2017 IL App (2d) 150694-U
No. 2-15-0694
Order filed January 3, 2018

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

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

JUSTICE JORGENSEN delivered the judgment of the court.
Justices Schostok and Spence concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court properly found that defendant owes punitive damages to plaintiff on plaintiff's outstanding judgment. Affirmed.

¶ 2 Plaintiff, Charles A. Brahos, obtained a judgment against defendant, Carey Chickerneo, and others, including $500,000 in punitive damages against Chickerneo. A portion of the judgment remains unpaid. The trial court granted Brahos's motion for determination of the punitive-damages amount, finding that there remains $225,502.88 due and owing on the punitive-damages award against Chickerneo, and it entered judgment on that amount. On appeal, Chickerneo argues that a secured promissory note entered into by plaintiff and North

Shore Auto Group, LLC (NSAG) satisfies the remaining unpaid portion of the judgment and the court erred in determining that Brahos may pursue judgment against Chickerneo. We affirm.

¶ 3 I. BACKGROUND

¶ 4 A. Proceedings Leading to First Two Appeals

¶ 5 In June 2009, Brahos sued Chickerneo and others after his capital contribution to an auto dealership venture, NSAG, was not repaid and after he was expelled from entity. Brahos alleged fraud, conspiracy to commit fraud, and breach of fiduciary duty and sought an accounting and the member-defendants' expulsion from NSAG. In 2011, Brahos received a $2.3 million judgment against Chickerneo and the other defendants. The judgment consisted of the following: $1,544,303.80 in compensatory damages (including his $750,000 capital contribution; $200,554.81 in interest he paid on the $750,000 he had borrowed; and 20% of the risk on his personal guaranty, or $593,748.99, on NSAG's indebtedness to AMCORE Bank N.A. (Amcore) ($2,968,744.95)) and $800,000 in punitive damages ($500,000 against Chickerneo and the remaining $300,000 against two other defendants). In *Brahos v. Chickerneo*, 2012 IL App (2d) 110616-U, ¶ 50, this court affirmed, upholding, *inter alia*, the damages award.

¶ 6 Meanwhile, Brahos sought to collect his judgment. 735 ILCS 5/2-1402 (West 2012). In 2011, the trial court, over Brahos's objection, permitted the sale of the dealership, which was sold for an amount insufficient (about 75%) to fully satisfy Brahos's judgment. In permitting the sale, the trial court specified 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. Later, the court also ruled that Brahos was no longer a member of NSAG.

¶ 7 In November 2011, NSAG, Chickerneo, Brahos, and the remaining three defendants, "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. (Harris) (as assignee of Amcore), and Bayview Loan Servicing, LLC (agent for Harris). In a section entitled "Agreement for Payoff of [NSAG] 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 [NSAG] is the named borrower, which loans were guaranteed by [Chickerneo, Brahos, and the other defendants]." It further states 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 [NSAG] and shall also release its claims against Borrower and Guarantors respecting the Loan to" NSAG.

¶ 8 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 secured promissory note, which is the subject of this appeal, on November 3, 2011, agreeing to repay the remaining $564,948.56 of Brahos's 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.

¶ 9 Defendants tried, unsuccessfully, to stay their duty to turn over funds pursuant to the promissory note, arguing that Harris's release of NSAG's debt warranted a credit to that portion of Brahos's damages attributable to exposure on the Harris guaranty. Defendants also sought, unsuccessfully, to dismiss the citation proceedings. They had argued that the unsatisfied portion

of Brahos's judgment (about $564,948.56) was more than satisfied by the Agreement, which resolved and released a loan and two lines of credit issued to NSAG by Amcore (and assigned to Harris) and, further, discharged any potential claims the bank might have had against Brahos related to the loan for which he was a guarantor. Defendants argued that the payment and resolution of the guaranty, pursuant to the Agreement, satisfied the remainder of the underlying judgment (*i.e.*, the $593,748.00 awarded to Brahos after trial as the "loss attributable to plaintiff being guarantor on debt"). Further, they maintained that it actually conferred on Brahos a benefit in excess of the unpaid amount of $564,948.56 by $28,800.43, which they also sought returned. The trial court found these arguments unconvincing and denied defendants' motion to dismiss the citation proceedings.

¶ 10 Brahos, in January 2012, moved to compel compliance with the promissory note, arguing that, after he received the sale proceeds, he was owed $564,948.56. He received $110,000 in partial payment of the note, reducing the outstanding judgment to $454,948.56. He sought an accounting and access to NSAG's records to monitor payment of receivables. Brahos also successfully moved for turnover of assets secured by the note, arguing that he had a judgment and was a secured creditor who had priority for all payouts from NSAG.

¶ 11 In an agreed order entered in March 2012, the trial court found that the citations to two defendants (who are not parties to this appeal) were discharged and it entered a satisfaction-and-release-of-judgment order as to the two defendants. The defendants had argued that the payments to date had fully satisfied Brahos's compensatory-damages award, postjudgment interest, and the two defendants' punitive-damages liabilities. As relevant here, Chickerneo submitted an affidavit in support of the two defendants' motion, averring that "[a]ny amounts

that remain owing on the Judgment are owed relative to the $500,000 punitive-damages award against me."

¶ 12 One year later, in March 2013, Chickerneo successfully moved to deem the judgment against him satisfied, arguing that, as a result of the bank's release of the debt "attributable to [Brahos] being guarantor on debt," Brahos's injury arising out of the $593,748.99 itemized-damages portion of the judgment had been fully satisfied. Chickerneo maintained that the Agreement released Brahos from all obligations upon which "future damage" was premised and the likelihood that the bank would institute proceedings against NSAG's members to collect on the loan and lines of credit was a likely "future damage." The "future damage" did not, he asserted, represent any monies Brahos has lost or paid with regard to an action instituted by the bank to collect on his personal guaranty. In Chickerneo's view, if Brahos was allowed to collect, it would result in a substantial windfall. The trial court granted Chickerneo's motion, finding that the $593,748.99 itemized jury verdict "is deemed satisfied by virtue of the" Agreement ("guarantor liability").

¶ 13 Brahos appealed, and this court reversed and remanded, holding that the release/Agreement did not specify that it was executed in satisfaction of the judgment; did not reflect that Brahos had agreed to receive a non-cash payment; and Chickerneo had previously represented that other payments were made in satisfaction of the debt relating to the guaranty. *Brahos v. Chickerneo*, 2014 IL App (2d) 130543-U, ¶¶ 35-37. This court noted that Chickerneo's affidavit averred that all of the compensatory-damages award had been paid and satisfied and all that remained outstanding was the portion of the judgment relating to the punitive damages against Chickerneo. *Id.* ¶ 37.

¶ 14 B. Proceedings Leading to Current Appeal

¶ 15 On January 8, 2015, Brahos moved for determination of the amount of the current punitive-damages judgment against Chickerneo. Brahos noted that the promissory note was to be used to satisfy the Chickerneo punitive-damage verdict, but Brahos was never paid in full under the note (and had incurred three years' interest). Chickerneo misrepresented to the court, according to Brahos, that the NSAG sale proceeds would be sufficient to pay the judgment and that the note would be paid in full within 120 days. Brahos argued that the consideration (for dismissing[1] the supplementary proceedings in reliance on the note) had failed. Brahos sought a declaration that Chickerneo owes the entire punitive-damages verdict ($500,000), interest, attorney fees, and costs. Brahos also sought, once a final judgment amount was determined, the issuance of additional supplementary proceedings against Chickerneo "since it has been several years since the date of his last citation examination."

¶ 16 Chickerneo responded that the promissory note was tendered and received as consideration for the payment of the remaining balance of the judgment after the sale of NSAG's assets proved insufficient to fully satisfy the judgment and that Brahos accepted the note as the *sole* mechanism to satisfy the judgment. Chickerneo argued that Brahos relinquished any rights he had to pursue any other legal remedies to collect on the judgment.

¶ 17 Brahos replied that he never agreed that the note be tendered or received as consideration for payment of the remaining balance on the judgment, nor did he release the debtors in exchange for the note.

¶ 18 On June 11, 2015, the trial court granted Brahos's motion for determination of punitive-damages amount, finding that there remains $225,502.88 due and owing on the punitive-damages award against Chickerneo as of June 5, 2015, and it entered judgment on that

[1] It appears that the supplementary proceedings were stayed, not dismissed.

determination. The court also denied Brahos's motion for attorney fees and costs against Chickerneo individually. The court's specific findings were as follows: (1) the secured promissory note did not replace the final judgment orders in this matter; (2) the judgment is not fully satisfied as to Chickerneo; (3) Chickerneo did not sign the note, individually, nor was he a guarantor of the note; (4) neither Brahos nor Chickerneo, individually, were granted any benefits or responsibilities under the terms of the note by the opposing party; (5) Chickerneo is not individually liable for attorney fees under the terms of the note; (6) Brahos's exhibit No. 7, outlining that Brahos has received $1,937,738 in payments as of May 15, 2015, is a full and accurate accounting of amounts paid under the judgment; and (7) Brahos was credible in testifying that he took all reasonable steps to attempt to collect judgment and obtain a fair price for certain NSAG vehicles.[2] Chickerneo appeals.[3]

¶ 19 II. ANALYSIS

¶ 20 Chickerneo argues that the trial court erred in finding in Brahos's favor that the judgment is not satisfied. He maintains that the court did not properly interpret the note as final payment on the judgment, where Brahos accepted the note and where the default remedies under the note were the remedies elected and exercised by Brahos. Disregarding the note as satisfaction of the judgment, Chickerneo argues, allows Brahos the opportunity to make a double recovery (*i.e.*, from both Chickerneo on the basis of the judgment and from NSAG on the default of the note). For the following reasons, we find Chickerneo's arguments unavailing.

¶ 21 A. Lack of Appellee's Brief

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

[3] The appeal in this case was temporarily stayed during pending bankruptcy proceedings involving Chickerneo. We terminated the stay on August 31, 2017.

¶ 22 Initially, we note that Brahos has not filed an appellee's brief. Here, because the record is simple and familiar in light of the previous two appeals and because the issues can be easily resolved, we decide the case on the merits. *First Capitol Mortgage Corp. v. Talandis Construction Corp.*, 63 Ill. 2d 128, 133 (1976).

¶ 23 B. Trial Court Did Not Err in Finding Judgment Not Satisfied

¶ 24 Chickerneo argues that the secured promissory note is a valid and enforceable contract between the parties and created a binding obligation for NSAG to pay $564,948.56 to Brahos. The tender by NSAG and acceptance by Brahos of the note satisfied, according to Chickerneo, the balance of the unpaid judgment and created an obligation from NSAG to Brahos. Chickerneo argues that Brahos's remedies are to be found within the four corners of the contract. Throughout the postjudgment proceedings, he notes, Brahos elected to pursue payment of the note. Chickerneo maintains that, although Brahos had the right to collect the determined amount of the unpaid judgment from *either* Chickerneo *or* NSAG, once Brahos chose to enforce the terms of the note, he created the possibility of claiming double recovery.

¶ 25 If the note, Chickerneo urges, had contained language that allowed the unpaid balance to be enforceable against Chickerno as the balance of the unpaid judgment, then no double recovery would be possible. However, the note contains no such language. He contends that, while the trial court may have drawn that inference, it could only have done so by looking outside the four corners of the document. It reads too much into the document, Chickerneo argues, to infer that it was intended to enforce the balance of the judgment in the event of a default on the note. By assuming that the unpaid balance on the note reverts back to the unpaid balance of the judgment against Chickerneo, he argues, the trial court created the possibility that Brahos can now claim a double recovery. Chickerneo contends that the court's ruling has allowed for recovery of the

unpaid balance of the note from Chickerneo and that Brahos retains the rights conferred under the note with NSAG. The trial court, Chickerneo urges, should not have ignored the enforceability of a valid and binding document between the parties. Brahos is bound to pursue his elected remedy and obtain all of the rights available to him under the note.

¶ 26 The primary goal of contract interpretation is to give effect to the parties' intent. *Joyce v. DLA Piper Rudnick Gray Cary LLP*, 382 Ill. App. 3d 632, 636-37 (2008). To this end, we interpret a contract as a whole and apply the plain and ordinary meaning to unambiguous terms. *Id.* at 637. A contract term is ambiguous if it can reasonably be interpreted in more than one way due to the indefiniteness of the language or due to it having a double or multiple meaning. *Zurich Midwest, Inc. v. St. Paul Fire & Marine Insurance Co.*, 159 Ill. App. 3d 961, 963 (1987). If the court determines that the contract is ambiguous, parol evidence may be considered by the trier of fact in determining the parties' intent. *Farm Credit Bank v. Whitlock*, 144 Ill. 2d 440, 447 (1991). Contract construction presents a question of law that we review *de novo*. *Carr v. Gateway, Inc.*, 241 Ill. 2d 15, 20 (2011).

¶ 27 First, we find Chickerneo's argument concerning double recovery unavailing because his concerns are speculative. The judgment against him has not been satisfied by payment under the note or otherwise. Even if Chickerneo were to pay the judgment against him and if Brahos then sought recovery under the note, the trial court could foreclose this avenue by finding that it would endorse a double recovery. However, at this point, the potential for such a recovery is speculative.

¶ 28 Second, the note does not specify that it was entered into to satisfy Chickerneo's outstanding indebtedness. Indeed, within the four corners of the document, there is no mention at all of the litigation between the parties or the note's purpose. The initial recital states: "For

value received, *** [NSAG] promises to pay to the order of Charles Brahos, *** $564,948.56[.]" The note nowhere provides that it releases any of the debtors, including Chickerneo, from the judgment owed to Brahos. In this respect, it is ambiguous and the trial court could reasonably have determined that, although the note provided an avenue by which Brahos's remaining judgment could be satisfied, it was *not* the sole means by which to do so. The note, dated November 3, 2011, and due March 3, 2012, states that, upon default, the indebtedness is immediately due and payable at Brahos's sole discretion. The note also states that Brahos's "rights and remedies pursuant to this Note are cumulative, are not exclusive[,] and no right or remedy under this Note, at law, in equity or otherwise shall be, or be deemed to be, the exclusive right or remedy of [Brahos] or the legal holder of this Note." Thus, although the note was intended to be an avenue by which to satisfy the punitive-damages judgment (parol evidence, such as the proceedings involving the sale of NSAG and the other litigation between the parties, supports this reading), the rights-and-remedies provision clearly allows Brahos to pursue other means to collect the unpaid portion of his judgment, such as the motion that led to this appeal.

¶ 29 III. CONCLUSION

¶ 30 For the reasons stated, the judgment of the circuit court of Lake County is affirmed.

¶ 31 Affirmed.