

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2010 CA 1436

JACKSON HOSPITALITY, LLC

VERSUS

EMAD AHMAD ZAYED & MAGNOLIA HOSPITALITY OF
MISSISSIPPI, LLC

DATE OF JUDGMENT: FEB 11 2011

ON APPEAL FROM THE TWENTY-SECOND JUDICIAL DISTRICT COURT
NUMBER 2007-11520, DIVISION E, PARISH OF ST. TAMMANY
STATE OF LOUISIANA

HONORABLE WILLIAM J. BURRIS, JUDGE

* * * * *

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Magnolia Hospitality of
Mississippi, LLC

* * * * *

BEFORE: KUHN, PETTIGREW, AND HIGGINBOTHAM, JJ.

Disposition: AFFIRMED.

Kuhn, J.

Defendant-appellant, Emad Ahmad Zayed, appeals a partial summary judgment granted in favor of plaintiffs-appellees, Jackson Hospitality, L.L.C. (“Jackson Hospitality”) and Jekishan Chauhan, that ordered Zayed to pay sums allegedly due under the terms of a promissory note. We affirm.

I. PROCEDURAL AND FACTUAL BACKGROUND

This court previously vacated a September 30, 2008 judgment in favor of Jackson Hospitality and against Zayed, wherein the trial court had awarded the principal amount of \$69,589.42, contractual interest at the rate of 7% per annum on the principal amount from April 27, 2004, until paid in full, a late charge in the amount of \$3,985.33, attorney’s fees, court costs, and legal interest. *Jackson Hospitality, LLC v. Zayed*, 09-0727, p. 2 (La. App. 1st Cir. 10/23/09) (unpublished), 24 So.3d 1033 (table). This court found that because Jekishan Chauhan was a payee under the terms of the promissory note, he should be joined as a party since complete relief could not be accorded between only Jackson Hospitality and Zayed. *Jackson Hospitality, LLC*, 09-0727 at p. 3.

By plaintiffs’ amended petition, Jekishan Chauhan was added as a plaintiff, and Southern Hospitality of Mississippi, Inc. (“Southern”), alleged to be an entity owned and controlled by Zayed, was added as a defendant. Thereafter, Jackson Hospitality and Jekishan Chauhan filed a supplemental motion for partial summary judgment, seeking a judgment on their “promissory note cause of action.” In support of their motion, Jackson Hospitality submitted the affidavit of

Jayanti Chauhan,¹ a member of Jackson Hospitality, which attested that Jackson Hospitality and Southern had entered into a lease/purchase agreement pertaining to certain property identified as the “Ramada Southwest Conference Center” located in Jackson, Mississippi. Zayed signed the lease individually as Lessee, and in his capacity as President of Southern.² Jekishan Chauhan signed as Lessor, representing Jackson Hospitality. The lease provided, in pertinent part:

[T]he LESSEE shall be responsible for the payment of all ad valorem real state [sic] taxes and/or other assessments and/or charges imposed upon the leased premises ... and shall pay said taxes and/or assessments and/or charges direct to the proper taxing authorities upon presentation to the LESSEE by the [LESSOR] of the tax bills. Within fifteen (15) days of the presentation to the LESSEE by the [LESSOR] of the tax bill(s), the LESSEE shall pay all taxes, penalties and interest due and shall deliver unto the [LESSOR] proof of payment of said taxes.

For the 2003 tax year, the tax collector assessed property taxes for the leased premises and, by letter dated December 9, 2003, Jackson Hospitality mailed Zayed copies of the tax bills. According to Jayanti Chauhan’s affidavit, Zayed failed to pay the tax bills within fifteen days of presentation. Afterwards, Jackson Hospitality agreed to pay a portion of the 2003 tax bill, and it loaned Zayed \$69,589.42 to pay the remaining taxes and interest due on the leased premises. According to Jayanti Chauhan’s affidavit, in consideration for the loan from Jackson Hospitality, Zayed executed a promissory note, dated April 27, 2004, in

¹ The record does not establish whether Jayanti Chauhan and Jekisan Chauhan are the same person. While the record suggests that these names refer to the same person, if they are in fact different persons, that fact does not affect our decision herein.

² The introductory paragraph of the lease identified the “LESSEE” as “[Southern] represented by Zayed.”

the amount of \$69,589.42.³ In his answer, Zayed admitted that he signed the promissory note.

Jackson Hospitality made payments to the tax collector that satisfied the 2003 tax bill and interest due on the leased premises. These payments included the amount paid on Zayed's behalf. According to Jayanti Chauhan's affidavit, as of August 14, 2008, none of the amounts due by Zayed under the promissory note had been paid. According to the terms of the note, "[p]resentment, and notice of dishonor, and protest [were] waived by [Zayed]."

Zayed answered the suit, raising affirmative defenses of "duress, error, mistake, estoppel, extinguishment of the obligation and failure of consideration." In opposition to plaintiffs' motion for summary judgment, Zayed asserted that the leased property had been surrendered to plaintiffs and that his obligation under the note had been released as a result of the surrender.

The trial court granted plaintiffs' motion and signed a January 8, 2010 judgment in favor of plaintiffs and against Zayed in accordance with the terms of the promissory note. The trial court designated this judgment as "final" pursuant

³ The promissory note was submitted to the court in support of plaintiffs' motion for summary judgment, identified by Jayanti Chauhan's affidavit, and submitted to the court as part of Zayed's responses to discovery. The note provides, in pertinent part, that Zayed, as borrower, promised to pay to the order of "Chauhan for himself and as agent for [Jackson Hospitality], the principal sum of [69,589.42], bearing interest at the rate of [7%] per annum from date until paid ..., payable in full of principal and interest due and owing on the 25th May, 2006 unless the entire balance is paid sooner."

to La. C.C.P. art. 1915(B),⁴ and Zayed has appealed this judgment, asserting that genuine issues as to material fact exist, that he is entitled to a credit for a liquidated set-off, and that the partial summary judgment was improper because “[n]o depositions have yet been taken.”

II. ANALYSIS

A motion for summary judgment will be granted if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and the mover is entitled to judgment as a matter of law. La. C.C.P. art. 966(B). Summary judgment is favored and shall be construed to secure the just, speedy, and inexpensive determination of every action. La. C.C.P. art. 966(A)(2).

The initial burden of proof remains with the movant. However, if the movant will not bear the burden of proof at trial, he need not negate all essential elements of the adverse party’s claim, but he must point out that there is an absence of factual support for one or more elements essential to the claim. La. C.C.P. art. 966(C)(2). Once the movant has met his initial burden of proof, the burden shifts to the non-moving party to produce factual support sufficient to

⁴ Based on a *de novo* review of the factors set forth in *R.J. Messinger, Inc. v. Rosenblum*, 04-1664, p. 14 (La. 3/2/05), 894 So.2d 1113, 1122, we determine the trial court properly designated this judgment as final and appealable. Because the issue of the validity of the promissory note is not intertwined with remaining issues arising from Zayed’s alleged breach of the lease/purchase agreement and Zayed’s claim to certain “accounts receivable,” there is no relationship between the adjudicated and unadjudicated claims. Additionally, there is no likelihood that the issue regarding sums due under the promissory note will be mooted out by further proceedings in the trial court, there is no possibility that this court will have to review the promissory note issue again if it is presently reviewed, there are no other claims by Zayed that will affect the resolution of the promissory note issue, and a decision on the promissory note issue at this time will likely facilitate resolution of any remaining issues, resulting in reduced litigation costs and fostering judicial economy. See *Dyess v. American Nat’l Property and Cas. Co.*, 03-1971, p. 3 n.2 (La. App. 1st Cir. 6/25/04), 886 So.2d 448, 450 n.2, *writ denied*, 04-1858 (La. 10/20/04), 885 So.2d 592.

establish that he will be able to satisfy his evidentiary burden at trial. *See Id.*; *Samaha v. Rau*, 07-1726, p. 5 (La. 2/26/08), 977 So.2d 880, 883. The non-moving party may not rest on mere allegations or denials but must set forth specific facts that show that a genuine issue of material fact remains. If the non-moving party fails to meet this burden, there is no genuine issue of material fact, and the movant is entitled to summary judgment as a matter of law. *Davis v. Peoples Benefit Life Ins. Co.*, 10-0194, p. 5 (La. App. 1st Cir. 9/10/10), 47 So.3d 1033, 1035; *see* La. C.C.P. art. 966(C)(2). A fact is material if it potentially insures or precludes recovery, affects a litigant's ultimate success, or determines the outcome of the legal dispute. *Samaha*, 07-1726 at p. 6, 977 So.2d at 884 (quoting *Hines v. Garrett*, 04-0806, p. 1 (La. 6/25/04), 876 So.2d 764, 765). An appellate court reviews a district court's decision to grant a motion for summary judgment *de novo*, using the same criteria that govern the district court's consideration of whether summary judgment is appropriate. *Davis v. Peoples Benefit Life Ins. Co.*, 10-0194 at p. 6, 47 So.3d at 1036.

Plaintiffs submitted the promissory note in support of their motion for partial summary judgment. In a suit on a promissory note, the plaintiff must merely produce the note in question to make out a "prima facie" case. The burden then shifts to the defendant to prove any affirmative defenses. *Long v. Long*, 04-938, p. 9 (La. App. 5th Cir. 1/25/05), 895 So.2d 34, 39; *Colonial Mortg. & Loan Corp. v. James*, 01-0526, p. 4 (La. App. 4th Cir. 3/6/02), 812 So.2d 817, 820. Based on this showing, plaintiffs established a *prima facie* case showing its entitlement to collect the amounts due under the note, thereby meeting their initial burdens of proof.

At this point, the burden shifted to Zayed to produce factual support sufficient to establish that he would be able to satisfy his evidentiary burden at trial. Zayed failed to meet this burden. Although he raised the affirmative defense of failure of consideration, he did not produce any factual support to support this defense. While he asserts that the parties verbally agreed that his liability under the promissory note would be extinguished upon his surrender of the leased premises, he has produced no written agreement to this effect, as is required to establish such a compromise. La. C.C. art. 3071 and 3072; see *Crawford v. United Service Auto. Ass'n.*, 03-2117, pp. 5-6 (La. App. 1st Cir. 3/24/05), 899 So.2d 668, 671-72. To the contrary, the "Mutual Agreement to Surrender Lease," executed by Zayed, Southern, and plaintiffs provides, "The Lessor is willing to accept the property as a last resort and without ... termination of its rights under [the] Lease/Purchase Agreement ... and all other documents"

Although Zayed further attests in his affidavit that he is entitled to a set off for accounts receivable due to him from plaintiffs (and relating to the leased property) in the amount of \$25,861.40, he has produced no evidence establishing that these funds have ever been collected by plaintiffs, and as such he has not established that these amounts are "presently due" to him. See La. C.C. art. 1893. As such, he has not produced factual support sufficient to establish that he will be able to satisfy his evidentiary burden at trial in this regard. Zayed also generally challenges the validity of the underlying lease agreement, but he presents no facts or legal theories to support his position.

Finally, Zayed urges that the partial summary judgment should not have been granted because "depositions of the principals should be taken." Because

plaintiffs' motion for summary judgment is supported by Jayanti Chauhan's affidavit and the documents identified therein, Zayed could not rest on the mere allegations or denials of his pleading. La. C.C.P. art. 967(B). He was required at that juncture to set forth specific facts showing that there was a genuine issue for trial. *Id.* Further, he did not provide information to the court establishing that he was unable to present by affidavit the facts essential to justify his opposition. La. C.C.P. art. 967(C). Unless plaintiff shows a probable injustice, a proceeding should not be delayed pending discovery when it appears at an early stage that there is no genuine issue of fact. *Vanderbrook v. Coachmen Industries, Inc.*, 01-0809, p. 8 (La. App. 1st Cir. 5/10/02), 818 So.2d 906, 911. Based on these facts, we find that the trial court was not required to delay entry of the summary judgment to afford Zayed the opportunity to conduct additional discovery.

III. CONCLUSION

For these reasons, we conclude that there are no genuine issues of material fact, and the plaintiffs are entitled to judgment as a matter of law. La. C.C.P. art. 966(B). The trial court properly granted judgment in plaintiffs' favor in accordance with the terms of the promissory note. Accordingly, the trial court's January 8, 2010 judgment is affirmed. Appeal costs are assessed against Zayed.

AFFIRMED.