[Cite as *Corporate Protection Servs., Inc. v. Guardian Alarm of Ohio*, 2012-Ohio-514.]

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

Corporate Protection Services, Inc., et al.	Court of Appeals No. L-10-1317
Appellees	Trial Court No. CI0200803974
v.	
Guardian Alarm of Ohio	**DECISION AND JUDGMENT**
Appellant	Decided: February 10, 2012

* * * * *

Keith Wilkowski and Jill K. Bigler, for appellees.

Thomas R. Paxton, for appellant.

* * * * *

SINGER, J.

{¶ 1} Appellant, Guardian Alarm of Ohio ("Guardian") appeals from a decision of the Lucas County Court of Common Pleas granting judgment to appellees, Corporate Protection Service, Inc. ("CPS"), and Block Communications, Inc., in a breach of contract action. After a thorough review of the record, we affirm.

{¶ 2} The facts giving rise to this appeal are as follows. CPS is an alarm monitoring business that installs and monitors commercial and residential alarm systems. CPS is a wholly owned subsidiary of Block Communications, Inc. Guardian supplies residential alarm monitoring devices.

{¶ 3} In February 2007, Guardian and CPS entered into a purchase agreement wherein Guardian agreed to purchase a substantial amount of CPS's accounts for $5,081,727.20. The price was subject to adjustment based on the value of the recurring monthly revenue ("RMR"), or the amount of revenue generated each month by customer accounts of the business. Section 2.2.3 of the purchase agreement stated: "[T]he settlement amount will be increased in an amount equal to the aggregate amount of money received by Guardian with respect to accounts receivable * * * earned by the company prior to the closing date."

{¶ 4} On March 27, 2007, the parties executed a closing agreement wherein Guardian agreed to pay an adjusted purchase price of $4,310,373.59 for CPS's accounts. In addition to the purchase price, the closing agreement also stated that with respect to internet protocol accounts ("IP accounts"), Guardian was to pay CPS an amount equal to 40 times the RMR of such accounts on the last day of the month in which any such accounts are transferred to Guardian, minus Guardian's costs to convert the accounts. With regard to accounts about which there was some uncertainty whether the accounts were subject to a standard form of alarm service contract, Guardian was to pay CPS 30

times the recurring monthly revenue for accounts that were not subject to the standard form.

{¶ 5} It is undisputed that CPS received the purchase price of $4,310,373.59. On May 9, 2008, however, CPS, noting that the settlement date had long since passed, filed a complaint against Guardian alleging breach of contract. Specifically, CPS alleged that it never received the additional payments which represented the accounts receivable described in paragraph 2.2.3 of the purchase agreement, the IP accounts and money from the accounts not subject to a standard form of alarm service contract. CPS alleged that they were owed $189,282 for the accounts receivable, $349,240 for the IP accounts, and $105,270 for the accounts not subject to a standard form of alarm service contract.

{¶ 6} Guardian answered the complaint and asserted counterclaims for damages based on the alleged illegal conduct of a CPS employee and CPS's failure to service or maintain Guardian's acquired accounts after the closing.

{¶ 7} Both parties filed motions for summary judgment. On May 14, 2010, the trial court granted CPS's motion in part and denied Guardian's motion for summary judgment. In granting CPS's motion in part, the court awarded CPS judgment in the amount of $349,272 for the IP accounts. A bench trial for the remaining claims was scheduled for May 20, 2010. Following the trial, the court issued a judgment in favor of CPS for $620,611. Guardian now appeals setting forth the following assignments of error:

I. The common pleas court erred in this breach of contract of sale of assets by granting plaintiffs' motion for summary judgment as it pertained to the issue of payment for internet protocol accounts (IP) in the amount of $349,272.00 where appellant Guardian provided evidence contradicting that amount creating at least a genuine issue of material fact precluding plaintiffs from summary judgment and the lower court should have granted summary judgment to Guardian.

II. The common pleas court erred by finding in favor of plaintiffs regarding their claims for payment for commercial accounts without contracts in the amount of $40,600.00 and accounts receivable /held in trust of $66,026.00.

III. The common pleas court erred in awarding plaintiffs' attorney fees and costs.

IV. The common pleas court correspondingly erred in awarding pre-judgment interest under 1343.03(A) if any of the judgment is vacated concerning monies owed under the purchase agreement.

{¶ 8} In their first assignment of error, Guardian contends that a genuine issue of material fact exists as to the value of the IP accounts. Specifically, Guardian contends that the value of the IP accounts should be calculated as to their value on the settlement date, 270 days after the closing. CPS contends and the trial court agreed that the IP accounts should be calculated as to their value on the closing date.

{¶ 9} On review, appellate courts examine a grant summary judgment de novo, *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996), applying the same standard as trial courts. *Lorain Natl. Bank v. Saratoga Apts.* (1989), 61 Ohio App.3d 127, 129, 572 N.E.2d 198 (1989). The motion may be granted only when it is demonstrated:

> * * * (1) that there is no genuine issue as to any material fact; (2) that the moving party is entitled to judgment as a matter of law; and (3) that reasonable minds can come to but one conclusion, and that conclusion is adverse to the party against whom the motion for summary judgment is made, who is entitled to have the evidence construed most strongly in his favor. *Harless v. Willis Day Warehousing Co.*, 54 Ohio St.2d 64, 67, 375 N.E.2d 46 (1978), Civ.R. 56(C).

{¶ 10} When seeking summary judgment, a party must specifically delineate the basis upon which the motion is brought, *Mitseff v. Wheeler*, 38 Ohio St.3d 112, 526 N.E.2d 798 (1988), syllabus, and identify those portions of the record that demonstrate the absence of a genuine issue of material fact. *Dresher v. Burt*, 75 Ohio St.3d 280, 293, 662 N.E.2d 264 (1996). When a properly supported motion for summary judgment is made, an adverse party may not rest on mere allegations or denials in the pleadings, but must respond with specific facts showing that there is a genuine issue of material fact. Civ.R. 56(E); *Riley v. Montgomery*, 11 Ohio St.3d 75, 79, 463 N.E.2d 1246 (1984). A "material" fact is one which would affect the outcome of the suit under the applicable

substantive law. *Russell v. Interim Personnel, Inc.*, 135 Ohio App.3d 301, 304, 733 N.E.2d 1186 (1999); *Needham v. Provident Bank*, 110 Ohio App.3d 817, 826, 675 N.E.2d 514 (1996), citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

{¶ 11} "If a contract is clear and unambiguous, then its interpretation is a matter of law and there is no issue of fact to be determined." *Inland Refuse Transfer Co. v. Browning–Ferris Indus. of Ohio, Inc.*, 15 Ohio St.3d 321, 322, 474 N.E.2d 271 (1984). 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. *Wolf v. Miller Diversified Consulting, L.L.C.*, 6th Dist. No. WD-07-049, 2008-Ohio-1233.

{¶ 12} Guardian relies on the following portion of the purchase agreement, Section 4.2, to support its argument.

> Further adjustments, if any, required to be made to the purchase price as a result of the provisions of Section 2.2 hereof shall be made on the two hundred seventieth (270) business day (the "settlement date") after the delivery to Guardian of all of the materials required to be delivered to Guardian pursuant to the provisions of Section 6 hereof. The amount of any such adjustment shall be referred to herein as the "settlement amount."

{¶ 13} With regard to "adjustments," Section 2.2 states:

> The purchase price shall be subject to adjustment under the following circumstances with such adjustments, if any, to be effected on the "settlement date" (as herein defined) and in the manner provided in Section 4.2 hereof.

{¶ 14} With regard to adjustments to RMR's expressly, the next paragraph of the purchase agreement provides:

> In the event that, as of the close of business on the closing date, [CPS's] "recurring monthly revenue" * * * is less than or greater than $127,587.98, then the purchase price will be reduced or increased by an amount obtained by multiplying the difference between $127,587.98 and the "recurring monthly revenue" as of the close of business on the day immediately preceding the closing date, by 40, the multiple.

{¶ 15} For purposes of the IP accounts, the closing date and the settlement date serve distinct purposes. Based on the above language, we find that the purchase agreement clearly and unambiguously provides that the RMR, upon which the value of the IP accounts is to be determined, is to be calculated using the RMR's value as of the closing date and to be paid on the settlement date. Accordingly, Guardian's first assignment of error is found not well-taken.

{¶ 16} In its second assignment of error, Guardian contends that the court erred in awarding CPS $40,600 for the accounts not subject to a standard form of alarm service contract and $66,026 for the accounts receivable. In its decision denying CPS's motion

for summary judgment, in part, the court found that there existed a general issue of material fact regarding the actual number of accounts without a standard form of alarm service contract which were transferred to Guardian pursuant to the closing agreement and retained by Guardian through the settlement period as well as a question of fact regarding the amount of the accounts receivable. The court quoted the affidavit testimony of Block Communications, Inc.'s President, Gary Blair, who merely estimated that there were four accounts transferred and retained. Blair also estimated that they were owed $189,292 for the accounts receivable but he noted that Guardian claimed that they had only collected $66,026.

{¶ 17} Judgment rendered after a bench trial will not be reversed as being against the manifest weight of the evidence in a civil case where the judgment is supported by competent, credible evidence in the record. *Seasons Coal Co., Inc. v. City of Cleveland*, 10 Ohio St.3d 77, 81, 461 N.E.2d 1273 (1984). The applicable standard requires the appellate court to give "the trial court's decision a presumption of correctness" and we may not substitute our judgment for that of the trial court. *Id*.

{¶ 18} We note that in this assignment of error, Guardian disputes the amounts of $40,600 and $66,026 based on its version of the RMR which we have already rejected in the first assignment of error.

{¶ 19} At trial, Guardian's director of finance, Laurie Mickiewicz, identified a copy of an email she sent to Blair informing him that as of the settlement date, four accounts without a standard form of alarm service contract were transferred to Guardian

pursuant to the closing agreement and retained by Guardian through the settlement period. The document also showed that the RMR of the retained accounts was $1,353.35. Blair also identified the email sent to him from Mickiewicz. As to the accounts receivable, Mickiewicz also identified another email she sent to Blair informing him that Guardian had collected $66,026 in accounts receivable and she verified, on the stand, that the amount was correct. Based on the testimony of Guardian's own director of finance, we find that there was competent, credible evidence introduced to support the trial court's judgment in the amount of $40,600 for the accounts not subject to a standard form of alarm service contract (30 times 1,353.35), and $66,026 in accounts receivable. Guardian's second assignment of error is found not well-taken.

{¶ 20} In the third assignment of error, Guardian contends that the court erred in awarding CPS attorney fees and costs in the amount of $107,174. Guardian's argument once again requires contract interpretation. Section 8.2 of the purchase agreement states in pertinent part:

> Guardian covenants and agrees that, notwithstanding the closing and the delivery of any instruments pursuant to this agreement, and regardless of any investigation at any time made by or on behalf of the company or Block may have in respect thereof, Guardian will indemnify and hold harmless the Company and Block from, for against any loss, damage, liability or deficiency (including without limitation, reasonable attorney's fees and other reasonable costs and expenses incidental to any suit, action,

> investigation or other proceeding) arising out of or resulting from, and will pay the Company and/or Block on demand the full amount of any sum which the Company or Block may pay or become obligated to pay on account of (i) any inaccuracy in any representation or the breach of any warranty made by Guardian hereunder, (ii) any failure of Guardian to perform or observe any term, provision, covenant, agreement or condition hereunder on the part of Guardian to be performed or observed: (iii) any claim, litigation or other action of any nature arising out of any act performed, transaction entered into or state of facts suffered to exist by Guardian prior or subsequent to the Closing; (iv) any claim, litigation or other action of any nature arising out of any customer services performed by Guardian, its agents or representatives after closing, or any change in the customer contracts assumed hereunder which are implemented by Guardian.

{¶ 21} Guardian focuses on the portion of the above section that states "* * * [Guardian] will pay the Company and/or Block on demand the full amount of any sum which the Company or Block may pay or become obligated to pay on account of * * *". Guardian contends that this language renders it responsible for attorney fees only in the event that CPS becomes financially liable for Guardian's actions. Guardian contends that because CPS is not indebted to a third party because of Guardian's actions, CPS is not entitled to attorney's fees.

{¶ 22} Guardian's interpretation specifically ignores the portion of the above quoted section which states in pertinent part:

> Guardian covenants and agrees that, * * * Guardian will indemnify and hold harmless the Company and Block from, for against any loss, damage, liability or deficiency (including without limitation, reasonable attorney's fees and other reasonable costs and expenses incidental to any suit, action, investigation or other proceeding)

In sum, the plain language of the contract provides indemnification for CPS in two instances. One, CPS is entitled to indemnification if Guardian's deficient performance of the contract results in litigation and, two, if Guardian's deficient performance of the contract causes CPS to be indebted to third parties. Accordingly, Guardian's third assignment of error is found not well-taken.

{¶ 23} In the fourth assignment of error, Guardian contends that CPS's award of pre-judgment interest should be reversed in the event that this court reverses the trial court's judgment. Given our disposition of Guardian's first three assignments of error, Guardian's fourth assignment of error is found not well-taken.

{¶ 24} On consideration whereof, we find that substantial justice was done the party complaining and the judgment of the Lucas County Court of Common Pleas is affirmed. Pursuant to App.R. 24, Guardian is ordered to pay the costs of this appeal.

Judgment affirmed.

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, P.J. _____
JUDGE

Thomas J. Osowik, J. _____
CONCUR.
JUDGE