

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

STONE EXCAVATING, INC. :

Plaintiff-Appellee : C.A. CASE NO. 20307

vs. : T.C. CASE NO. 03CV756

NEWMARK HOMES, INC., fka : (Civil Appeal from  
G.S. BARNEY CONSTRUCTION CO. Common Pleas Court)  
Defendant-Appellant :

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O P I N I O N

Rendered on the 6<sup>th</sup> day of August, 2004.

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GRADY, J.

{¶1} Defendant, Newmark Homes, Inc. ("Newmark"),  
appeals from a judgment of the court of common pleas in  
favor of Plaintiff, Stone Excavating, Inc. ("Stone"), on  
Stone's claim for breach of contract.

{¶2} Stone agreed to perform certain work to install

streets, water and sewer lines, and construction site pads at a subdivision of residential properties being developed by Newmark in Vandalia. The contract was in several writings, supplemented by oral agreements.

{¶3} The work to be performed by Stone was identified in a series of progressive steps, culminating in its installation of a second, finished layer of asphalt on the streets it had constructed. The contract provided the price of each step. Newmark agreed to pay for each when complete, upon Stone's application. Stone agreed that Newmark would retain six per cent of each payment dug for repair of any work performed improperly.

{¶4} Stone began work in 1997 and completed all steps except the last, installation of the second layer of asphalt on the streets, by March of 1998. Stone applied for payment as each was completed. Newmark paid the amount due for each, less the six per cent retainage.

{¶5} Vandalia's building regulations impose a minimum nine month period between installation of the first and second layers of asphalt on new streets. It also requires contractors to complete all development work within two years, subject to one-year extensions when delays are encountered.

{¶6} Newmark encountered delays and received several extensions from Vandalia. The final extension was until October of 2001. Approximately each six months following completion of its other work in 1998, Stone had asked for

permission from Newmark to place the second layer of asphalt. Each time Newmark declined, citing the need to complete its other work. It is undisputed that performance of the other work could damage the second layer of asphalt.

{¶7} When Stone made its last request to complete its work, Newmark stated that it would likely be ready some months later, in October of 2001. Stone protested that it could not do the work then, because of other commitments. Newmark stood with its projection.

{¶8} In October of 2001, Newmark requested Stone to place the second layer of asphalt. Stone said it could not perform the work then. Newmark performed the work itself. In the process, Newmark also performed the "bond work" repair to the earlier work that Stone had performed and for which it had been paid the contract price, less retainage.

{¶9} Stone demanded the retainage Newmark had kept from the payments it made for the work Stone performed. Newmark declined, citing Stone's failure to complete its work by installing the second layer of asphalt. Stone commenced an action for breach of contract. After a trial to the bench, the court granted judgment for Stone in the amount of the retainage, \$31,466.08, less a set-off of \$1,099.59 for bond work Newmark had performed. Newmark appeals.

FIRST ASSIGNMENT OF ERROR

{¶10} "THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN ITS APPLICATION OF THE SUBSTANTIAL PERFORMANCE DOCTRINE."

SECOND ASSIGNMENT OF ERROR

{¶11} "THE TRIAL COURT COMMITTED ERRORS OF LAW IN ITS CONSTRUCTION OF THE CONTRACT REGARDING TIME OF PERFORMANCE AND INSTALLING OF PADS."

{¶12} The contract provided no date certain for the completion of the work Stone promised to perform. The trial court, after taking evidence, found that the parties intended that the work would be completed within two years after Stone began work in 1997. The court went on to hold that the work Stone had performed within that time constituted substantial performance of its promises, and that Stone was entitled to have the retainage portions of the payment for that work kept by Newmark.

{¶13} Newmark argues that the trial court erred when it applied the doctrine of substantial performance on these facts, and we agree. In the law of contracts, "substantial performance" is approximation of full performance such that the parties obtain, in the main, what the contract called for, although it is not complete and final performance in every particular. See 17A American Jurisprudence 2d. 576, Contracts, Section 619. Here, the parties agreed that Stone would place the second layer of asphalt and do the required bond work, which it did not do at all. The work was necessary to complete the job. Therefore, on this record there could not be substantial performance.

{¶14} The trial court's error does not require us to reverse its judgment for Stone, however. An appellate court may decide an issue on grounds different from those

determined by the trial courts when the evidentiary basis upon which the appellate court decides the legal issue was addressed before the trial court and made a part of the record of the trial proceeding. *State v. Peagler* (1996), 76 Ohio St.3d 496. That is the case here.

{¶15} The subject of Newmark's second assignment of error is the trial court's finding that the parties intended that the whole contract be performed within two years. The trial court was required to make such a finding because the writings contain no date for completion of the promises made, and the issue is whether Stone breached the contract because of its nonperformance.

{¶16} When the performance period of a contract is undefined, the law implies that the parties intended and agreed that performance will take place within a reasonable time. *Stewart v. Herron* (1907), 77 Ohio St. 130, 147. What constitutes a reasonable time for contract performance is an issue of fact determined by the conditions and circumstances which the parties contemplated at the time the contract was executed. *Miller v. Bealer* (1992), 88 Ohio App.3d 180, 182. We will not reverse a trial court's finding of fact or conclusion of law if supported by competent and credible evidence. *Seasons Coal Co., Inc. v. City of Cleveland* (1984), 10 Ohio St.3d 77, 79. The president of Stone testified he expected to lay the second layer of asphalt in November of 1998. Newmark's president testified that there was no discussion about a performance period or delays at

the time the agreement was made. The trial court, as trier-of-fact, was in the best position to evaluate the evidence. It found that no performance period had been established, and imposed a reasonable period based on the City of Vandalia's two-year limitation for subdivision construction projects. Therefore, its finding of a two-year limit is supported by competent and credible evidence. *Seasons Coal Co., supra.*

{¶17} Retainage for which a contract provides may be treated as a penalty or as liquidated damages. *Jones v. Stevens* (1925), 112 Ohio St. 43. Under either alternative, a promisee who would deny payment of the amount it retained must show some breach by the promisor of a promise to which the retainage applies. Absent such a showing, the promisee is bound by its agreement to pay the retainage to the promisor.

{¶18} A party to a contract that prevents performance on the part of the adverse party cannot rely on that non-performance to claim a breach. *Sutter v. Farmer's Fertilizer Co.* (1919), 100 Ohio St. 403. It is undisputed that Newmark refused to allow Stone to place the final layer of asphalt within the two-year period the trial court found was a reasonable time for Stone's performance of its promises under the contract. Therefore, Newmark cannot rely on Stone's failure to perform that work and the related bond work to show non-performance. Lacking that showing, Newmark is not relieved of its duty to pay the retainage in the

amount of \$31,466.08 for the work Stone did perform.

{¶19} Being estopped from arguing nonperformance on the part of Stone, Newmark cannot demonstrate a breach or other event that would allow Newmark to avoid paying the retainage owed to Stone. Therefore, the trial court was correct when it awarded judgment for Stone in that amount. Further, the result it reached is sensible as well as just.

{¶20} It is undisputed that Stone performed the work to which the retainage applies. And, the separate payment for each step in the work for which the contract expressly provides allows the construction steps to be treated as severable obligations. The fact that Newmark performed the final step doesn't detract from the fact that Stone performed all the others, to which the retainage amount applies.

{¶21} Newmark argues that, even so, it is entitled for more compensation for the bond work it performed than the \$1,099.59 set off allowed by the trial court. Newmark also asks us to review the trial court's findings that: 1) Stone was only required to level as many construction site pads as could be done with material excavated on site; and that 2) Newmark was not entitled to a \$2,000 credit for a portion of the sewer line that was not installed per agreement. Both findings are supported by competent, credible evidence offered by both parties. The trial court was in the best position to evaluate the evidence, and it found for Stone on both points. We may not then reverse the finding. *Seasons*

*Coal Co., supra.*

{¶22} The First and Second Assignments of Error are overruled.

THIRD ASSIGNMENT OF ERROR

{¶23} "THE JUDGMENT OF THE TRIAL COURT IS MANIFESTLY AGAINST THE WEIGHT OF THE EVIDENCE AND IS NOT SUPPORTED BY SUFFICIENT EVIDENCE."

{¶24} Newmark mounts a general attack on all of the court's findings as being against the weight and/or sufficiency of the evidence. Sufficiency is a legal term of art describing the legal standard which is applied to determine whether the evidence is legally sufficient to support the judgment as a matter of law. *State v. Thompkins* (1997), 78 Ohio St.3d 380, 386. We will not reverse a civil judgment as against the manifest weight of the evidence if it is supported by any competent credible evidence that goes to each element of the case. *C.E. Morris v. Foley Cons. Co.* (1978), 54 Ohio St.2d 279, 281. Reversal requires that the conclusion of the trial court cannot be supported by any rational view of the evidence; not just that it is suspicious. *DeGarmo v. DeGarmo* (1949), 56 Ohio L. Abs. 357.

{¶25} We find that the evidence presented in this case is, at most, only conflicting. There is nothing to suggest that any of the evidence is legally insufficient to support the trial court's judgment or that the trial court's judgment is based on an irrational view of the evidence. The trial court evaluated competent and credible testimony

and documents from both sides and drew a conclusion. As  
such, we sustain its judgment. *C.E. Morris Co., supra.*

{¶26} The Third Assignment of Error is overruled.

FAIN, P.J. and YOUNG, J., concur.

Copies mailed to:

- Michael F. Boller, Esq.
- Paul M. Courtney, Esq.
- Hon. John D. Schmitt