

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

Signature Bank, N.A.

Court of Appeals No. WD-10-076

Appellees

Trial Court No. 2009CV0611

v.

Oakmont Family Medicine, LLC, et al.

DECISION AND JUDGMENT

Appellants

Decided: September 23, 2011

* * * * *

Paul T. Belazis, for appellee Signature Bank N.A.

David A. Cole and George J. Conklin, for appellee Mark W. Cooper.

John J. McHugh, III, and Sarah A. Miller, for appellants.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} Defendants-appellants, Oakmont Family Medicine, LLC, and Ray J. Miller, D.O., appeal the August 17, 2010 judgment of the Wood County Court of Common Pleas which granted plaintiff-appellee, Signature Bank, N.A.'s motion for partial summary judgment and defendant-appellee, Mark Cooper, D.O.'s motion for summary judgment. Because we find that no genuine issues remain for trial, we affirm.

{¶ 2} The relevant facts of this case are as follows. Prior to 1997, Miller and Cooper had been operating as Oakmont Medical, Ltd. The entity had taken out a \$100,000 line of credit; the balance remained at \$35,000 when the instant dispute arose. Appellant Miller and appellee Cooper formed Oakmont Family Medicine, LLC ("OFM") in August 2007; the family medical practice had an operating agreement which Cooper had refused to sign. On August 24, 2007, OFM secured a \$100,000 line of credit from Signature Bank ("Signature"). The loan was secured by the property of OFM and personal guarantees were signed by Miller and Cooper.

{¶ 3} Shortly thereafter, in December 2007, Cooper informed Miller of his intent to leave OFM. Cooper officially left the practice in March 2008. At that time, approximately \$86,000 had been drawn on the line of credit. Miller and Cooper met with OFM accountants in an effort to wind up the operations of OFM upon Cooper's withdrawal; the parties were unable to reach an agreement on the financial terms of Cooper's buy-out.

{¶ 4} On September 15, 2008, Miller filed a certificate with the Ohio Secretary of State formally dissolving OFM effective October 31, 2008. In the interim, on September 17, 2008, Miller contacted Signature about his starting a new entity, Oakmont Family Practice, and requested a \$100,000 line of credit to operate the new entity. About a week thereafter, Signature loan officer Rob Shamy discovered that Miller had filed paperwork with the Secretary of State to dissolve OFM. Upon this discovery, Shamy contacted Miller and informed him that because of the dissolution, the Oakmont Medical balance

and OFM's August 2007 note were in default and were to be repaid. As to the August 2007 note, Miller suggested that he and Cooper each be responsible for half of the outstanding line of credit, approximately \$40,571.58 each. Shamy indicated that he would submit the proposal to the bank's loan committee.

{¶ 5} On September 26, 2008, the committee approved the proposal and, subsequently, the bank issued two notes, each for \$40,589. Cooper was sent the personal note but refused to sign the note. He asserted that he had no knowledge of the discussions between Signature and Miller and that he disputed the amount owed; Cooper felt that OFM had significant collateral to cover the amount of the loan. Miller executed his note. Miller further executed, individually and on behalf of OFM, an additional note. Miller then drew \$40,589 from his personal note and applied it to the August 2007 note. He then drew the same amount from the OFM note and repaid his personal note.

{¶ 6} On October 20, 2008, Miller made a \$20,000 online payment to what he believed was the October 2008 note; however, Signature applied it to the balance on the August 2007 note (which was the amount of the note that Cooper refused to sign.) Miller telephoned Rob Shamy and requested that the sum be credited to the October 2008 note. Shamy indicated that he would not honor his request without Cooper's approval especially due to the fact that a dispute existed as to the allocation of OFM's assets to cover the notes.

{¶ 7} On June 12, 2009, Signature filed three claims. The first two claims sought recovery against OFM and Miller for the unpaid balance on the October 3, 2008 note and

the unpaid balance on the August 24, 2007 note. Signature's third claim was for declaratory relief against OFM, Miller, and Cooper. The court granted cognovit judgment on the first two claims. On July 15, 2009, appellants filed a motion for relief from judgment arguing that a valid defense to the claims existed; to wit, that Signature had agreed to accept payments from the guarantors rather than OFM and that Signature misapplied OFM's and Miller's October 17, 2008 \$20,000 payment. The court granted appellants' motion.

{¶ 8} On August 29, 2009, Cooper filed a counterclaim for declaratory relief requesting that the court direct Signature to apply funds held for payment of the OFM loans to the oldest mature loan. Appellants filed counterclaims against Cooper for breach of contract and against Signature for breach of contract, conversion, and abuse of process.

{¶ 9} On March 29, 2010, Signature filed a motion for partial summary judgment against appellants and Cooper. In its motion, Signature argued that, as to the August 2007 note, because there was no agreement to extinguish the liability of appellants on the balance of the note, Cooper, Miller and OFM were equally liable. In addition, Signature contended that there was no additional consideration to support a modification of the note. Signature argued that the language in the unconditional guarantee precluded oral loan modifications. Finally, Signature argued that appellants' counterclaims should be dismissed.

{¶ 10} On the same date, Cooper filed a motion for summary judgment on his declaratory judgment counterclaim. Cooper argued that according to the laws regarding

the application of payments the trial court should order Signature to apply any funds received from OFM to the August 2007 note. Cooper further argued that because Miller did not have the authority to enter into the 2008 loan on behalf of OFM, the loan is not a binding obligation between Signature and OFM.

{¶ 11} Opposing the motions, appellants argued that, looking at its own documents, Signature did, in fact, agree to replace the August 24, 2007 note with separate notes executed by each guarantor. Further, Cooper admitted that he signed a personal guaranty on the note. Finally, appellants argued that because Cooper refused to sign the OFM operating agreement, issues of fact remained as to whether he ever maintained member status.

{¶ 12} On August 17, 2010, the trial court granted Signature's and Cooper's motions. The court determined that as to the August 24, 2007 note, pursuant to OFM's borrowing resolution, Miller alone could not have entered into a modification of the note. The court also noted that there was no consideration for the new notes. As to the October 2008 note, the court found that it was enforceable against Miller only, that his attempt to bind OFM was not enforceable without Cooper's signature. The court also granted summary judgment to Signature as to appellants' counterclaims for conversion, abuse of process, and breach of contract. Finally, the court granted Cooper's motion finding that payment should first be applied to the August 2007 note.

{¶ 13} On September 9, 2010, appellants and Cooper filed a joint stipulation agreeing to dismiss their respective cross-claims and counterclaims. The court then issued a Civ.R. 54(B) order and appellants commenced the instant appeal.

{¶ 14} Appellants raise four assignments of error for our review:

{¶ 15} "Assignment of Error No. 1. The trial court erred prejudicially in entering summary judgment upon its determination, as a matter of law, that a member who had formally withdrawn in writing from membership in an Ohio limited liability company was still entitled to vote on matters affecting the liquidation of the limited liability company.

{¶ 16} "Assignment of Error No. 2. The trial court erred prejudicially in concluding that the basis for the claim of loan modification was supported by nothing more than a verbal agreement, where competent record evidence established that the lender had in writing proposed and authorized the modification, and had issued new promissory notes reflecting the replacement of the old notes.

{¶ 17} "Assignment of Error No. 3. The trial court erred prejudicially in determining which of various notes were to be paid in priority upon its determination that the notes had not, as a matter of law, been modified for want of consent by the member who had formally withdrawn from membership in the limited liability company.

{¶ 18} "Assignment of Error No. 4. The trial court erred prejudicially in dismissing, as a matter of law, the borrower's counterclaims for breach of contract, conversion, and abuse of process upon its finding that the notes, as originally written, had

not been, and could not be, modified without the consent of a member who had withdrawn from membership in the borrower limited liability company."

{¶ 19} At the outset we note that appellate 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. A motion for summary judgment should only be granted when there remains no genuine issue of material fact and, when construing the evidence most strongly in favor of the nonmoving party, reasonable minds can only conclude that the moving party is entitled to judgment as a matter of law. *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64, 66; Civ.R. 56(C). The burden of showing that no genuine issue of material fact exists falls upon the party who moves for summary judgment. *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 294. However, once the movant supports his or her motion with appropriate evidentiary materials, the nonmoving party "may not rest upon the mere allegations or denials of his pleadings, but his response, by affidavit or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." Civ.R. 56(E).

{¶ 20} Appellants' first and second assignments of error, for various reasons, assert that the trial court erred in granting Signature summary judgment. Because we are required to review the judgment, de novo, we will, generally, review the arguments made by the parties to determine whether summary judgment was appropriate.

{¶ 21} The parties do not dispute the amount that was owed and the fact that it was owed by OFM, Miller, and Cooper. Miller claims, however, that because Signature

agreed to his request to split the balance into two personal notes, his liability was extinguished when he paid his personal note. Miller further argues that Cooper's consent to the modification of the August 2007 note was not required once he withdrew from OFM.

{¶ 22} First, we reject appellants' argument that Cooper's consent was not required to modify the August 2007 note. At the time the note was made, Cooper was a member of OFM and, in addition to OFM's guaranty he executed a personal guaranty. OFM's borrowing resolution, signed by Miller and Cooper, provided that consent of both parties was required to enter into agreements with Signature, including the execution of promissory notes "and also to execute and deliver to the Bank one or more renewals, extensions, modifications, refinancings, consolidations, or substitutions for one or more of the notes * * *." The parties do not dispute that Cooper had no knowledge of the alleged modification until he received the note in the mail.

{¶ 23} Further, there is no evidence that Signature agreed to release Miller from his guaranty relating to the balance of the August 2007 note after receipt of the proceeds from the October 3, 2008 note. Certainly, had the full amount been paid, the guarantees would have been extinguished. However, the guaranty provided for "full payment to the Bank when due, whether by acceleration or otherwise."

{¶ 24} In Miller's deposition, he acknowledged that he and Cooper had an ongoing dispute as to how to wrap up OFM and that he had not discussed the idea to "split" the balance owed on the August 2007 note into two personal notes. Miller testified that he

was not even aware that the October 3, 2008 note was a personal note; he had only intended to be a guarantor. Miller did not represent that Cooper would be willing to pay the other half of the debt. Miller stated that he believed that Signature would agree to Miller only paying half of the indebtedness, as opposed to the full amount, in order to continue their business relationship.

{¶ 25} In his deposition, Rob Shamy testified that on September 23 or 24, 2008, Miller indicated that he and Cooper were going to each pay half of the balance on the August 2007 note. Shamy stated that following Cooper's failure to return the signed note he spoke with Cooper and learned that he disputed owing the sum of money based upon inside practice dealings. Shamy stated that it was Signature's position that both parties signed unconditional guarantees and that Miller's payment of the note did not extinguish his liability for the balance.

{¶ 26} Based on the foregoing, we find that because Cooper did not consent to the modification and because there was no additional consideration, Miller's payment of the \$40,859 personal note did not extinguish his guaranty for the payment of the August 24, 2007 note. Thus, the trial court did not err when it granted summary judgment. Appellants' first and second assignments of error are not well-taken.

{¶ 27} In appellants' third assignment of error they argue that the court erroneously granted Cooper's motion for summary judgment on his declaratory judgment claim. Cooper's claim requested that the court direct Signature to apply the funds it held for payment of the older, 2007 OFM loan first, then the 2008 loan. Cooper further

requested that the court declare that the 2008 loan to OFM is not valid and enforceable against him because it was not properly authorized by both members as required by the borrowing resolution. Appellants counter that Cooper's arguments are based on his belief that, as a member of OFM, Miller could not have obligated him to pay the October 2008 loan; however, because he had withdrawn from OFM, his consent was not required.

{¶ 28} As to the October 2008 loan, at that time, Miller was the sole member of OFM. Cooper readily admitted that he signed a personal guaranty as to the August 2007 note but had consistently disputed the application of the funds. Cooper's dispute appears to be based on the fact that, according to his deposition, Miller "sold" some of OFM's office equipment, which was listed as collateral on the August 24, 2007 note, to an entity called SKK (the initials of his children), which then allowed him to continue using the furniture and equipment while operating under his new entity, Oakmont Medical. The \$20,000 OFM received was the amount Miller intended to use to pay some of OFM's debt.

{¶ 29} Signature requested that the court determine the proper application of the payment. It was reasonable for the court to find that, based upon its determination that Miller's guaranty had not been extinguished, the sum first be applied to the balance on the August 2007 note. Further, at the time the amount was applied to the 2007 note, the newer, October 2008 note, had not become due. Finally, though apparently mistakenly, Miller acknowledged that he and his office assistant did direct the payment to the August 2007 note. At that point, a change in the application of the payment required the consent

of the debtors (which would include Cooper as a guarantor) and Signature. See 73 Ohio Jurisprudence 3d (2009) 209, Payment and Tender, Section 45. Accordingly, appellants' third assignment of error is not well-taken.

{¶ 30} Appellants' fourth and final assignment of error disputes the trial court's dismissal of their claims for conversion, abuse of process, and breach of contract. As to abuse of process, appellants argued that Signature took cognovit judgments against appellants despite knowledge that Miller's liability under the August 2007 note had been extinguished and Miller's and OFM's liability as to the October 2008 note had been reduced. Appellants' breach of contract claim asserted that Signature breached the agreement to modify the August 2007 note and to release Miller from his unconditional guaranty. Finally, appellant's conversion claim was based on the theory that Signature wrongly applied appellants' \$20,000 payment to the August 2007, rather than the October 2008, note.

{¶ 31} Based upon our disposition of the preceding three assignments of error, we find that no genuine issues of fact remain as to appellants' counterclaims. Specifically, in our discussion of appellants' first and second assignments of error we found that Miller did not modify the August 2007 note where the modification was not written and Cooper did not consent. It follows, then, that Miller's guaranty had not been extinguished. Thus, appellants' counterclaims for abuse of process and breach of contract must fail. As to the conversion claim, in our discussion of appellants' third assignment of error we concluded

that the bank did not err when it applied the \$20,000 payment to the August 2007 note. Accordingly, we find that appellants' fourth assignment of error is not well-taken.

{¶ 32} On consideration whereof, we find that substantial justice was done the parties complaining, and the judgment of the Wood County Court of Common Pleas is affirmed. Pursuant to App.R. 24, appellants are ordered to pay the 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.

Mark L. Pietrykowski, J.

JUDGE

Thomas J. Osowik, P.J.

JUDGE

Stephen A. Yarbrough, 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:
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