

IN THE UNITED STATES BANKRUPTCY COURT FOR THE
EASTERN DISTRICT OF TENNESSEE

In re

MILLERS COVE ENERGY CO., INC.)	
)	Case No. 90-34050
Debtor.)	Chapter 11
)	
THE OFFICIAL COMMITTEE OF)	
UNSECURED CREDITORS OF MILLERS)	
COVE ENERGY CO., INC.)	
)	
Plaintiff,)	
)	
v.)	Adv. Proc. No. 94-2008
)	
CHICAGO FUEL & IRON COMPANY,)	
INC., et al,)	
)	
Defendants.)	

MEMORANDUM OPINION

This is an action by the Official Committee of Unsecured Creditors ("Committee") for the avoidance and recovery of certain alleged fraudulent transfers made by the debtor, Millers Cove Energy Co., Inc. to the defendants. This proceeding is presently before the court on a motion for summary judgment by one of the defendants, Chicago Fuel & Iron Company, Inc. ("CFI") wherein CFI asserts that this adversary proceeding is barred by the two-year statute of limitations set forth in 11 U.S.C. § 546(a)(1), and, alternatively, that this adversary should be dismissed because the Committee and the debtor have released CFI from any liability for fraudulent transfers. Also pending before the court are the related motions of CFI to strike the affidavits of Neal S. Melnick and George Raymond which have been filed by the Committee in

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opposition to CFI's motion for summary judgment. For the reasons set forth below, the court concludes that CFI's motion for summary judgment should be granted, the Committee and the debtor having released CFI from liability for the purported transfer. The court further finds that the motions to strike should be granted because the tendered affidavits violate the parol evidence rule.

I.

This bankruptcy case was initiated as an involuntary Chapter 7 on October 12, 1990, and was subsequently converted to a Chapter 11 by an agreed order entered November 30, 1990. As set forth in the complaint, the Committee was appointed on December 14, 1990, and has been active in this case since its appointment. On April 3, 1992, the Committee filed a motion for leave to commence and prosecute on behalf of the debtor, certain adversary proceedings for the avoidance and recovery of certain alleged preferential and fraudulent transfers made by the debtor to various transferees, including CFI, within one year prior to the filing of this bankruptcy case. The motion recited that in a letter dated April 18, 1991, the Committee had requested that the debtor make known its intentions with respect to instituting these adversary proceedings and that the debtor had advised the Committee in a letter dated June 10, 1991, that the debtor would not be pursuing these causes of actions. Copies of both letters were attached to the motion. By order entered April 29, 1992, *nunc pro tunc* to April 3, 1992, the court granted the Committee's motion and the

Committee was given leave to prosecute these adversary proceedings on behalf of the debtor. Pursuant to the authority granted the Committee in the court's April 3, 1992 order, this adversary proceeding was commenced by the Committee on April 8, 1994.

II.

The document which forms the basis for CFI's assertion that the Committee and the debtor have released CFI from liability for any fraudulent transfers, including the transfer sought to be avoided in this adversary proceeding, is a settlement agreement entered into by the debtor, CFI, the Committee and Elders Finance, Inc. on May 20, 1991, which agreement was approved by the bankruptcy court on September 23, 1991 ("Settlement Agreement"). The release language is contained in paragraph 3 of the Settlement Agreement which provides:

[t]he Debtor and the Committee are forever barred from contesting the validity, perfection, priority, and enforceability of the liens and security interests of Elders and CFI in, to, and against the Debtor and its property and asserting the Claims or any other cause of action against Elders and CFI whether arising under the Code or applicable state or federal law, including the provisions described above in paragraph 1.

Paragraph 1 of the Settlement Agreement which is referenced in Paragraph 3, quoted above, provides that the parties agree, *inter alia*, that the liens and security interests of CFI and Elders are valid, properly perfected, and enforceable and not subject to avoidance or subordination by the Debtor, the Committee or any trustee "pursuant to the Code, including without limitation

Sections 510, 544, 547, 548 and 553 of the Code, or to applicable state or federal law."

The recitals portion of the Settlement Agreement explains how the agreement came about:

[t]he Committee has asserted certain claims and rights of action ("Claims") against Elders and CFI relating to the validity, enforceability, perfection, avoidability, nature, and extent of the security interests claimed by Elders and CFI and relating to the avoidance of certain transfers, and Elders and CFI assert and have asserted the validity, enforceability, perfection, and non-avoidability of their liens and security interests.

...

[t]he Debtor, Elders, CFI, and the Committee have reached agreement which resolves the Claims

Paragraphs F and J of the Settlement Agreement.

The present claim asserted against CFI is contained in the complaint at "Count VII." The complaint alleges that on or about October 9, 1990¹, the debtor, CFI and others entered into an assignment of royalty proceeds, which required a wholly owned subsidiary of the debtor to assign to CFI its right to receive \$497,404.10. The Committee contends that the monies were owed to the debtor rather than the subsidiary, and that the debtor received no consideration for the transfer. The Committee alleges that the

¹The date recited in the complaint is October 9, 1992 rather than October 9, 1990. However, the Assignment referred to by the Committee, a copy of which is attached as Exhibit D to the complaint, is dated October 9, 1990, not 1992. Accordingly, it is clear that the 1992 date set forth in the complaint was a typographical error.

transfer may be avoided and recovered pursuant to the Tennessee fraudulent conveyance statutes, TENN. CODE ANN. §§ 66-3-101, *et seq.*, and 11 U.S.C. § 544(b).

CFI asserts that this claim falls within the bounds of paragraph 3 of the Settlement Agreement quoted above, barring the Committee from asserting "any ... cause of action against ... CFI whether arising under the Code or applicable state or federal law." The Committee maintains to the contrary that it is clear from the language of the Settlement Agreement that the present cause of action was not included within the matters settled in the Settlement Agreement as set forth in the recitals portions of the Settlement Agreement, that this adversary proceeding had not even been filed at the time the Settlement Agreement was entered into and that it was never the intention of the parties to release CFI from any liability to the debtor upon which the instant adversary proceeding is based.

The Committee offers the affidavits of Neal S. Melnick and George Raymond in support of its assertion that the Committee did not intend in the Settlement Agreement to release this cause of action against CFI. Both affidavits state that the affiants are familiar with the Settlement Agreement, Mr. Melnick as the attorney for the Committee and Mr. Raymond as the chairman of the Committee, and that "it was not the intent of the Committee to release CFI from liability to the Plaintiff for the recovery of the avoided transfer under § 550 of Title 11 and alleged in the above styled adversary proceeding." CFI asserts that these proposed testimonies

should be stricken because they violate the parol evidence rule and contradict the unambiguous language of the Settlement Agreement releasing all causes of actions against CFI.

III.

Summary judgment is appropriate if there is no genuine issue as to any material fact and if the moving party is entitled to judgment as a matter of law. See FED. R. BANKR. P. 7056; FED. R. CIV. P. 56. Under Tennessee law, a release is a contract and, therefore, is subject to the same rules which apply in interpreting contracts. See *In re Blue Diamond Coal Co.*, 163 B.R. 798, 812 (Bankr. E.D. Tenn 1994), citing *Jackson v. Miller*, 776 S.W.2d 115, 117 (Tenn. App. 1989). It is well settled that "[i]f a contract is plain and unambiguous, the meaning thereof is a question of law and it is the court's function to interpret the contract as written according to its plain terms." *Id.*

In this case, the language of the Settlement Agreement provides that not only are the "Debtor and the Committee ... forever barred from ... asserting the Claims," as referenced in the recitals portion of the Settlement Agreement, but also from asserting "any other cause of action against ... CFI whether arising under the Code or applicable state or federal law ..." It is undisputed that this cause of action arises under the Code by virtue of 11 U.S.C. 544(b), and involves other applicable state law, namely, the Uniform Fraudulent Conveyance Act, as adopted by the state of Tennessee, TENN. CODE ANN. §§ 66-3-301, *et seq.*, and

Tennessee's codification of the common law regarding fraudulent conveyances, TENN. CODE ANN. § 66-3-101. Thus, the present lawsuit falls well within the language of the release, which can only be construed as a general release of all claims the debtor and the Committee had against CFI. The Committee's argument that it did not intend to release this cause of action conflicts with the plain and unambiguous language of the Settlement Agreement which clearly and unequivocally provides that the claims and "any other cause of action" are forever barred. The intent to release all causes of actions could not have been made more clear.

However, even if it is true as asserted by the Committee that the Committee did not intend to release the present cause of action in the Settlement Agreement, the court can not ignore the plain language of the Settlement Agreement which does in fact release CFI from liability. If the intention of the parties is expressed by language of an unambiguous contract, the intention must be given effect, even though it may not have been the actual intention entertained by one or more of the parties. *Petty v. Sloan*, 277 S.W.2d 355, 358 (Tenn. 1955); *E.O. Bailey & Co., Inc. v. Union Planters Title Guaranty Co.*, 232 S.W.2d 309, 314 (Tenn. App. 1949). Said another way, if the language of a written instrument is clear and unambiguous, a court must interpret the instrument as written rather than according to the unexpressed intention of one party. *Nashville Electric Supply Co., Inc. v. Kay Industries, Inc.*, 533 S.W.2d 306, 310 (Tenn. App. 1975). When construing a contract, the court is not concerned with the parties' state of mind when they

entered the contract, and therefore, the parties' uncommunicated, subjective intentions are not considered. *Bill Walker & Associates, Inc. v. Parrish*, 770 S.W.2d 764, 770 (Tenn. App. 1989). Thus, regardless of the Committee's intentions, the court must give effect to the clear and unambiguous language of the release which releases CFI from liability for all causes of action held by the debtor or the Committee.

The Committee does not contend that the cause of action did not exist at the time the Settlement Agreement was executed or that it was not aware of its existence. Instead, it only notes that this adversary had not been filed. However, the fact that this adversary proceeding was not filed at the time the Settlement Agreement was executed is not determinate of whether this particular cause of action was released. All that matters is that the cause of action existed at the time and was known by the parties. *Cross v. Earls*, 517 S.W. 2d 751, 752 (Tenn. 1974). Nor is it determinative that the existence of this claim was not expressly mentioned or noted in the recitals portion of the settlement agreement. It is not uncommon for parties to execute a broad, general release of all other potential causes of actions when a particular claim is settled, if for no other reason, to insure that the settlement will once and for all relieve the released parties from any further litigation arising out of the same subject matter. That appears to be the case here since CFI was released not only from the "Claims" stated in the recital portion of the Settlement Agreement, but also as to "any other

cause of action ... whether arising under the Code or applicable state or federal law, including [Sections 510, 544, 547, 548 and 553 of the Code]"

The Committee argues that CFI's interpretation of the Settlement Agreement as a general release would violate and undermine the Bankruptcy Code's policy and objective, as expressed in §§ 548 and 550, of bringing fraudulent conveyances back into the estate so that the asset may be shared by all creditors. This argument is without merit. All settlements of preference and fraudulent conveyance actions result in less than the full amount of the transfers being brought back into the estate. Such settlements are routine, however, for the very reasons the Settlement Agreement was entered into: litigation is costly, complex and fraught with delay, a successful outcome is uncertain and even if successful, collection can be difficult.² Moreover, this court, pursuant to its September 23, 1991 order, has already

²The precise language as expressed by the parties as to why settlement was reached is set forth in Paragraph J of the Settlement Agreement which provides:

In reaching this agreement, the Debtor and the Committee have considered in depth and in consultation with their respective counsel the probability of success in any litigation relating to the claims, the difficulties to be encountered in the matter of collection, the complexity of any litigation considered and the expense, inconvenience, and delay necessarily attending it, and the paramount interests of creditors, and to avoid protracted, costly, and uncertain litigation, have concluded that this agreement is in the best interests of the Debtor's estate and its creditors.

expressly found the settlement to be in the best interests of the estate and its creditors.³ This court is not inclined to revisit the issue, especially since to do so would require the court to ignore the intention of the parties as expressed by the plain and unambiguous language of the release.

CFI has moved to strike the affidavits of Messrs. Melnick and Raymond on the ground that the affidavits contain inadmissible evidence. In short, CFI asserts that the affidavits which state that the Committee did not intend in the Settlement Agreement to release CFI from liability for the present action violate the parol evidence rule. The court agrees. The parol evidence rule is a rule of substantive law intended to protect the integrity of written contracts. *Richland Country Club, Inc. v. CRC Equities, Inc.* 832 S.W.2d 554, 557 (Tenn. App. 1991). In its simplest form the rule provides that parol evidence is not admissible to contradict a written agreement. *See, e.g., Clayton v. Haury*, 452 S.W.2d 865, 867 (Tenn. 1970). As noted by one court: "We have the terms of the written contract. The express terms may not be changed or nullified by parol testimony, nor may such parol testimony antecedent to the reduction of the agreement to writing be considered where the language of the agreement is clear, unquestioned and unambiguous." *Nichelson v. U.S.*, 29 Fed. Cl. 180, 194 (Fed. Cl. 1993) *quoting* WILLISTON ON CONTRACTS, s 603, at 341; *see*

³Paragraph 3 of the September 23, 1991 order approving the Settlement Agreement includes a finding by the court that "the Settlement Agreement is in the best interest of the estate and the unsecured creditors."

Greco v. Department of Army, 852 F.2d 558, 560 (Fed. Cir. 1988) ("Only if there is ambiguity should parol evidence be considered."); *Hughes Communications Galaxy, Inc. v. United States*, 26 Cl.Ct. 123, 140 (1992) ("It is axiomatic that parol evidence cannot be used to alter the terms of an integrated document, in the absence of ambiguity."). Because the affidavits, if accepted, would contradict and alter the unambiguous language of the general release set forth in the Settlement Agreement, they may not be considered by this court and must be stricken in their entirety.

IV.

In conclusion, the court finds that the language in the Settlement Agreement barring the present cause of action against CFI is plain and unambiguous and that the Committee has released CFI from liability for the present action. That being the case, the court need not address CFI's other asserted ground for summary judgment based upon the statute of limitations. An order will be entered in accordance with this memorandum granting CFI summary judgment as a matter of law and striking the affidavits of Messrs. Melnick and Raymond.

ENTER: November 29, 1994

BY THE COURT



MARCIA PHILLIPS PARSONS
UNITED STATES BANKRUPTCY JUDGE