IN THE COURT OF COMMON PLEAS
LUCAS COUNTY, OHIO

SAVOY HOSPITALITY, LLC d/b/a Melting Pot Restaurant, *et al.*,	)	**Case No. CI-2011-02783**
	)	**Judge John P. O'Donnell**
Plaintiffs,	)	
v.	)	**JOURNAL ENTRY**
5839 MONROE STREET ASSOCIATES, LLC. d/b/a Monroe Associates, LLC,	)	
Defendant.	)	

John P. O'Donnell, J:

STATEMENT OF THE CASE

This is a lawsuit by a commercial tenant,[1] a restaurant, and the personal guarantors of the lease, against the landlord alleging breach of contract. The defendant landlord counterclaimed for breach of contract. Ultimately, the parties reached a written settlement agreement that the court enforced by an entry journalized May 18, 2012. That entry required the plaintiffs to complete certain work and the defendant to then return the plaintiffs' security deposit.

All of the work is now finished and the plaintiffs have filed a motion to enforce the court's order of May 18 seeking a separate order requiring the return of the security deposit.[2] The defendant has opposed that motion and filed its own motion for the recovery of attorney's

[1] Plaintiff Savoy Hospitality, LLC is the corporate tenant. Plaintiffs Myron and Nicole Duhart are the individual guarantors of the lease. Unless it is necessary to distinguish among the plaintiffs they will be referred to in this entry as "the plaintiffs" or "Savoy." Defendant 5839 Monroe Street Associates, LLC will be referred to as "the defendant" or "Monroe."

[2] Although the plaintiffs' motion is captioned as a "motion to enforce court order of May 18, 2012," the court will refer to it in this journal entry as a motion for the return of the security deposit.

fees. The plaintiffs, in turn, opposed the defendant's motion for attorney's fees and filed their own motion for attorney's fees.

The court held a hearing on the three pending motions on November 14, 2012 and this entry follows.

STATEMENT OF THE FACTS

A detailed statement of facts is included in the court's May 18 entry. By way of summary, each party alleged that the other breached the lease. A settlement agreement was signed on October 25, 2011. On January 19, 2012, the plaintiffs filed a motion to enforce the settlement agreement because the defendant was treating it as void by resuming the prosecution of its counterclaims. The May 18 entry enforced the settlement agreement by ordering the plaintiffs to replace light switches and fixtures, remove remaining pieces of a walk-in refrigerator, replace awnings and a speaker/stereo system, and clean the premises.

The May 18 entry also ordered the defendant to return the plaintiff's security deposit once the plaintiff performed its obligations under the order. The parties agreed at the November 14 hearing that all of the plaintiffs' work has been done and that the security deposit has not been returned. The evidence admitted at the hearing included testimony from plaintiffs' counsel Anthony Calamunci, plaintiffs' exhibits 1 through 4, and all of the defendant's exhibits attached to Monroe's motion for attorney's fees.

LAW AND ANALYSIS

By its motion for attorney's fees, Monroe argues that Savoy's post-settlement agreement conduct – namely, "rather than cooperate, the [plaintiff] forced [Monroe] to expend substantial effort and attorney fees to secure [Savoy's] performance of [Savoy's] obligations

under the Settlement Agreement"[3] – caused the defendant to incur attorney's fees that are compensable under the terms of the contract and pursuant to common law.

In their own motion for legal fees and expense, the plaintiffs argue that the defendant's motion is frivolous and that they should be awarded their own attorney's fees in connection with defending the motion as a sanction under section 2323.51 of the Ohio Revised Code and Rule 11 of the Ohio Rules of Civil Procedure.

The defendant's claim for attorney's fees under the contract

Ohio has long adhered to the "American rule" with respect to recovery of attorney fees: a prevailing party in a civil action may not recover attorney fees as a part of the costs of litigation. *Wilborn v. Bank One Corp.*, 121 Ohio St. 3d 546, 2009-Ohio-306, ¶7. However, there are exceptions to this rule and attorney fees may be awarded when an enforceable contract specifically provides for the losing party to pay the prevailing party's attorney fees, or when the prevailing party demonstrates bad faith on the part of the unsuccessful litigant. *Id.*

Like any written contract, the interpretation of an agreement to pay another party's attorney's fees is a question of law. See, e.g., *Fabrication Group LLC v. Willowick Partners LLC*, 11th Dist. No. 2011-L-141, 2012-Ohio-4460, ¶36. Absent ambiguity in the language of the contract, the parties' intent must be determined from the plain language of the document. *Id.*

The settlement agreement includes monetary terms at paragraphs 2 and 5. The non-monetary terms include a provision that Monroe "shall conduct a physical examination of the Premises" after Savoy is gone "to determine items of repair and replacement" and then notify the plaintiff of those things that need to be repaired or replaced. The agreement goes on to say:

[3] Defendant's motion for attorney's fees, page 3.

> [The plaintiffs] agree to provide at their expense all labor and materials necessary to repair or replace any defective conditions identified in the inspection, excepting reasonable wear and tear. . .If [the plaintiffs] fail or refuse to make any such expenditure or perform any such repair or replacement, Monroe Associates may seek and secure specific performance through appropriate legal proceeding or may implement such repair, replacement or remediation for which [the plaintiffs] agree, jointly and severally, to reimburse Monroe Associates for such costs. If [the plaintiffs] fail or refuse to timely reimburse Monroe Associates as required by this Paragraph, then Monroe Associates shall be entitled to commence appropriate legal proceedings for such monetary damages, and [the plaintiffs] agree, jointly and severally, to pay Monroe Associates' costs of collection, including without limitation attorneys' fees.
>
> Once any repairs replacement or remediation, if any, have been performed and paid for, the Parties shall execute and file a Stipulation of Dismissal With Prejudice.
> (Emphasis in italics added.)

The contract anticipates that Savoy might not undertake the repairs that Monroe determines are necessary and provides two ways to address that circumstance. The first is an "appropriate legal proceeding" by Monroe to hold Savoy to the settlement. A motion to enforce the settlement agreement is such a proceeding. The second is that Monroe would make the repairs at its own expense and then get reimbursement of the repair costs from the plaintiffs. Only if Savoy did not then reimburse the costs, Monroe could institute "appropriate legal proceedings" to recover the repair costs and its attorney's fees.

By its terms, the contract allows the defendant to recover its "costs of collection" only when Savoy "fail[s] or refuse[s] to timely reimburse" the defendant for repair expense. That did not happen in this case. While there is no question that the plaintiffs did not perform some of their obligations under the agreement – otherwise the court would not have ordered, by the May 18 entry, that Savoy take action to comply with the settlement terms – there is also no question that Monroe did not "implement such repair, replacement or remediation" at its expense, hence there was nothing for the plaintiff to "timely reimburse" and the cost of collection provision was never triggered. Instead, a motion to enforce the settlement was filed

and the contract does not include the filing of a motion to enforce the settlement as a context in which Savoy agreed to pay Monroe's attorney's fees.

The defendant's claim for attorney's fees under the common law: breach of settlement contract

In addition to alleging an entitlement to attorney's fees under the settlement contract, Monroe claims that it should be allowed to recover its legal fees because Savoy breached the settlement agreement. Courts can award attorney's fees incurred after the breach of a settlement agreement because when a party breaches a settlement agreement to end litigation and the breach causes a party to incur attorney's fees in continuing litigation, those fees are recoverable as compensatory damages in a breach of settlement claim. *Shelly Co. v. Karas Props.*, 8th Dist. No. 98039, 2012-Ohio-5416, ¶41.

Monroe's claim here is unavailing for two reasons. First, Monroe itself arguably breached the settlement agreement by unilaterally treating it as void and then continuing to prosecute its claims against the plaintiffs, causing the plaintiffs, not Monroe, to file the motion to enforce the settlement agreement. Second, by granting the motion to enforce the agreement and ordering Savoy to undertake certain repairs the court did not decide that Savoy had breached the agreement. Instead, the motion to enforce was analogous to a declaratory judgment action: Savoy sought clarity from the court about the respective obligations of the parties under the settlement agreement.

The defendant's claim for attorney's fees under the common law: bad faith

Even though Monroe has not shown that either the settlement agreement or a breach by Savoy of that contract allow Monroe to recover its attorney's fees under the circumstances here, Monroe can recover its legal fees if Savoy has demonstrated bad faith. See *Wilborn*, supra. More particularly, the Ohio Supreme Court has recognized that attorney's fees can be

recovered where one party has demonstrated "bad faith, vexatious, wanton, obdurate or oppressive conduct." *Sorin v. Board of Education*, 46 Ohio St. 2d 177, 183 (1976).

But the plaintiffs did not engage in any such conduct. Savoy did not do *some* of the repairs and restoration demanded by Monroe after inspection that the court eventually determined were Savoy's obligations. However, as ultimately decided by the court on the motion to enforce settlement, Savoy was correct to resist several of Monroe's demands. Until the parties (by compromise) or the court (on motion) could sort out which repairs Savoy was obligated under the agreement to make, the plaintiff was not acting in bad faith, vexatiously, wantonly, obdurately or oppressively by deferring repairs.

The plaintiff's claim for attorney's fees under R.C. 2323.51 and Rule 11

The same can be said for Monroe's motion to recover its attorney's fees. Although the court, by this entry, disagrees with Monroe's interpretation of the attorney's fee provision of the settlement agreement, it cannot be said that Monroe's motion constitutes frivolous conduct under R.C. 2323.51 or was filed without ground to support it in violation of Rule 11. Monroe did not file the motion until the court found that the plaintiff had failed to do some of what the settlement contract required and the defendant made a reasonable, if unavailing, argument under the contract and common law to support its claim for attorney's fees. Moreover, the defendant's anticipation of an award of attorney's fees combined with this court's failure to specifically address in the May 18 entry whether Monroe could retain from the security deposit any money that Savoy might owe for attorney's fees combined to justify Monroe in holding on to the security deposit, especially when the motion for fees was filed on June 11, less than a month after the court's ruling on the motion to enforce settlement.

CONCLUSION

For all of these reasons, the court hereby denies the defendant's June 11, 2012 motion for attorney's fees and the plaintiffs' June 19, 2012 counter motion for sanctions. The court hereby grants the plaintiffs' September 10, 2012 motion for the return of the security deposit and orders the defendant to forthwith return to the plaintiffs the balance of the security deposit still in its possession. Upon the return of the security deposit, the parties are ordered, as they agreed, to file a stipulation of dismissal with prejudice of all claims of all parties. That entry should include the allocation of court costs.

IT IS SO ORDERED:

_____ Date: _____
Judge John P. O'Donnell

SERVICE

A copy of this journal entry was sent by email, this 27th day of November, 2012, to the following:

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Judge John P. O'Donnell