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IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

WILLIAM MCKELVEY
Plaintiff

HOWARD HANNA SMYTHE CRAMER CO. ET.AL.
Defendant

Case No: CV-08-650472

Judge: BRENDAN J SHEEHAN

JOURNAL ENTRY

OPINION AND JUDGMENT ENTRY. O.S.J.

Judge Signature Date

09/02/2009

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

WILLIAM MCKELVEY, Plaintiff, v. HOWARD HANNA SMYTHE CRAMER CO, *et al.*, Defendants.	)	CASE NO. CV 08 650472 JUDGE BRENDAN J. SHEEHAN **OPINION AND JUDGMENT ENTRY**

I. FACTS AND ISSUES PRESENTED.

This matter is before the Court on Plaintiff's Motion For Enforcement Of Settlement Agreement Or In The Alternative, Appointment Of A Receiver And Dissolution Of The Corporate Defendant filed on April 21, 2009. Plaintiff's Motion for Enforcement has been exhaustively briefed and a full-day evidentiary hearing was held on the issue on July 15, 2009 ("Hearing").

Plaintiff, as a minority shareholder in Defendant Howard Hanna Smythe Cramer commenced this action on February 8, 2008 asserting claims of promissory estoppel, breach of fiduciary duty and age discrimination against Defendants Howard Hanna Smythe Cramer Co. and Howard W. Hanna. It is undisputed that the parties actively engaged in settlement negotiations from commencement of the litigation with agreement reached on numerous terms as of January 2009.

It is undisputed that Plaintiff's counsel, with full authority from his client, advised Defendant's counsel that the following settlement terms were acceptable:

1. My client will sell his stock to the company and resolve the pending litigation between the parties in exchange for a payment of $3,675,000.00;
2. The allocation of the payment will be the company's formula, which is $2,885,000 for the stock and the remainder for the litigation, with separate checks;
3. The payment will be made in five installments of $735,000.00. The first installment will be paid at closing, and a payment will be made on the one year anniversary of the closing each year for the next four years;
4. The installment payments will be for $735,000, with interest at an agreed CD rate, with the first anniversary payment paid at a CD rate for a one year CD, the second anniversary payment paid at a CD rate for a two year CD, etc.; and
5. The company will provide Mr. McKelvey with the typical guarantees and security for this type of transaction, subject to the limitations set forth in the company's loan agreements with the two banks.

Plaintiff's Ex. 1 to Hearing, letter dated January 14, 2009 from Plaintiff's counsel to Defendants' counsel.

It is undisputed that Defendants' counsel, with full authority of her clients, agreed to the following settlement terms:

> 1) the total payment to Mr. McKelvey for his stock and to solve the litigation would be $3,675,000; 2) of that sum, $2,885,000 would be allocated for the purchase of Mr. McKelvey's stock pursuant to the stock valuation formula in the Amended and Restated Stock Bonus Agreement (ARSBA), the remainder would be for the litigation; 3) payment would be made in five installments of $735,000. The first payment would be at closing, the remaining four equal payments would be made annually for four years on the anniversary of the closing pursuant to a note approved by HHSC's banks; and 4) Interest would accrue on the unpaid balance at an agreed CD rate, with the first anniversary payment paid at a rate for a one year CD, the second payment at a rate for a two year CD and so forth.

Plaintiff's Ex. 2 to Hearing, Affidavit of Dianne V. Foley, Esq., ¶7.

Defendants' counsel repeatedly acknowledged that the Defendants agreed to the four material terms concerning subject matter, consideration and time of performance:

THE COURT:	Did you, when the terms were brought, did you – did your client accept the payment amount?
THE WITNESS:	Yes.
THE COURT:	Did your client accept the payment allocation related to the consideration?
THE WITNESS:	Yes.
THE COURT:	And did your client agree to the time of the payment?
THE WITNESS:	Yes.
THE COURT:	Okay. And that was all reflected in the January 14th letter; correct?
THE WITNESS:	Yes.

Transcript of Hearing, 197:20—198:8.

Defendants memorialized the terms of the settlement agreement in various written proposed draft agreements.[1] Although the draft agreements varied in language related to assurances of performance and election of remedy, the basic terms of the agreement pertaining to subject matter, consideration, and time of performance did not vary.

It is similarly undisputed that the parties did not undertake any further discovery or other actions pursuing litigation of the claims at issue. Plaintiff's counsel testified:

Q:	Did you – did you or Ms. Foley continue to pursue litigation or discovery after January 14th?
A:	No. All litigation activity ceased after January 14th, 2009.
Q:	And when you say "litigation activity", what are you referring to?
A.	We had depositions that were scheduled for the last week of January 2009, and the first week of February 2009; those depositions were canceled and never went forward.

Transcript of Hearing, 116:11-19.

[1] The exchange of writings containing the material terms set forth above satisfy the requirements of R.C. § 1335.05 as writings signed by the party to be charged therewith or some other person lawfully authorized to enter into lawful agreements.

Defendants' counsel corroborated Plaintiff's counsel's testimony:

> Q. And there were discussions about taking depositions in January of '09?
> A. We had scheduled some, I think.
> Q. And those depositions were canceled; correct?
> A. They were.

Transcript of Hearing, 197:5-9.

The parties' subsequent discussions devolved into increasingly contentious exchanges concerning potential remedies for breach of the agreement, largely in terms of guaranties, guarantees and/or promissory notes.

II. APPLICABLE LAW AND ANALYSIS.

The basic law regarding settlement agreements is well-established:

> 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. *Spercel v. Sterling Industries* (1972), 31 Ohio St.2d 36, 38, 60 O.O.2d 20, 21, 285 N.E.2d 324, 325; see, also, 15 Ohio Jurisprudence 3d (1979) 511, 516, Compromise, Accord, and Release, Sections 1 and 3; and *Bolen v. Young* (1982), 8 Ohio App.3d 36, 8 OBR 39, 455 N.E.2d 1316. Further, settlement agreements are highly favored in the law. *State ex rel. Wright v. Weyandt* (1977), 50 Ohio St.2d 194, 4 O.O.3d 383, 363 N.E.2d 1387; *Spercel,* 31 Ohio St.2d at 38, 60 O.O.2d at 21, 285 N.E.2d at 325.

Continental W. Condominium Unit Owners Assn. v. Howard E. Ferguson, Inc. (1996), 74 Ohio St.3d 501, 502.

A trial court possesses full authority to enforce a settlement agreement voluntarily entered into by the parties. *Mack v. Polson Rubber Co.* (1984), 14 Ohio St.3d 34, 36. A settlement agreement cannot be unilaterally repudiated but can be set aside only for the same reasons that any other contract could be rescinded, such as fraud, duress, or undue influence. *Id.* "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 Industries, Inc.* (1972), 31 Ohio St.2d 36, 40.

Settlement agreements, like other contracts, are binding and enforceable if they encompass the essential terms of the agreement. *Mr. Mark Corp. v. Rush, Inc.* (1983), 11 Ohio App.3d 167. Minor terms left unresolved do not vitiate an agreement if essential terms have been incorporated into the agreement. *Id.* In reviewing the scope of the agreed terms related to any unresolved terms or uncertainties, the Eighth District Court of Appeals has advised:

> "The more important the uncertainty, the stronger the indication is that the parties do not intend to be bound; minor items are more likely to be left to the option of one of the parties or to what is customary or reasonable."

McCarthy, Lebit, Crystal & Haiman Co., L.P.A. v. First Union Mgt., Inc. (1993), 87 Ohio App.3d 613, 621, quoting Restatement of the Law 2d, Contracts (1981) 95, Section 33, Comment *f.*

Further, "[t]he courts must take cognizance of the fact that the argument that a particular agreement is too indefinite to constitute a contract frequently is an afterthought excuse for attacking an agreement that failed for reasons other than the indefiniteness." *Id.* at 535-536, § 4.1.

Finally, "[a] contract promise is not rendered unenforceable because the parties fail to include a term specifying the remedy for its breach. Where the contract provides a basis for determining a remedy, the law will provide it." *LaConte Ent. v. Cuyahoga Cty.* (1979), 145 Ohio App.3d 806, 812, citing Restatement of the Law 2d, Contracts (1979) 5, Section 1; *Mr. Mark Corp. v. Rush, Inc.* (1983), 11 Ohio App.3d 167, 169.

Based on the legal authority presented, the extensive briefs of the parties and the evidence and arguments presented at the Hearing in this matter, the Court finds that the parties agreed to the essential terms of a settlement and that the terms upon which the parties admit agreement provide a substantial and specific basis for determining a remedy.

The actions subsequent to the parties' agreement on the essential terms of the settlement consisted of attempts to fashion specific remedies for breach of the agreement. Adequate remedies for breach are available as a matter of law. The parties are free to modify the terms of their settlement to include mutually agreeable and exclusive remedies. However, in the absence of agreed upon remedies, all remedies at law will be available to the parties.

Accordingly, Plaintiff's Motion For Enforcement Of Settlement Agreement is **GRANTED.** The Court finds that the parties reached mutual agreement to settle and resolve this litigation upon the following terms:

1) Defendants shall pay the sum of $3,675,000 to Mr. McKelvey for his stock and to resolve the litigation;

2) Of that sum, $2,885,000 is allocated for the purchase of Mr. McKelvey's stock pursuant to the stock valuation formula in the Amended and Restated Stock Bonus Agreement (ARSBA), the remainder is in settlement of Mr. McKelvey's claims in this litigation;

3) Payments are to be made in five installments of $735,000. The first payment is due upon Defendants' receipt of Plaintiff's stock certificates, the remaining four equal payments would be made annually for four years on the anniversary of Plaintiff's tender of shares pursuant to a note approved by HHSC's banks; and

4) Interest would accrue on the unpaid balance at an agreed CD rate, with the first anniversary payment paid at a rate for a one year CD, the second payment at a rate for a two year CD and so forth.

Plaintiff to submit entry consistent with the terms of the settlement agreement and this Court's Order.

Parties to bear their own costs of this action.

IT IS SO ORDERED.

JUDGE BRENDAN J. SHEEHAN

Dated: 8/31/09

RECEIVED FOR FILING

SEP 02 2009

GERALD E. FUERST, CLERK
By Deputy

CERTIFICATE OF SERVICE

A copy of the foregoing was served by mail this 31st day of August, 2009 on the following:

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