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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

DAVID K. MURPHY, Plaintiff, Cross-Defendant and Appellant, v. DAVID C. HANSEN et al., Defendants, Cross-Complainants and Respondents.	B206751 (Los Angeles County Super. Ct. No. SC 077244 consolidated w/SC 079138)
MICHAEL ZACHA et al., Plaintiffs, Cross-Defendants and Respondents, v. DAVID C. HANSEN et al., Defendants, Cross-Complainants and Respondents.	(Los Angeles County Super. Ct. No. SC 079138 consolidated w/SC 077244)

APPEAL from an order of the Superior Court of Los Angeles County. Allan J. Goodman, Judge. Reversed.

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Anker, Reed, Hymes & Schreiber, Martin S. Reed, Douglas K. Schreiber; Greines, Martin, Stein & Richland, Marc J. Poster and Peter O. Israel for Plaintiff, Cross-Defendant and Appellant.

Lawrence D. Slavett for Defendants, Cross-Complainants and Respondents.

Brannan Law Offices and G. Bryan Brannan for Plaintiffs, Cross-Defendants and Respondents.

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David Murphy appeals from the trial court's order enforcing a settlement agreement arising out of litigation between Murphy, David Hansen, Joan Hansen, Michael Zacha, and the Malibu Business Trust (we will refer to Zacha and the Malibu Business Trust collectively as "MBT"). Murphy argues that the trial court's order conflicts with the terms of the settlement agreement and is not supported by the evidence. We agree and reverse.

BACKGROUND

In 2000, Murphy purchased from the Hansens two neighboring landlocked lots commonly described as 161 and 171 Westlake Boulevard. The deeds from the Hansens to Murphy purported to grant Murphy an easement for "ingress, egress, roadway, drainage, sewer, public utilities and incidental purposes" across the two parcels that separated lots 161 and 171 from Westlake Boulevard, a public street. Elise Nilsen owns one of those intervening parcels, and MBT owns the other.

Murphy partially financed the purchase by means of a promissory note for $360,000 in favor of the Hansens, earning 10 percent interest and secured by a deed of trust on the lots.

In 2003, Murphy filed suit against the Hansens, alleging fraud, breach of contract, and related claims. Among other allegations, Murphy claimed that MBT had never consented to the creation of the easement reflected in the Hansens' deeds. MBT then sued Nilsen, the Hansens, and others, seeking to extinguish the purported easements over MBT's property. The Hansens cross-complained against Murphy for foreclosure of the trust deed, alleging that Murphy had stopped making payments on the note.

In 2005, Murphy, the Hansens, and MBT participated in a mediation. Murphy's title insurer, Chicago Title Insurance Company, although not a party to the litigation, participated in the mediation. Nilsen did not participate in the mediation, for reasons not revealed by the record. Murphy asserts in his opening brief that Nilsen was excused from the mediation on the basis of "MBT's representation that it had reached a separate settlement with her." The reporter's transcript contains a statement by the court indicating that MBT dismissed its complaint (against Nilsen and others) in December 2005, and that Nilsen at some point filed a cross-complaint but later dismissed it as to at least one cross-defendant. In any event, Nilsen is not a party to this appeal.

The mediation resulted in a "memo of understanding" (MOU) signed by Murphy, the Hansens, and MBT on July 21, 2005, purporting to settle the then-pending lawsuits. The MOU provides that "each party releases each and every other party from all claims of every nature and kind whatsoever, known or unknown, suspected or unsuspected, past, present, or future, arising from or attributable to the dispute underlying this action[.]"

Although Chicago Title did not sign the MOU, the MOU indicates that Chicago Title agreed to perform certain tasks in furtherance of the settlement, and Chicago Title confirmed in a subsequent court filing that it had "agreed to assist the parties in resolving this matter."

The MOU provides that "[t]he parties agree to execute a more formal settlement agreement consistent with the terms set forth herein." But the MOU also purports to be independently enforceable even in the absence of such a later agreement, because it provides that the parties agree "that this case is fully settled and that the following terms

and conditions will be enforceable by the entry of judgment on failure to comply with the terms and conditions herein[.]" (Block capitals omitted.) The MOU further states that it is an integrated agreement.

The MOU called for an escrow to be opened for an exchange of performances by the parties and Chicago Title. Pursuant to the MOU, (1) MBT would pay $100,000 into escrow; (2) Chicago Title would pay $90,000 into escrow; (3) the Hansens would forgive $80,000 of the unpaid principal on the promissory note, reducing the then-outstanding principal from $160,000 to $80,000, and would also forgive "all outstanding interest on [their] promissory note on or before the 15th day of August, 2005, which is the date of the close of escrow"; (4) the Hansens would, before the close of escrow, "execute and deliver to escrow a reconveyance of the deed of trust held on the 161 and 171 properties and the cancellation of the . . . promissory note"; (5) upon close of escrow, $80,000 of the contributed funds would be paid to the Hansens, and the remainder of the contributed funds would be paid to Murphy; and (6) MBT would acquire title to lot 171 "free and clear of all liens and encumbrances." Thus, under the agreement Murphy would remain the owner of lot 161 and MBT would become the owner of lot 171.

Paragraph 8 of the MOU provides for an easement giving lot 171 access to Westlake Boulevard. (Lot 161 lies between lot 171 and Westlake Boulevard.) Under Paragraph 8, MBT "shall be given a non-exclusive[] easement as necessary, over the existing fire road, if practicable, of sufficient width to meet the fire code requirements for a residence[.]" Murphy "agree[d] to execute all documents necessary to grant this easement to MBT."

Paragraph 10 of the MOU provides that "MBT will execute all documents necessary to grant an easement for any and all purposes across the MBT property to Murphy for the 161 property. This easement shall be adequate to meet all applicable fire code requirements and government ordinances and regulations relating to roadways." (MBT's original property lies between Murphy's lot 161 and Westlake Boulevard.)

Paragraph 6 of the MOU provides that "Chicago Title shall complete, at its sole expense, a survey of all easements called out hereunder and the 161 and 171 properties, and shall act as escrow holder without charge to the parties hereunder." The MOU also provides that Chicago Title "gives up . . . all rights of subrogation and indemnity against Murphy, Hansen, and MBT."

After the parties entered into the MOU, however, they failed to comply with its provisions. They did not execute a "more formal settlement agreement." Chicago Title did not open escrow. MBT and Chicago Title did not contribute the specified funds. The Hansens did not reconvey the deed of trust or cancel the promissory note. Murphy did not convey lot 171 to MBT. MBT and Murphy did not grant each other the easements described in paragraphs 8 and 10, and Chicago Title did not survey the easements or lots 161 and 171.

In May 2006, MBT moved for entry of judgment pursuant to Code of Civil Procedure section 664.6 on the basis of the MOU.[1] Murphy opposed the motion, arguing inter alia that the MOU was unenforceable because the parties' "vastly different" interpretations of certain material terms show that there was no meeting of the minds. For example, Murphy stated that MBT had taken the position that the MOU entitled MBT to a 55-foot-wide easement over Murphy's lot 161, which is "almost two and one-half times the width of the existing fire road[.]" The Hansens filed a joinder to MBT's motion for entry of judgment and filed a response to Murphy's opposition, arguing that the MOU was enforceable. For its part, Chicago Title claimed that it had "paid a surveyor to stake the boundaries to facilitate the process of defining the easement," but "Murphy and MBT had disagreements over where they each believed the MOU placed the easement, among other things." Chicago Title never "opened up escrow or deposited the $90,000 because MBT and Murphy could never agree on what the MOU defined as

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[1] All subsequent statutory references are to the Code of Civil Procedure unless otherwise indicated.

the easement, which was the subject of the escrow." Chicago Title did not, however, contend that the MOU was unenforceable.

On June 27, 2006, the trial court entered a minute order granting MBT's motion, denying the Hansens' joinder request as untimely, and awarding MBT $5,925.50 in attorney's fees. The court determined that the MOU was sufficiently definite to be enforceable. The minute order directed MBT "to serve and lodge a proper proposed order pursuant to [California Rules of Court, rule] 391[.]" MBT never lodged the proposed order.

More than one year later, on August 2, 2007, Murphy moved for entry of judgment and for certain "additional orders and/or instructions to enforce said judgment." (Block capitals omitted.) By his motion, Murphy asked that the court not only enter judgment but also order that Chicago Title immediately open escrow and deposit the $90,000 and that MBT deposit the other $100,000. Murphy contended that unless the court "order[ed] the parties to take specific steps to at least start the transactions called for in the judgment, . . . nothing will happen."

In response to Murphy's motion, Chicago Title again stated that it "is not a party to this action" but conceded that it "is a party to the underlying Memorandum of Understanding[.]" Chicago Title asserted that it "has acted in good faith and attempted to work with the parties to develop escrow instructions and open escrow," but "Murphy and the MBT have not agreed upon the width and location of the easement that Murphy is to grant to the MBT in conjunction with the sale" of lot 171 to MBT. As a result, Chicago Title was unable to develop acceptable escrow instructions, open escrow, deposit the specified funds, or conduct the surveys.

MBT also filed a response to Murphy's motion. The theme of MBT's response was that after entering into the MOU, Murphy "developed seller's remorse" and consequently "has done everything in his power to stop the sale of [lot] 171." MBT did not, however, oppose the entry of judgment or other steps to enforce the MOU, provided that the judgment and other enforcement measures met three conditions. First, MBT

asked that the court require Murphy to record deeds correcting certain alleged errors in the legal descriptions of lots 161 and 171. Second, MBT asked that the court "make a finding that the MOU did not extinguish any existing easements on [lots 161 and 171] and that said easements continue in full force and effect." MBT did not precisely identify any of those "existing easements," but it did mention that "there is already a recorded easement" across lot 161 to lot 171, which is presumably a reference to the easement in the Hansens' deeds to Murphy. Third, MBT asked that the court "make the effective date of the MOU at some reasonable date in the future," because the escrow closing date specified in the MOU had already passed.

The record indicates that, in accord with the MOU, the trial court initially ordered the parties to return to the mediator to have him decide the disputed issues concerning the content of the judgment. The mediator, however, recused himself, so the dispute returned to the court. Also, at some point the Hansens asserted a claim against Murphy for unpaid interest on the promissory note from August 15, 2005, to the present. On January 17, the court entered a minute order granting the motion.

Under the court's order, "[t]he proper location for the easement in favor [of MBT] is described on the As Built Grading plans comprising Exhibit 15[.]" The court further (1) ordered MBT to "cause to be prepared an appropriate deed making the twenty foot correction in the Hansen deed to which the parties have stipulated"; (2) ordered Chicago Title to open escrow no later than February 7, 2008, and close escrow no more than "30 business days" later; and (3) found in favor of the Hansens on their interest claim, concluding that Murphy owes them "interest on $80,000 at 10% from July 21, 2005 until the $80,000 and interest are paid in full" because the MOU did not extinguish "Murphy's pre-existing and independent obligation to pay Hansen interest." The court's order also contains a single reference to the easement described in paragraph 10 of the MOU—the order states that the width of that easement should be the width depicted on the "As Built Grading plans," but the order says nothing more about the paragraph 10 easement, including where it should be located.

The court directed MBT to "prepare a judgment that contains all of the terms appropriate to finally resolve this dispute in accord with the MOU and the [o]rders of this [c]ourt[.]" From our review of the trial court's docket and the record on appeal, it appears that MBT has never filed a proposed judgment.

Murphy timely appealed from the trial court's order on his motion for entry of judgment.[2]

DISCUSSION

I. The Size and Location of the Easement Described in Paragraph 8

Murphy argues that the trial court's order must be reversed because the description of the easement in paragraph 8 of the MOU is inconsistent with the court's determination of the size and location of that easement. We agree.

The interpretation of a settlement agreement is governed by the same principles applicable to any other contract. (*Winet v. Price* (1992) 4 Cal.App.4th 1159, 1165.) Because there is no disputed extrinsic evidence regarding the proper interpretation of the MOU, we review the matter de novo. (*Amalgamated Transit Union Local 1277 v. Los Angeles County Metropolitan Transportation Authority* (2003) 107 Cal.App.4th 673, 685.)

Paragraph 8 of the MOU provides for an "easement as necessary, over the existing fire road, if practicable, of sufficient width to meet the fire code requirements for a residence all the way from Westlake Blvd[.] until the northernmost boundaries of [lot 171]." As relevant to the issues presented on this appeal, we do not find the language ambiguous. The easement is to be limited to the "existing fire road," to the extent that so limiting it is "practicable." And to the extent that the fire road is not located on lot 161, it is not "necessary" (or even possible) for Murphy to grant MBT an easement to use such

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2 The trial court's order on Murphy's motion for entry of judgment is appealable as an order granting injunctive relief (§ 904.1, subd. (a)(6)), because it specifically directed Chicago Title to open escrow by February 7, 2008, and to close escrow no more than 30 business days later. No party denies that the order is appealable.

portions of the fire road—where the fire road is not located on Murphy's property, Murphy cannot grant MBT (or anyone else) an easement to use it. In sum, as long as it is practicable for the easement to be limited to the portions of the fire road that are located on lot 161, the easement must be so limited.

The parties agree that the easement ordered by the trial court is not limited to the portions of the existing fire road that are located on lot 161. The fire road is 20 to 25 feet wide. It runs along the southern end of lot 161 and then turns north along the border between lots 161 and 171, with substantial parts of the road falling on both sides of the border. As depicted in the "As Built Grading plans," the easement ordered by the trial court is 55 feet wide for its entire length and is located almost exclusively on lot 161. The record, however, contains no evidence that it would not be practicable to limit the easement to the portions of the fire road that are located on lot 161.

The record does contain evidence that the fire code would require a 55-foot-wide and 70-foot-long turnaround at some point along the driveway between Westlake Boulevard and the residence that MBT plans to build on lot 171 in the future. But the record contains no evidence that it would not be practicable to accommodate that fire code requirement by widening the fire road *on the lot 171 side of the border*, thereby still limiting the easement to the portions of the fire road that are located on lot 161. The evidence of a fire code requirement for a 55-foot-wide turnaround therefore does not show that it would not be practicable to limit the easement to the portions of the existing fire road that are located on lot 161.

For the foregoing reasons, we conclude that the trial court erred, because there is no evidence supporting its determination of the size and location of the easement.

MBT's only argument to the contrary is that the easement must be located entirely on lot 161, for the following reason: "It would have been legally impossible for the [c]ourt to grant MBT an easement on the 171 property, because MBT will be the owner of that property and an owner cannot have an easement on his own property. Therefore, the [c]ourt correctly placed the entire easement on the 161 property[.]" We disagree. It

is certainly true, as we have already explained, that Murphy cannot grant MBT an easement on any property that Murphy does not own. But it does not follow that the full width of the driveway for MBT's future residence on lot 171 must be located entirely on lot 161. All that follows is that the easement Murphy granted MBT under the MOU can cover only those portions of the driveway that are located on Murphy's property. Thus, MBT's argument does not show that it is impracticable (or "legally impossible") to limit the easement to the portions of the existing fire road that are located on lot 161.[3]

Because no evidence supports the trial court's determination of the size and location of the easement described in paragraph 8 of the MOU, the trial court's order must be reversed.

II. The Award of Interest to the Hansens

Murphy argues that the trial court erred by requiring him to pay interest to the Hansens on the $80,000 of outstanding principal under the promissory note (i.e., taking into account the $80,000 reduction in principal provided by the MOU). We agree.

The MOU purports to be a comprehensive settlement of all of the parties' claims against one another in this litigation. It includes an express release of "each and every other party from all claims of every nature and kind whatsoever, known or unknown, suspected or unsuspected, past, present, or future, arising from or attributable to the dispute underlying this action[.]" In this action, the Hansens sued Murphy on the promissory note. The MOU provides for settlement of that claim. Under the MOU, the Hansens are to reconvey the deed of trust and cancel the promissory note before the close of escrow, and upon the close of escrow they are to receive $80,000 in full payment of

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3 We note that even if MBT's argument were sound, it still would not justify the 55-foot width of the easement ordered by the trial court. We note also that the trial court did not base its decision on MBT's argument, because the court located the "easement" *almost* exclusively, but *not* entirely, on lot 161—parts of the "easement" ordered by the trial court lie on lot 171 (which, we agree with MBT, is legally impossible).

the promissory note. None of the $80,000 is to come from Murphy—the funds are to be provided by MBT and Chicago Title alone.

We conclude that, assuming the MOU is enforceable,[4] the Hansens no longer have any claims against Murphy on the promissory note. If the Hansens wish to collect the $80,000 or any interest thereon, they can enforce the MOU against MBT and Chicago Title (assuming the MOU is enforceable).

The Hansens' arguments to the contrary are not persuasive. They argue that "[n]owhere in the MOU does it provide that Murphy's obligation to pay the Hansens the principal and interest due on the [p]romissory [n]ote is dependent on the action of any other party. Nowhere in the MOU do the Hansens agree that Murphy's obligation to them was dependent on performance by anyone other than Murphy." The statements are true but irrelevant. The MOU does not make Murphy's obligation to pay the Hansens the principal and interest due on the promissory note dependent on anyone or anything—rather, the MOU extinguishes that obligation altogether and imposes on MBT and Chicago Title the obligation to pay $80,000 in full satisfaction of the promissory note.

The Hansens also argue that because under the MOU "[i]nterest was explicitly waived only up to August 15, 2005," it would be "without reason or authority" and "contrary to the express terms of the settlement" to conclude that interest "was forever waived." The argument fails because the Hansens base their entitlement to interest on the promissory note rather than on the MOU. What the Hansens fail to recognize is that, assuming that the MOU is enforceable, the Hansens no longer have any claims against Murphy under the promissory note, because they expressly released all such claims, "past, present, or future," in the MOU. Their only remaining rights to payment flow from the MOU, not from the promissory note. And the MOU does not call for Murphy to pay any part of the $80,000 that the Hansens are entitled to under the MOU.

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4 See Part III, *post*.

That said, it does not follow that the Hansens have "forever waived" any claim to interest on the $80,000 they are to receive under the MOU. The MOU itself does not state what will happen, or what amount of interest (if any) will be due, if escrow does not close on time (as it did not).[5] Nonetheless, had the Hansens promptly moved for entry of judgment on the MOU, they could thereby have become entitled to postjudgment interest on any amounts the judgment awarded to them. Again, however, only MBT or Chicago Title would be liable for any such interest, because Murphy is not liable for any part of the $80,000.

Our conclusion on this issue does not do injustice to the Hansens or create a windfall for Murphy. The Hansens could have moved for entry of judgment on the MOU as soon as the MOU was signed. Or, when escrow did not close on August 15, 2005, in violation of the MOU, the Hansens could have moved for entry of judgment on the MOU the next day. In general, the Hansens could at any time have pursued any and all available means to enforce the MOU and thus to collect from MBT and Chicago Title. They did not do so. Instead, they waited until two years later to seek interest from Murphy, who is not obligated to pay anything (principal or interest) to the Hansens under the MOU. And Murphy has not received a windfall from the delay in the $80,000 payment to the Hansens, because the MOU does not call for him to make that payment.

For all of the foregoing reasons, we conclude that the trial court erred when, having determined that the MOU is enforceable, it ordered Murphy to pay interest to the Hansens.[6]

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5 Nor does the MOU state that the entire agreement is void if escrow does not close on time, and MBT and the Hansens do not contend that the MOU is void. On the contrary, both MBT and the Hansens have expressly and consistently contended that MOU is enforceable even though escrow did not close on time (and, indeed, never opened).

6 As already noted, the trial court's order says nothing about the easement described in paragraph 10 of the MOU other than that it should be of the width depicted on a particular exhibit. Because we reverse the court's determination of the size and location of the paragraph 8 easement, and because the parties may wish to argue that the size and location of the paragraph 10 easement is dependent on, or otherwise related to, the size and location of the paragraph 8 easement, we reverse the trial court's

III. The Enforceability of the MOU

Murphy argues that if the easement ordered by the trial court is consistent with the terms of the MOU, then the MOU is unenforceable. Because we reverse the trial court's determination of the size and location of the paragraph 8 easement, we need not address that argument.

MBT argues that because the trial court ruled on June 27, 2006, that the MOU is enforceable, and because no party has appealed from that order, "that issue is not subject to review." We disagree. MBT cites no authority for the proposition that the court's June 27, 2006, order on MBT's motion for entry of judgment (as opposed to the court's January 17, 2008, order on Murphy's motion for entry of judgment, from which the instant appeal was taken) was appealable. If the June 2006 order was not appealable, then the trial court remains free to revisit the issue in the course of any further proceedings on remand concerning the interpretation and enforcement of the MOU's terms. (*Le Francois v. Goel* (2005) 35 Cal.4th 1094, 1106-1107.) If the June 2006 order was appealable, then the time to appeal it has not run, for the following reasons: The order directed MBT to prepare a written order, so for purposes of calculating the deadline for filing a notice of appeal, the date of "entry" of the order is "the date the signed order is filed[.]" (Cal. Rules of Court, rule 8.104(d)(2); see *Russell v. Foglio* (2008) 160 Cal.App.4th 653, 660.) MBT never lodged the proposed order, so none was ever signed and filed. Accordingly, the time to appeal from the June 2006 order (if it was appealable) has never expired. Thus, any party contending that the order was appealable and wishing to appeal it remains free to do so.

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determination of the width of the paragraph 10 easement as well. The upshot is that the trial court's order of January 17, 2008, is reversed in its entirety.

DISPOSITION

The superior court's order of January 17, 2008, is reversed, and the cause is remanded for further proceedings consistent with this opinion. Appellant shall recover his costs of appeal.

NOT TO BE PUBLISHED.

ROTHSCHILD, Acting P. J.

We concur:

CHANEY, J.

JOHNSON, J.