[Cite as *Smith v. Allio*, 2010-Ohio-5738.]

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

	:	JUDGES:
LARRY K. SMITH, SR.	:	Hon. Julie A. Edwards, P.J.
	:	Hon. W. Scott Gwin, J.
Plaintiff-Appellee	:	Hon. William B. Hoffman, J.
	:	
-vs-	:	Case No. 2009 CA 00314
	:	
	:	
JANET K. ALLIO	:	O P I N I O N
Defendant-Appellant		

CHARACTER OF PROCEEDING:	Civil Appeal from Canton Municipal Court, Case No. 2009 CVF 3067
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	November 22, 2010

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
MITCHELL A. MACHAN, ESQ. 3810 West Tuscarawas Street Canton, Ohio 44708	JEFFREY W. KRUEGER J.W. KRUEGER, L.L.C. P.O. Box 360135 Cleveland, Ohio 44136

Gwin, J.

{¶1} Defendant-appellant, Janet Allio, appeals from a judgment of the Canton Municipal Court in favor of plaintiff-appellee Larry K. Smith, Sr. dba Armadillo Roofing & Siding Company in the amount of $5,506.27, plus interest. Appellant assigns two errors to the trial court:

{¶2} "I. THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR DIRECTED VERDICT AT THE CLOSE OF PLAINTIFF'S CASE-IN-CHIEF.

{¶3} "II. THE TRIAL COURT ERRED IN APPLYING AN UNJUST ENRICHMENT THEORY TO JUSTIFY ITS AWARD OF DAMAGES TO PLAINTIFF WHEN PLAINTIFF'S SOLE CLAIM WAS FOR BREACH OF CONTRACT."

{¶4} Appellant Janet Allio and her brother own a home located in Canton, Ohio. Appellant entered into a written contract with appellee for the replacement of roofing and siding for appellant's house and garage. The contract also provided appellee would strip the house and garage of all fascia, soffit, gutters and downspouts. The contract price was $22,400.00. The contract did not contain a completion date. Appellant gave appellee a check for $6,293.73 as a prepayment.

{¶5} After appellee obtained a building permit at a cost of $166.65, he began working on appellant's home. During the time he worked on the house, appellee purchased various materials for the job, although some of the materials were bought in bulk and would not be completely used at appellant's house.

{¶6} On or about January 15, 2009, appellee requested additional money and appellant paid him $5,000.00.

{¶7} On February 8, 2009, appellant called appellee and told him his services were terminated and she was going to hire someone else to complete the job because she had concerns about timeliness and the quality of the work. Appellee took his tools and the stock he bought in bulk, but left the remaining supplies for the project at appellant's house. Appellee testified the materials he left at the house would probably be "pretty close" to enough to finish the job.

{¶8} On April 17, 2009, appellee filed a complaint for breach of contract against appellant, seeking judgment against appellant in the amount of $11,106.27, the amount due and owing under the contract. Appellant filed an answer and a counterclaim, alleging appellee had breached their contract and had failed to perform in a workmanlike manner.

{¶9} The matter was tried to the bench. After the completion of appellee's case in chief, appellant moved for a directed verdict, arguing appellee had failed to produce evidence regarding what his expenses would have been had he performed the contract in full and therefore, had failed to prove his damages. The trial court overruled the motion. Appellant renewed her motion at the end of the trial, and the court again overruled the motion.

{¶10} The trial court concluded appellant had breached the parties' contract by terminating appellee's services. The trial court also found that appellant had not established her counterclaim by a preponderance of the evidence. The trial court granted judgment in favor of appellee and against appellant in the amount of $5,506.27 with interest at the statutory rate. In its judgment entry the court explained:

{¶11} "The total cost of the contract was $22,400. Plaintiff was paid the sum of $11,293.73 for his work which included in excess of $5,000 in supplies. The Court finds that the work was 75% complete at the time defendant terminated plaintiff, and 75% of the contract cost is $16,800. Plaintiff did not incur additional expenses for the purchases of the gutters and down spouts due to his termination. In addition, he did not incur the expense of a five man crew to complete the work that he estimated could be completed in 40 hours. Joshua Oliver did complete the work at a cost of $7,500. Plaintiff is entitled to the balance of $5,506.27 for the work performed at defendant's home."

I

{¶12} In her first assignment of error, appellant argues the trial court erred in denying her motion for a directed verdict at the close of appellee's case in chief.

{¶13} As an initial matter, we note that because this case involved a bench trial, the rule governing directed verdicts is not applicable. *Lillibridge v. Tarman,* Coshocton App. No. 08CA0009, 2009-Ohio-2216, ¶ 49, citing *Jarupan v. Hanna,* 173 Ohio App.3d 284, 2007-Ohio-5081, 878 N.E.2d 66. In a bench trial, a defendant seeking a favorable disposition after the close of the plaintiff's case must move to dismiss under the rule governing involuntary dismissal in non-jury actions. Id. *T*he trial court is not required to construe the evidence in favor of the non-moving party, but rather may simply weigh the evidence and render judgment. *Levine v. Beckman* (1988), 48 Ohio App.3d 24, 27, 548 N.E.2d 267.

{¶14} Appellant cites us to *Allen, Heaton & McDonald, Inc. v. Castle Farm Amusement Co.* (1949), 151 Ohio St. 522, 86 N.E.2d 782, which held a plaintiff must

prove the balance due under the contract, minus the savings to the plaintiff in the form of the expenses it would have incurred if it had fully completed the contract.

{¶15} The trial court found appellee had completed 75% of the entire contract before appellant stopped the work, and appellant does not challenge this finding. The doctrine of substantial performance allows recovery of the contract price minus any set off for defects in performance or damages for failure to strictly comply with the terms of the contract. *Hansel v. Creative Concrete & Masonry Constr. Co*., 148 Ohio App.3d 53, 772 N.E.2d 138, 2002-Ohio-198, at paragraph13. The court noted appellee did not incur additional expenses for materials and did not have to pay his five-man work crew for approximately 40 hours appellee estimated it would take to complete the job. The court did not make a specific finding as to the value of appellee's savings.

{¶16} The trial court determined the unpaid balance of the contract price, and determined 25% of the work was left uncompleted. We find no error.

{¶17} Appellant's first assignment of error is overruled.

II

{¶18} In her second assignment of error appellant argues the trial court erred in applying an unjust enrichment theory to justify its award of damages against appellant when appellee's sole claim was for breach of contract.

{¶19} Unjust enrichment is an equitable doctrine in which the law implies a promise to pay the reasonable value of services rendered where one confers a benefit upon another without receiving just compensation for those services. *Aultman Hosp. v. Community Mut. Ins. Co.* (1989), 46 Ohio St.3d 51, 55, 544 N.E.2d 920, 924. A party seeking a remedy under a contract cannot also seek equitable relief for unjust

enrichment since absent evidence of fraud, illegality, or bad faith, compensation is governed by the parties' contract. *Weiper v. W.A. Hill and Assoc.* (1995), 104 Ohio App.3d 250, 661 N.E.2d 796.

{¶20} The trial court did not state the damages were based upon unjust enrichment, and it appears the judgment was rendered on the theory of breach of contract.

{¶21} The second assignment of error is overruled.

{¶22} For the foregoing reasons the judgment of the Municipal Court of Canton, Ohio, is affirmed.

By: Gwin, J., and

Hoffman, J. concur;

Edwards, P.J. dissents

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HON. W. SCOTT GWIN

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HON. JULIE A. EDWARDS

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HON. WILLIAM B. HOFFMAN

WSG:clw 0913

EDWARDS, P.J., DISSENTING OPINION

{¶23} I respectfully dissent from the majority's analysis and disposition of appellant's first assignment of error.

{¶24} The majority, with respect to such assignment, finds that the trial court did not err in denying appellant's motion for a direct verdict. I disagree.

{¶25} Appellant maintains that appellee failed to prove his damages in this case. The party seeking damages in a breach of contract action bears the burden of proving the nature and extent of his or her damages in order to be entitled to compensation. *Akro-Plastics v. Drake Industries* (1996), 115 Ohio App.3d 221, 226, 685 N.E.2d 246. See also, *Effingham v. XP3 Corp*., Portage App. No. 2006-P-0083, 2007-Ohio-7135. As noted by the court in *Alliance Excavating, Inc. v. Transfer Real Estate Service*, Franklin App. No. 08AP-535, 2009-Ohio-2761, "The principles governing recovery under construction contract disputes such as the present one are clear in Ohio. A plaintiff who prevails on a claim for breach 'is entitled only to recover damages for the defendant's breach of contract. Such damages may include the further compensation plaintiff would have received under the contract if it had been performed, *less the value to plaintiff of his being relieved of the obligation of completing performance.'* (Emphasis added.) *Allen, Heaton & McDonald, Inc. v. Castle Farm Amusement Co.* (1949), 151 Ohio St. 522, 86 N.E.2d 782, paragraph one of the syllabus. A plaintiff thus bears the burden of proving not only the balance due under the contract beyond what was paid, but the expenses that the plaintiff would have incurred in completing its own performance under the contract. *Id.,* paragraph three of the syllabus." Id at paragraph 16.

{¶26} In the case sub judice, there is no dispute that appellee established that $11,106.27 was the balance due under the $22,400.00 contract after deducting out the $5,000.00 and the $6,293.73 that already was paid by appellant to appellee. However, we concur with appellant that appellee failed to establish the expenses that he would have incurred to complete the contract. At trial, appellee admitted that the gutters and downspouts had not been repaired or replaced, that not all of the siding was repaired or replaced and that the apron flashing had not been repaired or replaced. He further admitted that he had yet to detach and reset a satellite dish, that he had not yet repaired or replaced seven window wraps, and that he had not repaired or replaced fascia or one window screen. He also testified at trial that he had not repaired or replaced one window glass or detached and reset outdoor light and electric lines and that he had not yet detached and reset the shutters. Appellee also testified that the material left on the job site was not enough to complete the job although it was "pretty close." Trial Transcript at 46.

{¶27} Appellee also testified that it would take a good forty hour week to finish the job, that 99% of the roof was completed and that between 75% and 80% of the siding was completed. He estimated that, "with forty hours of time being left for a crew, I'd say we had eighty percent [of the entire job] done." Transcript at 52. However, as noted by appellant, appellee "failed to establish, with reasonable certainty, the expenses he would have incurred to complete his own performance under the Agreement." There was no evidence relating to additional material or labor costs that appellee would have incurred had his services not been terminated and that, because his services were terminated, he did not in fact incur.

{¶28} Based on the foregoing, I would find that appellee failed to meet his burden of proving the expenses that he would have incurred in completing the contract and that the trial court, therefore, erred in not dismissing the case.

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Judge Julie A. Edwards

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IN THE COURT OF APPEALS FOR STARK COUNTY, OHIO

FIFTH APPELLATE DISTRICT

LARRY K. SMITH, SR.	:	
Plaintiff-Appellee	:	
-vs-	:	JUDGMENT ENTRY
JANET K. ALLIO	:	
Defendant-Appellant	:	CASE NO. 2009 CA 00314

For the reasons stated in our accompanying Memorandum-Opinion on file, the judgment of the Canton Municipal Court affirmed. Costs assessed to appellant.

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HON. W. SCOTT GWIN

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HON. JULIE A. EDWARDS

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HON. WILLIAM B. HOFFMAN