

RENDERED: OCTOBER 22, 2010; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2009-CA-001321-MR

SUMMERS EQUIPMENT, LLC AND
GEORGE P. SUMMERS III

APPELLANTS

v. APPEAL FROM FLOYD CIRCUIT COURT
HONORABLE JOHN DAVID CAUDILL, JUDGE
ACTION NO. 08-CI-00236

VFS US LLC D/B/A VOLVO FINANCIAL
SERVICES, F/B/A VOLVO COMMERCIAL FINANCE

APPELLEE

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: CLAYTON AND KELLER, JUDGES; BUCKINGHAM,¹ SENIOR
JUDGE.

BUCKINGHAM, SENIOR JUDGE: Appellants Summers Equipment, LLC, a
Kentucky limited liability company, and George P. Summers III appeal from an
order of the Floyd Circuit Court granting summary judgment in favor of VFS US

¹ Senior Judge David C. Buckingham sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

LLC, d/b/a Volvo Financial Services (“VFS”), and dismissing Appellants’ counterclaims. We affirm.

Summers Equipment, LLC, a rental equipment business owned and operated by George P. Summers III, signed a franchise agreement with Volvo Construction Equipment Rents, Inc., in December 2003. Thereafter, beginning in the spring of 2004, VFS served as the lender and principal source of funding for Summers Equipment. In connection therewith, Summers Equipment executed a Master Loan and Security Agreement, two Promissory Notes, a separate Security Agreement, and a Revolving Credit Loan Agreement (collectively, the “Loan Documents”). At the same time that the Loan Documents were executed, Mr. Summers executed a Guaranty and Subordination Agreement in which he unconditionally guaranteed the full and timely payment, performance, and compliance of Summers Equipment under the Loan Documents.

Under the terms of the Loan Documents, Summers Equipment granted VFS a security interest in substantially all of the company’s rental fleet and equipment (the “Collateral”). VFS ultimately approved credit of over \$5,000,000 on behalf of Summers Equipment.

Summers Equipment subsequently defaulted on its payments to VFS due under the Loan Documents, and VFS and Summers Equipment entered into a written letter agreement in which VFS agreed to forbear from exercising its right to the Collateral in exchange for Summers Equipment’s compliance with the terms of that agreement (the “Forbearance Agreement”). The Forbearance Agreement was

executed by both Summers Equipment, as the borrower, and Mr. Summers, as the guarantor.

The Forbearance Agreement also included a release by Summers Equipment and Mr. Summers of any claims against VFS. Specifically, the parties acknowledged and agreed that:

[N]either Borrower, nor Guarantor has any claims, defenses, set-offs or counterclaims against Lender, or, alternatively, to the extent that any claims, defenses, set-offs or counterclaims exist, Borrower and Guarantor hereby waive and release any and all of them in consideration of the forbearance contained in this Agreement.

The Forbearance Agreement further provided that it would be “governed by and construed in accordance with the internal substantive laws of the State of North Carolina, without regard to choice of law principles.”

Following the execution of the Forbearance Agreement, Summers Equipment and Mr. Summers requested additional forbearance from VFS, and the original Forbearance Agreement was amended two times, once on October 23, 2006, and again on November 30, 2006. In both cases, Summers Equipment and Mr. Summers reaffirmed all of the conditions included in the original Forbearance Agreement.

VFS ultimately filed suit against Appellants for breach of contract and requested the issuance of a writ of possession to recover the Collateral in Appellants’ possession. Appellants filed an answer and counterclaim, asserting various claims against VFS, including fraud and misrepresentation. Appellants’

primary assertion was that VFS had failed to provide the financing to Summers Equipment in a timely manner, thereby crippling its business operations.

The trial court granted summary judgment in favor of VFS and dismissed Appellants' counterclaims against VFS. Appellants subsequently filed a motion to alter, amend, or vacate the summary judgment, which was denied. This appeal followed.

Although the Forbearance Agreement states that it is to be governed by the substantive laws of North Carolina, procedural matters such as summary judgment standards are governed by the law of the forum state. *Ley v. Simmons*, 249 S.W.2d 808 (Ky. 1952). Under Kentucky law, on a motion for summary judgment, the trial court must view the evidence in the light most favorable to the nonmoving party, and summary judgment should be granted only if it appears impossible that the nonmoving party will be able to produce evidence at trial warranting a judgment in its favor. *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky. 1991). Summary judgment "is only proper when the movant shows that the adverse party could not prevail under any circumstances. *Id.* (citing *Paintsville Hosp., Co. v. Rose*, 683 S.W.2d 255, 256 (Ky. 1985)). The party opposing summary judgment must present "at least some affirmative evidence showing that there is a genuine issue of material fact for trial." *Steelvest*, 807 S.W.2d at 482.

The standard of review on appeal when a trial court grants a motion for summary judgment is "whether the trial court correctly found that there were no

genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law.” *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996). Because summary judgment involves only legal questions and the existence of any disputed material issues of fact, “an appellate court need not defer to the trial court’s decision and will review the issue *de novo*.” *Lewis v. B & R Corp.*, 56 S.W.3d 432, 436 (Ky. App. 2001).

The trial court based its grant of summary judgment on the fact that the Forbearance Agreement was valid and, therefore, that the release contained in the Forbearance Agreement was valid. Both North Carolina and Kentucky law are clear that, because releases are contractual in nature, courts must apply principles governing the interpretation of contracts when construing a release. *Weaver v. St. Joseph of the Pines, Inc.*, 652 S.E.2d 701, 709 (N.C. App. 2007); *see also Abney v. Nationwide Mut. Ins. Co.*, 215 S.W.3d 699, 703 (Ky. 2007).

Moreover, the law of both states holds that, when faced with an unambiguous contract, courts may not look beyond the four corners of the contract when determining the parties’ intent. “When the language of the contract is clear and unambiguous, construction of the agreement is a matter of law for the court[,] and the court cannot look beyond the terms of the contract to determine the intentions of the parties.” *Weaver*, 652 S.E.2d at 709 (quoting *Piedmont Bank & Trust Co. v. Stevenson*, 339 S.E.2d 49, 52 (internal citations omitted), *aff’d per curiam*, 344 S.E.2d 788 (N.C. 1986)); *see also Abney*, 215 S.W.3d at 703 (“When

no ambiguity exists in the contract, we look only as far as the four corners of the document to determine that intent”).

Further, the North Carolina Supreme Court has held that “[t]he language in a release may be broad enough to cover all demands and rights to demand, or possible causes of action, a complete discharge of liability from one to another, whether or not the various demands or claims have been discussed or mentioned, and whether or not the possible claims are all known.” *Merrimon v. Postal Telegraph-Cable Co.*, 176 S.E. 246, 248 (N.C. 1934) (quoting *Houston v. Trower*, 297 F. 558, 561 (8th Cir. 1924)); *see also Abney*, 215 S.W.3d at 703 (“It is . . . of no consequence . . . that the release was a standard, fill-in the blank form that was broad in scope. It is a contract nonetheless”).

Here, there is no ambiguity in the Forbearance Agreement, nor do Appellants point to any ambiguity in their arguments. Appellants not only executed the Forbearance Agreement, they affirmed its provisions in the two subsequent extensions of the agreement. Therefore, the trial court correctly looked to the four corners of the document in enforcing its terms. Appellants clearly released any claims that they had against VFS at the time that they executed the Forbearance Agreement, and the trial court correctly granted summary judgment in favor of VFS.

Notwithstanding the fact that the trial court based its grant of summary judgment on the release contained in the Forbearance Agreement, Appellants allege that VFS perpetrated fraud in connection with the original Loan Documents

as well as the Forbearance Agreement. Appellants contend that, as a consequence of such alleged fraud, no valid contracts exist between the parties. Specifically, Appellants maintain that they were fraudulently induced into executing the Loan Documents and that VFS made misrepresentations regarding Appellants' financing.

Under both Kentucky and North Carolina law, one of the essential elements of a claim of fraudulent misrepresentation is a material false misrepresentation. See *Pearce v. American Defender Life Ins. Co.*, 343 S.E.2d 174, 178 (N.C. 1986); *United Parcel Serv. Co. v. Rickert*, 996 S.W.2d 464, 468 (Ky. 1999). Appellants cannot pinpoint a single representation made by an employee of VFS, much less one that was false or one upon which Appellants relied. Mr. Summers stated that he only spoke to two VFS employees before executing the Loan Documents: Mike Woody and Chris French. Mr. Summers acknowledged that he failed to recollect anything specific that Mr. Woody told him in any conversations he had with Mr. Woody. Similarly, Mr. Summers conceded that he had no memory of any particulars regarding his conversations with Mr. French. Therefore, we disagree with Appellants' assertion that these unsubstantiated allegations of fraud barred the trial court from granting VFS summary judgment.

Appellants further argue that the Forbearance Agreement was not a valid, enforceable contract, because there was a lack of consideration for the undertakings in the agreement. The doctrine of consideration is well-settled in both Kentucky and North Carolina. Consideration is defined as "any benefit,

right, or interest bestowed upon the promisor, or any forbearance, detriment, or loss undertaken by the promisee.” *Brenner v. Little Red School House, Ltd.*, 274 S.E.2d 206, 212 (N.C. 1981); *see also Phillips v. Phillips*, 294 Ky. 323, 171 S.W.2d 458, 464 (1943) (Consideration is “[a] benefit to the party promising, or a loss or detriment to the party to whom the promise is made”).

Further, under both states’ laws, forbearance constitutes valid consideration. “[C]onsideration need not consist of a promise to pay money for goods or services. Instead, it can take the shape of mutual promises to perform some act or to *forbear from taking some action.*” *IWTMM, Inc. v. Forest Hills Rest Home*, 577 S.E.2d 175, 179 (N.C. App. 2003) (emphasis added); *see also Alvey v. Union Inv., Inc.*, 697 S.W.2d 145, 148 (Ky. App. 1985) (“Clearly, the forbearance of a right to sue is valid consideration to support a promise”).

Here, at the time of Appellants’ execution of the Forbearance Agreement and the two subsequent extensions, Summers Equipment was in default under the Loan Documents, and VFS was clearly entitled to proceed with action against Appellants and the Collateral. Therefore, VFS’s promise to forbear from proceeding against the Collateral was adequate consideration for the Forbearance Agreement. Accordingly, Appellants’ argument that the Forbearance Agreement contained inadequate consideration is without merit.

The order of the Floyd Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANTS:

Earl M. McGuire
Prestonsburg, Kentucky

BRIEF FOR APPELLEE:

Michael J. Schmitt
Paintsville, Kentucky