[Cite as *S&G Invests., L.L.C. v. United Cos., L.L.C.*, 2010-Ohio-3691.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

CLERMONT COUNTY

S&G INVESTMENTS, LLC,	:	
Plaintiff-Appellant,	:	CASE NO. CA2010-03-017
	:	O P I N I O N
- vs -		8/9/2010
	:	
UNITED COMPANIES, LLC, et al.,	:	
Defendants-Appellees.	:	

CIVIL APPEAL FROM CLERMONT COUNTY COURT OF COMMON PLEAS
Case No. 2009CVH00339

Ritter & Randolph, LLC, Daniel P. Randolph, Kyle D. Murray, 105 East Fourth Street, Suite 1200, Cincinnati, Ohio 45202, for plaintiff-appellant

Altick & Corwin Co., LPA, Scott A. Liberman, Thomas F. Schmitt, One S. Main Street, 1700 Dayton Centre, Dayton, Ohio 45402, for defendant-appellee

HENDRICKSON, J.

{¶1} Plaintiff-appellant, S&G Investments, LLC, appeals a decision of the Clermont County Court of Common Pleas dismissing its breach of contract claim. For the reasons outlined below, we affirm the decision of the trial court.

{¶2} On July 7, 2007, defendant-appellee, United Companies, LLC, entered into a contract to purchase a parcel of real estate from S&G ("the contract"). The subject of the contract was a commercial complex located at 5510 Springboro Pike in

Montgomery County, Ohio ("the Property"). The contract required United to deliver an initial deposit of $50,000 in cash to the escrow agent, defendant Chicago Title Insurance Company ("escrow agent"), within three banking days of the contract's effective date.[1] Under the terms of the contract, failure to deliver the initial deposit rendered the contract null and void.

{¶3} United delivered a certificate of deposit ("CD") in the amount of $50,000 to the escrow agent. S&G did not learn of the form of deposit until months later, when it attempted to retrieve the initial deposit from the escrow agent. At that time, the escrow agent informed S&G that the deposit had been made in the form of a CD, and that United had filed a formal objection against S&G's receipt of the deposit.

{¶4} Upon discovering these discrepancies, S&G requested that United replace the CD with cash as required by the contract. United did not comply. Instead, United sent a letter to S&G stating that it elected to terminate the contract.

{¶5} On February 17, 2009, S&G filed a complaint against United for breach of contract. United moved to dismiss the complaint under Civ.R. 12(B)(6) for failure to state a claim upon which relief could be granted. Following a hearing, the trial court granted United's motion and dismissed the complaint. S&G timely appeals, raising two assignments of error.

{¶6} Assignment of Error No. 1:

{¶7} "THE TRIAL COURT ERRED WHEN IT GRANTED THE MOTION TO DISMISS FINDING THAT THE CERTIFICATE OF DEPOSIT DEPOSITED INTO ESCROW DID NOT SATISFY THE ESCROW REQUIREMENT THAT $50,000 'CASH' BE PLACED INTO ESCROW."

1. Although Chicago Title Insurance Company was a defendant in the proceedings below, the entity is not a party to this appeal.

{¶8} S&G argues that the trial court erred in dismissing its complaint for failure to state a claim under Civ.R. 12(B)(6) because the pleading presented a valid breach of contract claim. S&G insists that United complied with the contract term requiring an initial deposit when it submitted the $50,000 CD to the escrow agent. S&G emphasizes that the contract did not define "cash," and contends that the term is vague and ambiguous. According to S&G, a CD is interchangeable with cash.

{¶9} United maintains that the contract was null and void under the clear and unambiguous language of the agreement due to its failure to deposit cash with the escrow agent.

{¶10} We review a trial court's decision dismissing a complaint under Civ.R. 12(B)(6) de novo. *Perrysburg Twp. v. Rossford,* 103 Ohio St.3d 79, 2004-Ohio-4362, ¶5. Accordingly, this court must independently review the complaint to determine whether dismissal was appropriate. *Sparks v. Bowling*, Butler App. No. CA2009-02-065, 2009-Ohio-5071, ¶10. In so doing, we are not required to afford deference to the trial court's decision. Id.

{¶11} Civ.R. 12(B)(6) permits the dismissal of a complaint which fails to state a claim upon which relief can be granted. In order to prevail on a Civ.R. 12(B)(6) motion, "it must appear beyond doubt from the complaint that the plaintiff can prove no set of facts entitling relief." *DeMell v. Cleveland Clinic Found.,* Cuyahoga App. No. 88505, 2007-Ohio-2924, ¶7. If the court finds that there is a set of facts which align with the plaintiff's complaint and would allow the plaintiff to recover, a Civ.R. 12(B)(6) motion must be denied. *York v. Ohio State Hwy. Patrol* (1991), 60 Ohio St.3d 143, 145.

{¶12} To set forth a claim for breach of contract, a plaintiff must prove the following elements: (1) the existence of a contract, (2) the plaintiff fulfilled its contractual obligations, (3) the defendant failed to fulfill its contractual obligations, and (4) the

plaintiff incurred damages as a result. *Winner Brothers, LLC v. Seitz Elec., Inc.*, 182 Ohio App.3d 388, 2009-Ohio-2316, ¶31.

{¶13} We now examine whether S&G stated a viable breach of contract claim, which would preclude dismissal of the complaint under Civ.R. 12(B)(6). The central issue is whether the contract remained effective or was rendered void, which depends upon the propriety of United's initial deposit. Paragraph 2.A. of the contract set forth the following parameters for the initial deposit:

{¶14} "[On or prior to the third (3rd) banking days of the Effective Date (as hereinafter defined) of this Agreement, Purchaser shall deposit and deliver cash in the amount of Fifty Thousand and no/100 ($50,000.00) Dollars] (hereinafter "Initial Deposit") to CHICAGO TITLE INSURANCE COMPANY (hereinafter "Escrow Agent"), * * * to be held in accordance with the terms and conditions of Paragraph 14 hereunder. *In the event the Initial Deposit is not delivered to the Escrow Agent on or prior to the third (3rd) [banking day] of the Effective Date, this Agreement shall be null and void and of no further force or effect.*" (Italicized emphasis added. Underlined and capitalized emphasis in original.)

{¶15} We find the language in Paragraph 2.A. to be plain and unambiguous. As the trial court aptly observed, the provision does not contain *any* language indicating that the form of deposit was optional. Rather, the contract was very clear that if $50,000 cash was not deposited within three banking days from the effective date of the contract, the agreement was null and void and of no further force or effect. If the intent behind the provision was to permit *varied* forms of legal tender for the deposit, the inclusion of the word "cash" in the provision would not make sense. Presumably, had the parties intended for a wider variety of legal tender to be acceptable for the deposit, the word "cash" would not have been included in the provision.

{¶16} We also concur with the trial court's conclusion that a CD does not qualify as "cash," a finding that was necessary for the court to resolve whether dismissal of the complaint was warranted. As S&G notes in its appellate brief, a CD is a negotiable instrument. See R.C. 1303.03(A), (J). More specifically, R.C. 1303.03(J) defines a "certificate of deposit" as "an acknowledgement by a bank that a sum of money has been received by the bank and a promise by the bank to repay the sum of money." S&G asserts that a CD is "cash" because it is "a deposit account whereby money is kept after receipt from the depositor, then is paid out."

{¶17} S&G ignores a major distinction between cash and negotiable instruments such as a CD. Cash is *immediately* negotiable or liquid. A CD is not. In addition to the definition quoted in the previous paragraph, R.C. 1303.03(J) describes a "certificate of deposit" as "a note of the bank." The term "note" is defined by R.C. 1303.03(E)(1) as "an instrument that is a promise." Without a doubt, cash in the form of paper currency is more fluid than an instrument or a promise. Moreover, a CD generally cannot be withdrawn until it reaches its maturity date. These distinctions render cash more liquid and more secure than a CD.

{¶18} The record demonstrates that the CD in the present matter was in United's name, automatically renewable, and nontransferable. The instrument clearly demarcated a maturity date. Unlike cash, the funds were not redeemable until the arrival of this date. The funds were not as liquid or secure as cash. Moreover, S&G's averment in its complaint that United "breached the contract by failing to deposit cash as the initial deposit" amounted to an acknowledgement that a CD does not qualify as "cash."

{¶19} Because a CD is not cash, United's delivery of a CD to the escrow agent did not fulfill the initial deposit requirement under Paragraph 2.A. of the contract. The

pleadings indicate that United did not deposit $50,000 in cash within three banking days of the contract's effective date. Indeed, S&G admitted in its complaint that United "failed to deliver cash for the Initial Deposit as required by Paragraph 2.A. of the Agreement." Consequently, at that point, the contract became "null and void and of no further force or effect" under the plain terms of the agreement.

{¶20} We conclude that S&G failed to state a claim for breach of contract. Even if we presume that all of the factual allegations in S&G's complaint are true and make all reasonable inferences in favor of S&G, we find that S&G can prove no set of facts entitling the company to relief. Because United failed to deposit cash as required by Paragraph 2.A. of the contract, the contract became null and void after three banking days from the effective date of the contract. At that point, there was no longer a contract upon which to litigate.

{¶21} S&G's first assignment of error is overruled.

{¶22} Assignment of Error No. 2:

{¶23} "THE TRIAL COURT ERRED WHEN IT FOUND THAT THE PLAINTIFF-APPELLANT DID NOT WAIVE ITS CONTRACTUAL RIGHT THAT THE INITIAL DEPOSIT BE MADE AS CASH."

{¶24} Should this court find that the CD was insufficient to fulfill the cash requirement for the initial deposit, S&G maintains that it affirmatively waived this requirement by continuing to perform under the contract despite its knowledge that United placed a CD in escrow instead of cash.

{¶25} We first note that S&G did not raise this argument before the trial court. Rather, the trial court addressed the issue sua sponte. It is well-accepted that issues not raised by the parties are waived for appellate purposes. *State v. Awan* (1986), 22 Ohio St.3d 120, syllabus. Because S&G failed to assert that it relinquished the cash

requirement in the contract, the issue was waived for purposes of appeal. See id.

{¶26} Even had S&G preserved the issue for appeal, we would not be persuaded by its arguments. Waiver is an intentional relinquishment of a known right. *United States v. Olano* (1993), 507 U.S. 725, 733, 113 S.Ct. 1770, quoting *Johnson v. Zerbst* (1938), 304 U.S. 458, 464, 58 S.Ct. 1019. S&G contends that it made two affirmative acts of record which evidence its intent to waive the cash requirement for the initial deposit. One, the parties obtained a continuance on the basis that negotiations for the sale of the property were ongoing. Two, counsel for S&G stated at the dismissal hearing that S&G never said it was going to cancel the contract due to the fact that the initial deposit was in the form of a CD.

{¶27} We note that these two acts purportedly evidencing S&G's intentional relinquishment of its right to a cash deposit were far removed from the initial deposit deadline. In fact, both acts were carried out *after* S&G filed its complaint for breach of contract. This is particularly significant because the complaint contains averments which belie the waiver argument advanced by S&G on appeal.

{¶28} For example, S&G's complaint acknowledged that it remained unaware that United delivered a CD to the escrow agent rather than cash for four months after the contract became effective. S&G could not intentionally relinquish this contractual right when it had no knowledge of United's failure to deliver cash to the escrow agent within the three-day deadline.

{¶29} Far from waiving the right, the complaint also acknowledged that S&G reasserted its entitlement to a cash deposit by demanding that United replace the CD with cash pursuant to the contract. In addition, S&G's complaint averred that United "breached the contract by failing to deposit cash as the initial deposit." S&G therefore based its breach of contract claim on its contractual right to the cash deposit.

{¶30} In view of these averments, it is nonsensical for S&G to now claim that it waived its right to the cash requirement. We conclude that S&G's waiver argument, even if properly preserved for appeal, would be found to be without merit.

{¶31} S&G's second assignment of error is overruled.

{¶32} Judgment affirmed.

YOUNG, P.J., and POWELL, J., concur.