

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-002059-MR

JAMES E. WISSEL

APPELLANT

v. APPEAL FROM GALLATIN CIRCUIT COURT
HONORABLE JOSEPH F. BAMBERGER, JUDGE
ACTION NO. 97-CI-00011

GERALD H. DEATHERAGE

APPELLEE

OPINION
REVERSING AND REMANDING
* * * * *

BEFORE: DYCHE, JOHNSON AND TACKETT, JUDGES.

JOHNSON, JUDGE: James E. Wissel has appealed from the summary judgment entered by the Gallatin Circuit Court on July 14, 1998, that dismissed his complaint. He argues that the trial court erred in its determination that the appellee, Gerald H. Deatherage, signed a note as a representative of a corporation and was not individually obligated to repay the debt evidenced by the note. After reviewing the record and employing the standard of review for summary judgments set forth in Scifres v. Kraft,¹

¹Ky.App., 916 S.W.2d 779, 781 (1996) (standard of review on appeal of a summary judgment is "whether the trial court
(continued...)

we agree with Wissel that the trial court erred as a matter of law and that the judgment was improvidently granted.

Wissel commenced this lawsuit in January 1997, naming as defendants the appellee, Deatherage, Bill Myers, and the United Development Corporation. He alleged that on February 22, 1995, Deatherage and Myers executed a promissory note in the principal amount of \$50,000; that the payments, including interest, called for by the note had not been made; and that the obligation due thereunder was delinquent. He sought a judgment for \$50,000, plus \$5,000 interest, and \$500 in attorney's fees as provided by the note. Wissel attached a copy of the note to the complaint which provides in pertinent part:

8. OBLIGATIONS OF PERSONS UNDER THIS NOTE

If more than one person signs this Note, each person is fully and personally obligated to keep all of the promises made in this Note, including the promise to pay the full amount owed. Any person who is a guarantor, surety or endorser of this Note is also obligated to do these things. Any person who takes over these obligations, including the obligations of a guarantor, surety or endorser of this Note, is also obligated to keep all of the promises made in this Note. The Note Holder may enforce its right under this Note against each person individually or against all of us together. This means that any one of us may be required to pay all amounts owed under this Note.

The note was signed by both Deatherage and Myers, neither of whom indicated that he was signing in a representative capacity. The

¹(...continued)
correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law"). See also Kentucky Rules of Civil Procedure (CR) 56.03.

name, "United Development Corp.," appears immediately below the names of the two individuals.

On August 12, 1997, Deatherage answered the complaint by admitting that he had executed the note dated February 22, 1995, but he alleged that he had done so "as an officer of the corporation, United Development Corp." Deatherage, an experienced real estate agent and broker, set forth the affirmative defenses of lack of consideration, the statute of limitations and estoppel. He also filed a cross-claim against Myers and United Development and alleged that either Myers or the corporation "received and retained the funds evidenced by the note, and that therefore, he should be fully indemnified by them for any liability that he may have to [Wissel] resulting from their conduct."

On September 25, 1997, the trial court entered an order sustaining Wissel's motion for a default judgment against Myers and United Development. Prior to the bench trial which was scheduled to commence on July 27, 1998, Deatherage moved for summary judgment and made the following argument:

As grounds for this Motion, [Deatherage] would submit that there are no genuine issues of material fact, and that he is entitled to judgment as a matter of law. More specifically, [Wissel] did not receive from [Deatherage], individually, any contractual covenants, [Deatherage] having signed the note as an officer or agent of a corporation. Further, that he had no individual interest in the transaction whatsoever, directly or indirectly. [sic] [Deatherage] did not receive any of the funds transferred pursuant to the note made the subject matter hereof, at any time, and did not receive any of the proceeds of those funds in any form. Those funds were transferred into an account

controlled by Bill Myer[s], with whom this Defendant disassociated himself relatively soon thereafter.

Deatherage's motion did not cite any legal authority whatsoever in support of his contention that these facts, even if uncontradicted, entitled him to a judgment as a matter of law. Nevertheless, on July 14, 1998, the trial court granted the motion. In an order less than two pages long, which, like the motion it granted, contains no legal authority, the trial court found and concluded as follows:

The Defendant, Gerald H. Deatherage, signed the note dated February 22, 1995, only one time, which signature was in close proximity to the name United Development Corporation. The signature was made by the Defendant as an officer or agent of that corporation, and was not made by the Defendant in an individual capacity. There being no individual signature, there can be no individual liability.

In this appeal, Wissel argues that the trial court erred as a matter of law in concluding that Deatherage is not personally liable on the note and in granting his motion for summary judgment. We agree. Although neither the motion for summary judgment nor the judgment itself reference any legal authority for the dismissal of Wissel's complaint against Deatherage, there is both statutory law and case law applicable to the issue of the legal effect of Deatherage's signature on the note.

At the outset, we observe that the record reveals the existence of a significant and genuine issue of material fact concerning Deatherage's claim that he was acting in an agency capacity. Before one can act in the capacity as an agent, it is

axiomatic that he be in an agency relationship, which necessarily requires the existence of a principal. Although Deatherage argued in his motion for summary judgment that he was acting as the agent of United Development, the record, specifically Deatherage's deposition testimony, reveals a question as to the very existence of the corporation, and Deatherage's purported position as an officer in that corporation:

Q. And your signature on that second page is Gerald Deatherage. It doesn't say that you're acting in any capacity on behalf of United Development or anyone else.

A. Well, at that time Bill [Myers] was setting up--he was supposed to be forming the corporation of United Development Corporation. That was the assumption I was under.

Q. But he didn't?

A. I don't know.

Q. What happened to the proceeds of the loan?

A. Bill got it.

Q. Do you have any financial records of United Development Corporation?

A. No, sir, I don't.

Q. Were you an officer of the corporation?

A. I was supposed to have been secretary.

Later, Deatherage testified:

Q. Well, . . . you know that the note is your responsibility.

A. Do I know this note - - I signed this as an officer or a potential officer of United Development Corporation.

Q. Where does it say that, sir?

A. It says United Development Corporation.

Q. And it also has Gerald --

A. And the corporation being set up--and I'm led to believe--Bill Myers said he's setting the corporation up and that's--that's what it was all about.

Q. But it says Gerald--

A. I didn't get any of the money.

Q. Gerald Deatherage. It doesn't say Gerald Deatherage, secretary/treasurer, correct?

A. It doesn't say that on here.

This testimony reveals a genuine issue of material fact essential to the threshold question of Deatherage's ability to even act in a representative capacity. Thus, the trial court erred in resolving that issue in Deatherage's favor and in granting his motion for summary judgment. Furthermore, if on remand it is established that the corporation was not in existence at the time Deatherage signed the note, Deatherage, as a promoter would be personally liable on the note as a matter of law.²

Additionally, the issue presented falls within the purview of Article Three of the Uniform Commercial Code, specifically, KRS³ 355.3-402 and 355.3-403 (2) and (3). KRS 355.3-402 reads: "Unless the instrument clearly indicates that a

²See Pierson v. Coffey, Ky.App., 706 S.W.2d 409, 413 (1985) ("one who enters into a contract, for the benefit of a corporation which has yet to be incorporated, remains personally liable on the contract subsequent to incorporation, absent an agreement otherwise").

³Kentucky Revised Statutes.

signature is made in some other capacity it is an indorsement.”⁴

KRS 355.3-403(2) and (3) provide:

(2) An authorized representative who signs his own name to an instrument

(a) is personally obligated if the instrument neither names the person represented nor shows that the representative signed in a representative capacity;

(b) except as otherwise established between the immediate parties, is personally obligated if the instrument names the person represented but does not show that the representative signed in a representative capacity, or if the instrument does not name the person represented but does show that the representative signed in a representative capacity.

(3) Except as otherwise established the name of an organization preceded or followed by the name and office of an authorized individual is a signature made in a representative capacity.⁵

These portions of the Uniform Commercial Code were designed to “establish[] rules to enable subsequent holders to determine, by reference solely to the instrument itself, which party is liable on the instrument.”⁶ As stated earlier, the note did not reveal Deatherage’s relationship to United Development Corporation. Certainly his name was not, as required by KRS 355.403(3), followed by any words indicating that he was signing

⁴This statute was repealed effective January 1, 1997, after the signing of the note at issue.

⁵This statute was revised and renumbered effective January 1, 1997, by the enactment of KRS 355.3-402. Since the note at issue in the case sub judice was executed in 1995, the former version applies.

⁶First National Bank in Marlinton v. Blackhurst, 176 W.Va. 472, 345 S.E.2d 567, 1 UCC 2d 820, 823 (1986).

as an officer or agent of the corporation. Thus, the trial court's determination (from the fact that Deatherage's signature preceded and was in close proximity to the name of the corporation) that Deatherage signed in a representative capacity is erroneous as a matter of law.⁷ In order to avoid personal liability and to be entitled to judgment as a matter of law, an individual who signs a negotiable instrument must both reveal his principal and indicate that he is signing in a representative capacity. Deatherage's mere "assumption" that he was not individually liable "is insufficient to overcome a statutory presumption" that he was signing in his individual capacity.⁸

Because the immediate parties to the note are involved in this litigation, Deatherage may on remand present parole evidence to establish that there was an understanding between himself and Wissel that Wissel would not look to him personally to repay the note.⁹ Even if we accept as fact Deatherage's subjective understanding that he was signing for the corporation, he has yet to offer any evidence that such was Wissel's understanding. In any event, that issue involves questions of

⁷See Richardson v. First National Bank of Louisville, Ky.App., 660 S.W.2d 678, 680 (1983) (individuals who signed corporate note "without stating that such signing was as representatives" and who offered no proof that there was an "understanding" between the parties that only the corporation would be liable held to be personally liable on the note); See also Burrus v. Farmers Bank of Nicholasville, Ky.App., 938 S.W.2d 889 (1997) and White v. Winchester Land Development Corp., Ky.App., 584 S.W.2d 56, 59-60 (1979).

⁸Richardson, supra.

⁹KRS 355.3-403 (2) (b); Burrus, supra.

fact to be resolved by a jury and is not susceptible to summary judgment.

Although it is abundantly clear that the summary judgment was improper, we will discuss the arguments made by Deatherage in his brief in support of the judgment. First, Deatherage states that "[g]iven the status of the record at the time of the hearing, it was impossible for the trial [c]ourt to conclude that [Wissel] could produce evidence at trial supporting his contention that [Deatherage's] signature was made in an individual capacity." Of course, it was not Wissel who moved for summary judgment, but Deatherage. Thus, it was Deatherage, not Wissel, who had the burden to establish the non-existence of a genuine issue of material fact.¹⁰ At the time the motion was made, the record contained the note, Deatherage's admissions that he had signed the note and that the note had not been repaid. Deatherage's argument that Wissel was required to produce more evidence to overcome his motion is specious, particularly given the fact that his bare signature created a presumption that he was individually obligated.

Next, Deatherage argues that it was impossible for Deatherage's single signature to obligate both himself and the corporation. Relying on an annotation from American Jurisprudence 2nd,¹¹ Deatherage states that his designation lacked only the word "'for'" after his name and preceding that of

¹⁰Steelvest, Inc. v. Scansteel Service Center, Inc., Ky., 807 S.W.2d 476 (1991).

¹¹18B Am Jur 2d Corporations §1838.

the corporation's name to "comply with the proper form importing no personal liability." This argument overlooks KRS 355.403(3), which was in effect at the time the note was executed, and which, as discussed earlier herein, requires that to avoid personal liability a signer of a negotiable instrument must indicate the office he holds in the corporation he represents in addition to disclosing the identity of his principal.

Deatherage also cites the case of Morgan v. O'Neil¹², for the principle that "a shareholder is not liable for a debt of the corporation unless extraordinary circumstances exist to impose liability."¹³ In Morgan v. O'Neil, the only basis for liability asserted against the individual defendant for a corporate debt was the defendant's status as a shareholder. The Morgan case is factually inapposite to the case sub judice. Wissel is not attempting to establish Deatherage's liability based on his status as a shareholder, or even as an officer or director. Rather, the complaint alleges that Deatherage executed a note without indicating that he was signing in a representative capacity which, by its explicit terms, obligated Deatherage individually. Thus, the holding of Morgan and the principles established therein are not applicable to the circumstances in the instant case where a "viable" theory of liability was stated in the complaint.¹⁴

¹²Ky., 652 S.W.2d 83 (1983).

¹³Id. at 85.

¹⁴See Smith v. Isaacs, Ky., 777 S.W.2d 912, 914 (1989).

Finally, Deatherage argues that "[i]t does not make sense for a person to promise to repay individually if he is not receiving any funds individually." Deatherage's point is well-taken. However, that Deatherage may have been duped by Myers does not, as a matter of law, entitle him to a summary judgment on Wissel's complaint.

Accordingly, the judgment of the Gallatin Circuit Court is reversed and this matter is remanded for further proceedings.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

Frederick V. Short
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