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IN THE COURT OF APPEALS OF NORTH CAROLINA

2021-NCCOA-176

No. COA20-356

Filed 20 April 2021

Henderson County, No. 18 CVS 655

WESTLAND GROUP, INC., Plaintiff,

v.

ASCENTIUM CAPITAL, LLC, Defendant and Third-Party Plaintiff,

v.

SIMSCOR GROUP, INC., Third-Party Defendant

Appeal by plaintiff from judgment entered on 6 February 2020 by Judge Charles M. Viser in Henderson County Superior Court. Heard in the Court of Appeals 23 February 2021.

James W. Lee III, for Plaintiff-Appellant.

Smith Debnam Narron Drake Saintsing & Myers, L.L.P., by Byron L. Saintsing, for Defendant/Third-Party Plaintiff-Appellee.

CARPENTER, Judge.

¶ 1

Plaintiff Westland Group, Inc. (“Westland” or “Plaintiff”) appeals from an order granting summary judgment in favor of Defendant and Third-Party Plaintiff Ascentium Capital, LLC (“Ascentium” or “Defendant”). Westland contends that

summary judgment was improper because there were genuine issues of material fact with respect to whether it intended to be bound by Simscor Group, Inc.'s ("Simscor") Equipment Finance Agreement ("EFA") and corporate guaranty and whether Westland's execution of the corporate guaranty was the result of a mutual mistake. We affirm.

I. Factual and Procedural Background

¶ 2 The evidence of record tends to show the following: Westland is a North Carolina corporation in the business of operating Firehouse Subs franchises in Asheville and Hendersonville, North Carolina. Monte Sims is the president of Westland, and Donna Sims is the vice president (collectively "the Sims"). Simscor was a North Carolina corporation that operated a Wingstop franchise in Tennessee. Monte Sims was the president of Simscor, and Donna Sims was the secretary and treasurer.

¶ 3 Prior to 2017, Westland obtained two loans from Ascentium. On or about 14 April 2016, Ascentium and Simscor entered into the EFA, in which Ascentium agreed to loan Simscor \$244,409.53 to purchase restaurant and construction equipment. Pursuant to the EFA, Ascentium held a security interest in the financed equipment. The EFA also included a personal guaranty provision, which was signed by each of the Sims in their individual capacities. In connection with the loan, Monte Sims executed, in his capacity as president of Simscor, the following documents: EFA,

Schedule A, Commencement Agreement, and Delivery and Acceptance Certificate.

¶ 4 In addition to the personal guaranty signed by the Sims, Ascentium requested a separate corporate guaranty agreement to approve Simscor's loan. On 14 April 2016, a copy of the guaranty, which named "Westland Group, Inc." as the guarantor, was sent to Donna Sims with the other approved loan documents.

¶ 5 According to the Sims, they executed an initial copy of the guaranty, with Monte Sims signing as president, and Donna Sims signing as secretary and treasurer. Prior to signing, the Sims' attorney reviewed the loan document package. Yet when Donna Sims was filing the papers at home, she noticed for the first time that Westland was designated as the guarantor. She and Monte then signed a second copy in which she crossed out "Westland Group, Inc.," and handwrote "Simscor Group, Inc. 4/15/16" beside "Guarantor." On 15 April 2016, Donna Sims sent the second copy of the guaranty, via facsimile, to Paul Rutherford ("Rutherford"), Ascentium's loan officer.

¶ 6 The Sims testified that signing the agreement binding Westland as guarantor was an accident. During Monte Sims' deposition, he testified that they "were in a hurry" and that "[i]t was [his] fault [for] not reading" the final documents. Similarly, during Donna Sims' deposition, she testified that "they missed it." They further testified that they did not agree to bind Westland as the guarantor, and that signing the guaranty on Westland's behalf was a mistake.

¶ 7

Rutherford recounts a different version of events with respect to the Sims' execution of loan documents in his 4 June 2022 affidavit. According to Rutherford, he had informed the Sims that Westland was required to enter into the corporate guaranty for Simscor's loan to be approved. Thereafter, Monte and Donna Sims had signed the initial guaranty, in which Donna Sims had crossed out "Westland Group, Inc." and handwrote "Simscor Group, Inc. 4/15/16" beside "Guarantor" in the signature block. Monte Sims had signed the modified guaranty as president, and Donna Sims had signed as secretary and treasurer. Rutherford had then submitted the modified guaranty to Ascentium's funding group for review. The funding group informed Rutherford that the modified guaranty was a "no-go" because the original guarantor had been crossed out. Rutherford then sent a clean version of the guaranty to the Sims. This time the corporate guaranty was signed only by Monte Sims, and "Westland Group, Inc." remained the guarantor. After this copy of the guaranty was returned to Ascentium, it was reviewed, and the equipment was delivered.

¶ 8

On 19 April 2016, Ascentium filed a UCC Financing Statement in North Carolina against Westland. Westland did not discover this UCC Financing Statement until early 2017. On 3 June 2016, Ascentium and Simscor agreed to modify the payment terms of the EFA. On 28 February 2017, Ascentium amended the UCC Financing Statement, changing the name of the debtor from Westland to Simscor.

¶ 9 Between 10 May 2016 and 13 October 2017, Simscor made payments to Ascentium pursuant to the EFA. By the summer of 2017, the Wingstop franchise was on the verge of going out of business. On 18 August 2017, Ascentium filed a second amendment to the UCC financing statement changing the debtor from Simscor back to Westland group.

¶ 10 Westland commenced the action on 24 April 2018, by filing a complaint in Henderson County Superior Court. The complaint sought a judgment declaring that Westland was not a party to the EFA or the original guaranty; that Westland did not pledge any of its property as collateral; and that the UCC Financing Statement, as amended, filed against Westland by Ascentium was cancelled. Westland also sought damages relating to Ascentium's noncompliance with UCC Article 9. Ascentium answered Westland's complaint and brought various counterclaims against Westland including breach of guaranty and possession of equipment. Ascentium also brought third-party claims against Simscor including breach of the EFA and a judgment against Simscor for possession of the financed equipment. On 28 October 2018, Ascentium filed a motion for summary judgment, and on 6 February 2020, the trial court granted this motion. Westland now appeals.

II. Jurisdiction

¶ 11 Appeal lies in this Court as a matter of right pursuant to N.C. Gen. Stat. § 7A-27(b) (2019).

III. Issue

¶ 12 The issue on appeal is whether the trial court erred by granting Defendant’s motion for summary judgment because there were genuine issues of material fact as to whether the Sims intended to bind Westland as guarantor in their loan documents for Simscor and whether naming Westland as guarantor was the result of a mutual mistake.

IV. Standard of Review

¶ 13 “Our standard of review of an appeal from summary judgment is *de novo*” *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008) (emphasis added).

V. Analysis

¶ 14 On appeal, Westland argues that the trial court erred in granting summary judgment because there were genuine issues of material fact. We disagree.

¶ 15 Summary judgment is proper “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.” N.C. Gen. Stat. § 1A-1(c), Rule 56 (2019).

The party moving for summary judgment bears the burden of establishing that there is no triable issue of material fact. This burden may be met by proving that an essential element of the opposing party’s claim is nonexistent, or by showing through discovery that the opposing party cannot produce evidence to support an essential element of his claim or cannot surmount an affirmative defense which

would bar the claim. Once the moving party satisfies these tests, the burden shifts to the nonmoving party to produce a forecast of evidence demonstrating that the [nonmoving party] will be able to make out at least a prima facie case at trial. The trial judge must consider all the presented evidence in a light most favorable to the nonmoving party, and all inferences of fact must be drawn against the movant and in favor of the nonmovant.

DeWitt v. Eveready Battery Co., 355 N.C. 672, 681–82, 565 S.E.2d 140, 146 (2002)

(citations and quotations omitted).

¶ 16 “The essence of any contract is the mutual assent of both parties to the terms of the agreement so as to establish a meeting of the minds.” *Snyder v. Freeman*, 300 N.C. 204, 218, 266 S.E.2d 593, 602 (1980) (citation omitted). “Mutual assent is normally established by an offer by one party and an acceptance by the other” *Creech v. Melnik*, 347 N.C. 520, 527, 495 S.E.2d 907, 912 (1998). Express acceptance of a written instrument can be indicated by a signature. *Bumgarner v. Reneau*, 105 N.C. App. 362, 366, 413 S.E.2d 565, 569 (1992). When a party signs a contract, they are manifesting assent to that contract. *Branch Banking & Trust Co. v. Creasy*, 301 N.C. 44, 53, 269 S.E.2d 117, 123 (1980). It is presumed that the parties knew the contents of the instrument and signed the instrument they intended to sign. *Poston v. Bowen*, 228 N.C. 202, 203, 44 S.E.2d 881, 882 (1947).

A. Parol Evidence

¶ 17 In its first argument, Plaintiff contends that the trial court erred in granting summary judgment because the Sims provided sufficient evidence to show their intention to bind Simscor as guarantor.

¶ 18 The parol evidence rule bars consideration of evidence of conduct prior to, or simultaneous with, an agreement to a signed instrument, absent proof of mental incapacity, mutual mistake of the parties, undue influence, or fraud. *Thompson v. First Citizens Bank & Trust Co.*, 151 N.C. App. 704, 709, 567 S.E.2d 184, 188 (2002).

¶ 19 In this case, it is undisputed that Monte Sims, as a representative of Westland, signed a contract that bound Westland as guarantor of Simscor's EFA. Nevertheless, the Sims provide the following evidence in an attempt to prove their intent was to bind Simscor rather than Westland: Monte Sims' deposition statement that in previous financing transactions, the guarantor was always Simscor; Donna Sims' deposition statement that they had never used one corporation as the guarantor for the other corporation; the signature of Donna Sims on the original guaranty as the secretary and treasurer, which are her positions for Simscor; and the lack of evidence of a discussion about Westland being designated as the guarantor.

¶ 20 The evidence that the Sims point to on appeal is conduct that occurred prior to or contemporaneously with the signing of the guaranty. Thus, this evidence is admissible only if there is proof of a mutual mistake since the Sims made no showing of mental incapacity, undue influence, or fraud. *See Thompson*, 151 N.C. App. at 709,

567 S.E.2d at 188. Therefore, we hold that the trial court did not err in granting summary judgment in favor of Defendant because Plaintiff presented only inadmissible parol evidence to show that its officers did not intend to bind Westland to Simscor's EFA and corporate guaranty.

B. Mutual Mistake

¶ 21 In its second argument, Plaintiff contends that there exists a genuine issue of material fact as to whether Ascentium acknowledged that naming Westland as guarantor was a mutual mistake. Given the Sims made no showing of mental incapacity, undue influence, or fraud, the only evidence that could be admissible concerning their prior or contemporaneous conduct is evidence proving a mutual mistake of the parties. A mutual mistake exists where both parties were under the same misconception regarding a material fact of the instrument which they agreed upon. *Metro. Prop. and Cas. Ins. Co. v. Dillard*, 126 N.C. App 795, 798, 487 S.E.2d 157, 159 (1997). Our Supreme Court has defined “mutual mistake” as “a mistake common to all the parties to a written instrument and usually relates to a mistake concerning its contents or its legal effect.” *M. P. Hubbard & Co. v. Horne*, 203 N.C. 205, 208, 165 S.E.2d 347, 349 (1932).

¶ 22 When addressing the issue of a mutual mistake, the Sims rely on arguments that lack any evidentiary backing. In support of the assertion that Ascentium acknowledged the mistake, the Sims point to the amendment of the UCC Financing

Statement as evidence that “it knew Westland was not supposed to be part of the Simscor loan transaction.” However, the filed UCC Financing Statement, regardless of the named debtor, has no legal effect on a guaranty agreement. *See generally Mountain Farm Credit Serv., ACA v. Purina Mills, Inc.*, 119 N.C. App. 508, 513, 459 S.E.2d 75, 80 (1995) (“The purpose of a financing statement is to provide notice to third parties of the debtor-creditor relationship.”).

¶ 23 In proving that Rutherford acknowledged the mistake, the Sims point only to the testimony of Monte Sims taken in his deposition in which he states, *inter alia*, “we notified Paul Rutherford, and he acknowledged that [the guarantor] was incorrect.” He later states, “Paul discovered the problem [with the financing statement filed against Westland]. And that’s when we just went on the assumption it was going to be taken care of.” The evidence provided by the Sims is not sufficient to find a mutual mistake because there was no evidence to indicate that Ascentium was “under the same misconception respecting a material fact” with regard to the executed guaranty. *See Metro. Prop. and Cas. Ins. Co.*, 126 N.C. App at 798, 487 S.E.2d at 159. Their argument that a mutual mistake existed is further diminished by the fact that the Sims had their attorney review the documents prior to signing them. Therefore, the Sims have not shown a genuine issue of material fact existed with respect to whether there was a mutual mistake. We hold the trial court did not

err in granting summary judgment for Defendant because Plaintiff failed to establish the existence of a mutual mistake.

VI. Conclusion

¶ 24 The trial court did not err in granting summary judgment because there were no genuine issues of material fact. The Sims relied upon inadmissible parol evidence in an attempt to prove their intent to bind only Simscor with respect to the 14 April 2016 loan agreement and guaranty. Furthermore, the Sims failed to show evidence that there was a mistake as to the contents of the guaranty that was common to all parties to the contract.

AFFIRMED.

Judges ARROWOOD and GORE concur.

Report per Rule 30(e).