[Cite as *DiFranco v. Razakis*, 2011-Ohio-1677.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94809

ANTHONY DiFRANCO

PLAINTIFF-APPELLEE

vs.

DR. GEORGE W. RAZAKIS, ET AL.

DEFENDANTS-APPELLANTS

JUDGMENT:
REVERSED AND REMANDED

Civil Appeal from the
Cuyahoga County Common Pleas Court
Case No. CV-629071

BEFORE: E. Gallagher, J., Boyle, P.J., and Jones, J.

RELEASED AND JOURNALIZED: April 7, 2011

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EILEEN A. GALLAGHER, J.:

{¶ 1} Appellants Dr. George Razakis, William Razakis, Vision Sensors LLC ("Vision Sensors"), and Vision Venture Fund II, LP ("Vision Fund"), appeal the trial court's decision to grant summary judgment in favor of plaintiff-appellee, Anthony DiFranco ("DiFranco"). Appellants argue that the trial court erred in granting summary judgment because genuine issues of material fact remained as to whether the subject contract was voidable due to economic duress. For the reasons that follow, we agree and reverse the

decision of the trial court.

{¶ 2} In May of 2004, DiFranco entered into an agreement with Vision Sensors, whereby he would provide management services on behalf of Vision Sensors. Appellants Dr. George Razakis and William Rozakis are both members of Vision Sensors. Vision Venture Fund II, LP, which Dr. George Razakis represents, is the majority shareholder of Vision Sensors.

{¶ 3} In 2005, a dispute arose between Vision Sensors and Case Western Reserve University ("Case") concerning certain proprietary information. Vision Sensors sued the university in Cuyahoga Common Pleas Case No. CV-565991 (the "Case litigation"). Case filed counterclaims against Vision Sensors and Vision Fund and filed a third party complaint against Dr. George Razakis. Though DiFranco was not a party to this lawsuit, he negotiated with Case on Vision Sensors' behalf, and eventually an oral settlement agreement was reached. When the Case settlement agreement was to be formally signed, however, appellants allege that DiFranco refused to execute the agreement and threatened to sabotage the settlement unless they agreed to sign a separate "Settlement Agreement and Release" obligating them to pay DiFranco a total of $20,000 over a period of five months. Believing the underlying settlement agreement reached in the Case litigation to be in the best interest of the Vision Sensors shareholders and that DiFranco had placed the Case settlement at risk, appellants entered into the DiFranco settlement agreement. DiFranco presents a wholly

different explanation of the circumstances underlying the DiFranco settlement agreement. DiFranco's entire account is based upon facts not in the trial court's record and, thus, is beyond consideration for the purposes of this appeal.

{¶ 4} When appellants failed to make payments pursuant to the agreement, DiFranco filed the present action on July 5, 2007, for the enforcement of the settlement agreement. Appellants answered on September 10, 2007. DiFranco filed a motion for summary judgment on December 12, 2007. Appellants were granted leave to respond and filed their memorandum in opposition to summary judgment on February 15, 2008. On March 3, 2008, appellants filed a motion for leave to file an amended answer instanter to include the affirmative defense of duress. On April 24, 2008, DiFranco filed a motion to deem his requests for admissions, to all defendants, admitted. On February 9, 2010, the case was transferred from the docket of the originally assigned judge to another common pleas judge. On February 12, 2010, the trial court issued a journal entry simultaneously granting appellants' motion to file an amended answer, granting DiFranco's motion for summary judgment in his favor, and marking as "moot" DiFranco's motion to deem his requests for admissions to all defendants admitted. It is from this journal entry that appellants presently appeal.

{¶ 5} In appellants' sole assignment of error they argue that the trial court erred in granting summary judgment in favor of DiFranco because there were genuine issues of

material fact as to whether the DiFranco settlement agreement was voidable due to economic duress.

{¶ 6} As an initial matter, we note that the trial court, rather than making a specific ruling, marked DiFranco's motion to deem his requests for admissions to all defendants admitted as moot. Pursuant to Civ.R. 36(A), a party may serve upon any other party a written request for the admission of the truth of any matters within the scope of Civ.R. 26(B) that relate to statements or opinions of fact or of the application of law to fact, including the genuineness of any documents described in the request. "The matter is admitted unless, within a period designated in the request, not less than twenty-eight days after service of a printed copy of the request or within such shorter or longer time as the court may allow, the party to whom the request is directed serves upon the party requesting the admission, a written answer. * * *." Civ.R. 36(A)(1). "Any matter admitted under Civ.R. 36 is conclusively established unless the court on motion, permits withdrawal or amendment of the admission." Civ.R. 36(B).

{¶ 7} DiFranco served appellants with requests for admissions on November 16, 2007. Relevant to the present inquiry is Request for Admission No. 4, which asks the appellants to, "[a]dmit that you entered into the Settlement Agreement intelligently, knowingly, and voluntarily." On April 24, 2008, DiFranco filed a motion to deem his requests for admissions to all defendants admitted. The trial court did not rule on

DiFranco's motion until February 12, 2010, when it simultaneously marked the motion as moot and granted appellants' motion to file an amended answer alleging the affirmative defense of duress. It is unclear from the record why the trial court felt that DiFranco's motion to deem admissions admitted was moot. The record is silent as to whether this issue was resolved by the trial court at the May 1, 2008 pretrial, which was held shortly after DiFranco filed his motion. However, it necessarily follows that the trial court implicitly allowed appellants to retract this particular admission when the court allowed appellants to amend their answer to allege the affirmative defense of duress.

{¶ 8} Appellants argue that the trial court erred in granting summary judgment in this instance. Our review of a trial court's grant of summary judgment is de novo. *Grafton v. Ohio Edison Co.* (1996), 77 Ohio St.3d 102, 105, 671 N.E.2d 241. Pursuant to Civ.R. 56, summary judgment is appropriate when (1) there is no genuine issue of material fact, (2) the moving party is entitled to judgment as a matter of law, and (3) reasonable minds can come to but one conclusion and that conclusion is adverse to the nonmoving party, said party being entitled to have the evidence construed most strongly in his favor. *Horton v. Harwick Chem. Corp.* (1995), 73 Ohio St.3d 679, 653 N.E.2d 1196, paragraph three of the syllabus; *Zivich v. Mentor Soccer Club* (1998), 82 Ohio St.3d 367, 369-370, 696 N.E.2d 201. The party moving for summary judgment bears the burden of showing that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. *Dresher v. Burt*

(1996), 75 Ohio St.3d 280, 292-293, 662 N.E.2d 264.

{¶ 9} Appellants argue that summary judgment was inappropriate in this instance because there exist genuine issues of material fact regarding whether the DiFranco settlement agreement was voidable by reason of duress. Specifically, appellants allege in affidavits attached to their memorandum in opposition to summary judgment that DiFranco, after negotiating a settlement agreement in the Case litigation, threatened to sabotage that settlement agreement if the appellants did not agree to pay $20,000 in the form of the DiFranco settlement agreement. Appellants argue that they were compelled to acquiesce to DiFranco's threat because to do otherwise would put at risk a settlement in the Case litigation that was in the best interest of the Vision Sensors shareholders.

{¶ 10} The Ohio Supreme Court has recognized that the law of duress as a reason to avoid a contract has evolved to encompass economic duress as well as physical compulsion. *Blodgett v. Blodgett* (1990), 49 Ohio St.3d 243, 551 N.E.2d 1249. To show economic duress, a plaintiff must show: (1) that one side involuntarily accepted the terms of another; (2) that circumstances permitted no other alternative; and (3) that said circumstances were the result of coercive acts of the opposite party. Id. at 246. Merely taking advantage of another's financial difficulty is not duress. Rather, the person alleging financial difficulty must allege that it was contributed to or caused by the one accused of coercion. Id. Furthermore, the assertion of duress must be proven to have been the result of the defendant's

conduct and not by the plaintiff's necessities. Id.

{¶ 11} In the present case, DiFranco cites a number of facts not in the record while arguing that he merely took advantage of appellants' situation. DiFranco likens the present case to the facts of *Blodgett* wherein the Ohio Supreme Court rejected the appellant's duress argument. In *Blodgett*, the appellant was forced to accept a satisfaction of judgment that terminated her divorce appeal against her ex-husband because she found herself in financial distress and needed the money. The Ohio Supreme Court rejected the appellant's claim of economic duress, holding that it was insufficient to show that one assented merely because of difficult financial circumstances that are not the fault of the other party. Id. at syllabus.

{¶ 12} We do not find the facts underlying the *Blodgett* decision to be akin to the present situation. Rather, the present alleged facts are far more similar to the situation described in the Restatement of the Law 2d, Contracts, Section 176, at Comment *e*. Amongst the Restatement's list of improper threats that may underly a claim of duress is a situation where a party threatens non-performance under a contract for the purpose of inducing the other party to enter into an entirely separate contract. Appellant's version of the facts is similar to Illustration 9 found in Restatement of the Law 2d, Contracts, Section 176, at Comment *e*. Illustration 9 provides:

> "9. A contracts to excavate a cellar for B at a stated price. A begins the excavation and then threatens not to finish it unless B makes a separate contract to excavate the cellar of another building. B, having no reasonable alternative, is induced by A's

threat to make the contract. A's threat is a breach of his duty of good faith and fair dealing, and the proposed contract is voidable by B."

{¶ 13} In the present case, appellants have alleged that DiFranco, after negotiating a settlement with Case as part of his managerial job, held hostage the underlying Case settlement agreement, and appellants were compelled to accept his demands lest he take some action to sabotage the settlement. Under the facts alleged by appellants, DiFranco did more than merely take advantage of appellants' financial difficulty. Instead, he improperly used his managerial position to create appellants' distress and extract a benefit for himself. Since DiFranco contests the factual allegations presented in appellants' affidavits, we conclude that a genuine issue of fact concerning duress exists. Because we find that genuine issues of material fact remain, the judgment of the Cuyahoga County Court of Common Pleas is reversed, and the matter is remanded for further proceedings consistent with this decision.

Judgment reversed and remanded.

It is ordered that appellants recover from appellee 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.

EILEEN A. GALLAGHER, JUDGE

MARY J. BOYLE, P.J., and
LARRY A. JONES, J., CONCUR