IN THE COURT OF APPEALS OF TENNESSEE
AT JACKSON
November 8, 2022 Session

PHARMA CONFERENCE EDUCATION, INC. v. STATE OF TENNESSEE

Appeal from the Tennessee Claims Commission for the Western Division
No. K20171856 Commissioner James A. Hamilton, III

No. W2021-00999-COA-R3-CV

This appeal arises from a breach of contract case that concerned whether the contract at issue lacked consideration due to an illusory promise. Specifically, the terms of the contract provided that the plaintiff would produce as many programs "as is feasible." The parties filed competing motions for summary judgment. The claims commission granted the State of Tennessee's motion for summary judgment finding that the contract between the parties was devoid of consideration due to an illusory promise and was therefore unenforceable. Additionally, the claims commission denied the plaintiff's motion for summary judgment as to liability and denied the plaintiff's motion for summary judgment as to damages finding that the issue was moot. The plaintiff appeals. We affirm.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Claims Commission Affirmed

CARMA DENNIS MCGEE, J., delivered the opinion of the court, in which ARNOLD B. GOLDIN and KENNY W. ARMSTRONG, JJ., joined.

William F. Burns, William E. Routt, III, and Frank L. Watson, III, Memphis, Tennessee, for the appellant, Pharma Conference Education, Inc.

T. Harold Pinkley, Jr. and Rebecca P. Tuttle, Associate General Counsel for the University of Tennessee, for the appellee, State of Tennessee.

OPINION

I. FACTS & PROCEDURAL HISTORY

Pharma Conference Education, Inc. ("Pharma") was in the business of creating and

producing scientific and Good Manufacturing Practices[1] continuing-education conferences or programs for the pharmaceutical industry. Pharma was created in 1994 by Mr. John W. Smith, who planned and produced approximately 190 educational programs as its president over the course of a 23-year period. Dr. Thomas G. Bird was Mr. Smith's business partner and joined Pharma's management team in 2014.

In March 2016, Dr. Bird approached Dr. Kennard D. Brown, who was the Executive Vice Chancellor and Chief Operations Officer of the University of Tennessee Health Science Center ("UTHSC"), to discuss promoting UTHSC through Pharma's educational programs. After a subsequent meeting, Mr. Smith drafted and emailed a proposed Memorandum of Understanding to Dr. Brown. Dr. Brown then forwarded the Memorandum of Understanding to Mr. Anthony A. Ferrara, who was the Vice Chancellor and Chief Financial Officer for UTHSC. In communication with Mr. Smith, Mr. Ferrara revised the Memorandum of Understanding, which was ultimately reviewed and approved by UTHSC.[2] In July 2016, Pharma and UTHSC entered into the purported contract at issue, which stated in pertinent part as follows:

> 1. PHARMA will produce as many scientific and/or pharmaceutical programs for consumption by the pharmaceutical and Health Industry as is feasible. PHARMA's president will report to the Chief Operating Officer of UTHSC, any matter which might be of interest to UTHSC relative to the FDA or the programs produced by PHARMA.
>   a. UTHSC agrees to be the Sponsor of all programs. PHARMA's website and printed material will indicate this sponsorship and UTHSC and/or College of Pharmacy will issue continuing education certification for attendees of programs or conferences.
>   b. PHARMA agrees to compensate UTHSC for continuing education certification in the amount equivalent to 1% of PHARMA's revenue for each program in Year 1 and 2% of PHARMA's revenue for each program in Year 2. Following years to be negotiated as defined in paragraph 6.
> 2. PHARMA will have sole responsibility for determining location, marketing, production, registration, contracting, collecting, and printing of brochures and other publications, etc. PHARMA will work closely

[1] "Good Manufacturing Practices" is a term of art used in the pharmaceutical industry and is defined in the Code of Federal Regulations. *See* 21 C.F.R. § 26.1(c).

[2] The process of review and approval was completed by (1) Ms. Shenika Thomas, Assistant Vice Chancellor of Business and Financial Affairs in the Office of the Chancellor and Executive Vice Chancellor; (2) Ms. Sandra Pulliam, the Contracts Director for UTHSC; (3) the Contracts Office for the University of Tennessee; and (4) Mr. Mark M. Petzinger, an attorney in UTHSC's general counsel's office. Additionally, there was a contract certification process, which required Ms. Thomas and the Contracts Administrator, Mr. Trenton Pitts, who was an attorney, to conduct a review.

with the UTHSC Chief Operating Officer to ensure quality programs are produced.

3. UTHSC will cause an advertisement of the relationship with PHARMA to be placed on its website in a prominent location for the duration of the relationship with a link to . . . PHARMA's website.
   a. Also, UTHSC agrees PHARMA will place reference to the relationship on its website in a prominent position.
4. PHARMA agrees to organize program committees who will work with UTHSC and PHARMA in developing as many programs as feasible.
5. UTHSC agrees PHARMA will incur significant financial risk in the endeavor. Accordingly, PHARMA will pay all costs incurred in the development of conferences and will be entitled to all revenue received by PHARMA less the accreditation fee noted in paragraph 1. b.
   a. PHARMA will hold harmless UTHSC on any conference financial matters.
6. At two (2) years following the execution of this agreement, PHARMA will review financial results for the first two years of this relationship with the Chief Operating Officer of UTHSC and an agreement for revenue sharing will be negotiated.
7. This understanding will be in force for a period of five (5) years with one option to renew for an additional five (5) years unless either party desires to terminate the Agreement.
   a. In such case, the party desiring to terminate the Agreement may do so upon giving the non-terminating party one (1) years notice in writing sent by certified mail. Once notice is given, both parties agree no additional programs will be established under this contract.
8. The Period of Performance under this Contract is from July 1, 2016 through June 30, 2021.
9. The PHARMA's maximum liability under this Contract is $200,000.
10. The following changes are agreed to with respect to the University's Receivable Terms and Conditions:
    a. Delete Paragraph 3[; and]
    b. Modify Paragraph 10 to read "The University or Pharma shall have no liability except as specifically provided in this Contract.["]

The contract also included a page with the "University's Receivable Terms and Conditions," as indicated above in section 10 of the contract. In January 2017, the parties reached an impasse regarding their responsibilities under the contract, and UTHSC terminated the contract. Specifically, Dr. Brown sent a text message to Dr. Bird stating, "I'm over it [Dr. Bird], I'm sending the termination notice to the contract. Thanks for everything."

As a result, Pharma initiated this matter by asserting a claim with the Division of

Claims Administration in May 2017. Unable to act on the claim within statutorily allotted 90 days, the Division of Claims Administration transferred Pharma's claim to the claims commission.[3] In September 2017, Pharma filed its complaint for damages with the claims commission requesting that judgment be entered in Pharma's favor against UTHSC for breach of contract.[4] The State responded by filing a motion to dismiss for failure to state a claim for breach of contract pursuant to Tennessee Rule of Civil Procedure 12.02(6). The State contended that (1) the alleged contract between UTHSC and Pharma was unenforceable due to the absence of a meeting of the minds between the parties, (2) the alleged contract was merely an "agreement to agree," and (3) Pharma's promise under the alleged contract to produce as many programs "as is feasible" was an illusory promise that did not provide consideration for a valid contract. In March 2018, the claims commission entered an order denying the motion to dismiss. It found that the State's arguments did not serve to form a basis for a motion to dismiss for failure to state a claim. It explained that the State's motion challenged the strength of Pharma's proof rather than the legal sufficiency of the complaint. Afterward, the State filed its answer to the complaint. Pharma was then permitted to file an amended complaint, to which the State filed an answer.[5]

In April 2021, the State filed a motion for summary judgment. In its supporting memorandum, the State argued that the contract between Pharma and UTHSC was unenforceable due to the absence of a meeting of the minds and that the contract was merely an unenforceable "agreement to agree." The State also argued that Pharma's promise under the terms of the contract to produce as many programs "as is feasible" was an illusory promise which was not consideration for a valid enforceable contract. Pharma filed a motion for summary judgment as to liability and a motion for summary judgment as to damages. In August 2021, the claims commission entered an order granting the State's motion for summary judgment. It specifically found that the contract was "a clear example of a[n] 'illusory' promise." It explained that "Pharma promises nothing and also retains the option of not performing since Pharma possesses sole discretion as to how many scientific and/or pharmaceutical programs will be produced." As such, it found that the contract between Pharma and UTHSC was unenforceable for lack of consideration and that the State had affirmatively negated an essential element of a breach of contract claim. The claims commission also denied Pharma's motion for summary judgment as to liability and found that Pharma's motion for summary judgment as to damages was rendered moot. Thereafter, Pharma timely filed an appeal.

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[3] *See* Tenn. Code Ann. § 9-8-402(c) ("The division of claims and risk management shall investigate every claim and shall make every effort to honor or deny each claim within ninety (90) days of receipt of the notice.").

[4] The claim was erroneously transferred to the Eastern Division. After this error was pointed out in the State's motion to transfer, the claim was transferred to the Western Division without objection from Pharma.

[5] The State subsequently filed an amended answer to the complaint and an amended answer to the amended complaint.

II. ISSUES PRESENTED

Pharma presents the following issues for review on appeal, which we have slightly restated:

1. Whether the claims commission erred by granting the State's motion for summary judgment as to liability based on its finding that there was no consideration for the contract at issue, thereby rendering it unenforceable;
2. Whether the claims commission erred by denying Pharma's motion for summary judgment as to liability where Pharma established that the contract at issue was supported by consideration under Tennessee law and further established the existence of an enforceable contract and breach thereof; and
3. Whether the claims commission erred by finding Pharma's motion for summary judgment as to damages moot.

For the following reasons, we affirm the decision of the claims commission.

III. STANDARD OF REVIEW

This Court reviews a trial court's decision on a summary judgment motion de novo with no presumption of correctness. *Snake Steel, Inc. v. Holladay Constr. Grp., LLC*, 625 S.W.3d 830, 834 (Tenn. 2021); *Lemon v. Williamson Cnty. Schs.*, 618 S.W.3d 1, 12 (Tenn. 2021). Summary judgment is appropriate where "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." Tenn. R. Civ. P. 56.04. This standard requires "a fresh determination of whether the requirements of Rule 56 of the Tennessee Rules of Civil Procedure have been satisfied." *Lemon*, 618 S.W.3d at 12 (quoting *Rye v. Women's Care Ctr. of Memphis, MPLLC*, 477 S.W.3d 235, 250 (Tenn. 2015)).

Whether a valid and enforceable contract has been formed between the parties is a question of law. *German v. Ford*, 300 S.W.3d 692, 701 (Tenn. Ct. App. 2009) (citing *Murray v. Tenn. Farmers Assurance Co.*, No M2008-00115-COA-R3-CV, 2008 WL 3452410, at *2 (Tenn. Ct. App. Aug. 12, 2008)). Likewise, "[t]he interpretation of a contract and the ascertainment of the parties' intentions relating to the contract are also questions of law." *Id.* at 701-02 (citing *Guiliano v. Cleo, Inc.*, 995 S.W.2d 88, 95 (Tenn. 1999); *Doe v. HCA Health Servs. of Tenn., Inc.*, 46 S.W.3d 191, 196 (Tenn. 2001)). Accordingly, "the trial court's decisions relating to contract formation and its interpretation of the contract are not afforded a presumption of correctness. *Id.* at 702; *see Angus v. W. Heritage Ins. Co.*, 48 S.W.3d 728, 730 (Tenn. Ct. App. 2000).

IV. DISCUSSION

Pharma argues that the claims commission erred in finding that the contract was illusory and not supported by sufficient consideration. "A party attempting to prove the existence of a contract 'is required to show that the agreement on which he relies was supported by adequate consideration[.]'" *Rode Oil Co. v. Lamar Advert. Co.*, No. W2007-02017-COA-R3-CV, 2008 WL 4367300, at *10 (Tenn. Ct. App. Sept. 18, 2008) (quoting *Calabro v. Calabro*, 15 S.W.3d 873, 876 (Tenn. Ct. App. 1999)). As such, consideration is a "necessary element to the formation of a legal contract, and in general a contract that is unsupported by consideration is unenforceable." *Regions Bank v. Bric Constructors*, LLC, 380 S.W.3d 740, 761 (Tenn. Ct. App. 2011) (citing *Campbell v. Matlock*, 749 S.W.2d 748, 751-52 (Tenn. Ct. App. 1987)). Stated differently, it "is a necessary ingredient for every contract." *Estate of Brown*, 402 S.W.3d 193, 200 (Tenn. 2013) (citing *Bratton v. Bratton*, 136 S.W.3d 595, 600 (Tenn. 2004)). "The absence of consideration 'renders the contract, undertaking, or promise void and unenforceable as between the parties.'" *Rode Oil Co.*, 2008 WL 4367300, at *10 (citation omitted).

Pursuant to Tennessee Code Annotated section 47-50-103, however, there is "a rebuttable presumption that '[a]ll contracts in writing signed by the party to be bound, or the party's authorized agent and attorney, are prima facie evidence of a consideration.'" *Cumberland Props., LLC v. Ravenwood Club, Inc.*, No. M2010-01814-COA-R3-CV, 2011 WL 1303375, at *10 (Tenn. Ct. App. Apr. 5, 2011) (quoting Tenn. Code Ann. § 47-50-103). "Thus, the party claiming a lack of consideration for a validly executed contract has the burden of overcoming this presumption." *Estate of Brown*, 402 S.W.3d at 200 (citing *Douglas v. Gen. Motors Acceptance Corp.*, 326 S.W.2d 846, 850 (Tenn. 1959)). The contract at issue was signed by the parties. Therefore, there is prima facie evidence of consideration. Tenn. Code Ann. § 47-50-103. The question, then, is whether the State put forth any evidence to rebut the presumption of proper consideration.

In support of its motion for summary judgment, the State argued in part that Pharma's promise under the terms of the contract to produce as many programs "as is feasible" was an illusory promise which was not consideration for a valid enforceable contract. After analyzing the contract, the claims commission found that it was devoid of consideration and was therefore unenforceable. The claims commission explained as follows:

> In this instance, the wording of the contract does not require Pharma to do anything it does not wish to do. Stated differently, Pharma makes no promise of any kind to UTHSC to perform. According to the terms of the contract, Pharma will only produce as many programs "as is feasible." It is solely within the discretion of Pharma to determine if it is feasible for a program to be produced. The contract merely sets forth what will occur in the event Pharma chooses to perform by producing a program. As the Court in *German* held, a promise is "illusory" when it fails to bind the promisor who retains

> the option of not performing.
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> The . . . contract is a clear example of a[n] "illusory" promise. Pharma promises nothing and also retains the option of not performing since Pharma possesses sole discretion as to how many scientific and/or pharmaceutical programs will be produced.

Therefore, the claims commission concluded that "[b]ecause any promise or commitment made by Pharma is illusory, the agreement between Pharma and UTHSC lacks consideration. Without consideration there is no enforceable contract." Given that the claims commission's decision is not afforded a presumption of correctness on this issue, we analyze for ourselves whether this contract lacked consideration due to an illusory promise.

An illusory promise has been described as "a promise merely in form," which does not promise anything in actuality and cannot serve as consideration. 3 Williston on Contracts § 7:7 (4th ed.). "[A]n illusory promise is not consideration for a return promise, and so cannot be the basis for finding a contract." *German*, 300 S.W.3d at 704; *see Rode Oil Co.*, 2008 WL 4367300, at *10. We have explained as follows:

> Consideration may take a number of different forms, including a return promise. *See, e.g., Estate of Hordeski v. First Federal Savings and Loan Ass'n of Russell County, Ala.*, 827 S.W.2d 302, 304 (Tenn. Ct. App. 1991) ("It may be a promise for a promise.").
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> However, "[w]ords of promise which by their terms make performance entirely optional with the 'promisor' do not constitute a promise. *Restatement (Second) of Contracts* § 77, cmt. a. This is referred to as an "illusory promise." A promise may be illusory because it "essentially promis[es] nothing at all, or allow[s] the promisor to decide whether or not to perform the promised act." *Walker v. Ryan's Family Steak Houses, Inc.*, 289 F. Supp. 2d 916, 929 (M.D. Tenn. 2003) (citations omitted), *aff'd*, 400 F.3d 370 (6th Cir. 2005), *cert. denied*, 546 U.S. 1030, 126 S.Ct. 730 (2005). Similarly, a "promise may also be illusory if it is too indefinite to be enforceable." *Id.*

Rode Oil Co., Inc., 2008 WL 4367300, at *10. Yet, we have further explained that we "generally endeavor to avoid finding that a promise was illusory and that there was thereby a failure of consideration." *Id.*; *see* 1 E. Allan Farnsworth, *Farnsworth on Contracts* § 2.13, at 136 (3d ed. 2004).

One means for avoiding a finding of an illusory promise "is for a court to rely upon the implied covenant of good faith and fair dealing and to determine whether this covenant

may impose an obligation on each party . . . ." 21 Feldman, *Tennessee Practice: Contract Law and Practice* § 5:8 (2022); *see German*, 300 S.W.3d at 404 ("Almost invariably, a requirement of good faith is implied, requiring that the obligee's dissatisfaction with the obligor's performance exist in good faith and not be simulated to escape liability."). "Every contract imposes upon the parties a duty of good faith and fair dealing in the performance and interpretation of the contract." *Rode Oil Co., Inc.*, 2008 WL 4367300, at *10 (quoting *Elliot v. Elliot*, 149 S.W.3d 77, 84-85 (Tenn. Ct. App. 2004)).

> Although this implied covenant cannot be used to create new contractual obligations or to alter the specific terms of a contract, *see, e.g.*, *Goot v. Metro. Gov't of Nashville & Davidson County*, No. M2003-02013-COA-R3-CV, 2005 WL 3031638, at *7 (Tenn. Ct. App. Nov. 9, 2005) (citations omitted), courts often imply this covenant in order to prevent a promise from being deemed illusory. *See, e.g.*, *Storek & Storek, Inc. v. Citicorp Real Estate, Inc.*, 100 Cal. App. 4th 44, 61 (Cal. Ct. App.2002).

Id. As such, we have observed that a contractual obligation "is not illusory if the party's discretion must be exercised with reasonableness or good faith." *German*, 300 S.W.3d at 704 (citation omitted); *but cf.* 21 Feldman, *supra*, § 5.8 (observing that the implied duty of good faith and fair dealing should be applied with caution as it could inappropriately swallow up the illusory promise doctrine and the consideration requirement). Nevertheless, "an illusory promise cannot support a contract, even where the parties otherwise act in good faith." 21 Feldman, *supra*, § 5.7; *see Operations Mgmt. Int'l, Inc. v. Tengasco, Inc.*, 35 F. Supp. 2d 1052, 1055 (E.D. Tenn. 1999) (discussing an example of an illusory promise from a case where the court explained that "the presence or absence of good faith in the exercise of discretion was completely irrelevant because the promise made was illusory").

At this juncture, we analyze the contract at issue. The terms of the contract provided that Pharma would "produce as many scientific and/or pharmaceutical programs for consumption by the pharmaceutical and Health Industry as is feasible." Elsewhere, it provided that Pharma agreed "to organize program committees who will work with [the parties] in developing as many programs as feasible." As the State notes in its appellate brief, the contract was silent on how the number or the nature of programs to be produced by Pharma that were "feasible" was to be determined, leaving that determination within the sole discretion of Pharma. Therefore, it asserts that the factors left to the absolute discretion of Pharma as to its determination of "feasibility" under the contract were endless.

While we "generally endeavor to avoid findings that a promise was illusory and that there was thereby a failure of consideration," we cannot in this case. *Rode Oil Co., Inc.*, 2008 WL 4367300, at *10; *see* 1 Farnsworth, *supra*, § 2.13, at 136. The contract entered into between Pharma and UTHSC was a clear example of a situation where "[a] party has a completely unrestricted power to . . . not perform the contract." 21 Feldman, *supra*, §

5.7. The evidence the State relied on was the statements made by Mr. Smith in his deposition. Mr. Smith admitted that Pharma had the absolute right and sole discretion to determine what conferences were and were not feasible. He also admitted that hypothetically Pharma could have made the determination that no conferences were feasible. He explained that the reasons a conference would not be feasible to produce would be security issues, financial matters, or a lack of market for a particular program. Whatever the reason was—whether it was not enough attendance, not enough registration fees, or the inability to acquire the right venue, location, or featured speaker—he stated that it was in Pharma's ability to decide what conferences were and were not feasible to produce. Thus, UTHSC was not promised to sponsor any conferences or programs at all based on Pharma's sole discretion to only produce what it determined was feasible.

The State cites to *Smith v. Chickamauga Cedar Co.*, 82 So. 2d 200 (Ala. 1955), as persuasive authority to support its argument that Pharma's promise to produce as many programs "as is feasible" was illusory. In *Smith*, the Alabama Supreme Court analyzed and defined the term "feasible," a term used in the lumber contract at issue in that case. *Id.* at 202. It observed that there was "no provision in the contract obligating appellee to furnish any specified number of logs, nor [was] there any criterion furnished by the contract for ascertaining the number of logs to be furnished by appellee." *Id.* Instead, there was a provision in the contract that logs would be furnished in such quantities as the appellee deemed "feasible and economical." *Id.* The Alabama Supreme Court found that "the contract clearly [left] to appellee the right, at its own option and discretion, to determine what quantity of logs, if any should be furnished for cutting into lumber by appellant." *Id.* Therefore, it concluded that the "appellee is given 'an unlimited right to determine' the extent of its performance with respect to the furnishing of logs, thereby rendering its obligation too indefinite for legal enforcement." *Id.* Likewise, the contract in this case left Pharma the right, in its sole discretion, to determine what quantity of programs, if any, should be produced. As such, Pharma had the "unlimited right to determine" the extent of its performance with respect to the producing of programs, thereby rendering its "obligation too indefinite for legal enforcement." *See* 17A Am. Jur. 2d *Contracts* § 187 (2023) ("A reservation to either party to a contract, of an unlimited right to determine the nature and extent of his or her performance, renders the obligation too indefinite for legal enforcement.").

As previously discussed, an illusory promise cannot be the basis for finding a contract because it is not consideration for a return promise. *German*, 300 S.W.3d at 704; *see Rode Oil Co.*, 2008 WL 4367300, at *10. A promise may be illusory if it essentially promises nothing at all, allows the promisor to decide whether or not to perform the promised act, or is too indefinite to be enforceable. *Rode Oil Co., Inc.*, 2008 WL 4367300, at *10 (quoting *Walker*, 289 F. Supp. 2d at 929). "Courts will not enforce a contract that is vague or indefinite or missing essential terms, and will not make a new contract for the parties. *German,* 300 S.W.3d at 706 (citing *Four Eights, LLC v. Salem*, 194 S.W.3d 484, 487 (Tenn. Ct. App. 2005); *Marshall v. Jackson & Jones Oils, Inc.*, 20 S.W.3d 678, 682

(Tenn. Ct. App. 1999)). The contract here cannot be supported by the promise to produce as many programs "as is feasible" because it was illusory. It allowed Pharma to decide whether or not to produce programs based on its own determination of feasibility and was indefinite as to the number of programs Pharma was required to provide. Most significantly, Mr. Smith admitted that Pharma was not obligated to produce anything at all if it determined it was not feasible. Consequently, the contract between the parties lacked consideration. The State therefore overcame its burden by rebutting the presumption of consideration and negated a necessary element to the formation of a valid enforceable contract.

We find that the contract in this case lacked consideration due to an illusory promise and was therefore unenforceable. Accordingly, we conclude that the claims commission properly granted the State's motion for summary judgment. Based on our conclusion, we pretermit Pharma's second and third issues as to liability and damages because the contract was unenforceable for lack of consideration.

V. CONCLUSION

For the aforementioned reasons, we affirm the decision of the claims commission. Costs of this appeal are taxed to the appellant, Pharma Conference Education, Inc., for which execution may issue if necessary.

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CARMA DENNIS MCGEE, JUDGE