

**IN THE COURT OF APPEALS  
FIRST APPELLATE DISTRICT OF OHIO  
HAMILTON COUNTY, OHIO**

KAMEL SHALASH,	:	APPEAL NO. C-081258
	:	TRIAL NO. A-0711688
Plaintiff-Appellee,	:	
	:	<i>JUDGMENT ENTRY.</i>
vs.	:	
NIDAL KHRAIS	:	
and	:	
TKH, INC.,	:	
Defendants-Appellants.	:	

We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court.<sup>1</sup>

Plaintiff-appellee, Kamel Shalash, filed a complaint against defendants-appellees, Nidal Khrais and TKH, Inc., (collectively “Khrais”) alleging breach of contract and various tort claims. Khrais, the sole shareholder of TKH, filed a counterclaim, which alleged a breach of contract by Shalash. Following a bench trial, the trial court dismissed both the complaint and the counterclaim. Shalash has not appealed the trial court’s judgment. Khrais appeals the trial court’s dismissal of his counterclaim.

The evidence presented at trial showed that the parties had agreed that Shalash would take over the operation of Khrais’s business, a small grocery store, while Khrais was out of the country. The parties entered into a written lease agreement. It provided that Khrais would lease the store to Shalash, including an

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<sup>1</sup> See S.Ct.R.Rep.Op. 3(A), App.R. 11.1(E), and Loc.R. 12.

inventory of \$12,000 and liabilities of \$14,000. Shalash agreed to pay \$10,000 as a down payment when the agreement was executed and \$3,000 per month in rent.

Shalash testified that, immediately after taking possession of the store, he found that the inventory was outdated and in bad condition. He estimated that its real value was approximately \$6,000. Shalash also ended up paying a number of Khrais's debts that were not contemplated in the agreement. According to Shalash, Khrais had severe financial difficulties, including substantial gambling debts. He had bounced numerous checks and was chronically late on various payments.

Shalash estimated that he ended up paying approximately \$26,000, including the inventory shortage. Since he had only agreed to pay \$14,000 of liability, he offset the difference against the \$3,000 monthly rent payments. In retaliation for this offset, Khrais cancelled the liquor permit, the lottery license, and the food-stamp license, damaging the business and causing Shalash additional losses.

Khrais testified that the inventory was not deficient and that he had taken an inventory a few days before the contract was signed. He also stated that Shalash had had the opportunity to inspect the inventory at the time of the signing, but that he had declined it.

According to Khrais, the store generally had net monthly profits of \$9,000 for the lottery and \$45,000 for the grocery. He stated that approximately \$2,000 of lottery proceeds were locked in a closet in the back room for deposit in the store's lottery account. Shalash failed to deposit the funds in time for the Lottery Commission's scheduled withdrawal.

Khrais further testified that Shalash had paid less than \$9,000 of the store liabilities. When Shalash was \$9,000 in arrears on the monthly payments, Khrais

notified him of a default. Instead of curing the default, Shalash presented Khrais with a fraudulent list of debts that he had allegedly paid.

Khrais subsequently paid the balance owed on the lottery account and then cancelled it and the food-stamp account. He also was forced to deposit money in the store's bank account to cover Shalash's outstanding checks. Some of the utility payments that Shalash claimed to have made were actually payments on other accounts, including one in Shalash's name. He also discovered that tenants in his apartments had been paying their rent directly to Shalash at Shalash's insistence.

In dismissing both the complaint and the counterclaim, the trial court stated, "I cannot tell who is telling the truth. Both parties have engaged in bad faith in the execution of the 'agreement.' I find there was no meeting of the minds in this matter." The court went on to state that "[t]he 'agreement' between the parties in no way encompassed the expectations of the arrangement between the parties. Each party has, as best as I can tell, engaged in ad hoc payment of the other's debts. The 'agreement' allegedly involved the plaintiff unwittingly assuming any number of the defendant's debts and then paying the defendant \$3,000 per month for that privilege."

Khrais now presents three assignments of error for review. In his first assignment of error, he contends that the trial court erred by not enforcing the written contract and by finding bad faith in its execution. In his second assignment of error, he contends that the trial court abused its discretion by not enforcing the contract. He argues that both parties agreed that a contract existed and that the court abused its discretion by not applying the law to the undisputed facts. These assignments of error are not well taken.

Abuse of discretion is not the proper standard of review in this case. To show a breach of contract, a party must demonstrate by a preponderance of the evidence (1) that a contract existed, (2) that the party claiming the breach fulfilled his obligations, (3) that the other party failed to fulfill his obligations, and (4) that damages resulted from that failure.<sup>2</sup> Where the facts are undisputed and the only question to be resolved is whether a breach of contract occurred, a question of law exists for the court to decide. But where a dispute exists as to whether the parties satisfied the terms of the contract, a question of fact exists.<sup>3</sup>

The parties must use good faith to fill the gaps of a silent contract.<sup>4</sup> Every contract contains an implied duty of good faith and fair dealing.<sup>5</sup> That duty requires “honesty and reasonableness in the enforcement of a contract” and “faithfulness to an agreed common purpose and consistency with the justified expectation of the other party.”<sup>6</sup> Further, good faith is “a compact reference to an implied undertaking not to take opportunistic advantage in a way that could not have been contemplated at the time of drafting, and which therefore was not resolved explicitly by the parties.”<sup>7</sup>

In this case, a dispute existed over whether both Shalash and Khrais had satisfied the terms of the contract. The trial court made the factual determination

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<sup>2</sup> *Stephen Business Ent., Inc. v. Lamar Outdoor Advertising Co.*, 1st Dist. No. C-070373, 2008-Ohio-954, ¶16; *Blake Homes, Ltd. v. FirstEnergy Corp.*, 173 Ohio App.3d 230, 2007-Ohio-4606, 877 N.E.2d 1041, ¶177.

<sup>3</sup> *Stephen Business Ent.*, supra, at ¶19; *Farmers Market Drive-In Shopping Ctrs., Inc. v. Magana*, 10th Dist. No. 06AP-532, 2007-Ohio-2653, ¶32.

<sup>4</sup> *Burlington Resources Oil & Gas Co. v. Cox* (1999), 133 Ohio App.3d 543, 547, 729 N.E.2d 398; *Metropolitan Life Ins. Co. v. Triskett Illinois, Inc.* (1994), 97 Ohio App.3d 228, 238, 646 N.E.2d 528.

<sup>5</sup> *Stephen Business Ent.*, supra, at ¶19; *O'Brien v. Ravenswood Apts., Ltd.*, 169 Ohio App.3d 233, 2006-Ohio-5264, 862 N.E.2d 549, ¶36.

<sup>6</sup> *Stephen Business Ent.*, supra, at ¶19, quoting *O'Brien*, supra, at ¶36, and *Littlejohn v. Parrish*, 163 Ohio App.3d 456, 2005-Ohio-4850, 839 N.E.2d 2d 49, ¶27.

<sup>7</sup> *Burlington*, supra, at 548, quoting *Ed Schory & Sons, Inc. v. Francis*, 75 Ohio St.3d 433, 443-444, 1996-Ohio-194, 662 N.E.2d 1074.

that neither party had satisfied the contract's terms because both parties had acted in bad faith. Competent, credible evidence supported that finding.<sup>8</sup>

The evidence showed that the parties did not have an agreed common purpose or consistency with each other's expectations. The numerous unpaid debts and inventory problems were not contemplated by the parties in the written agreement. Shalash's evidence, if believed, showed that Khrais had taken advantage of that situation. Khrais is simply arguing that his evidence was credible and that Shalash's was not. But matters as to the credibility of evidence are for the trier of fact to decide.<sup>9</sup> As a reviewing court, we must defer to the trial court's findings, and we may not substitute our judgment for that of the trial court.<sup>10</sup>

This court has held that "a party can be found to have breached its contract if it fails to act in good faith."<sup>11</sup> Since the trial court found that Khrais had failed to act in good faith, he breached the contract, and he could not recover for any alleged breach by Shalash. Consequently, the trial court did not err in failing to enforce the contract and in dismissing Khrais's counterclaim. We overrule his first and second assignments of error.

In his third assignment of error, Khrais contends that the trial court's finding that Shalash had voluntarily paid debts was against the manifest weight of the evidence. He argues that Shalash inflated the amount of debt that he had paid and that his testimony was not credible. This assignment of error is not well taken.

In a civil proceeding, qualitative and quantitative distinctions between the weight and the sufficiency of the evidence are not recognized. Therefore, in the

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<sup>8</sup> See *Myers v. Garson*, 66 Ohio St.3d 610, 614-615, 1993-Ohio-9, 614 N.E.2d 742.

<sup>9</sup> *Kalain v. Smith* (1986), 25 Ohio St.3d 157, 162, 495 N.E.2d 572; *Mortensen v. Intercontinental Chem. Corp.*, 178 Ohio App.3d 393, 2008-Ohio-4723, 898 N.E.2d 60, ¶29.

<sup>10</sup> *Myers*, supra, at 614-615.

<sup>11</sup> *Littlejohn*, supra, at ¶24.

appeal of a civil case, the test for the sufficiency and the manifest weight of the evidence is the same.<sup>12</sup> A reviewing court will not reverse a judgment as being against the manifest weight of the evidence if competent, credible evidence supports it.<sup>13</sup>

Competent, credible evidence supported the trial court's finding that Shalash had voluntarily paid debts that were not contemplated in the written agreement. Therefore, that finding was not against the manifest weight of the evidence. Again, Khrais is arguing that Shalash's evidence was not credible, but credibility was for the trial court to determine.<sup>14</sup> Consequently, we overrule Khrais's second assignment of error and affirm the trial court's judgment.

A certified copy of this judgment entry is the mandate, which shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

**HENDON, P.J., DINKELACKER and MALLORY, JJ.**

*To the Clerk:*

Enter upon the Journal of the Court on September 23, 2009

per order of the Court \_\_\_\_\_  
Presiding Judge

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<sup>12</sup> *Capeheart v. O'Brien*, 1st Dist. No. C-040223, 2005-Ohio-3033, ¶11.

<sup>13</sup> *Shemo v. Mayfield Hts.*, 88 Ohio St.3d 7, 10, 2000-Ohio-258, 722 N.E.2d 1018; *Capeheart*, supra, at ¶11.

<sup>14</sup> *Kalain*, supra, at 162; *Mortensen*, supra, at ¶29.