[Cite as *DeFranco v. Paolucci*, 2009-Ohio-2441.]

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

LAKE COUNTY, OHIO

SYLVIA DeFRANCO, TRUSTEE, et al.,	**:**	**O P I N I O N**
Plaintiffs-Appellants,	**:**	**CASE NO. 2008-L-127**
- vs -	**:**	
GEORGE PAOLUCCI, et al.,	**:**	
Defendants-Appellees.	**:**	

Civil Appeal from the Court of Common Pleas, Case No. 06 CV 001774.

Judgment: Affirmed.

Paul H. Hentemann, Northmark Office Building, 35000 Kaiser Court, #305, Willoughby, OH 44094-4280 (For Plaintiffs-Appellants).

George L. Badovick, 11850 Mayfield Road, #2, Chardon, OH 44024 (For Defendants-Appellees).

COLLEEN MARY O'TOOLE, J.

{¶1} Sylvia DeFranco, Trustee, and her son, Anthony DeFranco, appeal from the judgment of the Lake County Court of Common Pleas, entered following bench trial, denying their claims for breach of contract and fraud against George and Salvatore Paolucci, regarding the sale of a ten acre parcel of land situated at 11522 Mayfield Road, Munson Township, Geauga County, Ohio. We affirm.

{¶2} In 1983, the Paolucci brothers purchased the Munson Township property. October 8, 1983, George Paolucci took out a zoning permit to build a thirty-two by

twenty foot accessory building, for storing equipment he used to maintain the property. He built the structure himself, using railroad ties as a foundation, and pouring a concrete floor. He testified that the structure consisted of a single room, without any electrical fixtures or plumbing. Pictures taken by Mr. DeFranco in the 1990s and introduced into evidence showed electrical outlets, a toilet, and a shower. Mr. Paolucci testified that he put in a small sink, fed by a hose running from an artesian well outside, so his elderly father could wash vegetables from the garden he maintained on the property. Mr. Paolucci also testified that he built a fireplace and chimney, since his children enjoyed snowmobiling on the property, and this gave them a place to warm up. He testified that the structure only had one window when he owned it, whereas Mr. DeFranco's pictures from the 1990s showed several. Mr. Paolucici testified that he maintained a porta potty behind the structure, attached to a large tank. He testified that he never put in any furniture, and never used the place as a residence.

{¶3} In or about 1990, the Paoluccis listed the property for sale. Mrs. DeFranco and her son, Anthony, were looking for a rural property, to carry on certain agricultural activities, which eventually included the raising of water lilies, cattle, and chickens. Both inspected the property, and, on or about June 8, 1990, Mr. Paolucci and Mr. DeFranco entered an "Option to Purchase Land and Improvements." This called for Mr. DeFranco to pay six monthly installments of three hundred dollars apiece, commencing July 1, 1990, for an exclusive six month option to purchase the land. The option provided, in relevant part, that the purchase included improvements, "in their present condition." It further provided that the property was "to be conveyed by warranty deed free and clear of all liens and encumbrances, except restrictions,

reservations, easements and encroachments which do not materially adversely affect the use or value of the property, [and] zoning ordinances, if any, ***[.]"

{¶4} June 8, 1990, Mr. Paolucci and Mr. DeFranco further entered a "Supplemental Agreement the Option to Purchase Fund," whereby Mr. Paolucci acknowledged prior receipt of one thousand dollars from Mr. DeFranco toward purchase of the property, and receipt contemporaneously with execution of the supplement of nine thousand dollars toward its purchase.

{¶5} On or about December 28, 1990, Mr. DeFranco exercised the option to purchase the Munson property, for an additional ninety-seven thousand dollars, bringing the total purchase price to one hundred seven thousand dollars. Title transferred to both Mrs. DeFranco and her son early the following year. Eventually, it became part of Mrs. DeFranco's trust.

{¶6} At trial, Mr. DeFranco testified that the only improvements he made to the structure on the property were to put down new linoleum, build a small, interior partition wall, and patch and paint drywall. He asserted that all of the other improvements shown in the undated pictures he had taken, including the electrical work and the interior plumbing, were present when he signed the option to purchase. He testified that Mr. Paolucci knew that he intended to live in the structure on the property until he could build a new house; that Mr. Paolucci urged him to live in the structure; and that Mr. Paolucci knew he was already living in it during the six month option period.

{¶7} In the mid-1990s, there commenced a series of actions by the Munson Township Zoning Inspector and the Geauga County health authorities against the DeFrancos. Evidently, the structure on the DeFranco's property is too small to qualify

as a residence under the Munson Township Zoning Resolution. Further, the minimalist septic system contravenes health regulations. Multiple actions regarding these issues have ensued in the Geauga County Court of Common Pleas; appeal has been taken to this court. See, e.g., *Zambory v. DeFranco*, 11th Dist. No. 2008-G-2820, 2008-Ohio-6556.

{¶8} The DeFrancos initially filed this action in October 2004; they dismissed it pursuant to Civ.R. 41(A) in April 2006. They refiled, asserting claims for breach of contract and fraud against the Paolucci brothers July 31, 2006. The Paoluccis filed their answer, with counterclaims for abuse of process and malicious prosecution. Bench trial went forward May 30, 2008. July 30, 2008, the trial court filed its judgment entry, finding no merit in any of the claims. August 26, 2008, the DeFrancos noticed this appeal, assigning a single error:

{¶9} "The Trial Court erred in finding against the Appellants on their claims of breach of contract and fraudulent concealment because the Trial Court relied on inaccurate findings of fact."

{¶10} The DeFrancos raise four issues under their assignment of error. First, they assert that the clause in the option conveying the property with "improvements in their present condition" was breached, as they believe the clause meant that the structure on the property had to be fit for habitation. Second, they assert the Paoluccis breached the warranty in the option conveying the property "free *** of all liens and encumbrances, except restrictions, reservations, easements and encroachments which do not materially adversely affect the use or value of the property, since the failure of the structure on the property to comply with applicable zoning and health laws makes it

useless as a residence. Third, they assert the Paoluccis committed fraud by representing that the structure on the property was habitable. Fourth, they assert they are entitled to damages equal to the amount necessary to make them whole: i.e., to make the structure habitable.

{¶11} The contract at issue herein is the June 8, 1990 option, as supplemented. Normally, the construction of written contracts is a matter of law, which appellate courts review de novo, giving common words there ordinary meanings, unless absurdity results. See, e.g., *QualChoice, Inc. v. Nationwide Ins. Co.*, 11th Dist. No. 2007-L-172, 2008-Ohio-6979, at ¶37. However, all extrinsic facts regarding formation of the contract should be considered if an ambiguity exists. *The Tillotson & Wolcott Co. v. The Scottdale Machine & Mfg. Co.* (1926), 23 Ohio App. 399, at paragraph two of the syllabus. In this case, the validity of the DeFrancos' breach of contract claims depends on factual matters outside the four corners of the documents. Was the "present condition" of the structure on the Munson property at the time the option was executed sufficient to warrant the DeFrancos' belief it could be used as a dwelling by Mr. DeFranco? Did the Paoluccis breach any warranty "materially adversely" affecting "the use or value" of the property, by failing to have the subject structure up to zoning and health code standards for dwellings? We review these issues under the civil manifest weight standard.

{¶12} "In a civil proceeding, '(j)udgments 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 Constr. Co.* (1978), 54 Ohio St.2d 279, 280-281, *** (citations omitted).

{¶13} "Furthermore, an appellate court will not disturb the trial court's findings of fact if the record contains competent, credible evidence to support such findings. *Stevenson v. Bernard*, 11th Dist. No. 2006-L-096, 2007-Ohio-3192, at ¶38. The underlying rationale in giving deference to the trial court's findings of fact is that the trial court 'is best able to view the witnesses and observe their demeanor, gestures and voice inflections, and use these observations in weighing the credibility of the proffered testimony.' *State, ex rel. Pizza v. Strope* (1990), 54 Ohio St.3d 41, 46, ***. See, also, *Omerza v. Bryant & Stratton*, 11th Dist. No. 2006-L-092, 2007-Ohio-5215, ¶12." *Warmuth v. Sailors*, 11th Dist. No. 2007-L-198, 2008-Ohio-3065, at ¶32-33. (Parallel citations omitted.)

{¶14} In this case, if the testimony of Mr. DeFranco is believed, substantially all the improvements in the subject structure – toilet, shower, electrical outlets, etc. – were in place when the property was purchased. If the testimony of Mr. Paolucci is believed, there was nothing in the structure except a fireplace and hose-fed sink. The trial court found Mr. Paolucci more credible. Thus, there was competent, credible evidence to determine that "the present condition" of the structure at the time the option was executed could not lead any rational person to believe the structure was a dwelling.

{¶15} Similarly, any breach of warranty regarding the "use or value" of the property depends on accepting Mr. DeFranco's testimony that Mr. Paolucci represented the structure to him as a dwelling, knew Mr. DeFranco intended on using it as such, and encouraged him to do so – all matters strictly denied by Mr. Paolucci. The trial court chose to credit Mr. Paolucci, and was within its rights to do so.

{¶16} Consequently, the trial court's judgment that no breach of contract occurred is not against the manifest weight of the evidence.

{¶17} Neither can we find any merit in the DeFrancos' argument that the trial court erred in finding against their fraud claim.

{¶18} "'In order to set forth a claim of fraud, a party must set forth sufficient facts demonstrating (1) a representation of fact, (2) which is material to the transaction at hand, (3) made falsely, with knowledge of its falsity, or with utter disregard and recklessness, as to whether it is true or false, (4) with the intent of misleading another into relying upon it, (5) justifiable reliance upon the representation, (6) and a resulting injury proximately caused by the reliance.' *Natl. City Bank v. Slink & Taylor, LLC*, 11th Dist. No. 2002-P-0045, 2003-Ohio-6693, at ¶23." *Potter Fur & Roots, Inc. v. Potter Group Worldwide, Inc.*, 11th Dist. No. 2005-P-0101, 2006-Ohio-4172, at ¶34.

{¶19} In this case, the DeFrancos' fraud claim rests exclusively upon their testimony that Mr. Paolucci knew Mr. DeFranco intended to use the structure on the property as a dwelling, represented that it was fit for that purpose, and encouraged Mr. DeFranco to do so. The trial court could choose to credit Mr. Paolucci's testimony to the contrary.

{¶20} Consequently, the trial court's judgment that the DeFrancos failed to prove fraud is not against the manifest weight of the evidence.

{¶21} No breach of contract or tort having been proved, we need not reach the issue of damages.

{¶22} The assignment of error lacks merit.

{¶23} The judgment of the Lake County Court of Common Pleas is affirmed.

{¶24} It is the further order of this court that appellants are assessed costs herein taxed.

{¶25} The court finds there were reasonable grounds for this appeal.

DIANE V. GRENDELL, J.,

TIMOTHY P. CANNON, J.,

concur.