IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

THE PEVAR COMPANY, a Pennsylvania Company,	)	C.A. No. 06L-01-142 JTV
Plaintiff,	)	
v.	)	
JAY A. HAWTHORNE, a Delaware Resident,	)	
Defendant.	)	

Submitted: January 29, 2010
Decided: March 31, 2010

Gerald J. Hager, Esq., Margolis Edelstein, Wilmington, Delaware and Perry F. Goldlust, Esq., Perry F. Goldlust, P.A., Wilmington, Delaware. Attorneys for Plaintiff.

Andrew G. Ahern, III, Esq., Joseph W. Benson, P.A., Wilmington, Delaware. Attorney for Defendant Hawthorne.

Upon Consideration of Plaintiff's
Motion For Reagrument
DENIED

VAUGHN, President Judge

Pevar v. Hawthorne
C.A. No. 06L-01-142
March 31, 2010

ORDER

Upon consideration of the plaintiff's Motion For Reargument, the defendant's opposition, and the record of this case, it appears that:

1. The plaintiff, The Pevar Company, has moved for reargument of a November 23, 2009 letter opinion that enforced a settlement agreement between the parties. The defendant, Jay Hawthorne, opposes the motion.

2. This litigation arises from a dispute regarding the Company's construction of a specialized home for Mr. Hawthorne. The Company filed its complaint in January of 2006. Mr. Hawthorne responded by filing an answer with a counterclaim against the Company. The filing of the counterclaim brought the Company's insurance carrier, Western World, into the picture because it appointed an attorney to represent the Company regarding the counterclaim. The controversy now centers on whether the parties had agreed to a settlement on the morning of trial, June 8, 2009.

3. Before going further, it is important to understand how, and by whom, the plaintiff is represented. The Company is owned and operated by Marc Pevar. Perry F. Goldlust, Esquire, of the law firm of Perry F. Goldlust, P.A., has been described in letters relating to this case as Mr. Pevar's "private attorney,"[1] and Mr. Goldlust has the closest professional relationship with Mr. Pevar. Mr. Goldlust was the attorney who filed the initial complaint on behalf of the Company. Mr.

[1] *See* Hager Ltr. to the Court, July 17, 2009 ("I sent my client, Mr. Pevar, and his *private attorney*, Mr. Goldlust, a release . . . .") (emphasis added).

Hawthorne's counterclaim was referred to Western, and Western selected Gerald J. Hager, Esquire, of the law firm of Margolis Edelstein, to represent the Company regarding the counterclaim. Months prior to the trial date, summary judgment was granted in favor of the Company as to its claim against the defendant, subject to offset by the counterclaim. Only the counterclaim was left to go to trial.

4. As the date of trial drew close, settlement negotiations gained momentum. The Court was provided with a June 3, 2009 letter from Mr. Hager,[2] which stated that on that same date Mr. Hager had received the first settlement demand from Mr. Hawthorne, and that it had been forwarded to Western for evaluation.

5. On June 7, 2009, one day before trial, Mr. Goldlust faxed a letter to Mr. Hager which discussed the case.[3] At a hearing on the motion to enforce the settlement, which was held in open court on August 13, 2009 with all counsel present, Mr. Goldlust and Mr. Hager made me aware of this letter, and wanted it considered, but they were concerned that it may contain privileged information. In order to resolve that immediate concern, I agreed to review and consider the letter *in camera*, without disclosure to Mr. Hawthorne's attorney. I have done so, and given the decision I have reached on this motion for reargument, I am content to remain consistent with the understanding upon which I received the letter. It will be sealed subject to any future order to unseal it.

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[2] Hager Ltr. to the Court, June 3, 2009.

[3] Goldlust Ltr. to Hager, June 7, 2009.

6. The next evidence in the record is a chain of three emails. The first was sent by Mr. Hawthorne's counsel to Mr. Hager at 11:21 a.m. on June 8, 2009, the morning of trial. It indicates a carbon copy was sent to Mr. Goldlust. That email reads:

> This will confirm that we have settled all claims and counterclaims for a payment to my client of the sum of $62,500, each party to bear his/its costs and fees. The parties will execute mutual releases of all claims and counterclaims and authorize their respective counsel to file a stipulation of dismissal upon the exchange of the settlement funds and releases. There are not other terms or agreements between the parties to this settlement.
>
> I have notified Judge Vaughn's chambers of the settlement and I will confirm this to the Court by letter delivered today.
>
> If you do not completely agree with any statement or term of settlement as set forth above, please contact me immediately.

Two minutes later, Mr. Hager responded to this email with the word "Agreed."[4] At the aforementioned August hearing, I also received a June 8 email written to Mr. Hager by Mr. Goldlust. This email was received in the same manner and under the same circumstances as the June 7 letter. It is being considered in the same manner as that letter.

7. On June 8, the Court was notified that the case had been settled and no

[4] It is unclear from the copies of the emails that were provided to me if Goldlust was carbon copied on Hager's "Agreed" e-mail.

one came to the courthouse. Over a month passed without any word from the parties. Then, on July 17, 2009, Mr. Hager informed the Court that he had sent Mr. Pevar and Mr. Goldlust a release but had not heard from them. He requested an office conference. On July 21, 2009, Mr. Hawthorne filed a motion to enforce settlement and for an entry of judgement. Both Mr. Goldlust and Mr. Hager, in two separate motions, responded to Mr. Hawthorne's motion on behalf of the Company. In addition, the Company, through Mr. Goldlust, filed a motion for entry of judgment on the plaintiff's original claim. Both Mr. Hawthorne and Western responded to that motion.[5] As mentioned, a hearing was held on August 13, 2009. On November 23, 2009, in a brief letter opinion, I granted Hawthorne's motion to enforce settlement and denied both motions for judgment. On December 2, 2009, the Company, through Mr. Goldlust, filed this motion for reargument.[6]

8. Finally, so far as the record is concerned, in December, while the motion

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[5] Western's motion in response to the Company's motion (through Goldlust) for judgment was not filed by Hager, but was instead filed by Daniel Bennet of the firm Mintzer, Sarowitz, Zeris, Ledva & Meyers, LLP.

[6] The Company's motion for reargument was timely. A motion for reargument must be filed within five days after the filing of the Court's decision. Super. Ct. Civ. R. 59(e). An untimely motion may not be considered. *See Carriere v. Penninsula Ins. Co.*, 2002 WL 506871, at *2 (Del. Super). The computation of time is governed by Superior Court Civil Rule 6, which provides that neither weekends and holidays nor the day of the act are counted. Because the time frame in question included two weekend days, Thanksgiving, and the day after Thanksgiving, the Company's motion was timely filed on the fifth countable day. In 2009, the Governor had declared both Thanksgiving and the day after Thanksgiving as state holidays. *See* http://www.delawarepersonnel.com/labor/holidays/2009.shtml; Super. Ct. Civ. R. 6(a) ("[L]egal holidays shall be those days provided by statute or appointed by the Governor . . . .") (internal quotation marks omitted).

for reargument was pending, I granted Mr. Goldlust's request to file an affidavit from Mr. Pevar. Subsequent research has revealed that granting permission to file the affidavit may have been improvident. "[A] motion for reargument properly seeks only a re-examination of the facts at the time of the decision,"[7] therefore, affidavits may not be submitted in support of a motion for reargument.[8] This rule is sound because an affidavit is an "*ex parte* statement by a witness whose demeanor cannot be observed and who is not subject to cross-examination,"[9] making the statement inherently unreliable.[10] Notwithstanding these authorities, I have considered parts of the affidavit. The affidavit contains Mr. Pevar's description of a conversation or conversations between Mr. Goldlust and Western's adjuster, and conversations between Mr. Goldlust and Mr. Hager. From the affidavit it appears that Mr. Pevar was not present at those conversations. Those parts of the affidavit appear to be hearsay and I give them no weight.[11] I have, however, considered those parts of the

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[7] *Maldonado v. Flynn*, 1980 WL 272822, at *3 (Del. Ch.).

[8] *Santora, Starr & Baffone, P.A. v. Lewis*, 1995 WL 562158, at *2 (Del. Super.) (Rule 59(e) "does not provide for new evidence in the form of affidavits not before the Court in the original motion.") (citing *Miles, Inc. v. Cookson America, Inc.*, 677 A.2d 505, 506 (Del. Ch. 1995)).

[9] *Lynch v. Athey Products, Corp.*, 505 A.2d 42, 45 (Del. Super. 1985).

[10] *See State v. Crespo*, 2009 WL 1037732, at *5 (Del. Super.) (citing 2 McCormick on Evidence § 245 (Kenneth S. Broun ed., 2006)).

[11] I thoroughly reviewed Mr. Pevar's affidavit and did not find anything that could be considered "newly discovered evidence." The contents of the affidavit could have been explored at the hearing in testimony by Mr. Pevar.

affidavit which appear to illustrate Mr. Pevar's state of mind during the settlement negotiations.

9. The standard of review for a Rule 59(e) motion for reargument is a familiar one. A motion for reargument will usually be denied unless the court has "overlooked a controlling precedent or legal principles, or the Court has misapprehended the law or facts such as would have changed the outcome of the underlying decision."[12] A motion for reargument should not be used merely to rehash the arguments already decided by the court, nor will the court consider new arguments that the movant could have previously raised.[13] The movant "has the burden of demonstrating newly discovered evidence, a change in the law, or manifest injustice."[14]

10. In its motion, the Company, through Mr. Goldlust, sets forth two primary contentions. First, the Company contends that I failed to make "sufficient findings of fact to support" the following conclusions which were set forth in my November letter opinion: that Western offered Mr. Hawthorne $62,500 to settle the counterclaim; that Mr. Hager had the authority to waive the Company's claim as part of the settlement offer; that the Company agreed to a settlement amount of $62,500;

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[12] *Lamourine v. Mazda Motor of Am.*, 2007 WL 3379048, at *1 (Del. Super.).

[13] *State v. Brooks*, 2008 WL 435085, at *1 (Del. Super.) (internal quotation marks omitted); *St. Search Partners, L.P. v. Ricon Int'l, L.L.C.*, 2006 WL 1313859, at *1 (Del. Super.).

[14] *Brooks*, 2008 WL 435085, at *1 (internal quotation marks omitted).

and that the Company agreed to waive its claim as part of the agreement.[15] The Company asks that I restate my findings of fact which support my conclusions. Second, the Company contends that Mr. Hager acted without its authority; in particular, that Mr. Hager was never given authority to compromise the Company's claim.[16] The Company also requests that I allow it to submit more evidence regarding Mr. Hager's scope of authority to act on the Company's behalf.[17]

11. Mr. Hawthorne contends that the motion should be denied. He contends that I am not required to restate my findings of fact because, one, the case is not "fact-intensive or legally complex such that a detailed statement of findings is necessary," and, two, it would be inappropriate for me to comment on the specific content of documents that may contain privileged communications.[18] In addition, Mr. Hawthorne contends that the Company's request to present more evidence should be denied because the Company had the opportunity to present the evidence at the hearing and failed to do so.

12. Delaware law favors voluntary settlements and treats them as binding contracts.[19] In determining whether an enforceable agreement was reached, the court

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[15] The Company's Mot. for Rearg. at ¶¶ 1-4.

[16] *Id.* at ¶ 4.

[17] As noted, I did permit the Company to file Mr. Pevar's affidavit.

[18] Hawthorne's Resp. Mot. at ¶¶ 4-5.

[19] *Crescent/Mach I Partners, L.P. v. Dr. Pepper Bottling Co. of Texas*, 962 A.2d 205, 208 (Del. 2008); *Rowe v. Rowe*, 2002 WL 1271679, at *3 (Del. Ch.).

must consider whether there was a meeting of the minds between the parties.[20] The court looks to the parties' "objective manifestations of assent rather than their professions of subjective intent."[21] "If the words employed by the parties to describe the settlement clearly and unambiguously reflect their intent to resolve th[e] litigation, and describe the manner by which the resolution was to be accomplished, the Court will enforce those terms regardless of whether a party may [later] have second thoughts."[22]

13. Delaware law regarding an attorney's settlement authority is well established. An attorney of record is presumed to have the lawful authority needed to enter into a settlement agreement.[23] "While an attorney lacks the inherent authority to accept a settlement offer, an attorney acquires lawful authority when the client either gives special authority or subsequently ratifies the agreement."[24] It is the client's burden to rebut a presumption of lawful authority.[25]

14. Under most circumstances, there are three separate types of authority that

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[20] *Mell v. New Castle County*, 2004 WL 1790140, at *3 (Del. Super.).

[21] *Murphy v. State Farm Ins. Co.*, 1997 WL 528160, at *4 (Del. Super.).

[22] *Mell*, 2004 WL 1790140, at *3.

[23] *Williams v. Chancellor Care Center of Delmar*, 2009 WL 1101620, at *3 (Del. Super.).

[24] *Id*.

[25] *Id*. (citing *Aiken v. Nat'l Fire Saftey Counsellors*, 172 A.2d 473, 475 (Del. Ch. 1956)).

an agent may possess.[26] Two types are implicated in this case. First, "[a]n agent acts with actual authority when, at the time of taking action that has legal consequences for the principal, the agent reasonably believes, in accordance with the principal's manifestations to the agent, that the principal wishes the agent to so act."[27] Second, "apparent authority is such power as a principal holds his [a]gent out as possessing or permits him to exercise under such circumstances as to preclude a denial of its existence."[28] That agent has the power "to affect a principal's legal relations with third parties when a third party reasonably believes the actor has authority to act on behalf of the principal and that belief is traceable to the principal's manifestation."[29]

15. I find that Mr. Hager and Mr. Hawthorne's counsel came to a meeting of the minds to settle all claims on the terms set forth by their exchange of emails on June 8. I also find that Mr. Hawthorne's counsel acted reasonably in believing that Mr. Hager had the authority to settle the claims. Only the counterclaim was going to trial, and it was reasonable for Mr. Hawthorne's counsel to be dealing with Mr. Hager and to believe that Mr. Hager had the authority to settle the entire lawsuit. After carefully considering Mr. Goldlust's June 7 letter, Mr. Goldlust's June 8 email, and the attendant circumstances, such as cancellation of the trial date without objection by any party, I find that the letter and email support a conclusion that Mr. Hager had

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[26] *Dweck v. Nasser*, 959 A.2d 29, 39 (Del. Ch. 2008).

[27] Restatement (Third) of Agency § 2.01 (2006).

[28] *Dweck*, 959 A.2d at 40 (internal quotation marks omitted).

[29] Restatement (Third) of Agency § 2.03.

both actual and apparent authority to settle the claims with the defendant as he did on June 8.

16. In parts of Mr. Pevar's affidavit, he states that he never authorized the sacrifice of his original claim as part of a settlement. But in paragraph 19 he states, in part, the following:

> In a review of my records, I am aware of a June 7, 2009 letter sent by Mr. Goldlust. By that time Western had already offered to waive the Company's claim, and I was told that there was little that could be done to undo what Western had already done. As Western had also agreed to pay $20,000 of Mr. Goldlust's fee, there was little I could do but agree, with the intention of seeking to recover from Western what Western took from me to preserve its assets. My argument was with Western for exceeding its authority.[30]

As mentioned in the preceding paragraph of this Order, I conclude from Mr. Goldlust's June 7 letter and June 8 email, and the attendant circumstances, that Mr. Hager had both actual and apparent authority to settle the claims with the defendant as he did. From the language just quoted in this paragraph, I infer and conclude that the plaintiff acquiesced in the June 8 settlement, with the intention of turning his complaint from Mr. Hawthorne to Western. In the alternative, when all the evidence is compared, I find that the plaintiff has failed to meet its burden of rebutting the presumption that Mr. Hager had authority to settle the case as he did.

17. I am aware that a dispute remains between Western and the plaintiff.

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[30] Pevar's Dec. 30, 2009 Aff. at ¶ 19.

The ruling made here is without prejudice to any aspect of that dispute, and I express no opinion as to that matter.

18. As I did in my November 23, 2009 letter opinion, I will defer entry of judgment pending Western's payment to the defendant of $62,500 plus interest at the legal rate from December 20, 2009, within 30 days of the date of this order. If Western does not do so, judgment will be entered against Western and the plaintiff in the amount of $62,500 plus interest.

19. For the foregoing reasons, the plaintiff's motion for reargument is ***denied***.

IT IS SO ORDERED.

/s/ James T. Vaughn, Jr.
President Judge

oc: Prothonotary
cc: Order Distribution
File