[Cite as *Rusu v. Carter-Jones Lumber Co.*, 2023-Ohio-2927.]

IN THE COURT OF APPEALS OF OHIO
ELEVENTH APPELLATE DISTRICT
PORTAGE COUNTY

JAMES RUSU, Plaintiff-Appellant, - vs - CARTER-JONES LUMBER COMPANY, et al., Defendants-Appellees.	**CASE NO. 2022-P-0085** Civil Appeal from the Court of Common Pleas Trial Court No. 2021 CV 00011

O P I N I O N

Decided: August 21, 2023
Judgment: Affirmed

Richard E. Hackerd, 55 Public Square, Suite 2100, Cleveland, OH 44113 (For Plaintiff-Appellant).

Todd A. Harpst and *Christine M. Garritano*, Harpst Becker, LLC, 1559 Corporate Woods Parkway, Suite 250, Uniontown, OH 44685 (For Defendants-Appellees).

ROBERT J. PATTON, J.

{¶1} Appellant, James Rusu, appeals the entry granting summary judgment in favor of appellees, Carter-Jones Lumber Company and Carter Lumber (collectively "Carter"). We affirm.

{¶2} In 2021, Rusu filed a complaint against Carter, alleging breach of contract, detrimental reliance, unjust enrichment, and fraud. In his complaint, Rusu maintained that he was employed by Carter from 2013 until Carter terminated his employment on January 10, 2020. Rusu maintained that Carter offered him an incentive-based bonus

plan for the 2019 calendar year. Although Rusu was unsure of the formula used to calculate the bonus, he alleged that Carter had informed him in December 2019 that the bonus would exceed $50,000.00. Rusu alleged that he relied on this bonus; however, Carter failed to pay him any bonus for his work performed in 2019.

{¶3} Carter moved to dismiss the fraud claim for failure to plead fraud with particularity and because the existence of the contract claim precluded a fraud claim. Thereafter, Rusu filed an amended complaint, modifying its allegations of fraud. Carter again moved to dismiss the fraud claim due to the existence of the contract claim. The trial court denied the motion to dismiss. Carter then answered the complaint. After unsuccessful mediation, Carter moved for summary judgment. Carter maintained that: pursuant to the express terms of a written bonus agreement, Rusu was eligible for the 2019 bonus only if he was still employed by Carter at the time of distribution of the bonus in March 2020, and thus his claim of breach of contract failed; Rusu's claims of detrimental reliance and unjust enrichment failed due to the existence of the bonus agreement that expressly governed this issue; and Rusu's fraud claim failed as his allegations regarding fraud directly contradicted the terms of the written bonus agreement. Rusu did not file a response in opposition. Thereafter, the trial court granted summary judgment to Carter and dismissed the complaint.

{¶4} In his two assigned errors, Rusu contends:

> [1.] The Trial Court committed reversible error when it applied the incorrect law in granting summary judgment.
>
> [2.] The Trial Court erred when it granted summary judgment for Carter Lumber where genuine issues of material fact exist.

{¶5} "On appeal, we review a trial court's entry of summary judgment de novo, i.e., 'independently and without deference to the trial court's determination.'" *Superior Waterproofing, Inc. v. Karnofel*, 11th Dist. Trumbull No. 2017-T-0010, 2017-Ohio-7966, ¶ 19, quoting *Brown v. Cty. Commrs. of Scioto Cty.,* 87 Ohio App.3d 704, 711, 622 N.E.2d 1153 (4th Dist.1993) and citing *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996).

{¶6} Civ.R. 56 governs summary judgment proceedings. Civ.R. 56(C) provides, in relevant part:

> Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. No evidence or stipulation may be considered except as stated in this rule. A summary judgment shall not be rendered unless it appears from the evidence or stipulation, and only from the evidence or stipulation, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence or stipulation construed most strongly in the party's favor.

{¶7} The moving party bears the initial burden to set forth specific facts demonstrating that no issue of material fact exists and that the moving party is entitled to judgment as a matter of law. *Dresher v. Burt*, 75 Ohio St.3d 280, 292-293, 662 N.E.2d 264 (1996). If the movant meets this burden, the burden shifts to the nonmoving party to establish that a genuine issue of material fact exists for trial. *Id.* However, "not every factual dispute precludes summary judgment; only disputes as to the material facts that may affect the outcome preclude summary judgment." *Found. Medici v. Butler Institute of Am. Art*, 11th Dist. Trumbull No. 2020-T-0042, 2022-Ohio-2923, ¶ 18, citing *Bender v.*

Logan, 2016-Ohio-5317, 76 N.E.3d 336, ¶ 49 (4th Dist.), citing *Anderson v. Liberty Lobby*, *Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

{¶8} Here, as part of Carter's summary judgment motion, it submitted a letter purporting to serve as an addendum to Rusu's offer letter, which was identified and submitted at Rusu's deposition. The addendum states the basis of computation of the bonus, and it then states it was "[p]ayable March of the following year." Thereafter, the addendum provides, in relevant part:

> Please note that, this Bonus offer supersedes any other Bonus offer made by the Carter Lumber Company. In addition, this letter does not represent: an express or implied promise, guarantee or contractual right to present or future employment and does not alter the at-will employment relationship. *If employment is separated and you are no longer the employed at the point in time the bonus is paid out, you will not be eligible for any part of that bonus.* If you understand and accept these terms, please sign and return this letter to me.

(Emphasis added.)

{¶9} At the end of the letter, Rusu signed the following acknowledgement, "I acknowledge that I have received the attached addendum to my original offer letter for the bonus structure and have been read, are understood, (sic.) and the offer is herewith accepted." Rusu's signature is dated May 23, 2016. At his deposition, Rusu acknowledged his signature on the letter. Moreover, Rusu affirmed that each bonus he had received from his employment at Carter was paid the March following the bonus computation year.

{¶10} Pursuant to the plain terms of the bonus agreement, the trial court concluded that there was no issue of genuine fact and Carter was entitled to judgment as a matter of law on all of Rusu's claims.

{¶11} On appeal, Rusu first maintains that the trial court erred through incorrect application of the law, maintaining that "Ohio courts have ordered the payment of commissions and bonuses when an employee completed the services for which he or she would have been compensated had the employer not terminated the employee before the commissions or bonuses were due."[1] In support, Rusu cites *Ohio Marble Co. v. Byrd*, 65 F.2d 98, 99 (6th Cir.1933); *McKelvey v. Spitzer Motor Ctr., Inc.*, 46 Ohio App.3d 75, 545 N.E.2d 1311, 1313 (8th Dist.1988); *Montgomery Ward & Co. v. Smith*, 12 Ohio Law Abs. 28, 29 (5th Dist.1931); *Turnipseed v. Bowness*, 7 Ohio Law Abs. 310 (4th Dist.1929); *Elbinger Shoe Mfg. Co. v. Patrick*, 14 Ohio App. 456, 458 (1st Dist.1921); and *Finsterwald-Maiden v. AAA S. Cent. Ohio*, 115 Ohio App.3d 442, 444, 685 N.E.2d 786, 787 (4th Dist.1996). Carter responds that the plain meaning of the addendum did not entitle Rusu to a bonus, relying in part on *Airtron, Inc. v. Tobias*, 2021-Ohio-2213, 175 N.E.3d 51, ¶ 38 (2d Dist.).

{¶12} We agree with Carter that the plain language of the bonus addendum rendered Rusu ineligible for the 2019 bonus. "The construction of a written contract is a matter of law that we review de novo." *Saunders v. Mortensen*, 101 Ohio St.3d 86, 2004-Ohio-24, 801 N.E.2d 452, ¶ 9, citing *Nationwide Mut. Fire Ins. Co. v. Guman Bros. Farm*, 73 Ohio St.3d 107, 108, 652 N.E.2d 684 (1995). When construing a written agreement, "[o]ur primary role is to ascertain and give effect to the intent of the parties." *Saunders* at ¶ 9, citing *Hamilton Ins. Serv., Inc. v. Nationwide Ins. Cos.*, 86 Ohio St.3d 270, 273, 714

1. Although Rusu did not respond to summary judgment, he has not forfeited challenges on appeal as to whether the trial court appropriately granted Carter summary judgment based upon the materials it provided in support of its initial burden under Civ.R. 56(C) and *Dresher*. *See Sovereign Bank, N.A. v. Singh*, 9th Dist. Summit No. 27178, 2015-Ohio-3865, ¶ 11. *Crown Asset Mgt., L.L.C. v. Gaul*, 4th Dist. Washington No. 08CA30, 2009-Ohio-2167, ¶ 13.

N.E.2d 898 (1999). "We presume that the intent of the parties to a contract is within the language used in the written instrument." *Saunders* at ¶ 9, citing *Kelly v. Med. Life Ins. Co.*, 31 Ohio St.3d 130, 509 N.E.2d 411 (1987), paragraph one of the syllabus. "If we 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." *Saunders* at ¶ 9, citing *Aultman Hosp. Assn. v. Community Mut. Ins. Co.*, 46 Ohio St.3d 51, 544 N.E.2d 920 (1989).

{¶13} In *Airtron*, the Second District applied these contract principles in its review of a bonus plan that specified that the participant must be employed by the company at the time the payment is made to be eligible to receive the payment. *Airtron* at ¶ 44-45. There, as with the present case, the employee left employment in 2020, prior to the payout of the bonus calculated for the 2019 year. The employee argued that the bonus was an earned part of his compensation. The Second District concluded that it is not the court's responsibility to rewrite the contract for more equitable results, and, pursuant to the plain terms of the bonus plan, the employee "must have been employed by *Airtron* at the time the sum was *paid out*" in order to be eligible to receive the bonus. (Emphasis sic.) *Airtron* at ¶ 47-49.

{¶14} However, Rusu further argues that "forfeiture" of his bonus is inequitable, relying on *McKelvey*, 46 Ohio App.3d 75. *McKelvey* does appear to support Rusu's position. Similar to the instant case, *McKelvey* involved a bonus plan which provided that the employee was entitled to a bonus based on the calendar-year profit when that year's audit was completed. The *McKelvey* court determined:

> This provision, in effect, acted as a penalty for failure to remain with the company into the next year even though an entire year's service had been rendered upon which the bonus was based. In this case a significant portion of total

> compensation earned by the employee over a twelve-month period was lost based solely on the fortuitous timing of the completion of the audit procedures, which procedures could in no way alter the profit or bonus actually earned. It is well-established that forfeiture is not favored in the law. 18 Ohio Jurisprudence 3d (1980) 62, Contracts, Section 169. Given the facts of this case, we find that equitable considerations require the denial of a forfeiture.

{¶15} However, here, the addendum specifically set forth that the bonus would be distributed in the following March. Thus, the timing of the bonus distribution was not "fortuitous," but instead was a specific term of the agreement. Moreover, the Ohio Supreme Court has held that "[a] person competent to contract who, pursuant to a written agreement with another has performed services, is entitled to compensation therefor only in accordance with the terms of such bargain, in the absence of fraud, illegality or bad faith." *Ullmann v. May*, 147 Ohio St. 468, 72 N.E.2d 63 (1947), paragraph three of the syllabus. "In the absence of fraud or bad faith, a person is not entitled to compensation on the ground of unjust enrichment if he received from the other that which it was agreed between them the other should give in return." *Id.* at paragraph four of the syllabus.

{¶16} Although Rusu set forth a claim for fraud in his complaint, Rusu has not set forth an argument on appeal that Carter failed to establish that no triable issue remained on this claim. If there is an argument that could support fraud, illegality, or bad faith, "'it is not this court's duty to root it out.'" *Village of S. Russell v. Upchurch*, 11th Dist. Geauga Nos. 2001-G-2395, 2001-G-2396, 2003-Ohio-2099, ¶ 10, quoting *Harris v. Nome*, 9th Dist. Summit No. 21071, 2002-Ohio-6994, ¶ 15.

{¶17} For the foregoing reasons, Rusu's first assigned error lacks merit.

{¶18} In Rusu's second assigned error, he maintains that there exists a question of material fact because he stated in his deposition that he was entitled to the bonus

because he worked the full year of 2019 and "earned it." However, Rusu's belief that he should receive the bonus does not create any question of fact given that the written addendum requires the employee's continued employment at the point of disbursement to receive the bonus.

{¶19} Accordingly, Rusu's second assigned error lacks merit.

{¶20} The judgment is affirmed.

MARY JANE TRAPP, J.,

EUGENE A. LUCCI, J.,

concur.