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ARKANSAS COURT OF APPEALS

DIVISION IV
No. CA10-861

Opinion Delivered March 30, 2011

JOE E. SIMPSON
APPELLANT

V.

TERENCE BRADEN
APPELLEE

APPEAL FROM THE CRAIGHEAD COUNTY CIRCUIT COURT, WESTERN DISTRICT
[NO. CV-2009-399]

HONORABLE RALPH WILSON, JR., JUDGE

REVERSED AND REMANDED

WAYMOND M. BROWN, Judge

Joe Simpson brings this appeal from an order of the Craighead County Circuit Court awarding judgment to appellee Terence Braden. Appellant argues that the trial court erred in granting appellee's motion in limine and in awarding prejudgment interest and attorney's fees to appellee. Because we are reversing the trial court's order regarding the motion in limine, we need not address the other issues.

In 2000, the parties and Barry Garner created TNT Wireless, LLC (Wireless). They did not sign a formal operating agreement but orally agreed to share profits and losses equally. The next year, Jeff Howard created TNT Technologies, Inc. (Clearwave). Wireless ceased doing business and transferred its equipment and customers to Clearwave in 2003. Braden,

Simpson, and Garner made capital contributions to Clearwave, which borrowed money from Heritage Bank on July 13, 2003, as evidenced by a note.

Clearwave filed for bankruptcy in 2004, and Howard did so in 2005. On October 20, 2005, the members of Wireless, as makers, renewed the Clearwave note, paying off its debts. They could not agree on how to handle the renewed note when it matured in 2008; appellant and Garner wanted to renew it but appellee wanted to pay it off. On November 14, 2008, appellee paid the balance on the note. He then sued appellant and Garner for contribution pursuant to Arkansas Code Annotated section 4-3-116(b) (Repl. 2001), which provides that a party having joint and several liability who pays an instrument is entitled to receive contribution from any party having the same joint and several liability. In response, appellant affirmatively pled set-off for his disproportionate contributions to the various obligations of both businesses.[1] After Garner settled with appellee, the trial court dismissed him from the case.

Appellee moved the court to exclude any evidence about appellant's right to set-off, arguing that, because the renewed note had merged all of the parties' prior negotiations and agreements, any evidence of appellant's right to set-off was barred by the parol-evidence rule. Appellant argued that the renewed note did not merge because it did not cover the parties'

[1]We note that the statute of limitations posed no obstacle to appellant's right to assert set-off. In *Little Rock Crate & Basket Co. v. Young*, 284 Ark. 295, 681 S.W.2d 388 (1984), the supreme court construed the predecessor to Arkansas Code Annotated section 16-56-102 (Repl. 2005) and held that a defendant may assert a set-off that arose from a different transaction and was barred by limitations when the plaintiff's cause of action accrued.

agreement with each other regarding reimbursement for expenses paid on their common obligations and that he was not attempting to alter, vary, or contradict the terms of the promissory note. The trial court accepted appellee's contention that the renewed note merged and superceded all prior and contemporaneous agreements between the parties, including their earlier agreement about sharing profits and losses. It granted appellee's motion in limine and prohibited appellant from introducing any evidence about his right to set-off, other than payments on the renewed note. Appellant proffered testimony about his set-off defense and exhibits supporting that testimony. The court awarded appellee contribution from appellant in the amount of $65,876.27, $4,818.91 in prejudgment interest, and $9,500 in attorney's fees. Appellant then pursued this appeal.

Appellant argues that the trial court erred in granting appellee's motion in limine prohibiting him from introducing evidence of his right to set-off on the basis of merger and the parol-evidence rule.[2] A merger clause in a contract, which extinguishes all prior and contemporaneous negotiations, understandings, and verbal agreements, is simply an affirmation of the parol-evidence rule.[3] The parol-evidence rule is a rule of substantive law in which all antecedent proposals and negotiations are merged into the written contract and

[2]The general rule is that we will not reverse the trial court's decision to admit or refuse evidence in the absence of an abuse of that discretion and a showing of prejudice. *Graftenreed v. Seabaugh*, 100 Ark. App. 364, 268 S.W.3d 905 (2007). However, we give no deference to conclusions of law, which we review de novo. *Hall v. Bias*, 2011 Ark. App. 93, 381 S.W.3d 152.

[3]*Farmers Coop. Ass'n v. Garrison*, 248 Ark. 948, 454 S.W.2d 644 (1970).

cannot be added to or varied by parol evidence.[4] It is a general proposition of the common law that, in the absence of fraud, accident, or mistake, a written contract merges, and thereby extinguishes, all prior and contemporaneous negotiations, understandings, and verbal agreements on the same subject.[5] Such testimony is inadmissible if it tends to alter, vary, or contradict the written contract but is admissible if it tends to prove a part of the contract about which the written contract is silent.[6] This rule applies only to documents that the parties intended as a final and complete expression of their agreement.[7] Extrinsic proof of an independent collateral agreement, about which the written contract is silent, is not excluded by the parol-evidence rule.[8]

Appellant argues that merger did not apply to this situation because the parties did not intend that the renewed note would merge their prior agreement.[9] Merger is largely a matter of intention of the parties; in fact, intention is a prerequisite for merger and the trial court will

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[4]*Pruitt v. Dickerson Excavation, Inc.*, 2010Ark. App. 849, 379 S.W.3d 766.

[5]*Cate v. Irvin*, 44 Ark. App. 39, 866 S.W.2d 423 (1993).

[6]*Gallion v. Toombs*, 268 Ark. 955, 597 S.W.2d 842 (Ark. App. 1980).

[7]*See Farmers Coop. Ass'n*, *supra*.

[8]*Rainey v. Travis*, 312 Ark. 460, 850 S.W.2d 839 (1993).

[9] Appellee asserts that the contributions were not made by appellant personally but by Medical Necessities, Inc. Appellant points out, however, that appellee conceded below that certain payments made by Medical Necessities should be credited to him.

use a totality-of-the-circumstances approach to determine the parties' intention.[10] Although whether the subsequent writing included a merger or integration clause is important to the question of intention, it is not determinative; the court will look to all of the other circumstances evidencing the parties' intent before deciding whether merger applies.[11] Appellant points out that the renewed note did not contain a merger clause; that it was not between the same parties or on the same subject as the parties' earlier agreement; and that the trial court's application of merger deprived him of a right that he had previously bargained for and acquired.[12]

Appellant's argument has merit. As mentioned above, merger only happens when the *same* parties to an earlier agreement later enter into a written integrated agreement covering the *same* subject.[13] Also, merger does not apply when the written agreement does not constitute the entire agreement between the parties; testimony on a point on which the contract is silent does not tend to vary or contradict the contract.[14] As appellant points out, the promissory note was between the parties and the bank; the bank, however, was not a party to

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[10]*Farm Bureau Policy Holders & Members v. Farm Bureau Mut. Ins. Co. of Ark.*, 335 Ark. 285, 984 S.W.2d 6 (1998).

[11]*See Koppers Co. v. Missouri Pac. R.R. Co.*, 34 Ark. App. 273, 809 S.W.2d 830 (1991).

[12]*See Koppers*, *supra* (noting that such a result would be unusual).

[13]*Ultracuts Ltd. v. Wal-Mart Stores, Inc.*, 343 Ark. 224, 33 S.W.3d 128 (2000); *Farm Bureau*, *supra*.

[14]*Loe v. McHargue*, 239 Ark. 793, 394 S.W.2d 475 (1965).

the parties' earlier agreement about how they would settle any discrepancies in their contributions. Additionally, the promissory note was on a completely different subject, only addressing the parties' obligations to the bank—and, by implication, to each other as to contribution for payments on the note—but not as to the other aspects of their business relationship. Since the trial court erred in granting appellee's motion in limine, we reverse and remand.

Reversed and remanded.

VAUGHT, C.J., and GRUBER, J., agree.