STATE OF MINNESOTA
IN COURT OF APPEALS
A09-1018

Carley Foundry, Inc., et al.,
Appellants,

vs.

CBIZ BVKT, LLC, et al.,
Respondents.

Filed April 6, 2010
Affirmed
Shumaker, Judge

Ramsey County District Court
File No. 62-CV-08-9791

Robert B. Hartley, Jr., Hartley Law Office, Columbia Heights, Minnesota (for appellants)

Peter A. Koller, Thomas J. Shroyer, Moss & Barnett, P.A., Minneapolis, Minnesota (for respondent CBIZ BVKT, LLC)

Dale M. Wagner, Bassford Remele, P.A., Minneapolis, Minnesota (for respondent Barton)

Considered and decided by Klaphake, Presiding Judge; Peterson, Judge; and Shumaker, Judge.

U N P U B L I S H E D O P I N I O N

SHUMAKER, Judge

The appellants contend that the district court erred in granting summary judgment on the ground that the respondents had been released from future claims, including the type asserted in this litigation. We affirm.

FACTS

This is an appeal from a summary judgment dismissing the appellants' claims. The district court ruled that, in a prior related lawsuit, the appellants had released the respondents from certain future claims, including those asserted in this action. The appellants contend that genuine fact issues exist regarding two releases from the prior litigation.

Claiming damages caused by erroneous tax advice relating to a tax-shelter device known as a "Benistar 419 Plan," appellants Carley Foundry, Inc. and Michael F. Carley, its president and sole shareholder (collectively "Carley"), sued a management company, a plan administrator, and a securities company in 2005. One of those defendants impleaded respondent Thomas L. Barton, a certified public accountant employed by respondent CBIZ BVKT LLC, which was also joined in the action.

It is not clear whether Carley asserted a direct claim against Barton and CBIZ, but, on May 16, 2006, Carley settled any claims it might have had against Barton and CBIZ and gave to them a *Pierringer* release. That release contained broad release terms reaching future claims, whether known or unknown, foreseen or unforeseen.

On July 20, 2006, Carley settled with the management company, the plan administrator, and the securities company. Included in a written release were not only those three companies but CBIZ and Barton as well. The release language in this document was narrower in scope than that of the *Pierringer* release, covering claims Carley "may have in the future, and/or which were, should have or could have been brought in connection with the Litigation," namely with *that* case.

In March 2007, Carley sought advice from Barton and CBIZ on a strategy for avoiding taxation of settlement proceeds from the prior lawsuit. Barton gave such advice, but it ultimately proved erroneous, and Carley brought the instant action against Barton and CBIZ. When Barton and CBIZ asserted the *Pierringer* release as a defense to the lawsuit, Carley responded that the second release had effectively cancelled the *Pierringer* release and that the narrower language of the second release did not preclude future claims, such as this, which were not connected with the prior litigation.

In the summary judgment proceeding, the parties did not disagree as to the terms of the respective settlements and releases. But Carley contended, and now contends, that the second release "supplanted" the first, or that at least there is a genuine fact issue as to that contention. The district court disagreed.

D E C I S I O N

Carley argues on appeal that summary judgment was inappropriate because, by entering the second settlement, the parties "were mutually agreeing to cancel the *Pierringer* Release"; that the second settlement, which Carley characterizes as a "Global Settlement," "constituted a complete integration for all the parties to the Litigation"; that,

by entering into the second settlement, Barton and CBIZ waived the *Pierringer* release; and that the district court misinterpreted the phrase "and/or" in the second release.

"We review de novo whether a genuine issue of material fact exists," and "whether the district court erred in its application of the law." *STAR Ctrs., Inc. v. Faegre & Benson, L.L.P.*, 644 N.W.2d 72, 77 (Minn. 2002)

Carley does not appear to contend that the *Pierringer* release suffers from a contractual infirmity that would make it invalid, or that its terms are insufficient to effect the release of Carley's claims in the instant action. Rather, Carley argues that the *Pierringer* release simply no longer exists because the second release was substituted for it.

Parties to a contract may cancel that contract if they agree to do so. *McQuarrie v. Waseca Mutual Ins. Co.*, 337 N.W.2d 685, 687 (Minn. 1983). If a party disputes the proposition that there was an agreement to cancel a contract, a court must attempt to ascertain the parties' intent: *See id.* ("Whether such a recession has been accomplished depends on the intent of the parties as evidenced by their acts."). As Carley acknowledges, mutual consent to cancel a contract must be clearly expressed and the parties' acts thereafter must be positive, unequivocal, and inconsistent with the continued existence of that contract. *Desnick v. Mast*, 311 Minn. 356, 365, 249 N.W.2d 878, 884 (1976).

One definitive act that would evince the contracting parties' mutual intent to rescind their contract is the creation of a substitute contract that expressly refers to and rescinds the prior contract. Although Carley claims that the second release was just such

a substitute contract, there is no language of rescission in it and it makes neither an express nor an implied reference to the *Pierringer* release. Because the parties did not clearly express their alleged intent to rescind the *Pierringer* release, we must necessarily infer their intent from the documents and the parties' conduct respecting those documents. Ordinarily, an inference is a jury issue, unless there is but one reasonable inference to be drawn. *See Smith v. Kahler Corp., Inc.*, 297 Minn. 272, 279, 211 N.W.2d 146, 151 (1973) (stating that fact issues are typically for the jury "except when the facts are undisputed and are reasonably susceptible of but one inference").

Carley argues that CBIZ and Barton demonstrated their intent to cancel the *Pierringer* release by participating in the second settlement. However, there is no evidence that CBIZ participated in the second settlement. That company was not a signatory to the second settlement agreement, and there were no facts before the district court from which to infer that CBIZ was an actual party to the second settlement and release. Barton did sign the second agreement. But signing or failing to sign the second settlement agreement is not per se determinative of the issue of rescission.

Keeping in mind that the law requires the expression of the parties' intent to rescind their contract to be clear, positive, unequivocal, and inconsistent with the existence of the prior contract, the only rational inference to be drawn comes from the language of the respective documents. If Barton and CBIZ intended to abandon the *Pierringer* release in favor of the second release, they would thereby be giving up a broad, clear, and final release of future claims and substituting a far narrower release of future claims. Although such conduct would be inconsistent with the continued existence

of the prior contract, it would not be rationally so. Nothing in the record shows any benefit to CBIZ or Barton, or any elimination or reduction of an obligation, that would explain why they would give up broad protection in favor of narrow protection. It would be unreasonable for the court to infer an irrational rescission, and such an inference cannot create a *genuine* fact issue.

Carley also argues that CBIZ acknowledged the substitution of the second release in its memorandum in support of its motion to dismiss the case when it stated that the second release "effectively supplanted the 5/12/06 Settlement Agreement . . . ." CBIZ contends that its attorneys simply selected a poor word to express their point. Whether or not the use of "supplanted" was a misstatement, we cannot conclude that the use of this single word by attorneys for a party had the legal effect that Carley urges, when the entire context of the case reasonably supports only the contrary position.

Finally, on the issue of rescission, Carley cites as authority *Wetter v. Karels*, 172 Minn. 539, 216 N.W. 248 (1927). The case involved two agreements, one superseding the other. But the parties formally "discharged" one of them in writing. We have no such written discharge here, and *Wetter* has little bearing on the dispositive issues of this case.

Carley next argues that the second settlement agreement and release constituted "a complete integration for all parties to the Litigation," and that it was intended to be "a final expression of the terms of settlement . . . ." The flaw in this contention is that Barton and CBIZ had already received a final expression of their settlement through the *Pierringer* release, which provided that it "shall constitute the entire accommodation and

compromise agreement of the PARTIES with respect to the matters contained therein." There is nothing in the record to show that the second agreement added any settlement terms or changed any terms of the *Pierringer* release. The *Pierringer* release appears to have left no loose ends that needed to be dealt with in the later agreement.

The proper reading of the two releases is that they were separate and distinct contracts. The first fully and finally released Barton and CBIZ and the second released others. Naming Barton and CBIZ in the second release was surplusage.

Carley contends that even if the *Pierringer* release was valid and enforceable, CBIZ and Barton waived that release by becoming parties to the second release. We note first that CBIZ did not become a party to the second release; thus, this argument cannot apply to it. Barton did sign the second settlement agreement but, as we have discussed, the mere signature does not show an intention to abandon the *Pierringer* release. The only rational inference to be drawn is that, whatever Barton's reason for signing the second agreement, he did not intend to give up his broad protection in favor of a much narrower protection.

Finally, Carley argues that the district court erroneously "adopted an interpretation of the phrase 'and/or' to mean 'the one or the other or both.'" In the "release" portion of the second agreement, the released claims are those that the parties "now have or may have in the future, and/or which were, should have or could have been brought in connection with the Litigation." Because of our holding that the *Pierringer* release was not superseded by the second release and instead remained valid and legally effective, the

concern over "and/or" is not dispositive. Nevertheless, it is an issue on appeal and it deserves some comment.

The phrase "and/or" is semantically and logically contradictory. A thing or situation cannot be simultaneously conjunctive and disjunctive. Laypersons often use the phrase and, surprisingly, lawyers resort to it from time to time. It is an indolent way to express a series of items that might exist in the conjunctive, but might also exist in the disjunctive. It is a totally avoidable problem if the drafter would simply define the "and" and the "or" in the context of the subject matter. Or the drafter could express a series of items as, "A, B, C, and D together, or any combination together, or any one of them alone." If used to refer to a material topic, as here, the expression "and/or" creates an instant ambiguity. Furthermore, as one legal-writing authority noted, a bad-faith reader of a document can pick whichever one suits him—the "and" or the "or." Bryan A. Garner, *Looking for Words to Kill? Start with These*, STUDENT LAW., Sept. 2006, at 12-14. At the very least, this sloppy expression can lead to disputes; at the worst to expensive litigation.

Affirmed.