

RENDERED: FEBRUARY 8, 2019; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2016-CA-001389-MR

EDWARD NEUTZ;
JAMI NEUTZ; AND
N & R PROPERTIES, LLC

APPELLANTS

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE SUSAN SCHULTZ GIBSON, JUDGE
ACTION NO. 12-CI-004928

JOE D. TAYLOR;
J.D. TAYLOR & SONS MOVING, INC.;
STUART E. ALEXANDER; AND
STUART ALEXANDER, PLLC

APPELLEES

OPINION
VACATING AND REMANDING

** ** * ** * **

BEFORE: CLAYTON, CHIEF JUDGE; ACREE AND TAYLOR, JUDGES.

CLAYTON, CHIEF JUDGE: Appellants appeal from a jury award and judgment of the Jefferson Circuit Court awarding Joe D. Taylor damages against Edward

Neutz for Neutz's breach of a promissory note and security agreement. Upon review, we vacate and remand for proceedings consistent with this opinion.

BACKGROUND

Taylor sold a moving company that he had formed in 1994, J.D. Taylor & Son Moving, Inc. ("JDTSM"), to Neutz in 2005 for a purchase price of approximately \$1.8 million. To consummate the sale, the parties entered into several contracts and agreements, each effective January 1, 2006, including a \$656,000.00 promissory note (the "Note") from Neutz, as maker, to Taylor, as payee. The Note contained the following language:

[Neutz] has granted [Taylor] a security interest in all of the stock now or hereafter owned by [Neutz] in [JDTSM] pursuant to a security agreement of even date herewith (the "Security Agreement"). This note shall be non-recourse to [Neutz], and [Neutz] is hereby released of all liability hereunder. In the event of default hereunder, [Taylor's] sole recourse shall be to exercise the remedies set forth in the Security Agreement, and any holder hereof (including [Taylor]) shall be deemed by acceptance of this note to have agreed not to take a deficiency judgement against [Neutz] with respect to indebtedness arising hereunder.

(Emphasis added).

As described in the Note, the parties also entered into a security agreement (the "Security Agreement") in which Neutz granted Taylor a security interest in the stock of JDTSM as collateral for repayment of the Note by Neutz. Section C of the Security Agreement defined events of default under the various

loan agreements, which events of default included non-payment of sums due under the Note for a period of ninety days after such payment was due or Neutz selling, assigning, transferring, or otherwise disposing of his interest in the collateral without the prior consent of Taylor. In turn, the Security Agreement detailed Taylor's remedies for any event of default described in Section C:

(D) Remedies of [Taylor]

If any default occurs as defined in Section C, *[Taylor's] sole remedies as a consequence thereof shall be the following:*

- (1) [Taylor] shall have the right to take immediate possession of the collateral without notice or demand or intervention of any court or other legal proceeding, provided that the act of taking possession is peaceful. *As a condition precedent to retaking the collateral, [Taylor] shall pay to [Neutz] an amount, if any, equal to the amount by which the then fair market value of the assets (excluding goodwill and going concern value) of [JD TSM], less its then liabilities and other liabilities which encumber [JD TSM's] assets (excluding liabilities owed to [Taylor]), exceeds \$225,000 (or \$175,000 if a household goods carrier license is not required to operate the business).*
- (2) [Taylor] may declare all indebtedness secured hereby to be due and payable and the same shall thereupon become due and payable without any further presentment, demand, protest, or notice of any kind. The waiver of any default hereunder shall not constitute a waiver of any subsequent default. Upon any

such default, the parties shall each pay their own reasonable attorney fees and legal expenses incurred in enforcing or attempting to enforce, and in defending, any claims brought hereunder.

(Emphasis added). The Security Agreement defined “collateral” as the “stock” in JDTSM. Additionally, the parties entered into a stock purchase agreement through which Neutz obtained 100% of the common capital stock of JDTSM, which shares were evidenced by the issuance of a stock certificate from JDTSM to Neutz. Both of the parties were represented by counsel during the negotiations concerning the terms of the transaction.

On January 31, 2006, Neutz and his wife Jami formed N&R Properties, LLC (“N&R”). Additionally, on November 14, 2008, Neutz and Jami established “Edward Neutz Sons and Daughters Moving” as an assumed name of N&R. In 2010, N&R and JDTSM entered into an Outsourcing Agreement, with Neutz signing the Outsourcing Agreement on behalf of JDTSM and Jami signing the Outsourcing Agreement on behalf of N&R. The Outsourcing Agreement provided that moving and storage marketing leads generated by JDTSM would be referred to N&R for performance by N&R in consideration for a commission of 2.5%, plus other economic consideration. Additionally, Neutz sold all of JDTSM’s assets to N&R in exchange for royalty payments and reduced rent. Taylor characterized the sale of JDTSM’s assets as a clandestine and methodical depletion

of JDTSM's assets in an attempt to operate a new company under the "Edward Neutz Sons and Daughters Moving" name in order to unjustly enrich N&R. Taylor alleged that in doing so, Neutz depleted to zero the value of the JDTSM stock which Neutz had pledged as collateral for his financial obligations.

During the first few years of the term of the loan, Neutz made regular payments as required pursuant to the agreements. However, at some point during the term of the loan, Neutz began missing the required payments and subsequently defaulted after the payment of approximately \$180,000.00 to Taylor. Taylor ultimately filed suit against Neutz in 2012, alleging breach of the various agreements and unjust enrichment. Taylor later amended his complaint to allege additional claims of fraud and breach of fiduciary duty and sought injunctive relief. Neutz filed several counterclaims, including Taylor's breach of the Security Agreement for his failure to comply with the sole remedies provision of the Security Agreement.

On August 7, 2013, Taylor obtained an injunction from the trial court requiring Neutz to turn over the stock and collateral of JDTSM. Taylor testified that the only assets returned by Neutz were the stock certificate and keys to trucks that allegedly were not in working order.

The Jefferson Circuit Court held a five-day jury trial from September 16-22, 2014. At trial, Taylor claimed that the JDTSM stock had no value at the

time he received it back from Neutz due to Neutz's transfer of JDTSM's assets to N&R. However, Taylor provided no expert testimony as to the value of JDTSM at the time Neutz returned the stock to Taylor or as to the value of the company at the time that the value was allegedly impaired. Neutz argued that Taylor had received numerous JDTSM assets that retained value, including JDTSM's intellectual property, and that the Security Agreement required that Taylor establish the fair market value of JDTSM at the time that the collateral was returned to Taylor, with any amounts above \$225,000.00 to be paid to Neutz.

In determining the appropriate jury instructions, the trial court allowed Taylor's claim for Neutz's breach of the Note to go to the jury, though the court noted that it understood that the non-recourse note issue was a legal one that would have to be resolved post-verdict, stating "I do agree with you as far as the recourse I think that becomes a matter for the court if the jury finds in favor of Mr. Taylor, then how is that collected I think that becomes a legal issue, I don't think that's a jury issue. That's not a factual issue."

The jury ultimately found that Neutz breached the Note and awarded damages of \$431,129.00. The jury also found that Neutz breached the Security Agreement and awarded damages of \$245,305.00. As to Neutz's counterclaim regarding Taylor's alleged breach of the Security Agreement, the jury found that Taylor had not breached the Security Agreement by failing to meet the condition

precedent before retaking the collateral and prior to seeking a remedy of default against Neutz.

On December 12, 2014, the trial court entered a judgment that narrated the jury's verdicts, asked the parties to schedule a hearing "to ascertain damages and costs associated with the verdicts rendered herein," and dismissed three of the parties' claims. The judgment did not specifically adjudicate any amount of damages against any party. The court also noted that it would "retain jurisdiction for determination of the award of attorney fees, costs and statutory damages" and stated that the judgment was final and appealable.

On December 22, 2014, Neutz moved to vacate the court's December 12, 2014 judgment, arguing that the Note was non-recourse and prohibited the entry of a deficiency judgment against Neutz, that Taylor had failed to perform conditions precedent to establish the remedies under the Security Agreement, and that the damages awarded to Taylor under the Security Agreement lacked substantial evidence. By order entered March 18, 2015, the trial court denied Neutz's motion, simply stating in its order that the motion was overruled.

On April 16, 2015, Neutz filed a notice of appeal to the Court of Appeals from the trial court's December 12, 2014 judgment and from the trial court's March 18, 2015 order denying Neutz motion to alter, amend, or vacate. On April 27, 2015, Taylor filed a notice of cross-appeal. Additionally, on April 22,

2015, Neutz made a motion for a hearing on the damages in accordance with the December 12, 2014 judgment. Taylor opposed the motion based on the fact that Neutz had already filed a notice of appeal with the Court of Appeals, and therefore the trial court no longer had jurisdiction. By order entered September 4, 2015, the Court of Appeals dismissed Taylor's cross-appeal, finding that Taylor had not timely filed the notice of cross-appeal. Additionally, by order entered November 4, 2015, the Court of Appeals dismissed Neutz's appeal for failure to appeal from a final and appealable order.

By order dated August 16, 2016, the trial court clarified that the December 12, 2014 judgment was not interlocutory and was a final judgment that adjudicated all of the rights of the parties on Taylor's claims against Neutz, including damages. This appeal followed.

ANALYSIS

Neutz first argues that, because the Note had clear non-recourse language and prohibited a deficiency judgment against Neutz, the jury's award of damages pursuant to its finding that Neutz had breached the Note, and the trial court's judgment upholding such damages, was improper. Neutz further argues that the Security Agreement contained an express condition precedent that Taylor was to make a good faith valuation of the company at the time he retook the collateral and pay to Neutz the value of the company in excess of \$225,000.00

before he could exercise the remedy of retaking the collateral, and that the failure of this express condition precedent made the contract as a whole unenforceable and precluded the damages rendered by the jury for breach of the Security Agreement. In the alternative, Neutz argues that the jury's damages award to Taylor for Neutz's breach of the Security Agreement were speculative and not supported by any expert or competent evidence.

Thus, Neutz is asking this Court to review and analyze both the non-recourse language contained in the Note as well as the sole remedy and condition precedent language contained in the Security Agreement. The "construction and interpretation of a written instrument are questions of law for the court." *Cinelli v. Ward*, 997 S.W.2d 474, 476 (Ky. App. 1999) (internal citations omitted). An appellate court "review[s] questions of law *de novo* and, thus, *without deference to the interpretation afforded by the circuit court.*" *Id.* (internal citations omitted) (emphasis added).

Here, Neutz argued, both before the jury trial and during the formation of the jury instructions, that the foregoing language contained in the Note and Security Agreement would ultimately have to be addressed by the trial court, as the trial court's interpretation of such language would control the award of damages. The trial court agreed, stating "I think that becomes a matter for the court if the jury finds in favor of Mr. Taylor, then how is that collected I

think that becomes a legal issue, I don't think that's a jury issue. That's not a factual issue." When the jury did in fact find in favor of Taylor regarding whether Neutz had breached both the Note and the Security Agreement and awarded Taylor damages, the trial court correctly asked the parties to schedule a hearing "to ascertain damages and costs associated with the verdicts rendered herein." However, such hearing was never held, and when Neutz asked the trial court to examine the language in its motion to alter, amend, or vacate, the trial court denied the motion with no explanation as to how the jury's award of damages could be reconciled with the non-recourse and limitation of remedies language of both the Note and the Security Agreement.

While this court must review questions of law *de novo*, the appellate court must have some "interpretation afforded by the circuit court" to review. *Cinelli*, 997 S.W.2d at 476. The trial court failed to address the non-recourse language in the Note and the condition precedent language in the remedies section of the Security Agreement, both questions of law upon which the entire question of damages hinged. Therefore, we vacate the trial court's judgement to the extent that it awarded damages to Taylor pursuant to Neutz's breach of the Note and the Security Agreement, and remand to the trial court for a hearing regarding the effect of the non-recourse language contained in the Note as well as the condition

precedent and limitation of remedies language contained in the Security Agreement.

ALL CONCUR.

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