STATE OF MICHIGAN

COURT OF APPEALS

THOMAS G. DEMIRO,

Plaintiff-Appellant,

v

GENERAL MOTORS CORPORATION,

Defendant-Appellee.

UNPUBLISHED
December 19, 1997

No. 193126
Wayne Circuit Court
LC No. 93-327198 CK

Before: McDonald, P.J., and Wahls and J. R. Weber*, JJ.

PER CURIAM.

Plaintiff appeals by right a Wayne Circuit Court order, dismissing his complaint. The dismissal arises out of a prior order of the circuit court, which enforced a settlement agreement containing terms which plaintiff disputed.

On the date originally scheduled for trial of the counts remaining in plaintiff's complaint after partial summary disposition, the trial court met sequentially with both sides in an effort to achieve a settlement, and was apparently successful. However, these in chambers proceedings, and the resulting settlement agreement, were never recorded by a court reporter, nor were they later placed on the record in open court. When defendant's attorney submitted proposed orders effectuating the settlement, plaintiff contended the language in the proposed order, which would release, acquit, and discharge defendant from liability for any cause of action which plaintiff might have brought as well as those he did bring, was beyond anything to which he had agreed during settlement negotiations. Defendant and the trial court took the position that such language is "boilerplate" which is part and parcel of every settlement agreement and the trial court even opined that such terms need not be specifically negotiated or agreed upon because they are universally understood, at least by attorneys. As plaintiff was represented by counsel, the trial court reasoned that plaintiff thereby agreed to such terms.

MCR 2.507(H) provides that an agreement or consent between the parties or their attorneys respecting the proceedings in an action, subsequently denied by either party, is not binding unless it was

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

made in open court or unless evidence of the agreement is in writing, subscribed by the party against whom the agreement is offered or by the party's attorney. There is no writing in which the disputed terms are subscribed either by plaintiff or his attorney. Although plaintiff acknowledges that an agreement was made, he disputes defendant's version of the terms of that agreement actually are.

If this merely represented a change of heart by plaintiff, as in *Thomas v Michigan Mutual Ins Co*, 138 Mich App 117; 358 NW2d 902 (1984), or a unilateral misunderstanding of the meaning and effect of the settlement, *Rossi v Transamerica Leasing Co*, 138 Mich App 807, 810; 360 NW2d 307 (1984), or if the terms of the agreement had been placed on the record in open court, *Groulx v Carlson*, 176 Mich App 484, 488-489; 440 NW2d 644 (1989), the trial court would have been correct in ordering enforcement of the settlement agreement. But this is not such a case. In this case it is apparently acknowledged by the trial court and defendant that terms included in the proposed order effectuating the settlement were not explicitly negotiated and assented to by plaintiff. One of the purposes of the court rule is to prevent exactly the type of controversy presented in this case. *Jorgensen v Howland*, 325 Mich 440, 446-447; 38 NW2d 906 (1949). The crucial, missing element of an enforceable settlement is the lack of an available full transcript, which would put the terms of any agreement beyond dispute and the fallibility of memory. *Groulx, supra* at 490, quoting *In re Dolgin Eldert Corp*, 31 NY2d 1, 10; 334 NYS2d 833; 286 NE2d 228 (1972). The fact the trial judge was a witness to the oral agreement fails to remove this case from the ambit of the cited court rule. *Jorgensen, supra* at 446.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Gary R. McDonald
/s/ Myron H. Wahls
/s/ John R. Weber