Cite as 2012 Ark. App. 8

ARKANSAS COURT OF APPEALS

DIVISION IV
No. CA11-757

JOSE ANAYA APPELLANT	**OPINION DELIVERED** JANUARY 4, 2012
V.	APPEAL FROM THE GARLAND COUNTY CIRCUIT COURT, [NO. CV-2010-1533-IV]
ROBERT FORD APPELLEE	HONORABLE MARCIA R. HEARNSBERGER, JUDGE
	REVERSED and REMANDED

ROBERT J. GLADWIN, Judge

This appeal follows the June 6, 2011 order of the Garland County Circuit Court that granted appellee's motion for summary judgment. Appellant argues that the circuit court erred in granting summary judgment because a genuine issue of material fact remained as to whether there was a meeting of the minds of the parties sufficient to constitute a release of appellant's claims against appellee. We find merit in appellant's argument; accordingly, we reverse and remand.

On November 22, 2010, appellant Jose Anaya and appellee Robert Ford were involved in a motor-vehicle accident that occurred in Hot Springs, Arkansas. Appellant sustained damages and injuries as a result of the accident. Following the accident, appellant entered into a recorded verbal release on November 22, 2010, with appellee's liability insurance carrier. During the conversation, appellant was asked if it was his intent to settle his claim in consideration of this payment of $500 and in further consideration of the promise

to pay reasonable and necessary medical bills up to a maximum of $1000 incurred by appellant before that day. In addition, appellant was asked if he agreed to release and forever discharge appellee from any and all injury claims of any kind or nature arising out of the motor-vehicle accident. The insurance carrier also stated that, in further consideration, it would be agreed that appellant's reasonable and necessary medical and/or dental expenses up to a maximum of $1500 incurred by him within the next thirty days after the date of the release would be paid provided such treatment related to the cause at issue. Appellant was asked if he acknowledged that he was waiving his right to counsel and there that was no fraud or undue influence that was forcing him to make that settlement, and appellant indicated that it was his desire to accept that settlement. Appellant further stated that he understood all of the questions and that all of his answers were true and correct and to the best of his knowledge. In addition, by letter dated December 3, 2010, appellee settled appellant's property-damage claim.

Appellant filed a complaint against appellee on December 28, 2010, seeking to recover for his damages and injuries. Appellee filed an answer to the complaint on January 19, 2011, pleading all available defenses under Rule 8(c) of the Arkansas Rules of Civil Procedure, including accord and satisfaction, payment, and release. Appellee argued that appellant and appellee's liability-insurance carrier entered into a contract, wherein the personal-injury claim was settled.

Appellee filed a motion for summary judgment on February 3, 2011, arguing that appellant did not have a cause of action against appellee as he had entered into an agreement with appellee's liability insurance carrier, which settled all of appellant's claims against

appellee. Appellee argued that appellant's claims were barred based on payment and release and accord and satisfaction.

Appellant filed a response to the motion for summary judgment on February 22, 2011, arguing that a factual issue existed regarding whether there was a meeting of minds in the conversation between appellant and appellee's representative sufficient to form a contract and release and discharge appellant's claims against appellee. Appellant attached his affidavit to his response, and stated that he moved to the United States in 1980 and began to learn to speak English at that time. He alleged that when appellee's representative called him after the accident, he understood the conversation was about paying for damage to his truck and medical expenses for injuries he received. Appellant alleged that he did not understand that he was being asked to give up all claims he might have against appellee. He also alleged that he did not understand what release and discharge meant and did not intend to give up all of his legal claims against appellee. He stated that when he received a check from appellee's insurance carrier he returned it because that amount was not acceptable for his injuries.

On May 2, 2011, a hearing was held on appellee's motion for summary judgment. The circuit court did not rule on the motion at the hearing, but in an order filed June 6, 2011, the circuit court granted appellee's motion for summary judgment. Appellant filed a notice of appeal from that denial on June 2, 2011, and an amended notice of appeal and designation of record on June 28, 2011.

Our standard of review is well established. Summary judgment is appropriate only when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Gentry v. Robinson*, 2009 Ark. 634, 361 S.W.3d 788. On appeal, we

determine if summary judgment was appropriate based on whether the evidentiary items presented by the moving party in support of the motion leave a material fact unanswered. *Id.* We view the evidence in the light most favorable to the party against whom the motion was filed, resolving all doubts and inferences against the moving party. *Id.* Summary judgment is not proper where the evidence, although in no material dispute as to actuality, reveals aspects from which inconsistent hypotheses might reasonably be drawn and reasonable minds might differ. *Id.*

Appellee has the burden of establishing the affirmative defenses of release and accord and satisfaction. A release agreement is a contractual agreement, and the essential elements of a contract are (1) competent parties, (2) subject matter, (3) legal consideration, (4) mutual agreement, and (5) mutual obligations. *Williamson v. Sanofi Winthrop Pharm., Inc.*, 347 Ark. 89, 60 S.W.3d 428 (2001). The elements of a contract are essentially the same as for accord and satisfaction, which have been correctly stated by appellee as follows, quoting from his motion for summary judgment:

> (1) proper subject matter; (2) competent parties; (3) an assent or meeting of the minds; and (4) consideration. The key element is a meeting of the minds, such that there must be an objective indicator that the parties agreed that the payment tendered will discharge the debt. Accord and satisfaction is an affirmative defense and must be proved by the party asserting it.

Morgan v. Turner, 2010 Ark. 245, 10, 368 S.W.3d 888, 894–95.

The key element in this dispute is whether there was a meeting of the minds. In *Williamson*, *supra*, our supreme court confirmed the circuit court's denial of a requested class certification, stating:

> We keep in mind two legal principles when deciding whether a valid contract was entered into: (1) a court cannot make a contract for the parties but can only construe and enforce the contract that they have made; and if there is no meeting of the minds, there is no contract; and (2) it is well settled that in order to make a contract there must be a meeting of the minds as to all terms, using objective indicators.

Williamson, 347 Ark. at 98, 60 S.W.3d at 434. Appellant argues that similar questions exist with respect to whether there was a meeting of the minds between appellant and appellee's insurance company representative with respect to appellant's understanding about the existence of a contract, whether he believed the contract existed between him and the representative, what the terms of the understanding were, and whether he believed that he had "accepted" an offer. Appellant argues that it is not clear, from the discrepancies between the transcript of the telephone conversation between appellee's insurance company representative and him and the affidavit he submitted in support of his response to appellee's motion, that both parties understood the "contract" as alleged by appellee. We agree.

This court recently reiterated that settlement agreements, like other contracts, must contain terms that are definitely agreed upon and reasonably certain. *Rubber & Gasket Co. of Am. v. Zimmerman*, 2011 Ark. App. 273. *See also Roberts v. Green Bay Pkg., Inc.*, 101 Ark. App. 160, 272 S.W.3d 125 (2008). Mutual agreement, as evidenced by objective indicators, is essential. *Zimmerman*, *supra*. If there is no meeting of the minds, there is no contract. *Id*. Whether a meeting of the minds has occurred is an issue of fact. *Daimler Chrysler Corp. v. Smelser*, 375 Ark. 216, 289 S.W.3d 466 (2008).

Applying these standards, we conclude that reasonable minds might differ as to whether appellant and appellee's insurance-company representative reached a settlement agreement.

We note that the transcript of the recorded telephone conversation between appellant and appellee's insurance-company representative, in and of itself, is significant evidence that an agreement had been reached; however, when viewed in conjunction with appellant's subsequent objective actions, we hold that the evidence could reasonably be interpreted as something less than an absolute acceptance. To create a binding contract, an acceptance must unconditionally agree to all material terms of the offer. It is undisputed that appellant neither signed a written release nor accepted and cashed the settlement check he received from appellee's insurance company representative.

We acknowledge that a settlement may be valid notwithstanding the fact that it has not been reduced to writing. See *Zimmerman*, *supra* (citing *Ark. A. C. & L. Co. v. Dunlap*, 142 Ark. 358, 218 S.W. 839 (1920)). But under the specific circumstances of this case—particularly the absence of a signed release and appellant's refusal of the proposed settlement check—we hold that there remains a question as to whether the parties had undisputedly reached a full and final settlement agreement that simply required a written memorialization. We therefore hold that summary judgment was inappropriate and must be reversed.

Reversed and remanded.

VAUGHT, C.J., and BROWN, J., agree.

G. Ben Bancroft, for appellant.

Watts, Donovan & Tilley, P.A., by: *Jim Tilley* and *Bethany A. Pike*, for appellee.