IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

THE OLB GROUP, INC., as Successor in Interest to Payprotec Oregon, LLC, d.b.a. Securus Payments,	:	APPEAL NO. C-220502 TRIAL NO. A-2001653
Plaintiff-Appellee,	:	*O P I N I O N.*
vs.	:	
BLUE SQUARE RESOLUTIONS, LLC,	:	
and	:	
SABIN BURRELL,	:	
Defendants-Appellants.	:	

Civil Appeal From: Hamilton County Court of Common Pleas

Judgment Appealed From Is: Reversed and Cause Remanded

Date of Judgment Entry on Appeal: August 4, 2023

Santen & Hughes and *Brian P. O'Connor*, for Plaintiff-Appellee,

Kutak Rock LLP, Oliver D. Griffin, and *Peter N. Kessler*, *Law Office of Raymond W. Lembke* and *Raymond W. Lembke,* for Defendants-Appellants.

CROUSE, Presiding Judge.

{¶1} Defendants-appellants Blue Square Resolutions, LLC ("Blue Square") and Mr. Sabin Burrell (collectively, "appellants") appeal the judgment of the Hamilton County Court of Common Pleas entering judgment in favor of plaintiff-appellee, The OLB Group, Inc. ("OLB"). Because OLB lacked standing to bring its claims, we reverse the judgment of the trial court.

I. Factual and Procedural Background

{¶2} In 2014, Blue Square, owned by Burrell, entered into an Independent Sales Organization/Member Services Provider Marketing Agreement ("agreement") with Securus Payments. The agreement provided that Securus, defined in the agreement as an Independent Sales Organization or "ISO," would solicit merchants to use certain credit card terminals as customers of Blue Square. Blue Square would then process the payments between the merchants and the banks. In exchange, Securus was to be paid a portion of the processed payments, known as a "residual," on an ongoing basis. This group of merchant accounts was known as Portfolio 1187.

{¶3} The agreement included the following anti-assignment clause:

> 17.1 ISO shall not assign (including without limitation, by operation of law), subcontract, license, franchise or in any manner attempt to extend to any third party any right or obligation of ISO under this Agreement, without [Blue Square's] prior written consent, which consent will not be unreasonably withheld. [Blue Square] may assign this Agreement to a new Bank or Banks to provide services hereunder at any time.

{¶4} In October 2015, Burrell sold a portion of Blue Square's assets, including Portfolio 1187, to non-party Applied Merchant Systems. In August 2016, a second transaction occurred wherein Applied Merchant Systems purchased the remaining Blue Square assets. Burrell testified that Blue Square sold the entire company to Applied Merchant Systems, including "all my employees, my office space, equipment, all of our intellectual property, computer server, terminals, my cell. I mean, we sold everything."

{¶5} On the other side of the marketing agreement, Securus was changing hands as well. In 2018, Great American Capital Partners foreclosed on the assets of Securus's parent company, Excel Corporation, after Excel defaulted on a loan. OLB then bought those assets at auction, including the rights under the agreement. Blue Square never provided written consent to either of these transactions.

{¶6} On April 21, 2020, OLB filed a nine-count complaint against Blue Square and Burrell, alleging that residuals had not been paid to them since October 2015. The complaint included two counts of breach of contract, two counts of unjust enrichment, breach of duty of good faith and fair dealing, and three counts of fraudulent transfer. Appellants filed a counterclaim for breach of contract.

{¶7} A three-day bench trial was held in June 2018. Following the close of OLB's case, the court granted appellants' motion for involuntary dismissal under Civ.R. 41(B)(2) as to several counts, leaving only count one for breach of contract, count five for fraudulent transfer under R.C. 1336.05, count six for fraudulent transfer under R.C. 1336.04(A)(2), and count eight for attorney fees.

{¶8} In its findings of fact and conclusions of law, the trial court found that appellants had breached the agreement by failing to pay OLB, and that OLB had proven $258,079.28 in compensatory damages for the breach. The court also found in favor of OLB on the fraudulent-transfer claims and ordered Burrell to disgorge the sum of compensatory damages from non-party SLB Ventures to pay OLB. The court found in favor of OLB on appellants' counterclaim and found appellants liable for attorney fees and prejudgment interest.

{¶9} On October 3, 2022, after a hearing on the amount of attorney fees, the court entered final judgment on all counts in favor of OLB against Blue Square and Burrell, jointly and severally, in the amount of $429,741.47.

{¶10} Blue Square and Burrell timely appealed.[1] In four assignments of error, they contend: 1) OLB lacks standing, 2) the trial court erred in calculating damages, 3) the trial court erred in finding that a fraudulent transfer occurred, and 4) the trial court erred in awarding attorney fees.

II. Law and Analysis

{¶11} In appellants' first assignment of error, they contend that the trial court erred in entering judgment in favor of OLB because OLB lacked standing. Specifically, appellants argue that because Securus was prohibited from assigning the rights under the marketing agreement without their consent, OLB is not a party to the agreement and lacks standing to bring its claims. OLB counters that the anti-assignment provision does not apply.

[1] Blue Square and Burrell had also filed a notice of appeal on September 14, 2022, after the trial court entered its findings of fact and conclusions of law on August 15, 2022. In a December 21, 2022 entry, we determined that the order appealed from was not final and subsequently dismissed the appeal numbered C-220461.

{¶12} We review issues of standing de novo. *Cowan v. Ohio Dept. of Job & Family Servs.*, 2021-Ohio-1798, 173 N.E.3d 109, ¶ 6 (1st Dist.). "In order for a trial court to have jurisdiction over an action, the matter must be justiciable, and '[a] matter is justiciable only if the complaining party has standing to sue.' " *Buckeye Firearms Found. Inc. v. Cincinnati*, 2020-Ohio-5422, 163 N.E.3d 68, ¶ 11 (1st Dist.), quoting *ProgressOhio.org, Inc. v. JobsOhio*, 139 Ohio St.3d 520, 2014-Ohio-2382, 13 N.E.3d 1101, ¶ 11, citing *Fed. Home Loan Mtge. Corp. v. Schwartzwald*, 134 Ohio St.3d 13, 2012-Ohio-5017, 979 N.E.2d 1214, ¶ 41.

{¶13} Where a party "does not rely on any specific statute authorizing invocation of the judicial process, the question of standing depends upon whether the party has alleged * * * a 'personal stake in the outcome of the controversy' * * *. " *Sierra Club v. Morton*, 405 U.S. 727, 731-732, 92 S.Ct. 1361, 31 L.Ed.2d 636 (1972), quoting *Baker v. Carr*, 369 U.S. 186, 204, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962); *see Cowan* at ¶ 6; *Schwartzwald* at ¶ 21. To have a personal stake in the outcome of a contract case, one must generally be either a party to the contract or an intended third-party beneficiary of the contract. *See Drew v. Weather Stop Roofing Co., LLC,* 2020-Ohio-2771, 154 N.E.3d 136, ¶ 14-15 (12th Dist.) (holding plaintiff lacked standing to pursue a breach-of-contract claim where he was neither a party nor a third-party beneficiary and did not own the land at-issue); *Stride Studios, Inc. v. Alsfelder,* 1st Dist. Hamilton No. C-220395, 2023-Ohio-1502, ¶ 20 ("Only a party to a contract or an intended third-party beneficiary may bring an action on a contract.").

{¶14} Moreover, contrary to OLB's contention, the mere allegation of standing in the complaint is not necessarily sufficient because " '[t]he state of things and the originally alleged state of things are not synonymous; demonstration that the original

allegations were false will defeat jurisdiction.' " *Schwartzwald* at ¶ 25, quoting *Rockwell Internatl. Corp. v. United States*, 549 U.S. 457, 473, 127 S.Ct. 1397, 167 L.Ed.2d 190 (2007).

{¶15} As a general rule, contract rights are assignable. At the same time though, clear contractual language prohibiting assignment operates as an exception to that rule and is routinely enforced. *See Blue Ash Auto Body, Inc. v. Grange Property & Cas. Ins. Co.,* 1st Dist. Hamilton No. C-220165, 2022-Ohio-4599, ¶ 12, citing *Pilkington N. Am., Inc. v. Travelers Cas. & Sur. Co*., 112 Ohio St.3d 482, 2006-Ohio-6551, 861 N.E.2d 121, ¶ 36 (discussing the three conditions where contract rights are not assignable); *accord Harding v. Viking Internatl. Resources Co.,* 2013-Ohio-5236, 1 N.E.3d 872, ¶ 13-14 (4th Dist.) (discussing *Pilkington* and holding that "clear and unambiguous anti-assignment clauses" in the agreement should be enforced). When a party violates an assignment clause, any assignments of the agreement are void. *See IPI II, L.L.C. v. Cleveland Clinic Found.,* 8th Dist. Cuyahoga Nos. 99898 and 99988, 2014-Ohio-700, ¶ 25 (holding failure to comply with clear contractual language voided assignment).

{¶16} "In interpreting a contract, our role is ' "to give effect to the intent of the parties to the agreement." ' " *Vandercar v. Port of Greater Cincinnati Dev. Auth.*, 2022-Ohio-3148, 196 N.E.3d 878, ¶ 25 (1st Dist.), quoting *Motorists Mut. Ins. Co. v. Ironics, Inc.*, 168 Ohio St.3d 467, 2022-Ohio-841, 200 N.E.3d 149, ¶ 8, quoting *Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216, 2003-Ohio-5849, 797 N.E.2d 1256, ¶ 11. "Common words appearing in a written instrument will be given their ordinary meaning unless manifest absurdity results or unless some other meaning is clearly evidenced from the face or overall contents of the instrument." *Alexander v. Buckeye*

Pipeline Co., 53 Ohio St.2d 241, 374 N.E.2d 146 (1978), paragraph two of the syllabus. "Where the terms in a contract are clear and unambiguous, courts 'cannot in effect create a new contract by finding an intent not expressed in the clear language employed by the parties.' " *Vandercar* at ¶ 26, quoting *Alexander* at 246.

{¶17} Here, the anti-assignment provision clearly and unambiguously prohibited Securus from "assign[ing] (including without limitation, by operation of law), subcontract[ing], licens[ing], franchis[ing] *or in any manner attempt[ing] to extend to any third party any right or obligation*" under the marketing agreement without Blue Square's prior written consent. (Emphasis added.)

{¶18} The rights under the agreement were first transferred when they were was collateralized and subsequently subjected to foreclosure by Great American Capital Partners. A second transfer occurred when OLB bought those assets at auction. Given the broad strokes of the provision, it is clear that the parties intended to prohibit all manner of transfer by Securus to any other party, unless written consent was provided. Either of these transfers, without consent, runs afoul of the provision.

{¶19} OLB does not allege, nor does the record reflect, that written consent was ever provided. Instead, OLB insists that Blue Square knew about OLB's acquisition and failed to object, thereby waiving the right. However, the record belies that assertion. In fact, Burrell specifically testified that he was not aware of the assets being put up for sale at public auction. Thus, we find OLB's waiver argument unpersuasive. *See Gembarski v. PartsSource, Inc.*, 157 Ohio St.3d 255,

2019-Ohio-3231, 134 N.E.3d 1175, ¶ 24 (defining waiver as a voluntary relinquishment of a known right).[2]

{¶20} OLB relies on *Schofield v. Benton*, 10th Dist. Franklin No. 92AP-161, 1992 Ohio App. LEXIS 4275 (Aug. 20, 1992) for the proposition that the right to payment for services already performed may be freely assigned. Yet, because there was no anti-assignment clause in the *Schofield* contract, this case is distinguishable.

{¶21} Given the lack of prior written consent, we hold that both transfers of the rights and obligations under the agreement are void. Accordingly, OLB is not a party to the contract, nor is it an intended third-party beneficiary. *See Caruso v. Natl. City Mtge. Co.,* 187 Ohio App.3d 329, 2010-Ohio-1878, 931 N.E.2d 1167, ¶ 23 (1st Dist.) ("For a person to be an intended third-party beneficiary, the contract must have been entered into directly or primarily for the benefit of that person."). Thus, because OLB does not have a personal stake in the outcome of the case, we hold that it lacks standing in this contract action and the court erred in entering judgment in its favor.[3] Consequently, we sustain appellants' first assignment of error.

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[2] Even if appellants were aware of the transfers, the failure to object is not always dispositive in these cases. *See Harding*, 2013-Ohio-5236, 1 N.E.3d 872, at ¶ 19-20 (4th Dist.) (holding anti-assignment clause enforceable despite lessor-appellee accepting rent and acknowledging assignment).

[3] We note that the trial court dismissed OLB's unjust enrichment claims against Blue Square and Burrell on appellants' Civ.R. 41 motion. The court stated: "In reading the current law on unjust enrichment in Ohio, it's clear that unjust enrichment is basically an equitable claim, and it's based on quasi contract, and a Plaintiff may not recover under a theory of unjust enrichment when an expressed contract covers the same subject matter." Obviously, our determination that OLB is not a party to the contract could have revived those equitable claims. However, because OLB did not file a conditional cross-appeal under App.R. 3(C) on that issue, we are unable to address it. *See, e.g., Gen. Medicine, P.C. v. Manolache,* 8th Dist. Cuyahoga No. 94861, 2011-Ohio-340, ¶ 31 ("While unusual, such a conditional request is not without precedent and is allowed by App.R. 3(C).").

III. Conclusion

{¶22} In light of the foregoing analysis, we sustain appellants' first assignment of error. Accordingly, we reverse the judgment of the trial court and remand the cause with instructions to dismiss the claims against appellants. Our disposition of the first assignment of error renders the second, third, and fourth assignments of error moot, so we decline to address them. *See* App.R. 12(A)(1)(c).

Judgment accordingly.

ZAYAS and **KINSLEY, JJ.,** concur.

Please note:

The court has recorded its entry on the date of the release of this opinion.