IN THE COURT OF APPEALS OF TENNESSEE
AT JACKSON
February 20, 2004 Session

THE LAUDERDALE COUNTY BANK v. LISA WIGGINS, ET AL.

Direct Appeal from the Chancery Court for Lauderdale County
No. 11,244 Jon Kerry Blackwood, Chancellor

No. W2003-01479-COA-R3-CV - Filed April 21, 2004

Plaintiff Lauderdale County Bank filed a declaratory judgment action to determine the obligations of the parties arising from its payment of a forged check. The trial court awarded summary judgment in favor of Defendant Newcourt Financial, holding Newcourt Financial was entitled to the proceeds of the check. Plaintiff appeals. We reverse.

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

DAVID R. FARMER, J., delivered the opinion of the court, in which ALAN E. HIGHERS, J., and HOLLY M. KIRBY, J., joined.

J. Thomas Caldwell, Ripley, Tennessee, for the appellant, The Lauderdale County Bank.

George T. Lewis, III, Memphis, Tennessee, for the appellee, Newcourt Financial.

OPINION

This dispute arises from an automobile accident which rendered a car owned by Lisa Wiggins, Christopher Wiggins, and Cutie B. Byrd a total loss. Insurance on the vehicle was provided by Midland Risk Insurance Company ("Midland Risk"). In December 1998, Midland Risk issued Lisa Wiggins, Christopher Wiggins, Cutie B. Byrd and World Omni Financial ("Omni"), which financed the vehicle, a check for $12,390.81 to cover the loss.

In June 1999, Lauderdale County Bank (the Bank) filed a declaratory judgment action in Lauderdale County Chancery Court. The Bank named as defendants Lisa Wiggins, Christopher Wiggins, Cutie B. Byrd, Michael Gaines, World Omni Financial, Newcourt Financial, Midland Risk Insurance Co, and Union Planters National Bank. In its complaint, the Bank alleged that on January 11, 1998, Michael Gaines presented a check drawn on a Union Planters National Bank ("Union Planters") account belonging to Midland Risk. It asserted the check was payable to Lisa Wiggins, Christopher Wiggins, Cutie Byrd and Omni, and that the check purported to bear the endorsement

of all payees. The Bank further stated that the check was processed through collection procedures and paid by Union Planters.

In February 1999, the Bank received an affidavit of improper and/or missing endorsements from Omni. In March 1999, Union Planters returned the check to the Bank, noting improper endorsement and demanding payment. In its answer to the Bank's complaint, Newcourt submits it purchased Omni Financial in 1997, and that it received an assignment of all of Omni's accounts. Newcourt further stated that in January 1999 it notified the Bank that the check had been paid without Omni's endorsement. It prayed for a decree that the check was paid without the proper endorsement of Omni and for a decree requiring the Bank to pay $12,390.81, the face amount of the check.

Newcourt moved for summary judgment in August 2000. The trial court granted the motion in August 2002. The Bank filed a "motion for hearing on entry of judgment" in December 12, 2002, supported by a memorandum brief filed previously on December 3. The trial court entered an order of judgment on January 3, 2003, entering its order for summary judgment as a final order. The Bank filed a motion for rehearing on January 7, 2003, which the trial court denied. In May 2003, the Bank moved for and the trial court awarded a default judgment against Lisa Wiggins, Christopher Wiggins, and Cutie Byrd, and against Michael Gaines, for a total amount of $17,798.15. The Bank appeals the award of summary judgment to Newcourt.

Issues Presented

The Bank raises the following issues for review by this Court:

(1) Whether the trial court erred in sustaining Newcourt Financial's motion for summary judgment.

(2) Whether the trial court erred in summarily dismissing the suit as to Newcourt Financial, Union Planters, and Midland Risk Insurance Company.

Standard of Review

Summary judgment is appropriate only when the moving party can demonstrate that there are no disputed issues of material fact, and that it is entitled to judgment as a matter of law. Tenn. R. Civ. P. 56.04; *Byrd v. Hall*, 847 S.W.2d 208, 214 (Tenn. 1993). The party moving for summary judgment must affirmatively negate an essential element of the non-moving party's claim, or conclusively establish an affirmative defense. *McCarley v. West Quality Food Serv.*, 960 S.W.2d 585, 588 (Tenn. 1998).

When a party makes a properly supported motion for summary judgment, the burden shifts to the non-moving party to establish the existence of disputed material facts. Tenn. R. Civ. P. 56.06;

McCarley, 960 S.W.2d at 588. A mere assertion that the non-moving party has no evidence does not suffice to entitle the moving party to summary judgment. *Id.* In determining whether to award summary judgment, the trial court must view the evidence in the light most favorable to the non-moving party and draw all reasonable inferences in that party's favor. *Staples v. CBL & Assocs.*, 15 S.W.3d 83, 89 (Tenn. 2000). The court should award summary judgment only when a reasonable person could reach only one conclusion based on the facts and the inferences drawn from those facts. *Id.* Summary judgment is not appropriate if there is any doubt about whether a genuine issue of material fact exists. *McCarley*, 960 S.W.2d at 588. This Court reviews an award of summary judgment *de novo*, with no presumption of correctness afforded to the determination of the trial court. *Guy v. Mut. of Omaha Ins. Co.*, 79 S.W.3d 528, 534 (Tenn. 2002).

Analysis

We first address the Bank's assertion that the trial court erred by dismissing the suit against Union Planters and Midland Risk. The trial court's final order reflects that the Bank voluntarily dismissed Union Planters and Midland Risk. Further, in its September 2003 response to Union Planters' and Midland Risk's motions to this Court to be dismissed as Appellees, the Bank stated, "[t]hese entities are not parties to this appeal. A nonsuit was taken as to them on final hearing, as the lower [c]ourt record states." Accordingly, any error in the initial grant of summary judgment dismissing Union Planters and Midland Risk would be harmless and this issue is without merit.

We next turn to the propriety of the trial court's award of summary judgment to Newcourt. In its brief to this Court, Newcourt asserts, *inter alia*, that the Bank may not here assert that there are genuine issues of material fact since it failed to provide a response to Newcourt's motion for summary judgment as provided by Tennessee Rule of Civil Procedure 56.03. Rule 56.03 provides, in pertinent part:

> Any party opposing the motion for summary judgment must, not later than five days before the hearing, 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 undisputed for purposes of ruling on the motion for summary judgment only, or (iii) demonstrating that the fact is disputed. Each disputed fact must be supported by specific citation to the record. Such response shall be filed with the papers in opposition to the motion for summary judgment.
>
> In addition, the non-movant's response may contain a concise statement of any additional facts that the non-movant contends are material and as to which the non-movant contends there exists a genuine issue to be tried. Each such disputed fact shall be set forth in a separate, numbered paragraph with specific citations to the record supporting the contention that such fact is in dispute.

Tenn. R. Civ. P. 56.03.

Courts consistently have emphasized that a party opposing a motion for summary judgment may not simply rest on its pleadings, but must affirmatively oppose the motion. *See, e.g., Staples*, 15 S.W.3d at 89; *McCarley*, 960 S.W.2d at 588. Such opposition may be made by pointing to evidence in the record which indicates disputed material facts. *McCarley*, 960 S.W.2d at 588. Rule 56.03 requires that a party opposing a motion for summary judgment *must* serve and file a response to the motion. Tenn. R. Civ. P. 56.03; *Holland v. Memphis*, 125 S.W.3d 425, 428 (Tenn. Ct. App. 2003).

The statements of material facts required by Rule 56.03 alert the court to specifically which factual issues are disputed and refer it to the evidence in the record that supports the party's position on each of these issues. *Holland*, 125 S.W.3d at 428. They serve as roadmaps, without which the court is not required to proceed further. *Id.* Although the trial court may, at its discretion, waive the requirements of Rule 56.03 where appropriate, the court may also refuse to consider the factual contentions of a non-complying party, even where such facts are ascertainable by the record. *Id*. In the absence of a statement of facts by the non-movant, the trial court may deem as admitted the facts as set forth in the statement of facts submitted by the movant. *Id.* Thus, failure to file a response in opposition to a motion for summary judgment as prescribed by Rule 56.03 generally will prove fatal in the trial court and upon appeal. *Id.*

Upon review of the record, we find that Newcourt's statement of facts in support of its August 2000 motion for summary judgment relied on the affidavit of Barry Kukulka (Mr. Kukulka), purportedly the director of collections and customer service for Newcourt at the time of the events giving rise to this action. In November 2001, the Bank moved the trial court to strike the affidavit or, in the alternative, to have Mr. Kukulka made available for deposition. In its motion, the Bank asserted that it had been advised that Mr. Kukulka no longer worked for Omni, and that Omni had only his last known address. The Bank noted that Newcourt relied on Mr. Kukulka's statement that Omni's endorsement on the check was unauthorized as proof of the forgery, and stated "[t]his case involves the genuineness of the endorsement of OMNI Corporation on a check cashed at the plaintiff's Bank." Although the Bank's motion does not strictly follow the form of a response to a motion for summary judgment as prescribed by Rule 56.03, it serves to inform the trial court of a dispute of material fact regarding the genuineness of the endorsement by Omni. In light of the trial court's order stating that it had considered the Bank's motion to strike, and in light of the subsequent hearings of this cause and further orders of the trial court, we believed the trial court exercised its discretion to waive the requirements of Rule 56.03 in this action.

We accordingly turn next to the propriety of the award of summary judgment to Newcourt. In its memorandum brief to the trial court in support of its motion for hearing on entry of judgment, in its motion for rehearing, and in its brief to this Court, the Bank contends disputed issues of material fact make summary judgment inappropriate in this case. First, the Bank submits there is no proof in the record demonstrating Newcourt's interest in the proceeds of the check to Omni. Second, the Bank asserts there is no proof in the record regarding the amount of Omni's/Newcourt's interest in the check. Third, the Bank contends a question of fact remains as to whether Omni and Midland Risk were negligent in their handling of the check.

Newcourt's response to the Bank's argument as presented to this Court is based, for the most part, on its assertion that the Bank's failure to respond to Newcourt's motion for summary judgment with a statement of facts in accordance with Rule 56.03 is fatal to this appeal. In a footnote, Newcourt submits the Bank's argument that Omni was negligent is "absurd." Newcourt does not address the question of the amount of Omni's interest in the check, which also listed Lisa Wiggins, Christopher Wiggins, and Cutie B. Byrd as payees. Newcourt also does not refer us to proof in the record demonstrating that it purchased the account from Omni.

Having reviewed the record, we agree with the Bank that genuine issues of material fact remain as to Newcourt's purchase/ownership of the Omni account and the amount of Newcourt's interest, if any, in the check. As noted, the check listed four payees. There is nothing in the record to indicate the respective interest of each of these payees in the proceeds of the check issued to them by Midland Risk. Likewise, there is nothing in the record to demonstrate that Newcourt purchased the Omni account and is, in fact, Omni's successor in interest.

However, there is nothing in the record to demonstrate that Omni was negligent in its handling of the check. It is undisputed that Omni never had the check in its control, but told the individual payees that it would not receive the check until it had been endorsed by the individual payees. We further note that the copy of the check in the record does not bear the endorsement of Lisa Wiggins. Thus, it was not properly endorsed for payment notwithstanding the forged Omni signature stamp. The Bank's claim that Midland Risk was negligent is without merit in light of its nonsuit of Midland Risk.

Holding

In light of the foregoing, summary judgment in favor of Newcourt is reversed. This cause is remanded for determination of whether Newcourt is, in fact, Omni's successor in interest in the account and, if so, for the amount of Omni's/Newcourt's interest in the check. Costs of this appeal are taxed to the appellee, Newcourt Financial.

____

DAVID R. FARMER, JUDGE