

**IN THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
TRUMBULL COUNTY, OHIO**

JEFFREY A. WINNING, et al.,	:	O P I N I O N
Plaintiffs-Appellants,	:	
- vs -	:	CASE NO. 2010-T-0124
JANET E. WINNING,	:	
Defendant-Appellee.	:	

Civil Appeal from the Court of Common Pleas, Case No. 2007 CV 02354.

Judgment: Affirmed.

Randil J. Rudloff and John M. Rossi, Guarnieri & Secret, P.L.L., 151 East Market Street, P.O. Box 4270, Warren, OH 44482 (For Plaintiffs-Appellants).

Carlo A. Ciccone, Ciccone Law Office, Reisman's Theater Building, Suite 1000, 42 S. Main Street, Niles, OH 44446-5012 (For Defendant-Appellee).

CYNTHIA WESTCOTT RICE, J.

{¶1} Appellants, Jeffrey A. Winning and Phyllis L. Winning, appeal the judgment of the Trumbull County Court of Common Pleas, following a bench trial, denying their complaint for specific performance against Jeffrey's sister, appellee Janet E. Winning. The complaint sought to compel Janet to convey her home to Jeffrey and Phyllis pursuant to the parties' purchase agreement. At issue is whether Janet breached the parties' contract. For the reasons that follow, we affirm.

{¶2} On June 3, 2006, the parties entered a purchase agreement pursuant to which Jeffrey and his wife, Phyllis, agreed to purchase the real estate located at 157 Charles Avenue in Warren, Ohio from Jeffrey's sister, Janet. In exchange for the property, Jeffrey and Phyllis agreed to pay an amount sufficient to pay off the mortgage and judgment lien on the property. Because Jeffrey and Phyllis failed to pay the purchase price, Janet refused to sign a deed transferring her property to them.

{¶3} As a result, on September 7, 2007, Jeffrey and Phyllis filed a two-count complaint against Janet. In the first count, they alleged that Janet breached the contract and demanded specific performance against her. In the second count, Jeffrey and Phyllis demanded judgment in excess of \$5,000 for: (1) expenses they allegedly incurred "in reliance upon the contract" to bring the property into compliance with Warren City Ordinances, and (2) an unspecified amount of money to pay off a third lien that allegedly did not exist at the time of the purchase agreement.

{¶4} Janet filed an answer along with a counterclaim in which she alleged that Jeffrey and Phyllis had trespassed onto her property and converted her personal property and furnishings to their own use. Janet asked for an award of damages and "other relief as the court may deem equitable."

{¶5} The case proceeded to bench trial on January 20, 2010. Jeffrey testified that he is 43 years old and his sister, Janet, is 39. He said that he and his sister were raised in the home on Charles Avenue, which is now solely owned by Janet. He lived there until 1993 when he moved to Georgia. Janet continued to live in the home, and the property eventually passed to her by inheritance following the death of the siblings' stepfather. The house had a mortgage on it in the amount of approximately \$10,000

and a judgment lien against the siblings' stepfather in an unspecified amount. Sometime between 2004 and 2005, Janet experienced financial difficulties and asked Jeffrey to help her pay the mortgage to keep it out of foreclosure. Jeffrey agreed to help and began to make the mortgage payments. After making some payments, Jeffrey told Janet that he would not continue to help with the mortgage unless she transferred her home to him and Phyllis.

{¶6} Jeffrey instructed his attorney to prepare a purchase agreement for Janet to sign. The contract did not state a specific purchase price. Instead, it provided that, in exchange for the property, "we [i.e., Jeffrey and Phyllis] agree to pay a sum sufficient to pay in full the current mortgage to America's Home Lender * * * and the judgment lien in favor of Capital One * * *." Under the contract, Jeffrey and Phyllis were not required to make any down payment. The contract stated: "Seller to provide a warranty deed. * * * Buyer to cooperate fully in securing necessary payoffs." However, the contract was silent with respect to the time and order of performance. Specifically, the contract did not provide the date of payment, the date of title transfer, the date of transfer of possession, the order in which the liens were to be paid off and title was to be transferred, or whether Janet retained a possessory interest in the property after title transfer. Further, the contract did not provide for an escrow.

{¶7} Janet testified she relied on her brother and signed the contract because Jeffrey said it would help her financially. It was her understanding that after Jeffrey paid her an amount sufficient to pay off the mortgage and lien, she would sign the deed conveying the property to Jeffrey and Phyllis, and Janet would continue to live in the home with them sharing the bills.

{¶8} In or about June 2007, one year after the purchase agreement was executed, Jeffrey and Phyllis moved into the home with Janet. Janet testified she paid the water, gas, and electricity bills. Although Jeffrey continued to make the monthly mortgage payments, he conceded he did not pay off the mortgage or judgment lien. He said he never contacted the mortgagee and so never secured the payoff amount on the mortgage. He testified he still does not know the balance due under the mortgage.

{¶9} Although Jeffrey testified he made monthly mortgage payments, he did not provide any specifics concerning the dates of payment, the dollar amount of the payments, the number of payments he made, or the total amount of such payments. Moreover, he did not present any documentary evidence in the form of checks or otherwise to verify such payments.

{¶10} Jeffrey estimated that he spent about \$7,000 to improve the home before and after executing the purchase agreement. However, the trial court found that the invoices and receipts he presented for material purchased and work done on the property after execution of the purchase agreement totaled only \$509.71. At trial, Jeffrey abandoned his claim for an amount to pay off the alleged third lien on the property and that claim is not part of this appeal.

{¶11} In June 2007, Jeffrey instructed his attorney to prepare a deed to the property for Janet to sign. However, Janet testified that, because Jeffrey did not pay the purchase price, she refused to sign the deed. The relationship between the siblings quickly deteriorated. Jeffrey testified that in September 2007, Janet moved out of her home, leaving behind all her belongings, including her refrigerator, stove, dishwasher, washer and dryer, and furniture. Jeffrey testified that after Janet left, all of her personal

property became his, although he conceded on cross-examination that the parties never agreed that Janet's property would become his. In that same month, Jeffrey and Phyllis filed their complaint against Janet.

{¶12} On cross-examination, Jeffrey admitted that he did not pay off the mortgage and judgment lien in 2006, 2007, 2008, or 2009, and as of the trial date, January 20, 2010, the mortgage was still not paid off and was still in Janet's name. Despite this, he and Phyllis still live in Janet's home.

{¶13} Jeffrey said he never paid off the mortgage because Janet never signed the deed conveying the property to him. He admitted the contract was silent regarding the timing of payment of the purchase price and transfer of title. He also admitted that the contract did not require Janet to transfer the property to him before he paid the purchase price.

{¶14} Jeffrey testified that in 2008 he borrowed \$10,000 from his friend, Ray Truran, to pay off the mortgage. On August 15, 2008, Jeffrey deposited \$10,592 with the clerk of courts, which, he alleged, was the amount owed on all liens. Jeffrey said he never paid Mr. Truran back so Mr. Truran sued him and recovered judgment against him for the amount of the loan.

{¶15} For the defense, Mr. Truran testified that Jeffrey and Phyllis told him they needed to pay off the liens on Janet's property in order to get title in their names. He said he loaned Jeffrey and his wife \$11,000 in late 2007 for this purpose, but they never repaid the loan to him according to their agreement, and he was forced to sue them. Mr. Truran subsequently recovered judgment against Jeffrey and Phyllis in the trial court.

{¶16} Janet testified that Jeffrey and Phyllis were not current on the mortgage payments, and that, as of the trial date, they were two months delinquent. She said that the mortgage is still in her name and, without access to her property and with Jeffrey not making the mortgage payments, she has been left “holding the bag.”

{¶17} Janet testified that Jeffrey forcibly removed her from her home in September 2007. She said that she had purchased the washer and dryer and stove in her home and that the other appliances and furnishings in her home were left to her by inheritance. She said she never agreed to give any of her personal property to Jeffrey. Janet said that Jeffrey and Phyllis never gave her an opportunity to take her things. She went back to her home for this purpose with the police. Jeffrey and Phyllis put her clothes in a garbage bag and put them on the front porch, but Janet was unable to retrieve the rest of her property.

{¶18} Janet testified that she now lives with her sister in Fowler, Ohio. She said she has filed an eviction action against Jeffrey and Phyllis in the Warren Municipal Court and that action is pending. Janet is currently employed full-time by West Telecommunications as a customer advisor, and she is now able to afford the mortgage, taxes, utilities, and maintenance costs of her home.

{¶19} Despite the funds deposited by Jeffrey and Phyllis with the clerk of courts, their counsel argued at trial that if the trial court were to decide the parties had entered a valid purchase agreement, Jeffrey and Phyllis could apply to a commercial lender for a mortgage and borrow the funds to pay for the property. Their counsel thus conceded that Jeffrey and Phyllis were still not in a position to pay off the mortgage and judgment lien. Their counsel also conceded that if Jeffrey and Phyllis were unable to obtain a

loan to pay off the mortgage and judgment lien pursuant to the purchase agreement, Janet would be entitled to rescission of the contract.

{¶20} Following the trial, the trial court entered judgment on November 2, 2010, finding that mutual mistakes existed with respect to the terms of payment under the parties' purchase agreement. First, the parties did not agree to a specific purchase price. Second, the parties disagreed as to whether Janet retained the right of possession to the property. Third, the parties did not agree as to the time for performance or the order of their performance. The trial court also found that, as Jeffrey's younger sister, Janet relied on Jeffrey to help her. Moreover, the court found that Janet was not negligent in failing to discover these mistakes because she was not sophisticated in real estate transactions. As a result, the trial court found that Janet was entitled to rescission of the purchase agreement and ordered that possession of the property be restored to her. In so ruling, the trial court implicitly found that Jeffrey was not entitled to specific performance of the contract.

{¶21} With respect to Jeffrey and Phyllis' claim for damages, the court entered judgment in their favor and against Janet for only their expenses incurred after execution of the contract that were supported by invoices and receipts in the amount of \$509.71.

{¶22} Although not raised in the pleadings or at trial, the court found that the amounts paid by Jeffrey and Phyllis by way of monthly mortgage payments on the property would be considered as rent for Janet's residence and that Jeffrey and Phyllis were therefore not entitled to any setoff or credit for such amounts.

{¶23} Jeffrey and Phyllis appeal the trial court's judgment, asserting three assignments of error. For their first assignment of error, they allege:

{¶24} "The trial court erred in finding that the parties' real estate purchase agreement contained several mutual mistakes of material fact which Janet Winning failed to discover so as to entitle her to rescind the agreement and be restored possession of the realty."

{¶25} Whether a contract exists is a question of law. *Zelina v. Hillyer*, 165 Ohio App.3d 255, 2005-Ohio-5803, ¶12. "A contract is generally defined as a promise, or a set of promises, actionable upon breach. Essential elements of a contract include an offer, acceptance, contractual capacity, consideration (the bargained for legal benefit and/or detriment), a manifestation of mutual assent and legality of object and of consideration." *Kostelnik v. Helper*, 96 Ohio St.3d 1, 2002-Ohio-2985, ¶16, quoting *Perlmutter Printing Co. v. Strome, Inc.*, 436 F.Supp. 409, 414 (N.D.Ohio 1976).

{¶26} In order to prove a breach of contract, the plaintiff must prove the existence of a contract, performance by the plaintiff, breach by the defendant, and damage or loss to the plaintiff. *Windsor v. Riback*, 11th Dist. Nos. 2007-G-2775 and 2007-G-2781, 2008-Ohio-2005, ¶32.

{¶27} Further, in order to be entitled to specific performance, the plaintiff must show he performed his part of the contract or, if the defendant repudiated the contract, the plaintiff must show his present readiness and ability to perform. *Hegedus v. Rittman*, 11th Dist. No. 1270, 1982 Ohio App. LEXIS 13600, *4 (Dec. 30, 1982), citing *The George Wiedemann Brewing Co. v. Maxwell*, 78 Ohio St. 54 (1908), paragraph two of the syllabus.

{¶28} A finding by the trial court that a party breached a contract will only be reversed by a reviewing court if it is against the manifest weight of the evidence. *Fitzpatrick v. Yeager*, 4th Dist. No. 97CA35, 1998 Ohio App. LEXIS 2950, *8 (June 26, 1998), citing *Seasons Coal Co. v. Cleveland*, 10 Ohio St.3d 77, 80 (1984). Findings supported by some competent, credible evidence will not be reversed as being against the manifest weight of the evidence. *Id.* at *8-*9.

{¶29} Turning our attention to the facts of the instant case, Jeffrey and Phyllis never paid or tendered the purchase price for the property, which was the combined amount of the balance owed on the mortgage and lien. Further, they never obtained the payoff amount of either debt, and they never applied for or obtained a mortgage loan to pay the purchase price. At trial, Jeffrey conceded that he and Phyllis were still not in a position to pay the purchase price. Consequently, Jeffrey and Phyllis did not perform their part of the contract or show their readiness and ability to pay. For this reason alone, they were not entitled to pursue a claim for specific performance. *Hegedus, supra.*

{¶30} Further, Jeffrey and Phyllis were not entitled to recover on their contract claim because they failed to perform under the contract within a reasonable time. Restatement of the Law, Second, Contracts, Section 234, sets forth the rules regarding the order of performance. That section provides:

{¶31} “(1) Where all or part of the performances to be exchanged under an exchange of promises can be rendered simultaneously, they are to that extent due simultaneously * * * .

{¶32} “(2) * * * [W]here the performance of only one party under such an exchange requires a period of time, his performance is due at an earlier time than that of the other party * * *.”

{¶33} “Contracts for the conveyance of land * * * are viewed by the law as being capable of simultaneous performance; absent agreement otherwise, they will be construed as calling for simultaneous rendition of performances. Under the rule of Section 234(1), it will thus be necessary for either party to such a contract – buyer or seller – to show that [he] has at least tendered performance on [his] part, in order to maintain an action for breach against the other party.” Problems in Contract Law, Section 869 (3d Ed.).

{¶34} The Restatement provides an illustration under this section, which mirrors the facts of the instant case. “A promises to sell land to B and B promises to pay A \$50,000, no provision being made for the time either of delivery of the deed or of payment. *Delivery of the deed and payment of the price are due simultaneously.*” (Emphasis added.)

{¶35} Because the parties’ contract did not include a provision regarding the time of delivery of the deed or the time of payment, such term may be implied by the rule announced in the Restatement, *supra*. According to Section 234(1), delivery of the deed and payment of the purchase price were due simultaneously.

{¶36} Further, it is well settled that where the time for performance of a contract is not stated in the contract as being of the essence, performance must be made in a reasonable time. *Jacobs v. Hawbaker*, 10th Dist. No. 84AP-771, 1986 Ohio App. LEXIS 7449, *12 (June 30, 1986). Jeffrey admitted at trial that he did not pay the purchase

price in 2006, 2007, 2008, or 2009. In fact, he admitted that as of the trial date, January 20, 2010, he and Phyllis had still not paid the purchase price.

{¶37} Thus, between the date of the contract, i.e., June 2006, and the date of the trial, i.e., January 20, 2010, Jeffrey and Phyllis never performed under the contract. They therefore failed to perform under the contract within a reasonable time. For this additional reason, Jeffrey and Phyllis were not entitled to recover on their contract claim.

{¶38} Alternatively, Janet would have been entitled to repudiate or rescind the contract. As noted above, Jeffrey and Phyllis failed to perform under the contract. In fact, in closing argument, their attorney stated that if the trial court were to find the contract enforceable, Jeffrey and Phyllis would be willing to apply for a mortgage loan to pay the purchase price for the property. Thus, even as of the trial date, Jeffrey and Phyllis had still not performed under the contract. In these circumstances, the evidence would have supported a finding that Jeffrey and Phyllis had breached the contract by failing to pay for the property, entitling Janet to repudiate or rescind the contract. *Resolution Trust Corp. v. York*, 1st Dist. No. C-960180, 1997 Ohio App. LEXIS 628, *6 (Feb. 26, 1997); *Yurchak v. Jack Boiman Constr. Co.*, 3 Ohio App.3d 15, 16 (1st Dist.1981); *Catz Enters. Inc. v. Valdes*, 7th Dist. Nos. 07 MA 201, 07 MA 202, and 08 MA 68, 2009-Ohio-4962, ¶47. In addition, Jeffrey and Phyllis' counsel conceded at trial that if the court found the contract to be valid and they were unable to perform under the contract, Janet would have the right to have the contract rescinded. Because Jeffrey and Phyllis never applied for a mortgage loan and, even as of the date of trial, they were still unable to perform under the contract, according to their own argument, Janet would have been entitled to rescind or repudiate the purchase agreement.

{¶39} We therefore hold the trial court's finding that Janet was not in breach of the parties' contract and that Jeffrey and Phyllis were not entitled to specific performance was supported by competent, credible evidence and was not against the manifest weight of the evidence.

{¶40} Jeffrey and Phyllis' first assignment of error is overruled.

{¶41} For their second assignment of error, Jeffrey and Phyllis allege:

{¶42} "The trial court erred in finding that the majority of Jeff and Phyllis Winning's expenditures and debts incurred for improvements to and for the benefit of the real estate in issue were non-compensable."

{¶43} Jeffrey and Phyllis alleged in their complaint that they were entitled to their expenses incurred "in reliance upon the contract." However, the trial court only compensated them for those expenses that were supported by invoices or receipts and that were incurred after execution of the contract. Jeffrey argues the trial court erred in not ordering Janet to reimburse him in the amount of about \$7,000 for all of his expenses, whether the expenses arose before or after the purchase agreement was executed and whether or not the alleged expenses were documented.

{¶44} As a preliminary matter, while Jeffrey argues he was entitled to compensation for expenses made "in anticipation of purchasing the residence," and therefore prior to execution of the parties' purchase agreement, he presents no pertinent authority in support of this proposition, as required by App.R. 16(A)(7). For this reason alone, his argument lacks merit.

{¶45} While Jeffrey estimated his total expenses in connection with the property at \$7,000, he presented no documentary evidence in the form of invoices, receipts, or

otherwise to support most of his alleged expenses. Moreover, he presented no testimony as to when any of the expenses were incurred, the amount of same, the reasonableness of same, or whether Janet was aware of them. The trial court chose not to blindly accept Jeffrey's testimony and only credited those expenses that were incurred after execution of the contract and supported by receipts or invoices.

{¶46} Further, since the complaint requested reimbursement for expenses made in reliance on the contract, the court also limited its award to expenses incurred after the contract was entered because appellants could not have made expenses in reasonable reliance on the contract before it existed. Jeffrey's documented expenses incurred after the purchase agreement was executed totaled \$509.71, which is the amount of the court's judgment.

{¶47} Contrary to Jeffrey's argument, even though he was the only person to testify regarding his alleged expenses, that does not mean the court was bound to accept all of his testimony. This is especially true in light of the lack of specifics in his testimony regarding the expenses and the lack of documentary support for most of them. It is well settled that the trier of fact is entitled to believe all, part, or none of the testimony of any witness. *State v. Archibald*, 11th Dist. Nos. 2006-L-047 and 2006-L-207, 2007-Ohio-4966, ¶61.

{¶48} We therefore hold that there was some competent, credible evidence in support of the trial court's damage award, and that same was not against the manifest weight of the evidence.

{¶49} Jeffrey and Phyllis' second assignment of error is overruled.

{¶50} For their third and final assignment of error, Jeffrey and Phyllis contend:

{¶51} “The trial court erred in holding that the mortgage payments made by Jeff and Phyllis Winning since 2005 should be considered monies paid toward rent of the residence and that they are not entitled to any setoff or credit for those funds paid on the mortgage.”

{¶52} Jeffrey and Phyllis argue the trial court erred in considering the monthly payments they made as rent because, they argue, the parties did not expressly agree that these payments would be considered as rent and further because there was no evidence presented concerning the fair rental value of the property. They therefore argue that they were entitled to a setoff or credit for all payments they made on the mortgage. We do not agree.

{¶53} As noted above, the complaint sought specific performance and damages to compensate Jeffrey and Phyllis for expenses allegedly incurred in connection with the property. The complaint *did not* request any setoff or credit for any funds they paid toward the mortgage. Likewise, at trial, Jeffrey and Phyllis did not argue they were entitled to a setoff or credit for such amounts. Because they failed to raise this issue below, it was not preserved and therefore is waived for purposes of appeal. *Schmidt v. Brower*, 11th Dist. No. 2010-A-0014, 2010-Ohio-4431, ¶17.

{¶54} In any event, even if the issue was before the trial court, Jeffrey failed to present any evidence in support of his present claim of entitlement to a setoff. The parties’ purchase agreement did not provide that Jeffrey and Phyllis were to be reimbursed for helping make Janet’s mortgage payments. Moreover, Jeffrey did not testify that the parties ever agreed, orally or in writing, that Jeffrey and Phyllis would be reimbursed for such amounts.

{¶55} Moreover, even if the issue was not waived and Jeffrey presented evidence that he was entitled to a credit for the mortgage payments made, he presented no evidence as to what amounts, if any, were paid on the mortgage or when any such payments were made. Neither he nor any witness from Janet's lender testified concerning any amounts Jeffrey and Phyllis paid toward the mortgage. Nor did Jeffrey present any records from the lender as to the date(s) or amount(s) of such payments. Nor did Jeffrey present copies of his checks evidencing payment on the mortgage. Thus, there is no evidence in the record reflecting the specifics of any such payments or the total amount of same.

{¶56} Due to the complete lack of any evidence concerning the dates and amounts of any payments made by Jeffrey and Phyllis on the mortgage, it would have been impossible for the trial court to determine the amount of any setoff or credit to which Jeffrey and Phyllis would have been entitled. The trial court's judgment in this regard was therefore supported by some competent, credible evidence and was not against the manifest weight of the evidence.

{¶57} Jeffrey and Phyllis' third assignment of error is overruled.

{¶58} For the reasons stated in this opinion, the assignments of error lack merit. It is the judgment and order of this court that the judgment of the Trumbull County Court of Common Pleas is affirmed.

MARY JANE TRAPP, J.,

THOMAS R. WRIGHT, J.,

concur.