

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Reitter Stucco, Inc.,	:	
	:	
Plaintiff-Appellee,	:	
	:	No. 11AP-488
v.	:	(C.P.C. No. 98CVH-03-1889)
	:	
John A. Ducharme,	:	(REGULAR CALENDAR)
	:	
Defendant-Appellant.	:	

D E C I S I O N

Rendered on December 30, 2011

Thompson Hine LLP, Daniel F. Edwards and Jason R. Harley,
for appellee.

John A. Ducharme, pro se.

APPEAL from the Franklin County Court of Common Pleas.

DORRIAN, J.

{¶1} Defendant-appellant, John A. Ducharme ("appellant"), appeals from the June 3, 2010 judgment of the Franklin County Court of Common Pleas. For the following reasons, we reverse.

{¶2} The present appeal stems from a complaint filed on March 9, 1998, wherein plaintiff-appellee, Reitter Stucco, Inc. ("appellee"), alleged that appellant and his wife, Anne Ducharme, engaged in the following conduct: (1) conversion of money/property; (2) receiving stolen property; (3) theft; and (4) conversion of property/tortious interference with business practices. (See Complaint, 2-5.) From October of 1984 to August of 1997,

appellant was employed as appellee's controller/financial officer. (See Complaint, 2.) As a direct and proximate result of appellant's alleged wrongful acts, appellee claimed damages in the amount of approximately \$654,513, together with interest in the amount of \$283,537, for a total of \$937,852, and punitive damages in the amount of \$500,000. (See Complaint, 3.) On May 28, 1998, the trial court issued a dismissal entry stating:

The Court, having been advised by counsel that Defendant John A. Ducharme has entered into an agreement for the repayment of certain sums which are the subject of this case, hereby orders the case dismissed without prejudice. The Court being further advised by counsel for John A. Ducharme that he has waived any and all applicable statutes of limitation so that in the event he should default upon his obligations under the Repayment Agreement executed by the Defendants on May 18, 1998, the Plaintiff may reinstitute this action and enforce its rights under such agreement and at law or in equity, hereby finds that any and all such statutes of limitation have been waived. The surety bond provided by the Plaintiff is hereby released and of no further force nor effect.

(See May 28, 1998 Dismissal Entry and Release of Bond.) That same day, the trial court also issued instructions for the clerk to terminate the case.

{¶3} Pursuant to the terms of the May 18, 1998 repayment agreement referenced by, but not incorporated into, the dismissal entry, appellant agreed to make the following periodic payments toward appellee's out-of-pocket expenses: \$100,000.00, with interest at the rate of ten percent per annum, payable \$2,124.70 per month commencing June 1, 1998 and continuing for 60 months. (See May 18, 1998 Repayment Agreement, paragraph E, attached to appellee's July 2, 2009 Motion to Reinstitute Case.) Further, on May 18, 1998, appellant executed a consent judgment wherein he "acknowledged a debt of \$1,147,852, and a duty to pay interest on that debt at the rate of

10 percent per annum." *Reitter Stucco, Inc. v. Ducharme*, 10th Dist. No. 10AP-946, 2011-Ohio-2051, ¶4 ("*Ducharme I*"). Appellee agreed that it would only file the consent judgment after the occurrence of one or more of the events set forth in paragraph G of the repayment agreement: (1) nonpayment of any obligation in accordance with the terms of the repayment agreement; or (2) discovery of a material misrepresentation by appellant, or his wife, as to their personal or real property. (See May 18, 1998 Repayment Agreement, paragraphs G and I, attached to July 2, 2009 Motion to Reinstitute Case.)

{¶4} On July 2, 2009, appellee filed a motion to reinstitute case No. 98CVH-03-1889 and to enforce the judgment per consent. In its motion, appellee alleged that, on April 14, 2009, appellant made a monthly payment in the lesser amount of \$1,139.90, which included the restrictive endorsement "final payment" on the check, and also failed to make any payments for May or June. (See April 14, 2009 check attached to July 2, 2009 Motion to Reinstitute Case.) Further, appellee alleged that appellant still owes \$60,734.39 but that he is unwilling to pay the balance. (See July 2, 2009 Motion to Reinstitute Case, 3.) Because appellant allegedly defaulted upon the terms of the repayment agreement, appellee requested that the trial court enter judgment in its favor in the amount of \$3,066,731.21. (See May 18, 1998 Repayment Agreement, paragraph E attached to July 2, 2009 Motion to Reinstitute Case.)

{¶5} On July 22, 2009, appellant filed a motion to deny appellee's motion to reinstitute case and to enforce judgment per consent. In his motion, appellant argued that the May 18, 1998 consent judgment "is no longer valid as all of the terms, conditions and payments have been satisfied in full as per the Repayment Agreement." (See July 22, 2009 Motion to Deny Plaintiff's Motion to Reinstitute Case and to Enforce Judgment per

Consent, 6.) Further, on July 31, 2009, appellee filed a reply, and on August 12, 2009, appellant filed a "reply contra."

{¶6} On June 3, 2010, the trial court journalized an order reinstating case No. 98CVH-03-1889 and for judgment per consent, resolving the case against appellant only, in the amount of \$3,066,731.21. Further, on August 19, 2010, the trial court journalized two separate entries setting the reinstated case for pretrial and trial and referring the matter to mediation. Then, on September 20, 2010, the trial court journalized an entry vacating its August 19, 2010 entry referring the case to mediation, striking the dates for the pretrial and trial, and terminating the case based upon the June 3, 2010 order.

{¶7} On October 4, 2010, appellant filed his notice of appeal in *Ducharme I*. In response, appellee filed a motion to dismiss based upon the theories that appellant is not appealing from a final, appealable order and that appellant failed to appeal at the time a final, appealable order was issued. *Ducharme I* at ¶2. On April 28, 2011, we granted appellee's motion to dismiss stating:

Anne Ducharme was a party in the original action. With separate counsel, she signed the settlement agreement. When the trial judge signed an entry reinstating the lawsuit, he reinstated a lawsuit filed against both [appellant and his wife]. The later entry resolved the lawsuit as to [appellant] but did not address the effect upon Anne, a named defendant. Under the circumstances, the lawsuit remains pending against Anne, and we have no final, appealable order.

Id. at ¶14.

{¶8} In *Ducharme I*, in addition to dismissing the appeal, we questioned, without deciding, whether the reinstatement of this case was proper. Id. at ¶13. We noted that appellee "sought to reinstate the initial lawsuit against [appellant and his wife] by simply

filing a motion in the same case number and sending the motion to a former lawyer of only one party by regular mail." *Id.* We also noted that:

[T]his court has held that enforcement of a valid settlement agreement may be sought either (1) by filing an independent action for breach of contract or (2) when the original action remains pending, by filing a supplemental pleading, pursuant to Civ.R. 15(E).

Id., citing *Castle King, L.L.C. v. Atty. Gen. of Ohio*, 10th Dist. No. 10AP-735, 2011-Ohio-1496. However, "when the action is no longer pending, we have not allowed a settlement agreement to be enforced through a motion filed in the original case alone." *Ducharme I*, at ¶13, citing *Putnam v. Hogan* (Feb. 23, 1995), 10th Dist. No. 94APE07-1089.

{¶9} On May 11, 2011, appellee filed a notice of dismissal with prejudice as to its claims against appellant's wife, Anne Ducharme.

{¶10} On May 31, 2011, appellant filed a notice of appeal as to the June 3, 2010 order, setting forth the following seven assignments of error for our consideration:

I. THE TRIAL COURT ERRED BY REINSTITUTING THE CASE AND FOR JUDGMENT BY CONSENT BY IMPROPERLY ALLOWING REITTER STUCCO'S MOTION TO BE FILED IN THE ORIGINAL CASE ALONE, WHICH IS NOT PROPER.

II. THE TRIAL COURT ERRED BY REINSTITUTING THE ORIGINAL CASE BECAUSE REITTER STUCCO'S MOTION TO REINSTITUTE THE CASE AND FOR JUDGMENT BY CONSENT WAS NOT PROPER AS REITTER STUCCO'S MOTION WAS SENT TO MR. DUCHARME'S FORMER COUNSEL VIA REGULAR MAIL, WHICH IS NOT SUFFICIENT.

III. THE TRIAL COURT ERRED WHEN IT FAILED TO PERFORM A FINDING OF FACTS, ESPECIALLY WITH REGARD TO THE CIVIL MANIFEST WEIGHT OF EVIDENCE PROVIDED BY THE DEFENDANT-APPELLANT, WHICH COMPRISED OF A COPY OF

EVERY PAYMENT MADE TO THE PLAINTIFF-APPELLEE TOTALING \$373,199.55 CONSTITUTING PAYMENT IN FULL OF THE REPAYMENT AGREEMENT WITH NO BREACH OF CONTRACT.

IV. THE TRIAL COURT ERRED WHEN IT FAILED TO PROVIDE A DETAILED ANALYSIS AND DECISION AS TO WHY IT GRANTED JUDGMENT IN FAVOR OF THE PLAINTIFF-APPELLEE.

V. THE TRIAL COURT ERRED WHEN IT MISLED THE DEFENDANT-APPELLANT AS TO MEDIATION AND HEARING BY ISSUING CONFLICTING ORDERS AND ENTRIES, WHICH ARE: ORDER TO REINSTITUTE THE CASE AND FOR JUDGMENT PER CONSENT ON JUNE 3, 2010, ENTRY REFERRING REQUIRED MEDIATION WITH A PRE-TRIAL FOR JANUARY 10, 2011 AT 1:30 PM AND THE TRIAL ON FEBRUARY 28, 2011 THEN AN ENTRY VACATING THE AUGUST 19, 2010 REQUIRED MEDIATION AND REMOVAL OF CASE FROM THE COMMON PLEAS COURT.

VI. THE TRIAL COURT ERRED BY VACATING THE JUNE 3, 2010 ORDER AS IT PERTAINED TO THE SCHEDULED MEDIATION, PRE-TRIAL AND TRIAL, THEREBY DENYING A HEARING TO THE DEFENDANT-APPELLANT.

VII. THE CLERK OF COURTS ERRED ON NUMEROUS OCCASIONS BY NOT PROVIDING PROPER SERVICE TO THE DEFENDANT-APPELLANT. SPECIFICALLY,

i. MOTION TO REINSTITUTE CASE AND ENFORCE JUDGMENT PER CONSENT DATED JULY 2, 2009.

ii. ORDER REINSTITUTING THE CASE AND FOR JUDGMENT PER CONSENT DATED JUNE 3, 2010.

iii. ENTRY VACATING AUGUST 19, 2010 REQUIRING MEDIATION AND REMOVAL OF CASE DATED SEPTEMBER 20, 2010.

THIS CAUSED SIGNIFICANT DIFFICULTY FOR DEFENDANT-APPELLANT TO ENSURE TIMELY FILINGS TO THE TRIAL COURT.

{¶11} In his first assignment of error, appellant contends that the trial court erred in reinstating the case by improperly allowing appellee to file its motion in the original

case, instead of filing an independent action for breach of contract. (See appellant's brief, 4; 12.) In support of this argument, appellant cites our decision in *Putnam*, without providing any further analysis or discussion.

{¶12} In *Putnam*, the appellant filed two related actions: a trust action in common pleas court and a will contest in probate court. The appellees moved to consolidate the two actions and, in response, the appellant dismissed the will contest without prejudice. *Id.* Subsequently, the appellees filed a motion for summary judgment in the trust action claiming that, because appellant dismissed the will contest, she could not maintain the trust action. *Id.* The trial court granted the appellees' motion for summary judgment. *Id.* The appellant then filed a motion to enforce the agreement to settle and to dismiss the pending suits, asserting that "she had settled the action with defendants, but that defendants refused to perform the settlement agreement." *Id.* The trial court overruled the appellant's motion to enforce for lack of jurisdiction, to which the appellant filed an appeal. *Id.* We affirmed the trial court's decision holding that:

[A] motion to enforce a settlement agreement may be filed in the same action pursuant to Civ.R. 15(E). A supplemental pleading under Civ.R. 15(E) is inappropriate after a judgment entry terminating the action. Similarly, [the appellant's] motion to enforce a settlement agreement is inappropriate after the trial court entered judgment in favor of [the appellees], and thus terminated the action. While, depending on the particular circumstances, a motion to enforce a settlement agreement may be appropriately filed in the same action if the case remains pending in the trial court, the trial court's entering judgment for [the appellees] terminated the action in this case and precludes plaintiff from seeking to enforce the settlement agreement by motion filed in that proceeding.

Id. Further, we stated that our resolution of the appellant's assignment of error did not leave her without a remedy because she may commence a separate action asserting breach of contract relating to the appellees' failure to perform the purported settlement agreement. Id.

{¶13} In response to appellant's argument, appellee asserts that it was entitled to reinstitute the case below by filing a motion because appellant expressly agreed that, if he failed to fulfill his obligations under the Repayment Agreement, appellee could simply reinstitute the existing case in order to enforce the consent judgment. (See appellee's brief, 11-12.) In support of this argument, appellee cites the Fifth District Court of Appeals' decision in *State ex rel. Spies v. Lent*, 5th Dist. No. 2008 AP 05 0033, 2009-Ohio-3844.

{¶14} In *Spies* at ¶2 and 6, the trial court held a hearing on the appellee's request for a preliminary injunction regarding the abatement of a nuisance. At the hearing, the trial court questioned both parties regarding the terms of the proposed settlement agreement and, further, specifically recited those terms in its June 11, 2004 judgment entry. Id. at ¶6; 15-16. Subsequently, the trial court held a status conference in order to determine whether the parties had complied with the terms of the agreement as of that date. Id. at ¶18. The trial court found that, as of September 15, 2004, both parties complied with the agreement and set the matter for a final hearing. Id. Prior to the final hearing, the appellants filed a motion to vacate the June 11, 2004 judgment entry, which the trial court denied. Id. at ¶19. Litigation ensued, and the appellee filed a motion to enforce the June 11, 2004 judgment entry. Id. at ¶21. The trial court granted the appellee's motion to

enforce and further ordered that the subject property be sold at sheriff's sale in compliance with the conditions set forth in the parties' agreement. *Id.* at ¶23.

{¶15} The appellant appealed, and the Fifth District dismissed the appeal for lack of a final, appealable order because the trial court never entered a final judgment. *Id.* at ¶24. Subsequently, the appellee filed a motion for a final hearing and asked the trial court to "withdraw the request for a declaration of a nuisance, 'based upon the settlement of all claims as reflected in the settlement agreement.'" *Id.* at ¶25. At the final hearing, the trial court granted the appellee's motion to dismiss, resolved other pending motions, and ordered that the property be sold at sheriff's sale. *Id.* at ¶29. The appellant filed a second appeal claiming, among other things, that the trial court lacked the authority to enforce the terms of the parties' June 11, 2004 settlement agreement "once the matter was voluntarily dismissed by the appellee." *Id.* at ¶45. In affirming the trial court's decision, the Fifth District stated:

We find that the entry of dismissal indicates that the court intended to reserve jurisdiction to enforce the settlement agreement. The court dismissed the nuisance action and enforced the settlement agreement in the same entry. Further, it is clear in the entry that appellee sought to dismiss its request for a declaration of a nuisance based on the settlement of all claims between the parties as reflected in the settlement agreement. Accordingly, the court did not lose jurisdiction to enforce the settlement agreement.

Id. at ¶53.

{¶16} Here, we agree with appellant that the facts in the present matter are more analogous to those in *Putnam* than in *Spies*. First, although the dismissal entry in the present matter stated that appellant "entered into an agreement for the repayment of certain sums," the dismissal entry did not recite or incorporate the specific terms of that

agreement as it clearly did in *Spies*. (See May 28, 1998 Dismissal Entry; see also *Spies* at ¶¶6; 15-16.) Second, in *Spies*, the trial court held a hearing where it questioned both parties regarding the terms of the settlement agreement. In the present matter, and in *Putnam*, the trial courts held no hearings regarding the parties' understanding of the terms of the settlement agreements prior to the dismissal of the actions. (See generally *Putnam* and *Spies*.) Finally, in *Spies*, the trial court monitored the parties' compliance with the settlement agreement by keeping the case pending, holding interim status conferences, and not entering a final judgment entry. See *Spies* at ¶¶18. Additionally, the judgment entry in *Spies* simultaneously dismissed the appellee's request for a declaration of nuisance, while enforcing the settlement agreement by ordering the sale of the property at sheriff's sale. See *Spies* at ¶¶29. In the present matter, unlike *Spies*, over ten years passed between the dismissal of appellee's case and the filing of appellee's motion to reinstitute the case and to enforce the judgment per consent. Further, subsequent to dismissal, the trial court issued orders to the clerk to terminate case No. 98CVH-03-1889. (See May 28, 1998 Dismissal Entry.)

{¶17} Further, in *Hart v. Smolak* (Sept. 5, 1995), 10th Dist. No. 94AP12-1808, we also determined that, based upon the language in the dismissal entry, the trial court unconditionally dismissed the action, thereby divesting itself of jurisdiction to enforce the parties' settlement agreement. In *Hart*, the appellant filed a complaint in municipal court alleging that the appellees failed to repair his 1988 Ford van and 1984 Chevrolet pickup truck and then refused to return the vehicles or the payment tendered for fixing the vehicles. In response, the appellees filed an answer and counterclaim alleging that they had repaired the vehicles and that the appellant owed an additional \$3,000 for the repairs,

plus \$5 per day, per vehicle, in storage costs. *Id.* Prior to trial, the parties notified the municipal court that they had entered into a settlement agreement. *Id.* The court journalized a judgment entry stating:

This action having been settled by agreement of the parties is dismissed with prejudice as to plaintiff's complaint and defendant's counterclaim, provided however, the court retains jurisdiction upon motion of either party to reopen the judgment and enforce the written settlement agreement entered into between the parties.

Id. Subsequently, the parties disagreed over the terms of the settlement agreement, and the appellees attempted to have the agreement enforced by the municipal court. *Id.* However, the municipal court *sua sponte* transferred the case to the common pleas court for lack of jurisdiction due to the forfeiture demand in the appellees' request for enforcement. *Id.* Without holding an evidentiary hearing, the common pleas court granted the appellees' motion to enforce and journalized an entry ordering that title to the appellant's van be transferred to the appellees. *Id.* The appellant filed an appeal, and we reversed the trial court's decision, holding that:

[T]he municipal court did not dismiss the action, provided the parties take action as directed in the dismissal entry. Instead, the court purported to dismiss the action and at the same time retain jurisdiction, not for the purpose of litigating the action if settlement was not ultimately achieved, but for the limited purpose of determining whether the alleged settlement agreement properly could be enforced. Such an entry is not a conditional dismissal.

Id. Because the trial court did not retain jurisdiction over the action, we concluded that "the party seeking to enforce the alleged settlement agreement between the parties to this action must commence an action in the appropriate court, asserting breach of the settlement agreement and requesting relief as appropriate." *Id.*

{¶18} Here, like in *Hart*, the trial court also unconditionally dismissed the action while at the same time attempting to retain jurisdiction for the limited purpose of allowing appellee to reinstitute the action, if need be, in order to assert its rights under the settlement agreement. However, unlike the dismissal entry in *Hart*, the dismissal entry in the present matter does not even specifically state that the trial court retains jurisdiction for this limited purpose. It simply states that: "The Court being further advised * * * that * * * in the event [appellant] should default upon his obligations under the Repayment Agreement executed by [appellant] on May 18, 1998, [appellee] may reinstitute this action and enforce its rights under such agreement and at law or in equity." Comparing the facts in the present matter with those in *Hart*, and given our decision in *Hart*, the trial court, here, clearly did not retain jurisdiction to enforce the parties' settlement agreement subsequent to the unconditional dismissal of the action.

{¶19} Based upon the foregoing analysis, we find here, as we did in *Putnam* and *Hart*, that the trial court unconditionally dismissed case No. 98CVH-03-1889 without the reservation of jurisdiction. As such, pursuant to Civ.R. 15(E), it is not appropriate for appellee to file a motion to enforce settlement in case No. 98CVH-03-1889. However, as this court has previously instructed, appellee may commence a separate action asserting breach of contract relating to appellant's alleged failure to perform the purported settlement agreement.

{¶20} Appellant's first assignment of error is sustained.

{¶21} Appellant's second, third, fourth, fifth, sixth, and seventh assignments of error are rendered moot.

{¶22} For the foregoing reasons, appellant's first assignment of error is sustained and his remaining six assignments of error are moot. The judgment of the Franklin County Court of Common Pleas is hereby reversed, and this cause is remanded to that court for further proceedings in accordance with law and consistent with this decision.

Judgment reversed and cause remanded.

KLATT and TYACK, JJ., concur.
