

Commonwealth of Kentucky
Court of Appeals

NO. 2018-CA-000605-MR

FRANK SEDDIO

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE KIMBERLY N. BUNNELL, JUDGE
ACTION NO. 15-CI-03146

GOLDEN RESOURCES, LLC

APPELLEE

OPINION
AFFIRMING

** ** * ** * **

BEFORE: GOODWINE, SPALDING AND L. THOMPSON, JUDGES.

L. THOMPSON, JUDGE: Frank Seddio (“Appellant”) appeals from an order granting plaintiff’s motion for partial summary judgment entered by the Fayette Circuit Court. Appellant argues that 1) the circuit court erred in improperly deciding a question of fact in its summary judgment analysis, 2) there exists a genuine issue of material fact, and 3) Appellant did not guarantee payment and was

unaware of additional credit. For the reasons addressed below, we find no error and AFFIRM the partial summary judgment on appeal.

On July 18, 2013, various parties¹ referred to in the record as “Borrowers” or “Makers” executed a promissory note (“Original Note”) agreeing to pay to Golden Resources, LLC (“Appellee”) as “Lender” the principal sum of \$1,120,000.00 plus interest.² The Original Note required monthly payments and defined default as Borrowers’ failure to make payment under the Note when due. On the same date, Appellant executed a Guaranty promising the unconditional payment of indebtedness under the Original Note. The Guaranty broadly defined “Indebtedness” as including the Note and all extensions, renewals, modifications and amendments, all additional indebtedness of any Borrower to Appellee, and attorney fees and expenses. On February 19, 2014, the Borrowers executed a Second Amendment promising to pay to Appellee the additional sum of \$700,000, for a total indebtedness at that time of \$1,511,589.58.

¹ These parties were Bartholomew Enterprise, Inc.; DB & Associates Realty, LLC; DB London KY Realty, LLC; DB Somerset KY Realty, LLC; GC Lexington KY, Inc.; GC Georgetown KY, Inc.; GC London KY, Inc.; GC Somerset KY, Inc.; and GC Nicholasville KY, Inc. They are not parties to the instant appeal.

² The indebtedness facilitated the purchase by Appellant and his business partners of five Golden Corral restaurants and associated real estate located in central Kentucky. Appellee/seller owned the realty associated with some or all of the five restaurants. The sale of the restaurants and associated realty was memorialized in a Purchase Agreement reflecting a price of \$19,425,000.00. In exchange for its agreement to accept the Original Note, Appellee required Appellant and his partners, who owned some or all of the Borrower entities, to execute the Guaranty.

On March 26, 2015, Appellee sent a notice of default to the Borrowers stating that Borrowers failed to make the required monthly payments under the Original Note and Second Amendment for January, February, and March, 2015. Appellee would later allege that the Borrowers failed to make any additional payments since that time.

On May 20, 2015, Appellee delivered a notice of default and demand for payment to Appellant and his partners. Appellant and his partners made no payments. Several Borrowers filed bankruptcy, as did Appellant's partners. Appellee then instituted the instant action in Fayette Circuit Court against Appellant to collect payment under the Guaranty. Appellee alleged that 1) Appellant breached the Guaranty, 2) Appellant was unjustly enriched as a result of his failure to pay Appellee pursuant to the Guaranty, and 3) Appellant was liable to Appellee for attorney fees under the Guaranty and Kentucky Revised Statute ("KRS") 411.195.

The matter proceeded in Fayette Circuit Court, whereupon Appellee filed a Plaintiff's Motion for Partial Summary Judgment. Appellee asserted that Appellant executed the Guaranty personally guarantying the indebtedness of various companies owned by Appellant and his partners, that the Borrowers defaulted on the Original Note, and that Appellant failed to make payment under the Guaranty upon the Borrowers' default. A hearing on the motion was

conducted on January 24, 2018, resulting in an order granting plaintiff's motion for partial summary judgment entered the following day. In support of the order, the Fayette Circuit Court determined that the Guaranty was a valid instrument pursuant to KRS 371.065 because 1) it expressly refers to the Note being guaranteed, 2) Appellant signed the Guarantee, and 3) it specifies the termination date and aggregate liability of Appellant as being the total amount of the Indebtedness. The circuit court also concluded that attorney fees were payable under KRS 411.195. It entered an order and judgment sustaining Appellee's motion for partial summary judgment and awarding to Appellee the sum of \$2,063,303.67 plus late fees and interest at the rate of 13.00% per annum. The court also awarded attorney fees in the amount of \$226,653.40 plus interest. This appeal followed.

Appellant first argues that the circuit court erred in failing to conclude that a genuine issue of material fact existed as to whether Appellee provided consideration for the various financing amounts. Appellant asserts that when viewing the record in a light most favorable to Appellant, "it could easily be determined that the additional \$700,000 credit listed in the Second Amendment to Promissory Note was not bargained for in exchange for any consideration from [Appellee]" He argues that it is not clear whether Appellee provided a \$700,000 credit to the Bartholomew entities³ and that the Fayette Circuit Court

³ See Footnote 1.

improperly made a finding of fact related to consideration. The focus of his argument is the issue of consideration as to a “Phase II” financing amount and whether the circuit court correctly determined that consideration was given for the Second Amendment. Appellant goes on to argue that the circuit court improperly considered parol evidence to find consideration for the Second Amendment and that the court considered the parties’ intent during the summary judgment hearing through a variety of evidence outside the contracts at issue.

We have closely examined these arguments and find no error. As noted by Appellee, the four corners of the Note and Guaranty expressly state that consideration is given in exchange for the financing amounts. Appellant voluntarily executed the Guaranty acknowledging his obligation to guarantee Borrowers’ obligation under the Note and Amendments. Appellant directs our attention to three cases⁴ for the proposition that issues of consideration are questions of fact which are not appropriate for summary judgment. We have closely examined the cited cases and conclude that they are distinguishable or otherwise non-persuasive on the issue before us. The Fayette Circuit Court found that Appellee was not legally obligated to increase the principal amount of the Original Note by \$700,000 to Borrowers; therefore, upon doing so, Borrowers

⁴ Appellant cites *Price v. Godby*, 263 S.W.3d 598 (Ky. App. 2008); *Tarter v. Arnold*, 343 S.W.2d 377 (Ky. 1960); and *Huff Contracting v. Sark*, 12 S.W.3d 704 (Ky. App. 2000).

acquiesced to this additional debt by continuing to make payments to Appellee, and that this constituted consideration for the Second Amendment.⁵ These findings are supported by the record and the law.

Summary judgment “shall be rendered forthwith if 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. “The record must be viewed in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor.” *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky. 1991). Summary judgment should be granted only if it appears impossible that the nonmoving party will be able to produce evidence at trial warranting a judgment in his favor. *Id.* “Even though a trial court may believe the party opposing the motion may not succeed at trial, it should not render a summary judgment if there is any issue of material fact.” *Id.* Finally, “[t]he standard of review on appeal of a summary judgment is whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law.” *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996).

⁵ Findings of Fact Nos. 9-11 in order granting plaintiff’s motion for partial summary judgment.

When viewing the record in a light most favorable to Appellant and resolving all doubts in his favor, we conclude that the circuit court correctly found that there were no genuine issues as to any material fact and that Appellee was entitled to a judgment as a matter of law. The Original Note identified Appellee as Lender and required Borrowers to make monthly payments on the debt. This Note was later amended by agreement of the parties. Appellant executed a Guaranty promising unconditional payment of the Original Note and all additional indebtedness as guarantor. The Borrowers defaulted on the Note and Amendments, and we find no basis for concluding that any issue of consideration stands as a bar to the entry of Partial Summary Judgment. Further, the Fayette Circuit Court did not improperly rely on parol evidence to reach this conclusion, as the face of the agreements are clear and unambiguous. See generally, *New Life Cleaners v. Tuttle*, 292 S.W.3d 318 (Ky. App. 2009).

In his related second and third arguments, Appellant asserts that 1) the Phase II seller financing amount was extended by a related entity, Golden Ranch, LLC (“Golden Ranch”) rather than Appellee, and 2) he did not guarantee debt to Golden Ranch and was unaware of the additional credit. We are not persuaded by these arguments. The circuit court noted:

[Appellee doesn't] hand [Borrowers] \$700,000, [Borrowers] don't take \$700,000.00 and then go buy a car with it, they give them the loan for \$700,000.00, they use the \$700,000.00 to purchase property from Golden Ranch

which is basically the same thing that happened in the first document

Further, Borrowers made payment on the Note to Appellee, not Golden Ranch.

The Guaranty executed by Appellant expressly applies to any “extensions, renewals, reamortizations, modifications and amendments” to the Original Note, and Appellant benefitted from the amendments and additional credit as they facilitated the Borrowers’ purchases. Ultimately, the circuit court correctly found that there were no genuine issues as to any material fact on this issue, and that Appellee was entitled to partial summary judgment as a matter of law. *Steelvest, Inc., supra*. We find no error.

For the foregoing reasons, we AFFIRM the order granting plaintiff’s motion for partial summary judgment entered by the Fayette Circuit Court.

ALL CONCUR.

BRIEFS AND ORAL ARGUMENT
FOR APPELLANT:

Andre F. Regard
Lexington, Kentucky

BRIEF AND ORAL ARGUMENT
FOR APPELLEE:

Emily H. Cowles
Lexington, Kentucky