

STATE OF MICHIGAN
COURT OF APPEALS

TRANS-AMERICA CONSTRUCTION
COMPANY,

UNPUBLISHED
November 3, 1998

Plaintiff-Appellant,

v

No. 200360
Wayne Circuit Court
LC No. 95-523262 CK

AUDREY GONDER, JOHN GONDER, UNITED
COMPANIES LENDING CORPORATION and
SECURA INSURANCE,

Defendants,

and

J. MICHAEL HILL and J. MICHAEL HILL, P.C.,

Defendants-Appellees.

Before: Gage, P.J., and Kelly and Hoekstra, JJ.

PER CURIAM.

This case arises from an agreement the Gonders entered into with plaintiff to repair their fire-damaged home in exchange for certain insurance proceeds. The Gonders retained attorney J. Michael Hill and his law firm, J. Michael Hill, P.C., to execute a series of agreements concerning disposition of the proceeds, including the agreement in question that released attorney Hill and his law firm from liability concerning the disbursements. Plaintiff subsequently filed a construction lien and this suit, asserting various grounds for compensation. The trial court entered a default judgment against the Gonders and granted summary disposition in favor of Hill and his law firm pursuant to MCR 2.116(C)(7) (release) and (10) (no genuine issue of material fact and moving party entitled to judgment as a matter of law). Plaintiff appeals as of right from the order granting summary disposition. We reverse.

We review de novo a lower court's decision regarding a motion for summary disposition. *Singerman v Municipal Service Bureau, Inc*, 455 Mich 135, 139; 565 NW2d 383 (1997). In ruling on a motion for summary disposition pursuant to MCR 2.116(C)(7), the court must

determine whether the moving party is entitled to judgment as a matter of law. *Limbach v Oakland Co Bd of Co Rd Comm'rs*, 226 Mich App 389, 395; 573 NW2d 336 (1997). A motion for summary disposition pursuant to MCR 2.116(C)(10) tests the factual support for a claim. *Singerman, supra*. In ruling on the motion, a court must consider the pleadings, affidavits, depositions and all other documentary evidence submitted by the parties. MCR 2.116(G)(5); *Singerman, supra*. The test is whether the kind of record that might be developed will leave open an issue upon which reasonable minds might differ. *Singerman, supra*.

Plaintiff argues that summary disposition was inappropriately granted in this case because it established a genuine issue of material fact regarding the validity of the release. We agree. As with other contracts, the validity of a contract of release turns on the intent of the parties, *Paterek v 6600, Ltd*, 186 Mich App 445, 449; 465 NW2d 342 (1990), which is a question of fact, *Theisen v Kroger Co*, 107 Mich App 580, 583; 309 NW2d 676 (1981), quoting *Denton v Utley*, 350 Mich 332, 345; 86 NW2d 537 (1957). To be valid, a release must be fairly and knowingly made. *Paterek, supra* at 449. A release is not fairly made and is invalid if (1) the releasor was dazed, in shock, or under the influence of drugs, (2) the nature of the instrument was misrepresented, or (3) there was other fraudulent or overreaching conduct. *Id.* A release may be found invalid where a misrepresentation is made with the intent to mislead or deceive the releaser. *Id.*

In response to defendants' motion for summary disposition in this case, plaintiff submitted the affidavit of the president of Trans-America Construction Company. The president alleged that when he arrived to endorse the insurance check for the Gonders' loss of contents, attorney Hill also presented him with the three-page document in question, which the president averred that he did not and could not understand. The president stated the following:

I specifically asked what the document was and why I needed to sign it. I was told that the document authorized Mr. Hill to negotiate the check and use it to replenish the building loss monies that had previously been advanced. This was consistent with our earlier agreement and I signed the document.

We agree with plaintiff that the affidavit presents a genuine issue of material fact regarding the following factors relevant to intent: whether the release was obtained with haste, the amount of consideration for the release, the conduct and intelligence of the parties, as well as all the circumstances surrounding the release. See *Theisen, supra* at 583, quoting *Denton, supra* at 345. It is well settled that if an affidavit is "competent evidence regarding the issue at bar, a question concerning the weight and credibility to be given to such averments would be presented, and, on familiar principles, summary disposition would then be precluded because of the presence of a triable issue of fact." *Zurich Ins Co v CCR & Co (On Rehearing)*, 226 Mich App 599, 603; 576 NW2d 392 (1998). The lower court's role was simply to take the affidavit at face value. See, e.g., *Huron Tool & Engineering Co v Precision Consulting Svcs Inc*, 209 Mich App 365, 377; 532 NW2d 541 (1995).

Defendant Hill and his law firm rely upon case law that a party's lack of understanding of the language and contents of a document are not grounds for avoiding a contract. See, e.g., *Aluia v*

Harrison Community Hosp (On Remand), 139 Mich App 742, 749; 362 NW2d 783 (1984). However, a contrary conclusion is not required by these authorities because a party's lack of understanding of the language and contents of a document are grounds for avoiding a contract only "in the absence of fraud." *Id.* See, e.g., *Dombrowski v City of Omer*, 199 Mich App 705, 710; 502 NW2d 707 (1993) (stating that rescission would be appropriate where the defendant fraudulently induced the plaintiff into signing the release without reading it or otherwise misrepresented the contents of the document).

Therefore, we conclude that plaintiff established a genuine issue of material fact regarding the validity of the release, specifically, whether Hill misrepresented the nature of the document with the intent to mislead the president of Trans-America Construction Company. Because a record could be developed that would leave open an issue upon which reasonable minds could differ, the trial court erred in granting defendants' motion for summary disposition. *Singerman, supra*.

Reversed and remanded. We do not retain jurisdiction.

/s/ Hilda R. Gage

/s/ Michael J. Kelly

/s/ Joel P. Hoekstra