[Cite as *Weisman v. Blaushild*, 2010-Ohio-3199.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93928

MARK S. WEISMAN, ET AL.

PLAINTIFFS-APPELLEES

vs.

JAY L. BLAUSHILD, ET AL.

DEFENDANTS-APPELLANTS

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-571769

BEFORE: McMonagle, J., Kilbane, P.J., and Cooney, J.

RELEASED: July 8, 2010

JOURNALIZED:

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) 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(C) unless a motion for reconsideration with supporting brief, per App.R. 26(A), or a motion for consideration en banc with supporting brief per Loc.App.R. 25.1(B)(2), is filed within ten 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(C). See, also, S.Ct. Prac.R. 2.2(A)(1).

CHRISTINE T. McMONAGLE, J.:

{¶ 1} Defendants-appellants, Jay L. Blaushild, Famous Enterprises, Inc., Famous Manufacturing Co., and Famous Distribution, Inc. (collectively "Famous"), appeal the trial court's judgment (1) denying Famous's motion for partial summary judgment, and (2) granting the motion for summary judgment of plaintiffs-appellees Mark S. Weisman, Heidi B. Weisman, Jack Weisman, and Sara Weisman. We affirm.

I. Procedural History and Facts

{¶ 2} In 1991, Mark Weisman entered into an employment agreement with Famous to become its vice president and general counsel. In 2001, the relationship between the parties soured and separation negotiations began. In an April 2002 meeting, Mark Weisman and Famous discussed the amount of stock the Weismans owned and the amounts of stock that would be transferred to them.[1] On May 14, 2003, Mark Weisman signed a Comprehensive Settlement Agreement and ended his employment with Famous.

{¶ 3} In September 2005, the Weismans filed suit against Famous, alleging that during the negotiations, it fraudulently or negligently misrepresented the amount of stock the Weismans owned. The Weismans

[1]Heidi Weisman is Mark's wife, and Jack and Sara are their minor children.

claimed that they first discovered the misrepresentation in July 2004. Famous answered and counterclaimed. In Count 1 of its counterclaim, Famous alleged that the release and waiver provision of the Comprehensive Agreement barred the Weismans' action. In Count 2 of its counterclaim, Famous alleged breach of contract based on the release and waiver provision of the Comprehensive Settlement Agreement and sought costs and attorney fees as damages.

{¶ 4} The Weismans moved to strike the counterclaims, but the trial court denied their motion. Famous moved for summary judgment on the Weismans' complaint. The trial court granted the motion and stayed the counterclaims pending appeal; this court upheld the judgment on appeal and remanded the case to the trial court for disposition of the counterclaims. *Weisman v. Blaushild*, Cuyahoga App. No. 88815, 2008-Ohio-219.

{¶ 5} On remand, Famous filed a motion for partial summary judgment on the issues of (1) liability, i.e., breach of the Comprehensive Settlement Agreement, and (2) the nature of the damages recoverable by law. The Weismans filed a cross motion for summary judgment. The trial court denied Famous's motion and granted the Weismans' motion, thereby denying any costs or attorney fees. "

II. Law and Analysis

{¶ 6} For its sole assigned error, Famous contends that the trial court erred in denying its motion for partial summary judgment and granting the Weismans' motion for summary judgment.[2] Famous raises the issues of (1) whether Mark Weisman breached the release contained in the Comprehensive Settlement Agreement by litigating claims that were barred by the release, and (2) whether Famous's attorney fees and expenses incurred in litigating the released claims are in the nature of compensatory damages resulting from the alleged breach of the release.

{¶ 7} We are not persuaded by Famous's contention that, "in bringing claims that were undeniably barred by the release language of the parties' Comprehensive Settlement Agreement, Weisman breached the agreement as a matter of law." As explained by this court in the first appeal, although a validly executed release is generally an absolute bar to an action on a claim encompassed by the release,[3] a party can be relieved from a release if he alleges that the "release was obtained by fraud and that he has tendered back

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[2]We review an appeal from summary judgment under a de novo standard of review. *Northeast Ohio Apt. Assn. v. Cuyahoga Cty. Bd. of Commrs.* (1997), 121 Ohio App.3d 188, 191, 699 N.E.2d 534. Under Civ.R. 56, summary judgment is appropriate when: (1) no genuine issue as to any material fact exists, (2) the party moving for summary judgment is entitled to judgment as a matter of law, and (3) viewing the evidence most strongly in favor of the non-moving party, reasonable minds can reach only one conclusion that is adverse to the non-moving party. See, also, *Temple v. Wean United, Inc.* (1997), 50 Ohio St.2d 317, 327, 364 N.E.2d 267.

[3]*Weisman v. Blaushild,* 2008-Ohio-219, ¶21.

the consideration received for the release." Id. at ¶25, citing *Haller v. Borrer Corp.* (1990), 50 Ohio St.3d 10, 552 N.E.2d 207.

{¶ 8} In the first summary judgment exercise, the Weismans argued that *Haller* is distinguishable from this case and, therefore, not controlling. This court disagreed, however, and held, on the authority of *Haller,* that because of the release, the Weismans had only one way to bring suit against Famous: they had to first rescind the Agreement and tender back the consideration they received for it. Id. at ¶43. Because the Weismans had not done so, this court found that the trial court properly granted Famous's motion for summary judgment on the Weismans' fraud claim. However, neither the trial court nor this court in the first appeal held, as Famous insinuates, that the Weismans breached the Agreement by bringing this action. And we do not now so hold. The Weismans were not absolutely barred from bringing suit; rather, they had only one course of action for bringing suit, i.e., rescind the Comprehensive Settlement Agreement and tender back the consideration, and they failed to exercise that course. Because they failed to exercise the proper course does mean that they breached the Comprehensive Settlement Agreement as a matter of law.

{¶ 9} Finding that the Weismans did not breach the Comprehensive Settlement Agreement by filing this action, Famous's argument that they are entitled to recover attorney fees and litigation expenses "as compensatory

damages flowing directly from Weisman's breach of the Comprehensive Settlement Agreement" is without merit.

{¶ 10} Further, under the "American rule," followed by Ohio courts, the prevailing party in a civil case may not recover attorney fees as a part of the costs of litigation. *Wilborn v. Bank One Corp.*, 121 Ohio St.3d 546, 2009-Ohio-306, 906 N.E.2d 396, ¶7. The following are exceptions to the rule: (1) attorney fees are provided for by statute, (2) bad faith by the non-prevailing party is demonstrated, or (3) there is an enforceable contract that specifically provides for the non-prevailing party to pay the prevailing party's attorney fees. Id., citing *Nottingdale Homeowners' Assn., Inc. v. Darby* (1987), 33 Ohio St.3d 32, 33-34, 514 N.E.2d 702. None of the exceptions apply here and, therefore, Famous is not entitled to recover its attorney fees.

{¶ 11} In light of the above, the sole assignment of error is overruled.

Judgment affirmed.

It is ordered that appellees recover from appellants costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court 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.

CHRISTINE T. McMONAGLE, JUDGE

MARY EILEEN KILBANE, P.J., and
COLLEEN CONWAY COONEY, J., CONCUR