2014 IL App (2d) 130543-U
No. 2-13-0543
Order filed April 14, 2014

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

CHARLES BRAHOS,	)	Appeal from the Circuit Court
	)	of Lake County.
Plaintiff-Appellant,	)	
	)	
v.	)	No. 09-L-556
	)	
CAREY CHICKERNEO,	)	Honorable
	)	Michael B. Betar,
Defendant-Appellee.	)	Judge, Presiding.

JUSTICE JORGENSEN delivered the judgment of the court.
Justices Zenoff and Birkett concurred in the judgment.

ORDER

¶ 1 *Held*: Trial court's order finding a judgment satisfied and discharged by virtue of a bank's release of guarantor liability reversed, where the release did not specify that it was executed in satisfaction of the judgment and did not reflect that plaintiff agreed to receive a non-cash payment, and where defendant had previously represented that other payments were made in satisfaction of the debt relating to the guaranty. Reversed and remanded.

¶ 2 Plaintiff, Charles Brahos, received a $2,344,303.80 judgment in his favor against defendant, Carey Chickerneo, and others. A portion of the judgment consisted of $593,748.99 in compensatory damages representing Brahos's risk on a personal guaranty for the parties' business's indebtedness on a bank loan ("for loss attributable to plaintiff being guarantor on

debt"). Brahos, Chickerneo, and others subsequently entered into an agreement with the lender to pay off and release the debt. Chickerno moved to have the judgment against him deemed satisfied by virtue of the bank's release of the debt. The trial court granted the motion. Brahos appeals. We reverse and remand.

¶ 3 I. BACKGROUND

¶ 4 In 2006, Chickerneo and Carl Ritz sought to purchase an automobile dealership in Highland Park. They needed additional investors and they, along with Steven Goodman, approached Nicholas Gouletas and Brahos. In August 2006, Ritz, Chickerneo, Goodman, Gouletas, and Brahos executed an operating agreement to govern the new dealership, named North Shore Auto Group, LLC (NSAG). The agreement specified that Brahos would be a non-managing member of the venture and have a 10% interest in the business. The venture's business plan called for $2 million in member contributions ($750,000 of which was from Brahos), plus a $1.5 million loan (in the form of a 10-year note) from AMCORE Bank N.A. (Amcore), and two lines of credit from the bank (totaling $2 million) for operating capital. Further, each member was to execute a guaranty under which he would be liable to Amcore if NSAG did not repay its loans. The loan and capital contributions from the members provided sufficient funds for the group to purchase the dealership.

¶ 5 A November 2006 operating agreement was prepared that contained provisions for repayment of capital contributions and addressed the consequences of nonpayment (specifically, managers' salary reductions and management shifting to Brahos and Gouletas). However, Goodman did not sign the document and a dispute arose concerning whether Goodman was present at the closing and whether he told the others that he had signed the document. Brahos stated that, based on Goodman's alleged representations that he *had* signed it, Brahos tendered to

NSAG his $750,000 capital contribution and signed the personal guaranty.

¶ 6 In August 2007, Chickerneo, Ritz, and Goodman signed a resolution that modified the November 2006 operating agreement, specifically, altering it so that Chickerneo's and Ritz's salaries would not be reduced until November 2010, regardless of whether Brahos was repaid by November 2008, as previously agreed. They did not give Brahos a copy of the resolution. By October 2007, Brahos had not been repaid any of his money and the personal loan he took out to make his capital contribution was about to become due. To repay the loan, he took out another loan from Amcore for $750,000, secured by real estate he owned. In the summer of 2008, Brahos had still not been repaid any funds, and he took actions to assume management responsibility in November pursuant to the November 2006 operating agreement.

¶ 7 At an October 2008 meeting, a resolution was passed to expel Brahos from NSAG. Amcore arranged the meeting after Brahos informed it that he was not repaid and intended to assume management responsibilities, of which Amcore reported it was unaware. At another meeting one month later, Ritz and Chickerneo stated that Goodman had not signed the November operating agreement and that they believed it was not enforceable. Also around this time, Brahos's Amcore loan became due and the bank instituted foreclosure proceedings on the loan.

¶ 8 Brahos was never repaid any of his capital contributions, Ritz's and Chickerneo's salaries were never reduced, and Brahos never assumed management responsibilities.

¶ 9 On June 11, 2009, Brahos sued NSAG, Chickerneo, Ritz, and Goodman, alleging fraud, conspiracy to commit fraud, and breach of fiduciary duty and sought an accounting and the member-defendants' expulsion from NSAG. He also alleged that Chickerneo and Ritz breached their employment agreements. The defendants filed a counterclaim for replevin and a

declaratory judgment.

¶ 10 On January 26, 2011, a jury trial commenced on Brahos's fraud-in-the-inducement claim, and a bench trial commenced on his claim of breach of fiduciary duty and the defendants' declaratory judgment and replevin counterclaims. The jury returned a verdict in Brahos's favor on his fraud-in-the-inducement claim, awarding him $1,544,303.80 in compensatory damages and $800,000 in punitive damages ($500,000 against Chickerneo, $200,000 against Goodman, and $100,000 against Ritz). The trial court, addressing the breach-of-fiduciary-duty claim, found that the defendants breached their fiduciary duties to Brahos. As to damages, the court found that, had Brahos known of Goodman's failure to sign the November agreement, he would not have invested in the entity or executed a guaranty. It adopted the jury's damages determination, awarding Brahos the same damages, and the court rejected the defendants' counterclaims.

¶ 11 On appeal, the defendants challenged, *inter alia*, the damages award. As relevant here, Brahos was awarded (in accordance with his expert's testimony) $1,544,303.80 in compensatory damages, including: (1) his $750,000 capital contribution; (2) the $200,554.81 in interest he paid on the $750,000 he borrowed; and (3) 20% of the risk on the personal guaranty, or $593,748.99, on NSAG's indebtedness to Amcore ($2,968,744.95). The defendants argued that the $593,748.99 award relating to Brahos's risk on the personal guaranty was erroneous because he would likely never have to pay it because no evidence was presented that Amcore had taken steps to collect on it, because Ritz testified that NSAG was current in making its loan payments, and because Brahos's expert's calculations were based on figures only through December 2009 (whereas the trial occurred in early 2011).

¶ 12 This court rejected the defendants' argument:

> "Similarly, as to the award related to the personal guaranty, we conclude that the

jury and trial court could have reasonably found that Brahos' exposure was $593,748 (or one-fifth of North Shore's outstanding $2,968,744.95 loan) and awarded him that amount. Defendants' primary complaint is that Amcore had not pursued the guarantors for its loan to North Shore and, therefore, the award was speculative and improper. This point is not well taken. First, any argument that it is speculative is forfeited, as previously noted [*i.e.*, because the defendants failed to renew their objection to the expert's testimony]. Next, we note that all damages, present as well as future, must be considered at trial. *Dillon v. Evanston Hospital*, 199 Ill. 2d 483, 502 (2002). 'A plaintiff can obtain compensation for a future injury that is not reasonably certain to occur, but the compensation would reflect the low probability of occurrence.' *Id.* at 504. [Brahos's expert] testified that he reviewed correspondence from Amcore in April 2009, wherein the bank stated that it was going to institute proceedings against North Shore's members to collect on the loan and two lines of credit. He also noted that bank correspondence from 2008 and 2009 reflected that Amcore did not believe that it could collect from North Shore itself on the balances due because the company had few assets. [Brahos's expert] further stated that his calculation was conservative: the estimate represented one-fifth of North Shore's outstanding debt, even though Brahos (or any other member) could be responsible for the entire amount. Defendants point to Ritz's testimony that North Shore was making regular payments to Amcore and that Amcore had taken no steps to collect on the loans. They urge that the triers of fact should have found Ritz's testimony credible. We cannot conclude that the jury's and trial court's credibility assessments were unreasonable. Accordingly, the damages award related to the guaranty was not erroneous." *Brahos v. Chickerneo*, 2012 IL App (2d) 110616-U, ¶ 50.

¶ 13 Following trial, Brahos, on February 24, 2011, attempted to collect his judgment from the defendants (he served on NSAG citations to discover assets, one pertaining to each defendant). The defendants claimed that they were unable to pay the full judgment without selling their stakes in an auto dealership that NSAG owned; accordingly, despite Brahos's objection that the proceeds would be insufficient to satisfy his judgment, NSAG moved, on July 21, 2011, to allow for the sale of the dealership, representing that the sale proceeds *would* be sufficient to satisfy the judgment in full.

¶ 14 The trial court, on August 9, 2011, permitted the sale, specifying that the proceeds first be distributed to NSAG's secured creditors "and then to [Brahos] to satisfy the outstanding Judgment plus interest acc[rue]d to the date of payment." It further ordered that the balance of the proceeds be placed in escrow for distribution by the court.

¶ 15 On November 2, 2011, the court ruled that Brahos, who refused to consent to the sale of NSAG, was no longer a member of the entity. The dealership was sold for an amount that was not sufficient (about 75%) to fully satisfy Brahos's judgment.

¶ 16 On November 3, 2011, NSAG, Ritz, Chickerneo, Goodman, Gouletas, and Brahos, "as borrower and guarantors" and listed as members of NSAG, entered into an "Agreement for Payoff and Mutual Release" (Agreement) with BMO Harris, N.A. (as assignee of Amcore), and Bayview Loan Servicing, LLC (agent for BMO Harris). (The Agreement explicitly provided that it was to be effective as of November 2, 2011.)

¶ 17 As relevant here, in a section entitled "*Agreement for Payoff of North Shore Auto Group Loan*," the contract states: "The Parties agree that each Party owes the Bank, jointly and severally, the approximate amount of $3,100,000 respecting the Loan, in the aggregate, exclusive of interest and exclusive of attorney[ ] fees and costs of collection to date." The Agreement

defines the "Loan" as "the loans in which North Shore Auto Group is the named borrower, which loans were guaranteed by Carl Ritz, Carey Chickerneo, Steven Goodman, Nicholas V. Gouletas, [and] Charles A. Brahos." It further stated that the Bank "shall, upon its receipt of [a certain amount]" on November 2, 2011, "forever release, waive and discharge its Interest in the assets of North Shore Auto Group, LLC, and shall also release its claims against Borrower and Guarantors respecting the Loan to" NSAG.

¶ 18 Ultimately, Brahos received $1,937,738 (sale proceeds) of the $2,502,108.52 he was owed at the time of the sale. Chickerneo, as manager of NSAG, executed a promissory note on November 3, 2011, agreeing to repay the *remaining* $564,948.56 of Brahos' judgment (including the punitive damages award). In a November 8, 2011, order, the trial court found that, following the sale, the judgment had been satisfied in part (75%) "and that there is a mechanism in place for payment of the balance of the judgment (Secured Promissory Note)." Accordingly, the court stayed the supplementary proceedings.

¶ 19 On November 16, 2011, the defendants filed an emergency motion to stay their duty to turn over funds pursuant to the note, asserting that Harris Bank's release of NSAG's debt warranted a credit to that portion of Brahos's damages attributable to exposure on the Harris guaranty. This motion was predicated on a contemporaneously-filed motion for partial satisfaction of judgment. However, on November 17, 2011, the motion for partial satisfaction was withdrawn and the trial court denied the motion seeking a stay.

¶ 20 On November 28, 2011, the defendants and NSAG moved to dismiss the citation proceedings and requested an order returning sums paid in excess of the judgment. They noted that a portion of the sale of NSAG's assets, specifically, over $1.9 million, had been paid to Brahos to satisfy the judgment and that this left a $564,948.56 balance still to be paid to him.

The Agreement, they argued, resolved and released a loan and two lines of credit issued to NSAG by Amcore (and assigned to BMO Harris, N.A.) and, further, discharged any potential claims the bank might have had against Brahos related to the loan for which he was a guarantor. "Neither he nor the other guarantors has potential liability for the loan." The defendants maintained that the payment and resolution of the guarantee, pursuant to the Agreement, satisfied the remainder of the underlying judgment (*i.e.*, the $593,748.99 awarded to him after the trials as the "loss attributable to plaintiff being guarantor on debt") and, they further urged, actually conferred a benefit on Brahos in excess of the unpaid amount of $564,948.56 by $28,800.43, which they also sought returned. Accordingly, they sought a finding that the judgment had been satisfied and that, consequently, the proceedings be terminated. Also, on December 2, 2011, the defendants moved to stay turnover of assets until the court resolved their motion to dismiss.

¶ 21 On February 9, 2012, the trial court denied the defendants' motion to dismiss, without issuing any written findings.[1]

¶ 22 On January 12, 2012, Brahos had moved to compel compliance with the November 3, 2011, promissory note, asserting that $564,948.56 was still owed to him after he received the sale proceeds. Brahos alleged that he received $110,000 in partial payment of the note, thereby reducing the outstanding judgment to $454,948.56. He sought an accounting and access to NSAG's records to monitor the payment of receivables. Further, on February 16, 2012, Brahos moved for turnover of assets secured by the note, arguing that he had a judgment and was a secured creditor (and, thus, had priority for all payouts from NSAG) and that NSAG had "hoarded the receivables and made improper expenditures." Brahos argued that he was entitled to the security provided by the note, including NSAG's bank accounts and assets and turnover of

[1] The record on appeal contains no report of proceedings from the hearing on the motion.

all its records and any other collateral identified in the note. He also asked to be allowed to resume supplementary proceedings against the defendants to satisfy his judgment. On March 6, 2012, the trial court granted Brahos's motion to turnover assets.

¶ 23 On March 2, 2012, the defendants moved for satisfaction of judgment and dismissal of citations as to Goodman and Ritz, arguing that their payments to-date to Brahos *fully* satisfied his compensatory damages award, postjudgment interest, and Goodman's and Ritz's punitive damages liabilities. In a March 1, 2012, affidavit Chickerneo submitted in support of the defendants' motion, he stated: "As of November 23, 2011, 100% of the compensatory damages award, the $100,000 in punitive damages assessed against Carl Ritz, the $200,000 in punitive damages assessed against Steve Goodman, accrued interest, and any costs awarded, had been paid to Plaintiff."[2] Chickerneo also stated that "[a]ny amounts that remain owing on the Judgment are owed relative to the $500,000 punitive-damages award against me." In their motion, the defendants argued that the total payments they had made to date satisfied Brahos's compensatory damages award (of which a portion consisted of the award relating to his loan guaranty), post-judgment interest, and his punitive damages awards from Ritz and Goodman. Thus, they requested that Ritz and Goodman should be dismissed from the proceeding after having been found to have satisfied the judgment. They further noted that their intent was to first satisfy the compensatory-damages component of the judgment (to extinguish their joint and several liability) and then to satisfy the punitive-damages component and cited case law to the effect that their intent was controlling.

[2] Ritz and Goodman also averred in separate affidavits that 100% of the compensatory damages award had been paid to Brahos.

¶ 24 In an agreed order entered on March 14, 2012, the court found that the citations as to Ritz and Goodman were discharged, without costs. On March 27, 2012, the court entered a satisfaction-and-release-of-judgment order as to those two defendants. 735 ILCS 5/12-183 (West 2012).

¶ 25 About one year later, on March 8, 2013, Chickerneo moved to deem the judgment entered against him satisfied. 735 ILCS 5/12-183(b) (West 2012). He argued that, as a result of the bank's release of the debt "attributable to plaintiff being guarantor on debt," Brahos's injury arising out of the $593,748.99 itemized damages portion of the judgment had been fully satisfied. He explained that he brought the motion because Brahos had refused to execute a release-of-judgment letter Chickerneo had sent to him on February 22, 2013. Chickerneo argued that the jury premised its damages award on evidence that the bank was likely to institute proceedings against NSAG's members to collect on the loan and two lines of credit. He argued that, because this was a likely "future damage," the Agreement acted to release Brahos from all obligations upon which the "future damage" was premised; the "future damage" did not represent any monies Brahos had lost or paid with regard to an action instituted by the bank to collect on his personal guaranty. Allowing Brahos to collect, he asserted, would result in a substantial windfall. Chickerneo, thus, requested an order finding that the $593,748.99 compensatory damages award related to the personal guaranty had been fully satisfied and discharged.

¶ 26 Brahos, in response, argued that the motion should be denied because it was barred by *res judicata* (because Chickerneo, on three occasions, had unsuccessfully sought release from the judgment); Brahos never agreed to accept the Agreement in lieu of a monetary judgment; there was no basis in equity to release Chickerneo from the judgment; and the doctrine of double

recovery did not apply because the bank was not found to be a joint tortfeasor. Brahos also requested fees and costs as provided in the promissory note.

¶ 27 On April 24, 2013, the trial court granted Chickerneo's motion, noting it was over Brahos's objection, and found that the itemized $593,748.99 jury verdict "is deemed satisfied by virtue of the" Agreement ("guarantor liability").[3] Brahos appeals.

¶ 28 II. ANALYSIS

¶ 29 Brahos argues that the trial court erred in finding that the $593,748.99 in damages relating to the personal guarantee was satisfied, where: (1) *res judicata* or the law-of-the-case doctrine bar such a finding; (2) the court erred in interpreting the Agreement; (3) the collateral source doctrine precluded the court's finding; and (4) alternatively, Chickerneo's failure to demonstrate a lack of a legal remedy barred the court from granting equitable relief. He also argues that the court erred in denying his request for attorney fees and costs (in opposing Chickerneo's motion). For the following reasons, we: (1) conclude that the trial court erred in granting Chickerneo's motion, where the Agreement did not act to satisfy the guaranty portion of the judgment entered against the defendants; and (2) decline to rule on Brahos's request for fees and costs; he may renew that request in the trial court.

¶ 30 To place this appeal in context, we note that the relevant actions in this case took place in supplementary proceedings (following the trials), wherein Brahos sought to collect on his judgment. See 735 ILCS 5/2-1402 (West 2012) (supplementary proceedings statute); see also *Bank of Aspen v. Fox Cartage, Inc.*, 126 Ill. 2d 307, 313 (1989) (section 2-1402 provides the method by which a judgment creditor may begin supplementary proceedings against a third party

[3] The court issued no written findings, and the record on appeal contains no report of proceedings from the hearing on the motion.

who is thought to be in possession of assets belonging to the judgment debtor); *Strojny v. Egelan*, 132 Ill. App. 2d 779, 781 (1971) (section 2-1402 proceedings are collateral to the direct proceeding); Ill. S. Ct. R. 277 (eff. Jan. 4, 2013) (prescribing procedures by which statute is implemented).

¶ 31 A. The Agreement

¶ 32 Brahos argues that the Agreement did not release Chickerneo from his liability and, thus, the trial court erred in granting Chickerneo's motion to deem the judgment against him satisfied. Brahos contends that the Agreement does not contain any release running from Brahos to Chickerneo and is devoid of any language stating that Brahos accepted the release in lieu of a cash payment on his judgment. He also argues that the circumstances surrounding the Agreement's execution reflect that it was not intended to satisfy the guarantee-related portion of the judgment. For the following reasons, we agree.

¶ 33 "As a general rule[,] discharge, satisfaction or extinction of the principal obligation[ ] discharges the obligation of a guarantor." *Mazur v. Stein*, 314 Ill. App. 529, 532 (1942). "The party who seeks the benefit of a release bears the burden of establishing the existence thereof, and the decision of the circuit court as to whether the release has been sufficiently proven will not be disturbed absent an abuse of discretion." *Doctor's Associates, Inc. v. Duree*, 319 Ill. App. 3d 1032, 1044 (2001). A release is a contract, and therefore is governed by contract law. *Polo National Bank v. Lester*, 183 Ill. App. 3d 411, 414 (1989). The intention of the parties to contract must be determined from the instrument itself, and construction of the instrument where no ambiguity exists is a matter of law. *Sutton Place Development Co. v. Bank of Commerce & Industry*, 149 Ill. App. 3d 513, 516 (1986).

¶ 34 A contract will be considered ambiguous if it is capable of being understood in more sense than one. *National Tea Co. v. American National Bank & Trust Co.*, 100 Ill. App. 3d 1046, 1049 (1981). Where a court determines that a contract is ambiguous, its construction is then a question of fact, and parol evidence is admissible to explain and ascertain what the parties intended. *Quake Construction, Inc. v. American Airlines, Inc.*, 141 Ill. 2d 281, 288 (1990).

¶ 35 "Generally, the only way in which a money judgment can be satisfied is by payment in money unless the parties agree otherwise." *Heller v. Lee*, 130 Ill. App. 3d 701, 702 (1985). Here, viewing the four corners of the Agreement, we cannot conclude that the parties intended that the contract release Chickerneo (or any of the defendants) from liability for the compensatory damages relating to Brahos's loan guaranty. As even Chickerneo concedes, there is no explicit language in the Agreement stating as such. Further supporting this conclusion is the fact that there is no document or other evidence showing that Brahos agreed to accept a non-cash benefit in lieu of a cash payment for the judgment. *Marble Emporium, Inc. v. Vuksanovic*, 339 Ill. App. 3d 84, 93 (2003), upon which Chickerneo relies, does not warrant a different conclusion. In contrast to this case, the *Marble Emporium* defendant general contractor was voluntarily dismissed from the case, and the court held that any obligation the contractor and the contractor's guarantor may have had were both discharged. Those circumstances are not present here. The present case went to trials (both a jury trial and bench trial), and the court entered judgment on the verdicts. No relevant party was dismissed from the case before judgment was entered.

¶ 36 We agree with Brahos that even the circumstances surrounding the execution of the Agreement do not suggest that it was intended to satisfy any portion of his judgment. He points to the fact that the defendants' cash payment and promissory note add up to the *total* amount of

the judgment without any discount for the release in the Agreement. Specifically, Brahos received from the defendants $1,937,738 (consisting of sale proceeds) of the $2,502,108.52 he was owed at the time of the sale, and Chickerneo, on NSAG's behalf, executed a promissory note on November 3, 2011, agreeing to repay the *remaining* $564,948.56 of Brahos' judgment (including the punitive damages award). Although the defendants sought around this time to dismiss the citation proceedings by asserting that the Agreement released the guaranty-related portion of Brahos's judgment, that motion was denied. Further, one month later, in his affidavit submitted with the pleadings leading up to Ritz's and Goodman's releases, Chickerneo averred that Brahos's compensatory-damages award was *fully* satisfied by the prior cash payments.

¶ 37 We reject Chickerneo's argument that our conclusion effectively awards Brahos a double recovery. Chickerneo states in his brief that the doctrine of double recovery "is a protection to prevent the Plaintiff from collecting his judgment against one tortfeasor and then attempting to collect on the same judgment for the same injury from a different tortfeasor." We note that the bank, a third-party creditor, is not a joint tortfeasor (with Chickerneo and the other defendants) and its release of Brahos does not act to satisfy the guaranty-related portion of his compensatory damages award. As Brahos notes, Chickerneo cites no case where the double recovery doctrine was applied to a non-joint tortfeasor. Further, Chickerneo would have this court read language into the Agreement that is not there while ignoring, among other documents, his affidavit wherein he represented to the trial court that 100% of the compensatory damages award had been paid and satisfied and that all that remained outstanding was the portion of the judgment relating to the punitive damages against him.

¶ 38 B. Attorney Fees and Costs

¶ 39 Brahos also argues, without citation to any authority, that the trial court erred by failing to consider his request (in his response to Chickerneo's motion to deem the judgment against him satisfied) for attorney fees and costs in defending Chickerneo's motion. He notes that the promissory note provided that he could recover such expenses with respect to enforcement of his security interest and that the note required that the defendants pay Brahos the remaining portion of his judgment by March 3, 2012. Brahos contends that Chickerneo's motion to deem the judgment satisfied is merely a "thinly-veiled attack" on the court's order releasing Ritz and Goodman and, further, is for the sole purpose of allowing Chickerneo to "claw back" the previous cash payments, including money previously paid pursuant to the note, thereby implicating the note's fees-and-costs clause. Brahos requests that this court remand for the calculation of fees and costs. Chickerneo offers no response to this argument. Given the absence of a ruling by the trial court on this issue, Brahos's inadequate briefing before this court, and the fact that the note was not the direct subject of the motion from which this appeal stems, we decline to rule on whether an award for attorney fees and costs is warranted. Upon remand, Brahos may, if he so chooses, renew his request.

¶ 40 III. CONCLUSION

¶ 41 For the reasons stated, the judgment of the circuit court of Lake County is reversed and the cause is remanded.

¶ 42 Reversed and remanded.