STATE OF MICHIGAN

COURT OF APPEALS

RENEE M. ISKE,

Plaintiff-Appellant,

V

CITY OF MELVINDALE POLICE OFFICER JOHN ALLEN,

Defendant-Appellee.

UNPUBLISHED
February 19, 2009

No. 281575
Wayne Circuit Court
LC No. 2006-632880-NO

Before: Servitto, P.J., and Owens and K. F. Kelly, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order granting defendant's motion for summary disposition. Because there is no material question of fact that the release-dismissal agreement signed by plaintiff is valid and the material terms of plaintiff's plea in the underlying criminal matter were implicitly incorporated into the record, we affirm.

Defendant was dispatched to an area outside plaintiff's sister's home due to a call concerning a possible drunk driver. When defendant arrived on the scene, he found plaintiff, intoxicated, behind the wheel of her running vehicle. Plaintiff alleged that although she was cooperative with defendant, he engaged in excessive and unnecessary force in arresting her which resulted in a serious injury to plaintiff's shoulder. Following her arrest and alleged injury, plaintiff was charged with operating under the influence of liquor and resisting and obstructing a police officer. However, plaintiff's attorney and the prosecutor reached a plea agreement whereby the prosecutor would dismiss the original charges, and in exchange plaintiff would plead guilty to operating while visibly impaired ("OWI") and agree to sign a release discharging defendant from all civil liability arising out of her arrest. Notwithstanding the accepted plea and the executed release, plaintiff later initiated the instant action against defendant. Defendant moved for summary disposition, citing the release agreement as a bar to plaintiff's action and, as previously indicated, the trial court granted the motion, dismissing plaintiff's claims.

On appeal, plaintiff first argues that there exists a question of material fact as to whether plaintiff signed the release voluntarily, such that summary disposition in defendant's favor was inappropriate. We disagree.

We review a trial court's decision to grant summary disposition de novo. *Schaendorf v Consumers Energy Co*, 275 Mich App 507, 509; 739 NW2d 402 (2007). Summary disposition

may be granted under MCR 2.116(C)(7) when an action is barred by, among other things, release. In deciding a motion under subrule (C)(7), the trial court must accept the plaintiff's well-pleaded allegations as true and construe them in the plaintiff's favor. *Hanley v Mazda Motor Corp*, 239 Mich App 596, 600; 609 NW2d 203 (2000). When reviewing a decision on a motion for summary disposition pursuant to MCR 2.116(C)(10), we consider "the affidavits, pleadings, depositions, admissions, and other documentary evidence submitted by the parties in the light most favorable to the party opposing the motion." *Rose v Nat'l Auction Group*, 466 Mich 453, 461; 646 NW2d 455 (2002). Summary disposition is appropriate under MCR 2.116(C)(10) if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. *Id.*

Until relatively recently, agreements wherein a criminal defendant relinquished his/her right to file a civil action in exchange for the dismissal of criminal charges were held invalid, per se. See, *Gray v Galesburg*, 71 Mich App 161; 247 NW2d 338 (1976). In *Town of Newton v Rumery*, 480 US 386; 107 SCt 1187; 94 LEd2d 405 (1987), however, the Supreme Court, noting that criminal defendants are often required to make difficult choices that effectively waive certain rights, found no rationale for the per se rule invalidating release-dismissal agreements.

> For example, it is well settled that plea bargaining does not violate the Constitution even though a guilty plea waives important constitutional rights. . . In many cases a defendant's choice to enter into a release-dismissal agreement will reflect a highly rational judgment that the certain benefits of escaping criminal prosecution exceed the speculative benefits of prevailing in a civil action." *Id.* at 393-394.

Given the above, the Court opined, "[w]e see no reason to believe that release-dismissal agreements pose a more coercive choice than other situations we have accepted." The *Rumery* Court then set forth three factors a trial court should consider in its determining whether a particular release-dismissal agreement is valid: (1) whether the agreement was voluntary, (2) whether there was evidence of prosecutorial misconduct, and (3) whether enforcement of the agreement would not affect the relevant public interests.

Our Court, in *Stamps v City of Taylor*, 218 Mich App 626, 628; 554 NW2d 603 (1996), adopted the *Rumery* three-prong analysis and further expanded upon the analysis. According to *Stamps*, in analyzing whether a release-dismissal agreement was entered into voluntarily (the first *Rumery* factor), the trial court should consider the following:

> (1) the sophistication of the criminal defendant, (2) whether the signer of the release was in custody at the time of signing, (3) whether the signer was represented by counsel, (4) whether the signer had ample time to consider the agreement before signing it, (5) whether the signer expressed any unwillingness, and (6) whether the release is clear on its face.

Here, the trial court considered all of the *Stamps* factors, noting that plaintiff was not totally unsophisticated and was not in custody at the time she signed the agreement. The trial court also indicated that plaintiff was represented by counsel, that she could have asked for more time to consider the agreement had she wanted to, that there was no indication in writing or

otherwise that she was unwilling to sign the release, and that the agreement was clear on its face. We find no error in the court's analysis or conclusions.

While plaintiff emphasizes that she signed the agreement only because her counsel told her she would be facing immediate jail time if she did not sign the agreement, this does not necessarily negate the voluntariness of her signature. Plea agreements are generally made under scenarios rife with concern and distress and are a commonly used mechanism which often allows a criminal defendant some certainty with respect to the outcome on his or her charges. Plaintiff does not deny that she was guilty of one of the two crimes she was initially charged with (OUIL) or that a term of jail is a possible penalty for such charge. That her counsel advised she would be going to jail immediately if she did not sign the agreement is supported only by plaintiff's affidavit. And, regardless of whether the advice was sound, the possibility of plaintiff receiving jail time was present and plaintiff received the benefit of the "no immediate jail time" recommendation in the agreement. Plaintiff has failed to establish that any of the six voluntariness factors set forth in *Stamps* weigh in favor of finding that she did not sign the agreement voluntarily.

Plaintiff next argues that the existence of evidence suggesting prosecutorial and police misconduct precluded summary disposition in defendant's favor. Again, we disagree.

According to *Stamps, supra,* in addressing the issue of prosecutorial misconduct, the party seeking enforcement must show that the prosecutor's pursuit of a release-dismissal agreement arose from a case-specific concern for the public interest, rather than a concern for the private interests of governmental officials.

> Examples of such prosecutorial misconduct would include situations where, following their use of excessive force, police officers file unfounded criminal charges as bargaining chips to cover up their own conduct or to induce the victim to give up his cause of action; or where a prosecutor, upon discovering that the victim has a meritorious civil claim, files frivolous criminal charges in order to protect the police officers.
> *Id.* at 633-634, quoting *Coughlen v Coots,* 5 F3d 970, 974 (CA 6, 1993).

Plaintiff in this matter contends that such misconduct did occur, as there was no basis for charging her with resisting and obstructing a police officer. While not specifically referring to the second prong of *Rumery*, the trial court indicated that plaintiff's arrest for drunk driving was legitimate, given her blood alcohol level, and that plaintiff admitted she did not want to get into the police car. Plaintiff admits, in fact, that when defendant asked her to get into the back of his patrol car because she was under arrest, she told defendant she wanted another officer there before she did. Even passive conduct, such as plaintiff's verbal refusal to get into defendant's car when placed under arrest, is sometimes sufficient to constitute resistance or obstruction. See, *People v Vasquez*, 465 Mich 83, 97; 631 NW2d 711 (2001). This is particularly so when the conduct places an officer in a position wherein the use of physical force to accomplish his lawful objective is a distinct possibility. See, *Id.* As such, we cannot conclude that the prosecutor's decision to charge plaintiff with resisting and obstructing a police officer was unfounded and thus constituted misconduct.

Plaintiff next asserts that an analysis of the final prong in *Rumery,* whether enforcement of the release would offend public interests, in this matter establishes that the trial court

wrongfully granted summary disposition in defendant's favor. While not binding upon this Court, we find the court's analysis of this factor in *Hill v City of Cleveland*, 12 F3d 575, 579 (CA 6, 1993), helpful. As noted by *Hill*, "[t]he least well-defined element of a *Rumery* analysis is the consideration of whether enforcement of [a release-dismissal] agreement will 'adversely affect the relevant public interests." The *Hill* court went on to find that enforcement of the release-dismissal before it was not violative of public interests because police misconduct was alleged, but the true facts of the case were in conflict and not known; because there was a substantial nexus between the criminal charges and the potential civil action; because the criminal charges were not the product of prosecutorial misconduct and, because enforcement limited the parties' exposure to potential liabilities and expenses. *Id.* For the same reasons and based on our review of the record, we are satisfied that the public interest is served here in holding that the agreement between the parties constitutes a bar to the plaintiff's suit.

Plaintiff next argues that the release should be deemed invalid, as the existence and terms of the release were not placed on the record, as required by MCR 6.610(E)(5). We disagree.

MCR 6.610(E)(5) requires that the trial court make a plea agreement part of the record and determine that the parties agree on all the terms of that agreement. Here, the written plea agreement provides that the prosecutor will dismiss the charges of operating while intoxicated and resisting and obstructing a police officer and defendant (Ms. Iski) will plead guilty to operating while visibly impaired. The following language also appears on the written plea agreement, under the heading "Additional Terms and/or Conditions of the Plea Agreement:"

> Plaintiff recommend no immediate jail
> Defendant agrees to forego any possible cause of civil action.

When putting the plea on the record, Ms. Iski's counsel stated:

> We met with the People's Attorney. He has amended the complaint and added a count of Operating While Visibly Impaired. My client is going to change her initial plea of not guilty to a guilty plea to the amended complaint. . . .and in return for that plea, People are moving to dismiss the original charge of Operating While Intoxicated and Resist and Oppose (sic) a Police Officer in the performance of his duty.

While neither counsel nor the trial court recited the "other terms" contained in the written plea agreement on the record, the trial court judge did state, "Ms. Iski, I have a plea agreement with your signature consistent with your attorney's representations. Is that how you wish to proceed?" Ms. Iski answered in the affirmative. The court having acknowledged the written agreement and specifically asking Ms. Iski if she wanted to proceed with the signed plea agreement, the entire plea agreement was implicitly made a part of the record.

Moreover, as indicated by defendant, "tender of consideration received is a condition precedent to the right to repudiate a contract of settlement." *Stefanac v Cranbrook Educational Community*, 435 Mich 155, 163; 458 NW2d 56 (1990). Plaintiff and the prosecutor reached an agreement wherein plaintiff would plead guilty to operating while visibly impaired and would forego any civil action arising out of her arrest and, in exchange, the prosecutor would dismiss the original, more serious crimes plaintiff was charged with. Plaintiff does not contend that the

prosecutor did not uphold its end of the bargain or that she did not receive the benefit of her plea to a reduced charge. Plaintiff, however, has not sought to have her plea set aside, but seeks only to have one part of the consideration she offered (the release) invalidated, while leaving the benefit she received intact.

A party entering into a settlement agreement, offering adequate consideration, is entitled to rely on the terms of the agreement. *Stefanac, supra.*

> A compromise and release is not to be confused with the law of contract, in which equivalents are exchanged, for the very essence of a release is to avoid litigation, even at the expense of strict right.
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> It is a general and salutary rule that one repudiating or seeking to avoid a compromise settlement or release, and thereby revert to the original right of action, must place the other party *in statu quo*, otherwise the very fact of payment, in consideration of the compromise or release, will likely operate as a confession of liability.
> *Stefanac, supra* at 164, quoting *Kirl v Zinner*, 274 Mich 331, 334-335; 264 NW 391 (1936) (Emphasis in original.)

Plaintiff having not sought to set aside her plea, i.e. placing the prosecutor in the position it was prior to the plea, she cannot seek here to invalidate their compromise and settlement.

Affirmed.

/s/ Deborah A. Servitto
/s/ Donald S. Owens
/s/ Kirsten Frank Kelly