IN THE COURT OF APPEALS

FILED

December 19, 1995

Cecil Crowson, Jr.
Appellate Court Clerk

JOSEPH L. LITTLE, Plaintiff-Appellant	)	BRADLEY CHANCERY C.A. NO. 03A01-9507-CH-00239
vs.	)	HON. EARL H. HENLEY CHANCELLOR
AMERICAN NATIONAL BANK & TRUST COMPANY, Defendant-Appellee and MARLIN FINANCIAL & LEASING CORPORATION, Defendant-Appellant	)	AFFIRMED AND REMANDED

ROGER E. JENNE, Jenne, Scott & Bryant, Cleveland, for Joseph L. Little.

JOHN B. CURTIS, JR., Leitner, Warner, Moffitt, Williams, Dooley, Carpenter & Napolitan, Chattanooga, for Marlin Financial & Leasing Corporation.

JEFFREY S. NORWOOD, Miller & Martin, Chattanooga, for American Bank and Trust Company.

O P I N I O N

McMurray, J.

This is a dispute between the plaintiff, Joseph Little and the defendants, American National Bank and Trust Company and Marlin Financial and Leasing Corporation, over a lease agreement. Marlin insists that as between it and the plaintiff, Little, it is entitled to the residual value of the equipment which was the subject of the lease (after the lease was paid in full). The chancellor resolved the issues against Marlin and this appeal resulted. We affirm the judgment of the trial court.

Mr. Harlee Guthrie, a long-time acquaintance and employee of Mr. Joseph Little, wanted to go into the restaurant business. Mr. Guthrie contacted Mr. Marlin of Marlin Financial and Leasing Corporation concerning the leasing of the equipment necessary to operate a restaurant. It appears that Marlin Financial and Leasing Corporation was in the lease brokering business.

Mr. Marlin, in turn, contacted the bank to arrange financing for the lease.[1] Mr. Little was experienced in the restaurant business both as a franchise holder, owner and operator. Prior to approving the transaction, the bank required Mr. Little to sign a guaranty in connection with the transaction. Mr. Little agreed to do so.[2] The transaction was thereafter completed. All the documentation of the transaction reflected that the bank was the record owner of all the equipment leased to Mr. Guthrie. Additionally, at closing, it was the bank who paid all the vendors from whom Mr. Guthrie sought to acquire the equipment.

After he began the operation of the restaurant, Mr. Guthrie received invoices for the lease payments. The invoices required him to remit to the bank, but to contact Marlin should he have any questions. Mr. Guthrie defaulted on the lease, and Mr. Little began to make the payments as they became due under the lease.

Mr. Little attempted to sell Mr. Guthrie's restaurant as a going concern, but was unable to do so. He began to try to sell some of the equipment which was the subject of the lease. He was successful in procuring a buyer for some of the equipment. Upon

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[1] At that time, the bank was Merchants Bank. In the meantime, the bank has changed hands and at the time of this lawsuit, American National Bank & Trust Company was the correct party.

[2] While the guaranty agreement is not in the record, there appears to be no dispute as to its existence.

locating a buyer, Mr. Little contacted Mr. David Eason, Senior Vice President of the bank, to obtain a bill of sale. The bank executed a bill of sale and received the proceeds from the sale.

Sometime later, Mr. Little sought to refinance several outstanding debts through another bank. He wanted to consolidate the transaction which is the subject of this action with the new financing package. He contacted Mr. Eason once again to determine the payoff on the lease. After receiving the figure from Mr. Eason, he checked to make sure that the amount included sales tax. Having been reassured that the amount of the payoff was correct and included the sales tax, Mr. Little proceeded to obtain funds to pay the bank.

Several days after paying off the bank and disposing of some of the equipment, Mr. Little was contacted by Mr. Marlin. Mr. Marlin explained that he was due the residual value of the equipment along with the sales tax because he was actually the record owner of the equipment and was the assignee of the lease agreement with the bank.[3] Mr. Little then filed this declaratory judgment action seeking a determination as to the rights and liabilities of these parties.

[3]It is claimed that the assignment was oral.

After a bench trial, the trial court resolved the issues in favor of Mr. Little. The chancellor determined that Mr. Little owed sales tax on the equipment, however, he found that Mr. Little did not owe any amount to Marlin.[4] The chancellor stated in his memorandum opinion: "The Court feels it would be unjust to require Little to pay the value of the equipment as of the date of the payoff. In fact, it would be unequitable to make him pay the value of the equipment as of this date. Many events have occurred since the bank's mistake that would result in unfair treatment of Little if the agreement should be strictly interpreted as insisted by the defendants. It is, therefore, deemed that Little is not responsible to Marlin for the residual."

Our review of a non-jury case is de novo upon the record of the trial court, accompanied by a presumption of the correctness of its findings, unless the preponderance of the evidence is otherwise. Tennessee Rules of Appellate Procedure, Rule 13(d). No presumption attaches to the trial court's conclusions of law. In a de novo review, the parties are entitled to a reexamination of the whole matter of law and fact and this court should render the judgment warranted by the law and evidence. Thornburg v. Chase, 606 S.W.2d 672, 675 (Tenn. App. 1980); American Buildings Co. v.

[4]No issue is made on this appeal regarding the sales tax.

White, 640 S.W.2d 569, 576 (Tenn. App. 1982); Tennessee Rules of Appellate Procedure, Rule 36.

It seems clear that the trial court reached the correct result. In addition to the equitable considerations expressed by the chancellor, it seems clear that the bank was acting as an agent for Marlin or that Marlin was acting as agent for the bank.

"Agency in its broadest sense includes every relationship in which one person acts for or represents another." Howard v. Haven, 198 Tenn. 572, 583, 281 S.W.2d 480, 485 (1955)(citations omitted). "In order to determine whether an agency has been established, the relationship of the parties is scrutinized, and the facts will establish agency whether the parties so intended or understood." V. L. Nicholson Co. v. Transcon Inv., 595 S.W.2d 474, 483 (Tenn. 1980) (citation omitted). "... an agreement or contract of agency need not be proved, if the acts of the parties are such as to establish that relationship." Smith v. Tennessee Coach Company 183 Tenn. 676, 194 S.W.2d 867 (1946).

The Supreme Court discussed the concept of apparent authority in V.L. Nicholson Co. v. Transcon Investment & Financial, supra, in which it stated:

> Apparent authority in an agent is such authority as the principal knowingly permits the agent to assume or which he holds the agent out as possessing . . . such authority as a reasonably prudent [person], using diligence and discretion, in view of the party's conduct, would naturally suppose the agent to possess. If it can be shown that the plaintiff held the agent out as having such authority or permitted him so to act, and if the person dealing with the agent "knew of the facts, and, acting in good faith, had reason to believe, and did believe, that the agent possessed the necessary authority," then the general rule on apparent authority may be applied. (Citations omitted).

Even if the bank was not an express agent for Marlin, it is indisputable that the bank was held out by Marlin as its agent and that the agent had apparent authority to act for Marlin. Marlin allowed the bank to take title to the property in its own name, allowed the invoices to be paid directly to the bank, and allowed the bank to collect the payments due under the lease. The lease agreement was between Guthrie and the bank with Mr. Little as guarantor. When Mr. Little made inquiry of the bank as to what would be required to pay the lease in full, the bank furnished the pay-off figures not only once but twice. Additionally, Marlin apparently acquiesced in or allowed the bank to execute a bill of sale for the first sale of equipment. The bank officers and employees testified that the lease was handled as an installment loan. We hold that the bank had apparent authority to act for Marlin.

Payment made to an agent having authority to receive or collect payment is equivalent to payment to the principal himself; such payment is complete when the money is delivered into the agent's hands, and is a discharge of the indebtedness owing to the principal, even though the agent misappropriates the money, or fails to turn it over to the principal. This is true, whether the agent has the express authority to collect, whether his authority is implied, is incidental to the agency transaction, or whether it arises from the fact that the principal has held the agent out as having apparent authority to collect and the debtor has relied upon such appearance of authority. 3 Am.Jur.2d, Agency, § 278. See also 1 Tenn. Juris., Agency, § 1. It is a well settled rule of law that the principal is bound by the acts of his agent. Id., §5.

Further, it is not demonstrated by a preponderance of the evidence that Mr. Little had notice of the alleged assignment of the lease from the bank to Marlin. "It has long been the law of this State that the assignment of a chose in action is not complete, so as to vest absolute title in the assignee, either as against the debtor or third persons acquiring rights, until notice of the assignment has been given to the debtor, and that an attaching creditor has priority over an assignee where notice was not given before the fund was attached." (Citations omitted). Kivett v. Mayes, 354 S.W.2d 492 (Tenn. App. 1961).

We have determined to our satisfaction that the evidence does not preponderate against the judgment of the trial court.

Both Mr. Little and the bank have raised issues relating to indemnity to Mr. Little by the bank in the event Mr. Little is required to pay Marlin. The chancellor did not address this issue in his memorandum opinion. In any event, our disposition of this appeal renders the issue moot.

We affirm the judgment of the trial court. Costs are taxed to the appellant, Marlin Financial & Leasing Corporation. This case is remanded to the trial court for the collection thereof.

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Don T. McMurray, J.

CONCUR:

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Houston M. Goddard, Presiding Judge

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Charles D. Susano, Jr., J.

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ORDER

This appeal came on to be heard upon the record from the Chancery Court of Bradley County, briefs and argument of counsel. Upon consideration thereof, this Court is of opinion that there was no reversible error in the trial court.

We affirm the judgment of the trial court. Costs are taxed to the appellant, Marlin Financial & Leasing Corporation. This case is remanded to the trial court for the collection thereof.

PER CURIAM