IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
September 15, 2008 Session

NANCY C. STYLES v. RON BLACKWOOD, ET AL.

Appeal from the Chancery Court for Knox County
No. 162876-2 Daryl R. Fansler, Chancellor

No. E2007-00416-COA-R3-CV - FILED DECEMBER 29, 2008

This is a fraud case in which plaintiff Nancy Styles alleged that Ron and Shelley Blackwood fraudulently induced her elderly mother to invest $75,000 in the singing group the Blackwood Quartet with no intention of making any payments on the "investment" or using the money for the asserted purpose of the investment. Following a bench trial, the trial court ruled for the plaintiff, finding that "this is as close to a flim-flam as I've ever seen" and that Mr. Blackwood's testimony was "absolutely unequivocally unbelievable." The trial court rescinded the written agreement memorializing the investment and awarded Ms. Styles $75,000 plus prejudgment interest. Upon review, we affirm the judgment of the trial court, finding that in this case the pivotal question of whether the Blackwoods acted with the fraudulent intent not to perform under the agreement was determined in significant part by the trial court's assessment of credibility based on its observation of the demeanor of the witnesses.

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

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

Scott D. Hall, Sevierville, Tennessee, for the Appellants, Ron Blackwood, individually and d/b/a Blackwood Management, Inc. and Universal Management, and Shelley Layne Blackwood, individually and d/b/a Blackwood Management, Inc. and Universal Management.

J. Terry Holland, Knoxville, Tennessee, for the Appellee, Nancy C. Styles.

OPINION

I. Background

Nancy Styles and her mother, Alba Hughes, became acquainted with Ron Blackwood and his wife Shelley Blackwood in 1998, at which time Ms. Styles' daughter was dating Tracy Trent, an employee of the Blackwoods. Ron Blackwood is the leader of a singing group known as the Blackwood Quartet that frequently performed in Pigeon Forge, Tennessee. Ms. Hughes became

interested in investing some of her money in the Blackwood Quartet. The testimony of the parties differs somewhat in the accounts of how Ms. Hughes developed this notion, but it is clear that she was avidly interested and excited in the investment prospect because, among other things, she wanted her children to "own a piece of the town" of Pigeon Forge. In 1998, the Blackwoods were trying to acquire a venue in Pigeon Forge where the Blackwood Quartet could regularly perform.

On December 10, 1998, the Blackwoods met Ms. Hughes and Ms. Styles at a Waffle House restaurant to discuss the "investment." At that meeting the parties signed the following agreement:

> This is an agreement between UNIVERSAL MANAGEMENT, a sole proprietorship and company that represents The Blackwood Quartet, hereinafter referred to as PARTY I, and ALBA HUGHES, hereinafter referred to as PARTY II.
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> Universal Management and Alba Hughes[1] desire to enter into an agreement that Alba Hughes desires and agrees to invest TWENTY FIVE THOUSAND DOLLARS into Universal Management on 08 DECEMBER 1998. Alba Hughes agrees to invest an additional FIFTY THOUSAND DOLLARS ($50,000.00) into Universal Management within TWO WEEKS (14 DAYS) of signing this agreement, a total of SEVENTY FIVE THOUSAND DOLLARS ($75,000.00). Alba Hughes understands that both investments are necessary to proceed with investment plans. Universal Management is trying to obtain a theatre[2] in which The Blackwood Quartet will perform. Alba Hughes accepts that Universal Management will do everything possible to protect the investment. The purpose of the investment is to secure a theatre and to promote the Blackwood Quartet. Alba Hughes will receive 10% on the investment over a 3 year period, then 12% in the 4th and 5th years subsequently. Alba Hughes will also receive 5% of net profit from the theatre venture.
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> Alba Hughes realizes that any investment involves risk, and understands that Universal Management has not made any promises. Alba Hughes is of sound mind and free from any outside pressure to enter into this agreement. All parties agree that this is a binding agreement and complies with all Federal and State of Tennessee Laws. It is agreed that any party deciding to breach this agreement will be responsible for all court costs and reasonable attorney fees.

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[1]The contract continues to use the terms "PARTY I and PARTY II" as defined in the first paragraph. For ease of reading and comprehension, we have substituted "Universal Management" for "PARTY I" and "Alba Hughes" for "PARTY II" in our quote of the contract.

[2]British spelling in original.

Shelley Blackwood signed the agreement as "sole proprietor" of Universal Management. Ms. Styles signed as a witness to her mother's signature on the agreement. Ms. Hughes wrote a $25,000 check to Universal Management that day and followed with a $50,000 check on December 23, 1998.

At the time of the agreement, Mr. Trent had become Ms. Hughes' son-in-law, having married her daughter. Mr. Blackwood had previously made an agreement with Mr. Trent to pay him a finder's fee of ten percent of any investment money Mr. Trent brought in. Ms. Styles testified that she and her mother were unaware of this arrangement at the time of the agreement. They became aware of the finder's fee agreement several months later, when Mr. Blackwood strenuously tried to avoid paying Mr. Trent, writing Ms. Styles a letter asserting there was a "conflict of interest" in "turning over a large sum of money to your daughter and son-in-law" and stating that "we will all be better off in the long run (Tracy and Robin included)[3] by stretching every penny of your investment for the security and promotion of the entire group."

In February of 1999, the Blackwoods signed an agreement with Eddie Anders, owner of a theater in Pigeon Forge, styled "Performance Agreement between Eddie's Heart and Soul Café and Universal Management/The Blackwood Quartet." The agreement provided that the Blackwood Quartet would regularly perform at Eddie's Heart and Soul Café from April through December of 1999. The Blackwoods testified that all of the $75,000 (less the finder's fee of $7,500 eventually paid to Mr. Trent) was spent on advertising for the Blackwood Quartet's appearances, although there was no accounting documentation filed with the trial court. Mrs. Blackwood testified that three and a half months after the agreement, they stopped doing business as Universal Management (the "sole proprietorship") and started doing business as Blackwood Management, Inc.

On June 22, 1999, Mrs. Blackwood sent Ms. Hughes a letter stating the following in pertinent part:

> The Blackwood Quarter has been at Eddie's Heart and Soul Café slightly more than two months and we are working hard to make this venture successful. As with any new venture, it takes time to build success.
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> * * *
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> As we discussed in our meetings, it can take 3 to 5 years to build a financially solid business. Know that *you are one of my **highest priorities***, and you will be among the first to reap the benefits of this endeavor. I deeply appreciate your patience, support and understanding. Ron and I, along with the rest of our staff, are trying very hard to make our performances the best they can be, and more importantly, to be good stewards in every aspect of this venture.

[3] "Tracy and Robin" refers to Mr. Trent and his wife.

(Emphasis in original).

Mrs. Blackwood testified that the Blackwood Quartet performed at Eddie's Heart and Soul Café for one season, and then Eddie Anders went bankrupt and abruptly left the state. Mrs. Blackwood sent Ms. Hughes another letter on May 22, 2002, stating as follows in relevant part:

> As you know, we performed at Eddie's Heart and Soul Café. We worked very hard to promote and market our program at Eddie's and make it as successful as possible. However, Eddie Anders filed bankruptcy and left town. As if this isn't bad enough, some of Eddie's business partners have informed us that Eddie said terrible things about us, displayed a deep resentment for us, and tried to undermine our efforts from the beginning of our relationship with him. Basically, he could have destroyed us. We still haven't recovered from his damaging actions and words. We lost a tremendous amount of money that year and subsequently, we have struggled to keep our head above water. What happened to us that year was enough to destroy most small business[es], however, we haven't given up! By the way, there are business people in this town who were involved with Eddie Anders who will confirm what we are telling you.

Ms. Hughes died in August of 2002. It is undisputed that neither the Blackwoods nor any of their business entities paid anything to Ms. Hughes, nor to Ms. Styles after Ms. Hughes' death. Ms. Styles brought this action on December 3, 2004, alleging fraud in the inducement of the agreement and promissory fraud, specifically that although the defendants told Ms. Hughes "that they were in the process of securing [a] theater and needed this investment to complete the package in order to obtain said theater, in point of fact the sole purpose of the transaction herein was to deprive [Ms.] Hughes of her revenue . . . and to take said money and convert it for Defendant's own use and benefit."

Following a bench trial, the trial court ruled in favor of Ms. Styles, specifically finding that "this may be the worst case of the absence of credibility on the part of the defendants I have ever seen. Particularly, Ron Blackwood is absolutely unequivocally unbelievable." In its memorandum opinion, the trial court stated, "the Court is convinced that at the time the representations were made to Mrs. Hughes in December 1998, defendants had no present intention to carry out the promises contained therein." The trial court, finding that "defendants were not only guilty of fraud but promissory fraud as well," held that "this is an appropriate case for rescission" of the agreement and granted Ms. Styles judgment in the amount of $75,000 plus prejudgment interest.

II. Issues Presented

The Blackwoods appeal, raising the following issues:

1. Whether Ms. Styles has standing to pursue this action.

2. Whether the trial court erred in holding that the applicable statutes of limitation had not run prior to the filing of this action.

3. Whether the trial court erred in holding that the evidence presented supports a finding of promissory fraud.

4. Whether any defendant other than the contracting party, Shelley Blackwood d/b/a the sole proprietorship of Universal Management, should have been held liable.

The Blackwoods also raise the issue of "whether the Plaintiff could properly be awarded attorney's fees," but as Ms. Styles notes, the trial court's judgment did not include an award of attorney's fees, so this issue is moot and without merit.

III. Analysis

A. Standard of Review

In a non-jury case such as this one, we review the record de novo with a presumption of correctness as to the trial court's determination of facts, and we must honor those findings unless the evidence preponderates to the contrary. Tenn. R. App. P. 13(d); ***Union Carbide v. Huddleston***, 854 S.W.2d 87, 91 (Tenn.1993). When a trial court has seen and heard witnesses, especially where issues of credibility and weight of oral testimony are involved, considerable deference must be accorded to the trial court's factual findings. ***Seals v. England/Corsair Upholstery Mfg. Co.***, 984 S.W.2d 912, 915 (Tenn. 1999). The trial court's conclusions of law are reviewed de novo and are accorded no presumption of correctness. ***Campbell v. Fla. Steel Corp.***, 919 S.W.2d 26, 35 (Tenn. 1996); ***Presley v. Bennett***, 860 S.W.2d 857, 859 (Tenn. 1993).

B. Standing to Pursue Action

After Ms. Hughes' death, Ms. Styles' brother, Sam Hughes, was named executor of her estate. Mr. Hughes testified to the effect that as executor, he orally assigned any interest in the agreement at issue here, including the right to pursue legal action upon it, to Ms. Styles. Although the Blackwoods correctly assert in their reply brief that "[n]owhere in the record does the Executor, Samuel E. Hughes, use the term 'assign,'" the clear import of his testimony is that Mr. Hughes assigned whatever rights or causes of action there were under the agreement to Ms. Styles, and the trial court so held. Addressing the Blackwoods' motion to dismiss for lack of standing, the trial court stated:

> It has been argued on several occasions in this court that the plaintiff is without standing. I think previously I have inquired as whether . . . whatever Exhibit 1 [the agreement] is, if it is a contractual right of some sort on behalf of Mrs. Hughes then after her death it became a contractual right of the estate. The testimony has been that it was assigned or given over to Mrs. Styles to proceed with in a fashion that she deems appropriate.

> I certainly don't claim to know all the law, but *I haven't been offered any authority at this point to say that they could not have made an oral assignment of this contract right* that belong[ed] to the Estate. *If there's something that prevents them from doing that then certainly upon presentation of authority I'll consider it.*

(Emphasis added). The Blackwoods provided no authority supporting their assertion of no standing as requested by the trial court, and the court denied the motion to dismiss for lack of standing. Under these circumstances, the Blackwoods waived and abandoned the issue of whether Mr. Hughes could orally assign the rights of the estate under the agreement to Ms. Styles, and because this issue was not properly raised and pursued at the trial level, we decline to address it here. To the extent that the Blackwoods' appeal challenges the trial court's factual finding that Mr. Hughes made such an assignment, we affirm the trial court's finding as supported by a preponderance of the evidence.

C. Statute of Limitations

The Blackwoods argue that the trial court erred in refusing to hold that the applicable statute of limitations ran before Ms. Styles filed her lawsuit. In ***Vance v. Schulder***, the Tennessee Supreme Court held that a claim for fraud in the inducement of the contract is governed by the three-year statute of limitations presently provided at Tenn. Code Ann. § 28-3-105. ***Vance v. Schulder***, 547 S.W.2d 927, 931-32 (Tenn. 1977). Under Tennessee law, the discovery rule "provides that a cause of action accrues and the statute of limitations begins to run when the plaintiff knows or in the exercise of reasonable care and diligence should know that an injury has been sustained as a result of wrongful or tortious conduct by the defendant." ***Fahrner v. SW Mfg., Inc.,*** 48 S.W.3d 141, 143 (Tenn. 2001) (internal quotation marks omitted).

The agreement was signed on December 10, 1998, and it provides among other things that Ms. Hughes "will receive 10% on the investment over a 3 year period." While this language, drafted by Mr. Blackwood, is thoroughly ambiguous, one reasonable interpretation of this clause would be that the Blackwoods agreed to pay Ms. Hughes ten percent of her investment back at the end of three years from the signing of the contract. Thus, Ms. Hughes would have had no indication that the Blackwoods did not intend to make payments under the contract until December 10, 2001, because that is arguably when the first payment under the agreement was clearly due. The agreement also provides that Ms. Hughes "will also receive 5% of net profit from the theatre venture," but the Blackwoods have consistently contended that there was no profit to be distributed, and in light of the written assurance sent from Mrs. Blackwood to Ms. Hughes that "it can take 3 to 5 years to build a financially solid business" and "*you are one of my* ***highest priorities***, and you will be among the first to reap the benefits of this endeavor," we do not think that Ms. Hughes in the exercise of reasonable care and diligence should have known that she sustained injury as a result of fraudulent conduct prior to December 10, 2001 at the earliest. The lawsuit was filed on December 3, 2004, and so we affirm the trial court's judgment declining to hold this action barred by the statute of limitations under these circumstances.

D. Promissory Fraud

The Blackwoods argue that the trial court erred in finding the evidence sufficient to support a judgment that they were guilty of promissory fraud. In this regard, the trial court held as follows:

> The trial court is in the unique position to observe witnesses, to listen to them as they answer, to see how willing they are to answer the questions. I can say that this may be the worst case of the absence of credibility on the part of the defendants I have ever seen. Particularly, Ron Blackwood is absolutely unequivocally unbelievable.
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> I'm not sure what the legal definition of a flim-flam is, but this is as close to a flim-flam as I've ever seen. This woman was just led to believe that she was going to be investing in something.
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> The Court is of the opinion that the facts and circumstances of this case support that the defendants obtained the $75,000 from Alba C. Hughes by fraud. As stated in the bench opinion on September 21, 2006, the Court is convinced that defendants, in December 1998, had no intention of purchasing a theatre. The statements of both Mr. and Mrs. Blackwood established that there was really no theatre available in the area where they were indicating to Ms. Hughes that they were going to obtain one. [The agreement] refers to investment plans and both Blackwoods acknowledged that there was no investment as such and that the only plan was to get some cash from someone so that operating expenses could be paid.
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> [D]efendants were not only guilty of fraud but promissory fraud as well. They made material misrepresentations in their written document and in their conversations with Mrs. Hughes and Mrs. Styles prior to the advancement of the $75,000. Accordingly, the Court finds that this is an appropriate case for rescission.

Our Tennessee courts have held that "[w]hen one is trying to set aside or reform a written instrument then fraud must be proven by clear and convincing evidence." ***Elchlepp v. Hatfield***, No. E2007-01154-COA-R3-CV, 2008 WL 2925712, at *3 (Tenn. Ct. App. E.S., filed July 30, 2008) (quoting ***Noblin v. Christiansen***, No. M2005-01316-COA-R3-CV, 2007 WL 1574273, at *11 (Tenn. Ct. App. M.S., filed May 30, 2007); *see also* ***Teter v. Republic Parking System, Inc.***, 181 S.W.3d 330, 341 (Tenn. 2005); ***Capital Mgmt. Partners v. Eggleston***, No. W2004-01207-COA-R3-CV, 2005 WL 1606066, at *8 (Tenn. Ct. App. W.S., filed July 7, 2005); ***Estate of Acuff v.***

O'Linger, 56 S.W.3d 527, 530-31 (Tenn. Ct. App. 2001). We are of the opinion that considering the totality of the circumstances, including the testimony of the parties, the trial court's determination of credibility based on its observations of the witnesses' demeanor, and the additional fact that the Blackwoods made no effort at any time to perform or make good on any obligations under the agreement, the trial court did not err in finding that Ms. Styles met her burden of proof to show promissory fraud.

In the ***Noblin*** case, this court recently discussed the tort of promissory fraud and its elements at length, stating in relevant part:

> Tennessee courts also recognize the tort of promissory fraud when the misrepresentation is not of existing facts. ***Oak Ridge Precision Indus., Inc. v. First Tennessee Bank Nat'l Ass'n.,*** 835 S .W.2d 25, 29 n. 1 (Tenn. Ct. App. 1992); ***Steed Realty v. Oveisi,*** 823 S.W.2d 195, 199 (Tenn. Ct. App. 1991). Under promissory fraud, the misrepresentation need not relate solely to existing facts to be fraudulent, but may include future promises. ***Steed Realty,*** 823 S.W.2d at 199. Actionable fraud can also be based upon a promise of future conduct, so long as it is established that such a promise or representation was made with the intent not to perform. ***Id.*** (quoting ***Fowler v. Happy Goodman Family,*** 575 S.W.2d 496, 499 (Tenn.1978)).
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> * * *
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> In order to prove promissory fraud, a plaintiff must prove (1) a promise of future conduct, (2) that was material, (3) made with the intent not to perform, (4) that plaintiff reasonably relied upon (5) to plaintiff's injury. *See* ***Happy Goodman Family,*** 575 S.W.2d at 499. Obviously, the most difficult element of this tort concerns the intent not to perform. The statement of intent must be false and not actually held. ***Id.***

Noblin, 2007 WL 1574273, at *9. As we noted in ***American Cable Corp. v. ACI Management., Inc.***, No. M1997-00280-COA-R3-CV, 2000 WL 1291265, at *5 (Tenn. Ct. App. M.S., filed Sept. 14, 2000), "[i]n the context of a promissory fraud claim, the mere fact that the promisor failed to perform the promised act is insufficient by itself to prove fraudulent intent." ***Id.*** This is because, as the ***American Cable*** court succinctly put it, "[n]ot every broken promise starts with a lie." ***Id.***

In the present case, Ms. Styles testified that it was the understanding of her and her mother that Ms. Hughes was investing in a theater that would be purchased or constructed by the Blackwoods, "not that they were going to go perform, that this investment was to perform in other theaters, it was to pursue their own." Ms. Styles' testimony at trial regarding what was said in the

discussions and negotiations was somewhat limited by a pair of rulings sustaining objections based on the parol evidence rule. These rulings were, we believe, erroneous, because "the parol evidence rule 'has no application to a case involving a fraudulent misrepresentation which induces the execution of a contract.'" ***Ray v. Williams***, No. W2000-03000-COA-R3-CV, 2002 WL 974671, at *5 (Tenn. Ct. App. W.S., filed May 9, 2002) (quoting ***Haynes v. Cumberland Builders, Inc.***, 546 S.W.2d 228 (Tenn. Ct. App. 1976). Even with her testimony hampered to some degree by the application of the parol evidence rule, Ms. Styles was able to convey to the satisfaction of the trial court the Blackwoods' alleged misrepresentations regarding the investment. Ms. Styles testified that "we were investing in a theater, not someone else's theater, a venture for the Blackwoods, their name in lights." Instead, the Blackwoods took the $75,000 and alleged that they used it for expenses of advertising the performances of the Blackwood Quartet at Eddie's Heart and Soul Café.

Our decision upholding the trial court's finding of promissory fraud is guided in significant part by the trial court's credibility determinations. As the Chancellor noted, he was uniquely the one who was able to observe the demeanor of the witnesses and the manner in which they answered questions. "Whether the defendant has the present intent not to comply with a promise is a question of fact," ***Noblin,*** 2007 WL 1574273, at *10, and as already stated, we accord substantial deference to the trial court's determinations of fact where issues of credibility and weight of oral testimony are involved. ***Seals,*** 984 S.W.2d at 915; *see also* ***Noblin***, 2007 WL 1574273, at *4 (affirming a finding of promissory fraud by clear and convincing evidence where trial court "based its ruling 'almost entirely' on the credibility of witnesses").

E. Liability of Defendants other than Mrs. Blackwood

Finally, the Blackwoods argue that the trial court erred in holding any defendant other than the contracting party, Shelley Blackwood d/b/a the sole proprietorship of Universal Management, liable for the judgment in Ms. Styles' favor. This argument misses the initial point that Ms. Styles was not merely seeking a judgment on a theory that the contract should be enforced, or for breach of contract, but rather that the agreement should be rescinded because of fraud, a significant part of which was perpetrated by Mr. Blackwood. Regarding the status and culpability of the various defendants, the trial court held as follows:

> Mrs. Blackwood says that with her few months experience in the business that she started running Universal Management. It is abundantly clear to the Court today that there is no difference between Mrs. Blackwood, Mr. Blackwood, Universal Management, The Blackwood Quartet, or this other entity, Blackwood Management Incorporated. Mr. Blackwood runs everything. It's pure and simple.

This finding by the trial court is wholly supported by the record, including the testimony of Mr. Blackwood himself, who freely admitted to being involved in and responsible for most every aspect

of the Blackwood business operations. When Mr. Blackwood was asked whether he "had general manager authority to bind Universal Management," he answered, "not without counsel of my wife, no. We're partners." Mr. Blackwood was actively involved in every aspect of the discussions with Ms. Hughes and the misrepresentations made to her, including drafting the agreement. Under these circumstances, principles of equity and fairness support the trial court's decision to hold the named defendants, including Mr. Blackwood, liable. We affirm the judgment of the trial court on this issue.

IV. Conclusion

The judgment of the trial court is affirmed. Costs on appeal are assessed to the Appellants, Ron Blackwood, individually and d/b/a Blackwood Management, Inc. and Universal Management, and Shelley Layne Blackwood, individually and d/b/a Blackwood Management, Inc. and Universal Management.

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SHARON G. LEE, SPECIAL JUDGE