

[Cite as *Phillips v. Farmers Ethanol, L.L.C.*, 2014-Ohio-4043.]

STATE OF OHIO, JEFFERSON COUNTY
IN THE COURT OF APPEALS
SEVENTH DISTRICT

MARTIN PHILLIPS,)	
)	CASE NO. 12 JE 27
PLAINTIFF-APPELLEE,)	
)	
- VS -)	OPINION
)	
FARMERS ETHANOL, LLC, et al.,)	
)	
DEFENDANTS-APPELLANTS.)	

CHARACTER OF PROCEEDINGS: Civil Appeal from Common Pleas Court, Case No. 11CV 355.

JUDGMENT: Affirmed.

APPEARANCES:
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JUDGES:
Hon. Mary DeGenaro
Hon. Joseph J. Vukovich
Hon. Gene Donofrio

Dated: September 8, 2014

[Cite as *Phillips v. Farmers Ethanol, L.L.C.*, 2014-Ohio-4043.]
DeGenaro, P.J.

{¶1} Defendants-Appellants, Farmers' Ethanol, LLC and Harrison Ethanol, LLC appeal the September 27, 2012 judgment of the Jefferson County Court of Common Pleas granting summary judgment in favor of Appellee, Martin Phillips in an action involving a convertible promissory note and mortgage. Appellants assert that the trial court erred by failing to consider parol evidence concerning the due date of the Note; that summary judgment was improper because genuine issues of material fact remain in dispute about whether the Note was in default; and, that Phillips' actions constituted a waiver of his rights to seek judgment in this matter.

{¶2} Appellants' arguments are meritless. Because the terms of the Note regarding the due date were clear and unambiguous, the trial court properly declined to consider parol evidence; moreover that language states the due date was January 31, 2007, at the latest. There is no dispute that Harrison Ethanol failed to pay Phillips \$600,000.00 by January 31, 2007, which constitutes default under the Note; thus there are no genuine issues of material fact precluding summary judgment in favor of Phillips. Finally, waiver by estoppel did not bar summary judgment; Phillips' subsequent infusion of more time and capital into the project does not constitute a waiver of his rights under the Note and Mortgage. Accordingly, the judgment of the trial court is affirmed.

Facts and Procedural History

{¶3} In 2001, Appellant Farmers' Ethanol LLC was formed to build three integrated bio-refineries in Ohio. Wendel Dreve and his wife own Farmers' Ethanol. Appellant Harrison Ethanol LLC holds the permits that were required to construct the facilities. Harrison Ethanol is an operating entity that is wholly owned by Farmers' Ethanol. Phillips learned of the bio-refinery project and wanted to invest.

{¶4} On May 25, 2006, Harrison Ethanol as maker and Phillips as lender executed a convertible promissory note. The Note was drafted by Appellants' counsel. Under the terms of the Note, Phillips invested \$1.55 million, and in return would receive ten membership units of Harrison Ethanol, valued at \$200,000 each, from an initial private placement memorandum offering, should that occur.

{¶5} The Note further provided:

At the earlier of Maker's formal abandonment of the Initial Offering or January 31st, 2007, the following shall occur: (a) the conversion feature of this Note set forth in the immediately preceding paragraph shall expire, (b) One Million Four Hundred Thousand Dollars (\$1,400,000.00) of the principal amount shall be forgiven, and (c) Maker shall repay the remaining Six Hundred Thousand Dollars (\$600,000.00) in principal amount hereof, from the proceeds of the real estate held by a mortgage. (*Id.*)

{¶6} A default provision was included in the Note, which provides in relevant part:

If any of the following events shall occur (each, an "Event of Default"), the principal *amount of this Note outstanding at the time of such event*, together with all accrued and unpaid interest on such amount, *shall be immediately due, without notice or demand by Lender.*

* * *

(c) Maker's failure to pay any installment of principal or interest within five (5) days after its due date in accordance with this Note, * * *. (Emphasis added.) (*Id.*)

{¶7} The Note was secured by a mortgage on real property, approximately 276 acres of real estate in Harrison County purchased by Farmers' Ethanol in 2005. The Mortgage was recorded on September 30, 2005. The company intended to build the bio-refinery on that property. The Mortgage provided:

This mortgage is given upon the statutory condition, to secure the payment of \$600,000.00 with interest as provided in note of even date. "Statutory condition" is defined in section 5302.14 of the Revised Code and provides generally that, if the mortgagor pays the principal and interest secured by this mortgage, performs the other obligations secured by this mortgage and the conditions of any prior mortgage, pays all taxes and

assessments, maintains insurance against fire and other hazards, and does not commit waste, then this mortgage shall be void.

{¶8} Harrison Ethanol failed to make an initial offering or repay Phillips as agreed by January 31, 2007, the date specified in the Note. Phillips continued to invest additional funds into the project, however, other investors eventually pulled out.

{¶9} As a result, over four years later, on May 11, 2011, Phillips filed a Complaint against Farmers' Ethanol and Harrison Ethanol, seeking money judgment on the Note and foreclosure of the Mortgage. On June 9, 2011, Farmers' Ethanol filed an Answer and motion for a change of venue. Venue was transferred to the Jefferson County Court of Common Pleas on June, 21, 2011.

{¶10} On March 21, 2012, Phillips filed a motion for summary judgment which Farmers' Ethanol opposed. On September 27, 2012, the trial court granted Phillips summary judgment, finding with respect to the Note and Mortgage: 1) the language was clear and unambiguous, rejecting parol evidence proffered by Appellants; 2) \$600,000.00 was due to Phillips as of January 31, 2007, since the initial offering had not been completed by that date; and 3) payment under the Note was based upon the sale of real estate. Thus, the trial court entered in rem judgment only in the amount of \$600,000.00 in favor of Philips. On Farmers' Ethanol's motion the trial court granted a stay.

{¶11} Farmers' Ethanol raises four propositions of law challenging summary judgment, which we will construe as assignments of error, and address out of order or together for clarity of analysis.

Standard of Review

{¶12} Civ.R. 56 provides that summary judgment is only proper when, viewing the evidence most strongly in favor of the non-moving party, the movant demonstrates that reasonable minds can only conclude no genuine issue as to any material fact remains to be litigated and the moving party is entitled to judgment as a matter of law. *Doe v. Shaffer*, 90 Ohio St.3d 388, 390, 738 N.E.2d 1243 (2000). A fact is material when it affects 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 (6th Dist.1999). "[T]he moving party bears the initial responsibility of informing the trial court of the basis for the motion, and identifying those portions of the record which demonstrate the absence of a genuine issue of fact on a material element of the nonmoving party's claim." *Dresher v. Burt*, 75 Ohio St.3d 280, 296, 662 N.E.2d 264 (1996). The nonmoving party has the reciprocal burden of specificity and cannot rest on the mere allegations or denials in the pleadings. *Id.* at 293. An appellate court reviews a trial court's summary judgment decision de novo, applying the same standard used by the trial court. *Ohio Govt. Risk Mgt. Plan v. Harrison*, 115 Ohio St.3d 241, 2007-Ohio-4948, 874 N.E.2d 1155, ¶5.

Parol Evidence

{¶13} In their second of four assignments of error, Appellants assert:

{¶14} "The trial court erred by failing to consider parol evidence to explain or clarify an ambiguity in the convertible promissory note."

{¶15} Appellants contend that the terms of the Note involving the due date are unclear, indefinite, and reasonably subject to dual interpretations and that therefore the trial court erred by failing to consider parol evidence.

{¶16} Contractual "language is unambiguous if from reading only the four corners of the instrument, such language is clear, definite and subject to only one interpretation." *Frederick v. Cocca Dev., Ltd.*, 7th Dist. No. 05 MA 107, 2006-Ohio-7273, ¶43. On the other hand, "[t]he language is ambiguous if it is unclear, indefinite and reasonably subject to dual interpretations or is of such doubtful meaning that reasonable minds could disagree as to its meaning." *Id.* "Where terms in an existing contract are clear and unambiguous, a court cannot create a new contract by finding an intent not expressed in the clear language employed by the parties." *Hunker v. Whitacre-Greer Fireproofing Co.*, 155 Ohio App3d 325, 2003-Ohio-6281, 801 N.E.2d 469, ¶12. "In such case, the court cannot resort to extrinsic or parol evidence. In other words, when a written instrument is unambiguous, intentions not expressed by writing in the contract are deemed to have no existence and cannot be shown by parol evidence." *Frederick* at ¶44, citing *TRINOVA Corp. v. Pilkington Bros., P.L.C.* (1994), 70 Ohio St.3d 271, 275.

{¶17} The language of the Note states:

At the *earlier* of Maker's formal abandonment of the Initial Offering or January 31st, 2007, the following *shall* occur: (a) the conversion feature of this Note set forth in the immediately preceding paragraph shall expire, (b) One Million Four Hundred Thousand Dollars (\$1,400,000.00) of the principal amount hereof shall be forgiven, and (c) Maker *shall repay* the remaining Six Hundred Thousand Dollars (\$600,000) in principal amount hereof, *from the proceeds of the sale of the real estate held by the mortgage*. (Emphasis added.)

{¶18} The Mortgage expressly stated that it was executed "to secure the payment of \$600,000.00 with interest as provided in note of even date." The trial court found that "[t]he terms of both the Note and the mortgage are clear and unambiguous, and there exists no uncertainty in the written instruments and, therefore, parol evidence is not admissible." The trial court further found that "[t]he plain reading of the Note, therefore, is that as of January 31, 2007 (at the latest), Defendant Harrison Ethanol LLC shall repay \$600,000.00 in principal amount to plaintiff. The Note further specifies that said sums should be paid from the proceeds of the sale of the real estate held by a mortgage."

{¶19} The trial court is correct. From the four corners of the document, there is no ambiguity that the due date of the Note was January 31, 2007, at the latest. The real property securing payment of the Note was to have been sold in time to pay Phillips \$600,000.00 no later than January 31, 2007 in order to avoid defaulting on the Note. Appellants' assertion that the due date is somehow impacted by the sale date of the real estate—in other words that the sale of the real estate is a condition precedent to the Note becoming due—is not a reasonable interpretation of the Note's language. Phillips argues if the due date of a note is dependent on the sale date of specified real estate, then giving a mortgage to the creditor on that same real estate would simply not make sense. Phillips is correct. Under such a scenario, the debt would never become due until after a sale that would extinguish the mortgage, but the Note would never be in default so long

as the mortgage existed. Were we to adopt Appellants' circular logic, this Note –or any note for that matter– would *never* become due. In turn, it would render this Mortgage– and any other mortgage– meaningless; the mortgage would secure *nothing*.

{¶20} Because the language of the Note is clear and unambiguous, the trial court properly rejected the use of parol evidence to determine the due date of the Note. Accordingly, Appellants' second assignment of error is meritless.

Genuine Issue of Material Fact

{¶21} In their first and third assignments of error, Appellants assert respectively:

{¶22} "The trial court erred in determining that there was no genuine issue of material fact regarding the due date of the note."

{¶23} "A genuine issue of material fact exists as to whether the subject note even required the sale of the real estate within a reasonable time."

{¶24} Appellants' arguments center on their assertion that the due date of the Note was not January 31, 2007, but instead some future date when the real estate is sold. As discussed above, this interpretation not only contradicts the clear language of the contract, it is circular reasoning which would render the Mortgage meaningless. The language "from the proceeds of the sale of the real estate held by the mortgage," merely specifies the *source* of the funds and reiterates the tie between the Note and Mortgage. This language has no impact upon the date the Note states Phillips must be repaid.

{¶25} There is no dispute that Harrison Ethanol failed to pay Phillips \$600,000.00 by January 31, 2007. The "Maker's failure to pay any installment of principal or interest within five (5) days after its due date in accordance with this Note, * * *" constitutes an "Event of Default." In an "Event of Default," the Note provides that the "amount of this Note outstanding at the time of such event, [here, \$600,000.00] together with all accrued and unpaid interest on such amount, shall be immediately due, without notice or demand by Lender." Thus, there are no genuine issues of material fact precluding summary judgment in favor of Phillips. Accordingly, Appellants' first and third assignments of error are meritless.

Waiver by Estoppel

{¶26} In their fourth and final assignment of error, Appellants assert:

{¶27} "Appellee's actions constituted a waiver of any obligation to pay the note on January 31, 2007."

{¶28} Appellants argue that assuming *arguendo* the trial court was correct in finding that the due date of the Note was January 31, 2007, Phillips waived his right to judgment because he continued to infuse more capital and other resources into the company after that date.

{¶29} As this court has explained:

Waiver by estoppel " 'exists when the acts and conduct of a party are inconsistent with an intent to claim a right, and have been such as to mislead the other party to his prejudice and thereby estop the party having the right from insisting upon it.' " *National City Bank v. Rini*, 162 Ohio App.3d 662, 2005-Ohio-4041, 834 N.E.2d 836, at ¶ 24, citing *Mark-It Place Foods, Inc. v. New Plan Excel Realty Trust, Inc.*, 156 Ohio App.3d 65, 2004-Ohio-411, 804 N.E.2d 979, at ¶ 57. "Waiver by estoppel allows a party's inconsistent conduct, rather than a party's intent, to establish a waiver of rights." *Id.*

Merriner v. Goddard, 7th Dist. No. 08-MO-2, 2009-Ohio-3253.

{¶30} Phillips invested additional funds into the bio-refinery project after the Note's due date. Dreve averred that Phillips loaned the company an additional sum of approximately \$500,000.00 in October 2007. Phillips admitted he tried to solicit new investors after the January 31, 2007 date had passed. According to Wendel, Phillips remained actively involved in efforts to facilitate the project's success and aided in attempts to seek the necessary regulatory permits. Significantly, there is no evidence Phillips misled Dreve into thinking he would not seek repayment of the Note.

{¶31} Phillips had a vested interest in seeing the company succeed. In depositions he testified about his efforts to aid the project after the Note was due, in an attempt to "[s]ave the project and recover my money." That Phillips tried to "save a

sinking ship" and protect his investment does not constitute a waiver of his right to seek a judgment based upon the Note. Rather, it is more properly characterized as mitigating his potential damages. Accordingly, Appellants' fourth assignment of error is meritless.

{¶32} In sum, Appellants' arguments are meritless. Because the terms of the Note regarding the due date were clear and unambiguous, the trial court properly declined to consider parol evidence; moreover that language states the due date was January 31, 2007, at the latest. There is no dispute that Harrison Ethanol failed to pay Phillips \$600,000.00 by January 31, 2007, which constitutes default under the Note; thus there are no genuine issues of material fact precluding summary judgment in favor of Phillips. Finally, waiver by estoppel did not bar summary judgment; Phillips' subsequent infusion of more time and capital into the project does not constitute a waiver of his rights under the Note and Mortgage. Accordingly, the judgment of the trial court is affirmed.

Donofrio, J., concurs.

Vukovich, J., concurs.