[Cite as *Kahler v. Cincinnati Inc.*, 2015-Ohio-979.]

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

JOHN S. KAHLER,	:	APPEAL NO. C-140407 TRIAL NO. A-1305242
Plaintiff-Appellant,	:	
vs.	:	*O P I N I O N.*
CINCINNATI INCORPORATED,	:	
Defendant-Appellee.	:	

Civil Appeal From: Hamilton County Court of Common Pleas

Judgment Appealed From Is: Affirmed in Part, Reversed in Part, and Cause Remanded

Date of Judgment Entry on Appeal:

John S. Kahler, pro se,

Lierman & Cornwell Co., LLC, and *Jeff J. Cornwell*, for Defendant-Appellee.

Please note: this case has been removed from the accelerated calendar.

SYLVIA SIEVE HENDON, Presiding Judge.

{¶1} Plaintiff-appellant John S. Kahler appeals the summary judgment entered by the Hamilton County Common Pleas Court in favor of his former employer, Cincinnati Incorporated ("CI"), in his action for declaratory judgment and promissory estoppel relating to the calculation of interest as set forth in the parties' deferred-compensation agreement.

{¶2} The gist of Kahler's action was to have the court declare that the agreement required interest to be paid on the combined balance in the account, consisting of deferred compensation and previously earned income, as CI had historically done, and to have the court stop CI from changing its method of computation to require interest to be paid solely on deferred compensation. Because the deferred-compensation agreement was ambiguous with respect to the calculation of interest, we reverse the judgment of the trial court on Kahler's declaratory-judgment claim.

Background

{¶3} Kahler was an employee of CI from 1993 until he retired in 2005. After retiring, Kahler provided consulting services for CI.

{¶4} In 1996, during his employment, Kahler and CI executed a written agreement for deferred compensation. Paragraph 3 of the agreement, captioned "Segregation of Deferred Amounts," provided as follows:

> The Company shall establish and maintain a bookkeeping Account for Mr. Kahler if he files an election under Section 2.1 hereof. The balance of such Account shall be credited with additional amounts as if the

> balance of such Account were invested to produce interest income at a simple annual rate equal to the rate of twenty-six week United States Treasury Bills on the first business day of each year, plus one percent. Apart from such bookkeeping account, the deferred amounts will not be segregated from other assets of the Company.

{¶5} In 2002, the parties executed an amendment to the agreement that changed the index used to calculate income. The amendment changed only the second sentence of Paragraph 3 to delete the words "rate of twenty-six week United States Treasury Bills on the first business day of each year, plus one percent," and to substitute the words "prime rate as published in the 'Wall Street Journal' on the first business day of each year plus 1%."

{¶6} In December 2004, in anticipation of Kahler's retirement, the parties executed a consulting agreement that incorporated the original deferred-compensation agreement and its amendment.

{¶7} According to Kahler, CI provided him annually with year-end statements that reflected the amounts credited by way of deferred compensation, together with the amounts of interest credited to the account balance. The ending balance for each year became the starting balance for the ensuing year, thus establishing a pattern of compounding the interest.

{¶8} In February 2012, Kahler received a letter from an accounting firm, Ossege Combs & Mann, Ltd. ("Ossege"), that had been hired by CI to review the company's retirement plan and the calculation of Kahler's deferred compensation. Ossege stated that it had obtained "a list of the amounts deferred by you, a list of

amounts paid to you, and a summary of pertinent interest rates. Using this information, we have recalculated the amounts[.]" Ossege further stated,

> The deferred compensation agreement requires simple annual interest which is interest applied on the original principal amount and our calculation uses that method. Our analysis of the previous calculations historically conducted by Cincinnati Incorporated concludes those previous calculations used a compound interest method, which is interest applied on the original principal plus interest on the cumulative interest.

{¶9} Kahler initiated this action against CI for declaratory judgment and promissory estoppel. He sought a declaration that the agreement be interpreted to require payment of interest on the balance in his deferred-compensation account, that the interest be credited to the balance, and that the aggregate balance be used as the basis for the subsequent computation of interest. He asked that CI be estopped from changing the method by which interest was credited to his account.

{¶10} The parties filed motions for summary judgment. CI contended that the agreement's use of the term "simple annual rate" required that interest be calculated at a "simple" rate. CI claimed that it had paid the balance of Kahler's deferred compensation using simple interest in accordance with the terms of the agreement. In addition, CI argued that the promissory-estoppel claim was not available where a written agreement governed the same subject matter.

{¶11} In Kahler's summary-judgment motion, he argued that the agreement was ambiguous with respect to the manner of calculating interest income. Specifically, he maintained that the reference to "simple annual rate" referred only to

the calculation of interest within a given year and not to the method of calculating the balance for successive years. Because of the ambiguity, Kahler contended, the court could look beyond the four corners of the contract and glean the parties' intention by their conduct for more than 15 years, which was consistent with his interpretation and entirely inconsistent with CI's claim that the agreement called for simple interest.

{¶12} The trial court entered summary judgment in favor of CI.

The Action for Declaratory Judgment

{¶13} In his first assignment of error, Kahler argues that the trial court erred by granting summary judgment to CI on his declaratory-judgment claim. Kahler contends that the language of the agreement was susceptible to more than one interpretation, so that a genuine issue of material fact remained for trial. We review a trial court's entry of summary judgment de novo. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996).

{¶14} Summary judgment is appropriately granted when no genuine issue of material fact exists, the movant is entitled to judgment as a matter of law, and the evidence, when viewed in favor of the nonmoving party, permits only one reasonable conclusion and that conclusion is adverse to the nonmoving party. *State ex rel. Howard v. Ferreri*, 70 Ohio St.3d 587, 589, 639 N.E.2d 1189 (1994).

{¶15} Under R.C. 2721.03 and 2721.04, a party to a written contract may bring a declaratory-judgment action to have a court determine any question of construction arising under the contract, as well as a declaration of rights, status, or other legal relations under it. *See Preferred Risk Ins. Co. v. Gill*, 30 Ohio St.3d 108, 507 N.E.2d 1118 (1987).

{¶16} The construction of a written contract is a matter of law. *Alexander v. Buckeye Pipe Line Co.*, 53 Ohio St.2d 241, 374 N.E.2d 146 (1978), paragraph one of the syllabus. Common words used in a contract must be given their ordinary meaning, unless the result would be absurd, or unless some other meaning is clearly intended from the overall content of the document. *Id.* at paragraph two of the syllabus.

{¶17} A court's role in examining a contract is to ascertain the intent of the parties. *See Hamilton Ins. Servs., Inc. v. Nationwide Ins. Cos.*, 86 Ohio St.3d 270, 714 N.E.2d 898 (1999). If a contract's terms are unambiguous, a court must apply the plain language of the contract. *Nationwide Mut. Fire Ins. Co. v. Guman Bros. Farm*, 73 Ohio St.3d 107, 108, 652 N.E.2d 684 (1995). If the contract language is unclear or ambiguous, extrinsic evidence is admissible to discern the intent of the parties. *See Shifrin v. Forest City Ents., Inc.*, 64 Ohio St.3d 635, 638, 597 N.E.2d 499 (1992). Contract language is ambiguous if the language is susceptible to two or more reasonable interpretations or if its meaning cannot be determined from the face of the contract. *See Bates v. Cincinnati*, 1st Dist. Hamilton No. C-130145, 2013-Ohio-5893, 7 N.E.3d 521, ¶ 13; *Drs. Kristal & Forche, D.D.S., Inc., v. Erkis*, 10th Dist. Franklin No. 09AP-06, 2009-Ohio-5671, ¶ 22.

{¶18} The dispute in this case centers on the interpretation of the second sentence of the third paragraph of the agreement: "The balance of such Account shall be credited with additional amounts as if the balance of such Account were invested to produce interest income at a simple annual rate equal to * * *." According to CI, the agreement required simple annual interest, which is equivalent to simple interest or interest applied on the original principal amount. According to

Kahler, the agreement required interest to be applied on the original principal amount plus interest on the cumulative interest. Because both interpretations are reasonable, and because we cannot determine the meaning of the language from the face of the agreement, we hold that the agreement is ambiguous with respect to whether interest must be paid on the combined balance of deferred compensation and previously earned interest, or whether interest must be paid solely on the deferred compensation. Because an issue of fact remains as to what the parties intended, we hold that the trial court improperly granted summary judgment. *See Inland Refuse Transfer Co. v. Browning-Ferris Industries of Ohio, Inc.*, 15 Ohio St.3d 321, 322, 474 N.E.2d 271 (1984). Accordingly, we sustain the first assignment of error.

Promissory Estoppel

{¶19} In his second assignment of error, Kahler argues that the trial court erred by granting summary judgment to CI on his promissory-estoppel claim. Kahler's claim for promissory estoppel essentially reasserted his interpretation of the third paragraph of the deferred-compensation agreement. He alleged that, by the "express terms of the [a]greement" and by its conduct, CI had promised to "[m]aintain a balance in a bookkeeping account established for plaintiff to account for his deferred compensation, [c]redit the balance in that account with interest as if the balance had been invested and earned interest at a rate calculated with reference to a specific benchmark, [and] [c]onsider the balance to include all previously earned interest, since such interest was retained in the account, not disbursed."

{¶20} Promissory estoppel is not an available remedy where the legal relationship of the parties is governed by a valid and enforceable contract. *Gibson*

Real Estate Mgt., Ltd. v. Ohio Dept. of Adm. Servs., Ct. of Cl. No. 2005-07658, 2006-Ohio-620. *Accord Waltherr-Willard v. Mariemont City Sch.*, S.D.Ohio No. 1:12-cv-476-HJW, 2013 U.S. Dist. LEXIS 4152 (Jan. 9, 2013). Where parties enter into an enforceable written contract "and merely dispute its terms, scope, or effect, one party cannot recover for promissory estoppel." *Terry Barr Sales Agency, Inc. v. All-Lock Co., Inc*, 96 F.3d 174, 181 (6th Cir.1996).

{¶21} In this case, the trial court correctly entered judgment in favor of CI on Kahler's promissory-estoppel claim because the claim was based on, and concerned the same subject matter as, their written agreement. *See Simpson v. Bakers/Local No. 57*, 1st Dist. Hamilton No. C-960517, 1998 Ohio App. LEXIS 1855. Consequently, we overrule the second assignment of error.

Conclusion

{¶22} We affirm the trial court's judgment in favor of CI with respect to Kahler's promissory-estoppel claim. We reverse the trial court's judgment with respect to Kahler's declaratory-judgment claim and remand this matter for proceedings consistent with law and this opinion.

Judgment affirmed in part and reversed in part, and cause remanded.

CUNNINGHAM and **FISCHER, JJ.,** concur**.**

Please note:

The court has recorded its own entry on the date of the release of this opinion.