[Cite as *Warren Concrete & Supply, Inc. v. Strohmeyer Contracting, Inc.*, 2010-Ohio-5395.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

TRUMBULL COUNTY, OHIO

WARREN CONCRETE AND SUPPLY, INC.,	:	**O P I N I O N**
Plaintiff-Appellant,	:	**CASE NO. 2010-T-0004**
- vs -	:	
STROHMEYER CONTRACTING, INC.,	:	
Defendant-Appellee.	:	

Civil Appeal from the Court of Common Pleas, Case No. 2006 CV 01526.

Judgment: Affirmed.

Michael J. McGee and *Matthew G. Vansuch*, Harrington, Hoppe & Mitchell, Ltd., 108 Main Avenue, S.W., #500, P.O. Box 1510, Warren, OH 44481 (For Plaintiff-Appellant).

James R. Scher, Burkey, Burkey & Scher Co., L.P.A., 200 Chestnut Avenue, N.E., Warren, OH 44483 (For Defendant-Appellee).

CYNTHIA WESTCOTT RICE, J.

{¶1} Warren Concrete & Supply Co., appellant herein, appeals from the judgment of the Trumbull County Court of Common Pleas adopting the magistrate's decision awarding judgment in favor of appellee, Strohmeyer Contracting, Inc. For the reasons discussed in this opinion, we hold the trial court did not abuse its discretion and affirm.

{¶2} In the summer of 2004, Gregory Strohmeyer, owner and president of appellee, a general contractor, hired Rick Marino, a contractor specializing in concrete installation, for various concrete installation services relating to a residential home construction job at 1066 Resevoir Run, Mineral Ridge, Ohio. Relevant to this case was the installation of a stamped and colored concrete sidewalk and a concrete driveway. Originally, Marino was told the driveway would be installed as a "plain" concrete driveway. The homeowners eventually changed their mind, however, deciding they wanted the driveway to match the sidewalk, which was stamped and finished in a gray-slate color.

{¶3} Strohmeyer communicated the instructions to Marino. Marino pointed out that, while there may be a slight variation in the color, he could match the concrete consistent with the sidewalk. Believing this to be satisfactory, Strohmeyer and Marino entered into an oral contract for Marino to pour the driveway pursuant to the homeowners' new specifications. In October of 2004, some 90 days after he poured the sidewalk, Marino commenced pouring the driveway.

{¶4} While preparing the concrete, Marino stated he used the same color as that used on the sidewalk. Both Strohmeyer and Theodore Gaydosh, the homeowner, were on site for the initial stages of the driveway installation. According to them, the concrete Marino was pouring was of an "obviously different" color. Indeed, Strohmeyer testified the color was so manifestly different he instructed Marino to stop pouring that particular mixture in order to avoid the apparent chromatic mismatch; Marino declined, emphasizing he was certain the dye in the concrete was the same color used on the

sidewalk. Marino explained the discoloration was due to the wetness of the newly mixed concrete and represented the driveway would be fine after the concrete cured.

{¶5} After the concrete on the driveway dried, it is uncontested that it was well-constructed and useable for its intended function (entering and exiting the property with motor vehicles, etc). The concrete on the driveway, however, possessed a completely different color tone: it did not include variations of slate-gray as the sidewalk did, but, instead, was imbued with variations of pink and purple. Due to this problem, the homeowner refused to pay Strohmeyer and, in turn, Strohmeyer did not pay Marino.[1]

{¶6} Subsequently, on June 20, 2006, Richard Marino Conrete Contractor, Inc. ("Marino Concrete"), filed a complaint for breach of contract and unjust enrichment against appellee.[2] Marino Concrete alleged that it was not paid for installing the driveway for appellee at the home of Theodore P. Gaydosh, Jr. and Jennifer L. Gaydosh ("the homeowners") and demanded $19,362.75 in damages.[3] Appellee duly filed its answer and counterclaim alleging breach of contract on behalf of Marino Concrete for failing to install the driveway pursuant to the homeowner's specifications. Prior to trial, the homeowners deposited $16,800 and Strohmeyer deposited $2,500 with the Trumbull County Clerk of Courts to be held in escrow pending the final outcome of the case.

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1. As a sidenote, the record reflects that the homeowners, dissatisfied with the appearance of the driveway, told Strohmeyer they intended to have it torn out and redone according to their specifications. The homeowners were eventually advised not to remove the driveway until the resolution of the pending litigation. The record reflected, however, that the removal of the driveway would cost at least the price of Marino's concrete installation and the additional cost of removal of the existing concrete. According to Strohmeyer, Marino agreed that Strohmeyer could hold $2,500 from a previous job to compensate for the removal if necessary. Marino, however, testified he never entered such an agreement.
2. Prior to the entry of judgment, appellant received an assignment of claims and interest from Marino Concrete from all of Marino Concrete's claims in the underlying case.
3. Although Marino Concrete alleged it was entitled to $2,500 above the amount it charged for installing the driveway, the amount appellee owed it from a previous job, its complaint emcompassed only facts

{¶7} On May 27, 2009, the matter proceeded to bench trial before the magistrate. At trial, Jim Hamilton, appellant's vice president, testified his company supplied the concrete for the sidewalk and driveway. He testified there are many variables that factor into the coloration of concrete, e.g., weather, humidity, and wind. Due to these variables, Hamilton claimed that if concrete is poured on different days, it is likely it will possess different shades of color. Hamilton also stated that the manner in which concrete is finished may have an impact upon its color, e.g., stamping techniques and the amount of color release agent used.

{¶8} Marino testified on his own behalf. He unequivocally stated he used the same color on the driveway as that used on the sidewalk. He asserted he never promised he could provide an exact match of the colors and underscored the only way such a match could occur is if the jobs are done at the same time. Ultimately, Marino's testimony implied that the variation in color was a result of the variables to which Hamilton testified, but most importantly the duration between pours.

{¶9} Michael Warko testifying for Marino Concrete, claimed Marino purchased the color dye from his company. Warko testified, in his recollection, Marino purchased the same dye for both the sidewalk and the driveway. Warko conceded, however, he had no documentation related to Marino's purchase. He further stated that he was not on site when Marino poured the cement and because customers "*** will buy, could buy three or four different colors for three or four different jobs at a time ***[,]" he could not attest to what colors Marino actually used on either the sidewalk or the driveway.

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related to the Reservoir Run job. Thus, Marino Concrete failed to relate these alleged damages to any specific allegation in its complaint.

{¶10} After Marino rested, Strohmeyer testified on behalf of appellee. He asserted, prior to entering the oral contract with Marino for the driveway, Marino explained the color of the finished concrete on the driveway would have a slight variation from that of the sidewalk. Strohmeyer testified, however, the difference was not a "slight variation," but a different color altogether.

{¶11} The homeowner, Theodore Gaydosh, echoed Strohmeyer's testimony, stating the sidewalk was stamped cement with variations of slate-gray and the driveway, while stamped, included variations of pinkish-purple. Gaydosh stated that Marino attempted to fix the color problem using a colored sealer, but was unsuccessful. After these measures failed, Gaydosh testified he needed to rip the entire driveway out and pour a new one. Gaydosh further testified that since the construction of his home, he enlisted a different concrete contractor, Todd Nagy, to pour a back patio to match the sidewalk in May of 2005. In Gaydosh's estimation, the patio Nagy poured very closely matched the color of the slate-gray, stamped concrete on the sidewalk.

{¶12} Finally, appellee called Todd Nagy. Nagy testified that concrete mixed using the same color dye that is installed at different times will have the same color, "*** just slight shade differences, depending on the material, company you're using or how it's mixed even from the same company. But, *** all in all *** you can get pretty darn close."

{¶13} Nagy testified there are factors which affect the appearance of the concrete, e.g., variations in the amount or types of release agents or dyes used. But such variations would change only the shade of the concrete, not the color. Nagy

consequently opined that the cement used on the driveway was mixed with "a totally different color ***" than the cement used on the sidewalk.

{¶14} After visiting the site to view the driveway personally, the magistrate issued his decision ruling in appellee's favor. The magistrate concluded Marino Concrete failed to prove, by a preponderance of the evidence, he substantially performed under the oral agreement. The magistrate further determined Marino Concrete was not entitled to recovery under a theory of unjust enrichment. Marino Concrete filed timely objections, which the trial court overruled. The trial court subsequently adopted the magistrate's decision, and entered final judgment in favor of appellee. Appellant now appeals asserting two assignments of error. Its first assignment of error provides:

{¶15} "The trial court erred when it entered judgment in favor of defendant-appellee Strohmeyer Contracting Co. based on the opinion that plaintiff Richard Marino Concrete Co. did not substantially perform the contract where defendant-appellee Strohmeyer Contracting Co. admitted entering into an agreement with plaintiff Richard Marino Concrete Co. for the installation of a decorative concrete driveway and also admitted that plaintiff Richard Marino Concrete Co. installed a safe, useable, and structurally sound concrete driveway."

{¶16} Under its first assignment of error, appellant claims that because the driveway was installed in a safe and structurally sound manner, Marino Concrete substantially performed under the contract. Appellant essentially contends that even though the color of the driveway was wrong, the quality of the construction was sufficient to meet the terms of the contract. Distilled to its essence, appellant's

argument challenges the manifest weight of the evidence upon which the trial court's judgment is based.

{¶17} Although appellant challenges the weight of the evidence, our standard of review of a trial court's decision under Civ. R. 53 is limited to a determination of whether the court abused its discretion in adopting the magistrate's decision. *In re Gibbs* (Mar. 13, 1998), 11th Dist. No. 97-L-067, 1998 Ohio App. LEXIS 997, *12. A court abuses its discretion when its judgment neither comports with reason, nor the record. *Nolan v. Nolan*, 11th Dist. No. 2009-G-2885, 2010-Ohio-1447, at ¶33.

{¶18} In Ohio, a "long and uniformly settled rule as to contracts requires only a substantial performance in order to recover upon such contract. Merely nominial, trifling, or technical departures are not sufficient to breach the contract." *Ohio Farmers' Ins. Co. v. Cochran* (1922), 104 Ohio St. 427, paragraph two of the syllabus. "Where a party has substantially performed its contract obligations, the party is entitled to payment under a contract." *Thompson v. Executive Transport Serv.*, 6th Dist. No. E-03-018, 2004-Ohio-686, 2004 Ohio App. LEXIS 661, *6, citing *Zolg v. Yeager* (1997), 122 Ohio App. 3d 269, 275. "Substantial performance of a contract is interpreted to mean *** that slight departures, omissions and inadvertences should be disregarded." *Kichler's, Inc. v. Persinger* (1970), 24 Ohio App.2d 124, 126, see also *Thompson*, *supra*. "For the doctrine of substantial performance to apply, the part unperformed must not destroy the value or purpose of the contract." *Hansel v. Creative Concrete & Masonry Constr. Co.*, 148 Ohio App.3d 53, 56, 2002-Ohio-198. Therefore, a "material breach" or an error which goes to the heart of the contract will undermine a promisor's claim despite his or her performance.

{¶19} The question of whether a contractor has substantially performed under a contract is one of fact and degree. Hence, there is no "rule of thumb" for determining whether obligations in an agreement have been substantially performed. Nevertheless, certain relevant factors are: the purpose of the contract; the desires being gratified by the contract; the excuse for deviating from the contract's specifications; and the cruelty of requiring the promisor to strictly adhere versus the problems inherent in compelling the promisee to accept something less than that for which it bargained. See *O.W. Grun Roofing & Construction Co. v. Cope* (1975), 529 S.W.2d 258, 261.

{¶20} In this case, the homeowners wanted their new driveway to match the color of their recently poured stamped sidewalk. There is no dispute that the homeower's specifications were communicated to Marino prior to installing the driveway; moreover, nothing in the record indicates Marino confused or misunderstood his instructions. After the installation, however, the homeowners received a pinkish-purple driveway which possessed a completely different chromatic hue than the slate-gray sidewalk. Appellant argues this difference, which the evidence indicates is not simply one of shade but of actual color, was sufficiently trifling so as not to destroy the value of the contract. Because the driveway was useable, safe, and structurally sound, appellant concludes, Marino substantially performed his obligations under the contract. In support of its position, appellant cites *Hansel*, supra, at 53, 56-57.

{¶21} In *Hansel,* the Tenth Appellate District determined a contractor substantially performed under a contract to install a concrete driveway where the driveway was clearly usable but showed some general defects, e.g., surface cracks, "scaling," as well as inconsistent thickness throughout. The owner was not awarded the

entire cost to replace the driveway, but was given a considerably smaller amount needed to repair the cracks. *Hansel* is distinguishable from the instant case.

{¶22} First of all, the sole identified purpose of the driveway at issue in *Hansel* was strictly utilitarian. Although it had cracks and other deficiencies, the court determined "[t]here was no testimony that the driveway was unusable or would become so in the near future." Id. at 59. Thus, while the plaintiffs in *Hansel* did not receive exactly what they bargained for, "the driveway still met its essential purpose." Id.

{¶23} In this case, the homeowners did not simply seek a "useable" driveway, but specifically requested the driveway to possess a certain aesthetic quality which, upon completion, it did not have. We decline to hold the trial court erred in concluding the aesthetic component of this agreement was a mere trivial or technical condition from which Marino was free to deviate. To be sure, a painter who successfully paints a home in a workmanlike fashion will have undoubtedly met the essential purpose of painting a home; if, however, the same painter agrees to paint the home gray but, mid-way through, runs out of gray paint and finishes the job using pink paint, he will have undeniably affected the essence of the agreement. Similarly, the deficiency in this case, while aesthetic, is so pervasive as to frustrate the purpose of the contract in a real and substantial sense. The doctrine of substantial compliance allows for minor deviations from contractual specifications; it does not, however, vouchsafe a contractor a license to install whatever is, in his judgment, "just as good." See Thel and Seigelman, Willfulness Versus Expectation: A Promisor-Based Defense of the Willful Breach Doctrine (2009), 107 Mich. L.Rev. 1517, 1528, citing *Grun*, supra.

{¶24} Furthermore, in *Hansel*, even though the court concluded the defendant had substantially complied with the contract, the court held the plaintiffs were entitled to damages sufficient to compensate for the existing defects in the driveway. In this case, although the driveway is functional, the defect cannot be addressed save complete removal. According to Marino, the colored dye was added to the concrete during the mixing process; as a result, the concrete has a pink tint throughout. We cannot hold that a contractor, who tenders a performance so deficient that it cannot be remedied save a complete redoing of the work for which the contract originally called, is entitled to legal absolution under a theory of substantial performance.

{¶25} Appellant nevertheless contends that the defect in the driveway was merely a "slight variation in color from the color in the sidewalk," and, consequently, Strohmeyer's as well as the homeowners' reactions to the variation were unreasonably extreme. Because, in appellant's view, their overreaction causes unreasonable economic waste, it maintains the judgment should be reversed. Again, we disagree.

{¶26} As discussed above, the evidence supports the trial court's conclusion that the color of the driveway was not merely a difference in shade or a minimal variance in color. Mr. Gaydosh, the homeowner testified:

{¶27} "*** compared to the sidewalk which is, looks like slate, which are variations of light and dark gray, the driveway and the stamping involved in it is variations of pink and purple. It's, in my opinion, not even close to being the right color."

{¶28} Strohmeyer testified he expected a slight variation in the color but the ultimate color difference was "well beyond what we expected." Strohmeyer elaborated: "We have a pink driveway and we have a gray sidewalk."

{¶29} Finally, Todd Nagy, owner of a different concrete contracting business with whom the Gaydoshes had recently worked, testified that, in his opinion, Marino used a totally different color in mixing the driveway concrete. He stated: "Instead of being gray it's almost a, it's more of, kind of like a mauve color, kind of pinkie."

{¶30} Although appellant and Marino, et al., may disagree with assessments of a color comparison which is contrary to their own, the foregoing testimony and photographic exhibits submitted at trial were enough to allow the magistrate to conclude the variation in color was neither slight nor inconsequential. Marino Concrete failed to perform in accordance with a specific aesthetic provision of the contract. We therefore hold, based upon the findings of fact set forth in the magistrate's decision, the difference in color represents a material breach of the oral agreement thereby precluding the conclusion that Marino Concrete substantially performed under the terms of the contract.

{¶31} Moreover, we do not believe this ruling creates unreasonable economic waste. As discussed above, Strohmeyer and Gaydash expressed concerns regarding the concrete's color *while* Marino was in the early stages of pouring the driveway. Strohmeyer even ordered Marino to stop but Marino declined, assuring the men the color would match when the concrete dried. The record therefore indicates Marino had the opportunity to mitigate the economic waste of which he now complains. In fact, Marino's decision to continue pouring the driveway in the face of the above evidence suggests Marino assumed the responsibility for any economic waste resulting from a color mismatch. We accordingly hold the magistrate's findings and recommendations

were supported by the weight of the evidence and the trial court did not abuse its discretion in adopting the same.

{¶32} Appellant's first assignment of error is overruled.

{¶33} For its second assignment of error, appellant asserts:

{¶34} "The trial court erred when it refused to award Plaintiff Richard Marino Concrete Co. damages under a theory of unjust enrichment."

{¶35} Appellant contends that even if the trial court properly declined to award damages to Marino Concrete, it acted unreasonably when it adopted the magistrate's decision to the extent appellee received a benefit for which it did not pay. We disagree.

{¶36} "[U]njust enrichment of a person occurs when he has and retains money or benefits which in justice and equity belong to another." *Hummel v. Hummel* (1938), 133 Ohio St. 520, 527. To prevail on a claim for unjust enrichment, or a contract implied in law, a party must demonstrate (1) the defendant received a benefit; (2) the defendant possessed an appreciation or knowledge of that benefit; and (3) the benefit was received under circumstances that would make it unjust for the defendant to retain the same without paying for it. See, e.g., *Hambleton v. R.G. Barry Corp.* (1984), 12 Ohio St.3d 179, 183.

{¶37} In this case, the homeowners, dissatisfied with the driveway, did not pay appellee, who, in turn, refused to pay Marino. Marino filed suit for, inter alia, breach of contract seeking $19,362.75 in compensatory damages. Prior to trial, $19,300 was deposited into escrow pending the resolution of the suit: $16,800 by the homeowners and $2,500 by appellee.

{¶38} At trial, the record reflected appellee did not "make a penny off of [the] driveway." Thus, appellee was not unjustly enriched with respect to Marino's installation of the driveway. Moreover, nothing in the record indicates Marino conferred a $2,500 benefit on appellee. Although there is some evidence that appellee owed Marino $2,500 from a separate matter, Marino's complaint did not sue appellee for wrongfully withholding the $2,500. Rather, the complaint simply sought an extra $2,500 on top of the cost Marino Concrete ascribed to the installation of the driveway at issue.

{¶39} Unjust enrichment is a theory of restitution based, not upon a plaintiff's loss, but a defendant's gain. See Kovacic, A Proposal to Simplify Quantum Meruit Litigation (1987), 35 Am. U.L.Rev. 547, 556. Because appellee did not receive a gain or a benefit vis-à-vis the oral contract at issue, he was not unjustly enriched. As the facts in this case fail to show appellee was unjustly enriched, we hold the trial court did not abuse its discretion in adopting the magistrate's decision.

{¶40} Appellant's second assignment of error lacks merit.

{¶41} For the reasons discussed in this opinion, the judgment of the Trumbull County Court of Common Pleas is hereby affirmed.

TIMOTHY P. CANNON, J., concurs,

COLLEEN MARY O'TOOLE, J., dissents with Dissenting Opinion.

COLLEEN MARY O'TOOLE, J., dissents with Dissenting Opinion.

{¶42} This matter arises from a contract dispute after the plaintiff, Marino Concrete, sued defendant, Strohmeyer Contracting, for nonpayment after Marino installed a driveway at a home in Mineral Ridge.

{¶43} Strohmeyer alleges that the concrete does not match the existing concrete at the residence, because it is pink. This writer notes that there was a contract attached as Exhibit A to Marino's complaint. There is no mention as to a color request or a need for matching. It is also noted that this is not a consumer contract and that both parties are commercial enterprises. Simply stated, pursuant to Exhibit A, the description of work performed is "Driveway @ Ridge Lake w/Integral Color & Stamped Slate."

{¶44} In appellee's answer to appellant's complaint, appellee states at paragraph 4 under its counterclaim:

{¶45} "4. Upon completion of Plaintiff's work, Defendant noticed that the color of the concrete installed by Plaintiff did not match the other existing concrete in violation of Plaintiff's contract with Defendant.

{¶46} "***

{¶47} "6. Said discoloring of the concrete has caused great inconvenience, annoyance and property damage, and has required expenditures for removal and correction of the discoloring of the concrete in the amount of $22,400.00, there being no other less costly alternative."

{¶48} At no time does the contract for performance indicate a specific color preference, nor is one specified in appellee's answer. The issue in this matter arises in the breach of contract dispute. However, other than an allegation of the incorrect color

on an otherwise structurally sound, well installed driveway, there is no evidence indicating any damage to property or diminution in value, and this does not rise to a breach of contract. *Short v. Greenfield Meadows Assocs.,* 4th Dist. No. 07CA14, 2008-Ohio-3311, at ¶14.

{¶49} It is undisputed in the record that appellant added the same coloring to the driveway as he did to the sidewalks which were poured nearly sixty days prior to the driveway.

{¶50} The only complaint by appellee is that the color is wrong, as it is pink and undesirable. There was no guarantee in the contract or by the contractor that the color would be an exact match. Also, there is no standard or case law that would indicate color being anything other than cosmetic, a guarantee as to the color of concrete for a driveway when there is no evidence of diminution in value and no economic damages to the property in the record. Color is a cosmetic defect. It does not interfere with the use or purpose of the driveway. See *Short*, supra, at ¶14.

{¶51} In this matter, without a specification in the written contract, the color of the concrete cannot be material nor can it be actionable in contract or breach.

{¶52} For the following reasons, I respectfully dissent.