[Cite as *Ingle-Barr, Inc. v. Scioto Valley Local School Dist. Bd.*, 2009-Ohio-5345.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
PIKE COUNTY

INGLE-BARR, INC.,		
Plaintiff-Appellant,	:	Case No. 07CA767
vs.	:	
SCIOTO VALLEY LOCAL SCHOOL DISTRICT BOARD,	:	DECISION AND JUDGMENT ENTRY
Defendant-Appellee.	:	

APPEARANCES:

COUNSEL FOR APPELLANT: Timothy G. Crowley, 150 West Wilson Bridge Road, Ste. 101, Worthington, Ohio 43085, and Michael J. Fusco, Fusco, Mackey, Mathews & Gill, L.L.P., 655 Cooper Road, Westerville, Ohio 43081.

COUNSEL FOR APPELLEE: Donald W. Gregory and Eric B. Travers, Kegler, Brown, Hill & Ritter, L.P.A., 65 East State Street, Ste. 1800, Columbus, Ohio 43215.

CIVIL APPEAL FROM COMMON PLEAS COURT
DATE JOURNALIZED: 9-24-09

ABELE, P.J.

{¶ 1} This is an appeal from a Pike County Common Pleas Court summary judgment in favor of the Scioto Valley Local School District Board (District), defendant below and appellee herein, on the claim that Ingle-Barr, Inc. (Ingle-Barr), plaintiff below and appellant herein, brought against the District.

{¶ 2} Appellant assigns the following errors for review:

FIRST ASSIGNMENT OF ERROR:

"THE TRIAL COURT ERRED IN DECLARING AND CONCLUDING IN ITS 'JUDGMENT ENTRY' THAT IT CONSTITUTED 'A FINAL JUDGMENT AS TO PLAINTIFF AND DEFENDANT' AND '... AS BETWEEN THESE PARTIES."

SECOND ASSIGNMENT OF ERROR:

"THE TRIAL COURT ERRED IN BOTH ITS 'DECISION' AND IN ISSUING ITS 'JUDGMENT ENTRY' WHEREIN IT DECREED THAT 'DEFENDANT'S CROSS-MOTION FOR SUMMARY JUDGMENT IS GRANTED AND PLAINTIFF'S COMPLAINT IS HEREBY DISMISSED WITH PREJUDICE BASED UPON THE FOURTEENTH DEFENSE OF DEFENDANT'S ANSWER.'"

THIRD ASSIGNMENT OF ERROR:

"THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT IN FAVOR OF APPELLEE SV AND DISMISSING WITH PREJUDICE APPELLANT IBI'S COMPLAINT."

FOURTH ASSIGNMENT OF ERROR:

"THE TRIAL COURT ERRED IN DENYING APPELLANT IBI'S MOTION FOR SUMMARY JUDGMENT FOR ENFORCEMENT OF THE PARTIES' $285,000.00 SETTLEMENT AGREEMENT."

FIFTH ASSIGNMENT OF ERROR:

"EVEN IF THE TRIAL COURT DID CORRECTLY FIND THAT A MUTUAL MISTAKE EXISTED CONCERNING THE $104,466.00 PAYMENT, THE TRIAL COURT NONETHELESS ERRED IN DENYING APPELLANT IBI'S ALTERNATIVE 'MOTION FOR PARTIAL SUMMARY JUDGMENT AS TO PLAINTIFF'S ENTITLEMENT TO $180,534.35 AS PARTIAL PAYMENT OF SETTLEMENT AMOUNT' AND/OR IN DENYING APPELLEE SV'S CROSS-MOTION FOR JUDICIAL REFORMATION OF THE SETTLEMENT AGREEMENT."

{¶ 3} The facts are relatively undisputed. In 2002, the parties' contract provided that Ingle-Barr perform construction and renovation work at the Jasper elementary school for $2,683,000. In 2004, the parties entered into a second "Site Improvements" contract for the Jasper elementary school for $332,232. Ingle-Barr also performed extra work at the site.

{¶ 4} Disagreements arose over the final contract payments and the parties pursued mediation. On May 16, 2005, the parties agreed that Ingle-Barr accept $285,000 in settlement of its claims against the District. In the process of making payment, however, the District discovered that Ingle-Barr double-billed, and the District double-paid, in excess of $104,000 for some of the work. Accordingly, the District refused to pay Ingle-Barr the amount set forth in the settlement agreement.

{¶ 5} Ingle-Barr commenced the instant action and alleged breach of the settlement agreement and requested $285,000 in damages. The District denied liability and asserted various affirmative defenses, including "fraud or mistake" in entering the settlement agreement.

{¶ 6} Subsequently, both parties requested summary judgment. The District produced evidence to substantiate its claim that Ingle-Barr had double-billed for the same work. Ingle-Barr did not contest the double-billing but, rather, relied on the settlement agreement as a negotiated contract whereby each side agreed to compromise on the payment problems that arose from construction.

{¶ 7} The trial court issued a lengthy decision in favor of the District. After it

noted that no dispute exists over the double-billing and payment issue, the court concluded that each side was, at the very least, "unmindful" of the double-billing during settlement as their positions would have undoubtedly changed if they had been, in fact, aware of the problem. Thus, the court ruled that the District was entitled to judgment in its favor as a matter of law "based upon the Fourteenth Defense stated in the Answer" (fraud or mistake). This appeal followed.

I

{¶ 8} In its first assignment of error, Ingle-Barr raises several arguments concerning both civil and appellate procedure. First, it objects to the inclusion of Civ.R. 54(B) language in the judgment. Although we agree that this language is unnecessary, and that all claims have been resolved, appellant has not been prejudiced in any manner by the inclusion of the "no just reason for delay" language. Next, Ingle-Barr objects to the trial court's comment that the August 9, 2007 entry is a "final judgment as between these parties." The basis for the objection appears to be its concern that the District is establishing a "res judicata defense" on every issue surrounding the construction contracts so that Ingle-Barr can never sue for monies that remain due and owing. This concern is meritless. Ingle-Barr's complaint, and the trial court's judgment, are based on the settlement agreement. No claim for breach of the construction contract was raised in this case and no such claim has been decided on the merits. As a result of this case, the doctrine of res judicata could not be used to bar subsequent suit on the construction contracts.

{¶ 9} Accordingly, for these reasons, we find no merit in appellant's first assignment of error and it is hereby overruled.

II

{¶ 10} Ingle-Barr asserts in its second assignment of error that the trial court's decision that summary judgment was granted to the District based on the "Fourteenth Defense stated in the Answer" violates the Civil Rules. Appellant contends that this violates Civ.R. 54(A) which provides that "[a] judgment shall not contain a recital of pleadings."

{¶ 11} First, we note that Civ.R. 54(A) applies to judgments. The language to which appellant objects appears in the trial court's decision, not its judgment. Second, the trial court did not recite pleadings in its decision; rather, it merely pointed to a single defense in one of those pleadings. This action helps to explain the trial court's reasoning and aids appellate review. Third, we fail to see prejudice resulting from the inclusion of the language in the court's decision. The rule's purpose is to make the judgment "a straightforward statement of the holding without an extensive recital of trial details." See Fink, Greenbaum & Wilson, Guide to the Ohio Rules of Civil Procedure (2001 Ed.)54-4, §54-3. Here, the judgment appealed is "straightforward" and no doubt exists as to the relief afforded to the parties.

{¶ 12} Accordingly, we hereby overrule appellant's second assignment of error.

III

{¶ 13} Ingle-Barr asserts in its third assignment of error that the trial court erred by granting the District summary judgment. We disagree.

{¶ 14} Our analysis begins with the concept that appellate courts review summary judgments de novo. Broadnax v. Greene Credit Service (1997), 118 Ohio App.3d 881, 887, 694 N.E.2d 167; Coventry Twp. v. Ecker (1995), 101 Ohio App .3d 38, 41, 654 N.E.2d 1327. In other words, appellate courts afford no deference to trial court summary judgment decisions, Hicks v. Leffler (1997), 119 Ohio App.3d 424, 427, 695 N.E.2d 777; Dillon v. Med. Ctr. Hosp. (1993), 98 Ohio App.3d 510, 514-515, 648 N.E.2d 1375; and, instead, conduct an independent review to determine if summary judgment is appropriate. Woods v. Dutta (1997), 119 Ohio App.3d 228, 233-234, 695 N.E.2d 18; McGee v. Goodyear Atomic Corp. (1995), 103 Ohio App.3d 236, 241, 659 N.E.2d 317.

{¶ 15} Under Civ. R. 56(C), summary judgment is appropriate when a movant can show (1) that no genuine issues of material fact exists, (2) that it is entitled to judgment as a matter of law, and (3) after the evidence is construed most strongly in favor of the non-movant, reasonable minds can come to one conclusion and that conclusion is adverse to the non-moving party. Zivich v. Mentor Soccer Club, Inc. (1998), 82 Ohio St.3d 367, 369-370, 696 N.E.2d 201; Harless v. Willis Day Warehousing Co. (1978), 54 Ohio St.2d 64, 66, 375 N.E.2d 46. The moving party bears the initial burden to show that no genuine issue of material facts exist and that he is entitled to judgment as a matter of law. Dresher v. Burt (1996), 75 Ohio St.3d 280, 293, 662 N.E.2d 264; Mitseff v. Wheeler (1988), 38 Ohio St.3d 112, 115, 526 N.E.2d 798. If the movant satisfies its burden, the onus shifts to the non-moving party to provide rebuttal evidentiary materials. See Trout v. Parker (1991), 72 Ohio App.3d 720, 723, 595 N.E.2d 1015; Campco Distributors, Inc. v. Fries (1987), 42 Ohio App.3d

200, 201, 537 N.E.2d 661. With these principles in mind, we turn our attention to the case at bar.

{¶ 16} Ingle-Barr's first contends that the District did not demonstrate that it is entitled to summary judgment based on fraud. We agree. Without dwelling on the legal requirements for fraud, no evidence was adduced to demonstrate that Ingle-Barr knowingly misled the District about the double-payment. It is plausible that Ingle-Barr may have been, like the District, unaware of the accounting mistake.[1] However, the District's answer also asserted the defense of mistake. Ingle-Barr argues that the District was not entitled to summary judgment on this basis. We disagree.

{¶ 17} A settlement agreement is a contract. See e.g. National City Mortgage Co. v. Wellman, 174 Ohio App.3d 622, 883 N.E.2d 1122, 2008-Ohio-297, at ¶14; Pierron v. Pierron, Scioto App. Nos. 07CA3153 & 07CA3159, 2008-Ohio-1286, at ¶7. Thus, the law of contracts applies to the case sub judice. The doctrine of mutual mistake permits a contract rescission when an agreement is formed on a mutual mistake of fact. FPC Financial v. Wood, Madison App. No. 2006-02-005, 2007-Ohio-1098, at ¶59, citing State ex rel. Walker v. Lancaster City School Dist. Bd. of Edn. (1997), 79 Ohio St.3d 216, 220, 680 N.E.2d 993. A "mutual mistake" is a mistake made by both parties at the time the contract was entered and has a material effect on the agreed exchange of performances. Reilley v. Richards (1994), 69 Ohio St.3d 352, 353, 632 N.E.2d 507; Weber v. Budzar Industries, Inc., Lake App. No. 2004-L-098,

[1] The trial court explicitly stated that the parties were "unmindful" of the double-billing and payment, thus suggesting that it awarded summary judgment to the District on the basis of mistake, not fraud.

2005-Ohio-5278, at ¶34. Regarding settlement agreements, the Seventh District Court of Appeals noted that "[i]f each party is mistaken as to a material fact of settlement, then there could be no meeting of the minds, and thus no valid contract for settlement." Connolly v. Studer, Carroll App. No. 07CA846, 2008-Ohio-1526, at ¶24.

{¶ 18} In the instant case, the amount of money due and owing for construction work at Jasper Elementary is a "material fact" involved in the parties' settlement negotiations. In fact, it is difficult to conceive of any fact more material than the amount owed for the construction work. The District pled "mistake" as a defense to the enforcement of the settlement agreement and, thus, had the burden to produce Civ.R. 56(C) evidentiary materials to support that defense. In its summary judgment motion, the District included the affidavit of Dennis Thompson, District Superintendent, attesting to the double-billing and introducing various billing documents to support that attestation. The burden then shifted to Ingle-Barr to produce rebuttal evidentiary materials. Ingle-Barr, however, failed to submit any Civ.R. 56(C) evidentiary materials in rebuttal and did not contest the double-billing. Actually, Ingle-Barr acquiesced to that portion of the District's argument. Accordingly, no genuine issues of material fact remained on the existence of a mutual mistake of fact and the District was entitled to judgment in its favor.

{¶ 19} As noted above, the typical remedy for a mutual mistake of fact is contract rescission. In this case, however, Ingle-Barr did not request rescission and the District did not request recission in its counterclaim or Answer. At common law, the defense of mutual mistake allows for avoidance of the contract. See Calamari & Perillo Contracts (2nd Ed. 1977) 299, §9-24; Knowlton, Contracts (2nd Ed. 1887) 175. However, because

neither party requested rescission or reformation, we believe that the trial court arrived at the correct remedy by refusing to enforce the settlement agreement and dismissing Ingle-Barr's complaint.

{¶ 20} Ingle-Barr counters that considering the double-billing allows parole evidence to alter the terms of the settlement agreement. We disagree. Neither this Court nor the trial court construed the terms of the contract. To the contrary, as the Seventh District noted in Connolly, supra, mutual mistake of fact means that no "meeting of the minds" occurred and, thus, no contract existed to begin with.

{¶ 21} Accordingly, for these reasons, we find no merit in appellant's third assignment of error and it is hereby overruled.

IV

{¶ 22} Ingle-Barr asserts in its fourth assignment of error that the trial court's denial of its motion for summary judgment constitutes reversible error. We disagree. Just as no dispute exists concerning the double-billing and double-payment, no dispute exists that the District did not pay the amount specified in the settlement agreement. We therefore treat Ingle-Barr as having carried its initial burden on summary judgment. However, as noted above, the District also carried its burden of rebuttal by submitting evidentiary materials to establish a mutual mistake of fact sufficient to avoid the contract. As a result, Ingle-Barr did not establish that it is entitled to judgment in its favor as a matter of law. Thus, appellant's fourth assignment of error is without merit and is hereby overruled.

V

{¶ 23} In its fifth assignment of error, Ingle-Barr asserts that even if the trial court correctly determined that the settlement agreement is avoidable due to mutual mistake, the court nevertheless erred by not granting Ingle-Barr's alternative, partial motion for summary judgment.

{¶ 24} It is undisputed that the District tendered to Ingle-Barr a check for $180,534.35, but its tender was rejected. The District argued that this was a settlement offer, not a concession that such amount was due and owing. We agree this is an issue that deserves further attention, but for the following reasons we will not reverse the summary judgment on this basis.

{¶ 25} First, although the Civ.R. 56(C) evidentiary materials mentions this check, neither party sufficiently developed evidence to properly address the issue and the District's defense. Therefore, Ingle-Barr did not carry its initial Civ.R. 56(C) burden and was not entitled to judgment as a matter of law.

{¶ 26} Second, and more important, Ingle-Barr's claim in the case sub judice is based solely on the settlement agreement. Although Civ.R. 56(A) allows a party to request summary judgment on any "part of [a] claim," we believe the "claim" to which the rule refers is a claim asserted in the case. Ingle-Barr's claim to $180,534.35 is premised on the original construction contract(s) rather than the settlement agreement. Ingle-Barr cannot in this case seek compensatory damages under the construction contract(s) when it did not plead breach of those contracts.

{¶ 27} Our decision should not be construed as determining that Ingle-Barr is not entitled to all, or part, of that money. This is an issue for another time and, as we

stated above, Ingle-Barr may bring an action against the District under the original construction contract(s). However, as to its alternative motion for summary judgment, we find no error in the trial court decision to decline to grant Ingle-Barr summary judgment on that basis. Accordingly, appellant's fifth assignment of error is hereby overruled.

{¶ 28} Having reviewed all the errors assigned and argued by Ingle-Barr in its brief, and having found merit in none of them, we hereby affirm the trial court's judgment.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the judgment be affirmed and that appellee recover of appellant costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Pike County Common Pleas Court to carry this judgment into execution.

A certified copy of this entry shall constitute that mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

Kline, P.J. & Harsha, J.: Concur in Judgment Only

For the Court

BY: _____
Peter B. Abele, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.