Note: In the case title, an asterisk (*) indicates an appellant and a double asterisk (**) indicates a cross-appellant. Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2019-153

NOVEMBER TERM, 2019

Richard J. Coburn* v. David Creech & William Deckelbaum	}	APPEALED FROM:
	}	
	}	Superior Court, Windsor Unit,
	}	Civil Division
	}	
	}	DOCKET NO. 261-5-16 Wrcv
		Trial Judge: Robert P. Gerety, Jr.

In the above-entitled cause, the Clerk will enter:

Plaintiff appeals from the trial court's judgment in favor of defendants in this collection action. The court initially granted partial summary judgment to plaintiff, finding as a matter of law that defendants were liable for the balance, if any, remaining due on a promissory note. Following a bench trial on the question of the balance due, the court concluded that plaintiff failed to prove his damages and it entered judgment for defendants. We reverse and remand.

The court relied on the following undisputed facts in granting partial summary judgment to plaintiff. In March 2010, defendants as well as nonparties Robert Crowe, Mountain Trading, Inc., and Bentley's of Quechee, Inc., signed a promissory note to allow for the refinancing of certain bank loans. Specifically, plaintiff agreed to deposit $175,000 in Mountain Trading's bank account, which was a condition of refinancing, in exchange for the note. The note's signatories "jointly and severally" promised to pay plaintiff $175,000 with interest. They agreed that the note would be enforced in accordance with New York law. The signatories also "agree[d] to remain fully bound notwithstanding the release of any party, extension or modification of terms, or discharge of any collateral for this note, if any." The two corporations are no longer in existence; their shareholders and officers were defendants and Robert Crowe.

Plaintiff indicated that he had released Mr. Crowe from his obligations under the note for consideration. Plaintiff further represented that Mountain Trading and Bentley's were seeking discharge of their obligations under the note in federal bankruptcy proceedings. Defendants admitted to paying only $30,000 on the note. Defendants nonetheless disputed liability for various reasons, including that material facts remained in dispute regarding their affirmative defenses. The court found that defendants provided insufficient evidence in support of their affirmative defenses to defeat summary judgment. It determined, as a matter of law, that defendants were liable under the promissory note. See Giller v. Weiss, 34 N.Y.S.3d 496, 497 (N.Y. App. Div. 2016) (stating that under New York law, "[t]o establish prima facie entitlement to judgment as a matter of law on the issue of liability with respect to a promissory note, a plaintiff must show the existence of a promissory note executed by the defendant and the failure of the defendant to pay in accordance with the note's terms" (quotation omitted)). The court could not determine on summary judgment

the value of the consideration that plaintiff received from Mr. Crowe, however, and it found that, under New York law, this value would reduce the principal due by the remaining obligors.

The court then held a bench trial to determine the amount remaining due on the note. It identified the only area of dispute as deciding the impact of plaintiff's release of one of the promisors on the note who was not a party to the action and whether the release should have the effect of reducing or eliminating the amount remaining due.

On this question, the court made the following findings. As relevant here, in March 2015, plaintiff delivered a release to Mr. Crowe for any liability he had on the note in exchange for valuable consideration. The consideration included two items: (1) Mr. Crowe transferred his 7.75% interest in Lancelot, LLC to plaintiff; and (2) Mr. Crowe verbally promised to pay plaintiff $101,299.74 in periodic payments of $700 per month. Plaintiff, defendants, and Mr. Crowe were all members of Lancelot, LLC. Lancelot owed real estate in Woodstock, Vermont at the time, which had at one time a fair market value of $550,000. Lancelot rented the real estate and received income from tenants. The court found the credible evidence presented at trial insufficient to make a finding regarding Lancelot's value.

Plaintiff testified that the transferred interest was worthless. Yet his affidavit stated that the transferred interest was valuable consideration for release from the note. The court found the evidence confused and unclear as to Lancelot's debts. It determined that it could not assess the value of the transferred interest without speculating. The court found the evidence was also murky with respect to Mr. Crowe's promise to pay plaintiff $101,299. The promise was given in part as consideration for releasing Mr. Crowe from the note at issue in this case, but, again, the court could not determine how much of this payment was intended as consideration for this note as opposed to a different debt. The court found that plaintiff had the burden of proving his damages and that he failed to prove the amount remaining due on the note that he sought to enforce against defendants here. It thus granted judgment to defendants. This appeal followed.

Plaintiff reads the court's decision as discharging defendants from their liability under the note because plaintiff released Mr. Crowe from his obligation. He asserts that this is inconsistent with New York law and the terms of the note, both of which provide that defendants remained liable notwithstanding his release of another obligor. Plaintiff also argues that the evidence showed that the consideration given for Mr. Crowe's release stemmed from a different debt assumed by plaintiff, independent of his obligation under the note in question. Finally, plaintiff argues that the court erred by requiring him to prove defendants' affirmative defense of "release." Defendants respond that their defense was accord and satisfaction, not "release," and that plaintiff failed to establish the balance due on the note net of the consideration provided by Crowe.

We need not consider the merits of plaintiff's first argument—that under the terms of the note and New York law plaintiff's release of Mr. Crowe did not operate as a release of any other co-obligor's obligation on the note—because the trial court did not rely on this argument, and defendants do not argue otherwise. In fact, defendants argue that plaintiff's arguments relating to New York law regarding release and recourse "is without any bearing on the issues before the Vermont court," and "is a red herring that serves only to obfuscate the single relevant and remaining issue as to what amounts Coburn received from Crowe in partial satisfaction of the note."[1]

[1] At oral argument, defendants took the opposite tack, suggesting that the amount of the consideration received by plaintiff was not that important because the release itself operated as a

Rather, the central issue in this case as framed by the parties is how much of the consideration provided to plaintiff by Crowe for plaintiff's release of his obligation on the note should be credited against the balance due on the note. The parties all agree that, under New York law, "[t]he amount or value of any consideration received by the obligee from one or more of several obligors, or from one or more of joint, or of joint and several obligors, in whole or in partial satisfaction of their obligations, shall be credited to the extent of the amount received on the obligations of all co-obligors to whom the obligor or obligors giving the consideration did not stand in the relation of a surety." N.Y. Gen. Oblig. Law § 15-103 (McKinney). In other words, "the amount or value of any consideration that is received by the obligee from one or more joint, joint and several, or several obligors in total or partial satisfaction of their obligations, is to be credited against the obligations of all of the obligors as to which the party making the payment was not a surety." 12 Williston on Contracts, § 36:27 (4th ed.) (citing obligation under Model Joint Obligations Act and recognizing New York as one of handful of states that have enacted its relevant provisions).

The trial court assigned the burden of proving the value of Crowe's consideration that should be allocated to the note at issue here to plaintiffs, reasoning that plaintiff bore the burden of establishing the damages or balance due under the note. Because plaintiff failed to adequately establish the value of the additional consideration from Crowe to be credited against the balance due on the note from defendants, the court reasoned, plaintiff failed to prove his claim that defendants owed him a remaining balance on the note.

We agree with plaintiff that the trial court erred in its allocation of the burden of proof with respect to the value of the Crowe consideration and its impact on the balance due on the note. Plaintiff has established that defendants executed the promissory note, plaintiff performed his obligations under the note, and defendants failed to pay the sums due under the note. The burden of proving partial satisfaction of the note or a credit on account of consideration paid by Crowe for the release falls to defendants. As defendants acknowledge in their brief on appeal, determination of the remaining balance on the note "was a material element necessary in the consideration and disposition of Appellees' affirmative defense of [partial] accord and satisfaction of the Note." (brackets in original). The argument that the consideration paid by Crowe for the release operates as a credit against the remaining balance due on the note is an affirmative defense, and defendants, as the proponents of the argument, bear the burden of establishing the value of this credit. See, e.g., Ross v. Ross Metals Corp., 976 N.Y.S.2d 485, 487 (N.Y. App. Div. 2013) (holding that party that failed to plead payment as an affirmative defense precluded party from submitting evidence of partial payment in opposition to the plaintiff's proposed decree); Valente v. Allen Shuman & Irwin Richt, D.P.M., P.C., 524 N.Y.S.2d 770, 771 (N.Y. App. Div. 1988) (holding that partial payment is an affirmative defense to be pled by party raising defense);

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full accord and satisfaction. Even if we were to reach this argument, we would conclude that 1) the trial court did not find an accord and satisfaction on account of the note but instead identified a failure of evidence as to the amount received by plaintiff as consideration for his releasing Crowe; and 2) the burden of proving a full accord and satisfaction falls to the party asserting it—defendants in this case. See Edwards v. Nemet Motors, LLC, 79 N.Y.S.3d 841, 843 (N.Y. App. Term 2018) ("The party asserting the affirmative defense of accord and satisfaction bears the burden of establishing that there was a disputed or unliquidated claim between the parties which they mutually resolved through a new contract discharging all or part of their obligations under the original contract." (quotation omitted)); see also Roy v. Mugford, 161 Vt. 501, 513 (1994) ("A party claiming the defense of accord and satisfaction must prove that: (1) the claim is disputed; (2) the party offered to pay less than the amount allegedly due; and (3) in full settlement of the claim, the other party accepted and retained the lesser amount offered.").

Trepanier v. Eldred, 137 Vt. 108, 109 (1979) (per curiam) (holding that where there was no dispute as to the charge for merchandise or the fact that it was delivered, burden of proof as to defendant's claim that he paid invoice falls to defendant); V.R.C.P. 8(c) (burden of establishing matters constituting an avoidance or affirmative defense falls to party raising defense). See also Novick v. AXA Networks LLC, 2016 WL 10918884, at *4 (S.D.N.Y.) (not reported) (explaining that under New York law when the holder of a promissory note establishes that parties entered into note, lender performed under note, and debtor failed to pay amount due thereunder, burden shifts to defendant to prove an affirmative defense such as payment); Dorr v. Smith, Keller & Associates, 2010 WY 120, ¶ 23 (explaining that party seeking to establish a credit against an outstanding judgment based on settlement of claims related to judgment by third parties bears burden of proving the credit); Marquez v. Mayer, 727 N.E.2d 768, 773 (Ind. App. 2000) (co-tortfeasor who raised affirmative defense of partial satisfaction of judgment requiring a set off bore burden of proof on that issue at trial); Nat'l City Bank v. Victor Bldg. Co., 2000 WL 1545096, at *5 (Ohio Ct. App.) (unpublished) (explaining that promissory note established indebtedness, and argument that current balance due on instrument was less than face value is an assertion of partial accord or satisfaction that must be proved by party asserting defense); Citizens Bank of Americus v. Ansley, 296 S.E.2d 370, 370-71 (Ga. Ct. App. 1982) (where bank established that defendant had gotten funds evidenced by promissory note and had made no repayments, burden of proving partial accord and satisfaction based on other payments to bank fell to borrower).

Because the trial court's determination in this case rested in large part on its allocation of the burden of proof, we remand for the trial court to determine based on evidence of record whether defendants have established any credit toward the outstanding balance on the note on account of Crowe's payments to plaintiff.

Reversed and remanded for additional proceedings.

BY THE COURT:

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Paul L. Reiber, Chief Justice

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Beth Robinson, Associate Justice

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Harold E. Eaton, Jr., Associate Justice