IN THE COURT OF COMMON PLEAS OF CARBON COUNTY, PENNSYLVANIA
CIVIL DIVISION

EAST PENN TOWNSHIP,	:	
	:	
Appellee	:	
	:	
v.	:	No. 18-2344
	:	
WILLIAM A. SWARTZ and SARAH L. SWARTZ,	:	
	:	
Appellants	:	

Robert S. Frycklund, Esquire — Counsel for Appellee

Susan L. Bucknum, Esquire — Counsel for Appellants

MEMORANDUM OPINION

Serfass, J. - September 9, 2022

Here before the Court is the appeal of our Order of June 30, 2022 denying the motion to enforce a purported settlement agreement between the parties which was filed by William A. Swartz and Sarah L. Swartz (hereinafter "Appellants"). We file the following Memorandum Opinion pursuant to Pa.R.A.P. 1925(a), respectfully recommending that our Order of June 30, 2022 be affirmed for the reasons set forth hereinafter.

FACTUAL AND PROCEDURAL BACKGROUND

Appellants are the owners of real property situated in East Penn Township, Carbon County, and known as 364 Berger Creek Road, Lehighton, Pennsylvania. On August 10, 2018, East Penn Township (hereinafter "Appellee") initiated the instant action through the filing of a complaint alleging that Appellants were in violation of several provisions of the township's zoning ordinance through their

operation of a trucking business on the subject property. Specifically, Appellee alleged that Appellants were in violation of Sections 402 (Permitted Uses in the Business Commercial Zoning District), 1204.01 (Change of Use), 1204.02 Ordinance Conformity (Zoning Permit Required), 303.04 (Environmental Protection District), 1007.0111 (Buffer Yard), and 201 Definitions (Junk and Junkyard).

On February 6, 2019, Appellee filed a Motion for Judgment on the Pleadings asserting that there were no genuine issues of material fact because Appellants waived any challenges to the zoning violations by failing to timely appeal the enforcement notice. On August 9, 2019, we entered an order granting Appellee's motion for judgment on the pleadings in part and denying it in part. This Court (1) granted partial judgment in favor of Appellee and against Appellants as to Appellee's claims concerning Appellants' violations of the zoning ordinance; (2) found Appellants to be in violation of the aforesaid sections of the zoning ordinance[1]; and (3) denied the motion with regard to Appellee's claims concerning the assessment and imposition of fines, the award of counsel fees and costs, and the issuance of an injunction. (Court's Order of 8/9/19).

Following a non-jury trial on the remaining issues held before the undersigned on March 6, 2020, we entered a verdict in favor of Appellee and against Appellants on April 27, 2020, ordering Appellants to (1) cease and desist from using the property in violation of the

[1] Our order dated August 9, 2019 incorrectly stated Appellants were in violation of Section 1204.04 instead of Section 1204.02 of the zoning ordinance.

zoning ordinance; (2) correct all zoning violations within thirty (30) days; and (3) pay a judgment of nineteen thousand fifty-one dollars and twenty-one cents ($19,051.21), the sum of the fine for the violation and Appellee's attorney's fees, to Appellee. (Court's Verdict of 4/27/20). Appellee filed a Praecipe to Enter Judgment on May 11, 2020. That same day, judgment was entered in favor of Appellee by the Carbon County Prothonotary. Post-trial motions were not filed. Appellants did not appeal this Court's decision. On June 24, 2020, Appellee filed a Petition for Contempt alleging that Appellants continued to use the property in violation of the zoning ordinance and failed to pay the judgment.

Following the filing of Appellee's contempt petition, the parties negotiated the drafting of a settlement agreement as Appellants were trying to obtain zoning and land development approval for the lawful use of their property. On October 1, 2021, Appellants filed a "Motion to Enforce the Parties' Settlement Agreement and for a Settlement Conference." On August 30, 2021, Robert S. Frycklund, Esquire, counsel for Appellee, sent a proposed settlement agreement via email to Susan L. Bucknum, Esquire, counsel for Appellants. Appellants argued that the parties entered into a settlement agreement with the following essential terms:

> 1) The Parties' issues and disputes in this action would be resolved through the Parties' agreement that Defendants obtain zoning and land development approval for the use of their property as set forth in their November 3, 2020, zoning permit application and in compliance with

the Zoning Officer's zoning permit review memorandum dated July 6, 2021;

2) Defendants agreed to tender to the Plaintiff, and the Plaintiff agreed to accept, the sum of Five Thousand Three Hundred Two Dollars and Thirty-Five Cents ($5,302,35), in full settlement, compromise and satisfaction of the said judgment of Nineteen Thousand Fifty-One Dollars and Twenty-Five Cents ($19,051.25);

3) Defendants' obligation to start making payments on the agreed compromised judgment was conditioned upon their execution of an approved formal, written settlement agreement;

4) Defendants' agreed to pay the compromised judgment in full within six (6) months of the date of their execution of the written settlement agreement; and

5) The Plaintiff would not issue a zoning permit or other approvals until after Defendants paid in full the compromised settlement of the money judgment.

(Appellants' Brief in Support of Motion to Enforce, 2/25/22 at p. 21).

Appellants requested that this Court enforce this purported settlement agreement with the exception of Paragraph 1 of the aforesaid agreement dated August 30, 2021. (*See* Appellants' Motion to Enforce, 10/1/21, Exhibit "N"). On October 14, 2021, Appellee filed an answer to Appellants' motion to enforce denying that it entered into a final settlement agreement with Appellants and asserting that the purported agreement is not enforceable. (Appellee's Answer to Appellants' Motion to Enforce, 10/14/21). On October 21, 2021, Appellee withdrew its contempt petition. On June 30, 2022, we entered an order denying Appellants' motion to enforce

finding that Appellants lacked standing to seek relief and that a settlement agreement was never finalized. (Court's Order of 6/30/22).

On July 18, 2022, Appellants filed an Appeal to the Commonwealth Court of Pennsylvania seeking review and reversal of this Court's June 30, 2022 Order denying their motion to enforce.[2] On July 19, 2022, we entered an order directing Appellants to file a concise statement of matters complained of on appeal pursuant to Pa.R.A.P. 1925(b). In compliance with our order, Appellants filed their "Statement of Matters Complained of on Appeal" on August 8, 2022.

ISSUES

In their Concise Statement, Appellants raise the following issues which we summarize as follows:

1. Whether this Court erred in denying Appellants' motion based on our finding that Appellants lacked standing to seek such relief;
2. Whether this Court erred in denying Appellants' motion based on our finding that the parties did not enter into a final agreement;
3. Whether this Court erred in denying Appellants' motion based on evidence that Appellee engaged in obstructive, coercive, or unconscionable conduct; and

[2] On August 15, 2022, Appellee filed a "Motion to Dismiss for Failure to Preserve Issues on Appeal" in the Commonwealth Court asserting that Appellants have failed to preserve issues for appellate review by failing to file post-trial motions as required by Pennsylvania Rule of Civil Procedure 227.1. *See* Pa.R.C.P. 227.1(c)(2); *see also* Chalkey v. Roush, 805 A.2d 491 (Pa. 2002). Appellants did not file post-trial motions following the entry of this Court's verdict on April 27, 2020. We note that the instant appeal lies from our order of June 30, 2022 denying Appellants' motion to enforce the purported settlement agreement.

4. Whether this Court erred in denying Appellants' motion based on our finding that Appellee did not approve a settlement agreement in a public meeting.

DISCUSSION

1. Standing

We first note that an order is final where it disposes of all claims and parties. Pa.R.A.P. 341(b)(1). Moreover, "... judicial intervention is appropriate only when the underlying controversy is real and concrete." Stilp v. Commonwealth of Pennsylvania, 927 A.2d 707, 710 (Pa.Cmwlth. 2007).

We found that Appellants did not have standing to petition this Court to enforce the purported settlement agreement between the parties. In Step Plan Services, Inc. v. Korseko, the Superior Court affirmed the trial court's order enforcing the parties' settlement agreement and rejected the defendants-appellants' argument that plaintiff-appellant had no capacity to sue in state court absent the certificate of authority required of foreign corporations because the plaintiff-appellant had "settled the suit before any judicial resolution of the case" and thus did not involve court action. Step Plan Services, Inc. v. Koresko, 12 A.3d 401 (Pa.Super. 2010).

Here, the underlying action has gone to trial and reached a conclusive disposition. The judgment of this Court in the instant matter is final and unappealable. As Appellee withdrew its contempt petition, there are no pending matters before us in the instant case to be settled by the parties or adjudicated by the Court. "[A] motion

to enforce may be only ancillary to a civil action—not be the action itself." Camp Horn Self Storage, LLC v. Lawyers Title Ins. Corp., 150 A.3d 999, 1002 (Pa.Super. 2016).

2. Finality of the Agreement

Even if we were to find that Appellants had standing to petition this Court to enforce the purported settlement agreement, we found that the record indicated that the parties did not enter into a final agreement. "The law of this Commonwealth establishes that an agreement to settle legal disputes between parties is favored." Mastroni-Mucker v. Allstate Ins. Co., 976 A.2d 510, 518 (Pa.Super. 2009) (*citing* Compu Forms Control Inc. v. Altus Group Inc., 574 A.2d 618, 624 (Pa.Super. 1990)). "The enforceability of settlement agreements is determined according to principles of contract law." Id. at 517 (*citing* Ragnar Benson, Inc. v. Hempfield Twp. Mun. Auth., 916 A.2d 1183, 1188 (Pa.Super.2007)). "The touchstone of any valid contract is mutual assent and consideration." Pittsburgh Logistics Systems, Inc. v. B. Keppel Trucking, LLC, 153 A.3d 1091, 1093 (Pa.Super. 2017) (internal citations omitted).

Attorney Frycklund's letter to Attorney Bucknum dated August 30, 2021 states:

> Enclosed is a Settlement Agreement which I have drafted **for review and discussion purposes.** If the terms are acceptable to your client, and subject to any review comments which I may receive from the Zoning Officer and/or any of the members of the Board of Supervisors, I will recommend that the Board approve the same in executive session at their next regular meeting on Monday, September 6, 2021.

(Appellants' Motion to Enforce, 10/1/21, Exhibit "N") (emphasis added).

Attorney Bucknum's email dated September 3, 2021 states: "To be clear, the terms of the **proposed draft settlement agreement** are not acceptable to my clients and **require further review and discussion.**" (Appellants' Motion to Enforce, 10/1/21, Exhibit "O") (emphasis added). Attorney Bucknum's email dated September 23, 2021 states: "I'm working on some **comments and suggested revisions** to the Township's **proposed settlement agreement.**" (Appellants' Motion to Enforce, 10/1/21, Exhibit "Q") (emphasis added). These exchanges demonstrate that the parties were still negotiating and never assented to a final agreement.

> Nothing is better settled than that in order to constitute a contract there must be an offer on one side and an unconditional acceptance on the other. So long as any condition is not acceded to by both parties to the contract, the dealings are mere negotiations and may be terminated at any time by either party while they are pending. …

Quiles v. Financial Exch. Co., 879 A.2d 281, 285 (Pa.Super. 2005) (internal citations omitted).

Appellants' claim amounts to a conditional acceptance that cannot be the basis of a meeting of the minds or intent to be mutually bound. Espenshade v. Espenshade, 729 A.2d 1239, 1247 (Pa.Super. 1999). Based upon the foregoing, we found that there was no settlement agreement to enforce.

3. Allegations of Misconduct

Appellants raised similar claims in their motion to enforce and at oral argument, but we did not discuss them in our order denying Appellants' motion to enforce. We cannot find that the record supports Appellants' claims that Appellee engaged in any obstructive, coercive, or unconscionable conduct during the parties' negotiations. The communications between the parties indicate that when they could not reach an agreement, Appellee chose to rescind its proposed settlement agreement and proceed with its contempt petition to enforce the verdict and monetary judgment. (*See* Appellants' Motion to Enforce, 10/1/21, Exhibits "P" and "R").

4. Approval at a Public Meeting

Furthermore, under the Pennsylvania Sunshine Act, 65 Pa.C.S.A. §§ 701-716, the East Penn Township Board of Supervisors would have been "required to take official action on the settlement at an open meeting" before a settlement agreement could be finalized. Baribault v. Zoning Hearing Bd. of Haverford Twp., 236 A.3d 112, 120-21 (Pa.Cmwlth. 2020). The record does not indicate that a final settlement agreement was approved at a public meeting of the East Penn Township Board of Supervisors. (*See* Appellants' Motion to Enforce, 10/1/21, Exhibits "P" and "R"). Rather, no agreement was finalized, settlement negotiations ceased and Appellee withdrew its petition for contempt, leaving in place the monetary judgment against Appellants entered pursuant to this Court's verdict of April 27, 2020.

CONCLUSION

Based upon the foregoing, we respectfully recommend that the instant appeal be denied and that our Order of June 30, 2022 be affirmed accordingly.

BY THE COURT:

Steven R. Serfass, J.