

IN THE COURT OF APPEALS OF OHIO  
TENTH APPELLATE DISTRICT

Gary Galbreath d.b.a. G.G.C. Wholesale Carpets,	:	
	:	
Plaintiff-Appellant,	:	No. 12AP-324
	:	(M.C. No. 2008CVF-9354)
v.	:	
	:	(REGULAR CALENDAR)
Marcus L. Martin et al.,	:	
	:	
Defendants-Appellees.	:	
	:	

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D E C I S I O N

Rendered on January 15, 2013

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*David M. Neubauer*, for appellant.

*The Isaac Firm, L.L.C., Kendall D. Issac and Lasheyl Stroud*,  
for appellee Marcus L. Martin.

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APPEAL from the Franklin County Municipal Court

BRYANT, J.

{¶ 1} Plaintiff-appellant, Gary Galbreath d.b.a. G.G.C. Wholesale Carpets, appeals from a judgment of the Franklin County Municipal Court granting the Civ.R. 12(B)(6) motion of defendant-appellee, Marcus L. Martin (individually, "defendant"). Plaintiff assigns a single error:

THE TRIAL COURT ERRED BY DISMISSING PLAINTIFF'S  
COMPLAINT PURSUANT TO OHIO CIV. R. 12(B)(6).

Because plaintiff's complaint states a claim for relief against defendant, we reverse.

## **I. Facts and Procedural History**

{¶ 2} On February 28, 2008, plaintiff filed a complaint against defendant, Galilee Missionary Baptist Church, Inc. and Galilee Baptist Church. His first cause of action alleged defendant owed plaintiff \$9,369.02 on an account; the second cause of action alleged an oral agreement between plaintiff and defendant in which defendant agreed to pay plaintiff \$9,369.02 in exchange for plaintiff's installing certain flooring materials at the church; and the third cause of action alleged the remaining named defendants are owners of the church property and benefited from the flooring materials plaintiff installed at a cost of \$9,369.02. Certified mail service of process was unclaimed, but service of process through regular mail on March 18, 2008 was not returned.

{¶ 3} When defendants did not respond to the complaint, plaintiff filed a motion for default judgment against them on April 22, 2008. The court entered judgment for plaintiff against all defendants in the amount of \$9,369.02 plus interest at 8 percent from August 13, 2007, and costs. The Notice of Chapter 11 bankruptcy of the church or churches stayed proceedings with respect to them, but the matter proceeded against defendant.

{¶ 4} On March 2, 2011, defendant filed a Civ.R. 60(B) motion seeking relief from judgment. Defendant contended he never was served with the complaint, no consideration supported the alleged agreement, and the facts did not support piercing the corporate veil to reach him individually. The trial court denied the motion on March 28, 2011. Plaintiff appealed to this court. In a decision rendered on November 10, 2011, this court concluded the trial court erred in denying defendant's Civ.R. 60(B) motion without conducting a hearing. *Galbreath v. Martin*, 10th Dist. No. 11AP-348, 2011-Ohio-5852. *Galbreath* noted the file showed a rebuttable presumption of service in the ordinary mail service that was not returned to the clerk of courts, but it also pointed out that defendant's affidavit stated he did not receive service; plaintiff's memorandum opposing defendant's motion did not address the controverted issue. Accordingly, this court concluded that "prior to denying [defendant's] motion, the trial court should have held an evidentiary hearing in order to determine whether [defendant] was ever properly served and whether the trial court had subject-matter jurisdiction." *Galbreath* at ¶ 10.

{¶ 5} After the case was remanded to the trial court, the trial court scheduled an evidentiary hearing; as a result of the hearing, defendant was served anew with the complaint. Defendant responded on February 22, 2012 with a motion to dismiss pursuant to Civ.R. 12(B)(6). After the parties fully briefed the motion, the court filed an entry on March 19, 2012 noting "all pleadings have been reviewed and the Court finds that Defendant's Motion to Dismiss is well taken. Plaintiff's case is dismissed. Costs to Plaintiff." Plaintiff appeals.

## **II. Assignment of Error**

{¶ 6} Plaintiff's single assignment of error asserts the trial court erred in granting defendant's Civ.R. 12(B)(6) motion to dismiss, as the allocations of the complaint state a claim against defendant upon which relief may be granted.

{¶ 7} Appellate review of a trial court's decision to dismiss a case under Civ.R. 12(B)(6) is de novo. *Singleton v. Adjutant Gen. of Ohio*, 10th Dist. No. 02AP-971, 2003-Ohio-1838, ¶ 16. For a court to dismiss a case pursuant to Civ.R. 12(B)(6), "it must appear beyond doubt from the complaint that the plaintiff can prove no set of facts entitling him to recovery." *O'Brien v. Univ. Community Tenants Union, Inc.*, 42 Ohio St.2d 242 (1975), syllabus. The court must presume all factual allegations in the complaint are true and draw all reasonable inferences in favor of the nonmoving party. *Bridges v. Natl. Eng. & Contracting Co.*, 49 Ohio St.3d 108, 112 (1990). "The essential elements of a cause of action for breach of contract are the existence of a contract, performance by the plaintiff, breach by the defendant and resulting damage to the plaintiff." *Winner Bros., L.L.C. v. Seitz Elec., Inc.*, 182 Ohio App.3d 388, 2009-Ohio-2316, ¶ 31 (2d Dist.), quoting *Flaim v. Med. College of Ohio*, 10th Dist. No. 04AP-1131, 2005-Ohio-1515, ¶ 12.

{¶ 8} Here, plaintiff's complaint against defendant alleged that plaintiff and defendant entered into an oral agreement in which defendant agreed to pay plaintiff \$9,369.02 in exchange for plaintiff's installing certain flooring materials. According to the complaint, plaintiff installed the flooring materials pursuant to the terms of the oral agreement with defendant, but defendant breached the agreement by failing to pay plaintiff the balance due him of \$9,369.02. Plaintiff's complaint thus alleged all the elements of a breach of contract claim: he asserted a contract between the parties, his

performance, defendant's failure to perform, and the resulting damage in the amount yet due him for the work performed.

{¶ 9} The trial court's decision does not address specifically the other issues the parties raised in their memoranda for and opposing the motion to dismiss, such as the defense of statute of frauds and the propriety of piercing the corporate veil. "Because affirmative defenses typically rely on matters outside the complaint, they normally cannot be raised in a Civ.R. 12(B)(6) motion." *Cristino v. Ohio Bur. of Workers' Comp.*, 10th Dist. No. 12AP-60, 2012-Ohio-4420, ¶ 21. "If, however, the existence of an affirmative defense is obvious from the face of the complaint, a court may grant a Civ.R. 12(B)(6) motion on the basis of the affirmative defense." *Id.*

{¶ 10} Here, the affirmative defense of statute of frauds required facts outside the face of the complaint to determine its validity. Accordingly, the trial court could not properly consider and resolve those arguments in determining defendant's Civ.R. 12(B)(6) motion. Rather, had the court wished to consider matters outside the face of the complaint, and in particular the facts pertinent to defendant's contentions regarding the statute of frauds or piercing the corporate veil, the court could have converted the matter to a Civ.R. 56 motion for summary judgment, allowed the parties to file the appropriate evidentiary materials under Civ.R. 56(C), and then resolved the motion based on those evidentiary materials. The trial court, however, did not convert defendant's motion to dismiss into a motion for summary judgment and thus was confined to the face of the complaint in determining whether plaintiff's complaint stated a claim for relief.

{¶ 11} As to defendant's claim that plaintiff's complaint improperly seeks to pierce the corporate veil to reach defendant, plaintiff's complaint does not allege a breach of contract with the church but with defendant. Accordingly, the alleged wrongdoing is not directed to the church, where the corporate veil would have to be pierced to reach defendant, but against defendant individually. Whether plaintiff will be able to prove the allegations is not the issue at this juncture. Rather, because plaintiff alleged defendant individually failed to perform his obligations under his contract with plaintiff, the complaint states a claim against defendant. *Miller v. Med. Economics Consultants Co., Inc.*, 2d Dist. No. 19177, 2002-Ohio-4972, ¶ 11.

{¶ 12} The face of plaintiff's complaint states a claim for breach of contract against defendant. Similarly, his complaint alleges an account with defendant. As a result, the trial court erred in dismissing plaintiff's complaint under Civ.R. 12(B)(6). Plaintiff's single assignment of error is sustained.

### **III. Disposition**

{¶ 13} Having sustained plaintiff's single assignment of error, we reverse the judgment of the Franklin County Municipal Court and remand for further proceedings consistent with this decision.

*Judgment reversed  
and cause remanded.*

TYACK and BROWN, JJ., concur.

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