[Cite as *Cintas Corp. v. Joel Lehmkuhl Excavating*, 2003-Ohio-2958.]

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

CINTAS CORPORATION :

Plaintiff-Appellee : C.A. CASE NO. 19613

v. : T.C. CASE NO. 02 CVF 354

JOEL LEHMKUHL EXCAVATING : (Civil Appeal from Vandalia Municipal Court)

Defendant-Appellant :

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O P I N I O N

Rendered on the 6th day of June, 2003.

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FREDERICK N. YOUNG, J.

{¶1} Defendant-Appellant Joel Lehmkuhl Excavating, Inc. ("Lehmkuhl") appeals the judgment of the Municipal Court of Vandalia, Ohio, which found in favor of Plaintiff-Appellee Cintas Corporation ("Cintas") for damages in the amount of $9,022.22.

{¶2} Lehmkuhl entered into a contract with Cintas on February 4, 2000 for Cintas to provide it with uniforms and other items on a weekly basis for a period of five years. After Lehmkuhl failed to pay Cintas for the month of June, 2001, Cintas stopped providing services to Lehmkuhl. At that time Lehmkuhl had a balance due of $597.93. At no time did Lehmkuhl state to Cintas either verbally or in writing that it wished Cintas to discontinue services on the contract.

{¶3} Cintas sent a demand letter to Lehmkuhl on August 24, 2001, requesting immediate payment on the outstanding balance. In November of 2001 another demand letter was sent through Cintas' counsel to Lehmkuhl. Lehmkuhl paid the outstanding balance on November 19, 2001.

{¶4} Cintas sent a letter to Lehmkuhl in December of 2001 addressing the "early termination of the contract." The letter stated that the damages incurred by Cintas as a result of Lehmkuhl's alleged breach of contract included the balance of $597.93 as well as the liquidated damages provided in the contract.

{¶5} On March 14, 2002, Cintas filed a complaint in Vandalia Municipal Court for Lehmkuhl's breach of contract. The complaint was amended on April 9, 2002 to include the proper parties and the correct sum of $9,022.22 in damages. Lehmkuhl filed timely answers to both complaints.

{¶6} The parties entered into a stipulation of facts, and each filed briefs with the trial court requesting judgment in their favor. On September 12, 2002, a magistrate issued a decision that Cintas was entitled to the liquidated damages for Lehmkuhl's early termination of the contract. The magistrate found that the failure to pay Cintas was, in effect, a "cancellation" of the contract, thus invoking the liquidated damages

clause.

{¶7} Lehmkuhl timely objected to the magistrate's decision on September 26, 2002. Vandalia Municipal Court Judge Richard Bannister affirmed the decision of the magistrate.

{¶8} Lehmkuhl now appeals, asserting one assignment of error:

{¶9} "The trial court erred by determining that Cintas was entitled to liquidated damages under the terms of the subject contract."

{¶10} Lehmkuhl contends that Cintas is not entitled to liquidated damages because Lehmkuhl did not cancel the contract, but instead made a "late payment" of the balance owed for June, 2001. Since the contract does not provide for liquidated damages in the event of a late payment, but only in the case of a cancellation, Lehmkuhl asserts that it should not be responsible for payment of those damages. Cintas asserts that the trial court was correct in its ruling, as the parties had entered into a long-term contract, and failure of a party to continue the contract for the full sixty months would invoke the liquidated damages clause.

{¶11} The construction of written contracts is a matter of law. *Long Beach Assn., Inc. v. Jones*, 82 Ohio St.3d 574, 576, 1998-Ohio-186, 697 N.E.2d 208, citing *Inland Refuse Transfer Co. v. Browning-Ferris Industries of Ohio, Inc.* (1984), 15 Ohio St.3d 321, 322, 474 N.E.2d 271. "The cardinal purpose for judicial examination of any written instrument is to ascertain and give effect to 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. A court must give effect to the expressed intentions of the parties where a written instrument is unambiguous. *United States Fid. & Guar. Co. v.*

St. Elizabeth Med. Ctr. (1998), 129 Ohio App.3d 45, 55, 716 N.E.2d 1201, citing *Aultman Hosp. Assn. v. Community Mut. Ins. Co.* (1989), 46 Ohio St.3d 51, 53, 544 N.E.2d 920. Contractual language is "ambiguous" where its meaning cannot be derived from the four corners of the contract or where the language may be reasonably interpreted in more than one way. *United States Fid.*, supra, at 55. "A contract is ambiguous if the rights and duties it imposes on the parties to it are reasonably subject to conflicting interpretations." *Matthews v. Morris Sons Co.* (1997), 118 Ohio App.3d 345, 349, 692 N.E.2d 1055.

{¶12} Furthermore, parties are generally free to enter into contracts that include a provision which apportion damages in the event of default. *Lake Ridge Academy v. Carney* (1993), 66 Ohio St.3d 376, 381, 613 N.E.2d 183. However, the question of whether a stipulation in a contract constitutes liquidated damages, a penalty, or a forfeiture is a question of law. Id. at 380. Therefore, an appellate court must review this question de novo. Id.

{¶13} For public policy reasons, parties may not contract for liquidated damages if they constitute a penalty. *Westbrock v. W. Ohio Health Care Corp.* (2000), 137 Ohio App.3d 304, 322, 738 N.E.2d 799. "Because the sole purpose of contract damages is to compensate the nonbreaching party for losses suffered as a result of a breach, '[p]unitive damages are not recoverable for a breach of contract unless the conduct constituting the breach is also a tort for which punitive damages are recoverable.'" (Citation omitted.) *Lake Ridge*, supra, at 381. A remedy is considered to be punitive if it subjects the breaching party to a liability "disproportionate to the damage which could have been anticipated from breach of the contract." Id. However, parties may contract

for liquidated damages to be paid in the event of a breach, when the provision does not disregard the principle of compensation. *Westbrock*, supra, at 322.

{¶14} In this case, it is undisputed that the contract allowed for liquidated damages in the event of cancellation. Specifically, the paragraph dealing with liquidated damages states the following:

{¶15} "Additional employees and products may be added to this agreement upon written or verbal request of the Customer. In the event of cancellation of this service agreement by the Customer prior to the termination date, other than for failure of the Company to perform under its guarantee, the Customer will pay the greater of 50% of the weekly service charge per week of the unexpired term, or buyback all the garments and other products in inventory at the rates listed above as replacement value."

{¶16} We note that at no time in the trial court nor in his appeal did Lehmkuhl raise the issue that the damages constituted a penalty or that the payment of damages was not the intent of the parties.

{¶17} The magistrate found that the parties had created a written contract; that the language in the contract, including the liquidated damages clause, was not ambiguous; and that both parties consented to the contract. The magistrate concluded that Lehmkuhl's failure to pay under the terms of the contract resulted in a material breach of contract "which in effect was a cancellation of the contract and triggered the liquidated damages clause. The failure to pay Plaintiff for services rendered is a nullification of the contract. Plaintiff is under no continuous duty to provide services each month without receiving payment from Defendant." (Doc. No. 19, p. 5-6.)

{¶18} In affirming the magistrate's decision, the trial court agreed that Lehmkuhl's actions of "not paying its monthly payment were tantamount to a cancellation of the contract." (Doc. No. 22, p. 2.) The trial court found that Cintas had established, by a preponderance of the evidence, that Lehmkuhl owed $597.93 for services during the month of June, 2001, and that Cintas, in response, discontinued services to Lehmkuhl. Cintas sent demand letters to Lehmkuhl on August 24, 2001 and November 24, 2001 demanding full payment of the balance due and the liquidated damages. Lehmkuhl paid Cintas the money owed for its June, 2001 balance on November 19, 2001. The trial court concluded that Lehmkuhl had cancelled the contract, and thus Lehmkuhl owed Cintas the amount of liquidated damages, $9,022.22, plus interest at the rate of 10% per annum from the date of judgment, plus court costs.

{¶19} In this case we agree with the trial court. Lehmkuhl signed a binding contract to pay a weekly amount to Cintas. The contract was for a period of sixty months. Cintas provided weekly services to Lehmkuhl in a satisfactory manner per the contract. In June of 2001, Lehmkuhl failed to perform on the contract, but did not properly file a complaint as provided for in the contract before defaulting. Additionally, at no time did Lehmkuhl request that Cintas resume services. We find that the effect of Lehmkuhl's default of paying for services was a cancellation of the contract.

{¶20} Lehmkuhl's argument focuses on its never having specifically stated to Cintas that it was "cancelling" the contract. According to Lehmkuhl, its default was a "late payment," and thus the liquidated damages clause is not applicable. We do not agree. "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 face or overall contents of the instrument." *Foster Wheeler Enviresponse*, supra, at 361. According to Black's Law Dictionary (6th Ed. 1990), to "cancel" is to "terminate," and Lehmkuhl terminated its performance on the contract by not paying for Cintas' weekly services. We find that this termination of performance is a cancellation of the contract. To find otherwise would produce an absurd result, for Cintas would have had to continue performance on the contract and provide services for the remainder of the sixty months, despite Lehmkuhl's default. That would have forced Cintas to wait until the expiration of the contract to invoke the liquidated damages clause, and we do not believe that was the intent of the parties.

{¶21} Therefore, we agree with the magistrate and the trial court's determination that the language of the contract shows that the parties intended that nonpayment in this case for services would constitute a cancellation of the contract, and thus Cintas was entitled to liquidated damages. Lehmkuhl's assignment of error is overruled.

{¶22} The judgment of the trial court is affirmed.

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BROGAN, J. and WOLFF, J., concur.

Copies mailed to:

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Hon. Richard J. Bannister