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ARKANSAS COURT OF APPEALS

DIVISION II
No. CA09-1392

DAVID BORLAND APPELLANT	**Opinion Delivered** June 2, 2010
V.	APPEAL FROM THE PULASKI COUNTY CIRCUIT COURT [NO. CV-07-11163]
TOM TRAVIS APPELLEE	HONORABLE JAMES MOODY, JR., JUDGE
	REVERSED AND REMANDED

JOSEPHINE LINKER HART, Judge

David Borland appeals from an order of the Pulaski County Circuit Court granting a judgment in favor of Tom Travis on a promissory note. On appeal, Borland argues that the trial court erred in entering the judgment because Travis admitted that the promissory note was not supported by consideration and that the note was meant to obligate Borland to a preexisting debt of the law firm that Borland and Travis had created. We reverse and remand.

In the mid-1990s, law-school friends Travis and Borland formed a law firm, Travis & Borland, P.A., specializing in collections. The professional association existed for approximately three years before Borland decided to leave. After Borland's departure, Travis continued to practice law in the same physical location, retaining all the office equipment, fixtures, and staff.

The law firm was not a financial success. It is not disputed that during the life of the

partnership, Travis infused at least $150,000 into the firm's coffers. Nor is it disputed that, at the time he infused the cash, there was no formal agreement regarding repayment—Travis merely expected to be reimbursed by the law firm. However, that reimbursement never occurred. It is also not disputed that during its existence, the firm incurred debt to the Internal Revenue Service totaling $44,619.28, which Borland eventually paid.

Before Borland left the firm, on May 22, 1998, he signed the promissory note[1] that is

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[1] The instrument reads as follows:

PROMISSORY NOTE

For value received, the undersigned maker hereby promises to pay to the order of Tom Travis, the sum of $75,000.00 and other such sum as is determined by any court or governmental agency to be owed by Travis & Borland, P.A. or by the officers in their individual capacity.

The entire obligation evidenced hereby may be accelerated at the option of the holder, in the event of insolvency, or if bankruptcy or receivership proceedings are initiated by or against the maker, death, dissolution or termination of the maker.

This Note is intended as a contract under, and shall be construed and enforceable in accordance with the laws of the State of Arkansas and the applicable laws of the United States of America.

Maker hereby waives and renounces for itself, its successors and assigns, any and all endorsers, guarantors and sureties, all rights to the benefits of any statute of limitations and any moratorium, reinstatement, marshaling, forbearance, valuation, stay, extension, redemption, appraisement, exemption and homestead now provided, or which may hereafter be provided, by the Constitution and Laws of the United States of America or the State of Arkansas.

Payments are acceptable.

The undersigned acknowledges receipt of a fully completed copy of this instrument. DATED this 22nd day of May, 1998.

(Signed)

the subject of this appeal. The parties dispute the circumstances under which Borland executed the document. Borland insists that he signed it out of friendship to Travis to placate Travis's wife, who was concerned about the money Travis had borrowed to infuse into the firm. Travis disputed that claim, asserting that the note secured Borland's portion of the $150,000 in financing that Travis had personally secured to keep the law firm financially viable.

Travis made no effort to enforce the promissory note for more than nine years. However, on August 30, 2007, Travis filed a complaint seeking judgment on the note. Borland timely answered. He admitted signing the note, but denied that the document had "legal effect" or was "enforceable." Among others, Borland asserted the affirmative defense of "failure or want of consideration." Borland also counterclaimed to recover half of the money that he had paid to the IRS on behalf of the law firm.

Borland served Travis with requests for admission in accordance with Rule 36 of the Arkansas Rules of Civil Procedure. They stated as follows:

> **REQUEST FOR ADMISSION NO.1:** Admit that David L. Borland received no consideration in exchange for signing the promissory note which is the subject of the Complaint you filed against him.
>
> **REQUEST FOR ADMISSION NO. 2:** Admit that you have no proof that David L. Borland was provided consideration in exchange for executing the promissory note upon which you have filed legal action.

Travis never answered these requests for admission.

Borland moved for summary judgment, asserting that when Travis failed to answer the requests for admission, pursuant to Arkansas Civil Procedure Rule 36, they were deemed admitted. The motion was denied. Borland filed a motion for the court to reconsider its decision, which was also denied.

At the trial, Travis admitted that he had simply failed to respond to the requests for admission and offered no excuse. Borland denied receiving any consideration for the purported agreement to pay Travis $75,000. Travis testified that there was no prior agreement that Borland would be obligated to pay half of the $150,000 that Travis had infused into the law firm, but nonetheless contended that Borland was obligated to pay the $75,000 as recited in the note. Borland moved for dismissal, again citing Travis's failure to respond to the requests for admission. The trial court denied the dismissal motion and found in favor of Travis. It also granted Borland's counterclaim, setting off $22,309.64 against the $75,000 judgment. Travis did not appeal the judgment on the counterclaim.

On appeal, Borland first argues that the trial court erred in entering the judgment because Travis admitted that the promissory note was not supported by consideration. Borland asserts that the note, like any contract, must be supported by legal consideration to be valid and enforceable. Further, citing *Borg-Warner Acceptance Corp. v. Kesterson*, 288 Ark. 611, 708 S.W.2d 606 (1986), among other cases, he contends that the supreme court has strictly enforced Rule 36 and the deemed admitted sanction contained therein. We find merit in this argument.

First, it is settled law that, despite the strictures of the parol-evidence rule, lack of consideration is a defense to a promissory note. *Ozark Diamond Mines Corp. v. Townes & Garanflo*, 117 Ark. 552, 174 S.W. 151 (1915). This fact makes the issue of consideration pivotal in this case. It is therefore not remarkable that the issue of consideration was the focus of Borland's requests for admission. As noted above, requests for admission are governed by Rule 36 of the Arkansas Rules of Civil Procedure. In pertinent part, Rule 36 provides:

> (a) Request for Admission. A party may serve upon any other party a written request for the admission, for purposes of the pending action only, of the truth of any matters within the scope of Rule 26(b) set forth in the request that relate to statements or opinions of fact or of the application of law to fact. . . . The matter is admitted unless, within thirty (30) days after service 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 or objection addressed to the matter, signed by the party or by the party's attorney, but, unless the court shortens the time, a defendant shall not be required to serve answers or objections before the expiration of forty-five (45) days after service of the summons and complaint upon that defendant. . . .
>
> (b) Effect of Admission. Any matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission. Subject to the provisions of Rule 16 governing amendment of a pretrial order, the court may permit withdrawal or amendment when the presentation of the merits of the action will be subserved thereby and the party who obtained the admission fails to satisfy the court that withdrawal or amendment will prejudice that party in maintaining the action or defense on the merits.

This case turns on Travis's failure to answer Borland's requests for admission. It is not disputed that Travis was given ample opportunity to respond to the requests for admission or to otherwise request relief from the trial court. Travis did neither. Accordingly, the case at bar is controlled by *Kesterson*, *supra*, where the supreme court reversed the denial of a motion

for summary judgment that was predicated upon a party failing to answer requests for admission. In *Kesterson*, the supreme court noted that it was its "policy" to require compliance with the rule governing requests for admission. We therefore reverse and remand to the trial court for entry of an order consistent with this opinion.[2] Because we reverse and remand on this point, we need not address Borland's second point regarding the invalidity of the note due to its intention to obligate Borland to a preexisting debt of the law firm that Borland and Travis had created.

Reversed and remanded.

VAUGHT, C.J., and ROBBINS, J., agree.

[2] We decline to simply reverse and dismiss because there is a portion of the trial court's order that also grants Borland's counterclaim, from which Travis has not appealed.