STATE OF MICHIGAN

COURT OF APPEALS

BROWN CITY CONCRETE, INC., Plaintiff-Appellee,	UNPUBLISHED August 18, 2011
v	No. 295451 Lapeer Circuit Court
DANIEL G. SEVERN and TRI COUNTY CONCRETE POURED WALLS, INC., Defendants-Appellants.	LC No. 08-040552-CZ

Before: SAAD, P.J., and JANSEN and K.F. KELLY, JJ.

PER CURIAM.

Defendants appeal the trial court's judgment in favor of plaintiff following a bench trial. For the reasons set forth below, we affirm in part and reverse in part.

I. FACTS AND PROCEEDINGS

Defendant, Daniel Severn, owned defendant Tri County Concrete Poured Walls, Inc., and James and Jeremy Homer owned plaintiff Brown City Concrete, Inc. In 2001 or 2002, Severn began buying concrete materials and was extended a line of credit from Brown City Concrete. In approximately June 2006, Tri County Concrete became unable to pay its bills on the account. The Homers testified that Brown City Concrete charges 18 percent interest on accounts that are 30 days past due, and that Severn agreed that Tri County Concrete would be charged interest. Testimony established that, by late 2006, defendants' past due amount was either $84,000 or $85,422.05. According to James and Jeremy, Severn stated that he would pay them "everything he owed" them. In reaching a verdict, the trial court ruled that there were "a hundred and some contracts," based on delivery of material by plaintiff and that Tri County Concrete agreed to pay for those deliveries. Tri County Concrete failed to pay for almost 1-1/2 years, but Severn made three payments totaling $84,000 via check in 2007. The court awarded plaintiff $15,000 in damages and $180 in costs.

II. DISCUSSION

A. ACCORD AND SATISFACTION

Defendants argue that Jeremy accepted and cashed a check written in November 2007 that was marked "paid in full" and that this constituted an accord and satisfaction. "This Court

reviews a trial court's findings in a bench trial for clear error and its conclusions of law de novo." *Alan Custom Homes, Inc v Krol*, 256 Mich App 505, 512; 667 NW2d 379 (2003). Factual findings are clearly erroneous if there is no evidence to support them or the reviewing court on the entire record is left with a definite and firm conviction that a mistake has been made. *Featherston v Steinhoff*, 226 Mich App 584, 588; 575 NW2d 6 (1997). The reviewing court shall give regard to the special opportunity of the trial court to judge the credibility of the evidence and the witnesses who appeared before it. MCR 2.613(C). The interpretation of statutes is a question of law that is reviewed de novo. *Healing Place at North Oakland Med Ctr v Allstate Ins Co*, 277 Mich App 51, 55; 744 NW2d 174 (2007).

Accord and satisfaction is an affirmative defense. Therefore, defendants have the burden to establish that an accord and satisfaction occurred. *Obremski v Dworzanin*, 322 Mich 285, 290; 33 NW2d 796 (1948). MCL 440.3311 applies to an accord and satisfaction involving a negotiable instrument such as a check. The statute provides in relevant part:

> (1) If a person against whom a claim is asserted proves that (*i*) that person in good faith tendered an instrument to the claimant as full satisfaction of the claim, (*ii*) the amount of the claim was unliquidated or subject to a bona fide dispute, and (*iii*) the claimant obtained payment of the instrument, the following subsections apply.
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> (2) Unless subsection (3) applies, the claim is discharged if the person against whom the claim is asserted proves that the instrument or an accompanying written communication contained a conspicuous statement to the effect that the instrument was tendered as full satisfaction of the claim. [MCL 440.3311(1)-(2).]

According to Jeremy, when he received the check marked "paid in full," he called Severn and told him that the check did not cover the total amount owed. Severn then instructed him to cross off "paid in full" and cash the check, and said they would figure out the remaining balance when they next saw each other. However, Severn testified that he told Jeremy to send the check back if he did not want to cash it but, instead, Jeremy crossed off "paid in full" and cashed it. The trial court ruled that the last payment in November 2007 did not constitute an accord and satisfaction, implicitly crediting Jeremy's version of events because Severn continued to leave a large boom truck with plaintiff as collateral even after the alleged accord and satisfaction occurred, and continued to discuss with the Homers the total amount he owed. We will not disturb the trial court's credibility findings. *Johnson v Johnson*, 276 Mich App 1, 11; 739 NW2d 877 (2007).

Moreover, Jeremy's testimony that Severn instructed him to cross off "paid in full" and cash the check indicates that Severn did not intend the check to be cashed in satisfaction of a new agreement. In *DMI Design & Mfg, Inc v Adac Plastics, Inc*, 165 Mich App 205, 210-211; 418 NW2d 386 (1987), this Court held, "[i]f a debtor has adequately expressed his intention that the check be taken as full satisfaction or not at all, the creditor does not obviate the effect of the language merely by crossing out or obliterating the words." However, in *Deuches v Grand Rapids Brass Co*, 240 Mich 266, 269; 215 NW 392 (1927), the Supreme Court held:

> Nor does it avail plaintiff that, after accepting and before cashing the check, he, without the knowledge or consent of defendant, obliterated from it the statement

> of the conditions upon which it was given. In the case of *In re Estate of Cunningham*, 311 Ill 311, 142 NE 740, it was said:
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> 'The fact that the words 'in full' are erased from the check or receipt by the creditor does not affect the question whether the proffer and acceptance of the check constitute an accord and satisfaction, *where the erasure is without the knowledge or authority of the debtor*.' [*Deuches*, 240 Mich at 269 (emphasis added).]

Here, the version of the facts accepted by the trial court showed that plaintiff had the "knowledge [and] consent of defendant[s]" before "oblitera[ting] from it the statement of the conditions upon which it was given." *Id*. Thus, the condition "paid in full" was no longer effective, to the extent it had any effect at the outset. Defendants' final payment in November 2007 did not constitute an accord and satisfaction.

B. INTEREST

Defendants claim that the trial court erred in finding there was an implied contract for the payment of interest because there was never an agreement that interest was to be paid on any unpaid balance. Defendants also argue that the trial court erred in finding that interest could be charged based on industry standards where there was no such evidence in the record. The interpretation of a contract is a question of law, which this Court reviews de novo. *Burkhardt v Bailey*, 260 Mich App 636, 646; 680 NW2d 453 (2004). "In the absence of agreement and except by way of damages for money withheld, interest does not run on an unliquidated claim." *Royal Oak Twp v City of Berkley*, 309 Mich 572, 584; 16 NW2d 83 (1944). Where an explicit contract does not exist, an implied contract may arise from the parties' conduct, language, or other circumstances that evidence an intent to contract. *Featherston*, 226 Mich App at 589. Here, the trial court correctly found that an implied contract for the payment of interest existed based on the actions of the parties. James and Jeremy explicitly testified that Severn orally agreed to pay interest. Severn admitted that interest was shown on the monthly statements he received. Although he claims that he never agreed to pay interest, he clearly understood that interest was charged on the account.

Moreover, the trial court did not err in finding that the evidence showed that there is a "standard of the industry that if you purchase on open account that there is a charge for that, carrying that balance." Defendant himself, who was in the concrete industry for 20 years, testified that he was aware that "in some cases" there is a "standard of the business where if you don't pay your invoices within 30 days there's interest." Thus, there was evidence that the industry standard is that interest is charged on accounts 30 days past due and this supported the charge of interest in this case.

Defendants argue that the trial court found that plaintiff was compounding interest, and that because no agreement existed for compound interest, the trial court should have disallowed plaintiff's claim for interest. "Compound interest means interest on interest, in that accrued interest is added periodically to the principal, and interest is computed upon the new principal thus formed." *Niggeling v Mich Dep't of Transp*, 195 Mich App 163, 166; 488 NW2d 791 (1992). The law generally disfavors compound interest, and compound interest is only allowed

if authorized by statute or contractual agreement. *Norman v Norman*, 201 Mich App 182, 184; 506 NW2d 254 (1993). The trial court did not explicitly state in its verdict that plaintiff was compounding interest or that it was awarding compound interest. While James testified that the final invoice sent to defendants in May 2007, showing a balance of $97,290, was compounded at 1.5 percent per month, plaintiff did not request compound interest in seeking damages, and the trial court did not appear to award it. The court stated in reaching its verdict:

> But even if the Court accepts that amount, $97,000.00, shortly after that the payments were made by the Defendant of 84,000 and I can't—I don't have the ability to determine exactly what the interest would be after each of those three payments but I'm going to round this out to say that there was $13,000.00 still owing after the November '07 payment by the Defendant. Still 13,000 whether you call that principal or interest, it doesn't matter because the Plaintiff simply showed a month end balance on his bills.
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> If the Court determines that there was still interest owed on the figure from November until this suit was filed in August of '08 I have estimated that is roughly $2,000.00 additional interest. And again, I've rounded those numbers off.
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> So the best I can do, based upon the Plaintiff's method of calculating is to determine that there's $15,000.00 owed on the account between the Plaintiff and the Defendant for principal and interest. And the Plaintiff may take a judgment against [Tri County Concrete] for $15,000.00.

On this record, we cannot conclude that the trial court clearly erred in relying on $97,000 as the base figure from which to calculate interest. The evidence does not show what portion of the $97,290 figure from May 2007 was principal. However, the evidence showed that the principal in December 2006 was either $84,000 or $85,422. Defendants stopped paying in or around June 2006. Simple interest of 18 percent on the principal is roughly the difference between $97,290 and the amount of principal owed. Moreover, defendants fail to specify how the court employed compound interest. Thus, we find no error.

C. COMPLAINT

Defendants claim that the complaint, which was originally for a suit on open account, was defective under MCR 2.113(F), which states that if a claim or defense is based on a written instrument, a copy of the instrument or its pertinent parts must be attached to the pleading as an exhibit unless an exception applies. The trial court ruled during trial, sua sponte, that it would treat this as a contract case. Defendants do not dispute that money was owed on an account with one of the Homers' companies. However, defendants argue that as the proofs progressed, the record became clear that plaintiff was basing its entire claim on a written instrument—a credit application defendant allegedly signed, which was not attached to the complaint or produced at trial. To the contrary, plaintiff's claims were not based on the credit application and MCR 2.113(F) is inapplicable. The testimony of all of the witnesses at trial belies defendants' argument that plaintiff relied on the credit agreement to establish that it had an agreement for the payment of interest, and the court did not rely on the agreement at all in deciding that an implied

contract for the payment of interest existed. Thus, defendants' arguments about the attachment of the alleged agreement are without merit.

D. PERSONAL LIABILITY

We agree with defendants that the trial court erred in holding Severn personally liable for the debts of Tri County Concrete, which dissolved in July 2007. "A personal guarantee for the debt of another can arise only where such an intent is clearly manifested." *Bandit Indus, Inc v Hobbs Int'l, Inc (After Remand)*, 463 Mich 504, 505; 620 NW2d 531 (2001). Here, the trial court found that an implied contract of guaranty existed based on Severn's dealings with and oral promises to the Homers. However, even if Severn's conduct indicated a clear intent to personally guarantee Tri County Concrete's past debts, Severn's promise had to be in writing in order to satisfy the statute of frauds.

Under the statute of frauds, MCL 566.132(1)(b), "a special promise to answer for the debt, default, or misdoings of another person" is void unless "[the] agreement, contract, or promise, or a note or memorandum of the agreement, contract, or promise is in writing and signed with an authorized signature by the party to be charged with the agreement, contract, or promise." James testified that the written credit agreement Severn signed contained a provision requiring Severn to personally guarantee Tri County Concrete's debts. Severn testified that if such a document "had [his] signature on it [he] probably signed it . . . 10 years ago." However, Severn also testified that he never promised to "personally pay [plaintiff] outside of [his] corporation." Thus, the writing's existence appears to be in dispute.

Where a signed agreement cannot be produced and there is a dispute as to whether the contract or agreement has been signed, a party may establish the existence of the signature through extrinsic and parol evidence. *Zander v Ogihara Corp*, 213 Mich App 438, 443-444; 540 NW2d 702 (1995). However, the evidence used to establish the existence of the signature must be "'clear, strong and unequivocal,' i.e., clear and convincing." *Id.* at 444. Here, James testified that the application Severn signed contained a "personal guarantee" provision, and he never does business with someone who does not sign a credit agreement. However, Jeremy testified only that he "believed" that the application contained such a guaranty provision, and Severn denied that he ever signed a document promising to personally guarantee Tri County Concrete's debts. The evidence is not "clear, strong and unequivocal," and the statute of frauds is not satisfied.

We disagree with plaintiff's argument that Severn's payments after Tri County Concrete dissolved constituted "partial performance of his personal guarantee" and is an assertion that the part performance exception to the statute of frauds applies. In *Dumas v Auto Club Ins Ass'n*, 437 Mich 521, 540; 473 NW2d 652 (1991), the Supreme Court observed that the part performance exception has only been applied to contracts involving the sale of land, and it declined to apply the exception to a contract that could not be performed within a year. Likewise, we find the exception does not apply here. The trial court clearly erred holding Severn personally liable for the judgment.

Affirmed in part as to the amount of the judgment, but the judgment holding Severn personally liable is reversed.

/s/ Henry William Saad
/s/ Kirsten Frank Kelly