

STATE OF MICHIGAN
COURT OF APPEALS

MARTONE BUILDING COMPANY, LLC,

Plaintiff/Counter Defendant-
Appellee,

v

ELAINE BARNETT, Trustee of the ELAINE
BARNETT REVOCABLE TRUST, and ELAINE
BARNETT REVOCABLE TRUST,

Defendant/Counter Plaintiff-
Appellant,

and

STANDARD FEDERAL BANK NA and LA
SALLE BANK MIDWEST NA,

Defendants,

and

BANK OF AMERICA,

Defendant-Third Party Plaintiff,

and

ANTON LUCAJ d/b/a MARTONE COMPANIES
and LENORA LULGJURAJ,

Third Party Defendants.

UNPUBLISHED
May 24, 2012

No. 299150
Oakland Circuit Court
LC No. 2007-085119-CK

Before: SAAD, P.J., and STEPHENS and RONAYNE KRAUSE, JJ.

PER CURIAM.

Defendant¹ appeals the trial court's order that voided two mortgages and granted judgment for plaintiff. For the reasons set forth below, we affirm in part, reverse in part, and remand for further proceedings consistent with this opinion.

Plaintiff, Martone Building Company, LLC, brought this action to quiet title to real property located at 47875 Ravello Court in Novi. Martone Building Company is a member-managed limited liability company and its members are Anton Lucaj and Louis Bajjali. Defendant filed a counter-complaint to foreclose on two mortgages that encumbered the property. The trial court ruled that the 2004 mortgage is void as a matter of law because, at trial, defendant did not produce the promissory note that secured the mortgage. The trial court held that the 2005 mortgage is void because Lucaj had not signed the promissory note in a representative capacity as a member of Martone Building Company, and thus did not bind the company.

I. STANDARD OF REVIEW

We review for clear error the findings of fact made by the trial court during a bench trial, with due regard given to the special opportunity of the trial court to judge the credibility of witnesses who appear before it. MCR 2.613. A finding is clearly erroneous if, after reviewing the entire record, this Court is left with a definite and firm conviction that a mistake has been made. *Walters v Snyder*, 239 Mich App 453, 456; 608 NW2d 97 (2000). A trial court's decision not to set aside a judgment is reviewed for abuse of discretion. *Limbach v Oakland County Bd of County Road Comm'rs*, 226 Mich App 389, 393-394; 573 NW2d 336 (1997). Interpretation of contractual language is an issue of law that is reviewed de novo. *Citizens Ins Co v Secura Ins*, 279 Mich App 69, 72; 755 NW2d 563 (2008).

II. EVIDENCE OF THE FIRST PROMISSORY NOTE

At trial, defendant did not introduce a copy of the promissory note that secured the first mortgage. Defendant argues, however, that it introduced sufficient evidence of indebtedness and consideration given for the mortgage at trial, or, alternatively, that its failure to introduce the first note should be excused under MCR 2.612. We hold that defendant established the existence of the note and that the trial court clearly erred by ruling that defendant failed to prove an "underlying enforceable obligation," thus rendering the 2004 mortgage void. While the trial court correctly observed that "a mortgage without the underlying enforceable obligation fails as a matter of law," citing *Prime Financial Services LLC v Vinton*, 279 Mich App 245, 257; 761 NW2d 694 (2008), the parties, including Martone Building Company, repeatedly acknowledged the existence of the loan obligation throughout the proceedings.

¹ Defendant Elaine Barnett, Trustee of the Elaine Barnett Revocable Trust, and the Elaine Barnett revocable trust are collectively referred to as "defendant" throughout this opinion. Defendants Standard Federal Bank, N.A.; La Salle Bank Midwest, N.A.; Bank of America, N.A.; Anton Lucaj, individually and d/b/a Martone Companies; and Lenora Lulgjuraj are not parties to this appeal. Defendant was also a counter-plaintiff in the case.

Defendant's observation is well taken that Martone Building Company never argued that the 2004 promissory note for \$150,000 did not exist. Indeed, defendant attached the note to its counter-complaint and the note is referenced in the mortgage itself, which was introduced at trial. In its answer to defendant's counter-complaint and affirmative defenses, Martone Building Company referred to the note, as appended to the counter-complaint, acknowledged the \$150,000 loan and mortgage, and merely took the position that Lucaj had no authority to execute them on behalf of Martone Building Company.

Furthermore, at trial, counsel for Martone Building Company specifically acknowledged in his opening statement that Lucaj procured the underlying \$150,000 loan from defendant and that, to secure the debt, Lucaj entered into a mortgage agreement affecting the property on Ravello Court. He further acknowledged that defendant gave Lucaj a check for the \$150,000. Dr. Thomas Barnett testified that Lucaj signed the \$150,000 promissory note as operating manager of Martone Building Company and that his signature was notarized. He also verified that the check for \$150,000 was for the loan that was secured by the 2004 mortgage. Defendant introduced a copy of the check and bank statement showing that the check was deposited in an account at Standard Federal Bank. Further, in his closing argument, counsel for Martone Building Company observed that the note was not introduced, but also made clear that Lucaj improperly requested and received a \$150,000 loan from defendant in 2004 and mortgaged the Ravello Court property to secure it.

Thus, this is not a case in which a party questions whether there was an underlying enforceable obligation for the mortgage. Indeed, in light of the testimony and evidence presented at trial, such an argument would have been illogical. We further observe that, the lack or failure of consideration is an affirmative defense requiring proof by, here, the counter-defendant, Martone Building Company. *Adell Broadcasting v Apex Media Sales*, 269 Mich App 6, 13; 708 NW2d 778 (2005). Martone Building Company did not present evidence to suggest, let alone prove, a lack of consideration. Rather, plaintiff solely questioned whether the person who secured the property to obtain the loan had the authority to do so to bind the company. This being the nature of the case, as evidenced throughout the record, we hold that the trial court clearly erred when it ruled that that there was no obligation underlying the 2004 mortgage and reverse its holding on that basis that the 2004 mortgage is void.²

² We further observe that this is not an issue implicating the best evidence rule, despite the trial court's statement, in denying defendant's motion for a new trial, that defendant failed to rebut "the opposing counsel's Best Evidence Rule argument regarding the failure to admit the mortgage note." Michigan's best evidence rule requires that the original writing be introduced to prove the content of a writing. MRE 1002; *Baker v General Motors Corp*, 420 Mich 463, 509; 363 NW2d 602 (1984). Generally, secondary evidence is not admissible to prove the contents of an instrument unless it can be shown that the original is lost or otherwise beyond the power of the party to produce it. *Kramar v Hackett*, 316 Mich 31, 35; 24 NW2d 544 (1946). Here, there was no dispute about the admissibility of any testimony or other evidence concerning the note.

The trial court did not address the substantive issue of Lucaj's authority to bind Martone Building Company, and we remand for further proceedings consistent with this opinion.

III. LUCAJ'S SIGNATURE ON THE SECOND NOTE

Defendant argues that the trial court erred in failing to find that Lucaj signed the 2005 note for \$100,000 in a representative capacity, because Lucaj signed the note under the global heading of Martone Building Company, LLC. Defendant observes that the signature block did not contain sufficient room for Lucaj to sign above the line labeled "Anton Lucaj, Operating Manager" and that his signature below the line was intended to refer to that designation. The specific signature lines underneath the block include a line labeled "Anton Lucaj, Individually," and Lucaj's signature appears on that line. Defendant's argument appears to be that there is no way Lucaj could have signed in his individual, rather than representative, capacity anywhere on this signature block because of the global heading, rendering the word "individually" a nullity.

A promissory note is a contract. *Collateral Liquidation v Renshaw*, 301 Mich 437, 443; 3 NW2d 834 (1942). Contractual language is to be construed according to its ordinary and plain meaning. *Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 47; 664 NW2d 776 (2003). If a signature on a promissory note is ambiguous, parol evidence is admissible to determine whether it was the intent of the parties that the signer be individually liable. *Lexington State Bank v Rose City Creamery Co*, 207 Mich 81, 81; 173 NW 481 (1919). Defendant refers to the signature block of the first note in support of its argument that Lucaj intended his signature to bind plaintiff. However, as discussed, this document was not made part of the record at trial and we will not consider it here. *Sherman v Sea Ray Boats, Inc*, 251 Mich App 41, 56; 649 NW2d 783 (2002).

A construction of a contract should be avoided that renders any part of the contract surplusage or nugatory. *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 467, 468; 663 NW2d 447 (2003). A plain reading of the signature block shows that Lucaj could sign in a representative capacity, an individual capacity, or both; in fact a common practice in the business world when dealing with small business entities is to demand that an officer personally obligate himself as well as the corporation by signing a note twice, once in his representative capacity and once in his individual capacity. See 8 Am Jur Proof of Facts 2d 193, § 4. Further, the note at issue does not contain the name of the borrower on the first page. The note also refers to the borrower in the first-person singular, i.e. "I promise to pay U.S. \$100,000 plus interest, to the order of the Lender." Dr. Barnett testified that he assumed that Lucaj signed that document as operating manager of plaintiff. Dr. Barnett testified that the main reason he loaned money to Lucaj was because of his past relationship with Lucaj and his family and previous loans that Lucaj had paid back.

"A finding of personal liability may be particularly appropriate where the note in question reads 'we promise to pay' the amount in question." *Kroll v Crest Plastics, Inc*, 142 Mich App 284, 289-290; 369 NW2d 487 (1985). Here, the note reads "I promise to pay," it does not identify the borrower in the body of the note, and it is signed by Lucaj on a signature line that designates his signature as "individually." Moreover, evidence established that Martone Building Company never received the funds. In light of this evidence, and Dr. Barnett's testimony that he considered his past relationship with Lucaj and his family an important factor

in making the loan, the trial court did not commit clear error in finding that Lucaj signed the note in an individual, rather than representative, capacity.

Affirmed in part, reversed in part and remanded for further proceedings. We do not retain jurisdiction.

/s/ Henry William Saad
/s/ Cynthia Diane Stephens
/s/ Amy Ronayne Krause