IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
August 16, 2007 Session

ROGERSVILLE INVESTMENT CORPORATION d/b/a HOLIDAY INN EXPRESS v. MERIDIAN INSURANCE GROUP, INC.

Appeal from the Chancery Court for Hawkins County
No. 15376 Thomas R. Frierson, II, Chancellor

No. E2007-00600-COA-R3-CV - FILED SEPTEMBER 4, 2007

In this case involving an insurance claim for property damage when a nearly-completed Holiday Inn building in Rogersville partially burned, the issue is how much money the insurance company must pay under the contract. The insurance contract provided that the insurer would pay the insured "the cost to repair, replace or rebuild the property with material of like kind and quality." The insured submitted proof that the contractor's bill for the covered repairs was $47,982.92. Over the insured's hearsay objection, the insurance company introduced evidence that its third-party investigator, who inspected the damaged property, prepared an estimate approximating the loss at $20,532.94. The trial court rejected the insurer's defense of accord and satisfaction, and awarded the insured $33,757.93. We affirm the trial court's judgment that the insurer did not prove accord and satisfaction, and hold that under the unambiguous terms of the contract, the insurer is required to pay the insured $46,982.92, in the absence of proof that the amount charged by the contractor for repairs is excessive or unreasonable. We therefore affirm the judgment of the trial court as modified.

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

SHARON G. LEE, J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, P.J., and D. MICHAEL SWINEY, J., joined.

Dudley W. Taylor, Knoxville, Tennessee, for the Appellant, Rogersville Investment Corporation d/b/a Holiday Inn Express.

Linda J. Hamilton Mowles, Knoxville, Tennessee, for the Appellee, Meridian Insurance Group, Inc.

OPINION

I. Background

On May 25, 1998, a fire partially burned a newly-constructed Holiday Inn hotel building in Rogersville, Tennessee, that was approximately 95 percent completed and nearly ready to be opened for business. The owner, Rogersville Investment Corporation d/b/a Holiday Inn Express ("Insured"), had insured the property against fire loss by purchasing a insurance policy from Meridian Insurance Group, Inc. ("Insurer"). The pertinent language of the insurance contract requires the Insurer to pay "the cost to repair, replace or rebuild the property with material of like kind and quality." The Insured promptly notified the Insurer of the loss, and the Insurer hired a third-party company, GAB Robins North America, Inc., to investigate the loss on behalf of the Insurer. GAB Robins sent Johnny Cleaver to observe and investigate the Holiday Inn site approximately three days after the fire. After his visit, Mr. Cleaver advised the Insurer to set a reserve of $50,000 on the Insured's claim. Because time was of the essence in getting the financing for the hotel closed, the Insured quickly initiated the process of repairing the fire, smoke, and water damage.

Mr. Cleaver also prepared a "building estimate" wherein he estimated the cost to repair and/or replace the property damaged by the fire to be $20,532.94. The insurance policy provided for a deductible in the amount of $1,000. On July 2, 1998, the Insurer sent Bruce Hurley, Insured's president and chairman of the board, a check in the amount of $19,532.94. The record contains relatively little evidence about the discussion between Mr. Hurley and representatives of the Insurer as regards this check. The Insurer takes the position that the check was sent as full and final payment in settlement of Insured's claim, and that the Insured is barred from seeking further payment by the doctrine of accord and satisfaction. Mr. Hurley testified to the effect that there was no indication that the check was offered in final settlement, and that representatives of the Insurer assured him that additional requests for payment under the contract would be considered by the insurance company.

After Mr. Hurley negotiated the check on Insured's behalf, he received an invoice from the contractor who performed the repair work, D.A. Wallace Construction, Inc., with a total charge of $47,982.92.[1] After Insurer refused to make additional payment for the loss, Insured filed this action seeking a judgment in the amount of the remaining difference between the contractor's bill, which the Insured had paid, and the $19,532.94 check from the Insurer. Following a trial, the trial court entered judgment in favor of the Insured in the amount of $33,757.93, exactly "splitting the difference" between Insured's requested amount and the amount that Insurer argued it was required to pay.

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[1] The invoice contained an additional charge for replacement of furniture, but the parties agree that that charge is not covered by the insurance policy and is not at issue here.

II. Issues Presented

The Insured has appealed the trial court's decision, arguing that under the terms of the insurance policy, it was entitled to recover the full amount of the contractor's bill, less the $1,000 deductible. The Insurer has cross-appealed, arguing, among other things, that the trial court erred by not finding an accord and satisfaction and barring the Insured from recovering more than the negotiated $19,532.94 check. The determinative issues are as follows:

1. Whether the trial court erred in denying Insurer's motion to dismiss pursuant to its argument that the Insured's actions in getting the property repaired without the Insurer's express permission constituted "obligations and expenses voluntarily incurred" by the Insured.

2. Whether the trial court erred in finding that the issuance and negotiation of the $19,532.94 check was not an accord and satisfaction in complete and final settlement of the Insured's claim.

3. Whether the trial court erred in finding that the cost to repair and/or replace the damaged property due to the fire damage was $33,757.93.

III. Analysis

A. Standard of Review

We review this non-jury case *de novo* upon the record of the proceedings below, with a presumption of correctness as to the trial court's findings of fact unless the preponderance of the evidence is otherwise. Tenn. R. App. P. 13(d); *see also* ***Hass v. Knighton***, 676 S.W.2d 554 (Tenn. 1984). There is no presumption of correctness with regard to the trial court's conclusions of law. ***Campbell v. Florida Steel Corp.***, 919 S.W.2d 26, 35 (Tenn. 1996); ***Presley v. Bennett***, 860 S.W.2d 857, 859 (Tenn. 1993).

B. Voluntarily Assumed Obligations

The Insurer argues that the Insured "voluntarily" made payments and incurred expenses by taking remedial steps after the fire without first obtaining permission from the Insurer, citing the following provision of the insurance policy:

> **Volunteer Payments.** The insured may not voluntarily make payments, assume obligations, pay or offer rewards or incur other expenses, except at the insured's own expense.

The trial court, rejecting this argument, made the following factual findings and legal analysis:

> The Insurer[2] argues that as the Insured began to make property repairs and incur expenses prior to notifying or seeking permission from Insurer, Insured assumed the obligation for all repair costs at its own expense. With the fire loss occurring during the Memorial Day weekend, Insured notified Insurer of the loss on the first business day following the fire. The evidence supports a determination that no repair work was done prior to the arrival of the independent adjuster. Certain preliminary steps such as evacuation of water, removal of damaged carpeting and furnishings did occur prior to the Insurer's assessment of the loss. At no time did the Insurer direct Insured not to commence repair work. Actual repair of the damage began approximately one week following the inspection by the claims adjuster.
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> The Court concludes that the extrication of fire and water damaged carpeting and hotel furnishings by Insured and the general contractor prior to the claims adjuster's inspection appears to be reasonable under the circumstances. Repairs were begun only after the adjuster's inspection and were made with an aim toward completing construction without placing interim and/or permanent financing at risk. Both parties concede that time was of the essence. With Insurer at no time instructing Insured to not make repairs until authorized, Rogersville Investment Corporation did not voluntarily assume any obligations or incur other expenses in violation of the provisions of the builder's risk coverage in effect.

The evidence in the record does not preponderate against these factual findings as stated by the trial court. Insurer's representative, who had spoken with Mr. Hurley about the claim, testified by deposition that he did not tell Mr. Hurley that Insured had to wait for permission or authorization to begin repairs. As the trial court noted, the Insurer was able to have its independent adjuster investigate and evaluate the loss before repairs were made. The two cases cited by Insurer in support of its voluntary assumption argument, ***Anderson v. Dudley Moore Ins. Co.***, 640 S.W.2d 556 (Tenn. Ct. App. 1982), and ***State Automobile Ins. Co. v. Laslee-Rich, Inc.,*** No. 02A01-9703-CH-00071, 1997 WL 781896 (Tenn. Ct. App. W.S., Dec. 22, 1997), are readily distinguishable on their facts, and inapposite. We affirm the trial court's judgment that Insured did not voluntarily make payments or incur expenses so as to void its coverage under the policy.

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2 In its memorandum opinion, the trial court used the terms "Plaintiff" and "Defendant" to describe the parties. For clarity and consistency, we have changed "Plaintiff" to "Insured" and "Defendant" to "Insurer" in this quote.

C. Accord and Satisfaction

The Insurer next argues that Insured's negotiation of the check in the amount of $19,532.94 on or about July 8, 1998, constituted a final and complete settlement of Insured's claim by reason of the application of the doctrine of accord and satisfaction. An accord and satisfaction is a type of contract and is governed by the law of contracts. ***Cole v. Henderson,*** 454 S.W.2d 374, 384 (Tenn. Ct. App. 1969); ***R.J. Betterton Mgm't. Servs., Inc. v. Whittemore,*** 733 S.W.2d 880, 882 (Tenn. Ct. App. 1987). "All such a defense or a plea means is that the parties have come to another agreement in substitution of the one upon which the plaintiff sues, and that the substituted agreement has been executed." ***Inland Equipment Co. v. Tennessee Foundry & Machine Co.***, 241 S.W.2d 564, 565 (Tenn. 1951). The Tennessee Supreme Court set forth the elements and governing principles of the law regarding accord and satisfaction in the case of ***Lytle v. Clopton*** as follows:

> An accord is an agreement whereby one of the parties undertakes to give or perform, and the other to accept in satisfaction of a claim, liquidated or in dispute, and arising either from contract or from tort, something other than or different from what he is or considers himself entitled to; and a satisfaction is the execution of such agreement. * * *To constitute a valid accord and satisfaction it is also essential that what is given or agreed to be performed shall be offered as a satisfaction and extinction of the original demand; that the debtor shall intend it as a satisfaction of such obligation, and that such intention shall be made known to the creditor in some unmistakable manner. It is equally essential that the creditor shall have accepted it with the intention that it should operate as a satisfaction. Both the giving and the acceptance in satisfaction are essential elements, and if they be lacking there can be no accord and satisfaction. The intention of the parties, which is of course controlling, must be determined from all the circumstances attending the transaction.

Lytle v. Clopton, 261 S.W. 664, 666-67 (Tenn. 1924) (quoting 1 C.J. *Accord and Satisfaction* §§ 1 and 16 (1914)).

Whether there has been an accord and satisfaction is a question of fact. ***Helms v. Weaver,*** 770 S.W.2d 552, 554 (Tenn. Ct. App. 1989); ***Lindsey v. Lindsey,*** 930 S.W.2d 553, 557 (Tenn. Ct. App. 1996); ***Ward v. Wilkinson,*** No. 01A01-9803-CH-0015, 1999 WL 221843, at *2 (Tenn. Ct. App. M.S., filed Apr. 19, 1999). It is well established in Tennessee jurisprudence that "[t]he party asserting the defense of accord and satisfaction has the burden of showing by a preponderance of the evidence that the parties intended to effect a satisfaction." ***Pinney v. Tarpley,*** 686 S.W.2d 574, 578 (Tenn. Ct. App. 1984); ***Rhea v. Marko Constr. Co.,*** 652 S.W.2d 332, 334 (Tenn. 1983); ***Inland Equipment Co. v. Tennessee Foundry & Machine Co.,*** 241 S.W.2d 564, 565 (Tenn. 1951); ***R.J. Betterton Mgm't. Servs., Inc. v. Whittemore,*** 733 S.W.2d 880, 882 (Tenn. Ct. App. 1987).

An examination of the evidence presented in light of the required elements enunciated in ***Lytle*** reveals that the trial court did not err in its determination that the Insurer failed to prove

accord and satisfaction. The only person to testify live before the trial court was Mr. Hurley. Mr. Hurley testified as follows regarding the $19,532.94 check issued by the Insurer and negotiated by Mr. Hurley:

> A: We discussed the check. And at that time [the Insurer's representative] assured me that if we had additional information to submit, to submit it and he would consider it. He told us that different times.
> Q: Did the insurance company representative tell you that if you cash this check, we're going to take the position that you can't get any more money out of us?
> A: Nothing like that was ever mentioned.
> Q: All right, sir. Did the insurance company representative ask you to sign a release?
> A: No, sir.
> Q: Did you ever sign a release?
> A: I would not have signed a release at that time because we didn't know exactly what the damage was going to be.
> * * *
> Q: All right, sir. At the time of your deposit [of the check], had you received a bill from the contractor?
> A: No, sir.

David Hogue, regional claim manager for the Insurer at that time, testified by deposition taken for proof. Mr. Hogue testified that he had no independent recollection of the facts of the case and relied entirely on the notes in his activity log. The activity log contained a note written by Mr. Hogue that states, "I talked to Mr. Hurley. He will accept our $19,532.94 mailed to Rogersville Investment, d/b/a Holiday Express..." Mr. Hogue did not have any further recollection of his conversation with Mr. Hurley.

The check states on the back "ENDORSEMENT CONSTITUTES SETTLEMENT AS SHOWN ON FRONT." There is no mention of "settlement" on the front of the check, nor is there any notation suggesting that the check is issued as full and final payment, or in complete satisfaction of the claim. Although Insurer argues in its brief that "the payment document indicates on its face that the check was issued in final payment of the claim," Mr. Hogue testified that Mr. Hurley never saw the complete "payment document" and would not have been aware of the "FP" notation, which he stated meant "final payment," written on the bottom half of the document:

> Q: All right, sir. Now, tell me more about this particular document, this Exhibit 3?
> A: This is part of the original check. It comes in a dupo-cut. You fill out the top which then becomes the actual check, the bottom of the check is filled out and given to the clerical to enter into the financial system.
> Q: All right, sir. So Mr. Hurley would not have received the check bearing the form that we see as Exhibit 3, would he?
> A: The one with the FP at the bottom?

Q: Yes, sir.
A: No, sir.

Jack Cassidy, a claims adjuster for the Insurer who also spoke with Mr. Hurley about the claim, testified by deposition taken for proof that he had no discussion with Mr. Hurley about whether the check was issued in full compromise of the claim "or anything of that sort." No other evidence was presented suggesting that the Insurer offered the check as full and final settlement of the property damage claim, nor that, if Insurer had that intention, it was communicated to Mr. Hurley "in some unmistakable manner," as required by ***Lytle***. We therefore affirm the trial court's ruling that Insurer failed to prove that the issuance and negotiation of the check effected an accord and satisfaction.

D. Amount of Loss

According to the operative language of the insurance contract, drafted by the Insurer, the Insurer agreed to pay "the cost to repair, replace or rebuild the property with material of a like kind and quality." The total cost to repair the fire damage, as reflected by the contractor's invoice, was $47,982.92. The contractor, Donald A. Wallace, who testified by deposition taken for proof, testified that all of the items on the invoice were reasonable and necessary to repair the fire damage, and that the charges on the invoice reflected the same customary and ordinary rates that the contractor had charged for the underlying construction work. The Insurer did not challenge or contradict this testimony on cross-examination of Mr. Wallace, nor did it present any expert testimony suggesting that the bill for $47,982.92 was unreasonable. There is no evidence that the materials used for repair and replacement were not of like kind and quality as required by the contract.

The only evidence presented by the Insurer arguably suggesting that the amount of the bill was unreasonable was the "building estimate" prepared by Mr. Cleaver, which estimated the repair cost to be $20,532.94. Mr. Cleaver did not testify in this case. The Insurer offered the estimate as an exhibit to Mr. Hogue's deposition. The proffering of Mr. Cleaver's estimate drew a hearsay objection from the Insurer that was eventually overruled by the trial court on the grounds that it was a "business record" subject to the exception to the hearsay rule found at Tenn. R. Evid. 803(6). Although the Insured argues on appeal that the trial court erred in admitting Mr. Cleaver's estimate as a business record, we find that this issue is not determinative, because even assuming (without deciding) that the trial court correctly allowed the admission of the document into evidence, we are of the opinion that the Insurer did not provide sufficient proof that the actual reasonable cost to repair the property damage was other than $47,982.92.

Because Mr. Cleaver did not testify, there was no evidence before the trial court regarding his qualifications or the criteria he used to arrive at the $20,532.94 estimate. Neither Mr. Cassidy nor Mr. Hogue had any personal knowledge about the estimate or how it was prepared. As already stated, the Insurer did not present any other evidence, nor explicit argument, that the $47,982.92 bill from the contractor was unreasonable.

Because of disputes over the workmanship and costs of the Holiday Inn project, the Insured eventually also sued the contractor in a separate lawsuit filed in Hawkins County Chancery Court. The Insurer argues that the Insured should not be allowed to take the position that the repair bill was reasonable, in contradiction of statements made in the Insured's complaint against the contractor, which the Insurer argues are inconsistent. Although not pleaded or stated as such, the Insurer is arguing for the application of the judicial estoppel doctrine. The trial court did not apply judicial estoppel, nor did it make any finding that the Insured's argument that the bill was reasonable and required to be paid by Insurer was inconsistent with any statement made in the litigation against the contractor.

The equitable doctrine of judicial estoppel prohibits a party from taking a position which is *directly contrary to or inconsistent with* a position that party has taken under oath in prior litigation, where such party had, or was chargeable with, full knowledge of the facts, and where another will be prejudiced by this action. ***Guzman v. Alvares,*** 205 S.W.3d 375, 382 (Tenn. 2006); ***Marcus v. Marcus***, 993 S.W.2d 596, 602 (Tenn. 1999) (emphasis added). The doctrine is not appropriately invoked unless it appears that the prior sworn statement was a willful falsehood, rather than the result of inadvertence, inconsideration, or mistake. ***State ex rel. Ammons v. City of Knoxville***, 232 S.W.2d 564, 567 (Tenn. Ct. App. 1950). Anything short of "conscious and deliberate perjury" is insufficient to give rise to the doctrine of judicial estoppel. ***State ex rel. Scott v. Brown***, 937 S.W.2d 934, 936 (Tenn. Ct. App. 1996). Judicial estoppel is not favored in Tennessee. ***Guzman,*** 205 S.W.3d at 382; ***Layhew v. Dixon***, 527 S.W.2d 739, 741 (Tenn. 1975).

A close reading of the Insured's complaint against the contractor in the separate lawsuit reveals that the Insured did not make any statements directly contrary to its position in this lawsuit. The lawsuit against the contractor raised issues regarding the entire construction project, a project costing approximately $1 million total, and not just the repair from the fire. There is nothing directly inconsistent with the positions taken by Insured in this action and the lawsuit against the contractor, and therefore the trial court did not err by not applying the judicial estoppel doctrine against the Insured in this case.

IV. Conclusion

The Insurer is contractually bound to pay "the cost to repair, replace or rebuild the property with material of a like kind and quality." The evidence presented preponderates in favor of a conclusion that the reasonable cost to repair the property after the fire was $47,982.92. Pursuant to the terms of the contract, the Insured is entitled to a judgment for this amount, less the $1,000 deductible. The judgment of the trial court is modified to reflect an award to the Insured in the amount of $46,982.92, and is affirmed as modified. Costs on appeal are assessed to the Appellee, Meridian Insurance Group, Inc.

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SHARON G. LEE, JUDGE