[Cite as *Hopes v. Barry*, 2011-Ohio-6688.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

ASHTABULA COUNTY, OHIO

RICHARD E. HOPES, Plaintiff-Appellee/ Cross-Appellant, - vs - TRACY BARRY, et al., Defendants-Appellants/ Cross-Appellees, JOANNE HOPES, Third Party Defendant-Appellee/ Cross-Appellant, INCENTIVE ASHTABULA, LLC, d.b.a. ReMAX DESTINATIONS, et al., Defendants-Appellees/ Cross-Appellants, WESTFIELD INSURANCE COMPANY, Intervening Defendant-Appellee/ Cross-Appellant.	: : : : : : : : : : : : : :	**O P I N I O N** **CASE NO. 2010-A-0042**

Civil Appeal from the Court of Common Pleas, Case No. 2007 CV 1165.

Judgment: Affirmed.

Gerald J. Patronite, Gerald J. Patronite Co., L.P.A., 34950 Chardon Road, Suite 210, Willoughby Hills, OH 44094-9162 (For Plaintiff-Appellee/Cross-Appellant).

Kenneth L. Piper and *Thomas C. Brown*, 185 Water Street, Geneva, OH 44041 (For Defendants-Appellants/Cross-Appellees).

Matthew T. Norman and *Holly Olarczuk-Smith*, Gallagher, Sharp, Fulton & Norman, Sixth Floor, Bulkley Building, 1501 Euclid Avenue, Cleveland, OH 44115-2108 (For Defendants-Appellees/Cross-Appellants).

Richard M. Garner and *Roni R. Sokol*, Davis & Young, 1200 Fifth Third Center, 600 Superior Avenue, East, Cleveland, OH 44114 (For Intervening Defendant-Appellee/Cross-Appellant).

Randy L. Taylor, Weston Hurd, L.L.P., 1900 The Tower at Erieview, 1301 East Ninth Street, Cleveland, OH 44114-1862 (For Third Party Defendant-Appellee/Cross-Appellant).

TIMOTHY P. CANNON, P.J.

{¶1} Appellants/cross-appellees, Tracy Barry, Denver Barry, and April Management LLC ("appellants"), appeal the judgment of the Ashtabula County Court of Common Pleas granting appellees/cross-appellants' ("cross-appellants") motion to enforce settlement and subsequently entering final judgment that the parties' "Memorandum and Settlement Agreement" represented a binding settlement contract.

{¶2} The parties in this action entered into a contract for the sale of a 63-acre farm in Orwell Township, Ashtabula County, by appellees Richard E. Hopes and Joanne Hopes ("the Hopes") to appellants. As litigation proceeded, appellees Incentive Ashtabula, LLC, d.b.a. ReMax Destinations; Incentive Ashtabula, LLC; and Marian Barbato (collectively referred to as "ReMax/Barbato") were added as parties to the lawsuit. ReMax/Barbato acted as the Hopes' real estate agent during the transaction. Appellee Westfield Insurance Company ("Westfield") also joined the lawsuit, as the Hopes maintained property insurance with this carrier.

{¶3} Various counterclaims and cross-claims were filed between the parties.

{¶4} On March 29, 2010, the parties and their attorneys engaged in a private mediation. A document entitled "Memorandum of Mediation Settlement" was executed by the parties. The memorandum stated the following:

{¶5} "1. On March 29, 2010, the parties reached an agreement to settle this matter.

{¶6} "2. All of the terms of the settlement will be memorialized in a written formal settlement agreement to be prepared by the parties within the next 21 days which will be the document governing the settlement.

{¶7} "3. Richard and Joanne Hopes will be paid $190,000.00 funded with payments of: (a) $155,000 from Marian Barbato, Incentive Ashtabula LLC, and Remax; and (b) $35,000 from Westfield net to the Hopes no later than July 1, 2010.

{¶8} "4. The property at 6725 Route 45, Orwell, Ohio will be transferred to Denver Barry, Tracy Barry and/or April Management, LLC, no later than July 1, 2010. The Hopes will terminate the lease(s) of any tenants on or before July 1, 2010.

{¶9} "5. All claims between all parties in *Richard E. Hopes v. Tracy Barry, et al.*, Case No. 2007 CV 1165, in the Court of Common Pleas for Ashtabula County, Ohio and all claims that would or could be brought in any court anywhere will be dismissed with prejudice with each party to bear its own costs.

{¶10} "6. The settlement is confidential and will be subject to a confidentiality agreement.

{¶11} "7. The Hopes agree to a $25 per diem holdover rent if they have not vacated the premises by July 1, 2010."

{¶12} The trial court conducted a hearing on the motion to enforce the settlement agreement, at which the court heard argument from the attorneys. Also, both parties submitted evidentiary materials with their written submissions, which the court considered. The trial court granted cross-appellants' motion to enforce the settlement agreement and denied their motion for attorney fees.

{¶13} Appellants subsequently filed this appeal. In addition, cross-appellants have filed a notice of cross-appeal.

{¶14} Appellants raise two assignments of error:

{¶15} "[1.] The trial court erred to the prejudice of Defendants/Appellants Barrys in granting Plaintiffs/Appellees Hopes['] Joint Motion to Enforce Settlement.

{¶16} "[2.] The trial court erred to the prejudice of the Barry Defendants/Appellants in its Order that the 'Memorandum of Mediation Settlement' and 'Settlement Agreement and Reciprocal Release' represent the binding settlement contract of the parties."

{¶17} We will address appellants' assigned errors in a consolidated fashion.

{¶18} Appellants claim the trial court erred by considering improper evidence that was attached to cross-appellants' motion to enforce the settlement agreement.

{¶19} The Supreme Court of Ohio has held, "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 v. Fan Co.* (1997), 79 Ohio St.3d 374, syllabus. However, "[i]n the absence of such a factual dispute, a court is not required to conduct such an evidentiary hearing." Id. at 377, citing *Mack v. Polson Rubber Co.* (1984), 14 Ohio St.3d 34, syllabus.

{¶20} In this matter, the trial court described the July 21, 2010 hearing as an "oral argument hearing." The following colloquy occurred at the July 21, 2010 hearing:

{¶21} "MR. TAYLOR [attorney for the Hopes]: There is evidence also in the Affidavit of Richard Garner that is attached as Exhibit A to the Joint Motion to Enforce, and we would rely upon these exhibits attached to that document.

{¶22} "MR. PIPER [attorney for the Barrys]: If that's some sort of an offer of these exhibits, I'm gonna object to all of them because Mr. Garner isn't here to testify and identify them.

{¶23} "MR. TAYLOR: Well, I'll move - -

{¶24} "THE COURT: This isn't a summary judgment - -

{¶25} "MR. TAYLOR: I'll move that they be entered into evidence, Your Honor.

{¶26} "MR. PIPER: I'll object.

{¶27} "THE COURT: I think I would have to convert this to a Motion for Summary Judgment; wouldn't it? You know, you don't - - summary judgment you attach your evidence and that, and its admissible. But I think on other motions where you're going outside the record providing evidence - - every time I pick this file up you folks create some new issues in this case.

{¶28} "***

{¶29} "THE COURT: Well, this thing was set for hearing today. If you got some evidence, I'm gonna hear it right now. If you don't have it right now, I'm not going to give you any more time to produce it.

{¶30} "MR. TAYLOR: I understand. This is the evidence I have. I'll let any other party here speak as to additional evidence that they may have."

{¶31} The trial court never specifically ruled on the objection or the admissibility of the evidence in question.

{¶32} The Sixth Appellate District has held, "the purpose of an evidentiary hearing is to clear up any ambiguity with regard to the terms or existence of a settlement agreement." *Johannsen v. Ward*, 6th Dist. No. H-09-028, 2010-Ohio-4203, at ¶80. In this matter, there was no factual dispute that a "mediation agreement" was reached. The terms of that document are not ambiguous. At most, appellants assert that the parties envisioned the addition of supplemental terms to the agreement. However, the terms of the mediation settlement agreement were unambiguous, in that they identified the property to be transferred, the purchase price of the property, and that the claims of the pending lawsuit would be dismissed. Since there were no ambiguous terms in the mediation agreement, the trial court did not err by failing to conduct a formal evidentiary hearing.

{¶33} Further, by not specifically requesting a formal *Rulli* evidentiary hearing or objecting to the lack of such a hearing, appellants have waived this issue on appeal. See *Monea v. Campisi*, 5th Dist. No. 2004CA00381, 2005-Ohio-5215, at ¶11. While appellants objected to specific exhibits, they did not object to the overall nature of the hearing. In fact, appellants also relied on evidence in the form of an affidavit, as Attorney Piper specifically referenced his own affidavit during the hearing.

{¶34} The trial court did not err in considering the evidence attached to cross-appellants' motion to enforce the settlement agreement.

{¶35} Appellants claim the trial court erred in considering an email sent from Attorney Piper. Appellants assert this was a mediation communication and privileged

pursuant to R.C. 2710.03(A). "'Mediation communication' means a statement, whether oral, in a record, verbal or nonverbal, that occurs during a mediation or is made for purposes of considering, conducting, participating in, initiating, continuing, or reconvening a mediation or retaining a mediator.'" R.C. 2710.01(B). In this matter, the emails sent from Attorney Piper were not made "during a mediation." They were sent several weeks after the mediation ended. Further, the emails do not constitute a "continuation" of the mediation. The emails contained additional requests that do not appear to have been discussed at the mediation.

{¶36} In addition, Evid.R. 408 does not preclude the admission of these exhibits. Evid.R. 408 "expressly permits evidence of settlement when that evidence is presented for a purpose other than proving 'liability for or invalidity of the claim.'" *Lewis v. ALFA Laval Separation, Inc.* (1998), 128 Ohio App.3d 200, 210. In this matter, the emails were not being offered to prove liability but, instead, to demonstrate the parties' intention that the mediation agreement was to be a full settlement agreement. The trial court did not err by considering the emails.

{¶37} Appellants argue the trial court erred by finding the mediation agreement constituted an enforceable agreement, since it contains qualifying language.

{¶38} Since a settlement agreement is a contract between the parties, it must contain all the essential terms of a contract, including a meeting of the minds and a valid offer and acceptance. *Rulli v. Fan Co.* (1997), 79 Ohio St.3d 374, 376, citing *Noroski v. Fallet* (1982), 2 Ohio St.3d 77, 79.

{¶39} The trial court found the mediation agreement contained all the essential elements of a settlement agreement. As previously noted, the mediation agreement

contained the purchase price, an identification of the property, and a clause that all the claims of the lawsuit would be dismissed.

{¶40} Appellants cite the following language from the Eighth Appellate District:

{¶41} "Where an agreement contemplates further action toward formalization or if an obligation to become binding rests on a future agreement to be reached by the parties, so that either party may refuse to agree, there is no contract. In other words, as long as both parties contemplate that something remains to be done to establish a contractual relationship, there is no binding contract." (Citations omitted.) *Weston, Inc. v. Brush Wellman, Inc.* (July 28, 1994), 8th Dist. No. 65793, 1994 Ohio App. LEXIS 3349, at *14.

{¶42} Appellants argue that the following clause of the mediation agreement anticipated further action: "All of the terms of the settlement will be memorialized in a written formal settlement agreement to be prepared by the parties within the next 21 days which will be the document governing the settlement." The subsequent action to be taken was merely to memorialize the mediation agreement into a formal settlement agreement. The mediation agreement did not anticipate, as appellants attempted to do, the supplementation of the agreement with additional material terms such as a hazardous waste warranty, groundwater testing, and payment of attorney fees.

{¶43} Appellants' assignments of error are without merit.

{¶44} Cross-appellants raise one assignment of error:

{¶45} "The trial court erred to the prejudice of appellees/cross-appellants in denying their request for attorneys fees against the Barry defendants for their frivolous conduct in refusing to honor the terms of the settlement."

{¶46} As part of their motion to enforce the settlement agreement, cross-appellants requested an award of attorney fees pursuant to R.C. 2323.51, due to their allegation that appellants' conduct was frivolous. Appellants filed a response to cross-appellants' motion, wherein they asserted that they did not engage in frivolous conduct. The trial court denied cross-appellants' motion for sanctions, finding that appellants' actions did "not rise to the level of 'frivolous conduct.'"

{¶47} This court has held that there is more than one standard of review for cases involving sanctions under R.C. 2323.51. *Stevenson v. Bernard*, 11th Dist. No. 2006-L-096, 2007-Ohio-3192, at ¶37. The determination depends on the underlying reasons the trial court imposed sanctions. "'The question of what constitutes frivolous conduct may be either a factual determination, e.g. whether a party engages in conduct to harass or maliciously injure another party, or a legal determination, e.g., whether a claim is warranted under existing law.'" (Internal citation omitted.) *In re Loube*, 11th Dist. No. 2007-L-147, 2008-Ohio-4975, at ¶10. Appellate courts use a de novo standard when reviewing legal conclusions but use the abuse of discretion standard when reviewing factual determinations. Id. In this matter, the trial court made a factual determination regarding appellants' conduct; thus, we will use the abuse of discretion standard of review. An abuse of discretion is the trial court's "'failure to exercise sound, reasonable, and legal decision-making.'" *State v. Beechler*, 2d Dist. No. 09-CA-54, 2010-Ohio-1900, at ¶62, quoting Black's Law Dictionary (8 Ed.Rev.2004) 11.

{¶48} Cross-appellants requested attorney fees based on their allegation that appellants engaged in frivolous conduct pursuant to R.C. 2323.51, which provides, in part:

{¶49} "(2) 'Frivolous conduct' means either of the following:

{¶50} "(a) Conduct of an inmate or other party to a civil action *** or of the inmate's or other party's counsel of record that satisfies any of the following:

{¶51} "(i) It obviously serves merely to harass or maliciously injure another party to the civil action or appeal or is for another improper purpose, including, but not limited to, causing unnecessary delay or a needless increase in the cost of litigation."

{¶52} In this matter, appellants believed that a final, binding settlement agreement had not been reached as a result of the mediation agreement. Operating under this belief, appellants proposed that additional terms be added to what they believed to be a "proposed" agreement. The trial court ultimately determined that a binding settlement agreement was, in fact, reached as a result of the mediation conference. However, this finding does not necessitate a finding that appellants' conduct was frivolous, as appellants were operating under the incorrect belief that a final settlement agreement had not been reached.

{¶53} We cannot say from the record before us that the trial court abused its discretion by determining that appellants' conduct was not frivolous and that cross-appellants were not entitled to an award of attorney fees under R.C. 2323.51.

{¶54} Cross-appellants' assignment of error is without merit.

{¶55} The judgment of the Ashtabula County Court of Common Pleas is affirmed.

CYNTHIA WESTCOTT RICE, J.,
MARY JANE TRAPP, J.,
concur.