REL: May 15, 2020

ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2019-2020

2180781

Aaron McCall

v.

Lowndes County Commission

2180826

Hayneville Plaza, LLC, Karl Bell, and Helenor Bell

v.

Lowndes County Commission

Appeals from Lowndes Circuit Court
(CV-13-900014)

MOORE, Judge.

In appeal number 2180781, Aaron McCall appeals from a judgment entered by the Lowndes Circuit Court ("the trial court") on a jury's verdict returned against him and in favor of the Lowndes County Commission ("the Commission"). In appeal number 2180826, Hayneville Plaza, LLC ("Plaza"), Karl Bell, and Helenor Bell appeal from that same judgment on the jury's verdict returned against them and in favor of the Commission. We reverse the judgment and render a judgment as to both appeals.

Background

South Central Alabama Broadband Cooperative District ("SCABCD") is a public entity that was formed by multiple rural counties and municipalities in order to bring optic-fiber Internet access to Lowndes County and surrounding areas. SCABCD applied for a grant from the federal government to obtain $59 million in funding for the project. Assuming that it would receive the grant, SCABCD would need a large building to house its operations. Plaza owned a suitable building ("the Plaza building"). The Commission developed a plan to purchase the Plaza building and, in turn, to lease the

building to SCABCD. The Commission hired Robert Woods as a consultant to arrange financing for the purchase.

Aaron McCall, a pastor of First Baptist Church, Hayneville, and the sole member of Habakkuk Enterprises International, LLC ("Habakkuk Enterprises"), who was also associated with the SCABCD project, approached Karl Bell ("Bell"), the sole and managing member of Plaza, about the Commission's plans. Through negotiations with McCall, Woods, and Bell, Plaza agreed to sell the Plaza building to the Commission for $3,200,000, which amount was to be paid from the proceeds of a bond that was to be issued by the Commission in the amount of $3,530,000. The Commission determined that it would need $500,000 in order to service the debt on the bond for two years, until SCABCD could commence its operations. According to the Commission, Bell orally agreed on behalf of Plaza to place $500,000 in escrow, from the $3,200,000 purchase price, that the Commission could access to service the bond debt. The oral agreement called for SCABCD to repay the $500,000 with interest at a rate to be determined.

On June 27, 2011, the Commission held a public hearing regarding the purchase of the Plaza building. At the meeting, Bell allegedly agreed on behalf of Plaza that the interest rate on the $500,000 to be placed in escrow would be 7.5%. The minutes from that meeting provide as follows:

> "Commissioner [Charlie] King moved to adopt the official statement for the bond subject to two agreements being executed upon the approval of the county attorney. One is a lease agreement and an agreement between [SCABCD,] the [Commission], and [Plaza]. The other is an agreement between the [Commission] and [Plaza] to provide [$]500,000.00 for payment of interest on the bond issue and accept and purchase the Plaza."

The motion was approved by a majority of the Commission.

Because the bond was scheduled to close the following day, the Commission's attorney, Hank Sanders, worked through the night drafting the agreements referenced in the minutes. However, no representative of Plaza signed any agreement drafted by Sanders. After the bond was issued and sold, Commissioner King, who was at all material times the chairman of both the Commission and SCABCD, instructed the bank holding the funds to pay Plaza $3,200,000. Following that payment, Helenor Bell, Bell's wife, made two large withdrawals from Plaza's business account. Significant amounts of funds from

the purchase of the Plaza building were also subsequently paid to Woods and McCall for assisting with the purchase. Approximately two weeks after Plaza received the purchase funds, Bell delivered to the Commission a check in the amount of $500,000 that was drawn on the business account of Plaza and was made payable to the Commission. The Commission deposited the check, but the check was returned due to insufficient funds. Plaza subsequently issued a deed conveying the Plaza building to the Commission, and SCABCD began occupying the building. Ultimately, SCABCD did not obtain the federal grant, so it did not lease the Plaza building from the Commission and the Commission serviced the bond debt through its own funds.

On February 25, 2013, the Commission filed a complaint against Plaza, Bell, and SCABCD. The Commission subsequently amended the complaint three times. The third amended complaint, which was filed on July 6, 2017, included as defendants Plaza, Bell, Helenor Bell, SCABCD, King, Woods, McCall, First Baptist Church, Hayneville, and Habakkuk Enterprises. The Commission asserted, among other things, a claim against Plaza alleging breach of contract and a claim

against Plaza, Bell, Helenor Bell, King, Woods, McCall, First Baptist Church, Hayneville, and Habakkuk Enterprises for the recovery of public moneys pursuant to Ala. Code 1975, § 6-5-4.[1]

On January 7, 2019, the case was tried before a jury. At the conclusion of the evidence, the defendants still remaining in the action (see note 1, supra) moved for a judgment as a matter of law; those motions were denied. The case was ultimately submitted to the jury on two claims against five total defendants: (1) a breach-of-contract claim against Plaza and (2) a claim seeking recovery of public moneys, pursuant to § 6-5-4, against Plaza, Bell, Helenor Bell, King, and McCall.[2] The jury entered a verdict in favor of the

[1]The trial court dismissed First Baptist Church, Hayneville, as a defendant. At the close of the trial, the Commission expressly abandoned all claims against Woods and SCABCD.

[2]Throughout the proceedings below, the Commission asserted that Habakkuk Enterprises should be disregarded as a separate legal entity because, it claimed, Habakkuk Enterprises was the alter ego of McCall. The verdict form submitted to the jury included an option for the jury to enter a judgment for damages against McCall and not Habakkuk Enterprises, and the Commission did not object to that form. Therefore, we conclude that the Commission waived or abandoned any claim against Habakkuk Enterprises. See, e.g., Target Media Partners Operating Co. v. Specialty Mktg. Corp., 177 So. 3d 843, 862 (Ala. 2013) (holding that a party's failure to object

Commission on both claims and assessed damages against the remaining defendants as follows: for breach of contract -- $1 in damages against Plaza; for recovery of public moneys -- $25,000 in damages against Plaza, $25,000 in damages against Bell, $13,177 in damages against Helenor Bell, $12,000 in damages against McCall, and $1 in damages against King. On January 16, 2019, the trial court entered a judgment on the jury's verdict. The trial court entered an order the next day in which it stated that it had granted a request by the Commission to pierce the corporate veil of Plaza.

On February 15, 2019, Plaza, Bell, and Helenor Bell filed a postjudgment motion that, among other things, renewed their motions for a judgment as a matter of law. McCall filed his postjudgment motion that same day. The postjudgment motions were denied by operation of law on May 16, 2019. See Rule 59.1, Ala. R. Civ. P. On June 27, 2019, Plaza, Bell, and Helenor Bell filed their notice of appeal to the Alabama Supreme Court; that court transferred the appeal to this court, pursuant to § 12-2-7(6), Ala. Code 1975. Also on June

---

to the verdict form after the trial court read it and provided it to the jury waives any objection as to the verdict form).

27, 2019, McCall filed his notice of appeal to this court. This court has consolidated the appeals.

Discussion

The dispositive issue in both appeals is whether Ala. Code 1975, § 8-9-2, the Statute of Frauds, bars the claims asserted by the Commission based on Plaza's alleged breach of the agreement to place $500,000 in escrow for the Commission's use to service the bond debt. If that agreement is void under the Statute of Frauds, any claims arising from its breach would be barred. See Southland Bank v. A & A Drywall Supply Co., 21 So. 3d 1196 (Ala. 2008).

Section 8-9-2 provides, in pertinent part:

> "In the following cases, every agreement is void unless such agreement or some note or memorandum thereof expressing the consideration is in writing and subscribed by the party to be charged therewith or some other person by him thereunto lawfully authorized in writing:
>
> "....
>
> "(5) Every contract for the sale of lands, tenements or hereditaments, or of any interest therein, except leases for a term not longer than one year, unless the purchase money, or a portion thereof is paid and the purchaser is put in possession of the land by the seller;
>
> "....

> "(7) Every agreement or commitment to lend money, delay or forebear repayment thereof or to modify the provisions of such an agreement or commitment except for consumer loans with a principal amount financed less than $25,000."

The Commission asserts that the case is governed by § 8-9-2(5), which provides that an oral contract for the purchase of land is not void if the purchase price is paid and the purchaser is placed in possession of the land. In this case, the Commission paid Plaza $3,200,000 for the Plaza building and received a deed for, and was placed in possession of, the Plaza building. The Commission argues that, based on the completed purchase of the Plaza building, the agreement requiring Plaza to place $500,000 in escrow is likewise valid and enforceable.

On the other hand, Plaza, Bell, Helenor Bell, and McCall maintain that the agreement for Plaza to place $500,000 in escrow, to be repaid with interest, was a loan subject to § 8-9-2(7). Because the terms of the loan are not in a signed writing, they argue, the Commission could not have maintained any action against them based on the alleged failure of Plaza to make the loan.

In DeVenney v. Hill, 918 So. 2d 106 (Ala. 2005), the supreme court considered the application of § 8-9-2(7) in relation to a land purchase. In that case, David Eason entered into an agreement to purchase land from John J. "Jack" DeVenney and Shirley Ann DeVenney for $250,000 and a promise by Eason to excavate an adjoining lot. Subsequently, Eason and the DeVenneys orally agreed that Eason would pay them an additional $50,000 if they would allow him an additional 30 days after closing to pay the purchase price. Eason subsequently assigned the purchase agreement to Mason Hill and Frank Thomas III. The parties attended a closing at which the various terms of the purchase were reduced to writing, except for the agreement regarding the additional $50,000. Eason tendered a check for $100,000 and postdated checks totaling an amount sufficient to cover the purchase price and the additional $50,000. After not receiving the additional $50,000 from Eason, the DeVenneys sued Eason, Hill, and Thomas, among others. The Elmore Circuit Court entered a summary judgment for Hill and Thomas, which the DeVenneys appealed.

In addressing the merits of the Devenneys' claim for the $50,000, the supreme court said:

> "With regard to the additional $50,000 Eason promised to pay the DeVenneys for the 30-day delay in making full payment of the purchase price, Hill and Thomas correctly point out that under the Statute of Frauds this agreement should have been in writing. The DeVenneys' agreement to lend or to forbear from collecting [the entire purchase price] for a sum of $50,000 must be in writing. § 8-9-2(7), Ala. Code 1975 (stating that '[e]very agreement or commitment to lend money, delay or forebear repayment thereof ... except for consumer loans ... less than $25,000' is to be in writing or the agreement is void).
>
> "The DeVenneys argue that the postdated checks of $150,000 and $50,000 sufficiently memorialize the terms of the agreement so as to satisfy the Statute of Frauds. We disagree. The checks are too indefinite to satisfy the Statute of Frauds with respect to Hill and Thomas's obligation because they fail to state the full terms of the agreement to forbear, the mutuality of the agreement, and the intention of the parties. Webster v. Aust, 628 So. 2d 846, 848 (Ala. Civ. App. 1993)(holding that a check does not satisfy the Statute of Frauds when it does not disclose the full terms of the contract, the specific dates of the closing, the payment of the balance, and the mutuality of the agreement and is not a final expression of the parties' agreement). Thus, the DeVenneys' agreement to forbear on collecting, or to lend $150,000, is void. See § 8-9-2(7), Ala. Code 1975; Webster, 628 So. 2d at 848-49. The purchase price stated in the sales agreement as assigned to Hill and Thomas did not include the additional fee of $50,000."

918 So. 2d at 115-16 (footnote omitted).

In DeVenney, the supreme court enforced the agreement requiring the payment of $250,000 for the sale of the land but not the agreement for the additional $50,000, which the court classified as an "agreement to lend or to forbear from collecting" within the meaning of § 8-9-2(7). 918 So. 2d at 115. We perceive no material difference between the facts of DeVenney and the facts in this case. Although the agreement by the Commission to purchase the Plaza building was not enforced as a signed written agreement, as the Commission itself argues, it was equally as valid as a written agreement under § 8-9-2(5) because of the performance of that agreement by the full payment of the purchase price and the conveyance of the property. Like in DeVenney, the parties entered into a contemporaneous agreement for the loan regarding the $500,000. Black's Law Dictionary 1085 (11th ed. 2019) defines "lend" as: "1. To allow the temporary use of (something), sometimes in exchange for compensation, on condition that the thing or its equivalent be returned. 2. To provide (money) temporarily on condition of repayment, usu. with interest." Despite the Commission's attempt to characterize the transaction as an escrow agreement, the transaction, as

described by the Commission, called for the temporary use of Plaza's money on the condition of repayment with interest, which clearly constitutes a loan. Just as in DeVenney, the tender of the $500,000 check from Plaza does not satisfy the Statute of Frauds because it "does not disclose the full terms of the contract, the specific dates of the closing, the payment of the balance, and the mutuality of the agreement and is not a final expression of the parties' agreement." DeVenney, 918 So. 2d at 115 (explaining the holding in Webster v. Aust, 628 So. 2d 846, 848 (Ala. Civ. App. 1993)).

Because it is undisputed that the alleged agreement for the loan was for more than $25,000 and it is undisputed that there is no writing indicating the consideration for the loan subscribed by "the party to be charged therewith or some other person by him thereunto lawfully authorized," § 8-9-2, any agreement concerning the purported loan is void as a matter of law. Therefore, the trial court erred in declining to grant a judgment as a matter of law on the breach-of-contract claim against Plaza. Branch Banking & Trust Co. v. Nichols, 184 So. 3d 337, 345 and 346 (Ala. 2015) (holding that, when "alleged oral agreements to modify [a] loan ... [were] not supported by

writings sufficient to satisfy the Statute of Frauds," "[the] breach-of-contract claim based on those alleged agreements is barred under the Statute of Frauds"); see also DISA Indus., Inc. v. Bell, 272 So. 3d 142, 148 (Ala. 2018).

The absence of a valid loan agreement vitiates the claim for recovery of public moneys under § 6-5-4, which provides in pertinent part:

> "(a) The Governor may cause actions to be commenced for the recovery of any public moneys, funds, or property of the state or of any county which have been lost by the neglect or default of any public officer, which have been wrongfully expended or disbursed by such officer, which have been wrongfully used by such officer, or which have been wrongfully received from him.
>
> "(b) In the event any public officer or agent of the state or any depositary or custodian of public funds or moneys has wrongfully used such funds or moneys, actions for the recovery thereof may be commenced before any court having jurisdiction of the subject matter; and it shall not be ground of objection to such an action that either, any, or all of the parties defendant do not reside within the county or within the district in which such action is commenced.
>
> "(c) Such action may be commenced in any court of competent jurisdiction; and such officer or agent, such depositary or custodian and the sureties on his official bond, or any one or more of them, may be joined as parties defendant; and any person who has wrongfully received such moneys or funds from such officer, agent, depositary, or custodian may also be joined as a party defendant."

In this case, the Commission concedes that the $3,200,000 disbursed to Plaza at King's direction was the consideration for the purchase of the Plaza building it received. The Commission contends, however, that the funds were wrongfully disbursed because the Commission did not receive the $500,000 allegedly promised by Plaza. However, as discussed previously, any such agreement is void pursuant to the Statute of Frauds. Consequently, it was not wrongful for King to disburse the purchase funds to Plaza or for Plaza, Bell, Helenor Bell, and McCall to indirectly receive part of those funds.

In Southland Bank, supra, our supreme court reasoned:

> "[T]he amended complaint alleges that Adkinson and Southland Bank were negligent or wanton in 'failing to provide to Plaintiffs a $500,000 line of credit once the [SBA] had guaranteed the loan.' This is an allegation that defendants violated a duty to assume or extend a loan. This is essentially a breach of a contractual duty to perform under a loan agreement, not of an assumed duty of care. However, as argued by the defendants in their motions for a JML [judgment as a matter of law] and on appeal, and as noted above, there is no contractual duty in this case because any purported contract 'to provide to Plaintiffs a $500,000 line of credit once the [SBA] had guaranteed the loan' -- i.e., a commitment to lend -- violated the Statute of Frauds. Therefore, the plaintiffs could not maintain their negligence or wantonness claim on this ground, and the trial

> court erred in failing to grant the motion for a JML."

21 So. 3d at 1220. Similarly, in this case, the Commission cannot maintain a claim under § 6-5-4 for alleged wrongful conduct arising out of a loan agreement that is void under the Statute of Frauds. Therefore, we conclude that the trial court erred in declining to enter a judgment as a matter of law as to Plaza, Bell, Helenor Bell, and McCall on this claim.[3]

Conclusion

Based on the foregoing, we reverse the trial court's judgment and render a judgment as a matter of law in favor of Plaza, Bell, Helenor Bell, and McCall.

2180781 -- REVERSED AND JUDGMENT RENDERED.

2180826 -- REVERSED AND JUDGMENT RENDERED.

Thompson, P.J., and Donaldson, Edwards, and Hanson, JJ., concur.

[3]Because we are disposing of these appeals based on the effect of the Statute of Frauds, we pretermit discussion of the other issues raised in the appeals.