**[Cite as *Business Resource Group, L.L.C. v. Vacco*, 2011-Ohio-399.]**

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

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| BUSINESS RESOURCE GROUP, LLC | C.A. No. 09CA0069 |
| Appellee | |
| v. | APPEAL FROM JUDGMENT ENTERED IN THE |
| JOE VACCO, et al. | COURT OF COMMON PLEAS COUNTY OF WAYNE, OHIO |
| Appellants | CASE No. 09-CV-0103 |

DECISION AND JOURNAL ENTRY

Dated: January 31, 2011

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DICKINSON, Presiding Judge.

INTRODUCTION

**{¶1}** Joe and Vivian Vacco hired Business Resource Group to find a buyer for their company, Unlimited Restoration LLC. Business Resource Group found Jason Smith, who entered into a written purchase agreement with the Vaccos. Under the purchase agreement, the sale was contingent on the Vaccos and Mr. Smith reaching an agreement regarding Mr. Vacco's employment with Unlimited Restoration after the sale. At a subsequent meeting, Mr. Vacco and Mr. Smith orally agreed that Mr. Vacco would continue to work for Unlimited Restoration for 12 months. A couple of weeks later, however, Mr. Vacco changed his mind about the employment agreement and the sale did not close. When the Vaccos refused to pay Business Resource Group a commission for finding a buyer, it sued them for breach of contract. Following a bench trial, the trial judge determined that the Vaccos had breached their listing agreement with Business Resource Group. The Vaccos have appealed, arguing that the trial court incorrectly determined

that the conditions of the listing agreement had been met. This Court affirms because the trial court's findings are supported by competent, credible evidence.

BACKGROUND

**{¶2}** The Vaccos and Business Resource Group entered into a listing agreement regarding the Vaccos' interest in selling Unlimited Restoration. Under the listing agreement, the Vaccos agreed to pay Business Resource Group a commission if it "obtain[ed] an offer to purchase the Business upon . . . terms and conditions acceptable to [the Vaccos] from a ready, willing, and able prospective purchaser" or if the Vaccos "accept[ed] in writing an offer from a prospective purchaser and [the Vaccos] then fail[ed] to complete the sale of the Business."

**{¶3}** Business Resource Group learned that Mr. Smith was interested in buying Unlimited Restoration and helped Mr. Smith and the Vaccos negotiate a purchase agreement. Under the purchase agreement, Mr. Smith agreed to pay $325,000 for Unlimited Restoration with ten percent down. He also agreed to immediately place $5000 in escrow as an earnest money deposit.

**{¶4}** The purchase agreement contained several contingencies, including that "[the Vaccos] shall enter into an employment contract acceptable to [the Vaccos] and [Mr. Smith]." A week after signing the purchase agreement, Mr. Vacco and Mr. Smith met to discuss everything that needed to happen before the sale could close. One of the issues they discussed at the meeting was the terms of an employment contract for Mr. Vacco. Mr. Smith wanted Mr. Vacco to continue working for Unlimited Restoration after the sale so that Mr. Smith would have time to learn its operations and so that Mr. Vacco could train his replacement.

**{¶5}** According to Donald Prince, who brokered the sale for Business Resource Group, at the meeting, Mr. Vacco and Mr. Prince reached an agreement about Mr. Vacco's employment.

Mr. Prince testified that Mr. Vacco and Mr. Smith agreed on Mr. Vacco's salary, hours, duties, and length of service. Mr. Smith also testified that he and Mr. Vacco reached an employment agreement at the meeting. According to Mr. Prince and Mr. Smith, under that agreement, Mr. Vacco agreed to continue working for Unlimited Restoration for twelve months after the sale closed.

**{¶6}** Mr. Vacco testified that he wanted to sell Unlimited Restoration so he could spend more time developing a couple of other businesses that he and Ms. Vacco, his ex-wife, operated. According to him, at the meeting, Mr. Smith and he agreed to the general terms of his employment. He said, however, that he told Mr. Smith and Mr. Prince that he had to get everything approved by Ms. Vacco because he did not want his employment with Unlimited Restoration to undermine his involvement in their other companies. According to Mr. Vacco, he discussed the terms of the employment agreement with Ms. Vacco and decided that they were unacceptable. Mr. Vacco testified that he was particularly concerned about the fact that Mr. Smith wanted him to help expand Unlimited Restoration into a different market, which would cause his other businesses to suffer. Mr. Vacco testified that, when he spoke to Mr. Smith again, he told him that he would only commit to Unlimited Restoration for six months. He further testified that Mr. Smith and he were never able to work out a final employment agreement.

**{¶7}** According to Ms. Vacco, after the meeting between Mr. Vacco and Mr. Smith, Mr. Vacco discussed the terms of the employment agreement with her. She testified that she was okay with Mr. Vacco continuing to work for Unlimited Restoration and that she understood it would be for 12 months. She testified, however, that she later learned that Mr. Vacco continued to have discussions with Mr. Smith about his responsibilities for Unlimited Restoration. She

testified that Mr. Vacco became concerned about his role in Mr. Smith's expansion plans and whether he would have enough time for their other businesses.

BREACH OF CONTRACT

**{¶8}** The Vaccos' first assignment of error is that the trial court incorrectly determined that Business Resource Group earned its commission under the listing agreement. Their second assignment of error is that the trial court incorrectly determined that the purchase agreement was enforceable. They have argued that Business Resource Group failed to establish that Mr. Vacco orally agreed to an employment contract with Mr. Smith, that Mr. Smith was a ready, willing, and able buyer, or that they failed to complete the sale of Unlimited Restoration.

**{¶9}** "Generally, in order to establish a breach of contract, it must be shown by a preponderance of the evidence that (1) a contract existed, (2) one party fulfilled his obligations, (3) the other party failed to fulfill his obligations, and (4) damages resulted from that failure." *Blake Homes Ltd. v. FirstEnergy Corp.*, 173 Ohio App. 3d 230, 2007-Ohio-4606, at ¶77. "In cases where the facts are undisputed, and the only question to be resolved is whether a breach of contract occurred, a question of law exists for the court to decide." *Id*. If "there is a dispute as to whether the parties' respective actions are sufficient to satisfy the terms of the contract," however, "a question of fact is presented for the trier of fact to decide." *Id*.

**{¶10}** The dispute in this case was whether Business Resource Group had the right to a commission even though the deal with Mr. Smith fell through. Business Resource Group argued it was entitled to a commission because it had "obtain[ed] an offer to purchase [Unlimited Restoration] upon . . . terms and conditions acceptable to [the Vaccos] from a ready, willing and able prospective purchaser" and because the Vaccos "accept[ed] in writing an offer from a prospective purchaser and [they] then fail[ed] to complete the sale . . . ." The trial court

determined that Business Resource Group could recover under either provision because Mr. Vacco and Mr. Smith orally agreed to the terms of Mr. Vacco's employment contract, the sale did not close because Mr. Vacco had second thoughts, and Mr. Smith was, at all times, a willing and able purchaser who was willing to complete the sale of Unlimited Restoration as the parties had agreed.

**{¶11}** Although the Vaccos have argued that this Court's review is de novo, whether Mr. Vacco orally agreed to an employment contract, whether Mr. Smith was a ready, willing, and able purchaser, and whether the Vaccos failed to complete the sale were questions of fact for the trial court to decide. Accordingly, their argument is actually that the trial court's findings were against the manifest weight of the evidence. In *State v. Wilson*, 113 Ohio St. 3d 382, 2007-Ohio-2202, at ¶26, the Ohio Supreme Court held that the test for whether a judgment is against the weight of the evidence in civil cases is different from the test applicable in criminal cases. According to the Supreme Court in *Wilson*, the standard applicable in civil cases "was explained in *C.E. Morris Co. v. Foley Constr. Co.*, 54 Ohio St.2d 279." *Id*. at ¶24. The "explanation" in *C.E. Morris* was that "[j]udgments 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." *Id*. (quoting *C.E. Morris Co.*, 54 Ohio St. 2d at syllabus); but see *Huntington Nat'l Bank v. Chappell*, 183 Ohio App. 3d 1, 2007-Ohio-4344, at ¶17-75 (Dickinson, J., concurring in judgment only).

EMPLOYMENT CONTRACT

**{¶12}** Regarding whether Mr. Vacco and Mr. Smith orally agreed to an employment contract, the Vaccos have noted that Mr. Prince, Mr. Smith, and Mr. Vacco each testified that they planned to have the terms of Mr. Vacco's employment contract reduced to writing. They

have argued that, "[u]nder Ohio law, when parties intend that an agreement be reduced [to] writing, no contract exists until the written contract is executed by the parties." They have cited *Berjian v. Ohio Bell Telephone Co.*, 54 Ohio St. 2d 147, 151 (1978), in support of their argument. What the Ohio Supreme Court wrote in *Berjian*, however, was that "it is well-established that courts will give effect to the manifest intent of the parties where there is clear evidence demonstrating that the parties did not intend to be bound by the terms of an agreement until formalized in a written document and signed by both[.]" *Id.*

**{¶13}** In this case, there was no evidence that the parties did not intend to be bound to the terms of the employment agreement until it was reduced to writing and signed. Just because Mr. Vacco and Mr. Smith intended to have a lawyer put their agreement in writing, does not mean that it did not exist until that was accomplished. According to Mr. Smith, when he walked out of his meeting with Mr. Vacco, there was "[no] doubt in [his] mind that [Mr. Vacco] had agreed to work for [him]." The Vaccos have argued that it was undisputed that Mr. Vacco advised Mr. Smith that he had to discuss the employment agreement with Ms. Vacco before he could agree to any terms. Mr. Smith, however, did not testify that there were any conditions on Mr. Vacco's acceptance of the employment agreement. According to him, they entered into an agreement at the meeting. Mr. Prince could not recall whether Mr. Vacco said anything at the meeting about needing to check with Ms. Vacco. It was his recollection that Mr. Smith and Mr. Vacco agreed on the terms of the employment contract at the meeting.

**{¶14}** The Vaccos have further argued that the fact that Mr. Smith and Mr. Vacco had discussions after the day of the meeting about Mr. Vacco's duties demonstrates that they did not have a meeting of the minds as to all of the material terms of the employment agreement. One of the duties that Mr. Vacco agreed to at the meeting, however, was to grow Unlimited

Restoration's customer base. Just because Mr. Smith and Mr. Vacco discussed Mr. Smith's plan to expand Unlimited Restoration into a new market as a way to grow its customer base, does not mean that they did not reach an agreement at the meeting about Mr. Vacco's post-sale duties. We have reviewed the record and conclude that there is some competent, credible evidence that Mr. Smith and Mr. Vacco entered into a valid oral contract at the meeting. The trial court's finding that the Vaccos and Mr. Smith had an employment agreement, therefore, is not against the manifest weight of the evidence.

FAILURE TO COMPLETE SALE

**{¶15}** Regarding whether they "fail[ed] to complete the sale," the Vaccos' primary argument is that, because there was no employment agreement, the conditions of the purchase agreement were not met. Their argument fails for the reasons explained in the previous section. The Vaccos have also argued that they were not the reason the sale collapsed because Mr. Vacco remained ready, willing, and able to continue working for Unlimited Restoration for six months after the sale. Mr. Smith testified, however, that their agreement was for 12 months and that he needed Mr. Vacco to stay on for that long because he had limited familiarity with Unlimited Restoration's industry and needed time to grow in to the business and get acclimated to a different business environment.

**{¶16}** Mr. Smith testified that, a week after he met with Mr. Vacco to discuss the employment contract and other issues, Mr. Vacco called him and asked him to back out of the deal. Ms. Vacco testified that, sometime after Mr. Vacco told her about the employment terms he had negotiated at the meeting with Mr. Smith, he began having concerns about staying on at Unlimited Restoration for the entire 12 months. Accordingly, there was some competent, credible evidence in the record to support the trial court's finding that the Vaccos accepted a

written offer for the sale of Unlimited Restoration, and that the sale did not close because Mr. Vacco had second thoughts.

READY, WILLING, AND ABLE

**{¶17}** Regarding whether Mr. Smith was a ready, willing, and able buyer, the Vaccos have argued that the trial court's finding that Mr. Smith was "a willing and able purchaser willing to complete the sale . . . as agreed" was not supported by the record because the evidence demonstrates that Mr. Smith never put $5000 in escrow, as required by the purchase agreement. They have also argued that, because Mr. Smith did not perform his obligations under the purchase agreement, it never became enforceable. Because it was not enforceable, they could not have caused it to fail.

**{¶18}** Assuming Mr. Smith's payment of the $5000 deposit was a condition precedent to the sale of Unlimited Restoration, there is evidence in the record from which the trial court could have inferred that the Vaccos waived the condition. See *Sharp v. Andisman*, 9th Dist. Nos. 24999, 25002, 2010-Ohio-4452, at ¶28 (providing general rule regarding waiver of conditions precedent). Ms. Vacco specifically testified that Mr. Smith's failure to pay the deposit was not the reason the sale did not close. We conclude that there is some competent, credible evidence in the record to support the trial court's determination that Business Resource Group was entitled to a commission under the listing agreement because it obtained an offer upon terms and conditions acceptable to the Vaccos from a ready, willing, and able prospective buyer. The Vaccos' first and second assignments of error are overruled.

CONCLUSION

**{¶19}** The trial court's finding that the Vaccos breached the listing agreement when they failed to pay Business Resource Group a commission is not against the manifest weight of the evidence. The judgment of the Wayne County Common Pleas Court is affirmed.

Judgment affirmed.

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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 Wayne, 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 appellants.

CLAIR E. DICKINSON
FOR THE COURT

MOORE, J.
CONCURS

CARR, J.
CONCURS IN JUDGMENT ONLY, SAYING:

**{¶20}** Although I agree with the majority's conclusion that there was competent, credible evidence to support the trial court's ruling here, I disagree with the part of the analysis addressing the $5,000 deposit and must concur in judgment only.

**{¶21}** The majority does not address appellants' arguments regarding the $5,000 deposit as a condition precedent on the merits. Instead, it assumes the deposit was a condition precedent and that it was waived. I cannot agree with this analysis as an implied waiver of a condition precedent requires some act of at least partial performance. *Sharp v. Andisman*, 9th Dist. Nos. 24999 and 25002, 2010-Ohio-4452. In reading the contract in its entirety, it is clear that payment of the earnest money was included in the offer to purchase as a penalty for breach of contract and not as a condition precedent.

APPEARANCES:

JEFFREY H. WEIR II and JOSHUA E. LAMB, attorneys at law, for appellants.

CHARLES A. KENNEDY, attorney at law, for appellee.