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IN THE SUPREME COURT OF THE STATE OF NEVADA

GABRIEL J. DALEY, Appellant, vs. ENCORE GROUP OF PROFESSIONALS LLC, *et al.*, Respondents.	**Supreme Court No. 84745** District Court Case No. A735644C

MOTION TO DISMISS APPEAL FOR LACK OF SUBJECT MATTER JURISDICTION AND FOR AN AWARD OF SANCTIONS, ATTORNEY FEES, AND COSTS

COME NOW, Respondents ENCORE GROUP OF PROFESSIONALS LLC, by and through its attorney of record, Kent P. Woods Esq. of the Law Office of Kent P. Woods LLC, and JOHN D. JACKSON, THE JOHN D. AND TERRI L. JACKSON FAMILY TRUST, ENCORE GROUP OF CALIFORNIA LLLP, ENCORE GROUP OF NEVADA LLC, ENCORE GROUP OF HAWAII LLC, and ENCORE GROUP OF TEXAS LLC (collectively, the "Encore Group Parties"), by and through their attorney of record, Phillip R. Emerson of Emerson Law Group, and move this Court for an order dismissing this appeal for lack of subject matter jurisdiction.

This Motion is made and based upon the pleadings and papers on file herein, the Points and Authorities filed herewith, and upon such other and further pleading and points and authorities as may be presented for the Court's consideration prior to or at the time of the hearing.

Introduction

This appeal is a dead letter because there has been no final judgment or order. The Appellant has merely appealed from an intermediate step in an enforcement process, and this Court's precedent is clear that no subject matter jurisdiction exists. If the Appellant feels that the District Court judge erred, the correct procedure would have been to wait until the District Court had entered judgment enforcing its order and then to appeal from such an order.

As it stands, regardless of the outcome of this appeal, further proceedings below will be necessary: if the Appellant succeeds, the District Court will either re-start the trial or conduct further inquiries into the settlement agreement it oversaw; if the Respondents prevail, the Respondents will have to ask the District Court to enter judgment and sanctions as the District Court deems appropriate.

Procedural History

The underlying facts of the case are outside the scope of this appeal. However, it is important to note that the Respondent Encore Group of Professionals LLC is a closely-held company managed by John D. Jackson. The Appellant, Gabriel J. Daley ("Daley") is Mr. Jackson's nephew. This dynamic informs certain of the actions and consequences in the underlying litigation.

Following six years of pre-trial litigation, in January of 2022 this case came to trial, to occur over a planned three-week period. After two full days of trial proceedings, Mr. Daley asked to settle the case. Counsel for both sides, genuinely wishing to foster familial harmony, assisted with the negotiations.

Before convening the jury on January 12, 2022, counsel met and presented a settlement structure that all thought fair: Mr. Daley would sign a promissory note in

favor of the Plaintiff in the amount of the accumulated fees and costs from inception of the case through January 12, 2022. If Daley were to pay $25,000 before the end of 2022, the balance of the note would be forgiven. As an additional benefit to Encore Group to swallow the debt forgiveness, counsel observed that Encore Group potentially could reap a tax benefit and that Daley would mitigate the corresponding tax cost through careful planning.

Knowing Mr. Daley not wisely but too well, the Encore Group Parties' counsel insisted on memorializing the settlement agreement on the record. Notably, Daley did not reserve any contingencies or provisos with respect to the terms stated above. He did not make the agreement subject to a review by tax counsel or discussions with his spouse. In reliance on the recorded agreement, the District Court told the jury of the settlement, dismissed the jury, and vacated the trial. Thereafter, Daley refused to execute final settlement documentation, and the Encore Group Parties filed a Motion to Enforce the Settlement Agreement (the "Motion"), effectively asking the District Court to recognize the settlement agreement and to instruct Mr. Daley to finalize documentation. The Encore Group Parties also asked for an award of fees and costs related to the Motion.

Daley opposed the Motion to Enforce on the grounds that (a) the settlement agreement was not enforceable because it was not reduced to writing; (b) the terms of the settlement were not sufficiently precise; (c) that the settlement agreement contained an unspoken condition of his tax advisor's satisfaction with the agreement; and (d) that a mutual mistake had occurred as to the tax effect of the agreement.

In her order granting the Motion in part and denying it in part, Judge Barisich of the District Court rejected Daley's arguments *in toto*. A true and correct copy of Judge Barisich's written memorandum opinion is attached to this Motion. The District Court found that the agreement was sufficiently precise in that it contained all material terms, i.e., that the trial be vacated and that the Daley would provide a promissory note in the amount of the Encore Group Parties' accumulated fees and

costs that would be forgiven after payment of $25,000. The District Court found that Nevada statute would resolve any missing terms of the settlement agreement and directed Daley to execute final documentation reflecting those terms. Notably, the District Court stopped short of reducing the settlement agreement to judgment and denied without prejudice the Encore Group Parties' request for attorney fees and costs related to the Motion. *See* Mem. Op. at 4 ("If any party fails to work in good faith to complete the settlement agreement, an appropriate motion can be filed and the Court will determine if sanctions are warranted."). It is from this order that the present Appeal arises.

Argument

I. The Court Lacks Subject Matter Jurisdiction

This Court has appellate jurisdiction to review decisions of the district court. Nev. Const. art. 6 § 4. That jurisdiction is limited, however, and the Court may only consider appeals that are specifically authorized by statute or rule. *See Valley Bank of Nev. v. Ginsburg*, 110 Nev. 440, 444 (1994); *Brown v. MHC Stagecoach, LLC*, 129 Nev. 343, 344 (2013).

Nevada Rule of Appellate Procedure defines the types of orders for which an appeal is permitted, namely, "a final judgment entered in an action or proceeding commenced in the court in which the judgment is rendered." Nev. R. App. P. 3A(b)(1). Notably, there has been no document labeled "judgment" lodged in this case, and the case itself remains open on the District Court's docket. In certain cases, the question of finality of a judgment or order is obvious; however, the finality of an order or judgment "depends on what the order or judgment actually does, not what it is called." *See Brown*, 129 Nev. at 344 (quoting *Valley Bank of Nev. v. Ginsburg*, 110 Nev. 440 (1994)). To be final, an order or judgment must "dispose of all the issues presented in the case, and leave[ ] nothing for the future consideration of the court, except for post-judgment issues such as attorney's fees and costs." *Lee v. GNLV Corp.*, 116 Nev. 424, 426 (2000).

This case does not present an issue of first impression. In *Valley Bank of Nevada v. Ginsburg*, 110 Nev. 440 (1994), this Court concluded that a district court's order approving a settlement agreement was not a final, appealable judgment because the parties' claims were not dismissed or otherwise resolved. *See also Brown v. MHC Stagecoach, LLC*, 129 Nev. 343 (2013) (quoting *Valley Bank*). This brings Nevada's jurisprudence in line with the conclusions of other states that have addressed the issue. *See*, *e.g.*, *St. Louis Union Station Holdings, Inc. v. Discovery Channel Store, Inc.*, 272 S.W.3d 504, 505 (Mo. Ct. App. 2008) (noting that an order granting a motion to enforce a settlement agreement becomes final and appealable only after a judgment on the settlement is entered and the case is dismissed); *Compare Resnick v. Valente*, 97 Nev. 615, 615-16, 637 P.2d 1205, 1205 (1981) (considering an appeal from an order granting a motion to enforce a settlement agreement where a judgment was also entered pursuant to the motion).

In this case, likely in the interest of giving Daley the opportunity to handle himself professionally before resorting to hard sanctions, the District Court stopped short of reducing the settlement agreement to judgment. To the contrary, Judge Barisich instructed Daley to enter final, binding agreements that reflected the terms set forth on the record and left it to the attorneys to use their professional judgment to make that happen. Awarding judgment or sanctions, inevitably, will be the next step of enforcement. To that end, in its memorandum opinion, the District Court invited the Encore Group Parties to seek an award of attorney fees or further enforcement steps if Mr. Daley were to prove himself recalcitrant. *See Mem. Op.* at 4 ("If any party fails to work in good faith to complete the settlement agreement, an appropriate motion can be filed and the Court will determine if sanctions are warranted.").

Ultimately, no matter the outcome of this Appeal, further efforts before the District Court will be necessary. If Mr. Daley prevails, the District Court will be called upon either to constitute a new jury and re-commence trial or, alternatively,

to undertake further proceedings to determine the terms of the settlement agreement. If the Encore Group Parties prevail, by contrast, they will then need to take the step of asking the District Court to reduce the settlement agreement to judgment and otherwise to enforce. Either way, though, further proceedings will be necessary, and this is the death knell to the appeal. *See Brown v. MHC Stagecoach, LLC* , 129 Nev. at 347 ("Once the district court formally resolves the underlying case by entering a judgment or order that finally and completely resolves [the parties'] claims based on its prior order enforcing the settlement agreement, if aggrieved, [the parties] may appeal from that disposition to this court.") (citing *Lee*, 116 Nev. at 426, 996 P.2d at 417; *Valley Bank of Nev.,* 110 Nev. at 446, 874 P.2d at 733-34).

II. An Award of Costs and Sanctions is Appropriate

Rule 38(a) provides that, if an appeal is frivolous, the Court may impose monetary sanctions. *See* Nev. R. App. P. 38(a). Sanctionable behavior occurs "when an appeal has frivolously been taken . . . [or] has been taken . . . solely for the purposes of delay." Nev. R. App. P. 38(b). Moreover, Rule 39 states that, when an appeal is dismissed "costs are taxed against the appellant, unless the parties agree otherwise." Nev. R. App. P. 39(a)(1).

This appeal was a dead letter from outset, and the Appellant or his counsel could have determined that through a simple search. This is not a hard case: there are no fewer than three Supreme Court precedents that directly address the issue of the finality of an order enforcing a settlement agreement that is not coupled with a judgment sanction. *See Brown v. MHC Stage Coach LLC*, 129 Nev. 343 (2013); *Valley Bank of Nev. v. Ginsburg* 110 Nev. 440 (1994); *Lee v. GNLV Corp.*, 116 Nev. 424 (2000); *Resnick v. Valente*, 97 Nev. 615, 615-16, 637 P.2d 1205, 1205 (1981). Mr. Daley either did not examine the question of jurisdiction or did not care. Either way, he foisted the cost of his own lawyering wholly onto the Respondents, and this is not appropriate.

More to the point, though, this appeal only exists to delay or create leverage. The underlying settlement agreement was entered on the record, and Mr. Daley reneged. Faced with enforcement, he raised arguments that a first-year law student would have blushed to advance, and the District Court rejected them. And all of this aside, the parties are likely to be back here again when the District Court completes its enforcement mechanisms. This is merely the latest in a long series of bad faith steps by Mr. Daley, and he will not learn his lesson until a court imposes some consequences. In this case, sanctions under Rule 38 and an award of fees and costs under Rule 39 are the appropriate.

Conclusion

Precedent in this court is clear, and this appeal is not presently justiciable. The Encore Group Parties are eager to take their victory, but an extended briefing schedule followed by dismissal is not in anyone's interest where a further appeal is likely once the District Court awards judgment and sanctions. To that end, and because the non-justiciability of this appeal is apparent from even a basic search of Supreme Court precedent, the Encore Group Parties request that this Court enter an order dismissing the appeal, awarding sanctions to the Respondents and attorney fees and costs related to the appeal, and entering such other and further relief as this Court deems necessary and appropriate.

Dated: June 28, 2022

Respectfully submitted,
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EXHIBIT A - DISTRICT COURT MEMORANDUM OPINION

A-16-735644-C

DISTRICT COURT
CLARK COUNTY, NEVADA

Other Contract | **COURT MINUTES** | **March 31, 2022**

A-16-735644-C Encore Group of Professionals, Plaintiff(s)
vs.
Gabriel Daley, Defendant(s)

March 31, 2022 **3:00 AM** **Minute Order**

HEARD BY: Barisich, Veronica M. **COURTROOM:** Chambers

COURT CLERK: Carolyn Jackson

RECORDER:

REPORTER:

PARTIES PRESENT:

JOURNAL ENTRIES

- This matter came before the Court on Plaintiff and Third Party Defendants' Joint Motion to Enforce Settlement Agreement and for Fees and Costs. After hearing the oral arguments, the Court took the matter UNDER ADVISEMENT. After carefully considering the evidence and arguments submitted, and good cause appearing, the COURT FINDS and ORDERS as follows:

The jury trial began on January 10, 2022. On January 12, 2022, after the jury was selected and the counsels made their respective opening statements, the counsels indicated that they reached a settlement and the terms were placed on the record. Plaintiff's counsel stated the terms of the settlement as follows: (1) Defendant will executed a promissory note in favor of the Plaintiff. The amount of the note is to be the attorney's fees and costs Plaintiff and Third Party Defendants incurred from the inception of the case to date (January 12, 2022). (2) Defendant will relinquish and disclaim any interest in Plaintiff or its affiliates. (3) Amount of the promissory note and the terms will be negotiated following the hearing. (4) If Defendant pays $25,000 before the end of 2022, the remainder of the promissory note will be forgiven. Defendant's counsel then stated that "we agree those are the terms". The Court then set a status check about 30 days out for the submission of the settlement documents. The jury was then summoned to thank them for their service and to inform them a resolution was reached. The jury was then dismissed.

However, settlement documents were not submitted to date. Instead, Plaintiff and Third Party Defendants filed the instant joint motion to enforce settlement agreement and for fees and costs, which Defendant opposed.

Under Nevada law, a settlement agreement is a contract, and therefore governed by basic contract principles such as an offer and acceptance, meeting of the minds, and consideration. May v. Anderson, 121 Nev. 668, 672, 119 P.3d 1254, 1257 (2005). In determining whether a contract has been sufficiently formed, preliminary negotiations do not constitute a binding contract unless the parties have agreed to all material terms. Id. In a case of a settlement agreement, a court cannot compel compliance when material terms remain uncertain. Id. Release terms, by their nature, are generally held to be material to any settlement agreement. Id. When the parties are in dispute regarding the terms of the release, then there is no settlement agreement. Id. However, even though parties can agree upon the settlement amount and negotiated over many of its terms, a settlement agreement is still not enforceable if the scope of the release terms remained unresolved. Id. at 674, 1258 (citing to Bontigao v. Villanova University, 786 F.Supp 513, 515-16 (E.D.Pa.1992)). Therefore, there is no "meeting of the minds" when the parties have not agreed upon the settlement agreement's essential terms. See Certified Fire Prot. Inc. v. Precision Constr., 283 P.3d 250, 255, 128 Nev. Op. 35 (Aug. 9, 2012) ("A meeting of the minds exists when the parties have agreed upon the contract's essential terms."). As to the settlement terms what were not written down, but put on the record during a hearing, such settlement is enforceable. Grisham v. Grisham, 128 Nev. 679, 686, 289 P.3d 230, 235 (2012). While recorded testimony has no signature, a signature's only purpose is authentication, and this is amply supplied in the case of an admission in court. Id.

Mistake of fact occurs when a person understands the facts to be other than they are. General Motors v. Jackson, 111 Nev. 1026, 1032, 900 P.2d 345, 349 (1995). Mutual mistake occurs when both parties, at the time of contract, share a misconception about a vital fact upon which they based their bargain. Id. Under general principles of contract law, unilateral mistake is not a ground for rescission unless the other party knows or has reason to know of the mistake. Id.; Oh v. Wilson, 112 Nev. 38, 40, 910 P.2d 276, 278 (1996) ("Unilateral mistake may be basis for rescission of agreement only if the other party had reason to know of mistake or if other party's fault caused the mistake.")

"Courts have consistently held that one is bound by any document one signs in spite of any ignorance of the document's content, providing there has been no misrepresentation." Yee v. Weiss, 110 Nev. 657, 662, 877 P.2d 510, 513 (1994). In Yee, the Nevada Supreme Court cited to the Restatement (Second) of Contracts 172 (1981):

A recipient's fault in not knowing or discovering the facts before making the contract does not make his reliance unjustified unless it amounts to a failure to act in good faith and in accordance with reasonable standards of fair dealing.

The Yee Court then states, "the comments to 172 note that if the recipient should have discovered the falsity by making a cursory examination, his reliance is clearly not justified and he is not entitled to relief; he is expected to use his senses and not rely blindly on the maker's assertions." Id.

Promissory estoppel can be used as "consideration substitute" to support release of liability under a guaranty contract. Pink v. Busch, 100 Nev. 684, 689, 691 P.2d 456, 459 (1984). To establish promissory estoppel, four elements must exist: party to be estopped must be apprised of true facts, he must intend that his conduct shall be acted upon or must so act that party asserting estoppel has right to believe it was so intended, party asserting estoppel must be ignorant of true state of facts, and he must have relied to his detriment upon conduct of party to be estopped. Id.

Contract interpretation is a question of law. Redrock Valley Ranch LLC v. Washoe County, 127 Nev. 451, 460, 254 P.3d 641, 647 (2011). Public Policy favors the settlement of disputes and thus, stipulations should not be easily set aside. Id. at 460, 648.

The Court FINDS and CONCLUDES that there was a binding settlement agreement that was entered on record on January 12, 2022. All material terms were provided, which are as follows: (1) Defendant will executed a promissory note in favor of the Plaintiff. The amount of the note is equal to the attorney's fees and costs that Plaintiff and Third Party Defendants incurred from the inception of the case to date (January 12, 2022). (2) Defendant will relinquish and disclaim any interest in Plaintiff or its affiliates. (3) Amount of the promissory note and the terms will be negotiated by the parties following the hearing. (4) If Defendant pays $25,000 before the end of 2022, the remainder of the promissory note will be forgiven.

The Court FINDS and CONCLUDES that although Defendant argues that there are missing material terms, the Court cannot agree. At the hearing, Defendant did condition his acceptance of the terms with review with his tax attorney or accountant before giving his final approval. Although Defendant argues that the parties never agreed to when the $25,000 payment being due by the end of 2022, this is contradicted by the transcript of the hearing. Terms of the promissory note, specifically regarding the maturity date and interest rate are indeed not put on the record and the parties were to negotiate the terms after the hearing. However, under NRS 99.040(1), if the parties were unable to agree on the interest rate, the interest rate would be set as the prime rate plus 2%. Defendant failed to show to the Court why the lack of agreement on the maturity date on the promissory note is material, especially given that if $25,000 is paid before the end of 2022, remaining amount on the promissory note will be waived.

The Court FINDS and CONCLUDES that Defendant failed to show that there was mutual or unilateral mistake regarding whether the settlement agreement was conditional. Specifically, Defendant argues that he believed that the settlement agreement was conditioned on him reviewing the terms with his tax attorney or accountant before final approval and that the parties did not agree to $25,000 payment being due by the end of 2022. However, again, the due date of $25,000 payment

is clearly set forth in the transcript. At best, this is a unilateral mistake by Defendant, which is not a ground for rescission unless Defendant can prove that Plaintiff and/or its counsel knew of this mistake and misrepresented it to the Court. Defendant failed to make any showing to the Court that the opposing parties and their counsel were aware of this mistake and misrepresented it to the Court. The transcript is clear and the terms put on the record must be enforced. Furthermore, there was no evidence that settlement agreement presented on the record is not final and Defendant still had to review the terms with this tax attorney or accountant before giving his final approval. Furthermore, although Defendant alleges subsequent agreement that modified the material terms of the agreement, this allegation is not supported by any affidavit or other evidence.

The Court FINDS and CONCLUDES that the settlement agreement that was put on the record on January 12, 2022 was a binding, final agreement. If the Court, and the parties and their counsel, believed otherwise, the jury would not have been dismissed and the jury trial be adjourned. Defendant cites to AO 22-02, which was announced on January 13, 2022, for the proposition that the jury trial would have to be suspended. Even if Defendant's interpretation is correct, the parties and their counsels, and the Court, were unaware of this administrative order when the settlement agreement terms were negotiated and put on the record on January 12, 2022. Thus, Defendant's argument as to AO 22-20 is a red herring.

The Court FINDS and CONCLUDES that promissory estoppel is applicable because Defendant was apprised of the true facts. If there were some conditions that were negotiated, but were inadvertently not revealed to the Court, Defendant was certainly aware of the missing terms before the settlement terms were put on the record. Defendant intended that his conduct is to be acted upon. The emails exchanged subsequently to the hearing by the parties' respective counsels show that the parties were acting to complete the settlement terms that were put on the record i.e. the terms of the promissory note. There was no showing that other parties or their counsels were aware of any purported missing conditions. Plaintiff and Third Party Defendants relied to their detriment upon Defendant's conduct because they agreed to settle their case instead pushing forward with litigation.

The Court FINDS and CONCLUDES that as to request for attorney's fees and costs, although the motion to enforce settlement agreement is granted, Defendant presented at least a genuine dispute over whether certain terms were material. Thus, the case does not fall under EDCR 7.60 and no finding that Defendant acted unreasonably, frivolously, or that the opposition was obviously frivolous, unnecessary or unwarranted shall be made. However, the parties and their respective counsels must work together to complete the terms of their settlement agreement regarding the promissory note. If any party fails to work in good faith to complete the settlement agreement, an appropriate motion can be filed and the Court will determine if sanctions are warranted.

The Court ORDERS that motion shall be GRANTED in part, DENIED in part. Motion to enforce settlement agreement shall be GRANTED. Motion for fees and costs shall be DENIED.

Counsel for Plaintiff or Third Party Defendants' is directed to submit a proposed Order consistent with this Minute Order and the submitted briefing. Counsel may add language to further supplement the proposed Order in accordance with the Court's findings and any submitted arguments. Defendant's counsel is to review and countersign as to form and content. Counsel is directed to have the proposed Order submitted to chambers within 14 days consistent with AO 21-04 and EDCR 7.21.

CLERK'S NOTE: This Minute Order was electronically served by Courtroom Clerk, Carolyn Jackson, to all registered parties for Odyssey File & Serve. /cj 03/31/21