IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

RAYCO MANUFACTURING, INC.	)	**CASE NO. CV 13 815844**
	)	
Plaintiff,	)	**JUDGE JOHN P. O'DONNELL**
	)	
vs.	)	
	)	**FINAL JUDGMENT ENTRY**
MURPHY, ROGERS, SLOSS &	)	**GRANTING THE DEFENDANTS'**
GAMBEL, L.P.A., *et al.*	)	**MOTION TO ENFORCE A**
	)	**SETTLEMENT AGREEMENT**
Defendants.	)	

John P. O'Donnell, J.:

History of the case

This is a lawsuit by plaintiff Rayco Manufacturing, Inc. alleging that the defendants – the law firms of Murphy, Rogers, Sloss & Gambel and Cavitch, Familo & Durkin, plus individual attorneys from both firms – committed legal malpractice while representing Rayco in a product liability lawsuit against Deutz Corporation and overcharged Rayco for their services.

On June 16, 2017, the defendants filed a motion to enforce a purported settlement agreement between them and Rayco. The plaintiff opposed the motion on July 31 and the defendants filed a reply brief on August 10. The gist of the motion is that the parties had reached an agreement to settle all issues in the case after two mediations and subsequent negotiations.

Based upon the evidence and argument contained in the briefing on the motion I determined that a motion to enforce settlement was an appropriate procedural means for resolving the parties' dispute but that a question of fact existed about whether they actually formed a contract of settlement. Accordingly, a trial on the issue of whether a contract of

settlement existed was held on November 7 and 8 before an advisory jury empaneled on my own motion pursuant to Rule 39(C)(1) of the Ohio Rules of Civil Procedure.

On November 8 the jury 1) unanimously answered written interrogatories saying that an enforceable agreement, i.e. a contract, was entered into between the parties and 2) unanimously signed a verdict form for the law firms and lawyers and against Rayco on the motion. Thereafter both sides briefed the issue of the defendants' claim for legal fees in connection with the motion to enforce settlement. This judgment entry ensues.

The evidence

The parties mediated the claims in the complaint on February 20, 2015, using the services of retired judge James McMonagle as a mediator. A second mediation session with Judge McMonagle was held more than a year later. By the end of June 2016 no agreement had been reached but efforts to settle continued, including: a visit, with the consent of all parties, by the mediator to Rayco's facility in Wooster to meet with Rayco's chief executive John Bowling; phone conversations among the mediator and counsel in the fall of 2016; a joint request by the parties to continue a November 21, 2016, pretrial conference because negotiations were ongoing; and a final report by the mediator that Rayco would not accept less than $3,050,000 for a full settlement.

The accuracy of the mediator's report was later confirmed by trial counsel for the plaintiff in discussions with defendants' counsel. Because the defendants' lawyers needed a firm demand before approaching their insurance carriers for monetary authority to settle the case, in late 2016 they asked Rayco's counsel for a written settlement demand. Ultimately, plaintiff's trial counsel wrote to the defense lawyers on January 26, 2017. In that letter, the plaintiff confirmed that Rayco had authorized the mediator to make an explicit demand on the defendants

for $3,050,000 as "an absolute aggregate amount necessary to settle the case."[1] A month later, on February 23, 2017, counsel for the Murphy firm and its lawyers, with the consent of counsel for the Cavitch firm and its lawyers, sent an email to Rayco's trial counsel saying "[t]he Murphy Firm, Cavitch firm and named lawyers from each firm accept the collective settlement demand of $3,050,000 in the aggregate" in exchange for a full release and dismissal plus "other customary provisions to be negotiated and memorialized in a formal settlement agreement."[2]

Rayco's trial counsel responded to that email by leaving a voicemail for the Murphy firm's trial counsel later that same day to say thank you and that he'd "like to talk to you briefly about the logistics and I note that you'll take the first cut at settlement documents."[3] Later that same day another lawyer for Rayco emailed Murphy's lawyer to say that Rayco's trial counsel would follow up "with how we would like to finalize things."[4]

The defendants' lawyers sent Rayco's trial counsel a draft settlement agreement on March 7. Rayco's response, on March 10, was to add a term that the release was mutual – i.e. the law firms and lawyers would release any claims they had against Rayco – and to include a provision maintaining the trial court's jurisdiction over any disputes connected to the settlement agreement. Rayco's counsel also sent a proposed dismissal entry. The lawyers for the defendants incorporated Rayco's proposed additions and sent a final settlement agreement to Rayco on March 16.

The next communication on the settlement was an April 4, 2017, voicemail from Rayco's trial counsel to Murphy's counsel. Counsel acknowledged that "the settlement document itself is

[1] Trial exhibit 4.
[2] Trial exhibit 6.
[3] Trial exhibit 7.
[4] Trial exhibit 8.

fine,"[5] and went on to say that "we had John [Bowling]'s commitment to settle with the number we agreed upon but he's being a bit difficult in getting the document signed."[6] This was the first time the defendants' lawyers were told there might not be a settlement.

The motion to enforce the settlement was filed about two months later.

The motion to enforce settlement

A settlement agreement is a contract and like any other contract it is formed through an offer, acceptance and consideration mutually assented to by the parties to the contract. *Rulli v. Fan Co.*, 79 Ohio St. 3d 374, 376 (1997). Because a settlement agreement constitutes a binding contract, a trial court has authority to enforce the agreement in a pending lawsuit. *Savoy Hospitality, LLC v. 5839 Monroe St. Assocs. LLC*, 6th Dist. Lucas No. L-14-1144, 2015-Ohio-4879, ¶23. And a settlement agreement can constitute an enforceable contract despite the fact that the parties have agreed to agree later on important terms or have agreed that final agreement will be memorialized in a final writing. *Rulli*, supra, 378.

In this case, on February 23 the defendants unambiguously offered the plaintiff a settlement of $3,050,000 in exchange for a dismissal of all claims against all defendants. The plaintiff – through counsel but with the authority of Rayco's chief executive – accepted that offer as shown by trial counsel's February 23 voicemail and as further evidenced by: 1) plaintiff's co-counsel's email that same day, 2) the plaintiff's March 10 proposed release of all claims leaving the figure of $3,050,000 undisturbed and 3) the plaintiff's confirmation on April 4 that "the settlement document (release dated March 16 and drafted by the defendants) is fine" and that Bowling had previously accepted the proffered settlement.

[5] Trial exhibit 15.
[6] *Id.*

Based upon all the evidence, I find that there is a contract to settle with terms that are clear and enforceable.

The defendants' claim for attorneys' fees

Besides a finding that the parties entered into an enforceable settlement, the defendants have also moved for an award of their attorneys' fees incurred prosecuting the motion to enforce settlement. The Tenth Ohio District Court of Appeals surveyed Ohio law and thoroughly articulated its view of the recoverability of attorneys' fees in connection with a successful motion to enforce a settlement as follows:

> Attorney fees are generally not recoverable in contract actions. (Citation omitted.) Such a principle comports with the "American Rule" that requires each party involved in litigation to pay its own attorney fees in most circumstances. (Citation omitted.) As exceptions to that rule, recovery of attorney fees may be permitted if (1) a statute creates a duty to pay fees, (2) the losing party has acted in bad faith, or (3) the parties contract to shift fees. (Citations omitted.)
>
> While plaintiffs contend that an award of attorney fees in the present case would violate the American Rule, they fail to distinguish between cases in which attorney fees are awarded as costs and those in which the fees are awarded as part of the aggrieved party's damages. (Citation omitted.) While the general 'American rule' does not permit the prevailing party to recover attorneys' fees, in the absence of statutory authorization, as part of the costs of litigation, defendant does not assert entitlement to attorney fees as costs of the action. Rather, defendant seeks attorney fees as compensatory damages flowing from plaintiffs' breach of the settlement agreement.

The purpose of damages is to compensate a party for the injuries suffered and to make that party whole. (Citations omitted.) Damages may be awarded in addition to the remedy of specific performance when it is necessary to attain justice and equity and to administer the full relief which a case demands. (Citations omitted.) While parties generally are responsible for their own attorney fees, recovery is not precluded in all circumstances. (Citations omitted.) Legal fees may be recovered if the trier of fact determines that the fees are the legal consequences of the original wrongful act. (Citation omitted.) Thus, in *Scheetz v. Aho*, 1998 Ohio App. LEXIS 2498 (May 18, 1998), Stark App. No. 1997 CA 00335, unreported, the court upheld an award of attorney fees to plaintiff in a breach of contract case. While defendant there argued that the award was improper and in violation of the American rule, the court found that the award of fees was not an abrogation of the Rule but rather was "an award of compensatory damages as a direct result of appellant's breach of the purchase agreement." *Id.*

* * *

When a party breaches a settlement agreement to end litigation and the breach causes a party to incur attorney fees in continuing litigation, those fees are recoverable as compensatory damages in a breach of settlement claim. Because defendant's attorney fees are attributable to and were incurred as the result of plaintiffs' breach of the settlement agreement, defendant is entitled to recover those fees in order to make whole and compensate him for losses caused by plaintiffs' breach. (Citation omitted.) *Shanker v. Columbus Warehouse Ltd. Pshp.*, 10th Dist. No. 99AP-772, 2000 Ohio App. LEXIS 2391, 11-15 (June 6, 2000).

Despite its lengthy exegesis on the subject, the *Shanker* court's affirmance of the award of attorneys' fees to a party enforcing a settlement agreement was based only on the fact that the fees were incurred because the agreement was breached. Yet that can be said for any successful plaintiff on a breach of contract claim. Adopting the *Shanker* rationale throughout Ohio would nullify the American rule that each party to a lawsuit is responsible for its own attorneys' fees unless they agreed otherwise, had a statutory entitlement to fees, or the other side acted in bad faith. Perhaps the abrogation of that rule would be salutary, but that is hardly a policy decision for a discrete three-judge appellate panel – much less a single common pleas judge – to make. In this case the parties did not agree to shift fees and there is no statute requiring one to pay the other's attorneys' fees. As for bad faith, there is insufficient evidence of the reasons for, and nature of, Bowling's resistance to finalizing the settlement. Due to that lack of evidence I cannot confidently find that Rayco acted in bad faith by refusing to finalize the settlement.

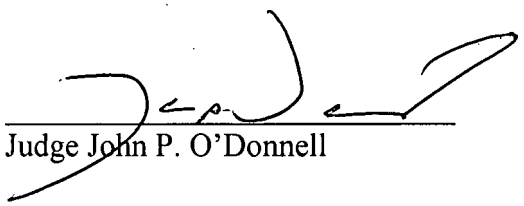
Conclusion

The defendants' motion to enforce settlement is therefore granted and the parties are ordered to conclude the settlement under the terms outlined in the March 16, 2017, written settlement agreement.[7] One of those terms, at section 3, is the dismissal with prejudice of this lawsuit. This judgment entry serves as the final judgment of the court on the merits and there is nothing left to litigate in the trial court, hence the resolution of this lawsuit is accomplished and a

[7] Trial exhibit 14.

stipulated dismissal entry is dispensed with. However, I do retain jurisdiction to enforce the settlement.

IT IS SO ORDERED:



Judge John P. O'Donnell

Date: December 13, 2017

SERVICE

A copy of this journal entry was sent by email, this 14th day of December, 2017, to the following:

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Judge John P. O'Donnell