IN THE COURT OF APPEALS

DON GIBSON,	)	SEVIER CIRCUIT
	)	C.A. NO. 03A01-9510-CV-00377
Plaintiff-Appellee	)	
vs.	)	HON. BEN W. HOOPER, II
	)	JUDGE
JIM CLEMENTS,	)	REVERSED AND REMANDED
Defendant-Appellant	)	

JOHN M. NEAL, Knoxville and JERRY GALYON, Sevierville, for appellant.

TIMOTHY W. JONES, Kite & Jones, Sevierville, for appellee.

OPINION

McMurray, J.

This case stems from a contract whereby the plaintiff sold a going business known as "The Mountain Man" to the defendant. The

purchase price was financed by the plaintiff seller. The plaintiff retained a security interest in the assets of the business as security for payment. The plaintiff, fearing that the defendant was liquidating the merchandise, obtained a writ of attachment and sued for all amounts due under the contract. The defendant filed an answer wherein he denied the underlying facts upon which the attachment was issued and filed a counterclaim wherein he sought rescission of the contract based upon misrepresentation, damages for loss of income, loss of business, trouble [sic] damages, attorney's fees and costs as provided by T.C.A. § 47-18-104, the "Tennessee Consumer Protection Act of 1977." The case was tried before a jury and resulted in a verdict in favor of the plaintiff for $56,175.00. Judgment was duly entered thereon. This appeal resulted. We reverse the judgment of the trial court.

Sometime during the third week of February, 1993, Mr. Gibson, the plaintiff, was contacted by Jim Clements, the defendant, regarding the purchase of the business known as "The Mountain Man." The two men subsequently met at The Mountain Man to discuss the sale of the store. They reached an agreement and executed a Purchase and Sale Agreement on March 5, 1993. The Agreement provided in pertinent part as follows:

> 2. Purchase Price: The purchase price for all of the Seller's interest in the business known as Mountain Man shall be Eighty Thousand Dollars ($80,000.00), payable as follows: $5,000 at the signing of this

> Agreement; $5,000.00 due May 1, 1993; $5,000 due July 1, 1993; $5,000 due October 1, 1993 and $60,000.00 shall be paid in monthly installments with interest at the rate of 10% beginning on May 1, 1993, and continuing on the same day on each month thereafter until fully paid.
>
> 3. Security: Security for the prompt and full payment of the debt is financing statements (UCC-1) filed with the Tennessee Secretary of State's Office on the equipment, furniture, fixtures, and accounts receivable of the business.

At the time of the signing of the Agreement, Mr. Clements tendered to Mr. Gibson the sum of $5,000.00 and executed a promissory note which embodied the terms of the repayment agreement and additionally provided that the monthly payments would be $1,274.82 beginning on May 1, 1993.

Late in April, 1993, Mr. Clements had some concerns about the quantity of inventory contemplated by the Sales Agreement. He contacted Mr. Gibson. They reached an oral agreement regarding a modification of the original sales agreement. It is essentially the terms of this oral modification that gave birth to this controversy. According to Mr. Gibson, it was agreed that all the $5,000.00 installment payments would be waived if all of the monthly installment payments were made on time and without any problems. However, according to Mr. Clements, Mr. Gibson agreed to unconditionally waive the three remaining $5,000.00 payments.

It was undisputed at trial that while the May, June and July payments were made, there were problems associated with each. The check for the May payment was returned due to insufficient funds;[1] the June payment was inadvertently $23.77 short, but was corrected the next day; the check for the July payment was not honored by the bank when first presented due to insufficient funds but was honored on the following day.

Mr. Gibson filed suit seeking a money judgment for the entire balance of the note, including the $5,000.00 payments. He also sought and obtained an attachment. As grounds for obtaining the attachment, Mr. Gibson, in his affidavit, stated that Mr. Clements was in default, that Mr. Clements was absconding or about to abscond or was concealing himself or his property or that he was fraudulently disposing of his property. Subsequent to obtaining the attachment, the sheriff went to the Mountain Man and changed the locks on the door. Mr. Clements was not given a key.

The case proceeded to trial before a jury. During the trial, the trial judge instructed the jury that, as a matter of law, the attachment was valid. The case was submitted to the jury and it retired to deliberate. The jury returned a verdict in favor of Mr. Gibson in the amount of $56,175.00.

[1]The reason for the return of the check for insufficient funds is sufficiently explained provided the jury should accept the testimony of the defendant.

The defendant-appellant has presented the following issues for our consideration:

1. Did the trial court err in instructing the jury that the Plaintiff's attachment of Defendant's assets was valid?

2. Did Plaintiff obtain an attachment of Defendant's business assets by making false representations that the Defendant had defaulted on his obligations to Plaintiff?

3. Did the trial court err in denying Defendant's Motion for Directed Verdict where the Plaintiff falsely represented that all property sold by him to the Defendant was unencumbered?

4. Did Defendant have the right to rescind the contract in view of Plaintiff's misrepresentations concerning title to the inventory?

5. Were the trial court's instructions to the jury so confusing that the jury was unable to understand them?

6. Was there any evidence to support the jury's verdict?

Our standard of review is set out in Rule 13(d), Tennessee Rules of Civil Procedure. "Unless otherwise required by statute, review of findings of fact by the trial court in civil actions shall be de novo upon the record of the trial court, accompanied by a presumption of the correctness of the finding, unless the preponderance of the evidence is otherwise. Findings of fact by a jury in civil actions shall be set aside only if there is no material evidence to support the verdict." We note that no

presumption of correctness attaches to conclusions of law. See Adams v. Dean Roofing Co., 715 S.W.2d 341, 343 (Tenn. App. 1986).

The first issue may be restated, i.e., is the validity of an attachment a question for the determination of the court or the jury?

We undertake our discussion of this issue by first noting that the validity of the attachment is not of jurisdictional importance. Personal service of process was obtained on the defendant. The attachment was obtained allegedly to prevent the defendant from improperly disposing of the plaintiff's collateral.

The attachment obtained by the defendant was procured pursuant to the provisions of T.C.A. § 29-6-101 which provides in pertinent part as follows:

> **29-6-101. Grounds for attachment.** — Any person having a debt or demand due at the commencement of an action, or a plaintiff after action for any cause has been brought, and either before or after judgment, may sue out an attachment at law or in equity, against the property of a debtor or defendant, in the following cases:
>
> (5) Where he absconds, or is absconding or concealing himself or property;
>
> (6) Where he has fraudulently disposed of, or is about fraudulently to dispose of, his property;

In support of his application for an attachment, the plaintiff filed his own affidavit, the affidavits of Donald Hess, Timothy Lewis and Judy A. Champagne. The plaintiff's affidavit stated in substance that the defendant was indebted to him, the debt was past due and owing and "... upon information and belief, I fear that the defendant is fraudulently disposing of all the assets securing the indebtedness owed to me and that the defendant plans to abscond with any remaining assets by Thursday, July 15, 1993."[2]

Donald Hess in his affidavit stated that he was the manager of the Mountain Man Shop and employed by the defendant. He deposed that: "I was told by Mr. Clements to sell everything in the shop no matter what the cost and for me to get some boxes because everything had to be out of the shop by Thursday, July 15, 1993." He further stated that he had witnessed Mr. Clements selling items from the shop at prices well below costs and offering to sell the display cases and other fixtures for well below their current value and that he had personally heard Mr. Clements tell many customers that he was going out of business.

Timothy W. Lewis stated in his affidavit that on July 10, 1993, he went to the Mountain Man Shop and spoke directly with Mr. Clements. "I told him that I had heard he was selling his display cases. He responded 'how many do you want?' I asked him how much

[2]The complaint was filed and the attachment obtained on July 13, 1993.

he wanted for these cases. He said they were worth $800.00 each, but he would sell them for $200.00 each. ... I returned to the Mountain Man Shop at approximately 8:30 p.m. the same day. I offered to purchase two (2) wooden statues one with a price tag of $250.00 and the other with a price tag of $175.00 for a total of $50.00. Jim Clements asked me how many I wanted at that price. I told him that I just wanted the two. So I purchased the two (2) statues for $50.00. When I handed Jim Clements the $50.00, he removed a large wad of money from his pocket and placed the $50.00 I had given him in with the rest of the money and returned the wad to his pocket. Jim Clements did not ring up the purchase on the cash register nor did he give me a receipt.

Ms. Judy A. Champagne stated the following:

> On July 9, 1993, I went to the Mountain Man Shop... While in the shop I personally heard Jim Clements tell several customers that he was selling everything so cheap because he was going out of business.
>
> I was also told by Joel Arwood, and employee of Jim Clements, that he had been instructed by Mr. Clements to sell everything in the store for whatever price was offered and that Mr. Clements had told him everything would be out of the Mountain Man Shop by Thursday [July 15, 1993]. (Bracketed material in the original.)

There are necessarily two facets which are to be examined in determining whether an attachment is valid. We are of the opinion that the court may look to the allegations and affidavits and that if found to be sufficient under the statute, the court may rule, as

a matter of law, that an attachment was or was not lawfully issued. In so doing, he is looking purely to the face of the instruments and not the truth or falsity of the underlying facts stated in the allegations and affidavits. If, on the other hand, the underlying facts stated in the allegations, affidavits or other evidence supporting the attachment are disputed and denied, then a question or questions of fact may be presented which cannot properly be resolved as a matter of law, but must be left to the trier of fact. The concept that questions of fact must be resolved by the trier of fact is so elementary as to require no citations of authority, nevertheless, see Morgan v. Tennessee Central Railway Co., 31 Tenn. App. 409, 216 S.W.2d 32 (1948).

We must, therefore, determine whether the defendant has sufficiently challenged the underlying facts in the plaintiff's affidavits.

Quite clearly, the record does not support a finding that the defendant is absconding or concealing himself or property, hence, the attachment must be based upon the statutory ground that the defendant has fraudulently disposed of, or is about to fraudulently dispose of his property.

In his answer, the defendant denies that he was fraudulently disposing of his property and testified that the disposition of the

property was in the ordinary course of business or else was being sold in anticipation of moving the business to another location. He further testified that the plaintiff knew the purpose of the disposition.

We believe, therefore, that there was an issue of material fact raised as to whether the attachment was wrongfully sued out and that by the denial of the underlying facts in the answer and the relief sought in the counterclaim, the disputed issues of fact should have been submitted to the jury for determination.

We should note that we have some reservations as to whether the plaintiff's sworn complaint and affidavits in this case are sufficient to support the issuance of a valid attachment. See Nelson v. Fuld, 14 S.W. 1079 (Tenn. 1891). See also In Re: Chemical Separation Corp. 29 B.R. 240 (Bkrtcy. 1983). Assuming without deciding that the plaintiff's complaint and affidavits are sufficient, as a matter of law, to warrant the issuance of a writ of attachment, is not determinative as to whether the attachment was wrongfully sought. The determination of whether the attachment was wrongfully sought, in the face of disputed facts, is to be left to the trier of fact.

We are of the opinion that it was error for the court to peremptorily instruct the jury that the attachment was valid. Our

next inquiry must be whether this error was harmless or constitutes reversible error?

Rule 36(b), Tennessee Rules of Appellate procedure provides as follows:

> (b) Effect of Error. — A final judgment from which relief is available and otherwise appropriate shall not be set aside unless, considering the whole record, error involving a substantial right more probably than not affected the judgment or would result in prejudice to the judicial process.

We conclude that not only did the error involve a substantial right and more probably than not affected the judgment but would also result in prejudice to the judicial process. In Morgan v. Tennessee Central Railway Co., supra, it was stated:

> Defendant had the constitutional right to have all issues of fact decided by a jury if evidence was in conflict on the issues. Constitution of Tennessee, Article I, Section 6, and Article VI, Section 9.

We further note that the charge was given by the court not only in the original charge but in response to a question by the foreman of the jury. The following colloquy transpired between the foreman of the jury, Mr. Spivey, and the court:

> MR. SPIVEY: There is a question as to the disposition of the court's in terms of what your position is

concerning the responsibility of the jury relating to the locking up of the business. Now, there is the understanding of the legality of it on behalf of the judge, but to what extent or is there any restriction on your part to us as to what that might have to do, to relate to the decision of the case in any way

I hope I have made myself clear.

* * * *

THE COURT: Ladies and Gentlemen, the question that you raised about the attachment is a matter of law as opposed to being a matter of fact.

And I have found that the attachment was properly issued and properly executed. And in this state, if it is properly issued and executed there are no damages that arise in that situation.

* * * *

JUROR: I want to know if the reason the place was padlocked was because the man was in default? There has to be a reason to do it — and I know it is all done legally, but we have talked about default and I want to know if that was the reason he was in default of the contract.

THE COURT: Ladies and Gentlemen, in an effort to answer the last question I am reiterating what I have already said, but it has been ruled that the attachment was legal and no damages can result from the fact of the attachment itself.

The default and/or breach of contract, and I use those words simultaneously. The default or breach of contract issue is still soaring for you to decide along with any damages that may have resulted from the default or breach.

Anything else?

It appears to us that the jury was concerned about the effect of the closing of the business by the attachment and subsequent

locking of the establishment by the Sheriff. It is reasonable to infer from the foregoing colloquy that the jury was concerned as to whether the padlocking was the cause of the default.

Under the circumstances of the case, we are of the opinion that the error in the court's charge is reversible error.

Since our resolution of the first issue is dispositive of this appeal, the remainder of the issues presented are pretermitted. Further, it is not necessary for us to consider the appellant's motion to consider post judgment facts.

We reverse the judgment of the trial court and remand the case for a new trial. Costs of this appeal are assessed to the appellee.

_____
Don T. McMurray, J.

CONCUR:

_____
Herschel P. Franks, J.

_____
Charles D. Susano, Jr., J.

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	)	JUDGE
JIM CLEMENTS,	)	REVERSED AND REMANDED
Defendant-Appellant	)	

ORDER

This appeal came on to be heard upon the record from the Circuit Court of Sevier County, briefs and argument of counsel. Upon consideration thereof, this Court is of the opinion that there was reversible error in the trial court.

We reverse the judgment of the trial court and remand the case for a new trial. Costs of this appeal are assessed to the appellee.

PER CURIAM