10-4-2012

Avalon Holdings , LLC v. Ameris Bank, et al. Order on JNOV

Melvin K. Westmoreland
Fulton County Superior Court

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

AVALON HOLDINGS, LLC, DARRYL B. MOORE, LAVERIA A. KNOWLES, and ALICE J. EKBERG,	)	
Plaintiffs,	)	
v.	)	**Civil Action File No. 2009-CV-176138**
REGAL PLAZA FUNDING, LLC, AMERIS BANK, and WILLIAM P. MOSS, III, as Substitute Trustee Under Deed of Trust Date January 8, 2008,	)	
Defendants.	)	

ORDER ON DEFENDANT AMERIS BANK'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT

On September 26, 2012, counsel appeared before the Court to present oral argument on Defendant Ameris Bank's ("Ameris") Motion for Judgment Notwithstanding the Verdict. Upon consideration of the arguments of counsel, the pleadings submitted therewith and the record of the case, this Court finds as follows.

This matter came before the Court for jury trial on Tuesday, June 5, 2012, and concluded on Friday, June 8, 2012. A unanimous jury found that 1) One Georgia Bank, Ameris's predecessor in interest, breached the loan agreement between Plaintiff Avalon Holdings, LLC and Regal Plaza Funding, LLC (the "Avalon Loan Agreement"); 2) Ameris is not a holder in due course of the Avalon Loan Agreement; 3) Ameris is a transferee of the Avalon Loan Agreement; 4) Plaintiffs Avalon Holdings, LLC, Darryl B. Moore and Laveria A. Knowles (collectively, the "Plaintiffs") are entitled to recover $691,000.00 in compensatory damages and $189,834.53 in attorneys' fees and expenses of litigation pursuant to O.C.G.A. § 13-6-11 from Ameris; and 5)

Plaintiffs and Defendant Alice J. Ekberg are excused from paying Ameris under the Avalon Loan Agreement because of One Georgia Bank's breaches of that agreement. On July 6, 2012, the Court entered final judgment memorializing the jury's findings and dismissing Ameris's counterclaims with prejudice. The Court also awarded Ameris $5,130.00 in attorneys' fees in connection with a past discovery dispute.

At the close of Plaintiff's case and again at the close of all the evidence, Ameris moved for a directed verdict in its favor. The Court denied Ameris's motion in the Final Judgment entered on July 6, 2012. Ameris now moves the Court to set aside the verdict and judgment entered thereon in favor of Plaintiffs and to enter judgment in favor of Ameris, dismissing Plaintiffs' Complaint with prejudice and entering judgment in favor of Ameris on its Counterclaim in accordance with Ameris's Motion for Directed Verdict made at the close of all the evidence. For the reasons set forth below, the Court hereby **DENIES** Ameris's motion.

"A motion for judgment notwithstanding the verdict (JNOV) may be granted only when, without weighing the credibility of the evidence, there can be but one reasonable conclusion as to the proper judgment; where there is conflicting evidence, or there is insufficient evidence to make a 'one-way' verdict proper, JNOV should not be awarded." Fertility Technology Resources, Inc. v. Lifetek Medical, Inc., 282 Ga.App. 148 (2006). "In considering a motion for judgment notwithstanding the verdict (J.N.O.V.), the court must view the evidence in the light most favorable to the party who secured the jury verdict." Mills v. Norfolk Southern Ry. Co., 242 Ga.App. 324 (1999).

As an initial matter, Plaintiffs take issue with the propriety of Ameris's motion from a procedural standpoint given that the Court denied Ameris's motion for directed verdict following the jury verdict. Plaintiff argues that a post-verdict ruling on a motion for directed verdict should

preclude the subsequent filing of a JNOV motion, because the "test for granting the JNOV is the same as the test for granting a directed verdict." Brandvain v. Ridgeview Institute, Inc., 188 Ga. App. 106, 112 (1988). Although as a practical matter Plaintiffs' argument is of no effect given that the Court's ruling here is consistent with the ruling on the motion for directed verdict, the Court declines to adopt this approach, which contradicts the plain language of O.C.G.A. § 9-11-50, to preclude a party from exercising a statutory right. See O.C.G.A. § 9-11-50(b) ("Not later than 30 days after entry of judgment, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict.").

Turning to Ameris's substantive arguments, Ameris urges the Court to reverse the jury's finding that One Georgia Bank breached the loan documents due to their contention that One Georgia Bank had sole and absolute discretion to refuse to fund Plaintiffs' draw requests. The Court has rejected this argument on previous occasions and finds no reason to revisit its past rulings. See *Order on Defendant Ameris Bank's Renewed Motion for Summary Judgment* entered on March 19, 2012; *Order on May 20, 2011, Hearing* entered on May 24, 2011. The Court finds that sufficient evidence was presented from which a jury could find that One Georgia Bank abused the limited area of its discretion under the loan agreement and denied the draw requests based on matters outside its discretion, such as the death of Defendant Regal Plaza Funding, LLP's principal.

Next, Ameris argues that it should be regarded as a holder in due course. A "holder" is protected from certain defenses to payment on a note if it is considered a "holder in due course"—if it took the note "for value," in "good faith," and "without notice that the instrument

is overdue or has been dishonored or that there is an uncured default with respect to payment of another instrument issued as part of the same series...." O.C.G.A. § 11-3-302(a).

Here, the Court finds that sufficient evidence was presented from which a jury could determine that Ameris lacked the requisite good faith necessary to qualify as a holder in due course. Testimony was presented at trial that called into question Ameris's efforts to conduct due diligence prior to purchasing the note at issue, and "evidence suggesting that a bank acted without checking the facts [places] the bank's good faith in issue." Choo Choo Tire Service, Inc. v. Union Planters Nat. Bank, 231 Ga. App. 346 (1998). Furthermore, there was a question regarding the issue of Ameris's "notice" of the instant dispute over the Plaintiffs' obligations under the note. Testimony was presented at trial that the low book value ascribed to the instant loan could potentially evidence a default.

Alternatively, Ameris asks the Court to limit Plaintiffs' recovery to a right to an offset against the amount owing under the note due to its status as a "Transferee". Relying on O.C.G.A. § 11-3-305(a)(3), Ameris asks this Court to find that a "Transferee" is protected from all affirmative claims of a payor, who Ameris contends should be limited to a mere right to set-off against such transferee to reduce the amount owing on the instrument at the time the action is brought.

O.C.G.A. § 11-3-305 provides:

(a) Except as stated in subsection (b) of this Code section, the right to enforce the obligation of a party to pay an instrument is subject to the following:

2. A defense of the obligor stated in another section of this article or a defense of the obligor that would be available if the person entitled to enforce the instrument were enforcing a right to payment under a simple contract; and

3. A claim in recoupment of the obligor against the original payee of the instrument if the claim arose from the transaction that gave rise to the

> instrument; but the claim of the obligor may be asserted against a transferee of the instrument only to reduce the amount owing on the instrument at the time the action is brought.

The reference to a transferee in O.C.G.A. § 11-3-305(a)(3) is solely made in the context of one specific type of defense that may be asserted—the defense of recoupment—which is one defense, among others, that non-holders in due course may be subject to under this section. The Court declines to accept the interpretation of the statute advanced by Ameris here, which would operate to divest the payor of the right to the defense contained in Section 11-3-305(a)(2) based on a limitation imposed in Section 11-3-305(a)(3). The Court finds that the distinction between a transferee and the original payee for purposes of a claim in recoupment (O.C.G.A. § 11-3-305(a)(3)) is immaterial for purposes of the other defenses contained in this section, such as a defense arising from a contract (O.C.G.A. § 11-3-305(a)(2)).

Ameris further contends that the jury's award to Plaintiffs of attorneys' fees and expenses of litigation under O.C.G.A. § 13-6-11 is barred by 12 U.S.C. § 1825(b)(3) because such award constitutes an impermissible penalty. 12 U.S. C. § 1825(b)(3) provides:

> The [FDIC] shall not be liable for any amounts in the nature of penalties or fines, including those arising from the failure of any person to pay any real property, personal property, probate, or recording tax or any recording of filing when due. This subsection shall not apply with respect to any tax imposed (or other amount arising) under the Internal Revenue Code of 1986.

Relevant case law suggests that claims that are punitive in nature under state law cannot be asserted against the FDIC. See Monrad v. FDIC, 62 F.3d 1169 (9th Cir. 1995); FDIC v. Claycomb, 945 F.2d 853 (1991). Applying Georgia law, attorneys' fees are not punitive in nature, so this provision does not preclude Plaintiffs from recovering attorneys' fees. See Standard Oil Co. v. Mount Bethel United Methodist Church, 230 Ga. 341 (1973).

Finally, Ameris submits that the Court should reverse the jury's finding of attorneys' fees in favor of Plaintiffs for the reason that Plaintiffs failed to segregate the recoverable fees incurred from the fees that are not recoverable. Both parties and the Court agree that a plaintiff who prevails on its claims is only entitled to attorneys' fees, if at all, in connection with its affirmative claims, not fees incurred in defending against its opponents counterclaims. See Williamson v. Harvey Smith, 246 Ga. App. 745 (2000).

Ameris argues that Plaintiffs' evidence and instructions to the jury failed in two respects. First, by passing the jury the burden of segregating what amount of time is not recoverable, and second, by informing the jury that Plaintiffs' counsel did not perform any activities to solely defend against Ameris's counterclaims.

The Court is not persuaded that a party is required to "segregate" evidence of recoverable attorneys' fees in the sense advanced by Ameris. Plaintiffs' attorney testified that all the work on the case was done in prosecution of its breach of contract claim. As a result, there is evidence from which a jury could find that the amount of attorneys' fees was incurred in connection with the underlying breach of contract claim and not in defense of counterclaims. Ameris's evidence, which attempts to call this finding into question, is not conclusive—they point to places in Mr. Johnson's billing descriptions that explain he was working on various responses to dispositive motions, among other task entries. But the record does not necessitate the conclusion for JNOV purposes that Mr. Johnson's tasks were exclusively oriented to the defense of counterclaims. Moreover, Ameris had the opportunity at trial to cross-examine Mr. Johnson about his billing records and the position that his work was done in exclusive prosecution of his underlying claims.

SO ORDERED this 4th day of October, 2012.

MELVIN K. WESTMORELAND, SENIOR JUDGE
Superior Court of Fulton County
Atlanta Judicial Circuit

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