2012 IL App (1st) 102384-U

SIXTH DIVISION
MARCH 2, 2012

No. 1-10-2384

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

EUGENE HARDIMAN,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County.
	)	
v.	)	No. 06 CH 19427
	)	
PAUL HARDIMAN,	)	Honorable
	)	Rita M. Novak,
Defendant-Appellee.	)	Judge Presiding.
	)	

PRESIDING JUSTICE ROBERT E. GORDON delivered the judgment of the court. Justices Garcia and Lampkin concurred in the judgment.

ORDER

¶ 1 *Held*: Trial court's dismissal of plaintiff's action for quiet title is reversed, since it is not clear whether the claim was contemplated to be released by plaintiff at the time an agreed settlement order containing a release was entered. Trial court's dismissal of plaintiff's actions for rescission and reformation is affirmed, since trial court correctly found it did not have jurisdiction to modify or vacate the agreed settlement order after two years.

¶ 2 The issue in the instant appeal concerns the rightful ownership of a parcel of real property

consisting of a house, the land surrounding the house, and the land the house was constructed on. Plaintiff Eugene Hardiman and defendant Paul Hardiman are brothers who are lawyers and who have been embroiled in litigation for 15 years. In 1995, Eugene purchased the property to be used as his home and asked Paul to co-sign the mortgages on the property as an accommodation to him. Paul agreed, and the land was placed in a land trust. Eugene and Paul were designated as beneficiaries under the land trust, but only Eugene retained the power of direction. It is obvious that this was done for security purposes so that Paul would have an interest should Eugene default on the mortgage. After Eugene failed to pay the trustee's fee, the trustee resigned and executed a trustee's deed, deeding the property to Eugene and Paul as joint tenants.

¶ 3 Paul, who had filed a complaint against Eugene and his ex-wife concerning the law firm that the three had owned, amended his complaint to include three counts concerning the real property, including a request for partition. During a hearing in the course of the litigation, Paul's attorney stated that Paul was primarily concerned with his liability under the mortgages. Eugene refinanced the property, obtaining a mortgage without Paul as a co-signer, and asked Paul to sign a quit claim deed conveying the property back to Eugene. Paul refused, and Eugene filed a motion to dismiss the claims concerning the property as moot since Paul was no longer liable under the mortgage.

¶ 4 The motion was never ruled upon and, six years later in 2004, Paul and Eugene settled all matters between them through an agreed settlement order. In 2006, Eugene initiated the instant lawsuit to force Paul to remove his name from the title to the real property, alleging that Paul released his claim to the property when the agreed settlement order was entered. The circuit

court dismissed Eugene's third amended complaint pursuant to section 2-615 of the Code of Civil Procedure (the Code) (735 ILCS 5/2-615 (West 2004)), finding that Eugene's claim was released under the agreed settlement order. Eugene filed a fourth amended complaint, seeking rescission or reformation of the agreed settlement order, which was dismissed by the circuit court pursuant a section 2-615 motion when the court found that it had no jurisdiction to modify the 2004 agreed settlement order. Eugene appeals, arguing that: (1) the circuit court erred in finding his claims released by the agreed settlement order and (2) the circuit court erred in finding that it had no jurisdiction to reform or rescind the agreed settlement order. We affirm in part and reverse in part.

¶ 5 BACKGROUND

¶ 6 Since this case concerns Eugene's third and fourth amended complaints, we draw the facts from those complaints and the exhibits attached to them.

¶ 7 I. The Real Property

¶ 8 On July 28, 1995, Eugene purchased property in Wilmette, obtaining two mortgages from Cole Taylor Bank (Cole Taylor). Eugene alone signed the sales contract, but Paul agreed to co-sign the mortgage notes as an accommodation to Eugene. On the same day, the property was conveyed into a land trust. Cole Taylor was designated as the trustee and Eugene and Paul were the named beneficiaries; Cole Taylor requested that Paul be named a beneficiary since he was a co-signor on the mortgage note. Eugene was given the sole power of direction over the property.

¶ 9 Eugene resided in a home located on the property with his children from July 28, 1995, until the filing of his lawsuit against Paul. Eugene paid the down payment on the property, as

well as its capital improvements, property expenses, such as mortgage and insurance payments, maintenance, repairs, utilities, and real estate taxes. Paul never paid any of the property expenses, nor did Paul ever reside at the property. Eugene eventually paid the Cole Taylor mortgages in full which were released on June 20, 2001. Eugene obtained another mortgage on the property from Banco Popular at approximately the same time as the Cole Taylor mortgage was released; Banco Popular "did not require plaintiff to obtain any deed, conveyance or signature from [Paul]."

¶ 10 On October 28, 1997, Cole Taylor resigned as trustee based on Eugene's "inadvertent[]" failure to pay $540.50 in trust fees and conveyed the property to Eugene and Paul as joint tenants with right of survivorship. Eugene never authorized Cole Taylor to name Paul as a grantee in the trustee's deed, as required by the trust agreement. Eugene also alleges he never received Cole Taylor's notice of resignation or the trustee's deed of resignation[1].

¶ 11 II. 1995 Suit

¶ 12 On December 1, 1995, Paul filed a complaint for declaratory judgment and accounting against Eugene, Eugene's ex-wife, Patricia, and the law firm in which the three had been shareholders (the 1995 suit). The complaint concerned Paul's rights upon withdrawal from the firm and made no mention of the real property at issue in the instant case. On January 5, 1998, less than three months after Cole Taylor's resignation as trustee, Paul amended the complaint,

[1] The record demonstrates that the notice of resignation was sent by certified mail and the return receipt was signed by Eugene's son. The trustee's deed was sent by certified mail and returned as unclaimed by the addressee.

adding three counts pertaining to the real property, including a request for partition. Paul also filed a *lis pendens* notice with the Cook County recorder of deeds. On March 23, 1998, Eugene filed an answer to the amended complaint, including denials of the claims concerning the real property and affirmative defenses to the claims. In his answer, Eugene stated that "it was never intended that Paul would have an ownership interest in the underlying property as is indicated by the fact that Eugene was vested with the sole Power of Direction with respect to the property[,] and Eugene had the sole power to deed the property to himself pursuant to the terms of the Land Trust Agreement."

¶ 13 During a hearing on August 27, 1998, on Paul's motion for summary judgment, Paul's attorney made the following statement:

> "We're not seeking to come in here for no apparent reason to partition a property and to have someone perhaps lose his home, a home he doesn't appear to be able to afford.
>
> Our goal here is to extricate my client from liability under this mortgage. And the best way we know how to do it is to seek partition of the property."

After an off-the-record discussion, the parties' attorneys continued:

> "MR. BLUMENTHAL [Eugene's attorney]: On the record, what we would like to do is to see if we can deed back his interest to us and see if we can get him off the mortgage.
>
> MR. TEPLINSKY [Paul's attorney]: And that's perfect.

> THE COURT: That's perfect. And that's why that money out there sitting is important to get a handle on, but I'm not going to give you a handle on it until you work out all of the other details.
>
> Work out the whole universal settlement. The money will be available once you've worked it all out. It will be available immediately. And if you can't work it out, it's going to go on and on."

¶ 14 On September 21, 2001, Eugene filed a motion to dismiss the counts of Paul's complaint related to the property, arguing that Eugene's procurement of the Banco Popular mortgage relieved Paul's liability on the Cole Taylor mortgages and rendered those counts moot. In Paul's response to Eugene's motion, Paul stated:

> "Paul and Eugene are joint tenants on the property regardless of whether Eugene has refinanced the mortgage. *** Paul has an absolute right to seek the partition. He is an owner of the property whether Eugene likes it or not."

The circuit court reserved its ruling on the motion to dismiss and has never made a ruling.

¶ 15 On November 4, 2004, the parties settled the 1995 suit and an agreed settlement order was signed by all of the parties and entered by the circuit court. Paragraph 4 of the agreed settlement order provided:

> "All other claims filed by the parties in this matter shall be dismissed with prejudice. The Plaintiff and the Defendants fully

> release each other from any claims alleged herein and any other claims whatsoever that they may have against each other for any reason whatsoever up to the date of entry of this Agreed Settlement Order."

¶ 16 III. Instant Suit

¶ 17 On September 18, 2006, Eugene filed a suit for declaratory judgment to quiet title against Paul and Cole Taylor, alleging that Paul refused to sign a quit claim deed conveying his interest in the property to Eugene in violation of the agreed settlement order, and that Cole Taylor refused to amend the trustee's deed to convey the property solely to Eugene; Eugene also alleged that any interest Paul claimed in the property was released pursuant to the agreed settlement order. On August 16, 2007, Paul filed a counterclaim and third party complaint for partition against Banco Popular. On July 31, 2008, the circuit court granted in part Eugene's motion for summary judgment on counts I and II of Paul's second amended counterclaim and third party complaint, finding that the claim for partition was released under the terms of the agreed settlement order.

¶ 18 On September 9, 2008, Eugene filed a verified third amended complaint to quiet title. In the complaint, Eugene alleged that after the entry of the agreed settlement order, he approached Paul and requested that Paul sign a quit claim deed conveying his interest in the property to Eugene, but Paul refused to do so. Eugene petitioned the circuit court to "enforce the Agreed Order of Settlement" but Paul's counsel objected, stating that the court no longer had jurisdiction since Eugene's petition was filed over 30 days after the court's entry of the agreed settlement order. Based on that objection, Eugene did not pursue the motion, but instead filed the action to

quiet title through enforcement of the agreed settlement order. Eugene further alleged that both the *lis pendens* notice and title being vested in Paul as a joint tenant constituted clouds on the title. Eugene alleged that Paul failed to abide by the agreed settlement order by refusing to release and convey his interest in the property to Eugene.

¶ 19 On January 20, 2009, Paul filed a motion to dismiss the third amended complaint pursuant to section 2-615 of the Code. Paul claimed that the 2004 agreed settlement order released Eugene's claims and that neither the *lis pendens* notice nor Paul's ownership interest constituted a cloud on title. On June 2, 2009, the circuit court granted Paul's motion to dismiss and granted Eugene leave to replead the complaint.

¶ 20 On November 18, 2009, Eugene filed a *pro se* verified fourth amended complaint. Count I of the complaint sought reformation of the settlement order entered in the 1995 suit. Eugene alleges that he paid the Cole Taylor mortgages in full in 2001 "pursuant to an oral agreement between the parties during the prior Chancery case." In his request for reformation, Eugene included the statement that "[i]n requesting reformation of the Agreed Settlement Order dated November 4, 2004, Plaintiff does not waive his prior claims for enforcement of said Agreed Settlement Order to quiet title to the Subject Property that were dismissed on June 2, 2009." Eugene further alleges that "prior to the entry of the Agreed Settlement Order the parties orally agreed that in consideration of Eugene Hardiman obtaining a new mortgage on the Subject Property, thereby relieving Paul Hardiman of liability on the mortgage, he would deed back his claimed interest in the Subject Property to Eugene Hardiman." Eugene alleges that the oral agreement reflects the intention of the parties and any failure in the agreed settlement order to

mention the property was either a mutual mistake by the parties or a unilateral mistake by Eugene with Paul knowingly remaining silent. Count II of the complaint requested rescission of the settlement order. Count II also included language almost identical to that in count I concerning waiver of claims alleged in the third amended complaint.

¶ 21 On March 11, 2010, Paul filed a motion to dismiss Eugene's fourth amended complaint pursuant to section 2-615 of the Code, claiming that the circuit court did not have jurisdiction to vacate or modify the 2004 agreed settlement order. Paul further claims that Eugene had derived a benefit from the enforceability of the settlement order when the circuit court granted Eugene's motion for summary judgment on Paul's counterclaim concerning allegations released under the agreed settlement order. Finally, Paul claimed that the statements of the attorneys during the 1998 hearing did not constitute an agreement to convey the property back to Eugene.

¶ 22 On June 17, 2010, the circuit court granted Paul's motion to dismiss Eugene's fourth amended complaint with prejudice, finding that it lacked jurisdiction to modify the 2004 order. During the hearing on the motion, the court noted:

> "My recollection, and the reason that I refer back to those prior proceedings, is that at the time the agreed settlement order was entered, there still was a claim to quiet title to this property. And it seems to the Court that if in fact there had been a side agreement or some portion of the case that was not resolved by the November 4th order, that that would have been reserved in some way or pointed out to the Court or perhaps even subject to a

request to reconsider or something filed within 30 days or subject to a [2-1401] petition. None of this occurred."

¶ 23 Eugene timely filed a notice of appeal, appealing the order dismissing the third amended complaint and the order dismissing the fourth amended complaint.

¶ 24 ANALYSIS

¶ 25 On appeal, Eugene argues that the trial court erred in dismissing his quiet title action as released by the agreed settlement order. Eugene also claims that the trial court erred in dismissing his claims for rescission and reformation based on lack of jurisdiction. All of Eugene's claims were dismissed pursuant to section 2-615 of the Code. A motion to dismiss under section 2-615 of the Code challenges the legal sufficiency of the complaint by alleging defects on its face. *Young v. Bryco Arms*, 213 Ill. 2d 433, 440 (2004); *Wakulich v. Mraz*, 203 Ill. 2d 223, 228 (2003). We review *de novo* an order granting a section 2-615 motion to dismiss. *Young*, 213 Ill. 2d at 440; *Wakulich*, 203 Ill. 2d at 228. *De novo* consideration means we perform the same analysis that a trial judge would perform. *Khan v. BDO Seidman, LLP*, 408 Ill. App. 3d 564, 578 (2011). The critical inquiry is whether the allegations in the complaint are sufficient to state a cause of action upon which relief may be granted. *Wakulich*, 203 Ill. 2d at 228. In making this determination, all well-pleaded facts in the complaint, and all reasonable inferences that may be drawn from those facts, are taken as true. *Young*, 213 Ill. 2d at 441. In addition, we construe the allegations in the complaint in the light most favorable to the plaintiff. *Young*, 213 Ill. 2d at 441.

¶ 26 I. Quiet Title Action

¶ 27 Eugene first argues that the trial court erred in dismissing his third amended complaint based on the conclusion that his quiet title action was released by the agreed settlement order. Instead, Eugene argues that the agreed settlement order resulted in Paul's release of his claim to the property. Additionally, in his fourth amended complaint, Eugene claims that there was a prior oral agreement between the parties in which Paul had agreed to release his claim to the property.

¶ 28 *A. 1998 Alleged Agreement*

We first consider the alleged earlier agreement, which occurred in 1998, when the parties' attorneys made several statements in the course of a court hearing. During a hearing on August 27, 1998, on Paul's motion for summary judgment, Paul's attorney made the following statement:

> "We're not seeking to come in here for no apparent reason to partition a property and to have someone perhaps lose his home, a home he doesn't appear to be able to afford.
>
> Our goal here is to extricate my client from liability under this mortgage. And the best way we know how to do it is to seek partition of the property."

After an off-the-record discussion, the parties' attorneys continued:

> "MR. BLUMENTHAL [Eugene's attorney]: On the record, what we would like to do is to see if we can deed back his interest

> to us and see if we can get him off the mortgage.
>
> MR. TEPLINSKY [Paul's attorney]: And that's perfect.
>
> THE COURT: That's perfect. And that's why that money out there sitting is important to get a handle on, but I'm not going to give you a handle on it until you work out all of the other details.
>
> Work out the whole universal settlement. The money will be available once you've worked it all out. It will be available immediately. And if you can't work it out, it's going to go on and on."

Eugene claims that this dialogue constituted a binding agreement between the parties that Paul would release his claim to the property if he was released from liability under the mortgage. We do not find this argument persuasive.

¶ 29 Eugene's argument focuses on whether the parties' attorneys had the authority to bind them to an oral agreement. However, that is not the dispositive issue here. Instead, we agree with Paul that there was no "meeting of the minds" sufficient to form an enforceable contract, regardless of the authority of the attorneys to do so. An oral settlement agreement is enforceable absent mistake or fraud. *Lampe v. O'Toole*, 292 Ill. App. 3d 144, 146 (1997). However, "[a]s with any contract, there must be an offer, an acceptance, and a meeting of minds on terms." *Lampe*, 292 Ill. App. 3d at 146. Generally, "[t]he existence of an oral contract, its terms, and the intent of the parties are questions of fact." *Johannesen v. Eddins*, 2011 IL App (2d) 110108, ¶ 22 (citing *Laughlin v. France*, 241 Ill. App. 3d 185, 195 (1993)). In addition, it must be shown that

the agreement contains the terms of the contract. *Downs v. Rosenthal Collins Group, LLC*, 2011 IL App (1st) 90970, ¶ 49. "[T]he intent of the parties to an oral agreement may become a question of law 'if the facts are undisputed and there can be no difference in the judgment of reasonable men as to the inferences to be drawn from them.' " *Ceres Illinois, Inc. v. Illinois Scrap Processing, Inc.*, 114 Ill. 2d 133, 142 (1986) (quoting *Yorke v. B. F. Goodrich Co.*, 130 Ill. App. 3d 220, 223 (1985)).

¶ 30 In the case at bar, there is no indication that the above dialogue between the parties' attorneys was intended to be a settlement agreement. Instead, the dialogue merely references the parties' ultimate goals: for Paul to be relieved of liability under the mortgage and for Eugene to have sole title to the property. There is nothing in the report of proceedings to indicate that either attorney was attempting to reach a binding agreement and all of the terms were not completed. Thus, we cannot find that Paul was obligated to convey his interest in the property as a result of that conversation.

¶ 31 *B. 2004 Agreed Settlement Order*

¶ 32 Prior to addressing the merits of Eugene's argument concerning the 2004 agreed settlement order, Paul claims that Eugene has forfeited his claim on appeal by failing to raise the issue in his fourth amended complaint. "It is well established that a party who files an amended pleading waives any objection to the trial court's ruling on the former complaints." *Boatmen's National Bank of Belleville v. Direct Lines, Inc.*, 167 Ill. 2d 88, 99 (1995). Thus, a party seeking to preserve its objection must either stand on the dismissed complaint or must incorporate its allegations. *Boatmen's National*, 167 Ill. 2d at 99; *Foxcroft Townhome Owners Ass'n v.*

Hoffman Rosner Corp., 96 Ill. 2d 150, 155 (1983).

¶ 33 In the case at bar, Eugene included the following statement in his request for reformation: "[i]n requesting reformation of the Agreed Settlement Order dated November 4, 2004, Plaintiff does not waive his prior claims for enforcement of said Agreed Settlement Order to quiet title to the Subject Property that were dismissed on June 2, 2009." Eugene included a similar statement in his request for rescission. Paul argues that this language is insufficient to preserve Eugene's claims on appeal because Eugene failed to reallege or incorporate the claims of the third amended complaint in the fourth amended complaint. We do not find Paul's argument persuasive.

¶ 34 Language similar to that in Eugene's complaint has been found sufficient to preserve a plaintiff's claims in several cases. For instance, in *Saunders v. Michigan Avenue National Bank*, 278 Ill. App. 3d 307 (1996), the appellate court found a footnote referencing prior complaints to be sufficient to preserve the issues found in the prior complaints. The plaintiff's third amended complaint in *Saunders* contained a footnote providing: " 'the prior complaints are attached as Appendix A to preserve the previously dismissed claim [sic] for appeal.' " *Saunders*, 278 Ill. App. 3d at 312. The court found that this footnote was sufficient to preserve the issues for review, since "the third amended complaint properly referenced the prior complaints," despite the fact that the complaints were not actually attached to the complaint until much later. *Saunders*, 278 Ill. App. 3d at 312.

¶ 35 Similarly, in *Guardino v. Chrysler Corp.*, 294 Ill. App. 3d 1071 (1998), we found a footnote to be sufficient to preserve prior claims. The footnote in *Guardino* stated that the

plaintiffs "did 'not intend by filing this pleading to waive their objections to previous dismissal orders of previous pleadings.' " *Guardino*, 294 Ill. App. 3d at 1079. The court cited *Saunders* and concluded that "[b]ecause plaintiffs in the instant case referred to the prior orders for the express purpose of preserving objections, we do not believe this constituted waiver." *Guardino*, 294 Ill. App. 3d at 1079-80.

¶ 36 In the case at bar, we do not find Eugene's statements in the fourth amended complaint to be less of a reference to the claims of the third amended complaints than in *Saunders* or *Guardino*. Accordingly, we do not consider Eugene's quiet title claim to be forfeited and proceed to consider it on its merits.

¶ 37 Both Eugene and Paul claim that they should prevail in the instant appeal because the other released his claims to the property. A release " 'is the abandonment of a claim to the person against whom the claim exists.' " *Thornwood, Inc. v. Jenner & Block*, 344 Ill. App. 3d 15, 21 (2003) (quoting *Hurd v. Wildman, Harrold, Allen & Dixon*, 303 Ill. App. 3d 84, 88 (1999)); *Fuller Family Holdings, LLC v. Northern Trust Co.*, 371 Ill. App. 3d 605, 614 (2007). It is a contract and is therefore governed by contract law. *Farm Credit Bank of St. Louis v. Whitlock*, 144 Ill. 2d 440, 447 (1991) (citing *Polo National Bank v. Lester*, 183 Ill. App. 3d 411, 414 (1989)). The interpretation of a contract involves a question of law, so we review it *de novo*. *Dowling v. Chicago Options Associates, Inc.*, 226 Ill. 2d 277, 285 (2007) (citing *People ex rel. Department of Public Health v. Wiley*, 218 Ill. 2d 207, 223 (2006)). As noted, *de novo* consideration means we perform the same analysis that a trial judge would perform. *Khan*, 408 Ill. App. 3d at 578.

¶ 38 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. *Rakowski v. Lucente*, 104 Ill. 2d 317 (1984); *Fuller Family*, 371 Ill. App. 3d at 614; *Shultz v. Delta-Rail Corp.*, 156 Ill. App. 3d 1, 10 (1987). However, a release will not be construed to include claims that were not within the contemplation of the parties. *Carlile v. Snap-On Tools*, 271 Ill. App. 3d 833, 838 (1995) (citing *Corona v. Illinois Central Gulf R.R. Co.*, 203 Ill. App. 3d 947, 951 (1990)). " '[N]o form of words, no matter how all encompassing, will foreclose scrutiny of a release [citation] or prevent a reviewing court from inquiring into surrounding circumstances to ascertain whether it was fairly made and accurately reflected the intention of the parties.' " *Carlile*, 271 Ill. App. 3d at 839 (quoting *Ainsworth Corp. v. Cenco, Inc.*, 107 Ill. App. 3d 435, 439 (1982)).

¶ 39 The release in the case at bar was included in the agreed settlement order entered on November 4, 2004, between Paul, Eugene, and Eugene's wife. After three paragraphs concerning specific assets, the order provided:

> "All other claims filed by the parties in this matter shall be dismissed with prejudice. Plaintiff and the Defendants fully release each other from any claims alleged herein and any other claims whatsoever that they may have against each other for any reason whatsoever up to the date of entry of this Agreed Settlement Order."

¶ 40 The fundamental area of disagreement between the parties is whether Eugene or Paul

released his claim to the property. Eugene claims that Paul released his claim of ownership to the property, which was a necessary element of Paul's claim for partition. Paul, on the other hand, claims that Eugene released all claims he had, asserted or unasserted, challenging Paul's ownership of the property. After closely examining the release and considering the parties' arguments, we find that the release is ambiguous and therefore not appropriate for resolution under a section 2-615 motion to dismiss.

¶ 41 There is no doubt that Paul's claim for partition was released, as it was contained in the complaint that resulted in the agreed settlement order. Indeed, the trial court at an earlier time had granted Eugene's motion for summary judgment to that effect, which is not challenged in the current appeal. However, we cannot agree with Eugene that the fact that the claim for partition was released necessarily means that Paul's underlying claim of ownership to the property was also released. Eugene has cited no authority for the proposition that a party releasing a cause of action also releases the underlying elements of that cause of action, and we are not willing to create such a rule of law.

¶ 42 However, we are likewise unable to accept Paul's contention that Eugene released his action for quiet title. Paul is correct when he notes that the issue of ownership of the property was contested for a number of years prior to the agreed settlement order. However, in his fourth amended complaint and on appeal, Eugene claims that there was an agreement in 1998 in which Paul agreed to release his claim to the property upon Eugene's releasing Paul from liability on the mortgage. While we concluded above that the alleged 1998 agreement was not a contract, it is nevertheless apparent from Eugene's conduct that he believed that once Paul was released

from liability under the mortgage, Paul would execute the deed. In other words, Eugene has alleged that he believed the issue of the ownership of the property was resolved in 1998 and that all that remained at the time of the 2004 agreed settlement order was Paul's execution of a deed.

¶ 43 As noted, a release will not be construed to include claims that were not within the contemplation of the parties. *Carlile*, 271 Ill. App. 3d at 838 (citing *Corona*, 203 Ill. App. 3d at 951). In the case at bar, construing the facts in Eugene's favor as we must on review of a motion to dismiss (see *Young*, 213 Ill. 2d at 441), we find that it is not clear whether the issue of the ownership of the property was within Eugene's contemplation at the time of the agreed settlement order. Accordingly, we must reverse the court's grant of Paul's motion to dismiss the claim for quiet title.

¶ 44 We find support for our conclusion in the Illinois Supreme Court's *Whitlock* decision. In *Whitlock*, the defendant children purchased a farm using financing obtained from the plaintiff bank; one of the conditions of the bank's agreement to provide financing was that the children's parents pledged their farm as security. *Whitlock*, 144 Ill. 2d at 443. As a result, two loans were arranged: loan No. 1 was secured by the parents' farm and was signed by both the parents and the children, and loan No. 2 was secured by the farm that the children were purchasing and was signed by the children alone. *Whitlock*, 144 Ill. 2d at 443-44. The children defaulted on loan No. 2, and in order to avoid foreclosure, the children transferred the land to the bank in exchange for a release agreement providing in part:

> " 'Bank *** does hereby remise, release and forever discharge Borrower, and each of them if more than one, of and from all

> manner of actions, *** whatsoever, at law or in equity, and particularly without limiting the generality of the foregoing all claims relating to the mortgage loan transaction aforesaid and the conveyance of title hereunder, which either party *** ever had, now have or may have in the future, for, upon or by reason of any matter, cause or thing, whatsoever.' " (Emphasis omitted.)
>
> *Whitlock*, 144 Ill. 2d at 444-45.

The bank attempted to foreclose on the parents' farm, and in an affirmative defense, the defendants argued that the release acted as a bar to the foreclosure action. *Whitlock*, 144 Ill. 2d at 445.

¶ 45 The bank claimed that the release was intended to apply solely to loan No. 2, pointing to numerous references to loan No. 2 contained in the release. *Whitlock*, 144 Ill. 2d at 445-46. The defendants argued that the general release language should apply to both loans. *Whitlock*, 144 Ill. 2d at 446. The court found that the claim was general and ambiguous on its face. *Whitlock*, 144 Ill. 2d at 447. The court noted that the release stated that the bank released the borrowers from all actions and claims, but *particularly* those relating to loan No. 2. *Whitlock*, 144 Ill. 2d at 448. Both parties were aware at the time of claims that might arise from loan No. 1, but the court found that it was not clear on the face of the release whether the parties intended to release both loans or limit the release to loan No. 2. *Whitlock*, 144 Ill. 2d at 448. Thus, the intent of the parties needed to be determined by examining extrinsic evidence. *Whitlock*, 144 Ill. 2d at 448.

¶ 46 Similarly, in the case at bar, the agreed settlement order provided that the parties released

each other "from any claims alleged herein and any other claims whatsoever that they may have against each other for any reason whatsoever up to the date of entry of this Agreed Settlement Order." Based on Eugene's claims concerning the 1998 agreement, it is not clear whether Eugene believed that the ownership of the property was a "claim[] *** that they may have against each other" at the time of the execution of the agreed settlement order. Regardless of whether Paul believed that the 1998 agreement resolved the issues of ownership of the property, Eugene's alleged lack of knowledge of the existence of his claim is sufficient to find that the claim was not within the contemplation of the parties. See *Thornwood*, 344 Ill. App. 3d at 22 (quoting *Todd v. Mitchell*, 168 Ill. 199, 204 (1897)) (noting that despite the fact that one party may have contemplated certain claims at the time a release was executed, "knowledge by one party, where the other party lacks knowledge, does not bring the claim within the 'contemplation of the parties.' "). Eugene believed that once Paul was removed from the mortgage, Paul would have no claim to the property. Accordingly, since the release is ambiguous under the facts of this case, we reverse the trial court's grant of Paul's motion to dismiss Eugene's quiet title claim.

¶ 47 *C. Cloud on Title*

¶ 48 Paul alternatively argues that even if Eugene's quiet title action was not released under the agreed settlement order, the dismissal of the action should be affirmed because neither the *lis pendens* notice nor Paul's valid interest in the property could be considered clouds on title. An action to quiet title in property is an equitable proceeding in which a party seeks to remove a cloud on his title to the property. *Stahelin v. Forest Preserve District of Du Page County*, 376 Ill. App. 3d 765 (2007). Thus, if either the *lis pendens* notice or Paul's interest in the property

did not constitute a cloud on title, the quiet title action was properly dismissed. "A cloud on title is said to be the semblance of a title, either legal or equitable, or a claim of an interest in lands, appearing in some legal form but which is, in fact, unfounded or which it would be inequitable to enforce." *Yeates v. Daily*, 13 Ill. 2d 510, 514 (1958). "Various forms of documents which appeared valid on their face have been held to constitute clouds on title." *Lakeview Trust & Savings Bank v. Estrada*, 134 Ill. App. 3d 792, 812 (1985) (citing *Johnston v. Masterson*, 397 Ill. 168, 172 (1947) (subsequent deed to second grantee), *Johnson v. Riedler*, 395 Ill. 412, 417 (1946) (recorded mortgage), and *Oswald v. Newbanks*, 336 Ill. 490, 496 (1929) (forged deed)).

¶ 49 In the case at bar, the *lis pendens* notice may not constitute a cloud on title. Generally, a *lis pendens* notice may constitute a cloud on title. See *Allensworth v. First Galesburg National Bank & Trust Co.*, 7 Ill. App. 2d 1, 4 (1955). However, upon the dismissal of Paul's suit for partition, the *lis pendens* was terminated. See *Eich v. Czervonko*, 330 Ill. 455, 459-60 (1928) (noting that "[*l*]*is pendens* ends with the entry of a final decree" in a case where there was no further action pending); *Duncan v. Farm Credit Bank*, 940 F.2d 1099, 1102-03 (7th Cir. 1991) ("In Illinois, a *lis pendens* terminates upon a final judgment or decree."). Therefore, the *lis pendens* notice may not have constituted a cloud on title, since there was no longer a claim of an interest in the land based on Paul's partition action.

¶ 50 However, Paul's alleged wrongful presence on the title to the property does constitute a cloud on title. There is no question that Paul is currently listed on the title to the property. A valid interest in property cannot constitute a cloud on title. *Illinois District of American Turners v. Rieger*, 329 Ill. App. 3d 1063, 1072 (2002) (citing *Hill v. 1550 Hinman Avenue Building*

Corp., 365 Ill. 129, 134 (1936)). However, Eugene claims that Paul's presence on title is wrongful, which would constitute a cloud on title. We do not agree with Paul's contention that Eugene has admitted that Paul's title is valid or that the court so found when it granted summary judgment in Cole Taylor's favor. As Eugene noted, the court did not explain its reasoning for granting summary judgment in Cole Taylor's favor, so we will not interpret the court's action as making a finding about the validity of Paul's interest in the property. Additionally, at most, Eugene has acknowledged that title to the property currently lists Paul as a joint tenant; however, Eugene has consistently argued that Paul in fact does not have a legitimate interest in the property. If Paul's ownership was only a security interest for the mortgage, then when the mortgage was removed, Paul's name should have been removed from title.

¶ 51 II. Rescission and Reformation

¶ 52 Eugene also claims that the trial court erred in dismissing his claims for rescission and reformation on the basis of lack of jurisdiction. In his fourth amended complaint, Eugene alleges that the agreed settlement order should be either reformed to include a provision about the disposition of the property or should be rescinded. The trial court found that since more than 30 days had passed since the agreed settlement order had been entered and no petition had been filed within two years of the order pursuant to section 2-1401 of the Code (735 ILCS 5/2-1401 (West 2008)), it had no jurisdiction to modify or vacate the agreed settlement order. On appeal, Eugene argues that since the agreed settlement order is essentially a contract, it may be rescinded or reformed at any time, and the trial court thus had jurisdiction and should not have dismissed his claims.

¶ 53 "An agreed order is considered a contract between the parties to the litigation. Accordingly, its construction is governed by principles of contract law." *Elliott v. LRSL Enterprises, Inc.*, 226 Ill. App. 3d 724, 728-29 (1992). Under contract law, in order to be entitled to reformation of a contract, "the party seeking reformation must prove (1) there was an agreement between the parties; (2) the parties agreed to put their agreement in writing; and (3) [there was] a variance between the parties' agreement and the writing" due to a mistake. *Goodwine State Bank v. Mullins*, 253 Ill. App. 3d 980, 991 (1993). To rescind a contract based on mistake, the party seeking rescission must demonstrate "by clear and positive proof: (1) that the mistake relate[s] to a material feature of the contract; (2) that the mistake is of such grave consequence that enforcement of the contract would be unconscionable; (3) that the mistake occurred notwithstanding the exercise of reasonable care; and (4) that the other party can be placed in *statu quo*." *John Burns Construction Co. v. Interlake, Inc.*, 105 Ill. App. 3d 19, 25 (1982). Eugene claims that the agreed settlement order between him and Paul entitles him to either rescission or reformation.

¶ 54 However, we cannot agree with Eugene that normal contract principles apply in the case at bar. While the agreed settlement order may in most respects be considered a contract, it nevertheless is also a court order. An agreed order "is a recordation of the parties' private agreement, not an adjudication of their rights. Once such a[n] [order] has been entered, it is generally binding on the parties and cannot be amended or varied without the consent of each party." *In re M.M.D.*, 213 Ill. 2d 105, 114 (2004). After a final order is entered, a trial court retains jurisdiction for 30 days, and a timely motion pursuant to section 2-1203 of the Code (735

ILCS 5/2-1203 (West 2008)) may properly raise the issue of a settlement agreement's validity. *Brewer v. National R.R. Passenger Corp.*, 165 Ill. 2d 100, 105 (1995). Additionally, agreed orders may be modified or vacated if they meet the requirements of section 2-1401 of the Code. *In re Marriage of Rolseth*, 389 Ill. App. 3d 969, 972 (2009); see also *Thompson v. IFA, Inc.*, 181 Ill. App. 3d 293, 297 (1989) (noting that "[r]elief can be granted with respect to consent orders under section 2-1401"). Since Eugene's claims were not brought in either of these ways, the trial court correctly dismissed them based on lack of jurisdiction.

¶ 55 Furthermore, we find *Kohl v. Montgomery*, 379 Ill. 579 (1942), the case cited by Eugene in support of finding jurisdiction, inapplicable to the case at bar. In *Kohl*, a wife and her husband were listed on the title of a tract of land as joint tenants with right of survivorship. When they divorced, the divorce decree "attempted to vest" the husband's interest in the wife. *Kohl*, 379 Ill. at 580. When the wife died 25 years later, her heirs brought a suit for partition, claiming that no interest remained in the husband. However, on appeal, "the partition decree was reversed because the divorce decree on which partition was based, did not, itself, vest the husband's interest in the wife." *Kohl*, 379 Ill. at 580. The complaint for partition was amended and claimed that it was the court's intent in the divorce decree to vest all interest of the husband to the woman and that whatever interest the husband retained was due to the failure of the court in the divorce decree to require him to convey his interest in the property; the complaint characterized the interest of the husband as "merely a cloud upon the title which should be removed." *Kohl*, 379 Ill. at 580. The court found that the earlier court had intended to divest the husband of his interest in the property and entered a decree ordering the husband to convey the

property to the wife's heirs. *Kohl*, 379 Ill. at 580-81, 584. On appeal, the Illinois Supreme Court found that the lower court had the power to order the husband to convey his interest in the property because the court "had the power and jurisdiction to enforce and execute the former decree to the extent it should be equitably enforced," and noted that "an omission or mistake may be corrected where it is necessary to maintain and effectuate the principle of the decree." *Kohl*, 379 Ill. at 584-85.

¶ 56 In the case at bar, Eugene argues that, like in *Kohl*, the court here had the jurisdiction to "construe and correct" the agreed settlement order. We cannot agree with Eugene's characterization of the issue before the trial court. *Kohl* involved enforcing a decree in a situation where it was clear that the court entering the decree had intended to divest the husband of his interest in the property. Thus, at most, *Kohl* speaks to the enforcement of an earlier order. *Kohl* does not speak to rescission or reformation sought by one of the parties to the order. Accordingly, we cannot accept Eugene's argument that *Kohl* applies here and affirm the trial court's dismissal of Eugene's claims based on lack of jurisdiction. Since we have determined that the trial court properly dismissed Eugene's claims, there is no need for us to consider Paul's additional arguments concerning the rescission and reformation claims.

¶ 57 CONCLUSION

¶ 58 For the reasons set forth above, we affirm the trial court's dismissal of Eugene's claims for rescission and reformation and reverse the dismissal of Eugene's quiet title claim.

¶ 59 Affirmed in part and reversed in part; cause remanded.