[Cite as *Gatlin v. Bonnerville Dev., Inc.*, 2002-Ohio-7223.]

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 80212

MORRIS E. GATLIN, ET AL.	:	
	:	
Plaintiffs-Appellants	:	
	:	JOURNAL ENTRY
	:	
vs.	:	and
	:	
	:	OPINION
BONNERVILLE DEVELOPMENT, INC.	:	
	:	
Defendant-Appellee	:	

DATE OF ANNOUNCEMENT OF DECISION:	December 26, 2002
CHARACTER OF PROCEEDING:	Civil appeal from Court of Common Pleas Case No. CV-438398
JUDGMENT:	REVERSED AND REMANDED
DATE OF JOURNALIZATION:	_____
APPEARANCES:	
For Plaintiffs-Appellants:	JAMES R. SKELTON 8025 Corporate Center North Royalton, Ohio 44133
For Defendant-Appellee:	TYRONE E. REED 11811 Shaker Boulevard Suite 420 Cleveland, Ohio 44120

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COLLEEN CONWAY COONEY, J.:

{¶1} Morris and Beth Gatlin appeal the trial court's sua sponte dismissal of their complaint. We find merit to the appeal and reverse and remand for further proceedings.

{¶2} The Gatlins originally filed a complaint against Bonnerville Development, Inc. for breach of a construction contract. On May 15, 1999, the Gatlins entered into a settlement agreement with Bonnerville and the original case was dismissed with prejudice.

{¶3} According to the Gatlins, Bonnerville breached the settlement agreement and, therefore, on May 9, 2001, they filed the underlying action as a new complaint ("the new case") which was assigned to a second judge. Bonnerville's answer stated that it had fully complied with the settlement agreement.

{¶4} On May 22, 2001, the second judge transferred the new case to the first judge who had presided over the original case involving the breach of the construction contract. However, the first judge transferred the new case back to the second judge stating in the journal entry:

{¶5} "As case CV 351207 [the breach of construction contract case] was dismissed with prejudice on 3-5-01, this matter is not a refiled action and is properly filed before [the second judge]." [Inserts added].

{¶6} On August 3, 2001, without a motion by either party, the second judge dismissed the new case, stating in the journal entry:

{¶7} "This case, previously filed as 351207 was S&D with prejudice. Case dismissed as not properly before the court. 60(B) motion pending in 351207 with [the first judge]. Final."

{¶8} The Gatlins raise two assignments of error in this appeal. They argue that the trial court erred by dismissing their case because the civil rules do not allow a sua sponte dismissal without notice or opportunity to the parties to respond. They also contend that they properly filed their claim for breach of the settlement agreement separately from the case in which they alleged breach of the construction contract.

{¶9} We find that the new case alleging breach of the settlement agreement should have been assigned to the docket of the first judge as was done by the trial court in *Tepper v. Heck* (Dec. 10, 1992), Cuyahoga Dist. No. 61061. When the original case was dismissed by the first judge, the journal entry declared that the matter was settled and dismissed, indicating the case was conditionally dismissed and thus allowing the first judge to retain authority over the case if the terms were not met. Apparently, a Civ.R. 60(B) motion seeking to vacate the settlement was also pending in the first case.

{¶10} However, we disagree with the manner in which the trial court resolved the issue by sua sponte dismissing the case after the first judge erroneously refused to accept the case on the judge's docket. This left the Gatlins with no means to seek reassignment of the case to the proper docket.

{¶11} Instead of dismissing the case after the first judge refused to accept the transfer of the case, the second judge should have referred the matter to the administrative judge for reassignment. Local Rule 15(H) states:

{¶12} "(H) Pursuant to Civil Rule 42, when actions involving a common question of law and fact are pending in this Court, upon motion by any party, the Court may order a joint trial of any or all of the matters in issue; it may order all or some of the actions consolidated * * *.

{¶13} "All the judges involved in the consolidation motion shall confer in an effort to expedite the ruling. The Judge who has the lowest numbered case shall rule on the motion. **In the event that the judges cannot agree, the motion shall be referred to the Administrative Judge for ruling."** (Emphasis added.)

{¶14} Although the local rule requires that a motion to consolidate be filed, the second judge's attempt to transfer the case to the first judge was essentially that – an attempt to consolidate the cases. If a hearing had been held prior to the trial court's sua sponte dismissal of the new case, a motion to consolidate could have been suggested by the parties or the judge. The Gatlins, having no notice of the court's intention to dismiss their case, were left with no avenue to obtain reassignment to the first judge's docket.

{¶15} The first and second assignments of error are sustained.

{¶16} Judgment is reversed and the case is remanded for further proceedings consistent with this opinion.

It is, therefore, considered that said appellants recover of said appellee their costs herein.

It is ordered that a special mandate be sent to the Cuyahoga County Court of Common Pleas to carry this judgment into execution.

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

FRANK D. CELEBREZZE, JR., P.J. CONCURS;

DIANE KARPINSKI, J. DISSENTS WITH SEPARATE DISSENTING OPINION

JUDGE COLLEEN CONWAY COONEY

N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also, S.Ct.Prac.R. II, Section 2(A)(1).

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KARPINSKI, J., DISSENTING:

{¶17} I dissent based upon the authority of this court's decisions in *Le-Air Molded Plastics, Inc. v. Goforth* (Feb. 24, 2000), Cuyahoga App. No. 74543, 2000 Ohio App. LEXIS 653 and *Estate of Sam Berger v. Riddle* (Aug. 18, 1994), Cuyahoga App. Nos. 66195, 66200, 1994 Ohio App. LEXIS 3623. I would affirm the judgment of the trial court in the case at bar, because the dismissal in the first case, No. 351207, was conditional, leaving that court with the authority to enforce the settlement agreement reached between the parties in that case.

{¶18} In making its decision, the majority has passed over appellant's specific argument in the two assignments of errors articulated in this case:

{¶19} "I. THE TRIAL COURT ABUSED ITS DISCRETION BY SUA SPONTE DISMISSING PLAINTIFF'S COMPLAINT WITHOUT ALLOWING THE PLAINTIFFS TO PRESENT EVIDENCE. (Journal Entry, Vol. 2631, p. 0205).

{¶20} "II. THE TRIAL COURT ABUSED ITS DISCRETION IN SUA SPONTE FINDING THE CASE BEFORE IT WAS PREVIOUSLY FILED AS CV351207 WITHOUT ALLOWING THE PLAINTIFF TO PRESENT EVIDENCE OR HAVE AN OPPORTUNITY TO BE HEARD. (Journal Entry, Vol. 2631, p. 0205)."

{¶21} The majority takes issue with "the manner in which the trial court resolved the issue." The issue as appellants articulated it is whether the second judge abused her discretion when, without a hearing, the court dismissed their case, which they characterize as a new action based upon the settlement previously reached in Case No. 351207. Without ever addressing appellant's specific argument, the majority has advised what the second judge "should have" done. The underlying

issue is whether appellants' commencement of a brand new action is proper and whether the court had sufficient information to make its decision sua sponte.

{¶22} In *Bolen v. Young* (1982), 8 Ohio App. 3d 36, 455 N.E.2d 1316, the Tenth District Court of Appeals held as follows: "Relief may be sought through the filing of an independent action sounding in breach of contract, or it may be sought in the same action through a supplemental pleading filed pursuant to Civ. R. 15(E), setting out the alleged agreement and breach." In the case at bar, the issue is *whether both options are available in any action seeking enforcement of a settlement agreement.* Not both options are available, at least, not on the facts provided in this case.[1]

It is the analysis of this issue that explains why the solution offered by the majority is not available.

[1] I note in *Bolen* the following critical facts: (1) the terms of the agreement were not memorialized on the record, (2)defendant later disputed the terms of the agreement by refusing to approve an entry journalizing the agreement, (3) the court asked plaintiff to submit a Judgment Entry setting forth the agreement, the terms of which defendant disputed, (4) without an evidentiary hearing, the trial judge, in a judgment entry, adopted the terms of the agreement *as the judge recalled them and understood them*. The *Bolen* court explained the proper procedure under these circumstances is to have an evidentiary hearing before another judge, in which the trial judge may be called as a witness to testify as to the judge's recollection and understanding of the terms of the agreement. In the case at bar, there is nothing to indicate that whether the judge relied upon her personal knowledge of the terms of the past settlement and that this basis is challenged.

{¶23} First of all, a motion filed in the original case to enforce the settlement was granted, and a 60(B) motion in that case is still pending. Appellants cite no authority to support the position that litigants can pursue both options at the same time. Second, no one in the case at bar has alleged anything that would justify removing the case from the jurisdiction of the judge in the earlier case.

This court has previously ruled that a case marked settled and dismissed is a conditional dismissal. We explained as follows:

{¶24} "A trial court possesses the authority to enforce a settlement agreement voluntarily entered into by the parties to a lawsuit." *Mack v. Polson* (1984), 14 Ohio St.3d 34, 470 N.E.2d 902. *Spercel v. Sterling Industries* (1972), 31 Ohio St.2d 36, 285 N.E.2d 324. A trial court loses the authority to proceed in a matter when the court unconditionally dismisses an action as the court no longer retains jurisdiction to act. *State, ex rel. Rice v. McGrath* (1991), 62 Ohio St.3d 70, 577 N.E.2d 1100.

{¶25} "When an action is dismissed pursuant to a stated condition, such as the existence of a settlement agreement, the court retains the authority to enforce such an agreement in the event the condition does not occur. *Tepper v. Heck* (Dec. 10, 1992), Cuyahoga App. No. 61061, unreported; *Hines v. Zafko* (March 22, 1994), Trumbull County App. No. 93-T-4928, unreported. In the event that a factual dispute arises concerning the existence or the terms of a settlement agreement, as in this instance, Ohio courts have held that an evidentiary hearing is required in order to determine the nature of the purported settlement. *Palmer v. Kaiser Found. Health* (1991), 64 Ohio App.3d 140, 580 N.E.2d 849." *Estate of Sam Berger v. Riddle* (Aug. 18, 1994), Cuyahoga App. Nos. 66195, 66200, 1994 Ohio App. LEXIS 3623.

{¶26} In *Estate of Sam Berger*, supra, the trial court conditionally dismissed the case by stating that all claims between the parties were settled and dismissed. Upon learning that a dispute had arisen between the parties concerning the settlement agreement, the trial court properly set the matter for an oral hearing to determine the extent of the disputed terms. At the evidentiary hearing, the court determined that the parties had, in fact, reached a settlement and ordered that the settlement agreement be enforced.

{¶27} In Case No. 351207, the docket of the first trial court indicates "*** S&D Case dismissed with prejudice." This entry specified a settlement; thus the dismissal was conditional, and the trial court "retain[ed] the authority to enforce" the settlement agreement. *Estate of Berger*, supra. See also *Le-Air Molded Plastics, Inc. v. Goforth* (Feb. 24, 2000), Cuyahoga App. No. 74543, 2000 Ohio App. LEXIS 653.

{¶28} After plaintiff filed the second case now before us, the matter was assigned to a different judge. This judge determined that this case was the same case that had been previously settled and dismissed with prejudice and, therefore, that she did not have jurisdiction to proceed.

{¶29} I agree. The complaint in the case at bar specifically alleges that the action arises from a settlement agreement, and the cover sheet filed with this complaint indicates the case had previously been filed and dismissed under Case No. 351207. Any enforcement of the settlement agreement in the underlying case would have to be filed in Case No. 351207. Indeed, the docket in that case indicates that a motion to enforce was filed on October 6, 2000 and granted on November 16, 2000.

{¶30} Moreover, because the face of the complaint and the cover sheet, along with the court's docket in Case No. 351207, provided all the information necessary to determine the issue of

jurisdiction, it was not necessary for the court to hold a hearing. Accordingly, I believe appellants' assignments of error are not well taken.

{¶31} The majority acknowledges that the original case was conditionally dismissed and also that this conditional dismissal allowed "the first judge to retain authority over the case if the terms were not met." The majority also acknowledges that "apparently" there was a Civ. R. 60(B) motion pending in the first case.[2] Nevertheless, the majority states that the second judge "should have" referred the matter to the administrative judge for reassignment pursuant to Local Rule 15(H).

{¶32} While there is much that the two common pleas judges could have and should have done to resolve the matter, there was no motion to refer to the Administrative Judge. Nor can I accept as a basis for this court's decision the speculation that, "if" the second judge had held a hearing, the parties "could have" suggested such a motion.

{¶33} I would affirm the judgment of the trial court in the case at bar because the dismissal in the first case, No. 351207, was conditional, leaving that court with the authority to enforce the

[2]The record in the underlying case makes this clear. A court may "take judicial notice of related proceedings and records in cases before that court." In re D.H. Overmeyer (1982) 23 B.R. 823, 928. See also Evid. R. 201.

settlement agreement reached between the parties in that case and thus leaving the parties *with no other option* than to return to the trial judge in that case.

{¶34} For this reason I further disagree with the majority's final reason: that because the first judge refused to accept the case back onto her docket and the second judge in the case dismissed the new case on the same matter, "[t]his left the Gatlins with no means to seek reassignment of the case to the proper docket." There was no reason to keep the second case alive, much less to reassign it. Neither at the trial nor at the appellate level has there been any indication that the cases differ in any material respect. Given the pendency of the 60(B) motion in the first case and the court's continuing jurisdiction to enforce the parties' settlement, I see no reason for the majority to declare that the second judge should have kept the second case alive, much less had to, when appellant never had the option to file it.