[Cite as *Bankers Trust Co. v. Wright*, 2010-Ohio-1697.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
FULTON COUNTY

Bankers Trust Company of California as Trustee under the Pooling and Servicing Agreement Series 2001-A	Court of Appeals No. F-09-009
	Trial Court No. 07 CV 78
Appellees	
v.	
Georgia Wright, et al.	**DECISION AND JUDGMENT**
Appellants	Decided: April 16, 2010

* * * * *

Shannah J. Morris and Joseph W. Scholler, for appellees.

Alan J. Lehenbauer, for appellants.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} This is an appeal from a judgment of the Fulton County Court of Common Pleas that granted the motion of plaintiff-appellee, Banker's Trust Company of California as Trustee under the Pooling and Servicing Agreement Series 2001-A ("Banker's Trust"),

to enforce a settlement agreement. Defendants-appellants, Georgia and David Wright, now challenge that judgment through the following assignments of error:

{¶ 2} "I. The trial court abused its discretion and erred in ordering a settlement agreement prepared by appellee enforced.

{¶ 3} "II. The trial court erred in failing to conduct an evidentiary hearing on the terms and conditions related to a disputed settlement agreement prior to issuing orders related to said agreement.

{¶ 4} "III. The trial court abused its discretion and erred in enforcing a purported agreement after a Supreme Court decision destroyed the consideration for any agreement and by not applying the doctrine of frustration of purpose."

{¶ 5} The following history was provided by the lower court in its judgment entry now on appeal. Appellee filed a first foreclosure action against the Wrights in January 2002. Appellee's corporate officers and counsel refused to negotiate, participate in, or communicate with appellants' counsel or the court and failed to attend noticed pretrial hearings. After approximately two years of non-action in that case, the court dismissed the action "without prejudice," by an entry filed on November 18, 2003. Appellee refiled the foreclosure action within weeks. Again, however, appellee's counsel failed to negotiate or participate in the case or attend to court orders. Accordingly, on April 1, 2004, the lower court dismissed the action, this time "with prejudice." Appellee did not appeal that dismissal.

{¶ 6} On March 26, 2007, appellee filed the present action in foreclosure against appellants. The case was originally set for a November 27, 2007 bench trial. Thereafter, it was twice rescheduled for September 19, 2008, and December 4, 2008. The court further advised the parties that it would not grant any further continuances. On December 3, 2008, appellants' counsel telephoned the court, notified the judge that a "full settlement" had been achieved and asked that the trial date be vacated. The court stated in its judgment entry below that it "then vacated the trial date in the expectation of receiving a Final Judgment Entry within a matter of weeks."

{¶ 7} On December 24, 2008, appellee filed a motion to enforce settlement and for sanctions in the court below. The motion and accompanying memorandum were supported by the affidavits of Michael E. Nitardy, appellee's trial attorney, and Gary G. Christensen, appellee's representative for trial. Nitardy attested to the following sequence of events:

{¶ 8} On December 1, 2008, Nitardy and Alan Lehenbauer, appellants' counsel, called Judge Barber to inquire about a possible continuance, due in part to ongoing settlement talks. Judge Barber replied that he would not continue the case again. On December 2, 2008, Nitardy faxed a letter and loan modification agreement to Lehenbauer that, if accepted, would settle the case. On December 3, 2008, Gary G. Christensen, flew to Cincinnati to prepare for trial. Also on December 3, Nitardy engaged in ongoing telephone calls with Lehenbauer regarding a potential settlement. The final barrier to

settlement was $1,734.05 in late fees still credited against the Wrights on the most recent loan modification agreement. Lehenbauer indicated that if appellee would waive the fees they would have a deal. Appellee agreed to waive the fees. Nitardy then telephoned Lehenbauer with that information. Nitardy asked Lehenbauer "point blank: 'Do we have a deal?'" Nitardy attested that Lehenbauer responded in the affirmative. Lehenbauer also stated that he would call the court to inform it of the settlement, that a trial would not be necessary and that the parties would file a final entry once the documents were finalized. Later that day, Lehenbauer called Nitardy and assured him that he had called the court. Nitardy asked Lehenbauer to have the Wrights sign the loan modification agreement the next day and send Bankers' Trust a check for $2,000. Lehenbauer indicated that he would. On December 4, 2008, Lehenbauer called Nitardy to inform him that there was a typo on the loan modification agreement. Nitardy asked Lehenbauer to have the Wrights sign the agreement but to hold the signature page until Nitardy sent him a clean copy the next day. On December 5, 2008, Lehenbauer asked Nitardy other administrative questions regarding whether the $2,000 payment had to be made with certified funds, whether the Wrights could make future payments on-line, and what the Wrights could do about insurance. Nitardy obtained answers to all of Lehenbauer's questions and forwarded those answers to Lehenbauer along with a clean copy of the entire loan modification agreement via over-night mail. Approximately one week later, the Supreme Court of Ohio decided the case of *U.S. Bank Natl. Assn. v. Gullotta*, 120 Ohio St.3d 399,

2008-Ohio-6268. The next day, Lehenbauer informed Nitardy that his clients' position on settlement had changed. Then, on December 19, 2008, Lehenbauer faxed Nitardy a letter regarding the Wrights' new position in light of *Gullotta*. Attached to Nitardy's affidavit were copies of the December 2, 2008 and December 5, 2008 loan modification agreements and correspondence relating to those documents.

{¶ 9} Christensen's affidavit was consistent with that of Nitardy.

{¶ 10} In its motion to enforce the settlement agreement, appellee asserted that the parties had entered into a binding and enforceable settlement agreement on the eve of trial, as was evidenced by the actions of both parties, and that the Wrights should be estopped from denying the existence of a binding and enforceable settlement agreement.

{¶ 11} The Wrights responded with a memorandum in opposition to the motion to enforce settlement. The Wrights asserted that a complete agreement was never reached because they never signed the loan modification agreement or tendered the $2,000 payment required under that agreement. They further asserted that the Ohio Supreme Court's decision in *Gullotta* destroyed appellee's cause of action and frustrated the purpose of the purported settlement agreement so that there was now a mutual mistake of fact and law which nullified any purported mutual assent. Accordingly, the Wrights asked that the motion to enforce the settlement agreement be denied or, in the alternative, that the matter be set for a hearing.

{¶ 12} On February 3, 2009, the lower court issued a judgment entry which, in relevant part, granted appellee's motion to enforce settlement. After reviewing the parties' arguments, evidence and law, the court determined that they had in fact entered into an agreement in full settlement of their issues and the controversy between them and that the agreement should be enforced. Appellants now challenge that judgment on appeal.

{¶ 13} We will address all three assignments of error together. Appellants assert that the lower court erred in ordering the enforcement of the settlement agreement because there was no meeting of the minds for an agreement, as evidenced by the parties' failure to sign the loan modification agreement and appellants' failure to tender the $2,000 payment required by that agreement. Appellants further assert that because there remained a dispute regarding whether a valid settlement agreement existed, the court erred in failing to hold an evidentiary hearing on the issue. Finally, appellants contend that the Ohio Supreme Court's decision in *Gullotta* destroyed appellee's cause of action against them and, therefore, frustrated the purpose of the purported settlement agreement.

{¶ 14} "[A] settlement agreement is a contract designed to terminate a claim by preventing or ending litigation[.]" *Continental W. Condominium Unit Owners Assn. v. Howard E. Ferguson, Inc.* (1996), 74 Ohio St.3d 501, 502. In *Salsbury v. Goodell*, 6th Dist. No. L-08-1204, 2008-Ohio-1204, ¶ 12, we set forth the following standard in regard to settlement agreements:

{¶ 15} "A valid settlement agreement is a binding contract between the parties which requires a meeting of the minds as well as an offer and acceptance. *Rulli v. Fan Co.* (1997), 79 Ohio St.3d 374, 376, 683 N.E.2d 337, citing *Noroski v. Fallet* (1982), 2 Ohio St.3d 77, 79, 442 N.E.2d 1302. Thus, a settlement agreement must meet the essential requirements of contract law before it will be subject to enforcement. Id. Moreover, 'it is within the sound discretion of the trial court to enforce a settlement agreement, and its judgment will not be reversed where the record contains some competent, credible evidence to support its findings regarding the settlement.' *Mentor v. Lagoons Point Land Co.* (Dec. 17, 1999), 11th Dist. No. 98-L190. Where there is a dispute regarding the meaning of the terms of a settlement agreement or where there is a dispute of whether a valid settlement agreement exists, a trial court must conduct an evidentiary hearing. *Rulli v. Fan Co.*, supra, syllabus."

{¶ 16} In *Kostelnik v. Helper,* 96 Ohio St.3d 1, 2002-Ohio-2985, ¶ 15, the Supreme Court of Ohio discussed the enforcement of oral settlement agreements and held that while it is preferable to memorialize settlement agreements in writing, "an oral settlement agreement may be enforceable if there is sufficient particularity to form a binding contract." In that situation, the court looks to the "'words, deeds, acts, and silence of the parties'" to determine the terms of the oral settlement agreement. Id. quoting *Rutledge v. Hoffman* (1947), 81 Ohio App. 85, paragraph one of the syllabus. The court continued:

{¶ 17} "'A contract is generally defined as a promise, or a set of promises, actionable upon breach. Essential elements of 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 and of consideration.' *Perlmuter Printing Co. v. Strome, Inc.* (N.D.Ohio 1976), 436 F.Supp. 409, 414. A meeting of the minds as to the essential terms of the contract is a requirement to enforcing the contract. *Episcopal Retirement Homes, Inc. v. Ohio Dept. of Indus. Relations* (1991), 61 Ohio St.3d 366, 369, 575 N.E.2d 134.

{¶ 18} "'To constitute a valid settlement agreement, the terms of the agreement must be reasonably certain and clear,' and if there is uncertainty as to the terms then the court should hold a hearing to determine if an enforceable settlement exists. *Rulli v. Fan Co.* (1997), 79 Ohio St.3d 374, 376, 377, 683 N.E.2d 337. However, '[a]ll 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*, supra, at ¶ 17, quoting 1 Corbin on Contracts (Perillo Rev. Ed.1993) 530, Section 4.1.

{¶ 19} A review of the record reveals that on December 3, 2008, the parties had a meeting of the minds as to the terms of the settlement agreement and orally agreed to settle the case. In exchange for appellee waiving $1,734.05 in late fees, and of course

dismissing the foreclosure action, the Wrights agreed to the terms of the loan modification agreement. The terms of that agreement are clear. Despite a typographical error pointed out by appellants' counsel, appellants never challenged the essential terms of the agreement and never asserted that they had not agreed to those terms on December 3, 2008. Rather, they asserted that because they had not signed the loan modification agreement or tendered the $2,000 payment required under the agreement, the issues between the parties had not been settled. We disagree. Under the loan modification agreement, appellee approved the modification of the Wrights' mortgage loan which added past due payments to the loan balance, and required the Wrights to pay appellee a modified deposit amount of $2,000. That is, the $2,000 payment was a term of the loan modification agreement, not a contingency for settling the foreclosure action.

{¶ 20} In our view, the words, deeds and actions of the parties on December 3, 2008, and thereafter, up until the Ohio Supreme Court released its decision in *Gullotta*, reveal that they had, and believed they had, a binding settlement agreement. After *Gullotta* was released, appellants attempted to renege on the settlement agreement. In *Gullotta*, at ¶ 18-28, the court held that each missed payment under a promissory note and mortgage did not give rise to a new claim. Accordingly, the court held that Civ.R. 41(A)'s two-dismissal rule applied and res judicata barred a third complaint where the third complaint was based on the same operative facts; that is, where the third complaint was based on the same note, mortgage and default and the note and mortgage had not

been amended in any way. Prior to the Ohio Supreme Court's ruling in *Gullotta*, there was a split of authority in Ohio on the issue. See *Gullotta*, supra; *U.S. Bank Natl. Assn. v. Gullotta*, 5th Dist. No. 2006CA00145, 2007-Ohio-2085; and *EMC Mtge. Corp. v. Jenkins*, 164 Ohio App.3d 240, 2005-Ohio-5799.

{¶ 21} Whether *Gullotta* would have applied to this case had it not been settled is debatable. The record before us does not include the complaints filed by appellee in the two prior foreclosure cases. It is therefore impossible to determine if the prior actions dealt with the same note, mortgage, and default as the third foreclosure action. We find it noteworthy that three years passed between the dismissal of the second case and the filing of the third.

{¶ 22} Assuming arguendo that *Gullotta* would have been relevant to the issues before the lower court, we note that the law in existence at the time the parties enter into a settlement agreement applies to that agreement and a subsequent change in the law does not affect the parties' rights unless the decision overruling the law is retroactive. *Rice v. Am. Select Ins. Co.*, 5th Dist. Nos. 2004-CA-00213 & 2004-CA-00333, 2005-Ohio-2597, ¶ 15. At the time the parties entered into their settlement agreement, *Gullotta* was not the settled law in this district. When it became law, the parties' contractual rights under their settlement agreement had already vested. See *Clark v. Bur. of Workers' Comp.*, 10th Dist. No. 02AP-743, 2003-Ohio-2193, ¶ 11-12.

{¶ 23} We therefore conclude that the trial court's determination that the parties had entered into a valid settlement agreement was supported by the record and that the court did not err in ordering the enforcement of the settlement agreement without holding a hearing. We further conclude that the lower court did not err in concluding that *Gullotta* did not apply to the situation before it. The three assignments of error are therefore not well-taken.

{¶ 24} On consideration whereof, the court finds that substantial justice has been done the parties complaining and the judgment of the Fulton County Court of Common Pleas is affirmed. Appellants are ordered to pay the costs of this appeal pursuant to App.R. 24.

JUDGMENT AFFIRMED.

Bankers Trust Company of California
as Trustee under the Pooling and
Servicing Agreement Series 2001-A
v. Georgia Wright, et al.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J. _____
JUDGE

Mark L. Pietrykowski, J. _____
JUDGE

Thomas J. Osowik, P.J. _____
CONCUR.
JUDGE