

STATE OF MICHIGAN
COURT OF APPEALS

In re DONALD K. EGELUS LIVING TRUST

DONALD K. EGELUS LIVING TRUST, and
SUSAN K. EGELUS, f/k/a SUSAN K. MIEL, and
RICK K. EGELUS as Co-Trustees of the
DONALD K. EGELUS LIVING TRUST,

Plaintiffs-Appellees,

v

ALICE L. EGELUS LIVING TRUST and ALICE
L. EGELUS, Individually,

Defendants-Appellants.

UNPUBLISHED
September 23, 2010

No. 292020
Wexford Probate Court
LC No. 2008-006161-CZ

Before: MURPHY, C.J., and HOEKSTRA and STEPHENS, JJ.

PER CURIAM.

Defendants appeal as of right an order granting plaintiffs' motion to enforce the parties' settlement agreement pursuant to MCR 2.507(G). On appeal, defendants argue that the parties failed to reach a valid settlement agreement and that even if such an agreement was reached, it was unenforceable for a variety of reasons. We disagree.

I. STANDARD OF REVIEW

Each of defendants' arguments on appeal can essentially be classified as alternative theories regarding why the trial court's enforcement of the settlement agreement was improper. This Court reviews a trial court's decision to enforce a settlement agreement for an abuse of discretion. *Groulx v Carlson*, 176 Mich App 484, 493; 440 NW2d 644 (1989). The abuse of discretion standard recognizes that, in some circumstances, there are multiple reasonable and principled outcomes and that where the trial court selects one of these outcomes, its ruling will not be disturbed. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006). Additionally, a settlement agreement is subject to the laws of contract formation and interpretation. *Mich Mut Ins Co v Indiana Ins Co*, 247 Mich App 480, 484-485; 637 NW2d 232 (2001). "The existence and interpretation of a contract are questions of law reviewed de novo." *Kloian v Domino's Pizza, LLC*, 273 Mich App 449, 452; 733 NW2d 766 (2006).

It is well established that "in the practical realities of civil litigation, the vast majority of cases must be and are in fact settled. Wise judicial policy favors settlement between the parties."

Putney v Haskins, 414 Mich 181, 189; 324 NW2d 729 (1982). In order to be binding upon the parties, an agreement to settle pending litigation must include all of the elements of a legal contract and must meet the requirements of MCR 2.507(G). *Mich Mut Ins Co v Indiana Ins Co*, 247 Mich App 480, 484-485; 637 NW2d 232 (2001). In the present case, defendants assert that the trial court erred granting plaintiffs' motion to enforce the settlement agreement for a variety of reasons. This opinion will separately address each of defendants' arguments.

II. COMPLIANCE WITH MCR 2.507(G)

Defendants first assert that the alleged settlement agreement should not have been enforced because it failed to meet the requirements of MCR 2.507(G), which provides:

An 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.

Defendants assert that the requirements of MCR 2.507(G) were not met because the settlement agreement was not made in open court and was not reduced to writing. We agree that the settlement was not reached in open court. However, because evidence of the agreement exists in a writing subscribed to by defendants, the trial court properly concluded that the requirements of MCR 2.507(G) were satisfied.

As explained above, a settlement agreement that is not reached in open court is still enforceable pursuant to MCR 2.507(G) if "evidence of the agreement is in writing, subscribed by the party against whom the agreement is offered or by that party's attorney." In the present case, defendants' original attorney wrote a letter to plaintiffs' attorney after the settlement agreement was placed on the record. In that letter, which was signed by defendants' attorney, it was stated that the parties had reached an agreement, that the agreement had been "hammered out" and that defendants were frustrated that the agreement had not yet been enacted. Those statements constitute evidence of the settlement, thus satisfying the requirements of the applicable court rule. Although the letter to plaintiffs' attorney does not explain the terms of the settlement agreement, the court rule does not require any such specificity. Consequently, because the court rule is satisfied, defendants are not entitled to relief unless they can demonstrate that the agreement was invalid under an alternative theory.

III. CONFLICT OF INTEREST

Defendants next assert that the trial court should not have enforced the settlement agreement because of the alleged conflict of interest that was created as a result of plaintiffs utilizing an attorney that had previously drafted Alice's trust. Defendants' further argue that, at a minimum, this Court should remand for further proceedings to determine the extent of the alleged conflict.

The record demonstrates that defendants became aware of the alleged conflict of interest prior to the scheduled deposition at which the settlement agreement was read for the record. Defendants' attorney stated, in multiple letters, that it was expected that plaintiffs' would be

hiring a different attorney if the matter proceeded to litigation. When litigation was commenced with the filing of the complaint, defendants did not file a motion to disqualify plaintiffs' counsel. Rather, the parties engaged in a discovery period and eventually began to discuss a settlement, culminating in the agreement that preceded this appeal.

When the parties were stating the terms of the settlement agreement, defendants' attorney specifically stated that the parties were looking for "finality" and emphasized that "no one can come back in the future and assert claims that could have been asserted now." During the course of that gathering, the parties and their attorneys were present. There was no indication that defendants intended to retain the ability to challenge the settlement or instigate any other claim on the basis of the alleged conflict of interest. As this Court has previously stated, "[a] compromise and settlement is conclusive as to all matters included. It merges and bars all included claims and pre-existing causes of actions." *Pedder v Kalish*, 26 Mich App 655, 657; 182 NW2d 739 (1970). The parties clearly expressed their intent to abandon all claims in exchange for a binding settlement agreement. Therefore, because the record demonstrates that defendants were aware of the possible existence of a conflict of interest at the time they entered the settlement agreement, this Court refrains from addressing the underlying merits of any such argument.

IV. FAILURE TO DISCLOSE TRUST AMENDMENTS

The merger doctrine also applies to defendants' arguments regarding the first amendment to Donald Egelus's trust. Donald's trust was amended twice prior to the commencement of this litigation. Plaintiffs provided defendants with a copy of the second trust amendment, which removed Daniel Stafford as a successor co-trustee. When defendants received the second trust amendment, they became aware that there was also a previous amendment. Defendants' attorney contacted plaintiffs and requested a copy of the first trust amendment, which disinherited Alice Egelus. Plaintiffs did not provide defendants with the requested document. Defendants now argue that if Alice had been aware of the contents of the first trust amendment, she would have exercised her power under the trust to discharge Rick and Susan Egelus and name herself as trustee. Defendants further argue that Alice would have subsequently dismissed the lawsuit that Rick and Susan had filed on behalf of the trust. According to defendants, Rick and Susan breached their fiduciary duties to Alice when they failed to inform her of the nature of the first trust amendment.

Based on the evidence in the record, it is clear that defendants were aware of the existence of both trust amendments at the time they reached the settlement agreement. It is true that the nature of the first trust amendment was unknown to defendants. However, defendants assumed the risk when they entered the settlement agreement with full awareness that they were ignorant of the contents of the amendment. By stating that they intended for the settlement agreement to be a final agreement that disposed of all of their claims against plaintiff, defendant waived their right to now assert a claim relating to an amendment of which they were fully aware.

V. JOINDER OF NECESSARY PARTIES

Next, defendants argue that even if the settlement agreement is facially valid, it should not have been enforced because all of the necessary parties were not joined pursuant to MCR

2.205. Specifically, defendants assert that Rick and Susan, in their individual capacities, along with Stafford, were all necessary parties and that the settlement agreement cannot be enforced because it would not be binding on those individuals. Defendants initially presented this argument in response to plaintiffs' motion to enforce the settlement agreement. The trial court noted that defendants had failed to ever raise the issue in a motion for joinder despite the fact that litigation had been ongoing for nearly a year. This Court has previously explained that a defendant bears the burden of objecting when a plaintiff fails to comply with the requirements of MCR 2.205. *United Services Automobile Ass'n v Nothelfer*, 195 Mich App 87, 89; 489 NW2d 150 (1992). Furthermore, such an objection must be timely made at the risk of being waived. *Id.* As the trial court noted, defendants waited roughly ten months prior to making their argument regarding joinder. Consequently, defendants' objection regarding the alleged violation of MCR 2.205 was not timely and was properly disposed of by the trial court.

VI. MUTUALITY OF AGREEMENT

Next, defendants assert that the trial court should not have enforced the settlement agreement because there was never a meeting of the minds, as required under the law of contracts. Defendants argue that Rick never consented to the settlement in his individual capacity or in his capacity as co-trustee. Likewise, defendants assert that Susan never consented to the agreement in her individual capacity, and that where there were two different renditions of the settlement agreement read into the record, Alice and Stafford did not agree to the same terms as plaintiffs. Specifically, defendants assert that the settlement agreements differed because the settlement read to plaintiffs stated that Stafford would waive any claims against Donald's trust, whereas the agreement read to Stafford did not state that fact.

To the extent that defendants assert that Stafford would not have entered the agreement had he been more fully informed or had he been represented by counsel, this Court refrains from addressing any such arguments because Stafford is not a party to this litigation and defendants did not timely object to plaintiffs failure to join Stafford to this action. Rather, the only question is whether the parties to this litigation mutually agreed to its terms. Regarding the actual parties, the record demonstrates that the agreement that was initially recited to plaintiffs slightly differed from the agreement that Alice agreed to. However, when the terms of the agreement were read to Alice, plaintiffs' attorney stated that his clients acknowledged and consented to the agreement. Therefore, Rick and Susan were bound to the agreement pursuant to the principles of agency. As indicated in MCR 2.401, a settlement agreement may be entered into by a party's agent where that agent has been granted authority to do so. In the present case, the circumstances certainly indicate that plaintiffs' attorney was operating with authority as their agent at the settlement discussions. Therefore, both Rick and Susan did consent to the same terms as Alice and the requisite mutuality of agreement is present.

VII. UNFULFILLED CONDITION

Next, defendants assert that the settlement agreement should not be enforced because the agreement was dependent on a contingency that never occurred. At the settlement hearing, defendants' attorney stated that the "agreement is subject to everyone being comfortable in receiving confirmation that the values that are shown [in the list of assets] were substantially accurate at the time the list was prepared." Subsequently, Jay Thiebaut examined the list that he had originally prepared and determined that there was a \$37,000 inaccuracy that would operate

to defendants' detriment if the settlement was enforced. Thiebaut opined that that inaccuracy was substantial. The trial court, however, concluded that the inaccuracy was insubstantial when considering the size of the trusts in question.

We agree with the trial court's determination that the alleged \$37,000 inaccuracy in Thiebaut's initial accounting does not qualify as a substantial inaccuracy when considering that the trial court found each trust involved in this matter to be individually worth approximately \$1.3 million. The term "substantial" is subjective in nature. However, the discrepancy amounts to less than 3% of the total value of each trust taken individually. It is highly unlikely that such a slight discrepancy would affect a party's willingness to enter a settlement agreement. Additionally, we note that Thiebaut's opinion regarding whether the discrepancy was substantial is not controlling.

Not only is the discrepancy at issue not substantial, but the record demonstrates that Thiebaut's initial asset list also contained discrepancies that operated to plaintiffs' detriment. According to an affidavit filed by Rick, the inaccuracies in the asset list resulted in a net benefit of over \$88,000 in favor of defendants. Defendants, in response, assert that this Court should not consider that evidence, as it was not preserved for appeal. We disagree, as the record establishes that Rick submitted a signed affidavit to the trial court on April 10, 2009. Although the court did not have that signed affidavit when it conducted the April 8, 2009 hearing on the motion for reconsideration, it was made aware of the contents of the affidavit during that hearing. Furthermore, the trial court was in possession of the signed affidavit well before it issued its April 21, 2009 order denying defendants motion for reconsideration. Consequently, the trial court did not err in concluding that the inaccuracies of the asset list did not allow defendants to avoid enforcement of the settlement agreement where any alleged inaccuracies were at best insubstantial, and at worst operated to defendants' benefit.

VIII. FAILURE TO TRANSFER A VEHICLE

Finally, defendants assert a variety of arguments relating to plaintiffs' failure to transfer a vehicle to defendants upon request. The parties' settlement agreement provided that a certain truck in plaintiffs' possession would be transferred to Alice. After the parties reached their agreement, there was a series of letters written between the parties. In one letter, plaintiffs' attorney stated that there was an inaccuracy in the asset list that Thiebaut prepared. As a result, plaintiffs stated that before the settlement agreement was enacted, it was necessary for Alice, Stafford and Thiebaut to ensure that there were no other inaccuracies and that the asset list was complete. Subsequently, it appears that the defendants brought a petition to force the transfer of the vehicle. In response, plaintiffs' opposed the motion and argued that the vehicle was properly in possession of Donald's trust and its transfer was contingent upon verification that there were no other inaccuracies in Thiebaut's list of assets. The trial court apparently agreed with plaintiffs and denied the petition to transfer the property in question in a May 9, 2008 order.

Defendants argue on appeal that the lower court's order established the settlement agreement was not enforceable and, as a consequence, plaintiffs are estopped from asserting that the settlement agreement is enforceable. We conclude that the application of collateral estoppel to this matter would be improper. When the parties reached their settlement agreement, they explicitly stated that the agreement was contingent on each party's ability to confirm the accuracy of the asset list. The only apparent reason plaintiffs opposed the transfer of the vehicle

after reaching the settlement agreement was because defendants were resisting plaintiffs' efforts to verify the accuracy of the asset list. Until the substantial accuracy of that list could be verified, the possibility remained that the agreement would not be effective. Therefore, the order that defendants are relying on for their collateral estoppel argument was only entered because of their own conduct. It would be improper to reward that conduct by holding that plaintiffs were now estopped from arguing the legitimacy of the settlement agreement.

Similarly, defendants argue that even if collateral estoppel does not apply, plaintiffs breached the settlement agreement when they failed to transfer the possession of the vehicle. According to defendants, plaintiffs' breach invalidated the agreement. As explained above, each party agreed that the agreement was contingent upon verification of the substantial accuracy of the asset list. While it is true that the settlement required the transfer of the vehicle from plaintiffs to defendants, the parties did not state that the transfer was to occur prior to the verification of the asset list. Plaintiffs in no way indicated that they were unwilling abide by the agreement. Rather, they merely indicated that transfer was not appropriate at the time requested by defendants. Therefore, plaintiffs were still in compliance with the terms of the settlement agreement.

Finally, defendants argue that plaintiffs' insistence that the settlement agreement could not be enforced until the asset list was verified is, in itself, evidence that the agreement was never valid. As explained throughout this opinion, this Court concludes that plaintiffs' conduct was consistent with the parties' agreement. Furthermore, even if plaintiffs' did improperly deny the enforceability of the agreement, we agree with the trial court's conclusion that plaintiffs' denial has no bearing on whether the agreement was valid. As stated above, a settlement agreement is valid if it meets the requirements of MCR 2.507(G) and has all of the elements of a binding contract. Once the parties entered into an agreement meeting that criteria, the agreement was binding and could be enforced by either party. Defendants offer no authority for the proposition that a party's subsequent position regarding an agreement's validity has any controlling effect.

IX. CONCLUSION

The trial court did not abuse its discretion in granting plaintiffs' motion to enforce the settlement agreement. Several of defendants' arguments at the trial level were improper due to the merger doctrine. Defendants' arguments that did not merge with the settlement agreement are without merit and do not entitle defendants to relief.

Affirmed.

/s/ William B. Murphy
/s/ Joel P. Hoekstra
/s/ Cynthia Diane Stephens