

Opinion issued December 1, 2011.



In The
Court of Appeals
For The
First District of Texas

NO. 01-10-00764-CV

KENNETH YELLOWE, Appellant

V.

VERN WILSON, BASHIR ADABA, AND LERE LADEJI, Appellee

**On Appeal from the 281st District Court
Harris County, Texas
Trial Court Case No. 2006-55839**

MEMORANDUM OPINION

Kenneth Yellowe appeals the trial court's grant of a motion for summary judgment in favor of Vern Wilson, Bashir Abada, and Lere Ladeji (collectively, the employees). The employees sued Global Energy, Inc., and Global Gas and

Refining Limited, alleging breach of an employment contract and Yellowe for tortious interference with contract. After the parties made a settlement agreement, the employees filed an amended petition asserting that Yellowe, Global Energy, Inc., and Global Gas and Refining Limited breached the settlement agreement. The trial court rendered summary judgment in favor of the employees for recovery of \$240,000.00 in damages, attorney's fees, and pre- and post-judgment interest from Yellowe, Global Energy, Inc., and Global Gas and Refining Limited. On appeal, Yellowe¹ contends that the trial court erred by refusing to grant his motion for summary judgment asserting a limitations defense to the employees' tortious interference claim and by granting the employees' motion for summary judgment on their claim for breach of the settlement agreement. We conclude the trial court did not err by concluding the settlement agreement is a valid and enforceable contract or by declining to reach Yellowe's motion for summary judgment but did err by granting the employees' summary judgment. Accordingly, we reverse and remand.

Background

The employees worked for Global Energy, Inc. and its subsidiary Global Gas and Refining Ltd. under employment contracts. In their employment contracts, the employees were to receive severance payments for a period of ten

¹ Global Energy, Inc., and Global Gas and Refining Limited have not appealed.

years upon their termination. On December 31, 2003, Abada was terminated. Wilson and Ladeji were terminated on April 30, 2004. The employees received their severance payments after their terminations until the payments were discontinued by an order from Yellowe, who was also employed by Global Energy, Inc. at the time. The employees received their last payment on July 31, 2004. The employees filed a breach of contract claim against Global Energy, Inc. and Global Gas and Refining Ltd. (collectively “Global”), and a tortious interference with contract claim against Yellowe. In their original petition, the employees claimed that Global breached their employment contracts by not paying the agreed severance payments and that Yellowe tortiously interfered with their employment contracts with Global by discontinuing the severance payments.

Yellowe filed a motion for summary judgment asserting the employees’ claims were barred by limitations. A hearing on the motion was held and the trial court took the motion under advisement. A few days after the summary judgment hearing, Yellowe and Global reached a mediated settlement agreement with the employees that stated the sum of \$240,000.00 was “to be paid by or on behalf of defendants within 90 days of the date of the memorandum of settlement.”

In the following months, Yellowe filed several motions with the trial court, asking for the court to rule on his motion for summary judgment. The employees amended their petition to add a breach of contract claim based on the settlement

agreement and filed a motion for summary judgment based on breach of that contract. After a summary judgment hearing, the trial court granted the employees' motion for summary judgment for breach of the settlement agreement and rendered a final judgment against Yellowe and Global. The trial court ordered Yellowe and Global to pay to the employees the \$240,000.00 sum agreed upon in the settlement agreement, plus pre- and post-judgment interest and attorney's fees. Yellowe appealed the decision of the trial court. Global does not challenge the trial court's decision.

Standard of Review

We review a trial court's summary judgment de novo. *Travelers Ins. Co. v. Joachim*, 315 S.W.3d 860, 862 (Tex. 2010). When reviewing a summary judgment motion, we must (1) take as true all evidence favorable to the nonmovant and (2) indulge every reasonable inference and resolve any doubts in the nonmovant's favor. *Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 661 (Tex. 2005); *Provident Life & Accident Ins. Co. v. Knott*, 128 S.W.3d 211, 215 (Tex. 2003). In a traditional summary judgment motion, the movant has the burden to show that no genuine issue of material fact exists and that the trial court should grant judgment as a matter of law. TEX. R. CIV. P. 166a(c); *KPMG Peat Marwick v. Harrison Cnty. Hous. Fin. Corp.*, 988 S.W.2d 746, 748 (Tex. 1999).

Validity of the Settlement Agreement

In his third issue, Yellowe contends that the settlement agreement is ambiguous and, because the parties disagree on the meaning of the agreement, there was no meeting of the minds necessary to form a valid enforceable contract.

A settlement agreement is a contract between parties, a breach of which gives rise to a cause of action for breach of contract. *Padilla v. LaFrance*, 907 S.W.2d 454, 461 (Tex. 1995). To be entitled to summary judgment on this claim, the employees were required to prove, as a matter of law, the following essential elements: (1) the existence of a valid contract; (2) performance or tendered performance by the plaintiff; (3) breach of the contract by the defendant; and (4) damages sustained as a result of the breach. *See B & W Supply, Inc. v. Beckman*, 305 S.W.3d 10, 16 (Tex. App.—Houston [1st Dist.] 2009, pet. denied). Parties form a valid and enforceable contract when the following elements are present: (1) an offer, (2) an acceptance in strict compliance with the terms of the offer, (3) a meeting of the minds, (4) each party's consent to the terms, and (5) the execution and delivery of the contract with the intent that it be mutual and binding. *See Winchek v. Am. Express Travel Related Servs. Co.*, 232 S.W.3d 197, 202 (Tex. App.—Houston [1st Dist.] 2007, no pet.); *Hubbard v. Shankle*, 138 S.W.3d 474, 481 (Tex. App.—Fort Worth 2004, pet. denied). “Meeting of the minds” describes the mutual understanding and assent to the agreement regarding the subject matter

and the essential terms of the contract. *Potcinske v. McDonald Prop. Invs., Ltd.*, 245 S.W.3d 526, 530 (Tex. App.—Houston [1st Dist.] 2007, no pet.).

Yellowe contends that there was no meeting of the minds in this case, because the settlement agreement is ambiguous. Whether a contract is ambiguous is a question of law for the court. *J.M. Davidson, Inc. v. Webster*, 128 S.W.3d 223, 229 (Tex. 2003). A contract is not ambiguous if its wording permits a definite or certain legal meaning. *DeWitt Cnty. Elec. Coop., Inc. v. Parks*, 1 S.W.3d 96, 100 (Tex. 1999). “[A]n ambiguity does not arise simply because parties advance conflicting interpretations of the contract.” *Wal-Mart Stores, Inc. v. Sturges*, 52 S.W.3d 711, 728 (Tex. 2001); *see also DeWitt Cnty. Elec. Coop.*, 1 S.W.3d at 100. We construe the parties’ intentions as expressed in the document, considering the entire writing and attempting to harmonize and give effect to all of the contract’s provisions with reference to the whole agreement. *Frost Nat’l Bank v. L & F Distributions*, 165 S.W.3d 310, 311–12 (Tex. 2005).

Yellowe contends that the following provisions of the agreement create an ambiguity:

Plaintiffs Vern Wilson, Bashir Adaba, and Lere Ladeji agree to settle any all claims against Global Energy, Inc., Global Gas and Refining Limited a/k/a Global Energy Refining Limited and Kenneth Yellowe for the sum of \$240,000.00, said sum to be paid by or on behalf of defendants within 90 days of the date of this Memorandum of Settlement.

This settlement is secured in an Agreed Judgment in favor of plaintiffs and against Global Energy, Inc. (but no other defendants), in the amount of \$240,000.00.

Yellowe contends that the latter provision, in which the judgment is secured only by an agreed judgment against Global Energy, Inc., creates an ambiguity as to whether only Global Energy, Inc., as opposed to Yellowe, is required to pay the \$240,000.00 sum required by the settlement agreement. We disagree.

The plain language of the agreement states the employees agree to settle any and all claims against Yellowe and the other defendants for the sum of \$240,000.00. The payment must be made “by or on behalf of” Yellowe and the other defendants within 90 days. The provision regarding the agreed judgment does not address which parties are required to make the \$240,000.00 payment; rather, it expressly states that the payment is *secured* by an agreed judgment against Global Energy, Inc. The fact that only one party provided security does not limit the preceding provision describing who must make the payment and when. The two provisions set forth separate, distinct duties and are independent. We conclude that the provisions identified by Yellowe do not create an ambiguity and that the trial court correctly found that the settlement agreement was valid and enforceable. *See Sturges*, 52 S.W.3d at 728 (parties’ disagreement does not create ambiguity); *see also DeWitt Cnty. Elec. Coop.*, 1 S.W.3d at 100 (contract not ambiguous if language of contract permits definite meaning).

Yellowe's Motion for Summary Judgment

In his first issue, Yellowe contends that he preserved for appeal his complaint that the trial court did not rule on his motion for summary judgment concerning his affirmative defense of limitations to the lawsuit originally brought by the employees. In his second issue, he contends that the trial court erred by failing to grant his motion.

We need not decide Yellowe's first issue. Even if Yellowe preserved this complaint for appeal, the trial court properly determined that a valid and enforceable settlement agreement existed and that the underlying case was settled. Thus, there is no live controversy regarding the employees' claims under the employment contracts. *See Bd. of Adjustment v. Wende*, 92 S.W.3d 424, 427 (Tex. 2002) (holding that when parties have settled dispute, there is no longer a live controversy between them, and case is moot); *Williams v. Lara*, 52 S.W.3d 171, 184 (Tex. 2001) (stating if controversy ceases to exist, case becomes moot and "[i]f a case becomes moot, the parties lose standing to maintain their claims."). A court is prohibited from deciding a moot case. *See Valley Baptist Med. Ctr. v. Gonzalez*, 33 S.W.3d 821, 822 (Tex. 2000). Because it found that the employees' claims under the employment contracts were rendered moot by the settlement agreement, the trial court did not commit error by declining to reach the merits of

the employees' claims or Yellowe's affirmative defenses to those claims. *See id.*; *see also Williams*, 52 S.W.3d at 184.

Summary Judgment on the Settlement Agreement

In his third issue, Yellowe also asserts that the trial court erred by granting summary judgment because there is no evidence to support the element of breach of the settlement agreement. The employees offered evidence supporting this element in an affidavit from Wilson. Wilson averred that "Defendants have wholly failed to meet any of their obligations under the [settlement agreement]." Yellowe objected to this statement as conclusory, and the trial court sustained that objection.

As stated above, the employees, to be entitled to summary judgment on their claim for breach of the settlement agreement, were required to establish a breach of the agreement—that is, that the sum of \$240,000.00 had not been paid "by or on behalf of" Yellowe and Global. *See B & W Supply, Inc.*, 305 S.W.3d at 16. The only evidence the employees submitted in support of this element was the single sentence in Wilson's affidavit. Because the trial court sustained the objection to this evidence, the record contains no evidence that the employees were not paid \$240,000.00. Accordingly, we conclude that summary judgment was improper.

Conclusion

We hold that the trial court properly found the settlement agreement was unambiguous, valid, and enforceable. We further hold that the trial court did not err in declining to rule on Yellowe's motion for summary judgment. However, we hold that the trial court erred by granting summary judgment on the employee's breach of the settlement agreement claim because no summary judgment evidence supports the element of breach. We reverse the judgment of the trial court and remand this cause.

Rebeca Huddle
Justice

Panel consists of Chief Justice Radack and Justices Bland and Huddle.