[Cite as *Time Warner Entertainment Co., L.P. v. Kleese-Beshara-Kleese,* 2009-Ohio-6712.]

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

TRUMBULL COUNTY, OHIO

TIME WARNER ENTERTAINMENT CO., LP,	:	**O P I N I O N**
Plaintiff,	:	**CASE NO. 2009-T-0010**
- vs -	:	
KLEESE-BESHARA-KLEESE, d.b.a. PARK HOTEL ASSOCIATES, et al.,	:	
Defendants/Third Party Plaintiffs-Appellees/ Cross-Appellants,	:	
- vs -	:	
WARREN INVESTMENTS LLC,	:	
Third Party Defendant/ New Third Party Plaintiff-Appellant/ Cross-Appellee,	:	
- vs -	:	
EDWARD A. KLEESE, JR., et al.,	:	
New Third Party Defendants-Appellees/ Cross-Appellants.	:	

Civil Appeal from Warren Municipal Court, Case No. 2003 CVF 01111.

Judgment: Modified and affirmed as modified.

Robert F. Burkey, Burkey, Burkey & Scher Co., L.P.A., 200 Chestnut Avenue, N.E., Warren, OH 44483-5805 (For Defendants/Third Party Plaintiffs-Appellees/Cross-Appellants).

Randil J. Rudloff and *John M. Rossi*, Guarnieri & Secrest, P.L.L., 151 East Market Street, P.O. Box 4270, Warren, OH 44482 (For Third Party Defendant/New Third Party Plaintiff-Appellant/Cross-Appellee).

MARY JANE TRAPP, P.J.

{¶1} Warren Investments, LLC, ("Warren") appeals from a judgment of the Warren Municipal Court regarding liquor permit which was transferred belatedly to Warren when Kleese-Beshara-Kleese ("KBK")[1] sold a hotel to Warren. Warren sought $10,000 in liquidated damages pursuant to the terms of the contract and prejudgment interest. The trial court awarded $6,500 without awarding prejudgment interest. For the following reasons, we conclude the trial court should have awarded Warren the full amount of damages as contracted by the parties. We conclude, however, the court did not abuse its discretion in not awarding prejudgment interest.

{¶2} **Substantive Facts and Procedural History**

{¶3} This case has a rather complex procedural history. It commenced on April 18, 2003, when Time Warner Entertainment Co., LP ("Time Warner") filed a suit against KBK for unpaid cable TV bills relating to cable services provided by Time Warner to the Park Hotel, which KBK owned before selling it to Warren on April 30, 2002.

{¶4} In response to Time Warner's complaint, KBK filed a third party complaint for indemnity against Warren, claiming Warren assumed the cable service contract. Warren answered the third party complaint, claiming the parties' contract for the sale of the hotel specifically stated Warren would not assume any of KBK's contractual

1. KBK is an Ohio general partnership, and its partners are members of the Kleese family.

obligations.

{¶5} Furthermore, Warren included a counterclaim against KBK in KBK's third party complaint. The counterclaim related to a liquor permit that KBK was required to transfer to Warren within 90 days of the sale of the hotel, as a condition of the sale. Warren cited section 17.43 of the Purchase and Sale Agreement ("Agreement") in support of its claim that KBK was liable for liquidated damages of $10,000 for its failure to timely transfer the permit. Section 17.43 of the Agreement for the Park Hotel addresses the liquor license. It states, in relevant part:

{¶6} "The Ohio Department of Liquor Control has issued Liquor Permit #6703365 *** in the name of 'Park Hotel Associates, Inc.' *** Seller agrees that the successful transfer to Purchaser of the said liquor permit is a condition of the closing of this agreement, and that Seller shall obtain the transfer of said liquor permit to Purchaser from Park Hotel Associates, Inc.

{¶7} "Until such time as this said liquor permit is transferred to Purchaser, the sum of $10,000.00 shall be held in escrow by the Escrow Agent. *If said liquor permit has not been transferred to Purchaser within ninety (90) days from date of closing of this agreement, then the Escrow agent shall pay over to Purchaser, upon its demand, the said $10,000.00 held in escrow, and Purchaser shall retain said sum as its own.* If the said liquor permit is successfully transferred to Purchaser within ninety (90) days from date of closing of this agreement, then Purchaser shall in writing notify Escrow agent of such and Escrow Agent shall then pay said $10,000 over to Seller. Seller shall fully cooperate with Purchaser in the transfer of all of Seller's liquor licenses used in the business. *If requested by Purchaser, Seller shall enter into a management agreement*

with Purchaser whereby Purchaser will operate the hotel bar and lounge under the said liquor permit and pursuant to such agreement until such time as the liquor permit has been transferred to Purchaser. The execution of such a management agreement and the actual transfer of liquor license shall be conditions of closing." (Emphasis added.)

{¶8} Pursuant to the Agreement, KBK placed $10,000 in escrow. The liquor permit did not transfer until January 15, 2003, more than eight months after the hotel's sale. After the transfer of the permit, KBK unilaterally directed the escrow agent to return the $10,000 to KBK.

{¶9} In its counterclaim, Warren sought $10,000 and prejudgment interest for KBK's delayed transfer of the liquor permit.

{¶10} In addition to the counterclaim, Warren filed a new third party complaint against several individuals in the Kleese family, who are partners of KBK and Kleese Development Associates[2] (hereafter "the individual partners"). Warren alleged the individual partners were jointly and severally liable for the payment of $10,000 and interest because the partners had unconditionally and personally guaranteed the performance of the contract regarding the sale of the hotel.

{¶11} Subsequently, Time Warner and KBK settled the cable bills for $4,000. Warren's counterclaim and its new third party complaint against the individual partners proceeded to trial before a magistrate on November 2, 2005.

{¶12} At trial, Robert S. Kleese, General Partner of KBK, testified that the amount of $10,000 was the approximate cost to replace the liquor permit in the event

2. The new third party defendants are: Edward A. Kleese, Jr., and Joseph P. Kleese, Kleese Development Associates, and Kleese Development Associates' partners, Robert S. Kleese, Edward J. Kleese, James M. Kleese, and Nick S. Perod.

the permit could not be transferred. Ajit Patel, President of Warren, testified that he was able to continue the operation of the hotel bar without the liquor permit under the management agreement.

{¶13} On January 5, 2007, the magistrate issued a Findings of Fact and Conclusion of Law, finding KBK and the individual partners liable to Warren for $10,000 plus interest at 10% per annum beginning with the date of judgment, January 5, 2007. The magistrate found the language of the parties' contract unambiguous, which required KBK to pay Warren $10,000 if the liquor permit did not transfer within 90 days of the sale of the hotel.

{¶14} Warren filed a timely objection to the magistrate's decision, claiming it should have been awarded prejudgment interest commencing on July 30, 2002, 90 days after the sale of the hotel, rather than commencing on the date of the judgment.

{¶15} KBK also filed a timely objection to the magistrate's decision, claiming that the decision was against the manifest weight of the evidence and contrary to law. Almost nine months later, on October 31, 2007, the individual partners filed a motion requesting that they be included in KBK's objection to the magistrate's decision, which the court granted.

{¶16} On January 27, 2009, the trial court entered a judgment modifying the magistrate's award of $10,000 to Warren. The court agreed that the contract called for liquidated damages of $10,000 for the failure of a timely transfer of the liquor permit, but nonetheless reduced the award to $6,500. The court found that, while KBK had no obligation, it voluntarily entered into a management agreement to allow Warren to continue to operate the hotel's bar, and further that Warren suffered no economic loss

from KBK's failure to timely transfer the liquor permit. The court placed the value of the "services" provided by KBK at $3,500 and therefore entered judgment for Warren in the amount of $6,500, plus interest of 10% from the date of the magistrate's judgment, January 5, 2007.[3]

{¶17} Warren appeals and KBK and the individual partners cross-appeal. Warren's assignments of error state:

{¶18} "[1.] The magistrate and the court erred in failing to award appellant statutory prejudgment interest at 10% per annum on the $10,000 from July 29, 2002, the date that it became due, rather than from the date of judgment.

{¶19} "[2.] The trial court erred in reducing the magistrate's decision in favor of appellant from $10,000.00 to $6,500.00 as there was no evidence in the record that the liquor license management agreement had any monetary value and KBK was contractually obligated to enter into the management agreement as a condition of the sale.

{¶20} "[3.] The trial court erred in granting appellees Kleeses' motion to amend the objections filed by KBK to the magistrate's decision so as to include appellees Kleese."

{¶21} The cross-appeal of KBK and the individual partners presents the following assignment of error:

3. We note that while the magistrate's decision was rendered specifically against KBK as well as the new third party defendants, i.e., the individual partners, the trial court's judgment entry could have been more precise regarding the entities liable for the damages awarded to Warren. Its judgment referred to "defendants" in this matter as "Kleese and Kleese-Beshara-Kleese (hereinafter referred to as Kleese)." However, the last paragraph of the decision stated: "The Court AFFIRMS the Magistrate's decision in part and MODIFIES the decision in part. Warren is GRANTED judgment against Kleese in the sum of $6,500 plus interest of 10% from January 5, 2007 plus costs." On its face it is unclear whether "Kleese" refers to both the individual partners and KBK. However, because the trial court stated it affirmed the magistrate's

{¶22} "The trial court erred in granting appellant liquidated damages as that created a double recovery and unjust enrichment/quantum meriut."

{¶23} **Standard of Review**

{¶24} This court reviews a trial court's decision to adopt, reject, or modify a magistrate's decision for abuse of discretion. *In re Adkins*, 11th Dist. No. 2006-L-250, 2007-Ohio-4629, ¶17.

{¶25} Despite the complicated procedural history, the parties' appeal and cross-appeal present only two issues for our review. The first relates to contract interpretation and the second concerns prejudgment interest.

{¶26} **Contract Interpretation**

{¶27} The interpretation of a written contract is a question of law. See *Alexander v. Buckeye Pipe Line Co.* (1978), 53 Ohio St.2d 241, paragraph one of the syllabus. The trial court's interpretation of a contract is subject to de novo review. See *Long Beach Assn., Inc. v. Jones* (1998), 82 Ohio St.3d 574, 576.

{¶28} It is a fundamental principle in contract construction that contracts should be interpreted so as to carry out the intent of the parties as that intent is evidenced by the contractual language. *Skivolocki v. E. Ohio Gas Co*. (1974), 38 Ohio St.2d 244, paragraph one of the syllabus. Absent ambiguity in the language of the contract, the parties' intent must be determined from the plain language of the document. See *Hybud Equip. Co. v. Sphere Drake* (1992), 64 Ohio St.3d 657, 665. "The intent of the parties to a contract is presumed to reside in the language they chose to employ in the agreement." *Foster Wheeler Enviresponse, Inc. v. Franklin Cty. Convention Facilities*

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decision except for the amount awarded, we construe the trial court's judgment as rendered against the individual partners as well, despite the imprecise wording.

Auth. (1997), 78 Ohio St.3d 353, 361. "A contract that is, by its terms, clear and unambiguous requires no real interpretation or construction, and courts will enforce such contracts as written." *Fouty v. Ohio Dep't. of Youth Servs*., Court of Claims No. 2002-07118, 2005-Ohio-177, ¶42, citing *Foster Wheeler*. Where the contractual terms are unambiguous, a court cannot create a new contract by finding an intent not expressed in the clear language of the contract. *Alexander v. Buckeye Pipeline Co.* (1978), 53 Ohio St.2d 241, 246. If a contract is unambiguous, the language of the contract controls and "[i]ntentions not expressed in the writing are deemed to have no existence and may not be shown by parol evidence." *Aultman Hosp. Assn. v. Community Mut. Ins. Co.* (1989), 46 Ohio St.3d 51, 53.

{¶29} If the terms of the contract are determined to be unambiguous, the interpretation of the language is a question of law reviewed de novo on appeal. *Nationwide Mut. Fire Ins. Co. v. Guman Bros. Farm* (1995), 73 Ohio St.3d 107, 108. Under a de novo review, an appellate court may interpret the language of the contract substituting its interpretation for that of the trial court. *Tabeling v. CBC Cos*. (Mar. 10, 1997), 5th Dist. No. 1996CA00175, 1997 Ohio App. LEXIS 1014, *4, citing *Children's Med. Ctr. v. Ward* (1993), 87 Ohio App. 3d 504, 508.

{¶30} Here, our review of the contractual language relating to the liquor permit reveals no ambiguity. Section 17.43 unequivocally obligated the seller to pay the purchaser of the hotel the amount of $10,000 in the event the liquor permit failed to transfer within 90 days of the sale of the hotel. When a contract is clear and unambiguous by its terms, as in the instant contract, it requires no interpretation and the court should enforce it as written. *Foster Wheeler*, supra.

{¶31} In its judgment entry, the trial court first stated that "the Court hereby affirms the Magistrate's decision in awarding 'Warren' the sum of TEN THOUSAND DOLLARS ($10,000) as and for liquidated damages as per the contract for sale of the business." The court, however, proceeded to consider Robert S. Kleese's testimony at trial that the amount of $10,000 was intended to cover any expense for acquiring a new permit -- it stated "the basis of the $10,000 was based on a belief by Warren as to the cost that would be involved to acquire a new license." The court therefore determined KBK's payment of $10,000 would not be justified if the permit was eventually transferred to Warren.

{¶32} However, the plain language of the contract did not condition the payment of $10,000 on a complete failure to transfer the liquor permit. Rather, the payment was predicated on a failure to timely transfer the permit within 90 days. Absent ambiguity in the language of the contract, the parties' intent must be determined from the plain language of the document. *Hybud Equip.*, supra. "Intentions not expressed in the writing are deemed to have no existence and may not be shown by parol evidence." Therefore, the trial court was not at liberty to rewrite the contract to reflect the presumed intention of the parties as testified to at trial.

{¶33} In concluding KBK is liable for $6,500 instead of $10,000 as contracted by the parties, the trial court considered the management agreement, which the parties entered into to allow the continued operation of the hotel bar, and assigned an arbitrary value of $3,500 to the management agreement. Despite the clear terms of the contract obligating KBK to enter into a management agreement to allow the hotel bar to continue to operate before the transfer of the liquor permit, the court's judgment entry stated that

KBK "had no obligation to enter into [the management] agreement, and apparently did so without any financial incentive."

{¶34} The trial court ignored the plain language of the contract in concluding that KBK had no contractual obligation to enter into the management agreement, and furthermore, its value of the management agreement at $3,500 was not supported by any evidence. Applying the de novo standard of review, we conclude Warren is entitled to the damages of $10,000 as contracted by the parties for KBK's failure to timely transfer the liquor permit.[4] Therefore, we sustain Warren's second assignment of error and overrule KBK and the individual partners' assignment of error in their cross-appeal.

{¶35} **Prejudgment Interest**

{¶36} In its counterclaim, Warren also requested prejudgment interest at 10% per annum from July 30, 2002, 90 days from the sale of the hotel. The magistrate awarded the sum of $10,000, with interest of 10% from the date of judgment, January 5, 2007. The trial court affirmed the magistrate's award of only postjudgment interest.

{¶37} The award of prejudgment interest is within the sound discretion of the trial court. *Kalain v. Smith* (1986), 25 Ohio St.3d 157, 161. "Determining whether prejudgment interest should be awarded requires judicial fact-finding and the exercise of judicial discretion." *Miller v. First Int'l. Fid. & Trust Bldg*., 113 Ohio St.3d 474, 2007-Ohio-2457, ¶7.

{¶38} Regarding whether to award prejudgment interest, the courts in Ohio in the past created a distinction between liquidated damages, i.e., where the amount of damages is ascertainable, and unliquidated damages, allowing prejudgment interest

4. We note there is a potential issue of whether the liquidated damage here constituted a "penalty" and hence not enforceable. However, KBK did not raise the claim and therefore we will not consider it.

where the damages are liquidated. See, e.g., *Young v. International Bhd. of Locomotive Eng'rs*. (1996), 114 Ohio App.3d 499, 509 (where the amount of damages was capable of ascertainment by the clear language of the contract, prejudgment interest was proper).

{¶39} The Supreme Court of Ohio, however, did away with the liquidated/ unliquidated distinction and changed the applicable standard for the award of prejudgment interest in *Royal Electric Constr. Corp. v. Ohio State Univ.* (1995), 73 Ohio St.3d 110, 116.[5] As the court explained:

{¶40} "[C]ourts in Ohio have attached great significance to the liquidated-unliquidated dichotomy, or have refined this rule and allowed prejudgment interest in situations where the claim is unliquidated but 'capable of ascertainment.' It is also apparent that these judicial creations (liquidated-unliquidated and capable-of-ascertainment tests) have caused much confusion among members of our bench and bar in deciding under what circumstances prejudgment interest is warranted. Hence, we believe that the focus in these types of cases should not be based on whether the claim can be classified as 'liquidated,' 'unliquidated' or 'capable of ascertainment.' Rather, in determining whether to award prejudgment interest pursuant to R.C. 2743.18(A) and 1343.03(A), a court need only ask one question: Has the aggrieved party been fully compensated?

{¶41} "An award of prejudgment interest encourages prompt settlement and discourages defendants from opposing and prolonging, between injury and judgment,

5. Although *Royal Electric* dealt with a claim against the state, its rationale and holding are applicable to suits involving private parties as well. See *Young* at 510; *Cincinnati Ins. Co. v. Continental Casualty Co.* (Dec. 6, 1995), 1st App. No. C-940884, C-940890, 1995 Ohio App. LEXIS 5325.

legitimate claims. Further, prejudgment interest does not punish the party responsible for the underlying damages ***, but, rather, it acts as compensation and serves ultimately to make the aggrieved party whole. Indeed, [in appropriate cases] to make the aggrieved party whole, the party should be compensated for the lapse of time between accrual of the claim and judgment." Id. at 116-117 (internal citations and footnote omitted).

{¶42} In the instant case, the liquor permit was eventually transferred to Warren and Warren was able to operate the hotel bar uninterrupted under the management agreement without suffering economic losses.

{¶43} Furthermore, Warren's cause of action accrued on July 30, 2002, 90 days after the sale of the hotel, yet it did not pursue the claim until July 30, 2003, after KBK filed a third party complaint against Warren in an unrelated action, where Time Warner sued KBK to collect some unpaid cable TV bills. Moreover, the record did not indicate any action by KBK to delay or prolong the resolution of Warren's claim. Under these circumstances, any further compensation to Warren for the lapse of time between the accrual of the claim and judgment is not warranted. Consequently, the trial court did not abuse its discretion in not awarding prejudgment interest. Warren's first assignment of error is overruled.

{¶44} In its third assignment of error, Warren complains the trial court should not have allowed the individual partners to join belatedly in KBK's objection over the magistrate's decision. The magistrate found KBK and the individual partners liable to Warren for $10,000. Because we essentially agree with the magistrate's decision and

determine KBK's objection to be meritless, the issue of whether the trial court should have allowed the individual partners to join KBK in its objection is moot.

{¶45} For the foregoing reasons, we conclude the trial court should have entered judgment in favor of Warren in the amount of $10,000 plus interest at 10% per annum from the date of judgment, January 5, 2007, against KBK and the new third party defendants. The judgment of the Warren Municipal Court is modified and affirmed as modified.

CYNTHIA WESTCOTT RICE, J.,

TIMOTHY P. CANNON, J.,

concur.