**[Cite as *Koller v. Zellman*, 2018-Ohio-2463.]**

**IN THE COURT OF APPEALS**

**ELEVENTH APPELLATE DISTRICT**

**GEAUGA COUNTY, OHIO**

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| RAYMOND G. KOLLER, JR., | : | **O P I N I O N** |
| Plaintiff-Appellant, | : | **CASE NO. 2018-G-0153** |
| - vs - | : | |
| JASON ZELLMAN, et al., | : | |
| Defendants-Appellees. | : | |

Civil Appeal from the Chardon Municipal Court, Case No. 2014 CVF 00885.

Judgment: Affirmed.

*Robert E. Rosenberg* and *Michael D. Dailey*, Rosenberg & Associates, 533 East Main Street, Ravenna, OH 44266 (For Plaintiff-Appellant).

*Dennis J. Ibold*, Ibold & O'Brien, 401 South Street, Chardon, OH 44024 (For Defendants-Appellees).

DIANE V. GRENDELL, J.

**{¶1}** Plaintiff-appellant, Raymond G. Koller, Jr., appeals from the judgment of the Chardon Municipal Court, ruling in favor of defendants-appellees, Jason Zellman and Patriot Security Systems, Inc., on Koller's claims relating to breach of contract and in favor of Zellman on his counterclaim. The issues to be determined in this case are whether a magistrate can consider a view of the property that he attended while excluding any comments or testimony made during that view and whether a court errs in awarding damages to repair contracting and painting work when there is conflicting testimony regarding the nature and quality of the work performed and the repair

estimates exceed the amount of the original contract. For the following reasons, we affirm the decision of the lower court.

**{¶2}** On November 19, 2014, Koller filed a Complaint in the Chardon Municipal Court against Zellman and Patriot, of which Zellman is the CEO, alleging failure to pay for work performed by Koller at Zellman's residence. The Complaint raised counts for Breach of Contract, Unjust Enrichment, and Quantum Meruit and requested compensatory damages in the amount of $6,719.

**{¶3}** Zellman and Patriot filed separate Answers on December 15, 2014.

**{¶4}** On January 26, 2015, Zellman filed a Counterclaim, in which he alleged that Koller negligently improved his property, necessitating repair work. Koller filed an Answer to the Counterclaim on February 17, 2015.

**{¶5}** Zellman filed a Motion for Court View of Property on July 13, 2015. A view of the property with the attorneys, parties, and magistrate, as the trier of fact, was conducted.

**{¶6}** Following a trial to the magistrate on August 20, 2015, the court issued an order finding that, given missing trial recordings, the matter would be set for a new trial.

**{¶7}** A second trial to the magistrate was held on July 7 and August 25, 2016. The following pertinent testimony and evidence were presented:

**{¶8}** At the start of the trial, Koller moved to strike observations from the magistrate's view of the residence, arguing that Zellman was permitted to point to flaws while Koller was not given an opportunity to respond. The magistrate reserved ruling on this issue.

**{¶9}** Zellman testified regarding the painting/construction work performed by Koller, at his residence, described as approximately 9,000 square feet in size. Koller

was a friend who performed satisfactory work for Zellman in the past. The job was conducted in two phases. Phase I work, which Koller was hired to do around February 2014, involved patching and painting several rooms, as well as working on a "salon" area. Phase II was to include additional painting of rooms and a main staircase, as well as the installation of doors. Following the Phase I work, Zellman expressed concern that some patched areas were not painted and "held back a certain number of dollars," the amount of which he did not recall. He testified that Koller ultimately refused to correct the items with which Zellman was dissatisfied, although given the opportunity to do so.

**{¶10}** Zellman testified regarding concerns with the work completed in both phases, which resulted in his non-payment for part of Phase I and all of Phase II. Issues described included: patchwork and cracks left unpainted; unmatched touchup paint in various rooms; improperly repaired holes; paint in several areas running, dripping, and on the trim; improperly installed doors; failure to complete a door frame and faucet repair; and paint splattered on the bathroom floor. Regarding the staircase, he expressed concerns of paint transfer, ridges and pitting in the paint, and dirt and fuzz embedded in the paint.

**{¶11}** Zellman testified that when he had discussed the work with Koller, he stated that he "wanted it perfect." He wanted black lacquer, which was not used, and for the stair rail to be "smooth" and "look like glass." He stated that he contracted with Koller "to reproduce a photograph that I provided perfectly."

**{¶12}** Koller, a contractor who has been performing construction work for 36 years, has done "numerous" jobs for Zellman over a more than ten-year time period. No written contract was completed for the work in Phase I, which included a sink and

gas line installation as well as painting, or Phase II. After providing an invoice for $3,788 following Phase I, Zellman paid $3,400, but did so due to a lack of cash rather than dissatisfaction. Zellman requested the Phase II work commence as soon as Phase I had been completed. Phase II included painting work on the stairs, for which Koller had provided a "ballpark" estimate of between $2,500 and $3,500, with wainscoting work later added. After completing the second phase, a bill for $6,719 was sent to Zellman, who did not pay it or respond to Koller's phone calls and attempts at contact.

**{¶13}** Koller testified that he had completed the work as agreed to by the parties, presenting photographs of the finished projects, and that Zellman had approved the paint samples used on the stairs. He testified that he was not given an opportunity to remedy Zellman's complaints but that it would take only about a day to fix the issues, such as completing minor paint touchups. He testified other work, such as door installation, caulking, and prepping were performed correctly and did not need to be fixed and some painting was not performed because it was to be done in a future project. Regarding the staircase, he testified that the agreement was to paint an "overcoat" rather than entirely strip the wood, which would have been more costly.

**{¶14}** Richard Sotka, a painter with 17 years of experience, inspected Koller's work. He believed that the work done was not of professional quality within the area. He testified that, regarding the stairs, the paint felt like sand paper and was completed over dust and other particles. Sotka also saw divots in the wall, cracks in caulking, and a lack of caulk in some areas. He testified that the painted areas were not prepped and that to get the appropriate finish he would have to re-sand and repaint, which he characterized as a "repair" of the work done, and it would cost $15,000.

**{¶15}** Daniel Groth, a general contractor for 42 years, also reviewed Koller's work. In his experience with Koller, he does "quality work" and will return to remedy problems. Regarding the paint used on the staircase, Groth believed defects may be due to the quality of the wood painted rather than the work. Groth believed the work fit the house, which was "middle of the road." He described the work as "fine," usual, and customary. He testified that he would "have talked my customer out of that gloss paint."

**{¶16}** Dave Strahl, the owner of CertaPro Painters, examined the work and testified that "if [his] company had done it, [he] would not be satisfied with the outcome." Although painting is "reasonably subjective," he believed the work should be redone. Regarding the paint applied in areas including the stairs and wainscoting, he noted drips, an "orange peel effect," cracks, areas with too little or too much paint, and paint on surfaces where it should not be. He opined that the areas painted were "not well prepared." Strahl disagreed with the conclusion that it would take a day or less to correct these issues. He estimated the cost of redoing the job at $22,096.02, which "is what it would take to get it to a point that [he] would consider standard for a home in that neighborhood."

**{¶17}** On September 28, 2017, a Magistrate's Decision entered judgment in favor of Zellman and Patriot Security on Koller's complaint and awarded a judgment of $15,000 in favor of Zellman on his counterclaim, noting that the amount would have been higher but for the jurisdictional cap. The magistrate denied the motion to strike observations made during the walkthrough, since he was "capable of noting the complaints of the Defendant-homeowner without pre-judging the matter." The magistrate found that, based on the evidence, "the quality of the workmanship and the services performed by the plaintiff are unsatisfactory to Jason Zellman and do not

reasonably meet usual and customary standards for the type of work performed."

**{¶18}** Koller filed Objections to the Magistrate's Decision on October 11, 2017, and Supplemental Objections on December 27, 2017, raising various alleged errors.

**{¶19}** On January 2, 2018, the trial court issued a Judgment, adopting the Magistrate's Decision and entering judgment against Koller on the original claims and awarding judgment of $15,000 in favor of Zellman on the counterclaim. It found no merit in the objections.

**{¶20}** Koller timely appeals and raises the following assignments of error:

**{¶21}** "[1.] Whether the Trial Court committed plain error by improperly considering the court view of the residence held on August 11, 2015.

**{¶22}** "[2.] Whether the Trial Court abused its discretion by overruling Koller's objections to the September 28, 2017 Magistrate's Decision and granting judgment in favor of Defendant Jason Zellman."

**{¶23}** In his first assignment of error, Koller argues that it was plain error to consider the court view of the residence, since Zellman was permitted to point out the areas of the residence where he perceived problems, which amounted to the court "hearing unsworn testimony that was evidentiary in nature."

**{¶24}** As an initial matter, Koller states a plain error standard of review. However, Koller moved to strike the court view from consideration at trial and raised the issue in the Objections to the Magistrate's Decision, so the issue was not waived. The decision to admit or exclude evidence is evaluated under an abuse of discretion standard. *Rudzik Excavating, Inc. v. Mahoning Valley Sanitary Dist.*, 11th Dist. Trumbull No. 2017-T-0008, 2017-Ohio-8630, ¶ 60. This court has also generally applied an abuse of discretion standard when reviewing an appeal from a trial court's

judgment accepting or rejecting a magistrate's decision. *Dudas v. Harmon*, 11th Dist. Lake No. 2015-L-060, 2015-Ohio-5218, ¶ 44. In any event, Koller's argument fails under either standard.

**{¶25}** R.C. 2315.02 allows jurors to "have a view of property which is the subject of litigation, or of a place where a material fact occurred." This rule also applies to the finder of fact in bench trials. *State v. Eckard*, 11th Dist. Geauga No. 2001-G-2336, 2002-Ohio-3127, ¶ 14. A view of a premises is conducted for "the purpose of enabling the trier of fact to understand and apply the evidence offered at trial" and "is not conducted to gather evidence; rather, the case must be tried and determined upon the evidence offered at trial." *Id.*, citing *Lacy v. Uganda Invest. Corp.*, 7 Ohio App.2d 237, 241, 195 N.E.2d 586 (8th Dist.1964).

**{¶26}** While the record does not reveal precisely what occurred at the view of the home, Koller argued at trial that Zellman was allowed "to testify" by pointing out flaws while Koller was not permitted to respond. The magistrate noted at trial that "somebody had to point out what the problems were." The Magistrate's Decision opined that allowing Koller to refute the areas pointed out by Zellman "would have resulted in a sort of mini-trial in the home." It concluded that the magistrate is "capable of noting the complaints of [Zellman] without pre-judging the matter" and the decision was based upon the photographic evidence and testimony. We find no error in this conclusion.

**{¶27}** It is reasonable that the homeowner would point out the work in the home and the areas of contention so the magistrate could get a view of all issues to be disputed in court. Further, Koller provides no grounds to rule contrary to the general proposition that a court in a bench trial is "presumed to have considered only relevant, material and competent evidence." *Carter v. New Buckeye Redevelopment Corp.*, 8th

Dist. Cuyahoga No. 72501, 1998 WL 158855, *4 (Apr. 2, 1998), citing *State v. Post*, 32 Ohio St.3d 380, 384, 513 N.E.2d 754 (1987). *See also Guliano v. Guliano*, 11th Dist. Trumbull No. 2010-T-0031, 2011-Ohio-6853, ¶ 19 (a judge/magistrate is presumed to be able to disregard improper or inadmissible testimony). Given the magistrate's statement that the matter was not prejudged based on the view of the house and the lack of evidence to show otherwise, we believe the magistrate, and the trial court in adopting the decision, considered only the evidence properly in the record.

**{¶28}** Finally, Koller notes, in one sentence within this assignment of error, that the court did not address the objection relating to this assignment. While the court did not provide specific analysis on this particular issue, which was one of nineteen objections, it did state that it had reviewed the record and "determines that there is no meritorious basis to any of the objections." Koller cites no authority and provides no argument as to whether this general rejection of the objection impacts this case, whether it warrants reversal, or how it relates to his contention that the merits of the ruling on his motion to strike should be reversed. "It is not the obligation of an appellate court to search for authority to support an appellant's argument as to an alleged error." *Village of S. Russell v. Upchurch*, 11th Dist. Geauga Nos. 2001-G-2395 and 2001-G-2396, 2003-Ohio-2099, ¶ 10.

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

**{¶30}** In his second assignment of error, Koller raises various issues with the lower court's decision, primarily in relation to the weight and credibility of the testimony presented.

**{¶31}** As noted above, generally an abuse of discretion standard is applied to an appeal from a trial court's judgment adopting a magistrate's decision. *Dudas*, 2015-

Ohio-5218, at ¶ 44. However, in cases involving the weighing of facts, this court has applied a manifest weight of the evidence standard. *CitiMortgage, Inc. v. Elrod*, 11th Dist. Portage No. 2017-P-0022, 2017-Ohio-8442, ¶ 15. "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.'" (Citation omitted.) *State v. Thompkins*, 78 Ohio St.3d 380, 387, 678 N.E.2d 541 (1997).

**{¶32}** Here, the magistrate issued a decision, adopted by the court, that the work performed by Koller was deficient and repairs would be necessary. This conclusion was based on photographs presented by both parties as well as the testimony of Koller, Zellman, and several witnesses who have experience in the fields of painting and construction. Testimony was presented that the work performed by Koller was not well done and would cost from $15,000 to $22,000 to repair and/or complete properly.

**{¶33}** Koller first raises issues with determinations about Zellman's and Koller's credibility regarding the circumstances surrounding the contract, completion of the work, and the quality of the work. Koller contends that the court erred in finding he lacked credibility because he inaccurately stated Zellman did not e-mail him about concerns with his work until after litigation was commenced; since he clarified by testifying he received the e-mail before a complaint was filed but after he had contacted his attorney, he should have been found credible. Koller's testimony as to this matter was somewhat unclear but in any event, the minor issue of whether the e-mail was sent before Koller filed the Complaint has little bearing on the overall credibility of the witnesses or the breach of contract issue. Further, Zellman testified that he repeatedly complained about the work throughout the job, testimony which the lower court was entitled to find credible. The issue of credibility is "a matter for the magistrate to decide as

the trier of fact." *Gray v. Petronelli*, 11th Dist. Trumbull No. 2016-T-0030, 2017-Ohio-2601, ¶ 42. "[W]hen assessing the credibility of witnesses, '[t]he choice between credible witnesses and their conflicting testimony rests solely with the finder of fact and an appellate court may not substitute its own judgment for that of the finder of fact.'" (Citations omitted.) *Jones v. Hunter*, 11th Dist. Portage No. 2008-P-0015, 2009-Ohio-917, ¶ 23.

**{¶34}** Koller also points to "inconsistencies" in Zellman's testimony, such as providing inaccurate testimony about the amount of money withheld for Phase I work and the square footage of his home, variously described as 9,000 or 10,000 square feet. These minor mistakes also appear to have little relation to Zellman's overall credibility on the matters in dispute. Again, we decline to second-guess the court's determination by examining every small, questionably-relevant inconsistency in each witness' testimony. While Koller also emphasizes that Zellman did not accurately state all of the work agreed to by the parties, it was evident from the testimony that the tasks to be performed were somewhat fluid and were variously described by both parties throughout the course of the litigation.

**{¶35}** Koller takes issue with the lower court's application of the testimony of the experts in favor of Zellman, citing testimony that Koller's work was "fine" and appropriate for the home and the surfaces being painted. Each of the expert witnesses gave lengthy testimony, with varying degrees of concern expressed about Koller's work. Koller chooses to point out only the testimony that was favorable to him but ignores the extensive testimony about the poor quality of his work and estimates to remedy it. The lower court clearly evaluated the work as a whole and the greater amount of evidence supported Zellman's argument.

**{¶36}** Also in relation to the experts, Koller argues that they testified regarding only what *they* would do in this situation rather than what should have been done. However, as individuals with expertise in the field, what they would have done in the circumstances if performing the work for a client is certainly relevant. Further, Sotka opined that the work was not of a "professional, workmanlike quality for Northeast Ohio." That witnesses found the work unacceptable within their field is a fact the lower court was entitled to rely upon in reaching its decision. To the extent that Koller argues that experts may not have seen certain photographs which would have impacted their conclusions, it was evident from the record that they were familiar with the work done, as they provided detailed testimony about the various defects. While Koller also contends that they were unaware of what was contracted for and thus could not give a clear estimate, Zellman testified that he gave Strahl "the exact same description of the work" provided to Koller. According to the testimony, the experts were both aware of the work Zellman wanted and of what defects existed and needed to be corrected.

**{¶37}** Koller also argues that the court erred by awarding damages to repair or perform work on areas where work was not yet scheduled to begin. No such findings were made by the lower court, which did not itemize each specific issue for which the damages were awarded. Koller fails to identify why he believes this was the case.

**{¶38}** Koller also contends that there was no meeting of the minds given the discrepancy in the amount agreed to be paid for the work he performed versus the estimates of the other contractors. "To constitute a valid contract, there must be an offer on the one side and an acceptance on the other resulting in a meeting of the minds of the parties." *Spoerke v. Abruzzo*, 11th Dist. Lake No. 2013-L-093, 2014-Ohio-1362, ¶ 30.

**{¶39}** We initially note that Koller did not raise this issue in his objections but, to the contrary, argued that there was a valid contract that had been breached. "Except for a claim of plain error, a party shall not assign as error on appeal the court's adoption of any factual finding or legal conclusion * * * unless the party has objected to that finding or conclusion as required by Civ.R. 53(D)(3)(b)." Civ.R. 53(D)(3)(b)(iv). Regardless, Koller fails to demonstrate that there was no meeting of the minds.

**{¶40}** Koller contends that the parties only agreed to a cost of $2,500 to $3,500 to complete the staircase but that the experts' estimates ranged from $15,000 to $22,000, demonstrating the parties did not agree about the quality or type of work to be performed. However, the testimony regarding the estimates did not include just the staircase, but repairs to work throughout the house as well. Further, the work billed by Koller for both phases totaled over $10,000. Given that different contractors charge varying rates for their work, and taking into account the repairs needed to fix the subpar work, we do not find that this demonstrates a lack of a meeting of the minds.

**{¶41}** Finally, Koller argues that the trial court's decision was punitive since, in the first trial which was not properly recorded, $13,870.12 was awarded to Zellman, while $15,000 was awarded following the second trial. Although he contends "it is clear that the Trial Court penalized Koller for challenging the Magistrate's initial decision," Koller provides no support for this contention. Neither the record before this court nor Koller's brief show what evidence was presented at the initial trial in contrast to the evidence presented in the second trial. In the absence of anything in the record demonstrating the decision was punitive, we reject this argument.

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

**{¶43}** For the foregoing reasons, the judgment of the Chardon Municipal Court is affirmed. Costs to be taxed against appellant.

THOMAS R. WRIGHT, P.J.,

CYNTHIA WESTCOTT RICE, J.,

concur.