

2005

Jillene Barnes v. Lagoon Corporation : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

JILLENE BARNES,

Plaintiff/Appellant,

v.

LAGOON CORPORATION, INC., a
corporation, and JOHN DOES I-V,

Defendants/Appellees.

CASE NO. 20050213-CA
ORAL ARGUMENT REQUESTED

BRIEF OF APPELLANTS

Appeal from a Judgment of Second Judicial District Court
of Davis County, State of Utah
Honorable Michael Allphin

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JURISDICTION

The Utah Court of Appeals has jurisdiction in this matter pursuant to U.C.A. §78-2a-3(2)(j)(2001)(pour-over civil jurisdiction).

ISSUES ON APPEAL

The following issue is presented on appeal:

Whether the District Court erred in summarily enforcing a settlement agreement between the parties, when there was a clear dispute between Barnes and Lagoon's adjuster whether there had ever been a settlement. The standard of review is *de novo*: "Because the trial court took no extrinsic evidence, we review for correctness." *Sackler v. Savin*, 897 P.2d 1217, 1220 (Utah 1995).

DETERMINATIVE STATUTES AND RULES

There are no determinative statutes or rules.

STATEMENT OF THE CASE

1. Nature of the Case

This is an appeal from summary judgment in favor of Lagoon enforcing a purported settlement agreement.

2. Course of Proceedings and Disposition in the Court Below

Barnes sued Lagoon for injuries she received while sliding down a water slide. Lagoon filed a motion to summarily enforce a purported settlement agreement under Utah R. Civ. P. 7. The motion was granted, and this appeal followed.

3. Statement of Relevant Facts on Appeal

Barnes was a patron at Lagoon. She decided to slide down a water slide and climbed to the top. (R. 2, ¶7). At the top, an employee of Lagoon was controlling the timing and spacing of the

water slide patrons as they went down the slide. (Id., at ¶8). Barnes slid down the slide at the direction of Lagoon's employee. (Id., at ¶10). Before Barnes reached the bottom of the slide, she was struck from behind by another patron, causing her serious and permanent injury. (Id., ¶11). Barnes ultimately incurred over \$40,000.00 in medical bills for surgery and other treatment for her injuries, and lost wages exceeding \$10,000.00. (R. 60-1, ¶12-13).

Undisputed Facts:

The following facts were undisputed before the trial court. After her injury, on July 7, 2000, Barnes contacted Lagoon about medical coverage to pay for her medical bills. (R. 59, ¶3; R. 19, ¶2). Barnes then mailed a letter to Lagoon on October 4, 2000, describing the incident and detailing her medical expenses (\$1,641.00). (R. 19, ¶3). Barnes was then contacted by an adjuster from Lagoon. (R. 19, ¶4). Lagoon's adjuster offered her \$2,000.00 to settle any claims Barnes might make. (Id.) Lagoon's adjuster sent a check for \$2,000.00, which Barnes ultimately returned, uncashed. (R. 19, ¶4; R. 60, ¶6). Over the next several years, Barnes had back surgery, and incurred over \$40,000.00 in medical bills. (R. 60-1, ¶12-13).

Lagoon's Version of the Facts:

Lagoon submitted an affidavit alleging that Barnes had agreed to settle for \$2,500.00. (R. 20, ¶6).¹ Lagoon claimed to have sent a check and release for \$2,000.00. (Id.) Despite claiming that Barnes had agreed to settle for \$2,500.00, Lagoon admitted that it never sent a check for the additional \$500.00 it had agreed to pay Barnes. Further, Lagoon admitted that Barnes never signed a release or cashed the \$2,000.00 check. (R. 20, ¶7). Lagoon took the position, instead, that Barnes

¹Lagoon also contended that Barnes had accepted a prior settlement of \$2,000.00. (R. 19, ¶4). Barnes denied that she had ever agreed to settle for that. (R. 60, ¶6, 7). The trial court and Lagoon did not purport to enforce that disputed settlement.

was required to sign a release for \$2,000.00 and return it, after which Lagoon, despite having been released in writing for \$2,000.00, would then send an additional \$500.00. (R. 20, ¶6).

Eventually, Barnes contacted an attorney in Idaho, Greg Maeser. (Id.) Mr. Maeser was told that there was a settlement agreement for \$2,500.00. (R. 20, ¶8). Later, Barnes retained present counsel to discuss settlement. (R. 20, ¶9). Because Mr. Maeser and present counsel did not agree that there was an enforceable settlement agreement, this action was filed.

Barnes Version of the Facts:

Barnes averred that it was Lagoon, through its representatives, that kept steering the conversation to settling the claim on a final basis. (R. 59, ¶4). Barnes averred that this was never her intention (i.e., to settle on a full and final basis) when she contacted Lagoon. (Id.) Barnes instead offered to settle with Lagoon, if they would agree to pay her expenses, including medical bills and loss of wages. This is what Barnes wanted, was an agreement from Lagoon to pay these expenses. (R. 60, ¶5). Lagoon kept offering, instead, to pay a set amount, for a full and final settlement. Finally, Lagoon offered \$2,000.00, and sent Barnes a check in that amount. Barnes said she would think about it. (Id., ¶6). After thinking about it, Barnes did not feel physically well or good about settling on a final basis, as she was worried about my future medical bills. Barnes told Lagoon this. (Id., ¶7).

Instead, Barnes asked for \$5,000.00. Lagoon verbally agreed to an additional \$500.00. Lagoon was to send a second check for that amount. Barnes did not sign anything in writing due to the fact Lagoon did not uphold their verbal agreement. In the meantime, Barnes received more physical therapy and was worried about future expenses. (Id., ¶8). The only check Barnes ever received from Lagoon was for \$2,000.00. She noticed that it contained a notation that if she cashed

it, it was “full payment of all claims”. This was not her understanding, so she never cashed it. (Id., ¶9).

Barnes averred that she was never sent an additional \$500.00 or anything in writing from Lagoon that they would agree to pay \$2,500.00 to settle after they agreed to the \$500.00. If Barnes had gotten such a settlement agreement, she averred that she would have consulted an attorney to review it. Since she never got such a document, she averred that she never had to decide whether to settle for that amount. (Id., ¶10). Barnes further averred that had she been sent an additional \$500.00 check, she would have consulted an attorney to decide whether to settle for that amount. Since she never got the remaining \$500.00 that Lagoon wanted to pay her, she never had to decide whether to settle for that amount. (Id., ¶11).

SUMMARY OF ARGUMENT

The trial court improperly decided the disputed issue, whether there was a binding agreement for \$2,500.00, on the basis of affidavits, without an evidentiary hearing. A motion for summary enforcement of a settlement agreement should be handled in the same manner as a motion for summary judgment. If there are disputed issues of fact, they should be either sent to a jury or reserved for an evidentiary hearing. The trial court did neither. There was never anything in writing from Lagoon to document an agreement for \$2,500.00. Barnes never signed anything to settle for any amount. Lagoon claimed it was strictly an oral agreement between its adjuster and Barnes. Barnes affidavit, essentially, states that she thought Lagoon was going to send her an additional \$500.00, after which she would decide whether to settle. Whether there was ever an agreement to settle for \$2,500.00 was obviously a disputed issue of material fact.

Further, the trial court erred in deciding that Lagoon could send the additional \$500.00 that

Lagoon admitted that it had never sent Barnes, in December, 2004, over four (4) years after the purported original oral settlement agreement. Even if there was a binding settlement agreement for \$2,500.00, Lagoon admittedly never sent Barnes a release or a check in that amount. Instead, it relied upon the prior check for \$2,000.00 that it sent in October, 2000. A performance of a contract must be tendered within a reasonable time. Four (4) years is not a reasonable time to tender a specific sum of money to settle a claim. The trial court's conclusion otherwise is error.

ARGUMENT

A.

THERE IS A JURY QUESTION WHETHER LAGOON AND BARNES EVER AGREED TO SETTLE FOR \$2,000.00

Lagoon concedes that “[i]t is fundamental that a meeting of the minds on the integral features of an agreement is essential to the formation of a contract. An agreement cannot be enforced if its terms are indefinite”. *Nielsen v. Gold's Gym*, 2003 UT, ¶11, 78 P.3d 600. Essentially, this is a motion for summary judgment. The facts must therefore be viewed in a light most favorable to Barnes. Ultimately, it will be up to a jury to decide whether a settlement agreement was reached, and if it was reached, whether Lagoon breached that agreement by failing to ever pay the full amount agreed upon.

There is no evidence from Barnes that a settlement was ever reached. Lagoon only offers its own internal notes, and the self-serving statements of its adjusters. Barnes offers her affidavit, to the contrary. The only written evidence from Barnes is a letter to Lagoon which states: “I am asking that Lagoon cover my expenses for this preventable accident”. This was her offer. Lagoon did not agree to this offer. Instead, it offered \$2,000.00 for a full and final settlement, by way of a check. Barnes

did not accept this offer, which was conditioned on her taking that amount as a “full payment of all claims”. Barnes made a counteroffer, which was \$5,000.00. Lagoon did not accept that counteroffer, but proposed a \$2,500.00 settlement. Lagoon never sent Barnes the remaining \$500.00. Several years went by, more than a reasonable time for tendering the remaining money, and Barnes contacted counsel for assistance.

Had Barnes cashed the check, a contract for settlement would have been created. Barnes refused to cash the check, which was the same as refusing the offer. Had Lagoon sent any other release documents, perhaps more might be inferred. However, all it ever sent Barnes was a check, for \$500.00 less than what it contends was the settlement amount. Lagoon’s memorandum suggests that a release in the amount of \$2,500.00 had been sent to Barnes, and that the only thing left was for her to send it back and get the remaining \$500.00. This is not correct. Lagoon never sent a release to Barnes. There was never any written commitment on Lagoon’s part to pay \$2,500.00. The only written communication to Barnes was a \$2,000.00 check, which Lagoon admits Barnes never cashed. The only evidence of a contract for \$2,500.00 before the court is internal notes made by Lagoon. There are no documents that were ever sent to Barnes to commit Lagoon to this offer. There are no documents from Barnes agreeing to settle for \$2,500.00. All the court has before it is a party’s internal notes to evidence a binding contract. Whether or not these notes are ultimately admissible, they certainly are not binding on Barnes, who never saw them, and who never received any written settlement agreement for \$2,500.00.

Lagoon contended, and the trial court agreed, that a settlement agreement could be summarily enforced without an evidentiary hearing. (R., 83). This was error. A settlement agreement can only be summarily enforced if there are no factual issues requiring an evidentiary hearing:

Yet it is apparent that the summary procedure for enforcement of unperformed settlement contracts is not a panacea for the myriad types of problems that may arise. The summary procedure is admirably suited to situations where, for example, a binding settlement bargain is conceded or shown, and the excuse for nonperformance is comparatively unsubstantial. On the other hand, it is ill-suited to situations presenting complex factual issues related either to the formation or the consummation of the contract, which only testimonial exploration in a more plenary hearing is apt to satisfactorily resolve.

Tracy-Collins Bank & Trust Co. v. Travelstead, 592 P.2d 605, 609 (1979)(emphasis added). Accord, *Sackler v. Savin*, 897 P.2d 1217 (Utah 1995)(refusing to enforce settlement agreement due to dispute over term of contract).

The closest case, factually, to the instant case, is *Murray v. State of Utah*, 737 P.2d 1000 (Utah 1987). In *Murray*, a personal injury (wrongful death) case, however, both parties were represented by counsel. It was undisputed that a settlement was reached between attorneys. Both a check and a release memorializing the settlement were sent within a few days, but were returned unsigned. There was no argument that settlement had not been reached, only that plaintiff had “changed her mind”; in fact, counsel for the surviving widow conceded at oral argument before the Utah Supreme Court that a settlement had been reached. Under these facts, certainly, there was no dispute that there was a settlement and summary enforcement was appropriate. However, here, all we have are oral communications between an injured person and a lay adjuster, none of which are documented with a contemporaneous letter. All that was ever sent by the defendant was a check with a restrictive endorsement, never cashed. The adjuster and the plaintiff disagree as to whether the check was merely an offer, or whether a settlement was actually reached.

B.

BY WAITING FOUR YEARS, LAGOON’S WAITED

AN UNREASONABLE TIME TO TENDER THE FULL \$2,500.00

Even if there was an oral agreement to settle for \$2,500.00, Lagoon waited an unreasonable amount of time to tender it. In October, 2000, Lagoon tendered a check for \$2,000.00 which contained a restrictive endorsement that “acceptance signifies full payment of all claims”. The only time Lagoon ever tendered a check for \$2,500.00, the purported settlement amount, was after the trial court enforced the settlement in December, 2004. Four years is an unreasonable amount of time.

See *Dent v. Dent*, 870 P.2d 280 (Utah Ct. App. 1994)(no time limit in decree of divorce for husband’s option to match offer on sale of home; option “effective only for a reasonable time”); accord, *Coulter & Smith, Ltd. v. Russell*, 966 P.2d 852 (Utah 1998)(“if a contract fails to specify a time of performance the law implies that it shall be done within a reasonable time under the circumstances”).

The trial court finessed this problem in two ways. First, it construed cashing the \$2,000.00 check, with the restrictive endorsement “full payment of all claims”, as a “condition precedent” to Lagoon’s tender of an additional \$500.00. The problem is that once Barnes cashed that \$2,000.00 check, it would have constituted a binding settlement for \$2,000.00. Any prior oral agreement would have been essentially merged into the cashing of the \$2,000.00 check. Further, there was no evidence in writing from Lagoon stating that cashing the \$2,000.00 check was a condition precedent. There was no evidence from Barnes that she understood it that way.

The second way around the four year delay was by the trial court’s focus on the time between October, 2000, and February, 2001, when Lagoon demanded that Barnes perform by returning a (non-existent) release for \$2,500.00. But the question isn’t Barnes’ performance. The question is

Lagoon's performance. Barnes was not required to perform before Lagoon. It was the other way around. Lagoon had to submit the settlement agreement to Barnes by way of either a release or check in the amount of \$2,500.00, within a reasonable time.

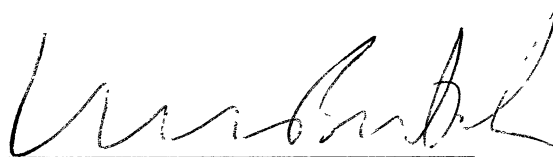
Neither scenario is correct. The trial court was obviously reaching for a way around Lagoon's obvious unreasonable delay, and it reached too far.

CONCLUSION

Utah has recognized that settlement agreements are treated like any other contract. If there is no genuine issue of material fact surrounding the formation or performance of the settlement agreement, then it is enforced in the ordinary fashion. If there are genuine issues of material fact, the trial court must submit those issues to the trier of fact. Here, Lagoon claimed an oral \$2,500.00 settlement, but only sent a check for \$2,000.00 that “acceptance signifies full payment of all claims”.. Barnes said that she only agreed to think about it, but never received the \$2,500.00, or an additional \$500.00 either. There is clearly a disputed issue of material fact, that should go to a jury.

Even if it is clear that the parties agreed to settle for \$2,500.00, Lagoon was required to tender, not a check for \$2,000.00 with an endorsement that “acceptance signifies full payment of all claims”. It was required to either send a check for \$2,500.00 (and stop payment on the other \$2,000.00 check), or send another check for \$500.00 within a reasonable time. It did neither until four years later, after the trial court had ruled to enforce the settlement. This is clearly error. The case should be reversed and sent back for a trial on the issues.

DATED THIS 1st day of August, 2005.

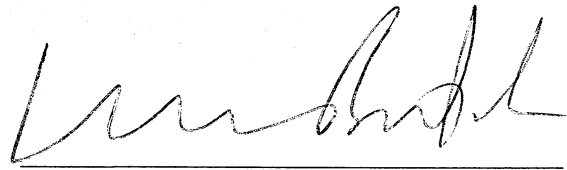
A handwritten signature in black ink, appearing to read 'Daniel F. Bertch', written over a horizontal line.

Daniel F. Bertch
Kevin K. Robson

CERTIFICATE OF SERVICE

I hereby certify that on this 1 day of August, 2005, I served a true and correct copy of the foregoing APPELLANT'S BRIEF, and by deposit in first class mail, postage prepaid to the following counsel of record:

Brian P. Miller
Sam Harkness
SNOW, CHRISTENSEN & MARTINEAU
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Salt Lake City, UT 84145



ADDENDUM

A
ORDER ENFORCING SETTLEMENT

IN THE SECOND DISTRICT COURT, DAVIS COUNTY
STATE OF UTAH

JILLENE BARNES,

Plaintiff,

vs.

LAGOON CORPORATION, INC., a Utah
Corporation, and JOHN DOES I-V,

Defendants.

**RULING ON DEFENDANT LAGOON'S
MOTION TO ENFORCE SETTLEMENT
AGREEMENT**

Case No. 040700166

Judge MICHAEL G. ALLPHIN

This matter is before the Court on defendant Lagoon Corporation's Motion to Enforce Settlement Agreement. The Court has reviewed the moving and responding papers and heard oral arguments from attorneys for both parties. For the following reasons, the Court finds that the parties entered into an enforceable settlement agreement. The Court orders the defendant to reissue to the plaintiff a new check for the full amount of \$2500 within thirty days of this Order and also orders the plaintiff to execute and deliver to the defendant a release in defendant's favor within two weeks of receipt of the check.

BACKGROUND

This concerns injuries the plaintiff allegedly sustained while a patron at the defendant's water slide. On July 1, 2000, the plaintiff was waiting to slide down the water slide while

another patron waited to go down after her. At the defendant's employee's direction, the plaintiff began down the slide. Before the plaintiff reached the bottom of the slide, the patron who had been standing behind her at the top of the slide, collided with the plaintiff, sliding into her from behind.

On July 7, 2000, the plaintiff phoned Lynette Small, defendant's employee in the Loss Prevention Office, and explained her allegations and claimed injuries. On October 4, 2000, about three months after calling the defendant, the plaintiff sent a letter to the defendant detailing her account of the events and injury-related expenses. On October 10, 2000, R.C. Fussner, defendant's Director of Loss Prevention, called the plaintiff after receiving a copy of her letter. The plaintiff and Mr. Fussner discussed the plaintiff's allegations and he offered to settle the matter for \$2000 to which the plaintiff agreed. He stated he would send her a check for \$2000 and a release for her to execute.

On October 20, 2000, however, the plaintiff called Mr. Fussner and stated that \$2000 would no longer be enough, but that \$5000 would be acceptable. Despite the plaintiff's previous agreement to settle for \$2000, Mr. Fussner offered an additional \$500 to settle. The plaintiff accepted the additional \$500, whereupon Mr. Fussner said he would send the additional \$500 upon receipt of her release. The plaintiff said she would sign the release and return a copy to him; she never cashed the \$2000 check nor signed a release. The next contact the defendant had with the plaintiff was when her attorney contacted the defendant on February 1, 2001.

ANALYSIS

A court may summarily enforce a settlement agreement without an evidentiary hearing. *Tracy-Collins Bank & Trust Co. v. Travelstead*, 592 P.2d 605, 609 (Utah 1979). After reviewing

the pleadings and supporting documents, and hearing oral arguments, it is apparent to the Court that the plaintiff entered into a valid settlement agreement. The defendant made an offer to settle the plaintiff's alleged claims, the plaintiff accepted the defendant's offer, there was valid consideration on the part of both parties, *see Golden Key Realty v. Manta*, 699 P.2d 730, 732 (Utah 1985) (holding that essential elements of a valid contract include "offer and acceptance, competent parties, and consideration."), and the terms and conditions of their oral agreement were "sufficiently definite to allow it to be enforced." *Flake v. Flake*, 2003 UT 17, ¶¶ 28, 71 P.3d 589.

In his affidavit, Mr. Fussner affirms that when the plaintiff spoke with him, she expressed a desire to "resolve the matter quickly." He offered to settle all of her claims for \$2000, to which the plaintiff agreed. Later, he offered an additional \$500, despite the plaintiff having previously agreed to settle for \$2000. He affirms that the plaintiff agreed to those terms—\$2500 in exchange for a release of all of the plaintiff's claims allegedly arising from the July 1, 2000 incident. The parties' oral agreement has the essential elements of a binding settlement.

The plaintiff claims that she did not agree to nor intend to settle for \$2500 and that she merely agreed to "think about it." This claim is unlikely given the plaintiff's own statements. In her letter of October 4, 2000, she wrote: "I am asking that Lagoon cover my expenses for this preventable accident"; "I am submitting these bills to you in hope that we can resolve this matter"; and "I am anxious to resolve this. Please contact me" It is clear that the plaintiff intended to settle. Also, in her own affidavit, she contradicts her claims that she did not intend to settle. She first affirms that the defendant "kept steering the conversation to settling the claim on a final basis. This was never my intention when I first contacted Lagoon." She later states,

however, that "I *offered to settle* with Lagoon if they would agree to pay my expenses, including medical bills and loss of wages. *This is what I wanted, was an agreement from Lagoon to pay these expenses.*" That is exactly what Lagoon agreed to pay. The October 4, 200 letter listed some \$1,640.62 in expenses for doctors' bills, hospital and ambulance bills, x-ray bills, and amounts for her co-pays. She also included \$893 for lost wages and clearly stated she was "anxious to resolve this." Her affidavit also shows she intended to and did settle.

The plaintiff argues that the terms of the oral contract are not clear. She claims that when she stated she wanted the defendant to pay her "expenses, including medical bills", she meant not the limited amount she set forth in her letter, but all of her medical bills, including those which she incurred after October and those in the future. This, however, appears an incredible explanation. Her own attorney's letter shows she indeed settled for a sum at least near the \$1,640.62 for which she asked. In his letter of March 10, 2003 to Lagoon, he states that if the plaintiff had cashed the \$2000 check, then "she would settle for less than the \$2500 *agreed upon.*" He states that she sought legal counsel because Lagoon "failed to perform the settlement. She assume[d] that Lagoon decided not to *settle for \$2500 . . .*" The plaintiff's own letter shows she intended the terms of the settlement to include merely the expenses she had detailed because she was "anxious to resolve" the matter. If she was anxious to resolve the matter, it seems reasonable that she would not want to drag out her dealings with the defendant by asking them to continually pay for her expenses. Finally, in her own affidavit, she admits that the defendant was to send a second check for \$500, that it never sent the additional \$500, and that Lagoon "did not uphold their verbal agreement", etc. The defendant argues, and the Court


agrees, that the defendant would not send—and the plaintiff would not expect, checks for \$2000 and \$500 without there having been a clear and definite settlement agreement.

It also seems apparent that the defendant was to send the additional \$500 once it received the plaintiff's executed release. This was merely a condition precedent the parties set prior to the defendant assenting to a new contract with an additional \$500; if the plaintiff did not follow through, then she would not get the extra \$500 and stay with the original \$2000. As it was a condition precedent in favor of the defendant, it could only be waived by the defendant. *Foster v. Montgomery*, 2003 UTApp 405, ¶¶ 23, 82 P.3d 191. In sum, the terms of the oral agreement are sufficiently definite to be enforced.

The plaintiff argues that she did not sign a release and so the contract is not binding. “[I]f a written agreement is intended to memorialize an oral contract,” however, “a subsequent failure to execute the written document does not nullify the oral contract.” *Lawrence Constr.Co. v. Holmquist*, 642 P.2d 382, 384 (Utah 1982). Also, the plaintiff argues that even if the Court finds that she was to send the release before the defendant was to send the additional \$500, too long of a time has run to enforce the agreement. “Parties have no right,” however, “to welch on a settlement deal during the sometimes substantial period between when the deal is struck and when all necessary signatures can be garnered on a stipulation.” *Brown v. Brown*, 744 P.2d 333, 336 (Utah Ct. App. 1987). Given the length of time that passed from the time of the accident to the first letter the plaintiff sent to the defendant, the fact that the defendant waited from mid-October 2000 until the plaintiff's attorney contacted it in February 2001 for the plaintiff's release

does not seem like an unreasonable time to wait for the plaintiff to perform her side of the agreement.

Signed this December 3rd, 2004.



DISTRICT COURT JUDGE
MICHAEL G. ALLPHIN

CERTIFICATE OF MAILING

I certify that I sent a copy of the foregoing RULING ON DEFENDANT LAGOON'S
MOTION TO ENFORCE SETTLEMENT AGREEMENT to the following, postage pre-paid, on
December 7, 2004:

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