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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 TWO

COALE FINANCIAL SERVICES, INC., et al., Plaintiffs and Appellants, v. MARK LUNDQUIST, Defendant and Respondent.	B250973 (Los Angeles County Super. Ct. No. VC050108)

APPEAL from a judgment of the Superior Court of Los Angeles County. Thomas I. McKnew, Jr., Judge. Affirmed.

Ryan & Associates, Wayne B. Brosman; Law Offices of Becky Walker James, Becky Walker James, Jessica Rosen; and James & Stewart, for Plaintiffs and Appellants.

Corrigan & Morris, Brian T. Corrigan and Stanley C. Morris, for Defendant and Respondent.

This appeal is from a judgment enforcing a settlement agreement made orally in court, pursuant to Code of Civil Procedure section 664.6.[1] Appellants contend the settlement did not include an indemnity provision and that indemnification does not apply to the third party action involved here. We disagree and affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

The Settlement

In 2008, Coale Financial Services, Inc. (CFS) sued Mark Lundquist (Lundquist) for breach of contract. Lundquist then filed a separate suit against CFS and Robert W. Coale, Jr. (Coale) (collectively the Coale parties) for breach of contract, conversion and accounting. The cases were consolidated in the trial court. On July 6, 2009, the date set for trial, the parties and their counsel instead negotiated a settlement at a settlement conference before the trial court.

The trial court placed the terms of the settlement on the record, including the following excerpts:

"[THE COURT]: For a full and complete settlement of both cases, it is agreed as follows: [¶] That Coale Financial Services, Inc., and Robert W. Coale, Jr., as an individual, shall pay a sum of $176,000 to Mark Lundquist . . . . [¶] . . . [¶] Also be it understood that Mr. Lundquist is not to, in any way whatsoever, to be obligated to any of the investors in the Coale Financial Services, Inc., that are known by or should have been known by the Coale Financial Services Group or Robert W. Coale, Jr. Those will only be the obligations of the Coale Financial Services, Inc., and not those of Mr. Lundquist. [¶] The court believes that that represents in sum the settlement that was discussed with the court. [¶] Are there any other matters that you'd like to either add or amend? This would be the time to do so."

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

"[DEFENSE COUNSEL]: And the second thing, with respect to—and you did touch on this—Mr. Lundquist is to have no responsibility to Mr. Coale's investors, and I understood that—

"[THE COURT]: I just did touch on that.

"[DEFENSE COUNSEL]: And I understood what that means is that they—to the extent that they might make a claim against him, CFS and Mr. Coale are going to indemnify Mr. Lundquist.

"[THE COURT]: I didn't use that word.

"[DEFENSE COUNSEL]: Hmm.

"[THE COURT]: I didn't use that word.

"[DEFENSE COUNSEL]: I know. That's why I'm raising it.

"[THE COURT]: I know it. It means the same thing. [¶] I'd rather not use scary words when they have the same meaning by explanation sometimes, particularly at this hour. . . . "

"[PLAINTIFF COUNSEL]: And conversely he [Lundquist] will hold us harmless—he will hold Coale Financial and my client harmless from any such claim [regarding an unrelated account].

"[THE COURT]: All right. That's what I'm trying to say without using such words as 'hold harmless' and 'indemnify,' but that's my understanding. They are out of the bag, but what I've said had the same content and effect. . . . "

"[THE COURT]: All right. Let me ask you, Mr. Coale, do you agree to the terms of this settlement insofar as it affects you personally?

"[MR. COALE]: Yes.

"[THE COURT]: Insofar as you are the principal and apparently the sole principal of Coale Financial Services, Inc., you are an attorney in fact, do you agree to the terms on behalf of the corporation?

"[MR. COALE]: Yes.

"[THE COURT]: And attorney—you join, Mr. Grobaty?

"[PLAINTIFF COUNSEL]: Yes.

"[THE COURT]: Mr. Lundquist, do you understand the terms of the settlement?

"[MR. LUNDQUIST]: Yes.

"[THE COURT]: Do you accept its terms?

"[MR. LUNDQUIST]: Yes, I do.

"[THE COURT]: Do you need any further advice of your counsel?

"[MR. LUNDQUIST]: No, I don't.

"[THE COURT]: All right. Which counsel [for Lundquist] joins? Mr. Lefkowitz?

"[DEFENSE COUNSEL]: Yes, your Honor.

"[THE COURT]: You join?

"[DEFENSE COUNSEL]: Yes, sir.

"[THE COURT]: We have a settlement, the cases are dismissed. Court retains jurisdiction under Code of Civil Procedure [section] 664.6 for enforcement."

The Third Party Lawsuit

In July 2012, a CFS investor, Jane G. Tourino (Tourino), filed a third amended complaint against the Coale parties and Lundquist. The causes of action alleged against Lundquist included elder abuse, fraud, negligence, negligent misrepresentation, breach of fiduciary duty, conspiracy, and accounting. Lundquist, through his counsel, made a written demand for defense of the Tourino action on the Coale parties. The Coale parties refused to provide a defense.

Motion to Enforce Settlement, Hearing, and Judgment

Lundquist filed a motion to enforce the settlement agreement, arguing that the agreement required the Coale parties to indemnify Lundquist in the Tourino action. Lundquist attached declarations from himself and his attorneys, plus documentary evidence. The Coale parties opposed the motion and submitted Coale's declaration.

The trial court began the hearing on the motion by noting that when the court recited the terms of the parties' settlement on the record, the court was "not using the terms but talking around it but meaning the same thing, as to what it believed to be the responsibility of the respective parties regarding indemnification." Following argument

of counsel, the court ruled that "the settlement agreement be interpreted that Mr. Lundquist is entitled to indemnification from Mr. Coale in the Tourino complaint, and Mr. Coale can assume the defense of Mr. Lundquist." The court continued: "He [Coale] can refuse to do so. Mr. Lundquist . . . would then have to proceed to provide his own representation, but this court will reserve the [jurisdiction] . . . to determine whether or not the attorneys' fees incurred by Mr. Lundquist were reasonable as well as other costs that might have been incurred that would have been reasonably recoverable in a successful party's action." The court also stated: "I will not discuss the fairness of the outcome with respect to Mr. Coale or Mr. Lundquist, but I do believe that the settlement placed on the record was clear . . . at the time. It may not be as clear now when one reads it in retrospect, but I do believe it was clear and sufficient for the court to make that ruling." Judgment was entered and the Coale parties filed this appeal.

DISCUSSION

The Coale parties contend that (1) the trial court committed reversible error by unilaterally adding the indemnity provision to the parties' settlement agreement, and (2) indemnification does not apply to the Tourino action. We disagree.

I. Section 664.6

Section 664.6 provides: "If parties to pending litigation stipulate, in a writing signed by the parties outside the presence of the court or orally before the court, for settlement of the case, or part thereof, the court, upon motion, may enter judgment pursuant to the terms of the settlement. If requested by the parties, the court may retain jurisdiction over the parties to enforce the settlement until performance in full of the terms of the settlement."

As our Supreme Court has explained: "Past cases have established that, in ruling upon a section 664.6 motion for entry of judgment enforcing a settlement agreement, and in determining whether the parties entered into a binding settlement of all or part of a case, a trial court should consider whether (1) the material terms of the settlement were explicitly defined, (2) the supervising judicial officer questioned the parties regarding their understanding of those terms, and (3) the parties expressly acknowledged their

understanding of and agreement to be bound by those terms. In making the foregoing determination, the trial court may consider declarations of the parties and their counsel, any transcript of the stipulation orally presented and recorded by a certified reporter, and any additional oral testimony. [Citations.] The standard governing review of such determinations by a trial court is whether the court's ruling is supported by substantial evidence." (*In re Marriage of Assemi* (1994) 7 Cal.4th 896, 911.)

II. The Parties Agreed to the Indemnity Provision

We reject the Coale parties' contention that the trial court unilaterally added the indemnity provision when interpreting the settlement agreement.

A review of the reporter's transcript shows that the indemnity provision was expressly included in the settlement agreement when the settlement was reached and placed on the record on July 6, 2009. After the trial court recited in its own words what it understood the settlement terms to be, the court invited counsel to make any changes or additions. Cocounsel for Lundquist, then clarified: "Mr. Lundquist is to have no responsibility to Mr. Coale's investors, and I understood that—[¶] . . . [¶] what that means is that they—to the extent that they might make a claim against him, CFS and Mr. Coale are going to indemnify Mr. Lundquist." The court responded that it "didn't use that word," but "[i]t means the same thing." Counsel for the Coale parties did not object. Instead, he asked for a reciprocal term that Lundquist hold his clients harmless for claims regarding an unrelated account. The trial court then stated: "That's what I'm trying to say without using such words as 'hold harmless' and 'indemnify,' but that's my understanding. They are out of the bag, but what I've said had the same content and effect." The court then obtained the parties' and their counsels' consent to the terms of the settlement.

Additionally, at the hearing on the motion to enforce the settlement agreement, the trial court stated that it was "not using the terms but talking around it but meaning the same thing, as to what it believed to be the responsibility of the respective parties

regarding indemnification." The court also noted that it remembered the settlement discussions, and believed that the settlement placed on the record was clear at the time.[2]

III. No Error In Applying Indemnification

The Coale parties argue that even assuming the settlement agreement contains an indemnification provision, indemnity would not apply here because the third amended complaint in the Tourino action "alleges that Lundquist committed active negligence and intentional torts." The Coale parties point out that the right to indemnity does not apply to an indemnitee's active, rather than passive, negligence or willful misconduct, absent explicit language in the indemnity clause. (See *Rossmoor Sanitation, Inc. v. Pylon, Inc.* (1975) 13 Cal.3d 622, 628–629; *Heppler v. J.M. Peters Co.* (1999) 73 Cal.App.4th 1265, 1277.)

The Tourino third amended complaint alleged negligence against Lundquist and sought an accounting from him, in addition to alleging intentional misconduct. As the trial court noted at the hearing on the motion to enforce the settlement agreement, the Tourino action was still pending and had not yet gone to trial, so there was no determination of whether Lundquist had committed active or passive negligence, or if he was negligent at all. Moreover, the trial court's judgment did not order the Coale parties to indemnify Lundquist for any and all liability he might incur in the Tourino action. Rather, the Coale parties were required to indemnify Lundquist for liability "except as may be prohibited by California law." Thus, the trial court recognized that the indemnity provision here did not cover all possible liability, only that permitted by law.[3] The trial court expressly retained jurisdiction "to determine the amount of any money judgment

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[2] Because we do not agree with the Coale parties' argument that the settlement agreement was "ambiguous" with respect to whether it contained an indemnity provision, we decline to remand the matter for "further fact-finding" on this issue. (Emphasis omitted.)

[3] At oral argument on appeal, counsel for Lundquist agreed that indemnity would not apply to intentional wrongdoing and emphasized that the real issue was a duty to defend.

that may be appropriate in favor of Lundquist and against the Coale Parties" with respect to the Tourino action. Given the stage of the Tourino action, the trial court's ruling was entirely reasonable.[4]

DISPOSITION

The judgment is affirmed. Lundquist is entitled to recover his costs on appeal.

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_____, J.
ASHMANN-GERST

We concur:

_____, P. J.
BOREN

_____, J.
HOFFSTADT

[4] We deny Lundquist's request for judicial notice, as it seeks to introduce documents not before the trial court at the time of its ruling.