AUTOVEST L.L.C. V. MISQUEZ

AUTOVEST L.L.C.,
Plaintiff-Appellant,
v.
TOMAS B. MISQUEZ and
ANNETTE MISQUEZ,
Defendants-Appellees.

No. A-1-CA-34964

COURT OF APPEALS OF NEW MEXICO

December 14, 2017

APPEAL FROM THE DISTRICT COURT OF DOÑA ANA COUNTY, Mary W. Rosner, District Judge

COUNSEL

Jenkins, Wagnon & Young, P.C., Jody D. Jenkins, Dan G. Young, Lubbock, TX, for Appellant

Jane B. Yohalem, Santa Fe, NM, for Appellees

JUDGES

JONATHAN B. SUTIN, Judge. WE CONCUR: J. MILES HANISEE, Judge, JULIE J. VARGAS, Judge

AUTHOR: JONATHAN B. SUTIN

MEMORANDUM OPINION

SUTIN, Judge.

{1} Autovest L.L.C. (Autovest) appeals an adverse judgment dismissing its action against Thomas B. Misquez and Annette Misquez (together, the Misquezes) to collect a

deficiency after the Misquezes' vehicle was repossessed and sold at auction. Autovest also appeals an adverse attorney fee award. Autovest contends that the district court erred in holding that Autovest lacked standing and in further holding that its claim was barred by the statute of limitations. In addition, Autovest contends that the attorney fee award against it was "manifestly unreasonable" and that the sale of the repossessed vehicle was "commercially reasonable." We hold that the district court did not err in holding that Autovest lacked standing or in awarding attorney fees. We need not address the statute of limitations issue.

BACKGROUND

{2} In 2008 the Misquezes purchased a used vehicle from Sisbarro's Autoworld Inc. (Sisbarro), pursuant to an installment contract. In 2010 Wells Fargo Auto Finance Inc., the assignee of the contract, repossessed the vehicle, and the vehicle was sold at auction, leaving a deficiency owed to Wells Fargo Auto Finance Inc. Autovest sued the Misquezes in June 2014 for the deficiency, claiming to be "the owner and holder of this account[.]"

{3} The record reflects the following pertinent documents.

A. A January 2008 Motor Vehicle Sales Contract and Purchase Money Security Agreement, including Sisbarro's assignment of its rights to Wells Fargo Auto Finance Inc. (the purchase agreement), by which the Misquezes bought from Sisbarro and obtained financing for the purchased vehicle, with the purchase agreement assigned to Wells Fargo Auto Finance Inc.

B. A January 2011 Flow Purchase Agreement by and between Autovest, "State Affiliates of Wells Fargo Financial, Inc. listed on the signature page hereto, and Wells Fargo Bank, N.A.[,]" reflecting Autovest's bulk purchase of defaulted automobile purchase agreements. "Wells Fargo Financial New Mexico, Inc." is listed on the Flow Purchase Agreement signature page as a State Affiliate."Wells Fargo Auto Finance Inc." is not listed as a State Affiliate. The district court found that "Autovest . . . relies on the Flow Purchase Agreement (Exhibit 27) . . . to establish that Wells Fargo Auto Finance[] Inc. became a direct or indirect predecessor to Wells Fargo Bank, N.A. sometime on or before February 7, 2013." The district court further found that "[w]ith or without Exhibit 27, [Autovest] has failed to carry its burden of proof to demonstrate a valid, legally sufficient assignment, from Sisbarro Auto World[] Inc., to Wells Fargo Bank, N.A., to Wells Fargo Auto Finance[] Inc., back to Wells Fargo [Bank] N.A. and then to Autovest[.]" The court excluded this exhibit from evidence as an admissible exhibit.

C. An Assignment of Installment Contract signed by "Darren Kazich, Agent" of "Wells Fargo Bank, N.A.[,]" stating that "[o]n May 19, 2011, Wells Fargo Bank, N.A. . . . hereby assigns the Installment Contract . . . to Autovest[.]"

D. A February 2013 document (Exhibit 26), stating "This is to certify that Wells Fargo Bank, N.A., is successor in interest (directly or indirectly) to[,]" among many

other listed entities, “Wells Fargo Auto Finance Inc.” A reference to the date of February 7, 2013 contained in the district court’s finding discussed earlier in regard to the Flow Purchase Agreement appears to relate to Exhibit 26.

{4} The district court found from the documents admitted into evidence and testimony in regard to the documents that “[t]here is no evidence of a clear and legally sufficient assignment between Wells Fargo Auto Finance[] Inc., and Wells Fargo Bank, N.A., and from Wells Fargo Bank, N.A. to Autovest . . . regarding the . . . Misquez[es]’ loan.” The court further found that “[f]or purposes of this [lawsuit], the most important notice of assignment was from Wells Fargo Bank, N.A. to Autovest” and that “[t]his assignment though required was absent.” The district court entered the following pertinent conclusions of law:

> Autovest . . . lacks standing to bring its lawsuit in New Mexico. Autovest . . . has failed to prove that the rights of the original owner of the debt, Sisbarro . . ., have been successfully assigned to itself, in two profound ways: (i) Autovest . . . failed to prove that it had ever given notice to [the Misquezes] that it had purchased their debt, and (ii) they were unable to prove that there had been a legally sufficient assignment.

{5} Following these determinations, the court awarded attorney fees incurred by the Misquezes, applying a lodestar multiplier of 1.2.

DISCUSSION

Standards of Review

{6} We review the standing issue under a substantial evidence standard. “Substantial evidence is such relevant evidence that a reasonable mind would find adequate to support a conclusion.” *Landavazo v. Sanchez*, 1990-NMSC-114, ¶ 7, 111 N.M. 137, 802 P.2d 1283. “Evidence is substantial even if it barely tips the scales in favor of the party bearing the burden of proof.” *Id.* “[W]hen considering a claim of insufficiency of the evidence, the appellate court resolves all disputes of facts in favor of the successful party and indulges all reasonable inferences in support of the prevailing party.” *Las Cruces Prof’l Fire Fighters v. City of Las Cruces*, 1997-NMCA-044, ¶ 12, 123 N.M. 329, 940 P.2d 177. “The question is not whether substantial evidence exists to support the opposite result, but rather whether such evidence supports the result reached.” *Id.* “[This Court] will not reweigh the evidence nor substitute our judgment for that of the fact[-]finder.” *Id.* And we view “the evidence in a light most favorable to the prevailing party and disregard[] any inferences and evidence to the contrary.” *Weidler v. Big J Enters., Inc.*, 1998-NMCA-021, ¶ 30, 124 N.M. 591, 953 P.2d 1089 (internal quotation marks and citation omitted).

{7} We review the attorney fee issue for abuse of discretion. *See N.M. Right to Choose/NARAL v. Johnson*, 1999-NMSC-028, ¶ 6, 127 N.M. 654, 986 P.2d 450. “[A] trial court abuses its discretion when its decision is contrary to logic and reason.” *Id.*

(internal quotation marks and citation omitted). "Generally, the district court has broad discretion in awarding attorney fees and [the appellate courts] will not disturb the court's fee determination unless there has been an abuse of discretion." *Calderon v. Navarette*, 1990-NMSC-098, ¶ 7, 111 N.M. 1, 800 P.2d 1058. Whether under the lodestar method or the percentage method of determining fees, the fees must be reasonable. *See id.* ¶¶ 9-11.

{8} In determining the reasonableness of a fee award, the district court should consider factors such as "(1) the time and effort required, considering the complexity of the issues and the skill required; (2) the customary fee in the area for similar services; (3) the results obtained and the amount of the controversy; (4) time limitations; and (5) the ability, experience, and reputation of the attorney performing the services." *Smith v. FDC Corp.*, 1990-NMSC-020, ¶ 27, 109 N.M. 514, 787 P.2d 433.

Standing

{9} The district court concluded that Autovest lacked standing to sue because it "failed to prove that the rights of the original owner of the debt, Sisbarro . . . , have been successfully assigned to itself[.]" The court explained that Autovest was "unable to prove that there had been a legally sufficient assignment." The court also explained that the Misquezes "did not know who Autovest . . . was and why they were being sued by [Autovest]."

{10} In its brief in chief's summary of proceedings, Autovest states, with no development of the point, that it challenges the district court's findings of fact Nos. 13, 30, 34, 35, 37, 38, 39, 41, 42, 48, 51, 52, and 55. In its argument and authority as to the standing issue, after discussing its exhibits and the testimony of its witness, Kimberlee Basha, Autovest mentions only findings of fact Nos. 39 and 51 as being erroneous. These two findings were:

> 39. Autovest . . . relies on the Flow Purchase Agreement (Exhibit 27) between itself and Wells Fargo Auto Finance[] Inc. to establish that Wells Fargo Auto Finance[] Inc. became a direct or indirect predecessor to Wells Fargo Bank, N.A. sometime on or before February 7, 2013. The Flow Purchase Agreement does not so state. After review, the [c]ourt determines that Exhibit 27 should be and is[] excluded as an admissible exhibit. With or without Exhibit 27, [Autovest] has failed to carry its burden of proof to demonstrate a valid, legally sufficient assignment, from Sisbarro . . . to Wells Fargo Bank, N.A., to Wells Fargo Auto Finance[] Inc., back to Wells Fargo N.A. and then to Autovest[.]
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> 51. Ms. Basha performed a final check on the Misquez loan the afternoon before going into court. She then recognized that the lengthy fifty-eight page Exhibit 27 was necessary to correct the mistake of the documents given previously to [the] Misquez[es]. Ms. Basha agreed that [the] Misquez[es] would not have known the originally provided assignment was irrelevant until the new assignment document was provided about 15 minutes before the merits trial

began. This is one of the reasons that this [c]ourt, after review, did not formally admit Exhibit 27.

(Citations omitted.) We do not agree that these two findings were unsupported by sufficient evidence or otherwise erroneous.

{11} To establish its standing, Autovest was required to show that it owned the Misquezes' purchase agreement at the time it filed this action. *See Bank of N.Y. v. Romero*, 2014-NMSC-007, ¶ 17, 320 P.3d 1. "One who is not a party to a contract cannot maintain a suit upon it." *Id.* (internal quotation marks and citation omitted). Autovest had the burden to establish standing. *See id.* ("If the entity was a successor in interest to a party on the contract, it was incumbent upon it to prove this to the court." (alteration, internal quotation marks, and citation omitted)). We agree with the Misquezes that the evidence and the reasonable inferences from that evidence support the district court's ultimate determination that Autovest failed to establish a successor-in-interest chain of ownership showing that it was the owner of the purchase agreement.

{12} The Flow Purchase Agreement made no mention of Wells Fargo Auto Finance Inc. Nothing in the Flow Purchase Agreement expressly created or confirmed any assignment by Wells Fargo Auto Finance Inc. or Wells Fargo Bank, N.A. to Autovest. The district court did not abuse its discretion or otherwise err in excluding Exhibit 27 from evidence.

{13} The only evidence possibly suggesting that the purchase agreement was assigned to Autovest by the Flow Purchase Agreement was the testimony of a purported representative of Autovest, Ms. Basha. For reasons explained in the district court's findings of fact, Ms. Basha's testimony did not persuade the district court to find facts in favor of any assignment to Autovest. Further, the district court reasonably refused to give credence to Autovest's undated Exhibit 24 purportedly signed by an agent of Wells Fargo Bank, N.A., Darren Kazich, and purporting to be a May 19, 2011 assignment of the purchase agreement from Wells Fargo Bank, N.A. to Autovest. Exhibit 24, itself undated, nowhere refers to any prior assignment by Wells Fargo Auto Finance Inc. to Wells Fargo Bank, N.A. or to any successor-in-interest status of Wells Fargo Bank, N.A. that would give Wells Fargo Bank, N.A. an ownership right and interest to assign the purchase agreement to Autovest. The district court was not required to determine, as Autovest argues, that Ms. Basha's testimony and Exhibit 24 established Autovest's ownership of the right to enforce the purchase agreement and seek a deficiency judgment.

{14} The document dated in February 2013, Exhibit 26, that attempts to show that Wells Fargo Bank N.A. became the successor-in-interest to Wells Fargo Auto Finance Inc. does nothing to prove that Wells Fargo Bank, N.A. was the successor-in-interest to Wells Fargo Auto Finance Inc. as of May 2011 or that after February 2013 Wells Fargo Bank, N.A. assigned the purchase agreement to Autovest.

Attorney Fees

{15} The Misquezes sought attorney fees pursuant to NMSA 1978, Section 39-2-2 (1981), which reads:

> In any civil action involving liability for a deficiency pursuant to [NMSA 1978,] Section 55-9-504 [(2001)] or [NMSA 1978,] Section 58-19-7 [(2013)], the debtor, if prevailing, may in the discretion of the court be allowed a reasonable attorney fee set by the court and taxed and collected as costs.

Applying the lodestar method of determining the fee, the district court awarded $41,963.02. "A lodestar is determined by multiplying counsel's total hours reasonably spent on the case by a reasonable hourly rate." *In re N.M. Indirect Purchasers Microsoft Corp.*, 2007-NMCA-007, ¶ 34, 140 N.M. 879, 149 P.3d 976. Citing several federal authorities, Autovest attacks the district court's use of the lodestar method on the ground that the lodestar method is employed primarily in socially beneficial litigation such as in civil rights or other fee-shifting statutes. Autovest also relies on *In re N.M. Indirect Purchasers*. *See id.* (discussing the lodestar method in class actions and stating "[t]he lodestar is ordinarily used in statutory fee-shifting cases because it provides adequate fees to attorneys who undertake litigation that is socially beneficial, irrespective of the pecuniary value of the classes"). Further, Autovest attacks as manifestly unreasonable and as an abuse of discretion the court's award in what Autovest characterizes as "a simple breach of contract case that was tried in less than half a day." Autovest attacks various time and subject entries submitted by the Misquezes, relies on evidence it presented through witness testimony that the Misquezes' counsel notoriously in other lawsuits made "late appearances" followed by attempts to garner unreasonable attorney fees after filing "numerous frivolous or dilatory motions[.]" Autovest further showed through an expert witness's affidavit opinion that the Misquezes' counsel's and his paralegal's hourly rates were unreasonable for the type of work performed on this type of case and that the reasonable hourly rate for a solo practitioner such as Misquezes' counsel would routinely be $175 per hour. And Autovest asserts that "[u]ltimely, the [district] court's award of 85 hours at a rate of $365 per hour[] is against the great weight of the evidence in light of the brevity of [the Misquezes'] pleadings, motions, and the withdrawal of their counterclaim approximately three weeks prior to trial."

{16} We are unpersuaded. Assuming without addressing or deciding that the lodestar method is primarily reserved for socially beneficial litigation, Autovest has offered nothing to show that the Section 39-2-2 allowance of attorney fees to a prevailing debtor in unsuccessful deficiency actions fails the test of socially beneficial litigation. Nor has Autovest provided persuasive case authority to the effect that use of the lodestar method was an abuse of discretion or otherwise improper in the case here. We note, as well, the district court's reflection here that can inferentially indicate that Section 39-2-2 is intended to provide socially beneficial relief.

> [The] Misquez[es] appeared to be one of 8,724 individuals caught up in a huge purchase of debt between giant corporations, neither of whom had any interest in the fundamental rights of a particular defendant, the original debt holder.

{17} We further note the substantial number of findings of fact (totaling 56) and conclusions of law (totaling 13) entered by the court subsequent to the parties' requested findings of fact and conclusions of law, all after a not insignificant amount of litigation preceding trial, then trial, ultimately involving relatively complex issues of fact and law relating to standing and the application of the statute of limitations. We will not attempt in this case to override the district court's own knowledge and experience in regard to litigation and also in regard to the reasonableness of fees in this case against a consumer where, as here, our Legislature has taken pains to enact a statute allowing fees to successful debtors in deficiency actions. Even Autovest acknowledges that the district court can use its own knowledge and expertise when valuing an attorney's legal services. *See Calderon*, 1990-NMSC-098, ¶ 10 ("[T]he [district] court may also apply its own knowledge and expertise regarding the nature of the services rendered . . . to calculate the value of the fee."). We hold that the district court did not abuse its discretion in awarding the attorney fees.

CONCLUSION

{18} We affirm the district court's dismissal for lack of standing and award of attorney fees.

{19} IT IS SO ORDERED.

JONATHAN B. SUTIN, Judge

WE CONCUR:

J. MILES HANISEE, Judge

JULIE J. VARGAS, Judge