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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FIRST APPELLATE DISTRICT  
DIVISION FIVE

TIAN SHAN TRADING (USA), INC.,  
Plaintiff and Appellant,  
v.  
NANCY HUANG,  
Defendant and Respondent.

A131548  
(San Francisco City & County  
Super. Ct. No. CGC-08-476390)

Appellant Tian Shan Trading (USA), Inc. (Tian Shan) sued Nancy Huang, a former employee for fraud, and Huang filed a claim against Tian Shan with the California Labor Commissioner seeking unpaid compensation. At a mandatory settlement conference in the fraud action, Tian Shan agreed to dismiss Huang from its lawsuit with prejudice, with a further agreement that each side would bear its own fees and costs. Tian Shan claimed this settlement included a mutual release of all claims between the parties. Huang, however, continued to pursue her claim with the California Labor Commissioner, ultimately separately settling that claim. Tian Shan contended that the subsequent settlement agreement of the labor claim was a novation resurrecting the fraud claims against Huang, and the trial court initially vacated the prior dismissal. Huang moved to enforce the original settlement pursuant to Code of Civil Procedure section 664.6.<sup>1</sup> The trial court granted the motion. We affirm.

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<sup>1</sup> All further statutory references are to the Code of Civil Procedure unless otherwise indicated.

## I. BACKGROUND

Tian Shan is a cellular telephone wholesaler. Nancy Huang worked for Tian Shan from November 2004 to January 2008 as an inventory stock person and, from 2006, she also had sales duties. Huang avers that in October 2007, she accepted a check from customer (and later codefendant), Appleton Tincheung Yum, for cellular phones. Huang and her coworkers tried to deposit Yum's check several times, but Yum's account never had sufficient funds to cover it. Tian Shan's president, Victor Yin, finally directed Huang to deposit the check, which was rejected for insufficient funds. Huang unsuccessfully attempted to collect the money from Yum. "When I was not able to collect the money, Mr. Yin threatened to fire me and contest my unemployment claim." On January 30, 2008, Huang was fired after refusing to use a new biometric time clock installed by her employer.<sup>2</sup>

### *Huang's January 2008 Labor Commission Claim*

On January 31, 2008, Huang filed a claim with the Labor Commission for unpaid wages and overtime, as well as missed meals and rest periods.<sup>3</sup> A prehearing conference on the claim was held on May 14, 2008.<sup>4</sup> A further hearing was scheduled for June 30, 2008.

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<sup>2</sup> Tian Shan claimed that Huang accepted a \$29,603 check from Yum knowing he did not have sufficient funds in his account and despite company policy not to extend customers more than \$7,500 in credit, and that Huang held the check rather than immediately depositing it so as to give Yum time to sell the goods and raise funds to cover the check.

<sup>3</sup> Huang's Labor Commission claim is not in the record. A May 2010 declaration by Huang's attorney, Emily Nugent, filed in support of Huang's opposition to Tian Shan's motion to set aside the dismissal in this action states that a copy of the claim was attached to the declaration as Exhibit D. When we granted Huang's September 19, 2011 motion to augment the record we received the declaration itself. However, the attachments to the declaration were not included in Huang's request for augmentation, and were not provided.

<sup>4</sup> The declaration lists the date as May 14, 2009, but based on the "further hearing" date and subsequent chronology, this appears to be a typographical error.

### *Tian Shan's Fraud Claims*

On June 30, 2008, the date of the Labor Commission hearing, Tian Shan served Huang with the underlying complaint in this action (hereafter, Fraud Case).<sup>5</sup> A copy of the complaint is not included in the appellate record, but the parties agree that it alleged Huang conspired with Yum to defraud Tian Shan.<sup>6</sup> Yum and his company, Cellular Gopher, LLC, were named as codefendants.

### *The October 2009 Fraud Settlement*

On October 13, 2009, a mandatory settlement conference for the Fraud Case was held in the San Francisco Superior Court before the Honorable Curtis Karnow. Present for Tian Shan were counsel Elizabeth McDonald,<sup>7</sup> Yin and Liqiang Hu. In the reporter's transcript for the hearing, Hu identified himself as a Cantonese interpreter for Yin. Huang was present with her counsel, Mary Shea Hagebols and Emily Nugent.

Following an off-the-record conference between the court and counsel, the parties confirmed on the record that they had reached a settlement. The minute order recites: "ON THE RECORD: The parties reach a settlement as set forth in the official Court Reporter's transcript as follows: Plaintiffs [*sic*] counsel will dismiss the action with prejudice, and the parties will bear their own fees and costs. *No other terms reached.*"

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<sup>5</sup> Huang represents that "Tian Shan convinced the Labor Commission to postpone adjudication of Ms. Huang's wage claim until its fraud allegations could be litigated in San Francisco Superior Court." That statement is not supported by either a record citation or by the record.

<sup>6</sup> The complaint was filed on June 16, 2008. Huang quotes the following allegations from the complaint: "Huang and Yum were close acquaintances and . . . Huang violated company policies for the benefit of Yum by allowing Yum to purchase merchandise on credit that was neither disclosed to nor approved by plaintiff, and further, accepting a check from Yum in an amount greatly exceeding company policy, the check later having been returned for non-sufficient funds. [¶] . . . [¶] Huang knew, or reasonably should have known, that her employment with plaintiff would soon be terminated. . . . [W]ith such knowledge, she and Yum did agree that Yum would tender a check in an amount greatly exceeded [*sic*] the credit limit . . . and Huang would give to Yum merchandise valued at \$29,603.00."

<sup>7</sup> Tian Shan alleges that McDonald was a "coverage attorney."

(Italics added.) Similarly, in the reporter’s transcript the court described the parties’ settlement as follows: “The [Fraud Case] brought by [Tian Shan] against Ms. Huang will be dismissed with prejudice. [¶] Each side to bear their own fees and costs, and there are no other terms as I understand it.” The court then asked the parties, “Is that right?” Tian Shan’s counsel, McDonald, responded, “That’s correct. That’s our understanding.” McDonald then said (presumably to Hu), “And if you’d like to translate.” The court then asked, “Sir, if you could tell me, do you agree with that?” Yin responded (in English) “Yeah. Yes.” The court then asked Huang and her counsel, Nugent, if they agreed, and both confirmed that they did.

At an order to show cause hearing on January 19, 2010, the court dismissed the Fraud Case against Huang on its own motion, without opposition from Tian Shan, pursuant to California Rules of Court, rule 3.1385.<sup>8</sup>

*Huang’s Pursuit and Settlement of Her Labor Claim*

On or about January 6, 2010, Huang “renewed” her claim with the Labor Commissioner and Tian Shan was served with the claim. Yin avers that he “was confused as [he] thought the parties agreed to resolve all claims.” In February 2010, Tian Shan’s counsel appeared at a hearing on the Labor Commission matter and obtained a continuance so it could move to set aside the dismissal of the Fraud Case.

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<sup>8</sup> In a written case management order, Commissioner Arlene T. Borick ruled: “The case having been called for hearing on JAN-19-2010 . . . , [¶] The court having been notified more than forty-five days ago that this case was settled; [¶] Notice having been given to all parties to show cause why this case should not be dismissed on the court’s own motion; and [¶] There being no appearance and no objection filed; [¶] IT IS HEREBY ORDERED that this case is dismissed pursuant to California Rules of Court, Rule 3.1385.” (All further rule references are to the California Rules of Court.)

Rule 3.1385 provides in pertinent part “Dismissal of case. Except as provided in (c) or (d), each plaintiff or other party seeking affirmative relief must serve and file a request for dismissal of the entire case within 45 days after the date of settlement of the case. If the plaintiff or other party required to serve and file the request for dismissal does not do so, the court must dismiss the entire case 45 days after it receives notice of settlement unless good cause is shown why the case should not be dismissed.” (Rule 3.1385(b).)

In April 2010, the Labor Commission awarded Huang \$31,002.24 on her labor claim. Tian Shan appealed the award. In October 2010, Tian Shan and Huang settled the labor case by written settlement agreement (Labor Settlement). The recitals to the Labor Settlement included the following: “HUANG and EMPLOYER desire to settle fully and finally all differences, *except as specifically set forth in Paragraph SIXTH*, that HUANG has ever had, has, or may have as of the date of the signing of this Agreement arising out of HUANG’S employment and/or termination of employment . . . .” (Italics added.)

The substantive terms of the Labor Settlement provided that Tian Shan, without admitting liability, would pay Huang the settlement funds, and Huang would release all claims against Tian Shan as of the date of the agreement, including unknown claims and all claims arising out of her employment. However, “Paragraph SIXTH” (Paragraph 6) of the agreement specifically excluded from the release “any and all claims made by EMPLOYER against HUANG in [the Fraud Case] . . . . Nothing in this Agreement shall limit the rights of the Parties in seeking any remedies against the other party in the aforementioned case . . . including, but not limited to seeking damages and other appropriate relief; seeking recovery, attachment to or freezing distribution of the funds paid in this settlement or seeking attorneys’ fees and costs in [the Fraud Case].”

“Paragraph TWELFTH” (Paragraph 12) of the Labor Settlement included the following integration clause: “This Agreement sets forth the entire agreement between the Parties hereto and fully supersedes any and all prior agreements or understandings, written or oral, between the Parties hereto pertaining to the subject matter hereof.”

#### *Tian Shan’s Motion to Set Aside Dismissal of the Fraud Case*

On April 9, 2010, Tian Shan moved to set aside the dismissal of the Fraud Case. Tian Shan invoked section 473, subdivision (b) and asked the court to relieve it of the dismissal on grounds of mistake, alleging that it understood that all claims were to be released by each party, and that either Huang had violated the terms of the settlement, or its understanding of the settlement was mistaken or error.

In support and in opposition to the motion to set aside the dismissal, the parties presented differing accounts of the off-the-record proceedings that preceded the

settlement. Nugent avers that at the beginning of the settlement conference the court asked Yin what language he spoke and whether he needed a translator. Yin told the court he spoke Cantonese, but did not need a court translator because Hu could translate for him. According to Nugent, Huang's other counsel "informed the Court, and Plaintiff's Counsel, that Ms. Huang had a pending wage claim with the California Labor Commission and that she would not agree to any dismissal in this case that would impede her right to pursue that claim. [¶] . . . Judge Karnow told us to meet separately regarding whether we were willing to accept such a dismissal—with prejudice, each side bearing its own fees and costs, and without any release that would impede [Huang] from pursuing her wage claims. We caucused separately for a few minutes. [¶] . . . When Judge Karnow reconvened the proceedings, he reiterated the terms—off the record—and asked each party whether it agreed to them. Both parties informed Judge Karnow that they agreed to the terms. . . . [¶] . . . At all times, Mr. Hu translated the . . . proceedings to Mr. Yin." Huang similarly avers that during the mandatory settlement conference, "I agreed to be dismissed with prejudice from this case in exchange for waiving my right to pursue attorneys' fees and costs. I refused to waive any of my other rights, because I intended to pursue the claims I made against [Tian Shan] for unpaid overtime wages, denied meal and rest breaks, waiting time penalties, and interest." Huang averred that she said nothing to Yin during the conference except to say "hello."

Yin, on the other hand, avers, "During the mandatory settlement conference, . . . Ms. Huang stated to me that she wanted to be done with everything and that we should resolve all of our matters. [¶] . . . I agreed with her. [¶] . . . The attorney that was there with me informed me that we can get a mutual release and that each party will bear their own costs. I agreed. [¶] . . . When we were in Court, it was translated to me that the parties will release each other of all claims and that each side will bear their own costs. [¶] . . . [¶] . . . I would have never agreed to settle the claim if the parties did not release each other of all claims. This is what was translated to me. [¶] . . . [¶] . . . I did not speak with attorney Nugent one on one. I was not even aware that there was a labor case at the time. I was under the belief that if we settled, then everything would be settled and

everyone would mind their own business and be done with everything.” Yin further avers, “I speak Cantonese and very little English[.] [T]his declaration was translated to me in Cantonese by a certified Court translator . . . .”

On June 15, 2010, Commissioner Borick granted the motion to set aside the dismissal and ruled, “The matter is placed back on active status.” Borick also set “a hearing for July 20, 2010 pursuant to . . . Rule 3.1385.” The hearing was repeatedly continued to at least July 12, 2011. The orders setting the continued hearing dates are captioned “Continued Order to Show Cause Re: Dismissal” and state that, pursuant to rule 3.1385, “the court will dismiss this case unless good cause is shown why it should not be dismissed.”<sup>9</sup>

#### *Huang’s Motion to Enforce the October 2009 Fraud Settlement*

On November 22, 2010, Huang filed a motion to enforce the settlement of the Fraud Case pursuant to section 664.6. She asked the court to enforce the October 2009 settlement according to the terms stated on the record, i.e., without a mutual release of claims. In opposition, Tian Shan argued the October 2009 settlement agreement was no longer operative because Borick had already set aside the dismissal, and that that Huang’s motion to enforce the settlement “is an inappropriate attempt to have the court effectively reconsider its earlier ruling to set aside the dismissal without complying with . . . section 1008.” Tian Shan further contended that the parties’ October 2010 Labor Settlement, which specifically excluded the claims in the Fraud Case from the mutual release of claims, in any event constituted a novation of the October 2009 settlement agreement.

The motion to enforce the Fraud Case settlement was heard by Judge Karnow, who had presided over the October 2009 mandatory settlement conference. The court rejected Tian San’s contention that Paragraph 6 of the Labor Settlement was a novation

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<sup>9</sup> Huang represented in the trial court that at a September 21, 2010 hearing Borick informed the parties that she expected one of them to file a motion to enforce the fraud action settlement agreement. This statement is not supported by evidence in the appellate record.

of the October 2009 settlement, i.e., a superseding agreement to resurrect Tian Shan's fraud claims against Huang: "It doesn't say that they're resurrecting, it doesn't say that they're preserving, it doesn't say they are bringing back . . . the [Fraud Case]. [¶] What it says is[] that the release contained in [Paragraph 6] does not apply to the claims made by [Tian Shan] against Huang in the [Fraud Case]." The court explained that its interpretation did not render the exclusion language superfluous because "as of the time that this document was signed, there was this business going on with respect to the setting aside and the vacating of the dismissal. There were different interpretations of what that was and what that meant. [¶] . . . [A]s of the time that this was signed, we didn't have[] . . . a clean record in the [Fraud Case]." The exclusion language preserved Tian Shan's fraud claims against Huang "[s]uch as they were at that time," which was a disputed issue.

Tian Shan also argued the fraud settlement should not be enforced because Yin did not have a competent interpreter at the October 2009 settlement conference. The court denied the motion without further elaboration.

In a written order, the court dismissed Huang from the Fraud Case with prejudice, and ordered each side to bear its own fees and costs.

## **II. DISCUSSION**

### *A. Enforceability of the October 2009 Fraud Settlement*

Tian Shan argues the court erred in dismissing its fraud claims against Huang pursuant to the October 2009 settlement because (1) Borick had already set aside the dismissal, inferably on the ground that the October 2009 agreement was unenforceable, and Huang did not file a motion for reconsideration of that decision; and (2) the October 2009 settlement is unenforceable because there was no meeting of the minds on its essential terms. We disagree on both grounds.

#### *1. Failure to File Motion for Reconsideration*

Despite Tian Shan's contention to the contrary, nothing in the record indicates that Commissioner Borick made any determination of the merits of the enforceability of the settlement agreement, or that she did anything more than set aside Tian Shan's default on

the first order to show cause hearing. In the same order setting aside the dismissal, the commissioner scheduled a further hearing to determine whether to dismiss the Fraud Case pursuant to rule 3.1385. The court's orders necessarily imply that the court had not yet determined that the October 2009 settlement agreement was enforceable, but merely reopened the case to allow that issue to be litigated.

Section 1008 “applies to two—and only two—types of motions. Section 1008, subdivision (a) applies to ‘[a] motion . . . that explicitly directs the court’s attention to a previous order and seeks to “modify, amend, or revoke [that] order.” ’ [Citation.] ‘Consistent with this understanding, merely asking the court to grant relief that is inconsistent with a prior order . . . is not a “motion for reconsideration.” ’ [Citation.] . . . [¶] In addition, section 1008, subdivision (b) applies to ‘a second application for “the same order” the court has already declined to make.’ [Citation.]” (*Ron Burns Construction Co., Inc. v. Moore* (2010) 184 Cal.App.4th 1406, 1418, italics omitted.) Neither circumstance has application here. Huang “neither asked for, nor sought by sly evasion, a determination contrary to any determination made in the first order.” (*Standard Microsystems Corp. v. Winbond Electronics Corp.*(2009) 179 Cal.App.4th 868, 891.) Therefore, the argument that Huang’s motion to enforce the settlement was an improper request for reconsideration of Borick’s order lacks merit.

## 2. *Meeting of the Minds*

“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.” (§ 664.6.) “In ruling on a [section 664.6] motion to enter judgment the trial court acts as a trier of fact. It must determine whether the parties entered into a valid and binding settlement. To do so it may receive oral testimony in addition to declarations. If the same judge presides over both the settlement and the section 664.6 hearing, he may avail himself of the benefit of his own recollection. [Citation.] The appellate court then determines whether the trial court’s ruling was supported by substantial evidence. [Citation.]” (*Kohn v. Jaymar-Ruby, Inc.* (1994) 23 Cal.App.4th 1530, 1533.) Where the

purported settlement was stated “orally before the court,” the 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 re Marriage of Assemi* (1994) 7 Cal.4th 896, 911; *Fiore v. Alvord* (1985) 182 Cal.App.3d 561, 565.)

“It is a fundamental principle of appellate review that we presume that a judgment or order is correct. [Citations.] Moreover, it is the appellant’s burden of providing a record that establishes error, and where the record is silent, we must indulge all intendments and presumptions to support the challenged ruling. [Citations.] From these principles, courts have developed the doctrine of implied findings by which the appellate court is required to infer that the trial court made all factual findings necessary to support the order or judgment. [Citations.]” (*Laabs v. City of Victorville* (2008) 163 Cal.App.4th 1242, 1271–1272.)

Tian Shan does not dispute that the parties agreed to settle the Fraud Case “orally before the court” on October 13, 2009. However, Tian Shan argues the settlement is not a binding contract because the parties never reached a meeting of the minds on the essential terms of the settlement, i.e., whether the contract included a mutual release of claims. “A settlement agreement is a contract, and the legal principles which apply to contracts generally apply to settlement contracts. [Citation.] An essential element of any contract is ‘consent.’ [Citations.] The ‘consent’ must be ‘mutual.’ [Citations.] ‘Consent is not mutual, unless the parties all agree upon the same thing in the same sense.’ [Citations.]” (*Weddington Productions, Inc. v. Flick* (1998) 60 Cal.App.4th 793, 810–811.)

Substantial evidence supports the trial court’s implied finding that the parties mutually intended to settle the Fraud Case without a mutual release of claims.

First, the official court record clearly states that the settlement included two and only two terms. The court’s minute order states that the settlement terms were dismissal of the claims against Huang with prejudice and an agreement that each side would bear

its own costs and fees. Those terms did not include a mutual release of claims. “No other terms [were] reached.” Insofar as the record discloses, no party objected to this written description of the agreement. The reporter’s transcript is in accord. Judge Karnow clearly stated that the settlement included a dismissal with prejudice and an agreement that each side would bear its own fees and costs and that there were “no other terms.” Immediately after stating these terms, Judge Karnow asked the parties whether his statement was correct and Yin agreed (in English) that it was. The court fully complied with the Supreme Court’s requirements for effectively recording an oral settlement on the record. (See *In re Marriage of Assemi*, *supra*, 7 Cal.4th at p. 911.)

Second, the court could reasonably find on this record that Yin’s claims of mistranslation were not credible. Evidence in the record indicates that Hu was Yin’s self-chosen translator, and that he translated for Yin throughout the on-the-record and off-the-record proceedings at the settlement conference. Tian Shan was represented by counsel at the conference and one would expect counsel to have raised a concern if it appeared Yin was not fully comprehending the discussions. Yin had personally responded, in English, to Judge Karnow’s inquiry about his understanding of the terms of agreement. Judge Karnow himself presided over the on-the-record and off-the-record proceedings (with the exception of the separate party caucuses) and could rely on his own memory of whether Yin appeared to be understanding what was said. Yin’s decision to decline a court interpreter and rely on Hu further supports an inference that he felt confident with the reliability of Hu’s translation. Finally, it strains credulity that Judge Karnow’s clear statement of the terms of the settlement, which made no mention of Huang’s labor claims or any party’s release of claims, would be mistranslated, or misperceived, to state that Huang was giving up her labor claims against Tian Shan.

Finally, there was evidence in the record that a mutual release of claims was expressly discussed and *rejected* at the settlement conference. Nugent avers that Huang’s counsel told Yin’s counsel and the court that Huang would *not* release her labor claims and that the court directed the parties to caucus separately about whether they would agree to a settlement without such a release. Huang’s declaration was in accord. When

the court later placed the parties' settlement on the record, the settlement did not include a release of Huang's claims and the court expressly stated that no other terms were reached. On this evidence, the court could easily conclude that Yin accepted the settlement on the express understanding that it did not include a release of Huang's labor claims. Although Yin's declaration about the settlement conference conflicts with this evidence, Judge Karnow was free to credit the Nugent and Huang declarations (and his own memory of the conference) and dismiss Yin's declaration as unbelievable.

In sum, the trial court's finding that the parties agreed to settle the fraud action without a release of Huang's labor claims is supported by substantial evidence.

B. *Effect of the October 2010 Labor Settlement*

Tian Shan next argues that, even if the parties made a binding contract to settle the Fraud Case on the record terms, the October 2010 Labor Settlement superseded the prior settlement and revived the Fraud Case. In other words, the October 2010 settlement was, in part, a novation of the October 2009 settlement.

"A 'novation is the substitution of a new obligation for an existing one.' (Civ. Code, § 1530.) . . . Novation must be pleaded either expressly or 'by unequivocal implication,' and the burden of proof is 'upon the party asserting its existence.' [Citations.] The 'question whether a novation has taken place is always one of intention' [citation], with the controlling factor being the intent of the obligee to effect a release of the original obligor on his obligation under the original agreement. [Citation.] While the evidence in support of a novation must be 'clear and convincing' [citation], the 'whole question is one of fact and depends upon all the facts and circumstances of the particular case' [citation], with the weight and sufficiency of the proof being matters for the determination of the trier of the facts under the general rules applicable to civil actions. [Citations.]" (*Alexander v. Angel* (1951) 37 Cal.2d 856, 860–861; see also *Wells Fargo Bank v. Bank of America* (1995) 32 Cal.App.4th 424, 431–432.)

The trial court's finding that Paragraphs 6 and 12 of the October 2010 Labor Settlement did not constitute a novation of the October 2009 fraud settlement is again supported by substantial evidence.

First, the plain language of the October 2010 Labor Settlement simply states that it has no effect on the Fraud Case. That is, the language referring to the Fraud Case takes the form of a carve-out, not a substantive agreement. Paragraph 6 describes a mutual release of claims “*except for*” the fraud action and provides that “[n]othing in this Agreement shall limit the rights of the Parties” in the fraud action. This limitation on the scope of the *Labor Settlement* does not purport to set forth any affirmative terms regarding the fraud action. It is a disclaimer of any agreement regarding the Fraud Case, and thus scarcely can be viewed as a superseding agreement.

Second, the purported novation makes absolutely no mention of the October 2009 fraud settlement it supposedly supersedes. Tian Shan argues Paragraph 12, the integration clause, provides this missing element because it provides that the Labor Settlement “supersedes any and all prior agreements and understandings” of the parties. However, the integration clause refers to prior agreements “pertaining to the subject matter hereof,” i.e., Huang’s labor claim. Even if the scope of the Labor Settlement is broadly construed to match the scope of the parties’ mutual release of claims, the scope of the release expressly *excludes* the Fraud Case. (Tian Shan’s argument that the scope includes the fraud action because Paragraph 6 is a novation of the fraud settlement is hopelessly circular.) It simply defies common sense that the parties would agree to replace the October 2009 fraud settlement with an agreement to revive Tian Shan’s fraud claims against Huang, yet fail to mention the October 2009 settlement (much less state that it was being superseded) in their novation.

Third, there is direct evidence in the record from which the trial court could find that Huang did not agree to a novation of the October 2009 fraud settlement. Huang avers that when she signed the October 2010 Labor Settlement, she knew the Fraud Case dismissal was being litigated in court and she did not intend to give up her right to that dismissal when she signed the Labor Settlement. The trial court was free to credit that statement and conclude that there was no meeting of the minds on a purported novation.

Finally, we are not persuaded by Tian Shan’s argument that the court’s interpretation of the Labor Settlement rendered the “except for” language in Paragraph 6

superfluous. As the trial court explained, at the time the parties entered into the October 2010 Labor Settlement the status of the fraud settlement was an actively disputed issue and a hearing on the issue was pending. It makes sense, therefore, that the parties would defer that issue for resolution in the trial court as they separately settled the labor claim. The language in Paragraph 6 simply set forth that understanding.

Tian Shan did not meet its heavy burden to demonstrate by clear and convincing evidence that Paragraphs 6 and 12 of the October 2010 Labor Settlement constituted a novation of the October 2009 settlement, vacating that settlement and reviving the Fraud Case. Thus, the trial court properly entered judgment pursuant to the terms of the October 2009 fraud settlement.

### **III. DISPOSITION**

The judgment is affirmed. Tian Shan shall bear Huang's costs on appeal.

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Bruiniers, J.

We concur:

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Simons, Acting P. J.

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Needham, J.