[Cite as *Webb v. Pewamo, Ltd.*, 2009-Ohio-2629.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

FAYETTE COUNTY

CHARLES W. WEBB,	:	
Plaintiff-Appellant/Cross-Appellee,	:	CASE NOS. CA2008-10-036 CA2008-12-042
	:	
- vs -	:	O P I N I O N 6/8/2009
PEWANO LTD., et al.,	:	
Defendants-Appellees/Cross-Appellants.	:	

CIVIL APPEAL FROM FAYETTE COUNTY COURT OF COMMON PLEAS
Case No. 08-CVH-00016

Kiger & Kiger, Lawyers, James A. Kiger, 132 South Main Street, Washington C.H., OH 43160, for plaintiff-appellant/cross-appellee

Fry, Waller & McCann Co., L.P.A., Barry A. Waller, 35 East Livingston Avenue, Columbus, OH 43215-5762, for defendants-appellees/cross-appellants, Pewano, Ltd. and Therll Clagg

Butler & Marshall, Jess C. Weade, 108 North Hinde Street, Washington C.H., 43160, for defendant-appellee, Harold Long, dba Harold Long Real Estate

YOUNG, J.

{¶1} Plaintiff-appellant and cross-appellee, Charles W. Webb, appeals a decision of the Fayette County Court of Common Pleas granting summary judgment in favor of defendant-appellee, Harold Long, and defendants-appellees and cross-appellants, Pewano, Ltd. and Therll Clagg.

{¶2} In 2007, Charles Webb was the owner of a 168.51 acre farm in Fayette County. Harold Long is a real estate agent. Therll Clagg is the sole owner of Pewano, Ltd., a holding company. Over the years, Long and Clagg have had several professional contacts regarding farm purchases but they never had a fiduciary relationship. In September 2007, Long and Webb entered into an exclusive listing agreement for Webb's farm. Long then contacted Clagg to see if he was interested in buying Webb's farm.

{¶3} On September 19, 2007, Long received an offer from Pewano, Ltd., through Clagg, to purchase the farm for $600,000. Accompanying the offer was a $25,000 check as earnest money. Webb rejected the offer and countered with a sales price of $625,000 which was accepted by Clagg on September 27, 2007. Under the terms of the contract, the $25,000 earnest money was to be held in escrow by Long and delivered to Webb at the time of the closing, on or before October 1, 2007. Further, paragraph eight of the contract stated: "This contract subject to buyers inspection and approval of the house." [sic]

{¶4} On September 29, 2007, Clagg inspected the house and the rest of the property, accompanied by Webb and an associate of Long. Clagg and Webb discussed the condition of the house, property management issues, and the rental situation of the farm; Clagg was introduced to the current farm tenant. During the inspection, Clagg never told Webb he approved the house. On the morning of October 1, 2007, Clagg left a message on Webb's answering machine indicating he was not buying the farm because of the condition of the house. Webb and Long subsequently both received a letter from Clagg dated October 2, 2007. The letters listed the condition of the house and the lack of road frontage as to why Clagg decided not to buy the farm. Long never deposited the earnest money check into a bank account but merely held on to it. In his deposition, Clagg testified he was 90 percent certain the check was returned to him. By contrast, Long testified the check was still in his

possession.

{¶5} Webb filed a complaint against Long, Clagg, and Pewano, Ltd. alleging breach of contract. Long and Clagg both moved for summary judgment.[1] On September 12, 2008, the trial court granted the motions for summary judgment.

{¶6} The trial court found that (1) under the plain and clear language of the contract, Clagg's approval of the house was a condition precedent to the performance of the contract; (2) the contract did not limit Clagg in any way in his decision to approve or reject the house, and his rejection of the house was not arbitrary; (3) "Clagg's cancellation by phone on October 1 did not violate any term, as the contract was silent regarding notification to Webb, and the rejection was made prior to closing;" and (4) Clagg did not breach the contract when he rejected the house and declined to buy the farm.

{¶7} With regard to Long, the trial court found that "[t]he liquidated damage provision requires a default by Clagg. The Court finds any claim by Webb against Long as to the handling of the deposit could only arise if Clagg had breached the contract. Webb's claim against Long for breach of a fiduciary relationship is not supported by the evidence."

{¶8} Webb filed a notice of appeal on October 6, 2008. Four days later, Clagg timely filed a motion for sanctions against Webb under Civ.R. 11 and for attorney fees under R.C. 2323.51. On October 31, 2008, finding it had no jurisdiction to entertain the motion, the trial court dismissed the motion.

{¶9} Webb now appeals, raising two assignments of error. Clagg cross-appeals, raising one assignment of error.

{¶10} Webb's Assignment of Error No. 1:

{¶11} "THE TRIAL COURT ERRED TO THE PREJUDICE OF APPELLANT WEBB

1. For brevity purposes, Pewano, Ltd. and Clagg will be referred to as Clagg for the remainder of the opinion.

BY GRANTING SUMMARY JUDGMENT IN FAVOR OF APPELLEE BY HOLDING THAT THE APPELLEE PEWANO / CLAGG HAD AN ABSOLUTE RIGHT TO REJECT THE CONTRACT AT ANY TIME BASED UPON HIS INSPECTION AND APPROVAL OF THE RESIDENCE OF THE FARM AND THAT SUCH WAS A CONDITION PRECEDENT TO THE CLOSING OF THE TRANSACTION."

{¶12} Webb challenges the trial court's grant of summary judgment to Clagg on the following grounds. Webb argues that by his actions during the inspection of the house, Clagg waived the condition precedent in paragraph eight of the contract. Webb further argues that a message left on an answering machine on the day of the closing is insufficient notice of a buyer's intention not to proceed. Webb submits that a buyer must reasonably and timely give notice of revocation in writing before the closing.

{¶13} This court reviews a trial court's decision on summary judgment de novo. *White v. DePuy, Inc.* (1999), 129 Ohio App.3d 472, 477. A court may grant summary judgment only when: (1) there is no genuine issue as to any material fact; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence submitted that reasonable minds can come to but one conclusion and that conclusion is adverse to the nonmoving party, who is entitled to have the evidence most strongly in his favor. Civ.R. 56(C); *Welco Industries, Inc. v. Applied Cos.*, 67 Ohio St.3d 344, 346, 1993-Ohio-191.

{¶14} "The interpretation of a written agreement is a matter of law for the court. *** The parties' intent is presumed to reside solely within the language employed in the agreement. If a contract is clear and unambiguous, the court looks only to the plain language of the agreement to determine the parties' rights and obligations; the court only gives effect to the agreement's express terms." *Bd. of Trustees of Union Twp., Ohio v. Planned Dev. Co. of Ohio* (Dec. 11, 2000), Butler App. No. CA2000-06-109, at 6-7. (Internal citations omitted.)

{¶15} A condition precedent is an act or event that must occur before the agreement of the parties become operative. *Johnston v. Cochran*, Franklin App. No. 06AP-1065, 2007-Ohio-4408, ¶12. If a condition precedent is not fulfilled, the parties are excused from performing under the contract. Id. A condition precedent may be waived by the party for whose benefit it existed. *Cornett v. Fryman* (Jan. 27, 1992), Warren App. No. CA91-04-031, at 5. A waiver is an intentional relinquishment of a known right; it may be made by express words or by conduct. Id.; *White Co. v. Canton Transp. Co.* (1936), 131 Ohio St. 190. To establish a waiver, the party alleging it "must prove a clear, unequivocal, decisive act of the party against whom the waiver is asserted, showing such a purpose or acts amounting to an estoppel on his part." *Cornett* at 5.

{¶16} The plain language of the parties' contract is clear and unambiguous. Under paragraph eight of the contract, Clagg's approval of the house was a condition precedent to the performance of the contract. However, Webb asserts that Clagg waived the condition precedent because during the inspection of the house and property, Clagg and Webb discussed the condition of the house, the rental situation, and property management issues; Clagg asked Webb to tear down an old building for $500 (Clagg denied making this request); Clagg met with the farm tenant; and Clagg did not disapprove the house.

{¶17} We find that Webb failed to prove a clear, unequivocal, decisive act by Clagg amounting to a waiver of the condition precedent. Webb testified that based on Clagg's foregoing conduct, Webb *believed* or *assumed* Clagg had approved the house. Webb admitted that Clagg never approved the house during the inspection and never told Webb he was satisfied with the house. The parties never discussed the closing during the inspection. By its express terms, the contract did not require Clagg to approve or disapprove the house at the time of the inspection; nor did it limit in any way his right to approve or disapprove the

house. Further, the contract contained no provisions regarding the manner in which Clagg was to approve or disapprove the house, or notify Webb of his approval or disapproval of the house. "Mere silence will not amount to waiver where one is not bound to speak." *White Co.*, 131 Ohio St. at 198.

{¶18} Regarding the manner in which Clagg notified Webb of his intention not to buy the farm, we find no breach of contract. By its express terms, the contract did not require Clagg to notify Webb of his disapproval of the house several days before closing, or in writing. Further, the contract contained no provision as to how Clagg was to notify Webb of his disapproval of the house or his intention not to buy the farm. In fact, absent from the contract was a requirement that Clagg notify Webb of his approval or disapproval of the house or his intention not to buy the farm. Clagg notified Webb of his intention not to buy the farm and the reasons why before the closing.

{¶19} Based on the foregoing, the condition precedent in paragraph eight of the contract was not fulfilled, nor was it waived. The trial court, therefore, did not err in granting summary judgment in favor of Clagg. Webb's first assignment of error is overruled.

{¶20} Webb's Assignment of Error No. 2:

{¶21} "THE TRIAL COURT ERRED TO THE PREJUDICE OF APPELLANT BY GRANTING SUMMARY JUDGMENT TO APPELLEE HAROLD LONG BY HOLDING THAT APPELLANT'S CLAIM AGAINST APPELLEE LONG AS TO THE HANDLING OF THE DEPOSIT COULD ARISE ONLY IF CLAGG HAD BREACHED THE CONTRACT; AND THAT LONG HAD NO FIDUCIARY DUTY TO APPELLANT AS PEWANO HAD NOT BREACHED ITS CONT[R]ACT."

{¶22} The trial court granted summary judgment to Long on the grounds that (1) any claim by Webb against Long as to the handling of the $25,000 check could only arise if Clagg

had breached the contract, which he had not, and (2) Webb's claim against Long for breach of fiduciary duty was not supported by the evidence. On appeal, Webb argues that in light of Long's failure to deposit the $25,000 check and to have a deed prepared in violation of the contract, Long breached his fiduciary duty and thus, the trial court erred in granting summary judgment to Long. We note that Webb never raised below the claim that Long breached his fiduciary duty by not having the deed prepared; we decline to address it for the first time on appeal.[2]

{¶23} With regard to the $25,000 check, the contract required Clagg to "pay $25,000 as earnest money to be held in escrow by Harold Long Real Estate as escrow agent, for delivery to seller at time of closing[.]" It is undisputed that Long received the check from Clagg on September 19, 2007 and that he never deposited it into a bank account but merely held on to it. Clagg testified he was 90 percent certain the check was returned to him but would not be surprised if in fact, it had not been returned to him. Long testified he was still in possession of the check and that he had not done anything with it.

{¶24} The contract required Long to hold the check in escrow. It did not require him to deposit the check into an account or with another party. The Ohio Supreme Court has defined escrow as "[a] written instrument which by its terms imports a legal obligation, and which is deposited by the grantor, promissor, obligor, or his agent, with a stranger or a third party, to be kept by the depositary until the performance of a condition or the happening of a certain event, and then to be delivered over to the grantee, promisee or obligee." *Squire v. Branciforti* (1936), 131 Ohio St. 344, 353. See, also, Black's Law Dictionary (8th Ed.2004) 584 (defining escrow as "a legal document or property delivered by a promisor to a third party to be held by the third party for a given amount of time or until the occurrence of a condition,

2. In its decision, the trial court twice briefly referred to the deed while stating the facts. However, the trial court

at which time the third party is to hand over the document or property to the promisee).

{¶25} In light of the foregoing definitions, Long held the check in escrow as required under the contract. The trial court, therefore, did not err in granting summary judgment to Long. Webb's second assignment of error is overruled.

{¶26} Clagg's Assignment of Error No. 1:

{¶27} "THE TRIAL COURT ERRED IN DISMISSING APPELLANT PEWA[N]O AND APPELLANT CLAGG'S MOTION FOR SANCTIONS."

{¶28} Following Webb's notice of appeal, Clagg timely filed a motion for sanctions against Webb under Civ.R. 11 and for attorney fees under R.C. 2323.51. The trial court dismissed the motion on the ground that once the notice of appeal was filed, it was divested of jurisdiction "as any action would be inconsistent with the appellate courts [sic] jurisdiction to reverse the judgment." On appeal, Clagg argues that the trial court erred by dismissing the motion rather than staying it pending the appeal. For the following reasons, we reverse the trial court's dismissal of Clagg's motion.

{¶29} An appellate court acquires jurisdiction in a case as soon as a timely notice of appeal is filed. *Columbus v. Adams* (1984), 10 Ohio St.3d 57, 60. The general rule is that when a notice of appeal is filed, the trial court is divested of jurisdiction except to take action in aid of the appeal. However, the trial court does retain jurisdiction over issues not inconsistent with the appellate court's power to review, affirm, modify, or reverse the appealed judgment, such as a collateral issue like contempt. *State ex rel. Special Prosecutors v. Judges* (1978), 55 Ohio St.2d 94, 97.

{¶30} Ohio courts have found that motions for Civ.R. 11 sanctions and for attorney fees are collateral to the adjudication of the parties' claims and are therefore unaffected by

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never addressed or discussed the deed when granting summary judgment to Long and Clagg.

the pendency of an appeal. In *Harris v. Southwest Gen. Hosp.* (1992), 84 Ohio App.3d 77, likening motions for attorney fees to a motion in aid of execution of judgment, the Eighth Appellate District held that motions for attorney fees "are merely post-judgment motions which do not disturb the original judgment. *** [They] cannot change the original judgment; they are ancillary and incidental to the judgment. *** Therefore, the trial court's jurisdiction to grant Southwest's application for attorney fees and request for sanctions was unaffected by the pendency of plaintiff's appeal on the motions *** for summary judgment." Id. at 85. See, also, *MSC Walbridge Coatings, Inc. v. Harmeyer*, Wood App. No. WD-05-075, 2006-Ohio-3181.

{¶31} In *Newman v. Al Castrucci Ford Sales, Inc.* (1988), 54 Ohio App.3d 166, the First Appellate District held that a motion for Civ.R. 11 sanctions "is similar to a contempt proceeding in that the trial court's decision whether to grant defendant's motion for Civ.R. 11 sanctions is collateral to the appeal of the summary judgment. Whatever the trial court decided on sanctions, this court's power to review and decide the appeal of summary judgment would remain unaffected. We therefore conclude that the trial court retained jurisdiction to decide the motion for Civ.R. 11 sanctions." Id. at 169. The appellate court also noted that had it reversed the summary judgment, "there would be a possible basis for the reversal of the imposition of sanctions, but our power to review the summary judgment still would not be affected." Id., fn. 1. See, also, *State ex rel. J. Richard Gaier Co., L.P.A. v. Kessler* (1994), 97 Ohio App.3d 782.

{¶32} In light of the foregoing, we find that the trial court's jurisdiction to rule on Clagg's motion for attorney fees and Civ.R. 11 sanctions was unaffected by the pendency of Webb's appeal of the trial court's grant of summary judgment to Clagg. The trial court, therefore, erred in denying Clagg's motion on the ground it did not have jurisdiction. Clagg's

cross-assignment of error is sustained.

{¶33} The trial court's September 12, 2008 judgment granting summary judgment in favor of Long and Clagg is affirmed. The trial court's October 31, 2008 judgment dismissing Clagg's motion for Civ.R. 11 sanctions and for attorney fees is reversed.

BRESSLER, P.J., and POWELL, J., concur.

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