

ORIGINAL

IN THE SUPREME COURT OF OHIO

INFINITE SECURITY SOLUTIONS,)
LLC, et al.)
)
Appellee)
)
vs.)
)
KARAM PROPERTIES I, LTD., et al.)
)
Appellants)

Case No.: 13-1671

On Appeal from the Lucas County Court
of Appeals, Sixth Appellate District
Court of Appeals Case No. L-12-1313

NOTICE OF CERTIFIED CONFLICT OF
APPELLANT THE TRAVELERS INDEMNITY COMPANY

Paul D. Eklund (0001132)
DAVIS & YOUNG
1200 Fifth Third Center, 600 Superior Avenue, East
Cleveland, OH 44114
(216) 348-1700/(216) 621-0602 (Fax)
peklund@davisyoung.com
Counsel for Appellant The Travelers Indemnity Company

John J. Reagan (0067389)
Alberto R. Nestico (0071676)
Christopher J. Van Blargan (0066077)
KISLING, NESTICO & REDICK, LLC
3412 W. Market Street
Akron, OH 44333
(330) 869-9007/(330)869-9008 (Fax)
regan@knrlegal.com
nestico@knrlegal.com
cvanblargan@knrlegal.com
Counsel for Appellees Karam Properties I, Ltd.,
Karam Properties II, Ltd., Karam Manager
Properties, LLC, and Toledo Properties, LLC

RECEIVED
OCT 23 2013
CLERK OF COURT
SUPREME COURT OF OHIO

FILED
OCT 23 2013
CLERK OF COURT
SUPREME COURT OF OHIO

NOTICE OF CERTIFIED CONFLICT OF APPELLANT
THE TRAVELERS INDEMNITY COMPANY

Pursuant to S.Ct.Prac.R. 8.01, Appellant, The Travelers Indemnity Company, hereby gives notice that on October 4, 2013, the Sixth Appellate District, Lucas County, issued a Decision and Judgment Entry in *Infinite Security Solutions, LLC, et al. v. Karam Properties I, Ltd., et al.*, No. L-12-1313, finding such decision to be in conflict with the decisions of the Eighth Appellate District, Cuyahoga County, in *Estate of Berger v. Riddle*, Nos. 66195, 66200, 1994 WL 449397, (August 18, 1994), and the Eleventh Appellate District, Trumbull County, in *Hines v. Zofko*, No. 93-T-4928, 1994 WL 117110 (March 28, 1994), and certifying a conflict pursuant to Article IV, Section 3(B)(4) of the Ohio Constitution.

A copy of the Sixth District's order certifying a conflict and opinion are attached hereto as Exhibit A. A copy of the conflicting opinion of the Eighth Appellate District in *Estate of Berger v. Riddle* is attached hereto as Exhibit B, and a copy of the conflicting opinion of the Eleventh Appellate District in *Hines v. Zofko* is attached hereto as Exhibit C.

Respectfully submitted,



Paul D. Eklund (0001132)
DAVIS & YOUNG
1200 Fifth third Center
600 Superior Avenue, East
Cleveland, OH 44114
(216) 348-1700
(216) 621-0604 (Fax)
peklund@davisyoung.com
Counsel for Appellant
The Travelers Indemnity Company

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Notice of Certified Conflict of Appellant The Travelers Indemnity Company was served by regular U.S. Mail this 22nd day of October 2013

upon the following:

John J. Reagan
Alberto R. Nestico
Christopher J. Van Blargan
Kisling, Nestico & Redick, LLC
3412 W. Market Street
Akron, OH 44333

Counsel for Appellees Karam Properties I, Ltd.,
Karam Properties II, Ltd., Karam Managed
Properties, LLC, and Toledo Properties, LLC

Steven G. Janik
Audrey K. Bentz
Janik, LLP
9200 South Hills Boulevard, Suite 300
Cleveland, OH 44147

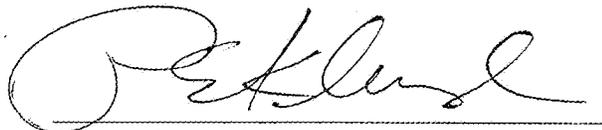
Counsel for Infinite Security Solutions, LLC

Martin J. Holmes, Jr.
300 Madison Avenue
1200 Edison Plaza
Toledo, OH 43604

Counsel for Infinite Security Solutions, LLC

Michele A. Chapnick
GREGORY AND MEYER
340 East Big Beaver, Suite 520
Troy, MI 48083

Counsel for Appellant The Travelers Indemnity
Company



Paul D. Eklund (0001132)

DAVIS & YOUNG

Counsel for The Travelers Indemnity Company

Exhibit A

FILED
COURT OF APPEALS
2013 OCT -4 A 8 01
COMMON PLEAS COURT
BERNIE QUILTER
CLERK OF COURTS

THE STATE OF OHIO, LUCAS COUNTY, as
I, BERNIE QUILTER, Clerk of Common Pleas Court
and Court of Appeals, hereby certify this document to be a true
and accurate copy of entry from the Journal of the proceedings
of said Court filed 10-04-13 on case number
L-12-1313.

IN TESTIMONY WHEREOF, I have hereunto
subscribed my name officially and affixed the seal of said court
at the Courthouse in Toledo, Ohio, in said County, this 17th
day of October, A.D., 2013

BERNIE QUILTER, Clerk

SEAL

By C. Wiley
Deputy

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

Infinite Security Solutions, LLC, et al.

Court of Appeals No. L-12-1313

Appellee

Trial Court No. CI0200903781

v.

Karam Properties I, Ltd., et al.

DECISION AND JUDGMENT

Appellants

Decided: OCT 04 2013

Paul D. Eklund, for appellee The Travelers Indemnity Company.

John J. Reagan, Alberto R. Nestico and Christopher J. VanBlargan,
for appellants.

YARBROUGH, J.

I. Introduction

{¶ 1} This is an appeal from a judgment granting appellee's, The Travelers
Indemnity Co. ("Travelers"), motion seeking priority to settlement proceeds. Because the

E-JOURNALIZED

OCT -4 2013

1.

E -
JOURNALIZED
CIVILSCANNER1
10/4/2013
7:17:00 AM

trial court lacked jurisdiction to entertain Travelers' motion, we dismiss this appeal for lack of a final appealable order.

A. Facts and Procedural Background

{¶ 2} On or around July 4, 2008, a fire caused over \$13 million of damage to an apartment complex owned by appellants, Karam Properties I, Ltd., Karam Properties II, Ltd., Karam Managed Properties, LLC, and Toledo Properties, LLC (collectively "Karam"). Karam insured the property through Travelers, who paid Karam approximately \$8.9 million for the loss in exchange for a policyholder's release.

{¶ 3} Subsequently, Infinite Security Solutions, LLC ("Infinite"), which provided security services to the apartment complex, brought a claim against Karam for breach of contract for Karam's failure to pay for several months of services. Karam answered and filed a counterclaim, alleging that Infinite negligently failed to stop residents from setting off the fireworks that started the fire. Around the same time, Travelers initiated a separate lawsuit against Infinite, seeking to recover the amount it paid to Karam for losses sustained by the fire. The trial court consolidated these two cases. Despite the consolidation, neither Travelers nor Karam filed cross-claims to determine who had priority to any recovery against Infinite.

{¶ 4} After extensive discovery, the parties purportedly reached a settlement agreement on May 19, 2011. Unfortunately, although the settlement agreement was discussed in open court, no record was made of those proceedings. Furthermore, the settlement agreement was not reduced to writing and signed by the parties. The parties

admit that pursuant to the agreement, Infinite will pay a fixed sum to settle the tort claims against it, less an amount to settle its breach of contract claim against Karam.¹ However, the parties disagree on the extent of the agreement relative to who has priority to the funds paid by Infinite. Notably, both Travelers and Karam concede that priority was not determined during the settlement discussions. Notwithstanding that the priority issue had not yet been resolved, on May 26, 2011, the trial court sua sponte entered a judgment dismissing the action.

{¶ 5} Shortly after this judgment was entered, Karam filed an action in federal court, seeking, in part, a judgment that it is entitled to all of the proceeds from Infinite because the policyholder's release that it signed was not effective to overcome the "make-whole" doctrine. Thereafter, Travelers moved the trial court, pursuant to Civ.R. 60(B), to set aside the May 26, 2011 judgment entry dismissing the case, so that the trial court could decide the priority issue. The parties briefed Travelers' motion, and the trial court held an oral hearing on the motion on September 6, 2011. The trial court then took the matter under advisement.

{¶ 6} On February 13, 2012, Infinite moved the trial court to enforce the settlement agreement. Essentially, because the trial court had not yet ruled on Travelers' Civ.R. 60(B) motion, and because the priority issue had still not been resolved, Infinite sought an order requiring the parties to execute a release so that Infinite could pay the agreed sum to the court, thereby concluding its role in the litigation, and allowing Karam

¹ Infinite has moved to seal several filings in this case so that the amount of the settlement is not disclosed.

and Travelers to continue to quarrel over the distribution of those funds. Travelers responded to Infinite's motion, and filed a cross-motion seeking priority to the settlement proceeds. Karam opposed Travelers cross-motion, arguing that the trial court did not have jurisdiction over the priority issue because the case had been unconditionally dismissed, and, because priority was never an issue that was presented to the court in the pleadings, it was not necessary to the settlement. Travelers replied that the May 26, 2011 judgment was conditioned on the settlement; consequently, the trial court retained jurisdiction to enforce the settlement. Furthermore, Travelers argued that the settlement included the parties' agreement that if they could not resolve the priority issue, they would return to the trial court for its determination.

{¶ 7} On October 12, 2012, the trial court entered its judgment on the respective motions. The trial court determined that its May 26, 2011 judgment was a conditional dismissal, and therefore it retained jurisdiction to enforce the settlement agreement between the parties. Accordingly, it denied Travelers' Civ.R. 60(B) motion for relief from judgment as moot. The trial court then decided the priority issue, determining that Travelers was entitled to the full amount of the settlement proceeds. As a result, the trial court granted Travelers' cross-motion for priority in the settlement proceeds, and in light of that decision, denied Infinite's motion to enforce the settlement agreement as moot.

B. Assignments of Error

{¶ 8} Karam has timely appealed the October 12, 2012 judgment, asserting three assignments of error:

4.

1. The trial court erred in declaring that Travelers has priority to the Infinite settlement proceeds because the court had previously dismissed the case unconditionally, and thus, lacked subject matter jurisdiction to decide this issue.

2. The trial court erred in reopening the case to decide the issue of priority where the settlement agreement did not address the issue, determination of the issue was not necessary to enforce the agreement, and the issue had not been raised in any pleading.

3. The trial court erred in holding that the policy's subrogation clause superceded (sic) the equitable "make-whole" doctrine where the clause did not expressly state that Travelers would have priority to funds recovered by Karam regardless of whether Karam obtained a full or partial recovery.

II. Analysis

{¶ 9} In Karam's first assignment of error, it argues that the trial court lacked jurisdiction to enforce the settlement agreement because the action had already been unconditionally dismissed.

{¶ 10} As an initial matter, Travelers argues that Karam has waived any argument that the trial court lacked jurisdiction. Travelers relies on *Figueroa v. Showtime Builders, Inc.*, 8th Dist. Cuyahoga No. 95246, 2011-Ohio-2912, ¶ 10, which quotes *Ohio State Tie & Timber, Inc. v. Paris Lumber Co.*, 8 Ohio App.3d 236, 240, 456 N.E.2d 1309 (10th

Dist.1982), for the proposition that “[t]he entering into the settlement agreement constitutes a waiver of the defense of lack of jurisdiction and [is] a consent to jurisdiction solely for the purpose of enforcement of the settlement agreement in the absence of some provision in the agreement itself to the contrary.” However, *Ohio State Tie & Timber* dealt with *personal* jurisdiction over a party to a contract, whereas here the trial court’s ability to enforce the settlement agreement is a question of *subject-matter* jurisdiction. It is well-settled that “[t]he lack of subject-matter jurisdiction may be raised for the first time on appeal,” and “[t]he parties may not, by stipulation or agreement, confer subject-matter jurisdiction on a court, where subject-matter jurisdiction is otherwise lacking.” *Fox v. Eaton Corp.*, 48 Ohio St.2d 236, 238, 358 N.E.2d 536 (1976), *overruled on other grounds*, *Manning v. Ohio State Library Bd.*, 62 Ohio St.3d 24, 29, 577 N.E.2d 650 (1991). Therefore, Karam has not waived, and could not waive, the issue of subject-matter jurisdiction.

{¶ 11} Turning to the merits of the assignment of error, we note that a trial court possesses authority to enforce a settlement agreement voluntarily entered into by the parties to a lawsuit because such an agreement constitutes a binding contract. *Mack v. Polson Rubber Co.*, 14 Ohio St.3d 34, 36, 470 N.E.2d 902 (1984). Further, “[w]hen an action is dismissed pursuant to a stated condition, such as the existence of a settlement agreement, the court retains the authority to enforce such an agreement in the event the condition does not occur.” *Estate of Berger v. Riddle*, 8th Dist. Cuyahoga Nos. 66195, 66200, 1994 WL 449397, *2 (Aug. 18, 1994). However, we also note that a trial court

loses jurisdiction to proceed in a matter when the court has unconditionally dismissed the action. *State ex rel. Rice v. McGrath*, 62 Ohio St.3d 70, 71, 577 N.E.2d 1100 (1991).

Therefore, the threshold issue in this case is whether the trial court's May 26, 2011 judgment constituted a conditional or unconditional dismissal of the action.

{¶ 12} "The determination of whether a dismissal is unconditional, thus depriving a court of jurisdiction to entertain a motion to enforce a settlement agreement, is dependent upon the terms of the dismissal order." *Le-Air Molded Plastics, Inc. v. Gaforth*, 8th Dist. Cuyahoga No. 74543, 2000 WL 218385, *3 (Feb. 24, 2000), citing *Showcase Homes, Inc. v. Ravenna Savs. Bank*, 126 Ohio App.3d 328, 331, 710 N.E.2d 347 (3d Dist.1998). Here, the dismissal entry stated: "Parties having represented to the court that their differences have been resolved, this case is dismissed without prejudice, with the parties reserving the right to file an entry of dismissal within thirty (30) days of this order."

{¶ 13} In *Huntington Natl. Bank v. Molinari*, 6th Dist. Lucas No. L-11-1223, 2012-Ohio-4993, ¶ 15-17, we recognized that Ohio courts have taken different views on whether similar language constitutes a conditional or unconditional dismissal. Karam urges us to adopt the view of a number of districts that this language is an unconditional dismissal because it does not expressly embody the terms of the settlement agreement nor expressly reserve jurisdiction to enforce the settlement agreement. *Davis v. Jackson*, 159 Ohio App.3d 346, 2004-Ohio-6735, 823 N.E.2d 941, ¶ 15 (9th Dist.), citing *Cinnamon Woods Condominium Assn., Inc. v. DiVito*, 8th Dist. No. 76903, 2000 WL 126758, *2

(Feb. 3, 2000). See *Grace v. Howell*, 2d Dist. Montgomery No. 20283, 2004-Ohio-4120, ¶ 4, 13 (dismissal entry stating the matter has “been settled and compromised to the satisfaction of all parties as shown by the endorsement of counsel below” held to be an unconditional dismissal); see also *Showcase Homes, Inc.* at 329, 331 (“This day came the parties and advised the Court that the within cause has been settled. IT IS THEREFORE ORDERED that the complaint and parties’ respective counterclaims be and hereby are dismissed with prejudice”); *McDougal v. Ditmire*, 5th Dist. Stark No. 2008 CA 00043, 2009-Ohio-2019, ¶ 16 (“Upon agreement of Counsel for Plaintiffs and Counsel for Defendant, this matter is dismissed with prejudice to refiling”); *Bugeja v. Luzik*, 7th Dist. Mahoning No. 06 MA 50, 2007-Ohio-733, ¶ 8 (“case settled and dismissed with prejudice at defendant’s cost”); *Smith v. Nagel*, 9th Dist. Summit No. 22664, 2005-Ohio-6222, ¶ 6 (“The court, having been advised that the parties have reached an agreement in this case, orders this matter to be marked ‘SETTLED and DISMISSED’”); *Baybutt v. Tice*, 10th Dist. Franklin Nos. 95APE06-829, 95APE08-1106, 1995 WL 723688, *1-2 (Dec. 5, 1995) (“The within action is hereby settled and dismissed with prejudice. Costs paid.”); *Nova Info. Sys., Inc. v. Current Directions, Inc.*, 11th Dist. Lake No. 2006-L-214, 2007-Ohio-4373, ¶ 3-6, 16 (“by agreement of the parties, * * *The Complaint * * * is hereby dismissed with prejudice. The Counterclaim * * * and * * * Third Party Complaint * * * are hereby dismissed with prejudice”).

{¶ 14} Travelers, on the other hand, argues that we should adopt the view of the Eighth District that merely referring to a settlement agreement is sufficient to form a

conditional dismissal. See *Berger*, 8th Dist. Cuyahoga Nos. 66195, 66200, 1994 WL 449397 at *1, 3 (“All claims and counterclaims in the above numbered cases settled and dismissed with prejudice” was “clearly a conditional dismissal based on a settlement agreement”); *Fisco v. H.A.M. Landscaping, Inc.*, 8th Dist. Cuyahoga No. 80538, 2002-Ohio-6481, ¶ 10 (“instant matter is settled and dismissed” held to be a conditional dismissal). Travelers also points out that the Eighth District is not alone in reaching this conclusion, citing *Hines v. Zofko*, 11th Dist. Trumbull No. 93-T-4928, 1994 WL 117110 (Mar. 22, 1994), in which the Eleventh District held that a dismissal entry which stated, “Case settled and dismissed,” was a conditional dismissal.

{¶ 15} Further, Travelers relies on *Marshall v. Beach*, 143 Ohio App.3d 432, 436, 758 N.E.2d 247 (11th Dist.2001), in which the Eleventh District again held that the trial court retained jurisdiction to consider a motion to enforce a settlement agreement. In that case, the entry stated, “Case settled and dismissed with prejudice, each party to bear their own costs. Judgment entry to follow. Case concluded.” *Id.* at 434. However, the parties never filed a separate entry, nor completed a formal settlement agreement. *Id.* at 435. One of the parties subsequently filed a motion to enforce the settlement agreement. The trial court then held a hearing, determined what the terms of the settlement agreement were, and granted the motion to enforce the agreement. On appeal, in addressing whether the trial court had jurisdiction to consider the motion to enforce the settlement agreement, the Eleventh District reasoned,

Although the [dismissal] order does not explicitly state that the dismissal was conditioned on the settlement of the case, it is implicit within its mandate that if the parties did not reach an ultimate resolution, the trial court retained the authority to proceed accordingly. This conclusion is further buttressed by the trial court's statement that a second judgment entry was to follow. *Id.* at 436.

Travelers argues that a similar result should be reached here, where the dismissal order referenced that the parties had resolved their differences and contemplated that a second judgment entry would be forthcoming.

{¶ 16} Upon due consideration, we agree with the majority view of our sister courts, and hold that for a dismissal entry to be conditioned upon a settlement agreement, the entry must either embody the terms of the settlement agreement or expressly reserve jurisdiction to enforce the settlement agreement. Therefore, because the dismissal entry in this case did neither, it constituted an unconditional dismissal. Accordingly, the trial court did not have jurisdiction to entertain Infinite's motion to enforce the settlement agreement or Travelers' cross-motion for priority in the settlement proceeds.

{¶ 17} Admittedly, entering an unconditional dismissal of the action was not the result contemplated by the trial court when it issued its May 26, 2011 judgment entry. As the court stated at the hearing on Travelers' Civ.R. 60(B) motion,

[Y]ou've made more out of the entry than the Court placed on the record. That is, I call them a placeholder entry, pending submission of

whatever the final entry is once you've finalized everything, and this is why the language reads the way it is and why the case was dismissed without prejudice to allow you time to complete the terms of the preparation of the full and final release, and then submit your replacement dismissal order which is the effective one with prejudice once all the release language and all the releases are signed and executed and processed.

However, "a court speaks exclusively through its journal entries." *In re Guardianship of Hollins*, 114 Ohio St.3d 434, 2007-Ohio-4555, 872 N.E.2d 1214, ¶ 30. Here, the entry unequivocally dismissed the action. Unlike *Marshall*, the provision that the parties "reserv[ed] the right to file an entry of dismissal" did not qualify the initial dismissal on the entry of a second. Instead, it merely provided the parties an option that they may or may not have exercised. Because the parties did not file a replacement entry of dismissal, the May 26, 2011 judgment remains in effect.²

{¶ 18} Furthermore, the fact that the dismissal was without prejudice actually supports our conclusion that the trial court lacks jurisdiction over the settlement agreement. Dismissal without prejudice does not mean that the dismissal is a placeholder having no effect; rather,

² Notably, Lucas County Court of Common Pleas Loc.R. 5.05(F) provides a procedure for settlements in civil cases that may have avoided this result: "Counsel shall promptly submit an order of dismissal following settlement of any case. If counsel fail to present such an order to the trial judge within 30 days or within such time as the court directs, the judge may order the case dismissed for want of prosecution or file an order of settlement and dismissal and assess costs."

[it] means that the plaintiff's claim is not to be unfavorably affected thereby; all rights are to remain as they then stand, leaving him or her free to institute a similar suit. The parties are put back in their original positions, and the plaintiff may institute a second action upon the same subject matter. In a typical civil action, a claim that is dismissed "without prejudice" may be refiled at a later date.

Dismissal without prejudice relieves the trial court of all jurisdiction over the matter, and the action is treated as though it had never been commenced. (Emphasis added.) 1 Ohio Jurisprudence 3d, Actions, Section 170 (2013).

{¶ 19} Therefore, because the trial court lacked jurisdiction to enforce the settlement agreement, its October 12, 2012 judgment is void. *State ex rel. Ohio Democratic Party v. Blackwell*, 111 Ohio St.3d 246, 2006-Ohio-5202, 855 N.E.2d 1188, ¶ 8 ("If a court acts without jurisdiction, then any proclamation by that court is void."). Accordingly, Karam's first assignment of error is well-taken, rendering Karam's second and third assignments of error moot.

III. Certification of Conflict

{¶ 20} Article IV, Section 3(B)(4) of the Ohio Constitution states, "Whenever the judges of a court of appeals find that a judgment upon which they have agreed is in conflict with a judgment pronounced upon the same question by any court of appeals of

the state, the judges shall certify the record of the case to the supreme court for review and final determination.”

{¶ 21} In order to qualify for a certification of conflict to the Supreme Court of Ohio, a case must meet the following three conditions:

First, the certifying court must find that its judgment is in conflict with the judgment of a court of appeals of another district and the asserted conflict *must* be “upon the same question.” Second, the alleged conflict must be on a rule of law—not facts. Third, the journal entry or opinion of the certifying court must clearly set forth that rule of law which the certifying court contends is in conflict with the judgment on the same question by other district courts of appeals.” *Whitelock v. Gilbane Bldg. Co.*, 66 Ohio St.3d 594, 596, 613 N.E.2d 1032 (1993).

{¶ 22} We find that our holding today is in conflict with the Eighth District Court of Appeals’ decision in *Estate of Berger v. Riddle*, 8th Dist. Cuyahoga Nos. 66195, 66200, 1994 WL 449397 (Aug. 18, 1994), and the Eleventh District Court of Appeals’ decision in *Hines v. Zofko*, 11th Dist. Trumbull No. 93-T-4928, 1994 WL 117110 (Mar. 22, 1994). Accordingly, we certify the record in this case for review and final determination to the Supreme Court of Ohio on the following issue: Whether a dismissal entry that does not either embody the terms of a settlement agreement or expressly reserve jurisdiction to the trial court to enforce the terms of a settlement agreement is an unconditional dismissal.

{¶ 23} The parties are directed to S.Ct.Prac.R. 8.01, et seq., for guidance.

IV. Conclusion

{¶ 24} Based on the foregoing, the October 12, 2012 judgment of the Lucas County Court of Common Pleas is void, and this appeal is dismissed for lack of a final appealable order. *See State v. Gilmer*, 160 Ohio App.3d 75, 2005-Ohio-1387, 825 N.E.2d 1180, ¶ 6 (6th Dist.) (a void judgment is not a final appealable order). Costs are assessed to Travelers pursuant to our discretion under App.R. 24(A).

Appeal dismissed.

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

Mark L. Pietrykowski, J.

Arlene Singer, P.J.

Stephen A. Yarbrough, J.
CONCUR.



JUDGE



JUDGE



JUDGE

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

Exhibit B

8. 29

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT
COUNTY OF CUYAHOGA
NOS. 66195 and 66200

ESTATE OF SAM BERGER, ET AL. :
: :
PLAINTIFFS-APPELLANTS : JOURNAL ENTRY
: :
v. : AND
: :
LYNDELL RIDDLE, ET AL. : OPINION
: :
DEFENDANTS-APPELLEES :

DATE OF ANNOUNCEMENT OF DECISION: AUGUST 18, 1994

CHARACTER OF PROCEEDING: Civil appeals from Common Pleas Court, Nos. CV-129085 and CV-167640.

JUDGMENT: AFFIRMED.

DATE OF JOURNALIZATION: AUG 29 1994

APPEARANCES:
For Plaintiffs-Appellants: Sanford J. Berger, Esq.
Robert M. Fertel, Esq.
Berger & Fertel
1836 Euclid Avenue
Room 305
Cleveland, OH 44115-2234
For Defendants-Appellees: Dennis A. Rotman, Esq.
Suite 300, CAC Building
1148 Euclid Avenue
Cleveland, OH 44115
James M. Johnson, Esq.
Keller and Curtin Co., L.P.A.
330 Hanna Building
Cleveland, OH 44115

98084 98089



98084 98089

- (1) plaintiff-appellant to receive \$14,000.00;
- (2) plaintiff-appellant to execute a full and final release;
- (3) plaintiff-appellant to execute a consent agreement;
- (4) plaintiff-appellant and defendants-appellees to execute a mutual release;
- (5) defendants-appellees to receive \$2,500.00.

The consent agreement in question apparently gave defendant-appellee, Lindell Riddle, access to plaintiff-appellant Berger's property for the limited purpose of pruning trees located along the property line. Berger denies that the consent agreement was ever part of the overall settlement agreement.

On June 7, 1993, the trial court held a hearing on defendants-appellees' motion to enforce the settlement agreement. On June 8, 1993, the trial court journalized the following entry:

Counsel present, hearing had. Defendants' motion to enforce settlement granted in part. Mr. Riddle is not to enter onto Berger's property. All parties agreed to same.

On August 24, 1993, a second judgment entry was journalized by the trial court pertaining to defendants-appellees' motion to enforce settlement agreement. This entry provided that defendants-appellees' motion was granted in part and denied in part. The entry went on to state that Berger was "deemed" to have executed a full and final release and the consent agreement. In addition, Berger and defendants-appellees were "deemed" to have executed a mutual release and Berger was ordered to pay defendants-appellees \$2,750.00 as consideration for the mutual release. Lastly,

VALD 364 PG0091

defendants-appellees were ordered to stay off Berger's property and Berger was ordered to stay off defendants-appellees' property.

Attached to the court's judgment entry were the full and final release executed by Berger. The consent agreement signed by the attorneys for the parties and the mutual release signed by Berger, his attorney and defendants-appellees' attorney. The consent agreement allows defendants-appellees to "continue to prune, maintain and care for the existing pine trees, ornamental trees and plants, the centerline of which are on Riddles' property, but which plantings are also along the common property line. Berger agrees not to interfere with these plants or their root systems."

On September 16, 1993, plaintiff-appellant Berger filed a motion for partial vacation of judgment. In the motion, Berger sought to vacate the section of the consent agreement allowing Riddle on the property to prune and maintain pine trees, ornamental trees and plants. Berger also sought to vacate the section of the entry ordering Berger to pay defendants-appellees \$2,750.00 as consideration for the mutual release.

On November 30, 1993, the trial court denied plaintiff-appellant's motion for partial vacation of judgment.

Plaintiff-appellant timely brought the instant appeal.

II. FIRST ASSIGNMENT OF ERROR

Plaintiff-appellant's first assignment of error states:

THE AUGUST 24, 1993 ORDER, WHICH MATERIALLY CHANGED THE TERMS OF THE SEPTEMBER 15, 1992 SETTLED AND DISMISSED WITH PREJUDICE ORDER, WAS VOID FOR LACK OF JURISDICTION.

V10354 00092

A. THE ISSUE RAISED: DID THE TRIAL COURT HAVE JURISDICTION

Plaintiff-appellant Berger argues, through his first assignment of error, that the trial court's judgment entry dated August 24, 1992 was void for lack of jurisdiction. Specifically, Berger argues that, once the trial court journalized its order settling and dismissing the underlying cases, it lost all jurisdiction absent the filing of a Civ.R. 60(B) motion to vacate.

Plaintiff-appellant's first assignment of error is not well taken.

B. THE STANDARD OF REVIEW

A trial court possesses the authority to enforce a settlement agreement voluntarily entered into by the parties to a lawsuit. *Mack v. Polson* (1984), 14 Ohio St.3d 34. *Spercel v. Sterling Industries* (1972), 31 Ohio St.2d 36. A trial court loses the authority to proceed in a matter when the court unconditionally dismisses an action as the court no longer retains jurisdiction to act. *State, ex rel. Rice v. McGrath* (1991), 62 Ohio St.3d 70.

When an action is dismissed pursuant to a stated condition, such as the existence of a settlement agreement, the court retains the authority to enforce such an agreement in the event the condition does not occur. *Tepper v. Heck* (Dec. 10, 1992), Cuyahoga App. No. 61061, unreported; *Hines v. Zafko* (March 22, (1994), Trumbull County App. No. 93-T-4928, unreported.

In the event that a factual dispute arises concerning the existence or the terms of a settlement agreement, as in this instance, Ohio courts have held that an evidentiary hearing is

11000, 20093

required in order to determine the nature of the purported settlement. *Palmer v. Kaiser Found. Health* (1991), 64 Ohio App.3d 140.

C. THE TRIAL COURT POSSESSED JURISDICTION TO ENFORCE THE SETTLEMENT AGREEMENT

In the case *sub judice*, the trial court's entry dated September 15, 1992 states clearly that all the claims and counterclaims between the parties were settled and dismissed. On March 3, 1993, the trial court was made aware of a dispute concerning the terms of the purported settlement.

The trial court's dismissal was clearly a conditional dismissal based on a settlement agreement and, as such, the trial court retained jurisdiction to hear a motion to enforce the settlement agreement. Faced with a factual dispute concerning the nature and terms of the settlement, the trial court properly set the matter for an oral hearing to determine the extent of the disputed terms. *Palmer, supra*.

At the evidentiary hearing, the court determined that the parties had, in fact, reached a settlement and ordered that the settlement agreement be enforced. Plaintiff-appellant's actions also indicated that a settlement was reached. Plaintiff-appellant not only negotiated the settlement check for \$14,000.00 but also executed the full and final release and the mutual release. In addition, plaintiff-appellant's attorney also signed the consent agreement on behalf of plaintiff-appellant. It is plaintiff-appellant's contention that his attorney was not authorized to sign

VERJ054 P00094

the consent agreement; however, the authorization for an attorney to settle a client's claim need not be express, but may be ascertained from the surrounding circumstances. *Elliott v. General Motors Corp.* (1991), 72 Ohio App.3d 486. Given the facts surrounding the instant action, it can be said that plaintiff-appellant's attorney was authorized to sign the consent agreement and settle the overall claim.

Accordingly, plaintiff-appellant's first assignment of error is not well taken.

III. SECOND ASSIGNMENT OF ERROR

Plaintiff-appellant's second assignment of error states:

THE TRIAL COURT'S NOVEMBER 30, 1993 ORDER,
DISMISSING THE APPELLANT'S CIV.R. 60(B) MOTION
FOR PARTIAL VACATION OF THE AUGUST 24, 1993
JUDGMENT, CONSTITUTED PREJUDICIAL ERROR.

A. THE ISSUE RAISED: WHETHER THE TRIAL COURT ERRED TO PLAINTIFF-APPELLANT'S PREJUDICE

Plaintiff-appellant Berger argues, through his second assignment of error, that the trial court's dismissal of his motion for partial vacation of judgment constituted prejudicial error. For the reasons that follow, plaintiff-appellant's second assignment of error is not well taken.

B. STANDARD OF REVIEW

To prevail on a motion brought under Civ.R. 60(B), a movant must demonstrate that: (1) the party has a meritorious defense or claim to present if relief is granted; (2) the party is entitled to relief under one of the grounds stated in Civ.R. 60(B)(1) through (5); and (3) the motion is made within a reasonable time, and,

1005, 10095

where the grounds of relief are Civ.R. 60(B)(1) to Civ.R. 60(B)(3), not more than one year after the judgment, order or proceeding was entered or taken. *GTE Automatic Electric, Inc. v. ARC Industries, Inc.* (1976), 47 Ohio St.2d 146.

Civ.R. 60(B) states:

(B) Mistakes; inadvertence; excusable neglect; newly discovered evidence; fraud; etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order or proceeding for the following reasons: (1) mistake, inadvertence, surprise or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(B); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party; (4) the judgment has been satisfied, released or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (5) any other reason justifying relief from the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2) and (3) not more than one year after the judgment, order or proceeding was entered or taken. A motion under this subdivision (B) does not affect the finality of a judgment or suspend its operation.

The procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules.

C. THE TRIAL COURT DID NOT ERR TO PLAINTIFF-APPELLANT'S PREJUDICE

In the case *sub judice*, plaintiff-appellant has failed to meet the three part test set forth in *GTE, supra*, in order to prevail on a Civ.R. 60(B) motion to vacate judgment. Although the motion for partial vacation of judgment was timely filed, plaintiff-

100-54 100096

appellant has failed to set forth either a meritorious claim or defense to present if relief is granted or that he is entitled to relief under the grounds enumerated in Civ.R. 60(B)(1) through (5). Plaintiff-appellant's second assignment of error is not well taken.

Judgment of the trial court is affirmed.

120037 120097

It is ordered that appellees recover of appellants their costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the Common Pleas Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

BLACKMON, P.J. and

DYKE, J., CONCUR.

RECEIVED FOR FILING

AUG 18 1994

GERALD E. FUERST, CLERK
By cmj Dep.

David T. Matia
DAVID T. MATIA
JUDGE

JOURNALIZED AUG 29 1994
GERALD E. FUERST, Clerk of Courts
By cmj Deputy.

COPIES MAILED TO CCUNSEL FOR
ALL PARTIES. — COSTS TAXED.

N.B. This entry is made pursuant to the third sentence of Rule 22(D), Ohio Rules of Appellate Procedure. This is an announcement of decision (see Rule 26). Ten (10) days from the date hereof this document will be stamped to indicate journalization, at which time it will become the judgment and order of the court and time period for review will begin to run.

1994 AUG 18 100098

Exhibit C

COURT OF APPEALS
ELEVENTH DISTRICT
TRUMBULL COUNTY, OHIO

JUDGES

DAVID A. HINES,
Plaintiff-Appellee,

HON. JUDITH A. CHRISTLEY, P.J.,
HON. JOSEPH E. MAHONEY, J.,
HON. ROBERT A. NADER, J.

- VS -

DAVID E. ZOFKO,
Defendant-Appellant.

ACCELERATED
CASE NO. 93-T-4928

OPINION

CHARACTER OF PROCEEDINGS:

Civil Appeal from the
Court of Common Pleas
Case No. 92 CV 1435

JUDGMENT: Affirmed.

ATTY. MICHAEL D. ROSSI
151 East Market Street
P.O. Box 4270
Warren, OH 44482

(For Defendant-Appellant)

ATTY. RONALD J. RICE
48 West Liberty Street
Hubbard, OH 44425

(For Plaintiff-Appellee)

FILED
COURT OF APPEALS

MAR 28 1994

TRUMBULL COUNTY, OHIO
MARGARET R. O'BRIEN, Clerk

VOL 30-650

mailed to:
Rossi
Rice
and date to C. P.

NADER, J.

This is an accelerated calendar appeal, which has been submitted for consideration upon the brief of appellant. Appellee, David A. Hines, has not participated in this appeal.

On August 17, 1992, appellee, David A. Hines, filed a complaint requesting an injunction and money damages against appellant, David E. Zofko. Appellant and appellee subsequently entered into a settlement agreement, which is not included in the record.

The trial court, on February 21, 1993, filed a judgment entry stating: "Case settled and dismissed." On April 20, 1993, appellee filed a "Motion to Enforce Settlement Agreement." An order was then entered on June 25, 1993, by the trial court, after a hearing on the motion was held. The record does not contain a transcript of this hearing or an appropriate substitute. The order granted appellee's motion to enforce the settlement agreement and entered judgment for appellee in the amount of \$1,500 plus interest. Appellant timely appealed, assigning the following as error:

"To appellant's prejudice, the trial court erred in entering a money judgment against him."

Appellant asserts that once the trial court had entered an order dismissing the action, it retained no jurisdiction to enforce the settlement agreement which precipitated its dismissal. Appellant does not challenge the existence or validity of the

VOL 30-651

settlement agreement, but asserts that appellee was obligated to proceed through a Civ.R. 60(B) motion to vacate the dismissal, prior to requesting enforcement of the settlement agreement, or to file a separate action on the settlement contract.

Although proceeding through a Civ.R. 60(B) motion to vacate the dismissal or in a separate action to enforce the settlement agreement are permissible avenues, they are not required under the facts in this case. When an action is unconditionally dismissed, the trial court loses authority to proceed in that matter. *State ex rel. Rice v. McGrath* (1991), 62 Ohio St.3d 70. It therefore follows that when a matter is conditionally dismissed, the trial court retains authority to proceed in the matter if the condition upon which the case was dismissed does not occur. Cf. *Tepper v. Heck* (Dec. 10, 1992), Cuyahoga App. No. 61061, unreported, fn. 1.

The judgment entry which dismissed the instant case stated: "Case settled and dismissed." It did not merely state that the case was dismissed. Thus, the dismissal was conditioned upon the settlement of the case. When the settlement was not performed, the condition upon which the action was dismissed failed, and the trial court retained authority to proceed in the action.

VOL. 30-652

Thus, we hold that the trial court proceeded properly by conducting a hearing and entering judgment upon appellee's motion to enforce the settlement agreement.

The judgment of the trial court is hereby affirmed.

Robert A. Nader

JUDGE ROBERT A. NADER

CHRISTLEY, P.J., dissents,

MAHONEY, J., concurs.

VOL 30-653

STATE OF OHIO)
) SS.
COUNTY OF TRUMBULL)

IN THE COURT OF APPEALS
ELEVENTH DISTRICT

DAVID A. HINES,
Plaintiff-Appellee,

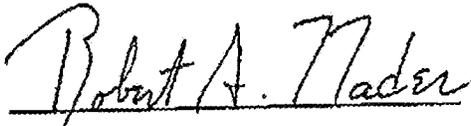
JUDGMENT ENTRY

- vs -

DAVID E. ZOFKO,
Defendant-Appellant.

CASE NO. 93-T-4928

For the reasons stated in the Opinion of this court, the assignment of error is without merit, and it is the judgment and order of this court that the judgment of the trial court is affirmed.


JUDGE ROBERT A. NADER
FOR THE COURT

CHRISTLEY, P.J., dissents.

FILED
COURT OF APPEALS

MAR 28 1994

TRUMBULL COUNTY, OHIO
MARGARET R. O'BRIEN, Clerk

93-T-4928-654