

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2021-001280

05/26/2021

HONORABLE DANIELLE J. VIOLA

CLERK OF THE COURT
K. Cabral
Deputy

BROVITZ GROUP INC, THE, et al.

CHARLES E MARKLE

v.

KASEY THOMPSON

JOSHUA M SNELL

JONES SKELTON & HOCHULI P L C
40 N CENTRAL AVE STE 2700
PHOENIX AZ 85004
WELLS FARGO BANK N A
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JUDGE VIOLA

MINUTE ENTRY

The Court has reviewed and considered Plaintiffs' Motion for Summary Judgment filed March 5, 2021, Response, and Reply and the related statements of fact. Plaintiffs requested oral argument in their Motion and withdrew their request in the Reply. Defendant did not request oral argument. Consistent with Rule 7.1(d) and 56(c)(1) of the Ariz. R. Civ. P., the Court concludes that oral argument is not necessary to decide the issue presented.

Background

This case arises from two written membership purchase agreements dated November 4, 2020—one between Brovitz Group, Inc. (“Brovitz”) and Kasey Thompson (the “Brovitz Agreement”) and one between Mackinaw Holding Corporation (“Mackinaw”) and Mr. Thompson (the “Mackinaw Agreement”). Mr. Thompson agreed to purchase a 22.2225% interest in KTLT,

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LLC from Brovitz for \$200,000 under the Brovitz Agreement. Mr. Thompson agreed to purchase an 11.1125% interest in KTLT, LLC from Mackinaw for \$100,000 under the Mackinaw Agreement. Pursuant to both Agreements, Brovitz and Mackinaw provided the assignments of their membership interests to Mr. Thompson. Mr. Thompson signed indicating receipt of the assignments. The email correspondence between the parties does not include any language indicating the deal was subject to any contingency. Mr. Thompson has not made the payments required under the Brovitz and Mackinaw Agreements.

Mr. Thompson asserts that payment of the \$300,000 under the Brovitz and Mackinaw Agreements was contingent on a private company sale and his receipt of the proceeds of such sale as a shareholder. Plaintiffs argue that the language of the Agreements is not ambiguous and required payment by November 4, 2020. Section 1.3 of the Agreements states:

The purchase and sale of the Purchased Membership Interest shall take place on November 4, 2020. At closing, Buyer shall deliver to Seller wire or other immediately available funds in an amount equal to the Purchase Price. Upon receipt of the Purchase Price, Seller shall deliver to Buyer an Assignment of Membership Interest in the Company in the form attached hereto as Exhibit A, transferring the Purchase Membership Interest to Buyer.

Both Agreements contain an integration clause: “This Agreement and the Exhibits attached hereto constitute the entire contract between the parties hereto concerning the subject matters hereof and no party shall be liable or bound to the other except as specifically set forth herein.” Section 4.1. Further, the Agreements “may not be amended or supplemented except by written agreement of Buyer and Seller.” Section 4.3. Mr. Thompson asserts that the Court should consider parol evidence regarding the parties’ intent and the alleged condition.

Standard

A party is entitled to summary judgment under Rule 56(c) only if “there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” *National Bank of Arizona v. Thruston*, 218 Ariz. 112, 115 (App. 2008). The moving party bears both the *initial* burden of producing sufficient, competent evidence that demonstrates the absence of any genuine issue of material fact (the “burden of production”) and the *ultimate* burden of persuading the Court that it is entitled to prevail on its summary judgment motion (the “burden of persuasion”). *Id.* “The burden of persuasion on the summary judgment motion is heavy. ‘[W]here the evidence or inferences would permit a jury to resolve a material issue in favor of either party, summary judgment is improper.’” *Id.* at 116 (citations omitted). Furthermore, in reviewing

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summary judgment pleadings “a court must view the evidence in a light most favorable to the non-moving party and draw all justifiable inferences in its favor.” *Id.* (citations omitted).

Analysis

It is undisputed that the parties entered into the Brovitz and Mackinaw Agreements and that Brovitz and Mackinaw provided the assignments of membership interest to Mr. Thompson according to the terms of the Agreements. It is also undisputed that Mr. Thompson has not made the payments required under the Agreements to Brovitz and Mackinaw. The issue before the court is whether a disputed fact remains that precludes summary judgment as to Mr. Thompson’s contention that the payments under the Agreements were contingent on the finalization of another private company sale.

“[I]n Arizona, a court will attempt to enforce a contract according to the parties’ intent.” *Taylor v. State Farm Mut. Auto. Ins. Co.*, 175 Ariz. 148, 152, 854 P.2d 1134, 1138 (1993). To determine the parties’ intent, the court must “look to the plain meaning of the words as viewed in the context of the contract as a whole.” *ELM Retirement Center, LP v. Callaway*, 226 Ariz. 287, 290-91, ¶ 15, 246 P.3d 938, 941-42 (App. 2010) (quoting *United Cal. Bank v. Prudential Ins. Co.*, 140 Ariz. 238, 259, 681 P.2d 390, 411 (App. 1983)). When the terms of a contract are plain and unambiguous, its interpretation is a question of law for the court. *Chandler Med. Bldg. Partners v. Chandler Dental Grp.*, 175 Ariz. 273, 277, 855 P.2d 787, 791 (App.1993). “Each part of a contract must be read together, ‘to bring harmony, if possible, between all parts of the writing.’” *Id.* at 291, ¶ 18, 246 P.3d at 942 (quoting *Gesina v. Gen. Elec. Co.*, 162 Ariz. 39, 45, 780 P.2d 1380, 1386 (App.1988)). If the contract language is reasonably susceptible to more than one meaning, extrinsic evidence may be admitted to interpret the contract. *Taylor v. State Farm Mut. Auto. Ins. Co.*, 175 Ariz. 148, 158–59, 854 P.2d 1134, 1144–45 (1993). Mere disagreement about a contract’s meaning, however, does not establish an ambiguity that requires admission of extrinsic evidence. *Chandler*, 175 Ariz. at 277, 855 P.2d at 791. “It is firmly established that where an agreement is reduced to writing in such terms as to express a complete contract, evidence of a contemporaneous oral agreement relating to the same subject matter, varying, contradicting or enlarging the written agreement, is inadmissible, in the absence of an allegation of fraud or mistake.” *U.S. Fidelity & Guaranty Co. v. Olds Bros. Lumber Co.*, 102 Ariz. 366, 368 (1967) (citations omitted).

Here, Mr. Thompson argues that his payment obligation under the Agreements did not arise until the private company sale was finalized and he had received his portion of the proceeds from such sale. However, the Agreements are silent as to any such condition. Mr. Thompson’s position fails because the actual language of the Agreements is not reasonably susceptible to the proposed interpretation. The Agreements are fully integrated and do not contain any provisions identifying the condition Mr. Thompson asserts existed. The alleged condition that Mr. Thompson asserts Plaintiffs agreed to would contradict the plain language of the Agreements regarding the closing

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date, the integration clause, and written amendment requirement. The Court finds that summary judgment is appropriate.

In his Response, Mr. Thompson states “As Plaintiffs agreed to at the time of contracting, Defendant is not obligated to issue payment to Plaintiffs until he has received the funds from this deal—a condition that has not yet occurred.” Response at 4. Mr. Thompson asserts that “[t]his condition was confirmed with Plaintiffs Brovitz and Mackinaw both through phone calls and through various text messages, and they were aware in making these Agreements that this was a necessary condition to payment being issued.” Dec. of K. Thompson ¶ 6. Included in Mr. Thompson’s Response are text messages between Jon Brovitz and Mr. Thompson that Mr. Thompson argues should be considered as parol evidence. Mr. Thompson has not provided any foundation for such text messages. Even if proper foundation had been established, such text messages are insufficient to establish a disputed material fact to preclude entry of summary judgment. The text messages attached by Mr. Thompson are all in reference to payment of the \$300,000 in exchange for dismissing the lawsuit—not to the original terms of the Agreements. Mr. Thompson does indicate in the messages that he was going to use the proceeds from the private company sale to buy out Plaintiffs:

- “I told you I would buy you guys out from the [REDACTED] sale and my liquidity.” Response, Ex. B at 2.
- “I told you I was buying you out with my [REDACTED] liquidity.” Response, Ex. B at 3.
- “You knew I was buying you guys out from my proceeds of this sale and we are now there.” Response, Ex. B at 5.

However, these statements fall short of showing the asserted condition in the Agreements. Rather, they show that Mr. Thompson planned on funding the buyout with proceeds from the private company sale not that the buyout was contingent on receipt of funds from the sale proceeds. Mr. Thompson even states that the private sale had nothing to do with Plaintiffs:

- “Not sure how this could have been more clear in regards to my sale situation of [REDACTED] (*although has nothing to do with you*): ‘On another note, the buyer [REDACTED] that won and we accepted their bud [*sic*] has confirmed they have the funds and ready to put in escrow and [REDACTED] has called a Board meeting for this Wednesday to sign the purchase and sale agreement and close...:’” Response, Ex. B at 4 (emphasis added).

Rule 56(e) requires that Mr. Thompson, “by affidavits or as otherwise provided in this rule, set forth specific facts showing a genuine issue for trial.” Mr. Thompson’s affidavit and text messages fail to set forth any *specific* facts sufficient to prevent summary judgment.

IT IS ORDERED granting Plaintiffs’ Motion for Summary Judgment.

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IT IS FURTHER ORDERED Plaintiffs shall lodge a form of judgment and file any application for attorneys' fees and costs on or before **June 28, 2021**.

IT IS FURTHER ORDERED vacating oral argument set June 2, 2021.