

STATE OF OHIO, MAHONING COUNTY
IN THE COURT OF APPEALS
SEVENTH DISTRICT

VICTOR MARSILIO,)	
)	
PLAINTIFF-APPELLANT/)	CASE NO. 06 MA 180
CROSS-APPELLEE,)	
)	
VS.)	O P I N I O N
)	
BRIAN BENNETT CONSTRUCTION,)	
et al.,)	
)	
DEFENDANTS-APPELLEES/)	
CROSS-APPELLANTS.)	

CHARACTER OF PROCEEDINGS: Civil Appeal from Common Pleas Court,
Case No. 04CV224.

JUDGMENT: Affirmed.

APPEARANCES:

For Plaintiff-Appellant/
Cross-Appellee:

Attorney William Kissinger
8255 South Avenue, Suite A
Youngstown, Ohio 44512

For Defendants-Appellees/
Cross-Appellants:

Attorney James Sennett
Attorney Laura Reinstein
4415 Euclid Avenue, Suite 200
Cleveland, Ohio 44103

JUDGES:

Hon. Joseph J. Vukovich
Hon. Mary DeGenaro
Hon. Cheryl L. Waite

Dated: September 26, 2008

VUKOVICH, J.

¶{1} Plaintiff Victor Marsilio appeals the decision of the Mahoning County Court of Common Pleas denying his motion for a new trial following a jury trial in which the jury found that defendant Brian Bennett Construction was liable to Marsilio for \$4,250. Marsilio contends that the trial court incorrectly denied the motion without holding a hearing. Additionally, in support of his assertion that he is entitled to a new trial, he argues that since the entire trial record was lost and had to be reconstructed by the Mahoning County Clerk of Courts, the record is unreliable and this court cannot rely on it in reviewing the trial court proceedings. Thus, according to him, the only available remedy is to send the matter back for a new trial. We find no merit with either of these arguments.

¶{2} Brian Bennett Construction cross-appeals the trial court's denial of a directed verdict in his favor. It contends that Marsilio failed to prove his case in two respects. First, Marsilio failed to present evidence of fair market value of the real property for which he was claiming damages. Thus, he failed to prove damages. Second, Marsilio failed to prove that he owned the real estate and thus, was entitled to any damages. We also find no merit with these arguments. For the reasons set forth below, the trial court's rulings and the jury's verdict are hereby affirmed.

STATEMENT OF THE CASE

¶{3} Marsilio and Brian Bennett Construction contracted for the latter to perform construction work on the former's residence and business located at 5340 Mahoning Avenue, Youngstown, Ohio. Problems arose during the course of the construction, which resulted in Marsilio suing Brian Bennett Construction for breach of contract, failure to perform the work in a workmanlike manner, negligence, and unjust enrichment.

¶{4} The case proceeded to trial. After the close of Marsilio's case in chief, Brian Bennett Construction moved for a directed verdict on Marsilio's breach of contract and unjust enrichment claims. The trial court granted the directed verdict on the unjust enrichment claim, but denied it on the breach of contract claim. On October 30, 2006, the jury returned a verdict in Marsilio's favor in the amount of \$4,250.

Following trial, Marsilio moved for judgment notwithstanding the verdict (JNOV) or in the alternative a new trial and also filed a notice of appeal. 11/13/07 Motion and 11/27/06 Notice of Appeal. The appeal was held in abeyance for the trial court to rule on Marsilio's pending JNOV/new trial motion, which was subsequently overruled. 12/26/07. Brian Bennett Construction then filed a cross-appeal. 01/10/07 Notice of Cross-Appeal.

FIRST ASSIGNMENT OF ERROR

¶{5} "THE APPELLANT CANNOT EXERCISE HIS RIGHT TO AN APPEAL AND MAKE RELEVANT ARGUMENTS DUE TO THE CIRCUMSTANCES THAT HAVE PRODUCED A TRIAL COURT FILE AND TRANSCRIPT OF PROCEEDINGS THAT ARE COMPLETELY UNRELIABLE THEREBY GIVING THE COURT OF APPEALS NO EVIDENCE UPON WHICH A FAIR APPEAL CAN BE GIVEN."

¶{6} This assignment of error deals solely with the record that was transmitted to this court for appeal purposes. Marsilio's notice of appeal in this case was filed on November 27, 2006. On that same date, Marsilio ordered the transcript of the trial proceedings. The transcripts were not completed until August 13, 2007. The transcript, however, did not contain the original exhibits that were admitted at trial because they had been lost by either the court reporter or the Clerk of Courts. Furthermore, the transcript of original papers filed by the parties, the docket and journal entries (the file) were misplaced by the Clerk of Courts and could not be found. 10/11/07 J.E. 06MA180. Thus, the Clerk of Courts reconstructed it. In doing so, the Clerk of Courts used its computerized docket and copies of the trial court's entries. Thus, it was only missing the pleadings and the exhibits attached thereto. In order to obtain these, the Clerk asked each party for copies of the pleadings they filed. The reconstructed file was completed on December 3, 2007 and filed thereafter.

¶{7} Marsilio claims that the length of time it took to transcribe the trial proceedings, and the fact that the file had to be reconstructed, prejudicially affected his right to make legitimate arguments on appeal. And further, he claims that given the reconstructed file, this court cannot make a fair decision on appeal. Thus, he contends that justice demands we order a new trial.

¶{8} No one disputes that the original file was lost by the Clerk of Courts and that it reconstructed the file with copies of filings and journal entries. App.R. 9(A) states that the record on appeal is the original papers and exhibits filed in the trial court, the transcript of proceedings, including exhibits, and a certified copy of the docket and journal entries prepared by the clerk of the trial court. The reconstructed file does not fully comply with App.R. 9(A) in that it does not contain the original papers and exhibits filed in the trial court. While misplacing an entire file is problematic, it does not necessarily mean that there is no means to recreate the file.

¶{9} This court ordered the file to be reconstructed by the Clerk of Courts since they were responsible for misplacing it. After the file was reconstructed, any objection or problem with that file could have been addressed by the parties pursuant to App.R. 9(E). That section is for correction or modification of the record. It states that if any difference arises as to whether the record discloses what occurred in the trial court, the difference shall be submitted to and settled by the trial court. Likewise, it also indicates that if any material is omitted from the record, the parties may stipulate that the omitted material be supplemented to the record or the trial court or appellate court may direct the omission or misstatement be corrected.

¶{10} Marsilio did not use section (E) to correct any alleged omissions in the record. In fact, he does not direct this court to any omission. Rather, he directs this court to the online docket for case number 00CV2477. That is the assigned case number for the first complaint Marsilio filed against Brian Bennett Construction. It was dismissed on August 26, 2003. The underlying case is the refile of the 00CV2477 complaint. Marsilio claims that 00CV2477's online docket displays that filings occurred in that case on June 6, 2005, October 23, 2006 and October 25, 2006, after the case was dismissed. He is insinuating that this renders the reconstructed file for the underlying case unreliable and a new trial should be granted.

¶{11} We do not agree with that logic. The online docket for 00CV2477 does contain filings for those dates - a brief in opposition to the third party defendant filing and two depositions. If those filings should have been made a part of the underlying record, they could have been added by complying with the aforementioned App.R.

9(E). However, the parties did not do that. Furthermore, Marsilio's concentration on a docket other than the one before us does not show how this file is unreliable.

¶{12} Moreover, without a specific indication of what is missing from the file and how that is needed for the appeal, a review of the entire file does not lend support to the conclusion that it is unreliable and beyond our review. This is an appeal of a jury verdict and ruling on a motion for directed verdict. Thus, considering that we have the transcript of the trial, it is unclear how the file is needed to make arguments about the correctness of those rulings. This is not a situation where the parties are arguing that a motion that is missing from the file was decided incorrectly.

¶{13} Along those same lines, it is unclear how the length of time it took to transcribe the trial proceedings prejudiced Marsilio's ability to appeal. Marsilio provides no indication how this nine month delay prejudiced him and this court should not assume the burden of finding prejudice for him. Moreover, even if this court was inclined to do so, it is difficult to see how this prejudiced him. The transcript was eventually done and thus counsel had the ability to formulate arguments for appeal on the basis of that transcript.

¶{14} Consequently, given the posture of this case and a review of the reconstructed file, we find that it is not unreliable and that a new trial is not warranted on that basis. Furthermore, it is noted that there is no case law which would support the theory that this court can grant a new trial when the entire record is lost. The general rule of law is that when there is no record we, the appellate court, are to presume the regularity of the proceedings and the validity of the trial court's judgments. *Knapp v. Edwards Laboratory* (1980), 61 Ohio St.2d 197. Consequently, arguments that could rely only on the record for support would be deemed meritless in the absence of a record. Considering the above, Marsilio's first assignment of error is meritless.

SECOND ASSIGNMENT OF ERROR

¶{15} "THE TRIAL JUDGE ERRED IN DENYING PLAINTIFF'S MOTION FOR A NEW TRIAL WITHOUT ANY KNOWLEDGE OF THE CASE AND WHAT TRANSPIRED AT TRIAL."

¶{16} Following trial, Marsilio filed a new trial motion on the basis of Civ.R. 59(A)(2), misconduct of the prevailing party. The motion asserted that Brian Bennett Construction's expert witness, Robert Johnston, conferred with Defendant Brian Bennett and his counsel during the lunch recess while Johnson was still testifying on direct examination and before cross-examination by Marsilio's counsel. Marsilio alleged that this lunch conference was improper and prejudicial.

¶{17} On appeal, Marsilio asserts Judge Franken abused his discretion when he denied the new trial motion without holding a hearing. He cites *Rohde v. Farmer* (1970), 23 Ohio St.2d 82, for the proposition that when a party files a motion for new trial on the ground that the judgment is not sustained by sufficient evidence, the trial court has a duty to review the evidence presented at trial and weigh the sufficiency of the evidence and the credibility of the evidence. He asserts that since Judge Cronin, not Judge Franken, presided over the trial, Judge Franken could not have made an informed decision without an oral hearing on the motion.

¶{18} We find no merit with this argument. First, as the above shows, the new trial motion was not made on the basis of lack of sufficient evidence or that the verdict was against the manifest weight of the evidence. As such, Marsilio's statement as to what a trial court has the duty to review when such an argument is made is irrelevant.

¶{19} Regardless, after reviewing the new trial motion and the opposition motion, it is clear that the motions did not require Judge Franken to review the evidence of the entire trial to rule on the motion. As stated above, the allegations in the new trial motion are that lunch with the expert witness constituted misconduct by Brian Bennett Construction and his counsel. The opposition motion did not dispute that lunch occurred. However, Brian Bennett Construction asserted that having lunch with the witness is not prejudicial; there was absolutely no evidence about what was discussed at lunch. Furthermore, he contended that any allegation that after lunch Johnston amended his earlier testimony was addressed at trial through cross-examination. In fact, he pointed out that the Third-Party Defendant did cross-examine Johnston on the alleged amendment of his testimony. Thus, as can be seen, the argument and counter arguments do not require a factual review of the case or necessarily require a hearing.

¶{20} Moreover, Civ.R. 59 does not require that in every instance an oral hearing must be held on new trial motions. *Jones v. Jones* (Sept. 22, 1980), 11th Dist. No. 2819. In fact, there is only one instance in which Civ.R. 59 mandates an oral hearing and that is when under section (D) the trial court grants a new trial on its own initiative. *Id.*

¶{21} Lastly, while there is an assertion in the reply brief that Judge Cronin had set the new trial motion for a hearing, the docket does not indicate a hearing was scheduled. However, even if she had set a hearing on the matter, that decision does not necessarily render Judge Franken's decision to rule on the motion without a hearing an abuse of discretion. Consequently, for those reasons, we do not find that the trial court abused its discretion when it failed to hold a hearing on the new trial motion.

CROSS-ASSIGNMENT OF ERROR

¶{22} "THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT DENIED BENNETT'S MOTION FOR A DIRECTED VERDICT BECAUSE MARSILIO FAILED TO PUT ON EVIDENCE OF THE FAIR MARKET VALUE OF THE REAL PROPERTY AND FAILED TO PROVED [SIC] THAT HE OWNED THE REAL ESTATE FOR WHICH DAMAGES WERE BEING CLAIMED."

¶{23} The trial court denied Brian Bennett Construction's motion for directed verdict on the breach of contract claim at the close of Marsilio's evidence and at the close of its own case in chief. His cross-appeal asserts that the denial of these motions was incorrect. We review the grant or denial of a directed verdict motion de novo. *Abbott v. Jarrett Reclamation Serv., Inc.* (1999), 132 Ohio App.3d 729, 738.

¶{24} Two arguments are made as to why the directed verdict should have been granted. First, Brian Bennett Construction claims that Marsilio failed to introduce any evidence as to the fair market value of the property immediately before and after the alleged damages. He contends that this kind of evidence is necessary when one is arguing that the property can be restored to its original condition. His argument to the trial court more succinctly explains his position:

¶{25} "Thus, in this case where there is a claim of temporary damage to real property, there has been evidence put on by the Plaintiff of the cost of repair and

restoration, but there's a ceiling under the law of Ohio, and that ceiling is the difference between the fair market value of the property immediately before or after the damage." (Tr. 215).

¶{26} Marsilio disagrees with the assertion that he had to present evidence of fair market value. He directs this court to our recent opinion *Stackhouse v. Logangate Property Management*, 172 Ohio St.3d 65, 2007-Ohio-3171.

¶{27} In *Stackhouse*, we explained that restoration and fair market value are separate tests:

¶{28} "The Ohio Supreme Court once stated that if land has sustained a permanent or irreparable injury based upon the tort of another, damages are limited to the difference in the market value of the property, including improvements, before and after the injury. *Ohio Collieries Co. v. Cocke* (1923), 107 Ohio St. 238, 248, 140 N.E. 356 (where neighboring mine caused subsidence and water diversion). If the injury is temporary and thus susceptible to repair, then, generally, the landowner may recover the reasonable cost of restoration, plus the reasonable value of the loss of the use of the property between the time of the injury and the restoration. *Id.*

¶{29} "Thereafter, the Ohio Supreme Court stated that where restoration of a damaged building is practicable, damages should represent the reasonable cost of restoration. *Northwestern Ohio Natural Gas Co. v. First Congregational Church of Toledo* (1933), 126 Ohio St. 140, 150, 184 N.E. 512 (dealing with negligent destruction of church by explosion and fire). Where restoration is impracticable, the measure of damages is the difference between the reasonable fair market value before and after the damage. *Id.* More specific to that case, the court added that when a destroyed church building had no real market value but had much useful and actual value, diminution in market value can be exceeded by considerations such as reconstruction costs in order to determine the value. *Id.*" *Id.* at ¶54-55.

¶{30} Thus, only when restoration is impracticable, are damages proven by the fair market value test. Brian Bennett Construction points out that in *Stackhouse* we stated:

¶{31} “The court must start with restoration, then move to fair market value and finally consider reproduction/rebuilding only if there is no conscionable market value.” Id. at ¶61.

¶{32} He implies that this means that the fair market value must be introduced in order to prove damages even when restoration is practical. Brian Bennett Construction is either somehow misunderstanding *Stackhouse* or only reading portions of it to draw the conclusion he wants. *Stackhouse*, when read in its entirety, clearly indicates that when computing damages, first look to restoration. If restoration is practical, then damages are the reasonable cost of restoration. However, if restoration is impracticable, then move to the fair market value test. These tests, restoration and fair market value, are “distinct tests with separate elements.” Id. at ¶59. Admittedly in *Stackhouse*, evidence of fair market value was produced, however, no one in that case contended that restoration was practicable. Id. at ¶64. Thus, fair market value had to be shown in order to prove damages.

¶{33} In the instant case, no one contends that restoration is impracticable. In fact, Brian Bennett Construction admits that damage was temporary and restorable. Thus, in accordance with *Stackhouse*, only evidence of restoration was needed at trial; Marsilio was not required to present evidence of fair market value since restoration was practicable. Thus, his first argument lacks merit.

¶{34} Brian Bennett Construction’s second argument as to why a directed verdict should have been granted in his favor was that evidence produced at trial showed that Marsilio no longer owned the real estate, rather, a trust did. The trial court denied this argument explaining:

¶{35} “Motion for directed verdict is overruled as is the motion as relates to the trust currently owning the property, and when the lawsuit was filed and the workmanship done on the property, the trust was not the owner nor was there a contract made between the trust and Brian Bennett.” (Tr. 556).

¶{36} The evidence at trial clearly shows that on June 8, 2005 (after the complaint was filed, but prior to trial), Marsilio ceased to own the property in question and at that time an irrevocable trust with Marsilio as the trustee owned the property.

¶{37} Brian Bennett Construction claims that a party alleging damage to their property has the burden of establishing that they own the property that was damaged and cites to *McGraw v. Englehart* (Dec. 22, 1995), 11th Dist. No. 94-L-105, to support that position. *McGraw* is a negligence case where one property owner was suing another for damages done to his property by dumping. The facts of the case show that there is some dispute as to whether appellant owned the property that was damaged.

¶{38} As can be seen by that synopsis, that case is different from the one currently before this court. Here, the case involves a breach of contract. Furthermore, it is undisputed that at the time of the contract, Marsilio owned the property and that he was the individual who entered into the contract with Brian Bennett Construction.

¶{39} The Second Appellate District has explained in an automobile repair case asserting violations of the Ohio Consumer Sales Practices Act, fraud and breach of contract that:

¶{40} “[S]ome proof of ownership has traditionally been required when one has claimed property damage. This is because the claimant must prove that he was damaged by the harm done to the property. However, Calderone did not claim property damage. Rather, she claimed to have been damaged by Jim's violations of the Ohio Consumer Sales Practices Act, fraud, and breach of contract.” *Calderone v. Jim's Body Shop* (1991), 75 Ohio App.3d 506, 511.

¶{41} Here, as aforementioned, there is some proof of ownership that Marsilio owned the property at the time of the contract. Furthermore, this is a breach of contract case. There was a valid contract, a breach of that contract and damages that resulted from the breach. Just because a person sells or transfers the property that involved the contract should not mean that the injured party cannot recover from the breach of the valid contract. This is especially the case in this instance since Marsilio transferred the property to a trust in which he was the named trustee. For all those reasons, we agree with the trial court's reasoning and thus, find that Brian Bennett Construction's second argument lacks merit.

CONCLUSION

¶{42} We find no merit with Marsilio's appeal; the reconstructed record is reviewable and the trial court's decision to not hold a hearing on the new trial motion was not an abuse of discretion. Likewise, Brian Bennett Construction's appeal also is meritless; the denial of the motion for directed verdict was not erroneous.

¶{43} For the foregoing reasons, the trial court's rulings and the jury's verdict are hereby affirmed.

DeGenaro, P.J., concurs.

Waite, J., concurs.