[Cite as *Artisan Mechanical, Inc. v. Beiser*, 2010-Ohio-5427.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

BUTLER COUNTY

ARTISAN MECHANICAL, INC.,	:	
Plaintiff-Appellant,	:	CASE NO. CA2010-02-039
	:	O P I N I O N
- vs -		11/8/2010
	:	
JAMES MICHAEL BEISER, et al.	:	
Defendants-Appellees.	:	

CIVIL APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
Case No. CV2009-06-2832

Taft Stettinius & Hollister LLP, Timothy G. Pepper, 110 North Main Street, Suite 900, Dayton, Ohio 45402-1786, for plaintiff-appellant

The Drew Law Firm Co., LPA, Anthony G. Covatta, One West Fourth Street, Suite 2400, Cincinnati, Ohio 45202, for defendants-appellees

POWELL, J.

{¶1} Plaintiff-appellant, Artisan Mechanical, Inc., appeals a summary judgment granted by the Butler County Common Pleas Court in favor of defendants-appellees, James Michael Beiser and Chris Lay, on Artisan's claim that Beiser and Lay breached an enforceable, oral settlement agreement between the parties regarding a prior lawsuit between them. We affirm.

{¶2} Artisan is a mechanical contractor. Beiser and Lay are mechanical engineers who were employed by Artisan through approximately the third quarter of 2008. Beiser and Lay left Artisan to start their own mechanical engineering firm, Accurate Mechanical Solutions. On November 10, 2008, Artisan filed a lawsuit against Beiser and Lay in the Butler County Common Pleas Court to prevent them from misappropriating Artisan's trade secrets and business opportunities.

{¶3} On the morning of February 4, 2009, Artisan's counsel made a settlement proposal to Beiser and Lay's counsel, in which both parties were to agree not to compete with one another with respect to certain "key customers" for a period of six months. Specifically, Beiser and Lay were to agree not to submit any new bids to work on projects for two of Artisan's key customers, Fuji and Veritus Technology Group, and Artisan, in turn, was to agree not to submit any bids to work on projects for two of its other key customers, Flavor Systems and Lyons Magnus, whom Beiser and Lay wished to have as customers for AMS. That same morning at 9:44 a.m., Beiser and Lay's counsel accepted Artisan's settlement proposal on the following terms and conditions:

{¶4} "1. Both sides 'walk away' from the litigation.

{¶5} "2. Six month non-compete, commencing today, February 4, 2009, ending August 3, 2009.

{¶6} "3. Beiser, Lay and their company will initiate no new bids to Fuji or Verdis [sic].

{¶7} "4. Artisan will initiate no new bids to Flavor Systems or Lyons Magnus."

{¶8} Beiser and Lay's counsel "suggest[ed]" that the parties prepare a

"Mutual Release and Settlement Agreement" and offered to prepare the agreement if Artisan's counsel would "likewise prepare an Entry of Dismissal of all claims and counterclaims."

{¶9} Artisan's counsel responded by e-mail as follows:

{¶10} "[A]s we discussed, the offer is that your clients basically stand still and submit nothing to Fuji and Verdis [sic] in furtherance of any bid. I don't know if that's what you mean by 'initiate,' but as we discussed, that is an important point. We do not have an agreement just on the wording below [referring to the 9:44 a.m. e-mail message]; please explain what 'initiate' means and whether your clients will agree to stand still and not submit anything further to Fuji or Verdis [sic], for today forward for six months, in furtherance of any bid."

{¶11} Beiser and Lay's counsel responded:

{¶12} "I am informed that the bid to Fuji is complete. Nothing further will be submitted, or needs to be submitted. We have a deal."

{¶13} The parties cancelled depositions that were scheduled for February 5-6, 2009. On February 6, 2009, Beiser and Lay's counsel sent Artisan's counsel a draft of a settlement agreement. When he had not received a response by February 16, 2009, Beiser and Lay's counsel e-mailed Artisan's counsel, asking him when he would be "ready to exchange signature pages," and Artisan's counsel replied, "I'll get back to you as quickly as I can."

{¶14} On February 19, 2009, Artisan's counsel informed the trial court that "the case had settled." The next day, the trial court issued an entry that noted that the parties had advised it that the case "has been settled" and ordered that the action be "dismissed with prejudice provided that any of the Parties may, upon good cause

shown, within sixty days, request further court action if settlement is not consummated." The entry further stated that "[u]pon agreement and within sixty days, the Parties may submit a supplementary entry outlining details of the settlement."

{¶15} On March 10, 2009, Beiser and Lay's counsel sent Artisan's counsel a "Settlement Agreement and Mutual Release" that had been executed by Beiser and Lay and contained a space for Artisan's signature.[1] On March 17, 2009, Artisan's counsel e-mailed Beiser and Lay's counsel, suggesting that the "confidentiality" and "non-disparagement" provisions in the proposed settlement agreement be deleted and that the "applicable law" provision be modified to make state court in Butler County, Ohio the proper venue for any future action that might arise from the agreement.

{¶16} On April 16, 2009, Artisan's counsel e-mailed Beiser and Lay's counsel and requested an update as to where matters stood regarding the lawsuit, and Beiser and Lay's counsel indicated in response that the parties had agreed to drop the "confidentiality" and "non-disparagement" provisions and modify the venue provision in the proposed settlement agreement. He then encouraged Artisan's counsel to "get your clients to sign [the proposed agreement] and then [he] would get his boys [Beiser and Lay] to sign as well."

{¶17} The parties did not send any further messages to each other. On April 21, 2009, the 60-day period set forth in the trial court's February 20, 2009 conditional dismissal order lapsed, without either party having ever requested the trial court to

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1. The March 10, 2009 draft of the proposed Settlement Agreement and Mutual Release that Beiser and Lay's counsel sent to Artisan's counsel is appended to this opinion.

take further action in the lawsuit or without the parties submitting a supplemental entry outlining the details of any settlement agreement they reached.

{¶18} In June 2009, Artisan learned that Beiser and Lay were performing work for Fuji. When Artisan's counsel requested an explanation, Beiser and Lay's counsel acknowledged that his clients had submitted a new bid to perform work for Fuji, but rejected any claim that their actions constituted a breach of a settlement agreement, because Artisan had failed to execute the proposed settlement agreement that Beiser and Lay had tendered and thus there was no settlement agreement between the parties that Beiser and Lay could have breached.

{¶19} On June 29, 2009, Artisan filed another lawsuit against Beiser and Lay in the Butler County Common Pleas Court, which forms the basis of the current appeal. Artisan alleged in its complaint that, even though the parties failed to execute a formal written contract, they reached an enforceable, oral settlement agreement on February 4, 2009 and that Beiser and Lay breached that agreement by making a bid to Fuji. On January 29, 2010, the trial court granted summary judgment to Beiser and Lay on the ground that the parties never reached a "meeting of the minds" on the "essential terms and details of the settlement agreement."

{¶20} Artisan now appeals, assigning the following as error:

{¶21} Assignment of Error No. 1:

{¶22} "THE TRIAL COURT ERRED IN GRANTING BEISER AND LAY'S MOTION FOR SUMMARY JUDGMENT AND FINDING THAT THERE WAS NO ENFORCEABLE SETTLEMENT AGREEMENT BETWEEN THE PARTIES."

{¶23} Artisan argues the trial court erred in finding that there was no enforceable settlement agreement between the parties, and consequently granting

summary judgment to Beiser and Lay because they accepted all the essential terms of the settlement agreement on February 4, 2009 and the parties' counsel agreed on all remaining terms of the agreement by April 16, 2009. Artisan also contends that even though the parties intended to but did not reduce their agreement to a formal written document, their February 4, 2009 oral settlement agreement was still enforceable since its terms can be determined with "sufficient particularity" and "the parties' deal was not contingent on it being reduced to writing." We disagree with these arguments.

{¶24} Summary judgment is appropriate under Civ.R. 56 when "(1) there is no genuine issue of material fact, (2) the moving party is entitled to judgment as a matter of law, and (3) reasonable minds can come to but one conclusion and that conclusion is adverse to the nonmoving party, said party being entitled to have the evidence construed most strongly in his favor." *Zivich v. Mentor Soccer Club, Inc.*, 82 Ohio St.3d 367, 369-370, 1998-Ohio-389. "[A] party seeking summary judgment, on the ground that the nonmoving party cannot prove its case, bears the initial burden of informing the trial court of the basis for the motion, and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact on the essential element(s) of the nonmoving party's claims." *Dresher v. Burt,* 75 Ohio St.3d 280, 293, 1996-Ohio-107. If the moving party satisfies its initial burden, "the nonmoving party then has a reciprocal burden outlined in Civ.R. 56(E) to set forth specific facts showing that there is a genuine issue for trial and, if the nonmovant does not so respond, summary judgment, if appropriate, shall be entered against the nonmoving party." Id.

{¶25} "[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.,* 74 Ohio St.3d 501, 502, 1996-Ohio-158. While "[i]t is preferable that a settlement agreement be memorialized in writing[,] an oral settlement agreement may be enforceable if there is sufficient particularity to form a binding contract." *Kostelnik v. Helper*, 96 Ohio St.3d 1, 3-4, 2002-Ohio-2985, ¶15. "Terms of an oral contract may be determined from 'words, deeds, acts, and silence of the parties.'" Id., quoting *Rutledge v. Hoffman* (1947), 81 Ohio App. 85, paragraph one of the syllabus.

{¶26} "'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.' [Citation omitted.] A meeting of the minds as to the essential terms of the contract is a requirement to enforcing the contract. [Citation omitted.]" *Kostelnik*, 2002-Ohio-2985 at ¶16.

{¶27} "Mutual assent" or "a meeting of the minds" means that both parties have reached agreement on the contract's essential terms. *Fenix Enterprises, Inc. v. M & M Mortg. Corp., Inc.* (S.D.Ohio 2009), 624 F. Supp. 2d 834, 841. A meeting of the minds occurs if "a reasonable person would find that the parties manifested a present intention to be bound to an agreement." *Zelina v. Hillyer,* 165 Ohio App.3d 255, 2005-Ohio-5803, ¶12. "The parties must have a distinct and common intention that is communicated by each party to the other." *Champion Gym & Fitness, Inc. v. Crotty,* 178 Ohio App.3d 739, 744, 2008-Ohio-5642, ¶12. Moreover, for a contract to be valid and enforceable, the contract must be specific as to its essential terms, such

as the identity of the parties to be bound by the contract and the subject matter of the contract. See *Mantia v. House,* 178 Ohio App.3d 763, 2008-Ohio-5374, ¶9.

{¶28} In support of its claim that the parties reached an enforceable, oral settlement agreement on February 4, 2009, Artisan points out that, when it asked Beiser and Lay's counsel to "explain what 'initiate' means," Beiser and Lay's counsel responded by stating that he had been "informed that the bid to Fuji is complete[,]" that "[n]othing further will be submitted, or needs to be submitted[,]" and that "we have a deal." Artisan asserts that once Beiser and Lay's counsel declared, "we have a deal," an enforceable, oral settlement agreement was created between the parties. We disagree.

{¶29} In his February 4, 2009, 9:44 a.m. e-mail to Artisan's counsel, in which he accepted the terms of Artisan's initial settlement proposal, Beiser and Lay's counsel suggested that the parties "prepare a Mutual Release and Settlement Agreement" and offered to prepare the agreement in exchange for Artisan's counsel preparing a dismissal entry. Two days after their February 4, 2009 negotiations, Beiser and Lay's counsel sent Artisan a draft of a settlement agreement. On February 16, 2009, Artisan's counsel told Beiser and Lay's counsel that he would get back to him as quickly as he could. However, Artisan did not indicate that the parties would not have to place their agreement in a formal written document.

{¶30} On February 19, 2009, Artisan advised the trial court that the case "had settled." However, the trial court's February 20, 2009 conditional dismissal entry did not dismiss the case with prejudice. Instead, it allowed either party, upon a showing of good cause, to ask the trial court to take further action in the case, which, presumably, meant to reactivate the case, within 60 days of the entry. The fact that

the trial court did not simply dismiss the case with prejudice at this point shows that the parties had not yet reached a final settlement agreement.

{¶31} Artisan's counsel finally got back to Beiser and Lay's counsel on March 17, 2009 and then again on April 16, 2009, at which time the parties agreed to delete the confidentiality and non-disparagement provisions and modify the venue provision in the contract. However, at no time during the parties' negotiations that took place between February 4, 2009 until April 16, 2009 did Artisan ever indicate that it would be unnecessary for the parties to place their agreement in a formal written contract.

{¶32} A review of the evidence submitted by the parties in the summary judgment proceedings, even when looked at in the light most favorable to Artisan as the nonmoving party, shows that, while the parties engaged in negotiations between February 4, 2009 and April 16, 2009, they never reached a meeting of the minds on the essential terms of the proposed settlement agreement regarding Artisan's 2008 action against Beiser and Lay. This conclusion is confirmed by Artisan's refusal to sign the proposed Settlement Agreement and Mutual Release sent to it by Beiser and Lay.

{¶33} In *Richard A. Berjian, D.O., Inc. v. Ohio Bell Tel. Co*. (1978), 54 Ohio St.2d 147, 151-152, the Ohio Supreme Court stated "that courts will give effect to the manifest intent of the parties where there is clear evidence demonstrating that the parties did not intend to be bound by the terms of an agreement until formalized in a written document and signed by both[.]"

{¶34} In this case, there was clear evidence demonstrating that the parties did not intend to be bound by the terms of the parties' proposed settlement agreement until both parties executed a formal written document. In the parties' final e-mail

communication during their settlement negotiations, Beiser and Lay's counsel indicated that the parties had reached agreement on the confidentiality, non-disparagement and venue provisions of the proposed settlement agreement, and encouraged Artisan's counsel to have his clients sign the proposed agreement, as amended, and stated that he would have his clients do the same. Again, Artisan's counsel did not indicate that a formal written contract would not be necessary in order for the parties to have an enforceable agreement.

{¶35} Artisan engaged in negotiations with Beiser and Lay over the terms of the settlement agreement from February 4, 2009 until April 16, 2009. Artisan's actions during this period demonstrates that Artisan agreed with Beiser and Lay that the parties' agreement had to be placed in a formal written contract in order for the agreement to be enforceable. However, Artisan refused to sign the agreement before the conditional dismissal entry became final on April 21, 2009 and failed to ask the trial court to take further action in the matter on the basis of good cause. Therefore, we agree with the trial court's finding that there was never a meeting of the minds between the parties on the essential terms of the settlement agreement, and we conclude that the trial court properly granted summary judgment to Beiser and Lay on Artisan's complaint.

{¶36} Consequently, Artisan's first assignment of error is overruled.

{¶37} Assignment of Error No. 2:

{¶38} "THE TRIAL COURT ERRED IN ENTERING JUDGMENT FOR BEISER AND LAY WITHOUT HOLDING AN EVIDENTIARY HEARING ON THE EXISTENCE OF AN ENFORCEABLE SETTLEMENT AGREEMENT."

{¶39} Artisan argues the trial court erred by not holding an evidentiary hearing

before granting summary judgment to Beiser and Lay because there was a factual dispute between the parties over the existence of a valid settlement agreement, and therefore, under *Rulli v. Fan Co.,* 79 Ohio St.3d 374, 1997-Ohio-380, the trial court was required to conduct an evidentiary hearing prior to entering judgment. However, *Rulli* is clearly distinguishable from this case.

{¶40} In *Rulli,* the Ohio Supreme Court held that a trial court erred by *enforcing* a purported settlement agreement between the parties without first conducting an evidentiary hearing where there was a legitimate dispute between the parties as to the existence of the settlement agreement. In support of its decision, the *Rulli* court noted that, "[s]ince a settlement upon which final judgment has been entered eliminates the right to adjudication by trial, judges should make certain the terms of the agreement are clear, and that the parties agree on the meaning of those terms." Id. at 376.

{¶41} Unlike the situation in *Rulli*, the trial court in this case *refused to enforce* what Artisan purported to be an enforceable, oral settlement agreement between the parties, after finding that the parties had never actually reached a settlement agreement — a determination that this court has upheld in response to Artisan's first assignment of error. Therefore, nothing in *Rulli* required the trial court to hold an evidentiary hearing before entering summary judgment in Beiser and Lay's favor. Cf. *Union Sav. Bank v. White Family Cos., Inc.,* 183 Ohio App.3d 174, 2009-Ohio-2075; *Ivanicky v. Pickus,* Cuyahoga App. No. 91690, 2009-Ohio-37, ¶13; and *Myatt v. Myatt,* Summit App. No. 24606, 2009-Ohio-5796, ¶8, 12-13.

{¶42} Artisan also argues the trial court committed reversible error by relying "on suspect evidence in granting Beiser and Lay's motion for summary judgment." In

support, Artisan points out that when Beiser and Lay attached to their summary judgment motion the parties' counsels' e-mail correspondence from February 4, 2009, March 17, 2009, and April 16, 2009, Beiser and Lay failed to properly authenticate these documents by attaching an affidavit, and thus argues the documents had no evidentiary value. Artisan acknowledges that Beiser and Lay attached to their reply brief an affidavit purportedly authenticating the documents, but notes that when it moved to strike the affidavit and to file a surreply brief, the trial court failed to rule on those motions. We find this argument unpersuasive.

{¶43} Evid.R. 901(A) states that "[t]he requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims."

{¶44} The record in this case shows that Artisan itself attached to its memorandum in opposition to Beiser and Lay's motion for summary judgment several of the e-mail messages whose authenticity Artisan is now challenging on appeal. Thus, any error the trial court may have committed in considering the e-mail messages attached to both parties' memoranda was induced by Artisan, and thus Artisan cannot be allowed to take advantage of it. See *Poneris v. A & L Painting, LLC,* Butler App. Nos. CA2008-05-133, CA2008-06-139, 2009-Ohio-4128, ¶41.

{¶45} Furthermore, Beiser and Lay filed an affidavit with the trial court averring that the materials attached to their motions are "accurate" and Artisan presented no evidence to the contrary. While Beiser and Lay did not file their affidavit authenticating the e-mail messages attached to their summary judgment motion until they filed their reply brief in the summary judgment proceedings, Artisan has failed to explain how it was materially prejudiced because of this. In particular,

Artisan has never claimed that the e-mail messages attached to Beiser and Lay's memoranda have been fabricated or are *not* what Beiser and Lay purport them to be. Therefore, the affidavit was sufficient under Evid.R. 901 to show that the documents were, in fact, what Beiser and Lay's counsel purported them to be, namely, copies of the e-mail messages the parties exchanged on the dates in question.

{¶46} Artisan also alleges that the trial court committed reversible error when it failed to rule on its request to compel discovery from Beiser and Lay. However, Artisan suffered no prejudice as a result of the trial court's failure to rule on its discovery requests since those requests were mooted as a result of the trial court's decision to grant summary judgment to Beiser and Lay. Additionally, if Artisan needed more time to respond to Beiser and Lay's summary judgment motion, Artisan could have requested it under Civ.R. 56(F), but failed to do so.

{¶47} In light of the foregoing, Artisan's second assignment of error is overruled.

{¶48} Judgment affirmed.

BRESSLER, P.J., concurs.

RINGLAND, J., dissents.

RINGLAND, J., dissenting:

{¶49} I respectfully dissent from the majority's opinion because when the evidence is looked at in the light most favorable to Artisan as the nonmoving party, it is apparent that genuine issues of material fact remain in dispute, and thus the trial court erred by granting summary judgment to Beiser and Lay.

{¶50} While a trial court has a duty to interpret the terms of a contract as a matter of law, the existence of a contract itself is generally regarded as a question of fact to be resolved by the trier of fact, i.e., a jury or the trial court acting in its role as the trier of fact. See, e.g., *Terrell v. Uniscribe Professional Services, Inc.* (N.D.Ohio 2004), 348 F. Supp. 2d 890, 893; *Snyder v. Snyder,* 170 Ohio App. 3d 26, 2007-Ohio-122; and *In re Estate of Ivanchak,* 169 Ohio App.3d 140, 2006-Ohio-5175. But, see, *Zelina v. Hillyer,* 165 Ohio App.3d 255, 2005-Ohio-5803 (holding that the existence of a contract is a question of law).

{¶51} In this case, sufficient evidence was presented in the summary judgment proceedings to create genuine issues of material fact regarding whether the parties' negotiations reached a point at which mutual assent to the essential terms of the settlement agreement had been expressed before the 60-day time limit set forth in the trial court's conditional dismissal order lapsed, and whether the parties intended for their settlement agreement to be binding even without a formal written contract.

{¶52} Specifically, the parties' exchange of e-mails on February 4, 2009 establishes the material elements of the parties' oral settlement agreement, including (1) the parties to be bound by the agreement: Artisan and Beiser and Lay and their company, AMS, and (2) the agreement's subject matter: a six-month non-compete agreement, in which both sides "walk away" from the litigation, with Beiser and Lay and AMS agreeing not to initiate any new bids to Fuji or Veritus Technology Group, and Artisan, in turn, agreeing not to initiate any new bids to Flavor Systems or Lyons Magnus.

{¶53} This court has held that it is not necessary for the parties to work out

every specific detail of their agreement in order for them to have had a meeting of the minds, as the trial court opined at one point in its opinion. See, generally, *Schrock v. Schrock,* Madison App. No. CA2005-04-015, 2006-Ohio-748; and *Carnahan v. London,* Madison App. No. CA2005-02-005, 2005-Ohio-6684. In this case, the subsequent e-mails exchanged between the parties' counsel on March 17, 2009 and April 16, 2009 established that the parties agreed not to include "confidentiality" and "non-disparagement" provisions in their agreement and that the proper venue for any action arising from any future dispute involving the agreement was to be in state court in Butler County, Ohio. Specifically, the April 16, 2009 e-mail that Beiser and Lay's counsel sent to Artisan's counsel in which Beiser and Lay's counsel stated that the parties had reached agreement on the remaining issues of confidentiality, non-disparagement and venue establishes that there was a meeting of the minds between the parties as to all essential and non-essential terms of the parties' agreement, or, at the very least, provided sufficient evidence to create a genuine issue of material fact on this question.

{¶54} Beiser and Lay assert that "it would be contrary to justice and law to impose terms of counsel's negotiations upon the parties" since "[c]ounsel for the parties, not the parties themselves, were negotiating and attempting to agree to terms that would then be presented to their respective clients." However, Beiser and Lay offered no evidence to show that their counsel did not have the specific authority to negotiate on their behalf, and it appears from the evidence presented by the parties in the summary judgment proceedings, which has to be examined in the light most favorable to Artisan as the nonmoving party, that Beiser and Lay's counsel *did* have such specific authority to negotiate on Beiser and Lay's behalf. See, generally,

Judd v. Queen City Metro (1986), 31 Ohio App.3d 88, 91-92.

{¶55} The majority asserts that a signed, formal written agreement was necessary in order to bind the parties. However, when the evidence is looked at in a light most favorable to Artisan as the nonmoving party, it is apparent that a genuine issue of material fact exists as to whether the parties intended that their agreement not become binding until they both signed a formal written contract.

{¶56} In *Richard A. Berjian, D.O., Inc. v. Ohio Bell Tel. Co* (1978), 54 Ohio St.2d 147, 151-152, the court stated:

{¶57} "[I]t is well-established that courts will give effect to the manifest intent of the parties where there is clear evidence demonstrating that the parties did not intend to be bound by the terms of an agreement until formalized in a written document and signed by both (see *Smith v. Onyx Oil and Chemical Co.* (C.A.3, 1955), 218 F.2d 104, 108; 1 Williston on Contracts (Rev.Ed.1936), 59, Section 28)[.]"

{¶58} Here, there was evidence on both sides of the question as to whether the parties *intended* to make their agreement contingent on a formal written contract. In his February 4, 2009, 9:44 a.m. e-mail to Artisan's counsel in which he accepted the terms of the settlement agreement proposed by Artisan's counsel, Beiser and Lay's counsel stated, "I would *suggest* that we prepare a Mutual Release and Settlement Agreement." (Emphasis added.) However, Beiser and Lay's counsel did not make the parties' agreement "subject to" or contingent upon the parties' signing a formal, written contract. Cf. *Union Sav. Bank v. White Family Cos., Inc.,* 183 Ohio App.3d 174, 2009-Ohio-2075, ¶27. Therefore, viewing the evidence in a light most favorable to Artisan as the non-moving party, a genuine issue of material fact exists as to whether or not the parties intended that their agreement would not become

effective until a formal written contract was signed.

{¶59} In light of the foregoing, the question of whether or not an enforceable, oral settlement agreement was created by the parties prior to April 21, 2009 should not have been decided by summary judgment. Therefore, I respectfully dissent from the court's decision upholding the trial court's grant of summary judgment to Beiser and Lay.

APPENDIX

SETTLEMENT AGREEMENT AND MUTUAL RELEASE

THIS SETTLEMENT AGREEMENT AND MUTUAL RELEASE is made by and among ARTISAN MECHANICAL, LLC, an Ohio limited corporation ("Artisan"), RON SEXTON, ABBE SEXTON (the "Sextons"), JAMES MICHAEL BEISER ("Beiser"), and CHRIS LAY ("Lay"), on February ___, 2009.

WHEREAS, there have been various dealings and transactions among the parties; and

WHEREAS, certain disputes have arisen among the parties with respect to their relationships, dealings, transactions and agreements, which disputes involve actual and potential allegations and claims among the parties and causes of action among the parties; and

WHEREAS, without any admission of liability but to resolve all issues, including all actual or potential allegations, claims and counterclaims, the parties hereto have compromised and settled all matters arising from the prior relationship among the parties.

NOW, THEREFORE, the parties, in consideration of the mutual promises, acceptances, covenants, releases and warranties set forth herein, hereby agree as follows:

TERMS

1. **Actions.** In consideration of the compromise and settlement of all outstanding issues among the parties, the parties will take and forbear from the following actions:

a. The parties will dismiss the litigation as described below.

b. The parties agree not to compete with one another for business as follows, for a term of six months, commencing February 4, 2009, and ending August 3, 2009:

(i) Beiser, Lay and their entity will initiate no new bids to Fuji or Vertus Technology Group.

(ii) Artisan and the Sextons will initiate no new bids to Flavor Systems ("FSI") or Lyons Magnus.

c. The agreement of non-competition described in subsection 1. b. above does not void bids to the subject companies completed prior to February 4, 2009.

d. Each party will bear its own costs and legal fees.

2. **Dismissal of Action.** The parties will dismiss the following action, including all claims and counterclaims, with prejudice: *Artisan Mechanical, Inc., et al., Plaintiffs and Counterclaim Defendants, v. James Michael Beiser, et al., Defendants and Counterclaimants,* Butler County, Ohio Common Pleas Court Case No. CV 2008 11 4889.

3. **Releases and Assurances.** By this agreement, the parties acknowledge that they have released and discharged and by this Agreement do release and discharge one another, their successors and assigns, as the case may be, of and from any and all liability, claims, demands, controversies, grievances, damages, actions and causes of action, and any and all other loss and damage of every kind and nature resulting from the relationships, dealings, agreements, and transactions among the parties (collectively "Claims") prior to the date of this Agreement. The parties further

state that they have not assigned nor will assign any Claims released and discharged in this paragraph.

4. **Confidentiality.** The Agreed Protective Order among the parties remains in full force and effect, pursuant to its terms. The parties agree to keep the terms of this Agreement confidential except to the extent necessary to share with their legal and financial advisors.

5. **Non-Disparagement.** All parties agree that they will not disparage the others in any respect including but not limited to their dealings with customers of the other. In dealing with customers all references to the other will be neutral or positive.

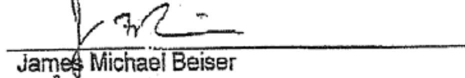
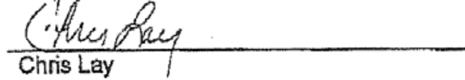
6. **Entire Agreement.** This Agreement contains the entire understanding of the parties with respect to the subject matter of this Agreement. There are no restrictions, agreements, promises, warranties, covenants or undertakings other than those expressly set forth in this Agreement. This Agreement supersedes all prior agreements and understandings among the parties with respect to its subject matter.

7. **Headings.** The section and paragraph headings contained in this Agreement are for the convenience of the parties only and are not intended to affect the construction or interpretation of this Agreement.

8. **Applicable Law.** Ohio law governs the application and interpretation of this Agreement. Any action or suit related to this Agreement may only be brought in the state or federal courts located in Hamilton County, Ohio.

9. **Counterparts.** This Agreement may be executed in two or more counterparts, any one of which may have the signature of only one of the parties, but each of which shall be deemed to be an original.

IN WITNESS WHEREOF, the parties have read the above Agreement and caused it to be executed on the date first written above.

WITNESSES:	ARTISAN MECHANICAL, LLC
______________________	By ______________________ ______________, President
______________________	______________________ Ron Sexton
______________________	______________________ Abbe Sexton
______________________	 James Michael Beiser
______________________	 Chris Lay

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- 4 -