IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

A.M. TODD COMPANY, INC., a Michigan corporation, Respondent, v. B&G FARMS, INC., a Washington corporation, and MICHAEL B. BROWN and MARGIE BROWN, individually and the marital community composed thereof, Appellants.	)	No. 30096-0-III UNPUBLISHED OPINION

Kulik, J. — B&G Farms, Inc. signed a promissory note to A.M. Todd Company, Inc. for over $2 million dollars. B&G failed to pay on the note, and A.M. Todd sued. B&G Farms asserted the defense of business compulsion, contending that A.M. Todd financially forced B&G Farms to sign the promissory note by not acting in B&G Farms' best interest under the 1999 production agreement. We conclude that no genuine issue of material fact exists as to whether (1) B&G Farms signed the note under duress, or (2) whether A.M. Todd owes B&G Farms an accounting of the 1999 production agreement.

Therefore, we affirm the trial court's summary judgment in favor of A.M. Todd.

FACTS

A.M. Todd, a Michigan corporation, is the world's largest supplier of American peppermint and spearmint oils for oral care, confectionary purposes, and chewing gum. B&G Farms, a Washington corporation, grew and supplied A.M. Todd with mint oil. Michael and Margie Brown own and operate B&G Farms, Inc.

In 1999, A.M. Todd and B&G Farms entered into a five year mint production agreement (1999 agreement). Under the terms of the 1999 agreement, B&G Farms produced a specified number of pounds of choice mint oil, and A.M. Todd sold the oil. The parties shared the net revenues. Additionally, A.M. Todd financed B&G Farms' mint growing operation. As a security for the financing, B&G Farms granted A.M. Todd a mortgage on real estate and a security interest in the peppermint crop.

The 1999 agreement had provisions for annual accounting reports. Upon the request of A.M. Todd, B&G Farms was to produce an annual report of B&G Farms' participation amount. In return, A.M. Todd was to deliver to B&G Farms a report prepared by an independent accounting firm to verify A.M. Todd's participation amount.

The parties dispute whether A.M. Todd complied with the annual accounting. The parties also dispute whether the 1999 agreement constituted a joint venture.

To meet the obligations of the 1999 agreement, B&G Farms invested between $11 and $12 million dollars in acreage and infrastructure. As a result, B&G Farms' production represented 7 to 8 percent of the United States market for mint oil. B&G Farms and A.M. Todd executed contracts for mint oil again in 2005 and 2006. These yearly contracts did not contain the revenue and loss sharing provisions of the 1999 agreement.

After entering the agreement, the market for mint oil declined. B&G Farms incurred losses under the 1999 agreement every year except 2002. B&G Farms owed a substantial debt to A.M. Todd at the expiration of the agreement. Mr. Brown confirmed the specific amount of debt accumulated as of February 14, 2003, and as of January 25, 2005.

In 2007, B&G Farms faced liquidation. B&G Farms' lender, Cenex, was no longer willing to continue B&G Farms' operating loan unless B&G Farms paid down its debt. B&G Farms sought financing through another lender, Rabo. Rabo required that A.M. Todd release the mortgage that A.M. Todd had on B&G Farms' property.

A.M. Todd released the mortgage in exchange for a partial payment of $500,000 and for a promissory note in the amount of $2,348,125. Interest was to accrue on the principal amount of the note at the rate of 7.25 percent. The promissory note called for

annual payments of approximately $600,000 from 2008 to 2011 and allowed A.M. Todd to accelerate the entire outstanding balance if the payments were not made. The promissory note also provided for a 12 percent interest rate on default. The Browns signed the note as individuals and Mr. Brown signed on behalf of B&G Farms.

The Browns and B&G Farms did not make payments on the note. A.M. Todd accelerated the entire balance of principal and interest.

On March 29, 2010, A.M. Todd filed its complaint against B&G Farms for payment of the promissory note. A.M. Todd moved for summary judgment. The trial court granted summary judgment in favor of A.M. Todd and ordered B&G Farms and the Browns jointly and severally liable for the principal of the note, plus 12 percent interest from December 1, 2008, totaling $717,750.98. The trial court also awarded attorney fees to A.M. Todd. B&G Farms appeals.

ANALYSIS

An appellate court reviews an order of summary judgment de novo. *Hisle v. Todd Pac. Shipyards Corp.*, 151 Wn.2d 853, 860, 93 P.3d 108 (2004). Summary judgment is appropriate when there is "no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR 56(c). "A material fact is of such a nature that it affects the outcome of the litigation." *Ruff v. County of King*, 125 Wn.2d

697, 703, 887 P.2d 886 (1995).

The reviewing court considers the facts and inferences from the facts in the light most favorable to the nonmoving party. *Jones v. Allstate Ins. Co.*, 146 Wn.2d 291, 300, 45 P.3d 1068 (2002). Factual issues may be decided as a matter of law when reasonable minds could reach but one conclusion or when the factual dispute is so remote it is not material. *Ruffer v. St. Frances Cabrini Hosp. of Seattle*, 56 Wn. App. 625, 628, 784 P.2d 1288 (1990) (quoting *Trane Co. v. Brown-Johnston, Inc.*, 48 Wn. App. 511, 513, 739 P.2d 737 (1987)).

A defendant moving for summary judgment may meet the initial burden by pointing out the absence of evidence to support the nonmoving party's case. *Young v. Key Pharm., Inc.*, 112 Wn.2d 216, 225 n.1, 770 P.2d 182 (1989) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)). "If the moving party is a defendant and meets the initial showing, then the inquiry shifts to the party with the burden of proof at trial, the plaintiff." *Id.* at 225 (footnote omitted). The facts set forth must be specific, detailed, and not speculative or conclusory. *Sanders v. Woods*, 121 Wn. App. 593, 600, 89 P.3d 312 (2004). If, at this point, the plaintiff "'fails to make a showing sufficient to establish the existence of an element essential to [his or her] case, and on which [he or she] will bear the burden of proof at trial', then the trial court should

grant the motion." *Young*, 112 Wn.2d at 225 (quoting *Celotex*, 477 U.S. at 322).

Promissory Note—Duress. Duress is a defense to an action enforcing a payable instrument and nullifies the obligation to the obligor. RCW 62A.3-305(a)(1)(ii). Business compulsion is a specific species of duress. *Barker v. Walter Hogan Enter., Inc.*, 23 Wn. App. 450, 596 P.2d 1359 (1979). Business compulsion involves an "involuntary action, in which one is compelled to act against his will in such a manner that he suffers a serious business loss or is compelled to make a monetary payment to his detriment." *Starks v. Field*, 198 Wash. 593, 598, 89 P.2d 513 (1939). The words "involuntary" and "compelled" are essential to the doctrine. *Barker*, 23 Wn. App. at 453. "Implicit in both words is the concept that the immediacy of the situation renders impractical any court action by which the victim might avoid the burden of either of the detrimental choices." *Id*.

Thus, the doctrine of business compulsion "can be successfully invoked only if the 'victim' can prove both that the offending party applied the immediate pressure and also that he caused or contributed to the underlying circumstances which led to the victim's vulnerability." *Id.* A party cannot void a business obligation simply because it was incurred under stress. *Nord v. Eastside Ass'n Ltd.*, 34 Wn. App. 796, 798, 664 P.2d 4 (1983).

The business loss must be imposed by the oppressive conduct of the offending party. *Barker*, 23 Wn. App. at 453. "The mere fact that a contract is entered into under stress of pecuniary necessity does not constitute business compulsion." *Puget Sound Power & Light Co. v. Shulman*, 84 Wn.2d 433, 443, 526 P.2d 1210 (1974). Acts of the threatening party, rather than necessity of the victim, must force acceptance. *Id*. (quoting *W.R. Grimshaw Co. v. Nevil C. Withrow Co.*, 248 F.2d 896, 904 (8th Cir. 1957)).

In *Barker*, a tavern owner claimed business compulsion against his landlord when the landlord refused to renew the lease unless the tavern owner paid a disputed cost. *Barker*, 23 Wn. App. at 451-52. The tavern owner needed the renewal of the lease to complete the sale of the tavern to a third party. *Id*. at 452. The court granted summary judgment in favor of the landlord, finding that the underlying circumstances of the tavern owner's vulnerability were not caused by the landlord but, instead, were caused by the normal termination of the lease and the tavern owner's attempt to sell his business. *Id*. at 453.

B&G Farms contends that the trial court erroneously granted summary judgment because an issue of material fact remained as to whether B&G Farms qualified for the defense of business compulsion. B&G Farms maintains that A.M. Todd applied immediate pressure by demanding the promissory note at a critical stage in B&M Farms'

operating loan refinance with Rabo and that B&G Farms had no recourse but to sign A.M. Todd's note. B&G Farms maintains that A.M. Todd caused or contributed to B&G Farms' underlying vulnerability by failing to account for B&G Farms' rightful share of the profits and by abusing its duty of loyalty to B&G Farms as alleged joint venturers under the 1999 agreement.

The undisputed facts show that B&G Farms needed to obtain new financing for its operating expenses because its old lender, Cenex, was not willing to continue B&G Farms' loan unless B&G Farms refinanced and paid down its debt. In order to be approved by the new lender, Rabo, B&G Farms needed to remove the liability from A.M. Todd. Accountants for B&G Farms worked with A.M. Todd for an agreement. While B&G Farms contends that it contested the amount due on the note, Mr. Brown signed the promissory note as president and on behalf of the Browns individually. The note stated the amount owed and the terms of repayment.

These facts conclusively establish that A.M. Todd did not place immediate pressure on B&G Farms to execute the promissory note. While B&G Farms may have been under pressure to address its indebtedness to A.M. Todd, the pressure arose from B&G Farms' need to find a new lender. The stress placed on B&G Farms to renegotiate its debt to A.M. Todd does not make the 1999 agreement a product of business

compulsion.

The facts also fail to raise a question as to whether A.M. Todd caused or contributed to the underlying circumstances which led to B&G Farms' vulnerability. Similar to *Barker*, even though the parties disputed the factual basis for the debt, outside influences still caused B&G Farms' vulnerability. The underlying circumstances contributing to the vulnerability arose from B&G Farms' financing issues. A.M. Todd did not cause the vulnerability by demanding full payment and forcing B&G Farms to execute the note. The fact that B&G Farms required A.M. Todd's cooperation in order to obtain financing does not mean that A.M. Todd caused B&G Farms to enter into the note.

We do not agree A.M. Todd's actions under the 1999 agreement placed B&G Farms in a position where it was compelled to enter into the promissory note. There is no evidence that the alleged financial impropriety from the 1999 agreement caused harm to B&G Farms. B&G Farms cannot rely on speculation that the circumstances would have been different. B&G Farms would have still been in financial difficulty arising from the loss of the operating loan and financial losses from other crops.

B&G Farms argues that A.M. Todd and B&G Farms entered into a joint venture in 1999. Although B&G Farms does not expressly state that it should be able to avoid the obligation under the note because A.M. Todd used its fiduciary power under the joint

venture to acquire a personal advantage in the note, based on its brief, we assume that this is B&G Farms' argument. As a general rule, "an agreement between a fiduciary and his corporation, which is not an arm's length bargain, may be set aside by the corporation." *Nord*, 34 Wn. App. at 799. We decline to address the issue of whether the parties entered into a joint venture or abused fiduciary duties in 1999. While this contention may be a reason to avoid the debt under the 1999 agreement, it cannot be used to avoid payment under the separate promissory note. B&G Farms agreed to the amount in 2007 when it signed the promissory note. There is no evidence of a breach of a fiduciary duty in the execution of the promissory note.

A.M. Todd did not compel B&G Farms to enter into the 2007 promissory note. B&G Farms could have chosen to not sign the note. Instead, B&G Farms voluntarily entered into the promissory note. B&G Farms' vulnerability was not caused by A.M. Todd but, instead, was caused by B&G Farms' need for financing. No question of material fact remains on the issue of duress.

As a matter of law, the undisputed facts show that B&G Farms did not execute the note under duress caused by A.M. Todd.

Accounting of the 1999 Production Agreement. Under RCW 62A.3-305(a), "the right to enforce the obligation of a party to pay an instrument is subject to the following:

. . . (3) A claim in recoupment of the obligor against the original payee of the instrument if the claim arose from the transaction that gave rise to the instrument; but the claim of the obligor may be asserted against a transferee of the instrument only to reduce the amount owing on the instrument at the time the action is brought."

In *Gleason v. Metropolitan Mortgage Co.*, 15 Wn. App. 481, 482, 551 P.2d 147 (1976), the trial court found that the parties formed a joint venture in the ownership of an apartment complex and ordered an accounting to determine the profits derived from the operation and sale of the apartments. The court granted the plaintiffs a judgment based on an accounting of the joint venture agreement. *Id*. at 496-97.

As relief on the promissory note, B&G Farms requested that the trial court require A.M. Todd to make a detailed accounting relating to the 1999 agreement and establish the amount of indebtedness. In this request, B&G Farms does not specifically plead a claim for recoupment. Regardless of whether B&G Farms' request for an accounting is sufficient to maintain a claim for recoupment, we find that relief cannot be granted because the claim does not arise out of the transaction that gave rise to A.M. Todd's promissory note.

Here, unlike *Gleason*, the alleged joint venture is not the subject of the lawsuit. Instead, A.M. Todd brought this lawsuit to enforce the 2007 promissory note. Therefore,

the 2007 note is the subject of A.M. Todd's claim. While a demand for an accounting could be made regarding the 2007 note, B&G Farms does not request such relief. As illustrated in *Gleason*, if B&G Farms wanted to contest the amount owed to A.M. Todd as a result of the 1999 agreement, B&G Farms needed to request the accounting as a part of that transaction. B&G Farms cannot request an accounting of the earlier agreement in this current claim.

Likewise, if A.M. Todd chose to advance the debt owed on the 1999 agreement, then the recoupment claim would be appropriate in establishing the amount owed. That is not the case here. B&G Farms and A.M. Todd reached an agreement as to the amount owed in the 2007 note. The current action brought by A.M. Todd addresses B&G Farms' obligation under that note, not under the 1999 agreement. B&G Farms cannot request an accounting of the 1999 agreement or request recoupment under A.M. Todd's cause of action. The trial court properly granted summary judgment.

Attorney Fees. "The trial court's determination of the reasonableness of attorneys' fees will not be set aside in the absence of clear abuse of discretion." *Nord*, 34 Wn. App. at 800.

A prevailing party may recover attorney fees and costs of litigation if the recovery of such fees is permitted by contract, statute, or some recognized ground in equity. *City*

of Sequim v. Malkasian, 157 Wn.2d 251, 284, 138 P.3d 943 (2006) (quoting *McGreevy v. Oregon Mut. Ins. Co.*, 128 Wn.2d 26, 35 n.8, 904 P.2d 731 (1995)).

RAP 18.1 provides for attorney fees on appeal if permitted by applicable law and requested in briefing. A provision in a contract that allows attorney fees in an action to collect payment due under the contract includes fees for the trial court action as well as fees incurred on appeal. *Granite Equip. Leasing Corp. v. Hutton*, 84 Wn.2d 320, 327, 525 P.2d 223 (1974).

The promissory note signed by the parties contained a provision awarding attorney fees and costs to a party protecting or enforcing their rights under the terms of the note. The promissory note allowed for costs and expenses rendered at trial and on appeal. In light of this provision and A.M. Todd's request, we uphold the trial court's award of attorney fees and costs to A.M. Todd and also grant attorney fees and costs to A.M. Todd incurred on appeal.

In summary, we affirm the decision of the trial court and grant attorney fees on appeal to A.M. Todd.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

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Kulik, J.

WE CONCUR:

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Sweeney, J. Korsmo, C.J.