[Cite as *LEH Properties, Inc. v. Pheasant Run Assn.*, 2011-Ohio-516.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF LORAIN	)	

LEH PROPERTIES, et al.	C.A. No. 10CA009780
Appellees	
v.	APPEAL FROM JUDGMENT ENTERED IN THE
PHEASANT RUN ASSOCIATION, et al.	COURT OF COMMON PLEAS COUNTY OF LORAIN, OHIO
Appellants	CASE No. 04CV137714

DECISION AND JOURNAL ENTRY

Dated: February 7, 2011

BELFANCE, Judge.

{¶1} Defendant-Appellant Pheasant Run Association ("Pheasant Run") appeals from decisions of the Lorain County Court of Common Pleas which granted the motions of Plaintiffs-Appellees LEH Properties, Inc., Sawbuck, Inc. and Lee Holztrager (collectively "Plaintiffs") to enforce a settlement agreement and for attorney fees. For the reasons set forth below, we affirm.

BACKGROUND

{¶2} Much of the background of this case was summarized in this Court's prior opinion:

> "Pheasant Run is a non-profit corporation composed of several hundred homeowner-shareholders living in the Pheasant Run Village community of LaGrange Township. Five individuals composed Pheasant Run's board of directors during the period relevant to this appeal, including Ronald Mertz, Leonard Schaffer, and Lori Quinones. LEH Properties, Inc. ("LEH") is a separate corporation. The principal of LEH, Lee Holztrager, also ran another company, Sawbuck, Inc. ("Sawbuck"), which built homes.
>
> "LEH owned land adjacent to Pheasant Run, and Hol[]ztrager sought to form a contract with Pheasant Run, whereby Sawbuck would build approximately 200 new houses on the land. The parties entered into extended negotiations, but

Pheasant Run eventually attempted to extricate itself from the deal. On February 23, 2004, LEH, Sawbuck, and Holztrager (collectively "Plaintiffs") brought suit against Pheasant Run and Shaffer for breach of contract and fraud.

"The parties prepared for a jury trial on August 7, 2006, but indicated that they had reached an agreement before trial commenced. The parties and their attorneys went on the record before the trial court and read their agreement into the record. Plaintiffs' attorney, Brent English, then indicated that he would draft the written agreement and forward it to Pheasant Run for review. It is a matter of contention on appeal as to when Attorney English actually forwarded the written agreement to Pheasant Run.

"On November 27, 2006, Plaintiffs filed a show cause motion, which targeted Pheasant Run's failure to carry out the settlement agreement and asked the court to enforce the agreement and to award Plaintiffs their attorney fees. On December 11, 2006, Pheasant Run filed a response, indicating that it had waited to respond to the 'proposed settlement' for various reasons. The trial court scheduled a status hearing on the matter, but never entered a formal ruling on the record as to Plaintiffs' motion.

"On May 23, 2007, Plaintiffs filed a renewed motion to enforce settlement. That motion contained a copy of a 'mutual release and settlement agreement' that set forth the entire agreement between the parties. The following individuals signed the mutual release and settlement agreement: Lee Hol[]ztrager, individually and in his capacity as president of LEH and president of Sawbuck; Leonard Shaffer, as an individual; Ronald E. Mertz, as president of Pheasant Run's board of directors; and Lori Quinones, as a member of Pheasant Run's board. The latter three individuals all signed the document on January 2, 2007.

"On August 6, 2007, Pheasant Run filed its response to Plaintiffs' renewed motion. In its response, Pheasant Run argued that the trial court was obligated to hold an evidentiary hearing to determine whether or not the parties even had a valid settlement agreement. Pheasant Run argued that the individuals who were present at the August 7, 2006 hearing and those who had signed the agreement on Pheasant Run's behalf all lacked authority to do so. Pheasant Run supplemented its response on August 8, 2007, arguing that its by-laws also forbade any entry into a settlement agreement without the full board's authorization. On October 18, 2007, the trial court denied Pheasant Run's request for an evidentiary hearing, granted Plaintiffs' motion to enforce the settlement agreement, and awarded Plaintiffs the attorney fees they incurred as a result of enforcing the settlement.

"Pheasant Run filed its notice of appeal on October 23, 2007. Pursuant to an order of this Court, Pheasant Run subsequently filed a nunc pro tunc journal entry from the trial court, indicating that there was no just reason for delay in seeking the appeal although it had yet to determine the amount of attorney fees to be awarded." *LEH Properties, Inc. v. Pheasant Run Assn.*, 9th Dist. No. 07CA009275, 2008-Ohio-4500, at ¶¶2-8.

This Court dismissed the appeal, concluding that it was not final and appealable as the trial court failed to enter judgment with the respect to the amount of attorney fees Plaintiffs were to receive. Id. at ¶12.

{¶3} Upon remand, the trial court issued an entry requesting that Plaintiffs provide an affidavit in support of their request for attorney fees. In response to Plaintiffs' filing of the itemized statement, Pheasant Run filed a motion to vacate the award of attorney fees contained in the 2007 entry. A hearing was had on the motion and a magistrate issued a decision. The magistrate recommended that Pheasant Run's motion to vacate be granted as no hearing was previously held to determine if Pheasant Run acted in bad faith. Further, after holding a hearing, the magistrate concluded that Plaintiffs were entitled to attorney fees in the amount of $8,000 plus interest. The trial court later clarified the decision to reflect that only the portion of the 2007 entry concerning attorney fees was vacated. Pheasant Run filed objections to the magistrate's decision. The trial court issued a decision concluding that the magistrate "has properly determined the factual issues and correctly applied the law."

{¶4} Pheasant Run again filed a notice of appeal. This Court again dismissed the appeal via a journal entry, concluding that the entry was not final and appealable because the trial court, in its entry, failed to independently enter judgment and failed to rule on the objections to the magistrate's decision. See *LEH Properties, Inc. v. Pheasant Run Assn.*, 9th Dist. No. 09CA009668. Upon remand the trial court issued another judgment entry. However, this Court again dismissed the subsequent appeal concluding the entry was still not final and appealable. See *LEH Properties, Inc. v. Pheasant Run Assn.*, 9th Dist. No. 09CA009708.

{¶5} Upon remand the trial court issued another judgment entry specifically overruling Pheasant Run's objections and adopting the magistrate's decision as clarified, as well as the

portion of the 2007 entry enforcing the settlement agreement. Pheasant Run has again appealed, raising two assignments of error for our review.

RULLI HEARING

{¶6} In Pheasant Run's first assignment of error, it asserts that the trial court erred in failing to hold a hearing pursuant to *Rulli v. Fan Co.* (1997), 79 Ohio St.3d 374, prior to enforcing the settlement agreement in 2007. Pheasant Run maintains that there is a factual dispute as to the existence of a settlement agreement and the terms of the settlement agreement. Specifically, Pheasant Run asserts that there is a factual dispute about whether the individuals who signed the settlement agreement had any authority to do so on behalf of Pheasant Run, and thus, there is a factual dispute about the existence of a settlement agreement. Pheasant Run also asserts that there is factual dispute as to the terms of the agreement as its performance under portions of the agreement is impracticable.

{¶7} In *Rulli*, the Supreme Court held that "[w]here the meaning of terms of a settlement agreement is disputed, or where there is a dispute that contests the existence of a settlement agreement, a trial court must conduct an evidentiary hearing prior to entering judgment." Id. at 377. The Supreme Court concluded that "it is not within the province of the trial judge to enforce a purported settlement agreement when the substance or the existence of that agreement is *legitimately* disputed." (Emphasis added.) Id. at 376.

{¶8} The instant matter presents this Court with an unusual fact pattern in that the facts of the instant matter are not similar to those of *Rulli* or other cases that reference *Rulli*. Unlike in *Rulli*, the heart of Pheasant Run's argument is not that the meaning of terms of the settlement agreement is disputed, see id. at 377; instead Pheasant Run's argument largely focuses on whether the agents of Pheasant Run present when the terms of the settlement agreement were

entered into the court record and present when the agreement was signed had authority to bind Pheasant Run.

{¶9} This is a particularly unusual argument for Pheasant Run to make for several reasons. First, both Mr. Mertz, the president of the board of directors of Pheasant Run, and Mr. Shaffer, were present in court when the settlement agreement was read into the record and both agreed to the terms of the agreement in their capacities as members of the board of directors of Pheasant Run. Second, when Plaintiffs filed their first motion to enforce the settlement agreement in November 2006, Pheasant Run did not allege that there was a lack of authority to enter into the agreement in its response. Third, despite Pheasant Run's opposition to the motion to enforce the settlement agreement, the written settlement agreement was signed by Mr. Mertz, as president of Pheasant Run and Ms. Quinones, as its secretary on January 2, 2007. Further, the written agreement contained a paragraph specifically providing that Mr. Mertz was authorized to sign the agreement on behalf of Pheasant Run. Moreover, there is no dispute that Pheasant Run has complied, and apparently continues to comply, with the monetary provisions of the settlement agreement; Pheasant Run has only refused to abide by the provision concerning the conveyance of Pheasant Run's real property to Plaintiffs. Finally, Pheasant Run did not allege that the settlement agreement was void for want of authority until August 2007, over two months after Plaintiffs filed a renewed motion to enforce the settlement agreement and approximately one year after entering into the agreement in open court.

{¶10} Notwithstanding the above, assuming without deciding that there was a legitimate dispute concerning the authority of Pheasant Run's agents to enter into a settlement agreement, thereby requiring a hearing under *Rulli*, we do not see how the failure of the trial court to hold a hearing in 2007 prejudiced Pheasant Run. An evidentiary hearing was held in 2009 before a

magistrate, at a point in time when the trial court's judgment was not final, and therefore subject to reconsideration. See *Helmstedter v. Helmstedter*, 9th Dist. No. 24237, 2009-Ohio-3559, at ¶14. While it is true that the subject of that hearing was supposed to concern whether Pheasant Run acted in bad faith in failing to abide by the terms of the settlement agreement, thereby entitling Plaintiffs to attorney fees, the determination of bad faith was intertwined with the determination of whether Pheasant Run had authority to enter into the settlement agreement. In other words, if Pheasant Run could establish that there was a legitimate dispute concerning its authority to enter into the settlement agreement, it could establish that it had acted in good faith in advancing its position that it lacked authority to enter into the settlement agreement. The vast majority of the attorney fees hearing involved testimony concerning whether members of the board had authority to enter into the agreement and whether Pheasant Run authorized the board members to enter into the agreement. Thus, there was an evidentiary hearing on the allegedly disputed points that Pheasant Run believed necessitated a *Rulli* hearing. As the trial court's entry was not final at the point the magistrate issued a report, Pheasant Run could have moved the trial court to reconsider its decision enforcing the settlement agreement in light of the facts adduced at the hearing. See id. It did not do so. Further, the trial court noted in its entry that it was adopting the "judgment entry of October 19, 2007, granting Plaintiff[s'] Motion to Enforce Settlement Agreement, as supplemented by the full hearing and Magistrate's decision[,]" implicitly indicating that the trial court itself, after the full hearing, did not see a reason to alter its decision to enforce the settlement agreement. Therefore, this Court concludes that any error in the trial court's failure to hold a *Rulli* hearing was rendered harmless when a subsequent hearing was held, prior to the entry of final judgment, addressing the allegedly contested issues.

{¶11} To the extent that Pheasant Run contends that it was entitled to a *Rulli* hearing on the issue of impracticability, this Court sees no merit in that argument. Pheasant Run asserts that the terms of the settlement agreement require Pheasant Run to allow Plaintiffs to connect homes to its sewer system. Pheasant Run argues that the Ohio Environmental Protection Association issued a connection ban prohibiting Pheasant Run from connecting additional homes to the sewer system. However, the settlement agreement itself acknowledges this connection ban problem and contains language stating that Pheasant Run has been using its best efforts to improve/enlarge its wastewater treatment plant. Further, the settlement agreement provides that Plaintiffs will commence development of the homes at issue by September 1, 2020, unless the connection ban is not lifted within eighteen months of the execution of the agreement. If the connection ban is not lifted in that window, then the fifteen-year period will not begin to run until the connection ban is lifted. Thus, it is clear that the settlement agreement anticipated the possibility of a long-term problem concerning connecting homes to Pheasant Run's sewer system. We cannot say that there is a legitimate factual dispute surrounding this term which warrants a *Rulli* hearing. See *Rulli*, 79 Ohio St.3d at 376. In light of the foregoing, we overrule Pheasant Run's first assignment of error.

HEARSAY AND BAD FAITH

{¶12} In Pheasant Run's second assignment of error, it maintains that the trial court abused its discretion in overruling its objections to the magistrate's decision which awarded Plaintiffs attorney fees. Thus, Pheasant Run asserts that the record does not support a finding of bad faith on the part of Pheasant Run. We disagree.

{¶13} "Generally a trial court possesses broad discretion with respect to the admission of evidence. However, the trial court does not have discretion to admit hearsay into evidence."

(Internal citation and quotations omitted.) *Monroe v. Steen*, 9th Dist. No. 24342, 2009-Ohio-5163, at ¶11.

{¶14} Pheasant Run challenges the admission of the alleged statements of three Pheasant Run representatives, Floyd Peaco, Linda Wotjko, and Barbara Harper. At the time the alleged statements were made, Mr. Peaco was the executive manager of Pheasant Run, and both Ms. Wotjko and Ms. Harper were members of Pheasant Run's board of directors.

{¶15} In overruling Pheasant Run's objections, the trial court concluded that the statements at issue were not hearsay, as they fell within the purview of Evid.R. 801(D)(2)(d). Evid.R. 801(D)(2)(d) provides that "[a] statement is not hearsay if * * * [t]he statement is offered against a party and is * * * a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship[.]" Pheasant Run appears to only argue that the statements did not concern a matter within the scope of the person's agency or employment. See Evid.R. 801(D)(2)(d).

{¶16} This Court has stated that "[i]t is not necessary under Rule 801(D)(2)(d) that an employee be authorized to make the specific statement at issue if that statement is within the scope of his agency. Evidence independent of the statement itself, however, must be adduced to establish the agency." *Valley Roco Mixing Co. v. Am. Internatl. Sales & Dev. Co.* (Apr. 21, 1993), 9th Dist. No. 15832, at *4. However, "in determining the scope of an agent's authority, a court may consider the content of the alleged admission itself." *Mowery v. City of Columbus*, 10th Dist. No. 05AP-266, 2006-Ohio-1153, at ¶59. "For a statement to qualify as an admission of a party-opponent, the agency relationship need not encompass authority to make damaging statements but requires only the authority to take action concerning the subject matter of the statements." Id.

{¶17} Pheasant Run first asserts that Lee Holztrager's testimony that Mr. Peaco told Mr. Holztrager that he would "never see a piece of this real estate ever transferred[]" was not admissible under Evid.R. 801(D)(2)(d), as Mr. Peaco lacked authority to comply with the terms of the settlement agreement. At the time Mr. Peaco allegedly made the above statement, Mr. Peaco was the executive manager of Pheasant Run. Mr. Mertz, the executive manager of Pheasant Run at the time the settlement agreement was signed, testified that the executive manager was generally responsible for supervising the maintenance crew associated with the wastewater treatment plant, lawn mowing, and other routine maintenance tasks. Thus, from that description it would appear that commenting on whether Pheasant Run was going to comply with the settlement agreement would be outside the scope of his employment or agency. However, Mr. Holztrager testified that the conversation between Mr. Peaco and himself occurred during a meeting at the courthouse during which lawyers for both sides were present. According to Mr. Holztrager, during the meeting Mr. Peaco sought to renegotiate the settlement agreement. From this it could be adduced that Mr. Peaco attended the meeting as Pheasant Run's representative and had authority to renegotiate the settlement agreement. Therefore, his statement could be characterized as concerning a matter within the scope of his employment or agency.

{¶18} Pheasant Run likewise alleges that Gary Burnett's testimony that Barbara Harper, the then president of the board of Pheasant Run, told him, with respect to the settlement agreement, that "they were trying to drag it out, the litigation, so they could wear [Mr. Holztrager] down and he would give up."

{¶19} The by-laws of Pheasant Run were also submitted as an exhibit at the magistrate's hearing. Not surprisingly, the by-laws provide that the board of directors shall "[m]anage and control the affairs of the Association." Given that Ms. Harper was, at the time, the president of

the board, it is only logical to conclude that matters concerning the settlement agreement and the board's position on it were within the scope of her employment or agency.

{¶20} We conclude the same is true with respect to the testimony of Mr. Holztrager that Ms. Wotjko, a then-member of the board of Pheasant Run, told him that Pheasant Run "[was not] going to give up the land[]" and that "we don't think you're going to get it. We don't want to turn it over to you." As Ms. Wotjko was a member of the board of Pheasant Run when she allegedly made that statement, it would concern a matter within the scope of her employment or agency. Accordingly, we cannot say the trial court erred in overruling Pheasant Run's objections.

{¶21} Further, even if these statements were hearsay, similar testimony came in through Mr. Mertz, who testified that Mr. Peaco said that "they were trying to wait LEH Properties out and push the lawsuit off as far as they could push it off, and hopefully LEH would go broke and go away[.]" Pheasant Run did not file an objection to the magistrate's decision with respect to Mr. Mertz's testimony of what Mr. Peaco said and has not assigned its admission as error on appeal.

{¶22} Moreover, there is evidence in the record, even aside from the statements discussed above that Pheasant Run believes to be hearsay, to support that Pheasant Run acted in bad faith in failing to comply with the terms of the settlement agreement. "Ohio law generally requires explicit statutory authorization or a finding of conduct that amounts to bad faith in order for a prevailing party to recover attorney fees." (Internal quotations and citation omitted.) *Hall v. Frantz* (May 24, 2000), 9th Dist. No. 19630, at *6. "A party seeking attorney fees because the opposing party acted in bad faith must be the prevailing party and must prove that the opposing

party acted in bad faith." Id. "A reviewing court will not reverse a trial court's determination on a motion for attorney fees absent an abuse of discretion." Id.

{¶23} In the insurance context, this Court has applied the following definition of bad faith:

> "A lack of good faith is the equivalent of bad faith, and bad faith, although not susceptible of concrete definition, embraces more than bad judgment or negligence. It imports a dishonest purpose, moral obliquity, conscious wrongdoing, breach of a known duty through some ulterior motive or ill will partaking of the nature of fraud. It also embraces actual intent to mislead or deceive another." (Internal quotations and citations omitted.) *Zaychek v. Nationwide Mut. Ins. Co.*, 9th Dist. No. 23441, 2007-Ohio-3297, at ¶18.

{¶24} When Plaintiffs first filed a motion to enforce the settlement agreement, Pheasant Run did not assert that the agreement could not be complied with due to lack of authority. Instead, Pheasant Run maintained that "[t]he primary reason for the delay in executing settlement documents is the unwillingness of the Lorain National Bank to release or subordinate its mortgage on the subject property." It was not until months after Plaintiffs filed their renewed motion to enforce the settlement agreement that Pheasant Run first claimed to the court that those individuals who participated in the settlement hearing and signed the agreement lacked authority to do so. In addition, even though Pheasant Run claimed that the individuals lacked authority to enter into the agreement on Pheasant Run's behalf, there is no dispute that Pheasant Run complied with, and as far as this Court is aware, continues to comply with, its monetary obligations under the settlement agreement.

{¶25} In addition, according to Mr. Mertz, the president of the board of Pheasant Run at the time the settlement agreement was signed, who testified at the attorney fees hearing, the entire board was aware of the terms of the settlement agreement. Further, the agreement was discussed at board meetings subsequent to the hearing at which the proposed agreement was read

into the record. Mr. Mertz further testified that at that point there was no opposition to the agreement. Moreover, as noted above, Mr. Mertz testified that he spoke with Mr. Peaco, the then executive manager of Pheasant Run, and Mr. Peaco said that Pheasant Run was "trying to wait LEH Properties out[.]" This statement has not been challenged as hearsay, and, if believed, certainly supports the notion that Pheasant Run was acting in bad faith in failing to comply with the terms of the settlement agreement. We cannot say that the trial court abused its discretion in concluding that Plaintiffs were entitled to an award of attorney fees due to Pheasant Run's bad faith. As such, Pheasant Run's second assignment of error is overruled.

CONCLUSION

{¶26} In light of the foregoing, we overrule Pheasant Run's assignments of error and affirm the judgment of the Lorain County Court of Common Pleas.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Lorain, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

EVE V. BELFANCE
FOR THE COURT

DICKINSON, P. J.
CONCURS

CARR, J.
CONCURS IN JUDGMENT ONLY, SAYING:

{¶27} As the majority indicates, *Rulli v. Fan Co.* (1997), 79 Ohio St.3d 374, requires that there be a legitimate dispute as to the terms or the existence of a settlement agreement. Based on the facts articulated in the majority opinion, I would overrule the first assignment of error on the basis that no legitimate dispute was shown.

{¶28} I cannot agree with the majority that the evidentiary hearing on the award of attorney fees was commensurate with a *Rulli* evidentiary hearing. Despite the fact that the enforcement of the settlement agreement was subject to reconsideration since a final, appealable order had not yet been entered, the magistrate specifically told the parties at the hearing that she would not revisit that issue and that was not the purpose of the hearing. At page 90 of the transcript, the magistrate cautioned the parties: "I am not here to reconsider whether or not there was authority to enter the settlement agreement."

{¶29} I concur with the remainder of the opinion.

APPEARANCES:

MATTHEW A. DOOLEY, ASHLEIGH B. ELCESSER, Attorneys at Law, for Appellant.

BRENT L. ENGLISH, Attorney at Law, for Appellee.