[Cite as *Sandusky v. Erie Cty. Bd. of Commrs.*, 2015-Ohio-2231.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
ERIE COUNTY

City of Sandusky

Appellant

v.

Board of County Commissioners,
Erie County, Ohio

Appellee

Court of Appeals No. E-15-010

Trial Court No. 2012-CV-0846

DECISION AND JUDGMENT

Decided: June 5, 2015

* * * * *

William P. Lang, for appellant.

Richard T. Sargeant, Joseph A. Gregg, Kevin J. Baxter, Prosecuting Attorney, and Jason R. Hinners, Assistant Prosecuting Attorney, for appellee.

* * * * *

YARBROUGH, P.J.

I. Introduction

{¶ 1} This is an accelerated appeal from the judgment of the Erie County Court of Common Pleas. Appellant, the city of Sandusky ("the city"), appeals the trial court's award of summary judgment to appellee, Erie County ("the county"), on the city's action for breach of contract. We reverse.

A. Facts and Procedural Background

{¶ 2} The background facts are not in dispute. The city and the county are parties to a contract whereby the city has agreed to sell surplus water from its water purification, pumping, and distribution system to the county. At issue in the present appeal is the price at which the water is to be sold for the three-year period beginning January 1, 2013.[1]

{¶ 3} Paragraph 3 of the contract between the parties provides, in pertinent part:

> For all water sold and delivered by [the city] to [the county] from the date of this contract through and including December 31, 2006, the wholesale rate per hundred cubic feet shall remain at the current rate of $1.34. Thereafter, for an initial period beginning on January 1, 2007 and through and including December 31, 2009, the wholesale rate per hundred cubic feet shall be $1.26. On January 1, 2010, and on January 1 of each third year thereafter, a new wholesale rate, established in accordance with Schedule A hereto, shall take effect for all water sold and delivered by [the city] to [the county] effective on and from January 1 of such year through and including the third December 31 thereafter. Such initial three-year period and each three-year period thereafter is hereafter referred to as a

[1] In its amended complaint, the city also raised claims regarding alleged promises the county made to increase its distribution system, thereby increasing the volume of water it would buy. The trial court granted summary judgment in the county's favor on those claims. On appeal, the city has not presented any assignments of error relative to that part of the trial court's decision.

"Rate Period". Notwithstanding the foregoing, the wholesale rate in effect for a particular Rate Period may be adjusted as contemplated in Section 3 of Schedule A.

{¶ 4} Schedule A, in turn, reads:

Section 2. Establishment of New Wholesale Rate Every Three Years.

The parties shall use their best efforts to retain B&N or a consulting engineering firm of similar repute and professional standing with respect to municipal water systems (the "Consulting Engineer"), by May 1, 2009, and by May 1 of every third year thereafter, to review and update the B&N Wholesale Rate Report (and any subsequent similar reports prepared by a Consulting Engineer under this Section or Section 3 of this Schedule A) in order to make a written recommendation (in substantially the same format and with substantially the same amount of detail as provided in the B&N Wholesale Rate Report) by October 1 of such year to the parties as to the new wholesale rate to take effect under this Section and paragraph 3 of the Contract for the Rate Period commencing on the next succeeding January 1 (the "Recommendation").

* * *

Each party shall have 30 days after the receipt of the Recommendation from the Consulting Engineer to determine whether to

reject it. If any party rejects the Recommendation then it shall provide its reasons for such rejection in writing to the other party.

If neither party rejects the Recommendation then it shall be established as the new wholesale rate for the new Rate Period for purposes of this Section and paragraph 3 of the Contract.

If only one party rejects the Recommendation it shall be established as the new wholesale rate for the new Rate Period for purposes of this Section and paragraph 3 of the Contract, subject, however, to the right of the party rejecting such Recommendation to submit the matter to the Arbitration Board as provided for in Section 4 of this Schedule A.

* * *

If a Consulting Engineer is not retained by either party in the given year, or if a recommendation is not received by the parties, then the new wholesale rate for the new Rate Period for purposes of this Section and paragraph 3 of the Contract shall be the indexed Wholesale Rate.

{¶ 5} At some time in 2012, the county retained Poggemeyer Design Group to conduct a rate study and prepare a written recommendation for the wholesale rate beginning January 1, 2013. In August 2012, Poggemeyer contacted the city's finance director seeking information to allow it to complete the study and recommendation. The information was given, and Poggemeyer presented a draft report to the county on August

22, 2012. The city requested a copy of that report, but was not provided with one. A final rate study and written recommendation as to the wholesale rate was not delivered to the city by October 1, 2012.

{¶ 6} On October 8, 2012, Poggemeyer again contacted the city seeking additional information to allow it to complete the rate study. On October 31, 2012, the city responded that it would not provide additional information until it was presented with the draft report presented to the county. Poggemeyer replied that it was unable to provide the draft report without authorization from the county. On November 12, 2012, despite not having received a draft report, the city provided the additional information to Poggemeyer. On December 7, 2012, the city received the final "Regional Water Rate Study Update" created by Poggemeyer, which recommended a wholesale rate of $1.18.

{¶ 7} Thereafter, on January 4, 2013, the city sent a letter to the county in which it detailed that because the county failed to present a written recommendation as to the wholesale rate by the October 1, 2012 deadline, pursuant to the terms of Schedule A, the city would be billing the county at the indexed wholesale rate of $1.35. The county replied in a letter dated February 28, 2013, that because the city did not submit its rejection of Poggemeyer's written recommendation to arbitration,[2] the county would pay the recommended rate of $1.18, as provided in Schedule A of the parties' agreement.

[2] Section 4 of Schedule A provides that an objecting party has 30 days following its rejection of the recommendation to submit the matter to arbitration.

{¶ 8} On February 19, 2013, the city filed its amended complaint in which it alleged that the county breached the parties' agreement by not paying the indexed wholesale rate of $1.35, resulting in approximately $300,000 in damages. The case was assigned to Judge Roger Binette.

{¶ 9} After filing its answer, the county moved for summary judgment, arguing that under the terms of the agreement, the city was required to object to the written recommendation and submit the matter to arbitration in order to avoid imposition of the recommended rate. The city opposed the motion for summary judgment, arguing that the county did not reasonably comply with the requirement that the written recommendation be provided by October 1, 2012. Having not received a recommendation, the city prepared its budget on November 1, 2012—as required by the city charter—using the indexed wholesale rate provided pursuant to Schedule A of the agreement. The city concluded that a genuine issue remained for trial regarding the appropriate wholesale rate.

{¶ 10} On December 30, 2014, Judge Thomas Pokorny entered the decision of the court, granting the county's motion for summary judgment. The court reasoned that the city properly rejected the written recommendation because it was untimely. However, the court found that the contract does not provide that a rejecting party may "self-calculate the new wholesale rate if the recommendation was late or untimely. Rather, the contract provides that such a recommendation is the new rate subject to an arbitration."

Because the city did not submit the matter to arbitration, the trial court held that, under the terms of the parties' agreement, the new wholesale rate became $1.18 as recommended by Poggemeyer.

B. Assignments of Error

{¶ 11} The city has timely appealed the December 30, 2014 judgment of the trial court, raising two assignments of error for our review:

1. THE JUDGMENT IS INVALID, AS THE JUDGE WAS NOT PROPERLY APPOINTED.

2. THE TRIAL COURT ERRED WHEN IT GRANTED THE DEFENDANT'S MOTION FOR SUMMARY JUDGMENT.

II. Analysis

{¶ 12} We review summary judgment decisions de novo, applying the same standard as the trial court. *Lorain Natl. Bank v. Saratoga Apts.*, 61 Ohio App.3d 127, 129, 572 N.E.2d 198 (9th Dist.1989). Applying Civ.R. 56(C), summary judgment is appropriate where (1) there is no genuine issue as to any material fact, (2) the moving party is entitled to judgment as a matter of law, and (3) reasonable minds can come to but one conclusion, and viewing the evidence in the light most favorable to the non-moving party, that conclusion is adverse to the non-moving party. *Harless v. Willis Day Warehousing Co.*, 54 Ohio St.2d 64, 66, 375 N.E.2d 46 (1978).

A. Certificate of Assignment

{¶ 13} In its first assignment of error,[3] the city argues that the judgment is invalid because there was no indication in the record that Judge Pokorny was appointed to act by the Ohio Supreme Court. The county responds that although the Certificate of Assignment appointing Judge Pokorny was not filed in the record of this case, the trial court retained a file-stamped, journalized copy of the assignment. Thus, the county concludes that the December 30, 2014 judgment is valid.

{¶ 14} Notably, while the appeal was pending, we granted the county's motion to supplement the record with the file stamped copy of the Certificate of Assignment. This assignment, file stamped on December 22, 2014, states:

> The Honorable Thomas John Pokorny, a retired judge of the Cuyahoga County Court of Common Pleas, General Division, is assigned effective November 1, 2014, to preside in the Erie County Court of Common Pleas, General, Domestic Relations, and Probate Divisions, for the months of November 2014 through January 2015 and to conclude any proceedings in which he participated that are pending at the end of that period.

Therefore, because we find that Judge Pokorny was properly assigned to preside in this matter, we hold that the December 30, 2014 judgment entry is valid. *See Ward v.*

[3] The city waived this assignment at oral argument, but a written waiver has not been filed in the record in this appeal. Therefore, absent a written waiver, we will address the city's assignment.

NationsBanc Mtge. Corp., 6th Dist. Erie No. E-05-040, 2006-Ohio-2766, ¶ 21-24 (holding that the record that was supplemented with certificate of assignment, which was not properly filed in the trial court case, sufficiently established the judge's authority to issue the appealed journal entry).

{¶ 15} Accordingly, the city's first assignment of error is not well-taken.

B. Contract Interpretation

{¶ 16} In its second assignment of error, the city argues that the trial court erred in applying the provision of Schedule A, Section 2 that requires arbitration where one party rejects the written recommendation. The city asserts that the applicable provision is, instead, the one pertaining to the determination of the rate when a recommendation is not received. To that end, the city contends that genuine issues of material fact exist regarding whether the county met its burden to provide the rate recommendation in a timely manner, and whether the city's determination that a rate would not be provided was reasonable.

{¶ 17} The county, on the other hand, argues that the parties do not dispute that the rate recommendation was received by the city, thereby negating the provision in Schedule A, Section 2 that allows a party to implement the indexed wholesale rate where the recommendation is not received. Thus, the county contends that the city's only remedy under Schedule A was to reject the recommendation and submit the matter to arbitration within 30 days of the rejection. Because the city failed to do so, the county

concludes that a straightforward application of Schedule A, Section 2 of the parties' agreement mandates that the recommended rate of $1.18 applies.

{¶ 18} Simplified, the parties' agreement obligates the county, whose turn it is to provide the report, to use its "best efforts" to retain a consulting firm by May 1, 2012, in order to make a written recommendation by October 1, 2012, as to the new wholesale rate. The agreement provides that if the recommendation is received, and only one party rejects it, the recommended rate is implemented, subject to the rejecting party's right to arbitration. Schedule A, Section 2 also provides, however, that "if a recommendation *is not received* by the parties, then the new wholesale rate for the new Rate Period * * * shall be the indexed Wholesale Rate." (Emphasis added.) Notably, the agreement does not specify at what point a recommendation is "not received," which is the determinative issue before us.

{¶ 19} The construction of written contracts is a matter of law. *Alexander v. Buckeye Pipe Line Co.*, 53 Ohio St.2d 241, 374 N.E.2d 146 (1978), paragraph one of the syllabus. The primary goal of contract construction is to ascertain and give effect to the intent of the parties. *Saunders v. Mortensen*, 101 Ohio St.3d 86, 2004-Ohio-24, 801 N.E.2d 452, ¶ 9. "Generally, courts presume that the intent of the parties to a contract resides 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). "When the terms in a contract are unambiguous, courts will not in effect create a new contract by finding an intent not expressed in the clear language employed by the parties." *Id.* "Only when the

language of a contract is unclear or ambiguous, or when the circumstances surrounding the agreement invest the language of the contract with a special meaning will extrinsic evidence be considered in an effort to give effect to the parties' intentions." *Id.* In determining whether contract terms are ambiguous, "common words appearing in a written instrument are to be given their plain and ordinary meaning unless manifest absurdity results or unless some other meaning is clearly intended from the face or overall contents of the instrument." *Alexander* at 245-246.

{¶ 20} As an initial matter, we find that in the context of the parties' agreement—specifically the requirement that a party use its best efforts to retain a firm to produce a recommendation by October 1—the phrase "is not received" is subject to multiple interpretations. The city argues, in effect, that the phrase "is not received," more appropriately means "is not received *by October 1 or a reasonable time thereafter*." The county, alternatively, argues that the phrase includes no such deadline, and so long as a recommendation is received by the parties, the provisions pertaining to rejection and arbitration apply. Because we find that both interpretations are reasonable, we hold that the phrase is ambiguous. *See Kademenos v. Harbour Homeowners Assn.*, 193 Ohio App.3d 112, 2011-Ohio-1266, 951 N.E.2d 125, ¶ 16 (6th Dist.) ("Contractual language is ambiguous only when its meaning cannot be derived from the four corners of the agreement, or when the language is susceptible of two or more reasonable interpretations.").

{¶ 21} We must next determine the parties' intent relative to when the recommendation "is not received" thereby triggering the clause that implements the indexed wholesale rate. In making that determination, we do not find persuasive the county's argument that so long as a recommendation is received at some point, the receiving party's only remedy is to reject the recommendation and submit the matter to arbitration. The fact that the agreement contains a provision for when a recommendation is not received necessarily implies that a deadline must exist for the receipt of the recommendation. To hold that anything received after that deadline still triggers the requirement to reject the recommendation and submit the matter to arbitration would render the provision implementing the indexed wholesale rate when a recommendation is not received nugatory.

{¶ 22} In identifying the deadline intended by the parties, we note that although the agreement does not define when a recommendation "is not received," Schedule A, Section 2 does state that best efforts should be used to deliver the report by October 1. In addition, the city's finance director stated in his affidavit that it was important for the city to receive any water rate study or recommendation in accordance with the terms of the agreement so that he could determine the appropriate rate, or whether the city would contest the proposed rate, for purposes of creating the city's budget, which must be submitted by November 1 of each year. Thus, we agree with the city that the intent of the parties is that the recommendation is considered "not received" if it is not received by

October 1, or a reasonable time thereafter. Because a question still exists as to whether the recommendation was timely "received" in this case, we hold that summary judgment in favor of the county is not appropriate.

{¶ 23} Accordingly, the city's second assignment of error is well-taken.

III. Conclusion

{¶ 24} For the foregoing reasons, the judgment of the Erie County Court of Common Pleas is reversed. The cause is remanded to the trial court for further proceedings consistent with this decision. The county is ordered to pay the costs of this appeal pursuant to App.R. 24.

Judgment reversed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J. _____
JUDGE

Arlene Singer, J. _____
JUDGE

Stephen A. Yarbrough, P.J. _____
CONCUR.
JUDGE