IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
May 8, 2008 Session

WADE LEE PHELPS v. BANK OF AMERICA

Appeal from the Chancery Court for Davidson County
No. 04-3567-III Ellen Hobbs Lyle, Chancellor

No. M2007-02135-COA-R3-CV - Filed March 13, 2009

Plaintiff appeals from the grant of summary judgment in a negligence and breach of contract action against bank which had closed loan and delivered loan proceeds to contractor. An agreement between contractor and third party providing financing for construction project stated that contractor and third party would be paid out of loan proceeds. Contractor failed to pay third party in accordance with their agreement. Trial court granted summary judgment to bank, holding that there was a joint venture between contractor and third party and that Bank's delivery of loan proceeds to contractor was payment to joint venture. Court also held that finding of joint venture pretermitted negligence and breach of contract claims against bank. Finding no error, we affirm the judgment of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed

RICHARD H. DINKINS, J., delivered the opinion of the court, in which FRANK G. CLEMENT, JR. and ANDY D. BENNETT, JJ., joined.

Dan R. Alexander, Nashville, Tennessee, for the appellant, Wade Lee Phelps.

H. Frederick Humbracht, Jr., Nashville, Tennessee, for the appellee, Bank of America.

OPINION

Joseph Angus owned property in Davidson County on which he wanted to construct a duplex. He approached Bank of America ("BOA") to obtain financing and was told that BOA could not finance the construction, but would extend a loan once the property was improved.[1] Mr. Angus engaged William Church, d/b/a C&C Construction ("C&C"), to perform the construction. To assist Mr. Angus in getting the construction funded, Mr. Church contacted Wade Phelps, a former business partner, to provide the construction funding. Mr. Phelps agreed.

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[1] The bank agreed to finance $137,000 or 80% of the as-built appraised value of the property, whichever amount was less.

A contract was entered into between Mr. Angus, as owner, and Mr. Church, on behalf of C&C Construction Co., as contractor, on June 13, 2004, for the construction of the duplex at a cost of $137,000.00; the cost was adjusted upward to $141,000.00 by addendum signed by Mr. Angus and Mr. Church, on behalf of C&C. A second addendum dated June 16, 2004, was added stating: "Wade Phelps owner of Phelps/Harrington Construction will be supplying the construction finance [sic] of $137,000.00 to complete this project at 10% interest payable by owner at closing at a fee of $1,370.00 total for use of money during construction." This addendum was signed by Mr. Phelps, Mr. Church, on behalf of C&C, and Mr. Angus.

Mr. Church and Mr. Phelps entered into a separate agreement dated June 16, 2004, which provided in pertinent part as follows:

> This agreement is between Wade Phelps owner of Phelps/Harrington Construction Co. and William Church, owner of C&C Construction Co. This 16th Day of June 2004. The two companies listed above has [sic] come to agreement to do a joint venture to construct a new (2) story approx 2,500 sq. foot dwelling located at ___ Hume St. Nashville, TN in Davidson County 37208.
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> * * *
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> 5) At time of closing all profit remaining will be divided in 50% by Wade Phelps of Phelps/Harrington Construction Co and William Church owner of C&C Construction Co.

During construction, Mr. Phelps made payments to Mr. Church or paid bills incurred in the construction. As construction neared completion, Mr. Angus and Mr. Church agreed upon the final amounts due for the construction of the project of $151,110.00. Included within that final amount was the sum of $1,370.00, the amount to be paid Mr. Phelps for providing the construction financing.

A loan closing date was set, however, the loan closing was later rescheduled because the duplex was not complete and an as-built appraisal had not been obtained. The appraisal was subsequently performed, but the property appraised for less than initially anticipated. Based on the appraisal figure of $165,000.00, BOA limited its loan to $132,000.00. At closing, the loan proceeds were disbursed and Mr. Angus paid the additional $24,342.22 necessary to pay off the construction costs. The closing attorney issued a check in the amount of $151,110.00 to Mr. Church, on behalf of C&C, for the construction costs; Mr. Church retained the entire proceeds and did not pay Mr. Phelps. BOA received a deed of trust securing the note of Mr. and Ms. Angus. Mr. Phelps contended that he was not advised of the closing date and, thus, did not attend the closing. Mr. Church acknowledged receipt of the construction payoff at closing and asserted that he did not pay Mr. Phelps because Mr. Phelps owed him money from prior dealings.

Mr. Phelps filed suit against Mr. Angus, Mr. Church, C&C Construction Co. and BOA. He alleged that BOA was negligent in releasing the monies to Mr. Church at the closing; that BOA was unjustly enriched by receiving the deed of trust; and that the grant of the deed of trust was a fraudulent conveyance under Tenn. Code Ann. §§ 66-3-101 and -301. Mr. Angus filed a cross-claim against BOA, asserting that it was negligent in not insuring that payments from the closing were made to Mr. Phelps. BOA filed a motion for summary judgment as to both the claims of Mr. Phelps and Mr. Angus, asserting that Mr. Phelps and Mr. Church entered into a joint venture for the construction of the duplex, that its obligation was to loan Mr. Angus $132,000.00, which it did, and that Mr. Angus' payment to Mr. Church at closing constituted payment to the joint venture.

The trial court granted summary judgment, holding that a joint venture was formed between Mr. Church and Mr. Phelps for the construction of the duplex and that payment to Mr. Church at closing was payment to the joint venture. The court dismissed all claims asserted by Mr. Phelps against BOA, holding that they were dependent upon failure of payment. The court also dismissed Mr. Angus' cross-claim, finding that the claim, as well, was dependent upon a claim that Mr. Phelps was not paid at closing. Because of the court's finding of joint venture between Mr. Phelps and Mr. Church, it pretermitted the negligence, unjust enrichment and fraudulent conveyance claims. The trial court made its judgement final as to BOA and reserved all other claims.

Mr. Phelps appeals, asserting that the trial court erred in granting summary judgment, in pretermitting the issues of negligence, unjust enrichment and fraud, and in ruling that payment to Mr. Church was payment to Mr. Phelps. BOA raises no issues on appeal. Mr. Angus does not appeal.

I. Standard of Review

This appeal is from a grant of summary judgment. Summary judgment is appropriate where a party establishes that there is no genuine issue as to any material fact and that a judgment may be rendered as a matter of law. Tenn. R. Civ. P. 56.04; *Stovall v. Clark*, 113 S.W.3d 715, 721 (Tenn. 2003). Moreover, it is proper in virtually all civil cases that can be resolved on the basis of legal issues alone, *Byrd v. Hall*, 847 S.W.2d 208, 210; *Pendleton v. Mills*, 73 S.W.3d 115, 121 (Tenn. Ct. App. 2001); however, it is not appropriate when genuine disputes regarding material facts exist. Tenn. R. Civ. P. 56.04. The party seeking a summary judgment bears the burden of demonstrating that no genuine disputes of material fact exist and that the party is entitled to judgment as a matter of law. *Godfrey v. Ruis*, 90 S.W.3d 692, 695 (Tenn. 2002). To be entitled to summary judgment, the moving party must affirmatively negate an essential element of the non-moving party's claim or show that the moving party cannot prove an essential element of the claim at trial. *Martin v. Norfolk Southern Railway Co.,* 271 S.W.3d 76, 83 (Tenn. 2008).

Summary judgments do not enjoy a presumption of correctness on appeal. *BellSouth Adver. & Publ'g Co. v. Johnson*, 100 S.W.3d 202, 205 (Tenn. 2003). This court must make a fresh determination that the requirements of Tenn. R. Civ. P. 56 have been satisfied. *Hunter v. Brown*, 955 S.W.2d 49, 50-51 (Tenn. 1977). We consider the evidence in the light most favorable to the non-moving party and resolve all inferences in that party's favor. *Stovall,* 113 S.W.3d at 721;

Godfrey, 90 S.W.3d at 695. When reviewing the evidence, we first determine whether factual disputes exist. If a factual dispute exists, we then determine whether the fact is material to the claim or defense upon which the summary judgment is predicated and whether the disputed fact creates a genuine issue for trial. *Byrd,* 847 S.W.2d at 214; *Rutherford v. Polar Tank Trailer, Inc*., 978 S.W.2d 102, 104 (Tenn. Ct. App. 1998).

The summary judgment analysis has been clarified in two recent opinions by the Tennessee Supreme Court. *See Martin*, 271 S.W.3d 76; *Hannan v. Alltel Publ'g Co.*, 270 S.W.3d 1 (Tenn. 2008). A party is entitled to summary judgment only if 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." Tenn. R. Civ. P. 56.04; *accord Penley v. Honda Motor Co.*, 31 S.W.3d 181, 183 (Tenn. 2000). A properly supported motion for summary judgment must show that there are no genuine issues of material fact and that the moving party is entitled to judgment as a matter of law. *See 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). If the moving party makes a properly supported motion, then the nonmoving party is required to produce evidence of specific facts establishing that genuine issues of material fact exist. *McCarley*, 960 S.W.2d at 588; *Byrd*, 847 S.W.2d at 215. The nonmoving party may satisfy its burden of production by:

> (1) pointing to evidence establishing material factual disputes that were over-looked or ignored by the moving party; (2) rehabilitating the evidence attacked by the moving party; (3) producing additional evidence establishing the existence of a genuine issue for trial; or (4) submitting an affidavit explaining the necessity for further discovery pursuant to Tenn. R. Civ. P., Rule 56.06.

McCarley, 960 S.W.2d at 588; *accord Byrd*, 847 S.W.2d at 215 n.6; *Martin* 271 S.W.3d at 83-84.

II. Discussion

Mr. Phelps' main contention is that BOA had an obligation to pay the loan proceeds to Mr. Phelps and that BOA was negligent in releasing the loan proceeds to Mr. Church. In support of this contention, Mr. Phelps relies upon the statements of Mr. Howell of BOA, contending that Mr. Phelps "obtained the assurances he believed necessary from the Bank representative that if he provided the financing, he would be paid at closing." The trial court, after finding a joint venture between Mr. Church and Mr. Phelps, held that payment to Mr. Church at the closing satisfied any duty owed by BOA to Mr. Phelps.

As the movant, BOA had the ultimate burden of persuading the court that there were no genuine issues of material fact and that it was entitled to judgment as a matter of law. *Byrd,* 847 S.W.2d at 215. It could make the required showing and therefore shift the burden of production to Mr. Phelps by either affirmatively negating an essential element of Mr. Phelps' claim or showing that

he could not prove an essential element of his claim at trial. *Hannan,* 270 S.W.3d at 8-9; *see also McCarley*, 960 S.W.2d at 588; *Byrd*, 847 S.W.2d at 215 n.5.

A. Joint Venture

A joint venture is:

> an association of persons with intent, by way of contract, express or implied, to engage in and carry out a single business adventure for joint profit, for which purpose they combine their efforts, property, money, skill, and knowledge, but without creating a partnership in the legal or technical sense of the term, or a corporation, and they agree that there shall be a community of interest among them as to the purpose of the undertaking, and that each coadventurer shall stand in the relation of principal, as well as agent, as to each of the other coadventurers, with an equal right of control of the means employed to carry out the common purpose of the adventure.

Spencer Kellogg & Sons, Inc. v. Lobban, 315 S.W.2d 514, 520 (Tenn. 1958) (citing 30 Am. Jur., p. 939, Sec. 2).

The elements necessary to establish a joint venture are set forth in *Cecil v. Harden,* 575 S.W.2d 268 (Tenn. 1978) as: (1) a common purpose; (2) some manner of agreement among the parties to the joint venture; and (3) an equal right to control the venture and any relevant instrumentality. A finding of a joint venture between Mr. Church and Mr. Phelps would effectively negate an element of Mr. Phelps' claim, i.e., that BOA breached its duty to Mr. Phelps by not paying the loan proceeds to him, since payment to Mr. Church at closing would constitute payment to the joint venture. *See Fain v. McConnell*, 909 S.W.2d 790, 792 (Tenn. 1995) (holding that, in a joint venture, each co-adventurer is the agent of the other and the act of one within the scope of the enterprise is chargeable to the rest); *see also Spencer Kellogg & Sons, Inc. v. Lobban*, 315 S.W.2d 514 (Tenn. 1958). In addition, a finding that BOA owed no duty to Mr. Phelps would negate the contention that BOA was negligent in releasing the funds to Mr. Church.

The record and material filed in support of the motion for summary judgment support a finding of a joint venture between Mr. Church and Mr. Phelps. First, Mr. Phelps signed the second addendum to the construction contract between Mr. Angus and Mr. Church, acknowledging that he would "be supplying the construction financing of $137,000.00 to complete this project. . . ." Second, he and Mr. Church signed a document acknowledging that they had come to an "agreement to do a joint venture to construct a new . . . dwelling"; that Mr. Phelps "has agreed to finance the project"; and that "at time of closing all profit remaining will be divided in 50% by Wade Phelps of Phelps/Harrington Construction Co. and William Church owner of C&C Construction Co." The agreement further detailed the separate responsibilities of Mr. Phelps and Mr. Church relative to the construction project.

This proof was sufficient to shift the burden to Mr. Phelps to provide evidence establishing material factual disputes that were either over-looked or ignored by BOA; rehabilitate the evidence supporting the finding of joint venture; produce additional evidence establishing the existence of a genuine issue for trial; or submit an affidavit explaining the necessity for further discovery. *See Martin,* 271 S.W.3d at 84 *(citing McCarley*, 960 S.W.2d at 588; *accord Byrd*, 847 S.W.2d at 215 n.6).

In response to the motion, Mr. Phelps filed his response to the statement of undisputed facts, his own affidavit, Mr. Angus' responses to discovery propounded by Mr. Phelps, the depositions of Mr. Phelps, Mr. Church and Mr. Angus, and a memorandum. With specific respect to the issue of joint venture, paragraphs 2, 8 and 9 of Mr. Phelps' affidavit affirmed that, unlike previous joint venture projects that he had engaged in with Mr. Church in which "we were both involved in all aspects of the contract," his role in this project was only to provide construction financing. Mr. Church testified in his deposition as follows:

> A. I told him [Mr. Phelps] that I had a client that wanted to do some construction but couldn't get the construction financing. And I asked Mr. Phelps would he be willing to come in because me and Wade used to be partners at one time. I asked him would he be willing to finance the project and he agreed to it on the terms that he would finance it, we would split the profits 50/50; I would do the work, he would supply the money for the project. And at the end of the project, whatever the profit was we would split 50/50 plus he was getting 10 percent or something like that for the use of his money.
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> A. Actually I approached Wade after I had a talk with Mr. Angus and he was having trouble getting the financing. And I told him I think I might have somebody that will help finance this project. That's when I went to Wade Phelps and explained to him how much money was involved and who I was trying to get it for, Mr. Angus, that he was already qualified for permanent financing so it won't be no problem getting the money back. And after the permanent financing, you know, on the construction end he was having trouble getting that. That's when I went to Wade for was to see if he wanted to be in partnership on this thing together.
> Q. What did Wade say?
> A. Mr. Wade agreed to it, we then proceeded to go to Bank of America to meet Tyrone Howell and in front of Tyrone Howell we set down and we came up - some of the paperwork was missing, was not here. . . .
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> Q[sic]: Well we set there and we talked about Joe's situation and Mr. Wade went on my strength that he agreed to do the financing. We were letting Tyrone Howell know

> that we were going to do the financing on this project for him and then he had talked back in terms of don't worry about the money because he already had permanent financing.

The proof submitted by Mr. Phelps in his response was insufficient to negate BOA's contention that Mr. Church and Mr. Phelps were joint venturers and, in fact, buttressed this conclusion and more clearly establishes the necessary elements of common purpose and agreement. Contrary to the contention of Mr. Phelps, the fact that the parties had different responsibilities[2] does not detract from a finding that they had an equal right of control; rather, the action of the parties in dividing the responsibilities of constructing and financing the duplex is evidence that each had an equal right to control the venture, exercised that control for the benefit of the enterprise and agreed to the division of responsibilities. The trial court did not err in finding that Mr. Church and Mr. Phelps were engaged in a joint venture.

Once established, a joint venture operates:

> something like a partnership, for a more limited period of time, and a more limited purpose. It is an undertaking to carry out a small number of acts or objectives, which is entered into by associates under such circumstances that all have an equal voice in directing the conduct of the enterprise. The law then considers that each is the agent or servant of the others, and that the act of any one within the scope of the enterprise is to be charged vicariously against the rest.

Fain v. McConnell, 909 S.W.2d 790, 792 (Tenn. 1995); *see also Messer Griesheim Industries, Inc. v. Cyrotech of Kingsport, Inc.*, 45 S.W.3d 588, 605 (Tenn. Ct. App. 2001). Each co-venturer "shall stand in the relation of principal, as well as agent, as to each of the other co-adventurers, with an equal right of control of the means employed to carry out the common purpose of the adventure." *Spencer Kellogg & Sons, Inc. v. Lobban*, 315 S.W.2d 514, 520 (Tenn. 1958). A joint venture is governed by the rules applicable to a partnership. *Federated Stores Realty, Inc. v. Huddleston,* 852 S.W.2d 206, 212 (Tenn. 1992).[3]

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[2] As noted by Mr. Phelps, Mr. Church had the ability to construct the duplex but could not finance the construction and Mr. Phelps had the ability to finance the construction but not build it.

[3] To determine whether a partnership exists, courts are to ascertain the intent of the parties. *Christmas Lumber Co. v. Viliga,* 99 S.W.3d 585, 595 (Tenn. Ct. App. 2002). The determination is made upon "consideration of all relevant facts, actions and conduct of the parties." *Id.* (citing *Bass v. Bass,* 814 S.W.2d 38 (Tenn. 1991)).

In accordance with Tenn. Code Ann. § 61-1-301(1),[4] payment to Mr. Church was payment to the joint venture. *See Fain v. McConnell, supra; Spencer Kellogg & Sons, Inc. v. Lobban, supra.* Mr. Phelps contends, however, that the existence of the joint venture did not alter the obligation of BOA to pay the proceeds of the loan to Mr. Phelps since BOA had a copy of the agreement that stated that Mr. Phelps would be paid at closing. In his deposition, Mr. Church acknowledged receipt of the proceeds of BOA's loan to Mr. Angus and explained in detail why he did not share the loan proceeds with Mr. Phelps in accordance with their agreement. There is nothing in the agreement or elsewhere in the record that indicates that Mr. Church did not have authority to receive the funds and Mr. Church's disposition of the funds after receipt is not contrary to the authority he had to receive the funds; rather, the record shows that he disposed of the funds contrary to his agreement with Mr. Phelps and not contrary to any actual or apparent authority he had to receive the funds.

B. Negligence

Mr. Phelps contends that BOA was negligent by not following the closing instructions and paying the loan proceeds to him. The elements of a claim of negligence are: (1) a duty of care owed to the plaintiff by the defendant; (2) conduct by the defendant falling below the standard of care amounting to a breach of the duty; (3) injury or loss to plaintiff; (4) causation in fact; and (5) proximate causation. *Rice v. Sabir,* 979 S.W.2d 305, 308 (Tenn. 1998); *see Satterfield v. Breeding Insulation Co.*, 266 S.W.3d 347, 355 (Tenn. 2008). The threshold issues presented here are whether BOA owed a duty to Mr. Phelps and whether any action or inaction of BOA caused Mr. Phelps' loss.

The materials filed in support of BOA's motion and other documents of record show that BOA was not a signatory to the agreement between Mr. Phelps and Mr. Church and that BOA's loan was made to Mr. Angus and his wife and secured by a deed of trust on their property; there was no privity of contract between BOA and either Mr. Church or Mr. Phelps. This proof was sufficient to shift the burden to Mr. Phelps to establish a genuine issue of material fact for trial or otherwise show that summary judgment was not appropriate. *See Martin, supra*.

In support of his contention that BOA owed him a duty and violated that duty, Mr. Phelps relies upon the statements of Mr. Howell, representative of BOA, that he would be paid at closing and that Mr. Howell would have the agreement between Mr. Angus, Mr. Phelps and Mr. Church sent to the closing agent. BOA correctly points out that the Statute of Frauds contained at Tenn. Code

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[4] Tenn. Code Ann. § 61-1-301(1) provides as follows:

> Each partner is an agent of the partnership for the purpose of its business. An act of a partner, including the execution of an instrument in the partnership name, for apparently carrying on in the ordinary course the partnership business or business of the kind carried on by the partnership binds the partnership, unless the partner had no authority to act for the partnership in the particular matter and the person with whom the partner was dealing knew or had received a notification that the partner lacked authority.

Ann. § 29-2-101(b)(1)[5] precludes any claim against BOA relative to the loan to Mr. Angus not based on an instrument signed by BOA. The representations of Mr. Howell, consequently, cannot establish a duty on the part of BOA that would sustain a cause of action for breach of that duty in the absence of a writing.

Moreover, any claim of negligence against BOA by Mr. Phelps would fail because of the uncontroverted proof that the cause in fact and proximate cause of Mr. Phelps' failure to be paid was the action of Mr. Church in not paying him.

C. Unjust Enrichment

Mr. Phelps claims that BOA was unjustly enriched "by improvements to the real property without any payment to the Plaintiffs"; specifically, he asserts that the bank got a lien on the property and the profits from the Angus loan as a result of Mr. Phelps' advancement of the construction funds to improve the property. We find that BOA was not unjustly enriched by securing a lien on the property to secure the Angus' indebtedness.

Both Mr. Phelps and BOA acknowledge that, in order to establish a claim of unjust enrichment, Mr. Phelps must show: (1) a benefit was conferred on BOA; (2) that BOA appreciated the benefit; and (3) it would be unjust for BOA to retain the benefit without providing compensation for it. *B&L Corp. v. Thomas & Thorngren, Inc.,* 917 S.W.2d 674, 680 (Tenn. Ct. App. 1995); *Paschall's, Inc. v. Dozier,* 407 S.W.2d 150, 155 (Tenn. 1966). Of these requirements, the most significant is that the enrichment be unjust. *Paschall's, Inc.,* 407 S.W.2d at 155.

The only benefit BOA received as a result of the transaction between Mr. Church, Mr. Phelps and Mr. Angus was any profit it received as a result of the loan made to Mr. Angus. At the time the loan was made, the duplex had been substantially completed and the property appraised at an amount sufficient to satisfy the BOA's loan requirements. BOA had no interest in the property and, consequently, had no interest to be enriched prior to construction of the duplex; after construction, the sole interest it had in the property was to secure the indebtedness.

D. Fraud

In his brief and at argument, Mr. Phelps does not specifically address his claim of fraud and the trial court pretermitted this issue. We have reviewed the complaint and the allegations of fraud

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[5] Tenn. Code Ann. § 29-2-101(b)(1) states:

> No action shall be brought against a lender or creditor upon any promise or commitment to lend money or to extend credit, or upon any promise to alter, amend, renew, extend or otherwise modify or supplement any written promise, agreement or commitment to lend money or extend credit, 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 lender or creditor, or some other person lawfully authorized by such lender or creditor.

contained therein are directed toward the actions and representations of Mr. Church and C&C Construction Co. with respect to documents provided and statements made to BOA. We find no basis for a claim of fraud against BOA.

III. Conclusion

For the foregoing reasons, the judgment of the Chancery Court is affirmed and the case remanded for further proceedings in accordance with this opinion.

Costs are assessed to Wade Lee Phelps.

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RICHARD H. DINKINS, JUDGE