[Cite as *Mohmed v. Certified Oil Corp.*, 2015-Ohio-2398.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 102049

EHADI MOHMED, ET AL.

PLAINTIFFS-APPELLANTS

vs.

CERTIFIED OIL CORPORATION

DEFENDANT-APPELLEE

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-13-814077

BEFORE: McCormack, J., Keough, P.J., and S. Gallagher, J.

RELEASED AND JOURNALIZED: June 18, 2015

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TIM McCORMACK, J.:

{¶1} Plaintiffs-appellants, Ehadi Mohmed, on behalf of his company, Midwest Citgo L.L.C. ("Midwest"), and Saeed Mahmoud, on behalf of his company, Mid-Town Oil Corporation ("Mid-Town") (collectively "plaintiffs" hereafter), commenced this action against Certified Oil Corporation ("Certified"), a fuel distributor. Plaintiffs claimed Certified unlawfully added the state of Ohio's Commercial Activity Tax ("CAT") to their invoices, in violation of R.C. 5751.02 and in breach of their contract. The trial court granted summary judgment in favor of Certified. After a careful review of the record and applicable law, we affirm the trial court's judgment.

Substantive Facts and Procedural History

{¶2} Certified supplies gasoline to gas stations throughout Ohio. Two of the gas stations in Cleveland they supplied gasoline to were Midwest, owned and operated by Ehadi Mohmed, and Mid-Town, owned and operated by Saeed Mahmoud.

{¶3} In January 2006 and July 2006, respectively, Midwest and Mid-Town entered into a Dealer Supply Agreement with Certified. The terms and conditions of the two agreements were substantially similar and will be hereafter referred to as the "Supply Agreement."

{¶4} Under the Supply Agreement, plaintiffs were to purchase gasoline from Certified for a fixed margin above the distributor's price. For Midwest, the margin was $.02 or $.015 per gallon, depending on the quantity purchased; for Mid-Town, the margin was $.035. Also included as part of the price of the gasoline was a fixed freight cost ($.015 per gallon for Midwest and $.025 for Mid-Town). The agreement stated that the fuel sold would be at the fixed margin above the distributor's price, plus the freight cost, "plus all applicable taxes."[1]

{¶5} During the course of the contract, Certified transmitted a daily price notification to plaintiffs indicating the current price of gasoline, which fluctuated daily. Plaintiffs then placed their order. After delivery, Certified sent them an invoice and debited their bank accounts for payment through an electronic funds transfer.

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[1]Section 2.01 of the Mid-Town Supply Agreement stated:

> Unless prevented by circumstances and conditions beyond the reasonable control, Company is authorized to distribute its motor fuel to Dealer at Premises 100% of the motor fuel which Company sells to Dealer at a price of **three and one half cents (.035)** per gallon above Marathon's Branded Distributor "net rack" price, plus freight of **two and one (.0250)** of a cent per gallon for gasoline, plus all applicable *taxes*. After Upfront Consideration is amortized, Company will sell at **.03 cpg** over "net' rack." Within a reasonable time period, Company shall provide Dealer with the "rack" price of motor fuels whenever asked for by Dealer. Company shall debit Dealer's banking account (EFT) 5-6 business days after motor fuel is delivered to Premises. Company shall credit to Dealer any credits from credit card sales that are received from the Branded Oil Company allocated to Dealer's location.

The Midwest Supply Agreement contained similar terms, except that the margin was $.015 per gallon when purchases were over 70,000 gallons per month, or $.02 per gallon when purchases were less than 70,000 gallons per month.

{¶6} The issue in this case concerns the CAT. The tax was enacted by the Ohio General Assembly in 2005 to replace the existing corporate franchise and personal property taxes. The CAT, however, did not apply to the sale of motor vehicle fuel until July 1, 2007. Ohio Adm.Code 5703-29-12(A). Beginning on July 1, 2007, Certified included its anticipated CAT liability on the daily price notifications; however, the tax was not explicitly isolated in the post-delivery invoices.

{¶7} Plaintiffs' business relationship with Certified ended in 2009. Midwest's last invoice was dated February 8, 2009; Mid-Town's last invoice, April 19, 2009.

{¶8} More than four years after the last invoices were sent, on September 19, 2013, plaintiffs brought the instant action against Certified, raising a breach-of-contract claim and a claim for declaratory relief.[2] Plaintiffs asserted that Certified's inclusion of a charge to cover its potential CAT liability both violated the CAT statute and breached the Supply Agreement.

[2]Plaintiffs also sought certification of a class action in their complaint.

{¶9} Plaintiffs moved for partial summary judgment on their claim for declaratory relief and Certified moved for summary judgment. The trial court granted Certified's motion for summary judgment, on four separate grounds: the statute does not prohibit Certified from inclusion of CAT in the price of the gasoline; plaintiffs' breach-of-contract claim was time-barred by a contractual limitation; the voluntary payment doctrine applied in this case to bar a recovery of money plaintiffs paid to Certified; and Mid-Town had released its claims against Certified in a prior settlement agreement.

Appeal

{¶10} On appeal, appellants raise the following four assignments of error:

1. The trial court erred when it interpreted the provision in Ohio Revised Code Section 5751.02 that the CAT "shall not be billed or invoiced to another person" as a limitation of commercial speech instead of treating the prohibition as an anti-pass through provision that barred defendant-appellee from directly transferring its CAT liability to plaintiffs-appellants.

2. Whether the trial court erred when it ignored the record and found that all payments from plaintiffs-appellants were voluntary. The undisputed facts show that defendant-appellee exercised complete economic domination over plaintiffs-appellants and that defendant-appellee took all payments from plaintiffs-appellants from accounts that defendant-appellee controlled as opposed to plaintiffs taking any affirmative action to pay the commercial activity tax.

3. Whether the trial court erred when it applied a contractual statute of limitations that defendant-appellant buried in an addendum that defendant-appellant never gave to plaintiffs-appellants, that plaintiffs-appellants never signed, and that plaintiffs-appellants never saw or knew the terms and conditions included in the addendum.

4. Whether the trial court erred when it found that plaintiff-appellant Mid-Town Oil released its claims against defendant-appellee despite the language in Ohio Revised Code Section 5751.02(B) that provides that business may not use a contract to pass-through its commercial activity tax liability and when Certified used economic duress to force Mid-Town Oil to execute the release.

{¶11} We review the trial court's summary judgment de novo, applying the same standard that the trial court applies under Civ.R. 56(C). *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996).

{¶12} Under Civ.R. 56(C), summary judgment is appropriate when (1) there is no genuine issue of material fact, (2) the moving party is entitled to judgment as a matter of law, and (3) after construing the evidence most favorably for the nonmoving party, reasonable minds can reach only a conclusion that is adverse to the nonmoving party. Civ.R. 56(C).

The CAT Statute

{¶13} R.C. 5751.02 ("Commercial activity tax levied on persons with taxable gross receipts; restrictions on billing or invoicing tax to another person") states, in pertinent part:

> (A) For the purpose of funding the needs of this state and its local governments, there is hereby levied a commercial activity tax on each person with taxable gross receipts for the privilege of doing business in this state. * * * The tax imposed under this section is not a transactional tax * * * . The tax imposed under this section is in addition to any other taxes or fees imposed under the Revised Code. The tax levied under this section is imposed on the person receiving the gross receipts and is not a tax imposed directly on a purchaser. * * *.
>
> (B) The tax imposed by this section is a tax on the taxpayer and *shall not be billed or invoiced to another person.* Even if the tax or any portion thereof is billed or invoiced and separately stated, such amounts remain part of the price for purposes of the sales and use taxes levied under Chapters 5739. and 5741. of the Revised Code. Nothing in division (B) of this section prohibits:
>
> (1) *A person from including in the price charged for a good or service an amount sufficient to recover the tax imposed by this section*[.]

(Emphasis added.)

{¶14} In *Ohio Grocers Assn. v. Levin*, 123 Ohio St.3d 303, 2009-Ohio-4872, 916 N.E.2d 446, the Supreme Court of Ohio, citing the statute, explained that the CAT operates like a privilege of doing business tax, and no right of collection from another person is created. The court noted, however, that like other costs of doing business, a seller may include the CAT in the price charged for a good or service. *Id.* at ¶ 43-46. *See also Beaver Excavating Co. v. Testa*, 134 Ohio St.3d 565, 2012-Ohio-5776, 983 N.E.2d 1317, ¶ 24 (the CAT is levied on persons with taxable gross receipts "for the privilege of doing business" in Ohio).

{¶15} Therefore, under a plain language of the statute, and as explained by the Supreme Court of Ohio, R.C. 5751.02 does not allow a taxpayer such as Certified to bill or invoice the CAT to another; however, the taxpayer is permitted to recoup its CAT liability by including it in the price charged for a good or service.

Whether Certified's Practice Was Permitted by the Statute

{¶16} With the foregoing background in mind, we now consider the first issue raised in this appeal: whether Certified's practice of recovering from plaintiffs its CAT liability was permitted under the statute.

{¶17} Before Certified delivered the gasoline to plaintiffs, it would send them a price notification, and after the delivery, an invoice. Beginning in July 2007, Certified charged, it passed on, its CAT liability to plaintiffs. An examination of these documents reflects that the information in the price notifications included the distributor's price, the specified contractual margin, freight cost, and the amount of the CAT tax. A subtotal for "price before taxes" including these four items was provided. The total price was then arrived at by adding an Ohio tax, federal tax, and oil spill tax to the "price before taxes."

{¶18} As for the invoice, it started with a subtotal, which carried the "price before taxes" from the price notification, and then separately listed the Ohio tax, federal tax, and oil spill tax, to arrive at an invoice total.[3]

{¶19} Our review thus reflects the price notifications and invoices were itemized differently: the CAT was a line item in the price notification while it was not specifically itemized in the invoice. The parties argue about the significance of this.

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[3] For example, the July 5, 2007 price notification showed the following information:

Rack:		$2.3855
Freight	$0.0250	
Certified Margin:		$0.0350
CAT Tax:		$0.0038
Price before Taxes:	**$2.4493**	
State Tax:		$0.2800
Federal Tax		$0.1330
Oil Spill Tax	$0.0011	
Total Cost:		**$2.8634**

The invoice for that day showed the following information:

Octane with ethanol					
Sub-total	$2.44930	8500	8500.0		20819.05
FET reduced rate	$0.13300				20819.05
Ohio excise tax	$0.28000	8500.0		1130.50	
Oil spill tax ethanol	$0.00108	8500.0		9.18	
SOCI surcharge					47.70
Invoice Total					24,386.43

{¶20} Certified points to its invoices, arguing that the CAT was not shown as a tax there, and therefore, it did not violate the statute's prohibitions against "billing or invoicing to another person."

{¶21} Plaintiffs, on the other hand, draw our attention to the price notification, which separately itemized the CAT as a tax. Plaintiffs contend that in separately listing the CAT tax, Certified passed the CAT through to its customers, in violation of the statute. Plaintiffs argue that, because CAT is an excise tax imposed for the privilege of doing business in the state, the statute should be read as prohibiting a vendor like Certified from passing through the CAT to another, regardless of whether Certified itemized the CAT as a tax in the invoices.

{¶22} Plaintiffs' claim that the statute prohibits a recovery of the CAT by a taxpayer is not supportable by a plain reading of the statute. Although the statute does not allow a vendor to bill or invoice it to another, subsection (B)(1) of R.C. 5751.02 unequivocally allows a vendor to recover its CAT liability by including the amortized amount of the CAT in the price charged. Certified did just that — it included the applicable amount of the CAT as part of the price charged.

{¶23} Plaintiffs make a creative argument based on a constitutionality claim purportedly advanced by Certified. According to plaintiffs, "Certified argued that the ban against billing and invoicing the CAT to another person served as a restriction on Certified's right to communicate information related to the CAT." According to plaintiffs, under Certified's interpretation, the statute would have imposed an

unconstitutional restriction of "commercial speech." Plaintiffs argue that because *their* interpretation of the statute — as an anti-pass through provision — would not render the statute unconstitutional, this court should adopt their interpretation over one offered by Certified. Plaintiffs' constitutional argument is puzzling because Certified did not take the position that the statute is an unconstitutional restriction of commercial speech.[4]

{¶24} The statute, plain and simple, does not allow a vendor to bill or invoice the CAT as a tax to another, but it allows a vendor to recoup the tax by including it in the price charged. A review of Certified's invoices reflects it recovered the amount of the CAT imposed under the statute by including it in the price charged, a practice permitted under the statute.

{¶25} The first assignment of error is without merit.

Breach of Contract Claim

{¶26} Although Certified would be permitted under the statute to include the CAT in the gasoline price charged in its invoices, there remains a question of whether Certified could do so under the parties' contract.

{¶27} Under the Supply Agreement, Certified was to sell gasoline to plaintiffs at a price that would include a specified mark-up above Certified's distributor price and freight cost, "plus all applicable tax." Under the contract, therefore, Certified could *not*

[4]We note that Certified argued in its motion for summary judgment that, *to the extent* plaintiffs interpreted the statute as prohibiting a vendor such as Certified from "disclosing information" about the CAT, the statute would impose an unconstitutional restriction of speech. Certified *itself* argued that the court should not accept an interpretation of the statute that would render the statute unconstitutional. (Certified's brief in support of summary judgment, p. 21).

recover its CAT liability by including it as a component of the price of the gasoline. This is because, pursuant to the contract, the price could only include a predetermined margin and the freight cost. Under the parties' contract, for Certified to recover its CAT liability, the amount would have to qualify as an "applicable tax," which was left undefined in their contract.

{¶28} To include the CAT liability as an applicable tax, however, is exactly what is prohibited by the statute. The statute prohibits a taxpayer such as Certified from billing the CAT to another person as a tax. Indeed, Certified did not seem to treat CAT as an "applicable tax." Certified's price notification listed the CAT as a component of the "price before taxes," in compliance with the statute.

{¶29} Although the statute would allow Certified to recoup its CAT liability by contractually including it as a component of the price of the gasoline, our review of the Supply Agreement indicates the negotiated price only included a predetermined margin and freight cost — the parties could have contracted to include the CAT as a component of the price of the gasoline, but they did not. For Certified to add the CAT to the prenegotiated price of gasoline in the middle of the contract's term would be a breach of the Supply Agreement.

{¶30} In *Mosser Constr., Inc. v. Toledo*, 6th Dist. Lucas No. L-07-1060, 2007-Ohio-4910, a city entered into a construction contract with a contractor before the CAT statute went into effect. The Sixth District held that the statute does not prohibit the contractor from including the cost of the CAT tax in the price it charged for its

services. *Id*. at ¶ 36. The Sixth District decided, however, that the contractor did not breach the contract by charging its CAT liability to the city, because the parties' contract contained a change-in-law clause, under which any increased cost of work was to be borne by the city. *Id.* The court concluded that, under the change-in-law clause, the contractor was permitted to bill the CAT to the city because the cost of work was increased due to the newly enacted CAT statute. *Id.* *Mosser* is consistent with our analysis here.

Plaintiffs' Breach-of-Contract Claim Was Time-Barred

{¶31} Although Certified's practice of including the CAT as a component of the price of the gasoline appeared to be a breach, the trial court properly determined that plaintiffs' breach-of-contract claim was time-barred. The statute of limitations for a written contract is 15 years in Ohio. When a contract involves a sale of goods, an action for a breach of contract must, however, be commenced within four years after the cause of action has accrued. R.C. 1302.98(A). Furthermore, the parties may, by agreement, reduce the period of limitation to no less than one year. *Id.* *See also Barbee v. Nationwide Mut. Ins. Co.*, 130 Ohio St.3d 96, 2011-Ohio-4914, 955 N.E.2d 995, ¶ 23 (the parties to a contract may limit the period of limitation to a shorter period, as long as the shorter period is a reasonable one).

{¶32} Here, paragraph 9.c of the General Provisions Addendum ("Addendum") of the Supply Agreement provide that "any claim of any kind by [plaintiffs] based on or arising out of this Agreement or otherwise shall be barred unless asserted by [plaintiffs]

by commencement of an action within twelve (12) months after delivery of the products or other event, action or inaction to which the claim relates." A claim for relief for breach of contract "accrues" when the breach occurs. R.C. 1302.98(B).

{¶33} Plaintiffs entered into the Supply Agreement with Certified in 2006. Beginning July 1, 2007, Certified added its CAT liability to the price charged. Therefore, the alleged breach of contract accrued on July 1, 2007. Pursuant to the contractual limitation, plaintiffs were required to file its breach-of-contract claim on or before July 1, 2008. The instant complaint was filed on September 19, 2013, more than five years after July 1, 2008.

{¶34} Plaintiffs argue that the Addendum that contained the provision for the contractual limitation was not part of the Supply Agreement signed by Mohmed or Mahmoud. This claim lacks merit. Our review of the record reflects that Paragraph 1.10 of the Supply Agreement, which was signed and attached as exhibits in Certified's answer to plaintiffs' complaint, referenced a "General Provision Addendum" and enumerated 19 parts contained in the "General Provision Addendum." Paragraph 1.10 further stated that the provisions listed in the "General Provision Addendum" were also terms of the Supply Agreement and were "incorporated herein and made a part hereof for all purposes." Immediately above the signature line was a boldfaced all-cap note, which stated:

> BEFORE SIGNING IN THE SPACE PROVIDED BELOW, YOU SHOULD CAREFULLY READ ALL PARTS OF THE AGREEMENT, WHICH IS A BINDING LEGAL DOCUMENT CONTAINING SEVERAL PARTS AND ATTACHMENTS (INCLUDING ALL

ADDENDA, AMENDMENTS, SCHEDULES AND DOCUMENTS INCORPORATED HEREIN).

{¶35} In Ohio, separate agreements may be incorporated by reference into a signed contract. *KeyBank Natl. Assn. v. Columbus Campus, L.L.C.*, 2013-Ohio-1243, 988 N.E.2d 32, ¶ 21 (10th Dist.). Therefore, although plaintiffs allege the Addendum was not part of the Supply Agreement and was unsigned, our review of the Supply Agreement reflects the Addendum was expressly incorporated into the Supply Agreement by reference, and therefore, plaintiffs were bound to the terms contained therein. *Garcia v. Wayne Homes*, 2d Dist. Clark No. 2001CA53, 2002-Ohio-1884, ¶ 44 (regardless of a lack of signature on a separate document, a party was bound to the terms contained in the document where the document was expressly incorporated by reference). The duty is upon plaintiffs to read the Supply Agreement before signing it. *Info. Leasing Corp. v. GDR Invs., Inc.*, 152 Ohio App.3d 260, 2003-Ohio-1366, 787 N.E.2d 652, ¶ 22 (1st Dist.). The Supply Agreement, signed by Mohmed on January 23, 2006, and Mahmoud on July 28, 2006, expressly incorporated the Addendum. Regardless whether the Addendum was separately signed, plaintiffs were bound by its terms, and therefore, plaintiffs' breach-of-contract claim was time-barred. The third assignment of error is without merit.

{¶36} For the foregoing reasons, we affirm the decision of the trial court granting summary judgment in favor of Certified. The second and fourth assignments of error are moot, and we decline to address them. Civ.R. 12(A)(1)(c).

{¶37} Judgment affirmed.

It is ordered that appellee recover of appellants 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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TIM McCORMACK, JUDGE

KATHLEEN ANN KEOUGH, P.J., and
SEAN C. GALLAGHER, J., CONCUR