[Cite as *Hammill Mfg. Co. v. Park-Ohio Industries, Inc.*, 2013-Ohio-1476.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

Hammill Manufacturing Company, Co-Op Tool Division

Appellant

v.

Park-Ohio Industries, Inc., et al.

Appellees

Court of Appeals Nos. L-12-1121

Trial Court No. CI0200908461

DECISION AND JUDGMENT

Decided: April 12, 2013

* * * * *

Marvin A. Robon and Larry E. Yunker II, for appellant.

James P. Sammon, for appellees.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} Plaintiff-appellant, Hammill Manufacturing Company, Co-Op Tool Division ("Hammill"), appeals the April 3, 2012 and September 9, 2011 judgments of the Lucas County Court of Common Pleas which, respectively, granted summary judgment in favor of defendants-appellees, Park-Ohio Industries, Inc. and General Aluminum

Manufacturing Company ("GAMCO"), and denied appellant's motion to amend its complaint to include a fraud claim. Because we find that no genuine issues of fact remain and the court did not abuse its discretion, we affirm.

{¶ 2} Hammill is an Ohio corporation with its headquarters in Maumee, Lucas County, Ohio. GAMCO is a subsidiary of Park-Ohio Industries, an Ohio company. GPF Industries, LLC ("GPF") is licensed to do business in Ohio. This case stems from an October 2007 purchase order between appellant and GPF for the manufacture of custom tooling or fixtures to be used in the manufacturing of a part known as D-30 for GAMCO to be supplied to end-user Magna Corporation. GPF ordered six fixtures at a cost of $32,095 each for a total of $192,570. Appellant delivered the fixtures in March 2008. Also in October 2007, GAMCO entered into its purchase order with GPF for tooling for the D-30 machining operation. On August 2, 2008, GAMCO paid GPF $574,630.20.

{¶ 3} As to the agreement between appellant and GPF, GPF remitted two payments totaling approximately $64,000 for the tooling. No further payments were received. On May 13, 2009, John Hammill, Jr., president of Hammill Manufacturing, and Patrick Fogarty of Park-Ohio met. Part of their discussion was the amounts owed by GPF to appellant. According to Hammill's deposition, Fogarty represented that "we'll get this taken care of" but that Fogarty did not promise that either GAMCO or Park-Ohio would make the delinquent payments.

{¶ 4} At the May 13, 2009 meeting, Hammill and Fogarty also discussed a letter agreement between GAMCO and GPF, memorialized in a letter dated April 6, 2009. The agreement provided:

> This will serve to memorialize our agreement regarding General Aluminum Manufacturing's (GAMCO) management of GPF Industries, Inc. (GPF) operations (Letter Agreement). In that regard we agree as follows:
>
> 1. GAMCO will assume the production and machining for the D30, RTA and Pump Body Parts (Parts) from the date of this Letter Agreement through March 31, 2010 (Term).
>
> 2. GAMCO will lease, for the Term all of GPF's machinery and equipment used or necessary for the production and machining of the Parts for $5,000 per month.
>
> 3. GAMCO will lease, from General Iron, LLC, for the Term, the real estate and facility located at 500 Madison Street, Conneaut, Ohio consisting of approximately 70,000 square feet (Facility).
>
> 4. GAMCO will pay or reimburse GPF for certain other reasonable expenses as set forth on Exhibit A attached hereto and made a part hereof, unless separately purchased by GAMCO to machine the Parts.
>
> 5. The Letter Agreement may be terminated by GAMCO at any time upon written [sic] to GPF or General Iron, LLC.

Exhibit A provided for payment of expenses related to payroll, insurance for the equipment and facility, repair and maintenance of the equipment, mortgage and utilities, and necessary tooling. The agreement remained effective for approximately two to three months after which the bank repossessed and sold the machining equipment. GAMCO removed the tooling it had paid GPF for and two of the eight fixtures were placed in machines located at a different facility.

{¶ 5} On November 25, 2009, after failing to receive payment from GPF, appellant commenced the instant lawsuit asserting breach of contract against GPF, promissory estoppel, unjust enrichment, and successor liability arguing that GPF and GAMCO as its successor, were liable for the unpaid tooling. The complaint was amended to correct party names.

{¶ 6} On September 30, 2010, a consent judgment entry was entered between appellant and GPF. GPF agreed to judgment in favor of GAMCO for $192,570 with interest.

{¶ 7} On July 1, 2011, appellees filed their motion for summary judgment. Appellees argued that neither Park-Ohio nor GAMCO had ever contracted with appellant, that no benefit was conferred upon appellant, that appellees paid for the benefit conferred by GPF, that no promise was made by appellees to pay appellant for the tooling, that appellant was not the intended beneficiary of the April 6, 2009 agreement between GAMCO and GPF, and that the agreement did not create successor liability.

{¶ 8} On the same date, appellant filed a motion for partial summary judgment on the issue of its status as a third-party beneficiary to the April 6, 2009 agreement and successor liability. Appellant argued that after the April 2009 agreement, GAMCO took over GPF's facilities and machinery and, thus, was in sole possession of the tooling manufactured by appellant. Appellant then argued that it was an intended beneficiary to the agreement because the agreement specified that GAMCO would be responsible for payment of certain items, including tooling. Thus, GAMCO intended to guarantee payment to appellant for the tooling. Appellant further argued that GAMCO's act of taking over GPF's operations met the legal requirements to impose successor liability.

{¶ 9} A hearing on the motions was held on August 31, 2011. At the hearing, the parties discussed appellant's request for leave to amend the complaint to include a fraud claim, which was first raised in appellant's July 18, 2011 opposition to appellees' motion for summary judgment. The court denied the request to amend; the corresponding judgment entry was journalized on September 9, 2011.

{¶ 10} On April 3, 2012, the trial court denied appellant's motion for partial summary judgment and granted appellees' motion for summary judgment. In sum, the court concluded that because appellant could not establish that it conferred any benefit to appellees and that there was no contractual privity between the parties, no issues of fact remained as to whether appellant could establish a claim for damages. This appeal followed.

{¶ 11} Appellant raises five assignments of error for our review:

1. The trial court erred in granting defendant's motion for summary judgment as to the issue of unjust enrichment.

2. The trial court erred in granting defendant's motion for summary judgment as to the issue of promissory estoppel.

3. The trial court erred in granting defendant's motion for summary judgment as to the issue of breach of guarantee.

4. The trial court erred in granting defendant's motion for summary judgment as to the issue of successor liability.

5. The trial court erred in denying plaintiff's motion to amend its complaint to include a cause of action for fraud where such fraud was uncovered during the course of discovery.

{¶ 12} Appellant's first four assignments of error challenge the trial court's award of summary judgment in favor of appellees. They will be jointly addressed. We first note that in reviewing a grant of summary judgment, this court must apply the same standard as the trial court. *Lorain Natl. Bank v. Saratoga Apts.*, 61 Ohio App.3d 127, 129, 572 N.E.2d 198 (9th Dist.1989). Summary judgment will be granted where there remains no genuine issue of material fact and, when construing the evidence most strongly in favor of the non-moving party, reasonable minds can only conclude that the moving party is entitled to judgment as a matter of law. Civ.R. 56(C).

I. Unjust Enrichment

{¶ 13} Appellant first argues that the trial court erroneously rejected its claim that appellees were unjustly enriched by possession and use of the tooling manufactured by appellant for use in GPF's machining operation. Appellees counter that it paid GPF for the products it supplied to GAMCO and that appellant never conferred a benefit upon either GAMCO or Park-Ohio.

{¶ 14} In Ohio, unjust enrichment is a claim under quasi-contract law that arises out of the obligation arising by law as to a person in receipt of benefits that he is not justly and equitably entitled to retain. *Hummel v. Hummel*, 133 Ohio St. 520, 527, 14 N.E.2d 923 (1938). Unjust enrichment entitles a party only to restitution of the reasonable value of the benefit conferred. *Sammartino v. Eiselstein*, 7th Dist. No. 08 MA 211, 2009-Ohio-2641, ¶ 14. The elements of an unjust enrichment claim are as follows: (1) a benefit conferred by a plaintiff upon a defendant; (2) knowledge by the defendant of the benefit; and (3) retention of the benefit by the defendant under circumstances where it would be unjust to do so without payment (i.e., the "unjust enrichment" element). *L & H Leasing Co. v. Dutton*, 82 Ohio App.3d 528, 534, 612 N.E.2d 787 (3d Dist.1992), citing *Hambleton v. R.G. Barry Corp.*, 12 Ohio St.3d 179, 183, 465 N.E.2d 1298 (1984). *See also Sammartino* at ¶ 14.

{¶ 15} Appellant contends that GAMCO retained a benefit following its April 6, 2009 agreement with GPF, by use of the tooling provided by appellant with knowledge that GPF had failed to pay for it. Appellant further argued that GAMCO represented that

they would aid appellant in recovering monies owed by GPF and that, based on such representations, appellant forbore pursuing repossession of the tooling. Conversely, appellees assert that because GAMCO paid GPF for the tooling at issue and has no contractual privity with appellant, there can be no unjust enrichment claim. Appellees further note that appellant did not have a security interest in the tooling.

{¶ 16} Upon review, we must conclude that appellant has failed to establish a claim for unjust enrichment. GAMCO paid GPF for the tooling. Appellant obtained a consent judgment against GPF for the amount owed. GAMCO cannot be expected to pay twice for the tooling it ordered.

II. Promissory Estoppel

{¶ 17} Appellant next argues that based on the representations made by appellees, they should be estopped from denying their obligations to appellant. Specifically, appellant contends that GAMCO made promises that they would get GPF's unpaid invoice "taken care of" and that appellant relied on the promise that forestalled its right of repossession. Appellees counter that no promises to pay were ever given.

{¶ 18} Promissory estoppel requires "'[a] promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise.'" *Shampton v. Springboro*, 98 Ohio St.3d 457, 2003-Ohio-1913, 786 N.E.2d 883, ¶ 32-33, quoting Restatement of the Law 2d, Contracts (1981), Section 90.

> To be successful on a claim of promissory estoppel, "[t]he party claiming the estoppel must have relied on conduct of an adversary in such a manner as to change his position for the worse and that reliance must have been reasonable in that the party claiming estoppel did not know and could not have known that its adversary's conduct was misleading." *Id*. at ¶ 34, quoting *Ohio State Bd. of Pharmacy v. Frantz*, 51 Ohio St.3d 143, 145, 555 N.E.2d 630 (1990).

{¶ 19} Appellant's argument that it was damaged by its reliance on the representations of appellees is based, in part, on the deposition testimony of John Hammill, Jr. wherein, he stated that Pat Fogerty, vice-president of Park-Ohio, indicated that "he would get [the invoice] taken care of. We understood that to mean he would get us paid." Hammill acknowledged, however, that Fogerty never stated that GAMCO or Park-Ohio would pay appellant.

{¶ 20} Reviewing the record, we must conclude that appellees never promised to pay the amount owed by GPF. Fogerty appeared to have access to GPF's president, John France, who was difficult to contact and he was going to make an inquiry about the money owned. There were no other representations. Thus, because there was no promise to pay, there can be no promissory estoppel.

III. Breach of Guarantee

{¶ 21} Appellant next contends that it was a third-party beneficiary of the April 6, 2009 letter agreement between GPF and GAMCO. Appellant assert that because the

agreement, as quoted above, provided that GAMCO would pay for tooling necessary for production of the parts, it intended that GAMCO pay appellant for the parts ordered by GPF.

{¶ 22} This court has discussed the right of a third party to enforce a contract:

> Only a party to a contract or an intended third-party beneficiary of a contract may bring an action on a contract in Ohio. *Thornton v. Windsor House, Inc*. (1991), 57 Ohio St.3d 158, 566 N.E.2d 1220; *Visintine & Co. v. New York, Chicago, & St. Louis RR. Co*. (1959), 169 Ohio St. 505, 9 O.O.2d 4, 160 N.E.2d 311. A third-party beneficiary is one for whose benefit a promise has been made in a contract but who is not a party to the contract. *Chitlik v. Allstate Ins. Co*. (1973), 34 Ohio App.2d 193, 196, 63 O.O.2d 364, 299 N.E.2d 295. "The third party need not be named in the contract, as long as he is contemplated by the parties to the contract and sufficiently identified." *Id*. Moreover, the "promisee must intend that a third party benefit from the contract in order for that third party to have enforceable rights under the contract." *Laverick v. Children's Hosp. Med. Ctr. of Akron* (1988), 43 Ohio App.3d 201, 204, 540 N.E.2d 305.

Perrysburg v. Toledo Edison Co., 171 Ohio App.3d 174, 2007-Ohio-1327, 870 N.E.2d 189 (6th Dist.), ¶ 20.

{¶ 23} Upon review, we find that the April 6, 2009 agreement was not intended to benefit appellant. The tooling needed for production did not include tooling already paid

for by GAMCO. The agreement contemplated tooling used after the April 2009 effective date. Further, there is no additional evidence in the record demonstrating that the agreement intended to benefit appellant. Thus, appellant's breach of guarantee claim must fail.

IV. Successor Liability

{¶ 24} In its final argument, appellant contends that based on the agreement, appellees assumed all the liabilities of GPF. Appellees dispute that GAMCO either purchased the assets of GPF or assumed its liabilities. Alternatively, appellees contend that even assuming that it could be considered a successor of GPF, there is no evidence that appellees agreed to assume GPF's liabilities.

{¶ 25} The following factors are used in determining whether a successor corporation can be liable for the liabilities of its predecessor "'(1) the buyer expressly or impliedly agrees to assume such liability; (2) the transaction amounts to a de facto consolidation or merger; (3) the buyer corporation is merely a continuation of the seller corporation; or (4) the transaction is entered into fraudulently for the purpose of escaping liability.'" *Welco Industries, Inc. v. Applied Cos.*, 67 Ohio St.3d 344, 347, 617 N.E.2d 1129 (1993), quoting *Flaughter v. Cone Automatic Machine Co.*, 30 Ohio St.3d 60, 62, 507 N.E.2d 331 (1987).

{¶ 26} First, there is no evidence that GAMCO agreed to assume GPF's debt to appellant especially since GAMCO had already paid GPF for the tooling. Regarding a merger, the *Welco* court explained:

> The hallmarks of a de facto merger include (1) the continuation of the previous business activity and corporate personnel, (2) a continuity of shareholders resulting from a sale of assets in exchange for stock, (3) the immediate or rapid dissolution of the predecessor corporation, and (4) the assumption by the purchasing corporation of all liabilities and obligations ordinarily necessary to continue the predecessor's business operations. *Id.* at 349.

{¶ 27} Reviewing the record below, we find no evidence that GAMCO retained GPF's corporate counsel. GAMCO operated GPF's facility for only two to three months and, thereafter, the bank took possession in order to auction the machinery and reduce the debt owed. Further, based upon the consent judgment against GPF, it is clear that GPF remained a distinct entity. Thus, there was no de facto merger.

{¶ 28} Further, there is no evidence that the agreement was entered into fraudulently to avoid liability. GAMCO paid GPF for the tooling it ordered and, again, appellant and GPF entered into a consent judgment entry for the amount owed.

{¶ 29} Based on the foregoing, we find that no genuine issues of fact remain and that summary judgment in appellees' favor was properly granted. Appellant's first, second, third, and fourth assignments of error are not well-taken.

{¶ 30} In appellant's fifth assignment of error, it argues that the trial court abused its discretion when it denied appellant's motion to amend the complaint to include a fraud claim. Appellant argues that the request was tardy due to the availability of the

deposition transcripts; the request was made prior to transcription and based solely on appellant's counsel's notes. Appellant states that the new evidence of fraud included the fact that appellees misled appellant into thinking that it would address payment of the debt while aware that GPF had already shut down and that GAMCO leased GPF's facilities for far less than fair market value.

{¶ 31} In general, a motion for leave to amend should be granted to a party absent a finding of bad faith, undue delay or prejudice to the opposing party. *CommuniCare, Inc. v. Wood Cty. Bd. of Commrs.*, 161 Ohio App.3d 84, 2005-Ohio-2348, 829 N.E.2d 706 ¶ 17 (6th Dist.). However, a trial court has discretion to either grant or deny a motion for leave to amend a pleading. *State ex rel. Askew v. Goldhart*, 75 Ohio St.3d 608, 610, 665 N.E.2d 200 (1996); *Hoover v. Sumlin*, 12 Ohio St.3d 1, 6, 465 N.E.2d 377 (1984). The trial court's decision will not be reversed by an appellate court absent an abuse of its discretion. *CommuniCare* at ¶ 18.

{¶ 32} Appellant's counsel first requested that the court allow him to amend the pleadings in the opposition to appellees' motion for summary judgment filed on July 18, 2011. Thereafter, at the hearing on the cross-motions for summary judgment, counsel orally requested leave to amend. Appellant contends that the information forming the basis of his fraud claim was not discovered until the June 28, 2011 depositions of GAMCO president, Donald Tyler, representative, Ron Mauer, and former CFO, Shawn McNamera, which detailed the agreement between GPF and GAMCO. Appellant claims

it was misled by appellees and lost its right to assert a claim to the tooling. Appellees counter that the motion for leave was untimely and prejudicial.

{¶ 33} At the August 31, 2011 hearing on the cross-motions for summary judgment, extensive argument was had on the issue of appellant's request for leave to amend. The court noted that raising the request in appellant's opposition to appellees' motion for summary judgment failed to comply with Civ.R. 15. Further, appellees expressed the prejudicial effect of appellant's request; they also denied any fraudulent activity.

{¶ 34} Upon review, we cannot say that the trial court abused its discretion when it denied appellant's motion for leave to include a fraud claim. Appellant's fifth assignment of error is not well-taken.

{¶ 35} On consideration whereof, we find that substantial justice was done the party complaining and the judgment of the Lucas County Court of Common Pleas is affirmed. Pursuant to App.R. 24, appellant is ordered to pay the costs of this appeal.

Judgment affirmed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J.

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JUDGE

Thomas J. Osowik, J.

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JUDGE

Stephen A. Yarbrough, J.
CONCUR.

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JUDGE