What if contract performance is impossible? The Bullet Point: Volume 1, Issue 18

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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.

Leon v. State Farm Fire & Casualty Co., 8th Dist. Cuyahoga. No. 105306, 2017-Ohio-8168.

Plaintiff was involved in a motorcycle wreck, where he claimed someone swerved into his lane and caused him to wreck the vehicle. The motorcycle was insured by Safe Farm under another individual's name. Plaintiff was not named under the policy. Under the policy, a claim against State Farm was required to be brought within three years. After three years passed, plaintiff filed suit, claiming, among other things, that it was impossible to comply with the three-year limitation period.

The trial court disagreed and ultimately entered judgment in favor of State Farm. The Plaintiff appealed, and on appeal, the Eighth Appellate District agreed with the trial court, finding that plaintiff could have performed under the insurance contract within the three-year limitation period.

The Bullet Point: Impossibility of performance occurs where after the contract is entered into, an unforeseen event arises rendering impossible the performance of one of the contracting parties. However, a contracting party will not be excused from performance merely because performance may prove difficult, dangerous, or burdensome.

Zacharias v. Medicore Transport Inc., 8th Dist. Cuyahoga No. 105413, 2017-Ohio-8171.

This was an appeal of a trial court's decision granting a motion to enforce a settlement. The parties had previously settled a lawsuit through mediation. Both parties' attorneys then filed a "stipulated dismissal" that reflected the case had been dismissed with prejudice. Thereafter, one of the parties filed a motion to enforce the settlement. The trial court eventually granted the motion, and the opposing party appealed.

On appeal, the Eighth Appellate District vacated the trial court's decision and reversed it finding that the trial court failed to retain jurisdiction to enforce the settlement.

The Bullet Point: A trial court has jurisdiction to enforce a settlement agreement after a case has been dismissed only if the dismissal entry incorporated the terms of the agreement or expressly stated that the court retained jurisdiction to enforce the agreement. This is typically done by adding language like: "this Court retains jurisdiction to enforce this settlement agreement" in the dismissal entry. If this language is not included in a dismissal, and an issue arises in finalizing the settlement, the court would lack the ability to hear the dispute.

Martin v. Lamrite West, Inc., 8th Dist. Cuyahoga No. 105395, 2017-Ohio-8170.

This was an appeal of a trial court's decision to dismiss a class action lawsuit under the Ohio Consumer Sales Practices Act (CSPA). Plaintiffs brought the class action alleging that Pat Catan's deceptively advertised savings. They claimed that this deception violated the CSPA. Defendant ultimately moved to dismiss the lawsuit, claiming that the plaintiffs failed to adequately allege actual damages as required to maintain a CSPA claim. The trial court agreed, and plaintiffs appealed.

On appeal, the Eighth Appellate District affirmed the trial court's decision finding that plaintiffs had failed to prove actual damages as required to maintain a class action under the CSPA.

The Bullet Point: Under Ohio law, plaintiffs bringing CSPA class action suits must allege and prove that actual damages were proximately caused by the defendant's conduct. A class action must provide proof of damages before a class can be certified under the CSPA. Under the CSPA, this includes damages for direct, incidental, or consequential pecuniary losses resulting from a violation of the CSPA and does not include damages for noneconomic loss as defined in [R.C. 2315.18].

Wischt v. The Heirs of Pearl Ruth Mourer, 5th Dist. Guernsey No. 17 CA 8, 2017-Ohio-8236.

This was an appeal of a trial court's decision to grant the appellees summary judgment on a claim for adverse possession. The parties were neighbors. Appellees claimed that the appellant had permission to access the land and therefore there was no adverse possession. The trial court agreed, as did the Fifth Appellate District on appeal, finding that "when the original entry onto another's property is permissive or conferred by grant, then any use reasonably consistent with such a grant or permission is not adverse."

The Bullet Point: Adverse possession focuses on the acts of the one claiming prescriptive ownership and requires proof of exclusive possession and open, notorious, continuous, and adverse use for a period of 21 years. A successful adverse possession action results in a legal titleholder forfeiting ownership to an adverse holder without compensation. Because of this, the law does not favor adverse possession, and the party asserting the claim must prove each element by clear and convincing evidence.

Some courts have found that permissive use can morph into adverse possession, noting that "although it is true that permission cannot ripen into adversity by mere lapse of time, this concept applies only to those persons to whom the permission was given. Where, for instance, the invited occupier leaves and a wholly new occupier

begins possession, the original permissive use is not automatically extended. Rather, the landowner must renew his permission to subsequent occupiers in order to avoid adverse possession."

Bd. of Trumbull Township v. Rickard, 11th Dist. Ashtabula Nos. 2016-A-0044, 2016-A-0045, 2017-Ohio-8143

This appeal focused on a charitable trust. The plaintiff had entered into an agreement with the local fire department, which appointed the plaintiff-board as the successor in interest to any claim the fire department may have. The fire department ran a beer concession at a medieval fair, run by the defendant, pursuant to an agreement that gave the fire department the exclusive use to sell beer. This money, in turn, benefited the county. However, the plaintiff-board claimed that defendant charged the fire department excessive fees and then ultimately refused to allow the fire department to run the concession stand.

The plaintiff-board filed suit and the defendant counterclaimed. Significant disputes arose in discovery, and ultimately, the court sanctioned the defendant for his actions; as a result, the court struck the defendant's answer and affirmative defenses and counterclaim. The court then entered default judgment against the defendant, and ultimately, a hearing on damages was held. The defendant defended himself at the hearing and the trial court found that the plaintiff-board failed to prove its damages. The plaintiff-board appealed, and on appeal, the Eleventh Appellate District affirmed.

In so ruling, the court noted that the Ohio default judgment rule (Rule 55) does apply to default judgments entered as a discovery sanction under Rule 37. As a result, the trial court was not required to accept all averments as true in the plaintiff-board's complaint just because it struck the defendant's answer as a discovery sanction.

The Bullet Point: A trial court has considerable latitude in imposing sanctions for a discovery violation. Even then, courts will attempt to fashion a punishment that comports with due process and does not resolve in one party receiving a windfall solely because of the discovery actions of the opposing party.

Case Previews

Wells Fargo Bank, N.A. v. Burd, No. 2017-0279.

This is an appeal recently accepted by the Ohio Supreme Court regarding the interpretation of the Housing and Urban Development's (HUD) mortgage regulations. Specifically, 24 CFR 203.604 requires a mortgage to have, or make reasonable attempts to have, a "face-to-face" meeting with a borrower "before three fully monthly installments due on the mortgage are unpaid."

The appellate court found that this timing was required and that if a mortgagee did not have or attempt to have a face-to-face meeting before three payments had been missed, it was precluded from foreclosing in the future.

The Preview Point: Wells Fargo appealed to the Ohio Supreme Court on the following issue: "A mortgagee's

failure to comply with the timelines provided in 24 C.F.R. § 203.604 does not bar an action to foreclose a mortgage insured by the Federal Housing Association as long as the mortgagee holds or makes a reasonable effort to hold a face-to-face meeting prior to initiating foreclosure."