

**IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO**

HAROLD WALCHER, et al.)	CASE NO. CV 07 636423
)	
Plaintiffs)	JUDGE JOHN P. O'DONNELL
)	
vs.)	<u>JOURNAL ENTRY</u>
)	
EDWARD W. DROBNICK, et al.)	
)	
Defendants)	

John P. O'Donnell, Judge:

I. STATEMENT OF THE CASE

On September 21, 2007, Plaintiff Harold Walcher and three of his sons filed a lawsuit against several defendants, including a fourth son named Dale Walcher. The complaint asserted various claims, including undue influence, wrongful conversion, tortious interference with contract, breach of contract, and unjust enrichment.

On February 20, 2008, defendant Dale Walcher's motion for leave to file a counterclaim *instanter* was granted. The essence of the counterclaim is a cause of action against plaintiff Harold Walcher only alleging promissory estoppel. The counterclaim asserts that Harold Walcher promised Dale Walcher a 25% portion of net proceeds from the sale of a farm.

All of the claims asserted in the Plaintiffs' complaint were voluntarily dismissed, and on May 12, 2008, a bench trial began on Dale Walcher's counterclaim for promissory estoppel.

II. FACTS

Harold Raymond Walcher is an 87-year-old who has been retired to Florida for about 15 years. He was married to Gene Ruth for about 65 years until she died in February, 2007. They had four sons: Dale, who is retired; twins Ray and Roy, who work at a trucking company and a chair factory, respectively; and John, who is retired.

Harold and Gene Walcher once owned nearly 35 acres of land around the area of Hathaway and Canal Roads in Valley View. The land is near the Cuyahoga Valley National Recreation Area. In 2001, Harold Walcher sold about 17 acres of this land to the federal government's Park Service. After covering expenses, he distributed about \$400,000.00 from that sale in equal shares to each of his four sons. In 2006, Harold Walcher sold an existing home to his son John for approximately \$200,000.00. He credited John with \$50,000.00 toward the purchase and distributed about \$150,000.00 in equal shares to his other three sons.

The property at issue in this case is about 14.75 acres and is referred to by members of the Walcher family as "the farm." Around February, 2005, Dale Walcher and his wife Bernadette visited his parents in Florida and had discussions about selling the farm. Dale Walcher claims that his father informed him then that any net proceeds of a sale would be divided equally among his four sons, but the amount of the distribution was unknown. Harold Walcher concedes that he agreed to pay Dale a 3% fee for his assistance in selling the property but denies ever promising him 25% of the net proceeds.

In early 2007 the developers who ultimately bought the property from Harold Walcher took their first tour of the farm at Dale Walcher's invitation and negotiations for the sale took place. In the meantime, around March 31, 2007, Dale Walcher procured an estimate from Blossom Homes LLC of the cost of work to remodel his own house by converting the garage to a

living area and adding a staircase to the master bedroom. Blossom Homes is run by Anthony J. Kucia, who testified that he first met Dale Walcher in the fall or winter of 2006 when Kucia was one of the people interested in buying the farm for development. He further testified that Dale Walcher first raised the possibility of a separate remodeling project on his own home sometime in the spring of 2007 and that the final cost of the project was just over \$58,000.00.

The parties presented divergent testimony about whether Harold Walcher knew about Dale Walcher's home remodeling and whether he ever told Dale and Bernadette Walcher that they should expect to receive one-fourth of the net proceeds from the sale of the farm. As noted above, Dale Walcher testified that in February, 2005, his father promised to divide proceeds of the sale equally among his four sons. Then, in May, 2007, when Dale and Bernadette Walcher were about to sign the remodeling contract, Dale Walcher claims to have called his father in Florida for a further assurance that he could expect one-fourth of the proceeds from the farm's sale. Dale Walcher claims that Harold Walcher assured him that he would be getting his "fair share," but there was no testimony as to the exact amount. Bernadette Walcher testified that "Grandpa (Harold Walcher) always said" that each son would receive about \$50,000.00 to \$55,000.00 from sale of the farm and that she and Dale adjusted the remodeling plan to reflect this expectation, but she did not provide dates and details of these statements.

Bernadette Walcher also testified to a spring 2007 phone call to Harold Walcher in Florida to confirm that one-fourth of the farm's sale proceeds would go to her and her husband. She testified that this call was made to reassure her and Dale that Harold was not going to change his mind about giving them money. Bernadette Walcher testified that she "probably" would not have agreed to the contract for the home addition without assurances that she and her husband were soon to get money from the sale of the farm.

The remodeler Anthony Kucia testified to confirm the spring 2007 phone call to Harold Walcher. Kucia testified that he was at Dale Walcher's house when Dale Walcher made a phone call to Harold Walcher. Although Kucia could not overhear the conversation, he testified that upon hanging up Dale Walcher assured the builder that he had the money to pay for the remodeling job.

On his own behalf, Harold Walcher testified that he did not know about the renovations to Dale's house until he first saw them when he came to Ohio around September, 2007. He testified that during discussions with Dale about the contract of sale of the farm to the developers Dale never asked him "what's my share?" He also said that he was told by Dale that the money for the home renovation came from Dale's share of the 2006 sale of separate land to John Walcher. Bernadette Walcher testified that when Harold first saw the home renovation project in September, 2007, he inquired how it was being financed and she reminded him that they intended to use money from the sale of the farm.

John Walcher testified on behalf of his father that he observed home remodeling beginning at Dale Walcher's house around the fall of 2006, not the spring of 2007. He also noted that Dale Walcher never mentioned to him that money for the remodeling was coming from the sale of the farm.

III. LAW

Promissory estoppel is an equitable doctrine formulated to prevent a failure of justice under circumstances where the legal requirements for a contract cannot be established. The elements of a claim for promissory estoppel are as follows: (1) a clear, unambiguous promise; (2) reliance upon the promise by the person to whom the promise is made; (3) the reliance is

reasonable and foreseeable; and (4) the person claiming reliance is injured as a result of reliance on the promise. *Pappas v. Ippolito*, Cuyahoga App. No. 89903, 2008-Ohio-3976, ¶54.

The focus of the evidence at trial here was whether Dale Walcher detrimentally relied on a promise made by Harold Walcher. Dale Walcher argues that there is an abundance of evidence that he would not have gone forward with the remodeling project without his father's promise of money from the sale of the farm. The father argues that there cannot be promissory estoppel in the case of a gift. It is true that the element of detrimental reliance often involves a benefit conferred on the promisor. Where a contract is imperfectly executed and promissory estoppel is claimed the defendant has typically received a benefit (merchandise, materials, labor or other services) at the expense of the plaintiff. The benefit is analogous to the contract element of consideration to the promisor. This case involves no obvious benefit to Harold Walcher since Dale Walcher's claimed detriment is having incurred debt to renovate his own house. Despite that, at least one court of appeals has implicitly recognized the availability of a promissory estoppel claim in the case of a gift¹ and this court has found no authority to the contrary.² Therefore, the court finds that the defendant/counterclaimant Dale Walcher did rely to his detriment on what he perceived as assurances of a future gift of money from his father.

However, reliance alone is not sufficient to justify a recovery. Dale Walcher has to show that his reliance was reasonable and foreseeable. For those things to be true, the evidence must show the existence of a clear, unambiguous promise because a person detrimentally relying on a vague and ambiguous promise cannot be said to be acting reasonably. The evidence in this case is that at most there was a general assurance from his father that Dale Walcher would get a

¹ *Church at Warren v. Natale*, 11th Dist. App. No. 96-T-5472, 1997 Ohio App. LEXIS 2138, at pages 6-7.

² All of the cases cited by the plaintiff/counterclaim defendant at trial and in his post-trial brief involve legal principles of contract, not equitable principles of promissory estoppel.

portion of any eventual sale proceeds. However, that assurance did not include any promise about what amount of money would be paid or when it would be paid. While a general assurance may have caused Dale Walcher to reasonably expect that sooner or later he would be getting some money, it was not reasonable to rely on the general promise of an eventual gift of some unspecified amount of money to finance a specific construction project for an exact amount of money.

IV. CONCLUSION

Because the defendant/counterclaimant Dale Walcher did not establish the existence of a clear and unambiguous promise,³ the court finds on the counterclaim in favor of the plaintiff/counterclaim defendant Harold Walcher, at Dale Walcher's costs.

IT IS SO ORDERED.

Date: September _____, 2008

JOHN P. O'DONNELL, JUDGE

³ Although most courts are of the opinion that the burden of proof on a promissory estoppel claim is by a preponderance of the evidence, there is some authority to suggest that the burden is by "clear and unequivocal" evidence. This court agrees that preponderance of the evidence is the correct standard and finds that Dale Walcher did not meet this burden of proof, much less the elevated burden of "clear and unequivocal." For discussion, see: *Ewert v. Stewart*, 6th Dist. No. L-00-1120, 2001 Ohio App. LEXIS 1817, at pages 9-10; *Kroll v. Close* (1910), 82 Ohio St. 190, 194; and *Hayes v. Brown*, 3d Dist. No. 7-89-9, 1990 Ohio App. LEXIS 5272, at pages 13-14.

CERTIFICATE OF SERVICE

A copy of the foregoing Journal Entry has been mailed this _____ day of
September, 2008 to:

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