

IN THE COURT OF APPEALS OF OHIO  
SIXTH APPELLATE DISTRICT  
OTTAWA COUNTY

Dan Cosic

Court of Appeals No. OT-11-012

Appellant/Cross-Appellee

Trial Court No. 08CV376E

v.

John Kronberg, et al.

**DECISION AND JUDGMENT**

Appellees/Cross-Appellants

Decided: December 14, 2012

\* \* \* \* \*

Richard R. Gillum, for appellant/cross-appellee.

John A. Coppeler, for appellees/cross-appellants.

\* \* \* \* \*

**OSOWIK, J.**

{¶ 1} This is an appeal and cross-appeal from a judgment of the Ottawa County Court of Common Pleas which found that the claimed joint venture agreement between the parties was vague and indefinite and did not constitute an enforceable contract. The trial court also dismissed appellees' counterclaims. For the reasons that follow, the judgment of the trial court is reversed.

{¶ 2} In June 2005, appellant/cross-appellee Dan Cosic, a contractor working in Ottawa County, suggested to appellees/cross-appellants Kronberg, et al., (John Kronberg and his company Hekron Investment, Inc.) that they enter into an agreement to build two “high end” houses on Lake Erie in Ottawa County which they would then sell, sharing the profits equally. The parties agreed that Kronberg would finance the endeavor and pay the subcontractors while Cosic would act as the general contractor.

{¶ 3} The two lots for the project were purchased in June 2005 at a total cost of \$325,000. Construction on the houses began in the fall of 2005. Cosic originally informed Kronberg that construction would take about nine months and that the cost for each home would be about \$450,000. The record reflects that by November 2007 construction was not yet complete. Cosic claimed that subcontractors were not being paid and that they eventually began to work on paying jobs rather than continue to work on this project; Cosic stated that some walked off the job and refused to return, forcing Cosic to find replacements. Although the houses were advertised in a real estate magazine and were listed with a realtor beginning in July 2006 at a reduced price of \$749,000 each, no offers to buy were received at any price during the two years they were actively offered for sale. In late 2007, when a certificate of occupancy was issued for one of the houses, Kronberg told Cosic that he and his wife were going to move into the house to try to spur interest from potential buyers. On January 2, 2008, Cosic filed mechanic’s liens on both houses and the houses were taken off the market. It was around that time that problems with the construction of the homes began to surface, according to

Kronberg, requiring corrections and incurring additional expenses. In 2010, a local contractor who had worked on the houses from November 2007 through January 2009 estimated the potential cost of correcting deficiencies in the two homes was between \$100,000 and \$150,000.

{¶ 4} On July 1, 2008, Cosic filed suit claiming that Kronberg breached the parties' joint venture agreement and that he was entitled to damages equal to the value of the houses minus the cost of purchase and construction; alternatively, Cosic claimed that there had been no meeting of the minds and that he was entitled to the fair value of his services, which was equal to ten percent of the total costs of the project in accordance with their prior course of business, and that Kronberg's actions, including denying the existence of an agreement and moving into one of the homes, constituted a breach of fiduciary duties and good faith. Cosic also prayed that the mechanic's liens be foreclosed upon.

{¶ 5} Kronberg denied having breached the parties' joint venture agreement, claiming that Cosic breached the agreement by failing to perform as required and that Cosic wrongfully filed the mechanic's liens. Kronberg counterclaimed against Cosic for breach of the joint venture agreement by not constructing the houses in a timely and workmanlike manner, for breach of fiduciary obligations, for slander of title by filing unsupportable liens, for a determination of the reasonable construction costs for the houses, and for a ruling that if the houses were sold at a loss, Cosic must bear half of the loss.

{¶ 6} After reviewing the evidence and the testimony, the trial court held that the terms of the agreement between Cosic and Kronberg were “vague and indefinite” and that, accordingly, no joint venture existed. The trial court further held that, since no joint venture existed, no fiduciary duty arose. The trial court determined Cosic was simply entitled to the fair value of his services for the work completed while he was overseeing the projects. Based on evidence as to the prior course of dealing between the parties, the trial court set the fair value of Cosic’s services at 15 percent of the total cost of materials, or \$121,500.30. Then, finding that uncontested testimony showed it would cost between \$100,000 and \$150,000 to make the homes saleable, the trial court deducted \$100,000 from Cosic’s award, leaving him with a judgment against Kronberg of \$21,500.30. The trial court also dismissed Kronberg’s counterclaims and released Cosic’s mechanic’s liens. It is from that judgment that Cosic appeals and Kronberg cross-appeals.

{¶ 7} Cosic sets forth the following assignments of error:

1. The Trial Court erred in awarding Kronberg’s set-offs/recoupments in the amount of One Hundred Thousand and 00/100 (\$100,000.00) Dollars because:

(a) Kronberg failed to prove these damages with reasonable certainty;

(b) These damages are not supported by competent, credible evidence; and

(c) These damages are against the manifest weight of the evidence.

2. The Trial Court erred in awarding Kronberg set-offs in the amount of One Hundred Thousand and 00/100 (\$100,000.00) Dollars because the Court assessed amounts for the costs to complete the project and the alleged costs to improve otherwise workmanlike items neither of which Cosic was under any legal duty to undertake.

{¶ 8} Kronberg does not set forth distinct assignments of error in support of his cross-appeal, which in essence consists of arguments in opposition to Cosic's assignments of error as set forth above. Essentially, Kronberg asserts that the trial court erred by finding that there was no joint venture agreement between the parties and by awarding Cosic 15 percent of the cost of construction of the two houses.

{¶ 9} Cosic's assignments of error both challenge the trial court's decision to award Kronberg a set-off of \$100,000 for the cost of completing the project and improving some of the work on the houses. In support of his first assignment of error, Cosic asserts that Kronberg failed to prove any of the damages with reasonable certainty and that the court's decision as to the amount of damages was against the manifest weight of the evidence and not supported by competent, credible evidence. Cosic argues that the sole evidence supporting the trial court's finding as to the set-off was Kronberg's "guestimate" that the cost of making the homes saleable was between \$100,000 and \$150,000. In support of his second assignment of error, Cosic asserts that he was not under any legal duty to complete the project or improve items that were not completed in a workmanlike manner.

{¶ 10} The trial court heard testimony from both Cosic and Kronberg as well as from numerous subcontractors who worked on both houses. Kronberg testified at length as to problems he noted with the interior and exterior construction on both houses. Specifically, Kronberg testified that one of the houses had a problem with the circuit breakers and electrical outlets, cable TV service not going to enough of the rooms, and cheap lighting fixtures. To Kronberg's knowledge, some of those items had been satisfactorily addressed at the time of trial. Kronberg further testified to ceiling and wall cracks in one of the houses and an improperly installed sink. Kronberg identified "major problems" still existing with the roof on one house, the cracked ceiling in the other, and the decks on both homes. Kronberg testified that he would have to spend \$100,000 to \$150,000 to make the houses suitable for someone to offer to buy. When asked if that amount included the roof and the decks, he stated simply, "I don't know what to do about the roof. \* \* \* I don't know the depth of the problem." Later, he testified, "I am oblivious as to what the cost of the roof is going to be." When asked on cross-examination to explain the basis for his opinion as to the cost of repairs on the two homes, Kronberg stated, "Looking at all the things that had to be done. That is what I would consider a ball park number. It could be less. There is a lot of unknowns. The roof is a tremendous unknown. I think all the decking needs to be removed." When asked for a price on the decking, Kronberg did not have a number and stated he would have to get bids, adding, "I don't know the exact number and you don't know the number."

{¶ 11} Cosic testified that he had no legal duty to assume the cost of completion of the homes or to improve what he believed was workmanlike product after Kronberg told Cosic his services were no longer needed. As to the construction of the homes, Cosic testified that both homes passed inspection for occupancy. He further testified that if he had been asked, he would have made sure that any problems were fixed. Cosic stated that he had problems with subcontractors walking off the job due to nonpayment, but that the workmen eventually finished the job as a favor to him.

{¶ 12} Ray Hendrix, a local contractor called by Kronberg to testify as an expert on construction issues, testified that he originally worked on the project installing siding until sometime during 2009. At the end of 2009 or the beginning of 2010, when he was no longer working on the house with Cosic, he was asked by Kronberg to evaluate both homes for problems. He testified as to the leaking roofs in both homes and said he believed there was \$5,000 worth of water damage, although he did not specify whether that sum included both homes or just one. Hendrix stated that both houses had additional “equal issues” in some of the same areas. Other aspects of the homes were excellent, in his opinion, including the exterior design, siding and trim, drywall and interior trim. As for the wood back decks, Hendrix stated that the issue was one of future maintenance as opposed to improper workmanship since wood decking needs to be treated and sealed annually. Hendrix further testified that some aspects of the homes were not what he would put in high-end homes.

{¶ 13} We first address the trial court’s determination that Cosic’s and Kronberg’s agreement to build the two houses was “vague and indefinite” and did not constitute a joint venture and that, therefore, no fiduciary duty arose.

{¶ 14} Appellant Cosic does not argue on appeal that the agreement did—or did not—constitute a joint venture, although in his complaint for money damages and foreclosure of mechanic’s liens, Cosic refers to having approached Kronberg “with a business proposition for a joint venture \* \* \*.” At trial, Cosic testified that prior to Kronberg’s purchasing the two lots they agreed to build the homes, which Cosic thought he could build for approximately \$450,000 each, and split the profits after deducting the cost of purchasing the land and of construction. He further testified that he would not have begun construction if he did not believe that he and Kronberg had an agreement, which was simply that he would supervise construction and Kronberg would provide the funds. Cosic denied any discussion as to accountings and bill-paying.

{¶ 15} Kronberg testified that Cosic approached him in 2005 about purchasing the two lots, building two homes and dividing the profit. Kronberg stated that he believed the two men had a verbal joint venture agreement, testifying that “[Cosic] structured the whole thing, brought it to my table, and I said okay.” He further testified that when he and Cosic first discussed the deal, “[i]t was the beginning of a joint venture.”

{¶ 16} According to the Ohio Supreme Court, a joint venture is

an association of persons with intent, by way of contract, express or implied, to engage in and carry out a single business adventure for joint

profit, for which purpose they combine their efforts, property, money, skill and knowledge, without creating a partnership, and agree that there shall be a community of interest among them as to the purpose of the undertaking, and that each co-adventurer shall stand in the relation of principal, as well as agent, as to each of the other co-adventurers.” *Al Johnson Constr. v. Kosydar*, 42 Ohio St.2d 29, 325 N.E.2d 549 (1975), paragraph one of the syllabus.

“In short, whether the parties have the relationship of joint venturers as a matter of law depends upon the facts and circumstances of the case.” *Kahle v. Turner*, 66 Ohio App.2d 49, 52, 420 N.E.2d 127 (12th Dist.1979).

{¶ 17} While the trial court cited to the definition of a joint venture set forth in *Kosydar, supra*, the extent of the court’s basis for concluding that there was no joint venture in this case was simply that the terms of any “purported” agreement were “vague and indefinite.” Based on our review of the record, we find to the contrary. As summarized above, both Cosic and Kronberg testified that they entered into an agreement to purchase two lots and build two homes. According to Cosic, the two men agreed that Kronberg would purchase the lots and pay the subcontractors. Cosic would engage in the day-to-day function of building the homes. It is also undisputed that they agreed to split any profit on the sale of the homes. Kronberg agreed at trial that he and Cosic entered into a joint venture. He testified, “In my mind, we had terms on all the major elements required to go ahead on the projects. If I did not believe we had an agreement on all of

the major terms, I would not have acquired or spent 325,000 [sic] to buy the property.” Kronberg further testified that, in his mind, a joint venture still existed between the two men. Cosic confirmed by his testimony that, in forming the joint venture agreement, he and Kronberg had several conversations in the spring of 2005 confirming that he would oversee the design and construction of the homes and Kronberg would provide the financing.

{¶ 18} Upon consideration of the foregoing, we find that Cosic and Kronberg clearly entered into a joint venture agreement as contemplated by the definition set forth in *Kosydar*. Specifically, the parties herein entered into an agreement to carry out a single business adventure, as detailed above, for joint profit; in so doing, they combined their efforts, property, money, skill and knowledge, with the objective of realizing a profit upon the eventual sale of the two homes. The parties entered into a joint venture to build and sell the homes; their agreement stands. When the homes are sold, the parties will share in any profits, as originally contemplated by both parties. Accordingly, the trial court’s finding that no joint venture existed was not supported by the weight of the evidence as summarized above and is reversed, as is that portion of the trial court’s order granting judgment against Kronberg in the amount of \$21,500.30. The trial court’s orders dismissing Kronberg’s counterclaims and releasing Cosic’s mechanic’s liens are affirmed. Appellant’s first and second assignments of error are found well-taken. Additionally, based on the foregoing, Kronberg’s cross-appeal is found to be moot.

{¶ 19} Upon consideration, the judgment of the trial court is reversed as to the issues set forth above and remanded for further proceedings consistent with this decision. Pursuant to App.R. 24, the costs of this appeal are assessed to appellees.

Judgment reversed in part  
and affirmed in part.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J.

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JUDGE

Mark L. Pietrykowski, J.

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JUDGE

Thomas J. Osowik, J.  
CONCUR.

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JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:  
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