[Cite as *Parker v. Turek*, 2011-Ohio-3889.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

ASHTABULA COUNTY, OHIO

JAMES MICHAEL PARKER, et al.,	:	**O P I N I O N**
Plaintiffs-Appellees,	:	**CASE NO. 2010-A-0051**
- vs -	:	
CYRIL TUREK,	:	
Defendant-Appellant.	:	

Civil Appeal from the Ashtabula County Court of Common Pleas, Case No. 2009-CV-348.

Judgment: Affirmed.

Gary L. Pasqualone, and *Jayne A. Parker*, Curry and Pasqualone, 302 South Broadway, Geneva, OH 44041 (For Plaintiff-Appellees).

Samuel L. Altier, 1027 Lake Avenue, Ashtabula, OH 44004 (For Defendant-Appellant).

MARY JANE TRAPP, J.

{¶1} Appellant, Cyril Turek, appeals from the judgment of the Court of Common Pleas of Ashtabula County, finding him in breach of contract and awarding appellees, James M. Parker and Jayne A. Parker (the "Parkers"), the sum of $5,401.75 in damages regarding the failed sale of a bar business, Harbor Supply, Inc. The Parkers brought a four-count complaint against Mr. Turek for failure to perform under a written contract for the sale of the business assets, which included a supply vessel or "Bum Boat" known as the Sonny II, its equipment, a liquor license, and a dockage lease with

the railroad. The Parkers also alleged conversion of the boat and sought punitive damages based on willful and malicious conduct. Mr. Turek asserted his counterclaim for breach of contract, unjust enrichment, and punitive damages based on willful and malicious conduct. Mr. Turek appeals the trial court's finding in favor of the Parkers and the dismissal of his counterclaim. We affirm the trial court's judgment.

{¶2} **Substantive Facts and Procedural History**

{¶3} Sometime in early 2008, Mr. Turek approached the Parkers about purchasing Harbor Supply, Inc., as he had heard they were looking to sell. Negotiations ensued, mostly between Mr. Parker and Mr. Turek, and eventually, on April 4, 2008, both signed an agreement, handwritten on a single sheet taken from a yellow legal pad, indicating Mr. Parker's intention to sell the boat to Mr. Turek. The Purchase Agreement stated "I Mike Parker here by [sic] accept $400.00 from Ceril [sic] Terek [sic] for the purchace [sic] of Harbor Supply Inc. for the price of $150,000.00[.] Terms to be agreed upon." The parties dispute who penned the document. But, it is undisputed that both parties signed the Purchase Agreement and that two days later Mr. Turek delivered $400 cash to the Parkers and received a receipt for the transaction signed by the Parkers. The receipt for the earnest money was also handwritten on an office supply/pre-printed cash receipt form, and noted that the receipt of $400 was "for Purchase of Harbor Supply to be applied to sale price of $150,000." The words "no Refund" also appear on the receipt.

{¶4} Mr. Turek contends that he did not draft the Purchase Agreement and that, at the time he signed it, the language regarding the $150,000 price was not present. Mr. Parker denies writing the document.

{¶5} After the Purchase Agreement was signed, negotiations as to the price continued. Mr. Turek sought to secure a lower price, and the record reflects an offer of $130,000 at some point, which the Parkers were hesitant to accept. Negotiations appear to have continued up until the day the Contract of Sale was signed. Mrs. Parker testified that Mr. Turek wanted to pay no more than $100,000, and the Parkers wanted no less than $130,000. She stated that they eventually settled on $115,000, splitting the difference between the two numbers on the table, conditioned upon Mr. Turek tendering $40,000 of that amount in cash on the day they set to meet and execute the Contract of Sale.

{¶6} On May 5, 2008, a meeting had been scheduled at the Parkers' attorney's office to sign the Contract of Sale, which had been prepared by the Parkers' attorney, with a stated purchase price of $75,000. Before entering the law office, Mr. Turek met Mrs. Parker in the parking lot and presented her with a check for $40,000, requesting that it not be cashed for two weeks. Mr. Turek asked Mrs. Parker for a receipt indicating that the $40,000 would be applied to the $75,000 purchase price. Mrs. Parker refused to apply it towards the $75,000, and testified that she believed the $40,000 was outside and in addition to the $75,000 purchase price indicated in the Contract of Sale. She did give Mr. Turek a receipt for the $40,000 check. Appearing on the receipt was a notation: "Will hold check for two weeks until 5/22/08-If cashed early check will be returned." The two then entered the law office and indeed executed the contract for $75,000; no mention of the $40,000 was made in this written agreement. Mr. Parker could not attend the meeting and gave his wife his power of attorney.

{¶7} **Terms of the Contract of Sale**

{¶8} The key terms of the Contract of Sale were: 1) Mr. Turek would receive the boat, known as Sonny II, all equipment and tangible assets of the business, the trade and business name of Harbor Supply, Inc., the existing post office box for the business, the good will of the business, all 120 shares of common stock of Harbor Supply, Inc., and all historical and file documents relative to the business; 2) the Parkers would assign their interest in the lease agreement with Norfolk Southern to Mr. Turek; 3) the purchase price was $75,000, to be paid in full by a deposit into an escrow account held by Mr. Turek's attorney; 4) conditions precedent of assignment of the lease and the liquor license existed; 5) Mr. Turek was responsible for all recording expenses, transfer fees, license fees, legal fees, insurance expenses, lease assignment expenses, and other costs of operation of the business as of May 1, 2008; and 6) closing was to occur 30 days from the date of the Contract of Sale.

{¶9} The parties also entered into a "Liquor Management Agreement" ("LMA"), which is dated April 29, 2008. Why the Contract of Sale and the LMA have different dates of execution is not clear from the record. In the LMA, the Parkers appointed Mr. Turek "manager of the operation of the business until [Mr. Turek] completes the transfer process with the Ohio Division of Liquor." Mr. Turek's compensation under the LMA was retention of the profits from sale of liquor during the duration of the LMA. Mr. Turek was also responsible for assisting the Parkers in preparing and filing all Ohio sales tax returns for the time period covered by the LMA.

{¶10} **The Sale Fails**

{¶11} Upon execution of the Contract of Sale and the LMA, Mr. Turek deposited $75,000 in escrow and took possession of the Bum Boat, assuming operational responsibilities as well. Mr. Turek then sought to have the liquor license transferred and

the railroad lease assigned, but he was unsuccessful in achieving either of the conditions precedent. The Parkers, having discovered that the insurance had not been paid on the boat, renewed the insurance at a cost to them of $3,333.25. They also renewed the liquor license twice, when Mr. Turek was unsuccessful in effecting a transfer, at a total cost of $2,068.00. Further, Mr. Turek failed to pay the sales tax during the time he managed the boat, and the Parker's paid $1,907.86 to the Ohio Department of Taxation to cover the amount outstanding. In July of 2008, Mr. Turek's attorney sent a letter to the Parkers' attorney indicating that his client was withdrawing from the Contract of Sale and that he would be returning the $75,000 being held in escrow to Mr. Turek. Mr. Turek, however, after receiving the $75,000, did not vacate the premises until September of 2009.

{¶12} **The Dispute Reaches the Bench**

{¶13} In March of 2009, the Parkers filed a four-count complaint against Mr. Turek alleging breach of contract and conversion of property, and seeking compensatory and punitive damages. In conjunction with their complaint, the Parkers also filed a motion to appoint a receiver for the "Bum Boat" during the pendency of the litigation. Mr. Turek answered and filed a three-count counterclaim, alleging breach of contract and unjust enrichment. He also sought compensatory and punitive damages.

{¶14} The trial court did not ultimately assign a receiver inasmuch as Mr. Turek agreed at a pre-trial conference to relinquish control of the Bum Boat on September 30, 2009. At the same pre-trial conference, Mr. Turek also agreed to pay $862.76 for the estimated sale taxes due to the state. The only matters remaining for trial were the Parkers' out of pocket expenses for maintaining the liquor license and the insurance, as

well as Mr. Turek's insistence on the return of the $40,000 and reimbursement for what he alleged was $30,000 worth of improvements made to the boat.

{¶15} The matter was tried to the bench and the parties submitted written closing arguments. The trial court released its judgment entry, finding in favor of the Parkers in the amount of $5,401.75 and dismissing Mr. Turek's counterclaim with prejudice. Mr. Turek filed a timely notice of appeal, and now submits two assignments of error for review:

{¶16} "[1.] The Trial Court's Judgment for Plaintiffs-Appellees was contrary to the weight of the evidence.

{¶17} "[2.] The Trial Court committed prejudicial error in granting Judgment for Plaintiff-Appellees when it made no factual findings regarding Appellant's down payment and offsets, if appropriate, from same."

{¶18} **Weight of the Evidence**

{¶19} A court of appeals, in reviewing a trial court's judgment, will give considerable deference to a trial court's findings of fact and conclusions of law. "Judgments supported by some competent, credible evidence going to all the essential elements of the case will not be reversed by a reviewing court as being against the manifest weight of the evidence." *C.E. Morris Co. v. Foley Constr. Co.* (1978), 54 Ohio St.2d 279, at syllabus. Deference is extended to the trial court's determination because "the trial judge is best able to view the witnesses and observe their demeanor, gestures and voice inflections, and use these observations in weighing the credibility of the proffered testimony." *Seasons Coal Co., Inc., et al. v. City of Cleveland* (1984), 10 Ohio St.3d 77, 80. Thus, "an appellate court should not substitute its judgment for that of the

trial court when there exists *** competent and credible evidence supporting the findings of fact and conclusions of law rendered by the trial judge." Id.

{¶20} In its judgment entry, the trial court specifically and clearly stated that it found "Plaintiffs' testimony to be more credible than the defendant's testimony," and that numerous examples existed to demonstrate defendant's lack of credibility. While Mr. Turek attacks those few examples of his lack of credibility the trial court included in the judgment entry, a review of the record reveals that the Parkers did present competent and credible evidence to support their contentions. This evidence includes testimonial evidence from both Mr. and Mrs. Parker that supported the allegations contained in their complaint and that was substantially more consistent than that offered by Mr. Turek. Further, this testimonial evidence was accompanied by documentary evidence related to Mr. Turek's failures to successfully assume the railroad lease, insure the business, and transfer the liquor license. Exhibits submitted to the court included the Contract of Sale and LMA, a letter from the Ohio Department of Commerce denying the liquor license transfer application based on Mr. Turek's failure to comply with financial verification requirements, and three letters from Norfolk Southern indicating a lapse in insurance coverage and prohibition of work on its property until insurance had been secured. The trial court awarded damages in the sum of $3,333.75 for the insurance premium and in the sum of $2,068.00 for expenses incurred as a result of the failure to complete the transfer of the liquor license. The amounts of consequential damages are fully supported by the evidence.

{¶21} Because some competent, credible evidence exists to support the findings of the trial court, we will not disturb the decision. Appellant's first assignment of error is without merit.

{¶22} **Was the Buyer Entitled to Return of the $40,000?**

{¶23} In his second assignment of error, Mr. Turek contends that the trial court committed prejudicial error when it did not find that the $40,000 he had paid to Mrs. Parker in the attorney's parking lot before the execution of the Contract of Sale was a down payment on the $75,000 purchase price. He asserts the sum should have been returned to him, upon what he argues was the trial court's "rescission" of the contract. Mr. Turek postulates in his brief a mutual abandonment theory resulting in an agreement to rescind. It is important to note that the trial court did not make a finding of mutual abandonment and resultant rescission. Instead, the trial court found that Mr. Turek had breached the sales contract and, accordingly, awarded the Parkers damages flowing from the breach. The trial court did not, however, require specific performance of the contract. Regardless, Mr. Turek argues that he is entitled to have the $40,000 returned to him, as he is insistent that it was a down-payment on the $75,000 purchase price.

{¶24} **The Mysterious Parking Lot Payment**

{¶25} No document exists to explain the $40,000 payment Mr. Turek made to the Parkers just prior to execution of the Contract of Sale and LMA. The $40,000 is not mentioned in the contract itself, nor is there a separate document explaining the purpose and proposed application of the $40,000 payment. Indeed, the trial court observed and we agree, "[i]t's a mystery why neither party insisted the $40,000.00, paid at the time of execution of Plaintiff's Exhibit 1 [Contract of Sale], as to what amount the $40,000.00 should be credited against. Defendant [Mr. Turek] claims it was towards the $75,000.00 purchase price, and Plaintiffs [the Parkers] claim it was towards

$115,000.00 purchase price, leaving the balance of $75,000.00, as stated in Plaintiff's Exhibit 1."

{¶26} While evidence outside the four corners of the Contract of Sale may shed some light on the purpose and intention of the $40,000 payment, the parol evidence rule, and its corollary -- the doctrine of contract merger, generally prohibit consideration of evidence beyond that which is contained in the contract.

{¶27} The parol evidence rule states that "absent fraud, mistake or other invalidating cause, the parties' final written integration of their agreement may not be varied, contradicted or supplemented by evidence of prior or contemporaneous oral agreements, or prior written agreements." *Galmish v. Cicchini* (2000), 90 Ohio St.3d 22, 27, quoting 11 Williston on Contracts (4 Ed. 1999) 569-570, Section 33:4. Therefore, by executing an agreement, "it is presumed that [the parties] incorporated all prior negotiations and agreements into the final agreement and that the final agreement represents the intent and full agreement between the parties." *United States Construction Corporation v. Harbor Bay Estates, Ltd.*, 172 Ohio App.3d 609, 2007-Ohio-3823, ¶30 (citations omitted).

{¶28} As previously noted, Mr. Turek argues that the $40,000 he paid to Mrs. Parker just before executing the Contract of Sale and LMA was meant to be a down-payment on the sales price. However, the contract they ultimately executed (with integration clause) does not reflect the payment of the $40,000 or to what amount the $40,000 should be applied. Rather, the contract unambiguously states that the sales price is $75,000 and that Mr. Turek is required to deposit the full $75,000 in an escrow account, which he promptly did upon execution of the Contract of Sale.

{¶29} Mr. Turek had an attorney present during the signing of the Contract of Sale and had the opportunity to further negotiate the terms or amend the sales price to reflect his down payment before signing. The terms of the Contract of Sale are clear and any discussion of the $40,000 predates the formalized contract. The trial court rightfully considered the $40,000 separate and distinct from the $75,000 Contract of Sale.

{¶30} Because the Contract of Sale terms are clear, unambiguous, and a complete representation of the parties' intent, parol evidence is not admissible. The trial court was not required to order the return of the $40,000 to Mr. Turek, because the sum was outside the scope of the proceedings before it. "Generally, courts presume that the intent of the parties to a contract resides in the language they chose to employ in the agreement." *Shifrin v. Forest City Enterprises, Inc.* (1992), 64 Ohio St.3d 635,638, citing *Kelly v. Med. Life Ins. Co.* (1987), 31 Ohio St.3d 130, paragraph one of syllabus. Mr. Turek chose not to insist that the written agreement reflect the $40,000 he had already paid, and therefore that transaction is not protected under the Contract of Sale. Mr. Turek's second assignment of error is without merit.

{¶31} For the foregoing reasons, we affirm the decision of the Court of Common Pleas of Ashtabula County.

TIMOTHY P. CANNON, P.J.,

CYNTHIA WESTCOTT RICE, J.,

concur.