

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

FRANK WIMMER,	:	APPEAL NOS. C-150401
		C-150633
Plaintiff-Appellant,	:	TRIAL NO. A-1305868
vs.	:	
		<i>JUDGMENT ENTRY.</i>
ANTHONY WAYNE WIMMER,	:	
Defendant-Appellee.	:	

We consider these consolidated appeals on the accelerated calendar, and this judgment entry is not an opinion of the court. *See* Rep.Op.R. 3.1; App.R. 11.1(E); 1st Dist. Loc.R. 11.1.1.

Following a bench trial, plaintiff-appellant Frank Wimmer appeals from the trial court's judgment in favor of his older brother, defendant-appellee Anthony Wayne Wimmer, on Frank's claim seeking specific performance of a purported oral contract to purchase a house owned by Anthony. Frank also appeals from the trial court's denial of his motion for relief from judgment.

When Frank encountered medical and financial problems, Anthony lent money to Frank and, in 2004, let Frank and his three children move into a house that he owned. Frank still occupies the home. Frank made some payments to Anthony in 2007. Starting in 2009, Frank began to make regular monthly payments of \$1,000 plus utility costs. Frank testified that these payments—totaling over \$120,000—were to repay Anthony for

his help and for the full purchase price of the house. His payments stopped in 2012 when Anthony refused to convey title.

Frank brought this action for specific performance, money damages, or the return of benefits unjustly received. At the conclusion of the lengthy trial, the trial court entered judgment against Frank, issued findings of fact and conclusions of law stating that no enforceable contract existed between the brothers for the sale of the property, and denied Frank's post-trial motions. Anthony had advanced a counterclaim but did not appeal the trial court's dismissal of that claim.

In his first assignment of error, Frank asserts that the trial court's judgment denying his claim for specific performance was against the manifest weight of the evidence. Because there was no written contract for sale of the land, Frank was required to prove the existence of an enforceable contract and its material terms by clear and convincing evidence. *See Alban v. Schnieders*, 67 Ohio App. 397, 399, 34 N.E.2d 302 (1st Dist.1940); *see also Bumgarner v. Bumgarner*, 4th Dist. Highland No. 09CA22, 2010-Ohio-1894, ¶ 26 (applying the same standard to the equitable doctrine of part performance).

In reviewing a weight-of-the-evidence challenge, we weigh the evidence and all reasonable inferences, consider the credibility of the witnesses, and determine whether in resolving conflicts in the evidence, the trial court clearly lost its way and created such a manifest miscarriage of justice that its judgment must be reversed and a new trial ordered. *See Eastley v. Volkman*, 132 Ohio St.3d 328, 2012-Ohio-2179, 972 N.E.2d 517, ¶ 20. But "[i]n weighing the evidence, [we] must always be mindful of the presumption in favor of the finder of fact." *Id.* at ¶ 21. This is particularly evident when the trial court has issued findings of fact and conclusions of law pursuant to Civ.R. 52. *See Busch Bros. Elevator*

Co. v. Unit Bldg. Servs., 190 Ohio App.3d 413, 2010-Ohio-5320, 942 N.E.2d 404, ¶ 3 (1st Dist.).

In a case such as this, where the evidence was often subject to more than one interpretation, we are guided by the principle that “the weight to be given the evidence and the credibility of the witnesses are primarily for the trier of the facts.” *See State v. DeHass*, 10 Ohio St.2d 230, 227 N.E.2d 212 (1967), paragraph one of the syllabus. Here, the trial court, sitting as the trier of fact, heard the testimony of 12 witnesses, and received hundreds of pages of documentary evidence. Without objection, the trial court actively questioned several witnesses to clarify their testimony. The parties’ testimony disputed the date of contract formation, whether money payments by Frank to Anthony were solely for purchase of the house or for reimbursement for funds provided earlier to Frank, and most revealingly, the ultimate purchase price of the property. There was ample evidence from which the trier of fact could have concluded that there was no “meeting of the minds.” Thus we cannot say that the trial court lost its way and committed such a manifest miscarriage of justice that the judgment must be reversed. *See Eastley* at ¶ 17-21. Accordingly, the first assignment of error is overruled.

Frank’s next assignment of error, in which he asserts that the trial court erred in denying his motion for relief from judgment on his unjust-enrichment claim, is without merit. We note that the trial court properly disposed of this claim in its Second Judgment Entry.

To prevail on a motion for relief from judgment made pursuant to Civ.R. 60(B)(1) and 60(B)(5), the moving party bears the burden to demonstrate that (1) he has a meritorious defense or claim to present if relief is granted; (2) he is entitled to relief under one of the grounds stated in Civ.R. 60(B)(1) through (5); and (3) the motion is timely made. *GTE Automatic Elec., Inc. v. ARC Industries, Inc.*, 47 Ohio St.2d 146, 351 N.E.2d

113 (1976), paragraph two of the syllabus; *W2 Props., LLC v. Haboush*, 196 Ohio App.3d 194, 2011-Ohio-4231, 962 N.E.2d 858, ¶ 21 (1st Dist.). Whether to grant relief from judgment lies within the trial court's discretion. *W2 Props.* at ¶ 21.

There was no expert testimony to substantiate Frank's claim that he had made improvements to the property which increased its valuation. He was able to document only \$3,900 of repairs to the property. And Frank and his children have lived in the house since 2004. On this record, the trial court's conclusion that work performed on the house by Frank was done for maintenance, upkeep, and his own enjoyment, and was not done to improve the value of the property, was supported by a sound reasoning process. *See Bank of N.Y. Mellon v. Martin*, 1st Dist. Hamilton No. C-140314, 2015-Ohio-2531, ¶ 26. Frank has failed to demonstrate entitlement to relief under Civ.R. 60(B), and the trial court did not abuse its discretion in denying his motion. *See GTE Automatic Elec., Inc.* at paragraph two of the syllabus. The second assignment of error is overruled.

Therefore, we affirm the trial court's judgments.

Further, a certified copy of this judgment entry shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

FISCHER, P.J., CUNNINGHAM and STAUTBERG, JJ.

To the clerk:

Enter upon the journal of the court on September 28, 2016
per order of the court _____.
Presiding Judge