

[Cite as *State ex rel. Delmonte v. Woodmere*, 2005-Ohio-6489.]

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT
COUNTY OF CUYAHOGA
No. 86011

STATE OF OHIO, EX REL., :
JORDAN S. DELMONTE :

Plaintiff-Appellant/ : JOURNAL ENTRY
Cross-Appellee :

vs. : AND

VILLAGE OF WOODMERE, ET AL., : OPINION
Defendants-Appellees/ :
Cross-Appellants :

DATE OF ANNOUNCEMENT : DECEMBER 8, 2005
OF DECISION :

CHARACTER OF PROCEEDING : Civil appeal from
Common Pleas Court
Case No. CV-500092

JUDGMENT : AFFIRMED

DATE OF JOURNALIZATION :

APPEARANCES:

For Plaintiff-Appellant/ :
Cross-Appellee: JORDAN S. DELMONTE
707 Brookpark Road
Brooklyn Hts., Ohio 44109

For Defendants-Appellants/ :
Cross-Appellants: BRADLEY A. SHERMAN
ROBERT M. WOLFF
Duvin, Cahn & Hutton
1301 East 9th Street
Erievue Tower - 20th Floor
Cleveland, Ohio 44114-1886

MARY EILEEN KILBANE, J.:

{¶ 1} Relator Jordan S. Delmonte ("Delmonte") appeals from the trial court's determination that his case against the Village of Woodmere, et al. ("Woodmere") was settled and dismissed with prejudice. Woodmere appeals the decision of the trial court denying it attorney fees. For the following reasons, we affirm the trial court's decision as it relates to both Delmonte and Woodmere's appeals.

{¶ 2} On April 28, 2003, Delmonte filed a complaint in mandamus against Woodmere seeking to compel Woodmere to allow him to inspect certain public records maintained by Woodmere. See *State of Ohio, Ex Rel. Jordan S. Delmonte v. Village of Woodmere*, Cuyahoga App. No. 83293 at paragraph 2, 2004-Ohio-2340. Delmonte claimed that Woodmere improperly refused to produce the requested documents for inspection and that Woodmere's conduct violated R.C. 149.43. *Delmonte, supra*. Delmonte also alleged that "Woodmere removed and destroyed certain public records and that his continued demands to access public documents were met with threats and intimidation by Woodmere." *Delmonte, supra*.

{¶ 3} On May 27, 2003, Woodmere filed an answer containing affirmative defenses as well as a motion to dismiss the complaint. *Id.* On July 2, 2003, the trial court granted Woodmere's motion to dismiss. *Id.* On that same day, Delmonte filed a Civ.R. 60 motion to vacate the dismissal of his first and fourth claims, which

Woodmere opposed. Id. "On July 25, 2003, the trial court issued a nunc pro tunc order granting Woodmere's motion to dismiss." Id.

{¶ 4} Delmonte then appealed to this court arguing that the trial court erred in dismissing the first and fourth causes of action for failure to state a claim for which relief may be granted. Id. at paragraph 5. This appellate court affirmed the trial court's dismissal of count one, but reversed its dismissal on count four and remanded for further proceedings. Id. at paragraph 11. The basis for the remand was that this court found that the trial court must have improperly relied on information outside of the four corners of the complaint in ruling on the motion. Id. at paragraph 11.

{¶ 5} After the announcement of the decision, both parties filed several motions, including a motion by Delmonte for leave to file an amended complaint consisting of thirty-two separate claims. The trial court stayed discovery pending the case management conference. After this order, Delmonte issued subpoenas *duces tecum* ordering no less than nine individuals to appear at the case management conference with the requested documents. The trial court informed Delmonte that no witnesses were to appear.

{¶ 6} On June 24, 2004, Delmonte filed a motion for leave to withdraw his motion to file an amended complaint. However, on August 31, 2004, Delmonte filed another motion for leave to file an amended complaint, which included public records claims raised for

the first time. The trial court denied his motion for leave to file an amended complaint on September 29, 2004.

{¶ 7} On September 15, 2004, Delmonte filed with the trial court an offer of settlement, which made the following offer:

"Plaintiff will forego almost all of the documents demanded in his original complaint as well as the first four counts of his amended complaint, and will release and/or dismiss with prejudice all of those claims. In return, Plaintiff asks Defendant to either produce or pay the statutory failure penalty for the failure to produce, the documents referred to in paragraphs twelve (12), thirteen (13), fourteen (14), twenty-six (26), thirty (30), thirty-one (31), thirty-seven (37), thirty-nine (39), forty-one (41), and forty-three (43) of Plaintiff's Amended Complaint."

{¶ 8} On September 17, 2004, Woodmere accepted Delmonte's offer in person and in written form on September 22, 2004. On September 29, 2004, counsel for Woodmere sent Delmonte a letter informing them that they were assembling all of the public records requested with the exception of the requested personnel files and the privileged billing statements for the law firm of Duvin, Cahn & Hutton. However, Woodmere informed Delmonte that the excepted personnel files were available for him to inspect at Village Hall, and, that they would provide the billing records for in camera inspection by the trial court. In response, Delmonte confirmed that he would arrive at Village Hall on October 5, 2004, to see the records. Woodmere alleges that they completed their portion of the settlement agreement on October 5, 2004, after supplying Delmonte with all the requested public records.

{¶ 9} However, on September 20, 2004, Delmonte requested a \$16,000 payment from Woodmere, or alternatively offered to dismiss certain claims in return for Woodmere's promise not to sue for vexatious litigation. On September 28, Delmonte filed a motion to amend supplemental offer, and on September 30, he sent a letter to Woodmere stating that he "did not intend to review any billing statements from you [Robert M. Wolf, Duvin, Cahn & Hutton] or any other defense attorney in this matter." Then on November 29, 2004, he announced "that he is withdrawing all settlement offers currently existing except, of course, any offers you claim were accepted and carried out by your clients."

{¶ 10} Woodmere attempted to rectify the situation by sending Delmonte a letter reminding him that he had not complied with his part of the settlement agreement. However, after Delmonte responded by withdrawing all settlement offers, Woodmere filed a motion to enforce settlement on December 14, 2004. Woodmere also requested attorney fees incurred in connection with the prosecution of its motion to enforce. Delmonte filed his own motion to enforce settlement on that same day arguing that Woodmere did not provide him with the billing records for Duvin, Cahn & Hutton.

{¶ 11} Following the cross-motions to enforce settlement, Delmonte filed a "Motion to Compel Production of Documents and Witnesses" (asking the court to find that Woodmere's attorney had no authority to enter into the settlement agreement; asking the

court to compel production of the lawyer's billing/time sheets; and asking the court to appoint a receiver to conduct an inventory of Woodmere documents), and a "Notice of Intent to Call Judge as Witness."

{¶ 12} On February 14, 2005, the trial court found that "all documents and records sought by Appellant, which serve as the basis for the initial public records request and thus for this lawsuit have been provided or made available to him for inspection." The trial court then marked the case settled and dismissed and ordered each side to pay its own costs.

{¶ 13} Eight days later, Delmonte filed this appeal raising the five assignments of error contained in the appendix to this opinion. Woodmere filed a cross-appeal, raising the single assignment of error also contained in the appendix to this opinion.

{¶ 14} Prior to addressing the merits of this opinion, this Court will address Delmonte's motion for reconsideration filed November 1, 2005. On October 27, this court issued a sua sponte order striking the thirty-six page brief of cross-appellee/reply of appellant. Delmonte's motion asks this Court to reconsider its order and allow his reply brief to be part of the record.

{¶ 15} In his motion, Delmonte argues that by striking his reply brief, this court claimed the arguments contained in the brief were not present. He further argues that this court violated Loc.App. R. 16(B) by striking his reply brief without allowing him the

opportunity to correct and re-file the brief. We disagree.

{¶ 16} This court struck Delmonte's thirty-six-page reply brief because though it purported to address Woodmere's cross-assignment of error, it merely re-argued his appeal. By striking Delmonte's brief, this court is not claiming that his arguments are not contained in his reply brief, we are merely recognizing that those arguments do not relate to Woodmere's appeal for attorney fees. None of the arguments contained in Delmonte's reply brief address attorney fees, the standard of review concerning attorney fees or even why attorney fees should be denied. Delmonte simply used his reply brief as an opportunity to re-argue his case.

{¶ 17} Delmonte's argument that this Court violated Loc. App. R. 16(B) is without merit. Though the rule does allow a nonconforming brief to be returned to the party with an opportunity for correction, the language contained in the rule is discretionary, not mandatory. Considering Delmonte filed his motion for reconsideration on November 1, 2005, and oral argument on this case was scheduled for November 2, 2005, no time existed for correction of the nonconforming brief.

{¶ 18} Accordingly, we deny Delmonte's motion for reconsideration.

{¶ 19} The standard of review to be applied to a ruling on a motion to enforce a settlement agreement depends primarily on the question presented. *Kaple v. Benchmark Materials, et al.*, Seneca

App. No. 13-03-60, 2004-Ohio-2620. If the question is an evidentiary one, this Court will not overturn the trial court's finding if there was sufficient evidence to support such finding. *Chirchiglia v. Bur. of Workers' Comp.* (2000), 138 Ohio App.3d 676, 679. If the dispute is a question of law, an appellate court must review the decision de novo to determine whether the trial court's decision to enforce the settlement agreement is based upon an erroneous standard or a misconstruction of the law. *Continental W. Condominium Unit Owners Assn. v. Howard E. Ferguson, Inc.*, 74 Ohio St.3d 501, 502, 1996-Ohio-158.

{¶ 20} In his first assignment of error, Delmonte argues that the trial court erred in dismissing his complaint because dismissal was not part of the settlement agreement and because no dispositive motion existed. We disagree.

{¶ 21} This assigned error presents an evidentiary question and, therefore, this court will not overturn the trial court's findings if sufficient evidence exists to support such findings. *Chirchiglia, supra.*

{¶ 22} As quoted above, Delmonte's offer of settlement, which Woodmere accepted, offered to "release and/or dismiss with prejudice" all remaining claims if Woodmere supplied it with ten specific requests for public documents. In its memorandum of opinion and order, the trial court found "that all documents and records sought by Plaintiff *** have been provided to Plaintiff or

made available to him for inspection. As such pursuant to the settlement agreement referenced by all parties, this matter is marked settled and dismissed."

{¶ 23} In its motion to enforce settlement, Woodmere supplied documentary evidence demonstrating to the trial court that it had supplied Delmonte with all requested public records. The evidence consisted of communications between Woodmere's counsel and Delmonte regarding when the requested documents would be ready; confirmation of delivery of the requested documents; Delmonte's intent *not* to review any billing records from Woodmere's counsel; confirmation that personnel files would be available October 5, 2004, for Delmonte's review at Village Hall; and, confirmation of the availability of both the Police Chief and Fire Chief for deposition.

{¶ 24} Therefore, sufficient evidence existed to support the trial court's finding that Delmonte received all requested documents, and that the within action should have been marked settled and dismissed in accordance with the settlement agreement.

{¶ 25} Delmonte's argument that there needed to be a pending dispositive motion before the trial court could dismiss the action is erroneous. A validly entered settlement agreement is enforceable by either party. *Kaple*, supra. Delmonte does not attack the validity of the settlement agreement under this assignment of error. Therefore, we shall go no further with our

analysis.

{¶ 26} Delmonte's first assignment of error is overruled.

{¶ 27} In his second assignment of error, Delmonte argues that the settlement agreement lacked the element of consideration, which is required for a valid contract. We disagree.

{¶ 28} In this assigned error, Delmonte contests the conclusion of law reached by the trial court. Therefore, we must review the decision de novo and determine whether the court's decision to enforce the settlement was based upon an erroneous standard or a misconstruction of the law. *Continental*, supra.

{¶ 29} A settlement agreement is viewed as a particularized form of a contract. *Kaple*, supra, citing *Noroski v. Fallet* (1982), 2 Ohio St.3d 77, 79. It is "a contract designed to terminate a claim by preventing or ending litigation and *** such agreements are valid and enforceable by either party." *Kaple*, citing *Spercel v. Sterling Indus., Inc.* (1972), 31 Ohio St.2d 36, 38. "Further, settlement agreements are highly favored in law." *Kaple*, citing *State ex rel. Wright v. Weyandt* (1977), 50 Ohio St.2d 194.

{¶ 30} To constitute a valid settlement agreement, the terms of the agreement must be reasonably certain and clear. *Rulli v. Fan Co.*, 79 Ohio St.3d 374, 1997-Ohio-380. However, the Ohio Supreme Court has acknowledged that "all agreements have some degree of indefiniteness and some degree of uncertainty. In spite of its defects, language renders a practical service. In spite of

ignorance as to the language they speak and write, with resulting error and misunderstanding, people must be held to the promises they make." *Kostelnik v. Helper*, 96 Ohio St.3d 1, 2002-Ohio-2985, quoting 1 Corbin on Contracts (Perillo Rev.Ed. 1993) 530, Section 4.1.

{¶ 31} The elements necessary to form a contract include "an offer, acceptance, contractual capacity, consideration (the bargained for legal benefit and/or detriment), a manifestation of mutual assent and legality of object of consideration." *Kostelnik*, at paragraph 16. Delmonte does not challenge any element of contract other than consideration.

{¶ 32} In this assigned error, Delmonte argues that because the settlement agreement only required Woodmere to produce public records, which they are required to do so by R.C. 149.43, no consideration exists to support the agreement. In response, Woodmere argues that it supplied documents to Delmonte for which his entitlement was in dispute, in exchange for a dismissal of the lawsuit.

{¶ 33} Consideration may consist either in a detriment to the promisee or a benefit to the promisor. *Ford v. Tandy Transp., Inc.* (1993), 86 Ohio App.3d 364, 384. The consideration given by each party to a contract need not be expressed and "may be inferred from the terms and obvious import of the contract." *Nilavar v. Osborn* (1998), 127 Ohio App.3d 1, 15, citing 17 Ohio Jurisprudence 3d 478,

Contracts, Section 46. Once consideration is shown, a court will not generally inquire into the adequacy of the consideration. *Ford*, supra, at 384. "To compromise consideration, however, a benefit or detriment must be something intended by the parties as such; it cannot be something merely incidental to the contract." *Nilavar*, at 15, citing 17 Ohio Jurisprudence 3d 486-87, Contracts, Section 54.

{¶ 34} In the offer of settlement drafted by Delmonte and accepted by Woodmere, the terms are clear. Delmonte agreed to "release and/or dismiss with prejudice" his claims in exchange for receipt of ten groups of documents or receipt of the statutory failure penalty. In accepting the agreement, Woodmere agreed to supply the requested documents, or pay the statutory penalty for failure to supply, in exchange for the dismissal of Delmonte's lawsuit. Given this arrangement, we find that the element of consideration is easily inferred.

{¶ 35} Delmonte's second assignment of error is overruled.

{¶ 36} In his third assignment of error, Delmonte argues that because the terms of the settlement agreement were ambiguous, the trial court erred when it failed to conduct an evidentiary hearing. We disagree.

{¶ 37} This assignment of error presents an evidentiary question and accordingly, this Court will not overturn the trial court's findings if sufficient evidence exists to support such findings.

Chirchiglia, supra.

{¶ 38} The Ohio Supreme Court has held that "where the meaning of terms of a settlement agreement is disputed, or where there is a dispute that contests the existence of a settlement agreement, a trial court must conduct an evidentiary hearing prior to entering judgment." *Rulli*, at syllabus. However, unlike the agreement in *Rulli*, where the parties did not produce any agreement for the trial court and disputed every element of the purported agreement, the present case is easily distinguishable.

{¶ 39} Here, Delmonte drafted the written offer of settlement, filed the written offer of settlement with the trial court, and both parties filed motions to enforce the settlement agreement. Moreover, in their motions to enforce settlement, the parties merely allege that the other party failed to fulfill their obligations under the settlement agreement. Neither party alleged any ambiguity in the terms or meaning of the agreement.

{¶ 40} Delmonte raised his argument that the terms of the settlement agreement were ambiguous for the first time in his appellate brief. Accordingly, any such argument is waived.

{¶ 41} This Court finds that the trial court had before it sufficient evidence to demonstrate the existence of a valid settlement agreement and a lack of dispute over the meaning of terms in the agreement. Therefore, the trial court did not err when it ruled on the motions to enforce settlement without holding

an evidentiary hearing.

{¶ 42} Delmote's third assignment of error is overruled.

{¶ 43} In Delmonte's fourth assignment of error, he argues that the trial court erred in dismissing the within action because such dismissal was in direct contravention of its prior decision of *State of Ohio, Ex Rel. Jordan S. Delmonte v. Village of Woodmere supra.*, and because the trial court failed to provide him with notice and an opportunity to be heard. We disagree.

{¶ 44} This appellate court's prior decision, hereafter referred to as Delmonte I, has no bearing on the issues presented in the present appeal, hereafter referred to as Delmonte II. The Delmonte I appeal dealt with the grant of a motion to dismiss for failure to state a claim upon which relief may be granted. Delmonte II deals with the trial court's grant of a motion to enforce settlement. Moreover, this court released Delmonte I on May 6, 2004, well before Delmonte filed his offer of settlement, well before Woodmere accepted the offer, and well before Woodmere complied with the settlement agreement as this court already determined in its analysis of the first assignment of error.

{¶ 45} Delmonte next argues that the trial court failed to provide notice or the opportunity to be heard. In his brief, Delmonte claims that

"[t]here was no motion or any pleading pending when the trial court made this ruling, which ruling is obviously evidentiary and on the merits. It is axiomatic that a

ruling on the merits cannot be made until notice is given to all parties in advance of such ruling, and an opportunity is afforded the parties to be heard.”

{¶ 46} This is a misstatement of fact. On December 14, 2004, both Woodmere and Delmonte filed motions to enforce settlement. By filing his motion, Delmonte was given his opportunity to be heard and also put on notice that the trial court would make a ruling.

{¶ 47} Delmonte’s fourth assignment of error is overruled.

{¶ 48} In his fifth and final assignment of error, Delmonte argues that the trial court abused its discretion when it failed to enter judgment in his favor and in failing to hold an evidentiary hearing on damages. We disagree.

{¶ 49} In this Court’s discussion of Delmonte’s first assigned error, we found sufficient evidence existed to support the trial court’s finding that Delmonte received all requested documents, and that the terms of the settlement agreement had been complied with, rendering the case settled and dismissed.

{¶ 50} Accordingly, Delmonte’s fifth assignment of error is rendered moot.

{¶ 51} We therefore, affirm the trial court’s judgment as it relates to Delmonte’s appeal.

{¶ 52} In its cross-assignment of error, Woodmere argues that the trial court erred when it failed to grant its request for attorney fees, or when it failed to hold a hearing on that request.

We disagree.

{¶ 53} The awarding of attorney fees is within the sound discretion of the trial court. *Tovar v. Tovar* (November 10, 1993), Cuyahoga App. No. 63933, 1993 Ohio App. LEXIS 5322. Thus, an award of attorney fees will only be disturbed upon a finding of an abuse of discretion. *Tovar, supra*. "The term abuse of discretion connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable." *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219. When applying the abuse of discretion standard, a reviewing court is not free to merely substitute its judgment for that of the trial court. *R.C.H. Co., An Ohio Partnership v. 3-J Machining Service, Inc., et al.*, Cuyahoga App. No. 82671, 2004-Ohio-57.

{¶ 54} In its motion to enforce settlement, and in its cross-appellate brief, Woodmere argues that the underlying case against it constituted a frivolous lawsuit. R.C. 2323.51 governs the award of attorney fees and costs for frivolous conduct. Although R.C. 2323.51 allows a trial court to award attorney fees incurred by a party subjected to frivolous conduct, the statute does not mandate such an award. Additionally, though R.C. 2323.51 requires a trial court to hold a hearing before it grants a motion for attorney fees, a hearing is not required when the court determines, upon consideration of the motion and in its discretion, that the motion lacks merit.

{¶ 55} Here, the trial court's order dismissing the within lawsuit orders each party to bear their own costs. Though the trial court did not specifically rule on Woodmere's motion, it is presumed denied for appeal purposes. Additionally, it can be inferred that the trial court did consider Woodmere's motion prior to issuing its order because the order specifically instructs both parties to bear their own costs.

{¶ 56} We cannot say that the trial court abused its discretion when it denied Woodmere's motion for attorney fees without holding an evidentiary hearing.

{¶ 57} Woodmere's cross-assignment of error is overruled.

{¶ 58} In accordance with this opinion, Woodmere's Motion to Strike Appellant's Amended Brief, filed October 28, 2005, is denied as moot. Additionally, Delmonte's Motion to allow the filing of his brief is denied as moot. This court accepted the corrected appellant's brief filed October 20, 2005.

Judgment affirmed.

It is ordered that the parties bear their own costs herein taxed.

The court finds that there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the Cuyahoga County Common Pleas Court to carry this

judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

MARY EILEEN KILBANE
JUDGE

SEAN C. GALLAGHER, P.J., And

CHRISTINE T. McMONAGLE, J. CONCUR

N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc. App.R.22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(E), unless a motion for reconsideration with supporting brief, per App.R. 26(A) is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also, S.Ct.Prac.R. II, Section 2(A)(1).

Appendix A

Assignments of Error:

"I. The trial court's dismissal of plaintiff's complaint was in error, in that such dismissal was not a term of the alleged settlement agreement between the parties; no dispositive motion was pending before the trial court which called for or justified such dismissal.

II. The dismissal of plaintiff's complaint in the trial court, in that such dismissal was based upon a settlement agreement, was in error, for the reason that such agreement, as interpreted by the trial court, lacked sufficient elements of a contract, including consideration and was therefore void.

III. The dismissal of plaintiff's complaint by the trial court, in that such dismissal was based upon a settlement agreement, was in error because the trial court was required, by the terms of such agreement, and by law, to grant plaintiff an evidentiary hearing to identify the terms of such agreement and order those terms into effect.

IV. The trial court's dismissal of plaintiff's complaint, to the extent that it was based upon a finding that "all documents and records sought by plaintiff, which serve as the basis for the initial public records request and thus for this lawsuit, have been provided to plaintiff or made available to him for inspection," a dismissal on the merits, was in error per this court's prior ruling in 8th district appellate case no. 83293, and for the reason that no notice or opportunity to be heard was provided to plaintiff-appellant.

V. The trial court erred and abused its discretion in entering judgment for the defendants-appellees, rather than the plaintiff-appellant, on the existence and terms of the alleged settlement agreement, and in failing to hold an evidentiary hearing on damages, in that the court's ruling was manifestly against the weight of the evidence."

Cross-Assignment of Error:

"I. The trial court erred in not granting appellees request for attorney's fees or holding a hearing on that request, given appellant's frivolous conduct, including refusing to abide by the terms of the settlement agreement reached by the parties."