IN THE COURT OF APPEALS OF TENNESSEE

EASTERN SECTION

NATIONAL BOOK WAREHOUSE, INC.,	)	C/A NO. 03A01-9606-CV-00189
	)	
Plaintiff-Appellee,	)	KNOX LAW
	)	
v.	)	HON. WHEELER ROSENBALM,
	)	JUDGE
BOOK-MART OF FLORIDA, INC., BOOK-WAREHOUSE OF SARASOTA, INC., BOOK-WAREHOUSE OF ST. AUGUSTINE, INC., BOOK-WAREHOUSE OF ELLENTON, INC., BOOK-WAREHOUSE OF WEST PALM BEACH, INC., BOOK-WAREHOUSE OF SAWGRASS, INC.,	)	
	)	AFFIRMED
	)	AS
Defendants-Appellants.	)	MODIFIED

F. DULIN KELLY and CLINTON L. KELLY, KELLY & KELLY, Hendersonville, for Plaintiff-Appellee.

JOHN B. WATERS, III, LONG, RAGSDALE & WATERS, P.C., Knoxville, for Appellant, Book-Mart of Florida, Inc.

OPINION

Franks. J.

In this contract dispute, the Trial Court entered summary judgment for plaintiff against defendants for the principal on notes of $113,630.40, plus attorney's fees of $15,750.00, and defendants have appealed.

Plaintiff, National Book Warehouse, Inc., (NBW) and defendant Book-Mart of Florida, Inc., (Book-Mart) were

involved in litigation. During the course of litigation, Book-Mart guaranteed payments on five promissory notes to NBW.

NBW filed suit to collect these notes and Book-Mart raised the affirmative defenses of fraud and mistake.

The issue presented is whether the Trial Court erred in granting summary judgment for Book-Mart's default on five promissory notes.

Before the Court was the affidavit and deposition of Dean Winegardner, President of the bookstore companies. His affidavit states in pertinent part:

> 2. The Notes and Guaranty which are the subject of this case were negotiated between myself, on behalf of the defendants and Dan Wiener, on behalf of the plaintiff. In our discussions, which took place before and after execution of the Notes and Guaranty, I was led to believe by Dan Wiener that there would be no net payment on the Notes from the defendants to plaintiff; that the execution of the Notes and Guaranty was one minor step in a settlement or resolution process of various claims between the plaintiff and the defendants; and that a final resolution of the case would result in obligations of the plaintiff to the defendants which would exceed the amounts of the Notes. Mr. Wiener either had the same understanding I had, or he misrepresented his understanding and the intended effect of the Notes and Guaranty.
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> 3. My sole reason for executing the Notes and Guaranty was that the amounts set forth therein would be an offset against amounts owed by the plaintiff to the defendants, and that no net amount would be owed or paid by the defendants to the plaintiff.

As a general rule, summary judgment is not appropriate for the disposition of a fraud claim. *Fowler v. Happy Goodman Family*, 575 S.W.2d 496, 499 (Tenn. 1978). However, a party asserting fraud, when confronted by a motion for summary judgment, must produce competent and material

evidence which is legally sufficient to support the defense. *Id.*

Here, the affidavit of Winegardner does not establish a claim of promissory fraud. Promissory fraud, a fraud based upon a promise of future conduct, requires that the promise or representation was made with the intent not to perform[1]. To demonstrate a lack of present intention to carry out the promise, evidence other than failure to keep the promise or the subjective impression of the promisee is required. *Id.*[2] *See Farmer's & Merchants Bank v. Petty*, 664 S.W.2d 77, 81 (Tenn.App. 1983); *Stacks v. Saunders*, 812 S.W.2d 587, 593 (Tenn.App. 1990); *Oak Ridge Precision Industry, Inc. v. First Tenn. Bank*, 835 S.W.2d 25, 28 (Tenn.App. 1992).

Winegardner's affidavit states that he "was led to believe" that there would be no net payment on the notes and that Mr. Wiener "had the same understanding I had, or he misrepresented his understanding." As a matter of law, Winegardner does not offer competent evidence of Wiener's lack of intention to carry out the promise. Summary judgment was appropriate on this fraud defense.

Summary judgment was also appropriate on the issue of mistake. Tennessee defines mistake as "an unconscious

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[1] Although the action of promissory fraud did not exist in Tennessee at one time, the Supreme Court made it clear in *Fowler* that such an action would be recognized if the proof was sufficient.

[2] The affidavit was legally insufficient because it offered only subjective belief in stating that "upon information I have, I believe that all of the aforementioned representations of the plaintiffs were made by them knowing that they were false and they were intended to mislead me." *See* T.R.C.P. Rule 56.

ignorance or forgetfulness of a fact, past or present, material to the contract,? and exists:

> when a person acting upon some erroneous conviction, either or law or fact, executes some instrument, or does some act, or omits to do some act, which but for that erroneous conviction, he would not have executed, done or omitted.

State ex rel. Mathes et al. v. Gilbreath, 181 Tenn. 498, 504, (Tenn. 1944).

The principals in this case were not unaware or forgetful of a past or present fact. They may have been anticipating the terms of a future settlement agreement, but this speculation is not a mistake that can be remedied by law.

The Trial Court awarded attorney's fees in the amount of $15,750.00. The amounts were assessed pursuant to a provision of the promissory notes which provides:

> Upon default, the undersigned agrees to pay reasonable attorney's fees, which shall in no event be less than 15% of the amount due hereunder, and all costs of collection.

The Trial Judge said in his final judgment ?that the actual and reasonable legal fees incurred by plaintiff in this action, in the absence of the promissory notes, amounted to $4,480.85, as set forth in the affidavit of attorney fees, submitted . . . [by plaintiff's attorney]; however, the plaintiff is entitled to judgment against defendant for legal fees in the amount of $15,750.00 pursuant to the written provisions of the notes sued upon.?

NBW relies on the case of *Waller, Lansden, Dortch, Davis v. Haney*, 851 S.W.2d 131 (Tenn. 1992) to uphold the award of attorney's fees. The court in that case enforced a provision in the terms of a promissory note which stated ?all

costs of collection, including attorney's fees of 15% if suit is brought on this note, shall be added to the principal hereof.? The Court found that the agreement constituted an unconditional commitment to pay the 15% if suit was brought, and distinguished this clause from a ?standard clause? awarding reasonable attorney's fees. *Id.* at 134. This case does not control the issue before the Court. The defenses raised in *Haney* was that plaintiff was not entitled to an award of attorney's fees, because it elected to represent itself in collecting the note, and that since plaintiff was representing itself, it was not incurring attorney's fees, but was actually seeking to increase the award. *Id.* at 133. The defense of reasonableness of the contractual obligation was not an issue before the Court.

In our view, this issue is controlled by *Dole v. Wade*, 510 S.W.2d 909, (Tenn. 1974). The Court recognized that the stipulation in a note for attorney's fees is valid, and will be enforced, but the Court is not bound to any particular amount set forth in the contract, which will be enforced only to the extent that it is reasonable. The Court overruled a line of cases apparently holding to the contrary, and followed an opinion by Justice Grafton Green, in the case of *Bank v. Wood*, 125 Tenn. 6, (1911). Justice Green said:

> Upon the question of the allowance of attorneys' fees, we think there is no error in the chancellor's decree. While a stipulation in a note for attorneys' fees is valid and will be enforced by this court, the court is not bound by a provision to the effect that any particular amount shall be allowed for such fees, and no matter what stipulation as to the amount is made in the face of the note, it will not be enforced unless it appears reasonable to the court.

125 Tenn. 16-17. This ruling is in keeping with the time-honored rule of equity that contracts are enforceable only to the extent they are reasonable.

In this case, it is undisputed that the reasonable fee for the services rendered is $4,480.85. Accordingly, we reduce the award of attorney's fees to that amount, and otherwise affirm the judgment of the Trial Court.

The cause is remanded with the costs of the appeal assessed one-half to each party.

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Herschel P. Franks, J.

CONCUR:

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Charles D. Susano, Jr., J.

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William H. Inman, Sr. J.