2011 IL App. (1st) 102338

SECOND DIVISION
December 20, 2011

No. 1-10-2338

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

ACTION CLEANERS RESTORATION, INC.,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County
	)	
v.	)	09 L 606
	)	
JAY ROBERTS ANTIQUE WAREHOUSE,	)	Honorable
	)	James P. McCarthy,
Defendant-Appellant.	)	Judge Presiding.
	)	
(Jay Roberts Antique Warehouse, Inc.,	)	
	)	
Third-Party Plaintiff-Appellant,	)	
	)	
v.	)	
	)	
Fireman's Fund Insurance Company,	)	
	)	
Third-Party Defendant-Appellee.)	)	

JUSTICE CONNORS delivered the judgment of the court.
Presiding Justice Quinn and Justice Cunningham concurred in the judgment.

ORDER

Held: In a bench trial where the parties presented conflicting extrinsic evidence about the meaning of an ambiguous clause in a contract, the trial court's interpretation and application of that clause was not against the manifest weight of the evidence.

¶1 Following a bench trial, the trial court found that defendant and third-party plaintiff Jay Roberts Antique Warehouse, Inc. breached its contract with plaintiff Action Cleaners Restoration, Inc. (ACR). The trial court also found that third-party defendant Fireman's Fund

Insurance Company was not required to indemnify Jay Roberts for the judgment against it. We affirm.

¶2 BACKGROUND

¶3 In 2008, a gas line broke in a building owned by Jay Roberts. The building filled with gas, but the fire department was able to respond and vent the gas without incident. In order to vent the gas, however, firefighters had to remove some windows and doors and install large fans. When the building was deemed safe to reenter, Jay Paset and his son Jeff, who are the founder and president of Jay Roberts, respectively, discovered that nearly every surface in the building, including a valuable antique collection, had been covered in a film of dirt and grease.

¶4 Jay Roberts held two insurance policies. The first covered the building itself and was provided by Travelers Insurance Company, and the second covered the antique collection and was provided by Fireman's Fund Insurance Company. Jay Roberts filed claims with both insurance companies and engaged the services of ACR for the cleanup of the building and antiques. Jay Roberts signed two written contracts with ACR on May 30, 2008, one covering cleanup of the building and the other for cleanup of the antiques. ACR explained at trial that the reason for having two separate contracts for the job was to keep the invoices for work performed on the building and the antiques separate because the building and antiques were separately insured. Neither insurance company was a party to the contracts.

¶5 The contracts are identical one-page form contracts that ACR provides to all of its customers, with the only difference being the identification of the relevant insurance company. At the insistence of Jay Roberts, there were two handwritten modifications made to the contracts. The first was placed on a blank line in the middle of the contract terms and reads, "Either party can terminate the contract at any time." The second modification was placed at the

bottom left hand corner of each contract, below the signature lines, and reads, "As per authorization of insurance company." The meaning and effect of this clause later became the primary issue at trial. Jay Roberts' position was that the clause meant that Jay Roberts would only be obligated to pay ACR for any work performed if the insurance companies paid Jay Roberts' insurance claim for that work. In contrast, ACR contended that the clause meant only that it agreed to obtain authorization from the insurance companies for the type and extent of the work that it intended to perform.

¶6 After the contract was executed, ACR contacted the insurance adjusters for the two insurance companies and discussed the type and cost of the work that would be necessary to clean up the building and antiques. ACR and the insurance companies came to a verbal agreement on the scope of the work and ACR began work immediately. Among other things, the cleanup plan required ACR to deploy 18 air scrubbers in order to remove dust and dirt from the building as the cleanup progressed. Each air scrubber is essentially a large fan with an attached high-efficiency particulate air (HEPA) filter, which removes 99.97% of particles that are larger than 0.3 micrometers from the air. The filters must be changed once or twice a week, depending on the amount of particulate matter in the air that is being filtered. ACR installed the air scrubbers in June 2008 and ran them continuously until August 2008. During June, ACR sent several invoices to Jay Roberts for the cleanup, and each of the invoices contained charges related to the use of the air scrubbers. Jay Roberts paid each of the invoices.

¶7 In July 2008, Jay Roberts asked ACR to stop the cleanup work for at least two periods of several days each while Jay Roberts performed remodeling in the building, some of which created a large amount of dust. During this time, the air scrubbers continued to run and remove dust, and ACR continued to change the HEPA filters at the request of Jay Roberts. Because

ACR was not performing any cleanup work on the building or the antiques, however, both insurance companies informed ACR that they would not cover the cost of the air scrubbers during this period. ACR passed this information on to Jay Roberts, although precisely when this occurred is unclear. At the latest, by July 30, 2008, Jay Roberts knew that the insurance companies would not cover the costs of the air scrubbers. On that date, ACR's owner, Jim O'Callaghan, spoke with Jeff Paset and informed him that Firemen's Fund would not pay for the use of the air scrubbers during the remodeling period. Jeff Paset asked ACR to remove the scrubbers from the building, which ACR did that day. ACR stopped work on the project and does not appear to have returned to the building after August 1, 2008. In September, ACR sent invoices to both Fireman's Fund and Jay Roberts for the use of the air scrubbers over 32 days, which amounted to about $115,000. ACR told Jay Roberts that ACR would still hold Jay Roberts responsible for the bill even if Fireman's Fund declined to cover the cost of the air scrubbers. Fireman's Fund ultimately agreed to pay for 5 of the 32 days.

¶8 When Jay Roberts refused to pay the balance owed for the use of the air scrubbers, amounting to about $97,000, ACR brought this breach of contract action against Jay Roberts. Jay Roberts impleaded Fireman's Fund and filed a third-party indemnification complaint against it for any judgment that ACR might win. At trial, Jay Roberts' primary defense was based on the contract clause that stated, "As per authorization of insurance company." Jay Roberts' theory was that if ACR had failed to ensure that the insurance companies would pay for any work that ACR performed, then ACR was owed nothing. Alternatively, if ACR had obtained the authorization, then Fireman's Fund was required to pay.

¶9 After hearing extensive evidence on the facts of the case and the meaning of the provision at issue, the trial court found, among other things, that the clause meant that ACR "was

to obtain insurance company authorization for the nature and scope of the work contemplated by ACR to address the conditions of [Jay Roberts'] place of business arising out of the gas leak." The trial court went on to find that ACR had in fact obtained authorization for the use of the air scrubbers and that Jay Roberts breached the contract by failing to pay the amount due on the invoice. Finally, the trial court ruled in favor of Fireman's Fund on the third-party indemnification complaint, finding that Fireman's Fund was not obligated to indemnify Jay Roberts for the breach of contract judgment. The trial court later awarded ACR about $40,000 in attorney fees and costs pursuant to the attorney fee provision of the contract. Jay Roberts appeals.

¶ 10 ANALYSIS

¶ 11 The only issue that Jay Roberts raises on appeal is whether the trial court correctly interpreted and applied the provision of the contract that reads, "As per authorization of insurance company."[1]

¶ 12 We first must determine the appropriate standard of review. Jay Roberts maintains that we should review this case *de novo* because the outcome depends on the trial court's interpretation of a contract. ACR argues that we should limit our review to only whether the trial court's findings were against the manifest weight of the evidence because the trial court considered extrinsic evidence when determining the meaning of the contract.

¶ 13 The meaning of a contract is ordinarily a question of law that we review *de novo*. See *Doornbos Heating & Air Conditioning, Inc. v. Schlenker*, 403 Ill. App. 3d 468, 488 (2010). Our primary objective is to give effect to the intent of the parties as it is expressed in the written

[1] Jay Roberts also appealed from the trial court's judgment in favor of Fireman's Fund on Jay Roberts' third-party indemnification claim, but it voluntarily dismissed that portion of its appeal pursuant to a settlement with Fireman's Fund that was reached while this appeal was pending. We therefore will not consider any issues related to indemnification.

instrument. See *id.* If the contract is ambiguous, however, the trial court "may consider extrinsic evidence to resolve the uncertainties present in the written agreement." *Id.* We will not disturb a trial court's factual findings at trial on the meaning of an ambiguous contract and whether a breach occurred unless they are against the manifest weight of the evidence. See *id.*; see also *State Bank of East Moline v. Cirivello*, 74 Ill. 2d 426, 432 (1978) (trial court's interpretation of the meaning of an ambiguous guaranty contract is an issue of fact).

¶14 The initial question, then, is whether the contract is ambiguous, which is an issue that we review *de novo*. "A contract term or provision is considered ambiguous if, due to the indefiniteness of the language, it can be subject to multiple interpretations." *Doornbos*, 403 Ill. App. 3d at 488. In this case, the clause "As per authorization of insurance company" was handwritten into the contract at the request of Jay Roberts, and it was placed at the bottom left corner of the contract below the signature lines. By itself, we have no idea what this clause means. The clause is a sentence fragment that, on its face, does not make sense or convey any useful information about the obligations of the parties. We do not know what kind of authorization the clause refers to, who is required to obtain it, or what the insurance company is purportedly authorizing. Even when the clause is considered in relation to the rest of the contract, its meaning is unclear because it is separated from the rest of the contract language by the signature blocks and it does not appear to relate to any other clause in the contract. The clause could mean nearly anything and is therefore ambiguous.[2]

¶15 Because the clause at issue is ambiguous, extrinsic evidence is necessary to interpret it. This makes the meaning of the clause a question of fact, and we will not overturn the trial court's

[2] Although Jay Roberts argues that the clause is *not* ambiguous, it fails to provide any persuasive analysis of the meaning of the clause based on the terms the written contract. Indeed, Jay Roberts' entire argument that the clause is unambiguous is based on extrinsic evidence of Jay and Jeff Paset's subjective interpretation of the clause and the parties' course of conduct subsequent to the signing of the contract.

findings of fact unless they are against the manifest weight of the evidence. See *Doornbos*, 403 Ill. App. 3d at 488. "A finding is against the manifest weight of the evidence only if the opposite conclusion is clearly evident or if the finding itself is unreasonable, arbitrary, or not based on the evidence presented." *In re Marriage of O'Brien*, 2011 IL 109039, ¶ 150.

¶16 The parties both presented evidence in support of their competing interpretations of the clause. Jay Roberts relied largely on the fact that ACR primarily dealt directly with the insurance companies, especially regarding the nature and scope of the work that would be required to clean the premises and the antiques. ACR submitted weekly production logs to the insurance adjusters, and ACR also submitted invoices to the insurance companies. Additionally, Jay Paset, who signed the contract on behalf of Jay Roberts, testified that he had asked for the clause in the contract because he did not want ACR to do any work that would not be paid for by the insurance companies. Both Jay and Jeff Paset testified that it was their understanding that all costs associated with the cleanup would be covered by the insurance companies.

¶17 In contrast, ACR relied primarily on the language of the written contract and the fact that the insurance companies had authorized the use of the air scrubbers. ACR pointed out that the contract was between ACR and Jay Roberts, and it did not include the insurance companies as signatories. Moreover, the contract expressly required Jay Roberts, not Fireman's Fund, "to pay or direct payment to [ACR] upon receipt of all invoices for all services." Importantly for ACR's position, the contract did not contain any clauses that made indemnification of Jay Roberts by the insurance companies a condition precedent to Jay Roberts' duty to pay ACR's invoices.

¶18 Although ACR sent invoices to both the insurance companies and to Jay Roberts, ACR presented evidence that showed Jay Roberts paid the invoices out of its own accounts. Regarding the personal understanding of the parties to the contract, ACR presented the

testimony of Robert Smolka, the project manager, and Jim O'Callaghan, both of whom testified that their understanding of the clause was that it merely required ACR to obtain authorization from the insurance companies for the nature and extent of any work that would be performed. Finally, ACR introduced portions of Jay Roberts' verified answer to ACR's complaint and Jay Roberts' verified third-party complaint against Fireman's Fund. In its answer, Jay Roberts admitted that it "agreed to pay for work authorized by its insurers," and in its third-party complaint Jay Roberts stated that Fireman's Fund "authorized and agreed to pay for all of the 'air scrubbing' work referred to in ACR's Complaint."

¶19 The trial court heard all of this conflicting evidence and found, among other things, that the clause at issue only required ACR to obtain insurance company authorization for any work that it intended to perform, which ACR did. The trial court expressly found that the clause "did not and does not mean that Jay Roberts is only obligated to pay what the insurance covers." These findings were not against the manifest weight of the evidence. This standard of review is relatively deferential, and it is grounded in the fact that the trial court "has observed the demeanor of the parties and the witnesses and because it has gained a familiarity with the evidence that a reviewing court can never have." *Best v. Best*, 358 Ill. App. 3d 1046, 1054-55 (2005) (citing *In re D.F.*, 201 Ill. 2d 476, 498-99 (2002)); see also *id.* at 1055 ("[W]e will not substitute our judgment for the trial court's regarding the credibility of the witnesses, the weight it should have given to the evidence, or the inferences it should have drawn."). Although Jay Roberts and ACR presented conflicting evidence about the meaning of the clause, as the finder of fact the trial court was entitled to credit ACR's evidence over the evidence presented by Jay Roberts. These findings of fact were based on evidence in the record, and we cannot say that they were unreasonable or arbitrary, or that the opposite conclusion is clearly evident.

¶20 Given that the trial court found that ACR fulfilled its obligation to obtain authorization from the insurance companies to use the air scrubbers and that Jay Roberts was obligated to pay ACR for the use of the scrubbers regardless of whether Jay Roberts was indemnified by the insurance companies, it necessarily follows that Jay Roberts breached the contract by failing to pay ACR.

¶21 CONCLUSION

¶22 In its response brief on appeal, ACR requested that, in the event that it prevails in this appeal, we remand this case to the trial court in order for ACR to file a supplemental petition for attorney fees and costs related to this appeal pursuant to the contract's attorney fee provision. This is an appropriate request in a breach of contract case in which attorney fees are authorized by the contract (see, *e.g.*, *Erlenbush v. Largent*, 353 Ill. App. 3d 949, 953 (2004)), and Jay Roberts did not object to this request in its reply brief. We therefore remand this case to the trial court in order to allow for a supplemental attorney fee petition and a hearing, if necessary.

¶23 Affirmed and remanded with directions.