EXHIBIT I

LEXSEE 1989 OHIO APP. LEXIS 1564

JIMMY KOMES, et al., Plaintiffs-Appellees, v. GARLAND TURNER dba SPRINGBORO HOME IMPROVEMENT, Defendant-Appellant

Case No. CA88-09-074

Court of Appeals of Ohio, Twelfth Appellate District, Warren County

1989 Ohio App. LEXIS 1564

May 1, 1989, Decided

COUNSEL: [*1]

Steven M. Runge, Franklin, Ohio, for plaintiffs-appellees

Jeffery E. Richards, Springboro, Ohio, for defendant-appellant

JUDGES:

JONES, P.J., HENDRICKSON and YOUNG, JJ., concur.

OPINION:

MEMORANDUM DECISION AND JUDGMENT ENTRY

Per Curiam. This cause came on to be heard upon an appeal, transcript of the docket, journal entries and original papers from the Franklin Municipal Court of Warren County, transcript of proceedings, and the brief of appellant, oral argument having been waived.

Now, therefore, the assignments of error having been fully considered are passed upon in conformity with *App. R. 12(A)* as follows:

Defendant-appellant, Garland Turner, dba Springboro Home Improvement, appeals a judgment granted to plaintiffs-appellees, Jimmy and Sandra Komes.

On March 16, 1987, the parties contracted for appellant to make certain repairs to appellees' residence which included, among other things, a promise to "take out bow [in the roof] over garage." Work began shortly thereafter and was completed by the end of March. At least nine months later, appellees contacted appellant and claimed that he had failed to remove the bow from the roof over the garage as required by the contract. When appellant **[*2]** refused to meet their request to complete the repairs, appellees filed a complaint for breach of contract in which they sought $ 1,500 in damages.

Following a bench trial in Franklin Municipal Court, the trial judge found in favor of appellees and granted judgment in the amount prayed for in the complaint. Appellant now appeals and submits the following two assignments of error for our consideration:

First Assignment of Error

"The trial court erred in failing to consider defendant-appellant's argument that plaintiffs-appellees waived any breach of contract claims."

Second Assignment of Error

"The trial court erred in assessing damages for $ 1,500.00 when the only estimate presented at trial was for $ 1,080.00."

In his first assignment of error, appellant claims that the trial court erred by failing to consider that appellees waived any breach of contract claim by acquiescing in the roof repairs which they knew were not proceeding according to contract. According to appellant's brief, which is supported by the record, n1 the contractor to whom appellant sub-contracted the job of removing the roof bow informed appellees that he could not remove the entire bow but was only **[*3]** able to remove approximately eighty-five to ninety percent of the bow. Furthermore, appellees were made aware of this fact before the sub-contractor began placing shingles on the roof. Appellees indicated their satisfaction with the job despite appellant's inability to remove the entire bow.

n1 Appellees failed to file a brief or otherwise make an appearance in this appeal. Under

such circumstances, an appellate court may accept the appellant's statement of the facts and issues as correct if such are supported by the record. *Ford Motor Credit Co. v. Potts (1986), 28 Ohio App. 3d 93; App. R. 18(C).*

Generally, acceptance of partial performance of a contract may operate as a waiver of strict compliance with the contract. *Allen v. Curles (1856), 6 Ohio St. 505.* Thus, where a party expresses satisfaction with less than full performance, the facts present "* * * a case of waiver of some item of performance of the contract by a party entitled to insist upon or to waive such performance, as he may elect." *Williams v. Fortlage (1910), 17 Ohio C.C. (N.S.) 242, 243.*

The trial court correctly observed that appellant failed to completely remove the bow above **[*4]** the garage. However, appellees accepted less than full performance on this particular item and such acceptance of partial performance constitutes a waiver of appellees' right to demand full performance. Appellant's first assignment of error is well-taken and is hereby sustained.

In his second assignment of error, appellant challenges the amount of damages which the trial court awarded to appellees. Having decided that appellees waived any right to demand strict compliance by accepting appellant's partial performance, we nevertheless note that the court also erred in the amount of damages. Appellees' complaint requested damages of $ 1,500. In its separate findings of fact and conclusions of law, the trial court found that the cost of completing the contract as specified would exceed $ 2,000. Our review of the record reveals absolutely no evidence to support this finding. Appellees' evidence consisted of a written estimate of $ 1,030 and a building contractor's testimony which established the cost of necessary repairs at $ 1,080. In any event, the evidence would only support a judgment of no more than the latter amount. Given our disposition of the first assignment of error, we also **[*5]** conclude that the trial court erred in awarding damages of $ 1,500.

We find both assignments of error to be well-taken. The judgment in favor of appellees is hereby vacated and judgment is entered in favor of appellant on the complaint.

The assignments of error properly before this court having been ruled upon as heretofore set forth, it is the order of this court that the judgment or final order herein appealed from be, and the same hereby is, reversed and judgment is entered for appellant.

It is further ordered that a mandate be sent to the Franklin Municipal Court of Warren County, for execution upon this judgment.

Costs to be taxed in compliance with *App. R. 24.*

And the court being of the opinion that there were reasonable grounds for this appeal, allows no penalty.

It is further ordered that a certified copy of this Memorandum Decision and Judgment Entry shall constitute the mandate pursuant to *App. R. 27.*

To all of which the appellees, by their counsel, except.

JONES, P.J., HENDRICKSON and YOUNG, JJ., concur.