FILED
01/08/2019
Ed Smith
CLERK OF THE SUPREME COURT
STATE OF MONTANA
Case Number: DA 18-0231

DA 18-0231

IN THE SUPREME COURT OF THE STATE OF MONTANA

2019 MT 5N

KELLY HIRSCH,

Plaintiff and Appellant,

V.

CITY OF CHOTEAU, by and through the City Council and Mayoral office,

Respondent and Appellee.

APPEAL FROM: District Court of the Ninth Judicial District,
In and For the County of Teton, Cause No. DV 17-007
Honorable John W. Parker, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Kelly Hirsch, self-represented, Choteau, Montana

For Appellee:

Jordan York Crosby, Andrew T. Newcomer, Ugrin Alexander Zadick, P.C.,
Great Falls, Montana

Submitted on Briefs: December 5, 2018

Decided: January 8, 2019

Filed:

/S/ BOWEN GREENWOOD
Clerk

Justice Jim Rice delivered the Opinion of the Court.

¶1 Pursuant to Section I, Paragraph 3(c), Montana Supreme Court Internal Operating Rules, this case is decided by memorandum opinion and shall not be cited and does not serve as precedent. Its case title, cause number, and disposition shall be included in this Court's quarterly list of noncitable cases published in the Pacific Reporter and Montana Reports.

¶2 Plaintiff Kelly Hirsch (Hirsch) appeals the order of the District Court granting summary judgment to Defendant City of Choteau (City) and dismissing his complaint alleging wrongful discharge from employment.

¶3 Hirsch was the Public Works Director for the City. In December 2015, shortly after returning from a 30-day suspension related to his job performance, Hirsch was fired by the City's mayor, Jack Conatser, for inappropriate workplace behavior. Hirsch retained attorney Patrick Flaherty, who filed a grievance with the City on Hirsch's behalf, challenging the discharge and asserting procedural and due process violations. On March 9, 2016, the Choteau City Council, while not concluding Hirsch's discharge was wrongful, nonetheless granted Hirsch's due process claim. The Council reinstated his employment status to paid administrative leave, paid back pay to Hirsch, ordered Conatser to provide a letter outlining why discipline, including termination, was appropriate, and scheduled a due process hearing on March 17, 2016. The purpose of this hearing was to allow Hirsch to present evidence or a defense regarding the Mayor's proposed discipline. Flaherty requested a continuance on Hirsch's behalf, but Jordan Crosby, the City's attorney

for this matter, informed Flaherty his request could only be granted by the Council, and would be considered at the upcoming hearing.

¶4 On March 16, 2016, the day before the hearing, Crosby conveyed to Flaherty an offer to resolve Hirsch's claims against the City. As stated in his Amended Complaint, Hirsch met with Flaherty on March 16th to discuss the City's settlement offer. Though initially reacting unfavorably to the offer, Hirsch acknowledged that when Flaherty called him later to inquire whether he wanted to accept the City's offer, Hirsch responded, "yeah, whatever, we're done."[1] Flaherty then called Crosby that afternoon to advise her that Hirsch had accepted the offer. Following the phone call, Flaherty sent Crosby an e-mail confirming the terms of the parties' settlement agreement, and indicating that he and Hirsch would not appear for the due process hearing before the Council the following day. Crosby's e-mailed response confirmed her understanding that "the matter has been resolved, subject to the Council's ratification" at the hearing, and outlined the terms of the agreement, as follows:

- Six months wages (inclusive of the back wages previously discussed);
- Mr. Hirsch will resign effective immediately;
- The City will not contest unemployment [benefits] and if a response is required, will merely respond as follows: "The City does not contest this application"
- [Crosby] will prepare a standard MDTL employment release, modified to conform to the facts of this matter for a release of all claims and to include a non-disparagement and a no re-hire clause

[1] This quote is taken from Hirsch's Amended Complaint.

Flaherty further communicated with Crosby regarding attorney's fees, but made no further mention of the parties' settlement agreement.

¶5 The next morning, before the scheduled hearing, Hirsch notified Flaherty that he would not accept the settlement agreement. Flaherty and Hirsch separately notified the City of this decision, and Flaherty withdrew from Hirsch's representation. The Council proceeded with the hearing and ratified the settlement agreement, including acceptance of Hirsch's resignation.

¶6 Hirsch filed suit against the City for wrongful discharge on March 17, 2017. The District Court ordered Hirsch to file an Amended Complaint containing a more definite statement pursuant to M. R. Civ. P. 12(e). In response, the City raised an affirmative defense of accord and satisfaction, arguing that Hirsch's claims were barred because the settlement agreement was enforceable, and moved for summary judgment "on the grounds that the City has already reached an enforceable and binding settlement with Hirsch to resolve the matters alleged in his Amended Complaint." The District Court conducted a hearing on the motion, in which Crosby appeared on behalf of the City and Hirsch appeared without representation.

¶7 At the hearing, Hirsch made statements that led to the District Court's ruling, and which serve to frame the arguments he makes on appeal. First, Hirsch stated that when Flaherty called him on March 16, 2016, to ask if he would accept the settlement offer, he had replied, "okay, yeah, whatever." Hirsch explained that Flaherty then called the City "to say that we took their deal," but "after thinking about it overnight, you know, I changed

my mind." In response, the District Court said to Hirsch, "it looks like you've made some admissions there had been an agreement," to which Hirsch responded, "Yeah, I've never denied that." Hirsch continued by arguing, "There was no binding enforceable settlement . . . I was forced into a take it or leave it quick decision, under duress." When the District Court asked Hirsch if there were any genuine issues of material fact related to the settlement agreement, Hirsch answered, "Well, the genuine issue of the material facts, of this case, you know, is my statement of duress."

¶8 Hirsch explained that the reason for his duress was that the City had prevented him from returning to his government office to retrieve files, documents, and personal property he needed to prepare for the hearing scheduled two days later. When the District Court asked, "you're talking about duress based upon the timing the hearing was set?," Hirsch denied this was the basis of his duress claim, but rather "the duress was that I could not collect evidence or retrieve any evidence for the hearing." The District Court asked whether he had asked Flaherty to retrieve anything from the government office in preparation for the hearing, and Hirsch replied, "I didn't ask the counsel about that, no."

¶9 The District Court granted the City's motion, reasoning, "Plaintiff acknowledges that he [] agreed to settle . . . . Plaintiff does not argue that at the time the agreement was accepted that he or his counsel made his acceptance conditional nor manifested an intention not to be bound. While Plaintiff argues that he did not fully support the settlement agreement he did not manifest an intent not to be bound until after the agreement had been accepted." Regarding Hirsch's duress claim, the District Court reasoned that Hirsch had

an adequate remedy under discovery rules to obtain information from his office, which was not pursued, and that Hirsch "did not allege a set of facts that could constitute duress."[2]

¶10 We review de novo a district court's ruling on summary judgment, applying the same criteria as the district court under M. R. Civ. P. 56. *Pilgeram v. GreenPoint Mortg. Funding, Inc.*, 2013 MT 354, ¶ 9, 373 Mont. 1, 313 P.3d 839. Summary judgment is appropriate "if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." *Feller v. First Interstate Bancsystem, Inc.*, 2013 MT 90, ¶ 16, 369 Mont. 444, 299 P.3d 338 (citing M. R. Civ. P. 56(c)(3)). We construe all facts in the non-movant's favor when determining whether a material fact issue exists and consider any findings of fact made by a district court to determine whether they are clearly erroneous. *Pilgeram*, ¶¶ 9, 12. Once the moving party demonstrates the absence of any issue of material fact, the burden of proof shifts and the non-movant "must establish with substantial evidence, as opposed to mere denial, speculation, or conclusory assertions, that a genuine issue of material fact does exist or that the moving party is not entitled to prevail under the applicable law." *Semenza v. Kniss*, 2008 MT 238, ¶ 18, 344 Mont. 427, 189 P.3d 1188 (citation omitted).

---

[2] The District Court also provided a discussion of what makes a settlement agreement enforceable and explained how those factors were present here. *See Hetherington v. Ford Motor Co.*, 257 Mont. 395, 399, 849 P.2d 1039, 1042 (1993) (holding that a party will be bound to a settlement agreement in the absence of "conditions or manifestations of conditional intent"); *Lockhead v. Weinstein*, 2003 MT 360, 319 Mont. 62, 81 P.3d 1284 (holding that a party is bound to an agreement if he accepts it unconditionally, without manifesting an intent not to be bound).

¶11 Though not clearly identified as separate issues, Hirsch makes several categorical arguments on appeal that challenge the enforceability of the settlement agreement, and the District Court's entry of summary judgment. First, Hirsch makes several claims against his counsel, to the effect that Flaherty was acting against Hirsch's wishes, stating, for example, that "Flaherty knew Hirsch wished to defend himself against the false accusations of Mayor Jack Conatser," and "Flaherty quit the next morning without attending the hearing for which he had been hired to attend." However, Hirsch did not make these arguments against his counsel before the District Court and, thus, we decline to consider them further. *Park Cnty. Stockgrowers Ass'n v. Mont. Dep't of Livestock*, 2014 MT 64, ¶ 10, 374 Mont. 199, 320 P.3d 467 ("[A] party who fails to raise a claim in the district court is barred from raising the claim for the first time on appeal.").[3]

¶12 About the agreement itself, Hirsch argues his answer to Flaherty's question about accepting the agreement—"yeah, whatever, we're done," was not an unconditional acceptance of the agreement, and that the agreement did not express sufficiently clear terms to technically constitute a settlement and with which he could agree. However, we have held that the essential terms of a settlement agreement are the amount of settlement and the release of all claims. *Murphy v. Home Depot*, 2012 MT 23, ¶ 11, 364 Mont. 27, 270 P.3d

[3] The District Court did note to Hirsch, on another issue, that "a disagreement between you and your attorney, would be a different legal issue that would have to be pursued in a different way." On the issue of authority, Hirsch argued to the District Court that Flaherty had acted without authority, and the District Court ruled that, "[n]either party disputes that Plaintiff directed his attorney to negotiate and then agree to the settlement agreement. Flaherty had actual authority to enter into a settlement agreement, which he did." On appeal, Hirsch makes a couple brief references to the idea that Flaherty acted without authority, but does not offer a factual record to demonstrate the District Court's ruling was in error on this point.

72 (holding that no agreement was reached because the parties' e-mails demonstrated a disagreement "as to which claims were to be settled"). Here, in contrast to *Murphy*, both parties agreed to release all claims. After the phone call verbally accepting the agreement, Flaherty sent a confirmation e-mail outlining the terms of the agreement, including "6 months of pay" and "the typical MDTLA Employment Release," plus instructions for the City to "[f]eel free to correct my confirmation." In response, the City's attorney confirmed "[s]ix months wages" and "a standard MDTL employment release," which she clarified would include "a release of all claims." Thus, both the amount of settlement and release of claims were clearly made a part of the agreement. Although the agreement was made subject to the Council's ratification, no further conditions as to the terms were made or reserved by the parties, and nothing further was contingent upon Hirsch.

¶13 Hirsch argues the District Court violated statute by failing to include the specific dollar amount of the settlement in its judgment. However, while Hirsch provides no authority to support his contention that this invalidates the settlement agreement itself, the amount of the settlement was not at issue in the litigation before the District Court, only the validity of the agreement in defense to Hirsch's wrongful discharge claim.

¶14 Finally, Hirsch raised duress as the only remaining issue of material fact, arguing he suffered duress when the City prevented him from re-entering his City office to retrieve property to assist in his defense at the due process hearing. Duress includes the "unlawful detention of the property of any such person." Section 28-2-402(2), MCA. However, Hirsch acknowledged never asking his attorney to retrieve any of this property for purposes

of the hearing, or seeking the property through discovery. Further, nothing in the record demonstrates that the City unlawfully restricted Hirsch from accessing his property.

¶15 We have determined to decide this case pursuant to Section I, Paragraph 3(c) of our Internal Operating Rules, which provides for memorandum opinions. In the opinion of the Court, the case presents a question controlled by settled law or by the clear application of applicable standards of review. The District Court's interpretation and application of the law were correct.

¶16 Affirmed.

/S/ JIM RICE

We concur:

/S/ MIKE McGRATH
/S/ INGRID GUSTAFSON
/S/ JAMES JEREMIAH SHEA
/S/ DIRK M. SANDEFUR