STATE OF MICHIGAN

COURT OF APPEALS

STOUT TOOL CORPORATION, Plaintiff-Appellant,	UNPUBLISHED December 22, 2009
v	No. 291996 Kent Circuit Court
BARRY KANE and MILLER, JOHNSON, SNELL & CUMMISKEY, Defendants-Appellees.	LC No. 06-005059-NM

Before: Markey, P.J., and Bandstra and Murray, JJ.

PER CURIAM.

In this legal malpractice action, plaintiff appeals as of right the trial court's order, which granted defendants' motion to enforce a settlement agreement. Because the settlement was agreed to and placed on the record in open court, the trial court did not abuse its discretion in enforcing the agreement. Consequently, we affirm.

I. Facts and Proceedings

Scott McIntosh is the founder and president of plaintiff Stout Tool Corporation. McIntosh invented the X-Band saw. Plaintiff retained defendant Barry Kane and his law firm defendant Miller, Johnson, Snell & Cummiskey "to obtain patent protection for [McIntosh's] inventions that are now incorporated in the X-Band saw." Plaintiff alleged that Kane failed to take the necessary steps to protect plaintiff's ability to seek foreign patent protection. Plaintiff filed the instant action against defendants, alleging breach of contract, breach of fiduciary duty, and negligence.

Defendants moved for summary disposition, essentially asserting that plaintiff's claim must fail because plaintiff could not establish any damages. The trial court granted defendants' motion for summary disposition, where there was "no concrete basis for finding damages in this particular case." On October 29, 2008, plaintiff filed a claim of appeal from that order.[1]

[1] That appeal (Docket No. 288658) has been held abeyance pending resolution of the instant appeal. *Stout Tool Corp v Kane*, unpublished order of the Michigan Court of Appeals, entered (continued…)

Defendants subsequently sought to recover fees and costs pursuant to MCR 2.403(O), as plaintiff apparently rejected a case evaluation award of $400,000. The trial court ordered plaintiff to pay defendants' costs and fees in the amount of $520,982.46, and plaintiff filed a claim of appeal from that order.[2] Defendants thereafter requested and received garnishment against plaintiff.

Plaintiff next moved to stay the execution of the January 21, 2009, order setting costs and fees at $520,982.46 pending appeal to this Court. At the hearing on plaintiff's motion to stay, defendants' counsel represented that the parties reached a settlement agreement regarding the dispute. The following colloquy took place at the hearing.

> *Defendants' counsel:* Jason Byrne on behalf of the defendants, and introducing for the first time on this matter is Tricia Roelofs on behalf of the plaintiff, Your Honor. We do have some happy news to report. *Today the parties have reached a settlement in principle of the entire dispute*, and that would essentially moot today's motion regarding enforcement and stay of case evaluation sanctions.
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> *The sum and principal [sic] generally*, Your Honor, *is that the defendants agree to drop enforcement of their sanctions claim, while in exchange the plaintiff will drop their [sic] appeal of this Court's rulings and dismiss with prejudice the underlying claims. This has been reached in principal [sic]. We've still got to iron out the details, but given that, I don't see any need to proceed with the hearing today.*
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> *Trial Court:* Well, it sounds like a good idea, *and it sounds like a pretty good resolution*. Anything that the defendants would like to add to all of this?
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> *Plaintiff's counsel:* Well, we're the plaintiffs.
>
> *Trial Court:* Or plaintiffs. I'm sorry. I was just hearing from the defendants. *Anything plaintiffs want to throw into the mix*?
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> *Plaintiff's counsel:* *No, thank you*, Your Honor.
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> *Trial Court:* All right. Well, I think we're in good shape then, and we'll simply pull the motion and hold it pending some sort of notification of where the parties stand. If a resolution is

(…continued)

July 27, 2009 (Docket Nos. 288658 and 290359).

[2] That appeal (Docket No. 290359) has also been held abeyance pending resolution of the instant appeal. *Stout Tool Corp v Kane*, unpublished order of the Michigan Court of Appeals, entered July 27, 2009 (Docket Nos. 288658 and 290359).

had, perhaps appropriate documentation can be sent in. And if not, we can always pull the motion up and hear it at a later date.

Defendants' counsel: Absolute [sic], Your Honor. We anticipate, in the next couple of days, we'll have that paperwork for you.

Trial Court: Good. Well, thank you very much, and have a good weekend.

Plaintiff's counsel: Thank you. You, too.

Defendants' counsel: Thank you, Your Honor. [Emphasis added.]

That same day plaintiff's counsel hand-delivered a letter to defense counsel indicating agreement to an additional term of plaintiff paying $1,000 for defendant's immediate release of a garnishment, and that plaintiff would "send to you a draft of a proposed settlement agreement, as detailed on the record at today's hearing . . . ."

On March 10, 2009, plaintiff's counsel moved to withdraw, asserting that the attorney-client relationship had broken down. Plaintiff's counsel also requested the trial court to stay all proceedings so that plaintiff could retain new counsel. At a motion hearing on March 16, 2009, the trial court noted:

> Evidently, from the written submission and [plaintiff's counsel] Mr. Jeffers' comments here on the record, we can conclude nothing but there has been an irredeemable breakdown in the attorney-client relationship between plaintiff Stout Tool Corporation and the law firm Dykema Gossett. Exactly what the nature of the problem is, is a little harder to discern, although one gathers that Stout Tool had experienced some buyer's remorse *at the settlement agreement that was put on the record on February 20th, and then documented by an exchange of e-mails and letters between the parties* . . . . [emphasis added].

The trial court granted plaintiff's counsel's motion to withdraw. In ruling, the trial court anticipated that defendants would file a motion to enforce the settlement agreement:

> I would be inclined to entertain a motion from [defendants' counsel] Mr. Byrne's side [sic] to enforce the judgment per the terms set forth on the record, and in the e-mail, and in the letter, which again, are pretty straightforward and pretty simple. And then, Stout Tool Corporation will have to appear and respond, presumably by some sort of counsel since presumably Stout Tool Corporation is a corporate entity and, therefore, can't appear in its own proper person, inasmuch as it doesn't have a proper person to appear in.

> But that will be up to Stout Tool. Stout Tool will have to take steps to secure new counsel, and I would imagine would want to do so within the day because I suspect other pleadings will quickly be filed.

Defendants subsequently moved to enforce the settlement agreement. At the hearing on defendants' motion, McIntosh asserted that plaintiff did not yet have counsel. The trial court did not permit McIntosh to speak on behalf of plaintiff, properly noting that only legal counsel may represent corporate entities. The trial court ultimately granted defendants' motion to enforce the settlement agreement. In reaching its conclusion, the trial court opined:

> I have reviewed all of the documents, and indeed, I've seen them before. Obviously, they consist of a court transcript from February 20, 2009, announcing a settlement. There's an e-mail that went out from [defendants' counsel] Mr. Byrne, which discusses the settlement in a document that runs a little over a page. And then, most importantly, I think there's a letter from [plaintiff's counsel] Bryan T. Smith on Dykema letterhead on behalf of Stout, confirming the agreement and indicating that the thousand dollars would be sent from Mr. McIntosh's bank account [to release the garnishment placed on plaintiff by defendant]. And then, of course, we have supporting affidavits as well.
>
> I agree that settlement does appear to be straightforward, and it was made by and between counsel for the respective parties at the time. It appears, for reasons that are not clear to the Court, that, at some time subsequent to the settlement being agreed to, there was a breakdown in the relationship between Stout Tool Corporation and the Dykema law firm. It's not my business to inquire as to the nature of it, and it probably isn't germane anyway. The settlement was entered into at arm's length by and between capable counsel, properly appearing on behalf of the respective parties.

The trial court also found that defendants relied on the settlement agreement by releasing plaintiff from the garnishment. The trial court effected its oral ruling in a subsequent written order, which also vacated its January 21, 2009, order awarding case evaluation sanctions, ordered plaintiff to dismiss all pending appeals, ordered plaintiff to forever release defendants from all claims related to this case, and ordered plaintiff to pay defendants $1,000.

After retaining new counsel, plaintiff moved the trial court to reconsider its March 27, 2009, ruling. The trial court denied plaintiff's motion.

II. Analysis

The sole issue on appeal is whether the trial court erroneously granted defendants' motion to enforce a settlement agreement. We review a trial court's ruling whether to enforce a settlement agreement for an abuse of discretion. *Groulx v Carlson*, 176 Mich App 484, 493; 440 NW2d 644 (1989). "The existence and interpretation of a contract are questions of law reviewed de novo." *Kloian v Domino's Pizza, LLC*, 273 Mich App 449, 452; 733 NW2d 766 (2006).

Under Michigan law we will enforce a settlement if there is an agreement and it is presented in open court pursuant to the court rule. *Columbia Assoc, LP v Dep't of Treasury*, 250 Mich App 656, 668-669; 649 NW2d 760 (2002). The relevant court rule is MCR 2.507(G):

> An agreement or consent between the parties or their attorneys respecting the proceedings in an action, subsequently denied by either party, is not binding unless it was made in open court, or unless evidence of the agreement is in writing, subscribed by the party against whom the agreement is offered or by that party's attorney.

Stated another way, MCR 2.507(G) provides that a settlement agreement that meets all the requisites of a contract is not binding on the parties if not made in open court or reduced to writing. *Id.* at 670. See, also, *Kloian*, 273 Mich App 456 ("A contract for the settlement of pending litigation that fulfills the requirements of contract principles will not be enforced unless the agreement also satisfies the requirements of MCR 2.507(H)."); *Michigan Mut Ins Co v Indiana Ins Co*, 247 Mich App 480, 484; 637 NW2d 232 (2001). Settlement agreements normally should not be set aside and a party may not disavow an agreement that has been reduced to writing or placed on the record merely because the party has "a change of heart." *Metropolitan Life Ins Co v Goolsby*, 165 Mich App 126, 128-129; 418 NW2d 700 (1987).

At the February 20, 2009 hearing, defendants' counsel represented that the parties reached a settlement agreement, and articulated on the record the essential terms of the agreement. Those terms were "that the defendants agree to drop enforcement of their sanctions claim, while in exchange the plaintiff will drop their [sic] appeal of this Court's rulings and dismiss with prejudice the underlying claims." Although plaintiff's counsel did not explicitly affirm on the record the existence of the settlement, she essentially did so when she declined, after inquiry from the court, to add anything to defense counsel's statement. Additionally, plaintiff's counsel clearly expressed in writing confirmation of the settlement agreement that same day. We therefore conclude that there was a valid agreement because mutual assent existed on the essential terms, *Mich Mutual Ins Co*, 247 Mich 486, because it would have been reasonable for plaintiff's counsel to notify defendants' counsel and the trial court if no settlement had been reached, or the terms were different than that stated by defense counsel. See Restatement Contracts 2d, §69(1)(c) ("Where an offeree fails to reply to an offer, his silence and inaction operate as an acceptance . . . [w]here because of previous dealings or otherwise, it is reasonable that the offeree should notify the offeror if he does not intend to accept.").[3] The essential terms of the agreement were put into the record at the February 20, 2009, hearing, and that was sufficient. *Mikonczyk v Detroit Newspapers, Inc*, 238 Mich App 347, 350; 605 NW2d

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[3] Plaintiff makes no claim that its counsel was acting outside of the scope of their authority. See *Carrier Creek Drain Drainage Dist v Land One, LLC*, 269 Mich App 324, 331; 712 NW2d 168 (2005) ("A longstanding principle derived from agency law is that a client is bound by the actions and inactions of that client's attorney that occurred within the scope of the attorney's authority."). Additionally, if what defendants' counsel said on the record was not accurate, plaintiff's counsel had a duty to inform the court of that fact, particularly where the trial court made a specific inquiry in that regard. See comment to MRPC 3.3.

360 (1999) (minimal terms, such as an agreement to pay a specified sum of money for the dismissal of a pending lawsuit, are sufficient to create a binding consent agreement).

We reject plaintiff's notion that defense counsel's use of the words "in principle" at the hearing reflected only a tentative agreement. The record clearly reflects that defendants' counsel's use of the term was simply to inform the trial court that agreement was reached on the essential terms, and that use of the term was consistent with the common understanding of that term. See Random House Webster's College Dictionary (1997), where "principle" is defined as "a determining characteristic of something; essential quality." And, even though defendants' counsel acknowledged that the parties still had "to iron out the details," uncertainty regarding more minor details does not preclude an enforceable agreement. *Nichols v Seaks*, 296 Mich 154, 159; 295 NW 596 (1941) ("So long as the essentials are defined by the parties themselves, the law supplies the missing details by construction."). Furthermore, use of conditional language, such as "subject to the satisfaction of each party," or as in this case, the need "to iron out the details" "was a promise reflecting the parties' intent to reduce the settlement agreement to writing utilizing mutually agreeable language." *Mikonczyk*, 238 Mich App 350.

Here, the parties reached a settlement agreement, the essential terms of that agreement were put into the record in open court, and neither party nor their counsel expressed any reservations. Written communications that same day confirmed the agreement placed on the record, as well as agreement on one additional minor term. Based on this record, we hold the trial court did not abuse its discretion in enforcing the agreement, because the parties mutually asserted to the settlement agreement and it was made in open court. *Columbia Assoc, LP*, 250 Mich App 670. Just as in *Mikonczyk*, 238 Mich App 351, we hold that plaintiff is "compelled to comply with the plain and simple terms of the agreement as set forth on the record," wherein defendants agreed to release their sanctions claim in exchange for plaintiff's dismissal of its underlying claims and appeals of the trial court's previous rulings, and plaintiff agreed to pay defendants $1,000 in exchange for a release of the garnishment on plaintiff's account, *Kloian*, 273 Mich App 454-455.

Affirmed.

Defendants may tax costs, having prevailed in full. MCR 7.219(A).

/s/ Jane E. Markey
/s/ Richard A. Bandstra
/s/ Christopher M. Murray