[Cite as *Cincinnati Ins. Co. v. Cleveland*, 2009-Ohio-4043.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92305

CINCINNATI INSURANCE COMPANY

PLAINTIFF-APPELLEE

vs.

CITY OF CLEVELAND, ET AL.

DEFENDANTS-APPELLANTS

JUDGMENT:
REVERSED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-534573

BEFORE: Celebrezze, J., Rocco, P.J., and Dyke, J.

RELEASED: August 13, 2009

JOURNALIZED:

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

FRANK D. CELEBREZZE, JR., J.:

{¶ 1} This is an interlocutory appeal taken by appellant, the City of Cleveland ("the City"), from the trial court's denial of the City's motion for summary judgment and the grant of summary judgment in favor of appellee, Cincinnati Insurance Company ("CIC"). After a thorough review of the record, and for the reasons set forth below, we reverse.

{¶ 2} In the summer of 2000, Metromedia Fiber Network ("Metromedia") was in the process of installing highspeed fiberoptic cabling in the Playhouse Square area of the City. Metromedia contracted with Hunters & Associates ("Hunters") to design and draw up plans for the excavation and installation of conduit to hold the fiberoptic cabling. Metromedia also hired Bechtel Corporation ("Bechtel") as the general contractor for the project. Bechtel hired Utilities Construction, Inc. ("UC") as the subcontractor to do the excavation and installation of conduit.

{¶ 3} The plans supplied by Hunters failed to include a 30-inch water main running through the project area. UC took the appropriate steps to locate all underground utility facilities by calling the Ohio Utilities Protection Service ("OUPS"), a one-call underground facility location service. OUPS[1]

[1]OUPS is a non-profit corporation, established pursuant to R.C. 3781.25 et seq., to operate a one-call notification service so the public can call only one phone number and have all utility companies with underground facilities in the requested area notified

took UC's requests for locations and forwarded them to all utility companies that had underground facilities in the area specified by UC, which included the City of Cleveland Division of Water ("CCDW").

{¶ 4} Beginning on June 27, 2000, UC called OUPS 13 times in the two months leading up to August 30, 2000 requesting that all underground utilities be marked at the East 13th and Euclid Avenue area. Each time, OUPS forwarded the request on to CCDW.

{¶ 5} CCDW received these requests and gave them a high priority due to the large diameter of the water main. Clint Causey, the CCDW employee responsible for this area, was given these requests but, because of under staffing, he was directed to other projects by his supervisor. CCDW did not mark any underground facilities or notify UC that there were underground water lines in the area that were not marked.

{¶ 6} On August 28, 2000, during excavation, UC encountered an abandoned vault and began removing the vault. Contrary to construction practice, the water main in question was directly under and in contact with the vault. On August 30, 2000, the 30-inch water main in the excavation area ruptured causing over $1 million in property damage to surrounding property owners and tenants. In a subsequent lawsuit by the insurance carriers of those injured, UC was found negligent and liable. CIC was

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of requests to locate and mark those facilities.

required to pay the judgment amount under an insurance policy between UC and CIC.

{¶ 7} On June 24, 2004, in an effort to recoup the losses sustained in the earlier suit, CIC filed an action for contribution and indemnification against the City, Bechtel, Metromedia, Hunters, and Clint Causey, and a breach of contract claim against the City based on being a third-party beneficiary to a contract between CCDW and OUPS. On October 12, 2004, Metromedia filed a cross-claim against the City for contribution and indemnification. The first two claims against the City were dismissed on July 21, 2006. Mr. Causey was dismissed from the suit by CIC due to his filing for bankruptcy.

{¶ 8} On October 19, 2007, CIC filed motions for summary judgment against the City and Metromedia. In response, the City and Metromedia filed briefs in opposition as well as cross-motions for summary judgment. The City next filed a motion for summary judgment against Metromedia asserting that it was immune from suit under R.C. 2744.05(B), which prohibits insurance subrogation claims against the state or its municipalities.

{¶ 9} On October 1, 2008, the trial court granted CIC's motion for summary judgment against the City and Metromedia as to liability only, leaving damages unresolved. The trial court also denied the City's and

Metromedia's motions. Pursuant to R.C. 2744.02(C),[2] on October 24, 2008, the City filed its notice of interlocutory appeal to this court citing three assignments of error.[3]

{¶ 10} "The trial court erred by denying summary judgment in favor of the City of Cleveland with regard to the claims of Cincinnati Insurance Company thereby exposing the City to insurance subrogation liability contrary to R.C. 2744.05(B)."

{¶ 11} "The trial court erred by granting summary judgment in favor of Cincinnati Insurance Company with regard to its claims against the City of Cleveland thereby exposing the City to insurance subrogation liability contrary to R.C. 2744.05(B)."

Review and Analysis

{¶ 12} Because these assignments of error involve the same issues, they will be addressed together. The basis of CIC's claim against the City is that the City and OUPS had a contract of which UC was a third-party beneficiary. The City breached that contract by not marking the 30-inch water main even though it knew its location and knew it had a duty to mark it, which was

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[2]This section states: "An order that denies a political subdivision or an employee of a political subdivision the benefit of an alleged immunity from liability as provided in this chapter or any other provision of the law is a final order."

[3]The City's third assignment of error addressed the trial court's denial of the City's motion for summary judgment against Metromedia's cross-claim. Because this claim was dismissed on June 29, 2009, it will not be addressed by this court.

imposed by statute and by its contract with OUPS. This complex legal theory is necessary for CIC to recover against the City due to statutory provisions for sovereign immunity[4] and immunity from claims of insurance subrogation.[5]

{¶ 13} "Civ.R. 56(C) specifically provides that before summary judgment may be granted, it must be determined that: (1) No genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the party against whom the motion for summary

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[4]R.C. 2744.02(A)(1): "For the purposes of this chapter, the functions of political subdivisions are hereby classified as governmental functions and proprietary functions. Except as provided in division (B) of this section, a political subdivision is not liable in damages in a civil action for injury, death, or loss to person or property allegedly caused by any act or omission of the political subdivision or an employee of the political subdivision in connection with a governmental or proprietary function."

[5] R.C. 2744.05 forbids insurance subrogation claims when it states: "Notwithstanding any other provisions of the Revised Code or rules of a court to the contrary, in an action against a political subdivision to recover damages for injury, death, or loss to person or property caused by an act or omission in connection with a governmental or proprietary function:

"* * *

"(B) (1) If a claimant receives or is entitled to receive benefits for injuries or loss allegedly incurred from a policy or policies of insurance or any other source, the benefits shall be disclosed to the court, and the amount of the benefits shall be deducted from any award against a political subdivision recovered by that claimant. *No insurer or other person is entitled to bring an action under a subrogation provision in an insurance or other contract against a political subdivision with respect to those benefits.*" (Emphasis added.)

judgment is made, that conclusion is adverse to that party." *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 327, 364 N.E.2d 267.

{¶ 14} It is well established that the party seeking summary judgment bears the burden of demonstrating that no issues of material fact exist for trial. *Celotex Corp. v. Catrett* (1986), 477 U.S. 317, 330, 106 S.Ct. 2548, 91 L.Ed.2d 265; *Mitseff v. Wheeler* (1988), 38 Ohio St.3d 112, 115, 526 N.E.2d 798. Doubts must be resolved in favor of the nonmoving party. *Murphy v. Reynoldsburg*, 65 Ohio St.3d 356, 1992-Ohio-95, 604 N.E.2d 138.

{¶ 15} In *Dresher v. Burt*, 75 Ohio St.3d 280, 1996-Ohio-107, 662 N.E.2d 264, the Ohio Supreme Court modified and/or clarified the summary judgment standard as applied in *Wing v. Anchor Media, Ltd. of Texas* (1991), 59 Ohio St.3d 108, 570 N.E.2d 1095. Under *Dresher*, "the 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 or material element of the nonmoving party's claim*." Id. at 296. (Emphasis in original.) The nonmoving party has a reciprocal burden of specificity and cannot rest on mere allegations or denials in the pleadings. Id. at 293. The nonmoving party must set forth "specific facts" by the means listed in Civ.R. 56(C) showing a genuine issue for trial exists. Id.

{¶ 16} This court reviews the lower court's grant of summary judgment de novo. *Brown v. Scioto Cty. Bd. of Commrs.* (1993), 87 Ohio App.3d 704, 622 N.E.2d 1153. An appellate court reviewing the grant of summary judgment must follow the standards set forth in Civ.R. 56(C). "The reviewing court evaluates the record * * * in a light most favorable to the nonmoving party * * *. [T]he motion must be overruled if reasonable minds could find for the party opposing the motion." *Saunders v. McFaul* (1990), 71 Ohio App.3d 46, 50, 593 N.E.2d 24; *Link v. Leadworks Corp.* (1992), 79 Ohio App.3d 735, 741, 607 N.E.2d 1140.

Lack of Contract

{¶ 17} The City challenges CIC's grant of summary judgment first by arguing there is no enforceable contract between OUPS and the City.

{¶ 18} The City argues that there is no contract because there is no consideration for a contract -- the City is statutorily bound to become a member of OUPS, and the City's duty to mark underground utilities is imposed by statute; therefore, there is no consideration for any contract between OUPS and the City.

{¶ 19} An agreement based on an obligation a party is already obligated by law to do is void for want of consideration. *City of Sylvania v. Ralston*, Lucas App. No. L-01-1448, 2002-Ohio-3575, ¶34. However, there is consideration for a contract. OUPS is agreeing to operate a one-call facility

and provide notice to the City in exchange for money. Even though CCDW is required to join OUPS by R.C. 3781.26(A), it could choose to be a limited member. It chose to be a voting member, which is not required by statute. This, coupled with the fact that the City is contracting for the operation of a call center and not for location and marking services, is sufficient consideration for the membership application and surrounding regulations to constitute a valid, binding contract. See *Whitney v. Stearns* (1839), 16 Me. 394, 397 (finding "a cent or a pepper corn * * * would constitute a valuable consideration").

{¶ 20} The City also challenges the lower court decision because the membership agreement between the City and OUPS is a membership agreement in a non-profit corporation, analogous to shareholders of a corporation, which does not bestow any rights on CIC or UC.

{¶ 21} In *Brown's Run Country Club v. Brown* (Oct. 2, 1995), Butler App. No. CA95-03-048, a valid contract was found to exist in the membership agreement and application for a non-profit entity, which the non-profit can base suit on. In *Brown's Run*, a member of a country club was sued for non-payment of dues. The Twelfth District held that a member's application agreement constituted a valid and enforceable agreement. The City distinguishes the case as not one involving third-party beneficiaries. This is

true, but it does establish that enforceable rights exist in the application for membership submitted to a non-profit corporation by its members.

{¶ 22} Here, the application form stated that all members would "support the purpose for which the Ohio Utilities Protection Service was formed, which is to operate a statewide one-call system * * * in order to reduce dig-in damages, periods of utility service disruptions, and the risk of injury to excavators and the public." The members also agreed to follow the Code of Regulations, the Operating Procedures, and to pay dues. The parties have performed under this agreement for more than 20 years. OUPS can enforce the provisions of this agreement.

{¶ 23} The City also argues that no valid contract exists because the city law director must approve all contracts before they become operative, and this contract was not so approved. "The law is well settled that, when a signed written agreement exists, an inference is drawn that the parties' minds have met and a contract was made, in the absence of contrary evidence. *Parklawn Manor, Inc. v. Jennings-Lawrence Co.* (1962), 119 Ohio App. 151, 156." *Young v. Hodapp* (Dec. 29, 1986), Butler App. No. CA85-08-094.

{¶ 24} CIC argues that CCDW signed the membership application form and agreed to become a member of OUPS and be bound by the terms and conditions of membership, whether or not the city law director signed the

contract. They operated as if a contract was created. The City paid fees and dues to OUPS, and OUPS provided notification of requests for location and marking services. Even though the city law director did not sign the agreement, the City was required by statute to join OUPS. The City's charter gives the director of CCDW the power to manage and operate the Division of Water.[6] The actions taken by CCDW were authorized by R.C. 3781.26, and thus did not exceed the bounds of the City's municipal charter.

{¶ 25} Generally, a municipality is immune from suit based on quasi contract, implied contract, or unjust enrichment theories because the actions of such governmental entities are limited by state and local statutes. *Magnum Towing & Recovery, LLC v. City of Toledo* (N.D. Ohio, 2006), 430 F.Supp.2d 689. "Individuals dealing with municipal corporations are charged with notice of all statutory limitations on the power of such corporations and their agents, and must, at their peril, ascertain whether all necessary statutory requirements relative to the subject matter of the transaction involved have been complied with." *Kimbrell v. Village of Seven Mile* (1984), 13 Ohio App.3d 443, 469 N.E.2d 954, paragraph two of the

[6]§111 of the Charter of the City of Cleveland states: "The Director of Public Utilities shall manage and supervise all non-tax supported public utility undertakings of the City, including all Municipal water * * * enterprises, but excluding mass transportation enterprises, and such other utilities now owned or hereafter acquired by the City of Cleveland as may be placed under any management and supervision other than that of the Director of Public Utilities."

syllabus. Had CCDW's director not become a member of OUPS, it would have been in violation of R.C. 3781.26. Because the Director of Public Utilities has authority to "manage and supervise," this includes the necessary power to undertake actions to ensure compliance with state statutes.

{¶ 26} It is clear that a contract was formed between OUPS and CCDW. Both parties have enforceable rights under the membership application, and their extensive and continued performance within the terms of the agreement further demonstrate a contract was formed.

Third-Party Beneficiary

{¶ 27} Simply because there was a valid contract between OUPS and the City is not determinative. This preliminary question is but a necessary step in addressing CIC's third-party beneficiary argument. CIC argues that it has enforceable rights under the agreement between CIC and OUPS as an intended third-party beneficiary to the membership agreement, the general operating procedures, and the bylaws of OUPS. It claims that rights in these documents flow to CIC.

{¶ 28} Only a party to a contract or an intended third-party beneficiary to a contract may bring an action. See *Merganthal v. Star Banc Corp.* (1997), 122 Ohio App.3d 100, 104, 701 N.E.2d 383. CIC asserts it is a third-party beneficiary under the "intent to benefit" test set forth in *Hill v. Sonitrol of Southwestern Ohio, Inc.* (1988), 36 Ohio St.3d 36, 521 N.E.2d 780. *Hill*

requires that "there must be evidence, on the part of the promisee, that he intended to directly benefit a third party, and not simply that some incidental benefit was conferred on an unrelated party by the promisee's actions under the contract." Id. CIC argues that the City intended excavators, including UC, to be third-party beneficiaries under the agreement.

{¶ 29} This argument confuses the third-party benefit analysis. "'The mere conferring of some benefit on the supposed beneficiary by the performance of a particular promise in a contract [is] insufficient; rather, the performance of that promise must also satisfy a duty owed by the promisee to the beneficiary.'" *Hill* at 40, 521 N.E.2d 780, 785, quoting *Norfolk & Western Co. v. U.S.* (C.A.6, 1980), 641 F.2d 1201, 1208.

{¶ 30} Under the contract, the promisee must intend a benefit to flow to the third party that is not merely incidental to the contract. Here, the contract was made to "operate a statewide one-call system to receive notification prior to excavation or prior to any activity which may damage underground facilities and to relay the notification to the corporation members in order to reduce dig-in damages, periods of utility service disruptions, and the risk of injury to excavators and the public." The duty that the City is relieved of is obtaining notice of the public's intent to dig. The duty to mark utility lines is imposed by statute, not by the agreement to operate a notification call center.

{¶ 31} The promise made by the City was to take any action it deemed necessary and to support the purpose for which OUPS was founded. When "the promisor retains an unlimited right to determine the nature or extent of his performance, the unlimited right, in effect, destroys his promise and thus makes it merely illusory." *Century 21 American Landmark, Inc. v. McIntyre* (1980), 68 Ohio App.2d 126, 129-130, 427 N.E.2d 534, 536-537, (citing 1 Williston on Contracts (3 Ed. 1957) 140, Section 43). This promise imposes no duty on CCDW to do anything. Even reading in a duty to operate in good faith,[7] the discretion left in these promises is so vast as to be meaningless.

{¶ 32} This court has previously held that "even if we [find] * * * a binding contract, * * * [i]n order to recover under a third-party beneficiary theory, the plaintiff must assert a breach of the underlying contract. *Sowers v. Heidler*, 12th Dist. No. CA2003-02-002, 2003-Ohio-6787, ¶12." *Castelli v. Patmon*, Cuyahoga App. Nos. 90103, 90104, 2008-Ohio-6468, ¶20. Because the promise made by the members to "be responsible individually for taking such action as it may deem necessary to protect the public, its underground facilities, and the continuation of its service," is so ambiguous as to be illusory, OUPS cannot sue for such a failure and, therefore, neither can CIC.

{¶ 33} Although the City agreed to support OUPS's purpose, it was incidental to its promise to pay money for OUPS's return promise to operate a

[7]Restatement of the Law 2d, Contracts (1981) Section 205.

one-call notification service. The City did not intend to benefit UC. "In order for a third party to seek enforcement of a promise ostensibly made for his benefit, it must appear that the contract was entered into directly or primarily for the benefit of the third person." See *Cleveland Metal Roofing & Ceiling Co. v. Gaspard* (1914), 89 Ohio St. 185, 106 N.E. 9. The reduction of risk to the public is incidental to the operation of a statewide one-call system for the convenience of those requesting location and marking of underground utilities. Also, the promise must not be one made to the public at large. *Amborski v. Toledo* (1990), 67 Ohio App.3d 47, 52, 585 N.E.2d 974. The promise made to protect "excavators and the public" is one made to the public at large and does not lend itself to suit by third-party beneficiaries.

{¶ 34} CIC relies on *East Ohio Gas Co. v. Kenmore Construction Co. Inc.* (Mar. 28, 2001), Summit App. Nos. 19567, 19790, for the proposition that the City can be held liable under the OUPS agreement as a third-party beneficiary to the agreement. In *East Ohio*, the East Ohio Gas Company ("East Ohio") contracted with Central Locating Services ("CLS") to locate and mark its underground utility lines in response to calls made by excavators such as Kenmore Construction ("Kenmore"). CLS failed to locate and mark the utility lines of East Ohio in the excavation area, and the lines were damaged by Kenmore. Kenmore sued East Ohio and brought a claim against CLS based on a breach of contract theory as a third-party beneficiary. The

court in *East Ohio* recognized enforceable contract rights in Kenmore as an intended beneficiary to the contract. This case is distinguishable.

{¶ 35} If CIC were suing OUPS, this case would be analogous because it was OUPS who undertook to operate a one-call service to reduce the risk to the public. This would mirror CLS's duties owed to Kenmore because it was CLS who agreed to perform East Ohio's statutory marking duties, and that is the primary purpose of the contract. The City did not contract with OUPS to have the City fulfill its own statutorily-mandated marking duties, but simply for notification of requests.

{¶ 36} Notably in *East Ohio*, supra, Kenmore sued East Ohio under a negligence theory, not as a third-party beneficiary to the East Ohio and CLS contract. The promise made by CLS was to locate and mark underground utilities. The promise made by OUPS was simply to notify utilities of requests to mark. As simply a notification service, OUPS owed no duty to CIC to mark utilities. The City also owes no duty under the contract to mark their locations. The contracts are different as are the duties in each. The duty to mark arises under statute, which does not provide a remedy for CIC. R.C. 3781.25 et seq. requires utility companies to mark the location of underground utility facilities, as well as specifying the color each type of utility must use to mark locations.

{¶ 37} There is no question that the City was negligent in its duty to locate and mark the underground water main. Hunters, who drafted the construction plans, was also negligent in not locating the line on the construction plans. However, the state legislature has left certain avenues open to those injured by acts or omissions of the state and its municipalities. R.C. 2744.02(B)(2)[8] would have allowed UC to recover from the City as one injured through the negligent operation of a proprietary function. UC could have impled the City as a third-party defendant in the original action against it by the injured insurance companies. This is the avenue left available to UC by statute. A convoluted third-party beneficiary claim to circumvent the insurance subrogation prohibition in R.C. 2744.05 should not be allowed.

{¶ 38} It is the opinion of this court that the lower court's denial of the City's motion for summary judgment and the granting of CIC's motion for summary judgment be reversed.

{¶ 39} This cause is reversed and remanded to the lower court for further proceedings consistent with this opinion.

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[8]This section states:

"(B) Subject to sections 2744.03 and 2744.05 of the Revised Code, a political subdivision is liable in damages in a civil action for injury, death, or loss to person or property allegedly caused by an act or omission of the political subdivision or of any of its employees in connection with a governmental or proprietary function, as follows:

"* * *

"(2) Except as otherwise provided in sections 3314.07 and 3746.24 of the Revised Code, political subdivisions are liable for injury, death, or loss to person or property caused by the negligent performance of acts by their employees with respect to proprietary functions of the political subdivisions."

It is ordered that appellant recover of said appellee costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

FRANK D. CELEBREZZE, JR., JUDGE

ANN DYKE, J., CONCURS;
KENNETH A. ROCCO, P.J., DISSENTS (WITH SEPARATE OPINION)

KENNETH A. ROCCO, J., DISSENTING:

{¶ 40} I would defer review of the question whether the city is liable for breach of contract until the judgment on that claim is final, that is, after damages have been assessed. I would hold only that the city is not immune from liability because Cincinnati Insurance's claim is a claim for breach of contract, which is not subject to R.C. Chapter 2744. R.C. 2744.09(A). Accordingly, I dissent.

{¶ 41} In my opinion, when the decision under review is interlocutory in nature, the scope of our review is limited by the statute that gives us jurisdiction. Cf. *Riggs v. Richard*, Stark App. No. 2007CA00328,

2008-Ohio-4697, ¶20-23; *State ex rel. Montgomery v. Columbus*, Franklin App. No. 02AP-963, 2003-Ohio-2658, ¶33. In this case, R.C. 2744.02(C) allows us to review an "order that denies a political subdivision * * * the benefit of an alleged immunity from liability * * *." Although the trial court's decision both finds that the city is liable and, implicitly, that the city is not immune, R.C. 2744.02(C) allows us to review only the denial of immunity, but not the determination that the city is liable. *Dynowski v. Solon*, Cuyahoga App. No. 92264, 2009-Ohio-3297, ¶57 (Rocco, J., dissenting).

{¶ 42} I would hold that the city is not immune from liability on Cincinnati Insurance's claim because that claim is for breach of contract and therefore is not subject to the defense of sovereign immunity. Cincinnati Insurance alleges that the city breached its contract with OUPS, of which Utilities Construction (Cincinnati Insurance's insured) was a third-party beneficiary. The city denies that it has a contract with OUPS and asserts that its duties to mark utilities are statutory, not contractual, and that Cincinnati Insurance (or its insured) is not a third-party beneficiary of any contract. These arguments do not change the fact that the *claim* is for breach of contract, so the sovereign immunity provisions of R.C. Chapter 2744 do not apply. R.C. 2744.09(A).

{¶ 43} I would decline to address the merits of Cincinnati Insurance's breach of contract claim until that judgment becomes final. Therefore, I would affirm and remand for further proceedings.