

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

PLUMB LINE BUILDERS, LLC

Appellee

v.

THOMAS PAUL HERTZOG

Appellant

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 1846 MDA 2012

Appeal from the Judgment Entered on September 28, 2012
In the Court of Common Pleas of Schuylkill County
Civil Division at No(s): J-128-2007.

BEFORE: MUNDY, OLSON AND STRASSBURGER,* JJ.

MEMORANDUM BY OLSON, J.:

FILED NOVEMBER 07, 2013

Appellant, Thomas Paul Hertzog, appeals from the judgment entered on September 28, 2012, in favor of Plumb Line Builders, LLC (hereinafter "Plumb Line"). We affirm.

The trial court has ably explained the underlying facts of this appeal.

[On January 12, 2007, Plumb Line filed a Mechanics' Lien claim against Appellant and, on May 8, 2007, Plumb Line filed a complaint, initiating its action to obtain a judgment upon the Mechanics' Lien. Within Plumb Line's pleadings, Plumb Line averred that it had entered into an agreement with Appellant to construct a "single family dwelling and four vehicle garage" on land that was owned by Appellant. According to Plumb Line, it performed and constructed \$110,700.00 of improvements on Appellant's land, but Appellant had refused to pay the sum that was due].

The work [upon] which [Plumb Line based its action] includes excavation work performed by Steven Steiner, an

*Retired Senior Judge assigned to the Superior Court.

excavator retained by [Plumb Line, and] who participated in site selection for a home designed by Scott Becker[. Mr. Becker] drafted plans for [Appellant] for the construction of a large ranch style, single family residence in a somewhat circular shape with an atrium in the middle thereof[. Mr. Steiner] then performed excavation services pursuant to Mr. Becker's design. . . .

[Plumb Line's] claim also [sought] compensation for services performed by Marcus Gehman[. Mr. Gehman] performed masonry work on the premises by pouring the foundation, including footers and foundation walls, for the premises. . . .

[Plumb Line's] claim also [sought] compensation for certain services performed by [it,] such as installing radon pipe, [installing] drains, and "stoning-in" [the] work[. Plumb Line sought compensation for all work done] prior to [mid-October] 2006, when the parties parted ways[] and no further work on the premises was performed by [Plumb Line or its] subcontractors.

[Plumb Line claimed that all of the above work was performed in accordance with] an oral agreement between the parties in which [Plumb Line] agreed to perform the work . . . and [Appellant] agreed to pay for [the work]. No written contract between the parties was ever executed, although one was discussed. . . .

[In defense against Plumb Line's claim, Appellant argued] that there was never a "meeting of the minds" between the parties[] and, as such, any work performed by [Plumb Line and its] subcontractors was at [Plumb Line's] own risk. [Appellant] also allege[d] that the work was not performed in a workmanlike and proper manner.

A non-jury trial was held on April 19, 2012, May 9, 2012, and June 15, 2012, [and during this trial, the following individuals testified]: Scott Steiner, the excavator; Marcus Gehman, the masonry subcontractor; Scott Becker, the individual who designed the plans for the construction of the residence at [Appellant's] request; Joan Zimmerman, [Appellant's] sister to whom he had granted [p]ower of [a]ttorney to act on his behalf; [Philip Lapp, principal

member of Plumb Line;] Glenn P. Powell, project manager for Powell Engineering, who testified on [Appellant's] behalf as to a report prepared by Robert Schaeffer, an engineer who works with Powell[; and Appellant]. . . .

There is no dispute as to the fact that Mr. Steiner and Mr. Gehman were subcontractors retained by [Plumb Line] to perform excavation and masonry services and that they performed those services. The evidence also established that the parties had a disagreement about the project in late September [] 2006 and that, in mid-October [] 2006, all work on [Appellant's] property ceased after [Plumb Line] was told by [Appellant], via e-mail, to discontinue all work on the premises and to forward an invoice for services performed to date to [Appellant]. [Plumb Line] did so, but [Appellant did] not pay the bill. . . . The bill was for \$110,700.00.

The evidence further established that [Appellant] is a disabled [Vietnam War] veteran who resides in Virginia but had been born and raised in Berks County, Pennsylvania, and was desirous of constructing a single family home in either northern Berks County or southern Schuylkill County which would provide for his special needs. He is wheelchair bound and requires kidney dialysis. As a disabled veteran, any residence he would build needs to be approved by the Veteran's Administration. . . . [Appellant] desire[d] to construct the . . . home [in Pennsylvania] so that he, his mother, his sister, and his sister's boyfriend could reside there. . . .

[Since Appellant is disabled and lives hours away from Pennsylvania, Appellant executed a power of attorney, wherein Appellant designated his sister, Joan Zimmerman, to act as his agent. The power of attorney authorized Ms. Zimmerman to "transact any and all of [Appellant's] business and do and perform all things and acts relating to [Appellant's] property, real or personal, tangible or intangible." Appellant's General Power of Attorney, dated February 6, 2006, at 1. Further, the power of attorney declared that Ms. Zimmerman had "full power and authority to: Execute upon such terms and conditions as [she] may deem proper all deeds, contracts, checks and other drafts, endorsements, negotiable instruments, guaranties, leases,

releases, disclaimers, waivers, bills of sale and other legal instruments of every kind and character[.]” ***Id.***]

[According to Appellant, in 2006, he “made a decision” to purchase the five acre parcel of property in Schuylkill County, Pennsylvania from Philip Lapp, the principal member of Plumb Line. In accordance with the power of attorney, Ms. Zimmerman attended the real estate closing in Pottsville, Pennsylvania, in May 2006. During the closing, Ms. Zimmerman signed, on behalf of Appellant, an agreement of sale. The agreement provided that, if Appellant chose to build a house on the land, Appellant was “duty bound to use [Plumb Line] as [his] builder for the first three years of [his] ownership.”]

[Shortly after closing, either Appellant or Ms. Zimmerman contacted Mr. Lapp and informed Mr. Lapp that they “were interested in having [Plumb Line] do the construction of a residence for them.” Mr. Lapp referred them to a draftsman named Scott Becker, and Appellant chose to retain Mr. Becker as the draftsman for the house. According to Mr. Lapp: “at that point I . . . left it up to [Mr. Becker, Appellant, and Ms. Zimmerman] to come up with the plans and once the plans were completed, then [Plumb Line] would step back in to the picture again to proceed with the building.”]

Mr. Becker’s plans were submitted to the Washington Township authorities for approval. Formal approval of the plans was given by the Township on October 5, 2006. . . .

Prior to the formal final approval, the Township had given [Plumb Line] verbal approval to commence the excavation and masonry work, which the Township engineer inspected and approved. During a telephone call between the parties, [Appellant] directed [Plumb Line] to begin the foundation work. This communication took place at the end of August [] 2006. Even though [Appellant] repeatedly changed the ultimate plans for [the] construction of the home, the excavation and masonry work did not involve any changes, so the parties agreed to commence that portion of the project so as to get the project “under roof” before the winter season made excavation and masonry work difficult. [Appellant] was anxious to move the project ahead because

he desired completion of the home by late 2006 or early 2007. [Plumb Line] was also anxious for the work because it was a "slow time" for construction. Thus, they agreed to do the excavation and masonry work in the absence of a formal written agreement which they continued to discuss.

[The trial court concluded that Plumb Line member, Philip Lapp,] credibl[y testified] that [Appellant] did not inform [Mr. Lapp] that a written contract had to be in place before work began. To the contrary, both parties were eager to begin work on the project. . . .

During the excavation and masonry work, Ms. Zimmerman visited the premises on several occasions and never directed [Plumb Line] to discontinue that work. On September 21, 2006, [Appellant] "suggested" that [Plumb Line] cease work and forward an invoice to him. On September 25, 2006, [Plumb Line] forwarded revisions to the proposed contract to [Appellant] and indicated that [it] would stop work until a written contract was signed. [Plumb Line] then ceased work other than completing what had already been started and advised [Appellant] and his sister about the need to protect the foundation from weather damage during the coming winter season. It was after this, on October 10, 2006, that [Appellant] forwarded to [Plumb Line] a letter informing [it] about the necessity of Veteran's Administration approval. [Indeed, although Appellant claims that it informed Plumb Line of the necessity for Veteran's Administration approval on September 27, 2006, at that time Appellant] had [only] informed [Plumb Line] that [the] contract provisions needed Veteran's Administration approval[. The contract provisions did not have anything] to do with the building's foundation[. It was not] until October 10, 2006 that [Appellant] informed [Plumb Line] of the necessity of [Plumb Line] becoming a Veteran's Administration approved contractor, which requirements [Plumb Line] fulfilled several days later. . . .

[Plumb Line] discontinued all work on October 15, 2006, after completing the masonry work that had been in progress. [Plumb Line] informed [Appellant] of the necessity of completing that work before leaving, and [Appellant] directed [Plumb Line] to complete the foundation before discontinuing the project. . . .

[Appellant] did not protect the premises from the ravages of the weather. Mr. Powell did not inspect the premises until December of 2007, after it had been exposed to the elements unprotected for over a year. Mr. Powell testified that he found defects in the work performed on the project – some of which involved failure to complete work such as completing the drainage system [and] removing a dirt embankment[. Mr. Powell also] testified that a landscape architect would be needed to divert water around the foundation. He [further] testified as to observing cracks in the cement work. He admitted that “shrinkage cracks” were normal and do not affect the structural integrity of the masonry work[,] but also admitted that leaving the foundation unprotected could be consistent with the cracks he observed. He was unfamiliar with the fact that the engineer for Washington Township had approved the excavation and foundation work, admitted that the Township engineering firm was a reputable one, and that many of his criticisms involve the fact that the job had not been completed. He testified that the drain work was not completed, but the drains were onsite. On cross-examination, he added that he is not an engineer himself but a project manager. . . .

[The trial court found] credible the testimony of Mr. Steiner, Mr. Gehman, and [Plumb Line member Philip Lapp,] to the effect that the excavation, masonry, and drainage work that was done had been performed properly and in a workmanlike manner and that the reason the job was not completed was because [Appellant] directed [Plumb Line] to discontinue the project and vacate the premises.

Trial Court Opinion, 7/24/12, at 1-6.

On July 24, 2012, the trial court rendered its verdict, finding “in favor of [Plumb Line] and against [Appellant] in the amount of \$110,770.00.”¹ Verdict, 7/24/12, at 1.

On August 2, 2012, Appellant filed a timely post-trial motion. Within this post-trial motion, Appellant claimed that he was entitled to a judgment notwithstanding the verdict (“JNOV”), because there was insufficient evidence to support the trial court’s conclusion that there was an oral contract between Appellant and Plumb Line. Appellant’s Post-Trial Motion, 8/2/12, at 1. In the alternative, Appellant claimed that he was entitled to a new trial, as the trial court’s finding of an oral contract was against the weight of the evidence. ***Id.*** at 2.

Following oral argument, the trial court entered an order denying Appellant’s motion for post-trial relief and entering judgment in favor of Plumb Line. The trial court’s order reads:

AND NOW, this 28th day of September, 2012, [Appellant’s] Motion for Judgment Notwithstanding the Verdict is DENIED and DISMISSED. The Motion in the alternative for a New Trial is deemed MOOT as having been WITHDRAWN. Judgment is ENTERED in favor of [Plumb Line] in the amount of the verdict.

Trial Court Order, 9/28/12, at 1.

Appellant filed a timely notice of appeal on October 22, 2012.

¹ We note that an action to obtain judgment on a mechanics’ lien is an action *in rem*, not a personal action upon a contract. ***Hoffman Lumber Co. v. Mitchell***, 85 A.2d 664, 667 (Pa. Super. 1952).

Quoting Appellant's Pennsylvania Rule of Appellate Procedure 2116 "statement of question involved," Appellant raises the following claim:²

Whether the trial court's decision in this case was based upon insufficient evidence and/or was against the weight of the evidence presented at trial?

Appellant's Brief at 2.

At the outset, we note that – although Appellant's Rule 2116 statement declares that the trial court's verdict was both unsupported by and against the weight of the evidence – the argument section of Appellant's brief argues only that the evidence was insufficient to support the trial court's verdict. Appellant's Brief at 5-15. Moreover, the trial court's September 28, 2012 order memorializes the fact that, during oral argument on Appellant's post-trial motion, Appellant withdrew his weight of the evidence claim. Trial Court Order, 9/28/12, at 1. As such, Appellant has waived any claim that the verdict was against the weight of the evidence. Pa.R.A.P. 302(a) ("[i]ssues not raised in the lower court are waived and cannot be raised for the first time on appeal").

Broadly stated, Appellant claims that the trial court erred in denying his motion for a JNOV, as there was insufficient evidence to establish that Appellant and Plumb Line entered into an oral contract.^{3, 4} This claim fails.

² The trial court did not order Appellant to file a concise statement of errors complained of on appeal, pursuant to Pennsylvania Rule of Appellate Procedure 1925(b).

As we have explained,

[a] JNOV can be entered upon two bases: (1) where the movant is entitled to judgment as a matter of law; and/or, (2) the evidence was such that no two reasonable minds could disagree that the verdict should have been rendered for the movant. When reviewing a trial court's denial of a motion for JNOV, we must consider all of the evidence admitted to decide if there was sufficient competent evidence to sustain the verdict. In so doing, we must also view this evidence in the light most favorable to the verdict winner, giving the victorious party the benefit of every reasonable inference arising from the evidence and rejecting all unfavorable testimony and inference. Concerning any questions of law, our [standard] of review is [*de novo*]. Concerning questions of credibility and weight accorded the

(Footnote Continued) —————

³ Our caselaw holds that, "to preserve the right to request a JNOV post-trial, a litigant must first request a binding charge to the jury or move for [a] directed verdict [or a compulsory nonsuit] at trial." **Thomas Jefferson Univ. v. Wapner**, 903 A.2d 565, 570 (Pa. Super. 2006) (internal quotations and corrections omitted); **Estate of Hicks v. Dana Companies, LLC**, 984 A.2d 943, 951 n.3 (Pa. Super. 2009) (same); **Bennyhoff v. Pappert**, 790 A.2d 313, (Pa. Super. 2001) (post-trial motion for a JNOV is preserved at trial by filing "a motion for nonsuit or directed verdict"); **see also Joseph v. Scranton Times, L.P.**, 959 A.2d 322, 334 (Pa. Super. 2008) (following a bench trial, the appellant filed a motion for a JNOV; this Court stated that "[a]ppellants preserved their right to seek a JNOV by making an oral motion for directed verdict at the close of all the evidence presented"). Here, at the close of Plumb Line's case-in-chief, Appellant orally moved for a "directed verdict" and claimed that he was entitled to a judgment in his favor, as there was insufficient evidence to establish the existence of an oral contract. N.T. Trial, 5/9/12, at 141-142; **but see Joseph**, 959 A.2d at 334 (Pa. Super. 2008) ("a directed verdict, by definition[,] is moved for at the close of all the evidence . . . [a] compulsory nonsuit . . . is used to test the sufficiency of the evidence, generally at the close of the plaintiff's case-in-chief"). Appellant has thus preserved the current claim on appeal.

⁴ We note that "[t]he right to file a mechanics' lien must have a contract as its basis." **Murray v. Zemon**, 167 A.2d 253, 255 (Pa. 1961); 49 P.S. § 1201(4) and (5).

evidence at trial, we will not substitute our judgment for that of the finder of fact. If any basis exists upon which the [fact finder] could have properly made its award, then we must affirm the trial court's denial of the motion for JNOV. A JNOV should be entered only in a clear case.

Am. Future Sys., Inc. v. BBB, 872 A.2d 1202, 1215 (Pa. Super. 2005) (internal quotations and citations omitted).

"Before a contract can be found, all of the essential elements of the contract must exist." ***Johnston the Florist, Inc. v. TEDCO Constr. Corp.***, 657 A.2d 511, 516 (Pa. Super. 1995). "Therefore, in determining whether an agreement is enforceable, we must examine whether both parties have manifested an intent to be bound by the terms of the agreement, whether the terms are sufficiently definite, and whether consideration existed. If all three of these elements exist, the agreement shall be considered valid and binding." ***Id.***

With respect to oral contracts, we note that "[t]he burden of proving an oral contract is on the party seeking to establish it." ***Boyle v. Steiman***, 631 A.2d 1025, 1033 (Pa. Super. 1993). Moreover, we have held:

A verbal agreement differs from a written one in that when construing a written contract all negotiations leading up to the contract are presumed to be merged in the writing; moreover, oral testimony is not admissible to explain the written document in the absence of an ambiguity requiring such an explanation. However, when construing an oral contract[,], the words constituting the agreement are merely parts of and imbedded in a general conversation, and the meaning must be interpreted with reference to the circumstances under which the parties contracted in light of the objectives to be accomplished. In cases involving contracts wholly or partially composed of oral communications, the precise content of which are not of

record, courts must look to surrounding circumstances and course of dealing between the parties in order to ascertain their intent.

Id. (internal citations omitted). “[I]n the case of a disputed oral contract, what was said and done by the parties, as well as what was intended by what was said and done by the parties, are questions of fact to be resolved by the trier of fact, in this instance the trial court.” **Johnston the Florist, Inc.**, 657 A.2d at 516.

Within Appellant’s brief to this Court, Appellant generally claims that the evidence was insufficient to establish the existence of an oral contract. However, within the argument section of Appellant’s brief, Appellant limits this claim and argues only: 1) that there was insufficient evidence to establish that Appellant gave Plumb Line “verbal authorization to begin” the excavation and foundation work, and 2) that there was insufficient evidence to support the trial court’s damages award, because Appellant “specifically directed Plumb Line [] to immediately cease all construction work on the property” on September 21, 2012, and yet Plumb Line continued to work until it completed the foundation of the house.⁵ **See** Appellant’s Brief at 5-15.

⁵ Appellant also writes, in conclusory fashion:

Plumb Line [] has failed to [meet] its burden of proving that there was a mutual understanding and, therefore, a “meeting of the minds,” between him and Plumb Line [], that both parties manifested their intent to be bound by the terms of the alleged oral contract, that its terms were

(Footnote Continued Next Page)

Yet, Appellant's claims on appeal immediately fail, as Philip Lapp – the principal member of Plumb Line – **specifically testified**: 1) that **Appellant verbally authorized** Mr. Lapp to begin and complete the excavation and foundation work, and 2) that, after Appellant wrote to Mr. Lapp and "suggested" that Mr. Lapp stop the work, Appellant spoke to Mr. Lapp over the telephone and **Appellant told Mr. Lapp to "finish[] the foundation . . . and then stop[the] work."** **See** N.T. Trial, 5/9/12, at 72 (Mr. Lapp testified: "I know prior to starting the project, [Appellant] and I had some phone conversations about the project and about getting it started and as far as the timeline and whether we were okay to go ahead and he had given
(Footnote Continued) _____

sufficiently definite so that it could be enforced and that there was a mutuality of consideration, to support the [t]rial [c]ourt's finding of an express oral contract.

Appellant's Brief at 14 and 15.

As was stated in the body of this memorandum, this Court has identified only two claims that Appellant has supported with argument: 1) that there was insufficient evidence to establish that Appellant gave Plumb Line "verbal authorization to begin" the excavation and foundation work, and 2) that there was insufficient evidence to support the trial court's damage award. **See supra** at **10-11. With the exception of these two claims, Appellant has not specified or identified: how or where the parties failed to reach a "mutual understanding," what particular contract term was "insufficiently definite," or where the "mutuality of consideration" failed. **See** Appellant's Brief at 1-15. Since "a claim that is undeveloped and unsupported by relevant authority [is] waived," we conclude that Appellant has preserved only his claim: 1) that there was insufficient evidence to establish that Appellant gave Plumb Line "verbal authorization to begin" the excavation and foundation work, and 2) that there was insufficient evidence to support the trial court's damage award. **Piston v. Hughes**, 62 A.3d 440, 444 (Pa. Super. 2013).

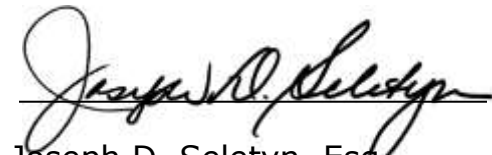
me verbal approval over the phone that, yes, the foundation was correct. There was no more changes going to be done on the foundation and that we could get started with that.”); N.T. Trial, 5/9/12, at 110 (Mr. Lapp testified that he began work “[i]n the absence of a written contract but with a verbal agreement from [Appellant]”); N.T. Trial, 5/9/12, at 111 (Mr. Lapp testified that he and Appellant spoke on the telephone and Appellant provided Mr. Lapp with verbal authorization “to proceed in the absence of a written contract”); N.T. Trial, 5/9/12, at 127 (Mr. Lapp testified that he “was confident in going forward with construction even though there wasn’t a written contract” because “we had a contract at that point and I wasn’t under the impression that it wouldn’t take much to resolve finishing that contract. So, therefore, I did not have any concerns about it, no.”); N.T. Trial, 5/9/12, at 98 (Mr. Lapp testified that, after Appellant “suggested” that he stop work, Appellant spoke to Mr. Lapp over the telephone and told Mr. Lapp to “finish[] the foundation . . . and then stop[] work” until the changes to the interior of the house were completed); N.T. Trial, 5/9/12, at 136 (Mr. Lapp testified that, after being told to stop his work, he spoke with Appellant and Appellant told him “[t]o complete the foundation up to the point where the walls were completed”).

Within Appellant’s brief to this Court, Appellant acknowledges Mr. Lapp’s testimony. **See** Appellant’s Brief at 7. Appellant simply claims that the trial court should not have believed Mr. Lapp’s testimony, as the testimony “strains credulity.” **Id.** at 11. Yet, in this case, the trial court

specifically concluded that Mr. Lapp was credible. Trial Court Opinion, 7/24/12, at 4 and 6. Moreover, since Appellant is appealing from the denial of his motion for a JNOV, we must “view [all of the] evidence in the light most favorable to [Plumb Line, as] the verdict winner, giving [Plumb Line] the benefit of every reasonable inference arising from the evidence and rejecting all unfavorable testimony and inference.” ***Am. Future Sys., Inc.***, 872 A.2d at 1215 (internal quotations and citations omitted). Given this standard of review – and given the fact that Appellant bases his appellate claim upon the assertion that this Court should overturn the trial court’s credibility determinations – Appellant’s claim on appeal fails as a matter of law.

Judgment affirmed.

Judgment Entered.

A handwritten signature in black ink, appearing to read "Joseph D. Seletyn", written over a horizontal line.

Joseph D. Seletyn, Esq.
Prothonotary

Date: 11/7/2013