

STATE OF MICHIGAN
COURT OF APPEALS

POWERHOUSE GYMS MONROE, INC.,

Plaintiff/Counter-Defendant-
Appellant,

v

POWERHOUSE OF MONROE, INC.,

Defendant/Counter-Plaintiff-
Appellee.

UNPUBLISHED

January 17, 2008

No. 274659

Monroe Circuit Court

LC No. 05-020869-CK

Before: Saad, C.J., and Borrello and Gleicher, JJ.

PER CURIAM.

Powerhouse Gyms of Monroe, Inc. (“PGM”), appeals the trial court’s grant of summary disposition to Powerhouse of Monroe, Inc. (“POM”). For the reasons set forth below, we affirm.

I. Facts and Procedural History

On August 8, 1996, PGM entered into a commercial lease agreement with a company called JRHW6 Corporation¹ for retail space in the South Monroe Food Plaza in Monroe. The lease provided, in part, that PGM would pay rent and a percentage of its gross sales to JRHW6 Corporation for a period of ten years. Section 8.01 of the lease further states that PGM “shall not assign the lease . . . without obtaining the prior written consent” of JRHW6 Corporation or its successors. PGM’s owners, William Dabish and Norman Dabish, and their respective spouses personally guaranteed the lease.

On September 5, 1996, Richard Orndorf incorporated POM and sought to purchase and operate a Powerhouse Gym in the Monroe Food Plaza. On September 27, 1996, PGM president William Dabish executed an assignment of the lease with POM president Orndorf.² The assignment provides, in relevant part:

¹ This company, JRHW6 Corporation, is not a party to this appeal.

² As discussed below, PGM disputes that the parties executed the assignment on September 27, (continued...)

3. **Release of Assignor's Liability.** By executing this Lease Assignment, [POM] agrees that [PGM] is released from any and all obligations under the terms of the Lease from and after this Lease Assignment's Effective Date, provided [POM] is current in the payment of rent and not otherwise in default under the Lease's terms and conditions.

4. [POM] agrees to indemnify and hold harmless [PGM], William Dabish and Norman Dabish and [PGM] of any and all liability that may arise out of the Lease. In the event that the landlord under the Lease declares a default under any terms of the Lease, this Assignment of Lease shall be null and void and all [POM]'s rights shall terminate but [POM] shall continue to be liable to [PGM], William Dabish and Norman Dabish for the indemnification as provided in this Section.

On September 27, 1996, PGM and POM executed a promissory note, management agreement and a licensing agreement.

In 1997, POM opened a Powerhouse Gym at the Monroe Food Plaza. Thereafter, POM sought to renegotiate the terms of the promissory note and management agreement. On June 4, 1998, after months of negotiations, PGM and POM entered into a settlement agreement. In exchange for \$70,000, PGM agreed to release POM from any and all obligations under the promissory note and management agreement. The settlement agreement contains a general release, which releases POM from:

All actual and potential claims, complaints, demands, causes of action, damages, costs, expenses, fees and other liabilities of every sort and description, direct or indirect, fixed or contingent, now accrued, or which may later accrue, known or unknown, and whether or not liquidated (collectively, the "claims"), arising out of, caused by, or otherwise related in any way to Richard Orndorf's/Powerhouse of Monroe, Inc. [sic] relationship with Powerhouse Gym Monroe, Inc., William K. Dabish, Norman K. Dabish and Powerhouse Gyms International, Inc.

It is the intention of the parties that this release be read as broadly as possible, such that Powerhouse of Monroe, Inc. and Richard Orndorf shall have no further obligation or liability of any sort or nature to Powerhouse Gym Monroe, Inc., William K. Dabish and Norman K. Dabish, and Powerhouse Gyms International, Inc., except as provided in this Agreement. [Emphasis deleted.]

Further, paragraph 6(b) of the settlement agreement provides:

The parties to this Agreement acknowledge that they will not institute, maintain, assist in, or otherwise encourage any suit, action, or other proceeding at

(...continued)

1996, and argues that it was executed on June 4, 1998.

law, in equity or otherwise, against the other or aid any third party in any way in such proceedings.

Notwithstanding the execution of the settlement agreement, the licensing agreement between the parties remained in effect.

In early 2003, POM's president, Orndorf, contacted JRHW6 Corporation and inquired about purchasing a building for its operations across the street from the Monroe Food Plaza. According to POM's summary disposition brief, JRHW6 Corporation agreed to release POM from its obligations under the lease based on Orndorf's agreement to purchase the separate building. On June 27, 2003, the Kroger Company of Michigan succeeded to JRHW6 Corporation's interest in the lease. When Kroger became aware that JRHW6 Corporation and POM had agreed to release POM from its obligations under the lease, it disputed the agreement. In October 2004, POM ceased operations at the leased premises and moved the fitness center across the street.

Because PGM was the original lessee and because of the personal guarantee, Kroger filed a complaint against PGM. Kroger alleged that PGM defaulted under the terms of the lease by failing to make the required payments and abandoning the leased premises. Kroger sought past rent and other payments under the lease. On November 28, 2005, PGM filed its complaint in this case against POM. PGM alleged that it had assigned the lease to POM and that POM agreed to indemnify and hold PGM harmless from any and all liability that may arise out of the lease. On March 30, 2006, POM filed a counterclaim against PGM, and alleged that, by filing the complaint, PGM breached the explicit terms of the general release in the settlement agreement. Moreover, POM alleged that the assignment of lease was ineffective under the terms of the lease.

On April 4, 2006, POM filed a motion for summary disposition pursuant to MCR 2.116(C)(7). POM argued that, notwithstanding the failure to obtain written consent from JRHW6 Corporation to assign the lease, the general release contained in the settlement agreement unambiguously released POM from any potential claims that may arise and the settlement agreement superseded any language in the assignment. POM further asserted that it could not be held accountable for any liabilities that PGM may incur as a result of the Kroger complaint. On May 19, 2006, POM filed another motion for summary disposition pursuant to MCR 2.116(C)(9) and set forth substantially the same arguments it raised in its prior motion.

In response, PGM asserted that the assignment was executed on the same day as the settlement, and that the assignment is an independent agreement that is unaffected by the settlement. PGM claimed that the assignment specifically referenced the lease and released PGM from any liability arising thereunder. PGM further argued that the settlement agreement did not reference the lease and that the general release clause did not operate to relieve POM of its obligations to indemnify and hold harmless PGM under the assignment. PGM attached to its response the affidavits of William Dabish and Deborah Berry, who stated that the parties executed the assignment on June 4, 1998, not on September 27, 1996. PGM also attached what

it titled a “superceding settlement agreement” and a second assignment of lease,³ but the documents are not signed. Nonetheless, PGM argued that the documents constitute a novation that controls the issue of POM’s liability and that, at a minimum, the newly introduced documents create a factual dispute about the intent of the parties.

On June 10, 2006, the trial court granted POM’s motions for summary disposition. Specifically, the trial court rejected PGM’s attempt to introduce the superseding agreement to impeach the settlement agreement, and ruled that the settlement agreement is clear and unambiguous on its face. The trial court also ruled:

Paragraph 2 of the [settlement] Agreement states “Satisfaction of All Obligations,” and is italicized in the Agreement for emphasis. It further mentions specifically, that it is a Release to [sic] the Promissory Note/Management Agreement dated September 27, 1996. The Release Agreement further provides a “General Release,” which appears to be boilerplate language, in Paragraph 3. In light of a plain reading of this Release Agreement, this Court finds the language to be very clear. The Agreement specifically states: “It is the intention of the parties that this release be read as broadly as possible, such that Powerhouse of Monroe, Inc. and Richard Orndorf shall have no further obligation or liability of any sort or nature to Powerhouse Gym Monroe, Inc. . . .”

The trial court also granted POM’s motion for summary disposition under MCR 2.116(C)(9), and ruled that there is no “question of fact” that the parties entered into the settlement agreement and that the unambiguous language of the settlement agreement released POM from all liability.

II. Analysis

PGM claims that the trial court erred when it granted POM’s motion for summary disposition under MCR 2.116(C)(7) because POM raised an issue of fact about whether POM must indemnify PGM under the terms of the release contained in the assignment.⁴

³ The superceding settlement agreement and the assignment of lease are in the exact same form as the original settlement agreement and assignment of lease; however, they contain various handwritten notes in the margins of each document.

⁴ We review de novo the grant or denial of a motion for summary disposition. *Cawood v Rainbow Rehab Ctr*, 269 Mich App 116, 118; 711 NW2d 754 (2005). MCR 2.116(C)(7) provides grounds for summary disposition if there is a valid release of liability between the parties. “In analyzing a motion for summary disposition pursuant to MCR 2.116(C)(7), the contents of the complaint are accepted as true unless contradicted by documentation submitted by the movant.” *Pusakulich v Ironwood*, 247 Mich App 80, 82; 635 NW2d 323 (2001). This Court must also consider the pleadings, affidavits, depositions, admissions and documentary evidence filed or submitted by the parties to determine whether a genuine issue of material fact exists. MCR 2.116(G)(5); *Watts v Polaczyk*, 242 Mich App 600, 603; 619 NW2d 714 (2000). If there is no factual dispute, whether a plaintiff’s claim is barred under a principle set forth in (continued...)

Contract language must be given its ordinary and plain meaning, *Bianchi v Automobile Club of Michigan*, 437 Mich 65, 71 n 1; 467 NW2d 17 (1991), and this Court must construe an unambiguous contract by its terms alone. *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 469; 663 NW2d 447 (2003). “The cardinal rule in the interpretation of contracts is to ascertain the intention of the parties.” *McIntosh v Groomes*, 227 Mich 215, 218; 198 NW 954 (1924).

This Court has previously considered provisions similar to the one contained in the settlement agreement. In *Collucci v Eklund*, 240 Mich App 654, 656; 613 NW2d 402 (2000), the plaintiff executed a release wherein he “agree[d] not to file against [his employer] . . . or any of their . . . employees, and you release the same from any and all claims and lawsuits arising from your employment or termination.” Subsequently, the plaintiff filed a defamation claim against his former co-employees. *Id.* at 657. This Court affirmed the trial court’s dismissal under MCR 2.116(C)(7) and ruled that the unambiguous and explicit terms of the release operated to discharge the defendants from liability. *Collucci, supra* at 656. Further, in *Stolaruk Corp v Central Nat Ins Co of Omaha*, 206 Mich App 444, 449-450; 522 NW2d 670 (1994), the plaintiff executed a consent judgment that provided a release of the defendants “as to all actions, suits, proceedings, claims and demands whatsoever, known or unknown, contingent or otherwise” The plaintiff later filed a complaint against the defendants and this Court ultimately held that the plaintiff was barred from pursuing its cause of action because it was “clear that the release encompassed all present or future causes of action whether known or unknown.” *Id.* at 447, 450.

Here, we hold that the text of the settlement agreement is unambiguous and operates to release POM from liability. PGM does not dispute that the settlement agreement was fairly and knowingly made or that it was supported by adequate consideration. See *Wyrembelski, supra* at 127. The general release contained in paragraph three of the settlement agreement releases POM from “[a]ll actual and potential claims . . . now accrued, or which may later accrue, known or unknown . . . arising out of, caused by, or otherwise related in any way” to POM’s relationship with PGM. The release also states that it is the “intention of the parties that this release be read as broadly as possible” such that POM “shall have no further obligation or liability of any sort or nature” to PGM. The agreement further provides that neither PGM nor POM will “institute, maintain, assist in, or otherwise encourage any suit, action, or other proceeding at law . . . against

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MCR 2.116(C)(7) is a question of law for the court to decide. *Huron Tool & Engineering Co v Precision Consulting Services, Inc*, 209 Mich App 365, 377; 532 NW2d 541 (1995). If a factual dispute exists, however, summary disposition is not appropriate. *Id.*

“The interpretation of a contract is also a question of law this Court reviews de novo on appeal, including whether the language of a contract is ambiguous and requires resolution by the trier of fact.” *DaimlerChrysler Corp v G-Tech Professional Staffing, Inc*, 260 Mich App 183, 184; 678 NW2d 647 (2003) (citations omitted).

the other.” We conclude that the release contained in the settlement agreement applies to both parties and operates to bar PGM from maintaining its action against POM for any potential liability that it may incur as a result of the Kroger complaint. “[T]here is no need to ‘look beyond the plain, explicit, and unambiguous language of the release in order to conclude that [POM has] been released from liability.” *Collucci, supra* at 656, quoting *Romska v Oppper*, 234 Mich App 512, 515; 594 NW2d 853 (1999). Accordingly, the trial court properly granted POM’s motion for summary disposition pursuant to MCR 2.116(C)(7).⁵

Notwithstanding the clear language of the settlement agreement, PGM contends that the trial court erred in rejecting the “equally plain language” contained in paragraphs three and four of the assignment wherein POM agreed to release and indemnify PGM from any and all obligations under the terms of the lease. PGM claims that the existence of the settlement agreement and the lease agreement creates a factual dispute that precludes summary disposition.

“When there are several agreements relating to the same subject matter, the intention of the parties must be gleaned from all the agreements.” *Omnicom of Michigan v Giannetti Investment Co*, 221 Mich App 341, 346-347; 561 NW2d 138 (1997) (citation omitted). “If parties to a prior agreement enter into a subsequent contract that completely covers the same subject, but the second agreement contains terms that are inconsistent with those of the prior agreement, and the two documents cannot stand together, the later document supersedes and rescinds the earlier agreement.” *Id.* at 347.

⁵ PGM claims that the trial court’s grant of summary disposition was premature and that the parties needed additional discovery. PGM did not argue in the trial court that there is a fair likelihood that further discovery will yield support for its position. Instead, PGM relied on the assignment and argued that it was sufficient to hold POM liable. Further, PGM did not assert or provide an evidentiary basis to support its claim that further discovery stands a fair chance of revealing the existence of additional factual support for its claims. See *Village of Dimondale v Grable*, 240 Mich App 553, 566; 618 NW2d 23 (2000). Moreover, PGM does not indicate on appeal what, if anything, additional discovery would disclose in light of the settlement agreement that it admittedly executed. Thus, we conclude that PGM’s claim of error is without merit.

Here, we note that the assignment of lease provided by the parties is not dated. Nevertheless, POM contends that the assignment of lease was executed on September 27, 1996, while PGM argues that the assignment of lease was executed on June 4, 1998, the same date that the settlement agreement was signed. There is no dispute that the assignment of lease and the settlement agreement were both agreements between the parties covering their business relationship. Were we to agree that the parties executed the assignment on the same date as the settlement, we hold that the settlement agreement is controlling on the issue of POM's liability to PGM. Paragraph three of the assignment releases PGM from all liability under the lease. Paragraph four of the assignment provides that POM "agrees to indemnify and hold harmless" PGM "of any and all liability that may arise out of the lease." However, as discussed above, the settlement agreement releases POM from all liability and contains unambiguous language that neither PGM nor POM will "institute, maintain, assist in, or otherwise encourage any suit, action, or other proceeding at law . . . against the other." More importantly, the settlement also contains language explicitly stating that it supersedes prior agreements and "embodies the entire understanding of the parties." POM and PGM also explicitly state that they intend that the settlement agreement should be "read as broadly as possible." We hold that the intention of the parties as expressed in the settlement was to release each other from any liability arising from their relationship. This clearly included a bar on subsequent suits between the parties. Accordingly, PGM's argument is without merit.⁶

⁶ PGM further claims that the trial court erred when it failed to consider the superseding settlement agreement and a second version of the assignment of lease. PGM contends that these documents constitute a novation. A novation requires (1) parties able to contract, (2) a valid previous obligation to displace, (3) consent to the substitution by all parties, with sufficient consideration, and (4) the termination of the old obligation and formation of a valid new one. *In re Dissolution of F Yeager Bridge & Culvert Co*, 150 Mich App 386, 410; 389 NW2d 99 (1986). The question rests in the parties' intent, as determined from surrounding and ensuing circumstances and conduct. *Gorman v Butzel*, 272 Mich 525, 529; 262 NW 302 (1935).

Here, our review of the superseding settlement agreement and the version of the assignment of lease attached to PGM's motion reveals that they are merely a draft version of each document. The documents are not dated, they contain various notes in the margins of each page and representatives of PGM and POM did not sign either document. Each document is also substantially similar to the assignment of lease and settlement agreement executed by the parties. Clearly, these documents do not satisfy the four elements required to constitute a novation. Moreover, "considering extrinsic evidence in the absence of ambiguous language is 'clearly inconsistent with well-established principles of legal interpretation . . .'" *Blackhawk Dev Corp v Village of Dexter*, 473 Mich 33, 49; 700 NW2d 364 (2005), quoting *Little v Kin*, 468 Mich 699, 700 n 2; 664 NW2d 749 (2003). As discussed, the settlement agreement is unambiguous and the trial court was not required to consider the "superseding" documents.

Affirmed.⁷

/s/ Henry William Saad
/s/ Stephen L. Borrello
/s/ Elizabeth L. Gleicher

⁷ PGM also argues that the trial court erred when it granted POM's motion under MCR 2.116(C)(9). "Summary disposition under MCR 2.116(C)(9) is proper if a defendant fails to plead a valid defense to a claim." *Village of Dimondale, supra* at 564. In reviewing a motion brought under MCR 2.116(C)(9), we accept "all well-pleaded allegations as true" and will grant the party's motion if the defenses are untenable as a matter of law. *Id.* A review of the trial court's order reveals that it considered documentary evidence outside of the parties' pleadings. Because the trial court considered documents outside the pleadings, we will construe the motion as having been granted pursuant to MCR 2.116(C)(10). *Driver v Hanley (After Remand)*, 226 Mich App 558, 562; 575 NW2d 31 (1997). Generally, if the trial court fails to dismiss a claim under the proper subrule to MCR 2.116(C), this Court may review the trial court's decision under the correct rule. See *Spiek v Dep't of Transportation*, 456 Mich 331, 338; 572 NW2d 201 (1998). In reviewing a motion under MCR 2.116(C)(10), we consider the pleadings, admissions, affidavits, and other relevant documentary evidence submitted in the light most favorable to the nonmoving party. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). If no genuine issue of material fact is established, the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999).

We hold that the trial court properly granted POM's motion for summary disposition on its counterclaim. In its motion, POM relied on the language contained in the settlement agreement and set forth substantially the same arguments it raised in its motion under MCR 2.116(C)(7), and PGM responded with the same facts and evidence it set forth in its response to POM's (C)(7) motion. In light of our conclusion that the settlement agreement clearly expressed the parties' intent to refrain from bringing any claims against each other arising out of any past or present activities between the parties, we conclude that the trial court properly granted POM's motion for summary disposition pursuant to MCR 2.116(C)(9) on its counterclaim. We also conclude that summary disposition pursuant to MCR 2.116(C)(10) was proper. Generally, this Court will not reverse a trial court's decision if the court reached the correct result. *Willett v Waterford Twp*, 271 Mich App 38, 55; 718 NW2d 386 (2006).