

## CONTRACT AMBIGUITY YIELDS SUMMARY JUDGMENT DENIAL

Ticer v. Reed Migraine Ctrs. of Tex., PLLC, 2018 Tex. App. LEXIS 9927 (Tex. App.—Dallas Dec. 4, 2018).

By Savannah M. Warner<sup>1</sup>

On December 4, 2018, the Texas Court of Appeals for the Fifth Circuit reversed the decision of the Dallas County Court at Law No. 2., holding that ambiguity within a contract constitutes a fact issue for which summary judgment is improper.<sup>2</sup>

The relevant facts of the case are as follows: Appellee Dr. Kenneth Reed created a procedure to treat migraine headaches, which was contractually agreed upon to be solely performed at the University General Hospital (“UGH”) in exchange for a portion of the net revenues.<sup>3</sup> Attorney Mark Ticer represented Reed and Reed’s entities (the “Reed Parties”) in state court after UGH and some of its doctors (the “UGH Parties”) were marketing the treatment as their own through a separate entity called the “Advanced Migraine Relief and Treatment Center.”<sup>4</sup> Ticer represented the Reed Parties in both state and federal lawsuits after discovering that UGH had paid over \$1,000,000 to the doctors and the treatment center.<sup>5</sup> Those lawsuits settled, resulting in an order of the UGH Parties to make a series of payments to the Reed Parties.<sup>6</sup> Shortly after, Ticer’s representation ended and a fee dispute arose, leading to his lawsuit in a state court action to recover his fees.<sup>7</sup>

After the Reed Parties filed a malpractice counterclaim against Ticer, the suit culminated in a settlement agreement (the “Ticer Agreement”) upon which Ticer would receive a portion of the settlement the Reed Parties received from the UGH Parties in exchange for mutual releases and a dismissal of all claims.<sup>8</sup> Two months after this agreement, the UGH Parties filed for bankruptcy before making any of the payments to the Reed Parties, which triggered an automatic stay of the state court action.<sup>9</sup> A year later, the Reed Parties settled their claims against certain members of the UGH Parties, and a federal court ordered that the whole settlement amount was to be deposited in the court’s registry and payment was to be stayed until resolution of the state court proceedings.<sup>10</sup>

The trial court proceeded to lift the abatement and severed the claims against the UGH Parties.<sup>11</sup> The Reed Parties then filed a motion for summary judgment seeking a release of all claims with prejudice against Ticer on the affirmative defense of release, which was granted.<sup>12</sup> Ticer appealed this decision, arguing that the Ticer Agreement was ambiguous as a matter of law.<sup>13</sup> The issue within the appeal was whether the mutual releases were effective immediately upon the parties signing the agreement, or only after the payments were made.<sup>14</sup>

The Court examined several provisions throughout the Ticer Agreement and eventually held that the agreement was subject to multiple interpretations. The court quoted these footnoted provisions from the Ticer Agreement<sup>15</sup> and then reasoned:

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<sup>2</sup> Ticer v. Reed Migraine Ctrs. of Tex., PLLC, 2018 Tex. App. LEXIS 9927 (Tex. App.—Dallas Dec. 4, 2018).

<sup>3</sup> *Id.* at \*1-2.

<sup>4</sup> *Id.* at \*2.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.* at \*3.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.* at \*4.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* at \*4-5.

<sup>11</sup> *Id.* at \*5.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* at \*7.

<sup>14</sup> *Id.* at \*8-9.

<sup>15</sup> “a. The Parties to this Agreement agree that they will each direct the UGH Parties to make the Initial Payment, as follows:

i. within 24 hours after this Agreement is executed by all Parties, the UGH parties will pay or cause to be paid to the Reed Entities \$300,000.00 . . .

Paragraph 2 of the Agreement addresses monetary compensation in several provisions that require (a) the parties to "direct the UGH Parties to make the Initial Payment," (b) the Reed Parties to make a payment to Ticer after receiving payment from UGH, and (c) the Reed Parties to convey a security interest to Ticer in an escrow fund created pursuant to the Global Settlement. Paragraph 3 of the Agreement entitled Mutual Releases sets forth releases of claims against the Reed Parties, Ticer, Griffith, Klemchuk, and Ticer's associate Jennifer Johnson. The mutual releases were made "[i]n exchange for the representations, mutual releases, warranties, undertakings and the Monetary Consideration described in Section 2." Ticer argues the releases were only effective upon the payment of the required monetary consideration. In response, appellees maintain that the release provisions in the Agreement were effective upon signing because the provisions state that Ticer "hereby RELEASES" the Reed Parties and Griffith. However, Paragraph 5 of the Agreement entitled Dismissal provides that "[t]he Intervention, the Counterclaim and the Third-Party Action shall be dismissed with prejudice within three (3) days following the receipt of payments that are identified in paragraph 2(a)(i), (ii) and (iii) of this Agreement, with all Parties bearing their own attorneys' fees and costs of suit." Thus, the dismissal provision appears to premise dismissal of the parties' claims upon receipt of the payments under Paragraph 2. Additionally, Paragraph 4 of the Agreement entitled Other Conditions includes a provision that "[t]he Parties agree that all pending discovery in the Litigation between the Parties to this Agreement will be abated pending the dismissal described in Paragraph 5, below." This provision appears to contemplate that no further proceedings in state court would take place until the parties' claims were dismissed with prejudice following the receipt of payments set forth in Paragraph 2.<sup>16</sup>

The Court then stated "[w]e are unable to harmonize the foregoing provisions to give effect to all the provisions in the Ticer Agreement."<sup>17</sup> Because the Court held that the Ticer Agreement was ambiguous in terms of when the release provisions were effective, it concluded that summary judgment was improper because the interpretation of the Ticer Agreement was a fact issue.<sup>18</sup> The case was then remanded to the trial court for further resolution.<sup>19</sup>

Although the facts within this case were particularly complicated and intricate, this case stands to show the fundamental principle that ambiguity and fact issues will typically not allow a summary judgment to survive. It is important to remember when drafting a contract that if it contains provisions that are susceptible to more than one interpretation, a court may deem this an ambiguity and thus a fact issue that cannot be properly resolved through summary judgment.

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ii. within 24 hours after this Agreement is executed by all Parties, the UGH Parties will pay or cause to be paid to LOMAT the amount of \$200,000.00 . . .

iii. within 24 hours after the Reed Entities receive the payment identified in Paragraph 2(a)(i) above, the Reed Entities will pay or cause to be paid to LOMAT the sum of \$18,836.09 by check for case expense reimbursement.

b. Within 48 hours following receipt by the Reed Entities of the next settlement payment from the UGH Parties pursuant to the Global Settlement, the Reed Entities will pay to LOMAT the sum of \$106,193.91 via check by hand delivery.

c. The Global Settlement contemplates that a \$200,000.00 escrow fund will be created. The Reed Entities also agree to grant and hereby assign and convey to LOMAT a security interest in this escrow fund to secure payment of the funds described in Paragraph 2(b) above. This security interest shall remain in effect until all monies contemplated under this Agreement to be payable to LOMAT are paid to LOMAT. LOMAT is entitled to first monies from this escrow until all amounts due LOMAT are paid. Once all amounts are paid to LOMAT, this security interest is released. *Id.* \*9-11.

<sup>16</sup> *Id.* at 8-9.

<sup>17</sup> *Id.* at \*11.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at \*12.