STATE OF MICHIGAN

COURT OF APPEALS

THAV, GROSS, STEINWAY & BENNETT, PC,

Plaintiff-Appellee,

v

BERNADINO PAVONE, JR., and ABOOD SAMAAN,

Defendants-Appellees.

UNPUBLISHED
August 14, 2008

No. 278062
Wayne Circuit Court
LC No. 06-612524-CZ

Before: Markey, P.J., and Whitbeck and Gleicher, JJ.

PER CURIAM.

Defendants appeal by right the trial court's order granting summary disposition to plaintiff on a promissory note defendants signed. In addition, defendants appeal the trial court's subsequent order denying defendants' motions for reconsideration and to amend their answer to add the affirmative defense of fraud in the inducement. We affirm.

I. Factual Background

Defendants were principals with Gloria Tactac in two corporate entities known as ICR Services, Inc (ICR) and National Credit Education and Review (NCER) that engaged in marketing credit repair services. Plaintiff, through attorney David Steinberg, provided significant legal services to defendants' corporate entities. In August 2003, the Federal Trade Commission (FTC) initiated litigation against ICR and NCER and their principals alleging deceptive trade practices. There also was litigation pending against defendants and the corporate entities in other forums, including a class action lawsuit in Alabama in which defendants' assets had been sequestered. Defendants acknowledge that at the time they executed the promissory note, the corporate entities owed plaintiff approximately $80,000 for legal services rendered.

On December 15, 2003, Steinberg wrote to defendant Samaan, the executive vice president of ICR, enclosing the $80,000 promissory note at issue. The letter indicated a copy also was sent to defendant Pavone. The letter referenced "Promissory Note" states:

> I am enclosing a non-binding draft of the promissory note as we briefly discussed during our recent call. Please be advised of the following:
>
> 1. I will contact the Alabama attorneys for their release.

2. With respect to signatories, all three are required to execute this note.

Thank you for your assistance. Please call me if you have any questions.

It is undisputed both defendants signed the two-page promissory note on its second page under "Maker" on lines above their typed names; the note's first page was dated December 17, 2003. The parties also do not dispute Gloria Tactac did not sign the note. A line with her name typed below is crossed off with four "X" marks. Defendants contend the promissory note they signed and returned to plaintiff bore a block-letter stamp "DRAFT" on its first page; plaintiff contends the original note that defendants signed and returned contains no such stamp.

Plaintiffs filed suit on the note on May 1, 2006, alleging its consideration was $80,000 in legal services, that the note had not been paid on demand, and that defendants owed the balance plus interest as stated in the note at 3% per annum. Defendants answered with general denials and asserted various affirmative defenses, including that plaintiff's claim was barred by plaintiff's "own actions, conduct, negligence, malfeasance and fraud." Defendants also asserted the contract contained "numerous statements of false and/or misleading material facts."

On October 6, 2006, plaintiff moved for summary disposition under MCR 2.116(C)(9) (failure to state a valid defense), and MCR 2.116(C)(10) (no genuine issue of material fact). Defendants in their response conceded they were principals in the corporate entities that owed plaintiff $80,000 for legal services. But defendants asserted there was no consideration for their signing the note in their individual capacities. Also, defendants argued the note required signatures of all three corporate principals to become effective, as evidenced by the transmittal letter and the word "DRAFT" purportedly stamped on the first page of the promissory note. Defendants further asserted the promissory note was unenforceable because it was obtained in violation of Michigan's Rules of Professional Conduct, specifically MRPC 1.8(a).[1]

In separate but identical affidavits defendants averred that the promissory note was drafted when Steinberg was receiving "heat" from his partners to collect the large receivable owed by ICR and NCER, and that Steinberg represented the note was a "draft" that was not effective without the signatures of Samaan, Pavone, and Tactac. Each defendant averred:

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[1] MRPC 1.8(a) provides:

(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security, or other pecuniary interest adverse to a client unless:

> (1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner that can be reasonably understood by the client;
>
> (2) the client is given a reasonable opportunity to seek the advice of independent counsel in the transaction; and
>
> (3) the client consents in writing thereto.

> Based solely on the facts that the Note was supposed to be a "draft" that required additional signatures, one of which I knew was not forthcoming, that Mr. Steinberg repeatedly told me it was a "draft" and therefore not binding, and because Mr. Steinberg was a friend who said it was in my best interest to sign the Note, I signed the Promissory Note. [Affidavits, ¶ 10.]

At the hearing on plaintiff's motion for summary disposition, the trial court asked defense counsel for the legal basis to go outside the "four corners" of the note to permit use of extrinsic evidence to interpret its meaning. In addition to the arguments noted already, defense counsel asserted fraud in the inducement regarding the reference in the December 15, 2003, letter to Steinberg's "contact[ing] the Alabama attorneys for their release," which defense counsel asserted was never done. The trial court ruled in plaintiff's favor, reasoning as follows:

> Okay. The issue before the Court is whether or not a certain writing that is purported to be a contract between the parties dated December 17th, 2003, is legally a valid note and whether there are any material questions of fact as relates to defenses to that note.
>
> The Defendant has asserted several defenses. The first is whether or not purported violations of the ethical rules of the state of Michigan in receiving signatures on the note would render it ineffective. Only where the conduct of Counsel can be demonstrated to be fraud and to that end, Counsel becomes no more than any other party to a contract, whose contract would be rendered invalid by fraud in the inducement would the ethical rules render the enforceability of the contract impossible. The Court is not aware nor did defense Counsel provide the Court with any case law that would be to the contrary.
>
> The . . . pleadings in this case do not support a defense of fraud in the inducement . . . If Counsel believes, somehow, he can file an amended paper or pleadings that would meet the Court rules for pleading fraud, the Court will expand the time for motions for reconsideration to 21 days, but would require that for any motion for reconsideration, that responsive papers be accepted and that oral argument be scheduled.
>
> The next issue on which the Defendant asserts that there is a material question of fact is the issue of whether or not the note attached to [the complaint], . . . which on its face is missing the word draft, is, in fact, what was signed by the party.
>
> The Court, for the purposes of this motion, will assume that the defendants are correct, and that they did sign a note that had draft in it. The Court will presume for the purposes of this motion that attached to the draft was [the December 15, 2003] letter. . . .
>
> * * *
>
> Assuming both the draft and the attachment of a December 15th, 2003 letter, the Court would find that while what was sent was a draft, or an offer, once it was accepted it could become a contract.

> While the writing itself is contradictory in referring to the undersigned party and then providing spaces for the signatures of three individuals, Mr. Pavone, Mr. Samaan, and Ms. Tack [sic], the parties do not disagree but that Ms. Tack [sic] declined to sign. They do not seem to have a material question of fact but that Mr. Steinberg was made aware of that and that the signatures on whichever version you have, were then affixed and the document returned to him. If, in fact, this is a contract for which there is valuable consideration, those series of events would not render it in effective [sic].
>
> Nothing in the papers by the Defendant indicate that the billing that had been made to the corporations in which Mr. Pavone, Mr. Samaan, and Ms. Tack [sic] were principles [sic] and had a significant financial interest, were not much greater than the $80,000. The compromise of a larger billing sum to a smaller billing sum relative to services rendered is, in fact, good and valuable consideration. Forbearance on suit against the then operating corporations is valuable consideration.
>
> There is nothing in the confines of the four corners of either version of this document that would render it internally unenforceable. The sum of the promissory note is stated. The persons responsible for the indebtedness are noted. The persons to whom the indebtedness is owed is noted. The percent rate is noted. The terms of enforcement are noted. And in other words, all the material terms of a contract are present. The issue of whether or not the promissory note was stamped draft or not is a question of fact. But it is not a material question of fact.
>
> And to that end, the Court would find that there is no material question of fact but that there was a valid promissory note signed by Messrs. Pavone and Samaan to the benefit of, of Thav, Gross, Steinway and Bennett P.C. for which payment has not been made and the interest rate is known. [Hearing 01/05/07, pp 19-23.]

The trial court then entered its order granting plaintiff summary disposition and defendants 21 days to move for reconsideration, to which plaintiff would be permitted to file a reply brief and oral argument.

Defendants moved for reconsideration and to amend their answer to plaintiff's complaint to allege as an affirmative defense, fraud in the inducement. Specifically, defendants claimed Steinberg falsely promised to obtain defendants' release from the then pending Alabama litigation if they signed the promissory note. Defendants submitted the affidavit of two other corporate employees that Steinberg stated to them on or about December 17, 2003, that he did not intend to seek defendants' release from the Alabama sequestration order. Each defendant submitted another identical affidavit averring that, in addition to relying on assertions the note was just a draft and required the signatures of all three principals, they also relied on Steinberg's promise to contact the Alabama attorneys for defendants' release from that litigation. Defendants also submitted a copy of an alleged letter dated December 11, 2003, from Steinberg to Jim Bates, ICR fraud investigation supervisor, which stated that Steinberg would not be representing the three corporate principals (defendants and Tactac) in obtaining releases from the Alabama attorneys.

The trial court denied both defendants' motion for reconsideration and the motion to amend, finding that the amendment would be futile.

II. Standards of Review

This Court reviews de novo a trial court's decision to grant or deny summary disposition. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). A motion brought under MCR 2.116(C)(10) tests the factual sufficiency of a claim and must be supported by affidavits, depositions, admissions, or other documentary evidence. *Maiden, supra* at 120. Both the trial court and this Court must view the substantively admissible evidence submitted at the time of the motion in the light most favorable to the party opposing the motion. *Id*. at 120-121. If the moving party satisfies its initial burden of supporting its position with evidence, the burden then shifts to the opposing party to establish that a genuine issue of disputed fact exists. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). Summary disposition is proper if there is no genuine issue regarding any material fact, and the moving party is entitled to judgment as a matter of law. *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). When the record viewed in the light most favorable to the opposing party leaves open an issue upon which reasonable minds might differ, a genuine issue of material fact exists. *Id*.

The interpretation of a contract is a question of law this Court reviews de novo on appeal. *Archambo v Lawyers Title Insurance Corp*, 466 Mich 402, 408; 646 NW2d 170 (2002). Further, whether contract language is ambiguous, thus requiring resolution by the trier of fact, is also a question of law we review de novo on appeal. *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 463, 480; 663 NW2d 447 (2003). The main goal of interpreting a contract is to honor the intent of the parties. *Burkhardt v Bailey*, 260 Mich App 636, 656-657; 680 NW2d 453 (2004). Courts must discern the parties' intent from the words used in the contract and must enforce an unambiguous contract according to its plain terms. *Id*. at 656; *Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 51-52; 664 NW2d 776 (2003). Thus, "when the language of a document is clear and unambiguous, interpretation is limited to the actual words used, and parol evidence is inadmissible to prove a different intent." *Burkhardt, supra* at 656, citing *Universal Underwriters Ins Co v Kneeland*, 464 Mich 491, 496; 628 NW2d 491 (2001), and *Meagher v Wayne State University*, 222 Mich App 700, 722; 565 NW2d 401 (1997).

III. Analysis

Defendants first argue that the trial court erred by enforcing the promissory note because Steinberg violated MRPC 1.8(a) in obtaining their signature to guarantee payment of the corporate debt. We disagree.

Defendants cite cases to the effect that when an attorney engages a business transaction with a client, courts will place the burden on the attorney to establish lack of undue influence and the transaction's fairness. None of these cases applies MRPC 1.8(a) to the situation of corporate principals' agreeing to pay the acknowledged legal debt of the corporation. Moreover, defendants present no argument at all regarding how the transaction here at issue was unfair or that the attorney fees were unreasonable or excessive. Indeed, MRPC 1.8(a) on its face has no application here because the debt at issue was incurred while the corporate entities were plaintiff's clients, not defendants. Because none of these cases applies nor have defendants made

any meaningful argument on the merits, we must deem this issue abandoned. *Prince v MacDonald*, 237 Mich App 186, 197; 602 NW2d 834 (1999).

Defendants next argue the trial court erred by excluding parol evidence to show the promissory note was not a binding contract but rather a "draft" that defendants signed as a favor for their friend Steinberg "to get his partner's off his back." We again disagree.

In making this argument, defendants do not contend the promissory note was ambiguous. In fact, defendants concede that the note is unambiguous but nevertheless assert that extrinsic evidence is admissible to show the note was non-binding or void. Defendants cite *Schupp v Davey Tree Expert Co*, 235 Mich 268; 209 NW 85 (1926), *Rambo v Patterson*, 133 Mich 655; 95 NW 722 (1903), and *Hobbs v Solts*, 37 Mich 357 (1877), to support their argument. These cases stand for the proposition that while parol evidence is normally not admissible to vary the terms of a written contract, it may be admitted to show that a party's signature to the contract was procured through fraud. In each of these cases the party claiming fraud contended he was duped into signing a document believing it stated something other than what it actually provided. For example, in *Rambo*, "an inexperienced country youth" was duped into paying the defendants money and signing a partnership agreement that was read to him but "was not the contract verbally agreed to at the time he paid the money." *Rambo*, *supra* at 656-657. Similarly, in *Hobbs*, a semi-literate farmer was induced to sign a contract for the installation of lighting rods believing it required him to pay $40 rather than the $400 called for by the written contract. *Hobbs*, *supra* at 358-359. These cases are factually distinguished from the instant case because defendants do not claim that they were led to believe the written contract they signed contained terms other than the written promissory note's clear and unambiguous terms.

Defendants do not argue they were deceived regarding the terms of the promissory note but only that it was never intended to have legal effect - - it was a sham. There are some cases that might support this argument. An exception to the parol evidence rule exists to attack a contract as a whole. *Hamade v Sunoco, Inc (R&M)*, 271 Mich App 145, 167; 721 NW2d 233 (2006). Thus, extrinsic evidence may be presented to show that the writing was a sham and not intended to create legal relations. *Id*. The plaintiff in *Hamade* did not contend the contract in that case was a sham but the theory was presented in *Harwood v Randolph Harwood, Inc*, 124 Mich App 137; 333 NW2d 609 (1983). In the latter case, the sole owner of the company entered a sham contract of employment with the plaintiff, his wife, for the purpose of evading taxes stemming from Social Security earnings' limitations. The *Harwood* Court held that extrinsic evidence was properly admitted "to show that the written instrument was a sham not really intended to create a contractual relationship between the parties." *Id*. at 139. This exception to the parol evidence rule permits the parties to the contract to show by extrinsic evidence that their mutual intent was that the written contract is only an ineffective sham as between them, but the contract remains valid with respect to third parties unaware of the sham. See *Tepsich v Howe Construction Co (On Rehearing)*, 377 Mich 18, 23; 138 NW2d 376 (1965).

We decline to extend the sham exception to the facts of this case. In essence, defendants contend the promissory note was a mere sham devised by Steinberg to deceive his partners. The "sham", ie, the alleged hidden purpose of the unambiguous promissory note, was to take the "heat" off Steinberg to collect the large legal services debt ICR and NCER owed the plaintiff law firm. That is, defendants signed the promissory note in a conspiracy with Steinberg to deceive Steinberg's partners, the plaintiff law firm, into believing the large legal debt owed by ICR and

NCER would be paid if not by the corporations then by the corporations' principals, but they did so with no intent to fulfill it. We conclude that to extend the sham exception to the parol evidence rule to these facts would sanction perpetration of fraud on plaintiff, which was not a party to the alleged sham.

Defendants next argue the trial court erred by denying their proposed amendment to allege as an affirmative defense that Steinberg fraudulently induced them to sign the note by falsely promising to seek defendants' release from the Alabama litigation. We disagree.

We review a trial court's decision on a motion to amend the pleadings for an abuse of discretion. *Ormsby v Capital Welding, Inc*, 471 Mich 45, 53; 684 NW2d 320 (2004). "[A]n abuse of discretion occurs only when the trial court's decision is outside the range of reasonable and principled outcomes." *In re Kostin Est*, 278 Mich App 47, 51; 748 NW2d 583 (2008). When the trial court grants summary disposition pursuant to MCR 2.116(C)(10), it should freely grant the nonprevailing party the opportunity to amend its pleadings pursuant to MCR 2.118, unless the amendment would not be justified. MCR 2.116(I)(5); *Ormsby*, *supra* at 52-53. A proposed amendment is not justified if it would be futile. *Weymers v Khera*, 454 Mich 639, 658; 563 NW2d 647 (1997); *In re Kostin Est*, *supra* at 52.

The unsigned affidavits defendants submitted in support of their motion to amend were contradicted by the affidavits defendants submitted earlier in response to plaintiff's motion for summary disposition. In the first affidavits, defendants averred they were induced to sign the promissory based "solely" on certain facts that did not include the alleged promise to contact the Alabama attorneys. "It is well settled that a party may not raise an issue of fact by submitting an affidavit that contradicts the party's prior clear and unequivocal testimony." *Palazzola v Karmazin Products Corp*, 223 Mich App 141, 155; 556 NW2d 868 (1997); see also *Dykes v William Beaumont Hosp*, 246 Mich App 471, 480-482; 633 NW2d 440 (2001). Consequently, the trial court did not abuse its discretion denying defendants' motion to amend their pleadings because it was a futile effort to create a factual issue with affidavits that contradicted defendants' prior unequivocal sworn testimony. *Ormsby*, *supra* at 53; *In re Kostin Est*, *supra* at 51-52.

Next, defendants argue that the promissory note is ineffective because the contract offer was not accepted according to the terms of its transmittal letter, i.e., all three corporate principals did not sign it. Again, we must disagree.

First, defendants' reliance on *Pakideh v Franklin Commercial Mortgage Group*, 213 Mich App 636; 540 NW2d 777 (1995) is misplaced. This Court observed: "An offer comes to an end at the expiration of the time given for its acceptance." *Id*. at 640-641. Thus, the Court held that "because [the] plaintiff did not timely accept [the] defendant's offer in the manner specified in the commitment letter, no contract was formed." *Id*. at 642. Here, however, the offer contained no expiration date and defendants accepted it in the manner provided by signing the promissory note and returning it to plaintiff. Second, there is nothing in the two-page promissory note that defendants concede is clear and unambiguous that states Tactac's signature was necessary. Defendants' effort to establish otherwise is precluded by the parol evidence rule. *Burkhardt*, *supra* at 656-657.

Last, defendants argue Steinberg's purported promise to obtain defendants release from the Alabama litigation fraudulently induced defendants to sign the note. Because Steinberg

failed to fulfill the alleged promise, defendants contend, the promissory note may be voided at defendants' option. We disagree for the reasons already discussed.

Moreover, as the trial court determined, the promissory note was fully supported by the principal beneficiaries of the legal services rendered for the corporation promising to pay that debt. Consideration is a bargained-for exchange resulting in "a benefit on one side, or a detriment suffered, or service done on the other." *General Motors Corp v Dep't of Treasury*, 466 Mich 231, 238-239; 644 NW2d 734 (2002) (citations omitted). "Courts do not generally inquire into the sufficiency of consideration." *Id*. at 239. By signing the promissory note, defendants obtained plaintiff's forbearance on the corporate debt and continued a working relationship with plaintiff at a time when the corporations were experiencing considerable legal difficulties. This resulted in a detriment to plaintiff while benefiting defendants. See *Chris Nelson & Son, Inc v Shubow*, 374 Mich 403, 406-407; 132 NW2d 122 (1965). Further, in a factually similar case involving a corporate promissory note accompanied by the corporate principals personal guarantee, this Court held that no consideration was necessary to secure an antecedent corporate debt. *Enzymes of America, Inc v Deloitte, Haskins & Sells*, 207 Mich App 28, 36; 523 NW2d 810 (1994), rev'd on other grounds 450 Mich 889 (1995). "The adequacy of the consideration is irrelevant to the enforceability of the note and guaranty." *Id*.

We affirm.

/s/ Jane E. Markey
/s/ William C. Whitbeck
/s/ Elizabeth Gleicher