RENDERED: MARCH 10, 2006; 2:00 P.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-001719-MR

SUNNYSIDE HOMES OF ROCKLEDGE, INC.;
KEVIN MOE; MICHAEL MORLEY; AND
PHILLIP HUTCHINGS — APPELLANTS

v.

APPEAL FROM MARSHALL CIRCUIT COURT
HONORABLE DENNIS R. FOUST, JUDGE
ACTION NO. 03-CI-00037

WENDELL E. GORDON — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: TACKETT, TAYLOR, AND VANMETER, JUDGES.

TAYLOR, JUDGE: Sunnyside Homes of Rockledge, Inc., Kevin Moe, Michael Morley, and Phillip Hutchings (also hereinafter referred to collectively as appellants) bring this appeal from an August 19, 2004, order of the Marshall Circuit Court granting a motion for partial summary judgment in favor of Wendell E. Gordon. We affirm.

Joe Owen and Michael Noonan developed and operated two assisted-living facility businesses in Florida known as Sunnyside Homes of Rockledge, Inc. (Rockledge) and Sunnyside Homes of St. Cloud, Inc. (St. Cloud). In early 2000, Owen and Noonan approached Gordon to borrow money for the Rockledge facility. In March 2000, Gordon loaned Rockledge four-hundred and fifty thousand dollars ($450,000.00). To secure repayment, Rockledge tendered a promissory note to Gordon. The note was due and payable on September 30, 2001. The note was also personally guaranteed by Owen, and his wife Karen Owen (collectively referred to as the Owens), and Noonan, and his wife Keri Noonan (collectively referred to as the Noonans). Rockledge also executed and delivered a mortgage in favor of Gordon and Karen Owen to secure repayment.[1]

In the summer of 2001, Owen and Noonan entered into negotiations with Moe, Morley, and Hutchings for the sale of Rockledge. In November 2001, Noonan allegedly contacted Moe, Morley, and Hutchings and represented that Noonan, Owen and Gordon had come to an agreement that would provide for the sale of Rockledge. Presumably, Gordon was involved because the note indebtedness was past due and could not be assumed without his permission. Moe, Morley, and Hutchings subsequently purchased

[1] There is no explanation in the record why Karen Owen was a mortgagee to this transaction, nor is there a legal description of the real property located in Florida that was pledged as collateral.

all of Rockledge's issued and outstanding shares of stock in January 2002.

On January 23, 2002, a Promissory Note Extension and Guaranty Agreement was executed which provided that Gordon and Rockledge had agreed to extend the maturity date of the note to December 1, 2002. The instrument also added Moe, Morley, and Hutchings as guarantors of the Promissory Note. The Owens and Noonans also agreed to the extension and their guaranty obligations remained in full force and effect.

In January 2003, the maker (Rockledge) and guarantors of the note were in default under the terms of the note extension and guaranty executed in January 2002. On January 23, 2003, Gordon filed a complaint in the Marshall Circuit Court to enforce the promissory note against Rockledge, the Owens, the Noonans, Moe, Morley, and Hutchings. Therein, Gordon requested judgment in the full amount of the original note of $450,000.00, plus accrued interest and attorney's fees.

No answer or responsive pleading was filed by any of the parties to the complaint. However, on February 28, 2003, a second Promissory Note Extension and Guaranty Agreement was executed by the parties. This note extension was also personally guaranteed by Moe, Morley, and Hutchings and extended the maturity date on the indebtedness to July 1, 2003. This new

note also required Rockledge and the guarantors to pay all past due interest at or prior to its execution.[2]

On September 12, 2003, Gordon filed a motion to amend his complaint and alleged that the unpaid note balance had not been paid when due and sought judgment for the entire balance in the amount of $451,000.00, plus interest and attorney's fees. The Noonans and Owens filed cross-claims against appellants. On December 8, 2003, Rockledge, Moe, Morley, and Hutchings filed an answer and counterclaim against Gordon alleging that Gordon committed fraud, intentional or negligent misrepresentation, and civil conspiracy as concerned the Rockledge acquisition by Moe, Morley and Hutchings.

On February 18, 2004, Gordon filed a motion for partial summary judgment. The motion was premised in part on appellant's failure to respond to discovery requests served in December 2003. In June 2004, Gordon filed a second motion for summary judgment against appellants. After hearing arguments from counsel in July 2004, the court granted Gordon's motion on July 22, 2004, holding that there were no genuine issues of material fact regarding the execution of the note and guaranty, and that the note was in default. The order was made final and

[2] Apparently, upon execution of the note extension and payment of past due interest, the litigation was held in abeyance pending payment of the entire principal balance on July 1, 2003.

appealable by inclusion of Ky. R. Civ. P. (CR) 54.02 language on August 19, 2004. This appeal follows.

Before beginning our analysis, we must determine the appropriate standard of review. Summary judgment is proper where no genuine issues of material fact exist and the moving party is entitled to judgment as a matter of law. Scifres v. Kraft, 916 S.W.2d 779 (Ky. 1996). When ruling upon a motion for summary judgment, the circuit court is required to view the record in a light most favorable to the nonmoving party, and any doubts are resolved in his favor, Steelvest, Inc. v. Scansteel Service Center, Inc., 807 S.W.2d 476 (Ky. 1991). As noted in Steelvest, "a party opposing a properly supported summary judgment motion cannot defeat it without presenting at least some affirmative evidence showing that there is a genuine issue of material fact for trial." Id. at 482.

We begin our analysis by noting that the claims of Rockledge, Moe, Morley, and Hutchings arise from different transactions involving the loan indebtedness owed to Gordon. Rockledge is the original maker of the promissory note that was created when Gordon made the loan to Rockledge in March 2000. The guaranty indebtedness of Moe, Morley, and Hutchings arose from their guaranty of the original note indebtedness in subsequent note extensions made in January 2002 and February 2003. Rockledge and the guarantors have asserted the same

allegations in their counterclaim against Gordon - that being fraud, intentional misrepresentation, and conspiracy - which the circuit court effectively treated as affirmative defenses. If proven, these defenses could excuse their obligation to repay the note indebtedness. However, the meager record before this Court on appeal does not support the claims or defenses by either Rockledge or the guarantors.

As concerns Rockledge, both the Owens and Noonans, prior owners of Rockledge's stock, acknowledge in their answers to discovery requests that the note indebtedness was a valid and a legitimate obligation of Rockledge. Moe, Morley, and Hutchings purchased the Rockledge stock with actual knowledge of the Gordon indebtedness. The transfer of the stock in no way legally altered Rockledge's obligation to repay Gordon's loan. Owens' counsel, at the hearing on Gordon's motion for summary judgment in July 2004, acknowledged on the record that the indebtedness owed to Gordon was valid and enforceable. The allegation that the Owens and Noonans may have converted the loan proceeds in no way alters Rockledge's liability on the note. Our thorough review of the record fails to disclose any disputed issue of material fact that would preclude Rockledge's obligation to Gordon as maker of the note indebtedness and thus summary judgment was properly entered against Rockledge.

As noted, the obligations of Moe, Morley, and Hutchings is that of guarantors, not makers. Our focus is thus on the guaranty executed in February 2003, which extended the repayment obligation on the promissory note to July 1, 2003. This note extension and guaranty incorporated all of the terms and obligations of the original promissory note which was agreed to by appellants. In Kentucky, a guaranty is classified as either one for payment or collection. A guaranty that is subject to no conditions and contains an absolute promise to pay the outstanding indebtedness guaranteed is a guaranty of payment. Liberty Nat'l Bank and Trust Co. v. Russ, 668 S.W.2d 567 (Ky.App. 1984). A guaranty of collection is one conditioned upon the creditor being required to pursue his claim against a debtor, including any collateral, before proceeding against the guarantors. 38 AM. JUR. 2D Guaranty § 106 (1999).

To determine whether a guaranty is one of payment or collection, the language set forth in the guaranty must be closely examined to determine the intent of the parties. McGowan v. Wells' Trustee, 184 Ky. 772, 213 S.W. 573 (1919). A plain reading of both the promissory note and the note extension and guaranty agreement entered into in February 2003, clearly reflects that the guaranty obligation of Moe, Morley, and Hutchings was absolute, specific, and unconditional. Thus, Gordon could maintain an action against the guarantors upon

default of Rockledge without demand for payment by Rockledge and without first proceeding against Rockledge or any collateral pledged to secure the debt.

Having determined that Moe, Morley, and Hutchings executed a guaranty of payment, we now address the defenses or claims asserted by appellants that arguable preclude summary judgment being entered against them. Moe, Morley, and Hutchings assert that Gordon participated in a fraud and otherwise made material misrepresentations and further knew that the Owens and Noonans converted funds from Rockledge. They further allege that Gordon conspired with the Owens and Noonans to induce Moe, Morley, and Hutchings to purchase the Rockledge stock.

First, we note that there is absolutely no evidence whatsoever in the record that would indicate that Gordon participated in any way whatsoever in either ownership or management of the Rockledge and St. Cloud facilities. There is no evidence that Gordon participated in any business decision with the Owens or Noonans regarding either facility. The only evidence presented to the circuit court was that Gordon was a creditor of Rockledge based upon a loan made in March 2000, from which the note indebtedness and subsequent guarantees arose.

Secondly, there is absolutely no evidence in the record that Gordon was involved in the sale of Rockledge stock to Moe, Morley, and Hutchings. The affidavits of Hutchings and

Moe submitted in response to the motion for summary judgment fail to establish that Gordon was in any way involved with the sale transaction. Gordon was involved in the transaction to the extent that the outstanding note indebtedness owed to him as a creditor of Rockledge was in default at the time of the stock sale and he agreed to extend the note indebtedness upon Moe, Morley, and Hutchings becoming guarantors of the debt. This conduct does not look to a conspiracy; but rather due diligence by Gordon.

The guarantors also argue that even if Gordon wasn't directly involved in the fraud or misrepresentations allegedly made by the Owens and Noonans, then at minimum he was "negligent." There exists no cause of action in Kentucky against a creditor of a business for negligence, where the stock or assets are being sold and the prior owners have committed fraud against the new purchasers in the sale. Gordon, as a creditor, owed absolutely no duty whatsoever to Moe, Morley, or Hutchings in regard to their exercise of due diligence in the purchase of the Rockledge stock.

While the circuit court did not make specific findings in concluding that there were no genuine issues of fact, we believe the circuit court could have also dismissed all claims against Gordon for fraud or misrepresentation upon the failure of appellants to plead these claims with particularity as

required by CR 9.02. At minimum, this rule requires that appellants plead the time, place, and substance of the fraud or facts misrepresented by Gordon. Scott v. Farmers State Bank, 410 S.W.2d 717 (Ky. 1966). The answer and counterclaim filed by appellants fails to state with any specificity or particularity the alleged acts or omissions by Gordon that could legally excuse the performance of their obligations under the guaranty.

Notwithstanding the foregoing analysis, the actions of appellants subsequent to acquiring the stock of Rockledge in January 2002 is totally inconsistent with the claims that have been asserted against Gordon in this action. After acquiring the stock, appellants executed two note extension and guaranty agreements. The February 2003 agreement reflects that appellants paid almost fifty thousand dollars ($50,000.00) in back interest and late fees prior to the execution. The agreement does not reflect any protest or reservation of rights by the guarantors concerning any claims that they may have had against Gordon regarding the note indebtedness. Clearly, the guarantors benefited from the note extension. Yet, in their answer and counterclaim, filed on December 8, 2003, (almost two years after the execution of the original note extension and guaranty agreement) appellants assert claims against Gordon regarding the debt and their guaranty thereof. Interestingly,

appellants assert no claims against Gordon for conduct arising after execution of the second extension in February 2003.

As a general rule a party to a contract cannot accept benefits under the contract while at the same time contesting its validity. 28 AM. JUR. 2D Estoppel and Waiver § 65 (2000). Since there are no claims or defenses against Gordon arising after February 28, 2003, we are of the opinion that appellants are equitably estopped from pursuing claims against Gordon on the note indebtedness as it would be unconscionable for appellants to now maintain a position totally inconsistent with their acquiescence to and subsequent benefit received from the note extension. Kentucky Hosp. Ass'n Trust v. Chicago Ins. Co., 978 S.W.2d 754 (Ky.App. 1998).

Finally, appellants argue that the granting of summary judgment was premature because they were not permitted sufficient time to take discovery. We find this argument troubling when local counsel for appellants admitted at the summary judgment hearing in July 2004 that he had never met his clients. Since the original complaint in this action was filed in January 2003, appellants had more than ample time to review the records of the business (which they took control of in January 2002) to determine if there were any claims or defenses regarding the note indebtedness to Gordon. When Rockledge and the guarantors defaulted again in July 2003, counsel for Gordon

filed a motion to amend his complaint in September 2003, which was still some ten months before the court heard oral arguments on the motion for summary judgment in July 2004. Under the facts and circumstances of this case, we believe appellants had ample opportunity to take discovery from Gordon. The law requires no more. See Hasty v. Shepherd, 620 S.W.2d 325 (Ky.App. 1981).

For the foregoing reasons, the order granting summary judgment by the Marshall Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANTS:

John C. Tilly
Kemp, Ison, Harton, Tilley & Holland, LLP
Hopkinsville, Kentucky

BRIEF AND ORAL ARGUMENT FOR APPELLEE:

George E. Long II
Benton, Kentucky

ORAL ARGUMENT FOR APPELLANTS:

Duncan Cavanah
Kemp, Ison, Harton, Tilley & Holland, LLP
Hopkinsville, Kentucky