

STATE OF MICHIGAN
COURT OF APPEALS

PEYTON MITCHELL,

Plaintiff-Appellee,

v

EDWARD BROWN, a/k/a ED BROWN, d/b/a
HERITAGE ROOFING,

Defendant-Appellant.

UNPUBLISHED
February 16, 2012

No. 299234
Wayne Circuit Court
LC No. 08-120065-CK

Before: GLEICHER, P.J., and METER and DONOFRIO, JJ.

PER CURIAM.

Plaintiff Peyton Mitchell hired defendant Edward Brown and his contracting company to install a new roof on her home. Brown's roof did not meet with Mitchell's satisfaction and she filed suit. The parties reached an \$8,000 settlement agreement on the record but Brown later refused to sign a written document memorializing the terms. In punishment for Brown's intransigence, the court set aside the settlement and entered a default judgment against Brown based on the underlying service contract. The settlement is a binding contract, the violation of which supports an action to enforce that agreement. It does not support punitive damages or reversion to the service contract. Accordingly, we vacate the trial court's contrary judgment.

Mitchell filed suit against Brown to recover the cost she incurred in having the roof he installed removed from her home and hiring another contractor to redo the job. On June 24, 2009, the parties entered a settlement on the record:

One, the parties agrees [sic] this settlement is entered into with neither party admitting liability and by mutual agreement to settle this matter amicably with no admission by either party. Two, [Brown] agrees to pay to [Mitchell] a total of \$8,000 on the following terms and conditions. [The agreement then outlines a schedule of payments to be made from future roofing and home improvement jobs taken by Brown and Brown's duty to keep Mitchell informed of his contracts.]

In consideration for all of the following, [Mitchell] agrees to withdraw the complaint at the Better Business Bureau and do everything within their [sic] capability to expunge the record of Mr. Edward Brown and Heritage Roofing.

Both parties affirmatively swore on the record that they agreed to these terms.

Thereafter, Brown's attorney reduced the settlement to writing. Mitchell signed the document, but Brown refused. Brown's attorney filed a motion to withdrawal as counsel of record as a result. At a hearing on October 16, 2009, the court granted counsel's motion. The court also heard Mitchell's complaint that Brown had not made any payment in furtherance of the settlement. Wayne Circuit Judge Kathleen MacDonald instructed Brown to abide by the settlement or the court would "give [Mitchell] a judgment for the full amount" of her requested damages. In essence, the court threatened to disregard the settlement and enter a judgment on the underlying service contract.

Nothing happened in the matter for several months. Then, in May 2010, Mitchell filed a motion to withdraw the settlement and enter a default judgment against Brown for \$17,700. Mitchell cited Judge MacDonald's exhortation at the October 16 hearing and noted that Brown had yet to make any payment toward the \$8,000 settlement figure. At a June 4, 2010 hearing before Wayne Circuit Judge John D. O'Hair, Brown retorted that Mitchell had not met her end of the bargain either. Mitchell conceded that she had not contacted the Better Business Bureau to withdraw her complaint against Brown and his contracting company because she believed that Brown was first required to make payment. The court ultimately gave Mitchell one week to contact the Better Business Bureau. Without citing any reason for withdrawing the settlement, the court also gave Brown one week to voluntarily remit over \$17,000 to Mitchell or face a judgment in that amount.

On June 11, 2010, the parties returned to court. Mitchell had contacted the Better Business Bureau as directed. Judge O'Hair ruled:

This is what Judge MacDonald said, whether you sign this Agreement or not, it doesn't matter, because I'm going to give her a judgment. Then she can come after you instead of agreeing to the terms of the settlement.

It's clear that she intended at the time you were before her, that the agreement that was entered into was going to be enforced, whether it was memorialized by an Order by the court or not.

I'm going to enter judgment in the sum of seventeen thousand seven hundred dollars (\$17,700.)

I. ADMINISTRATIVE DISMISSAL IMPROPERLY ENTERED

Brown challenges the trial court's authority to grant Mitchell relief in June 2010 when the case had been administratively closed eight months earlier. On November 25, 2009, the court clerk administratively dismissed the case because "no order or judgment [had] been presented within the ten (10) day period following adjudication" This administrative dismissal was improperly entered. MCR 2.502(A)(1) provides that the court may order on its own initiative "that an action in which no steps have been taken within 91 days be dismissed for lack of progress" Steps had been taken within the 91 days before November 25, and the court had not rendered an order or judgment regarding the settlement that could have been reduced to writing following the October 16 hearing. However, an administrative dismissal is made without prejudice and may be set aside for good cause. MCR 2.502(B)(1). While Mitchell should have

requested reinstatement of the action before filing her May 2010 motion, see MCR 2.502(C), Brown was not actually prejudiced by the de facto reinstatement of the improperly closed case. Accordingly, Brown is not entitled to relief in this regard.

II. ADJOURNMENT TO RETAIN COUNSEL

Brown's originally retained counsel withdrew at the October 16, 2009 hearing, in part because Brown refused to sign a written version of the settlement. Thereafter, Brown took no action to retain replacement counsel. When Mitchell filed her May 2010 motion to withdraw the settlement, Brown waited until the day before the hearing to request a two-week adjournment to retain counsel. The hearing went forward as scheduled, and although the court did not address Brown's request, it did adjourn the hearing for one week on other grounds. Brown claimed that he interviewed various attorneys during that week but had not selected counsel. One day before the June 11 hearing, Brown again filed a motion to adjourn, which the court denied.

We review the court's decision for an abuse of discretion. *Soumis v Soumis*, 218 Mich App 27, 32; 553 NW2d 619 (1996). In a civil matter, when a party requests an adjournment or continuance to retain counsel, the court should consider whether that party has sought previous continuances of the action and exercised due diligence in raising his current request, as well as the possibility of injustice to the moving party if the adjournment is denied. *Tisbury v Armstrong*, 194 Mich App 19, 20; 486 NW2d 51 (1991).

The trial court acted within its discretion in denying Brown's request. Although the court denied Brown the two-week extension, he actually spent three weeks interviewing potential counsel before the court refused a further adjournment. Moreover, Brown exhibited a lack of diligence throughout these proceedings. Brown waited an entire year to raise his single defense—that Mitchell's duty under the settlement was a condition precedent to his own duty to pay. With eight months between hearings, Brown made no attempt to find replacement counsel and failed to notify the court of this fact until the eve of a scheduled hearing. Simply put, Brown's motion was a last-ditch effort for more time when he clearly had not been diligent in defending his actions.

III. BREACH OF THE SETTLEMENT AGREEMENT

Brown challenges the trial court's authority to enforce the June 24, 2009 settlement, or to punish his violation of it, as the agreement had not been reduced to a written court order. At all relevant times, MCR 2.507(G) provided that a settlement "made in open court" is binding on the parties despite that a written order is not entered.¹ The parties agreed to the particulars of the

¹ MCR 2.507(G) specifically provided:

An agreement or consent between the parties or their attorneys respecting the proceedings in an action, subsequently denied by either party, is not binding unless it was made in open court, or unless evidence of the agreement is in writing, subscribed by the party against whom the agreement is offered or by that party's attorney.

settlement on the record in open court. That agreement is binding and enforceable. *Myland v Myland*, 290 Mich App 691, 700; 804 NW2d 124 (2010); *Mikonczyk v Detroit Newspapers, Inc.*, 238 Mich App 347, 349; 605 NW2d 360 (1999).

Brown argues that the court ignored Mitchell's breach of the settlement, i.e. her failure to withdraw her Better Business Bureau complaint until specifically commanded by the court. Brown's challenge is not supported by the record. The court chastised Mitchell to fulfill her obligation within one week or face the loss of her damages claim. The court clearly did not disregard Mitchell's wrongdoing.

However, the trial court committed a fundamental error in remedying Brown's breach of the settlement through reversion to a damages award pursuant to the underlying service contract. At the June 11, 2010 hearing, the court acknowledged that the settlement figure was \$8,000 and that awarding a full judgment would be problematic. As the hearing progressed, the court soured toward Brown, challenging him, "You had a chance to get out of this for \$8,000 and you didn't do it." The court then awarded Mitchell a \$17,700 judgment.

An agreement to settle a lawsuit is a binding contract, separate from any contract giving rise to the litigation in the first place. *Reicher v SET Enterprises, Inc.*, 283 Mich App 657, 664; 770 NW2d 902 (2009). Just like any other contract, the breach of a settlement gives rise to a breach of contract action. The parties had already settled Brown's breach of the service contract. The only issue properly before the court in June 2010 was Brown's breach of that settlement.

"[T]he damages recoverable for breach of contract are those that arise naturally from the breach or those that were in the contemplation of the parties at the time the contract was made." *Kewin v Massachusetts Mut Life Ins Co.*, 409 Mich 401, 414; 295 NW2d 50 (1980). In determining what damages "were in the contemplation of the parties," the court "must honor the parties' contract, and not rewrite it." *Reicher*, 283 Mich App at 665. As a general rule, the court may not award punitive or exemplary damages following a breach of contract. *Kewin*, 409 Mich at 414-416; *Tweddle v Tweddle Litho Co.*, 80 Mich App 418, 425; 264 NW2d 9 (1978). "[A]s with almost any agreement, [the breach of a contract] results in some annoyance or vexation." *Kewin*, 409 Mich at 417. Despite that, damages must be measured "by reference to the terms of the contract," *id.* at 416-417, and are limited to "the monetary value of the contract had the breaching party fully performed under it." *Id.* at 415. The goal "is to place the nonbreaching party in as good a position as if the contract had been fully performed[,] . . . not to punish the breaching party." *Corl v Huron Castings, Inc.*, 450 Mich 620, 625-626; 544 NW2d 278 (1996).

The parties agreed that Brown would remit \$8,000 to Mitchell. Nothing in the settlement's plain language suggests that Brown's breach would revive the underlying service contract. In the factually similar case of *Reicher*, 283 Mich App at 658-659, for example, the plaintiff was a salesman who entered into a commission agreement with the defendant automotive part manufacturer's predecessor-in-interest. The defendant terminated the relationship and denied its duty to pay future commissions to the plaintiff. *Id.* at 659. The plaintiff filed suit based on the commission agreement and the parties reached a settlement. *Id.* at 665. The defendant repeatedly made its agreed-upon payments late and the plaintiff filed a separate action based on the underlying contract, arguing that he was entitled to penalty interest.

Id. at 661. The trial court summarily dismissed the plaintiff's claims and this Court affirmed, noting:

Plaintiff could have continued the [original] litigation and may have recovered a judgment in full [based on the commission agreement], but he also could have lost the prior litigation and recovered nothing. . . . A settlement agreement is a binding contract. . . . Nothing in the settlement agreement provides any penalty for making late payments. Accordingly, the release bars the claims under the [original contract]. [*Id.* at 665 (citation omitted).]

The only real difference between *Reicher* and the current case is that the *Reicher* plaintiff filed a separate lawsuit following the defendant's breach of the settlement, while Mitchell challenged Brown's breach as a continuation of the original action. As in *Reicher*, nothing in the subject settlement provides for payment under the service contract terms. Rather, under the settlement, Brown promised to pay \$8,000. The trial court violated its duty to enforce the binding settlement. We therefore vacate the default judgment of \$17,700 and remand to allow the court to properly consider this matter as involving a breach of the settlement agreement, not the underlying service contract.

Vacated and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Elizabeth L. Gleicher
/s/ Patrick M. Meter
/s/ Pat M. Donofrio