

IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
September 19, 2006 Session

LOCKE DAVIS v. O&P ASSOCIATES, INC., ET AL.

**Appeal from the Chancery Court for Hamilton County
No. 04-0038 Howell N. Peoples, Chancellor**

No. E2005-02300-COA-R3-CV - FILED JANUARY 10, 2007

Locke Davis (“Plaintiff”) sued O&P Associates, Inc. and James Rogers, individually (“Defendants” or “O&P” and “Mr. Rogers” as appropriate) claiming, in part, that Defendants were in default under a note held by Plaintiff. Defendants answered and filed a counterclaim asserting, in part, that Plaintiff was in breach of contractual obligations contained in a settlement agreement and that Plaintiff had tortiously interfered with Defendants’ business and engaged in a civil conspiracy. Plaintiff filed a motion for summary judgment. The Trial Court, *inter alia*, granted Plaintiff summary judgment, found Defendants in default on the note, dismissed Defendants’ tortious interference and civil conspiracy claims, and granted Plaintiff a judgment. Defendants appeal to this Court. We affirm.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed;
Case Remanded**

D. MICHAEL SWINEY, J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, P.J., and SHARON G. LEE, J., joined.

John T. Rice, Chattanooga, Tennessee for the Appellants, O&P Associates, Inc. and James Rogers.

Michael A. Anderson, Chattanooga, Tennessee for the Appellee, Locke Davis.

OPINION

Background

In late 1997, or early 1998, Davis Orthopedics, Inc. merged with O&P. Prior to the merger, Plaintiff was the sole owner and stockholder of Davis Orthopedics, Inc. After the merger, Plaintiff became an employee, officer, director, and shareholder of O&P. Mr. Rogers is the President of O&P.

At some point the relationship between Plaintiff and Defendants soured. Defendants sent Plaintiff a letter dated May 21, 2001, stating that Plaintiff was placed on suspension from employment with O&P for violation of fiduciary responsibility to O&P and for having an inappropriate relationship with another O&P employee. Plaintiff then sent Defendants a letter dated June 11, 2001, giving notice that Plaintiff was resigning as an officer and employee of O&P.

On June 3, 2002, Plaintiff, Defendants, and the Irrevocable Trust of Margaret "Peggy" Davis ("the Trust") executed several documents in an attempt to settle the issues between Plaintiff and Defendants. Margaret "Peggy" Davis is Plaintiff's mother.

A Release and Settlement Agreement ("Settlement Agreement") was executed on June 3, 2002, by Mr. Rogers as President of O&P; Mr. Rogers individually; the trustees of the Trust; and Plaintiff. These parties also executed a Stock Purchase Agreement that same day. In pertinent part, the Settlement Agreement provides:

WHEREAS, the Trust, Davis and Rogers own shares of common stock of O&P and pursuant to a Stock Purchase Agreement, the Trust and Davis wish to transfer their shares to O&P; and

WHEREAS, the parties to this Agreement, being represented by counsel, desire to agree that it would be in the best interests of all Parties to settle and resolve all disputes pursuant to the terms of this Agreement;

NOW THEREFORE, in consideration of the above premises, and for other good and valuable consideration, the receipt and legal sufficiency of which is hereby irrevocably acknowledged, the parties agree as follows:

* * *

2. (a) Each of O&P and Rogers on behalf of itself and himself, respectively, and each respective Related Party (as defined below) hereby releases and forever discharges each of Davis and the Trust, and each of their respective Related Parties, from any and all claims, debts, demands, costs, expenses, causes of actions,

obligations, damages and liabilities of any nature whatsoever, including ownership claims of intellectual property, whether in contract, tort or otherwise and whether or not now known, suspected or claimed, which each of O&P and Rogers ever had, now have, or claimed to have against each of Davis and the Trust arising out of or in any way relating to the business operation, affairs or ownership of O&P. Each of O&P and Rogers hereby covenants and agrees never to commence, aid in any way, prosecute or cause or permit to be commenced or prosecuted any future action or other proceeding based on any such claims, demands, causes of action, damages or liabilities unless compelled by legal process to do so.

(b) Each of Davis and the Trust on behalf of himself and itself, respectively, and each of their respective Related Parties hereby releases and forever discharges each of O&P and Rogers, and each respective Related Party, from any and all claims, debts, demands, costs, expenses, causes of actions, obligations, damages and liabilities of any nature whatsoever, whether in contract, tort or otherwise and whether or not now known, suspected or claimed, which each of Davis and the Trust ever had, now have, or claimed to have against each of O&P and Rogers arising out of or in any way relating to the business operation, affairs or ownership of O&P. Each of Davis and the Trust hereby covenants and agrees never to commence, aid in any way, prosecute or cause or permit to be commenced or prosecuted any future action or other proceeding based on any such claims, demands, causes of action, damages or liabilities unless compelled by legal process to do so.

(c) For purposes of this Agreement, a Related Party means a Party's officers, directors, managers, trustees, employees, shareholders, partners, agents, affiliates, successors and assigns.

3. Each Party agrees that it will keep the terms of this Agreement completely confidential and that it will not hereafter disclose any information concerning this Agreement to any person or entity other than its own attorneys and tax advisors, except as required by law; provided that those individuals will be deemed the Party's agents and, therefore, bound by this Agreement. The Parties recognize and acknowledge that strict confidentiality is the essence of this Agreement and that every Party would suffer immediate and irreparable harm in the event of any breach of that confidentiality.

4. Each and every Party agrees not to publicly disparage or defame any other Party, and any other Party's officers, directors, trustees, employees, shareholders, partners, affiliates and agents, in any manner likely to be harmful to them or their business, business reputation or personal reputation; provided that the foregoing shall not prohibit any Party from responding accurately and fully to any questions, inquiry or request for information when required by legal process.

* * *

9. The parties mutually agree and understand that if the facts with respect to which this Agreement is executed are found hereafter to be other than or different from the facts in that connection now believed by them to be true, they expressly accept and assume the risks of such possible difference in facts and agree that this Agreement shall be and remain effective and final notwithstanding such differences and facts.

Mr. Rogers also executed a Promissory Note (“Note”) in his capacity as the President of O&P, and a Guaranty Agreement (“Guaranty”) in his individual capacity on June 3, 2002. The Note provides, in pertinent part:

FOR VALUE RECEIVED, O&P ASSOCIATES, INC. a Tennessee corporation (“*Borrower*”), hereby unconditionally promises to pay to the order of the **IRREVOCABLE TRUST OF MARGARET “PEGGY” DAVIS, DATED MARCH 18, 1996** (“*Trust*”) in lawful money of the United States of America and in immediately available funds, the principal sum of One Hundred Twenty Thousand Dollars (\$120,000.00), or, if less, the aggregate unpaid principal amount outstanding on this Note (the “*Loan*”) together with accrued and unpaid interest thereon, due and payable on the dates and in the manner set forth below.

* * *

James Rogers (the “Guarantor”) guarantees the performance of \$60,000 of principal payments and related interest of the Company’s obligations under this Note, subject to the provisions of this Note and the Guaranty.

* * *

(b) The Borrower shall be under no obligation to make any interest or principal payments until November 1, 2003. Beginning on November 1, 2003, and continuing on January 1, April 1, July 1 and October 1 of each subsequent year, the Company shall make quarterly payments of interest based on the applicable interest rate for such preceding quarter. Commencing on October 1, 2004, the Company shall make quarterly payments of principal and interest on the 1st day of October, January, April and July of each subsequent year based upon a straight-line seven year amortization schedule attached hereto as Annex A. This Note will mature on June 1, 2009, at which time the outstanding principal amount thereof which has not been paid, together with accrued but unpaid interest, shall be due and payable in full.

* * *

6. Costs of Collection. In the event of any default hereunder or under the Stock Purchase Agreement, Borrower shall pay all reasonable attorneys' fees and court costs incurred by the Trust in enforcing and collecting this Note.

* * *

9. Default. Each of the following events shall be an "*Event of Default*" hereunder:

(a) Borrower fails to pay timely the principal amount or any accrued interest or other amounts due under this Note on the date the same becomes due and payable;

* * *

Upon the occurrence of an Event of Default hereunder, all unpaid principal, accrued interest and other amounts owing hereunder shall, at the option of the Trust, ... be immediately due, payable and collectible by the Trust pursuant to applicable law.

* * *

13. Successors and Assigns. The provisions of this Note shall inure to the benefit of and be binding on any successor to Borrower and shall extend to any holder hereof.

The Guaranty¹ executed by Mr. Rogers provides, in pertinent part:

FOR VALUE RECEIVED, and in consideration of credit given to **O&P Associates, Inc.**, a Tennessee corporation (hereinafter called the "Debtor"), by **the Irrevocable Trust of Margaret "Peggy" Davis dated March 18, 1996** (hereinafter called the "Trust"), the undersigned **James Rogers** (hereinafter collectively the "Guarantor") hereby for himself and his heirs, executors, administrators and successors absolutely and unconditionally guarantees the full and prompt payment to the Trust, at maturity (whether by acceleration or otherwise) and at all times thereafter, of any and all indebtednesses, obligations and liabilities related to that certain Promissory Note dated June 3, 2002 between the Debtor and the Trust, together with all expenses, legal and/or otherwise (including court costs and attorney's fees) incurred by the Trust ... collecting or endeavoring to collect such

¹The record before us contains multiple copies of the Guaranty, yet all of these copies were cut off on one side impairing our ability to quote in full from the paragraph pertaining to the Trust's right to assign the Note. This fact, however, does not impact our analysis of the issues involved in this appeal as the pertinent portions of this particular paragraph are legible and complete in the copies contained in the record.

indebtedness or any part thereof, and in enforcing this Guaranty (all of which is collectively referred to as the “Indebtedness”). The right of recovery, however, against the Guarantor is limited to \$60,000 plus the applicable interest under the Note.

* * *

The Trust may without any notice whatsoever to anyone, sell, assign or transfer all or any part of said Indebtedness; and in that event each and every immediate and successive assignee, transferee or holder of all or any part of said Indebtedness shall have the right to enforce this Guaranty, by suit or otherwise, for the benefit of such assignee, transferee or holder, as fully as ... such assignee, transferee or holder were herein by name given such rights, powers and ... but the Trust shall have an unimpaired right, prior and superior to that of any said assignee, transferee or holder, to enforce this Guaranty for the benefit of the Trust, as to so much ... said Indebtedness that has not been sold, assigned or transferred.

Also on June 3, 2002, the Trust executed a Note Assignment Form (“Assignment”) assigning all of its rights under the Note to Plaintiff.

Approximately a year and a half later, Plaintiff sent Defendants a letter dated December 8, 2003, that stated, in pertinent part:

This letter is to inform you of your failure to pay timely the first payment of accrued interest due under the promissory note to the Irrevocable Trust of Margaret “Peggy” Davis, dated June 3, 2002.

Your first payment was due on November 3, 2003. Payment should be made in three business days from the from the (sic) date of this notice or further action will be required to deal with this event of default.

Upon request, Plaintiff provided Defendants a copy of the Assignment. Defendants still did not tender timely payment to Plaintiff and on January 9, 2004, Plaintiff filed the instant suit claiming, in part, that Defendants were in default on the Note and that “[t]he entire balance of principal plus interest, late charges, costs and attorney fees under the Note is presently due and owing”

Defendants answered Plaintiff’s complaint and filed a counterclaim asserting, in part, that Plaintiff was in breach of the Settlement Agreement and that Plaintiff had engaged in tortious interference with Defendants’ business and in a civil conspiracy. Defendants later moved to amend their counterclaim to include two additional parties, Jeanette Beach and the Trust, and to assert, among other things, additional theories of civil conspiracy. By order entered January 31, 2005, the Trial Court granted Defendants’ motion to amend.

Plaintiff moved for summary judgment and the Trust filed its motion to dismiss. On May 17, 2005, the Trial Court entered a Memorandum Opinion and Order, granting, *inter alia*, Plaintiff's motion for summary judgment and granting the Trust's motion to dismiss. Defendants filed a motion for relief under Rule 60, Tenn. R. Civ. P., which the Trial Court denied. The Trial Court then entered a Final Judgment on September 7, 2005, *inter alia*, granting Plaintiff summary judgment, finding Defendants in default under the Note, dismissing Defendants' claims against Plaintiff and Jeanette Beach, and granting Plaintiff a judgment against Defendants for the sum due under the Note plus attorney's fees and post-judgment interest as provided for in the Note. Defendants filed another motion for relief under Rule 60, Tenn. R. Civ. P. asserting that the Trial Court erred in entering a judgment against Mr. Rogers that exceeded the amount provided for in the Guaranty, that included attorney's fees, and that made Mr. Rogers jointly and severally liable for a judgment against O&P.

Defendants filed an appeal with this Court. Defendants also filed a motion asking this Court to grant a limited remand to address errors in the calculation of the judgment. This Court remanded the case to the Trial Court for the limited purpose of relief from the final judgment, if appropriate, as to the calculation of damages. Upon remand, the Trial Court entered an order February 1, 2006, finding and holding, *inter alia*:

ORDERED that consistent with the terms of the Guaranty the obligation of James Rogers for attorney's fees is amended and that obligation is deleted and the judgment corrected and that the plaintiff is only entitled to a judgment in the sum of \$77,117.19 against James Rogers. Further, it is

ORDERED that the judgment is clarified that the total amount of the judgment is \$154,234.38 exclusive of attorney's fees and costs, and a separate amount contained in the original judgment of \$77,000.00 against James Rogers personally is deleted. Further, it is

ORDERED that this clarification of the previous judgment entered relates back to September 7, 2005 nunc pro tunc.

Defendants appeal to this Court.

Discussion

Although not stated exactly as such, Defendants raise two issues on appeal: 1) whether the Trial Court erred in finding that Defendants were in default under the Note and, then granting Plaintiff summary judgment; and, 2) whether the Trial Court erred in granting summary judgment to Plaintiff on Defendants' tortious interference and civil conspiracy claims. Plaintiff raises as an issue whether the Trial Court erred in interpreting the Guaranty to preclude an award of attorney's fees against Mr. Rogers.

In *Blair v. West Town Mall*, our Supreme Court reiterated the standards applicable when appellate courts are reviewing a motion for summary judgment. *Blair v. West Town Mall*, 130 S.W.3d 761 (Tenn. 2004). In *Blair*, the Court stated:

The standards governing an appellate court's review of a motion for summary judgment are well settled. Since our inquiry involves purely a question of law, no presumption of correctness attaches to the lower court's judgment, and our task is confined to reviewing the record to determine whether the requirements of Tennessee Rule of Civil Procedure 56 have been met. See *Staples v. CBL & Assoc., Inc.*, 15 S.W.3d 83, 88 (Tenn. 2000); *Hunter v. Brown*, 955 S.W.2d 49, 50-51 (Tenn. 1997); *Cowden v. Sovran Bank/Central South*, 816 S.W.2d 741, 744 (Tenn. 1991). Tennessee Rule of Civil Procedure 56.04 provides that summary judgment is appropriate where: 1) there is no genuine issue with regard to the material facts relevant to the claim or defense contained in the motion, and 2) the moving party is entitled to a judgment as a matter of law on the undisputed facts. *Staples*, 15 S.W.3d at 88.

* * *

When the party seeking summary judgment makes a properly supported motion, the burden shifts to the nonmoving party to set forth specific facts establishing the existence of disputed, material facts which must be resolved by the trier of fact.

To properly support its motion, the moving party must either affirmatively negate an essential element of the non-moving party's claim or conclusively establish an affirmative defense. If the moving party fails to negate a claimed basis for the suit, the non-moving party's burden to produce evidence establishing the existence of a genuine issue for trial is not triggered and the motion for summary judgment must fail. If the moving party successfully negates a claimed basis for the action, the non-moving party may not simply rest upon the pleadings, but must offer proof to establish the existence of the essential elements of the claim.

Blair, 130 S.W.3d at 763, 767 (quoting *Staples*, 15 S.W.3d at 88-89) (citations omitted)).

Our Supreme Court also has provided instruction regarding assessing the evidence when dealing with a motion for summary judgment stating:

The standards governing the assessment of evidence in the summary judgment context are also well established. Courts must view the evidence in the light most favorable to the nonmoving party and must also draw all reasonable inferences in the nonmoving party's favor. See *Robinson v. Omer*, 952 S.W.2d at

426; *Byrd v. Hall*, 847 S.W.2d at 210-11. Courts should grant a summary judgment only when both the facts and the inferences to be drawn from the facts permit a reasonable person to reach only one conclusion. See *McCall v. Wilder*, 913 S.W.2d 150, 153 (Tenn. 1995); *Carvell v. Bottoms*, 900 S.W.2d 23, 26 (Tenn. 1995).

Staples v. CBL & Assocs., Inc., 15 S.W.3d 83, 89 (Tenn. 2000).

We begin by addressing whether the Trial Court erred in finding that Defendants were in default under the Note. As this Court explained in *Kafozi v. Windward*:

In resolving a dispute concerning contract interpretation, our task is to ascertain the intention of the parties based upon the usual, natural, and ordinary meaning of the contract language. *Planters Gin Co. v. Fed. Compress & Warehouse Co., Inc.*, 78 S.W.3d 885, 889-90 (Tenn. 2002)(citing *Guiliano v. Cleo, Inc.*, 995 S.W.2d 88, 95 (Tenn. 1999)). A determination of the intention of the parties “is generally treated as a question of law because the words of the contract are definite and undisputed, and in deciding the legal effect of the words, there is no genuine factual issue left for a jury to decide.” *Planters Gin Co.*, 78 S.W.3d at 890 (citing 5 Joseph M. Perillo, *Corbin on Contracts*, § 24.30 (rev. ed. 1998); *Doe v. HCA Health Servs. of Tenn., Inc.*, 46 S.W.3d 191, 196 (Tenn. 2001)). The central tenet of contract construction is that the intent of the contracting parties at the time of executing the agreement should govern. *Planters Gin Co.*, 78 S.W.3d at 890. The parties’ intent is presumed to be that specifically expressed in the body of the contract. “In other words, the object to be attained in construing a contract is to ascertain the meaning and intent of the parties as expressed in the language used and to give effect to such intent if it does not conflict with any rule of law, good morals, or public policy.” *Id.* (quoting 17 Am. Jur. 2d, *Contracts*, § 245).

This Court’s initial task in construing the Contract at issue is to determine whether the language of the contract is ambiguous. *Planters Gin Co.*, 78 S.W.3d at 890. If the language is clear and unambiguous, the literal meaning of the language controls the outcome of the dispute. *Id.* A contract is ambiguous only when its meaning is uncertain and may *fairly* be understood in more than one way. *Id.* (emphasis added). If the contract is found to be ambiguous, we then apply established rules of construction to determine the intent of the parties. *Id.* Only if ambiguity remains after applying the pertinent rules of construction does the legal meaning of the contract become a question of fact. *Id.*

Kafozi v. Windward Cove, LLC, 184 S.W.3d 693, 698-99 (Tenn. Ct. App. 2005).

The Note clearly and unambiguously provides: “Beginning on November 1, 2003, and continuing on January 1, April 1, July 1 and October 1 of each subsequent year, the Company shall make quarterly payments of interest based on the applicable interest rate for such preceding quarter.”

The Note also clearly and unambiguously provides that if “Borrower fails to pay timely the principal amount or any accrued interest or other amounts due under this Note on the date the same becomes due and payable; ...,” such failure constitutes an event of default. Upon an event of default, the Note clearly and unambiguously provides that “all unpaid principal, accrued interest and other amounts owing hereunder shall, at the option of the Trust, ... be immediately due, payable and collectible by the Trust pursuant to applicable law.”

The Note clearly and unambiguously provides that its provisions “shall inure to the benefit of and be binding on any successor to Borrower and shall extend to any holder hereof.” In addition, the Guaranty clearly and unambiguously provides:

The Trust may without any notice whatsoever to anyone, sell, assign or transfer all or any part of said Indebtedness; and in that event each and every immediate and successive assignee, transferee or holder of all or any part of said Indebtedness shall have the right to enforce this Guaranty, by suit or otherwise, for the benefit of such assignee, transferee or holder,

Thus, the Trust had the right to assign the Note without any notice whatsoever. The record reveals that the Trust assigned its rights under the Note to Plaintiff.

The record reveals that Defendants did not make the first payment of accrued interest due under the Note when it was due in November of 2003. Likewise, Defendants did not make the January 2004 payment when it came due. Defendants argue that they "tendered two checks in satisfaction of the interest payments," and, therefore, "suit was inappropriate." However, a careful review of the record reveals that the two payments Defendants claim to have attempted to tender were not tendered until after Plaintiff had given Defendants notice of the default and the period of time to cure the default had elapsed. Although the record is not crystal clear as to the exact date of any such attempt to tender the checks, what is undisputed is that any such attempt occurred outside of the time given to Defendants to cure the default. Defendants' attempt to tender the checks was simply too little, too late. Given this, Defendants' argument that they had attempted to cure the default is without merit. Defendants' failure to pay constituted an event of default under the Note and Plaintiff as the holder of the Note was entitled under the terms of the Note to declare a default and further declare that “all unpaid principal, accrued interest and other amounts owing ...” under the Note were immediately due and payable. Further, Plaintiff as the holder of the Note had the right to enforce the Guaranty “by suit or otherwise”

As the contract in this case is clear and unambiguous, the interpretation of the contract is a question of law leaving no genuine factual issue for a jury to decide. *See Kafozi*, 184 S.W.3d at 698 (stating: “A determination of the intention of the parties ‘is generally treated as a question of law because the words of the contract are definite and undisputed, and in deciding the legal effect of the words, there is no genuine factual issue left for a jury to decide.’” quoting *Planters Gin Co.*, 78 S.W.3d at 890). There is no genuine issue with regard to the material facts as to the issue of whether Defendants were in default under the Note, and Plaintiff is entitled to summary judgment

as a matter of law. We, therefore, affirm the Trial Court's grant of summary judgment on the issue of whether Defendants were in default under the Note.

We next consider whether the Trial Court erred in granting summary judgment to Plaintiff on Defendants' tortious interference and civil conspiracy claims. Defendants' tortious interference and civil conspiracy claims rest upon several allegations. Defendants allege that the Trust conspired to make a secret assignment of the Note to Plaintiff, which somehow impaired Defendants' ability to meet their obligations under the Note. Defendants also allege that Plaintiff "went into direct competition [with O&P] opening its own business Dynamic Prosthetics" and that Plaintiff "garnered the business of Benchmark and Siskin ..." with assistance from a co-conspirator, Jeanette Beach, who worked first at Benchmark and then later at Siskin. Defendants assert that by these actions Plaintiff violated his fiduciary duty to O&P.

"An actionable civil conspiracy is a combination of two or more persons who, each having the intent and knowledge of the other's intent, accomplish by concert an unlawful purpose, or accomplish a lawful purpose by unlawful means, which results in damage to [another.]" *Trau-Med of Am., Inc. v. Allstate Ins. Co.*, 71 S.W.3d 691, 703 (Tenn. 2002).

Addressing Defendants' conspiracy claims regarding the assignment of the Note, we first note that as discussed fully above, the Trust had the right to assign the Note to anyone with no notice whatsoever. Thus, Defendants' claim regarding the secrecy of the assignment is without merit. Next, we note, as did the Trial Court, that the assignment of the Note in no way impaired Defendants' ability to meet their obligations under the Note. As the Trial Court aptly stated in its May 17, 2005, Memorandum Opinion and Order:

Assuming that the Plaintiff actively concealed that he was the holder of the Note, the act cannot constitute an overt act in furtherance of the conspiracy. The action of taking the assignment of the Note did not further the conspiracy because it could not have caused any damages to the Defendants. Regardless of who held the Note, if O&P Associates failed to make payments, the holder would have the right to file suit to collect on the Note. By acquiring the Note, [Plaintiff] did not cause any potential damage to the Defendants. While the Defendants may not like paying [Plaintiff], [Plaintiff] could not cause them any harm if they did not default on the Note. The Defendants could have simply sent a check to [Plaintiff] after they received notice of the assignment. However, O&P Associates chose not to make a payment.

(footnote omitted). Thus, the assignment of the Note to Plaintiff was neither unlawful nor was it accomplished in an unlawful manner that caused damage to Defendants. This issue is without merit.

We next address Defendants' allegations that Plaintiff violated a fiduciary duty to O&P by opening his own business and that Plaintiff and Ms. Beach conspired to obtain the business of Benchmark and Siskin. The record reveals that the actions Defendants complain about all occurred prior to June 3, 2002, the date that Plaintiff and Defendants executed the Settlement

Agreement. The Settlement Agreement clearly and unambiguously provides that Defendants released and discharged Plaintiff:

from any and all claims, debts, demands, costs, expenses, causes of actions, obligations, damages and liabilities of any nature whatsoever, including ownership claims of intellectual property, whether in contract, tort or otherwise and whether or not now known, suspected or claimed, which each of O&P and Rogers ever had, now have, or claimed to have against each of Davis and the Trust arising out of or in any way relating to the business operation, affairs or ownership of O&P.

The actions that Defendants complain about, specifically, that Plaintiff opened a competing business and that Plaintiff took steps to obtain business from O&P clients clearly relate to the business operation or affairs of O&P. Defendants, who were represented by counsel as documented in the Settlement Agreement, released Plaintiff from any and all claims in contract or tort arising out of or in any way relating to the business operation or affairs of O&P.

The Settlement Agreement also clearly and unambiguously provides that Defendants:

agree and understand that if the facts with respect to which this Agreement is executed are found hereafter to be other than or different from the facts in that connection now believed by them to be true, they expressly accept and assume the risks of such possible difference in facts and agree that this Agreement shall be and remain effective and final notwithstanding such differences and facts.

Defendants cannot now claim they were unaware of the facts regarding the alleged breach of fiduciary duty or the alleged conspiracy as Defendants assumed that risk when they signed the Settlement Agreement. The Settlement Agreement clearly and unambiguously provides that Defendants released Plaintiff from all claims of this nature, and the courts must enforce the contract as written.

There are no genuine issues of material fact regarding Defendants' tortious interference and civil conspiracy claims, and Plaintiff is entitled to summary judgment on these claims as a matter of law. We, therefore, affirm the Trial Court's grant of summary judgment on these issues and claims.

Finally, we consider Plaintiff's issue as to whether the Trial Court erred in interpreting the Guaranty to preclude an award of attorney's fees against Mr. Rogers. The Note and Guaranty provide that in the event of default, Defendants would pay reasonable attorney's fees and court costs incurred in enforcing and collecting on the Note. However, the Guaranty clearly and unambiguously provides that "[t]he right of recovery, however, against the Guarantor is limited to \$60,000 plus the applicable interest under the Note." Mr. Rogers is the Guarantor under the Guaranty. Thus, the right of recovery against Mr. Rogers individually is limited to \$60,000 plus the applicable interest under the Note. The Trial Court awarded Plaintiff a judgment against Mr. Rogers

for \$60,000 plus the applicable interest under the Note. As Plaintiff's right of recovery against Mr. Rogers is clearly and unambiguously limited to \$60,000 plus the applicable interest, and the judgment Plaintiff obtained is for this amount, the Trial Court correctly refused to award Plaintiff a judgment for attorney's fees against Mr. Rogers. We affirm on this issue.

Conclusion

The judgment of the Trial Court is affirmed, and this cause is remanded to the Trial Court for collection of the costs below. The costs on appeal are assessed 50% against the Appellants, O&P Associates, Inc. and James Rogers, and their surety, and 50% against the Appellee Locke Davis.

D. MICHAEL SWINEY, JUDGE