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Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-000965-MR
AND
NO. 2011-CA-001575-MR
AND
NO. 2012-CA-000491-MR

GULF COAST FARMS, LLC; GULF COAST FARMS INVESTMENTS, LLC; GERALD F. BAILEY; LANCE K. ROBINSON; JEFFERSON T. DUNFORD; GARY W. MILLET; O. JEFFREY COLLETT, AND TIMPANOGAS STALLIONS, LLC — APPELLANTS

v.

APPEALS FROM FAYETTE CIRCUIT COURT
HONORABLE THOMAS L. CLARK, JUDGE
ACTION NO. 11-CI-00088

FIFTH THIRD BANK — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: MAZE, CAPERTON AND VANMETER, JUDGES.

MAZE, JUDGE: Appellants, Gulf Coast Farms, LLC (hereinafter "Gulf Coast"), appeal from four separate rulings by the Fayette Circuit Court in favor of Appellee,

Fifth Third Bank (hereinafter "Fifth Third"). Gulf Coast specifically appeals the trial court's dismissal of seven of the counts in its counterclaim for relief against Fifth Third, as well as the trial court's decision granting summary judgment regarding Fifth Third's seizure and sale of collateral. Gulf Coast further appeals the trial court's denial of its motions to alter, amend or vacate and for relief from summary judgment, respectively, following each ruling. After reviewing the copious record in these consolidated cases, as well as the supplemental pleadings presented after oral argument, we find that the trial court ruled properly on all issues involved. Therefore, we affirm.

Background

Gulf Coast is a partnership formed in 2004, consisting of several members, including Timpanogas Stallions, LLC (hereinafter "TSL"). Between 2004 and 2009, Gulf Coast and its members operated in the business of breaking and training yearlings as well as thoroughbred racing. To finance their various endeavors, Gulf Coast initiated a banking relationship with Fifth Third. In October of 2005 and 2007, individual members of Gulf Coast executed Loan and Security Agreements with Fifth Third. In these agreements, Gulf Coast pledged all of its "equine collateral" under the terms of this agreement. A related business, Gulf Coast Farms Investments ("GCFI") was also a party to the agreements and pledged its ownership interest in various businesses, including TSL, as collateral. By 2009, GCFI owned a 35.45 percent interest in TSL and acted as its manager. On October 1, 2009, facing the maturation of a prior loan, the parties entered into an Amended

and Restated Loan and Security Agreement ("2009 Agreement") which retained the previous terms but extended the period for repayment by Gulf Coast and GCFI to October 1, 2010. The extension was granted in light of financial hardships encountered as a result of an industry-wide recession.

Gulf Coast, GFCI and Fifth Third executed a second agreement in 2009 which was to mature in March 2010. For reasons similar to those surrounding the 2009 Agreement, the parties agreed to another Amended Loan and Security Agreement ("2010 Agreement"). The terms of this agreement were very similar; however, unlike the prior agreements, TSL was made a full party to the 2010 Agreement, pledging its own "equine collateral." Concurrently with the 2010 Agreement, TSL provided Fifth Third with an Omnibus Resolution which permitted GCFI to "pledge . . . all or any of [its] assets" as collateral under the 2010 Agreement. The maturity date of the 2010 Agreement was September 30, 2010. The total sum loaned to Gulf Coast and GCFI under the two agreements was approximately fifteen million dollars.

By October 2010, Gulf Coast and the other "pledges" had failed to pay in full according to the requirements of the 2009 and 2010 Agreements. Communication between Gulf Coast, its members and Fifth Third continued, and included the development of a "work out plan" or "managed liquidation" of Gulf Coast's and others' collateral to help pay off the loans owed to Fifth Third. Gulf Coast submitted its work out plan to Fifth Third on or about October 16, 2010, prompting Fifth Third to request further financial information regarding the

various partnerships and their members. Gulf Coast submitted a revised work out plan at Fifth Third's request on November 5, 2010. Three days later, Fifth Third informed Gulf Coast that it was rejecting the proposed work out plan and would immediately move for sale of Gulf Coast's and its partners' equine collateral pursuant to the terms of the 2009 and 2010 Agreements. Sales of collateral were made at the November 2010 and January 2011 Keeneland Sales, including sales made "without reserve" and resulting in collateral being sold below appraised value.

Fifth Third sued Gulf Coast and its partners for breach of contract, alleging that Gulf Coast had defaulted on both the 2009 and 2010 Agreements through non-payment on the loans. Gulf Coast filed its Answer and Counterclaim, which denied that they had defaulted and presented ten counterclaims against Fifth Third. Among these claims were wrongful conversion, unreasonable commercial conduct and tortious interference with a prospective advantage and business relations as a result of Fifth Third's sale of the equine collateral. Gulf Coast's counterclaims also alleged fraud, deceit, grossly negligent misrepresentation, breach of fiduciary duty and breach of the covenant of good faith and fair dealing resulting from Fifth Third's representations made prior to their calling the loans and selling the collateral.

In the course of discovery, Gulf Coast obtained several depositions or affidavits from members involved in the 2009 and 2010 Agreements and in the communications with Fifth Third in the fall of 2010. This testimony attempted to

demonstrate the intent of the members to pledge only certain property as collateral and not all property, including GCFI's 35.45 percent ownership interest in TSL, as opposed to all of TSL's assets. Testimony also included the deposition of a veterinarian, who testified to the value of the equine collateral and the commercially unreasonable nature of selling such collateral without reserve or at a certain amount below its appraised value.

Fifth Third filed its Motion to Dismiss the Counterclaim of Gulf Coast on March 11, 2011. After being fully briefed and argued, the trial court granted the motion as it pertained to seven of the ten counts.[1] On July 18, 2011, Gulf Coast filed a Motion to Alter, Amend or Vacate the trial court's order pursuant to Kentucky Rules of Civil Procedure ("CR") 59.05, which the trial court summarily denied.

Fifth Third also filed a Motion for Summary Judgment regarding its rights to the TSL collateral, which Gulf Coast argued was pledged only to the extent of GCFI's 35.45 percent ownership interest in TSL. Gulf Coast argued that the remainder of the proceeds from sale of that collateral was owed on another note to Celtic Bank. On June 1, 2011, the trial court granted the motion, finding that TSL, via the 2010 Agreement, had pledged all of its equine collateral to Fifth Third in the event of default and that Fifth Third had legal right to all such collateral. Gulf Coast immediately filed a Notice of Appeal regarding the trial court's order granting summary judgment.

[1] The seven dismissed counts were those mentioned *supra*.

On October 24, 2011, Gulf Coast took the deposition of former Fifth Third Vice President Chad Lashbrook, who testified to the extent of Fifth Third's knowledge of TSL's limited pledge of collateral under the 2010 Agreement. He testified that Fifth Third was aware of GCFI's intent to pledge only 35.45 percent pursuant to its ownership interest. Arguing that this testimony constituted "newly discovered evidence" under CR 60.02, Gulf Coast filed a Motion for Relief from Summary Judgment, which the trial court summarily denied on March 6, 2012.[2] Gulf Coast's consolidated appeal now follows.

Standards of Review

Gulf Coast's argument on appeal is three-fold. It contends first that the trial court committed reversible error in dismissing its counterclaims and that facts existed under which those claims could have succeeded before a jury. Secondly, Gulf Coast argues that the trial court improperly granted summary judgment in favor of Fifth Third regarding the sale of collateral which once belonged to TSL. In refuting the grounds for the summary judgment, Gulf Coast argues that genuine issues of material fact existed which precluded the court's ruling. Finally, Gulf Coast contends that the trial court's denial of its motions to alter, amend or vacate both orders constituted an abuse of its discretion.

[2] This Court consolidated Gulf Coast's 2011 appeal from the order granting summary judgment and the 2012 appeal from the denial of CR 60.02 relief. This Court further consolidated those appeals with Gulf Coast's appeal from the order denying CR 59 relief on the dismissal of the counterclaims.

"Since a motion to dismiss for failure to state a claim upon which relief may be granted is a pure question of law, a reviewing court owes no deference to a trial court's determination; instead, an appellate court reviews the issue *de novo*." *South Woodford Water District v. Byrd*, 352 S.W.3d 340, 341 (Ky. App. 2001). However, the denial of a motion to alter, amend or vacate is subject to the abuse of discretion standard. *See Eriksen v. Kentucky Farm Bureau Mutual Ins. Co.*, 336 S.W.3d 909, 911 (Ky. App. 2010). Thus, it must be determined whether the trial court's decision was "'arbitrary, unreasonable, unfair or unsupported by sound legal principles.'" *Miller v. Eldridge*, 146 S.W.3d 909, 914 (Ky. 2004) (*quoting Goodyear Tire & Rubber Co. v. Thompson*, 11 S.W.3d 575, 581 (Ky. 2000)).

Analysis

I. Dismissal of Gulf Coast's Counterclaim Counts

Gulf Coast first appeals the trial court's dismissal of seven counts included in its counterclaim against Fifth Third. The numerous counts which are the subject of this appeal can be divided into two chronological groups: those which arose during Gulf Coast's dealings with Fifth Third prior to the calling of the loans and those which arose after the loans were called as the result of Fifth Third's sale of Gulf Coast's equine collateral. With two exceptions, we will address each count within those two categories.

Breach of Fiduciary Duty and Covenant of Good Faith and Fair Dealing

We single out and affirm the trial court's ruling regarding Gulf Coast's claims that Fifth Third breached the implied covenant of good faith and fair dealing, as well as its fiduciary duty to Gulf Coast. Both arguments are easily disposed of upon examination of the law.

"[A]n implied covenant of good faith and fair dealing does not prevent a party from exercising its contractual rights." *Farmers Bank and Trust Company of Georgetown, Ky. V. Willmott Hardwoods, Inc.*, 171 S.W.3d 4, 11 (Ky. 2005); *Big Yank Corp. v. Liberty Mutual Fire Ins. Co.*, 125 F.3d 308, 313 (6th Cir. 1997)("party's acting according to the express terms of a contract cannot be considered a breach of the duties of good faith and fair dealing"). Furthermore, except in special circumstances, a bank does not have a fiduciary relationship with its borrowers. *In re Sallee*, 286 F.3d 878, 892-93 (6th Cir. 2002). Kentucky law has recognized a fiduciary relationship between bank and borrower on only two occasions, both of which involved banks which profited from information provided by the borrower in confidence and at the borrower's expense. *See Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476 (Ky. 1991), and *Henkin, Inc. v. Berea Bank & Trust Co.*, 566 S.W.2d 420 (Ky. App. 1978).

Both the March and October Loan and Security Agreements expressly granted Fifth Third the right to call both loans upon Gulf Coast's default on one or both. Additionally, the Term Notes for both agreements state, "[u]pon the occurrence of an Event of Default . . . [Fifth Third] may . . . declare this Note and

all other Obligations of the Debtor to be fully due and payable . . ." Gulf Coast erroneously asserts that a breach of the duty of good faith and fair dealing is possible when Fifth Third was expressly entitled under the terms of its contracts to call the loans and sell the pledged collateral. No such breach occurred.

Regarding Fifth Third's alleged fiduciary duty, Gulf Coast has provided no evidence that profit was gained from their dealings by Fifth Third at its expense; only that Fifth Third, despite its communications with Gulf Coast prior to default regarding a possible work-out plan, called the loans, which it was contractually entitled to do. This is insufficient to establish that a fiduciary duty of any kind was owed to Gulf Coast by Fifth Third.

Hence, we affirm the trial court's dismissal of both counts, as Gulf Coast would not be entitled to relief under any set of facts given the provisions of the contract to which it was bound. Furthermore, we find the trial court did not abuse its discretion in denying Gulf Coast's motion to alter, amend or vacate its prior decision regarding these counts.

Fifth Third's Conduct Prior to Calling the Loans

In relation to its dealings with Fifth Third prior to default, Gulf Coast's counterclaim alleged fraud, deceit and "grossly negligent misrepresentations" against Fifth Third. Specifically, Gulf Coast alleges that several representations and promises made by Fifth Third and its representatives

lulled it into believing the bank would not call the loans; rather, it would work with Gulf Coast to develop a "work-out" plan. Gulf Coast claims that, despite these intentional and negligent representations, Fifth Third intended to call the loans and extricate itself from the business of equine lending.

Gulf Coast seeks to proceed under its claim that Fifth Third fraudulently failed to disclose to them that its intention was to end its business of equine lending. To prove such a claim, a plaintiff must prove 1) that the defendants had a duty to disclose that fact; 2) that defendants failed to disclose that fact; 3) that the defendants' failure to disclose the material fact induced the plaintiff to act; and 4) that the plaintiff suffered actual damages. *Rivermont Inn, Inc. v. Bass Hotels and Resorts, Inc.*, 113 S.W.3d 636, 641 (Ky. App. 2003)(*citing Smith v. General Motors Corp.,* Ky.App., 979 S.W.2d 127 (1998)).

Gulf Coast fails to establish the existence of a duty on Fifth Third's part to disclose its business intentions or that it relied on, and was ultimately damaged by, the alleged omission. Recent precedent establishes that the requirement of a duty to disclose "preserves the healthy limits on a public corporation's 'duty to disclose all information even colorably material,' [and their] legitimate needs to keep some information non-public." *City of Monroe Employees Retirement System v. Bridgestone Corp.*, 399 F.3d 651 (6th Cir. 2005)(*quoting In re Sofamor Danek Group, Inc.*, 123 F.3d 394, 403 (6th Cir. 1997)). Gulf Coast has provided no grounds upon which to base the existence of

Fifth Third's duty to disclose its intention to exit the business of equine lending. As the trial court properly found, Gulf Coast's reliance on "the mere fact that there was a lending relationship between the parties" is misplaced and unfounded in the law.

Gulf Coast's remaining claims of deceit and negligent misrepresentation surround Fifth Third's dealings with Gulf Coast in the development and review of a proposed work out plan. Gulf Coast contends that, during the period before they defaulted on their agreements, Fifth Third representatives made "false, misleading, inaccurate or incomplete representations" which induced Gulf Coast to continue on a particular course, including development and implementation of a proposed work out plan. According to Gulf Coast, this led them to believe Fifth Third would accept the work out plan instead of immediately calling both loans and selling the collateral pledged under the agreements.

A claim of fraudulent or negligent misrepresentation is impermissible "where a contract is involved unless the misrepresentation . . . involved either a matter extraneous to the contract's terms or a risk not contemplated to be a part of the contract." *Thomas v. Brooks*, 2005-CA-001983, WL 13785510 (Ky. App. 2007). In other words, "for a fraud claim to have an identity independent from a related contract claim, the alleged fraud must be 'collateral and extraneous' to the contract." *GBJ Corporation v. Eastern Ohio Paving Co.*, 139 F.3d 1080, 1087 (6th

Cir. 1998); *see also Tabler v. Wolhoy*, 2008-CA-01913-MR, 2010 WL 2010738 (Ky. App. 2010). "If, by the terms of a contract, a person promises to perform an act in the future and fails to do so, the failure is a breach of contract, not a fraudulent or deceitful act . . . ." *Brooks v. Williams*, 268 S.W.2d 650 (Ky. 1954).

Under the above law, the alleged fraudulent and negligent misrepresentations against Fifth Third must concern a matter outside of, or not contemplated by, the terms of either the March or October agreements. However, the alleged misrepresentations pertained entirely to the possibility of Gulf Coast's default and Fifth Third's ability (or election not) to immediately call the loans and sell the pledged collateral. As the contracts demonstrate at length, such situations were fully contemplated under their terms and Gulf Coast's complaints of fraud and misrepresentation are clearly not "collateral and extraneous" to the contracts.

For the above reasons, Gulf Coast's claims of fraud, deceit and negligent misrepresentation are defeated at law and were properly dismissed by the trial court. Further, the trial court did not abuse its discretion in refusing to alter, amend or vacate its order regarding these counts.

Fifth Third's Conduct In Selling the Collateral

Regarding Fifth Third's decision to call the two loans after Gulf Coast defaulted and the subsequent sale of collateral, Gulf Coast alleges that Fifth Third committed wrongful conversion of its assets, tortious interference with a

prospective advantage and business relations and commercially unreasonable conduct in the sale of its horses "without reserve." However, all three allegations regard actions which Fifth Third was expressly authorized to take under the terms of the contract.

Both the March and October Loan and Security Agreements definitively defeat Gulf Coast's allegation that Fifth Third's sale of its horses "without reserve" and below their appraised value constituted commercially unreasonable conduct. Section 8(c) of both agreements states, "the Pledgors agrees [*sic*] and acknowledges that any disposition of Collateral at a regularly scheduled auction where similar Collateral is ordinarily sold (*e.g.* Keeneland or Fasig-Tipton sales) *with or without reserve* . . . is per se commercially reasonable." (Emphasis added). The collateral in question was sold at the regularly held Keeneland sale. Most importantly, Gulf Coast assented to these terms in signing the agreements. Therefore, they cannot now argue, through affidavits, expert testimony or any other measure, that Fifth Third's conduct in exercising its rights under Section 8(c) was commercially unreasonable. Given the express language of the 2009 and 2010 Agreements, there exists no set of facts under which such an argument may be sustained; therefore, dismissal was appropriate. For the same reasons, the trial court did not abuse its discretion in refusing to vacate its finding to that effect.

Similarly, Gulf Coast is prohibited at law from using the torts of conversion and tortious interference to avoid the enforcement of Fifth Third's clear

contractual rights; namely, the right to take possession of and sell the equine collateral. It has been held that a claim for tortious interference cannot be sustained where a defendant is sued for exercising a right found in the parties' contract. *N.C.A.A. v. Hornung*, 754 S.W.2d 855 (Ky. 1988). Further, Kentucky's statute of frauds requires contracts regarding loans and credit to be in writing if those contracts are to be enforceable. *See* Kentucky Revised Statutes ("KRS") 371.010(9).

Both agreements at issue in this case state that, upon Gulf Coast's default, "[Fifth Third] shall have the right to sell the Collateral at public or private sale, for cash or on credit." This right is unqualified under the terms of the contract. To allow Gulf Coast to claim that Fifth Third's rightful sale of collateral constituted a conversion of property and interfered with Gulf Coast's ability to sell the collateral for more money would be to allow them to modify the express terms of its contract with Fifth Third. Such a result is impermissible.

Even if Gulf Coast's counterclaim for wrongful conversion was somehow permissible, Gulf Coast's counterclaim lacks an essential element. Gulf Coast alleges that Fifth Third converted proceeds from sale of collateral which were actually pledged under contract to Barnes Banking Corporation (now Celtic Bank). However, as the trial court correctly pointed out, such an action "must be prosecuted in the name of the real party in interest." CR 17.01. In a claim for conversion or other damage to property, the owner of the property, or person with

legal title to the converted property, is the proper "real party in interest." *See Gregory v. Bryan-Hunt Co.*, 174 S.W.2d 510 (Ky. 1943); *Kentucky Association of Counties v. McClendon*, 157 S.W.3d 626 (Ky. 2005). Even if Fifth Third did wrongfully convert the proceeds of its sale of Gulf Coast's collateral, Celtic Bank, not Gulf Coast, is the "real party in interest." Therefore, Gulf Coast's counterclaim for wrongful conversion is barred by rule.

For the above reasons, Gulf Coast's counterclaims of wrongful conversion, tortious interference and commercially unreasonable conduct are barred by law and by the express provisions of its agreements with Fifth Third. Therefore, the trial court properly dismissed these counterclaims and did not abuse its discretion in denying to vacate that order.

II. Summary Judgment on Sale of Collateral by Fifth Third

Gulf Coast also appeals the trial court's order granting summary judgment regarding Fifth Third's sale of Gulf Coast and TSL assets. Gulf Coast argues that, at the inception of the 2010 Agreement, Gulf Coast held a 35.45 percent ownership interest in TSL and intended to pledge only that fraction of TSL assets as collateral to Fifth Third in the event of default. Gulf Coast contends in the alternative that the contract was ambiguous as to what assets were pledged as collateral and that evidence uncovered after the trial court's order remedied the ambiguity and required the trial court to grant the CR 60.02 motion. We disagree with both possible conclusions.

In support of their argument, Gulf Coast offers three documents which they contend show both TSL's intent to limit its pledge of assets and Fifth Third's knowledge of this limitation. Evidence of the former was included in Gulf Coast's Response to the Motion for Summary Judgment in the form of affidavits from two Gulf Coast partners, Gerald Bailey and Lance Robinson. The latter was revealed in the deposition of Fifth Third employee Chad Lashbrook, which became the subject of Gulf Coast's unsuccessful CR 60.02 motion.

The law of contracts in Kentucky tells us that, [i]n the absence of ambiguity, a written instrument will be enforced strictly according to its terms." *Frear v. P.T.A. Industries, Inc.*, 103 S.W.3d 100 (Ky. 2003). We further know that a court, in the absence of ambiguity, "will interpret the contract's terms by assigning language its ordinary meaning and without resort to extrinsic evidence." *Id.* (*citing Whitlow v. Whitlow*, 267 S.W.2d 739 (Ky. 1954) *inter alia*). "Absent an ambiguity in the contract, the parties' intentions must be discerned from the four corners of the instrument without resort to extrinsic evidence." *Cantrell Supply, Inc. v. Liberty Mutual Ins. Co.*, 94 S.W.3d 381 (Ky. App. 2002). Ambiguity in a contract exists only if it is "capable of more than one different, reasonable interpretation." *Frear*, *supra*, at 106.

The 2010 Loan and Security Agreement, to which TSL was a direct "pledgor" and party, was not ambiguous regarding the assignment of collateral upon default. That contract unequivocally states, "TSL hereby pledges, sells, assigns, transfers and grants a security interest in all of its right, title and interest in

and to the Collateral to Secured Party [Fifth Third] to secure the indebtedness . . . ." The 2010 Agreement defined "collateral" as TSL's "Thoroughbred Collateral" which the Agreement further defined as "all of TSL's right, title and interest in . . . stallion shares and/or fractional interest(s) . . . and any other interest(s) in any of the above owned by TSL, however classified, whether now owned or after-acquired . . . ."

Despite Gulf Coast's contention that Fifth Third's right to the proceeds of the sale were limited, when the term "all" is assigned its ordinary meaning, the 2010 Agreement was unambiguous in assigning the entirety of TSL's equine assets, not just 35.45 percent of them. Accordingly, there exists in the 2010 Agreement no ambiguity regarding collateral which would require the trial court to consider evidence such as the affidavits of Bailey and Robinson and the deposition testimony of Chad Lashbrook. Rather, the trial court was required to limit its examination to the four corners of the 2010 Agreement, within which it correctly found no genuine issue of material fact regarding what collateral had been pledged.

Viewing the contract on its face, we find that the trial court correctly determined the contract to be unambiguous on its face and that Fifth Third was entitled to all of TSL's equine collateral. Further, the trial court properly denied Gulf Coast's CR 60.02 motion on this issue. The sole evidentiary basis for that motion was extrinsic to the 2010 Agreement, and therefore unavailable for consideration by the trial court. Accordingly, the trial court acted correctly and

within its discretion in granting summary judgment in favor of Fifth Third and in denying Gulf Coast's subsequent CR 60.02 motion.

Conclusion

We find that the trial court correctly dismissed Gulf Coast's counterclaims against Fifth Third. The reason for their dismissal was best stated by the trial court in its order: "Each allegation can be dismissed because the actions taken [which form the subject of the counterclaims] were allowed by the contract at the time that they occurred." Similarly, the trial court properly granted summary judgment in favor of Fifth Third regarding the bank's sale of collateral because sale of "all" such collateral was expressly permitted under the various agreements between the parties. Further, these facts, along with relevant law, establish that the trial court's denial of Gulf Coast's motions to alter, amend or vacate its orders was not an abuse of its discretion. The orders of the Fayette Circuit Court are affirmed in the entirety.

VANMETER, JUDGE, CONCURS.

CAPERTON, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

CAPERTON, JUDGE, DISSENTING: I respectfully dissent. Gulf Coast Farms, LLC (Gulf Coast) and Gulf Coast Farms Investments, LLC (GCFI) argue that the intent of the agreement was to encumber only GCFI's 35.45 percent of ownership interest in Timpanagos Stallions, LLC (TSL). In support, they offer their testimony and that of former Fifth Third Vice President Chad Lashbrook all

testifying that Fifth Third was aware of the intent only to encumber GCFI's 35.45 percent interest in TSL. The majority characterizes the agreement as unambiguous, thereby precluding the introduction of parol evidence (testimony concerning the 35.45 percent). I disagree and instead believe that the agreement is ambiguous, thus requiring the introduction of parol evidence to clarify the agreement. *Burrus v. Farmers Bank of Nicholasville*, 938 S.W.2d 889 (Ky. 1997)**.** Alternatively, if viewed as unambiguous, then the same result (encumbrance of GCFI's 35.45 percent of the assets of TSL) is attained, as discussed *infra*.

A contract requires certain elements, one of which is the signature of the party to be charged with contractual duties under the terms of the contract. Undeniably, the facts below show that despite the fact TSL was listed as a party in the body of the contract and the contractual terms purported to pledge a substantial amount of its assets, the signature(s) of TSL is conspicuously absent. Instead, where the signature(s) of TSL should be located, there is the form-like reiteration of the signatures of the managers of Gulf Coast and GCFI signing in their capacities for Gulf Coast and GCFI, but not TSL.[3] Thus, the agreement lacks the signature(s) of TSL, the party sought to be charged with duties under the contract.

Alternatively, if the agreement is viewed as unambiguous, then the signatures of Gulf Coast and GCFI must be accepted as granting an encumbrance

[3] Interestingly, the majority references the fact that GCFI manages TSL (parol evidence) to support the conclusion that TSL is bound to the agreement but finds parol evidence to be inadmissible. Additionally, even if GCFI manages TSL as found by the majority, then for GCFI to bind TSL to any agreement it must cite to authority to do so; such citation is conspicuously absent. If the authority is unnecessary, this is indeed new law.

only to the extent of GCFI's ownership and authority, i.e., their 35.45 percent of TSL. No party can sign for another without authority; nor can a party be bound without its signature. Thus, GCFI can only offer its share, 35.45 percent of TSL, and no more.

The contract terms are either ambiguous or not. If ambiguous, then testimony supporting the position of Gulf Coast and GCFI, inclusive of the testimony of Lashbrook, is admissible to clarify the terms of the contract. If unambiguous, then GCFI undeniably signed the agreement and its 35.45 percent of TSL is encumbered but TSL is not a party to the agreement. I believe that parol evidence is necessary to clarify the agreement. I would reverse and remand to the trial court for further proceedings.

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