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

ICEK BENZ a/k/a IKE BENZ'S and LAUREN BENZ'S BRIEF IN CHIEF

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ORAL ARGUMENT REQUESTED

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STATUTES AND RULES

I. Summary of Proceedings

A. Nature of the case

Appellants, members of Town Center Land LLC, filed a complaint against Defendants-Appellees Town Center Land LLC ("Town Center"), Central Millenium Partnership ("Central Millenium"), Central Corridor Investors, LLC ("Central Corridor"), Martin D. Blanc ("M. Blanc") and David Blanc ("D. Blanc") (hereinafter collectively "Appellees") seeking dissolution of Town Center and an accounting. Appellants further alleged claims of fraud and misrepresentation against all Appellees, excepting Martin Blanc. (RP 0001-0015) Appellees filed an answer and counterclaim. (RP 0034-0057) Appellees subsequently filed an amended answer and counterclaim. (RP 0059-0066) Appellees' counterclaim sought a declaratory judgment that: a) the initial contributions and ownership percentages of the members be confirmed; b) that the owners' membership interests be adjusted to reflect the failure of Benz to respond to capital calls; c) that professional services and management services be determined to be reimbursable and payable by Town Center Land; d) that certain deferred fees payable to Compass Realty are due and owing; e) that costs and fees for defense of Benz' claim be confirmed as valid expenses of Town Center; f) for an award of attorneys fees and costs; g) that development services fees be payable; h) that Benz be removed as a member of Town Center; and i) that members who have provided

services to Town Center be granted a mortgage or lien upon the Town Center Lands to secure payment. Appellees further asserted a counterclaim against Appellants for malicious abuse of process. (RP 0034-0066)

B. Course of Proceedings and Disposition in the Court Below

A trial on the merits was held on February 28 through March 2 of 2011. On the weekend prior to the start of the trial on the merits of this matter, counsel for Appellees notified Appellants' counsel that Appellees wanted to submit Exhibit 43, a Final Agreement and Release dated June 16, 2006 as an Exhibit. (2/28/11,Tr- 12; l. 4-25) [1] Appellants made an oral motion in limine regarding Exhibit 43 at the outset of the trial on the grounds that Exhibit 43 was: 1) not timely disclosed as a potential exhibit; 2) not disclosed as an affirmative defense; 3) not part of the counterclaim; 4) not listed in the pretrial order as an issue; 5) the release, by its terms, was only related to Central Market, and 6) the Release, by its terms, did not release any of the entities in the instant lawsuit. (2/28/11, TR-9, l. 22-25; TR-10, l. 1-25; TR-11, l. 1; TR-12, l. 23-25; TR-13, l. 1-21)

Appellees' counsel admitted that they only recently "came to appreciate the significance of that document, that is that it is a general release, releasing any and all claims that existed at that time". (2/28/11, TR-11, l. 11-22) The trial court

[1] Prior to admission of the Final Agreement and Release as Exhibit 43, the parties referred to it as Exhibit 68 from the depositions. For a portion of the argument, the Court and Appellees' counsel mistakenly referred to Exhibit 68 as Exhibit 63.

ruled that Appellants' counsel could renew her objections at the time the exhibit was introduced during testimony. (2/28/11, TR-15, l. 23-25)

During the trial on the merits, Appellants objected to the admission of Exhibit 43 on the grounds set forth above. (2/28/11, TR-134, l. 8-18) The Court allowed into evidence Exhibit 43 entitled "Final Agreement and Release". (2/28/11, TR-135, l. 18)

Appellants submitted Proposed Amended Findings of Fact and Conclusions of Law on April 13, 2011. (RP 0453-0468) Appellees submitted proposed Findings of Fact and Conclusions of Law on April 15, 2011. (RP 0486-0494 and RP 0506-0524)

The trial court entered its findings of fact and conclusions of law on June 24, 2011. (RP 0532-0537) The trial court found that Appellants and D. Blanc were involved in another real estate project called the Central Market Project, which culminated, in part, with Benz releasing Blanc. (R.P. 534, ¶22, 24) The trial court concluded that, by executing Exhibit 43, Appellants released all claims raised in the Town Center matter, including claims that the capital account contributions are incorrect, that the membership interests of the parties should be reallocated, as well as claims for breach of fiduciary duty, misrepresentation, and fraud, but excepting the request for dissolution of Town Center. (R.P. at 535, ¶D)

The trial court concluded that the release language was not ambiguous and therefore parol evidence regarding the Release is not admissible. (R.P. at 535, ¶C)

The trial court further found that based on the current membership (50% owned by Appellants and 49.5% controlled by Blanc) that a majority of the Members would not vote to dissolve Town Center. (R.P. at 536, ¶F) The trial court found that there was insufficient evidence before the court to conclude that it is not reasonably practicable to carry on Town Center's business so that dissolution was not appropriate. (R.P. at 536, ¶I).

The trial court found that the Operating Agreement of Town Center did not clearly establish what Blanc's or the Blanc entities' contributions were to be - cash or services. (R.P. 533, ¶15) The trial court found that there was no clear written memorial of the parties' agreement with respect to contributions to Town Center. (R.P. 0533, ¶16) Appellants asserted in their complaint and Icek Benz testified at trial that Blanc and the Blanc entities were to contribute cash to Town Center to equalize Benz's contribution, but the trial court found there was no written evidence of Appellants' claim that D. Blanc and the Blanc entities were to contribute cash to Town Center to equal Appellants' contribution. (R.P. 534, ¶17 and ¶18)

The Appellants filed a Motion to Amend Court's Findings and Conclusions and to Supplement Plaintiffs' Findings of Fact and Conclusions of Law on July 14,

2011. (RP 0543-0550) The Appellants filed Proposed Supplemental Findings of Fact and Conclusions of Law on July 14, 2011. (RP 0538-0542) The Court granted Appellants' request to supplement their proposed Findings of Fact and Conclusions of Law but denied Appellants' request that the Court amend its Findings of Fact and Conclusions of Law. (RP 0578-0579). Judgment for the Defendants (Appellees) was filed on September 8, 2011, which incorporated the Court's Findings of Fact and Conclusions of Law entered on June 24, 2011. (RP 0580- 0581).

The Operating Agreement provides in paragraph 11.1 that the prevailing party in any legal action to enforce the terms and conditions of this Operating Agreement, shall be entitled to reasonable attorneys' fees and costs. (Exhibit 19) The Appellees filed a motion for award of attorneys fees on September 15, 2011 on the basis that they were the prevailing party. (RP 0582-0604) Appellants filed a response to the motion for attorneys fees on September 30, 2011, stating that: a) Appellees were not solely the prevailing party as Appellees did not prevail on their counterclaim; b) the fees were not reasonable because Appelles did not timely disclose their Release defense thereby engaging in litigation by surprise; c) many of the fees incurred were in trying to obtain an accounting; and d) some specific fees and costs should not be allowed. (RP0605-0609) If Appellants were to

prevail in this appeal, Appellees also would not be entitled to their costs and attorneys fees .

Appellants timely filed a notice of appeal on October 4, 2011, on the Judgement for the Defendants. (RP 0610-0613) That appeal was docketed as Court of Appeals No. 31,669. The Court heard the motion for attorneys fees and entered Judgment for Defendants on Motion for Award of Attorneys fees on February 2, 2012. Appellants timely appealed the award of attorneys fees by filing its Notice of Appeal on March 1, 2012. (RP 0673-0677). The appeal on the award of attorneys fees was docketed as Court of Appeals No. 32,031. Appellants filed a motion to consolidate the appeals on April 11, 2012 and a motion to supplement the designation of the transcript to include the pleadings regarding the attorneys fees issue.[2] In Court of Appeals No. 31,669, Robert Rambo, Appellate Mediator entered an order extending the time for filing the brief in chief until June 13, 2012.

C. Summary of the Relevant Facts

Plaintiffs-Appellants Icek and Lauren Benz (hereinafter "Appellants") are members of Town Center Land, LLC, a New Mexico LLC ("Town Center"). (RP 0532, ¶2) David Blanc, entities owned or controlled by David Blanc, and his father Martin Blanc own 49.5% of Town Center. (RP 0532, ¶6). David Blanc and his father own a 19.5% membership interest in Town Center. (RP 0532-0533,

[2] There is pending an unopposed Motion to Supplement Designation of the Transcript for the Attorneys Fees Hearing and to Consolidate the Appeals filed by Appellants on April 11, 2012.

¶7(a)) Central Millenium Partnership owns .25% of Town Center. David Blanc is the director of Central Millenium Partnership. (RP 0532-0533, ¶7(b)) Central Corridor Investors, LLC owns 29.75% of Town Center. David Blanc holds a majority interest in Central Corridor Investors. (RP 0532-0533, ¶7(c)) David Blanc is the manager of Central Millenium Partnership and the manager of Central Corridor Investors. (D. Blanc, 2/28/11, TR - 31, l. 22-25) Central Millenium Partnership and Central Corridor Investors, LLC are the Managing Members of Town Center. (RP0533, ¶8 and D. Blanc 2/28/12, TR-31, l. 21-25)

Town Center was created to acquire, own, operate and hold for investment real estate. Town Center owns property located at 601 Central Ave, Albuquerque, New Mexico (the "Property"). (RP 0532, ¶3) The Property was acquired by Town Center in October of 2002. (Exhibit 20, D. Blanc, 2/28/11 TR-80, l. 10-14) Appellants contributed $365,000 for a 50% interest in Town Center in 2002. (RP 0532, ¶4) Martin Blanc contributed $85,000 for the 19.5% interest in Town Center Land owned by David and Martin Blanc. (D. Blanc, 2/28/11, TR-55, l. 25; TR-56, l. 1) Central Corridor Investors borrowed $125,000 from Green Valley Land Company to contribute to Town Center. (D. Blanc, 2/28/11, TR- 57, l. 13-25; TR-58, l. 1-6) Martin Blanc and David Blanc have an excess of 70% interest in Green Valley Land Company. (D. Blanc, 2/28/11, TR-58, l. 12-17) Central Millenium

Partnership was to contribute $1,350 for its capital contribution, which sums still remained unpaid to Town Center. (D. Blanc, 2/28/11, TR-61, l. 8-22)

The Property was the location of the old Gas Light Motel. The Gas Light Motel was vacant at the time of the purchase and determined to be a nuisance property by the City of Albuquerque. (2/28/11, TR-42, l. 7-11) The Gas Light Motel was never operated as a motel by Town Center. (D. Blanc, 2/28/11, TR-83, l. 6-8) The Gas Light Motel was demolished in 2005. The Property remains vacant land.

Appellants and David Blanc, and/or various entities that he owned were involved in two other projects known as Central Market Ltd. and Baptist Convention Building LLC. Central Market, Ltd. (hereinafter "Central Market") owns property at 301 Central in Albuquerque, New Mexico. (D. Blanc, 2/28/11, TR-36, l. 3-12) Appellants were a lender and an equity owner in Central Market. (D. Blanc, 2/28/11, TR-38, l. 7-10) Central Market executed a promissory note for $545,600, payable to Appellants. (Exhibit 18, D. Blanc, 2/28/11, TR-37, l. 2-10) Appellants and D. Blanc entities were members in Baptist Convention Building LLC, which owned property at 600 Central known as the Baptist Convention Building. (D. Blanc, 2/28/11, TR-41, l. 10-20)

The central issue on appeal is the Final Agreement and Release (Exhibit 43). The district court ruled that by executing Exhibit 43, Appellants released all

claims raised in the Town Center matter, including claims that the capital account contributions are incorrect, that the membership interests of the parties should be reallocated, as well as claims for breach of fiduciary duty, misrepresentation, and fraud, but excepting the request for dissolution of Town Center. (R.P. at 535, ¶D) The Final Agreement and Release (Exhibit 43), however by its terms only pertained to the Central Market project. (I. Benz, 3/1/11, TR-54, l. 8-25; TR-55, l. 1-3.

II. Argument

A. The trial court erred when it held the Final Agreement and Release released all claims raised in the Town Center Matter, except the request for dissolution.

The district court held in Finding No. 24 that the Central Market dispute culminated, in part, with Appellants releasing Blanc from disputes related to Town Center raised by Appellants' Complaint. (RP 0534, ¶24) This finding is erroneous as there is no substantial evidence that the Central Market dispute culminated, in part, with Benz releasing Blanc, from anything other than claims involving Central Market. Furthermore, it was error by the Court to admit Exhibit 43, because Appellees failed to disclose it an as Exhibit or raise it as an issue in the Pre-trial Order, or at any other time prior to the weekend before trial. The district court's conclusions of law that the release language is not ambiguous and therefore parol evidence regarding the Release is not admissible are also in error. (RP 0535,

¶C). The trial court also erred in its conclusion that by signing the Release, Benz released all the claims he later raised in this matter, except for the request for dissolution of Town Center, including Benz's claims that the current capital account contributions are incorrect, that the membership interests of the parties should be reallocated, as well as the claims of fiduciary duty, misrepresentation and fraud. (RP 0535-0536, ¶D) The trial court is also in error to the extent that it concluded that Benz was aware of the claims he raised in this matter and executed the Release releasing Benz and other released parties from any and all known and unknown claims when it found in favor of Appellees. (RP 0535, ¶¶A, B) Any claimed error regarding the conclusions of law are reviewed de novo.

The issues set forth herein regarding the Final Agreement and Release were preserved in Appellants' oral motion in limine (2/28/11, TR-9, l. 22-25; TR-10, l. 1-25; TR-11, l. 1; TR-12, l. 23-25; TR-13, l. 1-21); Appellants' objection to the admission of Exhibit 43 (2/28/11, TR-134, l. 8-18); Appellants' Proposed Supplemental Findings of Fact and Conclusions of Law (RP 0538, ¶¶100 through 118 and Conclusions ¶¶56-67); and in Appellants' Motion to Amend Court's Findings and Conclusions and to Supplement Plaintiffs' Findings of Fact and Conclusions of Law. (RP 0543-0551)

1. The district court erred in holding that the Final Agreement and Release barred all the claims Benz raised in the instant case, except for the request for dissolution of Town Center.

The evidence at trial was that D. Blanc and Benz had engaged in three business ventures. Town Center owns property at 601 Central Ave., in Albuquerque, New Mexico. (RP 0532, ¶3) Town Center was formed in 2002. (Exhibit 20, D. Blanc, 2/28/11, TR-80, l. 10-14). Unrelated to Town Center, Central Market, Ltd. (hereinafter "Central Market") owns property at 301 Central in Albuquerque, New Mexico. (D. Blanc, 2/28/11, TR-36, l. 3-12) Central Market executed a promissory note for $545,600, payable to Appellants. (Exhibit 18, D. Blanc, 2/28/11, TR-37, l. 2-10) Appellants were a lender and an equity owner in Central Market. (D. Blanc, 2/28/11, TR-38, l. 7-10) Appellants and D. Blanc entities also owned property at 600 Central known as the Baptist Convention Building. (D. Blanc, 2/28/11, TR-41, l. 10-20) Each time Appellants and Blanc began a new transaction, they formed a new company.

Unrelated to the Town Center transaction, a dispute arose that Appellants had not been paid the amount of interest that had accrued under the note and was due from Central Market. (D. Blanc, 2/28/11, TR-39, l. 19-25; TR-40, l. 1-8) Mr. Benz retained the law firm of Cohen & Cohen to send a letter on his behalf on May 24, 2006.[3] (Exhibit 17). The letter from Benz's attorney demanded payment of the interest due on the Central Market Note, and suggested a sale or purchase of Benz's interests in Baptist Convention Building and Town Center Land. (Exhibit

[3] The first page of Exhibit 17 is mistakenly dated May 24, 2005, but it is undisputed that the correct date of the letter is May 24, 2006, as contained on page 2. (D. Blanc, 2/28/11, TR-40, l. 9-11)

17) Exhibit 17 further disputed the amount of capital contributions made by the parties in Town Center Land. (Exhibit 17) David Blanc's response of June 2, 2006, only addressed the Central Market dispute (Exhibit 37) even though the parties were meeting and corresponding in April and May of 2006 regarding the Town Center and Baptist Convention Building disputes. (Exhibit 36)

The Final Agreement and Release was dated June 16, 2006. (Exhibit 43) At the time Mr. Benz executed Exhibit 43, he was represented by the law firm of Cohen & Cohen. (2/28/11, TR-168, l. 3-6) The terms of the release agreement define the Central Market property as "the Project" that was the subject of the release, making no reference to the Town Center property or LLC (See Exhibit 43). Icek Benz testified that it was his understanding that the Final Agreement and Release (Exhibit 43) only pertained to the Central Market project. (I. Benz, 3/1/11, TR-54, l. 8-25; TR-55, l. 1-3)

The evidence presented at trial demonstrated that Appellees never really believed Exhibit 43 applied to anything other than Central Market Ltd. or the Central Market project until right before trial as confirmed by David Blanc's testimony at his deposition and by argument by Appellees' counsel in response to Appellants' oral motion in limine. David Blanc's deposition testimony, which was read at trial, stated that the Release (at that time Exhibit 68) released Mr. Benz and him regarding Central Market, Limited. (D. Blanc, 2/28/11, TR-112, l. 16-25; TR-

113, l. 1-4; See also deposition of David Blanc from July 16, 2009, entered into the record as Court's exhibit No. 2) Appellee's counsel conceded that they only recently "came to appreciate the significance of that document, that is that it is a general release, releasing any and all claims that existed at that time". (2/28/11, TR-11, l. 11-22)

David Blanc's testimony during the trial was that Central Market was "included" in the release. (D. Blanc, 2/28/11, TR - 112, l. 12-14) Mr. Blanc admitted that he recalled his testimony during his deposition, wherein he responded only with a "yes" at his deposition to the question that the release was from "Mr. Benz and you releasing each other regarding Central Market, Limited." (D. Blanc, 2/28/11, TR-112, l. 19-25, TR-113, l. 1-4) Mr. Blanc further testified that the Release was "written from the issue of Central Market" and "did affect Central Market, Limited." (D. Blanc, 2/28/11, TR-223, 1. 1-25; TR-224, 1. 1-2; TR-228, l. 18-20)

It is important to note that Mr. Blanc never affirmatively testified that he intended at the time of execution of Exhibit 43 that it included any claims regarding Town Center, or any other transaction or project between the parties. Mr. Blanc only states generally that he thought the Release "had to do with everything", but he didn't know at the time, in 2006, that there was going to be a lawsuit by Mr. Benz or anybody else. (D. Blanc, 2/28/11, TR-228, l. 3-7) Even

during examination by his counsel, Mr. Blanc does not testify that Exhibit 43 released all Town Center claims. The question by Mr. Blanc's counsel asks "Is that the Release by which you resolved the dispute involving Central Market, among other things." Mr. Blanc's answer is "Yes, but it was later." (D. Blanc, 2/28/11, TR-133, l. 17-23) Then Mr. Blanc only reads the Release Agreement into the record. (D. Blanc, TR-135, 1. 4-13) Based on the above testimony, there was no substantial evidence to support the district court's findings numbered 24 and 25 that Appellant released Blanc or Appellees from claims relating to anything other than Central Market.

Subsequent to the execution of the Exhibit 43, and in further support of Appellants' claims that Exhibit 43 was not intended to release Town Center, LLC or any issues related to Town Center Project, Icek Benz filed a lawsuit against David Blanc and the Baptist Convention Building LLC regarding the Baptist Convention Building Project. The lawsuit of *Benz v. Baptist Convention Building LLC, David Blanc, et al, No. CV 2008-02937* was filed March 24, 2008. (Exhibit 44; D. Blanc, 2/28/11, TR-113, l. 5-8) The lawsuit of *Benz v. Baptist Convention Building LLC* was settled by payment of money to Benz. (D. Blanc, 2/28/11, TR-142, l. 20-25). Notwithstanding that the Baptist Convention Building LLC had been a matter of contention between the parties since the Cohen & Cohen letter of

May 24, 2006, at no time during that litigation did Mr. Blanc assert the Release as a defense to Mr. Benz's claims raised. (D. Blanc, 2/28/11, TR-228, l. 8-23)

New Mexico courts have held that a release is contractual in nature and as such, the primary objective in construing its terms is to give effect to the intent of the parties. *Shaeffer v. Kelton*, 95 N.M. 182, 185, 619 P.2d 1226, 1229 (1980). The Supreme Court in *Hansen v. Ford Motor Co.*, 120 N.M. 203, 900 P.2d 952 (1995) held that an inherent ambiguity in any general release is recognized as a matter of policy. *Id* at 206, 955. The admissibility of parol evidence to determine the intent of the parties is discussed in more depth in II(A)(3) below.

The New Mexico Supreme Court further adopted a standard for the strict construction of liability releases that requires such clarity that a person without legal training can understand the agreement he or she has made. *Berlangieri v. Running Elk Corp.*, 2003-NMSC-024, 134 N.M. 341, 76 P.3d 1098. Although this Release is not in the nature of a liability release signed by a participant at a recreational resort as in the *Berlangieri* case, this standard should be adopted by this Court for all general releases.

2. The district court erred in ruling that the Final Agreement and Release pertained to Defendants in this case who were not named as released parties in the Final Agreement and Release.

The district court erred in its conclusions of law that Benz executed a release, releasing Blanc and other released parties from any and all known and

unknown claims and that by signing the release, Benz released all claims he later raised in this matter, except the dissolution. (RP 0535, ¶¶B, D). The issue of whether parties who are not specifically named or referred to in a release may be released is reviewed de novo. This issue was preserved in Appellants' oral motion in limine at trial (2/28/11, TR-10, l. 14-16); Appellants Motion to Amend Court's Findings and Conclusions and to Supplement Plaintiffs' Findings of Fact and Conclusions of Law (RP 0544, ¶11) and Proposed Supplement Finding (RP 0540, ¶116) and Proposed Conclusion of Law (RP 0540, ¶57 and ¶67).

Exhibit 43 is signed only by Icek Benz. (Exhibit 43) The released parties named in Exhibit 43 are Central Market, Ltd., David W. Blanc and their predecessors and successors in interest, heirs, agents, employees, officers, directors, partners and assigns (collectively "the released parties"). (Exhibit 43) The Appellees in this case, Town Center Land, Central Millennium Partnership, Central Corridor Investors, LLC, and Martin Blanc are not named anywhere in Exhibit 43 nor are they predecessors or successors in interest, heirs, agents employees, officers, directors or partners of Central Market. Lauren Blanc is one of the Appellants in this case, but not named anywhere in Exhibit 43, nor is she a signatory, yet her claims in the instant case were dismissed based on the release. David Blanc is named, but if the entire sentence is read, it is clear that he is named in connection with Central Market Ltd. and the project known as "Central Market".

In *Harrison v. Lucero*, 86 N.M. 581, 525 P.2d 941 (Ct. App. 1974) the Court held that the claims of the plaintiff were not affected by a release to which she was not a party and in which she was not named. This holding was further cited in *Johnson v. Aztec Well Servicing Co.,* 117 N.M. 697, 875 P.2d 1128 (Ct. App. 1994)

Although the Supreme Court in *Hansen* did not adopt the specific identiy rule, the Court held that a general release raises a rebuttable presumption that only those persons specifically designated by name or by some other specific identifying terminology are discharged. *Hansen* at 211, 960. In the absence of such specific terminology, the person seeking to be discharged must prove by extrinsic evidence that the parties to the agreement actually intended to discharge him from liability. *Hansen* at 211, 960. In this case, since the Appellees and the Town Center LLC and property were not specifically designated, the presumption shifted to Appellees to prove that all parties to the Release actually intended to apply the release to Town Center and Appellees. There is no substantial evidence to support the Appellees' claim that the Release was intended to apply to Appellees or the Town Center Land property. As set forth above, the Release does not name Appellees and only specifically names Central Market, David Blanc, and the Central Market Project. (Exhibit 43) David Blanc's testimony was self-serving and overly broad in that it involved "everything" and "Central Market, among other

things" (D. Blanc, 2/28/11, TR-133, l. 17-23; 2/28/11, TR-228, l. 3-7) David Blanc's testimony was also in contradiction to his deposition testimony. Mr. Benz testified that it was his understanding that Exhibit 43 only pertained to the Central Market project. (I. Benz, 3/1/11, TR-54, l. 8-25; TR-55, l. 1-3) Finally, David Blanc had not raised the release as a defense to the *Baptist Convention* litigation.

3. The district court erred in holding that the release language in the Final Agreement and Release is not ambiguous and therefore parol evidence regarding the Final Agreement and Release was not admissible.

The district court's conclusion lettered C that the release language is not ambiguous and parol evidence is not admissible is in error. (RP 0535, ¶C) This matter is reviewed de novo. This issue was preserved in Appellants' response to Appellees' objections at trial (2/28/11, TR-10, 1. 14-16). It was also preserved in Appellants' Motion to Amend Court's Findings and Conclusions (RP 0544) and Appellants' Supplemental Proposed Findings of Fact and Conclusions of Law (RP 0539, ¶104; RP 0540, ¶¶61, 62, 64, 65, 66, 67)

Appellants agree that the release language in the Central Market release agreement was not ambiguous; however, the trial court improperly interpreted the plain language of that release agreement, which plain language was supported by the facts surrounding the formation of that release agreement. Substantial evidence does not support the trial court's ruling. Finally, the trial court erred when it held

that extrinsic evidence surrounding the formation of the release agreement was not admissible.

New Mexico law is well-settled that the interpretation of the terms of an express contract is not restricted to the four corners of the document. *Ponder v. State Farm Mutual Automobile Inc. Co.,* 2000-NMSC-033 at ¶13, 129 N.M. 696, 703, 12 P.3d 960, 967. Extrinsic evidence is appropriate to provide the context surrounding the making of a contract. *Sanders v. FedEx Ground Package System, Inc.,* 2008-NMCA-40 at ¶25 and 26, 144 N.M. 449, 199 P.3d 1200, citing *Seidenberg v. Summit Bank*, 791 A.2d 1068, 1077 (N.J. Super. Ct. App. Div. 2002) (Court may consider the expectations of the parties and the purposes for which the contract was made). Quoting *Mark V. Inc. v. Mellekas,* 114 N.M. 778, 781-82, 845 P.2d 1232, 1235-36 (1993), the *Ponder* Court stated, "without full examination of the circumstances surrounding the making of the agreement, ambiguity or lack thereof often cannot properly be discerned." *Ponder,* 2000-NMSC-033 at ¶13, 129 N.M. at 703, 12 P.3d at 967. New Mexico courts are permitted to consider extrinsic evidence to determine whether an ambiguity exists at all, or to resolve any ambiguities a court may discover. *Id.*

It is clear from the testimony in Section II (A)(1) above that the Release concerned only Central Market. Further, testimony related to the actions of Blanc, including his failure to raise the release agreement as a defense to the claims raised

in the *Baptist Convention* litigation at all or in this litigation until the eve of trial constitute evidence of the parties' understanding of the terms of the release agreement. (I. Benz, 3/1/11, TR-54, 1. 825); TR-55, 1. 1-3)

4. The district court erred in allowing the admission of the final Agreement and Release as an Exhibit and the district court erred in allowing the Appellees to assert as a defense at trial that the Final Agreement and Release barred the claims of Appellants in this case.

Appellees filed a Final Witness and Exhibit List on October 15, 2010. (RP 373) The Appellees only incorporated the exhibits listed by Appellants and did not list the Final Agreement and Release, or any other Release Agreements. (RP 373) The Appellants Final Exhibit List did not list the Final Agreement and Release, nor any other Release Agreement. (RP 378-380)

A Pre-Trial Order was filed with the Court on February 8, 2011. (RP 0388-0486) In the Pre-Trial Order, Appellants did not contend that the Final Agreement and Release (Exhibit 43) was a contested issue of fact, contested issue of law or an exhibit. (RP 0395-0401) Appellants did not discuss the Final Agreement and Release in the section entitled "General Nature of the Claims of the Parties". (RP 0390-0393). Appellants did not assert the existence of a release as an affirmative defense, nor raise the issue of release in Appellants' Counterclaim. (RP 0036-0038 and RP 0061-0065) In Appellants' Pretrial Proposed Findings of Fact filed with the Court, Appellees contended that Appellants signed a release of "all claims" in exchange for payment to settle *Benz v. Baptist Convention Building, et al,* No. CV

2008-02937, a previous lawsuit between the parties regarding a separate, unrelated project. (RP 0430, ¶76)

Counsel for Appellees admitted in response to Appellants' oral motion in limine at trial that they had only recently "came to appreciate the significance of that document, that is that it is a general release, releasing any and all claims that existed at that time". (2/28/11, TR-11, l. 11-22) Exhibit 43 should not have been admitted because it was not timely disclosed as an Exhibit or defense.

B. The District Court Erred in Failing to Order a Dissolution.

Appellants assert that the district court's finding numbered 27 that there has been no affirmative vote to dissolve is in error. (RP 0535, ¶27) There can not be an affirmative vote in favor of dissolution because there is a deadlock. The district court's own conclusion lettered F concludes that based on the current membership, a majority of the members would not vote to dissolve the LLC. (RP 0536, ¶F) That constitutes a deadlock. Appellants further contend that the district court's conclusions that the business purpose is being fulfilled and that there is insufficient evidence before the Court to conclude it is not reasonably practicable to carry on business are in error. (RP 0536, ¶¶H, I) The standard of review for overturning the district court's finding numbered 27 is that there is no substantial evidence in support thereof. The Court may conduct a de novo review to overturn the district court's conclusions lettered H and I.

This issue was preserved in Appellant's Proposed Amended Findings of Fact and Conclusions of Law. (RP 0454-0468, Facts ¶¶27, 56, 57, 60, 61, 63, 83, 84, 85, 86, 94, 95, 96, 97, 98, 99; Conclusions ¶¶33, 34, 35, 36)

There was sufficient evidence before the trial court to conclude that it is not reasonably practicable to carry on Town Center's business. The relationship between the members is dysfunctional and there is a deadlock. However, because the court ruled that the Release barred all claims of Appellants, except dissolution, it is difficult to address this in this appeal. Appellants made claims concerning fraud, breach of fiduciary duty and misrepresentation, but the court made no findings thereon other than to conclude that the Release barred any such claims. If this Court overturns the trial court's ruling on the Release, this matter should be remanded back to the district court for findings and conclusions on the claims of fraud, misrepresentation, and breach of fiduciary duty. Findings and conclusions on those issues in favor of Appellants would support Appellants' claim that the management has become dysfunctional.

Section 1.7 of the Operating Agreement provides that a manager may be removed upon the affirmative vote of the members whose interest in capital equals more than 50 percent of all interests in the capital of the company. (Exhibit 19; D. Blanc, 2/28/11, TR-67, l. 8-17) The manager of the company has the authority to take most of the actions on behalf of Town Center. (Exhibit 19; D. Blanc, 2/28/11,

TR-68, l. 23-25) The managers of Town Center are entities controlled by David Blanc. (D. Blanc, 2/28/11, TR-69, l. 1-3) David Blanc admitted that if Appellants didn't like what David Blanc was doing, Appellants would have to convince David Blanc or one of his companies to vote against himself or to remove him as manager. (D. Blanc, 2/28/11, TR-69, l. 1-9) Appellants contend that the district court was correct in its conclusion lettered F that based on the current membership, a majority of the Members would not vote to dissolve the LLC. (RP 0536, ¶F) The district court's own conclusion lettered F, leads to the conclusion that there is a deadlock, which would require dissolution.

A court may decree dissolution of a limited liability company whenever it is not reasonably practicable to carry on its business in conformity with its articles of organization or operating agreement. NMSA §53-19-40. The court in *In re 1545 Ocean Ave. LLC*, 72 A.D.3d 121, 893 N.Y.S.2d 590 (N.M.A.D.2 Dept. 2010) held ...dissolution is reserved for situations in which the LLC's management has become so dysfunctional or its business purpose so thwarted that it is no longer practicable to operate the business, such as in the case of a voting deadlock...".

C. The District Court Erred in its Finding that there was no Clear Written Memorial of the Parties' Agreement with respect to Contributions to Town Center.

Appellants contend that the district court's finding numbered 16 that there is no clear written memorial of the parties' agreement with respect to contributions

and finding numbered 18 that there was no evidence of an agreement are in error because there is not substantial evidence in support thereof. (RP 0534, ¶16, 18) The district court's finding number 21 that "Benz was informed by Blanc that Blanc would no longer provide funds to Town Center for expenses" contradicts the court's findings numbered 16 and 18. (Exhibit 36; RP 0534, ¶21) The conclusions of law entered by the district court do not appear to directly relate to findings numbered 16 and 18, other than to conclude that any claims by Appellants that the capital account contributions are incorrect were released by Exhibit 43. (RP 0535, ¶D) Appellants contend that any conclusions of law that infer or imply that the capital account contributions were correct are in error.

This issue was preserved by Appellants' Proposed Amended Findings of Fact and Conclusions of Law. (RP 0453-0468; Findings ¶¶28 through 33; 35 through 37; 44 through 48; 54 through 58; 63, 65, 68, 87 through 92; Conclusions ¶¶14, 15, 24, 27, 28, 32)

The Operating Agreement is clearly ambiguous as to what was contributed as capital by the members. Schedule 1 to the Operating Agreement does not list anything for cash or services (Exhibit 19). There are no statements maintained by Town Center specifying the agreed value of services as required by Section 6.2 of the Operating Agreement. (Exhibit 19) As set forth above in the discussion regarding the Release, New Mexico courts are permitted to consider extrinsic

evidence to resolve any ambiguities. *Ponder*, 2000-NMSC-033 at ¶13, 129 N.M. at 703, 12 P.3d at 967.

There are various writings which evidence that any services provided were to be considered as capital contributions. It is undisputed that Appellants contributed $365,000 in cash as their capital contribution upon formation of Town Center. (RP 0532, ¶4) It is undisputed that the remaining members contributed $210,000 in cash as their capital contribution. (D. Blanc, 2/28/11, TR-55, l. 25; TR-56, l. 1)(D. Blanc, 2/28/11, TR- 57, l. 13-25; TR- 58, l. 1-6) Icek Benz testified that it was agreed upon by the parties that David Blanc and/or his entities were to pay future expenses until their contribution equalized the contribution of Appellants. (I. Benz, 3/1/11, TR-65, l. 4-17) David Blanc testified that the contribution of services was the additional capital contribution to be made by the other members. (Exhibit 36; D. Blanc, 2/28/11, TR- 181, l. 17-25; TR-182, l. 1-8)

The Operating Agreement provides in paragraph 2.1 that the Members shall contribute to the Company's capital the assets described in Schedule 1 attached to the Operating Agreement. (Exhibit 19). Schedule 1 does not list anything for cash and services. (Exhibit 19) David Blanc agreed in his testimony that Schedule 1 does not list anything for cash and services. (D. Blanc, 2/28/11, TR-79, l. 1-6)

Section 6.2 of the Operating Agreement provides that a separate capital account will be maintained for each member. The capital account may be

increased by a number of ways, including the amount of money contributed by each member and the fair market value of property or services contributed by such member to the company. (Exhibit 19) Section 4.9(e)(1) and (2) of the Operating Agreement require a statement of capital contributions made by each member, specifying the amount of cash and the agreed value of services as a capital contribution that each member has rendered to the company. (Exhibit 19) David Blanc admitted in his testimony that there are no statements specifying the agreed value of services as a capital contribution. (D. Blanc, 2/28/11, TR-72, l. 3-25; TR-73, l. 1-5) David Blanc also admitted that the statements about capital contributions all concern the amount of monies paid. (D. Blanc, 2/28/11, TR-73, l. 6-10)

There are other writings admitted as Exhibits which evidence that the other Members were to contribute cash for future expenses to equalize the capital contributions. Exhibit 4 is a facsimile from David Blanc to Ike Benz, which contains a summary of sources of cash and expenses. (Exhibit 4, D. Blanc, 2/28/11, TR-54, l. 2-11) David Blanc states that he will need to come up with another $7,000 to cover all costs as shown. (Exhibit 4; D. Blanc, 2/28/11, TR-54, l. 12-25; TR-55, l. 1-2)

Exhibit 8 was created in David Blanc's office on the accounting system with instructions from his accountant, Ms. Prangley. The statement is a year-end

adjustment entry "to record the purchase of assets and partner cap contributes". (Exhibit 8; D. Blanc, 2/28/11, TR-59, l. 5-25; TR- 60, l. 1-7) David Blanc admitted that Exhibit 8 lists the cash as capital contributions of the partners, but does not list any contribution of services. (Exhibit 8, D. Blanc, 2/28/11, TR-60, l. 8-25; TR-61, l. 1-25; TR-62, l. 1-7) Compass Realty, owned by David Blanc, contributed its commission to Town Center Land to pay for reimbursements. (Exhibit 13, 14; D. Blanc, 2/28/11, TR-64, l. 3-25; TR-65, l. 1-17)

Exhibit 32 is a letter dated February 15, 2006, with a Balance Statement attached. Only the cash contributed is shown in partners' equity and there is nothing for services. (Exhibit 32; D. Blanc, 2/28/11, TR-74, l. 1-23) Exhibit 39 shows that every member, excepting Appellants and Central Millenium, have a negative capital account. (Exhibit 39; D. Blanc, 2/28/11, TR-76, l. 4-25; TR-77, l. 1-7) The balance sheets of Town Center Land do not show any amount for services in the capital accounts. (D. Blanc, 2/28/11, TR-79, l. 7-10) David Blanc did not list anywhere in his income tax returns any income that would be allocated to him as a value for services provided to Town Center. (D. Blanc, 2/28/11, TR-80, l. 4-8)

Exhibit 32, dated February 15, 2006 was the first capital call ever sent to members by Town Center Land. (Exhibit 32; D. Blanc, 2/28/11, TR-93, l. 4-18) This was four years after the formation of Town Center in 2002. After Mr. Benz

received Exhibit 32, David Blanc and Icek Benz had a meeting in Chicago on April 21, 2006. Mr. Benz told David Blanc that he thought David Blanc was lying about the investments. (D. Blanc, 2/28/11, TR-97, l. 14-24). David Blanc wrote a letter to Mr. Benz dated May 9, 2006, wherein David Blanc admitted that neither he nor Compass Companies have received any personal reimbursement or other compensation for it's (sic) time, management, investment or construction coordination performed for these businesses. (Exhibit 36; D. Blanc, 2/28/11, TR-98, l. 10-25; TR-99, l. 1-25; TR-100, l. 1-15) David Blanc states in Exhibit 36, that as of May 1, 2006, he would no longer continue to provide funds and development or management services to those entities, as he had in the past. (Exhibit 36; D. Blanc, 2/28/11, TR-100, l. 16-25; TR-101, l. 1-9)

Town Center made another capital call on October 24, 2008. (Exhibit 39). Mr. Blanc admitted at trial that none of the members paid their portion of any capital call. (D. Blanc, 2/28/11; TR-104, l. 5-18)

David Blanc's testimony and one sentence in Exhibit 36, which is contradicted by an earlier sentence, is the only evidence which supports Appellees contention that Appellees could contribute services for their capital contributions. Based upon all of the evidence set forth above, there was not substantial evidence to support the district court's finding that there was no clear written memorial of the parties agreement with respect to contributions to Town Center.

Appellants must attack the court's findings numbered 16 and 18 even though there are no conclusions of law related thereto, other than the conclusions that all claims of Appellants were released. If this court finds that the Release did not bar Appellants' claims regarding Town Center and finds there is no substantial evidence to support the court's findings numbered 16 and 18, then this matter may be remanded back to the district court to make conclusions consistent therewith.

D. The Trial Court Erred when it Ordered that Appellants Pay the Cost and Attorneys Fees of Town Center Land and Appellees.

If Appellants prevail on this appeal, then Appellees are not the prevailing party and not entitled to an award of costs and attorneys fees. Furthermore, Appellees asserted counterclaims against Appellants, which Appellants successfully defended. Therefore, there is no clear prevailing party even if the judgment of the district court is upheld. Appellees did not obtain a judgment against Appellants which enforced the terms and conditions of the Operating Agreement. To the contrary, Appellants were not required to make capital contributions and Appellants did not have their membership interests adjusted and were not removed as members.

CONCLUSION

Appellants pray that this Court find as follows:

1) that Exhibit 43 is not admissible; and this matter be remanded back to the trial court to enter findings and conclusions consistent therewith on all claims; or

2) that Exhibit 43 does not release any claims raised by Appellants in this matter and this matter be remanded back to the trial court to enter findings and conclusions consistent therewith on all claims;

3) that dissolution is ordered because there exists a deadlock; and

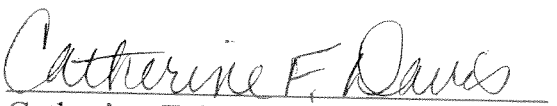
4) that the district court's findings numbered 16 and 18 are not supported by substantial evidence and this matter is remanded to the district court to enter findings and conclusions consistent therewith.

Oral Argument

Oral argument is respectfully requested and would assist this Court in reaching a decision because of the complexity of the facts.

Respectfully submitted,

HUNT & DAVIS, P.C.



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I hereby certify that on June 13, 2012, I have caused a true and correct copy of the Brief in Chief to be served by regular U.S. Mail to the following:

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