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

**November 25, 2014**

**Diane M. Fremgen**
**Clerk of Court of Appeals**



**Appeal No. 2013AP2474** **Cir. Ct. No. 2010CV18907**

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

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**COMMUNITY BANK & TRUST,**

**PLAINTIFF-RESPONDENT,**

**V.**

**SCOTT L. BERGGREN AND VICTORIA W. BERGGREN,**

**DEFENDANTS-APPELLANTS,**

**RIDGEVIEW HOLDINGS, LLC, RIDGEVIEW D & J., LLC, FLOYD R. BERGGREN AND LISA BERGGREN,**

**DEFENDANTS.**

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APPEAL from an order of the circuit court for Milwaukee County: DANIEL A. NOONAN, Judge. *Affirmed*.

Before Curley, P.J., Kessler and Brennan, JJ.

¶1 KESSLER, J. Scott L. Berggren and Victoria W. Berggren ("Scott and Victoria")[1] appeal a circuit court order denying their motion to reopen a default judgment and foreclosure. Scott and Victoria argue that a Settlement Agreement and Release entered between Floyd Berggren (Scott's father) and Community Bank and Trust ("Community Bank") released the claim on which Community Bank's foreclosure action was based. We affirm.

## BACKGROUND

¶2 The facts are largely derived from the circuit court's findings of fact. In March 2008, Scott and Victoria executed two loans with Community Bank. The first loan, a Home Equity Line of Credit, had an initial credit amount of $366,250. The second loan, a Small Business Administrative Note ("SBA Note") in the amount of $1,813,000, was executed by Scott's businesses, Ridgeview Holdings, LLC and Ridgeview D&J, LLC (collectively, "Ridgeview"). Scott and Victoria personally guaranteed payment of the amounts due under the SBA Note.

¶3 Both loans were secured by mortgages on Scott and Victoria's home in Fox Point, Wisconsin. Scott and Victoria already had a mortgage with Northern Trust Bank in the amount of $450,000. In essence, the two Community Bank mortgages provided part of the security for financing Scott's business.

¶4 The business had substantial financial difficulties. On December 31, 2009, the SBA Note was amended to require Ridgeview to pay three months of interest on the disbursed principal, and to resume principle and interest payments by February 26, 2010. A second Addendum of that Note permitted interest-only

[1] Because the individual litigants involved in the facts relevant to this appeal all share the same last name, to avoid confusion we refer to them by their first names only.

payments for another three months, with interest and principal payments to begin September 26, 2010.

¶5 In April 2010, Floyd separately executed two commercial notes with Community Bank. The first was a personal guarantee of a Commercial Line of Credit Agreement and Note in the amount of $500,000, executed by Ridgefield. The second was a Commercial Note in the amount of $200,000.

¶6 Later in 2010, Ridgeview experienced a business failure and defaulted on payments on the SBA Note and other obligations. In October 2010, Floyd sued Community Bank seeking rescission of his guarantee and damages based on claims of misrepresentation relating to his guarantee. Community Bank then sued Ridgeview, Scott, Victoria and Floyd, based on defaults in the Ridgeview business debts, seeking payment of those debts and seeking foreclosure of Scott and Victoria's mortgages, which secured those debts. This suit did not involve Scott and Victoria's Home Equity Line of Credit or its mortgage. Ultimately, these two suits were consolidated for trial. They have been referred to by the parties as the "Consolidated Cases."

¶7 Around the same time, Scott and Victoria filed for Chapter 7 Bankruptcy. Their personal debts to Community Bank were discharged; however, the mortgages securing the personal debts were not.

¶8 On March 18, 2011, Community Bank obtained a default foreclosure judgment on the two mortgages it held on Scott and Victoria's home. Before the sheriff's sale could be held, Scott and Victoria began a Chapter 13 Bankruptcy. During this bankruptcy, a settlement between Community Bank and Scott and Victoria was negotiated. On April 13, 2012, the Bankruptcy Court approved a settlement pursuant to which:

- Scott and Victoria executed a *new* Note to Community Bank in the amount of $485,000.[2]

- The new Note required payment of interest only for a period of time, then the payments increased to principal and interest.

- The new Note was secured by the two existing mortgages.

- If Scott and Victoria did not make the payments, Community Bank could proceed with the foreclosure.

Shortly before the increase in payments was scheduled to occur, Scott and Victoria, through counsel, asked for an extension of the interest-only payments. Community Bank refused. On December 18, 2012, Community Bank notified Scott and Victoria that they had defaulted on the Stipulation and that Community Bank would seek the relief provided in the Stipulation if Scott and Victoria did not pay by the following Friday. Scott and Victoria made no more payments.

¶9 On June 13, 2012, Floyd and Community Bank entered into a Settlement Agreement and Release in which Floyd settled his disputes and obligations with Community Bank. As relevant to this appeal, the Settlement Agreement and Release stated the following:

> RECITALS
>
> [Floyd] executed and delivered to Community Bank on or about December 22, 2009 a Commercial Promissory Note ("Note") in the principal sum of $200,000.00.... [Floyd] executed and delivered to [Community Bank] an enforceable renewal of the [Commercial Promissory] Note on or about April 27, 2010.

[2] This amount was the agreed upon value of the two mortgages.

> [Floyd] executed and delivered to Community Bank on or about April 27, 2010 an Unlimited Continuing Payment Guaranty ("Guaranty") … which … guaranteed payment of all amounts due under a Commercial Line of Credit Agreement and Note … in the principal sum of $500,000.00, which had been executed and delivered to Community Bank by Ridgeview … (collectively, the "Ridgeview Entities").
>
> Ridgeview Entities defaulted in payments due pursuant to the [Commercial] Line of Credit.
>
> [Floyd], on October 25, 2010, commenced an action against Community Bank … Case No. 10 CV 18037, seeking rescission of the Guaranty and damages from Community Bank based on alleged … misrepresentation and other related claims associated with the formation of the Guaranty.
>
> Community Bank, on November 3, 2010, commenced an action against [Floyd], the Ridgeview Entities, and other related parties in … Case No. 10 CV 18907, seeking … money damages against [Floyd] pursuant to the [Commercial Promissory] Note and [Commercial Line of Credit] Guaranty. The two cases were later consolidated….[3]
>
> [T]he circuit court … on May 10, 2012, granted Community Bank summary judgment against [Floyd] for all amounts due under the [Commercial Promissory] Note, along with attorneys' fees and costs associated with collecting on the [Commercial Promissory] Note. The circuit court denied Community Bank's motion for summary judgment on several claims asserted by [Floyd].
>
> [I]n accordance with the terms of this Agreement as set forth below, the parties hereto desire to resolve any and all outstanding disputes with respect to the [Commercial Promissory] Note and [Commercial Line of Credit] Guaranty, including, but not limited to, those at issue in the Consolidated Cases[.]

[3] The Settlement Agreement and Release asserts that the two cases were consolidated "into a single action." That is not technically correct. The cases were consolidated for purposes of trial, but remain separate actions with separate case numbers. They involve different people and issues, although some issues involve common facts, and Floyd is a party in both cases.

AGREEMENT

*[Floyd]*, for himself and all of his past, present and future agents, … relatives … and all persons acting … in concert with any of them (the "Berggren Releasing Parties"), hereby release … and *forever discharge Community Bank*, [its] employees, agents, … attorneys, ... subsidiary corporations, parent corporations, … (… the "Community Bank Released Parties") … *from any and all manner of action* … in law or equity, whether known or unknown, which they have had, now have, or may have *against* the *Community* Bank Released Parties … arising from or *related in any way to the [Commercial Promissory] Note, the [Commercial Line of Credit] Guaranty or any related loan transactions, including, but not limited to, all claims and counterclaims ... of [Floyd] raised in the Consolidated Cases*.

….

Except as provided for by this Agreement, *[the Community Bank Released Parties] ... [do] hereby ... release,* and forever discharge *[Floyd], and all of his* past, present and future agents, attorneys, … *relatives*, … and all persons acting … in concert with any of them (… the "Berggren Released Parties"), of and *from any and all manner of action* … known or unknown, which they have had, now have, or may have … *by reason of any transaction ... arising from or related in any way to the [Commercial Promissory] Note, the [Commercial Line of Credit] Guaranty*, or any related loan transactions, including, but not limited to, all claims and counterclaims of Community Bank raised in the Consolidated Cases[.]

….

[Floyd] shall execute a stipulation dismissing … all of *his* causes of action in Case No. 10 CV 18037 and all of *his* counterclaims in Case No. 10 CV 18907. Community Bank shall execute a stipulation conditionally dismissing … all of its causes of actions against [Floyd] in Case No. 10 CV 18907 and all of its counterclaims in Case No. 18037, subject to [Floyd]'s compliance with the payment terms agreed to and described below.

(Emphasis added.)

¶10 Floyd agreed to pay Community Bank an agreed upon amount on the Commercial Promissory Note, plus an agreed upon amount of attorney's fees. Floyd also agreed to pay Community Bank an agreed upon amount on the Commercial Line of Credit Guaranty with interest at five percent per year, in twenty monthly payments, with no early payment penalty. Floyd and Community Bank also agreed upon consequences if Floyd defaulted.

¶11 In January 2013, upon learning of the agreements between Floyd and the bank, Scott and Victoria's counsel sent a letter to Community Bank stating that the Settlement Agreement and Release between the bank and Floyd also discharged Scott and Victoria's obligations with the bank, including the mortgages. Community Bank proceeded to a Sheriff's Sale, where it bid successfully on Scott and Victoria's home. However, before a confirmation hearing could be held, Scott and Victoria filed for bankruptcy for a third time.

¶12 On June 17, 2013, the Bankruptcy Court in the Eastern District of Wisconsin asked the circuit court to interpret the scope of the Settlement Agreement and Release between Floyd and Community Bank. Scott and Victoria then sought relief from the foreclosure judgment pursuant to WIS. STAT. § 806.07(1)(d) & (e) (2011-12).[4] The circuit court summarized Scott and Victoria's argument as follows:

> [Scott and Victoria] argue that [Floyd's] Release contained within the Settlement Agreement served to discharge their own claims with [Community Bank]. Scott and Victoria contend that pursuant to the Release, they are members of the "Berggren Released Parties" and [Community Bank's] foreclosure judgment falls squarely within the definition of "Berggren Released Matters." As such, [Scott and

[4] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

> Victoria] contend that they should be relieved from the foreclosure judgment pursuant to Wis. Stats. § 806.07.

¶13 The circuit court noted that Floyd's Settlement Agreement and Release did *not* reference the following:

- The SBA Note in the sum of $1,813,000;
- Scott and Victoria's personal guaranty of the SBA Note;
- The mortgage Scott and Victoria gave securing the SBA Note and Guaranty;
- The judgment of foreclosure of the mortgage based upon that obligation; or
- Scott and Victoria's Home Equity Line of Credit and its mortgage.

The circuit court observed that the language of Floyd's Settlement Agreement only encompassed Floyd's two financial obligations: (1) the Commercial Promissory Note for $200,000, and (2) the Guaranty for the Commercial Line of Credit for $500,000.. The circuit court found: "It is clear that the Settlement Agreement is only between Floyd and [Community] Bank. Furthermore, it is clear that the Release served only to discharge the Berggren[] Released Parties from the matters specified in the Settlement Agreement: Floyd's Note for $200,000.00 and Floyd's Guaranty of the [Commercial] Line of Credit for $500,000.00." The circuit court denied Scott and Victoria's Motion for Relief from Judgment, finding that Floyd's "Settlement Agreement and Release did not discharge Scott and Victoria Berggren from any liability owed to [Community Bank] under the SBA Note and [Home Equity] Line of Credit."

¶14 Scott and Victoria appeal, raising the same argument made to the circuit court.[5]

## DISCUSSION

### Standard of Review.

¶15 As relevant to this appeal, WIS. STAT. § 806.07 governs relief from judgment.[6] "A [circuit] court's discretionary decision to grant or deny a motion for relief from judgment under … § 806.07 will be affirmed when it appears that the [circuit] court 'examined the relevant facts, applied a proper standard of law, and, using a demonstrated rational process, reached a conclusion that a reasonable judge could reach.'" ***Harbor Credit Union v. Samp***, 2011 WI App 40, ¶38, 332 Wis. 2d 214, 796 N.W.2d 813 (citation, quotation marks and footnote omitted). "The record must 'reflect the circuit court's reasoned application of the appropriate legal standard to the relevant facts of the case.'" ***Id.*** (citation and one set of quotation marks omitted). "However, when a [circuit] court fails to provide an adequate reason for its discretionary decision, this court will uphold the decision if, upon an examination of the record, the facts support the exercise of discretion." ***Id.***

[5] Although Scott and Victoria phrase the argument as three issues, we see that phrasing as distinctions without a difference because the underlying argument for each "issue" is grounded in Scott and Victoria's interpretation of Floyd's Settlement Agreement and Release as discharging Scott and Victoria's mortgages to Community Bank.

[6] WISCONSIN STAT. § 806.07(2) requires that a motion for relief from a judgment is to be brought within a reasonable time. Scott and Victoria brought this motion 40 months after entry of the default judgment of foreclosure on their home. The circuit court relied instead on § 806.07(1)(e). Consequently, we do not consider the timeliness requirement.

**Applicable Law.**

¶16 "[A] court should construe a release as it would a contract. Rules of construction favor an interpretation which gives a reasonable meaning to all terms over an interpretation which leaves part of the language useless or meaningless." ***Fleming v. Threshermen's Mut. Ins. Co.***, 131 Wis. 2d 123, 132, 388 N.W.2d 908 (1986). "The general rule as to construction of contracts is that the meaning of particular provisions in the contract is to be ascertained with reference to the contract as a whole." ***Tempelis v. Aetna Cas. & Sur. Co.***, 169 Wis. 2d 1, 9, 485 N.W.2d 217 (1992).

¶17 "The scope of a release, and the intention of the parties that the release shall cover particular claims, are for the jury or other triers of the facts; but where the facts are undisputed, the scope has been held to be for the court." ***Arnold v. Shawano Cnty. Agric. Soc'y***, 111 Wis. 2d 203, 212, 330 N.W.2d 773 (1983), *overruled on other grounds by* ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 401 N.W.2d 816 (1987) (citation and quotation marks omitted). "The interpretation of an unambiguous contract presents a question of law for [the] court's independent review." ***Town Bank v. City Real Estate Dev., LLC***, 2010 WI 134, ¶32, 330 Wis. 2d 340, 793 N.W.2d 476. "'If the contract is unambiguous, our attempt to determine the parties' intent ends with the four corners of the contract.'" ***Id.***, ¶33 (citation omitted).

¶18 "In the guise of construing a contract, courts cannot insert what has been omitted or rewrite a contract made by the parties." ***Levy v. Levy***, 130 Wis. 2d 523, 533, 388 N.W.2d 170 (1986). "The recital or whereas clause of a contract may be examined to determine the intention of the parties." ***Id.*** at 534. "When

unambiguous language is construed as if it were ambiguous, the resulting interpretation is contradictory and confusing." ***Id.*** at 535.

**Floyd's Settlement Agreement and Release had no effect on Scott and Victoria's mortgages to Community Bank.**

¶19 Both parties agree that the Settlement Agreement and Release between Floyd and Community Bank contains unambiguous language. We agree. Accordingly, "we will construe [the Settlement Agreement and Release] as it stands." *See* ***State v. Peppertree Resort Villas, Inc.***, 2002 WI App 207, ¶14, 257 Wis. 2d 421, 651 N.W.2d 345. We presume then that the parties' intent is evidenced by the words chosen in the contract as a whole. *See* ***Tempelis***, 169 Wis. 2d at 9.

¶20 We begin with the Recitals, which "may be examined to determine the intention of the parties." *See* ***Levy***, 130 Wis. 2d at 534. The Recitals in Floyd's Settlement Agreement and Release identify the parties to the contract as Floyd and Community Bank, then define the obligations to which the contract applies as:

> (1) a "Commercial Promissory Note" executed by Floyd and delivered to Community on December 22, 2009 "in the principal sum of $200,000.00" and an enforceable renewal of that specific note executed and delivered on April 27, 2010 and
>
> (2) an April 27, 2010 "Unlimited Continuing Payment Guaranty" applicable to "all amounts due under a Commercial Line of Credit Agreement and Note … in the principal sum of $500,000.00 … executed and delivered to Community" by the two Ridgeview LLC's.

¶21 This description is clear. The parties intended and agreed to resolve disputes only involving the $200,000 Commercial Promissory Note and the

$500,000 Unlimited Continuing Payment Guarantee. Both obligations had been signed by Floyd. There is no reference to Scott and Victoria's Home Equity Line of Credit and related note, nor to the SBA Note, both of which were secured by mortgages to Community Bank on their home. Had Floyd and Community Bank intended to discharge Scott and Victoria's mortgage obligations on Scott and Victoria's Home Equity Line of Credit, and Scott and Victoria's guaranty of Ridgeview's SBA Note, Floyd and Community Bank certainly would have referred to those debts with the same specificity used to describe Floyd's much smaller obligations to Community Bank. *See* ***Town Bank***, 330 Wis. 2d 340, ¶45. That there is likewise no mention of Scott and Victoria's mortgage obligations in the Recitals is compelling evidence that neither Floyd nor Community Bank intended those obligations to be included in their Settlement Agreement and Release. *See* ***Levy***, 130 Wis. 2d at 534.

¶22 Having unambiguously described in the Recitals the debts and obligations being resolved, we turn to the scope of the Release.

¶23 Scott and Victoria's arguments center on the following provision from Floyd's Settlement Agreement and Release:

> Conditional Release by Community Bank. Except as provided for by this Agreement, *Community Bank, ... does hereby remise, release, and forever discharge [Floyd], and all of his* past, present and future agents, attorneys, advisors, spouses, *relatives* … and all persons acting by, through, under, or in concert with any of them … of and *from any and all manner of action* …

(Emphasis added.) As to Floyd's above described Commercial Promissory Note for $200,000 and Continuing Payment Guaranty of Ridgeview's $500,000 Commercial Line of Credit debt, the parties recite their "desire to resolve any and

all outstanding disputes" regarding those obligations "including, but not limited to, those at issue in the Consolidated Cases."

¶24 We assume for purposes of this decision that Scott and Victoria, who are Floyd's son and daughter-in-law, are Floyd's "relatives" under the Settlement Agreement and Release. However, in reading the document as a whole, we also consider the following provision:

> Conditional Release by Community Bank. Except as provided for by this Agreement, Community Bank, … does hereby remise, release, and forever discharge [Floyd], and all of his past, present and future agents, attorneys, advisors, spouses, relatives … and all persons acting by, through, under, or in concert with any of them … of and from any and all manner of action … *arising from* or related in any way to *the [Commercial Promissory Note], [the Continuing Payment Guaranty of the Ridgeview Commercial Line of Credit and Note]*, or any related loan transactions, including, but not limited to, all claims and counterclaims of Community Bank raised in the Consolidated Cases….

(Emphasis added.) The document unambiguously states that the purpose of the Settlement Agreement and Release is to "resolve any and all outstanding disputes" regarding *only* Floyd's Commercial Promissory Note for $200,000 and his Continuing Payment Guarantee of Ridgefield's $500,000 Commercial Line of Credit and Note. Resolution of those two debts "or any related loan transaction," includes, "but [is] not limited to all claims and counterclaims of Community Bank raised in the Consolidated Cases."

¶25 By contrast to the specificity describing Floyd's debts and obligations, Scott and Victoria's Home Equity Line of Credit and the SBA Note are not mentioned. Scott and Victoria are not parties to this Settlement Agreement and Release and their mortgages are not mentioned. We conclude that the

Settlement Agreement and Release clearly demonstrates the intent "of the parties hereto" (Floyd and Community Bank) to resolve only the claims and counterclaims each has made against the other arising out of the two specific debts owed by Floyd.

¶26 The Settlement Agreement and Release clearly limits the discharge of any liability Floyd's relatives might have to claims "arising from or related in any way to" the debts to which the Settlement Agreement and Release apply. Specifically, no evidence is brought to our attention[7] by Scott and Victoria to establish that either of their mortgages were "arising from or related in any way to" Floyd's Commercial Promissory Note for $200,000 and Floyd's Continuing Payment Guaranty of the $500,000 Commercial Line of Credit and Note executed by Ridgeview. Scott and Victoria have not identified anything in the record which establishes that the home mortgages they gave Community Bank as security for their Home Equity Line of Credit and their Guaranty of Ridgeview's SBA Note were "arising from or related to" Floyd's obligations that are the subject of the Settlement Agreement and Release. It is the burden of the party seeking to reopen a judgment under WIS. STAT. § 806.07(1)(e) to establish the facts necessary to come within the protections of that statute. *See* ***Carmain v. Affiliated Capital Corp.***, 2002 WI App 271, ¶23, 258 Wis. 2d 378, 654 N.W.2d 265. Scott and Victoria have failed to establish that the foreclosure judgment was discharged by Floyd's settlement with Community Bank. This failure likewise defeats Scott and Victoria's grounds to reopen said foreclosure judgment.

¶27 For all the foregoing reasons, we affirm.

[7] Our role is to search the record for evidence to support the findings made rather than for findings which were not made. *See* ***Hawes v. Germantown Mut. Ins. Co.***, 103 Wis. 2d 524, 543, 309 N.W.2d 356 (Ct. App. 1981).

*By the Court*.—Order affirmed.

Not recommended for publication in the official reports.