STATE OF MICHIGAN

COURT OF APPEALS

KENT TILLMAN, LLC, and KENT COMPANIES, INC.,

Plaintiffs/Counter-Defendants-Appellees,

UNPUBLISHED
January 19, 2006

v

No. 263232
Kent Circuit Court
LC No. 02-011862-CK

TILLMAN CONSTRUCTION CO.,

Defendant/Third-Party Plaintiff/Counter-Plaintiff-Appellant,

and

ROOSEVELT TILLMAN,

Defendant-Appellant,

and

FIDELITY & DEPOSIT CO OF MARYLAND and ALLEN J. VANDERLAAN,

Third-Party Defendants-Appellees.

Before: Whitbeck, C.J., and Bandstra and Markey, JJ.

PER CURIAM.

Defendants appeal as of right the trial court order granting summary disposition in favor of plaintiffs and from a money judgment entered in favor of plaintiffs. We affirm.

Kent Companies (Kent) and Tillman Construction (Tillman) formed Kent-Tillman, LLC (the LLC), for the purpose of bidding on a construction project. Ownership interests in the LLC were 85 percent and 15 percent, respectively. Kent, the majority member, managed the LLC. The LLC submitted a bid for cement work to Erhardt/Hunt, the manager of the construction project, and Erhardt/Hunt awarded a contract to the LLC.

Plaintiffs initiated this action against defendants after the president of Tillman, Roosevelt Tillman, withdrew over $145,000 from the LLC's bank account without management approval. Defendants filed a counterclaim alleging that a subcontract existed between the LLC and Tillman under which Tillman was entitled to receive, as compensation for furnishing labor for the construction project, a fixed sum of 15 percent of the full contract price as set out in the contract between the LLC and Erhardt/Hunt. Tillman also alleged that the president of Kent distributed a disproportionate amount of money to Kent, in violation of the LLC operating agreement, and that Kent violated the Michigan Limited Liability Company Act ("LLCA"), MCL 450.4101 *et seq*., by controlling the LLC in a manner that was fraudulent, willfully unfair, and oppressive to Tillman. Plaintiffs moved for summary disposition, which was granted with a money judgment against defendants, jointly.

We review de novo a trial court's decision on a motion for summary disposition. *Hess v Cannon Twp*, 265 Mich App 582, 589; 696 NW2d 742 (2005). A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Id*. When deciding a motion for summary disposition under this subrule, we consider the pleadings, affidavits, depositions, admissions, and other documentary evidence submitted in the light most favorable to the nonmoving party. *Id*. Additionally, we review de novo the construction and interpretation of a contract. *Bandit Industries, Inc v Hobbs Int'l, Inc (After Remand)*, 463 Mich 504, 511; 620 NW2d 531 (2001).

Defendants first contend that there was sufficient evidence from which a fact-finder could conclude that a subcontract existed between the LLC and Tillman under which Tillman was to receive, as compensation, a fixed sum of 15 percent of the price of the contract between Erhardt/Hunt and the LLC. Defendants assert that the subcontract is evidenced by the proposal letter, letter of intent, and certain documents in the record that refer to Tillman as a "subcontractor." We disagree.

The LLC operating agreement, which contained an integration clause, provided that any profit or loss would be allocated according to each member's ownership interest in the LLC, as would distributions of cash. Further, members were not to be paid any salary or compensation for services rendered to the LLC. Contract language should be given its ordinary and plain meaning. *Lawsuit Financial, LLC v Curry*, 261 Mich App 579, 590; 683 NW2d 233 (2004). By the plain language of the operating agreement, the 85/15 percent split referred to losses, profits, and cash disbursements, not to the full contract price. "Parol evidence of contract negotiations, or of prior or contemporaneous agreements that contradict or vary the written contract, is not admissible to vary the terms of a contract which is clear and unambiguous." *UAW-GM Human Resource Ctr v KSL Recreation Corp*, 228 Mich App 486, 492; 579 NW2d 411 (1998), quoting *Schmude Oil Co v Omar Operating Co*, 184 Mich App 574, 580; 458 NW2d 659 (1990). Defendants cannot rely on the proposal letter, letter of intent, or other documents to vary the terms of the operating agreement.

Defendants contend that, even in the absence of a written subcontract, they are entitled to recover under the theory of promissory estoppel because plaintiffs promised to pay defendants 15 percent of the contract price and defendants relied on that promise in forming the LLC with Kent. We disagree. "The elements of promissory estoppel are (1) a promise, (2) that the promisor should reasonably have expected to induce action of a definite and substantial character on the part of the promisee, and (3) that in fact produced reliance or forbearance of that nature in circumstances such that the promise must be enforced if injustice is to be avoided." *Novak v Nationwide Mut Ins Co*, 235 Mich App 675, 686-687; 599 NW2d 546 (1999). Promissory estoppel should be applied cautiously and is appropriate only where the promise is clear and definite. *Marrero v McDonnell Douglas Capital Corp*, 200 Mich App 438, 442; 505 NW2d 275 (1993). Defendants failed to present evidence of a clear and definite promise. Moreover, the alleged representations made by Kent contradict the express terms of the operating agreement by which both parties are bound. Therefore, defendants' promissory estoppel claim must fail. See *Novak, supra* at 687.

Defendants next contend that the trial court erred when it granted summary disposition in favor of plaintiffs on defendants' fraudulent misrepresentation claim. We disagree. As one element of a claim of fraudulent misrepresentation, defendants were required to prove that their reliance on plaintiffs' representation was reasonable. *Foreman v Foreman*, 266 Mich App 132, 141-142; 701 NW2d 167 (2005). Because the written contract between the parties contained a merger clause, defendants' alleged reliance on representations not contained in the written contract was unreasonable. See *UAW-GM*, *supra* at 504.

Defendants next contend that Kent was not entitled to reimbursement for labor or equipment costs as out-of-pocket expenses and that, therefore, in the trial court's money judgment, Kent received compensation in excess of that which was allowed under the LLC operating agreement. We disagree. We review for clear error an award of damages. *Triple E Produce Corp v Mastronardi Produce, Ltd*, 209 Mich App 165, 177; 530 NW2d 772 (1995). Clear error exists only where, although there is evidence to support the trial court's finding, we are left with a definite and firm conviction that a mistake has been made. *Id*. at 171. "The primary goal in the construction or interpretation of any contract is to honor the intent of the parties." *UAW-GM*, *supra* at 491, quoting *Rasheed v Chrysler Corp*, 445 Mich 109, 127 n 28; 517 NW2d 19 (1994). "[W]hen the parties include an integration clause in their written contract, it is conclusive and parol evidence is not admissible to show that the agreement is not integrated except in cases of fraud that invalidate the integration clause or where an agreement is obviously incomplete 'on its face' and, therefore, parol evidence is necessary for the 'filling of gaps.'" *UAW-GM*, *supra* at 502, quoting 3 Corbin, Contracts, § 578, p 411.

Although, as discussed earlier, the operating agreement was complete and unambiguous regarding the allocation of profits and losses, the operating agreement was obviously incomplete regarding cost of reimbursements that each member was entitled to receive for labor and equipment expenses. The proposal letter and letter of intent, which preceded the operating agreement, provided that the members would receive reimbursement for labor at a designated rate and that the members would receive reimbursement for equipment leased to the LLC. Further, there was evidence that both the members received reimbursements in that fashion before the controversy underlying this litigation. See *The Cooke Contracting Co v Dep't of State Highways*, 52 Mich App 402, 409-410; 217 NW2d 435 (1974) (parties' conduct may be used to interpret contract). The trial court did not clearly err in concluding that, under the parties' agreement, Kent was entitled to receive reimbursement for labor as well as for equipment leased to the LLC.

Defendants next contend that the trial court erred in failing to allocate the Contractor Controlled Insurance Program credit ("CCIP credit") based on the members' respective ownership interests in the LLC. We disagree. In exchange for providing insurance for the employees of Kent and Tillman, Erhardt/Hunt received a CCIP credit, which reduced the gross contract price and, in turn, the amount owing the LLC. The trial court allocated the CCIP credit to the companies based on the amount each company would have had to pay to procure its own insurance, rather than in accordance with each company's ownership interest in the LLC. We conclude that this allocation was not clear error. First, the LLC had no employees and there is no evidence that the LLC would have had to provide insurance for the members' employees if Erhardt/Hunt had not contracted to provide the insurance. Therefore, the CCIP credit represented a benefit conferred upon the individual members, not upon the LLC itself. Second, although paragraph 5(d) of the operating agreement provides that "[a]ll items of income, gain, loss, deduction, or credit shall take into account the varying interests of the Members in the Company during such year," the CCIP credit is not a "credit" as contemplated by the operating agreement because it was Erhardt/Hunt, not the LLC, who received the credit. Therefore, the CCIP credit is not within the scope of paragraph 5(d) of the operating agreement.

Defendants also contend that the trial court erred when it ordered defendants to pay 15 percent of the LLC's legal expenses. We disagree. The trial court reasoned that paragraph 7(h) of the operating agreement, which purports to govern indemnification for attorney fees, "[did] not contemplate or include a lawsuit filed by one member versus the other or, more particularly, by the LLC versus a member." Thus, the trial court concluded that neither party was entitled to recover attorney fees from the opposing party under that paragraph. The trial court further held that defendants were liable for 15 percent of the legal expenses incurred by the LLC. We agree that, under paragraph 7(h) of the operating agreement, neither member was entitled to indemnification or attorney fees. However, we also agree with the trial court's conclusion that, under other provisions of the operating agreement, Tillman was liable for 15 percent of the LLC's (rather than Kent's) legal expenses, just as Tillman is liable for 15 percent of any other LLC expense. The trial court's decision to award legal expenses did not amount to clear error.

Defendants also contend that Kent violated the LLCA by controlling the LLC in a manner that was illegal, fraudulent, or willfully unfair and oppressive conduct toward Tillman. We disagree.

Section 515 of the LLCA provides:

> (1) A member of a limited liability company may bring an action . . . to establish that acts of the managers or members in control of the limited liability company are illegal or fraudulent or constitute willfully unfair and oppressive conduct toward the limited liability company or the member.
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> * * *
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> (2) As used in this section, "willfully unfair and oppressive conduct" means a continuing course of conduct or a significant action or series of actions that substantially interferes with the interests of the member as a member. The term does not include conduct or actions that are permitted by the articles of organization, an operating agreement, another agreement to which the member is a party, or a consistently applied written company policy or procedure. [MCL 450.4515.]

Defendants' expert witness testified that neither Kent nor Tillman did anything in violation of the LLC operating agreement. Further, he testified that although Tillman was not treated fairly by Kent, that treatment was not inconsistent with the provisions of the operating agreement. Defendants failed to set forth specific facts showing that a genuine issue of material fact existed that Kent violated section 515 of the LLCA.

Finally, defendants contend that there is no legal basis for making Roosevelt Tillman personally liable on the money judgment because it has no relation to the claims asserted against Roosevelt Tillman in his individual capacity. We disagree. "It is a familiar principle that the agents and officers of a corporation are liable for torts which they personally commit, even though in doing so they act for the corporation, and even though the corporation is also liable for the tort." *Hartman & Eichhorn Bldg Co, Inc v Dailey*, 266 Mich App 545, 549; 701 NW2d 749 (2005), quoting *Warren Tool Co v Stephenson*, 11 Mich App 274, 300; 161 NW2d 133 (1968). Because Roosevelt Tillman, by personally withdrawing funds from the LLC's bank account without management approval, actively participated in the tort of conversion, the trial court did not err in holding that Roosevelt Tillman was personally liable. Further, even though the money judgment was for less than the amount of the converted funds, there is no evidence to support defendants' contention that the money judgment was wholly unrelated to the conversion.

We affirm.

/s/ William C. Whitbeck
/s/ Richard A. Bandstra
/s/ Jane E. Markey