

NOTICE
This Order was filed under Supreme Court Rule 23 and is not precedent except in the limited circumstances allowed under Rule 23(e)(1).

2024 IL App (4th) 230797-U

NO. 4-23-0797

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED

July 25, 2024

Carla Bender

4th District Appellate
Court, IL

DeSHERLIA MARINA MANAGEMENT, INC., an)	Appeal from the
Illinois Corporation, JOSEPH DeSHERLIA, and)	Circuit Court of
JANICE DeSHERLIA,)	Jersey County
Plaintiffs-Appellants,)	No. 22LA3
v.)	
NBCUNIVERSAL MEDIA LLC, RICK EBERLIN, and)	
MARCUS LEMONIS,)	Honorable
Defendants)	Zachary A. Schmidt,
(Rick Eberlin, Defendant-Appellee).)	Judge Presiding.

JUSTICE KNECHT delivered the judgment of the court.
Justices DeArmond and Vancil concurred in the judgment.

ORDER

¶ 1 *Held:* The appellate court affirmed, concluding plaintiffs’ claims against defendant-appellee were properly dismissed as barred by a release.

¶ 2 Plaintiffs, DeSherlia Marina Management, Inc., Joseph DeSherlia, and Janice DeSherlia, filed a civil complaint against defendants, NBCUniversal Media LLC (NBC), Marcus Lemonis, and Rick Eberlin. Thereafter, plaintiffs’ claims against NBC and Lemonis were voluntarily dismissed, while their claims against Eberlin were involuntarily dismissed. As for the claims against Eberlin, the circuit court dismissed them upon finding they were barred by a release. Plaintiffs now appeal the dismissal of the claims against Eberlin. We affirm.

¶ 3 I. BACKGROUND

¶ 4 Joseph and Janice DeSherlia, through DeSherlia Marina Management, Inc., operate a marina business, Grafton Harbor Marina (Grafton Harbor), in Grafton, Illinois. The land upon

which Grafton Harbor sits has been leased from the City of Grafton (City) since 2002.

¶ 5 Over the years, the terms of the original lease agreement for the land upon which Grafton Harbor sits have been subject to dispute and litigation. See, e.g., *DeSherlia Marina Management, Inc. v. City of Grafton*, 2020 IL App (4th) 190887-U. Amongst other things, an issue in dispute in prior litigation was whether DeSherlia Marina Management, Inc., was paying the correct amount of rent. *Id.* ¶ 9. This issue was specifically in dispute in 2019, when Eberlin served as the City's mayor. Additionally, accusations were made in the prior litigation that Eberlin had engaged in efforts to harass and obstruct the business activities of Grafton Harbor while serving as mayor.

¶ 6 Also in 2019, Grafton experienced major flooding. As a result, Lemonis, a businessman and television personality, set out to help Grafton recover from the flooding. The recovery efforts were filmed and ultimately broadcasted by NBC as part of Lemonis's television series, "The Profit." Throughout the television episode featuring Grafton, Lemonis is seen with Eberlin, the City's then-mayor, and Eberlin's wife. Lemonis paid for Eberlin and his wife to go to Key West, Florida, to get ideas for a business Lemonis would start with Eberlin's wife. In a scene of the episode where Lemonis and Eberlin are discussing the City's finances, Eberlin states Grafton Harbor owes the City between \$250,000 and \$300,000 in back rent. Lemonis insisted the City seek to recover the back rent.

¶ 7 Following the initial broadcast of the television episode featuring Grafton in January 2020, Eberlin conducted an alleged "harassment campaign that included spontaneous code inspections, unreasonable demands from the city council, and lawsuits filed on behalf of the city against Grafton Harbor." Eberlin "pursued a lawsuit to collect the back rent."

¶ 8 In April 2021, Eberlin lost his bid for reelection as mayor. According to plaintiffs,

the “harassment” then “stopped.” Specifically, “[t]here were no additional lawsuits, no more fraudulent inspections, and no more harassment.” Later that year, the City and DeSherlia Marina Management, Inc., executed a “Global Settlement Agreement and General Release.” The effective date of the agreement was October 29, 2021. The agreement concerned disputes which had arisen between the parties “related to the construction, maintenance, the operations of the Grafton Harbor, and the Old Agreement [(lease agreement)] that resulted in litigation.” The parties agreed to terminate the lease agreement in exchange for them entering into a new lease agreement, executing a release, and dismissing all pending litigation. As for the release, the agreement provided, in pertinent part, the following:

“More specifically, the City and DeSherlia hereby release and discharge each other as well as all of their respective officers, directors, principals, shareholders, members, administrators, employees, agents, attorneys, consultants, insurers, and assigns from any and all claims, potential claims, demands, damages, actions, causes of action or suits of any kind or nature whatsoever, known or unknown, arising out of or relating in any way to the Old Agreement, the litigation of any disputes between the City and DeSherlia, or the operation of the Marina and its appurtenant activities through the Effective Date.”

¶ 9 Less than three months after the execution of the Global Settlement Agreement and General Release, plaintiffs filed their civil complaint against defendants. With respect to Eberlin, plaintiffs alleged he made defamatory statements about their failure to pay rent to the City during the television episode featuring Grafton and had engaged in a concerted effort with NBC and/or

Lemonis to defame plaintiffs and interfere with their business activities in exchange for a luxurious trip and assistance with starting a business for his wife. Plaintiff asserted five claims against Eberlin: (1) slander of title, (2) defamation *per se*, (3) tortious interference, (4) civil conspiracy (bribery), and (5) civil conspiracy (campaign finance).

¶ 10 Eberlin filed a motion to dismiss the claims asserted against him. Amongst other reasons, Eberlin argued the claims against him should be dismissed with prejudice because they were barred by the prior release. Specifically, Eberlin asserted, in pertinent part, plaintiffs' claims were based upon matters raised in the prior litigation and subject to the release. Eberlin maintained the language of the release demonstrated it was intended to cease all "litigation between the Desherlias and the City and/or the City's officers."

¶ 11 Plaintiffs filed a response in opposition to Eberlin's motion to dismiss. As for Eberlin's argument about the prior release, plaintiffs initially acknowledged Eberlin was invoking "[p]laintiffs' litigation with the City and the settlement of that action." Plaintiffs asserted, in pertinent part, the release in the settlement agreement had "no bearing" on the claims against Eberlin because Eberlin "was not party to that litigation" and was being sued "in his individual capacity, not as an 'officer' under" the release, for conduct occurring outside his employment.

¶ 12 In July 2022, the circuit court conducted a hearing on Eberlin's motion to dismiss. As for his argument about the prior release, Eberlin asserted, in pertinent part, he was a beneficiary of the release, and plaintiffs' claims were based upon matters raised in the prior litigation and subject to the release. Plaintiffs, in response, argued the release did not concern claims pursued against Eberlin in his personal capacity for actions alleged to have occurred outside the scope of his official duties. In so arguing, plaintiffs noted the release was "between the city and the marina management company itself." After taking the matter under advisement, the court denied Eberlin's

motion, finding, in pertinent part, “questions of material fact” existed as to whether claims asserted against Eberlin were released.

¶ 13 Eberlin filed a motion to reconsider the denial of his motion to dismiss. Amongst other reasons, Eberlin argued the circuit court should reconsider its decision and dismiss with prejudice the claims asserted against him because they were barred based upon the plain language of the release.

¶ 14 Plaintiffs filed a response in opposition to Eberlin’s motion to reconsider. As for Eberlin’s argument about the prior release, plaintiffs asserted the release was ambiguous as to whether it precluded the claims asserted against Eberlin in his personal capacity for conduct alleged to have occurred outside the scope of his employment. Plaintiffs noted the prior litigation was between the City “and one of the Plaintiffs here (the company and not its owners)” and had nothing to do with Eberlin’s statements or actions related to the television show.

¶ 15 In March 2023, the circuit court held a hearing on Eberlin’s motion to reconsider. As for his argument about the prior release, Eberlin asserted, in pertinent part, the release barred the claims asserted against him based upon its plain language. Plaintiffs, in response, argued the release was ambiguous as to whether it precluded the claims asserted against Eberlin. After taking the matter under advisement, the court granted Eberlin’s motion to reconsider and dismissed with prejudice plaintiffs’ claims against Eberlin, finding they were barred by the plain language of the release.

¶ 16 This appeal followed.

¶ 17 **II. ANALYSIS**

¶ 18 On appeal, plaintiffs argue their claims against Eberlin should not have been dismissed. Specifically, plaintiffs assert the circuit court erroneously found the claims were subject

to dismissal because they were barred by the release. Plaintiffs further assert the alternative grounds upon which Eberlin also sought dismissal are unavailing. Eberlin, in response, maintains plaintiffs' claims against him were properly dismissed.

¶ 19 Eberlin sought, and the circuit court granted, the dismissal of plaintiffs' claims pursuant to section 2-619 of the Code of Civil Procedure (735 ILCS 5/2-619 (West 2022)) because they were barred by the prior release.

¶ 20 A motion to dismiss under section 2-619 "admits the legal sufficiency of the claim but asserts defenses or defects outside the pleading to defeat the claim." *Cahokia Unit School District No. 187 v. Pritzker*, 2021 IL 126212, ¶ 23, 184 N.E.3d 233. When considering a section 2-619 motion, all pleadings and supporting documents must be construed "in the light most favorable to the nonmoving party." *Richter v. Prairie Farms Dairy, Inc.*, 2016 IL 119518, ¶ 18, 53 N.E.3d 1. The propriety of a dismissal under section 2-619 presents a question of law subject to *de novo* review. *Cahokia Unit School District No. 187*, 2021 IL 126212, ¶ 24.

¶ 21 "A release is the abandonment of a claim to the person against whom the claim exists." (Internal quotation marks omitted.) *Miller v. Lawrence*, 2016 IL App (1st) 142051, ¶ 26, 61 N.E.3d 990. A release is a contract "governed by contract law." *Farm Credit Bank of St. Louis v. Whitlock*, 144 Ill. 2d 440, 447, 581 N.E.2d 664, 667 (1991). "Where a contract is clear and explicit, a court must enforce it as written, and the meaning of the contract, as well as the intention of the parties, must be gathered from the document without the assistance of extrinsic aids." *Miller*, 2016 IL App (1st) 142051, ¶ 26.

¶ 22 Plaintiffs initially assert the Global Settlement Agreement and General Release does not release any claims against Eberlin. We disagree. While Eberlin was not a named party to the agreement, we find, contrary to plaintiffs' contention, the language of the agreement identified

Eberlin as a beneficiary of the release. Plaintiffs emphasize the agreement refers to releasing claims against the City’s respective officers in the present tense. They also cite case law where contracting parties used “current and former” language to release claims against current and former officers. Plaintiffs fail, however, to account for the second part of the sentence addressing the beneficiaries of the release. That part of the sentence indicates the parties intended to release the City’s respective officers from claims “arising out of or relating in any way to the Old Agreement, the litigation of any disputes between the City and DeSherlia, or the operation of the Marina and its appurtenant activities through the Effective Date.” This language, we find, demonstrates the parties intended to not only release claims against those officers presently working for the City but also any officers who formerly worked for the City that were involved with the prior lease and/or related litigation. Indeed, we note plaintiffs alleged the harassment, including the lawsuits and inspections by the City, stopped when Eberlin lost his bid for reelection. Therefore, the agreement releases the claims against Eberlin.

¶ 23 Plaintiffs also assert, even if the Global Settlement Agreement and General Release releases the claims against Eberlin, it does not unambiguously release the type of claims asserted against him in this case. We again disagree. The language of the agreement provides for a release of any and all claims “arising out of or relating in any way to the Old Agreement, the litigation of any disputes between the City and DeSherlia, or the operation of the Marina and its appurtenant activities through the Effective Date.” The claims asserted against Eberlin in this case are all based upon the known statements and actions of Eberlin while he was the mayor and in relation to the prior lease and related litigation. Therefore, the type of claims asserted against Eberlin fall within the language of the release.

¶ 24 Finally, plaintiffs assert, even if the Global Settlement Agreement and General

Release releases the type of claims asserted against Eberlin in this case, it does not release those claims to the extent they are pursued by the individual owner plaintiffs as opposed to the plaintiff corporation. Plaintiffs emphasize the individual owner plaintiffs were not named parties to the agreement and assert they did not receive consideration for any release. Plaintiffs, however, develop this argument for the first time on appeal, thereby forfeiting the issue for review. See *Martinez v. River Park Place, LLC*, 2012 IL App (1st) 111478, ¶ 29, 980 N.E.2d 1207 (“It is well settled that issues not raised in the [circuit] court are deemed forfeited and may not be raised for the first time on appeal.”). To be sure, plaintiffs, after initially referring to “[p]laintiffs’ litigation with the City and the settlement of that action,” changed course and referred to the prior litigation and settlement as being between the City and the plaintiff corporation. However, at no point did plaintiffs assert their claims should be evaluated based upon each individual plaintiff. In fact, at no point did plaintiffs assert the individual owner plaintiffs did not receive consideration for the release of the claims. As a result, the circuit court did not consider the issue, and this court declines to do so for the first time on appeal.

¶ 25 In sum, we conclude the claims against Eberlin were properly dismissed as barred by the release. We need not, therefore, consider the alternative grounds upon which Eberlin also sought dismissal of the claims against him.

¶ 26 III. CONCLUSION

¶ 27 We affirm the circuit court’s judgment.

¶ 28 Affirmed.