

ORIGINAL

IN THE SUPREME COURT OF OHIO

BANKERS TRUST COMPANY OF CALIFORNIA,

Plaintiff/Appellee,

v.

GEORGIA WRIGHT, et al.,

Defendants/Appellants.

Case No. 2010-0882

On Appeal from the Fulton County Court of Appeals, Sixth Appellate District
Court of Appeals Case No. F-09-009

Trial Court Case No. 07 CV 78
Fulton County Court of Common Pleas

**PLAINTIFF/APPELLEE'S MEMORANDUM IN OPPOSITION TO
DEFENDANT/APPELLANTS' MEMORANDUM IN SUPPORT OF JURISDICTION**

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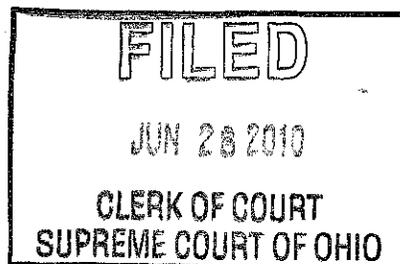


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I. STATEMENT OF APPELLEE'S POSITION AS TO WHY THIS CASE IS NOT OF PUBLIC OR GREAT GENERAL INTEREST AND DOES NOT INVOLVE SUBSTANTIAL CONSTITUTIONAL QUESTIONS

Plaintiff-Appellee brought this residential foreclosure action against the Defendant-Appellants because the Appellants failed to make numerous mortgage payments. After months of negotiating and on the eve of trial, the parties agreed to settle the matter pursuant to terms set forth in a loan modification/settlement agreement. Under Ohio law, due process does not require a court to conduct an evidentiary hearing to determine the enforceability of a settlement agreement when it is clear to the court that there are no factual disputes regarding the terms of the settlement agreement. The trial and appellate courts properly held that the parties mutually agreed on the essential terms of the settlement agreement and found no factual disputes vis-à-vis the settlement agreement. Furthermore, the trial and appellate courts, relying on established Ohio law, properly held that the frustration of purpose doctrine does not apply to the case at bar. Because the Appellants' Propositions of Law are contrary to well-established Ohio law, this case is not one of great general interest and does not involve any constitutional questions.

II. STATEMENT OF THE CASE/FACTS

This case is about a residential foreclosure. The Defendants-Appellants, David and Georgia Wright, are the mortgagees and have failed to pay their mortgage to the Plaintiff-Appellee, Banker's Trust Company of California as Trustee under the Pooling and Services Agreement Series 2001-A, for over seven years.¹ The Appellee does not agree with the Wrights' recitation of the facts.

¹ Appellee does not dispute that the prior foreclosure cases, 02CV000023 and 03CV000291, were dismissed for failure to prosecute. However, counsel for Appellee for those cases was not the undersigned. Further, even after the second dismissal, the Wrights continued to fail to pay their mortgage. Their decision not to pay their mortgage led to the filing of the case at bar.

After the case had been continued several times, most recently in September of 2008, the matter was finally set for trial for Thursday, December 4, 2008. The trial court informed both counsels that a continuance would not be allowed due to the length of time the case had been on the docket. As a result, the case had to either be settled, dismissed with leave to re-file, or be tried on Thursday, December 4, 2008. On December 3, 2008, the eve of trial, the parties entered into a valid and binding settlement agreement. After reaching an accord on the settlement terms, Appellants' counsel, Alan Lehenbauer, called the trial court and informed it that the parties had settled all claims and that trial would not be necessary. Not until weeks later, once the parties agreed to the terms of the agreement, did Appellants' change their minds about the settlement and refuse to sign the agreement.² Appellee then filed a motion to enforce settlement, which the trial court rightfully granted and appellate court affirmed.

Although the trial court did not conduct an evidentiary hearing prior to enforcing the settlement agreement, it was not required to do so under Ohio law. Both the trial and appellate courts properly held that parties had agreed to the terms of the agreement and that the terms were so clear that there were no factual disputes as to the agreement terms.³ Thus, the Court should affirm the trial and appellate court's enforcement of the settlement agreement and deny Appellants' request for jurisdiction.

² Appellants' claim that negotiations and "the dispute over the settlement agreement" were on-going when this Court rendered the Gullotta decision is disingenuous. See the appellate court's Decision and Judgment, p. 4 (finding that the only changes that needed to be added to the agreement were a typo and an administrative issue regarding the process of the Appellants' settlement payments.) (The Decision and Judgment was attached to the Appendix of the Appellants' Memorandum in Support of Jurisdiction, p. 1.)

³ See Decision and Judgment of the Fulton County Court of Appeals, ¶¶19-20 and Judgment Entry of the Fulton County Court of Common Pleas, p. 4. Both Judgments were attached in the Appendix of the Appellants Memorandum in Support of Jurisdiction.

III. ARGUMENT

A. Proposition of Law No. 1

When there is no factual dispute regarding the terms of a settlement, a court is not required to conduct an evidentiary hearing.

This Court has held that where there is no factual dispute regarding the terms of settlement, a court is not required to conduct such an evidentiary hearing. *Rulli v. Fan Co.*, 79 Ohio St. 3d 374, 377; 1997-Ohio-380; 683 N.E.2d 337. Ohio law also states that a trial court possesses the authority to enforce a settlement agreement voluntarily entered into by the parties to a lawsuit because such an agreement constitutes a binding and enforceable contract. *Mack v. Polson Rubber Co.*, 14 Ohio St. 3d 34, 36. As this Court stated in *Mack*, “[t]o permit a party to unilaterally repudiate a settlement agreement would render the entire settlement proceedings a nullity, even though, as we have already determined, the agreement is of binding force.” *Id.* See also *Spercel v. Sterling Industries* (1972), 31 Ohio St. 2d 36.

In *Mack*, like the present case, the parties entered into a settlement agreement outside the presence of the court. However, the court in *Mack* held that a court can enforce settlement agreements even if they are agreed to outside the presence of the court. *Id.* Also similar to the facts in *Mack*, Appellants’ counsel admitted that the parties had entered into a settlement agreement and did not dispute the essential terms of the agreement.⁴ *Id.* Thus, the court in *Mack* held that “in the absence of allegations of fraud, duress, undue influence, or of any factual dispute concerning the existence or the terms of a settlement agreement, a court is not bound to

⁴ Appellees base their appeal on the fact that a typo and minor administrative tasks had not been determined (i.e. whether to pay on-line or by certified check). However, this does not give rise to an actual factual dispute about the terms of the settlement agreement. The Appellants also alleged the following deficiencies with the settlement agreement: (1) that it only addressed David Wright and not Georgia Wright and (2) that Deutsche Bank/IndyMac Bank was not the proper signatory because it was not a party to this case. Both the trial and appellate courts rejected these alleged, baseless deficiencies and enforced the settlement agreement.

conduct an evidentiary hearing” prior to enforcing a settlement agreement. *Id.* at 36-37. (Emphasis added.)

The facts of *Superior Piping, Inc. v. Reilly Industries, Inc.*, a case relied on by Appellants, are not on-point with the case at bar. (Cuyahoga Cty.), 2008-Ohio-4858. Unlike the case at bar, the parties in *Superior Piping* never mutually agreed to the terms of the settlement agreement as they exchanged numerous drafts of the agreement. However, both the trial and appellate courts held that the Appellants and Appellee mutually agreed to all of the essential terms of the settlement agreement. There were not numerous drafts being exchanged between the parties and the only issues that Appellants raised about the agreement was a typo and the administrative procedure for the Appellants’ loan payments. As such, the trial and appellate courts properly held that the Appellee and Appellants came to a “meeting of the minds” as to the terms of the settlement agreement and that an evidentiary hearing was not necessary.

B. Proposition of Law No. 2

The frustration of purpose doctrine does not apply to this case because established Ohio law states that the law that is in existence at the time the contract is executed is the law that applies to the contract.

The trial and appellate courts properly held that the frustration of purpose doctrine does not apply to the case at bar. Appellants attempt to use *Donald Harris Law Firm v. Dwight-Killian* for the proposition that because of the Supreme Court’s decision in *Gullotta*, the parties’ settlement agreement should be void due to frustration of purpose. 2006-Ohio-2347, 853 N.E.2d 364, 166 Ohio App. 3d 786. However, not only does Ohio law not support Appellants’ assertion, but Appellants admit that Ohio courts have held that the frustration of purpose doctrine is disfavored. See Appellants’ Memorandum in Support of Jurisdiction, p.6. In *Rice*, a case on which Appellants rely, the issue before the court was whether a change in law impacted the

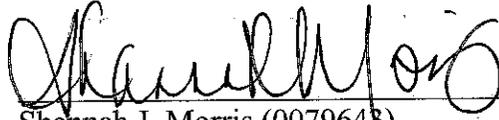
enforceability of an agreement. *Rice v. American Select Ins., Co.* (Stark Cty.), 2005-Ohio-2597. The court in *Rice* held that the law in existence at the time of a contract applies unless the change is retroactive. *Id.* at ¶15. There is no statement in *Gullotta* that the decision is retroactive. See *U.S. Bank v. Gullotta*, 2008 Ohio 628. Thus, the trial and appellate courts did not err by finding that Appellants' frustration of purpose argument failed.⁵

IV. CONCLUSION

Pursuant to established Ohio law, both the trial court and appellate courts properly held that there were no factual disputes as to the terms of the parties' settlement agreement. As such, the trial court was not required to hold an evidentiary hearing. Ohio law also states that the law in existence at the time a contract is executed is the law that governs that particular contract. Thus, the trial and appellate courts, in enforcing the settlement agreement, also properly held that the frustration of purpose doctrine is not applicable to the present case. For these reasons, this is not a case involving a constitutional question or any issues of public or great general interest. Appellee remains entitled to its judgment enforcing the settlement agreement and this Court should properly refuse jurisdiction of this appeal and permit the sound judgments of the trial court and the appellate court to stand.

⁵ See Decision and Judgment of the Fulton County Court of Appeals, ¶¶21-23 and Judgment Entry of the Fulton County Court of Common Pleas, p. 5. Both Judgments were attached in the Appendix of the Appellants Memorandum in Support of Jurisdiction.

Respectfully Submitted,

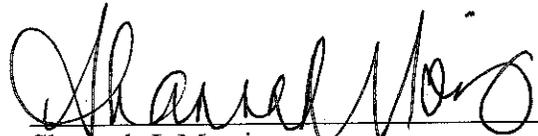


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CERTIFICATE OF SERVICE

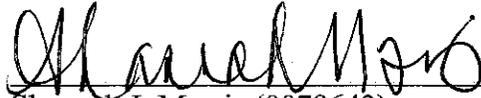
This is to certify that a copy of the foregoing Appellee's Memorandum in Opposition to Appellants' Memorandum in Support of Jurisdiction has been sent by ordinary U.S. mail, postage prepaid, to the following on the 25th day of June, 2010:

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CERTIFICATE OF SERVICE

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