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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

BFD INVESTMENTS, LLC, an Arizona limited liability company, Plaintiff/Appellant, v. BARNYARD HERITAGE, LLC, an Arizona limited liability company, Defendant/Appellee.	2 CA-CV 2012-0016 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. C20114627

Honorable Ted B. Borek, Judge

AFFIRMED

Porter Law Firm
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E C K E R S T R O M, Presiding Judge.

¶1 Plaintiff/appellant BFD Investments, LLC, appeals from the trial court's grant of summary judgment in favor of defendant/appellee Barnyard Heritage, LLC. BFD argues the trial court erred in determining as a matter of law that BFD's complaint was precluded by a prior settlement agreement between the parties.[1] For the following reasons, we affirm the judgment.

Factual and Procedural Background

¶2 BFD and Barnyard each own property in Heritage Plaza, a commercial development. BFD owns Lot 7, the only lot currently undeveloped, and Barnyard owns Lots 1, 2, and 3. Heritage Plaza is subject to a recorded Declaration of Covenants, Conditions, and Restrictions (CC&Rs), and Barnyard is the designated manager of Heritage Plaza under the terms of the CC&Rs.

¶3 In 2008, BFD purchased Lot 7 with the intent to build a dental office on it. The CC&Rs provide that the maximum building size allowed on Lot 7 is 4,000 square feet. In 2010, BFD began plans for developing the lot. However, BFD alleges that "[s]ometime around September 2010, BFD learned that its lender was no longer willing to make a construction loan unless the BFD's building would be at least 5,700 square feet in size." BFD sought from Barnyard a modification of the CC&Rs to allow the larger building, but Barnyard refused, citing the 4,000 square foot building size limitation set forth in the CC&Rs.

[1]BFD also makes a number of other arguments, but because we find the trial court correctly granted summary judgment based on the settlement agreement, we need not decide the other issues.

¶4 In June 2011, BFD filed a complaint against Barnyard for breach of contract and requested injunctive relief, asserting Barnyard had violated the CC&Rs by refusing to modify them to allow a larger building to be constructed on Lot 7. BFD asked the trial court to order Barnyard "to consent to the construction of a 5,800 square foot building on Lot 7 in Heritage Plaza provided that [BFD] complies with all Pima County parking requirements." Barnyard responded that BFD's actions, in seeking to modify the CC&Rs, breached an earlier settlement agreement between the parties that had resolved a lawsuit between them and other entities related to the development of Lot 7. Pursuant to the settlement, BFD had agreed to release all claims or causes of action "known or unknown" at the time of the settlement. The substantive provisions of that agreement pertinent here read as follows: "that the CC&Rs are in full force and effect and BFD will comply with the CC&Rs," that BFD will "initiate and complete construction of the building that is proposed to be constructed on Lot 7,"[2] and that if "completion of construction becomes impossible due to BFD's inability to secure construction funding and/or necessary governmental approvals . . . BFD agrees to restore The Subject Property . . . to the condition that existed prior to the commencement of the site work improvements."

¶5 Barnyard moved for summary judgment on BFD's claims, and the trial court granted the motion. The court entered a final judgment in which it dismissed

[2]Revision 3 to the Heritage Plaza development plan, adopted as part of the settlement agreement, provides for a 4,000 square foot building on Lot 7 and reserves the remainder of the lot as common area, which is used primarily for parking.

BFD's complaint with prejudice and awarded Barnyard its attorney fees and costs. BFD timely appealed. We have jurisdiction pursuant to A.R.S. § 12-2101(A)(1).

Discussion

¶6 BFD argues the trial court erred "in determining as a matter of law that BFD's complaint was barred by the prior settlement agreement" and in granting summary judgment in favor of Barnyard on that basis. We review de novo the court's grant of summary judgment, and in doing so, we view the evidence and all reasonable inferences therefrom in the light most favorable to the opponent of summary judgment. *Baseline Fin. Servs. v. Madison*, 229 Ariz. 543, ¶ 6, 278 P.3d 321, 322 (App. 2012). A party is entitled to summary judgment when "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Ariz. R. Civ. P. 56(c)(1). In other words, summary judgment must be granted "if the facts produced in support of the claim . . . have so little probative value, given the quantum of evidence required, that reasonable people could not agree with the conclusion advanced by the proponent of the claim." *Orme Sch. v. Reeves*, 166 Ariz. 301, 309, 802 P.2d 1000, 1008 (1990).

¶7 We also determine de novo whether the settlement agreement bars BFD's claims. *See Burke v. Ariz. State Ret. Sys.*, 206 Ariz. 269, ¶ 6, 77 P.3d 444, 447 (App. 2003); *Bothell v. Two Point Acres, Inc.*, 192 Ariz. 313, ¶ 8, 965 P.2d 47, 50 (App. 1998). We do note, however, the long-standing "policy of the law to favor compromise and settlement." *Dansby v. Buck*, 92 Ariz. 1, 11, 373 P.2d 1, 8 (1962). BFD contends its

lawsuit is not precluded by the settlement agreement because of "the language of the settlement agreement itself," and "undisputed facts showing that the claim BFD asserts in this action did not exist when the settlement agreement was made." A portion of the relevant language of the settlement agreement is provided in this release clause:

> Except for enforcement of the terms of this Agreement and BFD's existing and continuing obligation to pay CAM Charges, the parties, including all parents, members, affiliates and subsidiaries, and each of them, hereby release and forever discharge all of the other parties . . . from any and all claims or causes of action, known or unknown, presently existing, including but not limited to claims the undersigned have or may have arising out of or in any way relating to the matters alleged in The Lawsuit through the date of settlement. This release includes, without limitation, any claims or causes of action between the parties that were or could have been asserted by any party in The Lawsuit. . . . The parties are aware that the law in Arizona, as provided in *Dansby v. Buck*, 92 Ariz. 1, 373 P.2d 1 (1962), is that unknown claims are only deemed released if there is an intent by the parties to make a compromise of any and whatever damages may exist from the underlying incidents, whether known or unknown. The parties acknowledge, therefore, that part of the consideration being paid is for unknown claims regardless of their nature and regardless of whether such claims could have been discovered or are even discoverable at this point in time.

¶8 "Construction and enforcement of settlement agreements, including determinations as to the validity and scope of release terms, are governed by general contract principles." *Emmons v. Superior Court*, 192 Ariz. 509, ¶ 14, 968 P.2d 582, 585 (App. 1998). A guiding principle of contract interpretation is that courts attempt to enforce a contract according to the parties' intent. *Taylor v. State Farm Mut. Auto. Ins. Co.*, 175 Ariz. 148, 152, 854 P.2d 1134, 1138 (1993). "In order to determine what the

parties intended, we first consider the plain meaning of the words in the context of the contract as a whole." *Grosvenor Holdings, L.C. v. Figueroa*, 222 Ariz. 588, ¶ 9, 218 P.3d 1045, 1050 (App. 2009). If, after such consideration, the parties' intent is clear, the contract contains no ambiguity. *In re Estate of Lamparella*, 210 Ariz. 246, ¶ 21, 109 P.3d 959, 963 (App. 2005). A contract is not ambiguous simply because the parties disagree about the meaning of its terms. *Id*.

¶9 Here, after considering the plain meaning of the release terms "in the context of the contract as a whole," *Grosvenor Holdings*, 222 Ariz. 588, ¶ 9, 218 P.3d at 1050, we conclude the intent of the parties is clear. By referring to *Dansby* in the release provision, the parties unequivocally expressed their intention to preclude future litigation relating to the development of Lot 7, even if the claims were unknown at the time of the settlement. In *Dansby*, our supreme court held that "'[p]arties may preclude recovery for all injuries, whether known or unknown, if it is their intention at the time to do so.'" 92 Ariz. at 7, 373 P.2d at 5, *quoting* 45 Am. Jur. *Release* § 19. In other words, an unknown claim "must not have been within the parties' contemplation when the agreement was reached" in order to relieve a plaintiff from a release. *Dietz v. Lopez*, 179 Ariz. 355, 357, 879 P.2d 2, 4 (App. 1994).

¶10 The settlement agreement in this case provides that it relates to disputes between the parties concerning the development of Lot 7. The language also provides that financing for Lot 7 was an issue contemplated by the parties when they entered into the settlement agreement. And the terms discuss the possibility that BFD might never

construct a building on Lot 7, and that the reason for that lack of development might be BFD's inability to secure financing. Thus, BFD agreed to release any potential claims, known or unknown, relating to its ability to obtain financing and the effect that ability could have on the development of Lot 7. *Cf. Ryan, Klimek, Ryan P'ship v. Royal Ins. Co. of Am.*, 728 F. Supp. 862, 869-70 (D.R.I. 1990) (release binding when insureds discovered groundwater contamination after settlement but knew of possibility of contamination at time of settlement), *aff'd sub nom. Ryan v. Royal Ins. Co. of Am.*, 916 F.2d 731 (1st Cir. 1990); *Fardy v. Roen Transp. Co.*, 139 F. Supp. 167, 168 (D. Mass. 1956) (release binding when evidence established at time of release employee fully aware of chance he might have some physical ailment); *Bakamus v. Albert*, 95 P.2d 767, 772 (Wash. 1939) (general release effective to bar claim of which releasor claimed no knowledge despite full opportunity to investigate all matters connected with sale).

¶11 Nonetheless, seizing on language in the release that the claims must be "presently existing," BFD contends that because the facts underlying the claim in the lawsuit did not exist until September 2010, when the lender refused to approve financing, the claim did not exist at the time of the settlement agreement in mid 2010. Accordingly, BFD contends the settlement agreement does not cover the present claim.[3]

¶12 But BFD overlooks that the gravamen of its claim is not that the bank declined to provide financing, but that Barnyard unreasonably declined to modify the

[3]Notably, in support of this contention, BFD has provided only an affidavit containing inadmissible hearsay, which is insufficient to defeat a properly supported motion for summary judgment. *See* Ariz. R. Civ. P. 56(e).

CC&Rs so as to provide BFD markedly more building space, which would reduce the common area for parking. All of the bases of that claim existed at the time of the settlement agreement.

¶13 As noted above, BFD's desire to develop Lot 7 and its need for financing to achieve that were expressly contemplated by the agreement.[4] The agreement had settled a lawsuit which turned, in part, on a dispute between BFD and Barnyard about how much of BFD's lot would be available for building and how much must be set aside for common area under the terms of the CC&Rs.[5] The agreement resolved the dispute by approving a development plan that specifically set forth both the space BFD could build upon and the portion of Lot 7 that would be preserved for parking spaces.[6] Thus, BFD's desire to occupy space with a structure instead of having that space reserved as common area was addressed by the agreement and therefore presently existing. Finally, the agreement specified that BFD's inability to secure financing would not change the

[4]As part of the agreement, BFD agreed to "initiate and complete construction of the building that is proposed to be constructed on Lot 7" within two years, including applying for construction loans and other necessary financing. It also agreed that if "completion of construction becomes impossible due to BFD's inability to secure construction funding," it would restore Lot 7 to "the condition that existed prior to the commencement of the site work improvements described," which was common area used for parking.

[5]The relevant language of the settlement agreement provides that the "Lawsuit center[ed] on the development of a Lot 7," and "'Revision 3' to the Heritage Plaza development plan, which covers the development of Lots 6 and 7 at Heritage Plaza in accordance with the Pima County Zoning Code." Moreover, BFD agreed "that the CC&Rs are in full force and effect and BFD will comply with the CC&Rs."

[6]Pursuant to the agreement, Barnyard approved "Revision 3," to the Heritage Plaza development plan, "including the parking for Lot 7."

requirement that BFD complete its development by a certain time in conformity with the development plan.

¶14 In sum, the risk that BFD could not secure financing was reflected in the terms and conditions of the settlement agreement, making the risk presently existing. And we can conclude that BFD's and Barnyard's respective interests regarding how much of Lot 7 must remain common area likewise existed at the time of the settlement: those positions were at the heart of the dispute resolved by the development plan adopted by the agreement.

¶15 We acknowledge that the settlement agreement authorizes BFD to submit proposed revisions to the development plan. And, the CC&Rs pertinent to the development authorized BFD to seek their modification at the discretion of Barnyard. But because the settlement agreement was designed to resolve all then-existing disputes, and because it contains an express and comprehensive release provision barring claims relating to the matters settled, we do not read those provisions as entitling BFD to relitigate disputes at the core of the original lawsuit.

¶16 Thus, BFD's claims arose exclusively from disputes and potential risks that were fully known and presently existing at the time of the settlement agreement. Because the release provisions in the settlement agreement bar such presently existing claims—even "unknown claims regardless of their nature" that relate to the agreement—the trial court did not err in concluding that BFD's claim was barred by the settlement agreement.

Disposition

¶17 For all of the above stated reasons, the judgment is affirmed. Barnyard has requested its attorney fees on appeal. We grant the request pursuant to A.R.S. § 12-341.01(A) upon Barnyard's compliance with Rule 21, Ariz. R. Civ. App. P.

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Presiding Judge

CONCURRING:

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Judge