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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA15-1206

Filed: 19 July 2016

Guilford County, No. 14 CVS 3631

AIR ACCURACY, INC., Plaintiff,

v.

TERRY WAYNE CLARK, Defendant.

Appeal by plaintiff from order entered 2 July 2015 by Judge Lindsay R. Davis, Jr., in Guilford County Superior Court. Heard in the Court of Appeals 8 March 2016.

Lanier Law Group, P.A., by Donald S. Higley, II, for plaintiff-appellant.

Robert S. Boyan for defendant-appellee.

McCULLOUGH, Judge.

Air Accuracy, Inc. appeals from an order denying its motion to enforce a settlement agreement, in part. Based on the reasons stated herein, we affirm the order of the trial court.

I. Background

On 24 February 2014, Air Accuracy, Inc. (“plaintiff”) filed a complaint against Terry Wayne Clark (“defendant”) alleging embezzlement, conversion, and fraud. Plaintiff is a company engaged in the heating, ventilation, and air conditioning industry. Plaintiff alleged that on or about 1 May 2012, defendant was an officer and

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employee of plaintiff, holding a 25% stake in the company. As part of his employment, defendant was responsible for making and completing work orders, collecting payments from customers, and turning in work orders and payments to plaintiff's accounting department. Plaintiff further alleged that during 1 May 2012 to 28 August 2013, defendant withheld work orders from plaintiff and had plaintiff's customers pay defendant either in cash or by check, made payable directly to defendant. Defendant never turned in these payments to plaintiff. Plaintiff alleged that defendant kept the cash payments and deposited the checks into his personal account.

Defendant filed an answer on 27 May 2014. On 2 July 2014, the case was designated for a mediated settlement conference.

On 30 September 2014, a "Report of Mediator in Superior Court Civil Action" was filed. This report provided that the mediation settlement conference was held on 23 September 2014 and that the parties had reached an "agreement on all issues."

On 14 May 2015, plaintiff filed a "Motion for Enforcement of Settlement Agreement." Attached to this motion was the "Memorandum of Mediated Settlement" which included a "Settlement Memorandum" and "Addendum" as Exhibit A (hereinafter referred to as the "settlement agreement"). Plaintiff alleged that defendant had not been in compliance with the terms of the settlement agreement reached on 23 September 2014. Specifically, plaintiff alleged that defendant's

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mother, Joyce C. Lanier (“Ms. Lanier”), had agreed to relinquish her life estate in 118 Ridge Creek Circle in Trinity, North Carolina. A non-warranty deed and general warranty deed were drafted on or about 19 December 2014 and forwarded to defendant’s attorney for execution by defendant and Ms. Lanier. Plaintiff’s counsel attempted to contact defense counsel several times over the course of four months. On 1 May 2015, plaintiff’s counsel again contacted defense counsel and defense counsel responded via e-mail. Defense counsel advised that defendant would not sign the settlement documents and that defense counsel was not able to represent or advise Ms. Lanier with regard to signing the non-warranty deed. Plaintiff further alleged that the State charges against defendant had been dismissed.

The Settlement Memorandum provided as follows:

- 1) \$7,300.00 cash that is currently in evidence being held by the District Attorney in Guilford County.
- 2) Deed to the house located at 118 Ridge Creek Circle, Trinity, North Carolina to Debra Clark and Lisa Lanier (subject to the life estate previously in effect as long as it is the primary residence of Joyce C. Lanier). Joyce C. Lanier shall maintain the property and be responsible for upkeep and taxes related to the property as long as this remains in her primary residence. The deed will be prepared at the expense of Terry Clark and shall be provided to Lisa Lanier and Debra Clark within ten days of the date of this agreement.
- 3) Mutual Confidentiality Agreement.
- 4) Mutual Non disparagement.

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- 5) Non Compete for 5 years, through September 23, 2019 (with the exception of any area west of Charlotte and east of Raleigh).
- 6) Surrender all interest, claims and shares in Air Accuracy.
- 7) Terry Clark renounces any and all claims and shares of Air Accuracy owned by Debra Clark, Including but not limited to the pending equitable distribution in the pending divorce proceeding pending [SIC].
- 8) Mutual indemnity for any transactions after Terry Clark's termination effective October 2, 2013.
- 9) Recommendation and consent of dismissal of all felony charges by district Attorney.
- 10) Defendant Terry Clark will pay the Judge Greeson's fees for mediation.

The Addendum, signed by Joyce C. Lanier, provided that:

In consideration of the recommendation and consent regarding dismissal of the criminal charges agreed to in Paragraph 9, Joyce C. Lanier agrees to Paragraph 2, specifically to relinquish her life estate in 118 Ridge Creek Circle, Trinity, North Carolina at such time as it no longer remains her primary residence.

Defendant filed a "Response to Motion" on 28 May 2015 that stated on 29 September 2014, pursuant to the terms of the Settlement Memorandum, defendant had sent to plaintiff's counsel a letter and a deed executed by defendant. Defendant also stated that as of 30 September 2014, he had fully complied with all the terms of the Settlement Memorandum "that was under his control." Defendant

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did not receive any settlement documents or notice of disagreement of the deed he had executed until on or about 19 December 2014. Defendant's deed was made to grantees Lisa Lanier and Debra M. Clark and it recited that his grant was subject to a life estate expressly reserved by Ms. Lanier, "as long as this remains her primary residence" in accordance with the terms of the Settlement Memorandum. Defendant argued that plaintiff's deed included "additional language and terms, not contemplated, discussed, or agreed upon, at the mediation[.]"

Plaintiff's motion was heard on 4 June 2015 at the civil session of Guilford County Superior Court, the Honorable Lindsay R. Davis, Jr., presiding. In an order entered 2 July 2015, the trial court denied plaintiff's motion to enforce the settlement agreement, except that it enforced the conveyance from defendant in favor of plaintiff as set out in paragraph 2 of the Settlement Memorandum. The trial court made the following pertinent findings of fact:

2. That on September 29, 2014, Defendant sent to counsel for Plaintiff a letter and a deed executed by Defendant which are attached as Exhibits A and B to Defendant's Response to Motion. That counsel for Plaintiff acknowledges receipt of said letter and deed from Defendant.
3. That Defendant's deed was made to grantees, Lisa Lanier and Debra M. Clark, and it recited that his grant was subject to a life estate expressly reserved by his mother, Joyce C. Lanier, "as long as this remains her primary residence".
4. That the aforesaid deed from Defendant to said

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grantees substantially met the terms of the parties' SETTLEMENT MEMORANDUM and ADDENDUM; however, additional language from Paragraph 2 should be added by Defendant as follows:

“Subject to the life estate previously in effect as long as it is the primary residence of Joyce C. Lanier. Joyce C. Lanier shall maintain the property and be responsible for upkeep and taxes related to the property as long as this remains her primary residence.”

5. That the remaining terms of the SETTLEMENT MEMORANDUM are not enforceable by Plaintiff as against defendant, due to the insufficiency of the terms and the insufficiency of evidence presented by Plaintiff.

The trial court then made the following conclusions of law, in pertinent part:

1. That the Court, in its discretion, concludes as a matter of law, that the terms of the SETTLEMENT MEMORANDUM and ADDENDUM are enforceable in favor of Plaintiff, as against Defendant, only to the extent of the requirements set forth in Paragraph 2 of said Memorandum.
2. That all other terms of the SETTLEMENT MEMORANDUM in favor of Plaintiff, as against Defendant, are not enforceable due to the insufficiency of the terms and insufficiency of the evidence presented by Plaintiff.
3. That Plaintiff's Motion to Enforce Settlement Agreement is denied, except for the conveyance from Defendant to the grantees as set forth above.

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The trial court held that this constituted a final settlement in the cause of action and ordered plaintiff to file a notice of voluntary dismissal with prejudice. Plaintiff appeals.

II. Discussion

Plaintiff's sole argument on appeal is that the trial court erred in holding that the settlement agreement was not fully enforceable due to insufficiency of the terms and insufficiency of the evidence presented by plaintiff. We disagree.

It is well-established that "settlement of claims is favored in the law, and [] mediated settlement as a means to resolve disputes should be encouraged and afforded great deference." *Chappell v. Roth*, 353 N.C. 690, 692, 548 S.E.2d 499, 500 (2001) (internal citations omitted). "[C]ompromise agreements, such as the mediated settlement agreement reached by the parties . . . are governed by general principles of contract law. [S]ince contract interpretation is a question of law, the standard of review on appeal is *de novo*." *Apple Tree Ridge Neighborhood Ass'n v. Grandfather Mt. Heights*, 206 N.C. App. 278, 282, 697 S.E.2d 468, 472 (2010) (citations and internal quotation marks omitted). "It is a well-settled principle of contract law that a valid contract exists only where there has been a meeting of the minds as to all essential terms of the agreement. To be enforceable, the terms of a contract must be sufficiently definite and certain." *Lemly v. Colvard Oil Co.*, 157 N.C. App. 99, 103, 577 S.E.2d 712, 715 (2003) (citations and internal quotation marks omitted).

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On appeal, plaintiff argues that the terms of the settlement agreement are “clear and it should be fully enforced.” Specifically, plaintiff contends that “[t]he existence of an agreement by Defendant to execute a release ‘in a form acceptable to Plaintiff is so self evident that conception of an argument for not enforcing the term is difficult.” Plaintiff cites to *Smith v. Young Moving and Storage, Inc.*, 167 N.C. App. 487, 606 S.E.2d 173 (2004), and contends that it controls the outcome in the case before us.

First, plaintiff’s argument on appeal that defendant clearly agreed to execute a release in a form acceptable to plaintiff has no merit. The form entitled “Memorandum of Mediated Settlement,” which was dated 23 September 2014, includes options indicating the terms of the agreement. There is an option to check a blank next to a paragraph that provides as follows:

____ 2. Plaintiff shall pay Defendant the total sum of \$ _____ within ____ days from the date of this Agreement. *Defendant shall execute such releases as required by Plaintiff, in a form acceptable to Plaintiff, and shall file a Voluntary Dismissal with/without Prejudice upon receipt and disbursement of said settlement proceeds.*

(emphasis added). However, the blank adjacent to “2.” is not marked and none of the remaining blanks are filled in. There was no indication made on the writing itself that this was a term included in the parties’ settlement agreement. On the “Memorandum of Mediated Settlement” is merely a handwritten note that states “SEE ATTACHED SETTLEMENT MEMORANDUM.” Based on the foregoing, we

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hold that the parties did not agree that “[d]efendant shall execute such releases as required by plaintiff, in a form acceptable to [p]laintiff[.]”

In *Smith*, the plaintiff’s counsel sent a letter to the defendant indicating that she was willing to settle their dispute upon terms and conditions requiring the payment of \$32,750.00 plus interest over a three year period of time. *Id.* at 488, 606 S.E.2d at 174. The letter provided as follows, in pertinent part:

Based upon the information that I have reviewed on your client, it has been determined that it is in [the plaintiff’s] best interest to settle the above referenced matter upon the following terms and conditions:

1. Payment of \$10,000.00 to my office within thirty days of the execution of the settlement documents;
2. Payment of \$22,750.00 within 3 years at 8% simple interest with 3 yearly payments of no less than one-third (1/3) of the principal and interest balance owed; with the following payment schedule: No prepayment penalty. In the event of prepayment only the accrued interest shall be paid.
3. As of the date of the execution of the settlement agreement by [the defendant] that they are not in bankruptcy and that no bankruptcy petition is pending[.]
4. You will prepare the necessary settlement documents consisting of a settlement agreement and promissory note. A dismissal of the arbitration and lawsuit will be filed.

Id. at 492, 606 S.E.2d at 177. The very next day, the defendant’s counsel sent an unexecuted settlement and mutual release agreement and an unexecuted promissory note to the plaintiff’s counsel but the plaintiff refused to sign the documents and

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wanted to proceed with arbitration. *Id.* at 488, 606 S.E.2d at 175. The defendant filed a motion to enforce the settlement agreement and an arbitrator filed an award in favor of the defendant enforcing the settlement agreement. *Id.* The trial court affirmed the arbitration award and the plaintiff appealed to our Court. *Id.*

On appeal, the plaintiff in *Smith* first argued that the letter from the plaintiff's counsel was not a binding and enforceable settlement agreement but an unaccepted offer. Alternatively, the plaintiff contended that even if the offer was accepted, consideration was lacking, there was no mutual assent to all the terms, and the arbitrator failed to identify condition precedents. Our Court held that these legal arguments were not grounds for vacating an arbitration award pursuant to N.C. Gen. Stat. § 1-567.13 and overruled the plaintiff's arguments. *Id.* at 488-490, 606 S.E.2d at 175-76. The plaintiff also argued on appeal that "the arbitrator exceeded his authority by enforcing an invalid settlement agreement and not conducting a full and fair hearing on the merits of her claim." *Id.* at 490, 606 S.E.2d at 176. Our Court held that because "the validity of the settlement agreement was related to a dispute arising out of the parties' contractual relationship, the arbitrator did not exceed his authority in concluding the settlement agreement was binding." *Id.* at 491, 606 S.E.2d at 177. Our Court also concluded that the trial court correctly concluded a valid and enforceable agreement was entered by the parties when the plaintiff's counsel made a settlement offer to the defendant and the defendant accepted. The

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terms of the settlement were then memorialized in the letter sent to the defendant's counsel. *Id.* at 493- 95, 606 S.E.2d at 177-78. Lastly, the plaintiff argued that the trial court and arbitrator failed to identify a condition precedent: the execution of the settlement documents was a condition precedent to the formation of a contract. Our Court rejected this argument after reviewing the contents of the letter sent by the plaintiff's attorney. *Id.* at 493, 606 S.E.2d at 178.

Plaintiff argues that similar to the defendant's counsel in *Smith*, plaintiff's counsel also prepared settlement documents and like the plaintiff in *Smith*, the defendant refused to sign the documents. Nevertheless, we find the present case to be significantly distinguishable from *Smith*. Unlike the plain and unambiguous terms found in the *Smith* agreement, the Settlement Memorandum in the present case is not sufficiently definite in its terms and the intention of the parties is indiscernible. Excluding paragraph 2, we conclude that the following terms of the Settlement Memorandum fail for indefiniteness:

- 1) \$7,300.00 cash that is currently in evidence being held by the District Attorney in Guilford County.
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- 3) Mutual Confidentiality Agreement.
- 4) Mutual Non disparagement.
- 5) Non Compete for 5 years, through September 23, 2019 (with the exception of any area west of Charlotte and east of Raleigh).

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- 6) Surrender all interest, claims and shares in Air Accuracy.
- 7) Terry Clark renounces any and all claims and shares of Air Accuracy owned by Debra Clark, Including but not limited to the pending equitable distribution in the pending divorce proceeding pending [SIC].
- 8) Mutual Indemnity for any transactions after Terry Clark's termination effective October 2, 2013.
- 9) Recommendation and consent of dismissal of all felony charges by district Attorney.
- 10) Defendant Terry Clark will pay the Judge Greeson's fees for mediation.

Despite plaintiff's claims to the contrary, it is evident from the record that the parties did not sufficiently delineate: what would be done with the \$7,300.00 in cash; the specific terms of the mutual confidentiality agreement; the specific terms of the mutual non disparagement; the precise conditions of the non-compete; the specifics surrounding the surrender of interest in plaintiff; the requirements of defendant in renouncing all claims and shares of plaintiff owned by Debra Clark; the particular terms of the mutual indemnity; the conditions of dismissing the felony charges; and the specific conditions surrounding the payment of mediation fees. It is unclear what the parties are bound to do, or not to do, by virtue of the Settlement Memorandum. The parties' failure to specify the essential details left many terms open and unsettled, fatal to the formation of a binding agreement. Accordingly, we affirm the

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order of the trial court, holding that with the exception of paragraph 2, all other terms of the Settlement Memorandum are not enforceable due to the insufficiency of the terms.

III. Conclusion

The 2 July 2015 order of the trial court is affirmed.

AFFIRMED.

Judges BRYANT and STEPHENS concur.

Report per Rule 30(e).