[Cite as *Bull Run Properties, L.L.C. v. Albkos Properties, L.L.C.*, 2011-Ohio-5712.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

LAKE COUNTY, OHIO

BULL RUN PROPERTIES, LLC,	:	**O P I N I O N**
Plaintiff-Appellant,	:	
		CASE NO. 2011-L-003
- vs -	:	
ALBKOS PROPERTIES, LLC, et al.,	:	
Defendants-Appellees.	:	

Civil Appeal from the Lake County Court of Common Pleas, Case No. 09 CV 000877.

Judgment: Affirmed.

Daniel F. Lindner, Lindner, Sidoti, Jordan, L.L.P., 2077 East Fourth Street, 2nd Floor, Cleveland, OH 44115 (For Plaintiff-Appellant).

DIANE V. GRENDELL, J.

{¶1} Plaintiff-appellant, Bull Run Properties, LLC, appeals the December 7, 2010 Judgment Entry of the Lake County Court of Common Pleas, rendering judgment in favor of defendant-appellee, Albkos Properties, LLC, on Bull Run's Complaint. Bull Run also challenges the trial court's denial of its Motion for Partial Summary Judgment. The issue before this court is whether the trial court properly considered parol evidence in the interpretation of a contract for the sale of real estate. For the following reasons, we affirm the decision of the court below.

{¶2} On March 19, 2009, Bull Run filed a Complaint against Albkos. The Complaint alleged that on February 16, 2009, the parties entered into a written Purchase and Sale Agreement, whereby Bull Run would sell Albkos real property, located at 9470 Mentor Avenue, Mentor, Ohio. Albkos was to purchase the property for the sum of $1,500,000 and the transaction was to close by February 20, 2009. The Complaint further alleged that Albkos breached the Agreement "by attempting to terminate this Contract without any justification for doing so and failing to close the purchase of the Property." Bull Run raised claims for Specific Performance (Count I), Breach of Contract (Count II), and Commercial Bad Faith (Count III).

{¶3} On December 1, 2009, Bull Run filed a Motion for Partial Summary Judgment on its claims for Specific Performance and Breach of Contract.

{¶4} On December 10, 2009, Albkos filed its Motion for Summary Judgment.

{¶5} On February 17, 2010, the trial court issued a Judgment Entry denying both parties' Motions for Summary Judgment.

{¶6} On October 12, 2010, the case was tried before the court. The trial court made the following factual findings[1]:

> **{¶7}** In January 2009, Gezim Selgjekaj, owner and manager of Defendant Albkos Properties, LLC, began discussing with Mark Fuerst, the manager of Plaintiff Bull Run Properties, LLC, the purchase of the Sawyer House Restaurant, which included the restaurant assets, the liquor license, and the real property located at 9470 Mentor Avenue, Mentor, Ohio.
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> **{¶8}** On February 4, 2009, Plaintiff's counsel submitted draft documents to Defendant's counsel regarding the proposed sale. In said documents, the real estate was to be purchased for $1,500,000.00 ("the Real Estate Agreement"), the restaurant assets belonging to Plaintiff Bull Run Properties, LLC were to be purchased for $975,000.00 ("the Asset Purchase Agreement") and the liquor license and the assets belonging to

1. Neither party takes exception to the trial court's finding of facts.

the Sawyer House Restaurant were to be purchased for $25,000.00 ("the Liquor License Agreement").

{¶9} On February 9, 2009, Defendant's attorney requested various information from Plaintiff's counsel regarding assets secured by creditors and subject to liens. In addition, Defendant informed Plaintiff that the assets and liquor license would instead be purchased in the name of Old Village Farmers Market, LLC, which was owned by Pamela Goldsmith. This was because Selgjekaj has been convicted of a felony, rendering him unable to hold a liquor license.

{¶10} At a meeting of the parties on February 16, 2009, Mr. Selgjekaj was presented with the three agreements, including the new drafts of the Liquor License Agreement and the Asset Purchase Agreement naming the purchaser as Old Village Farmers Market LLC.

{¶11} Mr. Selgjekaj signed the Real Estate Agreement on behalf of Defendant and took the two other agreements to be reviewed and signed by Pamela Goldsmith, on behalf of Old Village Farmers Market, LLC. Plaintiff's attorney later sent all three agreements to the title company even though the Liquor License Agreement and the Asset Purchase Agreement had not been signed by Ms. Goldsmith. On February 18, 2009, Plaintiff's attorney was contacted when concerns arose regarding the discovery of various liens, a liquor license tax appeal, a judgment and an easement regarding the assets and real estate.

{¶12} On February 20, [2009], the closing date, Plaintiff's attorney forwarded an order from the Liquor Control Commission regarding the liquor license appeal, but did not address any of the other concerns. Ms. Goldsmith was informed of this and refused to execute the agreements. Defendant did not close on the purchase, and Plaintiff subsequently filed suit ***.

{¶13} On December 7, 2010, the trial court issued a written Judgment Entry on the merits of the case. In rendering its decision, the court considered parol evidence as to whether the parties contemplated the execution of the Liquor License Agreement and Asset Purchase Agreement as conditions precedent to the Real Estate Agreement.

{¶14} The trial court concluded that the parties intended the three Agreements to operate as a single transaction. "As the Liquor License Agreement and Asset Purchase

Agreement were never executed, the condition precedent to the Real Estate Agreement did not occur," and, therefore, it "did not become effective."

{¶15} In support of its conclusion, the trial court noted that the original Agreements were all to be executed by Albkos, and that the substitution of Old Village Farmers Market in the Asset Purchase and Liquor License Agreements did not alter in any way the substance of the Agreements. The court noted that Fuerst testified that he told Selgjekaj that the price "for everything" would be $2,500,000, representing the sum of the payments due under all three Agreements.

{¶16} The trial court noted a February 16, 2009 email sent by Bull Run's counsel to Mark Kapostasy, the owner of Ohio Title Corporation, the company handling the closing. The email transmitted unsigned copies of the three Agreements and stated: "This whole transaction is set to close THIS FRIDAY, February 20."

{¶17} The trial court noted another email, from Fuerst to Selgjekaj, and dated February 24, 2009, which stated: "Jimmy [i.e. Selgjekaj] I need to find out what is going on with the Sawyer House. I have a gentleman sitting on the side that wants to purchase the equipment and rent the building. I would rather sell to you but I do not want to loose (sic) the opportunity to lease the building if the sale cannot happen. I just need communication. Please advise. As of right now I do not have contracts signed and[/]or a deposit."

{¶18} Having determined that no enforceable contract existed between the parties, the trial court entered judgment in favor of Albkos.

{¶19} On January 4, 2011, Bull Run filed its Notice of Appeal. On appeal, Bull Run raises the following assignments of error:

{¶20} "[1.] The trial court erred by admitting appellee's parol evidence, considering it, and relying upon it to rewrite the express terms of a real estate contract to find that a condition precedent existed."

{¶21} "[2.] The trial court erred by not granting appellant's motion for summary judgment as to liability on Counts I and II of the Complaint."

{¶22} In considering the applicability of the parol evidence rule to a written instrument, appellate courts have applied a de novo standard of review inasmuch as the question involves the interpretation of contracts. *Dassel v. Hershberger*, 4th Dist. No. 10CA6, 2010-Ohio-6595, at ¶19; *Rejas Invests. v. Natl. City Bank*, 2nd Dist. No. 21243, 2006-Ohio-5586, at ¶61; *Rice v. Rice*, 7th Dist. No. 2001-CO-28, 2002-Ohio-3459, at ¶38.

{¶23} "The parol-evidence rule is a principle of common law providing that 'a writing intended by the parties to be a final embodiment of their agreement cannot be modified by evidence of earlier or contemporaneous agreements that might add to, vary, or contradict the writing.'" *Bellman v. Am. Internatl. Group*, 113 Ohio St.3d 323, 2007-Ohio-2071, at ¶7, quoting Black's Law Dictionary (8th Ed.2004) 1149; *Galmish v. Cicchini*, 90 Ohio St.3d 22, 27, 2000-Ohio-7 ("absent fraud, mistake or other invalidating cause, 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"), quoting 11 Williston on Contracts (4 Ed.1999) 569-570, Section 33:4.

{¶24} "Ohio courts have long recognized exceptions to the parol evidence rule." *Beatley v. Knisley*, 183 Ohio App.3d 356, 2009-Ohio-2229, at ¶15, citing *Galmish*, 90

Ohio St.3d at 27. "Among these exceptions is the allowance of extrinsic evidence to prove a condition precedent to a contract." Id. (citations omitted). "While parol evidence is inadmissible to vary the unambiguous terms of a written contract, it is admissible to establish a condition precedent to the existence of a contract." *Hiatt v. Giles*, 2nd Dist. No. 1662, 2005-Ohio-6536, at ¶31 (citation omitted). "[T]he parol evidence rule would not preclude the introduction of extrinsic evidence of a condition precedent to a contract," since "[s]uch a condition would not alter the terms of the agreement but would merely determine whether the agreement became effective." *Coleman v. Fishhead Records, Inc.* (2001), 143 Ohio App.3d 537, 543, fn. 4.

{¶25} Bull Run maintains that express written provisions of the Real Estate Agreement precluded the consideration of parol evidence by the trial court. Bull Run cites to the following contract provisions:

> **{¶26}** 14.1 Entire Agreement. This Agreement constitutes the entire contract between the parties hereto, and may not be modified except by instrument in writing signed by the parties hereto.
>
> **{¶27}** ***
>
> **{¶28}** 14.7 Construction. This Agreement will not be construed more strictly against any one party than against any other party, merely by virtue of the fact that it may have been prepared by counsel for one of the parties, it being recognized that all of the parties hereto and their respective counsel have contributed substantially and materially to the preparation of this Agreement.
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> **{¶29}** 14.8 Third Party Beneficiaries. Notwithstanding anything to the contrary contained herein, the parties hereto expressly acknowledge and confirm that the terms and provisions set forth in this Agreement are intended to inure solely to the benefit of the parties here and their respective successors and assigns. It is the express intent of the parties hereto that no other person or entity will be entitled, or will be deemed to have any right, to rely on any term or provision herein contained to any extent or for any purpose whatsoever, nor will any other person or entity have any right

of action of any kind thereon or be deemed to be a third party beneficiary hereunder.

{¶30} ***

{¶31} 14.10 Amendment. This Agreement may be amended only by a writing signed by all of the parties to be affected thereby.

{¶32} In addition to these provisions, Bull Run notes that the Agreement contains a section (Section 9) captioned "Conditions: Acts Prior to Closing," and another section (Section 10) setting forth the parties' obligations on the closing date. Bull Run notes that "[n]ohwere in these conditions does it ever reference any other agreements or any other contracts that must also be closed as a condition precedent to this agreement."

{¶33} Bull Run's arguments fail to demonstrate that the parol evidence considered by the trial court varied, contradicted, or supplemented the parties' Real Estate Agreement. The parol evidence that conditions existed precedent to the Real Estate Agreement becoming effective does not relate, in any way, to the above-cited clauses regarding the construction of the Agreement and third-party beneficiaries.

{¶34} With respect to the claim that the Real Estate Agreement is an integrated writing that may only be amended in writing, it has been thoroughly established in many decisions that integration does not bar the introduction of evidence of conditions precedent. *Beatley*, 2009-Ohio-2229, at ¶19; *Natl. City Bank v. Donaldson* (1994), 95 Ohio App.3d 241, 246 ("[i]t is well settled that whatever the formal documentary evidence, the parties to a legal transaction may always show that they understand a purported contract not to bind them") (citations omitted); *Broderick Co. v. Colville* (1931), 41 Ohio App. 449, 452 ("parol evidence is admissible in an action between the

parties to show that a written instrument executed and delivered, and absolute on its face, was conditional and was not to take effect until another event should take place") (citation omitted); *Cent. Community Chautauqua Sys. v. Rentschler* (1929), 31 Ohio App. 525, 530 ("where a parol contemporaneous agreement was the inducing and moving cause of the written contract, or where the parol agreement forms part of the consideration for a written contract, and it appears that the written contract was executed on the faith of the parol contract or representations, such evidence is admissible") (citation omitted); cf. *Ware v. Allen* (1888), 128 U.S. 590, 595-596 (holding "that this evidence shows that the contract upon which this suit is brought never went into effect; that the condition upon which it was to become operative never occurred, and that it is not a question of contradicting or varying a written instrument by parol testimony, but that it is one of that class of cases, well recognized in the law, by which an instrument *** is made to depend, as to its going into operation, upon events to occur or be ascertained thereafter").

{¶35} Even where parol testimony is considered as evidence of a condition precedent, the extrinsic evidence may not contradict the express terms of the written contract. *Beatley*, 2009-Ohio-2229, at ¶19 (citations omitted); *Cecil v. Orthopedic Multispecialty Network, Inc.*, 5th Dist. No. 2006 CA 00067, 2006-Ohio-4454, at ¶41 ("a condition precedent may not be shown by parol evidence when the condition precedent is inconsistent with the express terms of the writing").

{¶36} In this respect, Albkos notes several provisions in the Real Estate Agreement which contemplate collateral agreements to the sale of the real property.

For example, the following are claimed to contemplate the transfer of all contracts and licenses related to the real property:

{¶37} 1. Agreement of Purchase and Sale. Purchaser agrees to purchase and Seller agrees to sell the Real Estate in its "AS-IS" condition upon *** the following:

{¶38} ***

{¶39} 1.2 Any and all Seller's rights in and to any contracts related to the operation or management of the Real Estate in effect on the Closing Date ***. A list of the Contracts is attached hereto as Schedule 1.[2]

{¶40} 1.3 To the extent transferable, any and all of Seller's rights in and to any licenses and permits related to the ownership or operation of the Real Estate (the "Licenses").

{¶41} ***

{¶42} 4. Transfer Documents. Seller will convey and transfer its interest in all of the Real Estate *** by the following instruments and documents.

{¶43} ***

{¶44} 4.2 Seller will assign and transfer the Contracts, Licenses, and Guarantees by assignments in a form acceptable to Purchaser; and

{¶45} 4.3 Seller will execute and deliver any other Closing or Transfer documents that Purchaser may reasonably require.

{¶46} ***

{¶47} 10.3 By All Parties. On the Closing Date, each party will execute and/or deliver to the other such other and further additional documents and undertakings as may be reasonably required by any of the parties, their counsel or Purchaser's lender in order to carry into effect or to evidence the terms, conditions and purposes of this Agreement ***.

{¶48} While these provisions do not expressly provide for execution of the Liquor License Agreement and Asset Purchase Agreement as a condition precedent to the

2. No Schedule 1 was attached to the Agreement and the Contracts are not otherwise identified.

Real Estate Agreement, they are not inconsistent with the parol evidence admitted and relied upon by the trial court establishing such a condition.

{¶49} Bull Run's first assignment of error is without merit.

{¶50} In its second assignment of error, Bull Run contends the trial court erred by denying its Motion for Partial Summary Judgment with respect to its claims for Specific Performance and Breach of Contract.

{¶51} This assignment of error is rendered moot by our affirmance of the trial court's judgment on the merits of the Complaint in the first assignment of error. *Continental Ins. Co. v. Whittington*, 71 Ohio St.3d 150, 1994-Ohio-362, at the syllabus ("[a]ny error by a trial court in denying a motion for summary judgment is rendered moot or harmless if a subsequent trial on the same issues raised in the motion demonstrates that there were genuine issues of material fact supporting a judgment in favor of the party against whom the motion was made").

{¶52} For the foregoing reasons, the December 7, 2010 Judgment Entry of the Lake County Court of Common Pleas, rendering judgment in favor of Albkos Properties, is affirmed. Costs to be taxed against appellant.

CYNTHIA WESTCOTT RICE, J.,

THOMAS R. WRIGHT, J.,

concur.