[Cite as *SRW Environmental Servs., Inc. v. Dudley*, 2009-Ohio-3681.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

BUTLER COUNTY

SRW ENVIRONMENTAL SERVICES INC.,	:	
Plaintiff,	:	CASE NO. CA2008-11-282
- vs -	:	O P I N I O N 7/27/2009
TERRY DUDLEY,	:	
Defendant-Appellant,	:	
and	:	
JRJ COMPANY, INC.,	:	
Defendant–Appellee.	:	

CIVIL APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
Case No. CV2007-07-2845

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BRESSLER, P.J.

{¶1} Cross-complaint defendant/appellant, Terry Dudley, appeals the decision of the Butler County Court of Common Pleas awarding cross-complaint plaintiff/appellee, JRJ

Company, Inc., $20,000. We reverse the decision of the trial court.[1]

I. Statement of Facts

{¶2} In September 2001, JRJ entered into a purchase agreement in which it contracted to sell property located in Oxford, Ohio to Dudley. According to stipulated facts submitted to the trial court, the property had several environmental issues including previously-removed aboveground and underground tanks, and asbestos. The property was divided into three remediation areas, designated A, B, and C, and SRW Environmental Services, Inc. (SRW) was retained to assess and remediate the problem areas, and remove the asbestos.

{¶3} As a condition of loaning the purchase money, Dudley's bank required JRJ and Dudley to place $165,000 of the purchase price in escrow to pay for the environmental remediation. According to an addendum signed by JRJ's partners and Dudley on April 11, 2002, the escrow account was to "have a maximum duration of two (2) years after closing to allow Purchaser to determine if any corrective action is required under Areas A, B, and C ***." Regarding the asbestos removal, the addendum stated that "during said two (2) year period, Purchaser shall perform the asbestos abatement identified in said letter at a cost not exceeding the $20,000 estimated in said letter," and "it is agreed the asbestos abatement must be done and an expenditure of up to $20,000.00 is pre-approved." However, JRJ required Dudley to submit estimates for the other clean up before it would approve such expenditures. In the Second Addendum, dated May 13, 2002, $20,000 of the $165,000 was again designated for asbestos abatement and the rest was divided according to estimates that remediation for area A would be $50,000, $45,000 for B, and $50,000 for area C.

{¶4} SRW performed the environmental remediation over the next two years. After areas A, B, and C, were completed, SRW sent final invoices and requested payment from

1. Pursuant to Loc.R. 6(A), we have sua sponte removed this appeal from the accelerated calendar.

the escrow account being held at Bath State Bank. The escrow agent paid SRW, and the parties entered into an agreement whereby the remaining funds not needed to pay for areas A, B, and C were disbursed to JRJ's partners in addition to interest accrued on the account. However, the parties agreed to leave the $20,000 in the escrow account to be disbursed as final payment for the asbestos removal.

{¶5} Before the asbestos removal could commence, a tenant of the building containing the asbestos had to vacate the property. However, the tenant, Candlewood Terrace, requested a lease extension in accordance with the hold-over provision in its original lease with JRJ. Dudley agreed and extended the lease three times so that Candlewood Terrace's lease did not expire until April 6, 2004. After Candlewood Terrace vacated the property, Dudley arranged for SRW to complete the asbestos removal. As stipulated, the parties agree that the deadline for asbestos removal was May 12, 2004. However, SRW began the removal on May 27, 2004 and finished on June 14, 2004.

{¶6} After the deadline passed, but before the removal began, Jeff Schroer, JRJ's real estate agent, sent a letter to Bath State Bank requesting that the bank release the remaining $20,000 in escrow to JRJ.[2] Due to the dispute over the escrowed funds, SRW did not receive payment for the asbestos remediation, and filed a complaint seeking payment. SRW named Dudley and JRJ as defendants, and JRJ filed a cross-complaint against Dudley. Eventually, Dudley and SRW reached a settlement and SRW dismissed its claim against JRJ. However, the cross-complaint between JRJ and Dudley proceeded.

{¶7} The trial court accepted the parties' stipulations and heard testimony from Dudley and James Wespiser, one of JRJ's three owners/partners. The parties then submitted briefs in lieu of closing arguments, therein agreeing that the sole issue for the trial court's consideration was whether time was of the essence in the contract. The trial court

2. During the pendency of the dispute, Schroer passed away so that the trial court did not hear his testimony.

found that time was of the essence and that Dudley forfeited the $20,000 held in escrow to JRJ because the asbestos had not been removed by the two-year deadline set forth in the second addendum. It is from the trial court's ruling that time was of the essence that Dudley now appeals, raising the following assignment of error:

{¶8} "THE TRIAL COURT ERRED IN ITS APPLICATION OF THE FACTS TO OHIO'S TIME OF THE ESSENCE STANDARD WHEN IT FOUND THAT TIME WAS OF THE ESSENCE OF THE CONTRACT."

{¶9} In his assignment of error, Dudley argues that the trial court erred by finding that time was of the essence regarding the asbestos removal deadline. Finding this argument meritorious, we sustain Dudley's assignment of error.

II. Standard of Review

{¶10} Recently, the Ohio Supreme Court considered that standard of review applicable to issues of contract interpretation. *Taylor Bldg. Corp. of Am. v. Benfield*, 117 Ohio St.3d 352, 2008-Ohio-938. While *Taylor Bldg*. was specific to the conscionability of a contract's arbitration clause, the court noted that "we are not persuaded that the issue whether an arbitration agreement is unconscionable should be reviewed by a standard different from other legal issues involving contract interpretation. Accordingly, we agree with the Ohio and federal courts that have applied a de novo standard of review ***." Id. at ¶37. Therefore, while JRJ argues that this court should not overturn the trial court's decision because it is supported by the manifest weight of the evidence, the proper standard of review is de novo.

{¶11} However, the court in *Taylor Bldg*. went on to state that a trial court's factual findings should be granted "great deference" and that "where the decision in a case turns on the credibility of testimony, and where there exists competent and credible evidence supporting the findings and conclusions of the trial court, deference to such findings and

conclusions must be given by the reviewing court." Id. at ¶38, citing *Seasons Coal Co. v. Cleveland* (1984), 10 Ohio St.3d 77, 80.

{¶12} In this case, the parties stipulated to the facts, submitted exhibits, and the trial court held a hearing during which it heard testimony from two witnesses. In its decision, the trial court first set out the facts as stipulated, and then stated that the issue to be determined was whether time was of the essence in the contract. The trial court did not make any additional findings of fact based on the testimony adduced at the hearing. Instead, the trial court relied solely on the stipulated facts and exhibits admitted, including the contract itself, subsequent addendums, and two letters proffered by JRJ. Therefore, this case did not turn on the credibility of the witnesses, so that deference to the trial court's factual findings and conclusions is unnecessary. After considering the facts and evidence under a de novo review, we find that time was not of the essence.

III. Analysis

{¶13} As this court has recently stated, "the time of performance specified in a contract is generally not of the essence. The parties can alter this rule by including an express stipulation in the contract, or the nature of the contract itself or the circumstances under which it was negotiated can show that the parties intended for time to be of the essence." *Merritt v. Anderson*, Fayette App. No. CA2008-04-010, 2009-Ohio-1730, ¶24. When the parties fail to place an express term in the contract, and instead ask that the court make an inference based on their behavior, time will be of the essence only "by *clear implication* from the surrounding circumstances." *Hall v. U.S. Bank Natl. Assn.*, Hamilton App. No. C-040642, 2006-Ohio-303, ¶8. (Emphasis added.)

{¶14} In the absence of an express time of the essence clause, the fact that a contract contains a specified date or deadline does not automatically make time of the essence. *Brown v. Brown* (Oct. 4, 1993), Geauga App. No. 92-G-1726. Instead, "when it is

said that time is of the essence, the proper meaning of the phrase is that the performance by one party at the time specified in the contract or within the period specified in the contract is essential *in order to enable him to require performance from the other party*." *Lake Ridge Academy v. Carney* (1993), 66 Ohio St.3d 376, 378. (Emphasis sic.)

{¶15} Here, the parties do not dispute the fact that neither their purchase contract nor any subsequent addendums contained an express time of the essence clause. Instead, the trial court found that time was of the essence because of three circumstances: (1) the deadline for asbestos abatement set forth in the addendum; (2) two letters sent by JRJ's agent; and (3) the fact that JRJ was deprived of the use of the $20,000 until the work was completed and remaining funds released to them.

A. Contract and Addendums

{¶16} Regarding the deadline for asbestos abatement set forth in the addendum, and as noted above, the mere inclusion of a date of completion or a set deadline does not in and of itself make time of the essence. *Brown,* Geauga App. No. 92-G-1726. Instead, performance by a specific date must be an essential element of the contract based on the circumstances under which it was negotiated, and a review of the record indicates that closing escrow by the date specified in the addendum was not considered an essential element of the contract negotiations. JRJ agreed to place the funds in escrow in 2002, at the time the subsequent addendums were executed. The Second Addendum, states, "said escrow account shall have a maximum duration of two (2) years after closing to allow Purchaser to determine if any corrective action is required under Areas A, B, and C ***. Also during said two (2) year period, Purchaser shall perform the asbestos abatement identified in said letter at a cost not exceeding the $20,000 estimated ***." While the Addendum goes on to specifically state how the $145,000 could be spent for each of the areas, no mention is made as to the importance of work being completed or funds dispersed to JRJ within the two

years.

{¶17} Additionally, the exhibits admitted during the hearing indicate that the parties understood and specifically earmarked $20,000 to remain in escrow to compensate SRW for asbestos removal. While the eventual removal may have cost less than $20,000, there is no disputing the fact that the Second Addendum specifically states that $20,000 would remain in escrow for asbestos abatement and at no time did JRJ make performance contingent on escrow closing as of the specified date, or indicate that it was an essential factor in the decision to place the funds in escrow.

{¶18} Instead, during the hearing, the trial court asked James Wespiser, one of JRJ's owners/partners, to explain how the $165,000 was placed in escrow. Wespiser then explained, "this was money that was set aside at the day of the closing, had not been discussed before, and this was said to us – this was brought in front of us at the day of the closing. The closing just about did not take place because of this. But we accepted the letter."

{¶19} The court went on to ask: "but my question is, that money came from Mr. Dudley to [JRJ] but to be put in escrow until A, B, and C [sic] to be cleaned up and asbestos removal was done?" Wespiser replied, "and then the balance was to be given to us, you are correct, sir." From this exchange, it is clear that the parties' negotiations centered on placing $165,000 of the purchase price into escrow to pay for environmental remediation so that the bank would fund the sale. Wespiser's testimony, however, does not indicate that the duration of the escrow was an essential element in the negotiations or JRJ'S decision to agree to Dudley's terms.

{¶20} The evidence also indicates that in addition to JRJ and Dudley, even SRW understood that $20,000 would remain in the account specifically for asbestos removal once areas A, B, and C were finished. In a January 17, 2004 fax to JRJ's real estate agent, SRW

stated that work on area C was complete and forwarded invoices for payment. At the bottom of the fax transmittal sheet, a note states, "the asbestos abatement work has yet to start. As a result, 20,000 should remain in escrow."

{¶21} Additionally, after paying SRW from escrow for remediation of areas A, B, and C, JRJ took disbursements of the remaining funds other than the $20,000 meant for asbestos removal. In the Agreement to Release Escrow Funds, signed in February 2004, the parties authorized Bath State Bank to release $91,401.01 to SRW, and $17,866.33 plus interest, to each of JRJ's three partners. However, the last line of the Agreement specifically states that $20,000 was to remain "in the account for future asbestos removal."

{¶22} Therefore, from the date the parties negotiated the contract throughout the duration of the clean up, it is clear that the parties intended $20,000 to remain in escrow to pay for asbestos removal, and terminating escrow by May 12, 2004 was not an essential factor in the negotiation of JRJ and Dudley's purchase contract and subsequent addendums.

B. Letters

{¶23} Regarding the letters sent by Schroer (JRJ's real estate agent), the trial court stated that "two different letters were sent by the real estate agent to the [sic] Dudley indicating that JRJ Company would like to move forward as soon as possible."

{¶24} In the first letter, dated August 2, 2002, Schroer sent Dudley the proposal from SRW estimating the cost and processes involved in the environmental remediation. In the letter, Schroer states that JRJ "would like to move forward on the clean up work as soon as possible. We understand the asbestos clean up can not happen until the tenants move out."

{¶25} While Schroer informed Dudley that JRJ wanted the work to begin as soon as possible, the letter's purpose was to encourage Dudley to approve of SRW taking the job and starting the work. Schroer reiterated that JRJ wanted Dudley to "approve this proposal and allow SRW to begin the clean up work right away."

{¶26} Schroer's other letter, dated September 11, 2002, again requested that Dudley agree to let SRW begin the work. In that letter, Schroer states, "as previously indicated to you, [JRJ] feel[s] this proposal is very competitive and would like to move forward with the work right away. [JRJ] believe[s] that this proposal is in the best interests of all parties. Please be aware that if this proposal is not accepted by you, [JRJ] will not approve any other proposal which does not provide them the same or better benefits and pricing as this proposal. SRW Environmental Services cannot begin work until you have signed off on the proposal. Please let me hear from you no later than September 20, 2002, regarding your position on this proposal."

{¶27} Within a short time of this request, Dudley did in fact agree and permitted SRW to begin the remediation, thereby fulfilling the request made in the two letters. However, these letters were sent to Dudley months after JRJ had already agreed to place the funds in escrow and after it had negotiated the contract. Therefore, they fail to demonstrate what JRJ intended at the time of contract negotiations. Even so, no where in the letters does Schroer state that the asbestos removal needed to be completed or the escrow account closed by any date or in any way indicate that JRJ was operating under the belief that time was of the essence.

C. Use of the $20,000

{¶28} The trial court concluded its analysis by stating that JRJ was "deprived of the use" of the $20,000 held in escrow. However, from the date of closing on, the $20,000 was held in escrow specifically to pay for the asbestos removal. Therefore, JRJ was only entitled to funds if the asbestos removal cost less than $20,000. Throughout all of the documentation regarding the escrowed funds, the $20,000 was always specifically marked for asbestos removal and referenced separately from the other remediation funds. Therefore, the record demonstrates that JRJ understood at the time it negotiated the contract that $20,000 would

remain in escrow until the asbestos was removed, and could not have reasonably expected to have use of the $20,000.

{¶29} We also note that the record indicates that Schroer, and not JRJ, was the driving force in releasing the $20,000 from escrow. During the hearing, Wespiser testified that, "Jeff Schroer, our agent, called us prior to May 12th of 2004 and said, 'Gentlemen, remember, on May 12th, 2004, if work hasn't been completed, you gentlemen are entitled to $20,000 out of escrow.' On May 12th, Mr. Schroer called and said, 'Gentlemen, the due date is here.'" If terminating the escrow account by May 12, 2004 had been essential to the contract negotiations, had been what the agreement hinged on, or caused JRJ to feel deprived of its funds, it is doubtful that it would have been necessary for Schroer to contact JRJ and point out that the partners would be entitled to the funds.

{¶30} Schroer called to *remind* JRJ that the two-year time frame was soon coming to a close. JRJ's decision to passively wait and see if the work was completed by May 12th is counter to time being of the essence, and instead indicates that the company hoped to avoid its contractual obligation to pay for the asbestos removal based on the real estate agent's false belief that passage of the two year time frame entitled JRJ to the escrowed funds.

D. Escrow

{¶31} Beyond the three circumstances recognized by the trial court, it is important to note that at no time in the past proceedings or arguments before this court does JRJ assert that its agreement to place the funds in escrow hinged on receiving any overage by May 12, 2004. In its brief JRJ states, "JRJ was entitled to the funds immediately upon consummation of the sale of real estate subject only to the performance of the environmental remediation. JRJ's expectations were that it would receive its funds at the earliest possible time consistent with the time reasonably necessary to complete such remediation."

{¶32} Instead of arguing that closing escrow within two years was an essential term of

contract negotiations, JRJ's assertions to the trial court and this court center on the nature of an escrow account and what rights and duties escrow creates. Notwithstanding its argument that the nature of an escrow account eliminates the "reasonable time of completion" element inherent in contracts, JRJ's own words indicate that it negotiated the contract expecting to receive the remaining funds at the *earliest possible time consistent with the time reasonably necessary to complete such remediation*, and not that it negotiated the Second Addendum demanding that time be of the essence.

{¶33} However, even if the this court considers the case in terms of the escrow account, the record shows that time still would not have been of the essence. Regarding the nature of escrow and its impact on the case at bar, an escrow is "a matter of agreement between parties, usually evidenced by a writing placed with a third-party depository providing certain terms and conditions the parties intend to be fulfilled prior to the termination of the escrow. *** Escrow is controlled by the escrow agreement, placing the deposit beyond the control of the depositor and earmarking the funds to be held in a trust-like arrangement. Therefore, the duty of the escrow agent is to carry out the terms of the agreement as intended by the parties." *Swinderman v. Weaver*, Tuscarawas App. No. 2001AP040030, 2002-Ohio-89, *6. (Internal citations omitted.)

{¶34} The escrow agreement was created by way of its inclusion in the original addendum dated April 11, 2002. Therefore, it is impossible to construe the nature of the escrow agreement without first accepting its context and relationship to the original contract and subsequent addendums. See *Chou v. Chou*, Cuyahoga App. No. 80611, 2002-Ohio-5335 (construing contract and escrow agreement together in order to interpret the intent of the parties). Therefore, in order to construe the parties' intentions, it is important to consider the escrow agreement in conjunction with the parties' express agreement that $20,000 would remain in escrow to pay for the asbestos abatement.

{¶35} Escrow accounts, by their nature, ask a third party to carry out negotiated contract terms. Here, JRJ and Dudley agreed to place $165,000 in escrow, with $20,000 specifically designated for asbestos clean up. Simply because the escrow agreement contained a set date for termination does not automatically signify that time was of the essence. The fact that a time frame was set forth in an escrow agreement does not change the intention of the parties absent a clear indication that the escrow agreement was intended to create a time of the essence clause. In this case, it did not. Every document and subsequent communication between the parties reiterates that $20,000 was to remain in escrow and was always intended to pay for the removal. Yet within these documents and communications, no party indicated that time was of the essence or that JRJ and Dudley contracted with the clear understanding that escrow had to close by May 12, 2004.

E. Reasonable Time of Completion

{¶36} When time is not of the essence in a contract, the parties must perform in a reasonable time. *U.S. Const. Corp. v. Harbor Bay Estates, Ltd*., Ottawa App. No. OT-03-019, 2007-Ohio-3823. "A reasonable time for a contract's performance is not measured by hours, days, weeks, months, or years. Instead, a fact finder must ascertain whether the time period spent performing is reasonable in light of the parties' original expectations and the circumstances met during performance." *Morton Bldgs., Inc. v. Correct Custom Drywall*, Franklin App. No. 06AP-851, 2007-Ohio-2788, ¶17. (Internal citations omitted.)

{¶37} Here, Dudley contacted SRW to complete the asbestos removal when Candlewood Terrace, the tenant in the building that contained the asbestos, vacated after its lease expired. According to the record, JRJ was aware that Candlewood Terrace continued to rent the building, and had stated previously in Schroer's letter to Dudley that "we understand the asbestos clean up can not happen until the tenants move out."

{¶38} While JRJ argues that Dudley could have denied Candlewood Terrace's

request to extend the lease so that the asbestos removal could be completed, nothing in the record indicates that JRJ expressed its desire to have tenants vacate the premises or that time was of the essence so that Dudley had to force them out.

{¶39} The lease agreement expired April 6, 2004 and SRW commenced work on May 27th and completed the removal by June 14th. The removal work was completed a mere month after the contract date of May 12, 2004 and this amount of time was not unreasonable given the circumstances of the extensive environmental remediation performed and that the tenants did not vacate until April 6th. There is no indication that Dudley did anything to delay the removal process, or that he gained anything by the completion date being past the May 12th deadline. Of note, the only party to gain from the completion date being past May 12th would be JRJ who, if entitled to any overage, would also receive interest on the overage.

{¶40} Notwithstanding who did and did not benefit from the four-week delay in asbestos removal, completing the remediation after the deadline was not unreasonable given the two-year time frame spent performing the environmental clean up, and in light of the parties' original expectations and the circumstances met during performance.

IV. Conclusion

{¶41} As time was not of the essence and the work was completed within a reasonable time, Dudley's assignment of error is sustained. Consequentially, we reverse the decision of the trial court and enter judgment in favor of Dudley.

POWELL and YOUNG, JJ., concur.

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