STATE OF MICHIGAN

COURT OF APPEALS

TRI-OLM, INC.,

Plaintiff-Appellant,

v

GEORGE E. BUYS,

Defendant-Appellee.

UNPUBLISHED
September 18, 2008

No. 279347
Genesee Circuit Court
LC No. 06-083035-CK

Before: Whitbeck, P.J., and Bandstra and Donofrio, JJ.

PER CURIAM.

In this breach of contract action, plaintiff Tri-Olm, Inc. appeals as of right from a judgment of no cause of action in favor of defendant George Buys, arguing that the trial court erred in making a factual finding contrary to the facts stipulated by the parties. We reverse and remand for further proceedings.

I. Basic Facts And Procedural History

Tri-Olm and Buys were partners in a tanning salon. In January 2004, Tri-Olm and Buys entered into an agreement for the sale of Tri-Olm's half-interest in the tanning salon to Buys. The agreement provided that the sale price was $50,000. Because at that time Buys was already indebted to Tri-Olm in the amount of $40,000, Buys executed a promissory note in the amount of $90,000. Pursuant to the terms of the note, Buys was to make monthly payments that included interest. Buys made the required payments from February 2004 through August 2004, at which point he went into default.

Tri-Olm filed this lawsuit in January 2006, seeking payment of the contract balance. As this lawsuit was pending, the parties attempted to find a buyer for the business. In January 2007, the parties located a purchaser and entered into a handwritten settlement agreement. The parties agreed that Buys would pay $15,000 to Tri-Olm in settlement of the lawsuit and would relinquish his rights in the tanning salon to Tri-Olm. The agreement was contingent on the closing of the sale to the third-party purchaser. The agreement further stated:

> If the fifteen thousand dollars is not received from Mr. Buys by January 31, 2007 then the hold harmless clause becomes null and void and Mr. Buys will be sued for the entire balance owed which will be over Ninety Thousand Dollars ($90,000).

As partial payment of the $15,000, the parties agreed that Tri-Olm would receive a vendor credit in the amount of $1,000. For the balance, Buys paid $11,000 to Tri-Olm on January 16, 2007, and gave Tri-Olm a check for the $3,000 that was post-dated to January 31, 2007.

A few days before January 31, 2007, Buys telephoned Tri-Olm and stated that he had not closed a mortgage as expected. Buys therefore requested that Tri-Olm refrain from depositing the $3,000 check. On March 6, 2007, Buys called Tri-Olm, advised that the mortgage had closed, and stated that the check could be cashed. Tri-Olm cashed the check on March 8, 2007.

Tri-Olm asserted that because Buys had failed to tender the entire $15,000 by January 31, Tri-Olm was entitled to recover the entire balance on the promissory note, less the amount paid by the third-party purchaser. Buys raised various defenses, including substantial performance and waiver of strict performance. In addition, Buys maintained that the release in the settlement agreement remained valid. On the day of trial, the parties stipulated that the facts were not in dispute and agreed to submit the issue to the court on briefs.

In June 2007, with neither counsel nor the parties present, the trial court rendered its opinion from the bench. The trial court rejected most of Buys' arguments. Nevertheless, the trial court stated that there was "no evidence [th]at this check was actually presented to a bank for payment and dishonored." Accordingly, relying on *Long v Cuttle Construction Co*,[1] the trial court concluded that the date of payment related back to the date of delivery of the check. Because the check had been tendered to Tri-Olm prior to the deadline of January 31, 2007, the trial court held that there was no breach of contract and, therefore, Buys was entitled to a judgment of no cause of action. Tri-Olm now appeals.

II. The Stipulated Facts

A. Standard Of Review

Tri-Olm argues that the trial court erred in making a finding of fact contrary to the facts stipulated by the parties rather than accepting the parties' stipulation or ordering additional proceedings to resolve any material facts in dispute. We review for clear error a trial court's findings of fact.[2] "A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire record is left with the definite and firm conviction that a mistake has been committed."[3] We review de novo a trial court's conclusions of law.[4]

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[1] *Long v Cuttle Construction Co*, 60 Cal App 4th 834; 70 Cal Rptr 2d 698 (1998). See also MCL 440.3310.

[2] MCR 2.613(C); *Walters v Snyder*, 239 Mich App 453, 456; 608 NW2d 97 (2000).

[3] *Walters*, *supra* at 456.

[4] *Id.*

B. Analysis

The parties to a civil action may submit a stipulation of facts to the trial court, and if the stipulated facts are sufficient to enable the court to render judgment in the action, the court must do so.[5] "Where parties agree to submit a case on stipulated facts, courts generally accept those facts as conclusive."[6] "A stipulation is given full force and effect and is binding upon the parties unless abandoned or disaffirmed."[7]

A stipulation may be in writing or may be made in open court.[8] "'While a stipulation need not follow any particular from, its terms must be definite and certain in order to afford a proper basis for judicial decision, and it is essential that they be assented to by the parties or those representing them.'"[9]

Here, the parties stipulated that the facts were not in dispute and agreed to submit the issue to the trial court on briefs. However, the parties neither filed a written stipulation setting forth the facts that were not in dispute nor stated these facts in open court. The absence of any record regarding the particular facts that the parties agree are uncontested therefore hampers our review. Accordingly, we remand to the trial court so that it can make a proper record of the stipulated facts. Thereafter, the trial court may, in its discretion, permit the parties to present additional proofs supplementing the stipulation if any salient facts remain in dispute.[10]

We further conclude that the trial court made an error of law. Specifically, the trial court's reliance on *Long v Cuttle Construction Co*, was misplaced. In *Long*, the bank placed a five-day hold on payment of the defendant's checks.[11] The *Long* court held that once the checks were honored, the payment of the underlying debt related back to the date of the delivery of the checks.[12] In the present case, the trial court concluded that the date of payment of Buys' check related back to the date of delivery. Because the check had been tendered to Tri-Olm before the contractual deadline of January 31, 2007, the trial court held that there was no breach of contract and, therefore, Buys was entitled to a judgment of no cause of action. However, the facts here are distinguishable from *Long*. Here, sometime in January 2007, Buys apparently gave Tri-Olm a check that was post-dated to January 31, 2007. Given that the check was post-dated, Buys

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[5] MCR 2.116(A)(1)-(2).

[6] *Kaiser Optical Systems, Inc v Dep't of Treasury*, 254 Mich App 517, 520; 657 NW2d 813 (2002).

[7] *Nuriel v Young Women's Christian Ass'n of Metropolitan Detroit*, 186 Mich App 141, 147; 463 NW2d 206 (1990).

[8] See MCR 2.507(G).

[9] *Whitley v Chrysler Corp*, 373 Mich 469, 474; 130 NW2d 26 (1964), quoting 83 CJS, Stipulations, § 3, p 3.

[10] See *Signature Villas, LLC v Ann Arbor*, 269 Mich App 694, 706; 714 NW2d 392 (2006).

[11] *Long*, *supra* at 836.

[12] *Id*. at 837-838.

clearly did not intend Tri-Olm to deposit it at the time of delivery. Accordingly, the trial court erred in applying the holding of *Long*.

Moreover, in *Long*, the delay in obtaining payment was due to the independent action of the third-party bank rather than anything the payer did. In contrast, in his trial brief, Buys admitted that prior to January 31, 2007, he requested that Tri-Olm refrain from depositing the check because there were insufficient funds in the account. Accordingly, the trial court erred in requiring Tri-Olm to establish that the check had actually been presented to a bank for payment and dishonored. Under the circumstances, it would have been futile for Tri-Olm to present the check to a bank for payment at any time on or before January 31, 2007. The law does not require the doing of a useless act.[13]

We reverse and remand for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ William C. Whitbeck
/s/ Richard A. Bandstra
/s/ Pat M. Donofrio

[13] *Modern Globe, Inc v 1425 Lake Drive Corp*, 340 Mich 663, 669; 66 NW2d 92 (1954).