[Cite as *Catz Ent., Inc. v. Valdes*, 2009-Ohio-4962.]

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

CATZ ENTERPRISES, INC.,	)	
	)	CASE NO. 07 MA 201
PLAINTIFF,	)	
	)	
- VS -	)	OPINION
	)	
ALFONSO VALDES, et al.,	)	
	)	
DEFENDANTS-APPELLEES,	)	
	)	
- VS -	)	
	)	
THOMAS ZEBRASKY, et al.	)	
	)	
THIRD-PARTY/ DEFENDANTS/APPELLANTS.	)	

CATZ ENTERPRISES, INC.,	)	
	)	CASE NO. 07 MA 202
PLAINTIFF-APPELLANT,	)	
	)	
- VS -	)	OPINION
	)	
ALFONSO VALDES, et al.,	)	
	)	
DEFENDANT-APPELLEE.	)	

CATZ ENTERPRISES, INC.,	)	
	)	CASE NO. 08 MA 68
PLAINTIFF-APPELLANT,	)	
	)	
- VS -	)	OPINION
	)	
ALFONSO VALDES, A PARTNER	)	
	)	
DEFENDANT-APPELLEE.	)	

JUDGES:

Hon. Mary DeGenaro
Hon. Joseph J. Vukovich
Hon. Gene Donofrio

Dated: September 17, 2009

[Cite as *Catz Ent., Inc. v. Valdes*, 2009-Ohio-4962.]

CHARACTER OF PROCEEDINGS:	Civil Appeals from Common Pleas Court, Case No. 06 CV 1355.
JUDGMENT:	Affirmed in Part, Reversed in Part, Vacated in Part and Remanded.

APPEARANCES:

For Plaintiff-Appellant:	Attorney William Ramage 4822 Market Street, Suite 220 Youngstown, OH 44512 Attorney for Catz Enterprises, Inc.
For Third-Party/ Defendants-Appellants:	Attorney William Ramage 4822 Market Street, Suite 220 Youngstown, OH 44512 Atty. for Thomas A. Zebrasky, et al.
For Defendants-Appellees:	Attorney Thomas J. Wilson Comstock, Springer & Wilson 100 Federal Plaza East, Suite 926 Youngstown, OH 44503-1811 Attorney for Alphonso Valdes, et al. And Alfonso Valdes, a Partner

[Cite as *Catz Ent., Inc. v. Valdes*, 2009-Ohio-4962.]
DeGenaro, P.J.

{¶1} Appellants, Thomas Zebrasky and Corrada Zebrasky, appeal the October 24, 2007 decision of the Mahoning County Court of Common Pleas that ordered the Zebraskys to repay a personal loan of $20,000 to appellee Alfonso Valdes. Appellant, Catz Enterprises, Inc., owned by Thomas Zebrasky, appeals the October 24, 2007 decision of the Mahoning County Court of Common Pleas that found Catz to be in breach of an automobile service contract, denied Catz's demand for full compensation, and ordered Catz to return certain automobiles to Valdes. Catz also appeals the trial court's March 18, 2008 decision ordering Catz to return the parts of one automobile that Catz had removed prior to returning it pursuant to the October 24, 2007 order.

{¶2} On appeal, the Zebraskys argue that the $20,000 given to them by Valdes in 1991 was not a personal loan, and enforcement of repayment was otherwise barred by the statute of limitations. Catz argues that it did not breach a Jaguar service contract with Valdes because Valdes waived the reasonable time requirement, and the trial court further erred by awarding Valdes more than his restitution interest. Finally, Catz argues that the trial court's decision not to award Catz damages for the full amount claimed on a separate Ferrari service agreement was against the manifest weight of the evidence.

{¶3} The action on the oral loan agreement was barred by the statute of limitations, and the trial court should not have relied on alleged oral acknowledgements of the loan by Thomas Zebrasky in order to extend the statute of limitations. As for the Jaguar service contract, Valdes did not waive the requirement that Catz perform within a reasonable amount of time, and Catz's unreasonably delayed performance constituted a material breach. However, the trial court erred in calculating Valdes's restitution remedy by placing him in a better position than he would have been had the contract not been entered, namely by forcing Catz to forfeit the value added to one of the Jaguars that Valdes had given to Catz as payment. Finally, because Catz did not provide adequate proof of damages for the Ferrari service, the trial court's decision to deny most of the damages sought was not against the manifest weight of the evidence.

{¶4} Accordingly, the October 24, 2007 decision of the trial court is affirmed in part, reversed in part, vacated in part and remanded for further proceedings. The trial court's March 18, 2008 decision, ordering Catz to comply with the October 24, 2007 decision, is vacated.

Facts

{¶5} Between 1989 and 2005, Zebrasky and Valdes engaged in a variety of business activities, and Zebrasky restored approximately sixteen of Valdes's classic cars. There are three contracts at issue in this appeal: 1) A personal loan of $20,000 from Valdes to Zebrasky and Corrada Zebrasky; 2) an agreement for Catz to restore Valdes's 1955 Jaguar XK-140 MC Drop Head Coupe ("DHC") in exchange for possession of a Jaguar ZK-140 Open Two Seater ("OTS"); and, 3) an agreement for Catz to restore Valdes's 1960 Ferrari 250 PT Cabriolet ("Ferrari").

{¶6} On July 8, 1991, Valdes wrote two checks for $10,000, one to each of the Zebraskys. Valdes testified that the $20,000 was given as a loan, to be paid back within sixty days. Valdes sent six or more letters between 1992 and 2003, requesting repayment from the Zebraskys. Valdes testified that Zebrasky orally acknowledged the debt on multiple occasions. Zebrasky testified that the money was given as compensation for their collaborative sale of a car. Zebrasky testified that he did not receive the payment request letters from Valdes, and denied that he orally acknowledged the loan.

{¶7} In either 1995 or 1997, Zebrasky/Catz entered an agreement with Valdes to perform restoration service on the DHC in exchange for ownership of the OTS. Both vehicles were in very poor condition, with value coming only from parts. Valdes had purchased the DHC for $23,500 and the OTS for $42,500 around 1989. Zebrasky had helped facilitate the purchase of the DHC and the OTS, and the cars had been stored with Catz since their purchase. All witnesses explained that the market for Jaguars fluctuated wildly between the late 1980's and the present day. Valdes did not provide testimony as to the value of the DHC or the OTS at the time of contract formation. On April 6, 1995 and October 11, 1997 Zebrasky wrote offers to

Valdes to exchange Catz's service for Valdes's OTS. The letters detailed that Valdes would be expected to pay for any parts required for the restoration of the DHC. In the letters, Zebrasky estimated that Catz would perform approximately $15,000 to $18,000 worth of labor on the DHC. Zebrasky also noted that the market value of each car was around $15,000 at that time. Neither party specified a time for completion of this contract.

{¶8} An employee of Catz, Robert Swarm, testified that he intermittently performed body work on the DHC between 1997 and 1999, and between 2003 and 2005. Another employee of Catz, Jennifer Donitzen, testified that she had done some work on the DHC between 2003 and 2005. No other testimony indicated that work was completed on the DHC outside of those time periods. Zebrasky testified that Valdes prevented Catz from completing work on the DHC by pressing numerous other demands, such as Catz's work on Valdes's Ferrari and Zebrasky's work on the parties' other collaborative businesses, specifically a land development company. Zebrasky testified that Valdes did not complain about the timeliness of the restoration work, and that Valdes was aware of Catz's many commitments, small shop, and lack of funding at certain points over the years. Valdes testified that he did complain about the untimely restoration job, and never prevented Catz from performing work on the DHC.

{¶9} When the relationship between the parties dissolved in 2005, the DHC was estimated by various witnesses to be 15% to 44% complete. Witnesses for Valdes stated that the restoration process would have to be started over due to problems with the work done thus far. Catz claimed that the market value of the DHC at the time of trial was approximately $35,000. Valdes testified that, at the time of breach, the DHC was worthless except for the engine. Valdes's witness, Del Valle, testified that at the time of breach, the DHC was only worth the value for parts, estimated to be $6,000.

{¶10} Zebrasky testified that, between 1997 and 2005, Catz put approximately $94,864 worth of parts and labor into the OTS. Zebrasky testified that Catz received an offer for the OTS of $145,000, conditioned on the completion of restoration. Catz

did not provide an estimate of the market value of the OTS in its unfinished state at the time of the alleged breach. Valdes did not provide an estimate of the market value of the OTS at the time of contract formation, but did testify that he originally purchased it for $42,500. Valdes testified that the OTS was worth $60,000 at the time of breach. Valdes's witness, Del Valle, testified that the OTS was worth $30,000 or $40,000 at the time of breach.

{¶11} In 2003, Valdes purchased a 1960 Ferrari 250 PT Cabriolet online from a Ferrari broker. Based on information from the broker, Zebrasky/Catz estimated that restoration of the Ferrari would cost $60,000. The partially restored but unassembled Ferrari was delivered to Catz in a box in August of 2003. Zebrasky testified that the Ferrari was in worse condition than the broker and internet information had claimed, and that parts were discovered to be missing during the restoration process. Zebrasky stated that he and Valdes had agreed that Catz would do a Class One "100 point" restoration, converting the Ferrari into a perfect show car. Valdes testified that they agreed that Catz would restore the Ferrari to a "good driver" in "very good condition."

{¶12} Catz sent periodic bills for completed work on the Ferrari between August 2003 and July 2005, which Valdes paid. Catz sent a final bill for service performed on the Ferrari which included charges for Ferrari restoration work between July and November of 2005, as well as a sales tax charge for current work and the previous $73,395 worth of work already completed on the Ferrari.

{¶13} Upon the breakdown of the parties' business relationship in November of 2005, Valdes requested that Catz stop work on all of his vehicles and allow him to retake possession of them. Catz sent the aforementioned final Ferrari billing, along with storage charges for additional cars. Catz would not allow Valdes to retake the cars until all bills were paid.

Procedural History

{¶14} On April 7, 2006, Catz Enterprises, Inc. filed a complaint against Valdes, asking for $57,361.06 in damages for service performed on the DHC and Ferrari, as well as other claims not pertinent to this appeal. Catz claimed a possessory artisan's

lien on the Ferrari and DHC, and ownership of the OTS. On May 30, 2006, Valdes filed his answer, along with the counterclaim that Catz and Zebrasky had breached the agreements and caused the vehicles to diminish in value. Valdes also filed a third party complaint against Zebrasky and Corrada Zebrasky, asking for $20,000 for the unpaid personal loan. On September 18, 2006, the trial court granted Catz's motion to file an amended complaint against Valdes, in order to claim unjust enrichment in the event that Valdes recovered possession of the OTS.

{¶15} Valdes also filed a motion for order of possession for the various automobiles. The magistrate held a replevin hearing and ordered Catz to return the DHC to Valdes. Catz filed objections and requested an extension of time to file the transcript of the hearing. The trial court did not rule on Catz's request for an extension, and the record does not reflect that Catz ever filed the transcript with the trial court. The trial court adopted the magistrate's decision on January 26, 2007. After a counter-replevin bond hearing (which was not made part of the record) and much procedural grappling, the magistrate allowed Catz to post a counter replevin bond and allowed Catz to maintain possession of the Ferrari during the proceedings.

{¶16} After rejecting motions to continue, the matter was tried to the magistrate with the parties filing briefs in lieu of closing arguments. On June 27, 2007, the magistrate entered a decision finding that Catz's untimely performance was a material breach of the DHC/OTS contract. The magistrate stated that the OTS was consideration for the DHC repair, that Catz acted at its own peril by adding value to the OTS before fulfilling its contractual obligations, and that Catz's unjust enrichment claim was not applicable to the express contract between the parties. The magistrate denied Valdes's diminution in value claim. The magistrate did not explicitly find that either party had breached the Ferrari service contract, but found that Valdes must compensate Catz for the small amount of service proven. The magistrate further found that the $20,000 transfer was a loan and that Zebrasky had affirmed the loan as recently as 2003, placing the action within the statute of limitations. The magistrate ordered that Catz return the OTS and the Ferrari; that the Zebraskys repay the loan

money to Valdes; that the parties compensate one another for various charges or missing items, and that the interest be borne equally between the parties.

{¶17} Catz filed objections to the magistrate's decision supported by a transcript, which the trial court set for hearing. The trial court issued an opinion on October 24, 2007, adopting the decision of the magistrate. Catz, Zebrasky and Corrada Zebrasky all filed timely appeals which were consolidated into one case on February 20, 2008.

{¶18} Meanwhile, Valdes filed a motion to enforce the trial court's October 24, 2007 order, claiming (among other things not at issue on appeal) that Catz had unrightfully stripped the OTS of its engine, transmission, headlights, and other parts prior to returning the vehicle. On February 5, 2008, the magistrate ruled that the decision ordered the return of the OTS in its present state, and did not allow for Catz to remove the improvements from the vehicle. Subsequent to Catz's objections, the trial court affirmed and adopted the magistrate's decision on March 18, 2008. Catz filed a timely appeal of this decision, which was subsequently consolidated into the previously filed appeals on May 19, 2008.

{¶19} This consolidated appeal was held in abeyance while the parties pursued settlement negotiations, which subsequently failed.

Standard of Review

{¶20} Appellants, Catz and the Zebraskys, have not provided a standard of review in their analysis of the decision below. Appellee Valdes asserts that the abuse of discretion standard is generally applied to a trial court's decision to adopt a magistrate's decision. Although the abuse of discretion standard of review is applicable in contract cases where an appellant has failed to file a transcript or objections to the magistrate's decision, such failures did not generally occur in this case, with the exception of the underlying replevin hearing transcript.

{¶21} In ruling upon objections to a magistrate's decision, a trial court must "undertake an independent review as to the objected matters to ascertain that the magistrate has properly determined the factual issues and appropriately applied the

law." Civ.R. 53(D)(4)(d). In appellate review of a trial court's adoption of a magistrate's decision, "we are guided by the principle that judgments supported by competent, credible evidence must not be reversed, as being against the manifest weight of the evidence." *Miller-Yount Paving, Inc. v. Freeman Cargo Carrier, Inc*. (Mar. 30, 2000), 7th Dist. No. 98 CA 226, citing *Gerijo, Inc. v. Fairfield*, 70 Ohio St.3d 223, 226, 1994-Ohio-432, 638 N.E.2d 533; *C.E. Morris Co. v. Foley Constr. Co.* (1978), 54 Ohio St.2d 279, 8 O.O.3d 261, 376 N.E.2d 578, syllabus. Thus, on questions of fact, we generally defer to the judgment of the trial court, and we operate under the presumption that the trial court's findings of fact are correct. *Seasons Coal Co. Inc. v. City of Cleveland* (1984), 10 Ohio St.3d 77, 80, 10 OBR 408, 461 N.E. 2d 1273, citing *C.E. Morris Co.*, supra.

{¶22} However, in reviewing the trial court's decision on questions of law, this court "may properly substitute its judgment for that of the trial court since an important function of the appellate court is to resolve disputed propositions of law." *Miller-Yount*, supra; *Van-Am Ins.Co. v. Schiappa* (1999), 132 Ohio App.3d 325, 330, 724 N.E.2d 1232. Procedural variations, such as an initial hearing by a magistrate, do not circumvent this court's ability to review questions of law de novo. *Continental W. Condominium Unit Owners Assn. v. Howard E. Ferguson, Inc*., 74 Ohio St.3d 501, 502, 1996-Ohio-158, 660 N.E.2d 431.

{¶23} With this standard of review in mind, we proceed to address the issues raised in appellants' four assignments of error.

Loan

{¶24} In the first of four assignments of error, Zebrasky and Corrada Zebrasky assert:

{¶25} "The trial court committed error prejudicial to plaintiff appellant when it determined that two (2) checks from appellee to appellant and his spouse totally [sic] twenty thousand dollars ($20,000) constituted a loan rather than payment of appellant's share of a business deal."

{¶26} The Zebraskys make two assertions: the trial court erred in finding that

the $20,000 payment was a loan, and the court erroneously extended the statute of limitations for the alleged oral loan agreement. Valdes counters that the Zebraskys did not object to the magistrate's finding that the $20,000 was a loan rather than payment, and has thus waived the argument on appeal. The statute of limitations argument is dispositive.

{¶27} An oral contract is subject to a six year statute of limitations. R.C. 2305.07. If the contract has a set date for repayment, the cause of action accrues on the date that the borrower is supposed to partially or fully repay the loan, and fails to do so. Id.; *Dandrew v. Silver*, 8th Dist. No. 86089, 2005-Ohio-6355, at ¶13; *VanDyke v. Fisher*, 5th Dist. No. 2006 CA 0007, 2007-Ohio-4785, at ¶30. The six year statute of limitations may be extended if there is a writing, signed by the charged party, acknowledging the debt or promising to pay it. R.C. 2305.08. The statutory language requiring that such acknowledgment be in the form of a signed writing has existed for decades, if not centuries. *Stephenson v. Line* (1892), 7 Ohio C.C. 147, 3 Ohio C.D. 703, 7 Ohio C.D. 35.

{¶28} Valdes wrote checks to Zebrasky and Corrada Zebrasky in the total amount of $20,000 on July 8, 1991. The parties agree that there was no written contract related to the loan. The Zebraskys deny that the payment was a loan, and thus that there was any date set to repay the loan. Valdes alleged that he and Zebrasky orally agreed that the loan would be repaid in sixty days, which would have been September 6, 1991.

{¶29} Presuming that Valdes's testimony is true as decided by the trial court, the cause of action for the oral loan accrued on September 6, 1991, and ran on September 6, 1997. Valdes argues that he wrote many letters to the Zebraskys over the years asking for repayment. Valdes claims that he and Zebrasky discussed the loan many times, and that Zebrasky acknowledged and promised to pay back the loan during those discussions. Valdes stated that his letters and those conversations continued up to the year 2003. The court decided that the alleged oral statements of Valdes and Zebrasky extended the statute of limitations to June of 2003, and that

Valdes was not barred from enforcing payment through June of 2009.

{¶30} The trial court extended the statute of limitations based on writings by Valdes and oral statements by Zebrasky, and not by any writing signed by the Zebraskys. The evidence of Zebrasky's alleged oral acknowledgment of the loan did not satisfy the requirements of R.C. 2305.08 that there be a writing, signed by the charged party, acknowledging the debt or promising to pay it.

{¶31} Because Zebrasky's alleged oral acknowledgements of the July 1991 loan were not sufficient to extend the six-year statute of limitations, Valdes was barred from this claim as of September 1997. The trial court erred as a matter of law by extending the statute of limitations, and the Zebraskys' first assignment of error is meritorious.

Contract Breach

{¶32} In the second of four assignments of error, Catz asserts:

{¶33} "The trial court committed error prejudicial to appellant when it held that the appellant had breached the contract with appellee by failing to restore appellee's automobile within a reasonable period of time."

{¶34} Catz asserts that the trial court erred in finding that it had breached the Jaguar service contract with Valdes, because the circumstances surrounding performance indicated that Catz was performing within a reasonable time, and because Valdes's actions indicated that he waived any time requirement in the contract. Catz does not contest the court's finding that there was an express contract to restore Valdes's Jaguar DHC in exchange for the transfer of ownership of a Jaguar OTS to Zebrasky.

{¶35} Valdes claims that Catz failed to assert a waiver of time requirement in its objections to the magistrate's decision, thus waiving the issue on appeal. However, Catz's objections to the magistrate's decision did include assertions related to Valdes's waiver of time requirement. Catz has therefore not forfeited this claim for purposes of appeal.

{¶36} "A contract is a promise or a set of promises for the breach of which the

law gives a remedy, or the performance of which the law in some way recognizes a duty." *Ford v. Tandy Transp. Inc.* (1993), 86 Ohio App.3d 364, 380, 620 N.E.2d 996. In order for a party to be bound to a contract, the party must consent to its terms, the contract must be certain and definite and there must be a meeting of the minds of the parties. *Episcopal Retirement Homes, Inc. v. Ohio Dept. of Indus. Relations* (1991), 61 Ohio St.3d 366, 369, 575 N.E.2d 134.

{¶37} The determination of whether a party has materially breached a contract is generally a question of fact. *Creative Concrete v. D & G Pools*, 7th Dist No. 07 MA 163, 2008-Ohio-3338, at ¶20, citing *Kersh v. Montgomery Developmental Ctr.* (1987), 35 Ohio App.3d 61, 63, 519 N.E.2d 665. A reviewing court should defer to the judgment of the trial court in factual determinations, and "[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." *Creative Concrete* at ¶17, quoting *C.E. Morris v. Foley Construction Co.* (1978) 54 Ohio St.2d 279, 8 O.O.3d 261, 376 N.E.2d 578. This court therefore must "presume that the findings of the trier of fact are correct." *Creative Concrete* at ¶17, citing *State v. Wilson,* 113 Ohio St.3d 382, 2007-Ohio-2202, 865 N.E.2d 1264, at ¶24.

{¶38} When there is no time for performance stated in a contract, the presumption is that the contract is to be performed within a reasonable time. *Rock v. Monarch Bldg. Co*. (1912), 87 Ohio St. 244, 252, 100 N.E. 887, 889. A failure to perform within the presumed reasonable time constitutes a material breach of the contract. *Morton Bldgs., Inc. v. Correct Custom Drywall, Inc*., 10th Dist. No. 06AP-851, 2007-Ohio-2788, at ¶16, citing 23 Williston, Contracts (4 Ed.2000) 487-488, Section 63:18. "Reasonable time for a contract's performance is not measured by hours, days, weeks, months or years, but is to be determined from the surrounding conditions and circumstances which the parties contemplated at the time the contract was executed." *Miller v. Bealer* (1992), 80 Ohio App.3d 180, 182, 608 N.E.2d 1133.

{¶39} According to the facts presented in this case, the parties agreed some time between 1995 and 1997 that Valdes would give Zebrasky the OTS in exchange

for Catz's labor on the DHC. The trial court's opinion cites both 1995 and 1997 as the date of contract formation. Evidence at trial indicated that employees at Catz had performed 400 hours of work on the DHC from 1997 to 1999 and from 2003 to 2005, that no work was performed at all from 1999 to 2003, and that the car was estimated to now be approximately 15% to 30% complete. Witnesses were reluctant to gauge exactly how much time would be required to complete restoration on the DHC, except for Zebrasky who testified that there remained 500 hours of work to complete the restoration.

{¶40} Catz asserts that circumstances justified the timing of its performance, including the small size of its shop, few personnel, many projects going on at the same time, pressure from Valdes to perform additional separate obligations, lack of money for labor, and Valdes's knowledge of all these conditions. Valdes counters that Catz managed to find the time and money to make significant progress on the restoration of his OTS during the same time period, and that Catz provided no evidence to counter Valdes's contention that eleven years is an unreasonable amount of time to restore the DHC.

{¶41} It was not error for the trial court to conclude that nine or eleven years was an unreasonable amount of time. Catz failed to explain why no work was performed on the DHC whatsoever between 1999 and 2003. Though certain details might have justified some delay in performance from 2003 to 2005, this does not account for the fact that Catz was unable to restore the DHC between 1997 and 2003. The foregoing consisted of competent credible evidence upon which the magistrate could have relied in order to find that Catz's failure to complete performance from 1997 to 2005 exceeded the reasonable time requirement.

{¶42} Catz additionally argues that Valdes's actions during the time of contract performance constituted a waiver of the reasonable time requirement. Waiver of a contract term may happen through express words or implied by conduct. *White Co. v. Canton Transportation Co.* (1936), 131 Ohio St. 190, 5 O.O. 548, 2 N.E.2d 501. The asserting party must prove a clear and unequivocal act by the alleged waiving party.

Id. If a party allows a reasonable time to pass in complete silence, it might be reasonable for the other party to assume that the reasonable time requirement has been enlarged or waived. *Davis v. Suggs* (1983), 10 Ohio App.3d 50, 10 OBR. 59, 460 N.E.2d 665. As with the determination of material breach, whether a party has agreed to change or waive parts of the contract is a question of fact for the trier of fact to determine. *Palek Corp. v. A.P. O'Horo Co.*, 7th Dist. No. 05 MA 141, 2007-Ohio-1121, at ¶27.

{¶43} Catz argues that Valdes waived any presumed reasonable time requirement, because it alleges that Valdes failed to complain at any point about the progress of the DHC, and because Valdes made Catz stop work on the DHC to complete other projects, including the Ferrari and their shared real estate business. This contradicts testimony of Valdes, who stated that he complained repeatedly about the progress of the DHC, and did not ask Catz to stop work on the DHC at any point. Both parties relied on their testimony alone to support their claims. The trier of fact found Valdes to be the more credible witness, and a reviewing court should generally defer to such a finding. Accordingly, we will not disturb the decision of the trial court that Valdes did not waive the reasonable time requirement of his contract with Catz.

{¶44} Given the foregoing, the trial court's finding that Catz breached the Jaguar service contract was not against the manifest weight of the evidence. Catz's second assignment of error is meritless.

Restitution Interest

{¶45} In the third of four assignments of error, Zebrasky/Catz assert:

{¶46} "The trial court committed error prejudicial to appellant by declaring appellant in breach of the Jaguar contract and then placing appellee in a better position than he would have been in had the contract not been breached or entered into."

{¶47} Catz asserts that the value of the magistrate's award to Valdes for the Jaguar service contract breach exceeded Valdes's restitution and/or expectation interests. When a party has materially breached the contract, the aggrieved party is

entitled to recover restitution or sue for damages for expectation interest. *Yurchak v. Jack Boiman Const. Co.* (1981), 3 Ohio App.3d 15, 16, 3 OBR 16, 443 N.E.2d 526. The proceedings below indicate that Valdes elected to recover restitution rather than his expectation interest from the breach of contract claim. When suing for restitution, the goal is to restore the status quo ante, with the aggrieved party being returned to as good a position had the contract not been formed. Id.; *Bell v. Turner*, 172 Ohio App.3d 238, 2007-Ohio-3054, 874 N.E.2d 820, at ¶30.

{¶48} The contract between Valdes and Catz was the exchange of services for goods: Catz was to restore Valdes's Jaguar DHC, and Valdes was to give Zebrasky title to the Jaguar OTS as well as pay for parts needed in the restoration of the Jaguar DHC. After the trial court correctly found that Catz had materially breached the contract, it held that Catz should return the minimally-restored Jaguar DHC as well as the Jaguar OTS that was intended to be Catz's payment. However, Catz alleges that it completed approximately $94,000 worth of restoration on the Jaguar OTS, and argues that it should not be required to forfeit the value added to the OTS.

{¶49} Because this contract involved the provision of specialty services in exchange for a unique good with an extremely fluctuating value, the steps to arrive at the status quo ante are difficult to determine. The trial court simplified the issue by viewing the remedy as simply returning the goods to Valdes, i.e. returning the DHC and OTS. The trial court chose to disregard issues of market value for the cars. The court did not rely on market value because it believed that the market was too volatile and the testimony as to the values of the cars at different points in time was overly speculative.

{¶50} Catz does not dispute whether returning the DHC with its improvements was a proper remedy. Indeed, because Catz was the breaching party bound by an express contract, it could not recover the value of its services to the DHC in quantum meruit. However, the improvements to the OTS were not contemplated in the contract between the parties. All that was contemplated was that Valdes would transfer ownership of the OTS as his part of the bargain.

{¶51} The record does not indicate that title to the OTS was ever transferred into Catz or Zebrasky's name. Because Valdes continued to have an ownership interest in the OTS, Valdes could choose between alternative remedies of recovering the value of the OTS at the time of contract, or reclaiming the OTS itself.

{¶52} In the case of replevin, in order to return Valdes to the status quo ante, Catz would need to return the OTS in a condition which was comparable to its state at the time of contract formation. The OTS was purchased by Valdes in 1989 for $42,500, and in Zebrasky's 1995 and 1997 correspondence to Valdes, it was estimated to be worth $15,000. Witness opinions as to its current value varied between $30,000 and $145,000, and Zebrasky testified that Catz put approximately $94,000 worth of parts and labor into the OTS. The trial court elected not to make specific findings regarding these values, and explicitly noted that it did not trust the estimates given by any of the parties.

{¶53} However, the trial court noted that Catz had made improvements to the OTS, and that the OTS was in a much better and more valuable condition as a result. Valdes also conceded at trial that the OTS had a higher value of at least $17,500. The court decided that Catz's decision to make improvements to the OTS was made at its own peril. Because the OTS was ordered to be returned with improvements not contemplated in the contract between Valdes and Catz, and with a value that exceeded the damages that flowed from the breach, the remedy imposed by the trial court was a punitive one.

{¶54} Ohio law seeks "to compensate the injured party, not reward him." *Refrigeration & Air Conditioning Institute v. Rine* (1946), 80 Ohio App. 317, 320, 36 O.O. 19, 75 N.E.2d 473. The purpose of a remedy is to compensate the aggrieved party for losses actually suffered due to the breach: "No more can be recovered as damages than will fully compensate the party injured." *Saberton v. Greenwald* (1946), 146 Ohio St. 414, 32 O.O. 454, 66 N.E.2d 224, quoting 25 Corpus Juris Secundum, Damages, §120, page 716. Punitive damages are not recoverable in an action that is brought solely on breach of contract. *Goldfarb v. The Robb Report, Inc.* (1995), 101

Ohio App.3d 134, 140, 655 N.E.2d 211; *Ketcham v. Miller* (1922), 104 Ohio St. 372, 377, 136 N.E. 145.

{¶55} The change in the restoration status of the OTS cannot be ignored because it was ordered to be returned in a substantially different condition than it was at the time of contract formation. By deciding that Catz should forfeit the value it added to the OTS, the trial court exceeded the actual damage suffered by Valdes and imposed the equivalent of punitive damages on Catz. The trial court's decision to impose a punitive remedy which exceeded Valdes's restitution interest was therefore erroneous.

{¶56} Valdes asserts on appeal that Catz's argument is now moot due to the fact that Catz stripped many of the parts of the OTS before returning the vehicle to Valdes. While this may or may not be true, we are not able to determine such factual issues on appeal. Though the OTS has certainly been altered from the stripping, this court is not able to determine its current contents or restoration status compared to the time the contract was formed. The October 24, 2007 decision must be remanded for the trial court to determine the difference between the condition of the OTS at the time of contract formation and at present, be it in terms of restoration class level, parts value, or any other method of evaluation. Thus, if the stripped OTS is now in a condition comparable to its condition at the time of contracting, then the status quo ante would be satisfied. If the OTS is in better or worse condition than at the time of contracting, the trial court should reallocate the damages accordingly, in order to return Valdes to the status quo ante.

{¶57} The trial court's March 18, 2008 decision ordered Catz to comply with the portion of the October 24, 2007 decision that we are now finding contained reversible error. Because the subsequent order was founded on an order which is now being reversed, it is vacated so that Catz may comply with whatever future order the trial court provides subsequent to further proceedings upon the October 24, 2007 decision.

{¶58} Accordingly, Catz's third assignment of error is meritorious.

Money Owed for Service on Ferrari

{¶59} In the fourth of four assignments of error, Zebrasky/Catz asserts:

{¶60} "The trial court committed error prejudicial to plaintiff-appellant when, contrary to the undisputed evidence, the court found that defendant-appellee Valdes owed no further money for work done on the Ferrari by plaintiff-appellant."

{¶61} Catz asserts that the trial court's decision that Valdes owed no further money for Catz's service on a Ferrari was erroneous. Catz does not provide any legal support for its argument, and generally asserts that the trial court's decision was against the manifest weight of the evidence. Catz's complaint claimed that Valdes owed $33,505.06 for the Ferrari. The trial court found that Catz had met its burden of proof for $1,790.68 in compensatory damages.

{¶62} A plaintiff "bears the burden of proving the nature and extent of his damages in order to be entitled to compensation." *Akro-Plastics v. Drake Indus.* (1996), 115 Ohio App.3d 221, 226, 685 N.E.2d 246, citing *Columbus Fin. Inc. v. Howard* (1975), 42 Ohio St.2d 178, 184, 71 O.O.2d 174, 327 N.E.2d 654. A judgment supported by some competent and credible evidence will not be reversed on appeal as being against the manifest weight of the evidence. *Shemo v. Mayfield Hts.*, 88 Ohio St.3d 7, 10, 2000-Ohio-258, 722 N.E.2d 1018, citing *C.E. Morris v. Foley Constr. Co.* (1978), 54 Ohio St.2d 279, 8 O.O.3d 261, 376 N.E.2d 578, syllabus. We are guided by the presumption that the findings of the trier of fact are correct, and evidence susceptible to more than one interpretation will be construed consistently with the trial court's judgment. *Gerijo, Inc. v. Fairfield*, 70 Ohio St.3d 223, 226, 1994-Ohio-432, 638 N.E.2d 533. A reviewing court will not reverse a decision unless the fact-finder clearly lost its way in resolving conflicts in the evidence to the point that it "created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered." *State v. Thompkins*, 78 Ohio St.3d 380, 387, 1997-Ohio-52, 678 N.E.2d 541.

{¶63} In support of its claim on appeal, Catz points to the transcript of a replevin hearing during which Valdes stated that he believed he still owed $14,000 for

service on the Ferrari. Catz has attached three pages of the hearing transcript as an appendix to its appellate brief. However, the record does not reflect that the replevin hearing transcript was filed for consideration by the trial court, either in its January 26, 2007 decision adopting the magistrate's replevin decision, or in its October 24, 2007 decision.

{¶64} When a party objecting to a magistrate's decision fails to file the supporting evidence with the trial court, "appellate review of the court's findings is limited to whether the trial court abused its discretion in adopting the referee's report, and the appellate court is precluded from considering the transcript of the hearing submitted with the appellate record." *State ex rel. Duncan v. Chippewa Twp. Trustees*, 73 Ohio St.3d 728, 730, 1995-Ohio-272, 654 N.E.2d 1254. This court therefore disregards Catz's argument to the extent that it refers to evidence outside the record. *State v. Ishmail* (1978), 54 Ohio St.2d 402, 8 O.O.3d 405, 377 N.E.2d 500, paragraph one of the syllabus ("A reviewing court cannot add matter to the record before it, which was not a part of the trial court's proceedings, and then decide the appeal on the basis of the new matter.").

{¶65} Catz otherwise asserts that its statement of facts demonstrates that the decision was against the manifest weight of the evidence. In the statement of facts, Catz mentions its November 2005 final bill as well as four photographs as proof of completion of claimed work. Regardless of whether the photographs prove what work was done, they do not speak for themselves in order to prove that specific work efforts were completed between July and November of 2005. Looking to testimony that made reference to any of these exhibits, there are many conflicts as to what work was done when, and what work was actually requested.

{¶66} Robert Swarm testified that he performed work on the Ferrari, though most if not all work described either occurred before July 2005, or was listed as "N/C" (no charge) on the final bill. Catz testified that the Ferrari file was a full and complete record of work done on the vehicle, but the file did not contain a record of the vast majority of work claimed to have been completed between July and November 2005.

Plaintiff's Exhibit 14, listed as evidence of work completed, portrays metal stripping service performed in 2004, which is inapplicable to this assignment of error. Plaintiff's Exhibit V includes pictures of the Ferrari as it was delivered and during the process of restoration, with no explanation of what was done when. Valdes additionally points out in his brief that Plaintiff's Exhibit I, a letter written by Zebrasky on November 9, 2005, includes contradictory language as to whether or not the items listed in the November 2005 final billing statement were completed.

{¶67} Additionally, there was conflicting testimony about what work was supposed to have been done on the Ferrari. Valdes claimed that Catz performed more work than Valdes asked for, and felt he shouldn't be obligated to pay for service that he did not want. Valdes also claimed that some items on the invoice were for rebuilds and rust removal that were only needed due to Catz's failure to appropriately store and maintain the Ferrari and its parts.

{¶68} The court referred to printed invoices in Defendant's Exhibit 18 to find that there was sufficient proof to require Valdes to pay $1,790.68 in compensatory damages. The trial court also noted that Catz prevented Valdes from inspecting the Ferrari prior to trial. Thus, primarily due to the parties' problems with discovery, little proof was presented as to what improvements had been made upon the car between July and November 2005, beyond relatively unsupported claims by Catz.

{¶69} Though the evidence indicates that Catz completed a certain amount of work on the Ferrari, the testimony and exhibits provided inconclusive and sometimes contradictory information as to what work was completed on the Ferrari, and whether it occurred between July and November of 2005. The trial court relied on the only competent credible evidence available to find $1,790.68 in damages. Therefore, the trial court could have found that Catz did not meet its burden of proof of showing the costs incurred in restoration of the Ferrari between July and November 2005.

{¶70} Based on the evidence presented, the trial court did not lose its way in determining that Catz had not proven the majority of its damages by a preponderance of the evidence. Therefore the trial court's decision was not against the manifest

weight of the evidence, and Catz's fourth assignment of error is meritless.

Conclusion

{¶71} The trial court erred as a matter of law by relying on Zebrasky's alleged oral acknowledgements to extend the statute of limitations on the 1991 loan. Zebraskys first assignment of error is meritorious and the October 24, 2007 judgment of the trial court with regard to Zebraskys repayment of funds to Valdes is reversed and vacated.

{¶72} The trial court's decisions that Catz had breached the Jaguar service contract, and that Catz had not met its burden of proof for most of the claimed Ferrari damages, were not against the manifest weight of the evidence. Catz's second and fourth assignments of error are meritless.

{¶73} Finally, the trial court's award of damages on the Jaguar service contract placed Valdes in a better position than he would have been in had the contract not been formed. Catz's third assignment of error is meritorious. The October 24, 2007 judgment of the trial court with regard to this issue is reversed and remanded to the trial court to determine the difference between the condition of the OTS at the time of contract formation and at present, and to reallocate the damages accordingly, in order to return Valdes to the status quo ante.

{¶74} Accordingly, the October 24, 2007 judgment of the trial court is affirmed in part, vacated in part, reversed in part, and remanded to the trial court for further proceedings. Further, the March 18, 2008 judgment of the trial court is vacated.

Vukovich, P.J., concurs.

Donofrio, J., concurs.