

January 27, 1997
FOR PUBLICATION

IN THE SUPREME COURT OF TENNESSEE

AT JACKSON

APRIL WALLACE, VICKIE GWIN, (
ET AL., (
 (
 Plaintiffs-Appellants, (
 (
 (Shelby Circuit
 (
 v. (Hon. James M. Tharpe,
 (Judge
 (
 NATIONAL BANK OF COMMERCE, (No. 02S01-9509-CV-00074
 ET AL., (
 (
 Defendants-Appellees. (

FILED

January 27, 1997

Cecil Crowson, Jr.
Appellate Court Clerk

ORDER ON PETITION TO REHEAR

The petition to rehear filed by the plaintiffs-appellants insists that the Court should have remanded this case to the trial court for trial rather than dismiss the case on summary judgment.

The petitioners assert that at trial they can prove the defendants did not act in good faith and deal fairly, even though performance by each defendant bank was, as held by the Court, within the reasonable expectations of the parties to the contracts. The petitioners take exception to this Court's conclusion that the "plaintiffs do not contend that there are disputed issues of material fact" and suggest the Court was "led astray" because the case was before the Court on motions for summary judgment. The petitioners

assert that with additional discovery they can "indeed generate a Record to substantiate all their claims." Those claims, according to the petition, include claims that the banks "intentionally" increased the number of checks on which charges could be made and "doubled NFS charges."

The petitioners did not appeal from the first decision of the Court of Appeals dismissing five alleged claims because they did not state a cause of action. Both the Court of Appeals and this Court put the best face possible on the remaining claim made in the original complaint¹ and found that it stated a cause of action for breach of good faith in the performance of a contract. In a joint motion for summary judgment on this surviving claim, the defendants asserted that when a customer, pursuant to the agreement with the bank, is notified of an increase in the service charges before it becomes effective, there is no genuine issue of material fact as to whether the increased fees are within the customer's reasonable expectations. The defendants' statement of the issue presented as "the amount" of the NSF charge is confirmed by the petitioners' response to the motion for summary judgment. The petitioners specifically state that the cause of action is "for the bank's breach of its implied covenant of good faith in setting the amount of its NSF charge."

¹In determining whether a complaint fails to state a claim upon which relief can be granted, "courts should construe the complaint liberally in favor of the plaintiff." Cook v. Spinnaker's of Rivergate, Inc., 878 S.W.2d 934, 938 (Tenn. 1994).

The motion for summary judgment filed by the banks is based on affidavits showing that the petitioners knew the amount of the existing service charges when they opened their accounts and that the petitioners received prior notice of any change in those charges. Having established facts showing that the defendants acted in conformance with the terms of the contracts, the burden shifted to the petitioners to either counter the evidence presented or demonstrate that facts other than the amounts of the service charges support their claim that the defendants breached their duty of good faith in the performance of the contracts. The petitioners mistakenly assert that the allegations in their complaint must be taken as true in support of their position on motion for summary judgment. This is not an accurate statement of the law.

Once it is shown by the moving party that there is no genuine issue of material fact, the nonmoving party must then demonstrate, by affidavits or discovery materials, that there is a genuine, material fact dispute to warrant a trial. In this regard, Rule 56.05 provides that the nonmoving party cannot simply rely upon his pleadings but must set forth specific facts showing that there is a genuine issue of material fact for trial. "If he does not so respond, summary judgment . . . shall be entered against him."

Byrd v. Hall, 847 S.W.2d 208, 211 (Tenn. 1993); see also Tenn. R. Civ. P. 56.05. The petitioners presented no evidence in support of the claim now made that the banks

intentionally increased the number of checks on which charges could be made or doubled NSF charges.

The petitioners' assertion throughout this case has been, as stated in their brief filed in the trial court, that the banks breached their "implied covenant of good faith in setting the amount of its NSF charge." The petitioners essentially are now contending that they can prove the banks are guilty of "oppressive" and "unconscionable" acts for which they are entitled to recover. The substance of their petition to rehear is that they can prove some cause of action other than breach of contract. No claim other than breach of contract is before the Court.

The Court reaffirms the decision that the record before the Court, which is all that can be considered, does not support the only cause of action asserted, that the banks breached the contracts between the banks and their customers.

The petition to rehear is denied.

The costs are taxed to the plaintiffs-appellants.

Reid, J.

Concur:

Birch, C.J., Drowota, and
Anderson, JJ.

White, J. - Not participating.