[Cite as *Osair v. Avery Internatl.*, 2012-Ohio-6129.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

LAKE COUNTY, OHIO

OSAIR, INC.,	:	**O P I N I O N**
Plaintiff-Appellant,	:	
- vs -	:	**CASE NO. 2012-L-022**
AVERY INTERNATIONAL CORPORATION,	:	
Defendant-Appellee.	:	

Civil Appeal from the Lake County Court of Common Pleas, Case No. 11CV002920.

Judgment: Affirmed.

Richard N. Selby, II, Dworken & Bernstein Co., L.P.A., 60 South Park Place, Painesville, OH 44077 (For Plaintiff-Appellant).

Jennifer S. Roach and *Elizabeth B. Wright*, Thompson Hine LLP, 3900 Key Center, 127 Public Square, Cleveland, OH 44114 (For Defendant-Appellee).

TIMOTHY P. CANNON, P.J.

{¶1} Appellant, OsAir, Inc., appeals the judgment of the trial court granting appellee, Avery International Corporation's, motion for judgment on the pleadings. For the following reasons, we affirm.

{¶2} Avery and OsAir entered into a Nitrogen (N2) and Pipeline System Service Agreement effective November 1, 2008 ("the Agreement"). The Agreement provided that OsAir "agrees to sell and [Avery] hereby agrees to purchase [Avery's] requirements

of gaseous nitrogen ('Product')." The initial term of the Agreement "shall be 5 years from November 1, 2008 through October 31, 2013[.]" With respect to price, the Agreement stated: "[t]he price for Product delivered to [Avery] by [OsAir] shall be determined as set forth in Addendum B of this Agreement." The Agreement further provided that "[n]o modification or waiver of this Agreement shall bind [OsAir] unless in writing and signed and accepted by an executive officer of [OsAir]."

{¶3} On September 1, 2009, the parties entered into a First Amendment to the Agreement ("First Amendment"). The First Amendment was drafted by OsAir and signed by its President. The First Amendment was "intended to amend the previously executed Purchase Agreement." The First Amendment stated:

> 1. Exhibit B to the Purchase Agreement shall be deleted in its entirety.
>
> 2. Commencing as of September 1st, 2009, Buyer shall pay to Seller the agreed price of .29.50, 0 to 2,500,000 /scf, .33.55 over 2,500,000 /scf, per one hundred cubic feet of Nitrogen purchased monthly delivered under this Agreement.
>
> 3. The term of this Agreement shall expire on June 30, 2011.
>
> 4. Buyer shall have the option to extend the term of the Agreement provided that within 60 days of its expiration, Buyer and Seller have agreed to a new price for the nitrogen to be delivered during the agreed upon extended term.
>
> 5. The pipeline fee of $750.00 Mentor, $1300.00 Painesville Ohio, in the Agreement shall continue to remain in effect. Payment

> Terms are Net 30 days. A special term is allowed to 1/1/2010 net 40 days.
>
> In all other respects the Purchase Agreement shall remain in full force and effect and unmodified.

{¶4} The dispute in this case arose out of the language in Paragraph 3 of the First Amendment, to wit: "The term of this Agreement shall expire June 30, 2011." Based on this language, Avery stopped purchasing Nitrogen from OsAir effective July 1, 2011. OsAir then filed a complaint alleging breach of contract and reformation of contract, seeking a declaratory judgment that the term of the Agreement shall continue through October 31, 2013.

{¶5} In its complaint, OsAir alleges that Avery breached the terms of the Agreement by refusing to continue to buy Nitrogen from OsAir through October 31, 2013. OsAir alleges the purpose of the First Amendment was to change the pricing method from the date of the First Amendment through June 30, 2011, not terminate the Agreement in its entirety. OsAir further alleges that it intended the First Amendment to change the pricing term effective only through June 30, 2011, and thereafter, the pricing arrangement set forth in the Agreement would "go back into effect through the remainder of the term of the Agreement." OsAir maintains that the language contained in Paragraph 3 of the First Amendment "was a drafting error on the part of OsAir and that the intent of this provision was to prove that the terms of the revised payment schedule provided for in the [First] Amendment was to expire on June 30, 2011, but that the term of the Service Agreement would continue through October 31, 2013." OsAir

states that Avery was aware of this drafting error and took advantage of the error to the detriment of OsAir.

{¶6} Avery filed a Civ.R. 12(C) motion for judgment on the pleadings. In its motion, Avery asserted that Paragraph 3 of the First Amendment is unambiguous on its face and, when read in the context of the entire First Amendment, its meaning is "unmistakable." Avery claims the First Amendment deleted the original pricing schedule from the Agreement and replaced it with a new formula. Further, the First Amendment extended the terms of the Agreement beyond June 30, 2011, only if a new price could be agreed upon.

{¶7} OsAir filed a memorandum in opposition. The trial court granted Avery's motion. OsAir now appeals and alleges the following assignment of error:

{¶8} "The trial court erred in granting Avery's motion for judgment on the pleadings."

{¶9} 'Because Civ.R. 12(C) motions test the legal basis for the claims asserted in a complaint, our standard of review is de novo. In ruling on the motion, a court is permitted to consider both the complaint and the answer as well as any material incorporated by reference or attached as exhibits to those pleadings. In so doing, the court must construe the material allegations in the complaint, with all reasonable inferences drawn therefrom, as true and in favor of the non-moving party. A court granting the motion must find that the plaintiff can prove no set of facts in support of the claims that would entitle him or her to relief.' (Internal citations omitted.) *JTO, Inc. v.*

> *State Auto Mut. Ins. Co.*, 194 Ohio App.3d 319, 2011-Ohio-1452 (11th Dist.), ¶11, quoting *Frazier v. Kent*, 11th Dist. Nos. 2004-P-0077 & 2004-P-0096, 2005-Ohio-5413, ¶14.

{¶10} OsAir presents three issues for our review. First, OsAir maintains the trial court improperly determined that the terms of the First Amendment were clear and unambiguous and only subject to one possible interpretation. Second, OsAir alleges the trial court erred in determining that it did not set forth the elements necessary to establish a claim for reformation of contact. And, third, OsAir asserts the trial court erred in determining it failed to establish the elements of a declaratory judgment claim.

{¶11} OsAir argues the term "this Agreement" in Paragraph 3 of the First Amendment is ambiguous and, therefore, parol evidence is admissible. OsAir contends the purpose of the First Amendment was to change the pricing method provided for in the Agreement until June 30, 2011. Then, after the termination of the revised pricing method provided for in the First Amendment, the old pricing schedule set forth in Exhibit B of the Agreement would go back into effect through the remainder of the term of the Agreement, ending October 31, 2013.

{¶12} To the contrary, Avery suggests that extrinsic evidence is not admissible, as the terms of the First Amendment are clear and capable of only one interpretation. Avery maintains that when read in its entirety, it is evident that Paragraph 3 terminates the relationship between Avery and OsAir as of June 30, 2011, and Avery did not have an obligation to purchase nitrogen from OsAir after that date.

{¶13} Courts examine contracts to interpret and give effect to the intentions of the contracting parties. *Foster Wheeler Enviresponse,*

> *Inc. v. Franklin Co. Convention Facilities Auth.*, 78 Ohio St.3d 353 (1997). If contractual terms are unambiguous, a court may not interpret the contract in a manner inconsistent with the clear language of the instrument. *Shifren v. Forrest City Ents., Inc.*, 64 Ohio St.3d 635 (1992). A court may consider extrinsic evidence, however, if the terms of the contract are ambiguous or unclear. *Sugarhill Ltd. v. Brezo*, 11th Dist. No. 2004-G-2579, 2005-Ohio-1889, ¶35. Contractual terms are ambiguous if their meaning cannot be deciphered from reading the entire instrument or if the terms are reasonably susceptible to more than one interpretation. *Aultman Hospital Assn. v. Community Mut. Ins. Co.*, 46 Ohio St.3d 51 (1989). *Look v. H&M Custom Home Builders Co.*, 11th Dist. No. 2011-G-3036, 2012-Ohio-3017, ¶18.

{¶14} We find the terms of the First Amendment to be unambiguous. A reading of the Agreement reveals no pricing schedule. When the parties entered into the Agreement, the pricing schedule was set forth in Exhibit B. Exhibit B was deleted in its entirety by the First Amendment. With Exhibit B being deleted in its entirety and not suspended, there is no pricing schedule to which the parties may revert. As the trial court correctly observed:

> **{¶15}** By the unambiguous terms of the parties' Agreement and First Amendment, [OsAir's] position that the pricing arrangement set forth in the [Agreement] would go back into effect through the remainder of the term of the Agreement after June 30, 2011, is not

supported because there is no pricing arrangement in the Agreement except for the one provided for in the First Amendment.

{¶16} Additionally, the language of Paragraph 3 of the First Amendment does not limit the expiration of the Agreement to pricing. In fact, the First Amendment gives Avery the option to extend the term of the Agreement provided that within 60 days the parties have agreed to a new price for the nitrogen to be delivered.

{¶17} Next, OsAir alleges the trial court erred in determining that it did not set forth the elements necessary to establish a claim for reformation of contact. In its complaint, OsAir alleges that it made a drafting error; Avery was aware of that error; and Avery took advantage of OsAir's drafting error. OsAir asserted that it meant Paragraph 3 to provide "that the term of the revised payments schedule provided for in the Amendment was to expire June 30, 2011, but that the term of the Service Agreement would continue through October 31, 2013."

{¶18} Generally, the only grounds for reformation of a written instrument are fraud and *mutual* mistake. *Baltimore & O. R.R. Co. v. Bing*, 89 Ohio St. 92 (1913). There is no allegation of fraud in this matter.

{¶19} A court will not generally reform a contract in the case of a unilateral mistake. *Faivre v. DEX Corp. Northeast*, 182 Ohio App.3d 563, 2009-Ohio-2660 (10th Dist.), ¶19. The *Faivre* case, while cited by appellant in support of its position, makes it very clear that reformation of a contract cannot be used to bind a party to something to which it never agreed. *Id.*, ¶22. The Tenth District found the trial court erred in reforming a severance agreement because it bound the appellant to a contractual term

that he never accepted. "In essence, the trial court created a new contract that reflected only [the appellee's] intent." *Id.*, ¶22.

{¶20} This is precisely what OsAir is seeking here: among other things, Avery never agreed to revert to the pricing schedule in Exhibit B of the Agreement. As previously stated, the First Amendment excised Exhibit B, which contained the pricing schedule. The First Amendment then provided for a new pricing schedule and gave Avery the *option* of extending the term of the Agreement *if the parties agreed to a new price for the nitrogen*. If this court accepted OsAir's position, Avery would be bound to the pricing schedule in Exhibit B which had been mutually excised by agreement of the parties. We find OsAir's second argument to be without merit.

{¶21} We find OsAir's third issue, i.e., whether the trial court erred in its determination that OsAir failed to establish the elements of a declaratory judgment claim, moot based on our disposition of OsAir's first and second issue.

{¶22} Appellant's assignment of error is without merit.

{¶23} Based on the opinion of this court, the judgment of the Lake County Court of Common Pleas is hereby affirmed.

DIANE V. GRENDELL, J.,

MARY JANE TRAPP, J.,

concur.