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IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT

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BCL CAPITAL FUNDING, LLC, as assignee of First American Bank,	)	Appeal from the Circuit Court of Du Page County.
	)	
Plaintiff-Appellee,	)	
	)	
	)	
v.	)	No. 11-CH-4152
	)	
KINGLAKE, INC., KINGBROOK, INC., KINGBRIDGE 2130, INC., KINGBRIDGE 511, INC., DUPAGE CENTRAL PARK FOR BUSINESS ASSOCIATION, UNKNOWN OWNERS, and NONRECORD CLAIMANTS,	)	
	)	
Defendants	)	Honorable Bonnie M. Wheaton,
(Christopher E. King, Defendant-Appellant).	)	Judge, Presiding.

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JUSTICE HUTCHINSON delivered the judgment of the court.  
Justices Jorgensen and Hudson concurred in the judgment.

**ORDER**

¶ 1 *Held:* The trial court erred in denying defendant's motion for restitution of payment on a subsequently-reversed judgment: defendant established that he borrowed the judgment amount from a lender that paid it directly to the judgment creditor, and, although he borrowed the amount, it was due to him upon the judgment's reversal.

¶ 2 First American Bank (Bank), filed a complaint in the circuit court of Du Page County against five affiliated corporations to foreclose mortgages on commercial real estate owned by four of the corporations and to enforce the fifth corporation's guaranty of the mortgage debt. Christopher E. King, who was alleged to be the "principal and owner" of each of the corporate defendants, was joined as a defendant for claims seeking to enforce his personal guaranty of the mortgage debt. In a prior appeal, *First American Bank v. Kinglake, Inc.*, 2013 IL App (2d) 120762-U (*Kinglake I*), we reversed a judgment against King in the amount of \$60,333.23. That judgment was entered as a sanction after the trial court found King to be in direct civil contempt of court for disobeying an order appointing a receiver with authority to collect rents from tenants occupying the mortgaged premises. On remand, King filed a motion for disgorgement of the funds paid to the Bank on the contempt judgment. The trial court denied the motion. After the trial court denied King's motion to reconsider, he brought this appeal. We reverse and remand.

¶ 3 On August 29, 2012, while *Kinglake I* was pending, BCL Capital Funding, LLC (BCL), filed a motion in the trial court to substitute itself for the Bank as plaintiff. In support of its motion, BCL stated that, two days earlier, it had "purchased the Loan Documents including the notes and mortgages that are the subject of this foreclosure suit from [the Bank] and [the Bank] assigned the mortgages that are the subject of this foreclosure suit to BCL." The agreement governing that transaction ("Note Purchase Agreement") specified a purchase price of \$9,450,000, payable at closing "by transfer of the immediately available funds that [BCL] has previously deposited into an account owned by [BCL] at [the Bank]." The trial court granted BCL's motion on September 5, 2012. BCL also moved for voluntary dismissal of the action, stating that it had entered into a forbearance agreement with "certain [d]efendants." In its motion, BCL sought leave to reinstate the foreclosure action in the event of a default under the

terms of the forbearance agreement. On October 16, 2012, the trial court granted the motion to dismiss.

¶ 4 On March 29, 2013, we issued our decision in *Kinglake I*. On June 5, 2013, King filed his motion for disgorgement of funds paid to the Bank on the contempt judgment prior to our reversal of that judgment. On June 19, 2013, King filed a “Memorandum of Fact Clarification” in which he explained that he had borrowed the funds from BCL; BCL had remitted the funds directly to the Bank; and King remained indebted to BCL for “the remaining balance of the loan.” In an affidavit submitted as an exhibit to the memorandum, King averred that he had borrowed money from BCL to pay the contempt judgment and that BCL had disbursed the funds directly to the Bank. King also submitted copies of: (1) an e-mail in which the Bank’s attorney, Miles V. Cohen, informed BCL’s attorneys of King’s motion to disgorge and of the date of the hearing on the motion; (2) a release of the contempt judgment executed on August 27, 2012, by the Bank’s executive vice president, John Olsen; and (3) records of electronic fund transfers in the total amount of \$9,510,000 to BCL’s account with the Bank.

¶ 5 In its written response to King’s motion for disgorgement, the Bank asserted that “neither King nor [BCL] \*\*\* satisfied the \*\*\* contempt judgment.” The Bank observed that the Note Purchase Agreement provided that “the Purchased Assets do not include [the Bank’s] right, title and interest in and to [the contempt judgment] or any proceeds thereof or recoveries therefrom, and the same shall remain the property of [the Bank].” The Bank also relied on an integration clause in the Note Purchase Agreement, providing that “[t]his Agreement embodies the entire agreement between the parties relative to the subject matter hereof, and there are no oral or written agreements between the parties, nor any representations made by either party relative to the subject matter hereof, which are not expressly set forth herein.” The Bank argued that, when

the Note Purchase Agreement was executed, the Bank and BCL were aware of the pending appeal from the contempt judgment, and BCL could have, but did not, “negotiate[] for a provision in the Note Purchase Agreement which [*sic*] addressed the [contempt] [j]udgment and the appeal.” More particularly, the Bank observed that “[t]he Note Purchase Agreement does not provide for a refund of any part of the purchase price in the event that the [contempt] [j]udgment was reversed.”

¶ 6 The Bank’s response to King’s motion was accompanied by an affidavit from Olsen, who averred, *inter alia*, that “[t]here was only one payment made by BCL to [the Bank]—a lump sum payment for the Loans.” According to the affidavit, “[t]here was no separate payment made by BCL to [the Bank] to satisfy the [contempt] [j]udgment.” In his written reply, King noted that, under the Note Purchase Agreement, BCL agreed to pay \$9,450,000 to the Bank. King contended that “the actual sum remitted by BCL was \$9,510,000.00 or \$60,000.00 greater than the agreed price.” According to King, this additional sum represented the funds that he borrowed from BCL to pay the contempt judgment.

¶ 7 The trial court decided the motion on the parties’ memoranda and oral arguments; no testimony was presented under oath. At the hearing on the motion, King’s attorney, George A. Hesik, argued that it was clear from the documents submitted in connection with the motion that BCL had paid the Bank \$60,000 more than was owed under the Note Purchase Agreement. According to the Bank’s attorney, Cohen, that did not matter. Without committing to the premise that there was any payment in excess of the amount specified in the Note Purchase Agreement, Cohen insisted that King had no right to any such overpayment. Cohen stated:

“What you have here is a third party, BCL, saying to [the Bank] we understand you want this whole King mess over and done with, you don’t want to have this judgment

to enforce[.] \*\*\* [W]e'll pay you some amount for this judgment. You go ahead and release the judgment.”

Cohen stressed that the Bank had received the funds from *BCL* rather than from King. According to Cohen, *BCL* “voluntarily agree[d] to pay some amount to [the Bank] on behalf of this judgment on behalf of King without qualification.” Cohen added that “if anybody has a problem, it would probably be *BCL*,” but *BCL* had chosen not to “participate in this motion in any way, shape or form.”

¶ 8 Cohen further observed that “the loan purchase agreement speaks for itself that the judgment was specifically excluded.” However, in apparent contradiction of the premise that the terms of the Note Purchase Agreement governed the transaction, Cohen argued that *BCL* paid the sum of \$9,510,000 (\$60,000 more than the amount set forth in the Note Purchase Agreement) as “a settlement and compromise between *BCL* and [the Bank].” Cohen argued:

“[The Bank] sold the loan documents for well less than what was on the books. And this is the final amount that they decided on. It doesn't matter how they got to that number. That's the amount that was decided on, and that's the amount that was paid.”

¶ 9 Thereafter, the parties and the trial court engaged in the following colloquy:

“THE COURT: Mr. King did not pay \$60,000 to anybody, did he?

MR. HESIK: Mr. King borrowed the money from *BCL* and *BCL* added it to the purchase price of the note or the notes. \*\*\* And immediately thereafter [the Bank] released the [contempt judgment] for the \$60,000. So it's illogical that that \$60,000 was not paid in satisfaction of the contempt judgment.

THE COURT: Mr. King didn't pay \$60,000 to [the Bank].

MR. HESIK: No. He borrowed the money from *BCL* and *BCL* paid it.

THE COURT: *But he did not obtain personally \$60,000 from BCL.*

MR. HESIK: Indirectly he did. And he ended up paying back that \$60,000 to BCL. He borrowed 60,000 from BCL to pay off the judgment.

\* \* \*

THE COURT: But [the Bank], he didn't pay \$60,000 to [the Bank].

MR. HESIK: No. BCL paid \$60,000 in excess of the contract price to [the Bank].

MR. COHEN: But you are right, your honor, *it wasn't King that made the payment. It was the third party BCL, and it was part of an entire global agreement.*

THE COURT: All right. It's not logical to make [the Bank] pay back \$60,000 to Mr. King when Mr. King did not pay [the Bank] for the judgment.

MR. HESIK: But he did.

THE COURT: No, he didn't.

MR. HESIK: He borrowed the \$60,000 from BCL and BCL remitted the entire amount, the contract price for the loan documents and the extra \$60,000. Why would BCL pay an additional \$60,000 to [the Bank]?

THE COURT: We would have to ask BCL that, but BCL is not a party to this motion anyway. I am going to deny the motion." (Emphases added.)

¶ 10 King filed a motion to reconsider. Neither party presented sworn testimony at the hearing on the motion. Cohen argued that BCL paid a total of \$9,450,000 for the assets it received under the Note Purchase Agreement; the contempt judgment remained the property of the Bank; and "no other payments ever came to [the Bank] other than the purchase price set forth in [the Note Purchase Agreement]." Cohen added:

“As part of this global agreement, and it is not reflected in the note purchase agreement, \*\*\* I don’t know if it was done at the table or what they decided, but it was agreed among the parties that as part and parcel of this note purchase agreement, [the Bank] would release the judgments [*sic*] which it had recorded[.] \*\*\*

\* \* \*

\*\*\* They all got released, so even though the note purchase agreement says [the Bank] was entitled to, you know, reserved all the rights, et cetera, et cetera, they released them as part and parcel of this full purchase. There is nothing in the [Note Purchase Agreement] about the parties acknowledge and agree that really \$60,000 of this 9,450 (*sic*) reflects or represents the amount of the [contempt] judgment, and should that judgment be reversed on appeal \*\*\* [the Bank] will refund that money to BCL or to King or something along those lines.”

¶ 11 In denying King’s motion to reconsider, the trial court found that King had not shown that the Bank had received \$60,000 more than the purchase price set forth in the Note Purchase Agreement. The trial court also indicated that “if they paid \$60,000 more, it would alter the terms of that note purchase agreement and I would need to know that \$60,000 excess payment was specifically to alter the terms of the agreement to purchase the judgment, and I don’t have that[.]”

¶ 12 We begin our analysis by noting the well-established rule that, “if a party has received benefits from an erroneous decree or judgment, he must, after reversal make restitution.” *Buzz Barton & Associates, Inc. v. Giannone*, 108 Ill. 2d 373, 382 (1985). As an appellate court in a sister state has held, in the case of a money judgment, the obligation to make restitution is the same whether the judgment creditor enforced the judgment by levy of execution or the judgment

debtor tendered payment to avoid execution of the judgment. *Orgeron v. Security Industrial Funeral Homes, Inc.*, 96-2127, p. 5 (La. App. 4 Cir. 2/26/97), 690 So. 2d 243 (“Implicit in the rules that authorize the execution of judgments appealed devolutively is the obligation of a judgment creditor to return voluntary payments made by the judgment debtor to avoid execution of the judgment during the pendency of a devolutive appeal if the judgment is reversed.”).

¶ 13 Here, King sought restitution by means of his motion for disgorgement of funds paid in satisfaction of the judgment. The proper standard of review of the trial court’s adverse ruling is a point of controversy between the parties. King contends that the issue on appeal is whether, on remand following our decision in his earlier appeal, the trial court complied with that decision. King contends that the issue is subject to *de novo* review. In contrast, the Bank argues that, although the trial court’s conclusions of law are reviewed *de novo*, its decision hinged on a finding of fact—that King had not satisfied the contempt judgment—that should not be disturbed unless against the manifest weight of the evidence.

¶ 14 King did not bring the motion pursuant to any particular provision of the Code of Civil Procedure (the Code) (735 ILCS 5/1-101 *et seq.* (West 2012)) or any other statute or Illinois Supreme Court Rule. To identify the standard of review applicable to the trial court’s ruling on King’s motion, “we must first determine what sort of motion it was.” *City of Chicago v. Ramirez*, 366 Ill. App. 3d 935, 945 (2006). In *Ramirez*, the eponymous defendant unsuccessfully moved to enforce a purported settlement agreement in a lawsuit by the City of Chicago seeking an order that an unsafe building be demolished or repaired. As a prelude to consideration of the merits of the trial court’s ruling on the motion, the *Ramirez* court offered the following observations:

“As noted above, the motion itself does not cite to any section of the Code of Civil Procedure or the supreme court rules as authority. On first appearance, this prehearing motion is best classified as a motion for summary judgment concerning the issue of settlement. In the motion, Ramirez was requesting that the trial court enter a new judgment more favorable to Ramirez (based on the alleged settlement agreement) prior to an evidentiary hearing or trial. An examination of the case law reveals that a motion to enforce a settlement agreement can be a motion unto itself, albeit one not expressly authorized by the Code of Civil Procedure or supreme court rules. [Citations.] *Like a summary judgment motion, the trial court’s decision to grant or deny enforcement of a settlement agreement made on the motion pleadings and attachments, without holding an evidentiary hearing, is reviewable de novo.* [Citation.] Also like a summary judgment motion, if the court determines that there is insufficient evidence to decide summarily whether a settlement agreement exists or what its terms are, the factual dispute regarding the settlement agreement may be resolved in a later evidentiary hearing or trial. [Citations.]” (Emphasis added.) *Id.* at 945-46.

¶ 15 King’s motion is amenable to similar treatment. Although he did not move to enforce a settlement agreement as such, the proceedings on his claim for restitution focused heavily on the scope and effect of the Note Purchase Agreement. Indeed, as previously discussed, the Bank argued emphatically in the trial court that the payment for which King sought restitution was part of a “global agreement” settling the Bank’s substantive claims in the underlying foreclosure proceedings. Thus, the question confronting the trial court in this case was, broadly speaking, whether King’s claim to any of the funds disbursed by BCL to the Bank was barred by a settlement agreement. To the extent that the trial court believed that the affidavits and other

documents submitted in support of or in opposition to King's motion were insufficient to decide the motion summarily, the trial court could have conducted an evidentiary hearing. See *id.* Because the trial court did not do so, however, our review is *de novo*. See *id.*

¶ 16 In seeking to uphold the trial court's order, the Bank initially argues that the trial court found that King had not satisfied the contempt judgment, which finding was not against the manifest weight of the evidence. However, because our review is *de novo*, the Bank's argument is unavailing. King submitted an affidavit averring that he had borrowed money from BCL to pay the contempt judgment and that BCL disbursed the funds directly to the Bank, which then released the judgment. The Bank offered no evidence to refute these statements. The Bank submitted an affidavit from Olsen stating that "[t]here was no *separate payment* made by BCL to [the Bank] to satisfy the [contempt] [j]udgment." (Emphasis added.) Olsen did not dispute, however, that the Bank had received \$60,000 in excess of what it was entitled to receive under the terms of the Note Purchase Agreement. Indeed, if there was ever any honest dispute about the total amount that BCL received, there no longer is: in its appellate brief, the Bank expressly agrees with the assertion in King's brief that "BCL remitted a single payment to [the Bank] in the sum of \$9,510,000.00 as established by e-mails between BCL, its attorney, and counsel for [the Bank]."

¶ 17 It makes no difference that the \$60,000 payment in excess of the amount set forth in the Note Purchase Agreement was disbursed by BCL directly to the Bank. It has been observed that "[p]ayment in a legal sense relates to a debt or an obligation of the party who pays. Payment may be made by the debtor or by another in his behalf. If it is paid by another, but with the debtor's money, it is payment by the debtor." *Krichbaum v. United States*, 138 F. Supp. 515, 518 (E.D. Tenn. 1956). As noted, the record shows that the \$60,000 was paid from the proceeds

of BCL's loan to King. The proceeds of a loan are considered to be the borrower's money for purposes of this rule. *Id.* Accordingly, the \$60,000 payment toward the contempt judgment is properly attributed to King (even though the funds were received from BCL), and King is entitled to restitution.

¶ 18 The Bank takes issue with the proposition that BCL paid “most of the [contempt judgment] amount to [the Bank] ‘on [King’s] behalf,’ ” arguing that it is “unsupported by the Note Purchase Agreement.” The Bank points out that “the Note Purchase Agreement *specifically excludes* the [contempt judgment] as part of the purchased assets.” (Emphasis in original.) The Bank thus argues that, “[i]f this Court were to order the Bank to disgorge a part of the funds it received from BCL *from the note purchase* to [King] (or to BCL or any other party), it would have the effect of interfering with the negotiated Note Purchase Agreement.” (Emphasis added.) The argument presupposes that the \$60,000 at issue was received “from the note purchase.” However, the Bank received \$60,000 more than the price set by the Note Purchase Agreement.

¶ 19 Although Cohen argued in the trial court that the Bank and BCL had agreed to increase the stated purchase price as part of a global settlement encompassing not only the mortgage debt but the contempt judgment—*i.e.* that the additional payment was “part and parcel” of the Note Purchase Agreement—Cohen submitted no proper evidence to substantiate the argument. See generally *Busch v. Graphic Color Corp.*, 268 Ill. App. 3d 763, 766 (1995), *aff’d*, 169 Ill. 2d 325 (1996) (comments of plaintiff’s attorney at hearing on summary judgment motion “were mere argument and did not raise a sufficient factual assertion to prevent the trial court from deciding the issue as a matter of law.”). In any event, the Note Purchase Agreement was a fully integrated contract; by its own terms it “embodie[d] the entire agreement between the parties relative to the

subject matter hereof.” The Note Purchase Agreement also expressly stated that “there are no oral or written agreements between the parties, nor any representations made by either party *relative to the subject matter hereof*, which are not expressly set forth herein.” (Emphasis added.) “The effect of integration is to ‘preclude[] evidence of understandings, not reflected in a writing, reached before or at the time of its execution which would vary or modify its terms.’ ” *Midwest Building Distributing, Inc. v. Lord & Essex, Inc.*, 383 Ill. App. 3d 645, 661 (2007) (quoting *J&B Steel Contractors, Inc. v. C. Iber & Sons, Inc.*, 162 Ill. 2d 265, 269 (1994)). Accordingly, the \$60,000 at issue cannot be considered part of the consideration for the assets that BCL purchased.

¶ 20 For the foregoing reasons we reverse the judgment of the circuit court of Du Page County and remand for entry of an order granting King’s motion for disgorgement.

¶ 21 Reversed and remanded with directions.