2012 IL App (1st) 111405-U

SIXTH DIVISION
JUNE 1, 2012

No. 1-11-1405



IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

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| BING TIE and YING CHANG MA, | ) | Appeal from the |
| | ) | Circuit Court of |
| Plaintiffs-Appellees, | ) | Cook County. |
| | ) | |
| v. | ) | No. 09 L 8895 |
| | ) | |
| DYLAN REEVES, | ) | Honorable |
| | ) | John P. Kirby, |
| Defendant-Appellant. | ) | Judge Presiding. |

PRESIDING JUSTICE ROBERT E. GORDON delivered the judgment of the court. Justices Lampkin and Palmer concurred in the judgment.

**ORDER**

¶ 1 *Held:* Where the validity of a promissory note was not against the manifest weight of the evidence, the trial court's ruling was affirmed.

¶ 2 In the case at bar, plaintiffs Bing Tie and Ying Chang Ma filed a lawsuit to collect the principal and interest on a promissory note that they claimed was given to them for partial payment on the sale of a building to defendant Dylan Reeves. After a bench trial, the trial court entered judgment in favor of plaintiffs and ordered defendant to pay the principal amount of the

note plus the interest accrued to date, for a total of $96,050.08. For the reasons discussed below, we affirm.

¶ 3 BACKGROUND

¶ 4 I. Summary

¶ 5 Plaintiffs Bing Tie and Ying Chang Ma claim that they transferred a 10% interest in real property they owned on South King Drive in Chicago, Illinois (the property) to defendant Dylan Reeves in return for his management of the property. Plaintiffs claim that they subsequently transferred their remaining 90% interest to defendant in return for a sale price of $380,000. Plaintiffs were to receive $300,000 at closing plus a promissory note for $80,000 (the note) signed by defendant. Plaintiffs further claim that they received the $300,000 plus the note. Plaintiffs claim that defendant made one interest payment of $934.00 on the note more than a year after the note was executed, and that defendant failed to make any other payments.

¶ 6 Defendant claims that plaintiffs sold their 90% interest in the property for $300,000, and that therefore, there was no consideration to support the note. He claims that the note was given to plaintiffs in exchange for a promise by plaintiffs to loan him $80,000. He also claims that he did not sign the version of the note in evidence before the trial court.

¶ 7 As noted, after a bench trial, the trial court found in plaintiffs' favor and entered judgment against defendant and ordered defendant to pay the amount of the note plus the interest accrued to that date, for a total of $96,050.08. No court reporter was present the day that the trial court issued its decision from the bench, and no bystander report was prepared by the court or the parties.

¶ 8 II. The Parties and the Property

¶ 9 Plaintiffs purchased the property in August, 2004 for $375,000. They initially held title individually, but within one week of purchase, they transferred title to a LaSalle Bank Trust. Defendant was a real estate broker who plaintiffs retained to manage the property. On November 8, 2006, plaintiffs each assigned 5% of their beneficial interest in the property to defendant, transferring to him a 10% interest in the property. The parties also discussed an eventual sale of the remaining 90% interest in the property to defendant. In 2007, the parties executed documents to sell the remaining interest in the property to an LLC owned by defendant called Kendrick's Place (the LLC), and it is this transaction that is the focus of this appeal. Each side presents a different account of the facts surrounding this transaction.

¶ 10 III. The Complaint and Pretrial Proceedings

¶ 11 In their complaint, plaintiffs allege that on March 22, 2007, they transferred their remaining 90% beneficial interest in the property to the LLC for $300,000, each plaintiff receiving a $150,000 check, and an $80,000 promissory note ("the note") signed by defendant. Plaintiffs allege that the note allowed defendant to repay the principal interest-free until March 23, 2008, and after that, a yearly interest rate of 7% per annum would be applied to the remaining principal, beginning April 23, 2008. The complaint alleges that the note required final payment to be made on April 23, 2009. Plaintiffs further allege that defendant made a single, interest-only payment of $934 on May 23, 2008. Plaintiffs filed their complaint on July 29, 2009, three months after the final payment was due, claiming that defendant had defaulted on the note.

¶ 12 Defendant moved *pro se* to dismiss the complaint on November 30, 2009, arguing that

the note was not supported by consideration and did not satisfy the statute of frauds.[1] The trial court denied the motion on March 14, 2010, finding that the "lack of consideration" argument was an improper basis for a motion to dismiss, as it did not accept as true all well-pleaded facts of the complaint. The trial court also found that the statute of frauds was inapplicable because the note was a written instrument signed by the party against whom it was sought to be enforced.

¶ 13 Defendant, after obtaining counsel, again moved to dismiss the complaint, arguing that it insufficiently pled the existence of a valid contract, and therefore plaintiffs did not plead an action upon which relief could be granted. Defendant claims that plaintiffs failed to submit the original note with their complaint and that the note submitted by plaintiffs had been materially altered from the version of the note defendant had signed. Defendant also alleges that the note was invalid because he had not received anything in exchange for the note and it therefore lacked consideration. Defendant simultaneously filed a motion for summary judgment, asserting the same lack of consideration argument he presented in his motion to dismiss. The trial court denied all of defendant's motions on August 10, 2010.

¶ 14 On September 10, 2010, defendant filed an answer, and asserted the affirmative defenses that the note lacked consideration and that the note contained unauthorized alterations which

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[1] Defendant initially failed to respond to the complaint and plaintiffs moved for default. On November 9, 2009, the trial court entered a default order and judgment against defendant in the amount of $88,082.67. On November 30, 2009, defendant filed a *pro se* motion to vacate the default and quash the service, claiming that he had not been properly served. The trial court vacated its default order and judgment on December 14, 2009.

materially altered defendant's obligation under the note.

¶ 15 IV. The Trial

¶ 16 The case proceeded to a bench trial, held on April 4, 2011. At trial, only the parties testified, and each side presented a different account of the events of the case.

¶ 17 A. Plaintiff's Case

¶ 18 Plaintiff Tie testified for the plaintiffs that she and plaintiff Ma paid $375,000 to purchase the property for investment purposes in 2004. One year after their purchase, Tie and Ma retained defendant to manage the property. On November 8, 2006, Tie and Ma each transferred 5% of their beneficial interest in the property to defendant, giving him a 10% interest. The parties executed an Assignment of Beneficial Interest as the only memorialization of the transaction. At the time of the Assignment of Beneficial Interest, the parties discussed the eventual transfer of the remaining 90% interest in the property from plaintiffs to defendant.

¶ 19 Tie testified that she and Ma eventually agreed to sell their remaining interest to defendant. Defendant had informed Tie and Ma that the property had been appraised at $440,000,[2] and that, based on that appraisal figure, they agreed to sell their interest in the property for $380,000. The parties agreed that they would complete the transaction on March 22, 2007, and that defendant, on behalf of his LLC, would present each plaintiff a check for $150,000 on the date of the closing, and that the balance of $80,000 would be paid over time pursuant to a personal promissory note.

¶ 20 The parties closed the transaction without lawyers and defendant presented checks to Tie

[2] No objection was made to this statement.

and Ma in the amount of $150,000 each. However, Tie and Ma testified that only defendant was present with the closer and they were not present in the room. The checks were drawn on defendant's LLC account. Tie testified that she downloaded a promissory note form from the internet and brought one copy of the form to the closing. She filled in some of the blanks on the form and observed defendant fill in the other parts. The completed promissory note form stated that defendant would pay plaintiffs $80,000 on or before March 23, 2008 "for value received," and that the payments would not be subject to interest during the first year. Defendant crossed out the second paragraph on the form and wrote in a paragraph in the right margin of the form, which reads as follows: "If the lump sum payment is not received on or before March 23, 2008 an interest only payment based on 7% will commence on April 23, 2008 until the note is paid in full. Final payment based on interest payments shall be due and payable on April 23, 2009." Tie testified that this paragraph reflected the parties' agreed upon terms for repayment of the note. Tie and Ma remained in a waiting room while defendant took the note into a separate room, which Tie called the closing room, so that he could sign it before a notary. Defendant returned from the closing room and presented notarized copies of the note to plaintiffs. Tie testified that defendant retained the original note and that she did not observe defendant sign the note, but that his signature was on the notarized original and a photocopy of the note, and he gave a notarized copy to Tie.

¶ 21 In May of 2009, Ma presented Tie with a check for $934, which was given to Ma by defendant, to satisfy two months' worth of interest payments on the note.

¶ 22 On cross-examination, Tie testified that she had signed a document called "direction to

convey," which stated that she and Ma would each receive $150,000 from defendant's LLC in exchange for the property. However, Tie asserted that the document did not contain that statement when she signed it. Plaintiff Ma's testimony was substantially the same as Tie's. He also testified to repeated efforts to collect payments from defendant after interest began to accrue on the note.

¶ 23 B. Defendant's Case

¶ 24 Defendant presented a much different story. At trial, defendant testified that, although he signed the $80,000 note payable to plaintiffs, the note was unrelated to the transfer of the property. Defendant initially testified that the agreed purchase price for the property was roughly $319,000, not $380,000, and that the note was related to a separate transaction. Defendant testified on direct examination that the $319,000 figure was not based on an appraisal of the property, but was impeached on cross-examination from his deposition, where he testified that the purchase price was based on the appraisal value of the property. The details of his transaction with plaintiffs were memorialized on a United States Department of Housing and Urban Development form (HUD form), which stated that each plaintiff would receive $159,956.60 (which totaled nearly $320,000). However, the only signature on the HUD form was defendant's, who signed it on behalf of the LLC. Defendant then referred to a "direction to convey," which stated that his LLC would receive the deed to the property and that each plaintiff would receive $150,000 for their interest in the property.

¶ 25 Defendant testified that the note memorialized an agreement with plaintiffs in which he was to receive $40,000 from each plaintiff for investment in "future endeavors." Defendant

testified that he never received any money from either plaintiff. Defendant also testified that he never made any payments on the $80,000 note. Defendant testified that he did present the $934 check to plaintiffs, but stated that he did not recall the purpose for giving the check to plaintiffs. He testified that he had been sending plaintiffs multiple checks related to management of the property, and that the check could have been for anything affiliated with the building, but not interest payments on the note.

¶ 26 Defendant then testified that the copy of the note attached to plaintiff's complaint was not identical to the note he signed on March 22, 2007, and that plaintiffs must have unlawfully materially altered the note. Defendant testified that, in particular, the writing in the margin, which detailed the due date and 7% interest plan after the first year, was not present when he signed the note. Defendant also testified that he did not know who crossed out the second paragraph on the form. Defendant testified that plaintiffs were present when he signed the note and specifically stated that plaintiffs did enter the closing room, rather than waiting in the waiting room as they had testified. Defendant testified that he did not retain the original note. Defendant did not offer into evidence a copy of the note bearing the appearance that he testified it had when he signed it.

¶ 27 C. Closing Arguments

¶ 28 We present closing arguments in some detail, since there was no transcript of the trial court's ruling. The arguments indicate the issues the trial court was asked to decide. In closing arguments, plaintiffs argue that defendant gave inconclusive answers about whether or not he filled out his *pro se* motion, and then compared enlarged portions of the handwriting on the *pro*

*se* motion with enlarged portions of the writing from the margin of the note. Plaintiffs argue that the handwriting samples were extremely similar. Plaintiffs argue that the note recites that it is "for value received," which creates a presumption that value had been received by defendant. Plaintiffs argue that the presumption may be rebutted by clear and cogent evidence, and argue that defendant presented no clear and cogent evidence that he did not receive consideration for the note. Plaintiffs further argue that the documents relied on by defendant proved little for his case. The HUD form did not bear plaintiffs' signatures and plaintiffs argue that the direction to convey was blank when Tie signed it. Plaintiffs argue that the handwriting on the direction to convey stating that plaintiffs would each receive $150,000 was very similar to the handwriting in the margin of the note. Finally, plaintiffs argue that the $934 check presented to plaintiffs two months after interest began to accrue was equal to two months' interest on the note.

¶ 29 Defendant argues that the note lacked consideration because plaintiffs sold the property for only $300,000. Defendant pointed to the HUD form and the direction to convey to argue that when the deed was transferred to the LLC, it merged with those documents, terminating plaintiffs' interest in the property. Defendant argues that the note was made pursuant to a separate transaction, an argument defendant argues was supported by the fact that neither the HUD form nor the Direction to Convey mentioned the note or an additional $80,000 debt. Instead, the note was made in anticipation of a loan plaintiffs were going to make to defendant. Defendant argues that he never made any payments pursuant to the note because plaintiffs did not give defendant the money they promised. Defendant argues that the $934 check could have been drawn for any number of reasons, as defendant had been doing management and investment work

with plaintiffs for years. Finally, defendant argues that the note was invalid because plaintiffs made unauthorized modifications to it after it was executed.

¶ 30 On April 14, 2011, the trial court issued a ruling from the bench, finding in favor of plaintiffs and ordering defendant to pay them $96,050.80, covering the entire principal of the note and the interest accrued to date. Defendant filed a timely notice of appeal on May 13, 2011 and this appeal followed.

¶ 31 ANALYSIS

¶ 32 On appeal, defendant makes the same claims he made to the trial court. First defendant argues that he is not liable under the $80,000 note because plaintiffs offered no consideration. Second, defendant argues that he is not liable under the note because it was materially altered after he signed it.

¶ 33 I. Standard of Review

¶ 34 The parties dispute what standard of review we must use in deciding the case. Defendant argues that this case involves the construction, interpretation, or legal effect of a contract, and therefore requires *de novo* review. Conversely, plaintiffs argue that this case presents factual issues, including consideration, an alteration of the note, and the credibility of the parties. Therefore, plaintiffs argue that we must use a manifest weight of the evidence standard in deciding this case. *Guzell v. Kasztelanka Café and Restaurant, Inc.*, 87 Ill. App. 3d 381, 385 (1980); *Gustafson v. Lindquist*, 40 Ill. App. 3d 152, 155 (1976).

¶ 35 In the case at bar, defendant did not ask the trial court to interpret the terms of the note, but instead asked the trial court to find whether or not the note comprised a valid contract.

Defendant argues that plaintiffs provided no consideration and that the note had been materially altered. At trial, the parties presented different versions of the facts, and the trial court, after weighing the credibility of each side, found one set of facts more credible than the other. "Where the trial court sits without a jury, its findings of fact will not be disturbed unless they are against the manifest weight of the evidence." *Harris Trust and Savings Bank v. Barrington Hills*, 133 Ill. 2d 146, 157 (1989). Therefore, we review this case under a manifest weight of the evidence standard.

¶ 36 "A judgment is against the manifest weight of the evidence only when an opposite conclusion is apparent or when findings appear to be unreasonable, arbitrary, or not based on evidence." *Bazydlo v. Volant*, 164 Ill. 2d 207, 215 (1995). The manifest weight of the evidence standard affords great deference to the trial court, because the trial court is in a superior position to determine and weigh the credibility of the witnesses, observe witnesses' demeanor, and resolve conflicts in their testimony. *People v. Jones*, 215 Ill. 2d 261, 268 (2005).

¶ 37 II. The Trial Court's Ruling Was Not Against the Manifest Weight of the Evidence

¶ 38 A. Consideration

¶ 39 Defendant's first claim is that plaintiffs failed to prove consideration for the note.

¶ 40 It is a central tenet of contract law that consideration is an essential element of a valid contract. *Moehling v. W. E. O'Neil Construction Co.*, 20 Ill. 2d 255, 265 (1960). This court has held that the recital "for value received" in a promissory note is a sufficient allegation that valid consideration exists for a disputed note. *Pedott v. Dorman*, 192 Ill. App. 3d 85, 93 (1989). We have further held that consideration is presumed in an action on a validly executed promissory

note and that no further proof of consideration is required beyond the note itself. *Pedott*, 192 Ill. App. 3d at 93. The presumption of valid consideration is rebuttable, but the evidence offered in rebuttal must be of a "very clear and cogent nature." *Pedott*, 192 Ill. App. 3d at 93 (citing *Davis v. Buchholz*, 101 Ill. App. 3d 388, 392 (1981)).

¶ 41 Defendant has presented no evidence beyond his testimony to rebut the presumption that consideration existed. In defendant's version of the facts, there were in essence two discrete events: first, plaintiffs transferred the property to his LLC for $300,000; and second, he signed a promissory note in which he promised to personally pay plaintiffs $80,000 "for value received."

¶ 42 In essence, defendant is asking us to find that his own actions made no sense. Although he claims that he did not sign the version of the note presented at trial, he does admit to signing a version of the note, but he offers no explanation as to why he does not produce a copy at trial. Defendant claims that the note indicated that he would repay $80,000 to plaintiffs in return for plaintiffs loaning him $80,000 for future real estate investment. Defendant, an experienced real estate broker, admitted that he signed the note promising to repay monies he had not yet received.

¶ 43 Defendant referred to the HUD form, a document not signed by plaintiffs, to argue that the LLC paid each plaintiff $159,956.60 in exchange for the property. In addition to the fact that plaintiffs did not sign this document, plaintiffs submitted copies of checks proving that they received $150,000, rather than $159,956.60, further casting doubt on the accuracy of the HUD form and the weight to be given to defendant's testimony. Defendant did not testify that he made any effort to collect the $80,000 debt he claimed that plaintiffs owed him pursuant to the note. Plaintiffs, on the other hand, testified to extensive efforts made to collect the debt owed to them

by defendant.

¶ 44 Weighing the credibility of witnesses' testimony is the role of the trial court, and it concluded that plaintiffs' version of the facts made more sense. *Pedott*, 192 Ill. App. 3d at 93. The trial court therefore found that defendant failed to meet his burden of rebutting the presumption that consideration existed.

¶ 45 Defendant argues that the merger doctrine prevents plaintiffs from claiming that their interest in the property functioned as consideration for the note. The merger doctrine, which defendant admits is "not favored by modern courts," states that in the absence of an express clause in a contract, all agreements between a buyer and seller of real estate merge into the deed when it is delivered to the buyer at closing, and the deed supercedes all contract provisions. *Ollivier v. Alden*, 262 Ill. App. 3d 190, 195 (1994). See also *Krajcir v. Egidi*, 305 Ill. App. 3d 613, 623 (1999) (stating that the merger doctrine is not favored by modern courts). This court has held that the doctrine does not apply if there exist obligations in the contract that are not fulfilled by the delivery of the deed. *Krajcir*, 305 Ill. App. 3d at 623 (citing *Biehl v. Atwood*, 151 Ill. App. 3d 763, 765 (1986)).

¶ 46 Defendant argues that the HUD form contained all the intentions of the parties regarding the property, and that because it did not mention the note, the note was therefore unrelated to the sale of the property. However, the HUD form does not fall under the merger doctrine because it was not a contract for the sale of real estate between the parties, and since it was only signed by one party, it was not a contract at all. Defendant also points to the "Direction to Convey," which states that his LLC would pay each plaintiff $150,000, to assert that the $80,000 note was

unrelated to the sale transaction. Once again, the merger doctrine would not apply here because the "Direction to Convey" memorialized an agreement between plaintiffs and defendant's LLC. The note was a personal note made by defendant, and thus it would not be mentioned in an agreement between the LLC and plaintiffs. Finally, even if these documents were binding on all parties, the merger doctrine would not apply. This court has held that if contractual obligations are not fulfilled by the deed, they survive the merger clause. *Krajcir*, 305 Ill. App. 3d at 623 (citing *Biehl*, 151 Ill. App. 3d at 765). In the case at bar, defendant signed a promissory note "for value received" promising to pay plaintiffs in the future. Defendant's obligation to satisfy the debt memorialized in the note did not terminate when the plaintiffs transferred their interest in the property to his LLC. Therefore, the merger doctrine in inapplicable to this case.

¶ 47 The trial court, after being presented with such compelling evidence on the validity of the note and the existence of consideration, made a ruling based on the credibility of the witnesses. We cannot say that the trial court's judgment is against the manifest weight of the evidence on its finding of consideration.

¶ 48 B. Material Alteration

¶ 49 Next, defendant argues that the note presented by plaintiffs had been materially altered since he signed it on March 22, 2007. An alteration is an unauthorized change in an instrument that "purports to modify in any respect the obligation of a party." 810 ILCS 5/3-407(a)(i) (West 2006). If an alteration is made fraudulently, the party whose obligation has been affected by the alteration discharges the party of his obligation. 810 ILCS 5/3-407(b) (West 2006). Defendant claims that, when he signed the note, there was no writing in the margin and that the second

paragraph had not been scratched out. Defendant argues that, pursuant to section 5/3-407, he should be discharged of his obligation under the note.

¶ 50 Defendant cites to various cases in which contracts have been materially altered after they were executed. Illinois courts have consistently held that when a contract is materially altered after execution, the burden shifts to the party claiming the benefit of the contract to prove that the alterations were lawful. See *Danville UAW CIO Local No. 579 Credit Union v. Randle*, 58 Ill. App. 2d 84 (1944); *Ruwaldt v. W. C. McBride Inc.*, 388 Ill. 285 (1944); *Merritt v. Dewey*, 218 Ill. 599 (1905).

¶ 51 However, all of these cases are inapposite to the case at bar. In the cited cases, the defendants all proved that an alteration had occurred after the instruments were executed. In *Randle*, the plaintiff admitted that the alteration occurred after the instrument was executed, but argued that the alteration was not material. *Randle*, 58 Ill. App 2d at 87. In *Ruwaldt*, the parties did not dispute that the alteration was made after execution of the instrument. *Ruwaldt*, 388 Ill. at 288. In *Merritt*, the court made the factual finding that the alteration was made after it was executed. *Merritt*, 218 Ill. at 602.

¶ 52 In the case at bar, defendant and plaintiffs presented competing testimony about the appearance of the note at the time of signing, and the trial court was called upon to decide whether the note had been materially altered after execution as a matter of fact. Therefore, we may reverse the trial court's finding that the note was not altered only if the finding was against the manifest weight of the evidence. *Harris Trust and Savings Bank v. Barrington Hills*, 133 Ill. 2d 146, 157 (1989). Defendant claims that the second paragraph had not been crossed out and

that there was no writing in the margin when he signed it. Defendant claimed that he gave the original version of the note to plaintiffs, but he did not submit to the trial court the note in the state he claims it was in when he signed it.

¶ 53 Plaintiffs, on the other hand, claimed that defendant made the changes he now complains of and that he retained the original of the note. Plaintiffs were the only party to offer into evidence a copy of the note signed by the parties. In addition, defendant presented a check in the amount of $934 to plaintiffs two months after interest began accruing on the note. Plaintiffs argued that at 7% interest per year on an $80,000 note, monthly interest worked out to $467, and therefore, two month's worth of interest is $934. Each plaintiff testified that the check covered two month's interest, while defendant could not give a definite answer as to why he presented the check to plaintiffs. Furthermore, at trial, plaintiffs presented defendant on cross-examination with a *pro se* motion defendant submitted to the trial court and asked defendant if the handwriting on the motion was his own. Defendant answered that he did not remember whether he personally filled out his *pro se* motion. In closing arguments, plaintiffs presented enlarged images of the handwriting on defendant's *pro se* motion and the writing in the margin of the note. Plaintiffs argued that the handwriting was very similar.

¶ 54 We therefore find that the trial court's ruling that the note was not altered after execution is not against the manifest weight of the evidence. The trial court considered and weighed the credibility of the witnesses and concluded that one party was more credible than the other. Based on the evidence presented, we cannot say that the trial court's conclusion was against the manifest weight of the evidence.

¶ 55 CONCLUSION

¶ 56 For the foregoing reasons, we affirm the judgment of the trial court. The trial court was asked to decide two factual issues related to a promissory note executed by the parties. Each side presented a different factual account of the events surrounding the execution of the promissory note and the trial court weighed the credibility of the witnesses. We cannot say that the trial court's rulings that the note was supported by consideration and not altered after it was executed were not against the manifest weight of the evidence.

¶ 57 Affirmed.