[Cite as *Nippon Life Ins. Co. of Am. v. One Source Mgt., Ltd.*, 2011-Ohio-2175.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

Nippon Life Insurance Company of America

Appellant

v.

One Source Management, Ltd.

Appellee

Court of Appeals No. L-10-1247

Trial Court No. CI0200803912

DECISION AND JUDGMENT

Decided: May 6, 2011

* * * * *

Matthew Lombardy, for appellant.

R. Ethan Davis, for appellee.

* * * * *

HANDWORK, J.

{¶ 1} This appeal is from the August 10, 2010 judgment of the Lucas County Court of Common Pleas, which held that appellee, One Source Management, Ltd., had not breached the terms of a settlement agreement with appellant, Nippon Life Insurance Company of America, a/k/a NLI Insurance Agency, Inc. Upon consideration of the

assignments of error, we affirm the decision of the lower court. Appellant asserts the following assignments of error on appeal:

{¶ 2} I. "The Trial Court erred because the Court's ruling that the Defendant did not breach the terms of the Settlement Agreement was contrary to the Manifest Weight of the Evidence."

{¶ 3} II. "The Trial Court erred and abused its discretion when it arbitrarily altered the terms of the Settlement Agreement in a manner that is materially prejudicial to the Plaintiff."

{¶ 4} III. "The Trial Court erred and abused its discretion when it arbitrarily declared the Plaintiff could not exercise its contractual remedies for the Defendant's failure to make payments in May, June, July, and August."

{¶ 5} IV. "The Trial Court erred when it arbitrarily declared the Defendant should be held harmless for breaching the Settlement Agreement because, as a socioeconomic matter, the Defendant is a smaller entity than the Plaintiff."

{¶ 6} On May 7, 2008, appellant filed a complaint against appellee, One Source Management, Ltd., asserting that appellant issued group health insurance policies to appellee pursuant to a minimum premium agreement effective May 1, 2007. Appellant never received a properly-executed copy of the agreement from appellee. Furthermore, appellee was required to retain funds necessary to meet the monthly claims liability, which appellee failed to do and resulted in the inability of appellant to make electronic transfer of the monthly liability. As a result, the agreement was terminated and coverage

converted to a traditionally-insured program. Appellant asserts that it attempted to contact appellee and wrote to appellee to inform it of the cost of continuing insurance coverage. Appellee was required to pay the amount due by September 30, 2007, or coverage would terminate on October 1, 2007. Appellee made payments on September 14, 19, and 28, 2007, but these amounts did not cover the entire cost of insurance coverage. Therefore, coverage was terminated on October 1, 2007. Appellant asserted a breach of contract claim for $320,972.94, plus charges and fees as outlined in the agreement, and pre-judgment interest.

{¶ 7} When appellee failed to timely file an answer or otherwise plead, appellant moved for summary judgment. On July 11, 2008, default judgment was entered against appellee for $320,972.94. Appellant then proceeded with garnishment proceedings. On September 23, 2008, however, appellee moved for relief from judgment asserting that it never received notice of the complaint. The motion was granted on February 12, 2009.

{¶ 8} On March 9, 2009, appellee filed its answer to the complaint and asserted a counterclaim of breach of contract for charging appellee with the cost of a traditionally-insured policy, even though appellee complied with the requirements of the agreement. Appellee asserted a claim for wrongful termination of coverage, which had resulted in lawsuits by appellee's employees who were denied insurance coverage. Finally, appellee asserted a claim of bad faith because of appellant's termination of insurance coverage after appellee had paid the insurance premiums.

{¶ 9} On March 25, 2010, the parties entered into an agreed judgment, which provided for judgment against appellee on appellant's breach of contract claim and a judgment of $320,972.94, plus interest at the rate of eight percent from October 1, 2007, and costs. The judgment also provided for judgment in favor of appellant on appellee's counterclaim. The parties agreed that an execution of judgment would not be issued except that a certificate of judgment would be filed as a lien against the real property of appellee if appellee paid appellant $1,000 on or before March 1, 2010, and $2,000 per month, "by the 1st of each month thereafter until $25,000 has been paid in total."

{¶ 10} The parties orally agreed that payment would be made by paper checks. On February 23, 2010, appellee requested that its bank mail a $1,000 check to appellant. The bank mailed the check that day. On March 8, 2010, appellant claimed to have never received the check and the check has never been located or presented for payment. The settlement agreement provided that payment was to be delivered to appellant's attorney at a specified address. Appellant's counsel, however, attested that he directed appellee to mail the check to a different address. Appellee's bank indicated that it mailed the check to that address but had not included the suite number. After appellant notified appellee that it had not received the first check, appellee submitted documentation to prove that it had requested from its bank to issue a check on February 23, 2010.

{¶ 11} On March 9, 2010, appellant wrote to appellee noting that the failure of the check to arrive on time was beyond appellee's control, but demanded that the matter be rectified and a replacement check received by March 12, 2010, to avoid a breach of the

settlement agreement. Appellee contacted its bank on March 9, 2010, and requested another check be issued and delivered to appellant by March 12, 2010. The bank instead issued the check on March 12, 2010, and it was received by appellant on March 17, 2010. Appellant rejected the check and filed the settlement agreement with the trial court on March 18, 2010. While the settlement agreement had been signed by the attorneys for the parties on February 23, 2010, the court did not sign the agreement until March 15, 2010.

{¶ 12} On March 25, 2010, appellee requested that its bank issue another payment to appellant for $2,000, which the bank erroneously failed to mail until April 5, 2010. Appellee accepted this check as well as another $2,000 check one month later on the ground that these were "voluntary" payments on the full amount of the judgment now owed by appellee because of the breach of the contract.

{¶ 13} On April 29, 2010, appellant filed a motion for an order to disburse $13,826.60 in funds obtained from a bank attachment against the bank account of appellee and held by the court. Appellant asserted that appellee failed to make the first payment timely as it was 15 days late in making the payment. Therefore, the agreement had been breached and appellant was entitled to recover $320,972.74, plus interest. Appellee filed a motion to enforce the settlement agreement on May 5, 2010.

{¶ 14} The trial court concluded in its August 10, 2010 judgment that appellee did not willfully breach the contract because it requested the bank to send the checks prior to the time they were due. Furthermore, the first check was lost because of the lack of a

proper mailing address and the replacement March check and the April check were mailed late due to an error by the bank. As to the issue of whether the time was of the essence, the court found that there was no express provision for it and the court would not imply such a requirement. Therefore, the court found that performance within a reasonable time was acceptable. In this case, the court held that there was no critical hardship caused by the late acceptance of the checks and, therefore, there was no substantial and fundamental breach of the settlement agreement. The court ordered the parties to resume their performance under the settlement agreement. Appellant then sought an appeal to this court.

{¶ 15} In its first assignment of error, appellant argues that the trial court's finding that no breach had occurred was contrary to the manifest weight of the evidence.

{¶ 16} Settlement agreements are contracts. *Rulli v. Fan Co.* (1997), 79 Ohio St.3d 374, 376. Thus, a settlement agreement is subject to the same rules of construction that apply to contracts generally. *Brown v. Brown* (1993), 90 Ohio App.3d 781, 784. Settlement agreements, which have been incorporated into a consent decree, are enforceable by the court. *Grace v. Howell*, 2d Dist. No. 20283, 2004-Ohio-4120, ¶ 9. "To establish a breach of a settlement agreement, the party alleging the breach must prove: 1) existence of the Settlement Agreement, 2) performance by the plaintiff, 3) breach by the defendant, 4) resulting damages or loss to the plaintiff." *Raymond J. Schaefer, Inc. v. Pytlik*, 6th Dist. No. OT-09-026, 2010-Ohio-4714, ¶ 24, citing *Rondy, Inc. v. Goodyear Tire Rubber Co.*, 9th Dist. No. 21608, 2004-Ohio-835, ¶ 7.

{¶ 17} The issue in this case is whether a breach occurred when appellee's first payment was not received by appellant on March 1, 2010. This issue is a question of fact for the trier of fact to determine. *Blake Homes, Ltd. v. FirstEnergy Corp.*, 173 Ohio App.3d 230, 2007-Ohio-4606, ¶ 77, citing *Farmers Market Drive-In Shopping Ctrs., Inc. v. Magana*, 10th Dist. No. 06AP-532, 2007-Ohio-2653, ¶ 32, and *Butler Cty. Bd. of Commrs. v. Hamilton* (2001), 145 Ohio App.3d 454, 478. While the evidence in this case was undisputed, there remained a factual issue of whether appellee's actions were sufficient to constitute substantial performance of its duties under the contract.

{¶ 18} The trial court determined that appellee did not breach the agreement. On appeal, we apply a manifest weight of the evidence standard of review. *C.E. Morris Co. v. Foley Constr. Co.* (1978), 54 Ohio St.2d 279, syllabus. When making factual determinations, weighing conflicting evidence and making credibility determinations are matters solely within the province of the trier of fact. *Home Builders Assn. of Dayton & the Miami Valley v. Beavercreek* (2000), 89 Ohio St.3d 121, 129, reconsideration denied (2000), 89 Ohio St.3d 1471, and *Hollenbeck v. McMahon* (1875), 28 Ohio St. 1, paragraph one of the syllabus. Therefore, factual findings by the trial court are reversible error only if the findings are contrary to the manifest weight of the evidence as a matter of law. *Seasons Coal Co. v. Cleveland* (1984), 10 Ohio St.3d 77, 79-80. "Judgments supported by some competent, credible evidence going to all the essential elements of the case will not be reversed by a reviewing court as being against the manifest weight of the evidence." *C.E. Morris*, supra. If the evidence is susceptible to more than one

interpretation, we must give it the interpretation consistent with the trial court's judgment. *Seasons Coal*, supra.

{¶ 19} Upon a review of the facts in this case, we find that there was competent and credible evidence presented to support the trial court's finding that appellee substantially performed its duties under the settlement agreement. The evidence demonstrates that appellee took the necessary steps to ensure prompt delivery of the payments and that the payments arrived within a reasonable time. The delay in appellant's receipt of the payments was not caused by any action taken by appellee. Therefore, we find appellant's first assignment of error not well-taken.

{¶ 20} Appellant's second and fourth assignments of error are interrelated and will be considered simultaneously. In its second assignment of error, appellant argues that the trial court abused its discretion when it failed to find that the settlement agreement provided that the payments must be made on or before the first of each month. Appellant argues in its fourth assignment of error that the trial court erred when it arbitrarily declared that appellee should be held harmless for breaching the settlement agreement because, as a socioeconomic matter, appellee is a smaller entity than appellant.

{¶ 21} The trial court addressed the issue of whether the agreement provided that the time for performance was of the essence and found that since the agreement did not expressly specify that time was of the essence, the court would not imply such a requirement. Furthermore, the court reasoned that while a court might imply a "time of the essence" provision where a delay in performance would cause significant injury there

was no significant injury in this case due to the size of appellant's business. Therefore, the court found that performance within a reasonable time was acceptable.

{¶ 22} If the terms of a contract are clear and unambiguous, the construction of the contract is a question of law and there is no issue of fact to be determined. *Alexander v. Buckeye Pipe Line Co.* (1978), 53 Ohio St.2d 241, paragraph one of the syllabus, and *State ex rel. Parsons v. Fleming* (1994), 68 Ohio St.3d 509, 511. Ordinary words in a written contract must be "given their ordinary meaning unless manifest absurdity results, or unless some other meaning is clearly evidenced from the face or overall contents of the instrument." *Alexander*, supra at paragraph two of the syllabus.

{¶ 23} As a general rule, the time for performance is not assumed to be of the essence. *Brown v. Brown,* Id. However, when a specific date is set forth in the contract, courts disagree as to whether the time for performance is of the essence and a delay in performance would constitute a material breach of the contract. Some hold that the party may still perform within a reasonable time of the specified date without breaching the contract if the contract does not contain the express statement that time is of the essence. *Brown v. Brown,* Id. Other courts hold that "even in the absence of an express stipulation, time will be found to have been of the 'essence' when the contract sets forth a specific date for performance." *Marion v. Hoffman,* 3d Dist. No. 9-10-23, 2010-Ohio-4821, ¶ 22, and *Newman v. Hurni* (Dec. 30, 1993), 6th Dist. No. 92WM000022, at 3, in the latter cases, the courts have often considered the nature and circumstances of the

agreement or parole evidence and determined that the requirement of "time is of the essence" was implied.

{¶ 24} We find that the trial court did not err as a matter of law by finding that the contract in this case did not provide that time was of the essence. While a specific date was set forth in the agreement, there was no language in the agreement or any parole evidence to demonstrate that a reasonable delay in making the payment under the circumstances of this case would constitute a material breach of the contract. Furthermore, we find that there was no evidence to support a finding that appellant would suffer significant injury due to the delay in appellee's performance under this contract. Accordingly, we find appellant's second and fourth assignments of error not well-taken.

{¶ 25} In its third assignment of error, appellant argues that the trial court erred and abused its discretion when it arbitrarily declared that appellant could not exercise its contractual remedies when appellee failed to make payments in May, June, July, and August. Appellant argues that the first paragraph of the settlement agreement constituted an acceleration clause and that appellee's breach of the agreement by not timely making the first payment gave appellant the right to rescind the agreement under the second paragraph of the agreement and demand the full judgment.

{¶ 26} We disagree. The trial court concluded that there had not been a material breach of the provisions of the second paragraph of the settlement agreement because the payment was made within a reasonable time. Therefore, appellant had no right to rescind the agreement. Appellant's third assignment of error is not well-taken.

{¶ 27} Having found that the trial court did not commit error prejudicial to appellant and that substantial justice has been done, the judgment of the Lucas County Court of Common Pleas is affirmed. Appellant is hereby ordered to pay the costs of this appeal pursuant to App.R. 24.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J. _____
JUDGE

Arlene Singer, J. _____
JUDGE

Thomas J. Osowik, P.J. _____
CONCUR.
JUDGE