**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**October 10, 2006**

**Cornelia G. Clark**
**Clerk of Court of Appeals**



**Appeal No. 2005AP2214** **Cir. Ct. No. 2004CV3004**

**STATE OF WISCONSIN** **IN COURT OF APPEALS**
**DISTRICT I**

---

**IN THE MATTER OF THE JUDICIAL DISSOLUTION OF R&R FINANCIAL, INC., D/B/A COMPETITIVE MORTGAGE LENDERS:**

**STEVEN P. ROBELL,**

**PETITIONER-RESPONDENT,**

**V.**

**MARK A. RALFS,**

**RESPONDENT-APPELLANT.**

---

APPEAL from an order of the circuit court for Milwaukee County: PATRICIA D. McMAHON, Judge. *Affirmed in part, reversed in part, and cause remanded with directions; motion for frivolous appeal costs denied.*

Before Wedemeyer, P.J., Fine and Kessler, JJ.

¶1 FINE, J. Mark A. Ralfs appeals an order granting Steven P. Robell's motion to enforce a Settlement Agreement governing the dissolution of Ralfs's and Robell's business, R&R Financial, Inc., d/b/a Competitive Mortgage Lenders. Ralfs claims that the circuit court erred when it concluded that he violated the Settlement Agreement. We affirm in part, reverse in part, and remand with directions.

¶2 Robell seeks frivolous-appeal costs under WIS. STAT. RULE 809.25(3). We deny the motion.

I.

¶3 Robell and Ralfs were the sole shareholders of Competitive Mortgage Lenders, a mortgage brokerage business. In March of 2004, Robell petitioned the circuit court to dissolve the business, alleging that he and Ralfs could not agree on how to distribute corporate profits and revenues, and that Ralfs was "acting in a manner that may be illegal, oppressive or fraudulent in relationship to the corporate activities." *See* WIS. STAT. § 180.1430(2). Ralfs counterclaimed, alleging that Robell had improperly distributed corporate funds.

¶4 On September 29, 2004, Robell and Ralfs stipulated to the terms and conditions of dissolution, which were placed on the Record and approved by the circuit court. *See* WIS. STAT. RULE 807.05. They also signed a Settlement Agreement, which provided, as material to this appeal:

> 14. Ralfs shall provide evidence of the sale of both the 1995 and 2004 Lexus automobiles, including providing copies of checks and/or Bills of Sale or other sale records with respect to the sale of said automobiles.

> ….
>
> 17. Neither party shall have the right to use the name R&R Financial, Inc. or Competitive Mortgage Lenders in the future, but it is understood and agreed by both Robell and Ralfs that either party may use a similar name.
>
> ….
>
> 20. That the Corporation's final tax return is due two and one-half (2 ½) months following the date of dissolution, to wit: January 15, 2004 [*sic* – should be 2005]. Therefore, any and all tax information necessary to complete and prepare said return shall be submitted to the Corporation's accountants no later than November 30, 2004. The parties shall accept the Corporation's accountant's determination regarding the tax return; its preparation; and the tax due, if any.
>
> ….
>
> 22. That in the event either party is required to initiate legal proceedings to enforce the terms and/or conditions of this Settlement Agreement, then and in that event, the successful or prevailing party shall be entitled to a payment from the losing party of all reasonable expenses, including, but not limited to, court costs, witness fees and actual attorney fees incurred by the successful or prevailing party.

Robell started his own business under the name Accurate Mortgage and Closing Services, LLC, and Ralfs started his own business under the name Competitive Mortgage Lending, Inc.

¶5 In February of 2005, Robell sought to enforce the Settlement Agreement. As material, Robell claimed that Ralfs had violated the Settlement Agreement by: (1) naming his new corporation Competitive Mortgage Lending, Inc., and (2) "demanding" that the corporation's accountant revise the corporation's as-of-then unfiled 2003 tax return. Robell also requested sanctions and penalties, and reimbursement of the money he had to pay under the revision of

the 2003 tax return as the result of the tax treatment of a car purchased by the business. Ralfs responded with his own motion to enforce the Settlement Agreement, and for sanctions and penalties. In June of 2005, the circuit court held an evidentiary hearing on the dispute. We address these matters in sequence.

A. *The Name of the Business.*

¶6 Robell testified that Ralfs's use of the name "Competitive Mortgage Lending" put Robell at a "competitive disadvantage" because "the common person off the street and former customers would not be able to identify the difference especially in the content [and] the way it is being used." Robell then offered several exhibits to support his claim that Ralfs was intentionally using the same name for his new business:

- dictionary definitions of "lend," "lenders," and "lending," which Robell claimed showed that "lending" is a derivative of "lenders";

- photographs taken on December 11, 2004, showing that Ralfs had the old business name—Competitive Mortgage Lenders—posted in front of his new business;

- 1995, 2001, and 2002 newspaper advertisements Robell claimed he had developed for Competitive Mortgage Lenders and 2005 newspaper advertisements for Competitive Mortgage Lending, which Robell claimed showed that Ralfs had used "the same basic ad, same logo; and to the average consumer, obviously the same ad";

- an envelope from Competitive Mortgage Lenders and an envelope from Competitive Mortgage Lending which, as testified by Robell, to an "average person" would not seem "different[]"; and

- monthly statements from December of 2004 through May of 2005 showing that Ralfs was conducting business with Fannie Mae in the company's old name.

¶7 Ralfs testified that he considered his ability to use a similar name to be a "competitive advantage" for which he had paid a "financial premium," and that when he ordered the signs for his new business in late September or early October of 2004, he ordered the signs in the old name, Competitive Mortgage Lenders, because he "didn't know until the very end that we were going to settle or what was going to happen, so I thought we still had a chance of being Competitive Mortgage Lenders." He admitted, however, that he knew that when he was in court on September 29, when the terms of the Settlement Agreement were put on the Record, he could no longer use the old name.

¶8 When asked by Robell's lawyer on cross-examination whether people would be able to distinguish between Competitive Mortgage Lenders and Competitive Mortgage Lending, Ralfs replied, "I hope they would think of them as the same." He also admitted that someone looking at the new advertisements and envelopes "would think it was the same entity." Ralfs also testified that while Robell "provided input as to how the ads were designed," Ralfs's wife's public relations communications firm designed the logo. Additionally, Ralfs claimed that he had tried to change the account with Fannie Mae in December of 2004 and January of 2005, pointing to a fax his new business had sent to Fannie Mae in January of 2005, but that Fannie Mae did not change the account.

¶9 The circuit court ordered Ralfs to change the name of his new corporation within sixty days of the order's signing.

B. *Tax Return*.

¶10 The dispute over the revision of the 2003 corporate tax return appears to center around the sale of the 2004 Lexus automobile, although the parties have left the Record less than crystal-clear on this point. As we have seen, the Settlement Agreement required Ralfs to sell the Lexus. Robell testified that the corporate accountant, in a letter that the trial court received into evidence at the hearing, told Robell that the corporation's 2003 tax return had to be revised to account for the tax-treatment of the sale. The accountant's letter was received into evidence, and read, as material:

> Mark [Ralfs] was in on Friday and we reviewed the settlement paperwork and then I revised the R&R corporate return (Mark [Ralfs] had never mailed it) to take out the … $25,000 [Internal Revenue] Code Sec. 179 deduction on [the Lexus] because it was sold this year. (You have to hold an asset 3 years to avoid recapturing the 179 expense).

(Parentheticals in original; brackets and ellipses added.) Robell's lawyer wrote to the accountant, questioning the revisions. The accountant responded in a letter also received in evidence at the hearing:

> An important element to keep in mind is that a Sub S corporation is a "pass through" entity. The profits and/or losses pass thru to the stockholders, as do interest income, contributions, and the Code Section 179 expense of $25,000. Thus Steve [Robell] and Mark [Ralfs] each got a $12,500 deduction. In Steve[ Robell]'s case I accidentally entered it on the 4797 line of the input screen which made it income instead of a deduction on his personal return. Thus he has a refund coming for 2003.
>
> In order to qualify for the 179 deduction the vehicle has to be kept in service for three years. If it isn't then you have to "**recapture**" the deduction by **going back and amending the 1040 for the year it was taken. This is Federal tax law.** It does not matter that it was sold after Steve [Robell] was out of the corporation. The deduction was for 2003 and passed thru onto his personal return. The normal route is that Steve [Robell] would have been legally

> responsible to amend his return to take out the deduction and pay the tax due. In this case he actually gets money back, but he cannot keep the 179 deduction.
>
> The actual sale of the vehicle will appear on the 2004 corporate return but the [section] 179 deduction was originally on the 2003 corporate return and you cannot put the recapture into 2004.

(Bolding in original.) Robell also testified that he did not authorize or give Ralfs the authority to revise the 2003 corporate tax return and claimed that, as a result of the revision, he was required to pay an additional $5,200.

¶11 The circuit court concluded that Ralfs violated the Settlement Agreement when he: (1) named his new business Competitive Mortgage Lending, Inc., and (2) authorized the corporation's accountant to revise the 2003 tax return without consulting Robell. The circuit court also awarded Robell $5,200 "as and for Ralfs' violation of the Settlement Agreement" in connection with Ralfs's failure to consult with Robell before authorizing the 2003 tax revisions and $8,500 for costs and attorney's fees.

II.

¶12 This appeal presents mixed questions of fact and law. The circuit court's determinations of credibility and of the weight to be given to each witness's testimony are findings of fact. *See* ***Teubel v. Prime Dev., Inc.***, 2002 WI App 26, ¶13, 249 Wis. 2d 743, 751, 641 N.W.2d 461, 464. We will not disturb a circuit court's findings of fact unless they are clearly erroneous. *See* WIS. STAT. RULE 805.17(2).

¶13 The Settlement Agreement is a contract between Robell and Ralfs. *See* ***American Nat'l Prop. & Cas. Co. v. Nersesian***, 2004 WI App 215, ¶14, 277 Wis. 2d 430, 440, 689 N.W.2d 922, 927 (settlement agreement is a contract). The

interpretation of a contract presents a question of law that we review *de novo*. *See* ***ibid.*** "If the terms of the contract are plain and unambiguous, it is the court's duty to construe the contract according to its plain meaning even though a party may have construed it differently." ***Woodward Commc'ns, Inc. v. Schockley Commc'ns Corp.***, 2001 WI App 30, ¶9, 240 Wis. 2d 492, 498, 622 N.W.2d 756, 759–760.

¶14 Ralfs contends that the circuit court erred when it found that he had violated the Settlement Agreement by: (1) naming his new business Competitive Mortgage Lending, Inc., and (2) improperly authorizing the corporation's accountant to revise the 2003 tax return. We address each claim in turn.

A. *The Name of the Business.*

¶15 As we have seen, the Settlement Agreement provides: "Neither party shall have the right to use the name R&R Financial, Inc. or Competitive Mortgage Lenders in the future, but it is understood and agreed by both Robell and Ralfs that either party may use a similar name." The circuit court concluded that Ralfs had violated this provision because the name for his new company, Competitive Mortgage Lending, Inc., was the "same" as the name of the old company, Competitive Mortgage Lenders: "This Court finds that the distinction [between Lenders and Lending] is without a difference. The name Competitive Mortgage Lending is the same as Competitive Mortgage Lenders by any common sense reading of the words as well as any dictionary definition. The use of [the] name violates the agreement." Ralfs argues that the circuit court's interpretation of this aspect of the Settlement Agreement is contrary to its plain language. We disagree.

¶16 The difference between the two names (an "ers" at the end of "Lend" in the former business, and an "ing" at the end of "Lend" in Ralfs's new business) is, as the circuit court recognized, *de minimis*, and does not transform the names' congruency from "same" to merely "similar," *see* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 2007 (1993) ("same" defined as "3 : corresponding so closely as to be indistinguishable**:** closely similar **:** COMPARABLE") (small capitalization in original), any more than would changing the "s" at the end of "Lender" to an "S," and making the "M" and "L" lowercase – to read, with a symmetry of style, "Competitive mortgage lenderS." In reality, of course, few things above the molecular-structure level are wholly the "same" as their purported clones, although the word "same" can, in some contexts, be used to denote an atom-by-atom clone (as in, for example, "one regular water molecule is the 'same' as another"). To demand molecule-by-molecule, or letter-by-letter, identity here would impose on the Settlement Agreement an unworkable rigidity that would defeat the parties' intent as revealed by their agreement: that each shareholder would be able to remain in the mortgage brokerage business without palming-off their new enterprise as a mere continuation of the old. *See* ***Woodward Commc'ns***, 2001 WI App 30, ¶9, 240 Wis. 2d at 498, 622 N.W.2d at 759–760 ("If the terms of the contract are plain and unambiguous, it is the court's duty to construe the contract according to its plain meaning even though a party may have construed it differently."). Indeed, the circuit court found that "[t]he inference is strong that Ralfs did everything possible to lead people to believe that his business, Competitive Mortgage Lending, is the same as Competitive Mortgage Lenders."

B. *Tax Return.*

¶17 As we have seen, Paragraph Twenty of the Settlement Agreement provides:

> That the Corporation's final tax return is due two and one-half (2 ½) months following the date of dissolution, to wit: January 15, 2004 [*sic* – should be 2005]. Therefore, any and all tax information necessary to complete and prepare said return shall be submitted to the Corporation's accountants no later than November 30, 2004. The parties shall accept the Corporation's accountant's determination regarding the tax return; its preparation; and the tax due, if any.

The circuit court concluded that Ralfs had violated the Settlement Agreement because he did not consult with Robell before authorizing the accountant to revise the 2003 corporate tax return:

> The important part, and I'm troubled by this because it isn't part of the agreement, but the problem was Robell never had an opportunity to talk about it before the decision was made.
>
> It was a unilateral decision by Ralfs after the corporation was dissolved and there is nothing in the agreement that gives him authority to act on behalf of the dissolved corporation.
>
> Maybe had he talked to Robell and Robell had looked at it, they might have both agreed that this is the right way to go but he didn't.
>
> And I think that, that… It's kind of indicative about the way he approached this [as] if this was still his company. It was still-- He was still operating Competitive Mortgage Lenders; and, therefore, he didn't need to consult anybody else.
>
> And because of that failure to consult and failure to give an opportunity when there was time to do that, that resulted in Robell having to pay an additional $5200.
>
> And so I think because he intentionally failed to inform Robell, he's responsible for that amount.

(Ellipses in original; brackets added.) Ralfs contends that the circuit court's interpretation of Paragraph Twenty of the Settlement Agreement is wrong. On our *de novo* review, we agree.

¶18 Paragraph Twenty of the Settlement Agreement expressly delegated the preparation of the 2004 corporate tax return to the accountant, and did not impose any requirement that Ralfs and Robell first discuss what the accountant decided the law required. Although the Settlement Agreement did not specifically address the 2003 corporate tax return, as we have seen, the accountant explained that the 2004 return was bound-up with the 2003 return: "The actual sale of the vehicle will appear on the 2004 corporate return but the [section] 179 deduction was originally on the 2003 corporate return and you cannot put the recapture into 2004."

¶19 We reverse the circuit court's award of $5,200 relating to the tax-dispute over the Lexus and remand to the circuit court with directions to vacate that part of its order insofar as it stems from the circuit court's determination that Ralfs violated the Settlement Agreement by not consulting with Robell about the accountant's handling of the recapture matter. Additionally, the circuit court is to reassess the $8,500 costs and attorney's fee award in light of Ralfs's success on the corporate-tax-return issue. We affirm the circuit court's determination that Ralfs violated the Settlement Agreement by using the name Competitive Mortgage Lending.

III.

¶20 Robell seeks frivolous-appeal costs under WIS. STAT. RULE 809.25(3). Ralfs prevailed on his corporate-tax-return contention. Accordingly, we deny Robell's motion for frivolous-appeal costs. *See* ***Lenhardt v.***

***Lenhardt***, 2000 WI App 201, ¶16, 238 Wis. 2d 535, 545, 618 N.W.2d 218, 223–224 (we may not award fees under RULE 809.25(3) unless the entire appeal is frivolous).

*By the Court.*—Order affirmed in part, reversed in part, and cause remanded with directions; motion for frivolous appeal costs denied.

Publication in the official reports is not recommended.

**No. 2005AP2214(CD)**

¶21 KESSLER, J. (*concurring in part; dissenting in part*). I dissent from the majority's affirmance of the trial court's interpretation of the Settlement Agreement as applied to the name of the business. The Settlement Agreement, although prohibiting use of the name "Competitive Mortgage Lenders," specifically provided that "either party may use a similar name." There is no definition of "similar" in the Settlement Agreement. The majority "interprets" the plain language of the Settlement Agreement to prohibit exactly what is specifically permitted—namely the use of a similar name. (Majority at ¶¶15-16.) The majority admits that "Competitive Mortgage Lending, Inc.," the name used by Ralfs after dissolution, is not identical to "Competitive Mortgage Lenders" previously used by the now dissolved business. Had the parties wished to prohibit use of any name with the same or similar words as in the prior name, they could easily have done so. However, having chosen specifically to permit either party to "use a similar name," Robell cannot fairly complain when exactly that was done by Ralfs. Consequently, I would reverse the trial court decision on that issue.

¶22 On all other issues, I concur with the majority.