

April 22, 2008

MEMORANDUM DECISION – NOT FOR PUBLICATION

BAKER, Chief Judge

Appellant-cross-defendant John C. Lewis appeals the trial court's order denying his motion to correct error, arguing that there is insufficient evidence supporting the amount of the judgment in favor of appellee-plaintiff American State Bank (the bank).¹ Finding no error, we affirm.

FACTS

Lewis is the primary shareholder of appellant-defendant Tradewinds Marine, Inc. (Tradewinds). On January 30, 2004, Tradewinds executed a promissory note, secured by a mortgage, in the amount of \$445,504.55. The promissory note and mortgage were issued by the bank. That same day, Lewis and his business partner, William J. Gindele, executed a Commercial Guaranty to the bank, personally guaranteeing repayment of the loan.

Tradewinds failed to make any mortgage payments; thus, on August 16, 2004, the bank filed a complaint against Tradewinds. On September 15, 2005, the bank filed a second amended complaint, adding Lewis and Gindele as individual defendants based on their personal guaranties.

On October 12, 2006, the trial court held a hearing at which all parties, including Lewis and Gindele, were present and represented by counsel. The parties agreed to the

¹ Peoples Community Bank is the successor-in-interest to the bank.

entry of a judgment in favor of the bank and against Tradewinds in the amount of \$659,174.36, representing the principal plus accrued interest.

On February 13 and April 30, 2007, Lewis's personal liability on the loan was tried to the bench. At the trial, Lewis complained that the amount of the agreed-upon judgment was incorrect because it failed to reflect a November 12, 2004, payment of \$22,037.93 made by Tradewinds to the bank during the pendency of the lawsuit. On May 29, 2007, the trial court entered judgment against Lewis and Gindele for the full amount of the agreed upon judgment against Tradewinds, \$690,093.08. Lewis and Gindele filed a motion to correct error on June 27, 2007, again arguing that the amount of the judgment was incorrect. The trial court neither set the matter for hearing nor ruled on the motion. Thus, it was eventually deemed denied by operation of Indiana Trial Rule 53.3. Lewis now appeals.

DISCUSSION AND DECISION

Lewis argues that the trial court erroneously denied his motion to correct error. See Paragon Family Restaurant v. Bartolini, 799 N.E.2d 1048, 1055 (Ind. 2003) (holding that we review a trial court's ruling on a motion to correct error for an abuse of discretion). More specifically, although he does not dispute the issue of his liability in general, Lewis argues that there is insufficient evidence supporting the amount of the judgment entered against him. In evaluating the sufficiency of the evidence, we will neither reweigh the evidence nor assess witness credibility. BEI, Inc. v. Newcomer Lumber and Supply Co., Inc., 745 N.E.2d 233, 236 (Ind. Ct. App. 2001). Instead, we

look only to probative evidence and reasonable inferences to be drawn therefrom that support the verdict. Id.

At the October 12, 2006, hearing regarding the agreed judgment against Tradewinds, the following discussion took place between the trial court and various attorneys:

Court: . . . These matters have been consolidated for purposes of trial and hearing, and show that appearing today on behalf of the plaintiff, American State Bank . . . is Counsel, Mr. Butler. Mr. Blondell is here as Counsel for Dearborn Savings . . .

Blondell: Correct.

Court: Show that here on behalf of Mr. Gindel[e] . . .

Trenz: Yes, Your Honor.

Court: . . . is Counsel, Mr. Trezn . . .

Court: . . . And also present today is Counsel, Mr. David Zerbe, and with him is I believe his client, Mr. Lewis. Correct?

Zerbe: Yes, Your Honor.

Court: . . . [I]t's my understanding, Counsel, that a partial agreement has been reached, and that the parties have agreed upon a subsequent trial date to conclude any remaining issues which I believe will just be issues regarding personal guarantees. Is that correct?

Butler: Yes, Your Honor.

Zerbe: Yes, Your Honor.

Court: Counsel, would you please state the partial agreement for the record?

Butler: Your Honor, the parties agree today to a judgment against [Tradewinds] to take effect December 12 and to be nunc pro tunc to today's date, October 12 in the amount of \$659,174.36, that's the outstanding balance of \$448,917.92[,] interest at the ordinary rate of \$9,499.97 to August 16, 2004, which is the date on or about which the motion for Summary Judgment was filed, plus interest thereafter at the rate of 18% pursuant to the terms of the Promissory Note, that amounts of \$221.38 per day, costs of \$389.73, and fees in accordance with Dearborn Circuit Court Local Rule 2.12. . . .

Court: Mr. Zerbe?

Zerbe: Your Honor, if Mr. Butler could repeat the amount, my client has a question about the amount.

Butler: The total would be \$659,174.36. The outstanding principle balance of the mortgage is probably the cause for concern, it was at the time of this action, \$448,917.92, interest had accrued of \$9,499.97. Then there is interest under the terms of the loan . . . note, at 18% on that balance of \$221.38 per day, again, from August 16 to date, costs of \$389.73, and then attorney's fees pursuant to Local Rule 2.12.

Zerbe: Your Honor, the only reservation we have, is that we did not discuss the specific numbers, assuming Mr. Butler's math is correct and those numbers are what they are, we are in agreement with that.

Court: Okay. Let's take a short recess, let's get them resolved.

Zerbe: Okay.

Recess called.

Court reconvened following recess.

Court: . . . Counsel, at the time we broke, we were clarifying the terms of the agreement, making sure everyone was in agreement with the terms as stated by Mr. Butler. Mr. Zerbe, is there anything additional?

Zerbe: Your Honor, I apologize for that delay, we hadn't been prepared for that number, but upon review, it appears to be accurate.

Court: So, the terms as stated here today, are you and you client in agreement with that?

Zerbe: Yes, Your Honor.

Oct. 12 Tr. p. 4-7.

Thus, at trial, the bank was able to present evidence that an agreed-upon judgment had been entered against Tradewinds. Moreover, Lewis was present at the hearing at which the amount of the judgment was discussed. Most compelling, Lewis and his attorney² were sufficiently uncertain about the amount proposed by the bank that the trial court called a recess to enable the parties to reach a confident agreement about the amount of the judgment. Following the recess, Lewis and Tradewinds's attorney affirmed to the trial court that they agreed that the amount owed by Tradewinds was \$659,174.36. Although we cannot explain why no one broached the subject of the \$22,037.93 payment made by Tradewinds to the bank on November 12, 2004, for whatever reason, Lewis, Tradewinds, and their attorney were silent on the matter even though they had every opportunity to raise it and object. Under these circumstances, we can only conclude that Lewis has waived the right to object to the amount of the agreed-upon judgment. Inasmuch as the guaranty executed by Lewis specifically provided that the indebtedness guaranteed by the instrument included any future judgments against

² The same attorney represented Tradewinds and Lewis.

Tradewinds, we find that there is sufficient evidence supporting the judgment—and the amount thereof—in favor of the bank. Therefore, the trial court did not abuse its discretion by denying Lewis’s motion to correct error.

The judgment of the trial court is affirmed.

RILEY, J., and ROBB, J., concur.