STATE OF MICHIGAN

COURT OF APPEALS

MERRILL LYNCH BUSINESS FINANCIAL SERVICES, INC.,

Plaintiff/Counter-Defendant,

v

TELGEN CORPORATION, ALLAN D. DALE, EARL GOODRICH, II, THOMAS R. BAYERL, and FREDERICK ROTH,

Defendants/Counter-Plaintiffs/Third-Party Plaintiffs-Appellants,

v

MERRILL LYNCH PIERCE FENNER & SMITH, a/k/a MERRILL LYNCH & COMPANY,

Third-Party Defendant-Appellee.

UNPUBLISHED
March 11, 2004

No. 244880
Ingham Circuit Court
LC No. 01-094752-CZ

Before: Fitzgerald, P.J., and Cavanagh and Hoekstra, JJ.

PER CURIAM.

Third-party plaintiffs TelGen Corporation (TelGen), Allan D. Dale, Earl Goodrich, II, Thomas R. Bayerl, and Frederick Roth (TelGen's principals) (collectively, the TelGen parties) appeal as of right the trial court's grant of summary disposition in favor of third-party defendant Merrill Lynch Pierce Fenner & Smith (Merrill Lynch).[1] We affirm.

[1] This appeal concerns only the trial court's grant of summary disposition, and hence dismissal, of the third-party claims that the TelGen parties asserted against Merrill Lynch. The TelGen parties do not appeal the trial court's grant of summary disposition in favor of plaintiff/counter-defendant Merrill Lynch Business Financial Services, Inc. (MLBFS). on both MLBFS' complaint against the TelGen parties and the TelGen parties' counterclaim against MLBFS.

This case arises from the business relationship between TelGen, Merrill Lynch, and Merrill Lynch Business Financial Services, Inc. (MLBFS). Before that relationship existed, TelGen, a corporation in the business of designing, developing, and manufacturing technical products and services for the telecommunications industry, was selected by Sprint/United Management Company to supply certain components for its Sprint ION project. To do so, TelGen needed additional money and began exploring financing options. Meanwhile, a prospective buyer had approached TelGen. TelGen sought advice of investment bankers, including Merrill Lynch, with respect to evaluating and financing the commitment to Sprint and with respect to acquisition inquiries.

On July 20, 2000, Merrill Lynch and TelGen entered into a Financial Advisor Agreement, which provided that Merrill Lynch would act as exclusive financial advisor to TelGen in connection with any proposed business combination, such as a merger, consolidation, reorganization, or acquisition. Among other things, Merrill Lynch agreed to assist in identifying purchasers and in analyzing, structuring, negotiating, and effecting proposed business combinations or the acquisition of another company.[2]

On November 6, 2000, MLBFS and TelGen entered into a WCMA Loan and Security Agreement No. 686-07H84 (loan agreement). Pursuant to the loan agreement, MLBFS extended to TelGen a $2,600,000 commercial line of credit with an initial maturity date of May 31, 2001. To secure payment and performance, TelGen pledged to MLBFS first liens and security interests in its collateral, which is defined in the agreement.[3] Also on November 6, 2000, TelGen's principals signed an Unconditional Guaranty, which provided that, pursuant to the terms of the guaranty agreement, they would unconditionally guarantee all existing and further indebtedness owed by TelGen.

By letter dated June 8, 2001, MLBFS notified the TelGen parties that "MLBFS had elected not to extend the Loan Agreement beyond May 31, 2001," that the line of credit was terminated as of that date, and that no further draws on the line of credit would be permitted. The letter indicated that the outstanding loan balance became fully due and payable on May 31, 2001, and that MLBFS would defer the full and immediate collection of the indebtedness for thirty days while TelGen attempts to obtain refinancing from another lender for the outstanding balance if TelGen makes weekly payments of $25,000.

On August 17, 2001, MLBFS and TelGen executed a Forbearance Agreement. Under this agreement, MLBFS agreed "to forbear from exercising its rights and remedies under the Loan Documents [i.e., the loan agreement and guaranty], and … to defer the full collection of the outstanding loan balance until September 15, 2001," subject to the TelGen parties' compliance

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[2] Prior to TelGen and Merrill Lynch entering the Financial Advisor Agreement, Merrill Lynch had presented its plan to cause the sale, merger, or acquisition of TelGen, which Merrill Lynch had labeled "Project Spartan."

[3] MLBFS and Capitol National Bank entered into a subordination agreement whereby Capital subordinated its prior security interest in TelGen property except equipment "now owned" by TelGen.

with the terms of the forbearance agreement. In agreeing to the terms of the forbearance agreement, the TelGen parties acknowledged their default and the events of default, agreed that the loan documents are legal, valid, and binding obligations and acknowledged that they had no defenses, counterclaims or rights of set-off, and if they do, agree to waive such, and agreed to release "MLBFS and its agents, …" from any and all claims, including claims arising from the loan documents or MLBFS' conduct. TelGen failed to pay the amounts due by September 15, 2001.

This case commenced on December 19, 2001, when MLBFS filed a complaint against TelGen and its principals, alleging three counts, "Breach of Loan Documents," "Breach of the Unconditional Guaranty," and "Claim and Delivery of Goods and Chattels." MLBFS later moved for possession of collateral consisting of TelGen's inventory, and on February 1, 2002, the trial court entered an order granting that motion. Thereafter, on February 6, 2002, the TelGen parties filed a counterclaim against MLBFS and a third-party complaint against Merrill Lynch (in one document entitled "counterclaim and third-party complaint"), alleging breach of contract, fraud, innocent misrepresentation, fraudulent inducement, negligence, gross negligence, and breach of fiduciary duty.

On March 1, 2002, in a joint motion, MLBFS moved for judgment on the pleadings and for dismissal of the counterclaim pursuant to MCR 2.116(C)(7)–(10), and Merrill Lynch moved for dismissal of the third-party complaint pursuant to MCR 2.116(C)(7) and (8). Approximately three months after the trial court heard arguments on the motion, it issued an opinion and order dated August 26, 2002, in which it granted MLBFS' request for judgment against the TelGen parties and dismissed in their entirety the TelGen parties' counterclaim against MLBFS and the TelGen parties' third-party complaint against Merrill Lynch. On October 23, 2002, the trial court entered a judgment against the TelGen parties, consistent with its opinion and order, and awarding MLBFS $2,085,990.24, plus statutory interest from August 31, 2002, until the judgment is paid in full, but requiring credit against the judgment for "all amounts received by MLBFS from the disposition of any property of TelGen …." The trial court further awarded MLBFS attorney fees and costs in the amount of $13,609.60. This appeal ensued.

On appeal, TelGen[4] argues that the trial court erred in granting summary disposition in favor of Merrill Lynch on TelGen's third-party complaint. We disagree.

First, to the extent that TelGen claims that it is entitled to relief because the trial court granted summary disposition under MCR 2.116(C)(10), rather than under (C)(7), which is a subsection under with Merrill Lynch made its motion, we find its argument without merit. This Court reviews a trial court's grant of summary disposition de novo, *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998), and this Court will review under the correct subrule a trial court's grant of summary disposition under the wrong subrule. *Id.* at 338 n

[4] For ease in reference, in the remainder of this opinion the use of the term "TelGen" may refer to either the corporation itself, or the corporation and its principals, as appropriate and as apparent from the context.

9; *Morris & Doherty, PC v Lockwood*, 259 Mich App 38, 42; 672 NW2d 884 (2003); *Energy Reserves, Inc v Consumers Power Co*, 221 Mich App 210, 216; 561 NW2d 854 (1997).

Specifically with regard to the proceedings in the trial court, this Court has explained that "where a party brings a summary disposition motion under the wrong subrule, the trial court may proceed under the appropriate subrule as long as neither party is misled." *Blair v Checker Cab Co*, 219 Mich App 667, 670-671; 558 NW2d 439 (1996). In *Ruggeri Electrical Contracting Co, Inc v Algonac*, 196 Mich App 12, 18; 492 NW2d 469 (1992), this Court addressed an argument similar to TelGen's argument in the present case:

> Plaintiff also contends that summary disposition was improper because it was based on grounds not asserted in defendant's motion. This argument is without merit. MCR 2.116(I)(1) provides that "[i]f the pleadings show that a party is entitled to judgment as a matter of law," the court "*shall* render judgment without delay" (emphasis supplied). A court may even enter judgment for the opposing party if it is entitled to judgment. MCR 2.116(I)(2). If the moving party has asked for summary disposition under one subpart of the court rule where judgment is appropriate under another subpart, the defect is not fatal. See, e.g., *Retired Policemen & Firemen of Lincoln Park v Lincoln Park*, 6 Mich App 372, 375; 149 NW2d 206 (1967). The movant need not identify the specific subrule under which it seeks summary disposition. *Moy v Detroit Receiving Hosp*, 169 Mich App 600, 605; 426 NW2d 722 (1988). When a motion is brought under MCR 2.116(C)(8) but should have been brought under subpart C(10), the court should proceed under the latter as long as neither party is misled. *Chonich v Ford*, 115 Mich App 461, 464; 321 NW2d 693 (1982).

Here, TelGen asserts error requiring reversal in that the trial court granted summary disposition on its third-party claim on the basis of MCR 2.116(C)(10), rather than under one of the subrules under which Merrill Lynch requested summary disposition, i.e., (C)(7). However, TelGen does not assert in its appellate brief that it was misled. Moreover, TelGen fails to cite any authority for its position that reversal is compelled when the trial court relies on (C)(10) although (C)(7) is asserted. *Prince v MacDonald*, 237 Mich App 186, 197; 602 NW2d 834 (1999) ("[W]here a party fails to cite any supporting legal authority for its position, the issue is deemed abandoned."); *Head v Phillips Camper Sales & Rental, Inc*, 234 Mich App 94, 116; 593 NW2d 595 (1999) ("This Court will not search for authority to sustain or reject a party's position."). Further, MCR 2.116(C)(7) provides for summary disposition on the basis that "[t]he claim is barred because of release." In its opinion and order, the trial court, in dismissing TelGen's third-party claim, stated that "[t]he language of the Forbearance Agreement is clear; the Defendants [the TelGen parties] agreed to release and forever discharge [MLBFS] and its agents from any and all claims, demands, rights, and cause of actions," and thus the citation to (C)(10) may be inadvertent—i.e., citation to (C)(7) may have been intended. Under these circumstances, it is clear that TelGen is entitled to no relief with respect to this claim.

TelGen also claims, in essence, that summary disposition in favor of Merrill Lynch pursuant to MCR 2.116(C)(7) on the basis of the release, as interpreted under Illinois law, is inappropriate.

In evaluating a motion for summary disposition brought under MCR 2.116(C)(7), the trial court must consider any affidavits, depositions, admissions, or other documentary evidence submitted by a party and admissible in evidence, however supportive material is not required. *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999), citing MCR 2.116(G)(5). "The contents of the complaint are accepted as true unless contradicted by documentation submitted by the movant." *Id.* "[T]he nonmovant's well-pleaded allegations must be accepted as true and construed in the nonmovant's favor and the motion should not be granted unless no factual development could provide a basis for recovery." *Amburgey v Sauder*, 238 Mich App 228, 231; 605 NW2d 84 (1999).

The forbearance agreement clearly states, and the parties agree, that Illinois law governs the agreement. Under Illinois law,

> [a] release "is the abandonment of a claim to the person against whom the claim exists and is a contract to be construed under traditional contract law." *Hurd v Wildman, Harrold, Allen & Dixon*, 303 Ill App 3d 84, 88; 707 NE2d 609 (1999). This means that "[w]here a written agreement is clear and explicit, a court must enforce the agreement as written. Both the meaning of the instrument, and the intention of the parties must be gathered from the face of the document without the assistance of parol evidence or any other extrinsic aids." *Rakowski v Lucente*, 104 Ill 2d 317, 323; 472 NE2d 791 (1984).
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> A release, however, will not "be construed to include claims not within the contemplation of the parties." *Carlile v Snap-On Tools*, 271 Ill App 3d 833, 838; 648 NE2d 317 (1995). In many cases, a release makes clear on its face what claims were within the contemplation of the parties at the time the release was given. In other instances, the release provides very general language that does not indicate with any clear definition what claims were within the contemplation of the parties. In such cases, "the courts will restrict the release to the thing or things intended to be released and will refuse to interpret generalities so as to defeat a valid claim not then in the minds of the parties." *Carlile*, [*supra*] at 839. In other words, general releases do not serve to release unknown claims, which the party could not have contemplated releasing when it gave the release. See *Farm Credit Bank of St Louis v Whitlock*, 144 Ill 2d 440, 448; 581 NE2d 664 (1991) ("A general release is inapplicable to an unknown claim"). [*Thornwood, Inc v Jenner & Block*, 344 Ill App 3d 15; 799 NE2d 756, 762 (2003).]

Illinois courts have also explained that "'[t]he intention of the parties controls the scope and effect of the release, and this intent is discerned from the release's express language as well as the circumstances surrounding the agreement. Where the terms of the release are clear and explicit, the court must enforce the release as written.'" *Adams v American Int'l Group, Inc*, 339 Ill App 3d 669, 676; 791 NE2d 26 (2003), quoting *Loberg v Hallwood Realty Partners, LP*, 323 Ill App 3d 936, 941; 753 NE2d 1020 (2001) (citations omitted). Stated another way, "When [courts] consider the surrounding circumstances we do not change the terms of the release or create an ambiguity where none exists. … Instead, we consider the circumstances surrounding execution of the document as part of the agreement, reflecting the clear intent of the signators." *In re Estate of Constantine*, 305 Ill App 3d 256, 260; 711 NE2d 1190 (1999); see also *First Bank & Trust Co of Illinois v Village of Orland Hills*, 338 Ill App 3d 35, 47; 787 NE2d 300 (2003) (the

Illinois appellate court noted the recent trend in which Illinois courts have moved away from the "four corners" rule of contract interpretation and toward a more liberal approach.). "A release will not be construed to include claims that the parties did not contemplate." *Krilich v American Nat Bank & Trust Co of Chicago*, 334 Ill App 3d 563, 575; 778 NE2d 1153 (2002).

Applying Illinois law, we conclude that summary disposition under subrule (C)(7) was appropriate here. The release contained in the forbearance agreement states that the TelGen parties agree "to remise, release and forever discharge … MLBFS and its agents, servants, … and all other persons, firms and corporations of and from any and all claims, demands, rights, liens, and causes of action of whatsoever kind and nature including, without limitation, any claims arising from the Loan Documents or the conduct of MLBFS." Except to the extent that it specifically lists claims arising from the loan documents or MLBFS' conduct, the release is general with respect to the claims released and to the people/entities released, and as such it does "not serve to release unknown claims, which the party could not have contemplated releasing when it gave the release." *Thornwood, Inc, supra*. Thus, the question becomes whether the claims against Merrill Lynch were within the contemplation of the parties. See *Carlile, supra*. To make this determination, i.e., to determine the intent of the parties to the release, a court must look to the express language of the release and the circumstances surrounding the agreement. *Adams, supra*.

Here, the release expressly mentions MLBFS' "agents," which the trial court[5] and the parties focus upon, but it also includes "all other persons, firms and corporations" and releases them "of and from any and all claims … and causes of action of whatsoever kind and nature including, without limitation, any claims arising from the Loan Documents or the conduct of MLBFS." From this language, it appears that Merrill Lynch is included, if not under the "agent" language, then under the "all other persons, firms and corporations" language. Moreover, although Merrill Lynch was not a party to the forbearance agreement, from the information in the record, including TelGen's pleadings, their general existence and role in the situation was intended to be included in the release under the term "agent," and despite the general language in the release concerning all claims and causes of action, claims and causes of action against Merrill Lynch were contemplated.

In the TelGen parties' first amended answer, TelGen makes the following statement:

> [the loan] agreement (and other agreements) was merely a part of a larger transaction or arrangement between [MLBFS] and its affiliates and agents on the one hand (collectively, the "Merrill Group") and TelGen on the other hand,

[5] In granting summary disposition in favor of Merrill Lynch on TelGen's third-party claim "for reasons consistent with this Opinion," the trial court referred to the language of the forbearance agreement as clear and stated that TelGen "agreed to release and forever discharge [MLBFS] and it agents from any and all claims, demands, rights, and causes of actions." The trial court also noted that "[t]he Forbearance Agreement also included language that the parties negotiated at arms-length and had the opportunity to consult with legal counsel of their choosing and entered in to the agreement of their own free will, without coercion or duress." *Id.*

> known as "Project Spartan" pursuant to which the Merrill Group made certain warranties and representations regarding their unique abilities, skills, contacts and expertise with respect to the marketing of high-tech companies like TelGen for sale and their agreement to provide financial advisory and other services to TelGen.

In this statement, TelGen merges MLBFS and Merrill Lynch into the "Merrill Group," speaks of a "larger transaction or arrangement" with the Merrill Group, and lumps together MLBFS and Merrill Lynch when referring to the warranties and representations made to TelGen and with respect to the financial advisory agreement entered between TelGen and Merrill Lynch.

In the third-party complaint, TelGen alleges that "Merrill Lynch and MLBFS are affiliated companies and agents for each other and are liable for each other's acts and omissions in conjunction with Project Spartan, the Financial Advisor Agreement, the Loan Agreement, the Guaranty and their relationship with TelGen and the Guarantors." TelGen further alleges generally that "Merrill Lynch and MLBFS are affiliated companies and co-agents for each other with respect to their dealings and relationship with TelGen and the Guarantors in connection with Project Spartan. Accordingly, Merrill Lynch and MLBFS are liable for each other's conduct and breaches as alleged herein." From these allegations, it is apparent that TelGen considered Merrill Lynch and MLBFS as agents for each other. In at least three other allegations in the third-party complaint TelGen refers to Merrill Lynch and MLBFS as "agent for each other." Also, the third-party complaint alleges under the breach of contract count that "TelGen is entitled to an award of damages against Merrill Lynch and MLBFS, jointly and severally, for their breaches of the Financial Advisor Agreement." However, absent some sort of agency relationship, MLBFS has no link to the Financial Advisor Agreement entered between Merrill Lynch and TelGen. Moreover, the fact that TelGen filed a combined counterclaim and third-party complaint against MLBFS and Merrill Lynch, respectively, even when the forbearance agreement expressly forbids any claims against MLBFS, indicates that TelGen considered the circumstances as interwoven and inseparable. Indeed, in the prayer for relief, TelGen sought judgment against Merrill Lynch and MLBFS and an award of "damages against Merrill Lynch and MLBFS, jointly and severally." Moreover, as evidenced by the forbearance agreement itself, the agreement was the product of arm's length negotiations and the parties had the opportunity to consult legal counsel. With respect to contemplating the release of any possible claims against Merrill Lynch, the estimated timetable for a business combination was 15 weeks, and over a year had passed since TelGen entered the financial advisor agreement with Merrill Lynch when TelGen signed the forbearance agreement.

On the basis of the foregoing information, and accepting the contents of the complaint as true, *Maiden, supra*, we conclude that the parties to the forbearance agreement understood the term "agent" in the release to include Merrill Lynch and to have contemplated the release of any claims TelGen could have against Merrill Lynch arising from the TelGen's relationship with both Merrill Lynch and MLBFS, or as TelGen states in its answer, the "larger transaction or arrangement between [MLBFS] and its affiliates and agents."

To the extent that TelGen argues that the release is limited to claims "with respect to" the loan documents and MLBFS' conduct and thus does not include claims against Merrill Lynch, we disagree. In support of its argument, TelGen cites *Capocy v Kirtadze*, 183 F3d 629 (CA 7, 1999), in which the Seventh Circuit Court of Appeals, interpreting the scope of a release under

Illinois law, stated that under Illinois law, "when parties use specific language in addition to words of general release in a release, courts limit the more general words to the particular claim arising out of the more specific reference." *Id.* at 632. Here, TelGen relies merely on this statement of Illinois law to support its argument; however, the *Capocy* court, applying Illinois law, determined that although the general release specified actions arising under certain statutes, the accompanying language in the release, "but without limitation of the foregoing," cannot be ignored. The *Capocy* court, noting that a "basic principle of contract interpretation imbues each word or phrase in the contract with meaning, rather than stripping them of significance," concluded that "[w]hile perhaps poorly drafted, the text indicates that the parties intended to include all claims, including those arising out of the statutes mentioned, but not limited to those." *Id.* at 634. Here, TelGen's argument strips the significance from the phrase "including, without limitation" which precedes "any claims arising from the Loan Documents or the conduct of MLBFS." We find TelGen's argument without merit.

Also, to the extent that TelGen asserts that interpreting the release to bar all claims by TelGen against Merrill Lynch would make the release unconscionable, it cites only Michigan law addressing unconscionability, despite the undisputed fact that Illinois law applies to the forbearance agreement, and thus this Court need not address this argument. See *Head*, *supra* at 116 ("This Court will not search for authority to sustain or reject a party's position."). In any event, Illinois courts have stated that:

> No equitable principle, including unconscionability, will compel the cancellation of a valid contract merely because one of the parties thereto will possibly or probably sustain a loss. Where the parties to an instrument are competent to contract with each other, and there is no question of fraud, neither can be relieved from his agreement on the ground that he did not use good business judgment in entering into the contract." [*Bond Drug Co of Ill v Amoco Oil Co*, 323 Ill App 3d 190, 193-194; 751 NE2d 586 (2001).]

TelGen is entitled to no relief on the basis of unconscionability.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Michael J. Cavanagh
/s/ Joel P. Hoekstra