COLORADO COURT OF APPEALS

DATE FILED: September 24, 2015
CASE NUMBER: 2014CA2169

Court of Appeals No. 14CA2169
Gunnison County District Court No. 13CV30035
Honorable J. Steven Patrick, Judge

Christopher Klein Construction, Inc., a Colorado corporation,

Plaintiff-Appellee,

v.

Sheron M. Jelinek Owen Living Trust, dated October 31, 2001; and Sheron Owen,

Defendants-Appellants.

ORDER AFFIRMED IN PART, REVERSED IN PART,
AND CASE REMANDED WITH DIRECTIONS

Division V
Opinion by JUDGE HAWTHORNE
Furman and Richman, JJ., concur

NOT PUBLISHED PURSUANT TO C.A.R. 35(f)
Announced September 24, 2015

No Appearance for Plaintiff-Appellee

Craig Chambers, LLC, Craig Franklin Chambers, Rebecca Winters, Littleton, Colorado, for Defendants-Appellants

Defendants, Sheron M. Jelinek Owen Living Trust and Sheron Owen, appeal the district court's order enforcing a settlement agreement between defendants and plaintiff, Christopher Klein Construction, Inc.[1] We affirm in part, reverse in part, and remand with instructions.

I. Background

Plaintiff filed a complaint requesting foreclosure on a mechanic's lien and alleging breach of contract and unjust enrichment related to defendants' failure to pay for the renovation of their building. Defendants filed an answer alleging several counterclaims. The parties then scheduled an alternative dispute resolution meeting.

A mediation session was held before a retired judge who served as the mediator. The parties signed a mediation agreement that included the following provision:

> The parties understand that people who participate in mediation should feel free to communicate about sensitive issues without fear that the mediator could later be called as a witness. Therefore, the parties agree that the discussions held during the mediation shall be confidential and that the mediator shall not be

[1] Plaintiff's counsel has made no appearance on appeal.

> called as a witness to testify to facts concerning or relating to the matters raised during mediation. The parties agree that they shall not subpoena the mediator or the mediator's documents concerning the mediation, as such, the mediator may destroy all materials immediately after the mediation session.

After the mediation session, the parties entered into an oral agreement settling the case. This oral agreement was facilitated by the mediator and recorded in his presence. The parties not only agreed to settle their case, but also agreed that if a written agreement could not be reached the oral agreement was enforceable. A subsequent written agreement was signed by plaintiff and defendants' lawyer, but Ms. Owen did not sign this agreement. Plaintiff then performed its obligations under the settlement agreement's terms.

Plaintiff filed a "Motion to Enforce Settlement Agreement and for Attorney Fees." The district court reviewed the parties' briefs and concluded that the written agreement was never signed by Ms. Owen. However, the court relied on its analysis of *Yaekle v. Andrews*, 195 P.3d 1101 (Colo. 2008), in concluding that the oral

settlement agreement was enforceable, "even where communications would otherwise be confidential."

II. Mediation Communications

Defendants assert that the recording of the oral agreement was inadmissible as proof of a settlement agreement under the Dispute Resolution Act, §§ 13-22-301 to -313, C.R.S. 2015, and, thus, the district court's order enforcing the settlement agreement was erroneous.[2] Specifically, defendants contend that mediation communications are privileged under section 13-22-307, C.R.S. 2015. We agree.

A. Standard of Review

We review de novo questions of law. *See DiFrancesco v. Particle Interconnect Corp.*, 39 P.3d 1243, 1247 (Colo. App. 2001) ("Thus, although the fact of a settlement was disputed, the trial court's ruling necessarily was based on its interpretation of the written transcript, which is a question of law subject here to de novo review.").

[2] Plaintiff filed a copy of the recording with the court.

B. Analysis

Mediation communications are confidential and generally inadmissible as evidence in later judicial proceedings. *Yaekle*, 195 P.3d at 1106. Under section 13-22-307(2) and (3):

> (2) Any party or the mediator or mediation organization in a mediation service proceeding or a dispute resolution proceeding shall not voluntarily disclose or through discovery or compulsory process be required to disclose any information concerning any mediation communication or any communication provided in confidence to the mediator or a mediation organization . . . .
>
> (3) Any mediation communication that is disclosed in violation of this section shall not be admitted into evidence in any judicial or administrative proceeding.

Section 13-22-302(2.5), C.R.S. 2015, defines "mediation communication" as:

> any oral or written communication prepared or expressed for the purposes of, in the course of, or pursuant to, any mediation services proceeding or dispute resolution program proceeding, including, but not limited to, any memoranda, notes, records, or work product of a mediator, mediation organization, or party; except that a written agreement to enter into a mediation service proceeding or dispute resolution proceeding, or a final written agreement reached as a result of a mediation service proceeding or dispute resolution

> proceeding, which has been fully executed, is not a mediation communication unless otherwise agreed upon by the parties.

Section 13-22-302(2.5) provides an exception to the general confidentiality of mediation communications, if the communication is a written agreement fully executed by the parties. Although plaintiff signed a written settlement agreement, Ms. Owen never signed the agreement. Therefore, the written agreement was not fully executed and was inadmissible as evidence that the parties executed a settlement agreement. *See* § 13-22-307(3).

The only other evidence that the parties reached a settlement agreement was the recording of their oral agreement. The district court relied on *Yaekle* in holding that the parties agreed to an enforceable oral settlement agreement. This holding is not consistent with *Yaekle*'s description of mediation communications.[3]

[3] To the extent the court relied on *GSL of ILL, LLC v. Kroskob*, 11-CV-00939-WYD-KMT, 2012 WL 10311 (D. Colo. Jan. 3, 2012), that case is distinguishable because the agreement was recorded during open court proceedings which were not confidential. Furthermore, the magistrate specifically noted in detailing the settlement agreement's terms, the court "does [not] reference or allude to any matters which may have been discussed during the mediation between the parties." *Id.* at *1 n.3.

Our supreme court in *Yaekle* explained that "there may well be some cases wherein an agreement is reached among parties in mediation, but, because all mediation communications are protected as confidential, a binding contract cannot be proven." 195 P.3d at 1110. Thus, *Yaekle* held that section 13-22-307 "protects as confidential those communications made in the presence or at the behest of the mediator." *Id.* Consistent with this holding, "evidence of contract formation during mediation other than final written and fully executed agreements is generally inadmissible." *Id.* at 1112.

As previously discussed, the oral agreement was recorded in the mediator's presence. So, the agreement was a confidential mediation communication and the court erred in concluding the parties formed a binding settlement agreement. *See id.* Even if the parties orally agreed to waive the confidentiality of this mediation session, such a waiver would not be valid unless "[a]ll parties to the dispute resolution proceeding and the mediator consent[ed] in writing." § 13-22-307(2)(a). The parties never signed such a written waiver. Thus, we reverse the order enforcing the settlement agreement and remand the case to the district court.

III. Attorney Fees and Costs

Defendants request an award of appellate and district court attorney fees and costs because plaintiff's initial "Motion to Enforce Settlement Agreement and for Attorney Fees" was frivolous, groundless, and vexatious. We do not view the initial motion as frivolous, groundless, and vexatious. *See Mission Denver Co. v. Pierson*, 674 P.2d 363, 365 (Colo. 1984) ("Standards for determining whether an appeal is frivolous should be directed toward penalizing egregious conduct without deterring a lawyer from vigorously asserting his client's rights."). Accordingly, we deny defendants' request for attorney fees and costs on appeal and affirm the portion of the district court's order denying their previous request for attorney fees.

IV. Conclusion

The order is affirmed in part, reversed in part, and the case is remanded to the district court for further proceedings consistent with this opinion.

JUDGE FURMAN and JUDGE RICHMAN concur.

Court of Appeals

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CHRIS RYAN
CLERK OF THE COURT

PAULINE BROCK
CHIEF DEPUTY CLERK

NOTICE CONCERNING ISSUANCE OF THE MANDATE

Pursuant to C.A.R. 41(b), the mandate of the Court of Appeals may issue forty-three days after entry of the judgment. In worker's compensation and unemployment insurance cases, the mandate of the Court of Appeals may issue thirty-one days after entry of the judgment. Pursuant to C.A.R. 3.4(l), the mandate of the Court of Appeals may issue twenty-nine days after the entry of the judgment in appeals from proceedings in dependency or neglect.

Filing of a Petition for Rehearing, within the time permitted by C.A.R. 40, will stay the mandate until the court has ruled on the petition. Filing a Petition for Writ of Certiorari with the Supreme Court, within the time permitted by C.A.R. 52(b) will also stay the mandate until the Supreme Court has ruled on the Petition.

BY THE COURT: Alan M. Loeb
Chief Judge

DATED: October 23, 2014

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