

STATE OF MICHIGAN
COURT OF APPEALS

C. DAVID HUNT and CAROL SANTANGELO,

Plaintiffs-Appellants,

UNPUBLISHED
October 23, 2012

v

LOWER HARBOR PROPERTIES, L.L.C.,
DRESSLER MECHANICAL, INC. a/k/a
DRESSLER & SONS, INC., and SWAILES
PLUMBING & HEATING, INC.,

No. 303960
Marquette Circuit Court
LC No. 10-048615-NO

Defendants-Appellees.

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

PER CURIAM.

Plaintiffs appeal as of right the trial court's order granting defendants' motions for summary disposition brought pursuant to MCR 2.116(C)(7). The trial court found that plaintiffs' claims were barred because of a release executed by plaintiffs in a previous suit. We affirm.

Plaintiffs filed a lawsuit in federal court in 2009 against Robert and Amy Armstrong and Harbor Ridge Townhouse Condominium Association. Plaintiffs alleged that the Armstrongs leased a condominium unit to plaintiff C. David Hunt and that during Hunt's tenancy he was exposed to various hazardous substances as a result of living in the contaminated unit. Plaintiffs alleged causes of action that included violation of MCL 554.139 (landlord covenants of reasonable repair and fitness for intended use), negligence, nuisance, and negligent nuisance.¹ Subsequently, a settlement agreement was reached and plaintiffs executed the following release:

In consideration of the sum of Twenty-One Thousand dollars and 00/100 (\$21,000.00), the receipt of which is hereby acknowledged, the undersigned, C. David Hunt and Carol Santangelo, on behalf of themselves, their heirs, personal representatives and assigns, release and forever discharge Robert Armstrong and Amy Armstrong, *and any and all other persons, firms or corporations charged or chargeable with responsibility or liability*, their heirs, representatives or assigns,

¹ The claims by plaintiff Carol Santangelo were based on loss of consortium.

from any and all claims, demands, damages, costs, expenses, loss of services, actions or causes of action arising out of any act or occurrence up to the present time and particularly on account of all personal injury, disability, property damage, diminution in value, loss of damages of any kind, which have been sustained or that we may hereafter sustain in consequence of the lease of a condominium unit and associated property located at 235 North Lakeshore Blvd., Marquette, Michigan, all as set forth with specificity in United States District Court Case No: 2:09-cv-38[.] [Emphasis added.]

Thereafter, plaintiffs filed the instant suit against defendants. Plaintiffs alleged that defendant Lower Harbor Properties, LLC (“LHP”), had built the condominium unit that Hunt leased from the Armstrongs, that LHP had sold the unit to the Armstrongs, that Hunt was exposed to harmful toxic substances while residing in the unit during his leasehold, and that the exposure was due to LHP’s negligence. Plaintiffs alleged that defendant Dressler Mechanical, Inc., was a mechanical contractor, that it installed, inspected, and tested the mechanical system located in the condominium unit leased by Hunt, that Hunt was exposed to harmful toxic substances while residing in the unit during his tenancy, and that the exposure was caused by Dressler’s negligence. Plaintiffs alleged that defendant Swailes Plumbing & Heating, Inc., had installed an air system device in the condominium unit at issue, that Hunt was exposed to harmful toxic substances while living in the unit during his tenancy, and that the exposure was due to Swailes’ negligence. The trial court granted defendants’ motions for summary disposition on the basis of “release” under MCR 2.116(C)(7) (summary disposition is proper when a “claim is barred because of release”), finding that the broad release executed in the previous lawsuit encompassed defendants named in the present action.

We review de novo a trial court’s decision on a motion for summary disposition. *Ligons v Crittenton Hosp*, 490 Mich 61, 70; 803 NW2d 271 (2011). Further, this case involves a question regarding the proper construction of a contract, which is also subject to de novo review. *In re Egbert R Smith Trust*, 480 Mich 19, 24; 745 NW2d 754 (2008). For purposes of MCR 2.116(C)(7), this Court not only considers the pleadings, it must also take into consideration any affidavits, admissions, depositions, or other documentary evidence submitted by the parties. *RDM Holdings, Ltd v Continental Plastics Co*, 281 Mich App 678, 687; 762 NW2d 529 (2008). A complaint’s contents must be accepted as true except as contradicted by the documentary evidence. *Id.* We are required to consider the documentary evidence in a light most favorable to the nonmoving party. *Id.* When there is no factual dispute, the court must decide as a question of law whether a plaintiff’s claim is barred under a ground identified in MCR 2.116(C)(7). *Id.* However, if a pertinent factual dispute exists, summary disposition cannot be granted. *Id.* Release is an affirmative defense for which the defendant has the burden of proving. *Will H Hall & Son, Inc, v Ace Masonry Constr, Inc*, 260 Mich App 222, 234 n 6; 677 NW2d 51 (2003). However, once a defendant raises the defense of release and submits supporting documentary evidence in the context of a motion for summary disposition, it is incumbent on the plaintiff to submit documentary evidence showing a genuine issue of material fact regarding the issue of release. *Id.*

In *Shay v Aldrich*, 487 Mich 648; 790 NW2d 629 (2010), our Supreme Court engaged in an in-depth discussion of the law regarding releases and specifically the scope of a release where a party not expressly named or identified in a release nonetheless seeks protection from liability

under the release. In *Shay*, the plaintiff filed suit against Melvindale and Allen Park Police Officers for an alleged assault and gross negligence, the plaintiff and the Allen Park Officers alone agreed to and accepted a case evaluation award, and the plaintiff then executed releases based on the case evaluation that expressly released the Allen Park Officers, but which also released “all other persons, firms and corporations from any and all claims” *Id.* at 653. The Melvindale Officers subsequently moved for summary disposition under MCR 2.116(C)(7), arguing that the broad language in the releases encompassed not only the Allen Park Officers but also the Melvindale Officers. The trial court denied the motion; however, this Court reversed, holding that the unambiguous language in the releases covered the Melvindale Officers. *Id.* at 654-656. Our Supreme Court initially stated that “the Melvindale Officers were not involved in the Allen Park Officers’ settlement negotiations with plaintiff, were not named in the executed releases, and did not sign the releases.” *Id.* at 661. The Court also noted that the Melvindale Officers “concede[d] that neither plaintiff nor the Allen Park Officers intended to release them from liability.” *Id.* at 662. The Court then directed its attention to MCL 600.1405, which governs the rights of third-party beneficiaries, and which requires application of an objective, not subjective, standard in construing a release and determining whether it was executed directly for the benefit of the purported third-party beneficiary. *Id.* at 663. The Supreme Court concluded that “the Melvindale Officers qualify[ed] as third-party beneficiaries under the applicable statute because on its face, the release language unambiguously release[d] ‘all other persons.’” *Id.* at 665. However, this did not automatically entitle the Melvindale Officers to the sought-after benefit of protection under the releases, as the “courts must still apply basic principles of contract interpretation when determining the extent of the third party’s rights under the contract.” *Id.* at 666.

In examining the scope of the Melvindale Officers’ rights under the release, the Court noted that releases are generally treated as contracts,² that contracts are subject to the parol evidence rule, which precludes the use of extrinsic evidence when interpreting unambiguous contractual language, that ambiguous contracts open the door to the admission of extrinsic evidence to establish the actual intent of the parties, and that an ambiguity can be either patent or latent. *Id.* at 667. The Court further elaborated:

This Court has held that extrinsic evidence may not be used to identify a patent ambiguity because a patent ambiguity appears from the face of the document. However, extrinsic evidence may be used to show that a latent ambiguity exists. . . . A latent ambiguity exists when the language in a contract appears to be clear and intelligible and suggests a single meaning, but other facts

² This Court has traditionally applied theories of contract law to disputes regarding the terms of a release. “The cardinal rule in the interpretation of contracts is to ascertain the intention of the parties. To this rule all others are subordinate.” Generally, if the language of a contract is unambiguous, it is to be construed according to its plain meaning. On the other hand, if the language of a contract is ambiguous, courts may consider extrinsic evidence to determine the intent of the parties. [*Shay*, 487 Mich at 660 (citations omitted).]

create the “necessity for interpretation or a choice among two or more possible meanings.” To verify the existence of a latent ambiguity, a court must examine the extrinsic evidence presented and determine if in fact that evidence supports an argument that the contract language at issue, under the circumstances of its formation, is susceptible to more than one interpretation. Then, if a latent ambiguity is found to exist, a court must examine the extrinsic evidence again to ascertain the meaning of the contract language at issue. [*Id.* at 667-668 (citations omitted).]

The Court proceeded to indicate that it was necessary to consider whether a latent ambiguity arose from undisputed extrinsic evidence presented by the plaintiff, which included evidence that the officers were represented by different counsel, that the plaintiff only agreed to accept the case evaluation award as to the Allen Park Officers, that counsel for the Allen Park Officers explained to the plaintiff that the releases were drafted in order to settle only the claims against the Allen Park Officers, that the sole stipulation and order of dismissal entered in the case pertained to the Allen Park Officers, that the suit remained pending against the Melvindale Officers with a trial date being set, that the releases expressly contemplated the possibility of liability by the Allen Park Officers for contribution or indemnification, implying the existence of a continuing lawsuit against the Melvindale Officers, and that counsel for the Allen Park Officers averred in an affidavit that he drafted the releases absent an intent to release the Melvindale Officers. *Id.* at 671-672. The Court again noted that even the Melvindale Officers were not of the belief that the release was intended to include them. *Id.* at 674. The Court found that, “[c]onsidering the language of the releases and the extrinsic evidence presented, it is clear that the settling parties did not include the term ‘persons’ in the releases in order to effectuate an intent to release the Melvindale Officers from liability.” *Id.* at 672-673. The Court also observed that “[t]his is simply not a case in which a stranger to a contract or release comes forward sometime after the formation of the contract or release and seeks to benefit from its terms.” *Id.* at 673. The *Shay* Court reemphasized and summarized that in determining whether an unnamed party is a third-party beneficiary under broad or vague release language, there must be an objective analysis of said language, but even if the party achieves the status of a third-party beneficiary upon analysis, “traditional contract principles continue to apply to the release, and courts may consider the subjective intent of the named and unnamed parties to the release under certain circumstances, such as when there is a latent ambiguity.” *Id.* at 675.

Here, plaintiffs first argue that the plain language of the release on its face did not encompass defendants but only those in privity with the landlords, i.e., the Armstrongs. Plaintiffs engage in an exercise of grammatical gymnastics in presenting this argument. The plain language of the release discharged and released the Armstrongs “and any and all other persons, firms or corporations . . . chargeable with liability . . . from any and all claims . . . arising out of any act . . . particularly on account of all personal injury . . . sustained . . . in consequence of the lease of [the] condominium unit . . . all as set forth with specificity in United States District Court Case No: 2:09-cv-38.” Contrary to plaintiffs’ argument, this language does not indicate that “any and all other persons, firms or corporations” need to be in privity with the

Armstrongs, nor do plaintiffs even explain the concept of privity in the context of their particular argument and why the instant defendants would not be in privity with the Armstrongs.³

Plaintiffs additionally argue that the only prospective claims covered by the release pertained to those particularly resulting from the *lease* of the condominium unit and that the instant defendants had absolutely no connection with *leasing* the unit to Hunt. In that same vein, plaintiffs also argue that the only prospective claims covered by the release pertained to those raised in the federal suit, i.e., violation of MCL 554.139, negligence, and nuisance, all of which were predicated on subsurface contamination that intruded into the condominium unit. However, the claims here, according to plaintiffs, “can be summarized as defects in construction, building code violations, improper installation and the derivative duties to warn of same; a different factual scenario.” With respect to the release language covering claims for personal injury that were sustained “in consequence of the lease of [the] condominium unit,” this language, contrary to plaintiffs’ argument, clearly and unambiguously speaks to claims arising from Hunt’s tenancy and his residency and presence in the condominium unit under the lease whereby he was allegedly exposed to hazardous substances, which would include the claims in the case at bar. With respect to the release language covering claims for personal injury “all as set forth with specificity in United States District Court Case No: 2:09-cv-38,” the nature of the claims in the federal case all revolved around Hunt’s alleged exposure to toxic or otherwise harmful substances and included claims that the defendants were negligent, which negligence caused Hunt’s exposure-related injuries. Here, the nature of plaintiffs’ claims also revolve entirely around Hunt’s alleged exposure to harmful substances and include claims that defendants were negligent, thereby causing Hunt’s exposure-related injuries. The fact that the claims in the instant action are focused on negligence related to construction activities as the causal element of plaintiffs’ damages does not change the fact that the claims are based on exposure to harmful substances due to negligence. Certainly, had plaintiffs attempted to file a second suit against the Armstrongs claiming that they personally engaged in construction activities as to the condominium unit leased to Hunt, which caused Hunt to be exposed to harmful substances, the suit would be barred by the release.

Contrary to plaintiffs’ argument, we conclude that defendants, like the Melvindale Officers in *Shay*, were third-party beneficiaries under the plain and unambiguous language in the release, where, viewing the matter objectively as based on the face of the release, defendants fit under the umbrella of “any and all other persons, firms or corporations.”⁴ However, as reflected in *Shay*, this does not end the analysis.

³ This is especially true with regard to LHP, which sold the condominium unit to the Armstrongs.

⁴ Plaintiffs argue that defendants could not be third-party beneficiaries because there was no mutuality of obligation; however, the same could be said for the situation in *Shay*, where the Melvindale Officers were declared to be third-party beneficiaries despite having no obligation to perform for the plaintiff’s benefit. Moreover, mutuality of obligation did exist with respect to the general release transaction, given that named released parties were obligated to pay plaintiffs \$21,000.

For the reasons stated above, there is no patent ambiguity in the release, as the language, in and of itself, clearly encompasses defendants and the causes of action brought against defendants. The question then becomes whether there was extrinsic evidence showing the existence of a latent ambiguity. As opposed to the overwhelming evidence in *Shay* establishing that there was no intent to release the Melvindale Officers, the only evidence here is Hunt's affidavit in which he averred that he "understood the language" in the release "to be for the purpose o[f] releasing other persons who were or might have been involved in procuring me to be a tenant in the residence. It was not intended to release parties who were not in privity with the Armstrongs or involved in leasing the unit to me, nor anyone involved in having made improvements to the property." This self-serving affidavit essentially mirrors plaintiffs' legal arguments regarding the proper construction of the release, rather than providing true independent or extrinsic evidence of an intent that countered the plain language of the release. There are no affidavits or statements supporting plaintiffs' position from the attorneys and parties in the federal case, except for Hunt's, and there is no evidence regarding the surrounding circumstances that would justify a conclusion that a latent ambiguity existed. Hunt's affidavit standing alone is simply insufficient to create a latent ambiguity.⁵

Plaintiffs contend that defendants, who had the burden to establish the affirmative defense of release, had to show that an ambiguity existed; however, we reject this argument because it is premised on the mistaken assumption that the release should be construed as argued by plaintiffs, which position is untenable for the reasons stated above.

Affirmed. Having fully prevailed on appeal, defendants are awarded taxable costs pursuant to MCR 7.219.

/s/ William B. Murphy

/s/ David H. Sawyer

/s/ Joel P. Hoekstra

⁵ Plaintiffs argue that the \$21,000 settlement in the federal lawsuit was small, making it unlikely that they intended to forgo additional suits against other allegedly responsible parties. We have no information indicating that plaintiffs' case is potentially worth more than \$21,000, as opposed to the situation in *Shay* where the accepted case evaluation award totaled \$25,000 (Allen Park Officers) and the unaccepted case evaluation award totaled approximately \$1.4 million (Melvindale Officers). Plaintiffs' argument here is speculative.