

[Cite as *Grace v. Howell*, 2004-Ohio-4120.]

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

MARY ANN GRACE :

Plaintiff-Appellee : C.A. CASE NO. 20283

vs. : T.C. CASE NO. 02CV5200

LISA A. HOWELL : (Civil Appeal from
Common Pleas Court)

Defendant-Appellant :

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O P I N I O N

Rendered on the 6th day of August, 2004.

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GRADY, J.

{¶1} This is an appeal from an order of the court of
common pleas dismissing a post-judgment motion to enforce a
settlement agreement. We agree with the trial court that

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the relief sought is not available ancillary to the dismissal order entered in the current proceeding, and that a new action must be commenced to enforce the agreement. Accordingly, we will affirm.

{¶2} The underlying action was commenced by Mary Ann Grace against Lisa A. Howell on Grace's claim for relief for personal injuries arising from an automobile accident. The court referred the case for arbitration pursuant to Mont. Loc.R. 2.35.

{¶3} The arbitration panel filed its report and award on January 29, 2003. It awarded Plaintiff Grace a total of \$55,000 on her claim. Mont. Loc.R. 2.35X(D) provides that, absent a timely appeal, "the Court shall enter judgment in accordance with the report and award." No timely appeal was filed. Therefore, on March 6, 2003, the court granted judgment on the award in favor of Grace.

{¶4} After the arbitrator's report and award was filed but before the court granted judgment on the award, the parties agreed in February of 2003 to compromise and settle Plaintiff Grace's claims for relief. Subsequently on April 14, 2003, the court filed an agreed order of dismissal, with prejudice, stating that the matter had "been settled and compromised to the satisfaction of all parties as shown by the endorsement of counsel below." The agreed entry was signed by Defendant Howell's attorney, who entered the approval of Plaintiff Grace's trial attorney "per telephone approval." The terms of the settlement agreement were not

exemplified in the order of dismissal.

{¶5} Six months later, on September 14, 2003, Defendant Howell filed a motion to enforce the settlement agreement. A copy of the written agreement was attached to the motion. The agreement states that, in exchange for payment of \$65,000 from Defendant Howell and her insurer, Grange Mutual Casualty Company ("Grange"), receipt of which she acknowledged, Grace agrees to indemnify and hold Howell and/or Grange harmless on any claims arising from the accident, including any "subrogation claims by any other party." Howell's motion argued that, subsequent to the April 14, 2003 dismissal order, Grange had paid Grace's own insurer, State Farm Insurance Co. ("State Farm"), \$9,335.30 on a subrogated claim for the expenses incurred by State Farm for Grace's medical care, and that Grace refused to indemnify Grange. Howell asked the court to require Grace to perform on her promise.

{¶6} The trial court denied Howell's motion. It reasoned that, because the amount of the \$9,335.30 paid by Grange was in an amount that had been determined in an inter-company arbitration proceeding between State Farm and Grange to which Grace was not a party, Grace was not bound by her indemnification promise to pay Grange that amount. The court held that Grange must commence a separate action on its indemnification claim against Grace. Howell filed a timely notice of appeal.

ASSIGNMENT OF ERROR

{¶7} "THE TRIAL COURT ERRED IN DENYING THE DEFENDANT-APPELLANT'S MOTION TO ENFORCE THE SETTLEMENT AGREEMENT."

{¶8} The trial court reasoned that, while Grace had promised to indemnify Howell and Grange on State Farm's subrogation claim, the amount of indemnification Grange sought was not enforceable against Grace because she was not a party to the private arbitration between State Farm and Grange in which that amount had been determined. We agree. However, we also believe that the court lacked the power to enforce the promise that Grace made, at least by way of ancillary relief sought in the current proceeding, because any duty Grace had to perform on her promise is a matter dehors the record of the proceeding.

{¶9} Courts possess the general power to enter judgment by consent of the parties for the purpose of executing a compromise and settlement of the claims for relief in an action. In that judgment, which is stipulated by agreement, litigants voluntarily terminate a lawsuit by assenting to specified terms, which the court agrees to enforce as its judgment by signing and journalizing an entry reflecting the terms of the settlement agreement. 46 American Jurisprudence 2d., Judgments, Section 207.

{¶10} Motions to enforce settlement agreements typically involve one party's failure to perform on a promise to settle the case. The adverse party then asks the court to enforce the agreement, which the court may do on a finding that the requirements of a contract are satisfied. The

court then enters a judgment in the action on the claims for relief involved, pursuant to the terms of the settlement agreement.

{¶11} Courts are authorized to enforce the terms of their judgments through post-judgment proceedings. Civ.R. 69 authorizes the court to issue process to execute the term of its judgment. Civ.R. 70 authorizes the court to order a specific action performed. Each is granted on a post-judgment motion, usually filed by a party in whose favor relief was granted in the judgment.

{¶12} Instead of an agreed judgment, parties may elect to terminate a lawsuit upon a compromise and settlement by entering a voluntary stipulation of dismissal by the plaintiff pursuant to Civ.R. 41(A)(1)(a), or filing a stipulation of dismissal signed by all the parties pursuant to Civ.R. 41(A)(1)(b). The stipulation typically terminates the action without granting relief to either party. Therefore, for the terms of Civ.R. 69 or 70 subsequently to apply to enforce the terms of the underlying settlement, the terms of the agreement must be embodied in an order of dismissal or a resulting order must contain a provision for the court's continuing jurisdiction over disputes arising out of the settlement. *Kokkonen v. Guardian Life Ins.Co. Of America* (1994), 511 U.S. 375, 114 S.Ct. 1673, 128 L.Ed.2d 391. 15 American Jurisprudence 2d., Compromise and Settlement, Section 49. If, instead, the court enters a general and unconditional dismissal order, the court cannot

entertain a subsequent motion to enforce a settlement agreement which is de hors the record. *Morgan v. Hughes* (Feb. 12, 2004), Cuyahoga App. No. 82916. Then, a party seeking to enforce the agreement must either file a new, separate action for breach of contract or a motion to vacate the dismissal order.

{¶13} The agreed order of dismissal with prejudice the trial court signed and filed on April 14, 2003 neither expressly embodied the terms of the settlement agreement nor expressly reserved jurisdiction to enforce duties the settlement agreement imposed. Therefore, the trial court was correct in holding that it could not enforce the duty of indemnification that Grace had assumed in the settlement agreement in the same proceeding, and that a new action to enforce Grace's promise to Grange was required.

{¶14} Even had the April 14, 2003 dismissal order imposed an indemnification requirement or reserved jurisdiction, on this record those provisions would have been ineffective for the court to grant the relief sought by Grange's motion. The trial court's jurisdiction had terminated earlier, on March 6, 2003, when the court entered judgment for Grace on the arbitration panel's report and award. The court's judgment was final, and thereafter no claims survived which could be dismissed, voluntarily or otherwise. Therefore, the court lacked jurisdiction to enter the agreed order of voluntary dismissal it filed on April 14, 2003.

{¶15} At oral argument, counsel for Grange argued that the court's March 6, 2003, judgment on the arbitration panel's award was ineffective because his office had not received a copy of it. That fact is not demonstrated by the record. In any event, that failure does not render a judgment ineffective or non-binding. Moreover, in order to avoid the judgment, Grange was required by Mont. Loc.R. 2.35 X(D) to appeal the award, which it failed to do.

{¶16} This is not to say that Grange is without an avenue of relief on its right to indemnification. "Indemnity . . . arises from contract, express or implied, and is a right of a person who has been compelled to pay what another should pay in full to require complete reimbursement." *Travelers Indemnity Co. v. Trowbridge* (1975), 41 Ohio St.2d, 11. Grange may therefore commence an action for breach of contract on Grace's promise to indemnify.

{¶17} "Generally, in an action to recover from an indemnitor on account of a demand upon which there has been a judgment against the indemnitee, the indemnitor is bound by such judgment if he or she had due notice of the suit in which it was rendered and had an opportunity to defend; such a judgment is conclusive evidence against the indemnitor as to the amount of damages sustained." 18 Ohio Jurisprudence 3d., Contribution, Indemnity, and Subrogation, Section 45, pp. 279-280.

{¶18} Grace lacked notice and an opportunity to defend

in the inter-company arbitration proceeding between Grange and State Farm. Therefore, and as the trial court held, Grace is not bound by the arbitration finding that the value of State Farm's subrogated claim is \$9,335.30. That is not to say that Grace is relieved of her duty to indemnify Grange. It merely means that a new proceeding must be commenced by Grange to determine and enforce its right of indemnification. More sensibly, the parties ought to make a good faith effort to determine what costs attributable to the accident were actually paid by State Farm, and then Grace should indemnify Grange that amount.

{¶19} The assignment of error is overruled. The judgment of the trial court will be affirmed.

Judgment affirmed.

FAIN, P.J. and YOUNG, J., concur.

Copies mailed to:

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Hon. Jeffrey E. Froelich