[Cite as *Pensco Trust Co. v. H & J Properties, L.L.C.*, 2010-Ohio-3610.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93826

PENSCO TRUST COMPANY C/O EILEEN F. HEIL

PLAINTIFF-APPELLANT

vs.

H & J PROPERTIES, LLC, ET AL.

DEFENDANTS-APPELLEES

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Common Pleas Court
Case No. CV-673522

BEFORE: Boyle, J., Rocco, P.J., and McMonagle, J.

RELEASED AND JOURNALIZED: August 5, 2010

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MARY J. BOYLE, J.:

{¶ 1} This case came to be heard upon the accelerated calendar pursuant to App.R. 11.1 and Loc.R. 11.1.

{¶ 2} Plaintiff-appellant, Pensco Trust Company c/o Eileen F. Heil ("Pensco") appeals the trial court's grant of summary judgment in favor of defendant-appellee, Harvey Mierke, on the issue of his personal liability under a promissory note. Because we find that Mierke's signature on the note shows unambiguously that the signature was made on behalf of H and J Properties, LLC, and the plain language of the note reveals that H and J Properties was the sole maker of the note, we find no merit to the appeal and affirm.

Procedural History and Facts

{¶ 3} On October 16, 2008, Pensco, a trust company and custodian of an individual retirement account held in the name of Eileen F. Heil, commenced the underlying lawsuit against H and J Properties, LLC, and Mierke, alleging that, on April 12, 2005, the defendants "executed and delivered to plaintiff a cognovit promissory note for a principal amount of $60,000 plus interest." The complaint further alleged that the defendants were "makers" of the note and sought judgment against the defendants, jointly and severally, for the loan amount plus interest. The trial court subsequently entered judgment for Pensco on the cognovit note.

{¶ 4} On October 31, 2008, Mierke moved to vacate the cognovit judgment as to him personally on the basis that he never signed the promissory note in his personal capacity and therefore the judgment was taken by mistake. He further alleged that the "judgement was taken as a result of fraud because the cognovit promissory note presented to the court was materially different than the cognovit promissory note signed by H and J Propeties, LLC." The trial court held a hearing on the motion, vacated the judgment as to Mierke personally, and returned the case to the active docket.

{¶ 5} Mierke subsequently answered the complaint and asserted counterclaims for abuse of process and fraud. He later moved for summary judgment, which the court granted, finding that Mierke signed the promissory

note on behalf of H and J Properties only. The court, however, found in favor of Pensco on Mierke's counterclaims. Pensco appeals, raising a single assignment of error:

{¶ 6} "The trial court erred in granting summary judgment on the issue of whether Mierke personally signed the note because the material facts are in dispute."

Individual Liability

{¶ 7} In its single assignment of error, Pensco argues that the trial court erred in granting summary judgment because genuine issues of material fact exist and reasonable minds could reach differing conclusions as to Mierke's personal liability under the promissory note. We disagree.

{¶ 8} We review an appeal from summary judgment under a de novo standard of review. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 1996-Ohio-336, 671 N.E.2d 241. Thus, we afford no deference to the trial court's decision and independently determine whether genuine issues of material fact exist and whether a party is entitled to judgment as a matter of law. *Dresher v. Burt*, 75 Ohio St.3d 280, 292-293, 1996-Ohio-107, 662 N.E.2d 264; see, also, Civ.R. 56(C).

{¶ 9} Pensco relies on Eileen Heil's affidavit and other evidentiary materials to demonstrate that the parties intended for Mierke to be personally liable, or, at the very least, that a genuine issue of material fact exists on the

issue. But under the parol-evidence rule, if a contract is unambiguous, a court should not use extrinsic evidence to interpret the contract. See *Gray Printing Co. v. Blushing Brides, LLC*, 10th Dist. No. 05AP-646, 2006-Ohio-1656, ¶27. Indeed, before considering any outside evidence, a court must first look to the plain language of the agreement to determine the intent of the parties. *Aultman Hosp. Assn. v. Community Mut. Ins. Co.* (1989), 46 Ohio St.3d 51, 53, 544 N.E.2d 920. "If a contract is clear and unambiguous then its interpretation is a matter of law and there is no issue of fact to be determined." *Inland Refuse Transfer Co. v. Browning-Ferris Industries of Ohio, Inc.* (1984), 15 Ohio St.3d 321, 322, 474 N.E.2d 271.

{¶ 10} Under Ohio law, it is well settled that an individual who signs a note on behalf of a company is not liable for the corporate debt. See *Aungst v. Creque* (1905), 72 Ohio St. 551, 74 N.E. 1073. As recognized by the Ohio Supreme Court in 1905 and remains true today, the typical format for an officer to avoid liability is to sign "the name of the corporation, and underneath that his own name, to which he appends his official title." Id. at 553-554. The court, however, recognized that it is not absolute "that the signature should assume this exact form." Id. at 544. Instead, whether a note has been executed by a party in his individual or representative capacity is a question to be determined from the consideration of the whole instrument. Id. If "it plainly appears from

the instrument itself that the true object and intent of its execution is to bind the principal, and not the agent, courts will adopt that construction of it." Id.

{¶ 11} Based on the form of Mierke's signature and the form of the promissory note, we find that the note unambiguously demonstrates that Mierke signed only in a representative capacity. Here, the promissory note clearly identifies H and J Properties, LLC as the *sole* maker. Mierke was neither named nor referenced in the body of the note. The note also only refers to "maker" in connection with the promises and obligations under the note. There is no language that even implies that Mierke is contemplated as being personally liable under the note. Indeed, the note does not contain a personal guaranty clause. Thus, the plain language of the promissory note establishes that the parties intended for H and J Properties, LLC to be liable under the note — not Mierke.

{¶ 12} We further find that Mierke's signature evidences the parties intent that he was only obligating H and J Properties, LLC. At the bottom of the note, there is one signature line with the word "Maker" affixed underneath it. Above the line, Mierke signed "H and J Properties, LLC." Underneath it, he inserted the word "by," signed his name, and then printed his name. We find that the use of the word "by" clearly indicates that he was signing on behalf of H and J Properties, LLC. See *Aungst*, 72 Ohio St. at 554 (recognizing that the use of

"by" accompanied by the agent's name and following the company's name sufficiently indicates that individual is signing in a representative capacity).

{¶ 13} Accordingly, we find that the trial court did not err in finding that the note was unambiguous and that Mierke was not personally liable on the note.

{¶ 14} Pensco's sole assignment of error is overruled.

Judgment affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

MARY J. BOYLE, JUDGE

KENNETH A. ROCCO, P.J., and
CHRISTINE T. McMONAGLE, J., CONCUR