IN THE COURT OF APPEALS OF TENNESSEE

FILED

December 19, 1995

Cecil Crowson, Jr.
Appellate Court Clerk

CASWELL O. WALKER, by and through his conservator, Ralph E. Harwell Plaintiff-Appellee	:	KNOX CHANCERY CA No. 03A01-9506-CH-00201
vs.	:	HON. SHARON BELL CHANCELLOR
GLENN R. FREEMAN, individually and d/b/a FREEMAN CONSTRUCTION CO. Defendant-Appellant	:	AFFIRMED AND REMANDED

JERROLD L. BECKER and SAMUEL W. BROWN, WITH LOCKRIDGE, BECKER & VALONE, OF KNOXVILLE, TENNESSEE, FOR APPELLANT

EDWARD L. SUMMERS and MICHAEL D. HESTER, WITH HAYNES, MEEK, & SUMMERS, OF KNOXVILLE, TENNESSEE, FOR APPELLEE

O P I N I O N

Sanders, Sr. J.

The pivotal issue on this appeal is, where a check is drawn in the State of Kentucky on a Kentucky bank, payable to a resident of Tennessee, mailed in Kentucky to the payee's residence and received by him in Tennessee, which check was dishonored and suit was filed in Tennessee, was the Kentucky statute of limitations controlling in the case? We hold it was not, and affirm.

In the 1970's the Plaintiff-Appellee, Caswell O. Walker (Cas Walker) a resident of Knoxville, and Glen R. Freeman, d/b/a Freeman Construction Company, became joint owners of two commercial buildings located in a shopping center in Cumberland, Kentucky. Mr. Freeman was a resident of Cumberland, Kentucky, and he and Mr. Walker entered into an oral agreement that Mr. Freeman would collect the rents on the buildings, out of which he would pay the mortgage payments, taxes, insurance, and maintenance on the buildings and receive 10% of the rents for his services.

About 1985 Mr. Walker's health failed and he was placed in a nursing home. In 1996 his wife, Virginia Walker, and two grandsons, Robert Gaylor and Robin Gaylor, were given a durable power of attorney for Mr. Walker. It appears that at this time Mr. Ralph E. Harwell, who later became co-conservator with Mrs. Walker for Mr. Walker, was attorney for the Walker family.

In August, 1986, Mr. Freeman persuaded Mrs. Walker to sell him her and Mr. Walker's interest in the Kentucky property for $110,000. He gave Mrs. Walker a check for $5,000 and the balance of the purchase price was to be paid at the rate of $5,000 per month. Shortly thereafter, Mrs. Walker told Mr. Harwell she had received the check but did not tell him she had executed a deed to Mr. Freeman. Mr. Harwell advised Mrs. Walker not to cash the check.

On September 23, 1986, Mr. Freeman drew a check on The Guaranty Deposit Bank of Cumberland, Kentucky, payable to the order of Cas Walker, for $21,975.36 and mailed it to Mr. and Mrs. Walkers' residence in Knoxville. On the face of the check it was shown Mr. Freeman owed Mr. Walker $29,242.27 as his portion of rents collected by Mr. Freeman and deductions

of $2,168.91 for bank interest paid by Mr. Freeman and $5,000 for the check Mr. Freeman had given Mrs. Walker on 8/20/86. Soon after sending the check to Mrs. Walker, Mr. Freeman went to Mrs. Walker's house in Knoxville and took his records to verify the accounting. While he was there, Mrs. Walker called Mr. Harwell to tell him about the figures Mr. Freeman was exhibiting. Mr. Harwell asked Mrs. Walker to have Mr. Freeman come to his office, which she did, and Mr. Freeman went to Mr. Harwell's office. Mr. Harwell asked Mr. Freeman not to negotiate with Mrs. Walker to purchase the property because she was elderly and in poor health and, besides, she had no authority to sell the property.

After Mr. Freeman's conversation with Mr. Harwell, he talked to his attorney in Kentucky about his purchase of the property from Mrs. Walker. His attorney, Mr. Green, also advised him Mrs. Walker did not have authority to sell the property. After this conversation with his attorney, Mr. Freeman called Mrs. Walker and requested that she not cash either the $5,000 check he had given her on August 20 or the $21,973.36 check, payable to Cas Walker dated September 23, 1986. Mr. Freeman also placed a "stop payment order" on both of the checks with the bank upon which they were drawn. Although Mr. Harwell was aware Mrs. Walker had received the check dated September 23, 1986, he was not informed of Mr. Freeman’s asking her not to cash it. He assumed she had.

In February, 1988, Mr. Harwell and Mrs. Walker were appointed co-conservators of Mr. Walker and in March, Mr. Harwell negotiated a sale of the Kentucky property to Mr. Freeman for $145,000.

Mrs. Walker died in November, 1990. After her death it was discovered that the check, dated September 23, 1986, for $21,973.36, drawn by Mr. Freeman payable to Mr. Walker,

was in Mrs. Walker's purse at the hospital and had never been cashed. The check was turned over to Mr. Harwell as Mr. Walker's conservator. He presented the check for payment but it was dishonored because it was more than six months old. On February 18, 1991, Mr. Harwell wrote Mr. Freeman asking him to either replace the check or authorize the check to be deposited and paid. Mr. Freeman refused, and that precipitated this litigation.

Plaintiff filed suit asking for judgment in the amount of the check, plus pre-judgment interest.

For answer, Mr. Freeman made a special appearance and pursuant to TRCP Rule 12.02 filed a motion to dismiss, alleging the court had no subject matter or personal jurisdiction. He submitted an affidavit which avowed that he mailed the $21,973.36 check to Mr. Walker. The check was to be held by Mr. Walker until it was determined what credits were due to Mr. Freeman.

He averred all transactions took place in Kentucky and swore he delivered all his account records to Mrs. Walker and Ralph Harwell for review in 1988. He requested the account records be returned so he could show no amount was owed due to the credits to which he was entitled. He also claimed the purchase of the property settled all accounts between them. The chancellor denied the motion to dismiss.

On November 1, 1994, Mr. Freeman filed a motion to amend his answer of October, 1994, to set forth an affirmative defense of the applicable Kentucky five-year statute of limitations in Ky. Rev. Stat. Ann. § 413.120(7)(Baldwin 1992). Over Plaintiff's objection, the chancellor granted Defendant's motion to amend.

Defendant then filed a motion for summary judgment on the grounds the check was delivered in Kentucky and under the applicable Conflicts of Laws Rules, Kentucky law and its five-year statute of limitations should apply and Plaintiff-Appellee's claim was time barred. The chancellor denied the motion.

Upon the hearing of the case, the chancellor resolved all issues against the Defendant and awarded judgment for the Plaintiff of $21,973.36 plus pre-judgment interest.

The Defendant has appealed, presenting a single issue for review: "Did the court error in holding Plaintiff's claim was not barred by the Kentucky statute of limitations?"

We hold the court did not err, and affirm for the reasons hereafter stated.

The Defendant-Appellant argues the Kentucky five-year statute of limitations should be applicable in lieu of our Supreme Court in **Hataway v. McKinley**, 830 S.W.2d 53 (Tenn. 1992). In support of this argument, he states: "The Tennessee Supreme Court has recently endorsed the views of the Restatement (Second of Conflict of Laws. See **Hataway, et al v. McKinley**, 830 S.W.2d 53, 57-58 (Tenn. 1992)(adopting the 'most significant relationship' approach of Restatement (Second) of Conflict of Laws for determining conflicts questions in tort cases and applying said approach to all cases in Tennessee tried or retried after date of opinion and to all cases on appeal in which conflicts of law issue was raised on timely basis)."

This is a misleading statement as to the holding of the court in **Hataway**. **Hataway** involved a wrongful death case resulting from a scuba diving accident which occurred in the State of Arkansas. The parties were all lifelong residents of Tennessee. Suit was filed in Tennessee. The trial court charged the jury on the doctrine of lex loci delicti, which had been the rule in Tennessee in tort cases for more than 100 years. The issue on appeal was whether or not Tennessee should depart from the rule in tort cases as many other states had. The court did modify the rule as to tort cases only. In so doing, the court, as pertinent, said: "[W]e adopt the "most significant relationship" approach of §§ 6, 145, 146, and 175 of the Restatement (Second) of Conflict of Laws

(1971)...." In **Hataway** the court did not address or endorse or even refer to Restatement (Second) Conflict of Laws § 214. We have been cited to no cases in this jurisdiction, nor have we found any, adopting Restatement (Second) of Conflict of Laws in connection with commercial transactions.

The Restatement (Second) Conflict of Laws, § 214 states, in pertinent part, as follows:

> (1) The obligations of the maker of a note and of the acceptor of a draft are determined, except as stated in §§216-217, by the local law of the state designated in the instrument as the place of payment.
> (2) In the absence of a designated place of payment, the obligations of a maker or acceptor are determined, except as stated in §§216-217, by the local law of the state where he delivered the instrument. That state is presumptively the state where the instrument is dated, if such a state is indicated, and, in the absence of notice to the contrary on the instrument, this presumption is conclusive with respect to a holder in due course.

While the Restatement says the state law which should prevail is presumably the one where the check is dated, under Tennessee law, delivery did not in fact take place until the Plaintiff-Appellee received the check in Tennessee. The following provisions of the Tenn. Code Ann. § 47-1-201 are applicable to the matter before us:

> Tenn. Code Ann. § 47-1-201 **General definitions**.
> Subject to additional definitions contained in chapters 2-9 of this title which are applicable to specific chapters or parts thereof, and unless the context otherwise requires, in chapters 1-9 of this title:
>
> * * *
>
> (14) "Delivery" with respect to instruments, documents of title, chattel paper, or certificated securities means voluntary transfer of possession;

Tenn. Code Ann. § 47-3-202(1) defines negotiation as "the transfer of an instrument in such form that the transferee becomes a holder." Under § 47-1-201(20) a holder includes one in possession of an instrument issued to him. Under Tenn. Code Ann. § 47-3-201(1) a “transfer of an instrument vests in the transferee such rights as the transferor has therein. . ..” In order to transfer possession

there must be a transfer of title or negotiation. Tenn. Code Ann. § 47-3-202(1) defines "Negotiation" as the "transfer of an instrument in such form that the transferee becomes a holder. If the instrument is payable to order it is negotiated by delivery with any necessary endorsement; if payable to bearer it is negotiated by delivery." Therefore, under the applicable law, delivery occurred in Knoxville, where the check was received.

Appellant also argues that the Uniform Commercial Code § 47-3-503 requires the presentment of the check be timely. Therefore, since the presentment of the check was not made until February 18, 1991, it was untimely and, accordingly, Appellant is discharge from any duty to pay. We cannot agree. Under Tenn. Code Ann. § 47-3-511, a delay in the presentment is excused when the party is without notice it is due or when the delay is caused by circumstances beyond his control and he exercises reasonable diligence after the cause of the delay ceases to operate.

The Defendant testified he requested the check be held by Mr. Walker and **not cashed** until he confirmed what credits were due him. He never, however, presented any evidence of any additional credits due him. Also, Defendant testified that shortly after he mailed the $21,973.36 check dated September 23, 1986, he called Mrs. Walker and requested her not to cash the check or the $5,000 check which he had given her on August 20. He further testified he placed stop payment orders on both of the checks.

There is also another compelling reason why this court cannot reverse the trial court even if the chancellor was wrong in her determination that the Tennessee statute of limitations rather than the Kentucky statute was applicable. The statute of limitations had not run under either of the

statutes. The applicable Tennessee statute is Tenn. Code Ann. § 47-3-122(3). It provides: "A cause of action against a drawer of a draft or an endorser of any instrument accrues upon demand following dishonor of the instrument. Notice of dishonor is a demand." The Kentucky statute is Ky. Ann. St. § 355.3-122(3), which provides: "A cause of action against a drawer of a draft or an indorser of any instrument accrues upon demand following dishonor of the instrument. Notice of dishonor is a demand." Although the check here in issue was drawn September 23, 1986, dishonor and demand of payment did not occur until February 1991. Suit was filed in September, 1992.

It is a well established rule in this jurisdiction a trial court will not be reversed where the correct result has been reached, though predicated on an erroneous reason. See **Perlberg v. Jahn**, 773 S.W.2d 925 (Tenn. App. 1989).

The Appellee, in his brief, presented the issue for review of whether or not the trial court erred in permitting the Defendant to amend his pleadings to plead the Kentucky statute of limitations.

In view of our holding on Appellant's issue, the Appellee's issue is pretermitted.

The decree of the chancellor is affirmed. The cost of this appeal is taxed to the Appellant and the case is remanded to the trial court for any further necessary proceedings.

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Clifford E. Sanders, Sr. J.

CONCUR:

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Herschel P. Franks, J.

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Don T. McMurray, J.