**[Cite as *Englefield v. Corcoran*, 2007-Ohio-1807.]**

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

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| F.W. ENGLEFIELD, IV, et al., | : | |
| | : | |
| Plaintiffs-Appellees, | : | Case No. 06CA2906 |
| | : | |
| vs. | : | **Released: April 13, 2007** |
| | : | |
| JOANNE CORCORAN, et al., | : | DECISION AND JUDGMENT |
| | : | ENTRY |
| Defendants-Appellants. | : | |

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APPEARANCES:

Thomas M. Spetnagel and Paige J. McMahon, Chillicothe, Ohio, for the Appellants.

James L. Mann, Chillicothe, Ohio, for the Appellees.

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McFarland, P.J.:

**{¶1}** Joanne Corcoran, et al. ("Appellants") appeal the judgment of the Ross County Court of Common Pleas finding a purchase option F.W. Englefield, et al. ("Appellees") attempted to exercise was enforceable and sustaining the Appellees' motion for declaratory judgment. The Appellants assert that the trial court erred when it granted the declaratory judgment in favor of the Appellees, as the Appellees were not entitled to enforce the purchase option at issue because their predecessor in interest breached an express condition of the purchase option. Because we find that the

Appellees were entitled to exercise the purchase option, we affirm the judgment of the trial court.

## I. Facts

**{¶2}** On September 20, 1965, the Appellants entered into a written lease with the Standard Oil Company of Ohio for a parcel of real estate located on North Bridge Street in Chillicothe, Ohio. The initial term of the lease was twenty years, commencing on April 1, 1966, and ending on March 31, 1986. The lease included an option to extend the lease term by two additional successive periods of ten years, expressly conditioned upon the lessee's compliance with all the terms of the lease.

**{¶3}** During the term of the lease, the lessee, the Standard Oil Company of Ohio, was succeeded by the Sohio Oil Company. Sohio was, in turn, succeeded by BP Exploration & Oil, Inc. BP Exploration & Oil was later succeeded by BP Products of North America.

**{¶4}** By agreement dated August 14, 2001, the Appellees entered into a contract to purchase the assets of a gas station located on the leased property from BP Products of North America. On December 5, 2001, BP Products of North America assigned to the Appellees all of its rights in the lease.

**{¶5}** The subject lease contains a provision entitled "Purchase Option." This provision states: "As part of the consideration hereof lessee is hereby granted the privilege and option of purchasing the leased property at the completion [of the lease term]." The provision further conditioned the lessee's privilege to exercise the purchase option in the following manner: "The aforesaid right and privilege to purchase the leased property is expressly conditioned upon complete performance of all of the terms of this lease by the lessee to the date of exercise of said option * * *[.]"

**{¶6}** In September 2003, the Appellees notified the Appellants that they intended to exercise the purchase option. The Appellants refused to sell the property on the grounds that the purchase option was no longer enforceable due to a prior lessee's violation of the condition to the purchase option which required "complete performance of all the terms of [the] lease." The violation the Appellants cited was waste of their property, which dated back to 1987.

**{¶7}** On May 23, 1980, the Standard Oil Company, as permitted by the lease, subleased a portion of the leased property to one Don Bunch. The subleased portion consisted of 0.156 acres and was subleased solely for the use by the lessee for driveway and identification sign purposes, or as an easement. The easement covered a strip of land 34 feet wide. Subsequently,

Mr. Bunch assigned his easement rights to the North Bridge Development Company. On March 11, 1987, the North Bridge Development Company signed a plat which dedicated the easement to the city to be used in connection with North Plaza Boulevard.

**{¶8}** On September 12 and 20, 2003, the Appellees notified the Appellants that they would be exercising the purchase option contained within the lease. Shortly thereafter, the Appellants notified the Appellees that the Appellants felt that the purchase option was not longer valid, and thus, the Appellees could not exercise it. On December 12, 2003, the Appellees filed a complaint for declaratory judgment urging the trial court to hold that the purchase option was valid and enforceable and that the Appellants were required to recognize the exercise of the option by the Appellees and proceed with the sale of the property. On December 1, 2004, the Appellants filed a counterclaim seeking a declaration that the first refusal option on the sale or lease of the property at issue was valid and enforceable, rendering the purchase option under the aforementioned lease unenforceable.

**{¶9}** On May 22, 2006, the trial court filed a decision and order finding that the option to purchase was enforceable and that the Appellees had the right to purchase the property at issue. The Appellants now appeal this decision, asserting the following assignment of error:

**{¶10}** 1. THE TRIAL COURT ERRED AS A MATTER OF LAW IN GRANTING A MOTION FOR DECLARATORY JUDGMENT IN FAVOR OF PLAINTIFFS-APPELLEES.

## II. Standard of Review

**{¶11}** The Appellants assert that the trial court erred when it granted the Appellees' motion for declaratory judgment. The decision to grant declaratory relief is a matter within the sound discretion of the trial court. *State v. O'Donnell*, Scioto App. No. 05CA3022, 2006-Ohio-2696, at ¶8; *Arbor Health Care Co. v. Jackson* (1987), 39 Ohio App.3d 183, 185, 530 N.E.2d 928. Accordingly, we will not reverse the trial court's grant of the Appellees' complaint for declaratory relief unless the trial court abused its discretion. Id. The term "abuse of discretion" connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140.

**{¶12}** The case sub judice also involves the interpretation of the lease agreement in connection with the option to purchase and the first refusal option. The construction of written contracts and instruments of conveyance is a matter of law. *Graham v. Drydock Coal Co*. (1996), 76 Ohio St.3d 311, 313, citing *Alexander v. Buckeye Pipe Line Co.* (1978), 53 Ohio St.2d 241, 374 N.E.2d 146. Unlike determinations of fact which are given great

deference, questions of law are reviewed by a court de novo. *Yahraus v. City of Circleville*, Pickaway App. No. 01CA1, 2001-Ohio-2538, at *4, citing *Nationwide Mut. Fire Ins. Co. v. Guman Bros. Farm* (1995), 73 Ohio St.3d 107, 108, 652 N.E.2d 684.

**{¶13}** The cardinal purpose for judicial examination of any written instrument is to ascertain and give effect to the intent of the parties. *Fenstermaker v. Whitaker*, Pickaway App. No. 00CA40, 2001-Ohio-2649, a *4, citing *Aultman Hosp. Assn. v. Community Mut. Ins. Co.* (1989), 46 Ohio St.3d 51, 53, 544 N.E.2d 920. The intent of the parties to a contract is presumed to reside in the language they chose to employ in the agreement. *Kelly v. Med. Life Ins. Co*. (1987), 31 Ohio St.3d 130, 509 N.E.2d 411, paragraph one of the syllabus. A court should strive to give effect to the plain meaning of a contract. *Yahraus*, supra, at *4, citing *Cleveland Elec. Illuminating Co. v. Cleveland* (1988), 37 Ohio St.3d 50, 524 N.E.2d 441. As long as a contract is clear and unambiguous, the court need not concern itself with rules of construction nor go beyond the plain language of the agreement to determine the rights and obligations of the parties. *Yahraus*, supra, at *4, citing *Seringetti Constr. Co. v. Cincinnati* (1988), 51 Ohio App.3d 1, 553 N.E.2d 1371. However, the court must also give effect to all the terms of a contract, neither deleting nor adding words. *Cleveland Elec. Illuminating*

*Co*., supra, at paragraph three of the syllabus. Additionally, if the primary purpose of the contract can be ascertained, the court shall give it great weight. *Yahraus*, supra, at *4.

## III. Argument

**{¶14}** The Appellants argue that the trial court erred when it granted the Appellees' motion for declaratory judgment. They contend that a lessee prior to the Appellees breached a provision which conditioned the lessee's privilege to exercise the purchase option upon complete performance of all the terms of the lease. Thus, the Appellants contend that as successors in interest, the Appellees do not have the ability to exercise the purchase option. The Appellants also contend that the purchase option and first refusal option are inconsistent with one another, rendering the purchase option inapplicable.

### A. Purchase Option

**{¶15}** The Appellants contend that the Appellees do not have the ability to exercise the purchase option, as their predecessors in interest breached the provision requiring the complete performance of all terms of the lease prior to exercising such option. As set forth supra, on May 10, 1984, Don Bunch assigned all of his interest in the 34-foot right of way easement to North Bridge Development Company. On March 11, 1987,

North Bridge Development Company filed a plat of North Plaza Boulevard, which included its assigned rights in the easement and dedicated the plat of North Plaza Boulevard to public use. The plat was filed for record with the Ross County Recorder on March 30, 1987.

**{¶16}** At trial, Joanne Corcoran testified that she and other members of her family were aware that North Plaza Boulevard was being constructed adjacent to their property. Neither she, nor any other member of the Corcoran family, ever objected to the construction of the street, nor did they place the City of Chillicothe, BP America, or North Bridge Development Company on notice of any objection to the fact that the street was being built within the assigned easement. No interest in the property owned by Appellants, other than the 34-foot easement, has ever been assigned to any individual or entity, and the city holds only an assigned sublease for the portion of North Plaza Boulevard situated on the 34-foot right of way.

**{¶17}** Under the terms of the lease, the lessees and their assigns had the right to assign or sublease any portion of the property without the consent of the lessors. This included the easement at issue. The Appellants assert that the prior lessee's use of the property amounted to waste, and therefore, the terms and conditions permitting the exercise of the option have been breached. "Waste" is defined in Black's Law Dictionary (8th ed.,

2004) as "[p]ermanent harm to real property committed by a tenant (for life or for years) to the prejudice of the heir, the reversioner, or the remainderman." Assignment of the property by the lessees and their assigns was permitted by the lease; it also did not cause permanent harm to the real property at issue. Therefore, the lessees and their assigns did not commit waste to the property. The Appellees had the right to sublease the easement rights in the property until the lease ended. Had the Appellees not attempted to exercise the right to purchase the property, then at the end of the lease the Appellants could have demanded that the City of Chillicothe compensate them for the continued use of the easement or purchase the fee interest from the Appellants.

**{¶18}** Even assuming arguendo that the Appellees' predecessors in interest had breached a condition in the lease, a breach of a condition in a lease does not render the lease void, but voidable at the option of the lessor. *Brokamp v. Linneman* (1923), 20 Ohio App. 199, 201, 153 N.E. 130. In order to take advantage of the claimed breach, the lessor must declare a forfeiture by some positive act. Id. If the lessor knows of the breach, but ignores it and permits the lessee to remain in possession of the premises while continuing to accept the benefits under the lease, the lessor has waived his right of forfeiture based on the claimed breach. Id. at 202. In *Brokamp*,

supra, the lessor was aware for a period of approximately eighteen months that the lessee had subleased a portion of the leased premises and was contemplating the sale of his business and an assignment of the lease in violation of the lease agreement, but permitted the lessee to remain in possession of the premises and continued to accept rent. The court held that this constituted a waiver. Id. In light of this decision, we hold that the Appellants waived their right to take advantage of the claimed breach, as they permitted the prior lessee to remain in possession of the premises and continued to accept rent on the property.

**B. Right of First Refusal**

**{¶19}** The Appellants also contend that the purchase option and first refusal option are inconsistent with one another, rendering the purchase option inapplicable. As stated supra, courts must strive to give effect to all the terms of a contract, neither deleting nor adding words. *Cleveland Elec. Illuminating Co*., supra. A review of the agreement shows that the right to purchase the leased property was enforceable only at the end of the lease term. Although the Appellees gave the Appellants notice of their intention to exercise the option to purchase prior to the end of the lease, they could not require the Appellants to sell the property to them until the end of the term.

This restriction preserved the Appellants' right to continue to receive the benefits of the lease until it ended.

**{¶20}** In contrast to the purchase option, the right of first refusal gave the Appellants the right to sell the property prior to the expiration of the lease term. Purchasers would take the property subject to the terms of the recorded lease. If an offer had been made to purchase the property, the lessees would have either had to match the price or continue with their leasehold interest.

**{¶21}** Our review of the provisions at issue shows that the option to purchase and the right of first refusal are not at odds with one another. Giving effect, therefore, to the plain meaning of the contract, we find that the option to purchase was effective and enforceable at the point in time at which the Appellees attempted to exercise it.

## IV. Conclusion

**{¶22}** In our view, the trial court did not abuse its discretion in finding that the purchase option was effective and enforceable. The Appellants waived their right to take advantage of the claimed breach by a prior lessee, as they permitted the lessee to remain in possession of the premises after the alleged breach and continued to accept rent on the property. Therefore, the option was still enforceable at the time the Appellees attempted to exercise

it. Additionally, the option to purchase and the right of first refusal as set forth in the agreement are not at odds with one another. Thus, the purchase option was effective at the time of attempted exercise. Accordingly, we find that the trial court did not err when it granted the Appellees' motion for declaratory judgment, and we affirm its decision.

**JUDGMENT AFFIRMED.**

Kline, J., dissenting.

**{¶23}** I respectfully dissent. In my view, the appellants did not appeal a final, appealable order. Therefore, I would dismiss this appeal for lack of jurisdiction.

**{¶24}** Before considering the merits of this appeal, it is necessary to determine whether the order appealed from is a final appealable order. As this court has previously held, appellate courts possess jurisdiction to review only those orders that are final orders or judgments of the inferior courts in their appellate district. See, generally, Section 3(B)(2), Article IV, Ohio Constitution; R.C. 2505.02; see, also, *Dodrill v. Prudential*, Jackson App. No. 05CA13, 2006-Ohio-3674. If the lack of a final appealable order is not addressed by the parties in the appeal, the reviewing court "must raise it sua sponte." *Dodrill* at ¶ 8, citing *Chef Italiano Corp. v. Kent State Univ.* (1989), 44 Ohio St.3d 86, syllabus.

**{¶25}** Here, the trial court's May 22, 2006, decision and order grants Plaintiffs' (now Appellees') request for declaratory judgment holding that the "option to purchase is enforceable." However, the order fails to address portions of Defendants' (now Appellants') counterclaim. In that counterclaim, Defendants sought a declaration that: (1) the purchase option was no longer valid because there has not been complete performance under the lease; (2) that the original lessee interfered with the first refusal provision by allowing a portion of the property to be dedicated for public use; and (3) that the purchase option would be invalid and unenforceable if Defendants were to ever receive a bona fide offer to purchase the property from a third-party.

**{¶26}** Although the trial court never expressly ruled on Defendants' counterclaim, it did find that the purchase option was valid when ruling on Plaintiffs' cause of action and that the dedication did not amount to a breach of the lease. Thus, the trial court did address the first and second declaration sought by Defendants and implicitly overruled that claim. See *Crane Electronics, Inc. v. Crane* (June 2, 1993), Hamilton App. No. C-920188; see, also, *Security National Bank & Trust Co. v. Jones* (July 6, 2001), Clark App. No. 2000-CA-59. The trial court order, however, did not implicitly overrule the third declaration sought by Plaintiffs.

**{¶27}** A court may also allow an appeal "to proceed, even if claims are not expressly adjudicated, if the effect of the judgment is to render some claims moot." *Renfrow v. Joshi*, Montgomery App. No. 19895, 2004-Ohio-1316. Here, the third declaration sought by Defendants was essentially an alternative declaration that if the purchase option was enforceable itself, the purchase option would nevertheless cease to be enforceable *if* Defendants received a bona fide offer to purchase from a third-party. While this argument may be factually moot because Ms. Corcoran testified that she never received a bona fide offer to purchase from a third-party as of April 4, 2006 (the second extension of the lease would have expired on March 31, 2006, vesting Plaintiffs' option to purchase), Defendants' assertion was not rendered legally moot as an effect of the trial court's judgment. The trial court should have ruled on this issue after it determined that the purchase option was enforceable. See *Talbott v. Cincinnati Ins. Co.*, Trumbull App. No. 2004-T-0023, 2004-Ohio-5513, ¶7-8 (holding that until potentially moot claims "are dismissed from the case or otherwise disposed of by the trial court, no final appealable order exists").

**{¶28}** Thus, because Defendants' counterclaim remains pending, the court's decision and order cannot be a final appealable order unless it complies with Civ.R. 54(B). "When an action includes multiple claims or

parties and an order disposes of fewer than all of the claims or rights and liabilities of fewer than all of the parties without certifying under Civ.R. 54(B) that there is no just cause for delay, the order is not final and appealable." *Dodrill* at ¶9.

**{¶29}** Here, the trial court's entry does not contain the exact language set forth in the rule. Instead, it states that "[s]ince there is no need for further delay, this maybe a **FINAL APPEALABLE ORDER**." This court has held that the exact language "no just reason for delay" is not needed where "the expressed intent of the court is clear that there is no just reason for delay." *Hawker v. City of Jackson* (Apr. 14, 1982), Jackson App. No. 445 (holding that an entry stating "[t]his Judgment Entry shall be considered a final entry insofar as the City is concerned. No further entry is required[,]" was sufficient to satisfy the rule).

**{¶30}** However, other courts have recently held that "in order for an order that requires Civ.R. 54(B) language to be final and appealable, the order must contain, at the very least, language that substantially complies with the Civ.R. 54(B) language; that is, the language must evince that the trial court made the essential determination required by Civ.R. 54(B)." *Tadmor v. Huntington Natl. Bank v. Fisher*, Summit App. No. 22760, 2006-Ohio-1046, ¶17 (holding that an order stating "[t]his is a final order *that*

*shall not be delayed*" - falls short of this standard"); see, also, *Bankers Trust Co. of California v. Tutin*, Summit App. No. 22850, 22870, 2006-Ohio-1178, ¶4 (holding that an entry stating "'[t]here is no cause for delay'* * *did not 'ma[k]e the essential determination required by Civ.R. 54(B)'").

**{¶31}** Here, the entry does not substantially comply with the language set forth in Civ.R. 54(B). Further, the language does not *clearly show* the "expressed intent of the court* * *that there is no just reason for delay." The court merely says that the entry "since there is no need for further delay, this ***maybe*** a **FINAL APPEALABLE ORDER**." (Emphasis added). Such language fails to clearly state the express intent of the court to make the order final and appealable. Thus, because portions of Defendants' counterclaim remains unresolved, and because the trial court's entry does not substantially comply with the language set forth in Civ.R 54(B), there is no jurisdiction to consider the appeal.[1]

[1] Even where an order contains the "magic language" stating that "there is no just cause for delay," such language "does not, by itself, convert a final order into a final *appealable* order." *Oakley v. Citizens Bank of Logan*, Athens App. No. 04CA25, 2004-Ohio-6824, ¶10, citing *Bell Drilling & Producing v. Kilbarger Const., Inc.* (June 26, 1997), Hocking App. No. 96CA23.

"The trial court should include the express determination that there is no just reason for delay when a judgment has been entered as to one or more but fewer than all the claims of the parties only when the matter adjudicated is clearly independent of other rights and liabilities, because the trial court's power to modify the order[,] as may be necessary due to subsequent events[,] is otherwise substantially decreased. The trial court abuses its discretion in attempting to make the disposition of only part of the claims appealable by the addition of Civil Rule 54(B) language when the parties and issues contained in that order are so related and interconnected with an interlocutory order that, for purposes of judicial economy, they should be considered together. In that event, the appellate court is without jurisdiction to entertain the appeal until all of the intertwined claims are final. Ollick v. Rice [1984], 16 Ohio App.3d 448 * * *; see Noble v. Colwell [1989], 44 Ohio St.3d 92, at 97, fn. 7 * * *.]" *Id.* at ¶10, citing McCormac & Solimine,

**{¶32}** Thus, I dissent.

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Ohio Civil Rules Practice (3d Ed. 2003) 351, Section 13.17.

Here, the third declaration sought by Defendants is not so intertwined with Plaintiffs' cause of action. Plaintiff sought a declaration that the purchase option was enforceable. Defendants asserted an *alternative* declaration that even if the purchase option was enforceable itself, it would cease to be enforceable *if* Defendants received a bona fide offer to purchase from a third-party. Thus, the trial court could have ruled on Plaintiffs' cause of action without necessarily determining the argument asserted by Defendants.

**JUDGMENT ENTRY**

It is ordered that the JUDGMENT BE AFFIRMED and that the Appellees recover of Appellants 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 Ross County Common Pleas 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.

Abele, J.: Concurs in Judgment and Opinion.
Kline, J.: Dissents with Dissenting Opinion.

For the Court,

BY: _____
Matthew W. McFarland
Presiding 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.**