IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-669

Filed: 5 July 2017

Mecklenburg County, No. 12 CVS 3684

GECMC 2006-C1 CARRINGTON OAKS, LLC, Plaintiff,

v.

SAMUEL WEISS, Defendant.

Appeal by plaintiff from an order denying a motion for judgment notwithstanding the verdict entered 12 January 2016 by Judge Lisa C. Bell in Mecklenburg County Superior Court. Heard in the Court of Appeals 5 June 2017.

McGuireWoods LLP, by William O. L. Hutchinson and R. Kent Warren, for Plaintiff-Appellant.

Copeland Richards, PLLC, by Shawn A. Copeland and Drew A. Richards, for Defendant-Appellee.

INMAN, Judge.

The trial court properly denied the plaintiff's motion for judgment notwithstanding the verdict, because the defendant introduced sufficient evidence to take a disputed issue of material fact to the jury. It is not the role of the trial court,

or the appellate court, to second guess the jury's finding regarding the credibility of a witness unless credibility is manifest as a matter of law.

GECMC 2006-C1 Carrington Oaks, LLC ("Plaintiff") appeals the trial court's denial of its motion for judgment notwithstanding the verdict ("JNOV"). Plaintiff contends that there was insufficient evidence on which the jury could rely to find that Samuel Weiss ("Defendant") is not liable for the written loan guaranty. After careful review, we affirm.

I. Factual & Procedural Background

Plaintiff is the successor holder of a promissory note for a commercial real estate loan. Defendant is a New York-based commercial real estate developer. Along with his frequent business partner, Ezra Beyman, Defendant routinely provided capital for the purchase price of real estate, and the two would share in any rental profits proportionate to the percentage of their initial investments. One such investment was Carrington Place in Charlotte, North Carolina. A corporate entity owned by Mr. Beyman purchased land for Carrington Place by obtaining a $28,290,000 loan conditioned, in part, on personal guaranties from Mr. Beyman and Defendant.

Defendant testified he travelled to the Dreier Law Firm several times in 2006 to execute documents for different real estate transactions, including the Carrington Place deal. He signed between thirty and forty signature pages each time he went;

he was not brought the documents to which the signature pages would be attached, nor did he request to see them. Defendant testified that he was unaware of the nature of the documents he signed, did not ask for any copies, and did not inquire whether the documents included a guaranty agreement. One of the signature pages that Defendant signed while at the Dreier Law Firm (the "Signature Page") was eventually attached to a guaranty agreement (the "Guaranty") included in the lender's loan file concerning the Carrington Place transaction, and, if validly executed, would make Defendant a personal guarantor for the $28,290,000 loan. While Defendant does not deny that the Signature Page appears to bear his signature and was at some point attached to the Guaranty, he denies signing and executing the Guaranty.

In connection with the loan to Defendant and Mr. Beyman, two law firms, Dreier LLP of New York City and Kennedy Covington Lobdell & Hickman, L.L.P. ("Kennedy Covington") of Charlotte, wrote opinion letters to the lender[1] (the "Dreier Letter" and "KC Letter," respectively). The opinion letters asserted that the law firms represented Defendant and Mr. Beyman and that the Guaranty was duly executed, and the letters were accompanied by certifications signed by Defendant. But only the certification to the Dreier Letter included statements confirming the truth of the

[1] Plaintiff was not the initial lender, but purchased the lender's rights in the loan and thus became the holder of the Promissory Note.

letter's contents and that the Guaranty is "true, correct and complete and [is] in full force and effect."

Mr. Beyman's corporate entity defaulted on the Carrington Place loan in 2009 and failed to cure the default. Plaintiff, as holder of the note, sought payment from Defendant under the Guaranty, and Defendant refused payment. Plaintiff thereafter brought suit against Defendant in February 2012 to recover money owed under the Guaranty. In response, Defendant filed a motion to dismiss for lack of personal jurisdiction; the motion was denied, in part because the Guaranty included a provision subjecting the guarantors to personal jurisdiction in this state. Defendant appealed the order, and this Court affirmed the lower court's denial. *GECMC 2006-C1 Carrington Oaks, LLC v. Weiss*, 233 N.C. App. 633, 757 S.E.2d 677 (2014) ("*Weiss I*").[2] The case proceeded to trial.

At trial, the asset manager for Plaintiff's servicer, Dmitry Sulsky, testified that the Signature Page was attached to the Guaranty when he received the loan file.

[2] Without addressing it directly, Plaintiff's brief raises the specter of the law of the case doctrine, whereby our holding in *Weiss I*, affirming an interlocutory order, would bind the trial court and preclude the jury from finding that Defendant did not execute the Guaranty. However, the doctrine applies only "provided the same facts and the same questions, which were determined in the previous appeal, are involved in the second appeal." *Creech v. Melnik*, 147 N.C. App. 471, 474, 556 S.E.2d 587, 589 (2001), *disc. review denied*, 355 N.C. 490, 561 S.E.2d 498, *disc. review denied*, 355 N.C. 747, 565 S.E.2d 194 (2002). Because the question before us in *Weiss I* was not whether Defendant had actually executed the Guaranty, but instead whether "there was competent evidence to support the court's finding that defendant Weiss signed and executed the Guaranty[,]" the law of the case doctrine does not apply here. 233 N.C. App. at 639, 757 S.E.2d at 682; s*ee also Goetz v. N.C. Dep't of Health & Human Servs.*, 203 N.C. App. 421, 433, 692 S.E.2d 395, 403 (2010) ("Since the other appeal to this Court was interlocutory, there were no rulings of law which could become the law of the case.").

However, Mr. Sulsky also testified that: (1) he had no involvement in or personal knowledge of the execution of the Guaranty or the underlying real estate transaction; (2) he first received the loan document several years after the transactions had taken place; and (3) he did not know how the Signature Page became attached to the Guaranty.

Plaintiff also called as a witness Thomas Rivers, an associate at Kennedy Covington at the time the KC Letter was issued. But Mr. Rivers was unable to confirm whether Defendant had ever retained his firm to represent him or whether the firm had been authorized to act for Defendant. Mr. Rivers testified that any representations made by the firm in the KC Letter concerning the valid execution of the Guaranty were not based on the personal knowledge of anyone at Kennedy Covington, but instead on representations from the Dreier Law Firm, and that he did not know whether due diligence was performed by Kennedy Covington to confirm whether the Dreier Law Firm's representations were accurate.

No witness with personal knowledge of the Dreier Letter testified concerning its creation. Each page of the Dreier Letter and the attached signed certification by Mr. Beyman bore the numbers and letters "00146367.DOC;4" in the footer. But the signature page for Defendant's certification bore a different string of numbers and letters. So the certification signed by Defendant did not, on its face, relate to the Dreier Letter.

Defendant introduced evidence challenging Plaintiff's assertion that the Signature Page related to the Guaranty. Specifically, Defendant testified that: (1) he did not execute the Guaranty; (2) it was not his practice to sign guaranties in transactions like the purchase of Carrington Place, because he had no ownership interest in the real property (as opposed to guaranties he did sign in other real estate deals in which he or his family had an ownership interest); and (3) he never retained or authorized either the Dreier Law Firm or Kennedy Covington to represent him or issue the opinion letters. Defendant did admit that the signature on the Signature Page "appears to be my signature[,]" and he did not contend that it was a forgery.

Defendant also noted differences in the pagination and footer on the Guaranty and the Signature Page. Defendant contended that the presence of page numbers on the Guaranty but not on the Signature Page demonstrated that the documents were never presented to Defendant as a complete instrument, as did the word "Guaranty" in the footer of the Signature Page, which is absent from the pages of the Guaranty. When asked by counsel for Defendant whether the Signature Page carried an "indication . . . of the deal that it was signed for[,]" Mr. Sulsky testified "No, sir." Plaintiff, by contrast, argued that the pagination structure and use of a footer on the Signature Page made logical sense given that Defendant was only presented with free-standing signature pages, and that these characteristics are identical to

agreements that Defendant has admitted to signing in the past in relation to other transactions.

At the close of evidence, Plaintiff moved for directed verdict. The trial court denied Plaintiff's motion. Following closing arguments, the jury returned a verdict finding that Defendant had not signed "the signature page for the Guaranty . . . ." The court entered its judgment consistent with the verdict. Plaintiff thereafter moved for judgment notwithstanding the verdict or, in the alternative, a new trial. The motion was denied, and Plaintiff appeals.

II. Analysis

Plaintiff contends that the trial court erred in denying its motions for directed verdict and JNOV as to both liability and damages.[3] We disagree as to liability, and therefore affirm the trial court's order without reaching Plaintiff's argument concerning damages.

We review a denial of JNOV *de novo*, "consider[] the matter anew[,] and freely substitute[] [our] own judgment for that of the trial court." *Primerica Life Ins. Co. v. James Massengill & Sons Constr. Co.*, 211 N.C. App. 252, 258, 712 S.E.2d 670, 676 (2011) (citation omitted). Motions for directed verdict and JNOV ask the same question: "whether, upon examination of all the evidence in the light most favorable to the nonmoving party, and that party being given the benefit of every reasonable

[3] Plaintiff does not appeal the denial of a new trial.

inference drawn therefrom, the evidence is sufficient to be submitted to the jury." *Fulk v. Piedmont Music Ctr.*, 138 N.C. App. 425, 429, 531 S.E.2d 476, 479 (2000) (citation omitted).

Motions for directed verdict and JNOV by a party bearing the burden of proof, such as Plaintiff, "are rarely granted . . . because, even though proponent succeeds in the difficult task of establishing a clear and uncontradicted prima facie case, there will ordinarily remain in issue the credibility of the evidence adduced by proponent." *North Carolina Nat'l Bank v. Burnette*, 297 N.C. 524, 536, 256 S.E.2d 388, 395 (1979) (internal citations omitted). Such a movant, therefore, is not entitled to JNOV where "his right to recover depends upon the credibility of his witnesses." *Cutts v. Casey*, 278 N.C. 390, 417, 180 S.E.2d 297, 311 (1971).

A moving party bearing the burden of proof may still prevail on a motion for JNOV, however, if "credibility is manifest as a matter of law." *Burnette*, 297 N.C. at 536, 256 S.E.2d at 395 (citation omitted); *see also Streeter v. Cotton*, 133 N.C. App. 80, 82, 514 S.E.2d 539, 541 (1999) (citation omitted). Our Supreme Court has identified three circumstances in which credibility is manifest as a matter of law:

> (1) Where non-movant establishes proponent's case by admitting the truth of the basic facts upon which the claim of proponent rests.
>
> (2) Where the controlling evidence is documentary and non-movant does not deny the authenticity or correctness of the documents.

> (3) Where there are only latent doubts as to the credibility of oral testimony and the opposing party has failed to point to specific areas of impeachment and contradictions.

Burnette, 297 N.C. App. at 537-38, 180 S.E.2d at 396 (internal citations and quotations omitted). Even in such cases, "the evidence must so clearly establish the fact in issue that no reasonable inferences to the contrary can be drawn." *Murdock v. Ratliff*, 310 N.C. 652, 659, 314 S.E.2d 518, 522 (1984) (citation omitted).

Defendant does not refute that the Signature Page bears his signature; rather, the issue is whether Defendant's signature was ever affixed to this specific Guaranty. It is with respect to this issue that Defendant raised a genuine factual dispute because he denied signing the Signature Page in connection with the Guaranty and because the documentary evidence did not clearly refute Defendant's testimony.

This Court considered the same factual issue, albeit in a different procedural context, in *Carolina Mills Lumber Co., Inc. v. Huffman*, 96 N.C. App. 616, 386 S.E.2d 437 (1989). The appeal in *Carolina Mills* arose from a bench trial in which the trial court entered judgment in favor of a defendant who was sued for breach of a guaranty agreement. 96 N.C. App. at 617, 386 S.E.2d at 437. We affirmed the judgment because "[t]he plaintiff merely proved that the signature on the agreement was defendant's but did not show by a preponderance of the evidence that defendant signed that agreement." *Id.* at 619, 386 S.E.2d at 439.

Plaintiff asserts two arguments regarding the relation of the Signature Page to the Guaranty: (1) guaranty agreements are self-authenticating commercial paper pursuant to Rule 902(9) of the North Carolina Rules of Evidence, and therefore Plaintiff's failure to introduce witnesses with actual knowledge as to whether the Signature Page pertained to the Guaranty was immaterial; and (2) Defendant's evidence does not support the contention that the Signature Page was not related to the Guaranty. We address these arguments in turn.

A. The Guaranty as a Self-Authenticating Document

North Carolina Rule of Evidence 902(9) makes commercial paper and "signatures thereon" self-authenticating such that "[e]xtrinsic evidence of authenticity as a condition precedent to admissibility is not required . . . ." N.C. R. Evid. 902. Admissibility, however, does not determine whether a jury will assign any particular weight to the evidence. *See, e.g., Queen City Coach Co. v. Lee*, 218 N.C. 320, 323, 11 S.E.2d 341, 343 (1940) ("The competency, admissibility, and sufficiency of the evidence is a matter for the court to determine. The credibility, probative force, and weight is a matter for the jury. This principle is so well settled we do not think it necessary to cite authorities."). Plaintiff was not required to introduce eye-witness testimony to establish the authenticity of the Signature Page or the Guaranty under Rule 902(9). But the authenticity of a document does not, standing alone, satisfy Plaintiff's burden of proof or absolve the jury of its duty to weigh the evidence,

measure its credibility, and evaluate its probative effect in determining whether the Signature Page was connected with the Guaranty such that Defendant executed and is bound by the document. *Id.* Even if a juror could have reasonably inferred from the evidence that Defendant had signed the Signature Page in relation to the Guaranty, for reasons explained *infra*, a juror reasonably could have inferred that the Signature Page was signed by Defendant with no knowledge or intent that it would later be attached to the Guaranty. Plaintiff's argument is overruled.

B. The Evidence Supports a Conclusion that Defendant Did Not Execute the Guaranty

As recounted in Part I, Defendant offered testimony on direct and cross-examination that tended to undercut Plaintiff's assertion that Defendant executed the Guaranty by signing the Signature Page. Defendant denied signing the Signature Page in connection with the Guaranty. Neither of the witnesses testifying for Plaintiff had personal knowledge of how the Signature Page became associated with the Guaranty. Defense counsel further established on cross-examination that, notwithstanding the assurances contained in the KC Letter, Kennedy Covington had no actual knowledge to confirm the validity of the Signature Page and Guaranty, was relying solely on the Dreier Letter as to the documents' validity, and had done no due diligence concerning the Dreier Letter's representations.

Defendant testified that he travelled to the Dreier Law Firm to sign documents pertaining to multiple real estate transactions, that certain real estate transactions

of one particular type included guaranties, but that the Carrington Place transaction was not of this type due to his lack of ownership in the underlying real property, and therefore would not have included a personal guaranty from him.[4] As for the Signature Page and Guaranty themselves, defense counsel pointed to discrepancies in the pagination and footers of the documents that tended to support the conclusion they are unrelated, and Plaintiff's witness conceded that there was no way to determine from the documents whether the Signature Page was connected with the Carrington Place transaction. Because Defendant introduced more than a scintilla of evidence from which the jury could find that he did not sign the Signature Page in connection with the Guaranty, Plaintiff is not entitled to JNOV.

Plaintiff implores us to dismiss Defendant's testimony regarding the Signature Page because Defendant testified he did not know or read what he was signing, and he is bound by the Guaranty's terms regardless of his failure to read it. Specifically, Plaintiff urges us to adopt this same conclusion as to Defendant that was reached by the Arizona Court of Appeals in *DMARC 2006-C D2 Indian School LLC v. Empirian at Steele Park LLC*, No. 1 CA-CV 14-0603, 2016 WL 7209656 (Dec. 13, 2016)

[4] While Defendant stated in deposition testimony read into the trial record that the Carrington Place transaction was, in fact, of the type for which he would execute a guaranty, he addressed and attempted to resolve the contradiction in his live testimony. It is not our province to reconcile the inconsistency, as "[c]onflicts in the evidence and contradictions within a particular witness' testimony are 'for the jury to resolve.' " *Day v. Brant*, 218 N.C. App. 1, 19-20, 721 S.E.2d 238, 251 (2012) (quoting *Shields v. Nationwide Mut. Fire Ins. Co.*, 61 N.C. App. 365, 374, 301 S.E.2d 439, 445 (1983)).

(unpublished). However, Defendant in that case "d[id] not dispute that he signed the Guaranty . . . ." *Id.* at *2.

Plaintiff's argument omits the necessary step of establishing, as a matter of fact, "whether the defendant actually affixed his signature to *that* guaranty agreement." *Carolina Mills*, 96 N.C. App. at 619, 386 S.E.2d at 438 (emphasis added). A plaintiff may not recover where this issue of fact is not proven. *Id.* at 618, 386 S.E.2d at 438. Because the evidence in this case was "sufficient to support an inference that defendant did not in fact sign and deliver that particular agreement[,]" Plaintiff's argument that Defendant did not read what he was signing is immaterial, and the issue of fact was properly submitted to the jury. *Id.* at 619, 386 S.E.2d at 439.

Plaintiff's case is not one in which "credibility is manifest as a matter of law." *Burnette*, 297 N.C. at 536, 256 S.E.2d at 395 (citation omitted). Defendant never admitted to the facts necessary to establish Plaintiff's case. He denied the authenticity and correctness of the Guaranty and opinion letters, and his counsel raised doubts as to the weight, credibility, and probative value of Plaintiff's witnesses on cross-examination. In short, Plaintiff has failed to "so clearly establish the fact in issue [that the Signature Page was related to the Guaranty] that no reasonable inferences to the contrary c[ould] be drawn." *Ratliff*, 310 N.C. at 659, 314 S.E.2d at 522 (citation omitted). As a result, we affirm the trial court's order denying JNOV.

AFFIRMED.

Chief Judge MCGEE and Judge TYSON concur.

Report per Rule 30(e).