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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-001874-MR

DIMENSION SERVICE CORPORATION — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE PAMELA R. GOODWINE, JUDGE
ACTION NO. 10-CI-06392

DON JACOBS IMPORTS, INC.;
DON JACOBS MOTOR CARS, INC.;
AND DON JACOBS USED CAR
CENTER, LLC — APPELLEES

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: LAMBERT, TAYLOR, AND VANMETER, JUDGES.

LAMBERT, JUDGE: This appeal addresses the interpretation and application of Profit Share Agreements between Dimension Service Corporation (hereinafter "Dimension") and Don Jacobs Imports, Inc., and Don Jacobs Motor Cars, Inc., (hereinafter, collectively, "Don Jacobs"). Dimension has appealed from two orders

of the Fayette Circuit Court: The August 29, 2012, opinion and order granting Don Jacobs' motion for partial summary judgment and denying Dimension's motion for summary judgment related to its breach of contract claim and the October 1, 2012, final order and judgment awarding compensatory damages to Don Jacobs on the breach of contract claim, which made the August order final and appealable. The issues raised on appeal are whether the Profit Share Agreements in this case are enforceable contracts supported by consideration and whether the Profit Share Agreements contain a condition precedent. We have closely considered the record and the parties' arguments in the briefs. Holding that the circuit court erred in finding that the Profit Share Agreements did not contain a condition precedent, we reverse the judgments on appeal.

On November 5, 2010, Don Jacobs filed a complaint against Dimension in Fayette Circuit Court in order to recover money that it claimed Dimension owed to it under Profit Share Agreements between Don Jacobs and Dimension.[1] Dimension is an Ohio corporation that is qualified to do business in Kentucky. In the complaint, Don Jacobs alleged that two of its entities (Don Jacobs Imports and Don Jacobs Motor Cars) entered into Profit Share Agreements with Dimension on June 4, 2002, and a third entity (Don Jacobs Used Car Center) entered into a profit share agreement with another company on March 1, 2004. Pursuant to the agreements, Don Jacobs alleged that it had the right to obtain profit share distributions based upon the average number of vehicle service contracts, or

[1] Don Jacobs Used Car Center, LLC, was also named as a plaintiff in the complaint.

extended warranties, it sold to new and used car purchasers. Don Jacobs further alleged that Dimension charged a third party, Westchester Fire Insurance Company (hereinafter "Westchester"), with the authority to calculate the profit share amount Dimension had to pay. Don Jacobs alleged claims for breach of contract, unjust enrichment, and for an accounting, and it requested damages in the amount of $43,321.92, which was the amount Don Jacobs contended was due under the Profit Share Agreements. Dimension filed an answer disputing Don Jacobs' claims.

Discovery established that in 2002, Don Jacobs entered into Seller Agreements with Dimension, which provided Don Jacobs with the right to sell, and required Don Jacobs to offer, service contracts to every customer who purchased a qualifying vehicle. The Seller Agreements provided that the funds received from the service contracts were to be split between Don Jacobs and Dimension pursuant to a Seller Cost Guide. During the course of Don Jacobs' relationship with Dimension, it received $448,621.51 as its portion of the payments, less any refunds for canceled contracts. The Seller Agreement provided that "[t]his agreement constitutes the entire agreement between the parties with respect to the matters contained herein, and no prior agreement or understanding to any such matter shall be effective for any purpose."

At the same time Don Jacobs and Dimension entered into the Seller Agreements, they also entered into Profit Share Agreements which addressed what to do with unused funds that had been set aside and placed into a trust to pay claims on the service contracts once the warranty periods had expired. The Profit

Share Agreements provided that Dimension "manages, administers and provides vehicle service contracts ('Contracts') on new and used motor vehicles ...;" that Don Jacobs "desires to offer such Contracts, which are insured by Westchester Fire Insurance Company ('Insurer'), to owners and purchasers of motor vehicles;" that "a portion of the cost for each Contract (the 'Premiums'), is set aside to pay claims on the Contracts;" that Dimension "is entitled to receive a certain portion of the profits and net investment income, if any, from said Premiums ('the Profit Share Fund');" and that Dimension "desires to provide for [Don Jacobs'] participation in the Profit Share Fund on the terms and conditions hereinafter set forth[.]" The Profit Share Agreements provided that Westchester was to calculate the profit share as described in the agreements and that the profit share distributions were to be based upon the average number of contracts Don Jacobs sold each month, excluding canceled contracts. The agreement also provided that it was to be governed by Ohio law. Finally, it recited:

> This is the entire Agreement between the parties with respect to the subject matter. No amendment to this agreement shall be valid or binding on either party unless in writing and signed by all parties. This Agreement shall continue in full force and effect until all contract obligations to contract holders and policy obligations to the insured have expired.

Dimension paid Don Jacobs on two occasions pursuant to the Profit Share Agreements. On July 7, 2006, it paid Don Jacobs $24,632.46, and on April 3, 2007, it paid Don Jacobs $48,521.12. On both occasions, Westchester had calculated and released profits from the service contracts. Westchester stopped

calculating or releasing any profits to Dimension in 2008, and Dimension initiated an arbitration proceeding against Westchester. Dimension did not make any further profit share distributions after the 2007 distribution.

In 2009, Don Jacobs began contacting Dimension about the profit share it believed it was owed. By e-mail dated August 23, 2010, Dimension provided Don Jacobs with a two-page "Profit Share Report" showing that the "indicated Profit Distribution" was $43,321.92 based upon Dimension's calculations. The document stated that "[t]he above amount is contingent on the approval of [Westchester]." In the e-mail, Dimension employee Donna Clayton stated:

> As I have previously explained, we are involved in Arbitration with Westchester on the profit share business. As such no funds can be disbursed until the issues are resolved. Arbitration is currently scheduled for January 2011 but could change between now and then.

On March 7, 2012, Don Jacobs filed a motion for partial summary judgment on their claims, arguing that there were no material facts in dispute and that it was entitled to a judgment as a matter of law. It argued that it was due $43,321.92 under the terms of the Profit Share Agreements. Under Ohio law, Don Jacobs argued that it had entered into contracts, that it had complied with its obligations under the contracts by offering the service contracts to its customers, and that Dimension had not paid it under the agreements. It also argued that payment of the profit share funds by Westchester to Dimension was not a condition precedent to Dimension's obligation to pay Don Jacobs.

The following month, Dimension filed a motion for summary judgment on all of Don Jacobs' claims against it. Dimension contended that the agreements were not supported by consideration, and noted that it was not a party to the agreement with Don Jacobs Used Car Center, meaning that it was entitled to summary judgment against that particular entity.[2] Furthermore, it argued that there were no profits to share because Westchester was no longer releasing any profits from the profit share fund to Dimension. While it had voluntarily shared its profits with Don Jacobs on two occasions, after 2007, Westchester refused to release profits to Dimension, resulting in Dimension initiating an arbitration proceeding against Westchester. The arbitration was still pending at the time the motion for summary judgment was filed. In other words, the condition precedent which would trigger payment had not been met. Dimension also argued that it was entitled to summary judgment on the unjust enrichment and request for accounting claims.

In its reply, Don Jacobs did not dispute Dimension's motion with respect to its arguments related to Don Jacobs Used Car Center or with respect to the claims for unjust enrichment or for an accounting, but otherwise opposed the arguments Dimension made in its motion.

The court held a hearing on the motions for summary judgment on May 22, 2012. At the hearing, the circuit court set forth its understanding of the facts, specifically noting the e-mail response by Dimension stating that it owed in

[2] Dimension was not a party to the agreement entered into by Don Jacobs Used Car Center. Rather, Premier Dealer Services, Inc. was listed as the party to the agreement.

excess of $43,000.00, that Dimension had paid profit share to Don Jacobs on two occasions, and that Don Jacobs could have stopped offering the service contracts at any point but did not. Dimension argued that the Profit Share Agreements lacked consideration and that it could not be required to share profits that it had not yet received. Dimension also stated that it never stated the money was owed, but merely shared its own calculation and its view on what the amount of the profit share might be. Dimension reiterated that the Profit Share Agreements stated that the profit was to be calculated by Westchester, which was not done past 2007. Dimension also argued that no consideration supported the Profit Share Agreements, that the Profit Share Agreements were gratuities, and that the Profit Share Agreement and Seller Agreements should not be read together, as Don Jacobs contended. Even if the Profit Share Agreements were enforceable contracts, Dimension did not have an obligation to pay until the profits were received from Westchester. Don Jacobs argued that because Dimension drafted the contracts, it had to live with the risk and pay the amount it calculated. The court rejected Dimension's argument that the Profit Share Agreements were not supported by consideration, but instead held that the agreements were binding. The question remained whether there was a profit and whether Dimension was bound by its estimate of the profit due or whether payment by Westchester controlled. The court took the matter under submission.

On August 29, 2012, the circuit court entered an interlocutory opinion and order ruling on the breach of contract arguments, finding that the Profit Share

Agreements were enforceable contracts, that Dimension had breached the contracts, and that Don Jacobs was entitled to damages in the amount of $43,321.92. The court dismissed Don Jacobs' claim for an accounting, but reserved ruling on the unjust enrichment claim, noting that it was aware that Dimension and Westchester were in arbitration and that it had not been presented with any evidence to determine whether Dimension had been unjustly enriched.

In September 2012, Don Jacobs moved for a voluntary dismissal of its unjust enrichment claim, stating that it was no longer pursuing this claim, and moved to dismiss all claims brought by Don Jacobs Used Car Center because that entity's claims arose out of a separate agreement. Don Jacobs also requested the entry of a final judgment on the remaining breach of contract claim, as ruled upon by the court in the summary judgment opinion and order. The same day, Dimension requested a status conference to discuss the fact that arbitration with Westchester had been settled and whether any further briefing was necessary. Don Jacobs disputed this motion, noting that it had moved to voluntarily dismiss the unjust enrichment claim. The court held another hearing on September 28, 2012, where the parties argued the meaning of the initial order and Don Jacobs stated that all of the remaining issues had been resolved based upon its voluntary dismissal of the unjust enrichment claim.

On October 1, 2012, the circuit court entered a final judgment and order granting Don Jacobs' motion, awarding Don Jacobs compensatory damages,

pre- and post-judgment interest and costs, and dismissing the unjust enrichment claim with prejudice. This appeal now follows.

On appeal, Dimension presents two arguments: 1) whether the circuit court erroneously held that the Profit Share Agreements did not contain any conditions precedent; and 2) whether the Profit Share Agreements were enforceable contracts supported by consideration. Pursuant to the terms of the Profit Share Agreements, we shall consider these arguments under Ohio law.

Our standard of review from a summary judgment is well-settled in the Commonwealth. "The standard of review on appeal when a trial court grants a motion for summary judgment is 'whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law.'" *Lewis v. B & R Corp.*, 56 S.W.3d 432, 436 (Ky. App. 2001), citing *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996); *Palmer v. International Ass'n of Machinists & Aerospace Workers*, 882 S.W.2d 117, 120 (Ky. 1994); Kentucky Rules of Civil Procedure (CR) 56.03. "Because summary judgment involves only legal questions and the existence of any disputed material issues of fact, an appellate court need not defer to the trial court's decision and will review the issue *de novo*." *Lewis*, 56 S.W.3d at 436, citing *Scifres*, 916 S.W.2d at 781; *Estate of Wheeler v. Veal Realtors and Auctioneers, Inc.*, 997 S.W.2d 497, 498 (Ky. App. 1999); *Morton v. Bank of the Bluegrass and Trust Co.*, 18 S.W.3d 353, 358 (Ky. App. 1999). Because there are no disputed issues of material fact, we shall confine our review to whether the

circuit court's decision was correct as a matter of law. Accordingly, our review is *de novo*.

The first issue we shall address is whether the Profit Share Agreements are enforceable contracts supported by consideration. At the oral argument on the summary judgment motions, the court indicated that it did not agree with Dimension's argument that the Profit Share Agreements lacked consideration. In the portion of its opinion and order ruling on this question, the court stated as follows:

> Well-established rules of contract construction prohibit this Court from construing payments to DJ Entities under the profit share agreements as unenforceable "illusory promises." The Agreements require that Dimension make profit share payments to the DJ Entities: Paragraph 2 of the Agreements acknowledges when earnings should be distributed; paragraphs 3 through 6 of the Agreements recognize how earnings are calculated; and, paragraph 5 of the Agreements addresses the "[percentages] of profit share fund due." Nevertheless, Dimension argues it has discretion about whether to pay under this Agreement – and thus they contain unenforceable "illusory promises." This argument goes against the weight of Ohio law.
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> Under Ohio law, a promise is illusory "when by its terms the promisor retains an unlimited right to determine the nature and extent of his performance; the unlimited right, in effect destroys his promise.["] *Domestic Linen & Supply Co. v. Kenwood Dealer Grp., Inc.*, 672 N.E.2d 184, 187 (Ohio Ct. App. 1996). The fundamental rules of contract construction under Ohio law do not support Dimension's claim that its obligation to share profits under the Agreements is simply unenforceable and thus illusory.

It is well-established in Ohio that "if the language of a contract…is susceptible to two constructions, one of which will render it valid and give effect to the obligations of the parties and the other will render it invalid and ineffectual, that construction which will render the contract valid must be adopted." *State ex rel. Gordon v. Taylor*, 79 N.E.2d 127, 129 (Ohio 1948). Thus, Dimension's position that it was never bound to pay the DJ Entities under the Profit Share Agreements is untenable. The Court must construe the Agreements in favor of the DJ Entities to avoid creating an illusory promise.

Furthermore, and perhaps most important to the Court, is the parties' course of performance, which demonstrates that they have construed the Agreements to require mandatory profit share distributions to the DJ Entities. Dimension made two payments to the DJ Entities under the Agreements. The profit share earnings were distributed when Don Jacobs' accounts earned out. Only after several years of operation under the Agreements has Dimension asserted that the Agreements should now be construed differently.

Ohio law provides that "the practical construction by the parties may be considered by the court as an aid to its construction when…a dispute has arisen between the parties after a period of operation under the contract." *City of St. Marys v. Auglaize Cty. Bd. of Comm'rs*, 875 N.E.2d 561, 568 (Ohio 2007). In the case before the Court, the parties operated under the Agreement for eight years, with Dimension sending profit share payments to the DJ Entities when the Vehicle Service Contracts "earned out." Dimension conceded that during these eight years, the parties construed the Agreements to allow the number of contracts to be bundled for goodwill purposes. Thus, there is only one practical construction and that is that Dimension is obligated to pay the DJ Entities its "earned out" share of the profits under the Agreements.

Under Ohio law, breach of contract is established when "a party demonstrates the existence of a binding contract or agreement; the nonbreaching party performed its contractual obligations; the other party failed to fulfill its contractual obligations without legal excuse; and the nonbreaching party suffered damages as a result of the breach." *Wauseon Plaza Ltd. Partnership v. Wauseon Hardware Co.*, 2004-Ohio-1661, 156 Ohio App.3d 575, 582, 807 N.E.2d 953, 957 (Ohio Ct. App. 2004), citing *Garofalo v. Chicago Title Ins. Co.*, 104 Ohio App.3d 95, 108, 661 N.E.2d 218 (Ohio Ct. App. 1995) (internal quotations omitted).

> A court must interpret a contract so as to carry out the intent of the parties. *Foster Wheeler Enviresponse, Inc. v. Franklin Cty. Convention Facilities Auth.* (1997), 78 Ohio St.3d 353, 361, 678 N.E.2d 519. The intent of the parties to a contract is presumed to reside in the language they chose to employ in the agreement. *Shifrin v. Forest City Ent., Inc.* (1992), 64 Ohio St.3d 635, 638, 597 N.E.2d 499.
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> Courts have an obligation to give plain language its ordinary meaning and to refrain from revising the parties' contract. *Alexander v. Buckeye Pipe Line Co.* (1978), 53 Ohio St.2d 241, 246, 7 O.O.3d 403, 374 N.E.2d 146, and paragraph two of the syllabus. Accordingly, interpretation of clear and unambiguous contract terms is a matter of law, and our standard of review is de novo. *Nationwide Mut. Fire Ins. Co. v. Guman Bros. Farm* (1995), 73 Ohio St.3d 107, 108, 652 N.E.2d 684.

Wauseon Plaza, 156 Ohio App. 3d at 582, 807 N.E.2d at 957-58.

Dimension contends that there was no consideration to support a finding that the Profit Share Agreements constituted enforceable contracts, but rather were gratuitous promises. We disagree. Pursuant to Ohio law:

> A contract consists of an offer, an acceptance, and consideration. Without consideration, there can be no contract. Under Ohio law, consideration consists of either a benefit to the promisor or a detriment to the promisee. To constitute consideration, the benefit or detriment must be "bargained for." Something is bargained for if it is sought by the promisor in exchange for his promise and is given by the promisee in exchange for that promise. The benefit or detriment does not need to be great. In fact, a benefit need not even be actual, as in the nature of a profit, or be as economically valuable as whatever the promisor promises in exchange for the benefit; it need only be something regarded by the promisor as beneficial enough to induce his promise. Generally, therefore, a court will not inquire into the adequacy of consideration once it is found to exist.
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> Whether there is consideration at all, however, is a proper question for a court. Gratuitous promises are not enforceable as contracts, because there is no consideration. A written gratuitous promise, even if it evidences an intent by the promisor to be bound, is not a contract. Likewise, conditional gratuitous promises, which require the promisee to do something before the promised act or omission will take place, are not enforceable as contracts. While it is true, therefore, that courts generally do not inquire into the adequacy of consideration once it is found to exist, it must be determined in a contract case whether any "consideration" was really bargained for. If it was not bargained for, it could not support a contract.

Carlisle v. T & R Excavating, Inc., 123 Ohio App.3d 277, 283-84, 704 N.E.2d 39, 43 (Ohio Ct. App. 1997) (internal citations omitted).

Our review of the Profit Share Agreements does not uncover any bargained-for benefit to Dimension or any bargained-for detriment to Don Jacobs. The Profit Share Agreements recite that Dimension is "entitled to receive a certain portion of profits and net investment income, if any," from the premiums paid for each

service contract (the profit share fund) and that Dimension "desires" to permit Don Jacobs to participate in the profit share fund under specific terms and conditions, tied to the average number of service contracts sold by Don Jacobs each month. Rather, the Profit Share Agreements merely offered a bonus for reaching specific goals in selling the service contracts, which Don Jacobs was contractually obligated to do in the Seller Agreements. The Seller Agreements, entered into the same day, set forth the responsibilities of both Dimension and Don Jacobs, and required Don Jacobs to offer service contracts to every retail customer who purchased a qualifying vehicle and to pay Dimension an amount set out in the Seller Cost Guide in effect at the time of the sale. Furthermore, both the Seller Agreements and the Profit Share Agreements contained integration clauses stating that each agreement represented the entire agreement between the parties. But this does not end our analysis on the issue.

There is no dispute that the Seller Agreements were enforceable contracts, supported by consideration, because Don Jacobs was obligated to offer the service contracts to its customers. Don Jacobs contends that because the Seller Agreements and the Profit Share Agreements were entered into on the same day and in the same transaction, the documents should be construed together and consideration for the Seller Agreements acted as consideration for the Profit Share Agreements as well. We agree.

Dimension argues that under Ohio law, "[i]t is elementary that neither the promise to do a thing, nor the actual doing of it will constitute a sufficient

consideration to support a contract if it is merely a thing which the party is already bound to do, either by law or a subsisting contract with the other party. 11 Ohio Jurisprudence 2d 320, Contracts, Section 82." *Rhoades v. Rhoades*, 40 Ohio App.2d 559, 562, 321 N.E.2d 242, 245 (Ohio Ct. App. 1974). *See also Reedy v. Cincinnati Bengals, Inc.*, 143 Ohio App.3d 516, 525, 758 N.E.2d 678, 686 (Ohio Ct. App. 2001), *cause dismissed*, 92 Ohio St. 3d 1436, 750 N.E.2d 169 (2001). Here, Dimension points out that Don Jacobs was already bound to offer a service contract to each customer purchasing a qualifying vehicle pursuant to the terms of the Seller Agreements.

Dimension also argues that the doctrine of integration does not apply to permit the Seller Agreements and Profit Share Agreements to be read together, citing *Rock of Ages Memorial, Inc. v. Braido*, No. 00 BA 50, 2002 WL 234666 *3 (Ohio Ct. App. Feb. 8, 2002), *cause dismissed*, 2002-Ohio-2231, 95 Ohio St. 3d 1447, 767 N.E.2d 734 (2002) (internal citations omitted):

> Ohio has long held a court may construe multiple documents together if they concern the same transaction through the doctrine of integration. However, if the terms of a contract are clear, a court cannot resort to the rules of construction. "The doctrine of integration is meant to supply missing meaning in order to effectuate the full intent of the parties."

In addition, Dimension argues that rules of construction should not be used in the absence of any ambiguity:

> Rules of construction are aids in ascertaining the intent of the parties when the language used is ambiguous. They should never be invoked if the language is clear. If the

> meaning is apparent, the terms of the agreement are to be applied, not interpreted. 17 American Jurisprudence 2d 627, 646, Contracts, Sections 241, 253; 51 C.J.S. Landlord and Tenant 232, p. 860; 11 Ohio Jurisprudence 2d 378, Contracts, Section 133.

Carroll Weir Funeral Home, Inc. v. Miller, In re Appropriation of Easement for Highway Purposes, 2 Ohio St.2d 189, 192, 207 N.E.2d 747, 749 (1965). Dimension contends that Don Jacobs did not point to any language in the Profit Share Agreements that was ambiguous, which would permit any rules of construction to be employed, and contends that we must give effect to the plain meaning of the language used in the Profit Share Agreements without reading the agreements together.

However, we have also considered the case law cited by Don Jacobs that provides that agreements or writings entered into in the same transaction should be construed together, even if each document contains an integration clause and no ambiguities exist.

> It is a well-established principle of contract interpretation that:
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> > In construing any written instrument, the primary and paramount objective is to ascertain the intent of the parties. The general rule is that contracts should be construed so as to give effect to the intention of the parties. Where the parties, following negotiations, make mutual promises which thereafter are integrated into an unambiguous written contract, duly signed by them, courts will give effect to the parties' expressed intentions. Intentions not expressed in the writing are deemed to have

> no existence and may not be shown by parol evidence.
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> Thus, "[a] written contract which appears to be complete and unambiguous on its face will be presumed to embody the final and complete expression of the parties' agreement." Significantly, "this presumption is strongest where a written agreement contains a merger or integration clause expressly indicating that the agreement constitutes the parties' complete and final understanding regarding its subject matter." . . . .
>
> *However, writings executed as part of the same transaction should be read together as a whole*.

Agilysys, Inc. v. Gordon, 1:06 CV 1665, 2008 WL 5188278 *11-12 (N.D. Ohio Dec. 10, 2008) (internal citations omitted, emphasis added). *See also Center Ridge Ganley, Inc. v. Stinn*, 31 Ohio St. 3d 310, 314, 511 N.E.2d 106, 109 (1987) ("As a general rule of construction, a court may construe multiple documents together if they concern the same transaction."); *Edward A. Kemmler Memorial Found. v. 691/733 East Dublin-Granville Road Co.*, 62 Ohio St. 3d 494, 499, 584 N.E.2d 695, 698 (1992) (describing "the general contract principle in Ohio law that writings executed as part of the same transaction should be read together."); *Panagouleas Interiors, Inc. v. Silent Partner Group, Inc.*, Montgomery App. No. 18864, 2002-Ohio-1304, 2002 WL 441409 *10 (Ohio Ct. App. Mar. 22, 2002) ("Under general contract principles, 'writings executed as part of the same transaction should be read together.'").

In the present case, there is no dispute that the Seller Agreements and the Profit Share Agreements were entered into on June 4, 2002, during the same

transaction. Thus, pursuant to general contract principles under Ohio law, the agreements should be read together, and we hold that the consideration in the Seller Agreements acts as consideration in the Profit Share Agreements. Accordingly, we must reject Dimension's argument that the Profit Share Agreements were not supported by consideration and hold that the Profit Share Agreements were enforceable contracts.

Next, we shall consider Dimension's argument that the Profit Share Agreements contained a condition precedent that had not been met. The circuit court held:

> Dimension is liable on the Agreements with DJ Entities despite the fact that Dimension has yet to receive payment from Westchester, a non-party to the Agreements. Dimension misconstrues how Ohio courts view conditions precedent, which "are not favored by the law, and whenever possible courts will avoid construing provisions to be such unless the intent of the agreement is plainly to the contrary." *Rudd v. Online Resources*, 2nd Dist. No. 17500, 1999 Ohio App. Lexis 2733 (Ohio Ct. App. 1999). "Consequently, absent an explicit intent to establish a condition precedent, courts will not interpret a contractual provision in that manner, particularly when forfeiture will result." *Evans, Mechwart, Hambleton & Tilton, Inc. v. Triad Architects, Ltd.*, 10th Dist. No. 10AP-1154, 2011 Ohio 4979, 15 (Ohio Ct. App. 2011).
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> Applying this concept to the case before the Court, the Agreements do not explicitly recite that Dimension's receipt of payment from Westchester is a condition precedent to Dimension's payments to the DJ Entities. Even Mr. Andrews, Dimension's corporate representative, could not reference an express provision in the Agreements. According to Ohio law, the Court must construe the contract against the drafter. As such, Dimension's receipt of payment from Westchester is not

> a condition precedent to Dimension's obligation to pay the DJ Entities.
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> To the extent that Dimension purports that the Agreements create an obligation to the DJ Entities under a "pay if paid," approach, this theory also fails. The concept of a pay-if-paid approach originates from construction law, where such a provision "transfers the risk of an owner's nonpayment from the contract down through the contracting tiers." *Evans*, *supra*, at 11. Payment provisions qualify as pay-if-paid provisions if they explicitly state: 1) payment to the obligor by a third party is a condition precedent to payment to the obligee, 2) the obligee is to bear the risk of nonpayment, and 3) the obligee is to be paid exclusively out of a fund the sole source of which is the obligor's payment to the other party. *Id*. at 12. The Agreements herein meet none of these prongs. No explicit condition precedent is stated. Thus, Dimension's obligation to pay the DJ Entities is not contingent on Westchester's obligation to pay Dimension under Ohio law.

Dimension contends that the circuit court misconstrued and misapplied Ohio law in holding that an explicit condition precedent was required and that the Profit Share Agreements did not include a condition precedent. We agree.

In *Kern v. Clear Creek Oil Co.*, 2002-Ohio-5438, 149 Ohio App.3d 560, 565-66, 778 N.E.2d 115, 119 (Ohio Ct. App. 2002), the Ohio Court of Appeals defined a condition precedent as follows:

> A condition precedent is a condition that must be performed before the obligations in the contract become effective. Essentially, a condition precedent requires that an act must take place before a duty of performance of a promise arises. If the condition is not fulfilled, the parties are excused from performing. Whether a provision of a contract is a condition precedent is a question of the parties' intent. Intent is ascertained by considering not only the language of a particular

> provision but also the language of the entire agreement and its subject matter. [Internal citations and quotation marks omitted.]

"The failure of a condition precedent constitutes a legal excuse for non-performance under Ohio law." *Agilysys, Inc.*, 2008 WL 5188278 at *12.

> According to the Ohio Supreme Court, "a condition precedent is one that is to be performed before the agreement becomes effective. It calls for the happening of some event, or the performance of some act, after the terms of the contract have been agreed on, before the contract shall be binding on the parties." *Mumaw v. W. & S. Life Ins. Co.* (1917), 97 Ohio St. 1, 11, 119 N.E. 132.

Ohio Natl. Life Assur. Corp. v. Satterfield, 2011-Ohio-2116, 194 Ohio App.3d 405, 410, 956 N.E.2d 866, 870 (Ohio Ct. App. 2011), *appeal not allowed*, 2011-Ohio-4751, 129 Ohio St. 3d 1477, 953 N.E.2d 843 (2011).

Don Jacobs argues that conditions precedent must be explicitly set forth in the contract because such conditions are not favored by the law. "Conditions precedent are not favored by the law, and whenever possible courts will avoid construing provisions to be such unless the intent of the agreement is plainly to the contrary." *Rudd v. Online Resources, Inc.*, 17500, 1999 WL 397351 *7 (Ohio Ct. App. June 18, 1999), citing 17A American Jurisprudence 2d (1991) 491-491, Contracts, Section 471, citing Restatement of Law 2d, Contracts, Section 227.

> Because the law disfavors conditions precedent, whenever possible courts will avoid construing provisions to be such unless the intent of the agreement is plainly to the contrary. Consequently, absent an explicit

> intent to establish a condition precedent, courts will not interpret a contractual provision in that manner, particularly when a forfeiture will result.

Evans, Mechwart, Hambleton & Tilton, Inc. v. Triad Architects, Ltd., 2011-Ohio-4979, 196 Ohio App.3d 784, 792-93, 965 N.E.2d 1007, 1013-14 (Ohio Ct. App. 2011) (internal citations and quotation marks omitted). However, we are reminded by Dimension that *Evans* involves the interpretation of a construction contract, which is governed by different default rules.

We agree with Dimension that in the circumstances of cases such as this, Ohio law does not require an explicit recitation of a condition precedent. The existence of a condition precedent is determined by the intent of the parties based upon the language and subject matter of the agreement. *See Kern*, *supra*. Here, the Profit Share Agreements provide that Dimension is "entitled to receive a certain portion of profits and net investment income, if any," from the profit share fund and that Westchester is to "calculate the profit share as described in paragraphs 3 and 4" at set times. While this language does not explicitly state that payment of the profits to Dimension by Westchester is a condition precedent to Dimension's obligation to pay Don Jacobs, it certainly establishes that certain conditions must exist in order for that obligation to be triggered. First, as Dimensions argues, there must be a profit to be shared. Second, Westchester must calculate the profit share. Based upon the record in this case, there is no evidence that Westchester calculated the profit share or that there is profit to be shared. Dimension's document providing its estimate of the profit share was just that – an

estimate. Pursuant to the terms of the Profit Share Agreements, Dimension's obligation to provide its portion of the profit share fund to Don Jacobs did not arise until Westchester calculated the profit share, if any existed at all.

Therefore, we must hold that the circuit court erred as a matter of law in holding that the Profit Share Agreements did not contain a condition precedent related to Dimension's obligation to pay Don Jacobs its portion of the profit share. There is no evidence that Westchester ever calculated the profit share or that any profits existed, outside of Dimension's calculation, which is not determinative pursuant to the terms of the Profit Share Agreements. The circuit court should have denied Don Jacobs' motion for partial summary judgment and granted Dimension's motion for summary judgment on the breach of contract claim.

Furthermore, we note that the circuit court should have dismissed Don Jacobs Used Car Center as a party to the action below pursuant to Dimension's motion for summary judgment and Don Jacobs' request because Dimension was not a party to the profit share agreement with that entity.

For the foregoing reasons, the final order and judgment of the Fayette Court is reversed, and this matter is remanded for further proceedings in accordance with this opinion.

VANMETER, JUDGE, CONCURS.

TAYLOR, JUDGE, CONCURS IN RESULT ONLY.

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