RENDERED: JULY 21, 2017; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-001084-MR

FOX TROT CORPORATION; CHARLES YATES and his wife JACQUELYN YATES — APPELLANTS

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE JAMES D. ISHMAEL, JR., JUDGE
ACTION NO. 10-CI-06065

FORCHT BANK, NA — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: JONES, D. LAMBERT, AND THOMPSON, JUDGES.

LAMBERT, D., JUDGE: Appellants Charles Yates and his wife, Jacquelyn Yates, both individually and as the sole shareholder in the Appellant Fox Trot Corporation ("Fox Trot"), appeal a judgment issued by the Fayette Circuit Court disposing of Fox Trot's counterclaims in favor of Forcht Bank N.A. ("Forcht Bank"). They contend the Fayette Circuit Court improperly granted judgment by

excluding parol evidence in this breach of contract claim. Having reviewed the record, we affirm.

I. FACTUAL AND PROCEDURAL HISTORY

In 2007, Fox Trot had at least two different projects on its slate. The first was the completion of a waste coal power plant in Estill County (the "power plant project"). The second was the construction of a residence for Charles and Jacquelyn Yates on a 1,223-acre farm in Fayette County owned by Fox Trot (the "residential project"). The power plant had been an active project for Fox Trot since 1999, and had required an estimated total funding of three hundred million dollars. The Appellants sought financing from First National Bank of Lexington ("FNB"), a branch of a banking corporation which is now Forcht Bank. FNB agreed to provide a line of credit to the Appellants. The Appellants alleged that they intended to use the proceeds from this line of credit for the purposes of both the residential construction and for the power plant project, and that such intentions were understood by FNB at the time the loan was approved.

The cost of the construction of the residence was projected to be $2,034,000, but the Yates partially financed the construction from their own funds. To complete the residence, the Yates only needed to borrow approximately $900,000. Fox Trot also had an immediate need of approximately $1.47 million for the power plant project. On November 21, 2007, the parties executed three documents: a loan application (which was completed and submitted by Charles and Jacquelyn Yates), a "residential construction loan agreement," and a

"universal note and security agreement." In these documents, FNB granted a line of credit to the Appellants up to a maximum of $3,483,950.00. This loan was secured by a mortgage on the 1,223-acre tract (which was valued at just under $16,000,000).

The Appellants contend that the parties had an oral agreement that the line of credit would be available for both the residential and the power plant projects. However, the documents reflecting the agreement reached by the parties referenced only the residential project, making no mention of Estill County, the power plant project, or the subsidiary of Fox Trot through which the power plant project was to be completed. Additionally, Darryl Terry, the president of the branch of FNB at the time of the origination of the loan (and who also worked for Forcht Bank for a period of time), testified in deposition that he specifically told the Yates that the power plant project was "beyond the scope of the bank" and that the loan served as financing solely for the residential project. However, Terry also testified that the excess funds could be used in any way the Yates saw fit.

FNB made an immediate advance of $22,883.23 to cover the closing costs, and the Appellants did not request another advance until May 5, 2008. After the transition of ownership of FNB, Forcht Bank made ten more advances between July of 2008 and January of 2009, which the Yates allege were not made for the purposes of completing the residential project. Forcht Bank made six more advances between February of 2009 and April of 2009, despite the fact that the residence was 99% complete as of January 27, 2009.

On May 8, 2009, Forcht Bank informed the Appellants that it would not authorize any further advances. According to the deposition testimony of Tracy Hatfield, Forcht Bank's collections officer, and William Potter, Forcht Bank's market president, the reason for this refusal was that residential construction had been completed. At that time, the note had not yet reached maturity, and the Appellants still had approximately $860,000 in credit available under the terms of the agreement.

Also in May of 2009, the Appellants supplied tax information to Forcht Bank which indicated what the bank interpreted as a severe financial downturn for the Appellants. Deposition testimony revealed that when the parties met to discuss the loan, Charles Yates disclosed to agents of Forcht Bank that he was out of money. Despite this setback, the Appellants had kept their interest payments current. Kim Thiel, another Forcht Bank loan officer, testified in deposition that the bank would likely have difficulty collecting on the debt, based on the updated financial information supplied by the Appellants. However, the note remained secured by a first mortgage on the Yates' 1,223-acre farm.

Nevertheless, on December 21, 2009, with the maturity date of the loan approaching, the parties executed another document, a "Change in Terms Agreement," which adopted the terms of the previous written agreements and extended the maturity date of the note to June 21, 2010.

Ultimately, the Appellants failed to pay the debt after maturity, and Forcht Bank filed the action below to enforce its security interest on October 20,

2010. The Appellants filed their Answer and Counterclaim on November 23, 2010, alleging breach of contract and fraud, and demanded a jury trial. The parties settled Forcht Bank's main claim, and the trial court entered an agreed judgment reflecting that fact. The trial court also stayed enforcement of that judgment pending the outcome of the litigation of the counterclaim.

On June 19, 2012, the Appellants moved for summary judgment. The trial court extended Forcht Bank's deadline to respond to the motion until after additional discovery could be taken. Forcht Bank filed its response and its own motion for summary judgment on February 13, 2013. The trial court accepted Forcht Bank's arguments that the loan documents lacked any facial ambiguity, and that the Appellants' extrinsic evidence should be excluded. Without the extrinsic evidence, the trial court concluded, the record presented no unresolved issue of material fact, and on April 11, 2013, the trial court entered summary judgment in favor of Forcht Bank. The Appellants then moved to alter, amend, or vacate the judgment, which the trial court denied.

The Appellants filed a timely Notice of Appeal on June 21, 2013, but Fox Trot filed a bankruptcy petition on October 12, 2013. By agreed order entered by the bankruptcy judge on January 9, 2014, the automatic stay was modified to permit this appeal to proceed.

II. ANALYSIS

A. STANDARD OF REVIEW

When reviewing the propriety of a trial court's ruling on a motion for summary judgment, this Court examines the record to determine if the trial court correctly found that it lacked genuine issues of material fact, which would entitle the moving party to judgment as a matter of law. *W. Ky. Rural Electric Co-op. Corp. v. City of Bardwell*, 362 S.W.3d 351, 354 (Ky. App. 2011) (quoting *Scifres v. Craft*, 916 S.W.2d 779 (Ky. App. 1996)). Because a trial court's examination of the record seeks only to discover the existence of unresolved questions of fact and not to weigh the evidence, Kentucky law considers any findings resulting from that examination as questions of law, subject to a *de novo* review. *Blevins v. Moran*, 12 S.W.3d 698, 700 (Ky. App. 2000). Moreover, a court's interpretation of contractual language is a matter of law, also subject to *de novo* review. *McMullin v. McMullin*, 338 S.W.3d 315, 320 (Ky. App. 2011).

B. THE TRIAL COURT PROPERLY EXCLUDED THE PAROL EVIDENCE AS TO THE APPELLANTS' COUNTERCLAIM FOR BREACH OF CONTRACT

For more than a century, it has been axiomatic in contract law that evidence tending to show the terms of an unambiguous contract reflect something other than the agreement of the parties is inadmissible. "In the absence of a claim of fraud or mistake, parol evidence is inadmissible to contradict, vary, or alter its terms, or to add to it something not contained in it." *Krietz v. Gallenstein*, 170 Ky. 16, 185 S.W. 132, 134 (1916) (citing *Wight v. Shelby R.R. Co.*, 16 B. Mon. 4, 55 Ky. 4 (1855)). "[W]hen parties reduce their agreement to a clear, unambiguous,

and duly executed writing, all prior negotiations, understandings, and agreements merge into the instrument, and a contract as written cannot be modified or changed by prior parol evidence, except in certain circumstances such as fraud or mistake." *New Life Cleaners v. Tuttle*, 292 S.W.3d 318, 322 (Ky. App. 2009).

1. THE LANGUAGE IN THE CONTRACT WAS CLEAR AND UNAMBIGUOUS

The first stage in our inquiry is to determine whether the contract is ambiguous. Where no ambiguity exists, judicial review can go no further than the document itself. *Abney v. Nationwide Mut. Ins. Co.*, 215 S.W.3d 699, 703 (Ky. 2006). Contractual language capable of "different or inconsistent, yet reasonable interpretations" is ambiguous. *Tuttle,* 292 S.W.3d 318 at 322 (quoting *Cantrell Supply Co. v. Liberty Mut. Ins. Co.*, 94 S.W.3d 381 (Ky. App. 2002)). A contract does not become ambiguous after a conflict arises because one party asserts that it does not reflect the intent of the parties. *Frear v. P.T.A. Indus., Inc.*, 103 S.W.3d 99, 107 (Ky. 2003).

Here, none of the loan documents referenced the power plant project in any way. All of the documents stated that the purpose of the loan was to facilitate construction of the residence, including the loan application—submitted by Charles and Jacquelyn Yates—which contains a handwritten explanation of the intended use of the proceeds: "Build personal residence." Even if this Court were to presume the parties orally agreed that the loan proceeds could be used for the power plant project, because such agreement did not find its way into the written

agreement, we must presume it to have been abandoned. "It is presumed that the written agreement is final and complete and that all prior negotiations have either been abandoned or incorporated into the final written instrument." *Tuttle,* 292 S.W.3d 318 at 322 (citing *Childers v. Lucas*, 301 Ky. 763, 192 S.W.2d 714 (1946)).

Based on our own review of the documents and the authorities noted herein, we conclude that the trial court properly concluded the contract was clear and unambiguous, and the purpose of the loan was to facilitate construction of the residence.

2. OTHER USES OF PAROL EVIDENCE

The Appellants contend that evidence extrinsic to an unambiguous contract may be considered in a litany of situations, such as amendments, waiver, fraud, mistake, and estoppel; though their arguments before this Court focus only on amendment, mistake, waiver, and fraud.

The Appellants cite *Energy Homes, Div. of Southern Energy Homes, Inc. v. Peay*, 406 S.W.3d 828 (Ky. 2013), to stand for the proposition that parol evidence may be used to prove subsequent amendments to unambiguous contracts. However, that case has limited applicability here, as it concerned an arbitration clause in a sales contract, whereas the instant contract falls under KRS 370.010(9). KRS 370.010(9) requires that contracts to extend credit be in writing in order to be enforceable; by extension, the statute requires modifications to the same to be reduced to writing as well. Thus, even if the parol evidence conclusively

established the parties agreed to an amendment of the terms of this loan, neither party could enforce it absent a writing. We cannot conclude that the trial court committed reversible error in refusing to consider the parol evidence in the amendment context.

The Appellants next argue that the trial court should have allowed the parol evidence to establish a claim of mutual mistake. Specifically, they contend that parol evidence is proper because the loan documents do not reference the combined purposes of the loan.

This position becomes untenable in light of the Change in Terms Agreement, even assuming the parties were operating under a mutual mistake as to the terms of the original agreement. Forcht Bank made its position known to the Appellants in no uncertain terms prior to the execution of the Change in Terms Agreement. Knowing Forcht Bank's position, the Appellants had the opportunity to insist that any mistake be clarified in the Change in Terms Agreement, but failed to do so. The new agreement specifically adopted the terms of the prior written agreement and disclaimed any subsequent oral agreements the parties may have made. By entering into the new agreement, the Appellants accepted the terms as written, and in so doing bound themselves solely to the written terms of the documents.

Therefore, we cannot agree with the Appellants that the trial court erred in excluding the extrinsic evidence as it relates to mutual mistake.

The Appellants next contend that the trial court improperly refused to consider parol evidence on the issue of waiver. On this issue, both sides argue that the other misrepresented the facts related to Forcht Bank's knowledge as to what the Appellants were doing with the loan proceeds.

The Appellants argue that Forcht Bank knew the proceeds were being used for the power plant project for several reasons. First, Forcht Bank loaned the Appellants an amount of funds well in excess of the projected cost of construction of the residence. Second, Forcht Bank continued to make advances after the construction was complete. Third, the Appellants rely on the deposition testimony of Darryl Terry that "[W]e talked about loans that Chuck [Yates] would need and the amount we already know that over $2 million of that was for the house. And the rest of it basically was for him to use as he saw fit." Fourth, a notation was made on one of the advances occurring after February 2009 that the advance was "to fund additional line not used for cons of house."

Forcht Bank insists that it was unaware that the proceeds were being used for the power plant project. It points to the fact that all of its witnesses provided deposition testimony that they believed the loan was residential in nature.

However, the factual dispute presented in the briefs is obviated by the clear and unambiguous terms of the promissory note and the Change in Terms Agreement. The note contains the following language regarding waivers: "By waiving your right to declare a default, you do not waive your right to consider

later the event a default if it continues or happens again." The Change in Terms Agreement not only expressly acknowledges that the written terms of the prior note remain binding, but also contains its own waiver language: "Lender's consent to this Agreement does not waive the right to strictly enforce Lender's rights under this Agreement or the Instruments evidencing the existing debt[.]"

This Court has previously held that implied waivers "will not be inferred lightly." *Conseco Fin. Serv. Corp. v. Wilder*, 47 S.W.3d 335, 344 (Ky. App. 2001). "[S]omething more than a mere inference of intent [to waive a contractual right] is required." *Weis Builders, Inc. v. Complete Contracting, Inc.*, 247 S.W.3d 542, 545 (Ky. App. 2008). In *Weis*, the appellant was alleged to have waived its right to arbitration by virtue of a statement that it was "open to discussing" arbitration, but its "preference is to litigate" disputes. *Id.* This Court held that such a statement did not evince sufficient intent to waive the right to arbitration. *Id.*

Here, both the note and the Change in Terms Agreement unequivocally state that failure to enforce the right to declare a default did not constitute a waiver. These statements are even more definitive than that found in *Weis*. In light of the authorities cited herein, a waiver cannot be implied in these factual circumstances.

We must conclude that the trial court did not err in refusing to consider the parol evidence as it relates to any of these alternative uses of such evidence.

C. THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT AS IT RELATED TO THE APPELLANTS' COUNTERCLAIM FOR FRAUD

Even in instances where a contract's terms present no ambiguity, a court may examine parol evidence in order to resolve a claim or defense of fraud. *See Kreitz, Tuttle, supra.* Because fraud is a tort claim rather than a contract claim, the parol evidence rule does not apply. *Radioshack Corp. v. ComSmart, Inc.*, 222 S.W.3d 256, 261 (Ky. App. 2007).

The Appellants contend that Charles and Jacquelyn Yates would not have entered into the contract if not for the alleged oral representations by agents of Forcht Bank that the loan proceeds could also be used for the power plant project. Forcht Bank mischaracterizes the allegations comprising the fraud claim as stating the same conduct as the breach claim. The trial court's order granted Forcht Bank's motion for summary judgment and dismissed the Appellants' counterclaim with prejudice.

A party seeking to recover for fraud must establish six elements of the tort by clear and convincing evidence: 1) a material representation must have been made, 2) which was false, 3) known to be false or recklessly made by the party making the representation, 4) the representation was intended as an inducement to be acted upon, 5) the party seeking relief relied on the representation, and 6) suffered damages thereby. *United Parcel Service Co. v. Rickert*, 996 S.W.2d 464, 468 (Ky. 1999).

The extrinsic evidence does not present an unresolved issue of material fact concerning whether Terry's representations to Charles and Jacquelyn Yates constituted fraud. No proof in the record indicated Terry knew or should have known the representations were false at the time at which he made them. Because a failure of proof on any essential element precludes recovery, we cannot conclude that the trial court erred in issuing its judgment. *Steelvest,* 807 S.W.2d 476, at 481 (Ky. 1991).

III. CONCLUSION

Having reviewed the record and for the reasons stated herein, we affirm the judgment of the Fayette Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANTS:

D. Duane Cook
Georgetown, Kentucky

John Milton Sosbe
Georgetown, Kentucky

ORAL ARGUMENT FOR APPELLANTS:

D. Duane Cook
Georgetown, Kentucky

BRIEF AND ORAL ARGUMENT FOR APPELLEE:

William Craig Robertson III
Lexington, Kentucky