Not Reported in Cal.Rptr.3d, 2004 WL 187874 (Cal.App. 2 Dist.)
Nonpublished/Noncitable (Cal. Rules of Court, Rules 8.1105 and 8.1110, 8.1115)
(Cite as: 2004 WL 187874 (Cal.App. 2 Dist.))

Court of Appeal, Second District, Division 8.
TIRE DISTRIBUTORS, INC., Petitioner,
v.
The SUPERIOR COURT OF LOS ANGELES COUNTY, Respondent;
A-LINE CONSTRUCTION & ENGINEERING, INC., et al., Real Parties in Interest.

No. B165806.
(Los Angeles County Super. Ct. No. BC249340).
Jan. 30, 2004.
As Modified on Denial of Rehearing March 1, 2004.

ORIGINAL PROCEEDING in mandate. Richard C. Hubbell, Judge. Petition granted.
Osborne, Lipow & Harris and Michael L. Thornburg for Petitioner.

No appearance for Respondent.

Sheppard, Mullin, Richter & Hampton, Candace L. Matson, Robert T. Sturgeon; Dunn **Koes**, Pamela E. Dunn and Daniel J. **Koes** for Real Parties in Interest.

RUBIN, J.

***1** Plaintiff Tire Distributors, Inc., seeks a writ of mandate after the trial court denied its motion to enter judgment pursuant to the terms of a written settlement agreement between Tire Distributors and two of the defendants in the action. The trial court concluded the parties did not enter into an enforceable agreement because the writing in question did not include all material terms necessary for formation of a contract. We conclude Tire Distributors is entitled to relief and grant the petition.

FACTUAL AND PROCEDURAL HISTORY

This lawsuit arises out of a business dispute between father-in-law and son-in-law. Paul Resnick is the president and owner of Tire Distributors. Defendant Darren Cobrae, Resnick's son-in-law, is the president of defendant A-Line Construction & Engineering, Inc. (A-Line).

In April 2001, Tire Distributors filed this lawsuit against (1) A-Line, (2) Darren Cobrae, and (3) Gary Cobrae, Darren's father who, at least at one time, was a shareholder and officer of A-Line.[FN1] According to the complaint, Tire Distributors retained A-Line to perform electrical work on a Tire Distributors' store in Idaho, for which Tire Distributors would pay approximately $105,000. The complaint alleges that Tire Distributors paid the contract price, but A-Line failed to perform (at least not adequately and/or completely). The complaint contained causes of action for breach of contract and fraud. The individual defendants were sued, at least in part, under an alter ego theory.

FN1. Unless otherwise specified, all references to Cobrae are to Darren Cobrae.

A-Line cross-complained for breach of contract and quantum meruit. A-Line alleged that Tire Distributors had made several changes to the plans, requiring A-Line to perform additional work. The cross-complaint sought $22,000 because of the additional work allegedly required by these changes.

On December 27, 2002, Cobrae visited the home of his father-in-law, where the two signed a one-page, handwritten document captioned "Settlement agreement." The document provided as follows:

"12/27/02
Settlement agreement

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A-Line (Darren Cobrae)
vs
Tire Distributors (Paul Resnick)
"Darren/A-Line to pay Tire Distributors (Resnick) a total of $50,000 payable

"1. $25,000 cash by 1/31/03

"2. $25,000 payable $1000 per month plus 7% interest on balance until paid in full."

Resnick and Cobrae signed on the bottom of the page.

Notwithstanding this agreement, three days later, defendants' counsel applied for, and obtained, an order to specially set dates for the hearing of summary judgment motions that both Darren Cobrae and Gary Cobrae intended to file.

Tire Distributors' counsel contacted defendants' counsel and advised him that the parties had reached a settlement agreement. Several days later, defendants' counsel sent a letter in response, stating among other things that, "[a]lthough Paul Resnick and Darren Cobrae have engaged in some settlement negotiations, a complete settlement has not been reached. Further, the fact that Darren has now filed a summary judgment motion on which he expects to prevail greatly alters the terms on which he would be willing to settle on his own and his company's behalf."

***2** On January 30, 2003, Tire Distributors filed an ex parte application for an order shortening time for the hearing of a motion to enforce the settlement agreement, so the matter could be heard before the hearing on the recently filed summary judgment motions by Darren Cobrae and Gary Cobrae. The trial court took the matter under submission and, on February 7, 2003, it granted the application.

In the enforcement motion brought under Code of Civil Procedure section 664.6, Tire Distributors asked the court to enter judgment against A-Line and Cobrae in accordance with the terms of the parties' written agreement. [FN2] (Exh. 4.) Tire Distributors did not ask the court to enter judgment against the third defendant (Gary Cobrae), who was not mentioned in the written agreement.

> FN2. Section 664.6 provides in pertinent part: "If parties to pending litigation stipulate, in a writing signed by the parties outside the presence of the court ..., for settlement of the case, or part thereof, the court, upon motion, may enter judgment pursuant to the terms of the settlement."
>
> All statutory references are to the Code of Civil Procedure.

In a declaration he submitted in support of the motion, Resnick explained that, during their December 27, 2003, meeting, he and Cobrae agreed that Cobrae or A-Line would pay Tire Distributors $50,000 to settle the lawsuit.[FN3]

> FN3. Contrary to the contention of A-Line and Cobrae in their plenary opposition to the writ petition, Resnick's declaration did not purport to state his subjective intent in signing the agreement. Rather, for the most part, he described what actually transpired during his meeting with Cobrae.

In opposition, the defendants argued the written agreement was not enforceable because (1) it was not supported by consideration, (2) the parties to the agreement could not be ascertained, and (3) the scope of the agreement could not be determined. The defendants submitted no declaration in opposition, which meant Resnick's declaration in support of the motion was uncontested.

After a very brief hearing, the trial court took the matter under submission and later issued a minute order denying the motion. In relevant part, the court stated: "The Court finds that the prerequisites for entry of Judgment as set forth in *Weddington Productions, Inc. v. Flick* (1998) 60 Cal.App.4th 793, 71 Cal.Rptr.2d 265 [hereafter

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Weddington] have not been satisfied, precluding the Court's enforcement of the 'Settlement Agreement' dated December 27, 2002." [FN4]

> FN4. In *Weddington,* the Court of Appeal reversed a judgment entered by the trial court to enforce a purported settlement agreement. The Court of Appeal concluded the agreement was unenforceable because it failed to include numerous material terms. By citing this case, the trial court was merely saying the written agreement in this case did not include all material terms.

Tire Distributors filed a writ petition challenging the order and seeking a stay of trial court proceedings. On the same day that it filed the petition, Tire Distributors voluntarily dismissed Gary Cobrae from the lawsuit.

After staying trial court proceedings and receiving preliminary opposition, we notified the parties of our intention to issue a peremptory writ of mandate in the first instance (*Palma v. U.S. Industrial Fasteners, Inc.* (1984) 36 Cal.3d 171, 180, 203 Cal.Rptr. 626, 681 P.2d 893), directing the trial court to vacate its order denying Tire Distributor's motion and to thereafter enter a new and different order granting the motion.[FN5] We also invited and received plenary opposition to the petition from A-Line and Cobrae.

> FN5. We later modified our stay order to exclude from its scope any proceedings that concern only claims between Tire Distributors and Gary Cobrae.

After we notified the parties of our intention to issue a peremptory writ in the first instance, the defendants filed in the trial court what they described as a "response" to our notice, in which they repeated the arguments they had made in their original opposition to the motion. They also submitted a declaration by Cobrae, in which he stated, among other things: "I viewed the document at issue [the December 27, 2002 agreement] as just a start on our settlement negotiations. I did not believe it was an enforceable settlement agreement because Paul Resnick and I had not concluded our negotiations, including, among other things, what claims would be released." Cobrae also claimed that Resnick/Tire Distributors had asserted additional claims against A-Line "outside those at issue in this action" and that it was important to Cobrae that any settlement resolve all such claims.[FN6]

> FN6. It is not clear from the select pages of documents A-Line and Cobrae submitted to support this factual assertion to what extent these alleged additional claims were "outside those at issue in this action."

DISCUSSION

***3** " Section 664.6 was enacted to provide a summary procedure for specifically enforcing a settlement contract without the need for a new lawsuit." (*Weddington, supra,* 60 Cal.App.4th at p. 809, 71 Cal.Rptr.2d 265.) "In order to be enforceable pursuant to the summary procedures of section 664.6, a settlement agreement must either be entered into orally before a court (a possibility not involved here) or must be in writing and signed by the parties." (*Id.* at p. 810, 71 Cal.Rptr.2d 265.)

"A settlement agreement is a contract, and the legal principles which apply to contracts generally apply to settlement contracts." (*Weddington, supra,* 60 Cal.App.4th at p. 810, 71 Cal.Rptr.2d 265.)

We review a trial court's factual determinations on a motion to enforce a settlement under section 664.6 under the substantial evidence standard. (*In re Marriage of Assemi* (1994) 7 Cal.4th 896, 911, 30 Cal.Rptr.2d 265, 872 P.2d 1190; *Burckhard v. Del Monte Corp.* (1996) 48 Cal.App.4th 1912, 1916, 56 Cal.Rptr.2d 569.) However, to the extent we are called upon to interpret the meaning of the language used in the parties' settlement agreement, the issue is one of law over which we exercise independent judgment. (See *Parsons v. Bristol Development Co.* (1965) 62 Cal.2d 861, 865, 44 Cal.Rptr.

767, 402 P.2d 839 ["It is therefore solely a judicial function to interpret a written instrument unless the interpretation turns upon the credibility of extrinsic evidence"]; *Leoke v. County of San Bernardino* (1967) 249 Cal.App.2d 767, 772, 57 Cal.Rptr. 770 ["The mere fact, however, that conflicting inferences might be drawn from uncontradicted extrinsic evidence does not make the interpretation of a written instrument a question of fact"]; *Parsons v. Bristol Development Co., supra,* 62 Cal.2d at p. 866, fn. 2, 44 Cal.Rptr. 767, 402 P.2d 839, quoting *Estate of Rule* (1944) 25 Cal.2d 1, 17, 152 P.2d 1003 ["it is only when conflicting inferences arise from conflicting evidence, not from uncontroverted evidence, that the trial court's resolution is binding. 'The very possibility of ... conflicting inferences, actually conflicting interpretations, far from relieving the appellate court of the responsibility of interpretation, signalizes the necessity of its assuming that responsibility' " (original ellipses)]; *Timney v. Lin* (2003) 106 Cal.App.4th 1121, 1125-1126, 131 Cal.Rptr.2d 387; *Burckhard v. Del Monte Corp., supra,* 48 Cal.App.4th at p.1916, 56 Cal.Rptr.2d 569.) [FN7]

> FN7. In this case, the evidence before the trial court with respect to the meaning of the language of the agreement was not in dispute.

Here, it is undisputed that parties to the lawsuit signed a writing outside the presence of the court. The writing was signed by Resnick, Tire Distributors' president, and Cobrae, who is both a defendant in the action and the president of A-Line, a defendant and the cross-complainant in the action. Thus, the only question is whether the writing they signed constitutes an enforceable settlement agreement. We conclude it does.

We note that " '[t]he modern trend of the law is to favor the enforcement of contracts, to lean against their unenforceability because of uncertainty, and to carry out the intentions of the parties if this can feasibly be done. Neither law nor equity requires that every term and condition of an agreement be set forth in the contract. [Citations.] The usual and reasonable terms found in similar contracts can be looked to, unexpressed provisions of the contract may be inferred from the writing, external facts may be relied upon, and custom and usage may be resorted to in an effort to supply a deficiency if it does not alter or vary the terms of the agreement. [Citations.]' [Citations.] At bottom, '[i]f the parties have concluded a transaction in which it appears that they intend to make a contract, the court should not frustrate their intention if it is possible to reach a fair and just result, even though this requires a choice among conflicting meanings and the filling of some gaps that the parties have left. [Fn. omitted.]' (1 Corbin on Contracts (1963) § 95, p. 400.)" (*Larwin-Southern California, Inc. v. JGB Investment Co.* (1979) 101 Cal.App.3d 626, 641, 162 Cal.Rptr. 52 [fourth brackets added]; see also *Cal. Lettuce Growers v. Union Sugar Co.* (1955) 45 Cal.2d 474, 481, 289 P.2d 785 [" 'The law does not favor but leans against the destruction of contracts because of uncertainty; and it will, if feasible, so construe agreements as to carry into effect the reasonable intentions of the parties if that can be ascertained' " (quoting *McIllmoil v. Frawley Motor Co.* (1923) 190 Cal. 546, 549, 213 P. 971)].)

In their plenary opposition, A-Line and Cobrae claim the agreement is not enforceable because (1) it includes a "nonparty" to the lawsuit (Resnick), (2) it either encompasses "matters outside the litigation" or fails to resolve other disputes between the parties, (3) the agreement was not supported by consideration, (4) the scope of the agreement cannot be determined, and (5) the "circumstances surrounding the agreement [specifically, the parties' conduct after the agreement was signed] establish the parties never reached a settlement." These arguments lack merit.

***4** Contrary to the contention of A-Line and Cobrae, the agreement does not purport to include a "nonparty" to the lawsuit.[FN8] While Resnick's name appears twice in the agreement, it appears in parenthesis after the name of the company he owns,

which is a party to the lawsuit. While it may not have been necessary to include Resnick's name in the agreement, its inclusion is understandable, especially in an agreement that was not drafted by attorneys. Reviewing the settlement document in its entirety, the inclusion of individual names in parentheses appears no more than a reasonable lay effort to link the signatories with their respective corporate parties.

> FN8. Defendants cite no authority that the inclusion of a nonparty in a settlement agreement disqualifies a contract from section 664.6 enforcement. We note that it is common in long form settlement agreements to include nonparties such as officers, directors, agents, attorneys and others affiliated with parties to litigation. We see no policy reason to exclude this form of settlement agreement from the ambit of section 664.6.

The contention by A-Line and Cobrae that the agreement either encompasses "matters outside the litigation" or fails to resolve other disputes between the parties is based on information contained in the declaration Cobrae submitted in support of the "response" that A-Line filed in the trial court after we gave notice of our intention to issue a peremptory writ in the first instance. [FN9] However, because Cobrae's declaration was not before the trial court when it made the challenged ruling, it is irrelevant. (See *BGJ Associates v. Superior Court* (1999) 75 Cal.App.4th 952, 958, 89 Cal.Rptr.2d 693 ["Ordinarily a reviewing court will not consider evidence arising after the trial court ruling, involving facts open to controversy which were not placed in issue or resolved by the trial court"].)

> FN9. As noted above, Cobrae claimed in the declaration that Resnick and/or Tire Distributors had additional claims against A Line "outside those at issue in this action" and that it was important for Cobrae that those claims be resolved as well.

Even if considered, however, the declaration adds nothing because, as A-Line and Cobrae concede, it presents only Cobrae's "undisclosed intent or understanding [of the agreement, which] is irrelevant to contract interpretation." [FN10] (*Founding Members of the Newport Beach Country Club v. Newport Beach Country Club, Inc.* . (2003) 109 Cal.App.4th 944, 956, 135 Cal.Rptr.2d 505.)

> FN10. We also note that Cobrae's contention that he "viewed the document at issue as just a start on our settlement negotiations" is not particularly credible, considering he actually signed a writing captioned "Settlement agreement."

Moreover, the contention that the agreement includes matters that were not part of the litigation is unsupported. The writing does not refer to other matters. Moreover, Cobrae's declaration assumes the parties did *not* include these additional matters in the agreement. In any event, however, a written agreement to settle a lawsuit is not unenforceable merely because the agreement resolves additional matters.[FN11]

> FN11. While arguing that the agreement contains matters that were not part of the agreement, A-Line and Cobrae also claim the agreement is unenforceable because it does not address the additional claims Resnick and/or Tire Distributors allegedly had against A-Line. Even assuming the argument may be considered, we fail to see why the failure to include additional claims renders the agreement unenforceable. The parties are free to litigate the effect of the agreement or the dismissal of the action on other claims when and if those claims are asserted.

The argument that the agreement was not supported by consideration is based on the agreement's failure to specifically state what Tire Distributors would do in exchange for the monetary payments it would receive. Considering (1) the terms specified

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in the document, (2) the fact the document is captioned "Settlement agreement" and contains a litigation caption of "A-Line (Darren Cobrae) [¶] vs [¶] Tire Distributors (Paul Resnick)," (3) the absence of any evidence that there was additional litigation pending between the parties, and (4) the undisputed declaration of Resnick concerning the circumstances surrounding the signing of the settlement agreement, the only logical inference is that the parties agreed Tire Distributors would dismiss this action in exchange for the monetary payments. Such dismissal is adequate consideration. (See *Armstrong World Industries, Inc., v. Superior Court* (1989) 215 Cal.App.3d 951, 957, 264 Cal.Rptr. 39 ["it is a fundamental principle of contract law that forbearance from exercising a legal right constitutes legal consideration"].)

***5** The scope of the agreement is also clear. By settling existing litigation without reservation, it is clear that the parties intended to dismiss their respective complaint and cross-complaint for that is the very nature of *settling a lawsuit* as opposed to *settling unlitigated claims*. Thus, based on the writing itself and Resnick's undisputed declaration, it is clear the agreement calls for (1) Tire Distributors to dismiss its complaint against A-Line and Cobrae (though not against Gary Cobrae, who is not mentioned anywhere in the settlement agreement), (2) A-Line to dismiss its cross-complaint against Tire Distributors, and (3) A-Line and/or Cobrae to make the monetary payments.[FN12]

> FN12. The use of "Darren/A-Line" as a paying entity can only be understood as indicating that Tire Distributors did not care from whom it was paid, as long as payment was made.
>
> The dismissal of the cross-complaint necessarily follows from the dismissal of the complaint. Resolution of Tire Distributors' claims against A-Line would encompass all issues raised in the cross-complaint. Indeed, a judgment in favor of Tire Distributors on the complaint would serve as a bar to further litigation of the cross-complaint.

A-Line and Cobrae contend that the parties' conduct after the writing was signed prove the parties had not reached a binding agreement. A-Line and Cobrae suggest Tire Distributors continued to litigate the case and failed to advise the court about the settlement for an extended period of time. The record, however, is to the contrary. Almost immediately after defendants' counsel filed the ex parte application to specially set hearing dates for summary judgment motions, counsel for Tire Distributors contacted defense counsel and advised him that the case had settled.[FN13] In addition, it was only prudent for Tire Distributors' counsel to prepare to oppose the summary judgment motions that the individual defendants had filed because (1) counsel had no guarantee the trial court would grant the motion to enforce the settlement, and (2) Gary Cobrae, who filed one of the summary judgment motions, was not a party to the settlement.[FN14]

> FN13. Because of a typographical error in a letter from defendants' counsel, it is not known precisely when Tire Distributors' counsel contacted defense counsel. The settlement agreement was signed on the evening of December 27, 2002, a Friday. On January 6, 2003, defendants' counsel sent a letter to counsel for Tire Distributors, which references the "December 3 voice mail" in which counsel for Tire Distributors explained that a settlement had been reached. Because the agreement was only signed on December 27, the December 3 date is erroneous. Regardless whether the actual date was December 30, December 31 or January 3, the call came promptly, especially when one considers the very likely possibility that counsel for Tire Distributors (and perhaps also defense counsel) did not immediately learn of the settlement, which was reached on a Friday evening during the holiday season.

FN14. A-Line and Cobrae note that, on January 30, 2003, Tire Distributors' counsel filed an ex parte application seeking to continue the summary judgment hearings so additional depositions could be taken. They conveniently ignore the fact that, on the same day, Tire Distributors' counsel also filed an ex parte application for an order shortening time for the hearing of a motion to enforce the settlement agree- ment.

Finally, the fact that *defense* counsel attempted to proceed with the litigation after the settlement agreement was signed changes nothing. At most, it reflects that Cobrae either (1) subjectively believed a binding agreement had not been reached, or (2) had a change of heart. Either way, it makes no difference in the final analysis.

DISPOSITION

The petition for writ of mandate is granted. The respondent court is directed to vacate its March 19, 2003, order denying Tire Distributor's motion to enforce the settlement agreement and enter judgment under section 664.6, and to thereafter enter a new and different order granting the motion and entering judgment in accordance with the terms of the settlement agreement as discussed above.[FN15] Tire Distributors is entitled to recover its costs in this writ proceeding. (Cal. Rules of Court, rule 56.4.)

FN15. In its motion to enforce the settlement agreement, Tire Distributors asked the respondent court to enter judgment for $50,000 "according to the terms of the Settlement Agreement." As noted above, the settlement agreement provided for half of that amount to be paid by January 31, 2003, and the balance to be paid in monthly installments of $1,000 (plus interest). Because A-Line and Cobrae claimed the parties had not entered into a binding agreement, the date for making the initial payment cannot be met. Accordingly, we leave it to the trial court to fix the dates for payments of principal and interest in keeping with the spirit of the settlement agreement.

Tire Distributors also asked in its enforcement motion that the respondent court retain jurisdiction to enforce the settlement agreement. Nothing in our opinion should be construed as an expression of opinion whether such a provision would be appropriate. The respondent court may include such a provision in the judgment only if the conditions for doing so have been met. (See § 664.6; *Wackeen v. Malis* (2002) 97 Cal.App.4th 429, 440, 118 Cal.Rptr.2d 502.)

Our stay order of July 3, 2003, is hereby vacated so the trial court may conduct further proceedings consistent with the views expressed in this opinion.

We concur: COOPER, P.J., and BOLAND, J.

Cal.App. 2 Dist.,2004.
Tire Distributors, Inc. v. Superior Court of Los Angeles County
Not Reported in Cal.Rptr.3d, 2004 WL 187874 (Cal.App. 2 Dist.)

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