[Cite as *Osbourne v. Ahern*, 2005-Ohio-6517.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
JACKSON COUNTY

KAREN OSBOURNE, et al., :

Plaintiffs-Appellees, : Case No. 05CA9

v. :

JEFFREY AHERN, : DECISION AND JUDGMENT ENTRY

Defendant-Appellant. : **Released 12/1/05**

APPEARANCES:

William C. Martin, Jackson, Ohio, for appellant.

William S. Cole, Jackson, Ohio, for appellees.

Per Curiam

{¶ 1} Jeffrey Ahern appeals the trial court's judgment awarding Karen and Michael Osbourne monetary damages resulting from Ahern's breach of contract for the sale of his pizza business to the Osbournes. Ahern asserts the trial court erred in awarding judgment to the Osbournes because a limited liability company, not the Osbournes, owned the pizza business at the time of trial. Because Ahern did not present the issue of who is the real party in interest to the trial court, he has waived it. Thus, we will not consider it for the first time here.

{¶ 2} Ahern further asserts the trial court erred in awarding the Osbournes monetary damages for (1) a pizza "hot box" that none of the contract documents stated was included in the sale and (2) a business sign the Osbournes received as provided

in the parties' contract. The monetary damages awarded by the trial court for the pizza "hot box" and the restitution for the business sign placed the Osbournes in the position they would have been had Ahern not breached the parties' contract. Accordingly, we affirm the trial court judgment on the Osbournes' breach of contract claim.

I. Facts

{¶ 3} Ahern, an owner of Kali's Pizza Express located in Jackson, Ohio, listed the business for sale. Based on information Ahern gave to him, Ahern's realtor prepared a listing agreement stating that the business' equipment and sign would be included in the sale.

{¶ 4} In October 2003, the Osbournes viewed the business premises with Ahern's realtor. Ahern and some of the pizza business employees were present. After the Osbournes and Ahern discussed various items that would be included in the sale, the Osbournes presented a written purchase offer to Ahern, which he accepted as written.

{¶ 5} Ahern's realtor prepared the purchase agreement which specified that the sale included "all shop equipment presently in the business operating as Kali's Pizza Express plus surplus stock, tables and chairs," as well as "store fixtures and remaining stock." It is undisputed that when the Osbournes viewed the premises and before they presented their purchase

offer, a pizza "hot box", used to keep pizzas warm, was on the business premises. Ahern also told the Osbournes he would leave sufficient supplies to run the business until an order could be placed with and delivered by the supplier, which Ahern approximated to be one week after the Osbournes took over the business.

{¶ 6} After the parties entered into the purchase agreement, Ahern made a list of items included in the sale. Among the items was the business' sign, which Ahern listed as having a value of $4,000.

{¶ 7} The closing occurred on November 14, 2003. When the Osbournes assumed possession of the business premises on November 16, 2003, they found there was insufficient inventory on hand to open business the next day so they went to a store and bought stock to run the pizza business until the supplier could make a delivery.

{¶ 8} Ahern admits he removed food inventory from the pizza business the day before the Osbournes took possession of the business premises. Likewise, he does not dispute that the day after the Osbournes assumed possession of the premises, he removed the pizza "hot box" which had been present when the Osbournes viewed the premises prior to making their offer.

{¶ 9} The Osbournes changed the name of the business to Angelina's Pizzeria, and they planned to diversify the soft drink

line to include Pepsi products in addition to the Coca Cola products offered previously. They discovered, however, that Coca Cola, not Ahern, owned the business sign that Ahern had included as part of the agreement. In order to change the name on the business sign without incurring the cost of replacing it, the Osbournes were required to enter into a contract with Coca Cola to use Coca Cola products exclusively for one year. In exchange, Coca Cola paid the cost of having the new business name placed on the sign and Angelina's Pizzeria assumed ownership of the sign after one year.

{¶ 10} The Osbournes filed the breach of contract action against Ahern seeking monetary damages for his removal of supplies and the "hot box" from the pizza business premises, and for the $4,000 value of the business sign he sold as part of the purchase agreement.

{¶ 11} Following a bench trial, the court determined that the parties' contract included their written purchase agreement and Ahern's oral promises that the inventory remaining at the time the Osbournes' assumed ownership of the pizza business would be sufficient for them to operate the business until a supplier could deliver an order. The court also determined that the Osbournes' "viewing of the premises" was part of the parties' contractual agreement because the written contract expressly stated that all equipment on the business premises was included

in the sale. The court entered judgment in favor of the Osbournes, awarding $322.70 for supplies they purchased to open the business, $385 for the pizza "hot box" Ahern had removed from the business premises, and $4,000 for the business sign, which Ahern did not own but sold as part of the transaction.

II. Assignments of Error

{¶ 12} Ahern has timely appealed the court's judgment, raising the following assignments of error:

> ASSIGNMENT OF ERROR #1: Because the owner of the business at the time of the trial was an Ohio limited liability company, the trial court erroneously granted judgment to the individual Plaintiffs.
>
> ASSIGNMENT OF ERROR #2: Because the hot box was not an item of "shop equipment presently in the business", the trial court erroneously found that the hot box was an item of equipment included in this sale.
>
> ASSIGNMENT OF ERROR #3: Because the purchasers did in fact receive in the sale all of the Sellers' rights in the business sign, the trial court erroneously found that a judgment of $4,000 would restore the Plaintiffs to the "monetary position that the contract required."

III. Analysis

A. Real Party in Interest

{¶13} In depositions held before trial and in testimony presented at trial, the Osbournes stated they signed the purchase agreement as individuals but a limited liability company, with Karen Osbourne as its sole owner and agent, became the legal owner of the pizza business in December 2003. In his first assignment of error, Ahern contends the Osbournes were not entitled to bring suit for and recover judgment on the breach of contract claim because the limited liability company, not the Osbournes, owned the pizza business at the time of trial. Ahern argues that any breach of contract claim against him belonged solely to the limited liability company.

{¶14} Actions are to be prosecuted in the name of the real party in interest. Civ.R. 17(A). The "real party in interest" is "one who has been *directly* benefited or injured by the outcome of the case." (Emphasis *sic.)* *Shealy v. Campbell* (1985), 20 Ohio St.3d 23, 24. The purpose behind Civ.R. 17 is "to enable the defendant to avail himself of evidence and defenses that the defendant has against the real party in interest, and to assure him finality of the judgment, and that he will be protected against another suit brought by the real party at interest on the same matter." Id. at 24-25. A court will look to the substantive law creating the right being sued upon to

determine whether the real party in interest has brought the action. Id. at 25.

{¶15} We reject Ahern's argument summarily on the basis of waiver. Ahern never formally objected or moved to dismiss the breach of contract action on the ground that the Osbournes were not the proper parties to bring the action. Because Ahern has waited until this appeal to formally assert that the Osbournes were not the proper party to maintain the breach of contract action against him, Ahern has waived the issue. See, *Little Eagle Properties v. Ryan,* Franklin App. No. 03AP-923, 2004-Ohio-3830, at ¶26 (determining that a defendant waives a claim that the plaintiff is not a proper party to bring the action where the defendant waits until an appeal to formally claim that the plaintiff is not a real party in interest). If Ahern wanted to defend the suit on the basis that it was not filed in the name of the real party in interest, he should have availed himself of the benefits of Civ.R. 17(A) and Civ.R. 12(B)(6), or raised it as an affirmative defense. See, Fink, Greenbaum & Wilson, Guide to the Ohio Rules of Civil Procedure (2005 Ed.), ¶ 17:3. Accordingly, we reject the first assignment of error.

B. Terms of the Contract

{¶16} In his second assignment of error, Ahern contends the trial court erred in finding the pizza "hot box" was an item of equipment included in the sale. Ahern argues it was not listed on any of the written contract documents. Further, he asserts, although the hot box was on the *premises* when the Osbournes toured the pizza business and presented their offer, the hot box was actually owned by Ahern's father-in-law, not the business itself. Therefore, it was not an item of "shop equipment presently in the *business*", as specified in the written purchase contract.

{¶17} The construction of a written contract is a matter of law for the court. *Alexander v. Buckeye Pipe Line* (1978), 53 Ohio St.2d 241, paragraph one of the syllabus. A court must interpret a contract so as to carry out the intent of the parties. *Foster Wheeler Enviresponse, Inc. v. Franklin Cty. Convention Facilities Auth.* (1997), 78 Ohio St.3d 353. "The intent of the parties to a contract is presumed to reside in the language they chose to employ in the agreement." *Shifrin v. Forest City Ents., Inc.* (1992), 64 Ohio St.3d 635; *Kelly v. Med. Life Ins. Co.* (1987), 31 Ohio St.3d 130, paragraph one of the syllabus. In the absence of an integration clause in a written agreement, the contract between the parties may consist of their written and verbal agreements, including

the "words, deeds, acts, and silence of the parties." See, *Byers v. Coppel* (Aug. 24, 2001), Ross App. No. 01CA2586; *Ford v. Tandy Trans., Inc.* (1993), 86 Ohio App.3d 364, 380. When determining the nature and extent of these extrinsic terms, the court must make factual determinations. An appellate court will not reverse a trial court's factual findings so long as they are supported by competent, credible evidence. See *Pacific Natl. Bank v. Roulette* (1986), 24 Ohio St.3d 17, 20; *C.E. Morris Co. v. Foley Constr. Co.* (1978), 54 Ohio St.2d 279, 280.

{¶18} In this case, the trial court found that the parties' contract was not confined to the written purchase contract. Rather, the trial court found that because the written agreement states the sale of the business includes "all shop equipment presently in the business" and no equipment list accompanies the agreement, the contract included the equipment viewed by the Osbournes on the business premises and the items that Ahern orally promised were included in the sale. Because there is no integration clause in the written agreement, we agree with the trial court's conclusion.

{¶19} It is undisputed that the pizza hot box was present in the pizza business at the time the Osbournes viewed the premises. Accordingly, it was a piece of

equipment present in the business when the parties entered the purchase agreement. Moreover, the Osbournes, Ahern's realtor, and one of Ahern's employees testified that when the Osbournes toured the pizza business Ahern specifically told them the pizza box would remain.

{¶20} Thus, some competent, credible evidence supports the trial court's finding that the pizza hot box was an "item of equipment presently in the business" that was included in the sale of the business to the Osbournes. Implicit in that finding is the common meaning of the word "in", which refers to an item's location or placement rather than connotating ownership.

{¶21} A breach of contract occurs when a party demonstrates the existence of a binding contract or agreement; the non-breaching party performed its contractual obligations; the other party failed to fulfill its contractual obligations without legal excuse; and the non-breaching party suffered damages as a result of the breach. *Conley v. Willis* (June 14, 2001), Scioto App. No. 00CA2746, citing *Garofalo v. Chicago Title Ins. Co.* (1995), 104 Ohio App.3d 95, 108. The general measure of damages for a breach of contract is the amount necessary to place the non-breaching party in the position he or she would have been had the breaching party fully performed under the

contract. *F. Enterprises, Inc. v. Kentucky Fried Chicken Corp.* (1976), 47 Ohio St.2d 154.

{¶22} In this case, it is undisputed that Ahern removed the pizza hot box from the business premises after the Osbournes assumed control. Because there is ample support for the court's finding that the parties' agreement included the hot box in the sale of the business, Ahern's removal of the hot box breached the parties' contract regardless of who actually owned it.

{¶23} The Osbournes presented competent evidence, which Ahern did not dispute, that it would cost $385 to replace the hot box. The trial court did not err in awarding the Osbournes $385 for the hot box, which placed them in the position they would have been had Ahern left the hot box on the business premises as agreed by the parties. Ahern's second assignment of error is overruled.

C. Restitution

{¶24} In his final assignment of error, Ahern asserts the trial court erred in awarding the Osbournes $4,000 for the business sign because the limited liability company became the owner of the sign at no additional expense to it or to the Osbournes.

{¶25} Ahern specifically listed the business sign as an item included in the sale of the business, assigned a value

of $4,000 to the sign, and received the full purchase price from the Osbournes for the sale of the business, including the sign. Ahern, however, did not have ownership of the sign to pass to the Osbournes.

{¶26} The Osbournes acknowledged they had no out-of-pocket expenditures to have their new business name placed on the sign and ultimately the limited liability company became the owner of the sign. However, to gain ownership of the sign, the Osbournes were required to enter into an agreement with Coca Cola to exclusively carry its products for a year, foregoing their plan to carry Pepsi products and purportedly forfeiting monetary rebates offered by Pepsi in the interim.

{¶27} Simply stated, the Osbournes did not receive the benefit of the bargain they made with Ahern; they paid him $4,000 for a business sign and received nothing from him in return. They sought restitution rather than monetary damages. "Restitution," as it applies to breach of contract, places the aggrieved party in the position that party was in before the contract was made, allowing the aggrieved party the right to restitution of money paid to a party who has substantially failed to perform his part of the bargain. See, *Yurchak v. Jack Boiman Const. Co.* (1981), 3 Ohio App.3d 15, 16 fn. 1.

{¶28} Here, it was Ahern who placed a value of $4,000 on the business' sign. The trial court correctly determined that the Osbournes were entitled to a return of the $4,000 they paid Ahern for the sign he did not own. Ahern's final assignment of error is accordingly overruled.

{¶29} Having overruled each of Ahern's assignments of error, we affirm the judgment of the trial court in this case.

JUDGEMENT AFFIRMED.

Harsha J., Dissenting in Part:

{¶30} I dissent only from the decision on the third assignment of error. The Osbournes got the sign, and the measure of damages they proved was the $400 figure it would cost to have it repainted. Thus, I would remand for entry of judgment in their favor in that amount rather than the $4,000 figure.

JUDGMENT ENTRY

It is ordered that the JUDGMENT BE AFFIRMED and that Appellees recover of Appellant costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Jackson County Municipal Court to carry this judgment into execution.

Any stay previously granted by this Court is hereby terminated as of the date of this entry.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

Harsha, J.: Dissenting in Part with Attached Dissenting Opinion.
Kline, J. & McFarland, J.: Concur in Judgment and Opinion.

For the Court

BY: _____
William H. Harsha, Judge

BY: _____
Roger L. Kline, Judge

BY: _____
Matthew W. McFarland, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.