UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA

In re Citi-Boise Partners III, BKY 95-36020

Debtor.

John A. Hedback, Trustee for the Bankruptcy Estate of Citi-Boise Partners III,

Plaintiff,

v. ADV 00-3082

KEG Equity Group, LLC and Citi Equity Group, Inc.,

Defendants.

In re Citi-Chateau Crete Partners, BKY 95-35473

Debtor.

John A. Hedback, Trustee for the Bankruptcy Estate of Citi-Chateau Crete Partners,

Plaintiff,

v. ADV 00-3083

KEG Equity Group, LLC and Citi Equity Group, Inc.,

Defendants.

MEMORANDUM ORDER

This matter came before the Court at Saint Paul, Minnesota, for trial on the plaintiff-

trustee's complaint for interpleader, on January 30, 2001. Richard A. Anderson and Philip R. Schenkenberg appeared for KEG Equity Group, LLC (KEG),[1] and Charles F. Webber and Deborah Ellingboe appeared for Citi Equity Group, Inc. (CEG).

This Court has jurisdiction over this matter as a core proceeding under 28 U.S.C. §§ 157(b)(2)(A) and (O), and § 1334. Based upon the proceedings and all the relevant files and records contained herein, and for the reasons set forth below, the Court now makes this ORDER pursuant to the Federal and Local Rules of Bankruptcy Procedure.

I. BACKGROUND

The plaintiff John A. Hedback is the Chapter 7 trustee for the bankruptcy estates of Citi-Boise Partners III and Citi-Chateau Crete Partners. KEG, a Delaware limited liability company, holds allowed administrative expenses and general unsecured claims in the Citi-Boise and Citi-Chateau bankruptcy cases. Pursuant to the final reports and proposed distributions in both cases, the plaintiff proposes distributions to KEG in the amounts of $14,092.41, in the Citi-Chateau case, and $6,111.11, in the Citi-Boise case.

By writ of execution issued by this Court on February 8, 2000, related to a prior judgment (the Judgment) entered in favor of CEG against KEG, CEG sought to collect from the plaintiff the sums due KEG from the Citi-Boise and Citi-Chateau estates. KEG disputed the validity of the writ and the underlying Judgment, and the plaintiff filed this adversary proceeding to resolve the competing claims to the pending distributions.

On May 20, 1997, in an adversary proceeding (95-3277) brought by CEG against KEG (arising out of CEG's bankruptcy case 94-32494), this Court entered judgment

[1] This entity is alternatively referred to as Koll Equity Group.

against KEG and in favor of CEG, pursuant to a confession of judgment, in the amount of $999,548.61.

In the meantime, an action was commenced in California by a nationwide class of investors who had made investment purchases sponsored by CEG. Among the defendants in the class action were two investment banks, American Investment Bank and American Investment Financial. AIB and AIF held promissory notes executed by the plaintiff investors, and purchase price reserve funds in the amount of $294,500.00, to which the plaintiff investors asserted a claim.

Both CEG and KEG also claimed entitlement to the reserve funds. Because of concern over the competing interests in the reserve funds, AIB and AIF required the participation of CEG and KEG in any proposed settlement. The resulting settlement was negotiated and drafted by and through counsel for the plaintiff class.

On June 1, 1998, CEG and KEG entered into a Mutual Release and Settlement Agreement (the Agreement) along with the plaintiff investors and the defendants in the California class action. The Agreement provided for distribution of the reserve funds in payments of $40,000.00 each to KEG, CEG, and the CEG partnerships (the general partnerships of which were acquired by KEG), and a payment of $174,500.00 to the plaintiff class of investors. The Agreement included a release of AIB and AIF by KEG and the Class Parties, a release of the Class Parties by KEG, and a release of KEG by the Class Parties. It is this third release which is at issue in this case.

It is undisputed that both CEG and KEG are bound by the terms of the Agreement. It is moreover undisputed that CEG is a “Class Party” as defined by and for purposes of

the Agreement. KEG contends that the Class Party release of KEG provided in the Agreement released KEG from the Judgment. CEG claims the contrary.

The relevant section of the Agreement provides:

> 4. Release of KEG
>
> (a) Effective as of the Effective Date, the Class Parties release and discharge KEG and all of its members and all of their direct and indirect parents, subsidiaries and affiliates and all of its current and former directors, officers, employees, attorneys, and agents, its heirs, executors, administrators, successors and assigns, from all actions, causes of action, suits, debts, dues, sums of money, accounts, reckonings, bonds, bills, specialties, covenants, contracts, controversies, agreements, promises, variances, trespasses, damages, judgments, extents, executions, claims, any demands whatsoever, in law, admiralty, or equity, whether known or unknown, against which the Class Parties and/or their successors and assigns, ever had, now have or hereafter can, shall or may have for, upon, or by reason of any matter, cause or thing whatsoever from the beginning of the world to the Effective Date which (i) relate to the Class Litigation, (ii) arise from any litigation with or investment whether by means of equity or indebtedness in or with respect to Citi Equity Group, Inc., the Limited Partnerships, or any Citi Equity limited partnership, or any of them, or (iii) were, or could have been, asserted against KEG in the Class Litigation.

Put concisely, the release provision apparently indicates that: CEG released KEG from any judgment which: (1) arose from any litigation with CEG; or (2) arose from any investment in or with respect to CEG; or (3) could have been asserted against KEG in the Class Litigation. In the face of this patent general release, CEG relies on the final sentence of item 4(a), which provides:

> However, this release pertains only to the Class Litigation and shall not effect any rights any limited partner may have vis-a-vis KEG pertaining to KEG's conduct as a general partner in any partnerships KEG acquired from Citi Equity through the Citi-Equity bankruptcy proceeding.

II. CHOICE OF LAW

In its trial brief, KEG argued that California law applies to the construction of the Agreement. CEG did not expressly disagree in its brief, but under the heading "applicable law" cited only Minnesota law. The Agreement contains a choice of law clause which provides:

> 7. Governing Law
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> This Agreement shall be interpreted under, and governed by, the laws of the State of California without regard to its choice of law principles.

The issue was neither raised nor discussed by either party at trial.

A bankruptcy court applies the choice of law rules of the state in which it sits. See Amtech Lighting Services Co. v. Payless Cashways, Inc. (In re Payless Cashways) 203 F.3d 1081,1084 (8th Cir. 2000). "Minnesota courts traditionally enforce contractual choice-of-law provisions made 'in good faith and without an intent to evade the law.'" See U.S. Bank Nat. Ass'n v. Angeion Corp., 615 N.W.2d 425, 429 (Minn.App. 2000); Hagstrom v. American Circuit Breaker Corp., 518 N.W.2d 46, 48 (Minn.App.1994); Milliken and Co. v. Eagle Packaging Co., Inc., 295 N.W.2d 377, 380-n1 (Minn.1980); *see also* Rowlette & Associates v. Calphalon Corp., 2000 WL 385502, *3 (Minn.App.). Accordingly, the Court will rely on California principles of contract interpretation in construing the Agreement.[2]

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[2] In Minnesota, the first step before making a choice of law is ordinarily to determine that a conflict exists between the laws of the two forums. See Nodak Mut. Ins. Co. v. Am. Family Mut. Ins. Co., 604 N.W.2d 91, 93-94 (Minn. 2000). "A conflict exists if the choice of one forum's law over the other will determine the outcome of the case." Id. Although Minnesota's policy of enforcing choice of law clauses itself provides an adequate basis to apply California law in this case, the Court's review of the laws of both states, in light of the facts of this case, affords the conclusion that there is no outcome determinative difference in any event.

III. DISCUSSION

"[I]nterpretation of a settlement agreement is governed by the same principles applicable to any other contractual agreement." See Winet v. Price, 4 Cal.App.4th 1159, 1165 (Cal. Ct. App. 1992). The Court's "objective in construction of the language used in the contract is to determine and to effectuate the intention of the parties." Id. at 1166 (citation omitted). "[E]vidence of the undisclosed subjective intent of the parties is irrelevant to determining the meaning of contractual language," and any evidence to the same is "not competent extrinsic evidence." Id. at n.3.

"A written release extinguishes any obligation covered by the release's terms, provided it has not been obtained by fraud, deception, misrepresentation, duress, or undue influence." See Bardin v. Lockheed Aeronautical Systems Co., 82 Cal.Rptr.2d 726, 732 (Cal. Ct. App. 1999); Kinghorn v. Citibank, 1999 WL 30534 (N.D. Cal. 1999); Skrbina v. Fleming Companies, Inc., 45 Cal.App.4th 1353, 1366 (Cal. Ct. App. 1996) (citations omitted); *see also* Cal. Civ. Code § 1541 (2000).

There can be no dispute that the Agreement contains a general release of the Judgment. The unequivocal language of the release terminates KEG's liability on any judgment resulting from any litigation with a Class Party, which unarguably includes CEG. The Judgment was a product of litigation in this Court between CEG and KEG, and it was rendered between the beginning of the world and prior to the Effective Date of the Agreement. There is no other interpretation that can be reasonably attached to the plain words of the Agreement, and no allegations have been made nor evidence presented in support of any theory of deceptive or coercive inducement.

CEG's reliance on the final sentence of the release is misplaced. First, that the provision limits its applicability to the Class Litigation is consistent with construing the release to include the Judgment. The Agreement defines "Class Litigation" as "the pertinent litigation described in the Settlement Documents." The pertinent litigation necessarily includes the California class action, but that action was commenced to obtain a distribution of funds to which KEG and CEG also claimed an interest.

KEG's liability to CEG was inextricably intertwined with resolution, by settlement, of entitlement to the reserves. KEG would only consent to a distribution of those funds to plaintiff class investors if KEG were released by CEG on its right to execute on those same funds. CEG's right to KEG's interest derived from the Judgment. Consistent with determining that CEG was formally interested in the Class Litigation described in the Agreement, and indeed CEG's participation was required to settle the litigation, is the fact that the Agreement specifically labels CEG a Class Party, for purposes of the Agreement, in spite of the fact it was not a party in the underlying class action. Moreover, CEG does not dispute that it is a Class Party and bound by the terms of the Agreement.

However, even were the Court to find that CEG was not part of the Class Litigation referred to in the final sentence of the release, it would be of no moment. The limitation of the release to only the Class Litigation merely begins a single sentence, and the rest of that clause in context renders one exclusive and self-contained concept. The rest of that last sentence defines exactly what rights are being preserved from the release: any claims that a limited partner, of a partnership acquired by KEG from CEG, may have against KEG, as a general partner of such a partnership.

This second part of the provision itself also fails to extricate CEG from the plain effect of the release. CEG is not and was not a limited partner in any such partnership and the sentence simply has no effect upon CEG. In fact, the provision was drafted for the sole purpose of protecting plaintiff investor rights against KEG, along with an identical provision in KEG's release of the Class Parties, protecting KEG's rights as general partner against any limited partners in those same partnerships acquired from CEG. Moreover, CEG played no part in negotiating this language, which was agreed upon as a result of discussions between KEG and the represented plaintiff class.

The Court finds that the "threshold determination" of whether the Agreement contains ambiguity is plainly resolved to certainty in favor of no ambiguity.[3] However, both parties offered evidence outside the Agreement in support of their respective interpretations of the Agreement and in furtherance of identifying the presence or lack of assent to the release of the Judgment. See Edwards v. Comstock Ins. Co., 252 Cal.Rptr. 807, 809 (Cal. App. Ct. 1988) (extrinsic evidence permitted as proof that circumstances surrounding execution of a release indicated a lack of assent).

Indeed, although "[t]he general rule is that when a person with the capacity of reading and understanding an instrument signs it, he is, in the absence of fraud and imposition, bound by its contents, and is estopped from saying that its provisions are contrary to his intentions or understanding, ... it is also a general rule that the assent of a

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[3] See Paralift, Inc. v. Levin, 29 Cal.Rptr.2d 177, 180 (Cal. Ct. App. 1993); Winet v. Price, 4 Cal.App.4th 1159, 1165 (Cal. Ct. App. 1992) (when no parol evidence is introduced, requiring construction of the instrument solely based on its own language, or when the competent parol evidence is not conflicting, construction of the instrument is a question of law, and the [] court will independently construe the writing).

party to a contract is necessary in order that it be binding upon him, and that, if the circumstances of a transaction are such that he is not estopped from setting up his want of assent, he can be relieved from the effect of his signature if it can be made to appear that he did not in reality assent to it." See Bardin, 82 Cal.Rptr.2d at 732; Skrbina, 45 Cal.App.4th at 1366-67; Edwards v. Comstock Ins. Co., 252 Cal.Rptr. 807, 809 (Cal. App. Ct. 1988).

Interestingly, the extrinsic circumstances presented in this case, the evidence beyond of the four corners of the Agreement, are not disputed. Unfortunately for CEG, the facts surrounding the Agreement are also not inconsistent with a plain reading of the Agreement, and do not reasonably support CEG's claim of a lack of assent.

The Agreement was drafted by James Hoey, counsel for the plaintiff investors of the underlying California class action. Leonard Sebesta on behalf of CEG, and counsel for CEG, Dennis Ryan, did not conduct negotiations directly with Michael Leseney of KEG. In fact, it appears that there was no direct discussion of the Agreement between anyone from CEG and KEG. Instead, Hoey conducted the negotiations separately and delivered drafts of the settlement back and forth between the parties.

The release language in the Agreement evolved in just this way. A preliminary draft provided that subsection (ii) of the release language would state: "arise from any investment whether by means of equity or indebtedness in or with respect to CEG." Leseney wrote to Hoey and requested the addition of "litigation with or" immediately following the word "any." In a letter to both Ryan, counsel for CEG, and Leseney of KEG, dated less than one week later, Hoey enclosed the Agreement with the revisions made

pursuant to Leseney's proposed change. Accordingly, the Agreement thereafter provided a release of any obligation (or judgment) arising from any litigation or investment ... in or with respect to CEG.

CEG contends that the lack of direct communication between CEG and KEG on this particular revision amounts to a "nondisclosure" of KEG's intent to have the Judgment released as part of the Agreement, and that therefore "that intent is irrelevant." The Court finds it somewhat disingenuous for CEG to claim that KEG's failure to point out the revision and its intended result directly to someone at CEG is a legitimate basis to allege a lack of assent. Hoey presented the revision to CEG, and even if he had not, CEG admits that its principal and its counsel read the Agreement before signing it.[4]

Likewise, KEG admits that it had no direct contact with CEG or its attorney regarding the language of the Agreement, but correctly argues that the lack of direct negotiation does not, in this case, undermine the plain language of the Agreement or necessarily reflect an intent contrary to a usual reading of the terms of the Agreement. KEG asserts that in fact there were several more circumstances upon which it is reasonable to conclude that CEG understood the release of KEG in the Agreement to include the Judgment.

KEG introduced credible evidence that Sebesta believed KEG to be insolvent; that CEG had served a writ of execution on a proposed KEG distribution in another case in January 1998, but ultimately did not object to the distribution to KEG in July 1998,

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[4] As an aside, the Court agrees that had CEG not intended to release the million dollar Judgment, it would have required an exception to be enunciated with care and precision into the Agreement, especially having experienced counsel.

(following execution of the Agreement); and that CEG made representations to this Court during the period in which the Agreement was being negotiated, which representations reasonably conveyed an understanding that the Agreement extinguished the Judgment.[5]

None of these facts tend to show that Leonard Sebesta, on behalf of CEG, "was not in full possession of his faculties and did not know the meaning of the words to which he was agreeing." See Edwards v. Comstock Ins. Co., 252 Cal.Rptr. 807, 809 (Cal. App. Ct. 1988). Moreover, there is nothing here which could possibly support a conclusion that Dennis Ryan, as counsel to CEG, could have reasonably believed that the language of the Agreement "did not mean what it said." Id.

In fact, CEG was represented by counsel, the plaintiff investors were represented by counsel who drafted the Agreement and communicated revisions between CEG and KEG, and KEG was not represented by counsel. This is not a case "involv[ing] an unsophisticated claimant who is presented with a form release on a 'take it or leave it'

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[5] Actually, the Court finds the representations made to it by CEG in the CEG bankruptcy case quite disturbing. In CEG's motion for an order closing its Chapter 11 case, and again in its memorandum in support of the same, CEG stated that the Plan was "fully consummated and the property of the estate to be administered under the Plan has been liquidated," and that all contested matters had been fully resolved (except for an appeal unrelated to KEG). In CEG's final application for allowance of fees and expenses for its attorneys, CEG again repeated that all adversary proceedings and contested matters were concluded (except one matter unrelated to KEG) and most importantly that "[t]he uncertainty which caused the Court to prohibit payment in its February 21, 1996 Order has been removed. It appears that funds presently held by the Debtor will be nearly sufficient to pay administrative expenses in full. The Debtor *expects to receive additional funds in the future from its settlement with KEG* which should be sufficient to pay any remaining administrative expenses. The Debtor will make pro rata distributions to the administrative expense claimants until all such claims are paid in full." In addition to being patently at odds with CEG's present contentions in this matter, the representations made to this Court as to CEG's ability to fund administrative expense claims in full was, shall we say, inaccurate. The evidence before the Court today is that CEG in fact had only approximately half of the funds required (more than one million dollars). The only settlement pending between CEG and KEG at the time of CEG's final application for attorney fees and expenses was the Agreement at issue in this case. CEG's claim that the settlement it referred to was in fact the Judgment is not credible.

basis and signs the release without the benefit of counsel." See Winet, 4 Cal.App.4th at 1170.

"Where, as here, no conflicting parol evidence is introduced concerning the interpretation of the document, 'construction of the instrument is a question of law, and the [] court will independently construe the writing.'" See Paralift, Inc. v. Levin, 29 Cal.Rptr.2d 177, 180 (Cal. Ct. App. 1993). There is nothing in the record that contradicts the plain language of the Agreement and the release of KEG by CEG therein, and indeed the record is replete with indications that the reasonable expectations of the parties was, or should have been, that the Agreement would release KEG from the Judgment. See Paralift, Inc. v. Levin, 29 Cal.Rptr.2d at 181 (a release is enforceable if its enforcement would not defeat the reasonable expectations of the parties to the contract).

All that remains to potentially undermine the efficacy of the release in the Agreement, therefore, are the subjective intentions of the parties. Sebesta and Ryan testified that neither of them ever understood the Agreement to release KEG from the Judgment. Sebesta testified that he would not have entered into the Agreement had he known that KEG expected the Judgment to be thereby released.

The idea behind CEG's participation in the Agreement, apparently, was exclusively to obtain a distribution from the reserve funds held by AIB and AIF, and otherwise release any claim it may have had against KEG only with respect to those reserve funds. In other words, although the Agreement does not recite anything of the sort, CEG claims that it merely gave up the right to garnish the reserve funds in return for a partial distribution of those funds.

Nevertheless, it is well settled that when a party signs a "release on the mere unspoken belief that the release did not encompass such claims, despite express language in the release to the contrary, he may not now rely on his unspoken intention not to waive these claims in order to escape the effect of the release." See Bardin, 82 Cal.Rptr.2d at 733, citing Skrbina, 45 Cal.App.4th at 1367. "By [their] own admission, [the parties] read the release, then signed it 'willingly' to obtain the benefits provided in return for [that] signature." See Skrbina, 45 Cal.App.4th at 1367.

"The law imputes to a person an intention corresponding to the reasonable meaning of his words and acts. It judges of his intention by his outward expressions and excludes all questions in regard to his unexpressed intention. If his words or acts, judged by a reasonable standard, manifest an intention to agree in regard to the matter in question, that agreement is established, and it is immaterial what may be the real but unexpressed state of his mind on that subject." Edwards v. Comstock Ins. Co., 252 Cal.Rptr. at 810 (citation omitted).

IV. CONCLUSION

"Release, indemnity and similar exculpatory provisions are binding on the signatories and enforceable so long as they are clear, explicit and comprehensible in each essential detail," and "[s]uch an agreement, read as a whole, must clearly notify the prospective releasor or indemnitor of the effect of signing the agreement." See Skrbina, 45 Cal.App.4th at 1368.

The Agreement in this case is not difficult to understand or composed of confusing or misleading wording. "On its face, this language could not be plainer." See Skrbina, 45

Cal.App.4th at 1369. Indeed, the release provision is explicitly definite, broad, and repetitive. The use of the word "or" is precise, and the premier application of the label "Class Litigation" in advance of a limitation with respect to the rights of limited partners is intelligible of its own accord and makes sense in the context of the negotiated purpose of that narrow provision.

"It is the outward expression of the agreement, rather than a party's unexpressed intention, which the court will enforce." See Paralift, Inc. v. Levin, 29 Cal.Rptr.2d 177, 180 (Cal. Ct. App. 1993). Each action and circumstance of the parties involved in the preparation and execution of the Agreement evince mutual intentions to finally resolve all outstanding liabilities with the exception of those between limited partnerships in which KEG was the general partner. The language of the Agreement, and the release particularly, was drafted with much care and was reviewed by sophisticated counsel for CEG. A claim now to the contrary is unsupported by objective evidence and therefore the release must be enforced.

V. DISPOSITION

For the reasons set forth above, IT IS HEREBY ORDERED:

1. The effect of the Mutual Release and Settlement Agreement was a complete release by CEG of its judgment against KEG, dated May 20, 1997, and entered by this Court, in the amount of $999,548.61.

2. The pending distributions to KEG, in the amount of $6111.11 from the bankruptcy estate of Citi-Boise Partners III, and in the amount of $14,092.41 from the bankruptcy estate of Citi-Chateau Crete Partners, are not subject to execution by CEG pursuant to its May 20, 1997, judgment against KEG in the amount of $999,548.61, the same having been released in the Mutual Release and Settlement Agreement dated June 1, 1998; and

3. The Chapter 7 trustee for the bankruptcy estates of Citi-Boise Partners III and Citi-Chateau Crete Partners, John A. Hedback, is hereby ordered to make the pending distributions, described in item 2 above, to KEG.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: March 7, 2001

/e/ Dennis D. O'Brien
Hon. Dennis D. O'Brien
United States Bankruptcy Judge

ELECTRONIC NOTICE OF ENTRY AND FILING ORDER OR JUDGMENT Filed and Docket Entry made on March 7, 2001
Patrick G De Wane, Clerk By SKM
Deputy Clerk

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