STATE OF MICHIGAN

COURT OF APPEALS

ALAN JOSEPH WEINHOLD, Plaintiff-Appellee,	UNPUBLISHED June 18, 2013
v KURTIS FORD PARSCH, Defendant-Appellant, and KFP TRUST, Defendant.	No. 307257 Washtenaw Circuit Court LC No. 10-001395-CK

Before: BECKERING, P.J., and SAAD and O'CONNELL, JJ.

PER CURIAM.

Following a bench trial regarding a dispute on a promissory note, defendant Kurtis Parsch (Parsch) appeals by right the money judgment entered in favor of plaintiff. Defendant also appeals the trial court's award of attorney fees to plaintiff. We affirm.

I. FACTS AND PROCEDURAL HISTORY

This lawsuit arose from a promissory note executed in July 2009 by Parsch in favor of plaintiff. In the note, plaintiff agreed to loan Parsch $50,000 at an annual interest rate of 7.95% on the unpaid principal, and Parsch agreed to make installment payments on the loan beginning in November 2009. The note required Parsch to pay 9% interest and late fees on principal that remained outstanding after designated payment dates.

Plaintiff loaned $50,000 to Parsch in keeping with the note and paid those funds into the KFP Trust. Parsch never made any repayments on the note. In December 2010, plaintiff retained an attorney to file a complaint against Parsch and the KFP Trust for recovery on the note. Both defendants filed answers to the complaint, acting pro se. In their answers, defendants acknowledged the existence of the note, but denied that plaintiff ever made any loan pursuant to the note. Defendant KFP Trust asserted that it was not a party to the note and that payments it received from plaintiff were for "goods delivered."

After some discovery disputes, plaintiff moved for summary disposition pursuant to MCR 2.116(C)(10). In response, defendants argued that plaintiff's payments to defendants were unrelated to the note, and that plaintiff never actually loaned defendants money pursuant to the note. Defendants submitted a "Bill of Sale" dated July 1, 2009, which indicated plaintiff had purchased 50,000 carats of Mozambique garnets from the KFP Trust for $50,000. The bill of sale also indicated that the fair market value of the garnets was $200,000. Plaintiff asserted that the bill of sale was fraudulent and was a forgery. Defendants argued plaintiff owed them an outstanding balance pursuant to a separate "Consolidated Agreement." Plaintiff acknowledged that he had executed the consolidated agreement, but denied that the agreement was related to the note. The trial court denied plaintiff's motion, and the parties proceeded to a bench trial.[1]

At the outset of trial, plaintiff provided an exhibit list to Parsch. In response, Parsch objected to the introduction of any documents not produced in discovery. Plaintiff argued that all of the documents identified on the exhibit list were in Parsch's possession prior to trial, including copies of e-mail correspondence between Parsch and plaintiff. The trial court overruled Parsch's objection.

Both plaintiff and Parsch testified at trial. Plaintiff repeatedly testified that he had loaned Parsch money pursuant to the Note. Parsch acknowledged that he owed money under the note and stated:

> I have acknowledged consistently that the note is valid and that I owe on the note. I simply have said that he owes me under the consolidated agreement and the money that he owes me is just offset against the money that I owe him.
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> * * *
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> [Y]our Honor, I'm not saying, and I never have said, that I don't personally owe the promissory note. I do. The problem is that [plaintiff] owes me under the consolidated agreement and he hasn't paid me. . . . I'm entitled to the offsets that he owes me against the note . . . which is in excess of what I owe him under the promissory note. . . .
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> The objection, the whole problem in this whole litigation came about when they tried to claim that the trust was somehow liable under the promissory note.

The trial court found that Parsch had failed to establish he was entitled to any setoff. The court entered judgment against Parsch for the amount due under the note, plus interest and late fees, totaling $61,210.43. The court declined to enter judgment against the KFP Trust, finding

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[1] Defendants filed a cross-motion for summary disposition, seeking discharge of plaintiff's attorney fee claim. Defendants also filed a motion for leave to amend their answers to plaintiff's complaint. In addition, defendant KFP Trust filed a motion to dismiss. The trial court denied these motions.

that plaintiff had not established that the Trust was liable under the note. The court also awarded $10,600 in attorney fees to plaintiff.

II. EVIDENTIARY RULING

On appeal, Parsch first argues that the trial court erred by overruling his objections to trial exhibits that were not produced during discovery. Parsch does not specifically identify which exhibits are at issue, but he appears to be challenging copies of e-mails from Parsch to plaintiff dated from November 2009 through November 2010. Parsch asserts that he was unaware plaintiff intended to introduce these documents into evidence, and further asserts that he had no opportunity to prepare a defense to the information in the e-mails. Parsch acknowledged in the e-mails that he owed money to plaintiff under the note. Specifically, in one of the e-mails, Parsch wrote, "I am delinquent in the payment due on the 50k note because, as you are well aware, I am dealing with identity theft issues." In another, Parsch wrote, "I agree the 50K note is what it is and as I have repeatedly said I will pay that when I'm able to."

We find no error in the trial court's evidentiary ruling. To support his objection to the e-mails, defendant was required to demonstrate that he was unaware of the existence of the e-mails. See *KBD & Assoc, Inc v Great Lakes Foam Technologies, Inc*, 295 Mich App 666, 677-678; 816 NW2d 464 (2012). In *KBD*, the plaintiff challenged the trial court's evidentiary ruling that allowed the opposing party to testify about e-mails between the opposing party and another entity. *Id*. at 676. Like Parsch, the plaintiff in *KBD* claimed to be unaware of the existence of the e-mails and objected to admission of the e-mails into evidence on that ground. *Id*. The *KBD* Court determined that the plaintiff had failed to support the claim of being unaware of the e-mails. *Id.* at 678. Accordingly, the Court rejected the plaintiff's challenge to the trial court's evidentiary ruling. *Id*.

In this case, Parsch does not and cannot argue that he was unaware of the existence of the e-mails. As the author and recipient of the e-mails in question, Parsch must have been aware of them. His assertion to the trial court that he was unaware plaintiff intended to introduce the e-mails at trial was insufficient to require the court to exclude the e-mails. Parsch does not argue that the e-mails were irrelevant, and the record demonstrates that the e-mails were directly relevant to the issue of the amount due under the note. Consequently, the trial court was within its discretion to allow the e-mails into evidence.

Moreover, the admission of the e-mails into evidence would not require reversal of the judgment unless the admission affected Parsch's substantial rights. *KBD*, 295 Mich App at 678. Nothing in the e-mails affected Parsch's substantial rights, because the e-mails primarily reiterated information Parsch confirmed in his trial testimony. In his testimony, Parsch acknowledged that he had sent and received the e-mails in question. In addition, he testified that the note was valid, that he owed money to plaintiff under the note, and that he had made no payments to plaintiff. Given this testimony, any error in admitting the e-mails into evidence was harmless.

III. ATTORNEY FEES

The note included an attorney fee provision, as follows: "If any payment obligation under this Note is not paid when due, the Promisor promises to pay all costs of collection, including actual attorney fees, whether or not a lawsuit is commenced as part of the collection process." At trial, Parsch contended that he should not be required to pay the portion of plaintiff's attorney fees attributable to plaintiff's unsuccessful claim against the KFP Trust. Specifically, Parsch suggested to the trial court that he might have settled the case if plaintiff had not named the Trust as a defendant. The trial court rejected Parsch's implication that the lawsuit would have settled if plaintiff had not named the trust as a defendant.

We review the trial court's attorney fee award for an abuse of discretion. *Ypsilanti Charter Twp v Kircher,* 281 Mich App 251, 286; 761 NW2d 761 (2008). We first note that Parsch does not challenge the validity of the fee affidavit plaintiff submitted to the trial court and does not challenge the reasonableness of the attorney fees. Instead, Parsch challenges only the portion of the fees he claims were attributable to pursuing the claim against the KFP Trust. According to Parsch, plaintiff's counsel should have delineated between the time attributable to the claim against Parsch and the time attributable to the claim against the Trust, and the trial court should have awarded fees only for the time attributable to the claim against Parsch.

Parsch provides no legal or factual support for his position. We find nothing in the record to indicate that plaintiff's decision to name the Trust as a defendant was frivolous or otherwise sanctionable. Parsch's retrospective implication suggesting that the case might have settled had the Trust not been a defendant is too speculative to constitute a valid challenge to the attorney fee award. Consequently, Parsch has not presented a viable argument regarding the award. We conclude that the trial court was within its discretion in enforcing the attorney fee provision in the note.

Affirmed.

/s/ Jane M. Beckering
/s/ Henry William Saad
/s/ Peter D. O'Connell