COURT OF APPEALS
DECISION
DATED AND FILED

March 22, 2011

A. John Voelker
Acting Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2010AP1175 **Cir. Ct. No. 2008CV990**

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

DEBRA K. SANDS,

PLAINTIFF-RESPONDENT,

V.

MH PRIVATE EQUITY FUND, LLC,

DEFENDANT-APPELLANT,

JOHN R. MENARD, JR., MENARD, INC., MIDWEST MANUFACTURING, CO., WOOD ECOLOGY, INC., COUNTERTOPS, INC., TEAM MENARD, INC., MENARD ENGINE GROUP, MENARD COMPETITION TECHNOLOGIES, LTD., MC TECHNOLOGIES, INC., MENARD ENGINEERING, LTD., ULTRAMOTIVE, LTD., MERCHANT CAPITAL, LLC, HAVERSTICK CONSULTING, INC., KRATOS DEFENSE & SECURITY SOLUTIONS, INC. AND MENARD THOROUGHBREDS, INC.,

DEFENDANTS.

APPEAL from an order of the circuit court for Eau Claire County: PAUL J. LENZ, Judge. *Affirmed*.

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. MH Private Equity Fund, LLC (MH Equity) appeals an order granting Debra Sands' motion to enforce a settlement agreement. MH Equity contends the circuit court erred because MH Equity never entered into a binding settlement agreement with Sands. We disagree and affirm.

BACKGROUND

¶2 On November 3, 2008, Sands filed a complaint in Eau Claire County circuit court against her ex-fiancé, John Menard, Jr., and fifteen business entities he allegedly owned or controlled, including MH Equity. Sands sought to recover a portion of the assets accumulated during her cohabitation with Menard, including a partial ownership interest in MH Equity.

¶3 MH Equity is an Indiana-based private investment fund. It is managed by MH Equity Managing Member, LLC (Managing Member), which also holds a twenty-percent ownership interest. On January 30, 2009, Managing Member filed a complaint against Sands in Indiana superior court, alleging Sands breached a fiduciary duty to Managing Member by serving as its attorney in Indiana when she did not hold an Indiana law license. *See* ***MH Equity Managing Member, LLC v. Sands***, 938 N.E.2d 750, 753 (Ind. Ct. App. 2010). Managing Member sought disgorgement of $170,000 in attorney fees it allegedly paid Sands. *See* ***id.***

¶4 On November 23, 2009, Steven Shockley, counsel for MH Equity and Managing Member, telephoned Sands' counsel, Daniel Shulman, to discuss

settlement. Shockley proposed that Sands dismiss with prejudice her Wisconsin claims against MH Equity in exchange for Managing Member dismissing with prejudice its Indiana claim against Sands. On November 24, Shockley wrote an e-mail to Shulman, again offering to settle the Indiana and Wisconsin cases:

> Attached is the motion for summary judgment I intend to file tomorrow (Wednesday) afternoon if we are unable to agree on the resolution I offered yesterday (*dismissal of Ms. Sands' claims against MH Equity in the Wisconsin case in exchange for dismissal of MH Equity Managing Member's claims against Ms. Sands in its Indiana case*). ...
>
> As I mentioned yesterday, my client wishes to fix its costs of litigation now. Please respond to my offer before Noon on Wednesday, November 25.

(Emphasis added.) Shulman responded later that afternoon:

> Steve, *we accept your offer*. *I think dismissals with prejudice and mutual releases are in order*. Do you want to draft them or should we?

(Emphasis added.) Shockley replied:

> Thanks for your response. I will prepare for your review a stipulation for dismissal of Managing Member's lawsuit here in Indiana. If you would prepare a mutual release and a stip[ulation] for dismissal of MH Equity in the Wisconsin lawsuit for me to review, I would appreciate it.

Shulman responded that his associate would draft the Wisconsin stipulation and the mutual release and get them to Shockley "as quickly as possible." Later that day, Shockley provided Shulman with a stipulation and order for dismissal of Managing Member's Indiana claim. By reply e-mail, Shulman approved the Indiana stipulation.

¶5 On November 27, Shulman's associate e-mailed Shockley a draft stipulation and order for dismissal of Sands' Wisconsin claims. The next day, Shockley took issue with the Wisconsin stipulation and order, writing:

> I have some issues with your Stipulation and Order. My proposed revisions are attached, and the reasons for my revisions are as follows.
>
> First, I assume [WIS. STAT. §] 807.05, like [FED. R. CIV. P.] 41(a)(1)(A)(ii) and its counterpart in the Indiana Trial Rules, requires a stipulation for dismissal to be signed by "all parties who have appeared," so I have added a signature line for Web Hart as counsel for the Menard Defendants. …[1]
>
> Second, I do not agree that a Stipulation like this is an appropriate place to attempt to release claims by and against affiliates of the parties. That should be done in a separate release agreement, which you agreed to draft. (See the attached email.)
>
> Finally, to be clear, our agreement is limited to the dismissal and release of Sands' claims against [MH Equity] in the Wisconsin case and MH Managing Member's claims against Sands in the … Indiana case. …
>
> Please review the attached and let me know on Monday if they are acceptable. Also, please let me know when I can expect to have a draft of the release agreement.

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[1] The "Menard Defendants" refers to John Menard, Jr., Menard, Inc., and Menard Thoroughbreds, Inc.

WISCONSIN STAT. § 807.05 (2009-10), provides:

> No agreement, stipulation, or consent between the parties or their attorneys, in respect to the proceedings in an action or special proceeding shall be binding unless made in court or during a proceeding conducted under s. 807.13 or 967.08 and entered in the minutes or recorded by the reporter, or made in writing and subscribed by the party to be bound thereby or the party's attorney.

Contrary to Shockley's assertion, the statute does not require a stipulation for dismissal to be signed by all parties who have appeared.

¶6 By reply e-mail, Shulman's associate sent Shockley a draft release agreement. Shockley sent back a "redline[d]" version of the agreement on December 1. Although Shockley had edited the release, its core terms remained the same: namely, Sands agreed to dismiss with prejudice her claims against MH Equity in exchange for Managing Member's dismissal with prejudice of its claims against Sands. Shortly after Shockley e-mailed the redlined release to Shulman, Shockley wrote another e-mail confirming his authority to settle on the terms set forth in the release, stating, "My clients have approved the redline I sent you earlier this afternoon."

¶7 However, the next day, Shockley informed Shulman that the settlement was off because counsel for the Menard Defendants had refused to consent to MH Equity's dismissal from the Wisconsin case:

> The proposed Settlement and Release Agreement between Debra Sands and MH Equity and MH Managing Member is conditioned on the filing of mutual stipulations for dismissal with prejudice of Sands' claims against [MH Equity] in the Wisconsin case and of Managing Member's claims against Sands in the Indiana case.
>
> ….
>
> I have learned today that counsel for the Menard defendants will not consent to the dismissal of [MH Equity] from the Wisconsin action or sign a stipulation for such dismissal. Accordingly, a material condition to [MH Equity's] settlement agreement with Sands fails.[2]

[2] MH Equity's purported reason for backing out of the settlement has changed throughout this litigation. Shockley's December 2 e-mail indicated that MH Equity would not go through with the settlement because the Menard Defendants refused to consent to MH Equity's dismissal from the Wisconsin case. MH Equity does not raise this argument on appeal. Indeed, six days after MH Equity refused to go through with the settlement, counsel for the Menard Defendants informed Sands' counsel that he had no objection to dismissal of MH Equity and "wouldn't have standing to object to it even if he did, since the dismissal [did] not involve his clients."

(continued)

¶8 On December 11, Sands filed a motion to enforce the settlement agreement in Eau Claire County circuit court. Following a hearing, the circuit court entered an order of enforcement, finding that "[o]n or about November 24, 2009," Sands, MH Equity, and Managing Member entered into a binding settlement agreement. Pursuant to that agreement, the court dismissed Sands' claims against MH Equity.[3] MH Equity now appeals.

DISCUSSION

¶9 Whether a settlement agreement is binding and therefore enforceable by a court is a question of law that we review independently. ***Waite v. Easton-White Creek Lions, Inc.***, 2006 WI App 19, ¶5, 289 Wis. 2d 100, 709 N.W.2d 88 (Ct. App. 2005); *see also* ***American Nat'l Prop. & Cas. Co v. Nersesian***, 2004 WI App 215, ¶¶14-22, 277 Wis. 2d 430, 689 N.W.2d 922 (independently reviewing whether parties entered into binding settlement agreement). "Because a settlement agreement is a contract by nature, a valid settlement agreement requires an offer, an acceptance and consideration all resulting from a meeting of the minds." ***American Nat'l***, 277 Wis. 2d 430, ¶16.

¶10 MH Equity first argues that it did not enter into a valid settlement agreement with Sands because its offer of settlement by respective dismissals was

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MH Equity now asserts it backed out of the agreement because its president and CEO "had not been aware" of the settlement discussions with Sands and directed Shockley to withdraw from negotiations if an enforceable settlement had not been reached.

[3] The circuit court determined it did not have authority to order dismissal of Managing Member's Indiana claim against Sands. The Indiana superior court subsequently dismissed Managing Member's claim, finding that Sands "sufficiently show[ed] an enforceable settlement agreement." The Indiana Court of Appeals affirmed that dismissal. *See* ***MH Equity Managing Member, LLC v. Sands***, 938 N.E.2d 750, 757-58 (Ind. Ct. App. 2010).

not met with a "mirror image" acceptance, but rather with a counteroffer including an additional term—the execution of mutual releases.[4] *See* ***Hess v. Holt Lumber Co.***, 175 Wis. 451, 455, 185 N.W.2d 522 (1921) ("The acceptance of an offer upon terms varying from those of the offer, however slight, is a rejection of the offer.") (citation omitted). However, even assuming that Shulman's November 24 e-mail referring to "mutual releases" was a counteroffer, subsequent communications between Shulman and Shockley establish that MH Equity accepted the counteroffer, creating a binding settlement agreement.

¶11 In his November 24 e-mail, Shulman purported to accept MH Equity's settlement offer on Sands' behalf and then stated, "I think dismissals with prejudice and mutual releases are in order. Do you want to draft them or should we?" Shortly thereafter, Shockley replied, "Thanks for your response …. If you would prepare a mutual release … for me to review, I would appreciate it." Several days later, after Shockley failed to receive a draft release from Shulman, he reminded Shulman that "[A] Stipulation … is [not] an appropriate place to attempt to release claims by and against affiliates of the parties. That should be done in a separate release agreement, which you agreed to draft." In the same e-mail, Shockley stated, "[T]o be clear, our agreement is limited to the dismissal and release of Sands' claims against [MH Equity] in the Wisconsin case and MH Managing Member's claims against Sands in the … Indiana case." Further, Shockley's e-mail asked Shulman to "please let me know when I can expect to

[4] MH Equity's original settlement offer proposed "dismissal" of the parties' respective claims, whereas Shulman's reply e-mail referred to "dismissals with prejudice." On appeal, MH Equity does not contend that the distinction between mere "dismissal" and "dismissal with prejudice" violates the mirror image rule and renders Shulman's reply a counteroffer. MH Equity's mirror image argument is limited to its assertion that Shulman's reference to "mutual releases" added an additional term not present in the original offer.

have a draft of the release agreement." After Shulman's associate provided a draft release, Shockley edited that release and obtained MH Equity's approval of the edited version. These communications clearly show that, even if MH Equity's original settlement offer did not contemplate execution of mutual releases, MH Equity readily agreed to that term after Sands' counsel proposed it.

¶12 MH Equity next contends that counsels' e-mails reflect an unenforceable "agreement to agree," rather than a binding settlement agreement. *See* ***Dunlop v. Laitsch***, 16 Wis. 2d 36, 42, 113 N.W.2d 551 (1962) (an agreement to agree at a future time is unenforceable because there is no meeting of the minds as to the agreement's essential terms). MH Equity cites ***American National*** for the proposition that "[w]here … it is part of the understanding between the parties that preliminary writings are to be followed by a formal contract containing *additional material provisions* and signed by the parties, no binding or completed contract will be found." ***American Nat'l***, 277 Wis. 2d 430, ¶19 (emphasis added).

¶13 However, the record does not indicate that either MH Equity or Sands understood that additional material provisions would be contained in the written documents memorializing their settlement agreement. Instead, during the attorneys' e-mail exchange, the parties clearly agreed on the only provisions truly material to their agreement: releases and cross-dismissals with prejudice in the Wisconsin and Indiana cases. The e-mail exchange demonstrates a clear intent to be bound by the settlement agreement, as shown by the attorneys' agreement to draft mutual releases and stipulations of dismissal and their prompt exchange of those draft documents. That there may have been minor items to be worked out by counsel in their exchange of drafts does not automatically convert the valid settlement agreement into an unenforceable agreement to agree. Furthermore, Shockley expressly recognized the parties' agreement in his November 28 e-mail,

stating, "[O]ur agreement is limited to the dismissal and release of Sands' claims against [MH Equity] in the Wisconsin case and MH Managing Member's claims against Sands in the … Indiana case." This statement is inconsistent with an understanding that the parties had not yet reached a binding settlement agreement.

¶14 MH Equity argues ***American National*** holds, as a matter of law, that a release always contains additional material provisions not included in the parties' preliminary settlement agreement. We disagree. In ***American National***, an insurance company attempted to enforce a settlement of personal injury claims based on a letter it received from a law firm representing the injured claimants. ***Id.***, ¶¶4, 18. The letter confirmed the settlement amount and stated that the firm anticipated receiving "the settlement checks and release from you in the near future." ***Id.***, ¶4. For several reasons, we held that the letter did not create an enforceable settlement agreement because it was "a mere continuation of the lengthy negotiations between the parties and not an acceptance of an offer." ***Id.***, ¶19. One of these reasons was that the letter "clearly contemplate[d] the execution of another document containing more material provisions—a release …." ***Id.*** However, that the release in ***American National*** contained material provisions not included in the settlement letter does not mean, as a matter of law, that every release contains additional material provisions. Here, the attorneys' e-mails demonstrate an agreement on the material settlement terms, and MH Equity has not established that the parties understood the release would contain additional material provisions. The e-mails created a binding settlement agreement, which the circuit court properly enforced.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2009-10).