STATE OF MICHIGAN

COURT OF APPEALS

SAM'S CAFE, INC.,

Plaintiff-Appellee,

v

BUD'S PRO SHOP, INC.,

Defendant-Appellant.

UNPUBLISHED
August 19, 2003

No. 235991
Oakland Circuit Court
LC No. 00-022299-CK

Before: Donofrio, P.J., and Bandstra and O'Connell, JJ.

PER CURIAM.

Defendant appeals as of right from the trial court order determining that defendant was liable to plaintiff under an agreement guaranteeing the payment of a promissory note. Plaintiff had filed a claim against defendant alleging that defendant was liable for damages due to its failure to make payments under the terms of the guaranty agreement. We affirm.

The first issue is whether the trial court's extensive questioning of witnesses during this bench trial resulted in error mandating reversal. Reviewing this unpreserved issue for plain error affecting defendant's substantial rights, *Kern v Blethen-Coluni*, 240 Mich App 333, 336; 612 NW2d 838 (2000), error is not apparent.

A trial court may interrogate witnesses at trial, whether called by a party or the court itself. MRE 614(b); *Law Offices of Lawrence J Stockler, PC v Rose*, 174 Mich App 14, 24; 436 NW2d 70 (1989). Further, in a bench trial, a trial judge has more discretion to question witnesses than during a jury trial. *People v Wilder*, 383 Mich 122, 124; 174 NW2d 562 (1970); *In re Forfeiture of $1,159,420*, 194 Mich App 134, 153; 486 NW2d 326 (1992); *In re Forfeiture of $53*, 178 Mich App 480, 486; 444 NW2d 182 (1989).

In *Wilder*, the defendant was found guilty of felonious assault after a bench trial during which the trial judge asked more questions than the defense counsel and the assistant prosecuting attorney combined. *Wilder*, *supra*, 123-124. This Court had reversed the defendant's conviction and remanded the case for a new trial, stating that the court's examination was "extremely thorough and exhaustive" and that "the character of the judicial examination remove[d] the adversary nature from the proceeding" constituting "reversible error." *Id*. However, our Supreme Court reversed this Court's decision because none of the questions the trial judge asked were unfair or prejudicial. *Id*. at 124. The Court emphasized that it is not the number of

questions asked that determines error, but whether the trial court's questions were "intimidating, argumentative, prejudicial, unfair or partial" so as to prejudice a defendant. *Id*. at 124-125.

Since our Supreme Court's holding in *Wilder*, we have required a showing of bias before reversing a verdict based on a trial court's questioning of witnesses in a bench trial. For example, in *People v Meatte*, 98 Mich App 74, 78; 296 NW2d 190 (1980), the trial court in a bench trial engaged in "unusually extensive questioning" of five witnesses, including the defendant. *Id*. However, citing *Wilder*, this Court concluded that, because the trial court's questioning did not show bias, the defendant's claim lacked merit. *Id*.

As with the questioning at issue in *Wilder* and *Meatte*, the trial court's examination of each witness in this case could easily be described as "extremely thorough and exhaustive" or "unusually extensive." The record reveals that the trial court conducted its own extensive examination of each witness before turning the witness over to both attorneys for questioning. However, fatal to defendant's argument on appeal is its admission that the trial court's questioning "was applied to both sides equally" and the fact that defendant fails to classify any of the court's questions as "intimidating, argumentative, prejudicial, unfair or partial" pursuant to *Wilder*.

Because defendant fails to identify any conduct other than unbiased, albeit exhaustive, questioning by the trial court, we conclude that the trial court's conduct did not constitute plain error affecting defendant's substantial rights.[1] *Ferguson v Gonyaw*, 64 Mich App 685, 694; 236 NW2d 543 (1975).

Next, defendant argues that the trial court abused its discretion when it limited closing arguments to five minutes for each side. Again, reviewing this unpreserved issue for plain error affecting defendant's substantial rights, we disagree.

A trial judge is charged with the duty "to control all proceedings during the trial, and to limit the introduction of evidence and the argument of counsel to relevant and material matters, with a view to the expeditious and effective ascertainment of the truth regarding the matters involved." MCL 768.29. Further, in *Warden v Fenton Lanes*, 197 Mich App 618, 625; 495 NW2d 849 (1992), this Court held that the trial court in that case did not abuse its discretion when it limited closing arguments to ten minutes for each side in a two-day trial because defense counsel was able to cover every aspect necessary for a decision in the case.

Here, defendant has not shown prejudice because defendant has not identified any argument that defense counsel was prevented from making because of the court's five-minute time limitation. Rather, defense counsel's closing argument was thorough and defense counsel ended his statement without being cut off by the court. Absent any argument on how the court's decision to limit closing arguments to five minutes prejudiced defendant, this Court cannot reverse under the plain error standard. Accordingly, defendant has not established a plain error affecting its substantial rights.

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[1] We note that we lack the authority to overrule decisions of our Supreme Court such as its decision in *Wilder*.

Defendant also argues that the trial court committed error mandating reversal when it concluded that there was a written guaranty under which defendant is liable to plaintiff. Although the guaranty at issue referenced a security agreement and promissory note signed on February 28, 1998, between Tastebud's and plaintiff, no such security agreement and promissory note existed. The drafter of the guaranty had mistakenly referred to the wrong date, because the Bogoevski note and security agreement were dated March 16, 1996, and not February 28, 1998. February 28, 1998, was the date that Tastebud's agreed to assume the March 16, 1996, Bogoevski note. Accordingly, we review this issue of contract construction and interpretation de novo. *Bandit Industries, Inc v Hobbs Int'l, Inc*, 463 Mich 504, 511; 620 NW2d 531 (2001). Again, we conclude that no error occurred on this ground.

Contrary to defendant's argument on appeal, plaintiff did request reformation in its trial brief, even though it did not request this remedy in its complaint. Thus, reformation was requested. In addition, the court's decision to reform the agreement to reflect the true intent of the parties was a proper one.

Reformation of an instrument is appropriate to reflect the parties' actual intent where there is clear evidence that both parties reached an agreement, but due to mutual mistake, or mistake on one side and fraud on the other, the instrument does not express the true intent of the parties. *Mate v Wolverine Mut Ins Co*, 233 Mich App 14, 24; 592 NW2d 379 (1998), quoting *Olsen v Porter*, 213 Mich App 25, 29; 539 NW2d 523 (1995). In determining whether a mutual mistake exists, one must discern the intent of the parties at the time that they reduced their agreement to writing. 66 Am Jur 2d, Reformation of Instruments, § 21, p 246.

Furthermore, parol evidence is admissible to show a mutual mistake and to determine the true intention of the parties. *Schwaderer v Huron-Clinton Metro Auth*, 329 Mich 258, 268; 45 NW2d 279 (1951); *Scott v Grow*, 301 Mich 226, 239; 3 NW2d 254 (1942). Here, uncontradicted parol testimony established a mutual mistake in the language of the guaranty agreement. At trial, Alan Miller, defendant's CPA and the drafter of the guaranty agreement at issue in this case, testified that he intended to draft the document so that it would guarantee the debt owed under the Bogoevski promissory note. Likewise, Hussein Bazzi, plaintiff's president, testified at trial that it was his understanding that the guaranty agreement defendant's president sent him was guaranteeing payment of the Bogoevski promissory note. In addition, Wesley Mulholland, defendant's president, testified at trial that the guaranty agreement was a proposal in which Mulholland offered to guarantee payment of the same debt that Kort was guaranteeing so that Kort would be released as a guarantor.

Here, all parties believed that the debt to be guaranteed by the proposed agreement was the debt owed under the Bogoevski promissory note rather than some other debt due under a nonexistent note. Further, because a trial court may reform a contract containing a scrivener's error to reflect the true intent of the parties, *Capitol Savings & Loan Ass'n v Przybylowicz*, 83 Mich App 404, 408; 268 NW2d 662 (1978), the trial court's act of reforming the contract to reflect the intent of the parties at the time the agreement was drafted was proper.

Furthermore, contrary to defendant's contention, the reformed agreement satisfied the statute of frauds. MCL 566.132(1)(b) provides that a special promise to answer for the debt, default, or misdoings of another person is void unless it is in writing and signed by the party to be charged. For a writing to comply with the statute of frauds, the writing must be "certain and

definite" as to all of its essential terms and no essential term can be supplied by parol evidence. *In re Skotzke Estate*, 216 Mich App 247, 249; 548 NW2d 695 (1996); *McFadden v Imus*, 192 Mich App 629, 633; 481 NW2d 812 (1992).

Here, the court reformed the document so that the date of the promissory note matched the date the note was issued, rather than the date the note was assigned. Given the court's reformation to eradicate the scrivener's error, there is no question that the debt being guaranteed under the writing is the very same debt owed under the Bogoevski promissory note. Furthermore, it is undisputed that the agreement accurately reflects the guarantor, the obligee and the principal, as well as the amount due on the note.

Even if we were to conclude that the trial court's reformation of the guaranty agreement was improper, the document still satisfies the statute of frauds because the "$86,144.73" figure referenced in the guaranty agreement as the original amount due under the note is the same figure due under the Bogoevski promissory note referred to in Kort's guaranty agreement, as well as the same amount credited to Bogoevski, Inc. for assigning the Bogoevski note during the sale of the restaurant operation to Kort and Behrend. Thus, a careful review of these exhibits and the guaranty agreement reveals the essential terms of the agreement without resort to parol evidence. Therefore, regardless of whether the reformation of the agreement proper, because the writing and the accompanying written exhibits provide the essential elements of the agreement without resort to parol evidence, it complies with the statute of frauds. Accordingly, we find no merit to defendant's claim that the trial court erred in concluding that defendant is liable to plaintiff under the guaranty agreement.

Affirmed.

/s/ Pat M. Donofrio
/s/ Richard A. Bandstra
/s/ Peter D. O'Connell