[Cite as *Autumn Health Care v. Peoples Bank, NA*, 2019-Ohio-4545.]

COURT OF APPEALS
LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

		JUDGES:
AUTUMN HEALTH CARE, ET AL	:	Hon. W. Scott Gwin, P.J.
	:	Hon. John W. Wise, J.
Plaintiffs-Appellants/Cross-appellees	:	Hon. Patricia A. Delaney, J.
	:	
-vs-	:	
	:	Case No. 19-CA-19
PEOPLES BANK, NA	:	
	:	
Defendant-Appellee/Cross-appellant	:	OPINION

CHARACTER OF PROCEEDING:	Civil appeal from the Licking County Court of Common Pleas, Case No.2018CV00615
JUDGMENT:	Affirmed in part; Reversed and Remanded in part
DATE OF JUDGMENT ENTRY:	October 30, 2019

APPEARANCES:

For Plaintiffs-Appellants/Cross-appellees	For Defendant-Appellee/Cross-appellant
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Gwin, P.J.

{¶1} Appellants and cross-appellants both appeal the March 6, 2019 judgment entry of the Licking County Court of Common Pleas.

Facts & Procedural History

{¶2} On June 15, 2018, appellants/cross-appellees Autumn Health Care ("Autumn") and Steven Hitchens ("Hitchens"), individually and as successor in interest to Autumn Health Care, filed a complaint against appellee/cross-appellant Peoples Bank N.A., formerly known as Ohio Heritage Bank, for breach of contract and declaratory judgment, seeking a declaration of rights regarding the legal obligations of Hitchens, Autumn, and Peoples Bank under a consumer security agreement.

{¶3} The facts, as alleged in the complaint, are as follows. In June of 2009, Jeff and Janie Thompson ("Thompsons") sought to purchase the residence located at 2297 Brownsville Road S.E. in Newark by obtaining a loan and a mortgage. Hitchens agreed to pledge collateral, in the form of a $50,000 certificate of deposit, to help the Thompsons obtain a loan and mortgage. On or about June 30, 2009, Ohio Heritage Bank agreed to loan $133,000 to the Thompsons. The transaction between Ohio Heritage and the Thompsons culminated on August 5, 2009, with the execution of an adjustable rate note and a mortgage by the Thompsons in favor of Ohio Heritage Bank. Concurrently with the transaction between the Thompsons and Ohio Heritage, Hitchens executed a consumer security agreement and an assignment of deposit or share account.

{¶4} On October 17, 2017, Peoples Bank sent written notice to Autumn that the Thompsons were in default, sufficient payment arrangements had not been made to cure the default, and that the Hitchens CD would be setoff in the amount of $50,000.

{¶5} Autumn and Hitchens alleged in their complaint that, pursuant to a written memorandum by Ohio Heritage Bank Assistant Vice President Marlise Hitchens, the Thompsons' loan would have an adjustable rate, subject to increase after five years, and the collateral pledged by Hitchens only secured the initial five-year period of the loan. Further, that because the security agreement did not include a merger or integration clause, the memorandum of Marlise Hitchens and security agreement together reflect that the CD was pledged as collateral security for the Thompsons' loan only until August 5, 2014, the end of the initial five-year term of the loan.

{¶6} Autumn and Hitchens attached the following exhibits to their complaint: the certificates from the State of Ohio demonstrating Ohio Heritage Bank was merged into Peoples Bank; the June 30, 2009 memorandum signed by Marlise Hitchens; the adjustable rate note signed by the Thompsons; the mortgage; the adjustable rate rider signed by the Thompsons; the consumer security agreement signed by Hitchens; and the letter from Peoples Bank to Autumn stating the bank is exercising its right of setoff and debiting the CD in the amount of $50,000.

{¶7} The adjustable rate rider provides the initial interest rate of 5.875% may change after the 60th payment and every 60th payment thereafter.

{¶8} The security agreement, dated August 5, 2009, provides it secures a note in the amount of $133,407 signed by the Thompsons and lists the property given as collateral to secure the debts as CD #38438813 in the amount of $50,000 held at Ohio Heritage Bank. The security agreement further states,

> To secure the payment and performance of the Secured Debts, I give you a security interest in all of the Property described in this Agreement that I

> own or have sufficient rights in which to transfer an interest, now or in the future, wherever the Property is or will be located * * This Agreement remains in effect until terminated in writing, even if the Secured Debts are paid and you are no longer obligated to advance funds to me (or Borrower, if not the same) under any loan or credit agreement.

{¶9} The June 30, 2009 memorandum, with the signature of Marlise Hitchens at the bottom, states as follows:

> With additional approval from the lending committee, I agreed to lend Jeff and Janie Thompson approx. $133,000 to buy out their land contract. The land contract is held by the Catholic Church and the property is located at 2297 Brownsville Rd. SE, Newark. The original amount was $150,000 and they have paid $18,000. The land contract is actually for 0% interest and is due on August 1, 2009. We will be putting them into the 5/5 ARM beginning at 5.875%.
>
> Their D/I shows an exception of 12%. This is in part because Jeff is self employed as a heating and cooling person and has 'business' loans for vehicles on his personal credit bureau. He was sent to us by Steve Hitchens who is going to pledge additional collateral in the form of a $50,000 CD for 5 years on this loan. Janie is a homemaker.

{¶10} On August 20, 2018, Peoples Bank filed an answer to the complaint and a counterclaim. In the counterclaim, Peoples Bank alleged it was entitled to exercise its right to setoff and is entitled to complete indemnification from Hitchens for all claims asserted in the complaint, together with fees, costs, and attorney fees. Peoples Bank

attached the following exhibits to their complaint: the adjustable rate note signed by the Thompsons; the mortgage; the adjustable rater rider; the certificate of deposit dated July 6, 2009 issued to Hitchens; the consumer security agreement signed by Hitchens; and the assignment of deposit or share account signed by Hitchens.

{¶11} The certificate of deposit states it automatically renews after the initial five-year maturity date. It provides as follows with regard to setoff:

> We may (without prior notice and when permitted by law) set off the funds in the account against any due and payable debt you owe us now or in the future * * * You agree to hold us harmless from any claim arising as a result of our exercise of our right of setoff.

{¶12} The assignment signed by Hitchens states Hitchens gives Ohio Heritage Bank a security interest in the CD, and any renewals or substitutions, to secure payment of a note in the amount of $133,407 signed by the Thompsons. The assignment provides that the term "You" means the secured party name above (Ohio Heritage Bank) and "secured party" is defined as "the secured party named above, your successors and assigns." Further, the assignment states, "this agreement will last until You release it in writing, and You are not required to release it until the secured debts are paid in full."

{¶13} Hitchens filed an answer to the counterclaim on September 24, 2018.

{¶14} Peoples Bank filed a motion for judgment on the pleadings on October 29, 2018. Autumn and Hitchens filed a memorandum in opposition to Peoples Bank's motion for judgment on the pleadings and their own motion for summary judgment on December 17, 2018. Attached to the motion for summary judgment is the declaration of Michael King, attorney for Autumn and Hitchens. King avers that included in the documents

provided to him by the attorney for Peoples Bank on December 7, 2017 was the initial transaction summary signed by Marlise Hitchens, dated June 30, 2009. People's Bank filed a reply brief on January 14, 2019.

{¶15} The trial court issued a judgment entry on March 6, 2019. The trial court found that although Autumn and Hitchens attached the June 30, 2009 document signed by Marlise Hitchens to the complaint, it is not properly before the court pursuant to Civil Rule 56(E) and, even assuming its admissibility, it is excluded by the parol evidence rule. The trial court found as follows: the document was not made contemporaneously to the security agreement and assignment; the document was not directed to or signed by Mr. Hitchens; there is nothing ambiguous or uncertain about the security agreement or assignment; Autumn and Hitchens did not demonstrate any exception to the parol evidence rule; interpreting the documents as Autumn and Hitchens suggests would contradict the terms of the security and assignment; and the assignment clearly states it is in effect until the debts are paid in full, not five years. The trial court additionally found the assignment language disposes of Autumn and Hitchens' claim that Peoples Bank did not give them adequate notice of default or an opportunity to cure, as the assignment provides Hitchens had no right to notice of default or opportunity to cure.

{¶16} The trial court granted Peoples Bank's motion for judgment on the pleadings on Autumn and Hitchens' complaint. As to the bank's claim for indemnification, the trial court found the hold harmless clause does not include the claims in this case and contemplates third-party claims arising against an account holder for insufficient funds as a result of a setoff. Additionally, the trial court stated Autumn and Hitchens' claims arise from the security agreement and the assignment, and involve the interpretation of those

documents independent of the bank's right to a setoff. Thus, the trial court granted Autumn and Hitchens' summary judgment on the bank's claim for attorney fees and/or expenses.

{¶17} Autumn and Hitchens appeal the judgment entry of the Licking County Court of Common Pleas and assign the following as error:

{¶18} "I. THE TRIAL COURT ERRED BY MISAPPLYING THE PAROL EVIDENCE RULE, THEREBY FAILING TO GIVE PROPER LEGAL EFFECT TO THE COMPLETE AGREEMENT OF THE PARTIES AS EXPRESSED IN THEIR WRITTEN, SIGNED DOCUMENTS."

{¶19} Peoples Bank also appeals the judgment entry and assigns the following as error:

{¶20} "I. THE TRIAL COURT ERRED IN DISMISSING PEOPLE'S BANK'S COUNTERCLAIM FOR INDEMNIFICATION."

Summary Judgment Standard

{¶21} Civ.R. 56 states, in pertinent part:

> Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. No evidence or stipulation may be considered except as stated in this rule. A summary judgment shall not be rendered unless it appears from the evidence or stipulation, and only from the evidence or stipulation, that reasonable

> minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence or stipulation construed mostly strongly in the party's favor. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

{¶22} A trial court should not enter a summary judgment if it appears a material fact is genuinely disputed, nor if, construing the allegations most favorably towards the non-moving party, reasonable minds could draw different conclusions from the undisputed facts. *Hounshell v. Am. States Ins. Co.*, 67 Ohio St.2d 427, 424 N.E.2d 311 (1981). The court may not resolve any ambiguities in the evidence presented. *Inland Refuse Transfer Co. v. Browning-Ferris Inds. of Ohio, Inc.*, 15 Ohio St.3d 321, 474 N.E.2d 271 (1984). A fact is material if it affects the outcome of the case under the applicable substantive law. *Russell v. Interim Personnel, Inc.*, 135 Ohio App.3d 301, 733 N.E.2d 1186 (6th Dist. 1999).

{¶23} When reviewing a trial court's decision to grant summary judgment, an appellate court applies the same standard used by the trial court. *Smiddy v. The Wedding Party, Inc.*, 30 Ohio St.3d 35, 506 N.E.2d 212 (1987). This means we review the matter de novo. *Doe v. Shaffer*, 90 Ohio St.3d 388, 2000-Ohio-186, 738 N.E.2d 1243.

Motion for Judgment on the Pleadings

{¶24} Civil Rule 12(C) provides, "After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings." The standard of review of the grant of a motion for judgment on the pleadings is the same as

the standard of review for a Civil Rule 12(B)(6) motion. As the reviewing court, our review of a dismissal of a complaint based upon a judgment on the pleadings requires us to independently review the complaint and determine if the dismissal was appropriate. *Rich v. Erie County Dept. of Human Resources*, 106 Ohio App.3d 88, 665 N.E.2d 278 (6th Dist. Erie 1995). A reviewing court need not defer to the trial court's decision in such cases. *Id.*

{¶25} A motion for judgment on the pleadings, pursuant to Civil Rule 12(C), presents only questions of law. *Peterson v. Teodosio*, 34 Ohio St.2d 161, 297 N.E.2d 113 (1973). The determination of a motion under Civil Rule 12(C) is restricted solely to the allegations in the pleadings and the nonmoving party is entitled to have all material allegations in the complaint, with reasonable inferences to be drawn therefrom, construed in its favor. *Id*.

I.

{¶26} In their assignment of error, Autumn and Hitchens contend the trial court erred by misapplying the parol evidence rule and in failing to give proper legal effect to the complete agreement of the parties, as expressed in their written and signed documents. Autumn and Hitchens argue the trial court failed to consider the June 30th memorandum and the parol evidence rule has no application in this case because the memorandum is not extrinsic evidence offered to contradict or vary the terms of the agreement, but instead is part of the parties' complete and final written agreement. They contend the language used by Marlise Hitchens in the June 30th memorandum is clear that the collateral was only pledged for a five-year period beginning on August 5, 2009.

{¶27} It is a well-settled principle of contract law that the parties' intentions be ascertained from the contract language. *Inland Refuse Transfer Co. v. Browning-Ferris Indus.*, 15 Ohio St.3d 321, 474 N.E.2d 271 (1984). If a contract is clear and unambiguous, then its interpretation is a matter of law and there are no issues of fact to be determined. *Id.* A court cannot in effect create a new contract "by finding an intent not expressed in the clear language employed by the parties." *Alexander v. Buckeye Pipe Line Co.*, 53 Ohio St.2d 241, 374 N.E.2d 146 (1978).

{¶28} When confronted with an issue of contract interpretation, our role is to give effect to the intent of the parties. *McDonald v. Canton Medical Edn. Found., Inc.*, 5th Dist. Stark No. 2012CA00240, 2013-Ohio-3659. We presume the intent of the parties is reflected in the language of the contract and we will look at the plain and ordinary meaning of the language used in the contract. *Id.* "Common words appearing in a written instrument will be given their ordinary meaning unless manifest absurdity results, or unless some other meaning is clearly evidenced from the face or the overall contents of the instrument." *Alexander v. Buckeye Pipe Line Co.*, 53 Ohio St.2d 241, 374 N.E.2d 146 (1978). Parol evidence cannot be considered if no ambiguity appears on the face of the instrument. *Shifrin v. Forest City Ents., Inc.*, 64 Ohio St.3d 635, 597 N.E.2d 499 (1992). When terms of an agreement are ambiguous, parol evidence may be used to explain the understanding of the parties at the time the agreement was entered into. *Phillimore v. Butterbaugh*, 5th Dist. Richland No. 14CA32, 2014-Ohio-4641, citing *Ohio Crane Co. v. Hicks*, 110 Ohio St. 168, 143 N.E. 388 (1924).

{¶29} The trial court excluded the June 30th memorandum based upon the parol evidence rule. The parol evidence rule provides that "absent fraud, mistake or other

invalidating clause, the parties' final written integration of their agreement may not be varied, contradicted, or supplemented by evidence of prior or contemporaneous oral agreements, or prior written agreements." *Galmish v. Cicchini*, 90 Ohio St.3d 33, 734 N.E.2d 782 (2000), quoting 11 Williston on Contracts (4th Ed. 1999) 569-570, Section 33:4. The parol evidence rule "effectuates a presumption that a subsequent written contract is of a higher nature than earlier statements, negotiations, or oral agreement by deeming those earlier expressions to be merged into or superseded by the written document." *Id.*

{¶30} The purpose of the parol evidence rule "is to protect the integrity of written contracts." *Id.* The parol evidence rule "is a rule of substantive law that prohibits a party who has entered into a written contract from contradicting * * * the terms of the contract with evidence of alleged or actual agreement." *Williams v. Spitzer Autoworld Canton, L.L.C.*, 122 Ohio St.3d 546, 2009-Ohio-3554, 913 N.E.2d 410. However, if a written contract does not contain the complete and exclusive statement of all the terms of the agreement, a factual determination of the parties' intent may be necessary to supply the missing term. *Inland Refuse Transfer Co. v. Browning Ferris Indus.*, 15 Ohio St.3d 321, 474 N.E.2d 271 (1984).

{¶31} Upon review, we find the June 30th memorandum violates the parol evidence rule and the trial court properly excluded it.

{¶32} The terms of the agreement are clear and unambiguous as both the security agreement and assignment state they last until they are terminated in writing. Any attempt to use the June 30th memorandum, a prior written agreement, to contradict the terms of the security agreement and the assignment that were both signed weeks later on August

5, 2009, is not permitted by the parol evidence rule. Though Autumn and Hitchens contend the documents other than the June 30th memorandum do not set out an end date and thus do not conflict with the June 30th memorandum, we disagree. The security agreement signed by Hitchens specifically states, "This Agreement remains in effect until terminated in writing, even if the Secured Debts are paid and you are no longer obligated to advance funds to me (or Borrower, if note the same) under any loan or credit agreement." The assignment signed by Hitchens provides, "this agreement will last until You [the secured party] release it in writing, and You are not required to release it until the secured debts are paid in full." Thus, Autumn and Hitchens' interpretation of the June 30th memorandum that limits the pledge of collateral to five years contradicts the terms of the security agreement and assignment.

{¶33} According to Autumn and Hitchens, the documents in this case, including the June 30th memorandum, are all part of the same transaction, and should be interpreted together as the parties' expression of their agreement. They cite *Edward A. Kemmler Memorial Foundation v. 691/733 East Dublin-Granville Road Co.*, in support of their argument. 62 Ohio St.3d 494, 584 N.E.2d 695 (1992). In *Kemmler*, the Ohio Supreme Court held that, under former R.C. 1303.18, the terms of a promissory note or other negotiable instrument, as between the immediate parties to the instrument, may be modified or affected by another writing executed as part of the same transaction. *Id.* Specifically, the court found the mortgage, deed, and statement of settlement, executed and delivered at the same time as the note, could be admitted into evidence to prove an agency relationship. *Id.*

{¶34} We first note that the statute cited by the Ohio Supreme Court in *Kemmler* is no longer in effect. A similar statute, R.C. 1303.15, was enacted in 1994. However, the plain language of the statute makes it clear that it is subject to and limited by the parol evidence rule. R.C. 1303.15 ("Subject to applicable law regarding exclusion of proof of contemporaneous or previous agreements, the obligation of a party to an instrument * * * may be modified, supplemented, or nullified by a separate agreement * * * if the instrument is issued * * * as part of the same transaction giving rise to the agreement"). Thus, since the statute is limited by the parol evidence rule, our above analysis applying the parol evidence rule to exclude the June 30th memorandum is not altered by the application of *Kemmler* and R.C. 1303.15.

{¶35} Additionally, unlike the documents in *Kemmler* that were executed at the same time as the note, the June 30th memorandum was not executed and delivered as part of the same transaction as the security agreement and assignment. The June 30th memorandum was not signed by Steven Hitchens, was not directed to Hitchens, was not delivered to him during the transaction, and was not referenced or incorporated in either the security agreement or assignment.

{¶36} We find the June 30th memorandum is barred by the parol evidence rule as evidence of a purported prior agreement that contradicts the terms of the parties' signed and written agreement that this Court is precluded from considering as a matter of law. Autumn and Hitchens' first assignment of error is overruled.

Cross-Assignment of Error I.

{¶37} In its assignment of error, Peoples Bank contends the trial court committed error when it granted Autumn and Hitchens' motion for summary judgment on its

counterclaim for indemnification. The trial court found the hold harmless clause cited by Peoples Bank contemplates third-party claims arising against an account holder for insufficient funds as a result of a setoff and this case involved documents independent of Peoples Bank right to a setoff.

{¶38} As noted above, our role is to give effect to the intent of the parties and we presume the intent of the parties is reflected in the language of the contract; we will look at the plain and ordinary meaning of the language used in the contract. *McDonald v. Canton Medical Edn. Found, Inc.*, 5th Dist. Stark No. 2012CA00240, 2013-Ohio-3659.

{¶39} The specific language of the CD states, "you agree to hold us harmless from any claim arising as a result of our exercise of our right of setoff." There is no language contained in the hold harmless clause limiting indemnification to third party claims for insufficient funds and the final sentence of the provision does not limit the right of recovery only to third party claims for insufficient funds as a result of a setoff. The plain and unambiguous language of the parties' contract requires Autumn and Hitchens to hold Peoples Bank harmless for any claim arising from its rights of setoff.

{¶40} In their complaint, Autumn and Hitchens allege that the setoff by Peoples Bank was improper because the CD was only intended to be pledged for five years and not for the life of the mortgage loan. Thus, this case arises from Peoples Bank's exercise of its right of setoff as against the CD. Autumn and Hitchens' lawsuit would not exist but for Peoples Bank's exercising its right to setoff. Accordingly, we find the trial court committed error in granting summary judgment in favor of Autumn and Hitchens on Peoples Bank's indemnification claim. Peoples Bank's cross-assignment of error is sustained.

{¶41} Based on the foregoing, Autumn and Hitchens' assignment of error is overruled. Peoples Bank's cross-assignment of error is sustained.

{¶42} The March 6, 2019 judgment entry of the Licking County Court of Common Pleas is affirmed in part and reversed and remanded in part, for proceedings consistent with this opinion.

By Gwin, P.J.,

Wise, John, J., and

Delaney, J., concur