2012 IL App (1st) 113712-U

SIXTH DIVISION
September 28, 2012

No. 1-11-3712

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

EL FUNDING PARTNERSHIP, an Illinois general partnership,	)	Appeal from the Circuit Court of Cook County.
v.	)	
ROBERT J. VOEGEL,	)	No. 10 L 2736
Defendant	)	Honorable Raymond Mitchell,
(Joseph P. Cacciatore,	)	Judge Presiding.
Defendant-Appellant).	)	

JUSTICE HALL delivered the judgment of the court.

Presiding Justice Lampkin and Justice Garcia concurred in the judgment.

O R D E R

¶ 1 Held: Release of one co-obligor on a promissory note did not discharge the other co-obligor where the terms of the release and the circumstances surrounding its execution established the parties' intention not to release the other co-obligor.

¶ 2 Plaintiff El Funding Partnership (EFP) filed a complaint for breach of contract against defendant Joseph P. Cacciatore and Robert J. Voegel seeking payment on a promissory note. Plaintiff EFP entered into a settlement and release agreement with Mr. Voegel and dismissed him from the lawsuit. Following a bench trial, the trial court entered judgment in favor of plaintiff EFP and against defendant Cacciatore and awarded plaintiff EFP attorney fees.

¶ 3 Defendant Cacciatore appeals from the judgment. The sole issue on appeal is whether the release of Mr. Voegel from liability on the promissory note also released defendant Cacciatore from liability on the note. We hold that plaintiff EFP's release of Mr. Voegel did not release defendant Cacciatore from liability under the promissory note and affirm the judgment of the trial court.

¶ 4 BACKGROUND

¶ 5 On July 15, 2008, defendant Cacciatore and Mr. Voegel executed a secured promissory note in favor of plaintiff EFP in the amount of $210,000. The note was secured by collateral consisting of the following: the assignment of the beneficial interest in a deed of trust held by C&V Investments, LLC, which deed was collateralized by a property known as Windmill Corporate Center (Windmill) in Las Vegas, Nevada; a security interest in 100% of the shares of LJBV, Ltd., the 100% beneficiary of a land trust and the legal owner of real property located at 1244-1256 Rand Road, Des Plaines, Illinois; and a mortgage collateralized by real property located at 36 West Randolph, Chicago, Illinois. Under the terms of the note, the liability of

defendant Cacciatore and Mr. Voegel was joint and several.

¶ 6 After several months of nonpayment by defendant Cacciatore and Mr. Voegel, plaintiff EFP sent a notice of default, but no further payments were received. On March 3, 2010, plaintiff EFP filed suit for breach of contract against defendant Cacciatore and Mr. Voegel, seeking $256,500, the amount due in principal and interest on the promissory note, and attorney fees.

¶ 7 On July 14, 2010, plaintiff EFP filed a motion to dismiss Mr. Voegel from the lawsuit. The motion alleged that Mr. Vogel had not been served with process, had not answered or otherwise appeared in the suit. The motion further alleged that, following the filing of the lawsuit, plaintiff EFP and Mr. Voegel had entered into a settlement agreement. Under the terms of the agreement, plaintiff EFP would release Mr. Voegel from his liability on the promissory note and dismiss him from the suit. The motion further alleged that Mr. Voegel had completed those obligations. On July 22, 2010, the trial court granted the motion and dismissed Mr. Voegel from the suit with prejudice.

¶ 8 Defendant Cacciatore filed an answer to the complaint and an affirmative defense. He maintained that the unconditional release of Mr. Voegel served to release defendant Cacciatore from liability under the promissory note.

¶ 9 The case proceeded to a bench trial against defendant Cacciatore. The parties stipulated to the facts, and the trial court found in favor of plaintiff EFP and against defendant Cacciatore. The trial court denied defendant Cacciatore's motion to reconsider and vacate the judgment and awarded attorney fees to plaintiff EFP. This appeal followed.

¶ 10 ANALYSIS

¶ 11 Defendant Cacciatore contends that the trial court erred when it failed to apply the common law rule that the unconditional release of one co-obligor, without an express reservation of rights, releases the remaining co-obligors.

¶ 12 I. Standard of Review

¶ 13 When reviewing a judgment following a bench trial, the court determines whether the judgment is against the manifest weight of the evidence. *Brynwood Co. v. Schweisberger*, 393 Ill. App. 3d 339, 351 (2009). Where, as in this case, the facts are undisputed, a question of law is presented, which we review *de novo*. *Fields v. Schaumburg Firefighters' Pension Board*, 383 Ill. App. 3d 209, 210 (2008). A release is a contract, and the court reviews questions of law involving the construction or interpretation of a contract *de novo*. *Farmers Automobile Insurance Ass'n v. Wroblewski*, 382 Ill. App. 3d 688, 696 (2008).

¶ 14 II. Discussion

¶ 15 Section 50 of the Common Law Act provides that English common law "prior to the fourth year of James the First," with certain exceptions not applicable here, "shall be the rule of decision, and shall be considered as of full force until repealed by legislative authority." 5 ILCS 50/1 (West 2010). At common law, a full release of one of several joint tortfeasors released all, even if the release contained an express reservation of rights against the others. *Porter v. Ford Motor Co.*, 96 Ill. 2d 190, 193 (1983) (citing *Rice v. Webster*, 18 Ill. 331 (1857). The release rule was also applicable to co-obligors on a contract. *Cherney v. Soldinger*, 299 Ill. App. 3d 1006, 1070-71 (1998). While the enactment of the Joint Tortfeasor Contribution Act (740 ILCS 100/2

(West 2010)) abolished the common law rule as to certain tortfeasors, the rule otherwise survived. *Cherney*, 299 Ill. App. 3d at 1072. That, however, does not mean the common law release rule has remained unchanged since 1606.

¶ 16 As described by our supreme court, English common law was a system of rules and principles capable of expanding and adapting to meet the changes in society and commerce. *People ex rel. Keenan v. McGuane*, 13 Ill. 2d 520, 535 (1958). The court also recognized that the common law could be modified by "the decision of our courts." *Maksimovic v. Tsogalis*, 177 Ill. 2d 511, 518 (1997). In *Parmelee v. Webster*, 44 Ill. 405 (1867), the court modified the common law release rule to reflect the more reasonable rule that "where the release of one of several obligors shows upon its face, and in connection with the surrounding circumstances, that it was the intention of the parties not to release the co-obligors, such intention, as in the case of other written contracts, shall be carried out, and to that end the instrument shall be construed as a covenant not to sue." *Parmelee*, 44 Ill. at 413; see *Porter*, 96 Ill. 2d at 194-95 (noting that the court in *Parmelee* had rejected the strict common law rule in favor of the more reasonable rule).

¶ 17 In order to make that determination, we examine the language of the release and the circumstances leading to its execution. We are mindful that the purpose behind the rule is to prevent a claimant from receiving multiple recoveries for a single claim. *Diamond Headache Clinic, Ltd. v. Loeber Motors, Inc.*, 172 Ill. App. 3d 364, 369 (1988). However, it is not the purpose of the rule to release a co-obligor when a claim has been only partially settled between the claimant and another obligor if the claimant's intent is not to release the other obligor but to hold him responsible for the balance of the claim. *Diamond Headache Clinic, Ltd.*, 172 Ill. App.

3d at 369.

¶ 18 Under the terms of the settlement agreement, Mr. Voegel agreed to pay to plaintiff EFP his 50% portion of the principal of the loan amount (said amount to be reduced if Mr. Voegel fulfilled certain conditions) and 50% of the interest owed. The agreement also provided in pertinent part as follows:

> "8. In the event that 12 months (by March 15, 2011) after the signing of this Agreement, EFP i) is not successful in collecting the amounts due to EFP by [defendant Cacciatore] and has not been made whole by a) being paid by [defendant Cacciatore], or b) the completion of the transaction set forth above at 7[1], [a]nd ii) EFP has, in a commercially reasonable manner *** exhausted all of its remedies, at law and in equity, *** to collect all amounts due EFP from [defendant Cacciatore], then EFP may conduct a foreclosure action against Windmill on the Deed of Trust ***."

In the event the sale of Windmill resulted in a deficiency, the agreement provided that:

> "such deficiency will be strictly and exclusively enforced against [defendant Cacciatore], since [Mr. Voegel] by making the payment set forth in 1 above, *** has settled his total share of the loan obligations and liabilities with EFP."

The agreement further provided that in the event of foreclosure or sale of Windmill, plaintiff EFP was entitled to receive no more than "[defendant Cacciatore's] obligations under the Promissory Note (defined as 50% of the obligations set forth in the $210,000 Promissory Note for repayment of the Loan and interest" and reimbursement for both the costs of non-foreclosure-

[1]The sale of Windmill.

related lawsuits against defendant Cacciatore and for costs in bringing a foreclosure action) .

¶ 19 The above provisions make clear that plaintiff EFP did not intend that the release relieve defendant Cacciatore from liability under the promissory note. The agreement does not state that it is in full satisfaction and settlement of the promissory note. See *In re Estate of Constantine*, 305 Ill. App. 3d 256, 261 (1999). The agreement was for Mr. Vogel's 50% portion, not the full amount, owed on the promissory note. The agreement referred specifically to defendant Cacciatore and anticipated continued proceedings against him for satisfaction of his 50% portion owed on the promissory note. Moreover, proceeding against defendant Cacciatore would not result in a double recovery for plaintiff EFP. Plaintiff EFP's recovery was limited to the amount defendant Cacciatore owed on the promissory note and the collection expenses it incurred in recovering that amount.

¶ 20 The circumstances surrounding the execution of the release further support that the intent was not to release defendant Cacciatore from liability as to his 50% portion on the promissory note. Plaintiff EFP filed suit against both Mr. Voegel and defendant Cacciatore but was unable to serve Mr. Voegel. Nonetheless, plaintiff EFP reached an agreement with Mr. Voegel, which resulted in the execution of the written settlement and release agreement and the dismissal of Mr. Voegel from the suit. Plaintiff EFP did not dismiss the lawsuit against defendant Cacciatore, but continued its efforts to collect his 50% portion of the amount due on the promissory note. Both the language of the agreement and the circumstances surrounding the execution of the agreement evidenced that plaintiff EFP did not intend that its settlement with Mr. Voegel was in full satisfaction of all the money owed on the promissory note. See *Diamond Headache Clinic*, 172

Ill. App. 3d at 368 (a release will not be interpreted to defeat a valid claim which the parties never intended to be released or defeated).

¶ 21 Defendant Cacciatore's reliance on *Cherney* is misplaced. In *Cherney*, the plaintiffs settled their claim for breach of fiduciary duty against one defendant. In the plaintiffs' separate suit against the other defendant, the trial court denied the defendant's motion for summary judgment but certified the question whether the unqualified release of one defendant who had caused a monetary loss to the plaintiffs precluded a claim against the remaining defendant. On review, the court noted that the plaintiffs did not dispute that the release was unconditional and absolute as to the settling defendant. The court determined that only one loss was alleged by the plaintiffs and that it was identical to and inseparable from the loss alleged in the earlier suit. Therefore, the common law rule applied, and the unqualified release of the claims against one defendant released the remaining defendant. *Cherney*, 299 Ill. App. 3d at 1074.

¶ 22 Unlike *Cherney*, the release in the present case was not an unqualified one. The provisions of the release established that Mr. Voegel 's payment was not a complete satisfaction of the amount due it on the promissory note and that it would continue to pursue defendant Cacciatore for the remaining balance.

¶ 23 Moreover, unlike *Cherney*, the present case does not involve a single indivisible injury. In *Jones & Brown, Inc. v. W.E. Erickson Construction Co.,* 73 Ill. App. 3d 481 (1979), the appellate court discussed the difference between joint liability and joint and several liability in the context of a promissory note. The court stated as follows:

" 'Where the promise of several is joint, and not joint and several, *** a judgment

against one or more of several joint obligors or promissors, is a bar to another action upon the same contract against the same or other parties, for the contract is merged in the judgment and can no longer be made the subject of an action. [Citations.]

Where, however, the promise of several is both joint and several, the contract, in legal effect, is double, that is, equivalent to independent contracts, founded upon one consideration, for performance severally, and also for performance jointly, and distinct remedies upon the same instrument, treating it as a joint contract and as a several contract, may be pursued until satisfaction is *fully* obtained. [Citations.]' (Emphasis ours.)" *Jones & Brown, Inc.*, 73 Ill. App. 3d at 483 (quoting *Moore v. Rogers*, 19 Ill. 347, 348-49 (1857)).

¶ 24 Defendant Cacciatore argues that *Jones & Brown*, *Inc.* applies only to cases involving judgments. We disagree. While both *Jones & Brown*, *Inc.* and *Moore* dealt with judgments, not releases, the significance for the present case is those courts' recognition that joint and several liability under a contract created independent contracts, allowing a plaintiff to pursue "distinct remedies" until the amount owed was fully satisfied. Since under the terms of the promissory note, defendant Cacciatore and Mr. Voegel were jointly and severally liable, their default on the promissory note was the equivalent of the breach of two independent contracts, and therefore, unlike *Cherney*, two separate injuries resulted.

¶ 25 Defendant Cacciatore also argues that the trial court erred in relying on section 2-410 of the Code of Civil Procedure (735 ILCS 5/2-410 (West 2010)). Section 2-410 modified the common law doctrine of merger, by declaring that all joint contractual obligations were now joint

and several obligations, and now a judgment against fewer than all parties to an obligation no longer barred a subsequent action against those not included in the judgment. *Holmstrom v. Kunis*, 221 Ill. App. 3d 317, 324 (1991); 735 ILCS 5/2-410 (West 2010). Defendant Cacciatore notes correctly that statutes in derogation of the common law are strictly construed, and as section 2-410 refers only to judgments, the trial court erred in applying it to the release in this case.

¶ 26 As our review is *de novo*, we are not bound by the reasoning of the trial court. *Gonnella Baking Co. v. Clara's Pasta di Casa*, Ltd., 337 Ill. App. 3d 385, 388 (2003) (in *de novo* review, the appellate court is in the same position as the trial court). Moreover, our function as a reviewing court is to determine whether the lower court reached the correct result. *Argonaut-Midwest Insurance Co. v. Corrigan Construction Co.*, 338 Ill. App. 3d 423, 428 (2003). Even if we were to determine that section 2-410 applied only to judgments, our decision that plaintiff EFP's release of Mr. Voegel did not serve to release defendant Cacciatore is not based on the doctrine of merger but on the language of the release and the circumstances surrounding the execution of the release.

¶ 27 Finally, defendant Cacciatore argues that the trial court erred in relying on section 294 of the Restatement (Second) of Contracts (Restatement (Second) of Contracts §294 (1981)) because while section 294 rejected the common law rule, section 294 has not been enacted as the law in Illinois. However, as their decisions reflect, our courts have modified the common law rule governing the release of co-obligors. Now the determination of whether the release of one obligor releases any remaining obligors is based on the intent as expressed in the language of the

release when read in the light of the circumstances surrounding the transaction. See *Parmelee*, 44 Ill. at 413; *Estate of Constantine*, 305 Ill. App. 3d at 260-61; *Diamond Headache Clinic*, 172 Ill. App. 3d at 368.

¶ 28 We conclude that the intent of the release was not to release plaintiff EFP's claim against defendant Cacciatore. Therefore, the judgment in favor of plaintiff EFP and against defendant Cacciatore was correct.

¶ 29 CONCLUSION

¶ 30 The judgment of the trial court is affirmed.

¶ 31 Affirmed.