

[Cite as *Murrall, Inc. v. Shevetz Ents., L.L.C.*, 2016-Ohio-7040.]

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

MURRAL, INCORPORATED,)	CASE NO. 15 MA 0189
)	
PLAINTIFF-APPELLEE,)	
)	
VS.)	OPINION
)	
SHEVETZ ENTERPRISES,)	
LLC, et al.,)	
)	
DEFENDANT-APPELLANT.)	

CHARACTER OF PROCEEDINGS: Civil Appeal from the Court of Common Pleas of Mahoning County, Ohio
Case No. 2011 CV 2898

JUDGMENT: Reversed and Remanded.

APPEARANCES:

For Plaintiff-Appellee: Atty. Lynn Bruno
Lynn Sfara Bruno Co., LPA, Inc.
412 Boardman-Canfield Road
Youngstown, Ohio 44512

For Defendant-Appellant: Atty. James Lanzo
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JUDGES:

Hon. Carol Ann Robb
Hon. Cheryl L. Waite
Hon. Mary DeGenaro

Dated: September 6, 2016

[Cite as *Murral, Inc. v. Shevetz Ents., L.L.C.*, 2016-Ohio-7040.]
ROBB, J.

{¶1} Defendant-Appellant Shevetz Enterprises, LLC dba Tangier Bar & Pizza LLC appeals the decision of Mahoning County Common Pleas Court granting summary judgment for Plaintiff-Appellees Murral, Incorporated and ordering Appellant to pay \$29,379.15 in damages on Appellee's breach of contract claim. Two assignments of error are raised in this appeal. The first assignment of error is whether summary judgment was improperly granted; are there genuine issues of material fact regarding whether a contract between the parties existed. The second assignment of error is whether the trial court erred in ordering an amount of damages when there was no hearing on damages.

{¶2} Due to language in the agreements signed by the parties, there is a genuine issue of material fact as to whether a written rental agreement existed between the parties. Accordingly, the grant of summary judgment is reversed and the matter is remanded for further proceedings. The second assignment of error is rendered moot by our resolution of the first assignment of error.

Statement of the Facts and Case

{¶3} On November 3, 2008, Appellant and Appellee signed two documents. These documents concerned the operation of Tangier's Pizza Shop and Bar in Struthers, Mahoning County, Ohio. Appellee is the owner of the property and Appellant was becoming the manager.

{¶4} The first document was titled "Memorandum of Understanding." This document established Appellant as the manager of Tangier's and stated Appellant was entitled to all net profits for managing the establishment. The terms of this document set the rental price at \$2,200 per month; this amount consisted of \$800 per month to rent the bar, \$300 per month for use of bar staff, \$800 per month for rental of the pizza shop, and \$300 per month for use of pizza shop equipment. The rental term was a 3 year term starting in December 2008 with 2 renewable 3 year terms. Rental payments were due the 15th of each month and a 10% late charge would be assessed if the monthly payment was not received within ten days of the due date.

{¶5} In conjunction with signing the Memorandum of Understanding, Appellant paid a \$25,000 security deposit. Per the memorandum, the security

deposit was to serve as a guarantee of Appellant's performance of the agreement. The deposit would be forfeited for substantial nonperformance or gambling charges.

{¶16} The Memorandum provided no alterations to the property could be made without Appellee's written consent and Appellant would be responsible to pay the utilities for the property. It also contained an option to buy provision.

{¶17} Regarding whether the Memorandum of Understanding was a complete understanding of the parties' terms and conditions, the document provided:

12. The parties agree that the foregoing Memorandum of Understanding may not be a complete statement of all the terms and conditions of the proposed transaction.

13. The parties agree that neither this Memorandum of Understanding, nor any subsequent oral agreement or conduct of the parties, such as partial performance, shall be deemed to impose any legal obligation or liability.

14. The parties agree that they shall be legally bound only upon the execution of a definitive written agreement.

Memorandum of Understanding Paragraphs 12-14.

{¶18} The second document signed was titled "Interim Operating Agreement." This document indicated Appellant wanted to reopen Tangier's Bar and Pizza and the parties had entered into a rent with option to buy agreement. This document also set forth the monthly rental payment as \$2,200 and stated Appellant was responsible for any damage to the premises effective November 3, 2008.

{¶19} Appellant managed Tangier's from the effective date until vacating the property on July 4, 2011. This was prior to the completion of the first 3 year term. During the management, Appellant admittedly did not make timely rental payments and made alterations to the property; he installed ceiling fans, replaced the floor and replaced the island without prior written approval from Appellee. When Appellant replaced the floor, he placed a mechanic's lien on the property in what appears to be an attempt to have Appellee pay for the cost of the floor.

{¶10} As a result of Appellant's actions, Appellee filed a breach of contract and quiet title action against Appellant. 8/30/11 Complaint; 10/19/11 Amended Complaint. Appellee sought damages for the breach of contract claim and requested an order requiring Appellant to release the lien.

{¶11} Appellant filed an answer, cross claim and counter claim. The counter-claim and cross claim sought foreclosure of the mechanic's lien, breach of contract, unjust enrichment, wrongful withholding of the security deposit, and breach of statutory landlord duties as enumerated in R.C. 5321.12. 11/28/11 Filing.

{¶12} Following discovery, Appellee filed a motion for summary judgment. 1/11/13 Summary Judgment Motion. Appellee cited to David A. Shevetz's deposition in support of its position. Shevetz was doing business as Appellant during the management of Tangier's. In that deposition, Shevetz admitted to signing the documents, the amount of rent still owed under the three year term, the amount of late charges for late rent, and the amount of some of the outstanding utilities when he vacated the premises. Consequently, Appellee asserted there were no issues of fact and it was entitled to judgment and damages in the amount admitted by Shevetz.

{¶13} Appellant filed a response to Appellee's motion for summary judgment asserting there was a genuine issue of material fact as to whether a valid contract existed. 4/29/13 Motion in Opposition to Summary Judgment. The basis for this argument was paragraphs 12 through 14 of the Memorandum of Understanding. According to Appellant, those paragraphs indicate a contract did not exist.

{¶14} After consideration of the arguments, the magistrate granted summary judgment for Appellee and entered damages in the amount of \$29,379.15 against Appellant. The magistrate indicated the security deposit was forfeited, and Appellant was required to release the lien.

{¶15} Appellant filed objections reasserting a valid contract did not exist and argued there was no evidence of damages before the court. He also argued the property was not damaged and that all improvements made to the property were done with Appellee's verbal permission. 10/29/13 Objections.

Appellee filed a response to the objections. 11/22/13 Response.

The trial court overruled the objections and adopted the magistrate's decision:

This matter came before the Court for consideration of the Plaintiff's Objection filed October 29, 2013. The Objections are hereby ***Overruled.***

The Magistrate's Decision filed October 15, 2013 is sustained, therefore, the Magistrate's Decision is hereby adopted and made the action, judgment and order of this Court. (see attached)

There being no just cause for delay, Judgment is entered as above specified.

1/16/14 J.E.

{¶16} A timely appeal was filed. We sua sponte determined the January 16, 2014 order was not a final appealable order because the trial court merely adopted the Magistrate's Decision and failed to set forth the outcome and remedy. We stated attaching a copy of a Magistrate's Decision to a judgment entry does not convert a nonfinal entry into an appealable order. We remanded the matter to the trial court to enter a final judgment. 3/25/14 J.E.

{¶17} The trial court entered a final judgment on September 29, 2015. It recited the magistrate's decision within its decision and entered judgment. 9/25/15 J.E.

{¶18} Appellant timely appealed the decision.

Standard of Review

{¶19} This case involves a trial court's ruling on summary judgment. Summary judgment is appropriate when: (1) there is no genuine issue of material fact, (2) the moving party is entitled to judgment as a matter of law, and (3) after construing the evidence most favorably for the party against whom the motion is made, reasonable minds can reach only a conclusion that is adverse to the nonmoving party. Civ.R. 56(C). We review the trial court's judgment de novo. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996).

First Assignment of Error

"The trial court erred by entering summary judgment on the Plaintiff-Appellee's claims of breach of contract/agreement when the existence of a contract/agreement

is placed into dispute by the very document that the moving party purports to be a contract.”

{¶20} Appellant argues, given the language of the Interim Operating Agreement and the Memorandum of Understanding, there is a dispute whether an actual contract existed between Appellant and Appellee. Appellee disagrees and focuses on Shevetz’s deposition testimony where he admitted he entered into the Interim Order and Memorandum of Understanding. Shevetz stated he is a college graduate and knows how to read and write, and he had an attorney negotiate the terms of those two documents. Appellee asserts this evidence establishes the existence of a contract.

{¶21} Given the parties’ argument we are asked to determine whether the terms set forth in the Memorandum of Understanding are binding.

{¶22} Two documents were signed November 3, 2008; one was the Interim Operating Agreement and the second was the Memorandum of Understanding. The Interim Operating Agreement stated the parties entered into a “Rent With Option to Buy Agreement to Lease With Possible Purchase” and referenced the Memorandum of Understanding. The Interim Operating Agreement indicated Appellant would open the business at his expense, pay Appellee \$2,200.00 per month in rent, Appellant’s net profit would be his salary for managing the bar, the sale of business and transfer of license would be announced, Appellant would be responsible to pay monthly liability insurance, and Appellant would be responsible for damages effective November 3, 2008. This document was signed by both parties.

{¶23} The Memorandum of Understanding began with an explanatory paragraph:

This Memorandum of Understanding is intended to serve as an outline of the terms and conditions, and topic for negotiation, to be contained in a definitive Operating Agreement. Unless or until such an Operating Agreement has been executed, no party shall be under obligation to complete the transaction contemplated herein, except that all parties agree to negotiate in good faith to bring this transaction to a close, and

to adhere to the confidentiality provisions specified in Paragraph 11 below.

11/3/08 Memorandum of Understanding.

{¶24} The agreement explains Appellant is the manager of Tangier's, and Appellee is the owner. The following terms and conditions were then "proposed." The rental term was for three years with two renewable three year periods and the monthly rent was \$2,200.00. The agreement broke down how that rent was computed. The agreement indicated the monthly rental payments were due the 15th of each month and if not received within 10 days of the due date, a 10% late charge was due. The agreement also indicated the rental amount would increase 3% annual on the anniversary date. The agreement provided a list of items for which Appellant was responsible, including: utilities; maintenance, repair and upkeep; and equipment maintenance and repair. Under maintenance, repair and upkeep, the agreement further provided, "Further, no alterations to the property may be made without OWNER'S written consent, which shall not be unreasonably withheld." 11/3/03 Memorandum of Understanding Paragraph 9(k).

{¶25} The agreement set forth a \$25,000 security deposit to be paid prior to the effective date of the agreement. The security deposit was to serve as a guarantee of Appellant's performance. Forfeiture of the deposit would occur for, among other things, gambling charges.

{¶26} Paragraphs 12 through 14 of the agreement provided:

12. The parties agree that the foregoing Memorandum of Understanding may not be a complete statement of all the terms and conditions of the proposed transaction.

13. The parties agree that neither this Memorandum of Understanding, nor any subsequent oral agreement or conduct of the parties, such as partial performance, shall be deemed to impose any legal obligation or liability.

14. The parties agree that they shall be legally bound only upon the execution of a definitive written agreement.

11/3/08 Memorandum of Understanding Paragraphs 12-14.

{¶27} The parties signed and dated this agreement. Below the signatures was a paragraph titled “OPTION TO BUY.” The terms of the option were set forth. The last sentence provided if the option was not executed a new option would be negotiated.

{¶28} In general, Memorandums of Understanding “are often entered into between corporations, usually as a preliminary stage in negotiations over purchases, mergers and acquisitions.” Worster, *Between A Treaty & Not: A Case Study of the Legal Value of Diplomatic Assurances in Expulsion Cases*, 21 Minn. J. Int’l L. 253, 314-15 (2012). Memorandums of Understanding can include both binding and nonbinding provisions. Alan S. Gutterman, *Business Transactions Solutions*, Section 100:110 (Update 2016) (“The nonbinding provisions pertain to the preliminary consensus of the parties with respect to the essential economic terms of the proposed contract. The binding provisions relate to certain procedural matters during the period that the actual contract is prepared and finalized, including the obligation to negotiate in good faith.”).

{¶29} The memorandums also often include “express language that they are not legally binding. Nevertheless, they also often provide for legal rights and obligations.” Worster, *Between A Treaty & Not: A Case Study of the Legal Value of Diplomatic Assurances in Expulsion Cases*, 21 Minn. J. Int’l L. 253, 314-15 (2012). The legal obligations often require negotiation in good faith. *Id.*; Alan S. Gutterman, *Business Transactions Solutions*, Section 100:110 (Update 2016) (Example - “This Memorandum of Understanding is intended to be a confirmation of interest between the parties in pursuing negotiations for a definitive agreement based on the terms hereof and, except for the lettered paragraphs hereof, shall not constitute a binding agreement between the parties hereto. Neither party intends, by setting forth in this Memorandum of Understanding the provisions of a possible transaction, to create for itself or any other person, any legally binding obligation of liability. No subsequent oral agreement or conduct of the parties, including partial performance, shall be deemed to impose such obligation or liability. No agreement shall be binding unless and until each party has reviewed and approved (in its sole discretion) a definitive

written agreement incorporating all the terms, conditions, and obligations of the parties; has had such agreement reviewed by legal counsel; and has duly executed and delivered such agreement. The legal rights and obligations of each party shall be only those that are set forth in the definitive written agreement.”).

{¶30} Ohio case law indicates, as a general proposition, a memorandum of understanding is viewed as a contract. *Futey v. Director*, 5th Dist. No. 04 CA 14, 2004–Ohio–5400, at ¶ 23. The same can be said for an Interim Operating Agreement.

{¶31} Under the first rule of contract construction, a court must determine whether the provisions of the agreement are unambiguous and, accordingly, can be applied as written. *Gates v. Ohio Savings Assn.*, 11th Dist. No.2009–G–2881, 2009–Ohio–6230, at ¶ 24. A contract that is, by its terms, clear and unambiguous requires no interpretation or construction and will be given the effect called for by the plain language of the contract. *Aultman Hosp. Assn. v. Community Mut. Ins. Co.*, 46 Ohio St.3d 51, 53, 544 N.E.2d 920 (1989). Review of an unambiguous written agreement is a matter of law for the court, which an appellate court reviews de novo. *Savoy Hosp., L.L.C. v. 5839 Monore St. Assocs., L.L.C.*, 6th Dist. No. L-14-1144, 2015-Ohio-4879, ¶ 30.

{¶32} If the language of the contract is ambiguous, the intent of the parties becomes a question of fact. *Id.* at ¶ 31, citing *Beverly v. Parilla*, 165 Ohio App.3d 802, 808, 2006-Ohio-1286, 848 N.E.2d 881, ¶ 26 (7th Dist.). A contract is considered ambiguous if the language is “unclear, indefinite, and reasonably subject to dual interpretations or is of such doubtful meaning that reasonable minds could disagree as to its meaning.” *Beverly* at ¶ 24. If an ambiguity exists, courts are permitted to consider extrinsic evidence to determine the parties’ intent. *Wells Fargo Bank, N.A. v. TIC Acropolis, L.L.C.*, 2d Dist. No. 2015-CA-32, 2016-Ohio-142, ¶ 47. Extrinsic evidence includes the circumstances surrounding the parties at the time the contract was made and the objectives they intended to accomplish by entering the contract. *Oryann, Ltd. v. SL & MB, L.L.C.*, 11th Dist. No. 2014-L-119, 2015-Ohio-5461, ¶ 26. This includes consideration of the parties’ negotiations. *Id.*, citing *Pharmacia Hepar, Inc. v. Franklin*, 111 Ohio App.3d 468, 475, 676 N.E.2d 587 (12th Dist.1996). If the

parties' intent cannot be determined from consideration of extrinsic evidence, then the contract must be construed against the drafter. *Cocca Dev. Ltd. v. Mahoning Cty. Bd. of Commrs.*, 7th Dist. No. 12 MA 155, 2013-Ohio-4133, ¶ 10; *Michael A. Gerard, Inc. v. Haffke*, 8th Dist. No. 98488, 2013-Ohio-168, ¶ 14.

{¶33} Based on the terms of the agreements and considering Ohio case law, these agreements are contracts and, at the least, bind the parties to negotiate in good faith. The contracts include a rental arrangement setting forth the duration, amount of rent, and obligations and responsibilities of the parties. The question becomes, is that portion of the agreement binding? Although terms and conditions are set forth, the introductory paragraph refers to them as proposed terms and conditions. Paragraph 13 specifically states conduct of the parties does not impose legal obligation or liability. Paragraph 14 further indicates the parties are legally bound only upon executing a definitive written agreement.

{¶34} Considering the above language, the contract is ambiguous as to whether the rental terms are binding. Therefore, a genuine issue of material fact exists as to whether the three year term for rent was created. Given the facts, a reasonable trier of fact could find there was a contract or a reasonable trier of fact could find there was no contract.¹

{¶35} This assignment of error has merit. The trial court's grant of summary judgment for Appellee is reversed and the matter is remanded for further proceedings.

Second Assignment of Error

"The trial court erred by [entering] summary judgment against the Defendant-Appellant and further arriving at an amount of damages without further hearing."

{¶36} As this court finds merit with the first assignment of error, this assignment of error is moot.

Conclusion

¹If a jury found there was no contract for the entire three year term, then Appellant would not be liable for the rent for the entire three years. That finding, however, would not necessarily mean Appellant is not liable for any damages. The agreement does state it is an outline for the terms of the agreement. Although it may not have created a definite lease term, the act of paying rent on a monthly basis could be deemed to create a commercial month-to-month lease. *Kilcoyne Properties, LLC v. Fischbach*, 5th Dist. No. 03CA072, 2004-Ohio-7272, ¶ 40-42 (Where lessee takes possession under a defectively executed lease and pays rent, tenancy is implied and is

{¶37} The first assignment of error has merit. Therefore, the second assignment of error is moot. Summary judgment for Appellee is reversed and the matter is remanded for further proceedings.

Waite, J., concurs.

DeGenaro, J., concurs.