

Is my oral agreement enforceable?

July 14, 2021

Promissory Estoppel

***Faith Lawley, LLC v. McKay*, 12th Dist. Warren No. CA2020-08-052, 2021-Ohio-2156**

In this appeal, the Twelfth Appellate District affirmed the trial court's decision, agreeing that there was no evidence the plaintiffs ever made a clear and unambiguous promise on which the defendant could have reasonably relied to support a promissory estoppel claim.

The Bullet Point: Under the equitable doctrine of promissory estoppel, Ohio courts allow parties to rely on promises made even in the absence of a formal agreement. In order to succeed on a claim for promissory estoppel, a party must prove that: "(1) a clear and unambiguous promise was made; (2) upon which it would be reasonable and foreseeable for the party to rely; (3) actual reliance on the promise; and (4) the party was injured as a result of the reliance." The first element serves as a gatekeeping issue that can be particularly difficult for parties to overcome.

In this case, the defendant asserted a counterclaim of promissory estoppel, arguing that the plaintiffs represented that they would waive a deadline under the contract while the parties attempted to negotiate a new agreement. However, the defendant failed to point to any specific statement that clearly and unambiguously indicated that the plaintiffs promised to waive the contractual deadline. Rather, even in the defendant's own affidavit, the statements purported to be promises only vaguely implied that the plaintiffs were aware the defendant intended to negotiate a new agreement. As there was no evidence that the plaintiffs ever made a clear and unambiguous promise, the court determined that there was nothing on which the defendant could have reasonably relied.

Waiver of Right to Arbitrate

***Paradie v. Turning Point Builders, Inc.*, 11th Dist. Lake No. 2020-L-046, 2021-Ohio-2178**

In this appeal, the Eleventh Appellate District reversed and remanded the trial court's decision, holding that the filing of an answer and counterclaim did not waive the defendants' right to compel arbitration as they filed a motion to stay pending arbitration on the same day.

The Bullet Point: Ohio public policy favors arbitration, and the courts utilize a strong presumption in its favor. Nevertheless, the right to arbitration can be waived if 1) the party waiving the right to arbitration knew of the

existing right, and 2) said party acted inconsistently with its right to arbitration. That being said, waiver should not be “lightly inferred.” Rather, Ohio courts apply a totality of the circumstances test to determine whether a party acted inconsistently with its right to arbitration. Under said test, courts may consider the following circumstances: “(1) any delay in the requesting party’s demand to arbitrate by filing a motion to stay the proceedings pending arbitration; (2) the extent of the requesting party’s participation in the litigation prior to its filing a motion to stay the proceeding, including a determination of the status of discovery, dispositive motions, and the trial date; (3) whether the requesting party invoked the jurisdiction of the court by filing a counterclaim or third-party complaint without asking for a stay of the proceedings pending arbitration; and (4) whether the non-requesting party has been prejudiced by the requesting party’s inconsistent acts.”

In this case, the defendants filed a motion to stay pending arbitration on the same day as filing an answer, which set forth the affirmative defense of an arbitration clause. Although the motion to stay was stricken from the record as being procedurally deficient, the defendants subsequently refiled their motion and filed counterclaims on the same day, stating that they needed to “prepare for the possibility that the arbitration provision may not be enforced or that the case will not be stayed.” The trial court denied the motion to stay, finding that the defendants waived their right to arbitration due to filing an answer and counterclaims, as this recognized the trial court’s authority to determine the outcome of the claims. The appellate court disagreed, holding that under the totality of the circumstances, waiver did not apply. In making such a determination, the court emphasized that there was no delay between the defendants filing their initial motion to stay pending arbitration and filing their answer, which contained the affirmative defense of the arbitration clause. Further, although the defendants filed counterclaims, they provided a justifiable basis for doing so. The court noted that although the defendants might have been preparing an alternate plan if the stay was not granted, this did not, alone, mean they waived the right to arbitrate. Moreover, the plaintiff was not prejudiced in any way, as he was immediately put on notice that the defendants intended to pursue arbitration and he failed to file a dispositive motion on the issue. Lastly, the parties had not yet conducted discovery or held depositions. Consequently, the defendants did not act inconsistently with their right to compel arbitration and waiver did not apply.

Oral Agreement

***Erie Capital, LLC v. Barber*, 6th Dist. Erie No. E-20-010, 2021-Ohio-2258**

In this appeal, the Sixth Appellate District affirmed the trial court’s decision, finding that the oral settlement agreement was unenforceable as the parties did not have a meeting of the minds as to the essential terms of the settlement.

The Bullet Point: An agreement does not have to be in writing to be enforceable. Rather, whether written or oral, an agreement is sufficiently certain for a court to enforce if it provides a basis for determining the existence of a breach and for giving an appropriate remedy. Further, a meeting of the minds as to the essential terms of the contract is a requirement to enforcing said agreement.

At issue in this matter was a contested partition action between brothers who owned multiple parcels of land as tenants in common. The parties engaged in a recorded settlement hearing to resolve their disputes over the

division of the various parcels and ownership of access roads. At the conclusion of the hearing, the magistrate outlined the terms of the parties' agreement, specifying that "the deeds and documents would be filed as promptly as possible." The parties then verified that the magistrate's synopsis accurately reflected the terms of their agreement, that no changes needed to be made, and that "this is the agreement that [they] wanted to resolve the case." No written agreement was provided to the court, and, believing the case was settled, the court dismissed the litigation with prejudice. Subsequently, the defendants jointly moved to enforce the agreement reached at the settlement hearing. Specifically, the defendants argued that the material terms of the agreement were clear and that they had obtained an access road easement over the plaintiff's parcel. Both the trial and appellate courts disagreed, finding that the agreement was not enforceable as the essential terms were not sufficiently clear. As the appellate court explained, "an oral settlement agreement may be enforceable so long as there is sufficient particularity to form a binding contract. Terms of an oral contract may be determined from 'words, deeds, acts, and silence of the parties.'" Here, the agreement stated that the parties would file deeds as promptly as possible, but it did not specify what type of deeds would be filed. The appellate court noted that the type of deeds to be filed was an essential term of partitioning the parcels. Likewise, whether the plaintiff enjoyed exclusive access to his parcel or whether the defendants had a right to traverse over his parcel was fundamental to the partition action. Despite being an essential term, the settlement hearing record was devoid of any discussion whatsoever about an access road easement existing or being created over the plaintiff's parcel. As the parties did not reach mutual assent as to the essential terms of the agreement; namely, the type of deeds to be filed and the existence of an access road easement, the parties did not reach an enforceable oral settlement agreement.

Vicarious Liability

***Weiler v. Knox Community Hosp.*, 5th Dist. Knox No. 20CA000018, 2021-Ohio-2098**

In this appeal, the Fifth Appellate District affirmed the trial court's decision, agreeing that because the plaintiff's partial settlement of its medical malpractice claim included a release of the employee, the plaintiff's vicarious liability claim against the employer was extinguished.

The Bullet Point: Under the doctrine of respondeat superior, an employer or principal is vicariously liable for the torts of its employees or agents. Vicarious liability depends upon the existence of control by a principal (or master) over an agent (or servant). As the Ohio Supreme Court has explained, "for the wrong of a servant acting within the scope of his authority, the plaintiff has a right of action against either the master or the servant, or against both, in separate actions, as a judgment against one is no bar to an action or judgment against the other until one judgment is satisfied." Stated differently, until the injured party receives full satisfaction of his claim, a judgment against either the principal or the agent does not bar pursuing an action or obtaining a judgment against the other. Fundamental to the doctrine of respondeat superior is that the principal is vicariously liable only when the agent can be held directly liable. This is because the liability for the tortious conduct flows through the agent by virtue of the agency relationship to the principal. If there is no liability of the agent, there can be no liability of the principal. Simply stated, once the primary liability is extinguished, either by settlement and release or by a favorable judgment, the secondary liability is necessarily extinguished. Accordingly, when

there is a release of the agent, even a partial settlement with the agent bars a claim against the principal. This is because the principal's right to indemnity from the agent, by way of subrogation to the plaintiff's claims, is the crucial factor in releasing the principal when the agent is released.

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