

STATE OF MICHIGAN
COURT OF APPEALS

HFM, INC., ALAN AGEMY and MARIA
AGEMY,

UNPUBLISHED
June 8, 1999

Plaintiffs-Counterdefendants-
Appellees,

v

No. 203237
St. Clair Circuit Court
LC No. 93-001204 CK

DONACO, INC.,

Defendant,

and

JOHN M. DONOHOE,

Defendant,

and

SALVATORE VITALE,

Defendant-Counterplaintiff-
Appellant.

HFM, INC., ALAN AGEMY, and MARIA
AGEMY,

UNPUBLISHED

Plaintiffs-Counterdefendants-
Appellees,

v

No. 203253
St. Clair Circuit Court
LC No. 93-001204 CK

DONACO, INC.,

Defendant-Appellant,

and

JOHN M. DONOHOE,

Defendant,

and

SALVATORE VITALE,

Defendant-Counterplaintiff-Appellee.

Before: Doctoroff, P.J., and McDonald and Wilder, JJ.

PER CURIAM.

Defendants Donaco, Inc. (“Donaco”) and Salvatore Vitale (“Vitale”) appeal as of right from a circuit court order entering judgment in favor of plaintiffs in the amount of \$24,288.82. We affirm.

FACTS

The underlying facts giving rise to this lawsuit are largely undisputed. Plaintiff Alan Agemy (“Alan”) was the president and sole owner of Huron Farmer’s Market, Inc. (“HFM”). In August 1989, HFM and defendant Donaco, through its president and sole owner, John M. Donohoe (“Donohoe”) executed a purchase agreement whereby Donaco agreed to purchase all of HFM’s assets for \$75,000. Pursuant to the purchase agreement, Donaco executed a promissory note in favor of HFM in the amount of \$75,000 with payments of \$1,279 per month over several years. After HFM was dissolved, the \$75,000 promissory note was assigned by HFM to Alan, and then subsequently endorsed to Alan’s wife, plaintiff Maria Agemy (“Maria”). Thereafter, in accordance with the assignment, Donaco made payments under the note to Maria.

In November 1989, Vitale agreed to provide financing for a wholesale produce business operated by plaintiffs, and plaintiffs executed a promissory note in favor of Vitale in the amount of \$25,000 with payments of \$650 per month over several years. As security for the \$25,000 loan, plaintiffs gave the \$75,000 note executed by Donaco to Vitale. Also in November 1989, Alan executed a consulting agreement with Vitale whereby Vitale would provide consulting services in connection with the wholesale produce business to plaintiffs for four years in exchange for \$125 per month.

In early 1990, after it was apparent that plaintiffs' wholesale business was failing, plaintiffs again approached Vitale for financing to establish a retail fruit, produce and deli market named Villa Fruit and Deli ("VFD"). Vitale agreed and subsequently purchased a parcel of land on which VFD would be situated. Prior to the opening of VFD, Vitale deposited \$50,000 in a checking account established solely for VFD. The account was opened in the business' name, and Vitale, Alan and Maria were all authorized to write checks on the account. The funds were to be used to renovate the building, compensate the contractors, and pay for business related operating expenses.

On April 13, 1990, before VFD was opened for business and in order to insure that prompt payments were made to Vitale on the \$25,000 note, plaintiffs, through their attorney, executed a document transferring the \$1,279 monthly payments they received under the \$75,000 Donaco note directly to Vitale. The document was signed by Alan, Maria and Vitale and directed Donaco to make all future payments on the \$75,000 note owed to plaintiffs directly to Vitale. In accordance with this directive, Donaco began making the \$1,279 monthly payments directly to Vitale.

In June 1990, a tax levy was imposed by the IRS on plaintiffs' \$75,000 promissory note for unpaid payroll taxes owed by HFM. Donaco was advised of the IRS levy and was instructed to remit payments to the IRS for the benefit of HFM/Agemy. As directed, Donaco made the \$1,279 monthly payments to the IRS until it received notice that the levy had been released. As a result of the tax levy, Vitale did not receive any payments from Donaco. Thus, in order to restore payments to himself under the note at the maximum value, Vitale negotiated a payoff with the IRS. On December 3, 1991, Vitale paid the IRS \$11,136.58 in full satisfaction of the HFM/Agemy tax obligation. Thereafter, the tax lien was released and Vitale instructed Donaco to resume making payments to him directly.

On December 30, 1992, plaintiffs, who were unaware that the tax lien had been paid off, through their attorney, sent a letter to Donohoe directing Donaco to resume payments of the promissory note to plaintiffs because Vitale had been paid in full. A second letter directing Donaco to remit payments to plaintiffs was sent in January 1993. In addition, both Alan and plaintiffs' attorney contacted Donohoe by telephone regarding this matter. Donohoe did not respond and did not remit any payments to plaintiffs.

In February 1993, unbeknownst to plaintiffs, Vitale negotiated with Donaco an amount that Donaco would pay Vitale in full satisfaction of the total indebtedness owed by HFM and plaintiffs to Vitale. Vitale and Donaco entered into a settlement agreement memorializing the terms of the payoff, and on March 2, 1993, Donaco paid Vitale \$27,700 in full satisfaction of the note.

Shortly thereafter, plaintiffs filed the instant lawsuit alleging breach of contract and seeking to enjoin further payments on the note to Vitale. Defendant Vitale filed a countercomplaint against plaintiffs alleging breach of contract and unjust enrichment for the amount he paid to the IRS on behalf of plaintiffs.

STANDARD OF REVIEW

This issue involves mixed questions of fact and law. Factual findings are reviewed by this Court for clear error. MCR 2.613(C); *Berry v State Farm Mutual Automobile Ins Co*, 219 Mich App 340, 345; 556 NW2d 207 (1996). Legal questions are reviewed de novo. *Adams v City of Detroit*, 232 Mich App 701, 704; ___ NW2d ___ (1998). In a bench trial, the trial court must make particular factual findings and state separately its conclusions of law as to contested matters. MCR 2.517(A)(1); *Fletcher v Fletcher*, 447 Mich 871, 883; 526 NW2d 889 (1994), after remand 229 Mich App 19; 581 NW2d 11 (1998). A trial court's findings are sufficient if it appears that the trial court was aware of the issues in the case and correctly applied the law. *Triple E Produce Corp v Mastronardi Produce, Ltd*, 209 Mich App 165, 176; 530 NW2d 772 (1995).

DISCUSSION

Defendants Donaco and Vitale first argue that the trial court erred in finding that the challenged document directing Donaco to remit payments under the \$75,000 note to Vitale was not an assignment of plaintiffs' rights to Donaco, but simply a directive to reroute payments. We disagree.

The document at issue is titled "Security Note dated August 30, 1989 (Note)" and states as follows:

The undersigned, being the assignee of the Note, the holder, and the secured party,
direct collectively that future payments on the note be made to the order of:

Salvatore Vitale

c/o Italian Villa

4758-24th Avenue

Port Huron, Michigan 48060

This direction shall remain in effect until further notice.

The document was dated April 13, 1990, and was signed by Alan Agemy as assignee of HFM, Inc., Maria Agemy as the holder of the note, and Salvatore Vitale as the secured party.

Defendants assert that this document effectively assigned all of plaintiffs' rights and interest in the \$75,000 note to Vitale. Plaintiffs, on the other hand, contend that the document merely served to inform Donaco to direct all payments on the note to Vitale, but did not transfer any enforceable rights or interest in the note. The trial court found that the document was nothing more than a directive that simply transferred receipt of payments on the \$75,000 note from plaintiffs to Vitale, and was not an assignment under the law. The trial court noted that the collateralization of the \$75,000 note for the benefit of Vitale did not make him a holder in due course, a holder or an assignee in accordance with the UCC. Rather, the trial court found that Vitale simply had a perfected security interest in the note that he could rely upon if plaintiffs defaulted on payments on the \$25,000 note. However, Vitale had no right to collect on the \$75,000 note, or even enforce the note, absent a default by plaintiffs.

After a thorough review of the record, we conclude that the trial court's findings on this issue were adequately supported by the evidence. In particular, the trial court's finding that the written document was not intended to be an assignment of the \$75,000 note, or any rights or interest under the note, was based on credibility determinations that are supported by a rationale interpretation of the evidence. Alan testified that the written document temporarily rerouting payments to Vitale, was not an assignment of any rights or interest under the note. He simply wanted to insure that Vitale received prompt payments on the \$25,000 note, and found the directive to be a convenient method by which to achieve that objective. Plaintiffs' attorney who drafted the document also testified that the document was not an assignment of plaintiffs' rights. He explained that in the absence of a default by plaintiffs on the \$25,000 loan, Vitale had no interest in the \$75,000 note, beyond a security interest, and the directive did not afford him any additional rights or interest.

Under these circumstances, the trial court was in the best position to assess the evidence and the credibility of the witnesses to determine the parties' intent, and we give special deference to the trial court's findings when they are based upon its assessment of a witness' credibility. MCR 2.613(C); *Marlo Beauty Supply, Inc v Farmers Ins Group of Cos*, 227 Mich App 309, 325; 575 NW2d 324 (1998). Moreover, it is within the sole province of the trier of fact to resolve factual disputes. Therefore, although the language in the document may have been subject to varying interpretations by the parties, where there is competent evidence and testimony to support the findings and conclusions reached by the trial court, we will not disturb the judgment. Accordingly, we find no clear error in the trial court's findings concerning the interpretation of the challenged document.

Defendants Donaco and Vitale next argue that the document directing Donaco to remit payments directly to Vitale was irrevocable because the parties did not manifest an intent in the writing itself that the transfer be revocable, and because the consent of all the parties who signed the agreement was required to reroute payments. We disagree.

In order to resolve this issue, we must examine the language in the document stating, "[t]his directive shall remain in effect until further notice." In doing so, we find the general principles of contract construction and interpretation instructive in determining the intent of the parties as expressed in the written instrument. Under generally accepted contract principles, if contractual language is clear, construction of the contract is a question of law for the Court. *Meagher v Wayne State University*, 222 Mich App 700, 721; 565 NW2d 401 (1997). However, if the contract is subject to varying interpretations, and a factual development is necessary to determine the intent of the parties, the question becomes one for the trier of fact. *Id.* at 722. Where a contract is subject to judicial construction, the court must determine, as best as possible, the parties' true intent by considering the language in the contract, its subject matter, and the circumstances surrounding the transaction. *Sands Appliance Services v Wilson*, 231 Mich App 405, 412; 587 NW2d 814 (1998). Under either standard, the primary goal of judicial interpretation is to ascertain and give effect to the intent of the parties by affording the language of the document its plain and ordinary meaning. *Meagher, supra* at 721.

The trial court concluded from the testimony of the witnesses that the parties intended that the direction of the payments would only remain in effect until further notice was given to Donaco by Alan

Agemy. The trial court further found that because the document redirecting payments was only entered into for a matter of convenience, when plaintiffs gave notice to Donaco to redirect payments back to them, Donaco was required to comply with plaintiffs' instruction. We conclude that these findings reached by the trial court were based on credibility assessments of the witnesses through the testimony and evidence presented at trial. See *Marlo Beauty Supply, supra* at 325. Because the evidence and testimony was subject to varying interpretations, the trial court, sitting as the trier of fact, was called upon to resolve the issue in accordance with a rationale consideration of the evidence. In view of the fact that Vitale held no interest in the \$75,000 note beyond a security interest, we find no clear error with the court's finding that plaintiffs alone could redirect payments under the note upon proper notice given to Donaco. The trial court's conclusion properly recognizes that Vitale did not have any substantive rights or interest in the note, and all legal rights under the note, including the right to redirect payments, were retained by plaintiffs. Accordingly, we hold that the trial court's interpretation of the clause "until further notice" was not clearly erroneous.

Next, defendant Donaco argues that if the written document was not irrevocable, then Maria Agemy, the holder of the note at the time of this dispute, did not properly notify Donaco that the assignment was being revoked. Defendant claims that the trial court's finding that proper notice of revocation was given was clearly erroneous because there was no evidence that Donaco actually received the letters allegedly sent to him by plaintiffs' attorney, or that he spoke with Alan or plaintiffs' attorney about this matter on the telephone. We disagree.

After receiving conflicting testimony from the parties regarding whether adequate notice of revocation of the directive was given by plaintiffs to Donaco, the trial court concluded that two letters were in fact mailed to Donaco advising the company to send the remaining monthly payments under the note to plaintiffs. The trial court additionally found that a follow-up telephone call was placed by plaintiffs' attorney concerning this matter. Further, the trial court noted that during a telephone conversation between Donohoe and plaintiffs' attorney, Donohoe demanded documentation that Vitale had been paid in full before he would reroute the payments, clearly acknowledging that he received notice of plaintiffs' request. In view of such evidence, the court concluded that proper communication was given to Donohoe directing him to remit future monthly payments to plaintiffs directly. We find that the trial court's findings were well supported by the evidence and testimony at trial. Any conflicting testimony was properly resolved by the court, as the trier of fact, and we find no clear error with those findings.

Next, defendant Donaco argues that it is entitled to a credit for the \$27,700 it paid to Vitale in full settlement of the \$75,000 note. Donaco contends that plaintiffs' damages against it should be calculated by deducting the payoff to Vitale (\$27,700) from the balance owed on the note on the day of the payoff (\$38,616.98), totaling \$10,9116.98. We disagree.

Donaco's argument that the \$27,700 it paid to Vitale as a payoff on the note should be considered in calculating plaintiffs' damages is flawed because it fails to recognize that plaintiffs did not receive any financial benefit from the payoff between Donaco and Vitale. In other words, the amount of the payoff from Donaco to Vitale does not reduce the balance on the note owed to plaintiffs by Donaco, and should therefore not be credited toward the damages owed by Donaco. According to the

terms of the purchase agreement between plaintiffs and Donaco, plaintiffs were the only persons entitled to payment under the \$75,000 note, and they did not receive payment in full. Therefore, any amount paid by Donaco to Vitale is irrelevant for purposes of assessing damages, and the trial court's calculation of damages owed by Donaco is correct.

Defendant Donaco's final argument is that the trial court erred in imposing joint and several liability against it and Vitale for only a portion of the judgment. Donaco contends that the entire amount of damages should be subject to joint and several liability because it was the joint efforts of Donaco and Vitale that resulted in a payoff of the note and that caused plaintiffs to incur damages. In addition, Donaco maintains that they should both be liable for the entire amount because there was a single, indivisible injury to plaintiffs that could not be severed for purposes of apportioning damages. We disagree.

After all the credits are applied, Donaco remains liable to plaintiffs on its \$75,000 note in the amount of \$24,069.22, whereas Vitale is responsible for only \$13,152.54 of the total judgment, reflecting the amount he was overpaid on the \$25,000 note. Because plaintiffs are obviously not entitled to double recovery, and may not recover more than the \$75,000 owed to them under the note, any amount paid by Vitale to plaintiffs would entitle Donaco to a setoff in that amount. However, unless and until Vitale pays his portion of the damages, Donaco remains liable for the entire amount due on the note. Indeed, it was the breach of Donaco's obligation to plaintiffs under the \$75,000 note that resulted in plaintiffs' damages; Vitale was not a party to that transaction. Accordingly, we find no clear error with the trial court's assessment of damages against Donaco and Vitale, or the court's imposition of joint and several liability on only a portion of the damages.

Defendant Vitale argues that the trial court erred in finding that he did not meet his burden of proof by a preponderance of the evidence in his unjust enrichment claim raised in his countercomplaint. Vitale claims that he loaned plaintiffs \$50,000 to start VFD, and plaintiffs never reimbursed him for any of that loan. Although Vitale concedes that he did not obtain a promissory note from plaintiffs for the money, and there was no written loan agreement, he claims that he is entitled to \$50,000 under the theory of unjust enrichment. We disagree.

After the presentation of testimony and evidence, the trial court found that the \$50,000 given by Vitale to plaintiffs to open and operate VFD was not a loan subject to repayment, but was a capital investment in a business solely owned by Vitale. The trial court noted that the business was opened and incorporated in Vitale's name, it was situated on land owned exclusively by Vitale, and the business checking account was in Vitale's name. The trial court further found that plaintiffs had no ownership rights in the business or the land, and therefore, Vitale was not entitled to repayment of the \$50,000.

We conclude that the trial court's findings on this issue are adequately supported by the record. The record is devoid of any evidence presented by Vitale to support his contention that the \$50,000 was a loan to plaintiffs subject to repayment. As the trial court aptly noted, Vitale did not obtain a promissory note for the \$50,000 when he had consistently secured all his prior loans to plaintiffs with a promissory note identifying the terms of the loan and repayment schedule. In addition, the business was incorporated under Vitale's name, Vitale was the sole owner of the land on which the business was

situated, and Vitale opened a business checking account in his name. Accordingly, the trial court's finding that Vitale failed to prove his unjust enrichment claim by a preponderance of the evidence is not clearly erroneous, and the trial court's dismissal of Vitale's countercomplaint for lack of merit was proper.

Vitale's last argument on appeal is that the trial court's negative perception of Vitale as a "loan shark" established early in the proceedings detrimentally affected his credibility. Vitale claims that the trial court was influenced by passion or prejudice, and as a result, the court made improper remarks and rulings against Vitale throughout trial. We disagree.

To justify a new trial on the ground of judicial misconduct, the moving party must establish that actual prejudice resulted from the misconduct. *Wilkins v Wilkins*, 149 Mich App 779, 787; 386 NW2d 677 (1986). Judicial bias or prejudice cannot be established merely by repeated rulings against a litigant, even if the rulings are erroneous. *Wayne Co Prosecutor v Parole Bd*, 210 Mich App 148, 155; 532 NW2d 899 (1995). Similarly, neither public statements regarding a case, *Ireland v Smith*, 214 Mich App 235, 249; 542 NW2d 344 (1994) aff'd 451 Mich 457 (1996), nor a judge's remarks during trial which are critical or hostile to the parties or their cases, are ordinarily sufficient to establish bias or require disqualification of a judge. *Schellenberg v Rochester Elks*, 228 Mich App 20, 39; 577 NW2d 163 (1998).

A thorough review of the record reveals that the trial court did not engage in judicial misconduct and did not demonstrate judicial bias or prejudice against Vitale. First, the court's reference to the 22.5% interest rate on plaintiff's initial loan from Vitale was made only to clarify that the first financial transaction between plaintiffs and Vitale was paid in full and not the subject of the instant litigation. Second, while we are not privy to the trial judge's alleged facial, nonverbal reactions to evidence presented during trial, in view of the fact that this was a bench trial, such responses, even if true, could hardly be deemed prejudicial to Vitale's case. Further, because the trial court did not award excessively high damages in this matter, and the damages awarded were supported by the evidence, we conclude that Vitale was not prejudiced by such alleged conduct. Finally, we find no support in the record, other than Vitale's bare allegation, that the trial court publicly referred to the trial as the "Italian trial." Nor is there any evidence to substantiate Vitale's claim that the trial court perceived Vitale as a "loan shark," or that such alleged perception prejudiced Vitale's position at trial. Therefore, because Vitale cannot point to any instances on the record where the trial court demonstrated bias or questioned Vitale's credibility for improper reasons, we find no judicial misconduct.

Affirmed.

/s/ Martin M. Doctoroff

/s/ Gary R. McDonald

/s/ Kurtis T. Wilder