

Mediation Agreements – Mistakes Can be Costly

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The old adage reads, “Beware of the fine print”. Yet, two recently reported cases amplify that font size is not the only villain to a challenged “mistaken” mediation agreement.

The law will generally not look beyond the four corners of a contract to determine the parties’ intent. Furthermore, the provisions of Rule 10.360(a) and Florida Statute Section 44.102(3) insulate as privileged and confidential all communications made during a Mediation conference, except “an executed settlement agreement”. Only under rare circumstances can the substance of communications leading up to the agreement be subject to disclosure.

In DR Lakes, Inc. et.al. v. Brandsmart USA of West Palm Beach, 819 So. 2d 971 (Fla. 4th DCA 2002), an executed mediation agreement was challenged based on, get this, an alleged \$600,000 clerical error. The trial court denied the motion without taking evidence, relying on the above-referenced statutory privilege. The DCA reversed and remanded, due to the allegation of mutual mistake. “Relief should be given where, through a mistake of the scrivener, the instrument contains a clerical error or fails to define the terms as agreed on by the parties. Jacobs v. Parodi, 50 Fla. 541, 39 So. 833 (1905). ... Seller cannot obtain relief if this is a unilateral mistake because of the change in position of the parties resulting from the closing of the transaction. Md. Cas. Co. v. Krasnek, 174 So. 2d 541 (Fla. 1965).”

While alleging “mutual mistake” may overcome the privilege against disclosing mediation communications, proving such allegation is nearly impossible when contested. In Feldman v. Kritch, 824 So. 2d 274 (Fla. 4th DCA 2002), the Defendant challenged the executed mediation agreement on the basis of an alleged \$40,000 mutual mistake. Naturally, and as in the *DR Lakes* case, the nonmoving party vehemently opposed the motion. Based on the “mutual mistake” allegation, the trial court heard evidence of the mediation communications and ultimately granted the Defendant’s motion. The DCA reversed, stating that there was insufficient evidence of the mutuality of mistake to justify striking the agreement. “A party's performance under a contract is not excused on the basis of unilateral mistake when the mistake is the result of the party's own negligence and lack of foresight, or the other party has relied upon his performance so that rescission would be inequitable.”

So, what’s the point? It is unlikely that an opposing party would ever concede an alleged five- or six-figure “mistake” at Mediation, and the courts rarely find such to be the product of scrivener error or fine print. Thus, counsel should diligently recall prior interim agreements and closely review the written terms of the proposed Mediation agreement – even as to the placement of commas and decimal points. While alleging “mutual mistake” may overcome the statutory privilege against disclosure, the burden of proof is still quite high to rescind an executed Mediation agreement. Perhaps the adage is better stated as “Beware of the standard sized, handwritten, barely legible, attorney/Mediator’s print”. Mistakes can be costly.

This article is one in a series of periodic articles concerning mediation topics such as use, legal developments, and negotiation tactics. Blane G. McCarthy is a Jacksonville civil trial lawyer and certified circuit civil mediator. For questions, comments, or suggestions on future articles, please call (904) 391-0091 or email at bgmccarthy@sprintmail.com.