Maine Supreme Court sitting as the Law Court

Docket No. PIS-24-169

Moosehead Mountain Resort, Inc., et al.

v.

Carmen Rebozo Foundation, Inc.

Appeal from the Piscataquis County Superior Court

BRIEF OF APPELLEE CARMEN REBOZO FOUNDATION, INC.

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STATEMENT OF FACTS

On March 26, 2024, the Superior Court enforced a settlement agreement reached by these parties after a judicial settlement conference conducted in June, 2022. (A. 63). That decision is now before this Court on appeal.

Appellant Moosehead Mountain Resort, Inc. ("MMR") currently owns the Big Moose Mountain Ski Resort in Greenville. Appellant OFLC, Inc., which has common ownership with MMR, owns certain real estate in the vicinity of the resort. *See generally State of Maine v. Moosehead Mountain Resort, Inc.,* 2024 ME 50. Appellee Carmen Rebozo Foundation, Inc. ("CRF" or "the Foundation") is a Florida nonprofit foundation in a lending relationship with MMR and OFLC.

In 2013 and 2014, CRF advanced a total of $4,200,000 to Appellants, in part to refinance their existing debt with Machias Savings Bank and, in part, to advance additional operational funds to MMR. *See* CRF's Opposing and Additional Statements of Material Fact, dated December 10, 2021, ¶¶ 1, 24. Machias Savings Bank assigned and transferred its note, mortgage, and other security to CRF as part of the refinance, and the parties

executed other related agreements. *Id.* ¶¶ 2, 11, 18-20, 22. One of the agreements executed by the parties was a Profit Participation Agreement. *Id.* ¶ 22 and Affidavit of Vanessa Bertran and Exhibit VMB000057-70 submitted therewith. The Profit Participation Agreement provided that MMR and CRF would share in the proceeds from the sale of certain identified properties.

Appellants have been in arrears on their obligations to CRF since 2014 and otherwise breached a variety of obligations pursuant to the loan documents. Appellants were sued by the State of Maine in 2016 for failing to meet obligations owed to the public, as well as for wrongful timber cutting. This Court recently affirmed a judgment against Appellants in that matter, totaling approximately $4,000,000. At any rate, as a result of Appellant's various breaches of the terms of their agreements with CRF, CRF determined that default interest was due pursuant to the loan documents. When asked for a payoff number in mid-2021, the Foundation, after an initial error in calculations, issued a payoff letter requiring payment of more than $6 million in order to acquire a discharge. *See* CRF's Opposing and Additional Statements of Material Fact, dated December 10, 2021, ¶57 (citing VBM 000177

attached to Affidavit of Vanessa Bertran) (payoff document citing $6,494,161.94 payoff amount).

MMR and OFLC filed the instant action asserting various claims against the Foundation, although the crux of the action was to contest CRF's ability to charge default interest, claiming lack of proper notice pursuant to the loan documents. *See* Complaint (A.80-89). Appellants filed a motion for summary judgment on the default interest issue, among others. On April 8, 2022, the Superior Court denied Appellants' motion, finding a genuine issue of material fact as to whether CRF was entitled to default interest. *See* Order Denying Plaintiffs' Motion for Summary Judgment, dated 4/8/2022. At that juncture, the case was referred to a judicial settlement conference.

At the settlement conference, the parties reached an agreement that was reviewed with the settlement judge and embodied in a signed writing. (A.23-24). This agreement represented a significant compromise of the Foundation's claim that it was owed debt, interest, and default interest well in excess of $6,000,000. In the settlement, the Foundation agreed to a payoff number of $4.5 million and certain other terms if Appellants sold

the resort and related property within six months of the settlement conference, or by December 30, 2022. *See* Terms of Agreement (A.23-24), ¶ 3. If the sale did not occur by December 30, 2022, the amount due was to be deemed to be $5 million, and the terms of the note were to be amended to provide for a five-year term, requiring payments of 6% interest only during the term ($25,000 per month), with a balloon payment of the $5 million principal at the end of the five years. (A. 23, 24, at 4). The debt was to be secured by the existing security agreements and the settlement agreement specifically provided that the Profit Participation Agreement between the parties would no longer be in place. *Id.* The lawsuit was to be dismissed with prejudice and the Plaintiffs were to provide a release. *Id.* ¶ 1.

Counsel for the parties communicated at various points over the next six months about whether additional documents were needed before the case could be dismissed. Appellants' position was, consistently, that the Terms of Settlement were binding and that no further documents or settlement provisions of any kind were needed. *See* Combined Opposition to Motion For Reconsideration and to Vacate Settlement Agreement and Motion to

Enforce Settlement Agreement ("Motion to Enforce") (A.15-22), at A.17-19; *see also, e.g.* A. 36 (Exhibit E, 12/15/2022, 3:16 p.m. Flagg Email ["we have an enforceable agreement (you have a copy in your file)"].

The trial court had issued an Order to File Docket Entries on November 18, 2022, requiring documents showing final disposition to be filed within thirty days, or the case would be dismissed with prejudice. (A.1). Appellants objected to the suggestion by undersigned counsel that the deadline could be extended if the parties felt additional documents were needed. Appellants' objection was specifically based on the position that the parties already had a binding agreement which governed and supplanted the parties' liability for the underlying claims. *See* A. 36 (Exhibit E, 12/15/2022, 3:16 p.m. Flagg Email); *see also* A.11 and 14 (December 16, 2022, filings by Appellants' counsel stating that the case was settled in accordance with attached settlement agreement and that there could be "No further action for the same cause"). No agreed-upon documents were filed by the deadline, so the Court dismissed Plaintiff's claims, with prejudice, on February 6, 2023.

(A. 1). This action was completely congruent with the filings that had been submitted by Appellants' counsel.

Four days later, Appellants filed a Motion for Reconsideration and to Vacate Settlement Agreement, seeking to return the case to the docket for trial. (A.3-A.8). The motion did not articulate a single reason why the settlement agreement reached in June, 2022 – which Appellants had repeatedly stated was enforceable -- was not valid and enforceable. The Foundation filed a Combined Opposition and Motion to Enforce the Settlement Agreement. (A. 15-A.21). No opposition to the Foundation's Motion to Enforce was ever filed. A hearing on the pending motions was set, but the hearing was postponed to give the parties an opportunity to negotiate.

The parties had discussions and exchanged draft documents in an attempt to resolve the pending issues. Negotiations ultimately failed, as it became clear that Appellants were seeking to add a new material term to the parties' settlement, which position was finally articulated clearly in Appellants' Motion for Further Settlement Conference filed on May 4, 2023 (A.71-77). The term sought, which is not embodied in any of the existing security documents governing these parties' relationship but is based on an alleged

historical practice of the parties, would force the Foundation to agree to sales of its security at Appellants' discretion and engage in a certain level of profit participation with them. As noted above, the Foundation had expressly required that the Profit Participation Agreement between the parties (the enforceable one in writing) be terminated as part of the June, 2022, settlement. (A.23, last line, ¶ 4). A year later, with their Motion for Further Settlement Conference, Appellants were seeking to renegotiate the deal to inject this rejected aspect of the parties' dealings back into their relationship from another angle.

CRF filed an opposition to the Motion for Further Settlement Conference based on the settlement agreement reached in June, 2022, and the fact that Appellants had not articulated any basis for arguing that said settlement agreement was not enforceable. (A. 43-48). The trial court ordered the parties to a second settlement conference over the Foundation's objection. The negotiations did not bear fruit and the Court scheduled oral argument on the pending motions.

On March 26, 2024, the trial court entered an Order Enforcing Settlement Agreement. (A-63). The court cited the governing standards and found as follows:

> The court finds that the parties mutually assented to be bound when they entered the settlement agreement on June 22, 2022, and the terms of the settlement agreement signed by the parties are sufficiently definite to enable a court to determine their exact meaning and fix exactly the legal liability of the parties. Accordingly, the settlement agreement is enforceable.

(A.64).

The court refused to reverse the dismissal of the underlying claims with prejudice, as "dismissal essentially fulfills the expectation of the settlement agreement." (A. 64)[1]. It found that paragraph 4 of the terms of settlement govern the debt owed by Appellants, as paragraph 3 became moot when the resort was not sold by December 30, 2022. (A. 65). The court also found that the terms of the payments due were clear and enforceable:[2]

> …the amount due on the loan is $5 million with interest of 6%, interest only due on a monthly basis in the amount of $25,000, and with a final balloon payment of

[1] The court denied CRF's request to order Appellants to execute a release, as "that issue is mooted by the court's dismissal." (A. 66-67).

[2] For this reason, the Court found it was not necessary to order the Appellants to sign an amendment to the note. (A. 67).

> all amounts due in 5 years. The court otherwise concludes that all other terms and conditions of the note and mortgage not specifically amended by the settlement agreement remain in effect.

(A.65).

The trial court refused to hold that the settlement agreement is unenforceable unless it incorporates the profit-sharing provision sought by Appellants. Given that the alleged course of conduct between the parties had purportedly been in place well before this litigation was filed and certainly before the judicial settlement conference in June, 2022, if the issue was important to Appellants, they should have made it a part of the settlement. (A. 65) ("The judicial settlement conference held in June, 2022, was the time to raise all issues, yet the settlement agreement is silent on this issue."). In a footnote, the Court added "The Defendant has a right to end the litigation along the terms agreed to. To set aside agreement to address another term could be a never-ending effort." (A. 66, n. 1).

MMR and OFLC filed a timely appeal of the Court's decision.

STATEMENT OF THE ISSUE

Did the trial court commit clear error in enforcing the settlement agreement in this matter?

ARGUMENT

I. The Court Did Not Clearly Err in Enforcing the Settlement Agreement in this Matter.

A. Legal Standard/ Standard of Review

Settlement agreements are analyzed as contracts. *Marie v. Renner,* 2008 ME 73, ¶ 7, 946 A.2d 418 (citing *White v. Fleet Bank of Me.,* 2005 ME 72, ¶ 11, 875 A.2d 680, 683).

> The establishment of a contract requires that the parties mutually assent "to be bound by all its material terms; the assent must be manifested in the contract, either expressly or impliedly; and the contract must be sufficiently definite to enable the court to determine its exact meaning and fix exactly the legal liabilities of the parties".

Forrest Assocs. v. Passamaquoddy Tribe, 2000 ME 195, ¶ 9, 760 A.2d 1041, 1044 (citing *VanVoorhees v. Dodge,* 679 A.2d 1077, 1080 (Me. 1996)).

The existence of a binding settlement agreement is a question of fact, which this Court reviews for clear error. *Muther v. Broad Cove Shore Ass'n,* 2009 ME 37, 968 A.2d 539; *Renner,* 2008 ME 73, ¶ 7. Findings are clearly erroneous only when there is no competent evidence in the record to support them. *White,* 2005 ME 72, ¶ 10 (citing *State v. Marden,* 673 A.2d 1304, 1308 (Me. 1996)).

B. There Is Sufficient Evidence in the Record to Support the Trial Court's Findings.

The following record facts support the enforceability of the settlement agreement reached in this case: The parties attended a judicial settlement conference with Justice Roland Cole in June, 2022. The parties reached an agreement that day, facilitated and discussed with Justice Cole, who had the parties embody the settlement terms in writing. *Compare Muther v. Broad Cove Shore Association,* 2009 ME 37, ¶8, 968 A.2d 539 (where there was a record of the settlement agreement created in the presence of the court, that record conclusively established the existence of a binding settlement agreement as a matter of law, and subsequent disputes that arose while attempting to reduce the settlement to a stipulated judgment did not affect the authority of the court to enforce the agreement through the entry of a judgment incorporating the terms previously stipulated to by the parties."). The principarties, who are both sophisticated businessmen, signed the terms of agreement. The terms were straightforward: in exchange for dismissal/ release of Appellants' claims, the Foundation agreed to a significant compromise of its $6.4 million

dollar payoff claim. If the resort sold in six months, certain terms, now moot would apply. If not, Appellants would be deemed to owe $5,000,000 only, with interest only payments of $25,000 per month during a five-year term, with a balloon payment of $5,000,000 at the end of the term. The existing security documents governing Appellants' debt to CRF would continue to apply, except that the terms of the note would be as described. As demonstrated in the communications attached to the various submissions in the trial court, for the next six months, Appellants, through counsel, repeatedly emphasized that the terms of agreement signed in June, 2022, comprised a *binding settlement.* There is more than sufficient evidence in the record that the parties, including Appellants, intended to be bound by the terms of agreement, which terms included dismissal of this suit with prejudice.

With respect to whether the terms of the agreement are clear enough to understand and enforce, Appellants have not actually argued to the contrary. They have not indicated that the terms of the revised note applicable after December, 2022, are ambiguous. They do not argue that it is unclear that the underlying claims in the suit were to be dismissed in exchange for the Foundation's

agreement to amend the amounts due pursuant to the note. They are not challenging the agreement for other valid reasons, such as fraudulent inducement or duress, or any other grounds for vacating a binding agreement. Rather, their arguments, including in their brief, focus on their buyer's remorse for failing to include the alleged profit-sharing provision they now seek.

The evidence in the record is sufficient to support the trial court's conclusion that Appellants lost the ability to make the profit-sharing provision a condition for settlement when they executed final settlement terms -terms they acknowledged were binding -- that did not include the provision. First, the course of conduct that was apparently so critical had allegedly been ongoing for years. *See* (A. 73-74) (citing alleged conduct between 2013 and 2020). It was not a circumstance that arose after June, 2022. Furthermore, Appellants should have been on notice that the Foundation would likely not agree to continue any discretionary profit sharing it may have engaged in with Appellants in the past. By June, 2022, any goodwill between the parties earlier in their relationship had been exhausted by Appellants' loan defaults and other breaches of their obligations to CRF. MMR failed to operate the ski resort in the

manner promised, despite additional amounts loaned to it for ski lift repair. Due to its mismanagement, the Foundation was forced to participate in years of litigation with the State of Maine. Appellants then subjected the Foundation to the instant action over amounts due pursuant to the note, including unfounded allegations of fraud. At the time of the judicial settlement conference, CRF was no longer willing to "do business" with Appellants. CRF made that very clear by requiring, as a settlement term, that the Profit Participation Agreement between the parties – the only written agreement requiring CRF to agree to sales of its security in exchange for a portion of the proceeds – be considered void. In light of this, Appellants should have been on notice that, if they wanted CRF to agree to ongoing sales/ profit-sharing of any sort, they needed to raise that issue before final settlement terms were reached and documented. (A. 46).

In short, the totality of the evidence in the record is more than sufficent to support the trial court's finding that there was a binding settlement agreement, its findings with respect to the terms of that agreement, and its conclusion that the omission of the

profit-sharing term sought by Appellants does not impact the enforceability of the terms documented in June, 2022.

II. Conclusion

In conclusion, Appellants have failed to demonstrate reversible error committed by the trial court. For these reasons, the Court should affirm the trial court's dismissal of the underlying claims in this matter on February 6, 2023, and the trial court's Order Enforcing Settlement Agreement, entered on March 26, 2024.

Respectfully submitted this 20th day of September, 2024

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CERTIFICATE OF SERVICE

I, Teresa M. Cloutier, hereby certify that I served two (2) paper copies of Appellee's Brief on counsel for Appellants Moosehead Mountain Resort, Inc. and OFLC, Inc. at the following address:

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Undersigned counsel also sent an electronic copy of Appellee's Brief to Jonathan M. Flagg at the following email: jflagg@flagglawfirm.com.

Respectfully submitted this 20th day of September, 2024

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