

IN THE COURT OF APPEALS OF TENNESSEE
AT JACKSON
November 18, 2003 Session

**INTERNATIONAL MERCHANT SERVICES, INC. v. ATM CENTRAL,
L.L.C., ET AL.**

**A Direct Appeal from the Chancery Court for Shelby County
No. CH-01-1611-3 The Honorable D. J. Alissandratos, Chancellor**

No. W2003-00849-COA-R3-CV - Filed January 27, 2004

Appellant appeals the order of the trial court dismissing the appeal apparently pursuant to Tenn. R. Civ. P. 12.02(6) for failure to state a claim upon which relief can be granted. The record reflects that, although the trial court considered extraneous evidence in ordering the dismissal, the court refused to treat the matter as a Tenn. R. Civ. P. 56 motion for summary judgment and to allow additional time for disposal of such a motion. We reverse and remand.

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

W. FRANK CRAWFORD, P.J., W.S., delivered the opinion of the court, in which ALAN E. HIGHERS, J. and DAVID R. FARMER, J., joined.

John B. Philip, Memphis, For Appellant, International Merchant Services, Inc.

Eugene J. Podesta, Jr., Memphis, For Appellee, ATM Central, L.L.C.

OPINION

On August 3, 2001, International Merchant Services, Inc. ("IMS" or "Plaintiff") filed a "Complaint for Injunctive Relief and for Damages" against Defendant, ATM Central, L.L.C. ("Central") and on October 26, 2001, amended the Complaint to add Defendant, Dimension III Investments, L.L.C., d/b/a Express Lane Mart 1-5 ("Dimension"). The factual allegations of the Complaint, as amended, are summarized as follows:

IMS is a Texas company. Dimension is a Tennessee limited liability company. From July 17, 1997 to October 2, 2000, IMS entered into five separate contracts with Dimension. Each of these contracts, which were attached as exhibits to the Complaint, had an initial term of five (5) years. Four of the contracts pertain to retail locations owned and operated by Dimension in Tennessee; the

fifth contract pertains to a location in Mississippi. All five contracts are for the processing of automatic teller machine (“ATM”) transactions at each convenience store location owned and operated by Dimension. The contracts provide that IMS will install ATM machines at each of the five convenience store locations. In addition, IMS is to install computer software at each location to enable the ATM transactions to be processed. IMS is also responsible for the ongoing maintenance and repair of the ATMs.¹

¹ Each of the contracts executed by IMS to render services in Tennessee provides:

IMS will contract with a bank or banks (“Settlement Bank”) and processor to settle funds accessed through the Product. IMS and the Settlement Bank will facilitate transfer of funds received from the Networks as a result of Merchant transaction activity....

This provision was included in an effort to comply with T.C.A. §45-2-619 (Supp. 2003), which provides:

45-2-619. Definitions—Electronic cash dispensing devices.—(a) As used in this section:

(1)(A) “Depository institution” means:

- (i) An insured bank as defined in § 3 of the Federal Deposit Insurance Act (12 U.S.C. § 1813);
- (ii) A mutual savings bank as defined in § 3 of the Federal Deposit Insurance Act (12 U.S.C. § 1813);
- (iii) An insured credit union as defined in § 101 of the Federal Credit Union Act (12 U.S.C. § 1752);
- (iv) A member as defined in § 2 of the Federal Home Loan Bank Act (12 U.S.C. § 1422); a savings association as defined in § 3 of the Federal Deposit Insurance Act (12 U.S.C. § 1813) which is an insured depository institution as defined in such act; or
- (v) An association or entity which is wholly owned by or which consists only of institutions referred to in subdivisions (a)(1)(A)(i)-(iv); and

(B) Which:

- (i) Is domiciled in Tennessee;
- (ii) Has a branch lawfully doing business in Tennessee pursuant to the provisions of this part;
- (iii) Is a federally chartered institution described in (a)(1)(A)(i)-(v); or
- (iv) Is a state chartered institution described in (a)(1)(A)(i)-(v), provided the home state of such institution does not prevent or limit a Tennessee chartered institution’s ability to own or operate similar devices in such home state. If the home state has any such restrictions, then out-of-state institutions from such home state may own or operate to the same extent and under the same terms and conditions that would apply to a Tennessee institution in the home state; and

(continued...)

Central is a competitor of IMS. On or about May 24, 2001, Dimension's manager informed a representative of IMS that Dimension was no longer doing business with IMS and was signed up with Central. At the time of this change of service provider, none of the five contracts between Dimension and IMS had expired.² In addition, Dimension did not provide the 180 days notice required under each contract prior to termination. The Amended Complaint specifically states:

PARTIES

1. Plaintiff is a corporation organized under the laws of the State of Texas with principal offices in Euless, Texas, and qualified to do business in the State of Tennessee.

* * *

FACTS

* * *

2. Plaintiff has been doing business in the State of Tennessee and throughout the United States....

* * *

CAUSE OF ACTION AS TO CENTRAL

1. Central is in the ATM business and a competitor of Plaintiff. Central provides similar services. Central has been intentionally, deliberately, willfully persuading, misrepresenting, inducing or using

¹(...continued)

* * *

(b) Only a depository institution, or an affiliate thereof, may own, establish, alone or in combination with other persons, operate one (1) or more electronic cash dispensing devices located or to be located in this state....

² Express Lane #1 contract was signed and went into effect on July 17, 1997; at the time of the Amended Complaint, there were 14 months remaining on the five-year term. Express Lane #2 contract was signed and went into effect on September 10, 1997; at the time of the Amended Complaint, there were 16 months remaining on the five-year term. Express Lane #4 contract was signed and went into effect on August 1, 1999; at the time of the Amended Complaint, there were 40 months remaining on the five-year term. Express Lane #5 contract was signed and went into effect on September 7, 1997; at the time of the Amended Complaint, there were 41 months remaining on the five-year term. Express Lane #6 contract was signed and went into effect October 2, 2000; at the time of the Amended Complaint, there were 51 months remaining on the five-year term.

other means to procure or induce the breach of the contracts as set out herein. Central is continuing this activity not only in Shelby County, but also in other parts of the State of Tennessee and in other states within the region that the Plaintiff and Central conduct their business activities. Central has induced entities and/or individuals who are under contract with the Plaintiff to cease to honor and abide by the terms of the contracts with the Plaintiff. Central has induced the merchants by offering to pay and has paid, between \$500.00 to \$1,000.00 for each location that the merchant agrees to switch to Central...³

On November 20, 2001, Central filed its Answer to the Amended Complaint. As affirmative defenses, Central averred that “[t]he Amended Complaint fail[ed] to state a cause of action for which relief may be granted,” that “Plaintiff lack[ed] standing to bring this suit,” and that “the Amended Complaint [was] barred by the applicable statute of limitations.” On December 21, 2001, Dimension filed its Answer to the Amended Complaint. In its Answer, Dimension alleged, *inter alia*, that:

...all allegations in Plaintiff’s Amended Complaint describe the operation of “electronic cash dispensing devices” or ATM machines, as described in Tennessee Code Annotated § 45-2-619, and Defendant, Dimension Investment, LLC, as a further defense, alleges that all of said operations were in violation of the laws of the State of Tennessee, as Plaintiff is not a depository institution, nor is it an affiliate of a depository institution, as required by the laws of the State of Tennessee, thereby rendering all contracts and operations void and unenforceable under the laws of the State of Tennessee.

After some discovery, IMS filed a “Motion to Amend Pleading” on July 19, 2001. The Motion sought to amend Paragraph 1 of the Amended Complaint, see *supra*, to read “Plaintiff is a corporation organized under the laws of the State of Texas with principal offices in Euless, Texas.” On November 21, 2002, IMS filed an “Amended Motion to Amend Pleading” seeking to delete the first sentence of Paragraph 2 under the Facts section of the Amended Complaint.⁴

On October 29, 2002, Central filed a Motion to Dismiss, which reads, in relevant part, as follows:

³ Attached as exhibits to the Amended Complaint were copies of the original contracts between Dimension and IMS as well as lost revenue breakdowns, projecting losses to IMS from Dimension’s alleged breach of contract.

⁴ See *supra*, the sentence that IMS sought to delete reads “Plaintiff has been doing business in the State of Tennessee and throughout the United States.”

Comes now the Defendant, ATM Central, LLC, and moves this Court for an Order pursuant to Rule 12.02(6) of the Tennessee Rules of Civil Procedure and Tennessee Code Annotated, § 48-25-102⁵ dismissing Plaintiff's Complaint. In support of said Motion, ATM Central would state:

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2. In its original and Amended Complaints, Plaintiff alleged that it is a Texas corporation qualified to do business in Tennessee. In answering each Complaint, ATM Central denied that Plaintiff was authorized to do business in Tennessee....

3. On or about July 16, 2002, Plaintiff filed a Motion to Amend its Complaint. By this Amendment, Plaintiff seeks to delete the allegation that it is authorized to do business in Tennessee. ***No order has been entered on Plaintiff's Motion to Amend.***

4. The Complaint in this case was filed on August 3, 2001. Attached hereto as Exhibit A is a Certificate from the Tennessee Secretary of State indicating that as of August 10, 2001, Plaintiff was not authorized to transact business in Tennessee. It was not authorized when this suit was filed and it is not authorized to do business in this State today.

5. Pursuant to T.C.A. § 48-25-102, Plaintiff may not maintain this proceeding. ATM Central is entitled to an order dismissing the Complaint.

On November 1, 2002, Dimension also filed a Motion to Dismiss.⁶ A hearing was held on December 6, 2002 on IMS's motion and amended motion to amend its pleadings, and on Dimension and Central's respective Motions to Dismiss. However, the trial court did not rule on IMS's motion or amended motion. Following the hearing, the trial court granted the Motions to Dismiss by Order entered December 12, 2002.

On December 23, 2002, IMS filed a Motion to Amend or Alter Judgment, which reads, in pertinent part, as follows:

⁵ T.C.A. §48-25-102 is titled "consequences of transacting business without authority." The statute reads, in pertinent part that "[a] foreign corporation transacting business in this state without a certificate of authority may not maintain a proceeding in any court in this state until it obtains a certificate of authority."

⁶ The copy of this Motion found in the Technical Record on appeal is missing page 2. However, from the evidence in record, we can infer that the allegations in Dimension's Motion were along the same line as those outlined in Central's Motion set out *supra*.

1. The Motions to dismiss filed by the Defendant were pursuant to T.R.C.P. 12.02. Attached to the motion of each Defendant was a report from the Secretary of State indicating that no Certificate of Authority to do business in Tennessee was of record regarding the Plaintiff. The Memorandum filed by the Defendant, Dimension Investments III, LLC referred to Admissions filed in the cause.

Plaintiff submits that matters outside of the pleading were submitted to the Court and as such, the Motion filed should be treated as a Rule 56 Motion for Summary Judgment as provided in T.R.C.P. 12.02.

As such, the rule provides that “all parties shall be given reasonable opportunity to present all material made pertinent to such a Motion by Rule 56.” Plaintiff submits that such opportunity was not afforded it. Further, there was not full compliance with the requirements of Rule 56 in that no statement of undisputed material facts were provided by any party. Plaintiff was not permitted to complete discovery of other matters which would go to a complete determination, including but not limited to interrogatories, document requests and depositions. (Emphasis added).

A hearing on the Motion to Alter or Amend was held on January 24, 2003. An “Order Granting in Part and Denying in Part Plaintiff’s Motion to Alter or Amend Order of Dismissal” was entered on March 18, 2003. In pertinent part, the Order reads:

...it appears to the Court that the Motions to Dismiss filed by Defendants were not Rule 56 Motions, and were not treated as Rule 56 Motions pursuant to T.R.C.P. 12.03. The Plaintiffs have not been registered and still are not registered to do business in the State of Tennessee. The Court is comfortable with its ruling and will not amend it except for that portion of the Court’s oral ruling which was not reflected in the initial order. The Court ruled from the bench that the Plaintiff’s Motion to Stay the Proceedings pursuant to T.C.A. §48-25-102(c) was denied and the written order should reflect that. Further, the Motions to Amend the Pleadings and to Compel Discovery filed by the Plaintiffs were rendered moot by the Court’s Order of Dismissal.

IMS appeals⁷ and raises two issues for review as stated in its brief:

I. The trial court erred in ruling that Plaintiff could not proceed with suit in a Tennessee Court because it had not obtained a Certificate of Authority.

II. The trial court erred in failing to treat the Motions to Dismiss as Motions for Summary Judgment.

Because we find that the trial court erred procedurally in failing to treat the Motions to Dismiss as Motions for Summary Judgment, we pretermitt Appellant's first issue as it goes to the merits of the case, which are not ripe for appeal pursuant to our findings below.

At the December 6, 2002 hearing, the trial court considered evidence outside the original Complaint filed in this case, to wit:

MR. PODESTA [attorney for Central]: Well, I do want to point out one additional item to your Honor. And this is a document that had been produced in discovery during the course of the case. If I could approach.

THE COURT: You may hand it to the court officer, please. Thank you.

As noted above, the trial court never ruled on IMS's motion and/or amended motion to amend its Complaint. Consequently, the Complaint, as it stood at the time of the December 6 hearing, and as it still stands today, clearly states that IMS is "qualified to do business in the State of Tennessee." It is well settled that a motion to dismiss a complaint for failure to state a claim upon which relief can be granted tests the legal sufficiency of the complaint. It admits the truth of all relevant and material allegations but asserts that such allegations do not constitute a cause of action as a matter of law. *See Riggs v. Burson*, 941 S.W.2d 44 (Tenn. 1997). Obviously, when considering a motion to dismiss for failure to state a claim upon which relief can be granted, courts are limited to the examination of the complaint alone. *See Wolcotts Fin. Serv., Inc. v. McReynolds*, 807 S.W.2d 708 (Tenn. Ct. App. 1990). Had the trial court in this case only considered IMS's Complaint, it could have reached but one conclusion—that IMS was qualified to do business in Tennessee and that the Complaint should proceed. This is due to the fact that the basis for a motion to dismiss for failure to state a claim upon which relief can be granted is that the allegations in the complaint considered alone *and taken as true*, are insufficient to state a claim as a matter of law. *See Cornpropst v. Sloan*, 528 S.W.2d 188 (Tenn. 1975) (emphasis added).

⁷ IMS voluntarily dismissed the appeal as to Dimension by Order filed November 3, 2003.

Despite the trial court's oral statement that it took "the pleadings as they are on their bare face," the trial court's ultimate conclusion in granting the Motions to Dismiss, as well as the statements made at the hearing as outlined above, show that it considered documentation outside the Complaint.

When considering a motion to dismiss, the trial court retains discretion to consider extrinsic evidence outside the pleadings. *See Hixon v. Stickley*, 493 S.W.2d 471, 473 (Tenn. 1973). However, in the event that the trial court does consider extrinsic evidence, the motion "shall be treated as one for summary judgment and disposed of as provided in Rule 56." Tenn. R. Civ. P. 12.02; *Hixon*, 493 S.W.2d at 473; *Hunt v. Shaw*, 946 S.W.2d 306, 307 (Tenn. Ct. App. 1996). All parties, therefore, must be provided a "reasonable opportunity" to proffer sufficient evidence in accordance with Rule 56. Tenn. R. Civ. P. 12.02.

In the instant case, we find that the trial court considered evidence outside the Complaint in reaching its conclusion that the Motions to Dismiss should be granted. Pursuant to the law outlined above, the Motions to Dismiss should have been treated and disposed of under Tenn. R. Civ. P. 56, as if they had been motions for summary judgment. To that end, both sides in this case should have been afforded a "reasonable opportunity" to present memoranda in support of or in opposition to a motion for summary judgment along with statements of undisputed material fact and any other supporting documentation. Only after such documentation is obtained can the trial court make an intelligent ruling as to whether the facts of this case fall under T.C.A. §45-2-619 and/or whether T.C.A. §48-25-102 negates IMS's standing to file suit in Tennessee. For the purposes of granting the parties this opportunity, the case should be remanded to the trial court.

For the foregoing reasons, the Order of the trial court granting Central's Motion to Dismiss is reversed and the case is remanded to the trial court for such further proceedings as may be necessary. Costs of this appeal are assessed against the Appellee, ATM Central, L.L.C.

W. FRANK CRAWFORD, PRESIDING JUDGE, W.S.