[Cite as *Falcone Bros., Inc. v. Pawmew, Inc.*, 2017-Ohio-6958.]

falconeCOURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

FALCONE BROTHERS, INC., ET AL	:	JUDGES:
	:	Hon. Patricia A. Delaney, P.J.
Plaintiffs-Appellants	:	Hon. W. Scott Gwin, J.
	:	Hon. Earle E. Wise, Jr., J.
-vs-	:	
	:	
PAWMEW, INC., ET AL	:	Case No. 2016CA00209
	:	
Defendants-Appellees	:	O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Court of Common Pleas, Case No. 2015CV01420
JUDGMENT:	Affirmed
DATE OF JUDGMENT:	July 13, 2017

APPEARANCES:

For Plaintiffs-Appellants	For Defendants-Appellees
ROBERT E. SOLES, JR. KARA DODSON 6545 Market Avenue North North Canton, OH 44721	RALPH F. DUBLIKAR 400 South Main Street North Canton, OH 44720

Wise, Earle, J.

{¶ 1} Plaintiff-appellant, Falcone Brothers, Inc. appeal the October 13, 2016 judgment entry of the Stark County Court of Common Pleas following a bench trial.

FACTS AND PROCEDURAL HISTORY

The Reedurban Tavern Purchase Agreement

{¶ 2} In March 2004, plaintiff-appellant Greg Falcone submitted a purchase agreement to defendant-appellee Mark Parr and his late wife Natalie to purchase real estate located at 5029 West Tuscarawas Street in Canton, then known as the Reedurban Tavern. The agreement also included the business assets and liquor license. Dean Barcopoulos was the listing real estate agent, and was also involved in the negotiation of the purchase agreement.

{¶ 3} Parr also owned a second parcel of property located immediately north of the tavern property, 5022 Yukon Street. An office building is situated on that property. The purchase agreement submitted to Parr by Falcone included a handwritten provision stating “Seller to allow buyer to park in rear office area after 5:00 p.m.” The agreement also provided at paragraph 14 “This contract shall be binding upon the parties, their heirs, administrators, executors, successors and assigns. All provisions of this contract shall survive the closing.” Paragraph 15 provided “purchaser to advise owner in writing how title will be taken.” There was no provision in the purchase agreement requiring Parr to create or record an easement.

{¶ 4} Parr changed only the purchase price in his counteroffer to $230,000 before returning the purchase agreement to Falcone, agreeing to be bound by all its other terms. Falcone accepted the revised purchase price. A later addendum to the purchase

agreement clarified that $200,000 of the purchase price was for the real estate and $30,000 was for the tavern assets and liquor license.

{¶ 5} After the purchase agreement was finalized, Falcone and his brother formed two entities to close the transaction and take title. GFFFB, LLC purchased and took title to the real estate. Falcone Brothers, Inc. purchased and took title to the liquor license and business assets of the tavern, which subsequently became known as Falcone's. There was no language in the deed addressing the parking provision, nor was an easement prepared or recorded to address the parking provision.

Parr Sells the Office Property

{¶ 6} Several years later, Parr decided to sell the office property. He first offered it to Falcone. When Falcone declined, Parr advised that depending on who purchased the property, he was uncertain what would become of their agreement allowing Falcone's use of the parking spaces on the office property. Falcone took no action. In June, 2008, Parr sold the office property to Pawmew, Inc. Again, the deed contained no reference to any parking provision and no easement was prepared or recorded regarding the parking provision.

{¶ 7} For the following seven years, Pawmew continued to allow Falcone's to use parking spaces on the rear office property after 5:00 p.m. In late spring of 2015, however, Pawmew began erecting a fence on the property line between the tavern and the office property. The fence eliminated access to the office property from the tavern thereby eliminating Falcone's employee and customer access to the parking spaces, and also eliminating a thoroughfare from Tuscarawas to Yukon utilized by truck drivers delivering goods to the tavern.

Trial Court Proceedings

{¶ 8} In July 2015, Falcone filed a civil complaint against Pawmew and Parr for injunctive relief and breach of contract. As to Parr, Falcone claimed that due to the installation of the fence by Pawmew, Parr had breached the portion of the 2004 purchase agreement to permit parking in the rear office area after 5:00 p.m. and that Falcone had incurred damages as a result.

{¶ 9} A preliminary injunction hearing was held on August 13, 2015. The only issue addressed was the fact that the fence erected by Pawmew blocked ingress and egress for delivery trucks to the tavern. On September 22, 2015, the trial court granted the preliminary injunction and ordered Pawmew to remove any fence structure to permit ingress and egress.

{¶ 10} Before the permanent injunction hearing, Falcone and Pawmew voluntarily came to an agreement which restored Falcone's use of the 10-12 parking spaces. The agreement required Falcone to make certain improvements to the lot, add Pawmew as an additional insured on his insurance policy, and to pay rent for the parking spaces of $150.00 per month.

{¶ 11} Following a failed mediation attempt between Falcone and Parr, the breach of contract claim against Parr proceeded to a bench trial on September 12, 2016. On October 13, 2016, the trial court filed its findings of fact and conclusions of law determining that the provision in the purchase agreement allowing buyer to park in the rear office area was a personal license granted to Falcone by Parr which therefore expired upon Parr selling the property to Pawmew. Accordingly, the trial court concluded that Parr did not

breach the contract and therefore Falcone sustained no damages as a direct or proximate result of any action or inaction by Parr.

{¶ 12} Falcone filed an appeal and the matter is now before this court for consideration. Falcone raises one assignment of error:

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{¶ 13} "THE TRIAL COURT ERRED AS A MATTER OF LAW IN FINDING THAT APPELLEE DID NOT BREACH THE PURCHASE AGREEMENT BY FAILING TO PROVIDE A PERPETUALLY ENFORCEABLE EASEMENT RATHER THAN A PERSONAL LICENSE ALLOWING APPELLANTS TO PARK IN THE REAR OFFICE AREA."

{¶ 14} Falcone argues the trial court erred in finding the parking provision was a personal license rather than a perpetually enforceable easement, and that Parr did not, therefore breach the purchase agreement. He also argues that the trial court's conclusion finding Falcone's right to use the parking area expired when Parr sold the office property to Pawmew is against the manifest weight of the evidence. We disagree.

Breach of Contract Standard of Review

{¶ 15} The standard of review in a breach of contract action is whether the trial court erred as a matter of law. *Unifund, CCR, L.L.C v. Johnson*, 8th Dist. Cuyahoga No. 100600, 2014-Ohio-4376 ¶ 7, citing *Arrow Unif. Rental LP v. Wills, Inc*., 6th Dist. Wood No. WD-12-057, 2013-Ohio-1829. We must therefore "determine whether the trial court's order is based on an erroneous standard or a misconstruction of the law." *Id.* At the same time, due deference must be given to the trial court's findings of fact if supported by

competent, credible evidence. *State v. Clements*, 5th Dist. No. 08 CA 31, 2008-Ohio-5549 ¶ 11.

Breach of Contract

{¶ 16} Falcone argues that the trial court erred as a matter of law in finding Parr did not breach the purchase agreement by failing to provide a perpetually enforceable easement rather than a personal license

{¶ 17} In order to prove a claim for breach of contract by Parr, it was necessary for Falcone to show by a preponderance of the evidence 1) the existence of a contract, 2) performance by plaintiff, 3) breach by defendant, and 4) damage or loss to plaintiff. *Bayer v. S. Pleasant Dev. Group, LLC*, 5th Dist. Fairfield No. 15-CA-16, 2016-Ohio-1336, ¶ 38.

{¶ 18} A contract is to be interpreted to give effect to the intention of the parties. *Morrison v. Petro Evaluation Serv., Inc*., 5th Dist. Morrow No. 2004-CA-0004, 2005-Ohio-5640, ¶ 29 citing *Employer's Liab. Assur. Corp. v. Roehm*, 99 Ohio St. 343, 124 N.E. 223 (1919), syllabus. “Generally, courts presume that the intent of the parties to a contract resided in the language they chose to employ in the agreement.” *Shifrin v. Forest City Ents. Inc.*, 64 Ohio St.3d 635, 638, 597 N.E.2d 499 (1992). “Common words appearing in a written instrument will be given their ordinary meaning unless manifest absurdity results, or unless some other meaning is clearly evidenced from the face or overall contents of the instrument.” *Alexander v. Buckeye Pipe Line Co.*, 53 Ohio St.2d 241, 374 N.E.2d 146 (1978) paragraph two of the syllabus. Parol evidence cannot be considered if no ambiguity appears on the face of an instrument. *Shifrin v. Forest City Ents., Inc*., 64 Ohio St.3d 635, 638, 597 N.E.2d 499 (1992).

License v. Easement

{¶ 19} Whether Parr breached the contract is dependent on whether the parking provision in the purchase agreement created an easement or a license.

{¶ 20} An easement is defined as an interest in the land in the possession of another which "entitles the owner of such interest to a limited use or enjoyment of the land in which the interest exists." *Sterns v Devecka*, 5th Dist. Tuscarawas No. 2001AP110102, 2002-Ohio-3839, ¶ 42, citing *Smith v. Gilbraith* (1991), 75 Ohio App.3d 428, 434, 599 N.E.2d 798. "'Generally, the term "interest in land" means some portion of the title or right of possession, and does not include agreements which may simply affect the land. * * * Thus, easements are "interests in land" subject to the Statute of Frauds, but licenses are not." *Ferguson v. Strader*, 94 Ohio App.3d 622, 627, 641 N.E.2d 728 (1994).

{¶ 21} "In contrast to an easement, a license is 'a personal, revocable, and nonassignable privilege, conferred either by writing or parol, to do one or more acts upon land without possessing any interests in the land.' *DePugh v. Mead Corp*. (1992), 79 Ohio App.3d 503, 511 [607 N.E.2d 867]. A license has also been defined as " 'an authority to do a particular act or series of acts upon another's land, without possessing any estate therein." ' * * * One who possesses a license thus has the authority to enter the land in another's possession without being a trespasser.' *Mosher v. Cook United, Inc.* (1980), 62 Ohio St.2d 316, 317 [16 O.O.3d 361, 405 N.E.2d 720] * * *." Varjaski v. Pearch, 7th Dist. Mahoning App. No. 04MA235, 2006-Ohio-5268 ¶ 12.

The Eighth District Court of Appeals noted the differences between an easement and a license in *Weir v. Consolidated Rail Corp*. (1983), 12 Ohio App. 3d 63, 465 N.E.2d 1341 (1983) at 65-66: "There are several distinguishing characteristics between an

easement and a license: a license is terminable at the will of the licensor, an easement is not; a license cannot be assigned, and does not pass at death; a license terminates upon conveyance of the land; a license is an agreement, binding only on the parties to it; an easement is an interest in real property which runs with the land. *Rex v. Hartman* (App. 1934), 16 Ohio Law Abs. 573; *Wolfrum v. Hartman* (1933) 45 Ohio App. 172; *Fowler v. Delaplain* (1909), 79 Ohio St. 279; *Fairbanks v. Power Oil Co*. (1945), 81 Ohio App. 116 [36 0.0. 418]; *Yeager v. Tuning* (1908), 79 Ohio St. 121."

An Ambiguous Provision

{¶ 22} The trial court found that the provision "Seller to allow buyer to park in the rear office area after 5:00 p.m." ambiguous as it was not clear who was permitted to park, what area "the rear office area" encompassed, and for how long after 5:00 p.m. parking would be permitted.

{¶ 23} Through parol evidence offered at trial, the parties explained that parking would be permitted on Parr's property by employees and customers of Falcones; that the rear office area included approximately eleven parking spaces on Parr's office property; and that the time permitted for parking was from 5:00 p.m. until Falcone's Tavern closed at approximately 2:00 a.m.

{¶ 24} Barcopoulous testified that during the purchase negotiations, Falcone's expressed a need for additional parking, hence the agreement by Parr to permit parking on the office property after 5:00 p.m. Barcopoulous further testified his understanding was the parking would remain "forever." Falcone also testified he believed he would always have access to those spaces.

{¶ 25} Parr's understanding, however, was that he would permit Falcone's to use the parking spaces only as long as he owned the office property because to agree otherwise would have hindered his ability to sell the office property later.

The Purchase Agreement Language Created a License

{¶ 24} We agree that the purchase agreement was ambiguous as to the parking agreement. We further find no error in the trial court's determinations. The purchase agreement was silent as to subsequent owners of the office property. Plaintiff's exhibit 3. The deed is also silent and created no ownership interest in the parking spaces. Plaintiff's exhibit 4. No easements were ever granted. Transcript at 63.

{¶ 25} What is more, Falcone concedes that the language of the purchase agreement itself did not create an easement. Yet Falcone argues the same language obligated Parr to convey a binding and enforceable easement. Brief of appellant at 7. Falcone cannot have it both ways. Nothing in the purchase agreement created any obligation for Parr to convey a perpetually enforceable easement. As such, we concur with the trial court's finding that the parking provision in the purchase agreement created a personal license which terminated upon conveyance of the office property to Pawmew, and that Parr therefore did not breach the contract with Falcone.

Manifest Weight

{¶ 26} Within this same assignment of error, Falcone also argues the trial court's conclusion that his right to use the parking area expired when Parr sold the office property to Pawmew is against the manifest weight of the evidence. But because the parking provision was a license rather than an easement, it expired as a matter of law when Parr sold the office property to Pawmew.

{¶ 27} The sole assignment of error is overruled.

By Wise, Earle, J.

Delaney, P.J. and

Gwin, J. concur.

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