Petition for Writ of Mandamus Denied and Memorandum Opinion filed August 11, 2010

In The

Fourteenth Court of Appeals

NO. 14-10-00193-CV

IN RE CONNIE KRISTEN CLAYTON, Relator

ORIGINAL PROCEEDING
WRIT OF MANDAMUS

MEMORANDUM OPINION

On March 2, 2010, relator Connie Kristen Clayton filed a petition for writ of mandamus and, on March 4, 2010, a supplemental petition for writ of mandamus in this Court. *See* Tex. Gov't Code Ann. §22.221 (Vernon 2004); *see also* Tex. R. App. P. 52. In the petition, Clayton asks this Court to compel the Honorable William T. McGee, visiting judge of the Probate Court of Galveston County, to (1) set aside his March 2, 2010 order granting the motion to enforce a mediated settlement agreement; and (2) order the parties to return to mediation. We deny the petition.

Background

The underlying case involves a dispute over the Estate of Ronald D. Russell, Sr. Clayton is Ronald Russell's daughter and the executrix of the estate. Real party in interest, Kay Merrill Russell ("Russell"), is Ronald Russell's wife and Clayton's stepmother. Clayton and Russell signed a mediated settlement agreement ("MSA") regarding the distribution of the estate on October 1, 2009. The MSA provided, among other terms, that (1) Clayton would own 100 percent of Mangum Russell, LLC; (2) Russell would own 100 percent of SJC Enterprises, Inc.; (3) Mangum Russell, LLC (as landlord) and SJC Enterprises, Inc. (as tenant) would enter into a five-year lease; (4) the parties would establish an escrow account for repairs; (5) Clayton would pay Russell $80,000 by October 31, 2009, or by the date on which the lease was signed, whichever occurred earlier; and (6) except for terms spelled out in the MSA, all terms under the Texas Real Estate Commission would apply.

The parties scheduled the closing for October 31, 2009. Before the scheduled closing, Russell's counsel, David Brewer, tendered the documents necessary to effectuate the closing to Clayton's counsel, Margaret Hindman, for review. The parties extended the October 31 closing date to November 5, 2009, to provide Clayton additional time to obtain the $80,000 she was to pay Russell pursuant to the MSA. On November 4, 2009, in response to Brewer's inquiry about the proposed lease agreement, Hindman replied that Clayton would not attend the closing the next day because the property needed repairs; Clayton needed additional time to obtain the proceeds for the $80,000 payment; and no escrow agent had been found.[1]

[1] Hindman's email states, in relevant part:

> Lease

Brewer responded that he would consult with Russell about the issues Hindman raised and concluded, "Please note that we are ready, able and willing to proceed with the closing on the final settlement of this litigation as scheduled."

Brewer wrote Hindman on November 9, 2009, asserting that Clayton was (1) insisting on additional terms not contained in the MSA; and (2) refusing to abide by the MSA's clear terms. Brewer stated: "There are no conditions given in the MSA to the Lease being finalized, and we expect Mrs. Clayton to fulfill her agreement in the MSA immediately." Brewer concluded that "if we are unable to reschedule an agreeable time to close ALL matters agreed to in the MSA and actually do so by November 17, 2009, my client will be forced to seek the court's assistance in enforcing the MSA signed and agreed to by all parties."

On December 18, 2009, Russell filed a motion to enforce the MSA contending that Clayton had failed to comply with the terms of the MSA. At the January 6, 2010 hearing on the motion to enforce, Clayton asked the trial court to order the parties back to

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> My client advises that the commercial property is damages [sic] from IKS [sic], roof leaks, and water damage. She is not inclined to sign any lease agreement until the existing state of damage is repaired.
>
> 80K
>
> My client advises that she need [sic] another 30 days to get the proceeds. She had a cash buyer for the Providence location, but inspections revealed extensive mold and moisture damage to the carpet and walls, and the buyers backed out. The home, in the care and control of Ms. Russell, had no utilities and no air, thus, the damage and loss of a bona fide buyer.
>
> Escrow Account
>
> No success finding an escrow volunteer or otherwise, so I suggest that Kristen set up a bank account requiring two signatures!
>
> My client advises that she will not attend the "closing" tomorrow. We need to work out the repairs to the commercial property before we do a lease.

mediation to "hammer out the details." In its January 6, 2010 order on Russell's motion to enforce the MSA, trial court ordered Clayton to execute the lease agreement, the escrow agreement, and the written consent of shareholders that were tendered by Russell within 15 days of the order. The trial court further ordered Clayton to pay Russell's counsel $7,500 in attorney's fees for bringing the motion to enforce the MSA. Finally, the order provided that, if Clayton failed to comply with the order, upon notice and hearing, she would be found in contempt for failing to comply with the order and would be removed as executrix of the estate, and a third party administrator would be appointed for performing the acts necessary to consummate the MSA.

Claiming that the January 6, 2010 order impermissibly added terms and conditions to the MSA, Clayton filed a motion for rehearing on January 14, 2010 requesting that the court order the parties to return to mediation pursuant to the agreement. Also, on January 14 and 21, 2010, Hindman sent Clayton's suggested changes to the lease agreement, the escrow agreement, and unanimous written consent of shareholders to Brewer.

On January 15, 2010, Clayton filed a motion to stay enforcement of the January 6, 2010 order. The trial court granted the motion to stay and a hearing was set for January 29, 2010. Two days before the hearing, Russell filed an amended motion to enforce the MSA and a response to Clayton's motion for rehearing. In the amended motion, Russell argued the MSA should stand on its terms as the lease, with a blank lease form signed by the parties to supply "any and all terms" "except for the terms spelled out herein," as agreed to in the MSA. Russell further agreed to execute both the escrow agreement and written consent of shareholders as revised by Clayton.

At the January 29, 2010 hearing, Clayton again requested that the trial court order the parties to return to mediation. The trial court suspended the January 29, 2010 hearing due to inclement weather, and told the parties they could submit further briefing on the

issues. The trial court advised the parties it would appoint a receiver to carry out the terms of the MSA if they did not reach an agreement within 15 days. Both parties filed briefs, and Clayton also filed a motion for mediation.

Clayton filed a petition for writ of mandamus on March 2, 2010, asserting that the trial court had effectively denied her requests to order the parties to return to mediation, and asking that we compel the trial court to order the parties to return to mediation. Clayton alternatively argued that the trial court refused to rule on her motion for rehearing or her request for mediation.

After Clayton filed her petition in this court, the trial court signed an order on March 2, 2010, addressing the amended motion to enforce the mediated settlement agreement. The order directed relator, by March 7, 2010, to (1) pay Russell the $80,000; (2) execute the unanimous written consent of shareholders of SJC Enterprises, Inc. in the form revised by Clayton and submitted to Russell on January 14, 2010; (3) execute the form commercial lease as agreed to in the MSA, to supply "any and all terms" "except as for the terms spelled out herein," with all specific terms for said lease to be supplied by the MSA; (4) execute the escrow agreement in the form revised by Clayton and submitted to Russell on January 14, 2010, and again on January 21, 2010, and "immediately fund" the $15,000.00 escrow fund for repairs; and (5) file or cause to be filed the joint motion to dismiss with prejudice. The trial court also awarded Russell's counsel $15,000 in attorney's fees.

The March 2, 2010 order further provides that Clayton's failure to comply with the order may result in the trial court finding her in contempt of court after notice and hearing, removing her from her duties as executrix of the estate, and appointing a third-party administrator at Clayton's expense, solely for the purpose of performing all acts, paying and receiving all monies, and executing all documents necessary to consummate

the mediated settlement agreement. Clayton requests that we compel the trial court to set aside its March 2, 2010 order and order the parties to return to mediation.[2]

Standard of Review

To be entitled to the extraordinary relief of a writ of mandamus, the relator must show the trial court abused its discretion and there is no adequate remedy by appeal. *In re Gulf Exploration, LLC*, 289 S.W.3d 836, 842 (Tex. 2009) (orig. proceeding). A trial court abuses its discretion if it reaches a decision so arbitrary and unreasonable as to constitute a clear and prejudicial error of law, or if it clearly fails to correctly analyze or apply the law. *In re Cerberus Capital Mgmt., L.P.*, 164 S.W.3d 379, 382 (Tex. 2005) (orig. proceeding) (per curiam); *Walker v. Packer*, 827 S.W.2d 833, 839 (Tex. 1992) (orig. proceeding). The relator must establish that the trial court could reasonably have reached only one decision. *In re Dillard Dep't Stores, Inc.*, 198 S.W.3d 778, 780 (Tex. 2006) (orig. proceeding) (per curiam). In determining whether appeal is an adequate remedy, we consider whether the benefits outweigh the detriments of mandamus review. *In re BP Prods. N. Am., Inc.*, 244 S.W.3d 840, 845 (Tex. 2008) (orig. proceeding).

Interpretation of the MSA

Clayton argues that the MSA requires the parties to mediate disputes about the terms and performance of the agreement and, therefore, that the trial court abused its discretion by not ordering the parties to return to mediation.

The provision on which Clayton relies states as follows:

[2] In light of the trial court's March 2, 2010 order on the amended motion to enforce, Clayton's complaint that the trial court refused to rule on her requests to order the parties to return to mediation is moot.

> If one or more disputes arise with regard to the interpretation and/or performance of the Settlement Agreement and Release or any of its provisions the parties agree to attempt to resolve same by phone conversation and/or mediation with Judge Scanlon, the mediator that facilitated the settlement.

Settlement agreements are subject to the rules of contract construction. *Doe v. Tex. Ass'n of Sch. Bds., Inc.*, 283 S.W.3d 451, 458 (Tex. App.—Fort Worth 2009, pet. denied); *Old Republic Ins. Co. v. Fuller*, 919 S.W.2d 726, 728 (Tex. App.—Texarkana 1996, writ denied). Our primary concern in interpreting a contract is to ascertain the true intent of the parties as expressed in the contract. *Seagull Energy E & P, Inc. v. Eland Energy, Inc.*, 207 S.W.3d 342, 345 (Tex. 2006). We examine the writing as a whole in an effort to harmonize and give effect to all the provisions of the contract so that none will be rendered meaningless. *J.M. Davidson, Inc. v. Webster*, 128 S.W.3d 223, 229 (Tex. 2003). We presume the parties to a contract intend every clause to have some effect. *Heritage Res., Inc. v. NationsBank*, 939 S.W.2d 118, 121 (Tex. 1996). We give terms their plain, ordinary, and generally accepted meaning unless the contract shows the parties used them in a technical or different sense. *Id.* In construing a contract, the court may not rewrite the contract or add to its language. *Am. Mfrs. Mut. Ins. Co. v. Schaefer*, 124 S.W.3d 154, 162 (Tex. 2003).

Whether a contract is ambiguous is a question of law that must be decided by examining the contract as a whole in light of the circumstances present when the contract was entered. *Columbia Gas Transmission Corp. v. New Ulm Gas, Ltd.*, 940 S.W.2d 587, 589 (Tex. 1996). If the contract language can be given a certain or definite meaning, then the contract is not ambiguous and the court should interpret it as a matter of law. *Universal Health Servs., Inc. v. Renaissance Women's Group, P.A.*, 121 S.W.3d 742, 746 (Tex. 2003). Lack of clarity does not create an ambiguity; nor does an ambiguity arise merely because the parties to the agreement proffer different interpretations. *DeWitt*

County Elec. Coop., Inc. v. Parks, 1 S.W.3d 96, 100 (Tex. 1999). An ambiguity arises when an agreement is susceptible to more than one reasonable meaning after the application of established rules of construction. *Universal Health Servs., Inc.*, 121 S.W.3d at 746. The construction of an unambiguous contract is a question of law for the court. *Willis v. Donnelly*, 199 S.W.3d 262, 275 (Tex. 2006).

For the purposes of our analysis we presume that "phone conversation" as used in the MSA means a phone conversation involving the parties and Judge Scanlon. Whether the MSA requires (1) a phone conversation *or* mediation with Judge Scanlon or (2) a phone conversation *and* mediation with Judge Scanlon, Clayton did not ask the trial court to order either. Instead, Clayton asserted that the MSA required only mediation with Judge Scanlon. Clayton never asked the trial court to order a phone conversation with Judge Scanlon.

Clayton contends that the MSA's clear intent is to preclude the parties from litigating their disputes over the agreement. The parties agreed in the MSA to (1) to execute a joint motion to dismiss, dismissing all their claims and causes of action; (2) to waive all claims and causes of action against the other party, except for disputes arising out of the MSA; and (3) to release each other from all costs, expenses, and attorney's fees. Clayton contends that an interpretation requiring any steps other than mediation renders those provisions meaningless. However, ordering a phone conversation in tandem with mediation or as an alternative to mediation does not render the cited provisions of the MSA meaningless. In addition, Clayton presumes that mediation would succeed if ordered, and that no other dispute resolution method would succeed.

To establish an abuse of discretion by the trial court, Clayton must show that the trial court could have made only one decision and not the decision it made. *See In re Dillard Dep't Stores, Inc.*, 198 S.W.3d at 780. This Clayton has failed to do. Clayton

requested that the trial court order only mediation; however, the MSA does not require only mediation. Therefore, we conclude it was not an abuse of discretion for the trial court to have refused Clayton's request to order the parties to return to mediation. In light of our conclusion that the there was no abuse of discretion, we need not address whether Clayton has an adequate remedy by appeal.

Conclusion

Clayton has not established her entitlement to the extraordinary relief of a writ of mandamus as to the trial court's refusal to order mediation. Accordingly, we deny relator's petition for writ of mandamus and supplemental petition for writ of mandamus and lift our stay of March 4, 2010.

PER CURIAM

Panel consists of Justices Frost, Boyce, and Sullivan.