IN THE COURT OF APPEALS OF TENNESSEE

EASTERN SECTION

FILED

June 13, 1996

Cecil Crowson, Jr.
Appellate Court Clerk

BENNY GREEN, d/b/a K. B. STAVES COMPANY	)	CAMPBELL COUNTY
	)	03A01-9512-CV-00445
Plaintiff-Appellant	)	
v.	)	HON. CONRAD TROUTMAN, JUDGE
KYLE A. JUSTICE	)	
Defendant-Appellant	)	
ULTIMATE MANUFACTURING, INC.	)	
Defendant	)	VACATED AND REMANDED

VICTOR PRYOR OF JACKSBORO FOR KYLE A. JUSTICE

JOSEPH G. COKER OF JACKSBORO FOR BENNY GREEN

OPINION

Goddard, P.J.

Benny Green, d/b/a K. B. Staves Company, sues Kyle A. Justice, assignee of the rights of Ultimate Manufacturing, Inc., as to a certain instrument denominated a purchase agreement (see Appendix A) and Ultimate Manufacturing, Inc. The suit sought

damages totaling $25,000 because of the Defendants' failure to reimburse Mr. Green $2000, which they had promised, as well as for their failure to pay for firewood sold to the Defendants. Curiously, the suit also sought a declaration that "no definite or enforceable contract was ever entered into between the parties.

After a veritable avalanche of motions with attached exhibits were filed, the Trial Judge entered an order on September 21, 1995, which stated in part the following:

> (1) All parties are properly before the Court and all issues between the Parties are hereby addressed in this Order.
>
> (2) That the Court Declares that the document entitled "Purchase Agreement" dated March 12, 1994, attached as Exhibit One (1) to the original Complaint heretofore filed in this cause, is vague and is lacking in so many of the essential requirements of an enforceable contract that the contract is hereby declared as null and void, a copy of which document is attached as Exhibit One (1) hereto and is incorporated herein by reference as completely and fully as if copied verbatim.
>
> (3) The Court Declares, based upon the pleadings, the exhibits, the documents in the Court file, and the statements by and on behalf of the respective parties or their counsel in the various Court hearings which have been held pertaining to this case, and the entire record in this cause, that the document entitled "Purchase Agreement" dated March 12, 1994, referenced in Paragraph Two (2) above, was not a valid contract, and the Court Declares that no enforceable contract ever existed.
>
> (4) The Court further finds that each party is contending that certain of the other parties breached the said document entitled "Purchase Agreement" dated March 12, 1994, referenced in Paragraph Two (2) above; however, in light of the Declaratory Judgment of the Court as set forth above, the Court hereby dismisses

> all actions between the respective parties, except as to the findings and holdings herein.

Parenthetically, we note that, although the Defendants filed numerous motions, they never answered the complaint nor sofar as we are able to discern filed any counter-complaint.

Ultimate Manufacturing did not appeal the Trial Court's ruling, but both Mr. Green and Mr. Justice did.

Mr. Justice's single issue on appeal insists the Trial Court was in error in finding that the contract was unenforceable because it lacked the essential elements required for a valid contract.

Mr. Green appeals, raising a number of issues, most of which resist Mr. Justice's appeal. (See Appendix B).

Before addressing the issues on appeal, we note that Mr. Green has moved to dismiss Mr. Justice's appeal, and has also moved that we consider certain post-judgment facts. We are of the opinion these motions are not well taken and they are accordingly denied.

A contract has been succinctly defined by our Supreme Court as an agreement upon sufficient consideration to do or not do a particular thing. Smith v. Pickwick Electric Cooperative, 212 Tenn. 62, 367 S.W.2d 775 (1963); Johnson v. Central National

Insurance Co. Of Omaha, Nebraska, 210 Tenn. 24, 356 S.W.2d 277 (1962).

The contract in question specifically provides that Mr. Green will furnish Ultimate Manufacturing, Mr. Justice's assignor, firewood meeting certain specifications for a certain price if delivered, and another price if picked up. The mutual promises of the parties to the contract provides sufficient consideration. Pearson v. Garrett Financial Services, 849 S.W.2d 776 (Tenn. App. 1992); Bill Walker & Associates v. Parrish, 770 S.W.2d 764 (Tenn. App. 1989).

While we concede that the purchase agreement is not a model of contract drafting, it does meet the requirements hereinbefore noted.

In conclusion as to this point, we observe that when counsel for Mr. Green was asked in oral argument why the questioned document was not a valid contract, he was unable to suggest any reason.

Counsel's brief is no more enlightening, suggesting that the conclusory allegations of the complaint must be taken as true because not denied:

> (C) That no definite or enforceable contract was entered into and between the parties (R page 4, par. 9). (SEE ABSENCE OF DENIAL IN THE RECORD).

(D) That there was never a meeting of the minds between the parties (R page 4, par.9). (SEE ABSENCE OF DENIAL IN THE RECORD).

(E) That there was no mutual assent between the parties (R page 4, par. 9). (SEE ABSENCE OF DENIAL IN THE RECORD).

(F) That there was a mutual mistake of fact, each party assenting to a different agreement (R page 4, par. 9). (SEE ABSENCE OF DENIAL IN THE RECORD).

Although we find no authority in this State specifically on point, there is authority from sister states that failure to appear and answer a declaratory judgment suit does not entitle a plaintiff to a judgment based upon the conclusory pleadings of the complaint. St. Paul Mercury Ins. Co. v. Nationwide Mutual Ins. Co., 161 S.E.2d 694 (S.Ct. of Appeals of Va. 1961); Hall v. Hartley, 119 S.E.2d 759 (S.Ct. Of Appeals of W.Va. 1961).

We accordingly vacate the judgment finding a valid contract had not been executed.

We now turn to the issues raised by Mr. Green:

Issue One

Even if Mr. Justice had not appealed he would be entitled to raise issues by virtue of Mr. Green's appeal. Rule 13(a), Tennessee Rules of Appellate Procedure.

Issue Two

Although it is true the contract provided that its duration was one year "with the right of renewal for both parties," and it is also true there is no proof in the record to suggest either party exercised the right to renew, Mr. Justice nevertheless

would be entitled to any damages he might prove by reason of breach of the contract from its inception, April 1, 1994, through May 31, 1995.

Issue Three

Even though no answer was filed by Mr. Justice, Mr. Green is not entitled to judgment without first applying for a default judgment and following the procedures for notification mandated by Rule 55 of the Tennessee Rules of Civil Procedure.

Issue Four

It does not appear that any testimony was introduced other than by affidavits and exhibits thereto, and in the case of issue one, we are inclined in the context of this case to permit Mr. Justice to rely upon the facts set out in Mr. Green's brief.

Issue Five

We find the record adequate insofar as the validity of the contract to afford the relief Mr. Justice might appropriately plead and prove.

Issue Six

This issue has previously been answered adversely to Mr. Green's contention.

Issue Seven

In light of our disposition of this appeal, damages for a frivolous appeal will, of course, be denied.

Issue Eight

We agree with Mr. Green that the judgment of dismissal should be vacated in order to allow him to prove any damages he may have suffered.

For the foregoing reasons the judgment of the Trial Court is vacated and the cause remanded for further proceedings not inconsistent with this opinion. Costs of appeal are adjudged one-half against Mr. Green and one-half against Mr. Justice.

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Houston M. Goddard, P.J.

CONCUR:

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Herschel P. Franks, J.

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William H. Inman, Sr. J.