[Cite as *Witte v. Protek Ltd.*, 2010-Ohio-1193.]

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

LANE WITTE, ET AL.	:	JUDGES:
	:	Hon. Julie A. Edwards, P.J.
Plaintiffs-Appellees	:	Hon. Sheila G. Farmer, J.
	:	Hon. John W. Wise, J.
-vs-	:	
	:	
PROTEK LIMITED, ET AL.	:	Case No. 2009CA00230
	:	
Defendants-Appellants	:	O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Court of Common Pleas, Case No. 2005CV03945
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	March 22, 2010

APPEARANCES:

For Plaintiffs-Appellees	For Defendants-Appellants
TIMOTHY J. JEFFRIES 437 Market Avenue North Canton, OH 44702	RONALD N. TOWNE ANN L. WEHENER 388 South Main Street Suite 402 Akron, OH 44311

Farmer, J.

{¶1} On November 14, 2005, appellees, Lane Witte, ASP of Salem Limited, ASP Welding Corp., ASP Tooling, LLC, and Alliance Steel Products, Inc. filed a complaint against appellants, Protek Limited, Bruce Dinger, Patricia Dinger, and Richard Dinger, claiming breach of contract, defamation, money due, conversion, RICO, replevin, wrongful discharge, breach of fiduciary duty, and a shareholder derivative action. On December 2, 2005, appellants filed an answer and counterclaim alleging breach of contract, fraud, conversion, tortuous interference, replevin, breach of warranty, appropriation of trade secrets, and civil conspiracy. The dispute between the parties revolved around the ownership of certain tooling used to produce track pads that were sold to Goodyear Engineered Products, Inc. to be used for military contracts.

{¶2} In November 2006, the parties signed a settlement agreement. On April 7, 2009, appellees filed a motion to enforce settlement agreement, claiming appellants failed to pay appellees $60,000.00 on December 1, 2008. A hearing was held on May 28, 2009. By judgment entry filed August 12, 2009, the trial court granted appellees' motion and ordered appellants to pay appellees the $60,000.00.

{¶3} Appellants filed an appeal and this matter is now before this court for consideration. Assignment of error is as follows:

I

{¶4} "THE TRIAL COURT ERRED AS A MATTER OF LAW IN FINDING THAT DEFENDANTS-APPELLANTS WERE NOT RELIEVED OF THEIR OBLIGATION TO PAY $60,000 TO PLAINTIFFS-APPELLEES PURSUANT TO THE SETTLEMENT AGREEMENT BETWEEN THE PARTIES."

I

{¶5} Appellants claim the trial court erred in finding they were required to fulfill paragraph two of the November 2006 settlement agreement and pay appellees $60,000.00. We disagree.

{¶6} It is a fundamental principle in contract construction that contracts should "be interpreted so as to carry out the intent of the parties, as that intent is evidenced by the contractual language." *Skivolocki v. East Ohio Gas Company* (1974), 38 Ohio St.2d 244, paragraph one of the syllabus. A reviewing court should give the contract's language its plain and ordinary meaning unless some other meaning is evidenced within the document. *Alexander v. Buckeye Pipe Line Company* (1978), 53 Ohio St.2d 241. If the terms of the contract are determined to be clear and unambiguous, the interpretation of the language is a question of law reviewed de novo on appeal. *State ex rel. Parsons v. Fleming* (1994), 68 Ohio St.3d 509. Under a de novo review, an appellate court may interpret the language of the contract substituting its interpretation for that of the trial court. *Children's Medical Center v. Ward* (1993), 87 Ohio App.3d 504.

{¶7} A contract is ambiguous if its terms cannot be clearly determined from a reading of the entire contract or if its terms are susceptible to more than one reasonable interpretation. *United States Fidelity & Guaranty Company v. St. Elizabeth Medical Center* (1998), 129 Ohio App.3d 45. If the terms of the contract are determined to be ambiguous, the meaning of the words becomes a question of fact, and a trial court's interpretation will not be overturned on appeal absent a showing of an abuse of discretion. *Ohio Historical Society v. General Maintenance & Engineering Company*

(1989), 65 Ohio App.3d 139. In order to find an abuse of discretion, we must determine the trial court's decision was unreasonable, arbitrary or unconscionable and not merely an error of law or judgment. *Blakemore v. Blakemore* (1983) 5 Ohio St.3d 217.

{¶8} The matter sub judice does not involve any issues of fact, but merely the consequences of the result of certain events and the effects on the settlement agreement. Therefore, we find the trial court's extensive findings of fact to be uncontested and supported by the record.

{¶9} We note an even cursory review of paragraph two of the settlement agreement leads one to find that some of the terms are ambiguous and therefore subject to review by the trial court. The trial court was correct in taking evidence in order to determine if it needed to enforce the settlement agreement.

{¶10} Historically, as the record demonstrates, prior to the issues raised by paragraph two, appellees had been found in breach of the settlement agreement and the trial court was required to enforce said agreement. In particular, appellee Witte attempted to regain possession of the subject tooling equipment after the negotiation of the agreement, and the trial court was forced to order the equipment returned. T. at 170-171. In another instance, the trial court dismissed an eviction action commenced by appellee Witte as violating the agreement. T. at 170.

{¶11} Paragraph two of the settlement agreement states, "Protek will pay to ASP the sum of $60,000 on December 1, 2008 provided that Protek Limited remains as the exclusive supplier of track pads to Goodyear."

{¶12} As argued in their brief at 4, appellants did not pay the $60,000.00 to appellees "because neither Defendant-Appellant Protek, nor its successor, Hamlin, was

the exclusive supplier of track pads to any entity at that time and Goodyear was not even purchasing track pads at that time. Instead, it was Veyance who was buying track pads from Hamlin and at least on (sic) other supplier on December 1, 2008."

{¶13} The first issue challenged by appellants is that the sale of Goodyear Engineered Products by Goodyear Tire & Rubber Company to Veyance in July 2007 negated any obligation under the settlement agreement. James King, in-house counsel for Goodyear Tire & Rubber Company and then general counsel to Veyance Technologies after Goodyear divested its Engineered Products division, testified all of the production using the subject track pads was part of the asset sale of the Engineered Products division to Veyance. T. at 156-158. Any contracts and purchase orders involving Engineered Products was assigned to Veyance by Goodyear Tire & Rubber Company. T. at 156. Included in the sale was the license to use the "Goodyear Engineered Products" brand name. T. at 164. As a result of the sale, Goodyear Tire & Rubber Company no longer needed the track pads. T. at 166.

{¶14} The term "Goodyear" was never defined in the settlement agreement. Did the term refer to "Goodyear Tire & Rubber Company" or "Goodyear Engineered Products"? The trial court resolved this ambiguity as follows:

{¶15} "It is this Court's opinion that in referring to 'Goodyear' the intent of the parties was to reference the business of supplying track pad under this government contract. The Court is not persuaded that the legal name of the entity purchasing the track pads is a material term of the Settlement Agreement. Rather, the key is the continuing business relationship of Protek supplying track pads to whomever is selling to the government. Taken to its logical conclusion Defendants' argument is, 'had Protek

been the exclusive supplier to Veyance Technologies, Inc. on December 1, 2008, it, Protek, would still not owe Plaintiffs the $60,000.00 because Protek was supplying Veyance and not Goodyear.' Protek has not shown that they were prejudiced by the sale of the Goodyear Engineered Products Division to Veyance Technologies, Inc. in any way. The sale to Veyance merely changed the name on the purchase orders sent to Protek and had no negative economic effect on its track pad business. Therefore the argument that the sale of the government track pad contracts to Veyance absolves the Defendants of liability under Paragraph 2 of the Settlement Agreement has no merit." Judgment Entry filed August 12, 2009.

{¶16} As a result of the sale of Goodyear Engineered Products to Veyance, the contract with Protek remained in effect, and it was stipulated that up to and including the sale of Protek to Hamlin Newco, LLC on October 31, 2007, Protek was the exclusive provider of track pads to Goodyear and its successor, Veyance. T. at 96, 160.

{¶17} We conclude the change of purchaser, without any change in the contract for providing the track pads, was not an essential factor to the settlement agreement. It is clear from a reading of the agreement the issue was to have Protek own the tooling equipment free and unencumbered by any actions or claims of appellees.

{¶18} "A breach of one of several terms in a contract does not discharge the obligations of the parties to the contract, unless performance of that term is essential to the purpose of the agreement." *Kersh v. Montgomery Developmental Center, Ohio Dept. of Mental Retardation and Developmental Disabilities* (1987), 35 Ohio App.3d 61, 62. We find whatever the name of the purchaser, it had no bearing on the material issues of the agreement.

{¶19} Upon review, we find the trial court did not err in concluding the sale of Goodyear Engineered Products to Veyance was not a material change nor did it affect the meaning and results fashioned by the settlement agreement.

{¶20} The second issue raised is the effect the sale of Protek to Hamlin and its contract to supply track pads had on the settlement agreement. From the testimony at the hearing, Protek sold to Hamlin only after the exclusivity issue was settled with Veyance. T. at 98-99. The sale to Hamlin was conditioned on the continuation of the track pads business with Veyance. T. at 78-80. As a result of the sale to Hamlin, Protek realized a million dollars in cash, assumption of a debt of $600,000, and a $930,000 cognovit note owed by Hamlin. T. at 87, 89-90.

{¶21} The raison d'être of the settlement agreement was completed. Protek sold its bargained for exclusivity of track pads to Hamlin. Appellants argue because the sale to Hamlin occurred on October 31, 2007, prior to the December 1, 2008 condition for payment, they were relieved of their obligation to pay the $60,000.00.

{¶22} The trial court disagreed and we concur. Because the evidence substantiated that the sale of Protek to Hamlin was predicted on the exclusivity of the track pads product, we find appellants received the benefit of their bargain in the settlement agreement. That bargain was to have no interference in the track pads business with Goodyear/Veyance. It is undisputed that Protek received and benefited from that bargain. We find no error by the trial court in enforcing paragraph two of the settlement agreement.

{¶23} Apart from these two issues, appellants also argue the trial court erred in finding Protek failed to use good faith efforts to ensure Hamlin was the exclusive

provider. We find such argument to be non-germane to the issue of the settlement agreement. The evidence demonstrated that Hamlin lost its exclusivity because of its own actions and manufacturing difficulties that resulted in Veyance seeking other suppliers. T. at 100, 113-118. None of the parties in this case could have controlled the failure of Hamlin to supply Veyance in a timely matter. Furthermore, there was no action of interference by appellees that caused the failure. Appellants had already received the benefit of their bargain and were paid for the exclusivity clause.

{¶24} Lastly, appellants argue the settlement agreement is unambiguous. We have addressed this issue at the beginning of this assignment of error.

{¶25} The sole assignment of error is denied.

{¶26} The judgment of the Court of Common Pleas of Stark County, Ohio is hereby affirmed.

By Farmer, J.

Edwards, P.J. and

Wise, J. concur.

_s/ Sheila G. Farmer_____

_s/ Julie A. Edwards_____

_s/ John W. Wise_____

JUDGES

SGF/sg 0202

IN THE COURT OF APPEALS FOR STARK COUNTY, OHIO

FIFTH APPELLATE DISTRICT

LANE WITTE, ET AL.	:	
Plaintiffs-Appellees	:	
-vs-	:	JUDGMENT ENTRY
PROTEK LIMITED, ET AL.	:	
Defendants-Appellants	:	CASE NO. 2009CA00230

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas of Stark County, Ohio is affirmed. Costs to appellants.

_s/ Sheila G. Farmer_____

_s/ Julie A. Edwards_____

_s/ John W. Wise_____

JUDGES