Third District Court of Appeal
State of Florida

Opinion filed September 16, 2020.
Not final until disposition of timely filed motion for rehearing.

No. 3D19-1347
Lower Tribunal No. 17-13115

Erick A. Palma, M.D., et al.,
Appellants,

vs.

South Florida Pulmonary & Critical Care, LLC,
Appellee.

An appeal from the Circuit Court for Miami-Dade County, Rodney Smith, Judge.

Podhurst Orseck, P.A., and Joel D. Eaton, for appellants.

Law Offices of Robert P. Frankel, P.A., and Robert P. Frankel (Plantation), for appellee.

Before SCALES, MILLER, and GORDO, JJ.

MILLER, J.

Appellants, Michael J. Hernandez, M.D., Erick A. Palma, M.D., and Pedro A. Sevilla Saez-Benito, M.D., three physicians formerly employed by appellee, South Florida Pulmonary and Critical Care, LLC ("SFPCC"), challenge an adverse final judgment. The decree, entered in favor of SFPCC, imposes liability upon the physicians, under alternative theories of unjust enrichment and contribution, for an adjusted pro rata share of the outstanding balance due under two promissory notes. Applying the Uniform Commercial Code, along with the relevant limited liability company operating agreement, we find the physicians were mere accommodation indorsers under the notes. Hence, SFPCC, the party accommodated, is barred from recovery.

FACTS AND BACKGROUND

This dispute arises out of a series of renewals, modifications, and extensions of an existing line of credit, along with a separately executed term loan agreement. SFPCC is a limited liability company specializing in pulmonary and critical care services. The entity is comprised of several member physicians, along with numerous non-member employees. Member physicians render treatment in SFPCC's offices and the facilities of various hospitals affiliated with Baptist Health South Florida.

In 2011, Marquis Bank (the "Bank") extended a $150,000.00 line of credit to Dr. Palma and other physician members of SFPCC to provide working capital for

the business entity. Over the next several years, the Bank extended and eventually increased the line of credit to one million dollars, yielding freshly executed promissory notes denoting SFPCC as a borrower and the then-physician members, including Drs. Hernandez, Palma, and Sevilla, as co-borrowers.

By 2016, SFCC had enjoyed significant expansion, resulting in greater operational expenses and other financial needs, and sought to renew the most recent iteration of the note. After requiring the member physicians to furnish their individual tax returns and personal financial statements, the Bank approved the credit application. However, it mandated the execution of a separate $350,000.00 term loan, payable in predetermined installments. As with the prior loan documents, the notes evidencing the revolving line of credit and term loan designated most then-member physicians as co-makers.[1]

Shortly after the paperwork was completed, Hernandez, Palma, and Sevilla left the practice to pursue other ventures. Upon their exit, SFPCC demanded payment of a proportional share due under the notes, calculated according each physician's respective membership and departure date. The physicians refused, maintaining they bore no individual liability to SFPCC for the debt.

SFPCC then filed suit, seeking recovery in contribution, or, alternatively, unjust enrichment. The physicians answered the complaint and raised various

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[1] Sevilla declined to sign the 2016 notes.

affirmative defenses. After the pleadings closed, the dispute proceeded to a bench trial. At the conclusion, the lower tribunal entered a final judgment in favor of SFPCC, imposing damages reflecting a share of the remaining balance due under the loans, as of the physicians' disassociation dates, adjusted by any applicable termination compensation. The instant appeal ensued.

LEGAL ANALYSIS

The narrow issue before us is whether, upon their separation from employment, the physicians were liable to SFPCC for a pro rata share of the balance due under the notes. We rely upon two principal sources to determine the rights and duties of the parties. The first is Article 3 of the Uniform Commercial Code—Negotiable Instruments, as adopted and codified in chapter 673, Florida Statutes (2020). The second is the First Amendment to the South Florida Pulmonary and Critical Care, LLC Physician Group Governance Agreement (the "Governance Agreement").

Our interpretation of both involves pure issues of law, subject to de novo review. See Arnold, Matheny and Eagan, P.A. v. First Am. Holdings, Inc., 982 So. 2d 628, 632 (Fla. 2008) ("Because the issue requires this Court to interpret . . . statutory provisions of Florida . . . law, we apply a de novo standard of review.") (citation omitted); Dep't of Trans. v. United Cap. Funding Corp., 219 So. 3d 126, 129 (Fla. 2d DCA 2017) (applying a de novo standard of review to the trial court's

interpretation of the Uniform Commercial Code); Smith v. Reverse Mortg. Sols., Inc., 200 So. 3d 221, 224 (Fla. 3d DCA 2016) ("A trial court's construction of notes . . . involves [a] pure question[] of law, and therefore is subject to de novo review.") (citation omitted); see also Espinosa v. Pavel Pardo Invs., LLC, 296 So. 3d 949, 950-51 (Fla. 3d DCA 2020) ("[W]e review the trial court's legal conclusions and interpretation of the Operating Agreement de novo.") (citation omitted). However, to the extent that factual findings are implicated, we defer to the lower court, as "[w]hen a cause is tried without a jury, the trial judge's findings of fact are clothed with a presumption of correctness on appeal, and these findings will not be disturbed unless the appellant can demonstrate that they are clearly erroneous." Chackal v. Staples, 991 So. 2d 949, 953 (Fla. 4th DCA 2008) (citation omitted).

I. Uniform Commercial Code, Accommodation Party

We first examine the relevant Code provisions.[2] "The Uniform Commercial Code (UCC) was created by the American Law Institute and the National Conference of Commissioners on Uniform State Laws." Michael T. Hensley et al., Damages in the Typical Commercial Case, 20140521A NYCBAR 272 (2014). "The primary importance of the Uniform Commercial Code is the certainty and uniformity which it provides for commercial transactions." New Conn. Bank & Tr.

[2] "A promissory note is clearly a negotiable instrument within the definition of section 673.1041(1)," Florida Statutes. Perry v. Fairbanks Capital Corp., 888 So. 2d 725, 727 (Fla. 5th DCA 2004) (citation omitted).

Co., N.A. v. Stadium Mgmt. Corp., 132 B.R. 205, 209 (D. Mass. 1991) (citation omitted).

Under common law, "[t]he contract of suretyship [was] created when, to obtain some credit or other advantage for another, the surety engage[d] to be liable for him to another." James L. Elder, Stearns on Suretyship § 2.1, at 8 (5th ed. 1951). Consistent with this adage, chapter 673, Florida Statutes, defines the characteristics and rights of a variety of surety known as an "accommodation party."[3] Section 673.4191(1), Florida Statutes, provides:

> If an instrument is issued for value given for the benefit of a party to the instrument ("accommodated party") and another party to the instrument ("accommodation party") signs the instrument for the purpose of incurring liability on the instrument without being a direct beneficiary of the value given for the instrument, the instrument is signed by the accommodation party "for accommodation."

See also In re Kelaidis, 276 B.R. 266, 270 (Bankr. 10th Cir. 2002) ("A person who agrees to be liable for the debt of another is clearly a surety. If the person effectuates the agreement by becoming a party (i.e., a co-maker or indorser) to the same instrument that creates the obligation, the surety is also an accommodation party.")

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[3] "An accommodation party is always a surety." 6 Fla. Jur. 2d Bills and Notes § 303 (2020); see Rapp v. Demmerle, 61 So. 2d 481, 483 (Fla. 1952) ("[O]ne who signs as an accommodation party, although he does so without consideration, becomes a surety.") (citation omitted); The Florida Bar, Unsecured Claims, in Creditors' and Debtors' Practice in Florida, CD FL-CLE 2-1 (2019) ("Under the UCC, an individual who signs an instrument as a guarantor is a surety and an accommodation party.") (citation omitted).

(quoting Permanent Editorial Board for the UCC, PEB Commentary on the Uniform Commercial Code, Commentary No. 11, at 2 (West 1998)).

The suretyship status of the accommodation party precludes direct liability to the accommodated party. Gehrig v. Ray, 332 So. 2d 703, 705 (Fla. 1st DCA 1976) ("Florida law specifically provides that an accommodation party is not liable to the party accommodated.") (citation omitted). Indeed, this prohibition on direct recourse is codified in section 673.4191(5), Florida Statutes, as follows:

> An accommodation party who pays the instrument is entitled to reimbursement from the accommodated party and is entitled to enforce the instrument against the accommodated party. An accommodated party who pays the instrument has no right of recourse against, and is not entitled to contribution from, an accommodation party.

Nonetheless, accommodation parties remain directly accountable to the holder of the instrument and legally responsible, in contribution, to their co-accommodation makers. Dobrow v. Bryant, 427 So. 2d 809, 810 (Fla. 5th DCA 1983).

"[W]hether a [party] is an accommodation [indorser] is a question of fact," ascertained from the language of the pertinent instrument and the surroundings circumstances. U.C.C. § 3-419 cmt. 3 (Am. Law Inst. 2002). The putative accommodation party bears the burden of proof. 11 Am. Jur. 2d Bills and Notes § 69 (2020).

In the instant case, the stated purpose of the loans was the funding of expenses accrued by SFPCC, a party to the pertinent instruments. Although the relevant note

renewals reflected their signatures,[4] the then-physician members were not disbursed any of the loan proceeds. As it is undisputed that SFPCC received the entirety of the funds, the instruments were "issued for value given for the benefit of" SFPCC. § 673.4191(1), Fla. Stat.

Nonetheless, SFPCC asserts the payment of salaries, bonuses, and other advantages render the physicians direct beneficiaries of the loans, divesting them of accommodation party status under the definition set forth in the Code. As "[a]ny deviations from traditional, accepted interpretations of the Code should . . . come from the legislature and not from the courts," we respectfully disagree. Stadium Mgmt. Corp., 132 B.R. at 209 (citation omitted).

It is axiomatic a member's "benefit [from a loan given to the limited liability company] is only derivative and thus 'indirect.'" Neil B. Cohen, Suretyship Principles in the New Article 3: Clarifications and Substantive Changes, 42 Ala. L. Rev. 595, 601 (1991) (citing U.C.C. § 3-419 cmt. 1 (Am. Law Inst. 1990)). Indeed, this conclusion comports with the principle of law deeply ingrained in our legal and economic system that an LLC is an autonomous legal entity, separate and distinct from its members. Dania Jai-Alai Palace, Inc. v. Sykes, 450 So. 2d 1114, 1117 (Fla. 1984) (citation omitted); see also In re Harder, 413 B.R. 827, 835 (Bankr. D. Or. 2009) (The "LLC owns the assets, not the . . . members.") (citations omitted); §

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[4] Excepting Dr. Sevilla from the last set of documents.

605.0108(1), Fla. Stat. ("A limited liability company is an entity distinct from its members.").

Applying this adage, scholars have uniformly concluded:

> [N]either an officer nor a shareholder [or member] should fail to attain accommodation party status for the receipt of an indirect benefit. For example, if the value received in exchange for a negotiable instrument is placed in the entity's account and is used as working capital by the entity and an officer receives a salary in the ordinary course of business or consistent with contract terms, express or implied, the officer should attain the status of accommodation party.

Sarah Howard Jenkins, Arkansas's Revised Article 3: User Caution Advised!!, 16 U. Ark. Little Rock L.R. 573, 577 (1994); see Sarah Howard Jenkins, Revised Article 3: "[Revise] It Again, Sam", 36 Hous. L. Rev. 883, 893 (1999) ("[A]n accommodation party who is also an officer of a corporation that receives loan funds to be used as working capital is still an accommodation party, even though the officer signed individually as a maker and received a previously set salary paid from the proceeds of the loan, the same as any other employee.") (citations omitted).

This comports with the commentary to the relevant Code provision. Although not controlling authority,[5] the comment draws the following distinction between direct and indirect benefits:

> For example, if X cosigns a note of Corporation that is given for a loan to Corporation, X is an accommodation party if no part of the loan was

[5] "[T]he commentary to the UCC is not controlling authority." Corfan Banco Asuncion Paraguay v. Ocean Bank, 715 So. 2d 967, 971 (Fla. 3d DCA 1998) (citations omitted).

> paid to X or for X's direct benefit. This is true even though X may receive indirect benefit from the loan because X is employed by Corporation or is a stockholder of Corporation, or even if X is the sole stockholder so long as Corporation and X are recognized as separate entities.

U.C.C. § 3-419 cmt. 1 (Am. Law Inst. 2002).

Here, the physicians' credit was a prerequisite to the Bank funding the loan, as SFPCC, alone, was not considered sufficiently credit worthy. In correspondence between the Bank and SFPCC, the physicians were termed mere "guarantors."

The value given for the instruments was the money transmitted from the Bank to SFPCC. Additionally, the entity rendered all payments as due under the notes. It necessarily follows that, under these circumstances, any financial advantages and other interests were indirect benefits of the value given. See Citibank (Ariz.) v. Van Velzer, 982 P.2d 833, 836 (Ariz. Ct. App. 1998); see also Brown v. Arcuri, 43 A.D.2d 993, 994 (N.Y. App. Div. 1974) (finding party in need of funds and responsible for the periodic payments was accommodated party and others "were accommodation makes who signed so that [appellant] could obtain the loan"). Thus, the physicians signed the instruments for the purpose of lending their names to SFPCC.

II. SFPCC Governance Agreement

This conclusion is further compelled by the termination rights and remedies encapsulated within the Governance Agreement. Our courts have long held that a

plaintiff cannot pursue a quasi-contract claim for unjust enrichment if an express contract exists concerning the same subject matter. Diamond "S" Dev. Corp. v. Mercantile Bank, 989 So. 2d 696, 697 (Fla. 1st DCA 2008) (citations omitted). Here, the Governance Agreement serves as a contract, fully encompassing the entire understanding between the physicians and SFPCC. See Dinuro Invs., LLC v. Camacho, 141 So. 3d 731, 741 (Fla. 3d DCA 2014); § 605.0105(1)(a), Fla. Stat. By its express terms, it solely allows for non-competing, voluntarily departing physicians to collect compensation upon termination.[6] It does not allow for SFPCC to affirmatively collect funds from the physicians.

"[C]ourts may not rewrite, alter, or add to the terms of a written agreement between the parties and may not substitute their judgment for that of the parties in order to relieve one from an alleged hardship of an improvident bargain." Int'l Expositions, Inc. v. City of Miami Beach, 274 So. 2d 29, 30-31 (Fla. 3d DCA 1973) (citations omitted). Applying the revered maxim of construction, *expressio unius*

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[6] Any physician leaving SFPCC and practicing medicine in a facility where the group maintains operations forfeited the right to receive termination compensation. Under the Governance Agreement,

> [t]ermination [c]ompensation payable to any [p]hysician [m]ember shall be equal to the quotient of: (i)(A) [SFPCC's] collectable accounts receivable (as determined by [SFPCC's] accountants) as of the effective date of such [p]hysician [m]ember's termination, less (B) any loans or debts due from [SFPCC], divided by, (ii) the number of [p]hysician [m]embers at the time of such [p]hysician [m]ember's termination (including the terminating [p]hysician [m]ember).

est exclusio alterius, the expression of one thing implies the exclusion of others, the Agreement does not authorize the collection of outstanding balances owed to the Bank from disassociating physicians. See Shumrak v. Broken Sound Club, Inc., 898 So. 2d 1018, 1020 (Fla. 4th DCA 2005). Thus, we decline to undermine the statutory rights and remedies of the parties and import an unpenned obligation into the contract. See Okeechobee Resorts, LLC v. E Z Cash Pawn, Inc., 145 So. 3d 989, 993 (Fla. 4th DCA 2014) ("[I]t is a court's duty to enforce the contract as plainly written.") (citation omitted); Camacho, 141 So. 3d at 742 ("Conspicuously missing from the operating agreement is any provision stating that the members shall be directly liable" to the entity for their respective share of the outstanding balance of the loans at the time of their departure.).

III. Uniform Commercial Code and Equity

Lastly, in view of the foregoing, we address the availability of the decreed equitable relief. The Uniform Commercial Code abrogates "common law rules without requiring unequivocal, explicit reference to the common law in each statutory section that effects a modification." Burtman v. Tech. Chems. & Prods., Inc., 724 So. 2d 672, 676 (Fla. 4th DCA 1999). Thus, "[c]ourts should be hesitant to improvise new remedies outside the already intricate scheme of Articles 3 and 4." Girard Bank v. Mount Holly State Bank, 474 F. Supp. 1225, 1239 (D.N.J. 1979). Nevertheless, although the drafters endeavored to set forth clear and practical rules

for the purpose of ensuring predictable and dependable commercial outcomes, the Code "neither has, nor does it purport to have, all the answers." Mark D. Dean, P.S.C. v. Commonwealth Bank & Tr. Co., 434 S.W.3d 489, 505 (Ky. 2014) (quoting David J. Leibson & Richard H. Nowka, The Uniform Commercial Code of Ky. § 1.03, at 1–4 (3d ed.2004)); see also C-Wood Lumber Co., Inc. v. Wayne Cty. Bank, 233 S.W.3d 263, 281 (Tenn. Ct. App. 2007) ("While this scheme is not comprehensive, it is nearly so.").

In that spirit, "[w]hile principles of common law and equity may supplement provisions of the Uniform Commercial Code, they may not be used to supplant its provisions." 15A Am Jur. 2d Commercial Code § 18 (2020); see also § 671.103, Fla. Stat. ("Unless displaced by the particular provisions of this code, the principles of law and equity . . . shall supplement its provisions."). Thus, to the extent that reliance upon the same "would thwart the purposes of the [UCC]," common law claims are unauthorized. N.J. Bank, N.A. v. Bradfords Sec. Operations, Inc., 690 F.2d 339, 346 (3d Cir. 1982) (citation omitted).

Here, the Code, codifying common law surety principles, affirmatively bars SFPCC from obtaining relief from the physicians. Therefore, to allow the equitable claim to stand would "upset the legislative scheme for loss allocation" and

undermine the legislative prerogative.[7] City Check Cashing, Inc. v. Mfrs. Hanover Tr. Co., 764 A.2d 411, 416 (N.J. 2001) (citation omitted). Similarly, as the terms of the Governance Agreement neither disavow the application of the Code nor authorize relief, we decline, under the facts presented below, to, "in the name of equity, do an end run around what the law forbids." Spotswood v. Spotswood, 172 So. 3d 1264, 1266 (Miss. Ct. App. 2015).

Accordingly, finding the claims barred under the circumstances presented below, we reverse and remand for further proceedings consistent herewith.

Reversed and remanded.

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[7] "Under the separation of powers requirement of our state's constitution, when interpreting a statute, it is not the judiciary's prerogative to question the merit of a policy preference or to substitute its preference for the legislature's judgment." Fast Tract Framing, Inc. v. Caraballo, 994 So. 2d 355, 357(Fla. 1st DCA 2008) (citing Art. II, § 3, Fla. Const.); see State v. Rife, 789 So. 2d 288, 292 (Fla. 2001) ("When faced with an unambiguous statute, the courts of this state are 'without power to construe an unambiguous statute in a way which would extend, modify, or limit, its express terms or its reasonable and obvious implications. To do so would be an abrogation of legislative power.' This principle is 'not a rule of grammar; it reflects the constitutional obligation of the judiciary to respect the separate powers of the legislature.'") (citations omitted).