UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 94-40111
Summary Calendar

WILSHIRE VILLA ASSOC.,

Plaintiff-Appellee,
Cross-Appellant,

versus

RUTH L. STRAUSS, ET AL.,

Defendants,

RUTH L. STRAUSS, Individually,

Defendant-Cross-Appellee,

RUTH L. STRAUSS, as trustee of the Trust
for the benefit of Ruth L. Strauss,

Defendant-Appellant,
Cross-Appellee.

Appeals from the United States District Court for the
Western District of Louisiana
(2:91-CV-2517)

(October 24, 1994)

Before GARWOOD, SMITH and DeMOSS, Circuit Judges.[*]

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[*] Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

GARWOOD, Circuit Judge:

At issue in this Louisiana law diversity case are the existence and extent of liability for past-due capital contributions owed plaintiff under a partnership agreement. Defendant Ruth L. Strauss, in her capacity as trustee, appeals the order of the district court granting summary judgment for the plaintiff, Wilshire Villa Associates. Wilshire Villa Associates appeals the order of the district court granting summary judgment for Mrs. Strauss individually. We affirm in part and vacate and remand in part.

Facts and Proceedings Below

Effective September 26, 1985, R. Leonard Strauss and three other unrelated individuals formed Wilshire Villa Associates, a Louisiana partnership (the Partnership). In accordance with the written partnership agreement, each partner made an initial capital contribution and agreed to make additional contributions annually over the next four years. Besides these scheduled contributions, each partner agreed to make unscheduled contributions as required to cover the operating expenses and debts of the Partnership.

Two days after the Partnership's formation, Mr. Strauss and his wife, Ruth L. Strauss, executed an agreement entitled "Assignment of Partnership Interests." Under this agreement, Mr. Strauss assigned his partnership interest to a trust (the Trust) for the benefit of his wife. The Strausses served as co-trustees until Mr. Strauss's death in 1990.

At the time of his death, Mr. Strauss owed the Partnership $98,500 in scheduled contributions and $24,793 in unscheduled

contributions. The Partnership sued to recover these past-due capital contributions, along with 100 percent liquidated damages, plus attorneys' fees, and expenses. The suit named the estate of Mr. Strauss, Mrs. Strauss, and the Trust as defendants, liable *in solido* for these amounts. The parties filed motions for summary judgment. The matter was assigned to a magistrate for a report and recommendation.

In the report, the magistrate recommended summary judgment for the Partnership against Mr. Strauss's estate and the Trust and summary judgment for Mrs. Strauss against the Partnership. The magistrate found the estate of Mr. Strauss liable for the entire amount and the Trust liable as a substituted partner for the unscheduled amounts assessed after it became a partner. The magistrate found Mrs. Strauss free of any personal liability. Both sides filed written objections to the magistrate's report.

Responding to these objections, the district court decided to follow the recommendations of the magistrate with two exceptions. First, the court found the Trust liable for all past-due capital contributions, both scheduled and unscheduled. Second, the court found that legal interest should be awarded, not from the date of judgment, but from the date the obligation to contribute became due. The district court accordingly entered summary judgment in favor of the Partnership against the estate of Mr. Strauss and the Trust *in solido* for $258,786.59, together with prejudgment interest. The court also entered summary judgment for Mrs. Strauss

against the Partnership. Both sides appeal.[1]

Discussion

We are asked to decide whether the district court erred in finding the Trust liable for all past-due capital contributions, in finding Mrs. Strauss not liable, in enforcing the partnership agreement's liquidated damages clause, and in awarding legal interest from the date the unscheduled contribution came due. We affirm in part and vacate and remand in part.

I. The Liability of the Trust

Defendants contend that the district court erred as to the existence and extent of the Trust's liability for the past-due capital contributions. Resolution of the Trust's liability depends first upon whether the Trust was a substitute partner in the Partnership. On September 28, 1985, just two days after the formation of the Partnership, Mr. and Mrs. Strauss and the managing partner of the Partnership, Mr. Andrew Curley, executed an agreement entitled "Assignment of Partnership Interests." The parties dispute whether this agreement effected a substitution of the Trust as partner. Both the magistrate and the district court found that it did.

The agreement at issue consists of three basic parts, all of which appear in a single document. In the first part, Mr. Strauss assigned to the Trust for the benefit of Mrs. Strauss all his "beneficial right, title and interest in and to" the Partnership.

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[1] Defendants (Mrs. Strauss individually and as trustee) do not appeal the determination by both the magistrate and the district court that the estate of Mr. Strauss is liable for all past-due capital contributions.

His signature follows. The next part of the agreement provides the consent of Mrs. Strauss, as spouse and co-trustee, "to the Assignment of Assignor's beneficial interest and to the substitution of the Trust as an ordinary partner." Her signature follows. After these two provisions are the signatures of both Mr. and Mrs. Strauss, affirming that they together executed the assignment and the consent "for the purposes and considerations therein set forth." Finally, the managing partner signed the document, following a recital that "as managing partner" he "hereby consents to the above Assignment and substitution of" the Trust "for and in the stead of Assignor, R. Leonard Strauss, pursuant to Article VI of the Articles of Partnership of" the Partnership. Section 6.9(a) of Article VI of the partnership agreement deals with substitution of partners and provides for the managing partner's approval thereof.

Conceding that the Trust agreed to be a substitute partner, defendants nevertheless argue that the agreement is ineffective because Mr. Strauss transferred only his beneficial interest in the Partnership to the Trust and because the Trust never agreed to assume the obligations of a partner. In essence, defendants contend that Mr. Strauss never intended to substitute the Trust as partner.

Defendants insist that this Court should construe Mr. Strauss's intent only from the first provision of the document, not straying to consider the intent as manifested under the contract as

a whole.[2] Such fragmentary interpretation, however, counters long-settled Louisiana principles of contract construction. According to the Louisiana Civil Code, "[i]nterpretation of a contract is the determination of the common intent of the parties," LA. CIV. CODE ANN. art. 2045 (West 1987), and "[e]ach provision in a contract must be interpreted in light of the other provisions so that each is given the meaning suggested by the contract as a whole." LA. CIV. CODE ANN. art. 2050 (West 1987).

These principles justify the rejection of defendants' piece-meal parsing of the contract's language. As the magistrate and the district court both concluded, the document as a whole clearly manifests an intent to substitute the Trust as partner in the Partnership. Indeed, the express language of the contract renders unreasonable defendants' assertion that Strauss would not have intended the substitution specifically called for.[3]

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[2] Although defendants contend that the magistrate erred in concluding that the assignment and consent provisions are both part of a single contract, the content and structure of the document unequivocally support this conclusion. The provisions all appear on the face of a single document prepared by, or at the direction of, Mr. Strauss and executed on the same day by him, his wife, and the managing partner. As the magistrate judge concluded, Mr. Strauss's second signature, verifying execution of both the assignment and consent provisions, establish "that the language relative to the substitution was part of the agreement when Mr. Strauss signed it." We agree that the single document entitled "Assignment of Partnership Interest" is one contract with several provisions.

[3] In their reply brief, defendants suggest that Mr. Strauss never read the Trust's "acceptance" of the substitution. Given that Mr. Strauss had the document drafted and that he signed, executed, and acknowledged it, this suggestion seems apparently untrue and is, in any event, immaterial.

The facts bear out this conclusion.[4] Mr. Strauss had the document prepared after consulting with Mr. Curley, the managing partner. According to Mr. Curley's affidavit, Mr. Strauss assured him "that the Trust would be liable for the obligations of a partner in the partnership" and that, absent such assurance, he "would not have agreed to or executed the Assignment of Partnership Interest." Mr. Strauss evidently made these assurances to obtain the managing partner's signature, as required in the partnership agreement under the heading "Substitution of Partners." Under Article 6 of the partnership agreement, only a substitution, and not an assignment of rights, requires the signature and consent of the managing partner.

Moreover, following the assignment, the parties treated the Trust, and not Mr. Strauss, as a full general partner. The Partnership, for instance, consistently listed the Trust as partner on its tax returns. More importantly, the Trust, through its trustee, Mrs. Strauss, made scheduled contributions for some three years before stopping in 1988. Together these facts underscore what the text of the contract clearly reveals: a common intent by the parties to substitute the Trust as partner.

Although both the magistrate and the district court agreed that the Assignment of Partnership Interest agreement substituted the Trust as partner, they disagreed about the scope of the Trust's

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[4] Although the text of the contract decides this issue, we are also permitted to look to the conduct of the parties when construing ambiguous terms. LA. CIV. CODE ANN. art. 2053 (West 1987) ("A doubtful provision must be interpreted in light of the . . . conduct of the parties before and after the formation of the contract . . . .").

liability. According to the magistrate, the Trust was not liable for Mr. Strauss's obligation to pay the scheduled contributions contained in the partnership agreement, but only for the unscheduled contributions called for after the Trust's substitution as partner. The magistrate's reasoning rested on the well-settled principle that a substitute partner is not "personally liable for partnership obligations incurred prior to the substitution."

We agree with the district court that this principle does not apply when the obligation is to the partnership provided for in the partnership agreement and not one to a third party. The Louisiana Civil Code imposes upon all partners an obligation to contribute amounts agreed upon under the partnership agreement. LA. CIV. CODE ANN. art. 2808 (West 1994). The partnership agreement provides that each partner, and the partner's successors and assigns, must pay both scheduled and unscheduled contributions.

Here, the Trust replaced Mr. Strauss as partner. As a result of this substitution, the Trust stood in the place of Mr. Strauss and, as such, was bound as a partner by the partnership agreement and the Civil Code to make scheduled and unscheduled contributions.[5] The partnership agreement explicitly requires substitute partners to take on all the duties of a partner to the partnership.

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[5] That Mr. Strauss signed a promissory note to remain liable to the partnership for the obligations he originally assumed in the partnership agreement undercuts, rather than bolsters, defendants' argument that the Trust is not itself liable for these debts. Had Mr. Strauss not effected a substitution, he would have remained a partner and thus liable regardless of a promissory note.

Defendants nevertheless argue that, in the absence of an express assumption of Mr. Strauss's obligations in the substitution contract, the Trust did not have to make scheduled contributions. We refuse to interpret the substitution contract "to circumvent the basic duties established by . . . the Civil Code." *Palmisano v. Mascaro*, 611 So.2d 632, 644 (La. Ct. App. 4th Cir. 1992) (on rehearing) (disallowing interpretation of contract that would relive partner of his fiduciary duty), *writ denied*, 614 So.2d 80 (La. 1993). Accordingly, we conclude that, by substituting the Trust as partner, the parties must have intended the Trust to take on Mr. Strauss's pre-existing obligations.

Once again, the facts bear out our conclusion. For three years after the substitution agreement, the Trust, through its trustee Mrs. Strauss, made scheduled contributions totalling over $100,000. The Trust's actions only make sense. As the district court pointed out, "there is no reason why the substituted partner (the Trust) should expect to receive all of the benefits" but none of the obligations of a partner.[6] We agree and hold that, as a substitute partner, the Trust was liable under contract and the

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[6] *See also* RESTATEMENT OF CONTRACTS (SECOND) § 328(1) (1981) providing that any assignment in general terms of rights under a contract is presumptively "an assignment of the assignor's rights and a delegation of his unperformed duties under the contract." In this situation, "assignment operates as a promise [by the assignee] to the assignor to perform the assignor's unperformed duties, and the obligor of the assigned rights is an intended beneficiary of the promise." *Id.* § 328(2). Thus, under general contract principles, the assignment operated as a promise by the Trust to pay the scheduled obligations of Mr. Strauss, and the Partnership, as an intended beneficiary of that promise, was entitled to enforce it.

Civil Code to make both the scheduled and unscheduled capital contributions to the Partnership as provided in the partnership agreement.

II. The Liability of Mrs. Strauss

The Partnership claims the district court erred in finding Mrs. Strauss not individually liable for the past-due capital contributions. The Partnership grounds its argument on the following provision of the partnership agreement signed by Mrs. Strauss:

> "Now to these presents come the respective spouses of each of the married partners named above, who appear and intervene herein to acknowledge the execution of these Articles of Partnership by their spouses and to confirm the authority of their spouses to act herein on behalf of intervenors and their respective estates, specifically granting to their respective spouses full power and authority for them and in their name, place and stead, to do all things which they may deem fit and proper with respect to this partnership or any property, whether real or personal, owned by this partnership, or the partnership interests standing in the name of their respective spouses . . . . The respective spouses further agree and obligate themselves to be bound by this agreement and all such acts of their respective spouses in connection with it."

The Partnership argues that the final sentence of this provision obligates Mrs. Strauss *in solido* with her husband for the payment of capital contributions.

We disagree. To say Mrs. Strauss is bound to the agreement is not to say she personally is bound to pay the contribution obligations imposed on partners. The evident purpose and plain meaning of this intervention provision is to relieve the partners from the need of obtaining spousal consent for partnership acts. The partnership agreement imposes the obligation to contribute

capital on the partners, not their spouses. Nowhere in the agreement is there any language evidencing a promise by Mrs. Strauss to be bound personally for the debts of any partner, and we are unable to construe one from the language quoted above.

III. The Liquidated Damages Provision

Defendants also appeal the district court's enforcement of the partnership agreement's liquidated damages clause. Under Section 2.4 of the agreement, partners who are delinquent in making capital contributions must pay as liquidated damages "an amount equal to one hundred (100%) percent of the contribution not made when due." In Louisiana, a provision for stipulated damages creates a secondary obligation that will be upheld unless so "manifestly unreasonable as to be contrary to public policy." LA. CIV. CODE ANN. art. 2012 (West 1987). A stipulated damages clause is contrary to public policy if it is punitive, rather than compensatory. *Philippi v. Viguerie*, 606 So.2d 577, 579 (La. Ct. App. 5th Cir.), *writ denied*, 609 So.2d 226 (La. 1992).

Here, the defendants seek performance of both the principal obligation, the contributions of capital, and the secondary obligation, the payment of an amount equal to 100 percent of these past-due contributions. Under Louisiana law, the Partnership may elect to enforce either the principal obligation or the secondary obligation, but not both. LA. CIV. CODE ANN. art. 2007 (West 1987).[7]

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[7] Similarly, in *Rabin v. Blazas*, 537 So.2d 221, 223 (La. Ct. App. 4th Cir. 1988), the defendant breached an agreement to purchase real property. The district court awarded the plaintiff $5,500 for the breach of contract and, moreover, $5,500 for stipulated damages. Relying on section 2007 of the Civil Code, the court of appeals reversed, holding that it was error to

The only exception to this election rule exists where "the damages have been stipulated for mere delay." *Id.* In order, then, for the Partnership to recover both the secondary and the primary obligation, it must establish that the damages were stipulated for "mere delay" and not simply nonperformance. *McKay v. Prevost*, 563 So.2d 1260, 1263 (La. Ct. App. 1st Cir. 1990).

This the Partnership has failed to do. Indeed, in its brief, the Partnership makes no mention of delay, instead arguing "that parties may stipulate the damages that may be recovered in case of nonperformance." The language of the agreement, furthermore, resists interpretation as a stipulation for damages arising from mere delay. Had the parties intended merely to anticipate delay damages, surely the stipulation would have been formulated, at least in some measure, according to the duration of the delinquency, by scheduling interest payments or otherwise graduating the damages. Instead, the agreement calls for the instant doubling of the amount owed. Interest accrues only after the doubling and on the full amount. The Partnership has failed to establish why doubling the debt, aside from the stipulation of interest, relates in any way to damages arising from "mere delay." We therefore conclude that the doubling of the past-due contribution represents stipulated damages for simple nonperformance and not mere delay. Accordingly, the Partnership is not entitled to both the primary and secondary obligations.[8]

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enforce both the primary and secondary obligations of the contract.

[8] Because the obligations are equal, election between them is

But this need not end our inquiry. Even assuming its relation to delay, the stipulated damages provision is itself illegal and unenforceable. Where, as here, the principal obligation is the payment of money, the secondary obligation of paying more money raises unique concerns of public policy, specifically those related to usury. As the Louisiana Supreme Court has recognized, "There is, in our law, a marked difference between the damages which may be stipulated for the breach of an obligation to pay money, and an obligation to give a thing or perform an act." *Ekman v. Vallery*, 169 So. 521 (La. 1936) (quoting *Griffin v. His Creditors*, 6 Rob. 216)).[9]

When the primary obligation is to pay money, the Civil Code constrains a party's capacity to stipulate damages for delay:

> "When the object of the performance is a sum of money, damages for delay in performance are measured by the interest on that sum from the time it is due, at the rate agreed by the parties or, in the absence of agreement, at the rate of legal interest as fixed by Article 2924. The obligee may recover these damages without having to prove any loss, and whatever loss he may have suffered he can recover no more." LA. CIV. CODE ANN. art. 2000 (West Supp. 1994).

In the case at hand, the partnership agreement called for the flat

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pointless.

[9] As Professor Corbin has pointed out,

> "One case in which the courts all agree that the amount is a penalty and unenforceable is where a sum of money is made payable upon default in the payment of a smaller sum of money, and the difference between the two sums is not merely the interest value of the smaller. In general, the damages collectible for failure to pay a sum of money are limited to interest at the legal rate, if one exists, or at market rates." 5 ARTHUR LINTON CORBIN, CORBIN ON CONTRACTS § 1065 (1964).

and instantaneous doubling of the amount owed, with the sum bearing interest at the legal rate. Without question this provision violates articles 2000 and 2012 of the Civil Code, not to mention the laws of usury, which cap the rate of conventional interest at twelve per cent per annum. LA CIV. CODE ANN. art. 2924(C) (West 1994); *see generally Pembroke v. Gulf Oil Corp.*, 454 F.2d 606, 611-12 (5th Cir. 1971) (noting that "[w]hen the primary obligation of a contract is solely the payment of money, the parties may be precluded by the usury statutes from setting a liquidated amount in excess of the maximum allowable rate of interest"); *Mossy Enterprises, Inc. v. Piggy-Bak Cartage Corp.*, 177 So.2d 406, 412 (La. Ct. App. 4th Cir. 1965) (holding unenforceable a stipulated amount of damages far exceeding the lawful rate of interest).

If upheld, the partnership agreement would, for instance, allow the collection of $200,000 for a debt of $100,000 due the day before and, moreover, the collection of interest on the doubled amount. Usury aside, this stipulated amount bears no articulable or reasonable relationship to either the anticipated or actual damages caused by delay; it is, in short, grossly punitive and against public policy. LA CIV. CODE ANN. art. 2012 (West 1987).

More importantly, the double-damage stipulation breaches the express restraints of article 2000 of the Civil Code. Interest on past-due payments is the norm for damages because it offers the nonbreaching party adequate and calculable compensation for any damages caused by delinquency. Interest is accordingly all the Civil Code allows: "The obligee may recover . . . [interest] without having to prove any loss, and *whatever loss he may have*

suffered he can recover no more." LA. CIV. CODE ANN. art. 2000 (West Supp. 1994) (emphasis added). Here, the parties expressly agreed to pay interest at the legal rate for past-due capital contributions; the Partnership is entitled to no more. Accordingly, the additional and punitive amounts stipulated are void and unenforceable.[10] All the Partnership may collect is the amount of past-due capital contributions together with interest at the legal rate.

For the foregoing reasons, we agree with defendants that the court erred in enforcing the stipulated damages clause of the partnership agreement and accordingly order the judgment reduced by $123,293.[11]

IV. Prejudgment Interest

The Partnership contends that the district court erred in awarding prejudgment interest for the entire liability from the date the unscheduled obligations became due and payable. We agree. Under section 2.4 of the partnership agreement, the defaulting party agreed to pay interest at the legal rate on past-due capital contributions. Accordingly, interest begins to accrue the moment

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[10] We do not speak to the typical late charge often provided for in installment credit instruments or frequently made in respect to monthly utility bills or the like (nor do we address items such as charges made by banks or creditors for insufficient funds checks). Such charges are generally in an amount far less than the underlying payment due and may well represent a genuine effort to recoup estimated average bookkeeping and processing costs associated with the lateness of the payment or the like. They are wholly unlike the present penalty clause.

[11] This amount does not include the costs of attorneys' fees and other related expenses. Those costs are clearly recoverable. LA. CIV. CODE ANN art. 2000 (West 1987).

the unperformed obligation is past due. In its decision, the district court erred in lumping together both the unscheduled and scheduled contributions because these amounts became due at different times.

Under section 2.3 of the partnership agreement, the unscheduled amount, $24,793, became due ten days after receipt of notice to pay, that is, on September 16, 1991. On the other hand, under section 2.2 of the partnership agreement, scheduled contributions became due on the dates indicated in Schedule A of the agreement. The total liability for scheduled contributions, $98,500, should have been broken down and allotted according to the scheduled dates. Assuming all payments made by the Trust are first credited to the oldest unpaid capital contributions, the Trust is liable for the prejudgment interest on the following scheduled amounts: $1,750 from September 27, 1987; $66,750 from September 27, 1988; and $30,000 from September 28, 1989.

Conclusion

For the foregoing reasons, we affirm the district court's determination that the Trust is liable as a substitute partner for all past-due capital contributions, whether scheduled or unscheduled. We also affirm the district court's determination that Mrs. Strauss is not personally liable for any of these amounts. Finding error, however, in the district court's enforcement of the stipulated damages provision and in its award of prejudgment interest, we vacate the order of the district court and remand the case for modification of the judgment consistent with this opinion.

AFFIRMED in part; VACATED and REMANDED in part