

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2014 CA 0788

ADVOCATE FINANCIAL, LLC

VERSUS

HENRY DART, ATTORNEY AT LAW, A PROFESSIONAL CORPORATION, AND HENRY DART

Judgment Rendered: MAR 06 2015

Appealed from the
Twenty-Second Judicial District Court
In and for the Parish of St. Tammany, Louisiana
Docket Number 2007-11565

Honorable August J. Hand, Judge Presiding

Jack W. Harang
New Orleans, LA

and

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BEFORE: WHIPPLE, C.J., McCLENDON, AND HIGGINBOTHAM, JJ.

WHIPPLE, C.J.

This is an appeal by third-party defendant, Jack W. Harang, from a judgment of the trial court, granting third-party plaintiffs' motion for summary judgment and rendering judgment against Harang in the amount of \$1,217,304.75, plus legal interest. For the following reasons, we reverse and remand.

FACTUAL AND PROCEDURAL HISTORY

On April 3, 2007, Advocate Financial, LLC ("Advocate"), filed suit against Henry Dart and his law firm, Henry Dart, Attorneys at Law, P.C. (hereinafter collectively referred to as "Dart"), alleging that in 1996, Dart entered into a Master Loan Agreement with Advocate for the financing of certain litigation expenses, and that, as contemplated by the loan agreement, Dart also executed a Security Agreement and Commercial Guaranty in favor of Advocate. Advocate alleged that the loan agreement with Dart was a "comprehensive lending scheme," whereby Advocate would extend financing to the Dart law firm and its clients, which included a line of credit to the Dart law firm, individual loans to the Dart law firm, and loans directly to Dart's clients. The petition further alleged that Dart defaulted on several notes with Advocate, all of which were executed in 2006, and that accordingly, Advocate sought a judgment against Dart for the principal balance of the notes, plus interest and costs, and recognition of its security interest.

On February 18, 2009, Dart filed a third-party demand, naming Jack W. Harang and his law firm, Jack W. Harang, a Professional Law Corporation (hereinafter collectively referred to as "Harang"), as third-party defendants, alleging that Harang was obligated to Dart for all amounts Dart had paid to Advocate on certain case loans. According to Dart's third-party demand, in 1995, Dart and Harang entered into a joint venture by oral agreement to handle certain legal cases together, whereby they were to equally share the work, equally share the expense of financing the cases, and equally share the profits and losses of the

“venture cases.”¹ In 1996, in furtherance of the venture, Dart and Harang agreed to apply to Advocate for financing of the “venture cases.” Although Harang undisputedly did not complete the loan applications with Advocate, and Dart was named sole obligor on the Advocate loans, the third-party demand alleged that Harang agreed to be liable for half of the Advocate loans and that Harang was fully aware of the loan terms, specifically, that the loans matured annually and were renewed with all accrued interest added to the principal of the new notes. The third-party demand also set forth certain payments that Dart made to Advocate on the alleged “venture loans.” However, the third-party demand alleged that two of the notes sued upon in the main demand represent the remaining balance of “venture loans,” as owed by Harang. According to the third-party demand, Dart was entitled to judgment against Harang in the amount of \$806,919.72, as the amount that Dart has paid to Advocate, plus all amounts that Dart owes to Advocate pursuant to a consent judgment entered into with Advocate.²

Harang filed an answer to the third-party demand, generally denying the allegations therein and raising the affirmative defenses of payment, set-off, and failure of consideration. Alternatively, Harang averred that if a joint venture did exist, then Dart is estopped from pursuing these claims as his settlement with Advocate extinguished certain defenses that Harang may have been able to assert in response to the main demand.

On September 25, 2013, Dart filed a motion for summary judgment, asserting that there were no genuine issues of material fact remaining and that as

¹While the third-party demand does not state when this venture ended, the record contains an affidavit from Dart stating that in late 1997, he advised Harang that he wished to terminate their relationship with respect to the “venture’s individual cases,” and that these cases were divided over the course of the next two years, while Dart and Harang continued to work together on three class-action cases, the *Gaylord*, *FMC*, and *Rhone-Poulenc* cases.

²According to the third-party demand, on February 18, 2008, Dart made a partial settlement of Advocate’s lawsuit by paying \$416,839.53 towards the “venture loans” and entered into a consent judgment for the remaining balance of the “venture loans” in the amount of \$507,220.06, with contractual interest accruing thereon from February 18, 2008, until paid. Advocate agreed to forebear collection on the consent judgment until August 18, 2008; thus, the judgment is now collectible.

such, Dart was entitled to judgment in his favor as a matter of law. In support of the motion, Dart submitted fifty-four exhibits, consisting of approximately 380 pages, including his affidavit and affidavits from his CPA and bookkeeper. As further support, Dart submitted "third party plaintiffs' statement of uncontested material facts," consisting of fifty-eight facts, and twelve pages in length.

Harang opposed the motion for summary judgment, asserting that there are numerous genuine issues of fact remaining, which require the weighing of evidence and credibility determinations. Harang also submitted his affidavit in opposition to the motion for summary judgment, wherein he attested to the following:

- (1.) Dart never consulted him prior to making the Advocate loans on "venture cases," as detailed in Dart's motion for summary judgment;
- (2.) He never authorized Dart to make Advocate loans pertaining to "venture cases," as detailed in Dart's motion for summary judgment;
- (3.) It was his understanding that Dart would *personally* provide the financing necessary to support the "venture cases";
- (4.) When Dart began borrowing funds from Advocate, he specifically advised Dart that he would not participate in these activities and he was not in favor of these activities;
- (5.) He specifically told Dart that he was not in favor of borrowing any money to finance the "venture cases";
- (6.) To the extent that he and Dart had an oral agreement, borrowing money at excessive rates of interest from Advocate was not part of the agreement.

Following a hearing on the motion for summary judgment, the trial court granted the motion in open court. A final judgment was signed on December 11, 2013, granting Dart's motion for summary judgment, and rendering judgment on the third-party demand, in favor of Dart and against Harang, in the amount of \$1,217,304.75, plus legal interest. Harang thereafter filed a motion for new trial and request for oral argument. However, the trial court denied the motion for new trial, without a hearing.

Harang then filed the instant appeal, asserting (1) that the trial court erred, as a matter of law, in granting summary judgment as there are unresolved genuine

issues of material fact as to whether any oral agreement between Dart and Harang applied to Advocate loans incurred after the dissolution of their joint venture and as to the amount owed to Dart; and (2) that the trial court erred in denying his motion for new trial, because the summary judgment was clearly contrary to the law and evidence, and because there were good grounds supporting his request for a new trial.

SUMMARY JUDGMENT

A motion for summary judgment is a procedural device used to avoid a full-scale trial when there is no genuine issue of material fact. All Crane Rental of Georgia, Inc. v. Vincent, 2010-0116 (La. App. 1st Cir. 9/10/10), 47 So. 3d 1024, 1027, writ denied, 10-2227 (La. 11/19/10), 49 So. 3d 387. Summary judgment is properly granted if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, admitted for purposes of the motion for summary judgment, show that there is no genuine issue of material fact, and that mover is entitled to judgment as a matter of law. LSA-C.C.P. art. 966(B)(2). Summary judgment is favored and “is designed to secure the just, speedy, and inexpensive determination of every action.” LSA-C.C.P. art. 966(A)(2).

The mover bears the burden of proving that he is entitled to summary judgment. LSA-C.C.P. art. 966(C)(2). If the party moving for summary judgment will bear the burden of proof at trial, that party must support his motion with credible evidence that would entitle him to a directed verdict if not controverted at trial. Such an affirmative showing will thereafter shift the burden of production to the party opposing the motion, requiring the opposing party either to produce evidentiary materials that demonstrate the existence of a genuine issue for trial or to submit an affidavit requesting additional time for discovery. Hines v. Garrett, 2004-0806 (La. 9/25/04), 876 So. 2d 764, 766-67. Where the mover will bear the

burden of proof at trial, the initial burden of proof on a motion for summary judgment remains with the mover to show that no genuine issues of material fact exists. Gros v. Boisvert Farms, LLC, 2013-0016 (La. App. 1st Cir. 2/27/14), 142 So. 3d 991, 995. As this court has previously recognized:

In ruling on a motion for summary judgment the trial court's role is not to evaluate the weight of the evidence or to determine the truth of the matter, but instead to determine whether there is a genuine issue of triable fact. A trial court cannot make credibility decisions on a motion for summary judgment. [Citations omitted.]

All Crane Rental of Georgia, Inc., 47 So. 3d at 1027.

Appellate courts review evidence *de novo* under the same criteria that govern the trial court's determination of whether summary judgment is appropriate. Boudreaux v. Vankerkhove, 2007-2555 (La. App. 1st Cir. 8/11/08), 993 So. 2d 725, 729-730. An appellate court thus asks the same questions as does the trial court in determining whether summary judgment is appropriate: whether there is any genuine issue of material fact, and whether the mover-appellant is entitled to judgment as a matter of law. All Crain Rental of Georgia, Inc., 47 So. 3d at 1027.

DISCUSSION

As the mover seeking summary judgment on the third-party demand, Dart had the burden of demonstrating that no genuine issues of material fact remain and that, based on the undisputed facts, he was entitled to judgment as a matter of law. Dart had the burden of proving the exact terms of the purported oral venture agreement with Harang and, specifically, whether there was an agreement for Harang to be responsible for half of the Advocate loans, despite the fact that the loans were in Dart's name only. Dart contends that he "more than met his burden" of proving the elements of the joint venture agreement, the breach of the agreement by Harang, and the resulting damages. Based on our *de novo* review of the evidence and affidavits introduced in support of the motion for summary judgment,

we conclude that genuine issues of material fact remain that preclude summary judgment.

Dart's statement of uncontested facts includes the statement that the terms of the venture were that Dart and Harang would equally share the work, **equally share the expenses of financing the cases**, and equally share in the profits and/or losses of the "venture cases." The only exhibit referenced in support of this statement is Dart's affidavit. In his affidavit, Dart states "[t]he terms of the Venture were that Dart and Harang would ... equally share the expenses of financing the cases." In contrast, Harang states in his affidavit that he never authorized Dart to make Advocate loans on the "venture cases," and, moreover, "[t]o the extent that Dart and [he] had an oral agreement, borrowing money at excessive rates of interest from Advocate Financial was not part of that agreement."

In motions for summary judgment, where a contract is ambiguous and the intent of the parties becomes a question of fact, there often are conflicting affidavits concerning the intent of the parties, which preclude granting summary judgment. Carter v. BRMAP, 591 So. 2d 1184, 1188-89 (La. App. 1st Cir. 1991). However, even though granting a motion for summary judgment based on an intent issue may be rare, it can be done when there is no issue of material fact concerning the pertinent intent. Carter, 591 So. 2d at 1189. Here, the "pertinent intent" is whether Harang intended to agree to be responsible for half of the Advocate loans that were incurred in Dart's name. The conflicting affidavits of Dart and Harang demonstrate that the terms of any agreement and the intent of the parties remains very much in dispute. Moreover, to resolve this issue, this court would be required to determine the terms of any agreement by weighing the credibility of Dart and Harang, to determine "the truth of the matter," which determination cannot be made on summary judgment. Revere v. Dolgencorp, Inc., 2004-1758 (La. App. 1st

Cir. 9/23/05), 923 So. 2d 101, 107 (“[T]he trial court (and the appellate court on appeal) cannot make credibility determinations on a motion for summary judgment.”) Accordingly, on the record before us, we conclude that genuine issues of material fact remain regarding the terms of any joint venture agreement with Harang, including, specifically, the obligations, if any, agreed upon by the parties, and whether the terms of the venture included an agreement to share the cost and interest accrued on the Advocate loans.

Moreover, based on the record before us, we disagree with Dart and the trial court that there was an “absolute acknowledgement” of the debt by Harang and that Dart established such. In granting summary judgment, the trial court commented that “Exhibit 12” was “the most compelling evidence,” as it “seem[ed] like an absolute acknowledgement of an indebtedness to pay off [the Advocate balance], not questioning balances or amounts but a specific absolute obligation and acknowledgment to that.” Notably, exhibit twelve is a handwritten note purportedly signed by Harang and dated July 1, 2003, which states: “At the resolution of my arbitration[,] I/we agree to pay off the adjusted advocate balance.” However, without more, the record provides no basis to support the conclusion that all material issues of fact are resolved by the evidence herein.

As the burden of proof remained with Dart on summary judgment, it was Dart’s burden to demonstrate that the July 1, 2003 note unequivocally establishes that Harang acknowledged his indebtedness for the Advocate loans at issue herein. On review, we conclude that this one-sentence note does not establish any such acknowledgment. Instead, genuine issues of material fact remain as to: (1) the identity of “I/we” referred to in the note; (2) whether this note pertains to the same Advocate loans at issue in this litigation; and (3) even if this note establishes an acknowledgment of the subject loans, what is meant by and/or the amount of the

“adjusted Advocate balance.”³ As reflected in his discovery responses, Harang specifically denies that he ever agreed to pay half of the Advocate loans allegedly used to fund “venture cases.” These discovery responses, which were introduced into evidence by Dart in support of the motion for summary judgment, are in direct conflict with Dart’s argument that the July 1, 2003 handwritten note constituted an acknowledgment of the debt by Harang.

Resolution of these conflicting versions of the facts and the terms, nature, and scope of any agreement would require the weighing of conflicting evidence and determination of credibility, which are inappropriate in summary judgment proceedings. The law is well settled that the trial court cannot make credibility determinations, evaluate testimony, or weigh conflicting evidence in making a decision whether to grant or deny a motion for summary judgment. Pumphrey v. Harris, 2012-0405 (La. App. 1st Cir. 11/2/12), 111 So. 3d 86, 91. Accordingly, based on *de novo* review, we are unable to find that Dart satisfied the required burden of demonstrating that no genuine issues of material fact remain. In particular, we find that issues of fact remain as to: (1) the exact terms of the oral venture agreement between Dart and Harang; (2) whether Harang expressly acknowledged his indebtedness for the Advocate loans at issue in the principal demand and third-party demand; and (3) if Harang is indebted for the Advocate loans, the amount, if any, owed by Harang to Dart under the “comprehensive lending scheme” that Dart alone entered into with Advocate. Consequently, on the record before us, we find that the trial court erred in granting summary judgment in favor of Dart and against Harang on the third-party demand.⁴

³We recognize that although Harang could have offered an explanation of this note in opposition to the motion for summary judgment, he was not required to do so, as the burden of proof remained with Dart.

⁴In so ruling, we pretermitt discussion of Harang’s second assignment of error as to whether the trial court erred in denying his motion for new trial.

CONCLUSION

For the above reasons, the December 11, 2013 judgment of the trial court, granting the third-party plaintiffs' motion for summary judgment and rendering judgment against Jack W. Harang, in the amount of \$1,217,304.75, plus legal interest, is hereby reversed. The case is remanded to the trial court for further proceedings. Costs of this appeal are assessed to third-party plaintiffs, Henry T. Dart and Henry Dart, Attorney at Law, P.C.

REVERSED AND REMANDED.