RENDERED: AUGUST 10, 2007; 10:00 A.M.
TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-000994-MR

MYANH COLEMAN — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE LISABETH HUGHES ABRAMSON, JUDGE
ACTION NO. 04-CI-010337

BEE LINE COURIER SERVICE, INCORPORATED — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; ACREE AND WINE, JUDGES.

WINE, JUDGE: The Appellant, Myanh Coleman ("Coleman"), seeks review of an Opinion and Order of the Jefferson Circuit Court granting summary judgment in favor of the Appellee, Bee Line Courier Service, Inc. ("Bee Line"). Finding no error, we affirm.

The underlying facts are not in dispute. On December 11, 2003, the vehicle driven by Coleman was rear-ended by a vehicle driven by Frank Huff, an employee of Bee Line and while in the course of his employment by Bee Line. Coleman's vehicle

suffered property damage which was settled between Coleman and Bee Line without the aid of counsel.

Coleman sought chiropractic care to address her personal injuries and subsequently retained counsel to represent her on a personal injury claim.

On March 23, 2004, Coleman, through her counsel, sent a letter to Bee Line demanding $21,000 to settle the personal injury claim.[1] Included with the letter were the treatment records of Coleman's chiropractor. The letter was sent to the attention of "Louie." In subsequent discovery, it is clear "Louie" is Norman L. Seger, the vice-president of Bee Line. On March 25, Steven Price ("Price"), a claims representative for Gallagher Bassett Services, Inc. ("Gallagher-Bassett"), sent a counter-offer for $6,500 to settle the personal injury claim. Subsequently, on March 29 by telephone voice mail, and on March 30 by fax, Coleman, through counsel, accepted the offer of $6,500. The acceptance letter was signed by Grover S. Cox ("Cox").

Thereafter, on March 30, 2004, at 12:52 p.m., Price faxed a form styled "Release of All Claims" ("Release") to Cox for Coleman's signature. The Release was in fact signed by Coleman, and witnessed and notarized by Cox on March 30.

The Release reads in part as follows:

> This Indenture Witnesseth that I, Myanh Coleman, in consideration of the sum of $6,500.00, do hereby for my heirs, personal representatives and assigns, release and forever discharge Frank Huff, Bee Line Courier Service,

[1] Although Coleman initially questioned whether Bee Line was self-insured, that issue was not preserved for review. If Bee Line had not filed the requisite form to be self-insured, it could still be liable for a reimbursement claim pursuant to KRS 304.39-070(2). *See City of Louisville v. State Farm Mutual Automobile Insurance Co.*, 194 S.W.3d 304 (Ky. 2006).

> Gallagher Bassett Services, Inc., Zurich Insurance and any other person, firm or corporation charged or chargeable with responsibility or liability, their heirs, representatives or assigns, from any and all claims, demands, costs, expenses, loss of services, actions and causes of action arising from any act or occurrence up to the present time, and particularly on account of all personal injury, disability, property damages, loss or damages of any kind sustained or that I may hereafter sustain in consequence of an accident that occurred on or about the 11th day of December, 2003, at or near Louisville, KY.
>
> . . . **The undersigned agrees to hold the released parties harmless and indemnify them from any claims asserted by any third parties or lien holders, including but not limited to, all medical providers and any other insurance carriers against the proceeds of this settlement.**

(Emphasis added).

On March 31, Gallagher Bassett issued a check in the amount of $6,500. Sometime thereafter, Nationwide Mutual Insurance Company ("Nationwide") sought to recover from Bee Line $5,737 in Personal Injury Protection (PIP) benefits it paid to or on behalf of Coleman. Bee Line asked Coleman to either defend against or make payment on this claim. When Coleman refused, Bee Line negotiated a settlement in the amount of $4,737, which it paid to Nationwide. Bee Line sought indemnification from Coleman, relying on the language set out above in the Release signed by Coleman. Coleman refused and Bee Line filed the underlying action in December 2004. Coleman answered timely and filed a counterclaim alleging violation of the Fair Claims Settlement Practice Act, infliction of emotional distress and tortious bad faith.

When Coleman attempted to depose Price, the adjuster, Bee Line moved to dismiss the counterclaim and to stay all discovery on the counterclaim until the trial court ruled on the motion to dismiss. Shortly thereafter, Bee Line also moved for summary judgment. By February 11, 2005, Coleman responded to each of those motions and filed her own motion for summary judgment.

A pre-trial conference was held on February 14 to address the motion to hold discovery in abeyance. On February 22, the trial court granted Coleman's motions to depose Price and compel discovery from Bee Line. Further, the court allowed Coleman twenty days from the completion of discovery to file answers to Bee Line's motions to dismiss the counterclaim and for summary judgment.

On February 22, 2005, Bee Line filed with the trial court a Notice of Submission of Case for Final Adjudication. This form is commonly referred to as the AOC-280 form. Bee Line designated the two pending motions for summary judgment as those the court was to consider. A copy was mailed to counsel for Coleman.

Thereafter, both Coleman and Bee Line filed responses to requests for interrogatories. On May 19, Coleman filed a motion to dismiss Bee Line's complaint. On May 31, Coleman again filed a motion to compel discovery. Simultaneously, Bee Line filed a motion to stay discovery and bifurcate Coleman's bad faith claim from Bee Line's contract claim and to disqualify Coleman's counsel. Included in Bee Line's motion was a final paragraph which states:

> **Bee Line and Defendant have asserted and fully briefed cross motions for summary judgment on Bee Line's**

> **contract claim. An AOC-280 Form was submitted February 22, 2005.** The survival of Defendant's counterclaims hinges upon the adjudication of Bee Line's contract claim, which supplies even more support for bifurcation of Defendant's Bad Faith claims and a stay of discovery regarding those claims.

(Emphasis added).

The trial court passed the motions for a hearing on July 15, 2005.[2] On June 20, 2005, at the request of Bee Line's counsel, the hearing was rescheduled to August 12, 2005. However, on July 6, the trial court ruled on the pending summary judgment motions, granting summary judgment in favor of Bee Line and denying Coleman's motion.

Coleman moved to vacate the summary judgment entered on July 6 and asked that she be heard on the previously scheduled date of August 12. Arguments were heard on that date.

The trial court explained that because an AOC-280 form had been filed and because nearly five months had passed since that notice was filed, she believed discovery for those issues had been completed. Further, she explained the filing of an AOC-280 form triggered an inquiry from the Administrative Office of the Courts ("AOC") as to why there had not been a decision after ninety days.

On April 13, 2006, the trial court denied Coleman's motion to vacate and this appeal followed.

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[2] According to the clerk's case history, only the motion to disqualify defendant's counsel was passed to July 15. Neither oral arguments nor a hearing on the summary judgment motions was ever set.

The standard of review on appeal when a trial court grants a motion for summary judgment is "whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law." *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky.App. 1996). The trial court must view the evidence in the light most favorable to the nonmoving party, and summary judgment should be granted only if it appears impossible that the nonmoving party will be able to produce evidence at trial warranting a judgment in his favor. The moving party bears the initial burden of showing that no genuine issue of material fact exists, and then the burden shifts to the party opposing summary judgment to present "at least some affirmative evidence showing that there is a genuine issue of material fact for trial." *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky. 1991). The trial court "must examine the evidence, not to decide any issue of fact, but to discover if a real issue exists." While the court used the word "impossible" in describing the strict standard for summary judgment, the Supreme Court later stated that the word was "used in a practical sense, not in an absolute sense." *Id.* at 480. Because this summary judgment involves only legal questions and not the existence of any disputed material issues of fact, this Court need not defer to the trial court's decision and will review the issue *de novo*.

This action began as a simple breach of contract claim. Bee Line argues that the Release signed by Coleman clearly provides that she must indemnify Bee Line against any third party. Coleman defended against the suit, claiming it was never the

intention of the parties that she should be responsible for any reimbursement claims for PIP benefits made by her insurance carrier, Nationwide.

As set out in the July 6, 2005 opinion, the trial court considered the entire record in determining the parties' motions for summary judgment as well as the cross-motions to dismiss. The court's analysis turned on the interpretation of the language in the Release, including the pivotal sentence, "The undersigned agrees to hold the released parties harmless and indemnify them from any claims asserted by any third parties or lien holders, including but not limited to, all medical providers and any other insurance carriers against the proceeds of this settlement."

Nationwide, as a reparation obligor, has a separate right of recovery for PIP amounts expended on behalf of Coleman. KRS 304.39-070(3). Having made basic reparation benefit payments, Nationwide may intervene in Coleman's tort action against the tortfeasor, Bee Line, in order to assert a direct claim against the tortfeasor's insurer, which is again, Bee Line. It is well established that a policy of insurance cannot abrogate a mandatory provision of the Motor Vehicle Reparations Act. *State Farm Mutual Automobile Insurance Co. v. Mattox*, 862 S.W.2d 325 (Ky. 1993). The release/indemnification agreement signed by Coleman does not compromise Nationwide's right to assert a basic reparation benefit subrogation claim against the tortfeasor or its insurer. Rather, it shifts the responsibility for paying the claim from Bee Line to Coleman.

The court found while Coleman had no statutory obligation to reimburse Nationwide for its PIP payments, she did have a contractual obligation to reimburse Bee Line for the amounts it was forced to expend to settle Nationwide's claim.

"A release is nothing more than a contract between the party executing it and the party released. Where the contract is silent we must interpret the intent of the parties." *Richardson v. Eastland, Inc.*, 660 S.W.2d 7, 8 (Ky. 1983), *abrogated on other grounds by Abney v. Nationwide Mutual Insurance Co.*, 215 S.W.3d 699, 701 (Ky. 2006).

As with any contract generally, the language of the release determines the parties' intentions. *See Woodruff v. Bourbon Stock Yards Co.*, 149 Ky. 576, 149 S.W. 960, 962 (1912). "When no ambiguity exists in the contract, we look only as far as the four corners of the document to determine the parties' intentions." *3D Enterprises Contracting Corp. v. Louisville and Jefferson County Metropolitan Sewer District*, 174 S.W.3d 440, 448 (Ky. 2005). "The fact that one party may have intended different results, however, is insufficient to construe a contract at variance with its plain and unambiguous terms." *Cantrell Supply, Inc. v. Liberty Mutual Insurance Co.*, 94 S.W.3d 381, 385 (Ky.App. 2002). "Generally, the interpretation of a contract, including determining whether a contract is ambiguous, is a question of law for the courts and is subject to *de novo* review." *Id.*

Here, the Release is clear and unambiguous as it releases Huff, Bee Line, Gallagher Bassett, Zurich and their heirs, executors, administrators, agents and assigns, and all other persons, firms or corporations liable, or who might be claimed to be liable.

Further, the Release clearly provides that Coleman shall indemnify those released against any third party. Contrary to Coleman's argument, nothing in the Release would suggest indemnification is limited to health care providers, Medicare or Medicaid.

Coleman also argues that the contract was complete upon the faxed offer from Bee Line and her acceptance of the offer for $6,500 for personal damages. She further argues that the Release was outside the terms of an oral contract. This analysis is flawed.

The general requirements for any contract are offer and acceptance, full and complete terms, and consideration. *Cantrell Supply*, 94 S.W.3d at 384; *Hines v. Thomas Jefferson Fire Insurance Co.*, 267 S.W.2d 709 (Ky. 1954). As to the first requirement of an enforceable contract, it is clear from the face of the faxed correspondence there was an offer and acceptance between the parties. The second requirement is that the contract terms must be full and complete. Until the Release was tendered by Bee Line, the only term discussed in the correspondence was how much Bee Line was willing to pay Coleman for her personal injuries. Following Coleman's agreement to accept $6,500, Bee Line sent a Release which needed to be signed before the settlement money was to be paid. The Release was the contract, whereas the faxed letters were the negotiations between the parties. It was incumbent upon Coleman and her counsel to reject the Release if it did not accurately portray the terms of their agreement. She was free to refuse to sign the Release and the parties could have proceeded with the lawsuit. An unambiguous contract does not become ambiguous when a party asserts – especially post

hoc, and after detrimental reliance by another party – that the terms of the agreement fail to state what it intended. *Frear v. P.T.A. Industries, Inc.*, 103 S.W.3d 99, 107 (Ky. 2003). In *Frear*, the pre-settlement correspondence made no mention of indemnification. However, included with the final settlement contract was a release and indemnification agreement tendered by the appellees. The appellants objected to the indemnification language. The Supreme Court held, absent an explicit provision to the contrary, "we hold that an agreement to sign 'a release' contemplates only a release from liability and not indemnification from third party claims." *Id*.

Consideration is the final requirement for an enforceable contract. Typically, where an agreement is founded solely upon reciprocal promises, the contract is wanting in consideration. *Pace v. Burke*, 150 S.W.3d 62, 65 (Ky.App. 2004), *citing David Roth's Sons, Inc. v. Wright & Taylor, Inc.*, 343 S.W.2d 389, 390 (Ky. 1961). However, where each party has assumed some legal obligation to the other, the agreement is considered valid and enforceable. Here, Bee Line agreed to pay Coleman $6,500 and Coleman agreed to indemnify and hold harmless Bee Line against any third party claims. Those terms in the Release are clear and unambiguous.

The contention that the trial court acted prematurely is unpersuasive. In the case of *Hartford Insurance Group v. Citizens Fidelity Bank & Trust Co.*, 579 S.W.2d 628 (Ky.App. 1979), only six months expired between the filing of the complaint and the date of judgment. In that case, the Court indicated that this was ample time in which to engage in discovery or inform the court why judgment should not be granted. It is not

necessary that discovery actually be completed but only that a suitable opportunity to do so was available. *Hollins v. Edmonds*, 616 S.W.2d 801, 804 (Ky.App. 1981). Likewise, in the case *sub judice*, more than six months passed from the time of the filing of the action and over four months passed after Bee Line advised the court the summary judgment motions were ready for submission. While there were pending motions for discovery, those were only relevant if the terms of the Release were ambiguous.

Additionally, Coleman argues that the court failed to hold a hearing on the motions for summary judgment. Coleman properly cited to Jefferson Circuit Court Local Rule 401(A), which provides that motions for summary judgment "shall not be noticed for a hearing," but that prior to submission, counsel could file a motion for an oral argument. In this case, Bee Line and Coleman filed their motions for summary judgment along with a supporting memorandum. Neither party requested a hearing on the motions. Nor is the trial court required to hold a hearing prior to ruling on the motion for summary judgment. Coleman does not cite to this Court any hearing, order or agreement that there would be oral arguments on the motions for summary judgment.

Further, Coleman had at least two opportunities to advise the court that the case was not ready for a final decision by the court. First, when the notice of submission was filed on February 22, 2005, and then again on May 31, 2005, when Bee Line again advised the court that the matter was ready for submission. While, as argued by Coleman, the AOC 280 form is not a dispositive motion requiring a response, it is recognized as a fundamental method of advising the court that a ruling is expected.

Coleman acknowledged this important function when on September 23, 2005, she filed a similar form after the August 12, 2005 hearing on her motion to vacate. As stated by the court during that hearing, to remain silent only fostered the belief of the court that discovery on those issues had been completed and the parties were ready for it to rule.

Under the peculiar facts of this case, we conclude that summary judgment in favor of Bee Line should have been granted. Because the trial court properly granted Bee Line's motion for summary judgment, it is not necessary to address Coleman's motion for summary judgment or her motion to dismiss. Both become relevant only if the language in the Release was ambiguous. Because it was not, we cannot find the trial court erred in dismissing Coleman's counterclaims. Likewise, because of the clear language in the Release, we cannot find the trial court erred in granting Bee Line's motion to dismiss Coleman's counterclaims.

For the foregoing reasons, the final judgment entered on July 6, 2005, and the April 13, 2006 order denying Coleman's motion to reconsider as entered by the Jefferson Circuit Court are affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Grover S. Cox
Louisville, Kentucky

BRIEF FOR APPELLEE:

Jeremiah A. Byrne
Louisville, Kentucky