

Commonwealth Of Kentucky

Court Of Appeals

NO. 1997-CA-002557-MR

SLONE'S FOODTOWN, INC.;
DAVID WILLIS; AND RUTH ANN WILLIS

APPELLANTS

v. APPEAL FROM SCOTT CIRCUIT COURT
HONORABLE DAVID KNOX, JUDGE
ACTION NO. 96-CI-00098

TERRY W. SLONE, EDITH SLONE,
VIRGIL SLONE, AND BETHEL SLONE

APPELLEES

OPINION
AFFIRMING

* * * * *

BEFORE: GUDGEL, CHIEF JUDGE; GUIDUGLI AND SCHRODER, JUDGES.

GUIDUGLI, JUDGE: This is an appeal from an order of the Scott Circuit Court holding that Terry W. Slone is a shareholder in Slone's Foodtown, Inc. We affirm.

Virgil Slone (Virgil) and Bethel Slone (Bethel) are the parents of Terry Slone (Terry), Gary Slone (Gary), and Ruth Ann Slone (Ruth). Terry is married to Edith Slone (Edith) and Ruth is married to David Willis (David). Linda Slone (Linda) is a former wife of Gary.

Prior to 1968, Virgil Slone operated a grocery store business. Either at the time the business was commenced, or

shortly thereafter, Virgil Slone brought his son Gary into the business. In 1969, the business was incorporated as Slone's Foodtown. Upon incorporation, Virgil and Gary each received 500 shares of stock. The Articles of Incorporation authorized the issuance of 1,000 shares of stock.

As of January 1, 1970, the aforementioned 1,000 shares in Slone's Foodtown, Inc. were issued as follows: 200 shares to Linda; 200 shares to Gary; 200 shares to Bethel; 200 shares to Virgil; and 200 shares to Terry.

Terry began working at Slone's Foodtown in 1968. According to his testimony, he left the store in late 1973, disenchanted because of his role in the business. At about the same time, Terry and Gary held discussions related to the sale of Terry's stock. Terry testified that he agreed to sell his stock for \$100,000.00, with the company buying the stock. Gary testified that the agreed upon consideration for the shares was between \$50,000.00 and \$60,000.00. It is undisputed that, for a time, Terry received payments for his stock at the rate of \$1,000.00 per month, with taxes being deducted from that amount. Terry received verifiable payments of \$43,000.00 from January 1, 1974, to February 6, 1978. The payments were received from Slone's Foodtown, not Gary.

Terry's original ownership of 200 shares in Slone's Foodtown was represented by Stock Certificate No. 5. Though Terry admits that he agreed to sell his stock, he testified that he did not sign over or deliver the Stock Certificate to Gary. Gary, however, testified that Certificate No. 5 was signed over

to him after Terry was paid for the stock. At some point in time, the back of Stock Certificate No. 5 bore the signature of Terry purporting to transfer the 200 shares to Gary. Former Slone's Foodtown office worker Louise Rose signed as a witness to the transaction. She testified that she could not recall the circumstances but stated that she would not have signed as a witness unless she, in fact, had witnessed the signing of the document. The information on the back of Stock Certificate No. 5 relating to the purported transfer of the 200 shares from Terry to Gary and Terry's signature have been whited out. Some of the information and signatures are still legible. However, the date on the Certificate is not legible. Terry testified that he did not sign the Certificate, and that he does not know why portions are whited out. The trial court declined to make a finding regarding who was responsible for obliterating Stock Certificate No. 5, preferring to let that matter remain unresolved, since it did not believe that that issue had any bearing upon the issue of whether Terry transferred or re-transferred his stock, and because it placed greater weight on other evidence in the record in arriving at its ultimate decision.

The trial court ultimately entered a finding that, at some point in time, Terry did in fact sign Certificate No. 5, transferring his 200 shares of stock to Gary Slone. Gary testified that Stock Certificate No. 5 was signed when Terry was paid in full for the stock.

In late 1977, Terry came back to work for Slone's Foodtown. Terry testified that the \$1,000.00 per month payments

for his stock ceased, but that he then received regular paychecks as a result of his employment. Terry testified that the corporation did not pay for the balance of the stock and that he did not discuss the cessation of his stock payments with Virgil or with anyone else. He testified that there was no agreement that he would not sign over the stock until the stock was fully paid. He testified that there was no mention that he would be getting the stock back.

In the fall of 1984, Gary became dissatisfied with the store operations, and expressed a desire to sell the stock owned by him and his wife Linda. On November 1, 1984, by a document styled STOCK SALE AND PURCHASE AGREEMENT (Agreement), Slone's Foodtown, Inc. agreed to purchase the 400 shares of stock owned by Gary and Linda. The agreement recognized that "Guarantors presently own all of the other issued and outstanding shares of common stock in Foodtown" Virgil, Bethel, and Terry signed that document as Guarantors. Gary and Linda also executed that document as Sellers of stock. As a part of that transaction, Virgil, Bethel, Terry, and Edith, by STOCK PLEDGE AND SECURITY AGREEMENT (Security Agreement), dated December 6, 1984, pledged 600 shares of stock in Slone's Foodtown in order to guarantee Slone's Foodtown, Inc.'s debt to Gary and Linda from the sale of the stock. By AMENDMENT, dated December 6, 1984, the parties agreed that the Guarantors could convey stock to David so long as Gary and Linda's security interest in the stock was recognized.

Terry testified that, in 1984, Virgil told him that the prior sale of his stock would be treated as if it never occurred. In addition, the corporation subsequently, over time, executed various documents acknowledging that Terry owned an interest in the corporation, including an APPLICATION FOR LICENSE under the Perishable Agricultural Commodities Act, which was signed by David on January 8, 1996, and which list Terry and Edith as each owning 10% of the corporate stock, and Gary and Linda as each owning 20%; a document relating to the food stamp program, which lists Terry as an owner in the business, dated December 2, 1994, and signed by Helen Lindon as bookkeeper; and certain income tax returns for the corporation from 1986 to 1994, which acknowledged that Terry was an owner in the business.

Moreover, an unsworn handwritten document, obtained in March 1996, signed by Virgil, states that Virgil gave Terry 200 shares of stock in 1984 and an additional 100 shares in 1995. No corporate records reflect those transactions. David testified that he believed in 1984 that Terry owned stock.

In January 1996, Gary told David that he, not Terry, owned the 200 shares represented by Stock Certificate No. 5 and that David should check the certificates. David thereupon examined the certificates and discovered the obliterated transaction on the back of Stock Certificate No. 5. David accepted the obliteration as confirmation that Gary, and not Terry, owned the stock represented by Stock Certificate No. 5. On February 12, 1996, Virgil, Bethel, Ruth Ann, and David held a meeting at which they decided to terminate the employment of

Terry and Edith and remove them from the Board of Directors of the corporation. On February 15, Terry and Edith were informed of this decision. Terry and Edith then initiated this suit. The trial was bifurcated with the phase-one portion of the proceedings limited to the issue of whether Terry was a stockholder in the corporation. In June 1997, the trial court entered a ruling that the appellants were estopped from denying that Terry was a stockholder in the company. The judgment was made final and appealable pursuant to Rules of Civil Procedure 54.02 and this appeal followed.

The trial court held that the appellants were estopped from denying Terry's ownership of the 200 shares represented by Stock Certificate No. 5 based upon various facts set forth in the 1984 documents executed in conjunction with the corporation's purchase of Gary and Linda's stock. The trial court cited Dingus v. FADA Service Co., Inc., Ky. App., 856 S.W.2d 45 (1993), as its authority that directors and shareholders of a corporation may be estopped from challenging another stockholder's ownership of stock.

There are a wide range of theories under which a party may be estopped from asserting particular rights or defenses. See 31 C.J.S. Estoppel and Waiver § 1 et. seq. The trial court did not specifically identify the estoppel theory upon which it relied; however, it specifically identified the 1984 contract documents executed in conjunction with the corporation's repurchase of Gary and Linda's stock, and the facts recited therein, as the basis for its conclusion that the appellants were

estopped from denying Terry's ownership in Stock Certificate No. 5. Hence, though not specifically identified as such in its order, the trial court, we conclude, relied upon "estoppel by contract" in its decision.¹

Estoppel by contract binds a party to the terms of his own contract unless the contract is set aside or annulled for fraud, accident, or mistake. 31 C.J.S. Estoppel and Waiver § 55 (1996). Estoppel by contract includes "estoppel to deny the truth of things agreed upon and settled by the terms of the contract." Goodin v. Turner, 222 Ky. 132, 300 S.W. 327, 328 (1927). Estoppel by contract is applicable to the action at bar. Under this estoppel theory, in the absence of fraud, accident, or mistake, "[i]f, in making a contract, the parties agree on or assume the existence of a particular fact as the basis of their negotiations, they are estopped to deny the fact as long as the contract stands." 31 C.J.S. Estoppel and Waiver § 55 (1996).

Under the Stock Sale and Purchase Agreement (Agreement) dated November 1, 1984, the "Sellers" were Gary and Linda and the "Guarantors" were Virgil, Bethel, Terry, and Edith. The contract includes the following prefatory statements:

WHEREAS, Gary Slone and Linda Slone presently own a total of 400 shares of the common stock of Slone's Foodtown, Inc., a Kentucky corporation, which together constitutes forty percent (40%) of the issued and outstanding shares of common stock in said corporation; and

¹ The appellants likewise concluded that the trial court relied on estoppel by contract. The appellees contend that the trial court did not rely on estoppel by contract but that estoppel by contract would in fact serve to estop the appellants from denying Terry's status as a stockholder.

WHEREAS, Guarantors presently own all of the other issued and outstanding shares of common stock in Foodtown

WHEREAS, Foodtown has agreed to purchase all of the above-stated stock in Foodtown presently owned by Sellers and Sellers have agreed to sell said stock to Foodtown, all in accordance with the terms and conditions hereinafter set forth

Paragraph 4 (four) of the agreement provided that the

Guarantors shall execute and deliver to Sellers a pledge and security agreement evidencing the first lien of Sellers on 600 shares of common stock in Foodtown owned by Guarantors.

On December 6, 1984, the Agreement was amended so as to permit the Guarantors

to sell and transfer to [David and Ruth Ann] a portion of the SIX HUNDRED (600) shares of common stock held in Foodtown by the Guarantors[.]

The amendment further provided that

[i]n consideration of the agreement by Sellers to amend the Agreement as set forth above, David Willis and Ruth Ann Willis hereby join in this Amendment to ratify and confirm the Agreement and evidence their agreement to be bound by the terms thereof[.]

On December 6, 1984, a Stock Pledge and Security Agreement undersigned by Virgil, Bethel, Terry, and Edith provided that the Guarantors

hereby pledge, transfer and hypothecate 600 shares of the issued and outstanding common stock in Foodtown, evidenced by certificate(s) numbered No. 3, No. 4 And No. 5, attached hereto and made part hereof, unto [Gary and Linda] . . . to secure and guarantee the unpaid balance of the purchase price to be paid by Slone's

Foodtown, Inc., a Kentucky corporation . . . , in which the Guarantors own all of the issued and outstanding common stock, to [Gary and Linda] pursuant to [the Agreement].

The 1984 documents indicate that the Guarantors – Virgil, Bethel, Terry, and Edith – together owned 600 shares of Foodtown stock as of December 6, 1984. The documents also show that Gary and Linda, together, owned 400 shares as of that date. These 1,000 shares account for all shares authorized by the Articles of Incorporation, and all shares then issued and outstanding. The documents refute Gary's claim of ownership of Stock Certificate No. 5 and, moreover, set forth that the corporation did not hold Stock Certificate No. 5 as treasury stock in December 1984.

All parties to the appeal were parties to the 1984 documents. By operation of estoppel by contract, to the extent that the parties agreed on or assumed the existence of particular facts, they are estopped from denying those facts. 31 C.S.S. Estoppel and Waiver § 55 (1996). In this regard, the trial court made the following two findings:

(1) All parties, in the 1984 documents, expressly acknowledged that Terry Slone was a stockholder in the corporation at the time those documents were executed.

(2) With respect to the keeping of corporate records and stock transfer documents, the corporation was typically lax in record keeping, including the keeping of minutes. Based upon the acknowledgment in the 1984 documents by all principals in the corporation that Terry Slone was a stockholder, and considering the corporation's laxity in keeping corporate records and minutes, an undefined event or set of circumstances or understandings occurred prior to the execution of the 1984

documents which resulted in the acknowledgment and assumption on the part of all principals in the corporation that Terry Slone was a shareholder in the corporation of 200 shares represented by Certificate No. 5.

Findings of fact made by the trial court cannot be set aside unless they are clearly erroneous. CR 52.01. The documents state that "Guarantors [Virgil, Bethel, and Terry] presently own all of the other issued and outstanding shares of common stock in Foodtown." Moreover, Terry signed as a guarantor, thereby pledging his stock ownership interest in Foodtown for the payment of the stock purchase to Gary and Ruth Ann. The parties' acquiescence to Terry's pledging of his stock as security is sensible only if the parties acknowledged that Terry owned stock. The foregoing serves as substantial evidence for the trial court's first finding, and accordingly the finding may not be set aside.

Likewise, finding two, to the effect that an undefined event or set of circumstances or understandings occurred prior to the execution of the 1984 documents which resulted in the acknowledgment and assumption on the part of all principals in the corporation that Terry Slone was a shareholder in the corporation of 200 shares represented by Certificate No. 5 is not a clearly erroneous finding. David admits that he assumed Terry was a shareholder in 1984 and that he maintained this belief until Gary claimed ownership of Stock Certificate No. 5. Virgil acknowledged that he assumed Terry was a stockholder from the time he returned to work for the company, and this remains his understanding to the present. The documents specifically refer

to Stock Certificate No. 5 as being owned by the Guarantors, and stock certificate No. 5 was originally issued in Terry's name. All stock is accounted for in the documents. Neither Virgil nor Bethel have ever claimed ownership of Stock Certificate No. 5. Gary and Linda acknowledged in the documents that they owned only 400 shares. The corporation is listed in the documents as having no treasury stock. Based upon the foregoing, the trial court was not clearly erroneous in concluding that all principals acknowledged and assumed that Terry was the owner of Stock Certificate No. 5.

Inasmuch as the parties agreed on or assumed that Terry was the owner of the 200 shares represented by Stock Certificate No. 5 at the time the 1984 documents were executed, and that was a basis for their negotiations in forming the contract, we conclude that the elements for estoppel by contract are met. The appellants offer alternative interpretations of the 1984 contract documents; however, we cannot say that the trial court was clearly erroneous in making its findings as to the parties' understanding and intent in forming the 1984 contract. Further, based upon the trial court's findings, we conclude that by operation of estoppel by contract, David Willis, Ruth Ann Willis, Virgil Slone, Bethel Slone, and Slone's Foodtown, Inc., are estopped from denying that Terry W. Slone and Edith Slone are shareholders in Slone's Foodtown, Inc.

For the foregoing reasons the judgment of the trial court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANTS:

David A. Weinberg
Lexington, Kentucky

BRIEF FOR APPELLEES TERRY W.
SLONE AND EDITH SLONE:

Richard M. Rawdon, Jr.
Georgetown, Kentucky