

ORIGINAL

IN THE SUPREME COURT OF OHIO

R.C. OLMSTEAD, INC.

Appellant,

vs.

GBS CORP., ET AL.,

Appellees.

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SUPREME COURT OF OHIO

CASE NO. 10-0198

On Appeal from the Mahoning County
Court of Appeals
Seventh Appellate District

Court of Appeal Case No. 08 MA 83

Trial Court Case No. 04CV3080

MEMORANDUM IN OPPOSITION TO JURISDICTION
OF APPELLEE GBS CORP

Mark J. Skakun, III (0023475)
(COUNSEL OF RECORD)
Buckingham, Doolittle & Burroughs, LLP
4518 Fulton Drive NW
P.O. Box 35548
Canton, OH 44735-5548
Telephone: 330-492-8717
Facsimile: 330-492-9625
msskakun@bdblaw.com

COUNSEL FOR GBS CORP.

David S. Barbee (0037248)
(COUNSEL OF RECORD)
Stuart Strasfeld (0012399)
Roth, Blair, Roberts, Strasfeld & Lodge
100 Federal Plaza East, Suite 600
Youngstown, OH 44503-1893
Telephone: 330-744-5211
Facsimile: 330-744-3184

COUNSEL FOR STEPHEN P. MIHALICH

FILED
MAR 08 2010
CLERK OF COURT
SUPREME COURT OF OHIO

G. Ross Bridgman (0012945)
(COUNSEL OF RECORD)
Daniel J. Clark (0075125)
Vorys, Sater, Seymour and Pease, LLP
52 East Gay Street, P.O. Box 1008
Columbus, OH 43216-1008
Telephone: 614-464-5448
Facsimile: 614-719-4911
grbridgman@vorys.com
djclark@vorys.com

and

David A. Campbell (0066494)
Elizabeth A. Davis (0082186)
Vorys, Sater, Seymour and Pease, LLP
1375 East Ninth Street
2100 One Cleveland Center
Cleveland, OH 44114-1724
Telephone: 216-479-6100
Facsimile: 216-479-6060
dacampbell@vorys.com
eadavis@vorys.com

COUNSEL FOR APPELLANT,
R.C. OLMSTEAD, INC.

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**EXPLANATION OF WHY THIS IS NOT A CASE OF
PUBLIC OR GREAT GENERAL INTEREST**

Appellant, R.C. Olmstead, Inc. (“RCO”), urges the Court to accept this case in order to announce a new Ohio rule: that forgery is an affirmative defense to an action for breach of contract. RCO argues that by doing so, the Court can prevent abuses by litigants defending claims for breach of contract who may be encouraged to claim forgery to avoid legitimate contracts.

RCO has not identified any cases showing such abuse. This is an imagined danger and one that presumes frivolous court filings.

Most importantly, the proposition of law that RCO proposes is squarely at odds with Ohio law on affirmative defenses. This Court has held that an affirmative defense “is a new matter which, assuming the complaint to be true, constitutes a defense to it.” *State ex rel. Plain Dealer Publishing Co. v. City of Cleveland* (1996), 75 Ohio St.3d 31. A defendant sued over a contract he never signed does not assume the complaint to be true.

RCO’s brief cites to some decisions from other jurisdictions that either refer to forgery as an affirmative defense or that involved parties who asserted it as such. None of those decisions offer any reasoning on the issue and, therefore, have no persuasive value for this Court to change Ohio law.

Applying Ohio law on affirmative defenses to this issue is not complicated and leads to a clear answer. Ohio law is settled that an affirmative defense “is a new matter which, assuming the complaint to be true, constitutes a defense to it.” *State ex rel. Plain Dealer Publishing Co. v. City of Cleveland* (1996), 75 Ohio St.3d 31. Since a party who denies signing an contract does not “assume the complaint to be true,” forgery does not fit the definition of an affirmative defense.

Finally, even if the Court wanted to change Ohio law and adopt RCO's proposition of law, this is not the case to do so. There are at least two problems with this case as a vehicle for announcing a change of law on affirmative defenses. First, RCO did not preserve this issue for appeal. It did not ask the trial court to instruct the jury on defendants' burden to prove forgery. Second, the jury found by interrogatory answer that the alleged contract on which RCO brought its claim was never signed by the defendant. It found that plaintiff failed to prove the existence of a contract.

Thus, even if the proposition of law argued by RCO had been the law at the time of the trial, there is no way to say it would have made any difference in the outcome. The issue of the authenticity of the alleged contract was vigorously litigated by both parties. At page 6 of its memorandum, RCO says that "[g]iven the improperly high burden placed on RCO, the jury returned a verdict in favor of Appellees." RCO's burden was to prove, by a preponderance of the evidence, that there was a contract. The fact that it failed to meet that burden is not a reason to change Ohio law on affirmative defenses.

STATEMENT OF THE CASE

RCO filed its complaint in 2004, suing its former employee, Stephen Mihalich, and Mihalich's new employer, GBS Corp. ("GBS"). RCO claimed, in part, that Mihalich breached a non-compete agreement.

The case was tried to a jury in February and March of 2008. The jury returned a verdict for the defendants and the court entered judgment on the verdict. RCO appealed to the Mahoning County Court of Appeals, Seventh Appellate District. On December 29, 2009, the court affirmed the judgment.

On February 1, 2010, RCO filed its notice of appeal and jurisdictional memorandum, upon which the matter is now before this Court.

STATEMENT OF THE FACTS

RCO's complaint alleged, in part, that its former employee, Stephen Mihalich, breached a non-compete agreement when he left RCO to work for a competitor, GBS, Corp. ("GBS"). It did not attach a copy of the alleged agreement to its complaint. Mihalich's answer to the allegation said:

10. Defendant denies the allegation in paragraph 13 of Plaintiff's complaint. Further answering, Defendant states that Plaintiff requested that Defendant sign a covenant not to compete after Defendant notified Plaintiff that he was terminating his employment.

Mihalich's answer not only denied signing the non-compete, but also explained that the allegation was inconsistent with what RCO told him when he left the business. RCO was on notice, therefore, that Mihalich denied signing any non-compete agreement.

RCO also named GBS as a defendant. It alleged, in part, that GBS tortiously interfered with RCO's contractual relationships.

In November of 2005, more than a year after it filed its complaint, RCO produced for the first time what it claimed was a **photocopy** of the non-compete agreement. A few months later, RCO sought summary judgment on its claim of breach of contract.

GBS and Mihalich separately opposed the motion. Both GBS and Mihalich disputed that the photocopy document that RCO produced was authentic. The court denied all the summary judgment motions.

The case was tried to a jury in February and March of 2008, over 13 days, with testimony from 37 witnesses. Contrary to the suggestion in its jurisdictional memorandum, RCO did not submit a proposed jury instruction on forgery. It submitted one on fraud. The instruction read:

If you determine that Mihalich beached his non-competition agreement you must consider whether Mihalich has proven by clear and convincing evidence that he did not sign the non-competition agreement and that his signature was affixed to the agreement through fraud.

To prove fraud Mihalich must prove by clear and convincing evidence all of the following elements:

- (A) A false representation of fact was made with knowledge of its falsity or with utter disregard and recklessness about its falsity.
- (B) The representation was material.
- (C) The representation was made with the intent to mislead; and
- (D) The plaintiff was justified in relying on the representation, and did, in fact, so rely.

Unlike the preponderance of the evidence standard, to prove fraud by 'clear and convincing evidence' the evidence in favor of fraud must have more than simply a greater weight than the evidence opposed to it rather it must produce in your minds a firm belief or conviction about the facts to be proved.

Since Mihalich never claimed that the alleged contract was a product of a fraudulent representation or that he relied on any fraudulent representation, the trial court properly refused this instruction. The court instructed the jury that RCO on its burden in proving the breach of contract claim:

You may find that the defendant, Stephen Mihalich, breached his contract with RCO if RCO demonstrates by the greater weight of the evidence that; one, the parties entered into an enforceable contract; two, RCO fulfilled its duties under the contract; and, three, Mihalich failed to fulfill his obligations under the contract; and, four, that RCO incurred damages as a direct and proximate result of Mihalich's conduct.

The jury heard evidence from defendants' handwriting expert that the signature on the photocopy was not authentic. It also heard evidence that RCO maintained a spreadsheet listing all of its salespeople and indicating whether they had ever signed a non-compete, and that the document showed that Mihalich had not signed it. And it heard evidence that RCO sent a letter to Mihalich after he left its employment and warned him not to disclose trade secrets or tortiously interfere with its business relationships, but the letter said nothing about a non-compete agreement.

There was significant evidence that the non-compete agreement on which RCO brought suit was not authentic. Not surprisingly, the jury returned a **unanimous** verdict for Mihalich and GBS on each of the claims alleged by RCO. With reference to RCO's claim for breach of contract, the jury found that plaintiff failed to prove the parties entered into a contract. The jury interrogatories included the following:

Interrogatory No. 5, "Do you find that R.C. Olmstead, Inc. has proven, by a preponderance of the evidence, that Stephen Mihalich signed a written non-compete agreement with R.C. Olmstead, Incorporated on May 28, 2002?"

The jury's answer, signed by all eight jurors, was "**No.**"

The court entered judgment for GBS and Mihalich on the jury verdicts. RCO appealed the judgment to the Mahoning County Court of Appeals, Seventh Appellate District. On December 23, 2009, the unanimous court affirmed the judgment. RCO filed its notice of appeal and jurisdictional memorandum on February 1, 2010, upon which the matter is now before this Court.

ARGUMENT IN OPPOSITION OF PROPOSITION OF LAW

Proposition of Law No. 1: A plaintiff suing on a claim for breach of contract has the burden of proving the existence of the contract. The burden of proving that the contract is authentic entails proving that the defendant signed the document.

A plaintiff suing for breach of contract must “show the existence of a contract, performance (or readiness and willingness to perform), failure to perform by the defendant, and damages. *Galmish v. Cicchini*, 90 Ohio St.3d 22, 2000-Ohio-7, Cook, J., dissent. Under the Statute of Frauds, R.C. 1335.05, RCO had to prove that Mihalich signed the two-year non-compete agreement to establish breach.

RCO urges this Court to adopt a rule that when a plaintiff sues on a written contract bearing the apparent signature of the defendant, the document is sufficient proof to establish the first element of a claim for breach, i.e., the existence of a contract. RCO reasons that once the document has been introduced, the burden falls on the defendant to raise forgery as an affirmative defense if the signature is not his. This proposal would have the Court change Ohio’s law on affirmative defenses.

Civ. R. 8(C) requires that answers set forth affirmatively:

accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, want of consideration for a negotiable instrument, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense.

The listing does not include forgery. Neither does forgery qualify as an affirmative defense under Ohio common law. In *State ex rel. Plain Dealer Publishing Co. v. City of Cleveland* (1996), 75 Ohio St.3d 31, 33, this Court defined affirmative defense:

An affirmative defense is a new matter which, assuming the complaint to be true, constitutes a defense to it. See *Davis v. Cincinnati, Inc.* (1991), 81 Ohio App. 3d 116, 119, 610 N.E.2d 496, 498; *Black’s Law Dictionary* (6 Ed.1990) 60. “An affirmative defense is any defensive matter in the nature of a confession and avoidance. It admits

that the plaintiff has a claim (the 'confession') but asserts some legal reason why the plaintiff cannot have any recovery on that claim (the 'avoidance')." (Footnote omitted.) 1 Klein, Browne & Murtaugh, Baldwin's Ohio Civil Practice (1988) 33, T 13.03.

The rule in Ohio that affirmative defenses "assume the complaint to be true" is in step with the national view. In American Jurisprudence 2d, an affirmative defense is defined as follows:

An "affirmative defense" is a new matter which, assuming a complaint to be true, constitutes a defense to it. An affirmative defense **admits the plaintiff has claim**, but asserts some legal reason why the plaintiff cannot have any recovery on that claim. An affirmative defense is a legal defense to a claim, as opposed to a factual dispute as to an essential element of the claim. It is a defense that does not controvert the establishment of a prima facie case, but that otherwise denies relief to the plaintiff. **It is a defense of avoidance, rather than a defense in denial**. Thus, an "affirmative defense" is one which seeks to defeat or avoid the plaintiff's cause of action, and avers that even if the petition is true, the plaintiff cannot prevail because there are additional facts that permit the defendant to avoid legal responsibility.

Am. Jur.2d, Pleadings §288. (Emphasis added.)

A defendant who claims that a document on which plaintiff asserts a claim is not authentic is not raising a defense "in the nature of confession and avoidance." That defendant does not "admit that the plaintiff has a claim." Rather, the defendant denies the existence of a contract, which is a general denial.

The issue of forgery is different from the defense of fraud which, by rule, a defendant must plead with particularity. See Civ. R. 9(B). A defendant may claim he was fraudulently induced to sign the contract on which plaintiff has brought suit. In that case, the plaintiff's claim that the contract was authentic is not in issue, but the defendant, asserting the affirmative defense of fraud, is pleading (in the language of the *Plain Dealer* case cited above) a "legal reason why the plaintiff cannot have any recovery on that claim." There is a reasonable basis for finding that fraud, unlike forgery, is an affirmative defense.

One court has analyzed the relationship between a claim of forgery and the plaintiff's burden of proving the existence of a contract. In *Sherman v. Summit General Contractors, Inc.* (Ala. 2002), 848 So.2d 263, the defendants were sued on a settlement agreement and denied signing the agreement, but did not assert forgery as an affirmative defense. The plaintiff argued the defendants waived their right to assert forgery in a summary judgment motion.

The court in *Sherman* disagreed and held that forgery was not an affirmative defense. It began its analysis noting that (as in Ohio) forgery was "not one of the affirmative defenses listed in Rule 8(C)" and that there was no Alabama case holding that forgery was an affirmative defense to a breach of contract claim. The court then looked at decisions from other jurisdictions and found decisions from Texas and Missouri "highly persuasive." The court agreed with language from the Texas court defining affirmative defenses:

"Affirmative defenses,' as opposed to a defendant's denials, are any propositions that a defendant may interpose to defeat the plaintiff's prima facie case. They do not rebut any factual propositions asserted in the plaintiff's case, but open the way for the defendant to adduce evidence establishing an independent reason why the plaintiff may not recover."

W.R. Grace Co. v. Scotch Corp., (Tex. App. 1988), 753 S.W.2d 743, 746, overruled on other grounds in *Roark v. Stallworth Oil and Gas, Inc.* (Tex. 1991), 813 S.W.2d 492

The court, in *Sherman*, then approved of the reasoning from a Missouri court as to why forgery would not qualify as an affirmative defense:

"Since an affirmative defense by definition includes new matter or additional facts, Rule 55.08 [Mo. R. Civ. P.] requires such a defense to be pleaded in order to give notice to the plaintiff. If the plaintiff's cause of action never had a legal existence, however, the proper answer is a general denial." *World Enterprises, Inc. v. Midcoast Aviation Services, Inc.*, (Mo.Ct.Ap. 1986), 713 S.W.2d 606.

As noted above, Ohio follows the definition of an affirmative defense given by the Texas court. The reasoning that the Missouri court followed in holding that forgery is not an affirmative defense applies equally in this case.

RCO has cited decisions from other jurisdictions on this issue as “recognize[ing] that forgery is an affirmative defense. In many of those cases, however, the court simply referred to the “affirmative defense of forgery” but did not explain the conclusion. See, e.g., *Edwards v. Phoebe Putney Memorial Hosp.*, M.D. Ga., 1992 U.S. Dist. LEXIS 6983; *Zulein v. Hajiyerou*, N.J. Super. App. Div., 2007 N.J. Super. Unpub. LEXIS 2119; *Asia North America Eastbound Rate Agreement v. SIA International Corp.*, (D.C. D.C. 1995), 884 F. Supp. 5.

Also included among the cases cited by RCO are some where the issue of forgery was not raised in the context of a defense. In the Pennsylvania cases of *Toth v. Donegal Mutual Insurance Company* (Pa. Superior 2009), 964 A.2d 413, and *Jackson v. Allstate Ins. Co.* (E.D. Pa. 2006), 441 F. Supp.2d 728, the courts considered claims by insureds seeking uninsured motorist coverage, notwithstanding waiver forms rejecting such coverage that the insurers had on file. The insureds sought the coverage, claiming their names on waiver forms were forged. The courts held that under those circumstances, the insureds had the burden of proving the forgery. The case do not reach the issue of whether forgery is an affirmative defense and are not instructive on the issue here.

CONCLUSION

On page 10 of its brief, RCO writes that “a defendant should not be permitted to present serious allegations of forgery to a jury without having strong evidentiary support for that claim.” The defendants here had such evidence. The issue was litigated thoroughly and the jury concluded that RCO did prove the existence of a contract. It had that burden only by a preponderance of the evidence and it failed to meet it. It is supposition whether the jury would have decided this case any differently had it been defendants’ burden to prove forgery. The facts

would not have changed and the evidence would have been the same. The jury found that Mihalich never signed a non-compete agreement.

Ohio law on affirmative defenses is settled. An affirmative defense accepts as true the plaintiff's claim but opposes it on another legal ground. A defendant sued on a contract that is not authentic does not accept the complaint as true, and the challenge to the complaint is not on an independent legal basis. Forgery is not an affirmative defense.

The Court should deny plaintiff's jurisdictional motion.

Respectfully submitted,

BUCKINGHAM, DOOLITTLE & BURROUGHS, LLP

By: Mark J. Skakun / ms

MARK J. SKAKUN (0023475)
4518 Fulton Drive, NW
P.O. Box 35548
Canton, OH 44735-5548
Telephone: (330) 491-5319
Facsimile: (330) 252-5422
Email: mskakun@bdblaw.com

Attorney for Appellee, GBS Corp.

PROOF OF SERVICE

A copy of this memorandum in opposition of jurisdiction was served by ordinary U.S. Mail this 2nd day of March, 2010, on the following:

G. Ross Bridgman
Daniel J. Clark
Vorys, Sater, Seymour and Pease, LLP
52 East Gay Street, P.O. Box 1008
Columbus, OH 43216-1008

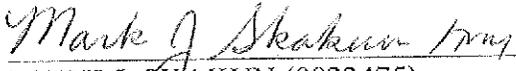
Counsel for R. C. Olmstead, Inc.

David A. Campbell (0066494)
Elizabeth A. Davis (0082186)
Vorys, Sater, Seymour and Pease, LLP
1375 East Ninth Street
2100 One Cleveland Center
Cleveland, OH 44114-1724

Counsel for R. C. Olmstead, Inc.

David S. Barbee
Stuart Strasfeld
Roth, Blair, Roberts, Strasfeld & Lodge
100 Federal Plaza East, Suite 600
Youngstown, Ohio 44503-1893

Counsel for Stephen P. Mihalich



MARK J. SKAKUN (0023475)
Attorney for Appellee, GBS Corp.