IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs July 31, 2015

**NATHANIEL BATTS v. ANTWAN L. CODY, ET. AL.**

**Appeal from the Chancery Court for Rutherford County**
**No. 11CV1570 Hon. Robert E. Corlew, III, Chancellor**

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**No. M2015-00070-COA-R3-CV – Filed September 14, 2015**

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This appeal arises from the trial court's grant of a motion for partial summary judgment as a result of the defendant's failure to file a proper response. The defendant appeals. We reverse.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Reversed; Case Remanded**

JOHN W. MCCLARTY, J., delivered the opinion of the Court, in which CHARLES D. SUSANO, JR., C.J., and THOMAS R. FRIERSON, II, J., joined.

Lorraine Wade, Nashville, Tennessee, for the appellant, Antwan L. Cody, individually and d/b/a Elite Auto Detail.

Wm. Kennerly Burger, Murfreesboro, Tennessee, for the appellee, Nathaniel Batts.

## OPINION

## I. BACKGROUND

On October 14, 2011, Nathaniel Batts ("Plaintiff") filed a complaint in which he asserted claims for fraud and breach of contract and sought dissolution of a partnership pursuant to Tennessee Code Annotated section 61-1-601. Plaintiff alleged that he left his employment with Nelson's Auto Shop ("Nelson's") to start a business, Elite Auto Detail ("Elite"), with Antwan L. Cody ("Defendant"). Despite the fact that the agreement was never reduced to writing, he claimed that Defendant offered him part ownership with an equal division of profits and assets. He stated that Elite, which offers car wash and detailing services on the premises of a service station, opened on February 10, 2011. He asserted that Defendant disavowed the partnership after Elite proved successful.

Plaintiff filed a motion for default judgment on January 6, 2012, after Defendant failed to respond to the complaint. Defendant appeared at the hearing and was given additional time to file a response.

Thereafter, Defendant filed a response in which he denied Plaintiff's allegations. He claimed that Elite was a subsidiary of Ambrico, Inc. ("Ambrico"), which he formed with his wife. Defendant stated that he hired Plaintiff, who had been fired by his previous employer, as an independent contractor. Pursuant to the contract, Plaintiff was only entitled to a percentage of the profits as a manager of Elite. He related that he was later forced to fire Plaintiff for "lack of integrity, using profanity in front of a customer and insubordination."

On August 1, 2012, Plaintiff filed a motion for partial summary judgment, requesting summary judgment on the issue of the existence of a partnership. He requested 50 percent of the interest in Elite and 50 percent of the net profits from inception of the partnership to dissolution. In support of his claim of partnership, Plaintiff attached a statement of material facts and several affidavits, including his own affidavit in which he asserted that he negotiated with the owners of the service station to operate Elite on the premises and that he arranged for the design and acquisition of business cards, advertising flyers, and signs. Anthony Nelson, a friend of the parties, and Larry Batts, Plaintiff's brother, both attested that they were present when the parties discussed the formation of Elite. They recalled that Plaintiff left his current employment to pursue a partnership opportunity with Defendant. Mr. Batts further attested that he provided electrical work for Elite at a reduced cost because he believed his brother was Defendant's business partner. Carol Prince, owner of Personally Yours, attested that the parties purchased several advertising materials from her business. She specifically recalled that Defendant referred to Plaintiff as a business partner and that Plaintiff expended time and effort designing and ordering the signs, business cards, and flyers related to the opening of Elite.

A hearing on the motion for partial summary judgment was scheduled for October 9, 2012. Prior to the hearing, Defendant requested additional time to retain counsel. The court rescheduled the hearing for March 19, 2013, but directed Defendant to file "appropriate summary judgment responses" no later than five days before the hearing. The parties appeared on March 19, but Defendant still had not retained counsel or filed a response. The court rescheduled the hearing for March 25.

Defendant did not hire an attorney. Instead, he submitted handwritten responses to Plaintiff's statement of material facts and filed the following documents: Ambrico's annual report form; two emails from Mapco concerning the agreement between Ambrico and Mapco to operate Elite on the premises of the service station; a copy of a check from

Ambrico to Mapco; a signed W-9 form, dated February 8, 2011, in which Plaintiff was classified as an independent contractor/sole proprietor; and a letter from Rob Horton, Senior Consultant for 3H Management Consultant Group, LLC. Mr. Horton attested that Defendant hired him as a business management consultant for Ambrico. He also provided "consultant services under the same agreement" for Elite. He stated,

> [t]he business plan only listed [Defendant] as Owner of the car wash. The information provided by [Defendant] listed [Plaintiff] as a manager for the business and was reflected in the Contract with Independent Contractor as such and not as a Business Partner.

He further attested to the following facts:

> 1. All business meetings, instructions, and transactions in regard[] to [Ambrico] while [doing business as Elite were] conducted by [Defendant].
>
> 2. All payments for 3H Management services were paid by [Defendant] through [Ambrico].
>
> 3. No business decisions, conversations nor compensation as it relates to 3H Management contract in the performance of said contract with [Ambrico were] conducted with [Plaintiff].
>
> 4. At no time was [Plaintiff] presented to me as a Business Partner in [Elite] operations and management decisions.

Following a hearing, the court granted the motion for partial summary judgment by memorandum opinion, dated March 28, 2013. The court found that Plaintiff had presented facts entitling him to relief and that Defendant had failed to present proper pleadings for consideration, despite numerous opportunities and leniency from the court. The court explained,

> Plaintiff has presented affidavits from a small number of persons supporting his position, some of whom appear to lack bias, including the affidavit of Mr. Nelson and Ms. Prince, while [Plaintiff's] own affidavit and that of [his] brother certainly may be challenged. [Defendant] has presented only the affidavit of his business consultant, who presented testimony only as to what [Defendant] told him.

Defendant then filed a motion to set aside the grant of partial summary judgment pursuant to Rule 60.02 of the Tennessee Rules of Civil Procedure. Defendant amended

the motion to include an alternative request for relief pursuant to Rule 59.04 of the Tennessee Rules of Civil Procedure. In both motions, Defendant asserted that the court relied upon misrepresentations in granting partial summary judgment. Defendant alleged that Plaintiff did not leave his employment to work for Elite. He claimed that Plaintiff worked for Nelson's as an independent contractor until the owner fired Plaintiff for handing out business cards for another company. He also asserted that Plaintiff never negotiated with the service station to operate Elite on the premises. He offered an affidavit from Tony McLarty, Mapco's Vice President for Community Relations, in support of his assertion.

The trial court denied the motions to set aside. The court noted that Defendant failed to file a proper response to the motion for partial summary judgment, despite "substantial concessions" and additional time provided by the court. Defendant requested certification of the order granting partial summary judgment and the order denying his motion to set aside as final judgments. The court certified the March 28 order as a final judgment pursuant to Rule 54.02 of the Tennessee Rules of Civil Procedure. This timely appeal followed.

## II. ISSUE

We restate the issue raised on appeal as follows:

Whether the trial court erred in granting partial summary judgment.[1]

## III. STANDARD OF REVIEW

Summary judgment is appropriate where: (1) there is no genuine issue with regard to the material facts relevant to the claim or defense contained in the motion and (2) the moving party is entitled to judgment as a matter of law on the undisputed facts. Tenn. R. Civ. P. 56.04. A properly supported motion for summary judgment "must either (1) affirmatively negate an essential element of the nonmoving party's claim; or (2) show that the nonmoving party cannot prove an essential element of the claim at trial." *Hannan v. Alltel Publ'g. Co.*, 270 S.W.3d 1, 9 (Tenn. 2008), superseded by statute, 2011 Tenn. Pub. Acts ch. 498 §§ 1, 3 (codified at Tenn. Code Ann. § 20-16-101).[2] "The

[1] The order denying relief pursuant to Rules 59.04 or 60.02 of the Tennessee Rules of Civil Procedure is not before this court. The trial court only certified the order granting partial summary judgment as a final judgment for purposes of this appeal.

[2] The Tennessee General Assembly legislatively reversed the Tennessee Supreme Court's holding in *Hannan*. See Tenn. Code Ann. § 20-16-101. The statute is applicable to cases filed on or after July 1,

burden-shifting analysis differs [when] the party bearing the burden at trial is the moving party. For example, a plaintiff who files a motion for partial summary judgment on an element of his or her claim shifts the burden by alleging undisputed facts that show the existence of that element and entitle the plaintiff to summary judgment as a matter of law." *Id.* at 9 n. 6. When the moving party has made a properly supported motion, the "burden of production then shifts to the nonmoving party to show that a genuine issue of material fact exists." *Id.* at 5; *see Robinson v. Omer*, 952 S.W.2d 423, 426 (Tenn. 1997); *Byrd v. Hall*, 847 S.W.2d 208, 215 (Tenn. 1993). The nonmoving party may not simply rest upon the pleadings but must offer proof by affidavits or other discovery materials to show that there is a genuine issue for trial. Tenn. R. Civ. P. 56.06. If the nonmoving party "does not so respond, summary judgment, if appropriate, shall be entered." Tenn. R. Civ. P. 56.06.

On appeal, this court reviews a trial court's grant of summary judgment de novo with no presumption of correctness. *See City of Tullahoma v. Bedford Cnty.*, 938 S.W.2d 408, 412 (Tenn. 1997). In reviewing the trial court's decision, we must view all of the evidence in the light most favorable to the nonmoving party and resolve all factual inferences in the nonmoving party's favor. *Luther v. Compton*, 5 S.W.3d 635, 639 (Tenn. 1999); *Muhlheim v. Knox. Cnty. Bd. of Educ.*, 2 S.W.3d 927, 929 (Tenn. 1999). If the undisputed facts support only one conclusion, then the court's summary judgment will be upheld because the moving party was entitled to judgment as a matter of law. *See White v. Lawrence*, 975 S.W.2d 525, 529 (Tenn. 1998); *McCall v. Wilder*, 913 S.W.2d 150, 153 (Tenn. 1995).

## IV. DISCUSSION

Defendant argues that the trial court erred in granting partial summary judgment when he presented proof disputing the existence of a partnership. He claims that the court erroneously discounted his affidavit, while approving the veracity of Plaintiff's affidavits. Plaintiff responds that the court did not err when Defendant never provided a proper response to the motion for summary judgment and never specifically refuted the statement of material facts.

"[W]hether a partnership exists under conflicting evidence is [a question] of fact." *Messer Grieshiem Indus., Inc. v. Cryotech of Kingsport, Inc.*, 45 S.W.3d 588, 605 (Tenn. Ct. App. 2001) (quoting *Wyatt v. Brown*, 281 S.W.2d 64, 68 (Tenn. Ct. App. 1955)). Tennessee Code Annotated section 61-1-101 defines a partnership as "an association of two (2) or more persons to carry on as co-owners of a business or other undertaking for

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2011, where the moving party who does *not* bear the burden of proof at trial files the motion for summary judgment. Thus, in this appeal, we will continue to apply the summary judgment standard set forth in *Hannan* because Plaintiff filed the motion for summary judgment.

profit[.]" "A partnership can only be created pursuant to a contract of partnership, though such an agreement may be either express or implied." *Cryotech*, 45 S.W.3d at 605 (citing *Bass v. Bass*, 814 S.W.2d 38, 41 (Tenn. 1991)). In implied partnership cases, the party alleging the existence of the partnership "carries the burden of proof of that fact by clear and convincing evidence." *See Montgomery v. Montgomery*, 181 S.W.3d 720, 726 (Tenn. Ct. App. 2005); *Story v. Lanier*, 166 S.W.3d 167, 175 (Tenn. Ct. App. 2004).

We acknowledge that Defendant's response to Plaintiff's statement of material facts left much to be desired. We believe that the shortcoming in his response was due, in part, to his status as a pro se litigant. This court "must not excuse pro se litigants from complying with the same substantive and procedural rules that represented parties are expected to observe." *Young v. Barrow*, 130 S.W.3d 59, 63 (Tenn. Ct. App. 2003) (citing *Edmundson v. Pratt*, 945 S.W.2d 754, 755 (Tenn. Ct. App. 1996); *Kaylor v. Bradley*, 912 S.W.2d 728, 733 n. 4 (Tenn. Ct. App. 1995)). However, "[t]he courts give pro se litigants who are untrained in the law a certain amount of leeway in drafting their pleadings and briefs." *Id.* Accordingly, we conclude that his response was not fatal to his defense of the motion for partial summary judgment. Indeed, he responded to each fact in a way that demonstrated that the fact was disputed. *See* Tenn. R. Civ. P. 56.03 ("[A party opposing the motion] must serve and file a response to each fact set forth by the movant either (i) agreeing that the fact is undisputed, (ii) agreeing that the fact is undispusted for purposes of ruling on the motion for summary judgment only, or (iii) demonstrating that the fact is disputed.").

Under *Hannan*, to obtain summary judgment, a plaintiff must have alleged undisputed facts to prove the existence of the essential element of the claim at issue. *Hannan*, 270 S.W.3d at 9 n. 6. Here, Plaintiff's motion was properly supported by affidavits from several people who alleged that Defendant referred to Plaintiff as a partner. Faced with a properly supported motion, Defendant was then tasked with offering proof to show that a genuine issue of material fact existed pursuant to Rule 56.06 of the Tennessee Rules of Civil Procedure, which provides, in pertinent part, as follows:

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but his or her response, *by affidavits or as otherwise provided in this rule*, must set forth specific facts showing that there is a genuine issue for trial.

(Emphasis added). Defendant responded to the supported motion with business documents, including a W-9 form dated two days prior to the opening of the business, and an affidavit. The W-9 form reflected that Plaintiff classified himself as an independent contractor/sole proprietor. The affidavit provided that Defendant never

referred to Plaintiff as a partner and that Plaintiff was listed as an independent contractor in documents pertaining to the establishment of Elite. Viewing the evidence in the light most favorable to Defendant, as we are constrained to do, we hold that Defendant offered proof to establish that a question remained as to whether a partnership existed. With these considerations in mind, we conclude that the trial court erred in granting the motion for partial summary judgment at this point in the proceedings. In so concluding, we express no opinion as to whether a partnership actually existed.

## V. CONCLUSION

The judgment of the trial court is reversed. We remand this case to the trial court for further proceedings. Costs of the appeal are taxed to the appellee, Nathaniel Batts.

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JOHN W. McCLARTY, JUDGE