RENDERED: AUGUST 4, 2017; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2016-CA-000410-MR

ROY L. BATES — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE THOMAS L. CLARK, JUDGE
ACTION NO. 15-CI-01381

ALLIANCE BANKING COMPANY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: KRAMER, CHIEF JUDGE; ACREE AND JONES, JUDGES.

KRAMER, CHIEF JUDGE: This appeal involves two promissory notes held by Alliance Banking Company relating to loans it made to an entity known as "Mortuary Trade Services, Inc. dba Noon Mortuary Services." Alliance filed two claims in Fayette Circuit Court to collect the outstanding balance of the two promissory notes from its purported guarantor, Roy L. Bates. Bates defended and

counterclaimed, alleging that any guaranty he may have executed relative to the two promissory notes was invalid and fraudulent. The circuit court entered summary judgment in favor of Alliance and summarily dismissed Bates's counterclaim. Bates now appeals. For the reasons discussed below, we affirm.

RELEVANT FACTUAL AND PROCEDURAL HISTORY

On or about October 18, 2006, Roy L. Bates, along with his daughter, Charlene Hollingsworth, and her husband, Paul A. Hollingsworth, signed a number of documents. Bates does not recall the nature of these documents, or why he signed them. Nor, he would later testify, did he read them.

On December 5, 2006, Bates, along with Charlene and Paul, signed another document. This document was also signed by George Edward Noon III, the owner of Noon Mortuary Service, Inc. Bates represents that he did not read or understand the nature of this document.

On or about January 23, 2007, these three individuals signed another document. Bates represents that he did not read or understand the nature of this document, either. He would later testify during a subsequent deposition that this document had something to do with Charlene and Paul saying:

> We need a board. We need a board to organize this or something. They said, will you be a board member? Me a board member? What's that? Well, it doesn't mean anything. It's just that you'd be on the board. That's what I remember, and that's what I signed.

Bates also recalls that at some later point in time shortly before February 12, 2007, he had a conversation with Cory Johnson, a loan officer for Alliance Bank. As Bates remembers it,

> Cory said, [Charlene and Paul] need a down payment of about $100,000; will you help them? And I said, I don't have $100,000. And he said, well, can you help them? Well, I can put my house up. My house is paid for; I can put my house up. And that's what I did.
>
> . . .
>
> And he said, that's acceptable, and we can do it with the small business thing. And that's all I know.

On or about February 12, 2007, Cory Johnson, on behalf of Alliance, then presented Bates, Charlene, and Paul with a series of documents to sign. Bates represents that he did not read, ask questions about, or understand the nature of these documents. But, he represents that when he and Charlene and Paul signed these documents that day, he was confident they related to a $103,000 loan for which his house would serve as collateral.

In his deposition, Bates also recalled that about three years later, beginning April 2010 and until April 2014,

> [Alliance] started calling me over, wanting me to sign papers. What kind of papers? Well, they're not able—they're having a rough time. We need to extend interest only so they don't have to make the payment, they just pay the interest. But we need you to sign to do that. So I did. And then a little while they did it again, and I did. And then in a while they did it again, and I did.
>
> And one day we had a meeting upstairs, and two ladies from the Small Business—this is my first ever encounter

> with the Small Business. I never knew anything about it. Never had any reason to want to know about it. But those two ladies were there, and they had discovered some kind of discrepancy in the interest that the bank was charging. And they were there to correct that and to see that Mr. Penn[1] did.
>
> It really wasn't any of my business so I wasn't paying attention. I didn't even know why they wanted me there. But Mr. Penn agreed that they were right and so he said, but you sign this, Mr. Bates, so we can get this, and so I signed again. To the best of my knowledge, those four times are the only times I ever signed anything. And they asked me many times, I can't remember how many, but more than one or two times again to sign, but I refused because I didn't think I needed to get involved any further.

On April 16, 2015, Alliance filed suit in Fayette Circuit Court against Paul, Charlene, Bates, and a company by the name of "Mortuary Trade Services, Inc. dba Noon Mortuary Services" (hereinafter "Mortuary"). Alliance alleged it had made three separate loans to these defendants. Further, it alleged that as part of the consideration for each loan, these defendants had executed promissory notes as joint obligors for the loan amounts, plus interest. One of the loans had been satisfied; two were in default (respectively as of June 30, 2014, and July 12, 2014) and were immediately due; and Alliance's action sought to collect what remained outstanding.

Charlene and Paul filed for bankruptcy protection. Mortuary filed no answer, and a default judgment was entered against it on July 15, 2015, for the outstanding balance. For his part, however, Bates filed an answer representing

[1] "Mr. Penn" is a reference to Stephen D. Penn, an individual noted as Alliance's president and CEO in several of the documents Bates signed.

that, to the best of his knowledge, the extent of his involvement and liability relative to Alliance's claims was that he had agreed his house would serve as collateral for the one loan that had been satisfied. In light of that, Bates asserted that any liability Alliance claimed he had in this matter was either nonexistent, or —as he counterclaimed—the product of what he alleged was Alliance's fraud. In relevant part, his claim alleged:

> 14. Alliance misrepresented to Bates that all documentation submitted to Bates was for a loan in the amount of approximately $103,000.00 to Mortuary, for which Bates would use his house as collateral.
>
> 15. Alliance misrepresented to Bates that all subsequent documentation, including but not limited to, the individual signature pages that were delivered to Bates, involved lowering the interest rate of the original loan to which he was a guarantor in the amount of $103,000.00.
>
> 16. Bates relied upon [Alliance's] misrepresentation and as a result, was brought into this action and has sustained damages.

A period of discovery followed. During his discovery deposition, Bates reviewed—for what he testified was the first time—the several previously discussed documents which he testified he had not read or understood but had nevertheless voluntarily signed between 2006 and 2011.

Among the documents Bates signed on October 18, 2006, was a seven-page application for a ten-year term loan of $315,000 from Alliance. The application represented the loaned funds would be used to purchase Noon Mortuary Service, Inc., from its then-owner, George Edward Noon III, for

$300,000, and to pay the additional fees and closing costs of the transaction. The application represented the business would be managed by Paul and Bates. On the fourth page of the application, Bates had signed his name as a guarantor of the applied-for loan. Another document Bates signed and dated on October 18, 2006, was a "Statement of Personal History" from the United States Small Business Administration. Aside from including Bates's signature, along with handwritten notations of Bates's date of birth, address, and Social Security number, this document also recites that Bates would be a 50% owner of Noon Mortuary Service, Inc.

The December 5, 2006 document Bates signed together with Charlene and Paul was a contract to purchase Noon Mortuary Service, Inc., from George Edward Noon III for $400,000, rather than the $300,000 price reflected in the loan application. The contract also provided that Bates, Charlene, and Paul would be liable, collectively and individually, for paying the purchase price and assuming various liabilities of the company.

What Bates signed on January 23, 2007, with Charlene and Paul were the articles of incorporation of Mortuary, a legal entity designed to assume the assets and functions of Noon Mortuary Service, Inc., and do business as Noon Mortuary Services. Above their signatures, this document indicated Bates, Charlene and Paul were the incorporators of this entity.

Another document Bates identified as bearing his signature was dated January 25, 2007. It detailed the purpose of the $315,000 loan was to "[p]urchase

equipment & business known as Noon Mortuary Service, Inc." It detailed the history of that business. It identified Bates, Charlene, and Paul as the "borrowers." And, it specified Bates was one of the two contact persons for Mortuary; an authorized borrower; and an individual guarantor of the loan—his signature is on the line designating him as such.

What Bates signed on February 12, 2007, consists of two separate documents. The first document is two pages in length and styled "GUARANTY." In substance, it provides Alliance had loaned Mortuary an additional $100,723; it references a promissory note for that amount plus interest Mortuary executed (by and through Paul) as consideration for the loan, payable monthly over the course of 30 years; and it specifies Bates would be personally liable for satisfying that amount in the event Mortuary defaulted. As an aside, both Alliance and Bates agree that Bates satisfied the full amount of this loan in 2014.

The second document is a promissory note six pages in length, and it jointly and severally obligated Mortuary, Bates, Charlene and Paul to pay Alliance $315,000, with interest, in monthly payments over the course of ten years.

What Bates signed between April 2010 and April 2014 begins with another two-page document styled "GUARANTY," dated April 14, 2010. It states that Alliance had loaned Mortuary an additional $34,859.90 on April 14, 2010. It references a promissory note for that amount plus interest Mortuary executed on April 14, 2010 (by and through Paul) as consideration for the loan, with a maturity

date of December 26, 2010. And, it specifies Bates would be personally liable for satisfying that amount in the event of Mortuary's default.

On April 27, 2010, Bates, Charlene and Paul signed and dated a document styled "commercial debt modification agreement." It referenced the $315,000 loan of February 12, 2007; it provided the current balance of that loan stood at $288,688; and it specified the parties were modifying the terms of that loan to allow for interest-only payments until January 12, 2011.

On or about March 30, 2011, Bates, Charlene and Paul signed and dated two commercial debt modification agreements. The first referenced the $315,000 loan of February 12, 2007; it provided the current balance of that loan stood at $283,988.64; and it specified the parties were modifying the terms of that loan to allow for interest-only payments from January 12, 2011 through March 12, 2012.

The second agreement referenced the $34,859.90 loan of April 14, 2010; it provided the current balance of that loan stood at $31,433.43; and it specified the parties were modifying the terms of that loan to allow for a later maturity date of December 31, 2013.

On or about June 13, 2013, Bates, Charlene and Paul signed and dated a commercial debt modification agreement. It referenced the $315,000 loan of February 12, 2007; it provided the current balance of that loan stood at $255,597.48; and it specified the parties were modifying the terms of that loan to

allow for substantially interest-only payments from March 2013 until January 12, 2014.

On or about December 31, 2013, Bates, Charlene and Paul signed a commercial debt modification agreement. It referenced the $34,859.90 loan of April 14, 2010; it provided the current balance of that loan stood at $31,737.29; and it specified the parties were modifying the terms of that loan to allow a later maturity date of April 30, 2014.

Lastly, on or about April 30, 2014, Bates, Charlene and Paul signed and dated two more commercial debt modification agreements. The first referenced the $315,000 loan of February 12, 2007; it provided the current balance of that loan stood at $251,536.58; and it specified the parties were modifying the terms of that loan to allow for interest-only payments until July 12, 2014.

The second agreement referenced the $34,859.90 loan of April 14, 2010. It provided the current balance of that loan stood at $32,062.37; and it specified the parties were modifying the terms of that loan to allow for a later maturity date of June 30, 2014, and for principal and interest payments to resume as of that date.

As Bates indicated in his discovery deposition, he refused to sign any other documentation after April 30, 2014. Consequently, the terms of the $315,000 and $34,859.90 loans were not modified any further; Mortuary defaulted on the $34,859.90 loan when it failed to make principal and interest payments after June 30, 2014; Mortuary defaulted on the $315,000 loan when it failed to make

principal and interest payments after July 12, 2014; and under the plain and unambiguous terms of the agreements discussed above—all of which Bates voluntarily signed and executed—Bates became individually liable for the outstanding balances of both loans.

Shortly after Bates gave his deposition in this matter, Alliance moved for summary judgment. In sum, Alliance argued Bates had produced no evidence that it had fraudulently induced him to sign any of the documents discussed above; Bates had produced no evidence Alliance had acted fraudulently in obtaining his signature; and absent that, Bates—who had the opportunity to read each of the documents, but chose not to do so and signed them anyway—was bound by them. *See Cline v. Allis-Chalmers Corp.*, 690 S.W.2d 764, 766 (Ky. App. 1985). Moreover, Alliance argued Bates had produced no evidence demonstrating he had sustained any kind of injury by entering into the various loan transactions. To the contrary, it noted Bates had testified during his deposition that the Alliance loans had been used to acquire assets and operate a business that he, Charlene, and Paul were contractually obligated to purchase from Noon Mortuary by virtue of the December 5, 2006 agreement.

Responding, Bates asserted that for purposes of summary judgment, he had provided enough evidence of fraud to support both vitiating any obligations he may have had relative to the two loans and allowing his counterclaim to go forward. The evidence he cited, discussed further below, derived from various

portions of his deposition and an unauthenticated letter purportedly from Cory Johnson.

Upon review, the circuit court entered summary judgment against Bates regarding Alliance's breach of contract claims and dismissed his counterclaim. This appeal followed.

STANDARD OF REVIEW

Summary judgment serves to terminate litigation where "the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Kentucky Rule of Civil Procedure (CR) 56.03.

It is well established that a party responding to a properly supported summary judgment motion cannot merely rest on the allegations in his pleadings. *Continental Cas. Co. v. Belknap Hardware & Mfg. Co*., 281 S.W.2d 914 (Ky. 1955). "[S]peculation and supposition are insufficient to justify a submission of a case to the jury, and . . . the question should be taken from the jury when the evidence is so unsatisfactory as to resort to surmise and speculation." *O'Bryan v. Cave*, 202 S.W.3d 585, 588 (Ky. 2006) (citing *Chesapeake & Ohio Ry. Co. v. Yates*, 239 S.W.2d 953, 955 (Ky. 1951)). "'Belief' is not evidence and does not create an issue of material fact." *Humana of Kentucky, Inc. v. Seitz*, 796 S.W.2d 1, 3 (Ky. 1990); *see also Haugh v. City of Louisville*, 242 S.W.3d 683, 686 (Ky. App. 2007) ("A party's subjective beliefs about the nature of the evidence is not the sort of affirmative proof required to avoid summary judgment."). Furthermore, the party opposing summary judgment "cannot rely on the hope that the trier of fact will disbelieve the movant's denial of a disputed fact, but must present affirmative evidence in order to defeat a properly supported motion for summary judgment."

Steelvest, Inc. v. Scansteel Serv. Ctr., Inc., 807 S.W.2d 476, 481 (Ky. 1991) (internal citations and quotations omitted).

On appeal, we must consider the evidence of record in the light most favorable to the non-movant, and must further consider whether the circuit court correctly determined that there were no genuine issues of material fact and that the moving party was entitled to judgment as a matter of law. *Scifres v. Kraft*, 916 S.W.2d 779 (Ky. App. 1996). "Because summary judgment involves only legal questions and the existence of any disputed material issues of fact, an appellate court need not defer to the trial court's decision and will review the issue *de novo*." *Lewis v. B & R Corp.*, 56 S.W.3d 432, 436 (Ky. App. 2001) (footnote omitted).

ANALYSIS

A party claiming fraud must establish six elements by clear and convincing evidence: (1) material representation; (2) which is false; (3) known to be false or made recklessly; (4) made with inducement to be acted upon; (5) acted in reliance thereon and, (6) which causes injury. *United Parcel Serv. Co. v. Rickert*, 996 S.W.2d 464, 468 (Ky. 1999); *Wahba v. Don Corlett Motors, Inc.*, 573 S.W.2d 357, 359 (Ky. App. 1978). Where the proven facts or circumstances merely show inferences, conjecture, or suspicion, or such as to leave reasonably prudent minds in doubt, it must be regarded as a failure of proof to establish fraud. *Goerter v. Shapiro*, 254 Ky. 701, 72 S.W.2d 444, 445-46 (1934). Here, Alliance was entitled to summary judgment for two reasons.

First, Bates failed to present clear and convincing evidence that Alliance misrepresented any material fact to him, or otherwise affirmatively led him to believe the documents he was signing were something other than what they purported to be. Rather, his claim was based entirely upon what he *assumed* the various documents stated when he signed them; what he *believed* Alliance knew about his assumptions; the fact that Alliance did not tell him to read the documents carefully; and the fact that Alliance told him to sign the documents. This is reflected in the following exchange that occurred during his deposition, in which Bates reviewed the particulars of his counterclaim with opposing counsel:

> COUNSEL: Okay. If you'd flip to the next page, paragraph 14, you say that Alliance misrepresented to Bates that all documentation submitted to Bates was for a loan in the amount of approximately $103,000 to Mortuary, for which Bates would use his house as collateral. Now we've gone through all these documents, and you've admitted that you've signed all these documents, and they all indicate two different loan amounts, one of 315 and one for 34,000 and change. Can you tell me how Alliance misrepresented to you that they were for a $103,000 loan?
>
> BATES: Say that again, please?
>
> COUNSEL: Sure. I'll do my best. It was a long question. In this allegation you say that Alliance misrepresented to you that all these documents were for a loan of $103,000. Are you saying that somebody from the bank said these all have to do with a $103,000 loan?
>
> BATES: *I'm not saying any such thing*, Mr. Brice.
>
> COUNSEL: Okay.

BATES: *What I'm saying is I had great confidence in the people I was dealing with, and they didn't ask me, read that, please, like you did*.

COUNSEL: Uh-huh.

BATES: They'd just say, sign them. And I had no reason not to and so I did.

COUNSEL: Did you ever discuss those documents and the loans with either Paul or Charlene, what was going on? Did you ask them what was going on?

BATES: No, I never asked them. We all was always there.

COUNSEL: Right.

BATES: I mean, they knew.

COUNSEL: But I mean, you came in for a reason. Did Paul and Charlene ask you to come in to the bank to sign documents?

BATES: No. Mr. Penn did.

COUNSEL: But he asked all of you to come in to sign the documents?

BATES: Well, it was their business, and he would say, ask Mr. Bates to come with you. They didn't know why Mr. Bates needed to come but I did. They asked me, Mr. Penn wants you to come with us, so I did.

COUNSEL: But did you internally ever discuss the documents you were signing? I mean, did you just walk in, sign documents, and leave, and never talk to each other about the documents?

BATES: Oh, no. We would sit down and have a social meeting. We would visit and we would—well, we'd talk about things that was beneficial to all of us. There just never was any discussion about what I'm signing.

> COUNSEL: Right.
>
> BATES: They knew and I knew that I had signed, by putting up my house, $103,000. I keep saying 100 but $103,000, and that's all.

(Emphasis added.)

As an aside, Bates also notes that in his deposition he testified that sometime in 2010, Charlene told him she had spoken with an unidentified woman employed by Alliance, and the unidentified woman told her he was only obligated to repay the $100,723 loan, nothing else. He also points to an unauthenticated, one-paragraph letter which he produced in response to Alliance's motion for summary judgment. The letter is purportedly from Cory Johnson, is dated February 1, 2016 (*i.e.*, roughly eight years after Johnson ended his employment with Alliance, and roughly one month after Alliance filed its summary judgment motion in this matter), and it provides in relevant part:

> While employed at Alliance Bank as a commercial lender I did a loan for Paul and Charlene Hollingsworth to purchase a mortuary business in Lexington, KY. To the best of my memory the transaction was done in two separate loans and they were SBA secured loans. There was a larger loan and a smaller loan. The smaller loan was secured by a mortgage on the personal residence of Roy and Betty Bates. As best I can remember Roy Bates was not a borrower on the loans, but only pledged his home as collateral for the smaller loan.

However, what Bates testified Charlene purportedly told him about what an unidentified employee of Alliance told her about his obligations under the various loans does not qualify as evidence, much less clear and convincing

evidence of fraud. At most, it is a statement from an out-of-court declarant—Charlene—offered to prove the truth of the matter asserted (*i.e.*, that Charlene overheard an unidentified agent from Alliance state, and therefore admit, that Bates was only obligated to repay the $100,723 loan). It is therefore hearsay. *See* KRE 801(c). And, Bates does not contend that any exception to the rule prohibiting hearsay applies to it. *See generally*, Kentucky Rules of Evidence (KRE) 802, 803, and 804.

Moreover, the February 1, 2016 letter purportedly from Cory Johnson, discussed above, was also insufficient for purposes of opposing Alliance's motion. Aside from likewise consisting of hearsay for which Bates raises no exception, the letter is unsworn and unauthenticated. *See* CR 43.13(1) (explaining affidavits permitted under the Civil Rules must be "sworn to or affirmed before an officer authorized to take depositions by Rule 28.").

As to the second reason Alliance was entitled to summary judgment, Bates also failed to adduce evidence demonstrating the sixth of the above-stated elements of fraud, *i.e.*, injury. Bates represents in his appellate brief, and represented in his pleadings below, that he sustained an injury due to what he characterizes as Alliance's fraud because his intention at all relevant times was only to provide a "down payment" to allow *Charlene and Paul* to purchase Noon

Mortuary.[2] His intention was not, he asserts, to ever expose himself to liability for the entire purchase price of that entity.

But, what Bates has represented is a mischaracterization of the evidence. On appeal, just as he did below, Bates avoids any mention of the December 5, 2006 purchase agreement *he* executed *with* Charlene and Paul to acquire Noon Mortuary. In particular, Bates testified:

> COUNSEL: [T]o acquire [Noon Mortuary] it took your loan [of $100,723] plus the small business loan [of $315,000] for [Charlene and Paul] to be able to buy the business; right?
>
> BATES: Yes.
>
> COUNSEL: *And you were contractually obligated to buy that business. You signed the purchase agreement; correct?*
>
> BATES: *I am. These are my signatures*. I'm almost certain they are. But I had nothing to do—I never asked a question about the loan. I never knew how much it was. I put up my house and left, and that's the last I heard of it for more than three years.

(Emphasis added.)

In short, Bates's intention was not to provide a "down payment" to allow Charlene and Paul to purchase Noon Mortuary. It is also disingenuous for Bates to argue he never would have intentionally exposed himself to liability for

[2] To illustrate, on the second page of his brief, Bates states in relevant part:

> Mr. Bates alleges that, although his signature appears on a number of documents, he was only involved in order to procure the "Capital Loan" [*i.e.*, the $100,723 loan] in order for the Hollingsworth's [sic] to purchase [Noon Mortuary], and that anything stating otherwise, was obtained by fraud or misrepresentation. (R. Vol 1, pp. 78-85, Answer and Counterclaim). The Hollingsworths entered into the initial loan debt in order to purchase the above-mentioned business.

repaying the entire amount of loans which were *used* to purchase Noon Mortuary for $400,000. At the time of those loans, Bates had *already* intended—as evidenced by the four corners of a December 5, 2006 purchase agreement he has never challenged or sought to avoid—to directly obligate himself to purchase Noon Mortuary for $400,000; and in doing so, he had *already* exposed himself to liability for paying the entire purchase price.

Bates has failed to demonstrate how entering any of the loan transactions with Alliance, even if he did so unknowingly, injured him. To the contrary, Bates's, Charlene's, and Paul's contractual obligations to purchase Noon Mortuary for $400,000 existed *before* they entered into the loan transactions with Alliance. Elsewhere in his deposition, Bates further admitted that without the loaned funds from Alliance, he, Charlene, and Paul would have breached their contractual obligation to purchase Noon Mortuary;[3] and, that the remaining loaned funds, along with the subsequent repeated modifications of the loan agreements allowing for interest-only payments, were necessary for the continued survival of the business he, Charlene, and Paul had incorporated to do business as Noon Mortuary.

CONCLUSION

In light of the foregoing, we AFFIRM.

ALL CONCUR.

[3] In his deposition, Bates testified "Paul didn't have any money, and all I had was a house. It was paid for, but I had no money."

BRIEF FOR APPELLANT:

J.D. Fleming
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BRIEF FOR APPELLEE:

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