[Cite as *4746 Dressler, L.L.C. v. Fitzpatrick Ents.*, 2009-Ohio-4001.]

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

4746 DRESSLER, LLC, SUCCESSOR-IN-INTEREST TO KPL INVESTMENTS, LLC	:	JUDGES:
	:	William B. Hoffman, P.J.
Plaintiff-Appellant	:	Julie A. Edwards, J.
	:	Patricia A. Delaney, J.
-vs-	:	
	:	Case No. 2008 CA 00155
FITZPATRICK ENTERPRISES, et al.	:	
	:	
Defendants-Appellees	:	O P I N I O N

CHARACTER OF PROCEEDING:	Civil Appeal From Stark County Court Of Common Pleas Case No. 2008 CV 1781
JUDGMENT:	Reversed and Remanded
DATE OF JUDGMENT ENTRY:	August 3, 2009
APPEARANCES:	
For Plaintiff-Appellant	For Defendants-Appellees
LESLIE E. WARGO DANIEL M. SINGERMAN McCarthy, Lebit, Crystal & Liffman Co., L.P.A. 101 West Prospect Avenue, Suite 1800 Cleveland, Ohio 44115-1088	ROY H. BATISTA Gregg, Batista & Andrews 4808 Munson Street, N.W. Canton, Ohio 44718

Edwards, J.

{¶1} Plaintiff-appellant, 4746 Dressler, LLC, Successor in Interest to KPL Investments LLC, appeals from the June 30, 2008, Judgment Entry of the Stark County Court of Common Pleas. Defendants-Appellees are Fitzpatrick Enterprises, William Fitzpatrick, Scott Fitzpatrick, Deanne Fitzpatrick and Lauren Fitzpatrick.

STATEMENT OF THE FACTS AND CASE

{¶2} Appellant 4746 Dressler, LLC is the successor in interest to KPL Investments, LLC. On August 25, 2005, appellee Fitzpatrick Enterprises, as seller, and KPL, as buyer, entered into a Purchase Agreement for the property located at 4746 Dressler Road in Canton, Ohio. The purchase price was $4,500,000.00. Paragraph 7(D) of the Purchase Agreement states as follows:

{¶3} "The parties shall prorate real estate taxes and assessments (both general and special) as of the date of title transfer, based upon the last available tax duplicate of the Stark County Treasurer, and shall charge Seller any amount chargeable to Seller and shall credit Buyer any amount due to Buyer by reason of said proration. In the event of a respread of taxes or the proration basis is incorrect, the parties shall make an appropriate adjustment so that the proration actually reflects the taxes due and payable by Buyer. Special assessments for improvements completed prior to the date of closing whether matured or unmatured, shall be paid in full by Seller." (Emphasis added).

{¶4} In November of 2005, KPL assigned its interest in the Purchase Agreement to appellant 4746 Dressler, LLC.

{¶5} The closing of the transaction took place on November 30, 2005 and appellant took title to the property at such time. At the time of the closing, the amount of

$48,994.47 was credited to appellant from appellee Fitzpatrick Enterprises for 2005 real estate taxes for the property. However, the actual first one-half taxes when billed in 2006 by the Stark County Treasurer were $29,719.52 and the second-half taxes were $29,719.52, for a total of $59,439.04. This was based on the assessed value of the subject property, which, at the time was $3,000,000.00. Appellees do not dispute that they were obligated to pay appellant $5,396.32 to cover the increase.

{¶6} In March of 2006, the Jackson Local School District Board of Education filed a complaint against the valuation of real property for the tax year 2005 with respect to the subject property. An amended complaint was filed on April 11, 2006. Following a hearing held on October 11, 2006, before the Stark County Board of Revision, the Board of Revision increased the market value of the subject property from $3,000,000.00 to $4,500,000.00, and the taxable value to $1,575,000.00. Appellant never notified appellees of the hearing before the Board of Revision and did not attend the same.

{¶7} As a result of the decision of the Board of Revision, appellant received tax bills in 2007 for the omitted back real estate taxes for 2005. These tax bills totaled $29,719.52, or $14,859.76 per half. Appellant, after receiving notice of the omitted back real estate taxes, contacted appellees and demanded that appellees pay 334/365ths of the same, or $27,195.40, because appellees had owned the subject property for 334 days in 2005. Appellees, however, refused to pay.

{¶8} Thereafter, on April 10, 2008, appellant filed a complaint for breach of contract, declaratory judgment, unjust enrichment and promissory estoppel against appellee Fitzpatrick Enterprises and appellees William Fitzpatrick, Scott Fitzpatrick,

Deanne Fitzpatrick and Lauren Fitzpatrick, its general partners. An amended complaint was filed on or about May 2, 2008.

{¶9} On June 6, 2008, the parties filed joint stipulations of fact and stipulations as to the authenticity and/or admissibility of specified documents. A bench trial was held on June 30, 2008. The following testimony was adduced at the trial.

{¶10} Brad Kowit is appellant's managing member and has been in the real estate field for approximately 22 years. At trial, Kowit testified that Greg Levy, another of appellant's members, drafted the Purchase Agreement in this case. He testified that appellee Fitzpatrick Enterprises participated in the drafting of the agreement and that "we went back and forth several times negotiating, terms and the language of the contract." Transcript at 20.

{¶11} Kowit further testified that paragraph 7(D) of the Purchase Agreement was a typical provision in real estate purchase agreements. Kowit testified that when he received the complaint against the valuation of the subject property, he contacted appellant's real estate tax attorney, Steve Gill, who told him that, based on the sale price of the property, there was nothing that appellant could so. For such reason, no one attended the Board of Revision hearing on appellant's behalf. When asked why he did not notify appellees of the hearing, Kowit testified that appellant had no obligation under the Purchase Agreement to do so. He further testified that the parties had stipulated that appellant had accrued penalties and interest on the 2005 omitted back taxes and that they added up to $4,241.68. Kowit testified that he believed that appellant was not responsible for the penalties and interest because appellant was not obligated to pay the omitted back taxes.

{¶12} At the trial, Steve Gill testified that Brad Kowit contacted him about the complaint against the valuation which was filed for the tax year 2005, and that Kowit told him that the sale of the subject property was an arm length's transaction between unrelated parties. Based on such information and his review of the applicable law, Gill told Kowit that it would be "fruitless" to appear at the Board of Revision hearing and contest the $4,500.000.00 valuation of the property. Transcript at 63. The following is an excerpt from Gill's trial testimony**:**

{¶13} "Q. And based upon your education and experience, had the Defendant Fitzpatrick Enterprises been notified of this complaint against the valuation, could they have contested the complaint?

{¶14} "A. No.

{¶15} "Q. Why not?

{¶16} "A. Ah, they did not have standing. In order to file a counter complaint or appear and represent a party, you have to be the owner, ah, on the date the complaint is filed.

{¶17} "Q. And on the date the complaint was filed who was the owner?

{¶18} "A. Ah, it was 4746 Dressler, LLC. But it really wouldn't have mattered who appeared; the decision would have been the same.

{¶19} "Q. Okay." Transcript at 68.

{¶20} He further testified that he did not see any provision in the Purchase Agreement requiring appellant to notify appellees of the complaint against valuation of the property.

{¶21} Appellee Scott Fitzpatrick testified at the trial that he was the managing partner of appellee Fitzpatrick Enterprises and that he had been involved in real estate development since 1973. He testified that appellee Fitzpatrick Enterprises owned and managed over a million square feet. When questioned about the Purchase Agreement, appellee Scott Fitzpatrick testified that there was very little negotiating between the parties over the agreement and that he had never seen the terminology "respread" of taxes as contained in Paragraph 7(D) before. When asked his interpretation of the "respread" of taxes, appellee Scott Fitzpatrick responded as follows**:**

{¶22} "A. A respread of the taxes would be if there is a change in the tax rate of the county, it's respread over the county, the tax rates, and the only way it affects the agreement is not on valuation, but on respread throughout the county." Transcript at 89.

{¶23} He testified that he did not see any language in the Purchase Agreement stating that appellees owed back taxes based on a valuation change.

{¶24} Appellee Scott Fitzpatrick further testified that there was an approximately $5,000.00 increase in taxes between 2004, and 2005, because of a rate change in the tax base and that a prorated portion of the same was a liability of appellee Fitzpatrick Enterprises due to the respread of taxes.

{¶25} Pursuant to a Judgment Entry filed on June 30, 2008, the trial court found that the language in paragraph 7 (D) the Purchase Agreement was ambiguous and noted that the word "respread" does not exist as a known word. The trial court also noted that appellant had drafted the agreement and that appellant had failed to define such term. In its Judgment Entry, the trial court further stated that the Board of Revision

action was foreseeable based upon the sale price of the subject property and that "[i]n drafting the contract, [appellant] chose not to cover this contingency and the contract must be construed strictly against the drafting party." Finally, the trial court, in its entry, stated, in relevant part, as follows:

{¶26} "Further, the conduct of the plaintiff [appellant] after the assessment action was filed shows a lack of any objective evidence that the word 'respread' included a Board of Revision action. When the action before the Board of Revision was commenced, it could have been contested. Plaintiff never contacted defendant to advise defendant that an action had been filed or that it was defendant's potential responsibility for any Board of Revision amount that might be rendered."

{¶27} Based on the foregoing, the trial court held that appellees were not responsible for any amount that would be due as a result of the Board of Revision action.[1]

{¶28} Appellant now raises the following assignments of error on appeal:

{¶29} "I. THE TRIAL COURT ERRED IN FINDING THAT THE TERMS OF THE PURCHASE AGREEMENT DO NOT REQUIRE DEFENDANT-APPELLEES TO PAY ANY OF THE 2005 'OMITTED BACK' REAL ESTATE TAXES FOR THE PROPERTY.

{¶30} "II. THE TRIAL COURT ERRED IN FINDING THAT PARAGRAPH 7(D) OF THE PURCHASE AGREEMENT IS AMBIGUOUS AND, THEREFORE, DID NOT REQUIRE DEFENDANT-APPELLEES TO PAY FOR ANY PORTION OF THE 2005 'OMITTED BACK' REAL ESTATE TAXES.

[1] The trial court, in its Judgment Entry, found that appellant Fitzpatrick Enterprises "does owe for an amount of taxes that was due and owing based upon the final actual bill that was issued for the tax year in question" and that such amount was $5,396.32. Appellant Fitzpatrick does not dispute that it was obligated to pay such amount and has not appealed with respect to this amount.

{¶31} "III. EVEN IF THERE IS AMBIGUITY IN THE PURCHASE AGREEMENT, THE TRIAL COURT ERRED IN CONSTRUING THE AMBIGUITIES AGAINST APPELLANT, AS BOTH PARTIES WERE EXPERIENCED AND SOPHISTICATED REAL ESTATE COMPANIES THAT HAD THE OPPORTUNITY TO NEGOTIATE THE TERMS.

{¶32} "IV. THE TRIAL COURT ERRED IN RULING THAT APPELLANT'S FAILURE TO NOTIFY DEFENDANT-APPELLEES OF THE BOARD OF REVISION COMPLAINT AND ITS FAILURE TO CONTEST THE COMPLAINT CONSTITUTED A 'LACK OF ANY OBJECTIVE EVIDENCE' THAT THE PURCHASE AGREEMENT REQUIRED DEFENDANT-APPELLEES TO PAY THEIR SHARE OF THE 2005 'OMITTED BACK' REAL ESTATE TAXES."

I, II, III, IV

{¶33} Appellant, in its four assignments of error, argues that the trial court erred in holding that the terms of the Purchase Agreement, specifically Paragraph 7(D), do not require appellees to pay any of the 2005 "omitted back" real estate taxes for the subject property. Appellant contends that the trial court erred in finding such paragraph ambiguous and, in the alternative, argues that even if the Purchase Agreement is ambiguous, the trial court erred in construing the ambiguity against appellant. Finally, appellant maintains that the trial court erred in holding that appellant's failure to notify appellees of the Board of Revision complaint and failure to contest the complaint constituted a "lack of any objective evidence" that the agreement required appellees to pay their share of the 2005 "omitted back" taxes.

{¶34} During the course of the judicial examination of a contract, the reviewing court should give the language of the instrument its plain and ordinary meaning unless some other meaning is evidenced within the document. *Alexander v. Buckeye Pipe Line Co.* (1978), 53 Ohio St.2d 241, 245, 374 N.E.2d 146. If the terms of the contract are determined to be clear and unambiguous, the interpretation of the language is a question of law reviewed de novo on appeal. *State ex rel. Parsons v. Fleming,* 68 Ohio St.3d 509, 511, 1994-Ohio-172, 628 N.E.2d 1377. Under a de novo review, an appellate court may interpret the language of the contract substituting its interpretation for that of the trial court. See *Graham v. Drydock Coal Co.* (1996), 76 Ohio St.3d 311, 313, 667 N.E.2d 949. Only in the event a term of a contract is determined to be ambiguous will the matter be labeled as a question of fact. *Inland Refuse Transfer Co. v. Browning-Ferris Industries of Ohio, Inc.* (1984), 15 Ohio St.3d 321, 322, 474 N.E.2d 271.

{¶35} A contract is ambiguous if its terms cannot be clearly determined from a reading of the entire contract or if its terms are susceptible to more than one reasonable interpretation. *United States Fidelity & Guaranty Company v. St. Elizabeth Medical Center* (1998), 129 Ohio App.3d 45, 716 N.E.2d 1201. If the terms of the contract are determined to be ambiguous, the meaning of the words becomes a question of fact, and a trial court's interpretation will not be overturned on appeal absent a showing of an abuse of discretion. *Ohio Historical Society v. General Maintenance & Engineering Company* (1989), 65 Ohio App.3d 139, 147, 583 N.E.2d 340. In order to find an abuse of discretion, we must determine the trial court's decision was unreasonable, arbitrary or unconscionable and not merely an error of law or judgment. *Blakemore v. Blakemore* (1983) 5 Ohio St.3d 217, 450 N.E.2d 1140.

{¶36} We find that Paragraph 7(D) of the Purchase Agreement is ambiguous. The term "respread" as used in the same is not defined. Moreover, as noted by the trial court, the word "respread" does not exist as a known word.

{¶37} In addition, it appears that the trial court found the words "proration basis is incorrect" to be ambiguous. Appellees, in their brief, contend that the same is not ambiguous and that the trial court should have applied such term and made "an appropriate adjustment to the payment of real estate taxes in the event the original estimation for such taxes was incorrect." In turn, appellees contend that the proration basis was not incorrect. According to appellees, "[t]he change in valuation came as a result of a complaint filed by Jackson Local Schools four (4) months after closing in a decision made approximately eleven (11) months after closing. The valuation was not incorrect." We find that it is unclear exactly what is meant by the word "incorrect."

{¶38} We find that the trial court erred in construing the Purchase Agreement against appellant as the drafting party. Ohio courts have generally resolved contract ambiguities against the drafter only where parties lacked equal bargaining power to select contract language. See *G.F. Business Equip., Inc. v. Liston* (1982), 7 Ohio App.3d 223, 224, 454 N.E.2d 1358, 1359 and *Cline v. Rose* (1994), 96 Ohio App.3d 611, 645 N.E.2d 806. In the case sub judice, appellant and appellee Fitzpatrick Enterprises are both sophisticated real estate companies that have been involved in the real estate business for years. There was no unequal bargaining power between the two.

{¶39} Because the trial court incorrectly construed the language in paragraph 7(D) against appellant, we find that the trial court's judgment must be reversed and this

matter remanded so that the trial court can make a factual determination of the intent of the contracting parties.

{¶40} Appellant's first assignment of error is sustained. Appellant's second assignment of error is overruled in part, and appellant's third assignment of error is sustained. Appellant's fourth assignment of error is moot.

{¶41} Accordingly, the judgment of the Stark County Court of Common Pleas is reversed and this matter is remanded for further proceedings.

By: Edwards, J.

Hoffman, P.J. and

Delaney, J. concur

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JUDGES

JAE/d0218

[Cite as *4746 Dressler, L.L.C. v. Fitzpatrick Ents.*, 2009-Ohio-4001.]

IN THE COURT OF APPEALS FOR STARK COUNTY, OHIO

FIFTH APPELLATE DISTRICT

4746 DRESSLER, LLC, SUCCESSOR-IN-INTEREST TO KPL INVESTMENTS, LLC	:	
Plaintiff-Appellant	:	
-vs-	:	JUDGMENT ENTRY
FITZPATRICK ENTERPRISES, et al.	:	
Defendants-Appellees	:	CASE NO. 2008 CA 00155

For the reasons stated in our accompanying Memorandum-Opinion on file, the judgment of the Stark County Court of Common Pleas is reversed in part and this matter is remanded to the trial court for further proceedings. Costs assessed 40% to appellant and 60% to appellees.

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JUDGES