[Cite as *Bailey v. Vaughn*, 2017-Ohio-7725.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 105412

MICHON BAILEY

PLAINTIFF-APPELLANT

vs.

ALISSA VAUGHN, ET AL.

DEFENDANTS-APPELLEE

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-16-868645

BEFORE: Stewart, J., Keough, A.J., and E.T. Gallagher, J.

RELEASED AND JOURNALIZED: September 21, 2017

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MELODY J. STEWART, J.:

{¶1} Plaintiff-appellant Michon Bailey brought this personal injury action against defendant-appellee Alissa Vaughn and various John Doe defendants, alleging that Vaughn negligently operated her vehicle causing him injury and damaging his vehicle. Vaughn filed a motion to enforce a prior settlement between the parties (brokered by her automobile insurer) in which she claimed that Bailey orally agreed to accept $1,500 in exchange for giving up his right to "file a lawsuit or make any further claim for bodily injury" against Vaughn. Bailey did not dispute that he initially agreed to settle, but said that he later had a change of heart and returned the uncashed $1,500 check issued to him. He told the court that the settlement was the product of a mutual mistake because his medical bills from the accident were $7,505. The court held that there was no mutual mistake because the parties "explicitly and unambiguously" intended that Bailey would release Vaughn from liability. This appeal followed.

{¶2} In three assignments of error, Bailey argues that the court erred by finding that there were no genuine issues of material fact regarding the parties' intent when executing the settlement agreement and that the court misapplied precedent on whether a mutual mistake existed.

{¶3} "An oral settlement agreement may be enforceable if there is sufficient particularity to form a binding contract." *Prime Properties, Ltd. Partnership v. Badah Ents.*, 8th Dist. Cuyahoga No. 99827, 2014-Ohio-206. A binding contract requires "'an offer, acceptance, contractual capacity, consideration (the bargained for legal benefit

and/or detriment), a manifestation of mutual assent and legality of object and of consideration.'" *Kostelnik v. Helper*, 96 Ohio St.3d 1, 2002-Ohio-2985, 770 N.E.2d 58, quoting *Perlmuter Printing Co. v. Strome, Inc.*, 436 F.Supp. 409, 414 (N.D.Ohio 1976).

{¶4} An exhibit attached to the motion to enforce the settlement agreement contained a transcript of a telephone conversation between Bailey and a representative of the insurer. The transcript states:

> Q. The purpose of this recorded conversation is to make record of the bodily injury settlement of a claim by Mr. Michon Bailey Sr. for bodily injury resulting from an automobile accident on November 6th, 2014 in Cleveland Heights, Ohio involving an automobile driven by Alissa Vaughn uh [sic] and also insured under the name of Alissa Vaughn. Is this correct[?]
>
> A. Yes[.]
>
> Q. Mr. Bailey we have agreed to settle your bodily injury claim for $1500.00 settling this bodily injury claim means Geico will pay to you on behalf of Alissa Vaughn $1500.00 and with your acceptance you will give up any and all rights to file a lawsuit or make any further claim for bodily injury again- [sic] against Alissa Vaughn for the accident on November 6th, 2014. Do you agree to accept $1500.00 in full and final settlement of your bodily injury claim against Alissa Vaughn for the accident on November 6th, 2014 and release them from an — [sic] any further liability[?]
>
> A. Yes[.]
>
> Q. You are agreeing to indemnify and hold harmless Alissa Vaughn and Geico General Insurance Company from any and all claims relating to your injury illness or disease related to the accident on November 6th, 2014 is this correct[?]
> A. Yes[.]
>
> Q. Is it your desire to settle this claim as discussed and release Alis — [sic] Alissa Vaughn[?]
>
> A. Yeah[.]

Q. Have you understood all of these questions[?]

A. Yes[.]

{¶5} The transcript proves that the settlement contained the elements of an enforceable contract: the insurer's offer to settle any claims for personal injury arising from the automobile accident involving Bailey and Vaughn, Bailey's acceptance of the offer, Bailey's agreement to accept $1,500 as consideration for agreeing to settle his claim, and a manifestation of a mutual assent to the terms.[1]

{¶6} Bailey attacks the order enforcing the settlement by arguing that the parties made a mutual mistake of fact by failing to consider that his injuries could have been more extensive than the consideration offered for settlement. In support of that argument, he cites *Sloan v. Std. Oil Co.*, 177 Ohio St. 149, 203 N.E.2d 237 (1964), where paragraphs one and two of the syllabus state:

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[1] Bailey claimed below that he did not cash the settlement check and tried to return it (without specifying when he tried to return it), suggesting there was a failure of consideration. On appeal, he abandons the claim that there was no consideration, and now argues that the consideration was inadequate in light of the medical bills he incurred after the settlement. Courts do not question the adequacy of consideration because "'it is still believed to be good policy to let people make their own bargains and their own valuations.'" *Lake Land Emp. Group of Akron, L.L.C. v. Columber*, 101 Ohio St.3d 242, 2004-Ohio-786, 804 N.E.2d 27, ¶ 21, quoting 15 Corbin on Contracts (Interim Ed.2002) 96-97, Section 1395. *See also Judy v. Louderman*, 48 Ohio St. 562, 571, 29 N.E. 181 (1891), paragraph two of the syllabus ("While it is necessary that the consideration of a promise should be of some value, it is sufficient if it be such as could be valuable to the party promising; and the law will not enter into an inquiry as to the adequacy of the consideration, but will leave the parties to be the sole judges of the benefits to be derived from their contracts, unless the inadequacy of consideration is so gross as of itself to prove fraud or imposition.").

> 1. A release may be avoided where the releasor can establish by clear and convincing evidence that it was executed by mutual mistake, as between himself and the releasee, of a past or present fact material to the release, as where there was a mutual mistake as to the existence of any injury of the releasor, unless it appears further that the parties intended that claims for all injuries, whether known or unknown at the time of the execution of the release, be relinquished. (*O'Donnel v. Langdon*, 170 Ohio St., 528, overruled.)
>
> 2. Whether the parties to a release actually intended to discharge all liability is a question of fact for the trier of the facts.

{¶7} *Sloan* does not aid Bailey — it says that no mutual mistake of fact exists when the parties to a settlement agreement "intended that claims for all injuries, whether known or unknown at the time of the execution of the release, be relinquished." The terms of the settlement provided that Bailey would "give up any and all rights to file a lawsuit or make any further claim for bodily injury * * * against Alissa Vaughn for the accident on November 6th, 2014." Using the word "further" to modify the phrase "bodily injury" showed that Bailey and the insurer agreed that the settlement would bind them for all injuries, whether known or unknown at the time.

{¶8} This is not a case where Bailey did not realize that he was injured before he agreed to settle. *Sloan* sets forth several factors for a court to consider when considering whether to rescind a settlement agreement, among them being the "absence of discussion concerning personal injuries; the contention that the injuries were in fact unknown at the time the release was executed is reasonable[.]" *Id*. at 153. In an affidavit appended to his brief in opposition to the motion to enforce the settlement agreement, Bailey stated that

"within 24 hours" of the accident, "I began to experience pain and discomfort in my neck, shoulder and upper back." He admitted that he communicated his injuries to the insurer's representative prior to confirming his intent to settle. And Bailey agreed to settle despite telling the insurer's representative that he had not yet been to a doctor — he told the insurer that he had a scheduled appointment with a doctor. These assertions show that the parties did discuss Bailey's injuries, including the fact that he may not have determined their full extent. With the terms of the settlement barring "any further claim for bodily injury," Bailey understood, or should have understood, that the settlement barred any claim for injuries discovered during scheduled doctor appointments occurring after the date of the settlement.

{¶9} We also reject Bailey's claim that the settlement agreement was the product of a mutual mistake. "A mistake is material to a contract when it is 'a mistake * * * as to a basic assumption on which the contract was made [that] has a material effect on the agreed exchange of performances.'" *Reilley v. Richards*, 69 Ohio St.3d 352, 353, 632 N.E.2d 507 (1994), quoting 1 Restatement of the Law 2d, Contracts, Mistake, Section 152(1) at 385 (1981).

{¶10} Bailey may have made a mistake in entering into the settlement agreement so soon after the accident, but it was one from which he cannot legally recover. At best, Bailey alleged that he made a unilateral mistake in agreeing to settle any claims against the insurer before he had verified the extent of the injuries he suffered in the accident. This was not a mistake shared by, and in common to, both parties. Bailey's retrospective

view of the extent of his injuries is not a basis for relieving him from the terms of the settlement agreement.

{¶11} Finally, Bailey also argues that he did not manifest an intent to accept the settlement because he attempted to return the $1,500 check without cashing it. We disagree. An accord and satisfaction existed once the insurer issued the check and Bailey received it, even though he refused to cash the check and later tried to return it. *Columbus Mut. Life Ins. Co. v. Natl. Life Ins. Co.*, 100 Ohio St. 208, 210, 125 N.E. 664 (1919) (receipt and acceptance of settlement check without complaint resulted in acceptance of the check itself as full payment for damages even though party later tried to return the uncashed check); *Hudak v. Nationwide Mut. Ins. Co.*, 112 Ohio App. 306, 310, 167 N.E.2d 666 (8th Dist.1960). This is not to say that Bailey's intent to enter into the settlement agreement is demonstrated solely by his acceptance of the check; rather, it is Bailey's oral acceptance of the settlement terms that made his acceptance of the check an accord and satisfaction. So when Bailey accepted the check in the agreed-upon amount as full payment for his injuries, the debt to him was discharged regardless of whether or not he presented the check for payment.

{¶12} The assigned errors are overruled.

{¶13} Judgment affirmed.

It is ordered that appellee recover of appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

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MELODY J. STEWART, JUDGE

KATHLEEN ANN KEOUGH, A.J., and
EILEEN T. GALLAGHER, J., CONCUR