IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs June 5, 2007

JOHN R. SHOMO ET AL. v. CITY OF FRANKLIN, TENNESSEE

Appeal from the Circuit Court for Williamson County
No. 05116 Russ Heldman, Judge

No. M2006-00319-COA-R3-CV - Filed February 22, 2008

The Shomos owned several sewer taps on undeveloped property. The City of Franklin sold sewer taps on the property, offering lower prices than the Shomos. The Shomos sued Franklin asserting causes of action for breach of contract, unjust enrichment, conversion, and violation of the duties of a public utility. The trial court granted Franklin's motion to dismiss on the grounds that the complaint contained no set of facts that would entitle the Shomos to any relief according to law. We affirm.

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

ANDY D. BENNETT, J., delivered the opinion of the court, in which PATRICIA J. COTTRELL, P. J., M.S., and FRANK G. CLEMENT, JR.,J., joined.

M. Taylor Harris, Jr., Nashville, Tennessee, for the appellants, John R. Shomo and Sylvia J. Shomo.

Douglas Berry, Nashville, Tennessee, for the appellee, City of Franklin, Tennessee.

OPINION

In 1980, Bill Wills (Wills) and two others founded Moore's Lane Sewerage Treatment Company, Inc. ("MLSTC"), a privately owned public utility providing service in the then undeveloped Cool Springs area in Williamson County. The Tennessee Public Service Commission granted MLSTC a certificate of convenience and necessity in order to provide sewer service in the area. Wills was a developer who owned several properties in the area. Wills proceeded to purchase sewer taps from MLSTC which were reserved for future use with the intention of developing his properties. These properties included the areas where Cracker Barrel, Krispy Kreme, and Costco are today. The amended complaint explains the importance of the advance purchase of sewer taps as follows:

> 7. Ownership of a "sewer tap" entitles the customer to sewer service of one (1) single family unit ("SFU") which is capacity for treatment of 350 gallons of wastewater per day. By purchasing sewer taps prior to development of property, the

> customer "reserved" sewer capacity in the system for future development. By reserving sewer capacity for future use, the customer was protected in the event of a sewer moratorium or of the remaining capacity of the sewer system having been sold prior to the need to utilize the reserved sewer taps. A customer owning reserved taps has the right to use the taps himself or to assign that right for a price he chooses to a person who will use them.

A tap is associated with a particular piece of property. Wills understood that MLSTC would not sell taps for properties he owned until all of the Wills taps had been sold first.

After the formation of MLSTC, the cities of Franklin and Brentwood annexed MLSTC's service area. The Wills properties became part of the City of Brentwood. On September 10, 1991, the City of Franklin ("Franklin") purchased the entire sewer system owned by MLSTC. Section 6.1 of the contract provided that Franklin would assume all obligations of MLSTC arising under its contracts with sewer customers. The contract also gave Franklin a credit of $809,214.22 for taps previously sold by MLSTC. Exhibit C to the contract listed all customers of MLSTC whose contracts were assumed by Franklin. Wills is listed as owning 102 reserved taps for property in Brentwood. Forty of these taps were assigned by Wills to Franklin to satisfy MLSTC's contractual promise to indemnify Franklin for certain contingent liabilities related to the sewer taps.

Wills sold three taps from 1994 to 1997, then assigned his remaining 59 prepaid sewer tap rights to John and Sylvia Shomo ("the Shomos").[1] Due to his experience in developing real estate in the area, Wills and the Shomos agreed that Wills would continue to arrange for the sale of the reserved taps on the Shomos' behalf.

There followed a series of transactions that led to this lawsuit. On March 1, 1999, Franklin sold 10 sewer taps for the Costco store located on Wills property despite Wills' claim that the taps he had previously purchased should be sold first. In January of 2002, the Shomos agreed for Wills to assign all 59 of their taps to a developer for $3,500 each. By letter of January 14, 2002 the attorney for the developer notified Franklin that his client would be purchasing these taps. Franklin made it known that it would sell sewer taps for $1,500 each. As a result, the taps were purchased from Franklin instead of the Shomos. Franklin later sold the equivalent of 23.4 taps to the Cracker Barrel and 40 taps to Krispy Kreme, both of which were located on Wills properties.

Alleging that the sale of such sewer taps violated their rights, the Shomos filed the original complaint on February 23, 2005. On August 26, 2005, the Shomos filed a Motion to File Amended

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[1] The assignment, signed by Wills on May 1, 1997, states the following:

> For and in exchange of Ten and 00/100 Dollars ($10.00), the receipt and adequacy of which is acknowledged, the undersigned Bill Wills herewith transfers to John R. Shomo and Sylvia J. Shomo, all his right, title and interest in all sewer taps which are now owned by, or which in the future may be owned by, the undersigned Bill Wills.
>
> Said sewer taps are the subject of the agreement dated April 30, 1990 between the parties hereto.

Complaint "based upon the contractual duties of Franklin set forth in the 1991 contract by which Franklin expressly assumed obligations to Bill Wills which obligations are now owed to Plaintiffs." The Motion to File Amended Complaint was granted by an agreed order on September 23, 2005.

The Shomos' amended complaint alleges breach of contract, breach of Franklin's duty as a public utility, conversion, and/or unjust enrichment. They claim that "Franklin destroyed Plaintiff's rights by circumventing Plaintiffs and selling sewer taps from its inventory to developers of Costco, Cracker Barrel, and Krispy Kreme." The Shomos assert that because of Franklin's actions, their reserved sewer tap rights are now worthless. According to the Shomos, Wills had an "understanding" with MLSTC that it would not sell more taps for use on properties owned by him until the taps for which he had prepaid, and subsequently assigned, were first used. This alleged agreement was detailed in the following paragraphs from the Shomos' amended complaint:

> 9. MLSTC and Bill Wills understood that MLSTC would not sell more sewer taps to third parties for use on Bill Wills Properties until the taps owned by Mr. Wills were first used on those properties. That obligation was necessary to protect the value and utility of the tap rights acquired by Bill Wills.
> . . .
> 17. Having assumed MLSTC's obligations to customers owning "reserved" sewer taps, Franklin had the legal duty to neither act nor fail to act in a way which would harm or destroy the tap rights of those customers. If Franklin were to then compete and sell its own sewer taps for use on Bill Wills Properties before all Bill Wills Taps were used, the pre-existing Bill Wills Taps rights would be harmed or destroyed. Franklin has sold more tap rights for the Bill Wills properties, without waiting until the Bill Wills Taps were first used. This violated an obligation of MLSTC to Bill Wills which Franklin assumed in the Purchase Contract.

On October 24, 2005, Franklin filed a motion to dismiss the Shomos amended complaint. On February 3, 2006, the trial court issued its order on Franklin's motion, stating: "The amended complaint contains no set of facts that would entitle Plaintiffs to any relief according to law." The amended complaint was dismissed.

The Shomos present the following two issues on appeal: (1) whether the trial court erred by granting a motion to dismiss which does not state with particularity the grounds for the motion; and (2) whether the trial court erred by granting Franklin's motion to dismiss, and dismissing the amended complaint as containing "no set of facts that would entitle Plaintiffs to any relief according to law."

The Supreme Court of Tennessee has explained the standard of review regarding a motion to dismiss:

> A Rule 12.02(6) motion to dismiss seeks only to determine whether the pleadings state a claim upon which relief can be granted. Such a motion challenges the legal sufficiency of the complaint, not the strength of the Plaintiffs' proof. *See Bell ex rel. Snyder v. Icard, Merrill, Cullis, Timm, Furen & Ginsburg, P.A.*, 986 S.W.2d 550,

> 554 (Tenn. 1999). The motion admits the truth of all relevant and material averments contained in the complaint, but asserts that such facts do not constitute a cause of action. *Stein v. Davidson Hotel Co.*, 945 S.W.2d 714, 716 (Tenn. 1997). In considering a motion to dismiss, the Court is required to take the relevant and material factual allegations in the complaint as true and to construe liberally all allegations in favor of the Plaintiffs. *Id.; Pursell v. First Am. Nat'l Bank*, 937 S.W.2d 838, 840 (Tenn. 1996); *Pemberton v. Am. Distilled Spirits Co.*, 664 S.W.2d 690, 691 (Tenn. 1984). Additionally, this Court's review of a trial court's determinations on issues of law is de novo, without any presumption of correctness. *Frye v. Blue Ridge Neuroscience Ctr., P.C.*, 70 S.W.3d 710, 712 (Tenn. 2002); *Bowden v. Ward*, 27 S.W.3d 913, 916 (Tenn. 2000); *Ganzevoort v. Russell*, 949 S.W.2d 293, 296 (Tenn. 1997).

Edwards v. Allen, 216 S.W.3d 278, 284 (Tenn. 2007). Further, an appellate court "should uphold granting the motion only when it appears that the plaintiff can prove no set of facts in support of a claim that will entitle him or her to relief." *Young v. Barrow*, 130 S.W.3d 59, 63 (Tenn. Ct. App. 2003).

STATE GROUNDS WITH PARTICULARITY

The Shomos argue that Franklin, in its Motion to Dismiss, did not state with particularity the grounds for the motion as required by the Tennessee Rules of Civil Procedure, which state in relevant part that "[a]n application to the court for an order shall be by motion which, unless made during a hearing or trial, shall be made in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought. . . ." Tenn. R. Civ. P. 7.02(1) (2006). The Shomos further allege that a memorandum of law does not fulfill the requirement.

Franklin's Motion to Dismiss, filed on October 24, 2005, states the following in its entirety:

> The defendant, City of Franklin, Tennessee, files this motion to dismiss the complaint, pursuant to Rule 12.02 (6) of the Tennessee Rules of Civil Procedure.[2] For the reasons set out in the attached memorandum of law, the complaint fails to state a claim upon which relief may be granted.

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[2] Tennessee Rule of Civil Procedure 12.02 states the following in relevant part:

> **12.02. How Presented.**
>
> Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion in writing: . . . (6) failure to state a claim upon which relief can be granted . . . .

Tenn. R. Civ. P. 12.02 (2006).

A lengthy memorandum of law accompanies the motion.

This issue has been addressed on several occasions and disposed of in various manners by the courts of this state. In *Willis v. Tenn. Dept. of Correction*, 113 S.W.3d 706 (Tenn. 2003), the Tennessee Supreme Court stated:

> The Attorney General's motion simply asserted that the petition should be dismissed "[p]ursuant to Tenn. R. Civ. P. 12.02(1) and (6)." This motion fails to meet the basic requirements of Tennessee Rule of Civil Procedure 7.02(1) which requires that motions must "state with particularity the grounds therefor." For the purposes of a Tennessee Rule of Civil Procedure 12.02(6) motion, the moving party must state in its motion why the plaintiff has failed to state a claim for which relief can be granted. Including the grounds for a Rule 12.02(6) motion in a separate memorandum of law does not comply with Rule 7.02(1). It is unclear why the Clerk and Master included this memorandum of law in the appellate record in light of Tennessee Rule of Appellate Procedure 24(a)'s language that trial briefs and counsel's memoranda of law are not part of the record on appeal.

Willis, 113 S.W.3d at 709 n. 2; *see also Ralph v. Pipkin*, 183 S.W.3d 362, 366 n. 1 (Tenn. Ct. App. 2005) ("The party moving for dismissal must state the particular grounds for the motion in the motion itself. Merely moving for dismissal based on the failure to state a claim and stating the grounds in an accompanying memorandum does not fulfill the requirement.") However, the *Willis* Court went on to decide the case on its merits, instead of remanding for the insufficiency of the motion to dismiss. This Court addressed the same issue the following year in *Finchum v. Ace, USA*, 156 S.W.3d 536 (Tenn. Ct. App.2004). Ultimately, because the motion to dismiss did not comply with the Tennessee Rules of Civil Procedure, this Court remanded the matter back to the trial court for further proceedings.

Procedural consistency is extremely important to the efficiency of the judicial system. When a case is appealed, memoranda of law are generally not included in the appellate record. *See* Tenn. R. App. P. 24(a). In a situation such as the one at hand, the only way this Court knows the grounds for the motion to dismiss is by referral to the attached memorandum of law. Therefore, when such vital memoranda are not included in the appellate record, the appellate court is left in the dark as to the grounds for the motion to dismiss. Hence the requirement that the motion itself state the grounds for dismissal.

We decline to reverse based only on the insufficiency of the motion to dismiss because the Shomos did not raise such insufficiency in the trial court and, as the Tennessee Rules of Appellate Procedure state, "[n]othing in this rule shall be construed as requiring relief be granted to a party responsible for an error or who failed to take whatever action was reasonably available to prevent or nullify the harmful effect of an error." Tenn. R. App. P. 36(a) (2007). Also, in this instance Franklin's Memorandum of Law in Support of Defendant's Motion to Dismiss has been included in the record for our review. However, we want to reiterate that a motion to dismiss must state the grounds for dismissal in the motion itself and not just in an accompanying memorandum of law.

DISMISSAL OF AMENDED COMPLAINT

According to the standard of review, as detailed above, when a party files a Rule 12.02(6) motion to dismiss, the "motion admits the truth of all relevant and material averments contained in the complaint . . . ." *Edwards*, 216 S.W.3d at 284. The trial court "is required to take the relevant and material factual allegations in the complaint as true and to construe liberally all allegations in favor of the Plaintiffs." *Id.* The Shomos' amended complaint alleged four causes of action: (1) breach of contract, (2) conversion, (3) unjust enrichment, and (4) violation of Franklin's duties as a public utility under Tenn. Code Ann. § 65-4-115.

In our view, the purpose for which Wills purchased the taps undermines the Shomos' arguments. According to the amended complaint, Wills bought the taps as a sort of "insurance" against future scarcity: "By purchasing sewer taps prior to development of property, the customer 'reserved' sewer capacity in the system for future development. By reserving sewer capacity for future use, the customer was protected in the event of a sewer moratorium or of the remaining capacity of the sewer system having been sold prior to the need to utilize the reserved sewer taps." Thus, Wills could develop his property in the future regardless of the general availability of taps. Future profit through sale of the taps was not the goal. Ensuring his properties had access to taps was Wills' goal.[3]

The argument that Franklin could not offer taps in competition with the Shomos on Wills properties is inconsistent with the allegations in the Amended Complaint. The purpose of the taps, as alleged by the Shomos, rests on the very notion that taps could be bought from another source. It is specifically alleged by the Shomos that reserved taps were "protection" in the event of a moratorium or lack of capacity. The event insured against is the absence of another source for the taps due to a moratorium or lack of capacity, i.e. circumstances that make these reserved taps the only taps that can service the property since there are no other available sources. This, however, presupposes the availability of taps from the utility. The Shomos argue that there can be no other source for the taps, i.e. the utility cannot sell taps to the Wills property owners. The Shomos' argument and the allegations in their Amended Complaint are at odds.

The Shomos contend that Wills had an "understanding" with MLSTC that as to the Wills properties these taps would be sold first. An "understanding" is not necessarily an enforceable contract.[4] In fact, the Shomos have failed to allege that Wills and MLSTC had a binding or enforceable contract regarding MSLTC's sale of future taps.

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[3] The sale of the taps to a third party seems logically inconsistent with an understanding that the taps must be used first on any of Wills' properties. Such an agreement would leave Wills or the purchasers of his properties at the mercy of the owners of the taps.

[4] While they have alleged what Wills and MLSTC "understood," and such an "understanding" may broadly constitute an agreement, "not every agreement is a contract." *Black's Law Dictionary*, 74 (8th ed. 1999) (quoting 2 *Stephen's Commentaries on the Laws of England* 5 (L. Crispin Warmington ed., 21st ed. 1950).

The Shomos attach great significance to a letter written by Franklin's attorney in 2002. Yet, what is absent from that letter is more significant than what is in it. The letter contains no indication by Franklin of exclusivity or priority for the Shomos' taps in relation to the Wills properties. It recognizes the *right* of Wills or his affiliates to use the taps in connection with his properties. It does not recognize an *obligation* on Franklin's part to require the use of those taps at the beginning of development or at any time thereafter.

The Shomos also argue as a basis for their claim that if the utility sells these taps at issue, then the Shomos' taps become worthless. Based on the allegations in their complaint, however, this is not an accurate conclusion. First, the reserved taps had value as protection if taps were not available from another source. Second, even if there is another available source for the taps (no moratorium or lack of capacity), the reserved taps could be sold to Costco or any other property owner since the reserved taps are assignable to other parcels of property[5]. The availability of another source of taps, such as Franklin, may eliminate a monopoly enjoyed by the reserved taps and may affect how much the taps are worth, but it does not eliminate their worth.

Based on the allegations discussed above in the Amended Complaint and the absence of allegations indicating the existence of a contract, we do not believe reference to an "understanding" creates an actionable claim for breach of contract.

The Amended Complaint also advances claims of conversion, unjust enrichment, and violation of Tenn. Code Ann. § 65-4-115. These claims also must fail for similar reasons as outlined above. Absent an enforceable agreement that the Shomos' taps will be sold to developers of Wills' properties first, there is no exercise of dominion over property in defiance of the Shomos' rights,[6] no benefit for Franklin to retain unjustly,[7] and no unjust or unreasonable practice under Tenn. Code Ann. § 65-4-115.[8]

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[5] A 2004 letter from Franklin's attorney indicated that the City was willing to permit the Shomos to use or sell their taps within the old MLSTC service area.

[6] "Conversion is the appropriation of the thing to the party's own use and benefit, by the exercise of dominion over it, in defiance of plaintiff's right." *River Park Hosp., Inc. v. BlueCross BlueShield of Tennessee, Inc.*, 173 S.W.3d 43, 60 (Tenn. Ct. App. 2002) (citations omitted).

[7] "The elements of an unjust enrichment claim are: 1) [a] benefit conferred upon the defendant by the plaintiff; 2) appreciation by the defendant of such benefit; and 3) acceptance of such benefit under such circumstances that it would be inequitable for him to retain the benefit without payment of the value thereof." *Freeman Industries, LLC, v. Eastman Chemical Co.*, 172 S.W.3d 512, 525 (Tenn. 2005)(citations omitted).

[8] Tenn. Code Ann. § 65-4-115 states: " No public utility shall adopt, maintain, or enforce any regulation, practice, or measurement which is unjust, unreasonable, unduly preferential or discriminatory, nor shall any public utility provide or maintain any service that is unsafe, improper, or inadequate, or withhold or refuse any service which can reasonably be demanded and furnished when ordered by the authority."

The judgment of the trial court is affirmed, and the cause is remanded to that court for further proceedings consistent with this opinion. Costs of the appeal are taxed to the Shomos, for which execution may issue, if necessary.

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ANDY D. BENNETT, JUDGE