[Cite as *Kindle Road Co., L.L.C. v. Trickle*, 2004-Ohio-4668.]

COURT OF APPEALS
LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

THE KINDLE ROAD COMPANY, LLC, et al. Plaintiff-Appellee/Cross-Appellant -vs- LAURA ANN TRICKLE Defendant-Appellant/Cross-Appellee	JUDGES: Hon. William B. Hoffman, P.J. Hon. Sheila G. Farmer, J. Hon. John W. Wise, J. Case No. 03CA99 O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Licking County Court of Common Pleas, Case No. 02CV642JRS
JUDGMENT:	Afirmed in part; Reversed in part and Remanded.
DATE OF JUDGMENT ENTRY:	September 2, 2004

APPEARANCES:

For Defendant-Appellant	For Plaintiff-Appellee
DAVID C. MORRISON 987 Professional Parkway Heath, Ohio 43056	JUD R. MAUGER 88 East Broad Street, Ste. 1220 Columbus, Ohio 43215

Hoffman, P.J.

{¶1} Defendant-appellant/cross-appellee Laura Ann Trickle appeals the portion of the October 8, 2003 Judgment Entry of the Licking County Court of Common Pleas entering judgment in favor of plaintiff-appellee/cross-appellants The Kindle Road Company, LLC. ("KRC") and James M. Lough, III. Appellee/cross-appellants KRC and Lough appeal that portion of the judgment entry denying their declaratory judgment claim.

STATEMENT OF THE FACTS AND CASE

{¶2} Appellant and Lough were married on November 10, 1990. On June 12, 1992, they purchased property consisting of approximately 70 acres in Licking County, Ohio, commonly known as Buckeye Lake Music Center (hereinafter "Kindle Road Property").

{¶3} On April 28, 1995, appellant filed for divorce, and from April 28, 1995, through October 16, 1996, the parties negotiated the terms of their divorce. On October 16, 2003, the parties entered into a Separation Agreement determining the division of the marital property. The Separation Agreement required Lough to immediately execute and deliver to Trickle a limited warranty deed conveying to Trickle all of his right, title and interest to the Kindle Road Property. The Separation Agreement required, upon execution and delivery of the limited warranty deed, Lough and Trickle immediately enter into a lease agreement whereby Trickle granted to Lough the right to co-promote with Trickle all concert events and other business activities conducted at or on the Kindle Road Property and such other rights pursuant to the general terms agreed upon by Lough and Trickle ("Lease").

{¶4} The Licking County Domestic Relations Division incorporated by reference the Separation Agreement in its Agreed Judgment Entry/Decree of Divorce and ordered

Lough and Trickle to comply with all terms and conditions of the agreement. The parties signed the Agreed Judgment Entry/Decree of Divorce.

{¶5} On October 16, 1996, Lough executed and delivered to Trickle a limited warranty deed conveying to Trickle all of his right, title and interest to the Kindle Road Property. Also on October 16, 1996, Trickle as lessor and The Kindle Road Company, LLC as lessee and assignee of Lough's interest, entered into the lease. Lough is the sole member of The Kindle Road Company, LLC.

{¶6} Paragraph 9(b) of the lease provides KRC is entitled to share equally with Trickle in any rent, fee or other consideration received for the use of the land for a concert or other event. The lease provides: "In the event that either party fails to provide the other with either (i) a timely, or (ii) an accurate, accounting or settlement a [sic] aforesaid the party so failing shall be barred from participating in the profits of any of the next three(3) events co-promoted on the Leased Premises following such failure."

{¶7} After October 16, 1996, concerts and events were held on the property, and Trickle received $74,784.53 in rent. Trickle did not pay KRC half of the money, nor did she account to KRC within three days after any of the concerts.

{¶8} KRC filed a complaint for declaratory judgment on February 5, 2002, requesting the trial court find, pursuant to the lease, KRC as lessee, had the right to unilaterally use the property in question, subject to said use not interfering with the use of the property by Trickle. On April 4, 2002, Trickle filed an answer and counterclaim for declaratory judgment asserting the lease was void for uncertainty. On April 5, 2002, Trickle filed an amended answer and counterclaim for declaratory judgment. On June 19, 2002, KRC and Lough filed an action against Trickle for breach of contract and intentional, willful

and malicious conduct, including theft by deception, conversion and fraud. On June 27, 2002, Trickle filed an answer and counterclaim for declaratory judgment maintaining the lease was void for uncertainty. The separate cases were consolidated on October 10, 2002. A bench trial commenced on September 4, 2003. On October 8, 2003, via Judgment Entry, the trial court granted KRC's claim for breach of contract, and denied the claims for acts of theft by deception, conversion and fraud. The trial court also denied KRC's claim it had the right to unilaterally use the property. The trial court further denied Trickle's claim the lease was void for uncertainty.

{¶9} It is from the portion of the October 8, 2003 Judgment Entry denying her claim and entering judgment in favor of appellee/cross-appellants, appellant/cross-appellee now appeals raising the following as assignments of error:

{¶10} "I. THE TRIAL COURT'S CONCLUSION THAT THE PURPORTED LEASE IS SUFFICIENTLY DEFINITE AND CERTAIN TO BE BINDING AS A CONTRACT IS CONTRARY TO LAW.

{¶11} "II. THE TRIAL COURT'S DECISION TO AWARD DAMAGES FOR BREACH OF THE PURPORTED LEASE ACCORDING TO ITS FORFEITURE CLAUSE IS CONTRARY TO LAW."

I

{¶12} In her first assignment of error, Trickle maintains the trial court's conclusion the purported lease is sufficiently definite and certain to be binding as a contract is contrary to law. Essentially, appellant argues the lease is an agreement to agree, and is unenforceable as the parties' manifest intentions are not definite enough to be enforced.

Trickle asserts the lease is an agreement to agree in the future to sell lemonade and co-promote concerts. We disagree.

{¶13} The lease does not require some future agreement before it becomes binding upon the parties. The lease manifests both parties' intention to be bound, and the terms are sufficiently definite to be enforced. The lease provides KRC has the "exclusive right to co-promote" with Trickle "any concerts or other events," and both parties would sell lemonade on the land from time to time as partners. While the lease contemplates future actions by the parties, it does not require a future agreement between the parties in order for either party to be bound. The lease agreement is specific as to the parties' obligations and the distribution of proceeds from any income generating event on the property.

{¶14} Trickle's first assignment of error is overruled.

II

{¶15} In her second assignment of error, Trickle contends the trial court's decision to award damages for breach of the purported lease according to its forfeiture clause is contrary to law.

{¶16} The lease contains the following forfeiture clause:

{¶17} "In the event that either party fails to provide the other with either (i) a timely, or (ii) an accurate, accounting or settlement a (sic) aforesaid, the party so failing shall be barred from participating in the profits of any of the next three (3) events co-promoted on the Leased Premises following such failure."

{¶18} Citing *Lake Ridge Academy v. Carney* (1993), 66 Ohio St.3d 376, appellant argues the forfeiture clause constitutes an invalid penalty rather than an enforceable liquidated damages clause. The Ohio Supreme Court stated in *Lake Ridge*:

{¶19} “As a general rule, parties are free to enter into contracts that contain provisions which apportion damages in the event of default. ‘The right to contract freely with the expectation that the contract shall endure according to its terms is as fundamental to our society as the right to write and to speak without restraint. Responsibility for the exercise, however improvident, of that right is one of the roots of its preservation.’ *Blount v. Smith* (1967), 12 Ohio St.2d 41, 47, 41 O.O.2d 250, 253, 231 N.E.2d 301, 305.

{¶20} “***

{¶21} “Determining whether stipulated damages are punitive or liquidated is not always easy: "[I]t is necessary to look to the whole instrument, its subject-matter, the ease or difficulty of measuring the breach in damages, and the amount of the stipulated sum, not only as compared with the value of the subject of the contract, but in proportion to the probable consequences of the breach, and also to the intent of the parties ascertained from the instrument itself in the light of the particular facts surrounding the making and execution of the contract." *Jones v. Stevens* (1925), 112 Ohio St. 43, 146 N.E. 894, paragraph one of the syllabus. (Emphasis added). "Neither the parties' actual intention as to its validity nor their characterization of the term as one for liquidated damages or a penalty is significant in determining whether the term is valid." 3 Restatement of Contracts, *supra,* at 159, Section 356, Comment *c.* See *Samson Sales, Inc. v. Honeywell, Inc.* (1984), 12 Ohio St.3d 27, 28, 12 OBR 23, 24, 465 N.E.2d 392, 394. Thus, when a stipulated damages provision is challenged, the court must step back and examine it in light of what the parties knew at the time the contract was formed and in light of an estimate of the actual damages caused by the breach. “If the provision was reasonable at the time of formation and it bears a reasonable (not necessarily exact) relation to actual damages, the provision will be

enforced. See 3 Restatement of Contracts, *supra,* at 157, Section 356(1)." (Emphasis added).

{¶22} The test developed in Ohio to judge a stipulated damages provision was set forth in *Samson Sales, Inc. v. Honeywell, Inc.,* supra:

{¶23} "Where the parties have agreed on the amount of damages, ascertained by estimation and adjustment, and have expressed this agreement in clear and unambiguous terms, the amount so fixed should be treated as liquidated damages and not as a penalty, if the damages would be (1) uncertain as to amount and difficult of proof, and if (2) the contract as a whole is not so manifestly unconscionable, unreasonable, and disproportionate in amount as to justify the conclusion that it does not express the true intention of the parties, and if (3) the contract is consistent with the conclusion that it was the intention of the parties that damages in the amount stated should follow the breach thereof." Id. at paragraph one of the syllabus, citing *Jones v. Stevens,* supra, paragraph two of the syllabus."

{¶24} Attorney Charles Koenig, who drafted the lease agreement, testified at trial:

{¶25} "Q. Could you please discuss that issue as it relates to the forfeiture?

{¶26} "A. Well, coincidentally enough, there was a concern obviously at the time that we were drafting this document that because Mrs. Lough was being given full fee title to the property, that there was the concern that she might not provide Mr. Lough with all the information necessary for him to be able to get his share of any profits from any activities that he was entitled to. That's part of the reason why we made this a lease so that it would be a recordable document that was obviously then on notice to the general public and so everybody was aware of it, if they dealt with this, he was entitled to share in profits from

activity on the - - held at the even. But also we put that provision that you just referred to on - - in paragraph 9-B in there so to make sure that there was a negative incentive to comply with the requirements of - - of sharing the profits among the parties, and if - - if a party either failed to provide accounting as required from a time or from an accuracy standpoint, that that party would simply not be entitled then to participate in the next three events. There was no - - there's no penalty, there's no - - there's no damages, there's no fine, there's no dollar amount that a person has to pay for their failure. They're just not entitled to go - - they're just not entitled to be able to do something with respect to future events that may or may not be held there." Tr. 29-30.

{¶27} Damages for breach of contract are those which are the natural or probable consequence of the breach of contract or damages resulting from the breach that were within the contemplation of both parties at the time of making the contract. On October 16, 1996, at the time the parties executed the lease agreement, the liquidated damages clause was within the contemplation of both parties.

{¶28} As provided in *Lake Ridge,* we must consider "the ease or difficulty of measuring the breach in damages, and the amount of the stipulated sum, not only as compared with the value of the subject of the contract, but in proportion to the probable consequences of the breach, and also to the intent of the parties ascertained from the instrument itself in the light of the particular facts surrounding the making and execution of the contract." *Lake Ridge* dictates we step back and look at what the parties knew at the time they entered into the contract and in light of an estimate of the actual damages caused by the breach. If the provision was reasonable at the time of formation and it bears a

reasonable (not necessarily exact) relation to actual damages, the provision will be enforced.

{¶29} Pursuant to the first prong of the *Lake Ridge* test, *at the time the parties entered into the contract*, there was uncertainty and difficulty in calculating what damages *would be* in the event of a breach. Even though damages were easily calculable at the time of Trickle's breach, they were not at the time the parties entered into the agreement.

{¶30} Further, under the second prong, the contract as a whole is not so manifestly unconscionable, unreasonable, and disproportionate in amount as to justify the conclusion that it does not express the true intention of the parties

{¶31} Finally, according to the third prong, the contract is consistent with the conclusion it was the intention of the parties damages in the amount stated should follow, if a party breached the contract.

{¶32} The second assignment of error is overruled.

{¶33} The portion of the October 8, 2003 Judgment Entry of the Licking County Court of Common Pleas entering judgment in favor of appellees/cross-appellants is affirmed.

Cross-Appeal

{¶34} It is from that portion of the October 8, 2003 Judgment Entry denying their claim for acts of theft by deception, conversion and fraud and finding KRC did not have the right to unilaterally use the property, appellees/cross-appellants-KRC and Lough raise the following assignments of error:

{¶35} "I. THE TRIAL COURT ERRED TO THE PREJUDICE OF CROSS APPELLANT THE KINDLE ROAD COMPANY, LLC WHEN THE COURT DENIED ITS

DECLARATORY JUDGMENT CLAIM FOR A FINDING THAT IT HAD A RIGHT TO UNILATERALLY USE THE PROPERTY IN QUESTION AS THE EVIDENCE SUPPORTED SUCH A FINDING.

{¶36} "II. TRIAL COURT ERRED TO THE PREJUDICE OF CROSS APPELLANTS WHEN THE COURT DENIED THEIR CLAIMS OF INTENTIONAL, WILLFUL AND MALICIOUS CONDUCT BY DEFENDANT, INCLUDING THEFT BY DECEPTION, CONVERSION AND FRAUD, WHICH GIVE RISE TO ADDITIONAL DAMAGES, INCLUDING PUNITIVE DAMAGES, AS THE EVIDENCE SUPPORTED SUCH A FINDING."

Cross Appeal

I

{¶37} In the first assignment of error, KRC argues the trial court erred in denying its request for declaratory judgment finding it had a right to unilaterally use the property in question.

{¶38} Section 2 of the Lease, introduced at trial, provides KRC is entitled to use the leased premises in the manner and to the extent set forth in the lease. Further, KRC's use of the leased premises shall not be to the exclusion of Trickle's use of the same, and, except as expressly set forth in the lease, the lease shall not in any way prevent KRC from using or leasing the premises, so long as such use does not interfere with Trickle's use thereof.

{¶39} Attorney Koenig testified at trial:

{¶40} "A. * * * You would have to look at the use of the premises, which is in section 1 and 2 of this document, and - - and section 2 says lessee shall be entitled to use the lease premises in the manner and to the extent set forth hereinafter, and throughout the

document there are multiple ways and rights and what have you that - - that the lessee is permitted to use the property. And they're not restricted as use of the property. Lessee is not restricted in any way in this document other than the fact that, No. 1, he can't use the property if it - - if it affects - - adversely affects Mrs. Lough's ability to use the property, and, No. 2, that he must share the profits with Mrs. Lough in any activity he engages in with respect to this property whether or not she participates in that activity.

{¶41} "Q. So those are the only - - his only two restrictions on the use of the property?

{¶42} "A. Correct." Tr. at 28-29.

{¶43} On September 4, 2003, the trial court held:

{¶44} "The Court also will not grant the exclusive use request that had been requested in the declaratory judgment action. We're really not pursuing that, I do not believe. At lease it did not appear in the proposed findings, did it? Is that in there?

{¶45} "MR. MAUGER: Yes, it was, Your Honor.

{¶46} "THE COURT: If it was, I deny that." Tr. at 269.

{¶47} Per the trial court's instructions, KRC and Lough filed proposed findings of fact and conclusions of law with the court on September 22, 2003. The proposed conclusions of law submitted to the court included:

{¶48} "A. Based upon the foregoing findings of fact, the Court concludes that The Kindle Road Company, LLC has a right to use the Kindle Road Property for any purpose as long as that purpose does not interfere with Lessor's use of the premises, including but not limited to Lessee entering into leases and other agreements for concerts and business activities conducted on the Kindle Road Property."

{¶49} Pursuant to the above, we find the trial court misinterpreted the issue properly before it as to whether KRC has the right to unilaterally use the property subject only to said use not interfering with the use of the property by Trickle and subject to the sharing of any profits derived from said use with Trickle. We interpret the trial court's conclusion as misinterpreting the issue as one of exclusive use, rather than unilateral use subject to the restrictions noted above.

{¶50} Accordingly, the first assignment of error on cross-appeal is sustained, and the matter is remanded to the trial court for a redetermination of this issue as it pertains to KRC's request for declaratory judgment.

II

{¶51} In the second assignment of error raised on cross-appeal, cross-appellants argue the trial court erred to their prejudice in denying their claims of intentional, willful and malicious conduct by Trickle, including theft by deception, conversion and fraud, which give rise to additional damages, including punitive damages.

{¶52} The trial court held:

{¶53} "The Court, however, agrees with counsel for the Defense that the actions of the Defendant did not rise to the level of fraud. It was simply a scheme not to pay those damage - - or those monies that were due the Plaintiff from the lease. It's a breach of contract. I obviously do not approve of the manner in which it was done and specifically find that Laura Trickle's testimony was not credible, nor that of Steven Trickle.

{¶54} "The Court, therefore, does find in favor of the Plaintiff in this case. I also find that the damages' figure that was submitted by the Plaintiff are adopted. I do - - again do

not believe the testimony of the Defendant in this case with respect to the expenses and do believe the testimony that was submitted on behalf of the Plaintiff.

{¶55} "It's the Court's finding that I do not accept the fraud cause of action. Attorney fees are not payable, nor are punitive damages; however, the Court costs are assessed to the Defendant." Tr. at 268-269.

{¶56} Cross-appellants argue, if the facts of the case show an intentional tort committed independently, but in connection with, a breach of contract and such tort is accompanied by conduct which is wanton, reckless, malicious or oppressive, then punitive damages may be awarded. They maintain Trickle entered into a scheme so as not to pay KRC the monies due it from the lease.

{¶57} Ohio law does not recognize a civil cause of action for theft by deception, and cross-appellants have not cited case law authority to the contrary. Therefore, the trial court did not error in finding cross-appellants could not maintain an independent and separate claim for civil theft by deception.

{¶58} Further, cross-appellants' claim for conversion is precluded by their recovery on their breach of contract claim. Their conversion claim is an alternative claim to their breach of contract claim, and any prejudice caused by its denial has been rendered harmless by the trial court's granting stipulated damages pursuant to the contract. Otherwise, an additional award in favor of cross-appellants on their conversion claim would result in a double recovery.

{¶59} Although the trial court's finding regarding Trickle's scheme not to pay and the manner it was done would have supported a finding of fraud, we are unable to conclude the

trial court's denial of cross-appellants' claim therefore was against the manifest weight of the evidence.

{¶60} The second assignment of error raised on cross-appeal is overruled.

{¶61} The October 8, 2003 Judgment Entry of the Licking County Court of Common Pleas is affirmed in part, reversed in part and remanded for further proceedings in accordance with our opinion and the law.

By: Hoffman, P.J.

Farmer, J. and

Wise, J. concur

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JUDGES

IN THE COURT OF APPEALS FOR LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

THE KINDLE ROAD COMPANY, LLC	:	
Plaintiff-Appellee/Cross-Appellant	:	
-vs-	:	JUDGMENT ENTRY
LAURA ANN TRICKLE	:	
Defendant-Appellant/Cross-Appellee	:	Case No. 03CA99

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Licking County Court of Common Pleas is affirmed in part, reversed in part and remanded for further proceedings in accordance with our opinion and the law. Costs assessed equally.

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JUDGES