What can I recover for breach of my contract?

August 20, 2021

Statute of Frauds

Csizmadia v. Gilkey, 5th Dist. Morgan No. 20AP0006, 2021-Ohio-2760

In this appeal, the Fifth Appellate District affirmed the trial court's decision, agreeing that the property owners could not assert a defense under the statute of frauds as they were not parties to the assignment of the land installment contract.

The Bullet Point: The plaintiff in this action, who was the assignee to a land installment contract, filed suit seeking quiet title against the owners of real property. In response, the owners argued that the plaintiff was not a valid assignee as the assignment of the land installment contract did not comply with the statute of frauds. Pursuant to Ohio's statute of frauds defense, "no action can be brought upon an agreement on the sale of land unless the agreement is in writing and signed by the party to be charged therewith." R.C. 1335.05. Simply stated, the statute of frauds prevents a party from enforcing an oral agreement regarding the sale of land. Notably, the statute of frauds is a defense that is personal to the parties to the transaction. As the court further explained, a non-party to a contract has no standing to question the enforceability of said contract and cannot "avail itself of the affirmative defense to a claim that a contract is unenforceable."

Here, the owners of the property were not a party to the assignment of the land installment contract. Instead, the original vendor and the plaintiff were the parties to the assignment. As such, the court determined the owners were unable to assert a statute of frauds defense regarding the assignment of the land installment contract.

Unilateral Agreement to Arbitrate

Gibbs v. Firefighters Community Credit Union, 8th Dist. Cuyahoga No. 109929, 2021-Ohio-2679

In this appeal, the Eighth Appellate District affirmed the trial court's decision, agreeing that the credit union's email notification it amended the terms of service to add an arbitration agreement was insufficient and as such, there was no binding agreement to arbitrate.

The Bullet Point: At issue in this case was the enforceability of an arbitration agreement. Specifically, the defendant credit union filed a motion to stay pending arbitration, asserting that the plaintiffs agreed to a change in terms and conditions to their account agreements to add an "Arbitration and Waiver of Class Action Relief

provision." The plaintiffs disagreed, arguing that they did not make an informed decision regarding the arbitration or waiver clauses and because there was no meeting of the minds, there was no enforceable agreement to arbitrate. Both the trial and appellate courts agreed with the plaintiffs, finding that no arbitration agreement existed. Whether a party has agreed to arbitration is a matter of contract, and Ohio courts apply ordinary principles that govern the formation of contract when deciding whether a party has agreed to arbitrate. As such, a valid arbitration agreement, like any contract, requires offer, acceptance, consideration, and a meeting of the minds as to the essential terms of the agreement.

Here, the credit union attempted to modify its account agreement to add arbitration and waiver clauses by emailing a notice to its customers, including the plaintiffs, that such clauses had been added. The credit union argued that it had the right to amend the terms of the agreement at any time so long as it provided the plaintiffs notice of such amendments, which was satisfied via the email notification. The court disagreed the email notification was sufficient, and further noted that just because a party may have the unilateral right to modify a contract does not mean the party has a right to make any kind of change whatsoever. In determining that no valid arbitration agreement existed, the trial and appellate courts underscored the specific circumstances under which the changes to the terms of service were sent.

The subject line of the credit union's email notification stated, "We've updated our terms of services." The body of the email provided: "We're writing to let you know that *we've updated our terms of service. These updates apply to all members* and accounts…*The changes in terms are attached to this email*. We recommend that you familiarize yourself with these updated agreements. *As you continue to use [FFCCU] for your banking needs, you agree to these updated terms*." (Emphasis in opinion.)

This email merely indicated that the terms of service had been updated, and nothing in the content of the email informed the recipient of the addition of the arbitration and waiver provisions or the ability to opt-out. Rather, the email notification simply stated that the change in terms applied to all members and was attached to the email. The courts stressed that "notice of arbitration and waiver provisions must be clear so that the parties can make an informed decision" and that the language used by the credit union "implied that all members already agreed to the updated terms." Clear notice was not provided for the plaintiffs to make an informed decision or to demonstrate they agreed to be bound by the arbitration provision. Instead, "[t]he plaintiffs were thus lulled into not giving a thought to the unilateral addition of the arbitration provision * * *."

The court also pointed out that the circumstances in this case were "the antithesis of good faith and fair dealing." Specifically, the evidence demonstrated the credit union sent out the email notification after the parties had been engaged in pre-suit settlement negotiations on a class-wide basis for several months. Therefore, the credit union arguably had knowledge that the plaintiffs would have opted out of the provision had proper notice been given. Regardless, the credit union failed to provide proper notice of the added arbitration provision. Without sufficient notice, there was no meeting of the minds and no binding agreement to arbitrate.

Breach of Contract Damages

180 Degree Solutions LLC v. Metron Nutraceuticals, LLC, 8th Dist. Cuyahoga No. 109986, 2021-Ohio-2769

In this appeal, the Eighth Appellate District partially reversed and remanded with instructions the trial court's decision, finding that there was no evidence the defendant incurred damages as a result of the plaintiff's breach of contract.

The Bullet Point: In this dispute, the parties to a distribution agreement filed competing claims alleging the other breached said contract. Following a jury verdict in favor of the defendant, the plaintiff filed a judgment notwithstanding the verdict (JNOV), arguing the defendant failed to introduce evidence of damages. The trial court denied the JNOV motion, and the plaintiff appealed. The appellate court reversed the trial court's decision, finding that there was no evidence the defendant incurred damages as a result of the plaintiff's breach. Under Ohio law, an injured party cannot recover damages for breach of contract beyond the amount that is established by the evidence with reasonable certainty. Reasonable certainty does not mean that damages must be calculated with absolute exactness. Rather, evidence is sufficient if it "affords a reasonable basis for computing damages, even if the result is only an approximation." Stated differently, "recovery for breach of contract is precluded only when the existence of damages is uncertain, not when the amount is uncertain." That being said, as to damages for lost profits, "the amount of the lost profits, as well as their existence, must be demonstrated with reasonable certainty."

Upon reviewing the record, this court found there was no evidence whatsoever that any of the plaintiff's breaches of the distribution agreement caused the defendant to incur damages. This court noted there was no evidence the defendant suffered damages as a result of the plaintiff's actions after the termination of the agreement, or that the defendant lost a particular business relationship with another distributor due to the plaintiff's sales. Further, even if the defendant had established it suffered some amount of lost profits as a result of the plaintiff's breaches, there was no evidence as to what those lost profits might be. As this court explained, lost profits must be substantiated by calculations based on facts available or evidence, not conclusory statements. The defendant produced no testimony or expert report to establish an amount of lost profits, and there was no explanation of how to calculate any lost profits. Therefore, without evidence of damages resulting from the plaintiff's breach, the defendant failed to establish a claim for breach of contract.

Duty of Care

S.L. & M.B., L.L.C. v. United Agencies, Inc., 8th Dist. Cuyahoga No. 109540, 2021-Ohio-2780

In this appeal, the Eighth Appellate District affirmed the trial court's decision, agreeing an insurance broker does not owe a duty of care to protect a third-party lienholder's interests.

The Bullet Point: In this dispute, the plaintiffs alleged the defendants insurance broker and agency breached their duty of care when they failed to protect the plaintiffs' third-party interests. Specifically, as the third-party

lienholders of a horse farm, the plaintiffs were to be named as a loss payee on the insurance policy pursuant to a note and security agreement entered into with the property owners of the farm. In response to these allegations, the defendants filed a motion for summary judgment, arguing that they did not owe the plaintiffs a duty of care. Both the trial and appellate courts agreed, finding that no duty of care exists to protect a third-party lienholder's interests.

As a gatekeeping matter, it must first be established that a legal duty of care exists in order to successfully bring a claim for breach of said duty. In Ohio, insurance agents do not generally owe a duty of care to third parties to make certain they are insured when there is no oral or written obligation to do so. The plaintiffs argued that because the defendants had knowledge of the security agreement pursuant to which they were to be named as a loss payee, the defendants had a duty to ensure the plaintiffs were named on the policy. The court disagreed, noting that while the plaintiffs had a contractual relationship with the property owners of the farm, there was no relationship between the plaintiffs and defendants. Further, the farm's business owner was the party who purchased the policy from the defendants. While the business owner initially instructed the defendants to name the plaintiffs as a loss payee, these instructions were later rescinded. As there was no contractual relationship between the plaintiffs and defendants, and as the purchaser of the policy directed that the plaintiffs not be named on the policy, the defendants did not owe a duty of care to protect the plaintiffs' third-party interests.

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