

**IN THE COURT OF COMMON PLEAS  
WOOD COUNTY, OHIO**

City of Northwood,

Case No. 2013CV0036

Plaintiff(s),

Judge Reeve Kelsey

v.

Woodville Mall Realty Management,  
LLC, et al.,

Evidentiary Hearing Requested

Defendant(s).

**DEFENDANT OHIO PLAZA SHOPPING CENTER, LLC'S MOTION TO ENFORCE SETTLEMENT AGREEMENT,  
OR ALTERNATIVELY, FOR RELIEF FROM JUDGMENT UNDER CIV.R. 60(B)(4)**

Defendant Ohio Plaza Shopping Center, LLC, through counsel, hereby requests the Court enforce the parties' settlement agreement and order the City of Northwood to review and approve any revised abatement plan that complies with the explicit terms of the Consent Judgment Entry of August 8, 2013, and to permit Defendants to demolish the Woodville Mall without first posting a bond. Alternatively, Ohio Plaza requests the Court grant it relief from the Consent Judgment Entry, under Civ.R. 60(B)(4), because it is no longer equitable that the judgment should have prospective application. Ohio Plaza's reasoning is fully set forth in the attached memorandum.

Respectfully Submitted,

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## MEMORANDUM

### I. Background

On January 17, 2013, Plaintiff City of Northwood (“Northwood”) filed a Complaint against Defendants, seeking abatement of a nuisance, removal of building(s), and an injunction. On April 4, 2013, Defendant Ohio Plaza Shopping Center, LLC (“Ohio Plaza”), filed its Answer.

The parties then negotiated a settlement that would terminate the case without the need for protracted litigation. The parties memorialized their agreement in the form of a consent judgment entry. That is, rather than agreeing Northwood would dismiss its Complaint, the parties consented to Northwood having a judgment against certain Defendants, which could be satisfied if Defendants complied with the timeline for demolishing the Woodville Mall (“the mall”). (*See* J. Entry of Aug. 8, 2013 at 5.) Counsel for Northwood, Ohio Plaza, and other defendants signed the Consent Judgment Entry. (*Id.* at 6.)

Specifically, the Consent Judgment Entry provided, “On or before September 30, 2013, Defendants Ohio Plaza Shopping Center, LLC, and Woodville Mall Realty Management, LLC shall submit the abatement plans to the Engineer for the City of Northwood for final approval.” (J. Entry of Aug. 8, 2013 at 3.) On September 23, 2013, Ohio Plaza submitted an abatement plan to Northwood, in full compliance with the Consent Judgment Entry. However, Northwood’s engineer, Dave Kuhn, rejected Ohio Plaza’s abatement plan and requested additional information.

Ohio Plaza then retained counsel to facilitate the approval of its abatement plan and demolition of the mall. Unfortunately, Northwood has consistently impeded the demolition of the mall by adding additional administrative roadblocks not included in the Consent Judgment Entry, and anticipatorily repudiating its obligation to approve the abatement plan under the Consent Judgment Entry.

For example, Northwood has arbitrarily imposed a requirement that Ohio Plaza or its demolition contractor post a bond in the amount of \$1.7 million before demolition can begin. Moreover, Northwood's City Administrator, Robert "Bob" Anderson, explicitly stated to the undersigned that because he believed Defendants had not complied with the timeline in the Consent Judgment Entry, Northwood would not approve any revised abatement plan Defendants submitted and Northwood would not permit Defendants to demolish the mall. Mr. Anderson's quote to Toledo News Now, on October 22, 2013, corroborated Northwood's position on the matter. (Ex. A.)

Given Northwood's refusal to approve a plan to permit Defendants to demolish the mall and its imposition of arbitrary administrative roadblocks to further prohibit Defendants from complying with the Consent Judgment Entry, Ohio Plaza now moves the Court to enforce the settlement agreement – Consent Judgment Entry – filed on August 8, 2013. Alternatively, Ohio Plaza requests the Court grant it relief from the August 8, 2013 Consent Judgment Entry because it is no longer equitable that the judgment should have prospective application.

**II. The Court should enforce the plain language of the Consent Judgment Entry because that was the agreement amongst the parties.**

A trial court has continuing jurisdiction to enforce compliance with a settlement agreement amongst the parties. Northwood and Defendants negotiated the terms of and agreed to abide by the Consent Judgment Entry. Northwood's anticipatory repudiation to permit Defendants to demolish the mall and its arbitrary requirement of a \$1.7 million bond require the Court to enforce the plain language of the Consent Judgment Entry and order Northwood to review and approve an abatement plan that complies with the Consent Judgment Entry and permit Defendants to demolish the mall without posting a bond of \$1.7 million.

**a. Law and Analysis**

“A valid settlement agreement is a binding contract between the parties which requires a meeting of the minds as well as an offer and acceptance.” *Salsbury v. Goodell*, 6th Dist. No. L-08-1204, 2008-Ohio-6172, at ¶ 12, citing *Rulli v. Fan Co.*, 79 Ohio St.3d 374, 376, 683 N.E.2d 337 (1997), citing *Noroski v. Fallet*, 2 Ohio St.3d 77, 79, 442 N.E.2d 1302 (1982). “Thus, a settlement agreement must meet the essential requirements of contract law before it will be subject to enforcement.” *Id.* “Moreover, ‘it is within the sound discretion of the trial court to enforce a settlement agreement, and its judgment will not be reversed where the record contains some competent, credible evidence to support its findings regarding the settlement.’” *Salsbury* at ¶ 12, quoting *Mentor v. Lagoons Point Land Co.*, 11th Dist. No. 98-L-190 (Dec. 17, 1999). “Where there is a dispute regarding the meaning of the terms of a settlement agreement or where there is a dispute of whether a valid settlement agreement exists, a trial court must conduct an evidentiary hearing.” *Salsbury* at ¶ 12, citing *Rulli* at syllabus.

When interpreting the terms of a contract, the Court is bound to “examine the contract as a whole and presume that the intent of the parties is reflected in the language of the contract.” *Sunoco, Inc. (R & M) v. Toledo Edison Co.*, 129 Ohio St.3d 397, 2011-Ohio-2720, 953 N.E.2d 285, at ¶ 37. The Court must “look to the plain and ordinary meaning of the language used in the contract unless another meaning is clearly apparent from the contents of the agreement. When the language of a written contract is clear, a court may look no further than the writing itself to find the intent of the parties.” *Id.*

Here, the Consent Judgment Entry was a contract amongst the parties. Defendants offered to forgo their right to fully litigate Northwood’s claims in exchange for the opportunity to satisfy the \$1.69 million judgment by demolishing the mall in compliance with the timeline. Northwood accepted this offer. The terms of the parties’ contract/settlement agreement are expressed in the Consent Judgment

Entry of August 8, 2013. The parties' mutual assent to this agreement is evidenced by their attorneys' signatures at the end of the Consent Judgment Entry. (J. Entry of Aug. 8, 2013 at 6.)

The Consent Judgment Entry required Ohio Plaza and Woodville Mall Realty Management, LLC to "submit the abatement plans to the Engineer for the City of Northwood for final approval \* \* \* [o]n or before September 30, 2013." (J. Entry of Aug. 8, 2013 at 3.) Ohio Plaza, through its demolition contractor, submitted an abatement plan on September 23, 2013. Thus, Ohio Plaza complied with the plain language of the Consent Judgment Entry.

Subsequently, Northwood, through its City Administrator, Bob Anderson, informed Ohio Plaza that Northwood believed Defendants had not complied with the Consent Judgment Entry and Northwood would begin soliciting bids from contractors to demolish the mall. Bob Anderson explicitly stated that Defendants would not be permitted to demolish the mall, and anticipatorily repudiated Northwood's implicit obligation under the Consent Judgment Entry to approve a suitable abatement plan that Defendants submit, and to permit Defendants to demolish the mall.

"[W]here one party to a contract refuses to perform under the terms of the contract, an anticipatory repudiation is said to occur." (Citations omitted.) *Blake Homes, Ltd. v. FirstEnergy Corp.*, 6th Dist. No. L-06-1269, 2007-Ohio-4606, at ¶ 73. *See also, Am. Bronze Corp. v. Streamway Products*, 8 Ohio App.3d 223, 228, 456 N.E.2d 1295 (1982), quoting Official Comment 1 to R.C. 1302.68 ("anticipatory repudiation centers upon an overt communication of intention or an action which renders performance impossible or demonstrates a clear determination not to continue with performance.").

Here, Bob Anderson unequivocally stated to Ohio Plaza's counsel and the media that Defendants would not be permitted to demolish the mall and Northwood would not approve any

revised abatement plan that Defendants submitted. Consequently, Northwood, anticipatorily breached the Consent Judgment Entry by stating it was impossible for Defendants to perform thereunder and demolish the mall.

As Ohio Plaza complied with the express requirement of the Consent Judgment Entry to submit an abatement plan for approval by September 30, 2013, the Court should order Northwood to review and approve any revised abatement plan that complies with the explicit terms of the Consent Judgment Entry.

Furthermore, Northwood, through discussions with counsel, arbitrarily imposed a requirement that Defendants and/or their demolition contractor post a \$1.7 million bond to be permitted to demolish the mall. This requirement of a bond – yet alone such a high bond – is not based upon any statute or regulation, is not a term of the Consent Judgment Entry, and is merely an administrative roadblock Northwood has placed in Defendants' way to prevent them from complying with the timeline in the Consent Judgment Entry. Northwood's requirement of a \$1.7 million bond before Defendants may demolish the mall is especially unconscionable and arbitrary given the fact that Defendants already consented to Northwood having a \$1.69 million judgment against them and judgment lien on their property.

If Northwood's concern is the Sears building or the former Elder-Beerman building being damaged during demolition of the main portion of the mall, Ohio Plaza's demolition contractor is fully insured. Because Northwood has no insurable interest in Sears or the former Elder-Beerman building, its attempt to protect the remaining anchor stores with a bond is laudable, but wholly unnecessary and inconsistent with the plan language of the Consent Judgment Entry.

As Northwood's newfound requirement of a \$1.7 million bond is arbitrary, unnecessary, and

not required under the Consent Judgment Entry, the Court should order Northwood to permit the demolition of the mall without Defendants posting a bond.

**b. Conclusion**

Accordingly, the Court should enforce the settlement agreement – the Consent Judgment Entry of August 8, 2013 – and require Northwood to review and approve any revised abatement plan Defendants submit that complies with the explicit terms of the Consent Judgment Entry, and then permit Defendants to demolish the mall without posting a bond. Ohio Plaza’s demolition contractor is ready, willing, and able to begin demolition, and can do so within three days of the Court ordering Northwood to stop impeding Defendants from complying with the Consent Judgment Entry, so this case may be resolved once and for all.

**III. It is no longer equitable that the Consent Judgment Entry should have prospective application because Northwood has clearly stated it will not permit Defendants to demolish the mall and Northwood has required an arbitrary and unnecessary bond.**

Ohio Civ.R. 60(B)(4) permits a court to grant a pretty relief from a judgment when its prospective application is inequitable due to a change in circumstances. Here, Northwood originally agreed to permit Defendants to satisfy the \$1.69 million by demolishing the mall in accordance with the Consent Judgment Entry. But Northwood has now stated it will not approve Defendants’ abatement plan, it will not permit Defendants to demolish the mall, and even if it did approve Defendants’ abatement plan, it would require Defendants to post a \$1.7 million bond before demolition could begin. Thus, the Court should not permit the judgment against Defendants to stand because Northwood’s new position on the mall demolition renders its application inequitable.

**a. Law and Analysis**

Ohio Civ.R. 60(B) provides, “On motion and upon such terms as are just, the court may relieve

a party or his legal representative from a final judgment, order or proceeding for the following reasons: \* \* \* (4) \* \* \* it is no longer equitable that the judgment should have prospective application.” Both Ohio courts and federal courts liberally interpret this section of Civ.R. 60(B). See *Wurzelbacher v. Kroeger*, 40 Ohio St.2d 90, 92, 320 N.E.2d 666 (1974); *Schildhaus v. Moe*, 355 F.2d 529, 530 (2d Cir.1964).

Civ.R. 60(B)(4) “was designed to provide relief to those who have been prospectively subjected to circumstances which they had no opportunity to foresee or control.” *Knapp v. Knapp*, 24 Ohio St.3d 141, 146, 493 N.E.2d 1353 (1986). “Relief under Civ.R. 60(B)(4) must be warranted by events occurring subsequent to the entry of the judgment in question.” *Youssefi v. Youssefi*, 81 Ohio App.3d 49, 52, 610 N.E.2d 455 (9th Dist. 1991), citing *Old Phoenix Nat’l Bank v. Sandler*, 14 Ohio App.3d 12, 13, 469 N.E.2d 943 (9th Dist. 1984).

Here, when the parties agreed to the Consent Judgment Entry, they contemplated Northwood acting in good faith in reviewing and approving Defendants’ abatement plan. The parties also contemplated Defendants being able to demolish the mall to satisfy the \$1.69 million judgment. The parties did not contemplate that Northwood would require a bond in excess of the \$1.69 million judgment already in place before Defendants could begin demolition of the mall. Since the Court journalized the Consent Judgment Entry, however, Northwood has radically changed its position and attempted to add new hurdles for Defendants to clear before they may demolish the mall and satisfy the \$1.69 million judgment.

First, Northwood unilaterally decided Defendants had not complied with the September 30, 2013 deadline for submitting an abatement plan for approval, even though Ohio Plaza submitted its abatement plan on September 23, 2013. Northwood explicitly stated Defendants would not be



permitted to demolish the mall and it would not approve any plans Defendants submitted, in direct contravention to the Consent judgment Entry, thereby preventing Defendants from satisfying the \$1.69 million judgment and frustrating the purpose of the Consent Judgment Entry.

Second, Northwood informed Defendants they had to post a bond of \$1.7 million before it would permit Defendants to demolish the mall. This requirement was not included in the Consent Judgment Entry and, as discussed above, is arbitrary and unnecessary.

The point of the Consent Judgment Entry was to have Defendants demolish the mall. Defendants consented to having judgment entered against them because the Consent Judgment Entry provided them a means satisfy the monetary judgment – demolishing the mall. Now, Northwood is prohibiting Defendants from demolishing the mall, and consequently from satisfying the judgment. This is wholly inequitable and the Court should not permit the judgment against Defendants to stand, especially considering the liberal construction of Civ.R. 60(B)(4) that the Court must employ. The Court should not permit Northwood to entice Defendants to consent to a \$1.69 million judgment against them, then to unilaterally extinguish Defendants' means of satisfying that judgment.

#### **b. Conclusion**

Accordingly, the Court should afford Defendants relief from the Consent Judgment Entry of August 8, 2013 because it is no longer equitable that the judgment should have prospective application.

#### **IV. Request for Telephonic Status Conference and Evidentiary Hearing**

Unfortunately, the parties have been unable to resolve these new issues extra-judicially. Defendants would appreciate the opportunity to discuss possible resolutions with the Court and opposing counsel. Defense counsel respectfully requests leave to attend the status conference by telephone, given his geographic location. In the event that this matter cannot be resolved by status

conference, the Defendant requests an evidentiary hearing on issues presented herein.

Respectfully Submitted,

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## CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was served upon the following parties via email on November 20, 2013, pursuant to Civ.R. 5(B)(2)(f):

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The undersigned hereby certifies that a copy of the foregoing was served upon the following parties via prepaid U.S. mail on November 20, 2013, pursuant to Civ.R. 5(B)(2)(c):

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