[Cite as *RFFG, L.L.C. v. Extinct Temps, Inc.*, 2015-Ohio-1805.]

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

RFFG, LLC	C.A. No. 26998
Appellee/Cross-Appellant	
v.	APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO
EXTINCT TEMPS, INC., et al.	
Appellant/Cross-Appellee	CASE No. 2010-08-5925

DECISION AND JOURNAL ENTRY

Dated: May 13, 2015

MOORE, Judge.

{¶1} Defendant, Extinct Temps, Inc., fka Ameritemps, Inc.[1] ("Extinct Temps"), appeals from the May 31, 2013 judgment entry of the Summit County Court of Common Pleas. Plaintiff, RFFG, LLC ("RFFG") filed a cross-appeal from the same judgment entry. We reverse and remand this matter for further proceedings consistent with this decision.

I.

{¶2} This matter arises out of a disagreement over the payment of certain workers' compensation obligations following the execution of an Assets Purchase Agreement ("APA"). Extinct Temps entered into the APA with WTS Acquisition Corp. ("WTS"). The APA provided that WTS would purchase Extinct Temps' business assets for $3,750,000, with an initial payment of $750,000, and the $3,000,000 balance was to be paid in accordance with the terms of a

[1] Ameritemps, Inc. was a temporary employment agency.

promissory note. WTS assigned all of its rights in the APA to RFFG prior to the closing on January 1, 2009.

{¶3} Thereafter, the Ohio Bureau of Workers' Compensation ("the Bureau") concluded that RFFG was the successor employer to Ameritemps and assessed RFFG as owing $3,096,316.92[2] in premiums and other charges attributable to Ameritemps' participation in the workers' compensation retrospective rating plan. RFFG unsuccessfully contested this ruling in an administrative appeal before the Bureau and in mandamus actions before the Tenth District Court of Appeals and the Supreme Court of Ohio. Recently, in *State ex rel. RFFG, L.L.C. v. Ohio Bur. of Workers' Comp*., 141 Ohio St.3d 331, 2014-Ohio-5199, ¶ 1, the Supreme Court of Ohio affirmed the Tenth District Court of Appeal's decision upholding the Bureau's determination.

{¶4} While RFFG's appeal from the administrative decision was pending before the Tenth District and Supreme Court of Ohio, RFFG filed a complaint against Extinct Temps,[3] in the Summit County Court of Common Pleas. As part of its complaint, RFFG alleged that Extinct Temps breached the APA by failing to pay workers' compensation obligations in accordance with the agreement. Extinct Temps filed an answer and counterclaim against RFFG, in which it, in relevant part, alleged breach of the APA by failing to make payments pursuant to the promissory note.

{¶5} Further, Extinct Temps filed a third party complaint, naming Hartford Specialty Company, a Division of the Hartford ("Hartford") as one of the third party defendants. Hartford

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[2] As a result of being assessed this money by the Bureau, RFFG stopped making payments to Extinct Temps on the balance of the promissory note.

[3] The complaint also named as defendants three of Extinct Temps' corporate officers, but the claims against them were ultimately dismissed.

then brought claims against Ameritemps and third party defendants that it claimed were successors to Ameritemps. As part of its claims, Hartford maintained that these parties were jointly and severally liable for payment to Hartford in the amount of $121,517 based upon a settlement agreement it had reached with Ameritemps in a previous case.

{¶6} The parties agreed that the case would proceed on stipulated facts, briefs, and final arguments. After final arguments, the trial court found, in relevant part, that Extinct Temps had breached the APA, and that it was required to indemnify RFFG for workers' compensation obligations in the amount of $3,096,316.92. The trial court also awarded RFFG attorney's fees in the amount of $75,000. Further, the trial court concluded that Hartford had proven that Extinct Temps entered into an agreed judgment and failed to pay as promised. Accordingly, it determined that $121,517 plus statutory interest was owed to Hartford from Extinct Temps.[4]

{¶7} Extinct Temps appealed, raising one assignment of error for our review. RFFG cross-appealed, also raising one assignment of error for our review.

II.

Appeal

ASSIGNMENT OF ERROR

> THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT DETERMINED THAT [EXTINCT TEMPS] WAS LIABLE TO [RFFG] FOR A BREACH OF THE PARTIES' [APA] AS THIS FINDING CONFLICTS WITH BOTH THE PLAIN LANGUAGE OF THE CONTRACT AND OHIO LAW.

{¶8} In its sole assignment of error, Extinct Temps argues that, under the plain language of the APA and Ohio law, it was not liable to RFFG for breach of contract because: (1) the APA obligated Extinct Temps to be liable for charges associated with its participation in the

[4] The trial court also certified the journal entry under Civ.R. 54, finding there was no just cause for delay.

retrospective rating plan after the closing date of the APA only if it was otherwise legally liable for such payments; (2) RFFG is a successor employer of Extinct Temps, and is solely liable for workers' compensation retrospective rating obligations; and (3) contracts that indemnify workers' compensation liability are void under Ohio law.

{¶9} Initially, as this case focuses on contractual provisions relative to Extinct Temps' participation in the workers' compensation retrospective rating plan, we find it beneficial to briefly discuss this plan:

> Under [a retrospective rating plan], the employer agrees to assume a portion of the risk for claims [that] may arise in exchange for a possible reduction in its workers' compensation premium. The [plan] employer pays the [the Bureau] only a percentage of the base rate premium, but it is then obligated to reimburse the actual compensation and benefits incurred in the claim for a ten[-]year period. More specifically, the employer agrees to reimburse [the Bureau] on a dollar for dollar basis, subject to a minimum and a maximum amount for the actual cost of the claims which occurred during each experience year and for a total of ten years thereafter.

State ex rel. Litco Wood Prods., Inc. v. Ohio Bur. of Workers' Comp., 87 Ohio St.3d 42, 43 (1999).

{¶10} Here, neither Extinct Temps nor RFFG was retrospectively rated at the time that they entered into the APA. However, Extinct Temps had been previously retrospectively rated. Therefore, for the period it was retrospectively rated, "and for the ten years that followed, [Extinct Tempts] continued to be liable, within the terms of the [retrospective rating plan], for the actual claims costs attributable to" the period for which it was retrospectively rated. *See id.* Accordingly, although neither Extinct Temps nor RFFG were retrospectively rated when entering into the APA, there continued to be an outstanding liability to the Bureau based upon Extinct Temp's prior plan participation.

{¶11} Ohio Adm. Code 4123-17-51(I) states that:

> If the successor and predecessor employers are not currently retrospective-rated but either or both have open retrospective-rated policy years in the evaluation period, the successor shall be liable for any and all retrospective-rated premiums or other charges associated with the predecessor. The adjustment for combinations in the experience rating system will follow the same rules that are currently being used.

{¶12} In accordance with this rule, the Bureau imposed liability on RFFG for the retrospective rating payments attributable to Extinct Temps' participation in the plan. *State ex rel. RFFG, L.L.C. v. Ohio Bur. of Workers' Comp.*, 10th Dist. Franklin No. 11AP-647, 2013-Ohio-241, ¶ 21.

{¶13} Despite the Bureau's determination that RFFG was liable for Extinct Temps' workers' compensation obligations, RFFG maintained in its complaint that workers' compensation liability was considered by the parties in Section 2.2 of the APA. RFFG claimed that, within that section, Extinct Temps had contractually assumed liability for the workers' compensation obligations here at issue. Section 2.2 of the APA provides:

> [Extinct Temps] acknowledges that, as a result of the transaction contemplated by this Agreement, it may be deemed to have opted out of the Ohio insurance fund and thus will be obligated to make retroactive premium payments over several years into the state fund to pay for coverage through the Closing Date. [Extinct Temps] agrees to comply with Ohio Admin. Code Sec. 4123-17-51[(K)] and notify the BWC of the sale of assets so that the BWC may conduct the hearing specified in said Section 4123-17-51(K).
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> [RFFG] shall NOT assume any liability of [Extinct Temps] other than those specifically set forth in Section 2.3 of this Agreement. Without limiting the generality of the foregoing, in no event shall [RFFG] assume or incur any liability in respect of, and [Extinct Temps] shall remain bound by and liable for, and shall pay, discharge or perform when due, the following liabilities of [Extinct Temps]:
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> Any and all assessments, claims, premiums, fees or other governmental charges of any nature whatever, whether disputed or not, together with any interest, penalties, or additional amounts with respect to [Extinct Temps'] participation in the [Bureau's] "Retro Program" for the period up to and including the Closing Date.

> Any indemnity by [Extinct Temps] with respect to [Extinct Temps'] obligation to make the payments to BWC specified herein shall survive any general expiration date of claims made by [RFFG] for breaches of [Extinct Temps'] covenants or representations contained in this Agreement. This indemnity shall not extend to [RFFG] receiving, if applicable, from the BWC, [Extinct Temps'] prior experience rating with respect to the period commencing on the Closing Date.

{¶14} In its complaint, and throughout these proceedings, RFFG claimed that Section 2.2, particularly the second and third paragraphs of 2.2, *imposed liability* on Extinct Temps for *all* charges resulting from its participation in the plan, and that Extinct Temps breached the contract by failing to pay amounts assessed by the Bureau as due for charges and costs resulting from its participation in the plan.

{¶15} In response, Extinct Temps has maintained that the second and third paragraphs of Section 2.2 do not operate to impose liability on Extinct Temps for all charges associated with its participation in the plan. Instead, Extinct Temps has maintained that, based upon the plain meaning and context of these paragraphs, these paragraphs provide that Extinct would be liable under the APA for the retrospective rating plan obligations assessed after the closing of the APA *only if* it was otherwise legally liable for such charges. Because the Bureau found RFFG liable for the these obligations due to its determination that RFFG was a complete successor, Extinct Temps argued that it was not liable, under the law or under the terms of the contract, for the plan obligations assessed by the Bureau after the closing date of the contract.

{¶16} "To prove a breach of contract claim[,] a plaintiff must demonstrate by a preponderance of the evidence that: (1) a contract existed, (2) the plaintiff fulfilled [its] obligations, (3) the defendant failed to fulfill its obligations, and (4) damages resulted from this failure." *Comstock Homes, Inc. v. Smith Family Trust*, 9th Dist. Summit No. 24627, 2009-Ohio-4864 ¶ 7, quoting *Second Calvary Church of God in Christ v. Chomet*, 9th Dist. Lorain No. 07CA009186, 2008-Ohio-1463, ¶ 9.

{¶17} Further, "[t]he construction of written instruments * * * is a matter of law." *Karam v. High Hampton Dev., Inc.*, 9th Dist. Summit Nos. 21265 & 21269, 2003-Ohio-3310, ¶ 20, citing *Alexander v. Buckeye Pipe Line Co.*, 53 Ohio St.2d 241 (1978), paragraph one of the syllabus. We review questions of law de novo. *Graham v. Drydock Coal Co.*, 76 Ohio St.3d 311, 313 (1996), quoting *Nationwide Mut. Fire Ins. Co. v. Guman Bros. Farm*, 73 Ohio St.3d 107, 108 (1995). "The cardinal principle in contract interpretation is to give effect to the intent of the parties." *Transtar Elec., Inc. v. A.E.M. Elec. Servs. Corp.*, 140 Ohio St.3d 193, 2014-Ohio-3095, ¶ 9. "[W]e will look to the plain and ordinary meaning of the language used in the contract unless another meaning is clearly apparent from the contents of the agreement. 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, ¶ 37.

{¶18} Here, the parties attached significantly different meanings to the second and third paragraphs of Section 2.2, each arguing that the other was liable for obligations assessed by the Bureau after the closing date of the APA under that section.

{¶19} In its judgment entry, the trial court stated that it based its findings on the stipulations of the parties, and it adopted those stipulations. "For purposes of clarity," the trial court then "briefly summarized some of the pertinent facts upon which it based its opinion." In this portion of its journal entry, the trial court quoted the first paragraph of Section 2.2. Nowhere in its journal entry did the trial court reference or discuss the second, third, or fourth paragraphs of Section 2.2. Moreover, nowhere in its journal entry did the trial court in any way analyze the import of Section 2.2 from the perspective of explaining the basis upon which that section supported finding Extinct Temps liable for breach of contract.

{¶20} The trial court further quoted a portion of Section 9.1 of the APA, which pertains to Extinct Temps' obligations to indemnify RFFG, as follows:

> [Extinct Temps] agrees to indemnify, defend and hold [RFFG] (and [RFFG's] officers, directors, employees, successors, Affiliates and permitted assigns) harmless from and against any and all loss, Liability, obligation, claim, demand, lawsuit, action, assessment, damage (including punitive, exemplary, consequential, lost profits and business interruption), or expenses whatsoever (including interest, penalties, fines, attorneys' fees and expenses (including those incurred to enforce rights to indemnification hereunder, and consultant's fees and other costs of defense or investigation), and interest on amounts payable as a result of any of the foregoing ("Damages") which may be asserted against, imposed upon or incurred by any of them by reason of, resulting from, or in connection (directly or indirectly) with the following:
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> * * *
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> (iii) the operation of the Business prior to the Closing Date (including but not limited to Damages arising by reason of (A) goods and services provided and sold by [Extinct Temps] prior to the Closing Date; (B) acts or omissions of [Extinct Temps] and its employees occurring prior to the Closing Date, and (C) Damages arising with respect to the litigation disclosed in Schedule 4.6)

{¶21} In its conclusions of law and judgment, the trial court determined, in relevant portion, as follows:

> * * *
>
> [2] [] RFFG is entitled to indemnity under Article 9 of the APA for unpaid Workers' Compensation premiums owed by Extinct [Temps] in the amount of $3,096,316.92. *Failure by Extinct [Temps] to pay this amount is a breach of the agreement.* The court does not find that the APA indemnity sections are void or unenforceable as a violation of public policy. This case is factually different from *Lo[ ]Guidice* [] *v. Harris* [], 98 Ohio App.[] 230, [] [(5th Dist.1954)]. The APA does not purport to indemnify the seller from all Workers Compensation costs but simply to apportion the costs between the parties based on time of ownership. As the seller has reaped the benefit of the contract and admitted it willingly entered into the sale, its pleas of inequity or illegality to avoid its obligations appear suspect.
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> * * *
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> [4] *The court finds that the amounts owed to [the Ohio Bureau of Workers' Compensation] as retro payments were obligations of Extinct [Temps]*. The subsequent determination by [the Bureau] that RFFG was the successor employer

> for its purposes did not extinguish the obligation that Extinct [Temps] had to RFFG under the APA.
>
> * * *

(Emphasis added.)

{¶22} Therefore, although the trial court found that "the amounts owed to [the Bureau] as retro payments were obligations of Extinct [Temps][,]" and that Extinct Temps' failure to pay that amount was a breach of the APA, it provided no findings or explanation as to how any portion of the APA imposed liability on Extinct Temps to make such payments. The trial court provided no findings or analysis as to whether it agreed with either party's interpretation of Section 2.2, especially the second and third paragraphs of that section, or whether its conclusion was based upon some other portion of the APA. Therefore, we cannot ascertain from the journal entry the trial court's conclusions as to the basis on which it found RFFG liable for the entirety of the amount at issue.

{¶23} "This Court has recognized that, '[if] a trial court's judgment is not sufficiently detailed, a reviewing court may be left in the unfortunate position of being unable to provide meaningful review.'" *Kokoski v. Kokoski*, 9th Dist. Lorain No. 12CA010202, 2013-Ohio-3567, ¶ 11, quoting *Zemla v. Zemla*, 9th Dist. Wayne No. 11CA0010, 2012-Ohio-2829, ¶ 19. *See also Murray v. David Moore Builders, Inc.*, 9th Dist. Summit No. 23257, 2006-Ohio-6751, ¶ 8-10; *MSRK, L.L.C. v. Twinsburg*, 9th Dist. Summit No. 24949, 2012-Ohio-2608, ¶ 10. Because the trial court did not identify any portion of the APA on which it relied to determine that the APA imposed liability on Extinct Temps for the entire amount of retrospective plan payments at issue, our review would be based upon our speculation of the trial court's conclusions in this regard. Therefore, we reverse the trial court's judgment and remand the matter "so that the trial court can create an entry sufficient to permit appellate review." *See MSRK, L.L.C.* at ¶ 10.

Specifically, upon remand, the trial court should determine which, if any, portion(s) of the APA imposes liability upon Extinct Temps for the retro payments at issue and the basis for this determination.

{¶24} Accordingly, we sustain Extinct Temps' sole assignment of error.

Cross Appeal

ASSIGNMENT OF ERROR

> THE TRIAL COURT ERRED IN THE CALCULATION OF DAMAGES AWARDED TO [RFFG].

{¶25} In its sole assignment of error, RFFG argues that the trial court miscalculated its damages by failing to take into consideration the amounts already paid by RFFG to Extinct Temps for the purchase of the business. Specifically, RFFG argues that Extinct Temps owes it $3,096,316.62 for the payment of the past due workers' compensation premiums, plus $75,000 in attorney fees, to be offset by the $2,062,500 still owed to Extinct Temps by RFFG for the purchase of the business. Further, Hartford would be paid from the balance of RFFG's funds.

{¶26} Based upon our disposition of the first assignment of error, we do not reach the cross-assignment of error, as it is premature.

III.

{¶27} Extinct Temps' sole assignment of error is sustained. Due to our disposition of Extinct Temps' assignment of error, we conclude that RFFG's sole assignment of error is not yet ripe for review. The judgment of the Summit County Court of Common Pleas is reversed, and this matter is remanded for further proceedings consistent with this decision.

Judgment reversed,
and cause remanded.

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(C). 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 Appellee/Cross-Appellant.

CARLA MOORE
FOR THE COURT

CARR, P. J.
WHITMORE, J.
CONCUR.

APPEARANCES:

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