

[Cite as *Estridge v. Briar Rd. Farms, Inc.*, 2009-Ohio-2980.]

COURT OF APPEALS
MORROW COUNTY, OHIO
FIFTH APPELLATE DISTRICT

RANDALL E. ESTRIDGE	:	JUDGES:
	:	Hon. W. Scott Gwin, P.J.
Plaintiff-Appellant	:	Hon. William B. Hoffman, J.
	:	Hon. John W. Wise, J.
-vs-	:	
	:	Case No. 2008-CA-0010
BRIAR ROAD FARMS, INC. DBA	:	
OHIO VALLEY CUSTOM HOMES	:	
	:	<u>OPINION</u>
Defendant-Appellee	:	

CHARACTER OF PROCEEDING: Civil appeal from the Morrow County Court of Common Pleas, Case No. 06CV00368

JUDGMENT: Affirmed

DATE OF JUDGMENT ENTRY: June 22, 2009

APPEARANCES:

For Plaintiff-Appellant

For Defendant-Appellee

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Gwin, P.J.

{¶1} Plaintiff-appellant Randall E. Estridge appeals a judgment of the Court of Common Pleas of Morrow County, Ohio, entered in favor of defendant-appellee Briar Road Farms, Inc. dba Ohio Valley Custom Homes, after a bench trial. Appellant assigns a single error to the trial court:

{¶2} “I. THE TRIAL COURT’S DECISION THAT THE PLAINTIFF FAILED TO PROVE BY A PREPONDERANCE OF THE EVIDENCE ANY OF THE ALLEGATIONS WHICH THE PLAINTIFF HAS SET FORTH AGAINST THE DEFENDANT CONSTITUTES REVERSIBLE ERROR.”

{¶3} The trial court made lengthy findings of fact. On October 19, 2005, the mother of the appellant, Shirley Estridge, entered into a contract to purchase a home to be built by appellee. Shirley Estridge intended to give the house and the property it stood on to her son, appellant Randall E. Estridge. The closing of the transaction was held on November 3, 2005, and the real estate was titled in appellant’s name at his mother’s request. At the time of closing, or sometime shortly prior thereto, appellee gave appellant a homeowner’s manual, which contained, among other provisions, a twelve-month warranty on the house. Appellant signed an acknowledgement of receipt of the manual on or about October 19, 2005. Appellee’s representative Anthony Daniels, the owner of Ohio Valley Homes, also signed the form.

{¶4} Approximately two weeks after the closing, appellant moved into the home. Several weeks thereafter, he discovered moisture on the basement wall, described as water seeping through the north wall of the basement of the house. It was also

described as dripping. Appellant reported it to Shirley Estridge, who contacted Anthony Daniels.

{¶5} Anthony Daniels inspected the basement in December of 2005, and observed two damp spots on the wall, but no cracks. Daniels concluded the problem was likely caused by a hard-driving rain. Although the parties dispute exactly what was said at the time, they agree Daniels suggested appellant plant some bushes outside in that area. Daniels maintained he also suggested that heavy rains with high winds drove water against the porous basement wall, and a black sealant called Drylock should be spread over the cement block walls to seal the area. Daniels stated he only suggested shrubbery because appellant did not wish to put a sealant on the walls. The warranty provides it is the owner's responsibility to extend the waterproofing above any mounded soil and to maintain the drainage established by the builder.

{¶6} The leak in the basement occurred a second time. Daniels was contacted again, and after going back to the property again, made the same suggestion that appellant put a sealant on the walls. Sometime around the same time, the appellant complained of cracks in the basement floor.

{¶7} The court found the only evidence of leaks or moisture was the testimony of the appellant and his mother Shirley Estridge. They indicated there were stains three feet wide and three feet high in two spots bigger than basketballs. The court found there was no authoritative evidence presented as to what caused the leaks or moisture to form on the walls.

{¶8} Appellant argues the testimony at trial clearly indicated appellant gave appellee notice of the problems with the basement, and appellee refused and failed to

take any steps to remedy or correct the problems for some eight months, until appellant hired another party to correct the problems. Appellant urges he called Brad Filius as a fact and expert witnesses. Filius worked for Everdry, and acted as foreman when Everdry waterproofed appellant's basement. Filius testified to several defects he found, including problems with the downspouts and dirt settling, problems with the footer tile, a wrong location for the discharge of the sump pump, and seepage on the foundation walls and floors because of hydrostatic pressure.

{¶9} The real estate purchase contract includes a procedure for inspection of the premises. The purchase contract recites generally that the buyer has been given an opportunity to examine the premises and in making the offer is relying solely on the builders inspection and/or test with reference to condition, character and size of the premises. Neither appellant nor his mother inspected the home prior to the closing.

{¶10} The homeowner's manual provides the homeowner has the responsibility to repair fine or hairline cracks in foundation walls, and it was somewhat normal to have leaks through porous cement block. The manual also stated cracks in the basement floor were considered normal unless they had heaved as a result of the cement drying.

{¶11} The court found appellant made no claim under the warranty and followed none of the procedures set forth in the warranty. Appellant did not seal the basement or follow through on any of the recommendations Anthony Daniels had made. Instead, appellant, through his mother, contracted with Everdry Waterproofing Company to have an Everdry system installed at a cost of \$15,600. Appellant indicated to the Everdry Company his reasons for wanting the system was because he wanted a dry basement, to protect his investment, and wanted peace of mind.

{¶12} The court found there was no clear evidence of any fault in the basement construction, especially the tile, on both inside and outside of the footers. Everdry's witness, Brad Filius, testified the tile in one location was not sloping in a proper direction and the sump pump was not in the proper location. He testified Everdry contracted to install a modern drainage system and was not asked to determine what was causing the moisture or leaking.

{¶13} The court made conclusions of law. The court found appellant did not follow the provisions in the warranty requiring proper notification, and even possible arbitration. Because of this, the self-help remedy of purchasing and installing an Everdry system effectively destroyed any evidence which may have either supported or failed to support appellant's allegations, to the detriment of both parties to the lawsuit. The court found the mere fact there was moisture and leaking in the basement, without proof of the cause, was not in and of itself sufficient to justify the installation of the new modern drainage system.

{¶14} The court found it was not part of appellee's obligation to provide a modern drainage system such as the one appellant purchased, and the system is above the basic standards of home construction recognized in the area. The court found the homeowner's manual stated: "Cracks in foundation walls can be caused by many factors and in many instances, can be considered minor, not affecting the strength of the wall. Fine or hairline cracks are common and are not warranted and may be repaired by the owner by applying a compound especially made for this purpose. The builder shall repair any cracks in excess of the maximum tolerances as outlined in the quality standard section of this manual." The standard in the manual for foundation wall

cracks is any crack greater than one-eighth inch wide or one-eighth inch in vertical displacement. Anything above that is unacceptable, and anything below that is within tolerance.

{¶15} The manual also provides “[l]eaks resulting in the actual trickling of water are unacceptable. The failure to maintain a positive grade/slope away from the foundation walls can cause or can contribute to dampness and/or leaks. However, dampness is not considered a deficiency.”

{¶16} The court found appellant had not presented proof that the condition of the basement was below the standard or tolerance set out in the homeowner’s manual. The court also found because appellant did not pursue the procedures in the manual under the warranty, he did not give appellee an opportunity to have evaluated the dampness and determine the exact cause. If appellant had followed the procedure set out in the manual, appellee would have had an opportunity to resolve any damage issues relating to the workmanship, construction or responsibilities which a builder/contractor would have in a home construction situation as this.

{¶17} The court found appellant had failed to prove by a preponderance of the evidence that appellee had breached the contract.

{¶18} Appellant urges the homeowner’s manual to which the court referred outlines a voluntary procedure by which the parties are encouraged to resolve any disputes. Appellant argues the Building Industry Association’s grievance process is not mandatory. The trial court did not find the arbitration procedure was mandatory, but found if appellant had used the arbitration process, appellee would have been given an opportunity to correct the problems. Appellant’s witness, Brad Filius, testified before he

ever went to appellant's home, he knew he was going to put in the Everdry system. It did not matter whether the footer tiles were good or bad, whether the basement was wet or dry. He was instructed to go to the job site and install an Everdry system.

{¶19} Filius never testified any of the defects or problems he perceived had proximately caused the leaks of which appellant complained.

{¶20} Daniels testified he had inspected the basement in December and again in March, and was never informed appellant had not followed his recommendations on how to resolve the problems. The first time Daniels knew appellant had hired Everdry was when he received notice of the lawsuit.

{¶21} A reviewing court will not disturb the trial court's decision as being against the manifest weight of the evidence if the decision is supported by some competent and credible evidence. *C.E. Morris Company v. Foley Construction Company* (1978), 54 Ohio St. 2d 279, 376 N.E. 2d 678. We are to defer to the findings of the trier of fact because in a bench trial 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 testimony. *Seasons Coal Company, Inc. v. City of Cleveland* (1984), 10 Ohio St. 3d 77, 461 N.E. 2d 1273.

{¶22} We have reviewed the record, and the transcript of proceedings of the bench trial, and we find there is sufficient, competent and credible evidence in the record to support the court's finding appellant had failed to prove his allegations against appellee by a preponderance of the evidence.

{¶23} The assignment of error is overruled.

{¶24} For the foregoing reasons, the judgment of the Court of Common Pleas of Morrow County, Ohio, is affirmed.

By Gwin, P.J.,
Hoffman, J., and
Wise, J., concur

HON. W. SCOTT GWIN

HON. WILLIAM B. HOFFMAN

HON. JOHN W. WISE

WSG:clw 0503

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IN THE COURT OF APPEALS FOR MORROW COUNTY, OHIO
FIFTH APPELLATE DISTRICT

RANDALL E. ESTRIDGE	:	
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Plaintiff-Appellant	:	
	:	
-vs-	:	JUDGMENT ENTRY
	:	
BRIAR ROAD FARMS, INC.	:	
DBA OHIO VALLEY CUSTOM HOMES	:	
	:	
Defendant-Appellee	:	CASE NO. 2008-CA-0010

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas of Morrow County, Ohio, is affirmed. Costs to appellant.

HON. W. SCOTT GWIN

HON. WILLIAM B. HOFFMAN

HON. JOHN W. WISE