IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

ICEK BENZ a/k/a IKE BENZ,
and LAUREN BENZ,

Plaintiff,

vs.

Ct. of Appeals No. 31,669
BCDC No. CV-2009-00184

TOWN CENTER LAND, LLC, a New Mexico Limited Liability company, CENTRAL MILLENIUM PARTNERSHIP, a New Mexico Non-profit corporation, CENTRAL CORRIDOR INVESTORS, LLC, a New Mexico Limited Liability Company, MARTIN D. BLANC and DAVID BLANC,

Defendants.

ICEK BENZ a/k/a IKE BENZ,
and LAUREN BENZ,

Plaintiffs/Appellants,

vs.

Ct. of Appeal No. 32,031
BCDC No. CV-2009-00184

TOWN CENTER LAND, LLC, a New Mexico Limited Liability company, CENTRAL MILLENIUM PARTNERSHIP, a New Mexico Non-profit corporation, CENTRAL CORRIDOR INVESTORS, LLC, a New Mexico Limited Liability Company, MARTIN D. BLANC and DAVID BLANC,

Defendants/Appellees

APPELLANTS ICEK BENZ a/k/a IKE BENZ'S and LAUREN BENZ'S REPLY BRIEF

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Plaintiffs-Appellants, Icek Benz, a/k/a Ike Benz and Lauren Benz (hereinafter, "Appellants") respectfully submit their Reply Brief.

ARGUMENT

1. It was an abuse of discretion by the trial court to allow the affirmative defense of the Release, which was a new theory first asserted on the Saturday or Sunday before trial. The Release Agreement (Exhibit 43) and any testimony related thereto should have been excluded.

Pursuant to NMRA 1-008(C), a party shall set forth affirmatively the defenses of accord and satisfaction and release. A defendant must plead affirmative defenses, otherwise they are not available to the defendants. *Hobson v. Miller,* 64 N.M. 215, 326 P.2d 1095 (1958). A claimed settlement agreement is an affirmative defense. *Arretche v. Griego,* 77 N.M. 364, 423 P.2d 407 (1967).

As Appellees correctly state, there was no ruling at trial allowing an amendment of the pleadings, other than the admission, over objection, of Exhibit 43 and testimony thereon. (Appellee's Answer Brief, Section (B), page 3) There was no specific finding or conclusion by the trial court granting Appellees' motion to amend. Appellees' counsel inadvertently was mistaken when he argued that release is not one of the listed affirmative defenses in NMRA 1-012 that must be pled or its waived. (2/2/11, TR-15, l. 10-13) The applicable rule is NMRA 1-008 and release and accord and satisfaction are listed as affirmative defenses. Because there are no findings or conclusions by the trial court on the motion to amend, it is

unknown whether the trial court interpreted that statement as a withdrawal of the motion. Nevertheless, the Appellees' motion to amend to add the Release as an affirmative defense was not granted because the trial court did not make a ruling.

If this court determines the trial court's findings and conclusions are sufficient to establish an implied ruling by the trial court allowing the amendment, Appellants argue that the trial court abused its discretion by allowing the amendment and admission of Exhibit 43. NMRA 1-015(B) allows amendments to pleadings at trial to conform to the evidence, even if objected to, if the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him. It is undisputed that Appellants objected to the proposed amendment (2/28/11 TR-14, l. 10-21) and the admission of Exhibit 43 (2/28/11 Tr-13, l. 7-11; 2/28/11, TR-134, l. 8-18). Appellants argued that there was unfair prejudice to Appellants to allow this amendment and evidence. Appellants argued in the oral motion in limine that they are prejudiced because there was a new legal theory arising over the weekend before trial, which required evidence be presented at the last minute. (2/28/11, TR-14, l. 10-25; TR-15, l. 105) Appellants also argued that there was unfair prejudice to them because the Release wasn't pled as an affirmative defense, wasn't part of a counterclaim, not listed as an issue in the pre-trial order, wasn't on the final exhibit list and the Release did not pertain to this case. (2/28/11, TR-10, l. 5-16)

Appellees state in their Answer Brief that at trial Appellants' counsel acknowledged she was not surprised by Exhibit 43. (Answer Brief, p. 2 ¶2) That statement is taken out of context. Appellants' counsel argued that there is not supposed to be trial by surprise and that this was all of a sudden a new theory. (2/28/11, TR-14, l. 10-21) Counsel for Appellants then states that Exhibit 43 was an actual deposition exhibit and, when it came in at that point, a motion to amend could have been filed to assert that claim, instead of doing it three days before trial, where suddenly it's a theory. (2/28/11, TR- 14, l. 22-25; TR-15, l. 1-5) Clearly, there was surprise. Even Appellees' counsel admitted in argument that he was not aware of the significance of Exhibit 43 at the time the final pretrial order and final exhibit list was prepared. (2/28/11, TR-12, l. 8-11) Since Appellees' counsel was not even aware of such a theory, Appellants' counsel could not be expected to be aware that such a theory would be raised at trial.

Appellee argues that Appellant had advance notice of Appellees' reliance on the release because twelve days before trial, Appellees filed and served "Defendants' Pretrial Proposed Findings of Fact", which contained Proposed Fact No. 76 concerning the Baptist Convention Building Release. (Appellees' Answer Brief, Section B, page 1) The proposed finding No. 76 was for a release agreement entered into between the parties concerning *Benz v. Baptist Convention Building, et al,* No. CV 2008-02937. (RP 0430) That Release is a completely different Release

than Exhibit 43 in this case, upon which the Appellees based their affirmative defense and therefore would be no notice to Appellants that a claim would be made at trial that Exhibit 43 was a release of claims in this case. The Appellees' proposed conclusion numbered 48, submitted twelve days before trial, does not alert Appellants that Appellees intended to use Exhibit 43 to argue that Appellants released Appellees from any and all claims in this case, since the only Release referred to in the proposed findings of Appellant was the Baptist Convention Building Release.

Appellees argue that the admission of Exhibit 43 would not be unfair and prejudicial to Appellant because Exhibit 43 was discussed at Appellee Blanc's deposition. As set forth in the Brief-in-Chief, Mr. Blanc's deposition testimony was used to impeach him at trial because in his deposition he identified Exhibit 43 (then deposition Exhibit 68) as a release that was from Mr. Benz and Mr. Blanc releasing each other regarding Central Market Limited. (See Court's Exhibit 2, 7/16/2009 deposition of David Blanc, p. 147, l. 24-25 and p. 148, l. 1-3 and 2/28/11 TR-112, l. 12-25; TR-113, l. 1-4) Blanc's answer in his deposition was just a yes. There was no qualification or statement by David Blanc in his deposition that the Exhibit 43 Release pertained to any other matters other than Central Market. There was nothing in the pleadings, exhibit lists, pre-trial order, or in David Blanc's deposition to indicate the Release was an affirmative defense to

Appellants' claims. Mr. Blanc's deposition was taken on July 16, 2009. (Court's exhibit 2) Appellees' own counsel admits that he didn't realize the significance of Exhibit 43 until after the final exhibit list and pre-trial order was prepared. The pre-trial order was filed on February 8, 2012. (RP-0388) As set forth on pages 13 and 14 of Appellants' Brief in Chief, Mr. Blanc does not affirmatively testify at trial that he intended at the time of the execution of Exhibit 43 that it included any claims regarding Town Center.

Appellate courts review the facts and objections to determine if there was an abuse of discretion in allowing or denying a motion to amend. *Slide-A-Ride of Las Cruces, Inc. v. Citizens Bank*, 105 N.M. 433, 733 P.2d 1316 (1987)(denial of amendment upheld because discovery was almost complete, a pretrial order had been entered, and case had been set for trial three times). *Pope Ex Rel. Lydick Roofing Co. v. Lydick Roofing Co,*, 81 N.M. 661, 472 P.2d 375 (1970)(denial of request to amend upheld because amendment was a new theory, no explanation from movant as to how prejudiced) *Roark v. Farmers Group, Inc.*, 2007-NMCA-074, 142 N.M. 59, 162 P.3d 896, (denial of amendment upheld because motion filed twenty months after filing of original complaint and close of discovery and included new theory).

The cases cited by Appellee in support of an amendment may be distinguished from the facts of this case. In *Bombach v. Battershell,* 105 N.M.

625, 735 P.2d 1131 (1987), the issue was whether a request for amendment of the pleadings to allow a claim for termination pursuant to a ninety day notice was prejudicial. The pleadings in *Bombach* originally requested termination alleging failure to pay rent. The court found that the Defendants were on notice that the lease, under the ninety day termination provision of the lease, had terminated . *Id.* at 627, 735 P.2d at1133.

In the unreported case of *Running Bear Rescue, Inc. v. City of Las Vegas,* 2012 WL 3193566 (N.M.App.), the City's answer incorrectly cited NMSA 1978, §37-1-23 as a statute of limitations defense and did not raise the correct statute of NMSA 1978, §37-1-24 until the day of trial. *Id.* at ¶3. In *Running Bear*, there was no claim in the record below nor in the brief in chief that Appellant was surprised or prejudiced. *Id.* at ¶3.

There was a stipulation of facts read into the record and evidence received without objection cited by the Supreme Court in *Posey v. Dove,* 57 N.M.. 200, 257 P.2d 541 (1953) to uphold an amendment to the pleadings to conform to the evidence. *Chavez v. Kitsch*, 70 N.M. 439, 374 P.2d 497 (1962) involved a motion to dismiss and not new evidence presented at trial.

In the case of *Smitz v. Smentowski, et al.,* 109 N.M. 386, 785 P.2d 726 (1990), the Appellant argued abuse of discretion in granting a motion to amend at trial to assert claims of prima facie tort and resulting trust. The Supreme Court

held that that the amendment at trial was allowed because the Appellees, in their original pleadings, stated the essential elements of those claims with sufficient particularity to give the Bank notice of their theory. The Bank did not object at trial to the introduction of evidence. *Id.* at 390, 730. The Supreme Court goes on to say that the test of prejudice is whether the party had a fair opportunity to defend and whether it could offer additional evidence on the new theory. *Id.* at 391, 731.

In the instant case, the Appellees did not assert the Release as an affirmative defense in their answer or amended answer. There was no other claim asserted with the same essential elements. The answers provided by Appellee Blanc in discovery did not claim that Exhibit 43 released all claims in the instant case. The affirmative defense and exhibit were not listed in the pretrial order. Appellees' counsel admitted he did not realize the significance of Release until after the pretrial order was entered in February of 2011. The motion to amend and request to admit Exhibit 43 was made at trial and objected to on the basis of unfair prejudice and surprise. The above evidence and objections establish that the court abused its discretion in allowing the admission of the Exhibit and in allowing Appellees to assert a new defense at trial.

2. The trial court erred when it concluded that parol evidence regarding the release was inadmissible and deciding as a matter of law that by signing the Release, Benz released all claims in the instant case. Furthermore, there is

no substantial evidence to support the trial court's decision that the Release was intended to release all claims and parties in the instant case.

Appellees argue Appellants were allowed to present parol evidence and that substantial evidence exists to uphold the trial court's decision as to the Release. The trial court makes two findings regarding the Release. Finding numbered 24 states that the Central Market dispute culminated, in part, with Benz releasing Blanc. (RP 0534, ¶24) Finding numbered 25 states that the Release is dated June 16, 2006 and then quotes some of the Release wording. (RP 0534-0535, ¶25) There is no finding about the intent of the parties or the parties' understanding as to what the Release pertained. Instead, the trial court concluded that the release language is not ambiguous and therefore parol evidence regarding the release is not admissible. (RP 0535, ¶C) The trial court further concludes that Benz released all claims, except for the dissolution of Town Center. (RP 0535-0536, ¶D)

Based on the findings and conclusions of the trial court, the trial court did not rely on any of the parol evidence because it deemed the evidence inadmissible and reached its conclusions as a matter of law. On pages 15 through 19 of Appellants' brief in chief, Appellants sets forth the case law that provides that interpretation of an express contract is not restricted to the four corners of the document and courts may consider the expectations of the parties and the purposes for which the contract was made. See *Ponder v. State Farm Mutual Automobile*

Inc. Co, 2000-NMSC-033 at ¶13, 129 N.M. 696, 703, 12 P.3d 960, 967; *Sanders v. FedEx Ground Package System, Inc.,* 2008-NMCA-40 at ¶25 and 26, 144 N.M. 449, 199 P.3d 1200; *Mark V. Inc. v. Mellekas*, 114 N.M. 778, 781-82, 845 P.2d 1232, 1235-36 (1993) The primary objective in construing a release is to give effect to the intent of the parties. *Schaeffer v. Kelton*, 95 N.M. 182, 185, 619 P.2d 1226, 1229 (1980) The Supreme Court held in *Hansen v. Ford Motor Co.,* 120 N.M. 203, 900 P.2d 952 (1995) that an inherent ambiguity in any general release is recognized, and that the parties seeking to be discharged must prove by extrinsic evidence that the parties to the agreement actually intended to discharge the parties. As such, the trial court erred when it refused to examine the parol evidence and make findings on the intent of the parties as to the purpose of the Release agreement and the parties intended to be discharged.

Appellants set forth in their brief in chief their argument that there is no substantial evidence to support a finding that the parties intended the Release to apply to Town Center Land LLC and the named members. Appellants cited evidence that the Release was a new theory, inconsistent deposition testimony by Appellant Blanc and vague testimony first proferred at trial that the Release applied to Central Market Ltd. and "other things". In this Reply, Appellants will specifically attack the evidence that Appellees raise in their Answer in support of their claim that there was sufficient evidence.

Appellees cite Exhibit 17 as evidence, because it was shortly followed by the Release. Exhibit 17 discusses the amounts due under the promissory note by Central Market, Baptist Convention Building LLC and Town Center LLC. The timing of the Release after Exhibit 17 is not substantial evidence, when there was evidence at trial of the separate release for Baptist Convention Building, Exhibit 43 names the project as Central Market, David Blanc's deposition testimony, and the parol evidence presented.

Appellees assert that Appellants' definition of the word "all" as "everything" was an admission that Appellant understood the Release to include all claims. That testimony must be examined in connection with the rest of Appellant's testimony to show it is taken out of context. Appellant testified that he did not understand what the word "all" meant when he signed the Release. (3/1/11, TR-149, l. 3-11) Despite objection of counsel, Appellee's counsel then limits his question to only the definition of the word "all" rather than in the context of the Release language. (3/1/11, TR-149, l. 14-25; TR-150, l. 1-19) Furthermore, Appellants' brief in chief sets forth the additional evidence about Appellants' understanding of the intent.

3. Appellant preserved the objection that the Release did not pertain to the parties in the instant case.

Appellees argue that Appellants failed to preserve the issue of the scope of the Release. Appellees admit that the issue of whether the corporate entities were

released when Mr. Blanc was released were set forth in the Appellants' proposed supplemental findings of fact and conclusions of law. Appellees argue that the proposed supplemental findings were filed after the trial and therefore it was too late to admit additional evidence. (Answer Brief, p. 9, B(1))

Most of the evidence and argument presented at trial concerning Exhibit 43 was about the scope of the Release. Exhibit 43 clearly does not identify by name Town Center Land, Central Millenium Partnership, Central Corridor Investors LLC, Martin Blanc and Lauren Benz. Counsel for Appellants argued in the motion in limine that the Release has to do with Central Market, which was another entity that's completely unrelated to this. (2/28/11, TR-10, l. 14-16) Appellees' counsel argued that Exhibit 43 was not a specific release related only to the former company, as it was a general release. (2/28/11, TR-12, l. 11-13) Counsel for Appellants responded that the Release was not relevant to this lawsuit and it doesn't release Mr. Blanc or any of his entities from any and all claims. (2/28/11, TR-13, l. 18-21) The parol evidence about the intent of the parties cited in Appellants' brief in chief concerned the scope of the agreement and whether the Release was intended to apply to Appellees not named in the Release and the claims in this case.

Appellees state that under both agent-principal and master-servant concepts, any release of Appellee Blanc would also apply to the corporations in which he

was involved. (Answer Brief, p. 12, Section 3) This argument ignores the law that a limited liability company is a separate legal entity. N.M.S.A. 1978, §53-19-10. The release in *Harrison v. Lucero*, 86 N.M. 581, 525 P.2d 941(Ct.App. 1974) specifically stated that it pertained to an accident which occurred on or about the 21st day of August, 1970, in Valencia County, 35.6 miles west of State Road 448. The court found that a release of the servant was also a release of the master, even though the release only named Harrison, the servant. There was a specific incident described in the Release, in which Harrison was acting in the scope of his employment. In the instant case, Appellees claim that naming David Blanc in the Release thereby releases all companies in which he is an agent because the Release encompasses everything. The Release does not disclose that David Blanc is acting as an agent for any of the defendants in this case and the only project mentioned is Central Market. When an agent signs his own name and fails to disclose the fact that he is acting for a principal, the agent alone is bound by the contract. *Otero v. Wheeler*, 102 N.M. 770, 701 P.2d 368 (1985) The overly broad application of agent-principal and master-servant concepts ignores the holding regarding Releases in *Hansen v. Ford Motor Co.*, 120 N.M. 203, 900 P.2d 952 (1995) , that in the absence of specific identifying terminology, the entities seeking to be discharged must prove by extrinsic evidence that the parties to the agreement actually intended to discharge them from liability.

4. The trial court held that the Release was dispositive, therefore any claim that Appellants failed to meet their burden of proof on accounting, breach of fiduciary duty, declaratory judgment to reapportion the membership interests, fraud or misrepresentation, or that appellants' claims were barred by the statute of limitations may not be asserted as the trial court did not enter any findings or conclusions related thereto.

There are no findings and conclusions entered by the trial court on any of the above issues, much less any findings and conclusions that Appellants failed to meet their burden of proof on those issues. If this court finds that the Release was not dispositive and that the trial court erred, this matter must be remanded back to the trial court to enter findings and conclusions on the remaining claims of Appellants.

5. Appellees are not entitled to an award of costs and attorneys fees as there was no clear prevailing party because Appellants successfully defended against Appellees' counterclaim. If Appellants prevail in this appeal, the award of costs and attorneys fees should be set aside.

Appellees state in their Answer Brief that they abandoned their Counterclaim at trial and cite the transcript at TR-57 to 58. (I(A) of Appellees' Answer Brief, p. 1) The only claim abandoned by Appellees at trial involved the claim for malicious abuse of process. (3/2/11, TR-57 to 58) Appellees' counterclaim also asserted a counterclaim for declaratory judgment that: the membership interests be adjusted to reflect the failure of Benz to respond to capital calls; professional services and management services be deemed payable by Town Center; deferred fees to Compass Realty be paid; development services be payable;

Appellant Benz be removed as a member; members be granted a lien upon Town Center Lands to secure payment. (RP 0062-0065) The trial court granted the motion for attorneys fees and upheld the initial allocation of membership interest, but did not make a ruling in favor of Appellees on any other claims asserted in the Counterclaim. (RP -0533 ¶14; RP-0660-0661)

The last day of trial consisted of David Blanc's testimony in support of Appellees' counterclaims for reimbursement of management, professional and development services. (3/2/11, TR-5, l. 5-8 and TR-5 through TR-56) The trial court did not make any findings or conclusions or enter a judgment against Appellants on Appellees' counterclaim, which adjusted the membership interest , removed Appellants as members, or ruled on Appellees' claims for reimbursement of expenses, management services, or development services.

A prevailing party is a plaintiff who recovers a judgment or a defendant who avoids an adverse judgment. *Marchman v. NCNB Tex. Nat'l. Bank,* 120 N.M. 74, 898 P.2d 709 (1995). Appellant argues Town Center is entitled to its costs and attorneys fees because it prevailed on the main issue of the case. It is clear from the Complaint and the Answer and Counterclaim filed in this case that there were two main issues in this case. Appellants asserted that Appellees did not contribute what they promised to in exchange for their 49.5% combined membership interests in Town Center Land LLC. (RP 0001-0015) Appellees asserted that they were

either entitled to a larger membership percentage or reimbursement for development, professional and management fees. (RP 059-066)

6. Conclusion

The trial court's admission of Exhibit 43 and allowing an amendment to the pleadings was an abuse of discretion. The trial court's ruling that parol evidence was inadmissible was in error. There was no substantial evidence to support the trial court's findings and conclusions that the Release disposed of all of Appellants' claims in this action, excepting the claim of dissolution. The finding of the trial court concerning dissolution establishes a deadlock as set forth in the brief in chief, so dissolution should be ordered. The Appellants rely on their argument in their brief in chief that there was no substantial evidence to support the trial court's finding that there was no clear written memorial of the parties' agreement as claimed by Appellants. This matter should be remanded to the trial court to amend its findings and conclusions accordingly and to enter findings and conclusions on the remaining claims of Appellants. The award of costs and attorneys fees should be set aside.

Respectfully submitted,

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I hereby certify that on August 30, 2012, I have caused a true and correct copy of the Reply Brief to be served by regular U.S. Mail to the following:

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