[Cite as *All Seasons Contracting, Inc. v. Areway, Inc.*, 2005-Ohio-6488.]

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT
COUNTY OF CUYAHOGA
No. 86003

ALL SEASONS CONTRACTING, INC.,	:	
Plaintiff-Appellant/ Cross-Appellee	:	JOURNAL ENTRY
vs.	:	AND
AREWAY, INC.,	:	OPINION
Defendant-Appellee/ Cross-Appellant	:	
	:	
DATE OF ANNOUNCEMENT OF DECISION		DECEMBER 8, 2005
	:	
	:	
CHARACTER OF PROCEEDING	:	Civil appeal from Common Pleas Court
	:	Case No. CV 472545
JUDGMENT	:	AFFIRMED
DATE OF JOURNALIZATION	:	

APPEARANCES:

For Plaintiff-Appellant/
Cross-Appellee:

TOM J. KARRIS
7835 Freeway Circle
Middleburg Heights, OH 44130

HUNTER SCOTT HAVENS
JEFFREY S. MOELLER
Hermann, Cahn & Schneider, LLP
1301 East Ninth Street
Suite 500

Cleveland, Ohio 44114

For Defendant-Appellee/
Cross-Appellant:

ROBERT W. MCINTYRE
THOMAS M. HORWITZ
Mcintyre, Kahn & Kruse Co., LPA
Galleria & Towers at Erieview
1301 East Ninth St. #2200
Cleveland, Ohio 44114

MARY EILEEN KILBANE, J.:

{¶ 1} All Seasons Contracting, Inc. ("All Seasons") appeals from an order of the trial court that granted summary judgment in favor of Areway Inc. on a three-year landscaping contract. All Seasons asserts that it presented sufficient evidence of damages to survive summary judgment. We affirm.

{¶ 2} The record reveals that in March 2001, All Seasons submitted a landscaping bid to Areway agreeing to perform landscaping services from 2001 through 2003. The proposal also included services for the individual residences of Areway's owners: John and Gregg Hadgis.

{¶ 3} Shortly after the proposal, Areway accepted the bid and the parties entered into a landscaping contract for the years 2001, 2002, and 2003. Areway was to pay $35,859 for each year of the contract, for a total value of $107,568.

{¶ 4} During the first year of the contract, Areway allegedly experienced problems with All Seasons' service, including the

destruction of a residential sprinkler system, over-fertilization of lawns, the mistaken removal of decorative ground cover, and the retention of a $5,000 blueprint for one of the residential homes. As a result, Areway hired Barnes Nursery to correct the landscaping problems, and hired a sprinkler company to repair the damaged sprinklers. As a result of these additional charges, Areway withheld $1,915.30 from All Seasons' final invoice charges. For contract year 2001, Areway then paid All Seasons $33,941.00—the contracted for amount, minus the $1,915.30 for repairs.

{¶ 5} In March 2002, Areway wrote to All Seasons terminating its landscaping services and citing deficiencies in All Seasons' performance. Three months later, in June 2002, All Seasons filed suit seeking the full amount remaining on the contract. Areway then filed a counterclaim alleging that All Seasons committed fraud and breached its contract.

{¶ 6} In February 2003, Areway moved for summary judgment claiming that All Seasons failed to prove actual damages caused by the breach. Areway also submitted counterclaims asserting that All Seasons was responsible for the amount paid to Barnes Nursery for landscaping repairs.

{¶ 7} The trial court granted partial summary judgment for years 2002 and 2003, and denied the motion as to the claims for the 2001 contract year. The court then dismissed Areway's counterclaim. All Seasons appealed from this order, but this court

dismissed the case finding that the grant of partial summary judgment is not a final appealable order.[1]

{¶ 8} The case was returned to the lower court, and a trial was scheduled on the remaining issue of damages for 2001. Prior to the court's ruling, however, the parties entered into an agreed judgment entry with judgment against Areway for $1,915.30. Because judgment on all claims is now final, All Seasons appeals the trial court's order granting summary judgment for contract years 2002 and 2003 in its assignments of error set forth in the appendix to this opinion. Areway cross appeals and claims error in the grant of summary judgment on its counterclaim.

{¶ 9} In both its first and second assignments of error, All Seasons contends that partial summary judgment on its damages claims for contract years 2002 and 2003 was inappropriate since it presented sufficient evidence of such damages during discovery. We disagree.

{¶ 10} Appellate review of summary judgment is de novo. *Village of Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 1996-Ohio-336. The Ohio Supreme Court set forth the appropriate test in *Zivich v. Mentor Soccer Club*, 82 Ohio St.3d 367, 369-370, 1998-Ohio-389, and held:

"Pursuant to Civ.R. 56, summary judgment is appropriate

---

[1]*All Seasons Contracting, Inc. v. Areway, Inc.* (July 27, 2005), Cuyahoga App. No. 84859.

> **when (1) there is no genuine issue of material fact, (2) the moving party is entitled to judgment as a matter of law, and (3) reasonable minds can come to but one conclusion and that conclusion is adverse to the nonmoving party, said party being entitled to have the evidence construed most strongly in his favor. The party moving for summary judgment bears the burden of showing that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law." (Citations omitted.)**

{¶ 11} Once the moving party satisfies its burden, the nonmoving party "may not rest upon the mere allegations or denials of the party's pleadings, but the party's response, by affidavit or otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." Civ.R. 56(E); *Mootispaw v. Eckstein*, 76 Ohio St.3d. 383, 385, 1996-Ohio-389. Doubts must be resolved in favor of the nonmoving party. *Murphy v. Reynoldsburg*, 65 Ohio St.3d. 356, 358-359, 1992-Ohio-95.

{¶ 12} All Seasons sought damages in excess of $75,000 for the alleged breach of contract; however, All Seasons has failed to meet its burden of proof. Under contract law, the doctrine of avoidable consequences requires that the nonbreaching party must avoid those damages that it could have reasonably avoided. *S & D Mechanical Contractors., Inc. v. Enting Water Conditioning Systems, Inc.* (1991), 71 Ohio App.3d 228, 238.

{¶ 13} In its brief, All Seasons claims that "Even if All Seasons is unable to demonstrate, with the evidence proffered, its expected profits and savings from not having to complete the

services for the two years of the contract, the Plaintiff's damages, which are recoverable, are the remaining moneys (sic) owed under the contract." (Appellant's brief at 9). Despite this contention, All Seasons failed to submit any evidence of damages or a showing that it at least attempted to deflect damages that it could have reasonably avoided.

{¶ 14} During the deposition of Mark Fourtounis, owner of All Seasons, Fourtounis stated that although he was aware of Areway's request for the financial statements for both 2001 and 2002 regarding the claim of damages, such statements were not available. Fourtounis then stated that the statements were not finished but that, "I"m sure we'll get to them, yes." (Deposition at 29-30). Further, on All Seasons' answers to Areway's request for production of documents, the corporate financial statements for 2001 and 2002 were listed as "Unfinished."

{¶ 15} While All Seasons further claimed that it had incurred employee and equipment expenses because of breach of contract, neither All Seasons nor Fourtounis could provide sufficient support or documentation as to what expenses were incurred as a result of the breach, which particular employees performed services to the company's detriment, or any other evidence proving resulting damages.

{¶ 16} All Seasons answered the request for production of documents and provided employee check stubs for some of its

employees, but could not provide specific time cards for these employees before or after Areway's alleged breach because it did not keep such records. Therefore, the record is silent as to which employees were hired or retained in furtherance of the Areway contract. Although Areway also requested documentation for materials purchased and supplied for Areway's property for March 2001 to April 2002, All Seasons only provided a plain listing that it "provided herbicides, fertilizers, weed deterrents, tree disease materials ***" and the like without any cost, receipt or further proof of expense or damages.

{¶ 17} All Seasons relies on *Cleveland Co. v. Standard Amusement Co.* (1921), 103 Ohio St. 382, for the proposition that there is no limit on recovery when the prevention of performance is solely defendant's fault. The holding in *Cleveland Co.*, however, states that an injured party may elect to sue for damages or may disregard the contract and sue for the reasonable value of what has been performed. All Seasons chose to sue for damages, yet such a claim is not without a reciprocal burden on summary judgment to set forth specific facts showing that there is a genuine issue for trial.

{¶ 18} Based on this substantial lack of documentation, All Seasons has failed to meet its reciprocal burden of proof or demonstrate that any material questions of fact remain as to any question of damages.

{¶ 19} All Seasons' first and second assignments of error lack

merit.

{¶ 20} In its cross appeal, Areway contends the trial court erred in granting summary judgment on its sole counterclaim. We disagree.

{¶ 21} Again, we review this assignment of error de novo.

{¶ 22} Areway asserts that it is entitled to recover payments it made to Barnes Nursery to repair the damages caused by All Seasons' deficient service performance. Areway, however, submitted insufficient evidence to survive summary judgment.

{¶ 23} Areway asserts that All Seasons agreed to perform landscaping services at the residences of the Areway officers, that it plead in the alternative that it had a contract with All Seasons and that this contract entitled it to recover for payments to Barnes for landscaping services in 2002 and 2003, and finally that it presented sufficient evidence of $5,000 in consequential damages.

{¶ 24} In asserting its damages, Areway claims that it incurred sufficient expenses including: $11,593.45 to Barnes Nursery for landscaping repairs, $450 to repair sprinkler system damages, $6,554 per year for two years to employ a substitute contractor for the 2002 and 2003 seasons, and $5,500 in "administrative expenses" relative to All Seasons' failure to perform under the last two years of the contract.

{¶ 25} With regard to the amount it claims due for sprinkler

damage, the amount of $450 for sprinkler repair appears first in the October 1, 2002 correspondence from attorney Robert W. McIntyre on behalf of Areway to attorneys Thomas J. Karris and Hunter Scott Havens on behalf of All Seasons. (See Motion for Summary Judgment on the Counterclaim of Plaintiff, All Seasons Contracting, Inc. Exhibit 3). While Areway's brief states that it paid $725 to Brooker & Brooker, Inc. for sprinkler repair, and references both Exhibit G of its appellate brief and Exhibit 4, authenticated therein, the corresponding deposition of John Hagdis states:

> **"Q: So you actually had Brooker & Brooker correct the problem?**
> **"A: Well, I don't know if it was Brooker & Brooker. It could have been some other folks that we were using. One of them did fix it though." (Deposition of John Hagdis at 19).**

{¶ 26} The exact figure and who preformed the repairs is both unclear and contradictory throughout the various motions for summary judgment and deposition testimony. Further, any claimed "administrative expenses" also lack supporting documentation.

{¶ 27} According to Gail Chester, CEO of Areway and the company's litigation manager, the administrative expenses consisted of:

> **"A. I believe it was an estimate of what it took to overcome the problems that were incurred in 2001 and obtain a competent replacement contractor.**
> **"Q. What did Areway do – - well, it sounds like there are two elements there. Let me break this up a little bit. What did Areway have to do to, to use your words, overcome the problems encountered in 2001?**
> **"A. I wouldn't have any specific immediate knowledge of**

that. I am sure that it took time and effort on behalf of Areway personnel to monitor what was going on, to communicate, to find a replacement contractor."
(Deposition at 25-26.)

{¶ 28} Such vague reference to an amount certain does not provide sufficient support for this claimed amount due.

{¶ 29} Finally, Areway asserts that it is entitled to recovery for payments to Barnes for landscaping services in 2002 and 2003. Areway specifically notes, however, that it pleads such damages only in the alternative in the event that this court determines that there was an enforceable three-year contract between All Seasons and Areway. Based on our determination that All Season's assignments of error lack the necessary merit to survive summary judgment, we find this portion of Areway's cross-assignment of error moot.

{¶ 30} We find Areway's cross-assignment of error moot on the issue of damages and that it lacks merit on any remaining claims.

{¶ 31} The judgment of the trial court is affirmed.

It is ordered that the parties bear their own costs herein taxed.

This court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the Cuyahoga County Common Pleas Court to carry this

judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

MARY EILEEN KILBANE
JUDGE

JAMES J. SWEENEY, P.J., And

CHRISTINE T. McMONAGLE, J. CONCUR

N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc. App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(E), unless a motion for reconsideration with supporting brief, per App.R. 26(A) is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also, S.Ct.Prac.R. II, Section 2(A)(1).

APPENDIX A

ASSIGNMENTS OF ERROR

"I. GENUINE AND MATERIAL ISSUES OF FACT REMAINED, MAKING THE GRANTING OF SUMMARY JUDGMENT IMPROPER; THEREFORE, THE TRAIL [SIC] COURT ERRED IN GRANTING PARTIAL SUMMARY JUDGMENT FOR CONTRACT YEARS 2002 AND 2003 THEREBY RULING

THAT PLAINTIFF HAD NOT PRESENTED SUFFICIENT EVIDENCE DURING DISCOVERY TO SUPPORT ITS CLAIM FOR DAMAGES.

II. THE TRIAL COURT ERRED IN [SIC] GRANTING OF SUMMARY JUDGMENT ON THE GROUNDS THAT PLAINTIFF HAS NOT PRESENTED, DURING DISCOVERY, SUFFICIENT EVIDENCE TO DEMONSTRATE ITS DAMAGES AS PLAINTIFF INDEED HAD SUFFICIENT EVIDENCE OF DAMAGES TO WHICH IT WAS ENTITLED HEREIN."

CROSS APPEAL

I. THE TRIAL COURT ERRED WHEN IT ENTERED SUMMARY JUDGMENT AGAINST AREWAY'S COUNTERCLAIM.