OA 3-8-85

IN THE SUPREME COURT OF FLORIDA

CASE NO. 66,039

JOSEPH ROBBIE, THE SOUTH FLORIDA SPORTS CORPORATION and THE MIAMI DOLPHINS, LTD.

Petitioners

vs.

CITY OF MIAMI

Respondent

RESPONDENT'S BRIEF ON THE MERITS

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INTRODUCTION

Joseph Robbie unequivocally guaranteed payment for two additional games to be played by his team. When the City reduced the agreement to writing, Mr. Robbie refused to sign the agreement which included an "Act of God" clause and the City refused to sign without it. Having reached this impasse, the trial Court imposed Mr. Robbie's version as an agreement and the Third District Court of Appeal reversed finding that the parties "did not have a meeting of the minds as to an essential element of their proposed 'settlement.'"

STATEMENT OF THE FACTS AND CASE

The City of Miami claimed againt Joseph Robbie, the South Florida Sports Corporation and the Miami Dolphins Ltd., for unpaid rent at the Orange Bowl. The pleadings include a complaint, amended complaint, counterclaim, answers and affirmative defenses (R 1-65).

The Court ruled in favor of the City on its motion for summary judgment claiming unpaid rent:

> ORDERED AND ADJUDGED that Summary Judgment is granted in favor of the Plaintiff, City of Miami, as to liability under County I of the Amended Complaint and that Summary Judgment is denied as to damages under Count I of the Amended Complaint (R 579).

In other words, petitioners were liable to the City for the unpaid rent claimed, but the amount of damages would be determined at trial.

The transcript of the hearing of August 5, 1983 (Vol. VI, pages 1-104) is relevant to this proceeding and attached to the petitioners' appendix on appeal, as A 91-190.

The parties then entered into settlement negotiations with references to all claims on which the Court had not ruled. The petitioners presented a settlement proposal to the City Commission (R 601-614), which passed a resolution authorizing the Manager and City Attorney to execute settlement papers (A 39-44).

The City Attorney's Office drafted a Stipulation and Order of Dismissal, which included the following clause:

> 1. That Joseph Robbie, The South Florida Sports Corporation, and The Miami Dolphins, Ltd., agree that the Miami Dolphins football team will play a tenth home football game, which game will not be a playoff game of any sort, in the Miami Orange Bowl Stadium during both the 1985 and 1986 regular football seasons as defined by the June 8, 1977 Agreement between the Miami Dolphins, Ltd. and the City of Miami or, in the alternative, if the said tenth home game is not played <u>for any reason</u>, that Joseph Robbie, The South Florida Sports Corporation and The Miami Dolphins, Ltd. agree to pay to the City of Miami Thirty Thousand ($30,000.00) Dollars for each such tenth game not played, without credit or setoff for any expenses, costs or obligations not incurred by the City of Miami because of the non-occurrence

> of such tenth game in 1985 and/or 1986. [Emphasis added.]
>
> (R 626)

The parties agreed to enter into a supplemental agreement pursuant to Paragraph No. 3 of the Stipulation and Order of Dismissal also prepared by the City. The supplemental agreement included the following:

> Par. 28. No liability of any kind shall be incurred by either of the parties hereto should the Orange Bowl Stadium, during the term of this Agreement become unfit for events to the played or staged therein because of any Act of God or public enemy except that this provision will in no fashion or way relieve the PARTNERSHIP of its obligation to pay Thirty Thousand Dollars ($30,000.00) per each guaranteed tenth home game in the 1985 and 1986 seasons not played as set forth in Paragraph No. 2 of this Supplemental Agreement as such obligation is assumed in partial compensation for the PARTNERSHIP's failure of performance under the June 8, 1977 Agreement prior to July 18, 1983. The CITY agrees to maintain the [ORANGE BOWL] during the term of and any renewal or extension of this Agreement in a safe physical condition and suitable for the playing of professional football games.
>
> (R 626; A 56).

The petitioners refused to sign the supplemental agreement if it included the above paragraph. Respondent refused to delete the paragraph (R 593-595; A 17-20).

Petitioners filed a motion to enforce the settlement, without paragraph 28 and a hearing took place before the trial Judge (Vol. VI, pages 1 - 104; A 91 - 190).

The Court ruled that paragraph 28 (referred to as "Act of God/Public Enemy" clause) should be stricken:

> 5. Defendants [respondent] fully and properly executed each of the settlement documents to the extent required to be executed by them, after Defendants properly struck therefrom the change proposed by the City of Miami to Paragraph 28 of the June 8, 1977 Agreement as said proposed change was not part of the settlement (R 716; A 13).

The Court further ruled that the City was deemed to have signed the settlement "exclusive of the proposed change to Paragraph 28 of the June 8, 1977 Agreement which was properly stricken" (R 717, A 13, Paragraphs 8 and 9).

The City appealed to the Third District Court (R 642) which reversed the trial Court (A 1-11). Petitioners then appealed to this Court under a "Petition for Writ of Common Law certiarari" and the writ issued.

ISSUE ON APPEAL

WHETHER THE THIRD DISTRICT CORRECTLY HELD THAT THE PARTIES HAD NOT REACHED A SETTLEMENT WHERE THEY DISAGREED AS TO MATERIAL ISSUES OF FACT.

"There must be mutuality of agreement, and there can be no such mutuality where there is no common intention. Kuharske v. Lake County Citrus Sales, 44 So.2d 641 (Fla. 1949). See also Hewitt v. Price, 222 So.2d 247 (Fla. 1969)." See Gaines v. Nortrust Realty Mgt., Inc., 422 So.2d 1037, 1039 (Fla. 3d DCA 1982). Gaines involved a dispute between a landlord and a tenant over the computation of the base rental rate of property. The parties included, as part of the settlement negotiations, the nature of releases to be exchanged. The landlord insisted on general releases while the tenant would only sign a release pertaining to the action at issue and reserved the right to sue the landlord on any future claims.

The attorneys' discussion pertinent to the appeal was off the record and the appellate Court held that the trial Curt erred in conjecturing that the parties had at least agreed to release each other from claims pertaining to the lease:

> In the present case, no meeting of the minds as to an essential element of the agreement existed. . .
>
> Which of those possible releases was to be exchanged was neither clearly expressed nor mutually understood during the discussions. While the trial judge may have logically concluded that

> Nortrust would not have agreed to accept anything less than a release of all claims arising under the lease, his logic is not a substitute for the missing ingredient, that is, a mutual understanding between the parties. (Emphasis added.)
>
> Gaines, at 1040.

Here, the City contends that Joe Robbie and The Dolphins agreed to pay the sum of $30,000 for an additional game during 1985 and 1986, whether such a game is played or not; petitioners believed that they do not owe the rental if the game cannot be played as a result of an Act of God or war. The trial Court ruled in favor of petitioners, imposing its own logic and interpretation of the proceedings before the City Commission:

> Now, in examination of the transcript of the proceedings before the City Commission on July 18th and the ensuing resolution prepared by the city counsel, there is nothing inconsistent between the two, and they authorize the agreement which was prepared by the city and forwarded to the defendants (A 187).

To summarize respondent's argument:

> A Court may not add terms to a settlement which were not in the contemplation of the parties. Southwest E & T Suppliers, Inc. v. American Enka Corp., 463 F.2d 1165, 1166 (5th Cir. 1972).
>
> Florida Education Association Inc. v. Atkinson, 481 F.2d 662 (5th Cir. 1973).

The trial Court mentions that the challenged paragraph was not discussed at the City Commission meeting. A detailed analysis of the City Commission minutes shows that

many comments were made which were not included in the settlement agreement and that the agreement includes matters of substance of legal significance, which were not discussed at the Commission meeting.

Furthermore, the intent of petitioners is quite clear with reference to their guarantee of $30,000 per game during the 1985 - 1986 seasons:

> MAYOR FERRE: . . . In addition to that, I want to say that I wanted for a guarantee. The problem and the reason why Robbie wouldn't agree until 6:30 was I said if by any chance they do not play the tenth in the year '85 and '86. I want $30,000 per game. That is $60,000. They have to assure, they have to guarantee that they are going to play . . .
>
> MR. SHEVIN: We changed the contract. We are agreeing to do that. (A 30)
>
> * * *
>
> MR. PLUMMER: No, sir, I am sorry. Bob did you make the statement, $150,000 per game?
>
> MR. SHEVIN: No $100,000 per game; $200,000 for two games, and we are saying a guarantee of $60,000. (A 34)

There is no question that the issue of a guarantee was discussed. Whether Robbie intended to guarantee that a tenth game would be played or whether the City expected a guarantee of $30,000 per game, regardless of the game were matters that were certainly discussed. It is incomprehensible that given the above quotes from the City Commis-

sion meeting, the trial Court could conclude that the "proposed change was not part of the settlement" (R 716; A 13; Paragraph 5). The fact that the parties arrived at different conclusions of what constituted the settlement means that there was no settlement, not that one party should prevail in interpretation over the other's.

The existence of ambiguity in a proposed settlement agreement will prevent its enforceability. Gaines holds that:

> 'For [a settlement] to be binding on the parties it should be clear that it is full and complete, covers all issues, and is understood by all litigants concerned.' Cross v. Cook, 147 Ga. App. 695, 250 S. E. 2d 28, 29 (1978). See also Rock-Weld Corporation of Puerto Rico v. Rock-Weld Equipment Corp. of Florida, 184 So.2d 186 (Fla. 3d DCA 1966) (in order to constitute a settlement agreement, the language of the agreement must be clear).
>
> Gaines, at 1040.

In the instant case the parties never even reached an agreement as to the payment of rental in the event of an Act of God or war. Unlike other cases where a procedure is established to resolve a problem and the parties then disagree as to whether the procedure was followed, the parties here never reached an accord as to the procedure itself. Dorson v. Dorson, 393 So.2d 632 (Fla. 4th DCA 1981), where the appellant did not file timely objections to an accounting and was bound by same. The Court held that

settlements are governed by contract law and "'the intention of the parties to a contract will be ascertained from a consideration of the whole agreement.' Torcise v. Perez, 319 So.2d 41, 42 (Fla. 3d DCA 1975); Point Mgt. Inc. v. Dept. of Business Regulation, 449 So.2d 306 (Fla. 4th DCA 1984) ("a settlement agreement between parties to litigation is in fact a contract)." "Secondly, [a] contract will be construed according to its own clear and unambiguous terms. Cueto v. John Allmond Boat, Inc., 334 So.2d 30, 32 (Fla. 3d DCA), cert. denied, 341 So.2d 290 (Fla. 1976)." Dorson, at 633. See, Weingart v. Allen & O'Hara, Inc., 654 F.2d 1096, 1103-1105 (5th Cir. 1981).

In determining the issue of mutual consent to a contract courts only look at the "objective intent" of the parties. Objective intent has been defined in Gendzier v. Bielecki, 97 So.2d 604, 608 (Fla. 1957):

> The rule is probably best expressed by the late Justice Holmes in 'The Path of the Law,' 10 Harvard Law Review 457, where it was stated in part that 'The making of a contract depends not on the agreement of two minds in one intention, but on the agreement of two sets of external signs -- not on the parties having meant the same thing but on their having said the same thing.'

When the parties here attempted to reduce to writing what each thought it had said at the Commission meeting, the results were very different. In the event of an act of God or War, which would prevent the playing of a tenth game, the

parties became $30,000 apart. There was never any agreement on this issue and the trial Court was powerless to rule in either one's favor or to have struck a compromise of its own.

If after the Commission minutes, Resolution, settlement drafts and telephone conferences the parties had totally different concepts of one section of the agreement, then there was no meeting of the minds, no agreement on objective signs. A binding settlement is "full and complete, covers all issues, and is understood by all litigants concerned" Gaines v. Nortrust Realty Mgt. Inc., 422 So.2d 1037, 1039 (Fla. 3d DCA 1982); Where a party asserted a settlement, but the other party denied it, "a genuine issue of material fact as to whether there was a settlement precluded summary judgment." Guy v. Kight, 431 So.2d 653 (Fla. 5th DCA 1983).

The party which seeks a judgment on a settlement has the burden of establishing assent by the opposing party. Massachusetts Casualty Ins. Co. v. Formon, 469 F.2d 259, 261 (5th Cir. 1972). The assent may be clear from the contract itself, or by an acceptance of the benefits of the agreement. Kisz v. Massry, 426 So.2d 1009, 1011, (Fl. 2d DCA 1983). Here, the parties never completed the settlement

agreement itself, much less accepted any of its benefits.

Respondents rely on Blackhawk Heat. & P. Co. Inc. v. Data Lease Fin. Corp., 302 So.2d 404 (Fla. 1974), where this Court quashed a decision which upheld a final judgment interpreting a contested section of an option agreement between the parties. The Court reviewed the case law on contracts, as interpreted by Professor Corbin, and ruled that the option agreement was not so uncertain that it could not be enforced.

The argument raised there was that since the amount of money could not be determined from the wording of the challenged section, thus the contract was unenforceable. Not so, since mathematical computations would disclose the correct amount. Here, the dispute is not over the amount of money per tenth game (all parties agree that the amount would be $30,000 per game without any setoffs), but under what circumstances it would be paid: Was the guarantee of $30,000 represented to the City Commission without any exceptions? Or could the petitioners avail themselves of acts of God for nonperformance?

The real issue in Gendzier v. Bielecki, 97 So.2d 604 (Fla. 1957) involved improper instructions to the jury. The judge allowed the jury to consider an invoice, initialed by

the parties for identification only, as evidence of a contract agreed to as an account stated. The question of intent of the parties was discussed and quotes Justice Holmes (page 8 of this brief).

The challenged Paragraph, No. 28, was absolutely necessary to effect the terms of the settlement, regardless of whether it was phrased or vocalized by anyone prior to its reduction to writing. The parties clearly agreed upon a $30,000 guarantee instead of a tenth game if for any reason, such game was not played. That is the test against which the tenth game must be measured: an absolute guarantee. If petitioners do not view the guarantee as all encompassing and the City does, then there is no objective meeting of the minds, no settlement, no agreement and the trial Court was wrong in ruling otherwise.

Petitioners also rely on Kisz v. Massry, 426 So.2d 1009, 1011 (Fla. 1983) in which:

> There is no issue as to whether the agreement was entered into or whether appellants received the benefit therefrom. These facts were contained in the court approved statement of the evidence and proceedings. (Emphasis added).

The attorneys for the parties agreed on the day of a mortgage foreclosure sale that the full amount of the judgment against appellants, plus costs would be paid and

the foreclosure sale was cancelled.

Here, the entire issue revolves around whether there was an agreement at all. Kisz proceeded from a basis very different from the instant case. Respondents would obliquely introduce the concept of a settlement agreement as grounds upon which to argue Kisz, when no such agreement exists.

CONCLUSION

Based upon the foregoing arguments and citations of authority, the opinion of the Third District should be affirmed and the Writ should be discharged.

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Respondent's Brief on the Merits has been furnished to Robert L. Shevin, One Southeast Third Avenue, Suite 3000, Miami, Florida by mail this 11th day of February, 1985.

Respectfully submitted,

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