[Cite as *McBroom v. Safford*, 2012-Ohio-1919.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Gracie McBroom,	:	
Plaintiff-Appellant,	:	
		No. 11AP-885
v.	:	(C.P.C. No. 11CVH06-7162)
Boyce Safford, III, et al.,	:	(ACCELERATED CALENDAR)
Defendants-Appellees.	:	

D E C I S I O N

Rendered on May 1, 2012

Gracie McBroom, pro se.

Glenn B. Redick, for appellees.

APPEAL from the Franklin County Court of Common Pleas.

SADLER, J.

{¶ 1} Plaintiff-appellant, Gracie McBroom, appeals from a judgment of the Franklin County Court of Common Pleas granting the motion to dismiss filed by defendants-appellees, Boyce Safford, III, Director, and the Department of Development. For the reasons that follow, we affirm the judgment of the trial court.

{¶ 2} This matter arose with the filing of a complaint on June 10, 2011, alleging breach of contract, negligent misrepresentation, and intentional infliction of emotional distress. According to the complaint, the asserted claims arise out of the "Roof Repair Plus Initiative, Home Safe and Sound Program" funded by the City of Columbus, Department of Development. (Complaint, 2.) Plaintiff alleges that on August 8, 2007,

she entered into a contract with the city of Columbus ("the City") for Superior Home Maintenance Company ("Superior") to "rehabilitate" her home. (Complaint, 2.) According to the complaint, because Superior failed to complete the work, appellant and the City entered into a separate contract on December 2, 2008 to have Warehouse Sales engage in corrective work. Alleging "defects and omissions in the construction and maintenance" performed by Warehouse Sales, appellant filed this lawsuit. (Complaint, 2.) Specifically, the complaint alleges Warehouse Sales' work involving appellant's gutters was faulty. Appellant's asserted claims against Safford and the Department of Development are premised on a portion of the December 2, 2008 contract that provides, "the Contractor will warrant all work for a period of three (3) years." (Complaint, 3.)

{¶ 3} On July 5, 2011, appellees filed a motion to dismiss the complaint, pursuant to Civ.R. 12(B)(6), arguing the contract giving rise to appellant's claims contains language releasing the City and all its agents and employees from liability arising from any repairs, including the corrective work done by Warehouse Sales. In addition to the arguments pertaining to the release, each appellee made arguments as to why dismissal was proper individually. The Department of Development argued that because it is merely a division within in a municipal corporation, it is not sui juris and, therefore, lacks the capacity to be sued. Safford argued that at the very minimum he was entitled to dismissal of appellant's claims for negligent misrepresentation and intentional infliction of emotional distress because the complaint contained no allegations that Safford had any contact or interaction with appellant.

{¶ 4} Finding that the release contained in the December 2, 2008 contract barred the claims asserted herein, the trial court granted appellees' motion to dismiss. Appellant timely appealed and brings the following assignment of error for our review:

> The trial court erred in sustaining the appellee's [sic] motion to dismiss based upon appellant's failure to state a claim in which relief may be granted filed July 15, 2011.

{¶ 5} Appellant contends the trial court erred in dismissing her complaint because appellees' breach of duty proximately caused her damages in the amount of $250,000.

{¶ 6} Civ.R. 12(B) states in part:

> Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: * * * (6) failure to state a claim upon which relief can be granted * * *. When a motion to dismiss for failure to state a claim upon which relief can be granted presents matters outside the pleading and such matters are not excluded by the court, the motion shall be treated as a motion for summary judgment and disposed of as provided in Rule 56.

{¶ 7} A Civ.R. 12(B)(6) motion to dismiss for failure to state a claim upon which relief can be granted "is procedural and tests the sufficiency of the complaint." *State ex rel. Hanson v. Guernsey Cty. Bd. of Commrs.*, 65 Ohio St.3d 545, 548 (1992), citing *Assn. for the Defense of the Washington Local School Dist. v. Kiger*, 42 Ohio St.3d 116, 117 (1989). In order for a trial court to grant a motion to dismiss for failure to state a claim upon which relief can be granted, it must appear "beyond doubt from the complaint that the plaintiff can prove no set of facts entitling her to relief." *Grey v. Walgreen Co.*, 8th Dist. No. 96846, 2011-Ohio-6167, ¶ 3, citing *LeRoy v. Allen, Yurasek & Merklin*, 114 Ohio St.3d 323, 2007-Ohio-3608, ¶ 14.

{¶ 8} In ruling on a Civ.R. 12(B)(6) motion, a trial court " 'cannot resort to evidence outside the complaint to support dismissal [except] where certain written instruments are attached to the complaint.' " *Brisk v. Draf Industries*, 10th Dist. No. 11AP-233, 2012-Ohio-1311, ¶ 10, quoting *Park v. Acierno*, 160 Ohio App.3d 117, 2005-Ohio-1332, ¶ 29 (7th Dist.). Rather, "[i]f a Civ.R. 12(B)(6) movant relies on evidence outside of the complaint and its attachments, then Civ.R. 12(B) specifies that the motion must either be denied or converted to a summary judgment motion, which would proceed under Civ.R. 56." *Id.* at ¶ 30, citing *Petrey v. Simon*, 4 Ohio St.3d 154, 156 (1983).

{¶ 9} An appellate court employs "a de novo standard of review for motions to dismiss filed pursuant to Civ.R. 12(B)(6)." *Grey* at ¶ 3, citing *Greeley v. Miami Valley Maintenance Contrs., Inc.*, 49 Ohio St.3d 228 (1990). Under de novo analysis, we are required to "accept all factual allegations of the complaint as true and draw all reasonable inferences in favor of the nonmoving party." *Grey* at ¶ 3, citing *Byrd. v. Faber*, 57 Ohio St.3d 56 (1991).

{¶ 10} Here, the trial court granted appellees' motion to dismiss based upon the release language in the contract underlying appellant's claims. The contract is attached to appellant's complaint and, therefore, could be considered by the trial court for purposes of appellees' Civ.R. 12(B)(6) motion. *Brisk*; *Miller v. Cass*, 3d Dist. No. 3-09-15, 2010-Ohio-1930 (a copy of a written instrument attached to a pleading is a part of the pleading for all purposes and thus can be considered for purposes of a motion to dismiss); *Adlaka v. Giannini*, 7th Dist. No. 05 MA 105, 2006-Ohio-4611, ¶ 34 ("If the plaintiff decides to attach documents to his complaint, which he claims establish his case, such documents can be used to his detriment to dismiss the case if they along with the complaint itself establish a failure to state a claim."). Thus, to the extent the language in the purported contract clearly forecloses appellant's claims against appellees, the trial court could properly dismiss those claims under Civ.R. 12(B)(6). *Denlinger v. Columbus*, 10th Dist. No. 00AP-315 (Dec. 7, 2000). *See Allstate Ins. Co. v. Blaum*, 4th Dist No. 1490 (Dec. 2, 1988) ("if a written instrument is attached to the complaint, it should be construed together with the averments of the complaint in determining whether there is any possible set of facts which would entitle the plaintiff to relief").

{¶ 11} Though appellant states in a conclusory fashion that the trial court erred in dismissing her complaint, we construe this as an argument that the trial court was incorrect in concluding her tort and contract claims fell within the purview of the contract's release. [1]

{¶ 12} A release of a cause of action for damages is ordinarily an absolute bar to a later action on any claim encompassed within the release. *Haller v. Borror Corp.*, 50 Ohio St.3d 10, 13 (1990). A release is a contract, and, as such, the overriding consideration in interpreting a release is to ascertain the intent of the parties, which intent is presumed to reside in the language the parties chose to employ in the agreement. *See generally Whitt v. Hutchison*, 43 Ohio St.2d 53 (1975); *Fabrizio v. Hendricks*, 100 Ohio App.3d 352 (11th Dist.1995). A court will not resort to extrinsic evidence in its effort to

[1] We note the Department of Development sought dismissal for two reasons: (1) the Department of Development is not sui juris and, thus, lacks the capacity to be sued, and (2) the contract's release of liability encompassed the claims asserted herein. Because the first reason is a separate and independent basis on which to dismiss this action against the Department of Development, the trial court's judgment with regard to it must stand regardless of our disposition of the arguments pertaining to the release.

give effect to the parties' intentions unless the language in a contract is unclear or ambiguous, or where the circumstances surrounding the agreement invest the language of the contract with a special meaning. *Kelly v. Med. Life Ins. Co.*, 31 Ohio St.3d 130, 132 (1987). Further, absent fraud or mutual mistake, broadly-worded releases are generally construed to include all prior conduct between the parties, even if the scope of such conduct or its damage is unknown to the releasor. *Denlinger*, citing *Task v. Natl. City Bank*, 8th Dist. No. 65617 (Feb. 10, 1994) (given broad language of the release, it was incumbent upon releasor to ascertain, at that time, whether he had any causes of action against defendant and, if so, to expressly manifest his intent to exclude those claims from the scope of the release).

{¶ 13} While releases from liability for future tortuous conduct are generally not favored by the law and will be narrowly construed, courts routinely apply such releases to bar future tort liability as long as the intent of the parties, with regard to exactly what kind of liability and what persons and/or entities are being released, is stated in clear and unambiguous terms. *Denlinger*, citing *Swartzentruber v. Wee-K Corp.*, 117 Ohio App.3d 420, 424 (4th Dist.1997) (language releasing livery stable from "any and all claims" that arose out of "any and all personal injuries" was sufficiently clear and specific to bar injured horseback rider's negligence claims); *Conkey v. Eldridge*, 10th Dist. No. 98AP-1628 (Dec. 2, 1999) (language in rental agreement releasing owner from "all liability for personal injuries, property damage, loss from theft, vandalism, fire, water, explosion, rodent damage, or any other causes" was sufficiently specific and clear to bar renter's claim arising out of theft of race car stored on owner's property); *Jacob v. Grant Life Choices Fitness Ctr.*, 10th Dist. No. 95APE12-1633 (June 4, 1996) (language in membership agreement releasing fitness center from liability for any injury or damage including damages resulting from negligence of fitness center barred member's negligence claims against fitness center).

{¶ 14} In *Denlinger*, the plaintiff, a former employee of Columbus Public Schools, sought damages from the city of Columbus for a variety of different claims, inter alia, breach of contract, defamation, breach of privacy, and intentional infliction of emotional distress. Attached to the complaint was a copy of the separation agreement entered into between the parties at the time the plaintiff left his employment. The defendant sought

dismissal of the complaint, pursuant to Civ.R. 12(B)(6), arguing that the waiver and release provisions of the separation agreement precluded the plaintiff's claims.

{¶ 15} The separation agreement in *Denlinger* provided that the plaintiff waived all claims "arising from or in connection with" his employment and resignation with the school. *Id*. Because the plaintiff's claims unquestionably arose from and/or were connected with his employment and/or resignation from employment, this court held the release and waiver provision in the contract "clearly and unambiguously" included the allegations presented. Therefore, this court affirmed the trial court's dismissal of those claims.

{¶ 16} The release at issue here states:

> Once the repairs have been satisfactorily completed by and paid to, Warehouse Sales I fully understand that I will have no further claims, cause of action or demands of any kind and nature, now or in the future, directly or indirectly, that may arise from repairs made, past and present, including the proposed corrective action work that will be caused by the City on my behalf. By voluntarily signing this letter, I understand and acknowledge that I have hereby completely and unconditionally released the City, its agents and employees from any liability for any and all work caused by the City.
>
> Therefore, I understand that in consideration for my complete and unconditional release, the City has agreed to pay $2,100.00, (Two thousand one hundred dollars and no cents) for the correction of discrepancies that may or may not have risen from work performed on my property through its Roof Repair Plus Program. Upon the City's determination that the repairs have been completed, said amount will be paid in accordance with the attached agreement and specifications.

{¶ 17} Clearly the claims asserted in appellant's complaint are claims that arose from repairs made pursuant to the "proposed corrective action work that will be caused by the City on [appellant's] behalf." As quoted above, appellant agreed to release the City and its agents and employees from liability arising from such repairs. As such, we find that the language of the release clearly and unambiguously includes the claims asserted in this case. *Denlinger*. Because it appears beyond doubt from the complaint that appellant can prove no set of facts entitling her to relief, appellant's complaint fails to state a claim

upon which relief can be granted, and, thus, appellees were entitled to have the complaint against them dismissed.

{¶ 18} Accordingly, we find no error in the trial court's decision granting appellees' motion to dismiss and overrule appellant's single assignment of error.

{¶ 19} For the foregoing reasons, appellant's assignment of error is overruled, and the judgment of the Franklin County Court of Common Pleas is hereby affirmed.

Judgment affirmed.

TYACK and CONNOR, JJ., concur.
