What is the “law-of-the-case”? The Bullet Point: Volume 2, Issue 11

May 22, 2018

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.

Giancola v. Azem, Slip. Op. No. 2018-Ohio-1694.

This appeal to the Ohio Supreme Court considered the limitation of the law of the case doctrine. The “law of the case” doctrine provides that legal questions resolved by a reviewing court in a prior appeal remain the law of that case for any subsequent proceedings at both the trial and appellate levels. In this case, the lower courts refused to consider various factual issues raised upon a motion for reconsideration after an appeal, finding they were precluded by the law of the case doctrine from doing so.

The Ohio Supreme Court disagreed, finding that the “law of the case” doctrine only applies to legal issues determined by a reviewing court, and not factual disputes that were not decided by the appellate court.

The Bullet Point: The law-of-the-case doctrine has long existed in Ohio jurisprudence.

“ ‘[T]he doctrine provides that the decision of a reviewing court in a case remains the law of that case on the legal questions involved for all subsequent proceedings in the case at both the trial and reviewing levels.’ “

“The doctrine is necessary to ensure consistency of results in a case, to avoid endless litigation by settling the issues, and to preserve the structure of superior and inferior courts as designed by the Ohio Constitution.” As a result, the doctrine mandates that a trial court follow an appellate court’s decision. Rather, “[u]pon remand from an appellate court, the lower court is required to proceed from the point at which the error occurred.”

Elliot-Thomas v. Smith, Slip. Op. No. 2018-Ohio-1783.

In this certified conflict case, the Ohio Supreme Court decided that the tort of intentional interference with or destruction of evidence does not include claims alleging interference with or concealment of evidence.

In so ruling, the court noted that of the various jurisdictions that permit a claim for tortious interference with or destruction of evidence, none of them has concluded that the tort of intentional spoliation includes claims alleging intentional concealment of or interference with evidence. The court further noted that there are other remedies to deter or punish this type of interference, including sanctions under Rule 37 and ethical considerations for abuse of the discovery process.

The Bullet Point: Ohio is among only a handful of jurisdictions that recognize the independent tort of intentional spoliation of evidence. This type of claim has five elements: "(1) pending or probable litigation involving the plaintiff, (2) knowledge on the part of defendant that litigation exists or is probable, (3) willful destruction of evidence by defendant designed to disrupt the plaintiff's case, (4) disruption of the plaintiff's case, and (5) damages proximately caused by the defendant's acts." The Ohio Supreme Court has decided not to expand the scope of this claim to include the interference or concealment of evidence, in part because of the additional burden placed on courts: "…extending the scope of the tort would result in more supplemental proceedings requiring presentation of evidence from underlying litigation in order for juries to determine the harm suffered by plaintiffs."

Ohio Plumbing, Ltd. v. Fiorilli Construction, Inc., 8th Dist. Cuyahoga No. 106242, 2018-Ohio-1748.

This appeal centered on whether the trial court properly denied a motion to stay and compel arbitration. Plaintiff was a subcontractor for defendant. A dispute arose over a job and plaintiff sued. In response, defendant sought to compel arbitration of the claims pursuant to the contract between the parties. The trial court summarily denied the motion and defendant appealed.

On appeal the Eighth Appellate District reversed, finding that the claim was subject to arbitration even if defendant had "agreed" it owed plaintiff money as alleged in the complaint.

The Bullet Point: As discussed previously, Ohio recognizes a strong public policy in favor of arbitration. A presumption favoring arbitration arises when the claim in dispute falls within the scope of the arbitration provision and courts must resolve any doubts in favor of arbitrability. In deciding whether a dispute falls within the scope of an arbitration agreement, "'[a] proper method of analysis * * * is to ask if an action could be maintained without reference to the contract or relationship at issue. If it could, it is likely outside the scope of the arbitration agreement.'"

Tackle Construction Group, LLC v. Pedtke Ent. Inc., 2nd Dist. Montgomery No. 27813, 2018-Ohio-1859.

This appeal considered the question of whether a set-off in the amount awarded at trial was appropriate. Plaintiff was hired by the defendant as a subcontractor to work on various property restoration projects. A

dispute arose over the amount owed and plaintiff sued, claiming it was owed over $6,300 from the defendant for work it had done.

In its answer, the defendant argued that it was entitled to set-off on some of the money allegedly owed for a project, because the plaintiff failed to complete the work as required. A hearing was held and after considering the evidence and testimony, the court ultimately found that due to various set-offs, plaintiff actually owed defendant money. Plaintiff appealed and on appeal the Second Appellate District affirmed the trial court's decision. In so ruling, the court found that defendant was entitled to various set-offs for work not done and/or for expenses it had to incur to complete work originally agreed to by the plaintiff.

The Bullet Point: The Supreme Court of Ohio defined the right of set-off as "that right which exists between two parties, each of whom under an independent contract owes a definite amount to the other, to set off their respective debts by way of mutual deduction." A set-off, whether legal or equitable, must relate to cross-demands in the same right, and when there is a mutuality of obligations. A set-off can be used, offensively or defensively, to reduce, or altogether eliminate the amount that may be owed under a contract.

Fannie Mae v. Hicks, 8th Dist. Cuyahoga No. 105550, 2018-Ohio-1831.

In this case, the Eighth Appellate District found that a mortgagee who had possession of real property could potentially be liable to a mortgagor for damage sustained to the property during the time it was in possession.

Here, the plaintiff had filed a foreclosure against the defendant/homeowner. It ultimately obtained judgment and the borrower appealed. During the appeal the property was sold and purchased by the plaintiff. Thereafter, the judgment was reversed on appeal and ultimately the sale was unwound. The borrower then filed a motion seeking damages from the plaintiff for failing to maintain the property during the time it had owned it. While the trial court denied the motion, the Eighth Appellate District reversed, finding that a mortgagee could be liable for damages incurred to real property during the time it was in possession of it.

The Bullet Point: Trial courts are afforded broad discretion in matters of equity, including foreclosures, to fashion a fair and just remedy. As the Eighth District held, this includes permitting a borrower to pursue claims for damages to the property against the mortgagee. Such a ruling also cautions against selling property during the pendency of an appeal. As the Eighth District noted, "[plaintiff] knew, or should have known, that [borrower] had an appeal pending and that the house could be returned to her. And since [plaintiff] had possession and control of the property, it had the power to preserve and protect the property from damage; [borrower] did not. Therefore, equitable principles of fairness require that [borrower] have an opportunity to present a claim for damages against [plaintiff] in the trial court…."