[Cite as *Corey v. Big Run Industrial Park, L.L.C.*, 2009-Ohio-5129.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

J. William Corey et al.,	:	
Plaintiffs-Appellants,	:	
		No. 09AP-176
v.	:	(C.P.C. No. 07CVH08-11562)
Big Run Industrial Park, LLC et al.,	:	(REGULAR CALENDAR)
Defendants-Appellees.	:	

D E C I S I O N

Rendered on September 29, 2009

Kemp, *Schaeffer & Rowe Co.*, *LPA*, *Steven D. Rowe*, and *Erica Ann Probst*, for appellants.

Wiles, *Boyle*, *Burkholder & Bringardner Co.*, *L.P.A.*, *Thomas E. Boyle*, *Kerry T. Boyle*, and *Alicia E. Zambelli*, for appellee Big Run Industrial Park, LLC.

APPEAL from the Franklin County Court of Common Pleas.

SADLER, J.

{¶1} Plaintiffs-appellants, J. William Corey ("Corey") and On Demand Land, LLC (collectively, "appellants"), appeal from the judgment of the Franklin County Court of Common Pleas, in which that court granted the motion for summary judgment of

defendant-appellee, Big Run Industrial Park, LLC ("appellee"), as to appellants' claims for breach of contract. The relevant procedural and factual history follows.

{¶2} In 2003, appellants engaged realtor Michael Linder ("Linder") to search for commercial real estate in Columbus, for the purpose of operating a Portable On Demand Storage franchise on the site. At the same time, appellee owned 55 acres of industrial real estate in the Village of Urbancrest and listed it for sale with another agent at Linder's agency. According to appellants, Linder told Corey that the taxes on improvements to the real estate were 100 percent abated for 15 years, and, based on that representation alone, appellants decided to purchase 4.7 acres ("the property") from appellee.

{¶3} The Real Estate Purchase Contract ("the contract") between the parties provided, in relevant part:

> 3. CONTINGENCIES:
> Buyer's obligations hereunder are contingent upon Buyer's satisfaction of the following contingencies regarding the Premises, at Buyer's sole discretion. If Buyer determines any of the results, reports or other information obtained as a result of Buyer's or Seller's efforts to satisfy the following contingencies are not acceptable to Buyer within the time limits set forth below, this contract shall be terminable by Buyer. Buyer shall have the right to terminate this contract, and if Buyer elects to terminate this contract, Buyer will provide notice of such election to Seller and upon such termination, Esquire Title shall return any deposit to Buyer and the parties shall be released from all further obligations hereunder. Buyer shall have the right to waive any of the contingencies in writing. Buyer shall have one hundred twenty (120) days after the date hereof to satisfy all the contingencies, provided, that so long as Buyer is diligently attempting to satisfy the contingencies but requests additional time during said one hundred twenty (120) day period. Seller shall grant Buyer a thirty (30) day extension of the one hundred twenty (120) day period.

* * *

> .14 Tax Abatement: Seller, at Seller's expense, shall provide Buyer with a copy of the Ordinance indicating the above mentioned parcel(s) are 100% tax abated for 15 years on all real property improvements.

{¶4} The contract also specified that "[a]ll provisions of this contract shall survive the closing." (Contract, Section 17, Page 4.) In addition, in Section 19 of the contract, entitled, "SELLER'S REPRESENTATIONS AND WARRANTIES," the contract provided:

> .5 With respect to the Premises, there are no present or pending representations, agreements or commitments between Seller or any of its respective predecessors in title and any governmental, public or quasi-public agency which would or could impose any obligation or require Buyer to pay any sums or require any development limitations (other than existing zoning and building codes and CRA agreement).

{¶5} G. Bradford Johnson ("Johnson") is appellee's managing member. He had negotiated with the Village of Urbancrest for a 15-year, 100 percent tax abatement on real property improvements on the property, which was memorialized in a document called the Community Reinvestment Area Agreement ("CRA"). The CRA provides, in pertinent part:

> WHEREAS, the Village of Urbancrest, Ohio, by Ordinance No. 96-07 adopted May 7, 1996, and amended by Ordinance No. 02-03, adopted February 5, 2002, designated the area as a "Community Reinvestment Area" pursuant to Chapter 3735 of the Ohio Revised Code; and
>
> WHEREAS, effective June 7, 1996, the Director of Development of the State of Ohio determined that the aforementioned area designated in said Ordinance No. 96-07 contains the characteristics set forth in Section 3735.66 of the Ohio Revised Code and confirmed said area as a Community Reinvestment Area under said Chapter 3735; and

WHEREAS, Urbancrest having the appropriate authority for the stated type of Project is desirous of providing the Owner and the Permitted Initial Assignee with incentives available for the development of the Project in said Community Reinvestment Area under Chapter 3735 of the Ohio Revised Code; and

* * *

NOW THEREFORE, in consideration of the mutual covenants hereinafter contained * * * the parties agree as follows:

1. * * * Construction of the Project shall commence no later than 2006, and be completed no later than 2016. The buildings and improvements that constitute the Project will be constructed in phases. Thus, the different buildings and their related improvements will be completed in different tax years.

* * *

4. Upon receipt of a written request from Owner, Urbancrest shall undertake the verifications and make the certifications required, pursuant to Section 3735.67 of the Ohio Revised Code, to grant the Owner a tax exemption for real property improvements made the Project site. For each building and its associated improvements, the exemption term shall be fifteen (15) years and the exemption percentage shall be one hundred percent (100%). For each building and its associated improvements, the exemption commences the first year for which the real property would first be taxable were that property not exempted from taxation and only when construction of the building and its associated improvements is complete. * * * The Owner must file the appropriate tax forms with the County Auditor, the Housing Council or both to effect and maintain the exemptions covered in the agreement.

* * *

16. This Agreement is not transferable or assignable, except to an affiliate of the Owner, without the express, written approval of Urbancrest, which approval shall not be unreasonably withheld, conditioned or delayed. It is contemplated that in the future Owner will desire to sell the property or a portion thereof to third parties not affiliated with Owner. In such event, Urbancrest shall approve the transfer

> of this Agreement so long as the buyer commits to fulfill all requirements under this Agreement and the sale of the property does not, in the reasonable and good faith judgment of Urbancrest, negatively impact the ability of the Owner or buyer to meet the job creation requirements of this Agreement. Urbancrest shall reasonably approve partial purchases and allocations of the payroll requirements contained in paragraph two (2) so long as the objectives of this Agreement will, in the reasonable and good faith judgment of Urbancrest, be met. Upon said partial purchases and allocations, Urbancrest and the subsequent buyer(s) shall either: (i) if R.C. 3735.65 through R.C. 3735.70 remain substantially unchanged from the date of this Agreement, enter into an agreement with such buyer that obligates buyer to meet such allocated payroll requirements (and other obligations), and that relieves Owner of the payroll requirements (and other obligations) allocated to the subsequent buyer * * *.

{¶6} Johnson gave a copy of the CRA to Linder's agency. Corey admitted in his deposition that Linder faxed a copy of the CRA to him on or about August 18, 2003. Corey also testified that Linder was the only person to whom he ever spoke about the tax abatement for the property, and never discussed the abatement with anyone associated with appellee. Appellee admitted that it never provided appellant with a copy of the ordinance adopting the CRA, but Johnson averred in his affidavit that this was because "merely reading The Village of Urbancrest ordinances, without the CRA, would not provide a potential buyer with information necessary to understand and activate the tax abatement on improvements when the construction of improvements is completed." (Johnson Affidavit, ¶11.)

{¶7} Between the date that Corey received a copy of the CRA and the date of the closing, neither Corey nor Johnson made any mention to the other about the CRA or the ordinances that implemented it. According to Johnson, Corey never indicated to him,

or to anyone else associated with appellee, that appellee had failed to provide any required document. The parties closed the real estate transaction on November 20, 2003.

{¶8} Following the purchase of the property, appellants proceeded to construct improvements on the property. Thereafter, when Corey received the property tax bill in the spring of 2006, he was shocked to learn that the tax of the real property improvements had not been abated and was being charged in full by the Franklin County Auditor. Following this discovery, Corey hired counsel to represent appellants in acquiring an assignment of the CRA and the associated tax abatement for the property. By the end of 2006, appellants' counsel had successfully obtained an assignment and assumption, which provided a 15-year, 100 percent abatement of real estate improvement taxes on the property.

{¶9} On August 28, 2007, appellants filed the instant action against appellee for fraud, breach of the contract, civil conspiracy, and negligent misrepresentation. They also brought various claims against Linder, his agency, and the agency's franchisor, but ultimately dismissed the claims against those defendants. Appellants also voluntarily dismissed their civil conspiracy and negligent misrepresentation claims against appellee, leaving only the breach-of-contract and fraud claims pending against appellee. On November 26, 2008, appellee filed a motion for summary judgment as to the fraud and breach-of-contract claims. Appellants filed a memorandum contra and appellee filed a reply memorandum. On February 5, 2009, the court of common pleas journalized a decision and entry granting appellee's motion for summary judgment.

{¶10} Appellants timely appealed and advance a single assignment of error for our consideration:

> THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT GRANTED DEFENDANT'S MOTION FOR SUMMARY JUDGMENT.

{¶11} We note initially that appellants' brief only addresses the trial court's decision as it relates to the breach-of-contract claim. As such, we will review the decision rendered below only with respect to that claim.

{¶12} An appellate court's review of summary judgment is de novo. *Koos v. Cent. Ohio Cellular, Inc*. (1994), 94 Ohio App.3d 579, 588. Summary judgment is proper only when the party moving for summary judgment demonstrates: (1) no genuine issue of material fact exists, (2) the moving party is entitled to judgment as a matter of law, and (3) reasonable minds could come to but one conclusion, and that conclusion is adverse to the party against whom the motion for summary judgment is made, when the evidence is construed in a light most favorable to the non-moving party. Civ.R. 56(C); *State ex rel. Grady v. State Emp. Relations Bd*., 78 Ohio St.3d 181, 183, 1997-Ohio-221.

{¶13} Appellants argue that appellee breached the contract because, while the language of the parties' agreement required appellee to "provide [appellants] with a copy of [an] Ordinance indicating the * * * parcel[ ] [was] 100% tax abated for 15 years on all real property improvements,"[1] appellee did not provide such an ordinance, and any such ordinance, even one that was delivered and that incorporated the CRA, would not, without additional action by appellants, have resulted in pre-closing exemption from tax

[1] Contract, Section 3.14.

for improvements to the property. According to appellants, appellee breached Section 3.14 of the contract because it failed to deliver, prior to closing, an ordinance that established an abatement applicable to appellants' real property improvements even before those improvements were made and without any effort on appellants' part. As such, their claimed damages consist in the amounts they were required to expend to obtain the tax abatement they ultimately received, along with any taxes for which they were not able to obtain a full abatement.

{¶14} Appellants argue that delivery of the CRA did not constitute compliance with the contract's terms because "no tax abatement had been assigned to the purchased property,"[2] and that "[e]ven an Ordinance enacting the CRA which [appellee] provided would not have complied with [appellee's] obligations under the contract as the CRA did not provide a tax abatement for the property purchased by Appellants."[3] Rather, because the CRA specified conditions precedent to granting of the tax abatement: (1) construction of the improvements to the property, (2) assignment of the CRA rights from appellee to appellants, and (3) application for the abatement by appellants, it was only through fulfillment of those conditions that appellee could have avoided breaching its promise that the property was "100% tax abated." Appellants argue that because appellee failed to do so, "[a]ppellants were forced to hire counsel to obtain the abatement, but only after they were forced to pay real estate taxes for the real property and the improvements for the tax year 2005."[4]

[2] Brief of appellants, 11.
[3] Brief of appellants, 11.
[4] Brief of appellants, 12.

{¶15} In response, appellee presents two alternative arguments. First, appellee argues that, by closing on the transaction, appellants waived the right to enforce the contingency that appellee provide a copy of an ordinance indicating the existence of the property tax abatement. Appellee characterizes this contingency as a condition precedent to appellants' obligation to perform from which appellee was excused once appellants performed under the contract (closed the real estate purchase).

{¶16} In the alternative, appellee argues that it fulfilled the tax abatement contingency by providing appellants with a copy of the CRA, which makes reference to the enacting ordinances, and that, by law, it could no more. Appellee directs our attention to R.C. Chapter 3735, which governs tax exemptions. Under R.C. 3735.67, the owner of a piece of real property cannot apply for activation of a tax exemption until a new structure or remodeling of an existing structure is completed. Therefore, appellee contends, it would have been legally impossible for appellee to have activated the tax abatement prior to the sale because when the sale occurred the property was unimproved. Finally, appellee points out that the parties' contract does not state that appellee was required to assign its rights under the CRA to appellants prior to closing; the language of the contingency at issue states only that appellee was required to provide an ordinance. Because it met this requirement by delivering the CRA, appellee argues, it did not breach the parties' contract.

{¶17} The first issue raised by the parties' arguments is whether, by closing the real estate sale, appellants waived the right to enforce appellee's obligation to "at [appellee's] expense * * * provide [appellants] with a copy of the Ordinance indicating the above mentioned parcel(s) are 100% tax abated for 15 years on all real property

improvements." For the reasons that follow, this issue is dispositive of appellants' assignment of error. A waiver is an intentional relinquishment of a known right; it may be made by express words or by conduct. *White Co. v. Canton Transp. Co.* (1936), 131 Ohio St. 190. To establish a waiver, the party alleging it "must prove a clear, unequivocal, decisive act of the party against whom the waiver is asserted, showing such a purpose or acts amounting to an estoppel on his part." *Cornett v. Fryman* (Jan. 27, 1992), 12th Dist. No. CA91-04-031, quoting *White Co.*

{¶18} Whether appellants may enforce the ordinance-delivery requirement through this breach-of-contract action, or whether they waived it, rests upon a determination whether the tax abatement contingency is a condition precedent or a promise. If it is a promise, then appellants may pursue a remedy for its breach. But "a condition precedent is one that is to be performed before the agreement becomes effective." (Citation omitted.) *Mumaw v. Western & Southern Life Ins. Co.* (1917), 97 Ohio St. 1, 10. "Essentially, a condition precedent requires that an act must take place before a duty to perform a promise arises. If the condition is not fulfilled, the parties are excused from performing." *Atelier Dist., LLC v. Parking Co. of Am., Inc.*, 10th Dist. No. 07AP-87, 2007-Ohio-7138, ¶35. "In Ohio, the general rule is that performance of a condition precedent may be waived by the party to whom the benefit of the condition runs; the waiver may arise expressly or by implication, and the key to its application in a particular case is a showing of some performance pursuant to the terms of the contract." *Mangan v. Prima Constr., Inc.* (Apr. 9, 1987), 1st Dist. No. C-860234, citing *Ohio Farmer's Ins. Co. v. Cochran* (1922), 104 Ohio St. 427.

{¶19} Therefore, if the tax abatement provision is a condition precedent, then it is not a promise for which liability for breach may be imposed, because a party may waive a condition precedent by the act of performance (here, closing on the transaction) despite the non-fulfillment of the condition. "After a failure of an express condition * * * the party for whose benefit the condition exists normally has the power to elect to cancel his performance or to proceed with performance. * * * An election may be, and often is, manifested by conduct. Thus, an election to waive a condition exists if the promisor continues his own performance (if the performance was dependent upon the condition) or by acceptance and retention of a defective performance." Calamari & Perillo, The Law of Contracts (1st ed.1970) 273. This is true even in the absence of additional consideration. "An election by conduct requires no consideration." Id. at 274.

{¶20} In other words, if the provision at issue is a promise, appellee's failure to perform it constitutes a breach, whereas if the provision is a condition precedent, then appellants waived the right to enforce it when they closed the transaction. This is so even though, as appellants point out, the contract specified that all provisions survived the closing. Even though the provision survived the closing, the closing did not change the provision's essential character as either a promise or a condition precedent.

{¶21} "No exclusive test exists to determine whether a particular provision creates a promise or a condition. Of course, if the language is clearly promissory or clearly creates a condition, interpretation is not difficult." Id. at 233. In the present case, the provision at issue is clearly a condition precedent to the obligation of the parties to perform. First, the contract plainly refers to the tax abatement provision as a "contingency." "Contingent" means "conditional." Black's Law Dictionary (8th ed.2004).

Moreover, "[i]n contract law, 'condition' is an event * * * [that] occurs during the performance stage of the contract, i.e., after the contract is formed and prior to its discharge." *Morrison v. Bare*, 9th Dist. No. 23667, 2007-Ohio-6788, ¶18, quoting John Edward Murray, Jr., Murray on Contracts, Section 99B (4th ed.2001). In this case, the contingency fits this description because it provides that appellants' "obligations hereunder are contingent upon" appellants being satisfied that the "contingencies" have been fulfilled, and confers upon appellants the right to unilaterally terminate the contract, prior to closing, in the event that any contingency remains unfulfilled within 120 days from the date the contract was signed, plus any agreed extensions. It specifies that the tax ordinance be delivered *before* appellants must perform, and the obligation for appellants to perform is dependent, in part, upon it.

{¶22} Another way to describe the difference between a promise and a condition precedent is that "[t]he purpose of a promise is to create a duty in the promisor. The purpose of constituting some fact as a condition is always the postponement or discharge of an instant duty. * * * The non-occurrence of a condition will prevent the existence of a duty in the other party." Id., quoting Corbin on Contracts, Section 30.12. It is clear that the purpose of the tax abatement provision here was to allow appellants to elect not to perform their duty to close. The fact that, to satisfy the provision, appellee had to do an act – deliver the specified ordinance – does not mean that it was a promise. "A condition can be an act to be done by one of the parties to the contract." Id. at ¶19. "Virtually any act or event may constitute a condition. The event may be an act to be performed or forborne by one of the parties to the contract, an act to be performed or forborne by a third party, or some fact or event over which neither party, or any other party, has any

control." Id., quoting Murray on Contracts, Section 99C. For all of these reasons, we conclude that the tax abatement contingency was a condition precedent operable only until the parties elected to perform.

{¶23} Ohio courts have applied this concept to find waiver by a party who proceeds to perform a contract despite the non-fulfillment by the other party of a condition precedent. See, e.g., *Creith Lumber, Inc. v. Cummins* (1955), 163 Ohio St. 264 (closing on home construction contract and acceptance of home constituted waiver of condition precedent of passing of final inspection); *Erectors, Inc. v. Dellagnese Constr. Co.* (Aug. 13, 1986), 9th Dist. No. 12461 (substantial performance of contract constituted waiver of any conditions precedent); *C.E. Morris Co. v. Concrete Constr. Co., Inc.* (Jan. 15, 1985), 10th Dist. No. 83AP-659 (evidence that plaintiff performed under the contract demonstrates plaintiff's waiver of condition precedent); *Cornett*, supra (plaintiffs' decisive acts of making required payments under contract constituted waiver of condition precedent); *City of St. Marys, Ohio v. Auglaize Cty. Bd. of Commrs.*, 3d Dist. No. 2-05-17, 2006-Ohio-1773, ¶31 (performance of contract waived any conditions precedent).

{¶24} We note that Section 3 of the contract states, "[b]uyer shall have the right to waive any of the contingencies in writing." This provision does not change the contingency's essential nature as a condition precedent. Because, by its very nature, a condition precedent is only operative prior to performance, appellants could have either waived it in writing prior to performance or enforced it prior to performance. But once appellants performed (closed), the condition precedent had no further force and effect. Thus, even assuming that appellee failed to fulfill the tax abatement condition, in accord with the foregoing authorities, we conclude that appellants waived the condition when

they closed on the transaction. Because they elected to perform rather than cancel the contract, they are foreclosed from seeking breach-of-contract damages on account of the condition being unfulfilled.

{¶25} Because appellants waived the right to enforce Section 3.14 of the contract and cannot maintain their breach-of-contract action, the issue whether or not appellee actually fulfilled its obligation under the contract is moot, and we need not address the arguments related thereto.

{¶26} For all of the foregoing reasons, we overrule appellants' assignment of error and affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

BRYANT and CONNOR, JJ., concur.

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