[Cite as *TieBridge, Inc. v. Rahim, Inc.*, 2016-Ohio-5141.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 103897

TIEBRIDGE, INC.

PLAINTIFF-APPELLANT

vs.

RAHIM, INC., ET AL.

DEFENDANTS-APPELLEES

JUDGMENT:
AFFIRMED IN PART,
REVERSED IN PART AND REMANDED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-14-832313

BEFORE: Blackmon, J., S. Gallagher, P.J., and Laster Mays, J.
RELEASED AND JOURNALIZED: July 28, 2016

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PATRICIA ANN BLACKMON, J.:

{¶1} tieBridge, Inc., ("tieBridge") appeals from the trial court's granting the city of Cleveland's ("Cleveland") motion for summary judgment, and denying tieBridge's motion for summary judgment, on tieBridge's claim for promissory estoppel against Cleveland. tieBridge assigns the following errors for our review:

> I. The trial court erred in granting Defendant the City of Cleveland's motion for summary judgment.
>
> II. The trial court erred in denying Plaintiff tieBridge, Inc.'s motion for summary judgment against the City of Cleveland.

{¶2} Having reviewed the record and pertinent law, we rule as follows: the court's granting Cleveland's motion for summary judgment is reversed, because we find genuine issues of material fact regarding some of the elements of tieBridge's promissory estoppel claim; and the trial court's denying tieBridge's motion for summary judgment is affirmed in part and reversed in part. Furthermore, we grant tieBridge's motion for summary judgment in part, finding that Cleveland made a clear and unambiguous promise to tieBridge. Whether tieBridge reasonably relied on this promise and the resulting damages are disputed issues for which summary judgment is not appropriate. The apposite facts follow.

{¶3} In December 2011, Cleveland hired Rahim, Inc., d.b.a. RNR Consultants ("RNR") to upgrade the information technology system in the Department of Public Utilities, Division of Water. As is often the case with governmental contracts, various

prerequisites were put in place regarding this agreement: Cleveland City Council passed an ordinance; Cleveland's Mayor authorized the contract; and Cleveland's Board of Control approved RNR as the general contractor. This agreement will be referred to as the "Principle Contract."

{¶4} Also in December 2011, RNR hired tieBridge as a subcontractor to perform many of the services required in the Principle Contract. This agreement will be referred to as the "Subcontract." It is undisputed that tieBridge did not contract directly with Cleveland to perform any work.

{¶5} In February 2014, tieBridge notified Cleveland that RNR was delinquent in paying tieBridge $385,000 under the Subcontract. tieBridge and Cleveland disagree about what happened next.

{¶6} According to tieBridge, Cleveland, RNR, and tieBridge reached an agreement that, as to "all further payments under the contract between RNR and Cleveland * * *, Cleveland would hold any checks to RNR and release the checks only if RNR immediately endorsed over the checks to tieBridge or otherwise paid tieBridge the equivalent sum." tieBridge alleges that in February 2014, Cleveland "held RNR's check of $193,884.08 for RNR's November and December 2013 invoices and had RNR sign over the check to [t]ie[B]ridge in compliance with the agreed upon protocol for payment delivery * * *."

{¶7} tieBridge further argues that Cleveland subsequently violated this agreement by releasing checks in the amount of $211,627.02 directly to RNR in May and June 2014.

{¶8} According to Cleveland, on the other hand, the Chief Financial Officer of Public Utilities (the "CFO") "[f]or one time, * * * agreed to hold the next checks to RNR until [t]ie[B]ridge was notified, and then he released those checks in the presence of a representative of [t]ie[B]ridge. Later on that day, he was informed by [t]ie[B]ridge that [t]ie[B]ridge 'worked it out' with RNR." After consulting with RNR and the acting Director of Public Utilities for Cleveland, the CFO issued subsequent payments directly to RNR.

{¶9} On September 5, 2014, tieBridge filed a complaint alleging breach of contract against RNR and unjust enrichment, promissory estoppel, and foreclosure of mechanic's lien against Cleveland. In November 2014, PNC Bank, N.A., ("PNC") was granted leave to intervene in the action, claiming it had a judgment on a cognovit note in its favor against RNR in the amount of $108,232.52, and a security interest on RNR's assets, including accounts receivable. *See PNC Bank, N.A. v. Rahim, Inc., an Ohio Corporation dba RNR Consulting*, Cuyahoga C.P. No. CV-14-832027 (Aug. 29, 2014).

{¶10} On July 27, 2015, the court in the case at hand granted PNC's default judgment motion against RNR, and the parties entered into a consent judgment entry, which stated, in part, that PNC was entitled to a portion of funds held by Cleveland for work performed by RNR and/or tieBridge for March through June 2014 ("the Fund").

The entry further stated that tieBridge had a competing interest in the Fund, and the "parties have agreed to settle the claims by and between them with respect to the Fund and have agreed that the proceeds of the Fund shall be distributed to PNC Bank in the amount of $83,613.13; with the balance of the proceeds distributed to tieBridge in the amount of $83,613.12."

{¶11} On November 19, 2015, the court granted summary judgment in favor of tieBridge against RNR and denied tieBridge's motion for summary judgment against Cleveland. Additionally, the court granted Cleveland's summary judgment motion on all claims against it. tieBridge now appeals the disposition of the cross-motions for summary judgment regarding its promissory estoppel claim against Cleveland.

Summary Judgment

{¶12} Appellate review of granting summary judgment is de novo. Pursuant to Civ.R. 56(C), the party seeking summary judgment must prove that (1) there is no genuine issue of material fact; (2) they are 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. *Dresher v. Burt*, 75 Ohio St.3d 280, 662 N.E.2d 264 (1996).

Promissory Estoppel Against a Political Subdivision

{¶13} "The elements of a claim for promissory estoppel are as follows: (1) a clear, unambiguous promise; (2) reliance upon the promise by the person to whom the promise is made; (3) the reliance is reasonable and foreseeable; and (4) the person claiming

reliance is injured as a result of reliance on the promise." *Rucker v. Everen Secs.*, 8th Dist. Cuyahoga No. 81540, 2003-Ohio-1166, ¶ 24.

{¶14} In *Hortman v. Miamisburg*, 110 Ohio St.3d 194, 2006-Ohio-4251, 852 N.E.2d 716, ¶ 25, the Ohio Supreme Court held that "the doctrines of equitable estoppel and promissory estoppel are inapplicable against a political subdivision when the political subdivision is engaged in a governmental function."

{¶15} Ohio courts have interpreted this to mean that "[i]f the prohibition against using estoppel is only a *general* rule, then by necessary implication there must be exceptions when the doctrine *is* applicable." *State v. First, Inc.*, 2d Dist. Montgomery No. 11486, 1990 Ohio App. LEXIS 1326 (Apr. 3, 1990) (emphasis sic).

{¶16} Specifically, this court has held that, although "municipalities may not be bound to a contract unless the agreement is formally ratified through proper channels * * * the doctrine of promissory estoppel applies to municipalities where the promisor's representations or statements are authorized." *Cooney v. Independence*, 8th Dist. Cuyahoga No. 66509, 1994 Ohio App. LEXIS 5290 (Nov. 23, 1994). Other Ohio courts have held similarly. *See, e.g., Pilot Oil Corp. v. Ohio Dept. of Transp.*, 102 Ohio App.3d 278, 283, 656 N.E.2d 1379 (10th Dist.1995) (promissory estoppel against the government "may be imposed in contract situations where the subject matter of a contract is not illegal or ultra vires"); *Shapely, Inc. v. Norwood Earnings Tax Bd. of Appeals*, 20 Ohio App.3d 164, 165-166, 485 N.E.2d 273 (1st Dist.1984) (holding that the successor tax commissioner was estopped from denying the validity of the former tax

commissioner's interpretation of an ordinance, because "[a]ll the elements of an estoppel are present" and "[t]he concept of *ultra vires* * * * does not apply to the facts of the instant case").

{¶17} Additionally, Ohio courts have recognized an exception to the general rule that the doctrine of estoppel does not apply against the state "with respect to acts undertaken by the state in its proprietary capacity, such as operation of a water department * * *." *State v. Johnson*, 2d Dist. Montgomery No. 21074, 2006-Ohio-417, ¶ 13. *See also Prisby v. Youngstown*, 7th Dist. Mahoning No. 94 C.A. 234, 1996 Ohio App. LEXIS 3418 (Aug. 14, 1996) ("estoppel would be available against a government entity when said entity is not undertaking a governmental function but is undertaking a proprietary function, such as * * * the management and control of a sewer system").

{¶18} Having identified situations in which a political subdivision may be held liable under a promissory estoppel theory, we turn to the facts of the instant case.

Governmental or Proprietary Function

{¶19} R.C. 2744.01(G)(2)(c) states in part as follows: "A 'proprietary function' includes * * * [t]he establishment, maintenance, and operation of a utility, including * * * a municipal corporation water supply system * * * ."

{¶20} In the case at hand, the "City of Cleveland, Department of Public Utilities, Division of Water" hired RNR "for information technology and software development, to enhance, integrate and maintain [Cleveland's water department's] customer service IT systems * * *." Upon review, we find that this function falls under the maintenance and

operation of a political subdivision's water department, and thus is proprietary in nature under R.C. 2744.01. Therefore, promissory estoppel may apply in this situation.

Ultra Vires Representations

{¶21} An ultra vires act is one that is "[u]nauthorized, beyond the scope of power allowed or granted by * * * law." *Black's Law Dictionary* 1525 (7th Ed.1999).

{¶22} Article X(A) of the Principle Contract states that the following, inter alia, shall constitute a default by RNR: RNR's insolvency; RNR's abandonment or discontinuation of services under the Principle Contract; and/or RNR's failure to abide by the terms of the Principle Contract for ten days after being notified of the failure. Additionally, Article X(B) of the Principle Contract states that, upon RNR's default, Cleveland "may, at its option, exercise concurrently or successively any one or more of the following rights and remedies: * * * pay any sum [RNR] is required to pay to others than the City and which [RNR] has failed to pay * * *."

{¶23} tieBridge argues that RNR's failure to pay tieBridge and failure to continue the work under the Principle Contract constitute defaults by RNR. tieBridge further argues that Cleveland was authorized to pay tieBridge directly upon RNR's default pursuant to the Principle Contract. Thus, tieBridge argues, Cleveland's representation that it would hold RNR's payments was not an ultra vires act.

{¶24} Cleveland, on the other hand, argues that "[a]t no time did Cleveland ever agree by contract or otherwise to pay tieBridge directly." Cleveland further argues that tieBridge "cannot show reasonable reliance, because as a matter of law, neither the

director, nor the CFO could bind the city to an oral agreement." Although somewhat unclear from its brief, Cleveland appears to be arguing that, because the parties did not formally adhere to the process of modifying a contract with Cleveland, any alleged promises were ultra vires; thus, it was not reasonable for tieBridge to rely on them. Cleveland's final argument is that tieBridge "can show no damages for the alleged promissory estoppel claim."

{¶25} In support of tieBridge's argument, it submitted an affidavit from Paul Bender ("Bender"), the former Director of Public Utilities for Cleveland, who held this position from March 2013 to October 2014. Bender confirmed the alleged payment agreement the parties entered into in February 2014: Cleveland would hold RNR's checks and "RNR would either endorse over the check to tieBridge or otherwise contemporaneously pay tieBridge the full amount of the payment from the City to RNR." According to Bender, Cleveland's CFO adhered to this agreement concerning the first payment of $193,884.08.

{¶26} However, Bender stated that "On May 21, 2014, the City sent a check directly to RNR in the amount of $71,036.73 in violation of the payment protocol." According to Bender, the CFO subsequently released additional funds, including a "$83,241.29 check as well as a $57,346 check directly to RNR in violation of the payment protocol." Attached to Bender's affidavit was an email from Bender to the CFO dated June 11, 2014, which was copied to tieBridge's president, and states as follows:

> Do not pay RNR without agreement with [tieBridge's owner]. Period!!! He is owed over $200,000.

> You are creating a huge liability for the City by releasing checks that [RNR] is cashing and not paying his subs — which you know is happening. This means you are culpable with [RNR]. You cannot escape this liability, Frank.
> Make sure any payments from the City go to unpaid subs, until those liabilities are settled. That is your responsibility!
>
> Let me know our plan to resolve this. We had a plan which you are not adhering to. Make sure any payments do not go to RNR if subs are not paid.
>
> Paul.

{¶27} Additionally, there is a July 11, 2014 letter from Bender, on behalf of Cleveland's Department of Utilities, to RNR, which states, in part, that

> RNR is in default of the [Principle Contract] under Article X, Default of Consultant, subsections 1, 4-5. In order to mitigate the ongoing costs to the City and to remedy RNR's default of its contractual obligations with the City, RNR must, within ten days of receipt of this letter, satisfy its obligations to tieBridge to reinstate services under [the Principle Contract] and to eliminate the City's risk due to RNR's default * * *.
>
> On or about February 18, 2014, you met with representatives of the City and tieBridge * * * [and] informed [them] that RNR would pay tieBridge to ensure continued work under [the Principle Contract]. RNR has not paid tieBridge for the on-going work before or after your assurances to the City in February 2014.
>
> As a consequence of RNR's conduct and your unmet assurances, tieBridge has removed its employees from and ceased work of the City's work tasks and RNR has created risk for the City.
>
> * * *
>
> Pursuant to Article X of [the Principle Contract], the City has a number of remedies to invoke in the event RNR continues in its default under [the Principle Contract]. RNR's continued default may result in the City exercising any of its available contractual remedies, including but not

> limited to, the direct payment of amounts RNR owes tieBridge for any work performed under [the Principle Contract].

{¶28} As to the issue of damages, tieBridge has submitted documentary evidence, supported by an affidavit, of "sales transactions" that tieBridge billed to RNR for work under the Subcontract. The documents show that some of these invoices have been paid, and some of them remain unpaid. Furthermore, some of the invoices are for work performed between March and June 2014; it appears, but we do not decide, that claims for these funds have been settled and waived pursuant to the consent judgment entry. However, the remaining unpaid invoices are prima facie evidence that tieBridge suffered damages. Cleveland's argument to challenge this is that "PNC's security interest would trump any claim [tieBridge] had to the proceeds to the RNR contract."

{¶29} Upon review, we find genuine issues of material fact regarding whether Cleveland's promise was ultra vires; whether it was reasonable for tieBridge to rely on Cleveland's promise; and the amount of resulting damages, if any, tieBridge suffered.

{¶30} Thus, the trial court properly denied tieBridge's summary judgment motion, and the second assigned error is overruled. However, the court erred by granting Cleveland's summary judgment motion, and tieBridge's first assigned error is sustained.

{¶31} Judgment affirmed in part, reversed in part, and remanded for proceedings consistent with this opinion.

It is ordered that appellees and appellant share the costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to the Cuyahoga County Common Pleas 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.

PATRICIA ANN BLACKMON, JUDGE

SEAN C. GALLAGHER, P.J., and
ANITA LASTER MAYS, J., CONCUR