

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

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CENTRAL GLOBAL EXPRESS, INC, f/k/a AIR  
FREIGHT, INC,

UNPUBLISHED  
April 3, 2003

Plaintiff-Appellant,

v

SILOG, INC, f/k/a VIDEO EXPRESS, INC,  
SALVATORE CRAPAROTTA, and IRENE  
CORREIA,

No. 233612  
Wayne Circuit Court  
LC No. 00-007454-CZ

Defendants-Appellees.

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Before: Cooper, P.J., and Hoekstra and Markey, JJ.

PER CURIAM.

Plaintiff appeals by right the trial court's order granting summary disposition in favor of defendants. We affirm.

Although plaintiff first argues that the trial court erred in granting summary disposition in favor of defendants after concluding that the settlement agreement's release language barred plaintiff's fraud claim, we conclude that the most expeditious resolution of plaintiff's appeal is through an analysis of plaintiff's third issue: whether the trial court erroneously concluded that plaintiff was required to tender back to defendants the settlement proceeds before it could file the instant suit. We conclude that the trial court did not err. This Court reviews denovo a trial court's decision granting summary disposition. *Spiek v Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998).

There is no dispute that plaintiff has failed to, at anytime, offered to, or, in fact, tender back to defendants the proceeds of the settlement. We believe that Michigan law absolutely requires, under this type of scenario, the tender back of settlement proceeds before one can initiate suit. Our Supreme Court in *Stefanac v Cranbrook Educational Community (After Remand)*, 435 Mich 155, 177; 458 NW2d 56 (1990), stated in relevant part:

The very essence of a release and settlement is to avoid litigation. The plaintiff is not entitled to retain the benefit of an agreement and at the same time bring suit in contravention of the agreement.

“The plaintiff must tender the recited consideration before there is a right to repudiate the release. . . . 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; see, also, *Collucci v Eklund*, 240 Mich App 654, 659; 613 NW2d 402 (2000). Plaintiff here claims neither waiver nor fraud in the execution of the settlement agreement. Because plaintiff has not tendered back the settlement proceeds, i.e., the consideration for the relief, the suit was properly dismissed.<sup>1</sup>

Indeed, we believe that the holding in *Rinke v Automotive Moulding Co*, 226 Mich App 432; 573 NW2d 344 (1997), and its facts are directly applicable to the instant matter. In *Rinke*, former shareholders of the defendant company sued the company and its officers alleging fraud in connection with their redemption of stock. The plaintiffs’ stock was redeemed at book value, but they were promised a higher price if the company was sold for more than book value within two years of their redemption. More than two years later, the company was sold for more than book value. The redemption agreement, however, also contained language releasing defendant and its officers from liability for claims arising from the plaintiffs’ status as shareholders. *Rinke*, *supra* at 434. The plaintiffs contended that the release was obtained by fraud; however, this Court affirmed the trial court’s grant of summary disposition to the defendants because the plaintiffs had failed to tender back the consideration they had received for redeeming their shares before or simultaneous with the filing of their complaint. As a result, the release barred the plaintiff’s claims. *Id.* at 435-438. Like the instant plaintiff, the plaintiffs in *Rinke* did not sue for rescission. Instead, they claimed breach of fiduciary duty, fraud, innocent or negligent misrepresentation, and breach of contract. *Id.* at 434. They were not disaffirming or attempting to disaffirm the entire agreement; they were only seeking the greater price for their shares as promised. However, their actions were barred because in essence they were trying to avoid the release; therefore, they were required to tender back the consideration. Their failure to tender back the consideration meant that the release stood, and dismissal was affirmed.

The next question then becomes whether plaintiff can cure its fatal defect by now tendering back the settlement proceeds. Again, a similar question was raised in *Rinke*. In *Rinke*, *supra*, this Court applied *Stefanac* and ruled that an offer of tender by proposing to amend the complaint was still untimely as it did not relate back to the original complaint. A delayed offer of tender would be contrary to the tender-back rule. *Id.* at 437. Because plaintiff here, as the plaintiffs in *Rinke*, did not tender the consideration before or at the time of filing suit, plaintiff is precluded from challenging the validity of the release. In fact, as we have indicated, plaintiff has not attempted at anytime to tender back the consideration. Instead, it chose to retain the settlement proceeds while at the same time suing to obtain additional funds as damages in the lawsuit. Any belated attempt to now tender back proceeds would be untimely. Consequently,

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<sup>1</sup>Plaintiff cites other cases; for example, the holdings in *Kordis v Auto Owners Ins Co*, 311 Mich 247; 18 NW2d 811 (1945), and *Triplett v St Amour*, 444 Mich 170; 507 NW2d 194 (1993). We have reviewed these cases and agree with defendants that they are simply inapplicable to the instant case. After reviewing the holdings in those cases, we conclude that under this type of scenario, a plaintiff may not bring an independent action as it has done in the instant case.

we again conclude that the release must stand and that the trial court properly granted defendants' motion for summary disposition.

In light of our resolution of this issue, we need not address plaintiff's other arguments.

We affirm.

/s/ Jessica R. Cooper

/s/ Joel P. Hoekstra

/s/ Jane E. Markey