

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

DANIEL G. BALOMBIN)	CASE NO. CV 10 726256
)	
Plaintiff,)	JUDGE JOHN P. O'DONNELL
)	
vs.)	<u>JOURNAL ENTRY</u>
)	
BERNADETTE KRAKOWSKI,)	
EXECUTOR OF THE ESTATE)	
OF BERNADIN BALOMBIN)	
)	
Defendant.)	

John P. O'Donnell, J.:

This is a lawsuit by Daniel Balombin against his mother's estate to recover money he claims to have advanced for repairs to a house she owned.

The complaint was filed on May 10, 2010. The nine-paragraph complaint does not allege a specific cause of action but, at paragraph six, the plaintiff says that it is a claim "for payment of the value of labor and materials provided by plaintiff to a residential property located at 4719 Wichita Avenue, Cleveland." The complaint contains a jury demand. Both parties waived a jury and the case was tried to the court on March 28, 2011. Plaintiff's counsel represented to the court at trial that the only cause of action was for breach of contract. This entry follows.

Trial testimony was given by plaintiff Daniel Balombin, defendant Bernadette Krakowski, and Nicola V. Piro of All Home Services Construction. Plaintiff's Exhibits 1 through 8 were admitted into evidence.

Daniel Balombin and Bernadette Krakowski are brother and sister. Their mother is Bernadin Balombin. The plaintiff has lived all his life at his parents' home on Vandalia Avenue in Cleveland. His mother owned that house and lived there with him until she died on September

23, 2009. Defendant Bernadette Krakowski was appointed as executor of the decedent's estate on November 3, 2009.

Bernadin Balombin owned a second house at 4719 Wichita, Cleveland. That home has been vacant for more than a decade. In 1998, Bernadin Balombin was cited for housing code violations at the Wichita house. The plaintiff remedied those violations at his own expense and then was reimbursed by his mother.

More code violations were found in 2001 and the same arrangement was followed: the plaintiff paid for the repairs and then was repaid by his mother.

The property was cited for more violations on May 25, 2004.¹ The plaintiff testified that he and his mother agreed that he would have the repairs done at his expense and that she would reimburse him. However, because these repairs were more expensive than those for the earlier violations, the plaintiff testified that his mother agreed to repay him upon the sale of the house.

The plaintiff retained All Home Services to do most of the repairs and they were completed by 2006 for \$7,940. The plaintiff bought paint necessary for the repairs at a cost of \$822, bringing his total expense to \$8,762.

The Wichita property was never sold before Bernadin Balombin died and the plaintiff was never repaid.

A few days after his mother's funeral, the plaintiff filed a small claims complaint in the Cleveland Municipal Court as case number 2009 CVI 021108. The caption of that lawsuit shows Bernadin Balombin as the defendant. The plaintiff's claim was for \$4,700 to recover the cost of roof repair on Wichita done by All Home Services.² Because of the jurisdictional limitation of

¹ Plaintiff's trial Exhibit No. 1.

² Plaintiff's trial Exhibit No. 4.

the small claims court, however, the plaintiff sought only \$3,000 in the small claims case. The small claims court found in favor of the defendant. This lawsuit was then filed.

At the close of the plaintiff's evidence, the defendant moved for an involuntary dismissal pursuant to Rule 41(B)(2) of the Ohio Rules of Civil Procedure, the non-jury equivalent of a motion for a directed verdict. The grounds for the requested dismissal were *res judicata* (based on the small claims action) and the statute of frauds.

As for *res judicata*, the court finds that the small claims complaint did not preclude this lawsuit. Indeed, it appears to this court that the municipal court never had jurisdiction to hear that action because a deceased person was named as the defendant. Simply put, no defendant existed when that lawsuit was filed. The proceedings there are a nullity.

As for the statute of frauds, Section 1335.05 of the Ohio Revised Code provides, in pertinent part, as follows:

1335.05 Certain agreements to be in writing.

No action shall be brought . . . 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 . . .

The plaintiff testified that his agreement with his mother was that when the Wichita house was sold he would be paid out of the proceeds. No testimony was offered about when the plaintiff or his mother expected the house to be sold. It was possible that the house would be sold within one year of the agreement and equally possible that it would not. But because the agreement, when made, was not explicitly "not be performed within one year," it does not fall within the statute of frauds. A promise unlikely to be performed within a year which is, in fact,

not performed within a year, is still not within the statute of frauds if at the time of making there is a possibility that it can be entirely performed as the parties intended within a year.³

The defendant also argued that Bernadin Balombin was never obligated to pay under the oral contract because a condition precedent to her obligation – sale of the house – never occurred. That may be so, but in that event, the plaintiff’s complaint would simply not be justiciable until the house is sold and he is not paid.

Therefore, the case should be decided on its facts, and those facts do not support a finding, by a preponderance of the evidence, that a contract existed. The decedent had reimbursed the plaintiff for similar expenses in the past without delay and there is evidence that the decedent kept a large amount of cash and used it, for example, to pay real property tax on the Wichita house. The plaintiff knew that his mother had this cash. It makes no sense that he waited three years – and presumably would still be waiting if his mother were alive – to get repaid.

Judgment is therefore entered in favor of the defendant and against the plaintiff on the plaintiff’s claim for breach of contract. During the trial, the plaintiff declined an opening to assert an alternative claim for unjust enrichment. That cause of action not having been prosecuted, the plaintiff is also unable to recover on that basis.

IT IS SO ORDERED:

JUDGE JOHN P. O’DONNELL

Date: _____

³ *Weiper v. W.A. Hill & Assoc.* (1995), 104 Ohio App.3d 250, 264.

SERVICE

A copy of this Journal Entry was sent by e-mail, this 12th day of April, 2001, to the following:

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JUDGE JOHN P. O'DONNELL