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Collucci v. Eklund

Court of Appeals of Michigan

January 12, 2000, Submitted ; April 28, 2000, Decided

No. 210924

Reporter

240 Mich. App. 654 *; 613 N.W.2d 402 **; 2000 Mich. App. LEXIS 99 ***

PAUL COLLUCCI, Plaintiff-Appellant, v LISA EKLUND and LOUISA MULDOON, Defendants-Appellees.

Prior History: [***1] Wayne Circuit Court. LC No. 97-723347 CZ.

Disposition: Affirmed.

Core Terms

tender-back, employees

Case Summary

Procedural Posture

Plaintiff appealed from judgment of the Wayne Circuit Court (Michigan), which granted defendants' motion for summary disposition because plaintiff's defamation claim was barred by the release he signed.

Overview

Plaintiff's employment was terminated and he entered into a severance agreement, releasing defendant employer from any liability arising from plaintiff's employment or termination. Defendant gave plaintiff money in consideration of the release, which plaintiff accepted and never tendered back. Plaintiff sued defendant for defamation, and defendant moved for summary disposition on the ground that plaintiff's release barred his claims. The trial court agreed and dismissed plaintiff's action. Plaintiff appealed, but judgment was affirmed. Plaintiff signed the release, did not tender back the consideration that defendant paid, and failed to show by a preponderance of the evidence that the release was unfair or incorrect on its face. Consequently, the release effectively barred plaintiff's claims. And finally, the trial court did not err in not allowing plaintiff to amend his complaint and attempt to tender consideration, because the tendering would not have related back to the original complaint.

Outcome

Judgment affirmed. Plaintiff signed the release, did not tender back consideration, and failed to show by a preponderance that the release was unfair or incorrect on its face. Where plaintiff could not demonstrate that one of the exceptions to the tender back requirement applied, the release effectively barred his claims.

LexisNexis® Headnotes

240 Mich. App. 654, *654; 613 N.W.2d 402, **402; 2000 Mich. App. LEXIS 99, ***1

Civil Procedure > ... > Defenses, Demurrers & Objections > Affirmative Defenses > General Overview

Civil Procedure > Settlements > Releases From Liability > General Overview

Torts > ... > Defenses > Exculpatory Clauses > General Overview

[HN1](#) [↓] To avoid the terms of a release of liability, a plaintiff must show, by a preponderance of the evidence, that the release is unfair or incorrect on its face.

Contracts Law > Contract Interpretation > General Overview

Torts > ... > Defenses > Exculpatory Clauses > General Overview

[HN2](#) [↓] It is well settled that that the scope of a release is governed by the intent of the parties as expressed in the release. If the text of the release is unambiguous, the parties' intentions must be ascertained from the plain, ordinary meaning of the language of the release.

Civil Procedure > ... > Defenses, Demurrers & Objections > Affirmative Defenses > General Overview

Contracts Law > Formation of Contracts > Consideration > General Overview

[HN3](#) [↓] A plaintiff may challenge a release on the basis of fraud, but not until he has tendered the consideration he received in exchange for the release.

Business & Corporate Compliance > ... > Contracts Law > Standards of Performance > Discharge & Termination

[HN4](#) [↓] Under Michigan law, a plaintiff is excused from the tender requirement only if the defendant waives the duty or the plaintiff demonstrates fraud in the execution.

Civil Procedure > ... > Defenses, Demurrers & Objections > Affirmative Defenses > General Overview

Civil Procedure > ... > Defenses, Demurrers & Objections > Affirmative Defenses > Releases

Business & Corporate Compliance > ... > Contracts Law > Standards of Performance > Discharge & Termination

[HN5](#) [↓] A defendant need not specifically raise the tender issue, because until plaintiff tenders the consideration recited in the release, it is the existence of the release and its terms which prohibit the plaintiff from bringing suit. By pleading the release as a defense, defendant has complied with the requirements of [Mich. Ct. R 2.111\(F\)](#).

Civil Procedure > ... > Pleadings > Amendment of Pleadings > General Overview

Civil Procedure > ... > Pleadings > Amendment of Pleadings > Relation Back

Business & Corporate Compliance > ... > Contracts Law > Standards of Performance > Discharge & Termination

[HN6](#) [↓] A plaintiff's attempt to tender consideration, when made in an amended complaint challenging the release, does not relate back to the date of the original complaint.

Counsel: Richard J. Corriveau (Donald M. Fulkerson, of Counsel), for the plaintiff. Northville, Westland.

Barris, Sott, Denn & Driker, P.L.L.C. (by Sharon M. Woods and Claudia D. Orr), for the defendants. Detroit.

Judges: Before: Zahra, P.J., and Saad and Gage, JJ.

Opinion by: Henry William Saad

Opinion

[*655] [**403] SAAD, J.

Plaintiff appeals the trial court's order that granted defendants' motion for summary disposition on the basis that plaintiff's claim is barred by the release he signed. We affirm.

I. FACTS AND PROCEEDINGS

Plaintiff was the human resources manager at the Westland facility of Textron Automotive Company. Defendant Lisa Eklund worked under his supervision and defendant Louisa Muldoon also worked at the [*656] Westland facility. In June 1996, Eklund complained to her employer of sexual harassment by plaintiff, and accordingly Textron conducted an investigation. In the course of the investigation, Muldoon made statements that corroborated Eklund's allegations. Textron concluded that although plaintiff's conduct did [***2] not satisfy the legal definition of sexual harassment, his conduct was unprofessional and evinced poor judgment.

Shortly after it finished its investigation, Textron began to downsize its work force and decided to terminate plaintiff's employment as part of the downsizing on August 1, 1996. Textron chose plaintiff for termination because of his poor judgment and other performance issues. Textron and plaintiff entered into a severance agreement, which called for Textron to pay plaintiff nearly a year's salary, pay plaintiff for his accrued vacation time, and continue certain employee benefits at Textron's expense. In exchange, plaintiff agreed to execute a release of claims against Textron. On August 30, 1996, plaintiff signed a release that provided, in pertinent part:

In consideration for the special severance pay and enhanced benefits mentioned above, you agree not to file against Textron . . . *or any of their . . . employees*, and you release the same from any and all claims and lawsuits arising from your employment or termination [Emphasis added.]

Plaintiff, a longtime human resources specialist, testified during his deposition that he read the release and [***3] consulted with two attorneys before signing the release. Plaintiff acknowledges that he received a copy of the release before he consulted the attorneys. However, plaintiff alleges that the amount of severance [*657] pay he would receive under the agreement was less than what Textron owed him. Plaintiff contends that he signed the release out of "desperation" because he was afraid of losing his insurance benefits.

In accordance with the severance agreement, Textron sent plaintiff regular salary checks for forty-eight weeks after his termination. Plaintiff cashed all the checks and has not tendered back any of the funds received from Textron before, or during the course of, these proceedings.

On July 29, 1997, plaintiff filed his complaint in this matter and alleged that defendants defamed him with their accusations of sexual harassment. ¹ Defendants [**404] moved for summary disposition on the ground that plaintiff's release barred his claims. The trial court agreed and dismissed plaintiff's action. Plaintiff now appeals.

[***4]

¹ Plaintiff also claimed intentional infliction of emotional distress in count II of this complaint. In addition to the tort action against defendants here, plaintiff filed a wrongful discharge and age discrimination action against Textron. The trial court dismissed that action under *MCR 2.116(C)(7)*, claim barred by release. The record does not reveal why these two lawsuits were not consolidated.

II. ANALYSIS

A. Terms of the Release

Plaintiff knowingly executed the release and received the recited consideration. Therefore, [HN1](#) to avoid the terms of the release, plaintiff must show, by a preponderance of the evidence, that the release is unfair or incorrect on its face. [Stefanac v Cranbrook Educational Community \(After Remand\), 435 Mich. 155, 165; 458 N.W.2d 56 \(1990\)](#). Plaintiff failed to do so.

[*658] Plaintiff incorrectly maintains that the release does not apply to his claims against defendants because they were not parties to the execution of the release and did not provide consideration for the release. [HN2](#) It is well settled that the scope of a release is governed by the intent of the parties as expressed in the release. [Rinke v Automotive Moulding Co, 226 Mich. App. 432, 435; 573 N.W.2d 344 \(1997\)](#). If the text of the release is unambiguous, the parties' intentions must be ascertained from the plain, ordinary meaning of the language of the release. *Id.* See also [Gortney v Norfolk & W R Co, 216 Mich. App. 535, 540; 549 N.W.2d 612 \(1996\)](#).

Here, by its very terms, the release expressly [***5] applies to all of Textron's employees. There is no dispute that defendants Eklund and Muldoon, at all times pertinent to this appeal, were employees of Textron. Because defendants clearly fall within the class of "employees," there is no need to "look beyond the plain, explicit, and unambiguous language of the release in order to conclude that [defendants have] been released from liability." [Romska v Opper, 234 Mich. App. 512, 515; 594 N.W.2d 853 \(1999\)](#). Here, as in *Romska*, the release language clearly applies to defendants, employees of Textron. Therefore, though defendants were not parties to the execution of the release and did not provide any of the consideration given to plaintiff for the release, the release operates to discharge defendants from liability in this matter. *Id.*

B. Fraud

Plaintiff also contends that the release is invalid because it was procured by fraud. Were we to conclude [*659] that plaintiff's fraud allegation is meritorious, the release would nonetheless preclude plaintiff's claim because he failed to tender back the consideration Textron paid for the release.

[HN3](#) A plaintiff may challenge a release on the basis of fraud, [***6] but not until he has tendered the consideration he received in exchange for the release. [Stefanac, 435 Mich. at 159, 165; Rinke, 226 Mich. App. at 436](#). Under *Stefanac*, plaintiff was required to tender back the consideration received for the execution of the release before, or simultaneous with, the filing of his complaint. [Stefanac, 435 Mich. at 159](#). It is undisputed that plaintiff did not tender back any funds before the filing of the complaint, at the time he filed the complaint, or at any time thereafter. Consequently, the release effectively bars plaintiff's claims unless he can demonstrate that one of the exceptions to the tender-back requirement applies. [Stefanac, 435 Mich. at 165; Rinke, 226 Mich. App. at 437-438; Dresden v Detroit Macomb Hosp Corp, 218 Mich. App. 292, 296; 553 N.W.2d 387 \(1996\)](#).

[HN4](#) Under Michigan law, a plaintiff is excused from the tender-back requirement only if the defendant waives the duty or the plaintiff demonstrates fraud in the execution. [Stefanac, 435 Mich. at 165](#). Here, on appeal, plaintiff does not claim fraud in the execution, nor does he adduce facts [***7] to establish fraud in the execution. There is no evidence that plaintiff did not know that he was signing a release. On the contrary, plaintiff, the human resources manager at Textron's [*405] Westland facility, admitted that he read the release and consulted with two attorneys before signing it. Plaintiff never claimed that he did not understand that the [*660] document he was signing was a release. Clearly, the fraud-in-the-execution exception does not apply.

Plaintiff does claim, however, that defendants waived the tender-back requirement because they did not raise nontender as an affirmative defense. This same argument was raised and rejected in [Stefanac, 435 Mich. at 169, n 15](#), wherein our Supreme Court stated:

[HNS[↑]] The] defendant need not specifically raise the tender issue because until plaintiff tenders the consideration recited in the release, it is the existence of the release and its terms which prohibit the plaintiff from bringing suit. By pleading the release as a defense, defendant has complied with the requirements of [MCR 2.111\(F\)](#).

Here, there is no dispute that defendants raised the release as an affirmative defense in their answer to plaintiff's complaint. Therefore, [***8] the waiver exception to the tender-back rule does not apply.

Plaintiff's contentions that he signed the waiver out of "desperation," that the consideration paid was less than what Textron owed him, and that "extreme inconvenience" prevented him from tendering back the consideration are not based on any recognized exceptions to the tender-back requirement in [Michigan](#).² [Stefanac, 435 Mich. at 165](#). Accordingly, we conclude [*661] that defendants' motion for summary disposition was properly granted.³

[***9] Affirmed.

/s/ Henry William Saad

/s/ Brian K. Zahra

/s/ Hilda R. Gage

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² [Moreover, plaintiff cannot factually support his claim that the consideration was less than what Textron owed him. Contrary to plaintiff's claim that Textron owed plaintiff pay for twenty-seven weeks of vacation, Textron only owed him for twenty-seven days of vacation.](#)

³ Finally, there is no merit to plaintiff's argument that the trial court abused its discretion in failing to grant his motion to amend his complaint so that he could tender the consideration back to Textron at that time. Although plaintiff made some reference to a possible motion to amend his complaint in his answer to defendants' motion for summary disposition, he never made this motion. The trial court did not rule with regard to the motion because such a motion was never formally before the court. Therefore, we cannot say that the trial court abused its discretion in this regard. In any event, had plaintiff properly moved to amend his complaint, this Court has previously held that [HNS[↑]](#) a plaintiff's attempt to tender back consideration, when made in an amended complaint challenging the release, does not relate back to the date of the original complaint. [Rinke, 226 Mich. App. at 437-438](#).

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