. 89AP-117. The measure of damages in such a case is "the cost to repair defects to the extent necessary to place the nonbreaching party in the position contemplated by the parties at the time of entering into the contract," i.e., "the measure of damages is determined by 'cost of correction.' " Id. See also *Landis v. William Fannin Builders, Inc.,* 10th Dist. No. 10AP-568, 2011-Ohio-1489, ¶31 ("Generally, the appropriate measure of damages in an action for a breach of a construction contract is the cost to repair the deficient work; that is, the cost of placing the building in the condition contemplated by the parties at the time they entered into the contract").

{¶21} Appellant does not dispute the magistrate's determination that Able failed to install the roof in a workmanlike manner, or that the proper measure of damages is the

replacement cost of a new roof. On the latter point, Ohio courts have permitted the cost of a replacement roof as a proper measure of damages. See, e.g., *Lambert v. Merrick* (Aug. 31, 1992), 3d Dist. No. 5-92-11 (trial court did not err in holding that proper amount of damages was cost of new replacement roof and not actual cost of roof installed by defendant). Appellant challenges, however, the trial court's adoption of the magistrate's determination that appellant's damages must be reduced by the unpaid contract balance, i.e., appellant argues he was entitled to damages in the amount of the full cost estimate to replace the roof ($18,910) rather than the difference between the replacement cost and the unpaid portion of the contract price.

{¶22} Under Ohio law, "[a] party proving breach of contract is entitled to the benefit of his or her bargain." *Schambach v. Afford a Pool & Spa,* 7th Dist. No. 08 BE 15, 2009-Ohio-6809, ¶10, citing *Garofalo v. Chicago Title Ins. Co.* (1995), 104 Ohio App.3d 95, 108. Further, "[i]n a breach of contract action, the award of money damages is designed to place an aggrieved party in the same position that he or she would have been had the contract not been breached." *Schambach* at ¶10, citing *World Metals, Inc. v. AGA Gas, Inc.* (2001), 142 Ohio App.3d 283, 287.

{¶23} Upon review, we find no error with the magistrate's determination that appellant was entitled to the estimated cost of replacing the roof ($18,910), less the amount of the contract price appellant did not pay ($9,193), resulting in an award of $9,717. As noted by the magistrate, the terms of the contract contemplated that appellant would receive a new roof constructed in a workmanlike manner, thus allowing, as the measure of damages, the estimated cost of replacing the roof; however, in order to receive a new roof, it was contemplated that appellant would pay the contract price (i.e.,

as the magistrate observed, appellant "is not entitled to receive the benefit of the Contract without paying the Contract price"). (Magistrate Dec. at 12.)

{¶24} Here, the magistrate and trial court correctly concluded that the damages must be reduced by the amount withheld by appellant (i.e., the unpaid portion of the contract price) to avoid a windfall to appellant in receiving the benefit of the bargain. See, e.g., *Oelschlegel v. Mut. Real Estate Investment Trust* (Pa.Super.Ct.1993), 633 A.2d 181, 184 (measure of damages for construction contractor's breach is the cost of completing the work minus the unpaid part of the contract price; the unpaid amount, which represents the "cost avoided," must be subtracted from the cost of completion in order to award damages to the non-breaching party). See also Restatement (Second) of Contracts (1981), Section 347 ("injured party has a right to damages * * * as measured by (a) the loss in the value to him of the other party's performance caused by its failure or deficiency, plus (b) any other loss * * * caused by the breach, *less (c) any cost or other loss that he has avoided by not having to perform*"). (Emphasis added.)

{¶25} Appellant also contends that the trial court erred in failing to award incidental and consequential damages, including attorney's fees, consulting fees, and loss of rent. We first address appellant's claim that he is entitled to damages with respect to consultant expenses and attorney's fees.

{¶26} In general, "the costs and expenses of litigation * * * are not recoverable in actions for damages, and ordinarily no attorney fees are allowed." *Weisel v. Laskovski*, 5th Dist. No. 2004CA00175, 2005-Ohio-1113, ¶24. See also *Wilborn v. Bank One Corp*., 121 Ohio St.3d 546, 2009-Ohio-306, ¶7 (Ohio "has long adhered to the 'American rule' with respect to recovery of attorney fees: a prevailing party in a civil action may not

recover attorney fees as a part of the costs of litigation"), citing *Nottingdale Homeowners' Assn., Inc. v. Darby* (1987), 33 Ohio St.3d 32, 33-34; *State ex rel. Beebe v. Cowley* (1927), 116 Ohio St. 377, 382. There are exceptions to this rule, however, permitting the award of attorney fees "when a statute or an enforceable contract specifically provides for the losing party to pay the prevailing party's attorney fees, * * * or when the prevailing party demonstrates bad faith on the part of the unsuccessful litigant." *Wilborn* at ¶7.

{¶27} In the instant case, appellant does not point to any contract language addressing the issue of attorney fees. The magistrate determined that appellant's claims for attorney's fees and expert witness costs "is squarely covered by the American rule making each party responsible for its own attorney's fees." We agree, and find no error with the trial court in adopting the magistrate's decision not to award attorney fees or other litigation expenses.

{¶28} Appellant also contends that the trial court erred in failing to award damages for alleged lost rental income. Appellant argues that he presented credible evidence of loss of income on the rental units due to Able's breach.

{¶29} In rejecting appellant's claim for damages based upon purported lost rental income, the magistrate held in part:

> In the post-trial brief, Mr. Pingue seeks an award of $159,600 for lost rental income. The Magistrate finds that Mr. Pingue has failed to provide sufficient evidence to support his claim for alleged lost rental income.
>
> First, the Magistrate does not find credible Mr. Pingue's testimony that rental vacancies were caused by Able's breach. Mr. Pingue testified that prior to Able's work, in 2003, various tenants had moved out of the Building because of hail damage. There was no evidence of when or if those units were re-rented. There was no evidence relating to the rental

> market in the area after Able's work was performed to show that but for Able's breach, some or all of the units would have been rented. There was no evidence that any potential tenants declined to rent due to the alleged water damage.
>
> Second, the evidence does not establish a specific calculation of the alleged lost rent. Mr. Pingue apparently sold one of the six units, but there was no evidence as to when. There was no specific evidence of which units were rented for which time period in 2006. There was no evidence that the claimed rental rates were reasonable for this market.
>
> Third, there was no evidence of efforts to mitigate damages. There was no evidence of efforts to lease any vacant units. Moreover, Mr. Pingue is claiming $159,600 in lost rental income for periods extending as long as five years after the Contract was entered into. If Mr. Pingue were in fact losing such large amounts because of the roof, it can be expected that he would have expended reasonable amounts to repair the roof, such as by accepting Mr. Weisenstein's $15,500 estimate to repair the roof in 2006.

{¶30} In addressing appellant's objections to the magistrate's decision, the trial court found that the record "reflects that [appellant] did not sufficiently prove that he lost rental income due to [Able's] breach of contract." The trial court further found that appellant "clearly did not fulfill his duty to mitigate damages," and that it was "nonsensical" for appellant "to seek $159,600.00 for lost rental income allegedly due to a leaky roof that he could have repaired for $15,500.00."

{¶31} Upon review, we agree with the determinations of the magistrate and trial court that appellant failed to present sufficient evidence for the trier of fact to conclude that appellant's alleged lost rental income was a direct result of Able's breach of the contract; further, the record supports the findings of the magistrate and trial court that there was insufficient evidence to prove mitigation of damages. We note that the primary evidence as to lost rental income came from appellant's own testimony. While the

magistrate credited the testimony of two of appellant's witnesses (Stephen Petty and Tim Weisenstein), the magistrate found the testimony of appellant himself "to be lacking in credibility" and biased. Further, while appellant testified in general that he was "losing money on the rental of these units," he did not testify as to specific efforts to re-rent the units. (Tr., 546.) Here, the trial court was in the best position to assess the credibility of the witnesses, and the court's finding that appellant failed to present evidence as to efforts to mitigate his damages was not against the manifest weight of the evidence. Upon review, we find that the trial court did not err in failing to award appellant damages for alleged loss of rental income.

{¶32} Accordingly, appellant's second assignment of error is without merit and is overruled.

{¶33} Based upon the foregoing, appellant's first and second assignments of error are overruled, and the judgment of the Franklin County Court of Common Pleas is hereby affirmed.

Judgment affirmed.

BRYANT, P.J., and CONNOR, J., concur.

_____