

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

---

MICHAEL P. HOWELL,

Plaintiff–Appellee,

v

THOMAS A. WARMUS,

Defendant-Appellant.

---

UNPUBLISHED

September 13, 1996

No. 172600

LC No. 89-373016

Before: Cavanagh, P.J., and Hood and J.J. McDonald,\* JJ.

PER CURIAM.

Defendant appeals as of right from the trial court order granting plaintiff’s motion for summary disposition pursuant to MCR 2.116(C)(7) on defendant’s counterclaim and the trial judgment entered in favor of plaintiff. We affirm.

Plaintiff and defendant were previously engaged in automobile dealerships, associated entities and real estate, including Winners Ford, Lincoln Mercury, Toyota, Inc., Freeway-91 Pontiac, Toyota, GMC, Inc., Winners Chevrolet, Inc., and Winners Dodge, Inc. The parties entered into a settlement agreement that assigned to each party various assets involved in their relationship. Subsequently, at defendant's request, the settlement agreement was amended. The amended settlement agreement assigned various assets to each party, mutually released any claims between them, provided for a final settlement, and dissolved their relationship.

Plaintiff subsequently filed an action against defendant, claiming that defendant breached several of the covenants of the agreement. Defendant filed a counter-complaint, alleging that plaintiff's misrepresentations concerning various assets caused him money damages and that the false and fraudulent misrepresentations by plaintiff induced him to enter into both the original and supplemental settlement agreements. Eventually, plaintiff moved for summary disposition on defendant's counterclaim. The trial court ruled that defendant's failure to tender back the assets received pursuant to the settlement agreement barred his counterclaim. Following a bench trial, judgment was entered in favor of plaintiff.

---

\* Circuit judge, sitting on the Court of Appeals by assignment.

Defendant argues that the trial court erred in granting plaintiff's motion for summary disposition on his counterclaim based on his failure to tender the consideration received under the Supplemental Settlement Agreement because the Supplemental Release stated consideration separate and distinct from the exchange of promises contained in the Supplemental Agreement. Defendant contends that the tender back of the consideration would have unjustly enriched plaintiff and that it would have been impossible for defendant to tender back the consideration. We disagree.

Settlement agreements are binding until rescinded for cause. Where a settlement agreement exists, the plaintiff must tender the consideration recited in the agreement within a reasonable time after execution of the agreement, but in all cases prior to or simultaneously with the commencement of any proceedings raising a legal claim in contravention of the agreement. *Stefanac v Cranbrook Educational Community*, 435 Mich 155, 163; 458 NW2d 56 (1990). The only recognized exceptions in Michigan are a waiver of the plaintiff's duty by the defendant and fraud in the execution. *Id.* at 165.

In this case, defendant testified at his deposition that plaintiff had assigned him the stock in Winners Chevrolet, Inc. He admitted that he did not tender back the stock. While there is uncertainty regarding what assets defendant received and failed to tender back, it is clear that, at a minimum, he received the Winners Chevrolet stock and failed to tender it back. Moreover, defendant does not claim that either exception applies to the tender rule.

Furthermore, having reviewed the pertinent documents, we find that the consideration for the Supplemental Mutual Final Release And Hold Harmless document was not separate and distinct from the Supplemental Settlement Agreement. Besides the fact that the agreements are basically one document (as evidenced by the continuous page numbering and identical execution date), the release indicates that it was being executed "in consideration of the payment of One Hundred (\$100.00) Dollars and other valuable consideration." Therefore, contrary to defendant's argument, the \$100 was not the only consideration. Moreover, the Supplemental Settlement Agreement refers to the release. Where a party's contentions are contrary to the express language of the release, the release must be upheld. See *Leahan v Stroh Brewery Co*, 420 Mich 108, 113; 359 NW2d 524 (1984). Because defendant failed to tender back the consideration received, the trial court properly granted plaintiff's motion for summary disposition on defendant's counter-complaint. See *Stefanac, supra* at 163.

Next, defendant argues that the trial court's finding that plaintiff did not commit a breach of the supplemental settlement agreement was clearly erroneous because there was evidence to the contrary. We disagree.

A trial court's findings of fact are reviewed on appeal for clear error. *Triple E Produce Corp v Mastronardi Produce, Ltd*, 209 Mich App 165, 171; 530 NW2d 772 (1995). A finding is clearly erroneous when, although there is evidence to support it, this Court is left with a definite and firm conviction that a mistake has been made. *Id.* Questions of credibility are properly left to the trier of fact. MCR 2.613(C); *In re Hardin*, 184 Mich App 107, 109; 457 NW2d 347 (1990). This Court

gives special deference to the special ability and opportunity of the trial judge to determine the credibility of the witnesses. *Id.*

After carefully reviewing the record, we are not left with a definite and firm conviction that a mistake has been made. Giving due consideration to the trial court's findings regarding the credibility of the witnesses, we find that the trial court's findings were supported by evidence and were not clearly erroneous. *Triple E Produce Corp, supra.*

Affirmed.

/s/ Mark J. Cavanagh

/s/ Harold Hood

/s/ John J. McDonald