[Cite as *Tillimon v. Tate*, 2020-Ohio-4544.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

Duane J. Tillimon

Appellant

v.

Etta Tate

Appellee

Court of Appeals Nos. L-19-1059
L-19-1290

Trial Court No. CVG-17-12004

DECISION AND JUDGMENT

Decided: September 11, 2020

* * * * *

Duane J. Tillimon, pro se.

Veronica L. Martinez, for appellee.

* * * * *

ZMUDA, P.J.

{¶ 1} In this consolidated appeal, Duane J. Tillimon appeals two judgments of the Toledo Municipal Court. In case No. L-19-1059, appellant alleges the trial court erred in granting appellee Ella Tate's motion for stay of execution of judgment. In case No. L-19-1290, appellant alleges the trial court erred in awarding appellee damages on her

counterclaim for unjust enrichment. We affirm, in part, and reverse, in part, the judgment of the trial court.

I. Background

{¶ 2} These appeals arise out of appellant's claim for forcible entry and detainer and monetary damages. While appellant's claim for monetary damages has already been resolved at trial and affirmed on appeal, resolution of the present appeals requires review of the entire scope of the litigation between the parties.

a. *Tillimon I*

{¶ 3} Appellant is the owner of a single family residence located at 3802 House of Stuart Avenue in Toledo, Ohio. Appellee resided at the premises under a three-year lease agreement entered into by the parties on November 11, 2016. The lease agreement included two addendums including a purchase option for the premises and a contract for repairs. Under the terms of the contract for repairs, appellee would receive a credit on the purchase price of the property for completing certain repairs when she exercised her purchase option. The contract for repairs also stated that if appellee failed to exercise the option to purchase the property, all repairs made would inure to the benefit of appellant. In addition to the contract for repairs addendum, the general lease agreement required appellee to perform any maintenance which cost less than $100 at her own expense. Appellee was also required to seek appellant's permission prior to performing any repairs which exceeded $100. In that instance, appellee was required to pay the first $100 of any approved repair.

{¶ 4} On August 11, 2017, appellant filed a two count complaint against appellee seeking to evict her from the premises for violations of the lease agreement and to recover a monetary award for property damage and unpaid rent, utilities, and property taxes. The eviction claim was dismissed following appellee's confirmation at an August 25, 2017 hearing that she had vacated the property. The trial court granted appellee leave to file her response to the claim for money damages on or before September 22, 2017. Appellee failed to file her answer before the extended deadline. On September 25, 2017, appellee filed a motion for extension of time to file an answer. Appellant filed a motion for default judgment the same day.

{¶ 5} Appellant's motion for default judgment was set for hearing on November 14, 2017. On that day, the parties agreed to participate in mediation. The mediation was unsuccessful. On December 18, 2017, appellee filed a motion for leave to file her answer and counterclaim for unjust enrichment which the trial court granted. On January 24, 2018, appellant filed a motion to compel discovery arguing appellee failed to produce documents she intended to introduce at trial as requested. The trial court denied appellant's motion.

{¶ 6} The matter proceeded to a bench trial on August 14, 2018. There, appellant requested damages totaling $6,615.54. During appellee's testimony, she introduced documents showing repairs she had made to the property in support of her unjust enrichment claim. Appellant objected to the admission of documents arguing they had not been produced during discovery. The trial court advised appellant that it would

address his concern in the final judgment entry and continued with the trial. In its October 11, 2018 judgment entry, the trial found appellant was entitled to $3,121.27 in damages. The trial court also overruled appellant's objection to the exhibits introduced by appellee. Based on those documents, the trial court found in favor of appellee on her counterclaim in the amount of $2,654 and offset the damages awarded to appellant by that amount. As a result, appellant was awarded damages in the amount of $473.27.[1]

{¶ 7} Appellant timely appealed the trial court's judgment and assigned as error the trial court's denial of his motion to compel discovery on appellee's counterclaim and the trial court's denial of the full amount of his requested damages. *Tillimon v. Tate*, 6th Dist. Lucas No. L-18-1237, 2019-Ohio-3022 ("*Tillimon I*"). We affirmed the trial court's award of damages but found appellant's assignment of error regarding the denial of his motion to compel well-taken. We remanded this matter for a new trial on appellee's counterclaim of unjust enrichment only and ordered that appellant was entitled to discovery of documents appellee intends to introduce at trial. *Id.* at ¶ 37.

b. Court of Appeals Case No. L-19-1059

{¶ 8} On January 15, 2019, during the pendency of his first appeal, appellant filed an affidavit of garnishment to aid in collection of the trial court's judgment. On February 8, 2019, appellee filed a motion to stay enforcement of the judgment pending resolution of the appeal. The trial court granted appellee's motion on February 12, 2019.

[1] For a complete recitation of facts, see *Tillimon v. Tate*, 6th Dist. Lucas No. L-18-1237, 2019-Ohio-3022.

Appellant timely appealed the trial court's granting of appellee's motion to stay. The appeal of the trial court's granting appellee's motion to stay was assigned case No. L-19-1059 and is currently before this court in this consolidated matter.

c. Court of Appeals Case No. L-19-1290

{¶ 9} On remand following our decision in *Tillimon I*, appellant filed a motion to set a deadline for appellee to respond to discovery on July 29, 2019. The trial court denied appellant's motion three days later stating that appellee had sufficient time to conduct discovery prior to the trial scheduled for August 29, 2019. The trial court also noted that appellant could make arguments regarding any allegedly deficient production at trial.

{¶ 10} Appellant next filed a motion for summary judgment on August 23, 2019. In his motion, appellant argued that appellee's claims for unjust enrichment were barred because the agreement entered into by the parties established that all improvements to the premises would inure to appellant's benefit if the option to purchase was not exercised. In response, appellee filed a motion to strike appellant's motion. Appellee argued that because a trial date had been set, appellant was required to obtain leave before filing a motion for summary judgment pursuant to Civ.R. 56. Appellant then filed a motion for leave to file summary judgment asking the trial court to consider his previously filed motion. On September 20, 2019, the trial court denied appellant's motion for leave to file summary judgment.

{¶ 11} After a continuance, the retrial on appellee's counterclaim took place on October 31, 2019. Immediately prior to trial, appellant orally requested the trial court reconsider his motion for summary judgment. The trial court denied the motion and proceeded with the trial.

{¶ 12} In support of her claim for unjust enrichment, appellee testified that upon signing the agreement between the parties, she agreed to perform certain repairs to the premises prior to her occupancy. According to the agreement, if appellee performed these repairs she would receive a credit on the purchase price of the home when she exercised her purchase option. Appellee produced receipts totaling $2,564.13 she alleges were spent on parts and labor necessary to make the required repairs. She also testified regarding why she believed the repairs were necessary for her to occupy the premises. On cross-examination, appellee conceded that she did not seek appellant's approval prior to making any of the repairs not identified in the contract for repairs.

{¶ 13} Appellant testified that he did not dispute that appellee had performed, or paid someone else to perform, all the repairs she identified during her testimony.[2] He also testified that the repairs were not necessary to make the property habitable. Appellant acknowledged that just prior to appellee's eviction he sent a letter to appellee, dated August 3, 2017, noting that he had observed the new garage door, entry door, and

[2] Appellant did challenge the total amount of the receipts introduced at trial as including personal use items such as candy and hygiene products which were not part of the repairs in dispute. Review of the receipts shows that appellee did not include the amount spent on personal items in the total amount sought on her unjust enrichment claim.

screen door appellee had installed. He did not request that she return the property to its original condition upon her eviction.

{¶ 14} On rebuttal, appellee testified that the garage door on the property at the time she moved in had an inoperable lock. On re-cross examination, appellee acknowledged that she never brought this issue to appellant's attention or requested he install a new lock.

{¶ 15} In his case-in-chief, appellant testified regarding the terms of the contract entered into by the parties. Appellant testified that the contract required appellee to seek approval for any improvements not specifically identified in the contract for repairs. He further testified that the contract for repairs stated that should appellee not exercise her option to purchase the property that all improvements would inure to his benefit. Appellant also testified that in his experience as a landlord that the repairs made did not improve the value of the house.

{¶ 16} After closing arguments, the trial court took the matter under advisement. On November 13, 2019, the trial court entered judgment in favor of appellee as to her unjust enrichment counterclaim. The trial court held that appellee satisfied the elements of unjust enrichment and was entitled to damages in the amount of $2,564.13. Offsetting the previous award of damages in appellant's favor by this amount, the trial court awarded final judgment in favor of appellant in the amount of $557.14. Appellant timely appealed. That appeal was assigned case No. L-19-1290. On June 29, 2020, we ordered the appeals in case Nos. L-19-1290 and L-19-1059 consolidated.

d. Assignments of Error

{¶ 17} In case No. L-19-1059, appellant asserts the following errors for our review:

1. The trial court committed reversable (sic) error, and abused its discretion, when it granted a motion to stay execution on a money judgment when the judgment debtor did not filed (sic) an appeal in the trial court, or a cross-appeal in the court of appeals.

2. The trial court committed reversable (sic) error, and abused its discretion, when it granted a stay of execution on a money judgment which it did not required the judgment debtor to post a supercedeas (sic) bond pursuant to R.C. 2505.09 stay of execution – supercedeas (sic) bond.

{¶ 18} In case No. L-19-1290, appellant asserts the following errors for our review:

1. The trial court committed reversible error, and abused its discretion, when it failed to dismiss the appellant's counterclaim for unjust enrichment because there were expressed contracts covering the same money now being disputed between the appellant and appellee.

2. The trial court committed reversable (sic) error, and abused its discretion, when it awarded appellee damages on the counterclaim against appellant because the damages were against the manifest weight of the

evidence presented in the case by appellee having the burden of proof at trial.

3. The trial court committed reversable (sic) error, and abused its discretion, when it denied the appellant discovery a second time in contravention of the court of appeals mandate in this case, case no. L-18-1237 *Tillimon v. Tate*.

II. Law and Analysis

{¶ 19} Because our resolution of the assignments of error in case No. L-19-1290 render the assignments of error in case No. L-19-1059 moot, we address those errors first.

{¶ 20} In his first assignment of error, appellant argues that the trial court erred in not granting his motion for summary judgment on appellee's unjust enrichment claim. We find appellant's assigned error not well-taken on its face as his motion for summary judgment was never properly before the trial court and, therefore, could not have been erroneously denied.

{¶ 21} Appellant filed his written motion for summary judgment on August 23, 2019. At that time, the trial court had already set this matter for trial to take place on September 26, 2019. Appellee moved to strike appellant's motion arguing he did not comply with Civ.R. 56(A) which states "[i]f the action has been set for pretrial or trial, a motion for summary judgment may be made only with leave of court." In an apparent effort to avoid having his motion stricken, appellant filed a motion for leave to file a

motion for summary judgment pursuant to Civ.R. 56. The trial court denied appellant's motion for leave on September 20, 2019.

{¶ 22} It is axiomatic that where leave of court is required to file a motion for summary judgment, the trial court's denial of that leave renders the filing a nullity. *See Internatl. Bhd. of Elec. Workers, Local Union No. 8 v. Kingfish Elec., LLC*, 2012-Ohio-2363, 971 N.E.2d 425, ¶ 18 (6th Dist.) (holding that the filing of an amended complaint without leave of court required by Civ.R. 15(A) renders that filing a nullity). *See also PNC Bank, Natl. Assn. v. J&J Slyman, LLC*, 8th Dist. Cuyahoga No. 101777, 2015-Ohio-2951, ¶ 20 (holding that the filing without leave of court may be treated as a nullity and as if it never occurred). Rather than assign the trial court's denial of his motion for leave as error, appellant argues the trial court erred in denying his motion for summary judgment on its merits. Since appellant's motion for summary judgment was never before the trial court, assigning the denial of that motion on its merits as error precludes us from finding such error.

{¶ 23} App.R. 16(A)(3) requires appellants to identify their assignments of error and "the place in the record where each error is reflected." App.R. 12(A)(2) authorizes this court to "disregard an assignment of error presented for review if the party raising it fails to identify in the record the error on which the assignment of error is based[.]" Because appellant failed to identify in the record that the trial court denied his motion for summary judgment on its merits, and indeed could not have done so, we disregard appellant's first assignment of error and find it not well-taken.

{¶ 24} In his second assignment of error, appellant argues the trial court's judgment in favor of appellee on her affirmative defense of unjust enrichment was against the manifest weight of the evidence. In reviewing a challenge to the manifest weight of the evidence, we must determine "whether the greater amount of credible evidence was admitted to support the judgment than not." *Quest Workforce Solutions, LLC v. Job1USA*, 2016-Ohio-8380, 75 N.E.3d 1020, ¶ 41 (6th Dist.); citing *Eastley v. Volkman*, 132 Ohio St.3d 328, 2012-Ohio-2179, 972 N.E.2d 517, ¶ 17. Appellant argues that the greater amount of credible evidence admitted at trial supports judgment in his favor. Specifically, he argues that all repairs appellee made to the premises were subject to terms of the parties' written contracts and therefore not subject to a claim for unjust enrichment. Appellant is correct, in part.

{¶ 25} Generally, litigants are precluded from pursuing a claim for unjust enrichment when the benefits conferred were subject to an express contract between the parties. *Donald Harris Law Firm v. Dwight-Killlian*, 166 Ohio App.3d 786, 2006-Ohio-2347, 853 N.E.2d 364, ¶ 14 (6th Dist.), citing *Sammarco v. Anthem Ins. Cos., Inc.*, 131 Ohio App.3d 544, 723 N.E.2d 128 (1st Dist.1998) (holding that "a party may recover the reasonable value of services rendered *in the absence of an express contract* if denying that recovery would unjustly enrich the opposing party"). This exclusion applies when the express contract "covers the same subject" as the issue in dispute. *Vancrest Management Corp. v. Mullenhour*, 2019-Ohio-2958, 140 N.E.3d 1051, ¶ 38 (3d Dist.), citing *Padula v. Wagner*, 2015-Ohio-2374, 37 N.E.3d 799, ¶ 48 (9th Dist.). The evidence

admitted at trial shows that some, but not all, of the repairs appellee performed are covered by the agreements between the parties and, therefore, not subject to her claim for unjust enrichment.

a. The Contract for Repairs Precluded Portions of Appellee's Unjust Enrichment Claim

{¶ 26} In his defense, appellant introduced the contract for repairs which the parties executed as an addendum to the option to purchase agreement. The contract for repairs states that if appellee performs certain repairs during her tenancy and exercises her option to purchase the premises, she would receive a $6,807.29 credit toward the purchase of the premises. The credit was based on estimated costs for labor and materials for performing the listed repairs as described in the table below:

REPAIR TO BE MADE	AMOUNT OF CREDIT
Painting	$1,785.00
Replacement of carpet and vinyl flooring	$3,494.27
Miscellaneous repairs	$275.00
Miscellaneous materials	$634.83
Other repair items	$618.91

The contract for repairs also stated that if appellee "does not purchase the house, improvements shall inure to the benefit of [appellant]." It is undisputed that appellee did not exercise the option to purchase the premises. We must determine, then, whether the greater weight of the evidence shows that contract for repairs covers any of the same

subjects appellee identifies in her counterclaim and, therefore, that the benefits of those repairs were forfeited to appellant pursuant to the agreement.

{¶ 27} As evidence of the repairs she made, appellee offered composite exhibit 6. Exhibit 6-A identified two payments totaling $1,010 to Anthony Beach, a handyman, for labor on certain repairs. Appellee testified that these repairs included pulling and replacing carpeting throughout the residence, plumbing work, and painting the entire home. Appellee did not provide an itemized breakdown for the work performed. Appellee's exhibit 6-B identified $10.73 spent for the purchase of flooring. Exhibits 6-C and 6-H identify a total of $230.53 spent for "materials, various." Exhibit 6-D identifies $439.19 paid for the purchase of replacement carpeting. Appellant does not dispute that these repairs were made or the amounts expended for the materials and labor costs. Instead, he argues that when appellee failed to exercise her option to purchase the premises that any of these repairs inured to his benefit pursuant to the contract.

{¶ 28} The contract for repairs specifically identified "miscellaneous materials," carpeting materials, and labor for painting as the repairs appellee could make to the property in order to receive a credit on the purchase price of the residence. Exhibits 6-B, 6-C, 6-D, and 6-H each identify labor costs or materials which correspond directly with those terms. The evidence at trial clearly shows that appellee performed the repairs identified in the contract for repairs. Based on the terms of the contract, when appellee failed to exercise her option to purchase the property, she forfeited the benefit of these repairs to appellant.

{¶ 29} Payments made to Mr. Beach are likewise not recoverable as they are addressed by the parties' agreement. Mr. Beach performed several repairs, some of which are identified in the contract for repairs—tearing out and replacing the carpeting, painting—and some which were not—plumbing repairs. The burden of proof on a claim for unjust enrichment rests with the party seeking recovery. *Stebbins Plumbing & Heating Co. v. Pragolas*, 2d Dist. No. 25701, 2013-Ohio-4949, ¶ 30-33. Appellee did not provide an itemized list of the costs for each repair made by Mr. Beach. By providing only an aggregate total of the amounts paid, we are unable to discern which portion of the labor costs are attributable to the plumbing work. Therefore, appellee failed in her burden to provide evidence what portion of the amount paid to Mr. Beach were not subject to the terms of the contract. As a result, we find that the greater weight of the evidence shows that the amounts paid to Mr. Beach were subject to the express contract between the parties and appellee cannot recover any portion of this amount through her unjust enrichment claim.

{¶ 30} The trial court's error is reflected in its judgment entry which held that the contract did not apply to the disputed repairs because those repairs were not identified in the contract. Specifically, the trial court stated that since "appellee did not repair the flooring, she was not entitled to the credit, and since she did not purchase the house, [appellant] was never in a position to extend the credit[.]" The trial court further held that "any repairs and improvements made where [appellant] was never in a position to

extend the credit would be considered unjust enrichment." The trial court's conclusion does not comport with the evidence presented at trial.

{¶ 31} Appellee introduced evidence at trial that the carpet and vinyl flooring was replaced. Under the terms of the contract, this repair inured to appellant's benefit when appellee declined her option to purchase the premises. The trial court's decision finding that this repair was not made is against the manifest weight of the evidence. Further, the trial court's erroneous conclusion that because the flooring was not replaced renders "any repairs and improvements" subject to appellee's claim for unjust enrichment is likewise against the manifest weight of the evidence. The contract identifies five repairs that, if made, would be forfeited to the benefit of appellant if appellee did not exercise the option to purchase the property. Appellee herself introduced evidence that repairs identified in the contract other than the replacement of the flooring were made. Since it is undisputed that appellee did not exercise the option to purchase the home, the evidence weighs in favor of finding any repairs contemplated by the contract inure to appellant's benefit. The trial court's extension of its erroneous conclusion that the flooring was not repaired to a finding that all repairs and improvements warranted judgment in appellee's favor, ignores the remaining terms of the agreement and is against the manifest weight of the evidence.

{¶ 32} We note that appellee seeks to avoid this result by arguing in her brief that "[t]he written agreements are ambiguous regarding repairs authorized." However, the record shows appellee failed to challenge the language of the agreement as ambiguous

with the trial court. "A party may not change its theory of the case and present new arguments for the first time on appeal." *Tokles v. Black Swamp Customs, LLC,* 6th Dist. Lucas No. L-14-1105, 2015-Ohio-1870, ¶ 24, citing *State ex rel. Gutierrez v. Trumbull Cty. Board of Elections*, 65 Ohio St.3d 175, 177, 602 N.E.2d 622 (1992). A party that fails to make an argument at trial is precluded from making that argument on appeal. *Id.* Therefore, we do not consider this argument.

b. The Lease Agreement Precluded Portions of Appellee's Unjust Enrichment Claim

{¶ 33} Having determined that the trial court erred in awarding appellee damages for the repairs subject to the contract for repairs, we next address those repairs for which appellee sought recovery that are not subject to that specific agreement. Composite exhibit 6 shows that these repairs include the installation of a window guard, new screens in various windows and doors, furnace repairs, a new bathroom sink drain and related materials, installation of a new garage door, installation of a new front entry door, and new deadbolt locks. Appellee identified these repairs at trial and provided receipts for the costs of materials and labor. Again, appellant does not dispute that the repairs were made or the amounts paid for those repairs. The trial court awarded judgment in favor of appellee on each of these repairs.

{¶ 34} Appellant argues that these repairs were subject to the parties' lease agreement. Paragraph 19 of the lease agreement states:

> [appellee] agrees to perform all routine maintenance defined as any maintenance costing $100.00 or less for parts or materials. There shall be a $100.00 deductible charge for any maintenance costing more than $100.00 at the discretion of [appellant] and with [appellant's] prior approval of any repair.

Under this term, appellee obligated herself to pay for any repairs which did not exceed $100 in parts or materials. Further, prior to making any repairs that exceeded $100, appellee was obligated to obtain appellant's approval before making any such repairs and to pay the first $100 of any approved repair. Appellant argues that this term of the lease agreement covered the "same subject" as the repairs not covered by the contract for repairs and precluded appellee from recovering the costs of these additional repairs in her counterclaim. We agree, in part.

{¶ 35} Of the remaining repairs appellee made which were not addressed in the contract for repairs, four were less than $100—installation of the window guard ($78.19), new window and door screens ($7.64), the bathroom sink drain and materials ($15.63), and the purchase of deadbolt locks ($29.97). Pursuant to the terms of the lease agreement, the costs of these repairs were "routine maintenance" and were to be borne by appellee. As these disputed repairs were covered by an express contract between the parties, appellee is unable to pursue her claim for unjust enrichment to recover the costs of these repairs. Because the evidence weighs in favor of this conclusion, the trial court's

finding to the contrary was against the manifest weight of that evidence and constitutes error in its final judgment.

{¶ 36} The record further shows that three repairs identified in appellee's composite exhibit 6 exceeded $100. These include having the furnace checked and cleaned ($130), the purchase and installation of a new garage door ($430), and the purchase of a front entry door ($107.25). These repairs are not "routine maintenance" as defined by the agreement and require separate analysis.

{¶ 37} As stated in the lease agreement, when a repair exceeds $100, appellee was required to pay a $100 deductible towards those repairs. As a result, the first $100 of these non-routine repairs were covered by the terms of the lease agreement and not subject to a claim for unjust enrichment. We find, however, that the funds appellee expended for these non-routine repairs beyond $100 are not covered by the agreement on its face and were subject to recovery in appellee's counterclaim.

{¶ 38} We note appellant's argument that the funds exceeding $100 per repair are likewise covered by the agreement because appellee failed to seek his consent before making such repairs. The agreement does require appellee to seek appellant's permission before engaging in such repairs. However, unlike the contract for repairs or the routine maintenance term, the lease agreement does not make any reference to appellee being required to pay any amount spent beyond $100 for repairs or forfeiting those expenditures if she failed to exercise her purchase option. As a result, the amounts appellee spent beyond $100 for the remaining repairs, totaling $367.25, are not covered

by an express contract and the trial court did not err in permitting appellee's claim for unjust enrichment to proceed as to these amounts. As these costs were properly subject to appellee's counterclaim, we address appellant's argument that the trial court erred in finding appellee supported the elements of her unjust enrichment claim only as to these amounts.

c. The Trial Court's Judgment in Favor of Appellee for Amounts not Covered by the Parties' Agreement was not Against the Manifest Weight of the Evidence

{¶ 39} In order to succeed on a claim for unjust enrichment, the party seeking recovery must show "(1) a benefit is conferred by a plaintiff upon a defendant; (2) knowledge by the defendant of the benefit; and (3) retention of the benefit under circumstances where it would be unjust to do so without payment." *Cuspide Properties, Ltd. v. Earl Mechanical Servs.*, 2015-Ohio-5019, 53 N.E.3d 818, ¶ 60 (6th Dist.) citing *Hambleton v. R.G. Barry Corp.*, 12 Ohio St.3d 179, 183, 465 N.E.2d 1298 (1984). At trial and on appeal, appellant does not dispute the trial court's finding that appellee established the second and third elements of her unjust enrichment claim. Instead, appellant argues that because the repairs appellee undertook did not result in an "improvement" to the property that appellee failed to show that she had conferred a benefit upon him. We disagree.

{¶ 40} Appellant argues that because appellee failed to introduce expert testimony showing that the repairs increased the value of his property that appellee failed to

establish he received a benefit from those repairs.[3] Appellant cites no authority requiring appellee to introduce expert testimony to establish a benefit was conferred. We recognize, however, that Ohio permits the property owner to express an opinion as to the value of their own property even when they are not "otherwise qualified as an expert on valuation." *Wray v. Hiironen*, 8th Dist. Cuyahoga No. 107558, 2019-Ohio-4669, ¶ 25, citing *Tokles & Son v. Midwestern Indemn. Co.*, 65 Ohio St.3d 621, 625, 605 N.E.2d 936 (1992). As noted by appellee, appellant expressed an opinion as to the value of the premises both with and without her repairs.

{¶ 41} At trial, appellant introduced the option to purchase agreement entered into by the parties. That agreement reflected a purchase price for the home of $42,100. The agreement also stated that should appellee elect to purchase the property without seeking credits for amounts previously paid in rent or purchase options or any "credits for work completed," the purchase price would be $28,000. Appellant testified that the option purchase price of $42,100 was dependent on appellee making the agreed upon repairs. Appellant also testified that the property was appraised at $28,000 without regard to any repairs appellee made. Clearly, based on appellant's own assessment of his property, the value of property without the repairs contemplated in the parties' agreements was $28,000.

[3] Appellant also objects to the trial court's denial of his motion to qualify himself as an expert witness. Appellant did not assign this denial as error and the issue is not before us.

{¶ 42} To show he received no benefit from appellee's repairs, appellant introduced a contract for sale of the property subsequent to appellee's eviction which identified the sale price as $39,900. Appellant argues that because he sold the property for less than the $42,100 price of the repaired property in the option to purchase agreement that he has not received a benefit from appellee's repairs. Appellant's argument misconstrues his $42,100 valuation of the property in the option to purchase agreement.

{¶ 43} Through his own testimony, appellant admitted that he based the option purchase price of $42,100 on the condition of the property *if* all repairs were made either by him or appellee. His argument on appeal ignores that the option to purchase agreement explicitly states that the purchase price of the property without any repairs made would be $28,000. The fact that appellant was able to subsequently sell the property for more than he would have if appellee did not make any repairs indicates that those repairs benefitted him by increasing the value of the property. Therefore, the trial court's conclusion that appellant received a benefit from the repairs is not against the manifest weight of the evidence introduced at trial. The trial court did not err in finding appellee satisfied the first element of her unjust enrichment claim and appellant's argument is without merit.

{¶ 44} We find appellant's second assignment of error well-taken, in part, in that the trial court erred in permitting appellee to pursue her claim for unjust enrichment as to repairs covered by an express agreement between the parties. We find appellant's second

assignment of error not well-taken, in part, in that that trial court permitted appellee to pursue her claim for unjust enrichment as to repairs not covered by an express agreement and that the greater weight of the evidence at trial warranted judgment in favor of appellee as to these non-contractual repairs.

{¶ 45} In appellant's third assignment of error, he alleges the trial court did not permit him to conduct discovery as directed by this court on remand from *Tillimon I.* On July 29, 2019, following our remand in *Tillimon I*, appellant filed a "motion to set deadline to respond to discovery" asking the trial court to order appellee to produce documents she intended to use at trial on or before August 14, 2019. The trial court denied appellant's motion stating a deadline was not necessary and appellant could address any allegedly deficient production at trial. Appellant filed a subsequent motion with this court seeking clarification of the decision in *Tillimon I* regarding the discovery to which he was entitled. We denied appellant's motion finding that appellant was seeking this court's review of the trial court's denial of his motion to set a discovery deadline. Since that denial was not a final appealable order, we lacked jurisdiction to perform such a review.

{¶ 46} Appellant filed no further motions related to the discovery he alleges he was denied. Conversely, on September 4, 2019, appellee filed a "notice of submission" which indicated that she had provided appellant with documents responsive to his requests for production issued prior to the original October 11, 2018 trial in this matter. While the record does not reflect what documents were produced, it also does not reflect

any attempts by appellant to seek any additional documents or cure any alleged deficiencies in appellee's production.

{¶ 47} Nevertheless, appellant now argues that he was denied the opportunity to conduct discovery. He argues that because he did not receive appellee's composite exhibit 6 prior to trial, he was unable to depose appellee or to subpoena any contractors that performed work on her behalf to appear and give testimony at trial. At no point, however, did appellant seek to resolve this issue with appellee as required by Civ.R. 37 or bring his claimed denial of discovery to the trial court's attention beyond asking the trial court to establish a date for production.

{¶ 48} Under these circumstances, it is entirely unclear what error appellant alleges the trial court committed. The trial court's choice not to set a discovery deadline did not preclude appellant from continuing to seek discovery, it merely left the time for pursuing such discovery open until trial. Moreover, appellee failed to address any deficiencies in appellee's production when those documents were produced more than one month prior to trial and failed to object when appellee introduced those documents at trial. Put simply, appellant had ample opportunity to conduct discovery following our remand in *Tillimon I.* His failure to do so was a result of his own conduct, not the trial court's decision not to set a discovery deadline. Further, appellant waived any argument regarding appellee's introduction of documents at trial by failing to object to their introduction at that time. *See State v. Wintermeyer*, 158 Ohio St.3d 513, 2019-Ohio-5156, 145 N.E.3d 278, ¶ 10, citing *Goldfuss v. Davidson*, 79 Ohio St.3d 116, 121, 679

N.E.2d 1099 (1997). Appellant's third assignment of error alleging he was denied the opportunity to conduct discovery is, therefore, not well-taken.

{¶ 49} Having determined the trial court's decision, in part, was against the manifest weight of the evidence, we exercise the authority granted in App.R. 12(C)(1) and modify the trial court's judgment in case No. L-19-1290 to award appellee $367.25 on her claim for unjust enrichment. *See Tillimon v. Richardson-Long*, 6th Dist. Lucas No. L-16-1055, 2017-Ohio-140, ¶ 29. We therefore, enter judgment in appellant's favor in the amount of $2,754.02—an amount calculated by offsetting the trial court's previously-affirmed award of $3,121.27 in favor of appellant by the award of $367.25 in favor of appellee.

{¶ 50} As a result of this judgment, appellant's assignments of error in case No. L-19-1059 are rendered moot. In that case, appellant argues that the trial court erred in granting appellee's motion to stay execution of judgment following his filing of an affidavit for wage garnishment in aid of execution. Appellee's motion requested a stay of execution of judgment pending appeal. With our resolution of his appeal in case No. L-19-1290, final judgment in this matter has been rendered in favor of appellant. The stay issued by the trial court is therefore lifted. As a result, we find any dispute arising from the trial court's granting of the stay of execution is moot and appellant's assignments of error in case No. L-19-1059 are found not well-taken.

III. Conclusion

{¶ 51} We find appellant's first and third assignment of error in case No. L-19-1290 not well-taken. We find appellant's second assignment of error in case No. L-19-1290 well-taken, in part and not well-taken, in part. We, therefore, reverse the judgment of the Toledo Municipal Court, in part, and enter judgment in favor of appellant in the amount of $2,754.02. We find appellant's remaining assignments of error in case No. L-19-1059 moot and not well-taken. The parties are ordered to split the costs of this appeal pursuant to App.R. 24.

Judgment reversed, in part.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J. _____
JUDGE

Thomas J. Osowik, J. _____
JUDGE

Gene A. Zmuda, P.J. _____
CONCUR.
JUDGE