[Cite as *State ex rel. Spies v. Lent,* 2009-Ohio-3844.]

COURT OF APPEALS
TUSCARAWAS COUNTY, OHIO
FIFTH APPELLATE DISTRICT

	:	JUDGES:
STATE OF OHIO, ex rel., AMANDA SPIES	:	William B. Hoffman, P.J.
	:	Julie A. Edwards, J.
	:	John W. Wise, J.
Plaintiff-Appellee	:	
	:	Case No. 2008 AP 05 0033
-vs-	:	
	:	
	:	O P I N I O N
DEBBIE LENT, et al.		
Defendants-Appellants		

CHARACTER OF PROCEEDING:	Civil Appeal from Tuscarawas County Court of Common Pleas Case No. 2004 CV 030142
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	July 21, 2009

APPEARANCES:

For Plaintiff-Appellee	For Defendants-Appellants
DAVID C. HIPP Assistant County Prosecutor Tuscarawas County, Ohio 125 E. High Avenue New Philadelphia, Ohio 44663	JAMES H. BANKS P.O. Box 40 Dublin, Ohio 43017 PETER VASILAKOS, Pro Se #66140-061 P.O. Box 1000 Morgantown, Ohio 26507

Edwards, J.

{¶1} Appellants, Debbie K. Lent, Peter J. Vasilakos and Ugly Mug, Ltd., appeal a judgment of the Tuscarawas County Common Pleas Court ordering real property belonging to Ugly Mug, Ltd. to be sold at sheriffs sale. Appellee is the State of Ohio, ex rel. Amanda Spies.

STATEMENT OF THE FACTS AND CASE

{¶2} On March 5, 2004, appellee filed a complaint for abatement of nuisance and injunction against appellants Debbie Lent, Peter J. Vasilakos and Ugly Mug, Limited. Ugly Mug, Ltd. is a limited liability company doing business in Tuscarawas County, Ohio, and is the owner of real property located at 105 W. Main Street in Port Washington, Ohio. The company did business as a bar called "The Ugly Mug" and held a liquor permit issued by the Ohio Department of Liquor Control. Appellants Debbie Lent and Peter Vasilakos are the owners of Ugly Mug, Ltd.

{¶3} In the complaint, the State alleged that the appellants encouraged sexual activity between customers and performers, and such performers were compensated by customers for sex. The complaint further alleged that appellants sold alcohol to minors and permitted minors to engage in nudity-oriented performances.

{¶4} Appellants counterclaimed-seeking damages in the amount of $1,000,000.00. Appellants filed a claim under 42 U.S.C. 1983 claiming that appellee violated their rights to free speech under the First Amendment to the U.S. Constitution and also claiming that selective enforcement of the law denied them freedom of speech and expression. The counterclaim alleged in paragraph 11 that, when it became know that appellants permitted patrons to "freely express themselves through dance,"

appellee engaged in a campaign to shut down their business establishment.

{¶5} On March 10, 2004, upon motion of the appellants, the case was removed to Federal District Court. On June 2, 2004, the matter was remanded by the Federal District Court back to the Tuscarawas Common Pleas Court.

{¶6} On June 11, 2004, the court held a hearing on the State's request for a preliminary injunction. The court's judgment entry recites the terms of an agreement reached by the parties at that time:

{¶7} "The parties represented that the matters raised in the Complaint for Abatement of Nuisance and Injunction filed March 5, 2004, have been resolved by agreement." The terms of the agreement pertinent to the appeal are as follows:

{¶8} "1. Grounds for the Temporary Injunction are stipulated.

{¶9} "2. The premises known as Ugly Mug Tavern, located at 105 West Main Street, Port Washington, Ohio, shall be closed and secured for a period of one year, pursuant to R.C. § 3767.06(A), unless reopening is permitted as provided below, the closing to be enforced by the Tuscarawas Sheriff.

{¶10} "3. Defendants shall remove personal property located at the premises, as provided by R.C. § 3767.06(A) and upon agreement with the Tuscarawas County Sheriff.

{¶11} "4. Defendant shall, within one years (sic), divest themselves of the real estate located at 105 West Main Street, Port Washington, Tuscarawas County, Ohio. However, the real estate shall not be transferred to any individual having ownership in the Ugly Mug, Ltd., or any relative of the owners of the Ugly Mug, Ltd., or to any employees, agents, or other persons who have had business relationships with the Ugly

Mug, Ltd., Debbie Lent or Peter Vasilakos. Thirty days prior to the proposed transfer of the real estate Defendants shall notify the Prosecuting Attorney of the name and address of the intended Transferee so as to allow the Prosecutor to verify that the proposed transfer complies with these restrictions...

{¶12} "6. The parties will convey within one week to the Division of Liquor Control the terms of this agreement and request that administrative litigation related to the renewal of the Defendants' Liquor Permit be terminated and that Defendants will seek to place the permit in "safekeeping" for possible transfer to a potential purchaser of the real estate qualified under the terms of this agreement. The parties understand that no guarantees are made concerning the agreement of the Division of Liquor Control or any other agency of the State of Ohio on this issue. Neither Defendants nor any persons or entities associated with them shall sell alcoholic beverages under such permit after the date and time of filing of the Judgment Entry resolving this matter with the Clerk of the Tuscarawas County Common Pleas Court...

{¶13} "9. This matter shall be continued for a period of ninety days to allow for performance of the obligations provided herein which are required to be performed within ninety days, and upon full compliance a with the terms is of this agreement the matter shall be concluded by enforceable Court Order incorporating the agreement of the parties...

{¶14} "11. The parties agree that this agreement resolves all claims to date, civil and criminal between the parties, and involving the Village of Port Washington, Ohio, for the conduct described in the Complaint filed in this matter, conduct of the Defendants which may be similar to that which was the subject of a criminal action known as the

United States v. Vasilakos, Lent, et al., Case No. CR2 03147, United States District Court, Southern District of Ohio, and any claims Defendants may have against the Village of Port Washington as of the date of this agreement. It is further agreed by the parties that each of the promises and covenants set forth in the agreement are essential terms and conditions of the settlement.

{¶15} "The Court, having questioned the parties, finds that the agreement was entered into by the parties knowingly and voluntarily after full consultation with counsel, and that the proposed settlement agreement is fair and equitable.

{¶16} "It is, therefore, Ordered, Adjudged and Decreed, that the agreement of the parties shall be adopted and incorporated into the Order of the Court as if fully rewritten, that the parties shall be Ordered to carry out the terms of the agreement, and that the Sheriff of Tuscarawas County, Ohio, shall be authorized to execute the Orders of the Court.

{¶17} "This matter shall be continued until the call of the Court as to the matter of formal determination of the existence and continuance of a nuisance." Judgment Entry, June 11, 2004.

{¶18} On September 2004 the trial court held a status conference to consider whether the parties had complied with the terms of the agreement to date. In a judgment entry filed on September 15, 2004, the court found that the appellants asserted that they had complied with the 90-day requirements. The court also found that the State represented that it had complied with paragraph 6 of the agreement. The court further found that the next significant action to be taken by the appellants was the divesting of the real estate as set forth in paragraph 4 of the agreement. The court

ordered that the matter be set for final hearing on the Complaint for a date which fell beyond one year from the original agreement: after June 11, 2005, but prior to March 1, 2006.

{¶19} On October 15, 2004, appellants appearing pro se filed a motion to vacate the June II, 2004, judgment entry. On October 28, 2004, the State filed a response. On November 30, 2004, the trial court permitted appellants' counsel to withdraw. On December 31, 2004, the court by judgment entry denied appellants' motion to vacate.

{¶20} On February 28, 2005, appellants, represented by counsel, filed a motion for relief from the June 11, 2004, judgment or in the alternative for a modification of paragraph 4 of the judgment entry. On March 11, 2005, the State filed a response.

{¶21} On June 17, 2005, the State filed a motion to enforce the June 11, 2004, judgment. In the motion the State moved the court to enforce the court's order of sale of the real estate pursuant to Civ.R. 70.

{¶22} On July 6, 2005, by judgment entry the trial court overruled appellants' February 28, 2005, motion for relief from judgment and set the State's motion to enforce the judgment for hearing.

{¶23} On August 23, 2005 the court by judgment entry granted three State's motion to enforce the June 11, 2004, judgment entry. The trial court further ordered the property sold at sheriffs sale to a purchaser in compliance with the conditions set forth in the agreement.

{¶24} On September 15, 2005, appellant filed an appeal to this Court from the August 23, 2005 judgment entry. On October 7, 2005, the trial court granted a stay of execution of the order of sale. On October 4, 2006, this Court dismissed the appeal for

lack of a final, appealable order. This Court found that although the parties represented that their settlement agreement disposed of all the issues, the trial court had continued the matter for final hearing and formal determination of the existence of a nuisance. Therefore, the record indicated that the court never entered a final judgment.

{¶25} On October 5, 2006, the State filed a motion for final hearing. In the motion, the State indicated its intent to ask the court to withdraw the request for a declaration of a nuisance, "based upon the settlement of all claims as reflected in the settlement agreement."

{¶26} In October or November of 2006, appellants attempted to file an affidavit of prejudice with the Ohio Supreme Court. On November 14, 2006, the trial court stayed all further proceedings, having received a copy of the affidavit which was not file stamped. On November 21, 2006, the Ohio Supreme Court rejected the affidavit for filing because it did not comply with the Ohio Revised Code.

{¶27} On December 19, 2006, appellants filed a motion for summary judgment and/or motion to dismiss claiming that incorrect parties had been named in the action.

{¶28} On January 5, 2007, appellants filed a motion for an order to gain entry to the-real estate and remove-property.

{¶29} On March 1, 2007, the matters came before the trial court for final hearing. On April 25, 2008, the court issued its final ruling. In the judgment entry, the court granted the State's motion to dismiss the claim of declaration of nuisance. The court further denied the appellants' motion for summary judgment, motion to dismiss and motion to gain entry into the premises. The court ordered that the real estate be sold by sheriffs sale.

{¶30} On June 11, 2008, the trial court stayed the April 25, 2008, judgment pending appeal.

{¶31} Appellants filed a notice of appeal from the April 25, 2008, judgment entry.

{¶32} Appellants Debbie Lent and the Ugly Mug, Ltd., set forth the following assignments of error:

{¶33} "I. THE TRIAL COURT ERRED TO THE PREJUDICE OF APPELLANTS IN ORDERING SALE OF THE PROPERTY AT ISSUE AFTER VOLUNTARY DISMISSAL OF THE CLAIMS IN THE COMPLAINT PURSUANT TO OHIO RULE OF CIVIL PROCEDURE 41(A).

{¶34} "II. THE TRIAL COURT ERRED TO THE PREJUDICE OF APPELLANTS IN ORDERING THE SALE OF THE PROPERTY AT ISSUE WITHOUT FINAL HEARING."

{¶35} Pro se appellant Peter Vasilakos sets forth the following assignments of error:

{¶36} "I. THE DEFENDANT-APPELLANTS MOVE TO VACATE AGREEMENT AS-VOID- AB- INITIO- SINCE-THE-CONTRACT- IS VOID--ON- IT'S FACE,--SINCE-THE PLAINTIFF-APPELLEES AVERRED THEY COULD BIND CERTAIN PARTIES WHEN PLAINTIFF-APPELLEES IN FACT THEY COULD NOT BIND THE PARTIES IN THE AGREEMENT. THE PLACING OF THIS CONTRACT ON THE RECORD & ATTEMPTING TO ENFORCE SAME IS A "FRAUD UPON THE COURT" PREJUDICING DEFENDANT-APPELLANT RIGHTS. THIS SCENARIO IN RE THE VOID CONTRACT CAUSES SAME TO LACK JURISDICTION TO ENFORCE.

{¶37} "II. TRIAL COURT ERRED TO THE PREJUDICE OF APPELLANTS PER

THE BELOW ARGUMENTS IN REFERENCE TO THE LAW & THE FACTS OF THE CASE SUPPORTED BY ON & OFF THE RECORD EXHIBITS WHEN IT DISMISSED THE NUISANCE ACTION 4/25/08 IN VIOLATION OF THE AGREEMENT & THE 'LAW OF THE CASE', 'RES JUDICATA', 'COLLATERAL ESTOPPEL', WITHOUT HOLDING A HEARING. THIS VIOLATED THE DUE PROCESS RIGHTS OF THE APPELLANTS UNDER THE OHIO & US CONSTITUTION APLT (SIC) SEEKS TO REVERSE VIA APPEAL OF 56(C) OR 60 (B) MOTION.

{¶38} "III. THE ALLEGED FORCED SALE OF THE DEFENDANT APPELLANTS PROPERTY BY SHERIFF'S SALE IS AN `UNCONSTITUTIONAL TAKING' IN VIOLATION OF THE 5TH AMENDMENT OF THE U.S. CONSTITUTION 'THE UNITED STATES & OHIO CONSTITUTION GUARANTEE THAT PRIVATE PROPERTY SHALL NOT BE TAKEN FOR PUBLIC USE WITHOUT JUST COMPENSATION, 5TH & 14TH AMENDMENT TO THE U.S. CONSTITUTION; § 19 ART. I, OHIO CONSTITUTION. STATE EX REL. SPRINGBORO, 99 O ST3D 347, 349. -THE AGREEMENT-BEING-'UNCONSTITUTIONAL IS ILLEGAL AND THEREFORE VOID UNDER THE OHIO & U.S. LAW.

{¶39} "IV. THE PLAINTIFF-APPELLEE BREACHED THE CONTRACT WITH DEFENDANT-APPELLANTS WHEN THEY REFUSED TO ALLOW A SALE OF THE PROPERTY TO AN INDEPENDENT 3RD PARTY AS THE CONTRACT CALLED FOR, ARBITRARILY & CAPACIOUSLY. THIS BREACH VOIDS THE CONTRACT. THE APPELLANTS ARE ALLOWED TO RAISE THIS GROUND IN THIS COURT SAME BASED ON THE 'RIGHT TO A REMEDY' PROVISION OF THE OHIO CONSTITUTION, WHICH PROVIDES: 'ALL COURTS SHALL BE OPEN, AND EVERY

PERSON, FOR AN INJURY DONE IN HIS LAND, GOODS, PERSON, OR REPUTATION, SHALL HAVE A REMEDY BY DUE COURSE OF LAW, AND SHALL HAVE JUSTICE ADMINISTERED WITHOUT DENIAL OR DELAY.' § 16, ART. I OF THE OHIO CONSTITUTION. HOOD V ROSE, 0 APP3D 199, 204. THIS ALSO VIOLATED THE DUE PROCESS RIGHTS OF APPELLANT UNDER OHIO & U.S. CONSTITUTION.

{¶40} "V. THE PLAINTIFF-APPELLEE, 'STATE OF OHIO', THE TRIAL COURT ERRED TO THE PREJUDICE OF THE DEFENDANT-APPELLANTS WHEN. IT OPINED IN 'OFF THE RECORD' EXHIBITS THAT THEY COULD NOT BE BOUND BY A DIFFERENT ALLEGED 'STATE OF OHIO', I.E., 'COUNTY PROSECUTOR', 'DIVISION OF LIQUOR CONTROL' RESPECTIVELY. THIS PREJUDICED THE DEFENDANT-APPELLANTS AND VOIDED THE CONTRACT FOR 'LACK OF JURISDICTION' FOR THE 'STATE OF OHIO, DIVISION OF LIQUOR CONTROL' TO OPINE THAT THEY WERE NOT BOUND BY THE AGREEMENT WHEN IN REALITY AS A MATTER OF LAW, THERE IS-ONLY ONE-(1)-STATE-OF OHIO- & THEY-ARE BOUND BY SAID AGREEMENT. THIS VIOLATED THE DEFENDANT-APPELLANTS 14TH AMENDMENT RIGHTS TO DUE PROCESS OF LAW & EQUAL PROTECTION OF THE LAW UNDER THE OHIO & U.S. CONSTITUTION. APLT (SIC) SEEKS TO REVERSE THIS ERROR VIA 56(C) OR 60 (B) MOTION.

{¶41} "VI. THE DEFENDANT-APPELLANTS MOVE TO VACATE THE AGREEMENT AS VOID AB INITIO SINCE THE ALLEGED CONTRACT (6/11/04: EX LL) IS VOID ON ITS FACE SINCE SAME IS ENTERED BY 'PROSECUTING ATTORNEY OF TUSCARAWAS COUNTY', EX LL, (12/15/06 MOTION) RATHER

THAN BY THE PROPER PARTY BEING THE VILLAGE OF PORT WASHINGTON (OFFICIALS) PER OHIO REVISED CODE § 4303.292(A)(1) & (2). THIS DEPRIVED THE DEFENDANT-APPELLANTS OF DUE PROCESS OF LAW UNDER THE OHIO &U.S. CONSTITUTION PER THE 14TH & 5TH AMENDMENTS RESPECTIVELY PREJUDICING THE DEFENDANTS-APPELLANTS IN VIOLATION OF § 16, 19, ART I OF THE OHIO CONSTITUTION. APLT (SIC) SEEKS TO REVERSE THIS ERROR VIA 56(C) OR 60(B) MOTION.

{¶42} "VII. THE PLAINTIFF-APPELLEE BREACHED THE AGREEMENT, EX LL (12/19/06 SUMMARY JUDGMENT MOTION, 6/11/04: JOURNAL ENTRY), TO THE PREJUDICE OF THE DEFENDANT-APPELLANTS BY NOT NOTIFYING THE OHIO DEPT OF LIQUOR CONTROL IN A TIMELY MANNER PER THE AGREEMENT, PG 3, ¶6 OF SAID AGREEMENT TO 6. THE PARTIES WILL CONVEY WITHIN ONE WEEK TO THE DIVISION OF LIQUOR CONTROL THE TERMS OF THE AGREEMENT & REQUEST THAT ADMINISTRATIVE LITIGATION-RELATED TO-THE RENEWAL OF THE DEFENDANTS' (APPELLANTS) LIQUOR PERMIT BE TERMINATED AND THAT DEFENDANTS-APPELLANTS' WILL SEEK TO PLACE THE PERMIT IN 'SAFE-KEEPING' FOR POSSIBLE TRANSFER TO A POTENTIAL PURCHASER OF THE REAL ESTATE QUALIFIED UNDER TERMS OF THIS AGREEMENT. THE BREACHING OF THIS ¶6 BY THE PLAINTIFF-APPELLEES VOIDS THE AGREEMENT AND THE PLAINTIFF-APPELLEE CANNOT ENFORCE THE (6/11/04: CONTRACT, EX LL, 12/19/06 SJ MOTION) AGREEMENT AFTER THE PLAINTIFF--APPELLEE BREACHED THE TERMS OF SAME. THIS VIOLATES THE APPELLANTS DUE PROCESS RIGHTS UNDER THE OHIO & U.S. CONSTITUTION.

{¶43} "VIII. THE TRIAL COURT ERRED TO THE PREJUDICE OF APPELLANT WHEN IT DENIED APPELLANT'S MOTION FOR ACCESS TO THE PROPERTY AS IT IS SECURED BY APPELLEE (SHERIFF) & APPELLANT HAS PERSONAL PROPERTY IN SAME IN VIOLATION OF THE APPELLANT'S DUE PROCESS RIGHTS UNDER THE OHIO &U.S. CONSTITUTION."

{¶44} We shall first address the assignments of error set forth by appellants Debbie Lent and The Ugly Mug, Ltd.

{¶45} In the first assignment of error, appellants Lent and Ugly Mug, Ltd. argue that the trial court lacked the authority to enforce the terms of the parties' June 11, 2004, settlement agreement once the matter was voluntarily dismissed by the appellee.

{¶46} A trial court possesses the authority to enforce a settlement agreement voluntarily entered by the parties to a lawsuit. *Tabaa v. Koglman*, 149 Ohio App.3d 373, 377-78, 2002-Ohio-5328, 777 N.E.2d 902, citing *Mack v. Polson Rubber Co.* (1984), 14 Ohio St.3d 34, 470 N.E.2d 902. However, a trial court loses jurisdiction to proceed when the court has unconditionally dismissed an action. Id., citing *State*, ex rel. *Rice v. McGrath* (1991), 62 Ohio St.3d 70, 577 N.E.2d 1100. When an action is dismissed pursuant to an expressed condition, such as the existence of a settlement agreement, the court retains jurisdiction to enforce said agreement. Id., citing *Berger v. Riddle* (August 18, 1984), Cuyahoga App. Nos. 66195, 66200. The determination of whether a dismissal is unconditional and the court is thus deprived of jurisdiction to entertain a motion to enforce a settlement agreement is dependent on the terms of the dismissal order. Id., citing *L-air Molded Plastics, Inc. v. Goforth* (February 24, 2000), Cuyahoga App. No. 74543; *Showcase Homes, Inc. v. The Ravenna Savings Bank* (1998), 126

Ohio App.3d 328, 710 N.E.2d 347.

{¶47} The language reserving limited jurisdiction need not be highly detailed or precise. *Nova Info Sys., Inc. v. Current Directions, Inc*., Lake App. No. 2006-L-214, 2007-Ohio-4373, ¶15. Rather, the entry of dismissal need merely allude to the existence of a settlement upon which the dismissal is premised. Id.

{¶48} This Court has found that a dismissal order which read, "Upon agreement of Counsel for Plaintiffs and Counsel for Defendant, this matter is dismissed with prejudice to refilling," did not reserve jurisdiction to enforce a settlement agreement. *McDougal v. Ditmore*, Stark App. No. 2008CA00043, 2009-Ohio-2019, 116. See also, *Nova Info. Sys*., supra, ¶16 (dismissal entry which unconditionally dismissed case. with prejudice failed to include language reserving jurisdiction to enforce agreement); *Cinnamon Woods Condo. Assoc., Inc. v. Divito* (February 3, 2000), Cuyahoga App. No. 76903, unreported- (appellant's notice of dismissal contained no additional notice that it was filed as a result of a settlement between the parties and the court's entry stated only that the case was dismissed with prejudice); *Lamp v. Goettle,* Hamilton App. No. C-040461, 2005-Ohio-1877, ¶11 (only document journalized was an unconditional, general notice of dismissal).

{¶49} In *Marshall v. Beach*, the trial court filed a judgment entry which stated in part, "Case settled and dismissed with prejudice, each party to bear their own costs. Judgment entry to follow. Case concluded." 143 Ohio App.3d 432, 434, 758 N.E.2d 247. No separate entry was ever filed, and the parties never completed a formal settlement agreement. Id. at 435. However, the court later granted a motion to enforce the settlement agreement. The Eleventh District Court of Appeals affirmed, finding that

although the order of dismissal did not explicitly state that the dismissal was conditioned on the settlement of the case, it was "implicit within its mandate that if the parties did not reach an ultimate resolution, the trial court retained authority to proceed accordingly." Id. at 436. The court found its conclusion buttressed by the trial court's statement that a second judgment entry was to follow. Id. The court noted that because the original order of dismissal was provisional in nature, the order was interlocutory and not appealable at that time. Id. at fn. 2.

{¶50} In the instant case, the parties entered into a settlement agreement on June 11, 2004. The terms of the agreement were journalized and the case remained pending while the court monitored the parties' compliance with certain provisions of the agreement required to be performed within certain time limits. Further, although the entry stated that it stetted all claims pending between the parties, the court continued the case until call of the court for a formal determination of nuisance. After the court's August 23, 2005, judgment enforcing the settlement agreement by ordering the property sold at sheriffs sale, an appeal to this court was dismissed for want of a final appealable order, as the court's entry stated that the issue of nuisance would be determined at a later time.

{¶51} The judgment of April 25, 2008, which is the judgment appealed from in this case, addressed a variety of motions pending before the court. This entry states:

{¶52} "Plaintiff moved this Court for a hearing on the issue of the rendering of a Final Appealable Order in this matter. [Footnote deleted]. Plaintiff requests that the Court permit the withdrawal of its request for a declaration of nuisance, based upon the settlement of all claims as reflected in the settlement agreement, and for final orders

carrying out the terms of that agreement." April 25, 2008 Judgment Entry, page 3. Thereafter the court states, "It is ORDERED that Plaintiffs request for a declaration of nuisance shall be dismissed." Id. at page 16. In the same entry the court orders that the property be sold at sheriffs sale. Id.

{¶53} We find that the entry of dismissal indicates that the court intended to reserve jurisdiction to enforce the settlement agreement. The court dismissed the nuisance action and enforced the settlement agreement in the same entry. Further, it is clear in the entry that appellee sought to dismiss its request for a declaration of a nuisance based on the settlement of all claims between the parties as reflected in the settlement agreement. Accordingly, the court did not lose jurisdiction to enforce the settlement agreement.

{¶54} The first assignment of error is overruled.

{¶55} Appellants argue that the court erred in ordering the property to be sold at sheriffs sale without a final hearing. Specifically, appellants argue the agreement as memorialized by the June 11, 2004, judgment does not bind the corporation as it does not bear the signature of anyone acting on behalf of the corporation and it does not mention the purchase price of the property or any other terms generally found in a contract for the sale of real property. Appellants argue that the court's continuance of the issue of nuisance renders the agreement ambiguous, as the agreement states that it resolves all claims between the parties. Appellants also argue that the sale of the property by the sheriff is contrary to law and equity because they performed the conditions of the agreement which were within their power to perform, appellee refused to approve prospective buyers of the property, and timely divestiture of the property was

impossible. Finally, appellants argue that the remedy of sheriffs sale is unjust.

{¶56} We first address appellants' claim that the agreement did not bind the Ugly Mug, Ltd. because the agreement was not signed by either Lent or Vasilakos in their corporate capacity.

{¶57} The record reflects that the members of the Ugly Mug, Ltd. were Debra Lent and Peter Vasilakos. See Counterclaim, ¶ 7; 3-21-05 Transcript pages 15-16. Both Lent and Vasilakos signed the settlement agreement. Therefore, all members of the limited liability company signed the agreement. Further, the transcript of the hearing reflects that Vasilakos represented to the court that he was there as the corporate representative, and Atty. Banks, who represented the Ugly Mug Ltd. in addition to Lent and Vasilakos, informed the Court that his clients agreed with the terms of the settlement:

{¶58} "MR. BANKS: Yes, your Honor. We understand the terms and my clients agree with the terms and conditions as they have signed the documents as of today's date.

{¶59} "THE COURT: Okay. And as far as representative of Ugly Mug, Ltd. which is another named party in this case, are -

{¶60} "MR. BANKS: Mr. Vasilakos is the corporate representative.

{¶61} "THE COURT: Okay, okay. Mr. Vasilakos, do you understand what all of these terms are?

{¶62} "MR. VASILAKOS: Yes, Ma'am.

{¶63} "THE COURT: And do you agree to abide by them?

{¶64} "MR. VASILAKOS: Yes, Ma'am.

{¶65} "THE COURT: And is this your signature on the document?

{¶66} "MR. VASILAKOS: Yes.

{¶67} "THE COURT: Did you sign it voluntarily?

{¶68} "MR. VASILAKOS: Yes." Transcript, pages 7-8.

{¶69} The agreement was signed by both members of Ugly Mug Ltd. Attorney Banks signed the document on behalf of all three clients and represented to the court that his clients agreed to the terms of the settlement, and Vasilakos represented to the court that he represented the corporation and signed it voluntarily. The agreement provided that the limited liability corporation would sell the property within one year, and purported-to settle all-pending claims-between the parties. The-record clearly indicates that at the time the agreement was entered, the parties and the court intended and understood that the limited liability corporation would be bound by its terms.

{¶70} Appellants next argue that the agreement does not comply with R.C. 1335.05 regarding contracts for the sale of land. Specifically they argue that the agreement was not signed by the owner of the property, nor does the contract state a purchase price.

{¶71} R.C. 1335.05 provides that an agreement for the sale of land must be in writing; the statute does not specify what terms must be included in that contract. Further, the instant agreement was not a contract for the sale of land. The agreement provided for the sale of land to a third party buyer at a date within one year of the agreement. The terms of the agreement for the sale of the land would be in the contract between appellant Ugly Mug, Ltd. and the buyer of the property, and are not germane to the agreement between the parties to this case.

{¶72} Appellants claim that the agreement is ambiguous because while it purports to settle all claims between the parties, the court included the following language in the final paragraph of the judgment incorporating the terms of the settlement agreement:

{¶73} "This matter shall be continued until the call of the Court as to the matter of formal determination of the existence and continuance of a nuisance." Judgment Entry, June 11, 2004.

{¶74} The portion of the judgment entry referenced by appellants is not a part of the agreement between the-parties. The agreement at paragraph 11, as quoted earlier in this opinion, clearly and unambiguously states that it resolves all claims between the parties. To the extent the court's entry created confusion as to the finality of the settlement, such confusion was clarified by the dismissal of the action for nuisance in order to render the judgment enforcing the agreement final and appealable.

{¶75} Appellants argue that sale of the property within one year was impossible and/or impracticable due in part to the fact that appellee thwarted their attempts to sell the property. They also argue that they substantially complied with the terms of the agreement.

{¶76} A party does not breach a contract when such party substantially performed the terms of the contract. *Hansel v. Creative Concrete & Masonry Construction Company,* 148 Ohio App.3d 53, 772 N.E.2d 138, 2002-Ohio-198, ¶12. Nominal, trifling, or technical departures are not sufficient to constitute breach. Id. The doctrine of substantial performance only applies if the unperformed portion of the contract does not destroy the value or purpose of the contract. Id.

{¶77} Impossibility of performance occurs where, after the contract is entered into, an unforeseen event arises rendering impossible the performance of one of the contracting parties. *State v. Curtis*, Greene App. No. 2008CA22, 2008-Ohio-5643.

{¶78} Performance may be impracticable because it will involve a risk of injury to person or property that is disproportionate to the ends to be attained by performance. *B-Right Trucking Co. v. Warfab Field Machining and Erection Corp*., Trumbull App. No. 2000-T-0072, 2001-Ohio-8724. "Impracticability" means more than "impracticality." Id. A mere change in the degree of difficulty or expense does not amount to impracticability. Id. A party is expected to use reasonable efforts to surmount obstacles to performance, and performance is only impracticable if it is so in spite of such efforts. Id.

{¶79} The agreement clearly provides at paragraph four that the property shall not be sold to any individual having ownership in the Ugly Mug, Ltd., any relative of the owners of the Ugly Mug, or any employees, agents, or other persons who have had a business relationship with any of the appellants.

{¶80} However, the transcript of the March 21, 2005, hearing reflects that the only efforts appellants made to sell the property were to persons impermissibly connected to the business under the terms of the agreement. Initially, they attempted to sell the property to appellant Lent's brother. Tr. 14. Later, they attempted to sell the property to Paul Triplett. Tr. 12. The evidence demonstrated that the land installment contract between appellants and Triplett listed a purchase price of $408,000 with no down payment because Triplett could not afford it. Tr. 16. Lent testified that appellants paid $110,000 for the property in 1999 or 2000, and she believed the price was reasonable because she knew "what the potential is." Tr. 16-17. However, she had no

idea what the business profit was the last year the bar was open. Tr. 17. The agreement did not divest appellants of their interest in the real estate, as the property reverted to Lent and Vasilakos if Triplett missed a payment. Tr. 22. Lent testified that Triplett at one point in time lived with her daughter, and while he no longer had a romantic relationship with Lent's daughter, he was "more in love" with Lent's granddaughter. Tr. 19. 81

{¶81} Triplett testified that he did not have the property assets appraised and did not know the earnings of the bar. Tr. 35. He did not attempt to get a loan to buy the bar because he had medical bills and had to file bankruptcy during a divorce. Tr. 37. He came into the bar daily, and while not paid for his services, had tended bar and made pizza. Tr. 39. He testified that he did the work voluntarily in exchange for free beer and "a shot here and there" because it was cheaper than "sitting there drinking." Tr. 28. He conceded that he might have reported to the Child Support Enforcement Agency that he was employed by the Ugly Mug. Tr. 29. He also received tips for helping in the bar. Tr. 38.

{¶82} The former Port Washington Chief of Police Scott Beckley testified that he believed Triplett was helping appellants run the business because Triplett dealt with the police to try to resolve issues involving the bar, and he heard Lent ask Triplett to run the bar on the night Beckley arrested Lent. Tr. 45-46

{¶83} Appellants made no effort to list the property with a real estate agent or business broker. Tr. 21.

{¶84} The court did not err in concluding that based on the evidence presented, appellants did not substantially comply with the contract, nor was performance rendered impossible or impracticable. The only efforts appellants made to sell the bar were to

persons connected to appellants and the business, which was not permitted under the terms of the agreement.

{¶85} Finally, appellants argue that the remedy of a sheriffs sale is unjust. Civ. R. 70 provides:

{¶86} "If a judgment directs a party to execute a conveyance of land, to transfer title or possession of personal property, -to deliver deeds or other documents, or to perform any other specific act, and the party fails to comply within the time specified, the court may, where necessary, direct the act to be done at the cost of the disobedient party by some other person appointed by the court, and the act when so done has like effect as if done by the party. On application of the party entitled to performance, the clerk shall issue a writ of attachment against the property of the disobedient party to compel obedience to the judgment. The court may also in proper cases adjudge the party in contempt. If real or personal property is within this state, the court in lieu of directing a conveyance thereof may enter a judgment divesting the title of any party and vesting it in others, and such judgment has the effect of a conveyance executed in due form of law. When any order or judgment is for the delivery of possession, the party in whose favor it is entered is entitled to a writ of execution upon application to the clerk."

{¶87} Appellants failed to comply with the agreement to sell the land in one year, as required by the contract. As discussed earlier, appellants made no effort to list the property with a real estate agent or business broker and their only attempts to sell the property were to persons with impermissible connections to the business. Pursuant to Civ. R. 70, the court had authority to appoint a person, in this case the sheriff, to sell the

property on appellants' behalf. Appellant has not demonstrated that this remedy is unjust.

{¶88} The second assignment of error is overruled.

{¶89} We next turn to the assignments of error filed pro se by appellant Vasilakos:

I, V, VII

{¶90} In his first, fifth and seventh assignments of error, appellant argues that the appellee breached the contract by failing to comply with the provisions of the agreement regarding the liquor license. Appellant argues that appellee committed fraud by negotiating the status of the liquor license with no authority to bind the Ohio Department of Liquor Control (hereinafter "ODLC"), and the agreement is therefore void ab initio. He argues that appellee failed to convey the agreement of the parties to ODLC in violation of the agreement and, having breached the contract, appellee can not now seek to enforce it.

{¶91} Paragraph 6 of the agreement, quoted earlier in this opinion, specifically states that the parties understand that no guarantees are made concerning what ODLC would choose to do on this issue. The agreement was simply that the terms of the agreement would be conveyed to ODLC along with a request that administrative litigation related to the renewal of the liquor permit would be terminated and the permit would be placed in safekeeping for possible transfer to a potential purchaser of the bar. The agreement clearly states that all parties knew appellee could not bind ODLC to any promises regarding the status of the liquor permit. On August 15, 2005, the prosecutor filed a response to appellant Vasilakos's communication to the court on this issue. The

prosecutor represented that he had notified the Bureau of Liquor Control, by phone on the day the court entered its judgment, that the State and Village of Port Washington were no long interested in the termination or suspension of the liquor permit. The prosecutor also represented that he had notified the Bureau of Liquor Control in writing on three occasions. The prosecutor attached letters communicating this position to the ODLC and the Ohio Attorney General dated June 22, 2004, July 1, 2004, and April 4, -2005: The evidence does not does not establish that appellee breached the contract by failing to send the agreement to ODLC.

{¶92} The first, fifth, and seventh assignments of error are overruled.

II, Ill, IV

{¶93} In his second, third, and fourth assignments of error, appellant challenges the court's judgment ordering the property sold at sheriffs sale. Appellant argues that the remedy was not in the original contract, the order constitutes an unconstitutional taking of his property and appellee's refusal to allow the sale of the property to a third party is a breach of the contract.

{¶94} The property is not owned by appellant. The property is owned by the limited liability corporation Ugly Mug, Ltd. Thus, the right to challenge the sale of the property belongs to the corporation, not appellant. While appellant is an owner of the limited liability corporation, a limited liability corporation as a separate legal entity cannot maintain litigation in propria persona, or appear in court through an agent not admitted to the practice of law. *Bd. of Educ. of the Whitehall School Dist. V. Franklin Cty. Bd. of Revision,* Franklin App. Nos. 01AP-878, 01AP-879, 2002-Ohio-1256, at page 4.

{¶95} The corporate entity has entered an appearance in this action properly

represented by an attorney admitted to the practice of law in this state. Appellant's pro se assignments of error on behalf of the corporation are not properly before this court.

{¶96} The second, third, and fourth assignments of error are overruled.

VI

{¶97} In his sixth assignment of error, appellant argues that the prosecutor was not the proper party to bring the instant action. Instead, appellant argues that the action was -required to be instituted-by the Village of Port Washington.

{¶98} R. C. 3767.03 provides in pertinent part:

{¶99} "Whenever a nuisance exists, the attorney general; the village solicitor, city director of law, or other similar chief legal officer of the municipal corporation in which the nuisance exists; the prosecuting attorney of the county in which the nuisance exists; the law director of a township that has adopted a limited home rule government under Chapter 504. of the Revised Code; or any person who is a citizen of the county in which the nuisance exists may bring an action in equity in the name of the state, upon the relation of the attorney general; the village solicitor, city director of law, or other similar chief legal officer of the municipal corporation; the prosecuting attorney; the township law director; or the person, to abate the nuisance and to perpetually enjoin the person maintaining the nuisance from further maintaining it."

{¶100} The statute clearly authorizes an action for abatement of a nuisance to be brought by the county prosecutor, as was done in the instant action.

{¶101} The sixth assignment of error is overruled.

VIII

{¶102} In his eighth and final assignment of error, appellant argues that the court erred in overruling his motion to gain entry to the real estate at issue in order to remove his personal property.

{¶103} The agreement provides that appellants shall remove personal property on the premises as provided by R.C. 3767.06(A) upon arrangement with the sheriff. R.C. 3767.06(A) provides in pertinent part:

{¶104} "If the existence of a nuisance is admitted or established in the civil action provided for in section "3767.03 of-the-Revised-Code or in a-criminal action, an order of abatement shall be included in the judgment entry under division (D) of section 3767.05 of the Revised Code. The order shall direct the removal from the place where the nuisance is found to exist of all personal property and contents used in conducting or maintaining the nuisance and not already released under authority of the court as provided in division (C) of section 3767.04 of the Revised Code and shall direct that the personal property or contents that belong to the defendants notified or appearing be sold, without appraisal, at a public auction to the highest bidder for cash."

{¶105} The statute places on the sheriff the responsibility to remove and sell at auction the property used in maintaining the nuisance. The settlement agreement placed the responsibility on appellants to make arrangements with the sheriff for the removal of personal property, not used in maintaining the nuisance, from the premises. Having agreed to the closing and securing of the bar pursuant to R.C. 3767.06(A) in the settlement agreement, appellant did not have the right to free access to the bar for the purpose of removing personal property. Appellant's remedy lies in making proper

arrangements with the sheriff to access the property, not by way of a court order giving him access to the property contrary to the terms of the agreement.

{¶106} The court did not err, pursuant to the terms of the agreement and the statute, in overruling appellant's motion to gain entry to the property.

{¶107} The eighth assignment of error is overruled.

{¶108} The judgment of the Tuscarawas County Common Pleas Court is affirmed.

By: Edwards, J.

Hoffman, P.J. and

Wise, J. concur

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JUDGES

JAE/R0508

Hoffman, P.J., concurring in part and dissenting in part

{¶109} I concur in the majority's analysis and disposition of Appellant Vasilakos's Assignments of Error I, II, III, IV, V, VI and VII.

{¶110} I dissent without further opinion as to the majority's disposition of Appellant Vasilakos's Assignment of Error VIII and Appellant Lent's Assignments of Error.

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HON. WILLIAM B. HOFFMAN

[Cite as *State ex rel. Spies v. Lent,* 2009-Ohio-3844.]

IN THE COURT OF APPEALS FOR TUSCARAWAS COUNTY, OHIO

FIFTH APPELLATE DISTRICT

STATE OF OHIO, ex rel.,	:	
Plaintiff-Appellee	:	
-vs-	:	JUDGMENT ENTRY
DEBBIE LENT, et al.,	:	
Defendant-Appellant	:	CASE NO. 2008 AP 05 0033

For the reasons stated in our accompanying Memorandum-Opinion on file, the judgment of the Tuscarawas County Court of Common Pleas is affirmed. Costs assessed to appellant.

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JUDGES