

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

Alliance Excavating, Inc.,	:	
	:	
Plaintiff-Appellee,	:	No. 08AP-535
	:	(C.P.C. No. 06CVH-02-01514)
v.	:	
	:	(REGULAR CALENDAR)
Triangle Real Estate Services, Inc., nka	:	
Village Communities Real Estate, Inc.,	:	
	:	
Defendant-Appellant.	:	

D E C I S I O N

Rendered on June 11, 2009

James W. Jordan, for appellee.

Thompson Hine LLP, Michael W. Currie, O. Judson Scheaf, III, and Gabe J. Roehrenbeck, for appellant.

APPEAL from the Franklin County Court of Common Pleas.

GREY, J.

{¶1} This case arises out of a construction dispute between a general contractor, defendant-appellant Triangle Real Estate Services, Inc., and an excavator, plaintiff-appellee Alliance Excavating, Inc. The parties contracted for Alliance to perform grading, excavation, sanitary sewer, storm drain, and utility preparation work on four condominium projects in central Ohio under four separate subcontracts. These contracts contain typical language specifying that Alliance would only be paid for additional work or expenses not covered by the original contract if the changes were approved in writing by the general contractor. The contract also specifies that in case of "dramatic change" to the plans that

formed the basis for the bid and contract price, the parties would either agree on a price adjustment or Triangle would rebid the job. Subcontractor Bid Confirmation, plaintiff's exhibits 1-5. Financially, Alliance conceded a small discount in the contract price in order to receive weekly payments from Triangle, rather than less frequent payments or a lump sum upon completion of work. The weekly draws allowed Alliance, a small company in relation to the size of the jobs it was undertaking, the financial means to pay its own subcontractors and material suppliers during the course of work.

{¶2} Under circumstances for which the parties give conflicting descriptions, the relationship between the parties soured over the course of construction. Triangle eventually quit paying weekly draws, while Alliance was unable to complete its work satisfactorily and completely. Each party's account in this matter varies as to which event triggered the other.

{¶3} Alliance brought suit against Triangle alleging breach of each of the four subcontracts and seeking \$468,130 in damages representing the total balance due on the contracts. Alliance also brought a claim for unjust enrichment seeking the same amount of damages; the trial court granted summary judgment to Triangle on this equitable claim and Alliance has not appealed from that determination.

{¶4} Triangle filed an answer and counterclaim asserting that Alliance had failed to complete its work, performed some of the completed work in a deficient manner, and failed to pay its own suppliers, thus exposing the properties to mechanics' and materialmen's liens. As a result, Triangle asserted, Triangle was forced to both pay Alliance's suppliers directly and to hire other excavating firms to complete Alliance's work and repair the defective work performed by Alliance.

{¶5} Alliance subsequently filed an amended demand for judgment that increased the amount of its claim to \$1,492,301. Although this pleading does not specify the nature of any additional claims presented, subsequent proceedings demonstrated that Alliance intended thereby to add a higher figure to include claims for specific extra work, outside the original contracts, that was performed at Triangle's verbal insistence but never subsequently covered by written, approved change orders.

{¶6} After an extended trial involving lengthy verbal testimony on behalf of both parties and much documentary evidence, the matter was submitted to the jury. At this time, Triangle filed a motion for directed verdict, which was never expressly addressed by the trial court.

{¶7} The instructions provided the jury with specific guidance regarding each party's claims in the case. For Alliance's breach of contract claim, the jury was instructed to find for Alliance if Triangle breached the contracts by failing to pay Alliance when Alliance had substantially performed its duties under the contracts. On this claim, the jury was told that the measure of damages would be an amount sufficient to place Alliance in the same position that it would have occupied had the contracts been fully performed by Triangle. For Alliance's claims for extra work, the court instructed the jury to first consider whether Triangle had waived the contractual requirement that all extra work and job changes be made in writing, and then consider whether Alliance had in fact performed extra work at Triangle's direction. The instructions did not otherwise specify the measure of damages to be awarded for such work. Finally, the jury instructions addressed Triangle's own claim for breach of contract against Alliance. On this claim, the jury was instructed to find for Triangle if Alliance breached the contracts by failing to complete the

work or failing to perform work completed in a timely and workmanlike manner. The measure of damages for this was defined as an amount sufficient to place Triangle in the position it would have occupied had Alliance fully performed the contracts.

{¶8} After deliberation, the jury returned a verdict in favor of Alliance on its breach of contract claim in the amount of \$468,130. The jury also found in favor of Alliance on its extra-work claim but awarded no damages. Finally, the jury found in favor of Triangle on its on breach of contract counterclaim and awarded \$78,817. The trial court entered judgment accordingly, including a subsequent entry granting Alliance's motion for prejudgment interest on the net amount. Triangle brings the following assignments of error on appeal:

1. The trial court erred in denying (or failing to rule on) Triangle's timely-filed Motion for Directed Verdict, and the jury verdict as to Alliance's contract-balance claim is against the manifest weight of the evidence, because Alliance admittedly failed to establish the costs it avoided by not having to complete its subcontract work.
2. The jury verdict on Alliance's contract-balance claim is against the manifest weight of the evidence because Triangle substantially performed under the subcontracts, and therefore could not have also breached them.
3. The jury verdict on Alliance's contract-balance claim is against the manifest weight of the evidence because Alliance materially breached the subcontracts, and Triangle was therefore excused from any further performance under them.
4. The jury verdict on Alliance's contract-balance claim is against the manifest weight of the evidence because there was no competent, credible evidence demonstrating that Alliance suffered any damages whatsoever.
5. The trial court committed plain error in entering judgment on the jury verdict as to the contract-balance claim, because the verdict is legally impossible and internally inconsistent.

6. The damages that the jury awarded to Triangle on its counterclaim are grossly inadequate and against the manifest weight of the evidence.

7. The trial court erred in awarding alliance pre-judgment interest because the jury verdict on which the pre-judgment interest award is founded is against the manifest weight of the evidence and contrary to law.

Alliance has not cross-appealed from the trial court's judgment.

{¶9} We will first address Triangle's fifth assignment of error, which asserts that the trial court should not have entered judgment on the jury verdicts in favor of Alliance because the general verdicts rendered by the jury are internally inconsistent and "legally impossible." Triangle's third assignment of error recasts this point as a manifest-weight argument, asserting that if the jury found that Alliance substantially breached its obligation under the contracts by failing to complete its work and failing to perform in a workmanlike manner, then Triangle was excused from further performance itself under the contracts and was not in breach when it ceased making weekly payments to Alliance.

{¶10} Inherent inconsistencies between different general verdicts rendered by a jury must be raised by a party before the jury is discharged. If not so raised, such arguments are thereafter waived. *Kenney v. Fealko* (1991), 75 Ohio App.3d 47, 49. (The *Kenney* court noted that inconsistencies between general verdicts should not be mischaracterized as Civ.R. 49 claims of inconsistencies between general verdicts and jury interrogatories. *Id.*) "The rationale for such a rule is clear. When a jury returns two inconsistent verdicts, a party can object, just as a party can object when a jury returns a verdict inconsistent with corresponding interrogatories. A trial court has a number of options at its disposal at that time, including the option of allowing the jury to deliberate further to clear up any ambiguities that may have arisen. However, if the objection is

allowed after the jury is dismissed, the party has unnecessarily limited the court's options. If such tactically placed objections were allowed, parties could circumvent the jury if they felt that the jury would not return a favorable verdict." *Romp v. Haig* (1995), 110 Ohio App.3d 643, 647.

{¶11} The rule is clear. Whether or not the jury's verdict of mutual reciprocal breach is legally sustainable in the present case, the time for objection has passed. Triangle did not raise the issue before the trial court in a timely fashion to allow the trial court to efficiently and economically remedy the situation by any of the remedies outlined above and has therefore waived the issue for appeal. Alliance has entirely declined to raise the issue either before the trial court or by cross-appeal to this court. The issue is thus not properly before us on the suggestion of either party. For purposes of this appeal, we take the jury's respective verdicts on their individual merits. Triangle's third and fifth assignments of error are overruled.

{¶12} We next turn to Triangle's first and fourth assignments of error, which concern the lack of proof of damages incurred by Alliance. Triangle's first assignment of error asserts both that the trial court erred in constructively denying Triangle's motion for directed verdict and that the jury verdict in favor of Alliance on Alliance's contract claim is against the manifest weight of the evidence. These in fact are two distinct issues as the case now postured, and the manifest weight arguments regarding breach (as opposed to damages resulting therefrom) will be considered later in this opinion. Triangle's fourth assignment of error addresses solely the absence of evidence of damages under a manifest weight standard and will be addressed with the directed verdict issues.

{¶13} We first note that the trial court never explicitly ruled on Triangle's motion for directed verdict. In allowing the case to go to the jury and thereafter entering judgment based upon the jury's verdict, however, the trial court can be deemed to have overruled the pending motion for directed verdict. *Maust v. Palmer* (1994), 94 Ohio App.3d 764, 769.

{¶14} Civ.R. 50(A)(4) provides the standard for directed verdicts:

When a motion for a directed verdict has been properly made, and the trial court, after construing the evidence most strongly in favor of the party against whom the motion is directed, finds that upon any determinative issue reasonable minds could come to but one conclusion upon the evidence submitted and that conclusion is adverse to such party, the court shall sustain the motion and direct a verdict for the moving party as to that issue.

Such a motion must thus be denied where there is substantial evidence to support the nonmoving party's case and reasonable minds may reach different conclusions. *Posin v. A.B.C. Motor Court Hotel* (1976), 45 Ohio St.2d 271, 275. Neither the weight of the evidence nor the credibility of the witnesses bear upon the court's determination in ruling on a motion for directed verdict. *Id.*

{¶15} The essence of Triangle's motion for directed verdict was that Alliance, even if it had established breach on Triangle's part, had failed to introduce evidence necessary to establish the measure of damages from that breach. This question concerns only Alliance's claim for damages for breach of the original contracts, and requires us to set aside any immediate discussion of damages attributable to extra work performed by Alliance outside the scope of those contracts.

{¶16} The principles governing recovery under construction contract disputes such as the present one are clear in Ohio. A plaintiff who prevails on a claim for breach

"is entitled only to recover damages for the defendant's breach of contract. Such damages may include the further compensation plaintiff would have received under the contract if it had been performed, *less the value to plaintiff of his being relieved of the obligation of completing performance.*" (Emphasis added.) *Allen, Heaton & McDonald, Inc. v. Castle Farm Amusement Co.* (1949), 151 Ohio St. 522, paragraph one of the syllabus. A plaintiff thus bears the burden of proving not only the balance due under the contract beyond what was paid, but the expenses that the plaintiff would have incurred in completing its own performance under the contract. *Id.*, paragraph three of the syllabus.

{¶17} While it can only be stated in the present case that each party presented ample evidence that, if believed, would allow each to prove bare breach by the other several times over, Triangle's assertion regarding the lack of evidence presented by Alliance on the specific damages issue is accurate.

{¶18} Alliance did present extensive testimony to support its proposition that Triangle repeatedly throughout the contract impeded Alliance's completion of performance by providing incorrect plans, explicitly ordering Alliance to complete extra work and then denying change tickets to cover the cost, causing Alliance to incur extra material expenses for gravel and other materials, and ultimately denying Alliance its weekly draws, thus forcing Alliance to cease work on all projects. The balances to be paid under the initial contracts are also ascertainable with some certainty based upon the contracts themselves and the admitted sums paid by Triangle to Alliance during the course of work.

{¶19} What is utterly lacking from the record, however, is any indication of the costs that Alliance would have incurred had it completed performance and continued

receiving payment; that is, the true measure of damages under *Allen, Heaton & McDonald*. While Alliance now argues on appeal that a passing reference in testimony by Alliance's principal regarding a planned five-percent profit margin on the project would suffice to establish the foregone costs, a contractor's planned profit margin prior to commencing a project is far too speculative a basis upon which to establish actual costs to completion. *Rhodes v. Rhodes Industries, Inc.* (1991), 71 Ohio App.3d 797, 809; *Banks v. Bob Miller Builders, Inc.* (Dec. 18, 2001), 10th Dist. No. 01AP-582. Moreover, the five-percent figure does not correspond in any discernible way to the original contract amounts and the amount awarded by the jury.

{¶20} Given the state of the record, it is clear that the trial court allowed the case to go to the jury without the necessary evidence to establish the measure of damages for breach of contract under *Allen, Heaton & McDonald*, and that any verdict rendered by the jury was as a result entirely speculative as to the amount of damages. The trial court therefore should have found that, construing the evidence most strongly in favor of Alliance, reasonable minds could come to but one conclusion upon the evidence and that Alliance had failed to introduce sufficient evidence to support the measure of its damages. Triangle's first assignment of error is sustained in this respect, and it logically follows that the fourth assignment is sustained in its entirety.

{¶21} The second aspect of Triangle's first assignment of error, and Triangle's second assignment of error, assert that the jury verdict finding that Triangle breached its contractual obligations is against the manifest weight of the evidence. These arguments address the issue of breach per se, rather than damages resulting therefrom.

{¶22} The sole argument advanced in support of the second assignment of error, however, is based upon the inconsistent verdict rendered by the jury, which determined on the one hand that Triangle has substantially performed under the contracts, but on the other hand that Triangle had breached its contractual obligations. Because this argument is again based upon the inconsistency of the jury verdicts, which was not timely raised before the trial court and is therefore waived, Triangle's second assignment of error is overruled.

{¶23} As for the remaining aspects of Triangle's first assignment of error, when reviewing a trial court's decision on a manifest weight of the evidence basis, we are guided by the presumption that the factual findings of the trial court were correct. The weight to be given the evidence and the credibility of the witnesses are primarily for the trier of fact. *State v. DeHass* (1967), 10 Ohio St.2d 230, paragraph one of the syllabus. The rationale for this presumption is that the trial court is in the best position to evaluate the evidence by viewing witnesses and observing their demeanor, voice inflections, and gestures. *Seasons Coal Co. v. Cleveland* (1984), 10 Ohio St.3d 77. Likewise, documentary evidence is best viewed in the context of the entire scope of evidence heard at trial, and the trier of fact is in the best position to assess the global weight of all evidence heard. Thus, judgments supported by some competent, credible evidence going to all the essential elements will not be reversed by a reviewing court as being against the manifest weight of the evidence. *C.E. Morris Co. v. Foley Constr. Co.* (1978), 54 Ohio St.2d 279.

{¶24} Triangle asserts that it paid Alliance as agreed up to the point where Alliance's cumulative failures to comply with the completion and quality requirements of

the contract rose to the level of a breach on the part of Alliance, and Triangle was thereafter excused from further payment.

{¶25} The jury in this case heard and saw a great deal of testimony over the course of a seven-day trial in which the parties attempted to establish each other's failings under the contracts. Triangle presented the testimony of its construction supervisors, buttressed by documentary evidence, regarding multiple incidences in which Alliance either failed to pay subcontractors, exposing the jobsite to liens, or performed substandard work.

{¶26} The most pressing difficulty, from the point of view of the developer and general contractor, was Alliance's inability to pay some of its material suppliers. This exposed the property to liens that would compromise the typically leveraged finances of such a construction project. Triangle chose to pay Alliance's suppliers directly to avoid such difficulties. Triangle was thus faced with the prospect of continuing to pay both Alliance and for materials that were Alliance's responsibility under the contracts. This unacceptable and costly burden, Triangle argues, simply compelled Triangle to cease paying Alliance and find other excavators to complete the work.

{¶27} Alliance, however, presented evidence which, if believed, would show that Triangle's improper management of the project and failure to provide reliable and definitive plans caused crippling additional material costs for Alliance: improper backfill material for sewer trenches, which resulted in the need for vast quantities of additional gravel; incomplete preliminary grading by other excavators; unexpected rock excavation work; and changes in sewer requirements due to incomplete site work.

{¶28} In addition to the lien issues, Triangle also presented evidence that Alliance did substandard work that eventually could no longer be tolerated. One example was an improperly compacted backfill of an abandoned storm sewer that ran underneath the basement of one of the condominium buildings, leading to serious structural problems in the building and expensive remediation. Triangle also pointed to sewer pipes that failed to pass city inspection, scheduling delays, and improper drainage from retention basins and ponds.

{¶29} Alliance, again, countered that many problems were the result of Triangle running the jobsites as perpetual emergencies, frequently asking Alliance to perform work on short notice after sudden changes in plan and schedule. Alliance also stressed that the initial plans upon which it bid had been so altered, in part to meet requirements after review by city authorities, that the work inescapably was subject to a sort of all-encompassing approved change order embodied in the new site drawings. Alliance also strove to establish that Triangle's poor planning resulted in site conditions that unreasonably increased Alliance's expenses and delays. These include instances in which other excavators working for Triangle deposited large amounts of fill in Alliance's work area, which Alliance then had to remove before proceeding to its own grading projects, and poor "balancing" of quantities of excavated material, which, rather than being moved directly from cut or excavation areas to fill areas, accumulated on the jobsite and impeded Alliance's progress. Alliance also cited instances in which it was forced to rectify outright blunders committed by other contractors, such as an accident in which several tons of gravel were inadvertently dumped into a storm sewer manhole and flowed

some distance into the pipes, which could only be cleared after many hours of hand-digging by Alliance crews.

{¶30} Viewing the evidence in this case, we can only conclude that each side did, in fact, effectively establish to the jury's satisfaction the other's failings under the contracts, and that these failings were, in the jury's eyes, so continuous, simultaneous, and intertwined that one party's breach cannot be determined to have predated and justified a repudiation by the other – regardless of whether the law contemplates such a result, as the time to challenge the inconsistent verdicts has passed. There was therefore sufficient competent, credible evidence to support the jury's verdict that Triangle had breached its contractual obligations, particularly with respect to cessation of payment when Triangle's own performance impeded Alliance's ability to perform under the contract. The manifest weight arguments raised under Triangle's first assignment of error are accordingly not well-taken, and that aspect of the assignment is overruled.

{¶31} Triangle's sixth assignment of error challenges the amount of damages awarded by the jury in favor of Triangle based on the jury's determination that Alliance had also breached the contracts. Again, Triangle raises a manifest weight of the evidence argument.

{¶32} Triangle presented extensive documentary and testimonial evidence to support its damages based upon Alliance's breach. The jury awarded \$78,817 rather than the \$401,008 sought by Triangle. Triangle's calculation of its damages consists of the total amount Triangle claimed it paid substitute contractors to either repair or complete the work under Alliance's contracts (\$708,271), to which must be added the amount Triangle actually paid Alliance for work (\$2,209,857), and subtracting the total amount of

the subcontracts and additional approved change orders (\$2,517,125). On appeal, Triangle speculates that the jury inexplicably awarded all of Triangle's requested damages except those related to one site, the Alkire project, totaling \$322,191, which when subtracted from the overall amount sought by Triangle leaves the precise amount awarded by the jury on the counterclaim. Of itself, such an outcome would not necessarily undermine the verdict; even if the jury chose to allow recovery only on three of the contracts and not at all on the Alkire contract, conditions and performance by Alliance varied from site to site under the four contracts, and certain deficiencies claimed in one area would not necessarily have applied to constitute breach at other sites. We have only before us a general verdict of breach that does not necessarily apply to all contracts if confined to fewer; indeed, Triangle on appeal continues to refer to the contracts as independent agreements.

{¶33} Nor can Triangle assert that its evidence of damages was uncontradicted. In support of its own claims and in rebuttal of Triangle's claims, Alliance presented extensive testimony regarding the purported inadequacy of contract and site plans provided by Triangle for all projects, and the degree to which these planned deficiencies, and the inevitable plan changes that resulted therefrom, impeded Alliance's timely and efficient completion of its work. The jury, as finder of fact, was free to believe or disbelieve any, all or any relative proportion of this evidence excusing Alliance from fault, as well as evidence put forth by Triangle in support of its monetary damages. *State v. Mills* (1992), 62 Ohio St.3d 357, 368; *Swanson v. Swanson* (1976), 48 Ohio App.2d 85, 97.

{¶34} As discussed above, the jury reached equal and opposite verdicts of breach against each party. As it happens, these conflicting verdicts may cover a multitude of sins in the jury's assessment of damages. On the other hand, and in conformance with the deferential standard we must apply in a manifest-weight review, both the general verdict in favor of Triangle and subsequent arithmetic computations undertaken by the jury to determine damages may reflect a reasoned, deliberative process by which some elements of evidence were discounted, others discarded, and yet others given full weight, at the end of which a reasonable allocation of damages attributable to Alliance was reached. The jury was called to apply an assessment of credibility as to each element of this considerable array of evidence, and on the present facts there is no reliable method, nor any justifiable mandate, under which an appellate court could or should substitute its judgment in some instances by selectively reweighing some contested points and not others to reach the conclusions urged by Triangle on appeal and reshape the outcome of the case.

{¶35} We upon this record cannot find that the damages awarded to Triangle on its counterclaim are against the manifest weight of the evidence, and Triangle's sixth assignment of error is overruled.

{¶36} Triangle's seventh assignment of error asserts that the trial court erred in awarding prejudgment interest to Alliance. Because we find that the trial court should have granted Triangle's motion for directed verdict, which would have precluded any award on Alliance's breach of contract claim, the question of prejudgment interest on amounts that will no longer be awarded is moot.

{¶37} In summary, Triangle's first assignment of error is sustained in part and overruled in part, its fourth assignment of error is sustained, its second, third, fifth and sixth assignments of error are overruled, and its seventh assignment of error is moot. The judgment of the Franklin County Court of Common Pleas is affirmed in part and reversed in part. The matter is remanded to the trial court to modify the judgment and award no damages in favor of Alliance while maintaining the original award in favor of Triangle on its counterclaim.

*Judgment affirmed in part, reversed in part,
and cause remanded with instructions.*

BRYANT and BROWN, JJ., concur.

GREY, J., retired, formerly of the Fourth Appellate District,
assigned to active duty under authority of Section 6(C), Article
IV, Ohio Constitution.
