STATE OF MICHIGAN

COURT OF APPEALS

BROWN BARK, II, LP,

Plaintiff-Appellant,

v

BAY AREA FLOORCOVERING & DESIGN, INC. and GREGORY GROMASKI,

Defendants-Appellees.

UNPUBLISHED
May 31, 2011

No. 296660
Bay Circuit Court
LC No. 08-003797-CK

Before: MARKEY, P.J., and FITZGERALD and SHAPIRO, JJ.

PER CURIAM.

Plaintiff appeals as of right the judgment of no cause for action entered by the trial court following a bench trial. Plaintiff specifically challenges the trial court's determination that it had failed to establish both the existence of a valid assignment of the defaulted loan at issue and its damages with reasonable certainty. Because we conclude that the evidence presented at trial was insufficient to establish a valid assignment of the defaulted loan to plaintiff, we affirm.

This action centers around a small business loan obtained by defendant Bay Area Floorcovering & Design (BAFD) from National City Bank of Michigan/Illinois. Defendant Gregory Gromaski, BAFD's president, personally guaranteed the loan.[1] No payments were made on the line of credit from June 2006 through December 2006. In December 2007, plaintiff Brown Bark II, L.C. purchased a block of loans from National City, ostensibly including the loan at issue here.

[1] Defendant Gromaski disputed personally guaranteeing the loan at trial. However, the trial court concluded that the evidence established that such guarantee had occurred and this finding has not been appealed.

Plaintiff commenced this lawsuit, alleging that it was entitled to recover money owed related to the loan as the assignee of the loan. To prove its assignee status, plaintiff relied on a half-page document, which purported to be an allonge,[2] which stated as follows:

> ALLONGE TO THE BUSINESS CREDIT LINE AND SECURITY AGREEMENT-FDR (MI) DATED AUGUST 5, 2002, IN THE ORIGINAL PRINCIPAL AMOUNT OF TWENTY-FIVE THOUSAND AND 00/100 DOLLARS ($25,000), AND MADE BY AND BETWEEN BAY AREA FLOORCOVERING & DESIGN, INC. (Borrower) AND GREGORY GROMASKI (Guarantor) AND NATIONAL CITY BANK, SUCCESSOR BY MERGER TO NATIONAL CITY BANK OF MICHIGAN/ILLINOIS
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> Pay to the order of Brown Bark II, L.P. without recourse, warranty or representation except as specifically contained in a certain Agreement for Purchase And Sale of Loan Accounts, dated December 3, 2007 by and between National City Bank and Brown Bark II, L.P.

Plaintiff argues this document was sufficient to establish a valid assignment and the trial court's finding to the contrary constituted reversible error. We disagree.

Following a bench trial, a trial court's findings of fact are reviewed for clear error and its conclusions of law are reviewed de novo. *Glen Lake-Crystal River Watershed Riparians v Glen Lake Ass'n*, 264 Mich App 523, 531; 695 NW2d 508 (2004). A determination related to an assignment is a question of fact. See *Keyes v Scharer*, 14 Mich App 68, 74-75; 165 NW2d 498 (1968).

> An assignment is defined as a transfer or making over to another of the whole of any property, real or personal, in possession or in action, or any estate or right therein. To constitute a valid assignment there must be a perfected transaction between the parties which is intended to vest in the assignee a present right in the thing assigned. [*Weston v Dowty*, 163 Mich App 238, 242; 414 NW2d 165 (1987) (quotation marks and citation omitted).]

"[A]n assignee stands in the shoes of the assignor and acquires the same rights as the assignor possessed." *Prof Rehab Assoc v State Farm Mut Auto Ins Co*, 228 Mich App 167, 177; 577 NW2d 909 (1998). An assignment requires no particular form of words; rather, the assignor must simply "manifest an intent to transfer and must not retain any control or any power of revocation." *Burkhardt v Bailey*, 260 Mich App 636, 654-655; 680 NW2d 453 (2004) (quotation marks and citation omitted). Stated differently, even a poorly drafted written instrument can create a valid assignment so long as it clearly reflects the necessary intent on the part of the

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[2] An "allonge" is "[a] piece of paper annexed to a bill of exchange or promissory note, on which to write endorsements for which there is no room on the instrument itself." Black's Law Dictionary (4th ed).

assignor. *Id*. at 654. However, "Michigan's version of the statute of frauds [still] requires that an assignment of 'things in action' be 'in writing and signed with an authorized signature by the party to be charged with the agreement, contract, or promise . . . .'" *Id*. at 654, quoting MCL 566.132(f).[3]

In the instant case, while the allonge was presented as evidence at trial, it was not attached to the note; nor did plaintiff introduce the agreement referenced in the allonge as evidence, citing privilege as its reason for failing to do so. Because the trial court did not have an opportunity to review the referenced agreement, and consequently could not determine what limitations might exist, the trier of fact could not reasonably conclude the half-page document constituted documentation of National City Bank's intent to transfer all of its rights related to the defaulted loan without any power of revocation. In addition, plaintiff's representative conceded that James Hrebenar, the person who purportedly signed the allonge on behalf of National City Bank, was actually an employee of plaintiff's affiliate. Plaintiff presented no evidence, either of an actual signed power of attorney or testimony by Hrebenar or a representative of National City Bank, to support the assertion that Hrebenar had been authorized to act as an attorney-in-fact on National City Bank's behalf.[4] In light of the foregoing facts, we cannot conclude that the trial court clearly erred in finding that plaintiff had failed to prove the existence of a valid assignment. *Burkhardt*, 260 Mich App at 653-654.

In light of our conclusion that plaintiff failed to establish a valid assignment in its favor, it is not necessary to address whether the trial court correctly found that plaintiff failed to meet its burden to establish damages with reasonable certainty.

Affirmed.

/s/ Jane E. Markey
/s/ E. Thomas Fitzgerald
/s/ Douglas B. Shapiro

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[3] *Burkhardt* provided the following definition of "thing in action":

> A "chose in action" is a "'right to personal things of which the owner has not the possession, but merely a right of action for their possession.'" *City of Holland v Fillmore Twp*, 363 Mich. 38, 43; 108 NW2d 840 (1961), quoting Black's Law Dictionary (4th ed), p 305. A "thing in action" is synonymous with a "chose in action." See *Powers v Fisher*, 279 Mich. 442, 448-449; 272 NW 737 (1937). See also Ballentine's Law Dictionary (3d ed), defining "chose in action" as "the right of a creditor to be paid; a right not reduced to possession but recoverable by bringing and maintaining an action," and "thing in action" as the "same as chose in action." [*Burkhardt*, 260 Mich App at 654 n 9].

[4] In addition, Hrebenar's signature was not notarized on the alleged allonge itself.