[Cite as *Foley v. Empire Die Casting Co., Inc.*, 2009-Ohio-5539.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF SUMMIT	)	

ROBERT FOLEY	C. A. No. 24558
Appellee	
v.	APPEAL FROM JUDGMENT ENTERED IN THE
EMPIRE DIE CASTING CO., INC.	COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO
Appellant	CASE No. CV 2007 01 0419

DECISION AND JOURNAL ENTRY

Dated: October 21, 2009

CARR, Judge.

{¶1} Appellant, Empire Die Casting Co., Inc. ("Empire"), appeals the judgment of the Summit County Court of Common Pleas. This Court affirms.

I.

{¶2} Appellee, Robert Foley ("Foley"), and his business, SEP Pro, L.L.C. ("SEP Pro"), performed certain work within their distinct capacities for Empire. SEP Pro worked pursuant to contract as an independent sales representative for Empire's Northeastern United States sales region. Pursuant to a separate contract, Foley was hired by Empire in his individual capacity as the company's national sales manager. Foley's contract provided that he would receive an annual bonus of $19,600.00 if Empire had sales in excess of $28 million.

{¶3} Foley and SEP Pro filed a complaint against Empire on January 17, 2007, alleging four counts of breach of contract, two counts of violation of the Ohio Commission Protection Act under R.C. 1335.11, one count of unjust enrichment, and one count of violation of the Ohio

Wage Payment Act under R.C. 4113.01 et seq. Empire filed an answer and counterclaim, alleging a claim for defamation. Foley and SEP Pro answered the counterclaim. On August 30, 2007, SEP Pro filed a notice of voluntary dismissal of all its claims against Empire. Although Empire disputed the sufficiency of SEP Pro's voluntary dismissal given the pending counterclaim, the issue became moot when Empire ultimately dismissed its counterclaim.

{¶4} On March 10, 2008, Foley filed a notice of voluntary dismissal of count three, his personal claim alleging a violation of R.C. 1335.11. While the Ohio Supreme Court does not recognize a voluntary dismissal pursuant to Civ.R. 41(A) as an appropriate mechanism by which a party may dismiss fewer than all his claims against another party, see *Pattison v. W.W. Grainger, Inc.*, 120 Ohio St.3d 142, 2008-Ohio-5276, at ¶1, this Court need not discuss the effect of Foley's notice in this case. Although count three remains pending, the trial court's judgment included the requisite language pursuant to Civ.R. 54(B) to confer upon this Court jurisdiction to consider the merits of the appeal.

{¶5} On March 10, 2008, Foley filed a motion for summary judgment on the five counts he believed remained pending. Empire responded in opposition. The trial court denied the motion for summary judgment and confirmed the matter for trial. The parties settled the breach of contract claims concerning payments for vacation time and car expenses. The remaining issues for trial involved the breach of contract claims for payment of a commission/annual bonus.

{¶6} Empire filed a motion in limine to exclude any evidence or testimony regarding oral representations, negotiations, promises, or understandings prior to or contemporaneous with the parties' agreement, purported to have been entered into on or about June 17, 2003. Immediately prior to the commencement of trial, the trial court reserved ruling on the motion in

limine to allow time for additional research. After opening statements, the trial court ruled that it would provisionally allow such evidence and testimony given Foley's opening statement that the written contract, as originally formed, did not include any dates to establish the time period upon which to determine Foley's eligibility for an annual commission/bonus. During the course of testimony, Empire objected to the admission of evidence concerning discussions regarding the terms of the contract. The trial court overruled the objection.

{¶7} At the conclusion of Foley's case-in-chief, Empire moved for a directed verdict. The trial court denied the motion. Empire presented its own case-in-chief, and renewed its motion for directed verdict at its conclusion. The trial court again denied the motion and submitted the matter to the jury for determination. The jury returned a general verdict for Foley, awarding him $19,600.00. Empire appealed, and this Court determined that the judgment failed to address the issues of pre-judgment interest and both plaintiffs' claims, and dismissed for lack of a final, appealable order. On December 11, 2008, the trial court issued an order, awarding pre-judgment interest, post-judgment interest, and court costs. The trial court further asserted that all other claims had been dismissed or otherwise resolved. The trial court stated: "This is a final appealable order and there is no just cause for delay." Empire filed a timely appeal, raising two assignments of error for review.

II.

ASSIGNMENT OF ERROR I

> "THE TRIAL COURT ERRED AS A MATTER OF LAW IN DENYING APPELLANT'S MOTION IN LIMINE TO EXCLUDE ORAL STATEMENTS, BY ADMITTING TESTIMONY OF PRIOR ORAL STATEMENTS CONTRADICTING THE TERMS OF THE WRITTEN EMPLOYMENT CONTRACT IN CONTRAVENTION OF THE PAROLE EVIDENCE RULE." (sic)

{¶8} Empire argues that the trial court erred by admitting extrinsic evidence of oral statements made prior to or contemporaneously with the creation of the parties' written contract in violation of the parol evidence rule. This Court disagrees.

{¶9} Empire filed a motion in limine to exclude oral statements made prior to and contemporaneously with the creation of the written contract. The trial court denied the motion in limine, and Empire objected to the admission of such evidence as the issue arose during trial. The trial court overruled the objection and allowed testimony regarding discussions between the parties as to their intent.

{¶10} A trial court's ruling on a motion in limine is interlocutory and does not preserve the evidentiary issue for appellate review in the absence of objection when the issue arises at trial. *Gable v. Gates Mills*, 103 Ohio St.3d 449, 2004-Ohio-5719, at ¶35. The Ohio Supreme Court, however, has recognized the general view that "as the prohibitions of the parol evidence rule are a matter of substantive law and not a mere rule of evidence, testimony introduced in violation of the rule, even in the absence of objection thereto, can be given no legal effect." (Internal quotations omitted.) *William v. Spitzer Autoworld Canton, L.L.C.*, 2009-Ohio-3554, at ¶12, citing 11 Williston on Contracts (4th Ed.1999), 581. Because the parol evidence rule is one of substantive law, this Court must address the issue even had Empire not objected. See *N. Shore Neurological Servs., Inc. v. Midwest Neuroscience, Inc.*, 9th Dist. No. 08CA009373, 2009-Ohio-2429, at ¶25, citing *Ed Schory & Sons, Inc. v. Soc. Natl. Bank* (1996), 75 Ohio St.3d 433, 440.

{¶11} The Ohio Supreme Court explains the parol evidence rule as:

> "a principle of common law providing that a writing intended by the parties to be a final embodiment of their agreement cannot be modified by evidence of earlier or contemporaneous agreements that might add to, vary, or contradict the writing. The rule operates to prevent a party from introducing extrinsic evidence of

> negotiations that occurred before or while the agreement was being reduced to its final written form, and it assumes that the formal writing reflects the parties' minds at a point of maximum resolution and, hence, that duties and restrictions that do not appear in the written document *** were not intended by the parties to survive." (Internal citations and quotations omitted.) *Bellman v. Am. Internatl. Grp.*, 113 Ohio St.3d 323, 2007-Ohio-2071, at ¶7.

{¶12} Generally, courts presume that the intent of the parties can be found in the written terms of their contract. *Shifrin v. Forest City Ent., Inc.* (1992), 64 Ohio St.3d 635, 638. If a contract is unambiguous, the language of the contract controls and "[i]ntentions not expressed in the writing are deemed to have no existence and may not be shown by parol evidence." *Aultman Hosp. Assn. v. Community Mut. Ins. Co.* (1989), 46 Ohio St.3d 51, 53. If, however, "a contract is ambiguous, parol evidence may be employed to resolve the ambiguity and ascertain the intention of the parties." *Illinois Controls, Inc. v. Langham* (1994), 70 Ohio St.3d 512, 521. Therefore, "[p]arol evidence directed to the nature of a contractual relationship is admissible where the contract is ambiguous and the evidence is consistent with the written agreement[.]" Id. at paragraph two of the syllabus. Terms in a contract are ambiguous if their meanings cannot be determined from reading the entire contract, or if they are reasonably susceptible to multiple interpretations. *Butler v. Joshi* (May 9, 2001), 9th Dist. No. 00CA0058. "The decision as to whether a contract is ambiguous and thus requires extrinsic evidence to ascertain its meaning is one of law." *Ohio Historical Soc. v. Gen. Maintenance & Eng. Co.* (1989), 65 Ohio App.3d 139, 146.

{¶13} The parties agree that Foley would be entitled to a commission of $19,600.00 if Empire had annual sales in an amount in excess of $28 million. The crux of the parties' dispute is how (1) the year upon which annual sales are calculated and (2) "sales" are defined. The parties agree that Empire had more than $28 million in gross sales during fiscal year 2004. The company's fiscal year runs from October 1 through September 30 of any given year. The parties

agree that Empire did not reach its $28 million goal in fiscal year 2004 if tooling sales are excluded. The parties further agree that Empire did not reach its $28 million annual goal if that period is measured from Foley's start date in mid-June 2003 until mid-June 2004. Foley sought a commission bonus based only on the company's performance in fiscal year 2004.

{¶14} In this case, there are two versions of what is purported to be the written contract in evidence. The parties do not dispute that Empire sent Foley a document (Defendant's Exhibit B-1) captioned "R Foley Offer" which set out for years one through six his base salary, company car, and company car expenses. Exhibit B-1 also referenced his yearly commission of sales by the notation "see table" for years one through three, and "1/2 of table" for years four through six. Defendant's Exhibit B is the same offer, except that it is on Empire company letterhead; is signed by two representatives of Empire, dated June 17, 2003; and includes a notation "Review @ yr end" under the line addressing profit sharing for the first three years.

{¶15} The parties further do not dispute that Defendant's Exhibit C-1 is the table referenced in the offer document and first presented to Foley. The table is captioned "Year 1,2,3 Commission." It breaks down "Empire Sales" by year, month, quarter, and breaks down "R. Foley Commission" by the same time increments. Defendant's Exhibit C is the same table, except that it is on Empire company letterhead; is signed by two representatives of Empire, dated June 17, 2003; and includes a line above "R. Foley Commission" that states "Effective Start Date June 1, 2003."

{¶16} Foley testified that he accepted Empire's offer as it was presented in exhibits B-1 and C-1, and that he first saw exhibits B and C (the modified offer and table documents) when he received copies of them several weeks after he began working for Empire. He testified that he did not notice the modifications to the written contract the parties had previously negotiated.

Foley testified that he understood that the terms of his employment would be governed by the original documents he received and which terms he accepted. He testified, in fact, that Empire faxed a copy of exhibit C-1 to him in connection with his employment on September 2, 2004, almost sixteen months after he began working for the company. Foley testified that the parties' contract was reflected in the written terms of exhibits B-1 and C-1, rather than exhibits B and C, and that there were no further negotiations of terms after he accepted the offer set forth in exhibits B-1 and C-1.

{¶17} Robert Diak testified that he was vice president of manufacturing and operations at Empire when Empire hired Foley. Mr. Diak testified that he was second in command to Rick Rogel who was the president and CEO of Empire at the time. He testified that he had authority to draft and approve employee contracts and that he did so for Foley in 2003. Mr. Diak testified that, while he drafted both exhibits C-1 and C, exhibit C-1 was originally sent to Foley for review in regard to his employment relationship. Mr. Diak testified that after Foley agreed to the terms enunciated in exhibit C-1, the contract was put on company letterhead, thereby creating exhibit C. He testified that Foley was not asked to sign any version of the contract. Mr. Diak testified that Foley would have received a copy of exhibit C either just before or some time after he began working on June 17, 2003.

{¶18} Rick Rogel, the president and CEO of Empire at the time Foley was hired, conceded that Mr. Diak was authorized to engage in employment contract negotiations on behalf of Empire and that Mr. Diak drafted exhibits C-1 and C. Mr. Rogel testified that he reviewed exhibits B-1 and C-1, that he made changes to C-1 as reflected in C, and that Empire representatives signed exhibit C. He testified that he added the "effective start date" to exhibit C

because the company always initiates a start date to establish an employment term. Mr. Rogel did not testify as to when Foley would have first seen exhibit C.

{¶19} Empire's theory of the case was that Foley was not entitled to any commission because exhibits B and C constituted his employment contract and that the contract was not ambiguous. Empire argued that exhibit C, by way of the "effective start date" provision, unambiguously demonstrated the parties' intent that Foley's eligibility for a commission would be based on annual company sales as measured by Foley's anniversary date, rather than by fiscal year. Accordingly, Empire argued that parol evidence was not admissible to prove any matters beyond the four corners of the document.

{¶20} The trial court, however, recognized the dispute as to which version of the contract was effective. Foley testified that he was first presented with exhibits B-1 and C-1 and that he agreed to those terms, thereby creating a contract. He testified that he first saw exhibits B and C after he had been working under contract for Empire for several weeks. Mr. Diak, the Empire representative who drafted and presented exhibits B-1 and C-1 to Foley during negotiations, testified that he did not know when Foley might have first seen exhibits B and C. Mr. Diak conceded that it may have been some time after Foley began working for Empire. Mr. Diak further testified that Foley accepted the terms presented to him in exhibits B-1 and C-1 before Empire sent Foley copies of the signed exhibits B and C. Accordingly, there was evidence to establish that the written terms in exhibits B-1 and C-1 constituted Foley's employment contract.

{¶21} Exhibit C-1, addressing Foley's commissions for his first three years of employment, breaks down "Empire Sales" by "yr," "month," and "qtr." The document does not identify any dates between which sales would be calculated to determine Foley's eligibility for

commission. It is unclear whether an annual commission would be based on sales during a calendar year, company fiscal year, or based on the employee's anniversary date. The document further does not define the scope of the company's "sales," i.e., whether they include gross sales or net sales, limited by some exclusions. The meaning of the terms "year" and "sales" cannot be determined from the face of the document. Because those terms are reasonably susceptible to multiple interpretations, the trial court did not err in finding the contract ambiguous. See *Butler*, supra. Accordingly, the admission of extrinsic, or parol, evidence was proper to resolve the ambiguity and determine the intention of the parties. See *Illinois Controls, Inc.*, 70 Ohio St.3d at 521. Empire's first assignment of error is overruled.

ASSIGNMENT OF ERROR II

> "THE TRIAL COURT ERRED BY DENYING APPELLANT'S MOTION FOR A DIRECTED VERDICT ON APPELLEE'S CLAIM FOR BREACH OF CONTRACT."

{¶22} Empire argues that the trial court erred by denying its motion for directed verdict. This Court disagrees.

{¶23} Civ.R. 50(A) allows a party to move for a directed verdict upon the opponent's opening statement, at the close of the opponent's evidence, or at the close of all the evidence. The rule further states:

> "When a motion for a directed verdict has been properly made, and the trial court, after construing the evidence most strongly in favor of the party against whom the motion is directed, finds that upon any determinative issue reasonable minds could come to but one conclusion upon the evidence submitted and that conclusion is adverse to such party, the court shall sustain the motion and direct a verdict for the moving party as to that issue."

{¶24} This Court has stated:

> "In ruling on a directed verdict - or, in our case, considering such a ruling on appeal - a court must construe the evidence most strongly in favor of the non-moving party and determine whether reasonable minds can come to but one

> conclusion on the evidence submitted, that conclusion being adverse to the non-moving party. If reasonable minds can reach different conclusions, the matter must be submitted to a jury. The court considers the motion without weighing the evidence or determining the credibility of witnesses. A motion for a directed verdict raises a question of law because it examines the materiality of the evidence rather than the conclusions to be drawn from the evidence. Thus, the court does not determine whether one version of the facts presented is more persuasive than another; rather, it determines whether only one result can be reached under the theories of law presented in the complaint." *Clair v. First Am. Title Ins.*, 9th Dist. No. 23382, 2007-Ohio-1681, at ¶5, quoting *Cox v. Oliver Machinery Co.* (1987), 41 Ohio App.3d 28, 29.

Accordingly, this Court reviews the trial court's decision to grant or deny a motion for directed verdict de novo. *Clair* at ¶5, citing *Nichols v. Hanzel* (1996), 110 Ohio App.3d 591, 599.

{¶25} In this case, construing the evidence most strongly in favor of Foley as the non-moving party, reasonable minds could reach different conclusions as to which version of the contract was controlling.

{¶26} Mr. Diak, who negotiated the contract with Foley and drafted both versions, testified that he thought Foley might have received the second version prior to his beginning work for Empire. Mr. Diak admitted, however, that Foley may have received it after his employment began. Mr. Diak testified that Foley agreed to the terms of the first agreement, exhibit C-1. Foley testified that he understood that exhibit C-1 was controlling, that there were no attempts to renegotiate the terms in exhibit C-1, and that he never saw exhibit C until after he had been working for several weeks for Empire. He testified that he did not notice the modifications from the original offer he had accepted. Moreover, Empire faxed a copy of the C-1 document to Foley in connection with his employment almost fifteen months later, as evidenced by the facsimile transmission information along the top of the exhibit. Accordingly, reasonable minds could conclude that both Foley and Empire understood that terms reflected in exhibits B-1 and C-1 were controlling as to the employment contract.

{¶27} Furthermore, construing the evidence most strongly in favor of Foley as the non-moving party, reasonable minds could reach different conclusions as to whether Foley's eligibility for an annual commission was to be determined based on either Empire's gross or net sales, and calculated based on fiscal year or Foley's anniversary date.

{¶28} Foley testified that he had discussions regarding the terms of Empire's offer with Mr. Diak and David Palivec, vice president of sales and engineering. Foley testified that both Messrs. Diak and Palivec informed him that his commission would be based on sales during the fiscal year. Specifically, he testified that Mr. Palivec told him that Empire would have to obtain $28 million in sales within its fiscal year before Foley would be entitled to a commission bonus. Foley testified that no one ever told him that the commission would be predicated upon sales during a calendar year or by his anniversary date with the company. He testified that, even if exhibit C could be construed as controlling, that document contained only Foley's "effective start date" and not a notation that his commissions would be effective as of a certain date.

{¶29} Foley further testified that he received a job description document, reviewed by Mr. Diak and approved by Mr. Palivec, which stated that the national sales manager's performance would be evaluated pursuant to the achievement of annual sales, marketing, and gross profit goals, and that all of those elements were based on the company's fiscal year. Foley testified that, after Mr. Rogel insisted that he was not eligible for a commission, Mr. Palivec told him that the $28 million sales goal was designed to be unobtainable.

{¶30} Foley testified that he was never informed that certain types of sales were not included as part of the sales upon which his commission eligibility was based until Mr. Rogel refused to pay him because "tooling sales" were not included. Foley agreed that tooling sales

were expressly excluded from consideration in SEP Pro's contract with Empire, but that there was no such exclusion in his personal contract.

{¶31} Mr. Diak testified that the requirement that Empire attain $28 million in sales before Foley could receive a commission bonus related to "total gross sales" and did not exclude tooling sales or anything else. He testified that, as the drafter, he would have expressly excluded tooling sales in writing if he had meant to do so. Furthermore, Mr. Diak testified that all references to "year" or "yr" in the contract related to the company's fiscal year and not Foley's start date because Empire's accounting was set up in terms of the fiscal year. He testified that it would have been "very difficult to have a special report for one guy," as well as "wasteful" since everything else in the business was reported in terms of the fiscal year. Mr. Diak asserted that Empire never based anything on an employee's anniversary date. Mr. Diak testified that both versions of the contract (C-1 and C) were intended to cover fiscal year 2003 from October 1, 2002 through September 30, 2003, as the first year. Foley conceded that he was not entitled to any commission for fiscal year 2003, given that Empire had not obtained the requisite sales that year. Mr. Diak conceded that other sales representatives at Empire were paid monthly commissions based on their sales. He emphasized that all other sales representatives were independent contractors who did not receive a salary, unlike Foley who was a salaried employee.

{¶32} Mr. Rogel conceded that Foley's commission was based on annual company sales which exceeded $28 million, while other sales representatives received a percentage of their own sales from the date of their contracts. He testified that no one was entitled to commissions on tooling sales. While he conceded that Empire's sales exceeded $28 million during fiscal year 2004, Mr. Rogel testified that Foley's eligibility for a commission bonus was based on sales

from his start date in June 2003 to mid-May 2004, based on his anniversary date with the company.

{¶33} Robert Hopkins, the current president of Empire, acknowledged that the commission structure for other sales representatives was very different from Foley's because Foley could only get an annual bonus, not periodic commission payments. Mr. Hopkins could not explain why Empire faxed the C-1 document to Foley near the end of fiscal year 2004 if that document was not the controlling contract as Empire insists.

{¶34} Based on a construction of the evidence most strongly in Foley's favor, reasonable minds could conclude that the "sales" upon which Foley's eligibility for a commission bonus were based included gross company sales. Furthermore, reasonable minds could conclude that Foley would be eligible for an annual commission bonus based on Empire's sales during the fiscal year. Accordingly, Empire was not entitled to a directed verdict. Empire's second assignment of error is overruled.

III.

{¶35} Empire's assignments of error are overruled. The judgment of the Summit County Court of Common Pleas is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

DONNA J. CARR
FOR THE COURT

DICKINSON, P. J.
BELFANCE, J.
CONCUR

APPEARANCES:

MARK A. ZICCARELLI, Attorney at Law, for Appellant.

ERIC NORTON, Attorney at Law, for Appellee.