



Missouri Court of Appeals

Southern District

Division One

DARINDA BAGGETT,	)	
	)	
Plaintiff-Respondent,	)	
	)	
v.	)	No. SD36607
	)	Filed: November 24, 2020
HAUFF AND ASSOCIATES, LLC,	)	
BRIAN HAUFF and NICOLE HAUFF,	)	
	)	
Defendants-Appellants.	)	

APPEAL FROM THE CIRCUIT COURT OF CHRISTIAN COUNTY

Honorable Laura J. Johnson, Judge

AFFIRMED

Hauff and Associates, LLC (“the Hauff LLC”) and Brian Hauff and Nicole Hauff (collectively the “Appellants”)¹ appeal from the trial court’s Judgment, where the trial court entered judgment in favor of DaRinda Baggett (“Baggett”). In two points on appeal, Appellants assert the trial court erred in ruling that Baggett had standing and capacity to sue. Finding no merit to Appellants’ two points relied on, we deny the same and affirm the judgment of the trial court.²

¹ Brian and Nicole Hauff are referred to collectively as “the Hauffs.”

² Baggett did not file a brief. She was not required to do so and suffers no penalty as a result, though we are left to adjudicate the issues presented without the benefit of any argument Baggett may have asserted. *See Erskine v. Dir. of Revenue*, 428 S.W.3d 789, 790 n.1 (Mo.App. S.D. 2014).

Facts and Procedural Background

We recite the evidence in accord with the principle that the trial court can believe some, all, or none of the evidence, and that our standard of review requires us to view the evidence in the light most favorable to the trial court's judgment. **Bramer v. Abston**, 553 S.W.3d 872, 879 (Mo.App. S.D. 2018). We recite other material as necessary for context.

Baggett founded Serenity Spa in 2007 or 2008. In 2010, Baggett transferred the business and its assets into a limited liability company, "Serenity Day Spa LLC" ("the Spa"), of which she was the only member. In 2014, Baggett sold the Spa to the Hauff LLC for \$50,500.

A closing of the sale was held on June 3, 2014. The following documents were executed by the parties at the closing:

- Asset Purchase Agreement (signed by Baggett as a member of Serenity Day Spa, LLC, and by the Hauffs as members of the Hauff LLC), which set forth that the sale would include, in part:

- inventory in the amount of \$2,500, based on the actual cost of same to Baggett, value not to exceed \$2,750;
- equipment valued at \$32,500;
- goodwill currently associated with the Spa, valued at \$15,500;
- additional payments for goodwill equal to 2 percent of gross sales over \$75,000 for the years 2014 – 2018;
- four weeks of informed training to be provided by Baggett or current Spa staff; and
- attorney fees and costs for the prevailing party arising out of any action to enforce the Asset Purchase Agreement.

- Security Agreement (signed by the Hauffs as members of Hauff LLC) granting a security interest in collateral defined as "All equipment, inventory, accounts, vehicles, furniture and trade fixtures of Debtor, now owned or hereafter acquired."

- Promissory Note (the "Note") (signed by Brian and Nicole as members of Hauff LLC) in the amount of \$39,500 (the Hauffs made a down payment of \$11,000), with monthly

installments of \$772.86, beginning September 1, 2014, at an interest rate of 6.5 percent per annum, until June 1, 2017, at which time a balloon payment of \$16,670.70, would be due and owing. The Note was also subject to the terms and conditions of the Security Agreement and the Asset Purchase Agreement.

- Personal Guarantee (the “Guarantee”) to the Note (signed by the Hauffs as “guarantors”) guaranteeing the performance of the terms of the Note by the Hauff LLC.

On June 4, 2014, Baggett (on behalf of the Spa) executed an “Assignment” to herself personally that read:

I, the undersigned, Serenity Day Spa, LLC of 505 East South Street, Ozark, Christian County, Missouri, 65721, assign to DaRinda K. Baggett of 8131 State Highway W, Ozark, Christian County, Missouri, 65721 the following: All legal authority to act upon the contractual sale of Serenity Day Spa, LLC and follow the tenants of said contract until fruition of all it's [sic] terms. This would include the pursuit of the promissory Note should default occur AND hold ownership of all equipment, furnishings and decor as set forth in the UCC agreement as security interest upon the sale of the business.

In consideration thereof, I acknowledge receipt of the Promissory Note (Hauff and Associates, LLC, and Nicole & Brian Hauff each individually) for monies due from sale of Serenity Day Spa, [] LLC. Full contractual consideration re: the disposition of ALL equipment, furnishings and decor per UCC Security agreement filed with the State of MO at time of sale will be due DaRinda K. Baggett.

It is agreed that this Assignment will enure [sic] to the benefit of and be binding upon the parties to this Assignment, their heirs, executors, administrators, successors and assigns, respectively.

This Agreement will be construed in accordance with and governed by the laws of the State of Missouri.

The Hauffs made payments on the Note in September, October and November 2014 for a total of \$2,318.58. No further payments were made.

On November 9, 2016, Baggett filed a two-count petition against the Hauffs and the Hauff LLC (collectively “the Defendants”). Baggett asserted in Count I (Breach of Contract) that the Defendants had defaulted on the Note. In Count II (Conversion), Baggett asserted that certain property was sold for which Baggett held a security interest.

The Defendants filed a four-count counterclaim asserting Breach of Contract (Count I), Breach of Implied Covenant of Good Faith and Fair Dealing (Count II), Fraudulent Misrepresentation/Inducement (Count III), and Negligent Misrepresentation (Count IV).

A bench trial was held on May 31, 2019, and July 19, 2019. Baggett and the Hauffs testified. The case was taken under advisement, with the parties filing trial briefs.

On August 29, 2019, the trial court filed “Findings of Fact and Conclusions of Law and Order” finding Baggett proved that Defendants breached the Note and Guarantee, and that Defendants failed to show a material breach of the Asset Purchase Agreement sufficient to excuse their default on the Note and Guarantee. The trial court found in favor of Baggett on Count I of her petition, and on Counts I, II, III and IV of Defendants’ counterclaims. The trial court found in favor of Defendants on Count II of Baggett’s petition. The trial court awarded Baggett the unpaid portion of the Note in the amount of \$37,181.42, prejudgment interest at 6.5 percent, post-judgment interest at 9 percent, and attorney fees and cost. The trial court stated that this was an interlocutory order and was not a final judgment until an evidentiary hearing was held on the issue of earned interest and attorney’s fees.

On September 23, 2019, Baggett’s attorney filed a “Motion for Attorney’s Fees” and an “Affidavit for Attorney Fees and Interest.” Defendants filed suggestions in opposition.

On October 18, 2019, Defendants filed a “Motion for Reconsideration of Interlocutory Judgment,” asserting that Baggett had no standing to sue or seek recovery as she personally was not the proper payee and holder of the Note in that the Assignment did not assign any ownership interest in the Note or the Spa, but was merely an appointment giving Baggett authority to act on its behalf, not to substitute herself for the separate legal entity of the Spa.³ The motion also

³ The exhibits at trial were admitted into evidence by stipulation of the parties. The Assignment was part of these stipulated exhibits admitted and was marked as “Exhibit 2.”

asserted that Baggett did not have standing to seek recovery of attorney fees and/or interest as that entitlement and right was not legally assigned to Baggett, and that Baggett's calculated interest due on the Note was incorrect in that it calculated compound interest.

A hearing was held on October 29, 2019, and after hearing argument, the trial court took the motions under advisement.

On November 12, 2019, the trial court entered its "final Judgment," "disposing of the remaining issues in the case." The trial court found that the Assignment was a valid assignment of the Note and Guarantee to Baggett, noting that Defendants did not object to the admission of the Assignment at trial or argue that the Assignment was not a valid assignment of the Note and Guarantee. The trial court also awarded attorney fees in the amount of \$14,790.75, prejudgment interest in the amount of \$12,547.56, and costs in the amount of \$162.35.

On December 10, 2019, Appellants filed a "Motion for New Trial or to Amend Judgment." A hearing was held on March 6, 2020, and after hearing argument, the motion was denied. This appeal followed.

In two points on appeal, Appellants argue:

I.

The trial court erred by ruling that Baggett had standing to sue on the ground that the Disputed Assignment "was a valid assignment of the Promissory Note and guaranty [sic] to Plaintiff" and, "considered as a whole, is sufficient to assign [Serenity Day] Spa's interest in the Note and Guaranties [sic] to" Baggett, because the court erroneously declared and applied the law by allowing Baggett to sue individually, in that the Disputed Assignment merely appointed Baggett to act as the agent of Serenity Day Spa, LLC, to deal with the aftermath of the sale, but an agent cannot bring suit in her own name when she is acting only in the capacity of an agent.

II.

The trial court erred by ruling that Baggett has standing to sue on the ground that the Disputed Assignment “at the least . . . is sufficient to assign [Serenity Day Spa, LLC’s] right to collect on the Note and Guaranties” [sic] to Baggett, because the judgment is unsupported by the evidence, in that the only evidence that supports any form of assignment of the right to collect the note and guaranties [sic] is the Disputed Assignment itself, but that contradicts both Baggett’s claim to own the promissory note individually and her explanation of the reason for the Disputed Assignment document in the first place.

Standard of Review

The judgment in a court-tried case will be affirmed unless there is no substantial evidence to support it, it is against the weight of the evidence, or it erroneously declares or applies the law.

Murphy v. Carron, 536 S.W.2d 30, 32 (Mo. banc 1976).

Analysis

In Point I, Appellants argue that the trial court erred as a matter of law in finding that the Assignment was sufficient to transfer the Note and Guarantee to Baggett, in that Baggett—as an agent—lacked standing to sue individually. Appellants’ second point argues that the “trial court erred by ruling that Baggett had standing to sue” in that such finding was “unsupported by the evidence”—specifically, “the only evidence that supports any form of assignment of the right to collect the note and guaranties [sic] is the . . . Assignment itself,” but that such was contradicted by Baggett’s evidence at trial. Ultimately, both points challenge Baggett’s capacity to bring the claim underlying this appeal,⁴ so we combine them for ease of analysis.

Appellants’ brief claims these issues are “preserved in [their] Motion for Reconsideration, in their argument on the motion, in their Motion for New Trial or to Amend

⁴ Although Appellants characterize the issue in terms of “standing” (as the trial court also did at one point in its judgment), it is merely one of capacity to sue. See *Unifund CCR Partners v. Kinnamon*, 384 S.W.3d 703, 707-09 (Mo.App. W.D. 2012). “Missouri courts on multiple occasions have treated errors in bringing a claim directly rather than in the name of another party, or similar defects, as issues of capacity rather than standing, which may be waived or avoided by amendment of the pleadings.” *Id.* at 708 (quoting *City of Wellston v. SBC Communications, Inc.*, 203 S.W.3d 189, 193 (Mo. banc 2006)).

Judgment and supporting suggestions, and in their argument on those motions.” However, a claim (as here) that “a party lacks capacity to sue is **waived** [where] it is not raised in a motion or responsive pleading in accordance with Rules 55.13 and 55.27[(g)].”⁵ *Pauli v. Spicer*, 445 S.W.3d 667, 673 n.4 (Mo.App. E.D. 2014) (internal quotation and citation omitted).⁶

Rule 55.13 in relevant part states:

When a person desires to raise an issue as to the legal existence of any party or the capacity of any party to sue or be sued or the authority of a party to sue or be sued in a representative capacity, **the person shall do so by specific negative averment, which shall include such supporting particulars as are peculiarly within the pleader’s knowledge.**

(Emphasis added).

Rule 55.27(g), governing “**Waiver or Preservation of Certain Defenses**[.]” states that a defense that a plaintiff does not have legal capacity to sue is “**waived**” if it is: “(A) Omitted from a motion in the circumstances described in Rule 55.27(f),”⁷ or “(B) Neither made by motion under this Rule 55.27 nor included in a responsive pleading.” Rule 55.27(g)(H)(A)&(B). (Emphasis added).

Appellants waived their current complaint by failing to timely raise it in accord with the provisions of Rule 55.13 or Rule 55.27(g). This is dispositive as to both Appellants’ Points I and II, and the same are accordingly denied.

⁵ All rule references are to Missouri Court Rules (2016).

⁶ See *Coyne v. Edwards*, 395 S.W.3d 509, 515 n.5 (Mo. banc 2013) (where party’s “answer did not contend that Chief Coyne was not duly authorized by Community Fire to represent it, with the capacity to sue on its behalf if it was entitled to sue, [it] **waived** that claim.”) (emphasis added); *Bank of Am., N.A. v. Duff*, 422 S.W.3d 515, 520 (Mo.App. E.D. 2014) (“Defendants made no motion under Rule 55.27 asserting that Plaintiff lacked capacity to sue with regard to the 1998 Loan Documents. Therefore, . . . Defendants’ waiver is **dispositive** of this point[.]”) (emphasis added).

⁷ Rule 55.27(f) states:

A party who makes a motion under this Rule 55.27 may join with it any other motions herein provided for and then available to the party. If a party makes a motion under this Rule 55.27 but omits therefrom any defense or objection then available that this Rule 55.27 permits to be raised by motion, the party shall not thereafter make a motion based on the defense or objection so omitted, except a motion as provided in Rule 55.27(g)(2) on any of the grounds there stated.

The judgment of the trial court is affirmed.

WILLIAM W. FRANCIS, JR., J. - OPINION AUTHOR

NANCY STEFFEN RAHMEYER, P.J. - Concur

DANIEL E. SCOTT, J. - Concur