

STATE OF MICHIGAN
COURT OF APPEALS

EDW. C. LEVY COMPANY,

Plaintiff-Appellant,

v

FORD MOTOR COMPANY,

Defendant-Appellee.

UNPUBLISHED

October 1, 2009

No. 287249

Wayne Circuit Court

LC No. 07-724630-CK

Before: Murray, P.J. and Markey and Borrello, JJ.

PER CURIAM.

Plaintiff appeals by right the circuit court's order granting summary disposition to defendant. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Plaintiff had a history of contracting with defendant for delivery of construction materials and services. In October 1998, an incident occurred involving a truck owned by plaintiff, doing business as Levy Co., and a train owned by defendant. Each party maintained that the other was responsible. Plaintiff reports that defendant issued a debit memorandum in 2001, and thereafter stopped paying invoices to offset its alleged losses from damage to its train.

In connection with other contracts, plaintiff, doing business as Clawson Concrete, sued defendant for payment for ready-mix concrete shipped after May 2004. The parties settled that case, and their agreement included a release that comprehensively waived any further claims plaintiff might have against defendant "from the beginning of time," but "with the sole exception of any claim arising out of damage to train equipment, between Ford and a related corporation or entity of Edward C. Levy Co. **that occurred on October 6, 1998 . . . and which is described in Debit Memo . . . dated March 30, 2001**" (bold in the original).

In 2007, plaintiff filed the instant action as a claim for payments due under invoices dating from "2001 and before" in connection with deliveries of "aggregate sand/gravel construction materials to Defendant." Plaintiff sought monetary contract damages plus an accounting. Defendant sought summary disposition pursuant to MCR 2.116(C)(7), on the ground that the release barred the claim. The trial court agreed and granted the motion.

On appeal, plaintiff asserts first that the allegations in the complaint were clearly excluded from the release and settlement agreement and alternatively argues that summary

disposition was improper because the pertinent exclusion was reasonably susceptible to more than one interpretation.

We review a trial court's decision on a motion for summary disposition *de novo*. *Terlecki v Stewart*, 278 Mich App 644, 649; 754 NW2d 899 (2008). When deciding a motion under MCR 2.116(C)(7), the trial court must accept as true the allegations of the complaint unless contradicted by the parties' documentary submissions. *Patterson v Kleiman*, 47 Mich 429, 434 n 6; 526 NW2d 879 (1994). When the material facts are undisputed, whether a claim is barred by a legal defense becomes a question of law. *Terlecki, supra*.

Plaintiff insists that Levy Co. and Clawson Concrete are wholly separate corporations, so that Clawson's settlement and release should not affect the former. However, the exception set forth in the release addressing the train equipment controversy between the parties clearly indicates that Levy and Clawson are related corporate entities. Moreover, defendant's exhibits, which plaintiff nowhere challenges, clearly indicate that Levy, Clawson, and certain other entities merged into a single corporation, that being plaintiff, in 1988, and that "Clawson Concrete Co." thereafter operated as an assumed name of plaintiff. The trial court thus correctly recognized Clawson as "a related corporation or entity" of plaintiff and bound by the release.

Plaintiff argues that defendant should not benefit from the release because defendant did not sign it. But plaintiff did not challenge the effectiveness of the release below on that ground, and so that issue was not preserved. Further, performance under an agreement indicates the parties' assent even apart from the question of signatures. See *NBD-Sandusky Bank v Ritter*, 437 Mich 354, 364-365; 471 NW2d 340 (1991) (dating a loan contract and security agreement from when it was performed instead of when it was signed); *Kraus v Gerrish Twp*, 205 Mich App 25, 45; 517 NW2d 756 (1994) ("an acceptance sufficient to create a contract arises where the individual to whom an offer is extended manifests an intent to be bound by the offer, and all legal consequences flowing from the offer, through voluntarily undertaking some unequivocal act sufficient for the purpose"), *aff'd in part and remanded in part on other grounds sub nom Kraus v Dep't of Commerce*, 451 Mich 420 (1996). Moreover, the release and settlement agreement plainly bear a signature attributable to plaintiff. MCR 2.507(G) provides: "An agreement . . . between the parties . . . respecting the proceedings in an action, subsequently denied by either party, is not binding unless it was made in open court, or unless evidence of the agreement is in writing, subscribed by the party against whom the agreement is offered" Plaintiff's unchallenged signature thus brings the release and settlement agreement to bear against plaintiff. For these reasons, we reject plaintiff's arguments relating to any lack of defendant's signature on the release.

At issue, then, is whether the exception included within the release permits this cause of action. Again, the exception covers "any claim arising out of damage to train equipment" Plaintiff argues that because defendant withheld payment on the invoices at issue under a claim of right stemming from the train incident, plaintiff's claim for payment on those invoices must be considered an inherent part of that controversy.

But, nowhere in plaintiff's complaint does it acknowledge the incident resulting in damaged train equipment, much less assert plaintiff's lack of responsibility in the matter. Nor was there any mention, or copy appended, of the debit memo alleged to express defendant's intention to withhold payments on the invoices as a means of redressing damages suffered in the

train incident. As pleaded, plaintiff brought a straightforward claim for contract damages. Consequently, plaintiff's protestations concerning precisely why defendant did not pay as demanded were not in issue below, but constituted instead an incidental matter of, at best, some evidentiary interest. Plaintiff's failure below to establish a direct link between the train incident, which remained actionable, and its claim for contract damages, which on its face clearly comes under the terms of the release, is fatal to the contract claim. For these reasons, we conclude that the trial court properly granted defendant's motion for summary disposition.

We affirm. As the prevailing party, defendant may tax costs pursuant to MCR 7.219.

/s/ Christopher M. Murray

/s/ Jane E. Markey

/s/ Stephen L. Borrello