

FILED
United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

September 16, 2021

Christopher M. Wolpert
Clerk of Court

CHRISTINE DWYER,

Plaintiff - Appellee,

v.

CD’S MACHINE, INC., an Oklahoma
corporation; CALVIN SMITH,

Defendants - Appellants.

No. 20-7058
(D.C. No. 6:18-CV-00328-KEW)
(E.D. Okla.)

ORDER AND JUDGMENT*

Before **McHUGH, BALDOCK**, and **MORITZ**, Circuit Judges.

Following a bench trial, the district court entered judgment in favor of Christine Dwyer and against CD’S Machine, Inc. (CDS) for unpaid loans and against Calvin Smith for fraud. CDS and Smith appeal. Exercising jurisdiction under 28 U.S.C. § 1291, we affirm.

* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist in the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, *res judicata*, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

I. BACKGROUND

The following facts and conclusions of law are from the district court's opinion and order entered under Fed. R. Civ. P. 52(a), which provides that “[i]n an action tried on the facts without a jury . . . the court must find the facts specially and state its conclusions of law separately.”

CDS is an Oklahoma corporation that was originally formed in 2008 by Smith as an automotive repair shop. In 2013, Smith and Kenneth Dwyer—Christine Dwyer's husband—agreed to two business ventures. One of those ventures was the “new” CDS, which “involved manufacturing parts pursuant to preferential bidding on government contracts due to Smith's status as a Native American and veteran.” *Aplt. App.*, Vol. 2 at 372. “Smith owned 51% of the stock and Kenneth Dwyer owned 49%.” *Id.* at 367. As explained below, CDS operated without any governing documents until July 2016, when Smith and Kenneth executed a Partnership Agreement that had a retroactive effective date of May 1, 2015.

On June 20, 2016, Kenneth Dwyer was injured in a traffic accident. While he was recuperating, Smith called Christine Dwyer and asked her to come to CDS' office, where he “told her that CDS needed money [for] payroll and to keep the business going. He told her that the business needed \$26,000.” *Id.* at 372. Christine “loaned CDS \$26,000 by check or money transfer with no promissory note and only an oral loan agreement. The money was paid back to her.” *Id.*

Not long thereafter, Smith also asked Christine Dwyer “to help take care of the record keeping for CDS.” *Id.* Prior to this time, Christine “had not been involved

with the paperwork of the business.” *Id.* at 371. Christine “testified that there was no real record keeping for the business and that it needed to be ‘straightened around,’” and “Smith told her he would appreciate it if she could help.” *Id.* at 372. To that end, among other things, Christine “helped build files for outstanding accounts and contracts.” *Id.*

At or about the same time, “Smith and Kenneth Dwyer entered into [the] ‘Partnership Agreement,’ which was dated May 1, 2015 but was not executed until 2016, after Kenneth[’s] . . . traffic accident.” *Id.* at 368. “Although Smith did not like certain clauses in the agreement,” he “executed it . . . [to] make [Christine] happy that she had something on paper.” *Id.* (brackets and internal citations omitted). “Smith . . . read the . . . Agreement before he signed it.” *Id.* The district court found that “[t]he . . . Agreement was intended to also operate as the by-laws of CDS.” *Id.* at 369.

“The Partnership Agreement designated the Partners in CDS to be Smith (51%) and Kenneth Dwyer (49%).” *Id.* at 368. It further acknowledged that Smith had made capital contributions to CDS in the amount of \$510,000 in cash and labor, and Kenneth in the amount \$500,000 in cash and equipment.

“The Partnership Agreement also provided for additional monetary contributions to the partnership.” *Id.* at 369. As to additional capital, the Agreement stated that capital contributions “‘may be amended from time to time . . . provided that the interests of the Partners are not affected, except with the unanimous consent of the Partners. No Partner will be required to make [a]dditional [c]apital

[c]ontributions.” *Id.* at 369-70. For non-capital contributions, the Agreement provided that “[a]ny advance of money to the Partnership by any Partner in excess of the amounts provided for in this Agreement or subsequently agreed to as [an] [a]dditional [c]apital [c]ontribution will be deemed a debt due from the Partnership and not an increase in the [c]apital [c]ontribution of the Partner.” *Id.*

Beginning on July 20, 2016, and continuing through May 16, 2017, Smith solicited and obtained additional loans from Christine Dwyer. Smith told Christine that CDS needed the money to keep the business open and she would be repaid when CDS received payment on the contracts. Christine relied on Smith’s representations in making the loans. In its opinion and order, the district court documented the date, circumstance, and amount of each loan, including the amounts repaid by CDS

By May 2017, Christine Dwyer had been repaid on a portion of her loans to CDS, and she “presented Smith with a promissory note in the amount of \$251,000.00 obligating CDS to repay the loans made by [Christine] and her companies. The note was already signed by Kenneth Dwyer but Smith refused to sign.” *Id.* at 381. Smith’s theory was that “the [funds] provided by [Christine] constituted capital contributions [to CDS] by Kenneth Dwyer which [were] not entitled to repayment.” *Id.* at 382.

The district court rejected Smith’s defense for several reasons. “First and foremost, Smith ignores the fact that [Christine Dwyer] and her companies which provided the funds to CDS are not Kenneth Dwyer nor a party to the Partnership Agreement, which [was] also considered the Bylaws of CDS.” *Id.* “Smith’s attempt to transform [Christine’s] act of providing loaned funds to CDS into a further or

additional capital contribution by her husband ignores the separation between these parties – one acting as a partner to Smith and the other as an outsider to the business relationship loaning money to keep the business afloat.” *Id.* at 382-83.

“Moreover, much as Smith might prefer that the Partnership Agreement did not exist or had no effect upon the relationship between [himself] and Kenneth Dwyer, the Partnership Agreement represents a valid . . . legal agreement,” that “explicitly provides any further advance of money to CDS constitutes a ‘debt due from the Partnership and not an increase in [c]apital [c]ontribution of the Partner,”” *id.* at 383-84, absent unanimous consent of the partners. “Thus, even if somehow [Christine Dwyer’s] payments to CDS were considered an act of her husband, characterizing and interpreting the payments as additional capital contributions is strictly prohibited by the Partnership Agreement.” *Id.* at 384.

Finally, as between Smith and Christine Dwyer, the district court concluded the funds she advanced to CDS were loans—not capital contributions. In particular, the court found: (1) “at least three of the payments were expressly noted by [Christine] to be loans to CDS – a fact which should have been apparent to Smith;” *id.*; (2) “[i]f Smith or CDS considered the [first] payment to be a capital contribution, it is only reasonable to presume that each payment would be addressed similarly; that is, the \$26,000.00 would not have been repaid if it were not a loan,” *id.* at 385-86; and (3) “[t]he evidence of constant contact between [Christine] and Smith [particularly] when [a large line of credit was due] indicates that Smith relied upon [her] for funding CDS’ projects and to keep its business operations functioning,” *id.*

at 386. The court concluded that “[i]t is contrary to reason to believe [Christine] made these substantial and repeated payments without an assurance of repayment from the proceeds of CDS’ government contracts.” *Id.*

After considering the testimony, exhibits, and parties’ proposed findings and conclusions, the district court found Christine Dwyer made \$223,420.00 in loans to CDS that had not been repaid; however, it limited Christine’s recovery to \$198,920.00—the amount sought in the pretrial order.

The district court’s decision on the fraud claim against Smith was “based upon [Christine Dwyer’s] testimony which this Court finds to be most credible and the circumstances surrounding the transactions.” *Id.* at 388. In particular, the court found that “Smith repeatedly misrepresented that [Christine] would be repaid from contract proceeds received by CDS[,] *id.* at 387, and it concluded “that the statements were both material and [false] from the fact that [Christine] was never repaid after the first loan even after CDS received funds on the contracts and that Smith now contends the receipt of monies from [Christine] were not loans at all in spite of his promises of repayment in order to procure the loans,” *id.* at 387-88.

Additionally, the district court concluded that “Smith . . . made the representations with the intent that [Christine Dwyer] would rely upon them to make the loans to CDS. CDS needed cash to be infused into the business operation, [Christine] had loaned money before based upon Smith’s assurances of repayment, and he continued to make the same misrepresentation upon which [Christine] would

rely to loan the money.” *Id.* at 388. The court entered judgment against Smith for fraud in the amount of \$198,920.00.

II. STANDARDS OF REVIEW

“Following a bench trial, the district court must state the basis for its findings of fact and conclusions of law. This requirement ensures that we have an adequate basis for review. When calculating damages, the district court must give adequate reasons to support the amount it awards.” *Ramos v. Banner Health*, 1 F.4th 769, 777 (10th Cir. 2021) (citing Fed. R. Civ. P. 52(a)) (further citations, brackets, and internal quotation marks omitted).

“We review the district court’s findings of fact for clear error and its conclusions of law de novo.” *Id.* “A factual finding is clearly erroneous if there is no support for it in the record or we are left with a definite and firm conviction that a mistake has been made.” *Id.* (internal quotation marks omitted). “When reviewing factual findings, we must view the evidence in the light most favorable to the district court’s ruling and must uphold any district court finding that is permissible in light of the evidence.” *Id.* (internal quotation marks omitted).

“It is not the role of an appellate court to retry the facts, because the court below has the exclusive function of appraising credibility, determining the weight to be given testimony, drawing inferences from facts established, and resolving conflicts in the evidence.” *Holdeman v. Devine*, 572 F.3d 1190, 1192 (10th Cir. 2009) (brackets and internal quotation marks omitted). “That the record supports a view of the evidence that is permissible but contrary to the trial court’s findings is

not sufficient to warrant upsetting the lower court’s findings.” *Id.* In other words, a party seeking to reverse the trial court’s findings “must show more than the viability of their own theory to warrant remand under the clear error standard. They must demonstrate the district court’s findings were impermissible.” *Obeslo v. Great-W. Life & Annuity Ins. Co.*, 6 F.4th 1135, 1148 (10th Cir. 2021).

Because federal court jurisdiction in this case is based on the diversity of citizenship between the parties as provided in 28 U.S.C. § 1332, we apply the substantive law of the forum state—Oklahoma. *See Haberman v. Hartford Ins. Grp.*, 443 F.3d 1257, 1264 (10th Cir. 2006) (“In diversity cases, the substantive law of the forum state governs the analysis of the underlying claims.”).

III. DISCUSSION

A. Validity of the Partnership Agreement

For the first time on appeal, CDS argues that the Partnership Agreement was invalid for several reasons, including: (1) Kenneth Dwyer was incompetent when he executed the Agreement shortly after the traffic accident; (2) lack of consideration; (3) mistake; and (4) impossibility. We review an argument for reversal not raised in the district court for plain error. *See Richison v. Ernest Grp., Inc.*, 634 F.3d 1123, 1130 (10th Cir. 2011). However, CDS’s failure to argue plain error on appeal “marks the end of the road for an argument for reversal not first presented to the district court.” *Id.* at 1131. Consequently, we do not consider Smith’s argument against validity of the Agreement.

B. Repayment of Loans

The district court found that in addition to the repayment of the initial \$26,000 loan, Christine Dwyer “received payments from CDS in the amount . . . of \$16,000.00.” *Aplt. App.*, Vol. 2 at 380. The court also gave credit to CDS for additional repayments totaling \$11,415.00 based on Defendant’s Exhibit 8. Thus, the total amount of repayments found by the court was \$53,415.00. CDS, however, maintains that this finding is undermined by one of Christine’s trial exhibits—a summary listing of checks written on a CDS bank account that arguably shows \$59,530.49 in repayments.

Our role is not to retry the facts; rather, the trial court “has the exclusive function of appraising credibility, determining the weight to be given testimony, drawing inferences from facts established, *and resolving conflicts in the evidence.*” *Holdeman*, 572 F.3d at 1192 (internal quotation marks omitted) (emphasis added). That the record *could* have supported a finding of \$59,530.49 in loan repayments is not the issue; instead, the issue is whether the court’s finding of \$53,415.00 was “permissible in light of the evidence.” *Ramos*, 1 F.4th at 777 (internal quotation marks omitted). Christine Dwyer’s testimony and CDS’s own exhibit provide ample support for the finding.

C. Whether the Funds Were Loans or Capital Contributions

Next, CDS asks this court to reweigh the evidence and decide the funds were capital contributions rather than loans. In particular, CDS maintains that the district court should have examined the loans under the factors announced in *In re Hedged-*

Investments Assoc., Inc., 380 F.3d 1292, 1298 (10th Cir. 2004), and recharacterized them as equity investments. We are not persuaded.

In re Hedged-Investments is of limited relevance because it applies primarily in bankruptcy cases. It concerns “[r]echaracterization” of a loan as equity, which “is essential to a [bankruptcy] court’s ability to properly implement the priority scheme of the Bankruptcy Code.” *In re Alternate Fuels, Inc.*, 789 F.3d 1139, 1146 (10th Cir. 2015). “The practical effect of recharacterizing a putative debt claim as an equity interest is subordination, since a corporation repays capital contributions only if and when it has satisfied all other obligations.” *Id.* at 1147. “In this way, recharacterization ensures that controlling equity owners of a troubled corporation do not jump the line of the bankruptcy process and thwart the company’s outside creditors’ and investors’ priority rights.” *Id.* (brackets and internal quotation marks omitted). But these concerns are not present here because CDS is not in bankruptcy and neither Christine Dwyer nor Kenneth Dwyer are trying to jump the line and thwart other creditors.

Instead, the record supports the district court’s conclusion that the parties intended the advances as loans, as evidenced by the facts that: (1) several advances were specifically noted as loans; (2) the first advance and several others were repaid; and (3) Smith relied on Christine Dwyer for money to keep the business open—not to acquire capital assets. And even if Christine was acting for her husband, the advances would still be considered loans because recharacterizing the payments as

additional capital contributions is prohibited by the Partnership Agreement without unanimous consent.

D. Whether the Record Supports the Judgment for Fraud

The elements of actionable fraud under Oklahoma law are “1) a false material misrepresentation, 2) made as a positive assertion which is either known to be false or is made recklessly without knowledge of the truth, 3) with the intention that it be acted upon, and 4) which is relied on by the other party to his . . . own detriment.” *Bowman v. Presley*, 212 P.3d 1210, 1218 (Okla. 2009).

The gravamen of Smith’s argument is that Christine Dwyer’s knowledge of CDS’s financial affairs precluded a finding that she relied on his promises that she would be repaid from the proceeds of specific government contracts when the funds were received by CDS. According to Smith, it was “impossible” for Christine to believe these promises, because “[s]he exercised almost complete financial control over CDS,” and would have known when the payments were made. Aplt. Opening Br. at 30.

This argument ignores the district court’s finding that “money from the government contracts paid to CDS [was] deposited into the Valley National Bank account,” to which Christine had no access. Aplt. App., Vol. 2 at 373. As such, she had no knowledge of what contracts had been paid or the amounts; instead, her role was to identify the expenses that CDS needed to pay and tell Smith the amount so that he would transfer the money to an account on which Christine could sign checks

to pay bills. Therefore, the court's finding that Christine relied on Smith's misrepresentations was permissible.

IV. CONCLUSION

The judgment of the district court is affirmed.

Entered for the Court

Bobby R. Baldock
Circuit Judge