

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
February 6, 2008 Session

JAMES B. JOHNSON , ET AL v. CHARLIE B. MITCHELL, JR., ET AL.

**Appeal from the Chancery Court for Williamson County
No. 32232 Jeffrey S. Bivins, Chancellor**

No. M2007-00977-COA-R3-CV - Filed September 16, 2008

Plaintiffs appeal the Chancery Court’s grant of summary judgment in this breach of contract action. Finding no error, we affirm the Chancery Court’s judgment.

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

RICHARD H. DINKINS, J., delivered the opinion of the court, in which ANDY D. BENNETT, J., joined. PATRICIA J. COTTRELL, P.J., M.S., not participating.

James B. Johnson and Stephen H. Price, Nashville, Tennessee, for the appellants, James B. Johnson and Sylvia S. Johnson.

Stephen Andrew Lund and Thomas V. White, for the appellees, Charlie B. Mitchell, Jr., and CBM Enterprises, Inc..

MEMORANDUM OPINION¹

I. Factual Background

Plaintiffs, James and Sylvia Johnson (“the Johnsons”) entered into a contract with defendant, CBM Enterprises, Inc. (“CBM”) for the purchase of an unimproved lot in the Magnolia Vale subdivision in Williamson County, Tennessee, on November 11, 2004. The contract price was

¹Tenn. R. Ct. App. 10 states:

This Court, with the concurrence of all judges participating in the case, may affirm, reverse or modify the actions of the trial court by memorandum opinion when a formal opinion would have no precedential value. When a case is decided by memorandum opinion it shall be designated “MEMORANDUM OPINION,” shall not be published, and shall not be cited or relied on for any reason in any unrelated case.

\$150,000.00, to be paid upon approval of the Johnsons' building plans and their securing a construction loan; they tendered \$1,000.00 as an earnest money deposit. The Johnsons were given a copy of design criteria for the subdivision, including architectural guidelines and design review procedures, when they signed the contract; they were also given a copy of the Declaration of Protective Covenants, Conditions and Restrictions for Phase II of Magnolia Vale. The design criteria required the Johnsons to receive approval of their plans from the architectural review committee prior to commencing construction.

The Johnsons submitted plans to the architectural review committee in May 2005, which were rejected by the committee; verbal and written suggestions were given to their architect. The Johnsons submitted revised plans in June 2005, which were also rejected. After the second rejection, James Johnson spoke with David Lowry, senior real estate manager for an affiliate of CBM; while there is some disagreement as to the conversation that took place, on August 10 CBM's counsel sent a letter to the Johnsons (on behalf of CBM) advising the Johnsons that they had until October 15, 2005, to submit new plans and that a response would be made by October 28. The letter included the following statement:

I am urging you and your architect to take into account the comments already passed along to you by Mitch Barnett and come up with a set of plans that are consistent with his direction. If you and your architect are committed to a set of plans that are not acceptable to my client, let's be realistic about that and avoid any further time by both your architect and Mitch Barnett. On the other hand, my client is perfectly willing to review any new plans as long as they are submitted with a good faith recognition of all of the direction of Mitch Barnett. If an agreement cannot be reached as to my client's acceptance of satisfactory plans by October 28, the contract will be deemed null and void and we will return to you the \$1,000.00 in earnest money.

The Johnsons submitted an incomplete set of plans to the review committee on October 15 and a complete set on October 22; these, too, were unacceptable and the Johnsons were notified by letter from counsel for CBM dated November 1, 2005, that the contract would be deemed null and void and their earnest money returned. After a further meeting between Ms. Johnson, her architect, and representatives of CBM on January 10, 2006, the Johnsons received a letter from counsel for CBM dated January 26, 2006, declaring the contract void and enclosing a check for the earnest money deposit.

II. Procedural History

The Johnsons filed suit against CBM and Charlie B. Mitchell, Jr., ("Mitchell")² for breach of contract, asserting that CBM's action in voiding the contract constituted a breach of the contract

² Charlie B. Mitchell, Jr., was added as a party apparently based upon the allegation that he, rather than the architectural review committee, was the person who disapproved the Johnsons plans. The Appellees will be referred to herein collectively as "CBM" unless specifically named.

and requesting specific performance. The Court entered a preliminary injunction on March 14, 2006, enjoining CBM from transferring the property, conditioned on the Johnsons posting bond in the amount of \$150,000.00. After mediation was unsuccessful, the Court entered a scheduling order on October 25, 2006, setting forth deadlines for discovery and dispositive motions. On December 12 CBM filed a motion for summary judgment, along with supporting material; hearing on the motion was set for February 12, 2007. The Johnsons filed a response to the motion on the afternoon of February 9. Also on February 9, CBM filed a supplement to their motion, requesting the court to deny any written responses filed by the Johnsons as untimely and adding two additional arguments for granting summary judgment.

Following the February 12 hearing the parties submitted competing orders for entry.³ On February 22 the court entered the order which had been tendered by CBM on February 13, stating, *inter alia*:

1. The Motion for Summary Judgment in this case was filed on December 12, 2006 and the hearing was set for February 12 by an Agreed Order on January 18, 2007.
2. The Defendants' Motion for Summary Judgment was in the form as required by Rule 56.03 including a separate concise statement of material facts as to which the moving party contended there was no genuine issue for trial.
3. Under Rule 56.03, the Plaintiffs were required, not later than five (5) days before the hearing, to serve and file a response to each fact set forth by the moving party.
4. The Plaintiffs failed to file anything with the Court until approximately 4:00 p.m. on February 9, 2007. On that date, the Defendants filed supplemental information in support of their Motion and the Plaintiffs filed their first response to the motion for Summary Judgment.
5. For purposes of this ruling, the Court will not consider either party's February 9, 2007 filings.
6. The Court finds that the plaintiffs did not respond as required by Rule 56.03 in the manner as required by the Tennessee Rules of Civil Procedure, and therefore, there is no genuine issue of material fact. As a result, the Defendants are entitled to judgment as a matter of law. Therefore, the Court grants the Defendants' motion for summary judgment in favor of the Defendants.

Prior to entry of the order of February 22, the Johnsons had filed a competing order, along with a Motion To Enter Order, and set the motion for hearing on February 26. By agreement the hearing was reset for March 26. On February 27 the Johnsons filed a supplement to their motion requesting, *inter alia*, that the court "state in its order the legal grounds upon which the Court granted Defendants' motion for summary judgment." On March 22 the Johnsons gave notice of filing two affidavits of Mr. Lowry, Defendants' Statement of Material Facts and Plaintiffs Responses to

³ No transcript of the February 12, 2007, hearing is in the record. The Johnsons did, however, file a Statement of the Evidence which includes matters which transpired at this hearing.

Defendants' Request for Admission, along with a document styled "Reply To Defendants' Response to Plaintiffs' Supplemental Motion To Enter Order Or State Grounds And Response To Defendants' Motion To Enter Order."

The court heard the Johnsons' motion, as supplemented, on March 26. On March 28 CBM tendered an order reflecting the court's disposition of the motion; on March 29 the Johnsons tendered a competing order along with a Motion to Enter Order. Following a hearing on the motion on April 9,⁴ the court entered an order striking the Johnsons' motion, stating that it would consider both orders tendered for entry. On April 19 the court entered its order denying the motions heard on March 26; in addition, the court reiterated the bases for granting summary judgment which had been outlined in the February 22 order and added the following:

5. The Court finds that the facts set out in the Defendants' Statement of Material Facts, pursuant to Tenn. R. Civ. P. 56.03, affirmatively negate the claims as set out in the Complaint.

No further amplification or clarification of the court's order was sought.

Plaintiffs appeal the grant of summary judgment, asserting that the materials filed in support of the motion failed to negate their contract claims and that the trial court should have continued the hearing on the motion after defendants filed a supplement to the motion that raised new issues.

III. Analysis

A. Standard of Review

The standard for review of a grant of summary judgment by the trial court is *de novo*. See *Blair v. W. Town Mall*, 130 S.W.3d 761, 763 (Tenn. 2004). This court must make a fresh determination that the requirements of Tenn. R. Civ. P. 56 have been satisfied. *Hunter v. Brown*, 955 S.W.2d 49, 50-51 (Tenn. 1977). When reviewing the evidence, we first determine whether factual disputes exist. If a factual dispute exists, we then determine whether the fact is material to the claim or defense upon which the summary judgment is predicated and whether the disputed fact creates a genuine issue for trial. *Byrd v. Hall*, 847 S.W.2d 208, 214 (Tenn. 1993); *Rutherford v. Polar Tank Trailer, Inc.*, 978 S.W.2d 102, 104 (Tenn. Ct. App. 1998). We consider the evidence in the light most favorable to the non-moving party and resolve all inferences in that party's favor. *Stovall v. Clarke*, 113 S.W.3d 715, 721 (Tenn. 2003); *Godfrey v. Ruis*, 90 S.W.3d 692, 695 (Tenn. 2002). We review the decision to grant summary judgment as a matter of law. *Finister v. Humboldt Gen. Hosp., Inc.*, 970 S.W.2d 435, 437 (Tenn. 1998); *Robinson v. Omer*, 952 S.W.2d 423, 426 (Tenn. 1997). Because the question is one of law, no presumption of correctness attaches to the grant of a summary judgment. *Hembree v. State*, 925 S.W.2d 513, 515 (Tenn. 1996); *BellSouth Adver. & Publ'g Co. v. Johnson*, 100 S.W.3d 202, 205 (Tenn. 2003).

⁴ There is no transcript of this hearing in the record. The Statement of the Evidence includes matters which transpired at this hearing.

Summary judgment is appropriate where the movant establishes that there is no genuine issue as to any material fact and that a judgment may be rendered as a matter of law. Tenn. R. Civ. P. 56.04; *Stovall*, 113 S.W.3d at 721. The first determination for the court, therefore, is whether factual disputes exist; any such factual disputes must be material to the claim or defense upon which the summary judgment is predicated and must create a genuine issue for trial. *Byrd v. Hall*, 847 S.W.2d 208, 214 (Tenn.1993); *Rutherford v. Polar Tank Trailer, Inc.*, 978 S.W.2d 102, 104 (Tenn.Ct.App.1998). The movant bears the burden of persuading the court that no genuine issue of material fact exists and that it is entitled to judgment as a matter of law; once it does so, the opponent of the motion may not rely on its pleadings but must demonstrate by affidavits or discovery materials that there is a genuine factual dispute that warrants a trial. *Byrd v. Hall, supra*. As part of its burden, the movant must either affirmatively negate an essential element of the opponent's claim or conclusively establish an affirmative defense. *McCarley v. West Quality Food Service*, 960 S.W.2d. 585 (Tenn. 1998). If the movant fails to do so, the opponent's burden to come forward with affidavits or discovery materials is not triggered and the motion fails. *Id.* at 588. If the movant does negate a basis of the suit in its filing, the opponent must establish the existence of the "essential elements of the claim" by (1) demonstrating evidence showing a material factual dispute; (2) rehabilitating the evidence which was attacked by the movant; (3) producing additional evidence establishing the existence of a genuine issue for trial; or submitting an affidavit explaining that additional discovery is necessary. *Id.*; see also *Staples v. CBL & Assoc., Inc.*, 15 S.W.3d 83 (Tenn. 2000).

B. Discussion

The Johnsons first complain that the February 22 order did not state that CBM affirmatively negated their breach of contract claim. Following the entry of the February 22 order, the Johnsons moved the court to state the legal grounds upon which it granted summary judgment; that request resulted in the April 19 order which reiterated the language of the February 22 order and added the paragraph quoted above. They then assert that the April 19 order was erroneous because it found that movants had affirmatively negated the Johnsons' breach of contract claim, even though, they contend, the court had previously stated that it would not consider the issue of "whether the Defendants affirmatively negated Plaintiffs [sic] claims."⁵ They also contend that the April 19 order is "deficient" for its asserted failure to comply with Rule 56.04; they do not specify in what manner the order is allegedly deficient and, in fact, quote Rule 56.05 in support of their contention. We have reviewed the April 19 order and have determined that it is in compliance with Rule 56.04 as worded prior to the July 1, 2007 amendment.⁶ We consider the April 19 order to be the operative order for

⁵ The Johnsons contend that the court made this statement in the March 26 hearing on the Johnsons' oral motion to have the court state the grounds upon which it granted summary judgment.

⁶ The amendment to Rule 56.04, effective July 1, 2007, extended the trial court's responsibility to state the legal grounds for granting and denying summary judgment and deleted the language of the prior rule that the trial court responsibility be exercised "upon request." Here, the motion for the court to state its legal grounds was made relative to the February 22 order and no request was made relative to the April 19 order.

purposes of this appeal; however, we will discuss the issues raised relative to the February 22 order to the extent our disposition of those issues impacts our decision of issues relating to the April 19 order.

The February 22 order found, *inter alia*, that no genuine issue of material fact existed and that CBM and Mitchell were entitled to judgment as a matter of law. Even though the February 22 order did not include the specific language appearing in the April 19 order (*i.e.*, that the facts in the statement of material facts negated the Johnsons' claims), adherence to the standard set forth in *McCarley* was still required of the trial court and is the standard we apply in our "fresh determination [of whether] the requirements of Tenn. R. Civ. P. 56 have been satisfied." See *Hunter v. Brown, supra*. Thus, we look to the pleadings and materials filed in support of the motion to determine if summary judgment was appropriate in this case.

The Johnsons allege that CBM breached the contract when it terminated the contract and returned the Johnsons' earnest money deposit; they received a preliminary injunction enjoining the sale of the property and sought specific performance of the contract of sale. In answer to the complaint, CBM set forth, as an affirmative defense, that the Johnsons first breached the contract by stating that they would not cooperate with the architectural review committee, by not dealing in good faith and by "repeatedly breach[ing] the contract." In opposition to the Johnsons' request for a preliminary injunction, CBM submitted, *inter alia*, the affidavit of David Lowry, Senior Real Estate Manager for the Mitchell Development Group, an affiliate of CBM,⁷ in which Mr. Lowry stated that, on August 3, 2005, Mr. Johnson stated to him that Mr. Johnson "was not going to accept any of the [Magnolia Vale Architectural] Committee's decisions and would no longer cooperate with the Seller and the Seller's associates." Affidavits of the Johnsons' architectural designer, Jelani Ingram, and home designer, Butch Madison, were filed by the Johnsons in support of the application. The order granting the preliminary injunction found the following facts:⁸

In November 2004, the defendants offered to sell the real property identified as Lot 58 of the Magnolia Vale Subdivision and the plaintiffs agreed to purchase the property for the sum of \$150,000.00. Closing of the contract was contingent upon the defendants' Architectural Review Committee's ("ARC") approval of the plaintiffs' proposed home design and plans. The defendants provided the plaintiffs with a copy of the Design Criteria and a copy of the Declaration of Protective Covenants, Conditions and Restrictions ("Covenant"). In May and August 2005, the plaintiffs submitted one set of plans that was rejected by the defendant, Charlie B. Mitchell, Jr. In October 2005, the plaintiffs submitted a new set of plans which the defendants attempted to reject on November 1, 2005. Plaintiff Sylvia Johnson, designer Butch Madison and defendant's architect, Mitch Barnett, met on January 10, 2006 to discuss the plaintiffs new plans. On January 26, 2006, the defendants notified the plaintiffs that the plans had been rejected and the defendants deemed the

⁷ This affidavit is dated March 1, 2006.

⁸ The findings were made in accordance with Rule 65.04(6), Tenn. R. Civ. P.

contract null and void. The defendants also refunded the plaintiff's [sic] escrow money. The plaintiffs then filed the above styled action on February 3, 2006, alleging breach of contract, seeking specific performance and a temporary injunction.

CBM's affirmative defenses to the action included the assertions that the Johnsons anticipatorily breached the contract by stating they would not cooperate with the architectural review committee; by failing to deal in good faith; and by breaching the contract themselves prior to CBM's termination of the contract.⁹ These affirmative defenses were also asserted as grounds for granting CBM summary judgment. In support of the motion for summary judgment, CBM filed the affidavits of David Lowry¹⁰ and Mitchell Barnett, formerly CBM's architect for the Magnolia Vale subdivision; the Johnsons' responses to requests for admissions; and a statement of undisputed material facts. As stated earlier, the court did not consider any of the material untimely filed by the Johnsons.¹¹

Taking the materials filed in support of the motion, requests for admissions, statement of material facts, as well as the material filed in support of and in opposition to the request for preliminary injunction, it is clear that the Johnsons were obligated to submit plans to the architectural review committee for approval, with such approval being a precondition of closing on the sale. Approval of the plans was in the sole discretion of the committee and that approval was never obtained. The affidavit of Mr. Lowry established that, as early as August 3, 2005, Mr. Johnson had indicated dissatisfaction with the decisions of the committee rejecting the two sets of plans submitted as of that date and had stated his unwillingness to cooperate further with CBM, thereby supporting CBM's contention that the Johnsons did not deal in good faith.

Inasmuch as a party who has materially breached a contract cannot recover on it, *see ARC LifeMed, Inc. v. AMC-Tennessee, Inc.*, 183 S.W.2d 1 (Tenn. Ct. App. 2005), a finding that the Johnsons breached the contract would negate an essential element of their claim and entitle CBM to judgment as a matter of law. The Johnson's breach of contract claim was premised upon CBM's declaration that the contract was null and void in its letter of January 26, 2006. The record shows that the plans submitted by the Johnsons at the January 10, 2006, meeting were still deficient in the areas of dimensions, details, scale, proportions, use of acceptable materials, coordination, completeness, generally acceptable architectural standards of design, proper architectural style and a site plan, and that no changes or revisions had been made in accordance with the recommendations in November 2005. The actions and inactions of the Johnsons support a finding that they breached the contract

⁹ The materials filed in support of the motion identified the Johnsons' failure to close by January 7, 2005, as a breach of the contract.

¹⁰ This affidavit is dated December 11, 2006.

¹¹ The court was entitled to do this. Failure to comply with Rule 56.03 can result in the trial court's "refusal to consider the factual contentions of the nonmoving party even though those facts could be ascertained from the record," *Owens v. Bristol Motor Speedway, Inc.*, 77 S.W.3d 771 at 774; *see also Simmons v. Harris*, No. M2000-00227-COA-R3-CV, 2000 WL 1586451, at *3 (Tenn. Ct. App. Oct. 25, 2000), and the material facts set forth in the movant's papers may be deemed admitted if not controverted by the opposing party. *Holland v. City of Memphis*, 125 S.W.3d 425 (Tenn. Ct. App.2003); *Staples v. CBL & Assocs.*, 15 S.W.3d 83 (Tenn. 2000); *McCarley v. West Quality Food Serv.*, 960 S.W.2d 585 (Tenn. 1998).

with CBM by repudiating it and in failing and refusing to perform their responsibilities. Contrary to their insistence, they were required to produce evidence raising material factual issues relative to their repudiation and breach and their failure to do so supports an award of summary judgment to CBM.¹²

The Johnsons also assign as error the action of the trial court in not continuing the summary judgment hearing in light of CBM's filing of the supplement to its motion on February 9, 2007. The decision to waive or strictly enforce the requirements of a rule is a discretionary one with the trial court, which we review under an abuse of discretion standard. *See Owens v. Bristol Motor Speedway*, 77 S.W.3d 771 (Tenn. Ct. App. 2001). The court did not consider CBM's supplement in its consideration of the summary judgment motion and based its ruling on the motion and supporting materials that had been filed on December 12, 2006. The trial court did not abuse its discretion.

IV. Conclusion

For the foregoing reasons, the judgment of the trial court granting summary judgment to CBM is affirmed. Costs are assessed to James. B. Johnson and Sylvia S. Johnson, equally.

RICHARD H. DINKINS, JUDGE

¹² The majority of the Johnsons' argument on appeal is premised upon the contention that they had no responsibility to produce evidence establishing the existence of a genuine issue for trial because CBM's submission did not affirmatively negate their breach of contract claim. This argument is somewhat inconsistent with their action in filing an untimely response with the trial court and appears to be an effort to justify "after the fact" their failure to adhere to the requirement of Rule 56.04 that a response be filed not later than five days prior to the hearing.