IN THE COURT OF APPEALS 12/29/95

OF THE

STATE OF MISSISSIPPI

NO. 95-CA-00137 COA

JOE LAMBERT D/B/A JOE'S AUTO & TRUCK

APPELLANT

v.

ORIX CREDIT ALLIANCE, INC.

APPELLEE

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND

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

TRIAL JUDGE: HON. BARRY W. FORD

COURT FROM WHICH APPEALED: TISHOMINGO COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:

NICHOLAS B. PHILLIPS

ATTORNEY FOR APPELLEE:

DOUGLAS M. WRIGHT, JR.

NATURE OF THE CASE: BREACH OF CONTRACT

TRIAL COURT DISPOSITION: SUMMARY JUDGMENT IN FAVOR OF PLAINTIFF

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

THOMAS, P.J., FOR THE COURT:

Orix Credit Alliance filed suit against Joe Lambert claiming that: (1) Lambert entered into a contract

with Orix; (2) Orix delivered goods to Lambert under the contract; (3) Lambert received those goods; and (4) Lambert only partially paid for those goods. Orix filed a motion for summary judgment asserting that there was no triable issue of fact. The trial court agreed and granted the motion.

Feeling aggrieved Lambert appeals to this Court assigning two issues. Finding both to be without merit, we affirm the trial judges ruling granting summary judgment.

FACTS

Orix and Lambert entered into a contract whereby Orix would deliver a beverage machine to Lambert for the consideration of $229.95 per month for thirty-six months. The contract specifically stated that Lambert was responsible for the maintenance and care of the equipment and that Lambert would look to the manufacturer of the equipment and not to Orix for repairs. It further stated that even if the equipment malfunctioned, Lambert was still responsible for the monthly payments. Not only was this stated in the contract, it was also stated in the invoice that Lambert signed when he received the merchandise.

Sometime during the duration of the contract, Lambert stopped payments. Because of this Orix repossessed the equipment for resale, but could only get $350.00 because of damages to the equipment. Orix filed suit seeking to obtain the remaining balance left on the contract minus the monies received for the sale of the equipment.

Orix filed a motion for summary judgment asserting that there was no genuine issue of material fact. Lambert did not dispute the fact that he owed Orix money, nor did he dispute the amount of money owed, he simply responded that the contract between the parties was unconscionable. The trial court granted summary judgment to Orix finding that Lambert did not raise a triable fact issue. Orix was awarded $3,789.10 for the remaining balance under the contract minus the monies received for the sale of the equipment and reasonable attorney fees in the amount of $1,263.33, for a total judgment of $5,104.43.

DISCUSSION

In *Palmer v. Anderson Infirmary Benevolent Ass'n*, the Mississippi Supreme Court provided the standard of review in determining whether a trial court properly granted summary judgment, and stated:

> In our de novo review, this Court looks to see if the moving party has demonstrated that no genuine issue of fact exists. *Daniels v. GNB, Inc.*, 629 So. 2d 595, 599 (Miss. 1993). 'A motion for summary judgment should be overruled unless the trial court finds, beyond a reasonable doubt, that the plaintiff would be unable to prove any facts to support his claim.' *Id.* at 599 (citing *McFadden v. State*, 580 So. 2d 1210 (Miss. 1991). 'The lower court is prohibited from trying the issue; it may only determine whether there are issues to be tried.' *Id.* (citing *Brown v. Credit Center, Inc.*, 444 So. 2d 358, 362

(Miss. 1983)).

Palmer v. Anderson Infirmary Benevolent Ass'n, No. 91-CA-00654-SCT, slip op. at 6 (Miss. 1995). The evidence must be viewed in a light most favorable to the party against whom the motion has been made. "The movant has the burden of demonstrating that no genuine issue of fact exists while non-movant is given the benefit of every reasonable doubt." *Marsalis v. Lehmann*, 566 So. 2d 217, 219 (Miss. 1990). If the court finds that the moving party is entitled to a judgment as a matter of law, summary judgment should be entered in his favor. Otherwise, the court should deny summary judgment. *Mantachie Natural Gas Dist. v. Mississippi Valley Gas Co.*, 594 So. 2d 1170, 1172 (Miss. 1992).

In order to survive summary judgment Lambert must present to the trial court some factual dispute. This he failed to do. Lambert did not argue that he did not owe Orix the money sought, he merely argued that the contract was unconscionable. This is a legal theory of defense; it is not a factual issue. The trial court can decide whether the contract is unconscionable at the hearing below, and then once that decision is made he then may grant summary judgment if he finds that there is no triable issue of fact.. Summary judgment is proper in this type of case in which a party against whom summary judgment is sought fails to raise a factual issue but instead argues a legal theory of defense.

Lambert's next issue is whether he should have been allowed to present evidence to the trial court showing that the contract was unconscionable. Mississippi Code Annotated Section 75-2-302(2) provides that:

> When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determination.

Miss. Code Ann. § 75-2-302 (1972).

Jurisdictions are split as to whether this statute would preclude a trial court from granting summary judgment until evidence is presented on the contracts "commercial setting, purpose and effect." *See Haugen v. Ford Motor Co.*, 219 N.W. 2d 462, 468 (1974). *But see Block v. Ford Motor Credit Co.*, 286 A.2d 228, 231 (1972). However, this Court need not address this issue in this case. At the hearing below Lambert's attorney informed the court that Mr. Lambert was "here for testimony if need be concerning the commercial setting of this situation." However, he never presented this testimony. Furthermore, no proffer was made as to what Mr. Lambert would testify to, and therefore, this issue is waived. It is not the duty of the trial court to ensure that the parties have presented their case.

THE TRIAL COURT'S GRANTING OF SUMMARY JUDGMENT IS AFFIRMED. COSTS ARE TAXED TO THE APPELLANT. STATUTORY DAMAGES AND INTEREST ARE AWARDED.

FRAISER, C.J., BRIDGES, P.J., BARBER, COLEMAN, DIAZ, KING, McMILLIN, PAYNE, AND SOUTHWICK, JJ., CONCUR.