

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
HURON COUNTY

The Croghan Colonial Bank

Court of Appeals No. H-10-013

Appellee

Trial Court Nos. CVH 20080060
CVH 20080120

v.

Lepley Farm Lines, Inc., et al.

DECISION AND JUDGMENT

Appellants

Decided: July 15, 2011

* * * * *

Mark R. Tantari and Steven B. Winters, for appellee.

Richard D. Panza, Matthew W. Nakon and Rachelle Kuznicki Zidar,
for appellants.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} This appeal concerns enforcement of commercial loan agreements entered to provide operating funds for business enterprises. Appellee, The Croghan Colonial Bank ("Croghan Colonial" or "bank"), made the loans to appellants, Lepley Farm Lines, Inc., LFL Logistics Co., JRL Leasing, LLC, James Lepley, Elita Lepley, and Michelle Clark (collectively "Lepleys"). The dispute has involved three lawsuits, each filed in the Huron County Court of Common Pleas.

{¶ 2} Croghan Colonial brought two of the lawsuits against Lepleys to collect on loans made by the bank. These included loans made under separate promissory notes and two lines of credit. Lepleys filed suit against Croghan Colonial and asserted claims in contract and tort, claiming a right to damages arising from actions taken by the bank in pursuing collection of the loans.

{¶ 3} Croghan Colonial secured a cognovit judgment against Lepleys on January 16, 2008, in the amount of \$624,069.01 with respect to one line of credit. On March 21, 2008, the trial court granted Lepleys' motion for relief from the judgment. The three cases were consolidated, and they proceeded through discovery to a series of motions for summary judgment. Through judgments filed on May 8, 2009, September 14, 2009, and September 16, 2009, the trial court granted Croghan Colonial summary judgment against Lepleys in the amount of \$624,069.01 and \$557,685.14 for indebtedness under the two lines of credit and awarded Croghan Colonial attorney fees. The trial court also granted Croghan Colonial summary judgment as to liability for claims asserted against it by Lepleys.

{¶ 4} On September 22, 2009, Lepleys filed a notice of appeal of the September 14 and 16, 2009 judgments. We dismissed the appeal in a decision and judgment filed on April 6, 2010, for lack of a final appealable order, because the trial court's judgment awarded attorney fees but failed to determine the amount of the award.

{¶ 5} Afterwards, the trial court conducted a hearing on attorney fees. In a judgment journalized on June 7, 2010, the court amended the September 14 and 16, 2009

judgments to award Croghan Colonial attorney fees in the amount of \$92,340 and \$7,286.64 in costs associated with the collection of the commercial loans.

{¶ 6} Lepleys filed a notice of appeal on July 1, 2010, appealing the May 8, 2009, September 14, 2009, September 16, 2009, and June 3, 2010 judgments.

{¶ 7} James R. Lepley and Elita R. Lepley filed Chapter 7 bankruptcy petitions in 2009 and subsequently were discharged in bankruptcy on January 21, 2010. They jointly filed a motion to substitute their bankruptcy trustee, Pattie Baumgartner-Novak, for them as a party to this appeal. We granted the motion to substitute. Under the substitution order, the status of Lepley Farm Lines, Inc., JRL Leasing, LLC, LFL Logistics Co. and Michelle Clark as parties to this appeal remains unchanged.

{¶ 8} Lepleys assert five assignments of error on appeal:

{¶ 9} "Assignment of Error

{¶ 10} "1. The trial court erred in construing ambiguous contract language in favor of the drafter of the documents.

{¶ 11} "2. The trial court erred in finding the bank was entitled to engage in set-off when the applicable contract language specifically limited that right to an event of demand and/or default.

{¶ 12} "3. The trial court erred in determining the bank could not, as a matter of law, be held liable for conversion.

{¶ 13} "4. The trial court erred in failing to address the enactment of R.C. 1303.16.

{¶ 14} "5. The trial court erred in awarding the bank its attorney fees for the entirety of the action, including the defense of claims asserted against it."

{¶ 15} Lepley Farm Lines, Inc. is a corporation and at the time of the commercial loan agreements acted as a common contract carrier for hire operating cargo trucks, including refrigerated trucks. It engaged in the business of transporting produce across the United States. JRL Leasing, LLC is a limited liability company that leased trucks and trailers to Lepley Farm Lines, Inc. LFL Logistics Co. is a corporation. It engaged in the business of freight brokerage—arranging for the transportations of customers' freight using outside carriers for a brokerage fee.

{¶ 16} Croghan Colonial entered into commercial loan agreements providing for two lines of credit for business operations of the Lepley companies. Ultimately, both provided lines of credit with limits of \$750,000. Lepley Farm Lines, Inc., James R. and Elita R. Lepley, and JRL Leasing, LLC contracted with Croghan Colonial for the first line of credit of \$750,000 on June 8, 2006. On June 15, 2006, LFL Logistics Co., James R. and Elita R. Lepley, Michelle Clark and Lepley Farm Lines, Inc. contracted for the second line of credit, with limits of \$425,000. This line of credit was subsequently increased to \$750,000. The commercial loan agreements provided that advances under the lines of credit were to be limited in amount to 80 percent of Lepleys' accounts receivable that were 90 days or less in age ("formula").

{¶ 17} Various events affected the financial health of the Lepleys. In the summer of 2007, Lepleys advised Croghan Colonial of an accounting error in their reporting of

financial information to the bank. Corrected data established that the Lepleys were out of formula on the loan—as they owed greater than 80 percent of accounts receivable 90 days or less in age. By October 2007, Lepleys had exhausted one line of credit—having drawn loans totaling \$750,000 on the credit line. Croghan Colonial then froze the other line of credit, ceasing to make any further advances under it. Croghan Colonial requested additional collateral.

{¶ 18} By December 2007, the loans were out of formula by more than \$800,000. On December 27, 2007, Croghan Colonial froze Lepleys' deposit accounts with the bank.

{¶ 19} It is undisputed that counsel for the parties spoke over the telephone on December 27, 2007, concerning developments. It is disputed whether counsel for Croghan Colonial informed counsel for Lepleys on December 27, 2007, that the bank was calling its notes, making demand for payment on the lines of credit, and that the bank would exercise a right of set-off against Lepleys' accounts at the bank. Counsel for Lepleys admits that on December 27, 2007, he was informed that the bank had frozen Lepleys' deposit accounts.

{¶ 20} It is undisputed that on December 28, 2007, Croghan Colonial sent a demand letter to Lepleys with respect to the loans and on that date the bank asserted a set-off of \$267,439.84 against the entire amount of Lepleys' deposit accounts at the bank. The set-off was against sums owing under the commercial loans. All Lepley companies ceased operations on December 27, 2007.

Summary Judgment

{¶ 21} Appellate courts review judgments granting motions for summary judgment on a de novo basis, applying the same standard for summary judgment as the trial court. *Grafton v. Ohio Edison Co.* (1996), 77 Ohio St.3d 102, 105. Such motions are based upon a showing that there is no genuine issue of material fact for trial:

{¶ 22} "Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Civ.R. 56 (C).

{¶ 23} The moving party must demonstrate "(1) that there is no genuine issue as to any material fact; (2) that the moving party is entitled to judgment as a matter of law; and (3) that reasonable minds can come to but one conclusion, and that conclusion is adverse to the party against whom the motion for summary judgment is made, who is entitled to have the evidence construed most strongly in his favor." *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64, 66.

{¶ 24} "The construction of a written contract is a matter of law that we review de novo. *Nationwide Mut. Fire Ins. Co. v. Guman Bros. Farm* (1995), 73 Ohio St.3d 107, 108, 652 N.E.2d 684. Our primary role is to ascertain and give effect to the intent of the parties. *Hamilton Ins. Serv., Inc. v. Nationwide Ins. Cos.* (1999), 86 Ohio St.3d 270, 273, 714 N.E.2d 898. We presume that the intent of the parties to a contract is within the language used in the written instrument. *Kelly v. Med. Life Ins. Co.* (1987), 31 Ohio

St.3d 130, 31 OBR 289, 509 N.E.2d 411, paragraph one of the syllabus. If we are able to determine the intent of the parties from the plain language of the agreement, then there is no need to interpret the contract. *Aultman Hosp. Assn. v. Community Mut. Ins. Co.* (1989), 46 Ohio St.3d 51, 544 N.E.2d 920." *Saunders v. Mortensen*, 101 Ohio St.3d 86, 2004-Ohio-24, ¶ 9.

Contract Documents

{¶ 25} Both commercial loan agreements identified loan documents to include the commercial loan agreements and "all documents prepared pursuant to the terms of this Agreement [commercial loan agreement] including all present and future promissory notes (Notes), security instruments, guaranties, and supporting documentation as modified, amended or supplemented."

Demand Notes

{¶ 26} Under Assignment of Error No. 1, appellants argue that the trial court erred in holding that Croghan Colonial was entitled to set-off deposit accounts held at the bank against indebtedness on the loans. Appellants contend that the contract language specifically limited set-offs to where a demand for payment or default has occurred. Croghan Colonial argues that the contract documents clearly indicated that the loans were payable on demand and the right to set-off did not require an actual demand or default.

{¶ 27} Ohio law recognizes that demand notes are due and payable on delivery:

"Where a negotiable instrument is payable on demand, the instrument is construed to be due upon delivery, and actual demand is not necessary before action may be

commenced upon it." *Marion Ins. Agency Inc. v. Fahey Banking Co.* (1988), 61 Ohio App.3d 9, at syllabus. Accord *Hill v. Henry* (1848), 17 Ohio 9, 11-12; *Union Central Life Ins. Co. v. Curtis* (1880), 35 Ohio St. 357, 359; *National City Bank v. Aballa* (1999), 131 Ohio App.3d 204, 211.

{¶ 28} In our view, the plain language of the loan contracts demonstrates that the loans were demand obligations. The notes provided for a maturity date of "on demand." Under the heading "payments," both notes provided for "monthly payments of accrued interest calculated on the amount of credit outstanding" on a date specified in each agreement followed by the statement: "[p]rincipal plus any unpaid interest due upon demand."

{¶ 29} This reading is also supported by an express waiver in both notes of any requirement for a demand, protest, or notice to Lepleys that any amount due remained unpaid:

{¶ 30} "WAIVER: I give up my rights to require you to do certain things. I will not require you to:

{¶ 31} "(1) demand payment of amounts due (presentment);

{¶ 32} "(2) obtain official certification of nonpayment (protest); or

{¶ 33} "(3) give notice that amounts due have not been paid (notice of dishonor).

{¶ 34} "I waive any defenses I have based on suretyship or impairment of collateral."

{¶ 35} These loans were commercial transactions entered to provide operating funds for business enterprises. We are in agreement with the trial court that the contract terms are clear and unambiguous and establish that the loan notes were demand notes, due and payable upon delivery, without a requirement of any prior actual demand or notice to the debtor. Accordingly, we find appellants' Assignment of Error No. 1 is not well-taken.

Right to Set-Off Against Deposit Accounts

{¶ 36} Appellants argue under Assignment of Error No. 2 that the trial court erred in determining that Croghan Colonial was entitled to a right of set-off against deposit accounts without proof of demand or default. The bank set-off a total sum of \$267,439.84 (the total balance of Lepleys' deposit accounts at the bank) against Lepleys' obligations under the loans.

{¶ 37} Croghan Colonial contends that the trial court correctly determined that the loan contracts required neither demand nor default for the right of set-off. We agree. The contract language allows for set-off of amounts "due and payable" under the notes without proof of default. Both notes provide:

{¶ 38} "SET-OFF: I agree that *you may set off any amount due and payable* under this note against any right I have to receive money from you.

{¶ 39} "'Right to receive money from you' means:

{¶ 40} "(1) any deposit account balance I have with you;

{¶ 41} "(2) any money owed to me on an item presented to you or in your possession for collection or exchange; and

{¶ 42} "(3) any repurchase agreement or other nondeposit obligation.

{¶ 43} "*Any amount due and payable under this note' means the total amount of which you are entitled to demand payment under the terms of this note at the time you set off. This total includes any balance the due date for which you properly accelerate under this notice.*" (Emphasis added.)

{¶ 44} Both contracts provide that Croghan Colonial "may set off any amount due and payable under this note." As the notes were demand instruments, due and payable on delivery, we conclude that the plain language of the contracts provided for a right of set-off of the sums owing on the notes against Lepleys' deposit accounts without an actual demand for payment or default of note obligations. Accordingly, we conclude that Assignment of Error No. 2 is not well-taken.

Effect of R.C. 1303.16(B)

{¶ 45} We consider appellants' Assignment of Error No. 4 at this time because it also relates to the right of set-off against deposit accounts. Under Assignment of Error No. 4, appellants contend that the trial court erred in failing to address the repeal of former R.C. 1303.21(A) in 1994 and its replacement by R.C. 1303.16 in determining whether an actual demand was required before engaging in a set-off against the deposit accounts. Appellants argue that the Third District Court of Appeals' decision in *Marion*

Ins. Agency Inc. v. Fahey Banking Co. regarding when demand instruments become due and payable was based upon the court's interpretation of former R.C. 1303.21(A).

{¶ 46} In response, Croghan Colonial contends that R.C. 1303.16 has no bearing on the availability of the set-off in this case. R.C. 1303.16(B) sets forth the applicable statute of limitations for demand notes. *J & A Inc. v. Francis*, 6th Dist. No. H-03-006, 2004-Ohio-1039, ¶ 16-18. Lepleys have not claimed that Croghan Colonial's claims on the demand notes are barred under the statute of limitations. Croghan Colonial argues that the Third District Court of Appeals' decision in *Marion Ins. Agency, Inc. v. Fahey Banking Co.* was based upon the recognized characteristics of demand notes under Ohio law and not the provisions of R.C. 1303.16.

{¶ 47} We agree. In the *Marion Ins. Agency, Inc. v. Fahey Banking Co.* decision, the court of appeals considered and quoted the analysis in 4 Hawkland, Uniform Commercial Code Series (1984) 258-259, Section 3-122.03 and 72 Ohio Jurisprudence 3d (1987) 198, Negotiable Instruments, Section 672 concerning the nature of demand notes in reaching its decision. Both recognize that the demand notes are due on delivery and that no demand for payment is necessary to commence action on the note. *Marion Ins. Agency, Inc. v. Fahey Banking Co.*, 61 Ohio App.3d at 126. As discussed earlier in this decision, this analysis is supported by longstanding Ohio case law.

{¶ 48} R.C. 1303.06(B) provides for differing periods in which actions on demand notes must be brought depending on whether demand for payment has been made on the note:

{¶ 49} "(B) Except as provided in division (D) or (E) of this section, if demand for payment is made to the maker of a note payable on demand, an action to enforce the obligation of a party to pay the note shall be brought within six years after the date on which the demand for payment is made. If no demand for payment is made to the maker of a note payable on demand, an action to enforce the note is barred if neither principal nor interest on the note has been paid for a continuous period of ten years."

{¶ 50} In our view, the statute does not purport to change the long recognized characteristics of demand instruments that they are due upon delivery without notice or demand for payment. We find appellants' Assignment of Error No. 4 is not well-taken.

Claim for Conversion

{¶ 51} In their complaint against Croghan Colonial, Lepleys alleged that the bank was liable in tort for conversion arising from the set-off of all Lepleys' deposit accounts against Lepleys' indebtedness under the loans. In its judgment of May 8, 2009, granting summary judgment to Croghan Colonial on the conversion claim, the court held that no claim for conversion existed because the Lepley funds, once deposited with the bank, became the property of Croghan Colonial.

{¶ 52} Under Assignment of Error No. 3, Lepleys claim that an unauthorized set-off against their deposit accounts at Croghan Colonial presented an actionable claim for conversion against the bank and that the trial court erred in granting the motion for summary judgment on the conversion claim. Appellants cite the Supreme Court of Ohio's decision in *Society Natl. Bank v. Security Fed. S. & L.* (1994), 71 Ohio St.3d 321,

in support of the argument. In the decision, the court recognized that a depository bank is subject to liability for conversion arising from the bank's payment of a check contrary to a restrictive endorsement. *Id.* at 325. Appellants also cite the decision of the First District Court of Appeals in *Taylor v. First Natl. Bank of Cincinnati* (1986), 31 Ohio App.3d 49, 52-53, in which the court of appeals held that a depository bank could be held liable to the beneficiary of a payable-on-death account for conversion where the bank paid proceeds from the account to an estate creditor rather than to the account beneficiary.

{¶ 53} Croghan Colonial argues alternatively that taking the set-off did not constitute an exercise of dominion or control over another's property or, alternatively, that the set-off taken was authorized by contract.

{¶ 54} One of the elements of the tort of conversion is that the tortfeasor's exercise of dominion and control over another's property must be wrongful. *Joyce v. General Motors Corp.* (1990), 49 Ohio St.3d 93, 96; *Shinaberry v. Toledo Edison Co.* (July 17, 1998), 6th Dist. No. L-97-1389. Here there is no dispute of material fact that Croghan Colonial acted within its rights under the loan agreement in taking the set-off against the deposit accounts. Accordingly, no viable claim for conversion exists under the undisputed facts.

{¶ 55} We conclude that the trial court did not err in granting Croghan Colonial summary judgment on the conversion claim. Assignment of Error No. 3 is not well-taken.

Attorney Fees

{¶ 56} Under Assignment of Error No. 5, Lepleys assert "[t]he trial court erred in awarding the bank its attorney fees for the entirety of the action including the defense of claims asserted against it." Appellants argue that the agreement to pay attorney fees was limited to circumstances of default. They also argue that the trial court's award of attorney fees was unreasonable, should not have included the costs of defense of claims the Lepleys asserted against Croghan Colonial, and should have been limited to fees associated with preparing a complaint, answer and judgment entry on the promissory notes.

{¶ 57} With respect to payment of attorney fees, the commercial loan contracts provide:

{¶ 58} "To the extent permitted by law, Borrower agrees to pay all expenses of collection, enforcement, and protection of Lender's rights and remedies under this Agreement. Expenses include, but are not limited to, reasonable attorneys' fees including attorney fees permitted by the United States Bankruptcy Code, court costs and other legal expenses. * * *."

{¶ 59} The demand notes provided:

{¶ 60} "I agree to pay all costs of collection, replevin or any other or similar type of cost if I am in default. In addition, if you hire an attorney to collect this note, I also agree to pay any fee you incur with such attorney plus court costs (except where prohibited by law). To the extent permitted by the United States Bankruptcy Code, I also

agree to pay the reasonable attorney's fees and costs you incur to collect this debt as awarded by any court exercising jurisdiction under the Bankruptcy Code."

{¶ 61} "[A] contract is to be read as a whole and the intent of each part gathered from a consideration of the whole. *Foster Wheeler Enviresponse, Inc. v. Franklin Cty. Convention Facilities Auth.* (1997), 78 Ohio St.3d 353, 361, 678 N.E.2d 519. If it is reasonable to do so, we must give effect to each provision of the contract. *Expanded Metal Fire-Proofing Co. v. Noel Constr. Co.* (1913), 87 Ohio St. 428, 434, 101 N.E. 348." *Saunders v. Mortensen*, supra, at ¶ 16.

{¶ 62} We read the commercial loan agreements themselves to unambiguously provide for payment of attorney fees by Lepleys incurred in collection and enforcement of the commercial loan agreements and protection of Croghan Colonial's rights and remedies under the agreements without regard to whether the Lepleys defaulted on the loans. Construing the document as a whole and giving effect to the unambiguous terms of the commercial loan contract language, we construe the demand notes also to impose an obligation to pay attorney fees in the absence of default.

{¶ 63} We find no basis under the commercial loan agreements to conclude that the agreement to pay attorney fees is limited to fees incurred in preparation of a complaint, answer and judgment entry on the promissory notes as contended by appellants.

{¶ 64} In its June 7, 2010 judgment awarding fees, the trial court recognized that the parties agreed that the hourly rate charged by counsel was reasonable. The court also

concluded that the fee billings were related to collection efforts of Croghan Colonial under the notes and commercial loan agreements and reasonable. We find that there is competent credible evidence in the record supporting the trial court's conclusions.

{¶ 65} Accordingly, we find no trial court error in treating defense of appellants' unsuccessful tort and contract claims that challenged collection efforts by the bank as coming within the scope of the attorney fee obligations under the loan contracts.

{¶ 66} We note that the agreement to pay attorney fees in these contracts is authorized by R.C. 1302.21 as the agreements concern enforcement of commercial contracts of indebtedness exceeding \$100,000 in amount. See *Wilborn v. Bank One Corp.*, 121 Ohio St.3d 546, 2009-Ohio-306, ¶ 39; R.C. 1301.21(B).

{¶ 67} Accordingly, we find Assignment of Error No. 5 is not well-taken.

{¶ 68} We conclude that justice was afforded the parties complaining and affirm the judgment of the Huron County Court of Common Pleas. Pursuant to App.R. 24, we also order appellants to pay the court costs of this appeal.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

The Croghan Colonial Bank
v. Lepley Farm Lines, Inc.
C.A. No. H-10-013

Peter M. Handwork, J.

JUDGE

Mark L. Pietrykowski, J.

JUDGE

Thomas J. Osowik, P.J.
CONCUR.

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
<http://www.sconet.state.oh.us/rod/newpdf/?source=6>.