[Cite as *Mun. Constr. Equip. Operator's Labor Council v. Cleveland*, 2011-Ohio-730.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 95047

MUNICIPAL CONSTRUCTION EQUIPMENT OPERATOR'S LABOR COUNCIL

PLAINTIFF-APPELLANT

vs.

CITY OF CLEVELAND, OHIO

DEFENDANT-APPELLEE

JUDGMENT:
AFFIRMED IN PART, REVERSED IN PART AND REMANDED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-683433

BEFORE: Sweeney, J., Kilbane, A.J., and Keough, J.

RELEASED AND JOURNALIZED: February 17, 2011

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JAMES J. SWEENEY, J.:

{¶ 1} Plaintiff-appellant Municipal Construction Equipment Operator's Labor Council (the "Union") appeals from the trial court's judgment entry that declared certain rights and obligations related to a November 6, 2008 Agreement the Union entered with defendant-appellee, the city of Cleveland[1] (the "November Agreement"); which was attached as Exhibit A to the amended complaint. For the reasons that follow, we affirm in part, reverse in part and remand for further proceedings.

[1]Referred to hereafter as "the City."

{¶ 2} In this appeal, the Union argues that the trial court erred by finding (1) that the City was not required to calculate vacation and longevity pay due its members under the November Agreement pursuant to the terms of the Cleveland Building and Construction Trades Council Contract dated April 1, 2007 to March 31, 2010 ("the BTA"); (2) that the trial court erred by finding that Union members were not entitled to payment of 100% of the prevailing wage as well as continued healthcare benefits based on the Union's contention that the November Agreement terminated no later than February 12, 2009; and (3) the trial court erred by not striking certain portions of Robert Triozzi's and Richard Sensenbrenner's affidavits along with an unsigned order from a related civil case.

{¶ 3} The facts relevant to this appeal are summarized as follows: the Union and the City operated under a collective bargaining agreement from February of 2005 to March 31, 2007. After that time, various disputes arose between the Union and the City that resulted in unfair labor practice charges and wage rate disputes. The Ohio Supreme Court ultimately determined the prevailing wage rate. The Union members were to receive 100% of the prevailing wage rate as determined by the Ohio Supreme Court when a collective bargaining agreement was not in effect. Thereafter, a dispute arose among the parties as to the Union member's entitlement to continued healthcare benefits during periods when they were being compensated at 100% prevailing wage rates.

{¶ 4} The Union commenced a declaratory judgment action in the common pleas court seeking a declaration that its members were entitled to continued healthcare

benefits; the matter was designated as case number CV-627153 and assigned to Judge Eileen T. Gallagher. This matter has been referred to as the "Gallagher Case."[2]

{¶ 5} The Union presents three assignments of error for our review, which we address out of order for ease of discussion.

{¶ 6} "Assignment of Error No. I: The Trial Court Erred by Failing to Declare Rights Under the Plain Language of a Contract and Granting Summary Judgment for Appellee."

{¶ 7} "Assignment of Error No. III: The Trial Court Erred by Failing to Declare that Cleveland was Obligated by the November 5, 2008 Cease-Fire Agreement to Allow Paid Vacation Leave and Longevity Pay 'As Provided Under the Building and Construction Trades Agreement' and Ordering Damages as Prayed for in Appellant's Motion for Summary Judgment."

{¶ 8} Appellate review of summary judgment is de novo. *Grafton v. Ohio Edison Co.* (1996), 77 Ohio St.3d 102, 105, 671 N.E.2d 241. The Ohio Supreme Court stated the appropriate test in *Zivich v. Mentor Soccer Club* (1998), 82 Ohio St.3d 367, 369-370, 696 N.E.2d 201, as follows:

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[2] The trial court granted the City's motion for summary judgment and declared, "City of Cleveland is to provide plaintiff members health, dental, and vision coverage at the same premium cost charged to defendant City while plaintiff members are being paid at the Building Trades prevailing wage rate. Defendant is to provide paid sick leave benefits as directed by the Ohio Supreme Court 2006 ruling." This court dismissed the Union's appeal for lack of a final, appealable order and remanded the matter to the trial court for a full declaration concerning the Union's alleged entitlement to specified benefits. See *Mun. Const. Equip. Operators Labor Council v. Cleveland*, Cuyahoga App. No. 93755, citing, *Klocker v.*

{¶ 9} "Pursuant to Civ.R. 56, summary judgment is appropriate when (1) there is no genuine issue of material fact, (2) the moving party is entitled to judgment as a matter of law, and (3) reasonable minds can come to but one conclusion and that conclusion is adverse to the nonmoving party, said party being entitled to have the evidence construed most strongly in his favor. *Horton v. Harwick Chem. Corp.* (1995), 73 Ohio St.3d 679, 653 N.E.2d 1196, paragraph three of the syllabus. The party moving for summary judgment bears the burden of showing that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 292-293, 662 N.E.2d 264, 273-274."

{¶ 10} Additionally, the "construction of a written contract is a matter of law" that appellate courts review de novo. *Saunders v. Mortensen*, 101 Ohio St.3d 86, 2004-Ohio-24, 801 N.E.2d 452, ¶ 9. Ohio courts "presume that the intent of the parties to a contract is within the language used in the written instrument. If [courts] are able to determine the intent of the parties from the plain language of the agreement, then there is no need to interpret the contract." Id.

{¶ 11} The Union maintains the contract is clear and unambiguous and expired upon its terms no later than February 12, 2009 at which point the Union argues that Cleveland was obligated to resume payment of 100% prevailing wage rate determined by the Ohio Supreme Court in Case No. 2007-2227. Secondly, the Union contends that the plain terms of the Agreement obligated the payment of benefits, specifically vacation and

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Zieger, Cuyahoga App. No. 92044, 2009-Ohio-3102.

longevity pay, as provided under the BTA, including how those benefits would be calculated.

{¶ 12} In Assignment of Error I and Assignment of Error III, the Union presents arguments that the "quid pro quo" in the November Agreement for its acceptance of a reduced wage rate (80%) was the payment of City benefits "as provided under" the BTA. Although the City recognized the Union members rights to receive vacation and longevity pay as provided under the BTA, the City calculated the benefits based on external law and not as provided in the BTA. The pertinent language from the November Agreement provides:

{¶ 13} "While the parties are negotiating, the members of the CEO Union will be paid at the CEO prevailing wage rate described in and pursuant to the Ohio Supreme Court Case 2007-2227 except as noted herein. Starting November 3, 2008 the City will compensate CEO Union members at 80% of the amount required pursuant to the Supreme Court Case No. 2007-2227, and will also provide City benefits as provided under the Building and Construction Trades Agreement. While the parties are engaged in negotiations the overtime provisions of the Building and Trades Agreement shall apply, and there will be no double time rate. The CEO Union compensation and benefits recited above will continue until the parties have negotiated a successor agreement, or the parties are unable to achieve an agreement despite their best efforts."

{¶ 14} A separate paragraph of the Agreement addresses calculations applicable to the accrual of vacation benefits as follows: "The CEO employees will accrue vacation

benefits during the period of compensation covered by this agreement at the rate proportional to yearly vacation benefits. At the beginning of each month the CEO Union member will earn and be credited 1/12 annual vacation time credit for each month that the CEO Union employee is compensated under this agreement. All accrued vacation benefits under the Building and Trades Agreement described above will carryover into 2009."

{¶ 15} The above language is clear and unambiguous, negating any need to consider evidence outside the record to determine its intent. The November Agreement required the City to pay the Union members longevity and vacation pay "as provided under" the BTA. The City admits it did not do so but instead determined the longevity and vacation pay as provided under City ordinances. The City's method of calculation is not supported by either the plain terms or any term of the November Agreement. The parties continued to operate under the terms of the November Agreement until May 31, 2009; therefore, the Union members are entitled to longevity and vacation pay as provided under the BTA (including the manner of calculating said payments) from November 3, 2008 until May 31, 2009.

{¶ 16} Next we examine the Union's position that it was entitled to receive 100% prevailing wage (contrary to the terms of the November Agreement) and healthcare benefits as provided under the November Agreement, from February 12, 2009 through May 31, 2009. Either the November Agreement was in effect during this time period or it was not. The Union can not have it both ways.

{¶ 17} "It is well settled that a party, by words or conduct, may waive the terms of a written contract." *Automated Solutions Corp. v. Paragon Data Sys., Inc.*, 167 Ohio App.3d 685, 2006-Ohio-3492, 856 N.E.2d 1008, ¶28, citing, *White Co. v. Canton Transp. Co.* (1936), 131 Ohio St. 190, 5 O.O. 548, 2 N.E.2d 501; *Cornett v. Fryman* (Jan. 27, 1992), Warren App. No. CA91-04-031, unreported; *Pekarek v. Broadway Realty Partnership* (May 30, 1991), Cuyahoga App. No. 58626, unreported.

{¶ 18} Notwithstanding the court order in the Gallagher case that indicated that the November Agreement's provision of "healthcare benefits" was to continue, the record establishes that the parties continued to operate under all of the terms of the November Agreement until May 31, 2009.[3] There is nothing in the record to indicate that the Union refused these benefits on the basis that the November Agreement upon which they were being continued had expired. By accepting benefits to which the Union members were not entitled to upon termination of the November Agreement, the Union waived its right to receive 100% prevailing wage rates that took effect upon termination of the November Agreement. Therefore, the terms of the Union members pay at that time period between February 12, 2009 and May 31, 2009 were governed by the described "quid pro quo" of the November Agreement; that being the 80% rate.

[3] With the exception of the method for calculating certain benefits as addressed previously in this Opinion.

{¶ 19} The first assignment of error is sustained in part with regard to the Union member's entitlement to vacation and longevity pay as provided under the BTA and overruled in all other respects. The third assignment of error is sustained.

{¶ 20} "Assignment of Error No. II: The Trial Court Erred by Failing to Strike Inappropriate Evidence Submitted by Cleveland."

{¶ 21} Our disposition of the preceding assignments of error renders this assigned error moot.

Judgment affirmed in part and reversed in part. This matter is remanded for further proceedings consistent with this opinion.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

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

JAMES J. SWEENEY, JUDGE

MARY EILEEN KILBANE, A.J., and
KATHLEEN ANN KEOUGH, J., CONCUR