[Cite as *Berkut, Inc. v. Devolver Corp.*, 2024-Ohio-63.]

COURT OF APPEALS OF OHIO

EIGHTH APPELLATE DISTRICT
COUNTY OF OHIO

BERKUT, INC., :

:

Plaintiff-Appellee, No. 112298

:

v.

:

DEVOLVER CORP.,

:

Defendant-Appellant.

JOURNAL ENTRY AND OPINION

JUDGMENT: AFFIRMED IN PART, REVERSED IN PART, AND REMANDED
RELEASED AND JOURNALIZED: January 11, 2024

Civil Appeal from the Cuyahoga County Court of Common Pleas
Case No. CV-21-945390

Appearances:

James E. Boulas Co., L.P.A., and James E. Boulas, *for appellee*.

Ronald A. Skingle, *for appellant*.

SEAN C. GALLAGHER, J.:

{¶ 1} Defendant-appellant Devolver Corp. ("Devolver") appeals the judgment of the trial court that ruled in favor of plaintiff-appellee Berkut, Inc. ("Berkut"), on Berkut's claim of breach of contract and on Devolver's counterclaims.

Upon review, we affirm in part and reverse in part, and we remand the case to the trial court with instructions.

{¶ 2} On March 22, 2021, Berkut filed a complaint against Devolver and raised claims for breach of contract, money owing on an account, violation of Ohio's Prompt Payment Act, and unjust enrichment. The breach-of-contract claim referenced a written contract under which Berkut was to provide labor and material for a construction project located on Bosworth Avenue in Cleveland (referred to as "Bosworth"). Attached to the complaint was a Master Agreement between Devolver as "Contractor" and Berkut as "Subcontractor," which agreement was to apply to future subcontracts between the parties for the furnishing of construction and construction-related services, and the Bosworth Subcontract Work Order, along with exhibits for the Bosworth Scope of Work and the Bosworth Payment Schedule Agreement. Berkut alleged in the complaint that it had performed all its obligations under the Bosworth contract, but that Devolver had failed to completely pay for the labor and material provided. Berkut sought damages for the balance it claimed to be owed for the Bosworth contract in the amount of $6,971.99, plus interest, attorney fees, and costs. Berkut did not set forth any other claim for breach, or anticipatory breach, of contract.

{¶ 3} On April 19, 2021, Devolver filed an answer and counterclaim. Devolver's counterclaim alleged two counts of breach of contract, which related to two subcontract projects. The first count involved the Bosworth property, for which Devolver alleged Berkut failed to install cabinets in a workmanlike manner. The

second count involved a property located on Lake Avenue in Cleveland (referred to as "Lake Villa"), for which Devolver alleged Berkut failed to complete the work. Devolver attached to its answer and counterclaim the Master Agreement between the parties, the Lake Villa Subcontract Work Order and its Payment Schedule Agreement, and the Bosworth Subcontract Work Order and its Payment Schedule Agreement.

{¶ 4} In its reply to the counterclaim, Berkut raised a number of affirmative defenses. Among other affirmative defenses raised were that Devolver's counterclaims were barred by its own breach of contract and that Devolver's alleged damages were the result of its own acts and/or omissions and its own breach of contract.

{¶ 5} The case eventually proceeded to a bench trial.[1] In its trial brief, Berkut argued that it had performed all its obligations for the Bosworth contract, but that Devolver had refused to pay the balance owed of $6,071.99.[2] Berkut claimed the same amount of damages at trial and in its closing argument brief. On the other hand, Devolver argued in its closing argument brief, in part, that Berkut was not entitled to recover on the Bosworth contract because it failed to perform all of its contractual obligations and that even if Berkut did perform its contractual obligations pursuant to the Bosworth contract, Devolver was entitled to a setoff

[1] Testimony was provided by Oleksander Ivashchuk on behalf of Berkut and by Chad Thompson on behalf of Devolver.

[2] This amount differed from the damages amount sought in the complaint.

amount of $6,883.50 allegedly owed back to it from the deposit paid to Berkut on the Lake Villa project.

{¶ 6} On December 15, 2022, the trial court entered judgment in favor of Berkut on its claim of breach of contract and on Devolver's counterclaims. The trial court ruled against Berkut on its claims for unjust enrichment, accounting, and violation of Ohio's Prompt Payment Act. The trial court awarded Berkut damages not only for breach of the Bosworth contract ($5,987.99), but also for anticipatory breach of the Lake Villa contract ($4,312.00). The total amount of damages awarded was $10,299.99, plus statutory interest at the rate of 3.00 percent per annum and costs.

{¶ 7} Devolver timely filed this appeal. It raises four assignments of error for our review. We have thoroughly reviewed the entire record and considered all of the arguments presented.

{¶ 8} Under its first assignment of error, Devolver claims the trial court erred by awarding judgment against it for breach of the Bosworth contract because it claims Berkut failed to prove that it performed the conditions precedent for the final payment under Section 5 of the Bosworth Payment Schedule Agreement.

{¶ 9} The interpretation of a written contract is a question of law that we review de novo. *Boone Coleman Constr., Inc. v. Piketon*, 145 Ohio St.3d 450, 2016-Ohio-628, 50 N.E.3d 502, ¶ 10, citing *Arnott v. Arnott*, 132 Ohio St.3d 401, 2012-Ohio-3208, 972 N.E.2d 586, ¶ 14. When interpreting a contract, we must give effect to the intent of the parties as evidenced by the actual language of the contract. *See*

Transtar Elec. v. A.E.M. Elec. Servs. Corp., 140 Ohio St.3d 193, 2014-Ohio-3095, 16 N.E.3d 645, ¶ 9, citing *Skivolocki v. E. Ohio Gas Co.*, 38 Ohio St.2d 244, 313 N.E.2d 374 (1974), paragraph one of the syllabus. "'When the language of a written contract is clear, a court may look no further than the writing itself to find the intent of the parties.'" *Id.*, quoting *Sunoco, Inc. (R&M) v. Toledo Edison Co.*, 129 Ohio St.3d 397, 2011-Ohio-2720, 953 N.E.2d 285, ¶ 37.

{¶ 10} In this matter, the trial court determined Devolver breached the Bosworth contract by failing to pay the promised amount after all work had been completed. Devolver's challenge centers upon its contention that Berkut did not fulfill conditions precedent for final payment under Section 5 of the Bosworth Payment Schedule Agreement. The language to which Devolver refers concerns the third and final payment that was to be made under the payment schedule and provides that "[f]inal payment of $8,473.99, given after installation of cabinets and all other components are confirmed and signed off by project manager and lien waiver is signed." Devolver argues that it was excused from paying Berkut the final payment because Berkut never received a sign-off from the project manager and never signed a lien waiver. We find nothing in the express language of the agreement to have established any such requirement as a "condition precedent" to the final payment.

{¶ 11} "A 'condition precedent' is 'a condition that must be performed before obligations in a contract become effective.'" *Transtar Elec.* at ¶ 22, quoting *Coffman v. Ohio State Adult Parole Bd.*, 10th Dist. Franklin No. 12AP-267,

2013-Ohio-109, ¶ 11. Generally, the law disfavors conditions precedent, and a court will not interpret a contract provision to impose a condition precedent absent an explicit intent, particularly when a forfeiture will result. *Mkt. Ready Real Estate Servs. v. Weber*, 10th Dist. Franklin Nos. 12AP-183 and 12AP-803, 2013-Ohio-4879, ¶ 20-21, citing *Hiatt v. Giles*, 2d Dist. Darke No. 1662, 2005-Ohio-6536, ¶ 23; *Evans, Mechwart, Hambleton & Tilton, Inc. v. Triad Architects, Ltd.*, 196 Ohio App.3d 784, 2011-Ohio-4979, 965 N.E.2d 1007, ¶ 15 (10th Dist.).

{¶ 12} Here, the Bosworth Payment Schedule Agreement clearly reflects the parties' agreed "Contract Price" and explicitly requires "[t]he General Contractor shall pay the Subcontractor for material and labor" in "the sum of $17,471.98 for 10 units." Although Section 5 of the agreement sets forth a "Payment Schedule," this section sets forth a schedule pursuant to which "Payments of Contract Price shall be made," and the schedule provides for three installment payments, only two of which were made. The payment schedule does not include any conditional terms and is not explicit enough to indicate the parties intended to create a condition precedent to the final payment owed for the material and labor provided.

{¶ 13} The trial court properly determined Devolver breached the Bosworth contract by failing to pay Berkut after all work had been completed by Berkut. Devolver's first assignment of error is overruled.

{¶ 14} Under its second assignment of error, Devolver claims the trial court erred by awarding judgment against it for breaching the Lake Villa contract because Berkut never set forth such a claim. We find merit to this argument.

{¶ 15} Civ.R. 8(A), "Claims for relief," states, in pertinent part, that "[a] pleading that sets forth a claim for relief * * * shall contain (1) a short and plain statement of the claim showing that the party is entitled to relief, and (2) a demand for judgment for the relief to which the party claims to be entitled." Civ.R. 8(E) further directs that averments of a pleading be "simple, concise, and direct." In this case, it is readily apparent from the record that although Berkut set forth a breach-of-contract claim on the Bosworth contract, it did not set forth any claim for breach, or anticipatory breach, of the Lake Villa contract in any pleading.

{¶ 16} Although Civ.R. 15(B) provides, in pertinent part, that "[w]hen issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings[,]" there is nothing in the record that suggests Berkut raised an affirmative claim for anticipatory breach or for any damages relating to the Lake Villa contract that was tried by express or implied consent of the parties. The total amount of damages Berkut was seeking at trial was $6,071.99, which was reflective of the damages sought for the Bosworth contract. Berkut never sought any damages on the Lake Villa contract.

{¶ 17} The record shows that it was Devolver that presented a counterclaim for breach of the Lake Villa contract, and Berkut raised a breach by Devolver as an affirmative defense to the counterclaim. The trial court herein failed to recognize that there is a difference between asserting an affirmative claim for damages and raising an affirmative defense that serves to preclude recovery. *See Payette Fin.*

Servs., LLC v. Mtge. Electronic Registration Sys., 11th Dist. Portage No. 2020-P-0010, 2020-Ohio-5055, ¶ 72-88 (finding sellers' affirmative defense of release was not transformed into a counterclaim via Civ.R. 15(B) because there was nothing in the record that suggested an affirmative claim for damages relating to release was tried by implied consent).

{¶ 18} At trial, Berkut defended against the counterclaim. Although counsel for Berkut argued in defense of the counterclaim that it was Devolver that had beached the Lake Villa contract, no affirmative claim for damages was ever presented by Berkut in that regard. In arguing against the counterclaim at the conclusion of trial, counsel for Berkut stated that "[t]here's no claim or evidence of anticipatory repudiation or anything else. They had no reason to deny my client his rights under the contract to do that work and get paid for it. They Breached. * * * Most importantly, I think that the damages that they put before the Court [on the counterclaim] are unreliable."

{¶ 19} Berkut ultimately prevailed on the counterclaim. The trial court determined that Devolver anticipatorily breached the Lake Villa contract by refusing to allow Berkut to continue to work on the project. Although only a defense was set forth by Berkut, the trial court went a step further and awarded damages to Berkut upon the Lake Villa contract.

{¶ 20} Upon our review, we find the trial court abused its discretion in transforming Berkut's defense to Devolver's counterclaim into an affirmative claim for anticipatory breach of the Lake Villa contract. Because such a claim was not set

forth in the pleadings or tried by express or implied consent of the parties, it was not properly before the court for determination. The second assignment of error is sustained.

{¶ 21} Under its third assignment of error, Devolver claims the trial court erred by awarding judgment against it on its counterclaim against Berkut for breach of the Lake Villa contract. Devolver argues that the trial court's finding that Devolver anticipatorily breached the Lake Villa contract is against the manifest weight of the evidence. "'An anticipatory breach of contract by a promisor is a repudiation of the promisor's contractual duty before the time fixed for performance has arrived.'" *Metz v. Am. Elec. Power Co., Inc.*, 172 Ohio App.3d 800, 2007-Ohio-3520, 877 N.E.2d 316, ¶ 35 (10th Dist.), citing *McDonald v. Bedford Datsun*, 59 Ohio App.3d 38, 40, 570 N.E.2d 299 (8th Dist.1989). "The repudiation must be expressed in clear and unequivocal terms." *Id.*, citing *McDonald* at 40.

{¶ 22} "In assessing whether a verdict is against the manifest weight of the evidence, we examine the entire record, weigh the evidence and all reasonable inferences, consider the witnesses' credibility, and determine whether, in resolving conflicts in the evidence, the trier of fact clearly lost its way and created such a manifest miscarriage of justice that the verdict must be overturned and a new trial ordered." *Sonis v. Rasner*, 2015-Ohio-3028, 39 N.E.3d 871, ¶ 53 (8th Dist.), citing *State v. Martin*, 20 Ohio App.3d 172, 175, 485 N.E.2d 717 (1st Dist.1983). "'[A] reviewing court will generally uphold a trial court's judgment as long as the manifest weight of the evidence supports it — that is, as long as 'some' competent and credible

evidence supports it.'" *Patel v. Strategic Group, L.L.C.*, 2020-Ohio-4990, 161 N.E.3d 42, ¶ 20 (8th Dist.), quoting *MRI Software, L.L.C. v. W. Oaks Mall FL, L.L.C.*, 2018-Ohio-2190, 116 N.E.3d 694, ¶ 12 (8th Dist.).

{¶ 23} We have reviewed the entire record herein. The record shows that under the Lake Villa contract, Berkut agreed to provide material and labor for 19 units at $3,432.50 per unit for the total sum $65,217.50. Berkut received an initial payment of $13,043.50. However, after issues arose regarding the cabinet installation for the Bosworth project, Devolver issued a stop-work order. Devolver did not want Berkut to install the cabinets at Lake Villa. Berkut conceded that it agreed to modify the Lake Villa contract to remove the installation of the cabinets and to a credit for the installation.[3]

{¶ 24} Berkut delivered the materials for four of the units. The cabinets were delivered unassembled in boxes, and a dispute arose as to whether Berkut was required to assemble the cabinets. Berkut requested a fee of $15 per cabinet for assembly, but Devolver did not agree to the extra charge. Devolver kept the cabinets.

{¶ 25} Berkut installed countertops in one of the units. According to Berkut, it did not install the countertops for the three other units because the cabinets, which were installed by a third party, were not yet secured to the wall or leveled. Berkut left the island countertops for the three units, but it took the sink countertops back

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[3] Arguably, the parties' conduct showed a modification and waiver of contract terms in this regard. *See J. Richard Industries, LP v. Stanley Machining, Inc.*, 6th Dist. Lucas No. L-03-1024, 2004-Ohio-3804, ¶ 45.

to its warehouse to keep them secure from damage or theft. Berkut represented that it could not use those countertops for anything else because they were cut specifically to the Lake Villa project. Berkut claimed that Devolver would not allow Berkut to return. Devolver acknowledged that it terminated the Lake Villa contract. No further work was performed.[4] Other testimony and evidence were introduced.

{¶ 26} Upon our review, we find the trial court's judgment against Devolver on its counterclaim for breach of the Lake Villa contract was not against the manifest weight of the evidence. The trial court found an anticipatory breach occurred by Devolver. The record reflects Devolver's repudiation of the contract was expressed in clear and unequivocal terms. It cannot be said that the trial court clearly lost its way.

{¶ 27} Further, although Devolver claims there was a balance of $6,883.50 that was owed back to it from the initial deposit, there was competent, credible evidence to support the trial court's rejection of its claim. According to the testimony, Berkut delivered all the material, including cabinets and countertops, for four of the units, but it was not permitted or allowed to complete the installation and Devolver repudiated the contract.[5]

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[4] Berkut states it agreed to a credit for the countertop installation for Lake Villa for $900.

[5] Berkut estimated the cost of the cabinets for each unit was $1,740.00 and the cost of the countertops for each unit was $1,209.00. There also was some testimony and evidence reflecting the cost for installation was $360 per unit and the cost of the material was $3,072.50 per unit.

{¶ 28} We are not persuaded by any other argument presented. The third assignment of error is overruled.

{¶ 29} Under its fourth assignment of error, Devolver claims the trial court erred in calculating damages.

{¶ 30} First, Devolver challenges the damages awarded to Berkut for breach of the Bosworth contract. The contract total for Bosworth was $17,471.98. The record reflects that Devolver paid Berkut the first two payments for $3,494.40 and $5,241.59, and Berkut agreed to two credits for $1,764.00 and for $984.00 for cabinet installation issues that arose from the work completed on the Bosworth project. However, Devolver did not make the final payment. The trial court awarded Berkut the balance due of $5,987.99.

{¶ 31} Devolver claims the trial court failed to deduct $4,287.00 for the costs of countertops that had to be discarded and replaced due to what it claims was Berkut's improper measurement and ordering of the cabinets. However, consistent with the record, the trial court determined that Berkut did not measure all of the units because some were filled with trash, a representative from Devolver told Berkut the units were identical, the timeline was tight, and Devolver did not confirm the measurements provided by Berkut. Further, the record shows Berkut was not involved with the ordering or the installation of the countertops; the fabricator of the countertops had its own independent ability to take measurements and to verify the fit of the countertops, and Devolver approved all the counter specifications and measurements. Upon review, we find the trial court properly determined that

Devolver is not entitled to a credit for the costs of the new countertops, and its determination is supported by competent, credible evidence. Moreover, we find the trial court did not err in its calculation of damages for Devolver's breach of the Bosworth contract.

{¶ 32} Second, Devolver challenges the damages awarded to Berkut for breach of the Lake Villa contract in the amount of $4,312.00. Devolver claims the trial court failed to deduct $2,949 in labor costs that were removed from the Lake Villa contract. We have already determined that an affirmative claim by Berkut for breach, or anticipatory breach, of the Lake Villa contract was not properly before the court. It was only raised as an affirmative defense to the counterclaim. Therefore, the damages awarded to Berkut on the Lake Villa contract must be vacated, and we need not assess the trial court's calculation of damages.

{¶ 33} Accordingly, the fourth assignment of error is overruled as to the award of damages for the Bosworth contract, and moot in regard to the Lake Villa contract.

{¶ 34} In conclusion, we reverse the trial court's decision to award judgment against Devolver on a claim of anticipatory breach of the Lake Villa contract because such a claim was not properly before the court. Upon remand, the trial court shall issue an order vacating the damages awarded to Berkut on the Lake Villa contract. The decision of the trial court is otherwise affirmed.

{¶ 35} Judgment affirmed in part; reversed in part. Case remanded with instructions.

It is ordered that appellant and appellee share costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the 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.

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SEAN C. GALLAGHER, JUDGE

EILEEN T. GALLAGHER, P.J., and
EMANUELLA D. GROVES, J., CONCUR