COURT OF APPEALS
DECISION
DATED AND FILED

January 26, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 03-2869 **Cir. Ct. No. 00CV000642**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

KEVIN K. PARMAN AND SUSAN K. PARMAN,

PLAINTIFFS-APPELLANTS,

V.

JEFFREY D. OGDEN AND DURALAM, INC.,

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Winnebago County: BRUCE SCHMIDT, Judge. *Affirmed.*

Before Brown, Nettesheim and Snyder, JJ.

¶1 PER CURIAM. Kevin and Susan Parman have appealed from an order granting a motion by Jeffrey Ogden and Duralam, Inc., to enforce a settlement agreement executed by the parties in October 2002. Based on the settlement agreement, the trial court dismissed the Parmans' complaint against Ogden and Duralam. We affirm the order.

¶2 This action was commenced by the Parmans in August 2000. They alleged that the property adjacent to their home was owned by Ogden and leased to Duralam, which operated a printing business.[1] They contended that the noise generated by Duralam's business constituted a nuisance, and demanded abatement of the nuisance, an injunction, and damages.

¶3 The case was scheduled for trial on October 8, 2002. A few days before trial, the parties reached a settlement agreement, which they executed in writing on October 9, 2002. The settlement agreement provided that in order to avoid the costs and uncertainties associated with further litigation in this case, the parties agreed "that sound attenuation work, as described below, shall be performed" at the printing plant. It further provided that "[t]he specific scope of the sound attenuation work will be established by mutual agreement between an expert retained by the Parmans, Mr. Paul Kurland of Bay Hearing Conservation, Inc., and an expert retained by Ogden and Bemis, Mr. Bob Andres of Oshex-ESA Consulting Services."

¶4 The agreement stated that Duralam would undertake to provide access and make the entire building available for review by the experts. It indicated that Kurland and Andres would inspect the facility as soon as they had a common half day available and would prepare a joint recommendation relating to sound attenuation work that should be performed at the facility. The agreement stated that Kurland and Andres would analyze and consider all decibel and frequency readings taken by any entity at either the Parman house or the printing

[1] Duralam, Inc., is now known as Bemis, Inc. The parties have used both names in their briefs. Our use of the name "Duralam" therefore also refers to Bemis.

facility, as well as prior specified reports, their personal observations, and their specialized knowledge and expertise. The agreement specified that the sound attenuation work that would be performed at the facility had to be mutually agreed upon by Kurland and Andres, and that if they were unable to agree, they would select an additional expert who would serve as a neutral third party and evaluate the sound attenuation proposals. It was agreed that the experts were retained not only to prepare the plan "but to also approve the 'after-built' result as being in conformance with their recommendations."

¶5 In addition to the provisions for sound attenuation work, the settlement agreement provided that Ogden and Duralam's insurer would pay $30,000 to the Parmans. It provided that upon payment and completion of the sound attenuation work described in the agreement, the Parmans would release their claims against Ogden and Duralam. The agreement stated that the release would "constitute a release of the particular nuisance, argued but denied, that may be presented by" the Duralam building as it was then equipped.

¶6 It is undisputed that the $30,000 payment was made to the Parmans, and that Kurland and Andres inspected the printing facility on November 18, 2002. In an affidavit dated April 9, 2003, Kurland indicated that on November 18, 2002, he and Andres reviewed the noise remediation work that had already been done, and measured noise levels at the plant and at the Parman residence. Kurland indicated in his affidavit that a joint recommendation for specific sound attenuation work was made. He stated that he returned to the facility on March 28, 2003, and all of the work agreed to by him and Andres had been completed.

¶7 After the sound attenuation work agreed to by Kurland was completed, the Parmans refused to sign a stipulation for dismissal. Ogden and

Duralam then filed a motion to enforce the settlement agreement and dismiss the action. The trial court granted the motion after concluding that the parties entered into a valid and enforceable settlement agreement and that all the provisions of the settlement agreement had been fulfilled.

¶8 On appeal, the Parmans concede that a valid agreement was entered into between the parties, and state that they are not seeking relief from the agreement. However, they contend that the intent of the agreement was to remediate the noise of which they complained (the complaint noise). They contend that the trial court erred in enforcing the settlement agreement because uncontroverted evidence indicated that the complaint noise had not been remediated by the work performed by Duralam. They also contend that the trial court erred when it enforced the settlement agreement without permitting further discovery or conducting an evidentiary hearing. In conjunction with these arguments, they contend that Duralam acted in bad faith when it failed to run its printing machinery at maximum capacity when sound levels were being tested, thus preventing the experts from properly assessing and remediating the complaint noise. They rely on an affidavit from Kurland dated July 18, 2003, indicating that it was not until March 28, 2003, after the sound attenuation work had been completed, that he took his maximum sound readings at the plant. In this affidavit, Kurland also attested that this was the first time the Parmans were able to report to him that the noise they were hearing was the noise level that generated their lawsuit.

¶9 The defect in the Parmans' argument is that the settlement agreement signed by them did not provide that release of their claims would occur when the complaint noise was remediated. Rather, as determined by the trial

court, the settlement agreement provided for release of their claims after the parties' experts agreed to sound attenuation work and the work was completed.

¶10 Courts may consider principles of contract construction when construing a stipulation for settlement of a civil action. ***State v. Peppertree Resort Villas, Inc.***, 2002 WI App 207, ¶13, 257 Wis. 2d 421, 651 N.W.2d 345. Construction of a contract presents a question of law which this court reviews de novo. ***Borchardt v. Wilk***, 156 Wis. 2d 420, 427, 456 N.W.2d 653 (Ct. App. 1990). Where the terms of a contract are plain and unambiguous, we will construe it as it stands. ***Id.***

¶11 After a settlement agreement is construed, the issue of whether it should be enforced is committed to the trial court's discretion, as is the issue of whether a party is entitled to an evidentiary hearing on the question of enforcement. ***Phone Partners Ltd. P'ship v. C.F. Communications Corp.***, 196 Wis. 2d 702, 710, 542 N.W.2d 159 (Ct. App. 1995). An appellate court will sustain a discretionary decision if the trial court considered the relevant facts, applied a correct standard of law, and, using a demonstrated rational process, reached a conclusion that a reasonable judge could reach. ***Id.***

¶12 The settlement agreement signed by the Parmans clearly and unambiguously provided that, after conducting an inspection of the Duralam plant, the parties' experts would prepare a joint recommendation for the performance of sound attenuation work and, after the work was performed, would approve it if it conformed to their recommendations. It is undisputed that this was done, and that the $30,000 payment required by the settlement agreement was made to the Parmans. As concluded by the trial court, all terms of the settlement agreement were thus fulfilled.

¶13 The Parmans contend that discovery and an evidentiary hearing are necessary to determine whether the complaint noise has been remediated. However, based upon the terms of the settlement agreement, this issue is irrelevant. Nothing in the settlement agreement stated that if the sound attenuation work agreed upon by the experts ultimately failed to remediate the noise to the satisfaction of the Parmans, further work would be done. As determined by the trial court, the settlement agreement called for expert agreement on the sound attenuation work to be performed, and approval of the completed work as conforming to the experts' recommendations. The terms of the settlement agreement were fully satisfied, and the trial court properly exercised its discretion in enforcing it without further discovery or an evidentiary hearing.

¶14 In affirming the trial court's order, we also reject the Parmans' argument that they are entitled to a finding that Ogden and Duralam breached the settlement agreement, or further discovery and an evidentiary hearing, because Ogden and Duralam acted in bad faith. A breach of the implied contractual covenant of good faith may occur even though all the terms of a written agreement have been fulfilled. ***Peppertree Resort***, 257 Wis. 2d 421, ¶19. Bad faith includes the evasion of the spirit of the bargain, lack of diligence and slacking off, willful rendering of imperfect performance, abuse of a power to specify terms, and interference with or failure to cooperate in the other party's performance. ***Id.***, ¶20.

¶15 The Parmans contend that Duralam violated the spirit of the settlement agreement and acted in bad faith by failing to run its machinery at full capacity or at a level which produced the complaint noise, preventing the experts from being exposed to the complaint noise until after the sound attenuation work was completed. However, nothing in the settlement agreement specified that Duralam was required to run its machinery at maximum capacity during the

experts' inspection or at any other time. Moreover, nothing in the record provides any basis to conclude that Duralam willfully produced a noise level during the experts' November 18, 2002 inspection that was lower than the complaint noise, or otherwise acted in bad faith. The record contains the undisputed affidavit of Tom Van Handel, Duralam's plant manager. Van Handel attests that he was present during the site inspection by Kurland and Andres on November 18, 2002, that the entire Duralam building was made available for their access and review, and that Duralam operated its equipment at whatever levels were requested so as to allow for the experts' noise measurements and inspection.

¶16 If the Parmans or Kurland believed that the sound levels during the November 18, 2002 inspection did not rise to the level of the complaint noise, or that the other materials relied on by Kurland did not reflect the complaint noise level, it was incumbent upon them to resolve the matter before Kurland agreed to the sound attenuation work. When Kurland joined Andres in agreeing to the work and the work was performed, the settlement agreement was fulfilled. The trial court therefore properly enforced the terms of the agreement without ordering further discovery or an evidentiary hearing.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2003-04).