11-1325

IN THE CIRCUIT COURT OF PRESTON COUNTY, WEST VIRGINIA

JOSEPH F. JOHN,

PLAINTIFF,

v.

Civil Action No. 09-C-225

RICHARD RINGER,

DEFENDANT.

ORDER DENYING PLAINTIFF'S MOTION FOR NEW TRIAL; ORDER GRANTING, IN PART, AND DENYING, IN PART, PLAINTIFF'S MOTION FOR STAY OF EXECUTION/RULING ON TOPSOIL; AND ORDER DENYING DEFENDANT'S MOTION TO AMEND JUDGMENT ORDER

On August 1, 2011, came the Plaintiff, in person and by counsel, Peter D. Dinardi, and came also the Defendant, by counsel, William C. Brewer, pursuant to Notices of Hearing given by the respective counsel on the parties' filed Motions. The Motions which were scheduled and heard at the August 1, 2011, hearing included Plaintiff's Motion for a New Trial, Plaintiff's Motion for Stay of Execution/Ruling on Topsoil, and Defendant's Motion to Amend Judgment Order.

The Court, after hearing the argument of counsel and reviewing the court file and relevant authorities, hereby **FINDS** and **CONCLUDES** the following:

Plaintiff's Motion for New Trial

Plaintiff's Motion for New Trial is **DENIED**. The Motion states three grounds for granting a new trial: (1) the Court erred in not giving Plaintiff's proposed Statute of Frauds jury instruction; (2) the Court erred in permitting the Defendant's father Marvin Ringer to testify over Plaintiff's objection; and (3) the jury did not fulfill its obligation to fully consider all of the evidence in the case. (Pl.'s Mot. For New Trial.)

First, the Statute of Frauds. The Defendant requested in his Counterclaim (filed August 2, 2010) judgment against the Plaintiff for services the Defendant performed in the furtherance of an agreement between the parties. Such claim supports a jury instruction on a breach of contract theory, or, alternatively, an unjust enrichment theory. The Defendant was not seeking damages arising out of a breach of the parties' agreement to develop a whole subdivision, rather he was seeking damages for work already performed (i.e., excavation and road improvements) and materials provided to the Plaintiff.

Defendant Ringer's Counterclaim states: "Plaintiff John has failed to make any payments to Defendant Ringer for the excavation services provided, including machine time, aggregates / stone and other materials provided by the Defendant, and for storage of topsoil removed from the Plaintiff's property and to store for future use by the Plaintiff." (Def.'s Counterclaim filed August 2, 2010, at 2, ¶ 10.)

West Virginia Code section 55-1-1 (1990) (Repl. Vol. 2008) states, in pertinent part, that "[n]o action shall be brought . . . [u]pon any agreement that is not to be performed within a year; [u]nless the offer, promise, contract, agreement, representation, assurance, or ratification, or some

memorandum or note thereof, be in writing and signed by the party to be charged thereby or his agent." Defendant's Counterclaim relates only to a recovery for performed services rather than a breach of an agreement that could not be performed within one year, and, therefore, is more properly considered on a contract *or* unjust enrichment theory to which a Statute of Frauds instruction would be inapplicable.

Even if the damages sought were for a breach of the agreement to construct the subdivision, the Court is of the opinion the Statute of Frauds requires only that the contract be capable of performance within one year. The West Virginia Supreme Court of Appeals in *Thompson v. Stuckey*, 171 W. Va. 483, 300 S.E.2d 295 (1983), stated in Syllabus Point One that "[a]n oral contract under terms of which whole performance is possible within a year from date contract was entered into is not within statute of frauds." (*Quoting Jones v. Shipley*, 122 W. Va. 65, 7 S.E.2d 346 (1940)). Conflicting testimony was presented regarding the intended performance of the agreement by the parties. At one point during the trial the Defendant testified that the agreement was to be performed over the span of three years, but later testified that the agreement could have been performed within one year. "[I]f an oral contract may, in any possible event, be fully performed according to its terms within a year, it is not within this subdivision of the statute of frauds." *Thompson*, 171 W.Va. at 485-86, 300 S.E.2d at 298 (*citing Jones*, 122 W. Va. 65, 7 S.E.2d 346). Therefore, because the contract in this case arguably *could* have been performed within a year, the contract does not fall within the Statute of Frauds and the Court did not commit error by refusing the Plaintiff's proposed Statute of Frauds jury instruction.

Therefore, the Statute of Frauds jury instruction would have been improper in this case because (1) Defendant Ringer in his Counterclaim sought damages under unjust enrichment theory

for services perform and materials provided, and (2) even if the case would have been decided on contract theory the contract could have been performed within one year.

Plaintiff's second ground in his Motion for New Trial alleges error in permitting Defendant's father, Marvin Ringer, to testify. (Pl.'s Mot. for New Trial at 2.) The Court, by order entered December 22, 2009, set a deadline for the disclosure of preliminary witness lists by March 1, 2010. (Scheduling Conference Order entered December 22, 2009.) Thereafter, discovery was extended several times.[1] Throughout the submission of the Defendant's Pre-Trial Conference Memoranda and Expert Witness Disclosures, the only witnesses disclosed by the Defendant were Mr. Ringer (the Defendant), Mr. John (Plaintiff), Patrick F. Ware, Dave Bryte, and any witnesses called by the Plaintiff. (*See* Def.'s Pre-Trial Conference Memorandum filed July 19, 2010; Def.'s Pre-Trial Conference Memorandum filed December 20, 2010; Pre-Trial Order entered December 28, 2010; Def.'s Expert Disclosure filed March 3, 2011; Def.'s Expert Disclosure filed June 9, 2011.)

Testimony presented by Defendant Ringer during the first day of the trial identified that the Defendant was able, or alternatively had the authority, to use the property near his shop for whatever purpose he wished – including storing topsoil. At the close of the first day of trial, Plaintiff's counsel raised the issue of Defendant Ringer's authority to collect the rentals for the use of the property near his shop for the storage of topsoil from Plaintiff's land. The following day, Defendant's counsel proposed to call Marvin Ringer (owner of the property and father of Defendant Ringer) to testify as to what the Defendant was authorized to use the property for and how any profits

[1] By Order dated April 21, 2010, the discovery deadline was extended to July 1, 2010. (Order entered April 21, 2010.) A pre-trial conference was scheduled for September 27, 2010, and subsequently moved for conversion to a scheduling conference. (Joint Motion to Continue filed September 27, 2010.) Upon conversion to a scheduling conference, discovery was extended to December 1, 2010. (Order entered September 30, 2010.)

derived from the property would be shared. Plaintiff's counsel objected to Marvin Ringer's testimony as he had not been disclosed as a witness prior to the trial, and further argued that Marvin Ringer's testimony should have been presented in the Defendant's case-in-chief. Neither attorney offered the Court case law in support of their positions. After considering the parties' arguments, the Court permitted Marvin Ringer to testify for the limited purpose identified by Defendant's counsel, reserving the Plaintiff the right to present rebuttal evidence. The Court also noted that the topsoil storage issue was specifically pleaded and disclosed by the Defendant as itemized damage in his pre-trial pleadings, and, therefore, was not a surprise to the Plaintiff.

Marvin Ringer's testimony reiterated the testimony presented by Defendant Ringer – that Defendant Ringer had the authority to use the property as he saw fit and to keep the money he earned from its use. Marvin Ringer offered no testimony regarding values for the use of the property; his testimony was limited to what Defendant Ringer was permitted to do with the property owned by Marvin Ringer.

The West Virginia Supreme Court of Appeals addressed a similar issue in *Roark v. Dempsey,* 159 W. Va. 24, 25, 217 S.E.2d 913, 914 (1974). In *Roark* the Court was presented with an alleged trial court error in not permitting the plaintiff to present a witness's testimony because the plaintiff did not disclose the witness ten days in advance in accordance with the judge's oral direction. In *Roark* the Court referenced *Duling v. Bluefield Sanitarium, Inc.*, 149 W. Va. 567, 142 S.E.2d 754 (1965), in which the Court had earlier considered the non-disclosure of a plaintiff's witness until a few days prior to trial. 159 W. Va. at 30-31, 217 S.E.2d at 917 (internal citations omitted). The *Roark* Court noted that the specific facts in *Duling* led the Court to "[r]ecogniz[e] that

the physician witness in the wrongful death arising from an alleged hospital malpractice was very important to the plaintiff's case, that opposing counsel was advised of plaintiff's intent to use this witness before trial, and that trial proceedings were protracted, thereby obviating claims of 'prejudicial surprise[.]" 159 W. Va. at 31, 217 S.E.2d at 917 (internal citations omitted). Those findings led the Court to hold:

> Bearing in mind that the basic purpose of a trial in court is the ascertainment of truth with the aid of all testimony which may properly contribute to that purpose, and, believeing that the defense could have been put to no serious disadvantage by having Dr. Byrne's testimony go to the jury, we are of the opinion that the trial court abused its discretion in excluding Dr. Byrne's testimony from consideration by the jury.

Id. The *Roark* Court then adopted the following Syllabus Point from *Duling*:

> While it is proper for a trial court to direct counsel for the respective parties to exchange lists of witnesses ten days in advance of the commencement of the trial, such a requirement should not be so applied as to create undue hardship or unduly to impede the development of pertinent facts before the jury. The trial court, in the light of the situation subsequently arising, may commit reversible error in refusing to permit a witness to testify before the jury on the ground that opposing counsel were apprised less than ten days in advance of the trial that such person would be called as a witness.

Syllabus Point 1, *Roark*, 159 W. Va. 24, 217 S.E.2d 913 (*quoting* Syllabus Point 6, *Duling*, 149 W. Va. 567, 142 S.E.2d 754).

While the instant case may be distinguished on the facts, the principles remain the same. Here, Plaintiff's counsel raised the issue of Defendant Ringer's ability to use and collect the rental value of the property owned by his father, Marvin Ringer, for the storage of topsoil from Plaintiff's land. The Court on the following day permitted Defendant's counsel to present the father

of the Defendant and owner of the property to testify for a limited identified purpose. As noted by the *Roark* Court, "[t]he ascertainment of truth and the prevention of manifest injustice . . . should always be a court's first priority." 159 W. Va. at 32, 217 S.E.2d at 918. Because Plaintiff's counsel raised the issue, Plaintiff could not have been surprised when Defendant's counsel addressed the issue with the Court on the second day of trial. Furthermore, Plaintiff was given the opportunity to present rebuttal evidence, but made effort to produce rebuttal evidence to refute Marvin Ringer's testimony. Allowing this witness to testify assisted the jury in its "ascertainment of truth with the aid of all testimony which may properly contribute to that purpose[.]" *Roark*, 159 W. Va. at 31, 217 S.E.2d at 917.

The third issue raised by the Plaintiff in his Motion for New Trial was that the Court committed error in accepting the jury verdict because "[t]he jury took less than 90 minutes to deliberate" and, therefore could not have fully considered all the evidence. (Pl.'s Motion for New Trial at 2-3.) While it may be argued that the jury deliberation time was too brief to permit the jury to effectively review all of the evidence, fully deliberate on that evidence, and reach a fair verdict, a judge may not, without some evidence of fraud or undue duress, invade the province of the jury with regard to how the jury arrived at its verdict.

For all of the reasons state above, the Plaintiff's Motion for New Trial is **DENIED**.

Plaintiff's Motion for Stay of Execution [of Judgment]/Ruling on Topsoil

Plaintiff's Motion for Stay of Execution [of Judgment]/Ruling on Topsoil is GRANTED, in part, and DENIED, in part. The Motion as it pertains to the **Stay of Execution [of Judgment] is GRANTED,** and the judgment of the jury may not be executed upon Plaintiff's

pending appeal of any issue in this matter; provided, however, Plaintiff must timely initiate and pursue an appeal. Plaintiff's Motion relating to "rent" on the storage of topsoil is **DENIED**, provided that the Defendant shall not prohibit Plaintiff from removing said topsoil.

Furthermore, there is to be no accrual of "rent" through the judgment in this case for the storage of said topsoil after the date of the jury verdict.

Defendant's Motion to Amend Judgment Order

Defendant's Motion to Amend Judgment Order with respect to the rate of interest allowable on the judgment is **DENIED**. An Administrative Order of the Supreme Court of Appeals of West Virginia dated January 2, 2007, relating to the rate of interest on judgments established the rate of interest for judgments and decrees entered in the 2007 calendar year, and ordered that a rate for subsequent years be established annually. For each following year, pursuant to this Order, the Court set different interest rates. The rate established for 2011, the year of the judgment in this case, was set at even percent (7%). A fair reading of the Administrative Order, which makes no reference to the date of the cause of action, would suggest that the applicable interest rate is the rate established by the Court for the *actual year of the judgment*; otherwise, logic would result in different rates to be applied to a judgment anytime the cause of action accrual date is one or several years prior to the year of the actual judgment.

For the above-stated reasons, Plaintiff's Motion for New Trial is **DENIED;** Plaintiff's Motion for Stay of Execution [of Judgment] is **GRANTED**; Plaintiff's Motion of Ruling on Topsoil is **DENIED;** and Defendant's Motion to Amend Judgment Order is **DENIED**.

It is **ORDERED** that the Clerk of the Court shall personally deliver or deliver by first-class mail a certified copy of this order to counsel for the Plaintiff, Peter D. Dinardi, and counsel for the Defendant, William C. Brewer.

2 copies
s 10
8/18/11

ENTER this 18th day of August, 2011.

Larry V. Starcher, SPECIAL JUDGE

ENTERED this 18th day of August, 2011.

Betsy Castle, CLERK

A TRUE COPY:

ATTEST: S/BETSY CASTLE
CLERK OF THE CIRCUIT COURT

By _____ Deputy

IN THE CIRCUIT COURT OF PRESTON COUNTY, WEST VIRGINIA

JOSEPH F. JOHN,
Plaintiff

v.

CIVIL ACTION NO: 09-C-225
Judge Lawrance S. Miller, Jr.

RICHARD RINGER,
Defendant.

JUDGMENT ORDER

On the 21st day of June, 2011, came the Plaintiff, Joseph F. John, by Peter D. Dinardi, Esq., his attorney, and came the Defendant, Richard Ringer, by William C. Brewer, Esq., his attorney, for a jury trial in the above matter. Thereupon came a jury consisting of six (6) persons who were duly selected according to law and duly sworn to well and truly try the issues joined and a true verdict rendered according to the evidence.

The issues were tried before the Court, and the jury, on June 21, 2011, and on June 22, 2011. At the conclusion of all the evidence of all the parties, and after hearing argument from counsel for the parties, the Court submitted the case to the jury with the exhibits, appropriate jury instructions on the law of the case, and provided the jury with an appropriate verdict form to be utilized by the jury in rendering its verdict.

Thereupon, on June 22, 2011, the jury, found by a preponderance of the evidence, that:

1) Defendant Richard Ringer did breach his contract with Plaintiff Joseph John for purchase of the 1986 endloader.

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&
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ATTORNEYS AT LAW
MORGANTOWN, WV

2) Plaintiff Joseph John breached a contract with Defendant Richard Ringer for excavation work and road improvements, or, alternatively that Plaintiff Joseph John was unjustly enriched by Defendant Richard Ringer's excavation work and road improvements.

3) Plaintiff Joseph John breached a contract with Defendant Richard Ringer for storage of topsoil.

Based on the above findings, the Court awarded damages to the parties as follows:

1) The jury found, by a preponderance of the evidence, that the Plaintiff Joseph John incurred damages in the amount of nine thousand four hundred fifty dollars and twenty-seven cents (9,450.27) as a result of Defendant Richard Ringer's breach of contract for purchase of the 1986 endloader. Accordingly, the jury awarded Plaintiff Joseph John damages totaling nine thousand four hundred fifty dollars and twenty-seven cents (9,450.27).

2) The jury found, by a preponderance of the evidence, that Defendant Richard Ringer incurred damages in the following amounts:

a. Stone: twenty thousand dollars ($20,000.00)

b. Excavation Services: five thousand dollars ($5,000.00)

c. Perc. Test: one hundred dollars ($100.00)

d. Earnest money: five hundred dollars ($500.00)

e. Storage of topsoil: sixteen thousand five hundred dollars ($16,500.00)

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MORGANTOWN, WV

Accordingly, the jury awarded Defendant Richard Ringer damages totaling forty-two thousand one hundred dollars ($42,100.00).

West Virginia Code § 56-6-31 [2006] provides that "if the judgment or decree, or any part thereof, is for special damages, as defined below, or for liquidated damages, the amount of special or liquidated damages shall bear interest at the rate in effect for the calendar year in which the right to bring the same shall have accrued[.]" Id. "Special damages includes lost wages and income, medical expenses, damages to tangible personal property and similar out-of-pocket expenditures, as determined by the court." Id. Accordingly, the Court hereby FINDS that the damages awarded by the jury to Defendant Ringer were special damages under W. Va. Code § 56-6-31.

It is therefore, ORDERED, ADJUDGED, and DECREED that Plaintiff Joseph John, recover of and from Defendant, Richard Ringer, the sum of nine thousand four hundred fifty dollars and twenty-seven cents (9,450.27) with post judgment interest at the rate of 7% per annum from June 22nd, 2011. It is further ORDERED, ADJUDGED, and DECREED that Defendant Richard Ringer, recover of and from the Plaintiff, Joseph F. John, individually, the sum of forty-two thousand one hundred dollars ($42,100.00) with post judgement interest at the rate of 7% per annum from June 22nd, 2011, and with pre-judgment interest at a rate of ~~9.75%~~ 7.0% beginning from the date on which Defendant Richard Ringer's right to bring his claims against Plaintiff Joseph John accrued. (1) to June 22, 2011 ~~and post judgment interest @ 7% per annum on unpaid balance~~

On June 21, 2011, the court ruled that the Plaintiff, Joseph F. John, was the owner of the 10 acres described in the 3 pleadings and owner of the removed top soil with right to remove the top soil

(1) counter claim filed August 2, 2010

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It is further ORDERED that each party shall be responsible for their individual costs and attorney's fees as may have been incurred in this matter.

It is further ORDERED that the Circuit Court Clerk shall submit a copy of this Order upon counsel for Plaintiff, Peter D. Dinardi, Esq., 198 Spruce Street, Morgantown, West Virginia, 26505 and counsel for the Defendant, William C. Brewer, Esq., P.O. Box 4206, Morgantown, West Virginia, 26504.

2 copies
S/D 7-11-11
P.D.D.
W.C.B.

ENTER: July 11, 2011
Held 5 days w/o objection

JUDGE LAWRANCE S. MILLER, JR.

ENTERED: July 11, 2011
Betsy Castle Clerk
by: Lisa Leishman, Deputy

Prepared by:

William C. Brewer, Esquire
W.Va. State Bar No. 448
Counsel for Defendant
Brewer & Giggenbach, PLLC
P.O. Box 4206
Morgantown, WV 26504
(304) 291-5800

A TRUE COPY:

ATTEST: S/BETSY CASTLE
CLERK OF THE CIRCUIT COURT
By Lisa Leishman Deputy