STATE OF MICHIGAN

COURT OF APPEALS

PETER R. MORRIS,

Plaintiff/Counter Defendant-Appellant,

v

COMERICA BANK,

Defendant/Counter Plaintiff-Appellee.

UNPUBLISHED
August 12, 2004

No. 245563
Wayne Circuit Court
LC No. 00-013298-CZ

Before: Cavanagh, P.J., and Jansen and Saad, JJ.

PER CURIAM.

Plaintiff Peter Morris appeals as of right, challenging the trial court's orders granting defendant Comerica Bank's motions for summary disposition pursuant to MCR 2.116(C)(8) and (10) on all three counts of plaintiff's complaint, and the court's judgment awarding defendant $1,082,968.70 on its countercomplaint to enforce a personal guaranty. We affirm the trial court's orders granting defendant summary disposition of plaintiff's claims, and also affirm the judgment amount of $1,082,968.70 in favor of defendant on its counterclaim, but remand for recalculation of interest on the judgment as provided in MCL 600.6013(6) and (8).

This case arises out of loan agreements between Success Holdings L.L.C. ("Success") and Comerica Bank-Illinois ("Comerica-Illinois"), an Illinois banking corporation whose parent company was Comerica, Incorporated, a bank holding company chartered in Delaware. Defendant Comerica-Detroit ("Comerica Bank"), a Michigan banking company, is a separate wholly-owned subsidiary of Comerica, Incorporated. Plaintiff was a former officer and shareholder of Success.

In 1994, Success entered into three loan agreements with Comerica-Illinois totaling $7 million, comprised of two term loans of $3 million dollars each and one revolving loan of $1 million dollars. While Success had other shareholders, plaintiff was principally involved in dealing with Comerica Bank-Illinois. Shortly thereafter, Success defaulted on the loans. By March 1995, Comerica-Illinois became concerned about its ability to collect its debt from Success. After the defaults were declared, Comerica-Illinois and Success began workout negotiations regarding the loans. Eventually, on December 26, 1995, Comerica-Illinois and Success executed a "standstill agreement" to enable Success to raise capital within a six-month period and to satisfy its indebtedness to Comerica-Illinois.

As part of the workout, plaintiff agreed to personally guarantee Success' debt to Comerica-Illinois in the amount of $947,968.70. In exchange, Success was permitted to draw the same amount from its revolving line of credit with Comerica-Illinois.

Subsequently, on August 1, 1996, Comerica, Incorporated sold Comerica-Illinois to ABN Amro, Inc., the parent company of LaSalle Bank. As part of the transaction, LaSalle Bank refused to purchase poorly performing assets and loans, including the Success loans. As a result, the Success loans were assigned from Comerica-Illinois to Comerica, Incorporated, which, in turn, assigned them to defendant.

Eventually, Success filed for bankruptcy. After Success filed for bankruptcy, defendant alleged that Success owed it over $5 million dollars and that plaintiff owed it nearly $1 million dollars under the guaranty that was assigned to defendant.

During this time, the parties attempted to negotiate a compromise of plaintiff's personal guaranty with defendant, exchanging several drafts of a proposed settlement agreement. On February 18, 2000, Robert Diehl, Jr., defendant's attorney, sent a draft of a proposed agreement to plaintiff's attorneys. The cover letter accompanying this draft agreement stated:

> Enclosed is a revised agreement. It is marked from the last draft (I think that Mr. Ehrens has an earlier draft). Also enclosed is a clean copy. The agreement remains subject to Comerica Bank's review and approval.

Diehl sent another letter and accompanying draft of a proposed agreement to plaintiff's attorneys on March 3, 2000, stating, in pertinent part:

> Enclosed is a revised settlement agreement. The revisions are marked. Please note that a breach of Morris' indemnity responsibility, if not cured, will permit the Bank to collect the full guaranty amount. If the Bank is required to sue Mr. Morris, he does not get the $450,000 discount.
>
> Also enclosed is an unmarked copy of the settlement agreement.
>
> The Bank's deadline for Mr. Morris to execute the agreement and pay the $50,000 first installment is March 17, 2000.

This draft agreement contained a blank signature line for an employee of defendant to sign.

The parties' attorneys continued negotiations over the terminology of the agreement to compromise plaintiff's personal guaranty. In a letter dated March 21, 2000, Diehl stated:

> I have revised the agreement to your letter dated March 18, 2000. The revisions are marked. The revised agreement is subject to review and approval of Comerica Bank. The deadline for execution and delivery of the agreement and payment on the initial installment is March 24, 2000.

Thereafter, in a letter dated March 22, 2000, plaintiff responded to Diehl's letter, stating:

> As discussed, enclosed please find, as per our settlement agreement, the first payment of $50,000.00 dated Friday, March 24, 2000.
>
> In addition, you will find two copies of the executed Warrant Authorizing Confession of Judgement and two copies of the executed Settlement Agreement.

Defendant subsequently returned both the settlement agreement and plaintiff's check without signing the settlement agreement.

On April 25, 2000, plaintiff filed a three-count complaint against defendant seeking damages and declaratory relief for "promissory fraud" (count I), "impairment of rights and breach of covenant of good faith and fair dealing" (count II), and "specific enforcement of settlement" (count III). Defendant filed its answer and a counterclaim seeking to enforce plaintiff's guaranty. Defendant subsequently amended its answer to add the affirmative defense of the statute of frauds.

Defendant thereafter filed separate motions for summary disposition on each of plaintiff's claims. After taking the motions under advisement, the trial court entered separate orders on July 31, 2002, granting each of defendant's motions.

Immediately thereafter, on August 1, 2002, defendant moved for summary disposition of its counterclaim to enforce plaintiff's personal guaranty under MCR 2.116(C)(10). The motion was granted. The court thereafter awarded defendant a judgment in the amount of $947,968.70, plus costs and attorney fees in the amount of $135,000, for a total judgment amount of $1,082,968.70. The judgment specified that "[i]nterest shall accrue on the judgment from the date of filing of the Complaint until the judgment is satisfied at the statutory rate of 12% per annum, compounded annually." This appeal followed.

I. Dismissal of Plaintiff's Claims

Plaintiff argues that the trial court erred in granting defendant summary disposition of each of his claims. We disagree.

A. Standard of Review

A trial court's decision on a motion for summary disposition is reviewed de novo. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). Summary disposition against a claim may be granted on the ground that the opposing party has failed to state a claim on which relief can be granted. MCR 2.116(C)(8); *Horace v Pontiac*, 456 Mich 744, 749; 575 NW2d 762 (1998); *Morris & Doherty, PC v Lockwood*, 259 Mich App 38, 42; 672 NW2d 884 (2003). The motion should be granted only when the claim is so clearly unenforceable as a matter of law that no factual development could possibly justify a right of recovery. *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999). A motion for summary disposition under MCR 2.116(C)(10) tests whether there is factual support for a claim. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998); *Mino v Clio School Dist*, 255 Mich App 60, 67; 661 NW2d 586 (2003). When deciding a motion under MCR 2.116(C)(10), a court must consider the pleadings, affidavits, depositions, admissions and other documentary evidence submitted by the

parties in the light most favorable to the nonmoving party. *Ritchie-Gamester v Berkley*, 461 Mich 73, 76; 597 NW2d 517 (1999).

B. Governing Law

Counts I and II of plaintiff's complaint arise out of the standstill agreement, which contains a choice of law provision that states:

> This Agreement has been executed, issued, delivered and accepted in, and shall be deemed to have been made under and shall be governed by and construed in accordance with, the internal laws of the State of Illinois.

Because plaintiff's counts I and II arise under the standstill agreement, they are therefore governed by Illinois law. Conversely, plaintiff's count III arises out of the negotiations between plaintiff and defendant to compromise plaintiff's personal guaranty. This claim is not subject to a contractual choice of law provision and, therefore, is governed by Michigan law.

C. Plaintiff's Count I

The trial court properly granted defendant summary disposition on count I of plaintiff's complaint alleging promissory fraud. Defendant was not a party to the standstill agreement and had no obligations under that agreement, inasmuch as the Success loans were not assigned to defendant until after the standstill agreement expired, with Success in default for failing to make the required payments.

In *Cramer v Ins Exchange Agency*, 174 Ill 2d 513; 675 NE2d 897, 905 (1996), the Illinois Supreme Court identified the elements of a fraud claim as follows:

> (1) a false statement of material fact; (2) the party making the statement knew or believed it to be untrue; (3) the party to whom the statement was made had a right to rely on the statement; (4) the party to whom the statement was made did rely on the statement; (5) the statement was made for the purpose of inducing the other party to act; and (6) the reliance by the person to whom the statement was made led to that person's injury.

As noted in *Bower v Jones*, 978 F2d 1004, 1011-1012 (CA 7, 1992)

> Promissory fraud is generally not actionable in Illinois, but there is an exception to this rule "where the false promise or representation of intention of future conduct is the scheme or device to accomplish the fraud." *Steinberg v Chicago Medical School*, 69 Ill 2d 320; 371 NE2d 634, 641; 13 Ill Dec 699 (Ill, 1977). . . . The scheme exception applies where "a party makes a promise of performance, not intending to keep the promise but intending for another party to rely on it, and where the other party relies on it to his detriment." *Concord Industries, Inc v Marvel Industries Corp*, 122 Ill App 3d 845; 462 NE2d 1252, 1255; 78 Ill Dec 898 (Ill App, 1984).

Although plaintiff contends that defendant or its employees were involved with the negotiations concerning the standstill agreement, there was no evidence that defendant made any representation to plaintiff regarding the standstill agreement. Moreover, plaintiff admitted in his deposition that he never had any substantive discussions with defendant's employees until after the standstill agreement was executed. Thus, plaintiff's promissory fraud claim must fail.

D. Plaintiff's Count II

Next, plaintiff argues that the trial court erred in granting defendant summary disposition of count II of plaintiff's complaint pursuant to MCR 2.116(C)(8). Plaintiff argues that he stated a viable cause of action for breach of a covenant of good faith under ¶ 10 of the standstill agreement. Plaintiff raises this particular argument for the first time on appeal. In the trial court, plaintiff alleged that count II was based upon an alleged breach of a duty of good faith and fair dealing under the Uniform Commercial Code, § 1-203, not the express terms of the standstill agreement. Because plaintiff never alleged a claim based on ¶ 10 of the standstill agreement below, this issue is waived. *Napier v Jacobs*, 429 Mich 222, 227; 414 NW2d 862 (1987); *Blake v Consolidated Rail Corp*, 176 Mich App 506, 520; 439 NW2d 914 (1989).

E. Plaintiff's Count III

Plaintiff also argues that the trial court erred in granting defendant summary disposition of count III of plaintiff's complaint under MCR 2.116(C)(8). Count III of plaintiff's complaint sought specific enforcement of a settlement agreement to compromise plaintiff's personal guaranty, which was part of a financial accommodation that Comerica-Illinois entered into with Success. The evidence demonstrates that the parties entered into negotiations to settle plaintiff's liability of $947,968.70, plus costs and expenses, for a reduced amount of $500,000, to be paid in installments. Although draft agreements were prepared and exchanged, a final agreement was never executed. The trial court granted defendant's motion for summary disposition on the basis that the alleged settlement agreement was unenforceable under the statute of frauds, MCL 566.132(2), because there was no signed, written agreement evidencing a compromise.

Plaintiff contends that a letter written by defendant's attorney, dated March 3, 2000, was sufficient to satisfy the statute of frauds, thereby entitling him to specific enforcement of the settlement agreement. We disagree. Plaintiff's guaranty is part of a financial accommodation that Comerica-Illinois entered into with Success. The proposed compromise agreement would modify that financial accommodation because it would have settled plaintiff's liability in the amount of $947,968.70, plus costs and expenses, for a reduced amount of $500,000, to be paid in installments. Because the proposed agreement involves a promise and commitment of the type prescribed in MCL 566.132(2), it is not enforceable unless it is in writing and signed by an authorized representative of defendant. *Crown Technology Park v D & N Bank, FSB*, 242 Mich App 538, 549-550; 619 NW2d 66 (2000). The undisputed evidence discloses that the proposed agreement was never signed by defendant bank. Therefore, the alleged agreement is unenforceable under MCL 566.132(2), and plaintiff's claim for specific performance of the agreement was properly dismissed by the trial court.

II. Defendant's Counterclaim

Plaintiff next argues that the trial court erred in granting defendant's motion for summary disposition of its counterclaim to enforce plaintiff's personal guaranty. Resolution of this claim hinges on whether plaintiff waived a violation of the covenant of good faith and fair dealing as a defense to the guaranty. The guaranty agreement provides, in pertinent part:

> The undersigned unconditionally and irrevocably waive(s) each and every defense and setoff of any nature which, under the principles of guaranty or otherwise, would operate to impair or diminish in any way the obligation of the undersigned under this Guaranty, and acknowledge(s) that each such waiver is by this reference incorporated into each security agreement, collateral assignment, pledge and/or other document from the undersigned now or later securing this Guaranty and/or indebtedness, and acknowledge(s) that as of the date of this Guaranty no such defense or setoff exists. The undersigned acknowledge(s) that the effectiveness of this Guaranty is subject to no conditions of any kind.

We conclude that this language is binding and enforceable and, therefore, the trial court properly granted defendant's motion for summary disposition of its counterclaim to enforce the guaranty.

Defendant's counterclaim is governed by Illinois law pursuant to a provision in the guaranty agreement providing, "THIS GUARANTY SHALL BE GOVERNED BY AND CONSTRUED IN ACCORDANCE WITH THE LAWS OF THE STATE OF ILLINOIS." Under Illinois law, guaranty agreements containing waivers of all defenses, including the duty to act in a commercially reasonable manner, are enforceable. See *Chemical Bank v Paul*, 244 Ill App 3d 772, 781; 614 NE2d 436 (1993) (noting also that "a covenant of good faith and fair dealing is implied into every contract, absent express disavowal"); *Lincoln Park Fed Sav & Loan Ass'n v Carrane*, 192 Ill App 3d 188, 192-193; 548 NE2d 636 (1989).[1] In addition, the United States District Court for the Northern District of Illinois has interpreted Illinois law in this way. See *National Acceptance Co v Wechsler*, 489 F Supp 642, 647 (ND Ill, 1980). Therefore, summary disposition of this claim was properly granted.

III. Statutory Interest

Finally, because the written guaranty does not contain a specified interest rate, we conclude that the trial court erred in determining that the twelve percent interest rate prescribed in MCL 600.6013(5) is applicable to this case. Although defendant contends that MCL 600.6013(5) is the proper subsection to apply because the standstill agreement contains specified interest rates, judgment was not entered on the basis of that instrument. Rather, the written guaranty was the instrument on which judgment was entered. Because the guaranty does not

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[1] It appears that the Illinois Supreme Court has never decided the question whether a guarantor may waive the duty of good faith or commercial reasonableness. See *AAR Aircraft & Engine Group, Inc v Edwards*, 272 F3d 468, 470 (CA 7, 2001).

contain a specified interest rate, statutory interest is to be calculated in accordance with MCL 600.6013(6) and (8). Accordingly, we reverse the trial court's judgment in part insofar that it provides for statutory interest at a rate of twelve percent and remand for recalculation of interest as prescribed in MCL 600.6013(6) and (8).

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Mark J. Cavanagh
/s/ Kathleen Jansen
/s/ Henry William Saad