STATE OF MICHIGAN

COURT OF APPEALS

JOHN L. ADAMS and SCOTT L. ADAMS,

Plaintiffs-Appellees,

v

SCOTT WERTHMANN, JANE TERNES, a/k/a JANE WERTHMANN, and MICHAEL BAKALUKAS,

Defendants-Appellants.

UNPUBLISHED
March 28, 2000

No. 207798
Oakland Circuit Court
LC No. 94-489011-CB

Before: Wilder, P.J., and Bandstra and Cavanagh, JJ.

PER CURIAM.

Defendants appeal as of right from a settlement order entered by the trial court pursuant to the parties' agreement as placed on the record in open court. We affirm.

Defendants first argue that the trial court improperly denied their motion for relief from judgment because the settlement order actually entered by the court failed to comply with the agreement as orally set out in open court. We disagree. A trial court's decision on a motion for relief from judgment is governed by MCR 2.612(C). This Court reviews the trial court's denial of a motion for relief from judgment for an abuse of discretion. *Redding v Redding*, 214 Mich App 639, 642-643; 543 NW2d 75 (1995). "In exercising its discretion, the court must balance the public interest in achieving finality in litigation versus the private interest of remedying an injustice." *Mikedis v Perfection Heat Treating Co*, 180 Mich App 189, 203; 446 NW2d 648 (1989).

A settlement agreement is a contract and is to be construed and applied as such. *Massachusetts Indemnity & Life Ins Co v Thomas*, 206 Mich App 265, 268; 520 NW2d 708 (1994). If the language contained in the contract is clear and unambiguous, its meaning is a question of law that is reviewed de novo on appeal. *Brucker v McKinlay Transport, Inc (On Remand)*, 225 Mich App 442, 448; 571 NW2d 548 (1997). Under usual contract principles, a party is bound by the settlement agreement unless a showing of mistake, fraud, or unconscionable advantage is made. *Plamondon v Plamondon*, 230 Mich App 54, 56; 583 NW2d 245 (1998). Under MCR

2.612(C)(1)(a), the mistake may be a mistake of the trial court. *Altman v Nelson*, 197 Mich App 467, 477; 495 NW2d 826 (1992).

Pursuant to MCR 2.507(H), "[a]n agreement or consent between the parties or their attorneys respecting the proceedings in an action, subsequently denied by either party, is not binding unless it was made in open court, or unless evidence of the agreement is in writing, subscribed by the party against whom the agreement is offered or by that party's attorney." This Court has held that when a defendant is present when the terms of a settlement agreement are read in open court and no objections are made thereto, this Court must conclude that the agreement met the defendant's approval. *Michigan Bell Telephone Co v Sfat*, 177 Mich App 506, 513; 442 NW2d 720 (1989). "Unilateral mistake is insufficient to warrant a modification of a judgment." *Hilley v Hilley*, 140 Mich App 581, 585; 364 NW2d 750 (1985). A court may not enter an order pursuant to the consent of the parties that deviates in any material respect from the parties' agreement. *Scholnick's Importers-Clothiers, Inc v Lent*, 130 Mich App 104, 112; 343 NW2d 249 (1983).

In the present case, defendants claim the following discrepancies between the court's order and the settlement agreement:

> (1) According to the parties' agreement, the redemption was to be an obligation of the corporate entity, not an obligation of the corporation and the individual defendants. The order stated that the corporation and the individual defendants agreed to redeem plaintiff's shares in exchange for $160,000.
>
> (2) According to the parties' agreement, in the event of a default, plaintiffs' remedy was limited to taking ownership of the corporation. The order provided that plaintiffs could either assert ownership over the corporation or accelerate the balance due plus interest.
>
> (3) According to the parties' agreement, plaintiffs' complaint was to be dismissed with prejudice immediately. The order provided for dismissal only after the final payment was made on the debt.

Defendants swore in open court that the settlement placed on the record was an accurate and complete recitation of their agreement, and that they agreed to be bound by its terms. Regarding defendant's personal liability, the first statement made by plaintiffs' counsel in court was that the "defendants" agreed to pay plaintiffs $160,000 to redeem their stock. Counsel did not say "defendant," "the corporation," or "M-59." He clearly stated "defendants" – plural. Reference to the schedule of payments was unequivocally stated in terms of "they" will pay. These statements suggest that defendants agreed to be personally liable.

Further, besides the general allegation that defendants breached their fiduciary duties, the complaint specifically alleged that the individual defendants conspired to defraud plaintiffs of their rights as shareholders, and to exploit the corporation and convert its funds to their own benefit. The individual defendants were the sole corporate officers and directors of M-59 Associates. "[A] corporate

employee or official is personally liable for all tortious or criminal acts in which he participates, regardless of whether he was acting on his own behalf or on behalf of the corporation." *Attorney Gen'l v Ankersen*, 148 Mich App 524, 557; 385 NW2d 658 (1986). Thus, the individual defendants would be personally liable for any loss suffered by plaintiffs as a result of fraud, and though the corporation may also have been liable, it is clear from the record that the individual defendants, none of whom stated that they were acting in their representative capacity and, notably, who were the only other shareholders of the corporation, agreed to redeem plaintiffs' stock in satisfaction of their claims for individual injury.

Defendants argue that the notes signed by defendants were only being executed on behalf of the corporation and that only a corporation may redeem stock. However, defendants' single citation to a case that does not address the specific issue presented here is insufficient to bring this issue before this Court. "A party may not leave it to this Court to search for authority to sustain or reject its position." *Gen'l Motors Corp v Public Service Comm No 2*, 175 Mich App 584, 590; 438 NW2d 616 (1988). "A statement of position without supporting citation is insufficient to bring an issue before this Court." *Id.* We deem this issue abandoned on appeal.

Defendants' assertion regarding the remedy in the event of a default is also meritless. The lower court record shows that the parties clearly intended plaintiffs would have alternative remedies in the event of a default. The clarification made in court regarding plaintiffs' options in the event of a default gave plaintiffs the option of either taking the escrowed stock and taking over the corporation immediately, or suing the defendant shareholders on the accelerated debt. Thus, it appears from the transcript that plaintiffs were not limited to taking ownership of the corporation in the event of a default as suggested by defendants. The settlement order accurately reflected alternative remedies.

Finally, the settlement order provided that the action would be dismissed with prejudice upon satisfaction of the settlement. The trial court was to retain jurisdiction to enforce the terms and conditions of the settlement. Defendants' handwritten notes list the chronology of the settlement, placing "case dismissed with prejudice" after all other terms of the agreement, except for that requiring monthly financial reports. There is no indication that the case was to be dismissed with prejudice immediately. Moreover, during oral argument on plaintiffs' motion for entry of order, defendants' counsel stated, "They have this jurisdiction of this court over the settlement agreement, and if they want to come back into court, you said you can back into this court any time if you feel they are running the corporation into [the] ground." Defendants' counsel's statements would indicate that the case was not to be dismissed immediately, but that the court would retain jurisdiction until the note was paid in full. The trial court properly entered the settlement order with dismissal being reserved until after the debt was paid.

"[L]itigants are not free to disregard a settlement agreement knowingly entered into on the court record and to which satisfactory evidence of mistake, fraud, or unconscionable advantage is not evident." *Groulx v Carlson*, 176 Mich App 484, 492; 440 NW2d 644 (1989). The transcripts of the hearings on this issue, instead of suggesting mistake, fraud, or excusable neglect, suggest that defendants were unhesitating in their consent to the terms of the settlement agreement at the time the agreement was formally read into the record. Although plaintiffs sought clarification of their options in the event of a default, defendants were silent. Any misgivings concerning the terms of the settlement

agreement that defendants or defendants' counsel may have had were brought to the attention of the trial court only after the agreement had been formally entered in the record and only after defendants specifically accepted the terms of the agreement. Notably, defendants' attorney, who was "not privy to what took place in chambers and during the negotiation," stated that, had he been present when the settlement was placed on the record, he "would have leaped and yelled that that was not the deal." He was not present, however, and his client, after being sworn, accepted the terms of the settlement placed on the record and agreed to be bound by them.

Defendants also argue that the agreement read into the record on July 31, 1997, was not binding because there was no "meeting of the minds" among the parties in the instant case. We disagree. "There must be a meeting of the minds on all the material facts in order to form a valid agreement, and whether such a meeting of the minds occurred is judged by an objective standard, looking to the express words of the parties and their visible acts." *Groulx*, *supra* at 491. In the present case, the express words of the parties' attorneys recited on the record, and the parties' sworn affirmation of their acquiescence thereto, unambiguously indicate that the parties stipulated and agreed to accept the terms of the recited agreement. Thus, there was a meeting of the minds regarding the agreement read into the record on July 31, 1997.

Finally, defendants argue that their counsel did not have authority to enter into a settlement that would have bound them personally. We disagree. An attorney, acting solely in the client's interest and without any improper motives, has the apparent authority to settle a lawsuit on the client's behalf. *Nelson v Consumers Power Co*, 198 Mich App 82, 83; 497 NW2d 205 (1993).

> Generally, when a client hires an attorney and holds him out as counsel representing him in a matter, the client clothes the attorney with apparent authority to settle claims connected with the matter. [Citations omitted.] Thus, a third party who reaches a settlement agreement with an attorney employed to represent his client in regard to the settled claim is generally entitled to enforcement of the settlement agreement even if the attorney was acting contrary to the client's express instructions. In such a situation, the client's remedy is to sue his attorney for professional malpractice. The third party may rely on the attorney's apparent authority unless he has reason to believe that the attorney has no authority to negotiate a settlement. [*Id.* at 89-90, quoting *Capital Dredge & Dock Corp v Detroit*, 800 F2d 525, 530-531 (CA 6, 1986).]

"[P]ursuant to MCR 2.507(H), an agreement between counsel to settle a case, subsequently denied by either party, is not binding under principles of apparent authority unless the settlement was made in open court, or unless evidence of the agreement is in writing, subscribed by the party against whom the agreement is offered or by that party's attorney." *Nelson*, *supra* at 90. Defendants swore in open court that the settlement placed on the record was a complete and accurate reflection of the agreement. Defendants' acquiescence belies their assertion that their counsel exceeded his authority. Even if defendants' counsel exceeded his authority, their acceptance of the settlement terms amounted to a ratification of their attorney's acts and, therefore, the settlement is binding just as if defendants'

counsel had the authority to enter into the agreement. *Kresnak v Kresnak*, 190 Mich App 643, 651; 476 NW2d 650 (1991).

Defendants' clear intention to be bound by the terms of the settlement agreement that was read into the record by plaintiffs' counsel, and defendants' failure to support their claims of mistake, fraud, and excusable neglect with satisfactory evidence, support the trial court's decision denying defendants' motion to set aside the settlement. The trial court did not abuse its discretion in denying defendants' motion for relief from judgment. *Redding, supra*.

We affirm.

/s/ Kurtis T. Wilder
/s/ Richard A. Bandstra
/s/ Mark J. Cavanagh