

Commonwealth Of Kentucky

Court Of Appeals

NO. 1999-CA-002463-MR

SYNERGIST, LLC; and
ROBERTA MANNING

APPELLANTS

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE THOMAS WINE, JUDGE
ACTION NO. 98-CI-006557

STAR BANC CORPORATION; and
STAR BANK, N.A.

APPELLEES

OPINION
REVERSING and REMANDING
** **

BEFORE: BUCKINGHAM, EMBERTON AND TACKETT, JUDGES.

EMBERTON, JUDGE: This is an appeal from an order of summary judgment dismissing Synergist's claim against Star Banc Corporation on the grounds of the statute of frauds and the parole evidence rule.

Synergist is a marketing company whose primary product is the Blowsdrier, a cloth garment bag which, when used with a hair dryer, removes wrinkles from clothing. In early 1998, the owners of Synergist, Roberta Manning and Rod and Gloria Wenz, met with Star Banc representatives to discuss a collaborative effort to promote credit cards to over-the-road truck drivers. The

cards, issued by Star Banc, would carry the trademark of Mama Tucker, a trademark of Catawba Holdings, LLC. A travel kit, consisting of a Blowsdrier, a travel bag and several other small items, was to be assembled by Synergist as an incentive for truck drivers to open a credit card account. Synergist alleges that on or about March 2, 1998, Faris Weber, senior vice-president and manager for credit card services at Star Banc, requested quotes on quantities of 10,000, 50,000 and 100,000 travel kits. Because it anticipated high demand by Star Banc for the kits, Synergist identified prospective suppliers, obtained quotes, and took steps to replace its prior Blowsdrier manufacturer in Mexico with a larger factory in Korea.

Synergist alleges that there were various telephone conversations between it and representatives of Star Banc which led to the placing of a verbal order of 10,000 travel kits. There was a sense of urgency to have the kits produced for availability at a Las Vegas truck show in mid-May of 1998. On March 10, 1998, representatives from Synergist, Star Banc and Catawba met at Star Banc's headquarters and Weber reduced the size of Star Banc's order to 5,000. Synergist claims that there was an oral agreement that Star Banc would purchase 5,000 kits for delivery in sixty days, and 2,000 kits per month thereafter for a three-year period. The price for each kit was \$36.90. Synergist contends it was instructed to proceed immediately. There is no written contract evidencing the alleged oral agreement and Star Banc denies any oral agreement to purchase more than 1,000 kits.

There are several pieces of correspondence which are worthy of mention. On March 12, 1998, Rod Wenz from Synergist wrote a letter to Weber expressing his appreciation for Star Banc's order and confirming that at the March 10, 1998, meeting the order had been changed from 10,000 kits to 5,000 kits. Star Banc and Synergist representatives again met on March 13, 1998, to complete a purchase order for 5,000 travel kits, 1,000 to be delivered to Las Vegas, and 4,000 for delivery elsewhere. Synergist alleges, however, when Weber sought advice from Star Banc as to the method of payment for the kits, Weber was informed that the purchase orders would have to be staggered with orders of 1,000 kits at a time. Synergist alleges that Weber assured it that Star Banc would need all 5,000 kits. Star Banc alleges that Weber was informed that he had no authority to commit to more than 1,000 kits and Weber signed and provided the following purchase order:

March 13, 1998

Ms. Bobbi Manning
Synergist, LLC
2435 Carolina Avenue
Louisville, KY 40255

Dear Ms. Manning:

This letter will serve as Star Banc's initial order for the purchase of your product, Trucker's Traveler.

Star will purchase 1,000 units for a May deliver to Las Vegas, Nevada.

This also serves as our non-binding Letter of Intent to purchase an additional 4,000 units by July 31, 1998.

Very Truly Yours,

Faris Weber
Senior Vice President
CREDIT CARD SERVICES

Synergist did not sign the purchase order. Following the March 13, 1998, meeting, Synergist placed an order with GO Global for 1,000 kits to be shipped to Las Vegas and 4,000 to be shipped elsewhere. The order was immediately passed to the factory in Korea.

The Mama Tucker credit card program made its debut at the Las Vegas truck show and was a failure. Prior to leaving Las Vegas, Manning alleges she reminded Weber about the sixty-day delay in shipping, and that based on his order, Synergist committed to buying 2,000 units every month after May. Manning gave Weber a copy of a telefax received from Wenz which showed that 2,000 units were en route, 2,000 were due to leave Korea the next day, 2,000 units were committed for June production, and 2,000 for July production unless canceled by May 18, and 2,000 for August production unless canceled by June 15. When Manning did not hear from Weber on Monday, May 16, she allowed the production order to remain. However, as June approached and realizing that the 8,000 kits on hand were sufficient to meet Star Banc's need, Synergist suspended the production order.

As of September 1998, Synergist alleges it received and paid for 9,000 travel kits yet, Star Banc paid for only 1,000. By correspondence dated September 28, 1998, Weber denied an agreement to purchase more than 1,000 kits.

There is no dispute that Star Banc ordered a quantity of kits for use in its Mama Tucker's credit card promotion. The

dispute arises as to the number ordered. Star Banc contends and the trial court agreed, that the March 13, 1998, purchase order is a written contract and that an oral agreement between the parties is unenforceable.

The statute of frauds for the sale of goods is codified in KRS 355.2-201 which provides in part:

(1) Except as otherwise provided in this section a contract for the sale of goods for the price of \$500 or more is not enforceable by way of action or defense unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought or by his authorized agent or broker. . . .

. . . .

(3) A contract which does not satisfy the requirements of subsection (1) but which is valid in other respects is enforceable

(a) if the goods are to be specially manufactured for the buyer and are not suitable for sale to others in the ordinary course of the seller's business and the seller, before notice of repudiation is received and under circumstances which reasonably indicate that the goods are for the buyer, has made either a substantial beginning of their manufacture or commitments for their procurement. . . .

The trial court held that the March 13th purchase order signed only by Star Banc precludes Synergist from relying on the specifically manufactured goods exception. Contrary to the finding of the trial court, Synergist was not attempting to enforce the purchase order against Star Banc. Star Banc asserted the order as a defense to payment for more than 1,000 kits and

since it was not signed by Synergist cannot be asserted against it.¹

The trial court found there was no evidence that the kits were "specially manufactured." If the kits were specially manufactured for Star Banc, the oral contract alleged by Synergist would be taken out of the statute of frauds. In Marilyn Shoe Company v. Martin's Shoe Store, Inc.,² the court held that shoes shipped to the buyer were not specially manufactured:

We agree with the trial court that the shoes were not manufactured by the seller especially for the buyer and were suitable for sale to others in the ordinary course of the seller's business. . . . The shoes were ordered from a sample shoe, and the colors were selected from 'swatches' of leather shown by appellant's salesman. The order was placed according to 'stock numbers.' The shoes were not made according to any special design, plan, or specification, or any model furnished by the buyer such as the seller did not use in the ordinary course of its business. The fact that the shoes were of the 'fad type' is not important since the business of appellant is making shoes of this type.³

In this case, Synergist alleges that Star Banc agreed to purchase 5,000 kits plus an additional 2,000 kits every month for three years. Synergist enlarged its factory, moved it to another country, extended its line of credit at the bank, and ordered the kits. The kits included not only the Blowsdrier but also five items imprinted with the Mama Tucker logo. Although

¹ Nicholson v. Clark, Ky. App., 802 S.W.2d 934, 938 (1990).

² Ky., 253 S.W.2d 18 (1952).

³ Id. at 19-20.

Synergist manufactured the Blowsdrier, the kits were specifically for the Star Banc credit card promotion. We find that the trial court erred when it found that the statute of frauds precludes proof of an oral agreement between Synergist and Star Banc.

Synergist concedes that if the oral agreement it alleges was made contemporaneous with a written contract to purchase only 1,000 kits, then the parol evidence rule precludes evidence of the oral contract.⁴ Synergist, however, contends that Star Banc, through the March 13, 1998, purchase order, attempted to modify the pre-existing oral contract by a unilateral issuance of an order for a reduced quantity of kits. KRS 355.2-202 provides:

Terms with respect to which the confirmatory memoranda of the parties' agree or which are otherwise set forth in a writing intended by the parties as a final expression of their agreement with respect to such terms as are included therein may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement but may be explained or supplemented. . . .

The purchase order submitted was not signed by Synergist and only by Star Banc. In summary, Synergist claims that there was an oral agreement made on or before March 13, 1998, and that the purchase order does not reflect the intentions of it or Star Banc. The trial court erred in failing to consider the facts as alleged by Synergist.

The summary judgment entered by the trial court is reversed and this case is remanded for further proceedings.

⁴ Mario's Pizzeria v. Federal Sign & Signal Corp., Ky., 379 S.W.2d 736 (1964).

ALL CONCUR.

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