

**IN THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
LAKE COUNTY, OHIO**

GEORGE KILKO,	:	OPINION
Plaintiff-Appellant,	:	
- vs -	:	CASE NO. 2012-L-003
HELEN LOCKHART, et al.,	:	
Defendants-Appellees.	:	

Civil Appeal from the Lake County Court of Common Pleas, Case No. 10 CV 003160.

Judgment: Affirmed

Walter J. McNamara, III, McNamara & Loxterman, 8440 Station Street, Mentor, OH 444060 (For Plaintiff-Appellant).

A. Pearce Leary, 401 South Street, Bldg. 4-A, Chardon, OH 44024 (For Defendants-Appellees).

DIANE V. GRENDELL, J.

{¶1} Plaintiff-appellant, George Kilko, appeals the Opinion and Judgment Entry of the Lake County Court of Common Pleas, finding in favor of defendant-appellee, Helen Lockhart, on a claim for breach of contract (asset purchase agreement). The issue before this court is whether a trial court may find that a party has failed to prove that he overpaid under the terms of a contract, based on a mutual mistake of fact, where the party’s testimony regarding the mistake is uncontradicted. For the following reasons, we affirm the decision of the court below.

{¶2} On October 20, 2010, Kilko filed his Complaint against Lockhart.¹ “Kilko brought suit for breach of contract, tortious interference with business relationship by violating an agreement not to compete and unjust enrichment arising from his 2003 purchase of Cameo Jewelers, Inc.” Opinion & Journal Entry of September 14, 2011. Lockhart was the sole shareholder of Cameo Jewelers, an S Corporation which owned a jewelry store located at 115 Main Street, Chardon, Ohio. Opinion and Judgment Entry of December 6, 2011.

{¶3} On November 15, 2010, Lockhart filed her Answer and counterclaimed for breach of a promissory note.

{¶4} On September 8, 2011, Kilko filed an Amended Complaint, adding Cameo Jewelers, Inc., as a defendant.

{¶5} On September 14, 2011, the trial court granted summary judgment in Lockhart’s favor as to Kilko’s claim for unjust enrichment. The court also granted summary judgment in Lockhart’s favor on Kilko’s breach of contract claim against her, since “Kilko made no allegations or presented any evidence to breach the corporate veil and hold Lockhart personally liable for breach of the asset purchase agreement.” Opinion and Judgment Entry of December 6, 2011.

{¶6} On September 16, 2011, trial was held before the court on the remaining claims raised in the Complaint and Counterclaim.

{¶7} On December 6, 2011, the trial court issued its Opinion and Judgment Entry. The court found in favor of Cameo Jewelers and Lockhart on Kilko’s claim for

1. Kilko filed an earlier Complaint on May 2, 2008. This Complaint was dismissed in October 2009, following the “Final Payment Due on Note,” described below.

breach of a non-competition agreement; and in favor of Kilko on Lockhart's counterclaim for breach of a promissory note. Neither of these judgments are challenged on appeal.

{¶8} With respect to Kilko's claim against Cameo Jewelers for breach of the asset purchase agreement, the trial court made the following findings. On October 20, 2003, Kilko and Lockhart, in her capacity as president of Cameo Jewelers, signed a purchase agreement for the assets of the above-mentioned jewelry store.

{¶9} The total purchase price was \$50,000 plus the seller's cost of the inventory to be transferred to the buyer. The \$50,000 was allocated as follows: \$36,000 for furniture, fixtures and equipment; \$2,000 for Lockhart's covenant not to compete; and \$12,000 for goodwill. Paragraph 3(c) specified that the total cost of the inventory is \$150,310.51 and that fifty percent of this amount shall be paid in cash at closing less a \$5,000 credit for the earnest money deposit. The parties testified that Kilko made a down payment of \$64,481.52 (no later than October 24, 2003) which, including the \$5,000 earnest money deposit, would have represented an inventory cost of \$138,963. No explanation for the difference in inventory cost was provided by the parties. Paragraph 3.(c)(ii) specified that the balance would be satisfied by the buyer's execution and delivery of a cognovit promissory note in the principal amount of \$50,000 plus fifty percent of the cost of the inventory.

{¶10} Opinion and Judgment Entry of December 6, 2011.

{¶11} On October 24, 2003, Kilko and Lockhart, in her capacity as president of Cameo Jewelers, signed an addendum to the asset purchase agreement. The addendum contained the following section captioned Agreement:

{¶12} In order to be able to agree, Buyer and Seller agreed to use a Fifty Thousand (\$50,000.00) dollar amount in the Purchase and Sales Agreement, over and above the cost of inventory. Changes as follows: The actual dollar amount was \$15,000.00, but the adjusted amount of actual purchase price #3 and Exhibit C will be determined by using the year 2003 store sales net profit ability [sic], after expenses, to pay the total purchase price within five (5) year time period.

{¶13} The trial court construed “actual purchase price #3” as referring to the third paragraph of the asset purchase agreement, i.e., \$50,000 “plus the Seller’s cost of the inventory,” and “Exhibit C” as referring to the Cognovit Promissory Note attached to the asset purchase agreement. The court further observed: “This paragraph did not specify how [the] purchase price will be ‘adjusted.’ Kilko argued during trial that if the store was not profitable in 2003, he would owe no more than \$15,000. Presumably if the store made any profit, however minimal, he would owe the full \$50,000.”

{¶14} Below the Agreement section of the addendum was a section captioned Terms:

{¶15} The Purchase price amortized at 6.5% interest over a maximum of five (5) years. The Fifty Thousand (50,000.00) dollar number stated in the Purchase and Sales Agreement is the maximum dollar amount and the minimum dollar amount will not be less than Fifteen Thousand (15,000.00) dollars. This amount and 50% of the inventory is the amount to be financed by the Seller.

{¶16} The trial court noted that Kilko took over operation of the jewelry store in October 2003. Kilko made payments on the promissory note through September 2009,

when he issued a final check for \$2,330.72, and marked it, "Final Payment Due on Note."

{¶17} The basis for Kilko's breach of contract claim was that he overpaid the purchase price under the October 24, 2003 addendum. The overpayment was the result of the 2003 tax return erroneously showing that the business was profitable. As described by the trial court: "Kilko essentially claims his accountant missed over \$45,000 in expenses (some of which were actually paid in 2004) and that if those expenses were included in The Cameo Jewelers tax return, then the combined tax returns (of The Cameo Jewelers and defendant Cameo Jewelers, Inc.) for 2003 * * * would have shown that the store was not profitable in 2003. He thus claims he mistakenly paid \$50,000 rather than \$15,000 pursuant to the first addendum. Kilko claims he is owed the difference (\$35,000) plus interest on the \$50,000 he mistakenly paid. In response, Cameo Jewelers, Inc. claims Kilko is trying to include expenses paid in January 2004 as 2003 expenses, in effect applying thirteen months of expenses against twelve months of income."

{¶18} The trial court found in favor of Cameo Jewelers on Kilko's breach of contract claim, based on the following findings and analysis:

{¶19} Kilko presented testimony by his accountant who prepared the tax returns for The Cameo Jewelers. The accountant testified that tax returns for a business should use an accrual basis in which inventory ordered and received in 2003 should be reflected as an expense in the 2003 tax return. This is unlike cash basis accounting (used by individuals) in which the cost of inventory would be shown as an expense in the year in which the invoice is paid (i.e. in January or February 2004). He testified that he

prepared the 2003 tax return for The Cameo Jewelers based on information provided by the store's clerk and bookkeeper which incorrectly labeled as inventory certain expenses (amounting to about \$9,500) and which failed to include as expenses in 2003 the cost of inventory received that year but paid in early 2004. The accountant testified that had these items been included in the 2003 tax return for The Cameo Jewelers (covering the period of October 1, 2003 through December 31, 2003), the reported income of \$17,005 would have been reduced to zero. He testified that he did not file an amended tax return for 2003 since the three year statute of limitation had expired.

{¶20} Kilko claims he did not become aware of this accounting error until 2009. He further testified that Lockhart showed him a second set of handwritten financial records that he asserted falsely showed the store was profitable. He essentially claimed that she kept two sets of books (i.e. financial records). However, he also testified that he received the assets and financial records specified in the asset purchase agreement so he had the store's financial records and tax returns for the past several years. He also stated that he was unable to retain all of the customers of the former store which presumably reduced his store's profitability.

{¶21} Lockhart denied keeping a second set of books. She testified that the 2003 tax return for the store for the first nine months of 2003 accurately showed a loss of \$3,522 but that the Christmas season was ordinarily profitable and made up for the lack of profits for the first nine months of the year. She claimed the store should have been profitable for

the year. She testified that she did have handwritten notes that she provided to her accountant. She also used these notes to list expenses for replacing customer watch batteries which she provided at no cost.

{¶22} In support of his claim, Kilko provided * * * a General Ledger for The Cameo Jewelers for the year 2003. Under “inventory” this exhibit showed a starting value of inventory of \$150,310.51 presumably as of October 1, 2003. This amount is in accordance with the inventory value specified in paragraph 3.(c) of the Asset Purchase Agreement but does not reflect the amount Kilko actually paid for the inventory. This exhibit also showed the value of the inventory as of December 29, 2003 as being \$169,937.69. This represented an increase of \$19,627.18. Kilko check-marked twenty-one items on this inventory list that totaled \$9,252.44 that he claims w[ere] omitted as an expense from his store’s 2003 tax return. All of the items were ordered in the period October through December 2003 and thus were ordered by Kilko or his store manager. Even if the \$9,252.44 were subtracted from the store’s income of \$17,005 as reported in the store’s 2003 federal income tax return, the store still would have shown a profit of \$7,752.56. It was not clearly explained how the remaining profit was reduced to zero or less.

{¶23} There was no evidence of payments in 2004 for items of inventory ordered by Lockhart. As previously mentioned, the inventory allegedly paid in 2004 appears to be items ordered by Kilko or his store manager. It is not clear why Lockhart should be financially penalized for expenses solely under the control of Kilko. Kilko does not specifically allege or

provide any proof that any of the inventory turned over by Lockhart was not paid for in full or was on consignment. In addition, some of Kilko's store expenses dramatically increased after he took control of the store in late 2003. For instance, the 2003 tax return for Cameo Jewelers, Inc. (under Lockhart's control) showed total expenses for rent as \$3,560 or \$395.55 per month for nine months. In contrast, the tax return for The Cameo Jewelers (under Kilko's control) showed total expenses for rent as \$5,411 or \$1803.66 per month for three months, an anomaly that if true, significantly impacted the new store's profitability. In addition, Kilko hired a store clerk/bookkeeper who was paid \$14,981 (or almost \$5,000 per month) according to his store's 2003 tax return. In contrast, Lockhart apparently did not pay herself for operating the store. The income tax return for Lockhart's store (Cameo Jewelers, Inc.) showed no deductions for salaries and wages or for compensation of officers. While Kilko would not have had access to the tax return of Cameo Jewelers, Inc. before closing, he did have access to the financial records of the store and the fact that Lockhart was apparently not paying herself should have been a red flag as being unreasonable. Despite these significant additional expenses, Kilko has failed to show by a preponderance of the evidence that the store under his management in late 2003 was unprofitable. Even assuming his interpretation of the October 24, 2003 addendum is reasonable, he is not entitled to a return of \$35,000 from Cameo Jewelers, Inc.

{¶24} On January 5, 2012, Kilko filed his Notice of Appeal. On appeal, he raises the following assignments of error:

{¶25} “[1.] The trial court’s decision that the buyer of a jewelry store, plaintiff-appellant did not overpay for the store, is not supported by credible, competent evidence where the Addendum to the Contract of Sale provided (in pertinent part) that a portion of the purchase price would be dependent upon the net profitability of the jewelry store for the year 2003 and that the minimum price would be \$15,000 with a maximum price being \$50,000, all depending upon the ability of the net profitability to sustain a payment on a five-year note, amortized at 6.5%, when the jewelry store had a net loss for the year 2003, appellant had previously paid the \$50,000, plus interest by mistake and was entitled to a refund of \$35,000, plus interest as a matter of law.”

{¶26} “[2.] The trial court erred as a matter of law in its interpretation of the Addendum to the Contract of Sale of a jewelry store when it found the buyer, plaintiff-appellant, was liable for the maximum purchase price despite the plain language of the Addendum, which included a price range based upon the store’s profitability.”

{¶27} “Weight of the evidence concerns ‘the inclination of the *greater amount of credible evidence*, offered in a trial, to support one side of the issue rather than the other. It indicates clearly to the [finder of fact] that the party having the burden of proof will be entitled to their verdict, if, on weighing the evidence in their minds, they shall find the *greater amount of credible evidence* sustains the issue which is to be established before them. Weight is not a question of mathematics, but depends on its *effect in inducing belief*.” (Emphasis sic.) *State v. Thompkins*, 78 Ohio St.3d 380, 386, 678 N.E.2d 541 (1997), quoting *Black’s Law Dictionary* 1594 (6th Ed.1990).

{¶28} “The court, reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the evidence, the [finder of fact] clearly lost its way and created such a manifest miscarriage of justice that the [judgment] must be reversed and a new trial ordered.” *Id.* at 387, quoting *State v. Martin*, 20 Ohio App.3d 172, 175, 485 N.E.2d 717 (1st Dist.1983).

{¶29} “In weighing the evidence, the court of appeals must always be mindful of the presumption in favor of the finder of fact.” *Eastley v. Volkman*, 132 Ohio St.3d 328, 2012-Ohio-2179, 971 N.E.2d 517, ¶ 21; *Seasons Coal Co., Inc. v. Cleveland*, 10 Ohio St.3d 77, 80 fn. 3, 461 N.E.2d 1273 (1984), quoting 5 Ohio Jurisprudence 3d, Appellate Review, Section 603, at 191-192 (1978) (“every reasonable intendment and every reasonable presumption must be made in favor of the judgment and the finding of facts”).

{¶30} The interpretation of a contract, however, is a matter of law subject to a de novo standard of review. *Nationwide Mut. Fire Ins. Co. v. Guman Bros. Farm*, 73 Ohio St.3d 107, 108, 652 N.E.2d 684 (1995).

{¶31} In Ohio law, “[t]he general rule is that money paid under the mistaken supposition of the existence of a specific fact which would entitle the payee to the money, which money would not have been paid had it been known to the payer that the fact did not exist, may be recovered.” *Firestone Tire & Rubber Co. v. Cent. Natl. Bank of Cleveland*, 159 Ohio St. 423, 112 N.E.2d 636 (1953), paragraph two of the syllabus. “The test of the right of recovery of money paid under mistake of fact is whether the payee has a right to retain the money and not whether he acquired possession of it honestly or in good faith. If the money belongs to the payer and the payee can show no

legal or equitable right to retain it he must refund it.” *Id.* at paragraph five of the syllabus. “Recovery back of payments made under mistake of fact is not, as a matter of law, defeated by the failure of the payer to exercise ordinary care to avoid the mistake, but his negligence is a relevant factor in determining whether it is equitable to allow recovery.” (Citation omitted.) *Id.* at 434

{¶32} Kilko contends in his first assignment of error that he paid the purchase price of \$50,000 for the jewelry store in the mistaken belief that the store was profitable in 2003. Kilko maintains the unprofitability of the store in 2003 was established by the uncontradicted testimony of his accountant and bookkeeper. Although the 2003 tax return for The Cameo Jewelers reported an ordinary (adjusted) income of \$17,005, approximately \$9,500 of this figure constituted expenses which had been improperly coded as inventory, and approximately \$7,500 of this figure constituted expenses incurred in 2003 but paid in early 2004. According to Kilko’s account, these payments should have been included in the 2003 return on an accrual basis. With these adjustments, Kilko asserts the evidence conclusively demonstrates the jewelry store’s unprofitability in 2003.

{¶33} The fact that the testimony of Kilko’s accountant and clerk was uncontradicted does not conclusively demonstrate that Kilko met his burden of proving the store’s unprofitability in 2003. It is well-established that uncontradicted testimony need not be accepted as credible and that the finder of fact “may believe or disbelieve any witness or accept part of what a witness says and reject the rest.” *State v. Antill*, 176 Ohio St. 61, 67, 197 N.E.2d 548 (1964).

{¶34} Kilko’s position was that for six years he failed to realize \$17,000 worth of errors in his 2003 tax return resulting in a \$35,000 overpayment for an allegedly

unprofitable business. No explanation was given as to how or why the errors were discovered after six years. The only evidence of the actual errors was the testimony of the clerk, who simply testified that \$9,252 worth of items were improperly identified as inventory rather than expenses and that there were an additional \$7,500 of expenses incurred in 2003 but not paid until 2004. The clerk did not explain how she recalled which items should have been identified as expenses rather than inventory. Her testimony was not corroborated by any documentary evidence or business records.² The trial court's conclusion that, based on this evidence, Kilko failed to meet his burden of proving that the store was unprofitable in 2003 does not constitute a manifest miscarriage of justice so as to require the reversal of the judgment.

{¶35} In addition to the deficiencies in the evidence's credibility, Kilko has failed to convincingly demonstrate a contractual or legal basis for concluding the store was unprofitable. As Kilko conceded in his appellate brief, the "Addendum did not set a method for determining the net profitability of the store for the year 2003," although the "only rational method is to analyze the actual results of the parties." Brief of appellant, at 5-6. This, in effect, is what the trial court did in its analysis. Rather than accepting or rejecting outright Kilko's evidence, the court considered the evidence with regard for its bearing on the store's profitability. Accordingly, the court noted that Lockhart should not be "financially penalized" by the inventory acquired by Kilko at the end of 2003 (the cost of which would eventually be offset by its sale); the cost of rent increased four-fold under Kilko's operation of the store; and the cost of hiring a clerk/bookkeeper should have been a foreseeable expense. As a reviewing court, we need not approve or

2. The General Ledger submitted by Kilko is a list of "inventory," with certain items marked off by the clerk. At best, this attests the value of the purportedly misidentified inventory. The summary of expenses incurred in 2003 but paid in 2004 submitted by Kilko was created in anticipation of trial and did not contain any underlying documentation that would support the figures it contained.

disapprove the trial court's analysis of the evidence before it. Rather, where the evidence, as here, is susceptible of multiple constructions, we must accept the construction more favorable to sustaining the court's verdict and judgment. *Eastley*, 132 Ohio St.3d 328, 2012-Ohio-2179, 792 N.E.2d 517, at ¶ 21.

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

{¶37} In the second assignment of error, Kilko argues that the trial court erred, as a matter of law, in its interpretation of the October 24, 2003 addendum. The court construed the addendum to mean that if the jewelry store showed any profit in 2003, its purchase price would be \$50,000, otherwise, its purchase price would be \$15,000. Kilko argues that the "plain language" of the addendum indicates that the actual purchase price is the net profit for the year 2003 amortized over five years at 6.5 percent interest, with a potential maximum price of \$50,000 and a potential minimum price of \$15,000. Thus, the court should have determined what the net profitability of the jewelry store was for 2003, recalculated the purchase price accordingly, and awarded Kilko the appropriate restitution.

{¶38} We find no error in the trial court's interpretation of the addendum. As noted above, the addendum did not set forth a formula for determining net profitability, but stated that the "actual purchase price * * * will be determined by using the year 2003 store sales net profit ability [sic], after expenses, to pay the total purchase price within a five (5) year time period." The trial court did not strictly equate net profitability with the ordinary (adjusted) income listed in the tax returns, and the addendum did not require it to do so. Rather, the court considered multiple factors bearing on the store's profitability. This approach is consistent with the law regarding the recovery of money

paid under mistake of fact, which allows for such equitable considerations. *Firestone*, 159 Ohio St. at 434, 112 N.E.2d 636.

{¶39} As Lockhart points out in her appellate brief, Kilko did not argue before the trial court for a recalculation of the purchase price based upon an adjusted net profit, but, rather, that the store was unprofitable. See, e.g., Plaintiff's Opposition to Defendant's Cross-Motion for Summary Judgment, at 2 ("[w]hile there may be different views of profitability, profitability never means a loss"). Kilko presented no evidence as to what the purchase price would have been with an adjusted net profit (although he maintains on appeal that such a recalculation is a matter of "simple math"), and did not move the court to conform the pleadings so as to raise the issue. *State ex rel. Evans v. Bainbridge Twp. Trustees*, 5 Ohio St.3d 41, 44, 448 N.E.2d 1159 (1983) ("[a]lthough Civ. R. 15 allows for liberal amendment of the pleadings toward that end, the rule will only apply when, as stated therein, the amendment would 'conform to the evidence' and when the issue is tried by either the 'express or implied consent of the parties'") The interpretation of the amendment argued by Kilko on appeal was first suggested to the trial court during rebuttal closing argument. At no point prior to this appeal did Kilko claim that he was entitled to anything less than \$35,000, the full difference between the maximum and minimum purchase prices. Based on Kilko's failure to argue this claim before the lower court, we find no error in the court's Opinion.

{¶40} Finally, even under Kilko's interpretation of the addendum as set forth on appeal, the trial court's verdict is sustainable given the court's rejection of the testimony that certain items of inventory should have constituted expenses. That the court was doubtful regarding this testimony is evident from its use of the subjunctive in its Opinion, where it states "[e]ven if the \$9,252.44 **were** subtracted from the store's income * * * as

reported in the store's 2003 federal income tax return." (Emphasis added.) Since Kilko failed to carry his burden in showing that the store's reported profitability for 2003 was in error, the court's interpretation of the addendum with respect to an adjusted net profit becomes irrelevant.

{¶41} The second assignment of error is without merit.

{¶42} For the forgoing reasons, the Opinion and Judgment Entry of the Lake County Court of Common Pleas, finding in Lockhart's favor on Kilko's claim for breach of contract, is affirmed. Costs to be taxed against appellant.

TIMOTHY P. CANNON , P.J.,

THOMAS R. WRIGHT, J.,

concur.