

COURT OF APPEALS
COSHOCTON COUNTY, OHIO
FIFTH APPELLATE DISTRICT

WILLIAM W. HUNTER, JR.	:	JUDGES:
	:	Hon. W. Scott Gwin, P.J.
Plaintiff-Appellant	:	Hon. William B. Hoffman, J.
	:	Hon. Patricia A. Delaney, J.
-vs-	:	
	:	Case No. 09-CA-0010
STACEE H. GREEN, ET AL	:	
	:	
Defendant-Appellee	:	<u>OPINION</u>

CHARACTER OF PROCEEDING: Civil appeal from the Coshocton County Court of Common Pleas, Case No. 03CI302

JUDGMENT: Affirmed in part; Reversed in part

DATE OF JUDGMENT ENTRY: March 30, 2010

APPEARANCES:

For Plaintiff-Appellant

For Defendant-Appellee

PHILLIP L. HARMON
6649 North High Street, Ste. 105
Worthington, OH 43085

RONALD J. KOCH
698 Morrison Road, Ste. B
Columbus, Oh 43213

Gwin, P.J.

{¶1} Plaintiff-appellant William W. Hunter, Jr. appeals several judgments of the Court of Common Pleas of Coshocton County, Ohio, entered in favor of defendants-appellees, Stacey H. Green and her parents Herschel L. and Syvonía E. Green. Appellant assigns six errors to the trial court:

{¶2} “I. THE TRIAL COURT ERRED AS A MATTER OF LAW BY DISMISSING COUNTS 1, 7 AND 8 OF PLAINTIFF HUNTER’S COMPLAINT IN THE JUDGMENT ENTRY GRANTING IN PART DEFENDANT STACEE H. GREEN’S MOTION FOR PARTIAL SUMMARY JUDGMENT.

{¶3} “II. THE TRIAL COURT ERRED AS A MATTER OF LAW BY ISSUING A POST-TRIAL WRITTEN JUDGMENT ENTRY WHICH AUTHORIZED PLAINTIFF HUNTER TO PROCEED AT RETRIAL SOLELY UPON ¶31 OF HIS COMPLAINT, COUNT 5 (iii) FOR UNJUST ENRICHMENT.

{¶4} “III. THE TRIAL COURT ERRED AS A MATTER OF LAW BY ISSUING A POST-TRIAL WRITTEN JUDGMENT ENTRY WHICH LIMITED PLAINTIFF HUNTER AT RETRIAL TO A MAXIMUM RECOVERY OF \$68,232.43 ON ¶31 OF THE COMPLAINT, COUNT 5 (iii) FOR UNJUST ENRICHMENT.

{¶5} “IV. THE TRIAL COURT ERRED AS A MATTER OF LAW BY IMPLICITLY GRANTING DEFENDANTS’ COUNTERCLAIM COUNT 1, THAT DEFENDANT STACEE GREEN TOOK TITLE TO THE FARM FREE AND CLEAR OF ANY EQUITABLE INTEREST BY PLAINTIFF HUNTER.

{¶6} “V. THE TRIAL COURT’S AWARD OF AN \$8,000.00 MONEY JUDGMENT IN FAVOR OF DEFENDANT STACEE GREEN AND AGAINST PLAINTIFF HUNTER

ON DEFENDANTS' COUNTERCLAIMS 7 AND 8 WAS CONTRARY TO THE MANIFEST WEIGHT OF THE EVIDENCE.

{¶7} “VI. THE TRIAL COURT’S DISMISSAL OF PLAINTIFF’S COMPLAINT ¶31, COUNT 5 (iii) FOR UNJUST ENRICHMENT AGAINST DEFENDANTS SYVONIA AND HERSHELL GREEN, WAS CONTRARY TO THE MANIFEST WEIGHT OF THE EVIDENCE.”

{¶8} The case began in August, 1999 in Franklin County, Ohio, but subsequently was dismissed and re-filed in Coshocton County on May 19, 2003. Appellant set out nine counts in his complaint: (1) Breach of contract; (2) slander of title; (3) negligence; (4) money due on account; (5) unjust enrichment; (6) lis pendens; (7) breach of fiduciary duty; (8) fraud; and (9) tortuous interference with contract.

{¶9} Essentially, appellant alleged he temporarily transferred title to his family farm to Stacee Green, gave appellees certain valuable personal property in bailment, and paid for certain real estate construction, for which appellees promised to reimburse him. Appellant alleged his property was not returned and he had not been reimbursed. Appellant alleged his motive was to shield the property during a dispute with his siblings.

{¶10} On July 19, 2003, appellees filed an answer denying the material allegations, and also filed a counterclaim. The counterclaim set out ten causes of action: (1) complaint for declaratory judgment; (2) complaint on account; (3) claim for profits; (4) trespass; (5) claim on a promissory note; (6) claim on a second promissory note; (7) claim for loan repayment; (8) unjust enrichment; (9) trespass at 882 Kelton Avenue and 889 Kelton Avenue; and (10) trespass at 897 Kelton Avenue. Appellees contended all

the real and personal property transfers and construction costs were unconditional gifts from appellant and they owed him nothing. Appellant denied the allegations the counterclaim.

{¶11} On July 9, 2004, the trial court granted partial summary judgment in favor of appellees and dismissed count one, seven, and eight of appellant's complaint. The trial court subsequently overruled appellant's motion to set aside the judgment. The July 9, 2004 judgment entry was not a final appealable order.

{¶12} In July 2005, the trial court conducted the first jury trial on the remaining claims. Appellant voluntarily dismissed count three which alleged negligent damage to the personal property, and the trial court construed this as a voluntary dismissal of a portion of count five, unjust enrichment as to the personal property. Appellant voluntarily dismissed count nine, and modified count four. Appellant asserts counsel did so all without his knowledge or consent. The matter was set for trial on the remaining counts and the counterclaim.

{¶13} On July 20, 2005, midway through the trial, the trial court declared a mistrial on the remaining counts, but found any prior dismissals would stand. The trial court found the only issue remaining for retrial was a portion of appellant's count five, unjust enrichment, as it pertains to appellant's payment of the repair and construction costs for which appellees had not reimbursed him.

{¶14} Appellant appealed the matter to this court, but we dismissed the appeal, finding the judgment was not final and appealable because one of the claims between the parties remained unresolved.

{¶15} After a bench trial, the trial court entered final judgment which reaffirmed its prior judgment entries, dismissed appellant's remaining claim for unjust enrichment, found the first count of appellees' counterclaim was moot, dismissed counterclaims two and three, granted counterclaim four, dismissed counterclaim five and six, granted judgment of \$8,000 in favor of appellee Stacey Green on counterclaims seven and eight, and granted counterclaims nine and ten. This entry disposed of all the remaining claims.

{¶16} From these judgment entries, appellant now appeals.

I.

{¶17} In his first assignment of error, appellant argues the trial court erred in dismissing counts one, seven and eight of his complaint and granting partial summary judgment in favor of appellees.

{¶18} Civ. R. 56 states in pertinent part:

{¶19} "Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. No evidence or stipulation may be considered except as stated in this rule. A summary judgment shall not be rendered unless it appears from the evidence or stipulation, and only from the evidence or stipulation, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence or stipulation construed most strongly in the party's favor. A summary

judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.”

{¶20} A trial court should not enter a summary judgment if it appears a material fact is genuinely disputed, nor if, construing the allegations most favorably towards the non-moving party, reasonable minds could draw different conclusions from the undisputed facts, *Houndshell v. American States Insurance Company* (1981), 67 Ohio St. 2d 427. The court may not resolve ambiguities in the evidence presented, *Inland Refuse Transfer Company v. Browning-Ferris Industries of Ohio, Inc.* (1984), 15 Ohio St. 3d 321. A fact is material if it affects the outcome of the case under the applicable substantive law, *Russell v. Interim Personnel, Inc.* (1999), 135 Ohio App. 3d 301.

{¶21} When reviewing a trial court’s decision to grant summary judgment, an appellate court applies the same standard used by the trial court, *Smiddy v. The Wedding Party, Inc.* (1987), 30 Ohio St. 3d 35. This means we review the matter de novo, *Doe v. Shaffer*, 90 Ohio St.3d 388, 2000-Ohio-186.

{¶22} The party moving for summary judgment bears the initial burden of informing the trial court of the basis of the motion and identifying the portions of the record which demonstrate the absence of a genuine issue of fact on a material element of the non-moving party’s claim, *Drescher v. Burt* (1996), 75 Ohio St. 3d 280. Once the moving party meets its initial burden, the burden shifts to the non-moving party to set forth specific facts demonstrating a genuine issue of material fact does exist, *Id.* The non-moving party may not rest upon the allegations and denials in the pleadings, but instead must submit some evidentiary material showing a genuine dispute over material facts, *Henkle v. Henkle* (1991), 75 Ohio App. 3d 732.

{¶23} The record indicates appellant failed to respond to appellees' motion for summary judgment. However, the lack of response by the opposing party cannot of itself mandate a grant of summary judgment. *Morris v. Ohio Casualty Insurance Company* (1988), 35 Ohio St. 3d 45, 47, 517 N.E. 2d 904. A trial court cannot grant summary judgment unless it appears from the evidence the moving party is entitled to judgment as a matter of law.

{¶24} The trial court found there was no writing incorporating appellant's claim appellee agreed she would re-convey the farm in question back to him. As such, the court found appellant did not present evidence which would satisfy the statute of frauds. The court found appellant's donative intent in conveying the farm was supported by evidence from his own attorneys, and therefore there was no genuine issue of material fact. We disagree.

{¶25} Ohio's statute of frauds is R.C. 1335.05. It provides in pertinent part:

{¶26} "No action shall be brought whereby to charge the defendant, upon a special promise, to answer for the debt, default, or miscarriage of another person; nor to charge an executor or administrator upon a special promise to answer damages out of his own estate; nor to charge a person upon an agreement made upon consideration of marriage, or upon a contract or sale of lands, tenements, or hereditaments, or interest in or concerning them, or upon an agreement that is not to be performed within one year from the making thereof; unless the agreement upon which such action is brought, or some memorandum or note thereof, is in writing and signed by the party to be charged therewith or some other person thereunto by him or her lawfully authorized.

{¶27} ***"

{¶28} Courts have struggled with the question of what writing is sufficient to satisfy the statute of frauds. In *Landskroner v. Landskroner*, 154 Ohio App. 3d 471, 2003-Ohio-4945, 797 N.E.2d 1002, the court of appeals for the Eighth District found: “A signed memorandum is sufficient to satisfy the Statute of Frauds so long as it (1) identifies the subject matter of the agreement; (2) establishes that a contract has been made; and (3) states the essential terms with reasonable certainty. *Kling v. Bordner* (1901), 65 Ohio St. 86, 61 N.E. 148, paragraph one of the syllabus; see, also, *N. Coast Cookies, Inc. v. Sweet Temptations, Inc.* (1984), 16 Ohio App.3d 342, 349, 16 OBR 391, 476 N.E.2d 388, citing 1 Restatement of the Law 2d, Contracts (1981) 336, Section 131. It does not have to be a formal memorial of the agreement, nor does it need to contain all of the terms of the agreement. Rather, a signed acknowledgment of an oral promise can qualify as a memorandum that satisfies the statute, even if the acknowledgment repudiates the oral promise. Restatement, *supra*, at 347, Section 133, Illustration 4. *N. Coast Cookies*, 16 Ohio App.3d at 349, 16 OBR 391, 476 N.E.2d 388.” *Landskroner* at paragraph 23.

{¶29} In order to satisfy the writing requirement of the statute of frauds, the writing must at the least demonstrate the parties reached an agreement. *Stickney v. Tullis-Vermillion*, 165 Ohio App.3d 480, 2006-Ohio-842, 847 N.E.2d 29.

{¶30} Parol evidence may not be presented to contradict the terms of a written contract. However, parol evidence is admissible to fill in the missing terms of a contract. In *Williams v. Spitzer Autoworld Canton, L.L.C.* 122 Ohio St.3d 546, 2009- Ohio-3554, 913 N.E.2d 410, the Ohio Supreme Court explained, “[t]he parol evidence rule is a rule of substantive law that prohibits a party who has entered into a written contract from

contradicting** the terms of the contract with evidence of alleged or actual agreements. 'When two parties have made a contract and have expressed it in a writing to which they have both assented as the complete and accurate integration of that contract, evidence, whether parol or otherwise, of antecedent understandings and negotiations will not be admitted for the purpose of varying or contradicting the writing.' " (Citation omitted.) *Ed Schory & Sons, Inc. v. Soc. Natl. Bank* (1996), 75 Ohio St.3d 433, 440, 662 N.E.2d 1074, quoting 3 Corbin, *Corbin on Contracts* (1960) 357, Section 573." *Williams* at paragraph 14. However, if a written contract does not contain the complete and exclusive statement of all the terms of the agreement, a factual determination of the parties' intent may be necessary to supply the missing term. *Inland Refuse Transfer Company v. Browning Ferris Industries* (1984), 15 Ohio St.3d 321, 474 N.E.2d 271.

{¶31} To further complicate matters, equitable considerations such as partial performance and/or the doctrine of promissory estoppel may remove a transaction from the statute of frauds *McCarthy, Lebit, Crystal & Haiman Co., L.P.A. v. First Union Mgt., Inc.* (1993), 87 Ohio App.3d 613, 622 N.E.2d 1093; *Weishaar v. Strimbu* (1991), 76 Ohio App.3d 276, 601 N.E.2d 587. Appellant raised equitable issues of fraud and breach of fiduciary duty in his complaint, counts seven and eight.

{¶32} Deposition Exhibit number 6 presented by appellee is a Form DTE100 entitled Statement of Reason for Exemption from Real Property Conveyance Fee, and cites R.C. 319.202 and 319.54 (F)(3). It is the form a grantee must present to the county auditor to demonstrate no conveyance fee should be charged on a real property transfer. The exhibit lists appellant as the grantor and identifies the property in question by the permanent parcel numbers. The signature is illegible, but presumably appellee or

her representative signed the form as grantee. The form lists a number of situations in which no transaction fee is collected. Appellee checked (m): “[a transfer] to or from a person when no money or other valuable and tangible consideration readily convertible into money is paid or to be paid for the real estate and the transaction is not a gift”. This language is taken from R.C. 319.54.

{¶33} This court found no case law construing this section to define what a conveyance made without consideration but not as a gift might be. However, several Ohio Attorney General’s opinions offered explanations that such a transfer could be, among other things, a transfer of real property pursuant to a revocable trust if, for example, the settlor, his heirs, or a charity is the beneficiary.

{¶34} We find the record contains at least one document signed by appellee which contradicts her allegation the transfer was a gift, but which could be construed as a writing supporting appellant’s contention he retained an equitable interest in the farm.

{¶35} We conclude the within presents a genuine issue of material fact, and reasonable minds could differ regarding appellant’s intent in transferring the property.

{¶36} Appellant also contends the record contains evidence appellee purchased the property, but we find appellant’s complaint contains no allegations appellee breached a contract for sale, and he never amended his complaint to include a cause of action alleging breach of a contract for sale. Instead, his theory of the case was that the transaction was essentially a trust.

{¶37} The trial court did not discuss appellant’s claims of breach of fiduciary duty and fraud beyond finding appellant’s donative intent was clear. Because we find the

record contains evidence to the contrary, the court should not have dismissed counts one, seven and eight.

{¶38} The first assignment of error is sustained.

II. & III.

{¶39} In his second assignment of error, appellant argues the trial court erred as a matter of law by finding appellant could proceed only on his claim for unjust enrichment. In his third assignment of error, he urges the trial court erred as a matter of law in limiting his recovery on the unjust enrichment claim to \$68,232.43. This claim was based on appellant's payment for work done on the Kelton Avenue properties.

{¶40} Appellees argue appellant introduced evidence, which if believed, proved his damages in the amount \$68,232.43 at the first trial. This amount was for repair to the Kelton Avenue property and is distinct from appellant's claim for fraud and for conversion of his personal property, which the court had dismissed. At the second trial, the trial court overruled appellees' motion to cap the damages. Appellant began the second trial alleging damages of \$193,314.23, and the trial court allowed him to present his evidence relating to damages. Appellant cannot demonstrate he was prejudiced by the court's earlier ruling, because it does not appear the court actually limited his potential damages

{¶41} The trial court's final judgment determined appellant had failed to establish by the greater weight of the evidence all the elements of unjust enrichment, and determined appellant was not entitled to any damages.

{¶42} The gist of appellant's argument is the verdict was against the manifest weight of the evidence, because, he argues, he presented sufficient evidence in support

of his claim for unjust enrichment. This court may not disturb a trial court's decision as being against the manifest weight of the evidence if the decision is supported by some competent, credible evidence. *C.E. Morris Company v. Foley Construction Company* (1978), 54 Ohio St. 2d 279, 376 N.E.2d 578. We may not substitute our judgment for that of the trier of fact. *Pons v. Ohio State Medical Board* (1993), 66 Ohio St. 3d 619. 621, 614 N.E. 2d 748.

{¶43} We find the verdict is not against the manifest weight of the evidence. The second and third assignments of error are overruled.

IV.

{¶44} In his fourth assignment of error, appellant argues the trial court erred as a matter of law in finding appellee Stacey Green took the title to the farm free and clear of any equitable interest by appellant, thus implicitly granting count one of her counterclaim. For the reasons stated in I, supra, we agree.

{¶45} The fourth assignment of error is sustained.

V.

{¶46} In his fifth assignment of error, appellant challenges the trial court's award of an \$8,000.00 money judgment in favor of appellee Stacey Green as being against the manifest weight of the evidence.

{¶47} The record contains evidence appellant borrowed \$8,000.00 from appellee Stacey Green, and Stacey Green testified she had demanded repayment but appellant had failed to pay her back. Appellant does not dispute that a loan was made, but argues the money was used to improve some of the property in question, and appellees were to pay him back for the money he spent on the improvements.

{¶48} We find the trial court's decision is supported by sufficient, competent and credible evidence, and therefore is not against the manifest weight of the evidence.

{¶49} The fifth assignment of error is overruled.

VI.

{¶50} In his sixth assignment of error, appellant argues the trial court erred in dismissing his complaint for unjust enrichment against appellees Syvonía and Hershell Green. Appellant suggests the trial court must have concluded the expenditures he made on behalf of the appellees were gifts, rather than loans. Appellant asserts the trial court did not state in its judgment entry which of the elements of unjust enrichment he had not established.

{¶51} Appellant did not ask for findings of fact and conclusions of law pursuant to Civ. R. 52. Appellees testified they did not believe appellant expected to be repaid. Appellees presented evidence there was a good relationship between appellant and appellees at the time the expenditures were made. Appellee Syvonía Green testified she believed appellant wished to do something nice for them and intended the repairs to be a gift.

{¶52} We find the trial court's decision is not against the manifest weight of the evidence. The sixth assignment of error is overruled.

{¶53} For the foregoing reasons, the judgment of the Court of Common Pleas of Coshocton County, Ohio, is affirmed in part and reversed in part, and the cause is remanded to the court for further proceedings in accord with law and consistent with this opinion.

By Gwin, P.J.,

Hoffman, J., and

Delaney, J., concur

HON. W. SCOTT GWIN

HON. WILLIAM B. HOFFMAN

HON. PATRICIA A. DELANEY

WSG:clw 0308

IN THE COURT OF APPEALS FOR COSHOCTON COUNTY, OHIO
FIFTH APPELLATE DISTRICT

WILLIAM W. HUNTER, JR.	:	
	:	
Plaintiff-Appellant	:	
	:	
-vs-	:	JUDGMENT ENTRY
	:	
STACEE H. GREEN, ET AL	:	
	:	
	:	
Defendant-Appellee	:	CASE NO. 09-CA-0010

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas of Coshocton County, Ohio, is affirmed in part and reversed in part, and the cause is remanded to the court for further proceedings in accord with law and consistent with this opinion. Costs to be split between the parties.

HON. W. SCOTT GWIN

HON. WILLIAM B. HOFFMAN

HON. PATRICIA A. DELANEY