STATE OF MICHIGAN

COURT OF APPEALS

JAMES E. JACK and AUDREY M. JACK, Plaintiffs-Appellants, v HASTINGS MUTUAL INSURANCE COMPANY, Defendant-Appellant.	UNPUBLISHED November 20, 2008 No. 278109 Grand Traverse Circuit Court LC No. 06-025364-CK

Before: Hoekstra, P.J., and Whitbeck and Talbot, JJ.

PER CURIAM.

Plaintiffs, James Jack and Audrey Jack, husband and wife, appeal as of right the trial court's order granting summary disposition to defendant, Hastings Mutual Insurance Company. Because the release is unambiguous and supported by consideration and because plaintiffs failed to comply with the tender back rule, we affirm.

I

Plaintiffs are the owners of a condominium in the Deep Water Pointe II Condominiums in Williamsburg. Defendant insured plaintiffs' condominium through a homeowner's insurance policy. In December 2004, plaintiffs' condominium unit and personal property suffered extensive water damage after the condominium's water pipes froze. Plaintiff submitted claims to defendant, and defendant paid $34,646 on the claims.

Plaintiffs sued Grand Traverse Resort and Spa and GTB Holdings, LLC (hereinafter collectively referred to as the resort defendants), along with the Deep Water Pointe II Condominium Association and the association's insurer, Auto Owner's Insurance Company (the Water Pointe litigation). Defendant moved to intervene in the Water Pointe litigation to protect its subrogation rights. However, before defendant's motion was heard, plaintiffs and the Water Pointe defendants engaged in mediation. Defendant also participated in the mediation, in which the following agreement was reached:

1. Defendant Auto Owners shall pay Plaintiffs within 15 days $22,500.

2. Defendants Grand Traverse Resort and Spa and GTB Holdings shall pay Plaintiffs $182,500 and Hastings Mutual Insurance Co, Intervener, $15,000 within 15 days.

3. Plaintiffs shall release Defendants and Intervener of all claims and actions arising from only the December 2004 freezing water loss.

5. [sic] It is understood and agreed that Hastings has paid $34,646.23 as partial indemnification for Plaintiffs[’] loss, in addition to the settlement amount agreed upon herein.

6. Auto Owners and Hastings shall release the resort defendants of all claims arising from said December 2004 freezing water loss.

* * *

Auto Owners agrees to pay $22,500 in full settlement of all claims by Plaintiffs in consideration of a full release.

Following the mediation, defendant withdrew its motion to intervene.

Plaintiffs subsequently submitted additional claims to defendant. Defendant, believing that the settlement agreement released them from any obligation to pay the claims, refused to pay the claims. Plaintiffs then refused to sign the final settlement documents in the Water Pointe litigation, prompting the resort defendants to file a motion to enforce the settlement agreement. The resort defendants asked the trial court to order enforcement of the settlement agreement as to the named parties in the Water Pointe litigation, which would allow plaintiffs and defendant to settle their dispute in another lawsuit. After plaintiffs stated their compliance with the request, the trial court ordered plaintiffs to sign the final settlement documents and to stipulate to an order dismissing with prejudice the Water Pointe litigation. The trial court specifically stated that, because defendant was not a party to the Water Pointe litigation, the effect of the settlement agreement as between plaintiffs and defendant could be litigated in another lawsuit.

In July 2006, plaintiffs sued defendant for breach of contract, bad faith denial of claims, and violation of the Uniform Trade Practices Act, MCL 500.2001. Plaintiffs claimed that the settlement agreement was void for lack of consideration, fraud and misrepresentation, unilateral mistake, and mutual mistake.

Defendant moved for summary disposition under MCR 2.116(C)(7) and (10). Defendant argued that plaintiffs’ claims were barred by the tender back rule. According to defendant, because it had relinquished its right to recover the money it had already paid to plaintiffs, plaintiffs received $34,646 from defendant as consideration for the release of claims against defendant. Because plaintiffs had not returned the $34,646 to defendant, defendant argued that plaintiffs were precluded from challenging the validity of the release. In the alternative, defendant asserted that no genuine issue of material fact existed regarding the enforceability of the release. The release was unambiguous, and plaintiff had not pleaded with particularity any facts in support of a claim of fraud, misrepresentation, or mistake.

In response, plaintiffs argued that defendant's claim that their claims were barred by the tender back rule was without merit because there was no consideration by defendant. According to plaintiffs, no provision in the homeowner's policy provided defendant with the right to seek reimbursement from plaintiffs if plaintiffs received any settlement proceeds from a third party. Moreover, plaintiffs claimed that such a subrogation right would violate the "made whole" rule, which provides that, before an insurer can seek reimbursement of paid claims from its insured's settlement proceeds from a third party, the insured must have received money in excess of the total amount of its loss, including legal costs. Plaintiffs also claimed that defendant's argument that the release was enforceable was without merit because there was no consideration for the release and the release was the result of mistake.

The trial court granted defendant's motion for summary disposition. It rejected plaintiffs' claim that the release was not supported by consideration. The trial court concluded that defendant, by agreeing to release the resort defendants from claims arising from the December 2004 incident, facilitated the payment of the $182,000 from the resort defendants to plaintiffs. The trial court also concluded that the release was unambiguous, and it rejected plaintiffs' attempt to introduce parol evidence to establish fraud or mistake.

II

On appeal, plaintiffs assert several claims of error. In addition to other claims, plaintiffs argue that the trial court erred in concluding that the release was unambiguous and that the release was supported by consideration. These are the only claims raised by defendant that we need to address to affirm the trial court's grant of summary disposition in favor of defendant.

A

We review de novo a trial court's decision on a motion for summary disposition. *Manuel v Gill*, 481 Mich 637, 643; 753 NW2d 48 (2008). Summary disposition is proper under MCR 2.116(C)(7) if the undisputed facts establish that "[t]he claim is barred because of release." MCR 2.116(C)(7); *By Lo Oil Co v Dep't of Treasury*, 267 Mich App 19, 26; 703 NW2d 822 (2005). In determining whether summary disposition is proper under subsection (C)(7), this Court "consider[s] all documentary evidence submitted by the parties, accepting as true the contents of the complaint unless affidavits or other appropriate documents specifically contradict them." *Fane v Detroit Library Comm*, 465 Mich 68, 74; 631 NW2d 678 (2001). Summary disposition is proper under MCR 2.116(C)(10) if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *A & E Parking v Detroit Metro Wayne Co Airport Auth*, 271 Mich App 641, 644; 723 NW2d 223 (2006). In determining whether summary disposition is proper under subsection (C)(10), this Court must view the documentary evidence in the light most favorable to the nonmoving party. *Mulcahy v Verhines*, 276 Mich App 693, 699; 742 NW2d 393 (2007).[1]

[1] We reject plaintiffs' argument that the trial court erred in granting defendant's motion for summary disposition because defendant failed to attach any affidavits to its motion to support the
(continued…)

B

On appeal, plaintiffs claim that the trial court erred in holding that the release was unambiguous. We disagree. Whether a contract is ambiguous is a question of law. *Coates v Bastian Bros, Inc*, 276 Mich App 498, 504; 741 NW2d 539 (2007). If the language of the contract is unambiguous, construction of the contract is also a question of law. *Laurel Woods Apartments v Roumayah*, 274 Mich App 631, 638; 734 NW2d 217 (2007). "A contract is ambiguous when two provisions irreconcilably conflict with each other or when [a term] is equally susceptible to more than a single meaning." *Coates, supra* at 503 (quotations marks and citations omitted).

The release provided that "[p]laintiffs shall release Defendants and Intervener [previously identified as defendant] of *all* claims and actions arising from the December 2004 freezing water loss" (emphasis added). There is no broader classification than the term "all"; the term leaves no room for exceptions. *Romska v Opper*, 234 Mich App 512, 515-516; 594 NW2d 853 (1999). Accordingly, the release is susceptible to only one meaning: plaintiffs released defendant not just from the claims for damage to the condominium unit which arose from the December 2004 incident, but also from the claims for damage to plaintiffs' personal property and for loss of use. The trial court did not err in holding that the release was unambiguous. Because the release was unambiguous, plaintiffs were not entitled to introduce parol evidence to vary the terms of the release. See *UAW-GM Human Resource Ctr v KSL Recreation Corp*, 228 Mich App 486, 492; 579 NW2d 411 (1998).

In concluding that the release is unambiguous, we reject plaintiffs' contention that the subsequent phrase in the settlement agreement that "[i]t is understood and agreed that Hastings has paid $34,646.23 as partial indemnification for Plaintiffs' loss" renders the release ambiguous. This phrase does not irreconcilability conflict with the release. It accurately states that defendant had partially indemnified plaintiffs for their loss. The phrase contains no language indicating that defendants intended to pay additional claims by plaintiffs for damage to their personal property or for loss of use.

C

Plaintiffs also claim that the trial court erred in holding that the release was supported by consideration. Defendant argues that the release was supported by consideration—it did not require plaintiffs, upon settling with the resort defendants and Auto Owners Insurance, to return the $34,646 that defendant had paid on plaintiffs' claims[2]—and that, because plaintiffs did not

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factual representations it made at the motion hearing as to what occurred at the mediation. A review of the hearing transcript reveals that the challenged statements were not factual representations as to what had occurred at the mediation, but were defendant's argument as to why the release was supported by consideration.

[2] Defendant's argument concerning the consideration for the release was not the same consideration found by the trial court. The trial court concluded that the release was supported by consideration because defendant's agreement to release the resort defendants for claims arising from the December 2004 incident facilitated the payment of $182,000 from the resort defendants to plaintiffs.

tender this money back to defendant before the filing of the lawsuit, plaintiffs' claims are barred by the tender back rule.

1

To be valid, a release must be supported by consideration. *Babcock v Pub Bank*, 366 Mich 124, 135; 114 NW2d 159 (1962); see also *Yerkovich v AAA*, 461 Mich 732, 740; 610 NW2d 542 (2000) ("An essential element of a contract is legal consideration"). Consideration is a bargained-for exchange; "[t]here must be a benefit on one side, or a detriment suffered, or service done on the other." *Gen Motors Corp v Dep't of Treasury*, 466 Mich 231, 238-239; 644 NW2d 734 (2002) (quotation marks and citation omitted). Generally, whether a promise is supported by consideration is a question of fact. *Haji v Prevention Ins Agency, Inc*, 196 Mich App 84, 87-88; 492 NW2d 460 (1992).

In the settlement agreement, defendant, as did Auto Owners Insurance, released the resort defendants from all claims arising from the December 2004 incident. An insurance company, upon paying a loss to its insured under an insurance policy, is subrogated to the position of the insured, attaining the insured's rights to recover against a third party. *Auto-Owners Ins Co v Amoco Production Co*, 468 Mich 53, 60; 658 NW2d 460 (2003); *State Auto Ins Cos v Velazquez*, 266 Mich App 726, 729; 703 NW2d 223 (2005). Accordingly, by releasing the resort defendants from all claims arising from the December 2004 incident, defendant gave up the right to recover from the resort defendants claims it paid or would pay plaintiffs. By obtaining the releases from defendant and Auto Owners Insurance, the resort defendants were assured that they would not be liable for any amounts of money for the December 2004 incident beyond the $182,000 and $15,000 it agreed to pay plaintiffs and defendant, respectively. Without the releases from defendant and Auto Owners Insurance, the resort defendants would not have agreed to settle with plaintiffs, as the resort defendants would not have been assured that defendant and Auto Owners Insurance would not seek to recover from them the claims defendant and Auto Owners Insurance paid or would pay to their insureds. Thus, the benefit plaintiffs received from the resort defendants, $182,000, was a direct result of a detriment suffered by defendant, its release of the resort defendants for claims arising from the December 2004 incident. Accordingly, there is no factual dispute regarding whether the release was supported by consideration. The trial court did not err in holding that the release was supported by consideration.

2

Because plaintiffs sued defendant for failure to pay claims submitted after the mediation, the present lawsuit contravenes the unambiguous release. Before a party may commence a lawsuit that contravenes a release, the party must tender any consideration received in exchange for the release. *Rinke v Automotive Moulding Co*, 226 Mich App 432, 436; 573 NW2d 344 (1997).

> It is a general and salutary rule that one repudiating or seeking to avoid a compromise settlement or release, and thereby revert to the original right of action, must place the other party *in statu quo* . . . .
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> * * *

> "Where a party to a compromise desires to set aside or avoid the same and to be remitted to his original rights, he must place the other party *in statu quo* by returning or tendering the return of whatever has been received by him under such compromise, in case it is of any value, and so far as possible any right lost by the other party because thereof. This rule obtains even though the contract was induced by the fraud or false representations of the other party, or was obtained under duress, or was made under a mistake of fact or as to the law; and until this is done the settlement will constitute a good defense. By electing to retain the property, a party must be held to be bound by the settlement." [*Kirl v Zinner*, 274 Mich 331, 335; 264 NW 391 (1936), quoting 12 C.J. p 355, § 57.]

The tender of the consideration must occur before or simultaneous with the filing of the lawsuit. *Stefanac v Cranbrook Ed Community (After Remand)*, 435 Mich 155, 176; 458 NW2d 56 (1990).

"[A] plaintiff is excused from the tender-back requirement only if the defendant waives the duty or the plaintiff demonstrates fraud in the execution." *Collucci v Eklund*, 240 Mich App 654, 659; 613 NW2d 402 (2000). Neither exception applies to the present case. Defendant has not waived the tender back requirement, nor have plaintiffs demonstrated, or even alleged, fraud in the execution. In addition, the tender back rule applies even if there is no specific recitation of the consideration for the release. See *Rowady v K Mart Corp*, 170 Mich App 54, 59; 428 NW2d 22 (1988).

The present case involves unique circumstances. Compare *Dresden v Detroit Macomb Hosp Corp*, 218 Mich App 292, 294; 553 NW2d 387 (1996), in which the plaintiff settled his medical malpractice lawsuit with the defendant for $285,000 and signed a release. When the plaintiff filed a subsequent lawsuit alleging fraud against the defendant, the defendant was entitled to summary disposition because the plaintiff had failed to tender back the $285,000. *Id.* at 296-298. In this case, the release was the result of a bargained-for exchange between the parties participating in the mediation, not just between plaintiffs and defendant. In addition, the bargained-for exchange resulted in several agreements between the participating parties, and the agreements between the named parties in the Water Pointe litigation were enforced by order of the trial court.

Given these unique circumstances, plaintiffs, unlike the *Dresden* plaintiff who could have easily placed the defendant in status quo by tendering back the $285,000, cannot easily place defendant in status quo. To place defendant in status quo, plaintiffs need to restore to defendant the right to recover from the resort defendants any claims it paid or would pay to plaintiffs. Plaintiffs cannot restore this right to defendants without invalidating defendant's release of the resort defendants. And, the resort defendants will not agree to rescind the release from defendant unless plaintiffs, at the very least, return to the resort defendants the $182,000. In exchange for the return of the $182,000, plaintiffs would require that the release granted to the resort defendants be invalidated. However, as mentioned *supra*, the mediation agreement as to the named parties in the Water Pointe litigation, was ordered enforced by the trial court. Given the unique circumstances of this case, we are unable to conceive of a manner in which plaintiffs would be able to place defendant in status quo.

However, plaintiffs' apparent inability to place defendant in status quo is due, in part, to plaintiffs' actions. In the Water Pointe litigation, plaintiffs refused to sign the final settlement

documents, forcing the resort defendants to file a motion to enforce the settlement agreement. The resort defendants asked the trial court to enforce the mediation agreement as to the named parties in the Water Pointe litigation. Plaintiffs stated that, as long as defendant was "not considered to be a party" to the Water Pointe litigation, they had no objection to the trial court enforcing the settlement agreement as to the named parties in the Water Pointe litigation.[3] By agreeing to the resort defendants' request, plaintiffs' chosen course of action at the hearing is a cause of plaintiffs' apparent inability to place defendant in status quo. Because plaintiffs' chosen course of action contributed to its apparent inability to place defendant in status quo, we see no reason to except plaintiffs from the requirements of the tender back rule. Cf. *Munson Medical Ctr v Auto Club Ins Ass'n*, 218 Mich App 375, 388; 554 NW2d 49 (1996) ("An appellant cannot contribute to error by plan or design and then argue error on appeal"). Accordingly, because plaintiffs did not tender back the consideration received in exchange for the release, plaintiffs are barred from challenging the validity of the unambiguous release, and defendant was entitled to summary disposition. *Rinke, supra* at 437-438. Because the trial court reached the right result, we affirm the trial court's order granting summary disposition to defendant. See *Gleason v Dep't of Transportation*, 256 Mich App 1, 3; 662 NW2d 822 (2003).

Given our inability to conceive of a manner in which plaintiffs could have placed defendant in status quo, we recognize that plaintiffs were in a difficult position below. Plaintiffs, if they truly were without the ability to place defendant in status quo, were without means to challenge the release. However, after defendant moved for summary disposition on the basis that plaintiffs failed to comply with the tender back rule, plaintiffs chose to defend with the argument that the release was not supported by consideration, rather than with an argument that, given the unique circumstances of the case, the tender back rule should not apply. Moreover, despite the firm entrenchment of the tender back rule in our common law, plaintiffs made no effort to comply with the rule. There is no evidence that plaintiffs sought from defendant a waiver of the tender back rule. In addition, there is no evidence that plaintiffs sought to tender to defendant the $19,000 defendant gave up its right to recover from the resort defendants. The settlement agreement clearly stated that defendant had paid $34,646 as partial indemnification for plaintiffs' loss and that defendant only received $15,000 from the resort defendants. Accordingly, at the very least, plaintiffs could have attempted to place defendant in status quo by tendering to defendant the amount of money that defendant could no longer recover.

Affirmed.

/s/ Joel P. Hoekstra
/s/ William C. Whitbeck
/s/ Michael J. Talbot

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[3] We note that plaintiffs' compliance with the resort defendants' request came despite an objection by defendant that an order to enforce the settlement agreement as to the named parties in the Water Pointe litigation could interfere with its subrogation rights.