CASE NO. 14-10-01001-CV

IN THE COURT OF APPEALS
FOURTEENTH DISTRICT OF TEXAS
HOUSTON, TEXAS

GUS H. COMISKEY, III a/k/a TREY COMISKEY,
and TC3, INC.,

Appellants,

v.

FH PARTNERS, LLC,

Appellee.

On Appeal from the 113th District Court
Harris County, Texas

APPELLANTS' BRIEF

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Oral Argument Requested

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STATEMENT OF THE CASE

Plaintiff-Appellee FH Partners, L.L.C. ("FHP") sued Defendants-Appellants Gus H. Comiskey, a.k.a. Trey Comiskey, and TC3, Inc. (collectively "Comiskey") seeking a declaratory judgment that FHP's refusal to release its lien on property allegedly securing certain notes, and transfer clear title to Comiskey, did not breach any contractual or other duty to Comiskey. CR 6-7.[1] Comiskey asserted several counterclaims, including breach of contract, fraud and others. CR 89-90, 198-206. The case was tried to a jury, and following the close of evidence the district court (113th Judicial District, Harris County) granted a directed verdict in FHP's favor. RR 5:221. The district court issued a final judgment, including an award of attorneys' fees, on July 12, 2010. CR 507-12. The court also denied Comiskey's motion for a new trial and to modify the judgment. CR 891.

[1] Citations to specific pages in the Clerk's Record are to "CR. __." Citations to the Supplemental Clerk's record, which consists of Plaintiff's Second Amended Petition, are to and "SCR, Petition at ¶ __." Citations to the Reporters Record are to "RR [volume number]:[page number]." References to Comiskey's Appendix are to "App. Tab __."

ISSUES PRESENTED

1. Whether the guarantor of a note presented more than a scintilla of evidence that waiver, estoppel and mutual mistake bar the note's buyer from enforcing a dragnet clause contained in a deed where the guarantor was told that his full payment of the note would confer clear title to the property and was never informed of the dragnet clause or other debts supposedly securing the property.

2. Whether the district court abused its discretion by excluding testimony from the guarantor of a note and a bank officer about the officer's understanding of the guarantee agreement when such testimony proved operative facts underlying the guarantor's defenses and counterclaims and did not consist of legal conclusions but merely the officer's understanding of his own contract.

3. Whether the guarantor of a note presented more than a scintilla of evidence that the note's buyer committed fraud by representing that the note could be paid off for a specified sum but later foreclosing on the property securing the note in order to pay other debts incurred by the note's maker that were never disclosed to the guarantor.

4. Whether the district court erred in deciding that loan documents unambiguously permitted the buyer of a note to enforce a dragnet clause in a deed and to refuse to release a lien on property because of the maker's default on unrelated debts where an agreement extending and modifying the note provided only for repayment of the note in question and made no mention of the dragnet clause or the other debts.

5. Whether the district court erred in declining to take the fair market value of foreclosed property into account when considering whether the deficiency on the note relating to the foreclosed property could be invoked to prevent release of a lien on other property under a dragnet clause.

6. Whether the district court erred in awarding $153,487.95 in attorneys' fees where the prevailing party did not adequately exclude unrecoverable charges and where redactions in billing records made it impossible to tell whether other charges are properly recoverable.

INTRODUCTION

Appellant Gus "Trey" Comiskey signed a contract with a bank guaranteeing a $900,000 note in order to buy property in Houston. The bank told him it would release its lien on the property when he finished paying off the note. It also told him he did not need to review any other documents before signing the guarantee, such as the note itself or the deed securing the property, since the guarantee contained the key terms of the deal. Comiskey proceeded to pay off over 90% of the note, but then a lawyer for Appellee FH Partners, L.L.C. ("FHP"), which bought the note from the bank, notified him that paying off the note would not discharge the lien after all. FHP informed Comiskey that he also had to pay almost $2 million in other debt incurred by the original maker of the note, and that it could require this because of a cross-collateralization or "dragnet" clause in the deed pledging the property as security for the rest of the original maker's debt. Not only had Comiskey never been told about this clause or the other debt, but the bank and FHP gave him payoff quotes listing the dwindling balance on the note – in one case with a statement that the lien would be discharged after payment – omitting any mention of other debt. E-mails indicate FHP actually was unaware of the dragnet clause for months while Comiskey paid off the note, only discovering it when the maker's other loans went into default. FHP then decided, in the words of one of its agents, to "play hardball" with Comiskey.

FHP sued Comiskey seeking a declaratory judgment that its use of the dragnet clause was legal, and Comiskey asserted several counterclaims. After two days of trial, the district court directed a verdict for FHP and dismissed the counterclaims.

The facts established by Comiskey at trial – that the bank indicated he would receive full title after paying off the $900,000 note, that it steered him away from the deed with the dragnet clause, that it and FHP gave him payoff quotes with no mention of other debt and in one case stating the lien would be released after payment, and that they more generally concealed the other debt and its supposed relationship to his deal – constitute far more than a scintilla of evidence of waiver and estoppel. They entitle Comiskey to put his counterclaims for breach of contract, fraud, promissory estoppel, reformation and unjust enrichment to the jury. This is the case even if, as FHP argued in support of the directed verdict, the loan documents are otherwise unambiguous and permit cross-collateralization.

As it happens, however, the loan documents are not unambiguous, and the district court erred in holding that they compel judgment for FHP as a matter of law. The trial court initially found the contract Comiskey signed to be ambiguous and held that the parties could testify about their understandings of it. But the court then reversed itself, excluded parol evidence, and construed the contract to permit enforcement of the dragnet clause. This was also reversible error, and a jury should decide whether Comiskey's understanding of the contract is correct and whether FHP therefore breached by refusing to release its lien.

This Court should reverse the declaratory judgment and an accompanying award of attorneys' fees, and remand for trial of Comiskey's counterclaims.

BACKGROUND

I. Comiskey's Sale of the Burkhart Property to Gomberg

Comiskey is a businessman who has worked in a variety of jobs. RR 4:24-26. At one of these, he helped develop power plants and negotiated the high-level terms of some contracts, but left the detailed drafting to lawyers and engineers. RR 4:21-22. He is now an energy consultant and also owns a separate real estate investment and home-building company called GHC3, which also did business as Canterra Development. RR 4:23-24. Comiskey has only been involved in three other small real estate projects besides the one at issue here. RR 4:28.

In 2006, GHC3 bought a 1.15-acre lot in northwest Houston on Burkhart Road (the "Burkhart property"). RR 4:29-30. On February 28, 2007, Comiskey agreed to sell the Burkhart property to Paul Gomberg for $1,200,000. RR 4:31; Pl. Exh. 35. Gomberg intended to build homes on it with the owner of adjacent land, Jack Howeth, and eventually "flip" his portion to Howeth. RR 4:32, 205; RR 5:166. Comiskey and Gomberg had not previously done business together. RR 5:165. To finance the acquisition, Gomberg executed a note payable to 1st Choice Bank for $900,000 ("the Burkhart note"). App. Tab 3; RR 4:33. The Burkhart note was secured by a deed of trust containing a dragnet clause securing the rest of Gomberg's current and future indebtedness to 1st Choice, not simply the $900,000 ("the Burkhart deed"). App. Tab 4 at 1. Gomberg executed a second note to GHC3 for $303,400 to cover the rest of the purchase price and costs. RR 4:122-23; Def. Exh. 12. 1st Choice enjoyed the first lien on the property, and GHC3 the second. RR 4:33, 124; Def. Exh. 13.

II. The Extension and Modification Agreement

In November 2007, Gomberg determined he would be unable to sell the Burkhart property to Howeth, and he consequently proved unable to repay the loans to 1st Choice and GHC3. RR 5:168-69. On December 21, 2007, he executed a deed in lieu of foreclosure returning the property to a second company owned by Comiskey, TC3, to which GHC3 assigned its lien. RR 4:35, 185; RR 5:171; Def. Exhs. 15-16. Gomberg also proposed that Comiskey assume Gomberg's obligation to 1st Choice so that Comiskey could protect his interest in the property and Gomberg could stop paying monthly interest. RR 4:36; RR 5:172-75.

Gomberg told Bill Sellers, a senior vice president at 1st Choice, in December 2007 that he had given Comiskey the deed in lieu of foreclosure, and in early 2008 Comiskey discussed the Burkhart property by phone with Sellers. RR 4:244, 197; RR 5:178, 208. Sellers did not recall when he learned of the deed in lieu of foreclosure, which he testified may have been later in 2008. RR 4:209-10, 230. Nonetheless, he was happy to have Comiskey involved: "Well, one thing I learned in banking, you never turn down collateral." RR 4:207. By January 2008, the Burkhart Property had been subdivided into four lots called Lots 5-8. RR 4:178. Comiskey told Sellers he "intended to sell off the first three lots, get a construction loan and build a home on the fourth and pay the note off as quickly as possible." RR 4:110.

On February 19, 2008, Comiskey and Gomberg went to 1st Choice to meet with Sellers and finalize Comiskey's substitution for Gomberg. RR 4:38. Comiskey arrived expecting to obtain his own note for the property, but Sellers instead presented

him with an agreement entitled "Extension and Modification of Real Estate Note and Lien" ("Extension and Modification"). App. Tab 2; RR 4:37. Comiskey asked Sellers about other documents having to do with Gomberg's loan – and specifically about seeing the Burkhart note – but Sellers said "the key terms of what would be [their] relationship going forward were in that three-page document," that is, the Extension and Modification. App. Tab 5; RR 4:39; 37-38. As a result, Comiskey did not receive or review the Burkhart note or deed. RR 4:54, 246-47. Comiskey testified that Sellers told him "[t]hat I didn't need a copy of any other documents, either the prior note or anything else. Quite frankly, I didn't know to ask for the deed of trust at that point in time. That this would be the governing document." App. Tab 5; RR 4:46. Sellers and Gomberg recall only brief "small talk" at the meeting, though Gomberg "stepped away" for part of it. RR 4:213-14; RR 5:182, 202.

Sellers, Gomberg and Comiskey signed the Extension and Modification at the February 19 meeting.[1] The agreement references the Burkhart note, identifies Gomberg as maker, states that the note's original principal is $900,000, and lists the Burkhart deed's date and recording information. App. Tab 2. It also states:

> NOW THEREFORE, in consideration of the modification, extension and rearrangement of the time or manner of payment of said note as hereinafter set forth by the legal owner and holder thereof, the Undersigned hereby renews said note and indebtedness and promises to pay to the order of 1st CHOICE BANK... the sum of NINE HUNDRED THOUSAND AND 00/100 ($900,000) Dollars together with interest thereon at the rate of 8.% per annum after date hereof until maturity.

[1] The Extension and Modification states that it was executed on January 18, 2008, but it was actually signed on February 19 at the parties' meeting. App. Tab 2; RR 4:247.

Id. Comiskey understood that payment of this $900,000 debt would result in release of the bank's lien and his taking title to the Burkhart property. App. Tab 5, RR 4:99, 102-05. As he put it, "I would never have paid that money or done any of that had I known that [FHP] had no intention of releasing the titles." *Id.*, RR 4:87. He reached that conclusion because of his reading of the agreement and "[d]iscussions I had with Mr. Sellers." *Id.*, RR 4:99, 109. Gomberg also understood from his own conversations with Sellers that "the sale of each four lots would result in a partial release. And then the fourth one would be – that would be the end of it. It would be paid off." *Id.*, RR 5:194.

The Extension and Modification provides for six monthly interest payments, with principal and accrued interest due on July 18, 2008. App. Tab 2 at 2. It states that liens on the property are extended "until said indebtedness and note as so renewed, modified and extended has been fully paid." *Id.* The only identified "indebtedness" in the agreement is the Burkhart note for $900,000. *Id.*; App. Tab 5, RR 4:253-54 (Sellers). It also provides that the Burkhart note and "liens securing the same" are not affected, impaired or waived; that its purpose is "simply to extend or rearrange the time or manner of payment of said notes and indebtedness and to carry forward all liens securing the same, which are acknowledged by the Undersigned to be valid and subsisting;" and that the terms of the note "and of the instrument or instruments creating or fixing the liens securing the same shall be and remain in full force and effect as therein written, except as otherwise provided herein." *Id.*

Comiskey testified that, while his "eyes glazed over" when reviewing some of the Extension and Modification, he read its "salient points" – "the amount that I was borrowing, the interest rate, the term, things like that." App. Tab 5, RR 4:47, 49 (Comiskey "scanned" agreement). He thought he had simply "[s]igned up for a note that said I had to pay back $900,000, plus interest." *Id.*, RR 4:130. He did not recall whether he read the sentence referring to extending liens. *Id.*, RR 4:50-51. He did not consult a lawyer beforehand because he assumed it was "the typical kind of loan agreement [he had] always signed." *Id.*, RR 4:48. "I was taking them at their word about the material terms being in the document that I was signing." *Id.*, RR 4:52.

III. FHP's Acquisition of the Note and Refusal to Release the Lien

After executing the Extension and Modification, Comiskey worked to carry out the plan he had described to Sellers: selling Lots 5, 7 and 8; designing his house on Lot 6; and paying off the Burkhart note. On April 15, 2008, he sold Lot 8 to Howeth for $193,370. RR 4:114-16; Def. Exh. 24. On May 6, 2008, he sold Lot 7 for $365,000. RR 4:116-17; Def. Exh. 26. Most of the proceeds from these sales went to 1st Choice to pay down the note. RR 4:115-17. After both sales, 1st Choice executed partial releases discharging the lots from the overall lien. RR 4:119; App. Tab 6.

In May 2008, Gomberg told Comiskey that 1st Choice intended to sell the Burkhart note. RR 4:66. In response, Comiskey called his banker, Dan Tralmer at AllegianceBank, and asked him to prepare a new note to pay off the remaining balance. RR 4:133. AllegianceBank approved the financing, and 1st Choice provided a payoff statement indicating that Comiskey could complete payment on the Burkhart

note for interest and principal totaling $463,094.70. App. Tab 7; App. Tab 5, RR 4:144, 262-63. The payoff quote states in capital letters, "PLEASE FURNISH RELEASE OF LIEN," App. Tab 7, which Sellers admitted indicates that 1st Choice's lien would have been released upon payment. App. Tab 5, RR 4:263.

Rather than accept payment from Comiskey and release its lien, however, 1st Choice sold the Burkhart note to FHP on May 23, 2008 as part of a package of 30-35 loans. RR 4:144-45, 219; RR 5:16, 62. 1st Choice was in the process of selling itself to Prosperity Bank, which asked it to "get rid of some assets," including Gomberg's loans. RR 4:238. Prosperity completed its acquisition of 1st Choice on May 28. RR 4:227. 1st Choice sold the note for less than full value, though Comiskey was poised to pay off the full $900,000. RR 5:62.

After learning of the sale of the Burkhart note, Comiskey instructed Tralmer to contact FHP. RR 4:47. On May 27, 2008, Tralmer e-mailed Andrew Schmeltekopf at First City Servicing Corporation, which managed the loans for FHP. Def. Exh. 35; RR 5:13. Tralmer wrote: "Andrew, Hope to have you paid off end of week or early next week. Thanks for your help." Def. Exh. 35. In early June, Comiskey met with Jeff Coupe at First City about paying off the note through a sale of Lot 5 and a construction loan Comiskey planned to get from AllegianceBank. App. Tab 5, RR 4:150-52; RR 5:28-30, 55. Comiskey understood that his plan could proceed once FHP entered the note into its computer system. RR 4:152. Coupe ultimately had "several conversations" in summer 2008 with Comiskey about paying off the note. App. Tab 5, RR 5:58. Coupe also corresponded with Tralmer about AllegianceBank

buying or refinancing the note, which Coupe agreed would have resulted in FHP releasing or assigning to AllegianceBank its lien on the Burkhart property. *Id.*, RR 5:56-57, 70-73; Def. Exh. 36. Comiskey ultimately decided to pay off FHP directly. *Id.*, RR 5:71-73.

On June 6, 2008, Comiskey sold Lot 5 for $399,000. RR 4:153; Def. Exh. 44. FHP received $374,685.02 from the sale and partially released the property from the lien. RR 4:153-54; App. Tab 6. The same day, Comiskey e-mailed Coupe and asked for the balance due on the Burkhart note. App. Tab 8. Coupe responded on June 16:

> Attached is the note balance information we received from 1st Choice Bank. Per their pay history the note balance at the time FHP acquired the note was $461,859.53. Currently after application of the $374,685.02 from the sale of lot # 5 on 6/9/08 I am showing a current balance of $87,174.53.

Id.; RR 4:155-56; RR 5:77-78. Coupe's e-mail made no mention of any other loan or debt belonging to Gomberg. App. Tab 8.

Comiskey then worked to finalize the construction loan from AllegianceBank in order to pay off the note. RR 4:166. He also discovered that 1st Choice had made an error in calculating the balance, which FHP worked to correct, ultimately crediting nearly $5,000 back to the note. Def. Exh. 61; *see also id.* at COM000589-90 ("Resolving this payoff balance issue has taken almost 60 days"). But in August 2008, First City's relationship with Gomberg deteriorated, and it began to explore other ways of recouping Gomberg's loans. App. Tab 5, RR 5:128-30. On August 8, Schmeltkopf e-mailed another First City officer, asking: "On that Gomberg Deed of Trust, do you think the bank could have done anything to lose the mother hubbard

[dragnet] clause when they consented to Comiskey taking ownership of the property?" App. Tab 9; RR 5:81. Minutes later, he e-mailed Coupe and others:

> It appears that the Deed of Trust on the Burkhart Property has Mother Hubbard cross collateralization language that might allow us to grab all the cash from the sale of the last lot. I know Comiskey is now the owner, but I do not see why the cross collateralization language in the Deed of Trust would not be enforceable. You might want to let [First City in-house counsel] Lotte take a quick look before you play hardball, but I would definitely not release these proceeds without trying to grab it all.

App. Tab 9; RR 5:82. First City fully understood that the value of the final remaining lot on the property – Lot 6, where Comiskey intended to build his home – far exceeded the $87,174.53 still owing on the Burkhart note. RR 5:85-86.

On August 19, 2008, Comiskey e-mailed Coupe and again asked for a payoff quote now that 1st Choice's calculation error had been corrected. RR 5:92-93; Def. Exh. 61. In response, FHP's outside counsel Scott Williams e-mailed Comiskey and wrote that the company held several notes from Gomberg that were in default and were cross-collateralized by the Burkhart deed, "so that the Burkhart property is subject to multiple obligations of Mr. Bomberg [sic] and his wife which all must be paid to obtain a release of the lien on the Burkhart property." App. Tab 10; App. Tab 5, RR 4:167-68. Williams also transmitted payoff statements for five Gomberg notes totaling $1,943,954. App. Tab 10; App. Tab 5, RR 4:168-70. Williams's e-mails were the first time anyone notified Comiskey of any claimed relationship between his obligation under the Extension and Modification and other Gomberg debts. App. Tab 5, RR 4:167-68.

Comiskey eventually tendered the full amount FHP indicated remained on the note – $87,351.42 – but FHP responded that it would not accept payment given Gomberg's other debts. Def. Exhs. 2, 3, 5. FHP foreclosed on Lot 6 on April 7, 2009 and bought it for $237,000 – over $150,000 less than the buyer of Lot 5 paid in June 2008. RR 4:182; RR 5:213, 86 (Lots 5 and 6 similar with "similar value").

The largest of Gomberg's other debts was $1,403,407.60 owed on a mortgage issued by 1st Choice to Gomberg and his wife for their house in Houston on Drury Lane (the "Drury property"). Def. Exh. 63 at COM00070; RR 5:22, 98. Gomberg defaulted on that loan on April 20, 2008, and FHP foreclosed on November 4, 2008. RR 4:72; RR 5:120. The balance on the Drury note after the foreclosure and resulting credit of sale proceeds was $618,024.83. RR 5:102, 145-46; Def. Exh. 3.

IV. Procedural History and Evidentiary Rulings

FHP brought suit on October 13, 2008 seeking a declaratory judgment that the Burkhart deed effectively cross-collateralized Gomberg's other loans, and that FHP did not breach any contract or common law duty to Comiskey. CR 6-7; SCR, Petition at ¶ 16-17. Comiskey answered and pled defenses including waiver and several forms of estoppel. App. Tab 11, CR 89-90. He later asserted counterclaims for breach of contract, mutual mistake and reformation, fraud, unjust enrichment and statutory violations. App. Tab 12, CR 198-206. He requested damages and a declaratory judgment on the parties' contractual rights. *Id.*, CR 208-11. Comiskey also filed cross-claims against Prosperity, which he nonsuited, RR 4:4, and First City, which were dismissed on summary judgment. CR 185.

The trial court denied motions for summary judgment, set the case for trial, and heard argument on motions in *limine* on May 12, 2010. RR 2; CR 259-64. FHP moved to exclude parol evidence of the parties' understandings of the Burkhart loan documents, CR 261 (Request 14), but the court ruled that the Extension and Modification is ambiguous: "the contract is ambiguous and we're going to let in what these – what the bank's understanding of it was and what Comiskey's understanding of it was and what Gomberg's understanding of it was." App. Tab 5, RR 2:70.

Trial occurred on May 13-14, 2008. Despite her ruling that the Extension and Modification is ambiguous, the court excluded ample testimony on what the parties understood the contract to mean. When Comiskey testified, the court sustained FHP's hearsay objection to his telling the jury what Sellers said to him that led him to believe 1st Choice would release its lien after his full payment of the Burkhart note. App. Tab 5, RR 4:109. Comiskey would have testified as follows:

> Mr. Sellers stated and represented "the deal," that full payment of the Note would result in a full release of the bank's first lien on the Burkhart Property. This representation was made in sum and substance before and after Mr. Comiskey signed the Extension and Modification agreement.

App. Tab 13 at 2-3.

When Sellers testified, Comiskey's counsel attempted to elicit his understanding of the meaning of the Extension and Modification. App. Tab 5, RR 4:250-54. He asked Sellers what liens the agreement meant to extend, but the court ruled that the question called for a legal conclusion and emphasized that Sellers was a fact witness and would not give "any expert opinions." *Id.*, RR 4:250-51. Then the

court reversed itself, saying, "I guess he can answer as far as his understanding of it," and allowed Sellers to explain his view of certain terms. *Id.*, RR 4:252-54.

But inexplicably, when counsel came to whether Sellers understood the Extension and Modification to provide that full payment of the Burkhart note would discharge the lien, the court reversed itself again and ruled that the question called for a legal conclusion, ordering Sellers not to answer. *Id.*, RR 4:254. Comiskey's counsel tried to ask this question two more times but the court sustained objections that the questions called for speculation and that Sellers had supposedly "already said the documents control." *Id.*, RR 4:261-62. In his offer of proof, Comiskey offered an excerpt from Sellers's deposition testimony to show how he would have testified:

> Q. If at that time [March-April 2008] Mr. Comiskey had sold or had sales to sell the entire property, would you have authorized the release of the entire lien at that time?
>
> A. Yes.
>
> Q. To your understanding, was that the deal?
>
> A. The deal was to sell off the lots and pay the loan off.
>
> Q. And when the loan was paid off, the bank would release its lien?
>
> A. Yes, sir.

App Tab 13, Exh. B at 43-44 (form objections omitted).

V. Directed Verdict and Post-Trial Motions

After the parties rested, FHP moved for a directed verdict. It reiterated its view that the Extension and Modification and other loan documents are not ambiguous and