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IN THE
COURT OF APPEALS OF INDIANA

THE HUNTINGTON NATIONAL BANK,	)	
Appellant,	)	
vs.	)	No. 49A05-1012-CC-759
GEORGE P. BROADBENT,	)	
Appellee.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Heather A. Welch, Judge
Cause No. 49D12-1001-CC-446

December 13, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

BROWN, Judge

The Huntington National Bank ("Huntington") appeals the trial court's denial of its motion for summary judgment. Huntington raises four issues which we consolidate and restate as whether the trial court erred in denying Huntington's motion for summary judgment. We reverse and remand.

The relevant facts as designated by the parties follow. In November 2001, Huntington extended a line of credit to George Broadbent, and Broadbent executed a Promissory Note dated November 9, 2001 in the original principal amount of $4,000,000.

In 2004, Huntington and Broadbent agreed to certain modifications of the 2001 agreement and bifurcated the loan into a line of credit loan and a working capital loan. Broadbent executed two promissory notes both dated December 1, 2004. The first promissory note was in the amount of $3,000,000, and the second note was in the amount of $1,000,000.

In December 2008, Broadbent entered a note titled "Replacement Promissory Note" in the amount of $3,000,000. Appellant's Appendix at 45. The note contained the following provision:

> 25. Renewal and Replacement of Prior Notes. This Note renews, amends, modifies and consolidates, and replaces in their entirety, the indebtedness evidenced by (i) that certain Promissory Note dated December 1, 2004, executed by [Broadbent] in favor of [Huntington] in the principal amount of Three Million and no/100 Dollars ($3,000,000.00), as renewed, modified and amended (hereinafter referred to as the "**Equity Capital Note**"), and (ii) that certain Promissory Note dated December 1, 2004, executed by [Broadbent] in favor of [Huntington] in the principal amount of One Million and no/100 Dollars ($1,000,000.00), as renewed, modified and amended (hereinafter referred to as the "**Working Capital Note**"). [Broadbent] acknowledges and confirms that [Broadbent] shall continue to be liable for all unpaid interest outstanding under the Equity Capital Note and the Working Capital Note which as accrued through the date of this

> Note and shall pay all of such accrued and unpaid interest prior to or in connection with the execution of this Note. Notwithstanding anything contained herein to the contrary, [Broadbent] further acknowledges and confirms that [Huntington] shall not accept, nor be deemed to have accepted, delivery of this Note until such time that (i) [Broadbent] has executed and delivered to [Huntington] all documents, confirmations and agreements that [Huntington] may require in connection with the renewal, amendment, modification and consolidation of the loans evidenced by the Equity Capital Note and the Working Capital Note, including but not limited to executing and delivering to [Huntington] the Loan Agreement and (ii) [Broadbent] has furnished to [Huntington] such other documentation as [Huntington] may require in connection with the renewal, amendment, modification and consolidation of the loans evidenced by the Equity Capital Note and the Working Capital Note.

Id. at 54. The note stated that "[o]n the Maturity Date, the entire unpaid principal balance and all accrued interest shall be due and payable." Id. at 47. The note also defined events of default and stated that an event of default includes "a failure by [Broadbent] or any other obligor to pay, within ten (10) days upon demand or when due, any other amounts due and payable pursuant to the terms of this Note or pursuant to the terms of any other document or agreement executed by [Broadbent] or any guarantor in connection with the indebtedness evidenced by this Note." Id. at 49-50.

An Amended and Restated Loan Agreement "made and entered into effective as of December 19, 2008," referenced the 2004 notes and indicated that the note in the principal amount of $3,000,000 was the "Equity Capital Note" and the note in the principal amount of $1,000,000 was the "Working Capital Note." Id. at 115. The Amended and Restated Loan Agreement stated: "NOW, THEREFORE, in consideration of these premises and the undertakings of the parties hereto, [Broadbent] and [Huntington] hereby agree that this Agreement shall amend, modify, restate and replace

in its entirety the Prior Loan Agreement . . . ." Id. Huntington reaffirmed earlier representations to Broadbent that regardless of the 2008 note's maturity date, Huntington would extend the maturity date as long as he was current on his interest payments. Broadbent failed to pay Huntington the entire unpaid principal and accrued interest due and owing under the Replacement Note on the maturity date or within ten days thereafter.

On January 5, 2010, Huntington filed a complaint seeking to recover $1,041,486.71 plus interest and attorney fees. On March 3, 2010, Broadbent filed an answer. Broadbent later filed an amended answer claiming that Huntington was "estopped to assert a default of the Replacement Note." Appellant's Appendix at 76. On March 29, 2010, Huntington filed a motion for summary judgment and argued that it was entitled to summary judgment because Broadbent failed to pay the amounts due under the Note and that Huntington is entitled to reasonable attorney fees. After a hearing, the court denied Huntington's motion for summary judgment.

The issue is whether the trial court erred in denying Huntington's motion for summary judgment. Summary judgment is appropriate only where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Ind. Trial Rule 56(C); Mangold ex rel. Mangold v. Ind. Dep't of Natural Res., 756 N.E.2d 970, 973 (Ind. 2001)). All facts and reasonable inferences drawn from those facts are construed in favor of the nonmovant. Mangold, 756 N.E.2d at 973. Our review of a summary judgment motion is limited to those materials designated to the trial court. Id. We must carefully review a decision on summary judgment to ensure that a party was not improperly denied his day in court. Id. A party moving for summary judgment bears the

initial burden of showing no genuine issue of material fact and the appropriateness of judgment as a matter of law. Id. (citing Monroe Guar. Ins. Co. v. Magwerks Corp., 829 N.E.2d 968, 975 (Ind. 2005)). If the movant fails to make this prima facie showing, then summary judgment is precluded regardless of whether the non-movant designates facts and evidence in response to the movant's motion. Id.

Both parties cite Paulson v. Centier Bank, 704 N.E.2d 482 (Ind. Ct. App. 1998), reh'g denied, trans. denied. In Paulson, Wayne Paulson borrowed from Centier Bank to invest in a series of limited partnerships. 704 N.E.2d at 487. Wayne testified that he was not in a position financially to participate in the investments, but was given financing by the bank and assured that distributions from the investments would cover the interest due on the notes and that when the investments were sold the proceeds would pay the principal. Id. The notes did not contain any provisions to that effect and included only standard repayment terms. Id. Wayne executed several renewals on the notes because the investments did not perform as hoped, and eventually, his wife, Diane, began co-signing renewals. Id.

In 1987, the outstanding balances on Wayne's loans for the investments were consolidated into a single note signed by both Wayne and Diane in the principal amount of $286,185.69. Id. The Paulsons made several agreements with the bank to reduce the principal amount of the consolidated note, and although they made a few lump sum payments, they largely failed to follow through with the agreements. Id. In July 1989, the Paulsons signed an "Extension and Modification Agreement," extending the time for payment of the consolidated note to January 1, 1990. Id. When the note came due on

that date, the Paulsons defaulted and the Bank sued. Id. The Paulsons answered and filed a counterclaim against the Bank, alleging fraud or constructive fraud, breach of fiduciary duty, and that there was a different agreement than that actually signed based upon oral statements. Id.

After a bench trial in 1994, the court ruled in favor of the bank in 1996. Id. Specifically, the court concluded:

> In this case, the Execution and Modification Agreement signed on July 1, 1989 . . . is covered by the [Lender Liability Statute, Ind. Code §§ 32-2-1.5-1 to -5] and, therefore, the Paulsons' Counterclaim attempting to allege an oral agreement is barred as there is no written document confirming any of the material terms and conditions of the Paulsons' alleged "agreement" with [the Bank] that their loan would not have to be repaid until the monies became available from the Efron investments.

Id. at 491.

On appeal, the Paulsons argued that the Lender Liability Act did not become effective until July 1, 1989, and because the agreement signed by the Paulsons on that date was an extension and modification of credit agreements entered into prior to that date, the Act should not apply. Id. At the time of the decision in Paulson, Indiana's Lender Liability Act provided:

> A debtor may bring an action upon an agreement with a creditor to enter into a new credit agreement, amend or modify a prior credit agreement, forbear from exercising rights under a prior credit agreement or grant an extension under a prior credit agreement only if the agreement:
>
> (1) is in writing;
>
> (2) sets forth all the material terms and conditions of the agreement; and
>
> (3) is signed by the creditor and debtor.

Id. (quoting Ind. Code § 32-2-1.5-5). The court agreed with the Paulsons and held:

> The Paulsons' counterclaim alleging that the notes signed by Wayne did not represent the true agreement of the parties with respect to repayment of the loans is based upon the circumstances surrounding the execution of the original notes in 1981, 1982, and 1983. These notes were consolidated into a single note signed by both Wayne and Diane in 1987. The maturity date of the consolidated note was extended by agreement twice, the last agreement being dated July 1, 1989.
>
> We agree with the Paulsons that the Lender Liability Act does not apply to bar their counterclaim. The July 1, 1989 agreement rewrote the original promissory note to reflect a maturity date of January 1, 1990, "the same as if said Note were originally written to come due on that date." R. 2784. The parties were still relying on the promissory note dated prior to July 1, 1989, which was clearly outside the Act.

Id.

In 2005, the Indiana Supreme Court addressed whether the Lender Liability Act, which prohibited a debtor from bringing an action upon a credit agreement unless it is in writing, applies also to a debtor's assertion of an affirmative defense. Sees v. Bank One, Ind., N.A., 839 N.E.2d 154, 155 (Ind. 2005). The Court interpreted the Lender Liability Act "as prohibiting only debtor-initiated action against a creditor" and held that the Act did not prohibit a debtor's assertion of an affirmative defense based upon oral representations by the creditor. Id. at 159.

In 2006, the Lender Liability Act was amended to provide:

(a) A debtor may assert:

(1) a claim for legal or equitable relief; or

(2) a defense in a claim;

arising from a credit agreement only if the credit agreement at issue satisfies the requirements set forth in subsection (b).

(b) A debtor may assert a claim or defense under subsection (a) only if the credit agreement at issue:

(1) is in writing;

(2) sets forth all material terms and conditions of the credit agreement, including the loan amount, rate of interest, duration, and security; and

(3) is signed by the creditor and the debtor.

Ind. Code § 26-2-9-4 (Supp. 2006).[1]

Huntington argues that "[a]pplying Paulson to our case, the issue is whether the 2008 Note is merely an extension of the original 2004 Notes, such that it can be said that the parties in this case were still relying on the 2004 Notes and only the maturity dates changed as a result of entering into the 2008 Note." Appellant's Reply Brief at 17. Huntington argues that "[a]lthough there were a series of agreements in this case, the particular agreement at issue came into existence after 2006 and, thus, the Act applies." Id. Huntington points out that Broadbent consolidated the 2004 notes "totaling four million dollars into a new, single promissory note in the amount of three million dollars." Id. at 18. Huntington also points out that the 2008 Replacement Promissory Note was different from the earlier notes in that it contains: (1) a definition section with twelve different definitions; (2) a section titled "Computation of Interest;" (3) an additional paragraph under the section titled "Payments;" (4) additional terms and restrictions under

[1] Subsequently amended in 2011 by substituting "to" for "in" in subsection (a)(2). See Pub. L. No. 76-2011, § 2 (eff. July 1, 2011).

the section titled "Prepayment;" (5) different "Events of Default;" (6) a "Waiver of Trial by Jury" provision; and (7) a "Continuing Enforcement" provision. Appellant's Reply Brief at 18.

Broadbent argues that "the Bank's complaint against Broadbent was 'founded on' the 2001 and 2004 Notes because, together with the 2008 Note, they created and extended the single, continuing Line of Credit to Broadbent that the Bank's complaint seeks to collect." Appellee's Brief at 42. Broadbent also argues that "[i]f the Bank's claim were [sic] founded solely on the 2008 Note, as it now contends, there would have been no need to attach the 2001 and 2004 Notes to the complaint." Id. Broadbent also argues that "[w]hatever minor differences might exist among the 2001, 2004, and 2008 Notes, the Bank relies on all of them in its complaint to collect the continuing Line of Credit created five years before the amendment to the [Lender Liability Act] became effective." Id. at 43. In its reply brief, Huntington argues that it attached the earlier notes "to provide context for understanding the history of the transactions between the parties." Appellant's Reply Brief at 18.

We initially observe that the 2008 Note was titled "REPLACEMENT PROMISSORY NOTE." Appellant's Appendix at 45. While Broadbent argues that the "2008 Note likewise 'renew[ed], amend[ed], modifie[d], and consolidate[d] . . . the indebtedness evidenced by' the 2004 Notes 'as renewed, modified and amended," Appellee's Brief at 42, the portion of the 2008 Replacement Promissory Note deleted in Broadbent's ellipses states: "and replaces in their entirety." Appellant's Appendix at 54. Specifically, the 2008 Replacement Promissory Note states:

> This Note renews, amends, modifies and consolidates, and *replaces in their entirety*, the indebtedness evidenced by (i) that certain Promissory Note dated December 1, 2004, executed by [Broadbent] in favor of [Huntington] in the principal amount of Three Million and no/100 Dollars ($3,000,000.00), as renewed, modified and amended (hereinafter referred to as the "**Equity Capital Note**"), and (ii) that certain Promissory Note dated December 1, 2004, executed by [Broadbent] in favor of [Huntington] in the principal amount of One Million and no/100 Dollars ($1,000,000.00), as renewed, modified and amended (hereinafter referred to as the "**Working Capital Note**").

Appellant's Appendix at 54 (emphasis added). The 2008 Amended and Restated Loan Agreement stated: "NOW, THEREFORE, in consideration of these premises and the undertakings of the parties hereto, [Broadbent] and [Huntington] hereby agree that this Agreement shall amend, modify, restate *and replace in its entirety the Prior Loan Agreement* . . . ." Id. at 115 (emphasis added). Based upon the differences between the 2008 Replacement Promissory Note and the earlier notes and the language in the 2008 Replacement Promissory Note and the 2008 Amended and Restated Loan Agreement, we conclude that the 2008 Replacement Promissory Note constituted a new note and that the 2006 amendment to the Lender Liability Act applies. Thus, Broadbent cannot assert a defense based on alleged oral modifications to the loan agreement.[2]

Huntington also argues that it is entitled to attorney fees and argues that "Broadbent never challenged [Huntington's] entitlement to these fees if [it] is successful

[2] To the extent that Broadbent claims promissory estoppel, we observe that this court has previously addressed this issue. In Ohio Valley Plastics, Inc. v. Nat'l City Bank, 687 N.E.2d 260, 263 (Ind. Ct. App. 1997), trans. denied, the court addressed a borrower's argument that the Statute of Frauds had no application because his lawsuit was based on theories of fraud and promissory estoppel and was not an action upon an agreement as required by statute. The court held that "[t]he substance of an action, rather than its form, controls whether a particular statute has application in a particular lawsuit." Id. The court concluded: "Regardless of whether the present cause of action is labeled as a breach of contract, misrepresentation, fraud, deceit, promissory estoppel, its substance is that of an action upon an agreement by a bank to loan money. Therefore, the Statute of Frauds applies." Id. at 263-264.

in these proceedings." Appellant's Brief at 19. Huntington requests that this court "declare that [Huntington] is entitled to the expenditures and expenses incurred by [Huntington] in this litigation to enforce the 2008 Replacement Note, including its reasonable trial and appellate attorney fees, and remand the case for a hearing on the amount of such award." Id. Broadbent does not address Huntington's request for attorney fees.

The 2008 Replacement Promissory Note states:

> In addition to all other sums payable under this Note, [Broadbent] shall pay to [Huntington] (a) reasonable attorneys' fees incurred by [Huntington] in connection with (i) the protection of any security for or rights arising in connection with this Note, (ii) the enforcement of any provision contained in this Note or in any document executed in connection herewith, or (iii) the collection of any indebtedness evidenced hereby or arising in connection herewith (including without limitation attorneys fees incurred by Lender in connection with any bankruptcy, reorganization, receivership or other proceeding affecting creditor's rights and involving a claim under this Note or any document executed in connection herewith), (b) costs of collection, (c) interest at the Default Rate on all accrued interest which is not paid when due, and (d) interest at the Default Rate on all fees, costs and expenses incurred by Lender which are to be reimbursed by [Broadbent] pursuant to this Section, from the date demand for payment is made by [Huntington]. If, after the occurrence of an Event of Default hereunder, [Huntington] employs an attorney or attorneys to protect [Huntington's] rights or remedies arising in connection with this Note or any security for this Note, then [Broadbent] shall pay to [Huntington] upon demand all reasonable attorneys fees and expenses incurred by Lender in connection with such Event of Default, regardless of whether any action is actually commenced against [Broadbent] by reason of any such Event of Default.

Appellant's Appendix at 48. Given this language in the 2008 note, we remand to the trial court for the purpose of conducting a hearing to determine reasonable attorneys' fees. See Kruse v. Nat'l Bank of Indianapolis, 815 N.E.2d 137, 151 (Ind. Ct. App. 2004)

(remanding for the purpose of conducting a hearing to determine reasonable attorney fees based upon language in a guaranty).

For the foregoing reasons, we reverse the trial court's denial of Huntington's motion for summary judgment and remand with instructions to enter summary judgment in favor of Huntington and conduct a hearing to determine reasonable attorney fees.

Reversed and remanded.

BAKER, J., and KIRSCH, J., concur.