IN THE COURT OF APPEALS

9/9/97

OF THE

STATE OF MISSISSIPPI

NO. 94-CA-00200 COA

W. P. THOMAS, JOHN R. BUNCH, III AND JIM DAVIS APPELLANTS

v.

CLARK INSURANCE AGENCY APPELLEE

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND

MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

TRIAL JUDGE: HON. EUGENE M. BOGEN

COURT FROM WHICH APPEALED: LEFLORE COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT: K. ELIZABETH DAVIS

ATTORNEY FOR APPELLEE: FRED WITTY

NATURE OF THE CASE: SUIT ON OPEN ACCOUNT

TRIAL COURT DISPOSITION: JUDGMENT FOR PLAINTIFF

MANDATE ISSUED: 9/30/97

BEFORE THOMAS, P.J., PAYNE, AND SOUTHWICK, JJ.

THOMAS, P.J., FOR THE COURT:

Clark Insurance Agency brought suit in County Court in Leflore County on open account to recover for insurance premiums from W. P. Thomas, John R. Bunch, III, and Jim Davis, a partnership doing business as BDT Land Company.

The county court gave judgment for the premiums on the building owned by BDT but rejected the claim for the coverage provided to Aquaculture Engineering and Manufacturing Company (AEMCO). The circuit court reversed the judgment of the county court and gave judgment to Clark for the full amount of the premiums plus statutory interest from the date of the demand letter and

awarded attorney's fees of $3,500. Finding that the circuit court erred, we reverse its decision and reinstate the decision of the county court.

Clark Insurance Agency is a Mississippi corporation in Greenwood in the general insurance business. BDT Land Company was a Mississippi partnership comprised of Thomas, Bunch, and Davis for the purpose of purchasing and leasing real estate. AEMCO was a Mississippi corporation which was in the business of manufacturing aeration equipment for use in catfish ponds. Thomas, Bunch, and Davis were stockholders in AEMCO. Jim Davis was the president and general manager of AEMCO. Prior to AEMCO being formed, BDT purchased property located on Highway 49 South, Greenwood, Mississippi, and on April 15, 1985, leased the property to AEMCO. The terms of the lease provided that AEMCO would provide insurance for the property. AEMCO was not a party to this lawsuit.

Clark Insurance wrote insurance for AEMCO beginning in 1985 and carried that account on its computer accounts receivables under the name of AEMCO. When the insurance came up for renewal in July 1988, Clark re-wrote all of the insurance on the building, contents, general liability, and workers compensation. Randy Clark, the president of Clark Insurance, indicated that he added BDT to the policy because Deposit Guaranty National Bank, the mortgage holder, called him and said BDT needed coverage and because insurance underwriting principles require that the owner of the property be named in any policies involving mortgaged property. At that time, Clark designated BDT as the first insured on the policy even though the only coverage which pertained to BDT and for which BDT was the loss payee was the coverage on the building and premises which BDT owned. The policy was still carried on Clark's accounts receivables under the name of AEMCO. The policy was again renewed in July 1989.

AEMCO got into financial difficulties and in September 1989 held a creditors' meeting at which time AEMCO announced that it was ceasing operations. After the meeting Davis asked Randy Clark to keep the building insured and assured Clark that he would be paid. No mention was made of whether Davis was acting on behalf of BDT or AEMCO in this conversation. Clark continued the insurance on the building and canceled all other insurance. Eventually the insurance on the building was canceled for nonpayment.

On or about February 19, 1991, Clark Insurance Agency sent a demand letter to Thomas, Bunch, and Davis for the unpaid insurance premiums. Attached to the letter was the ledger sheet in the name of AEMCO. Clark Insurance subsequently brought suit in the County Court of Leflore County, alleging that Thomas, Bunch, and Davis were liable for the outstanding insurance premiums incurred by AEMCO.

A bench trial was held on November 10, 1992, wherein the court ruled that Thomas, Bunch, and Davis were not liable to Clark on any contractual basis or on open account. The court did find that since BDT had made a claim regarding a fire loss to the property that they were therefore liable to Clark Insurance Agency on a quantum meruit basis in the amount of $1,294.14 for the premiums on the property it owned.

Clark Insurance Agency appealed to the Circuit Court of Leflore County arguing that the decision of the county court was against the overwhelming weight of the evidence. The circuit court, as appellate court, reversed the judgment of the county court. The circuit court held that Thomas, Bunch, and Davis were liable based on language in the insurance policies which stated that the first named insured was responsible for the payment of premiums. The court also awarded 8% interest from the date of the demand letter. The court also awarded Clark attorney's fees of $3,500.

On appeal, the appellants raise three issues (1) that the circuit court erred in holding them as business property owners liable to Clark Insurance on a contractual basis and thus on open account for insurance premiums incurred by a tenant on a net pass through lease, (2) that the court erred in awarding Clark Insurance interest at the rate of 8% per annum from the date of the demand letter when the plaintiff's complaint did not seek such relief, and (3) that the court erred in awarding attorney's fees when the plaintiff offered no proof, and the record contained no evidence of reasonable attorney's fees.

DISCUSSION

DID THE CIRCUIT COURT ERR IN REVERSING THE JUDGMENT OF THE COUNTY COURT?

The circuit court concluded that "this is a very simple case." The court based its conclusion that BDT was liable because "the express unambiguous terms of the contract of insurance provide[] that the first named insured shown on the declaration sheet is responsible for all premiums." The circuit court, however, ignored all the evidence which clearly showed that BDT was never a party to the insurance contract, except as loss payee.

In *A. Copeland Enterprises v. Pickett & Meador*, 422 So. 2d 752 (Miss. 1982), the supreme court addressed the issue of whether an additional insurer was liable for the delinquent insurance premiums when the person obtaining the insurance fails to pay the policy premiums. In that case a franchise agreement required the franchisee to have the franchiser, Copeland, listed as an additional insured on all insurance policies of the Popeye's franchises. The supreme court concluded that Copeland had no liability in the absence of a contractual relationship between the additional insured and the insurer. *Id.* at 754. The court stated:

We are of the opinion that there was no promise by the additional insured to pay premiums, nor was there an express or implied contract between the parties and this Court will not draft a contract between two parties where they have not manifested a mutual assent to be bound. *See* Restatement of Contracts (Second) § 21 (1981).

Id. In *Copeland*, the supreme court looked to a decision of the Supreme Court of Alaska, *Century Insurance Agency Inc. v. City Commerce Corp.*, 396 P.2d 80, 81 (Alaska 1964), where that court held:

The main question on this appeal is whether a lessor is liable for the payment of premiums on a fire insurance policy procured by the lessee on the leased property in accordance with the terms of the lease, where the insurance is taken out in the lessor's name and for its benefit and the policy is delivered to the lessor. Our answer is that the lessor is not liable unless it has contracted to pay the premiums.

Such a contract, the existence of which is essential for the imposition of liability on the lessor, is missing in this case. In order for there to be a contract there must be a promise by the lessor to pay the insurance premiums. There is no evidence that any such promise was made by the lessor here. . . . The insurance was purchased from appellant solely by the lessee, Johnson, without any assistance or advice from appellee. At no time did appellee expressly undertake to be responsible for payment of the insurance premiums. Nor is there evidence of any conduct on appellee's part which reasonably could have justified appellant in understanding that appellee intended to assume the responsibility. The fact that the insurance was issued in appellee's name and for its benefit and delivered to appellee did not give rise to a justifiable expectation on appellant's part that appellee had undertaken to pay the cost of insurance.

See also Home Insurance of Dickinson v. Speldrich, 436 N.W. 2d 1, 4 (N.D. 1989)(finding that the named insured is not liable for payment of premiums where that insured has not contracted to pay the premiums); *Midlland Ins. Co. v. Universal Technology*, 508 A.2d 427, 429 (Conn. 1986) ("a person named as insured does not become liable for the premium due by virtue of that fact alone"); *Stevens v. Howells*, 473 P.2d 523, 528 (Mont. 1970)(finding that despite the fact that the coinsured participated in the contract negotiations between the purchaser and insurer, "this does not change the status of a coinsured unless he has made an additional promise or contract to pay premiums of insurance.").

Under Miss. Code Ann. § 11-51-79 (1972), "[a]ppeals shall be considered solely upon the record as made in the county court . . . ." On appellate review, the circuit court was asked to decide if the decision of the county court was against the overwhelming weight of the evidence.

The testimony from Randy Clark was that he changed the policy to include BDT as first named insured after he learned that BDT was the property owner. The evidence supports the county court's finding that the addition of BDT as named parties in the policy was the initiative of Clark apparently to correct and show that they that they were the owners of the building in case of loss and in response to a request by the mortgagee, Deposit Guaranty.

All of Clark's dealings were with Davis in his capacity as president of AEMCO. Davis testified without dispute that he had no authority to act on behalf of the partnership. The only possible ambiguous moment was when Davis asked Clark to continue the coverage on the property. Even Clark concedes in argument that it was unclear who Davis was speaking for in that conversation; this was also after both policies had been issued.

One of the contested issues in county court was whether either AEMCO or BDT ever received a full copy of the policy including the part which stated that the first named insured was responsible for the payment of premiums. Davis contended that they did not, and Clark testified that he mailed the policies to the Highway 49 address.

From 1985 forward, Clark dealt with Davis in procuring insurance for AEMCO. Until 1988, Clark was unaware of the existence of BDT. All premiums were paid by AEMCO. BDT did not even have a checking account. Clark could not unilaterally bind BDT as guarantor of payments without the agreement of the partnership. Davis testified that he had no authority to bind the partnership.

BDT was a named beneficiary to the insurance contract, but there was no proof that it was a party to the contract. We can find no factual or legal basis for the circuit court's decision. We therefore reverse the circuit court's decision and reinstate the decision of the county court.

Although we are reversing the decision of the circuit court based on the first issue, we feel that the other issues also warrant some discussion.

DID THE CIRCUIT COURT ERR IN AWARDING INTEREST WHEN THE PLAINTIFF'S COMPLAINT DID NOT SEEK THIS RELIEF?

The second issue raised is that the court erred in awarding interest since Clark Insurance Agency did not ask for interest in the complaint. The appellants cites no Mississippi case law which supports this proposition. In this case, the court's primary error was in awarding interest when the county court did not award interest and in awarding interest beyond that which the statute allows.

Mississippi Rule of Appellate Procedure 37 provides a fairly clear rule for the application of interest from the date of judgment without any special pleading requirements. Miss. Code Ann. § 75-17-7 (1972), cited by Clark, provides:

All judgment or decrees founded on any sale or contract shall bear interest at the same rate as the contract evidencing the debt on which the judgment or decree was rendered. All other judgments or decrees shall bear interest at a per annum rate set by the judge hearing the complaint from a date determined by the judge to be fair *but in no event prior to the filing of the complaint.*

(emphasis added). *See also Porter v. Ainsworth*, 288 So. 2d 709, 710 (Miss. 1974). Interest may be awarded at the rate allowed by law (currently 8% per annum, Miss. Code Ann. § 75-17-1 (Supp. 1996)), but the court is limited to awarding interest from the date of judgment or from the date of the filing of the complaint. We find that the circuit court erred in its award of interest, but not as the appellants contend.

DID THE CIRCUIT COURT ERR IN AWARDING ATTORNEY'S FEES WITHOUT PROOF OR EVIDENCE OF REASONABLE ATTORNEY'S FEES?

Based on our previous holding, we first note that the circuit court had no basis for awarding attorney's fees where the county court found that there was no open account and did not award attorney's fees. To the extent that the circuit court awarded any attorney's fees, it was in error. In

addition, the circuit court also awarded an amount of attorney's fees without any evidence as to their reasonableness.

On the question of the propriety of attorney's fees, Miss. Code Ann. § 11-53-81(1972) provides for the recovery of "reasonable" attorney's fees in suit on open account. In this case, the circuit court judge found that he was in "just as good a position to make that determination [of attorney's fees] having read the record and having seen what work was done by counsel in this case," and made the award of attorney's fees without any hearing, argument, or evidence as to reasonable attorney's fees. The circuit court judge awarded attorney's fees of $3,500 with no further explanation as to how this amount was derived.

In *Key Constructors, Inc. v. H & M Gas Co.*, 537 So. 2d 1318, 1325 (Miss. 1989), the supreme court stated:

[O]ur law in recent years has in no uncertain terms provided that the matter of "reasonable attorney's fees" requires proof. The court may not judicially note what is a reasonable fee and it certainly may not pull a figure out of thin air. Rather, the party entitled to recover a reasonable fee must furnish an evidentiary predicate therefor. *See Sanford v. Jackson Mall Shopping Center Co.*, 516 So. 2d 227, 230 (Miss. 1987); *Lovett v. E. L. Garner, Inc.*, 511 So. 2d 1346, 1354 (Miss. 1987).

While a judge may take judicial notice as a means of establishing one or two elements of a claim for

attorney's fees, it is not appropriate for him to take judicial notice of every factor without hearing some evidence. *Carter v. Clegg*, 557 So. 2d 1187, 1192 (Miss. 1990); *Clark v. Whiten*, 508

So. 2d 1105, 1109 n.1 (Miss. 1987). The trial judge committed error in this case both in awarding attorney's fees without requiring proof given in support and in awarding attorney's fees at all.

THE JUDGMENT OF THE CIRCUIT COURT OF LEFLORE COUNTY IS REVERSED AND RENDERED. THE JUDGMENT OF THE COUNTY COURT OF LEFLORE COUNTY IS REINSTATED. ALL COSTS OF APPEAL ARE ASSESSED TO THE APPELLEE.

BRIDGES, C.J., McMILLIN, P.J., DIAZ, HERRING, HINKEBEIN, KING, PAYNE, AND SOUTHWICK, JJ., CONCUR. COLEMAN, J., NOT PARTICIPATING.