

FILED

2016 JUN -6 P 1:13

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

CLERK OF COURTS
CUYAHOGA COUNTY

MID AMERICA STAINLESS, LLC, *et al.*

CASE NO. CV 13 814242

Plaintiffs,

JUDGE JOHN P. O'DONNELL

vs.

JUDGMENT ENTRY

MID-AMERICA STEEL CORP, *et al.*

Defendants.

John P. O'Donnell, J.:

This is a lawsuit seeking a declaratory judgment that a contract exists between plaintiff Jonathan Kaufman and defendant Anne Kaufman. The complaint includes a cause of action for breach of the purported contract. The defendants deny that there is a contract, and defendant Mid-America Steel Corporation has a counterclaim for a money judgment against the plaintiffs on a promissory note.

The pleadings did not include a jury demand, therefore all claims were to be tried by the court.

A trial began on May 23, 2016. By stipulation of the parties only the declaratory judgment claim was tried. Upon the court's own motion, an advisory jury pursuant to Rule 39(C) of the Ohio Rule of Civil Procedure was empaneled.

The trial concluded on May 27, the jury returned answers to interrogatories and a verdict on May 31, and this entry follows.

The parties

Plaintiff Jonathan Kaufman is the son of defendant Anne Kaufman. Anne's late husband, and Jonathan's father, is Morton Kaufman.¹ Morton died in early 2012.

Mid-America Steel Corporation – referred to during the trial as MAS – is a carbon steel service center located at 20900 St. Clair Avenue in Euclid. Plaintiff Mid America Stainless, LLC – referred to during the trial as Stainless – is a stainless steel service center operated out of the same location as MAS. Mid-America Stamping, LLC – referred to during the trial as Stamping – is not a party to the lawsuit, but it is a carbon steel stamping company also operating at the same building.

When Morton died he was the sole owner of MAS and a 40% owner of Stainless and Stamping. Jonathan owns the remaining 60% of Stainless and Stamping. Morton's entire interests in the three companies – and a fourth entity, Kaufco, Inc., the owner and landlord of the property – went into the Morton Kaufman Trust dated November 10, 2010, upon his death. Anne is the sole trustee and sole beneficiary of that trust.

The declaratory judgment claim and issue for trial

On August 29, 2012, Jonathan, Anne and their lawyers participated in an all-day negotiation over the future of MAS and the trust's other assets. At the end of that day Jonathan and Anne signed a term sheet.

The term sheet is part of the record in three places. It is attached as Exhibit A to the complaint and it was admitted at trial as plaintiffs' Exhibit 1 and defendants' Exhibit D. For ease of reference it is also attached as Appendix 1 to this judgment entry.

¹ Because there are several people involved in the case with the last name of Kaufman they are referred to in this decision by their first names to avoid confusion. No disrespect is intended.

By the declaratory judgment claim at count two of the complaint, Jonathan contends that the term sheet constitutes an enforceable contract. Anne denies that the term sheet amounts to a contract. Whether the term sheet is a contract or something less is the question of fact that must be decided before the rights and obligations of the parties can be declared pursuant to section 2721.03 of the Ohio Revised Code.

The term sheet

The gist of the term sheet is that Anne will sell all of the trust's assets to Jonathan for 180 consecutive monthly payments of \$40,000.00 each, for a total of \$7,200,000.00.

In particular, the first 108 months of payments would constitute the sale of MAS and the remaining 72 months would cover every other asset of the trust.

As security for Jonathan's purchase he agreed to two nonrecourse promissory notes for the respective sale amounts. Payments on those notes, however, would end upon Anne's death. The term sheet also provides that the "loan documents [will] provide for agreed to grace periods and for reductions in payments in the event of business downturns as well as compensation restrictions during the loan."

The term sheet required Jonathan to pledge the assets he was buying as collateral to secure the notes.

Also according to the term sheet, MAS, Stainless and Stamping would jointly and severally lease the premises at 20900 St. Clair Avenue from Kaufco. Even though Jonathan would own Kaufco and essentially be entering into leases with himself, this provision was important to Anne because she could enforce the leases if she ever gained control of Kaufco in the event Jonathan defaulted on a note.

The term sheet also required MAS to offer a 10-year employment contract to Michael Kaufman, Jonathan's brother and a salesman for MAS. The term sheet permitted MAS to continue to make tax distributions and other payments on Anne's behalf through the date of closing. Finally, the term sheet provided "attorneys to draft documents consistent with above as soon as possible with anticipated closing date of September 30, 2012."

The law

A contract is generally defined as a promise, or a set of promises, actionable upon breach. *Kostelnik v. Helper*, 96 Ohio St. 3d 1, 3 (2002). In order to declare the existence of a contract there must be a meeting of the minds of both parties about the essential terms of the agreement. *Episcopal Retirement Homes, Inc. v. Ohio Dept. of Indus. Relations*, 61 Ohio St. 3d 366, 369 (1991). The meeting of the minds is demonstrated by evidence showing that the parties mutually consented to the purported contract's provisions. *Adams v. Windau*, 6th Dist. No. L-08-1041, 2008-Ohio-5023, ¶22.

The essential terms of a contract may vary, but they typically include the identity of the parties, the subject matter of the contract, and consideration. *Wallace v. Kalniz*, 6th Dist. No. WD-12-048, 2013-Ohio-2944, ¶21. The essential terms are sufficiently certain if they provide a basis for determining the existence of a breach and for giving an appropriate remedy. *Knoop v. Orthopaedic Consultants of Cincinnati, Inc.*, 12th Dist. No. CA2 007-10-101, 2008-Ohio-3892, ¶13. It is not fatal to a claim that a contract was formed where some terms in a purported contract are not defined, or if the purported contract leaves open the negotiation and execution of closing documents. If it is found that the parties intended to be bound, a court should not frustrate this intention if it is reasonably possible to fill in some gaps that the parties have left and reach a fair and just result. *Oglebay Norton Co. v. Armco, Inc.*, 8th Dist. No. 54917, 1989 Ohio

App. LEXIS 1365. Whether the parties intended a contract remains a factual question, not a legal one, and as such is an issue to be resolved by the finder of fact. *Normandy Place Associates v. Beyer*, 2 Ohio St. 3d 102, 106 (1982).

The evidence

The written term sheet is the best evidence of the parties' intentions. Its first two paragraphs provide that "Anne sells at closing 100% of MAS to Jonathan for \$40,000 per month for 108 months" and every other asset in the trust for another 72 monthly payments of \$40,000. Those paragraphs identify: the parties to the contract (Jonathan and Anne); the subject matter (all of the trust's assets); and the consideration (\$7,200,000 over 15 years).

The term sheet goes on to obligate Jonathan to secure the purchase price by executing two nonrecourse promissory notes in Anne's favor and by pledging all of the assets as collateral, i.e. mortgaging the assets to Anne in the event of a default. As additional security, Jonathan, on behalf of MAS, Stainless and Stamping, is also required to lease the premises from Kaufco for 15 years "at rates currently set forth in the existing leases."

By spelling out the basic obligations and rights of the parties, the term sheet includes all of the essential elements of a contract with sufficient certainty to allow either party to enforce it.

This is true even in the face of Anne's contention that the term sheet does not include all essential contract elements because it leaves open for later negotiation the specific terms of the nonrecourse promissory notes, the pledge of collateral (or mortgage) and the lease. Indeed, defendants' Trial Exhibit G1 alone includes a draft pledge agreement of 20 single-spaced pages and two draft promissory notes of six single-spaced pages each.

But the parties could have signed commercially reasonable notes and a pledge of collateral, however terse or verbose, as long as they comported with the term sheet: the notes had

to 1) promise the payment of a total of \$7.2 million and 2) allow the payments to end upon Anne's death, and the mortgage had to pledge the entire trust assets as collateral for the notes. The possibility that Jonathan or Anne would fail – or refuse – to assent to the precise language of the notes and mortgage did not negate the existence of a term essential to the formation of a contract.

The same can be said for the leases because their essence is set forth in the term sheet: 15 years under terms already in place.

The term sheet also says:

The loan documents would provide for agreed to grace periods and for reductions in payments in the event of business downturns as well as compensation restrictions during the loan period.

Anne argues that a definition of “business downturn,” a description of the meaning and length of “grace periods,” and the amount and duration of any “reductions in payments” or “compensation restrictions” are all essential elements of a contract, so their absence precludes the existence of a contract.

That argument is unconvincing because these items, while not unimportant, are incidental, not essential, parts of the contract. Moreover, Anne has been tangentially involved in the steel business since 1971 and Jonathan began working for MAS in the 1990s. Both of them acknowledged that the steel business is cyclical, making downturns – i.e., a decrease in profitability – inevitable. The fact that the term sheet explicitly mentioned business downturns suggests as much. As a result, there is evidence that the parties understood what was meant by a business downturn even without an express definition. As Jonathan persuasively testified, the term sheet was meant to reflect how “we actually behaved” since the business was started.

As for the uncertainty about grace periods, reductions in payment and compensation restrictions, those items – like the conditions for a business downturn – are not essential to the contract and could be filled in with commercially reasonable terms if the parties didn't agree to exact terms. The essence of the contract is the sale of assets for \$7.2 million over 15 years on the condition of adequate security. Again, while not trivial, agreement about a temporary delay or reduction in monthly payments by Jonathan – with a concomitant decrease in his compensation – was not vital to creating an enforceable contract.

Just as the intent of the parties to an indisputable contract is gauged by the words the parties chose to put into the contract, the intention to form a contract through mutual assent can be inferred from the words of the purported contract. Here the words are straightforward: Anne “sells” all of “the assets” to Jonathan for \$7.2 million over 180 “monthly payments,” secured by promissory notes and a pledge of the assets themselves. Contrary to Anne's testimony that the term sheet was just an outline that “had to be processed further” to make it fair to both sides, there is no qualifying verbiage to the effect that Anne “will consider” a sale on those terms once a completely documented proposal is submitted to her. It is just the opposite: the parties agreed to the sale on those terms with the understanding that they would supplement the agreement with other documents, none of which would vary the essential terms agreed to on the term sheet.

Additional evidence bearing on whether the parties achieved a meeting of the minds enforceable against them both comes from the circumstances of the negotiation. Discussions about Jonathan taking over the businesses began once they knew Morton's illness was terminal and those discussions continued after he died. Jonathan testified that those negotiations produced several written proposals, all of which were labeled as drafts and not signed by the parties. Anne acknowledged that the term sheet she signed on August 29, 2012, could have been

captioned and acknowledged as a non-binding draft but it wasn't. Both Jonathan and Anne testified that they entered the negotiation with the intention of reaching a deal for Jonathan to buy the steel business. According to Jonathan the term sheet was put in writing and signed so it could be enforced.

The final piece of evidence about whether the parties mutually assented to the essential terms of a contract is the advisory jury's answer to an interrogatory. The jury was unanimous in answering "yes" to the question "Does the August 29, 2012, term sheet include all of the terms essential to enforce it?"

Anne puts up two obstacles to obligating her on the contract. First, she claims that a condition precedent has not been performed. Second, she asserts that if the term sheet is a contract, Jonathan abandoned it and her performance is excused. Both of these arguments are unavailing.

A condition precedent is a condition which must be performed before the obligations in the contract become effective. *Mumaw v. Western & Southern Life Ins. Co.*, 97 Ohio St. 1, 9 (1917). A condition precedent means that that an event shall happen or an act shall be performed in the future, before the contract shall become effectual. *Id.* If the condition is not fulfilled, the parties are excused from performing. *Troha v. Troha*, 105 Ohio App. 3d 327, 334 (2d Dist. 1995).

Anne describes as a condition precedent the following provision in the term sheet:

MAS and Michael [Kaufman] sign a 10 year employment contract for \$140,000 per year plus commissions, customary fringe benefits, auto expense and hospitalization. Contract terminable for good cause. At the end of the 10 year period, Michael to receive four years of nonqualified deferred compensation at the rate of \$60,000 annually.

Anne testified that this provision was important to her because she wanted to make sure her other son was compensated at least until he turned 65. Jonathan described the employment contract as a "sweetheart deal" but he agreed to it.

Whether a provision in a contract constitutes a condition precedent is a question of intent, and the intention will be ascertained by considering the language, not only of the particular provisions, but of the whole contract and its subject matter. *Kandel v. Gran*, 5th Dist. No. CA-5475, 1981 Ohio App. LEXIS 12445, *11 (June 17, 1981). The evidence does not support a finding that Jonathan and Anne intended Michael's execution of a 10-year employment contract with MAS as a condition precedent to their obligations under the term sheet. Anne testified that her intent was to sell the business and Jonathan said his intent was to buy it. Given their intention to strike a deal, it makes no sense that they would give a third party – Michael – veto power over the sale by simply refusing to enter into a contract with MAS. There is also no evidence that Michael participated in the negotiations at all nor did Anne testify that she consulted with Michael about his wishes, so it is unlikely that Anne would sell the business only on the condition that Michael would bind himself to it for ten years. Instead, the evidence demonstrates that only an offer of employment to Michael under the summarized terms was necessary, so that his signature on an employment contract with MAS was not a condition precedent to Anne and Jonathan's performance of the contract's other terms.

Parties who have entered into a contract may, by mutual consent or conduct, abandon the contract which they have entered into. *Hunter v. BPS Guard Servs.*, 100 Ohio App. 3d 532, 541 (10th Dist. 1995). A contract will be treated as abandoned when the acts of one party, which are inconsistent with the existence of the contract, are acquiesced in by the other party. *Hodges v. Ettinger*, 127 Ohio St. 460, 463 (1934). Where one party effectively abandons a contract, the

other party may accede to the abandonment and, in effect, the contract is dissolved by the mutual assent of both parties. *Hunter*, supra.

The trial evidence showed that Jonathan did not sign Anne's October 2012 monthly distribution check until near the middle of the month, when historically she received her distributions on or near the first of the month. The same thing happened in November. Anne cites those late payments as Jonathan's abandonment of the contract.

But during this time, and after, the parties' lawyers were still exchanging drafts of the ancillary agreements and appeared to be working toward a closing, albeit later than the end of September as anticipated in the contract. And it was Anne, according to her lawyer, who "had misgivings" about the contract from the start. Anne testified that she "changed her mind about everything" because she could "no longer trust" Jonathan to live up to his end of the contract after Jonathan delayed signing her October payment, even though it was a payment she could have made to herself. Finally, on December 23, 2013, Anne's lawyer acknowledged in writing to Jonathan's lawyer that "Anne has no interest in selling."

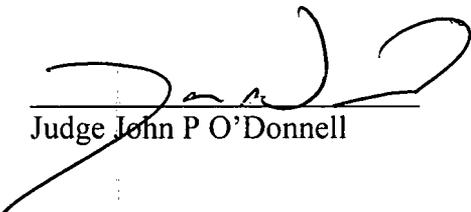
Jonathan did not abandon the contract: Anne did. As demonstrated by the filing of this lawsuit Jonathan did not acquiesce in Anne's abandonment, and the word for unilateral abandonment of a contract is breach.

Conclusion and declaratory judgment

Plaintiff Jonathan Kaufman proved by a preponderance of the evidence that the term sheet he and defendant Anne Kaufman signed on August 29, 2016, is an enforceable contract. Jonathan Kaufman did not abandon the contract and its performance is not barred by the failure of a condition precedent.

Accordingly, Jonathan Kaufman is entitled to the declaratory relief that he sought in his complaint: the declaration in the preceding paragraph that the term sheet is an enforceable contract.

IT IS SO ORDERED:



Judge John P O'Donnell

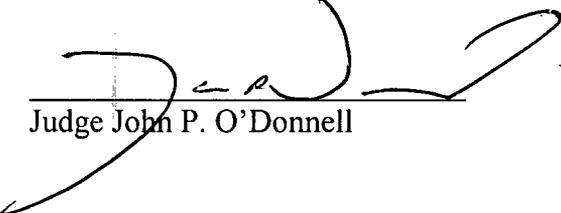
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June 3, 2016

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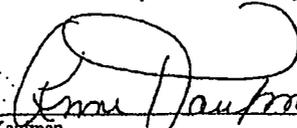


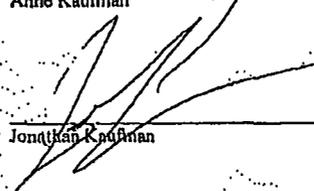
Judge John P. O'Donnell

TERM SHEET

1. Anne sells at closing 100% of MAS to Jonathan for \$40,000 per month for 108 months (including interest at the mid-term AFR).
2. Anne (the "Trust") sells at closing all of her other interests in stocks, LLC interests, promissory notes, etc. (the "Assets") to Jonathan for 72 monthly payments commencing after the 108th month, of \$40,000 including long term AFR interest *AFR*
3. Jonathan signs Nonrecourse Promissory Notes for the above amounts. Note payments to cease on Anne's death. The loan documents would provide for agreed to grace periods and for reductions in payments in the event of business downturns as well as compensation restrictions during the loan period.
4. Jonathan pledges the Assets to secure the Promissory Note. Pledge does not include Jonathan's 60% of Stamping or Stainless. *AND INTEREST IN MAS*
5. All three entities sign a joint and several 15 year lease on the premises with Kaufco at rates currently set forth in the existing leases.
6. MAS and Michael sign a 10 year employment contract for \$140,000 per year plus commissions, customary fringe benefits, auto expense and hospitalization. Contract terminable for good cause. At the end of the 10 year period, Michael to receive four years of nonqualified deferred compensation at the rate of \$60,000 annually.
7. MAS to continue to make tax distributions (based on prorated estimated taxable income) for 2012 through closing date, and other similar customary payments on Anne's behalf until closing.
8. Attorneys to draft documents consistent with above as soon as possible with anticipated closing date of September 30, 2012.

Date: August 29, 2012


Anne Kaufman


Jonathan Kaufman

Judgment Entry
Appendix 1

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PLAINTIFFS
TRIAL EXHIBIT

1