Circuit Court for Baltimore County
Case No. 03-C-15-004070

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2567

September Term, 2016

MIRROR COPY, INC.

v.

MIRROR COPY II, LTD.

Friedman,
Shaw Geter,
Rodowsky, Lawrence F.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Rodowsky, J.

Filed: April 11, 2018

In this case an alleged debtor put the creditor to its proof. The creditor argued that the debtor's counsel had made an admission in opening statement. The trial court ruled that the statement was not evidence. We shall hold that the trial court acted within its discretion.

Factual and Procedural Background

The appellant, Mirror Copy, Inc. (Seller), and one of the appellees, Mirror Copy II, Ltd. (Buyer), entered into an asset purchase agreement dated July 16, 2013. The principals of Seller were Donald K. Pazdersky, Robert L. Pazdersky, and John Chinskey. The principal of Buyer was the other appellee, Todd F. Benson. The business was the selling and servicing of Canon copiers, printers, and fax machines, conducted under the name Mirror Copy, out of premises in Towson, Maryland.

The purchase price of the assets was $400,000, of which $175,000 was paid at closing, $25,000 was paid ninety days thereafter, and the balance of $200,000 was payable, in accordance with the terms of a confessed judgment promissory note, on or before July 16, 2014. The note was personally guaranteed by Benson.

Paragraph 2.b of the note in relevant part provided:

> "Unless Maker is otherwise directed by Payee, the payment due hereunder shall be timely delivered, for the benefit of Payee, to and in form payable to [Seller's attorney] Client's Funds Account at [address]."

In late March 2015, Buyer and another Benson-owned company sued Seller and its principals in the District Court of Maryland for Baltimore County, claiming in excess of $40,000 for violation of employment or non-compete agreements. On April 13, 2015, the subject action (Case No. 4070) was instituted by appellant against appellees in the Circuit

Court for Baltimore County requesting a judgment by confession, supported by an affidavit by Donald K. Pazdersky. He affirmed that $49,960.65 was due and owing as of March 30, 2015, of which $25,000 was the balance of principal on the note. Judgment was so entered.

Appellees, referring to their District Court suit, moved to vacate the confessed judgment. Exhibit 6 to that motion was a letter from Buyer's counsel to Seller's counsel objecting to "financial liberties" that the principals of Seller allegedly had taken with funds of Benson-owned companies. Counsel stated, "[a]s a result, the last payment to be made on this Note was short by $25,000 and an audit is undergoing[.]" Meanwhile, Seller had removed the District Court case to the Circuit Court for Baltimore County by a request for jury trial. After a hearing, the circuit court (Glass, J.) vacated the confessed judgment and ordered Case 4070 consolidated with the removed action, Case 5735, by order entered August 14, 2015.

The consolidated cases came on for trial before Norman, J. and a jury on November 15, 2016. In a chambers conference between court and counsel after jury selection, the attorney for appellees alerted the court that, because payments on the note were sent directly to Seller's counsel, it would be hearsay for a principal of Seller to testify to the amount of any unpaid balance based on what the attorney told the client. He said, in part:

> "Let's see how to couch this, because I have a confess[ed] judgment case. The Plaintiffs in that case ha[ve] to prove the amount owed. The problem that exists is that all payments were received by Counsel, so if he's going to put his client on the stand and testify regarding payments that were made to [Seller's counsel] – we got a waiver of attorney-client privilege, otherwise it would be hearsay.
>
> "And I kind of expected [Seller's counsel's] office [to] come in today with some bookkeeper saying, [']we received this much money,['] but they

> haven't. His client's incompetent to testify, because he didn't receive the payments. He got from his attorney money, not from my client."

Appellee suggested that counsel may have remitted net of his fee. The succeeding six pages of the transcript are devoted to a discussion of the hearsay issue, without resolution.

When the jury reassembled, the court gave preliminary instructions, two paragraphs of which told the jury that "[o]pening statement and closing argument are not evidence in the case." Seller's counsel then made a full opening statement. Buyer's counsel followed with a chronological review of appellees' complaints with Seller's principals, in the course of which counsel said:

> "So, we're in the fall of 2014, and Miss Benson's doing her audit work. She finishes her [audit] work in the fall of '14. And what happens in December of 2014? Mr. Benson strokes the last check that's due on this purchase agreement, because the Pazdersky brothers and Mirror Copy, Inc. have already helped themselves [to] over $25,000.00 of Mr. Benson's money."

In its case Seller introduced the note and guarantee through Donald Pazdersky. The witness was then asked, "Now, during the course of his opening remarks, [Buyer's counsel] mentioned that all but $25,000.00 of the principal amount of that note's obligation had been paid by Mr. Benson, or MC II; is that correct?" The witness replied, "That's correct." An objection was overruled on the ground that the question had been asked and answered. Buyer did not move to strike.

There followed twenty pages of transcript over which counsel for Seller labored to prove through the testimony of Donald Pazdersky the unpaid balance and the basis for a proffered interest calculation. The court repeatedly sustained objections based on hearsay,

lack of foundation, or leading questions. The court allowed the witness to testify that Seller had received $175,000 from its counsel.

Seller rested and Buyer moved for judgment in the action on the note. The court pointed out that appellant had the burden of production. There then transpired:

> "[Seller's counsel]: Coupled with the admission during the course of opening, that is, on the part of [Buyer's counsel], that all the --
>
> "The Court: That's not evidence.
>
> "[Seller's counsel]: Oh, that could be taken -- that's a stipulation, Your Honor.
>
> "The Court: No, it's not a stipulation. I told -- I'm the person who told the jury in opening, in my remarks, that opening statement and closing argument is not evidence in the case."

The court granted appellees' motion for judgment. The parties then settled the District Court case. This appeal followed.

Questions Presented

> "I. Did the lower court err in determining, as a matter of law, that an admission made during opening remarks was not evidence?
>
> "II. Did the lower court err as a matter of law in determining that there was no evidence sufficient to support a judgment in the amount of $25,000.00?"[1]

[1]Question II is not a separate question. Seller argues that Donald Pazdersky's agreement ("That's correct") with his counsel's statement that Buyer's counsel had stated that all but $25,000 had been paid by Buyer was not based on the witness's personal knowledge but was dependent on Buyer's counsel's statement having been an admission. That is the issue we address under Question I.

Discussion

The Court of Appeals explained in *McLhinney v. Lansdell Corp.*, 254 Md. 7 (1969), why it is not universally true that opening statements are not evidence. In that motor vehicle, intersectional collision case, the plaintiff, a firefighter passenger on a fire engine, sued the owner and the driver of a tanker trailer. In his case in chief, the firefighter never identified the owner or operator of the tanker or proved the relationship between them. The Court reversed a directed verdict against the plaintiff because the defendants' counsel, in opening statement, fully covered the driver's work history with his employer, the owner of the tanker. The Court said:

> "Appellees argue that the sole purpose of an opening statement is to acquaint the judge and jury with facts that counsel expects to prove, citing *Hartman v. Meadows*, 243 Md. 158, 220 A.2d 555 [(1966)], and that an opening statement is not to be construed as substantive evidence. While this Court indicated in *Hartman* that the function of an opening statement should not be changed into an opening 'argument,' nothing was stated to indicate that its *sole* purpose was merely to make the judge and jury better informed about what counsel intended to prove. And further, to say that 'an opening statement is not evidence' is misleading. It is correct insofar as statements made in an attorney's opening comments cannot replace the requirement that substantive evidence be produced during the trial to establish counsel's theory of the case. However, this phrase should not be interpreted to mean that an attorney, acting as his client's agent within the scope of his authority, should not be able to make admissions favorable to the opposing side. 'They [admissions of counsel] may dispense with proof of facts for which witnesses would otherwise be called. ... Indeed, any fact, bearing upon the issues involved, admitted by counsel, may be the ground of the court's procedure, equally as if established by the clearest proof ....' *Oscanyan v. Arms Co.*, 103 U.S. 261[, 26 L. Ed. 539 (1880)]. As stated in 7 C.J.S. Attorney and Client § 100 b (1937):
>
> > "'An attorney employed to prosecute or defend a particular cause is usually held to have the implied power to bind his client by statements and admissions in the pleadings, or *in the opening statement*; or by any admission or statement

> of fact deliberately made in good faith in open court during the progress of the case for the purpose of dispensing with testimony or facilitating the trial of the cause, unless the admission or statement is one which is expressly required by statute to be made or signed by the client personally.' (Emphasis added.)"

Id. at 12-13 (emphasis retained).

In *Raitt v. Johns Hopkins Hospital*, 22 Md. App. 196 (1974), *rev'd on other grounds*, 274 Md. 489 (1975), we held that the opening statements of counsel for the defendants could not be construed to contain admissions that any failure to meet the standard of care was a direct cause of the plaintiff's injuries where lack of proof of that causal connection was the basis for directed verdicts. We said, in part:

> "Recognizing that an admission made in the counsel's statement of the case may be treated as binding, it is stated in 9 *Wigmore on Evidence* (3rd Ed.) § 2594 that 'It is of the nature of an admission, plainly, that it be by intention an act of waiver, relating to an opponent's proof of the fact, and not merely a statement of assertion or concession, made for some independent purpose.'"

Id. at 211.

Whether evidence is admissible is to be determined in the first instance by the trial court. Maryland Rule 5-104(a). Here, the court ruled that the portion of Buyer's counsel's opening statement to which Seller's counsel had directed the court's attention was not evidence, that is, it was not an admission. After Buyer's counsel had consumed pages of transcript in the conference preceding opening statements alerting the court that Buyer was going to put Seller strictly to its proof with respect to any unpaid balance of principal on the note, there was no abuse of discretion by the court in declining to find that Buyer's

counsel was trying to narrow the issues for trial by admitting the unpaid balance or that Buyer's counsel otherwise intended to make that admission.

For these reasons, we affirm.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE COUNTY AFFIRMED.

COSTS TO BE PAID BY THE APPELLANT.