[Cite as *GRW Industries, Ltd. v. Bernstein*, 2011-Ohio-4885.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

LAKE COUNTY, OHIO

GRW INDUSTRIES LTD., d.b.a. MARVIN DESIGN GALLERY,	:	**O P I N I O N**
Plaintiff-Appellant,	:	**CASE NO. 2010-L-110**
- vs -	:	
TERRY L. BERNSTEIN, et al.,	:	
Defendants-Appellees.	:	

Civil Appeal from the Court of Common Pleas, Case No. 09 CV 000345.

Judgment: Affirmed.

James J. Costello, Powers Friedman Linn P.L.L., Four Commerce Park, Suite 180, 23240 Chagrin Boulevard, Cleveland, OH 44122 (For Plaintiff-Appellant).

Shannon M. Cianciola and *Francis P. Manning*, Manning & Manning Co., L.P.A., Western Reserve Law Building, 7556 Mentor Avenue, Mentor, OH 44060 (For Defendants-Appellees).

TIMOTHY P. CANNON, P.J.

{¶1} Appellant, GRW Industries Ltd., d.b.a. Marvin Design Gallery ("GRW"), appeals the judgment of the Lake County Court of Common Pleas in favor of appellees, Terry L. Bernstein and Seth B. Stern. The trial court held that GRW breached its contract to install windows and doors in appellees' residence. Judgment was rendered in favor of appellees in the amount of $3,030.22. For the following reasons, we affirm the judgment of the trial court.

{¶2} A bench trial was held in this matter and the following testimony was elicited. In 2006, appellees determined the windows and doors of their Willoughby Hills home needed to be replaced. In March 2007, appellees contracted with GRW to provide 14 windows and two patio doors. The contract for the new windows and doors included all new interior and exterior trim-work. Appellees made a down payment of $20,000. The balance of $23,596.72 was due upon project completion.

{¶3} On Monday, July 2, 2007, work began at appellees' residence. Installation of the windows and doors continued longer than expected. This was because additional parts and materials had to be ordered and delivered from Warroad, Minnesota. Some of these materials had significant lead times. The project's completion was also slowed when unanticipated wood rot, which required additional carpentry work, was found under appellees' front windows. The wood rot was so bad that GRW recommended that the siding in the front of the house be replaced in its entirety. Appellees opted not to replace the home's siding.

{¶4} GRW installers also encountered problems with the specially-ordered white oak trim. First, the new trim was two and one-half inches wide, a quarter-inch narrower than the existing trim. The new trim was initially installed so appellees would not need to repaint; however, this left gaps around the windows, and the trim was removed and replaced to remove these gaps at Stern's request. Second, some of the trim had knots which appellees thought to be unsightly. Finally, a curved piece of trim intended to trim a round top window snapped while being repositioned. These issues slowed the project. Work continued throughout the summer until communications broke

down in November 2007. Both parties acknowledged that the job was not complete at this time.

{¶5} In February 2008, Stern noticed that three of the windows installed by GRW were leaking. These leaks stained the woodwork and drywall within appellees' home. These windows were determined by the manufacturer, Marvin Windows and Doors, Inc., ("Marvin") to be defective. Marvin offered to repair, replace, or refund the windows. Appellees elected to have the windows replaced. The windows were then ordered and shipped to GRW's warehouse, arriving sometime in September. GRW then contacted Stern on October 24, 2008, about how to proceed. GRW did not hear back from either appellee nor were the windows ever delivered to appellees' residence.

{¶6} Appellees ordered three new round top windows from Colony Lumber to replace the three leaking windows. These windows cost $10,354.34. The newly-ordered windows were identical to those Stern had delivered to GRW in September 2008. Stern then contracted with Wood Images, Inc. to install the three windows purchased from Colony Lumber. Appellees paid Wood Images, Inc. carpenter Michael O'Neal $18,729. In addition to installing the windows, Wood Images, Inc. also repaired GRW's work and completed the window and door project. Work completed by Mr. O'Neal included replacing all the casings inside the house, providing two new arched casings, insulating around the windows, siding work, and drywall repair.

{¶7} On February 4, 2009, GRW filed a complaint against appellees seeking compensatory damages along with costs, interest, and attorney fees. GRW also sued for an action in quantum valebant, unjust enrichment, and breach of contract. Appellees counterclaimed for breach of contract, breach of implied warranty of fitness and

workmanship, negligent workmanship, unjust enrichment, and violation of Ohio's Consumer Sales Practice Act. The trial court held that GRW breached its contract to install windows and doors in appellees' residence. Judgment was rendered in favor of appellees in the amount of $3,030.22.

{¶8} GRW filed a timely notice of appeal and raises the following assignments of error for our review:

{¶9} "[1.] The judgment amount of $3,030.22 was not sustained by the evidence and is against the manifest weight of the evidence.

{¶10} "[2.] The evidence was insufficient, as a matter of law, to enter a judgment against GRW in the amount of $3,030.22."

{¶11} Before we address GRW's first assignment of error, we observe that this court has previously distinguished between the manifest weight of the evidence and the sufficiency of the evidence in the context of civil law. In *Davis v. DiNunzio*, 11th Dist. No. 2004-L-106, 2005-Ohio-2883, at ¶23-25, we stated:

{¶12} "While the degree of proof necessary in a civil proceeding is significantly less than that required in a criminal matter, there is no cogent reason why the fundamental logical differences relating to evidential sufficiency and weight cease to exist in a civil context. ***

{¶13} "A challenge to the evidential sufficiency asks a reviewing court to examine whether the plaintiff met his burden of proof. An analysis of this sort is mechanical in that it requires a court to observe the record and determine whether the plaintiff offered adequate evidence to support the elements of his particular claim.

{¶14} "Alternatively, evidential weight involves an analysis of whether the plaintiff met his burden of persuasion. This analysis is more abstract and requires a court to look at the evidence in its totality and engage in a limited weighing exercise for purposes of assessing its credibility. Hence, a plaintiff may present sufficient evidence to meet the elements of his tort or breach claim, yet the greater weight of the credible evidence may still militate against a verdict in his favor."

{¶15} Recognizing this distinction, we now address GRW's first assignment of error. Under this assignment of error, GRW contends the judgment in favor of appellees is against the manifest weight of the evidence for the following reasons: an undisputed contract existed between GRW and appellees, and appellees breached that contract; there was no evidence connecting the alleged damages sustained by appellees to the monies spent by appellees; and appellees failed to mitigate their damages with respect to the replacement windows.

{¶16} An appellate court presumes that the findings of the trier of fact were correct and may not merely substitute its judgment for that of the finder of fact. *Pons v. Ohio State Med. Bd.* (1993), 66 Ohio St.3d 619, 621. A judgment supported by competent, credible evidence will not be reversed unless it is against the manifest weight of the evidence. *C.E. Morris Co. v. Foley Constr. Co.* (1978), 54 Ohio St.2d 279, 280. Therefore, reversal on manifest weight of the evidence is reserved only for the exceptional case where the finder of fact clearly lost its way and created a manifest miscarriage of justice. *State v. Thompkins* (1997), 78 Ohio St.3d 380, 387. (Citation omitted.)

{¶17} Under the first issue presented for our review, GRW notes that appellees paid only $20,000 of the $43,596.72 total contract price, and, therefore, GRW claims the "evidence was undisputed that Bernstein-Stern breached the contract and the only real issue at trial was the extent of damages." We disagree.

{¶18} As previously noted, the trial court did not find that appellees breached their contract with GRW. Conversely, the trial court found that GRW breached its contract with appellees. At trial, the existence of a contract between GRW and appellees was undisputed. The trial court found that appellees performed their obligations under the contract by paying the initial down payment, with the remainder due at completion. Evidence elicited at trial suggests that the balance never came due and that GRW materially breached the contract by failing to complete the project and by failing to complete the installation in a workmanlike fashion. A review of the record reveals competent, credible evidence to support the trial court's conclusion that GRW breached its contract with appellees.

{¶19} First, the president of GRW confirmed that the project was never finished. GRW's lead installer also testified that the installation was never completed. Second, in addition to not completing the installation, GRW failed to perform in a workmanlike fashion. Photographs presented at trial showed that miters were poorly cut, trim was deficiently installed, and much of the finish work was executed poorly. Testimony from appellees' expert witness stated that the windows were improperly trimmed and that some of this trim required replacement. For the foregoing reasons, it was not against the manifest weight of the evidence for the trial court to find that GRW breached its contract with appellees.

{¶20} Under the second issue presented for our review, GRW alleges that the trial court erred in finding damages in favor of appellees in the amount of $3,030.22. GRW takes issue with the trial court utilizing the invoice presented by Wood Images, Inc. and the testimony of Mr. O'Neal, the carpenter for Wood Images, Inc.

{¶21} The trial court heard testimony that appellees paid $18,729 to Mr. O'Neal to install the three replacement windows, install new trim, and complete other tasks. As recognized by the trial court, Wood Images, Inc. never created a cost breakdown of the work performed at appellees' residence. The trial court, however, found "that the majority of the work was to complete or repair problems with the window and door installation." After reviewing the invoice, the trial court deducted $2,500 from the $18,729 paid to Mr. O'Neal. This reduction was for work completed by Mr. O'Neal outside the original contract between GRW and appellees. After hearing testimony of the witnesses, the trial court determined that the deduction of $2,500 was appropriate because Mr. O'Neal performed the following work outside the original contract, which was not necessary to bring the property in line with the condition contemplated at contracting: (1) back prime new siding; (2) rework the wall under the window unit in the home office; and (3) repair indoor drywall areas.

{¶22} Trial court findings are presumed to be correct because the trial judge had the opportunity to observe opposing witnesses and weigh the credibility of opposing evidence and testimony. *Bd. of Trustees v. Anderson*, 6th Dist. No. L-06-1014, 2007-Ohio-1530, at ¶9.

{¶23} Here, the trial court correctly recognized some work was outside the scope of the original contract and deducted the value of these services accordingly,

weighing the presented evidence and testimony to determine the amount of work performed by Mr. O'Neal outside the contract entered into between appellees and GRW. For this reason, the trial court's decision on the damages and monies spent by appellees is not against the manifest weight of the evidence.

{¶24} Under the third issue presented for our review, GRW argues the judgment is against the manifest weight of the evidence as appellees failed to mitigate their damages with respect to the replacement windows. GRW maintains that appellees failed to contact them in order to obtain the replacement windows when they arrived at GRW's warehouse. Instead, appellees chose to purchase three new windows from Colony Lumber, thereby increasing their damages.

{¶25} Once appellees noticed the leaking windows, they contacted a representative from Marvin who determined the windows were defective. Appellees were given the opportunity to have the windows replaced or refunded; they chose to have the windows replaced. Although Stern attempted to obtain the windows through Marvin directly, his efforts were futile. Instead, the new windows were delivered to GRW in either September or October 2008, seven months after the windows began to leak. While awaiting the replacement windows, Stern purchased tarps from a home-center to keep the elements from entering his home.

{¶26} The trial judge found that "Bernstein and Stern had given up on GRW *** the court does not find Bernstein and Sterns' actions unreasonable since they had attempted to work with GRW for approximately a year." The trial court heard evidence that GRW attempted to contact appellees by phone in October after receiving the replacement windows; however, Stern testified that the message was obscure and

indirect. Stern never returned GRW's phone call nor did GRW make further attempts to contact appellees. Appellees never took possession of these windows. Instead, in April 2009, they paid for the Colony Lumber windows and had them installed by Mr. O'Neal.

{¶27} The trial court, as the trier of fact, was in the best position to view the witnesses and their demeanor. Consequently, competent, credible evidence was presented that would allow the trial court to make a finding that appellees were reasonable in their efforts to mitigate.

{¶28} GRW's first assignment of error is without merit.

{¶29} In their second assignment of error, GRW contends the evidence was insufficient, as a matter of law, to enter a judgment against GRW in the amount of $3,030.22. GRW argues that no evidence was presented connecting the alleged damages sustained by appellees to the monies spent by appellees, and that no evidence was presented that appellees mitigated their damages with respect to the replacement windows.

{¶30} Sufficiency is a test of whether the trier of fact had evidence before it to satisfy the required degree of proof. *State v. Thompkins* (1997), 78 Ohio St.3d 380, 386. See, also, *Bryan-Wollman v. Domonko*, 115 Ohio St.3d 291, at ¶3 (stating, "[w]hen applying a sufficiency-of-the-evidence standard, a court of appeals should affirm a trial court when 'the evidence is legally sufficient to support the jury verdict as a matter of law.'")

{¶31} First, GRW contends there was no testimony that any of the work done by Mr. O'Neal was necessary as a result of the "lack of workmanlike installation of GRW." When a contractor fails to perform in a workmanlike manner, the proper measure of

damages is the cost to repair the damage to the condition contemplated by the parties at the time of contract. *McCray v. Clinton Cty. Home Improvement* (1998), 125 Ohio.App.3d 521, 523-24.

{¶32} Although GRW claims these expenses cannot be connected to the failure of GRW to complete the job in a workmanlike fashion, the record demonstrates otherwise. Numerous witnesses, representing both sides of the case, presented evidence that Mr. O'Neal made repairs to appellees' residence due to the lack of workmanlike installation by GRW. Mr. O'Neal testified to the work he performed, which included replacing casings around all the windows, replacing three windows in their entirety, and redoing caulking. Photographs taken by Stern illustrated poorly-fitted and misaligned window trim, gaps and bubbles in the exterior caulking, excessive use of wood filler, large nail holes, misaligned miters, and uneven windows. Even GRW's own president testified the installation was never completed and that appellees had outstanding concerns about the quality of the installation. The president testified that many of the items on Stern's punch list were valid and were never corrected. The trial court also noted that the president acknowledged the miter joints in the window trim required fixing and the exterior caulk required replacement.

{¶33} A review of the record demonstrates the trial court had sufficient competent evidence that, if believed by the trial court, related the damages sustained by appellees to the monies spent by appellees.

{¶34} Next, GRW argues there was not sufficient evidence to show that appellees mitigated their damages with respect to the replacement windows. Under this

issue, GRW rehashes the same evidence as presented under its first assignment of error.

{¶35} It is well settled that an injured party has a "duty to mitigate its damages and may not recover those damages which it could have reasonably avoided." *S & D Mechanical Contrs., Inc. v. Enting Water Conditioning Sys., Inc.* (1991), 71 Ohio App.3d 228, 238. However, the duty to mitigate applies only to damages which could have been avoided with reasonable effort and without undue risk or expense. *Tokai Fin. Serv., Inc. v. Matthews* (Nov. 24, 1995), 11th Dist No. 95-L-098, 1995 Ohio App. LEXIS 5163, at *6-7. (Citation omitted.)

{¶36} Although GRW claims there was not sufficient evidence to show that appellees mitigated their damages, the record demonstrates otherwise. Appellees gave GRW numerous opportunities to complete the project consistent with workmanlike standards. Throughout the installation, Stern provided GRW with punch lists of issues that needed to be resolved. These issues were left mostly unresolved. Furthermore, in February 2008, when the windows first began to leak, appellees worked with Marvin to have the windows corrected. Appellees tried to obtain the windows directly from the manufacturer, but instead the windows ended up in GRW's warehouse. Once GRW received the windows, they made only one call to Stern. Appellees did not purchase replacements from Colony Lumber until a full year after the windows began to leak and after unsuccessful efforts by their attorney to directly obtain the replacements from Marvin. By this point, appellees had given up on GRW. The trial court found their frustration and abandonment of the relationship was reasonable. As such, there was no failure to mitigate.

{¶37} A review of the record demonstrates that the trial court had sufficient evidence to conclude that appellees met their duty to mitigate with respect to the replacement windows.

{¶38} We find GRW's second assignment of error to be without merit.

{¶39} Based on the opinion of this court, the judgment of the Lake County Court of Common Pleas is hereby affirmed.

CYNTHIA WESTCOTT RICE, J.,

MARY JANE TRAPP, J.,

concur.