2011 IL App (4th) 101022-U

Filed 9/20/11

NO. 4-10-1022

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

WILLIAM M. O'NEILL,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Champaign County
RANDY SANDONE and MARY SANDONE,	)	No. 04L272
Defendants-Appellants.	)	
	)	Honorable
	)	Michael Q. Jones,
	)	Judge Presiding.

JUSTICE APPLETON delivered the judgment of the court.
Justices Pope and McCullough concurred in the judgment.

ORDER

¶ 1 *Held:* (1) The trial court did not err in granting summary judgment in favor of plaintiff based on defendants' failure to pay their promissory note. Plaintiff, as a member of the board of directors of defendants' employer, did not interfere with defendants' ability to perform their obligations under the note by voting not to pay defendants any sums due upon their separation from employment due to the corporation's inability to pay.

¶ 2 (2)The trial court did not err in dismissing with prejudice defendants' counterclaims on the basis that plaintiff cannot be held personally liable for the corporation's failure to pay defendants' their salaries and severance pay without proof that plaintiff acted in a manner that is illegal, oppressive, or fraudulent in voting to not pay defendants.

¶ 3 I. BACKGROUND

¶ 4 Plaintiff William O'Neill was a member of the board of directors of Argus Systems Group, Inc., a software company started by defendant Randy Sandone. In June 2001, Randy signed an employment agreement, which designated him as president and chief executive officer of Argus.

On May 1, 2002, Randy and his wife, defendant Mary Sandone, borrowed from O'Neill personally $50,000, the designated purpose of which was a "business expense." They both executed the note, pledging their promise to repay the debt at an interest rate of 6.5% on or before November 2, 2002. The note contained a confession-of-judgment provision, whereby it allowed, without service of process, O'Neill to obtain a judgment for the amount of unpaid principal, interest, collection costs, and attorney fees against Randy and Mary should they default. On November 2, 2002, O'Neill agreed to "renew" the note, extending its maturity date to May 1, 2003.

¶ 5 Meanwhile, on November 1, 2002, the Argus's board of directors voted to terminate Randy as president and CEO due to Argus's financial difficulties. Randy immediately filed a lawsuit (Champaign County case No. 02-L-272) against O'Neill and the other board members individually for failing to comply with Argus's bylaws by not securing two-thirds of the shareholders' votes before removing him from his position with Argus. On December 4, 2002, the board voted to freeze any payments purportedly due to Randy and Mary. Thus, Randy also alleged actions for tortious interference with an employment contract and tortious interference with a prospective economic advantage. He sought to recover the severance payments contemplated by his employment agreement.

¶ 6 Randy and Mary made no payments on the note to O'Neill, and on November 17, 2004, O'Neill filed a complaint against them (Champaign County case No. 04-L-272) seeking $56,933.17 as unpaid principal and interest, with interest accruing in the amount of $10.28 per day, plus attorney fees and costs. Randy and Mary filed a motion to consolidate this matter with the other lawsuit, to which Mary was not a party. In September 2005, the trial court allowed defendants' motion to consolidate.

¶ 7 In April 2007, the trial court, on Randy's complaint, granted the defendant individual directors' motions for summary judgment, finding the board's decisions to terminate Randy and to not pay him his severance pay based on Argus's financial inability to do so, were reasonable decisions. The court found that each board member, including O'Neill, was not personally liable for the causes of action Randy had alleged. Randy appealed. While the appeal was pending, O'Neill's attorney in the case *sub judice*, who was different from the attorney representing him in Randy's lawsuit, filed with this court an emergency motion to dismiss the appeal. O'Neill argued that the appeal was premature because not all issues had been resolved in the trial court. There still remained pending O'Neill's complaint against Randy and Mary, since the two lawsuits had been consolidated.

¶ 8 After considering the issues on review, this court affirmed the trial court's order granting the individual board members' motions for summary judgment. *Sandone v. Walz*, No. 4-07-0615 (March 7, 2008) (unpublished order pursuant to Supreme Court Rule 23). We also allowed Randy to amend his notice of appeal to reflect that the appeal had been brought pursuant to Supreme Court Rule 304(a) (210 Ill. 2d R. 304(a)), as one contemplating a final judgment that had not disposed of all claims in the action. Therefore, we affirmed the court's entry of summary judgment but remanded with directions to conduct further proceedings on O'Neill's pending action in case No. 04-L-272 against Randy and Mary. See *Sandone*, slip order at 17, No. 4-07-0615.

¶ 9 On remand, in November 2008, Randy and Mary filed an answer, affirmative defenses, and a counterclaim. In their answer, they admitted executing the note for the purpose of obtaining $50,000, not for personal benefit, but for that of Argus. They denied owing O'Neill any money as a result of the note for the following reasons–reasons listed as affirmative defenses. First,

Randy and Mary claimed they were entitled to a setoff from the amounts due them from Argus. Second, they claimed O'Neill had unclean hands in that he had prohibited Argus from paying Randy his salary or severance pay, an act which interfered with Randy's and Mary's ability to make any payments on the note.

¶ 10 Third, they claimed O'Neill's conduct of refusing to pay Randy and Mary estopped him from obtaining a judgment against them for their failure to pay. And finally, in the fourth affirmative defense, Randy and Mary claimed that, as employees and shareholders of Argus, they were protected parties pursuant to section 12.56 of the Business Corporation Act of 1983 (Corporation Act) (805 ILCS 5/12.56 (West 2008)). They claimed as protected parties, they were entitled to relief under the Illinois Wage Payment and Collection Act (Wage Act) (820 ILCS 115/1 through 15 (West 2008)), based on O'Neill's illegal, oppressive, or fraudulent conduct of not paying Randy or Mary their salaries and other sums due when Argus had the financial ability to do so. Randy and Mary claimed the business judgment rule did not apply because O'Neill's conduct was illegal, oppressive, or fraudulent.

¶ 11 For her counterclaim, Mary alleged O'Neill, as a director of Argus, owed her $6,357 in wages upon her termination on October 31, 2002. She claimed O'Neill caused Argus to refuse to pay her wages even though Argus was financially able to do so. She alleged a cause of action pursuant to section 14(a) of the Wage Act (820 ILCS 115/14(a) (West 2008)) (an employee who had not been paid wages or final compensation may file a civil action to recover amounts claimed due). She also alleged she has suffered emotional distress as a result of O'Neill's nonpayment. She sought $6,357 in damages, prejudgment interest in the amount of $2,160, an amount in excess of $50,000 for her emotional distress, costs, attorney fees, and authorization to seek punitive damages.

¶ 12 For his counterclaim, Randy alleged the same causes of action as Mary, claiming O'Neill owed him $63,991 in wages upon his termination on November 1, 2002. He sought $63,991 in damages, $21,780 in prejudgment interest, an amount in excess of $50,000 for his emotional distress, costs, attorney fees, and authorization to seek punitive damages.

¶ 13 In January 2009, O'Neill filed a motion to dismiss the counterclaims pursuant to sections 2-615 and 2-619 of the Code of Civil Procedure (735 ILCS 5/2-615, 2-619 (West 2008)) and a motion to strike the affirmative defenses. The trial court conducted a hearing in March 2009 on O'Neill's motions. After considering counsels' arguments, the court held that the doctrine of *res judicata* served to bar relitigation of any claim under the Wage Act as this court had previously determined that no such claim was viable under the facts of this case. The court granted O'Neill's motion to dismiss and motion to strike the first and fourth affirmative defenses (a claimed entitlement to a setoff and a claim under the Wage Act, respectively). The court allowed the second and third affirmative defenses to remain (a claim that O'Neill had unclean hands and a claim that he was estopped from obtaining a judgment based on his refusal to pay their salaries, respectively).

¶ 14 In October 2010, O'Neill filed a motion for summary judgment, claiming Randy and Mary had admitted executing the note, and that their claimed affirmative defenses were equitable remedies and did not serve to defend against O'Neill's action at law.

¶ 15 In November 2010, the trial court conducted a hearing on the motion for summary judgment. The court granted O'Neill's motion and entered judgment against defendants, finding as follows:

> "I don't think there's any dispute about Mr. Aeilts' [(O'Neill's attorney)] first premise which is the Plaintiff and the Defendants

> executed a note. There's no dispute about signature or anything like that. There's no dispute about the fact that the Defendants got their money. There's no dispute that they haven't paid it back. And, therefore, Plaintiff is entitled to summary judgment unless Defendants have available defense.
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> * * *
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> I believe the affirmative defenses alleged do not constitute legal defenses as to whether Plaintiff is entitled to judgment on the note."

The court reserved the issue of attorney fees but found no just reason to delay the enforcement of the judgment or appeal. This appeal followed.

¶ 16 II. ANALYSIS

¶ 17 Randy and Mary contend the trial court erred in granting O'Neill's motion for summary judgment. They claim the order was in error because there remained a genuine issue of material fact, namely whether O'Neill made it impossible for them to perform their obligations under the note by voting not to pay them their salaries or Randy's severance pay. O'Neill claims summary judgment was proper because the repayment of the note was not conditioned on any event. Randy and Mary claim O'Neill's interference with their contractual obligation to repay the note did not have to be explicitly set forth as a condition precedent within the body of the note.

¶ 18 A motion for summary judgment may be granted when the pleadings, depositions and affidavits reveal no genuine issue of material fact or controversy and the movant is entitled to judgment as a matter of law. See 735 ILCS 5/2-1005(c) (West 2010); *Webber v. Armstrong World*

Industries, Inc., 235 Ill. App. 3d 790, 795 (1992). In determining whether a genuine factual dispute or controversy exists, which would preclude granting summary judgment, the trial court is to consider the facts presented in a light most favorable to the nonmovant. *Bubb v. Evans Construction Co.*, 255 Ill. App. 3d 673, 676 (1993). We review *de novo* a trial court's grant of summary judgment. *Kleiss v. Bozdech*, 349 Ill. App. 3d 336, 349 (2004).

¶ 19 Randy and Mary contend O'Neill is not entitled to a judgment as a matter of law. They rely on the following principle to excuse their nonpayment:

> "Where one party to a contract shows that the other party has deliberately made it impossible for the contract to be performed by some act of his done prior to the time that performance was to be made or had, such act in law amounts to a prevention of performance. It is also the law that where one contracting party can show that the other prevented his performance of the contract, it is to be taken as *prima facie* true that he would have accomplished it if he had not been so prevented." *Levy & Hipple Motor Co. v. City Motor Cab Co.*, 174 Ill. App. 20, 25 (1912).

¶ 20 In *Levy*, the parties entered into a contract whereby the plaintiff was to provide taxi cab bodies to the defendant for a certain price. The defendant discovered the name of the company that was going to manufacture the cars for the plaintiff and purchased the cars directly from that company, then refusing to purchase any cars from the plaintiff. *Levy*, 174 Ill. App. at 22. The court awarded judgment to the plaintiff for the entire contract amount, holding that the plaintiff was prevented from performing the contract by defendant's conduct. *Levy*, 174 Ill. App. at 25. The First

District affirmed the trial court, holding as follows: "From the foregoing authorities may be deduced the rule that when one party stipulates that another shall do a certain thing he thereby impliedly obligates himself to do nothing which may hinder or obstruct that other in doing the thing agreed." *Levy*, 174 Ill. App. at 25.

¶ 21 Randy and Mary insist that they are excused from performing their obligations under the note because O'Neill made it impossible for them to do so and he is thereby estopped from claiming any sums due. We disagree. Other than Randy's and Mary's self-serving statements in their affidavits that O'Neill knew that they needed to be paid by Argus in order for them to pay him, nothing in the record indicates they entered into the contract with O'Neill while relying exclusively on their income from Argus to satisfy their obligation of repayment. In other words, nothing indicates that any party contemplated that Randy and Mary's continued employment and payment of a salary from Argus was a condition precedent to their repayment of the note to O'Neill. Randy's and Mary's explanation is logical, but it cannot serve as a legal defense to their contractual obligation in this case. First, O'Neill cannot be held personally responsible for Argus's board of director's decision not to pay Randy and Mary their severance pay and salaries. Randy and Mary contracted with O'Neill personally to borrow $50,000 in exchange for repayment of principal amount plus interest.

¶ 22 Second, nothing on the face of the note suggests that repayment was contingent upon Randy's and Mary's continued employment with Argus. The terms of the contract indicate only that O'Neill personally loaned Randy and Mary $50,000 for business expenses. We cannot read into a contract terms that do not appear on the face of the document. "[I]f a written contract between parties is clear and its language unequivocal then parol evidence may not be received by the trier

of fact to explain or expand upon its terms. On the other hand, if the language contained in the contract is ambiguous or silent as to essential terms then oral testimony may be properly admitted into evidence." *Farnsworth v. Lamb*, 6 Ill. App. 3d 785, 788 (1972). The source of income that will provide a payor the ability to satisfy his obligation to repay a note is not an "essential term" of a promissory note. See *Farmers State Bank v. Doering*, 80 Ill. App. 3d 959, 962 (1980) (the essential terms of a note are the express and absolute promise of signer to pay a specified person or order, or bearer, a definite sum of money at a specified time).

¶ 23 Without some indication to the contrary, O'Neill, in his personal capacity, did not interfere with Randy and Mary's performance of the contract. They executed a promissory note, promising to repay, with interest, the amount of $50,000 borrowed from O'Neill personally by a date certain. They defaulted on their obligation and are therefore, as a matter of law, liable for their breach. See *Tuttle v. Rose*, 102 Ill. App. 3d 865, 866-67 (1981) (in an action to recover an amount due on a promissory note, the plaintiff, after alleging nonpayment, need only demonstrate the existence of a valid note). Similarly, Randy and Mary's defense of estoppel fails as it relied on the claim of O'Neill's interference as well.

¶ 24 Randy and Mary also asserted the equitable affirmative defense of unclean hands to O'Neill's action at law. We note that this defense is generally not available to a contract cause of action. "The doctrine of unclean hands applies if a party seeking equitable relief is guilty of misconduct, fraud, or bad faith toward the party against whom relief is sought and if that misconduct is connected with the transaction at issue in the litigation. [Citation.] *** [T]he unclean hands doctrine bars only equitable remedies and does not affect legal rights." *Zahl v. Krupa*, 365 Ill. App. 3d 653, 658 (2006). Because O'Neill did not seek equitable relief against Randy and Mary, but the

legal remedy of money damages, the unclean-hands doctrine is not available to Randy and Mary to defeat his claim.

¶ 25 Based on the above, we conclude that the trial court did not err in entering a judgment in O'Neill's favor and against Randy and Mary for the amount due and remaining unpaid under the note. There was no connection under the terms of the note between Randy and Mary's employment with Argus and their obligation to repay the $50,000 loan they obtained from O'Neill personally. We affirm the entry of summary judgment in favor of O'Neill.

¶ 26 We further conclude that Randy and Mary's counterclaims fail as well. First, according to the Wage Act, corporate directors cannot be held individually liable to former employees of the corporation seeking renumeration for unpaid wages unless that director knowingly permits a violation of the Wage Act. 820 ILCS 115/14(a-5) (West 2008); *Andrews v. Kowa Printing Corp.*, 351 Ill. App. 3d 668, 679-80 (2004). A corporation's inability to pay negates a finding of a willful violation of the Wage Act. *Stafford v. Puro*, 63 F.3d 1436, 1441 (7th Cir. 1995).

¶ 27 Second, corporate directors are not liable for the corporation's obligations. *Willmschen v. Trinity Lakes Improvement Ass'n.*, 362 Ill. App. 3d 546, 551 (2005). This privilege is extended to those corporate officers or directors who act in accordance with their business judgment for the good of the corporation, even if it means their actions interfere with the corporation's contractual relations. *Swager v. Couri*, 77 Ill. 2d 173, 191 (1979). This principle is known as the business judgment rule. *Shaper v. Bryan*, 371 Ill. App. 3d 1079, 1087 (2007). Guided by these principles, this court has already determined that the individual directors of Argus, including O'Neill, are not individually liable to Randy for terminating his employment agreement or for the amounts he claims due pursuant thereto. *Sandone*, slip order at 11-12. The individual

directors exercised their discretion in good faith in voting to not pay Randy (or Mary) the amounts claimed due for the benefit of the corporation. As such, they individually are not liable to Randy or Mary for any amounts claimed due from Argus. We specifically held as follows: "the Board's votes on November 1, 2002, and December 4, 2002, were (1) privileged as an act performed on behalf of the corporation, (2) made on an informed basis, (3) without a malicious intent, and (4) in good faith–all qualities that cloak the Board's decisions with protection under the business judgment rule." *Sandone*, slip order at 15.

¶ 28 Though a decision based on a Wage-Act claim would not be barred as *res judicata*, as the same was not considered previously, nevertheless, such a claim fails on the same basis relied upon in our previous holding. As mentioned, O'Neill could be liable under the Wage Act only if he allowed a willful violation of the Wage Act to be perpetuated by Argus. Our holding that he and the other directors acted in good faith for the good of the corporation precludes an action under the Wage Act against O'Neill personally. See 820 ILCS 115/14(a-5) (West 2008). We previously held, and we continue to hold, that O'Neill's conduct did not constitute illegal, oppressive, or fraudulent conduct within the meaning of section 12.56(a)(3) of the Corporation Act (805 ILCS 5/12.56(a)(3) (West 2008)) (a shareholder may bring an action against a director of a corporation if he acted in a manner that "is illegal, oppressive, or fraudulent with respect to the petitioning shareholder"). O'Neill's conduct was protected by the business judgment rule as a decision made "on an informed basis, in good faith, and with the honest belief that the course taken was in the best interests of the corporation." *Ferris Elevator Co. v. Neffco, Inc.*, 285 Ill. App. 3d 350, 354 (1996). This applies to O'Neill's conduct as it relates to both Randy and Mary. Both are unable to state a cause of action against O'Neill personally based upon his conduct of voting against Argus paying them any wages

upon their separation from employment.

¶ 29 III. CONCLUSION

¶ 30 For the foregoing reasons, we affirm the trial court's judgment granting summary judgment in favor of O'Neill and entering an order dismissing Randy's and Mary's counterclaims.

¶ 31 Affirmed.