IN THE COURT OF APPEALS OF TENNESSEE

EASTERN SECTION

JON H. TATE	)	MONROE COUNTY
	)	03A01-9609-CH-00284
Plaintiff-Appellant	)	
	)	
	)	
v.	)	HON. EARL H. HENLEY,
	)	CHANCELLOR
	)	
KENNETH MASHBURN	)	
	)	
Defendant-Appellee	)	VACATED AND REMANDED

GEORGE F. LEGG and CHADWICK B. TINDELL OF KNOXVILLE FOR APPELLANT

J. REED DIXON OF SWEETWATER FOR APPELLEE

OPINION

Goddard, P.J.

In this real estate contract dispute over the return of the Buyer's earnest money, Jon H. Tate, Buyer of real property, appeals the Monroe Chancery Court's decision to grant summary judgment in his favor for only $10,000 plus prejudgment interest as to earnest money that he paid to the Seller, Kenneth Mashburn.

The Buyer insists on appeal that the Trial Court erred in not finding that he should receive a total award of $20,000 plus prejudgment interest, consisting of the $10,000 earnest money paid incident to the original contract and an additional $10,000 paid in consideration for a modification of the original contract. Additionally, the Buyer insists that the Trial Court erred on procedural grounds by allowing the Seller to file an affidavit after originally granting the summary judgment and in reconsidering the summary judgment.

On December, 16, 1992, Jon H. Tate, Buyer, and Kenneth Mashburn, Seller, entered into a real estate contract for the sale of property in Monroe County for $600,000 to be closed on March 1, 1993. Pursuant to the contract, the Buyer was required to pay the Seller $10,000 in earnest money. The contract provided in pertinent part:

> THAT IN CONSIDERATION of the payment by Buyer to Seller of the sum of TEN THOUSAND ($10,000.00) DOLLARS, to be held in escrow by the Broker for this transaction, as earnest money and as part of the purchase price, the receipt of which is hereby acknowledged, Seller agrees to sell and Buyer agrees to buy the following described property:
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> . . .
>
> 12. OTHER CONDITIONS:
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> Sale and closing are subject to the following:
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> . . .
>
> F. Buyer shall furnish Seller, at Buyer's expense to be paid at closing, a Level 1 Environmental Survey of the residential premises. Should such Level 1 Environmental Survey indicate the presence of any

> hazardous substances or deposits of chemicals or other toxic material which might result in required site remediation in accordance with state and federal law, Seller shall take such action, prior to closing, as may be necessary to restore the residential premises to acceptable environmental standards.
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> . . .
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> I. Buyer being able to obtain a First Mortgage loan, on favorable terms to Buyer, in the amount of Four Hundred Thousand($400,000.00) from Southern United Bank of McMinn County or other bank selected by Buyer.
>
> 13. If any of the conditions of paragraph 12. above or any part of this Agreement cannot be completed to the satisfaction of the Buyer, then the Buyer may, at his sole discretion, be refunded the earnest money deposit and no contract will exist.

As of March 1, 1993, the original closing date, the sale had yet to occur. Therefore, on April 30, 1993, the Buyer and the Seller entered into a Modification Agreement in which the Buyer was required to pay an additional $10,000 in earnest money, and the closing date would be extended to May 28, 1993. The Modification Agreement provided in pertinent part, as follows:

> RESOLVED, that in consideration of the payment of Ten Thousand ($10,000.00) Dollars to Seller, direct and not through his Agent, Seller agrees to reinstate the expired Contract and both Buyer and Seller agree to the following additional conditions that modify the Contract:
>
> 1. Initial earnest money paid at execution of the Contract is not refundable to Buyer in the event Buyer fails to close on the Contract, unless due to environmental problems that Seller is unable or unwilling to remediate. Said earnest money will be applied to the Purchase Price if Buyer closes on Contract.
>
> 2. Additional payment of Ten Thousand ($10,000.00) Dollars paid by Buyer directly to Seller is not refundable for any reason except if environmental problems cannot or will not be remediated by Seller.

> Said reinstatement fee shall be applied to Purchase Price if Buyer closes on Contract.
>
> 3. Buyer will engage environmental engineer to complete analysis to satisfy lending institution the site is environmentally safe. The costs of the environmental analysis shall be born by Buyer.
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> 4. Closing will occur on May 28, 1993. In the event the environmental analysis or remediation is not completed by this date, the Lending Institution, First National Bank of Knoxville, will create an escrow fund to hold all funds brought to Closing. Disbursement of these funds will occur when the environmental analysis is complete and no site remediation is required. If remediation is required, adequate funds will be retained by escrow agent and disbursed when remediation is complete.

On June 14, 1993, International Waste Management Systems completed a Phase I Environmental Site Evaluation of the property which warned of a potential hazardous substance on the property which had been stored on adjacent property. The Buyer was subsequently denied a mortgage loan on the property by First National Bank of Knoxville, and therefore the contract failed to close. On August, 27, 1993, the Buyer alleged that he had satisfied all of his duties under the contract and demanded from the Seller a return of the $20,000 in earnest money. The Seller refused and the Buyer filed suit on January 24, 1995, demanding a return of the earnest money.

After the Seller filed his answer to the complaint, the Buyer filed a motion for summary judgment on July 26, 1995, supported by his own affidavit and an affidavit of a loan officer from First National Bank of Knoxville. The Trial Court granted the Buyer's motion for summary judgment on October 3, 1995, and

awarded him $20,000 plus prejudgment interest. Prior to the entry of an order, the Seller filed a motion to reconsider on October 19, 1995, along with a supporting affidavit on November 27, 1995. There is no indication in the record that the Buyer made any objection to the Seller's filing of the additional affidavit at that time. The Trial Court reheard the motion for summary judgment and altered the original ruling, and held in the Buyer's favor for $10,000 plus prejudgment interest. The Buyer appeals the final order.

The Buyer's first issue on appeal is that the Trial Court erred by considering the Seller's affidavit filed on November 27, 1995, in support of the Seller's October 19, 1995, motion to reconsider. In this additional affidavit, the Seller made additional allegations that he did not make in the original affidavit he filed in response to the motion for summary judgment. This later affidavit was filed nearly two months after the original summary judgment hearing. The Buyer relies on Tennessee Rules of Civil Procedure 6.04(2) which states,

> When a motion is supported by affidavit, the affidavit shall be served with the motion; and, except as otherwise provided in Rule 59.02, opposing affidavits may be served not later than one (1) day before the hearing, **unless the court permits them to be served at some other time**. (Emphasis added.)

The Seller insists that the Trial Court was well within its discretion to consider an additional affidavit and relies on the previously emphasized language and Tennessee Rules of Civil Procedure 56.05 which states "[t]he court may permit affidavits

to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits." We agree and conclude that it was within the discretion of the Trial Court to consider the Seller's additional affidavits in his motion to reconsider the motion for summary judgment.

The Buyer's second issue on appeal is that there are no genuine issues of material fact and that he should have received an award of $20,000 plus interest as a matter of law to account for the two checks he gave the Seller as earnest money.

The Seller claims that he does not owe the Buyer a full refund of the earnest money because the contract was breached by the Buyer, not him. He alternatively argues that, at most, he owes the Buyer only $10,000 since he, as Seller, had only received one of the $10,000 checks. He alleges that the first $10,000 payment was given to Bill Eccles, who he insists was the Buyer's agent. The Buyer denies that Mr. Eccles was his agent. Since this is a summary judgment, if a genuine issue of material fact is found, the case must be remanded for further fact finding. "According to Rule 56.03, summary judgment is to be granted if the 'pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, 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.'" Byrd v. Hall, 847 S.W.2d 208 (Tenn. 1993). A review of the affidavits in the record show that there is a

genuine issue of material fact as to whether Mr. Eccles was the Buyer's or the Seller's agent. This fact is material since it cannot be determined whether the Buyer ever paid the Seller the original earnest money unless it is first determined whose agent Mr. Eccles was.

The Buyer argues that the issue of whose agent Mr. Eccles was is not an issue of fact since as a matter of law, Mr. Eccles was the Seller's agent. The Buyer relies on the language in Loveday v. Barnes, 909 S.W.2d 448 (Tenn. App. 1995), quoting from 3 Am. Jur. 2d §278, which states:

> 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.

It is not clear from the record whether Mr. Eccles had any authority, express or implied, to serve as the Seller's agent. Therefore, Loveday v. Barnes is not controlling in this case. We conclude that the issue of whose agent Mr. Eccles was is a genuine issue of fact and remand to the Trial Court for a finding of this issue. If it is found that Mr. Eccles was the Buyer's agent, the Buyer has no recourse against the Seller for the $10,000. If the Trial Court finds that Mr. Eccles was the

Seller's agent, the Buyer's cause of action properly lies against the Seller for the $10,000 under the holding in Loveday v. Barnes.

The Seller argues that there are other genuine issues of fact that would preclude a summary judgment in the Buyer's favor. He argues that the Buyer did not comply with his duties under the contract, and thus he is not entitled to a return of the earnest money. He insists that the Buyer did not satisfy the financing requirements in Paragraph 12I of the original contract. Additionally, the Seller alleges that the Buyer breached the original contract and the modification agreement by failing to complete the environmental testing required in paragraph 12F of the original contract and paragraph 3 of the Modification Agreement. The Seller denies that he breached the contract, alleging the land was not actually environmentally contaminated. The Buyer denies each of these allegations and, therefore, there is a genuine issue of fact. Each of these issues impacts the ultimate question--whether the Buyer is due a refund of all of the earnest money.

In a motion for summary judgment, this Court must consider the case in a manner where "all the evidence must be viewed in the light most favorable to the opponent of the motion and all legitimate conclusions of fact must be drawn in favor of the opponent." Byrd, supra. Therefore, we conclude there are genuine issues of material fact that must be determined at trial,

and this case did not satisfy the requirements of Rule 56 of the Tennessee Rules of Civil Procedure for summary judgments. We hold that this is an appropriate case for an evidentiary hearing in the Trial Court.

For the foregoing reasons, the judgment of the Trial Court is vacated and the case is remanded for a hearing to determine Mr. Eccles' principal and whether either party breached the contract. Exercising our discretion, we assess the costs of appeal one-half to Mr. Mashburn and one-half to Mr. Tate and his surety.

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Houston M. Goddard, P.J.

CONCUR:

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Don T. McMurray, J.

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Charles D. Susano, Jr., J.