MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Shorewood Forest Utilities, Inc.,
Appellant-Plaintiff,

v.

Rex Properties, LLC and Don Blum,
Appellee-Defendants

August 11, 2023

Court of Appeals Case No. 22A-PL-2345

Appeal from the Porter Superior Court

The Honorable Jeffrey W. Clymer, Judge

Trial Court Cause No. 64D02-1810-PL-10020

Memorandum Decision by Judge Mathias
Judges Vaidik and Pyle concur.

Mathias, Judge.

[1] Shorewood Forest Utilities, Inc. ("Shorewood") appeals and Rex Properties, LLC ("Rex Properties") and Don Blum cross-appeal the trial court's order to enforce the parties' settlement agreement. Between them, the parties raise three issues for our review. However, we need only reach the following dispositive issue: whether the trial court's order to enforce the parties' settlement agreement is erroneous. We agree with the trial court that the parties had an enforceable agreement, and we therefore affirm its judgment. Because the parties' settlement agreement requires them to dismiss all claims, counterclaims, and cross-claims in this case with prejudice, we dismiss as moot Rex Properties and Blum's cross-appeal issues regarding the merits of the trial court's denial of their motions for judgment on the pleadings and summary judgment. We also decline their request for appellate damages and attorneys' fees.

Facts and Procedural History[1]

[2] Shorewood is a nonprofit corporation that provides sewer service to more than 1000 residents in Porter County. Rex Properties is a property developer, and Blum is the sole managing member of Rex Properties (we will refer to Rex Properties and Blum together as "Rex Properties" going forward). In 2017, Shorewood and Rex Properties entered into an agreement for Shorewood to

[1] Shorewood fails to cite the Record on Appeal in its brief to this Court. *See* Ind. Appellate Rules 46(A)(6)(a), (A)(8)(a) (requiring citations to the Record on Appeal in both the Statement of the Facts and the Argument). Accordingly, we conclude that Rex Properties and Blum's factual assertions in their brief, which are supported by appropriate citations, are not disputed.

expand into a new Rex Properties development and service the homes there according to certain terms, rates, and fees. However, not long thereafter, Shorewood concluded that its agreement with Rex Properties was not enforceable, and Shorewood declined to participate in the project.

[3] A number of lawsuits ensued. Around mid-2019, the only claim remaining in the instant cause was Rex Properties' approximately sixteen-million-dollar counterclaim against Shorewood for breach of contract. However, in late 2019, Shorewood sought to amend its complaint to allege claims of fraud, fraud in the inducement, unjust enrichment, and criminal deception against Rex Properties. In March 2020, the trial court permitted Shorewood's requested amendment.

[4] Meanwhile, Rex Properties had moved for summary judgment on its counterclaim. The trial court eventually denied that motion as well as a motion for judgment on the pleadings filed by Rex Properties on Shorewood's amended claims.

[5] In the spring and summer of 2020, the parties attempted to settle the instant cause out of court. On June 8, counsel for Shorewood sent counsel for Rex Properties an email stating that Shorewood's insurance carrier, Stratford Insurance, had agreed to pay Rex Properties $950,000 for Shorewood and Rex Properties to settle and dismiss all claims, counterclaims, and cross-claims in this cause. Shorewood's counsel copied counsel for Stratford Insurance on the email.

[6] Shorewood's June 8 email provided as follows:

Based on your request and that of [counsel for Stratford Insurance], the Board of Directors for [Shorewood] have now provided their consent to reaching a global resolve between all named parties. This will also confirm that [Shorewood] is not and will not be paying any of the settlement funds as this is the sole responsibility of [Stratford Insurance].

During an earlier phone call[,] you were kind enough to confirm that your clients were willing to accept the aforementioned settlement amount/sum contingent on the [Shorewood] Board of Directors consenting to a global settlement . . . . I have met with and conferred with . . . [the] Board Members, and they confirm their consent . . . .

As we also discussed[,] resolution will be accomplished via a Settlement Agreement and Covenant Not to Sue whereby each of the involved parties (i.e., Rex [Properties], Blum[,] and [Shorewood]) will dismiss their respective complaint, counterclaim, and third-party complaint with prejudice. [Shorewood] and your clients further agree via the Covenant Not to Sue and a Dismissal with Prejudice (by all parties) to end all disputes. I will draft those documents (for your review and input) which will include carve-outs of other claims filed and still pending against other tortfeasors or non-parties in other litigation (not directly involving Rex [Properties] /Blum). . . .

The parties will stipulate to the foregoing conditions precedent and at the appropriate time file a Joint Motion to Dismiss with prejudice the complaint, counterclaim[,] and third-party complaint in the state court action.

PLEASE CONFIRM THAT THE FOREGOING IS ACCURATE AND ACCEPTABLE TO REX PROPERTIES, LLC AND ITS SOLE MEMBER-MANAGER DONALD BLUM BY REPLYING TO THIS EMAIL . . . .

Appellant's App. Vol. 2, pp. 48-49 (highlighting and bold font removed).

[7] Approximately one hour later, counsel for Rex Properties responded to Shorewood's email as follows: "Mr. Blum has reviewed and approved the settlement with the terms set forth in your email . . . . I assume you will draft the releases?" *Id.* at 47. Rex Properties' counsel also confirmed that he would contact the trial court to vacate a pending hearing.

[8] Over the next several weeks, the parties' attorneys worked on drafting a Settlement Agreement. However, Shorewood insisted that two of its other insurance carriers be signatories to the Agreement along with Stratford Insurance. And, on July 15, Shorewood informed Rex Properties that it "reserve[d] the right for final review and approval" of the Agreement and that "nothing can be considered final until the party to be charged has signed on behalf of [Shorewood]." *Id.* at 52.

[9] Ten days after that message, counsel for Stratford Insurance emailed the parties with a draft Settlement Agreement in accordance with the parties' June 8 email exchange. However, Shorewood refused to sign it. Accordingly, Rex Properties filed a Motion to Enforce Settlement Agreement on the ground that the June 8 email exchange represented an enforceable agreement between the parties whereby Stratford Insurance would pay Rex Properties $950,000 and, in exchange, Shorewood and Rex Properties would dismiss all claims in this cause with prejudice. Stratford Insurance then moved to intervene and join Rex Properties' motion. After a hearing, the trial court granted the Motion to

Enforce Settlement Agreement and declared the instant cause closed. This appeal ensued.

Standard of Review

[10] The central issue in this appeal is whether the email exchange between the parties on June 8 represented the offer and acceptance of an enforceable settlement agreement. As our Supreme Court has explained:

> The basic requirements for a contract are offer, acceptance, consideration, and a meeting of the minds of the contracting parties. Whether a contract exists is a question of law.
>
> To be valid and enforceable, a contract must be reasonably definite and certain. All that is required to render a contract enforceable is reasonable certainty in the terms and conditions of the promises made, including by whom and to whom; absolute certainty in all terms is not required. Only essential terms need be included to render a contract enforceable. Thus, where any essential element is omitted from a contract, or is left obscure or undefined, so as to leave the intention of the parties uncertain as to any substantial term of the contract, the contract may not be specifically enforced. A court will not find that a contract is so uncertain as to preclude specific enforcement where a reasonable and logical interpretation will render the contract valid.

Conwell v. Gray Loon Outdoor Mktg. Grp., Inc., 906 N.E.2d 805, 812-13 (Ind. 2009) (citations omitted).

We agree with the trial court that the parties' June 8 email exchange created an enforceable settlement agreement.

[11] The parties' June 8 email exchange created an enforceable contract between them. Shorewood's initial email to Rex Properties and Stratford Insurance made clear the essential terms of that contract, namely, that Stratford Insurance would pay Rex Properties $950,000; that Shorewood itself would pay no money to Rex Properties; and that, in exchange, Shorewood and Rex Properties would dismiss all claims in the instant cause with prejudice. Further, Shorewood's counsel expressly represented to Rex Properties and Stratford Insurance that his client had consented to settlement on those terms. Rex Properties promptly accepted the offered agreement, and there is no dispute that Stratford Insurance did as well.

[12] At the moment of Rex Properties' acceptance about one hour after Shorewood sent the June 8 email, the parties created a clear and enforceable agreement. Shorewood had made an offer, Rex Properties accepted the offer, there was more than ample consideration between them and Stratford Insurance, and all parties had a meeting of the minds over definite and certain essential terms. There were no essential terms left uncertain in Shorewood's offer or in Rex Properties' response to that offer. Thus, we agree with the trial court that Shorewood was bound by the terms of the settlement agreement created by the June 8 email exchange.

[13] Still, Shorewood asserts that "no contract came into existence" because its email to Rex Properties "was clearly contingent upon future written

documents." Appellant's Br. at 11 (formatting altered). In particular, Shorewood points to the language in its June 8 email where its counsel stated that resolution of the instant cause "will be accomplished" by an ensuing Settlement Agreement and Covenant Not to Sue, that he would "draft those documents (for your review and input)," and that ensuing documents effecting dismissal of the instant cause would also be drafted. *Id.* According to Shorewood, that language made the June 8 emails nothing more than an "agreement to agree," which is not an enforceable contract. *Id.* at 12.

[14] But all Shorewood's counsel stated in that language was that he would memorialize and give effect to the parties' agreement, as represented in the June 8 emails, once Rex Properties accepted it. It is well settled that "parties may make an enforceable contract which obligates them to execute a subsequent final written agreement." *Wolvos v. Meyer*, 668 N.E.2d 671, 674 (Ind. 1996). Indeed, that principle is essential to negotiating; allowing, as Shorewood requests, every agreement that is yet to be memorialized to be unenforceable would enable endless dilatory negotiation tactics. What matters in the formation of a contract is an offer, an acceptance, consideration, and a meeting of the minds over definite and certain essential terms. *See Conwell*, 906 N.E.2d at 812-13. Those requirements were met here, and therefore the parties had an enforceable contract.

[15] Shorewood also asserts that Rex Properties' response did not mirror the offer made. Specifically, Shorewood states that Rex Properties' response "indicated that [counsel] expected [Shorewood] to draft 'releases' . . . . However, no

'release' was ever offered . . . ." Appellant's Br. at 14. We reject this assertion. Rex Properties' response was plainly referring to the agreement to dismiss all claims with prejudice and covenant not to sue. Shorewood's argument to the contrary is unpersuasive.

[16] Finally, Shorewood claims that Stratford Insurance colluded with Rex Properties and somehow kept Shorewood "in the dark and uninformed" about the "terms, conditions, requirements, and payments" to be made to Rex Properties. Appellant's Br. at 15. This argument is not supported by citations to the Record on Appeal. *See* Ind. Appellate Rule 46(A)(8)(a). And it disregards the fact that the emailed June 8 offer and its stated terms was sent by Shorewood. Thus, the argument is also not supported by cogent reasoning. *See id.* We reject it accordingly, and we affirm the trial court's judgment to enforce the parties' settlement agreement.

Rex Properties' cross-appeal issues are moot.

[17] We briefly address Rex Properties' arguments on cross-appeal. In particular, Rex Properties asks that we review the trial court's denial of Rex Properties' motion for judgment on the pleadings and its motion for summary judgment on the ground that, had the trial court not denied those motions, "the settlement at issue would never have come into existence." Appellees' Br. at 30. Be that as it may, the course of these proceedings resulted in a settlement agreement between Shorewood and Rex Properties, and their settlement of this cause renders the trial court's prior judgments moot.

[18] Rex Properties also suggests that our review of those decisions is proper because Rex Properties should be allowed to treat Shorewood's actions following the June 8 email exchange as a "repudiation" of the settlement agreement, which Rex Properties should have the option to accept. *Id.* at 30-31. But insofar as Rex Properties may have had an election of remedies following Shorewood's purported repudiation of the settlement agreement, the remedy Rex Properties elected to pursue was a motion to enforce that agreement. Rex Properties cites no authority for its apparent proposition that it can elect the remedy of a motion to enforce an agreement, receive a favorable trial court judgment on that motion, and then continue to seek other alternative remedies. *See* App. R. 46(A)(8)(a). Accordingly, we are not persuaded that Rex Properties' cross-appeal issues are properly before us given our holding on the trial court's judgment on the motion to enforce the settlement agreement, and we decline to address them.

We also decline to enter an award of appellate damages or attorneys' fees for Rex Properties.

[19] Finally, Rex Properties requests that we award it appellate damages and attorneys' fees pursuant to Appellate Rule 66(E).[2] As we have explained:

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[2] Elsewhere in its brief, Rex Properties states that, "[w]hen remanding this case for entry of judgment in favor of [Rex Properties], the Court should direct the trial court to award [Rex Properties its] reasonable attorneys' fees from the inception of this case through appeal." Appellees' Br. at 50. We interpret Rex Properties' argument regarding trial attorneys' fees to be contingent on this Court agreeing to review Rex Properties' cross-appeal issues and then remanding for judgment on one of those issues. As we do not reach the cross-

> Ind. Appellate Rule 66(E) provides that this Court "may assess damages if an appeal, petition, or motion, or response, is frivolous or in bad faith. Damages shall be in the Court's discretion and may include attorneys' fees." Our discretion to award attorney fees under Ind. Appellate Rule 66(E) is limited to instances when "an appeal is permeated with meritlessness, bad faith, frivolity, harassment, vexatiousness, or purpose of delay." *Thacker v. Wentzel*, 797 N.E.2d 342, 346 (Ind. Ct. App. 2003). To prevail on a substantive bad faith claim, a party must show that the appellant's contentions and arguments are utterly devoid of all plausibility. *Id.* Procedural bad faith occurs when a party flagrantly disregards the form and content requirements of the rules of appellate procedure, omits and misstates relevant facts appearing in the record, and files briefs written in a manner calculated to require the maximum expenditure of time both by the opposing party and the reviewing court. *Id.* at 346-347.

Staff Source, LLC v. Wallace, 143 N.E.3d 996, 1012 (Ind. Ct. App. 2020). While we have the authority to award damages and fees on appeal, "we must use extreme restraint when exercising this power because of the potential chilling effect upon the exercise of the right to appeal." *Thacker*, 797 N.E.2d at 346.

[20] Rex Properties' request for appellate damages and attorneys' fees is based primarily on Shorewood's weak arguments on appeal and Shorewood's complete failure to cite to the Record on Appeal. However, while Rex Properties' argument is well-taken, the direct appeal issue was straightforward, and Shorewood's Appendix was uncomplicated. We cannot say that

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appeal issues, we likewise do not consider Rex Properties' contingent request for instructions to have the trial court consider attorneys' fees on remand. We further note that Rex Properties does not appear to raise as a cross-appeal issue an order or judgment from the trial court in which the court denied any such fee request.

Shorewood's admittedly weak arguments and lack of compliance with our Appellate Rules rose to the extraordinary level of bad faith under Rule 66(E). We therefore decline Rex Properties' request for an award of appellate damages and attorneys' fees.

Conclusion

[21] For all of these reasons, we affirm the trial court's judgment on the motion to enforce the settlement agreement, we decline to reach Rex Properties' cross-appeal issues, and we decline Rex Properties' request for appellate damages and attorneys' fees. The trial court's judgment is affirmed.

[22] Affirmed.

Vaidik, J., and Pyle, J., concur.