[Cite as *Daniel v. Walder*, 2017-Ohio-8914.]

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY

HARVEY DANIEL	:	
	:	
Plaintiff-Appellant	:	Appellate Case No. 27558
	:	
v.	:	Trial Court Case No. 2016-CVI-5221
	:	
RACHELLE WALDER	:	(Civil Appeal from Municipal Court)
	:	
Defendant-Appellee	:	
	:	

. . . . . .

O P I N I O N

Rendered on the 8th day of December, 2017.

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HARVEY DANIEL, 1211 Harvard Boulevard, Dayton, Ohio 45406
Plaintiff-Appellant-Pro Se

RACHELLE WALDER, 620 North Eppington Avenue, Trotwood, Ohio 45426
Defendant-Appellee-Pro Se

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TUCKER, J.

{¶ 1} Plaintiff-appellant Harvey Daniel appeals from a judgment of the Dayton

Municipal Court, Small Claims Division, ruling against him on his claim for damages arising from a breach of a construction contract. Daniel contends that the trial court's judgment is not supported by the evidence, and that the court ignored his testimony. He further contends that the trial court erred in its application of contract law.

{¶ 2} We conclude that Daniel has waived all but plain error as he failed to file objections to the decision of the magistrate. We further conclude that, on this record, he has failed to establish plain error. Accordingly, the judgment of the trial court is affirmed.

I. Facts and Procedural History

{¶ 3} On June 9, 2016, Daniel entered into a written contract with appellee Rachelle Walder for plumbing to be installed in Walder's home.[1] The contract provided Daniel would perform the following: (1) install new pex water lines bath and kitchen; (2) install drain lines to sink and toilet in kitchen and bath; (3) install washer box with drain; (4) move/vent plumbing; (5) set tub/shower, toilet and sink; and (6) rework gas line to water heater and furnace. The contract price was $6,000. The contract provided that Walder would make a down payment of $2,000, and that she would pay another $2,000 when the work was seventy-five percent complete, with the remaining $2,000 due upon completion. Although the contract contained the following notation, "2 weeks finish," it did not contain a start or completion date.

{¶ 4} Walder paid Daniel $2,000 on June 13, 2016. Daniel began working on the home approximately two weeks later. On August 24, 2016, Walder informed Daniel that

[1] We note that the record indicates Walder's name is spelled Rachele rather than Rachelle as set forth in the trial court's judgment.

his services were terminated.

{¶ 5} On November 4, 2016, Daniel filed a complaint for breach of contract against Walder seeking damages in the amount of $5,000. Walder filed a counterclaim seeking $6,000 in damages based upon her allegation that Daniel had breached the contract by failing to perform in a timely or workmanlike manner. The matter was tried to a magistrate.

{¶ 6} Daniel testified that all the work was complete with the exception that the pex water lines had to be inspected by City officials. He later noted that he had not performed the task of setting the toilets and sinks which he stated he could not do until finish carpenters had completed their work. He also testified that Walder stopped the work just before he was ready to move the gas line. He testified that the contract did not contain a specific timeframe for completing the job. He also admitted that he is not a licensed plumber.

{¶ 7} Walder testified that Daniel was aware that the work was to be completed in two weeks. However, she admitted that she permitted him to continue working despite going over that limit. She further testified that while Daniel had laid some of the pex lines, he did not connect them properly and the City, following inspection, refused to clear the work. Walder testified that Daniel installed drain lines to the kitchen and bathroom, but claimed that the work was not properly performed. She testified that Daniel completed the installation of the washer box with its drain. She testified that he moved and vented the plumbing, but that the work was incomplete and incorrect. She testified that he did set the toilet and shower. Walder testified that Daniel did not perform the gas line work. She also testified that he used old piping rather than new in some spaces. Finally, she

testified that she was required to pay someone else to correct and finish the

{¶ 8} The magistrate concluded that the failure to complete the work within two weeks did not constitute a breach of contract as claimed by Walder.[2] In support, the magistrate noted that the contract did not specify a start and completion date and that Walder permitted Daniel to continue working after two weeks had elapsed. The magistrate further concluded that Walder breached the contract when she halted work. However, while the magistrate found that Daniel had performed some work pursuant to the contract, the magistrate concluded that the evidence was not clear as to how much of the work was completed. Thus, the magistrate found that Daniel was not entitled to any further monies under the contract. The trial court adopted the magistrate's decision.

{¶ 9} Daniel, acting pro se, appeals.

II. Analysis

{¶ 10} Daniel's first and second assignments of error state as follows:

> THE MAGISTRATE COMPLETELY DISREGARDED THE TESTIMONY OF ME, THE APPELLATE [SIC], WITH REGARDS TO HIS FINDINGS. THE MAGISTRATE MINIMIZED THE AMOUNT OF WORK THAT WAS COMPLETED ON SAID CONTRACT, IN COMPLETE DISREGARD OF THE TESTIMONY GIVEN AT TRIAL.
>
> THE MAGISTRATE'S COMPLETE DISREGARD OF THE DAMAGES FOR A [PARTY'S] BREACH OF CONTRACT [ARE] THE AMOUNT OF THE FURTHER COMPENSATION [THE PARTY] WOULD

[2] Walder has not appealed the decision.

> HAVE RECEIVED UNDER THE CONTRACT LESS THE VALUE TO [THE PARTY] BEING RELIEVED FROM THE BREACHING PARTY HAD THE CONTRACT BEEN FULLY PERFORMED. *SCHULKE RADIO PRODUCTIONS, LTD. V. MIDWESTERN BROADCASTING CO.* (1983), 6 Ohio St.3d 436, 441. HOWEVER, OHIO COURTS HAVE HELD THAT A PARTY WHO INDUCES A BREACH OF CONTRACT BENEFIT [SIC] OF OBTAIN VALUE FROM THAT BREACH [SIC]. BOTH PARTIES ASSERT DAMAGES CAUSED BY THE OTHER PARTIES [SIC] BREACHING CONDUCT. AS BOTH PARTIES' CLAIMS ARE INTERTWINED, THEY WILL BE ADDRESSED COLLECTIVELY.

{¶ 11} In these assignments of error, Daniel essentially argues that the trial court erred in its judgment because his testimony established that more than 78% of the work was complete and because Walder's testimony was not credible.

{¶ 12} We begin by noting that Daniel failed to object to the decision of the magistrate. Civ.R. 53(D)(3)(b)(iv) provides that "[e]xcept for a claim of plain error, a party shall not assign as error on appeal the court's adoption of any factual finding or legal conclusion * * * unless the party has objected to that finding or conclusion as required by Civ.R. 53(D)(3)(b)." Accordingly, because appellant failed to file objections to the magistrate's decision, we are limited to plain error review in considering his appeal. *In re G.S.*, 10th Dist. Franklin Nos. 10AP–734, 10AP-736, 10AP-738, 2011–Ohio–2487, ¶ 6; *Brown v. Sigler*, 2d Dist. Montgomery No. 24403, 2011-Ohio-4661, ¶ 28. The plain error doctrine is not favored in civil appeals. *Care Risk Retention Group v. Martin*, 191 Ohio App.3d 797, 2010-Ohio-6091, 947 N.E.2d 1214, ¶ 80 (2d Dist.). Plain error in civil

cases is defined as error that "seriously affects the basic fairness, integrity, or public reputation of the judicial process, thereby challenging the legitimacy of the underlying judicial process itself." *Goldfuss v. Davidson*, 79 Ohio St.3d 116, 679 N.E.2d 1099 (1997), syllabus. Civil plain error is applied "only in the extremely rare case." *Id.* Daniel does not allege plain error, and we do not perceive any.

{¶ 13} To recover for breach of contract, a claimant must prove damage as a result of the breach. *Metropolitan Life Ins. Co. v. Triskett Illinois, Inc*., 97 Ohio App.3d 228, 235, 646 N.E.2d 528 (1st Dist. 1994). "As a general rule, an injured party cannot recover damages for breach of contract beyond the amount that is established by the evidence with reasonable certainty, and generally, courts have required greater certainty in the proof of damages for breach of contract than in tort." *Rhodes v. Rhodes Indus., Inc*., 71 Ohio App.3d 797, 808–809, 595 N.E.2d 441 (8th Dist. 1991), citing *Kinetico, Inc. v. Independent Ohio Nail Co.*, 19 Ohio App.3d 26, 482 N.E.2d 1345 (8th Dist. 1984), citing Restatement of the Law 2d, Contracts (1981) 144, Section 352. "The normal remedy for a breach of contract claim is to give the injured party such relief as will put him in as good a position as if the contract had been performed." *Tucker v. Young*, 4th Dist. Highland No. 04CA10, 2006-Ohio-1126, ¶ 30 "Damages include compensation a non-breaching party would have received if the contract had been performed, less the value received from release of further performance." *Id.* "Within these general rules, a trial court enjoys some flexibility in structuring damage awards." *Id.*

{¶ 14} The parties presented conflicting testimony at trial. The magistrate was in a much better position than this court to view the parties and observe their demeanor and weigh their credibility. *Seasons Coal Co. v. Cleveland*, 10 Ohio St.3d 77, 80, 461 N.E.2d

1273 (1984). Thus, the credibility to be given to the parties was for the magistrate as trier of fact, and the magistrate was free to believe all, part or none of the testimony of each party. *State v. Caldwell*, 79 Ohio App.3d 667, 679, 607 N.E.2d 1096 (4th Dist. 1992); *A.A. v. S.H.*, 2d Dist. Clark No. 2014-CA-37, 2014-Ohio-4101, ¶ 32. It appears that the magistrate found Walder more convincing than Daniel with regard to the amount of work performed, and that the magistrate rejected Daniel's claim that the work was almost done. It further appears that the magistrate believed, based upon the testimony, that the $2,000 already remitted by Walder was sufficient to remunerate Daniel.

{¶ 15} Judgments supported by some competent, credible evidence going to all the essential elements of the case will not be reversed by a reviewing court as being against the manifest weight of the evidence. *C.E. Morris Co. v. Foley Construction Co*., 54 Ohio St.2d 279, 376 N.E.2d 578 (1978). We will make every reasonable presumption in favor of the trial court's judgments. *Seasons Coal Co. v. Cleveland*, *supra*. Daniel's testimony did not convince the magistrate with reasonable certainty as to the amount of his damages. We find no reason, on this record, to conclude that the trial court's judgment adopting the decision of the magistrate constitutes error, and it certainly does not rise to the level of plain error.

{¶ 16} Accordingly, both of Daniel's assignments of error are overruled.

III. Conclusion

{¶ 17} Both of Daniel's assignments of error being overruled, the judgment of the trial court is affirmed.

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DONOVAN, J. and WELBAUM, J., concur.

Copies mailed to:

Harvey Daniel
Rachelle Walder
Hon. Carl Sims Henderson