



02/25/86 THIRD NATIONAL BANK KNOXVILLE v. JOHN F.

1986 | Cited 0 times | Court of Appeals of Tennessee | February 25, 1986

Goddard, J.

John F. Wilson, Defendant-Appellant, appeals a judgment rendered against him as a guarantor on an obligation owed Third National Bank. The promissory note evidencing the obligation, however, had been lost.

This appeal arises from the decision of the Chancery Court of Knox County in which the Third National Bank in Knoxville, Plaintiff-Appellee, was awarded a money judgment against John F. Wilson, Defendant-Appellant, who was a guarantor of an alleged obligation of which the promissory note had been lost.¹

By his issue on appeal Mr. Wilson contends there is no competent proof of the terms of the note, or that it had ever been signed by its maker, and that if the terms have been adequately proven the Appellee is not entitled to recover because the note was never endorsed to it.

In attempting to prove the existence of the lost note, the Appellee introduced evidence of an exact form of the actual note used and a hard-to-read photostatic copy, the bottom portion thereof not reproduced, of the actual note. The Appellee also offered oral testimony to establish the existence, ownership and terms of the note. In an effort to prove ownership, the Appellee also introduced a post-transfer assignment of the note from the receiver of the original holder to the predecessor entity of the Appellee. The Appellant rested at the Conclusion of the Appellee's case-in-chief, asserting that the terms of the note were not competently proven and that there was no competent proof that the maker signed the note. The Appellant also contended that even if the terms of the note were adequately proven, the terms themselves precluded any recovery because of the requirement which was never satisfied, that the holder be in possession through endorsement.

The Chancellor was convinced that a Corporation, Monex, Inc., on or about March 9, 1983, for value received, executed a promissory note to the City and County Bank of Knox County, as evidence of a loan of \$233,000. A continuing guaranty was admitted into evidence by the Chancellor because the Appellant failed to deny in his answer to the Appellee's allegations the existence of the guaranty. The Chancellor found that the City and County Bank failed and on the last day it operated, May 27, 1983, the obligation on the note was \$230,994.36. The Federal Deposit Insurance Corporation took over the assets of City and County, acting as its receiver, and sold its assets, including this note and obligation, to the Bank of Knoxville. The Bank of Knoxville merged with the Appellee who thereby came into possession of the note, guaranty and obligation. The Appellee alleged in its amended



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complaint that the note mysteriously disappeared from its files.

At trial the following facts were established by testimony from officers of the Appellee: (1) they had seen the note, (2) they had personal knowledge that the note was in the Bank's files, (3) that it had disappeared, and (4) a proper diligent search conducted to find the note was to no avail. The Chancellor found that during the time the Appellee was the holder of the note, Monex, Inc., and the Appellant both dealt and negotiated with the Appellee regarding the obligation and the note.

Based upon this finding, the Chancellor found that Monex, Inc., was obligated upon the lost note. He found no defect in the transfer of the note from the City and County Bank through the F.D.I.C. to the Bank of Knoxville which later merged with the Appellee. He found that the continuing guaranty was valid and enforceable and that the Appellant was liable to the extent of the guaranty. Although the Appellee did not stand as a "holder" within the original note definition because of lack of possession by endorsement,² he felt that the Appellee did have constructive possession of the note, and that the post-transfer assignment fulfilled the purpose of possession and endorsement by insuring that one actually having the note or some written evidence of it was entitled to its collection.

The Appellant reasserts here his contentions below, namely, that the Appellee did not competently prove the terms or the signing of the note, and that the terms of the note require holder status through endorsement, which the Appellee did not have.

It is well settled that review of a chancellor's findings shall be de novo upon the record with a presumption of correctness of the chancellor's findings unless the pre-ponderance of the evidence is otherwise. Rule 13(d) T.R.A.P.; Haynes v. Cumberland Builders, Inc., 546 S.W.2d 228 (Tenn. App.1976). Having examined the entire record, we are satisfied that the evidence does not preponderate against the Chancellor's findings of fact and Conclusions of law and, therefore, affirm his actions.

The Appellant contends there is no competent evidence to meet the requirements of T.C.A. 47-3-804³ relative to lost instruments, citing various passages in the trial record where he asserts improper evidence was introduced. We find his insistence without merit.

As to the terms of the note, there was testimony from one of the Appellee's officers that had seen the note prior to its being misplaced, that a form copy exemplar admitted in evidence was the same as the lost note.

In our view the Chancellor found that the photostatic copy of the original note was properly admitted as such, but because of the difficulty in reading the printed material a form copy was also admitted as corroborative evidence of the terms of the note.

The Appellant contends that there was inadequate proof that the note was signed. The photostatic



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copy of the note was somehow cut off at the bottom where a signature would be if it were signed. There was testimony presented by the Appellee that certain of its officers had seen the signature of Kenneth B. Graham, an officer of Monex, Inc., at the bottom of the note where such a signature would be, that they had witnessed Graham sign a check on the obligation and that both signings were the same. One officer of the Appellee concededly did not actually compare the check signature with the one on the lost note, but we feel that the evidence preponderates in favor of the Chancellor's decision that the note was signed by Graham in his official capacity for Monex, Inc.

The Appellant alternatively argues that even if the terms of the note were adequately proven, they preclude any recovery because the note was not endorsed by its prior holder and the Appellee did not have possession of the note by reason of such endorsement. It is true that the note terms do require possession by endorsement before the subsequent holder may recover the note. We question the necessity of complying with these note terms in a lost note situation, because one purpose of T.C.A. 47-3-804 is to prove ownership of the note even though it has been lost, which we feel the Appellee has accordingly done, but assuming that these note terms must be complied with before the Appellee can recover, we nonetheless believe it has done so. We see the Chancellor as viewing this aspect of the case as different from the normal situation where one holder transfers for value the note to another, thereby giving the new holder an unqualified right to endorsement under T.C.A. 47-3-201(3).

⁴ Instead, the City and County Bank was in receivership and the F.D.I.C. took possession of the assets of City and County and bargained and sold them to the predecessor of the Appellee. There is convincing proof that these transactions took place. This cannot be disputed.

The purpose for requiring such an endorsement from a holder is to protect the maker from multiple claims against it on the same note. In this case, the F.D.I.C.'s act of executing an assignment to the Appellee as proof of possession and endorsement convinced the Chancellor that the Appellee was the owner of the note and the underlying obligation, and that the assignment fulfilled the purpose and intention of the requirement of possession and endorsement, and we agree. Also, the Chancellor imposed the bond requirements of T.C.A. 47-3-804 to the extent of the Appellant's guaranty obligation, to protect him from possible multiple claims. Therefore, he is protected.

We feel that the Appellee has met the requirements of T.C.A. 47-3-804. It has proven its ownership of the note, the reasons for its non-production and its terms.

There is one more point we wish to address. As indicated earlier, at the end of the Appellee's case-in-chief the Appellant rested on the ground that the Appellee has not proven the existence of the original obligation, and that since there was no adequate proof, the Appellant guarantor was not liable. We think that the Appellant's assertion is unwarranted from the start because such a defense against the Appellee creditor is considered personal to the principal debtor and may not be used by the guarantor in an action against him.

The text writers in 38 Am.Jur.2d., Guaranty § 52, addressed the question with appropriate citations



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thusly:

§ 52. Defenses personal to debtor.

If the principal obligation is not void (as it is where there is no consideration or mutual assent or where the principal contract is illegal or contrary to law), but is merely unenforceable against the debtor because of some matter of defense which is personal to the debtor, the guarantor may not successfully set up this matter to defeat an action by the creditor or obligee seeking to hold the guarantor liable on the contract of guaranty. Accordingly, the guarantor may not successfully defend an action brought on the contract of guaranty on the basis that the principal obligation was obtained through fraud practiced on the debtor, that the principal obligation was not in writing (and, therefore, did not conform to the requirements of the statute of frauds), that the principal obligation was subject to the defense of usury (where usury does not have the effect of rendering the obligation invalid), that the creditor was guilty of a breach of warranty, or that the debtor was under a disability, such as coverture, infancy, or incompetency. Again, the guarantor may not successfully defend the creditor's action on the ground that the guaranteed debt or obligation, being the contract of a corporation, Was ultra vires and for this reason is not enforceable by an action against the corporation.

We are not called upon to say whether the original maker would have prevailed had he asserted the same argument as the Appellant, but we are inclined to the belief that any irregularity in the execution of the note is personal to the debtor and cannot be relied upon by the guarantor.

For the foregoing reasons the Trial Court is affirmed and the cause remanded for collection of the judgment and costs below. Costs of appeal are adJudged against Mr. Wilson and his surety.

Clifford E. Sanders, J.; Herschel P. Franks, J., concur.

1. The Appellee dismissed its action against Monex, Inc., and Kenneth B. Graham, who were alleged to be the original maker, and another guarantor, respectively. This left the present Appellant, a guarantor, the only remaining Defendant in the suit.
2. The note states: DEFINITIONS: The term "Holder" as used herein shall mean Bank or any subsequent person, firm or corporation who is in possession hereof by reason of endorsement. (The remaining terms of the contract refer to "holder" as the status required for enforcement of the contract.)
3. 47-3-804. Lost, destroyed or stolen instruments. The owner of an instrument which is lost, whether by destruction, theft or otherwise, may maintain an action in his own name and recover from any party liable thereon upon due proof of his ownership, the facts which prevent his production of the instrument and its terms. The court may require security indemnifying the defendant against loss by reason of further claims on the instrument.



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4. (3) Unless otherwise agreed any transfer for value of an instrument not then payable to bearer gives the transferee the specifically enforceable right to have the unqualified endorsement of the transferor. Negotiation takes effect only when the endorsement is made and until that time there is no presumption that the transferee is the owner.

