ORIGINAL

IN THE SUPREME COURT OF OHIO

Bankers Trust Company of California	)	CASE NO. 2010-0882
	)	
Appellee,		
	)	On Appeal from the Fulton County Court of Appeals
vs.	)	Sixth Appellate District
Georgia Wright, et al.		
	)	Court of Appeals Case No. 09FU000009
Appellants.	)	(Entry Date: April 16, 2010)
	)	Trial Court No. 07 CV 78 Fulton County, Court of
	)	Common Pleas

RECEIVED
JUN 01 2010
CLERK OF COURT
SUPREME COURT OF OHIO

MEMORANDUM IN SUPPORT OF JURISDICTION

OF APPELLANTS, GEORGIA WRIGHT AND DAVID WRIGHT

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EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST AND INVOLVES SUBSTANTIAL CONSTITUTIONAL QUESTIONS

Due process requires notice and an opportunity to be heard when there is a dispute as to the terms or existence of a settlement agreement. This decision will undermine precedent established by this court. Additionally, when the Supreme Court issues a decision which undermines the consideration for a purported settlement, that agreement is not enforceable as it is no longer supported by valid consideration.

STATEMENT OF THE CASE/ STATEMENT OF FACTS

On March 26, 2007, plaintiff-appellee filed a foreclosure complaint against defendants-appellants. Two previous foreclosure actions involving this real property had been filed and dismissed in Fulton County, Cases 02CV0023 and 03CV291, for failure to prosecute.

The above matter was scheduled for trial. Prior to trial, the parties had been attempting to resolve this matter and ultimately the trial court was advised that a settlement had been reached. A dispute arose relative to the settlement terms and the court, upon consideration of the pleadings filed by the parties, ordered that appellants sign and enter into an agreement presented by appellee. No hearings were held relative to this agreement. During the time

of negotiations and the dispute over the settlement agreement, the Ohio Supreme Court's decision in U.S. Bank Nat'l Ass'n v. Gullotta, (2008) 120 Ohio St. 3d 399, changed the law as to multiple foreclosure actions - this change invalidated plaintiff-appellee's original cause of action.

By separate entry, the trial court also dismissed appellant's counterclaims. The instant appeal followed.

ARGUMENT IN SUPPORT OF APPELLANT'S POSITIONS OF LAW

Proposition of Law No. I:

> When there is a dispute as to the existence of a settlement agreement or the terms of a settlement agreement, a trial court must conduct an evidentiary hearing prior to entering judgment.

There are numerous issues involved in this case which precluded the trial court from enforcing a proposed settlement agreement.

This Court issued a decision relative to purported settlement agreements in Rulli v. Fan Co. (9/10/1997) Case No. 96-249, holding that where there is a dispute that contests the existence or terms of a settlement agreement, a trial court must hold an evidentiary hearing prior to entering judgment. Further, the Sixth District in Salsbury v. Goodell (11/26/2008) Case No. L-08-1204 also supports the appellant's position. The parties in Salsbury went on the

record during the course of a contested matter and indicated they had reached a mutual resolution of all claims before the court.

> "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, citing Noroski v Fallet (1982), 2 Ohio St.3d 77, 79. 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-L 190. 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."

In Kolar v Shapiro (2008), Case No. 2007-L-148, unreported Eleventh District Court of Appeals, the Court of Appeals affirmed a trial court decision which refused to adopt a settlement. The court in Kolar noted the difference between an "in court" and "out of court" settlement stating:

> "It is well-established that '[w]here the parties in an action *** voluntarily enter into an oral settlement agreement *in the presence of the court,* such agreement constitutes a binding contract." (Emphasis added.) Spercel v Sterling Industries, Inc. (1972), 31 Ohio St. 2d 36, paragraph one of the syllabus; accord: Walther v Walther (1995), 102 Ohio App.3d 378, syllabus; Roth v Roth, 8th Dist. No. 89141, 2008-Ohio-927, at ¶23; Campbell v Buzzelli, 9th Dist. No. 07CA0048-M, 2008-Ohio-725.

The court in Kolar also noted that any proposed agreement required the payment of $10,000.00 which never occurred and found that the agreement was contingent upon the payment of said funds.

In Superior Piping Inc. v Reilly Industries Inc. (2008) unreported, 8th District Court of Appeals Case No. 2008-4858, the parties engaged in settlement negotiations and several drafts of a proposed agreement were exchanged but never executed. The court found that where details of the settlement became unclear and no agreement had been signed that there was no "meeting of the minds" between the parties.

The record reflects that there were discussions between the attorneys for the parties that this matter could still be submitted to the trial court for litigation if there were disputes. A meeting of the minds for settlement would have required that all contingencies be addressed including those involved wherein the parties failed to tender the payment or sign the loan modification documents. Also, the final loan modification agreement had not been prepared as of December 3, 2008.

The proposed loan modification agreement also is deficient in several other respects. The proposed document only addresses appellant David Wright as a borrower and is between David Wright and Deutsche Bank and/or IndyMac Bank. Neither Deutsche Bank nor IndyMac Bank were parties to the pending litigation. The signatory

to the agreement is IndyMac Bank, FSB. This mortgage is held by Banker's Trust and was not reassigned to either of the foregoing entities. There were also unresolved questions over financial matters contained in the documents. The court also dismissed appellants' counterclaim even though the record did not support this dismissal. The trial court's decision based upon the limited record before it was in error.

This court also held in Rulli that where there is a dispute regarding the meaning of terms of a settlement agreement, or where there is a dispute whether a valid settlement agreement exists, the court must conduct an evidentiary hearing before ruling on a motion to enforce the terms of a purported settlement.

The record reflects that disputes about terms and whether an agreement even existed were in issue in this matter. The court erred in ruling on these issues without conducting a hearing.

Proposition of Law No. II:

> A change in law based upon a court decision can destroy the underlying consideration for a settlement agreement.

In Rice v American Select Insurance (2005) unreported, Fifth District Court of Appeals, Case No. 2005-2597, the court found that the parties had not reached an agreement even though a pending offer was in place and a faxed acceptance of that offer was forwarded holding there was no meeting of the minds. The court

also found that a change in law by virtue of an Ohio Supreme Court decision had effectively destroyed the underlying cause of action.

The Sixth District Court of Appeals has also recognized that although disfavored, the doctrine of frustration of purpose also could apply to a contract. In Donald Harris Law Firm v Dwight Killian (2006), 166 Ohio App.3d 786, the court stated as follows:

> "The doctrine of frustration of purpose is defined, in the Restatement of the Law 2d, Contracts (1981) 334, Section 265, as: 'Where, after a contract is made, a party's principal purpose is substantially frustrated without his fault by the occurrence of an event, the non-occurrence of which was a basic assumption on which the contract was made, his remaining duties to render performance are discharged, unless the language or the circumstances indicate the contrary.' Nevertheless, the doctrine of frustration of purpose is not widely accepted in Ohio. American Premier Underwriters, Inc. v. Marathon Pipe Line Co., 3rd Dist. No. 10-2001-08, 2002 Ohio-1299; Mahoning National Bank of Youngstown v. State (May 27, 1976), 10th Dist. No. 75AP-532."

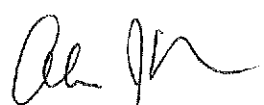
Here, the doctrine can be applied to the facts of this case due to the complete failure of the purpose of any purported settlement due to the Ohio Supreme Court's decision in U.S. Bank v Gullota, (supra). That decision held that the two prior dismissals of the same foreclosure action barred any further claim arising out of the mortgage. Here as in Gullota, the two prior foreclosure actions against appellants were dismissed. Applied to the case here, the appellants would be repaying appellee for an unenforceable mortgage. Clearly, the consideration for any

purported agreement would fail. The trial court erred in failing to apply these standards to the purported agreement. The trial court should have found any purported agreement would be subject to this doctrine and unenforceable.

CONCLUSION

For the reasons discussed above, this case involves matters of public and great general interest and substantial constitutional questions. The appellants request that this court accept jurisdiction in this case so that the important issues presented will be reviewed on the merits.

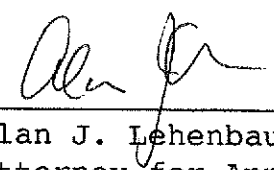
Respectfully submitted,



Alan J. Lehenbauer
Attorney for Appellants Wright

PROOF OF SERVICE

I hereby certify that a copy of the foregoing Memorandum in Support of Jurisdiction was sent by ordinary U.S. mail service this 28th day of May, 2010, to: Michael E. Nitardy, Shannah J. Morris, and W. Joseph Scholler, FROST BROWN TODD LLC, 201 East 5th St., 2200 PNC Center, Cincinnati, Ohio 45202; Bev Schlosser, Treasurer of Fulton County, Ohio, 152 S. Fulton St. #165, Wauseon, Ohio 43567; and Nancy J. Yackee, Auditor of Fulton County, Ohio, 152 S. Fulton St. #165, Wauseon, Ohio 43567.



Alan J. Lehenbauer
Attorney for Appellants Wright

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FILED
FULTON COUNTY COURT OF APPEALS
APR 16 2010
Paul E. MacDonald, Clerk

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

Appellees

v.

Georgia Wright, et al.

Appellants

Court of Appeals No. F-09-009

Trial Court No. 07 CV 78

DECISION AND JUDGMENT

Decided: APR 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

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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.

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Bankers Trust Company of California
as Trustee under the Pooling and
Servicing Agreement Series 2001-A
v. Georgia Wright, et al.
F-09-009

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. _____ JUDGE
CONCUR.

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at: http://www.sconet.state.oh.us/rod/newpdf/?source=6.

JOURNALIZED 2/17/09
VOL 75 PG 1423

IN THE COMMON PLEAS COURT OF FULTON COUNTY, OHIO
CIVIL DIVISION

FILED
FULTON COUNTY
COMMON PLEAS COURT
2009 FEB 13 A 11: 03
MARY GYPE
CLERK

BANKERS TRUST COMPANY OF CALIFORNIA AS TRUSTEE UNDER THE POOLING AND SERVICING AGREEMENT SERIES 2001-A,	:	**Case No.: 07 CV 78**
Plaintiff,	:	**Judge: James E. Barber**
v.	:	**FINAL JUDGMENT ENTRY**
GEORGIA WRIGHT, *et al.*	:	Michael E. Nitardy (0079507) Shannah J. Morris (0079643) W. Joseph Scholler (0072764) Attorneys for Bankers Trust Company of California Frost Brown Todd LLC 201 East 5th Street 2200 PNC Center Cincinnati, Ohio 45202 Phone: (513) 651-6492 Fax: (513) 651-6981 mnitardy@fbtlaw.com
Defendants.	:	

Upon Plaintiff Banker's Trust Company's Motion to Enforce Settlement and to Impose Sanctions and Defendants David and Georgia Wrights' Motion to Strike, after reviewing all of the motions and memoranda, the Court finds the following:

It is therefore ordered that Plaintiff's Motion to Enforce Settlement is hereby GRANTED.

It is further ordered that Plaintiff's Motion to Impose Sanctions is hereby DENIED.

It is further ordered that Defendants' Motion to Strike is hereby OVERRULED.

This Final Judgment Entry shall be construed as a final appealable order.

IT IS SO ORDERED.

Date: 2·13·09

Judge James E. Barber

This is a Final Judgement. To the Clerk: Serve all parties not in Default with "Notice" of this Judgement, and "Date of its Entry upon the Journal."

James E. Barber, Judge

Copies Served 2/17 09
Mary Gype, Clerk
By _____

JOURNALIZED
VOL 75 PG 1424

Copies To:
Shannah J. Morris, Esq.
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Swanton, Ohio 43558
Trial Attorney for Defendants David and Georgia Wright

CINLibrary BT10482.0536860 1936006v1

JOURNALIZED 2/3/09
VOL 75 PG 1147

FILED
FULTON COUNTY
COMMON PLEAS COURT
2009 FEB -3 P 4: 24
MARY GYPE
CLERK

IN THE COURT OF COMMON PLEAS OF FULTON COUNTY, OHIO

Bankers Trust Company,	*	
Plaintiff,	*	
-vs-	*	Fulton Co. Case No. 07CV000078
Georgia Wright, et al,	*	**JUDGMENT ENTRY**
Defendants.	*	

* * * * *

Coming on before the Court are the following:

1. Plaintiff's Motion to Enforce Settlement, and to impose Sanctions, filed December 24, 2008, along with Affidavits of G. Christensen and Michael Nitardy, and Supporting Documentation.

2. Defendant's Motion to Strike, filed January 16, 2009.

3. Defendant's Memorandum in Opposition, filed January 16, 2009.

4. Plaintiff's Reply Memorandum, filed January 26, 2009.

5. Defendant's Reply Memorandum, filed January 30, 2009.

This case comes before the Court with a long history. Plaintiff filed its first foreclosure action against the Defendants in January of 2002, being Case Number 02CV000023. Plaintiff's corporate officers and counsel refused to negotiate, participate in, or communicate with Defendant's

counsel or the Court, which included counsel's failure to attend noticed Pretrial Hearing dates. After almost two years of non-action the Court dismissed Plaintiff's action, "without prejudice," by Entry filed November 18, 2003.

Plaintiff refiled the foreclosure action within weeks, being Case Number 03CV000291. Again Plaintiff's counsel refused/failed to negotiate, participate in, communicate with, or attend to Court Orders, and the case was again dismissed, but this time "with prejudice," by Entry filed April 1, 2004. This "dismissal" was never appealed.

The present case was refiled on March 26, 2007. This time Plaintiff's counsel actively participated in and communicated with Defendant's counsel and the Court. Settlement negotiations, understandably, were "slow-going," with the Defendants having "estoppel" and "res judicata" arguments in hand.

Pretrial Conference was held August 16, 2007, and Bench Trial was assigned for November 27, 2007. By Agreement and Consent, trial was rescheduled for September 19, 2008. On September 17, 2008, by Agreement and Consent, trial was rescheduled for December 4, 2008. The Court further advised counsel that there would be no further continuances.

On December 3, 2008 the Court received a telephone call from Defendants' Attorney Lehenbauer, who advised the Court that a "full settlement" had been achieved, and that the trial date of December 4, 2008 should be vacated. The Court then vacated the trial date in the expectation of receiving a Final Judgment Entry within a matter of weeks.

On December 24, 2008, the Court received Plaintiff's two-prong Motion, with an extensive Memorandum and Documentation, to "Enforce Settlement" and to impose "Sanctions." Defendants filed their Motion to Strike and Memorandum in Opposition on January 16, 2009. Plaintiff filed its

Reply on January 26, 2009, and Defendants filed their Reply on January 30, 2009. All matters had been scheduled for Hearing on January 30, 2009. However on January 29, 2009 the Court contacted the Attorneys and advised them that the Hearing on January 30, 2009 would be vacated, and the Court would decide the issues on the basis of the Motions, Pleadings, and Documentation already in the record.

Defendants claim they should not be required to proceed with the finalization or execution of a purported Settlement Agreement, since they had made their offers and representations, and an assent, without the benefit of knowledge that the law, upon which they had based their decision, had changed with the rendering of the new Slip Opinion U.S. Bank v. Gullota (2008), 2008 Ohio St. 6268, which reversed the Court of Appeals Decision of U.S. Bank v. Gullota (2007), Ohio App. Lexis 1935 (5th App. Dist), upon which all parties had relied upon in formulating their Agreement. Further, they claim they have yet to put their signature to any written document which would affect any interest in real estate, and thus any enforcement proceeding would run afoul of the Statute of Frauds.

It is interesting to note that the Gullota Appellate Decision was expressly referenced by Plaintiff's Attorney in her letter to Defendant's Attorney, dated August 13, 2008, in support of Plaintiff's position that its claim retained viability. Defendants now claim that there was no real "meeting of the minds," and that there was a mutual "mistake in law," as well as a mutual "mistake in fact," which nullifies any purported mutual assent.

Defendants further point out that the alleged agreement was subject to a "contingency" whereby the Defendants were to pay $2,000.00. Since this contingency was never fulfilled, and the documents were never signed, Defendants argue the purported Agreement was never "integrated."

Defendants further argue that the latest Gullota Decision constitutes a "frustration of purpose," and that if the purported settlement were to be enforced against them, then it would have the effect of requiring the Defendants to pay on an "unenforceable mortgage."

Lastly Defendants claim that this Court must "strike" any evidence of an "Offer in Compromise," dated December 12, 2008, since it is precluded from any consideration under the auspices of Evidence Rule 408.

Plaintiff claims there was a fully formulated Agreement arrived at on the eve of trial, that both parties assented to it, that its terms were and are established by "clear and convincing" evidence, and that this Court must enjoin its enforcement. Plaintiff further claims that Evidence Rule 408 is not applicable in this case, since the Agreement at issue was fully integrated, and thus more than a mere offer to compromise.

Defendants have further replied that Plaintiff "Bankers Trust" is not a real party in interest in this case, and that any negotiations held in regard to the present action were conducted by and with Representatives of "Deutsche Bank," which (allegedly) has no interest in Defendants' mortgage. Thus Defendants claim their action must be dismissed.

After a review of the Pleadings, Documentation, and Recitations of Law in this case, the Court finds that Plaintiff Bankers Trust has been properly substituted as a Party Plaintiff, and it has a real and sufficient interest in the instant proceeding whereby it should be allowed to prosecute the action. The Court further finds that the Parties did in fact enter into an Agreement in full settlement of their issues and the present controversy. Settlement Agreements are "favored at law." The Agreement at issue represents concessions that were made by both sides, and it is not "unconscionable." Thus, in consideration of all of the above, the Court finds that in law and equity

it should and must enforce and enjoin the same.

The Court ADOPTS its FINDINGS as its ORDER. Now therefore,

Defendant's Motion to Strike is OVERRULED.

IT IS SO ORDERED.

Plaintiff's Motion to Enforce is found to be in the interest of justice, and it is GRANTED.

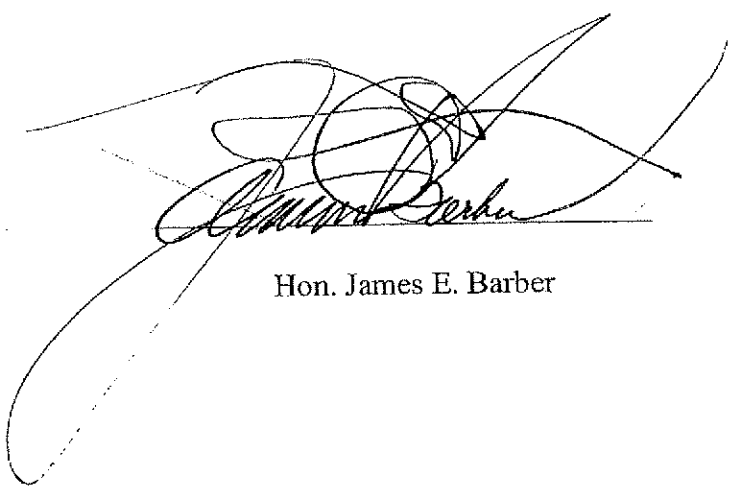
IT IS SO ORDERED.

Plaintiff's Motion for Sanctions is found not to be in the interest of justice, and it is DENIED.

IT IS SO ORDERED.

Plaintiff's Counsel shall within 15 days, prepare and forward to the Court for signature and filing a Final, Appealable, Judgment Entry consistent with the Court's Rulings herein. Defendants' right to Appeal is preserved.

IT IS SO ORDERED.



Hon. James E. Barber

cc: Shannah Morris, Esq.
Michael Nitardy, Esq.
Alan Lehenbauer, Esq.