IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
September 22, 2015 Session

AVENUE BANK v. GUARANTEE INSURANCE COMPANY

Appeal from the Chancery Court for Davidson County
No. 131664iv Russell T. Perkins, Chancellor

No. M2014-02061-COA-R3-CV – Filed October 6, 2015

Appellee Avenue Bank ("the Bank") filed suit against the Appellant Guarantee Insurance Company ("GIC"), alleging breach of contract with respect to a "Funds Held Agreement" entered into between the parties. Pursuant to the parties' agreement, the Bank agreed to disburse proceeds of a letter of credit to GIC. In turn, GIC agreed to hold the funds in a separate "Funds Held Account" and disburse the funds to pay unpaid premiums and certain claims that might become payable pursuant to policies of workers' compensation insurance. The agreement further provided that upon the resolution of all workers' compensation claims filed within the applicable statute of limitations period, GIC would, upon request of the Bank, return to the Bank any funds remaining in the Funds Held Account. Following the resolution of all claims filed within the limitations period, the Bank demanded the repayment of the remaining balance. GIC failed to comply with this demand. In its answer, GIC alleged that it was unable to perform in light of a Delaware court order concerning the liquidation of a third-party, Ullico Casualty Company ("Ullico"). It contended that the terms of the Delaware order barred disbursement of the funds at issue. The Bank ultimately moved for judgment on the pleadings by asserting that the undisputed facts showed that it was entitled to relief. The trial court granted the motion and concluded that the facts admitted by GIC's answer established the Bank's right to recover on its breach of contract claim. In doing so, the trial court rejected GIC's arguments that Ullico's liquidation and/or the Delaware court order had any effect on its performance. We affirm.

Tenn. R. App. P. 3 Appeal as of Right: Judgment of the Chancery Court Affirmed and Remanded

ARNOLD B. GOLDIN, J., delivered the opinion of the Court, in which FRANK G. CLEMENT, JR., P.J., M.S., and KENNY ARMSTRONG, J., joined.

Griffin S. Dunham, Nashville, Tennessee, for the appellant, Guarantee Insurance Company.

Russell B. Morgan, Edmund S. Sauer, and Connor M. Blair, Nashville, Tennessee, for the appellee, Avenue Bank.

OPINION

Background and Procedural History

The basic background facts in this case are not in dispute between the parties. The genesis of this appeal arises from the relationship that the parties formed with Sommet Group, LLC ("Sommet Group"). GIC served as a workers' compensation carrier for Sommet Group. To secure its payment of premiums and claims under policies issued by GIC, Sommet Group obtained a letter of credit from the Bank in the amount of $250,000.00. This letter of credit, which was dated November 18, 2009,[1] was issued for the benefit of GIC.

On July 7, 2010, GIC issued a "sight draft" to the Bank after Sommet Group defaulted on its obligations to GIC. In relevant part, the "sight draft" requested that the Bank disburse the full amount of the letter of credit. Later, on July 20, 2010,[2] the Bank and GIC entered into the agreement at issue in this appeal, the "Funds Held Agreement" ("the Agreement"). The Agreement recited the chronology of facts attendant to the parties' relationship and stated that it was being entered into by the parties in order to "facilitate the disbursement of sums by the Bank to [GIC] pursuant to the Letter of Credit." In pertinent part, the Agreement provided as follows:

> 1. The Bank will honor the Sight Draft by delivering to [GIC] the sum of $250,000.00 (the "Draw Amount") to be held by [GIC] and disbursed pursuant to the provisions of this Funds Held Agreement.

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[1] The complaint and amended answer identify the date of the letter of credit as November 18, 2010. However, we observe that the parties' "Funds Held Agreement" lists the date of the letter of credit as November 18, 2009. Moreover, we observe that GIC's "sight draft" was issued in July 2010. It would be illogical for the "sight draft" to demand payment for a letter of credit that had not yet issued. With this in mind, it appears that the listed November 2010 date was an inadvertent typographical error.

[2] This date also appears to be erroneously identified by the complaint, which references the date of the parties' contract as July 20, 2013. The agreement itself is dated July 20, 2010.

> 2. [GIC] agrees to deposit the Draw Amount in a funds held account (the "Funds Held Account"), subject to a separate accounting when requested by the Bank and maintained by [GIC] solely to cover unpaid premiums and payouts pursuant to workers compensation claims relating to the Insurance Policies. [GIC] may immediately disburse the funds in the Funds Held Account to repay [GIC] for outstanding amounts in arrearage (including, without limitation, unpaid premiums and deductable amounts) relating to the Insurance Policies, which amount to $48,848.05 as of the date of this Agreement. [GIC] represents that it has canceled the Insurance Policies effective August 10, 2010 (GPEO0238000001-109; UPEO0469000001-109; UPEO0470000001-109 — Employer #3 & #4), July 21, 2010 (GPEO0239000001-109), July 11, 2010 (UPEO0470000001-109 — Employer #1) (the "Cancellation Date"). [GIC] may disburse the funds in the Funds Held Account from time to time to repay [GIC] for amounts on current or future claims properly asserted under the Insurance Policies that are filed against [GIC] within the applicable statute of limitations period. After all claims filed within the applicable statute of limitations period, or at a later date if permitted by a court of competent jurisdiction, have been finally resolved (including final resolutions of any appeals), [GIC] will promptly notify the Bank of such occurrence and, if requested by the Bank, cause any funds remaining in the Funds Held Account to [be] disbursed to the Bank.

After GIC paid all insurance claims filed within the applicable statute of limitations period, a balance of $137,982.52 remained in the Funds Held Account. Pursuant to the parties' agreement, on October 22, 2013, the Bank demanded disbursement of the remaining balance. GIC failed to disburse the remaining sum to the Bank.

On November 27, 2013, the Bank filed suit in the Davidson County Chancery Court seeking to recover the remaining balance owed by GIC pursuant to the parties' agreement. The complaint stated that all conditions precedent requiring GIC's payment had been satisfied and that GIC had refused to comply with its obligation to remit the remaining balance. In addition to seeking recovery of the remaining $137,982.52 balance, the Bank prayed for a recovery of pre-judgment interest, post-judgment interest, and attorneys' fees. Attached to the Bank's complaint was a copy of the parties' agreement.

On January 9, 2014, GIC filed a motion requesting that the Bank's complaint be dismissed, or in the alternative, that the proceedings be stayed. In support of its request for relief, GIC contended, *inter alia*, that a third-party, Ullico, was needed for adjudication of the Bank's claims. According to GIC's motion, both Ullico and GIC were workers' compensation carriers for Sommet Group, and GIC asserted that the Bank "should have been

aware" that the collateral provided through its letter of credit would be in favor of both GIC and Ullico. GIC claimed that Ullico had asserted an interest in over $134,000.00 of the remaining funds and stressed that Ullico was the subject of liquidation proceedings in the Delaware Chancery Court. In further observing that an order of the Delaware court enjoined the transfer of Ullico assets, GIC stated that it was legally prohibited from transferring the remaining balance to the Bank. On February 24, 2014, the trial court entered an order denying GIC's motion to dismiss or stay. In explaining its ruling, the trial court noted that Ullico was not a party to the Agreement and observed that nothing in the record indicated that Ullico was a necessary or indispensable party.

On March 6, 2014, GIC filed an answer to the Bank's complaint. Although GIC acknowledged that it had entered into an agreement with the Bank, GIC argued that the agreement attached to the Bank's complaint lacked mutual assent. In particular, GIC asserted that it had no record that the Agreement was ever executed by both parties. Later, counsel for GIC discovered that the Agreement had been executed by GIC, and GIC moved to file an amended answer. That motion was granted by the trial court, and GIC filed an amended answer wherein it admitted that the parties' agreement was "valid and enforceable." Notwithstanding its concession that the Agreement was enforceable by the Bank, GIC's amended answer asserted a number of affirmative defenses. These defenses were specifically predicated upon the notion that Ullico's liquidation in Delaware barred GIC's performance. As presented in GIC's amended answer, the raised affirmative defenses were as follows:

> 1. [The Bank] cannot prevail because all conditions precedent have not been satisfied.
> 2. [The Bank] cannot prevail because it knew that, at all times, third-party [Ullico] had a right to assert an interest in amounts contained in the Funds Held Account in question.
> 3. [The Bank] cannot prevail because the real party in interest for approximately $134,363.92 of the amounts contained in the Funds Held Account is third-party [Ullico].
> 4. [The Bank] cannot prevail because the purpose of the contract was frustrated upon the liquidation of third-party [Ullico].
> 5. [The Bank] cannot prevail because the liquidation of third-party [Ullico] has made it impossible and/or impractical for GIC to perform.

On July 11, 2014, the Bank moved the trial court for judgment on the pleadings pursuant to Rule 12.03 of the Tennessee Rules of Civil Procedure. In its motion, the Bank alleged that the "undisputed facts show that there is no issue of fact as to the existence of the contract, the satisfaction of all conditions precedent requiring GIC's performance, GIC's

non-performance, and the damages to [the Bank] as a result." On July 21, 2014, GIC filed a response to the Bank's motion for judgment on the pleadings. Therein, GIC contended that "[t]aking the denied allegations in the Complaint as false and taking GIC's affirmative defenses as true, [the Bank] cannot prevail on its breach of contract claim." In addition to suggesting that the Delaware liquidation proceedings involving Ullico prohibited it from disbursing the funds at issue, GIC asserted that it had never actually agreed to disburse the funds. With respect to the latter contention, GIC emphasized that the Agreement merely provided that GIC would "cause any funds remaining in the Funds Held Account to [be] disbursed to the Bank." Such language, GIC asserted, indicated that "disbursement is not in the party's control."

On August 29, 2014, the trial court entered an order granting the Bank's motion for judgment on the pleadings. In relevant part, the trial court found as follows:

> [T]he facts established by the answer establish that there is no issue of fact as to the existence of the contract between Plaintiff and Defendant; the satisfaction of all conditions precedent requiring Defendant's performance; Defendant's non-performance; and the damages to Plaintiff as a result. Additionally, pursuant to the plain language of the contract, Ullico, a third party, has no interest in the contract, and accordingly, Ullico's liquidation has no effect on Defendant's performance.

A consistent order of judgment was later entered on September 12, 2014. Under the judgment entered by the trial court, the Bank was awarded damages in the amount of $137,982.52, plus pre- and post-judgment interest.[3] GIC then filed this timely appeal.

Discussion

In this appeal, we are tasked with reviewing whether the trial court erred in granting the Bank's motion for judgment on the pleadings on its breach of contract claim. A motion for judgment on the pleadings is provided for by Rule 12.03 of the Tennessee Rules of Civil Procedure. In pertinent part, that Rule provides that "[a]fter the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the

[3] Although the prayer from the Bank's complaint also requested an award of attorneys' fees, we observe that the trial court's judgment did not rule on this issue. Although technically this leaves one of the Bank's claims unresolved, we note that we are not without jurisdiction to hear this appeal. The trial court's judgment was certified pursuant to Rule 54.02 of the Tennessee Rules of Civil Procedure. As the Tennessee Supreme Court previously explained, certification under Rule 54.02 "creates a final judgment appealable as of right." *In re Estate of Henderson*, 121 S.W.3d 643, 646 (Tenn. 2003) (citation omitted).

pleadings." Tenn. R. Civ. P. 12.03. In cases like the one at bar, where the plaintiff is the party moving for judgment on the pleadings, "the motion argues that the answer fails to controvert any material fact in the complaint and states no legally sufficient defense." *Laundries, Inc. v. Coinmach Corp.*, No. M2011-01336-COA-R3-CV, 2012 WL 982968, at *8 (Tenn. Ct. App. Mar. 20, 2012) (citation omitted). In reviewing the trial court's ruling on a motion for judgment on the pleadings, "we must accept as true 'all well-pleaded facts and all reasonable inferences drawn therefrom' alleged by the party opposing the motion." *Cherokee Country Club, Inc. v. City of Knoxville*, 152 S.W.3d 466, 470 (Tenn. 2004) (quoting *McClenahan v. Cooley*, 806 S.W.2d 767, 769 (Tenn. 1991)). Importantly, conclusions of law are not admitted. *Id.* (citation omitted). A motion for judgment on the pleadings should not be granted "unless the moving party is clearly entitled to judgment." *McClenahan v. Cooley*, 806 S.W.2d 767, 769 (Tenn. 1991) (citation omitted). Because the trial court's determination on a Rule 12.03 motion is a question of law, we review the trial court's actions *de novo*, with no presumption of correctness. *See Bowden v. Ward*, 27 S.W.3d 913, 916 (Tenn. 2000).

In this case, the Bank sought recovery for an alleged breach of contract. As we have previously stated, "[t]he essential elements of any breach of contract claim include (1) the existence of an enforceable contract, (2) nonperformance amounting to a breach of the contract, and (3) damages caused by the breach of the contract." *ARC LifeMed, Inc. v. AMC-Tenn., Inc.*, 183 S.W.3d 1, 26 (Tenn. Ct. App. 2005) (citation omitted). In addressing the propriety of the trial court's action in granting judgment to the Bank, we must determine whether the parties' pleadings clearly establish the existence of each of these three elements. With respect to the first element, there is no dispute that an enforceable contract exists. In its amended answer, GIC conceded that the parties entered into the Agreement and expressly admitted that it was "valid and enforceable." With regard to the second and third elements, we note that they depend upon the validity, or lack thereof, of GIC's affirmative defenses. Indeed, it is clear from the pleadings that GIC has not performed under the Agreement. Over $137,000.00 remained in the Funds Held Account following GIC's payment of all insurance claims within the applicable limitations period, and notwithstanding the Bank's demand for disbursement pursuant to the Agreement, GIC did not comply by remitting the remaining balance. As these facts are not in dispute, the critical question is whether GIC's failure to disburse the remaining funds to the Bank is justified in light of one of its raised defenses.

In its appellate brief, GIC raises two primary arguments in support of its failure to disburse the remaining balance to the Bank. First, GIC asserts that it never agreed to disburse the funds. Positing this notion as a matter of absolute defense, GIC emphasizes that the Agreement states that GIC will "cause any funds remaining in the Funds Held Account to [be] disbursed to the Bank." GIC argues that there is a significant distinction between a party "disbursing" funds and a party "causing" the disbursement of funds. In light of the Delaware

liquidation order barring the transfer of Ullico assets, GIC asserts that it cannot legally "cause" the funds to be disbursed and, as such, contends that it has not failed to perform under the Agreement. Respectfully, this Court disagrees that GIC's obligations are somehow altered by the mere fact that the Agreement provides that GIC shall "cause" the remaining balance to be disbursed. There is no fundamental difference between what is required by such language and what would have been required of GIC if the Agreement had simply stated that GIC "shall disburse" the remaining funds. The plain meaning of the Agreement obligates GIC, under the conditions specified therein, to remit the remaining balance in the Funds Held Account to the Bank. Accordingly, we must reject GIC's argument that it never agreed to disburse the funds.

GIC's second primary argument is that it is prohibited by the Delaware liquidation order from disbursing the funds in question. This argument, which generally serves as the contextual basis for each of GIC's affirmative defenses, is predicated upon the notion that the Bank knew that Ullico had a right to assert an interest in the amounts contained in the Funds Held Account. GIC contends that Ullico is the real party in interest for most of the funds in question and further asserts that Ullico's liquidation has frustrated the purpose of the Agreement and made it impossible/impracticable for GIC to perform.

We fail to see how the alleged facts supporting GIC's affirmative defenses are in any way relevant to the contractual claim at issue. Per the facts admitted in GIC's amended answer, the $250,000.00 letter of credit was issued by the Bank for the benefit of GIC. Moreover, when the parties entered into the Agreement, the only obligations were those pertaining to the relationship between the Bank and GIC. The Agreement recited that the letter of credit had been issued for the benefit of GIC, and it stated that the insurance policies at issue were those between Sommet Group and GIC. Nowhere was Ullico mentioned, nor was it contemplated that the Agreement benefit any third party. Indeed, one provision of the Agreement expressly stated as follows: "This Agreement shall be binding upon and inure solely to the benefit of the Parties hereto and their respective successors and assigns, and shall not be enforceable by or inure to the benefit of any third party." Although the amended answer asserts that the Bank cannot prevail because it knew that Ullico had a right to assert an interest in the amounts contained in the Funds Held Account, we fail to see how Ullico is in any way connected to the contractual obligations existing between the Bank and GIC. As already stated, GIC admitted that the letter of credit was issued for the benefit of GIC, a fact that is also stated in the recitals of the Agreement. The Agreement, which deals only with the relationship between the Bank and GIC, does not involve Ullico in any manner. The asserted affirmative defenses presume Ulllico's liquidation is relevant to the Bank's right to recover under the Agreement, but the Delaware proceedings have no bearing on the contractual claim at issue. As the defenses are not legally sufficient, it is clear that GIC's nonperformance under the Agreement constituted a breach that has resulted in damages.

As already established, the Agreement directed that GIC disburse the remaining balance in the Funds Held Account to the Bank upon request following the resolution of all timely-filed insurance claims. When the Bank demanded disbursement of the remaining balance upon the resolution of all claims, GIC failed to remit the remaining funds. Although GIC has asserted that Ullico's liquidation has prevented it from disbursing the remaining balance, this contention is without merit. Ullico's liquidation is simply no impediment to the Bank's right to recover against GIC pursuant to the Agreement. GIC was required to remit the remaining balance, and it breached the parties' contract when it failed to do so. We therefore affirm the trial court's decision to grant the Bank's motion for judgment on the pleadings.

In closing, we note that the Bank's brief contains a request for an award of attorneys' fees and costs pursuant to Tennessee Code Annotated section 27-1-122. That statute allows appellate courts to "award damages against parties whose appeals are frivolous or are brought solely for the purpose of delay." *Young v. Barrow*, 130 S.W.3d 59, 66 (Tenn. Ct. App. 2003). In this case, the Bank's request for recovery under section 27-1-122 was presented in the argument section of its brief, but it was not presented as an issue for our review in compliance with Tennessee Rule of Appellate Procedure 27(a)(4). As such, it is waived. *See Forbess v. Forbess*, 370 S.W.3d 347, 356 (Tenn. Ct. App. 2011) (citation omitted) (noting that "[w]e may consider an issue waived where it is argued in the brief but not designated as an issue"). Although Tennessee Code Annotated section 27-1-122 does allow appellate courts to award damages on their own motion, *see Whalum v. Marshall*, 224 S.W.3d 169, 180 (Tenn. Ct. App. 2006), we decline to do so in this case.

Conclusion

For the foregoing reasons, we affirm the trial court's decision to grant the Bank's motion for judgment on the pleadings. The costs of this appeal are assessed against the Defendant/Appellant, Guarantee Insurance Company, and its surety, for which execution may issue if necessary. This case is remanded to the trial court for the collection of costs, enforcement of the judgment, and for such further proceedings as may be necessary and are consistent with this Opinion.

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ARNOLD B. GOLDIN, JUDGE