IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
October 13, 2009 Session

CITICAPITAL COMMERCIAL CORPORATION v. CLIFFORD COLL

Appeal from the Chancery Court for Trousdale County
No. 6599 Charles K. (C.K.) Smith, Chancellor

No. M2009-00912-COA-R3-CV - Filed January 19, 2010

A finance company that owned a security interest in a Hyundai excavator appeals the award of a judgment against it in favor of a consumer for violations of the Tennessee Consumer Protection Act. The consumer alleged in his complaint that the creditor and the equipment company that sold the excavator to the consumer had engaged in unfair and deceptive trade practices, because the excavator was defective when it was delivered, it never worked properly, and the defendants failed to make repairs and refused to permit him to trade for another excavator. The financing company denied any wrongdoing and asserted the one-year statute of limitations as an affirmative defense. The equipment company that sold the excavator went out of business and dissolved prior to trial. The only claim tried was the consumer's TCPA claim against the finance company. The trial court denied the finance company's Tenn. R. Civ. P. 50.01 motion for a directed verdict on the statute of limitations defense, finding that the TCPA claim was timely filed within the five-year statute of repose. At the conclusion of the jury trial, the consumer prevailed on his TCPA claim and the trial court awarded treble damages and attorneys' fees based on a finding the finance company "willfully and knowingly" violated the TCPA. We have determined the TCPA claim was barred by the one-year statute of limitations; therefore, the trial court erred in denying the motion for a directed verdict, and the judgment of the trial court is reversed.

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

FRANK G. CLEMENT, JR., J., delivered the opinion of the court, in which ANDY D. BENNETT and RICHARD H. DINKINS, JJ., joined.

Mark G. Arnold and JoAnn T. Sandifer, St. Louis, Missouri, and Joseph R. Prochaska, Nashville, Tennessee, for the appellant, Colonial Pacific Leasing Corporation, Successor in Interest by Merger and Acquisition to CitiCapital Commercial Corporation.

William L. Moore, Jr., Gallatin, Tennessee, and Eddie Taylor, Hartsville, Tennessee, for the appellee, Clifford Coll.

OPINION

This appeal arises out of two separate but related civil actions, one commenced by Clifford Coll in Montgomery County and the other commenced by CitiCapital Commercial Corporation in Trousdale County. Each of these civil actions arise from the purchase of a Hyundai hydraulic excavator and other excavation equipment by Clifford Coll. The Hyundai excavator was purchased pursuant to a Conditional Sale Contract and Security Agreement that Coll entered into with United Equipment Inc. of Lavergne, Tennessee, dated December 30, 1998.

The first action was commenced by Coll in the Circuit Court for Montgomery County, Tennessee. In that action Coll sought to recover damages against United Equipment Inc. and Associates Commercial Corporation (CitiCapital Commercial Corporation) pursuant to the Tennessee Consumer Unfair and Deceptive Trade Practices Act and the Uniform Commercial Code. The other action was commenced by CitiCapital Commercial Corporation ("CitiCapital") to recover equipment from Coll. In that action, CitiCapital asserted that Coll was in default of a Security Agreement that was assigned to CitiCapital, which gave it a secured interest in the Hyundai excavator. The two civil actions were consolidated into this action and tried in the Chancery Court for Trousdale County, Tennessee. The relevant facts and procedural history are as follows.

Coll, who had been in the excavation business for many years, operated his own excavation business located in Sumner County, Tennessee when the matters at issue occurred.[1] On two separate occasions in 1997 and 1998, Coll purchased construction equipment pursuant to a Conditional Sale Contract and Security Agreement he entered into with United Equipment.[2] This appeal by CitiCapital pertains to Coll's purchase of a Hyundai hydraulic excavator pursuant to a Conditional Sale Contract and Security Agreement dated December 30, 1998. The excavator was sold to Coll for the price of $130,595, and Coll was required to sign a Security Agreement at the time of purchase. Paragraph 15 of the Security Agreement, titled "Chattel Paper," stated in pertinent part that the Security Agreement was to be sold to "Associates First Capital Corporation or one of its affiliates or subsidiaries

[1] At the time of trial Coll had been in the excavation business for almost fifty years.

[2] The first Conditional Sale Contract and Security Agreement Coll entered into with United Equipment, dated September 19, 1997, was for the purchase of a Western Star Tractor with Rogers 16' Dump Body and a Volvo Wheel Loader.

("Associates") and is subject to the security interest of Associates." Pursuant to paragraph 15, the Security Agreement was immediately assigned by United Equipment to an affiliate of Associates First Capital, specifically CitiCapital Commercial Corporation.

The excavator was delivered to Coll on a job site two months later, on March 1, 1999. Coll signed a Delivery Report upon delivery, which stated:

> I hereby acknowledge that the subject machine was delivered in satisfactory condition and operates satisfactorily, and that I received parts manual, operation & maintenance manual and instruction as to it's Proper Operation, Preventive Maintenance, and that all aspect of the standard warranty have been fully explained to me."

The Delivery Report further stated that the manufacturer's warranty provided by Hyundai started on March 1, 1999, the day of delivery, and the manufacturer's warranty expired on Feb. 28, 2000. As for any other warranties, the Conditional Sale Contract's paragraph 5 provided a warranty disclaimer, which reads:

> DISCLAIMER. There are no warranties other than provided by the Manufacturer of the Collateral. SELLER MAKES NO REPRESENTATIONS OR WARRANTIES, EXPRESS OR IMPLIED, AS TO THE QUALITY, WORKMANSHIP, DESIGN, MERCHANTABILITY, SUITABILITY, OR FITNESS OF THE COLLATERAL FOR ANY PARTICULAR PURPOSE, OR ANY OTHER REPRESENTATION OR WARRANTY WHATSOEVER, EXPRESS OR IMPLIED, unless such warranties are in writing and signed by Seller. Seller shall not under any circumstances be liable for loss of anticipatory profits or for consequential damages.

The Complaint was filed on December 11, 2000, twenty-two months after the delivery of the excavator. In the Complaint, and in his testimony, Coll repeatedly asserted that the excavator failed to work properly from the time he first took possession on March 1, 1999. He explained he continued to have problems with the excavator on all subsequent jobs; problems so significant that he was unable to complete the jobs. Coll also testified that he notified United Equipment from the beginning that the excavator did not work, but all United Equipment did was provide a "rental excavator," which it charged Coll $2,500 for the rental. Coll explained that he continued to call United Equipment on almost every one of his job sites and each time United Equipment sent a mechanic who made repairs on the excavator and billed him for the repairs.

The Hyundai excavator was covered by Hyundai's warranty; yet, Coll never made a warranty claim against Hyundai.[3] Moreover, Coll stated that he never attempted to directly contact Hyundai regarding the warranty or any of the problems with the excavator. Coll testified that a Hyundai representative was at the United Equipment store one day when Coll was meeting with Blake Wilson, the General Manager of United Equipment, and that Coll considered talking with the Hyundai representative, but Blake Wilson told him not to speak to the representative and that "he [Wilson] would take care of it." Consequently, Coll did not speak to the Hyundai representative.

As for CitiCapital, Blake Wilson testified that United Equipment never discussed any of Coll's problems concerning the excavator with a representative of CitiCapital. Coll, however, testified that on his second job following the receipt of the excavator, he spoke with a CitiCapital employee, whose name he recalls to be "Todd." Coll stated that Todd had come to the job site, but he did not know why, and that Coll asked Todd if he could trade-in the excavator. Coll further testified that Todd informed him that CitiCapital would not allow a trade-in because Coll had not made enough payments on the excavator to make a trade-in at that time. Coll also stated that he was informed by Todd that all decisions regarding the repair and replacement of the excavator were made by CitiCapital. The General Manager at United Equipment, Blake Wilson, stated that he remembered a general conversation with Coll about the possibility of a trade-in, but stated that he never told Coll that CitiCapital would not allow a trade-in.

More than a year later, in August 2000, Coll sent a letter to United Equipment attempting to revoke his acceptance of the excavator pursuant to Tennessee Code Annotated § 47-2-608 and stopped making payments on the equipment. United Equipment apparently informed CitiCapital of Coll's notice of revocation, because Coll received a letter from CitiCapital in September of 2000, stating that his August 2000 notice of revocation and failure to make payments would be treated as a default on his obligations.

On December 11, 2000, Coll filed suit in the Circuit Court for Montgomery County, Tennessee, against United Equipment and CitiCapital asserting claims based upon Tennessee's Uniform Commercial Code and Tennessee Code Annotated §47-18-104, the Tennessee Consumer Unfair and Deceptive Trade Practices Act. Soon thereafter, Coll filed for bankruptcy. CitiCapital then removed the Montgomery County action to the Bankruptcy Court. With the permission of the bankruptcy court, CitiCapital filed suit against Coll in the Chancery Court for Trousdale County seeking immediate possession of a wheel loader, a piece of equipment in which CitiCapital had a security interest and which Coll refused to

[3]The general manager of United Equipment testified that Coll never requested that United Equipment submit a warranty request and that one would have been submitted had Coll asked.

surrender. The Chancery Court ordered that the wheel loader be turned over to CitiCapital. CitiCapital obtained possession of the wheel loader and stored it at Ritchason Equipment; however, shortly thereafter the wheel loader was unlawfully removed from Ritchason Equipment's facilities. CitiCapital then filed an Amended Complaint against Coll in the Chancery Court for Trousdale County asserting a claim for immediate possession of the wheel loader, and a tractor, in which CitiCapital also had a security interest, and asserted a claim for conversion of the wheel loader. In response, on December 19, 2001, Coll filed an Amended Complaint and a Counter-Complaint against CitiCapital and United Equipment alleging that the excavator was defective, that United Equipment made representations regarding the repair of the defect to the excavator at no cost to Coll, and that United Equipment had failed to cure the defects.

The bankruptcy court remanded the Montgomery County case to the Circuit Court, which promptly transferred the case to the Chancery Court for Trousdale County. Coll then filed an Amended Counter-Complaint in which Coll asserted claims under the Tennessee Consumer Protection Act against United Equipment and CitiCapital. United Equipment dissolved prior to trial; thereafter, CitiCapital was the only defendant.

The case against CitiCapital was tried before a jury in the Chancery Court for Trousdale County from August 25 through August 29, 2008. The TCPA claims were the only claims that were submitted to the jury. At the close of evidence in the trial, CitiCapital moved for a directed verdict on the TCPA claim, arguing that the claim was barred by the one-year statute of limitations in Tenn. Code Ann. §47-18-110, that there was no evidence of any acts giving rise to liability under the TCPA, and that even if there were acts giving rise to liability on the part of United Equipment, there was no proof of any violations by CitiCapital. The trial court denied CitiCapital's motion for a directed verdict.

The jury awarded $365,000 plus prejudgment interest to Coll on his TCPA claim, and awarded $30,000 plus prejudgment interest to CitiCapital on its claim for conversion. The trial court also determined that CitiCapital "willfully and knowingly" violated the TCPA and awarded Coll treble damages and attorneys' fees of approximately $129,000, which were offset by the $40,471 award to CitiCapital for the conversion claim. A final judgment was entered on December 22, 2008, after which CitiCapital filed several post-trial motions, including a motion for judgment in accordance with its motion for directed verdict, one of which was the one-year statute of limitations set forth in Tenn. Code Ann. § 47-18-110. The motions were denied; thereafter, CitiCapital filed a timely appeal.

ANALYSIS

STATUTE OF LIMITATIONS

Several issues have been raised on appeal, however, we have determined the dispositive issue is whether Coll commenced his Tennessee Consumer Protection Act claim against CitiCapital within the one-year statute of limitations set forth in Tenn. Code Ann. § 47-18-110, which provides:

> [a]ny action commenced pursuant to § 47-18-109 shall be brought within one (1) year from a person's discovery of the unlawful act or practice, but in no event shall an action under § 47-18-109 be brought more than five (5) years after the date of the consumer transaction giving rise to the claim for relief.

CitiCapital argues that the trial court erred in denying its motion for directed verdict on the statute of limitations argument because the TCPA claim was filed more than one year following Coll's discovery of the alleged unlawful act or practice. In response, Coll argues that CitiCapital waived the statute of limitations argument by failing to submit a jury instruction on the issue and that the action was timely filed.

We will first address Coll's contention that CitiCapital waived the statute of limitations defense. The affirmative defense was properly pled, pursuant to Tenn. R. Civ. P. 8.03, in CitiCapital's Answer to Coll's Amended Complaint. Further, CitiCapital properly raised the defense pursuant to Tenn. R. Civ. P. 50.01 in its motion for directed verdict at the close of the evidence in the trial. In denying the motion, the trial court explicitly ruled that the TCPA claim was commenced timely by Coll,[4] thereby removing the issue from the province of the jury. Moreover, the defense was again raised in CitiCapital's post-trial motion for judgment in accordance with the directed verdict motion, which was filed pursuant to Tenn. R. Civ. P. 50.02. We, therefore, find that CitiCapital has not waived the statute of limitations defense.

As for the merits of the defense, we have determined that Coll's TCPA claim against CitiCapital is subject to the one-year statute of limitations set forth in Tenn. Code Ann. § 47-18-110. The basis for Coll's TCPA claim was pled as follows:

> 26. The representations made by United Equipment and/or CitiCapital that certain defective parts had been replaced when, in fact, they had not

[4] As we discuss below, the trial court erroneously applied the five-year "statute of repose"; not the one-year "statute of limitations."

> constituted unfair and deceptive trade practices in violation of the Tennessee Consumer Protection Act.
>
> 27. The failure and refusal of United Equipment and/or CitiCapital to repair or replace the defects in the Excavator in conformity with their promises and/or warranties was an unfair and deceptive trade practice in violation of the Tennessee Consumer Protection Act.

Whether Coll timely filed his TCPA claim against CitiCapital hinges on when Coll knew or should have know that he had sustained an injury as a result of an unfair and deceptive trade practice by CitiCapital or one of its agents. A plaintiff discovers he has sustained an injury when he "knows, or in the exercise of reasonable care and diligence, should know that an injury has been sustained." *Pero's Steak and Spaghetti House v. Lee*, 90 S.W.3d 614, 621 (Tenn. 2002) (citing *Quality Auto Parts Co. Inc.*, 876 S.W.2d 818, 820 (Tenn. 1994)). A "plaintiff is deemed to have discovered the right of action *when the plaintiff becomes aware of facts sufficient to put a reasonable person on notice that he . . . has suffered an injury as a result of the defendant's wrongful conduct.*" *Id*. (citing *Shadrick v. Coker*, 963 S.W.2d 726, 733 (Tenn. 1998); *Roe v. Jefferson*, 875 S.W.2d 653, 657 (Tenn. 1994)) (emphasis added).

The issue of whether the plaintiff exercised reasonable care and diligence in discovering the injury or wrong is a factual determination to be decided by the jury. *Wyatt v. AC and S, Inc.*, 910 S.W.2d 851, 854 (Tenn. 1995); *see also McIntosh v. Blanton*, 164 S.W.3d 584, 586 (Tenn. Ct. App. 2004). However,

> . . . where the undisputed facts demonstrate that no reasonable trier of fact could conclude that a plaintiff did not know, or in the exercise of reasonable care and diligence should not have known, that he or she was injured as a result of the defendant's wrongful conduct, . . . judgment on the pleadings or dismissal of the complaint is appropriate.

Schmank v. Sonic Auto., Inc., No. E2007-01857-COA-R3-CV, 2008 WL 2078076, at *3 (Tenn. Ct. App. May 16, 2008) (citing *Roe v. Jefferson*, 875 S.W.2d 653, 658 (Tenn. 1994); *Stanbury v. Bacardi*, 953 S.W.2d 671, 677-78 (Tenn. 1997); *Brandt v. McCord*, No. M2007-00312-COA-R3-CV, 2008 WL 820533, at *4 (Tenn. Ct. App. Mar. 26, 2008)).

The act CitiCapital is alleged to have engaged in that constituted an unfair or deceptive practice stems from a statement made by a person Coll identified as "Todd", whom

Coll believed to be a CitiCapital employee.[5] Coll testified that Todd told him that he could not trade-in the excavator because he had not made enough payments on the excavator. Coll testified that this conversation took place in March, April or May of 1999, on a job site. It was the second job for which Coll had attempted to use the recently acquired Hyundai excavator. Coll stated that he made the inquiry, because he had already determined the excavator would not work, and he also stated that he knew by this time that the excavator could not be repaired.

The foregoing establishes that Coll believed, and thus was aware, by May of 1999 that he had a defective excavator that could not be repaired and that CitiCapital had informed him that it would not allow him to trade-in the Hyundai excavator. Coll claims that Todd's statement constituted an unfair and deceptive trade practice; therefore, as of May of 1999, Coll was aware of facts sufficient to put a reasonable person on notice that he had suffered an injury. *See Pero's*, 90 S.W.3d at 621. Therefore, Coll's own testimony establishes that he knew or should have known by May of 1999 that he had sustained an injury as a result of an alleged unfair or deceptive trade practice by CitiCapital. More than one year passed, thereafter, before Coll commenced this action.

Coll did not commence this action until December 2000, more than a year after he discovered he had sustained an injury as a consequence of alleged unfair and deceptive practice by CitiCapital. Therefore, Coll's TCPA claims against CitiCapital were barred by the one-year statute of limitations in Tenn. Code Ann. §47-18-110. Accordingly, the trial court erred in failing to grant CitiCapital's motion for directed verdict on the ground that the action was time barred by the one-year statute of limitations in Tenn. Code Ann. §47-18-110.[6]

IN CONCLUSION

The judgment of the trial court is reversed, and this matter is remanded with instructions to enter judgment dismissing the Complaint against CitiCapital as time barred. Costs of appeal are assessed against Clifford Coll.

FRANK G. CLEMENT, JR., JUDGE

[5]Coll did not know Todd's last name or his title or the extent of any authority Todd had to act for CitiCapital.

[6]This decision renders all other issues on appeal moot.