When can a non-party enforce a forum selection clause?

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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. We're pleased to expand our Commercial Law Bulletin from its previous coverage of Ohio case law to include additional areas in McGlinchey's footprint.

Ohio

Disclaimer of warranties

Lapkovitch v. Rankl & Ries Motorcars, Inc., 5th Dist. Stark No. 2021CA00062, 2021-Ohio-4436

In this appeal, the Fifth Appellate District affirmed the trial court's decision, agreeing that the car dealership was entitled to summary judgment as it disclaimed all warranties regarding the vehicle and there was no evidence the engine's replacement made either the factory or extended warranty void.

The Bullet Point: In this matter, the plaintiff purchased a used Jeep Renegade from the defendant car dealership. At the same time, the plaintiff purchased a third party's extended warranty service contract. After receiving a manufacturer's recall notice, the plaintiff took his Jeep to a different dealership for servicing, where he was informed that the Jeep engine in his vehicle had been replaced with an engine from a Dodge Dart. This different dealership also informed the plaintiff that the original manufacturer's powertrain warranty was void because the vehicle no longer had the original factory engine. The plaintiff filed suit against the defendant, alleging claims for breach of contract and violations of the Consumer Sales Practices Act (CSPA). After the trial court granted the defendant's motion for summary judgment, the plaintiff filed the instant appeal. Specifically, the plaintiff argued the defendant breached the contract by failing to provide the plaintiff with the benefits of the original factory warranty, the extended warranty, or the vehicle with its original factory engine or the prior engine type for the vehicle.

In order to succeed on a breach of contract claim, a plaintiff must demonstrate: "(1) a contract existed; (2) the plaintiff fulfilled his obligations; (3) the defendant breached his obligations; and (4) damages resulted from this breach." Here, the plaintiff never made or attempted to make any warranty claims under either the factory warranty or the extended warranty. The plaintiff never even spoke with anyone from the manufacturer or the third party that provided the extended warranty to verify the status of either warranty. On the other hand, the defendant presented an expert report indicating that only a portion of the factory warranty would have been voided by the replacement engine and that the entire extended warranty remained in full effect. Further, evidence was presented that the vehicle's value had not been diminished by the replacement engine.

As the plaintiff failed to prove any breach of contract by demonstrating he was denied coverage under said warranties or that he suffered any damages as a result of said alleged breach, the defendant was entitled to summary judgment on the breach of contract claim. The plaintiff also argued that the defendant violated R.C. § 1345.02(B)(2),(10) of the CSPA by making "several direct and implied false representations" regarding the vehicle and its warranty. The court reviewed the retail sales contract entered into between the parties and found the defendant disclaimed all warranties. Consequently, the court held the defendant did not make any representations to the plaintiff with regard to the vehicle or the engine. As the defendant disclaimed all warranties, and as the plaintiff failed to demonstrate he was denied coverage under the warranties or that the warranties were void, the defendant was also entitled to summary judgment on the plaintiff's CSPA claim.

Unjust Enrichment

DC Welch Trucking LLC v. Lagowski, 7th Dist. Belmont No. 21 BE 0006, 2021-Ohio-4555

In this appeal, the Seventh Appellate District affirmed the trial court's decision, agreeing it would have been unjust to allow the defendant to retain the nearly 1,360 tons of stone the plaintiff delivered to him without payment.

The Bullet Point: In this dispute, the plaintiff trucking company brought suit against the defendant landowner, asserting a claim for unjust enrichment related to the purchase and delivery of stone used to build a parking lot on the defendant's commercial property. Following a bench trial, the lower court entered judgment on behalf of the plaintiff, and the defendant appealed. Specifically, the defendant argued the plaintiff failed to prove the third element of unjust enrichment, claiming that he paid for the purchase and delivery of the stone to a third party who was allegedly a subcontractor, that it was unfair for the third party to escape liability, and that the plaintiff should have filed suit against said third party as well.

Ohio courts have long held that in order to support a claim of unjust enrichment, "a plaintiff must demonstrate that (1) he conferred a benefit upon the defendant, (2) the defendant had knowledge of the benefit, and (3) circumstances render it unjust or inequitable to permit the defendant to retain the benefit without compensating the plaintiff." Here, the plaintiff made 54 deliveries totaling nearly 1,360 tons of stone to the defendant, which the defendant was then able to use to build a parking lot. As the construction of the parking lot enabled the defendant to lease his commercial spaces, the defendant received a benefit. The defendant had knowledge of this benefit, and the trial court found it would be inequitable to permit the defendant to avoid payment for this benefit. Although the defendant testified he already paid the third party for the job, the trial court found this testimony not credible. Notably, the trial court found that the defendant's refusal to compensate the plaintiff was "at best bad faith and at worst fraudulent." Therefore, the court determined it would have been unjust to permit the defendant to retain the benefit conferred upon him without paying the plaintiff.

Contract Interpretation

Mr. Pulpstone, LLC v. Shops on 58, LLC, 9th Dist. Lorain No. 21CA011718, 2021-Ohio-4467

In this appeal, the Ninth Appellate District reversed the trial court's decision, finding that the trial court erred by resolving competing definitions of the term "smoothie" without considering the parties' intentions as reflected in the context of the lease agreement itself.

The Bullet Point: At issue in this matter was the exclusive-use clause in a lease entered into between a plaintiff tenant and defendant landlord of commercial space in a shopping center. Pursuant to the exclusive-use clause, the tenant had the exclusive right to sell "specialty juices, smoothies, wraps, or frozen yogurt products" in the shopping center. The landlord subsequently entered into negotiations to lease space to the tenant's purported competitor, and the tenant filed an action for declaratory judgment, requesting a declaration that the landlord was prohibited from leasing space to said competitor as it violated the exclusive-use clause. The trial court entered summary judgment in the landlord's favor, determining that the word "smoothie," as used in the relevant paragraph of the lease, was unambiguous; that the competitor did not offer products for sale that fell within the definition of "smoothie"; and therefore, that the lease permitted the landlord to lease space to the competitor. The tenant appealed, arguing the trial court erred by concluding that the term "smoothie" was unambiguous.

Exclusive-use clauses are interpreted the same as any other contract. That is to say, when determining the meaning of contract terms, Ohio courts are guided by the principle that they must give effect to the parties' intentions. The intentions of the parties are presumed to be reflected in the plain language of the contract, which is to be examined as a whole. When the language used by the contracting parties is clear, courts may look no further than the writing itself to find the intent of the parties. However, when the language used is not clear and "when determining whether a contract term is ambiguous, it is incumbent upon courts to look to the context in order to discern which of [the] competing definitions comports with the parties' intentions."

On appeal, the court analyzed the exclusive-use clause and found it did not define the term "smoothie." Nevertheless, the "'mere absence of a definition * * * does not make the meaning of [a] term ambiguous.'" Rather, the next step in a courts' analysis is to determine whether there is a plain and ordinary meaning of the term used in the contract. Because contracts must be construed with reference to the ordinary meaning of words, Ohio precedent allows reliance upon dictionary definitions to establish their meaning.

Here, both the tenant and landlord submitted different dictionary definitions of the term "smoothie." While the tenant maintained the contract was not ambiguous, the landlord surprisingly argued the terms were ambiguous and that as a result, the exclusive-use clause should be construed narrowly in its favor. As the appellate court explained, a contract term is unambiguous if it can be given a definite legal meaning. On the other hand, a contract term is ambiguous when it "may reasonably be understood in more than one sense[.]" "A term that has more than one possible meaning in its ordinary and usual sense must be considered in its context within the contract to discern the appropriate meaning." When the context is unhelpful in discerning the appropriate meaning, the contract term is deemed ambiguous. The trial court in this matter acknowledged that the relevant definitions of "smoothie" differed. Nevertheless, it did not look to the context of the agreement to determine whether one definition should be favored over another before concluding that "smoothie" was an unambiguous

term and adopting a plain and ordinary meaning of its own. Because the trial court did not first look to the context of the agreement in order to discern which competing definition comported with the parties' intentions, it erred in concluding the term "smoothie" was unambiguous.

Filing of a Lawsuit does not Violate the CSPA

Vesper v. Lebanon, 12th Dist. Warren No. CA2021-02-016, 2021-Ohio-4545

In this appeal, the Twelfth Appellate District affirmed the trial court's decision, agreeing that the existence of legal defenses available to the plaintiffs that they could have asserted against the nursing home's claims did not demonstrate the nursing home violated Ohio's CSPA by filing a lawsuit and alleging said claims.

The Bullet Point: At issue in this dispute was whether the filing of a lawsuit constituted a violation of Ohio's Consumer Sales Practices Act (CSPA). The defendant was a nursing home who previously brought suit against the plaintiffs, the wife and daughter of a deceased resident of the nursing home, alleging claims of breach of contract, promissory estoppel, and a claim for necessaries. The plaintiffs answered and asserted counterclaims in the previous litigation, alleging the nursing home acted unfairly, deceptively, and unconscionably by filing the lawsuit and attempting to collect a debt upon which neither of the plaintiffs were liable.

While the previous litigation was pending, the resident's Medicaid benefits were retroactively reinstated and the nursing home received payment for the past due bill for services and room and board rendered. Consequently, the nursing home dismissed its claims and the plaintiffs ultimately voluntarily dismissed their counterclaims. The plaintiffs then filed the instant litigation, alleging nearly identical CSPA claims against the nursing home. The trial court granted summary judgment in favor of the nursing home, finding there was nothing wholly unfair, deceptive, or unconscionable with respect to the nursing home's action of filing suit against the plaintiffs. The plaintiffs appealed, again arguing the nursing home violated the CSPA by filing the claims. Ohio's CSPA prohibits unfair or deceptive acts or practices and unconscionable acts or practices by suppliers in consumer transactions. R.C. 1345.02(A) and 1345.03(A). R.C. 1345.02(B) contains a representative list of unfair and/or deceptive practices. R.C. 1345.03(B)(1) through (7) presents a list of considerations for a trial court to undertake in determining whether an act or practice is "unconscionable." Considered together, "the CSPA defines "unfair or deceptive consumer sales practices" as those that mislead consumers about the nature of the product they are receiving, while "unconscionable acts or practices" relate to a supplier manipulating a consumer's understanding of the nature of the transaction at issue."

In support of their contention that the nursing home violated the CSPA by filing the previous lawsuit, the plaintiffs presented multiple arguments against the nursing home's claims of breach of contract, promissory estoppel, and its claim for necessaries. However, as noted by the appellate court, the plaintiffs did not dispute many of the basic factual allegations of the nursing home's complaint that formed the basis of its claims. Rather, the plaintiffs' arguments were merely legal defenses they could have raised had the claims not been dismissed in the previous action. These arguments did not establish that the claims were wholly baseless or that the nursing home's assertion of the claims constituted deceptive, unfair, or unconscionable acts under the CSPA. This is not to say the nursing home would have ultimately prevailed on all its claims. In fact, the plaintiffs

could have asserted legal defenses that would have either defeated or significantly limited recovery on nearly all of the nursing home's claims. But the fact that the plaintiffs had available defenses against the nursing home's claims does not mean that the claims were groundless. Stated differently, simply because a defense could be asserted, even a defense that would be fatal to the claim, does not demonstrate the claim is not colorable, much less that the filing of a lawsuit constituted an unfair, deceptive, or unconscionable act or practice under the CSPA.

Transferee of Funds in Deposit Account

Cortland Savs. & Banking Co. v. Platinum Rapid Funding Group, Ltd., 11th Dist. Trumbull No. 2021-T-0006, 2021-Ohio-461

In this appeal, the Eleventh Appellate District reversed and remanded the trial court's decision, holding that unless the transferee acts in collusion with a debtor, funds that are transferred from a deposit account transfer free and clear of a conflicting security interest pursuant to R.C. 1309.332(B).

The Bullet Point: At issue in this dispute was whether the funds received from a deposit account were transferred free and clear of the secured party's interest. In this case, the plaintiff entered into a business loan agreement whereby it loaned the debtor funds pursuant to a promissory note and commercial security agreement. The security agreement granted the plaintiff a security interest in the debtor's accounts. Further, the debtor maintained a deposit account with the plaintiff pursuant to the loan agreement. Subsequently, the debtor entered into multiple merchant agreements with the defendant, whereby the defendant loaned the debtor funds in exchange for a percentage of the debtor's future receivables. The debtor authorized the defendant to withdraw weekly payments from the deposit account it maintained with the plaintiff. The debtor subsequently defaulted on its loan with the plaintiff, and the plaintiff obtained judgment against it. The plaintiff then filed suit against the defendant, seeking the return of all funds transferred to it from the deposit account prior to the debtor's default on the loan. The defendant argued that pursuant to R.C. 1309.332(B), the funds it received from the debtor's deposit account were transferred free and clear of the plaintiff's security interest. The trial court disagreed, concluding that because the "funds from a deposit account" are different than the "deposit account" itself, R.C. 1309.332(B) strips a secured party's interest in "the deposit account," leaving intact its interest in the "funds." Following the trial court's granting of judgment on behalf of the plaintiff, the defendant appealed.

The trial court's decision turned largely upon the statutory construction of R.C. 1309.332(B), the meaning of which was disputed by the parties. Pursuant to R.C. 1309.332(B), "a transferee of funds from a deposit account takes the funds free of a security interest in the deposit account unless the transferee acts in collusion with the debtor in violating the rights of the secured party." The trial court's reasoning also relied upon a Fifth Circuit decision which did not consider the definition of an "account" under Article 9. As explained by the appellate court in this matter, a "deposit account" under Article 9 is not a device containing funds. Instead, Article 9 defines a "deposit account" as "a demand, time, savings, passbook or similar account maintained with a bank but does not include investment property or accounts evidenced by an instrument. R.C. 1309.102(A)(29). The UCC defines an "account" as, with certain exclusions, a right to payment of a monetary obligation…." R.C.

1309.102(A)(2)(a). Accordingly, for purposes of Article 9, a deposit account is by statutory definition a right to payment from a bank of the money that was deposited by the customer. Pursuant to this definition, the deposit of funds in an account is the equivalent of exchanging the funds for a promise to pay. The appellate court further disagreed with the Fifth Circuit's decision insofar as it was based on the premise that a deposit account contains funds. Instead, "the funds are transformed to a right to payment, i.e. the deposit account, to which the security interest attaches. However, the security interest does not attach from the deposit account to the funds ordered paid, absent collusion, pursuant to R.C. 1309.332(B)." The appellate court stressed that not only does this broad protection for transferees help to ensure that security interests in deposit accounts do not impair the free flow of funds, but it also minimizes the likelihood that a secured party will enjoy a claim to whatever the transferee purchases with the funds. Consequently, unless collusion is found between the debtor and the defendant, the funds that were transferred from the deposit account to the defendant were transferred free and clear of the plaintiff's security interest.

Florida

Forum Selection Clauses

Aquachile v. Williams, Case No. 4D21-1453 (Fla. 4th DCA December 22, 2021)

The Fourth District Court of Appeal ruled that a forum selection clause in a contract did not apply to a non-party to the contract despite containing a Himalaya clause.

The Bullet Point: The plaintiff entered into a contract with Royal Caribbean in connection with her purchase of a cruise ticket. The contract contained a "Himalaya Clause," which purports to extend liability limitations to downstream parties. The plaintiff became severely ill after she ate seafood sourced by the defendant, a non-party to the contract, while on the cruise. The defendant sought to enforce the forum selection clause contained in the contract. The defendant's motion to enforce the forum selection clause was denied by the trial court after the trial court determined that the defendant was an indirect supplier to Royal Caribbean and was not engaged in the type of activity that would be expected to be covered under the contract, and the Himalaya Clause did not reflect a clear intent to extend Royal Caribbean's rights and defenses under the contract to parties such as the defendant.

This decision was upheld on appeal. The fish that the plaintiff consumed was sold by the defendant to at least one other company before it reached Royal Caribbean, and the Fourth District ruled that a trial court should not extend Himalaya Clause protections to an indefinite chain of indirect suppliers.

Prevailing Party Costs

Lennox National Account Services, LLC v. Claire, Case No. 4D20-2797 (Fla. 4th DCA December 22, 2021)

The Fourth District Court of Appeal ruled that defendant was entitled to its legal costs following the plaintiff's voluntary dismissal of the lawsuit.

The Bullet Point: Rule of Civil Procedure 1.420(d) provides that "c[]osts in any action dismissed under this rule shall be assessed and judgment for costs entered in that action, once the action is concluded as to the party seeking taxation of costs." In this case, the plaintiffs filed a lawsuit against multiple defendants alleging negligence and loss of consortium. Shortly before a hearing on one of the defendant's summary judgment motions, the plaintiffs dismissed the lawsuit against that defendant without prejudice. The dismissed defendant filed a motion to tax costs under Rule 1.420(d) which was denied by the trial court. However, this decision was reversed by the Fourth District on appeal.

Attorney's Fees

Keldie v. Dennstedt, Case No. 4D21-198 (Fla. 4th DCA December 22, 2021)

The Fourth District Court of Appeal ruled that a ruling of entitlement to attorney's fees without a determination as to amount was not ripe for appellate review.

The Bullet Point: Under Florida law, an order merely finding entitlement to attorney's fees is a non-final, non-appealable order. In this case, the trial court determined that a party was entitled to its attorney's fees. However, the amount of fees the party was entitled to had not yet been determined by the trial court. As a result, the attorney fee award was not ripe for appellate review.

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