In The

Court of Appeals

Ninth District of Texas at Beaumont

NO. 09-09-00431-CV

CURTIS W. NEALY, Appellant

V.

DSF ADVANCED STAFFING, INC. D/B/A ADVANCED STAFFING, INC., JEFFERSON COUNTY DRAINAGE DISTRICT NO. 6 AND JOSHUA BROUSSARD, Appellees

---

On Appeal from the 60th District Court
Jefferson County, Texas
Trial Cause No. B-181,479-A

MEMORANDUM OPINION

Curtis W. Nealy appeals the summary judgment granted to DSF Advanced Staffing, Inc. d/b/a Advanced Staffing, Inc. ("Advanced Staffing"), Jefferson County Drainage District No. 6 ("DD6") and Joshua Broussard.[1] The two issues raised on appeal contend the trial court erred in granting the summary judgment and denying the motion for reconsideration. Nealy argues the appellees failed to establish as a matter of

[1] The trial court severed Nealy's claims against all defendants into a case separate from the claims asserted by Nealy's wife, Sharon Nealy.

law all of the elements of their release defense. Nealy argues there is a fact issue regarding the contents of the release signed by him and the one page of the release that he signed does not unambiguously release all of his claims. Nealy also argues that a fact issue on mutual mistake precludes summary judgment. We affirm the judgment.

Nealy was involved in a motor vehicle collision between his dump truck and a dump truck driven by Joshua Broussard. At the time of the accident, Broussard was allegedly employed by Advanced Staffing and was performing work on behalf of DD6. Nealy was experiencing pain within an hour after the accident. Three days after the accident, Nealy received $486.00 from DD6 and signed a release. He had already been to the doctor and he was wearing a cervical collar when he signed the release. Nealy subsequently filed suit and the appellees asserted release as an affirmative defense to Nealy's claims. The trial court granted appellees' joint motion for summary judgment.

As defendants moving for summary judgment on an affirmative defense, appellees were required to plead and conclusively establish each element of their affirmative defense. *City of Houston v. Clear Creek Basin Auth.*, 589 S.W.2d 671, 678 (Tex. 1979). Our appellate review of the summary judgment must take as true all evidence favorable to the nonmovant and indulge every reasonable inference in the nonmovant's favor. *Nixon v. Mr. Prop. Mgmt. Co.*, 690 S.W.2d 546, 548-49 (Tex. 1985). Summary judgment is proper if there is no genuine issue of material fact. *Id.* at 548. We review the

summary judgment *de novo*. *Provident Life and Accident Ins. Co. v. Knott,* 128 S.W.3d 211, 215 (Tex. 2003).

Nealy contends that he was given only the last page to sign and he believed that it was the entire agreement. He supplies no authority to support his proposition that the one page he signed is the only document that should be considered on appellate review. The Supreme Court has held that signing a page marked "4 of 4" placed the signing party on notice of the existence of the first page of the contract that the signing party was not shown. *In re Int'l Profit Assocs., Inc.,* 286 S.W.3d 921, 923-24 (Tex. 2009). "A party to a contract is obliged to protect itself by reading what it signs and its failure to do so is not excused by mere confidence in the honesty and integrity of the other party." *E.R. Dupuis Concrete Co. v. Penn Mut. Life Ins. Co.,* 137 S.W.3d 311, 317 (Tex. App.--Beaumont 2004, no pet.). A party cannot avoid a clause in a contract by simply failing to read it. *In re U.S. Home Corp.,* 236 S.W.3d 761, 764 (Tex. 2007).

Nealy testified in deposition that the DD6 employee gave him the third page to sign but did not show him the first two pages of the release. Nealy also testified that he did not read the release before he signed it and that he declined to take a copy of the release when the DD6 employee who watched Nealy sign the release in duplicate asked him if he wanted a copy. The bottom of the signature page is clearly marked as the third page.

Nealy testified that he believed he had only waived his right to lost wages because the DD6 employee told him that he would not be able to ask for any more lost wages when she gave him the check for his lost wages. The document did release any future claims for lost wages so the DD6 employee did not misstate the contents of the release. Furthermore, there is no evidence that the DD6 employee had knowledge that she concealed from Nealy. She offered him a copy of the release. Nealy assented to the entire contract by signing the third page and depositing the check without reading the release or determining its entire contents. Thus, the release consists of the three pages and not just the page that bears Nealy's signature.

The first page of the release recites that Nealy claims to have sustained personal injuries as a result of an automobile collision involving an employee, agent, or borrowed servant of DD6 or Advanced Staffing and refers to DD6 and Advanced Staffing as "Released Parties." The release recites that the sum of $468 is given "in full settlement of all claims asserted or that could be asserted in any potential lawsuit for personal injuries, whether such claims have in fact been asserted at the time of the execution of this Release." In return for the stated consideration, Nealy released the Released Parties and their employees from all claims "arising directly or indirectly from or by reason of the above described incident, or the injuries or damages resulting from said incident. . . ." The release recites that "I intend this Release to be as broad and comprehensive as possible and to encompass any claims I presently have against defendant or the released

parties mentioned herein . . . for any type, kind and character of damages or injuries. . . ."

In addition, the release recites in part, as follows:

> the consideration stated herein fully and completely compensates me for all injuries and damages, known and unknown, past and future, directly or indirectly resulting from or in any manner related to the incident giving rise to this litigation. It is my intention and I understand that by this Release I reserve no claims against anyone, whether named or unnamed, arising out of this incident.

The second page of the release recites in part, as follows:

> I acknowledge that I rely fully upon my own knowledge and information as to the extent and duration of the injuries and damages received, and that I have not been influenced by any representations made by or on behalf of the parties herein released. I acknowledge that it is possible that I may subsequently discover, develop, or sustain damages, diseases or injuries of which I am not aware at this time, or which are not foreseeable or in existence at this time, and I acknowledge that this Release is intended to extend to and cover such future damages or injuries which I may incur, develop, sustain, contract or discover.

The signature page recites in part, as follows:

> Only the consideration stated herein has been paid or agreed to be paid for this Release, it being the understanding that the same is to constitute a **FULL** and **FINAL** settlement and release of any and all claims which Claimants may have against Released Parties, by virtue of the injuries and damages described.

Nealy argues that the release is ambiguous because it does not identify the released parties by name. A release discharges only those persons or entities that are named or specifically identified in the release. *McMillen v. Klingensmith,* 467 S.W.2d 193, 196 (Tex. 1971). "A tortfeasor can claim the protection of a release only if the release refers to him by name or with such descriptive particularity that his identity or his

connection with the tortious event is not in doubt." *Duncan v. Cessna Aircraft Co.*, 665 S.W.2d 414, 420 (Tex. 1984).

The first paragraph of the release names both DD6 and Advanced Staffing as "Released Parties" and notes that the alleged personal injuries resulted from a motor vehicle collision between Nealy and an employee of either DD6 or Advanced Staffing. The release recites that Nealy is releasing the employees of the released parties. A release of "employees" is sufficiently descriptive so that a stranger to the agreement could readily understand that the employee who was driving the other vehicle is being released. *See Kalyanaram v. Burck*, 225 S.W.3d 291, 300 (Tex. App.--El Paso 2006, no pet.). Moreover, the sentence Nealy asserts is ambiguous very clearly states that it is a release of any and all claims that he may have against the released parties for his injuries.

Nealy also contends that the release is ambiguous because it does not describe his injuries. Again, the first paragraph of the release recited that Nealy claimed that he sustained personal injuries. Thus, the "injuries and damages described" on the third page of the document are personal injuries. In his petition, Nealy did not identify any damages other than those arising out of injury to his person. The release also expressly includes damages subsequently developed or discovered. A release must "mention" the claim to be effective, but the parties need not anticipate and identify every potential claim relating to the subject matter of the release. *Keck, Mahin & Cate v. Nat'l Union Fire Ins. Co. of*

Pittsburgh, PA, 20 S.W.3d 692, 698 (Tex. 2000). "[A] valid release may encompass unknown claims and damages that develop in the future." *Id.*

Nealy argues the trial court erred in granting summary judgment because a material issue of fact exists regarding his assertion of mutual mistake as an avoidance of the appellees' defense of release. "Pursuant to the doctrine of mutual mistake, when parties to an agreement have contracted under a misconception or ignorance of a material fact, the agreement will be avoided." *Williams v. Glash*, 789 S.W.2d 261, 264 (Tex. 1990).

> The question of mutual mistake is determined not by self-serving subjective statements of the parties' intent, which would necessitate trial to a jury in all such cases, but rather solely by objective circumstances surrounding execution of the release, such as the knowledge of the parties at the time of signing concerning the injury, the amount of consideration paid, the extent of negotiations and discussions as to personal injuries, and the haste or lack thereof in obtaining the release.

Id. In *Williams v. Glash*, the plaintiff signed a global release when both parties believed the plaintiff sustained only property damage in the accident. *Id.* The parties never discussed a personal injury claim and the settlement the plaintiff received was the amount of property damage to her automobile. *Id.* Neither party was aware at the time of the release that the plaintiff had sustained a personal injury as well as property damage. *Id.* The Court reasoned that if it can be established that the release set out a bargain that was never made, the release can be invalidated. *Id.* at 265.

This case is distinguishable from *Williams v. Glash* because the parties here knew that Nealy had sustained a personal injury and the release Nealy signed expressly states that the release includes all claims Nealy might acquire or discover in the future. *Cf. Williams*, 789 S.W.2d at 263. The parties were aware that Nealy had sustained personal injuries, and DD6 compensated Nealy for those personal injuries.

In his initial contact with the DD6 office, the DD6 representative asked Nealy how he was doing and told him to let them know if he "need[ed] any help." Nealy called back a few days later and told the DD6 representative that it would be difficult for him to pay his bills with four days of lost wages. DD6 called back with an offer to pay Nealy at his hourly rate for four days he missed work. Nealy had already received medical treatment when he signed the release and he arrived at the DD6 office wearing a cervical collar, but he only asked to be compensated for his lost wages. When she presented the release, the DD6 representative told Nealy that "we have to have you sign a deal that you won't hold us liable for any more lost wages, days of work." Approximately one week after he cashed the settlement check, a MRI revealed Nealy had a pinched nerve in addition to his initially diagnosed cervical sprain.

At the time of execution of the release, the parties were aware that Nealy had received an injury to his person, they had negotiated compensation for his personal injuries, and DD6 compensated Nealy for all damages for which he sought compensation. Nealy signed a release that placed the risk of mistake on Nealy. Although there is

summary judgment evidence that Nealy was not aware that he had released any claim he might have for subsequently discovered injuries, at most that evidence raises an issue of unilateral mistake that would have been prevented by Nealy's reading the release. *See Pack v. City of Fort Worth*, 552 S.W.2d 895 (Tex. Civ. App.--Fort Worth 1977), *writ ref'd n.r.e.,* 557 S.W.2d 771 (Tex. 1977).

We hold the trial court did not err in granting summary judgment and in denying the motion for reconsideration. Accordingly, we overrule issues one and two and affirm the judgment.

AFFIRMED.

_____

STEVE McKEITHEN
Chief Justice

Submitted on March 12, 2010
Opinion Delivered May 20, 2010

Before McKeithen, C.J., Gaultney and Kreger, JJ.