2008

Dr. Rinda Ellis v. Richard Ferguson, III, Cord Beatty, Hollywood Body Salon, LLC, a Utah Limited Liability Company d/b/a Hollywood Body Laser Center, and any other successor entity or d/b/a as subsequent John Does Entities I-X : Brief of Appellant

Utah Court of Appeals

Julian D. Jensen; Jensen, Duffin & Dibb; attorney for appellee.
David O. Black; Black & Argyle; attorney for appellant.

IN THE UTAH COURT OF APPEALS

DR. RINDA ELLIS

Plaintiff / Appellee,

vs.

RICHARD FERGUSON, III, CORD BEATTY, HOLLYWOOD BODY SALON, LLC, A UTAH LIMITED LIABILITY COMPANY d/b/a HOLLYWOOD BODY LASER CENTER, AND ANY OTHER SUCCESSOR ENTITY OR d/b/a AS SUBSEQUENT JOHN DOE ENTITIES 1-X

Defendant / Appellants.

BRIEF OF THE APPELLANT

Appeal No. 20080482

APPEAL FROM THE MAY 8, 2008 JUDGMENT OF THE 3RD JUDICIAL DISTRICT COURT, SALT LAKE COUNTY, THE HONORABLE ROBERT FAUST

Julian D. Jensen
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Attorney for Appellant

IN THE UTAH COURT OF APPEALS

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vs.

RICHARD FERGUSON, III, CORD BEATTY, HOLLYWOOD BODY SALON, LLC, A UTAH LIMITED LIABILITY COMPANY d/b/a HOLLYWOOD BODY LASER CENTER, AND ANY OTHER SUCCESSOR ENTITY OR d/b/a AS SUBSEQUENT JOHN DOE ENTITIES 1-X

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Attorney for Appellee

David O. Black
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Attorney for Appellant

IDENTIFICATION OF THE PARTIES

The appellants in this matter are Richard Ferguson, III and Hollywood Body Salon, LLC, a Utah Limited liability Company, d/b/a Hollywood Body Laser Center. The Appellee is Dr. Rinda Ellis.

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BRIEF OF APPELLANT

JURISDICTION OF THE COURT

This Court has jurisdiction over this appeal by virtue of § 78A-3-102 of UTAH CODE ANN. 1953 AS AMENDED.

ISSUES PRESENTED ON APPEAL AND STANDARD OF REVIEW

1. Whether or not the court below within its sound discretion can compel a Settlement Agreement where the references to the parties to the alleged Agreement were without specific references to the parties to the Agreement in light of the Affidavits of the individual Defendant Richard Ferguson, and his attorney, that each thought the Settlement Agreement that was being discussed was for the Defendant Hollywood Body Laser Center, LLC and not Richard Ferguson.

RELEVANT CONSTITUTIONAL, STATUTORY, AND RULE PROVISIONS

There are no particular statutory and rule provisions relevant to the case. The case is governed by Utah case law.

STATEMENT OF THE CASE

The case was commenced by the filing of a Complaint on March 2, 2002 (R. 1-24). Each of the Defendants were served (R. 45-47, 59-61). After the filing of the original Complaint and service on the Defendants, the Plaintiff filed a Motion for Order to Show

Cause Hearing, and a Motion for a Prejudgment Writ of Replevin (R.25-27). Thereafter, the Writ of Replevin was abandoned by the Plaintiff (R. 54).

Defendants Ferguson and Hollywood Body Salon, d/b/a Hollywood Body Laser Center, LLC filed a Motion to Compel Arbitration and for Dismissal of Plaintiff's Complaint on April 23, 2007 (R. 62-64). Plaintiffs' responded to the Defendant's Motion to Compel Arbitration (R. 76-92). The Court entered its Order on August 16, 2007, granting the Order to Compel Arbitration as to the corporate Defendant, but stayed the action, pending arbitration (R. 104-107). The Court in its' Order stated, "Defendant Ferguson . . .is not a party to the Agreement and therefore cannot enforce its arbitration provision." A Settlement and Release was entered into between the Plaintiff and the Defendant Cord Beatty on or about July 3, 2007 (R.100-103).

In the Fall of 2007, Plaintiff and Counsel for the Defendants Ferguson and Hollywood Body Laser Center entered into Settlement Negotiations (R. 157-159). The Plaintiff alleges in an Affidavit of Counsel, that the Parties entered into a Settlement Agreement in which a $15,000.00 counteroffer was accepted by the Defendant Richard Ferguson. There is no mutual memorialization of the alleged counter offer. The Plaintiff relied upon a November 30, 2007 e-mail to Appellants' counsel to state the alleged Settlement which reads:

> "Just a follow-up from our telephone conversation the other day, it is my understanding that your client had agreed to accept the Settlement Offer of my client for $15,000 conditional upon the existing laser salon operations still being in operation at the end of the six month period from the date

> of settlement. I indicated to you that I would be willing to draft up the stipulation if you are presently overwhelmed with other matters. At any rate, I appreciate you getting some form of dismissal to me as soon as possible so that we can inform the court of the status of this matter. One other issue that was raised by my client, that seems fair and would not constitute any adverse burden as I see it is to request your client to grant to my client a security interest in assets of the business equal to her $25,000 claim in the event that it is liquidated. Do you mind discussing this with your client." (R. 113, 126).

The e-mail which the Plaintiff claims confirms the Settlement Agreement, refers to your "client" referring to Black's "client", and contains Counter Offers with regard to suggestions of security interests which were never agreed to by the parties.

Thereafter, Plaintiff filed a Motion to Confirm and Enforce Settlement Agreement or in the Alternative for a Scheduling Conference, (R. 108-109) and a Memorandum in Support of Motion to Compel (R.110-138) stating that the parties had agreed to the Settlement Memorialized by the November 30, 2007 e-mail (R.111, 113, 114, 126). Defendant Richard Ferguson in his Response to the Motion to Compel Settlement admitted that a Settlement Agreement had been reached between the Plaintiff and Hollywood Body Laser Center, but not between the Plaintiff and Richard Ferguson individually (R. 162).

Counsel for the Plaintiff also set out in an Affidavit that he believed that a

Settlement Agreement had been reached between Rinda Ellis and Hollywood Body Laser Center that there was never a discussion with regard to the individual Defendant Richard Ferguson (R. 157-159).

SUMMARY OF THE ARGUMENT

1. A District Court abuses its discretion when it compels a settlement where there is not a clear meeting of the minds of the alleged parties to the settlement.

2. The Appellant agrees that there was a settlement between the Plaintiff and Hollywood Body Laser Center, LLC. The Appellant Ferguson denies that the Settlement included him individually. The documents relied upon by the Appellee to show a Settlement never mention Ferguson's name individually and refer to client singularly (Hollywood Body Laser Center, LLC), and not plurally.

ARGUMENT

I.

A District Court has the power to enter a Judgment enforcing a Settlement Agreement only if there is an enforceable contract *John Deere Company v. A & H Equipment, Inc.,* 876 P.2d, 880, 241 Utah Adv. Rep. 17. It is axiomatic that the law favors the settlement of disputes. The Appellant Ferguson acknowledges the rule that the law favors the settlement of disputes. Such agreements under the proper circumstances may be and should be summarily enforced.

However, whether a Court should enforce such an agreement does not turn merely on the character of the agreement. An agreement of compromise and settlement constitutes an executory contract. Since a settlement contract constitutes a valid enforceable contract, basic contract principals effect the determination of when a Settlement Agreement should be so enforced. *Goodmansen v. Liberty Vending Systems, Inc.* 866, P.2d. 581, 227 Utah Adv. Rep. 64

The operative document in the matter before the Court is the is the unilateral e-mail correspondence from Counsel for the Plaintiff to Counsel for the Defendant. The e-mail correspondence raises two issues. The first is that the e-mail refers to "client", and in fact counsel for the Defendant represented both the individual Defendant Ferguson and the LLC know as Hollywood Body Center. The e-mail further sets out a counteroffer suggesting a security interest which further raises the issue as to whether the meeting of the parties minds ever took place.

In the matter before this court, the Defendant Hollywood Body Laser Center does not dispute that a Settlement was entered into. The dispute centers solely on whether or not the individual Defendant Ferguson agreed to the Settlement. All of the communications relied upon the by Appellee in asserting that a settlement should be compelled refer to "client". The reference to client is always in the singular. There is not a single reference to a settlement on behalf of the Defendant Richard Ferguson. In fact,

the Plaintiff's own correspondence referring to the alternative of settlement and suggesting scheduling an arbitration only refers to Hollywood Body Laser Center, LLC. The Court had not compelled an arbitration with regard to Richard Ferguson.

Settlement agreements are governed by the rules applied to general contract action *Butcher v. Gilroy,* 744 P.2d 311, 312 (Ut. Ct. App. 1987). Under the principals of basic contract law, a contract is not formed unless there is a meeting of the minds. *Pingree v. Continental Group of Utah, Inc.,* 558 P.2d, 1317, 1321 (Utah 1976). In the matter before the Court, there is not question that a Settlement was entered into. The question before this Court is was the Settlement entered into on behalf of Richard Ferguson and the Plaintiff Rinda Ellis, or Hollywood Body Laser Center and Rinda Ellis, or Ellis and both Richard Ferguosn and Hollywood Body Laser Center. The references to client in the alleged agreement language are always singular, when there are in fact two clients. The fact that there are two clients, at the very least creates an ambiguity to what the intent of the parties was. Both the Affidavits of Black and Ferguson indicate that they though they were dealing with Settlement negotiations on behalf of Hollywood Body Laser Center.

It is an abuse of discretion for a court to identify which parties entered into the settlement when the agreement itself refers to only one party.

Ferguson's Argument becomes manifest in light of the Court's below ruling on the Motion to Compel arbitration where it states, "Defendant Ferguson . . . is

not a party to the Agreement and therefore cannot enforce its arbitration provision." The Procedural posture of the case was Ellis v. Hollywood Body Laser Center.

CONCLUSION

For the reasons set forth above, this Court should set aside the District Courts Order compelling a Settlement Agreement with regard to the Defendant Richard Ferguson and remand the matter for trial between the Defendant Ferguson and the Plaintiff on the remaining issues.

DATED this 9th day of September, 2008.

David O. Black
Attorney for Appellant

CERTIFICATE OF SERVICE

I hereby certify that on the 4th day of September, 2008, I delivered the foregoing Brief of the Appellant by first class mail to:

Julian D. Jensen
311 South State Street
Suite 380
Salt Lake City, UT 84111

Kasey MacRae

ADDENDUM

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

DR. RINDA ELLIS,	:	MINUTE ENTRY
Plaintiff,	:	CASE NO. 070903441
vs.	:	
RICHARD FERGUSON, III, CORD BEATTY, HOLLYWOOD BEAUTY SALON, LLC, a Utah Limited Liability Company, dba HOLLYWOOD BODY LASER CENTER, and any other successor entity or dba as subsequent John Doe Entities I-X,	:	
Defendants.	:	

The Court has before it a request for decision filed by the Plaintiff seeking a ruling on the Defendants' Motion to Compel Arbitration & Dismiss. The Court notes that the Plaintiff requests a hearing on this Motion. However, since the Motion is not dispositive and the parties' written submissions adequately detail their respective legal positions, the Court declines to schedule this matter for hearing. Therefore, having reviewed the moving and responding memoranda, the Court rules as stated herein.

The Defendants' Motion to Compel asserts that the Plaintiff's various claims against them arise from and relate to a Marketing Agreement, dated August 3, 2006 ("the Agreement"). Paragraph 6, at page 4, of the Agreement contains an Arbitration provision which requires the

parties to submit any "irreconcilable dispute [arising] between the parties regarding any of the matters set forth in this agreement" to binding arbitration Relying on this provision, the Defendants request that this Court compel arbitration The Defendants also request that the Court dismiss this action pending resolution of the arbitration

In her Opposition, the Plaintiff points out that Defendant Ferguson (and Defendant Beatty, who is no longer a party to this action) is not a party to the Agreement and therefore cannot enforce its arbitration provision The Court agrees and therefore denies the Motion to Compel, as brought by Defendant Ferguson

The Plaintiff next argues that the Agreement was procured through fraud and is therefore unenforceable, including the arbitration provision Although the Plaintiff's argument in this regard is not entirely clear, it appears that she is suggesting that the Court must assess in the first instance whether the entire Agreement is subject to rescission prior to submitting it to arbitration If that is a correct analysis of the Plaintiff's argument, the Court is not persuaded

Rather, consistent with the federal case law which the Plaintiff candidly discusses and cites to in her Opposition, the Plaintiff's claim that the Agreement, as a whole, was induced by fraud is arbitrable The Plaintiff's reliance on Sosa v Paulos, 924 P.2d 359 (Utah 1996), is misplaced and the general principles she ascribes to this case are incorrect Indeed, unlike the present case, the arbitration agreement

R.165

in Sosa was found to be unconscionable. There is nothing in the present arbitration provision which can be considered unconscionable. To reiterate, the Plaintiff is not actually challenging the arbitration provision, but rather the validity of the Agreement in the entirety.

The Plaintiff also alludes in her Opposition to the fact that certain of her claims do not relate to the Agreement. Again, the Court determines that this is an issue for the arbitrator. If the arbitrator determines that certain of the Plaintiff's claims are non-contract claims and therefore outside of the scope of arbitration, the Court will proceed to consider these claims in the context of this action.

Accordingly, the Court grants the corporate Defendants' Motion to Compel Arbitration. The Court denies the request that this matter be dismissed. Instead, the matter is stayed as to the corporate Defendants only.

This Minute Entry decision will stand as the Order of the Court Dated this 16 day of August, 2007.

/S/
ROBERT P. FAUST
DISTRICT COURT JUDGE

12,164

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Minute Entry, to the following, this_____day of August, 2007

Julian D Jensen
Attorney for Plaintiff
311 S State Street, Suite 380
Salt Lake City, Utah 84111

David O Black
Attorney for Defendants Ferguson,
Hollywood Beauty Salon and
Hollywood Body Laser
5806 South 900 East
Salt Lake City, Utah 84121

R. 107

78A-3-102. Supreme Court jurisdiction.
(1) The Supreme Court has original jurisdiction to answer questions of state law certified by a court of the United States.
(2) The Supreme Court has original jurisdiction to issue all extraordinary writs and authority to issue all writs and process necessary to carry into effect its orders, judgments, and decrees or in aid of its jurisdiction.
(3) The Supreme Court has appellate jurisdiction, including jurisdiction of interlocutory appeals, over:
(a) a judgment of the Court of Appeals;
(b) cases certified to the Supreme Court by the Court of Appeals prior to final judgment by the Court of Appeals;
(c) discipline of lawyers;
(d) final orders of the Judicial Conduct Commission;
(e) final orders and decrees in formal adjudicative proceedings originating with:
(i) the Public Service Commission;
(ii) the State Tax Commission;
(iii) the School and Institutional Trust Lands Board of Trustees;
(iv) the Board of Oil, Gas, and Mining;
(v) the state engineer; or
(vi) the executive director of the Department of Natural Resources reviewing actions of the Division of Forestry, Fire and State Lands;
(f) final orders and decrees of the district court review of informal adjudicative proceedings of agencies under Subsection (3)(e);
(g) a final judgment or decree of any court of record holding a statute of the United States or this state unconstitutional on its face under the Constitution of the United States or the Utah Constitution;
(h) interlocutory appeals from any court of record involving a charge of a first degree or capital felony;
(i) appeals from the district court involving a conviction or charge of a first degree felony or capital felony;
(j) orders, judgments, and decrees of any court of record over which the Court of Appeals does not have original appellate jurisdiction; and
(k) appeals from the district court of orders, judgments, or decrees ruling on legislative subpoenas.
(4) The Supreme Court may transfer to the Court of Appeals any of the matters over which the Supreme Court has original appellate jurisdiction, except:
(a) capital felony convictions or an appeal of an interlocutory order of a court of record involving a charge of a capital felony;
(b) election and voting contests;
(c) reapportionment of election districts;
(d) retention or removal of public officers;
(e) matters involving legislative subpoenas; and
(f) those matters described in Subsections (3)(a) through (d).
(5) The Supreme Court has sole discretion in granting or denying a petition for writ of certiorari for the review of a Court of Appeals adjudication, but the Supreme Court shall review

1. those cases certified to it by the Court of Appeals under Subsection (3)(b).
(6) The Supreme Court shall comply with the requirements of Title 63G, Chapter 4, Administrative Procedures Act, in its review of agency adjudicative proceedings.

10/14/87 WENDELL L. BUTCHER AND IRENE BUTCHER v.

[1] COURT OF APPEALS OF UTAH

[2] No. 860111-CA

[3] 1987.UT.273 <http://www.versuslaw.com>, 744 P.2d 311

[4] October 14, 1987

[5] **WENDELL L. BUTCHER AND IRENE BUTCHER, PLAINTIFFS AND APPELLANTS,**
v.
FRANK H. GILROY AND R. G. H., INC., A UTAH CORPORATION, DEFENDANTS AND RESPONDENTS

[6] Marcus G. Theodore, Esq., for Plaintiffs and Appellants.

[7] James R. Holbrook, Steven E. Tyler, Russell C. Kearl, Greene, Callister & Nebeker, for Defendants and Respondents.

[8] The opinion of the court was delivered by: Billings

[9] FACTS. - In 1972, the parties settled litigation by agreement, according to which they were both to attempt to sell certain property, then split the proceeds. Gilroy sold the property in 1982 without informing Butcher or paying him his share. Butcher discovered the sale in 1982.

[10] PROCEEDINGS. - Butcher sued Gilroy, but the trial court held the claim barred by the 6-year statute of limitations. Butcher appealed.

[11] RESULT. - Reversed. Per Billings; Greenwood & Jackson concur.

[12] HELD. - The statute of limitations applied to the settlement agreement and was not tolled until Gilroy received payment of the sale price. Pleadings sufficed to indicate concealment by Gilroy, precluding Gilroy from raising the statute of limitations.

[13] BILLINGS, Judge:

[14] Wendell and Irene Butcher ("the Butchers") appeal from an order of the district court granting defendant Gilroy's ("Gilroy") motion to dismiss the Butchers' complaint ruling that the action was barred by Utah Code Ann. § 78-12-23 (1987), the statute of limitations applicable to written instruments. We reverse and remand.

[15] FACTS

[16] Because we are reviewing a dismissal pursuant to Rule 12(b)(6) of the Utah Rules of Civil Procedure, we accept as true the following well-pleaded facts in the Butchers' Amended Complaint. See Byran v. Stillwater Bd. of Realtors, 578 F.2d 1319, 1320 (10th Cir. 1977); see also Donnelly Const. Co. v. Oberg, 139 Ariz. 184, 677 P.2d 1292 (1984); Nassar v. Utah Mortgage & Loan Corp., 100 N.M. 419, 671 P.2d 667 (1983).

[17] In October 1972, the Butchers and Gilroy stipulated to the entry of a written settlement judgment. The agreement vested in Gilroy title to 33 acres of land surrounding Mountain Dell Golf Course. He was required to sell the property by April 1976, and the proceeds from the sale were to be apportioned between the parties as specified in the agreement.

[18] Both parties attempted to sell the property, but were frustrated by various subdivision development changes and watershed questions. On March 8, 1982, Gilroy sold the 33 acres to R.G.H., Inc. without notifying the Butchers nor accounting to them for their share of the proceeds. The Butchers continued in their efforts to sell the property, periodically notifying Gilroy of their progress. Gilroy did not tell the Butchers that he had sold the property, but rather encouraged them in their efforts to secure a buyer, and assured them that he was also continuing to attempt to secure a buyer. After discovering Gilroy's sale, the Butchers brought an action against Gilroy and R.G.H., Inc. on March 26, 1984, *fn1 seeking an accounting and their share of the proceeds under the terms of the stipulated settlement agreement.

[19] The district court dismissed the action against Gilroy ruling that the Butchers' claims were barred by Utah Code Ann. § 78-12-23 (1987), the six-year statute of limitations applicable to written instruments. This appeal ensued.

[20] Several issues are presented on appeal. First, was the Butchers' claims against Gilroy barred under Utah Code Ann. § 78-12-23 (1987), the six-year statute of limitations applicable to written instruments? Second, did Gilroy's sale of the property to R.G.H., Inc. in March 1982 constitute a "payment" under the settlement agreement within the meaning of Utah Code Ann. § 78-12-44 (1987), thus providing the Butchers an additional six years within which to commence this action? Third, is Gilroy precluded from raising the statute of limitations defense because of his concealment of the sale to R.G.H., Inc., and his misleading conduct and representations, encouraging the Butchers to continue their efforts to secure a buyer? Fourth, does Gilroy's claimed absence from the state toll the statute of limitations?

[21] I.

[22] UTAH CODE ANN. § 78-12-23 (1987)

[23] The first issue we address is whether the Butchers' claims based on the written settlement agreement are barred by Utah Code Ann. § 78-12-23 (1987), the six-year statute of limitations.

[24] Settlement agreements are governed by the rules applied to general contract actions, including matters such as the statute of limitations. See Kershaw v. Pierce Cattle Co., 87 Idaho 323, 393 P.2d 31, 34 (1964); Thomas v. Gordon, 285 S.W.2d 829, 831 (Texas 1955). *fn2

[25] The general rule in Utah is that the statute of limitations begins to run at the moment a cause of action accrues. Fredericksen v. Knight Land Corp., 667 P.2d 34, 36 (Utah 1983) In a breach of contract action the statute of limitations ordinarily begins to run when the breach occurs. Id. (citing M.H. Walker Realty Co. v. American Surety Co.. 60 Utah 2d 435, 211 P. 998 (1922)). "Ordinarily, a cause of action for a debt begins to run when the debt is due and payable because at that time an action can be maintained to enforce it." Id. (quoting O'Hair v. Kounalis, 23 Utah 2d 355, 357, 463 P.2d 799, 800 (1970)).

[26] Under the settlement agreement, Gilroy was to have sold the property and distributed the proceeds by April 1976. Therefore, the Butchers' cause of action accrued when April 1976 passed and Gilroy had not sold the property. Consequently, under section 78-12-23, the Butchers had six years, or until April 1982, within which to commence this action. The Butchers did not commence their action until March 1984, two years beyond the requisite period. Thus, the trial court correctly determined that the Butchers' cause of action against Gilroy would ordinarily be barred by the six-year statute of limitations.

[27] II.

[28] UTAH CODE ANN. § 78-12-44 (1987)

[29] The Butchers, however, argue that the six-year statute of limitations was tolled by R G H , Inc 's purchase of the land from Gilroy under Utah Code Ann § 78-12-44 (1987), and/or Gilroy's purported absence from the state We can easily dispose of the Butchers' contention that the statute of limitations was tolled by Gilroy's alleged absence form the state as the Butchers pled no facts in support of this contention

[30] The Butchers' contention that the six-year statute of limitations was tolled by Utah Code Ann § 78-12-44 (1987) demands further analysis The Butchers argue that if Gilroy received payment of any part of the principal or interest on the land which is the subject of the settlement agreement, the statute of limitations runs form the date of this payment Section 78-12-44 provides

[31] In any case founded on contract, when any part of the principal or interest shall have been paid, or an acknowledgment of an existing liability, debt or claim, or any promise to pay the same, shall have been made, an action may be brought within the period prescribed for the same after such payment, acknowledgment or promise, but such acknowledgment or promise must be in writing, signed by the party to be charged thereby When a right of action is barred by the provisions of any statute, it shall be unavailable either as a cause of action or ground of defense

[32] Utah Code Ann § 78-12-44 (1987) (emphasis added) Therefore, if we find section 78-12-44 applicable, the Butchers would have had an additional six years from March 1982, when Gilroy accepted payment from R G H , Inc , to bring this action

[33] The question we must address is whether Gilroy's sale of the property to R G H , Inc , in March 1982 constituted a "payment" under the settlement agreement within the meaning of section 78-12-44 Utah Code Ann § 78-12-44 (1987)

[34] The Utah Supreme Court interpreted the predecessor to section 78-12-44 in Holloway v Wetzel, 86 Utah 387, 45 P 2d 565 (1935), explaining that the payment must be a reaffirmation of the debt due

[35] he payment must be made by the party to be affected thereby, or by an agent authorized for that express purpose In the contemplation of the statute, the part payment of the debt is regarded as evidence of a willingness and obligation to pay the residue, as conclusive as would be a personal written promise to that effect It could not, then, have been intended to give this effect to payments other than those made by the party himself, or under his immediate direction Surely nothing short of this would warrant the assumption of a willingness to pay equal to his written promise to that effect

[36] Id at 391-92, 45 P 2d at 568 (emphasis added) (citation omitted) Accord Mobile Discount Corp v Price, 99 Nev 19, 656 P 2d 851, 853 (1983), Jarnagin v Ditus, 198 Kan 413, 424 P 2d 265, 270 (1967)

[37] Under Holloway, section 78-12-44 extends the six-year statute of limitations only if (1) partial payment of either principal or interest due under the settlement agreement was made (2) by the debtor/obligor of the settlement agreement (Gilroy) (or by a third party at Gilroy's direction), and (3) the payment was made to the creditor (the Butchers) under the settlement agreement R G H , Inc 's payment to Gilroy for the property arose from the sale of the property from Gilroy to R G H , Inc , not out of the settlement agreement between the Butchers and Gilroy We cannot infer that R G H , Inc 's payment to Gilroy in any way renewed Gilroy's promise to pay the Butchers or acknowledged any obligation on his part to pay the Butchers their share of the proceeds Therefore, we find that the trial court correctly concluded that section 78-12-44 was not applicable to this case

[38] III

[39] IS GILROY PRECLUDED FROM RELYING ON THE STATUTE OF LIMITATIONS?

[40] Although section 78-12-44 did not toll the six-year statute of limitations in this case, there are other exceptions to the general rule that a cause of action accrues upon the happening of the last event necessary to complete the cause of action Myers v McDonald, 635 P 2d 84 86 (Utah 1981) For example, in some circumstances, where the statute of limitations would normally bar a claim, proof of concealment or misleading by the defendant precludes the defendant from raising the statute of limitations defense Myers v McDonald, 635 P 2d 84, 86 (Utah 1981), Vincent v Salt Lake County, 583 P 2d 105 (Utah

1978); Rice v. Granite School District 23 Utah 2d 22, 456 P.2d 159 (1969). This theory is alluded to by the Butchers in their Complaint:

[41] [The Butchers] continued to attempt to sell the property and periodically notified of their progress in this regard. at no time notified [the Butchers] that he had sold the property, and continued to encourage [the Butchers] in their efforts to find a buyer and acquire the necessary building permits from Salt Lake City. Based upon [Gilroy's] representations and assurances that he was also trying to perform the contract, [the Butchers] continued to attempt to sell the property and work with the city to obtain permits for the property.

[42] The Butchers may have reasonably relied to their detriment on Gilroy's false representations regarding the circumstances surrounding the sale transaction and his performance under the settlement agreement. The Butchers claim Gilroy concealed the sale transaction and misled them into believing that he was still searching for a buyer and intended to honor the settlement agreement. Had the Butchers known of the sale of the property in March 1982, the Butchers could have sued under the settlement agreement before their cause of action was barred by the six-year statute of limitations. The Butchers plead facts which, if proved, could have precluded Gilroy from raising the statute of limitations defense under the exception articulated in Meyers.

[43] Therefore, we reverse the trial court's determination that the Butcher's claims were barred by section 78-12-23 and remand for further factual development consistent with this opinion.

[44] Reversed and remanded. Cost to the Butchers.

Opinion Footnotes

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[45] *fn1 The dismissal of R.G.H , Inc. has not been raised on appeal.

[46] *fn2 An agreement of compromise and settlement in a legal dispute constitutes an executory accord. L & A Drywall, Inc. v. Whitmore Const. Co., Inc., 608 P.2d 626, 629 (Utah 1980). As such, a party has the option of seeking to enforce the settlement agreement, or regarding the agreement as rescinded and moving against the other party on the underlying claim as a result of the breach. Id. The Butchers, in the present action, clearly sought to enforce the written settlement agreement. The Butchers, in their Amended Complaint, prayed for "judgment to be entered against Frank Gilroy for the amounts due and owing plaintiffs under the stipulated agreement "

19871014

12/07/93 BRUCE GOODMANSEN AND WILMA GOODMANSEN v.

[1] COURT OF APPEALS OF UTAH

[2] No. 920156-CA

[3] 1993.UT.306 <http://www.versuslaw.com>, 866 P.2d 581, 227 Utah Adv. Rep. 64

[4] December 7, 1993

[5] **BRUCE GOODMANSEN AND WILMA GOODMANSEN, PLAINTIFFS AND APPELLEES,**
v.
LIBERTY VENDING SYSTEMS, INC.; HOWARD ABRAMS; CASCADE INDUSTRIES, INC.; AND DOUGLASS GOFF, DEFENDANTS AND APPELLANTS

[6] Third District, Salt Lake County. The Honorable James S. Sawaya

[7] William B. Parsons, III (Argued), Attorney at Law for Appellant, 440 East 3300 South, Salt Lake City, UT 84111.

[8] Bruce Goodmansen (Argued), 390 South 500 West, Provo, UT 84601.

[9] Before Judges Billings, Davis, and Greenwood.

[10] The opinion of the court was delivered by: Billings

[11] BILLINGS, Presiding Judge:

[12] Defendants/appellants Liberty Vending Systems, Inc. and Howard Abrams appeal the trial court's order enforcing a settlement agreement with Plaintiffs/appellees Bruce and Wilma Goodmansen. We affirm.

[13] FACTS

[14] In October of 1989, Bruce Goodmansen and his mother Wilma Goodmansen entered into an agreement with Liberty Vending Systems, Inc. to purchase vending machines. In June of 1990, the Goodmansens brought suit against Liberty *Vending and Howard Abrams, its president, alleging breach of implied and express warranties, fraud, and misrepresentation.* The Goodmansens claimed that nine months after the agreement, most of the machines had not been delivered, and of those machines received, many were non-conforming and defective. A jury trial was set for March 26, 1991.

[15] Between March 7 and March 22, 1991, the parties engaged in settlement negotiations. These negotiations are evidenced by a series of letters between Barry Lawrence, counsel for the Goodmansens, and Dean Becker, counsel for Liberty Vending and Abrams. A pretrial conference was held on March 18, 1991. *fn1

[16] By March 21, 1991, the settlement negotiations seemed in jeopardy. That day Lawrence had a letter hand delivered to Becker which stated: "As we have been unable to agree to a settlement in this case . . . we fully intend to be ready, willing and able to go ahead with the trial in this matter this Tuesday." That same day Lawrence also sent a letter to Judge Sawaya indicating they were preparing for trial on Tuesday, March 26, 1991.

[17] However, three subsequent letters between Lawrence and Becker, all dated March 22, 1991, corroborate the Goodmansens' contention that the parties reached a settlement agreement. The first letter bearing that date was from Lawrence to Becker. It set forth the general terms of their agreement and was signed by both Lawrence and Becker. The letter stated:

[18] This letter is to reflect the settlement that we seemed to have reached in the above-referenced case. It is my understanding that we have agreed to the following general terms:

[19] 1. Howard Abrams will sign a $55,000 Promissory Note both as the President of Liberty Vending and in his individual capacity made payable to my client, Bruce Goodmansen. That Note is to be paid starting with a $1,000 payment on April 1, 1991, a $1,500 payment on May 1, 1991, a $2,5000 payment on July 1, 1991, and $3,000 payments on the first day of each month for the sixteen (16) months thereafter followed by a final payment of $2,000 due on November 1, 1992.

[20] 2. As we agreed, if your client defaults in making any monthly payment, the entire amount remaining on that $55,000 Note becomes due at once againt Howard and Libery Vending.

[21] 3. If your client makes timely payments for each of the next nineteen (19) months as agreed above, we will then execute a Satisfaction of Judgment of the $81,000 judgment against Doug Goff and Cascade Industries. If your clients default on their $55,000 Note, we will be able to execute on that judgment at once.

[22] Based upon our telephone conversations over the past few days, this is my understanding of the agreement we have reached in this case. If I have in any way misunderstood the agreement that we reached, contact me at once. I have left a place below for you to approve these general settlement terms. Once I have received your written consent as to this settlement, I will contact the court and let them know that we have agreed to a settlement in this case and that the Tuesday trial date will not be necessary. If I do not hear back from you, in writing, by 4:00 p.m. today, I will assume that these general terms are as we have agreed, and that we have thus effectuated a settlement on these general terms. Once again, if I have in any way misstated our settlement, contact me at once.

[23] Becker replied to Lawrence with a letter hand delivered that same day, March 22, 1991, in which Becker stated:

[24] Your settlement letter of March 22, 1991 is acceptable with the following exceptions:

[25] 1. The April 1, 1991 payment is changed to April 20, 1991.

[26] 2. The provisions of paragraph 2 are modified to reflect that the payment is late after the 1st of the month and in default after the 10th, but that no judgment may be rendered without notice and hearing.

[27] With the above changes, the settlement is acceptable.

[28] In response, Lawrence had a second letter hand delivered to Becker, dated March 22, 1991. In this letter Lawrence stated:

[29] After speaking with my client, we basically agree to those terms, as follows:

[30] 1. That in the event that payment is late (i.e , after the first of the month), a 5% interest charge will be placed on that payment. Default occurs if your client fails to pay within ten (10) days after payment is due.

[31] 2. We will agree that no judgment will be entered without notice to either Howard Abrams, Liberty Vending, or yourself. We cannot agree that a hearing will take place, particularly because the local rules do not provide for hearings in many circumstances.

[32] 3. We are willing to take the first payment (of $1,000) on April 20, 1991, in the form of a Cashier's Check. Thus, the Promissory Note will be for $54,000, the first payment being due thereunder on May 1, 1991 and continuing, as we previously agreed, through November 1, 1992.

[33] I believe that these terms are agreeable with you and your client from our telephone conversations this morning. Please approve these terms where provided for below and I will tell the court that the scheduled trial date will not be necessary.

[34] Becker signed this letter on the signature line Lawrence provided for Becker's approval. Lawrence thereafter cancelled the scheduled trial date.

[35] Lawrence drafted a promissory note and a general release and settlement agreement pursuant to the terms agreed upon in the March 22, 1991 correspondence. Lawrence had those documents hand delivered to Becker, with a cover letter, on March 25, 1991. This letter stated:

[36] Pursuant to the agreement we reached last week, enclosed is a General Release and Settlement Agreement, and a Promissory Note for your review and your clients' execution in this matter. I believe that I have incorporated all of the terms we agreed per last week, however, if you have any questions or concerns regarding this settlement, please contact me at once. If I have not heard back from you by the end of this week, I will assume that you are trying to get your clients to sign the documents. I will be out of town the latter part of this week, so if I do not hear from you I will give you a call early next week. In any event, it is my hope to have this wrapped up by April 20, 1991 so that we are in accordance with the payment procedures we have agreed upon.

[37] Thanks for your cooperation in this matter and give me a call if you have any questions concerning these documents.

[38] However, Becker neither contacted Lawrence nor signed and returned the documents. On April 11, 1991, Lawrence had a letter hand delivered to Becker to ensure that appellants would comply with the settlement before April 20, 1991.

[39] It has been over two weeks since I forwarded our proposed Settlement and Release Agreement, and Promissory Note to you for your approval and for your clients' signatures. I have made numerous telephone calls to you over the last two weeks, but have not heard back from you. I am assuming that the forms of our proposals are acceptable and that you are now obtaining the appropriate signatures. In any event, under the settlement agreement we reached, we are expecting a $1,000 Cashier's Check from your clients on or before April 20, 1991. Please contact me at once if you have any questions or concerns over this matter.

[40] By April 19, 1991, Lawrence had not heard from Becker or appellants regarding the settlement. Lawrence had another letter hand delivered to Becker that same day, which stated that he expected to receive a signed promissory note and settlement agreement, along with a $1000 check, by April 20, 1991. In that letter, Lawrence stated that "if I have not received the documents and check by Monday, April 22, 1991, I will make a motion to the court to compel our settlement agreement and will seek the appropriate fees and costs."

[41] Lawrence never received a check for $1000 or a signed promissory note and settlement agreement. According to Lawrence, he did not learn of appellants' intent not to abide by the settlement agreement until a telephone conversation with Becker on April 22, 1991. On April 22, 1991, Becker withdrew as counsel for appellants and was replaced by Edwin F. Guyon.

[42] Lawrence requested the court to enforce the settlement agreement, and a hearing was held on May 20, 1991. The court granted the motion to enforce the settlement agreement and entered judgment "on the terms and conditions of the Settlement Agreement reached on March 22, 1991 between the parties." *fn2 The court also awarded fees and costs incurred in enforcing the agreement. It is from this order and judgment appellants appeal. They argue that (1) a settlement agreement

was not reached between the parties, and even if it was (2) the Code of Judicial Administration precludes enforcement of this agreement.

[43] STANDARD OF REVIEW

[44] "'The decision of a trial court to summarily enforce a settlement agreement will not be reversed on appeal unless it is shown that there was an abuse of discretion.'" Zions First Nat'l Bank v. Barbara Jensen Interiors, Inc., 781 P.2d 478, 479 (Utah App. 1989) (quoting Mascaro v. Davis, 741 P.2d 938, 942 n.11 (Utah 1987)).

[45] I. BINDING SETTLEMENT AGREEMENT

[46] Appellants first argue that under controlling authority a legally binding settlement agreement was not reached between the parties. Specifically, appellants claim they cannot be bound because they did not sign a written settlement agreement. We note that appellants do not contend Becker exceeded the scope of his authority in assenting to the terms of settlement, but rather concede they are bound by his acts under the doctrine of apparent authority. See Luddington v. Bodenvest Ltd., 855 P.2d 204, 208-09 (Utah 1993); Zions First Nat'l Bank v. Clark Clinic Corp., 762 P.2d 1090, 1094 (Utah 1988).

[47] The trial court has the power to enter a judgment enforcing a settlement agreement if it is an enforceable contract.

[48] It is a basic rule that the law favors the settlement of disputes. Such agreements under the proper circumstances may be summarily enforced. However, whether a court should enforce such an agreement does not turn merely on the character of the agreement. An agreement of compromise and settlement constitutes an executory accord. Since an executory accord "constitutes a valid enforceable contract," basic contract principles affect the determination of when a settlement agreement should be so enforced.

[49] Mascaro v. Davis, 741 P.2d 938, 942 (Utah 1987) (footnotes omitted) (quoting Lawrence Constr. Co. v. Holmquist, 642 P.2d 382, 384 (Utah 1982)).

[50] It is of no legal consequence that the parties have not signed a settlement agreement. Mascaro, 741 P.2d at 941 n.2; accord Murray v. State, 737 P.2d 1000, 1001 (Utah 1987). Likewise, "if a written agreement is intended to memorialize an oral contract, a subsequent failure to execute the written document does not nullify the oral contract." Lawrence, 642 P.2d at 384. "It is a basic and long-established principle of contract law that agreements are enforceable even though there is neither a written memoralization of that agreement nor the signatures of the parties, unless specifically required by the statute of frauds." Murray, 737 P.2d at 1001. "Parties have no right 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 App. 1987) (Orme, J., Dissenting).

[51] The three letters between Lawrence and Becker dated March 22, 1991 constitute a binding settlement agreement between the parties. The first letter from Lawrence to Becker stated, "This letter is to reflect the settlement that we seemed to have reached." Lawrence then set forth the general terms of the agreement, which delineated amounts owed and a clear payment schedule. Becker signed this letter, approving the general settlement terms. In this letter, Lawrence asked twice for Becker to contact him if he had in any way misunderstood the agreement they had reached. Lawrence stated, "If I do not hear back from you, in writing, by 4:00 p.m. today, I will assume that these general terms are as we have agreed, and that we have thus effectuated a settlement on these general terms." (Emphasis omitted). Lawrence also said he would contact the court to cancel the trial "once I have received your [Becker's] written consent as to this settlement."

[52] Becker clearly accepted the settlement in his reply letter to Lawrence on March 22, 1991. Becker stated, "Your settlement letter of March 22, 1991 is acceptable with the following exceptions." The changes he specified did not affect the substance of the agreement; he merely changed the first payment date from April 1, 1991 until April 20, 1991, and defined a late payment. Becker concluded, "With the above changes, the settlement is acceptable."

[53] Lawrence indicated his belief that a settlement agreement had been reached in his second letter dated March 22, 1991, in

which he stated, "After speaking with my client, we basically agree to those terms . . . ." Lawrence then set forth four changes which did not alter the substance of the agreement. He stated the interest charge, defined default, agreed to notice before entry of judgment, and required the first payment to be a cashier's check. Neither the amount nor terms of the agreement were changed. Lawrence further stated, "I believe that these terms are agreeable with you and your client from our telephone conversations this morning. Please approve these terms where provided for below and I will tell the court that the scheduled trial date will not be necessary." Becker signed this letter on the signature line Lawrence provided for Becker's approval.

[54] Moreover, the conduct of the parties indicates that both parties believed a settlement agreement had been reached. Lawrence stated repeatedly that he would cancel the trial date once a settlement of the case had been reached. After Becker signed the settlement letters, Lawrence cancelled the trial set for March 26, 1991, an act consistent with a settlement having been reached. Thus, the conduct of the parties supports the Conclusion that the correspondence between Lawrence and Becker, dated March 22, 1991, constitutes a binding settlement agreement

[55] II. RULE 4-504(8)

[56] Appellants next argue that Rule 4-504(8) of the Code of Judicial Administration precludes enforcement of this agreement. This Rule provides: "No orders, judgments, or decrees based upon stipulation shall be signed or entered unless the stipulation is in writing, signed by the attorneys of record for the respective parties and filed with the clerk or the stipulation was made on the record."

[57] However, Rule 4-504 was amended, effective April 15, 1991, to include two new provisions relevant to the resolution of this issue. The following was added to the Intent paragraph: "This rule is not intended to change existing law with respect to the enforceability of unwritten agreements." Subsection (10) was also added, which provides that "nothing in this rule shall be construed to limit the power of any court, upon a proper showing, to enforce a settlement agreement or any other agreement which has not been reduced to writing." Rule 4-504(10) of the Utah Code of Judicial Administration.

[58] These amendments clarify the disagreement among panels of this court interpreting the impact of Rule 4-504 on the common law power of the court to enforce an otherwise legally enforceable settlement agreement. *fn3 The addition of subsection (10) indicates that Rule 4-504 was never intended to preempt the power of the court to enforce settlement agreements that meet common law requirements. Thus, Rule 4-504 does not preclude enforcement of the settlement agreement at issue.

[59] Conclusion

[60] The correspondence between Lawrence and Becker dated March 22, 1991 constitutes a binding settlement agreement. The conduct of both parties supports this Conclusion. The trial court has the power to enforce this agreement pursuant to basic contract principles, and Rule 4-504 of the Code of Judicial Administration does not preclude its enforcement. Accordingly, we affirm.

[61] Judith M. Billings, Presiding Judge

[62] WE CONCUR:

[63] James Z. Davis, Judge

[64] Pamela T. Greenwood, Judge

Opinion Footnotes

[65] *fn1 The record contains no information concerning the pretrial conference, other than it was ordered to be held on March 18 1991. Appellants claim that Lawrence, Bruce Goodmansen, and Becker were present at the conference, and that Abrams did not attend. They claim that Becker called Abrams before the close of the conference and presented the settlement offer to him, and that Abrams indicated he agreed in substance with the settlement. However, without support in the record, we do not rely on this assertion.

[66] *fn2 Settlement agreements may be summarily enforced without an evidentiary hearing. Tracy-Collins Bank & Trust Co. v. Travelstead, 592 P.2d 605, 609 (Utah 1979) (affirming trial court's order to enforce settlement agreement without an evidentiary hearing); accord Robinson v. Department of Natural Resources, 620 P.2d 519, 520 (Utah 1980) (noting settlement agreements are enforceable without evidentiary hearing).

[67] *fn3 Prior to the 1991 amendments, there was conflict within this court concerning whether all settlement agreements were "stipulations" covered by Rule 4-504(8), and whether a settlement agreement must be in writing to be enforceable, thus meeting the procedural requirements of Rule 4-504(8). Compare Zions First Nat'l Bank v. Barbara Jensen Interiors, Inc., 781 P.2d 478, 480 n.1 (Utah App. 1989) (plurality decision) (affirming order to compel settlement and holding that settlement agreements need not be in writing to be enforceable) with Brown v. Brown, 744 P.2d 333, 335 (Utah App. 1987) (finding stipulations must be in writing or submitted in open court to be enforceable, relying in part on predecessor to Rule 4-504(8)) and Bagshaw v. Bagshaw, 788 P.2d 1057, 1059 n.1 (Utah App. 1990) (recognizing disagreement that settlement agreements must meet procedural requirements of Rule 4-504(8) to be enforceable).

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[1] COURT OF APPEALS OF UTAH

[2] No. 920774-CA

[3] 1994.UT.16256 <http://www.versuslaw.com>, 876 P.2d 880, 241 Utah Adv. Rep. 17

[4] June 9, 1994

[5] **JOHN DEERE COMPANY, PLAINTIFF AND APPELLEE**
v.
A&H EQUIPMENT, INC.; WENDELL HANSEN; MARK B. ANDERSON; AND VADA A. ANDERSON, DEFENDANTS AND APPELLANTS

[6] Fourth District, Utah County. The Honorable Cullen Y. Christensen

[7] D. David Lambert (Argued), Linda J. Barclay, Howard, Lewis & Petersen, Attorneys at Law for Appellants, 120 East 300 North, P.o. Box 778, Provo, UT 84603.

[8] R. Brent Stephens (Argued), Ryan E. Tibbitts, Snow, Christensen & Martineau, Attorneys at Law for Appellee, Ten Exchange Place, 11th Floor, P.o. Box 45000, Salt Lake City, UT 84145.

[9] Before Judges Bench, Billings, and Greenwood.

[10] The opinion of the court was delivered by: Greenwood

[11] GREENWOOD, JUDGE:

[12] This dispute involves the judicial enforcement of a settlement agreement. John Deere Company (Deere) asserts that the parties mutually agreed to settle this case and thus that the trial court properly ordered A&H Equipment, Inc. (A&H) to comply with that agreement. On the other hand, A&H argues that the parties were in the midst of negotiating the terms of the settlement agreement when Deere made, and the trial court granted, the motion to have the trial court judicially enforce Deere's proposed settlement agreement. We affirm.

[13] BACKGROUND

[14] Deere initially brought this civil action against A&H *fn1 on June 20, 1989, to collect monies which A&H owed to Deere on an open account. A&H filed a cross-complaint against Deere alleging breach of the parties' franchise agreement and other tortious acts. The trial court entered judgment on September 21, 1992 in favor of Deere, after hearing oral argument on both Deere's and A&H's motions to enforce their respective interpretations of the settlement agreement. A&H appealed this order to the Utah Supreme Court on September 23, 1992, which subsequently poured the case over to this court for Disposition

[15] Beginning in 1963, Deere established a franchisor-franchisee relationship with A&H. Deere granted to A&H an exclusive franchise territory covering six counties in Central Utah. The franchise arrangement also required A&H to enter into various agreements with Farm Plan, Inc. (Farm Plan), a sibling corporation to Deere in that they share a common parent corporation, but nonetheless a separate and autonomous corporation. Farm Plan is the financing arm of Deere, through which many of

A&H's customers financed their purchases of farm machinery

[16] Prior to 1989, A&H, in the midst of serious financial setbacks, defaulted on some of the agreements with Deere and Farm Plan Consequently, Farm Plan brought suit against A&H for breach of its agreements with Farm Plan *fn2 On June 1, 1989, the trial court entered judgment for Farm Plan against A&H in the amount of $36,062 47 plus interest and costs *fn3

[17] Nineteen days later, on June 20, 1989, Deere filed the present suit against A&H, alleging that A&H had defaulted on various obligations under the franchise agreement A&H counterclaimed against Deere, alleging that it had breached the franchise agreement and had committed other tortious acts

[18] Almost two years later, A&H instructed its attorney, David Lambert, to try and settle the case At this point, the parties' versions of the facts diverge A&H claims that it intended for Lambert to obtain a release from Deere on all "John Deere-related matters," which it asserts included a release from the outstanding judgment held by Farm Plan *fn4 Deere viewed the scope of the settlement agreement as a release of all claims by the single entity John Deere Company against A&H, but not a release of all claims by the John Deere family of corporations, which would have included Farm Plan

[19] Lambert initially wrote a letter to Deere's counsel, stating, "I have been asked by my client to propose a settlement with your client in the above referenced case *fn5 The settlement proposal is a mutual dismissal with prejudice and a general release of claims with each party to bear their respective costs and fees " Deere's counsel accepted A&H's offer by telephone on April 15, 1991 A week later, on April 22, 1991, Deere's counsel sent a letter confirming the earlier telephonic acceptance, stating, "This will confirm my telephone conversation of April 15, 1991, in which I accepted your settlement proposal contained in your letter of April 10, 1991 I will prepare the settlement documents and forward them to you for execution " Deere's attorney thereafter prepared the settlement documents and sent them to Lambert, on May 8, 1991, to obtain A&H's signature

[20] Lambert forwarded the settlement agreement to A&H for signature by its corporate officers After reviewing the agreement, A&H advised Lambert that it wanted to incorporate into the settlement agreement a release from the Farm Plan judgment as well After a period of approximately two months, Deere's attorney wrote Lambert, on July 18, 1991, inquiring as to the delay in obtaining signatures on the settlement agreement Lambert, responding by letter dated July 29, 1991, requested that Deere include language in the settlement agreement releasing A&H from the Farm Plan judgment That letter stated, in relevant part

[21] My client is concerned about making sure that the Mutual Release of All Claims comprehensively releases him from any obligations to John Deere Specifically, my client would like to add John Deere Farm Plan as a releasing party Please let me know if that is acceptable so that we can get this matter finalized

[22] Thereafter, Deere's counsel phoned Lambert and related his client's refusal to include the requested language Deere thereafter filed a motion in the trial court to enforce the settlement agreement originally proposed by A&H A&H filed a cross-motion to have the court enforce A&H's proposed settlement agreement (i e a release of Deere's claims and the Farm Plan judgment) and requested oral argument On August 28, 1992, the trial court heard oral argument on the pending motions Subsequently, it issued a memorandum decision granting Deere's motion to enforce the settlement agreement, denying A&H's motion, and requiring A&H to execute the settlement documents prepared by Deere's counsel A&H now appeals from the trial court's decision

[23] ISSUES

[24] A&H asserts that the trial court erred by enforcing the settlement agreement because (1) the parties failed to have a meeting of the minds on the specific terms of the settlement agreement, (2) it was not previously filed with, or entered upon the minutes of, the trial court, (3) even if it was enforceable, the agreement should be rescinded because A&H's attorney unilaterally erred when proposing the settlement to Deere, and (4) its terms were ambiguous

[25] STANDARD OF REVIEW

[26] Generally, a trial court's summary enforcement of a settlement agreement "'will not be reversed on appeal unless it is shown that there was an abuse of discretion.'" Zions First Nat'l Bank v. Barbara Jensen Interiors, Inc., 781 P.2d 478, 479 (Utah App. 1989) (quoting Mascaro v. Davis, 741 P.2d 938, 942 n.11 (Utah 1987)). In arriving at its decision to enforce the settlement agreement, the trial court concluded that Deere and A&H had a meeting of the minds and that the settlement agreement was unambiguous. As to these issues, whether a contract exists between parties is a question of law which we review for correctness. Herm Hughes & Sons, Inc. v. Quintek, 834 P.2d 582, 583 (Utah App. 1992). In addition, whether contractual language is ambiguous is a question of law, also reviewed for correctness. Equitable Life & Casualty Ins. Co. v. Ross, 849 P.2d 1187, 1192 (Utah App.), cert. denied, 860 P.2d 943 (Utah 1993).

[27] ANALYSIS

[28] Meeting of the Minds

[29] A&H insists on appeal that Deere failed to propose, and A&H never agreed to, the specific terms of the settlement agreement. Consequently, argues A&H, there was no meeting of the minds, no enforceable agreement, and the trial court erred in summarily enforcing an otherwise unenforceable contract.

[30] A&H correctly contends that a trial court has the power to enter a judgment enforcing a settlement agreement only if there is an enforceable contract.

[31] "It is a basic rule that the law favors the settlement of disputes. Such agreements under the proper circumstances may be summarily enforced. However, whether a court should enforce such an agreement does not turn merely on the character of the agreement. An agreement of compromise and settlement constitutes an executory accord. Since an executory accord 'constitutes a valid enforceable contract,' basic contract principles affect the determination of when a settlement agreement should be so enforced."

[32] Goodmansen v. Liberty Vending Sys., Inc., 866 P.2d 581, 584 (Utah App. 1993) (quoting Mascaro v. Davis, 741 P.2d 938, 942 (Utah 1987) (emphasis added) (footnotes omitted) (quoting Lawrence Constr. Co. v. Holmquist, 642 P.2d 382, 384 (Utah 1982))); accord Zions First Nat'l Bank v. Barbara Jensen Interiors. Inc., 781 P.2d 478, 479 (Utah App. 1989) ("Voluntary settlement of legal disputes is favored by the law and, under certain circumstances, a settlement agreement may be summarily enforced as an executory accord."). Thus, this court has generally affirmed the "granting of a motion to compel settlement if the record establishes a binding agreement and 'the excuse for nonperformance is comparatively unsubstantial.'" Id. (quoting Tracy-Collins Bank & Trust Co. v. Travelstead, 592 P.2d 605, 609 (Utah 1979)). We therefore review the record to determine whether A&H and Deere had a binding agreement and whether A&H's excuse for nonperformance was "comparatively unsubstantial."

[33] Of the elements required to constitute a binding contract, A&H asserts that only one was missing--a meeting of the minds. A&H insists that Mr. Lambert's first letter to Deere's counsel was intended to obtain a release from all outstanding claims and judgments held not only by Deere but also by Farm Plan. To support this claim, A&H points to the phrase "and a general release of claims," found in Mr. Lambert's settlement proposal letter of April 10, 1991. *fn6 Consistent with this position, A&H maintains that Deere proposed a counter-offer when it submitted the settlement agreement document because that document covered claims held by Deere but not the outstanding Farm Plan judgment against A&H. Accordingly, A&H asserts that the parties were still negotiating the settlement agreement when Deere asked and received, judicial enforcement of the proposed settlement agreement.

[34] Contrary to A&H's portrayal of the circumstances, we believe that the trial court did not abuse its discretion by determining that the parties initially had a meeting of the minds and that A&H subsequently changed its mind. *fn7 In Crismon v. Western Co. of North America, 742 P.2d 1219 (Utah App. 1987), this court stated that "contractual mutual assent requires assent by all parties to the same thing in the same sense so that their minds meet as to all the terms." Determining whether the specific terms omitted were essential to the agreement requires an examination of the entire agreement and the circumstances under which the agreement was entered into.

[35] Id. at 1221-22 (quoting Cessna Fin. Corp. v. Meyer, 575 P.2d 1048, 1050 (Utah 1978)). In Crismon, the issue was whether the parties had entered into a valid lease agreement. In arriving at a negative Conclusion, this court looked to the

correspondence that had passed between the parties. The language in those letters was preliminary, indicating that negotiations were still ongoing. *fn8

[36] In the present case, there are three relevant documents in the record that changed hands between the parties - - two letters and the unsigned settlement agreement. Mr. Lambert's first letter, dated April 10, 1991, included the following relevant portions:

[37] Re: John Deere v. A&H Equipment, et al.

[38] Dear Brent:

[39] I have been asked by my client to propose a settlement with your client in the above referenced case. The settlement proposal is a mutual dismissal with prejudice and general release of claims with each party to bear their respective costs and fees.

[40] As you may know, the defendants have been involved in other litigation and have generally suffered serious financial reversals. . . .

[41] Several parts of this letter are significant. First, Mr. Lambert specifically references the proposed settlement to the John Deere v. A&H Equipment, et al. case. It is undisputed that Farm Plan was not a party to this suit and that it had a separate corporate identity. Second, Mr. Lambert states that he is proposing the settlement at A&H's request, thereby implying some communication between Mr. Lambert and his client as to acceptable terms of the proposed settlement. Third, Mr. Lambert acknowledges in his letter, without being specific, that A&H has been involved in "other litigation." This statement by Mr. Lambert, while necessarily dispositive of whether he was aware of the Farm Plan judgment, at least indicates his awareness that A&H had been involved in other, potentially unresolved lawsuits. Finally, Mr. Lambert indicates after his signature that he sent a carbon copy of the letter to A&H, thereby putting it on notice as to the proposed settlement offer.

[42] Twelve days after Mr. Lambert's initial letter, counsel for Deere sent Mr. Lambert a letter confirming Deere's earlier telephonic acceptance of A&H's proposed settlement. That letter stated, in relevant part:

[43] Re: John Deere Co. v. A&H Equipment, et al.

[44] Dear [Mr. Lambert]:

[45] This will confirm my telephone conversation of April 15, 1991, in which I accepted your settlement proposal contained in your letter of April 10, 1991. I will prepare the settlement documents and forward them to you for execution.

[46] There are two significant points in this second letter. First, Deere's counsel references the identical case as Mr. Lambert referenced in his letter, i.e., John Deere v. A&H Equipment, et al. Second, counsel for Deere simply states that Deere accepts the settlement proposal as contained in Mr. Lambert's letter; there were no additional terms or conditions proposed by Deere in this letter.

[47] The third relevant document, the unsigned settlement agreement, states in its entirety:

[48] IN CONSIDERATION of the mutual dismissal of the Complaint of John Deere Company (hereinafter the "Plaintiff") and the Counterclaim of A&H Equipment, Inc., Wendell Hansen, Mark B. Anderson, and Vada A. Anderson (hereinafter the "Defendants") Plaintiff and Defendants hereby release and forever discharge the other from any and all claims, demands, damages, actions, causes of action or suits of whatever kind or nature, which now exist of [sic] which may hereafter accrue, because of, for, arising out of or in any way connected with that contractual dispute, the details of which are more fully set

forth in the files and records of the District Court of Utah County, in that certain action entitled John Deere Company, plaintiff v. A&H Equipment, Inc., Wendell Hansen, Mark B. Anderson, and Vada A. Anderson, defendants, Civil No. CV-89-1151, pending in the Fourth Judicial District Court of Utah County, State of Utah.

[49] The Settling Parties understand and agree that this is a release of all claims and includes but is not limited to contractual claims and profits, claims for damages and claims for both direct and consequential damages of any and all kind or character.

[50] The Settling Parties understand and agree that this settlement is made for the purpose of compromising a disputed claim and shall not be construed as an admission of liability, since any liability is expressly denied.

[51] This Release of All Claims may be executed in counterparts.

[52] Consistent with the two earlier letters, this settlement agreement references only the case of John Deere v. A&H Equipment, et al. None of the three relevant documents names, mentions, or even implies that the Farm Plan judgment, or that Farm Plan itself, is intended to be part of the proposed settlement agreement. Accordingly, these documents establish that both parties initially agreed "to the same thing in the same sense so that their minds [met] as to all the terms." Crismon, 742 P.2d at 1221. The result was an agreement binding on both parties. *fn9 We therefore affirm the trial court's ruling that the parties had a meeting of the minds. *fn10

[53] Settlement Agreement and Rule 4-504

[54] Relying on Utah Code Ann. § 78-51-32(2) (1992) and Utah Rule of Judicial Administration 4-504(8), A&H argues that the settlement agreement was unenforceable because it was neither in writing and signed by the parties nor entered into by stipulation of the parties and entered on the minutes of the court. *fn11 Rule 4-504(8) of the Utah Code of Judicial Administration states that "no orders, judgments, or decrees based upon stipulation shall be signed or entered unless the stipulation is in writing, signed by the attorneys of record for the respective parties and filed with the clerk or the stipulation was made on the record." Utah Code Jud. Admin. R4-504(8).

[55] It is undisputed that the attorneys in this case did not file with the clerk or enter upon the minutes of the court the settlement agreement nor did the attorneys of record sign and submit to the court a written stipulation. Accordingly, argues A&H, the settlement agreement is unenforceable.

[56] This court recently decided the question of whether a court can summarily enforce an oral settlement agreement in Goodmansen v. Liberty Vending Systems, Inc., 866 P.2d 581 (Utah App. 1993). In Goodmansen, the appellants argued, similar to this case, that Rule 4-504(8) of the Code of Judicial Administration precluded enforcement of a settlement agreement. This court ruled, based on the 1991 amendments to Rule 4-504, that Rule 4-504 does not preclude a trial court from enforcing an oral settlement agreement. Id. at 586; *fn12 accord Murray v. State, 737 P.2d 1000, 1001 (Utah 1987) ("Agreements are enforceable even though there is neither a written memorialization of that agreement nor the signatures of the parties, unless specifically required by the statute of frauds."). *fn13

[57] The amendments to Rule 4-504, effective April 15, 1991, included two new provisions. To the "Intent" paragraph was added the following: "This rule is not intended to change existing law with respect to the enforceability of unwritten agreements." Id. Furthermore, new subsection ten provides that "nothing in this rule shall be construed to limit the power of any court, upon a proper showing, to enforce a settlement agreement or any other agreement which has not been reduced to writing." Id. (quoting Utah Code Jud. Admin. R4-504(10)).

[58] Consistent with the holding in Goodmansen, we hold that the settlement agreement between A&H and Deere was enforceable despite the fact that it had not been reduced to writing, signed by the parties, and entered on the minutes of the court. *fn14 Therefore, the trial court did not err in granting Deere's motion to enforce the settlement agreement.

[59] Settlement Agreement Entered into by Mistake

[60] A&H argues, in the alternative, that if the settlement agreement is enforceable, the trial court's decision to enforce it should still be reversed because A&H's attorney made a unilateral mistake when he communicated the settlement offer to Deere's counsel. A&H maintains that Deere, Deere's counsel, and A&H, but not Mr. Lambert, were aware of the earlier Farm Plan judgment. In addition, A&H contends that Deere and its attorney should have been aware of A&H's probable intent to include the Farm Plan judgment in the settlement agreement. As a result, A&H argues that Mr. Lambert unilaterally erred when he did not specify in his initial settlement proposal to Deere that A&H's offer included a release from the Farm Plan judgment.

[61] Deere, on the other hand, argues that this court should not address A&H's unilateral mistake argument because it failed to raise the issue before the trial court. A review of the trial court's transcript of oral argument on the motions arguably supports Deere's assertion. At oral argument, Mr. Lambert discussed three issues with the court: (1) cross-claims and setoffs; (2) limited authority of attorneys; and (3) meeting of the minds. On the third issue, meeting of the minds, Mr. Lambert focused on the failure of the parties to reach a meeting of the minds, rather than on Mr. Lambert's own unilateral mistake. We agree with Deere that A&H did not properly raise this issue at the trial court below and is therefore precluded from arguing it on appeal. See Ong Int'l (U.S.A.) Inc. v. 11th Ave. Corp., 850 P.2d 447, 455 (Utah 1993) (general rule is to decline consideration of issues raised for first time on appeal). *fn15

[62] Ambiguity of Settlement Agreement

[63] A&H finally asserts that if there was an agreement, its terms were ambiguous and the trial court should not have enforced it without conducting an evidentiary hearing. Specifically, A&H emphasizes the following language of the trial court's ruling:

[64] And based on the letter, your letter, and in view of the pleadings in this case, which I have reviewed, and the posture of these parties, it appears evident to the Court that the only thing that reasonably could have been contemplated is that it involved a general release of claims of each party with respect to the matter that is pending before the Court in this action.

[65] (Emphasis added.) A&H argues that the trial court's reference to the "posture of the parties," clearly shows its belief that the letter was unclear and ambiguous. Deere's counter argument is that by referring to the "posture of the parties," the trial court was not referring to any ambiguity in the letter; rather, it was simply noting the fact that Farm Plan, as an unnamed party to the action, could not be forced to join into the settlement agreement. Furthermore, Deere argues that the settlement agreement is clear and unambiguous, that it clearly contemplates a settlement of claims between only the parties to the instant suit--A&H and Deere.

[66] This court has previously noted that

[67] language in a written document is ambiguous if the words used may be understood to support two or more plausible meanings. A court is justified in determining that a contract or order is ambiguous if its terms are either unclear or missing. However, the mere fact that the parties interpret the language differently does not, per se, render the writing ambiguous.

[68] Whitehouse v. Whitehouse, 790 P.2d 57, 60 (Utah App. 1990) (citations omitted).

[69] In the present case, we conclude that the language in the first two letters and the settlement document does not support two or more plausible meanings. *fn16 In addition, we believe that the letters and document are clear and do not hint of any missing terms. Consequently, the trial court did not err in concluding that the settlement agreement between the parties was unambiguous and in summarily enforcing it.

[70] Conclusion

[71] After reviewing the record in this case, we cannot say that the trial court abused its discretion in summarily enforcing the

settlement agreement between the parties or that its legal Conclusions were erroneous. Accordingly, we affirm the trial court's decision.

[72] Pamela T. Greenwood, Judge

[73] I CONCUR:

[74] Judith M. Billings, Judge

[75] BENCH, Judge (dissenting):

[76] I respectfully Dissent. I believe that the trial court improperly held, as a matter of law, that these parties had a meeting of the minds. Because this is a fact sensitive threshold issue, I would remand this case to allow the parties to present evidence as to whether there was a meeting of the minds.

[77] The main opinion erroneously asserts that the parties never urged, at trial or on appeal, that the trial court should take evidence on the meeting-of-the-minds issue. At the hearing before the trial court, A&H Equipment, Inc. (A&H) asked the court to enforce the settlement agreement consistent with A&H's interpretation and, in the alternative, urged that there was no meeting of the minds. In support of the alternative argument, A&H contended that Brown v. Brown, 744 P.2d 333 (Utah App. 1987) *involved a similar "fact sensitive" issue, which was "exactly analogous to this case." If the trial court did not* rule for A&H as a matter of law, A&H urged the court to take evidence on the fact sensitive meeting-of-the-minds issue.

[78] On appeal, A&H abandoned its argument regarding the enforceability of its own interpretation of the settlement agreement (as a matter of law), asserting only its alternative theory that there was no meeting of the minds. Specifically, A&H argued:

[79] The trial court took no evidence other than to consider the affidavit by defendants' counsel. The trial court did not resolve this . . . factual issue by receiving evidence, but summarily decided the issue based upon the memoranda and oral arguments of the respective counsel. The trial court's action in failing to take evidence on an issue of fact is reversible error. This court, therefore, should reverse the trial court's summary enforcement of the proposed settlement agreement and remand for trial.

[80] A&H clearly requested this court to remand the case for a factual determination. Thus, A&H requested, both in the trial court and this court, a factual determination of the meeting-of-the-minds issue.

[81] The trial court summarily ruled, as a matter of law, that there was a meeting of the minds as to the settlement agreement. The trial court took no evidence regarding the parties' perceptions of the scope of the settlement agreement. *fn1 Determining whether there was a meeting of the minds in the present case requires a factual inquiry. The trial court's ruling on this fact sensitive issue, as a matter of law, was improper. See, e.g., Canfield v. Albertsons, Inc., 841 P.2d 1224, 1228 (Utah App. 1992), cert. denied, 853 P.2d 897 (Utah 1993). I would therefore remand this case to allow the parties to present *evidence as to whether there was a meeting of the minds* *fn2

[82] Russell W. Bench, Judge

Opinion Footnotes

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[83] *fn1 There were several other parties named in this suit but for ease of expression, this opinion refers to all defendants

collectively as A&H. The three other named parties--Wendell Hansen, Mark B. Anderson, and Vada A. Anderson--were apparently either officers and/or directors of A&H or its principal shareholders.

[84] *fn2 In this earlier suit, Farm Plan sued A&H and Wendell Hansen, but did not sue the Andersons.

[85] *fn3 Farm Plan agreed to postpone execution of the judgment based on a stipulation by A&H to pay off the judgment by way of regular, periodic payments. A&H apparently defaulted on this stipulation by failing to make any payments to Farm Plan and the judgment remains outstanding.

[86] *fn4 Lambert did not represent A&H in the earlier Farm Plan case although Deere retained the same counsel for both suits. Hence, Lambert was initially unaware of the outstanding Farm Plan judgment. Lambert claims that he discovered its existence, and A&H's desire to obtain its release along with a release from the present suit, only after A&H objected to the formal settlement documents that Deere submitted to A&H for signature.

[87] *fn5 The phrase "above referenced case" refers to the following caption in the letter which appears immediately after the addressee's name and mailing address: "Re: John Deere v. A&H Equipment, et al."

[88] *fn6 As Black's Law Dictionary clarifies, the term "claim" is arguably not expansive enough to include Farm Plan's outstanding judgment against A&H. It defines "claim" as, "A cause of action. Means by or through which claimant obtains possession or enjoyment of privilege or thing Demand for money or property as of right . . . . " Black's Law Dictionary 247 (6th ed. 1990). These definitions of a "claim" seemingly anticipate something which exists prior to the time that a court decides the issue. As confirmed by Black's definition of "judgment," a court's ruling transforms a claim into a judgment: "The official and authentic decision of a court of Justice upon the respective rights and claims of the parties to an action or suit therein litigated and submitted to its determination." Id. at 841 (emphasis added).

[89] In A&H's case, the phrase "general release of claims" thus likely refers to rights or causes of action that A&H possibly had against Deere which had not yet been decided by a court of law. The phrase, therefore, arguably does not include the Farm Plan judgment, which has already undergone the metamorphosis from a claim to a judgment.

[90] *fn7 A&H postures its argument as if Deere proposed and A&H did not agree to, the specific terms of the settlement agreement. Our reading of the record indicates that A&H initiated the settlement Discussions and proposed the initial agreement, which agreement did not refer specifically to the Farm Plan judgment. The terms of the settlement agreement as stated in the documents prepared by Deere thus mirrored, we believe, A&H's proposed offer rather than introducing new terms as A&H suggests. While it is true that the third letter from Lambert to Deere's counsel does in fact introduce the additional term regarding the Farm Plan judgment, we believe that this additional proposal came after the parties had already entered into a binding agreement.

[91] *fn8 For example, the letter stated that "'at the time that leases are agreed upon and executed, first and last months rental payments will be due and payable to lessor.'" Crismon v. Western Co. of N. Am., 742 P.2d 1219, 1222 (Utah App. 1987). Further, the same letter stated, "'Please inform me as to your position regarding the above changes so that we may proceed toward a final agreement on this matter.'" Id.

[92] *fn9 On the question of whether A&H's excuse for nonperformance was "comparatively substantial," we note that A&H's aversion to performance of the settlement agreement because it failed to include the Farm Plan judgment apparently arises from A&H's misconception that the doctrine of claim preclusion will deprive it of the right to initiate action against Farm Plan on a breach-of-franchise-agreement claim. A&H states in its brief that the settlement agreement, if enforced, would be unconscionable because A&H "will have lost the right to litigate the claims set forth in [its] counterclaim and will also have lost the benefit of the bargain which [it] intended to make, namely, to dismiss [its] obligation on the John Deere Farm Plan judgment.

[93] A&H's argument is misguided. First, it has already lost its right to relitigate the claims underlying the court's award of judgment to Farm Plan. Second, the doctrine of claim preclusion does not prevent A&H from bringing another suit against Farm Plan for breach of the franchise agreement if it is not foreclosed by the existing judgment to Farm Plan. As stated by

this court in Ringwood v. Foreign Auto Works, Inc., 786 P.2d 1350 (Utah App.), cert. denied, 795 P.2d 1138 (Utah 1990):

[94] Claim preclusion is a branch of the doctrine of res judicata which has three requirements for its application:

[95] "First, both cases must involve the same parties or their privies. Second, the claim that is alleged to be barred must have been presented in the first suit or must be one that could and should have been raised in the first action. Third, the first suit must have resulted in a final judgment on the merits."

[96] Id. at 1357 (quoting Madsen v. Borthick, 769 P.2d 245, 247 (Utah 1988)). In a subsequent suit between A&H and Farm Plan, the elements of claim preclusion would not be met. First, the parties would not be the same. Second, the first suit (Deere v. A&H) would not be deemed to have resulted in a "final judgment on the merits" because it would have been resolved by settlement rather than litigation on the merits. Accordingly, A&H could pursue an action against Farm Plan for breach of the franchise agreement, despite the fact that Deere and A&H would have already settled their dispute which involved the same nucleus of operative facts. It is also noteworthy that A&H had no such claims against Farm Plan in this case, either by its cross-claim or a third-party complaint. Therefore, A&H's excuse for nonperformance of the agreement seems comparatively unsubstantial.

[97] *fn10 The Dissent would have us remand to the trial court for an evidentiary hearing on the meeting-of-the-minds issue. We have rejected that course for two reasons. First, the parties never requested, and have not requested on appeal, that the trial court hold an evidentiary hearing on this issue. The parties submitted the issue to the trial court based on the points raised at oral argument and the letters and affidavits in the record. Our analysis in this case has not deviated from that approach; we have based our decision on a review of the hearing transcript and the relevant documents in the record. To remand for an evidentiary hearing at this juncture would therefore be inappropriate.

[98] Second, a decision to remand this case for an evidentiary hearing would be contrary to the parol evidence rule. "Questions of whether a contract is ambiguous because of uncertain meaning of terms, missing terms, or facial deficiencies are questions of law that must be determined by the court before parol or extrinsic evidence may be admitted to clarify the contractual intent of the parties." Fitzgerald v. Corbett, 793 P.2d 356, 358 (Utah 1990) (footnotes omitted).

[99] In the present case, the trial court believed, and we agree, that the relevant documents in this case are clear and unambiguous on their face. Accordingly, the trial court was correct in looking no further than the four corners of these documents in deciding this issue.

[100] *fn11 Utah Code Ann. § 78-51-32(2) (1992) states that an attorney has the power to bind a client "in any of the steps of an action or proceeding by his agreement filed with the clerk or entered upon the minutes of the court, and not otherwise." Id. .

[101] The only Utah case to cite this statute is State v. Musselman, 667 P.2d 1061 (Utah 1983), which involved an attorney who had forged his client's signature to misappropriate the client's funds. However, the Musselman court focused on § 78-51-32 (3) rather than the quoted language above. The court also noted the long-established rule that attorneys can make procedural decisions in a lawsuit but it is the client's right to make decisions regarding settlement. Id. at 1067 n.8. In the present case, it is clear that A&H empowered its attorney to offer the proposed settlement offer to Deere. Therefore, there has been no usurpation of A&H's power by its attorney.

[102] As § 78-51-32 was first enacted in 1898 and has not been substantively changed since that time, there is no legislative history available from which we might discern legislative intent or the possible interplay between this section and Rule 4-508. We believe, however, that the thrust of § 78-51-32(2) is to give attorneys the power to act on their client's behalf, in most cases without prior consultation, as to those procedural matters of a lawsuit for which attorneys have the expertise and obligation to act in the best interests of their clients. Section 78-51-32(2) protects an attorney from disciplinary action for so acting. We do not believe, however, that § 78-51-32 was intended to void oral settlement agreements. Clearly, the power to settle a lawsuit resides in the client. If a client authorizes the attorney to settle the matter and has expressed an intent to be bound by the attorney's acts, absent a statute of frauds issue, an oral or privately negotiated settlement agreement is as valid as a signed, written settlement agreement that has been entered on the minutes of the court. See Murray v. State, 737 P.2d 1000, 1001 (Utah 1987); Tracy-Collins Bank & Trust Co. v. Travelstead, 592 P.2d 605, 608 (Utah 1979); Goodmansen v. Liberty Vending Sys., Inc., 866 P.2d 581, 584 (Utah App. 1993).

[103] *fn12 The Goodmansen decision resolved a dispute among panels of this court and thus governs this case by virtue of the doctrine of stare decisis. State v. Thurman, 846 P.2d 1256, 1259 (Utah 1993).

[104] *fn13 Neither the duration of the present settlement agreement nor its subject matter brings it within our statute of frauds. See Utah Code Ann. § 25-5-1 to -9 (1989).

[105] *fn14 The Utah Supreme Court noted in Tracy-Collins that it is not fatal to a settlement agreement that the court has had no opportunity to review the agreement prior to its consideration of the motion to enforce. "The critical issue is whether the court had before it sufficient facts to properly order specific enforcement according to the terms of the agreement. In this respect, the court had before it the agreement itself, and heard oral argument by counsel for both [parties]." Tracy-Collins, 592 P.2d at 608.

[106] In the present case, the trial court likewise had before it the relevant letters and documents of the parties and heard oral argument by counsel for both sides. We believe that the trial court thus had before it sufficient facts to properly order specific enforcement of the settlement agreement.

[107] *fn15 We further note that the trial court determined that A&H and Deere reached a meeting of the minds regarding the settlement. This determination is inconsistent with a claim of unilateral mistake by Mr. Lambert. In other words, any misapprehension by Mr. Lambert is irrelevant because the settling parties had arrived at an agreement regarding settlement terms.

[108] *fn16 See our earlier Discussion in footnote six, (supra) , regarding the definition of the term "claims."

[109] 1 However, A&H's attorney filed an affidavit stating that his clients had informed him that they were not willing to dismiss their counterclaim against John Deere unless John Deere relinquished all its matters against A&H. "If there was evidence from which it would be reasonable to find that there was [no] meeting of the minds, the decision [decided as a matter of law] cannot be sustained." R.J. Daum Constr. Co. v. Child, 122 Utah 194, 196-97, 247 P.2d 817, 818 (1952).

[110] 2 I disagree with the main opinion's assertion that remanding this case "would be contrary to the parol evidence rule." If the parties had both signed a document, that document would be controlling, and we would look to extrinsic evidence only if that document was ambiguous. See Krauss v. Utah State Dep't of Transp., 852 P.2d 1014, 1019 (Utah App.), cert. denied, 862 P.2d 1356 (Utah 1993). However, where a document has not been signed by both parties, and they reasonably interpret their purported agreement differently, a trial court may look to extrinsic evidence to determine whether there was ever a meeting of the minds.

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12/22/76 CARL L. PINGREE ET AL. v. CONTINENTAL

[1] SUPREME COURT OF UTAH

[2] No. 14484

[3] 1976.UT.238 <http://www.versuslaw.com>, 558 P.2d 1317

[4] December 22, 1976

[5] **CARL L. PINGREE ET AL., PLAINTIFFS, RESPONDENTS, AND CROSS-APPELLANTS,**
v.
THE CONTINENTAL GROUP OF UTAH, INC., A UTAH CORPORATION, AND LESLIE W. VAN ANTWERP, JR., AKA L. A. ANTWERP DBA VAN'S BLUE OX, DEFENDANTS AND APPELLANTS

[6] Brian R. Florence, of Florence & Hutchison, Ogden, for defendants and appellants.

[7] Edward P. Powell, of Christensen, Gardiner, Jensen & Evans, Salt Lake City, for respondents.

[8] Maughan, Justice, wrote the opinion.

[9] Henriod, C.j., and Ellett, Crockett and Wilkins, JJ., concur.

[10] The opinion of the court was delivered by: Maughan

[11] MAUGHAN, Justice:

[12] On appeal is a judgment of the District Court in an action for a Declaratory Judgment involving a lease, together with a cross-appeal seeking treble damages for unlawful detainer.

[13] We affirm, in part, reverse, in part; and remand for elimination from the judgment all sums included because of failure to construct the fire escape. No costs awarded. Statutory references are to U.C.A. 1953.

[14] Plaintiffs, lessors of premises suitable for use as a restaurant initially leased to The Continental Group of Utah, Inc., hereafter Continental. Continental's interest was assigned, with the lessor's consent, to Leslie Van Antwerp, Jr., hereafter, defendant or lessee. In their complaint, plaintiffs sought an order declaring a provision granting lessee an option to renew, invalid for uncertainty. In the alternative, a decree declaring the rental under the renewal option to be $900 per month, and a determination as to the one responsible under the lease for the installation of a fire escape.

[15] Upon trial to the court, plaintiffs were awarded judgment as follows: $4,000 damages for breach of the covenant to repair and maintain the premises and for lessee's failure to install a fire escape; $400 per month additional rent commencing October 1, 1974, through February 1975; damages for holdover of the premises from March 4, 1975, to January 15, 1976, in the sum of $9,450, with offset of $5,000 paid during this period ($90 per month reasonable rental value); $5,000 attorney's fees; and a decree terminating the lease and restoring possession.

[16] Lessors and Continental, the initial lessees, executed a lease for a term of five years, commencing October 1, 1969. The lease

provided the premises were rented in an "as is" condition. The lessee covenanted, at his sole expense, to maintain the exterior and interior of the building and improvements on the premises, including the roof, plumbing and electrical wiring, air-conditioning, and heating equipment, subject to reasonable wear and tear. Reserved rent was $500 per month, plus three percent of the gross receipts, in excess of $10,000. Beginning in 1970, Continental utilized the second floor of the premises for banquets and parties. In January 1972, the Fire Department of Roy City informed Continental this new use of the premises required the installation of a fire escape.

[17] In May 1972, Continental, with lessor's consent, assigned its leasehold interest to defendant. A representative of Continental testified defendant was informed it was his responsibility to install the fire escape, and to repair the floor. The trial court found defendant assumed all the rights and obligations under the lease, and defendant understood, at the time of the assignment, the lease required him to do all maintenance; including changes made necessary by the public authorities. Further, defendant assumed the obligation to repair and maintain any condition which occurred during the occupancy of Continental.

[18] By a letter of September 24, 1974, lessors informed defendant of specific deficiencies in his maintenance, and in their amended complaint, they sought damages for breach of the covenant. The trial court found defendant had failed to make extensive repairs within the covenant. Plaintiffs were awarded damages of $4,000 for defendant's failure to repair and maintain the premises, and to install the fire escape.

[19] On appeal, defendant contends there was insufficient evidence to sustain the finding he was responsible for the damages awarded. However, with the exception of the fire escape, the record does not sustain defendant's contentions.

[20] A representative of defendant's predecessor, Continental, testified the building was in good condition at the time defendant took possession. The records of the Health Department during 1974, indicated the need for repair of the premises. Significantly, defendant did not contradict the testimony of Continental, to wit, he agreed he would be responsible for the repairs and installation of the fire escape.

[21] Estimates of the cost of repairs were adduced, and the court was of the view, if the repairs were made, betterment would be the result. There is no evidence in the record to show the cost of the fire escape, which was not included in the estimate of repair of structural damage. The total estimate for repairs without the fire escape was $4,564. The trial court did not allocate the $4,000 for delayed maintenance and the fire escape among the various cited deficiencies. However, since there is evidence in the record to sustain the amount of the award, (excepting the fire escape), the finding of the trial court is sustained.

[22] It was found the City of Roy directed the fire escape be installed, because of the use being made of the premises by the lessee; and defendant understood at the time of the assignment, it was his duty to do all maintenance; including changes made necessary by public authorities. Defendant testified he used the upstairs for banquets and parties, which accounted for 10 to 20 percent of his business.

[23] Gaddis v. Consolidated Freightways, *fn1 illuminates the several factors to be considered in determining who should bear the cost of compliance required by governmental authority, in order to conform the premises to health and safety laws.

[24] The court quoted the following from 1 American Law of Property 353:

[25] Where the lessee covenants to repair, the question of who should bear the cost of compliance depends upon the nature of the alteration or improvement and the reason for requiring it. If the order involves mere repairs which the lessee would normally be required to make under his covenant, he should bear the cost. Likewise, the burden is on the lessee where the alteration is required only because of the particular use which he is making of the premises, although it may be questioned whether even in this case, the court would place the burden of extensive and lasting improvements on the lessee, except perhaps where the lease is for a long term. At any rate, if the order requires the making of such improvements, so-called "structural" changes, and they are not required because of the particular use made of the premises by the lessee, the lessor must bear the burden of compliance.

[26] In our matter, defendant had the responsibility to install the fire escape, had he continued to engage in activities which required it. Defendant's particular use of the premises was the reason the authorities required the installation. *fn2 He was notified no business license would be issued were he to continue the prohibited use. Faced with this ultimatum defendant chose to stop the proscribed activities, thus rendering the fire escape responsibility moot.

[27] Defendant asserts error in the court's determination that, under the option to renew, $900 per month was a reasonable rental rate. The lease contained the following renewal provisions, which were drafted by defendant's predecessor Continental:

[28] The Lessee shall have and is hereby granted the option to renew this lease for two separate additional five-year terms, commencing on the first month following the expiration of the term of this lease upon the same terms and conditions contained herein except that the rental amount will be renegotiated; however, maximum total monthly rental shall not exceed $900.00 per month.

[29] Factors of tax increase, costs of business increases or decreases, business volume and success, insurance costs and other reasonable allowances, will be the basis for terms of negotiation.

[30] Defendant gave lessors timely notice of his exercise of the option to renew. Lessors responded the new rental would be $900 per month. Defendant replied citing the factors of the lease and explaining his costs of doing business had increased 81 per cent, and his volume had decreased 24 per cent. Defendant was willing to pay $500 per month. Lessors based their demand on the increase in taxes and insurance, interpreting the provision "and other reasonable allowances," as meaning they were entitled to a fair return on their investment in the premises. Evidence set the value of the premises to be between $150,000 and $200,000.

[31] The parties were unable to agree on the rental rate for the renewal period - resulting in this action. Defendant urges, if the factors set forth in the option were compared to his evidence, it clearly illustrates error in setting the rent at $900 per month. Plaintiffs cross-appeal, asserting the trial court erred by not ruling the option for renewal void and unenforceable, on the ground it was too indefinite and vague.

[32] Plaintiffs' contention is correct. If the factors are considered in view of the defendant's evidence, a low rental is justified. If the factors are weighed in light of plaintiff's evidence, the maximum rental would be appropriate. From the factors specified, a court cannot derive an objective standard applicable to both parties; i.e., there is a material difference in the final result (the renewal rate), when the factors are analyzed in relationship to the position of each party.

[33] A condition precedent to the enforcement of any contract is that there be a meeting of the minds of the parties, which must be spelled out, either expressly or impliedly, with sufficient definiteness to be enforced.... *fn3

[34] Cited are the various rules of interpretation to support their positions. In Slayter v. Pasley, *fn4 the court in a scholarly opinion set forth majority and minority rulings.

[35] The majority rule, in essence, is that a provision for the extension or renewal of a lease must specify the time the lease is to extend and the rate of rent to be paid with such a degree of certainty and definiteness that nothing is left to future determination. If it falls short of this requirement, it is not enforceable....

[36] The court then explained the minority rule has two divisions. In the first, the provision is held enforceable if it clearly establishes a mode for ascertaining the future rental rate, as by arbitration, or if there is an express declaration for a reasonable rental during the extension period, or other words or phrases; which clearly connote and are legally synonymous with reasonable rental. Under the second division of the minority rule, the court implies a mutual agreement for a reasonable rental.

[37] In the current matter, the court implied the parties had agreed on a reasonable rental figure, which the court proceeded to determine. This interpretation had the effect of nullifying the express factors specified by the parties, and substituting a new agreement to which the parties had not committed themselves.

[38] To attempt by judicial fiat to substitute the legal concept of "reasonable rental" in lieu of the previously followed design of a fluctuating rental, measured by future uncontrolled and uncontrollable conditions, would, indeed, be to remake the contract for the parties and very possibly frustrate what to us appears to be a very important contrary intent concerning the rental amount.... *fn5

[39] The option to renew was too vague and indefinite to be enforceable and the lease terminated by its own terms as of September 30, 1974. Under Section 28 of the lease, if the lessee holds possession after expiration of the term, he becomes a tenant on a month-to-month basis in an amount equal to the prior monthly payment. The court erred in ordering defendant to pay an additional $400 per month rent from October 1, 1974, to March 5, 1975.

[40] Plaintiffs' cross-appeal urging error in not being awarded treble damages for defendant's unlawful detainer under 78-36-10. Defendant asserts this ruling of the trial court should be sustained.

[41] Plaintiffs initially sent a letter to defendant on September 24, 1974, setting forth deficiencies in the maintenance of the premises. Plaintiffs stated, if the deficiencies were not corrected within thirty days, "you are hereby notified of lessors intent to forfeit, cancel and terminate this lease...."

[42] Later, there were several meetings between the parties and the repairs were discussed. On February 26, 1975, plaintiffs served notice on defendant, which stated they "hereby declare a forfeiture" of the lease for the lessee's failure to correct the deficiencies set forth in the letter of September 24, 1974. The lessors informed lessee he was a tenant at will, and ordered him to vacate the premises within five days. Lessee was informed if he failed to vacate, an unlawful detainer proceeding would be commenced and he would be liable for treble damages.

[43] On March 17, 1975, defendant was served with summons and complaint, for the declaratory judgment action. The summons was not in accordance with the mandatory provisions of 78-36-8, and the complaint did not include any claim of forfeiture or unlawful detainer. It was not until July 21, 1975, plaintiffs filed an amended complaint, alleging unlawful detainer.

[44] In Gerard v. Young, *fn6 this court held that a plaintiff, to bring his case under the Forcible Entry and Detainer statute, must comply with the provisions of 78-36-8. For plaintiffs failure to comply with this statute, the trial court properly ruled they were not entitled to treble damages. In addition, plaintiffs' declaration of forfeiture was not conditional as required by 78-36-3(5). This court has consistently ruled a notice of forfeiture is sufficient to terminate a lease for breach of a covenant, but it is not sufficient to place the lessee in unlawful detainer. This for the reason the statute requires an alternative notice, viz., the tenant either perform, or quit; before he can be held in unlawful detainer, and be subject to treble damages. *fn7

[45] The court was correct in its ruling that defendant's refusal to vacate was wrongful, after the service of the notice of forfeiture and to vacate on February 26, 1975. The amended complaint filed by plaintiffs in July was a common law action for ejectment. The court properly awarded plaintiffs possession of the property, and damages for the time defendant remained in possession. Damages recoverable under such circumstances are generally the reasonable rental value of the premises. *fn8 The reasonable rental value was found to be $900 per month; such sum is sustained by the evidence.

[46] HENRIOD, C.J., and ELLETT, CROCKETT and WILKINS, JJ., concur.

Opinion Footnotes

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[47] *fn1 239 Or. 553, 398 P.2d 749, 22 A.L.R.3d 514 (1965).

[48] *fn2 See 22 A.L.R.3d 521, 539, Sec. 8: "Where the tenant covenants to repair and the alterations or improvements ordered by public authority are ordered because of the particular use the tenant makes of the premises, the tenant, and not the landlord, has been held obligated."

[49] *fn3 Valcarce v. Bitters, 12 Utah 2d 61, 63, 362 P.2d 427 (1961).

[50] *fn4 199 Or. 616, 264 P.2d 444, 446 (1953).

[51] *fn5 Id. p. 451 of 264 P.2d.

[52] *fn6 20 Utah 2d 30, 432 P.2d 343 (1967).

[53] *fn7 Jacobson v. Swan, 3 Utah 2d 59, 68, 278 P.2d 294 (1954); Erisman v. Overman, 11 Utah 2d 258, 358 P.2d 85 (1961); Van Zyverden v. Farrar, 15 Utah 2d 367, 393 P.2d 468 (1964); Fireman's Insurance Co. v. Brown v. Fullmer, 529 P.2d 419 (Utah 1974).

[54] *fn8 32 A.L.R.2d 582, Anno: Measure of damages for tenant's failure to surrender possession of rented premises, Sec. 4, p. 589.

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