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**FILLINGER CONSTRUCTION, INC., dba ROOFMASTERS, Plaintiff-Appellee v.
HARLEY J. COON, Defendant-Appellant**

C.A. Case No. 93-CA-0002

**COURT OF APPEALS OF OHIO, SECOND APPELLATE DISTRICT, GREENE
COUNTY**

*1993 Ohio App. LEXIS 4670***September 28, 1993, Rendered**

PRIOR HISTORY: [*1] T.C. Case No. 91-CV-0089

DISPOSITION: The judgment of the trial court will be Reversed.

COUNSEL: DAVID P. WILLIAMSON of BIESER, GREER & LANDIS, 400 Gem Plaza, Third and Main Streets, Dayton, Ohio 45402, Atty. Reg. No. 0032614, Attorney for Plaintiff-Appellee.

KONRAD KUZCAK, 333 West First Street, Suite 236, Dayton, Ohio 45402, Atty. Reg. No. 0011186, Attorney for Defendant-Appellant.

JUDGES: BROGAN, GRADY, YOUNG

OPINION BY: BROGAN

OPINION

OPINION

BROGAN, J.

Harley J. Coon appeals from the judgment of the Greene County Court of Common Pleas rendered in favor of Fillinger Construction, Inc., doing business as Roofmasters.

Coon advances seven assignments of error, asserting that the trial court committed prejudicial error (1) by failing to conclude what documents, if any, constituted the complete and exclusive statement of the agreement between the parties; (2) in entering a finding of fact that "plaintiff was unable to obtain white roofing material within the time frame of job completion, so black material was ordered;" (3) by awarding judgment for the plaintiff absent proof that the terms of the contract were being performed in a workmanlike manner; (4) in determining "* * * the contract is [*2] silent as to the color of the roofing material;" (5) in determining "the parole [sic] evidence offered by defendant Coon to vary or contradict the terms of the agreement was insufficient to overcome the provisions of the contract and parole [sic] evidence offered by the plaintiff;" (6) in failing to determine that the plaintiff-appellee had breached an accord and satisfaction; and (7) in concluding, as a matter of law, that the damages awarded to the plaintiff-appellee were directly caused by interference with the contract (conclusion of law no. 4).

Due to their substantial similarity, and in the interest of judicial economy, some of these assignments of error will be considered

together.

The facts of this case are as follows.

On August 23, 1991, Coon contacted Fillinger Construction, Inc., dba Roofmasters (hereinafter referred to as Roofmasters) by phone in order to obtain an estimate for the replacement of a portion of a roof on the commercial building located at 4520 Industrial Lane in Greene County, Ohio. During or immediately after the phone call, David Fillinger, a salesperson for Roofmasters, filled out the top portion of a proposal sheet, in triplicate, with Coon's name, [*3] phone number, address, job location, and the date received.

Two to three weeks after Coon initially contacted Roofmasters, David Fillinger met with Coon to inspect the premises and draw up an estimate. Fillinger returned to his office and completed the estimate on the original proposal sheet, which later became the final contract. On September 30, 1991, Fillinger delivered the final contract to Coon.

The contract provided that Roofmasters would repair the roof by applying a Manville rubber roof system. The total contract price was \$ 18,606. Although the contract did not specify the color of the roofing material to be applied, David Fillinger admitted that Mr. Coon specified that a white roofing material was to be applied. The center portion of the roof was in need of repair while the remainder of the roof was already white. Coon also testified he told Fillinger he needed a white roof to insure that machinery inside the building would not be damaged by the heat generated from a black roof.

Fillinger testified he agreed that Roofmasters would install a white roof if it was available when Roofmaster's was ready to proceed on the roofing job. Specifically, Fillinger testified at page [*4] 29 of the transcript:

A. I mentioned to Mr. Coon -- I

said, you know, white -- the white is something that -- I will do my best to get it up there for you but the possibility of that being -- at that time he was having severe leaking in the building. *At that time I told him if I could not get the white, would it be possible to go with the black at that point in time because realizing how severe his leaks were, he said at that point in time, that he had no problem with that.* (Emphasis ours).

Fillinger testified he informed Coon that the white roofing material would not be available for six to eight weeks, but he admitted Roofmasters began work on Coon's roof a few weeks before the eight weeks allotted for receiving the white roofing material. (Tr. 31). Fillinger testified the roofing was begun with black material because Roofmasters supplies did not have the white material on hand.

Roofmasters began work on Coon's roof on November 18, 1991 and two days later when Coon noticed Roofmasters subcontractor's applying black roofing material he ordered them to stop the roofing. Before the roofers left the job site, they waterproofed the roof to protect it from the elements.

[*5] The roofing was completed by Nationwide Roofing who applied white roofing material for approximately the same contract price.

On February 11, 1992, Roofmasters filed a complaint against Coon for breach of contract, quantum meruit, and unjust enrichment.

Coon filed an answer on February 24, 1992, generally denying the allegations of the complaint and setting forth several affirmative defenses. Coon also filed a counterclaim for damages to his premises, asserting that Roofmasters left areas of his roof unprotected

from the elements. A third party complaint against Modern Builders Supply was dismissed by the trial court on October 29, 1992.

Coon filed a motion to file an amended answer and counterclaim on November 3, 1993. The trial court permitted the amendment "only as to the value of the lien presently against the property and to show the cost incurred to complete and repair the roof subsequent to the * * * withdrawal of the Plaintiff from the contract." A bench trial was held on November 12, 1992. On December 8, 1992, the trial court filed a memorandum decision, finding that Roofmasters had incurred damages in the amount of \$ 12,410.00; 4,278.74 for loss of material, \$ 1,150.00 [*6] for loss of labor, and \$ 6,881.26 for loss of profit. The judgment entry was filed on December 23, 1992.

Coon filed a notice of appeal from the trial court's judgment on January 5, 1993. He also filed a motion for an order staying execution pending appeal and an application for a supersedeas bond, both of which remain pending.

In his first, fourth, and fifth assignments of error, Coon asserts that the trial court committed prejudicial error by failing to conclude what documents, if any, constituted the complete and exclusive statement of the agreement between the parties, by determining " * * * the contract is silent as to the color of the roofing material," and in determining "the parole [sic] evidence offered by defendant Coon to vary or contradict the terms of the agreement was insufficient to overcome the provisions of the contract and parole [sic] evidence offered by the plaintiff."

The contract signed by Coon provides, *inter alia*, for the application of "Manville rubber roof system to roof deck (20 yr)." The document makes no reference to roof color. However, at trial, Coon testified that the parties orally agreed that a white rubber roof would be installed. Fillinger's [*7] testimony did not

contradict Coons' except for his additional understanding that should the necessary materials for a white roof not be delivered on time, then black rubber could be substituted.

It is apparent from the trial court's memorandum that it considered the contract to be the sole writing evidencing a contract between the parties. It is also apparent that the trial court considered both parties' parole testimony in determining that "at the time of execution of the contract, Defendant Coon requested a white roof, but if white was not available, black would be acceptable."

Parole evidence "which is not contradictory to the terms of a contract is admissible to illuminate the circumstances under which the contract was executed, and to explain the intent of the parties as reflected in the contract." *Fodor v. First Natl. Supermarkets* (July 5, 1990), Cuyahoga App. No. 58587, unreported, citing *Third Natl. Bank of Cincinnati v. Laidlaw* (1912), 86 Ohio St. 91, 98 N.E. 1015.

The parole evidence rule is set forth in *R.C. 1302.05* as codified at UCC 2-202, and provides that:

Terms * * * which are * * * set forth in a writing intended by the parties as a final expression [*8] of their agreement with respect to such terms as are included therein may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement but may be explained or supplemented:

* * *

(B) by evidence of consistent additional terms unless the court finds the writing to have been intended also as a complete and exclusive statement of the terms of the agreement.

See, also, *Camargo Cadillac Co. v. Garfield Enterprises*. (1982), 3 Ohio App.3d 435, 445 N.E.2d 1141.

In this case, the phrase "Manville rubber roof system" is ambiguous, and, as such, the admission of parol evidence was necessary to determine the parties' intent. Both parties' testimony revealed that Coon wanted a white roof on his building. The only dispute was whether Coon also agreed to the installation of a black roof should the order for white materials not arrive in time.

After considering the parol testimony of both parties, the trial court held that Coon's parol testimony "was insufficient to overcome the provisions of the contract and parole [sic] evidence offered by the plaintiff." Thus, the trial court found that Coon's assertion that he did not want a black roof under [*9] any circumstances was not sufficient to overcome the contract's silence as to color combined with Roofmasters' testimony that a black roofing materials could be substituted for the white.

"The law in Ohio is clear that an appellate court will not disturb the findings of the trier of fact unless they are against the manifest weight of the evidence. *Shady Acres Nursing Home, Inc. v. Rhodes* (1983), 7 Ohio St.3d 7, 8, 455 N.E.2d 489. We find that the trial court's judgment was supported by competent, credible, evidence and agree that the contract signed by Coon constituted the final expression of the agreement of the parties. *C.E. Morris Co. v. Foley Construction Co.* (1978), 54 Ohio St.2d 279, 376 N.E.2d 578, syllabus. Therefore, Coon's first, fourth, and fifth assignments of error are overruled.

In his second assignment of error, Coon asserts that the trial court committed prejudicial error in entering a finding of fact that "plaintiff was unable to obtain white roofing material within the time frame of job completion, so black material was ordered."

Roofmasters testified that it orders all its

building materials from a single supplier, Modern Builders Supply, Inc. Mark Fillinger [*10] testified that he ordered white roofing for Coon's project but that Modern Builders was unable to procure it within the time frame specified necessitating the use of black materials. Fillinger admitted that no effort was made to acquire the materials from another supplier because it could not be obtained elsewhere at the same price. Tr. 100.

Generally, performance of a contract will not be excused because performance may be more expensive, burdensome, or difficult. *The London & Lancaster Indemnity Co. of America v. Columbiana County* (1923), 107 Ohio St. 51, 140 N.E.2d 672.

Gerald Jayne, owner of Nationwide Roofing, testified that white roofing material is readily available in the roofing industry. He testified there are ten to fifteen marketers of white roofing material and three or four sources for it in the Dayton area. He stated that he ordered the white roofing material when he obtained the Coon roofing job and received delivery in two or three days.

David Fillinger admitted that he never made any inquiry from any other supplier as to the availability of the white roofing material. Coon could reasonably expect that "availability" of the roofing material to Roofmaster meant [*11] more than whether it was available only through Modern Builders Supply. R.C. 1301.09 provides that every contract imposes an obligation of good faith in its performance or enforcement. See *Huntington Natl. Bank v. Elkins* (1990), 53 Ohio St.3d 79, 559 N.E.2d 456. Accordingly, appellant's second assignment is sustained.

In his third assignment of error, Coon asserts that the trial court erred by awarding judgment for the plaintiff absent proof that the terms of the contract were being performed in a workmanlike manner.

The contract between the parties contained a clause stating that "all work to be completed

in a workmanlike manner according to standard practices." The trial court made no finding of fact or conclusion of law with respect to Roofmasters' performance.

We agree with Coon's assertion that there is a duty imposed upon a builder-vendor of a real-property structure to perform the work in a workmanlike manner. See *Mitchem v. Johnson* (1966), 7 Ohio St.2d 66, 69, 218 N.E.2d 594.

Gerald Jayne, who completed the roofing project after Roofmasters left the site, testified that Roofmasters failed to perform certain necessary preliminary steps prior to the installation of [*12] the roof. The appellee presented no evidence to rebut Jayne's testimony. We agree with the appellant that there was no substantial evidence to support a finding that the contract was performed in workmanlike manner. The appellant's third assignment of error is sustained.

In his sixth assignment of error, Coon asserts that the trial court committed prejudicial error in failing to determine that the plaintiff appellee had breached an accord and satisfaction.

Specifically, Coon argues that the trial court's findings of fact and conclusions of law make no reference to the November 26, 1991 accord and satisfaction which is made up of exhibits E and F. Tr. 178. Coon asserts that Roofmasters repudiated this accord and satisfaction with the message left on Coon's answering machine combined with Roofmasters' failure to send a crew to the premises between November 26 and December 2.

Four elements must be present to have an accord and satisfaction: (1) proper subject matter; (2) competent parties; (3) mutual assent, and (4) consideration. *Shady Acres Nursing Inc., supra, at 8*. "As an accord and satisfaction is the result of an agreement between the parties, it cannot be consummated unless [*13] the creditor accepts the lesser amount with the intention that it constitutes a

settlement of the claim. *Id. at 8*.

Exhibits E and F consist of the following letter from Roofmasters' counsel to Coon's counsel.

Following-up our telephone conversation on Tuesday, November 26, 1991, it is my understanding that my client will continue to work on your client's roof. The work will include the applying of a white painted surface to the roof. However, as you and I discussed, it is my client's position that your client agreed that a white rubber roof may not be available within the time period he was demanding that the construction take place. My client's position is that your client agreed that a black rubber roof could substitute for the white. As I explained to you, my client could not obtain the white rubber roof. Your client, upon learning this, stopped them from doing any further work. It is for this reason that the work on the roof ceased. My client suggested that they paint the roof white, but that your client would have to pay the costs thereof. Your client stated that he would not pay any further amount. It is our belief that your client is, therefore, in breach of the agreement. [*14] Accordingly, upon completion of the roof, my client will seek reimbursement for the cost of the white paint, which was not part of the parties' agreement. It is my understanding that despite these representations, your client will not prevent the work. It is also my understanding that you and I agreed that the fact that your client is allowing the work to proceed, and the fact that my client is going

forward with the work, does not constitute a waiver of my client's claims and does not constitute a waiver of your client's defenses as to my client's claim for reimbursement for the white paint.

Finally, it is my understanding that your client will permit the roof work to continue even though my client cannot finish the work before the end of the work day on November 27, 1991.

Exhibit T consists of a message from Roofmasters to Coon on his answering machine.

Hello, Mr. Coon, this is Tom with Roofmasters Company. I'm trying to place a call back with you so that I could get some things settled on this. Mark is the only person that has authorization to have anything done on that roof. I can't get ahold of him. I feel that he's -- I think that he's gone out of town here for [*15] the weekend. The earliest I can get anything done on that is Monday. I know that our lawyers are handling this and unfortunately right now at this point I'm not authorized to move on this without conferring with Mark and the attorneys. I guess I will get back with you the first thing Monday morning, one of us will. Thank you very much.

We find that this letter and the subsequent telephone message constitutes evidence of the parties attempt to settle their dispute rather than an accord and satisfaction. The letter simply reiterates the facts of the case and describes Coon's agreement not to interfere with

Roofmasters finishing of the project and Roofmasters' statement that it would seek reimbursement for painting the roof.

The four elements necessary for an accord and satisfaction are not present in this agreement. Accordingly, this assignment of error is overruled.

In his final assignment of error, Coon asserts that the trial court committed prejudicial error in concluding, as a matter of law, that the damages awarded to the plaintiff-appellee were directly caused by interference with the contract.

The trial court found, and the evidence supports the finding, that Coon orally [*16] ordered Roofmasters' workmen off the site and that Roofmasters understood that it was not permitted to continue the roofing work. The trial court stated in its fourth conclusion of law "the ordering of Plaintiff from the job by Defendant was an interference with the contract and directly caused the damages to Plaintiff."

Coon interprets the trial court's holding as a finding that Coon committed the intentional tort of interfering with a contract. Coon asserts that he ordered Roofmasters off the site because they were installing the wrong color roof and the work was being performed in an unworkmanlike manner. Therefore, he argues there was no interference with the contract.

Since we have concluded that the plaintiff breached the parties' contract by installing a black roof without determining whether a white roof was reasonably available, and in failing to perform the contract in an workmanlike manner, the trial court erred in awarding damages to the plaintiff-appellee. The appellant's last assignment of error is also sustained.

The judgment of the trial court will be Reversed.

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GRADY, P.J., and YOUNG, J., concur.

