2012 IL App (3d) 110065-U

Order filed January 19, 2012

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2012

CITIZENS EQUITY FIRST CREDIT UNION, an Illinois Credit Union,	)	Appeal from the Circuit Court of the 10th Judicial Circuit, Peoria County, Illinois,
Plaintiff-Appellee,	)	
v.	)	
E. LEE HOFMANN,	)	Appeal No. 3-11-0065 Circuit No. 08-L-169
Defendant-Appellant	)	
(James R. Grube and Michael L. Stessman, Defendants).	)	Honorable Stuart P. Borden, Judge, Presiding.

JUSTICE LYTTON delivered the judgment of the court.
Justices McDade and O'Brien concurred in the judgment.

ORDER

¶ 1 *Held*: Where the terms of the guaranty required payment on a certain date and did not incorporate alleged waivers and oral agreements to delay payment, the trial court did not err in granting summary judgment in favor of the bank for the amount of the loan, plus interest, when the debtor defaulted.

¶ 2 Plaintiff Citizens Equity First Credit Union Group (Citizens) filed a complaint

against E. Lee Hofmann, seeking to enforce a written guaranty executed to secure a loan to Games Management, LLC, a company owned by Hofmann, James Grube and Michael Stessman. The trial court granted summary judgment in favor of Citizens. On appeal, Hofmann argues that (1) his motion to dismiss the bank's complaint should have been granted, (2) summary judgment in the bank's favor was inappropriate, (3) the affirmative defense of promissory estoppel is not barred by the Illinois Credit Agreements Act (815 ILCS 160/1 *et seq*. (West 2008)), and (4) his request to depose a witness a second time should have been granted. We affirm.

¶ 3 On September 3, 2004, Citizens loaned Games Management, LLC, the sum of $2.7 million. As the owners and managers of Games Management, Hofmann, Grube and Stessman, executed and delivered to Citizens a promissory note to repay the debt. Under the terms of the note, Games Management agreed to pay nine monthly payments at a lower rate beginning on October 1, 2004, and then 83 monthly payments in the amount of $37,485.82, beginning July 1, 2005. The loan maturity date was June 1, 2012.

¶ 4 In addition to the promissory note, the owners each executed and delivered a commercial guaranty, stating that they unconditionally guaranteed to pay the indebtedness if Games Management defaulted on the loan. Specifically, the guaranty provided:

> "DURATION OF GUARANTY. This Guaranty will take effect when received by Lender without the necessity of any acceptance by Lender, or any notice to Guarantor or to Borrower, and will continue in full force until all Indebtedness shall have been fully and finally paid and satisfied.

* * *

GUARANTOR'S AUTHORIZATION TO LENDER. Guarantor authorized Lender, without notice or demand and without lessening Guarantor's liability under this Guaranty, from time to time: *** (B) to alter, compromise, renew, extend, accelerate, or otherwise change one or more times the time for payment or other terms of the Indebtedness or any part of the Indebtedness, including increases and decreases of the rate of interest on the Indebtedness; extensions may be repeated and may be for longer than the original loan term; *** (E) to determine how, when and what application of payments and credits shall be made on the Indebtedness.

* * *

GUARANTOR'S WAIVERS. Except as prohibited by applicable law, Guarantor waives any right to require Lender to continue lending money or to extend other credit to Borrower.

* * *

Guarantor also waives any and all rights or defenses arising by reason of (C) any disability or other defense of Borrower, or any other guarantor, or of any other person, or by reason of the cessation of Borrower's liability from any cause whatsoever, other than payment in full in legal tender, of the Indebtedness; *** (F) any defenses given to guarantors at law or in equity other than actual payment and performance of the Indebtedness.

GUARANTOR'S UNDERSTANDING WITH RESPECT TO WAIVERS. Guarantor warrants and agrees that each of the waivers set forth above is made with Guarantor's full knowledge of its significance and consequences and that, under the

circumstances, the waivers are reasonable and not contrary to public policy or law.

* * *

NO WAIVER BY LENDER. Lender shall not be deemed to have waived any rights under this Guaranty unless such waiver is given in writing and signed by Lender."

¶ 5 In April of 2006, the Citizens's loan officer, Don Schwegel, and Hofmann had several conversations in which Hofmann expressed his desire to modify the loan payments. Hofmann asked Schwegel if Games Management could make smaller payments for the six "slower" months of the year, those being May through October. Citizens agreed to lower the monthly payments to $26,000 until October, and Hofmann agreed that the payments would increase to $42,000 from November through April. In the fall of 2006, however, Games Management continued to make payments of $26,000.

¶ 6 In 2007, Schwegel and Hofmann again discussed payment options. Citizens agreed to accept payments of $26,000 for the period of July 1, 2007, through February 1, 2008, and later agreed to defer those payments to the end of the term of the loan.

¶ 7 Games Management failed to make the March 1, 2008, and the April 1, 2008, payments. Citizens agreed to defer those payments, in the amounts of $37,485.82, to the end of the term of the loan.

¶ 8 On April 1, 2008, Citizens sent a letter to all three guarantors asking them to sign an enclosed "Promissory Note Modification and Extension Agreement" for the loan. The written modification set forth the oral changes that had been discussed, noted that the monthly payments were reverting to $37,485.42 on May 1, 2008, and extended the maturity

date of the loan to April 1, 2013.

¶ 9 On April 23, 2008, Hofmann signed and returned the proposed agreement with several handwritten changes. The agreement was not signed by Grube or Stessman, nor was it signed by an officer of the bank.

¶ 10 No one made the May 1, 2008, monthly payment or any payment thereafter. In his deposition, Hofmann admitted that no payments had been made on the loan since January 2008.

¶ 11 On June 4, 2008, the bank filed a two-count complaint against the three guarantors of the loan, claiming that Games Management was in default based on the April 2006 and April 2008 oral modifications to the loan. Hofmann moved to dismiss the complaint based on the Credit Agreements Act and the ground that separate claims needed to be stated against each guarantor (735 ILCS 5/2-603(b) (West 2008)). The motion was granted, without prejudice.

¶ 12 Citizens filed an amended complaint stating three separate counts against each guarantor. Count II was against Hofmann. Hofmann moved to dismiss that count based on the statute of frauds. The trial court denied his motion.

¶ 13 Shortly thereafter, Citizens filed an amendment to the amended complaint, which repled count II against Hofmann. The amendment did not adopt or incorporate any part of the prior complaints. The amendment alleged the same facts as the prior complaints, removed the allegation that the agreement to repay was “modified,” and added an allegation that there were "temporary waivers and oral agreements" involving the payment terms of the promissory note.

¶ 14 In addition, the amendment no longer alleged that Games Management defaulted based on the modified agreement. Instead, it alleged that Games Management was in default on the 2004 promissory note by its failure to pay the May 1, 2008, payment of $37,485.82, and that Hofmann was liable pursuant to the written guaranty.

¶ 15 Hofmann moved to dismiss count II of the amendment, which the trial court denied. He then filed an answer to count II and asserted the affirmative defense of promissory estoppel. Hofmann also sought leave to allow a supplemental deposition of Schwegel based on the "newly pled" allegations in the amendment to the amended complaint. The trial court denied Hofmann's requests and granted summary judgment in the bank's favor in the amount of $2,803,491.25.

¶ 16 ANALYSIS

¶ 17 I

¶ 18 Hoffman claims that the trial court erred in refusing to dismiss Citizens's amendment to the amended complaint because it is based on an oral loan agreement that cannot be performed within one year.

¶ 19 The Frauds Act provides:

> "No action shall be brought *** whereby to charge the defendant upon any special promise to answer for the debt, default or miscarriage of another person *** or upon any agreement that is not to be performed in the space of one year from the making thereof, unless the promise or agreement upon which action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith." 740 ILCS 80/1 (West 2008).

¶ 20 The act requires that an agreement sued upon be in writing. In this case, Citizens's breach of contract claim in the amendment to the amended complaint is based on the 2004 guaranty signed in conjunction with the original loan. Although the guaranty has a performance date that extends beyond one year, it is a written agreement signed by the guarantor, Hofmann. There is no violation of the statute of frauds.

¶ 21 II

¶ 22 Hofmann argues that the trial court erred in granting summary judgment in Citizens's favor because questions of fact exist as to the terms of the parties' modified loan agreement and whether the bank established a contract based on those terms.

¶ 23 Summary judgment is appropriate where the pleadings, affidavits, depositions, admissions and exhibits on file, when viewed in the light most favorable to the nonmovant, reveal that no genuine issue of a material fact exists and that the movant is entitled to judgment as a matter of law. *Busch v. Graphic Color Corp.*, 169 Ill. 2d 325 (1996). We review the entry of summary judgment *de novo*. *Id.* at 333.

¶ 24 In construing a contract, we must interpret the unambiguous terms as written. *BA Mortgage & International Realty Corp. v. American National Bank & Trust Co. of Chicago*, 706 F. Supp. 1364 (N.D. Ill. 1989). In a contract of guaranty, a waiver of all defenses is enforceable under Illinois law. *Bank of America, N.A. v. 108 N. State Retail LLC*, 401 Ill. App. 3d 158 (2010). When waivers contained in a guaranty are clear and unambiguous, Illinois courts consistently enforce them. *Id.* at 172.

¶ 25 Hofmann argues that the breach and amendment to the amended complaint are based on the oral modifications, which he claims cannot be established as a matter of law. In the

original complaint and the amended complaint, Citizens alleged a breach of the modifications to the promissory note. However, after several motions, Citizens filed an amendment to the amended complaint, which alleged a breach of the promissory note and the guaranty. While the amendment did mention subsequent oral waivers and verbal agreements, it no longer based a claim for relief on those modifications.

¶ 26 As a result, our analysis of the summary judgment issue is based on a plain reading of the promissory note and the guarantee. In this case, Games Management executed a note for a loan with the bank in 2004, and Hofmann signed a guaranty in which he agreed to be liable in the event Games Management defaulted on the loan. Under the terms of the loan agreement, a payment was due on May 1, 2008. No one disputes that the May 1, 2008, payment was not made. Thus, there is no genuine issue of fact regarding the default; Games Management defaulted on the note, and, as a guarantor, Hofmann was responsible for the debt. There also is no genuine issue of fact as to whether Hofmann breached the guaranty by failing to pay the indebtedness; Hoffman stated that no payments were made after January 2008. Thus, as a matter of law, the bank is entitled to judgment based on the unambiguous terms of the written guaranty.

¶ 27 III

¶ 28 Hofmann argues that the trial court erred in denying summary judgment based on his affirmative defense of promissory estoppel. Specifically, Hoffman argues that the trial court erred in finding that no question of fact exists as to whether Citizens made an unambiguous promise to modify the terms of the promissory note.

¶ 29 Section 2 of the Credit Agreements Act states that "[a] debtor may not maintain an

action on or in any way related to a credit agreement unless the credit agreement is in writing *** and is signed by the creditor and the debtor." 815 ILCS 160/2 (West 2008). The act also provides that any oral modification or forbearance does not give rise to a claim, counterclaim, or defense by a debtor. 815 ILCS 160/3 (West 2008). A guaranty falls within the statutory definition of a credit agreement and is governed by the act. *Bank One, Springfield v. Roscetti*, 309 Ill. App. 3d 1048 (2000).

¶ 30 Here, Hofmann's defense of promissory estoppel is based on the bank's oral agreements to extend and reschedule the terms of payment under the loan. Those agreements were never reduced to writing and signed by both parties. Since the modifications upon which Hofmann's defense is based are not in writing, his affirmative defense is barred by the Credit Agreements Act and was properly dismissed by the trial court.

¶ 31 IV

¶ 32 Hofmann also claims the trial court erred in denying his request to depose Schwegel a second time because Citizens's amendment included allegations and theories that had not been raised before. Specifically, Hofmann claims that another deposition is necessary because the earlier complaints did not contain "any allegations of temporary waivers, oral agreements, and/or a combination thereof."

¶ 33 Trial courts have broad discretionary powers to insure fair and orderly trials and can restrict pretrial discovery where probative value is lacking. *People ex. rel. Illinois State Dental Society v. Norris*, 79 Ill. App. 3d 890 (1979). A court should deny a discovery request where there is insufficient evidence that the request is relevant or will lead to

relevant evidence. *Mistler v. Mancini*, 111 Ill. App. 3d 228 (1982). A "fishing expedition" conducted with the hope of finding something relevant is properly refused in the exercise of the court's discretion. *Fabiano v. City of Palos Hills*, 336 Ill. App. 3d 635 (2002).

¶ 34 Here, no new facts or evidence exist that would require additional discovery, only a new legal theory of recovery. The bank's new legal theory relies on the written guaranty and the note. Both of those documents were previously disclosed to Hofmann. Thus, another deposition of Schwegel would not lead to any relevant evidence. Moreover, the first deposition of Schwegel was, as the trial court noted, a detailed inquiry that "covered completely" the relevant issues. Accordingly, the trial court did not abuse its discretion in denying a second deposition.

¶ 35 CONCLUSION

¶ 36 The judgment of the circuit court of Peoria County is affirmed.

¶ 37 Affirmed.