**[Cite as *Look v. H&M Custom Home Builders Co.*, 2012-Ohio-3017.]**

**IN THE COURT OF APPEALS**

**ELEVENTH APPELLATE DISTRICT**

**GEAUGA COUNTY, OHIO**

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| GRETCHEN LOOK, et al., | : | **O P I N I O N** |
| Plaintiffs-Appellants, | : | **CASE NO. 2011-G-3036** |
| - vs - | : | |
| H & M CUSTOM HOME BUILDERS CO., INC., et al., | : | |
| Defendants-Appellees. | : | |

Civil Appeal from the Geauga County Court of Common Pleas, Case No. 08M000985.

Judgment: Affirmed.

*Jay F. Crook,* Shryock, Crook & Associates, LLP, 30601 Euclid Avenue, Wickliffe, OH 44092 (For Plaintiffs-Appellants).

*John S. Salem,* Denman & Lerner Co., L.P.A., 8039 Broadmoor Road, #21, Mentor, OH 44060 (For Defendants-Appellees).

CYNTHIA WESTCOTT RICE, J.

**{¶1}** Appellants, Gretchen Look, et al., appeal from the judgment of the Geauga County Court of Common Pleas, entered after a trial to the bench, concluding they failed to prove their case for, inter alia, breach of contract, filed against appellees, H&M Custom Homes, Inc., et al. We affirm.

**{¶2}** In April of 2005, appellants provided appellees with a blueprint of a home they intended to construct. Appellee-H&M Custom Homes, Inc. ("H&M"), via its president, Appellee-Frank Horvath, submitted a bid to construct the home for $231,000.

The parties entered a contract and construction commenced. While building the home, an additional $10,755 was spent due to order changes and the like. Over the course of the construction, appellants authorized appellees to make four separate bank draws totaling $198,000. Appellants refused to authorize the final draw, however, due to various alleged defects in, and purported omissions to, the construction. Despite Horvath's contention that all aspects of the contract were complied with and the construction was accomplished in a workmanlike manner, H&M did not receive the final payment installment. In November 2005, appellants moved into the home, notwithstanding the lack of an occupancy permit from Geauga County, and the parties ceased contact.

**{¶3}** On September 9, 2008, appellants filed a complaint against H&M and its president, Horvath, alleging breach of contract, breach of warranties, unjust enrichment, conversion, and Consumer Sales Protection Act violations. The allegations were premised upon multiple alleged deficiencies in the construction of the home, an alleged failure to finalize construction in compliance with the construction plans, and the alleged removal of damaged appliances from the home without appellants' permission. Appellee-H&M filed an answer denying all allegations. Appellants subsequently moved for default judgment against Horvath for failure to file an answer. Horvath sought leave of court to file an answer, asserting his name was inadvertently omitted from the answer previously filed; he also sought leave to file a counterclaim against appellants. After considering the motions, the trial court added Horvath as an "answering defendant" to the original answer, but denied his motion to file a counterclaim.

**{¶4}** On June 20, 2011, the matter came before the court for a bench trial. At trial, Appellant-Gretchen Look testified that, during the pendency of the litigation, the

home had burnt down; as a result of the fire, appellants received $243,000 from their insurance company, the full coverage value of the policy. Notwithstanding this point, Look asserted Horvath and H&M breached the construction contract by failing to build the home in compliance with the specifications of the original blueprint. To wit, she claimed H&M and Horvath failed to build an "in-law suite" as well as a sunroom onto the home, even though these rooms appeared in the original site plan. Look recognized that the rooms were crossed out on the blueprint. She maintained, however, neither she nor Appellant-Gordon Byrne, agreed to omit the rooms from the house.

**{¶5}** Look further claimed that Horvath had orally agreed to fully landscape the property; because he failed to do so, appellants were required to pay an additional $15,000 to a third party to initiate and complete the landscaping. Look also asserted the general construction of the home was substandard, claiming, inter alia, that the basement had flooded, destroying her new appliances, and the concrete on the driveway had cracked. According to Look, Horvath said he would file a claim with his insurance carrier in an effort to replace the appliances. Look testified, however, that Horvath removed the damaged appliances without paying for or replacing them.

**{¶6}** Finally, Look testified that, as a result of appellees' alleged deficient work, appellants defaulted on their mortgages. Upon default, foreclosure proceedings were initiated on the property upon which the underlying dispute is premised as well as a separate residence owned by appellants.

**{¶7}** Horvath testified that H&M had dissolved in 2006. With respect to the construction of the home, he maintained H&M met all feasible conditions in the contract in a timely and workmanlike manner. And any aspect of the contract that was not

complied with was a result of appellants denying Horvath, H&M, or its subcontractors access to the property.

**{¶8}** With respect to the issue of the in-law suite and sunroom, Horvath testified appellants agreed to omit these rooms due to projected costs. He stated his $231,000 bid was based upon the site plan *minus* the two rooms. He testified he discussed the matter with Look and, because his bid would have increased by approximately $40,000, the parties agreed to omit the construction of the rooms. When Geauga County approved the site plan, the inspector included informational stamps on all approved rooms; the "in-law suite" and sunroom, which were crossed out with a "no build" directive next to them, contained no such stamps.

**{¶9}** Regarding the flooding issue, Horvath testified he was responsible for failing to close a well valve after installing new holding tanks. He stated he notified his insurance company who cleaned and dried the entire basement. Horvath also testified that he transported the damaged appliances off the property after paying Jack Paris, appellants' friend who was at the house during the cleanup, $1000. Horvath stated he did not replace the appliances because he was informed by Look that she was addressing the issue through warranties on the damaged items. Look asserted, however, she never received any money for the damaged items and was eventually forced to re-purchase new appliances out-of-pocket.

**{¶10}** Finally, Horvath testified he never orally obligated H&M to fully landscape the property. According to the contract, the yard required a "finished grade." Horvath testified such a grade involves leveling the ground and removing debris. This, however, does not imply grass or trees would be planted.

**{¶11}** At the close of evidence, appellees moved to dismiss Horvath as a defendant, asserting he was not a party to the contract and appellants did not seek to pierce the corporate veil. Counsel for appellants asserted his belief that a plaintiff may recover against an owner of a company if the company dissolves in the course of litigation. The matter was briefed by both parties and, after considering the evidence at trial and the arguments relating to Horvath's dismissal, the court found in appellees' favor on all matters in issue.

**{¶12}** The court first dismissed Horvath as a defendant because the matter was pleaded and tried as a breach-of-contract case; because the issue of whether a corporate officer could be pursued for purported damages resulting from that contract was not an aspect of the case, the court concluded Horvath was entitled to dismissal as a matter of law. The court noted, however, that the dismissal was of little, if any, substantive relevance because appellants failed to meet their burden of proof on the underlying breach claim.

**{¶13}** In particular, the court determined the greater weight of evidence militated against appellants' claim that they were entitled to the in-law suite and sunroom. And, similarly, appellants' claim that they suffered damages due to the costs they absorbed from the purportedly deficient construction was denied because it was unsupported by the evidence that the costs were fair and reasonable. As a result, the court determined appellants "failed to prove they are owed anything from any Defendant."

**{¶14}** Appellants filed a timely notice of appeal and assign five errors for this court's review. Their first assignment of error alleges:

**{¶15}** "The trial court erred in finding no credible evidence to support plaintiffs[']claim that the sunroom and inlaw [sic] suite were not part of the original contract and therefore were not to be used in the calculation of any damages."

**{¶16}** Appellants assert there was credible evidence to support the conclusion that the in-law suite and sunroom were aspects of the construction contract. They therefore maintain the trial court erred in concluding they failed to adequately establish proof on this point. We do not agree.

**{¶17}** Initially, appellants did not, in their complaint, assert appellees breached the contract for failing to build the in-law suite and sunroom. This, however, was an issue before the court at trial. And, because appellees did not object to the litigation of the issue, we shall treat the argument as though it was tried by consent of the parties.

**{¶18}** Courts examine contracts to interpret and give effect to the intentions of the contracting parties. *Foster Wheeler Enviresponse, Inc. v. Franklin Co. Convention Facilities Auth.*, 78 Ohio St.3d 353 (1997). If contractual terms are unambiguous, a court may not interpret the contract in a manner inconsistent with the clear language of the instrument. *Shifren v. Forrest City Ents., Inc.*, 64 Ohio St.3d 635 (1992). A court may consider extrinsic evidence, however, if the terms of the contract are ambiguous or unclear. *Sugarhill Ltd. v. Brezo*, 11th Dist. No. 2004-G-2579, 2005-Ohio-1889, ¶35. Contractual terms are ambiguous if their meaning cannot be deciphered from reading the entire instrument or if the terms are reasonably susceptible to more than one interpretation. *Aultman Hosp. Assn. v. Community Mut. Ins. Co.*, 46 Ohio St.3d 51 (1989).

**{¶19}** In this case, the contract does not expressly detail the specifications of the construction; rather, it incorporates the finalized, owner-approved site plans "as if they

were fully rewritten" in the contract. It is not entirely clear, however, what site plans were actually approved by the owners. Look asserts the approved site plans included the in-law suite and the sunroom; alternatively, Horvath testified that his bid, which Look and Byrne accepted, was based upon a site plan that excluded those rooms. The trial court was therefore required to construe whether the contract, entered on April 5, 2005, included or excluded plans for the subject rooms. To do this, it was required to consider extrinsic evidence of what purportedly occurred during the negotiations and the surrounding circumstances of the parties' post-agreement association.

**{¶20}** With this in mind, appellants point out the contract was signed on April 5, 2005. The contract stated "[u]pon final review and approval by the Owner and the Builder of the work drawings, site plan, and specifications * * * shall become a part of this Contract as if they were fully rewritten herein * * *." In June of 2005, the site plan was submitted for approval to Geauga County. By that time, the in-law suite and sunroom had been crossed out on the blueprint with an annotation by each that advised: "not building." Appellants underscore that the contract required any change in work order to be signed by the owner. She points out that neither she nor Byrne signed the areas of the site plan authorizing the excision of the in-law suite and sunroom from the construction plan. She therefore maintains the in-law suite and sunroom were, by operation of the contractual terms, part of the original contract.

**{¶21}** Appellants are essentially alleging the trial court's conclusion is contrary to the weight of the evidence. A court reviewing the manifest weight of the evidence must bear in mind that evaluating and assessing the credibility of evidence are primary functions of the trial court. *See e.g. King v. E.A. Berg & Sons, Inc.*, 11th Dist. No. 2002-T-0182, 2003-Ohio-6700, ¶10. "The trial judge 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." *Seasons Coal Co., Inc. v. Cleveland*, 10 Ohio St.3d 77, 80 (1984). Accordingly, "[a]n appellate court may not simply substitute its judgment for that of the trial court so long as there is some competent, credible evidence to support the lower court's findings." *State ex rel. Celebrezze v. Environmental Ent. Inc.*, 53 Ohio St.3d 147, 154 (1990).

**{¶22}** Appellants are correct that the contract required all changes to previously finalized work orders to be in writing and signed by the owner. Appellants, via their argument, suggest that the site plan that did not have in-law suite and sunroom crossed out was the plan they originally approved. Horvath, however, testified that H&M's offer was premised upon the home *without* the in-law suite and sunroom. He further testified that Look and Byrne accepted this offer when the parties entered the contract. According to Horvath's testimony, therefore, the final and approved site plan was the plan that excluded the rooms. Accepting Horvath's testimony, no formal signatures were necessary to validate the revised site plans.

**{¶23}** To be successful on a claim for breach of contract, a plaintiff must provide adequate evidence that a contract existed, performance by the plaintiff, breach by the defendant, and damages. *See e.g. Bliss v. Chandler*, 11th Dist. No. 2006-G-2742, 2007-Ohio-6161, ¶52. In this case, the trial court specifically found appellants failed to prove the rooms were part of the original agreement; it further determined that "[p]laintiffs failed to prove they are owed anything from [d]efendant." Given these legal conclusions, the trial court was persuaded by Horvath's testimony that the site plan excluding the in-law suite and sunroom was the final plan incorporated into the contract and that H&M's $231,000 bid was based upon that site plan. Given the circumstances

of the case and the nature of the testimony, we conclude the trial court did not err when it found Horvath's testimony had greater persuasive force than the testimony provided by Look. We therefore hold the trial court's conclusion that appellants failed to prove their claim is therefore supported by the weight of credible evidence.

**{¶24}** Appellants' first assignment of error lacks merit.

**{¶25}** Appellants' second assignment of error provides:

**{¶26}** "The trial court erred by refusing to admit and/or consider receipts and statements offered by plaintiff showing payments for replacement of damaged appliances, replacements for items provided under contract that were either damaged and/or non conforming [sic] or for work provided from identified contractors."

**{¶27}** Appellants contend that the receipts demonstrated they were required to expend additional funds, and were thereby specifically damaged, due to appellees' alleged failure to properly perform under the contract. Thus, they maintain the trial court erred in excluding the evidence.

**{¶28}** A trial court enjoys broad discretion on whether to admit or exclude evidence. *Guiliano v. Guiliano*, 11th Dist. No. 2010-T-0031, 2011-Ohio-6853, ¶18. In this case, after receiving testimony regarding the items appellants were purportedly required to fix or replace due to appellees' alleged acts or omissions, appellants moved to admit the receipts. The court ruled that appellants' failure to introduce some testimony regarding whether the amounts listed in the receipts were fair and reasonable was sufficient basis to exclude the evidence. We see no error.

**{¶29}** Although Look maintained the expenses were necessary, appellants failed to introduce any evidence as to whether the purchased items were equivalent or similar

to those items they replaced. In this respect, the trial court's decision to exclude the receipts was a sound exercise of its discretion.

**{¶30}** Appellants' second assignment of error is without merit.

**{¶31}** Appellants' third assignment of error provides:

**{¶32}** "The trial court committed reversible error by finding plaintiffs failed to provide evidence of actual damages."

**{¶33}** Appellants contend they presented evidence that the original contract included an in-law suite and sunroom. And, they point out, Horvath testified the cost of building those rooms would be approximately $40,000. Subtracting this amount from the contract price, appellants contend that, even if they did not pay the full contract price, they still overpaid appellees. They therefore maintain the trial court erred in concluding they failed to prove actual damages. We disagree.

**{¶34}** Appellants are presuming what they failed to establish by a preponderance of the evidence. Namely, that the two rooms were included in the original construction agreement. As discussed under appellants' first assignment of error, this contention lacks merit.

**{¶35}** Horvath testified that his $231,000 bid was premised upon a home construction that excluded the sunroom and in-law suite. He further testified that appellants accepted his bid being fully informed of this point. Horvath testified Look was aware from the beginning that the rooms would not be built because "the funds were not available, and she would try to worry about doing it down the road, to get her mother to live out there." When asked to comment on Look's claim that she thought the contract always included the two extra rooms, Horvath observed: "I mean, it is ridiculous. I

mean, why would you sign all those draws and keep signing draws when you don't see an in-law suite put on the back of the house."

**{¶36}** The trial court was in the best position to assess the credibility of the witness' testimony and the credibility of the surrounding evidence. In doing so, it is apparent the court chose to believe Horvath's rendition of events; to wit, that the original contractual agreement was to build a home that excluded the in-law suite and sunroom. It did not err in doing so.

**{¶37}** Appellants' third assignment of error is without merit.

**{¶38}** Appellants' fourth assignment of error provides:

**{¶39}** "The trial court erred in not awarding consequential damages for the loss in value of the existing residence lost by Look and Byrne due to the foreclosure caused by the failure to complete the new construction in a timely manner."

**{¶40}** Appellants contend that the record demonstrates that Horvath was aware that his failure to complete construction would result in foreclosure upon both the property on which the residence was being built as well as the property appellants were using as collateral. They therefore maintain the trial court erred in failing to address the issue of consequential damages. We do not agree.

**{¶41}** The record indicates that Horvath was aware that appellants' *default* on their loans could cause foreclosure on both properties. Moreover, the construction contract specified that the construction must be completed within six months. These points, however, do not imply that appellees' specific failure to finish the construction would necessitate foreclosure.

**{¶42}** Appellees began construction in June of 2005; the final walk-through occurred in October of 2005. Although the record demonstrates appellants had various

issues during the final walk-through, they nevertheless moved into the home in November of 2005. And, even though the home did not have a certificate of occupancy when appellant's moved in, the construction contract places the burden of obtaining this certification on the owners. The record is clear that appellants did not specifically pursue obtaining the certification. Under the circumstances, we fail to see how appellees were responsible for appellants' eventual foreclosures. The trial court therefore did not err in not considering consequential damages.

**{¶43}** Appellant's fourth assignment of error lacks merit.

**{¶44}** For their fifth assignment of error, appellants allege:

**{¶45}** "The trial court erred to the prejudice of plaintiffs by not allowing them to amend the pleadings on the record to conform to the evidence and not finding Frank Horvath personally liable for the damages suffered by Look and Byrne."

**{¶46}** Appellants argue that the trial court committed error in denying them the opportunity to amend their complaint in order to pierce the corporate veil; they further assert the court erred in dismissing Horvath from the proceedings when he should be held liable for their purported damages. We do not agree.

**{¶47}** First of all, appellants never formally moved the court to amend their pleadings for purposes of trying to pierce the corporate veil. The trial court, at the close of trial, permitted appellants to brief the issue of whether an officer of a company, dissolved during a pending litigation, can be held personally liable for the damages caused by the company. This, appellants' counsel conceded, was not an attempt to pierce the corporate veil. The matter was briefed and the trial court determined Horvath was entitled to be dismissed from the action. Regardless, as no motion to amend the pleadings was advanced, the trial court did not err by omission.

**{¶48}** Finally, as discussed throughout this opinion, the trial court found appellants sustained no damages stemming from the underlying construction contract. Because we hold the trial court did not err in drawing this conclusion, there are no damages for which Horvath could be held responsible even if he were inappropriately dismissed from the action. The trial court's judgment that appellants were entitled to no damages essentially rendered its dismissal of Horvath moot.

**{¶49}** Appellants' final assignment of error lacks merit.

**{¶50}** For the reasons discussed in this opinion, the judgment of the Geauga County Court of Common Pleas is affirmed.

TIMOTHY P. CANNON, P.J.,

DIANE V. GRENDELL, J.,

concur.