STATE OF MICHIGAN

COURT OF APPEALS

CHEMICAL BANK,

Plaintiff-Appellant,

v

LONG'S TRI COUNTY MOBILE HOMES, INC., RICHARD E. LONG, and JEANETTE LONG,

Defendants-Appellees,

and

JAMES GERSTENBERGER and KIMBERLY GERSTENBERGER,

Defendants.

UNPUBLISHED
May 21, 2013

No. 309126
Sanilac Circuit Court
LC No. 07-032078-CK

Before: STEPHENS, P.J., and SAWYER and METER, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's judgment against defendants Richard and Jeanette Long for $148,776.69 on the Longs' personal guaranties. Defendant Tri County Mobile Homes, Inc was in the business of selling mobile and modular homes. For the reasons set forth below, we affirm in part, reverse in part, and remand for further proceedings.

This matter is back before this Court following remand in *Chemical Bank v Long's Tri-County Mobile Homes*, unpublished opinion per curiam of the Court of Appeals, released February 15, 2011 (Docket No. 294009). The underlying facts are set forth in this Court's prior opinion. In the prior appeal this Court affirmed the trial court's finding that plaintiff breached the terms of a loan contract by failing to obtain buyback agreements, but it reversed the trial court's conclusion that the breach wholly relieved the Longs from liability under the guaranties. This Court "remand[ed] for consideration of [the Longs'] damages for plaintiff's breach, with said amount to be offset against [the Longs'] personal liability under the promissory notes."

On remand, the trial court reopened proofs to determine the damages suffered by the Longs for plaintiff's failure to obtain the required buyback agreements. The trial court found that the Longs were damaged in the amount of $842,795.12, which represented the net purchase

price of the eight housing units on the model line at the time of default.[1] Further, the trial court found that plaintiff failed to reasonably pursue certain collateral that it was awarded in the October 2, 2008 stipulated judgment for plaintiff against Tri County. Specifically, the trial court found that plaintiff failed to pursue in a commercially reasonable manner accounts receivable totaling $559,923.19 and employee loans totaling $8,843. The trial court entered judgment against the Longs for $148,776.69, and plaintiff now appeals.

I. REOPENING OF PROOFS

Plaintiff first argues that the trial court exceeded the scope of the remand order by reopening proofs and considering the Longs' argument that it failed to dispose of collateral in a commercially reasonable manner. We disagree.

"Whether a trial court followed an appellate court's ruling on remand is a question of law that this Court reviews de novo." *Schumacher v Dep't of Natural Resources*, 275 Mich App 121, 127; 737 NW2d 782 (2007).

On remand, a trial court is limited to the scope of the remand order. *Waatti & Sons Electric Co v Dehko*, 249 Mich App 641, 646; 644 NW2d 383 (2002). Thus, "when an appellate court gives clear instructions in its remand order, it is improper for a lower court to exceed the scope of the order." *K & K Constr, Inc v Dep't of Environmental Quality*, 267 Mich App 523, 544; 705 NW2d 365 (2005). However, "[w]hen an appellate court remands a case without instructions, a lower court has the 'same power as if it made the ruling itself.'" *Id*. (citation omitted).

In this case, this Court remanded "for consideration of defendants' damages for plaintiff's breach, with said amount to be offset against defendants' personal liability under the promissory notes." By using the language "for consideration" and "said amount," this Court indicated that the Longs' damages were unascertainable on the basis of the existing record. If, as plaintiff argues, this Court had concluded that the Longs' damages were $96,805, it would have explicitly remanded with instructions to reduce the Longs' liability under the promissory notes by that amount. That the Court did not do so means that the Longs' damages were to be determined by the trial court. The only possible avenue available to the trial court to consider the Longs' damages was by reopening proofs.

Moreover, we conclude that the Longs' challenge to plaintiff's disposition of the accounts receivable was properly considered by the trial court on remand. For reasons explained later in this opinion, plaintiff had control over the accounts receivable through operation of the October 2008 judgment. The trial court entered its judgment against the Longs in December 2008, only about two and a half months after the October 2008 judgment against Tri County. After the remand, the Longs argued that plaintiff failed to pursue the accounts receivable for a period of months or years after the pre-remand proceedings had concluded. This argument could

[1] In fact, the model line included nine housing units, but one housing unit was sold with the consent of the parties.

not have been raised in the initial pre-remand proceedings because the complained-of facts did not occur until after the pre-remand proceedings had concluded. Therefore, the argument was properly considered in the post-remand proceedings. See *Grievance Administrator v Lopatin*, 462 Mich 235, 261; 612 NW2d 120 (2000) (explaining that a trial court may be allowed to consider on remand "any matters left open" by the remanding decision).

II. THE LONG'S DAMAGES

Plaintiff next argues that the trial court erred in deciding that its breach caused the Longs $842,795.12 in damages, which was the total value of all eight model units remaining in inventory when the litigation was initiated. We agree.

"We review a trial court's determination of damages after a bench trial for clear error." *Chelsea Investment Group, LLC v Chelsea*, 288 Mich App 239, 255; 792 NW2d 781 (2010). "In an action based on contract, the parties are entitled to the benefit of the bargain as set forth in the agreement." *Ferguson v Pioneer State Mut Ins Co*, 273 Mich App 47, 54; 731 NW2d 94 (2006). "The proper measure of damages for a breach of contract is 'the pecuniary value of the benefits the aggrieved party would have received if the contract had not been breached.'" *Id*., quoting *Davidson v Gen Motors Corp*, 119 Mich App 730, 733; 326 NW2d 625 (1982).

In this case, plaintiff breached the contract by not obtaining buyback agreements for all model-line units at issue. Instead, plaintiff only obtained buyback agreements from two manufacturers: Pinnacle Building Systems and Hart Housing Group. As this Court observed in its remanding opinion, these were the only two buyback agreements in evidence, and they incorporated a one-year buyback limitation. From the only record evidence, therefore, the lack of buyback agreements damaged the Longs with respect to the two units that were less than one-year-old in October 2007. Damages for breach of contract are measured by the value that the non-breaching party would have received had the contract not been breached. *Ferguson*, 273 Mich App at 54. In this case, had plaintiff not breached the contract and obtained the buyback agreements, plaintiff would have been able to exercise the buyback agreements for only these two units. Accordingly, the Longs are entitled to damages for these two units, which totals $71,805.

III. ACCOUNTS RECEIVABLE

Plaintiff raises three separate issues with respect to the accounts receivable, each of which will be addressed in turn. First, plaintiff argues that the trial court erred in determining that it was required to pursue the accounts receivable in a commercially reasonable manner because it was entitled to enforce the guaranties against the Longs without exercising its rights under the security agreements. We disagree. We review de novo issues of contractual interpretation, *Trader v Comerica Bank*, 293 Mich App 210, 215; 809 NW2d 429 (2011), and the proper interpretation of Article 9 of the UCC, *In re Moukalled Estate*, 269 Mich App 708, 713; 714 NW2d 400 (2006).

The parties agree that under the plain language of the guaranties, plaintiff was entitled to enforce the guaranties against the Longs without first attempting to enforce its rights to the collateral (i.e., the accounts receivable). See, e.g., *Krekel v Thomasma*, 255 Mich 283, 288-289;

238 NW 255 (1931) (explaining that a creditor may elect to enforce an absolute guaranty against the guarantor without first proceeding against the primary debtor). However, the issue is whether the October 2008 judgment imposed certain duties on plaintiff with respect to the accounts receivable that were not otherwise imposed by the law or the guaranties themselves. See 68A Am Jur 2d § 586 ("The fact that the defendant has absolutely guaranteed the debt means only that the creditor is not required to pursue the primary debtor before proceeding against the guarantor but does not waive the right of the guarantor to raise the defense that the creditor had disposed of the collateral in a commercially unreasonable manner.").

In October 2008, by stipulating to judgment, plaintiff decided to enforce the security agreements and take possession of the collateral owned and possessed by Tri County. At this point, plaintiff had two options: (1) either directly collect/enforce the accounts receivable against the respective account debtors; or (2) dispose of the accounts receivable by selling them to a third party. See MCL 440.9607(1)(c) (secured party may "[e]nforce the obligations of an account debtor") and MCL 440.9610(1) (secured party may "dispose of any or all of the collateral in its present condition").[2] Under MCL 440.9607(3), if plaintiff elected to "collect from or enforce" the respective obligations of the account debtors, plaintiff was required under to "proceed in a commercially reasonable manner" against the accounts receivable. Under MCL 440.9610(2), if plaintiff elected to dispose of the accounts receivable, plaintiff was required to dispose of the accounts receivable in a "commercially reasonable" manner.

On appeal, plaintiff does not contend that the Longs waived their rights under MCL 440.9607(3) or MCL 440.9610(2). Rather, plaintiff argues that the Longs waived their right under MCL 440.9608(1) that requires applying the proceeds from the collateral against their personal liabilities under the guaranties. In support of this argument, plaintiff notes that the guaranties provide that "I waive for myself . . . all right to require the holder to proceed against the maker or against any other person or to apply any security it holds or to pursue any other remedy." However, MCL 440.9602(c) provides that a "debtor or obligor may not waive or vary the rules" set forth in MCL 440.9607(3), "which deals with collection and enforcement of collateral." Further, MCL 440.9602(g) provides that a "debtor or obligor may not waive or vary the rules" set forth in MCL 440.9610(2), "which deal[s] with disposition of collateral." As previously noted, MCL 440.9607(3) requires a secured party to "proceed in a commercially reasonable manner" when collecting or enforcing accounts receivable, MCL 440.9607(3)(a)-(b), and MCL 440.9610(2) states that "[e]very aspect of a disposition of collateral . . . must be commercially reasonable." Maintaining exclusive control over the accounts receivable while allowing the value of the accounts receivable to deteriorate is not "commercially reasonable."[3]

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[2] We note that plaintiff's inaction was not an acceptable alternative to collecting, enforcing, or disposing of the accounts receivable because MCL 440.9207 imposes a duty "to preserve and protect collateral." See *Shurlow v Bonthuis*, 456 Mich 730, 739-740; 576 NW2d 159 (1998).

[3] The trial court applied MCL 440.9624, which the parties agree does not apply to this case. However, we will not reverse a correct result reached for the wrong reason. See *Dybata v Wayne Co*, 287 Mich App 635, 647; 791 NW2d 499 (2010).

Second, plaintiff argues that it did not have "possession" of the accounts receivable by operation of the October 2008 judgment, so it was not obligated to offset the Longs' liability under the guaranties by the value of the accounts receivable. We disagree.

MCL 440.9102(1)(b) states, in relevant part:

> "Account", except as used in "account for", means a right to payment of a monetary obligation, whether or not earned by performance, for property that has been or is to be sold, leased, licensed, assigned, or otherwise disposed of, for services rendered or to be rendered, for a policy of insurance issued or to be issued, for a secondary obligation incurred or to be incurred . . . . The term does not include rights to payment evidenced by chattel paper or an instrument, commercial tort claims, deposit accounts, investment property, letter-of-credit rights or letters of credit, or rights to payment for money or funds advanced or sold . . . .

In this case, the accounts receivable are within the statutory definition of "account" because the accounts receivable are "a right to payment of a monetary obligation."

The Longs argue, and the trial court agreed, that plaintiff had "possession" of the accounts receivable pursuant to the October 2008 judgment. The October 2008 judgment provided in relevant part that "Plaintiff Chemical Bank is entitled to possession of the property of Defendant Long's Tri County Mobile Homes, Inc. . . . in accordance with . . . the Security Agreements." It is not disputed that the security agreements included Tri County's accounts receivable. However, the use of the word "possession" in the October 2008 judgment is not controlling because intangible property such as accounts receivable may be controlled, but not possessed.[4] Nevertheless, a fair reading of the October 2008 judgment indicates that the word "possession" actually means "control" or "legal right."

After a debtor has defaulted, a secured party may either directly proceed against the collateral as provided by Article 9, seek judicial enforcement of its security interest, or both. See MCL 440.9601(1). Here, plaintiff sought and successfully obtained judicial enforcement of its security interest against Tri County. When the trial court entered judgment against Tri County in October 2008, plaintiff obtained a legal right to the specific property listed in the judgment. See *Cheron, Inc v Don Jones, Inc*, 244 Mich App 212, 220 n 4; 625 NW2d 93 (2000). The accounts receivable were included in the judgment. Further, under Article 9, plaintiff was required to either collect on or dispose of the accounts receivable in a commercially reasonable manner. See MCL 440.9608; MCL 440.9615. In either event, the Longs were entitled to an offset against

[4] For instance, tangible property such as negotiable documents may be possessed, see MCL 440.9313(1), and intangible property such as deposit accounts or electronic chattel paper may be controlled, see MCL 440.9314(1).

their liability on the guaranties for the proceeds from the accounts receivable. MCL 440.9608(1); MCL 440.9615(1).[5]

Third, plaintiff argues that the trial court erred in valuing the accounts receivable at $669.715 and a series of unidentified "employee loans" at $8,843.[6] We agree. We review a trial court's determination of the value of property for clear error. See *Jansen v Jansen*, 205 Mich App 169, 171; 517 NW2d 275 (1994).

For the reasons explained above, we conclude that the Longs properly placed plaintiff's compliance with Article 9 in issue as required by MCL 440.9626(1)(a). Further, plaintiff failed to comply with Article 9 because it had exclusive control over the accounts receivable yet did not pursue the accounts receivable for a period of months or years. Thus, it becomes necessary to determine "[t]he amount of proceeds that would have been realized had [plaintiff] proceeded in accordance with the provisions of [Article 9] relating to collection, enforcement, disposition, or acceptance." MCL 440.9626(1)(c)(*ii*). This amount is presumed to be equal to the amount of the guaranties, unless plaintiff proves otherwise. MCL 440.9626(1)(d). In this case, plaintiff challenges the trial court's determination that its violation of Article 9 caused losses of $559,923.19 for the accounts receivable and $8,843 for the employee loans.

Tri County's discovery response entitled "Defendants' Response to Second Request for Production of Documents" included documentation responsive to the following inquiry:

> ¶ 4. Produce all documents evidencing or supporting all accounts receivable of Long's Tri-County Mobile Homes, Inc. from January 1, 2007 to date hereof, (excluding Inventory Units #2000, #1817 and #1976, above), including without limitation, sales contracts, customer financing documents, payments, closing statements, evidence of title, accountings, disbursements of proceeds, correspondence and collection of efforts of unpaid amounts.

The documents provided only reflected accounts receivable totaling $270,615.92. Each account receivable was specifically itemized. However, in contrast to the specificity of Tri County's discovery response, Tri County's "Financial Statements" dated May 31, 2007 identified accounts receivable as $669,715 without any itemization.

Although we generally defer to a trial court's opportunity to assess witness credibility and weigh the evidence, see *In re Clark Estate*, 237 Mich App 387, 395-396; 603 NW2d 290

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[5] Plaintiff argues that under Article 9, it did not have "possession" of the accounts receivable because neither plaintiff nor defendants specifically provided notice of assignment of the accounts receivable. However, plaintiff obtained the accounts receivable through judicial enforcement, not solely through Article 9.

[6] Specifically, the trial court valued the accounts receivable at $669,715 but excluded two litigations from the Longs' offset in liability. Thus, the trial court concluded that the Longs' liability should be reduced by accounts receivable totaling $559,923.19.

(1999), a review of the record in this case shows that the $669,715 figure is inflated and speculative. Moreover, as plaintiff suggests, accounts receivable totaling $669,715 would have been pursued by at least one party before and during the litigation. We therefore conclude that, absent any specific itemization or accounting, the trial court clearly erred in determining the value of the accounts receivable as $669,715. Similarly, we agree that the trial court clearly erred because the record contains no description, itemization, or information about the $8,843 in employee loans.

Plaintiff argues that the trial court clearly erred in valuing certain litigation at $87,425.19, when court documents showed that the amount claimed was only $32,292.08. We conclude that the trial court did not clearly err in its valuation because the $87,425.19 figure was supported by a specific itemization on a trial exhibit and the testimony of a witness.

IV. ATTORNEY FEES AND COSTS

Plaintiff next argues that the trial court erred in refusing to award it reasonable attorney fees and costs as required by the guaranties. We agree.

We review a trial court's decision to award or refuse to award attorney fees as provided by contract for an abuse of discretion. *Mitchell v Dahlberg*, 215 Mich App 718, 729; 547 NW2d 74 (1996). "Contracts of guaranty are to be construed like other contracts, and the intent of the parties, as collected from the whole instrument and the subject-matter to which it applies, is to govern." *Comerica Bank v Cohen*, 291 Mich App 40, 46; 805 NW2d 544 (2010) (citation and quotation marks omitted). Attorney fees may be recovered pursuant to a contractual clause. *Fleet Business Credit, LLC v Krapohl Ford Lincoln Mercury Co*, 274 Mich App 584, 589; 735 NW2d 644 (2007). The attorney fees must be reasonable, and the party seeking attorney fees under the contract must show the reasonableness of the attorney fees. *Zeeland Farm Servs*, 219 Mich App 584, 195-196; 555 NW2d 733 (1996).

The guaranty executed by the Longs on each master note clearly provides that "the undersigned . . . promises to pay . . . all expenses of collection, including attorney fees, whether of this guaranty or of the indebtedness hereby guaranteed." The attorney-fee provision does not limit plaintiff's recovery to occasions when plaintiff is the prevailing party. Rather, plaintiff is entitled to attorney fees and costs when they are incurred as "expenses of collection." Here, plaintiff incurred attorney fees and costs in these proceedings to collect upon the guaranties executed by the Longs. Thus, the Longs are obligated under the guaranties to pay plaintiff's attorney fees and costs.

V. CASE EVALUATION SANCTIONS

Finally, plaintiff argues that the trial court erred in awarding the Longs $7,888 in case evaluation sanctions for attorney fees incurred after the remand. However, we lack jurisdiction to consider this issue because plaintiff did not file a claim of appeal from the trial court's order imposing case evaluation sanctions. See *McIntosh v McIntosh*, 282 Mich App 471, 484; 768 NW2d 325 (2009).

VI. CONCLUSION

To summarize, the trial court properly reopened proofs to determine the extent of the Longs' damages, which included damages for failure to comply with Article 9 with respect to the accounts receivable. With respect to plaintiff's failure to obtain buyback agreements, we reverse the trial court's finding that this breach caused the Longs $842,795.12 in damages, and we remand with instructions to reduce this amount to $71,805. With respect to plaintiff's failure to comply with Article 9, we affirm the trial court's decision to reduce the Longs' liability under the guaranties, but we reverse the specific amount by which the Longs' liability was reduced. Specifically, we reverse the trial court's finding that the accounts receivable were valued at $669,715 and the employee loans were valued at $8,843. We also reverse the trial court's decision to not award plaintiff reasonable attorney fees and costs as required by the guaranties.

We remand for further proceedings to determine the value of the accounts receivable, the employee loans, and plaintiff's reasonable attorney fees and costs. We do not conclude that the accounts receivable should be valued at $270,615.92 and the employee loans should be valued at $0. On remand, the parties may set forth specific evidence to establish the values of the accounts receivable and the employee loans.

Affirmed in part, reversed in part, and remanded for further proceedings. We do not retain jurisdiction.

/s/ Cynthia Diane Stephens
/s/ David H. Sawyer
/s/ Patrick M. Meter