

STATE OF MICHIGAN
COURT OF APPEALS

JAMES A. STEPHENSON,

Plaintiff-Appellant,

V

WILLIAM H. STEPHENSON and VIRGINIA
TILE COMPANY,

Defendants-Appellees.

UNPUBLISHED

August 24, 2001

No. 220506

Oakland Circuit Court

LC No. 98-008009-CK

Before: Smolenski, P.J., and McDonald and Jansen, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order of dismissal, with prejudice, of all claims after a motion for summary disposition under MCR 2.116(C)(7) was granted in favor of defendants. We affirm.

Plaintiff first argues that the trial court erred in finding plaintiff's attempt to repudiate a 1994 settlement and release agreement by the mere recitation in his complaint that he tendered the money received in the settlement agreement was insufficient to satisfy the tender rule. We disagree. This Court reviews a trial court's grant of a motion for summary disposition de novo to determine whether the moving party was entitled to judgment as a matter of law. *Watts v Polaczyk*, 242 Mich App 600, 603; 619 NW2d 714 (2000). In reviewing a motion under MCR 2.116(C)(7), this Court accepts as true the plaintiff's well-pleaded allegations and construes them in the plaintiff's favor, and must also consider the pleadings, affidavits, depositions, admissions, and documentary evidence filed or submitted by the parties to determine whether a genuine issue of material fact exists. *Id.*; MCR 2.116(G)(5).

It is well settled law that settlement agreements are binding until rescinded for cause and that tendering back the consideration received is a condition precedent to the right to repudiate a contract of settlement. *Stefanac v Cranbrook Educational Community (After Remand)*, 435 Mich 155, 163; 458 NW2d 56 (1990). Thus, a plaintiff may challenge a release and settlement agreement, but must first tender back any consideration received in exchange for the release not only within a reasonable time after execution of the agreement, but in all cases prior to or simultaneously with the filing of a suit in contravention of the agreement. *Id.* at 159, 176-177; *Collucci v Eklund*, 240 Mich App 654, 659; 613 NW2d 402 (2000); *Rinke v Automotive Moulding Co*, 226 Mich App 432, 436-437; 573 NW2d 344 (1997).

This case raises the issue of what constitutes tender for purposes of the tender-back requirement. Whether there has been tender is a question of fact. *Keller v Paulos Land Co*, 381 Mich 355, 359-360; 161 NW2d 569 (1968). Although there is no dictionary-type definition of “tender” in Michigan case law, our Supreme Court has noted that “tender” requires something more than an offer: “We would import into the law an unsafe and litigious element if we should hold an offer to perform, with ability to do so, accomplishes the purpose of a tender, or constitutes ground for equitable relief.” *Kaiser v Weber*, 301 Mich 609, 616; 4 NW2d 29 (1942) (citing *Pappas v Harrah*, 221 Mich 460, 463; 191 NW 221 (1922)). See also *Flynn v Korneffel*, 451 Mich 186, 189; 547 NW2d 249 (1996). Thus, a mere offer to tender, recited in the complaint, is insufficient to accomplish the purpose of a tender. *Friedman v Winshall*, 343 Mich 647, 655; 73 NW2d 248 (1955); *Karakas v Dost*, 67 Mich App 161, 167; 240 NW2d 743 (1976).

The complaint states, “contemporaneous with the filing of this complaint, plaintiff tenders to defendant all monies paid pursuant to that release.” It is undisputed that plaintiff never actually tendered the money to defendants prior to or simultaneously with the filing of the complaint. In fact, defendants did not receive a check from plaintiff until almost six months after the complaint was filed. Allowing plaintiff to merely recite an act of tender does not place defendants in status quo and allows plaintiff to retain the benefit of the agreement while at the same time filing suit contravening the agreement. This undermines the purpose of the tender rule. *Stefanac, supra* at 176-177. Not only did plaintiff fail to tender prior to or simultaneously with the filing of his suit, his filing the complaint nearly four years after the settlement is not, as a matter of law, “within a reasonable time.” *Randall v Port Huron, St C & M C R Co*, 215 Mich 413, 424; 184 NW2d 435 (1921); *Davis v Bronson Methodist Hosp*, 159 Mich App 251, 253; 406 NW2d 201 (1986). Plaintiff is therefore precluded from challenging the validity of the release or bringing any other claims in contravention of the release. Accordingly, the trial court properly granted summary disposition for defendants based on the release and settlement.

Plaintiff’s second issue on appeal is that the trial court erred in finding that plaintiff failed to satisfy the exceptions to the tender rule. We disagree. “[A] plaintiff is excused from the tender-back requirement only if the defendant waives the duty or the plaintiff demonstrates fraud in the execution.” *Collucci, supra* at 659 (citing *Stefanac, supra* at 165). Plaintiff argues that defendants waived the requirement to tender back the consideration when defendant Stephenson specifically stated that repayment of the money was not necessary. However, it is undisputed that defendant Stephenson made this alleged waiver after the filing of the complaint. Since the right to repudiate a release only arises when a timely tender has been made, once the period for timely performance has passed, that right is extinguished. *Stefanac, supra* at 163, 176-177. Thus, when it is too late for plaintiff to tender, it is likewise too late for him to rely on a subsequent waiver; he no longer can exercise the right to repudiate. Accordingly, the trial court did not err in finding that plaintiff failed to satisfy the waiver exception to the tender rule.

Plaintiff also argues that he is excused from the tender requirement under the fraud in the execution exception. However, plaintiff’s assertions imply not fraud in the execution, but rather, fraud in the inducement. There is no evidence that plaintiff did not know that he was signing a release, despite his alleged emotional shock and pressure from family members. In fact, plaintiff reviewed and signed the documents with the advice of an attorney. Thus, the fraud in the

execution exception does not apply. *Collucci, supra* at 659-660. Accordingly, the trial court did not err in granting defendants' motion for summary disposition.

Affirmed.

/s/ Michael R. Smolenski

/s/ Kathleen Jansen

McDonald, J., did not participate.