[Cite as *Berry Network, Inc. v. United Propane Gas, Inc.*, 2009-Ohio-2537.]

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY

BERRY NETWORK, INC.

Plaintiff-Appellee

v.

UNITED PROPANE GAS, INC.

Defendant-Appellant

Appellate Case No. 22875

Trial Court Case No. 07-CV-1470

(Civil Appeal from
Common Pleas Court)

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O P I N I O N

Rendered on the 29th day of May, 2009.

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FAIN, J.

{¶ 1} Defendant-appellant United Propane Gas, Inc. (UPG) appeals from a summary judgment rendered in favor of plaintiff-appellee Berry Network, Inc. (Berry). The trial court

awarded Berry $116,245.19 for UPG's breach of a settlement agreement, and also awarded Berry $15,524.07 in attorney fees and costs.

{¶ 2} UPG contends that the trial court erred in finding that a valid and enforceable settlement agreement existed between the parties. UPG also contends that the trial court erred by awarding Berry attorney fees and costs.

{¶ 3} We conclude that the trial court properly rendered summary judgment in favor of Berry, because the parties entered into a valid and enforceable settlement agreement. We further conclude that the trial court did not abuse its discretion in granting attorney fees and costs to Berry. The original agreement between the parties, which gave rise to the settlement agreement and the subsequent lawsuit for breach of contract, was broadly worded and provided for an award of attorney fees to the prevailing party in "any litigation involving" the agreement. The trial court reasonably concluded that the litigation for breach of the settlement agreement involved the original agreement. Accordingly, the judgment of the trial court is Affirmed.

I

{¶ 4} In January 2003, UPG and Berry entered into an agreement for national yellow pages service. Under the agreement, Berry was to insert UPG's advertising in various telephone directories. Paragraph 6(a) of the agreement provided that:

{¶ 5} "All invoices for published advertising under this Agreement shall be directed by Berry to the Client following the publication of the directory in which such advertising appears for the anticipated life of the directory. Applicable taxes shall be included in said invoices. Client agrees to pay said invoices in full within 30 days of invoice without

deduction or setoff regardless of any claims of the Client against Berry or Publisher with respect to such advertising. BERRY AGREES TO PROVIDE A COPY OF THE ACTUAL AD PLACED AND PROOF OF PUBLICATION OF SAID AD WITH EACH INVOICE. Any failure of the Client to pay for advertising in accordance with this paragraph 6 shall constitute a material breach of this Agreement and Berry shall at any such time without advance notice to Client and in Berry's sole discretion, declare this contract canceled and accelerate all sums payable hereunder and declare same immediately due, which amounts Client agrees to immediately pay to Berry. Regardless of Berry exercising its right of cancellation, any invoice not paid in accordance with the Agreement shall accrue interest at the rate of the greater of 1.5% a month or the maximum rate permitted by law. All invoices shall be denominated and payable in United States Dollars ($US)."

{¶ 6} In 2005, UPG began experiencing problems with advertising that Berry had placed. Although UPG's president, Eric Small, discussed the problems with Berry representatives, he was dissatisfied with their response and stopped paying invoices that UPG received. Around October 2006, the dispute between UPG and Berry was brought to the attention of Eric Gibson, who was UPG's in-house counsel. Berry's attorney, Christine Haaker of Thomson Hine, had written UPG to request payment of $166,064.55, plus additional monthly interest that would thereafter accrue for the advertising services Berry had provided. Haaker indicated that Berry would file suit if arrangements for payment were not made by November 2, 2006. The letter was addressed to Eric Small, UPG's President.

{¶ 7} Small gave Gibson the letter, and authorized him to settle for 50% of the claimed balance due. Gibson then responded on behalf of UPG, by writing a letter to

Christine Haaker.

{¶ 8} In Gibson's letter to Haaker, which is dated November 1, 2006, Gibson stated that he was unfamiliar with the exact disputes in the matter. Gibson said, however, that he had been told of UPG's prior offer to settle the matter for reductions in billing as well as reductions for errors in the rates charged and ads being placed in the wrong directories. Gibson then stated that:

{¶ 9} "While I am not presently aware of the exact credits being sought, I have been authorized to offer one-half of the claimed balance due in full and final resolution of this matter. According to the amount stated in your letter, this confidential settlement offer is for $83,032.23. This offer remains open until 5:00 p.m. CST on November 8, 2006."

{¶ 10} Gibson did not show this letter to Small after it was sent. Berry rejected the offer and made a counteroffer for 80% of the claimed damages. Gibson related Berry's offer to Small, who told him to offer 70%. Gibson then spoke with Jim Butler of Thompson Hine, and they orally agreed upon the following settlement terms: UPG's payment to Berry of $116,245.19 (or 70% of the claimed amount of $166,064.55), and a mutual release of claims.

{¶ 11} On November 16, 2006, Gibson sent Butler an e-mail and a release. Gibson's e-mail stated, "Attached is the Release. Please execute and fax back to me with the original to follow in the mail. Once I receive the faxed copy, I will forward the check. Glad we were able to get this resolved." Plaintiff's Ex. 3, attached to the Eric Gibson Deposition.

{¶ 12} The amount listed in the release was $116,245.19. During Gibson's deposition, the following exchange occurred:

{¶ 13} "Q: Okay. Other than payment by UPG to Berry of $116,245.19, and a mutual release between the parties, were there any other terms or conditions, to your understanding, of the agreement on November 16, 2006?

{¶ 14} "A. No.

{¶ 15} "Q. So, as of November 16, 2006, the full agreement between Berry and UPG was Berry receiving $116,000 and change from UPG, and the parties granting each other a mutual release of claims?

{¶ 16} "A. Correct." Eric Gibson deposition, p. 18.

{¶ 17} Gibson did not give Small a copy of the release before the release was sent to Berry. However, after Gibson sent the e-mail and release to Butler, Gibson mentioned the payment amount to Small. Small indicated at this time that the 70% figure was not 70% of what Berry claimed to be owed, but was 70% of what would have been due, given the errors in the advertising. Small told Gibson that the correct number was around $80,000. Although Small testified that this number was in his mind all along, he never communicated that to Gibson.

{¶ 18} On November 20, 2006, Small sent Haaker an e-mail, stating that he had given Gibson "the wrong figure," and that the settlement amount should be $80,223.44, not $116,245.19. Small asked Haaker to let him or Gibson know if the amount was acceptable, so that they could proceed with settlement.

{¶ 19} Subsequently, Butler sent Gibson an e-mail, stating that their oral agreement was valid and enforceable, and that Berry would file suit to enforce the settlement agreement if UPG failed to provide positive reassurance of an intention to perform by January 10. 2007. Gibson informed Butler on January 10, 2007, that if settlement in the

amount of $80,233.44 was not possible, the matter should be litigated. Berry then filed suit in February 2007, alleging breach of the settlement agreement and breach of the original agreement. Berry also asked for attorney fees.

{¶ 20} In December 2007, the trial court granted Berry's motion for partial summary judgment. The trial court concluded that Gibson had authority to enter into a settlement agreement and that a valid settlement agreement existed. The court further concluded that the unilateral mistake was the result of UPG's negligence, and was not sufficient to allow UPG to rescind the contract. Accordingly, the trial court concluded that Berry was entitled to the amount of the settlement agreement, which was $116,245.19. Subsequently, the trial court also held that Berry was the prevailing party in litigation involving the contract. The court, therefore, awarded Berry $15,524.07 in attorney fees and costs. UPG now appeals from the summary judgment decision and the award of attorney fees.

II

{¶ 21} UPG's First Assignment of Error is as follows:

{¶ 22} "THE TRIAL COURT ERRED BY GRANTING APPELLEE'S MOTION FOR SUMMARY JUDGMENT BY FINDING THAT A VALID AND ENFORCEABLE SETTLEMENT AGREEMENT EXISTED BETWEEN THE PARTIES."

{¶ 23} Under this assignment of error, UPG contends that the trial court erred in finding that an enforceable contract existed. UPG argues that the terms of the oral negotiation were unclear, and that Gibson did not have adequate authority to enter into the settlement agreement. UPG further argues that Berry did not detrimentally rely on UPG's unilateral mistake, and that the agreement was unconscionable.

{¶ 24} Trial courts "may grant a moving party summary judgment pursuant to Civ. R.

56 if there are no genuine issues of material fact remaining to be litigated, the moving party is entitled to judgment as a matter of law, and reasonable minds can come to only one conclusion, and that conclusion is adverse to the nonmoving party, who is entitled to have the evidence construed most strongly in his favor." *Smith v. Five Rivers MetroParks* (1999), 134 Ohio App.3d 754, 760. "We review summary judgment decisions de novo, which means that we apply the same standards as the trial court." *GNFH, Inc. v. W. Am. Ins. Co.*, 172 Ohio App.3d 127, 133, 2007-Ohio-2722, at ¶ 16.

{¶ 25} Before addressing UPG's arguments, we should note that UPG conceded in the trial court that the material facts are not in dispute. In the trial court, UPG only contested whether the facts rose to the level of a new and separate contract or whether the alleged new agreement should be enforced. See UPG Memorandum in Response to Motion for Partial Summary Judgment of Plaintiff Berry Network, Inc., filed on September 24, 2007. We also note that this matter was not yet in litigation when the alleged settlement agreement occurred. With these points in mind, we consider UPG's arguments about the validity of the alleged settlement agreement.

{¶ 26} "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." *Continental W. Condominium Unit Owners Assn. v. Howard E. Ferguson, Inc.*, 74 Ohio St.3d 501, 502, 1996-Ohio-158. The law highly favors agreements to settle. Id.

{¶ 27} The Ohio Supreme Court has stressed that:

{¶ 28} "To constitute a valid settlement agreement, the terms of the agreement must be reasonably certain and clear. 'A court cannot enforce a contract unless it can determine

what it is. It is not enough that the parties think that they have made a contract. They must have expressed their intentions in a manner that is capable of being understood. It is not even enough that they had actually agreed, if their expressions, when interpreted in the light of accompanying factors and circumstances, are not such that the court can determine what the terms of that agreement are. Vagueness of expression, indefiniteness and uncertainty as to any of the essential terms of an agreement, have often been held to prevent the creation of an enforceable contract.' " *Rulli v. Fan Co.*, 79 Ohio St.3d 374, 376, 1997-Ohio-380 (citations omitted).

{¶ 29} In the context of settlements, we have also noted that attorneys who enter into settlement agreements must have actual authority to enter into the agreement. See *Adkins v. Estate of Place*, Clark App. No. 08-CA-73, 2009-Ohio-526, at ¶ 2. As a result, the first issue that must be addressed is whether Gibson had actual authority to settle the case for $116,245.19. Based on the undisputed facts, we conclude that Gibson had actual authority.

{¶ 30} The facts elicited in connection with summary judgment indicate that UPG's president, Eric Small, failed to properly communicate the desired settlement amount to Gibson, and realized his error only after settlement had occurred. Based on Gibson's testimony, there is no doubt that Small authorized Gibson to settle for 70%, and did not indicate to Gibson that he had a different figure in mind other than the amount reflected in Haaker's letter, which was $166,064.55. 70% of this amount is $116,245.19, and is the figure agreed upon by Gibson and by Berry's counsel. Notably, Haaker's letter was addressed to Small and was given to Gibson by Small, prior to the time that Gibson made either the 50% offer or the 70% offer.

{¶ 31} The amount of the unpaid invoices was $137,688.62, plus interest that had been added pursuant to the contract. The contract specifically provided for the addition of interest to amounts that were not paid. Small admitted that he had signed the advertising contract with Berry, and that Berry had assessed interest charges on the unpaid invoices based on the terms of the contract. Gibson deposition, pp. 16-18, and 21-22. During Small's deposition, the following exchange occurred:

{¶ 32} "Q. Okay, I am asking you, in your conversations with Mr. Gibson about settlement, what process or method of analysis did you discuss in order to arrive at the amount you would offer to pay as a settlement?

{¶ 33} "A. It seemed like we were – the figure was 70 percent. And like I said, I just – we were just discussing an amount that would be reasonable to settle it. I didn't want to be unreasonable, but I wanted to make sure that we got compensated for their errors – blatant errors. I didn't even – so that was pretty much it. I think that's the only conversation I remember specifically.

{¶ 34} "Q. So –

{¶ 35} "A. But I can't tell you when or what, I just remember that.

{¶ 36} "Q. And when you say 70 percent, 70 percent of what?

{¶ 37} "A. The invoices, invoice amounts.

{¶ 38} "Q. 70 percent of the amount you owed Berry under the agreement that UPG entered into with Berry?

{¶ 39} "A. We had invoices, as I said before, we got invoices for billing, and those invoices were copied and sent to them. I think that was the number I was working with." Eric Small Deposition, pp. 12-13.

{¶ 40} Small stated that he only intended to settle for 70% of an amount that would have been 70% of the following items: the invoiced amount of $137,688, minus the interest that was due, and minus some unspecified amounts that Small had decided to deduct for errors Berry allegedly made in the advertising. Unfortunately, Small did not tell Gibson the amount he had in mind, which was approximately $80,233.

{¶ 41} After Small became aware that the figure given to Berry was not the same as his own internal figure, Small sent an e-mail to Christine Haaker on November 20, 2006. The e-mail stated as follows:

{¶ 42} "*I gave Eric Gibson our company attorney the wrong figure*. The settlement amount is $80,223.44, not $116,245.19. Please let me or Eric Gibson know if this is not acceptable." Plaintiff's Ex. 4, attached to the Eric Small Deposition (italics supplied). During Small's deposition, the following further exchange took place:

{¶ 43} "Q. Okay. Well, let's step back. The question I asked you was about the first sentence in the e-mail. And I said the first sentence reads: I gave Eric Gibson the wrong figure. What figure did you give him?

{¶ 44} "A. Well, the – actually the wrong figure was given by L.M. Berry. I said I gave him the wrong figure, which means the figure that – the figure he had was different from the figure that I had. So I didn't tell him – for instance, when we were talking about 70%, I didn't say, Eric, we are talking about 70 percent of the $137, minus the wrong companies. I just didn't give him that number. I didn't give him the right number.

{¶ 45} "Q. You told Eric to settle for 70 percent?

{¶ 46} "A. 70 percent. And I just assumed that he understood the 70 percent was of the – we were of the same mind. But apparently we weren't."

{¶ 47} In his deposition, Small criticized Berry's $166,064.55 figure as "wrong" and "misleading" because it included "interest and everything but the kitchen sink." Small Deposition, p. 21. Small, therefore, claimed that Berry is the one who confused Gibson. Id. However, Small is the one who gave Gibson the letter with the $166,064.55 settlement figure, and he is also the one who authorized Gibson to settle for 70%, without telling Gibson that he actually had a figure in mind other than $166.064.55. Section 6(a) of the advertising agreement also explicitly provides for interest charges on unpaid balances, so there would have been no apparent reason to exclude interest from the settlement computation.

{¶ 48} The above facts indicate that Gibson had authority to settle the claim and acted within the authority he had been given. Small's negligence in failing to give Gibson the actual figure that Small had in mind does not detract from Gibson's authority to settle the claim.

{¶ 49} Furthermore, the trial court correctly found that the settlement agreement met the requirements for an enforceable contract. "The result of a valid settlement agreement is a contract between parties, requiring a meeting of the minds as well as an offer and an acceptance thereof." *Rulli*, 79 Ohio St.3d 374, 376. In the present case, there is no dispute about the meeting of the minds of the parties, or the occurrence of an offer and acceptance. The attorneys for Berry and UPG negotiated and agreed upon UPG's payment of $116,245.19, and a mutual release of claims.

{¶ 50} UPG additionally argues that it should be excused from the contract because Berry did not detrimentally rely on UPG's unilateral mistake, and enforcement of the contract would be unconscionable. However, we disagree.

{¶ 51} "The subject of unilateral mistake is addressed in 1 Restatement of the Law 2d, Contracts (1981) 394, Section 153, as follows:

{¶ 52} " '§ 153. When Mistake of One Party Makes a Contract Voidable.

{¶ 53} "Where a mistake of one party at the time a contract was made as to a basic assumption on which he made the contract has a material effect on the agreed exchange of performances that is adverse to him, the contract is voidable by him if he does not bear the risk of the mistake under the rule stated in § 154, and

{¶ 54} "(a) the effect of the mistake is such that enforcement of the contract would be unconscionable, or

{¶ 55} "(b) the other party had reason to know of the mistake or his fault caused the mistake.'

{¶ 56} " * * * *

{¶ 57} "Section 154 provides as follows:

{¶ 58} " '§ 154. When a Party Bears the Risk of a Mistake.

{¶ 59} "A party bears the risk of a mistake when

{¶ 60} "(a) the risk is allocated to him by agreement of the parties, or

{¶ 61} "(b) he is aware, at the time the contract is made, that he has only limited knowledge with respect to the facts to which the mistake relates but treats his limited knowledge as sufficient, or

{¶ 62} "(c) the risk is allocated to him by the court on the ground that it is reasonable in the circumstances to do so.' " *Aviation Sales, Inc. v. Select Mobile Homes* (1988), 48 Ohio App.3d 90, 93-94, quoting from 1 Restatement of the Law 2d, Contracts (1981) 394, Sections153 and 154. Accord, *S. Ohio Med. Ctr. v. Trinidad*, Scioto App. No. 03CA2870,

2003-Ohio-4416, at ¶ 26.

{¶ 63} In the present case, the trial court concluded that the settlement agreement was not voidable because the mistake resulted from UPG's own negligence. The court also noted the absence of any Civ. R. 56 evidence indicating that Berry was aware of UPG's negligence or that Berry attempted to take advantage of the negligence. Finally, the trial court concluded that enforcing the contract was not unconscionable given the nature of the mistake and the requirements of the original contract. We agree with the trial court. Allocating the risk of mistake to UPG was reasonable, since Small could have avoided the mistake by communicating his intentions. In addition, there is no evidence that Berry knew of the alleged mistake, as required by Section 153, subsection (b).

{¶ 64} The current situation also does not fit the requirement of unconscionableness under Section 153, subsection (a). " 'Unconscionable' may be defined as 'affronting the sense of justice, decency, or reasonableness.' " *Byers v. Robinson*, Franklin App. No. 08AP-204, 2008-Ohio-4833, at ¶ 56, quoting from Black's Law Dictionary (8 Ed.2004) 1561. We see nothing unconscionable about requiring UPG to comply with an agreement that it freely made.

{¶ 65} UPG's First Assignment of Error is overruled.

III

{¶ 66} UPG's Second Assignment of Error is as follows:

{¶ 67} "THE TRIAL COURT ERRED WHEN IT AWARDED APPELLEE'S REQUEST FOR ATTORNEY'S FEES."

{¶ 68} Under this assignment of error, UPG contends that the trial court erred when

it found that Berry was entitled to attorney fees and costs. UPG notes that the settlement agreement and release did not provide for attorney fees, and attorney fees may not be awarded absent statutory authorization or an enforceable contract.

{¶ 69} The original agreement between Berry and UPG provided in paragraph 6(c) that "Both parties agree that the prevailing party in any litigation involving this agreement shall recover its cost including reasonable attorney fees from the non-prevailing party." Based on this provision, the trial court concluded that Berry was entitled to attorney fees and costs as the "prevailing party" in litigation involving the original agreement between Berry and UPG. The trial court reasoned that there would have been no settlement without the original agreement, and that the current litigation involves, or is related to the original agreement.

{¶ 70} Contractual agreements to pay attorney fees have been upheld in commercial settings where the parties are of equal bargaining power. See, *e.g.*, *Buckeye Check Cashing, Inc. v. Madison*, Cuyahoga App. No. 90861, 2008-Ohio-5124, at ¶ 20, citing *Nottingdale Homeowners' Assn., Inc. v. Darby* (1987), 33 Ohio St.3d 32. Accord, *Hilb, Rogal & Hamilton Agency of Dayton, Inc. v. Reynolds* (1992), 81 Ohio App.3d 330, 336. See also, *Hagans v. Habitat Condominium Owners Assn.*, 166 Ohio App.3d 508, 2006-Ohio-1970, at ¶ 41 (noting that Ohio follows the "American Rule," which generally does not allow prevailing parties to recover attorney fees. Fees may, however, be recovered in certain circumstances, including situations where enforceable contract provisions provide for an award).

{¶ 71} We review attorney fee awards for abuse of discretion. *Yarber v. Cooper* (1988), 61 Ohio App.3d 609, 612. "Abuse of discretion is found when a decision is ' * * *

arbitrary, fanciful or unreasonable, or only when no reasonable man would take the view adopted by the trial court.' * * * It ' * * * implies an attitude on the part of the trial court that is unreasonable, arbitrary or unconscionable.' * * * " Id. at 613 (citations omitted).

{¶ 72} After reviewing the record, we find no abuse of discretion on the part of the trial court, as the court's interpretation of the contract is reasonable. UPG contends that attorney fees should not have been awarded because the $116,245.19 settlement did not provide for attorney fees. While that is true, the settlement agreement and ensuing litigation arise from, and are related to, the original contract. In fact, count three of Berry's complaint is specially premised on breach of the agreement for yellow pages advertising. But for UPG's alleged breach of this contract, there would have been no settlement agreement and no lawsuit. More importantly, the contractual provision is very broad, as it refers to "any litigation involving this agreement." Accordingly, the trial court did not abuse its discretion in awarding attorney fees based on Section 6(c) of the original agreement between Berry and UPG.[1]

{¶ 73} UPG's Second Assignment of Error is overruled.

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[1]As an aside, we note that the Tenth District Court of Appeals has held that attorney fees may be recovered in actions for breach of settlement agreements, as part of the compensatory damages caused by the breach. The Tenth District has applied this rule in a case where the settlement was reached prior to litigation, and also in a case where settlement occurred during the litigation process. See, *e.g.*, *Tejada-Hercules v. State Auto. Ins. Co.*, Franklin App. No. 08AP-150, 2008-Ohio-5066, at ¶ 9-17. In addition, the Sixth District Court of Appeals has held that attorney fees are compensatory, not punitive, where a parent filed suit to enforce a disabled student's rights under a statute. The Sixth District, therefore, concluded that recovery of fees is not barred by a statute precluding recovery of punitive damages from political subdivisions. See *Grine v.Sylvania Schools Bd. of Edn*., Lucas App. No. L-06-1314, 2008-Ohio-1562, at ¶ 58. However, we do not need to rely on this authority, since we hold that attorney fees are recoverable pursuant to the original agreement in this case.

IV

{¶ 74} Both of UPG's assignments of error having been overruled, the judgment of the trial court is Affirmed.

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BROGAN and GRADY, JJ., concur.

Copies mailed to:

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