STATE OF MINNESOTA
IN COURT OF APPEALS
A10-1055

Keith Baker,
Appellant,

vs.

North American Capital Resources, LLC,
d/b/a Sunbelt Business Brokers, et al.,
Respondents.

Filed January 11, 2011
Affirmed; motions denied
Crippen, Judge[*]

Hennepin County District Court
File No. 27-CV-06-15730

Allen H. Gibas, Allen H. Gibas, P.A., Minneapolis, Minnesota (for appellant)

Christopher M. Daniels, David J. Wymore, Jesse Hersch Kibort, Daniels & Wymore, PLLC, Plymouth, Minnesota (for respondents)

Considered and decided by Peterson, Presiding Judge; Worke, Judge; and Crippen, Judge.

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

CRIPPEN, Judge

Challenging the district court's judgment enforcing a settlement agreement, appellant contends that the court erred in determining the parties' objective intent.

[*] Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

Because there is merit in the district court's determination of the unambiguous meaning of the settlement agreement, we affirm.

FACTS

As finally submitted to the district court, appellant Keith Baker's complaint asserted a cause of action against respondents Maxann, LLC, and North American Capital Resources, LLC (NACR), two commercial brokers doing business as Sunbelt Business Brokers, claiming cause for recovery of $40,000 earnest money paid on a failed real estate purchase transaction.

On September 3, 2009, appellant proposed a settlement that provided only two forms of relief for appellant: (1) the expectation of payment from Maxann; and (2) the Minn. R. Civ. P. 68 offer for judgment against NACR. Respondents accepted appellant's offer on September 8, 2009.[1]

Appellant was aware NACR was no longer doing business and had no assets. He claims he intended to seek relief under the Real Estate Education, Research, and Recovery Fund (the fund) if NACR did not have collectable assets. Appellant suggested to the district court that he knew at the time the parties were negotiating the settlement agreement that he would need to sue an individual to recover under the fund.

[1] The district court correctly determined that respondents' inquiry regarding the addition of a confidentiality clause did not constitute a counteroffer, as appellant suggested. When appellant refused to add a confidentiality clause, absent additional payment, respondents immediately withdrew their request in an effort to preserve the settlement agreement. Respondents accepted appellant's offer, as originally proposed, on September 8, 2009.

In the principal part of its judgment enforcing the settlement, the district court determined, "the parties' objective intent was to fully and completely settle this action, which would necessarily include a general and global release of both [respondents]." The court concluded that a demand for relief against individuals did not occur, nor did it appear in the settlement language or otherwise.

The court order necessarily implicates a determination that the settlement agreement unambiguously calls for no more than the two forms of relief stated in the offer and acceptance in September 2009.

D E C I S I O N

Settlement Agreement

We review the district court's decision on a motion to enforce a settlement agreement under an abuse-of-discretion standard. *Johnson v. St. Paul Ins. Co.*, 305 N.W.2d 571, 573 (Minn. 1981) (stating that district court has discretion to vacate settlement stipulation, a decision that will not be reversed unless arbitrary). Generally, the existence of a contract, as well as the terms of that contract, are questions of fact to be determined by the fact-finder. *Bergstedt, Wahlberg, Berquist Assocs., Inc. v. Rothchild*, 302 Minn. 476, 480, 225 N.W.2d 261, 263 (1975). "But where the relevant facts are undisputed, the existence of a contract is a question of law, which this court reviews de novo." *TNT Properties, Ltd. v. Tri-Star Developers, LLC*, 677 N.W.2d 94, 101 (Minn. App. 2004).

As stated in *Voicestream Minneapolis, Inc. v. RPC Props., Inc.*, the district court may enforce a settlement agreement as a matter of law when its terms are clear and

unambiguous and there are no material fact disputes. 743 N.W.2d 267, 272 (Minn. 2008). This standard is similar to the summary judgment standard, which asks if any genuine issues of material fact exist and whether a party is entitled to judgment as a matter of law. *See State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990).

Settling suits without trial is greatly favored, and such agreements will not lightly be set aside by Minnesota courts. *Johnson*, 305 N.W.2d at 573. A settlement is a contract. *Jallen v. Agre*, 264 Minn. 369, 373, 119 N.W.2d 739, 743 (1963). To enforce a settlement, there must be an offer to settle and an acceptance so "it can be said that there has been a meeting of the minds on the essential terms of the agreement." *Id.* If the parties dispute the settlement agreement, the district court may determine what the facts are. *Id.*

As the district court determined, the settlement proposal, as accepted, permitted appellant nothing more than a judgment against NACR in the form of a rule 68 offer for judgment. This conclusion is demanded by favor for the finality of settlement agreements and by appellant's failure to reserve rights for any further judgments.

Appellant specifically asserts that the district court erred by compelling him to sign the settlement agreement as drafted by respondents, including release of individuals, arguing that the court misinterpreted the parties' intent and understanding regarding the release language in the settlement agreement.[2]

[2] Appellant also asserts error in the district court's conclusion that the parties had a general settlement in principle "but had not yet reduced their agreement to writing," contending, rather, that his September 3, 2009, offer and respondents' acceptance on September 8, 2009, constituted the written settlement agreement. This argument is

Whether respondents were entitled to an order compelling appellant to release all claims against respondents' "representatives, employees, subcontractors, independent contractors, owners, members, governors, managers," depends on if the settlement agreement is ambiguous.

"The determination of whether a contract is ambiguous is a question of law." *Current Tech. Concepts, Inc. v. Irie Enters., Inc.*, 530 N.W.2d 539, 543 (Minn. 1995). "In making that determination, a court must give the contract language its plain and ordinary meaning." *Id.* "The cardinal purpose of construing a contract is to give effect to the intention of the parties as expressed in the language they used in drafting the whole contract." *Art Goebel, Inc. v. N. Suburban Agencies, Inc.*, 567 N.W.2d 511, 515 (Minn. 1997). "A contract is ambiguous if, based upon its language alone, it is reasonably susceptible of more than one interpretation." *Id.* If a contract is unambiguous, a party cannot alter its language based on "speculation of an unexpressed intent of the parties." *Metro. Sports Facilities Comm'n v. Gen. Mills, Inc.*, 470 N.W.2d 118, 123 (Minn. 1991).

The district court found that the parties' objective intent was to fully and completely settle this action, which would necessarily include a general and global release of NACR and Maxann. The court appears to have reasoned that the settlement agreement unambiguously calls for this release, as respondent asserts. Appellant agrees

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without merit because both parties explicitly agreed to draft the settlement and mutual release agreement and rule 68 offer for judgment in the following days and weeks, which they did. Also, appellant did not raise this issue before the district court. Generally, this court does not consider matters not argued to and considered by the district court. *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988).

that the settlement agreement is unambiguous, but argues that it calls for the release set forth by appellant, permitting a suit against individuals.

The court's finding is supported by the fact that appellant only sued NACR and never an individual. Since commencement of this action in 2006, appellant has never named an individual in his complaint. In addition, respondents offered to draft a customary release, which was another opportunity for appellant to state his intent to pursue a judgment against an individual. Appellant either could have drafted the agreement himself or communicated his intent to limit the scope of the release, but stated no objection until respondent completed the release document.

Finally, appellant's only offer of parol evidence is his own attorney's affidavit accompanying the motion to the district court that states the sole purpose of the settlement was to finally resolve the lawsuit. The only other evidence that exists is the correspondence in September 2009 where respondents specifically discuss the singular judgment against NACR, in the form of a rule 68 offer for judgment, and the issues surrounding the fact that NACR was no longer doing business. Respondents left it in appellant's hands to determine whether assets could be discovered or if the fund could be used to recover from NACR. In an e-mail to appellant's attorney dated September 1, 2009, respondents' attorney stated:

> To the best of my knowledge [NACR does] not have hard assets, but [NACR] may (I don't know this to be a fact) have other assets, like listing agreements still pending. Although you would have to do the due diligence on the applicability of this, but [the fund] might offer a viable source of funding the judgment if the collectability would become an issue.

Appellant offered no parol evidence that supports an alternative interpretation to the district court's reading of the settlement agreement.

Appellant also argues that he knew before negotiations were finalized that recovery under the fund required a judgment against an individual and respondents were "presumed to know the law and [were] bound at [their] peril to take notice of the public statutes." *See Jenness v. Sch.-Dist. No. 31, Washington Cnty.*, 12 Minn. 448, 450, 12 Gil. 337, 345 (1867). But the parties' state of knowledge is not reflected in the language they chose for their settlement.

This court has held that "an agreement should be upheld where, despite some incompleteness and imperfection of expression, the court can reasonably find the parties' intent by applying the words as the parties must have understood them." *Triple B & G, Inc. v. City of Fairmont*, 494 N.W.2d 49, 53 (Minn. App. 1992). Intent to contract is based upon the objective manifestations of the parties and not upon subjective but unmanifested intent. *Speckel by Speckel v. Perkins*, 364 N.W.2d 890, 893 (Minn. App. 1985) (holding that where attorney offered $50,000 to settle claim but intended to only offer $15,000, the district court "correctly disregarded [the attorney's] protestations that the offer was unintended" and properly disregarded "the fact that the letter contained the unintended amount as the result of a mistake"). Speculation as to hidden and unexpressed intent of parties to a contract cannot alter the unequivocal language of an agreement. *Kuhlmann v. Educ. Publishers*, 71 N.W.2d 889, 893 (Minn. 1955).

In determining the intent of the parties, the district court correctly found no evidence in the record to suggest that appellant communicated a demand during negotiations for anything more than a rule 68 offer for judgment against NACR. If appellant desired to reserve the right to sue an individual, as he claims, he had many opportunities to do so. On this record, especially when read in light of favor for the finality of settlement agreements, the district court was required to conclude that the parties intended the release as drafted by respondents.

District Court's Sua Sponte Enforcement of Settlement

Appellant claims the district court erroneously ordered enforcement of the settlement agreement sua sponte. Choosing instead to enforce the agreement, the court denied appellant's motion to enforce the settlement agreement. Respondents did not bring a motion to enforce the settlement agreement, nor did they assert a breach-of-contract action to enforce the agreement.

A settlement agreement may be enforced by an independent breach-of-contract action or by motion in the action asserting the claims that were settled. *See Voicestream*, 743 N.W.2d at 271 (discussing enforcement of settlement agreements). But the court can enforce the settlement agreement absent a party's motion.

Respondents cite to *Septran, Inc. v. Indep. Sch. Dist. No. 271, Bloomington, Minn.*, 555 N.W.2d 915, 920 (Minn. App. 1996), to support their contention that because a court can grant summary judgment sua sponte, it can also enforce a settlement agreement of its own accord. In *Septran*, the court stated, "[a] district court may, sua sponte, grant summary judgment if, under the same circumstances, it would grant

summary judgment on motion of a party." 555 N.W.2d at 920, *review denied* (Minn. Feb. 26, 1997). "A reviewing court will not reverse a lower court grant of summary judgment unless the objecting party can show prejudice from lack of notice, procedural irregularities, or from the lack of a meaningful opportunity to oppose summary judgment." *Id.*

There is no showing that appellant was prejudiced from a lack of notice because his motion to enforce the settlement agreement called for a full determination of the rights at issue. Because it is within the district court's discretion to enforce a settlement agreement without a motion from the parties, and because appellant was not prejudiced from a lack of notice due to his own motion to enforce the settlement agreement, the district court did not err when it enforced the settlement agreement sua sponte.

Appellant's Motion to Strike

Appellant moves to strike four statements from respondents' brief. "The papers filed in the trial court, the exhibits, and the transcript of the proceedings, if any, shall constitute the record on appeal in all cases." Minn. R. Civ. App. P. 110.01. The general rule is that "[a]n appellate court may not base its decision on matters outside the record on appeal, and may not consider matters not produced and received in evidence below." *Thiele*, 425 N.W.2d at 582-83. "Appellate courts may not consider matters outside the record on appeal and will strike references to such matters from the parties' briefs." *Stageberg v. Stageberg*, 695 N.W.2d 609, 613 (Minn. App. 2005), *review denied* (Minn. July 19, 2005).

Appellant's motion to strike involves the merits of respondents' arguments and the conclusions respondents draw from the documents in the record. Appellant properly raises these arguments in his reply brief, but the challenged statements of respondents do not refer to documents that were not a part of the record. Because respondents' mere interpretation of what was in the record was not improper, we deny appellant's motion to strike.

Respondents' Motion for Attorney Fees

Respondents argue they are entitled to an award of attorney fees because appellant's motion to strike has no evidentiary support, it ignores Minn. R. Civ. App. P. 110.01, and it is simply an attempt to have the court adjudicate the appeal by motion. Respondents state that appellant's motion to strike has caused respondents "to incur thousands of dollars in unnecessary attorney fees and costs."

"All motions for fees must include sufficient documentation to enable the appellate court to determine the appropriate amount of fees." Minn. R. Civ. App. P. 139.06, subd. 1.

> This generally will include specific descriptions of the work performed, the number of hours spent on each item of work, the hourly rate charged for that work, and evidence concerning the usual and customary charges for such work, or if the basis for the fees is other than hourly, information by which the court can judge the propriety of the request.

Minn. R. Civ. App. P. 139.06 1998 advisory comm. cmt. Rule 139.06 is procedural only and does not provide a substantive basis for claiming fees on appeal. *Id.*

Respondents' request for fees does not comply with Minn. R. Civ. App. P. 139.06, subd. 1, because it did not include sufficient documentation to enable the court to determine the appropriate amount of fees. In addition, respondents failed to cite an appropriate basis for an award of fees. Respondents assert that this court should award fees under Minn. R. Civ. P. 11.03(a), (b), but a request for attorney fees on appeal is beyond the scope or intent of rule 11. *Uselman v. Uselman*, 464 N.W.2d 130, 145 (Minn. 1990), *superseded on other grounds*, by Minn. Stat. § 549.21 (1990). Respondents also suggest that this court award fees under rule 139.06, but this rule does not provide a substantive basis for claiming fees on appeal. Minn. R. Civ. App. P. 139.06 1998 advisory comm. cmt. Respondents' motion for attorney fees is denied.

Procedural Deficiency of Appellant's Motion to Enforce Settlement Agreement

The scope of appellate review is defined by Minn. R. Civ. App. P. 103.04, which provides that "appellate courts may reverse, affirm or modify the judgment or order appealed from or take any other action as the interest of justice may require." As a general rule, appellate review is limited to review of the facts and legal arguments contained in the trial record. Minn. R. Civ. App. P. 103.04 1998 advisory comm. cmt. Although appellant's motion to the district court for enforcement of the settlement agreement was procedurally deficient, we have elected to reach the merits of the case in the interest of judicial economy, just as the district court did.

Affirmed; motions denied.