STATE OF MICHIGAN

COURT OF APPEALS

VERTEX DEVELOPMENT LLC,

Plaintiff-Appellant,

v

FIFTH THIRD BANK,

Defendant-Appellee.

UNPUBLISHED
January 8, 2013

No. 308822
Muskegon Circuit Court
LC No. 11-047971-CZ

Before: HOEKSTRA, P.J., and BORRELLO and BOONSTRA, JJ.

PER CURIAM.

Plaintiff appeals as of right a trial court order granting defendant's motion for summary disposition wherein the trial court held that plaintiff's claims were barred by a release agreement signed by the parties in 2006. For the reasons set forth in this opinion, we affirm.

In August 2004, defendant, through its former officer Case McCalla, extended loans in the amount of $1,460,000 to plaintiff so that plaintiff could purchase four oil change locations. As security for the loans, plaintiff granted defendant a mortgage on the four business properties, Steve LeVeck and David Moore, plaintiff's corporate officers, personally guaranteed the loans, and LeVeck and his wife granted defendant a mortgage on their personal residence. Unbeknownst to the parties at the time, in order to effectuate the transaction and secure the loans from defendant's lending committee, McCalla engaged in fraud and inflated the assets of plaintiff and its corporate officers.

Approximately one year later, defendant commenced foreclosure proceedings on all of the properties including the LeVeck residence. In a letter to defendant's attorney, plaintiff's former attorney, John Anding, alleged that McCalla, who was terminated several days after facilitating plaintiff's transaction, had promised to loan plaintiff an additional $600,000 to facilitate business operations. Anding stated that defendant's failure to follow through on McCalla's promise caused plaintiff to default. In addition, Anding stated that "bank personnel" made "misrepresentations" and committed "forgery" and he outlined "disturbing and illegal practices by Bank personnel" that occurred during the transaction. In particular, Anding identified several documents related to the transaction that appeared to have been forged, and Anding alleged that defendant had "notarized signatures for persons who were not in the presence of a notary." Anding concluded that plaintiff "was induced to borrow money based on the Bank's fraud," and requested that defendant enter into settlement negotiations with plaintiff.

Thereafter, on June 25, 2006, the parties entered into a release agreement wherein plaintiff agreed to release defendant from any and all liability arising from the parties' financial transactions including all present or future claims. In exchange, defendant released its mortgage on the LeVeck residence and agreed not to enforce the personal guaranty against LeVeck.

On June 9, 2010, the nature and extent of McCalla's fraud was exposed in a front-page article in the Muskegon Chronicle. Specifically, McCalla pleaded guilty in federal court to falsifying loan applications related to certain bank transactions including plaintiff's transaction. The article stated that McCalla admitted that he falsified information regarding plaintiff in an effort to secure lending from defendant's lending committee.

Following publication of the article, both Moore and LeVeck's wife filed suit individually against defendant in the U.S. District Court for the Western District of Michigan. In both cases, the U.S. District Court granted defendant's motions to dismiss for lack of standing because the alleged injuries, if any, occurred to the corporate entity as opposed to the corporate officers individually. *Moore v Fifth Third Bank*, No. 1-10-CV 641, (W.D. Mich, March 30, 2011); *LeVeck v Fifth Third Bank*, No. 1-10-CV-640, (W.D. Mich, August 25, 2011).

Shortly thereafter, plaintiff commenced this action in the trial court, essentially alleging that defendant's failure to lend plaintiff an additional $600,000 caused plaintiff damages. Plaintiff also alleged that defendant's "fraud, perjury and forgery" set plaintiff up for "certain failure." The trial court granted defendant's motion for summary disposition pursuant to MCR 2.116(C)(7) on grounds that plaintiff's claims were barred by the release agreement. The trial court rejected plaintiff's argument that the release was invalid because plaintiff was unaware of the extent of McCalla's criminal conduct at the time the release was executed.

On appeal, plaintiff contends that the trial court erred in granting summary disposition because the release was invalid and did not bar its claims where plaintiff lacked knowledge regarding the extent of defendant's wrongdoing at the time it signed the release.

We review de novo a trial court's ruling on a motion for summary disposition under MCR 2.116(C)(7). *Tarlea v Crabtree*, 263 Mich App 80, 87; 687 NW2d 333 (2004). Summary disposition is appropriate under MCR 2.116(C)(7) where a valid release of liability exists between the parties. *Xu v Gay*, 257 Mich App 263, 266; 668 NW2d 166 (2003). "When reviewing a motion for summary disposition under MCR 2.116(C)(7), an appellate court accepts all the plaintiff's well-pleaded allegations as true, and construes them most favorable to the plaintiff, unless specifically contradicted by documentary evidence." *Id*. A court must also consider any documentary evidence to determine whether there is a genuine issue of material fact regarding whether a valid exception under MCR 2.116(C)(7) exists. *Dextrom v Wexford Co*, 287 Mich App 406, 431; 789 NW2d 211 (2010). "If no facts are in dispute, and if reasonable minds could not differ regarding the legal effect of the facts, the question whether the claim is barred is an issue of law for the court." *Id*. We review questions of law de novo. *Kessler v Kessler*, 295 Mich App 54, 57; 811 NW2d 39 (2011).

A cause of action may be barred by a release agreement pursuant to MCR 2.116(C)(7). *Rinke v Automotive Moulding Co*, 226 Mich App 432, 435; 573 NW2d 344 (1997). "The scope of a release is governed by the intent of the parties as it is expressed in the release." *Id*. "If the

text in the release is unambiguous, the parties' intentions must be ascertained from the plain, ordinary meaning of the language of the release." *Id*. Moreover,

> It is a well-settled principle of Michigan law that settlement agreements are binding until rescinded for cause. *Further, tender of consideration received is a condition precedent to the right to repudiate a contract of settlement* . . . . The policy consideration underlying the general rule is that the law favors settlements. A party entering into a settlement agreement, offering adequate consideration, is entitled to rely on the terms of the agreement. [*Stefanac v Cranbrook Ed Community*, 435 Mich 155, 163; 458 NW2d 56 (1990) (citations omitted) (emphasis added).]

In this case, plaintiff neither tendered the consideration cited in the release agreement nor moved to rescind the release prior to or in conjunction with filing the present action in contravention of the release. Accordingly, absent fraud in the inducement or waiver, plaintiff is precluded from challenging the validity of the release. See *id*. at 165 (noting that the only exceptions to the "tender rule" are waiver and fraud in the inducement). Here, defendant has not waived plaintiff's obligation to tender, and plaintiff has failed to show that the release was fraudulently induced.

Plaintiff contends that the release was procured through fraud because it was unaware of the nature of the underlying conduct of defendant's former officer McCalla at the time the release was executed. However, the letter from plaintiff's former attorney Anding shows that plaintiff was aware that defendant's personnel engaged in wrongdoing. Specifically, in the letter, Anding referenced "altered and/or misleading documents," that plaintiff had discovered. Anding also referenced "disturbing and illegal practices by Bank personnel," and Anding cited examples of forged documents that were part of the transaction. Anding also plainly stated that plaintiff was "induced to borrow money based on the Bank's *fraud*" (emphasis added). Indeed, Anding essentially used the misconduct of defendant's employees as a basis to propose a settlement agreement. Merely because McCalla eventually pleaded guilty to criminal fraud as opposed to civil fraud is immaterial. Plaintiff was aware of the irregularities associated with the transaction and referenced those irregularities as a basis to propose a settlement agreement. Plaintiff entered the agreement knowingly and the agreement covered all "known" and "unknown" damages arising from the transaction. Furthermore, McCalla perpetrated a crime against defendant, i.e. bank fraud, in an effort to secure additional loans for the benefit of plaintiff. Subsequent to the release, plaintiff did not learn of any new criminal conduct that McCalla perpetrated against plaintiff. In sum, plaintiff has failed to show fraud in the inducement and plaintiff's challenge to the validity of the release agreement is therefore precluded. *Stefanac*, 435 Mich at 159, 165.

Moreover, the release agreement bars all of plaintiff's claims. Specifically, in the agreement, plaintiff released defendant from "any and all claims, actions, causes of action" arising out of "any and all unknown foreseen and unforeseen injuries" related to the parties' loan agreements. The release stated that it "is intended to release all claims existing as of [May 23, 2006] arising from facts and/or circumstances that occurred prior to or on [May 23, 2006]." The agreement provided that the parties understood that the release effected "a general and *complete release of all claims* or actions of *any* type which [plaintiff] now [has] or may hereafter acquire against [defendant]" (emphasis added). Plaintiff agreed to release defendant "from any further

liability whatsoever for damages and losses of any kind" and agreed that it understood that the agreement constituted a "release in full" and that it would "never again be able to recover damages" from defendant. Plaintiff agreed that it would "never institute in the future any complaint, suit, action, or cause of action" against defendant. The language in the agreement is unambiguous and it sweeps with great breadth such that it releases defendant from all liability alleged in plaintiff's complaint.

In sum, the parties' release agreement bars plaintiff's claims against defendant and plaintiff's arguments regarding the validity of the release are precluded and otherwise lack all merit. Accordingly, the trial court properly granted defendant's motion for summary disposition pursuant to MCR 2.116(C)(7).

Affirmed. Defendant having prevailed, may tax costs in accord with MCR 7.219.

/s/ Joel P. Hoekstra
/s/ Stephen L. Borrello
/s/ Mark T. Boonstra