ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
LARRY D. VAUGHT, JUDGE

DIVISION I

CA07-1004

May 7, 2008

GEORGE B. ROTHWELL and
TERRY L. ROTHWELL
APPELLANTS

V.

STEVEN L. YEAGER, LLC and
XTO ENERGY, INC.
APPELLEES

APPEAL FROM THE CLEBURNE COUNTY CIRCUIT COURT
[CIV-2006-59-4]

HON. TIM WEAVER, JUDGE

AFFIRMED

Appellants George and Terry Rothwell appeal the Cleburne County Circuit Court's decree dismissing with prejudice their first amended complaint against appellees Steven Yeager, LLC, and XTO Energy, Inc. The Rothwells contend that the trial court clearly erred in finding that they failed to rebut the presumption that a bonus check mailed by Yeager was timely delivered to them. We affirm.

The Rothwells own a 111.75 acre tract of land in Cleburne County. In late February/early March 2005, they were contacted by a representative of Yeager, an oil and gas leasing company headquartered in Edmond, Oklahoma. After negotiations, the Rothwells orally agreed to lease the oil, gas, and other minerals in their land to Yeager. On March 4, 2005, Yeager mailed a letter to the Rothwells enclosing an oil and gas lease, a bank draft, and a W-9 tax form. The letter stated that if the lease met with the Rothwells' approval, they

were to sign the original lease, draft, and W-9 form and mail the documents to Yeager. The letter continued: "We will research the county records to verify your mineral interest. Upon approval a check will be mailed to you." The bank draft stated that the Rothwells would be paid an $11,175 bonus "on approval of lease, mineral deed or contract covering the following property, and on approval of title to same by drawee not later than 60 banking days after arrival of this draft at collecting lands [sic] in: [Rothwells' property]."

The Rothwells signed the documents and returned them by mail to Yeager no later than March 11, 2005. George Rothwell testified that the primary reason that he entered into the lease agreement with Yeager was because of his need for the lease bonus. He expected to receive the bonus in late May 2005, and when he did not receive it at that time, he contacted the mail-room employees at his business (where Yeager previously sent mail to the Rothwells) to advise them that he was expecting a check and to notify him immediately if the check were delivered.

In the meantime, the Rothwells received inquiries from other companies about leasing their oil and gas rights. George Rothwell testified that he received a "constant bombardment of inquiries." On June 15, 2005, George Rothwell contacted his personal attorney, Cal McCastlain, to seek a legal opinion on whether the Rothwells had an enforceable lease with Yeager. Rothwell advised McCastlain that the bonus check had not been delivered by Yeager, and Rothwell wanted McCastlain to look into the matter.[1]

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[1]McCastlain testified that George Rothwell also told him that the price per acre of these leases had increased recently. While the Rothwells had negotiated a price of $100 per acre with Yeager in March 2005, the current price per acre had increased to between

Sometime in late June or early July 2005, George Rothwell received a telephone call from one of his employees advising him that the bonus check had been delivered that day. Rothwell directed the employee to deliver it directly to McCastlain. The envelope containing the bonus check was postmarked on May 25, 2005, from Edmond, Oklahoma.

McCastlain testified that after he was contacted by George Rothwell, McCastlain mailed correspondence to Yeager contesting the validity of the lease on the basis that the bonus check was not timely delivered to the Rothwells. McCastlain requested that Yeager sign a release of the lease. Yeager responded, contending that under the parties' agreement, it was required to mail the bonus check to the Rothwells within sixty days of the agreement and that it complied with that promise by mailing the check on May 25. Yeager also refused to sign the release.

On March 13, 2006, the Rothwells filed suit against Yeager alleging that the lease was void based on Yeager's failure to satisfy the contractual condition of payment of the lease bonus within sixty banking days. A first amended complaint was filed on August 29, 2006, adding XTO Energy (to whom Yeager assigned the lease) as a defendant. Yeager and XTO Energy answered the first amended complaint, claiming compliance with the terms of the contract because the bonus check was mailed to the Rothwells on May 25, 2005, which was within the sixty-day period.

After a hearing, the trial court orally ruled that Yeager made an offer to the Rothwells on March 4, 2005, and that the Rothwells accepted that offer on March 11. The court further

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$185 and 200.

found that there was no ambiguity in the contract documents and that the sixty-banking-day period began to run March 11, 2005, giving Yeager until June 3 to mail the bonus check. The trial court then cited the undisputed evidence that the bonus check was mailed to the correct business address of the Rothwells on May 25 as reflected on the envelope containing the check. The court noted that there was no evidence on the envelope demonstrating any type of delay in delivery. While the trial court stated that it did not disbelieve George Rothwell's testimony, it found that the Rothwells did not present sufficient proof that the check was untimely mailed. The court further noted that George Rothwell testified he was not involved in the collection of the mail and that none of the Rothwells' employees who handled the mail testified. Based on these findings, the trial court concluded that there was proof giving rise to the presumption of delivery and that the Rothwells failed to rebut it. Accordingly, the trial court dismissed the Rothwells' complaint.[2] A decree was later entered by the trial court restating the court's findings of fact and conclusions of law. It is from this decree that the Rothwells appeal.

The Rothwells' only point on appeal is that the trial court clearly erred in concluding that they failed to rebut the presumption that the bonus check was timely delivered to them. The standard of review following a bench trial is whether the trial court's findings are clearly erroneous or clearly against the preponderance of the evidence. *Claver v. Wilbur*, ___ Ark. App. ___ , ___ S.W.3d ___ (Mar. 19, 2008). A finding is clearly erroneous when, although

[2]The trial court also held that the each party would bear its attorney's fees. Yeager and XTO Energy filed a cross-appeal on that issue; however, they have abandoned that issue on appeal.

there is evidence to support it, the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been made. *Id.* Disputed facts and determinations of credibility of witnesses are both within the province of the fact finder. *Id.*

This case revolves around the application of the presumption surrounding the delivery of mail. There is a presumption of fact that when a letter, properly and sufficiently addressed and stamped, is mailed, it and its contents were received by the addressee in due course of mail. *Swink & Co., Inc. v. Carroll McEntee & McGinley, Inc.*, 266 Ark. 279, 584 S.W.2d 393 (1979). The word "mailed," when applied to a letter, means that it was properly prepared for transmission in the due course of mail and that it was placed in the custody of the officer charged with the duty of forwarding the mail. *Southern Engine & Boiler Works v. Vaughan*, 98 Ark. 388, 135 S.W. 913 (1911). The presumption ceases to exist, and becomes a question of fact, when the addressee denies receipt. *Swink*, *supra.* A mere denial that a properly mailed letter was not received is not sufficient, as a matter of law, to rebut the presumption; it simply leaves the question of receipt to the fact finder. *Id.*

The Rothwells contend that the trial court was clearly erroneous when it found that they did not rebut the presumption that the bonus check was delivered within sixty days of March 11, 2005. The Rothwells cite testimony that George Rothwell was anxious to receive the check, and so he contacted his mail-room employees to advise them to watch out for it. They point out that their employees were reminded about this weekly and that George Rothwell did not get a call from his employees reporting the delivery of the check until after June 15, 2005.

The facts in the instant case are somewhat similar to the facts in *Southern Engine & Boiler Works v. Vaughan*. There, two of the issues were whether the appellee mailed a letter to the appellant giving notice of a defective product and whether the appellant received it. Evidence was presented that the appellee mailed the letter to the appellant's Jackson, Tennessee office, raising the presumption. However, the appellant, in an effort to rebut the presumption, contended that the letter was not received. The only witness produced by the appellant who disputed receipt of the letter was its vice president and sales manager. This witness testified that the Jackson office had twelve employees who handled all correspondence and that he himself never opened any of the letters. The procedure in the mail room was that these employees would open the mail and then redirect it to the appropriate department. The witness testified that to the best of his knowledge and belief, and from the course of custom of the business at the appellant's office, the appellee's letter was not received. *Vaughn*, 98 Ark. at 393, 135 S.W. at 915. The jury found in favor of the appellee. *Id.* In affirming the jury verdict, our supreme court held that the evidence presented a question of fact for the jury to determine whether the letter had been mailed by the appellee and received by the appellant. *Id.* The court then noted that the jury, by finding in favor of the appellee based on the above evidence, answered that question of fact. *Id.*

In the case at bar, there is clear evidence that Yeager mailed the bonus check, and the Rothwells do not appeal the trial court's finding on this issue.[3] The issue is whether the trial

[3]The facts demonstrated that Rothwell's office received the bonus check. A copy of the envelope containing the check is part of the record. The envelope reflects that the check was mailed May 25, 2005, and was properly addressed to the Rothwells' business address.

court was clearly erroneous in finding that the Rothwells failed to rebut the presumption. We hold that was not.

George Rothwell essentially put on the same evidence that the appellant did in *Vaughn*. The Rothwells own and operate two corporations that have separate physical administrative offices in Little Rock and have employees all over the United States. According to George Rothwell, his businesses receive a significant amount of mail each day via two corporate post office boxes. The Rothwells have three employees who pick up the mail from the post office boxes and then distribute the mail to the appropriate locations. George Rothwell testified that he was not one of the individuals collecting the mail and was infrequently in the offices where the mail was collected, sorted, and distributed. The Rothwells offered no evidence from the employees who were actually collecting and sorting the mail about their efforts in searching for the check. Additionally, while Rothwell testified that the bonus check did not arrive timely, he did not know the exact date that it was delivered. He did not ask to see the check, or the envelope containing it, when his employee called him about it. Finally, he testified that he did not make any investigation as to whether the check arrived timely and his employees failed to tell him.

The trial court weighed this evidence and the credibility of the parties, and ultimately found that the Rothwells failed to rebut the presumption that the bonus check was timely delivered by Yeager to the Rothwells. Disputed facts and determinations of credibility of witnesses are both within the province of the fact finder. *Claver*, *supra.* Therefore, we hold that the trial court was not clearly erroneous in making this finding.

Affirmed.

HART and HEFFLEY, JJ., agree.