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IN THE SUPREME COURT OF THE STATE OF MONTANA

No. _____

DR. KIMBERLY STRABLE,

Plaintiff / Appellant,

v.

CARISCH, INC., d/b/a ARBY'S,

Defendant / Appellee.

NOTICE OF APPEAL

NOTICE OF APPEAL

Appeal from the District Court of the First Judicial District
of the State of Montana in and for Lewis and Clark County
Cause No. CDV-2021-866
The Honorable Judge Seeley

Attorneys of Record

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NOTICE is hereby given that Dr. Kimberly Strable (“Appellant”) in the above-named matter in that cause of action filed in the First Judicial District, Lewis and Clark County, as Cause No. CDV-2021-866, hereby appeals to the Montana Supreme Court of the State of Montana from the following orders and rulings:

a. ORDER ON DEFENDANT’S MOTION FOR SUMMARY

JUDGMENT, dated October 4, 2023 (Dkt. 55).

b. JUDGMENT, dated October 18, 2023 (Dkt. 58).

Appellant further certifies:

1. That this appeal is subject to the mediation process required by M.R.App.P. 7 because Appellant’s underlying action seeks monetary damages.
2. That this is an appeal of an order (Dkt. 58) certified as final. A copy of the Order is attached as Ex. 1. This appeal is timely, with notice filed less than 30 days after entry of the Order.
3. That all available transcripts of the proceedings in this case have been ordered from the court reporter contemporaneously with the filing of this Notice of Appeal.
4. That included herewith is the filing fee prescribed by statute.

5. This Notice has been served upon the clerk of the district court and counsel for all parties.

DATED this 3rd day of November, 2023.

PASSAMANI & LETANG, PLLC

/s/ Nick LeTang
Nick LeTang
Attorney for Plaintiff/Appellant

CERTIFICATE OF SERVICE

I hereby certify that on November 3rd, 2023, I filed a true and accurate copy of the foregoing NOTICE OF APPEAL with the Clerk of the Montana Supreme Court electronically; and that I have served a true and accurate NOTICE OF APPEAL upon the Clerk of the District Court, by mail, at the address below:

Angie Sparks
228 Broadway, Room 104
Helena, MT 59624-0158

I further certify that I served true and accurate copies of the foregoing on all parties to this action by electronic service. Each attorney of record is registered for electronic service through the Court's eService process.

 /s/ Nick LeTang
Nick LeTang

EXHIBIT 1

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**MONTANA FIRST JUDICIAL DISTRICT COURT
LEWIS AND CLARK COUNTY**

<p>DR. KIMBERLY STRABLE,</p> <p style="text-align: center;">Plaintiff,</p> <p>v.</p> <p>CARISCH, INC. d/b/a ARBY’S,</p> <p style="text-align: center;">Defendant.</p>	<p style="text-align: center;">Cause No. CDV-2021-866</p> <p style="text-align: center;">ORDER ON DEFENDANT’S MOTION FOR SUMMARY JUDGMENT</p>
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On August 23, 2021, Plaintiff Dr. Kimberly Strable filed a Complaint and Request for Stay of Administrative Proceedings against Defendant Carisch, Inc., d/b/a Arby’s (Carisch). This case arises from an age discrimination complaint Plaintiff brought against Carisch with the Montana Human Rights Bureau (HRB) and the subsequent HRB conciliation process. On March 16, 2023, Defendant filed a motion for summary judgment, arguing that no genuine issues of material fact exist and asking the Court to find that no binding settlement agreement was entered into by the parties. The motion has been fully briefed and neither party requested oral argument. Based on the briefs

1 and supporting documents, the Court concludes that Defendant’s motion should
2 be granted.

3 **STATEMENT OF UNDISPUTED FACTS**

4 On August 28, 2020, Plaintiff inquired with a manager at Arby’s in
5 Great Falls, Montana about whether she could apply for a job as a manager.
6 Plaintiff was told that she was not eligible to work as a manager at Arby’s
7 because she was under the age of eighteen. Plaintiff then filed a Formal
8 Complaint of Discrimination with the HRB, alleging age discrimination.

9 On April 7, 2021, after concluding its investigation, the HRB
10 issued a “reasonable cause” determination, finding that it was more likely than
11 not that discrimination had occurred. The HRB then initiated the conciliation
12 phase of the process and assigned Clarice Beck as the conciliator. During this
13 phase, parties attempt to negotiate a mutually agreeable settlement before
14 proceeding to a contested administrative hearing before the OAH.

15 On June 14, 2021, after negotiations, the parties agreed on a
16 monetary amount of \$25,000 as a component of the settlement. Strable Dep. ¶ 51,
17 March 1, 2023. This figure was agreed upon via an email exchange between the
18 parties.

19 On June 15, 2021, Clarice Beck, the HRB conciliator, sent a stock
20 settlement agreement form to the parties via email. Pl.’s First Am. Compl. ¶ 26,
21 Aug. 30, 2021. The stock agreement was left incomplete – the monetary amount
22 was blank, the signature lines were unsigned, and the agreement’s language,
23 including stock affirmative relief provisions, was left unaltered.

24 On July 30, 2021, before the parties completed the settlement
25 agreement form to reflect details of an agreement, counsel for Plaintiff, Raph

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1 Graybill, withdrew from representation. After Graybill withdrew, Plaintiff, acting
2 *pro se*, emailed Thomas Revnew, counsel for Defendant, and attempted to
3 finalize the agreement. Revnew, in response to Plaintiff and Clarice Beck, stated
4 that no valid agreement existed. *Id.* at ¶ 34.

5 On August 30, 2021, Plaintiff filed an Amended Complaint in this
6 case asserting claims of breach of contract, bad faith, and equitable estoppel, with
7 all claims based upon an allegedly enforceable agreement to settle the case.
8 Defendant filed an answer on June 7, 2022.

9 On September 30, 2021, Defendant submitted a supplemental brief
10 informing the Court of a related decision by the Office of Administrative
11 Hearings (OAH). The OAH Order concluded that no valid resolution agreement
12 exists between Plaintiff and Defendant, based on the hearing officer’s findings
13 that (1) the parties had only reached an informal agreement that was not reduced
14 to writing, and (2) any tentative agreement reached by the parties omitted the
15 affirmative relief provisions that are a required component of any voluntary
16 resolution agreement submitted to the HRB for approval. Supp. To Br. Supp.
17 Def.’s Mot. To Dismiss Ex. A at 2, Sept. 28, 2021.

18 LEGAL STANDARDS

19 Under Rule 56, Montana Rules of Civil Procedure, a party may
20 move for summary judgment “if the pleadings, the discovery and disclosure
21 materials on file, and any affidavits show that there is no genuine issue as to any
22 material fact” and the moving party “is entitled to judgment as a matter of law.”
23 Mont. R. Civ. P. 56(c)(3). Further, in a summary judgment proceeding, “the
24 parties are not arguing over what happened or presenting conflicting evidence;
25 they merely need to know which of them, under the uncontested facts, is entitled

1 to prevail under the applicable law. In such a case, the district court judge need
2 not weigh evidence, choose one disputed fact over another, or assess credibility
3 of the witness.” *Wurl v. Polson Sch. Dist. No. 23*, 2006 MT 8, ¶ 11, 330 Mont.
4 282, 127 P.3d 436, citing *Cole v. Valley Ice Garden, L.L.C.*, 2005 MT 115, ¶ 4.

5 DISCUSSION

6 The heart of this dispute is whether the elements of a contract as
7 defined by Mont. Code Ann. § 28-2-102 have been satisfied. The Montana
8 Supreme Court has held that “settlement agreements are contracts, subject to the
9 provisions of contract law”, and therefore an analysis of this agreement as a
10 contract is proper. *Jarussi v. Sandra L. Farber Trust*, 2019 MT 181, ¶ 15,
11 396 Mont. 488, 445 P.3d 1226, citing *Dambrowski v. Champion Int’l Corp.*,
12 2003 MT 233, ¶ 9, 317 Mont. 218, 76 P.3d 1080. Under Montana contract law, a
13 valid contract requires (1) identifiable parties capable of contracting, (2) their
14 consent, (3) a lawful object, and 4) a sufficient cause or consideration. Mont.
15 Code Ann. § 28-2-102. Plaintiff contends that the parties had reached a binding
16 agreement as to the proposed settlement, while Defendant argues that, because
17 the agreement was never reduced to writing, signed, or modified to reflect the
18 requisite affirmative relief provisions, the agreement between the parties is
19 unenforceable. Br. Supp. Mot. For Summ. J. ¶ 8, Apr. 21, 2023. In determining
20 whether a contract existed under Montana contract law, the Court analyzes the
21 relevant undisputed facts as they pertain to the necessary elements of a valid,
22 enforceable contract:

23 1. Identifiable parties capable of contracting:

24 Plaintiff and Defendant are identifiable parties capable of
25 contracting. While the Court recognizes the role that the HRB played in the

1 conciliation process, the HRB cannot be considered a party in the context of a
2 contractual dispute between Plaintiff and Defendant.

3 2. Their consent:

4 The consent of the parties to a contract must be (1) free, (2)
5 mutual, and (3) communicated by each to the other. Mont. Code Ann.
6 § 28-2-301. The requirement that consent to contract be mutual requires that the
7 parties “agree upon the same thing in the same sense...” *Amerimont v. Fid. Nat’l*
8 *Title Ins. Co.*, 2009 MT 212, ¶ 15, 351 Mont. 292, 210 P.3d 691. Further, “[a]
9 contract is not made so long as, in the contemplation of both parties thereto,
10 something remains to be done in order to establish contract relations.” *Schwedes*
11 *v. Romain*, 179 Mont. 466, 470, 587 P.2d 388 (1978). Here, the undisputed facts
12 show that both parties understood that, although an agreement had been reached
13 on the monetary amount to be awarded in settlement, something remained to be
14 done.

15 The parties both understood that the agreement on material terms
16 was subject to approval by the HRB, and that, before such approval would be
17 given, the HRB would require the inclusion of affirmative relief provisions to be
18 imposed on Defendant. Pl.’s First Am. Compl. and Req. for Stay of Admin.
19 Proceedings, ¶ 6, Aug. 30, 2021. The parties received a copy of a stock
20 conciliation agreement, were aware that the agreement would have to be agreed
21 upon, altered, and signed, but never did so. *Id.* at ¶ 27; Br. Supp. Mot. For Summ.
22 J. ¶ 3, Mar. 16, 2023. No agreement was ever presented to the HRB for approval,
23 which both parties recognized at the time was the next necessary step in the
24 conciliation process. *Id.* at ¶ 3-4. There was a mutual understanding that the
25 conciliation process as the parties had left it was unfinished, and there could have

1 been no “meeting of the minds as to [the] existence and the respective
2 requirements for fulfillment of” the terms of affirmative relief yet to be imposed.
3 *Martel Constr. v. Montana State Bd. of Examiners*, 205 Mont. 332, 342, 668 P.2d
4 222 (1983). Defendant, at this point in the process, could not have feasibly
5 consented to contract, because Defendant had not yet had affirmative relief
6 provisions imposed on them, and therefore could not consent to perform
7 conditions of which they had not yet been made aware. The Court, therefore,
8 finds no factual basis to support Plaintiff’s assertion that Defendant had
9 consented to contract in the same manner contemplated by Plaintiff.

10 Although the facts of this case are here analyzed in the context of a
11 breach of contract claim under Montana law, the reality is that these negotiations
12 were occurring amidst an ongoing HRB case, which both parties understood to
13 require more than what they had compromised on. Consent by the parties to a
14 contract must be “unconditional... according to its terms...”, and there can be no
15 unconditional consent to the terms of a contract that has yet to be fully defined
16 and agreed upon. *Keesun Partners v. Ferdig Oil Co.*, 249 Mont. 331, 337,
17 816 P.2d 417 (1991). Applying the uncontested facts of this case to the well-
18 established requirements for parties to consent to a contract, this Court finds the
19 element of consent lacking.

20 3. A lawful object:

21 The dispute here concerns settlement of an HRB discrimination
22 claim, which is lawful.

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25 ////

CERTIFICATE OF SERVICE

I, Nicholas LeTang, hereby certify that I have served true and accurate copies of the foregoing Notice - Notice of Appeal to the following on 11-03-2023:

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Electronically Signed By: Nicholas LeTang
Dated: 11-03-2023