

STATE OF MICHIGAN
COURT OF APPEALS

CAPCO 1998-D7 PIPESTONE, LLC,

Plaintiff-Appellant,

v

MILTON VENTURES LIMITED
PARTNERSHIP, GILA SHALTIEL, MOSHE
SHALTIEL, MAL CORPORATION, and
MILTON VENTURES II, LP,

Defendants-Appellees.

UNPUBLISHED

July 24, 2008

No. 271907

Berrien Circuit Court

LC No. 2004-003157-CZ

Before: Davis, P.J., and Murphy and White, JJ.

PER CURIAM.

Plaintiff appeals as of right the circuit court order requiring plaintiff to sign the “Settlement Agreement and Mutual Release.” We reverse.

I

CAPCO was the holder of a mortgage, granted by defendant Milton Ventures Limited Partnership (Milton Ventures), which encumbered the Pipestone Plaza Shopping Center (“shopping center” or “the Property”). Defendants Gila Shaltiel and MAL Corporation were general partners in Milton Ventures. Defendant Moshe Shaltiel was the general manager of Milton Ventures. Defendant Milton Ventures II, LP, an “alter ego” of Milton Ventures, owned property adjoining the shopping center. When Milton Ventures defaulted on the mortgage, CAPCO foreclosed on the shopping center, which, thereafter, CAPCO owned.

CAPCO also was the holder of an assignment of leases and rents (assignment of leases) regarding the shopping center. In the assignment of leases, Milton Ventures transferred to CAPCO its interest, including rents received, in all leases of any part of the shopping center. CAPCO filed suit against defendants in April 2004 when, according to CAPCO, Milton Ventures failed to forward to CAPCO rents received from tenants of the shopping center. In the same suit, CAPCO also asked the circuit court to declare that an easement had been established allowing for the continued use of a grease trap and a beer garden on the Adjacent Parcel and to order defendants to remove the barriers they erected, which prohibited automobile access from the shopping center to the Adjacent Parcel.

CAPCO and defendants participated in facilitative mediation on October 27, 2004. No settlement was reached at the mediation session, but the parties continued to negotiate through their lawyers. On December 23, 2004, CAPCO and defendants reached an agreement. On December 27, 2004, the parties informed the circuit court that an agreement had been reached. The circuit court cancelled a pretrial conference.

On January 6, 2005, Mark Stern, counsel for CAPCO, sent, via facsimile, a proposed "Settlement Agreement and Mutual Release" (the initial settlement agreement) to William Jack, counsel for defendants. The accompanying cover letter, which was signed by Stern, contained the following paragraph:

Enclosed is the proposed Settlement Agreement and Mutual Release. Please let me know if you or your clients have any comments. We obviously need to have an executed Agreement prior to January 27.

The initial settlement agreement contained the following terms: (1) defendants would pay CAPCO \$50,000; (2) CAPCO and defendants would acknowledge that the barricades had been removed; (3) Milton Ventures would receive \$3,272.50 a month for the continued use of the grease trap and beer garden; and (4) the parties would cause an order of dismissal to be entered by the circuit court. The initial settlement agreement also contained the following release provision:

Except for the rights and obligations set forth in this Settlement Agreement, CAPCO hereby fully and forever releases, remises, acquits, and discharges Milton Ventures, Gila Shaltiel, Moshe Shaltiel, MAL, and Milton Ventures II, and each and every one of them, their respective officers, directors, employees, shareholders, partners, members, attorneys, agents, representatives, affiliates, subsidiaries, successors and assigns, from any and all manner of action and causes of action, suits, debts, obligations, choses in action, contracts, covenants, warranties, claims, sums of money, rents, liens, judgments, damages, commissions, compensation for purported personal services rendered, demands and rights whatsoever, known or unknown, in law or in equity, in any way relating to the Property or the Adjacent Parcel, including, but not limited to, the claims in the Lawsuit and/or the transactions and occurrences forming the basis of the claims in the Lawsuit; provided, however, that nothing in this release is intended to or shall release, waive, or discharge any rights or obligations contained in the Deed of Declaration recorded at Liber 1086, Page 549 of Berrien County Records, the Declaration of Covenant and Restriction recorded at Liber 1522, Page 741 of Berrien County Records, the Declaration of Easements, Restrictions and Operating Agreement recorded at Liber 1903, Page 480 of Berrien County Records, or any similar documents or agreement governing the Property and the Adjacent Parcel previously recorded with the Berrien County Register of Deeds.

The initial settlement agreement contained blank signature pages.

On Wednesday, January 12, 2005, Stern e-mailed Jack and asked where defendants stood on the initial settlement agreement. Jack replied that he forwarded the initial settlement

agreement to Mullin, defendants' Illinois counsel, "who has the final say." Although Mullin was out of his office for the remainder of the week, he intended to look at the agreement first thing Monday morning.

Later that same day, Stern e-mailed Jack that he had received "one new comment" on the initial settlement agreement, and that the release provision needed to exclude CAPCO's claim relating to K-Mart's rejection of a lease. Stern believed that, because the instant case was limited to the rent and easement issues, the exclusion should not be an issue. Thereafter, Stern sent Jack a revised "Settlement Agreement and Mutual Release." The revised settlement agreement added the following to the release provision: "that nothing in this release is intended to or shall release, waive, or discharge . . . any claim in any way arising out of or relating to the lease rejection claim for the Property in the K-Mart bankruptcy proceeding". On January 20, 2005, Jack informed Stern that he had authority from defendants to sign the initial settlement agreement. Jack further informed Stern that, "[b]ecause the other issue was never in the law suit [sic], never discussed and never on the table in any setting," defendants could not agree to the revised settlement agreement.

On January 25, 2005, the circuit court adjourned all proceedings in the case for 30 days. During the adjournment, CAPCO and defendants agreed to "make every effort to reach resolution on the sole remaining issue having to do with the Settlement Agreement and Mutual Release." The adjournment was in response to a letter written by Jack to the circuit court. In his letter, Jack informed the circuit court that "all of the terms of a fairly complex settlement ha[d] been agreed upon and reduced to writing," except for "one item left in a proposed Settlement Agreement and Mutual Release" on which the parties disagreed. Jack asked the circuit court to allow the parties until February 8, 2005, to work out the disagreement.

On February 22, 2005, defendants informed the circuit court that the parties were at "an impasse." Defendants explained that, after "extensive mediation," they and CAPCO had reached "a full and complete resolution." They agreed to pay CAPCO \$50,000, to remove certain barriers, and to allow continued access to the grease pit and beer garden. Defendants stated that they were prepared to sign the initial settlement agreement and asked the circuit court for an order requiring the parties to sign the initial settlement agreement, as that agreement "reflect[ed] the intention of the parties." According to defendants, the addition to the release provision in the revised settlement agreement "limited the full and complete release negotiated by the parties."

In response, CAPCO asserted that it could not, and would not, sign any settlement agreement that released its claim to the lease rejection damages in the K-Mart bankruptcy proceedings. According to CAPCO, it and defendants negotiated the amount of money defendants would pay, the removal of certain barriers, and the continued use of the grease pit and beer garden, but the parties never negotiated the specifics of the release provision. CAPCO asserted that it was never the intent of the parties that the settlement agreement would, in any way, affect its claim to the lease rejection damages.

At the hearing on defendants' motion, after the parties briefly summarized their positions, the circuit court stated that it found "that the first tendered release accurately state[d] what the agreement of the parties was at the time" the parties informed the circuit court that a settlement had been reached. The circuit court noted that the first amended complaint contained no allegations regarding the damages associated with K-Mart's rejection of its lease. The circuit

court explained that it would not insert into the release provision an exclusion regarding the lease rejection damages in the K-Mart bankruptcy proceedings because the parties never agreed to the exclusion. “It was never discussed as to what effect, if any, this settlement would have on the Indiana [sic] litigation.” The circuit court told CAPCO that, whether the release provision in the initial settlement agreement pertained to its claim to the lease rejection damages was “another battle on another day” and that CAPCO was “just going to have to deal with whatever legal consequences there are or there aren’t.” It ordered CAPCO to sign the initial settlement agreement.

The circuit court subsequently entered the following order:

Upon a reading and filing of Defendants’ Motion for Judicial Resolution of Settlement Documents, and the Court having heard oral argument and being fully advised in the premises:

THE COURT FINDS that the Settlement Agreement and Mutual Release as attached to Defendant’s motion as Exhibit 1 is enforceable as written,

IT IS HEREBY ORDERED that Defendant’s motion to enforce the settlement agreement is granted,

IT IS FURTHER ORDERED that the parties are directed to sign and carry out each of the terms of the Settlement Agreement and Mutual Release as attached to Defendant’s motion as Exhibit 1.

CAPCO moved the circuit court for a stay of the March 28, 2005 order while it applied for leave to appeal the order with this Court. Accordingly to CAPCO, it should not be required to sign the initial settlement agreement, and thereby allow defendants to use the settlement agreement as a defense in the K-Mart bankruptcy proceedings, until after this Court reviewed the merits of the appeal. The circuit court granted the motion. The effectiveness of the March 28, 2005 order was “stayed during the time period for any application for leave to appeal, and any appeal of that [o]rder [wa]s pending.” On October 11, 2005, this Court denied CAPCO’s application for leave to appeal “for lack of merit in the grounds presented.” *CAPCO 1998-D7 Pipestone, LLC v Milton Ventures Ltd Partnership*, unpublished order of the Court of Appeals, entered October 11, 2005 (Docket No. 262098).

Thereafter, defendants moved the circuit court for an order of dismissal. They wanted an order of final judgment. CAPCO opposed the motion. It had applied for leave to appeal this Court’s October 11, 2005 order with the Supreme Court, and, again, it did not believe that the circuit court should enter an order of final judgment, which defendants could use against CAPCO in the K-Mart bankruptcy proceedings, until the Supreme Court ruled on the merits of the order. The circuit court denied defendant’s motion without prejudice. However, it believed that, by entering an order of dismissal while an appeal was pending with the Supreme Court, it would “do more harm than good or cause more confusion than clarification.” On May 17, 2006, the Supreme Court denied CAPCO’s application for leave to appeal because it was “not persuaded that the questions presented should be reviewed by” it. *CAPCO 1998-D7 Pipestone, LLC v Milton Ventures Ltd Partnership*, 475 Mich 856; 713 NW2d 769 (2006).

A week later, defendants moved for an order of dismissal. They argued that dismissal was appropriate because an application for leave to appeal was no longer pending before this Court or the Supreme Court. CAPCO opposed the motion. It argued that the case should not be dismissed pursuant to a settlement agreement that was not agreed upon by the parties. The circuit court granted defendants' motion. It vacated the April 11, 2005 stay, noted that the March 28, 2005 order remained in full force and effect, and dismissed the present case with prejudice.

Upon CAPCO's subsequent motion, the circuit court ordered that the portion of its July 3, 2006 order, which provided that the March 28, 2005 order remained in full force and effect and required CAPCO to execute the initial settlement agreement was stayed until this Court heard and decided a motion for stay. On August 24, 2006, CAPCO filed a motion for a stay with this Court, and on September 22, 2006, the Court granted the motion. *CAPCO 1998-D7 Pipestone, LLC v Milton Ventures Ltd Partnership*, unpublished order of the Court of Appeals, entered September 22, 2006 (Docket No. 271907).

II

Plaintiff argues that the circuit court erred in requiring it to sign the settlement agreement because there was no meeting of the minds regarding the scope of the release provision included in the agreement. In the alternative, plaintiff argues that, even if there had been a meeting of the minds, the settlement agreement could not be binding against it because the settlement agreement, as required by MCR 2.507(G), was not subscribed to by plaintiff or its attorney. Plaintiff also argues that the circuit court erred in entering the March 28, 2005 order because it contained findings and directives beyond those given orally by the court.

A

Plaintiff raised these issues in a prior application for leave to appeal. We denied the application "for lack of merit in the grounds presented." *CAPCO 1998-D7 Pipestone, LLC v Milton Ventures Ltd Partnership*, unpublished order of the Court of Appeals, entered October 11, 2005 (Docket No. 262098). Defendants assert that the law of the case doctrine prevents us from revisiting the merits of the issues. *Grievance Administrator v Lopatin*, 462 Mich 235, 260; 612 NW2d 120 (2000); *Webb v Smith (After Second Remand)*, 224 Mich App 203, 209; 568 NW2d 378 (1997). While this Court has recognized orders denying interlocutory leave "for lack of merit in the grounds presented" as being decisions on the merits constituting the law of the case, the law of the case doctrine is a discretionary rule of practice and does not limit our power. *Locricchio v Evening News Ass'n*, 438 Mich 84, 109; 476 NW2d 112 (1991); *Schumacher v Dep't of Natural Resources*, 275 Mich App 121, 128; 737 NW2d 782 (2007). The doctrine "is a matter of practice and discretion rather than an absolute limit on the courts' authority." *Hill v City of Warren*, 276 Mich App 299, 308; 740 NW2d 706 (2007), citing *Grace v Grace*, 253 Mich App 357, 362; 655 NW2d 595 (2002). Under the circumstances that we are presented with an interlocutory order that expresses no reasoning on the merits, and we are convinced that the circuit court's order requiring plaintiff to sign the release was error, we exercise our discretion to address the merits of this appeal.

B

In the instant case, the circuit court concluded that the first tendered release was accurate and forced CAPCO to sign it. The record does not, however, support that conclusion. Rather, the record is clear, and the court also found, that the parties reached an agreement regarding settlement of the issues in the instant action, but did not discuss the K-Mart claim, or what effect the settlement would have on that litigation. Indeed, the court stated that whether the release provision it was forcing CAPCO to sign covered the K-Mart litigation would be left to another day. Further, the record is also clear that the original broad release language was withdrawn by CAPCO *before* Milton Ventures accepted the proposed terms.

Under these circumstances, while the court could properly dismiss the case and enter an order requiring the parties to comply with the agreed-upon settlement terms, and leave the parties to litigate the effect of the dismissal on the K-Mart litigation, the court erred in forcing CAPCO to sign a release that by its terms included the K-Mart litigation. While the court stated that whether the release applied to the K-Mart rejection damages would be left to another day, this statement ignored that the release was so broadly worded that it precluded argument on the subject. The effect of the court requiring CAPCO to sign the original release is the enforcement of a release provision that was not agreed to by the parties.

Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ William B. Murphy

/s/ Helene N. White