2019 IL App (5th) 180391-U

NO. 5-18-0391

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

PAMELA M. JOHNSON, Independent Executor, of the Estate of Clyde E. Beimfohr, Deceased, Plaintiff-Appellee, v. SEVILLE HOLDINGS, LLC, and R. ADAM HILL, Defendants-Appellants.	)	Appeal from the Circuit Court of St. Clair County. No. 17-L-352 Honorable Christopher T. Kolker, Judge, presiding.

JUSTICE WELCH delivered the judgment of the court.
Justices Moore and Barberis concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court's order granting summary judgment in favor of the plaintiff, Pamela M. Johnson, independent executor of the estate of Clyde E. Beimfohr, against the defendant, Seville Holdings, LLC, on count I of the complaint is affirmed where the debt obligation incurred by Seville was not discharged under either section 3-605 or section 3-604 of the Uniform Commercial Code (810 ILCS 5/3-605, 3-604 (West 2016)). The trial court's order granting summary judgment in favor of the plaintiff and against the defendant, R. Adam Hill, on count II of the complaint, which dealt with the personal guaranty of the debt signed by Hill, is reversed where there was a genuine issue of material fact as to whether there had been a verbal release of the debt. Thus, we remand to the trial court for further proceedings.

¶ 2 This action commenced when the plaintiff, Pamela M. Johnson, independent executor of the estate of Clyde E. Beimfohr,[1] brought a two-count complaint against the defendants, Seville Holdings, LLC (Seville), and R. Adam Hill, for recovery on a $200,000 commercial promissory note (Note) and to enforce a personal guaranty. The trial court granted Beimfohr's motion for summary judgment, awarding him $200,000 under the Note, an additional $256,372.60 in interest, $24,874 for attorney fees, and costs in the amount of $1059.80 (the entire judgment totaled $482,306.40). For the reasons that follow, we affirm the judgment against Seville, reverse the judgment against Hill, and remand for further proceedings.

¶ 3 Seville is an Illinois single-member limited liability company; Hill, who is a real estate developer, is the single member of the company. On October 22, 2007, Beimfohr loaned Seville $200,000 and executed a Note on the debt. In the Note, Seville agreed to repay the $200,000 loan plus 12% interest in four installments of $50,000 each, commencing one year after the date of the Note. The proceeds of the $200,000 loan were used by Seville to purchase a stake in a development in Caseyville, Illinois, which was known by the parties as the Forest Lakes Retail Centre property.

¶ 4 Contemporaneously with the Note, Hill executed and delivered to Beimfohr a personal guaranty of payment of the loan reflected in the Note, and the parties both signed a security agreement, giving Beimfohr a security interest in the property as collateral for the

[1]Clyde Beimfohr initially brought the complaint. However, during the pendency of these proceedings, he passed away, and this court allowed Pamela Johnson, the independent executor of his estate, to be substituted as the plaintiff-appellee in this action. For ease of reference, we will refer to the appellee as Beimfohr.

loan. During this time, Hill and Beimfohr were also involved in two other investment projects: Islands of Waterside in Marissa, Illinois, and Caseyville Sport Choice, LLC (CSC).

¶ 5 On May 21, 2013, Beimfohr released his lien on the property, but the release of the lien specifically indicated that it did not release Seville from its obligations under the Note. The release provided as follows:

> "By instrument dated October 22, 2007 and recorded on October 26, 2007 ***, Releasor [(Beimfohr)] recorded a promissory note payable to Releasor by Seville Holdings, LLC (the 'Note') as a purported lien against the real property described in Exhibit A hereto (the 'Property').
>
> Releasor hereby disclaims the Note as being a lien, claim or encumbrance against the Property and does hereby release, discharge and revoke the filing of the Note as a lien, claim or encumbrance against the Property of any kind or nature. The release of the Note as a lien, claim or encumbrance against the Property does not release the maker of the Note from the obligation to pay the Note in accordance with its terms."

The release of lien was signed by Beimfohr and was notarized.

¶ 6 Because Beimfohr's investments in Waterside, Forest Lakes Retail Centre, and CSC resulted in a loss, the parties formed and began operating TBHP, LLC (TBHP), in late 2010, to allow Beimfohr to recover the losses he incurred in those projects.

¶ 7 Almost 10 years later, on April 6, 2017, Beimfohr's attorney sent Hill a letter, which noted that Seville had failed to make any payment toward the loan's principal and interest and demanded full payment of the $200,000 and accrued interest within 10 days from the date of the letter. Neither Seville nor Hill repaid the loan, and, on July 5, 2017, Beimfohr filed a two-count complaint against them. Count I was based on the Note and was directed at Seville, while count II was based on the personal guaranty and was directed at Hill. In the

complaint, Beimfohr contended that, despite having received the demand for payment, Seville and Hill had failed to make any payment on the debt.

¶ 8 In their answer filed on August 7, 2017, the defendants raised two affirmative defenses. First, the defendants contended that Beimfohr failed to state a claim for which relief could be granted because he misled the defendants into believing that the Note and the alleged indebtedness would be satisfied and forgiven in exchange for Hill's management of TBHP. The defendants argued that Hill, for himself and on behalf of Seville, agreed to forego a salary or similar compensation from TBHP; that he oversaw and managed its business; that he paid for project costs and expenses associated with TBHP from his own accounts; and that he consented to and assisted in making certain tax allocations of jointly held assets in Beimfohr's favor, which resulted in considerable savings to him. The defendants further argued that Hill reasonably and in good faith relied on Beimfohr's oral representation that the Note and alleged indebtedness was forgiven, and Hill had no reason to believe that his reliance was misplaced. Second, the defendants argued that Beimfohr forgave the Note and the alleged indebtedness in or around 2010 in exchange for Hill's above stated efforts with TBHP. The defendants contended that Hill's personal efforts and payments constituted consideration in exchange for Beimfohr's forgiveness and waiver of the Note.

¶ 9 On May 10, 2018, Beimfohr filed a motion for summary judgment, contending that the defendants' allegations in their affirmative defenses were conclusory and that they had failed to provide any evidentiary support for their position that he had forgiven the defendants' obligation to repay the loan. He noted that the defendants had not provided any

written documentation evidencing the forgiveness of the loan. Thus, Beimfohr contended that the defendants had not presented a genuine issue of material fact.

¶ 10 On June 11, 2018, the defendants filed a response to the motion for summary judgment, acknowledging that, consistent with the style of business between them and Beimfohr, the agreement concerning TBHP and the forgiveness of the $200,000 loan was not memorialized in writing but argued that Beimfohr had orally forgiven the indebtedness; that Hill had regularly delivered reports and other memoranda to Beimfohr as early as January 21, 2011, which contained unequivocal statements that the $200,000 loan was released and forgiven; that despite receiving these reports, Beimfohr never objected or gave any indication that he had not forgiven the loan; and, except for the April 2017 demand letter from Beimfohr's attorney, Beimfohr never requested or demanded any payments on the loan. The defendants contended that, due to the contrary evidence that there was an oral release of the loan, which was legally effective in Illinois, Beimfohr was not entitled to judgment as a matter of law.

¶ 11 Attached to the response was Hill's affidavit, which stated that there were numerous reports and correspondences between him and Beimfohr that reflected their business plans for TBHP, which included the forgiveness of the loan. Hill stated that Beimfohr had never given him, either directly or indirectly, any indication that the loan had not been forgiven. Also attached to the response was a January 21, 2011, monthly disclosure report from Hill to Beimfohr, which indicated that the land costs associated with the Forest Lakes Retail Centre were available to be used as tax write-offs for tax purposes as they would not be repaid.

¶ 12 On June 25, 2018, Beimfohr filed a reply to the defendants' memorandum in opposition to his motion for summary judgment. In that reply, Beimfohr contended that section 3-604(a) of the Uniform Commercial Code (UCC) (810 ILCS 5/3-604(a) (West 2016)), which sets forth the manner in which a negotiable instrument may be discharged by cancellation or renunciation, was applicable and that the defendants had failed to set forth any evidentiary facts to support their position that Beimfohr had committed an intentional, voluntary act under section 3-604(a) that would result in a discharge of the debt.

¶ 13 On June 26, 2018, the defendants filed a sur-reply, contending that Beimfohr's release of his security interest in the property resulted in a discharge of Seville's obligation under the Note pursuant to section 3-605(f) of the UCC (*id.* § 3-605(f)). Section 3-605(f) allows an indorser or accommodation party to assert the defense of collateral impairment where there is a release of collateral without substitution of collateral of equal value. *Id.*

¶ 14 After a hearing on the motion for summary judgment, on June 27, 2018, the trial court, finding that the applicable provisions of the UCC controlled, granted summary judgment in favor of Beimfohr and against Seville and Hill. On July 12, 2018, the court entered a written judgment order, awarding Beimfohr $200,000 for the amount of the Note, $256,372.60 in interest, $24,874 for attorney fees, and costs in the amount of $1059.80 (a total judgment amount of $482,306.40). The defendants appeal.

¶ 15 A summary judgment is appropriate when "the pleadings, depositions, 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." 735 ILCS 5/2-1005(c) (West 2016). In determining whether there is a genuine issue of material

fact, a court must construe the pleadings, depositions, admissions, and affidavits strictly against the movant and liberally in favor of the nonmoving party. *Williams v. Manchester*, 228 Ill. 2d 404, 417 (2008). We review the circuit court's summary judgment order under the *de novo* standard of review. *Nationwide Financial, LP v. Pobuda*, 2014 IL 116717, ¶ 25.

¶ 16 We will first address whether the trial court erred in granting summary judgment in favor of the plaintiff on count I of the complaint (count I alleges a breach of the Note against Seville). Section 3-604(a) of the UCC, which sets forth the methods in which a party may discharge an obligation by cancellation or renunciation, states as follows:

> "A person entitled to enforce an instrument, with or without consideration, may discharge the obligation of a party to pay the instrument (i) by an intentional voluntary act, such as surrender of the instrument to the party, destruction, mutilation, or cancellation of the instrument, cancellation or striking out of the party's signature, or the addition of words to the instrument indicating discharge, or (ii) by agreeing not to sue or otherwise renouncing rights against the party by a signed writing." 810 ILCS 5/3-604(a) (West 2016).

The identified intentional voluntary acts to discharge a debt, either a physical act or a signed cancellation, are not present here.

¶ 17 Thus, Seville relies on section 3-605(f) of the UCC (*id.* § 3-605(f)) to argue that it was released from liability on the Note. Section 3-605(f) of the UCC states as follows:

> "If the obligation of a party is secured by an interest in collateral not provided by an accommodation party and a person entitled to enforce the instrument impairs the value of the interest in collateral, the obligation of any party who is jointly and severally liable with respect to the secured obligation is discharged to the extent the impairment causes the party asserting discharge to pay more than that party would have been obliged to pay, taking into account rights of contribution, if impairment had not occurred. If the party asserting discharge is an accommodation party not entitled to discharge under subsection (e), the party is deemed to have a right to contribution based on joint and several liability rather than a right to reimbursement. The burden of proving impairment is on the party asserting discharge." *Id.*

¶ 18 Subsection (g) defines impairment of collateral as follows:

> "Under subsection (e) or (f), impairing value of an interest in collateral includes (i) failure to obtain or maintain perfection or recordation of the interest in collateral, (ii) release of collateral without substitution of collateral of equal value, (iii) failure to perform a duty to preserve the value of collateral owed, under Article 9 or other law, to a debtor or surety or other person secondarily liable, or (iv) failure to comply with applicable law in disposing of collateral." *Id.* § 3-605(g).

The UCC comment regarding the impairment of collateral defense states as follows, in pertinent part:

> "The importance of the suretyship defenses provided in Section 3-605 is greatly diminished by the fact that the right to discharge can be waived as provided in subsection (f). The waiver can be effectuated by a provision in the instrument or in a separate agreement. It is standard practice to include such a waiver of suretyship defenses in notes prepared by financial institutions or other commercial creditors. Thus, Section 3-605 will result in the discharge of an accommodation party on a note only in the occasional case in which the note does not include such a waiver clause and the person entitled to enforce the note nevertheless takes actions that would give rise to a discharge under this section without obtaining the consent of the secondary obligor." 810 ILCS Ann. 5/3-605, Uniform Commercial Code Comment 9, at 382 (Smith-Hurd 2014).

¶ 19 In this case, on May 21, 2013, Beimfohr released his security interest in the property. The lien release specifically indicated that the "release of the Note as a lien, claim or encumbrance against the Property does not release the maker of the Note from the obligation to pay the Note in accordance with its terms." The lien release was signed by Beimfohr. However, despite this language in the lien release, Seville contends that Beimfohr discharged its payment obligation under the Note when he voluntarily released the security interest in the property and failed to secure substitute collateral. We disagree. Count I of the plaintiff's complaint alleges a breach of the Note against Seville. A review of section 3-605, which is titled discharge of indorsers and accomondation parties, and the committee comments reveal

that the impairment of collateral defense is a defense that can only be raised by acommodation parties or indorsers, and not by the borrower or the maker of the Note. As Seville is neither an accommodation party nor an indorser,[2] this defense is not available to Seville.

¶ 20 Moreover, the defendants argue that the plaintiff, who has been unable to produce the original Note during discovery, cannot recover unless he produces the original Note or shows an excuse for its nonproduction because the law presumes that the Note has been paid if not produced. In support, the defendants cite *Tally Ho Associates, Inc. v. Worth Bank & Trust Co*., 264 Ill. App. 3d 957, 961 (1994), which states that when the maker has possession of a negotiable instrument, a presumption arises that the debt has been discharged, but the presumption may be rebutted by other evidence. However, in this case, the defendants admit that the obligation under the Note has not been paid, and they have not alleged that they have possession of the original Note. Even if they had alleged possession of the Note, section 3-605 does not apply under these circumstances, and there was no intentional voluntary act to discharge or a written cancellation of the Note under section 3-604(a). Thus, the trial court properly granted summary judgment against Seville on count I.

¶ 21 We now turn to count II, which deals with the personal guaranty signed by Hill. Hill contends that the personal guaranty is not a negotiable instrument under the UCC. If Hill is correct that it falls outside the UCC, then the impairment of collateral defense would be

[2]An accommodation party is a person who signs an instrument for the purpose of incurring liability on the instrument without being a direct beneficiary of the value given for the instrument. 810 ILCS 5/3-419(a) (West 2016). An indorser is a person who makes an indorsement. *Id.* § 3-204(b). An indorsement is a signature, other than that of a signer as maker, drawer, or acceptor, that alone or accompanied by other words is made on an instrument for the purpose of negotiating the instrument, restricting payment of the instrument, or incurring indorser's liability on the instrument. *Id.* § 3-204(a).

unavailable to him, and we would need to determine whether there was a genuine issue of material fact as to whether Beimfohr orally discharged his loan obligation.

¶ 22 To be discharged from liability under section 3-605(f) as a result of any impairment of collateral, Hill must be a party to an "instrument." 810 ILCS 5/3-605(f) (West 2016). The UCC defines an instrument as a negotiable instrument. *Id.* § 3-104(b). A negotiable instrument requires the following: (1) an unconditional promise, (2) to pay a fixed amount of money, (3) to bearer or to order, (4) on demand or at a definite time, and (5) without any other requirement of undertaking or instruction on the part of either party. *Id.* § 3-104(a). A personal guaranty does not satisfy this definition because it is conditioned on the principal debtor's failure to pay the debt, and the amount to be paid under the guaranty is dependent on the amount the debtor has already paid toward the debt. *Federal Deposit Insurance Corp. v. Hardt*, 646 F. Supp. 209, 212 (C.D. Ill. 1986). Thus, because it is a conditional promise to pay an unfixed amount of money, it is not a negotiable instrument and article III of the UCC (and by extension, the impairment of collateral defense) does not apply to Hill's personal guaranty.

¶ 23 Having determined that article III does not apply to the personal guaranty, we will address whether the trial court erred in granting summary judgment in favor of Beimfohr and against Hill under the common law of contracts. See *Millennium Park Joint Venture, LLC v. Houlihan*, 241 Ill. 2d 281, 305 (2010) (common law rights and remedies remain in full force unless expressly repealed by the legislature or modified by a court decision). A release or a discharge of a debt may be verbal or in writing. *Mutual Mill Insurance Co. v. Gordon*, 20 Ill. App. 559, 566 (1886).

¶ 24 Here, Beimfohr contends that there was no oral release of the debt. In support of this position, Beimfohr points to the deposition of Jeffrey Kilian, his son-in-law, who testified that he met with Hill in March 2017 and they had discussed the $200,000 loan. According to Kilian, he told Hill that Hill needed to repay the 10-year-old debt, that he would give him a two-week grace period with 0% interest, and that Hill acknowledged that the debt was owed and stated that the offer was fair. Beimfohr further points to his August 31, 2017, answers to interrogatories, which indicated that he had made verbal demands for repayment of the loan from "time to time after October 22, 2007," and that he had never waived repayment of the indebtedness under the Note. In contrast, Hill argues that the loan was discharged, again pointing to the January 21, 2011, monthly disclosure report, which indicated that the land costs related to the Forest Lakes Retail Centre would not be repaid. Hill also contended that Beimfohr never challenged or objected to this report and waited approximately 10 years before demanding any payment on the loan. Thus, there is a genuine issue of material fact as to whether there had been a verbal release of the loan, and the trial court erred by entering summary judgment in Beimfohr's favor on count II of the complaint. Accordingly, we affirm the judgment against Seville, reverse the judgment against Hill, and remand for further proceedings.

¶ 25 Affirmed in part and reversed in part; cause remanded.