Affirmed and Opinion filed September 20, 2001.

In The

Fourteenth Court of Appeals

NO. 14-00-01173-CV

HOWARD & ELAINE LOVE, Appellants

V.

THE HARVEST FINANCIAL GROUP, INC., Appellee

On Appeal from the County Court at Law No. 4
Harris County, Texas
Trial Court Cause No. 720,295

OP I N I O N

Howard and Elaine Love (the Loves) appeal the grant of summary judgement in favor of plaintiff, The Harvest Financial Group (Harvest), on its suit to recover upon two promissory notes. We affirm.

Background

Harvest began factoring the receivables of Howard Love Pipeline Supply Co., Inc. (HLPS) in September of 1997. The Loves personally guaranteed the performance of HLPS under its written factoring agreement with Harvest. The factoring agreement provided that

HLPS would be in default if it filed for bankruptcy. On December 1, 1997, HLPS filed for Chapter 11.

The bankruptcy filing allowed Harvest to force HLPS to buy back those receivables that had yet to be funded by debtors to HLPS. Harvest could also have enforced the personal guarantee given by the Loves because HLPS was unable to repurchase the receivables. Harvest did not do this.

Instead, on December 3, 1997, the Loves signed a promissory note in the amount of $61,418.08 in favor of Harvest. This note did not include language expressly identifying the Loves as "principal obligors," as opposed to guarantors. On January 29, 1998, the bankruptcy court approved a post-petition financing order, which apparently involved this note in that it was related to the continued post-petition factoring. Pursuant to the bankruptcy court order, Harvest continued to factor HLPS.

In September of 1998 HLPS went into Chapter 7 liquidation. During August, September and October of 1998, several payments were mistakenly made to HLPS by its customer, Noram Gas Transmission (Noram), for receivables rightfully owned by Harvest. HLPS did not turn the proceeds it received from Noram over to Harvest. In December of 1998, the promissory note signed by the Loves in 1997 was exchanged for two new notes in the amounts of $40,769.89 and $12,500. These replacement notes matured on June 7, 1999, and are the subject of this lawsuit. Except for the amounts, these notes are identical to each other and are significantly more detailed than the single note for which they were exchanged.

Harvest, Noram, and the bankruptcy trustee for HLPS settled the dispute over the Noram payments by way of a Mutual Release and Settlement of Invoices (MRSI) dated March 26, 1999. Under the MRSI, Harvest received $18,876.06. This constituted payment for the Noram receivables Harvest had purchased from HLPS but which Noram had paid directly to HLPS. The payment was net of the $22,500 that Harvest had withheld from

HLPS during 1998 and credited as payment against the notes Harvest now alleges to be personal debts of the Loves. In other words, through the MRSI, the bankruptcy trustee recovered $22,500 for the estate from Harvest, money which Harvest had withheld from HLPS to pay the notes given by the Loves.

Finally, in April of 1999, the Loves made some payments on the notes. Though the Loves and Harvest disagree as to the total amount of the payments, both agree the Loves are in default. Thereafter, the Loves ceased paying on the notes and this lawsuit was filed.

Procedural History and Issues Presented

The trial court granted Harvest's Third Motion for Summary Judgment and denied Love's Cross Motion for Summary Judgment. The Love's Cross Motion sought judgment on the ground that the MRSI constituted a satisfaction and release of the Love's liability on the promissory notes. On appeal, the Loves object to the grant of summary judgment on the basis that Harvest failed to negate the existence of material fact issues regarding each of the following:

> (1) Whether the MRSI included and directly discharged the Love's obligations on the notes;
>
> (2) Whether the Loves intended to sign the notes as principal obligors, as opposed to sureties; and
>
> (3) Whether the release of HLPS under the MRSI discharged the Loves from the notes under surety law.

We begin with an examination of the first and third of these points of error, saving the second point for last.[1]

[1] Because the Loves do not appeal the trial court's ruling against them on their Cross Motion for Summary Judgment, we do not address it here.

Standard of Review

As the parties correctly note, in reviewing a trial court's summary judgment decision, we take as true all evidence favorable to the non-movant and indulge every reasonable inference and resolve any doubts in favor of the non-movant. *See Nixon v. Mr. Property Management Co., Inc.*, 690 S.W.2d 546, 548-49 (Tex.1985). A motion for summary judgment under Texas Rules of Civil Procedure 166a(a), 166a(b) or 166a(c) should be granted if the moving party establishes that no genuine issue of material fact exists and entitlement to judgment as a matter of law. *Id.*

However, both in their Response to Plaintiff's Third Motion for Summary Judgment and here on appeal, the Loves incorrectly argue that the grant of summary judgment for Harvest was improper because Harvest failed to prove as a matter of law that the MRSI did not constitute a satisfaction and release of the Loves obligations on the notes. Because satisfaction and release is an affirmative defense, the burden at summary judgment rests upon the Loves, not Harvest, to prove the existence of a material fact issue as to each element of their defense. *See Brownlee v. Brownlee*, 655 S.W.2d 111, 112 (Tex. 1984), *citing City of Houston v. Clear Creek Basin Authority*, 589 S.W.2d 671, 678-9 (Tex.1979); *See also Jim Rutherford Investments, Inc. v. Terramar*, 25 S.W.3d 845, 849 (Tex. App.—Houston [14th Dist.] 2000, pet. denied).[2] In sustaining Harvest's motion for summary judgment, the trial court implicitly found that the Love's failed to present more than a scintilla of evidence of each element of their defense. Our review of the trial court's decision is therefore the same as we would give to a decision granting a directed verdict or a no-evidence summary judgment under Texas Rule of Civil Procedure 166a(i). *See Jim Rutherford Investments, Inc.*, 25 S.W.3d at 850. *See also Moore v. K-mart Corp*., 981 S.W.2d 266, 269 (Tex. App.—San Antonio 1998, no pet.).

[2] The Love's brief references *Maddox v. Oldham Little Church Foundation*, 411 S.W.2d 375, 378 (Tex. App.—Tyler 1967), a case which predates *Clear Creek Basin Authority*.

Discussion

I. Discharge under the MRSI

The Loves argue their obligations on the notes were discharged either under the law of surety or directly under the terms of the MRSI.

A. Direct Release

To prevail on a defense of accord and satisfaction, a party must prove the existence of a new contract, express or implied, whereby the parties agree to discharge the existing obligation by payment of a lesser amount. *See Industrial Life Ins. Co. v. Finley*, 382 S.W.2d 100, 104 (Tex.1964), *cited in Boland v. Mundaca Inv. Corp.*, 978 S.W.2d 146, 148 (Tex. App.—Austin 1998).

The Loves argue the following language in the MRSI constitutes a release of their obligations on the notes:

> *Stephen J. Zaylor*, Chapter 7 Trustee of the Bankruptcy Estate of Howard Love Pipeline Supply Company, *is acting on behalf of* the Bankruptcy Estate of Howard Love Pipeline Supply Company, and on behalf of *all of its present shareholders, officers, directors*, and predecessors-in-interest . . .
>
> The above-referenced invoices will hereinafter be referred to as the "Invoices." *This agreement will also settle all obligations related to or in any way connected with Letter Agreements* dated June 25, 1998 and July 8, 1998 between and among Reliant (f/k/a Noram), Harvest, and Howard Love Pipeline Supply, Inc. (hereinafter referred to as the "Letter Agreements", *as well as the underlying agreement between Howard Love and Harvest referenced in the Letter Agreements* (all of which are referred to collectively hereinafter as the "Agreements"). [Italics added]

The Loves argue that the foregoing italicized language specifically identifies them

either as parties to the MRSI through the bankruptcy trustee or, presumably, as intended third-party beneficiaries. We cannot agree.

There is no evidence in the record to show that the Loves were intended third-party beneficiaries of the MRSI. The Loves did not sign the MRSI in any capacity, nor does the MRSI expressly name them. Absent such evidence, we cannot reasonably infer third-party beneficiary status. Additionally, there is a presumption against third-party beneficiary agreements. *See generally MCI Telecomm. Corp. v. Texas Util. Elec. Co.,* 995 S.W.2d 647, 652 (Tex.1999). For these reasons, we find that the record is legally insufficient to confer third-party-beneficiary status upon the Loves. *See Jim Rutherford Investments*, 25 S.W.3d 845.

If the Loves are to have been directly released under the MRSI, then they must show that the bankruptcy trustee acted as their agent. It is well settled, however, that a bankruptcy trustee represents only the estate and is adverse to all other parties. *See generally* 11 U.S.C. § 323(a). We must find that the trustee cannot have acted as the Love's agent in executing the MRSI. The MRSI therefore cannot have directly released the Loves from their obligations under the notes.

B. Release Under Surety Law

The Loves next argue they were discharged by the MRSI because the notes were given only as an accommodation to HLPS. In order to present surety defenses, there must be some evidence of the surety relationship itself. The only such evidence in the present case is the contents of Howard Love's summary judgment affidavit, which directly conflicts with the unambiguous language of the notes.[3] In order for surety defenses to be presented, the affidavit contents must be admissible over a parol evidence objection. As we discuss below, we hold the contents to be inadmissible to vary the notes' express terms. Therefore,

[3] The affidavit reads, in pertinent part: "These two promissory notes were intended to be personal guarantees of debts owed by our company. . . . When we signed the notes, we did not receive any cash or other property in return for our signatures."

we do not address any surety defenses that may have been available to the Loves. Defendant's third point of error is overruled.

II. Application of the Parole Evidence Rule; Whether Love signed the notes as sureties.

Before the trial court, the Loves argued there exists a material fact issue regarding whether the Loves intended to sign the notes as guarantors, rather than as principal obligors. In support of their position, the Love's sole evidence consists of the contents of an affidavit from Howard Love. Presumably, the Loves argue that there exists a material question of fact as to whether the Loves qualify as "makers" of the note. *See Blankenship v. Robbins*, 898 S.W.2d 236, 238 (Tex. App.—Houston [14th Dist.] 1994) (enumerating the elements of proof required to recover on a promissory note).

The Loves' position directly conflicts with the language of the notes, which identify the Loves as "Maker" and further state that "all signers and endorsers of this Note are to be regarded as principals as to their respective joint and several liability." Because the notes are unambiguous writings, the contents of the affidavit offered by the Loves are inadmissible under the parol evidence rule. The contents are therefore not competent summary judgment evidence. *See United Blood Servs. v. Longoria*, 938 S.W.2d 29, 30 (Tex. 1997) (summary judgment evidence must be admissible at trial).[4] The Loves therefore failed in their burden to present more than a scintilla of evidence that they were sureties rather than principal obligors on the notes.

Accordingly, the trial court's judgment is affirmed.

/s/ Don Wittig
Justice

[4] The result might have been different had the notes been for amounts over fifty-thousand dollars. *See* TEX. BUS. & COM. CODE ANN. § 26.02 (Vernon Supp. 1997).

Judgment rendered and Opinion filed September 20, 2001.

Panel consists of Justices Yates, Edelman, and Wittig.

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