Did my actions waive my contractual rights?

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McGlinchey's Commercial Law Bulletin is a biweekly update of recent, unique, and impactful cases in state and federal courts in the area of commercial litigation.

Ohio

"Best efforts"

***Cintrifuse Landlord LLC v. Panino, LLC*, 1st Dist. Hamilton, No. 2022-Ohio-4104**

In this appeal, the First Appellate District reversed the trial court's decision to grant the plaintiff's motion for summary judgment finding an issue of fact existed as to whether the plaintiff had utilized its "best efforts" to obtain government approval for part of a commercial lease.

The Bullet Point: As the court noted, in commercial lease agreements, the phrase "best efforts" "has been widely held to be an ambiguous contract term and on the factual circumstances surrounding an agreement." Definitions of "best efforts" vary among jurisdictions. A minority of courts have held that "best efforts" is equivalent to the duty of good faith. The First District declined to follow the minority rule, noting that "a duty of good faith is implied in every contract. Therefore, equating best efforts with good faith would make best-efforts clauses meaningless." Other courts have distinguished best efforts from good faith by holding that diligence is central to best efforts, while fairness and honesty are central to good faith. Still, others focus on the reasonableness of the efforts. Ultimately the court defined "best efforts" as "The duty of "best efforts" is more exacting than the duty of good faith. It requires the promisor to pursue its contractual obligations diligently and with reasonable effort considering its ability, the means at its disposal, and the other party's justifiable expectations. The duty of best efforts requires that the responsible party pursue all reasonable methods of satisfying its obligations in light of circumstances beyond its control."

Waiver by Estoppel

***Crutcher v. Oncology/Hematology Care, Inc.*, 1st Dist. Hamilton No. 2022-Ohio-4105.**

In this appeal, the First Appellate District affirmed in part and reversed in part the trial court's summary judgment decision and found that by virtue of waiver by estoppel, the plaintiff was bound by the defendant's monetary calculations for an equity payout.

The Bullet Point: "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."

"A party asserting waiver must prove it by establishing a clear, unequivocal, decisive act by the other party, demonstrating the intent to waive."). An anti-waiver provision in a contract may not preclude a finding of waiver by estoppel either. Instead, as the First District found, "this provision only applies to "passive waiver," or a "failure" to act, and not to the affirmative conduct that fills the record in this case."

Invasion of privacy

***Morlatt v. Johnson*, 4th Dist. Adams, No. 2022-Ohio-4155.**

Here, the Fourth District reversed the trial court's decision on claims for invasion of privacy and nuisance, finding that there was no evidence presented at trial that the defendants had intruded upon the plaintiff's seclusion as required to support an invasion of privacy claim.

The Bullet Point:

"The right of privacy is the right of a person to be let alone, to be free from unwarranted publicity, and to live without unwarranted interference by the public in matters with which the public is not necessarily concerned."

One actionable invasion of the right of privacy is "the wrongful intrusion into one's private activities in such a manner as to outrage or cause mental suffering, shame or humiliation to a person of ordinary sensibilities."

Adverse Possession

***McMullen v. Wyatt*, 11th Dist. Portage, No. 2022-Ohio-4162.**

In this case, the Eleventh Appellate District affirmed the trial court's decision on a claim for adverse possession.

The Bullet Point:

"It is well established in Ohio that to succeed in acquiring title by adverse possession, the claimant must show exclusive possession that is open, notorious, continuous, and adverse for 21 years."

"[T]he legal requirement that possession be adverse is satisfied by clear and convincing evidence that for 21 years the claimant possessed property and treated it as the claimant's own." "It is well established that a

possession is not hostile or adverse if the entry is by permission of the owner, or the possession is continued by agreement; such an occupancy, consequently, confers no right."

Florida

Multiple Corporate Representative Depositions

***Assurance Grp. of America, Inc. v. Security Premium Fin., Inc.*, No. 3D22-1602 (Fla. 3d DCA Nov. 30, 2022)**

The Third District found no irreparable harm when a trial court issued a protective order prohibiting the second deposition of a corporate representative.

The Bullet Point: Pursuant to Florida Rule of Civil Procedure 1.280(c), a trial court is allowed, for good cause shown, to protect a party from discovery that would cause annoyance, embarrassment, oppression, or undue burden or expense. Abusive, cumulative depositions of corporate executives are an example of good cause sufficient to warrant a protective order. In this case, the petitioners sought a writ of certiorari quashing the trial court's protective order preventing them from taking a second deposition of the respondent's corporate representative. The petitioners argued that the corporate representative is a material witness and would be irreparably harmed if they were prevented from taking the second deposition. The Third District disagreed, concluding that this was not a situation in which newly discovered evidence or new developments necessitated a second deposition. Accordingly, the Third District found no irreparable harm under the circumstances and dismissed the petition.

Standing to Challenge an Assignment Agreement

***The Kidwell Group, LLC v. ASI Preferred Ins. Corp.*, No. 5D21-2946 (Fla. 5th DCA Nov. 22, 2022)**

The Fifth District examined whether an insurer had standing to challenge an assignment agreement that failed to comply with section 627.7152, Florida Statutes.

The Bullet Point: Under section 627.7152(2)(d), Florida Statutes, an agreement to assign insurance proceeds that do not comply with the statute's requirements is invalid and unenforceable. At issue in this appeal is whether the terms "invalid" and "unenforceable" render the agreement void or voidable, thus impacting whether an insurer has standing to challenge the assignment. The Fifth District concluded that the statute's language renders the agreement void, not voidable. The Fifth District reasoned that the plain and ordinary meaning of the terms "invalid" and "unenforceable" is inconsistent with a "voidable" contract, which can be affirmed or rejected at the option of one party. Further, holding the agreement voidable, thereby prohibiting an insurer from challenging the assignment, would be in direct conflict with the statute's purpose. Accordingly, an insurer has the authority to challenge an assignment for failing to comply with section 627.7152.

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