Rel: June 18, 2021

SUPREME COURT OF ALABAMA

OCTOBER TERM, 2020-2021

1190767

Martin Burdette

v.

Auburn-Opelika Investments, LLC

1190801

Auburn-Opelika Investments, LLC

v.

Martin Burdette

Appeals from Lee Circuit Court
(CV-19-900504)

STEWART, Justice.

Martin Burdette appeals from a judgment entered by the Lee Circuit Court ("the trial court") in favor of Auburn-Opelika Investments, LLC ("AOI"), regarding a dispute involving a promissory note entered into by the parties. AOI cross-appeals from the trial court's judgment denying its request for relief under the Alabama Litigation Accountability Act ("the ALAA"), § 12-19-270 et seq., Ala. Code 1975. We affirm the judgment.

Facts and Procedural History

In 2004, Martin Burdette and Susan Burdette, a married couple, formed AOI, with each owning 50% of the company. After its formation, AOI obtained a bank loan to purchase certain commercial property. In 2012, Martin and Susan sold property that they owned in Florida for $432,855. Martin and Susan agreed to use the proceeds from that sale, along with other funds, to make a loan to AOI so that it could pay off the bank loan. In May 2012, AOI executed a promissory note in which it agreed to pay Martin and Susan the principal sum of $489,000, with an interest rate of 5.75% ("the 2012 note").

In 2014, Martin and Susan divorced. Neither the 2012 note nor ownership of AOI was addressed in the divorce proceedings. In 2016, Martin and Susan had a disagreement regarding the management and operation of AOI, and Martin sued Susan. In June 2017, as part of those proceedings, Martin and Susan entered into a mediated settlement agreement wherein Susan agreed to pay Martin $560,000 in exchange for sole ownership of AOI ("the 2017 agreement"). The 2017 agreement provided, among other things, that the agreement was "intended to resolve all presently pending issues between Martin Burdette and Susan Burdette and is entered into in full and complete settlement of the above captioned lawsuit" and that the "agreement supersedes any prior understandings or agreements between the parties, whether or not the matters are covered in this agreement, except for the 2014 mediated settlement agreement" in the divorce proceedings. Susan paid Martin $50,000 in cash, and she executed a promissory note in favor of Martin in the amount of $510,000. That note was secured by a mortgage on the property owned by AOI. Susan later sold the property, and she paid the balance due on the note to Martin in full.

In August 2019, Martin sued AOI, asserting claims of breach of contract and unjust enrichment. Martin alleged that AOI had failed to pay Martin the amount owed under the 2012 note, which he asserted was $244,500. Martin sought $259,500.72, which included accrued interest, plus court costs, attorney fees, and additional interest. AOI filed an answer and asserted various affirmative defenses and filed a counterclaim seeking damages because, it asserted, Martin had commenced the action without substantial justification.

A trial was held on March 12, 2020. Martin testified that the 2017 agreement does not mention the 2012 note and that AOI was not a party to that agreement. Martin testified that he had been paid on his share of the interest on the 2012 note up until the 2017 agreement was entered into but that he had not received any payments since. Martin testified that he never agreed that the interest or principal payments to him on the 2012 note would stop after he and Susan entered into the 2017 agreement. Martin testified that he was still owed $244,500, which, he contented, amounted to his half of the debt owed by AOI on the 2012 note. Martin testified that he was never contacted by AOI or Susan regarding capitalizing the loan he and Susan had made to AOI. Martin acknowledged that he had accepted $560,000 as his value of half of AOI from Susan in 2017.

Robert Hudson, a certified public accountant, testified as an expert witness on behalf of Martin. Hudson testified that he had reviewed the 2012 note and the 2016 and 2017 federal tax returns of AOI, the 2017 agreement, and the 2017 promissory note from Susan to Martin. Hudson testified that the 2016 tax return showed an "outstanding loan to partners" of $489,000. Hudson further testified that nothing in the 2017 agreement would indicate that the 2012 note had been canceled or forgiven. Hudson testified that, in preparing the 2017 AOI tax return, he would have shown the 2012 note as a continuing loan from partners, unless he had been given further instructions. Hudson testified that the 2017 tax return showed that the 2012 note had been reclassified as equity or capital. Hudson explained that, typically, debt is repaid with interest payments while capital or equity does not necessarily have a promise of being repaid.

Hudson testified that, when Martin sold his 50% interest in AOI, the capitalization of the $244,500 debt owed to Martin increased Martin's basis by the amount of the reclassification and that, as a result, Martin paid fewer taxes. According to Hudson, if AOI had repaid the 2012 note, the amount paid to Martin would have been a tax-free return to Martin of the original principal amount but that, instead, the conversion of that debt to capital had saved Martin only $61,125 -- the maximum amount of federal taxes Martin would have had to pay. Hudson opined that the actual tax amount saved by Martin would have been less because the calculation of Martin's tax obligation would have also been based on other capital gains and losses. According to Hudson, a creditor's authorization is normally needed in order to convert a bona fide loan obligation into capital, but he also acknowledged that transferring what was a debt to Martin's capital account for the 2017 tax return was an acceptable general accounting practice.

Susan testified that, when she had agreed to pay to Martin $560,000 for his interest in AOI, that included all assets and liabilities of AOI, which included the debt owed under the 2012 note. Susan testified that, during the mediation, they had agreed that the value of AOI was around $1 million and that Martin had proposed that Susan pay $560,000 to acquire his half of AOI. Susan believed that, when they mediated the case, the payment to Martin of $560,000 included the $244,500 that he was owed, plus his equity in AOI. Susan acknowledged that Martin never approved converting the $244,500 to a capital account.

Jeff Hilyer, an attorney and certified public accountant, testified as Susan's expert witness. Hilyer testified that he had prepared AOI's tax returns and that Susan had represented to him that the 2017 agreement settled Martin's claims, that the amount of the 2012 note was no longer an obligation of AOI, and that, therefore, it was transferred from the category of "loans to the company" to the category of "capital contributed to the company." As a result, he said, Martin then had a capital increase equivalent to half the principal amount of the 2012 note.

Hilyer testified that it is reasonable to assume that an entity is worth the value of its underlying asset and that, in this case, AOI was worth the value of the real property that it owned. On direct examination by Susan's attorney, Hilyer testified to various calculations that he had done in determining whether Martin had received half the value of AOI and whether that included his half of the 2012 note:

> "[Hilyer:] [Martin] was given $560,000 in the settlement agreement. And I say on here, payment to note zero, so net to Martin would have been [$]560,000. Martin had a 50[%] interest in the entity. So we divide what Martin got by [.5] to get assumed net sale proceeds [$1,120,000]. The actual transaction in December of 2019 had a 6[%] sales commission. So if we apply the 6[%] sales commission, you divide by [.94], you get an adjusted sales price of $1,191,500, and that's rounded to the nearest hundred dollars.
>
> "....
>
> "[Hilyer:] When you compare that to the price two and a half years later, and I would argue that if I took that two and half years later price and backed it up two and a half years it would be less. I'm just, for the sake of arguments here, using that price.
>
> "....
>
> "Martin got [88.6%] of the value comparing apples to apples.
>
> "Q. Of the value of his one half interest?
>
> "[Hilyer:] Yes. Based on the subsequent sale two and a half years later.
>
> "....

> "[Hilyer:] All right. You go back and do the transaction assuming [Martin] prevails on his claim here that he is due a payment of $244,900.[1] I'm looking in column three on the sheet right here [Exhibit 12]. That means he would have gotten [$560,000] plus [$]244,900 for a total of [$]804,9[00] for his half. Converting that to the whole, would mean that the value of the building, net proceeds from the sale would be [$]1,609,800 and would gross it up with the 6[%] commission, means that the building, for that transaction to fly and both of them get 50/50 and get equal, it would have to sell for $1,712,600, once again rounded to the nearest hundred dollars. In other words, it would have to sale for 127[%] of its actual value for that to happen. And coming to my conclusion that [Martin] was treated fairly, at [88.6%], you have to consider the time value, you've got two and a half years involved, the property could have appreciated in two and a half years. But in the valuing a fractional interest of an entity, you apply -- a fraction is not worth -- when you take an entity and fractionalize the ownership, the sum of the fraction, the pieces, is less than the value of the whole for two reasons: One, you're dealing with a lack of marketability. When people buy something, they want to buy the whole. They don't want to buy a fractional interest. So to sell a fractional interest in entities you have to discount them. What we see for IRS tax purposes is anywhere from 10 to 20 percent discount for a lack of marketability.
>
> "....

---

[1]Half the value of $489,000 is $244,500, but the discrepancy between that value and Hilyer's testimony is inconsequential for purposes of the appeal.

> "[Hilyer:] Another factor that you use is a minority interest. Now, this is 50/50, so you could argue that it's not minority but it's not a majority either. It lacks control. Who wants to buy an interest in something if they can't control it and can't sell it, because nobody wants to buy the fractional interest. Typically a minority interest you see discounts in the range of 10 to 20 percent. In this particular case we have an [11.4%] discount ignoring a two and a half year increase in value, for discounts it could range anywhere from 20 to 40 percent. I think that what he got was fair. And for him to -- to get his half based on those factors plus half the [2012] note is unfair. Perhaps unjust enrichment."

On May 18, 2020, the trial court entered a judgment, stating, in pertinent part:

> "The primary dispute between the parties was whether or not a promissory note executed by [AOI] on May 21, 2012 payable to Martin Burdette and Susan Burdette was satisfied when Martin Burdette sold his interest in [AOI] to Susan Burdette in 2017.
>
> "Having duly considered the testimony of all witness and the exhibits entered into evidence, along with the arguments of counsel, the Court finds that ... Martin Burdette failed to carry his burden of proof, as follows:
>
> "Based upon the evidence presented, including the testimony of the parties, and the analysis and testimony of Jeff Hilyer, CPA and Robert Hudson, CPA, the Court finds that the 2012 Promissory Note at issue in this case was satisfied when [Martin] received payment of the $560,000.00, from Susan Burdette, for his interest in [AOI].

> "Therefore, judgment is due to be, and is hereby, entered against ... Martin Burdette, and in favor of the Defendant, [AOI].
>
> "The Court finds that the Defendant, [AOI] failed to carry its burden of proof as to its Counterclaim against [Martin] pursuant to the Alabama Litigation Accountability Act. The Court is unable to find that the action brought on by [Martin] was filed without substantial justification, was frivolous, groundless in fact and in law, and interposed for improper purpose.
>
> "Therefore, on the Defendant's Counterclaim, Judgment is due to be, and is hereby, entered for [Martin] and against Defendant, [AOI]."

Martin appealed and AOI cross-appealed.

Standard of Review

"Our ore tenus standard of review is well settled. '"When a judge in a nonjury case hears oral testimony, a judgment based on findings of fact based on that testimony will be presumed correct and will not be disturbed on appeal except for a plain and palpable error."' Smith v. Muchia, 854 So. 2d 85, 92 (Ala. 2003) (quoting Allstate Ins. Co. v. Skelton, 675 So. 2d 377, 379 (Ala. 1996)).

> "'"The ore tenus rule is grounded upon the principle that when the trial court hears oral testimony it has an opportunity to evaluate the demeanor and credibility of witnesses." Hall v. Mazzone, 486 So. 2d 408, 410 (Ala. 1986). The rule applies to "disputed issues of fact," whether the dispute is based entirely upon oral testimony or

> upon a combination of oral testimony and documentary evidence. Born v. Clark, 662 So. 2d 669, 672 (Ala. 1995). The ore tenus standard of review, succinctly stated, is as follows:
>
> > "'"[W]here the evidence has been [presented] ore tenus, a presumption of correctness attends the trial court's conclusion on issues of fact, and this Court will not disturb the trial court's conclusion unless it is clearly erroneous and against the great weight of the evidence, but will affirm the judgment if, under any reasonable aspect, it is supported by credible evidence."'
>
> "Reed v. Board of Trs. for Alabama State Univ., 778 So. 2d 791, 795 (Ala. 2000) (quoting Raidt v. Crane, 342 So. 2d 358, 360 (Ala. 1977)). However, 'that presumption [of correctness] has no application when the trial court is shown to have improperly applied the law to the facts.' Ex parte Board of Zoning Adjustment of Mobile, 636 So. 2d 415, 417 (Ala. 1994)."

Kennedy v. Boles Invs., Inc., 53 So. 3d 60, 67-68 (Ala. 2010).

Discussion

I. Martin's Appeal

Martin raises numerous arguments challenging the trial court's judgment, many of which are not relevant to the disposition of this appeal. For example, Martin spends a portion of his brief arguing that the 2012 note was valid and subject to Florida laws.[2] However, it is undisputed that the 2012 note was valid and enforceable when it was executed. Martin argues that the 2012 note was not modified, canceled, or discharged and that, as a result, AOI still owes to him $244,500, plus accrued interest. AOI does not argue, and the trial court did not find, that the 2012 note had been modified or canceled. Instead, AOI argued that the 2012 note was satisfied when Martin sold his interest in AOI to Susan via the 2017 agreement. AOI points to language in the 2017 agreement stating that it was intended to settle all disputes between the parties, and AOI also relies on the evidence from Susan and Hilyer during the trial. AOI further asserts that Martin's acceptance of the $560,000 constitutes an accord and satisfaction.

Martin argues that the 2017 agreement did not modify AOI's assets and liabilities and that AOI was not a party to the 2017 agreement. Martin further argues that the 2017 agreement is unambiguous and that,

---

[2]The 2012 note was executed in Florida, and the note itself provides that it is to be governed by Florida laws. Martin argues that the Florida Statute of Frauds required that any modification of the 2012 note be in writing.

therefore, the trial court was required to interpret it based on the text of the agreement alone and could not consider Susan's testimony and beliefs about the effect of the 2017 agreement.[3] This Court has explained, however:

> "A latent ambiguity ... exists when the 'writing appears clear and unambiguous on its face,"but there is some collateral matter which makes the meaning uncertain." ' Medical Clinic Bd. of City of Birmingham-Crestwood v. Smelley, 408 So. 2d 1203, 1206 (Ala. 1981) (quoting Ford v. Ward, 272 Ala. 235, 240, 130 So. 2d 380, 384 (1961)). In making the threshold determination of whether there is a latent ambiguity, a court may consider extrinsic evidence. Brown v. Mechanical Contractors, Inc. v. Centennial Ins. Co., 431 So. 2d 932, 942 (Ala. 1983). If it determines that a latent ambiguity exists, the court may then consider and rely upon extrinsic evidence to determine the true intentions of the parties to the contract. Mass Appraisal Servs., Inc. v. Carmichael, 404 So. 2d 666, 672 (Ala. 1981)."

Dupree v. PeoplesSouth Bank, 308 So. 3d 484, 490 (Ala. 2020). It is apparent from the parties' disagreement regarding whether the language

---

[3]Martin further argues that, even if the trial court believed Susan's testimony, Susan's mistaken beliefs regarding the import of the 2017 agreement would not permit the trial court to revise the 2017 agreement because, he asserts, those beliefs would only amount to a unilateral mistake. The trial court did not operate under the theory of contract avoidance or revision or otherwise find that there had been a mistake. Instead, the trial court found that AOI's debt to Martin had been satisfied when Susan purchased Martin's interest in AOI.

of the 2017 agreement and the payment of $560,000 applied to AOI's outstanding debt to Martin that a latent ambiguity exists. The trial court, therefore, was permitted to consider extrinsic evidence.

In considering the extrinsic evidence, the trial court specifically found that AOI's obligation to Martin under the 2012 note was satisfied when Martin received $560,000 for his share of AOI. This Court has explained:

> " 'An accord and satisfaction is an agreement reached between competent parties regarding payment of a debt the amount of which is in dispute. Limbaugh v. Merrill Lynch, Pierce, Fenner & Smith, 732 F.2d 859, 861 (11th Cir. 1984); O'Neal v. O'Neal, 284 Ala. 661, 227 So. 2d 430 (1969). There can be no accord and satisfaction "without the intentional relinquishment of a known right." Id. at 663, 227 So. 2d at 431.
>
> " 'Like any other contract, a valid accord and satisfaction requires consideration and a meeting of the minds regarding the subject matter. Bank Indep. v. Byars, 538 So. 2d 432, 435 (Ala. 1988); Farmers & Merchants Bank of Centre v. Hancock, 506 So. 2d 305, 310 (Ala. 1987); Austin v. Cox, 492 So. 2d 1021, 1022 (Ala. 1986); Ray v. Alabama Central Credit Union, 472 So. 2d 1012, 1014 (Ala. 1985).' "

Ex parte Meztista, 845 So. 2d 795, 797-98 (Ala. 2001)(quoting Leisure Am. Resorts v. Carbine Constr. Co., 577 So. 2d 409, 411 (Ala. 1990)).

Susan testified that she and Martin intended to include the debt evidenced by the 2012 note in the 2017 agreement, that they had agreed that AOI was valued at around $1 million, and that her payment of $560,000 to Martin for his interest in AOI included the debt owed to Martin under the 2012 note. Hilyer testified that Martin's receipt of $560,000 constituted 88.6% of his share of the value of AOI, after considering the amount for which AOI's sole asset -- the real property -- sold. Hilyer also opined that, for Martin to fairly receive the $244,500 in addition to the $560,000 he already had received, one would have to assume a value much higher than what the real property actually sold for. Based on that evidence, the trial court could have found that, as part of the 2017 agreement, Susan and Martin had agreed that the $244,500 owed to Martin under the 2012 note would be included in the $560,000 and that Martin intentionally relinquished the right to otherwise pursue the repayment of that debt. Although Martin testified that he did not intend for the $244,500 to be included in that amount, the trial court was presented with conflicting evidence, and "[i]t was within the province of the trial court judge as the fact-finder to resolve any conflicts in the testimony and to judge the credibility of the witnesses." Imperial Aluminum-Scottsboro, LLC v. Taylor, 295 So. 3d 51, 61-62 (Ala. 2019)(citing Hall v. Mazzone, 486 So. 2d 408, 410 (Ala. 1986)). In considering that conflicting evidence, the trial court had the benefit of viewing Martin and Susan testify, and that advantage is the basis of the ore tenus rule. See Hall v. Mazzone, 486 So. 2d 408, 410 (Ala. 1986). Because there is evidence to support the trial court's determination that the payment of $560,000 pursuant to the 2017 agreement included the $244,500 owed to Martin under the 2012 note and that the debt was satisfied, a presumption of correctness attends the trial court's conclusion, and we will not disturb that conclusion on appeal. Kennedy, 53 So. 3d at 68.

Martin also argues that AOI is estopped from asserting that the 2012 note was satisfied by the 2017 agreement because, he contends, although AOI stopped making payments to him after he and Susan entered into the 2017 agreement, it continued making payments to Susan. Martin also argues that the capitalization of the debt did not constitute payment, satisfaction, or cancellation of the 2012 note because it was done without Martin's consent and that the transfer of the debt to Martin's capital account recognizes that there was an outstanding debt owed to Martin after he and Susan entered into the 2017 agreement. Because the trial court's judgment is supported by the evidence, and because this Court "will affirm the judgment appealed from if supported on any valid legal ground," Tucker v. Nichols, 431 So. 2d 1263, 1265 (Ala. 1983), we need not discuss these arguments, which all involve the trial court's resolution of disputed factual issues.

Martin also argues that the capitalization of the 2012 note unjustly enriched AOI. To be successful on an unjust-enrichment claim, a plaintiff must demonstrate, among other things, that the defendant has wrongfully retained money that belongs to the plaintiff. Mantiply v. Mantiply, 951 So. 2d 638, 654 (Ala. 2006). Martin asserts that AOI accepted the benefit of the money he loaned it and that it wrongfully retained that money by capitalizing the debt rather than repaying it to Martin. As explained above, however, there is evidence in the record to support the trial court's determination that Martin was repaid the money owed to him under the 2012 note. Accordingly, the evidence would support a conclusion that

Martin did not present evidence demonstrating that AOI had wrongfully retained money that belonged to him, and, thus, Martin failed to demonstrate that AOI had been unjustly enriched.

II. AOI's Cross-Appeal

AOI challenges the trial court's judgment insofar as it determined that AOI did not demonstrate that Martin's action was commenced without substantial justification. AOI relies on the ALAA. Pursuant to § 12-19-272(a), Ala. Code 1975, a part of the ALAA, a trial court "shall award ... reasonable attorneys' fees and costs against any attorney or party, or both, who has brought a civil action, or asserted a claim therein, or interposed a defense, that a court determines to be without substantial justification." The phrase "without substantial justification" is defined in § 12-19-271, Ala. Code 1975, as an action that is "frivolous, groundless in fact or in law, or vexatious, or interposed for any improper purpose, including without limitation, to cause unnecessary delay or needless increase in the cost of litigation, as determined by the court." This Court has explained:

> "If a court denies a claim for attorney fees under the ALAA after holding a hearing on that claim, and the party seeking attorney fees appeals that denial arguing that the subject action, claim, defense, or appeal was frivolous, groundless in fact, vexatious, or interposed for an improper purpose, the appellate standard of review is equivalent to the ore tenus standard of review. ... If a court denies a claim for attorney fees under the ALAA after holding a hearing on that claim, and the party seeking attorney fees appeals that denial arguing that the subject action, claim, defense, or appeal was groundless in law, the appellate standard of review is de novo ...."

Ex parte Loma Alta Prop. Owners Ass'n, 52 So. 3d 518, 523-24 (Ala. 2010).

AOI argues that Martin commenced the action against it without substantial justification because, it asserts, Martin was "fully aware that he has been paid in full for his interest in the 2012 Promissory Note and despite that fact, [he] initiated the groundless underlying lawsuit." AOI's brief at p. 24. AOI also argues that Martin commenced the action with the intent to harass Susan. AOI contends that Martin's action is frivolous and is groundless in fact and in law. As explained above, the trial court was confronted with conflicting evidence regarding whether AOI's debt to Martin had been satisfied by the 2017 agreement, and it had the opportunity to observe Martin testify. Martin testified that he did not believe that the 2017 agreement and the payment of $560,000 encompassed the $244,500 owed to him. Although the trial court found in favor of AOI on the substantive claims Martin asserted in his complaint, the trial court could have determined that the issues of fact surrounding Martin's claim were reasonably in conflict. Accordingly, the trial court's factual determination that Martin's action was not frivolous or groundless in fact is supported by the evidence. Moreover, this Court's review of the record, in particular of Martin's assertions in the trial court, leads us to conclude that Martin's claims against AOI were not groundless in law. Accordingly, the trial court's decision to not award attorney fees and costs to AOI under the ALAA is affirmed.

Conclusion

Based on the foregoing, we affirm the judgment.

1190767 -- AFFIRMED.

Parker, C.J., and Bolin and Wise, JJ., concur.

Sellers, J., concurs in the result.

1190801 -- AFFIRMED.

Parker, C.J., and Bolin, Wise, and Sellers, JJ., concur.