

STATE OF OHIO)
) SS:
CUYAHOGA COUNTY)

FIORILLI CONSTRUCTION, INC.,)
)
Plaintiff,)
)
vs.)
)
A. BONAMASE CONTRACTING, et al.,)
)
Defendants.)
)

IN THE COURT OF COMMON PLEAS

CASE NO. CV-09-683295
(Consolidated)

OPINION

NATIONWIDE MUTUAL FIRE)
INSURANCE COMPANY,)
)
Plaintiff,)
)
vs.)
)
A. BONAMASE CONTRACTING, INC.,)
)
Defendant.)
)

CASE NO. CV-09-696897

SHIRLEY STRICKLAND SAFFOLD, JUDGE:

I. FACTUAL BACKGROUND

This matter arose from an alleged breach of contract. Plaintiff, Fiorilli Construction, Inc. (hereinafter “Plaintiff”), alleged that the Defendant’s, A. Bonamase Contracting, David Bonamase and Scott Bonamase (collectively hereinafter “Defendants”), breached the subcontract agreement entered into with the Plaintiff on July 6, 2007. On August 31, 2007, the subcontract agreement between the Plaintiff and Defendants was terminated.

Plaintiff filed this case on January 29, 2009, alleging: breach of contract and duty of good faith, breach of express warranties, breach of implied warranties, negligence/breach of duty to

perform in a workmanlike manner, intentional misrepresentation, fraud, negligent misrepresentation, indemnification, and piercing the corporate veil and alter ego. In response, Defendants filed a Counterclaim alleging: breach of contract, breach of express/implied warranties, and unjust enrichment.

Trial in this matter commenced on December 7, 2009, in this Honorable Court, and continued for approximately two weeks. At numerous times during the duration of the trial, this Honorable Court encouraged settlement between the parties. Settlement negotiations continued throughout the duration of the trial. Despite the encouraged negotiations, a settlement was not reached.

On December 16, 2009, Plaintiff rested its' case in chief and the Defendants moved for a directed verdict. This Honorable Court granted Defendants' Motion for Directed Verdict on the following counts: fraud, intentional misrepresentation, piercing the corporate veil, and indemnification. On December 18, 2009, this matter was given to the jury and deliberations ensued. After almost two days of deliberation the jury returned its verdict on December 21, 2009. The jury returned a verdict against the Plaintiff on all of its' remaining claims, and in favor of the Defendants on their counterclaims, awarding the Defendants \$240,800.27 in compensatory damages.

On January 4, 2010, Plaintiff filed a Motion for New Trial and Alternative Motion for Judgment Notwithstanding the Verdict. Plaintiff alleged that it was entitled to a new trial because, 1. The jury's verdict was against the manifest weight of the evidence, 2. This Honorable Court engaged in a pattern of hostility toward Plaintiff's President, Carmen Fiorilli, as well as Plaintiff's counsel, Thomas Connick, throughout the trial that in turn prevented the Plaintiff from receiving a fair and impartial trial, 3. Because of the misconduct of the jury or prevailing party,

resulting in an excess damage award due to passion and/or prejudice, and 4. Due to error in the amount of recovery for breach of contract. In the alternative, Plaintiff argued that it was entitled to judgment notwithstanding the verdict.

A full hearing on the Plaintiff's Motion was set for January 13, 2010 at 10:00 am. Due to the Plaintiff's tardiness, the hearing commenced at approximately 10:20 am.

II. LAW AND ANALYSIS

Pursuant to the Ohio Rules of Civil Procedure, Rule 59(A), a new trial may be granted upon any of the following grounds:

- (1) Irregularity in the proceedings of the court, jury, magistrate, or prevailing party, or any order of the court or magistrate, or abuse of discretion, by which an aggrieved party was prevented from having a fair trial;
- (2) Misconduct of the jury or prevailing party;
- (3) Accident or surprise which ordinary prudence could not have guarded against;
- (4) Excessive or inadequate damages, appearing to have been given under the influence of passion or prejudice;
- (5) Error in the amount of recovery, whether too large or too small, when the action is upon a contract or for the injury or detention of property;
- (6) The judgment is not sustained by the weight of the evidence; however, only one new trial may be granted on the weight of the evidence in the same case;
- (7) The judgment is contrary to law;
- (8) Newly discovered evidence, material for the party applying, which with reasonable diligence he could not have discovered and produced at trial;
- (9) Error of law occurring at the trial and brought to the attention of the trial court by the party making the application.

Civ. R. 59(A)(1)-(9).

A. Plaintiff is not entitled to a new trial pursuant to Civil Rule 59(A)(6).

Here, the Plaintiff in its' Motion asserts that it is entitled to a new trial pursuant to Civ. R. 59(A)(6) because the "[j]ury's verdict was against the manifest weight of the evidence." Fiorilli Motion for New Trial at 3. In support of this contention Plaintiff cites to *Tenaglia v. Russo*, 2007 WL 613980.

In that case, the Eighth District Court of Appeals opined that, "The decision whether to grant a new trial pursuant to Civ. R. 59(A) rests within the sound discretion of the trial court." *Id.* at ¶ 4. The Court further states that when reviewing a Motion for a New Trial pursuant to Civ. R. 59(A)(6), "[T]rial courts are vested with wide discretion to determine whether a manifest injustice has been done." *Id.* at ¶22. In order to set aside an award as being against the manifest weight of the evidence, the court must determine that "[t]he verdict is so gross as to shock the sense of justice and fairness, cannot be reconciled with the undisputed evidence in the case, or is the result of an apparent failure by the jury to include all the items of damage making up the plaintiff's claim." *Id.*

In the current case, the Plaintiff has pointed to nothing that would indicate to this Honorable Court that the jury's decision in anyone shocks the sense of justice and fairness, cannot be reconciled with the undisputed evidence or was the result of a failure of the jury to include the items of damage. Furthermore, reviewing the evidence and the testimony presented at trial, it is the opinion of this Honorable Court that the jury's findings in favor of the Defendants on both the claims and counterclaims can easily be reconciled with the evidence presented. Thus, this Honorable Court finds that the Plaintiff is not entitled to a new trial pursuant to Civil Rule 59(A)(6).

B. Plaintiff is not entitled to a new trial pursuant to Civil Rule 59(A)(1).

Plaintiff next asserts that it is entitled to a new trial pursuant to Civ. R. 59(A)(1) because this Honorable Court “[E]ngaged in a pattern of hostility toward Plaintiff’s president, Carmen Fiorilli, and Plaintiff’s counsel (Thomas Connick) throughout the trial, which prevented Plaintiff from receiving a fair and impartial trial.” Fiorilli Motion for New Trial at 8.

Plaintiff has alleged specifically that this Honorable Court made no secret of its’ desire for the parties to settle and that this position was directly adverse to the Plaintiff’s. Further, Plaintiff claims that this Honorable Court engaged in a pattern of hostility when it stated that it was the Court’s belief that Mr. Fiorilli was negotiating in bad faith. *Id.* Plaintiff even goes as far as to state that this Honorable Court “clearly had misunderstood the settlement negotiations…”and made this allegation of bad faith “erroneously.” *Id.* at 8-9. Finally, it is alleged that his Honorable Court made various improper legal and evidentiary rulings against Plaintiff that ultimately resulted in Mr. Connick’s cross examination of a witness being cut short.

In support of it’s claims, the Plaintiff cites to *Bambeck v. Berger*, 2008 WL 2688096. However, that case is easily distinguishable from the situation at hand. In that case, the trial judge made the appellant remove a cross that he wore around his neck stating if he did not he would be banned from the courthouse. *Id.* at ¶ 3. Additionally, the trial court judge repeatedly made hostile comments to the appellant in the presence of the jury. *Id.* at ¶ 9. The judge also refused to allow appellants’ counsel to ask certain questions, even going as far as to threaten to hold counsel in contempt for so doing, but then allowed appellee’s counsel to ask the exact same questions without any ramifications. *Id.* at ¶ 12.

Here, Plaintiff alleges that this Honorable Court was out of line by saying that the Plaintiff would be getting a “donut” in this case. However, Plaintiff fails to mention that this was an off-handed comment made after an afternoon of negotiations, headed by the Court. Furthermore,

this was a statement made to both the Plaintiff's counsel as well as Defense counsel and was made outside the hearing of the jury.

It was, and still is, the belief of this Court that Plaintiff and his counsel were negotiating in bad faith. At numerous points during this trial the Court and various Court personnel stepped in attempting to facilitate settlement negotiations between the parties. On more than one occasion, Plaintiff's counsel indicated to the Court and Court personnel that settlement could be accomplished for one number, and when an offer that came close was proffered, Plaintiff's number would increase. In the opinion of this Honorable Court, those actions constituted bad faith.

Thus, because Plaintiff has failed to establish that there was any pattern of hostility that jeopardized the Plaintiff's right to a fair and impartial trial, the Plaintiff's Motion must be denied.

C. Plaintiff is not entitled to a new trial pursuant to Civil Rule 59(A)(2) and Civil Rule 59(A)(4).

In the third assertion for a new trial, the Plaintiff alleges that Defendants' Attorney, Ron Rawlin, made abusive comments toward Plaintiff and it's counsel, that inflamed the passion of the jury and clearly prejudiced the Plaintiff. Plaintiff alleges that it was unfairly prejudiced and that it was the responsibility of this Court to have stopped Mr. Rawlin's "abusive comments."

At no point in the Motion does Plaintiff specifically state what these alleged abusive comments were. Furthermore, it bears mentioning that at no point during Mr. Rawlin's closing argument did Mr. Connick make any objections to any statements made by Mr. Rawlin. The only objection voiced by Mr. Connick was to object to the amount of time allotted to Mr. Rawlin during his closing arguments. A. Bonamase Contracting Brief in Opposition at 12. Plaintiff's Motion and the record are devoid of abusive comments made by Mr. Rawlin, leading to the

inflammation of the jury's passion or to prejudice, and thus, the Plaintiff's Motion must be denied.

D. Plaintiff is not entitled to a new trial pursuant to Civil Rule 59(A)(5).

Plaintiff asserts that this Honorable Court improperly allowed the jury to deliberate on the Defendants' breach of contract claim when Defendants failed to establish the actual damages to a reasonable degree of certainty. The Plaintiff further addressed this issue in the portion of his Motion labeled "Alternative Motion for Judgment Notwithstanding the Verdict." Thus, this argument will be addressed below.

E. Plaintiff is not entitled to Judgment Notwithstanding the Verdict.

Plaintiff asserts that it is entitled to Judgment Notwithstanding the Verdict for the following reasons: 1. Defendants failed to establish to a reasonable degree of certainty that they were entitled to any actual damages related to the Plaintiff's breach of contract; 2. Defendants failed to comply with the terms of Article 7 of the Subcontract Agreement and thus, waived the right to assert a claim for damages; and 3. Plaintiff is entitled to Judgment Notwithstanding the Verdict for Unjust Enrichment.

Civil Rule 50(B) governs the granting of a motion for judgment notwithstanding the verdict.

That Rule states, in part:

A party may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion; or if a verdict was not returned such party, within fourteen days after the jury has been discharged, may move for judgment in accordance with his motion...

Plaintiff maintains that this Honorable Court should grant its Motion on the basis that the Defendants have failed to establish their damages to a reasonable degree of certainty. In fact, Plaintiff repeats this statement over and over again throughout the Motion but cites to little to support the assertion. Further, Plaintiff alleges that to establish damages to a degree of certainty

expert testimony must be proffered. Plaintiff fails to cite to, and this Honorable Court is unaware of, any law that requires the proffering of expert testimony to establish damages in a breach of contract case to a reasonable degree of certainty.

Defendants, in their Brief in Opposition, correctly assert that where it is certain that damages have resulted, uncertainty as to the amount does not preclude recovery. *Bemmes v. Public Employee Retirement System of Ohio*, 102 Ohio App. 3d 782, 789, quoting 22 American Jurisprudence 2d (1988, Supp. 1995). In *Bemmes v. Public Employee Retirement System of Ohio*, the Court of Appeals of Ohio, Twelfth District, defined “reasonable certainty” as “[t]hat degree of certainty of which the nature of the case admits.” *Id.*

This Honorable Court agrees both with the Defendants and the jury that the evidence presented at trial established to a reasonable certainty the damages that Defendants were entitled to. As Defendants assert in the Brief in Opposition, Defendants’ Exhibit Z established, to a reasonable degree of certainty, in conjunction with that terms definition, the amount of damages that the Defendants were entitled to. Furthermore, expert testimony was not needed to establish these damages. Thus, Plaintiff’s first assertion as to entitlement to Judgment Notwithstanding the Verdict is not well taken.

Secondly, Plaintiff asserts that Defendants failed to comply with the terms of the Subcontract and thus, waived their right to a damages claim. The Defendants maintain, and the jury and this Court agree, that the evidence established that the Subcontract Agreement was modified.

Defendants assert that the testimony at trial established that they attempted to comply with the Subcontract Agreement but that the Plaintiff refused to address the issues because it had already resolved to fire the Defendants. It was the finding of the jury that the evidence established that the Defendants did not breach their contract, and instead, that the Plaintiff did.

After reviewing the evidence submitted at trial, this Honorable Court agrees. Thus, Plaintiffs second contention is not well taken.

Finally, Plaintiff asserts it is entitled to Judgment Notwithstanding the Judgment on Defendants' Unjust Enrichment claim. Because the jury awarded no damages on this count, this issue is moot.

III. CONCLUSION

Therefore, it is the opinion of this Honorable Court that the allegations contained in the Plaintiff's Motion for New Trial and Alternative Motion for Judgment Notwithstanding the Verdict, are completely baseless. There is absolutely no basis for the attacks against Defense counsel, the jury or the procedure of this trial. Plaintiff received a fair and impartial trial and now tries to blame everyone else involved for the shortcomings of its' case. Plaintiff's counsel had ample opportunity to conduct himself in a professional manner and to present a professional presentation during this trial and repeatedly he chose not to. It is inexcusable to return to the presiding Judge and blame him or her for one's own poor lawyering.

Due to the erroneous allegations put forth in its' Motion and the total lack of a legal basis for granting such a Motion, Plaintiff's Motion for New Trial and Alternative Motion for Judgment Notwithstanding the Verdict is hereby denied in its' entirety.

IT IS SO ORDERED.

Date

Judge Shirley Strickland Saffold