[Cite as *Gough Family Trust v. Vos,* 2018-Ohio-5390.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
COLUMBIANA COUNTY

GOUGH FAMILY TRUST, et al.,

Plaintiffs-Appellees,

v.

DONALD L. VOS,

Defendant-Appellant.

OPINION AND JUDGMENT ENTRY
Case No. 17 CO 0035

Civil Appeal from the
Court of Common Pleas of Columbiana County, Ohio
Case No. 2016 CVG 2138

BEFORE:
Kathleen Bartlett, Cheryl L. Waite, Carol Ann Robb, Judges.

JUDGMENT:
AFFIRMED

Atty. K. Brett Apple, P.O. Box 770, Salem, Ohio 44460, for Plaintiffs-Appellees and

Donald Vos, Pro-se, 39916 Hazel Run Road, Hammondsville, Ohio 43930, for Defendant-Appellant.

Dated: December 31, 2018

BARTLETT, J.

{¶1} Defendant-Appellant Donald L. Vos appeals the September 15, 2017 decision of the Columbiana County Municipal Court entering judgment in accordance with a settlement that was reached among the parties. For the following reasons, Appellant's appeal is barred by *res* judicata and further rendered moot by the parties' settlement. Therefore, judgment of the trial court is affirmed.

Facts & Procedural History

{¶2} The parties in the present action have previously litigated the ownership of the property at issue in *Jefferson Gough, et al. v. Donald L. Vos,* Columbiana County Court of Common Pleas, Case No. 2010 CV 391, Seventh District Court of Appeals, Case No. 13 CO 29. In the prior litigation, it was determined that Appellant held no ownership interest in the property. Despite the previous adjudication, Appellant remained on the property of Appellee. The parties did not have a written or oral agreement that permitted Appellant to remain on Appellee's property, and the Appellant did not make payments for rent to Appellees.

{¶3} Appellees served notice upon Appellant to leave the property. Upon Appellant's failure to vacate the property, Appellee filed the underlying action in the Columbiana Municipal Court based upon civil trespass. Appellant argued to the trial court that a civil trespass claim does not exist under Ohio law that is applicable to the case, and the trial court granted the parties the opportunity to file briefs on the issue of civil trespass. (3/3/17 JE).

{¶4} On April 3, 2017, Appellees filed a Brief in Support of Civil Trespass Claim stating that Appellant was served with a 30 Day Notice to Leave Premises and Civil Trespass on June 23, 2016, and on December 22, 2016 Appellees filed the underlying civil trespass complaint. Appellees sought to remove Appellant from the 18 acres of land owned by the Gough Family Trust. Appellees noted that the issue of ownership of the subject premises was previously litigated in the matter of *Jefferson Gough, et al. v. Donald L. Vos,* Columbiana County Court of Common Pleas, Case No 2010 CV 391, and Seventh District Court of Appeals, Case No. 13 CO 29. The prior litigation determined that Appellant held no ownership interest in the subject premises.

Appellees asserted that any attempts by Appellant to argue before the trial court that he had any "rights" or "permission" to be on the property were barred by *res judicata.*

{¶5} On April 13, 2017, Appellant filed a Reply Brief to Plaintiff's Brief in Support of Civil Trespass Claim, asserting that he "claims ownership by contract" and that since he was in possession of the property that a civil trespass claim could not be asserted against him, because "Donald L. Vos gives Donald L. Vos full consent to be on the property that I the Defendant, Donald L. Vos am on." (Reply Brief at 2). Appellant further argued that a "fraud upon the court" had occurred in the trial before Judge Washam in the Columbiana County Common Pleas Court, and that the judgment entry of Judge Washam was "of no effect and void." (Reply Brief at 4). Appellant also argued that the statute of limitations applied, referring to the 2011 notice to leave the property which was served as part of the prior Common Pleas Court action. (Reply Brief at 5).

{¶6} On April 26, 2017, Appellees filed a Reply Brief in Support of Civil Trespass Claim. Appellees argue that Appellant was not the rightful owner or possessor of the land in question, but rather was a trespasser. Despite the prior court rulings and the Appellees' demands to leave the premises, Appellant remained.

{¶7} On May 1, 2017, Appellant filed a Response to Plaintiff's Reply Brief in Support of Civil Trespass Claim. Appellant repeats his position that a civil trespass claim is not valid since he is in possession of the property, and further states that Judge Washam and counsel for Appellees acted unconstitutionally,[1] and that the claim is barred by the statute of limitations.

{¶8} On May 22, 2017, Appellees filed an Amended Complaint (Forcible Entry & Detainer & Civil Trespass), which outlines that the Common Pleas Court decision was rendered on May 29, 2013, followed by this Court's dismissal of the appeal as untimely on December 22, 2014, and subsequently the Ohio Supreme Court and U.S. Supreme Courts declined to accept jurisdiction on May 20, 2015 and October 19, 2015, respectively. Appellees argue that Appellant has unlawfully remained on the property, and sought an order removing Appellant from the premises, as well as damages for the

[1] Appellant states that Disciplinary Counsel will decide that issue, and attaches two letters from Disciplinary Counsel about the grievance that he filed, which also state "all matters concerning this investigation are confidential." (4/19/17 Letters attached to Reply). Appellant has disregarded the confidential nature of such investigation by including the letters with a public filing in the trial court.

time that Appellant remained on the property.

{¶9} On June 28, 2017, Appellant filed a "Reply Brief to Plaintiff's Amended Complaint to Forcible Entry and Detainer Civil Trespass" stating that Appellees did not seek leave to amend, the Amended Complaint was not served upon Appellant, statute of limitations apply, and Appellant continues to assert ownership of the premises at issue.

{¶10} The trial court issued an August 24, 2017 Opinion and Judgment Entry. The court stated that the complaint was originally filed as a claimed civil trespass and subsequently amended to include a forcible entry and detainer cause of action. It further states the "Columbiana County Common Pleas Court has unequivocally settled certain of the issues between the parties in a Decision rendered on May 29, 2013, in which Judge Washam determined that Plaintiff was at that time the title owner of the real estate in question and that Defendant had been living there pursuant to a verbal agreement." (8/24/17 Opinion and Judgment Entry at 1). The court further stated that there was a prior finding that the agreement relating to purchase of all or part of the land was unenforceable, but that there was an agreement by which Mr. Vos was in possession of the property. *Id.* The court noted "this ruling is binding upon the Court in the present case through res judicata." *Id.* The court further stated that "the sole issue before the court at this point is whether Plaintiff is entitled to possession of the premises claimed to be owned by Plaintiff, generally known as the "First Cause" in a Forcible Entry and Detainer case." *Id.* at 2. The court specifically overruled the motion included within Defendant's pleadings seeking a dismissal based upon the statute of limitations, and scheduled the September 15, 2017 forcible entry and detainer (FED) hearing on the issue of possession. *Id*.

{¶11} On August 30, 2017, Appellant filed an "Objection to the Court Opinion and Judgment Entry Dated August 24, 2017 and Hereby Requests a Reconsideration and Correction of the Judge's Opinion and Judgment Entry." Appellant again asserts arguments regarding the amended complaint, statute of limitations, whether civil trespass was an available claim, and that there was no service of the amended complaint. At the end of his "Objection" Appellant requested a trial by jury if the case moved forward.

{¶12} The trial court held the first cause forcible entry and detainer hearing on September 15, 2017. Before the conclusion of the hearing, the parties met to discuss a resolution of the case. (9/15/17 Transcript, pg. 52). Upon returning to the court, the parties informed the judge that a settlement had been reached, and read the terms of the agreement into the record. (*Id.* at pg. 52-58). The parties recited the settlement terms, which were adopted in the trial court's September 15, 2017 Judgment Entry and Opinion, and were as follows: Appellant would consent to judgment on the forcible entry and detainer and vacate the property within sixty (60) days; Appellees would sign an entry to release funds to Appellant held by the Columbiana County Clerk of Courts; Appellees would dismiss their remaining cause of action, and Appellant would forego any type of appeal. (*Id.*)

{¶13} The September 15, 2017 Judgment Entry and Opinion also states that "[p]rior to trial, the court overruled the motion filed by Defendant on August 30, 2017," titled "Objection to the Court Opinion and Judgment Entry of Judge Charles C. Amato Dated: August 24, 2017, and Hereby Requests a Reconsideration and Correction of the Judge's Opinion and Judgment Entry."

{¶14} On October 5, 2017, Appellant filed a Request for Stay of Judgment Entry, stating there was an agreement reached upon which Appellant would not file an appeal, and that Appellant was to receive money put into escrow which included interest. Appellant stated that he "question [sic] Attorney K. Brett Apple's secretary about the interest and the Defendant was informed by the secretary that the defendant would receive the interest as per the Court Order. The Plaintiffs and or their Attorney, Attorney K. Brett Apple have failed and refused to give the Defendant the Post trial Interest prior to the end of the 30 Day Appeal Period, thereby breaking the agreement the Defendant had with the Plaintiffs not to file an Appeal." As a result, Appellant filed the appeal and requested a stay of the September 15, 2017 Judgment Entry.

{¶15} On October 13, 2017, the trial court granted the request for stay "conditioned upon posting by Defendant of a supersedeas bond with the Clerk of this court in the amount of $10,000.00 cash or surety. In computing this amount, the court has taken into account the rental value of the real property owned by Plaintiff which is now in the possession of Defendant." The temporary stay of a writ of restitution was

granted until October 27, 2017. The stay would be lifted if the Defendant failed to post the required supersedeas bond.

{¶16} On October 19, 2017, Appellant filed a Request for Stay with this Court outlining the issues raised in the appeal, including a jury trial request, forcible entry and detainer, and the statute of limitations.

{¶17} On November 6, 2017, this Court denied Appellant's Motion upon the basis that a stay was granted by the trial court, rendering Appellant's motion moot.

{¶18} On November 6, 2017, Appellant filed a "Motion to Have Court Reconsider Its Order Calling Motion for a Stay Moot." In that Motion, Appellant asserts that he is a pauper, and raises issues regarding the forcible entry and detainer action, statute of limitations, and a jury trial request.

{¶19} On November 20, 2017, this Court issued a judgment entry denying Appellant's motion for reconsideration. This Court stated "If Appellant has not posted the bond, then no permanent stay will be in effect pursuant to the terms of the trial court's order. As we previously stated, the trial court has issued a stay order and there is no reason for this Court to duplicate the order. Whether or not a statute of limitations applies may be part of the subject matter of the appeal, but it is not a basis for issuing a stay above and beyond the one issued by the trial court."

{¶20} Appellant never posted the supersedeas bond for the stay.

{¶21} Appellant subsequently filed his Brief with this Court on December 26, 2017.

Appellant's Assignments of Error[2]

{¶22} Appellant identifies twelve errors in his Brief, several of which overlap and can be categorized as follows: Errors I and IX pertain to statute of limitations arguments for a forcible entry and detainer action; Errors II, III, and IV pertain to Appellant's request for a jury trial; Errors V and X pertain to issues of rent in a forcible entry and detainer action; Error VI alleges that the trial judge acted unconstitutionally in ruling on common law; Error VII pertains to proof of service; Errors VIII and XII pertain to res judicata, and Error XI contends that the trial court was not provided any evidence of the Trustee of the Trust. (Appellant Brief at pgs. 3-5).

[2] The assignments of error have been consolidated for purposes of discussion herein.

{¶23} All of Appellant's issues were raised by Appellant in his pleadings and at the hearing before the trial court which resulted in the settlement agreement of the parties that was adopted by the trial court. The settlement agreement covered all pending issues and resulted in the Appellees dismissing their remaining causes of action with prejudice. (9/15/17 Tr. at pgs. 53-54; 9/15/17 JE at ¶ 3). Appellant admitted the settlement on the record:

> **The Court:** Mr. Vos. . . . I want to make sure that you understand what Attorney Apple just said, and that is that you are agreeing – what I heard was, that you agree that if you have not vacated the premises, let's say November 15th, which is actually probably 61 days from now, on that date, if you have not voluntarily vacated, the Plaintiff may come in and obtain a writ of possession for the sheriff to serve upon you to put them back into possession.
>
> **Mr. Vos**: Correct.
>
> **The Court**: That also included in this agreement is that the Plaintiff will dismiss any and all other causes of action in this case.
>
> **Mr. Vos**: Correct.
>
> **The Court**: Further, that you will not appeal the decision on the FED decision. And finally, that the Plaintiff will take what steps are necessary to cause the release of the money being held by the clerk in the Judge Washam case to be released to you.
>
> **Mr. Vos**: Yes, sir.

Based upon the acknowledgement on the record of the parties' settlement agreement, the trial judge prepared the September 15, 2017 Judgment Entry reflecting the agreement of the party. (9/15/17 Transcript at 57; 9/15/17 JE).

{¶24} The assignments of error raised in this appeal pertain to arguments that were made by the Appellant to the trial court. However, the arguments were not ruled

upon because the parties took a break during the hearing and returned with a settlement of the case. The trial court memorialized the parties' agreement on the record and in its September 15, 2017 Judgment Entry. Appellant has continued to drag out this case, ignoring the underlying judgment (which appeals were completely exhausted), and now ignoring the settlement agreement of the parties. All of the assignments of error identified by Appellant are issues that were raised before the trial court and incorporated into the settlement judgment entry, which resulted in the dismissal of the remaining claims asserted by Appellees. Appellant wants this Court to disregard the fact that the parties had a settlement that was adopted by the trial court. Appellant is attempting to litigate all of the issues raised before the trial court at the appellate court level. An appellate court's duty "is to decide actual controversies between parties and to enter judgments capable of enforcement." *State v. Bistricky*, 66 Ohio App.3d 395, 397, 584 N.E.2d 75 (1990). The court is not required to give mere advisory opinions or to rule on questions of law which cannot affect the matters in issue in the case before it. *Id.*

{¶25} "A settlement agreement between parties operates as *res judicata* to the same extent as an adjudication on the merits." *Bogart v. Gutmann,* 2nd Dist. No. 2017-CA-27, 2018-Ohio-2331, ¶ 12, citing *MCM Funding 1997-1, Inc. v. Amware Distrib. Warehouses M & M, L.L.C.*, 8th Dist. No. 87041, 2006-Ohio-332, ¶ 35. See also *Jammal v. American Family Ins. Grp.*, N.D.Ohio Case No. 1:13 CV 437, 2015 WL 1810304 (Apr. 21, 2015) ("Ohio law holds that a settlement agreement between parties resulting in a dismissal with prejudice operates as *res judicata* to the same extent as an adjudication on the merits."). Here, since the parties entered into a settlement agreement that was adopted by the trial court, the settlement entry operates as *res judicata* as to any claims that were raised before the trial court. If Appellant disputes whether the Appellees have complied with the settlement agreement, then appropriate action can be taken with regard to the settlement agreement. Appellant's assignments of error are barred by *res judicata.*

{¶26} The settlement entry has also rendered Appellant's assignments of error moot. See *Barstow v. O.U. Real Estate III, Inc.,* 4th Dist. No. 01CA49, 2002-Ohio-4989, ¶ 5 (stating that since the parties entered into a settlement agreement, any issues

surrounding the trial court's denial of summary judgment that occurred prior to the bench trial (during which the parties reached a settlement and read the agreement into the record), like all disputes before the court in the case, were resolved by the settlement agreement, rendering those issues moot). A valid settlement agreement covering all disputed issues removes those issues from the tribunal's consideration and renders further consideration by the tribunal of the substantive portion of the dispute unnecessary. *Nat'l Audobon Soc. v. Schregardus* 133 Ohio App.3d 245, 248, 727 N.E.2d 614 (10th Dist.1999).

{¶27} "The doctrine of mootness is rooted both in the 'case' or 'controversy' language of Section 2, Article III of the United States Constitution and in the general notion of judicial restraint." *See James A. Keller, Inc. v. Flaherty,* 74 Ohio App.3d 788, 791, 600 N.E.2d 736 (10th Dist.1991) citing 1 Rotunda, Novak & Young, *Treatise on Constitutional Law: Substance and Procedure,* 97, Section 2.13 (1986). "While Ohio has no constitutional counterpart to Section 2, Article III, Ohio courts have long recognized that a court cannot entertain jurisdiction over a moot controversy." *Id.*

{¶28} A case becomes moot if at any stage there ceases to be an actual controversy between the parties. *See Miner v. Witt,* 82 Ohio St. 237, 92 N.E. 21 (1910); *see also Fortner v. Thomas,* 22 Ohio St.2d 13, 14, 257 N.E.2d 371 (1970) ("[it] has become settled judicial responsibility for courts to refrain from giving opinions on abstract propositions and to avoid the imposition by judgment of premature declarations or advice upon potential controversies."). A case or controversy is lacking and the case is moot "when its issues are no longer 'live,' or when the parties no longer have a legally cognizable interest in the outcome. *U.S. Bank Natl. Assn. v. Marcino,* 7th Dist. No. 09 JE 29, 2010-Ohio-6512, ¶ 7, citing *State ex rel. Gaylor, Inc. v. Goodenow,* 125 Ohio St.3d 407, 2010-Ohio-1844, 928 N.E.2d 728, ¶ 10. *Los Angeles v. Davis,* 440 U.S. 625, 631, 99 S.Ct. 1379, 59 L.Ed.2d 642 (1979), quoting *Powell v. McCormack,* 395 U.S. 486, 496, 89 S.Ct. 1944, 23 L.Ed.2d 491 (1969). *City of Erie v. Pap's A.M.,* 529 U.S. 277, 287, 120 S.Ct. 1382, 146 L.Ed.2d 265 (2000). Moreover, the Supreme Court of Ohio has advised us that it is reversible error for an appellate court to consider the merits of an appeal that has become moot. *See State v. Berndt*, 29 Ohio St.3d 3, 4, 504 N.E.2d 712 (1987). Here, the parties resolved the underlying controversy with a

settlement of all issues pending before the trial court. As a result, those issues are moot, rendering Appellant's appeal moot. This Court is not able to give an opinion on issues that have already been resolved by the parties.

{¶29} Appellant has waived the issues raised in his assignments of error. The incorporation of a contested issue into an agreed entry constitutes waiver of that issue on appeal unless specifically preserved by the objecting party. *See Huffer v. Huffer,* 10th Dist. No. 09AP–574, 2010–Ohio–1223, ¶ 13 (holding appellant waived assigning as error on appeal the substance of the temporary orders by agreeing to incorporate their modification into an agreed entry); *see also Blinder, Robinson & Co., Inc. v. Ohio Dept. of Commerce,* 10th Dist. No. 89AP–712 (Mar. 22, 1990) (holding appellant effectively waived the issue on appeal when he failed to timely object and then stipulated to a resolution of the matter by way of an agreed entry).

{¶30} Thus, based on all of the above, Appellant's assignments of error are barred by *res judicata* and further rendered moot based upon the settlement of the underlying action. Therefore, judgment of the trial court is affirmed.

Waite, J., concurs.

Robb, P.J., concurs.

For the reasons stated in the Opinion rendered herein, the assignments of error are barred by *res judicata* and rendered moot based upon the settlement of the underlying action. Judgment of the trial court is affirmed. Costs taxed against Appellant.

A certified copy of this opinion and judgment entry shall constitute the mandate in this case pursuant to Rule 27 of the Rules of Appellate Procedure. It is ordered that a certified copy be sent by the clerk to the trial court to carry this judgment into execution.

NOTICE TO COUNSEL

This document constitutes a final judgment entry.