[Cite as *Home Savings Bank v. Loeffler*, 2018-Ohio-4223.]

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

HOME SAVINGS BANK	:	JUDGES:
	:	
	:	Hon. John W. Wise, P.J.
Plaintiff-Appellee	:	Hon. Patricia A. Delaney, J.
	:	Hon. Craig R. Baldwin, J.
-vs-	:	
	:	Case No. 2018CA00032
	:	
BRYCE K. LOEFFLER	:	
	:	
	:	
Defendant-Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Stark County Court of Common Pleas, Case No. 2017CV00528
JUDGMENT:	AFFIRMED
DATE OF JUDGMENT ENTRY:	October 15, 2018

APPEARANCES:

For Plaintiff-Appellee:	For Defendant-Appellant:
BRENT A. BARNES GEIGER, TEEPLE et al. 1844 W. State St., Ste. A Alliance, OH 44601	EDWIN H. BREYFOGLE 103 Third St. NE Massillon, OH 44646

Delaney, J.

{¶1} Appellant Bryce K. Loeffler appeals from the February 22, 2018 Judgment Entry of the Stark County Court of Common Pleas. Appellee is Home Savings Bank.

FACTS AND PROCEDURAL HISTORY

{¶2} The following facts are adduced from the record, including the parties' cross-motions for summary judgment.

{¶3} Audrey Helen Loeffler ("Audrey") created the Audrey Helen Loeffler Revocable Trust in 1992. Audrey had three children: appellant and his two sisters, Adrienne S. Loeffler ("Adrienne") and Diane H. Lowry ("Diane"). Appellant, Adrienne, and Diane are the beneficiaries of the Trust, and each is entitled to one-third of the residue of the Trust. The Trust is presently valued at approximately 1.5 million dollars.

{¶4} The Trust was amended over time. Throughout the years, loans were made to the Trust beneficiaries, with the expectation that the loans would be repaid to the Trust.

{¶5} In 1999 and 2000, appellant borrowed a series of loans from the Trust totaling approximately $224,000, payable at an interest rate of five percent per annum. Appellant made four repayments to the Trust: March 15, 2003; April 24, 2003; May 1, 2003; and June 2, 2003. These repayments totaled $57,500, and appellant did not make any further payments.

{¶6} On October 3, 2007, Audrey executed the Seventh Amendment to and Restatement of Trust Agreement, with Diane designated as Trustee. Jon Hollingsworth ("Hollingsworth") was the Trust attorney.

{¶7} On June 9, 2007, appellant filed a petition for bankruptcy. He acknowledges the debt to the Trust was not scheduled.

{¶8} In 2010, appellant and Adrienne requested a meeting with Diane and Hollingsworth. The four met in February 2010 to discuss amending the Trust and appellant's outstanding loan obligation to the Trust. The parties discussed appellant's failure to make payments since 2003 and the accruing interest. The parties agreed on behalf of the Trust to convert appellant's loan obligation into a non-interest bearing note, to be paid from appellant's beneficiary interest at the time of final distribution.

{¶9} Hollingsworth prepared the promissory note and appellant executed it on March 30, 2010.

{¶10} Appellee was appointed Trustee by the Stark County Court of Common Pleas, Probate Division on November 17, 2014.

{¶11} On November 21, 2014, appellee demanded appellant pay the note in full.

{¶12} On January 23, 2017, Audrey passed away.

{¶13} Appellant did not pay the note and appellee initiated suit on March 9, 2017, alleging appellant owes $280,000. Appellant asserted that the promissory note lacked consideration due to his discharge in bankruptcy in 2007.

{¶14} Appellant and appellee filed cross motions for summary judgment. On February 22, 2018, the trial court overruled appellant's motion for summary judgment and granted appellee's motion for summary judgment.

{¶15} Appellant appeals from the trial court's Judgment Entry of February 22, 2018.

{¶16} Appellant raises one assignment of error:[1]

[1] Appellant withdrew his second assignment of error at oral argument.

ASSIGNMENT OF ERROR

{¶17} "THE TRIAL COURT ERRED BY DENYING THE DEFENDANT-APPELLANT'S MOTION FOR SUMMARY JUDGMENT IN THAT THE DEBT WAS DISCHARGED IN THE PRIOR BANKRUPTCY, WHICH DISCHARGE PREVENTED PLAINTIFF FROM SEEKING A DETERMINATION OF THE DEFENDANT-APPELLANT'S PERSONAL LIABILITY FOR THE DEBT."

ANALYSIS

{¶18} In his sole assignment of error, appellant argues the debt to the Trust was discharged in his 2007 bankruptcy, therefore the promissory note is not supported by consideration. We disagree.

{¶19} We review cases involving a grant of summary judgment using a de novo standard of review. *Bonacorsi v. Wheeling & Lake Erie Ry. Co*., 95 Ohio St.3d 314, 2002-Ohio-2220, 767 N.E.2d 707, ¶ 24. Summary judgment is appropriately granted when "'(1) [n]o genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to that party.'" *Esber Beverage Co. v. Labatt USA Operating Co*., 138 Ohio St.3d 71, 2013-Ohio-4544, 3 N.E.3d 1173, ¶ 9, citing *M.H. v. Cuyahoga Falls*, 134 Ohio St.3d 65, 2012-Ohio-5336, 979 N.E.2d 1261, ¶ 12, internal citation omitted; Civ.R. 56(C).

{¶20} A trial court should not enter a summary judgment if it appears a material fact is genuinely disputed, nor if, construing the allegations most favorably towards the

non-moving party, reasonable minds could draw different conclusions from the undisputed facts. *Hounshell v. Am. States Ins. Co*., 67 Ohio St.2d 427, 433, 424 N.E.2d 311 (1981). The court may not resolve any ambiguities in the evidence presented. *Inland Refuse Transfer Co. v. Browning–Ferris Inds. of Ohio, Inc*., 15 Ohio St.3d 321, 323, 474 N.E.2d 271 (1984). A fact is material if it affects the outcome of the case under the applicable substantive law. *Russell v. Interim Personnel, Inc*., 135 Ohio App.3d 301, 304, 733 N.E.2d 1186 (6th Dist. 1999).

{¶21} The party moving for summary judgment bears the initial burden of informing the trial court of the basis of the motion and identifying the portions of the record which demonstrate absence of a genuine issue of fact on a material element of the nonmoving party's claim. *Wentling v. David Motor Coach Ltd*., 5th Dist. Stark No. 2017CA00190, 2018-Ohio-1618, --N.E.3d--, ¶ 23, citing *Dresher v. Burt*, 75 Ohio St.3d 280, 293, 662 N.E.2d 264 (1996). Once the moving party meets its initial burden, the burden shifts to the non-moving party to set forth specific facts demonstrating a genuine issue of material fact does exist. *Id.* The non-moving party may not rest upon the allegations and denials in the pleadings, but instead must submit some evidentiary materials showing a genuine dispute over material facts. *Downtown Enterprises Co. v. Mullet*, 5th Dist. Holmes No. 17CA016, 2018-Ohio-3228, ¶ 50, citing *Mitseff v. Wheeler*, 38 Ohio St.3d 112, 115, 526 N.E.2d 798 (1988).

{¶22} The premise of appellant’s argument is that the promissory note was not supported by consideration, therefore the note is unenforceable, and the trial court erred in granting summary judgment for appellee. Appellee responds that appellant has not met his burden of establishing want of consideration because the benefit conferred upon

him by execution of the note is evident: the five-percent-per-annum interest was eliminated, his outstanding loan balance was reduced by $10,000, and his one-third beneficiary interest in the Trust was preserved.

{¶23} We begin our analysis by noting appellee's Rule 56 evidence established the promissory note was executed by the parties.[2] "A promissory note is defined as 'a written promise to pay a certain sum of money at a future time, unconditionally.'" *Morgan v. Mikhail*, 10th Dist. Franklin Nos. 08AP–87 and 08AP-88, 2008-Ohio-4598, 2008 WL 4174063, ¶ 66, quoting *Burke v. State*, 104 Ohio St. 220, 222, 135 N.E. 644 (1922). "'Generally, the holder of a [promissory note] * * * establishes a prima facie case for payment on a note where the note is placed in evidence and the makers' signature(s) is (are) admitted.'" *Gallwitz v. Novel*, 5th Dist. Knox No. 10-CA-10, 2011-Ohio-297, 2011 WL 303253, ¶ 23, quoting *Dryden v. Dryden*, 86 Ohio App.3d 707, 711, 621 N.E.2d 1216 (4th Dist.1993), citing R.C. 1303.36(B).

{¶24} Appellant argues, though, that the note is unenforceable for want of consideration. A party may defend against having to pay under a promissory note by arguing failure or want of consideration for the note. See, *W. Ohio Colt Racing Assn. v. Fast*, 3d Dist. Mercer No. 10-08-15, 2009-Ohio-1303, 2009 WL 737776, ¶ 13, citing *Ohio Loan & Discount Co. v. Tyarks*, 173 Ohio St. 564, 568, 184 N.E.2d 374 (1962). See also, R.C. 1303.33(B) ("The drawer or maker of an instrument has a defense if the instrument is issued without consideration."). However, "'[t]he law presumes the existence of a

[2] Appellant withdrew his second assignment of error, to wit: "The trial court erred by granting plaintiff-appellant's motion for summary judgment because there was a dispute over a material fact, to-wit, whether or not [appellant] signed the promissory note which was the subject of the complaint."

consideration for a promissory note, and this presumption continues until it is shown that there was none; and the burden of showing this is on the party attacking the note for want of consideration.'" *Gallon v. Scouten*, 6th Dist. Lucas No. L-06-1168, 2007-Ohio-2957, 2007 WL 1720774, ¶ 17, quoting *Dalrymple v. Wyker*, 60 Ohio St. 108, 53 N.E. 713 (1899), paragraph three of the syllabus. "[A] claim of a lack of consideration for [a promissory note] is an affirmative defense which must be proved by a preponderance of the evidence." *Sur–Gro Plant Food Co., Inc. v. Morgan*, 29 Ohio App.3d 124, 129, 504 N.E.2d 445 (12th Dist.1985), citing *Riegert v. Weatherholt*, 12th Dist. Butler No. CA82–10–0099, 1983 WL 6321, *4 (Nov. 21, 1983).

{¶25} Appellant's evidence of want of consideration for the note is his argument that his 2007 bankruptcy discharged all of his debts, thus no debt was owed at the time of the signing of the note. Therefore, he concludes, there was no debt to reduce and no interest to eliminate.

{¶26} We find appellant's argument does not rebut appellee's evidence of the origin and execution of the note, which demonstrates consideration. Appellee's evidence established appellant and Adrienne requested the February 2010 meeting to discuss the Trust; appellant and his sisters attended the meeting with Hollingsworth, the Trust attorney; the purpose of the meeting was to discuss amending the trust and appellant's outstanding loan from the Trust; and at the time of the meeting, appellant's loan had a balance of approximately $290,914.19.

{¶27} Following the February 2010 meeting, Hollingsworth drafted the Eighth Amendment to Trust (which preserved appellant's one-third interest) and the promissory note. Audrey executed the Eighth Amendment on March 17, 2010. Appellant executed

the promissory note on March 30, 2010. The documents memorialize the agreement reached at the February 2010 meeting, and constitute evidence that appellant benefitted from the Trust's agreement to 1) reduce the outstanding balance by $10,000; 2) eliminate the future five percent per annum interest; and 3) preserve his interest as a one-third beneficiary of the Trust.

{¶28} We find the promissory note is supported by consideration. Consideration may consist of either a detriment to the promisee or a benefit to the promisor. *Doe v. Canton Regency*, 5th Dist. Stark No. 2010CA00095, 2011-Ohio-53, ¶ 10, citing *Lake Land Emp. Group of Akron, LLC v. Columber,* 101 Ohio St.3d 242, 2004-Ohio-786, 804 N.E.2d 27. In the instant case, appellant clearly benefited by execution of the note.

{¶29} If appellant had not executed the promissory note, the Eighth Amendment to the Trust would have included a provision reducing his beneficiary interest according to the original loan terms. Appellant's 2007 bankruptcy discharge had absolutely no effect on the Trust's ability to reduce his beneficiary amount by the original loan amount plus interest via an amendment. The evidence, again, comes back to the 2010 meeting: if appellant didn't agree to execute he promissory note, his beneficiary interest would be reduced.[3] Appellant argues this benefit is illusory because the Trust preserved the power of the settlor to "revoke, amend, or terminate the Trust at any time * * *." The existence of the promissory note, though, reduced the outstanding balance of the loan by $10,000 and eliminated the future five-percent-per-annum interest.[4]

[3] As appellee pointed out in the trial court, appellant did not take the position that his 2007 bankruptcy invalidated the 2010 note until he received notice of the Trust's demand to collect the note.

[4] Appellee points out that Audrey passed away on January 23, 2017, and appellant was saved seven years' worth of accumulated interest.

{¶30} This Court, having found consideration for the agreement, will not look to the adequacy or sufficiency of the consideration. *Mason v. Estate of McCaulley*, 5th Dist. Richland No. 94-CA-27, 1994 WL 728492, *2 (Dec. 6, 1994).

{¶31} Appellant's 2007 bankruptcy does not affect the enforceability of the 2010 promissory note. We agree with the trial court that appellee demonstrated the absence of a genuine issue of fact, appellant failed to rebut appellee's evidence because no material fact is at issue, and appellee was thus entitled to summary judgment. Appellant's sole assignment of error is overruled.

CONCLUSION

{¶32} Appellant's sole assignment of error is overruled and the judgment of the Stark County Court of Common Pleas is affirmed.

By: Delaney, J.,

Wise, John, P.J. and

Baldwin, J., concur.