

[Cite as *Safety 4th Fireworks, Inc. v. Ohio Dept. of Commerce Div. of State Fire Marshal*, 2016-Ohio-787.]

STATE OF OHIO, JEFFERSON COUNTY
IN THE COURT OF APPEALS
SEVENTH DISTRICT

SAFETY 4TH FIREWORKS, INC.
DBA COUNTY FIREWORKS, et al.

PLAINTIFF-APPELLANT

V.

OHIO DEPT. OF COMMERCE
DIVISION OF STATE FIRE MARSHAL

DEFENDANT-APPELLEE

CASE NO. 13 JE 7

OPINION

CHARACTER OF PROCEEDINGS:

Civil Appeal from Court of Common
Pleas of Jefferson County, Ohio
Case No. 99 CV 275

JUDGMENT:

Reversed and Remanded

APPEARANCES:

For Plaintiff-Appellant

Attorney Michael Close
Isaac Wiles Burkholder & Teetor, LLC
Two Miranova Place, Suite 700
Columbus, Ohio 43215

For Defendant-Appellee

Mike DeWine
Ohio Attorney General
Hilary Damaser
Assistant Attorney General
Executive Agencies Section
30 East Broad Street, 26th Floor
Columbus, Ohio 43215

JUDGES:

Hon. Mary DeGenaro
Hon. Gene Donofrio
Hon. Carol Ann Robb

Dated: February 16, 2016

[Cite as *Safety 4th Fireworks, Inc. v. Ohio Dept. of Commerce Div. of State Fire Marshal*, 2016-Ohio-787.]
DeGENARO, J.

{¶1} Plaintiff-Appellant, Safety 4th Fireworks, Inc. appeals the February 13, 2013 judgment entry of the Jefferson County Court of Common Pleas which ruled in favor of the Ohio Department of Commerce, Division of State Fire Marshal. On appeal, Safety 4th asserts that the trial court erred in not ruling on its motion to vacate pursuant to Civ.R. 60(B). For the reasoning provided below, Safety 4th's first assignment of error is meritorious. The judgment of the trial court is reversed and remanded.

Facts and Procedural History

{¶2} The parties have been involved in protracted litigation and appeals since 1999. Safety 4th is a licensed fireworks wholesaler and sought approval from the Fire Marshal to transfer three of its licenses. The dispute centers in part on statutory changes which appear to have restricted a fireworks wholesaler's ability to transfer its license; thus the litigation was instigated to force the Fire Marshal to approve the transfers. After two years of litigation, the parties entered into a settlement agreement which was memorialized in a June 6, 2001 agreed order issued by the trial court which, inter alia, the Fire Marshal agreed to grant Safety 4th until June 6, 2004, to submit a proposal to relocate any of their licenses, which would be treated as if it were effective prior to the commencement of the statutory changes. *Safety 4th Fireworks, Inc. v. Ohio Dept. of Commerce*, 7th Dist. No. 02-JE-19, 2003-Ohio-3477, ¶2-3.

{¶3} Safety 4th began the process of acquiring sites upon which to relocate their wholesale licenses. Fearing that competitors might discover the proposed locations before the license transfers and thereby thwart its relocation efforts, Safety 4th filed a pleading styled as a motion to enforce the settlement provision requesting that any proposed site locations be kept confidential until the license transfers were final, contending that the Fire Marshal implicitly agree to the confidentiality in the 2001 agreed order. *Id.* at ¶4. At a hearing on the motion both parties admitted the confidentiality was a new provision; nonetheless, in its April 18, 2002 judgment entry the trial court ordered that "any and all information provided by the plaintiffs [Safety

4th] to the Ohio State Department of Commerce and/or any of its subdivisions regarding the proposed sites of relocation for the plaintiffs' wholesale fireworks licenses * * * pursuant to the settlement agreement be kept confidential and not subject to public disclosure in responses to a public records request made pursuant to R.C. 149.43." *Id.* at ¶6.

{¶4} The Fire Marshal timely appealed. Based upon case law at the time, even though the 2001 agreed order contained the terms of the settlement agreement, this Court held that the trial court did not retain jurisdiction to consider Safety 4th's motion to enforce the settlement because the order included language dismissing the complaint with prejudice and lacked language setting forth "any conditions precedent to the effectiveness of the dismissal," reasoning: "Although a court generally retains jurisdiction to enforce an agreed judgment entry, a court loses its jurisdiction to enforce a settlement agreement when the underlying action has been unconditionally dismissed by the court." *Id.* at ¶13-16.

{¶5} Safety 4th's concerns were warranted as several competitors filed lawsuits against the Fire Marshal in an attempt to block approval of Safety 4th's license transfers;¹ thus, Safety 4th could not complete the construction and inspections as required by the June 2001 agreed entry. Despite our ruling in *Safety 4th I*, in 2005 Safety 4th moved for, and the trial court granted, three additional years to fulfil the terms of the agreed entry. Although the Fire Marshal challenged the trial court's modification of the agreed entry, the appeal was voluntarily dismissed. On May 5, 2008, the trial court modified the 2001 agreed order, again enlarging the time in which Safety 4th had to comply until June 2010. At this time Safety 4th had been able to successfully transfer only one of the three licenses.

¹ Several competitors attempted to delay the process by attempting to intervene or filing their own litigation. Significantly one of the lawsuits, *Ohio Pyro, Inc. v. The Ohio Dept. of Commerce, Division of State Fire Marshal*, 115 Ohio St.3d 375, 2007-Ohio-5024, 875 N.E.2d 550, initially resulted in an injunction by the Fayette County Court of Common Pleas prohibiting the transfer of Safety 4th's firework licenses. Not until 2008 was the litigation ultimately resolved with the U.S. Supreme Court refusing to issue a writ of certiorari from the Ohio Supreme Court's decision holding that Ohio Pyro's lawsuit in Fayette County constituted an impermissible collateral attack on the Agreed Entry that was adopted in the present case in 2001 by the Jefferson County trial court.

{¶6} On March 10, 2010, Safety 4th filed a motion for another extension which was granted that day. A series of filings ensued in both the trial court and this Court, which culminated on March 7, 2012, with the parties filing a joint notice that the trial court vacated the judgment giving rise to the appeal; as such this Court dismissed the appeal as moot.

{¶7} On February 14, 2012, Safety 4th filed a "Motion to Vacate and Amend Paragraph 5 of Agreed Order" to once again extend the deadline for compliance from the date contained in the 2001 agreed order pursuant to Civ.R. 60(B)(5). The Fire Marshal opposed this motion on the basis that the court did not retain jurisdiction to amend or enforce the 2001 order. The trial court overruled the motion holding that it had no "jurisdiction over the parties for lack of an open case within which to act."

Jurisdiction Over Settlement Agreements

{¶8} In Safety 4th's two assignments of error it asserts:

The trial court erred when it held as a matter of law that it did not have the power to act on Safety 4th's 60(B)(5) motion.

The trial court abused its discretion in overruling Safety 4th's 60(B)(5) motion.

{¶9} Before evaluating the merits of the Civ.R. 60(B) motion, it is necessary to determine whether an agreed judgment entry is the proper subject of a Civ.R. 60(B) motion to vacate. The Tenth District stated that it is "highly questionable that Civ.R. 60(B) can be used to obtain relief from a judgment based upon a settlement agreement entered into by the parties to the action." *Bond v. BancOhio Nat. Bank*, 10th Dist. No. 92AP-536, 1992 WL 214351, *1 (August 27, 1992). "The settlement agreement terminates the rights that parties may have and the judgment entry of the trial court ordinarily only clears up the court records." *Id.*

{¶10} "A settlement agreement differs from a judgment, decision or order

entered by the court and, consequently, Civ.R. 60(B) is not the proper vehicle to rescind a settlement agreement." *Boster v. C & M Serv., Inc.*, 93 Ohio App.3d 523, 526, 639 N.E.2d 136 (10th Dist.1994). However in *Schorpp v. Dickard*, 8th Dist. No 75447, 1999 WL 1249553 (December 23, 1999) the Eighth District distinguished a settlement agreement with an agreed judgment entry. In *Schorpp*, although the parties entered into an extrajudicial settlement agreement, the parties submitted the agreement to the court for its approval as an agreed judgment entry. The trial court approved the parties' settlement agreement and incorporated the agreement into its order dismissing the case. Accordingly, the "agreed judgment entry was a judicial act from which relief could be granted according to Civ.R. 60(B)." *Id.* at *6.

{¶11} As noted above, this Court previously held:

The Agreed Order does not contain any conditions precedent to the effectiveness of the dismissal. Therefore, the dismissal was effective at the time it was accepted and journalized by the court, and the dismissal of the underlying complaint was also effective upon journalization. As the underlying complaint was already unconditionally dismissed by the trial court, the trial court had no authority to entertain the Motion to Enforce Settlement arising from the dismissed complaint.

Safety 4th I, ¶16.

{¶12} Despite this ruling, the trial court extended the deadline within the 2001 agreed order twice; in essence modifying the parties' settlement agreement and the prior agreed order. The Fire Marshal initially challenged the first modification but then voluntarily dismissed the appeal; after the second modification the Fire Marshal did not appeal the modification.

{¶13} The present appeal was stayed by this Court while the Supreme Court of Ohio decided *Infinite Security Solutions, L.L.C. v. Karam Properties, II, Ltd.* 143 Ohio St.3d 346, 2015-Ohio-1101, 37 N.E.3d 1211.

{¶14} *Infinite* involved multiple parties asserting multiple claims against each

other as the result of a fire at an apartment complex, including liability issues and prioritizing disbursement of insurance proceeds which covered the loss. At a pretrial conference the parties represented to the trial court that they had tentatively reached a settlement except for how insurance proceeds would be divided; if they could not agree, they would submit the priority issue to the trial court for resolution. *Id.* at ¶3-8. Although the common pleas court local rule gave counsel 30 days to submit a dismissal entry, a week after the parties agreed to settle, the trial court sua sponte dismissed the matter without prejudice based upon the parties' representation that the case was settled; the trial court permitted the parties 30 days thereafter to file another dismissal entry. *Id.* at ¶9.

{¶15} Immediately thereafter, one party filed a motion to vacate the dismissal pursuant to Civ.R.60(B)(1) and reopen the case to decide how to prioritize disbursement of the insurance proceeds; a second party opposed that motion asserting the trial court no longer had jurisdiction to consider the priority issue; and a third party filed a motion to enforce settlement, specifically asking for the agreed amount of insurance proceeds to be paid into the court. *Id.* at ¶10. At a hearing on the parties' competing motions, the trial court denied the motions to enforce settlement and Civ.R. 60(B) motion as moot, reasoning that because the dismissal was without prejudice it was conditional, and thus the court retained jurisdiction. The trial court then issued an order with respect to the distribution to a majority of the funds. *Id.* at ¶11.

{¶16} An appeal was taken to the Sixth District arguing that the trial court lacked jurisdiction to issue an order prioritizing disbursement of the insurance proceeds because its prior dismissal order was not only unequivocal but also unconditional, reasoning that it neither incorporated the settlement terms nor expressly retained jurisdiction to enforce the settlement. *Id.* at ¶13.

{¶17} The Ohio Supreme Court held that "[a] trial court has jurisdiction to enforce a settlement agreement after a case has been dismissed only if the dismissal entry incorporated the terms of the agreement or expressly stated that the court retained jurisdiction to enforce the agreement." *Id.* at ¶34. After an analysis of law

from multiple jurisdictions, the Supreme Court of Ohio stated:

We agree with those jurisdictions that allow a court to retain jurisdiction after a dismissal in order to enforce an underlying settlement agreement. Therefore, we hold that, as a general principle, a trial court may retain jurisdiction to enforce a settlement agreement when it dismisses a civil case. Retaining jurisdiction provides the most efficient means of enforcing the agreement. It keeps the matter in the court most familiar with the parties' claims, if not their settlement positions. And it keeps the parties from having to file another action.

Id. at ¶25.

{¶18} Applying this proposition of law to the facts in *Infinite*, the Ohio Supreme Court concluded that the trial court's dismissal entry did not retain jurisdiction to enforce the settlement agreement or conduct further proceedings in the case, nor was the dismissal conditional. *Id.* at ¶32. As a result, the Court held that the trial court was divested of jurisdiction to issue the order prioritizing distribution of the insurance funds. *Id.* Pertinent to this appeal, the Court further held that although the trial court lacked jurisdiction to consider the motion to enforce the settlement, the Civ.R. 60(B) motion was not moot, and remanded the case to the trial court to consider the merits of the motion to vacate. *Id.* at ¶33.

{¶19} Here, the trial court did not consider the merits of Safety 4th's motion to vacate, refusing to do so and instead denying the Civ.R. 60(B) motion because of a lack of jurisdiction. But a review of the June 6, 2001 agreed order clearly demonstrates that the terms of the settlement were incorporated therein; the entry was styled as an agreed order stating the parties "agree that the following terms and conditions" which were then set forth in detail. This agreed entry is a judicial act from which Safety 4th could seek relief pursuant to Civ.R. 60(B), the same conclusion our sister district reached in similar circumstances as discussed above. *Schorpp* at *6. Thus, pursuant to *Infinite*, the trial court here retained jurisdiction over this case.

And, as in *Infinite*—which also involved a motion to vacate not resolved on the merits—we must remand this case to the trial court to consider Safety 4th's Civ.R. 60(B) motion in the first instance. See *Infinite* at ¶33.

{¶20} Accordingly, Safety 4th's first assignment of error is meritorious and the second assignment of error is rendered moot based upon this resolution. See App.R. 12(A)(1)(c). The judgment of the trial court is reversed, and this case is remanded to the trial court so it may address Safety 4th's motion for relief from judgment on its merits.

Donofrio, P. J., concurs

Robb, J., concurs

APPROVED:

Mary DeGenaro, Judge