IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE

FILED

November 24, 1999

Cecil Crowson, Jr.
Appellate Court Clerk

THE WINDOW GALLERY OF KNOXVILLE,) 03A01-9906-CH-00225
)
Plaintiff/Appellee) Appeal As Of Right From The
) MONROE CO. CHANCERY COURT
v.)
)
RICHARD DAVIS, individually and) HON. JERRI S. BRYANT
RICHARD H. DAVIS d/b/a DAVIS) CHANCELLOR
CONSTRUCTION COMPANY,)
)
Defendant)
and)
)
NICHOLAS R. MARLER and SUE POSTON)
MARLER,)
)
Defendants/Appellants.)

For the Appellants:
Steven E. Schmidt
Rebecca B. Murray
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For the Apellee:
Jay W. Mader
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VACATED and
REMANDED

Swiney, J.

O P I N I O N

The Window Gallery of Knoxville ("Window Gallery") sued Nicholas R. Marler and Sue Poston Marler ("Marlers") for payment for windows furnished by Window Gallery to Richard Davis (" Davis"), a building contractor, and which were installed in the Marlers' new house. Window Gallery was paid neither by the Marlers nor Davis for the windows. The Trial Court granted Window Gallery summary judgment on its claim of unjust enrichment against the Marlers. Window Gallery originally filed suit against both Davis and the Marlers, but sought summary judgment only against the Marlers. Marlers appeal, insisting that the Trial Court erred in finding that Window Gallery had exhausted its remedies against Davis and that the Marlers were unjustly enriched so that summary judgment against the Marlers in favor of Window Gallery was proper. The issues before us in this appeal are: (1)did Window Gallery exhaust its remedies against Davis; and (2)if the answer to issue number one is yes, was summary judgment in favor of Window Gallery against the Marlers appropriate. As our resolution of the first issue is "no", it is unnecessary to address the second issue. We vacate the judgment of the Trial Court and remand the case for further proceedings consistent with this Opinion.

BACKGROUND

Defendant Richard Davis, a party below but not before us in this appeal, served as general contractor for the building of a house for Nicholas and Sue Marler. Windows costing $24,595.69 were selected for the house by the Marlers at Window Gallery, were ordered by Davis and charged to his account there, and were then delivered to the construction site. Disagreement concerning the construction arose between Davis and the Marlers. Davis left the job after the windows were delivered but before they were installed in the house. No one paid Window Gallery for the windows, and Window Gallery sued Davis and the Marlers on that debt.

In a separate suit, Davis sued the Marlers on the construction contract, and the Marlers filed their counterclaim. The Marlers moved to consolidate Window Gallery's suit with Davis' suit

against them. Window Gallery opposed the motion, contending that a consolidation would delay their recovery and result in unnecessary confusion and complication of the issues. The Trial Court consolidated the cases. Window Gallery then filed its Motion for Summary Judgment on its claim for unjust enrichment against the Marlers, *but not against Davis*, for the cost of the windows, which the Trial Court granted. Pursuant to Rule 54.02 of the Tennessee Rules of Civil Procedure, the Trial Court directed that the summary judgment against the Marlers be a final judgment. The summary judgment assigned responsibility for the $24,595.69 cost of the windows to the Marlers, while leaving the Davis/Marler dispute and Window Gallery's claim against Davis still pending in the Trial Court.

DISCUSSION

The Marlers appeal, raising the issues as stated above. In this Opinion, we need only address the issue of whether or not it was error for the Trial Court to find Window Gallery had exhausted its remedies against Davis. Our review is de novo upon the record, accompanied by a presumption of the correctness of the findings of fact of the trial court, unless the preponderance of the evidence is otherwise. Rule 13(d), T R A P.; *Davis v. Inman,* 974 S.W.2d 689, 692 (Tenn. 1998).

When evaluating a motion for summary judgment, the Trial Court should consider "(1) whether a *factual* dispute exists; (2) whether the disputed fact is *material* to the outcome of the case; and (3) whether the disputed fact creates a *genuine* issue for trial." *Byrd v. Hall,* 847 S.W.2d 208, 214 (Tenn. 1993). No presumption of correctness attaches to decisions granting summary judgment when they involve only questions of law. *Hembree v. State,* 925 S.W.2d 513 (Tenn. 1996); Tenn.R.App.P. 13(d). The Court of Appeals must view the evidence 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. *Gray v. Amos,* 869 S.W.2d 925 (Tenn. App. 1993).

The Trial Court's Memorandum Opinion in this case states, in part:

> The Court in *Paschall's, Inc.* also "conditioned" the assertion of an unjust enrichment claim against a property owner as follows: "[B]efore recovery can be had against the landowner on an unjust enrichment theory, the furnisher of the materials and labor must have exhausted his remedies against the person with whom he had contracted, and still has

> not received the reasonable value of his services." *Paschall's, Inc. v. Dozier,* 407 S.W.2d 150, 155 (Tenn. 1966).
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> The Court further finds that the Window Gallery has exhausted its remedies against Davis. When told by the Marlers that Davis would be responsible for all billing involved with the construction of the house, the Window Gallery mailed its invoices to Davis every month. Davis has received these invoices. When payment still was not forthcoming, the Window Gallery filed the present action against Davis for breach of contract and against the Marlers for unjust enrichment. The Window Gallery thus has exhausted its remedies against Davis and has not received any compensation from him for the windows installed into the Marler residence.

The Trial Court then applied this rule from *Paschall's*[1] to the facts in this case and found that summary judgment against the Marlers was proper because they had been unjustly enriched by receipt of the windows and Window Gallery had exhausted its remedies against Davis. We are faced on appeal first with the issue of whether Window Gallery has, indeed, exhausted its remedies against Davis by sending him bills, calling him, and filing suit against him. We think not.

After our Supreme Court's opinion in *Paschall's,* this Court denied recovery for unjust enrichment in *Tri-State Crawler Service, Inc. v. Christian,* 1986 WL 8336 (Tenn. Ct. App. 1986). In that case, a bulldozer repair company made repairs to a tractor first owned by Christian, but then sold under a "Lease-Purchase Agreement" from Christian to Brooks. When the repairs were complete, Brooks paid Tri-State's $9,283.24 bill with a bad check. Brooks subsequently defaulted on the Lease-Purchase Agreement with Christian, and Christian repossessed the bulldozer. Brooks disappeared. The Trial Court awarded damages to Tri-State against Christian for the reasonable value of the repairs. This Court reversed, holding that Tri-State had failed to prove the extent of any unjust enrichment. On the issue of exhaustion of remedies, we held:

> Furthermore, we think that plaintiff should not recover for another reason. Plaintiff's contract to repair the bulldozer was with Brooks, but plaintiff never filed a civil action against Brooks. More importantly, plaintiff did not pursue its common law possessory lien. This could have provided an equitable disposition of the controversy by limiting plaintiff's recovery to the value realized out of the bulldozer instead of personal liability against defendant. It is clear that plaintiff did not exhaust its remedies against Brooks, the person with whom it has contracted, and thus can have no recovery against defendant on an unjust enrichment

theory. [Citations omitted].

In another case, this Court explained that the exhaustion of remedies defense "is a judge-made doctrine whose purpose is to winnow out claims that are not ripe for adjudication." *Byrn v. Metropolitan Bd. of Pub. Educ.,* No. 01A01-9003-CV-00124 (Tenn. Ct. App., filed Jan. 30, 1991) *no appl. perm. app.* The Court later defined "ripeness" as follows:

> Ripeness is a category of justiciability that questions whether the dispute has matured to a point that warrants a judicial decision. The central concern is whether the case involves uncertain or contingent future events that may or may not occur as anticipated or, indeed, may not occur at all. *Lewis v. Continental Bank Corp.,* 494 U.S. 472, 480-81, 110 S. Ct. 1249, 1255 (1990); *Story v. Walker,* 218 Tenn. 605, 607, 404 S.W.2d 803, 804 (1966); *United States Fidelity & Guar. Co. v. Askew,* 183 Tenn. 209, 212, 191 S.W.2d 533, 534 (1946); *Hester v. Music Village U.S.A., Inc.,* 692 S.W.2d 426, 427 (Tenn. Ct. App. 1985); 13A Charles A. Wright, et al., Federal Practice and Procedure § 3532 (2 ed. 1984).
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> Determining whether a controversy is ripe enough to be justiciable involves a two-part inquiry. The court must first determine whether the issues are of the type that would be appropriate for judicial determination. Then the court must consider the hardship that declining to consider the case will have on the parties. *Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n,* 461 U.S. 190, 201, 103 S. Ct. 1713, 1720 (1983); *Joint Anti-Fascist Refugee Comm. v. McGrath,* 341 U.S. 123, 156, 71 S. Ct. 624, 640 (1951); *Morgan v. Norris,* App. No. 88-70-II, slip op. at 4, 14 T.A.M. 4-20 (Tenn. Ct. App. Dec. 16, 1988). The courts will decline to act in cases where there is no need for the court to act or where the refusal to act will not prevent the parties from raising the issue *at a more appropriate time.* [Emphasis added].

Martin v. Washmaster Auto Ctr., Inc., No. 01A01-9305-CV-00224 (Tenn. Ct. App., filed July 2, 1993) *no appl. perm. app.*

Whether or not a plaintiff such as Window Gallery has exhausted it remedies so as to allow it to pursue an unjust enrichment claim against a homeowner must be determined by the facts of each individual case. Window Gallery moved for summary judgment against the Marlers, but not against Davis. Window Gallery obtained Summary Judgment against the Marlers, but not against Davis. As reflected in the record before this Court, Window Gallery's suit against Davis remains pending in the Trial Court.

The only actions taken by Window Gallery to collect from Davis were to send bills to Davis, to call Davis, and to file suit against Davis. Window Gallery continues to maintain its suit against Davis and has not surrendered it as being futile in nature. In fact, Window Gallery in its brief filed with this Court argued that the Marlers in their counterclaim against Davis ". . .can recover the amount of the windows from Davis." If the Marlers can recover the amount of the windows from Davis, Window Gallery should be able to do likewise. The phrase "exhaust its remedies" requires more of Window Gallery than it has done here. Window Gallery only has begun to pursue its remedies against Davis rather than having exhausted them. There is nothing in this record before us that shows further pursuit by Window Gallery of Davis through its lawsuit would be futile.

We hold that while Window Gallery has taken some steps to attempt recovery from Davis, it has not exhausted its remedies against Davis. Window Gallery must exhaust its remedies against Davis before it can proceed against the Marlers under its theory of unjust enrichment. The Trial Court erred in granting Summary Judgment.

CONCLUSION

Accordingly, we vacate the judgment of the Trial Court granting summary judgment to Window Gallery against the Marlers, and remand this cause to the Trial Court for further proceedings consistent with this Opinion. The costs on appeal are assessed against Window Gallery.

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D. MICHAEL SWINEY, J.

CONCUR:

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HOUSTON M. GODDARD, P.J.

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HERSCHEL P. FRANKS, J.