IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
May 12, 2014 Session

DEBORAH RUSSO v. SUNTRUST BANK

Appeal from the Circuit Court for Hamilton County
No. 12C1026 W. Neil Thomas, III, Judge

No. 2013-02052-COA-R3-CV-FILED-AUGUST 28, 2014

This is an action brought against SunTrust Bank, executor of the estate of James Darrel Russo, Sr. ("decedent"). Decedent's former wife, plaintiff Deborah Russo, alleged that Albert W. Secor, a SunTrust employee, who was handling the estate's affairs for the bank, promised her that SunTrust would continue to pay insurance premiums under a policy of health insurance insuring plaintiff. In July 2006, SunTrust paid one premium payment. Coverage under the policy lapsed after that due to non-payment of premium. The trial court granted partial summary judgment to SunTrust, holding that the bank "cannot be held liable as executor of the estate of [decedent] because the Plaintiff is not a beneficiary of that estate." After Secor filed an affidavit attesting that he acted on behalf of SunTrust *as the executor of the estate only*, and not on behalf of the bank in any other capacity, the trial court granted SunTrust summary judgment as far as its individual responsibility is concerned. At issue is the correctness of the trial court's second ruling. We hold that there is no genuine issue of material fact regarding the capacity in which Secor was acting when he made the alleged promise. Plaintiff presented no evidence suggesting that Secor acted in any capacity other than as a representative of SunTrust in its fiduciary capacity. Furthermore, any alleged promise by Secor to bind SunTrust individually to pay the insurance premiums is barred by the statute of frauds, Tenn. Code Ann. § 29-2-101(a)(1) (2012). We affirm.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed; Case Remanded

CHARLES D. SUSANO, JR., C.J., delivered the opinion of the Court, in which D. MICHAEL SWINEY and THOMAS R. FRIERSON, II, JJ., joined.

Megan C. England and Jeremy M. Cothern, Chattanooga, Tennessee, for the appellant, Deborah Russo.

Alan L. Cates and Caroline B. Stefaniak, Chattanooga, Tennessee, for the appellee, SunTrust Bank.

OPINION

I.

Plaintiff and decedent were divorced in 1996. They never remarried, but the proof suggests that they resumed living together. They had one child together, James R. Russo, Jr. ("Jamie"). At the time of his death, decedent maintained a COBRA health benefits continuation plan ("the policy"), under which decedent, plaintiff, Jamie, and another of decedent's children from a former marriage were insured. The COBRA continuation enrollment form was signed by decedent and plaintiff (listed as "spouse") on August 30, 2005. Decedent died testate on June 6, 2006. His beneficiaries were his five children – Jamie and four other children from earlier marriages.

SunTrust is the executor of the estate. Al Secor, then a senior vice president with SunTrust, handled the executor duties on behalf of the bank. Plaintiff was then represented by attorney Thomas E. Smith. Smith contacted Secor in June 2006 and told him that an insurance premium was due for the month of July for the health insurance policy covering plaintiff and Jamie. Secor told Smith that SunTrust would pay the premium. The July 2006 premium was paid *out of the funds of the estate*. SunTrust did not make any further premium payments.

Plaintiff filed this action in general sessions court, and then appealed to the trial court. Plaintiff alleged that Secor promised to pay the insurance premiums on behalf of SunTrust, and that the bank was liable for not paying the premiums, and allowing the policy to lapse. SunTrust moved for summary judgment. The trial court granted partial summary judgment to SunTrust in its capacity as executor, stating as follows:

> SunTrust . . . asserts that there is no promise or agreement for which it can be held liable other than as the executor of the estate of [decedent]. [Smith's] affidavit indicates that Mr. Smith dealt with no one at SunTrust other than Al Secor, and no affidavit has been submitted by Mr. Secor. Consequently, an issue of fact does exist with respect to the independent liability of SunTrust but SunTrust cannot be held liable as executor of the estate of James Russo because the Plaintiff is not a beneficiary of that estate.

As previously noted, plaintiff has not appealed the ruling that SunTrust is not liable *in its capacity as executor*.

SunTrust thereafter filed Al Secor's affidavit, in which he stated that "[i]n all of my communications with [plaintiff] or Mr. Smith regarding either the Estate, the [decedent], or the Policy, I was acting on behalf of SunTrust as Executor of the Estate, and not on behalf of SunTrust in any other capacity." Plaintiff responded by filing Smith's second affidavit, in which he stated that he had spoken with Secor on several occasions "about [plaintiff's] COBRA health insurance benefits and the owed premiums and exchanged several letters with Mr. Secor." Four of these letters were attached as exhibits to Smith's affidavit. Plaintiff also filed the transcript of Smith's deposition. SunTrust filed a renewed motion for summary judgment, which the trial court granted by order stating:

> The only issue before the Court is whether SunTrust can be held liable in its independent capacity . . . The only reason that summary judgment was not [earlier] granted to SunTrust in its independent capacity was because no affidavit was submitted to show the capacity in which Al Secor was acting for SunTrust.
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> * * *
>
> [T]he affidavit of Al Secor has now been submitted. In opposition, the second affidavit of Thomas E. Smith is submitted, but Exhibits B, C, and D to the affidavit constitute inadmissible hearsay. In any event, they do not raise genuine issues of material fact about Al Secor's capacity.

Plaintiff timely filed a notice of appeal.

II.

Plaintiff raises the following issues for review, as quoted from her brief:

> Whether the trial court committed reversible error in ruling Exhibits B, C, and D of the Second Affidavit of Thomas E. Smith were inadmissible hearsay[.]
>
> Whether permitting [SunTrust] to file an impermissible "reply brief" and then failing to give [plaintiff] the procedural time to respond to [SunTrust's] new facts and arguments violated

> Tennessee Rule of Civil Procedure 56 and/or other Tennessee law and whether this error constitutes reversible error[.]
>
> Whether the trial court's order granting summary judgment was in error because whether [SunTrust's] agent, Al Secor, had actual, or apparent, authority to bind [SunTrust] and whether [plaintiff's] reliance on Secor's promises was reasonable in order to support a claim for detrimental reliance are questions of fact, not law, that are to be reserved for the jury and whether this error constitutes reversible error[.]

(Paragraph numbering in original omitted.)

III.

Our standard of review of a trial court's grant of summary judgment is well established and, as recently reiterated by this Court, is as follows:

> [T]he standard of review of a trial court's award of summary judgment promulgated by the [S]upreme [C]ourt in ***Hannan v. Alltel***, 270 S.W.3d 1 (Tenn. 2008) and ***Martin v. Norfolk Southern Railway Co.***, 271 S.W.3d 76 (Tenn. 2008) is applicable to this matter where [plaintiff] filed her complaint prior to July 1, 2011. We review a trial court's award of summary judgment *de novo* with no presumption of correctness, reviewing the evidence in the light most favorable to the nonmoving party and drawing all reasonable inferences in that party's favor. ***Norfolk S. Ry. Co.***, 271 S.W.3d at 84 (citations omitted). Summary judgment is appropriate only where the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits . . . show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." ***Id.*** at 83 (quoting Tenn. R. Civ. P. 56.04; accord ***Penley v. Honda Motor Co.***, 31 S.W.3d 181, 183 (Tenn. 2000)). The burden of persuasion is on the moving party to demonstrate, by a properly supported motion, that there are no genuine issues of material fact and that it is entitled to judgment as a matter of law. ***Id.*** (citing . . . ***Staples v. CBL & Assocs., Inc.***, 15 S.W.3d 83, 88 (Tenn. 2000); ***McCarley v. W. Quality Food Serv.***, 960 S.W.2d

585, 588 (Tenn. [1998]); ***Byrd v. Hall***, 847 S.W.2d 208, 215 (Tenn. 1993)). The nonmoving party's "burden to produce either supporting affidavits or discovery materials is not triggered" if the party moving for summary judgment fails to make this showing, and the motion for summary judgment must be denied. ***Id.*** (quoting ***McCarley***, 960 S.W.2d at 588; accord ***Staples***, 15 S.W.3d at 88). The moving party may carry its burden by "(1) affirmatively negating an essential element of the nonmoving party's claim; or (2) showing that the nonmoving party cannot prove an essential element of the claim at trial." ***Id.*** (citing ***Hannan v. Alltel Publ'g Co.***, 270 S.W.3d 1, 5 (Tenn. 2008)); *see also* ***McCarley***, 960 S.W.2d at 588; ***Byrd***, 847 S.W.2d at 215 n. 5). Additionally, a mere "assertion that the nonmoving party has no evidence" will not suffice. ***Id.*** at 84 (citing ***Byrd***, 847 S.W.2d at 215). "[E]vidence that raises doubts about the nonmoving party's ability to prove his or her claim is also insufficient." ***Id.*** (citing ***McCarley***, 960 S.W.2d at 588). Rather, "[t]he moving party must either produce evidence or refer to evidence previously submitted by the nonmoving party that negates an essential element of the nonmoving party's claim or shows that the nonmoving party cannot prove an essential element of the claim at trial." ***Martin v. Norfolk S. Ry. Co.***, 271 S.W.3d 76, 84 (Tenn. 2008) (citing ***Hannan***, 270 S.W.3d at 5). In order to negate an essential element, "the moving party must point to evidence that tends to disprove an essential factual claim made by the nonmoving party." ***Id.*** at 84 (citing . . . ***Blair v. W. Town Mall***, 130 S.W.3d 761, 768 (Tenn. 2004)). The motion for summary judgment must be denied if the moving party does not make the required showing. ***Id.*** (citing ***Byrd***, 847 S.W.2d at 215).

After the moving party has made a properly supported motion, the nonmoving party must "produce evidence of specific facts establishing that genuine issues of material fact exist." ***Id.*** (citing ***McCarley***, 960 S.W.2d at 588; ***Byrd***, 847 S.W.2d at 215). To satisfy its burden, the nonmoving party may: (1) point to evidence of over-looked or disregarded material factual disputes; (2) rehabilitate evidence discredited by the moving party; (3) produce additional evidence that establishes the existence of a genuine issue for trial; or (4) submit an affidavit

> asserting the need for additional discovery pursuant to Rule 56.02 of the Tennessee Rules of Civil Procedure. ***Id.*** (citing ***McCarley***, 960 S.W.2d at 588; accord ***Byrd***, 847 S.W.2d at 215 n. 6). The court must accept the nonmoving party's evidence as true, resolving any doubts regarding the existence of a genuine issue of material fact in that party's favor. ***Id.*** (citing ***McCarley***, 960 S.W.2d at 588). " 'A disputed fact is material if it must be decided in order to resolve the substantive claim or defense at which the motion is directed.' " ***Martin v. Norfolk S. Ry. Co.***, 271 S.W.3d 76, 84 (Tenn. 2008) (quoting ***Byrd***, 847 S.W.2d at 215). "A disputed fact presents a genuine issue if 'a reasonable jury could legitimately resolve that fact in favor of one side or the other.' " ***Id.***

Ms. B. v. Boys and Girls Club of Middle Tenn., No. M2013-00812-COA-R3-CV, 2014 WL 890892 at *2-3 (Tenn. Ct. App. M.S., filed Mar. 6, 2014).

IV.

Throughout this litigation SunTrust has taken the following position, as quoted from the trial court's first order granting partial summary judgment: "SunTrust . . . asserts that there is no promise or agreement for which it can be held liable other than as executor of the estate of [decedent]." Plaintiff submitted, as exhibits to Smith's deposition, three letters that Smith wrote to SunTrust's attorney addressing, among other things, Secor's alleged promise to pay the insurance premiums. The trial court held that the letters "constitute inadmissible hearsay" but that "[i]n any event, they do not raise genuine issues of material fact about Al Secor's capacity." Plaintiff argues that the trial court erred in its hearsay ruling. We have considered the content of the letters and hold that, assuming arguendo for the purposes of this appeal that plaintiff is correct and the trial court should have considered the letters, they do not establish a genuine issue of material fact as to whether Secor was acting in any capacity other than as executor of the estate.

The only testimony plaintiff proffered in opposition to summary judgment is that of Smith, her attorney at the time Secor made the alleged promise at issue.[1] Smith testified as follows in his deposition:

> Q: How did the premium issue arise?

[1]Plaintiff has different legal counsel on appeal.

A: Debbie Russo called me and said she was concerned that she had not seen a premium paid online and wanted me to call Al [Secor], and I did.

Q: What were the mechanics of paying the premium?

A: *The estate was paying the premium*.

* * *

Q: Okay. You mentioned in your affidavit . . . you make reference to SunTrust Bank's promise to pay health insurance premium.

A: Uh-huh.

Q: And you say that . . . in more than one place in the affidavit, SunTrust promised. What form of communication did that promise take?

A: It was verbal from Al Secor.

Q: Okay. And did it happen on more than one occasion?

A: Yes, sir.

Q: How many occasions?

A: At least two, maybe more.

* * *

Q: And what did you understand Mr. Secor's position to be with the bank?

A: I thought he was the physical, personal, live, warm-body representative of SunTrust *as executor*. . . .

* * *

Q: . . . Mr. Secor was the, as far as you can recall, *the visible manifestation of the executor*. Is that correct?

A: Yes.

Q: Okay. All right. And you understood that he was an employee of the bank?

A: Yes, sir.

Q: Okay. Your affidavit says so. All right. On whose behalf do you think he made this promise that you – to which you refer in your affidavit?

A: Well, there are only two possibilities.

Q: Okay.

A: One is the estate and one is the bank's.

Q: Okay.

A: I would – *at the time, I thought he was talking about the estate*.

* * *

Q: When Mr. Secor made promises to have the premiums paid, was there any equivocation in that promise?

A: No.

Q: W[ere] there any contingencies that he made when making those promises?

A: No.

Q: Okay. And he, in fact, had the July 2006 premium paid. Is that correct?

A: Yes.

Q: Okay. Now, Mr. Secor – do you recall what Mr. Secor's position was at SunTrust Bank at the time that you were dealing with him?

A: According to this letter, he was a senior vice-president. This was the October 5, 2006 letter.

* * *

Q: And he was not hired specifically to deal with the estate, was he?

A: No, sir.

(Emphasis added.)

The first letter written by Smith to SunTrust's counsel is dated September 22, 2006, and states in pertinent part as follows:

> [T]his is a punch list of issues that we have identified to date *with Mr. Secor's administration of the above-referenced estate*.
>
> (1) *The executor* did not pay the August and September COBRA health insurance payments for Jamie. This is particularly significant since during August and the first part of September, Jamie was a minor; thus *the estate* allowed health insurance to lapse for a minor *despite its obligation to support Jamie during the pendency of the administration*.

(Emphasis added.) Smith's second letter, dated September 25, 2006, states as follows in pertinent part:

> [W]e need to know what, if anything, *the Executor* is willing to do about getting [plaintiff's] COBRA coverage reinstated. . . . I had several telephone conversations with Al Secor where he assured me the COBRA coverage was going to be paid. Only after that coverage had not been paid for did Al advise me that he did not intend to pay it. I noticed that Al said he was waiting

> on a copy of the statement as a condition to pay it; however, this is not something he had ever required prior to *the Executor* letting the coverage lapse.

(Emphasis added.)

Plaintiff also attached as an exhibit to Smith's affidavit a letter from Secor to Smith, dated October 5, 2006, which states as follows:

> As we discussed in our September 29 meeting, we contacted Lloyd Rogelia with Piedmont Chemical [decedent's employer] to determine if the Cobra Medical Insurance for [plaintiff] and Jamie Russo could be reinstated.
>
> Mr. Rogelia advised us that once [decedent] died neither [he] nor his estate had any rights regarding the Cobra Medical Insurance. He advised that it was [plaintiff] and Jamie who had a right to elect to continue Cobra coverage. If they elected to continue Cobra coverage, it was their liability to make the premium payments.
>
> * * *
>
> Mr. Rogelia . . . also advised that under the Cobra rules the company could only deal with [plaintiff] and Jamie and not [decedent's] estate. The company did give [plaintiff] notice of the fact a premium needed to be paid to avoid cancellation of the coverage. [Plaintiff] also received the notice of cancellation.
>
> Mr. Rogelia advised that he discussed all this information directly with [plaintiff] and he was confident that [plaintiff] understood her liability.
>
> * * *
>
> As we also noted in our meeting September 29, we advised you that *the estate would continue to make the Cobra payments as an advance against Jamie's share* if we were furnished statements to pay. No statements were ever furnished to us.

* * *

> From my conversation with Mr. Rogelia, it is apparent that [plaintiff] and Jamie were totally in control of the Cobra insurance following [decedent's] death and that *the estate* could do nothing with respect to the insurance except to assist [plaintiff] and Jamie if we were asked to assist.

(Emphasis added.)

Reviewing the record in the light most favorable to plaintiff, and drawing all reasonable inferences in her favor, the evidence does not present a genuine issue of material fact regarding the capacity in which Secor was acting when he promised to make premium payments, and made one such payment, *from the funds of the estate*. The only reasonable conclusion a trier of fact could reach is that Secor was acting on SunTrust's behalf in its capacity as executor only. The letter of Smith, an experienced attorney, fully supports this conclusion, as is seen from the above-quoted excerpts. There is no evidence suggesting that Secor – also an experienced attorney – made any promise or showed any intention to bind SunTrust individually.

Moreover, plaintiff's claim that Secor's promise to pay the premiums should be construed as one for which SunTrust would be individually liable, instead of or in addition to in its capacity as executor of the estate, is precluded by the statute of frauds, which provides:

> (a) No action shall be brought:
>
> (1) To charge any executor or administrator upon any special promise to answer any debt or damages out of such person's own estate;
>
> * * *
>
> unless the promise or agreement, upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person lawfully authorized by such party.

Tenn. Code Ann. § 29-2-101. Plaintiff presented no evidence that any alleged promise made by Secor was in writing. The trial court correctly granted SunTrust summary judgment for these reasons.

Much of plaintiff's brief is dedicated to asserting that (1) as senior vice president, Secor should be held to have had significant and extensive actual authority, or apparent authority, or both, to bind SunTrust; and (2) the scope of an agent's actual or apparent authority is generally a question for the trier of fact. Again, assuming for purposes of argument that plaintiff's propositions are correct, they miss the point and do not change the outcome of the case. Even assuming that Secor had relatively extensive authority to bind SunTrust for his promise, there is no proof that, outside the scope of the bank's fiduciary responsibilities, he made such a promise, *i.e.*, to obligate the bank to pay individually out of its own funds. All of the communication between Secor and Smith referred to "the executor" and "the estate." The one premium payment made by SunTrust was out of the funds of the estate. Smith, plaintiff's attorney at the time, testified that he understood Secor to be acting as the executor of the estate. There is no evidence that Secor made any statement that would lead a reasonable person to conclude that he promised to obligate SunTrust individually.

Finally, plaintiff argues that the trial court erred in considering SunTrust's filed reply to its response in opposition to summary judgment. Plaintiff characterizes the filing as a "reply brief" containing additional legal arguments, and asserts that "[r]ather than permitting a reply brief, Tennessee Rule of Civil Procedure 56 only permits a moving party to respond to the nonmoving party's **statement** of additional facts in the same manner as the nonmoving party responds to the moving party's asserted facts in its **statement** of undisputed material facts (*i.e.*, making factual assertions, not legal arguments.)" (emphasis in original). Tenn. R. Civ. P. 56.03 provides in pertinent part as follows:

> Any party opposing the motion for summary judgment must, not later than five days before the hearing, serve and file a response to each fact set forth by the movant either (i) agreeing that the fact is undisputed, (ii) agreeing that the fact is undisputed for purposes of ruling on the motion for summary judgment only, or (iii) demonstrating that the fact is disputed. Each disputed fact must be supported by specific citation to the record. Such response shall be filed with the papers in opposition to the motion for summary judgment.
>
> In addition, the non-movant's response may contain a concise statement of any additional facts that the non-movant contends are material and as to which the non-movant contends there

> exists a genuine issue to be tried. Each such disputed fact shall be set forth in a separate, numbered paragraph with specific citations to the record supporting the contention that such fact is in dispute.
>
> If the non-moving party has asserted additional facts, *the moving party shall be allowed to respond to these additional facts by filing a reply statement in the same manner and form as specified above*.

(Emphasis added). SunTrust's reply, captioned "reply to plaintiff's response in opposition to renewed motion for summary judgment," made reference to facts placed in evidence by plaintiff – parts of Smith's affidavit, attached exhibits, and deposition testimony – in support of an argument that it had consistently made throughout the proceedings. This assertion, as quoted from SunTrust's reply, is that "[a]ll of the evidence points to the fact that SunTrust was acting as Executor of the Estate, and that everyone knew it." This was not a new or surprising legal argument. The trial court acted within its discretion in considering the reply statement, and we do not believe Rule 56 curtails this discretion such that there was any prejudicial error in allowing the reply statement. Moreover, after plaintiff objected to the "reply brief" under Rule 56, SunTrust renewed its arguments in the form of a filed "trial brief" allowed under the local rules of court.

V.

The trial court's summary judgment in SunTrust's favor is affirmed. Costs on appeal are assessed to the appellant, Deborah Russo. This case is remanded to the trial court, pursuant to applicable law, for collection of costs assessed below.

_____
CHARLES D. SUSANO, JR., CHIEF JUDGE