

[Cite as *The 820 Co., L.L.C. v. A & M Financial Group, Inc.*, 2003-Ohio-1723.]

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

No. 81306

THE 820 COMPANY, LLC :
 : JOURNAL ENTRY
 Plaintiff-Appellee :
 : AND
 vs. :
 : OPINION
 A&M FINANCIAL GROUP, INC., :
 ET AL. :
 :
 Defendants-Appellants :
 :
 :
 :
 DATE OF ANNOUNCEMENT :
 OF DECISION : APRIL 3. 2003
 :
 CHARACTER OF PROCEEDINGS : Civil appeal from
 : Common Pleas Court
 : Case No. CV-433441
 :
 JUDGMENT : AFFIRMED.
 :
 DATE OF JOURNALIZATION :

APPEARANCES:

For plaintiff-appellee: JEFFREY L. KOCIAN, ESQ.
25360 Westwood Road
Westlake, Ohio 44145

EDWARD P. MARKOVICH, ESQ.
4071 S. Cleveland-Massillon Road
P.O. Box 1080
Norton, Ohio 44203-9480

For defendants-appellants: JEROME W. COOK, ESQ.
RICHARD W. CLINE, ESQ.
McDonald, Hopkins, Burke, & Haber Co.
2100 Bank One Center

600 Superior Avenue, East
Cleveland, Ohio 44114

FRANK D. CELEBREZZE, JR., J.:

{¶1} The appellants, A&M Financial Group, Inc., et al., appeal from the judgment of the Cuyahoga County Court of Common Pleas, Civil Division, which enforced the terms of a previously negotiated settlement agreement between the parties without conducting an evidentiary hearing. For the following reasons, the appellants' appeal is not well taken.

{¶2} The instant matter stems from a settlement agreement reached between the parties, A&M Financial Group, Inc., et al. ("A&M") and The 820 Company, LLC ("820"), on March 6, 2002. Specifically, the stipulation for dismissal and judgment entry stated:

{¶3} "We, the attorneys for the respective parties, do hereby stipulate that the within matter has been settled, agreement to follow. Costs to plaintiff and that the court may enter an order accordingly, notice by the clerk being waived."

{¶4} The judgment entry was signed by the lower court judge, counsel for 820, and former counsel for A&M. Thereafter, in memorializing the agreement, it is alleged by A&M that an agreement had not, in fact, been reached. Apparently, although the parties had agreed to a settlement of \$55,000, Alfred J. Feronti, president of A&M, refused to sign the agreement, both individually and as president of A&M, because of his sudden rejection of a term in the agreement which prevented him from personally encumbering his

residence without 820's consent prior to 820 being paid the agreed settlement amount.

{¶5} Therefore, on April 2, 2002, 820 filed a motion to vacate the judgment and requested that the matter immediately be set for trial. On April 3, 2002, the lower court modified the motion to vacate to a motion for enforcement of the settlement agreement and set a hearing on that motion. On April 16, 2002, A&M's new counsel, counsel for 820, and the lower court judge met in chambers to discuss the motion to enforce the settlement agreement. Thereafter, the lower court granted said motion and entered judgment enforcing the terms of the settlement agreement as requested by 820.

{¶6} The appellants present five assignments of error for this court's review. Their first and second assignments of error have a common basis in both law and fact, thus, they will be addressed together. They state:

{¶7} "I. THE TRIAL COURT ERRED BY GRANTING ITS OWN MOTION TO ENFORCE THE SETTLEMENT AGREEMENT WITHOUT CONDUCTING AN EVIDENTIARY HEARING BEFORE ANOTHER JUDGE."

{¶8} "II. THE TRIAL COURT ERRED BY ENFORCING A PURPORTED SETTLEMENT AGREEMENT WHEN NO SUCH AGREEMENT EXISTED."

{¶9} The appellants agree that the lower court erred in failing to conduct an evidentiary hearing prior to enforcing the previously negotiated settlement agreement. They claim that because the terms of the settlement agreement were allegedly reached in the presence

of the lower court judge, the judge was required to institute an evidentiary hearing before another judge in which the trial judge may be called as a witness to testify as to his recollection and understanding of the terms of the agreement. See *Bolen v. Young* (1982), 8 Ohio App.3d 36.

{¶10} In *Bolen*, the Tenth District Court of Appeals held that a trial judge may not adopt the terms of the (settlement) agreement as he recalls and understands them in the form of a judgment entry without first conducting an evidentiary hearing before another judge in which the trial judge may be called as a witness to testify as to his recollection and understanding of the terms of the agreement. *Id.* at 36-37. In following *Bolen*, the appellants argue that the lower court judge, because he was present when the settlement was reached, must be called as a material witness to testify as to his recollection. This argument is without merit.

{¶11} First, the facts of *Bolen* are clearly distinguishable from the matter at hand. In *Bolen*, the material terms of the settlement agreement were clearly in dispute, and the trial court judge was a necessary witness in the determination of the obligations of each party in relation to the settlement agreement. In the case at hand, the material terms of the settlement agreement are not in dispute; rather, the appellants simply contest the inclusion of a single term in the agreement which effectively encumbers the appellants' right to transfer

property prior to the discharge of their obligation to the appellee. The agreement was clearly reached, as reflected by the dismissal entry of March 6, 2002. In memorializing the agreement, it is clear that the appellants unilaterally determined that the previously agreed provision regarding encumbering the appellants' property be stricken.

{¶12} In the absence of allegations of fraud, duress, undue influence, or of any factual dispute concerning the existence or the terms of a settlement agreement, a court is not bound to conduct an evidentiary hearing prior to signing a journal entry reflecting the settlement agreement. *Morform Tool Corp. v. Keco Industries, Inc.* (1971), 30 Ohio App.2d 207. At the April 16 hearing, the lower court judge was offered the written settlement agreement, which reflected the terms previously agreed to by the parties. The lower court's statement on the record reflecting the previously negotiated settlement is as follows: "The court was present for the settlement negotiations between the parties on March 6, 2002, and the parties agreed that a provision of the agreement was that the defendant's ability to encumber his home would be effected until he paid the moneys due under the agreement." Volume 2732, pg. 914.

{¶13} Since the only point of contention between the parties is the encumbrance provision, it was not necessary to conduct a hearing as outlined in *Bolen*, supra. The lower court judge in the matter at hand was not a material witness, nor were

the provisions of the agreement in dispute at the time of settlement on March 6, 2002.

{¶14} In *Spercel v. Sterling Industries* (1972), 31 Ohio St. 2d 36, the party to a settlement agreement refused to comply with its terms and filed a petition to vacate the agreement. The Ohio Supreme Court refused to allow the unilateral rescission of the settlement agreement solely on the basis that the party seeking rescission had changed his mind and become dissatisfied with the agreement. "To permit a party to unilaterally repudiate a settlement agreement would render the entire settlement proceedings a nullity, even though, as we have already determined, the agreement is of a binding force. *Id.* at 40.

{¶15} To note, this court is aware that in *Spercel*, *supra*, the settlement agreement was entered into in the presence of the court. Nonetheless, we do not believe that this distinction is of any consequence to the matter at hand because the lower court judge was present for the settlement negotiations, and the memorialization of the agreement was merely a formality, as evidenced by the agreement of both parties to dismiss the matter on March 6, 2002.

{¶16} Last, the appellants failed to formally request an evidentiary hearing before the lower court. The motion to vacate was filed by the appellee and, as in *Spercel*, *supra*, "the record is silent as to any request by the appellant for an evidentiary hearing to adjudicate either the existence or terms of the

settlement agreement," Therefore, there exists no entitlement to an evidentiary hearing. See, also, *Mack v. Polson Rubber Co.* (1984), 14 Ohio St.3d 34; *Silverman & Co. v. Carter & Assoc.* (June 27, 1985), Cuyahoga App. Nos. 49307 and 49491.

{¶17} In light of the above, this court cannot conclude that the lower court erred in failing to conduct an evidentiary hearing before another judge because there was no material dispute concerning the terms of the previously negotiated settlement agreement, nor did the appellants request an evidentiary hearing before another judge prior to the journalization of the lower court's judgment. As such, the appellants' first and second assignments of error are without merit.

{¶18} The appellants' third and fourth assignments of error have a common basis in both law and fact, thus, they will be addressed together. They state:

{¶19} "III. THE TRIAL COURT ERRED IN DENYING THE PARTIES THE RIGHT TO HAVE THEIR DISPUTE ADJUDICATED BY TRIAL BY SUA SPONTE FILING A MOTION TO ENFORCE THE SETTLEMENT AGREEMENT."

{¶20} "IV. THE TRIAL COURT ERRED BY FILING ITS OWN MOTION TO ENFORCE THE SETTLEMENT AGREEMENT BECAUSE THE TRIAL COURT DOES NOT HAVE THE POWER TO SUA SPONTE FILE SUCH A MOTION."

{¶21} Essentially, the appellants argue that the lower court erred in converting the appellee's motion to vacate into a motion to enforce the settlement agreement and, in so doing, the appellants contend that the lower court deprived the parties of the

right to have their dispute properly adjudicated. This argument is without merit.

{¶22} First, the appellee originally filed a motion to vacate, which was sua sponte converted to a motion to enforce the settlement agreement by the lower court. In seeking enforcement of a settlement agreement, relief may be sought through the filing of an independent action sounding in breach of contract, or it may be sought in the same action through a supplemental pleading filed pursuant to Ohio R.Civ.P. 15(E), setting out the alleged agreement and breach. A motion to enforce a settlement made pursuant to Ohio R.Civ.P. 15(E) *may only be filed prior to the entry of a final judgment.* (Emphasis added.) Thus, a motion to enforce a settlement is inappropriate after an entry adjudicating all the claims in dispute has been journalized.

{¶23} Since the settlement agreement had not been formally journalized, the appellee's motion to vacate was improper in light of the fact that there was no agreement to vacate. Therefore, the lower court was correct in modifying the appellee's motion to vacate and treating said motion as a motion to enforce the settlement agreement, which is the proper avenue pursuant to Ohio R.Civ.P. 15(E).

{¶24} This court cannot conclude that the lower court erred in modifying the original motion. In the case at hand, the formal entry of final judgment had yet to be journalized. As such, the lower court was well within its jurisdiction to modify said

motion. Therefore, the appellants' third and fourth assignments of error are not well taken.

{¶25} The appellants' fifth assignment of error states:

{¶26} "V. THE TRIAL COURT ERRED BY ENTERING JUDGMENT ENFORCING A PURPORTED SETTLEMENT AGREEMENT BECAUSE THE TRIAL COURT WAS DIVESTED OF JURISDICTION UPON DEFENDANT-APPELLANTS FILING OF THEIR FIRST APPEAL."

{¶27} The appellants' fifth assignment of error is hereby rendered moot since this court dismissed the previously filed appeal in Cuyahoga App. No. 81160 because the March 6, 2002 judgment entry was not a final appealable order. As such, the lower court had jurisdiction to entertain the instant matter.

Judgment affirmed.

FRANK D. CELEBREZZE, JR.
JUDGE

JAMES J. SWEENEY, J., CONCURS;

TIMOTHY E. MCMONAGLE, P.J., DISSENTS
(WITH SEPARATE DISSENTING OPINION)

TIMOTHY E. MCMONAGLE, A.J.:

{¶28} I respectfully dissent because the trial court: 1) did not have jurisdiction to enforce the settlement agreement in light of appellants' previously filed notice of appeal; 2) had no authority to convert appellee's motion to vacate judgment into a motion to enforce the settlement agreement; and 3) erred in enforcing the settlement agreement without referring the matter for an evidentiary hearing before another judge.

{¶29} The record reflects that on April 11, 2002, after the trial court had entered an order converting appellee's motion to vacate judgment into a motion to enforce the settlement agreement, but prior to any "hearing" on appellee's motion, appellants filed a notice of appeal. In their notice of appeal, appellants appealed the trial court's journal entry dated March 12, 2002 in which the trial court ordered, "Matter settled. Agreement to follow. Costs to plaintiff," and dismissed the case with prejudice. In their notice of appeal, appellants summarized the issue for appeal as "whether the trial court erred in rendering a Stipulation for Dismissal and Judgment Entry asserting that the matter had been settled when, in fact, it had not." This appeal was assigned Case No. 81160.

{¶30} On June 18, 2002, this court dismissed Case No. 81160 for lack of a final appealable order. While appellants' appeal was pending, however, on April 16, 2002, the trial court conducted an in-chambers meeting with appellee's counsel and appellants' new counsel regarding the motion to enforce the settlement agreement. The trial court concluded that the parties had earlier entered into a settlement agreement and, accordingly, on April 17, 2002, the trial court entered an order granting the motion to enforce the settlement agreement.

{¶31} The majority asserts that the trial court had jurisdiction to enforce the settlement agreement since this court ultimately dismissed the appeal in Case No. 81160 because the March

6, 2002 judgment entry was not a final appealable order. It is a well-recognized principle, however, that:

{¶32} "[O]nce an appeal has been perfected, the trial court loses jurisdiction over the matter, pending the outcome of the appeal. * * * This principle is limited to the extent that it is the area pertaining to the final order, judgment or decree sought to be reviewed which is divested from the trial court upon appeal. As to the remainder of the cause, the lower court retains all jurisdiction not inconsistent with that of the appellate court to review, affirm, modify or reverse a final order, judgment or decree from which the appeal has been perfected." *Kane v. Ford Motor Co.* (1984), 17 Ohio App.3d 111, 116.

{¶33} Here, the issue on appeal was whether a settlement agreement had, in fact, been reached in the case. Therefore, upon the filing of appellants' notice of appeal on April 11, 2002, the trial court was divested of jurisdiction to render any further decisions regarding the enforceability of the purported agreement.

It does not matter that the appeal was ultimately dismissed for lack of a final appealable order. While the appeal was pending, the trial court had no jurisdiction to consider matters relating to the settlement agreement. Therefore, the trial court's order granting the motion to enforce the settlement agreement is void ab initio.

{¶34} Moreover, even assuming that the trial court retained jurisdiction after appellants' appeal was filed, the trial

court erred in sua sponte converting appellee's motion to vacate judgment into a motion to enforce the settlement agreement. There is simply no authority or precedent for the trial court to sua sponte modify a motion in this manner and award relief that neither party requested.

{¶35} Furthermore, even assuming that the trial court properly converted appellee's motion to vacate judgment into a motion to enforce the settlement agreement, it is apparent that the trial court erred in not referring the motion for hearing before another judge.

{¶36} The syllabus in *Rulli v. Fan Co.* (1997), 79 Ohio St.3d 374, states:

{¶37} "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."

{¶38} Whether the original trial judge or another judge conducts the hearing depends on whether or not the agreement was reached in the presence of the trial judge. Where the settlement agreement is arrived at by the parties in open court and the terms of the agreement are preserved either by being read into the record or being reduced to writing and filed, the judge may approve a journal entry adopting the agreement as his or her judgment. *Bolen v. Young* (1982), 8 Ohio App.3d 36, 37. Where the settlement agreement is "extrajudicial," however, in the sense that the trial

judge is advised that the parties have agreed to a settlement, but he or she is not advised of the terms of the agreement, then the settlement agreement can be enforced only if the judge conducts a hearing and concludes that the parties entered into a binding contract. Id.

{¶39} Where, however, the agreement was arrived at in the presence of the trial judge, but the terms are not memorialized in the record, there must be an evidentiary hearing before another judge. Id. "Such hearing is to be conducted by a judge who was not the trial court judge in the case below so that the original judge is free to testify as a witness at the hearing." *Akbar Consulting Corp. v. M.J. Kelley Co.* (Feb. 15, 1990), Cuyahoga App. No. 58057.

{¶40} In *Teffer v. Heck* (Dec. 10, 1992), Cuyahoga App. No. 61061, this court considered whether the original trial court judge erred in holding an evidentiary hearing to determine whether the parties had reached a settlement agreement. We concluded there was no error in holding the hearing before the original judge because he had nothing to do with working out the settlement and was not told the terms of the oral settlement agreement. We noted, however, that where a settlement is reached in the presence of the trial judge, but the terms are not memorialized in the record such that "the trial judge's recollection of the existence of, or the terms of, a settlement would be pertinent" to any dispute regarding the settlement, a hearing before another judge is necessary. Id.

{¶41} Here, the journal entry dated April 17, 2002 granting the motion to enforce the settlement agreement clearly states, "The court was present for the settlement negotiations between the parties on March 6, 2002 * * *." Accordingly, an evidentiary hearing before another judge was required so that the original trial judge could testify regarding whether the parties had entered into an agreement, and whether that agreement included, as appellee contends, a term that appellant Feronti could not encumber his property without first obtaining appellee's consent.

{¶42} The majority erroneously asserts that a hearing before another judge was not required because appellants "simply contest the inclusion of a single term in the agreement." Rather, appellants assert that no agreement was ever reached in this matter, much less an agreement that included the disputed provision. Therefore, the original trial judge's unbiased testimony regarding the parties' negotiations and subsequent agreement, or not, to the negotiated terms is essential to determining whether there was a settlement agreement in this case.

{¶43} I realize what the trial judge was attempting to do by enforcing the settlement agreement that he worked so diligently to achieve. As stated by the Ohio Supreme Court in *Continental West Condominium Unit Owners Assn. v. Howard E. Ferguson, Inc.* (1996), 74 Ohio St.3d 501, 502, "It is axiomatic that a settlement agreement is a contract designed to terminate a claim by preventing or ending litigation and that such agreements are valid and

enforceable by either party. Further, settlement agreements are highly favored in the law." (Citations omitted.) Thus, "to permit a party to unilaterally repudiate a settlement agreement would render the entire settlement proceedings a nullity, even though * * * the agreement is of binding force." *Spercel v. Sterling Ind., Inc.* (1972), 31 Ohio St.2d 36, 40. Accordingly, in *Spercel*, the Ohio Supreme Court refused to allow the unilateral rescission of a settlement agreement solely on the basis that the party seeking rescission had changed his mind and become dissatisfied with the agreement.

{¶44} Here, the record reflects that the parties had settlement discussions with the judge several times while the case was pending. The record also reflects that on March 6, 2002, the day of trial, counsel for the parties and the judge all signed a Stipulation for Dismissal and Judgment Entry, which stated that "the within matter has been settled" -- significant evidence that the extensive settlement discussions had finally come to fruition.

For appellants "to [now] argue that there was no agreement until a written agreement was signed is to say that the parties merely suspended the trial of the case while they made a further attempt at negotiating. The stipulation belies that contention * * *." *Teffer, supra.*

{¶45} While I sympathize with the plight of the trial judge, nevertheless, because the agreement was entered into in the presence of the trial judge, any dispute regarding the existence or

terms of a settlement agreement should have been resolved in an evidentiary hearing conducted by a judge other than the judge involved in the settlement discussions.

{¶46} Accordingly, I would sustain appellants' fifth assignment of error. Because the trial court was divested of jurisdiction to enter any orders regarding the settlement agreement after appellants filed their notice of appeal, the trial court order granting the motion to enforce the settlement agreement is void ab initio. Therefore, I would remand this matter for further proceedings consistent with this opinion.