[Cite as *Cunningham v. Miller*, 2010-Ohio-2526.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

TRUMBULL COUNTY, OHIO

ROBERT R. CUNNINGHAM,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2009-T-0092**
- vs -	:	
JOHN N. MILLER,	:	
Defendant-Appellant.	:	

Civil Appeal from the Trumbull County Court of Common Pleas, Eastern District, Case No. 2009 CVI 250 E.

Judgment: Affirmed.

Robert R. Cunningham, pro se, 7959 Warren-Sharon Road, #18, Masury, OH 44438 (Plaintiff-Appellee).

Phillip S. Arbie, Suite D, Lower Level, 409 Harmon Avenue, Warren, OH 44483 (For Defendant-Appellant).

DIANE V. GRENDELL, J.

{¶1} Defendant-appellant, John N. Miller, appeals the Judgment Entry of the Trumbull County Court of Common Pleas, in which the trial court awarded plaintiff-appellee, Robert R. Cunningham, $1,500 plus interest. For the following reasons, we affirm the decision of the trial court.

{¶2} Cunningham filed a Complaint alleging Miller owed him $1,500, as of July 1, 2009, from the sale of property. A small claims hearing was scheduled for August 24, 2009.

{¶3} The court held that Miller owed Cunningham $1,500, plus interest at the rate of 5% per annum from July 1, 2009.

{¶4} On October 28, 2009, Miller filed a Submission of Statement in Lieu of a Transcript Under Appellate Rule 9(C) with this court. We remanded the matter back to the trial court for the court to "issue a separate judgment stating whether the 9(C) statement has been accepted or rejected." On December 10, 2009, the trial court filed a judgment entry setting forth a statement in lieu of a transcript under App.R. 9(C) and holding that said statement was "settled and approved."

{¶5} The following facts, as set forth in the App.R. 9(C) statement, and approved by the trial court, are relevant for the determination of this appeal.

{¶6} Cunningham and his mother, Jacqueline Cunningham, were present at the hearing, along with Miller. Neither of the parties was represented by counsel.

{¶7} Cunningham presented a contract. Extensive oral testimony, along with several other documents submitted by Miller, was also presented during the hearing. The documents submitted included the deed showing transfer of property; the settlement sheet showing the purchase price as $6,000; and the grantee's statement showing the purchase price to be $6,000. The court found that the documents supported the claims of Cunningham.

{¶8} Miller timely appeals and raises the following assignments of error:

{¶9} "[1.] The trial court erred in enforcing a contract made without consideration.

{¶10} "[2.] The purported contract did not represent the terms of the sale of the real estate, and the true terms of the sale were embodied in official documents (the deed, settlement statement, and the grantee's statement for tax) that the trial court erred in refusing to admit.

{¶11} "[3.] The trial court erred in enforcing an unconscionable contract.

{¶12} "[4.] The trial court erred in enforcing a contract that did not meet the requirements of the Statute of Frauds.

{¶13} "[5.] The second Small Claims Complaint filed August 12, 2009 was not properly served upon the defendant, and, therefore, the trial court erred in accepting it.

{¶14} "[6.] The true party in interest was not properly named as a plaintiff and plaintiff Robert Cunningham was not a true party in interest; therefore, the trial court erred in not dismissing the cause of action.

{¶15} "[7.] The trial court erred in not approving the statement in lieu of a transcript submitted by Defendant/Appellant on September 28, 2009."

{¶16} Miller first contends that the "alleged contract between the Plaintiff-Appellee Robert Cunningham III and Defendant-Appellant John Miller was a contract for John Miller to pay Robert Cunningham a total of seven thousand five hundred dollars ($7,500) for an undescribed lot. At no point did John Miller ever purchase any property from Robert Cunningham." Miller contends that the property was owned by Robert Cunningham's mother, plaintiff-appellee, Jacqueline Cunningham. He claims that "[a]ny promise by John Miller to pay Robert Cunningham money was gratuitous and cannot be enforced."

{¶17} Interpretation of a contract is a matter of law. Appellate courts will review de novo a trial court's interpretation of a contract. *Latina v. Woodpath Dev. Co*. (1991), 57 Ohio St.3d 212, 214. The purpose of contract construction is to discover and effectuate the intent of the parties, and the intent of the parties is presumed to reside in the language they chose to use in their agreement. *Graham v. Drydock Coal Co*., 76 Ohio St.3d 311, 313, 1996-Ohio-393.

{¶18} "'Generally, the consideration necessary to support a contract may consist of either a benefit to the promisor or a detriment to the promisee.' '[T]he benefit to the promisor or detriment to the promisee must be bargained for.' 'Gratuitous promises are not enforceable as contracts, because there is no consideration. Thus, a promise to make a gift is not binding on the promisor.'" *Varee v. Holzinger*, 11th Dist. No. 2006-A-0072, 2007-Ohio-1924, at ¶22 (footnotes omitted).

{¶19} The contract at issue, which was signed by Miller, stated the following:

{¶20} "Lot for sale
John Miller cost $7,500.00
Details- pays $6,000.00 down for the purchase
Balance of $1,500.00 due July, 1, [20]09
Paid to Robert Cunningham III for total owed on sale of property.
Both parties to split the cost of sale.
Make check out Colonial Hill Complex"

{¶21} Furthermore, a deed showing transfer of land from Jacqueline Cunningham to Miller was recorded on August 14, 2008.

{¶22} "It is elementary that the consideration expressed in a contract is presumed to be the full and entire consideration for the services therein agreed to be rendered, or for the material or commodity therein agreed to be furnished and delivered." *Lima v. Pub. Utils. Comm*. (1919), 100 Ohio St. 416, 420. Moreover, the

parol evidence rule precludes the introduction or use of evidence to vary or contradict the terms, including consideration, of a written contract. See *Charles A. Burton, Inc. v. Durkee* (1952), 158 Ohio St. 313, at paragraph two of the syllabus; *AmeriTrust Co. v. Murray* (1984), 20 Ohio App.3d 333, 335; *Gerwin v. Clark* (1977), 50 Ohio App.2d 331, 332-33.

{¶23} Accordingly, on the face of the contract, there was the benefit to the promisor of receiving the land for paying Cunningham. Thus, there was consideration.

{¶24} The first assignment of error is without merit.

{¶25} Miller next asserts that "the purported contract did not in any way embody the terms of the sale of the real estate." He claims that the entire agreement was "contained within the deed, the settlement agreement, and the grantee's tax statement." Furthermore, he argues that these documents were not admitted into evidence. However, the App.R. 9(C) statement explicitly states that "Mr. Miller **provided into evidence several documents**. These included the deed ***, the settlement ***, and the grantee's statement." (Emphasis added).

{¶26} The trial court found that the documents supported the claims of Cunningham, as opposed to Miller. The small claims court judge listened to the witnesses, determined their credibility, and weighed the evidence. Those tasks are for the trier of fact, not the appellate court. *Bechtol v. Bechtol* (1990), 49 Ohio St.3d 21, 23. Moreover, in the absence of relevant evidence, a reviewing court must indulge the presumption of regularity of the proceedings and the validity of the judgment of the trial court. *Knapp v. Edwards Laboratories* (1980), 61 Ohio St.2d 197, 199.

{¶27} We also note that Ohio law has recognized that different rules need to be applied in small claims court. In fact, Evidence Rule 101(C)(8) specifically states that

the Ohio Rules of Evidence do not apply in the small claims division of a county or municipal court.

{¶28} After reviewing the record before us, we cannot conclude that the trial court erred in failing to admit evidence or interpreting the contract. See *Karnofel v. Watson*, 11th Dist. No. 99-T-0052, 2000 Ohio App. LEXIS 2770, at *4 ("Based upon the state of the record before us, we cannot conclude that the court's award of damages was unreasonable, arbitrary, or unconscionable.").

{¶29} Miller's second assignment of error is without merit.

{¶30} In his next assignment of error, Miller claims that the trial court erred in enforcing an unconscionable contract. Miller claims that he "was deprived on any meaningful choice and no meeting of the minds *** occur[ed]." Further, he states that he was "under duress" when he signed the contract.

{¶31} Whether a contract or specific clause is unconscionable is a question of law, which we review de novo. *Taylor Bldg. Corp. of Am. v. Benfield*, 117 Ohio St.3d 352, 2008-Ohio-938, at ¶2; *Renken Enters. v. Klinck*, 11th Dist. No. 2004-T-0084, 2006-Ohio-1444, at ¶17.

{¶32} "Unconscionability is generally recognized to include an absence of meaningful choice on the part of one of the parties to a contract, combined with contract terms that are unreasonably favorable to the other party." *Collins v. Click Camera & Video, Inc.* (1993), 86 Ohio App.3d 826, 834. "Unconscionability thus embodies two separate concepts: 1) unfair and unreasonable contract terms, *i.e.*, 'substantive unconscionability,' and 2) individualized circumstances surrounding each of the parties to a contract such that no voluntary meeting of the minds was possible, *i.e.*, 'procedural unconscionability' ***. These two concepts create what is, in essence, a two-prong test

of unconscionability. One must allege and prove a 'quantum' of both prongs in order to establish that a particular contract is unconscionable." Id. (citation omitted).

{¶33} "Substantive unconscionability refers to the actual terms of the agreement. Contract terms are unconscionable if they are unfair and commercially unreasonable." *Porpora v. Gatliff Bldg. Co*., 160 Ohio App.3d 843, 2005-Ohio-2410, at ¶8.

{¶34} The trial court found, as evidenced in the App.R. 9(C) statement, that the documents supported the claims of the plaintiff. There is nothing in the record before us indicating that the terms are unfair and/or commercially unreasonable.

{¶35} "Procedural unconscionability concerns the formation of the agreement, and occurs where no voluntary meeting of the minds was possible." Id. at ¶7. "In order to determine whether or not a contract provision is procedurally unconscionable, courts consider the relative bargaining positions of the parties, whether the terms of the provision were explained to the weaker party, and whether the party claiming that the provision is unconscionable was represented by counsel at the time the contract was executed." Id.

{¶36} "In considering the relative bargaining positions of each party for purposes of procedural unconscionability, courts should look to the age, education, and experience of the parties, and which party drafted the agreement, amongst other factors. *** Courts should consider whether the party with inferior bargaining power was misled." *Klinck*, 2006-Ohio-1444, at ¶20.

{¶37} "In determining unconscionability, courts are required to look at all of the facts and circumstances surrounding the contract in question. *** When all of the aforementioned factors indicating procedural unconscionability in the formation of this

contract are considered together, it is evident that appellant has met his burden in *** the unconscionability test." Id. at ¶24.

{¶38} Miller cites to facts that are outside the record to support his claims. There is nothing in the record before us to suggest that the contract was procedurally unconscionable. Accordingly, the trial court did not err.

{¶39} Miller's third assignment of error is without merit.

{¶40} In his fourth assignment of error, Miller alleges that the contract did not comply with the Statute of Frauds. He contends that the contract for real estate was not signed by the grantor, Jacqueline Cunningham, and there was no description of the lot in the contract.

{¶41} R.C. 1335.05, Ohio's codification of the statute of frauds, provides: "No action shall be brought whereby to charge the defendant, upon a special promise, to answer for the debt, default, or miscarriage of another person *** or upon a contract or sale of lands ***; unless the agreement upon which such action is brought, or some memorandum or note thereof, is in writing and signed by the party to be charged therewith or some other person thereunto by him or her lawfully authorized."

{¶42} Agreements that do not comply with the statute of frauds are unenforceable. *Hummel v. Hummel* (1938), 133 Ohio St. 520, at paragraph one of the syllabus.

{¶43} In order to satisfy the statute of frauds, a signed memorandum must 1) identify the subject matter of the agreement; 2) establish that a contract has been made; and 3) state the essential terms of that contract with such clearness and certainty that they may be understood from the memorandum itself, or some other writing to which it refers, without the necessity of resorting to parol proof. *Kling v. Bordner* (1901), 65

Ohio St. 86, at paragraph one of the syllabus; *McGee v. Tobin*, 7th Dist. No. 04 MA 98, 2005-Ohio-2119, at ¶3 ("[T]he essential terms to a contract for the sale of land are the identity of the parties, the identity of the land, and the sale price.").

{¶44} The Ohio Supreme Court has held that the statute of frauds does not require that real estate "be described with the particularity used in a deed or a formal contract. To so hold would render nugatory the provision of the statute that 'unless the agreement upon which such action is brought, or some memorandum or note thereof, is in writing, and signed by the party to be charged therewith.'" *Sanders v. McNutt* (1947), 147 Ohio St. 408, 410 (emphasis omitted). Rather, to comply with the statute of frauds, the memorandum "must definitely point out the particular land to be conveyed or must furnish the means of identifying it with certainty." *Schmidt v. Weston* (1948), 150 Ohio St. 293, at paragraph three of the syllabus.

{¶45} "The doctrine of part performance can be invoked, to take a case out of the statute of frauds in Ohio only in cases involving the sale *** of real estate, wherein there has been a delivery of possession of the real estate in question." *Hodges v. Ettinger* (1934), 127 Ohio St. 460, at the syllabus.

{¶46} "Ohio courts have consistently recognized the doctrine of part performance as an exception to the statute of frauds. *** In order to remove a contract from the statute of frauds pursuant to the doctrine of part performance, the party that is relying on the agreement must have undertaken 'unequivocal acts *** which are exclusively referable to the agreement and which have changed his position to his detriment and make it impossible or impractical to place the parties in status quo.' *** 'Thus, a party seeking to establish part performance must demonstrate that he has performed acts in exclusive reliance on the oral contract, and that such acts have

changed his position to his prejudice.'" *Spectrum Benefit Options, Inc. v. Med. Mut. of Ohio*, 174 Ohio App.3d 29, 2007-Ohio-5562, ¶43 (citations omitted).

{¶47} As mentioned above, the property was transferred by quit-claim deed to Miller on August 14, 2008.

{¶48} Consequently, the part performance doctrine removes the statute of frauds bar.

{¶49} Miller's fourth assignment of error is without merit.

{¶50} In his fifth assignment of error, Miller contends that the amended Complaint was not properly served upon him, and, thus, the trial court erred in accepting it. In his sixth assignment of error, Miller argues that the real party in interest, Jacqueline Cunningham, was not named, therefore, the "entire cause of action should have been dismissed by the trial court." Since these assignments of error are interrelated, they will be addressed jointly.

{¶51} An amended Complaint was filed August 12, 2009. The amended Complaint contains the same trial date as the original Complaint, which Miller does not dispute was served properly. The only amendment made to the original Complaint was adding Jacqueline Cunningham as a plaintiff.

{¶52} R.C. 1925.05(A) provides that "[n]otice of the filing [for small claims cases] shall be served on the defendant as provided by the Rules of Civil Procedure." The statute further provides that "[i]f the notice is returned undelivered or if in any other way it appears that notice has not been received by the defendant, at the request of the plaintiff or his attorney, a further notice shall be issued, setting the trial for a subsequent date, to be served in the same manner as a summons is served in an ordinary civil action." R.C. 1925.05(B).

{¶53} The basic statutory purpose of small claims court is to provide a "simple, inexpensive and just way for individuals to resolve small financial disputes with a minimum of legal technicalities." *Miller v. McStay*, 9th Dist. No. 23369, 2007-Ohio-369, at ¶12 (citations omitted). "[B]y design, proceedings in small claims courts are informal and geared to allowing individuals to resolve uncomplicated disputes quickly and inexpensively. Pro se activity is assumed and encouraged." *Cleveland Bar Assn. v. Pearlman*, 106 Ohio St.3d 136, 2005-Ohio-4107, at ¶15.

{¶54} The Tenth District in *Bodmann v. Locations, Ltd*., 10th Dist. No. 03AP-910, 2005-Ohio-1511, stated that the "purpose of service of process [in small claims cases] is both to notify a defendant that a judicial proceeding has been commenced against him, and also to provide him with an opportunity to appear and defend himself." Id. at ¶14. "1925.05 is designed to ensure that necessary parties to an action are properly served with process and that they are afforded adequate time to prepare for trial." Id. at ¶16. Furthermore, "[b]ecause strict legal rules and technicalities are not observed [in small claims cases], it is usually not necessary for a litigant to retain counsel." *Barcley v. Wing*, 7th Dist. No. 86 C.A. 180, 1988 Ohio App. LEXIS 668, at *5 (citation omitted).

{¶55} As the amended Complaint contained the same trial date and location and Miller had sufficient time to prepare for trial. Moreover, Cunningham, Jacqueline, and Miller were present at trial. Any error committed by the trial court in the service of the amended Complaint was harmless.

{¶56} Furthermore, "[t]he real party in interest is the party who will directly be helped or harmed by the outcome of the action. 'The person must have more than an interest in the case. He or she must have some interest in the subject matter of the litigation or is the person who can discharge the claim on which the suit is brought.' ***

The purpose behind Civ.R. 17 is 'to enable the defendant to avail himself of evidence and defenses that the defendant has against the real party in interest, and to assure him finality of the judgment, and that he will be protected against another suit brought by the real party in interest on the same matter.'" *Zuckerman v. Gray*, 11th Dist, No. 2008-T-0022, 2009-Ohio-1319, at ¶13 (citations omitted).

{¶57} Since both Cunningham and Jacqueline Cunningham were parties, the real party in interest was named in the dispute.

{¶58} Miller's fifth and sixth assignments of error are without merit.

{¶59} In his seventh assignment of error, Miller argues that the trial court erred in amending his App.R.9(C) statement prior to accepting it. Further, "the trial court judge, in his corrections, drafted a finding of fact rather than attesting to the accuracy of the testimony."

{¶60} App.R. 9(C) states "If no report of the evidence or proceedings at a hearing or trial was made, or if a transcript is unavailable, the appellant may prepare a statement of the evidence or proceedings from the best available means, including the appellant's recollection. The statement shall be served on the appellee no later than twenty days prior to the time for transmission of the record pursuant to App.R. 10, who may serve objections or propose amendments to the statement within ten days after service. The statement and any objections or proposed amendments shall be forthwith submitted to the trial court for settlement and approval. The trial court shall act prior to the time for transmission of the record pursuant to App.R. 10, and, as settled and approved, the statement shall be included by the clerk of the trial court in the record on appeal."

{¶61} A trial court is permitted to reject an appellant's 9(C) statement by filing its own statement of the evidence. *Covey v. Natural Foods, Inc*., 6th Dist. No. L-03-1111, 2004-Ohio-1336, at ¶31, citing *State ex rel. Fant v. Trumbo* (1986), 22 Ohio St.3d 207, 208. "Where a trial court submits its own statement of the evidence for appeal purposes, the reviewing court, pursuant to App.R. 12(A), is bound to accept the trial court's statement of the evidence. *** [T]he trial court's act of filing its own statement of the evidence acted as a tacit rejection of appellant's 9(C) statement; accordingly, we will rely on the trial court's statement of the evidence." *State v. Lambrecht*, 6th Dist. No. WD-04-097, 2005-Ohio-5882, ¶8 (citation omitted).

{¶62} Accordingly, the trial court was able to modify and/or reject portions of Miller's statement. See *Squires v. John Shelly Painting, Inc*., 11th Dist. No. 2005-T-0006, 2005-Ohio-5285, at ¶11 ("in the absence of a transcript, the trial court, under App.R. 9(C), may accept, reject, modify, or adopt its own statement of evidence and proceedings in order to comport with the truth") (citation omitted).

{¶63} Miller's final assignment of error is without merit.

{¶64} For the foregoing reasons, the Judgment Entry of the Trumbull County Court of Common Pleas, Eastern District, awarding Cunningham $1,500 plus interest, is affirmed. Costs to be taxed against appellant.

MARY JANE TRAPP, P.J.,

TIMOTHY P. CANNON, J.,

concur.