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DISTRICT IV

January 31, 2014

To:

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You are hereby notified that the Court has entered the following opinion and order:

2013AP754

Yellow Book Sales and Distribution Co., Inc. v. Buss & Burleson
S.C. (L.C. # 2011CV186)

Before Blanchard, P.J., Sherman and Kloppenburg, JJ.

David Burleson appeals a money judgment in favor of Yellow Book. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21(1) (2011-12).¹ We reverse.

Yellow Book sued both the Buss & Burleson corporation and Burleson personally. The claim was that they failed to pay for advertising services provided by Yellow Book. The circuit court granted Yellow Book's motion for summary judgment as to both the corporation and Burleson personally. Only Burleson appeals.

¹ All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

Summary judgment methodology is well established, and need not be repeated here. *See, e.g., Grams v. Boss*, 97 Wis. 2d 332, 338-39, 294 N.W.2d 473 (1980), *abrogated on other grounds by Olstad v. Microsoft Corp.*, 2005 WI 121, 284 Wis. 2d 224, 700 N.W.2d 139. On review, we apply the same standard the circuit court is to apply. *Green Spring Farms v. Kersten*, 136 Wis. 2d 304, 315, 401 N.W.2d 816 (1987).

In Burleson's reply brief, he notes that both his opening brief and Yellow Book's brief relied on a version of Yellow Book's form contract that is inapplicable to this case because it is different from the one signed by Burleson during the period at issue. Burleson suggests that the circuit court relied on the inapplicable, newer version of the contract. Burleson asserts that the controversy has not been fully tried if the court applied the wrong contract.

We disagree on the last assertion. Because our review of a summary judgment decision is de novo, it would make no difference to our review if the circuit court used the wrong contract. We will apply summary judgment methodology independently to the record. The record is unambiguous in showing that Exhibit N attached to Yellow Book's brief in circuit court is *not* the contract language at issue in this case. Yellow Book's brief to the circuit court stated that Exhibit N was provided "for illustrative purposes" and had "slightly different terms." Instead, the applicable contract language is found in the copies of the contracts attached to the complaint, and we proceed based on the language contained in those documents.

Burleson argues that he cannot be held personally liable on the contracts. He argues that while he clearly signed the contracts as an agent for the corporation, the contract form is insufficient to hold him personally liable. Burleson does not appear to dispute that the language on the contract form is sufficient, in its literal meaning, to bind him individually. Instead, his

argument is based on case law holding to the effect that, to bind the agent individually, the contract must clearly show the intent of the agent to be individually bound. In response, Yellow Book appears to agree that the intent must be clear and explicit. See *Theuerkauf v. Sutton*, 102 Wis. 2d 176, 188, 306 N.W.2d 651 (1981).

Yellow Book argues that Burluson's intent to assume individual liability under the applicable contracts is sufficiently clear and explicit from the contract. We disagree. We start with the material on the front of the contract form. That language shows that this is an advertising contract between Yellow Book and the name that is filled out in a blank space for "the company." In addition, in the space below there is a line for the "authorized signature individually and for the company." The form directs the signer to read "clause 15F on reverse side."

Read by itself, the front of the contract is not sufficiently clear and explicit to establish individual liability. It is clear from the language who the first two parties to the contract are. However, as a description of the third party to the contract, "authorized signature individually and for the company" is unclear. The phrase "authorized signature" is normally used in an agency context. It refers to a person authorized by the company to sign on its behalf. As a result, the combination of the phrase "authorized signature" with "individually" is inconsistent. We do not know what an "authorized signature individually" would be. Read in total, the clause appears to be attempting to say that the signer is signing "as an individual, and also as authorized agent for the company." However, the syntax used is not so clear. Ultimately, the combining of the "individual" and "company" concepts into a single phrase and line on the contract tends to muddle, rather than clarify, that this is in fact a three-party contract.

The language on the front of the contract *might* be adequate if the referred-to clause 15F on the back supplemented it with a clear explanation of the three-party nature of the contract. However, clause 15F is not sufficient for that purpose. It provides in full: “The signer of this document does, by his execution personally and individually undertake and assume the full performance hereof including payments of amounts due hereunder.” We conclude that this language is not sufficiently clear and explicit because it does not explain that the signer is assuming personal liability *as a separate party in addition to* the liability the signer is assuming on behalf of the company as agent.

This contract provision 15F contrasts markedly with the later version of the form we referred to above as Exhibit N, which apparently was relied on by the circuit court. In the later version of the contract, paragraph 15 spells out, in separately enumerated clauses, that the signer is signing (1) in his or her individual capacity, (2) as a representative of the customer, and (3) as a representative of the entity identified in the advertisement being placed. A second sentence states that the signer personally undertakes the performance of the agreement “jointly and severally with the Customer.” This later version of the contract demonstrates what a genuinely clear and explicit provision might say to explain individual liability.

IT IS ORDERED that the judgment appealed is summarily reversed under WIS. STAT. RULE 809.21(1).

Diane M. Fremgen
Clerk of Court of Appeals