FILED
02/28/2017
Clerk of the
Appellate Courts

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
January 17, 2017 Session

SK FOOD CORPORATION, ET AL. v. FIRSTBANK

Appeal from the Circuit Court for Davidson County
No. 15C3254 Thomas W. Brothers, Judge

No. M2016-01019-COA-R3-CV

Three corporations approached a lender seeking to refinance an existing loan secured by a deed of trust on certain commercial properties. The parties entered an agreement specifying that the lender's security interest would be a "first lien deed of trust" and requiring the borrowers to pay a nonrefundable "commitment fee." The borrowers executed the agreement and paid the commitment fee, but the loan did not close due to the discovery of a prior lien on one of the properties. The borrowers filed suit against the lender for damages arising out of the lender's refusal to lend or to refund the commitment fee. The trial court granted the lender's motion for summary judgment but denied the lender's request for attorneys' fees. Discerning no error, we affirm.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

W. NEAL MCBRAYER, J., delivered the opinion of the Court, in which ANDY D. BENNETT and RICHARD H. DINKINS, JJ., joined.

Thomas J. Kinsland, Nashville, Tennessee, for the appellants, SK Food Corporation, J & J International Food Corporation, and JC Sun Investment, Inc.

Peter C. Sales and Frankie N. Spero, Nashville, Tennessee, for the appellee, FirstBank.

OPINION

I.

In March 2013, James G. Sun and his counsel, Vivien Wang, approached FirstBank on behalf of SK Food Corporation, J & J International Food Corporation, and JC Sun Investment, Inc. (collectively, the "Borrowers") seeking to refinance an existing

loan with First Tennessee Bank. The First Tennessee Bank loan was secured by a deed of trust on properties located at 5861 Charlotte Pike and 4529 Nolensville Pike in Nashville, Tennessee.

On June 26, 2013, Mr. Sun and his wife, Chon Kim, executed a commitment letter with FirstBank. The commitment provided for a loan to Borrowers of up to $3 million secured by the Charlotte Pike and Nolensville Pike properties and a third property located at 320 Lellyett Avenue, also in Nashville. The commitment specified that FirstBank's security interest would be a "first lien deed of trust." The commitment also specified that the loan must be closed in accordance with the terms of the commitment prior to July 27, 2013.

In connection with the commitment letter, JC Sun Investment paid a commitment fee of $30,000. The commitment letter provided that "**[t]he Commitment Fee will be deemed earned upon the signing of the Commitment and will be non-refundable**."

The loan did not close. Due to a lien on the 4529 Nolensville Pike property held by an entity other than First Tennessee Bank, Borrowers could not grant FirstBank a first lien deed of trust as required by the commitment letter. A document[1] signed later by Mr. Sun stated that the property was "encumbered with a loan from a life insurance company that precludes second liens."

Borrowers filed suit against FirstBank in the Circuit Court for Davidson County, Tennessee, seeking damages for breach of the commitment letter, conversion of the commitment fee, and violations of the Tennessee Consumer Protection Act. On FirstBank's motion for partial dismissal for failure to state a claim, the trial court dismissed the claim for violations of the Tennessee Consumer Protection Act and awarded FirstBank its costs and reasonable attorneys' fees under Tennessee Code Annotated § 20-12-119(c).[2]

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[1] A second commitment letter was issued by FirstBank and signed only by Mr. Sun. In the trial court, Borrowers argued that the second commitment letter never was a binding agreement.

[2] The statute provides as follows:

> [W]here a trial court grants a motion to dismiss pursuant to Rule 12 of the Tennessee Rules of Civil Procedure for failure to state a claim upon which relief may be granted, the court shall award the party or parties against whom the dismissed claims were pending at the time the successful motion to dismiss was granted the costs and reasonable and necessary attorneys' fees incurred in the proceedings as a consequence of the dismissed claims by that party or parties.

Tenn. Code Ann. § 20-12-119(c)(1) (Supp. 2016).

FirstBank later moved for summary judgment on the remaining claims. Borrowers responded in opposition and submitted the affidavits of Mr. Sun and Ms. Wang and Sunny Choi, an accountant for Borrowers and Mr. Sun and Ms. Kim. Mr. Sun's affidavit explained his view of the circumstances surrounding the signing of the commitment letter. He stated that, when he, his wife, and his attorney met with representatives of FirstBank on June 26,

> [t]he representatives for [FirstBank] demanded that I execute the June 2013 Commitment Letter without a proper review or consideration of the information presented. The representatives of [FirstBank] advised that if my wife and I did not execute the June 2013 Commitment Letter that day, they would withdraw the offer. [FirstBank] knew that my wife and I were facing [sic] foreclosure deadline with our current lender, First Tennessee Bank.

Ms. Wang's affidavit added that, despite "repeated request[s], [FirstBank] never allowed us to review the June 2013 Commitment Letter prior to the June 26, 2013, meeting." Her affidavit did not mention a demand to execute the commitment that day, but she did state that FirstBank "made clear to my clients that should they fail to accept the June 2013 Commitment Letter's terms during the aforementioned meeting, that said offer of [sic] lend to my clients would be withdrawn." The affidavit also stated that FirstBank knew her "clients were in financial distress and facing foreclosure from their original lender, First Tennessee Bank."

The affidavits of Mr. Sun and Ms. Wang also faulted FirstBank for its failure to fund the loan. Mr. Sun claimed that,

> My wife and I presented [FirstBank] with all necessary information to allow them to properly make a decision of whether to lend to us or not. Additionally, we complied with all of [FirstBank's] demands during this process. Thus, we are not the party that failed to close on the June 2013 Commitment Letter, rather it was the decision of [FirstBank] to not close on the June 2013 Commitment Letter loan.

Ms. Wang's affidavit stated that "[a]t no time were my clients the cause of the June 2013 Commitment Letter loan failing to close." According to Ms. Wang, FirstBank and its representatives were advised "on numerous occasions" that FirstBank could not secure a first position deed of trust.

On April 15, 2016, the trial court entered an order granting FirstBank's motion for summary judgment on Borrowers' remaining causes of action for breach of contract and conversion. But the court denied FirstBank's request for attorneys' fees incurred in defending against Borrowers' claims.

II.

Summary judgment may be granted only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Tenn. R. Civ. P. 56.04. The party moving for summary judgment has "the burden of persuading the court that no genuine and material factual issues exist and that it is, therefore, entitled to judgment as a matter of law." *Byrd v. Hall*, 847 S.W.2d 208, 211 (Tenn. 1993). If the moving party satisfies its burden, the burden shifts to the nonmoving party to "demonstrate . . . that there is a genuine, material fact dispute to warrant a trial." *Id.*

In this case, the party moving for summary judgment does not bear the burden of proof at trial. The burden-shifting analysis to be employed by courts tasked with deciding a motion for summary judgment in such situations is the same as that employed in the federal system. "[T]he moving party may satisfy its burden of production either (1) by affirmatively negating an essential element of the nonmoving party's claim or (2) by demonstrating that the nonmoving party's evidence *at the summary judgment stage* is insufficient to establish the nonmoving party's claim or defense." *Rye v. Women's Care Ctr. of Memphis, MPLLC*, 477 S.W.3d 235, 264 (Tenn. 2015), *cert. denied*, 136 S. Ct. 2452 (2016). Satisfying this burden requires more than a "conclusory assertion that summary judgment is appropriate," rather the movant must set forth specific material facts as to which the movant contends there is no dispute. *Id.* If a motion for summary judgment is properly supported, the nonmoving party must then come forward with something more than the allegations or denials of its pleadings. *Id.* at 265. The nonmoving party must "by affidavits or one of the other means provided in Tennessee Rule 56, 'set forth specific facts' *at the summary judgment stage* 'showing that there is a genuine issue for trial.'" *Id.* (quoting Tenn. R. Civ. P. 56.06).

A trial court's decision on a motion for summary judgment enjoys no presumption of correctness on appeal. *Martin v. Norfolk S. Ry. Co.*, 271 S.W.3d 76, 84 (Tenn. 2008); *Blair v. W. Town Mall*, 130 S.W.3d 761, 763 (Tenn. 2004). We review the summary judgment decision as a question of law. *Martin*, 271 S.W.3d at 84; *Blair*, 130 S.W.3d at 763. Accordingly, we must review the record de novo and make a fresh determination of whether the requirements of Tennessee Rule of Civil Procedure 56 have been met. *Eadie v. Complete Co.*, 142 S.W.3d 288, 291 (Tenn. 2004); *Blair*, 130 S.W.3d at 763.

Borrowers argue that there are factual issues that preclude summary judgment. They also argue that they had insufficient time to conduct discovery.

First, Borrowers contend there are sufficient facts in the record demonstrating that FirstBank breached the commitment letter. According to Borrowers, the breach occurred

when FirstBank failed to fund the loan. However, our review of the record and the contractual language does not support Borrowers' claim.

The commitment letter clearly required Borrowers to provide FirstBank the first lien position on each of the subject properties on or before July 27, 2013, as a condition to lend. Because Borrowers have conceded that they were unable to do so, Borrowers could not satisfy the terms of the commitment, and FirstBank was not required to perform.[3] *See Strickland v. City of Lawrenceburg*, 611 S.W.2d 832, 837 (Tenn. Ct. App. 1980) (No liability arises under a contract "until such time as the condition precedent was fulfilled."). Thus, we agree with the trial court's conclusion that "whether FirstBank knew or did not know about a preexisting lien on the Property [wa]s immaterial."

Next, Borrowers claim that a genuine factual dispute remains as to whether the loan commitment was executed under duress. Borrowers alleged that during the June 26, 2013 meeting, FirstBank's representatives "demand[ed] that [Borrowers] either accept their terms right then and there or FirstBank would walk away from the negotiations." According to Borrowers, because FirstBank also had knowledge of First Tennessee Bank's intention to foreclose on the original deed of trust, this amounted to economic duress. We disagree.

The facts set forth in the affidavits concerning the circumstances surrounding the signing of the commitment letter fail, as a matter of law, to establish duress. "Duress" is defined as "'a condition of mind produced by the improper external pressure or influence that practically destroys the free agency of a party, and causes him to do an[ ] act or make a contract not of his own volition, but under such wrongful external pressure.'" *Simpson v. Harper*, 111 S.W.2d 882, 886 (Tenn. Ct. App. 1937) (quoting *Pride v. Baker*, 64 S.W. 329, 332 (Tenn. Ct. App. 1901)). It requires "unlawful restraint, intimidation, or compulsion that is so severe that it overcomes the mind or will of ordinary persons." *Boote v. Shivers*, 198 S.W.3d 732, 745 (Tenn. Ct. App. 2005).

Borrowers, admittedly, were experiencing financial difficulty at the time the commitment letter was executed. Still, taking the allegations as true, FirstBank's presentation of a "take it or leave it" offer did not amount to a wrongful act sufficient to establish economic duress. *See Telecomms., Eng'g Sales & Serv. Co. v. S. Tel. Supply Co.*, 380 F. Supp. 997, 1000 (E.D. Tenn. 1974), *vacated on other grounds*, 518 F.2d 392 (6th Cir. 1975). Indeed, "[a]n ordinary offer to make a contract commonly involves an implied threat by one party, the offeror, not to make the contract unless his terms are accepted by the other party, the offeree. Such threats are an accepted part of the bargaining process." Restatement (Second) of Contracts § 176 cmt. a (1981). Moreover,

[3] Though not specifically raised as an issue on appeal, we also agree with the trial court's conclusion that, because Borrowers did not satisfy the terms of the commitment letter, FirstBank did not convert Borrowers' property by failing to return the "earned and non-refundable commitment fee."

Borrowers' have alleged no facts suggesting that FirstBank was responsible for their financial distress. *See Moman v. Walden*, 719 S.W.2d 531, 534 (Tenn. Ct. App. 1986) ("The pressure of financial circumstances is insufficient to establish economic duress which will allow a party to avoid an agreement when the other party to the agreement is not responsible for the financial circumstances of the party.").

Additionally, we find Borrowers' argument concerning the insufficiency of discovery unavailing. Borrowers submit that the trial court erred by failing to afford them the opportunity to conduct additional discovery before granting summary judgment. Yet, when responding to FirstBank's motion for summary judgment, Borrowers did not submit an affidavit establishing why they could not respond to the motion without further discovery. *See* Tenn. R. Civ. P. 56.07. In light of that fact, no further analysis of Borrowers' argument is necessary. *See Simpson v. Frontier Cmty. Credit Union*, 810 S.W.2d 147, 153 (Tenn. 1991) ("[I]ssues not raised in the trial court cannot be raised for the first time on appeal.").

III.

Finally, FirstBank asks this Court to consider whether the trial erred in denying its request for attorneys' fees. As recognized by our Supreme Court,

> Tennessee, like most jurisdictions, adheres to the "American rule" for award of attorney fees. Under the American rule, a party in a civil action may recover attorney fees only if: (1) a contractual or statutory provision creates a right to recover attorney fees; or (2) some other recognized exception to the American rule applies, allowing for recovery of such fees in a particular case.

Cracker Barrel Old Country Store, Inc. v. Epperson, 284 S.W.3d 303, 308 (Tenn. 2009) (footnote and citations omitted). Contractual provisions creating a right to recovery of attorneys' fees are strictly construed and will be interpreted as an exception to the American rule "only when a contract *specifically* or *expressly* provides for the recovery of attorney fees." *Id.* at 309. The terms "costs" or "expenses" do not general encompass attorneys' fees. *Id.* at 310.

FirstBank relies upon language in the commitment letter as the basis for its claim to attorneys' fees. The commitment letter provides, in pertinent part, as follows:

> Notwithstanding anything contained herein to the contrary, if this commitment is accepted, the borrower agrees to pay, or reimburse the Bank on demand for, all reasonable out of pocket costs and expenses incurred by the Bank in connection with the proposed facility *including reasonable attorneys' fees and expenses incurred in the preparation and negotiation of*

> *documentation*, whether or not the proposed facility is actually finalized. Your obligation in respect of such costs and expenses shall survive the expiration or termination of this letter.

(emphasis added).

The language of the commitment unambiguously provides for attorneys' fees incurred in the drafting and negotiation of documents. However, we do not read the language as authorizing attorneys' fees beyond that. Recovery of attorneys' fees under a contractual provision "is limited to the situation agreed to by the parties in the contract." *J & B Investments, LLC v. Surti*, 258 S.W.3d 127, 138 (Tenn. Ct. App. 2007). Thus, the trial court properly concluded that "the attorneys' fees provision in the June Commitment Letter . . . did not sufficiently put [Borrowers] on notice that they were liable for FirstBank's attorneys' fees in defending this matter." The subject provision simply does not allow for an award of attorneys' fees in this situation.

IV.

For the foregoing reasons, we affirm the trial court's decision to grant FirstBank's motion for summary judgment. We also affirm the trial court's denial of FirstBank's request for attorneys' fees.

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W. NEAL MCBRAYER, JUDGE