STATE OF MICHIGAN

COURT OF APPEALS

BRIAN DOMINICK,

Plaintiff-Appellant,

v

AUTO-OWNERS INSURANCE COMPANY and PRIMERICA LIFE INSURANCE, Jointly and Severally,

Defendants-Appellees,

and

PAUL MULLENBACH and JOHN C. CARLISLE,

Defendants.

UNPUBLISHED
February 26, 2002

No. 225074
Macomb Circuit Court
LC No. 98-005081-CZ

Before: K.F. Kelly, P.J., and Hood and Doctoroff, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's decision granting defendant Auto-Owners Insurance Company summary disposition. We affirm.

I. Basic Facts and Procedural History

The case at bar is a first party no-fault cause of action arising out of a snowmobile/automobile accident occurring on January 23, 1993[1]. As a result of the accident, plaintiff had his left leg amputated at the hip.

When the accident occurred, plaintiff had no-fault automobile insurance through defendant Auto-Owners Insurance Company. After the accident, plaintiff began to negotiate directly with Mr. Clements, an adjuster for defendant, for payment of extensive home

[1] In their respective appellate briefs, defendant Auto-Owners submits that the accident occurred on January 22, 1993 and plaintiff represents that the accident occurred on January 23, 1993. However, in his deposition, plaintiff testified that the accident in fact occurred on January 23, 1993.

modifications necessitated by plaintiff's amputation. Initially, during these first-party benefits negotiations, plaintiff did not elect to have legal representation. However, plaintiff did have an attorney, Mr. Serra, representing him on another insurance matter not at issue in this appeal.

After the occupational consultant evaluated plaintiff's home, defendant agreed to pay for certain home modifications. In exchange for its agreement to pay, however, defendant requested a partial waiver of any claim for additional home modifications arising out of the January 23rd accident. Accordingly, Mr. Clement drafted a partial release and sent it to plaintiff for his signature. After Mr. Clement sent the partial release to plaintiff but before plaintiff signed it, Mr. Clement learned of Mr. Serra's legal representation. Accordingly, Mr. Clement promptly contacted Mr. Serra to ensure that he was not representing plaintiff as regards the negotiations for the home modifications.

Ultimately, Mr. Serra reviewed the partial release on plaintiff's behalf and recommended a modification allowing plaintiff to submit future claims for additional home modifications to accommodate *a change in plaintiff's medical condition.* Defendant agreed to this modification[2]. Thereafter, Mr. Serra advised plaintiff that the partial release would bar any future claim for home modifications in his existing residence unless a change in his medical condition required further alterations. Evidence presented indicated that Mr. Serra explained the effect of the partial release to plaintiff and plaintiff understood that the document released defendant from any further liability for additional home modifications save for those necessitated by a change in plaintiff's medical condition.

Since plaintiff did not wish to litigate the home modification issue, he agreed to the terms contained in the partial release and signed the document. The partial release provides in pertinent part:

> AUTO-OWNERS INSURANCE COMPANY shall pay $39,250.00 to be used to complete modifications on [plaintiff's home] as recommended and outlined by [the occupational therapist] in her attached Home Evaluation Report of December 17, 1993. Auto-Owners Insurance Company believes this sum will be adequate to complete the home modifications recommended and outlined . . . . If that sum should prove inadequate to complete the home modifications . . . Auto-Owners Insurance Company shall pay additional sums as needed to complete the home modification.
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> In consideration of this, [plaintiff] agrees to the following:
>
> A. That if [plaintiff] should voluntarily choose to change his accommodations, Auto-Owners Insurance Company *shall not be responsible for any payments with regard to the new accommodations unless [plaintiff's] medical condition as a result of the 1-29-93 [sic] accident shall change so as to cause a need to change accommodations*. Should such a change occur, Auto-Owners and [plaintiff] may consider additional modifications or relocation. Involuntary

[2]Mr. Serra also suggested additional changes to the release to benefit plaintiff of which defendant flatly refused.

changes of residence are not covered by this agreement. As used in this agreement, "involuntary" means beyond the ability of [plaintiff] to choose to alter the outcome, irrespective of the desire of [plaintiff] to move or stay. (Emphasis added.)

B. That completion of the accommodations and payment for these services as outlined in paragraph 1 by Auto-Owners Insurance Company *releases Auto-Owners Insurance Company from any obligations it might have under the Michigan No-Fault Act, specifically Section .3107(a) for home accommodations for [plaintiff] except as otherwise noted in this agreement.* (Emphasis added.)

* * *

The parties and their representatives, having carefully reviewed this document, do hereby voluntarily affix their signatures with the understanding that this is a partial release of No-Fault benefits as stated above.

After plaintiff executed the partial release, and without dispute, defendant authorized payment totaling almost $40,000 for modifications recommended by the occupational therapist and plaintiff's home was modified accordingly.

After the initial modifications were completed, plaintiff sought additional home modifications to further accommodate his condition as a result of his accident. Plaintiff also sought reimbursement for expenses incurred as a result of additional modifications that plaintiff arranged without defendant's knowledge or prior approval. Defendant refused and plaintiff filed suit.

Relying upon the terms of the partial release, defendant filed a motion for summary disposition pursuant to MCR 2.116(C)(7) and (C)(10) arguing that the additional modifications were not necessitated by any change in plaintiff's medical condition thus absolving defendant from any liability for the additional expenses[3].

The trial court issued its written Opinion and Order holding that the release was valid and that its terms specifically barred plaintiff's claim for home modifications without a concomitant change in plaintiff's medical condition. The court further held that conditions for which plaintiff sought modification existed at the time of plaintiff's disability and as such, could have been bargained for when the original modifications were made to plaintiff's home. Finding that plaintiff "can make no viable claims against Auto-Owners" the trial court granted defendant's motion for summary disposition and dismissed plaintiff's claims as to Auto-Owners with prejudice. Plaintiff appeals as of right. We affirm.

II. Summary Disposition – Standards of Review

[3] Defendant also sought summary disposition pursuant to MCR 2.116(C)(8) arguing that certain of plaintiff's requested reimbursements were barred by the one-year back rule of MCL 500.3145. Plaintiff stipulated to same and this issue is not relevant to the instant appeal.

This Court reviews de novo motions for summary disposition. *Dampier v Charter County of Wayne*, 233 Mich App 714, 720; 592 NW2d 809 (1999).

Where a valid release of liability exists between the parties, summary disposition is appropriate in accord with MCR 2.116(C)(7). *Wyrembelski v City of St Clair Shores*, 218 Mich App 125, 127; 553 NW2d 651 (1996). "When reviewing a motion for summary disposition under MCR 2.116(C)(7), the court must accept the nonmoving party's well-pleaded allegations as true and construe the allegations in the nonmovant's favor to determine whether any factual development could provide a basis for recovery." *Diehl v Danuloff*, 242 Mich App 120, 123; 618 NW2d 83 (2000). The court considers any pleadings, affidavits, depositions, admissions, or other documentary evidence submitted by the parties. *Id.* Unlike a motion brought pursuant to (C)(10), a (C)(7) movant is not necessarily required to file any supportive material and the party opposing the motion need not respond in kind. *Maiden v Rozwood* 461 Mich 109, 119; 597 NW2d 817 (1999). Rather, the allegations contained in the complaint are accepted as true save for those allegations specifically contradicted by documentation submitted by the movant. *Id.* If the parties in fact submit documentary evidence, the court must consider the evidence submitted when deciding the motion. *Diehl, supra* at 123.

A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. "In evaluating a motion for summary disposition brought under this subsection, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, in the light most favorable to the party opposing the motion. Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law." *Maiden, supra* at 120.

III. General Validity of Release

The validity of a contractual release turns on the parties' intent. *Skotak v Vic Tanny International, Inc*, 203 Mich App 616, 618; 513 NW2d 428 (1994). For a release to be valid, it must be fairly and knowingly made. *Id*. In fact, a release is invalid if: (1) [T]he releasor was dazed, in shock, or under the influence of drugs; (2) the nature of the instrument was misrepresented, or (3) there was other fraudulent or overreaching conduct. *Id*. See also *Dombrowski v City of Omer*, 199 Mich App 705, 709; 502 NW2d 707 (1993).

A. Consideration

In the case at bar, plaintiff argues first that the partial release fails for lack of consideration. It is a well settled principal that legal consideration is an essential element to a valid contract. *Yerkovich v AAA*, 461 Mich 732, 740; 610 NW2d 542 (2000). As our Supreme Court explained, "[v]alid consideration for a contract cannot be presumed merely because two parties receive benefit from each other. Rather, a bargained for exchange is required. The essence of consideration, therefore, is legal detriment that has been bargained for and exchanged for the promise." *Higgins v Monroe Evening News*, 404 Mich 1, 20; 272 NW2d 537 (1978) (citing Calamari, Contracts (1st ed.), s 53, p. 105.) Indeed, the forbearance of a legal right is sufficient consideration to make another's promise in exchange thereof binding. See *Green v Millman Brothers Inc*, 7 Mich App 450, 456; 151 NW2d 860 (1967). However, just as well settled is the preexisting duty rule which provides that agreeing to do something that one is already legally bound to do does not constitute sufficient consideration to make a promise

binding. *Yerkovich, supra* at 740-41. To that end, plaintiff suggests that defendant already had a preexisting statutory duty to perform the modifications to plaintiff's home thus providing an insufficient legal detriment to support a contract. We do not agree.

MCL 500.3107 provides in pertinent part that:

> (1) Except as provided in subsection (2), personal protection insurance benefits are payable for the following:
>
> (a) Allowable expenses consisting of all reasonable charges incurred for *reasonably necessary* products, services and accommodations for an injured person's care, recovery or rehabilitation. (Emphasis added.)

As the trial court properly observed, accommodations as contemplated by the statute, "vary depending upon the circumstances of each injury and the parties' understanding of the term `reasonable.'" An insurance company is not under a preexisting duty to accept, without dispute, what an occupational therapist deems "reasonably necessary" to accommodate a particular disability. Indeed, pursuant to the no-fault act, an insurer is permitted to review claims for lack of coverage, excessiveness or fraud and to dispute coverage or the amount of benefits owing where necessary and without penalty. See *Lewis v Aetna Casualty & Surety Company*, 109 Mich App 136, 139; 311 NW2d 317 (1981) (stating that insurance companies are not "required to merely process and pay claims without reasonably challenging their validity.")

In the instant matter, defendant agreed to accept the occupational therapist's recommendations for modifications to plaintiff's home without contest thus forbearing its legal right to litigate whether those recommendations were in fact "reasonably necessary" for purposes of section 3107[4]. In exchange for its promise not to litigate and to pay for the recommended accommodations, defendant requested that plaintiff sign the partial release absolving defendant of any future liability for additional modifications of his existing home or a new home not necessitated by a change in plaintiff's medical condition. Desiring to circumvent litigation pertaining to home modifications, plaintiff agreed to sign the partial release.

In the case sub judice, defendant had a choice and elected to relinquish its legal right to litigate in exchange for plaintiff's promise to execute the partial release. Stated otherwise, defendant's promise to forbear its legal right to litigate the scope of the suggested "reasonably necessary" modifications provided the requisite consideration to make plaintiff's promise to execute the partial release legally binding. Accordingly, we affirm the trial court and find that the partial release was supported by a valid consideration as a matter of law.

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[4] Although defendant may have been bound by statute to provide home modifications, defendant was not otherwise legally bound to accept the recommendations without quarrel thus rendering all of the cases cited by plaintiff discussing the preexisting duty rule factually distinguishable. In all of the cases relied upon by plaintiff, the law delineated an unequivocal legal obligation to perform the act at issue. In fact, the *Borg-Warner* court specifically observed that the "filing officer [had] *no choice* but to comply with the request and perform certain specific acts required by statute. *Borg-Warner Acceptance Corp v Department of State*, 433 Mich 16, 20; 444 NW2d 786 (1989). (Emphasis added.)

B. Fraud, Duress, Coercion and Overreaching

As an initial matter, we recognize that a misrepresentation sufficient to invalidate a contract of release is one "made with the intent to mislead or deceive." *Paterek v 6600 Limited*, 186 Mich App 445, 449; 465 NW2d 342 (1990). See also *Hungerman v McCord Gasket Corporation*, 189 Mich App 675, 677; 473 NW2d 720 (1991). Claims for fraudulent representation require evidence establishing that:

> (1) the defendant made a material representation, (2) it was false, (3) the defendant knew it was false when made, or made it recklessly, without knowledge of its truth and as a positive assertion, (4) it was made with the intention to induce reliance by the plaintiff, (5) the plaintiff acted in reliance upon it, and (6) the plaintiff thereby suffered injury. *Hungerman, supra* at 677-678.

Beyond a conclusory statement that Mr. Clements "misrepresented the terms and nature" of the release which "induced [plaintiff] to sign," plaintiff does not otherwise identify the alleged material misrepresentation upon which plaintiff relies to state his fraud claim.[5] Documentary evidence submitted by defendant establishes that plaintiff consulted with an attorney before signing the partial release and that counsel, acting on plaintiff's behalf, negotiated a term providing for additional modifications to the extent that same are ever required to accommodate a change in plaintiff's medical condition. Plaintiff did not submit a scintilla of evidence to substantiate his allegation that defendant procured the partial release by fraud. *Maiden, supra* at 119-120. Indeed, a review of the record reveals that summary disposition pursuant to MCR 2.116(C)(10) is appropriate considering that plaintiff failed to come forth with documentary evidence to create a genuine factual issue upon which reasonable minds might differ. *Id.*

Similarly unpersuasive is plaintiff's allegation that defendant "exploited" his fragile mental condition and thus procured the partial release by coercion, duress or overreaching. Uncontroverted documentary evidence established that when Mr. Clements learned that plaintiff may be represented by an attorney, he immediately contacted that attorney to ascertain the scope of his legal representation. And, as a result of this contact, not only did Mr. Clement ascertain the scope of Mr. Serra's legal representation as regards plaintiff, he further advised that he wanted plaintiff to sign a partial release. Mr. Clement's candid disclosure prompted Mr. Serra to write a letter to plaintiff offering to review the terms contained in the partial release before plaintiff signed it.

The unrebutted evidence submitted by defendant establishes that defendant did not obtain the partial release by fraud, duress, coercion or overreaching. Even accepting as true that plaintiff was in a weakened mental condition when he signed the partial release, and that he did so because he was desperate to have the home modifications completed, the fact that plaintiff had independent legal representation before executing the partial release substantially militates against a finding of fraud, coercion, duress or overreaching. The documentary evidence

[5] To the extent that plaintiff relies on Mr. Clement's statement that defendant would not pay for any modifications until plaintiff signed the partial release, we find that such a statement does not rise to the level of a representation made with the intent to mislead or deceive necessary for actionable fraud. *Paterek, supra* at 449.

submitted establishes that plaintiff wanted to avoid home modification litigation and thus agreed to sign the partial release. Plaintiff's choice to sign the partial release and thereby avoid litigation was a tactical decision that this Court declines to review. See *Lewis, supra* at 140. Upon de novo review of the record, we find that plaintiff failed to come forth with sufficient evidence to create a material factual dispute upon which reasonable minds could differ. Accordingly, summary disposition is appropriate pursuant to MCR 2.116(C)(10).

IV. The Partial Release Was Not Vague and Ambiguous

A contract is considered "ambiguous" where its provisions are susceptible to conflicting interpretations. *Farm Bureau v Nikkel*, 460 Mich 558, 566; 596 NW2d 915 (1999). A court, however, is not permitted to read in ambiguity where none otherwise exists. *Id*. at 567-568. As our Supreme Court explained, "if a contract, however inartfully worded or clumsily arranged, fairly admits of but one interpretation it may not be said to be ambiguous or, indeed, fatally unclear." *Id*. at 566 (citation omitted.)

In the case at bar, the trial court held that the partial release was valid and unambiguous. We agree. Where the text contained in a release is unambiguous, incumbent upon this Court is to discern the parties' intentions from the plain, ordinary meaning of the terms employed in the release. *Wyrembelski v City of St Clair Shores*, 218 Mich App 125, 127; 553 NW2d 651 (1996). Additionally, if the terms are not ambiguous, "contradictory inferences become subjective and irrelevant, and the legal effect of the language is a question of law to be resolved summarily. *Id*. (Citation omitted.)

The words, "if [plaintiff] should voluntarily choose to change his accommodations, [defendant] shall not be responsible for any payments with regard to the new accommodations unless [plaintiff's] medical condition as a result of the 1-29-93 [sic] accident shall change so as to cause a need to change accommodations. Should such a change occur, [defendant] and [plaintiff] may consider additional modifications or relocation" fairly admits of but one interpretation. *Farm Bureau, surpa* at 566.

Plaintiff argues that the word "accommodation" in the partial release means new residence and new residence only. Plaintiff's narrow interpretation however, does not adequately represent the parties' intent. The plain language of the partial release absolves defendant from providing any further "accommodations" whether in plaintiff's current residence or in an entirely new residence where such additional accommodations are not precipitated or otherwise necessitated by any change in plaintiff's medical condition. The very terms of the partial release indicate that the intent of the parties is to re-visit the home modifications issue when necessitated by a change in plaintiff's medical condition. The term "accommodations" as used in the partial release is clear and unambiguous. The language provides that defendant is not responsible for any further "accommodations" be it to plaintiff's current residence or a new residence, *absent a change in plaintiff's medical condition.* Accordingly, we hold that the trial court did not err when it determined that the partial release was valid and unambiguous.

V. Conclusion

Upon de novo review of the record, we find that the evidence submitted establishes that the partial release was fairly and knowingly made and that it was valid in all respects. See *Skotak, supra* at 618. Defendant submitted uncontroverted evidence establishing that plaintiff

understood the effect of the partial release. On the record here presented, we decline to conjure ambiguity where none exists and thus re-affirm the holding recognized many times by this Court that "one who signs a contract will not be heard to say, when enforcement is sought, that he did not read it, or that he supposed it was different in its terms." *Farm Bureau, supra* at 567. (Citation omitted.)

Although the trial court did not specify under which court rule it granted defendant summary disposition, to the extent that the trial court found that plaintiff's claims were barred by the existence of a valid release, summary disposition was indeed proper pursuant to MCR 2.116(C)(7) and MCR 2.116(C)(10).

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Harold Hood
/s/ Martin M. Doctoroff