IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
January 23, 2015 Session

NANCY HART DIEHL HARVEY, EXECUTRIX OF THE ESTATE OF W. JOSEPH DIEHL, JR., ET AL. V. PHILLIPS TURNER, JR.

Appeal from the Chancery Court for DeKalb County
No. 2007105 Ronald Thurman, Chancellor

No. M2014-00368-COA-R3-CV - Filed March 26, 2015

This is a lawsuit brought for damage to property. After partial summary judgment was denied to the defendant, and after the trial court ruled that the defendant's request for a jury trial was waived, the parties proceeded to a bench trial. During a hiatus after three days of trial, the parties settled the case and announced the essential terms of the settlement to the court in open court. The parties failed to agree to a written settlement document, and the plaintiffs asked the trial court to enforce the settlement. The trial court found that the settlement was enforceable. The defendant appealed. We affirm.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed

ANDY D. BENNETT, J., delivered the opinion of the court, in which RICHARD H. DINKINS, and W. NEAL MCBRAYER, JJ., joined.

Darrell G. Townsend, Nashville, Tennessee, for the appellant, Phillips Turner, Jr.

T. Michael O'Mara, Cookeville, Tennessee and Robb S. Harvey, Nashville, Tennessee, for the appellees, Nancy Hart Diehl Harvey, Executrix of the Estate of W. Joseph Diehl, Jr., and Patricia Simpson.

OPINION

Joseph Diehl, Jr. and the Yount Family Partnership ("Diehl"), Patricia Simpson ("Simpson"), and Phillips Turner, Jr. ("Turner") are owners of adjoining tracts of land off Coconut Ridge Road near Center Hill Lake. Their lands slope westward toward the lake. Diehl's property is east of Turner's and Simpson's. Simpson, who owns multiple lots, owns

the lots to the southeast and northeast of Turner's. Thus, Turner's land is bordered on three sides by two of Simpson's lots and Diehl's lot. The land west of Turner's and Simpson's lots is owned by the U.S. Army Corps of Engineers, which is not involved in this action.

Diehl and Simpson sued Turner on September 11, 2007. Diehl claimed that blasting and excavation by Turner had intruded upon and damaged the Diehl property, including damaging the lateral support of his property. Although the complaint alleged Turner had promised to build a retaining wall, Diehl's complaint expressed concern that the wall would be built on Diehl's land, not Turner's, and that further trespasses would result. Both Diehl and Simpson claimed that the blasting and excavation destroyed a dirt road on Diehl's property upon which Simpson had an easement. Both Diehl and Simpson alleged that Turner had built a gate on the Diehl property blocking the easement and denying both Diehl and Simpson access to their property. They sought a restraining order to stop further trespasses, to prevent construction of a retaining wall that did not provide lateral support for Diehl's property, for removal of materials placed on Simpson's property, and for removal of the gate. They also sought approval of any plans for a retaining wall prior to construction, damages for trespass/conversion, and a declaratory judgment to set the boundary lines and quiet title.

A couple of weeks later, the parties worked out an agreed order, pursuant to which Turner was to remove the gate and not construct a retaining wall without the prior approval of the plaintiffs or the court. The litigation continued over the next six years. Finally, the trial court heard three days of testimony, August 26 - 28, 2013. The trial was to resume September 4, 2013.

In the interim, counsel for all parties exchanged emails and telephone calls about settling the case. An "agreement in principle" was negotiated. Counsel for the parties appeared in court on September 4 to announce the settlement. By agreement, the parties did not attend. As stated to the trial court, the settlement consisted of a confidential agreement that Turner would pay an unspecified amount[1] to the plaintiffs, and all parties would accept the survey of Richard Puckett as to the establishment of a boundary line between Turner's property and the properties of Diehl and Simpson. Turner agreed to construct a retaining wall entirely on his property "roughly 110 feet long," at his expense, running from where the present retaining wall ends along the Diehl-Turner property line to where the I-beams for the gate are. Scott Miller would design the wall and the design would be submitted to the plaintiffs for approval. The wall would be built within seven months of the completion of the plans. The disputed area would be redrawn to provide Turner with a 20-foot property strip. If Turner decided to install a gate at the end of his property, it would open entirely onto his property. Turner's easement for ingress-egress would be expanded to allow the water

[1]The amount was not disclosed in open court.

lines and the gas line to remain, but no additional lines would be placed along the easement, and the easement would not be expanded further. Turner would allow access to his property to permit its use in removing designated trees from the plaintiffs' properties, upon thirty days notice from the plaintiffs. Turner would not attempt to stop construction of a roadway on the 20-foot easement as long as there was no damage to his property. At least 60 days before construction is to begin, the plaintiffs would provide Turner with the plans. The parties would agree to an equitable means to maintain the easement. As to the common gate, all parties would use reasonable efforts to keep it locked when not in use and would use it solely for ingress and egress. They would try to find a solar-operated system to power an electronic key pad on the gate. Turner would install a new security light, in consultation with Simpson, that would be directed solely toward Turner's property and operate on a system that would only come on at night and only upon the detection of movement. Turner would not utilize the turnaround area near the common gateway. All parties would make good faith and reasonable efforts not to leave unattended vehicles on the roadway blocking access. Turner would not apply herbicides on the common roadway or elsewhere on the Diehl or Simpson properties. The parties also agreed that the trial court would retain jurisdiction to enforce the settlement. Both attorneys affirmed to the court that their clients had agreed to the settlement. The court accepted the settlement.

The parties could not agree on the final settlement document, so a hearing was held on December 4, 2013. Apparently, Turner felt that there was supposed to be a mention of a sewer line in the agreement. The trial court did not. The court stated:

> As it relates to the sewer, unless – and this goes for both sides. What was announced to the Court on 9/4, in the Court's mind, was a settlement. I think the essential terms are there. They can be readily identified. If it's not contained [in] those e-mails or announced in court, it doesn't exist, which means if the sewer is not in there, it's not part of the settlement that was announced at court. The Court finds that there was a meeting of the minds and that that issue was not part of it.

The court discussed the various parts of the settlement and then stated:

> The settlement I accepted was what is contained in our able court reporter's transcript, and that's going to be the terms of it. If there's something that – issues that have arisen since then, that's a different lawsuit. In the Court's mind, that resolves all the issues that I was going to try. . . . What took place after the fact, in the Court's mind, is just language in a release. But as far as I was concerned and based on what my understanding was in trying this case, is that the parties had reached a meeting of the minds, that there were e-mails

and documents back and forth which substantiated that.

The court found that there was a binding settlement. Turner appealed.[2]

ANALYSIS

In *Petersen v. Genesis Learning Centers*, No. M2004-01503-COA-R3-CV, 2005 WL 3416303, at *4 (Tenn. Ct. App. Dec. 13, 2005), this Court stated:

> Absent a demonstration of fraud or other compelling circumstances, a court should honor and enforce a settlement agreement as it would any other contract. *Moffett, Larson, & Johnson v. Carman*, No. 01-A-01-9501-CH00007, 1995 WL 322642, at *3 (Tenn. Ct. App. May 26, 1995). The formation, interpretation, and enforceability of settlement agreements are governed by general contract law. *Sweeten v. Trade Envelopes, Inc* ., 938 S.W.2d 383, 386 (Tenn. 1996). In order to be enforceable, a contract "must result from a meeting of the minds of the parties in mutual assent to the terms." *Id.* (quoting *Higgins v. Oil, Chem. & Atomic Workers*, 811 S.W.2d 875, 879 (Tenn. 1991)). Thus, absent mutual assent to the essential terms of a claimed settlement agreement, the agreement cannot be enforceable. *State v. Clements*, 925 S.W.2d 224, 227 (Tenn. 1996).

Turner maintains that the purported settlement cannot be enforced for three reasons: the "agreement in principle" was subject to a more formal, written settlement agreement; the purported settlement was not agreed to by the parties in open court; and the purported settlement agreement was subject to a condition precedent.

Expectation of a More Formal Settlement

Turner claims that counsel for the parties stated that they had reached an "agreement in principle" and that the parties expected a more formal settlement agreement to be drafted and executed. He maintains that the "agreement in principle" is simply an unenforceable agreement to agree. The formal, written settlement agreement, he claims, was necessary to create a binding agreement.

The best place to begin is with the words actually said in court.

MR. O'MARA: The parties have reached an agreement in principle regarding

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[2]On September 24, 2014, this court granted the appellees' motion to substitute Nancy Hart Diehl Harvey, Executrix of the Estate of W. Joseph Diehl, Jr., in place of W. Joseph Diehl, Jr.

the resolution of the claims in this case in addition to acknowledging that there is a resolution of the disputed claims. We will also -- the document will also recite the exchange of funds in satisfaction of the claims and will acknowledge that all the matters in the lawsuit have been completely resolved. A more formal settlement agreement which contains the essential terms of the documents exchanged between the parties will be executed and will include confidentiality provisions. The PDF of various e-mails of the essential terms have been identified by counsel, and we will be reciting the essential terms of the settlement in just a moment. . . .

And now I think Mr. Townsend was going to recite the essential provisions of the settlement.

MR. TOWNSEND: Yes, Your Honor.

Mr. O'Mara's statement is accurate, and what we would like to do is recite generally the terms of the settlement so that we can then have a transcript from which we can work in order to do a comprehensive release.

. . .

MR. O'MARA: I think -- I believe that's everything.

THE COURT: So you both agree that's what your clients have agreed to.

MR. TOWNSEND: Yes, sir, Your Honor.

THE COURT: Mr. O'Mara?

MR. O'MARA: Yes, Your Honor. I'm sorry.

THE COURT: And the Court will approve that and that will resolve this matter as soon as they get the final paperwork up where I can sign off on it.

What is an agreement in principle? It appears that Tennessee courts have not defined the term. Other courts have adopted conflicting definitions. For example, it has been said that "[w]hen business people use [the term] 'agreement in principle,' it means that the parties have reached a meeting of the minds with only details left to be resolved." *In re 400 Walnut Assocs., L.P.*, 454 B.R. 60, 71 (Bankr. E.D. Pa. 2011) (quoting *Am. Fin. Serv. Grp. v. Treasure Bay Gaming & Resorts, Inc.*, 2000 WL 815894, at *9 (S.D.N.Y. June 30, 2000)). On the other hand, the Sixth Circuit Court of Appeals "has indicated that the term signifies a preliminary agreement, and not a final, binding contract." *Faurecia Auto. Seating, Inc. v. Toledo Tool & Die Co., Inc.*, 579 F. Supp. 2d 967, 972 (N. D. Ohio 2008). Given the different interpretations of the term, it offers us no assistance in determining the intent of the parties.

Turner states that the in-court announcement is nothing more than an agreement to agree. Such agreements are unenforceable in Tennessee because their terms are indefinite. *Four Eights, LLC v. Salem*, 194 S.W.3d 484, 486-87 (Tenn. Ct. App. 2005). Turner's counsel did note that several items were subject to the agreement of the parties. The

conditions precedent do not make the terms indefinite. The agreement to divide the maintenance of the easement equitably is not indefinite and neither are promises to use reasonable efforts to keep the gate locked and vehicles from blocking the road. These items do not make the settlement an agreement to agree.

Turner argues that the fact that a formal settlement document was contemplated indicates that the settlement announced in court was not intended to be binding. As we noted earlier, "absent mutual assent to the essential terms of a claimed settlement agreement, the agreement cannot be enforceable." *Petersen*, 2005 WL 3416303, at *4 (quoting *State v. Clements*, 925 S.W.2d at 227)). One of the factors courts have relied on in determining the intent behind a "preliminary" agreement is its completeness. If the agreement "contains the essential terms of the transaction, it indicates that the parties intended to be bound to consummate the transaction." Harvey L. Temkin, *When Does the "Fat Lady" Sing?: An Analysis of "Agreements in Principle" in Corporate Acquisitions*, 55 FORDHAM L. REV. 125, 135 (1986).

The agreement announced on September 4, 2013, is quite detailed, not only covering boundaries and the construction of the retaining wall, but also addressing matters not raised in the litigation, such as a security light, an electronic pad to operate the gate, and the spraying of herbicides. The September settlement announcement began with Mr. O'Mara providing some introductory statements and indicating that "we will be reciting the essential terms of the settlement in just a moment." Subsequently, Mr. Townsend noted that the attorneys would "recite generally the terms of the settlement so that we can then have a transcript from which we can work in order to do a comprehensive release." Thus, the statements of counsel at the September 2013 hearing were intended to establish the essential terms of the settlement which would form the basis of the release. Significantly, at the hearing on December 4, 2013, the trial court observed that the September settlement announcement "resolves all the issues that I was going to try . . . ." Finally, both attorneys agreed before the trial judge that their clients agreed with the settlement announcement.

Turner wanted a sewer line to run to his property. He maintains that this issue was to be addressed in the settlement. The sewer line, as Turner's attorney mentioned in his affidavit, was important to Turner, "although not a part of his claims in this lawsuit." The inclusion of matters in a settlement that are not raised in the lawsuit is sometimes prudent, especially if these matters are expected to affect the future relations of the parties. These matters cannot, however, be considered essential to the settlement of the lawsuit if they are not raised as issues in the lawsuit. Consequently, because Turner's sewer line is not essential to the settlement, the omission of any agreement as to Turners's sewer line is not material to whether a settlement contract was created.

Turner also argues that the parties continued to negotiate after the settlement announcement of September 4. He sees the continued negotiations as evidence that the settlement announcement was not binding. He offers no argument, however, that the negotiations concerned any of the essential terms set out before the court.

In light of all of the above, we find that the trial court's decision that the settlement announcement on September 4, 2013, formed a binding contract is supported by the preponderance of the evidence.

Agreement by the Parties in Open Court

Turner also attacks the settlement on the basis that the purported settlement was not agreed to by the parties in open court. The general rule on settlements is that, "[t]he power of the court to render a judgement by consent is dependent on the existence of the consent of the parties at the time the agreement receives the sanction of the court or is rendered and promulgated as a judgment." *Harbor v. Brown for Ulrich*, 732 S.W.2d 598, 599 (Tenn. 1987) (quoting 49 C.J.S. *Judgments* § 174(b)).

Turner relies on *Environmental Abatement, Inc. v. Astrum R.E. Corp.*, 27 S.W.3d 530 (Tenn. Ct. App. 2000), for the proposition that both parties must actually be present in court when the agreement is presented to the court in order for the agreement to be binding. In particular, Turner points to the following language in *Environmental Abatement*:

> From all of the above, we conclude that Tennessee is one of those jurisdictions where:
>
> > the terms of the settlement should be stated to the court and taken down by the reporter or otherwise reduced to writing so as to prevent a dispute as to what are the terms of the settlement, and that an oral stipulation for compromise and settlement made in open court in the presence of the parties and preserved in the record of the court is as binding as a written agreement.

Environmental Abatement, 27 S.W.3d at 539-40 (quoting 15A C.J.S. *Compromise and Settlement* § 17 at 214-15 (citations omitted)). This statement does provide that a stipulation of settlement made in open court in the presence of the parties is binding. It does not, however, say that without the presence of the parties, a stipulation of settlement made in open court, where the parties have agreed not to be present, is not binding even when the attorneys state that each party agrees. *Environmental Abatement* addressed a very specific fact situation where one party withdrew its consent to an unrecorded oral settlement agreement

made at a settlement conference. *Id.* at 540. The Court of Appeals held that the agreement was not stated "in open court" and "on the record," so consent could be withdrawn. *Id.* at 541.

Environmental Abatement does, however, provide some guidance for our situation. The court noted that "[c]onsent to judgment must be made by or *on behalf of the parties* in open court or by documentary evidence of legal sufficiency." *Id*. at 537 (quoting 49 C.J.S. *Judgments* § 184 (1997)) (emphasis added). On September 4, 2013, who acted in open court on behalf of Turner? His attorney, who, in response to a question from the trial judge, stated that his client agreed to the settlement.

Turner's attorney maintains that Turner had not given him, and he had not sought, authority to dismiss the lawsuit. He further states that he considered any dismissal of the lawsuit would be contingent upon the formalization of the agreements mentioned in court on September 4, 2013. Turner's attorney is an honest man and a well-respected attorney. Yet, our reading of the transcript of the September 4, 2013 hearing is consistent with that of the trial court, which found that there was, indeed, a settlement. Bolstering the trial court's decision is an email dated September 2, 2013, in which Turner's attorney wrote, "We have agreement in principle on all non-monetary issues. No objection from us on the blue comments in your last email." This statement indicates that the only item left to agree on was a monetary payment. In court, it was indicated that the payment issue was resolved.

We agree with the trial court's finding that there was a valid settlement.

Condition Precedent

A "condition precedent" is "[a]n event, not certain to occur, which must occur, unless its non-occurrence is excused, before performance under a contract becomes due." *Covington v. Robinson*, 723 S.W.2d 643, 645 (Tenn. Ct. App. 1986) (quoting RESTATEMENT (SECOND) OF CONTRACTS § 224). In other words,

> A condition precedent in a contract . . . must be performed or happen before a duty of immediate performance arises on the promise which the condition qualifies. A condition precedent is either an act of a party that must be performed or a certain event that must happen before a contractual right accrues or contractual duty arises.

McGhee v. Shelby Cnty. Gov't, No. W2012-00185-COA-R3-CV, 2012 WL 2087188, at *8 (Tenn. Ct. App. June 11, 2012) (quoting 13 Samuel Williston, TREATISE ON THE LAW OF CONTRACTS § 38:7 (Richard A. Lord ed., 4th ed. 2011).

> Whether a contractual provision is or is not a condition precedent depends upon the parties' intention which should be gathered from the language they employ and in light of all the circumstances surrounding the contract's execution. Courts do not favor conditions precedent and will, as a general matter, construe doubtful language as imposing a duty rather than creating a condition precedent.

Harlan v. Hardaway, 796 S.W.2d 953, 957-58 (Tenn. Ct. App. 1990) (citations omitted). Words or phrases such as "if," "provided that," "when," "after," "as soon as," and "subject to," can indicate the presence of a condition. *Id.* at 958.

Turner identifies the condition precedent to which the agreement was subject as the future agreement of the parties on the location of the new boundary lines between Simpson and Turner and between Diehl and Turner. At the September 4, 2013 hearing, the counsel for Turner stated:

> The parties have agreed with respect to boundary line issues that all of the parties will accept the June 4, 2008, survey of Richard Puckett that will allow the establishment of a boundary line between the Turner and the Diehl properties and between the Turner and the Simpson properties. That will be marked on the ground subject to the agreement of the parties.

The fundamental point here is agreement to the Puckett survey by all parties. Marking the survey on the ground subject to the parties approval should not be a difficult condition precedent to meet in that there would be little or no discretion about the boundary lines given the agreement to the survey.

Turner also maintains that the location of the disputed 20-foot strip also constituted a condition precedent. He relies on the following comment from the plaintiffs' attorney:

> [W]e still have to go out there and find that space before we can say exactly where that [sic] the 20-foot easement starts. Not easement, 20-foot strip starts on the Simpson line. It's very important to them to know where that's going to start. So we have to go out there and get that done first.

The statements before and after the above quote are illuminating. Before the above quote, plaintiffs' counsel stated: "And we think there are markers out there from Puckett's survey. At least Mr. - - if you looked at Mr. Phillips' survey, he found some Puckett markers on the ground. We think they're still there, but we still have to go out there and find that

space [continues above quote]." After the above quote, defendant's counsel stated: "That's why I referred to that as the approximately 110-foot strip. We're not sure exactly." The full context of the quote indicates that the location of the 20-foot strip is known within a general area and is probably marked.

The comments of Turner's counsel on September 4 also pinpointed the 20-foot strip pretty well: "The disputed area will be redrawn so that Mr. Turner has a 20-foot property strip, and it will be measured from the downhill of the Simpson line. This property line agreement will be reduced to writing and it will be recorded."

While the parties' counsel did indicate that the 20-foot strip had to be identified, they also knew the general area in which the strip was located and thought there were markers from a prior survey that already identified it. As with the first condition, identifying the 20-foot strip subject to the parties' approval should not be a difficult condition precedent to meet, given that the area has been so narrowed down.

"Whether a meeting of the minds occurred is a question of fact." *In re Estate of Josephson*, No. M2011-01792-COA-R3-CV, 2012 WL 3984613, at *2 (Tenn. Ct. App. Sept. 11, 2012) (citing 17B C.J.S. *Contracts* § 1008 (2012)). The trial court found that there was a meeting of the minds of the parties as to the essential terms of the settlement. The findings of the trial court are presumed to be correct unless the preponderance of the evidence is otherwise. TENN. R. APP. P. 13(d). The conditions precedent are part of the contract to which the parties agreed. The trial court's findings are not inconsistent with the preponderance of the evidence.[3]

Statute of Frauds

"Settlement agreements arising from litigation that involves real property are subject to the Statute of Frauds only if the terms of the settlement agreement require the transfer of an interest in real property." *Waddle v. Elrod*, 367 S.W.3d 217, 226 (Tenn. 2012). In *Waddle*, the Tennessee Supreme Court cited *Meyer v. Lipe*, 14 S.W.3d 117, 120 (Mo .Ct.

[3]In addition, we note that the absence of the fulfillment of the conditions precedent in these two provisions is not necessarily the end of the inquiry. This court has previously stated that "the same degree of good faith effort required in the performance of a contract also applies to the performance by a party of conditions of a contract or conditions precedent to the effectuation of the contract." *Smith v. Carson*, 1986 WL 10145, at *2 (Tenn. Ct. App. Sept. 19, 1986). One "cannot benefit from the failure of the conditions because he himself prevented the conditions from occurring . . . ." *Thomas Builders, Inc. v. Patel*, No. E2007-01184-COA-R3-CV, 2008 WL 2938054, at *3 n.2 (Tenn. Ct. App. July 31, 2008). An agreement unreasonably withheld would be actionable. Consequently, the good faith of the party declining to agree may be an issue.

App. 2000) with approval, noting that *Meyer* explained "that the Statute of Frauds does not apply to settlements which fix a disputed or uncertain boundary line because no conveyance of land or passage of title is involved, only an effort to clarify and give effect to the title the parties already possess." *Waddle*, 367 S.W.3d at 226. The settlement in the instant case resolves a property line dispute. Thus, under *Waddle*, the Statute of Frauds does not apply.

Other Issues

Turner also raises issues concerning the denial of his motion for partial summary judgment and the demand for a jury. Our determination that the settlement is enforceable removes any necessity for ruling on these issues.

CONCLUSION

The trial court's judgment is affirmed. The matter is remanded for any further proceedings that are consistent with this opinion. Costs of appeal are assessed against the appellant, Phillips Turner, Jr., for which execution may issue if necessary.

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ANDY D. BENNETT, JUDGE