

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
CLERMONT COUNTY

PIERCE POINT CINEMA 10, LLC,	:	
	:	CASE NO. CA2012-02-014
Plaintiff-Appellee,	:	
	:	<u>OPINION</u>
	:	10/29/2012
- vs -	:	
	:	
PERIN-TYLER FAMILY	:	
FOUNDATION, LLC, et al.,	:	
	:	
Defendants-Appellants.	:	

CIVIL APPEAL FROM CLERMONT COUNTY COURT OF COMMON PLEAS
Case No. 2010CVH02223

Earl K. Messer, 425 Walnut Street, Suite 1800, Cincinnati, Ohio 45202, for plaintiff-appellee

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defendant-appellant, Perin-Tyler Family Foundation, LLC

Greater Huntington Theatre Corporation, 1021 4th Avenue, Huntington, West Virginia 25701,
defendant pro se

S. POWELL, P.J.

{¶ 1} Appellant, Perin-Tyler Family Foundation (PTFF), appeals from a decision of
the Clermont County Court of Common Pleas in a breach of contract action. For the reasons
stated below, we affirm.

{¶ 2} PTFF is the owner of a 10-screen movie theater in Amelia, Ohio. Appellee,

Pierce Point Cinema 10 (Pierce), is the tenant. In 2007, the parties entered into a lease contract which provided that PTFF would erect a movie theater and Pierce would lease the building and operate the theater. PTFF hired Cincinnati United Contractors (CUC), as the general contractor for the project.

{¶ 3} The lease contract addressed several aspects of the parties' obligations and responsibilities for construction of the theater. One of the specific issues in the lease contract addressed the furnishing and installation of "Building Improvements" (improvements) in the theater. The improvements involved theater equipment such as concession stands, ice machines, security cameras and the installation of electrical and plumbing systems for this equipment. Several provisions in the lease contract addressed these improvements. One of the provisions stated that PTFF would install all electrical and plumbing systems for the theater. However, another provision stated that Pierce would furnish and install the improvements. Additionally, a document incorporated into the contract stated that while Pierce was to provide and install most of the improvements, CUC, the general contractor, would install the electrical or plumbing systems to some of the improvements.

{¶ 4} Nearing the end of construction on the project, a dispute arose over which party was to pay for CUC's work in installing the electrical and plumbing systems to some of the improvements. CUC first sought payment from PTFF but PTFF denied responsibility and refused to make payment. Thereafter, CUC sought payment from Pierce, who also denied responsibility but ultimately paid the amount requested. On October 19, 2010, Pierce filed a complaint in the Clermont County Court of Common Pleas against PTFF requesting reimbursement for the amount paid to CUC – as outlined in Exhibit D of the lease contract – and several other contractual issues not relevant to this appeal.

{¶ 5} On January 27, 2012, the trial court found that the contract was ambiguous as to which party was to pay for the work CUC completed pursuant to Exhibit D. The court then

considered extrinsic evidence regarding the parties' intent concerning this work. The court found that the testimony at trial established that it was the intention of the parties that PTFF be responsible for this expense and ordered PTFF to reimburse Pierce the amount it paid CUC.

{¶ 6} PTFF now appeals, asserting one assignment of error:

{¶ 7} Assignment of Error No. 1:

{¶ 8} THE TRIAL COURT ERRED IN FINDING THAT APPELLANT, PERIN-TYLER FAMILY FONDATION, LLC WAS RESPONSIBLE FOR THE PAYMENT OF THE ITEMS LISTED ON EXHIBIT D TO THE GROUND LEASE.

{¶ 9} In PTFF's sole assignment of error, it argues that the trial court erred in finding the contract ambiguous regarding which party was responsible for the work CUC performed pursuant to Exhibit D. Specifically, PTFF contends that the lease contract is not ambiguous regarding which party is to pay for CUC's work but instead the contract contains specific and general contract provisions. Therefore, the contract was not ambiguous and the court erred in admitting extrinsic evidence regarding the parties' intent of who would pay for this expense.

{¶ 10} This case involves the interpretation of the parties' obligations in regards to the improvements outlined in the lease contract. The interpretation of a contract and whether a contract's terms are clear or ambiguous is a question of law. *Latina v. Woodpath Dev. Co.*, 57 Ohio St.3d 212, 214 (1991). Thus, when reviewing issues of contract interpretation, this court applies a de novo standard of review. *Smith v. Littrell*, 12th Dist. No. CA2001-02-004, 2001 WL 1598301, *2 (Dec. 17, 2001). However, once the court determines the contract to be ambiguous, it must decide the meaning of the terms in the contract. *Walter v. Agoston*, 12th Dist. No. CA2003-03-039, 2004-Ohio-2488, ¶ 12. This determination is a question of fact and will not be overturned on appeal absent a showing that the trial court abused its discretion. *Id.*

{¶ 11} When confronted with an issue of contract interpretation, our role is to give effect to the intent of the parties. *Sunoco, Inc. v. Toledo Edison Co.*, 129 Ohio St.3d 397, 2011-Ohio-2720, ¶ 37. In interpreting a contract, courts are to examine the contract as a whole and presume that the intent of the parties is reflected in the language of the contract. *Id.* The court's construction of a contract should attempt to harmonize all the provisions of the document rather than to produce conflict in them. *Farmers Natl. Bank v. Delaware Ins. Co.*, 83 Ohio St. 309, 337 (1911). A contract should also be construed so as to give effect to all of its provisions. *Id.*

{¶ 12} Generally, courts presume that the intent of the parties to a contract resides in the language they chose to employ in the agreement. *Shifrin v. Forest City Ents., Inc.*, 64 Ohio St.3d 635, 638 (1992). However, when a contract is ambiguous, a court may consider extrinsic evidence to ascertain the parties' intent. *Id.* Contract terms are ambiguous where the language is susceptible to two or more reasonable interpretations. *Agoston* at ¶ 12. When the language of a contract is ambiguous, extrinsic evidence is admissible in order to interpret, but not contradict, the terms of the contract. *Pharmacia Hepar, Inc. v. Franklin*, 111 Ohio App. 3d 468, 475 (12th Dist.1996).

{¶ 13} In the present case, paragraph 3 of the lease contract addresses the parties' obligations in regards to the construction of the theater and the improvements. Paragraph 3 provides that PTFF is to erect a 10 screen cinema building and *install all plumbing and electrical systems* to "serve[] the premises generally." Specifically, PTFF is to erect the theater and install plumbing and electrical systems "as set forth" in the *Plans and Specifications* (Plans) prepared by PTFF's architect. Paragraph 3 goes on to address the improvements at issue in this case stating that "[Pierce], at [Pierce's] cost and expense, shall furnish and install to completion the * * * Improvements set forth in *Exhibit D.*"

{¶ 14} Exhibit D states that Pierce "shall be responsible for the following [improvements]" and lists all of the improvements. Many of the items listed in Exhibit D provide that Pierce shall "provide and install" the improvements. However, some of the portions of Exhibit D state that Pierce shall:

* * *

Provide Ice Machine, line set and remote condenser, *CUC to mount condenser, hookup the condenser side and run line-set to ice machine location.*

Provide Outside Poster Cases, *CUC to install and wire.*

Provide Inside Poster Cases, *CUC to install.*

* * *

Provide & Install LED signs in hallway and lobby. *CUC to run LED sign wiring.*

* * *

Provide & Install "Pierce Pointe["] lettering on front of building. *CUC to provide mounting points.*

* * *

Provide and Install security camera system. *CUC to run all camera wires.*

(Emphasis added.)

{¶ 15} The Plans referenced in paragraph 3 and incorporated in the lease contract encompasses several pages of architectural drawings. Some of these drawings contain notations relevant to the improvements. Within the Plans, the following relevant notations are:

Install the owner supplied flexible lines for the ice machine, *plumber will do the water piping.*

Plumber to include the final hookup of all owner furnished equipment.

Verify Amount, Sizes, and Location of Coming Attraction Signs with Lessee Before Construction. *Provide Required Utilities.* * * *

Beldern #654IFE from each Now Showing sign to the Office/Concession.

Camera 11 & 12 to be mounted on top of canopy parapet. Verify location w/owner prior to installation.

(Emphasis added.)

Lastly, a notation pointed to the location of the theater's outside poster cases states, "[c]oming Attraction Signage (sic) *Installed by General Contractor. Provided by Owner.*"

(Emphasis added.)¹

{¶ 16} As noted above, PTFF argues that the contract is not ambiguous regarding which party is to pay for CUC's work pursuant to Exhibit D, but instead contains specific and general contract provisions. PTFF asserts that the provision in paragraph 3 requiring Pierce to "furnish and install to completion" the improvements listed in Exhibit D is a specific provision. Therefore, this specific provision controls over the more general contract provision requiring PTFF to install all plumbing and electrical systems.

{¶ 17} This court has previously stated that specific contract provisions take precedence over more general provisions and do not create an ambiguity in a contract. *Littrell*, 12th Dist. No. CA2001-02-004, 2001 WL 1598301 at *3. Moreover, when there are specific and general provisions in a contract, the specific provision always addresses something more specific or different than the general provision in the contract. See *Kings Local School Dist. Bd. of Edn. v. Hillsmith Constr. Co.*, 12th Dist. No. CA92-07-061 (Jan. 19, 1993) (finding that arbitration provision which specifically addressed joinder of certain party controlled over general provision allowing parties who are substantially involved in case to be joined). See also *Littrell*, 12th Dist. No. CA2001-02-004, 2001 WL 1598301 at *3; *Gibbons-*

1. These notations are found on Sheets M1.01, P1.02, A2.01, A7.01, and E1.07 in the Plans.

Grable Co. v. Gilbane Bldg. Co., 34 Ohio App.3d 170 (8th Dist.1986).

{¶ 18} Appellant points to a Tenth District case which the court found that the contract was not ambiguous but instead contained specific and general contract provisions. *Ins. Co. of North America v. Wells*, 35 Ohio App.2d 173, 174 (10th Dist.1973). In *Wells*, the court held that a contract clause which stated that the owner of an apartment building retained liability for fire damages was a specific contract provision and controlled over another provision which stated that a contractor retained liability for damages resulting from his own negligence. *Id.* Therefore, the contract was not ambiguous and extrinsic evidence was not admissible to determine the parties' intent.

{¶ 19} After reviewing the contract and other documents incorporated into paragraph 3, we disagree with PTFF's characterization of the contract as containing "general" and "specific" provisions for two reasons. First, the "general" and "specific" contract provisions address the same issue and are therefore not "general" or "specific." Paragraph 3 of the lease contract does contain language which requires Pierce to furnish and install the improvements and thus could be interpreted to be a specific provision. However, the Plans which are incorporated in paragraph 3 also indicate that PTFF is responsible for the work listed in Exhibit D. As discussed above, the lease contract requires PTFF to construct the theater and provide the general utilities for the theater, "* * * as set forth in those certain *Plans and Specifications** * *." The Plans contain several notations which address the plumbing for the ice machine, plumbing for owner furnished equipment, utilities for "coming attraction" signs which points to the location of outside and inside poster cases, a "Belden #654IFE" data wire, and the installation of camera wires in the theater. All of the work described above is listed in Exhibit D as work CUC is to perform. Unlike *Wells*, the alleged "general" provision in this case contained language which addressed the very same issue as the "specific" provision; the installation of utilities to the improvements. Therefore, the

alleged "specific" and "general" provisions both address the work CUC is to perform pursuant to Exhibit D.

{¶ 20} Second, we disagree with PTFF's characterization of the contract as containing specific and general contract provisions because it would conflict with an important principle of contract interpretation. It is well-established that courts should interpret a contract so as to give effect to all of the contract's provisions. In following PTFF's interpretation of the contract, this court would render the notations in the Plans meaningless. The lease contract provides that PTFF is required to erect a theater "as set forth" in the Plans. The Plans contain specific notations regarding the work listed in Exhibit D. Therefore, a finding that paragraph 3 only addresses the installation of plumbing and electrical systems generally would completely ignore the notations in the Plans and give no effect to these notations. Thus, we disagree with PTFF's assertion that the contract contained general and specific provisions regarding the work listed in Exhibit D.

{¶ 21} Now that we have decided that the contract does not contain general and specific provisions, our next inquiry is whether the contract is ambiguous regarding the payment of the Exhibit D work. Paragraph 3 states that PTFF shall erect a theater "as set forth" in the Plans. The Plans include notations which address the installation of utilities to the improvements listed in Exhibit D. Therefore, a reasonable interpretation from these documents is that PTFF is responsible for the expense. However, paragraph 3 also goes on to state that Pierce, at Pierce's cost and expense, shall furnish and install to completion the improvements listed in Exhibit D. Thus, a reasonable interpretation of this language indicates that Pierce is responsible for the payment to CUC. Consequently, because the lease contract is susceptible to two reasonable interpretations, the contract is ambiguous

{¶ 22} Because we find the contract is ambiguous, we must now determine whether the trial court abused its discretion in finding that the parties intended for PTFF to pay CUC

for the work listed in Exhibit D. At trial, the president of the company that partially owns Pierce testified that it was the parties understanding that PTFF would pay for the work delineated in Exhibit D as CUC's responsibility. The president testified that the notations on the Plans that stated "owner provided" meant that Pierce would provide the actual item but that PTFF was responsible for all other items listed in the notations. However, the manager of PTFF testified at trial and denied that the parties agreed that PTFF would pay for the work to be performed by CUC as listed in Exhibit D. A September 2006 letter sent from Pierce to PTFF was also introduced and stated that PTFF was to pay for the installation of a power and data wire for signs and the installation of the electricity and plumbing to the ice machine and remote condenser. PTFF did not object to this letter. Additionally, faxes were introduced at trial that were sent from CUC to PTFF which requested approval of changing some of the work listed in Exhibit D. The faxes requested PTFF's approval, not Pierce's approval, in CUC's installation of some of the electrical and plumbing work associated with the improvements. Thereafter, the work referenced in the faxes was completed by CUC.

{¶ 23} We find that the trial court did not abuse its discretion in finding that the parties' intended for PTFF to be responsible for CUC's work performed pursuant to Exhibit D. The trial court's finding that the parties intended for PTFF to be responsible for CUC's work is supported by the testimony of Pierce's president, the September 2006 letter, and the CUC fax that requested approval from PTFF for the Exhibit D work changes. Therefore, we find that the trial court did not err in ordering PTFF to pay \$14,618.00 to Pierce.

{¶ 24} PTFF's sole assignment of error is overruled.

{¶ 25} Judgment affirmed.

RINGLAND and YOUNG, JJ., concur.

Young, J., retired, of the Twelfth Appellate District, sitting by assignment of the Chief Justice, pursuant to Section 6(C), Article IV of the Ohio Constitution.

