

ORIGINAL

IN THE SUPREME COURT OF OHIO

ARTISAN MECHANICAL, INC., : Case No. 2011-0052
Appellant, : On Certification of Conflict from
v. : Butler County Court of Appeals,
: Twelfth Appellate District
JAMES MICHAEL BEISER : Court of Appeals
and : Case No.: CA 2010 02 039
CHRIS LAY, :
Appellees.

MERIT BRIEF OF APPELLEES JAMES MICHAEL BEISER AND CHRIS LAY

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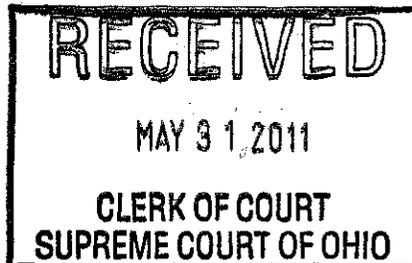
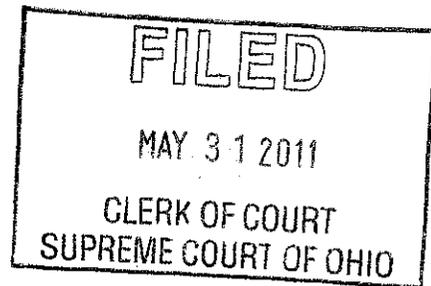


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SUMMARY OF ARGUMENT

The Court should either dismiss this appeal as having been improvidently granted or affirm the lower courts' decisions without addressing *Rulli v. Fan Co.*, 79 Ohio St.3d 374, 1997-Ohio-380, 683 N.E.2d 337 (attached as Exhibit "A"). Artisan has waived its *Rulli* argument, and in any event, this case is factually distinguishable from *Rulli* and from the purported conflict cases. This case represents not a blank factual canvass on which the Court should base Ohio precedent; rather it embodies myriad grounds supporting either a dismissal of the certified conflict or an affirmance of the lower courts' decisions without resort to *Rulli*.

Should this Court reach the *Rulli* issue, Beiser and Lay respectfully submit that, (1) the *Rulli* reasoning does not apply in cases where the court has denied enforcement of the disputed agreement and (2) an evidentiary hearing was not warranted under the undisputed facts, the long-standing canons of construction for the interpretation of contracts, and Ohio Supreme Court precedent.

STATEMENT OF THE CASE AND FACTS

In 2008, plaintiff-appellant Artisan Mechanical, Inc., ("Artisan") sued defendants-appellees James Michael Beiser and Chris Lay ("Beiser and Lay") in the case captioned *Artisan Mechanical, Inc. v. Beiser, et al.*, Butler County Court of Common Pleas, Case No. CV 2008 11 4889, alleging unfair competition. The 2008 case was dismissed with prejudice pursuant to the Common Pleas Court Order of February 20, 2009. See Order of Dismissal, Case No. CV 2008-11-4889 (attached as Exhibit "B"). The Court's entry of dismissal with prejudice provided that either party "may, on good cause shown, within sixty days, request further action if settlement is not consummated * * * and that on agreement, and within sixty days, the Parties may submit a supplementary entry outlining details of the settlement." See Exhibit B.

The facts leading to the February 20, 2009 Entry of Dismissal are properly recited in the Twelfth Appellate District's Decision in *Artisan Mechanical, Inc. v. Beiser, et al.*, 12th Dist. No. CA2010-02-39, 2010-Ohio-5427 (attached as Exhibit "C") as recounted here: 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 Accurate Mechanical Systems ("AMS"), their business. That same morning at 9:44 a.m., Beiser and Lay's counsel accepted Artisan's settlement proposal on the following terms and conditions: (1) Both sides "walk away" from the litigation; (2) Six month non-compete, commencing today, February 4, 2009, ending August 3, 2009; (3) Beiser, Lay and their company will initiate no new bids to Fuji or Veritus; and (4) Artisan will initiate no new bids to Flavor Systems or Lyons Magnus. (2/4/09 E-mail from AGC to TGP, "Artisan Mechanical and Beiser and Lay," attached as Exhibit "D"). Beiser and Lay's counsel also "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." See Exhibit D.

Artisan's counsel responded by e-mail as follows:

"[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 Veritus, for today forward for six months, in furtherance of any bid.” (2/4/09 E-mails TGP to AGC and AGC to TGP, “No Deal” and “Nothing further will be submitted,” attached as Exhibit “E”).

Beiser and Lay’s counsel responded:

“I am informed that the bid to Fuji is complete. Nothing further will be submitted, or needs to be submitted [to Fuji]. We have a deal.” See Exhibit E.

The parties cancelled depositions that were scheduled for February 5-6, 2009. Two days later, on February 6, 2009, Beiser and Lay’s counsel sent Artisan’s counsel a draft of a settlement agreement. (2/6/09 E-mail from AGC to TGP, “Draft of Settlement Agreement,” attached as Exhibit “F”). When Artisan had failed to respond in ten days, on 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.” (2/16/09 E-mails from AGC to TGP and TGP to AGC, “Sign Settlement Agreement” and “Busy,” attached as Exhibit “G”).

On February 19, 2009, Artisan’s counsel informed the Court that the case had settled.

POST-DISMISSAL NEGOTIATIONS

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. (3/10/09 E-mail AGC to TGP, “Signatures Attached,” attached as Exhibit “H”). 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. (3/17/09 E-mails TGP to AGC, AGC to TGP, TGP to AGC, “Paragraphs 4, 5, 8 unaccepted,” “Agree to 8,” “Drop Them,” attached as Exhibit “I”).

On March 17, 2009, the negotiations continued, and Artisan suggested that two paragraphs be redacted from the proposed agreement. The final March 17, 2009 email from Artisan's counsel read: "I suggest we just drop [paragraphs four and five]. They were not a part of either my *offer to settle or yours*, and given the nature of the dispute, I foresee them doing more harm than good." See Exhibit I (Emphasis added).

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 negotiations: "I know we communicated on this after my email below, but I'm coming up blank on where this stands. Please advise." (4/16/09 E-mails from TGP to AGC and AGC to TGP, "Coming Up Blank" and "Recap", attached as Exhibit "J"). 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. See Exhibit J. 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." See Exhibit J. All of these facts are gleaned from communications between the two lawyers. There is nothing from Beiser and Lay except their signatures on one draft. There is no relevant evidence from the principals of Artisan whatsoever.

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

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. This was because Artisan had failed to execute the proposed settlement agreement that Beiser and Lay had tendered and because the parties had not made an agreement on the material terms. Thus, there was no settlement agreement between the parties that Beiser and Lay could have breached.

On June 29, 2009, rather than filing a Motion to Enforce the Settlement Agreement under the old case number, Artisan filed a new lawsuit against Beiser and Lay in the Butler County Common Pleas Court, alleging 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. As can be discerned from Beiser and Lay's Motion for Summary Judgment (see Decision and Entry Granting Motion for Summary Judgment, Case No. CV 2009-06-2832, attached as Exhibit "K") the entire dispute involved the legal question whether the two lawyers had generated a binding legal document. Summary judgment was an appropriate vehicle for resolving the dispute. And Judge Sage agreed. 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." See Exhibit K. Nothing in the record demonstrates that Artisan's principals had agreed to anything and nothing in the record exists that could show it.

Thus, the facts show that on February 6, 2009, and again on March 10, 2009, Beiser and Lay's counsel sent drafts of a settlement agreement to Artisan's counsel. And even on April 16, 2009, (a mere five days before the 60-day period set forth in the trial court's February 20, 2009 conditional dismissal order lapsed) the parties still had not executed an agreement, as evidenced

by Artisan’s counsel’s “blank-on-where-this-stands” email. The April 21, 2009 conditional-dismissal deadline passed without Artisan attempting to consummate the proposed settlement agreement, to modify the court’s contingent dismissal date or the date in which it may file a notice of appeal, or to request further court action. The April 16, 2009 proposal had no signatory.

The trial court entered summary judgment for Beiser and Lay, and the Twelfth Appellate District affirmed the judgment, holding that the trial court was not required to conduct an evidentiary hearing pursuant to *Rulli v. Fan Co.*, 79 Ohio St.3d 374, 1997-Ohio-380, 683 N.E.2d 337, because the trial court refused to enforce, rather than enforced a settlement agreement between the parties. See *Artisan*, 12th Dist. No. CA2010-02-039, ¶41 (Exhibit C). The Twelfth Appellate District certified a conflict on that issue on December 14, 2010, and on March 2, 2011, this Court ordered the parties to brief the following: “When there is a factual dispute between the parties over the existence of a valid settlement agreement, is the trial court required to conduct an evidentiary hearing regardless of whether it enforces or denies the enforcement of the agreement and enters judgment pursuant to the Ohio Supreme Court decision in *Rulli v. Fan Co.*”

Beiser and Lay respectfully submit that the Court answer that question in the negative because Artisan waived its *Rulli* argument, because the facts of this case are distinguishable from *Rulli* and from the conflict cases as is more fully discussed below, and because *Rulli*’s reasoning is not advanced in cases where the court denies enforcement of a disputed settlement agreement and enters judgment.

ARGUMENT

Proposition of Law No. 1: The Court need not interpret *Rulli*'s holding because it was waived and in any event the facts are distinguishable and the case can be dismissed or affirmed without resort thereto.

I. NO REQUEST FOR EVIDENTIARY HEARING AND NO MENTION OF *RULLI*

Before the trial court entered judgment, Artisan in fact never requested an evidentiary hearing nor argued that one was required under *Rulli*. See Trial Docket (attached as Exhibit "L"). See, e.g., *Monea v. Campisi*, 5th Dist. No. 2004CA00381, 2005-Ohio-5215, ¶11 (The party seeking enforcement failed to raise the [*Rulli*] argument during the summary judgment proceedings and did not request an evidentiary hearing resulting in a waiver of those arguments.) Artisan did not properly place its *Rulli* argument before the trial court: Before summary-judgment was entered, Artisan did not once cite *Rulli*, did not request an evidentiary hearing, and did not present evidence which may have been gleaned from an evidentiary hearing. See Exhibit L. Not a word about *Rulli*. In fact, the first suggestion of a whisper of *Rulli v. Fan Company* came only after Artisan prosecuted its appeal before the Twelfth Appellate District. Thus, the trial court was never given the opportunity to rule on Artisan's untimely *Rulli* argument. It was waived.

Generally, alleged "errors which arise during the course of a trial of a cause which are not brought to the attention of the court by objection, or otherwise, are waived and may not be urged for the first time on appeal." *Rosenberry v. Chumney* (1960), 171 Ohio St. 48, 168 N.E.2d 285; *Monea*, 5th Dist. No. 2004CA00381, ¶11. In this case, Artisan contended that the trial court should have held an evidentiary hearing only on appeal and only after the trial court's entry of summary judgment; and Artisan likewise failed to direct the trial court to its newly-advanced *Rulli* argument asserting that the court must hold an evidentiary hearing when it denies the

enforcement of a proposed valid settlement agreement when there is a “factual dispute” between the parties about the validity thereof. Accordingly, Artisan, like the appellant in *Monea*, has waived any right to request an evidentiary hearing or to advance a *Rulli* argument because it failed to raise those issues before the trial court.

II. THE COURT CONSIDERED ALL THE EVIDENCE

Beiser and Lay further note that in *Rulli*, the Plaintiff had identified probative and relevant evidence that it sought to be admitted in the form of two exhibits. In *Rulli*, the Defendants objected to the admission of the evidence; the trial court sustained Defendants’ objection, concluded that a previous settlement had been reached, and entered judgment based on Defendants’ interpretation of the agreement. That is not so in this case. Whereas in *Rulli* material evidence was sought to be admitted, in this case Artisan presented no fact or evidence rebutting Beiser and Lay’s summary-judgment motion beyond its canned recitations that Defendants’ motion (1) fails to demonstrate that there are no legal theories on which Artisan could prevail; (2) references no Civ.R. 56 evidence; and (3) contains no recognizable theory entitling it to summary judgment.

Artisan has identified not an iota of probative evidence that might be introduced into an evidentiary hearing instructive on whether a settlement agreement existed, nor can they do so. The trial and appellate courts considered all of the evidence, and properly determined that no issue of fact existed and that Beiser and Lay were entitled to judgment as a matter of law.

The closest Artisan came to identifying relevant or probative evidence with respect to the existence of an agreement or to requesting an evidentiary hearing was in its Motion to Compel Discovery filed on December 23, 2009. See Artisan’s December 23, 2009 Motion to Compel (attached as Exhibit “M”). And even in its Motion to Compel, Artisan identified no fact in

dispute on whether an agreement existed; rather it sought to discover facts related to “what work Beiser and Lay have performed * * * [and what] damages may have been caused.” See Exhibit M. Artisan referenced no scintilla of disputed fact germane to the issue before the trial court on summary judgment: whether a legally binding agreement existed. See Exhibit M.

It should also be noted that Artisan likewise failed to move for additional time to conduct discovery under Civ.R. 56(F). See Exhibit L (No Civ.R. 56(F) motion in the Trial Docket). That no Civ.R. 56(F) motion was filed highlights that no additional facts were discoverable. In Artisan’s own words it possessed all of the relevant evidence needed to respond on the merits to Beiser and Lay’s Motion for Summary Judgment: “Here, Artisan is not arguing that it needs additional discovery to respond in opposition to Beiser and Lay’s motion for summary judgment. *Artisan already has responded on the merits to the motion and does not seek discovery for the purposes of responding.* Rather, Artisan seeks discovery for the purposes of assessing the damages it may seek at trial.” (Emphasis added). Plaintiff’s Reply Memorandum in Support of Its Motion to Compel, Case No. CV 2009-06-2832, p.3 (attached as Exhibit “N”).

Where a party seeks enforcement of a disputed settlement agreement, it is hard to posit a scenario wherein that party would not already possess the relevant facts sought to be discovered in a hearing pursuant to *Rulli v. Fan Co.* (a “*Rulli* hearing”) or would not be able at least to identify that evidence precisely; moreover it would be derelict to the point of malpractice for counsel to fail to raise those operative facts or evidence in response to a dispositive motion. Artisan has identified neither relevant evidence nor potentially probative evidence that the trial court neglected to consider in entering judgment denying enforcement of the proposed agreement. The nonexistence of probative evidence is fatal to Artisan’s lately-discovered stratagem that a conflict exists, as is more fully discussed below.

III. A FABRICATED CONFLICT—A DISTINGUISHABLE CASE

That Artisan did not and cannot identify evidence that may be gleaned from a hearing likewise distinguishes this case from the cases that it cites in fabricating its conflict between districts: *Moore v. Johnson* (Dec. 11, 1997), 10 Dist. No. 96APE11-1579 and *Michelle M.S. v. Eduardo H.T.*, 6th Dist. No. E-05-053, 2006-Ohio-2119 are distinguishable from this case and therefore represent no conflict.

Initially, it should be noted that Artisan cites no less than five cases in contending that “Ohio’s appellate courts have required trial courts to conduct evidentiary hearings before entering judgment on matters where the parties factually dispute the existence of a settlement agreement.” (Merit Brief of Appellant Artisan Mechanical, Inc, at 6). However, each of the five cited cases specifically addressed instances where Courts sought to *enforce* proposed agreements. See *Myatt v. Myatt*, 9th Dist. No. CV 2007 12 8610, 2009-Ohio-5796, ¶¶ 12-14 (Reviewing a judgment to *enforce* a settlement agreement, the Court held it was “necessary for the trial court to conduct an evidentiary hearing”); *Ivanicky v. Pickus*, 8th Dist. No. 91690, 2009-Ohio-37, ¶5 (Reviewing trial court’s grant of motion to *enforce* settlement); *Union Savings Bank v. White Family Companies, Inc.*, 2nd Dist. No. 22730, 2009-Ohio-2075, ¶¶ 17, 27 (A hearing was required to *enforce* the agreement); *Wertzbaugher v. Goodell*, 6th Dist. No. L-08-1204, 2008-Ohio-6172, ¶13 (Contested matter was the trial court’s failure to conduct an evidentiary hearing when the trial court granted a motion to *enforce* a settlement agreement); *Lawrence v. Russell* (Aug. 11, 2000), 1st Dist. No. C-000008 (trial court erred in granting a motion to *enforce* a settlement when it failed to conduct an evidentiary hearing). Accordingly, these cases do not stand for Artisan’s general proposition advanced above, and they certainly do not buttress its

assertion that an evidentiary hearing is required when a court denies enforcement of a disputed agreement and enters judgment.

Artisan further contends that *Moore v. Johnson* conflicts with the Twelfth Appellate District's decision herein and that it requires a *Rulli* hearing before making a determination that no agreement existed. Yet, *Moore* concerned a case where tangible probative evidence existed. Specifically *Moore* concerned probative evidence, in the form of testimony from a magistrate who witnessed the oral agreement, which the trial court failed to consider when it ruled on a motion to *enforce* the agreement at issue. As such, *Moore* held that there should have been an opportunity to present such evidence. That tangible probative evidence is not present here. Thus *Moore*, like *Rulli*, is distinguishable because in those cases probative evidence tending to explain or evince the existence of an agreement had been identified, which in turn merited an evidentiary hearing. Furthermore, *Moore* was an *enforcement* case.

Finally, Artisan cites *Michelle M.S. v. Eduardo H.T.*, as its sole remaining conflict case, but in *Michelle* the party seeking enforcement in fact requested an evidentiary hearing before judgment was entered. 6th Dist. No. E-05-053, 2006-Ohio-2119, ¶16. Artisan did not. As noted above, Artisan sought discovery on damages, an issue separate and apart from whether a valid settlement agreement existed. Thus, *Moore* and *Michelle M.S.* are factually distinguishable from this case, and no conflict exists. But as explained above, this case is not so different from *Monea*, indeed in both fact and law it is on all fours.

IV. WRITTEN CONTRACT REQUIRED

Further, the facts show that Beiser and Lay intended only to be bound by a written and signed contract as evinced by the multiple requests that Artisan execute the proposed agreement. See Exhibit G (“Let me know when you are ready to exchange signatures”) and Exhibit J (“get

your clients to sign, and then I would get my boys to sign as well”). Where the parties intend to be bound by a written and signed contract only, no oral contract can be had. See e.g., *Central Cas. Co. v. Fleming* (1926), 22 Ohio App. 129, 153 N.E. 345; *McIntosh v. Micheli Restaurant* (1984), 22 Ohio Misc.2d 5, 488 N.E.2d 1261 citing 17 Ohio Jurisprudence 3d (1980) 515-516, Contracts, Section 81 and 17 American Jurisprudence 2d (1964) 406-407, Contracts, Section 67. Where the trial judge is advised that the parties have agreed to the settlement but the court is not advised of the terms of the agreement, the settlement agreement can be enforced only if the parties are found to have entered into a binding contract. *Natl. Court Reporters, Inc. v. Krohn & Moss, Ltd.*, 8th Dist. No. 95075, 2011-Ohio-731, ¶9, citing *Bolen v. Young* (1982), 8 Ohio App.3d 36, 38, 455 N.E.2d 1316.

It cannot be refuted that Beiser and Lay required that the proposed Agreement be reduced to a signed writing. See Exhibit F (sending an actual written draft of a proposed settlement agreement), Exhibit G (seeking a signature date), and Exhibit J (requesting Artisan’s signatures). Beiser and Lay’s counsel on several occasions prompted Artisan to reduce the proposed agreement to a signed writing and that never occurred. Instead Artisan’s response included feigned compliance but actual systematic and continual purposeful neglect in reducing the proposed agreement to a signed writing. The only logical conclusion is the one reached by both the Butler County Common Pleas Court and the Twelfth Appellate District: there was no settlement agreement because the parties did not agree on the material terms. On the one hand Artisan’s lack of assent to the material terms is marked plainly by its recalcitrance in signing the agreement and on the other hand Artisan seeks to enforce the very proposed agreement that it would not, and indeed did not, sign.

Artisan cannot pick and choose which terms of the proposed settlement it likes to later enforce, when in failing to execute the Agreement as proposed they have neglected to assent to a mutual commitment. This case represents nothing more than Artisan’s last-ditch effort to induce a court to impose upon Beiser and Lay terms on which the parties had not agreed. Moreover Artisan’s endeavor in this respect is purely academic: Artisan has both neglected and purposefully avoided any attempt to identify a modicum of instructive fact concerning the alleged existence of the disputed agreement which may have been gleaned from an evidentiary hearing. There are none.

It is important to note that in addition to the requirement that the proposed agreement be reduced to a signed writing, other material terms were not agreed on including the “confidentiality” and “non-disparagement” paragraphs that Artisan refused to accept—and those terms cannot be considered immaterial. The court had all of the facts available to it and none of those facts evinced the parties’ assent to an agreement.

In light of the underlying principle when it is not necessary to decide more, it is necessary not to decide more,¹ Beiser and Lay respectfully submit that the Court dismiss the appeal as having been improvidently accepted or affirm lower courts’ judgments without resort to *Rulli* because the lower court considered the all the evidence submitted by the parties, because Artisan requested no hearing, because Artisan has waived its *Rulli* argument by failing to raise it, and because the record fully supports the judgment for Beiser and Lay.

¹ *PDK Laboratories, Inc. v. United States Drug Enforcement Admin.* (C.A.D.C. 2004), 362 F.3d 786, 799, 360 U.S. App. D.C. 344.

Proposition of Law No. 2: When the parties dispute the existence of a settlement agreement, a trial court need not conduct an evidentiary hearing before entering judgment denying enforcement of the agreement.

V. THE *RULLI* REASONING IS NOT ADVANCED

This case neither presents the finality of judgment found in *Rulli*, nor advances the sound reasoning set forth therein.

Beiser and Lay initially note that this case must be reviewed through the *Rulli* lens's cautionary advisement that courts should be "particularly reluctant" to *enforce* a disputed settlement agreement as between adversarial litigants. 79 Ohio St.3d at 376. In *Rulli* this Court noted that the finality of judgment requires that a mandatory evidentiary hearing be held before a court enforces a disputed settlement agreement and enters judgment: "Though we encourage the resolution of disputes through means other than litigation, parties are bound when a settlement is reduced to final judgment. Since 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.*

In light of this Court's well-reasoned analysis in *Rulli*, it is apparent that the rationale behind mandating a hearing was predicated on (1) the finality of judgment when a court enforces a disputed settlement agreement along with its disputed terms and the associated extinguishment of the right to adjudication by trial, and (2) long-standing precedent militating against *enforcement* of a purported contract when its terms or existence is disputed. *Rulli* *supra*, citing 1 Corbin on Contracts (Rev.Ed. 1993) 525, Section 4.1; *James Ward & Co. v. Wick Bros. & Co.* (1867), 17 Ohio St. 159; *Columbus, Hocking Valley & Toledo Ry. Co. v. Gaffney* (1901), 65 Ohio St. 104, 61 N.E. 152.

The finality of judgment espoused in *Rulli* is not present when a Court denies the enforcement of a disputed settlement agreement. In such cases, a plaintiff that sought enforcement may nonetheless move for Civ.R. 60(B) relief from judgment in the original dismissed action, and then pursue the underlying cause of action. The Civ.R. 60(B) factors are met when a plaintiff has dismissed a lawsuit in contemplation of settlement and when no settlement was subsequently consummated. In those cases, a granted Civ.R. 60(B) motion does not prejudice the right to trial and allows the moving plaintiff to pursue the original cause of action and to continue negotiating settlement. A trial court's entry granting a Civ.R. 60(B) motion in such cases is obligatory when the underlying dismissal was predicated on the parties' intention to enter into a contract to settle the dispute. Assuming that a trial court, for whatever reason, denies the 60(B) motion, the party may then pursue that adverse judgment in the Courts of Appeals. Thus a party seeking enforcement is not prejudiced when a court denies enforcement of a disputed settlement agreement, and that lack of prejudice applies equally to plaintiffs and to defendants.

A defendant claiming that a settlement agreement exists has not been stripped of any prejudicial right when a court denies enforcement of the disputed settlement agreement and enters judgment. It may continue to defend in the underlying action as though no settlement had taken place and further negotiate settlement on agreed upon terms.

A plaintiff or a defendant seeking enforcement of a disputed settlement agreement should set forth probative evidence, or evidence expected to be discovered, sufficiently indicating the existence of an agreement such that an evidentiary hearing is warranted. A trial court contemplating enforcing the disputed agreement may then grant an evidentiary hearing in consideration of the movant's purported probative evidence. However no justification for an

evidentiary hearing presents itself when no additional evidence is identified or exists and when a trial court is disinclined to enforce a disputed settlement agreement. Either there is sufficient evidence tending to prove the existence of a disputed contract, which in turn requires a *Rulli* hearing, or there is not enough evidence to justify the *Rulli* hearing in which case a required evidentiary hearing is superfluous and the denial thereof is a proper exercise of the trial court's broad discretion. The Court may properly deny enforcement without redundantly delving into cumulative evidence that could have been raised by the party seeking enforcement either in its opposition to a dispositive motion or in support of its own dispositive motion. In both support of or in opposition to a dispositive motion, it is incumbent on the party seeking enforcement to proffer evidence probative of the validity of the disputed agreement and where it cannot, there is no prejudice in denying enforcement of the disputed agreement and entering judgment without holding a hearing. Such is one reason that *Rulli* limited its application to cases where a court *enforces* a disputed settlement agreement.

The *Rulli* Court further reasoned that the law disfavors enforcement of contracts laden with ambiguity. *Rulli*, supra at 376. In fact, *Rulli* warns against the enforcement of unascertainable contracts of the types at issue here—those that do not reflect mutual assent or that include terms that are indefinite, vague, or unascertainable. “A Court cannot enforce a contract unless it can determine what it is.” *Id.* It is not sufficient that both parties think that they have an agreement—and it certainly is not sufficient when only one party thinks that an agreement exists. A Court properly refuses to enforce a disputed contract—without holding an evidentiary hearing—when its unable to determine the terms of an asserted agreement and when the asserted agreement is vague, indefinite, or uncertain as to the material terms: “It is not even enough that they had actually agreed, if their expressions, when interpreted in the light of

accompanying factors and circumstances, are not such that the court can determine the terms of that agreement. Vagueness of expression, indefiniteness and uncertainty as to any of the essential terms of an agreement, have often been held to prevent the creations of an enforceable contract.” *Id.*, citing 1 Corbin on Contracts (Rev.Ed. 1993) 525, Section 4.1. Moreover, when a court enforces a disputed settlement agreement, it in effect denies the parties’ rights to control litigation and implicitly adopts the interpretation of one party rather than enter judgment based on a mutual agreement. *Rulli* at 377.

Courts should not endeavor to make contracts for the parties, and they often “wash their hands of a difficult problem that is thrust upon them by reason of incompleteness or indefiniteness in the expression of some term in a written instrument by which the parties clearly intended to be bound.” *Id.* Such is the case here. Artisan should not be rewarded for its refusal to consummate an agreement that was obviously meant to be reduced to a signed writing. That manifestation of assent to all the terms of the agreement by virtue of a signature is the gesture that Courts in Ohio have endeavored to encourage. *Rulli*’s mandate requiring an evidentiary hearing before enforcement and entering judgment represented a logical extension of long-standing Ohio precedent dictating that Courts not endeavor to reform a contract or *make a contract* for the parties that they did not make for themselves. *Linn v. Wehrle* (1928), 35 Ohio App. 107, 172 N.E. 288. (Emphasis added). Thus *Rulli* stood for the proposition, when a court reforms or makes a settlement agreement that the parties did not make for themselves, it must first conduct an evidentiary hearing to ascertain the terms or *confirm* the enforceability of the purported settlement agreement. And that consideration is likewise not advanced when a court denies the enforcement of a disputed settlement agreement.

The required *Rulli* hearing in enforcement cases encourages parties to reduce settlement agreements to signed writings so that the court may properly interpret or confirm the enforceability of the written agreement sans piecemeal-adjudication of terms. Requiring that a Court conduct a *Rulli* hearing when it denies enforcement has the opposite effect because it encourages parties to purposefully neglect the fundamental contract principal that agreements should be reduced to signed writings. A party who knows that a Court will be required to conduct a *Rulli* hearing whether it enforces or denies enforcement of a settlement agreement is likely to neglect to execute an agreement and instead rely on the required *Rulli* hearing in optimistically expecting that it can cobble together sufficient evidence to make a case that a contract existed. Such is not the function of Ohio trial courts. Further, it is bad practice in Ohio. A ruling requiring blanket *Rulli* hearings regardless whether the court enforces or denies enforcement of a disputed agreement signals to parties that the manifestation of assent is no longer tantamount to contract formation, denigrates the development of the well-settled principles of contract law espoused in *Rulli*, encourages undesirable contract practice in Ohio, and undermines the principles espoused to be encouraged by the Statute of Frauds' requirement that certain contracts be reduced to signed writings. Parties—not courts—should consummate agreements by reducing them to signed writings. Where a purported agreement is palpably indefinite and a party refuses to reduce it to a signed writing, only one conclusion can be had—no agreement existed. Therefore, no *Rulli* hearing need be had when a court concludes as much and enters judgment.

Because the finality of judgment is not present when a court denies enforcement of a disputed settlement agreement and because the reasoning underpinning *Rulli* is not advanced in such cases, Beiser and Lay respectfully submit that when the parties dispute the existence of a

settlement agreement or its terms, a trial court need not conduct a *Rulli* hearing before entering judgment denying enforcement of the agreement.

CONCLUSION

Artisan waived the opportunity to request an evidentiary hearing or to argue that one was required under *Rulli* when it failed to raise the issues before the trial court. Even if the Court were to assume that Artisan's arguments in that respect have not been waived, this case is nonetheless distinguishable on its facts both from *Rulli* and from the conflict cases. The Butler County Common Pleas Court considered all the relevant evidence in entering judgment and as such this case is inapposite to *Rulli* and *Moore v. Johnson*. Furthermore, this case cannot be reconciled with *Michelle M.S. v. Eduardo H.T.* because Artisan neither requested a hearing nor identified evidence probative of whether an agreement existed. Accordingly, the Court may properly dismiss the appeal as having been improvidently granted or affirm the lower courts' judgments irrespective of *Rulli*.

If the Court should undertake an analysis under *Rulli*, Beiser and Lay respectfully submit that *Rulli's* reasoning is not advanced when a trial court denies enforcement of a disputed settlement agreement and enters judgment: *Rulli's* analysis explicitly warned against only *enforcement* of disputed agreements for the litany of reasons set forth therein; the prejudice in *enforcing* a disputed agreement without holding a hearing is not present when a court denies enforcement; and long-standing Ohio precedent advises courts against forcing parties into a settlement when the very terms or existence of a settlement agreement are at issue.

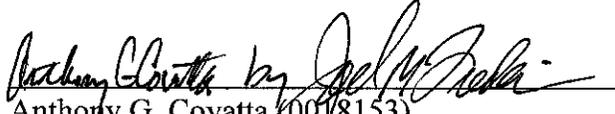
Therefore, Appellees Beiser and Lay ask that this Honorable Court refrain from deciding *Rulli's* application to this case because that argument has been waived by Artisan and because the facts of this case are nonetheless distinguishable such that the matter can be dismissed or

affirmed on the merits without reaching *Rulli's* application or lack thereof. In the alternative, Beiser and Lay ask that the Court answer the certified question in the negative and rule that a *Rulli* hearing is not required before a trial court enters judgment denying the enforcement of a disputed agreement.

OF COUNSEL:

Respectfully submitted,

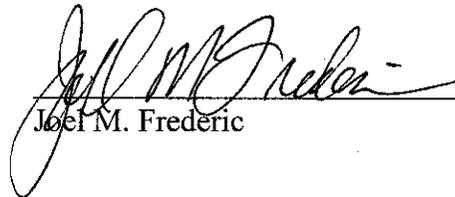
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CERTIFICATE OF SERVICE

I hereby certify that I served a copy of the foregoing by electronic mail and ordinary U.S. mail, postage prepaid, on May 31, 2011, upon the following:

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Counsel for Appellant


Joel M. Frederic

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RULLI, APPELLANT, v. FAN COMPANY ET AL., APPELLEES.

[Cite as *Rulli v. Fan Co.* (1997), 79 Ohio St.3d 374.]

Civil procedure — Where meaning of terms of settlement agreement is disputed, or there is a dispute that contests the existence of a settlement agreement, trial court must conduct an evidentiary hearing prior to entering judgment.

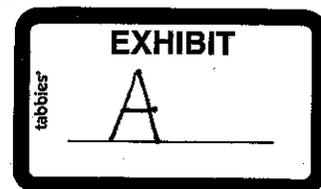
Where the meaning of terms of a settlement agreement is disputed, or where there is a dispute that contests the existence of a settlement agreement, a trial court must conduct an evidentiary hearing prior to entering judgment.

(No. 96-249 — Submitted April 1, 1997 — Decided September 10, 1997.)

APPEAL from the Court of Appeals for Mahoning County, No. 94 C.A. 14.

Frank A. Rulli, appellant, initiated an action in 1992 in the Court of Common Pleas of Mahoning County against his brothers, appellees Nick and Anthony Rulli. In his complaint, Rulli alleged that his brothers had excluded him from the operation of a corporation (Rulli Bros., Inc.), in which he and his brothers were equal shareholders, and a partnership (Fan Co.), in which the three were equal partners. Rulli sought a financial accounting of the two businesses as well as other property received and distributed, and also sought access to the books and records of the corporation and the partnership.

On June 23, 1993, during a hearing before the trial judge on pending motions, counsel for both parties indicated that they had reached a settlement purporting to resolve all matters involved in the dispute. Counsel for Frank Rulli then read into the record that Frank Rulli would purchase his brothers' interest in both the corporation and the partnership by paying his brothers \$950,000 each for their interest. Counsel further stipulated that the corporation would be sold by asset sale, with the terms being cash payable within ninety days; the corporation would maintain a minimum inventory of \$200,000; and all fixtures were to remain



intact and in place. Nick and Anthony Rulli retained the right to use the names “Rulli Brothers” and “Rulli Brothers Market” in any future business, and agreed to be solely responsible for encumbrances, liens, or liabilities of the two businesses. All three brothers agreed to be equally responsible for a mortgage on a parcel of real estate owned by the partnership.

In response to a query by the trial court, Nick, Anthony, and Frank Rulli all indicated that they understood the parameters of the settlement agreement and agreed to be bound by it. The trial judge then stated that he would “mark the case called for hearing, case settled and dismissed,” and gave counsel twenty-one days to submit a separate judgment entry. The court filed a judgment entry on June 23, 1993, to this effect.

No separate entry was ever filed, nor did the parties ever complete a formal purchase agreement. Anthony and Nick Rulli filed a motion to enforce the agreement, in which they disputed the meaning of the statements read into the record at the prior hearing. They asserted that the agreement required Frank Rulli to pay \$1.9 million for the entire partnership and its assets and for the inventory of the corporation free and clear of any liabilities, and that they each were responsible for paying one third of an existing mortgage. Frank Rulli argued that he was only responsible for purchasing the assets of the partnership and the corporation, and that the partners would then pay off the existing mortgage and distribute to each of the parties the balance of their capital and income accounts (approximately \$45,000 each). This interpretation would have resulted in Anthony and Nick Rulli each receiving \$852,500 as a net proceed from the transaction. Frank Rulli also stated that Nick and Anthony Rulli were excluding cash, the corporate name, and refunds due from suppliers on return items from the

assets of the corporation in violation of the agreement. As a result, Frank Rulli filed a motion to vacate the June 23, 1993 judgment entry.

The trial court conducted a proceeding in which the judge allowed oral arguments on both motions. At the hearing, counsel for Frank Rulli attempted to admit into evidence two exhibits: an unsigned eleven-page settlement agreement and an affidavit by counsel stating his inability to conclude the agreement. The trial court sustained defendants' objection, concluding that the parties had reached a settlement at the prior hearing by stating that the plaintiff's claim that no final agreement had been reached was nothing more than an attempt to renege on the settlement. Judgment was then ordered pursuant to the defendants' interpretation of the agreement, without any consideration of the additional evidence the plaintiff had attempted to admit at the hearing. The trial court awarded two million dollars in money damages to the defendants. The court of appeals affirmed, but modified the original judgment awarding damages by ordering specific performance pursuant to the sale price as discussed in the original hearing.

The cause is now before the court pursuant to the allowance of a discretionary appeal.

Manchester, Bennett, Powers & Ullman, L.P.A., and John F. Zimmerman, Jr., for appellant.

Henderson, Covington, Messenger, Newman & Thomas Co., L.P.A., James L. Messenger and Jerry M. Bryan, for appellees.

MOYER, C.J. The question presented in this civil action is whether a trial court abuses its discretion by ordering the enforcement of a disputed settlement agreement without first conducting an evidentiary hearing. Analysis of the law

and the underlying record in this case causes us to conclude that it is not within the province of the trial judge to enforce a purported settlement agreement when the substance or the existence of that agreement is legitimately disputed. Accordingly, we reverse the judgment of the court of appeals.

Where possible, it is generally within the discretion of the trial judge to promote and encourage settlements to prevent litigation. *In re NLO, Inc.* (C.A. 6, 1993), 5 F.3d 154. A trial judge cannot, however, force parties into settlement. See *id.* The result of a valid settlement agreement is a contract between parties, requiring a meeting of the minds as well as an offer and an acceptance thereof. *Noroski v. Fallet* (1982), 2 Ohio St.3d 77, 79, 2 OBR 632, 633, 442 N.E.2d 1302, 1304. To constitute a valid settlement agreement, the terms of the agreement must be reasonably certain and clear. “A court cannot enforce a contract unless it can determine what it is. It is not enough that the parties think that they have made a contract. They must have expressed their intentions in a manner that is capable of being understood. It is not even enough that they had actually agreed, if their expressions, when interpreted in the light of accompanying factors and circumstances, are not such that the court can determine what the terms of that agreement are. Vagueness of expression, indefiniteness and uncertainty as to any of the essential terms of an agreement, have often been held to prevent the creation of an enforceable contract.” (Footnote omitted.) 1 Corbin on Contracts (Rev.Ed. 1993) 525, Section 4.1.

In addition, the law disfavors court enforcement of contracts laden with ambiguity. “Courts have often said that they do not make contracts for the parties, very often in cases in which they wash their hands of a difficult problem that is thrust upon them by reason of incompleteness or indefiniteness in the expression

of some term in a written instrument by which the parties clearly intended to be bound.” *Id.* at 529, Section 4.1.

We observe that courts should be particularly reluctant to enforce ambiguous or incomplete contracts that aim to memorialize a settlement agreement between adversarial litigants. Though we encourage the resolution of disputes through means other than litigation, parties are bound when a settlement is reduced to final judgment. Since 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.

Though upon first examination, the settlement terms as read into the record on June 23, 1993, appear reasonably clear, the parties were subsequently unable to agree upon the meaning and effect of those terms. They were unable to execute a formal purchase agreement and they did not provide the court with an entry as ordered by the court. The parties instead offered varying interpretations of the terms read into the record, and disputed nearly every major element of the purported agreement. Therefore, the language read into the record at the initial hearing reflects, at best, merely an agreement to make a contract.

Given the lack of finality and the dispute that evolved subsequent to the initial settlement hearing, we hold that the trial judge should have conducted an evidentiary hearing to resolve the parties’ dispute about the existence of an agreement or the meaning of its terms as read into the record at the hearing, before reducing the matter to judgment. Where parties dispute the meaning or existence of a settlement agreement, a court may not force an agreement upon the parties. To do so would be to deny the parties’ right to control the litigation, and to implicitly adopt (or explicitly, as the trial court did here) the interpretation of one

party, rather than enter judgment based upon a mutual agreement. In the absence of such a factual dispute, a court is not required to conduct such an evidentiary hearing. *Mack v. Polson Rubber Co.* (1984), 14 Ohio St.3d 34, 14 OBR 335, 470 N.E.2d 902, syllabus.

Where the meaning of terms of a settlement agreement is disputed, or where there is a dispute that contests the existence of a settlement agreement, a trial court must conduct an evidentiary hearing prior to entering judgment. The judgment of the court of appeals is reversed and the cause remanded to the trial court for further proceedings consistent with this opinion.

*Judgment reversed
and cause remanded.*

DOUGLAS, RESNICK, F.E. SWEENEY and PFEIFER, JJ., concur.

COOK and LUNDBERG STRATTON, JJ., dissent.

COOK, J., dissenting. I respectfully dissent. An oral settlement agreement entered into in the presence of the court constitutes a binding contract. *Spercel v. Sterling Industries, Inc.* (1972), 31 Ohio St.2d 36, 60 O.O.2d 20, 285 N.E.2d 324. As a contract, the settlement agreement is subject to contract defenses such as mistake and indefiniteness. A settlement agreement, however, is also subject to common rules of contract construction. Application of these rules prevents Frank Rulli from avoiding his agreed-to settlement obligations.

I

Indefiniteness

The majority concludes that the settlement agreement read into the record is too indefinite for the court to enforce and that the terms of that agreement, at best, reflect an agreement to make a contract. I disagree in both respects.

“Vagueness, indefiniteness, and uncertainty are matters of degree, with no absolute standard for comparison. It must be remembered that all modes of human expression are defective and inadequate.” 1 Corbin on Contracts (Rev. Ed. 1993) 528, Section 4.1. “The courts must take cognizance of the fact that the argument that a particular agreement is too indefinite to constitute a contract frequently is an afterthought excuse for attacking an agreement that failed for reasons other than the indefiniteness.” *Id.* at 535-536, Section 4.1.

For a court to enforce a contract it must be capable of understanding, from the parties’ expressions, the terms upon which the parties have agreed. See *id.* at 525, Section 4.1. “[A]n agreement can constitute an enforceable contract despite the fact that the parties have agreed to agree later on important terms or have agreed that final agreement will be memorialized in a final writing.” *Id.* at 532, Section 4.1. Moreover, while indefiniteness of an agreement may be an indicium of a lack of contractual intent, a “court should be slow to come to this conclusion if it is convinced that the parties themselves meant to make a ‘contract’ and to bind themselves to render a future performance.” *Id.* at 569, Section 4.3.

Counsel for appellant concedes that “the parties and their counsel * * * stipulated on the record * * * that they had reached a settlement of all issues then in dispute between them, and that this settlement was to be effected by the purchase and sale of Appellees’ interests in the two businesses in question.” Review of the record reveals that appellant’s attorney entered a reasonably detailed buy-out agreement concerning the partnership and corporation. The agreement included the purchase price of the businesses, the terms and time for payment, and the required inventory on transfer of the corporation. The agreement also specifically designated the sale of the corporation as an asset sale, addressed the parties’ continued use of the trade name “Rulli Brothers,” contained a

geographically limited covenant not to compete, and required each party to pay an equal share of the remaining partnership mortgage. Each party assented to this agreement on the record.

Despite the existence of this detailed settlement agreement, appellant argues that the parties' later inability to complete a draft purchase agreement setting out more complete sale terms establishes that the parties initially lacked the requisite intent to enter into a contract. As aptly demonstrated in the court of appeals' opinion, however, the terms of the oral settlement agreement are detailed enough to determine contractual intent. While the parties were free to supplement the oral contract with parol agreements and to further incorporate them into an integrated purchase agreement, nothing required the parties to do so and failure to agree to parol terms did not vitiate the parties' original intent to contract.

Appellant specifically addresses four issues as "material" to the transaction, yet unresolved in the oral settlement agreement: "1) there is no allocation of the purchase price among assets to be conveyed by Appellees to Appellant, even as between the partnership and corporation; 2) there is no provision for the standard warranties and representations customarily given by a seller to a buyer in an asset sale, such as a warranty of corporate good standing, a warranty of title, a warranty of authority to convey, etc.; 3) although provision is made for a 'minimum inventory of \$200,000.00 value[d] at cost,' no procedure is established for determining which items (such as perishables, 'out of date' materials, packaging materials, etc.) are to be excluded from inventory for purposes of determining the minimum required amount of inventory to be transferred, or for resolving disputes between the parties with respect to the valuation of inventory; and 4) there is no provision allocating the risk of loss or damage to the assets to be conveyed pending closing of the sale." Appellant additionally cites the lack of a provision

“allocating taxes and other expenses associated with the purchase and sale of the assets in question” as a factor rendering the settlement agreement fatally indefinite.

It may have been prudent for appellant and his counsel to include some, if not all, of these terms in the initial settlement agreement. These terms, however, are not so essential to the core agreement that failure to include them should render the contract unenforceable. The rule of indefiniteness restrains courts from enforcing contracts where the parties’ expressions are inadequate to reveal their contractual intent. Where, however, the parties express a contractual intent to undertake discernible mutual obligations, courts should not defeat those intentions because one or both of the parties lacked the foresight to negotiate terms that would have been more prudently included in the agreement. Accordingly, I disagree with the majority that the oral settlement agreement is so incomplete that it, at best, reflects an agreement to make a contract.

II

Mistake

Appellant cites several additional conflicts to demonstrate a failure of mutual assent. These conflicts focus on the parties’ varying interpretations of the terms of the oral settlement agreement, rather than a failure of operative terms to create an enforceable contract. Accordingly, these issues are most appropriately analyzed as concerning the contract defense of mistake.

Review of the procedural history of this case reveals that most of the “mistakes” that appellant now asserts as demonstrating a lack of mutual assent could be raised as defenses by appellees, but not by appellant himself. Consistent with the meanings ascribed to the settlement agreement by appellant, the appellate court concluded that the agreement required appellees to transfer, as assets of the

corporation, the corporate name and all business records, cash, licenses, and leases belonging to the corporation. The subject of unilateral mistake is addressed in 1 Restatement of the Law 2d, Contracts (1981) 394, Section 153, as follows:

"When Mistake of One Party Makes a Contract Voidable

"Where a mistake of one party at the time a contract was made as to a basic assumption on which he made the contract has a material effect on the agreed exchange of performances that is adverse to him, the contract is *voidable by him* * * * [.]” (Emphasis added.)

Accordingly, even assuming that these issues create an avenue to defeat the settlement agreement, the agreement would be voidable at the option of appellees, not the appellant.

Appellant additionally argues that the parties disagreed over the meaning of the language of the settlement agreement concerning the covenant not to compete. The appellate court, however, properly concluded that the language of the covenant was clear and unambiguous, needing no interpretation.

“When two parties have reduced their agreement to writing [or have orally expressed their intentions to contract in identical words (Corbin at 619-620, Section 4.10)], using the words that each of them consciously intends to use, it is often not a sufficient ground for declaring that the agreement is void or subject to cancellation by the court that the parties subsequently gave different meanings to the agreed language, or even that they gave different meanings thereto at the time the agreement was expressed. If the meaning that either one of them gave to the words was the only reasonable one under the existing circumstances, as the other party has reason to know, the latter is bound by that meaning and there is a contract accordingly.” (Footnote omitted.) Corbin at 617, Section 4.10.

Courts have an obligation to give plain language its ordinary meaning and to refrain from revising the parties' contract. See *Alexander v. Buckeye Pipe Line Co.* (1978), 53 Ohio St.2d 241, 246, 7 O.O.3d 403, 406, 374 N.E.2d 146, 150, and paragraph two of the syllabus. Accordingly, interpretation of a clear and unambiguous contract term, such as this one, is a matter of law, and a court should not admit extrinsic evidence to establish its meaning. *Shifrin v. Forest City Ent., Inc.* (1992), 64 Ohio St.3d 635, 638, 597 N.E.2d 499, 501.

III

Conclusion

Appellant has not demonstrated that he is entitled to have the settlement agreement voided as a matter of law, or that he was improperly denied an evidentiary hearing. This is not to say that there are no circumstances where an evidentiary hearing might be required to enforce an oral settlement agreement entered into before the court. Such a hearing is proper to resolve ambiguity in the terms of the agreement, to collaterally enforce parol agreements supplementing the contract, and to determine whether fraud or mistake occurred during contract formation that would render the contract voidable by the party seeking to avoid its force. Because none of those circumstances is present in this case, I would affirm the judgment of the appellate court.

LUNDBERG STRATTON, J., concurs in the foregoing dissenting opinion.

IN THE COMMON PLEAS COURT
GENERAL DIVISION
BUTLER COUNTY, OHIO

FILED
2009 FEB 20 PM 1:04
COURT CENTER
BUTLER COUNTY
CLERK OF COURT

ARTISONS MECHANICAL, INC.

* CASE NO. CV08-11-4889

Plaintiff,

* JUDGE: NOAH E. POWERS II

v.

*

ORDER OF DISMISSAL

JAMES MICHAEL BEISER, et al

*

Defendant

*

*

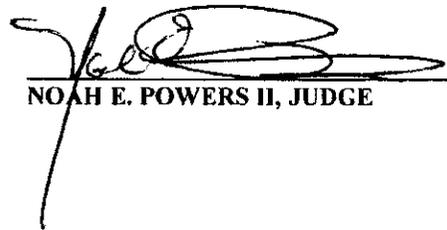
The Court has been advised by the Parties that the above action has been settled.

It is the order of this Court that this action is 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.

Upon agreement and within sixty days, the Parties may submit a supplementary entry outlining details of the settlement.

Costs to Plaintiffs.

SO ORDERED:



NOAH E. POWERS II, JUDGE

JUDGE NOAH E. POWERS II
Common Pleas Court
Butler County, Ohio

cc:

Anthony Covatta, Esq.
DREW & WARD CO., LPA
1 West Fourth Street, Suite 2400
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EXHIBIT

B

tabbles

[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
 :
- vs - : OPINION
 : 11/8/2010
 :
JAMES MICHAEL BEISER, et al. :
 :
Defendants-Appellees. :

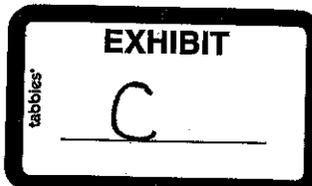
CIVIL APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
Case No. CV2009-06-2832

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.



{¶12} 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.

{¶13} 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:

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

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

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

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

{¶18} 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

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.

{¶155} 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.

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

{¶157} "[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)[.]"

{¶158} 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 Fujl 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.

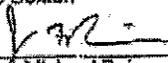
WITNESSES:

ARTISAN MECHANICAL, LLC

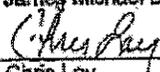
By _____, President

Ron Sexton

Abbe Sexton



James Michael Beiser



Chris Lay

172788

From: Anthony G. Covatta [mailto:acovatta@drewlaw.com]
Sent: Wednesday, February 04, 2009 9:44 AM
To: Pepper, Timothy G.
Cc: 'Michael Beiser'
Subject: Artisan Mechanical and Beiser and Lay

Tim, We accept your offer, made by telephone earlier this morning, to conclude the current litigation on the following terms and conditions:

1. Both sides "walk away" from the litigation
2. Six month non-compete, commencing today, February 4, 2009, ending August 3, 2009
3. Beiser, Lay and their company will initiate no new bids to Fuji or Verdis
4. Artisan will initiate no new bids to Flavor Systems or Lyons Magnus

I would suggest that we prepare a Mutual Release and Settlement Agreement. I will do that for your review if you will likewise prepare an Entry of Dismissal of all claims and counterclaims. Each side, of course, should bear its own costs and attorneys fees.

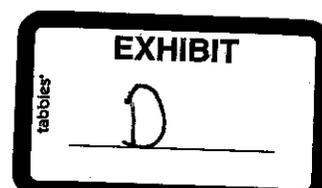
Thank you for your co-operation in this matter.

Tony Covatta

**DREW &
WARD**

A LEGAL PROFESSIONAL ASSOCIATION

Anthony G. Covatta
1 West Fourth Street
Suite 2400
Cincinnati, Ohio 45202
Phone: 513.621.8210
Fax: 513.621.5444
www.drewlaw.com



Anthony G. Covatta

From: Anthony G. Covatta
Sent: Wednesday, February 04, 2009 10:32 AM
To: 'Pepper, Timothy G.'
Cc: 'Michael Beiser'
Subject: RE: Artisan Mechanical and Beiser and Lay

Tim, I am informed that the bid to Fuji is complete. Nothing further will be submitted, or needs to be submitted. We have a deal.

**DREW &
WARD**

A LEGAL PROFESSIONAL ASSOCIATION

Anthony G. Covatta
1 West Fourth Street
Suite 2400
Cincinnati, Ohio 45202
Phone: 513.621.8210
Fax: 513.621.5444
www.drewlaw.com

From: Pepper, Timothy G. [mailto:pepper@taftlaw.com]
Sent: Wednesday, February 04, 2009 10:22 AM
To: Anthony G. Covatta
Subject: RE: Artisan Mechanical and Beiser and Lay

Tony, as we discussed, the offer is that your clients basically stand still and submit nothing to Fuji or Verdis 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; please explain what "initiate" means and whether your clients will agree to stand still and not submit anything further to Fuji or Verdis, from today forward for six months, in furtherance of any bid.

Tim

Taft /

Timothy G. Pepper / Attorney
Taft Stettinius & Hollister LLP
110 North Main Street, Suite 900
Dayton, Ohio 45402-1786
Tel: 937.228.2838 • Fax: 937.228.2816
Direct: 937.641.1740
www.taftlaw.com / pepper@taftlaw.com

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EXHIBIT

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Anthony G. Covatta

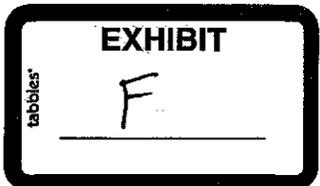
From: Anthony G. Covatta
Sent: Friday, February 06, 2009 11:56 AM
To: 'Pepper, Timothy G.'
Cc: 'Michael Beiser'
Subject: 172786_1.DOC
Attachments: 172786_1.doc

Tim, Here is a draft of a Settlement Agreement. Please give me your thoughts and comments. TC



A LEGAL PROFESSIONAL ASSOCIATION

Anthony G. Covatta
1 West Fourth Street
Suite 2400
Cincinnati, Ohio 45202
Phone: 513.621.8210
Fax: 513.621.5444
www.drewlaw.com



Anthony G. Covatta

From: Pepper, Timothy G. [pepper@taftlaw.com]
Sent: Monday, February 16, 2009 8:47 PM
To: Anthony G. Covatta
Subject: RE: Settlement Doc

Tony, my apologies for the delay, I'm knee-deep in two other noncompete cases. I'll get back to you as quickly as I can.

Thanks,
Tim

Taft /

Timothy G. Pepper / Attorney
Taft Stettinius & Hollister LLP
110 North Main Street, Suite 900
Dayton, Ohio 45402-1786
Tel: 937.228.2838 • Fax: 937.228.2816
Direct: 937.641.1740
www.taftlaw.com / pepper@taftlaw.com

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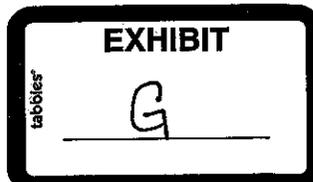
From: Anthony G. Covatta [mailto:acovatta@drewlaw.com]
Sent: Monday, February 16, 2009 12:53 PM
To: Pepper, Timothy G.
Cc: 'Michael Beiser'
Subject: Settlement Doc

Tim, Let me know when you are ready to exchange signature pages. TC



A LEGAL PROFESSIONAL ASSOCIATION

Anthony G. Covatta
1 West Fourth Street
Suite 2400
Cincinnati, Ohio 45202
Phone: 513.621.8210
Fax: 513.621.5444
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Taft /

Timothy G. Pepper / Attorney
Taft Stettinius & Hollister LLP
110 North Main Street, Suite 900
Dayton, Ohio 45402-1786
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###

-----Original Message-----

From: Anthony G. Covatta [mailto:acovatta@drewlaw.com]
Sent: Tuesday, March 10, 2009 4:43 PM
To: Pepper, Timothy G.
Cc: 'Michael Beiser'
Subject: Beiser/Artisan

Tim, Mike and Chris's signatures are attached. Please forward your clients'. Thanks.
TC

Anthony G. Covatta | The Drew Law Firm Co, LPA
1 West Fourth Street, 24th Floor | Cincinnati, OH 45202
Office: 513.621.8210 | Fax: 513.621.5444 | Email: acovatta@drewlaw.com

-----Original Message-----

From: 24copier@drewlaw.com [mailto:24copier@drewlaw.com]
Sent: Tuesday, March 10, 2009 5:41 PM
To: Anthony G. Covatta
Subject: You have a scan from 24scanner

Sent from the KM-6030 Scanner on the 24th Floor.



Anthony G. Covatta

From: Pepper, Timothy G. [pepper@taftlaw.com]
Sent: Tuesday, March 17, 2009 11:26 AM
To: Anthony G. Covatta
Subject: RE: Beiser/Artisan

I suggest we just drop them. They were not a part of either my offer to settle or yours, and given the nature of the dispute, I foresee them doing more harm than good.

Taft /

Timothy G. Pepper / Attorney
Taft Stettinius & Hollister LLP
110 North Main Street, Suite 900
Dayton, Ohio 45402-1786
Tel: 937.228.2838 • Fax: 937.228.2816
Direct: 937.641.1740
www.taftlaw.com / pepper@taftlaw.com

-----Original Message-----

From: Anthony G. Covatta [mailto:acovatta@drewlaw.com]
Sent: Tuesday, March 17, 2009 11:13 AM
To: Pepper, Timothy G.
Cc: 'Michael Beiser'
Subject: RE: Beiser/Artisan

I agree with you on 8. Paragraphs 4 and 5 are very standard, and I have never encountered a problem with them. What do you suggest?

Anthony G. Covatta | The Drew Law Firm Co, LPA
1 West Fourth Street, 24th Floor | Cincinnati, OH 45202
Office: 513.621.8210 | Fax: 513.621.5444 | Email: acovatta@drewlaw.com

-----Original Message-----

From: Pepper, Timothy G. [mailto:pepper@taftlaw.com]
Sent: Tuesday, March 17, 2009 11:10 AM
To: Anthony G. Covatta
Subject: RE: Beiser/Artisan

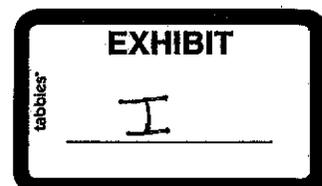
Tony,

Regarding the attached proposed agreement:

Paragraphs 4 and 5 seem to be inviting further litigation. My clients' allegations against yours concerned breaches of confidentiality, and your clients' allegations against mine concerned disparagement. I'm not inclined to include contract provisions that open the door for more.

Paragraph 8 should say "state court in Butler County, Ohio," because venue to enforce a settlement agreement is appropriate in the court where the underlying litigation occurred.

Thanks,
Tim



Anthony G. Covatta

From: Anthony G. Covatta
Sent: Thursday, April 16, 2009 4:02 PM
To: 'Pepper, Timothy G.'
Subject: RE: Beiser/Artisan

Hi, Tim-- My recollection is that I had suggested that you should drop the offending paragraphs (4 and 5, I believe) get your clients to sign, and then I would get my boys to sign as well. Plus we agreed to add language in Paragraph 8 regarding "state court in Butler County Ohio" as the proper venue.

Anthony G. Covatta | The Drew Law Firm Co, LPA
1 West Fourth Street, 24th Floor | Cincinnati, OH 45202
Office: 513.621.8210 | Fax: 513.621.5444 | Email: acovatta@drewlaw.com

-----Original Message-----

From: Pepper, Timothy G. [mailto:pepper@taftlaw.com]
Sent: Thursday, April 16, 2009 3:58 PM
To: Anthony G. Covatta
Subject: RE: Beiser/Artisan

Tony, I know we communicated on this after my last email below, but I'm coming up blank on where this stands. Please advise.

Thanks,
Tim

Taft /

Timothy G. Pepper / Attorney
Taft Stettinius & Hollister LLP
110 North Main Street, Suite 900
Dayton, Ohio 45402-1786
Tel: 937.228.2838 • Fax: 937.228.2816
Direct: 937.641.1740
www.taftlaw.com / pepper@taftlaw.com

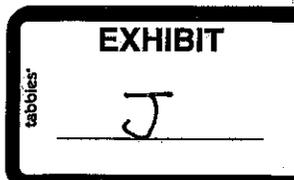
-----Original Message-----

From: Pepper, Timothy G.
Sent: Tuesday, March 17, 2009 11:26 AM
To: Anthony G. Covatta
Subject: RE: Beiser/Artisan

I suggest we just drop them. They were not a part of either my offer to settle or yours, and given the nature of the dispute, I foresee them doing more harm than good.

-----Original Message-----

From: Anthony G. Covatta [mailto:acovatta@drewlaw.com]
Sent: Tuesday, March 17, 2009 11:13 AM
To: Pepper, Timothy G.
Cc: 'Michael Beiser'
Subject: RE: Beiser/Artisan



I agree with you on 8. Paragraphs 4 and 5 are very standard, and I have never encountered a problem with them. What do you suggest?

Anthony G. Covatta | The Drew Law Firm Co, LPA
1 West Fourth Street, 24th Floor | Cincinnati, OH 45202
Office: 513.621.8210 | Fax: 513.621.5444 | Email: acovatta@drewlaw.com

-----Original Message-----

From: Pepper, Timothy G. [mailto:pepper@taftlaw.com]
Sent: Tuesday, March 17, 2009 11:10 AM
To: Anthony G. Covatta
Subject: RE: Beiser/Artisan

Tony,

Regarding the attached proposed agreement:

Paragraphs 4 and 5 seem to be inviting further litigation. My clients' allegations against yours concerned breaches of confidentiality, and your clients' allegations against mine concerned disparagement. I'm not inclined to include contract provisions that open the door for more.

Paragraph 8 should say "state court in Butler County, Ohio," because venue to enforce a settlement agreement is appropriate in the court where the underlying litigation occurred.

Thanks,
Tim

Taft /

Timothy G. Pepper / Attorney
Taft Stettinius & Hollister LLP
110 North Main Street, Suite 900
Dayton, Ohio 45402-1786
Tel: 937.228.2838 * Fax: 937.228.2816
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From: Anthony G. Covatta [mailto:acovatta@drewlaw.com]
Sent: Tuesday, March 10, 2009 4:43 PM
To: Pepper, Timothy G.
Cc: 'Michael Beiser'

Subject: Beiser/Artisan

Tim, Mike and Chris's signatures are attached. Please forward your clients'. Thanks.
TC

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To: Anthony G. Covatta
Subject: You have a scan from 24scanner

Sent from the KM-6030 Scanner on the 24th Floor.

FILED

2010 JAN 29 AM 10:28

KINDY CARPENTER
BUTLER COUNTY
CLERK OF COURTS

COURT OF COMMON PLEAS
BUTLER COUNTY, OHIO

Artisan Mechanical, Inc.

Plaintiff,

v.

James Michael Beiser, et al.,

Defendants.

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*
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*
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*

Case No. CV 2009 06 2832

Judge Sage

DECISION AND ENTRY
GRANTING MOTION FOR
SUMMARY JUDGMENT

Final Appealable Order

This matter comes before the Court on the motion for summary judgment of Defendants, James Michael Beiser, et al. ("Defendants"), filed on July 9, 2009 against Plaintiff, Artisan Mechanical ("Plaintiff"). Defendants ask this Court to find that the standard for summary judgment has been met, and to grant the motion in their favor. For the following reasons, the motion is granted.

Plaintiff is a mechanical contractor. Defendant James Michael Beiser ("Beiser") is a former employee of Plaintiff. Defendant Chris Lay ("Lay") is also a former employee of Plaintiff. On November 10, 2008, Plaintiff filed a lawsuit against Defendants to prevent them from misappropriating Plaintiff's trade secrets and business opportunities. The prior lawsuit was filed in the Butler County Court of Common Pleas with Case No. CV 2008 11 2889. That lawsuit was dismissed with prejudice on February 20, 2009. The Court's order of dismissal stated: "It is the order of this Court that this action is dismissed with prejudice provided that any of

Judge Michael J. Sage
Common Pleas Court
Butler County, Ohio

EXHIBIT

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the parties may, upon good cause shown, within 60 days, request further Court action if settlement is not consummated.”

Defendants filed their motion to dismiss and/or for summary judgment, which this Court construes as a motion for summary judgment, on July 9, 2009. Plaintiff filed a memorandum in opposition to the motion on July 30, 2009. Defendants filed a reply in support of their motion for summary judgment on August 14, 2009. On November 13, 2009, this Court held oral arguments on the motion. Defendants argue that by failing to act to incorporate future terms into a settlement agreement, which the Court could then enforce, Plaintiff elected to forego any ability to restrain Defendants from fairly competing with them. Plaintiff argues that Defendants are bound by the settlement at least to the extent that they agreed not to submit new bids to Fuji. Therefore, in the instant case, the issue before the Court is not an evidentiary question; rather the issue is whether a settlement agreement was reached between the parties.

It is appropriate for a trial court to grant summary judgment pursuant to Civ.R. 56(C) when (1) there is no genuine issue as to any material fact; (2) the moving party is entitled to judgment as a matter of law; and (3) reasonable minds can come to only one conclusion, and that conclusion is adverse to the party against whom the motion for summary judgment is made, who is entitled to have the evidence construed most strongly in his favor. *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64, 66; Civ.R. 56(C). A party seeking summary judgment

bears the initial burden of informing the 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 as to the essential elements of the nonmoving party's claims. *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 293. If the moving party has satisfied its initial burden, the nonmoving party then has a reciprocal burden to set forth specific facts showing that there is a genuine issue for trial. *Id.*; Civ.R. 56(E).

A settlement agreement is viewed as a particularized form of a contract. *Noroski v. Fallet* (1982), 2 Ohio St.3d 77, 79, 442 N.E.2d 1302. It is a contract designed to terminate a claim by preventing or ending litigation, and such agreements are valid and enforceable by either party. *Continental W. Condominium Unit Owners Assn. v. Howard E. Ferguson, Inc.* (1995), 74 Ohio St.3d 501, 502, 660 N.E.2d 431. Therefore, the interpretation of a settlement agreement is governed by the law of contracts. *Chirchiglia v. Bur. Of Workers Comp.* (2000), 138 Ohio App.3d 676, 679, 742 N.E.2d 180.

The elements necessary to form 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 of consideration.” *Kostelnik v. Helper* (2002), 96 Ohio St.3d 1, 16, 770 N.E.2d 58. Additionally, “[a] meeting of the minds as to the essential terms of the contract is a requirement to enforcing the contract.” *Id.* See also *Episcopal Retirement Homes, Inc. v. Ohio Dep't. of Industrial Relations* (1991), 61 Ohio St.3d 366, 369, 575 N.E.2d 134.

In the instant case, counsel for Plaintiff discussed settlement of the case with counsel for Defendants on the morning of February 4, 2009. At 9:44 a.m. on February 4, 2009, counsel for Defendants sent an email to counsel for Plaintiff stating that “[w]e accept your offer, made by telephone earlier this morning.” Counsel for Defendant went on to include the material terms and conditions of the proposed settlement agreement. These terms are as follows: (i) Both sides walk away from the litigation; (ii) Six month non-compete, commencing February 4, 2009, ending August 3, 2009; (iii) [Defendants] and their company will initiate no new bids to Fuji or Verdis; and (iv) [Plaintiff] will initiate no new bids to Flavor Systems or Lyons Magnus.

Counsel for Plaintiff responded in an email the same day:

... [T]he offer is that your clients basically stand still and submit nothing to Fuji or Verdis in furtherance of any bid. I don't now 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; please explain what 'initiate' means and whether your clients will agree to stand still and not submit anything further to Fuji or Verdis, for today forward for six months, in furtherance of any bid.

Counsel for Defendants responded that there was a deal, but Defendants argue that that deal was to be embodied in:

... a Mutual Release and Settlement Agreement. I will do that for your review if you will likewise prepare an Entry of Dismissal of all claims and counterclaims. Each side, or course, should bear its own costs and attorneys fees.

Following this exchange is a long series of emails between counsel for Plaintiffs and counsel for Defendants to achieve settlement. On February 6, 2009,

counsel for Defendants submitted a draft of a settlement agreement to counsel for Plaintiff. As of February 16, 2009, counsel for Defendants did not receive a response from counsel for Plaintiffs so counsel for Defendants sent counsel for Plaintiff an email inquiring about when he would be ready to exchange signature pages. Counsel for Plaintiff replied, "I'll get back to you as quickly as I can." The February 20, 2009 Order of Dismissal was entered before counsel for Plaintiff contacted counsel for Defendants.

On March 17, 2009, a series of emails of emails was exchanged after counsel for Plaintiff suggested revisions, which included the elimination of two paragraphs of the proposed agreement and the modification of a third paragraph. The final email on March 17, 2009 from counsel for Plaintiff reads:

I suggest we just drop them [Paragraphs 4 and 5]. They were not a part of either my offer to settle or yours, and given the nature of the dispute, I foresee them doing more harm than good.

On April 16, 2009, counsel for Plaintiff sent counsel for Defendants an email inquiring about the status of their negotiations:

I know we communicated on this after my email below, but I'm coming up blank on where this stands. Please advise.

Counsel for Defendants responded as to the status of the settlement negotiations:

My recollection is that I had suggested that you should drop the offending paragraphs (4 and 5, I believe), get your clients [Artisan] to sign, and then I would get my boys [Defendants] to sign as well. Plus we agreed to add language in Paragraph 8 regarding state court in Butler County, Ohio as the proper venue.

This email sent by counsel for Defendants was the final communication between the parties. Defendants argue that Plaintiff never agreed to any revisions, and never signed the documents. Defendants assert that the 60 days allotted by the Court for incorporation of a settlement agreement passed without further action from Plaintiff. On June 19, 2009, counsel for Plaintiff contacted counsel for Defendants to request information about the work Defendants were performing for Fuji. Defendants admitted that they had submitted new bids to perform work for Fuji.

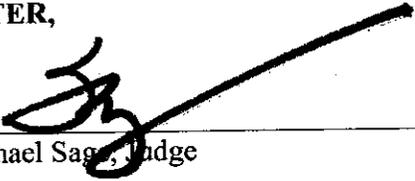
Based upon the foregoing, it is clear from the record before this court that the parties fell short of reaching an agreed settlement. This Court's opinion is that a meeting of the minds does not occur until all of the details are worked out between the parties. Therefore, this Court disagrees with Plaintiff's argument that a meeting of the minds was reached as to the prohibition on the submission of new bids on the part of Defendants and the parties just needed to go back and work out the details. We find that there was never a point in time where a "meeting of the minds" occurred between Plaintiff and Defendants as to the essential terms and details of the settlement agreement.

Specifically, because Defendants insisted that certain language be excluded in the release agreement that Plaintiff did not agree to, the key element of whom and what claims had to be released for settlement to be reached was not determined by the parties prior to Plaintiff filing suit in the instant case.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that
Defendant's motion for summary judgment is **GRANTED**.

SO ORDERED.

ENTER,



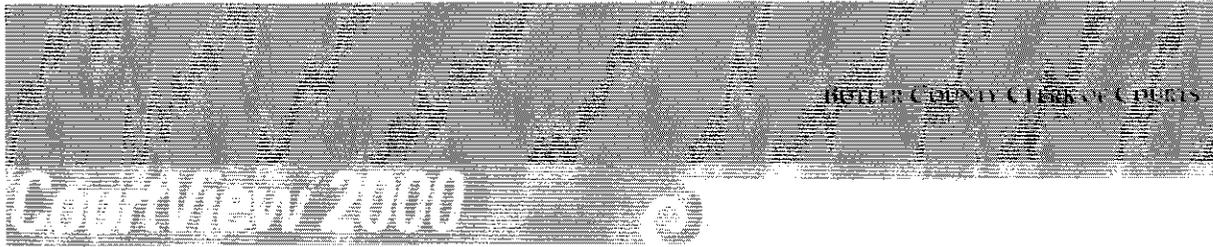
Michael Sage, Judge

Copies to:

Timothy G. Pepper
Attorney for Plaintiff
Taft Stettinius & Hollister LLP
110 North Main Street, Suite 900
Dayton, Ohio 45402

Anthony G. Covatta
Attorney for Defendants
The Drew Law Firm Co., LPA
1 West Fourth Street, Suite 2400
Cincinnati, Ohio 45202

Judge Michael J. Sage
Common Pleas Court
Butler County, Ohio



General Inquiry



New Search...

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- Events
- Dockets**
- Fields
- Notes
- Disposition
- Costs

Docket Search

CV 2009 06 2832 ARTISAN MECHANICAL INC vs. BEISER, JAMES MICHAEL et al -SAGE

Search Criteria

Docket Desc. ALL

Begin Date

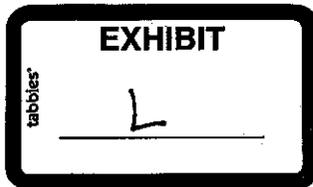
Sort

End Date

- Ascending
- Descending

Search Results 39 Docket(s) found matching search criteria.

Docket Date	Docket Text	Amount	Amount Due	Images
01/10/2011	DEPOSIT REFUND CHECK ISSUED TO TIMOTHY G PEPPER Esquire	5.00	0.00	
01/10/2011	"STENOGRAPHER" (TAPE TRANSCRIPTION) FEE Receipt: 550985 Date: 01/10/2011	25.00	0.00	
11/08/2010	MANDATE issued-trial ct. COPIES ISSUED TO ATTORNEY OF RECORD BY REGULAR MAIL Receipt: 550985 Date: 01/10/2011	2.00	0.00	
07/14/2010	ALL PAPERS SENT TO COURT OF APPEALS	0.00	0.00	
02/26/2010	NOTICE OF APPEAL CA10-02-0039 FILED	0.00	0.00	
02/01/2010	Issue Date: 02/01/2010 Service: FINAL APPEALABLE ORDER Method: SERVICE BY ORDINARY MAIL Cost Per: \$ 5.00 ARTISAN MECHANICAL INC c/o ATTY: PEPPER Esquire, TIMOTHY G TAFT STETTINIUS & HOLLISTER LLP 110 NORTH MAIN ST SUITE 900 DAYTON, OH 45402 Tracking No: 1000506340 BEISER, JAMES MICHAEL c/o ATTY: COVATTA, ANTHONY G DREW & WARD 4TH & VINE TOWER 1 W	25.00	0.00	



FOURTH ST #2400 CINTI, OH 45202
 Tracking No: 1000506341 LAY, CHRIS
 c/o ATTY: COVATTA, ANTHONY G
 DREW & WARD 4TH & VINE TOWER
 1 W FOURTH ST #2400 CINTI, OH
 45202 Tracking No: 1000506342
 BEISER, JAMES MICHAEL 7702
 JASON COURT MIDDLETOWN, OH
 45044 Tracking No: 1000506343 LAY,
 CHRIS 1329 HAZEN ST COVINGTON,
 KY 41016 Tracking No: 1000506344
 Receipt: 550985 Date: 01/10/2011

01/29/2010	DECISION AND ENTRY GRANTING MOTION FOR SUMMARY JUDGMENT FINAL APPEALABLE ORDER FILED SAGE,J Receipt: 550985 Date: 01/10/2011	14.00	0.00	
01/29/2010	FINAL APPEALABLE ORDER FILED AND NOTICE issued all parties and counsel of record FINAL APPEALABLES Sent on: 02/01/2010 12:39:31 Receipt: 550985 Date: 01/10/2011	2.00	0.00	
01/22/2010	PLTF ARTISAN MECHANICAL'S REPLY MEMORANDUM IN SUPPORT OF ITS MOITON TO COMPEL FILED Attorney: PEPPER Esquire, TIMOTHY G (0071076)	0.00	0.00	
01/13/2010	MEMORANDUM CONTRA MOTION TO COMPEL FILED Attorney: COVATTA, ANTHONY G (0018153)	0.00	0.00	
01/04/2010	COURT ADMINISTRATION OFFICE HAS SCHEDULED: Event: HEARING ON MOTION TO COMPEL Date: 02/25/2010 Time: 8:30 am Judge: SAGE, Honorable MICHAEL J Location: General Division Court Govt Serv Ctr 3rd floor Result: VACATED	0.00	0.00	
12/23/2009	PLAINTIFF'S MOTION TO COMPEL DEFENDANTS TO PARTICIPATE IN DISCOVERY AND MEMORANDUM OPPOSING REQUEST FOR EXTENSION OF TIME FILED Attorney: PEPPER Esquire, TIMOTHY G (0071076)	0.00	0.00	
12/14/2009	REQUEST FOR EXTENSION OF TIME FILED Attorney: SMYTH, ROBERT M (63482)	0.00	0.00	
09/15/2009	COURT ADMINISTRATION OFFICE HAS SCHEDULED: Event: PRETRIAL CONFERENCE HEARING Date: 03/01/2010 Time: 8:40 am Judge: SAGE, Honorable MICHAEL J Location: General Division Court Govt Serv Ctr 3rd floor Result: VACATED	0.00	0.00	
09/15/2009	COURT ADMINISTRATION OFFICE HAS SCHEDULED: Event: JURY TRIAL Date: 03/15/2010 Time: 9:00 am Judge: SAGE, Honorable MICHAEL J Location: General Division Court Govt Serv Ctr 3rd floor Result: VACATED	0.00	0.00	

09/15/2009	COURT ADMINISTRATION OFFICE HAS SCHEDULED: Event: SUMMARY JUDGMENT HEARING Date: 11/13/2009 Time: 8:30 am Judge: SAGE, Honorable MICHAEL J Location: General Division Court Govt Serv Ctr 3rd floor	0.00	0.00	
09/09/2009	DEFTS' REPLY MEMORANDUM CONTRA TO PLTF'S MOTION FOR LEAVE TO FILE A SURREPLY AND MOTION TO STRIKE FILED Attorney: COVATTA, ANTHONY G (0018153)	0.00	0.00	
09/04/2009	PLTFS ARTISAN MECHANICAL INC'S MOTION FOR LEAVE TO FILE A SURREPLY TO DEFTS REPLY MEMORANDUM IN SUPPORT OF MOTION TO DISMISS/MOTION FOR SUMMARY JUDGMENT Attorney: PEPPER Esquire, TIMOTHY G (0071076)	0.00	0.00	
09/04/2009	PLTF ARTISAN MECHANICAL INC'S MOTION TO STRIKE DEFTS REPLY MEMORANDUM IN SUPPORT OF MOTION TO DISMISS/ MOTION FOR SUMMARY JUDGMENT AND THE AFFIDAVIT OF MR COVATTA Attorney: PEPPER Esquire, TIMOTHY G (0071076)	0.00	0.00	
08/27/2009	NOTICE OF APPEARANCE OF ANTHONY G COVATTA AS COUNSEL ON BEHALF OF JAMES BEJSER AND CHRIS LAY FILED Attorney: COVATTA, ANTHONY G (0018153) Receipt: 550985 Date: 01/10/2011	2.00	0.00	
08/26/2009	NOTICE OF APPEARANCE FILED Attorney: PEPPER Esquire, TIMOTHY G (0071076) Receipt: 550985 Date: 01/10/2011	2.00	0.00	
08/14/2009	AFFIDAVIT OF COUNSEL FILED	0.00	0.00	
08/14/2009	DEFTS' REPLY MEMORANDUM IN SUPPORT OF MOTION TO DISMISS/ MOTION FOR SUMMARY JUDGMENT FILED Attorney: COVATTA, ANTHONY G (0018153)	0.00	0.00	
08/14/2009	COURT ADMINISTRATION OFFICE HAS SCHEDULED: Event: STATUS REPORT HEARING Date: 09/15/2009 Time: 10:40 am Judge: SAGE, Honorable MICHAEL J Location: General Division Court Govt Serv Ctr 3rd floor	0.00	0.00	
08/03/2009	AGREED ENTRY EXTENDING TIME FOR DEFENDANT'S TO DILE REPLY MEMORANDUM IN SUPPORT OF MOTION TO DISMISS AND/OR MOTION FOR SUMMARY JUDGMENT FILED Attorney: PEPPER Esquire, TIMOTHY G (0071076) Attorney: COVATTA, ANTHONY G (0018153) Receipt: 550985 Date: 01/10/2011	2.00	0.00	
07/30/2009	PLTF ARTISAN MECHANICAL, INC.'S	0.00	0.00	

	MEMORANDUM IN OPPOSITION TO DEFT'S MOTION TO DISMISS AND/OR FOR SUMMARY JUDGMENT FILED Attorney: PEPPER Esquire, TIMOTHY G (0071076)			
07/14/2009	RETURN RECEIPT OF CERTIFIED MAIL OF Method : SERVICE BY CERTIFIED MAIL Issued : 07/06/2009 Service : SUMMONS BY CERTIFIED MAIL Served : 07/08/2009 Return : 07/14/2009 On : LAY, CHRIS Signed By : SANDRA LAY Reason : CERTIFIED MAIL SERVICE SUCCESSFUL Comment : Tracking # : L000194223	0.00	0.00	
07/13/2009	RETURN RECEIPT OF CERTIFIED MAIL OF Method : SERVICE BY CERTIFIED MAIL Issued : 07/06/2009 Service : SUMMONS BY CERTIFIED MAIL Served : 07/07/2009 Return : 07/13/2009 On : BEISER, JAMES MICHAEL Signed By : TYA BEISER Reason : CERTIFIED MAIL SERVICE SUCCESSFUL Comment : Tracking # : L000194222	0.00	0.00	
07/09/2009	MOTION TO DISMISS AND/OR FOR SUMMARY JUDGMENT FILED Attorney: COVATTA, ANTHONY G (0018153)	0.00	0.00	
07/06/2009	SUMMONS ON COMPLAINT BY CERTIFIED MAIL ISSUED. SUMMONS ON COMPLAINT BY CERTIFIED MAIL Sent on: 07/06/2009 11:14:24 Receipt: 478442 Date: 07/09/2009	1.00	0.00	
07/06/2009	Issue Date: 07/06/2009 Service: SUMMONS BY CERTIFIED MAIL Method: SERVICE BY CERTIFIED MAIL Cost Per: \$ 8.00 BEISER, JAMES MICHAEL 7702 JASON COURT MIDDLETOWN, OH 45044 Tracking No: L000194222 LAY, CHRIS 1329 HAZEN ST COVINGTON, KY 41016 Tracking No: L000194223 Receipt: 478442 Date: 07/09/2009	16.00	0.00	
06/29/2009	CIVIL DOCKET SHEET DESIGNATING CATAGORY OF CAUSE, FILED	0.00	0.00	
06/29/2009	General Division Special Projects Fee pursuant to Local Rule 4.13. Receipt: 476825 Date: 06/29/2009	95.00	0.00	
06/29/2009	Court Computerization Fee pursuant to ORC 2303.201 (A)(1). Receipt: 476825 Date: 06/29/2009	3.00	0.00	
06/29/2009	Clerk of Courts Computerization Fee pursuant to ORC 2303.201 (B)(1). Receipt: 476825 Date: 06/29/2009	10.00	0.00	
06/29/2009	General Division Arbitration/Mediation Special Project Fee pursuant Local Rule 4.12. Receipt: 476825 Date: 06/29/2009	45.00	0.00	
06/29/2009	Complaint & Filing fee for each cause of	25.00	0.00	

action ORC 2303.20(A). Receipt: 476825
Date: 06/29/2009
06/29/2009 Legal aid fees pursuant to ORC 2303.210 26.00 0.00
(C). Receipt: 476825 Date: 06/29/2009
06/29/2009 FUNDS ON DEPOSIT FOR COURT 96.00 0.00
COST. Receipt: 476825 Date: 06/29/2009

FILE

IN THE COURT OF COMMON PLEAS
BUTLER COUNTY, OHIO

2009 DEC 23 PM 3:39

CINDY CARPENTIER
BUTLER COUNTY
CLERK OF COURTS

ARTISAN MECHANICAL, INC.

Plaintiff,

v.

JAMES MICHAEL BEISER, et al.,

Defendants.

: Case No. CV09-06-2832

: (Judge Michael J. Sage)

**PLAINTIFF'S MOTION TO
COMPEL DEFENDANTS TO
PARTICIPATE IN DISCOVERY AND
MEMORANDUM OPPOSING
REQUEST FOR EXTENSION OF
TIME**

Pursuant to Ohio Rules of Civil Procedure 26, 33, 34, and 37, Plaintiff Artisan Mechanical, Inc. ("Artisan") respectfully moves for the Court to compel Defendants James Michael Beiser and Chris Lay to participate in discovery. Defendants should be compelled to respond to Artisan's discovery requests and to provide dates that they will be available to be deposed by Artisan.

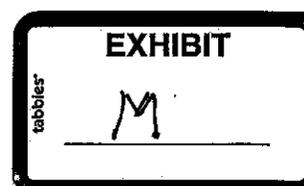
A Memorandum in Support of this Motion and opposing Defendants' request for an extension of time, as well as an affidavit from the undersigned counsel, Timothy G. Pepper, are attached to this Motion.

Respectfully submitted,



Timothy G. Pepper (0071076)
TAFT STETTINIUS & HOLLISTER LLP
110 North Main Street, Suite 900
Dayton, Ohio 45402-1786
Telephone: (937) 228-2838
Fax: (937) 228-2816
pepper@taftlaw.com

Attorneys for Plaintiff
Artisan Mechanical, Inc.



MEMORANDUM

I. INTRODUCTION

Artisan opposes Defendants "Request for Extension of Time" to respond to discovery filed on December 14, 2009. Although captioned a "Request for Extension of Time," Defendants Beiser and Lay are in reality seeking a stay of all discovery in this case until the Court rules on their motion to dismiss / motion for summary judgment. Defendants' request should be denied because they have not followed this Court's requirement to meet and confer to resolve discovery disputes, and because granting the requested stay would not give Artisan sufficient time to prepare for the trial of this matter scheduled in March 2010. The Court should compel Defendants to participate in discovery.

II. BACKGROUND

Artisan filed this case against two of its former employees, Defendants Beiser and Lay, for breach of a settlement agreement formed to resolve an earlier trade secrets action between the parties. Defendants filed a motion to dismiss and/or for summary judgment. The Court held oral arguments on Defendants' motion on November 13, 2009.

On November 20, 2009, Artisan served requests for production and interrogatories on Defendants Beiser and Lay. (See Affidavit of Timothy G. Pepper, attached, ¶ 2, Ex. A) In its requests and interrogatories, Artisan sought information to determine the amount of damages that have resulted from Beiser and Lay's breach of the settlement agreement. Artisan also provided dates in January 2010 that it was available to depose Beiser and Lay, and requested that Beiser and Lay respond with their available dates.

When Beiser and Lay did not respond with any available dates to be deposed by December 3, 2009, Artisan followed up with counsel for Beiser and Lay by email. (Pepper Aff., ¶ 3, Ex. B) Defendants' counsel responded on December 4, 2009 that discovery would be a

"waste of our clients' money and time." (Pepper Aff., ¶ 4, Ex. C) Defendants' counsel indicated that he would not respond to Artisan's discovery requests or provide dates for Artisan to depose Beiser and Lay until the Court ruled on their motion to dismiss / motion for summary judgment. To date, Defendants have not responded to Plaintiff's written discovery requests. Defendants filed their motion for an extension of time on December 14, 2009, but did not provide any certification from counsel that they had exhausted extrajudicial means to resolve this discovery dispute.

III. ARGUMENT

Defendants requested extension should be denied. First, Defendants have failed to comply with Butler County Local Rule 4.11(D), which provides:

No objections, motions, applications or requests related to discovery shall be filed under the provisions of Civ. R. 26 through 37 unless counsel have, in good faith, exhausted among themselves all extrajudicial means for the resolution of differences. If any such objection, motion, application or request is filed, a certificate of counsel setting forth a brief statement of the extrajudicial means employed to resolve the dispute shall be attached thereto. Failure to comply with this rule may result in appropriate sanctions against counsel filing the objection, motion, application or request.

The fact that Beiser and Lay have captioned their motion a "Request for Extension of Time" does not change the nature of their motion. Counsel for Defendants did not attach the required certificate setting forth the "brief statement of the extrajudicial means employed to resolve the dispute," and their motion should be denied for that reason alone.

Even if Beiser and Lay had followed the Court's Local Rule, however, their requested extension should be denied. Nothing in the Ohio Rules of Civil Procedure permits a party to avoid its responsibility to respond to discovery requests because the party has filed a dispositive motion. If that was the rule, every defendant in a civil action would file a motion to dismiss if only to stall discovery until the Court ruled upon the motion.

More importantly, Artisan will be prejudiced if discovery is stayed. At the status hearing on September 15, 2009, the Court set this matter for a jury trial on March 15, 2009, a date to which both parties agreed despite knowing that the dispositive motion was pending. Defendants' present request to avoid engaging in any discovery until the court rules on their motion is contra to their prior agreement to have this case resolved in an expeditious manner.

Artisan needs the requested written discovery and needs to depose Beiser and Lay to prepare for trial. Beiser and Lay agreed not to compete with Artisan, and to forego submitting any bids to two of Artisan's customers, during a six month period. Beiser and Lay do not deny that they have "proceed[ed] with their business activities" without following the settlement agreement. (Defendants' Motion to Dismiss / Motion for Summary Judgment, p. 5) Without knowing what bids Beiser and Lay have made to Artisan's customers, and what work Beiser and Lay have performed, Artisan has no way of assessing the damages that have been caused by their breach.

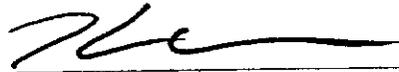
Based on Defendants unwillingness to respond to Artisan's written discovery requests or schedule depositions, and the motion they have filed, Artisan has exhausted all extrajudicial means to resolve this discovery dispute. In compliance with Butler County Local Rule 4.11(D), an affidavit of Artisan's counsel is attached certifying Defendants refusal to participate in discovery. The Court should compel Defendants to participate by responding to Artisan's written discovery requests, order them to appear for depositions, and award an appropriate sanction to Artisan under Rule 37. Ohio R. Civ. P. 37(D) ("[T]he court shall require the party failing to [respond to document requests] . . . to pay the reasonable expenses, including attorney's fees, caused by the failure.") (emphasis added); *Bates v. Midland Title of Ashtabula County, Inc.* (Ohio App. 11 Dist.), 2004-Ohio-6325, ¶ 49 ("Civil Rule 37(D) mandates [an

attorney fees award], when a party has failed to comply with a request for production under Rule 34." (emphasis added).

IV. CONCLUSION

For the foregoing reasons, Artisan respectfully requests that this Court deny Defendants' Request for Extension of Time, compel Defendants to respond to Artisan's discovery requests, and award Artisan the attorneys' fees expended in filing this motion and memorandum.

Respectfully submitted,



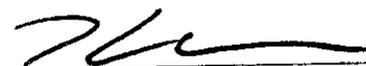
Timothy G. Pepper (0071076)
TAFT STETTINIUS & HOLLISTER LLP
110 North Main Street, Suite 900
Dayton, Ohio 45402-1786
Telephone: (937) 228-2838
Fax: (937) 228-2816
pepper@taftlaw.com

Attorneys for Plaintiff
Artisan Mechanical, Inc.

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing was served this 22nd day of December, 2009, via regular U.S. mail upon the following:

Anthony Covatta, Esq.
DREW & WARD CO., LPA
1 West Fourth Street, Suite 2400
Cincinnati, Ohio 45202



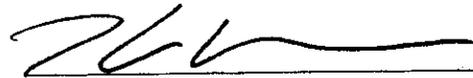
Timothy G. Pepper

3. When Beiser and Lay did not respond with any available dates to be deposed by December 3, 2009, I wrote to counsel for Beiser and Lay requesting a response. A copy of my email correspondence with Defendants' counsel is attached as Exhibit B.

4. Defendants' counsel responded on December 4, 2009 and indicated that he would not respond to Artisan's discovery requests or provide dates for Artisan to depose Beiser and Lay until the Court ruled on their motion to dismiss / motion for summary judgment. A copy of the email correspondence received from Defendants' counsel is attached as Exhibit C.

5. To date, Defendants have not provided any response to Plaintiff's written discovery requests.

FURTHER AFFIANT SAYETH NOT.


Timothy G. Pepper

Sworn to and subscribed in my presence this 22nd day of December, 2009.


Notary Public



TANIA MARIE WELCH
Notary Public, State of Ohio
My Commission Expires
November 2, 2014

FILED

IN THE COURT OF COMMON PLEAS
BUTLER COUNTY, OHIO

2010 JAN 22 AM 10:24

ARTISAN MECHANICAL, INC.

Plaintiff,

v.

JAMES MICHAEL BEISER, et al.,

Defendants.

Case No. CV09-06-2832

(Judge Michael J. Sage)

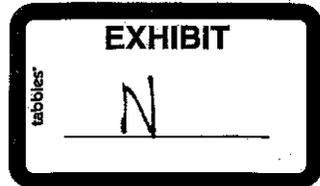
CINDY CARPENTER
BUTLER COUNTY
CLERK OF COURTS

PLAINTIFF ARTISAN
MECHANICAL'S REPLY
MEMORANDUM IN SUPPORT OF
ITS MOTION TO COMPEL

I. INTRODUCTION

Plaintiff Artisan Mechanical, Inc. served written discovery requests to Defendants James Michael Beiser and Chris Lay in this matter on November 20, 2009. (See Pepper Aff., attached to Motion to Compel, ¶ 2, Ex. A) Artisan sought information to determine the amount of damages that resulted from Beiser and Lay breaching a settlement agreement that was reached between the parties in a prior case. (Id.) When Beiser and Lay refused to respond to the written discovery requests, Artisan filed a motion to compel and sought sanctions against Beiser and Lay pursuant to Ohio Civ. R. 37(D).

In response to Artisan's motion to compel discovery, Beiser and Lay argue that they are entitled to an automatic stay of discovery pursuant to Ohio Civ. Rule 56 based on their filing a motion for summary judgment. The argument is meritless on its face. Nothing in the Civil Rules provides for an automatic stay of discovery after a party has filed motion for summary judgment. And the cases cited by Beiser and Lay in support of their motion do not support their novel theory either.



Artisan respectfully submits that the Court should grant its motion to compel, and that it is entitled to an award of reasonable attorneys' fees incurred in bringing this motion pursuant to Ohio Civ. R. 37(D).

II. ARGUMENT

Beiser and Lay cite two Ohio cases in support of their argument that a motion for summary judgment stays all discovery in a civil case. Neither case supports their argument.

In MacConnell v. Safeco Property (Ohio App. 2d Dist.), 2006-Ohio-2910, 2006 Ohio App. LEXIS 2735, after the defendant filed a motion for summary judgment, the defendant sought a stay of discovery, and the court stayed all discovery in the case pending the resolution of the motion for summary judgment. There was no automatic stay of discovery -- the court had to affirmatively order a stay. Similarly, in Jackson v. Walker (Ohio App. 9th Dist.) 2006-Ohio-4351, 2006 Ohio App. LEXIS 4270, the court did not say that filing a motion for summary judgment stayed a party's obligations to comply with discovery.

Beiser and Lay's argument is not supported by Ohio Civ. Rule 56. Rule 56(F) gives the party defending a motion for summary judgment the option to argue that it has had an insufficient time for discovery:

"Should it appear from the affidavits of a party opposing the motion for summary judgment that the party cannot for sufficient reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or discovery to be had or may make such other order as is just."

Nothing in the rule permits a party to avoid its responsibilities to respond to discovery requests related to other issues in the case while the motion is pending.

If the party does not file a Rule 56(F) motion and affidavit, then it is precluded from arguing that the motion for summary judgment should not be granted because it has had an

insufficient amount of time for discovery. MacConnell, supra. ("Parties who find themselves in the position of having to respond to a motion for summary judgment before adequate discovery has been completed must seek their remedy through Civ. R. 56(F)."). Jackson, supra. Here, Artisan is not arguing that it needs additional discovery to respond in opposition to Beiser and Lay's motion for summary judgment. Artisan already has responded on the merits to the motion and does not seek discovery for the purposes of responding. Rather, Artisan seeks discovery for the purposes of assessing the damages it may seek at trial. Nothing in the rules precludes a party from seeking discovery after the filing of a motion for summary judgment

Moreover, Beiser and Lay's novel theory would create a perverse incentive for any party who has been sued to file an immediate motion for summary judgment, as Beiser and Lay did in this case. If a party were entitled to an automatic stay of discovery pending a motion for summary judgment, then every defendant would want to stall the discovery process by filing a prompt motion.

Finally, Beiser and Lay's argument is belied by their conduct in this litigation. In response to Artisan's written discovery requests, Beiser and Lay filed a motion to stay discovery until the Court rules on its motion for summary judgment. In filing the motion for a stay, Defendants acknowledged that no automatic stay was in place and that it needed the Court to grant a stay to avoid its responsibility to provide timely responses to the requests.

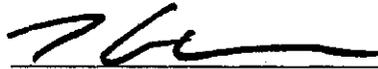
Both parties agreed to the scheduling order that the Court issued for resolving this matter. The final pretrial conference has been set for March 1, 2010, and a jury trial is set for March 15, 2010. With trial less than two months away, Artisan needs the requested written discovery so that it may assess the damages it will seek resulting from Beiser and Lay breaching the settlement agreement in the prior litigation.

Defendants already have delayed in responding to Artisan's discovery requests for more than two months. As a result of their delay, and their frivolous argument that Ohio Civ. Rule 56(F) precludes Artisan from even seeking discovery, Artisan has had to expend needless attorney's fees and expenses in filing this motion to compel and responding to Defendants' arguments. Therefore, Artisan now renews its request for the Court to grant attorney's fees against Defendants for their obstinacy in refusing to respond to Artisan's written discovery requests. Artisan respectfully submits that it is entitled to an award of attorneys' fees expended in bringing this motion. See Ohio Civ. R. 37(D) ("[T]he court shall require the party failing to [respond to document requests] . . . to pay the reasonable expenses, including attorney's fees, caused by the failure.") (emphasis added); Bates v. Midland Title of Ashtabula County, Inc. (Ohio App. 11 Dist.), 2004-Ohio-6325, ¶ 49 ("Civil Rule 37(D) mandates [an attorney fees award], when a party has failed to comply with a request for production under Rule 34.") (emphasis added).

III. CONCLUSION

For the foregoing reasons, Artisan respectfully requests the Court to compel Defendants to respond to Artisan's discovery requests, and award Artisan the attorneys' fees expended in filing this motion and memoranda.

Respectfully submitted,



Timothy G. Pepper (0071076)
TAFT STETTINIUS & HOLLISTER LLP
110 North Main Street, Suite 900
Dayton, Ohio 45402-1786
Telephone: (937) 228-2838
Fax: (937) 228-2816
pepper@taflaw.com

Attorneys for Plaintiff
Artisan Mechanical, Inc.

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing was served this 21st day of
January, 2010, via regular U.S. mail upon the following:

Anthony Covatta, Esq.
DREW & WARD CO., LPA
1 West Fourth Street, Suite 2400
Cincinnati, Ohio 45202



Timothy G. Pepper

TANIA M. WELCH
937.641.1719
welcht@taftlaw.com

January 21, 2010

Via Federal Express

Butler County Clerk of Courts
Cindy Carpenter
Court of Common Pleas
315 High St., Suite 550
Hamilton, Ohio 45011

Re: Artisan Mechanical, Inc. v. James Michael Beiser, et al.
Butler County Court of Common Pleas
Case No. CV09-06-2832

Dear Clerk:

Accompanying this letter is an original and two copies of Plaintiff Artisan Mechanical's Reply Memorandum in Support of its Motion to Compel for filing in the above-captioned matter. Once filed, please return any time-stamped copies to our office in the enclosed self-addressed, stamped envelope. Thank you for your assistance in this matter.

Sincerely,

Tania M. Welch
Paralegal

:tmw

Encl.

cc: Anthony Covatta, Esq. (w/ encl., via regular mail)