IN THE COURT OF APPEALS OF TENNESSEE
AT JACKSON

FILED

March 11, 1998

Cecil Crowson, Jr.
Appellate Court Clerk

NELSON McCOY d/b/a NELSON McCOY COTTON COMPANY,	)	
Plaintiff/Appellee,	)	**Shelby Circuit No. 60900 T.D.**
VS.	)	**Appeal No. 02A01-9710-V-00258**
DALLAS THOMASON & SONS COTTON, INC.,	)	
Defendant/Appellant.	)	

APPEAL FROM THE CIRCUIT COURT OF SHELBY COUNTY
AT MEMPHIS, TENNESSEE
THE HONORABLE JOHN R. McCARROLL, JR., JUDGE

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AFFIRMED

ALAN E. HIGHERS, J.

CONCUR:

W. FRANK CRAWFORD, P.J., W.S.

HOLLY KIRBY LILLARD, J.____

_____Defendant/Appellant, Dallas Thomason & Sons Cotton, Inc. (“defendant”), appeals

the judgment of the trial court finding that it had breached its contract with Plaintiff/Appellee, Nelson McCoy d/b/a Nelson McCoy Cotton Company ("plaintiff"), and awarding damages to plaintiff in the amount of $60,672.20. For reasons stated hereinafter, we affirm the judgment of the trial court.

Plaintiff is an individual doing business in Memphis, Tennessee, under the name of Nelson McCoy Cotton Company. Plaintiff is engaged in the business of cotton merchandising. Defendant is a Louisiana corporation with its offices and principal place of business in Rayville, Louisiana. It is also in the business of cotton merchandising. Its owner is Dallas Thomason ("Thomason").

On October 21, 1993, plaintiff entered into an agreement with defendant in which defendant was to sell and plaintiff was to purchase 1060 bales of # 1 motes at $.35 per pound and 240 bales of #2 motes at $.34 per pound. The cotton was to conform to samples sent to plaintiff by defendant labeled #1 for higher quality cotton and #2 for cotton of a lesser quality. Within all of these purchases, the obligation of defendant was to deliver motes of equal quality to the #1 and #2 samples sent to plaintiff. Copies of the confirmations of these transactions were mailed by plaintiff to defendant on that same day.

Thomason alleges that on October 23, 1993, he mailed a letter to plaintiff stating that all sales from that point forward would be "no approval, no sale." Plaintiff denies ever receiving such a letter. Thomason further alleges that his secretary, Dorothy Timms, overheard defendant tell plaintiff that the sales of cotton to plaintiff were of the "no approval, no sale" type. Additionally, defendant proffered the testimony of Joe Seymour, a cotton classifier for defendant, as stating that their policy as of October of 1993 was "no approval, no sale" concerning the sale of cotton.

On February 4, 1994, plaintiff and defendant entered into an agreement for the sale of 387 bales of #1 and #2 motes at $.45 per pound. There were to be 260 bales of #1 motes of cotton and 127 bales of #2 motes of cotton delivered to plaintiff. Plaintiff's

confirmation of this purchase was mailed to defendant on that same day.

Dallas Thomason & Sons delivered 880 of the 1060 bales of #1 motes ordered by plaintiff, and plaintiff paid for these motes. At this time, there were still 180 outstanding bales to be delivered under the first October 21, 1993, order; 240 outstanding bales to be delivered on the second October 21, 1993 order; and 387 outstanding bales to be delivered on the February 4, 1994, order. Subsequently, on February 24th and 25th of 1994, defendant tendered the remaining 807 bales to plaintiff. Plaintiff alleges that only 344 bales were of the quality illustrated in the samples sent to it by defendant. Defendant insisted that plaintiff accept all 807 motes or none at all. On March 8, 1994, plaintiff rejected the entire 807 bales and was reimbursed for its prior payment.

On March 25, 1994, plaintiff, through its attorneys, made a demand on defendant to deliver the balance due under the agreement on or before Friday, April 1, 1994. No delivery was made.

Plaintiff was in the business of reselling the bales of cotton, and, in fact, had agreed to sell 1960 bales of cotton to Avondale Mills. Consequently, plaintiff contends that it was unable to purchase bales of cotton motes of comparable quality until the next crop year, and it did so at a substantial loss. Particularly, plaintiff states that he bought the remaining 807 bales at $.52 per pound from an Arkansas cotton farmer.

Plaintiff filed this suit on April 12, 1994, alleging that defendant breached 3 separate contracts for the sale of certain quantities and qualities of cotton. The trial was held on March 3, 1997, when the trial court found the following:

> (1) The parties agreed on the price, quantity, and quality of the cotton "motes" to be sold by Dallas Thomason & Sons Cotton, Inc. ("Thomason") to Nelson McCoy d/b/a Nelson McCoy Cotton Company ("McCoy"), as follows:
>
> (a) Price and quality:
>
> (I) 1060 bales of "motes" at $.35 per pound
> (ii) 240 bales of "motes" at $.34 per pound
> (iii) 387 bales of "motes" at $.45 per pound

(b) Quality

(I) #1 motes
(ii) #2 motes
(iii) #1 and #2 motes

(2) Thomason tendered and McCoy accepted and paid for 880 bales of cotton "motes" in accordance with the above listed terms regarding price, quantity, and quality.

(3) Thomason tendered and McCoy rejected the remaining 807 bales of cotton "motes" because although 344 bales conformed to the agreed upon quality, the remaining 463 bales did not conform to the agreed upon quality. The fact that the remaining 463 bales did not conform to the quality represented by the samples was established by the testimony of McCoy and his expert, Joe Roark. McCoy had every reason to keep the cotton it if conformed to the quality represented. He wanted to honor his contract with the mill and make a profit. The only reason to reject the cotton was that it did not conform to the quality represented by the samples. McCoy acted properly in rejecting the entire shipment because of the demand that he take the entire tender or nothing at all.

(4) A dispute exists between the parties as to whether or not the agreement between the parties included a "no approval, no sale" provision. Thomason said he advised McCoy both orally and in writing prior to the shipment of the 880 bales that all dealings would have to be on a "no approval, no sale" basis. McCoy said that the first time Thomason had advised him of a "no approval, no sale" policy was when McCoy attempted to accept 344 bales of cotton from the tender of the remaining 807 bales and was told by Thomason that he must accept all or none of the tender of the remaining 807 bales. This supplemental term was not established by a preponderance of the evidence.

(5) Thomason knew that McCoy was in the business of reselling the bales of cotton "motes." McCoy in fact had agreed to resell the cotton to a mill in reliance on the agreement with Thomason. McCoy was not able to meet his agreement with the mill because of the failure of Thomason to provide 807 bales of cotton meeting the quality represented by the samples provided by Thomason. (Although 344 bales did conform, it is agreed between the parties that Thomason would not allow McCoy to take delivery of only the conforming. This is puzzling because it would seem that if Thomason was confident that the remaining 463 bales were of a conforming quality he would have no objection to selling McCoy the 344 bales knowing he could get the same or a higher price for this quality cotton "motes."

(6) McCoy was not able to purchase bales of cotton "motes" of comparable quality until the next crop year. The cost of purchasing the cotton necessary to honor McCoy's obligation to the mill is as follows:

(a) Agreed price: $.35 per pound
Cost of cover: $.52 per pound = $.17 difference
500 lbs. (average weight of one bale) x $.17 x 180 bales = $15,300.00

(b) Agreed price: $.34 per pound
Cost of cover: $.52 per pound = $.18 difference
500 lbs. (average weight of one bale) x $.18 x 240 bales = $21,600.00

(c) Agreed price: $.45 per pound

Cost of cover: $.52 per pound = $.07 difference
500 lbs. (average weight of one bale) x $.07 x 387 bales = $13,545.00

Total $50,445.00

(7) An award of prejudgment interest is discretionary and based on equitable principles. Since the amount of the obligation could not be ascertained until McCoy was successful in completing the "cover" purchase in February of 1995, plaintiff is entitled to prejudgment interest at 10% only from March 1, 1995, until the date of this judgment on March 10, 1997 or $10,227.20

IT IS THEREFORE, ORDERED, ADJUDGED AND DECREED:

(1) Plaintiff, Nelson McCoy d/b/a McCoy Cotton Company is hereby awarded judgment against the defendant, Dallas Thomason & Sons Cotton, Inc., in the amount of $50,445.00, plus prejudgment interest of $10,227.20, for a total judgment of $60,672.20, for which let execution issue. . .

On appeal, the following issues have been raised by the parties:

1. Does the evidence in the record overcome by a preponderance the presumption that the trial court was correct in finding that the contract between the parties did not contain a "no approval, no sale" term?

2. Does the evidence in the record overcome by a preponderance the presumption that the trial court was correct in finding that the cotton tendered by the Defendant did not conform to the quality required?

3. Does the evidence in the record overcome by a preponderance the presumption that the trial court was correct in finding that McCoy established "cover" damages?

Inasmuch as this case was tried by the trial court sitting without a jury, this Court's review on appeal is governed by Tennessee Rule of Appellate Procedure 13(d), which directs us to review the case *de novo*. *Roberts v. Robertson County Bd. of Educ.*, 692 S.W.2d 863, 865 (Tenn. Ct. App. 1985); *Haverlah v. Memphis Aviation,Inc.*, 674 S.W.2d 297, 300 (Tenn. Ct. App. 1984); T.R.A.P. 13(d). In conducting a *de novo* review of the record below, however, this Court must presume that the trial court's findings of fact are correct. Under this standard of review, we must affirm the trial court's decision unless the trial court committed an error of law affecting the result or unless the evidence preponderates against the trial court's findings. *Roberts*, 692 S.W.2d at 865.

Does the evidence in the record overcome by a preponderance

the presumption that the trial court was correct in finding that the contract between the parties did not contain a "no approval, no sale" term?

The contract between plaintiff and defendant is a transaction in goods and is, therefore, governed by the sales article of the Uniform Commercial Code, Tenn. Code Ann. §§ 47-2-101 through 47-2-725 (1996).

Undoubtedly, in the case before us, we have a contract, although, admittedly not in the traditional sense of the word. Here, we have a situation in which plaintiff orders a specified amount of cotton at a certain price per pound at a particular level of quality. The quality is represented by samples sent by defendant to plaintiff. These samples serve to guarantee the quality of cotton that should be received by plaintiff. There is no contract, *per se*, where the exact terms of the parties agreement are scripted within the four corners of a document. What we do have, however, are confirmations mailed by plaintiff to defendant verifying the price and quantity of the cotton and a sample to verify the quality of such cotton. As such, this Court agrees with the finding of the trial court that a contract has been formed.

Tenn. Code Ann. § 47-2-104 (1996) defines two terms relevant to our discussion--"merchant" and "between merchants."

> (1) "Merchant" means a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction . . .
>
> (3) "Between merchants" means in any transaction with respect to which both parties are chargeable with the knowledge or skill of merchants.

Both parties in this matter certainly qualify by the foregoing definitions.

Tenn Code Ann. § 47-2-201(1997 Supp.) provides:

> (1) Except as otherwise provided in this section, a contract for sale of goods for the price of five hundred dollars ($500) or more is not enforceable by way of action or defense unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom the enforcement is sought or by his authorized agent or broker. A writing or record is not insufficient because it omits or incorrectly states a term agreed

> upon but the contract is not enforceable under this paragraph beyond the quantity of goods shown in such writing or record.
>
> (2) Between merchants if within a reasonable time a writing or record in *confirmation* of the contract and sufficient against the sender is received and the party receiving it has reason to know its contents, it satisfies the requirements of subsection (1) against such party unless written notice of objection to its contents is given within ten (10) days after it is received.

Tenn. Code Ann. § 47-2-201 (1996) (emphasis added).

The parties in this action sharply dispute the terms of their agreement. Plaintiff sent written confirmations of the contract, defendant received these, and filed them. Plaintiff contends that these confirmations, according to Tenn. Code Ann. § 47-2-201, have become the basis of the agreement between the parties. These confirmations were clear as to the price and quantity of the cotton to be delivered. The quality of the cotton was indicated by the samples. Defendant insists that the agreement was one premised on a "no approval, no sale" policy. In other words, defendant contends that its sale agreement with plaintiff was all or nothing concerning the acceptance of the cotton in question. Defendant argues that on October 23, 1993, it sent plaintiff notice of this policy by sending plaintiff a letter stating that it would no longer allow plaintiff to cull the best cotton but would require that plaintiff take all of the cotton shipped or nothing at all. At trial, defendant bolstered this evidence by offering the testimony of two employees--Dorothy Timms and Joe Seymour. Mrs. Timms has been employed by defendant for twenty years and is Thomason's secretary. She testified that she overheard Thomason tell plaintiff that plaintiff would have to "take all of the motes on his sale or it would not be a sale." Additionally, Mrs. Timms testified that she saw Thomason write the aforementioned letter to plaintiff and mailed it personally. Joe Seymour testified that defendant had changed its policy in October of 1993 to a "no approval, no sale" policy with cotton buyers. Plaintiff contends that he never received such a letter from defendant, thereby denying defendant's contention that there was a "no approval, no sale" term supplemental to this agreement for the purchase of cotton.

On appeal from a judgment rendered by a court without a jury, any conflict in

testimony requiring a determination of the credibility of witnesses is for the trial court, and this determination is accorded great weight by this Court unless other real evidence compels a contrary conclusion. *Linder v. Little*, 490 S.W.2d 717 (Tenn. Ct. App. 1972); *See also Duncan v. Duncan*, 686 S.W.2d 568 (Tenn. Ct. App. 1985); *Haverlah v. Memphis Aviation, Inc.*, 674 S.W.2d 297 (Tenn. Ct. App. 1984). The findings of the trial court in a non-jury case are entitled to great weight where the trial court saw and heard the witnesses and observed their manner and demeanor on the stand and was therefore in a much better position than the appellate court to judge the weight and value of their testimony. *Smith v. Hooper*, 59 Tenn. App. 167, 438 S.W.2d 765 (Tenn. Ct. App. 1968); *Duncan v. Duncan*, 686 S.W.2d 568 (Tenn. Ct. App. 1985).

We recognize that the evidence concerning the "no approval, no sale" policy in this case was sharply disputed at trial. These conflicts required the trial judge to evaluate the credibility of the witnesses who appeared before him. He resolved these credibility issues in favor of plaintiff. Not having seen these witnesses in person, we are not in a position to say that he was wrong in his assessment of the witnesses' credibility. Considering the importance of credibility in this case, we cannot say that the evidence preponderates against the trial court's findings of fact supporting its conclusion that this agreement between plaintiff and defendant was absent the "no approval, no sale" policy.

Does the evidence in the record overcome by a preponderance the presumption that the trial court was correct in finding that the cotton tendered by the defendant did not conform to the quality required?

Tenn. Code Ann. § 47-2-313 provides:

> (1) Express warranties by the seller are created as follows:
>
> > (c) Any sample or model which is made part of the basis of the bargain creates an express warranty that the whole of the goods shall conform to the sample or model.

In this case, it is undisputed that defendant sent plaintiff samples of the cotton types in October of 1993 that were the basis of this agreement. These samples types were illustrative of the cotton that plaintiff was purchasing from defendant. The pivotal dispute is whether or not the quality of the cotton delivered matched that of the samples types

delivered in October of 1993. At trial, defendant contended that "the cotton is okay. . . [i]t's good cotton." Furthermore, defendant argues that the cotton was resold to another buyer quickly thereafter without complaint as to the quality of said cotton. Plaintiff testified at trial that the cotton it received from defendant did not match the quality of the cotton samples types it received from defendant in October of 1993. As concerning the quality of the cotton sent to plaintiff by defendant, plaintiff proffered the expert testimony of Joe Roark, a man who had been in the business of cotton classification for over 35 years. Mr. Roark testified that the cotton samples were of a higher grade than the actual cotton received by plaintiff:

> Q. Have you compared Exhibit 19 -- the samples of cotton that was delivered against the two types – type 1 and 2?
> A. Yes, sir.
> Q. Is the cotton in Exhibit 19 up to snuff? Is it as good as types 1 and 2?
> A. No, sir.

The trial court was faced with the issue of whether the cotton received by plaintiff was of sufficient quality to match the sample types sent to plaintiff in late October of 1993. Once again, the trial court weighed the credibility of the witnesses testifying concerning the quality of the cotton received by plaintiff in comparison to that of the samples. The trial court settled this matter in favor of plaintiff. We agree and cannot say that the evidence preponderates against the findings of the trial court concerning this issue. As seen in Tenn. Code Ann. § 47-2-313, the cotton samples sent to plaintiff became an express warranty that the whole of the cotton delivered would conform to the sample quality. The only testimony concerning whether the cotton received by plaintiff conformed to the sample types sent to it by defendant was that of plaintiff and his expert. The trial court found in favor of plaintiff on this issue and we cannot say that the evidence preponderates against the finding of the trial court concerning this matter.

Does the evidence in the record overcome by a preponderance the presumption that the trial court was correct in finding that McCoy established "cover" damages?

Tenn. Code Ann. § 47-2-712 provides in pertinent part:

> (1) After a breach within the preceding section the buyer may "cover" by making in good faith and without unreasonable

> delay any reasonable purchase of or contract to purchase goods in substitution for those due from the seller.

We think the rule as stated in *Jones v. Tennessee Central Railway Co.*, 8 Tenn.App. 183 (1928), is particularly valid here: "Where the elements of damage are such as to be susceptible of pecuniary admeasurement, there can be no recovery of substantial damages in the absence of evidence as to the extent of the pecuniary loss." 8 Tenn.App. at 191. A more recent version of the same rule was stated in *Sheetz v. Morgan*, 98 Ill.App.3d 794, 424 N.E.2d 867 (1981), where the Court said: "Where damages are susceptible to proof in dollars and cents, direct and tangible proof must be offered ... and evidence as to damages must not be remote, speculative or uncertain."

In this case, plaintiff was due 807 bales of cotton from defendant. When defendant proffered these 807 bales, plaintiff refused 463 bales insisting that only 344 of these bales complied with the quality of the sample types. Defendant insisted that plaintiff take all 807 bales or nothing at all. Plaintiff was left to procure cover in order to substitute the goods due from defendant. Plaintiff did so by contracting with Cotton Growers, Inc. from Dell, Arkansas, at $.52 per pound. We conclude that the evidence does not preponderate against the findings of fact concerning plaintiff's "cover" damages. We find the calculations of the trial court concerning damages to be a fair representation of Tenn. Code Ann. § 47-2-712 "cover" damages.

Accordingly, the judgment of the trial court is affirmed. Costs are taxed against defendant, for which execution may issue if necessary.

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HIGHERS, J.

CONCUR:

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CRAWFORD, P.J., W.S.

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LILLARD, J.