

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF GRAND TRAVERSE

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BAY BUSINESS SERVICES, INC.,

Plaintiff,

v

File No. 01-21823-CK  
HON. PHILIP E. RODGERS, JR.

THOMAS K. JOLITZ,

Defendant.

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Craig W. Elhart (P26369)  
Attorney for Plaintiff

Wilson D. Brott (P51446)  
Attorney for Defendant

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DECISION AND ORDER GRANTING  
DEFENDANT'S MOTION FOR SUMMARY DISPOSITION

The Plaintiff Bay Business Services, Inc. ("Bay Business") filed this breach of contract action against the Defendant Thomas K. Jolitz ("Jolitz"). The undisputed facts are these. On May 29, 1998, Bay Business and Jolitz entered into a contract whereby Bay Business agreed to provide certain services to assist Jolitz in his business in exchange for 30 percent of any revenue payable to Jolitz during the three year term of the contract. The contract also contained a provision that "neither party may assign this Agreement without the prior written consent of the other."

The parties contemporaneously entered into an Accounts Receivable Security Agreement and Assignment whereby Jolitz assigned a security interest in all of his present and future accounts and accounts receivables, commissions payable and the proceeds thereof . . . due from any source, including, but not limited to, the Independent Contractor Agreement dated May 21, 1998 between [Jolitz] and Gen-Ex, Inc. ("Gen-Ex Contract") to secure payment of [certain] obligations." Pursuant to the Gen-Ex Contract, Jolitz was to receive commissions on the Europa and Myers telecommunications contracts. Paragraph 6 of the Security Agreement provided, in pertinent part as follows:

**6. Miscellaneous.** All rights of Secured hereunder shall inure to the benefit of its personal representatives, successors and assigns, and all Obligations of Debtor shall bind its successors and assigns . . .

All rights of the Secured Party in, to and under this Security Agreement and in and to the Collateral shall pass to and may be exercised by any assignee thereof. The Debtor agrees that if the Secured Party gives notice to the Debtor of an assignment of said rights, upon such notice, the liability of the Debtor to the assignee shall be immediate and absolute. The Debtor will not set up any claim against the Secured Party as a defense, counter-claim or set-off to any action brought by any such assignee for the unpaid balance owed hereunder or for possession of the Collateral, provided, that Debtor shall not hereby waive any right of action to the extent that waiver thereof is expressly made unenforceable under applicable law.

Shortly after Bay Business and Jolitz executed the May 29, 1998 contract and the Security Agreement, Bay Business approached another of its clients, Charles Willette ("Willette"), about loaning Jolitz money. On July 9, 1998, Bay Business entered into a joint venture agreement with Willette for the management of Jolitz. In exchange for Willette's assistance in managing Jolitz, Bay Business assigned to Willette the Jolitz' contract with Gen-Ex and Bay Business agreed to forward to Willette 50 percent of all gross revenues due to Bay Business under its May 29, 1998 contract. Willette made loans and advances to Jolitz and made purchases and payments on behalf of Jolitz.

On or about October 2, 1998, Willette purchased the other 50 percent of the gross revenues from Bay Business that were due Bay Business under its May 29, 1998 contract.

Jolitz failed to repay Willette. On June 16, 1999, Jolitz and Willette entered into a Forbearance Agreement whereby Jolitz agreed to pay Willette by turning over a commission stream from the Chip Greenberg deal and Willette agreed to refrain from filing legal action.

On September 22, 1999, Jolitz and Willette entered into a Settlement Agreement and Mutual Release "regarding their respective interests in that certain Europa telecommunications contract, . . . and that certain Myers telecommunications contract . . . along with the related income streams generated from such contacts [sic]." That agreement contained the following relevant provisions:

8. **Applicability of Release by Jolitz.** This release and discharge by Jolitz shall also apply to any and all persons or entities related to Willette including any . . . predecessors or successors in interest . . . and all other persons, firms or corporations with whom Willette may have been or is now or may hereafter be affiliated.

9. **Applicability of Release by Willette.** This release and discharge by Willette shall also apply to all persons or entities related to Jolitz including any . . . predecessors . . . in interest and any . . . corporations with whom Jolitz has been or is now or may hereafter be affiliated.

\* \* \*

16. **Warranty of Capacity to Execute.** Jolitz and Willette each warrant and represent that no other person or entity except as stated herein has or has had or will have any interest in the claims, demands, obligations, or agreements referred to in this Settlement Agreement, and that each such party has the legal capacity and authority to enter into this Settlement Agreement . . .

In October or November of 1999, the parties met at the offices of Jolitz' then-attorney, Mike Lewis, in an attempt to negotiate another settlement because Jolitz still had not paid Willette. Larry Flynn of Bay Business was present at that meeting. According to Eric Phelps, the attorney who was present and representing Willette, there was "discussion on the assignment, . . . the key issue on the assignment was whether it was valid . . . because . . . the underlying agreement between Jolitz and Bay Business . . . required mutual consent before there could be assignment of any portion of the contract." (Phelps deposition at p 7). Jolitz had not consented in writing to the assignment by Bay Business to Willette.

In January, 2000, Willette filed suit against Jolitz in the 86<sup>th</sup> District Court for the County of Grand Traverse, Case No. 00-7072-CZ, to enforce the September 22, 1999 Settlement Agreement. On August 15, 2000, Willette and Jolitz entered into yet another Settlement Agreement and Release of All Claims. This Agreement provided, in pertinent part, as follows:

1. For and in consideration for the amounts, terms and conditions stated herein, the terms and sufficiency of which are hereby agreed to and acknowledged, **WILLETTE and JOLITZ hereby release and forever discharge the other** and their insurers, heirs, executors, partners, administrators, principals, employees, corporations, representatives, agents, officers, directors, shareholders, assigns and successors **from any and all claims**, demands, damages, actions, causes of action or suits of any kind or nature whatsoever, both known and unknown, **which were brought, or could have been made a part of the legal action filed with the 86<sup>th</sup> District Court for the County of Grand Traverse, Michigan, Case No. 00-7072-CO.** . . . [Emphasis added].

This Agreement also contained an Addendum which, as initially drafted, provided as follows:

This Mutual General Release includes all claims except those that involve claims that Bay Business, Inc. may have against [Jolitz]. In the event Bay Business sues [Jolitz], [Jolitz] reserves the right to seek relief against [Willette] if warranted by Facts and Law.

As finally adopted, the Addendum simply states:

In the event Bay Business sues [Jolitz], both parties reserve the right to seek relief against the other if warranted by Facts and Law.

On October 17, 2001, Bay Business filed this action seeking to enforce the May 29, 1998 contract and collect 30 percent of the gross revenues payable to Jolitz during the three-year term of that Agreement. Jolitz filed a motion for summary disposition pursuant to MCR 2.116(C)(7) claiming that Bay Business' claims are barred by release because Bay Business assigned all of its interest in the May 29, 1998 contract to Willette and Jolitz and Willette settled all of the claims existing between them. Jolitz' motion is also brought pursuant to MCR 2.116(C)(10). Jolitz claims that he is entitled to judgment as a matter of law because there is no genuine issue of material fact that Bay Business cannot prove that it is entitled to any damages as it has no documentary evidence that would establish that Jolitz received any monies during the term of the Agreement.

On November 25, 2002, the Court heard the arguments of counsel and took Jolitz' motion under advisement. The Court now issues this written Decision and Order and for the reasons stated herein grants the motion brought pursuant to MCR 2.116(C)(7). The Court does not reach the motion brought pursuant to MCR 2.116(C)(10).

#### STANDARD OF REVIEW

MCR 2.116(C)(7) sets forth the following grounds for summary disposition:

The claim is barred because of release, payment, prior judgment, immunity granted by law, statute of limitations, statute of frauds, an agreement to arbitrate, infancy or other disability of the moving party, or assignment or other disposition of the claim before commencement of the action.

In *Amburgey v Sauder*, 238 Mich App 228, 231; 605 NW2d 84 (2000), the Court of Appeals said:

When a motion for summary disposition is premised on MCR 2.116(C)(7), the nonmovant's well-pleaded allegations must be accepted as true and construed in the nonmovant's favor and the motion should not be granted unless no factual development could provide a basis for recovery. *Stabley, supra* at 365; 579 NW2d 374; *Dewey v Tabor*, 226 Mich App 189, 192; 572 NW2d 715 (1997). '[T]he court must consider not only the pleadings, but also any affidavits, depositions, admissions, or documentary evidence that has been filed or submitted by the parties.' *Horace v City of Pontiac*, 456 Mich 744, 749; 575 NW2d 762 (1998). If no facts are in dispute, whether the claim is statutorily barred is a question of law. *Dewey, supra* at 192; 572 NW2d 715.

I.

VALIDITY OF ASSIGNMENT

All facts pertinent to the Court's ruling are undisputed. In order to determine whether Bay Business' claim is barred by release, which is a question of law, the Court must first determine whether Bay Business' assignment of its interest in the May 29, 1998 contract to Willette is valid. Bay Business and Willette claim that it is not valid because it was not consented to in writing by Jolitz as required by the May 29, 1998 contract.

For several reasons, the Court holds that the assignment is valid.

A.

More than a year after Willette and Jolitz compromised and settled their respective financial interests in the telecommunications contracts, Bay Business raised the claim that the assignment was invalid because Jolitz had not consented to it in writing as required by the May 29, 1998 contract. In the absence of a statute or arbitrary rule to the contrary, an agreement need not be signed, provided it is accepted and acted on, or is delivered and acted on. *Ehresman v Bultynck & Co, PC*, 203 Mich App 350; 511 NW2d 724 (1994). Where mutuality of assent is established, written agreements do not have to be signed in order for the agreement to be binding. See, *Green v Gallucci*, 169 Mich App 533, 426 NW2d 693 (1988). According to 17 CJS, Contracts, § 62, pp 731-733:

[S]ignature is not always essential to the binding force of an agreement, and whether a writing constitutes a binding contract even though it is not signed or whether the signing of the instrument is a condition precedent to its becoming a binding contract usually depends on the intentions of the parties. The object of a signature is to show mutuality or assent, but these facts may be shown in other ways.

In the instant case, none of the parties denies that Jolitz accepted the benefit of the assignment. He received short-term financing from Willette and Willette took over the management responsibilities that Bay Business had contracted with Jolitz to provide. Jolitz' conduct clearly conveyed assent to the assignment. Under the circumstances, Jolitz acceded to the terms of the assignment by his conduct and should be bound by it.

By the same token, Bay Business and Willette entered into the joint venture and executed the assignment. For them to now claim that the assignment is invalid because it was not consented to in writing by Jolitz would be to ignore their undeniable intentions as evidenced by their agreements and course of conduct.

B.

From the time that Willette and Bay Business entered into the July 9, 1998 joint venture agreement for the management of Jolitz until the time that Larry Flynn raised the issue of the validity of the assignment, everyone operated under the belief that the assignment was valid. On September 22, 1999, which was during that time period, Willette and Jolitz compromised and settled their disputes over their respective financial interests in the telecommunications contracts that were the subject of the May 29, 1998 contract. Bay Business does not contend that it did not receive adequate consideration or that it returned to Willette the consideration it received for the assignment and purchase of its interest under the May 29, 1998 contract. Consequently, it is the Court's opinion that Bay Business and Willette should be estopped from claiming that the assignment was invalid.

Equitable estoppel is not an independent cause of action, but instead a doctrine that may assist a party by precluding the opposing party from asserting or denying the existence of a particular fact. Equitable estoppel may arise where (1) a party, by representations, admissions, or silence intentionally or negligently induces another party to believe facts, (2) the other party justifiably relies

and acts on that belief, and (3) the other party is prejudiced if the first party is allowed to deny the existence of those facts. *Conagra, Inc v Farmers State Bank*, 237 Mich App 109, 140-141; 602 NW2d 390 (1999) and *West Bay Exploration Co v Amoco Production Co*, 148 Mich App 197, 207; 384 NW2d 407 (1986).

Equitable estoppel exists “when one by his acts, representations, or admissions, or by his silence when he ought to speak out, intentionally or through culpable negligence induces another to believe certain facts to exist and such other rightfully relies and acts on such belief so that he will be prejudiced if the former is permitted to deny the existence of such facts.” *Lichon v American Universal Ins Co*, 435 Mich 408, 415; 459 NW2d 288 (1990). An individual may be estopped by its acts, conduct, silence, and acquiescence. *Oliphant v Frazho*, 381 Mich 630, 638; 167 NW2d 280 (1969).

In *Lakeside Oakland Development, LC v H & J Beef Co*, 249 Mich App 517; 644 NW2d 765 (2002), the Court of Appeals held that the doctrine of equitable estoppel barred a real estate vendor from relying on the statute of frauds to overcome the purchaser’s claim that an easement had been conveyed with the property, saying:

In *Opdyke Investment Co v Norris Grain Co*, 413 Mich 354, 365; 320 NW2d 836 (1982), our Supreme Court recognized that legal doctrines, including estoppel and promissory estoppel, “have developed to avoid the arbitrary and unjust results required by an overly mechanistic application of the [statute of frauds].” The statute of frauds exists for the purpose of preventing fraud or the opportunity for fraud, and not as an instrumentality to be used in the aid of fraud or prevention of justice. *Farah v Nickola*, 352 Mich 513, 519, 90 NW2d 464 (1958). The doctrine of equitable estoppel has been applied to defeat the defense of the statute of frauds where a party has acted to his detriment in reliance on oral agreements or where application of the doctrine of equitable estoppel is necessitated by the facts. *Nygaard v Nygard*, 156 Mich App 94, 100; 401 NW2d 323 (1986).

In *Cincinnati Ins Co v Citizens Ins Co*, 454 Mich 263; 562 NW2d 648 (1997), the defendant was equitably estopped from asserting the statute of limitations as a bar to plaintiff’s action.

In the instant case, Bay Business assigned 50 percent of its interest in the revenue stream Jolitz anticipated receiving from various telecommunications contracts to Willette in July of 1998.<sup>1</sup>

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<sup>1</sup>Bay Business has not alleged that it did not receive adequate consideration from Willette.

The management contract did not allow for such an assignment, but the contemporaneously executed Accounts Receivable Security Agreement did. From that point until October or November 1999, the parties conducted themselves as if the assignment was valid. During that time, Willette bought Bay Business' remaining 50 percent interest in the revenue stream and, approximately one year later, on September 22, 1999, compromised and settled his dispute with Jolitz over their respective financial interests in the telecommunications contracts.

Under the circumstances, it would be unjust and inequitable to allow Bay Business to maintain this action. Bay Business received value for the assignment to Willette and purchase by Willette of its interest in the May 29, 1998 contract. Willette compromised and settled his disputes with Jolitz. This Court, therefore, finds that Bay Business and Willette are estopped from claiming that the assignment is invalid.

C.

Willette loaned Jolitz money and took an assignment of Bay Business' interest in its May 29, 1998 contract with Jolitz. When Jolitz did not repay Willette, Willette and Jolitz entered into the Settlement Agreement of September 22, 1999. At that time, everyone believed that Willette had an interest in the revenue stream that was expected to flow from the May 29, 1998 contract. This is apparent from the Settlement Agreement which purports "to resolve and settle any and all disputes related to [Willette's and Jolitz'] respective financial interests in [the Europa and Myers telecommunications contracts]." Thus, Willette's claim that his settlement with Jolitz "had nothing to do with the revenue purportedly assigned to me by Bay Business, but rather dealt with Tom Jolitz' failure to repay me the money I had personally loaned him, which loans were made exclusive of Tom's agreement with Bay Business" is belied by the clear, unambiguous language of the September 22, 1999 Settlement Agreement.

This interpretation of the September 22, 1999 Settlement Agreement is not altered by the later District Court action to enforce that Agreement or the August 15, 2000 Settlement Agreement even though the August 15, 2000 Settlement Agreement is admittedly more restricted. It contains only a limited release "from any and all claims . . . which were brought, or could have been made a part of the legal action . . ." (The legal action being one to enforce the September 22, 1999



Settlement Agreement.) And, the August 15, 2000 Settlement Agreement contains an Addendum which reserves to the parties the right to seek relief against one another if Bay Business sues Jolitz. However, by this point in time, the parties had already compromised and settled their disputes “regarding their respective financial interests in that certain Europa telecommunications contract . . . and that certain Myers telecommunications contract.” Only by virtue of the assignment and purchase of Bay Business’ interest in the May 29, 1998 contract did Willette have any interest in those telecommunications contracts.

D.

Willette sued Jolitz in District Court, not to enforce the May 29, 1998 contract, but to enforce the September 22, 1999 Settlement Agreement. Bay Business was aware of what was transpiring between Willette and Jolitz because Larry Flynn was present at the October or November 1999 meeting at Mike Lewis’ office and Willette and Jolitz expected Bay Business to sue Jolitz. Even so, Bay Business did nothing to protect the interests it contends it has by virtue of the assignment being invalid. Bay Business did not intervene in the District Court action. It did not file this action until 14 months after Willette and Jolitz settled the District Court action.

For all of these reasons, the Court finds that the assignment is valid.

II.

RELEASE

Since the assignment is valid, the next question to be answered is whether the September 22, 1999 Settlement Agreement or the August 15, 2000 Settlement Agreement releases any and all claims Bay Business might have against Jolitz. The August 15, 2000 Settlement Agreement was a settlement of any and all claims that were or could have been brought in the District Court Action. That action was for breach of contract to enforce the September 22, 1999 Settlement Agreement.

The September 22, 1999 Settlement Agreement on the other hand resolved and settled any and all disputes related to Willette’s and Jolitz’ respective financial interests in the Europa and Myers telecommunications contract. Willette only had a financial interest in those contracts because

of the joint venture agreement with Bay Business and the assignment and purchase of Bay Business' interest in the May 29, 1998 contract. The September 22, 1999 Settlement Agreement is controlling.

The scope of a release is governed by the intent of the parties as it is expressed in the release. If the text in the release is unambiguous, the parties' intentions must be ascertained from the plain, ordinary meaning of the language of the release. A contract is ambiguous only if its language is reasonably susceptible to more than one interpretation. *Rinke v Automotive Moulding Co*, 226 Mich App 432, 435; 573 NW2d 344 (1997). The fact that the parties dispute the meaning of a release does not, in itself, establish an ambiguity. *Gortney v Norfolk & Western R Co*, 216 Mich App 535, 540; 549 NW2d 612 (1996).

The release contained in the September 22, 1999 Settlement Agreement covered "any and all disputes related to [Willette's and Jolitz'] respective financial interests in [the Europa and Myers telecommunications] Contracts." As the Court of Appeals has held, "there is no broader classification than the word 'all'" *Skotak v Vic Tanny Int'l, Inc*, 203 Mich App 616, 619; 513 NW2d 428 (1994). The release clearly expressed the parties' intent to release one another from all obligations under the May 29, 1998 contract. *Gara v Woodbridge Tavern*, 224 Mich App 63, 67; 568 NW2d 138 (1997), citing *Skotak, supra* at 619 and *Dombrowski v Omer*, 199 Mich App 705, 711-712; 502 NW2d 707 (1993). The release specifically addressed the Europa and Myers telecommunications contracts which Willette had an interest in by virtue of the assignment and purchase from Bay Business of its interest in the May 29, 1998 contract. The release specifically states:

8. **Applicability of Release by Jolitz.** This release and discharge by Jolitz shall also apply to any and all persons or entities related to Willette including any . . . predecessors or successors in interest . . . and all other persons, firms or corporations with whom Willette may have been or is now or may hereafter be affiliated.
9. **Applicability of Release by Willette.** This release and discharge by Willette shall also apply to all persons or entities related to Jolitz including any . . . predecessors . . . in interest and any . . . corporations with whom Jolitz has been or is now or may hereafter be affiliated.

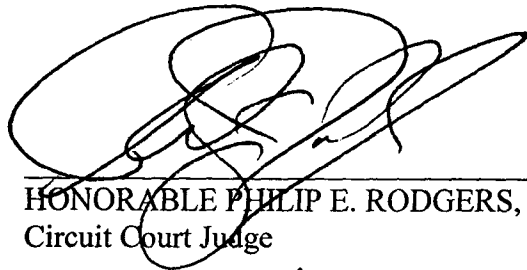
Therefore, as a matter of law, the September 22, 1999 Settlement Agreement between Willette and Jolitz resolved all claims arising out of the May 29, 1998 contract and Bay Business is precluded from pursuing this action.

#### CONCLUSION

For the reasons stated herein, the Defendant's Motion for Summary Disposition brought pursuant to MCR 2.116(C)(7) is hereby granted. This action is dismissed with prejudice. Counsel for the Defendant shall prepare and submit a proposed order pursuant to MCR 2.602(B)(3). No costs are awarded to either party.

IT IS SO ORDERED.

This Decision and Order resolves the last pending claim and closes this case.



HONORABLE PHILIP E. RODGERS, JR.  
Circuit Court Judge

Dated: 12/11/02