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Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-000065-MR
NO. 2011-CA-001825-MR

THE GIBSON COMPANY REAL ESTATE, INC. APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE JAMES D. ISHMAEL, JR., JUDGE
ACTION NO. 10-CI-05027

GARRETT, LLC; CENTRAL BANK AND TRUST CO., AND WISE RECYCLING, LLC APPELLEES

OPINION AFFIRMING

** ** ** ** **

BEFORE: NICKELL, TAYLOR AND VANMETER, JUDGES.

NICKELL, JUDGE: The Gibson Company Real Estate, Inc. ("Gibson"), has appealed from the December 16, 2010, opinion of the Fayette Circuit Court granting summary judgment in favor of Garrett, LLC.[1] Following a careful review, we affirm.

[1] Although Central Bank and Trust Co. and Wise Recycling, LLC, were named defendants in the action below, the summary judgment entered by the trial court referred to only Garrett.

Garrett owns a parcel of commercial real estate located on Lisle Road in Lexington, Kentucky. On November 10, 2008, Garrett and Gibson entered into a Commercial Exclusive Right to Sell/Lease Contract related to the property. On May 18, 2009, a lease agreement for the property was executed between Garrett and Wise Recycling. Gibson issued an invoice to Garrett seeking payment of its commission in the amount of $131,400.00[2] for arranging the executed lease. A disagreement ensued between Garrett and Gibson regarding the propriety of the commission and the method of payment of any amounts due. During the course of negotiations between Garrett and Gibson, Garrett made several partial payments toward the disputed commission totaling $3,481.94.[3] When Garrett refused to honor Gibson's demand to satisfy the purported debt in full, Gibson filed a lien on the Lisle Road property on November 18, 2009.

On December 7, 2009, counsel for Garrett sent a letter to counsel for Gibson setting forth Garrett's belief that no commission was owed by it and demanding a refund of all commission payments made, reimbursement of legal expenses, and release of the lien on the Lisle Road property. Garrett threatened further legal action if Gibson failed to comply with its demands. The following

[2] Pursuant to the terms of the listing agreement, assuming certain conditions were satisfied, Gibson was entitled to a six percent commission of the sales price or gross lease amount of the property. The lease between Garrett and Wise was valued at $2,190,000.00.

[3] Garrett later contended Gibson was not entitled to any commission as Garrett and Wise had conducted previous negotiations regarding a potential lease of the Lisle Road property and that such discussions had occurred significantly prior to the execution of the listing agreement on November 10, 2008.

day, Gibson e-mailed an unsigned document entitled "Release Agreement"[4] to Garrett. In pertinent part, the Release Agreement provided as follows:

> IN CONSIDERATION of the mutual promises of Release contained herein, we, the undersigned Buyers, Sellers, Principal Brokers and Agents involved in the Offer to Purchase and/or Sell/Purchase Contract dated November 10, 2008 for the sale and purchase of real property located at 203 Lisle Road, Lexington, Fayette County, Kentucky, do hereby fully and forever release each other and all other parties involved in said Sale/Purchase Contract from all past, present and future obligations that might arise from said Contract and the said Contract shall be for all purposes NULL AND VOID.

Garrett promptly executed the Release Agreement and returned it to Gibson. Thereafter, Gibson signed the release and returned a fully executed copy to Garrett.

Several months later, on August 30, 2010, Gibson filed the instant suit against Garrett, Wise and Central Bank and Trust Co.,[5] in an attempt to collect its commission.[6] Gibson set forth claims for breach of contract, breach of lease, unjust enrichment, promissory estoppel and equitable estoppel, and sought to foreclose on its lien. Garrett and Wise subsequently moved to dismiss the action

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[4] The Release Agreement was a form document prepared by or for the Lexington-Bluegrass Association of Realtors with blanks included for manual inclusion of pertinent information, including names, dates and property descriptions.

[5] Wise and Central Bank and Trust were named as defendants because each claimed an interest in the subject property: Wise as a tenant/lessee and Central Bank and Trust as the primary mortgage lender. Central Bank and Trust filed an answer to Gibson's complaint but the record is silent as to any further involvement in the action on its behalf. Wise and Garrett were represented by the same counsel in the trial court and have filed a combined brief in this Court.

[6] Contemporaneously with the filing of the civil action, Gibson caused a notice of *lis pendens* to be filed in the Office of the Fayette County Court Clerk in accordance with the provisions of Kentucky Revised Statutes (KRS) 382.440.

or, alternatively, for summary judgment, arguing the Release Agreement extinguished all claims between the parties. In opposition to the motions, Gibson contended no disagreement ever existed over whether it was owed a commission, but rather how the commission was to be paid, and further, that the release was inapplicable to the disputed commission.

Following a hearing on November 12, 2010, the trial court granted summary judgment to Garrett based on the plain language of the Release Agreement. It concluded the language of the release was simple and unambiguous and operated to terminate all past, present and future obligations between the parties arising from the listing agreement executed on November 10, 2008. Contrary to Gibson's contention, the trial court found the release to be supported by adequate consideration and further determined it was unnecessary and improper to consider parol evidence. A written opinion setting forth the trial court's rationale, granting summary judgment to Garrett and dismissing Gibson's claims was entered on December 16, 2010. Gibson timely appealed to this Court. A subsequent motion to vacate that order pursuant to CR[7] 60.02 (b) and (f) was denied on September 28, 2011. Gibson likewise appealed from that order. In the interest of judicial economy, the two appeals were consolidated and will be resolved in this single Opinion.

Gibson raises three allegations of error in seeking reversal. First, Gibson contends the trial court erred in concluding the Release Agreement was

[7] Kentucky Rules of Civil Procedure.

supported by adequate consideration. Second, it argues the trial court erred in determining the Release Agreement applied to obligations between the parties that had already arisen. Finally, Gibson believes the language of the Release Agreement was ambiguous and, thus, the trial court should have resorted to an examination of parol evidence to determine the intent of the parties.

We begin with a general discussion of the standard of review. In reviewing a grant of summary judgment, our task is to determine whether the trial court correctly concluded no genuine issue exists as to any material facts, and whether based on such facts 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 only legal questions and the existence, or non-existence, of material facts are to be considered, we review a grant of summary judgment *de novo*. *Lewis v. B & R Corp.,* 56 S.W.3d 432, 436 (Ky. App. 2001). Additionally, we owe no deference to the trial court's interpretation of the Release Agreement because "the construction and interpretation of a contract, including questions regarding ambiguity, are questions of law to be decided by the court." *Frear v. P.T.A. Industries, Inc.*, 103 S.W.3d 99, 105 (Ky. 2003) (quoting *First Commonwealth Bank of Prestonsburg v. West*, 55 S.W .3d 829, 835 (Ky. App. 2000)).

With these standards in mind, we turn to the arguments in the case *sub judice*. Gibson first contends the trial court erred in concluding the Release Agreement was supported by adequate consideration. Gibson argues Garrett gave nothing of value in exchange for Gibson executing the release and no mutuality of

obligations existed to support enforcement of the release. Gibson further argues the trial court abused its discretion in denying its motion for post-judgment relief pursuant to CR 60.02 with respect to the consideration issue.

Under Kentucky law, a release is considered a "contract between the party executing the release and the party being released." *Waddle v. Galen of Kentucky, Inc.*, 131 S.W.3d 361, 365 (Ky. App. 2004) (citing *Richardson v. Eastland, Inc.*, 660 S.W.2d 7, 8 (Ky. 1983)).

> A release is a private agreement amongst parties which gives up or abandons a claim or right to the person against whom the claim exists or the right is to be enforced or exercised. In other words, a release is a discharge of a claim or obligation and surrender of a claimant's right to prosecute a cause of action.

Frear, 103 S.W.3d at 107 (quoting 66 Am.Jur.2d *Release* §1). As with any other contract, for a release to be valid and enforceable, it must be supported by valuable consideration. *Waddle*, 131 S.W.3d at 365 (citing *Brown v. Kentucky Lottery Corp.*, 891 S.W.2d 90, 92 (Ky. App. 1995)). "Consideration for a contract may be a benefit to the promisor, or a detriment to the promisee." *Grass v. Akins*, 368 S.W.3d 150, 153 (Ky. App. 2012) (citing *Van Winkle v. King*, 145 Ky. 691, 693, 141 S.W. 46, 47 (1911)).

Here, the trial court found consideration flowed between the parties in the form of mutual releases of past, present and future obligations arising from the sole contract signed by the parties concerning this parcel of land. In making its determination, the trial court specifically noted the letter of December 7, 2009,

from Garrett to Gibson, wherein Garrett reiterated its position that no commission was owed to Gibson, and demanded a refund of monies paid, reimbursement of its legal fees, and release of the lien. The letter further advised Gibson of Garrett's intent and ability to pursue legal actions if its demands were not met. Without determining the viability or probability of Garrett's success on any of its purported claims, the trial court found Garrett's forbearance of prosecuting such claims constituted valid consideration to support Garrett's execution of the release. The trial court noted the obvious "consideration from Gibson to Garrett would have been in the form of the release of any claim of the foresaid commission."

It is well-settled—and undisputed by the parties—that mutual promises may serve as valid consideration to support enforcement of a contract. *Campbell v. Campbell*, 377 S.W.2d 93 (Ky. 1964); *More v. Carnes*, 309 Ky. 41, 214 S.W.2d 984 (1948); *Association of Army & Navy Stores v. Young*, 296 Ky. 61, 176 S.W.2d 136 (1943); *Robbins v. Robbins*, 246 Ky. 411, 55 S.W.2d 31 (1932). Furthermore, forbearance of a right to sue is valid consideration. *Huff Contracting v. Sark*, 12 S.W.3d 704, 707 (Ky. App. 2000); *Alvey v. Union Investment, Inc.*, 697 S.W.2d 145, 148 (Ky. App. 1985). However, Gibson alleges the promises made by Garrett to forbear its right to pursue legal action could not serve as consideration as its purported claims were "utterly groundless." Thus, Gibson believes the trial court was incorrect in determining the presence of mutuality of obligations sufficient to form valid consideration for the release. We disagree.

As the trial court correctly noted, Garrett set forth several potential claims regarding the propriety of Gibson's lien and the refund or reimbursement of monies expended in relation to the lien. Although Gibson characterizes these claims as baseless, the trial court clearly believed from the evidence before it that Garrett had a good-faith basis for asserting them. "[G]ood faith is enough unless the claim is so obviously unfounded that the assertion of good faith would affront the intelligence of the ordinary and reasonable layman." *Hall v. Fuller*, 352 S.W.2d 559, 562 (Ky. 1962). While we make no comment on the merits of Garrett's purported claims, we believe the trial court was correct in finding Garrett's forbearance of prosecuting its potential claims against Gibson for slander of title or unjust enrichment served as valid consideration for the release. Contrary to Gibson's contention, we are unable to conclude from the evidence in the record that Garrett's threatened legal actions were "utterly groundless" nor that they would "affront the intelligence of the ordinary and reasonable layman."

Because we have concluded the trial court properly determined the release was supported by sufficient consideration, we must likewise conclude the trial court did not abuse its discretion in denying Gibson's motion for post-judgment relief pursuant to CR 60.02. Gibson's motion was primarily predicated upon a series of e-mail messages between counsel for the parties exchanged over seven months *after* the trial court rendered its judgment. Those messages, Gibson argues, clearly reveal Garrett's acknowledgment of its obligation to pay Gibson the commission and confession that the sole dispute between the parties was the

method of payment of the commission (lump sum or periodic payments). Gibson argues these statements show Garrett made material misrepresentations of fact to the trial court by arguing in its motion for summary judgment that it did not owe Gibson a commission, thereby undercutting the reasoning for the trial court's decision. We have reviewed the messages in question and cannot countenance Gibson's interpretation of them, nor can we say this extrinsic evidence is of such character to undermine the factual and legal basis for the trial court's ruling. Thus, we conclude the trial court did not abuse its discretion in denying Gibson's CR 60.02 motion.

Second, Gibson argues the trial court erred in determining the scope of the Release Agreement extended and applied to obligations between the parties that had already arisen, including Gibson's right to collect a commission from Garrett. Gibson reads the release to apply only to obligations that were unknown or unascertained at the time of its execution. Thus, because Garrett's purported obligation to pay a commission was known and had arisen several months *prior* to the execution of the release, it was not an obligation that was released by the December 8, 2009, agreement. Again, we disagree.

The phrase in the release agreement upon which Gibson bases its argument sets forth the scope of the release as "all past, present and future obligations that might arise" from the November 10, 2008, contract. Gibson contends use of the terminology "might arise" referred only to unknown or disputed obligations that could possibly arise at some time in the future and

necessarily excluded ongoing claims or obligations that had already arisen. This narrow reading of the release plainly ignores the context of the phrase in question and the remaining language of the document.

As the trial court noted, the release agreement is a relatively simple document using neither complicated nor confusing language. Its terms are extremely broad as to the obligations and responsibilities being released, specifically mentioning "past, present and future obligations" arising from the November 10, 2008, contract. Clearly, the release Gibson sent to Garrett does not preserve—or even mention—its claim to a commission arising from the original contract. Likewise, we cannot conclude the release applies only to unknown and disputed obligations and responsibilities when it specifically references "all past, present and future obligations" flowing from the original contract. As the trial court specifically and correctly found, "[t]he language is plain and simple and is standard form language for release of all parties to alleged or claimed legal obligations or responsibilities." Undoubtedly, this plain and simple language operates to release Gibson's claim for a commission stemming from the November 10, 2008, contract. Gibson's impassioned pleas to the contrary must be rejected.

Finally, and perhaps most interestingly, Gibson contends the release it chose to send Garrett was ambiguous with respect to the scope of the agreement. Therefore, it contends the trial court should have considered parol evidence to determine the parties' intent. Gibson contends the release of its right to a

commission was not the intent of the parties when the release was executed and runs counter to the language of the release.

"A contract is ambiguous if a reasonable person would find it susceptible to different or inconsistent interpretations." *Cantrell Supply, Inc. v. Liberty Mutual Insurance Co.,* 94 S.W.3d 381, 385 (Ky. App. 2002) (citing *Transport Ins. Co. v. Ford,* 886 S.W.2d 901, 905 (Ky. 1994); *Luttrell v. Cooper Industries, Inc.*, 60 F.Supp.2d 629, 631 (E.D.Ky. 1998)). "Where a contract is ambiguous or silent on a vital matter, a court may consider parol and extrinsic evidence involving the circumstances surrounding execution of the contract, the subject matter of the contract, the objects to be accomplished, and the conduct of the parties." *Id*. However, "an otherwise unambiguous contract does not become ambiguous when a party asserts . . . that the terms of the agreement fail to state what it intended." *Frear,* 103 S.W.3d at 107. In other words, "[t]he fact that one party may have intended different results . . . is insufficient to construe a contract at variance with its plain and unambiguous terms." *Cantrell Supply, Inc.,* 94 S.W.3d at 385. It is well-settled "that we are not permitted to create an ambiguity where none exists even if doing so would result in a more palatable outcome." *First Commonwealth Bank* 55 S.W.3d at 836 (citing *Friction Materials Company, Inc. v. Stinson*, 833 S.W.2d 388, 391 (Ky. App. 1992)). Likewise, we will not "torture ordinary words until they confess to ambiguity." *Western States Insurance Co. v. Wisconsin Wholesale Tire, Inc.,* 184 F.3d 699, 702 (7th Cir. 1999).

Conversely, where the contract's language is clear and unambiguous, the agreement is to be given effect according to its terms, and the court "will interpret the contract's terms by assigning language its ordinary meaning and without resort to extrinsic evidence." *Frear,* 103 S.W.3d at 106. As such, in the absence of ambiguity, the parties' intention must be gathered from the four corners of the instrument at issue, and extrinsic evidence may not be admitted to vary the instrument's terms. *Hoheimer v. Hoheimer,* 30 S.W.3d 176, 178 (Ky. 2000).

It is also well-settled that, "[i]n the absence of ambiguity a written instrument will be strictly enforced according to its terms." *Mounts v. Roberts,* 388 S.W.2d 117, 119 (Ky. 1965); *O'Bryan v. Massey–Ferguson, Inc.,* 413 S.W.2d 891, 893 (Ky. 1966). Words are to be accorded their "ordinarily used meaning unless the context requires otherwise." *Bays v. Mahan,* 362 S.W.2d 732, 733 (Ky. 1962). "As a cardinal principle relating to the construction of a contract, it has long been recognized and held in this and other jurisdictions that where the instrument is so clear and free of ambiguity as to be self-interpretive, it needs no construction and will be performed or enforced in accordance with its express terms." *Ex parte Walker's Ex'r,* 253 Ky. 111, 68 S.W.2d 745, 747 (1933) (citations omitted). The only purpose of judicial construction is to remove ambiguity and doubt and to make certain that which in itself is uncertain. *Frear,* 103 S.W.3d at 106. While nothing can be added to or taken from a written contract by parol evidence, it is the rule that ambiguities may be explained by parol evidence. *Stubblefield v. Farmer,* 291 Ky. 795, 165 S.W.2d 556, 557 (1942).

Under the parol evidence rule, when parties reduce their agreement to a clear, unambiguous, and duly executed writing, all prior negotiations, understandings, and agreements merge into the instrument, and a contract as written cannot be modified or changed by prior parol evidence, except in certain circumstances such as fraud or mistake. *Childers and Venters, Inc. v. Sowards,* 460 S.W.2d 343, 345 (Ky. 1970). Only a mistake of fact will affect the enforceability of a contract, not a mistake of law. *Raisor v. Burkett,* 214 S.W.3d 895, 906 (Ky. App. 2006) (citations omitted).

Based upon our review, we find no ambiguity in the release agreement; accordingly, "the parties' intentions must be discerned from the four corners of the instrument without resort to extrinsic evidence." *Hoheimer*, 30 S.W.3d at 178. Although Gibson vehemently argues the release of its right to a commission was never the intent of the parties, it is clear such hindsight is insufficient to transform the otherwise unambiguous release language into something it is not, thereby requiring a resort to judicial construction. *Frear,* 103 S.W.3d at 107; *Cantrell Supply,* 94 S.W.3d at 385. The plain and simple language of the release clearly applies to void and nullify the November 10, 2008, contract and to waive all past, present and future obligations stemming therefrom. No intention to the contrary appears within the four corners of the release.

Furthermore, we are not persuaded that the terms of the release agreement are capable of more than one reasonable interpretation; consequently, Gibson's reliance on extrinsic evidence is misplaced. Because the release

agreement is not ambiguous, the trial court correctly refused to resort to an examination of extrinsic evidence.

Additionally, were we to deem the language of the release agreement to be ambiguous, we would be required to hold any such flaw against Gibson. While not technically the "drafter" of the language, Gibson chose to send Garrett a standard form prepared by the Lexington-Bluegrass Association of Realtors without tailoring it to fit the Lisle Road property and this particular factual situation. In hindsight, the form chosen by Gibson may not say what it now wishes it said, but the trial court and we can only enforce what was said and agreed to in the plain language of the release agreement.

For the foregoing reasons, the judgment of the Fayette Circuit Court is affirmed.

ALL CONCUR.

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