[Cite as *Thyssen Krupp Elevator Corp. v. Constr. Plus, Inc.*, 2010-Ohio-1649.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Thyssen Krupp Elevator Corporation,	:	
Plaintiff-Appellant,	:	
		No. 09AP-788
v.	:	(C.P.C. No. 07CVH-01-990)
Construction Plus, Inc. et al.,	:	(ACCELERATED CALENDAR)
Defendants-Appellees.	:	

D E C I S I O N

Rendered on April 13, 2010

Rendigs, Fry, Kiely & Dennis, L.L.P., Peter L. Ney and *Michael J. Chapman,* for appellant.

Dinsmore & Shohl LLP, and *Michael V. Passella,* for appellees Retail Ventures, Inc. and Retail Ventures Services, Inc.

Roetzel & Andress, LPA, and *Thomas L. Rosenberg,* for appellees Northland Associates, LLC and Realty Finance Management, LLC.

APPEAL from the Franklin County Court of Common Pleas.

BRYANT, J.

{¶1} Plaintiff-appellant, Thyssen Krupp Elevator Corporation, appeals from a judgment of the Franklin County Court of Common Pleas granting the motions for summary judgment of defendants-appellees, Retail Ventures, Inc. and Retail Ventures

Services, Inc. (collectively "RVI"), Northland Associates, LLC ("Northland"), and Realty Finance Management, LLC ("Realty"). Because (1) genuine issues of material fact remain with respect to RVI's motion for summary judgment, and (2) no genuine issue of material fact remains with respect to Northland's and Realty's motions for summary judgment, we affirm in part and reverse in part.

I. Procedural History

{¶2} Plaintiff's complaint arises from plaintiff's elevator and escalator installation and repair work performed at 1649 Morse Road, Columbus, Ohio ("the property"). In 2003, RVI, the long-term tenant, entered into a lease agreement for the property with Northland, the property owner. The lease agreement required Northland to renovate the property for RVI. In 2004, Northland hired Construction Plus, Inc., as general contractor, to oversee the renovation project; Northland received financing for the project from Realty. Construction Plus, Inc. contracted with plaintiff, as subcontractor, to perform elevator and escalator installation and renovation services ("original contract"). At some point in 2005, Northland and RVI amended their lease agreement to allow RVI to sublet the completed property to the State of Ohio, Department of Taxation ("DOT").

{¶3} In early 2005, Construction Plus, Inc., then defunct, stopped paying plaintiff for plaintiff's services. As a result, plaintiff walked off the job site without completing the scope of the work contemplated under the original contract with Construction Plus, Inc. At some point, plaintiff resumed its work on the property, though the parties dispute under what conditions. Plaintiff completed all work on the project in November 2005, but plaintiff never received the $111,300 it claims to be owed for its work.

{¶4} On January 22, 2007, plaintiff filed a complaint in the Franklin County Court of Common Pleas against defendants, asserting, among other things, breach of contract, unjust enrichment, and third-party beneficiary claims to recover money owed to plaintiff for the elevator and escalator installation and repair work plaintiff performed at the property. Northland filed a cross-claim against RVI, and RVI filed cross-claims against Northland, Realty, Construction Plus, Inc., and its owner and executive officer, Cecil Hudson. After plaintiff obtained default judgments against Construction Plus, Inc. and Hudson for their breach of the original contract, the parties engaged in discovery related to plaintiff's claims against RVI, Northland, and Realty.

{¶5} On December 15, 2008, RVI, Northland, and Realty filed motions for summary judgment on plaintiff's breach of contract and unjust enrichment claims and its allegations it was a third-party beneficiary of the contract between Northland and Realty. Plaintiff, on January 9, 2009, filed a memorandum in opposition to defendants' summary judgment motion, arguing defendants incorrectly focused on the original contract between plaintiff and Construction Plus, Inc. while ignoring what plaintiff contends were separate, subsequent contracts defendants made directly with plaintiff.

{¶6} On February 6, 2009, the trial court issued a decision and entry denying defendants' motions for summary judgment because "there are numerous issues of material fact that are far from settled." (Decision and Entry, 1.) Among the remaining factual issues the trial court cited were whether a contract actually existed between plaintiff and defendants, whether defendants induced plaintiff to continue work on the property, and who was responsible for paying plaintiff.

{¶7} Defendants then filed eight motions in limine; the trial court granted all eight motions on June 4, 2009. As a result of the trial court's evidentiary rulings, defendants on July 10, 2009 filed a joint motion to reconsider their prior motions for summary judgment. The trial court granted defendants' motion for reconsideration, and then granted their summary judgment motions on July 21, 2009. Despite the trial court's judgment entry, plaintiff on July 27, 2009 filed its response, supported with affidavits, to defendants' joint motion to reconsider. Plaintiff again argued that additional contracts existed other than the original contract between plaintiff and Construction Plus, Inc. Believing the trial court incorrectly focused only on the original contract, and ignored subsequent contracts that plaintiff contended existed between plaintiff and defendants, plaintiff filed a motion on July 27, 2009 for leave to amend its complaint in order to clarify the matter. The trial court denied plaintiff's motion to amend on August 11, 2009.

II. Assignments of Error

{¶8} Plaintiff appeals, assigning as error:

> FIRST ASSIGNMENT OF ERROR: THE TRIAL COURT ERRED, PROCEDURALLY, IN ITS JULY 21, 2009 JUDGMENT ENTRY GRANTING SUMMARY JUDGMENT IN FAVOR OF DEFENDANTS-APPELLEES RVI AND NORTHLAND.
>
> SECOND ASSIGNMENT OF ERROR: THE TRIAL COURT ERRED, SUBSTANTIVELY, IN ITS JULY 21, 2009 JUDGMENT ENTRY GRANTING SUMMARY JUDGMENT IN FAVOR OF DEFENDANT-APPELLEE RVI.
>
> THIRD ASSIGNMENT OF ERROR: THE TRIAL COURT ERRED IN ITS JUNE 4, 2009 DECISION AND ENTRY GRANTING THREE (OF EIGHT) MOTIONS IN LIMINE FILED BY DEFENDANTS-APPELLEES RVI/RVSI.

> FOURTH ASSIGNMENT OF ERROR: THE TRIAL COURT ERRED IN ITS AUGUST 10, 2009 DECISION AND ENTRY DENYING THYSSENKRUPP'S MOTION FOR LEAVE TO AMEND ITS COMPLAINT.

For ease of discussion, we address plaintiff's assignments of error out of order.

III. Preliminary Considerations

{¶9} Preliminarily, we note plaintiff stated in its oral argument before this court that it no longer pursues its third-party beneficiary claim, so the focus of plaintiff's appeal is plaintiff's breach of contract and unjust enrichment claims. Additionally, plaintiff does not assign any error to the trial court's granting summary judgment to Realty, so we do not review that aspect of the trial court's judgment.

IV. Second Assignment of Error – Summary Judgment to RVI

{¶10} Plaintiff's second assignment of error asserts the trial court erred when it granted summary judgment in favor of RVI because genuine issues of material fact remain.

{¶11} An appellate court reviews summary judgment under a de novo standard. *Coventry Twp. v. Ecker* (1995), 101 Ohio App.3d 38, 41; *Koos v. Cent. Ohio Cellular, Inc*. (1994), 94 Ohio App.3d 579, 588. Summary judgment is appropriate only when the moving party demonstrates: (1) no genuine issue of material fact exists, (2) the moving party is entitled to judgment as a matter of law, and (3) reasonable minds could come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence most strongly construed in its favor. Civ.R. 56(C); State *ex rel. Grady v. State Emp. Relations Bd.*, 78 Ohio St.3d 181, 183, 1997-Ohio-221.

{¶12} Pursuant to Civ.R. 56(C), the moving party bears the initial burden of informing the trial court of the basis for the motion and of identifying those portions of the record demonstrating the absence of a material fact. *Dresher v. Burt*, 75 Ohio St.3d 280, 293, 1996-Ohio-107. Once the moving party discharges its initial burden, summary judgment is appropriate only if the non-moving party does not respond, by affidavit or as otherwise provided in Civ.R. 56, with specific facts showing that a genuine issue exists for trial. Civ.R. 56(E); *Dresher* at 293; *Vahila v. Hall*, 77 Ohio St.3d 421, 430, 1997-Ohio-259. See also *Castrataro v. Urban* (Mar. 7, 2000), 10th Dist. No. 99AP-219.

{¶13} To recover on a breach of contract claim, a plaintiff must demonstrate (1) the existence of a contract, (2) plaintiff's performance, (3) defendant's breach, and (4) damages or loss to the plaintiff. *Jarupan v. Hanna*, 173 Ohio App.3d 284, 2007-Ohio-5081, ¶18. Within those parameters, RVI asserted in its summary judgment motion that plaintiff could not prove breach of contract against RVI because RVI had no contract with plaintiff, the original contract being between plaintiff and Construction Plus, Inc. See, e.g., *Samadder v. DMF of Ohio, Inc.*, 154 Ohio App.3d 770, 2003-Ohio-5340, ¶25 (stating "a contract is binding only upon parties to a contract and those in privity with them" so a plaintiff cannot maintain a breach of contract action against a defendant who was not a party to the contract at issue), citing *Am. Rock Mechanics, Inc. v. Thermex Energy Corp.* (1992), 80 Ohio App.3d 53, 58.

{¶14} Plaintiff, though admitting RVI was not a party to the original contract between plaintiff and Construction Plus, Inc., asserted RVI entered into two subsequent contracts which form the basis of plaintiff's breach of contract claim against RVI. In its memorandum in opposition to RVI's summary judgment motion, plaintiff noted that, after

plaintiff walked off the job due to Construction Plus, Inc.'s failure to pay plaintiff amounts owed under the original contract, RVI induced plaintiff to complete work on the project by negotiating a new contract between RVI and plaintiff.

{¶15} To support his claims, plaintiff pointed to deposition testimony and affidavits timely filed with the trial court. See Civ.R. 56(C) (describing the type of evidence appropriate for consideration in a motion for summary judgment as the "pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action"). Among the documents plaintiff filed was the affidavit of Daniel Eisert, plaintiff's representative during the renovation project.

{¶16} In that affidavit, Eisert averred plaintiff engaged in a series of meetings with RVI and Northland after plaintiff ceased its work under the original contract with Construction Plus, Inc. In those meetings, Eisert explained that plaintiff required payment for past due work previously completed at the property. Additionally, Eisert averred, plaintiff produced four separate proposed repair orders for work not yet started, but necessary to complete the project; plaintiff demanded partial payment on the proposed repair orders before returning to the job site. Plaintiff received what it characterizes as a 50 percent deposit on the proposed future work. Relying on that payment as the basis for its belief a new contract ("Contract Two") had been formed, plaintiff returned to the property to complete its work on the elevators and escalators. As proof RVI's payments represented a down payment for future work and not merely payment for past work, plaintiff also submitted copies of the checks it received from RVI with the handwritten

notation, "50% Down." (Plaintiff's Memo in Opposition RVI's Motion for Summary Judgment, Exhibit B.)

{¶17} To corroborate Eisert's affidavit, plaintiff pointed to the deposition testimony of Scott Brownfield, the vice president of store planning for RVI. In his deposition, Brownfield acknowledged an agreement between RVI and Northland in which RVI would pay plaintiff, and then Northland would reimburse RVI, as RVI wanted to ensure the timely completion of plaintiff's work at the property to avoid penalty clauses in its sublease with DOT. Brownfield eventually authorized payment to plaintiff and testified he understood "that unless this payment was made, [plaintiff] was not going to complete any additional work." (Brownfield Depo., 72.)

{¶18} Plaintiff also notes the deposition testimony of Wayne Long, RVI's facilities manager at the property. Long testified plaintiff notified RVI that plaintiff would not continue to work on the property unless it received payment. According to Long, plaintiff presented a number to RVI, and RVI paid 50 percent of that number. Plaintiff contends Eisert's affidavit, the deposition testimony of Brownfield and Long, and the copies of the RVI checks at least create a genuine issue of material fact that plaintiff and RVI entered into Contract Two, with the 50 percent payment as consideration for plaintiff's continued work at the property. As such, plaintiff argues, summary judgment was inappropriate.

{¶19} Plaintiff further notes RVI executed a repair order in September 2005 establishing an hourly rate for plaintiff's services on other elevators, and the September 2005 repair order is either a separate contract ("Contract Three") or evidence corroborating the existence of Contract Two. Plaintiff alleges RVI owes plaintiff money under the repair order, and the damages it incurred as a result of not receiving payment

are part of its damages either under RVI's breach of Contract Two or a breach of a separate Contract Three.

{¶20} Where the evidence presented allows conflicting inferences, a court considering a summary judgment motion may not weigh the evidence. See *White v. Westfall*, 183 Ohio App.3d 807, 2009-Ohio-4490, ¶9 (stating "a court may not weigh the evidence" on summary judgment), citing *Hamilton v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. No. 06AP-916, 2007-Ohio-1173, ¶10. Plaintiff and RVI each characterize these events in a manner that reveals a dispute to be resolved: whether plaintiff and RVI entered into a contract or contracts subsequent to plaintiff's original contract with Construction Plus, Inc. If plaintiff's evidence be believed, the four elements of a breach of contract appear to be satisfied. On the other hand, if defendants' version of events be believed, RVI did not enter into any contract with plaintiff, but simply paid plaintiff for past work or for unrelated maintenance work. "Such a discrepancy over a material fact can be resolved only by the trier of fact." *Turner v. Turner* (1993), 67 Ohio St.3d 337, 341.

{¶21} RVI nonetheless argues the trial court did not err in granting its summary judgment motion because plaintiff's complaint referred only to the original contract, a contract for which plaintiff admittedly also seeks payment and to which RVI was not a party. The allegations in plaintiff's complaint underlying its breach of contract claim are a bit confusing, in part due to plaintiff's using different terms without clarifying whether they refer to the same contract or different contracts. Even so, the complaint refers, though perhaps not as clearly as desirable, to RVI's payments to plaintiff and contemplates RVI's potential "ratification of the contract." (Complaint, ¶12.)

{¶22} Moreover, although plaintiff's complaint does not include a detailed description of the terms and conditions of Contract Two or Contract Three, such details are unnecessary. *Wildi v. Hondros College*, 10th Dist. No. 09AP-346, 2009-Ohio-5205, ¶12 (stating the complaint "need not state with precision all elements that give rise to a legal basis for recovery as long as fair notice of the nature of the action is provided"). " 'Notice pleading' under Civ.R. 8(A) and 8(E) requires that a claim concisely set forth only those operative facts sufficient to give 'fair notice of the nature of the action.' " Id., quoting *DeVore v. Mut. of Omaha Ins. Co.* (1972), 32 Ohio App.2d 36, 38. Here, the allegations of the complaint, though not perfect, were minimally sufficient to put the parties on notice of a potential contract or contracts between plaintiff and RVI and the alleged breach of it. Indeed, the trial court so understood plaintiff's complaint, as evidenced in its initial conclusion that summary judgment was inappropriate due to genuine issues of material fact. To the extent RVI needed to clarify the allegations, a motion for a more definite statement was available. See Civ.R. 12(E).

{¶23} Even if the trier of fact concludes plaintiff and RVI did not enter into any contract subsequent to plaintiff's original contract with Construction Plus, Inc., the trier of fact nonetheless will have to determine whether, as plaintiff contends, plaintiff conferred a benefit on RVI so as to establish a claim for unjust enrichment. The same evidence plaintiff cites to support its breach of contract claim is implicated in its unjust enrichment claim.

{¶24} To succeed in an action for unjust enrichment, plaintiff must prove: (1) a benefit the plaintiff conferred upon the defendant; (2) the defendant's knowledge of the benefit; and (3) the impropriety of defendant's retaining the benefit conferred without

rendering payment to plaintiff for same. *Metz v. Am. Elec. Power Co., Inc.*, 10th Dist. No. 06AP-1161, 2007-Ohio-3325, ¶43, citing *Hummel v. Hummel* (1938), 133 Ohio St. 520, 527. "[R]ecovery under an unjust enrichment claim is unavailable where the matters in dispute are governed by the terms of an express contract." Id. at ¶45, citing *Kucan v. Gen. Am. Life Ins. Co.*, 10th Dist. No. 01AP-1099, 2002-Ohio-4290, ¶39.

{¶25} RVI argues plaintiff's services unjustly enriched, if anyone, only Northland because Northland is the property owner. RVI avers that, since it made all rental payments to Northland under its lease agreement, RVI did not retain a benefit for which it did not pay. In response, plaintiff contends it conferred a benefit directly upon RVI when it improved the property so RVI could honor its sublease to DOT. Plaintiff thus asserts that, if no express or implied-in-fact contract exists, plaintiff demonstrated sufficient facts for recovery under unjust enrichment based on a contract implied-in-law.

{¶26} The arguments of the parties, in the context of the evidence, reveal disputed issues to be resolved at trial. Although RVI asserts any benefit from plaintiff's work was bestowed on Northland, plaintiff's evidence, if believed, indicates RVI not only knew of but induced plaintiff's services and received the benefit in its ability to meet its obligations to DOT. The credibility issues inherent in resolving the parties' differing factual assertions are not properly resolved on summary judgment. Cf. *Hubbard v. Dillingham,* 12th Dist. No. CA2002-02-045, 2003-Ohio-1443, ¶26 (holding lessee could not recover from lessor on theory of unjust enrichment where lessee independently made improvements to the property for the benefit of lessee's business and lessee was up to date on all rental payments).

{¶27} In the final analysis, a genuine issue of material fact exists regarding the existence of Contract Two and Contract Three; reasonable minds could come to more than one conclusion from the evidence presented in support of and in opposition to RVI's motion for summary judgment. Accordingly, summary judgment was inappropriate with respect to plaintiff's breach of contract claim against RVI. The same evidence creates a genuine issue of material fact regarding plaintiff's unjust enrichment claim. Because genuine issues of material fact remain regarding plaintiff's claims for breach of contract and unjust enrichment against RVI, we sustain plaintiff's second assignment of error.

V. First Assignment of Error – Summary Judgment for Northland

{¶28} In its first assignment of error, plaintiff argues the trial court erred procedurally when it granted summary judgment to RVI and Northland. Because we sustained plaintiff's second assignment of error regarding the substance of the summary judgment granted to RVI, plaintiff's procedural argument with respect to RVI is moot. As to Northland, plaintiff asserts the trial court erred procedurally when it granted Northland's motion to reconsider because the trial court issued its decision before plaintiff's time to respond had lapsed.

{¶29} Loc.R. 21 of the Rules of the Franklin County Common Pleas Court provides, in relevant part, that "[t]he opposing counsel or a party shall serve any answer brief on or before the 14th day after the date of service as set forth on the certificate of service attached to the served copy of the motion." Loc.R. 21.01, Franklin County Common Pleas Court, General Division. Additionally, "[o]n the 28th day after the motion is filed, the motion shall be deemed submitted to the Trial Judge." Id. With limited exceptions inapplicable here, "this Rule shall apply to all motions." Id.

{¶30} Northland submitted its motion for reconsideration on July 10, 2009. The trial court then granted that motion in a judgment entry on July 21, 2009, 11 days after the motion for reconsideration was filed and prior to plaintiff's response. Plaintiff argues its response filed July 27, 2009 was timely, as the response date is 14 days per Loc.R. 21.01, plus three days for service by mail per Civ.R. 6(E).

{¶31} In *Cuervo v. Snell* (Sept. 26, 2000), 10th Dist. No. 99AP-1442, this court found the trial court committed reversible error in filing a decision on a motion 11 days before the time allowed in Loc.R. 21.01 for the opposing party to file a response and 25 days before the day Loc.R. 21.01 states the motion "shall be deemed submitted to the Trial Judge." Id., citing Loc.R. 21.01. Based on this court's decision in *Cuervo*, plaintiff here asserts the trial court erred in granting summary judgment in favor of Northland.

{¶32} Because the trial court granted Northland's motion to reconsider prematurely, the trial court erred. Plaintiff, however, does not challenge the merits of the trial court's decision granting summary judgment to Northland. Indeed, plaintiff acknowledged at oral argument before this court that it no longer would pursue its third-party beneficiary claim against Northland. Further, plaintiff's claims against Northland for breach of contract and unjust enrichment are based on statements of Ronald Huff, now deceased. Huff and his estate are not parties to this lawsuit, so his statements are inadmissible hearsay that do not fall within any exception. See Ohio Evid.R. 804(B)(5); *Welsh v. Cavin,* 10th Dist. No. 02AP-1328, 2004-Ohio-62, ¶32 (explaining, in combination, the limited situation, not applicable here, in which the statements of a decedent are exempt from the hearsay rule, including the requirement that the estate or personal representative of the decedent's estate be a party). Thus, "[e]ven if the trial court

had waited until the parties had completed the briefing process, the end result" as to Northland would be the same because plaintiff could not demonstrate with admissible evidence a genuine issue of material fact. *Robinson v. Kokosing Constr. Co., Inc.,* 10th Dist. No. 05AP-770, 2006-Ohio-1532, ¶16 (holding a trial court will not require reversal due to a violation of Loc.R. 21.01 when that violation is harmless error); Civ.R. 56(E) (requiring affidavits filed in response to "set forth facts as would be admissible in evidence" in order to overcome a motion for summary judgment).

{¶33} Accordingly, plaintiff's first assignment of error as to RVI is moot, and plaintiff's first assignment of error as to Northland is overruled.

VI. Third Assignment of Error – Motions in Limine

{¶34} In its third assignment of error, plaintiff asserts the trial court erred in granting three of RVI's motions in limine. Specifically, plaintiff challenges the trial court's decision to grant RVI's motions in limine precluding plaintiff from presenting (1) evidence in support of attorney's fees; (2) evidence or testimony in support of the September 21, 2005 repair order; and (3) evidence or testimony regarding its claims for breach of contract, third-party beneficiary, or unjust enrichment.

{¶35} "[A] decision on a motion in limine is a pretrial, preliminary, anticipatory ruling on the admissibility of evidence. A ruling on a motion in limine is interlocutory, usually dealing with the potential admissibility of evidence at trial." *Krotine v. Neer*, 10th Dist No. 02AP-121, 2002-Ohio-7019, ¶10, citing *State v. Grubb* (1986), 28 Ohio St.3d 199, 201-02. Because a trial court's decision on a motion in limine reflects "anticipatory treatment of the evidentiary issue," "[i]n virtually all circumstances finality does not attach when the motion is granted. Therefore, should circumstances subsequently develop at

trial, the trial court is certainly at liberty ' * * * to consider the admissibility of the disputed evidence in its actual context.' " *Grubb* at 201-02, quoting *State v. White* (1982), 6 Ohio App.3d 1, 4. Because motions in limine are aimed at admissibility of evidence at trial, they are "antithetical in a summary judgment context." *Pieper v. Williams*, 6th Dist. No. L-05-1065, 2006-Ohio-1866, ¶42.

{¶36} Plaintiff nonetheless would have us review the trial court's June 4, 2009 order granting RVI's motions in limine, contending it was merged into the final order granting summary judgment. See, e.g., *Lillie v. Meachem*, 3d Dist. No. 1-09-09, 2009-Ohio-4934, ¶12 (stating "where, as here, the motion in limine is merged into the final order granting summary judgment, an appellate court may address the trial court's decision"), citing *Brown v. Mabe*, 170 Ohio App.3d 13, 2007-Ohio-90, ¶6.

{¶37} Having determined the trial court improperly granted RVI's motion for summary judgment, this court has no basis to review the trial court's decisions regarding the motions in limine, other than to note motions in limine procedurally do not apply in a summary judgment context. Although the purpose of such motions is to ascertain the admissibility of evidence at trial, Civ.R. 56 governs the evidence properly considered in summary judgment motions, defendants' motions in limine, and the trial court's rulings on them, play no role in determining defendants' summary judgment motions even though they may address admissibility issues the court also considers under Civ.R. 56. The motions in limine, instead, are pertinent to a trial, where plaintiff will be able to attempt to establish the admissibility of the disputed evidence in the context of the trial evidence. *State v. Hillyer*, 10th Dist. No. 05AP-1202, 2006-Ohio-4621, ¶10, citing *Grubb* at 201-02. Because, however, the motions in limine present only preliminary rulings on trial

evidence, and are not procedurally appropriate to the summary judgment posture of the trial court's judgment and this court's review of that judgment, we need not consider the motions in limine. Id., citing *Grubb* at 203. Plaintiff's third assignment of error thus is moot.

VII. Fourth Assignment of Error – Leave to Amend

{¶38} In its fourth and final assignment of error, plaintiff asserts the trial court erred in denying plaintiff's motion for leave to amend its complaint. Plaintiff sought leave to amend for the purpose of clarifying which contracts pertained to which parties. The decision whether to grant or deny a motion for leave to amend a pleading is within the discretion of the trial court, and an appellate court will not reverse the trial court's decision absent an abuse of discretion. *Wilmington Steel Prod., Inc. v. Cleveland Elec. Illum. Co.* (1991), 60 Ohio St.3d 120, 122.

{¶39} Here, plaintiff filed its motion for leave to amend more than two and a half years after filing its original complaint and after all deadlines for discovery and for filing dispositive motions had passed. Although plaintiff argues that granting it leave to amend would clarify proceedings and avoid unnecessary confusion, we find it hard to say the trial court abused its discretion when plaintiff waited so long to seek leave to amend its complaint. Nonetheless, because this matter will be returned to the trial court for further proceedings, the trial court, in its discretion, may consider whether an amended complaint, that only clarifies but does not add to the existing claims, will facilitate or hinder resolution of plaintiff's remaining claims.

{¶40} Plaintiff's fourth assignment of error is overruled.

VIII. Disposition

{¶41} Having sustained plaintiff's second assignment of error, rendering moot plaintiff's third assignment of error, and having overruled plaintiff's first and fourth assignments of error, we reverse in part and affirm in part the judgment of the Franklin County Court of Common Pleas and remand for further proceedings consistent with this decision.

Judgment affirmed in part and reversed in part; case remanded.

BROWN and McGRATH, JJ., concur.

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