Affirmed and Memorandum Opinion filed June 15, 2010.

In The

Fourteenth Court of Appeals

NO. 14-09-00748-CV

GARY GRAYSON AND DALE GRAYSON, Appellants

V.

GRAYSON ARMATURE LARGE MOTOR DIVISION, INC., Appellee

On Appeal from the 133rd District Court
Harris County, Texas
Trial Court Cause No. 2008-57085

MEMORANDUM OPINION

Appellants Gary and Dale Grayson challenge the trial court's July 23, 2009 order granting summary judgment in favor of appellee Grayson Armature Large Motor Division, Inc. ("Grayson Armature"). We affirm.

Background

On February 13, 2007, Gary and Dale Grayson filed suit against Richard Grayson, Leon Huggins, and Grayson Armature asserting claims for breach of fiduciary duty and

shareholder oppression. They also requested an accounting. Richard Grayson is a director of Grayson Armature and serves as its vice president. Huggins also is a director of Grayson Armature and serves as its president. Gary and Dale Grayson are shareholders of Grayson Armature.

A settlement agreement was reached on May 21, 2008 in conjunction with a mediation. The terms "parties," "plaintiffs," and "defendants" are not defined in the settlement agreement. The settlement agreement was signed by (1) Gary and Dale Grayson, and counsel for the "plaintiffs;" and (2) Richard Grayson, Huggins, and counsel for the "defendants." There is no signature block for Grayson Armature.

Pursuant to the settlement agreement, the "defendants" agreed to pay the "plaintiffs" $300,000 each. The settlement agreement further states as follows:

> 5. The parties hereby agree to release, discharge, and forever hold the other harmless from any and all claims, demand, or suits, known or unknown, fixed or contingent, liquidated or unliquidated, whether or not asserted in the above case, as of this date, arising from or related to the events and transactions which are the subject matter of this cause, including but not limited to any claims Plaintiffs may have to any interest in Grayson Armature Large Motor Division, Inc.; Grayson Armature, Orange Texas, Inc.; Pasadena Services, Inc.; Grayson Armature, Inc.; Grayson Small Motor; and any and all related or associated businesses of any kind. Also included in release is [sic] Richard Grayson and Leon Huggins.
>
> 6. Other terms of this settlement are this settlement is subject to the conveyance of all right, title and interest in the land and all attachments at 1203 Witter Street in Pasadena, Texas, including all land presently occupied by Grayson Armature Large Motor Division, Inc., including all land noted in attached exhibit A (marked purple).

On June 2, 2008, counsel for Richard Grayson, Huggins, and Grayson Armature sent a letter to Gary and Dale Grayson's counsel requesting instructions on "how the settlement checks are to be paid." On June 3, 2008, counsel for Richard Grayson, Huggins, and Grayson Armature sent a letter to Gary and Dale Grayson's counsel "follow[ing] up on

discussion [from] this morning" and again requesting "settlement disbursement instructions." Gary and Dale Grayson did not respond to the June 3, 2008 letter.

On September 26, 2008, Grayson Armature filed its original petition asserting a breach of contract claim and seeking a declaratory judgment. Gary and Dale Grayson filed their original answer on October 31, 2008.

On March 11, 2009, Grayson Armature filed a traditional motion for summary judgment. Grayson Armature asserted that it entered into a valid contract with Gary and Dale Grayson to settle the underlying litigation; that it had tendered performance; and that Gary and Dale Grayson failed to tender performance, causing damages. Grayson Armature requested that the trial court "order [Gary and Dale Grayson] to simply perform in accordance with the plain language of the Settlement Agreement," or reform the agreement and order Gary and Dale Grayson to perform in accordance with the reformed agreement if the trial court "concludes that any portion of the Settlement Agreement is unclear."

Gary and Dale Grayson filed a first amended original answer on March 26, 2009, and a response to Grayson Armature's motion for summary judgment on March 30, 2009. In their summary judgment response, they asserted that Grayson Armature lacked "standing" to enforce the settlement agreement because it was not a party to or a third-party beneficiary of the settlement agreement, and that the settlement agreement was unenforceable due to mutual mistake and impossibility. On April 6, 2009, Grayson Armature filed a reply asserting that it had "standing" to enforce the settlement agreement as a party to or third-party beneficiary of the agreement, and that the agreement was not unenforceable due to mutual mistake or impossibility. Richard Grayson and Huggins filed a plea in intervention on June 3, 2009.

The trial court signed an order granting Grayson Armature's motion for summary judgment on July 23, 2009. Richard Grayson and Huggins subsequently filed an

intervenor's notice of non-suit on July 24, 2009. Gary and Dale Grayson timely filed this appeal.

Standard of Review

We review a traditional motion for summary judgment *de novo*, taking as true all evidence favorable to the nonmovant, and indulging every reasonable inference and resolving any doubts in the nonmovant's favor. *Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 661 (Tex. 2005). A traditional summary judgment may be granted if the motion and summary judgment evidence establish there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Tex. R. Civ. P. 166a(c); *Provident Life & Accident Ins. Co. v. Knott*, 128 S.W.3d 211, 215 (Tex. 2003).

Analysis

Gary and Dale Grayson present three issues on appeal. First, they argue that the trial court erred in granting Grayson Armature's motion for summary judgment because Grayson Armature lacks "standing" to sue them to enforce the settlement agreement. Alternatively, in their second and third issues, Gary and Dale Grayson argue that the trial court erred in granting Grayson Armature's motion for summary judgment because they raised a genuine issue of material fact regarding their affirmative defenses of mutual mistake and impossibility of performance.

I. "Standing" to Enforce Settlement Agreement

Gary and Dale Grayson first argue that Grayson Armature lacks "standing" to enforce the settlement agreement. To enforce a contract, a litigant must be (1) a party to the contract; or (2) an intended third-party beneficiary of the contract. *See Wells v. Dotson*, 261 S.W.3d 275, 284 (Tex. App.—Tyler 2008, no pet.); *Yasuda Fire & Marine Ins. Co. of Am. v. Criaco*, 225 S.W.3d 894, 898 (Tex. App.—Houston [14th Dist.] 2007, no pet.). Gary and Dale Grayson also argue that the settlement agreement is unenforceable because it is ambiguous regarding Grayson Armature's status under the agreement.

Preliminarily, Gary and Dale Grayson argue that determining whether Grayson Armature has "standing" to enforce the settlement agreement is a jurisdictional issue. We rejected this argument in *Criaco* and held that "[t]his issue is not one that affects the court's power to make a legal decision or enter a judgment, and it is not jurisdictional." *Criaco*, 225 S.W.3d at 898. We further stated, "Although lawyers and courts occasionally state informally that an entity has no 'standing' to enforce a contract if that entity is not a party to the contract or a third-party beneficiary of it, such an entity's inability to sue goes to the merits and does not deprive courts of jurisdiction." *Id.*

Gary and Dale Grayson next argue that Grayson Armature cannot enforce the settlement agreement because (1) "nothing in the agreement indicates" Grayson Armature is a party to the settlement agreement; and (2) Grayson Armature was not an intended third-party beneficiary of the settlement agreement because it did not receive "any great benefit" from the settlement agreement. Even if it is assumed for argument's sake that Grayson Armature was not a party to the settlement agreement, summary judgment nonetheless is appropriate if Grayson Armature is entitled to enforce the settlement agreement as an intended third-party beneficiary.[1]

There is a presumption against conferring third-party beneficiary status on noncontracting parties. *S. Tex. Water Auth. v. Lomas*, 223 S.W.3d 304, 306 (Tex. 2007) (per curiam). In determining whether a third party may enforce provisions of a contract between others, the intent of the contracting parties controls. *Id.* The intent to confer a

[1] In its motion for summary judgment, Grayson Armature asserted only that it was a party to the settlement agreement; Grayson Armature did not argue in the motion that it was a third-party beneficiary. Grayson Armature asserted its status as a third-party beneficiary in its reply to the summary judgment response. Although a trial court cannot grant summary judgment on a ground not asserted in the movant's motion, any such error must be asserted on appeal. *Beathard Joint Venture v. W. Houston Airport Corp.*, 72 S.W.3d 426, 436 (Tex. App.—Texarkana 2002, no pet.); *Toonen v. United Servs. Auto. Ass'n.*, 935 S.W.2d 937, 942 (Tex. App.—San Antonio 1996, no writ). Gary and Dale Grayson have not raised an issue on appeal complaining that the trial court erred in granting summary judgment on a ground not raised in Grayson Armature's motion for summary judgment. Therefore, we will consider the third-party beneficiary theory in deciding whether summary judgment was appropriate. *See Beathard Joint Venture*, 72 S.W.3d at 436; *Toonen*, 935 S.W.2d at 942.

direct benefit upon a third party must be clearly and fully spelled out before a third party can enforce the contract. *Id.*

To determine whether Grayson Armature is a third-party beneficiary under the settlement agreement, we must interpret the agreement. *See MCI Telecomms. Corp. v. Tex. Utils. Elec. Co.*, 995 S.W.2d 647, 652 (Tex. 1999). We construe settlement agreements according to the rules applicable to contract interpretation. *Cities of Abilene, San Angelo, & Vernon v. Pub. Util. Comm'n*, 146 S.W.3d 742, 747 (Tex. App.—Austin 2004, no pet.). In construing a contract, our primary concern is to ascertain the parties' intent as expressed in the instrument. *Seagull Energy E & P, Inc. v. Eland Energy, Inc.*, 207 S.W.3d 342, 345 (Tex. 2006). To ascertain those intentions, we examine the entire contract in an effort to harmonize and give effect to all of its provisions so that none will be rendered meaningless. *Id.* No single provision should be given controlling effect, but all provisions must be construed in reference to the whole. *Id.* When a written contract is so worded that it can be given a certain or definite legal meaning or interpretation, it is not ambiguous, and the court construes it as a matter of law. *Am. Mfrs. Mut. Ins. Co. v. Schaefer*, 124 S.W.3d 154, 157 (Tex. 2003). A contract is ambiguous when its meaning is uncertain and doubtful or is reasonably susceptible to more than one interpretation. *Heritage Res., Inc. v. NationsBank*, 939 S.W.2d 118, 121 (Tex. 1996). The court may conclude that a contract is ambiguous in the absence of such pleading by any party. *Sage St. Assocs. v. Northdale Constr. Co.*, 863 S.W.2d 438, 445 (Tex. 1993).

In this case, the settlement agreement contains a general release of claims that includes a release of plaintiffs' claims to an interest in Grayson Armature:

> The parties hereby agree to release, discharge, and forever hold the other harmless from any and all claims, demand, or suits, known or unknown, fixed or contingent, liquidated or unliquidated, whether or not asserted in the above case, as of this date, arising from or related to the events and transactions which are the subject matter of this cause, including but not limited to any claims plaintiffs may have to any interest in Grayson Armature Large Motor Division, Inc.; Grayson Armature, Orange Texas., Inc.;

> Pasadena Services, Inc.; Grayson Armature, Inc.; Grayson Small Motor; and any and all related or associated businesses of any kind. Also included in release is [sic] Richard Grayson and Leon Huggins.

The inclusion of a non-party in a waiver or release clause indicates the parties' intent to confer a direct benefit on the non-party. *See Pratt-Shaw v. Pilgrim's Pride Corp.*, 122 S.W.3d 825, 830-31 (Tex. App.—Dallas 2003, pet. denied); *Derr Constr. Co. v. City of Houston*, 846 S.W.2d 854, 860 (Tex. App.—Houston [14th Dist.] 1992, no writ). The inclusion of Grayson Armature in the release of claims clause clearly indicates the contracting parties' intent that Grayson Armature receive a direct benefit from the settlement agreement. *See Pratt-Shaw*, 122 S.W.3d at 830-31; *Derr Constr. Co.*, 846 S.W.2d at 860. The settlement agreement can be given a certain legal meaning — that Grayson Armature is a third-party beneficiary — and is not susceptible to more than one reasonable interpretation. *See Lomas*, 223 S.W.3d at 306; *Derr Constr. Co.*, 846 S.W.2d at 860. Therefore, the settlement agreement is not ambiguous. *See Heritage Res., Inc.*, 939 S.W.2d at 121.

As a third-party beneficiary, Grayson Armature is entitled to rely upon and enforce all of the settlement agreement's provisions. *See Temple EasTex, Inc. v. Old Orchard Creek Partners, Ltd.*, 848 S.W.2d 724, 730 (Tex. App.—Dallas 1992, writ denied). Accordingly, we overrule Gary and Dale Grayson's first issue.

II. Mutual Mistake and Impossibility

Alternatively, Gary and Dale Grayson argue that the settlement agreement cannot be enforced because (1) "it is the product of a mutual mistake regarding their ownership of the real property located in Pasadena that was to be conveyed as part of the settlement;" and (2) "it is impossible for them to convey the property as required by the settlement agreement." The defenses of mutual mistake and impossibility are affirmative defenses. *Walden v. Affiliated Computer Servs., Inc.*, 97 S.W.3d 303, 324 (Tex. App.—Houston [14th Dist.] 2003, pet. denied). A non-movant resisting a motion for summary judgment

based on an affirmative defense must present sufficient evidence to raise a genuine issue of material fact on each element of the defense. *Brownlee v. Brownlee*, 665 S.W.2d 111, 112 (Tex. 1984).

A. Mutual Mistake

To establish a mutual mistake, the evidence must show that the parties were acting under the same misunderstanding of the same material fact. *Walden*, 97 S.W.3d at 326. A mutual mistake of fact occurs when the parties to an agreement have a common intention, but the written contract does not reflect the intention of the parties due to a mutual mistake. *N. Natural Gas v. Chisos Joint Venture I*, 142 S.W.3d 447, 456 (Tex. App.—El Paso 2004, no pet.). When a party alleges mutual mistake, the court should not interpret the language contained in the contract but should determine whether the contract itself is valid. *See Williams v. Glash*, 789 S.W.2d 261, 264-65 (Tex. 1990). If the court determines a contract sets out a bargain that was never made, the contract will be invalidated. *Id.* at 264. The doctrine of mutual mistake must not routinely be available to avoid the results of an unhappy bargain. *Id.* at 265.

Gary and Dale Grayson argue that the parties to the settlement agreement held a mistaken belief that they owned "the real property located in Pasadena that was to be conveyed as part of the settlement." They do not argue that the settlement agreement does not accurately reflect the intention of the parties to the settlement agreement. Therefore, Gary and Dale Grayson have failed to raise a genuine issue of material fact regarding their affirmative defense of mutual mistake. *See id.* at 264-65; *N. Natural Gas*, 142 S.W.3d at 456.

We overrule Gary and Dale Grayson's second issue.

B. Impossibility

Gary and Dale Grayson next argue that it is impossible for them to convey the property required in the settlement agreement because they do not own the property.

There are two general types of impossibility: (1) objective; and (2) subjective *Walston v. Anglo-Dutch Petroleum (Tenge) L.L.C.*, No. 14-07-00959-CV, 2009 WL 2176320, at *6 n.2 (Tex. App.—Houston [14th Dist.] July 23, 2009, no pet.) (mem. op.); *Janak v. FDIC*, 586 S.W.2d 902, 906-07 (Tex. Civ. App.—Houston [1st Dist.] 1979, no writ). Objective impossibility is impossibility that relates solely to the nature of the promise. *See Janak*, 586 S.W.2d at 906-07. Something is objectively impossible if "the thing cannot be done," such as a promisor's inability "to perform the promise to settle [a] claim by entering an agreed judgment in a lawsuit which had been dismissed" prior to the completion of the agreement. *See id.*; RESTATEMENT (FIRST) OF CONTRACTS § 455 (1932). Subjective impossibility is impossibility that is due wholly to the inability of the individual promissor. *See Janak*, 586 S.W.2d at 906-07. Something is subjectively impossible if "I cannot do it," such as a promisor's financial inability to pay. *See Stacy v. Williams*, 834 S.W.2d 156, 160 (Ark. Ct. App. 1992); RESTATEMENT (FIRST) OF CONTRACTS § 455.

Objective impossibility can serve as a defense in a breach of contract suit. *Janak*, 586 S.W.2d at 906-07. However, a party cannot escape contract liability by claiming subjective impossibility; subjective impossibility neither prevents the formation of the contract nor discharges a duty created by a contract. *Walston*, 2009 WL 2176320, at *6 n.2; *Janak*, 586 S.W.2d at 906-07.

Gary and Dale Grayson contracted to convey "all right, title and interest in the land and all attachments at 1203 Witter Street in Pasadena, Texas, including all land presently occupied by Grayson Armature Large Motor Division, Inc., including all land noted in attached exhibit A (marked purple)." Gary and Dale Grayson's performance in this case is not objectively impossible by virtue of the nature of the promise. Rather, their performance is subjectively impossible because they do not have title to the property. Their inability to perform as promised is due wholly to their individual inabilities, not due to the nature of the promise. Therefore, they cannot escape liability under the settlement

agreement based on the defense of impossibility of performance. *See Walston*, 2009 WL 2176320, at *6 n.2; *Janak*, 586 S.W.2d at 906–07.

We overrule Gary and Dale Grayson's third issue.

Conclusion

We affirm the trial court's July 23, 2009 order granting Grayson Armature's motion for summary judgment.

/s/ William J. Boyce
Justice

Panel consists of Chief Justice Hedges and Justices Yates and Boyce.