MISSOURI COURT OF APPEALS
WESTERN DISTRICT

EDWARD E. BAILEY, ET AL.

APPELLANTS-RESPONDENTS,

v.

HAWTHORN BANK

RESPONDENT-APPELLANT.

DOCKET NUMBER WD74240 Consolidated with WD74278

DATE: July 31, 2012

Appeal From:

Jackson County Circuit Court
The Honorable Robert M. Schieber, Judge

Appellate Judges:

Division One: James M. Smart, Jr., Presiding Judge, Lisa White Hardwick, Judge and Gary D. Witt, Judge

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Attorneys:

Robert J. Bjerg, Overland Park, KS, for appellants-respondents.

Mark M. Iba, Robin K. Carlson, and Megan McCurdy, Kansas City, MO, for respondent-appellant.

MISSOURI APPELLATE COURT OPINION SUMMARY

MISSOURI COURT OF APPEALS
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APPELLANTS-RESPONDENTS,

v.

HAWTHORN BANK,

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No. WD74240 Consolidated with WD74278 Jackson County

Before Division One: James M. Smart, Jr., Presiding Judge, Lisa White Hardwick, Judge and Gary D. Witt, Judge

This appeal follows a jury trial in which a verdict was rendered in favor of the plaintiffs, Edward Bailey ("Bailey") and Darlene Briggs ("Briggs"). Defendant, Hawthorn Bank ("Bank") appeals and Plaintiffs cross-appeal.

Bailey owned a business that served wine and cold food, as it did not have a kitchen. The Bank was Bailey's business lender. Bailey contacted the Bank, regarding a loan so that he could buy the building in which it was located, and renovate into a full service restaurant. The Bank referred Bailey to another of its customers, Forbes Cross ("Cross"), an experienced restaurateur, to prepare a detailed Business Plan for the new restaurant concept. The Bank approved the plan and agreed to loan Bailey the sum of $510,000. The Bank prepared a loan summary which detailed the business plan and terms of the loan. The bank was aware that Bailey was borrowing $120,000 from his sister, Briggs and sent Bailey a loan commitment letter. After the Bank approved the loan, Bailey had Briggs wire the $120,000 to the Bank, and entered into a contract to purchase the building for $540,000. The Bank never closed on the loan and Bailey was forced to close his business.

The jury returned a verdict in favor of Bailey for breach of contract and negligent misrepresentation for $310,000 in actual damages and, $200,000 in punitive damages. The jury also awarded Briggs $120,000 in actual damages on her claims for negligent misrepresentation and promissory estoppel. The trial Court granted the Bank's motion for JNOV solely as it pertained to the jury's punitive damage award of $200,000.

In Point One, the Bank argues the trial court erred in denying the Bank's motion for JNOV because the Missouri Credit Agreement Act (sections 432.045 and 432.047) bars Plaintiffs' claims. This Act requires that for a debtor to maintain an action or defense regarding a credit agreement it must be in writing, provide for the payment of interest, and set forth the relevant terms and conditions.

There is no dispute that the agreement in question is a credit agreement. The question is whether the credit agreement falls within the terms of Section 432.047 and is barred by this statute. The agreement, as reflected in the Bank's letter of Commitment and its Loan Summary, was indisputably in writing and provided for the payment of interest. Specifically, the Loan Summary calculated the *precise* monthly principal and interest payment for the "25 year amortization, 5 year balloon note" on the $510,000 loan. The Bank approved the loan, based on this loan summary and the Business Plan. The Bank argues that because the interest rate was subject to change in the future, that therefore the Bank and Bailey had not reached an agreement. However, section 432.047 does not address the enforceability of the credit agreement. This section is a limitation on the ability of a debtor to maintain an action against a creditor or a limitation upon what defenses may be available to a debtor. The question is not whether all of the elements of a contract were entered into by the parties, but what minimum requirements must be met before a debtor can proceed with ***any*** cause of action or defense to a credit agreement, not just a breach of contract action.

The Bank argues that the Loan Summary cannot be considered because Bailey did not receive it until after he filed suit. Section 432.047 is in the nature of a statute of frauds and does not require delivery of the credit agreement. The purpose of the commercial credit statute of frauds is met if the Bank officers and the Bank board have approved the written conditions and are aware of a written commitment. Point One is denied.

In Point Two, the Bank argues that Bailey failed to make a submissible case of recoverable damages because lost future profits were improperly speculative. While the *general* rule is that recovery of anticipated profits of a commercial business are too uncertain and dependent upon changing circumstances to warrant a judgment for their recovery, they are recoverable when they are made reasonably certain by proof of actual facts which present data for a rational estimate of such profits.

In this case there was unrebutted expert testimony regarding future, lost economic damages. Bailey's expert was the same person the Bank referred him to for preparation of the business plan, which included detailed financial projections for the restaurant.

It also appears disingenuous for the Bank to argue that the Business Plan was too speculative for the jury to determine damages, when the Bank relied on this same Business Plan to determine whether or not to make its commitment to loan Bailey $510,000. Point Two is denied.

In Point Three, the Bank argues that the agreement is barred by Missouri's statute of frauds because it could not be completed in one year. But the statute of frauds defense is inapplicable if the agreement is *capable* of being performed within one year. Here, Bailey was allowed to pay off the note in full before it was due without any prepayment penalty. While the contemplated term of the loan was twenty five years with a five year balloon, the statute of frauds is not applicable to Bailey's claim, because it could be performed in less than one year. Point Three is denied.

In Point Four, the Bank argues Bailey and Briggs failed to make a submissible case on negligent misrepresentation because the identified representations were statements of future intent, which were true when offered, and Briggs failed to establish reliance or show damages.

Here, the Bank made an extremely cursory oral motion for directed verdict at the close of the plaintiffs' case. On appeal, the Bank makes a variety of arguments that were never raised in the motion for directed verdict. Because the Bank raised these arguments for the first time in its motion for judgment notwithstanding the verdict, it has failed to preserve these issues for appeal. The Bank did not request plain error review. The evidence, when viewed in the light most favorable to the jury's verdict, supported the jury's verdict. Point Four is denied.

In Point Five, the Bank argues that Briggs failed to make a submissible case on her promissory estoppel claim in that a legal remedy was available and Briggs failed to prove the existence of a promise. The Bank waived this issue by failing to raise it in its motion for directed verdict. Briggs established sufficient evidence of a promise, based on the Bank's Loan Commitment Letter because the Bank was aware that Bailey used this "commitment" from the Bank to obtain the loan from Briggs. Accordingly, Point Five is denied.

Cross-Appeal

Plaintiffs raise Three Points in their cross-appeal. In Point One, Bailey argues that JNOV as to punitive damages was error because he made a submissible case for punitive damages. Bank argues that Bailey offered no evidence of an evil motive, or a willful, wanton or malicious culpable mental state. However, a jury can infer the defendant's evil motive when the defendant recklessly disregards the interests and rights of the plaintiff.

There was circumstantial evidence from which the jury could infer that the Bank, knowing that Bailey was exposed to large losses, and was depending on the Bank for the loan, callously refused to even inform him in a timely fashion that the Bank was <u>not</u> going to make the loan. Viewed in the light most favorable to the jury's verdict, Bailey presented clear and convincing evidence from which the jury concluded that the Bank acted with reckless disregard for Bailey's rights and interests and thereby possessed the requisite evil motive for purposes of punitive damages. The evidence showed that Bailey was diligent in pressing the Bank to close the loan, but the Bank committed to make the loan and then simply ignored Bailey's repeated pleas to close and knew that doing so would adversely affect Bailey. The Bank knew that Bailey was entering into a contract to purchase the building prior to closing on the loan and was borrowing $120,000 from his sister based on their loan commitment. The evidence allowed the jury to conclude that the Bank had all the power to close on the loan in a timely fashion, and its failure to do so was intentional, wanton, and in reckless disregard of Bailey's rights and interests. There is a presumption favoring the reversal of a judgment notwithstanding the verdict. Here, the Bank has simply failed to overcome this presumption. Point One of the cross appeal is granted. Pursuant to Rule 84.14, we order that the jury's verdict be reinstated, which awarded Bailey $200,000 in punitive damages.

In Point Two on the cross appeal, Bailey argues he was entitled to prejudgment interest under either Section 408.020 or under equitable principles in that the damages for breach of contract and promissory estoppel were liquidated. On appeal, plaintiffs argue two distinct legal theories, neither of which was actually raised before the trial court: (1) Section 408.020 and (2) equitable principles.

However, even plaintiffs acknowledge on appeal that it is unclear *how* the jury arrived at its award of damages. Bailey's damages were based on lost future profits, not on the amount of the actual loan. Bailey fails to cite any authority that would allow this Court to conclude that lost future profits are readily ascertainable. Point Two of the cross appeal is denied.

In Point Three of the cross-appeal, plaintiffs argue that they are entitled to attorney's fees under Section 408.092. However, Bailey agrees that he did not seek attorney's fees in his amended petition, which by itself is fatal to his argument on appeal. Attorney's fees are special damages which must be specifically pleaded in order to be recovered. Point Three is denied.

Conclusion

The judgment of the circuit court is hereby affirmed in part, and reversed in part. Bailey's first Point Relied On in the cross-appeal is granted. Pursuant to Rule 84.14, we order that the jury's verdict be reinstated, and we accordingly enter judgment in Bailey's favor for $200,000 in punitive damages on his negligent misrepresentation claim. In all other respects, the trial court's judgment is affirmed.

Opinion by Gary D. Witt, Judge July 31, 2012

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