

IN THE COURT OF APPEALS 05/21/96

OF THE

STATE OF MISSISSIPPI

NO. 94-CA-01084 COA

WORLDWIDE MACHINERY SALES, INC. AND RANDY BRASWELL

APPELLANTS

v.

**FEDERATED MUTUAL INSURANCE COMPANY AND MURPHY'S INTERNATIONAL,
INC.**

APPELLEES

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND
MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

TRIAL JUDGE: HON. FRANK G. VOLLOR

COURT FROM WHICH APPEALED: PIKE COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANTS: ROBERT S. REEVES

ATTORNEY FOR APPELLEES: WILLIAM W. SMITH

SALES AND UNJUST ENRICHMENT

NATURE OF THE CASE:

TRIAL COURT DISPOSITION: FOUND THAT PLAINTIFF WAS NOT A GOOD FAITH
PURCHASER AND WAS NOT ENTITLED TO RECOVER IN QUANTUM MERUIT

BEFORE FRAISER, C.J., McMILLIN, AND SOUTHWICK, JJ.

FRAISER, C.J., FOR THE COURT:

The Pike County Circuit Court granted summary judgment to Federated Mutual Insurance Company

and Murphy's International [Murphy's] on an action brought against Worldwide Machinery Sales [WMS] and Randy Braswell to replevy a caterpillar excavator. WMS via Braswell, WMS's agent, purchased the excavator from Thomas Equipment Company [TEC]. TEC purchased the excavator from Robert Macon who fraudulently appropriated the excavator from its owner, Murphy's. WMS and Braswell contend that WMS was a good faith purchaser of the excavator. The trial court held on summary judgment that WMS was not a good faith purchaser because there was no transaction to purchase between Macon and Murphy's and because Murphy's was not a merchant engaged in the sale of construction equipment. WMS and Braswell contend that the trial court erred in holding: (1) delivery of the excavator to Robert Macon was not in furtherance of a transaction of purchase and that, therefore, title did not pass to Macon and (2) Macon was not a merchant dealer capable of passing good title to a subsequent purchaser for value. Further, WMS argues that even if it was not a good faith purchaser it was entitled to a lien for repairs to the excavator.

We conclude that the trial court, in a well reasoned opinion, properly granted summary judgment in this cause and, therefore, affirm.

FACTS

Murphy's International is an equipment dealer. Murphy's inventory included a used Caterpillar 211 LC Excavator, which was subject to a security interest of People's Bank and Trust Company. On October 8, 1992, Murphy's delivered the excavator to Macon, a prospective purchaser. The record is uncontradicted that the excavator was in Macon's possession only for demonstration purposes. Murphy's did not contract with Macon to pass title. Additionally, the record indicates that it is a common practice in the industry for dealers to deliver to prospective purchasers equipment for demonstration purposes.

Macon and Mike Barns, representing they had title to the excavator, sold it to Keith Thomas of TEC sometime before October 13, 1992. TEC sold the excavator to WMS on October 13, 1992. WMS intended to resell the excavator at an auction on October 30, 1991. Prior to resale, WMS repaired the excavator.

On October 30, 1992, Murphy's discovered that the excavator along with several other pieces of equipment leased to Macon were being sold by TEC. That same day, Murphy's, through its employees, reported Macon's actions to law enforcement authorities. Macon was charged and indicted in Booneville, Mississippi for unlawfully appropriating the excavator by false pretenses.

Murphy's employees next contacted WMS and requested the return of the excavator. WMS refused to return it. Consequently, Murphy's filed an action in the Circuit Court of Pike County to replevy the excavator. WMS answered that it purchased the excavator from Keith Thomas and TEC. WMS claimed that Macon had voidable title to the excavator, which he sold to TEC. WMS argued that because TEC, Thomas, and Macon were merchant dealers in heavy machinery, WMS received valid title because WMS was a good faith purchaser for value without notice of Murphy's claim. Murphy's moved for summary judgment arguing that Macon never had title to the excavator and was not a merchant dealing in equipment. The circuit court granted partial summary judgment holding that Macon never obtained an ownership interest in the excavator and that Macon was not a merchant engaged in selling equipment. Thus, the circuit court found that Murphy's was entitled to replevy the excavator.

The only issue remaining was WMS's counterclaim for an equitable lien for repairs to the excavator, which the circuit court denied on Murphy's second summary judgment motion. WMS perfected its appeal alleging the following issues:

I. WHETHER THE COURT ERRED AS A MATTER OF LAW IN HOLDING THAT THE DELIVERY TO ROBERT MACON WAS NOT IN FURTHERANCE OF A TRANSACTION OF PURCHASE AND THAT THEREFORE TITLE DID NOT PASS TO MACON?

II. WHETHER THE COURT ERRED AS A MATTER OF LAW IN HOLDING THAT ROBERT MACON WAS NOT A MERCHANT DEALER CAPABLE OF PASSING GOOD TITLE TO SUBSEQUENT PURCHASERS FOR VALUE?

III. IN THE EVENT THAT WMS AND BRASWELL ARE NOT ENTITLED TO THE DISPUTED EQUIPMENT, WHETHER THE COURT ERRED IN FINDING THAT THEY WERE NOT ENTITLED TO A LIEN FOR THE REPAIRS AND IMPROVEMENTS MADE BY THEM?

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. 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. The lower court is prohibited from trying the issues; it may only determine whether there are issues to be tried.

Palmer v. Anderson Infirmary Benevolent Ass'n, 656 So. 2d 790, 795 (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, 220 (Miss. 1990). If in this view the moving party is entitled to judgment as a matter of law, summary judgment is appropriate. *Northern Elec. Co. v. Phillips*, 660 So. 2d 1278, 1281 (Miss. 1995) (citations omitted).

I. WHETHER THE COURT ERRED AS A MATTER OF LAW IN HOLDING THAT THE DELIVERY TO ROBERT MACON WAS NOT IN FURTHERANCE OF A TRANSACTION OF PURCHASE AND THAT THEREFORE TITLE DID NOT PASS

TO MACON.

In the trial court WMS and Braswell argued that WMS was a good faith purchaser for value under section 75-2-403(1)(d) of the Mississippi Code of 1972. Section 75-2-403(1)(d) provides:

(1) A purchaser of goods acquires all title which his transferor had or had power to transfer except that a purchaser of a limited interest acquires rights only to the extent of the interest purchased. A person with voidable title has power to transfer a good title to a good faith purchaser for value. When goods have been delivered under a transaction of purchase the purchaser has such power even though

....

(d) The delivery was procured through fraud punishable as larcenous under the criminal law.

The trial court ruled that WMS was not a good faith purchaser in accord with 75-2-403(1)(d) because Murphy's did not deliver the excavator to Macon under a transaction of purchase. Consequently, Macon did not have any title voidable or otherwise to convey to WMS.

On appeal, WMS argues that "Murphy's act was an act whereby it delivered to Macon the excavator under a transaction for purchase and which conveyed title to the property to Macon even if Macon obtained the property through fraud punishable as larcenous under the criminal law." As with most erroneous arguments, the flaw in WMS's argument lies in its premises. WMS alleges that the delivery of the excavator to Macon by Murphy's constitutes a transaction of purchase without justifying this bare assertion. As the trial court noted, WMS's assertion that delivery constitutes a transaction of purchase is unsupported by Mississippi law. The Mississippi Supreme Court has held that when a good faith purchaser asserts its good faith purchaser status based on a conveyance of a person who never received title:

It encounters a rule as old as the hills and often enforced without regard to context, viz., no thief, forger or other felonious fraud has power to pass title to his ill-gotten goods. *See, e.g., Morgan v. Morgan*, 431 So. 2d 1119, 1120 (Miss. 1983); *Craig v. Columbus Compress & Warehouse Co.*, 210 So. 2d 645, 648 (Miss. 1968); *St. Paul Fire & Marine Ins. Co. v. Leflore Bank & Trust Co.*, 254 Miss. 598, 609-10, 181 So. 2d 913, 918 (1966) A purchaser can take only those rights which his transferer has in the subject goods; a thief has neither title nor power to convey such. *Allstate*, 345 So. 2d at 266. We reiterated this view in *Walker v. Johnson*, 354 So. 2d 792 (Miss. 1978), where we held: Even though the sale of the property is made to a bona fide purchaser for value, if it is stolen property, the person from whom it is stolen is not divested of his title. *Walker*, 354 So. 2d at 793.

It is certainly true the Sales Article of our version of the Uniform Commercial Code, see Miss .Code Ann. § 75-2-403(1)(d) (1972), imports a limited exception to this general rule, but that applies only where the "goods have been delivered under a transaction of purchase." See Paschal v. Hamilton, 363 So.2d 1360, 1361 (Miss.1978).

South Miss. Fin. Co. v. Mississippi State Tax Comm'n, 605 So. 2d 736, 739 (Miss. 1992) (emphasis added); see also Alabama Great S.,R.R. v. McVay, 381 So.2d 607, 611(Miss. 1980) (holding that absent a "transaction of purchase," section 75-2-403 of the Code is not applicable).

The phrase transaction of purchase is not defined in Title 75 of the Mississippi Code; however, the term "purchase" is defined there. A "'purchase' includes taking by sale, discount, negotiation, mortgage, pledge, lien, issue or reissue, gift, or any other voluntary transaction creating an interest in property."Miss. Code Ann. § 75-1-201 (1972).

Viewing the record in the light most favorable to WMS and Braswell, there is no evidence that Murphy's voluntarily intended to transfer any interest in the excavator to Macon; consequently, the mere delivery of the excavator to Macon was not a purchase or transaction of purchase. The delivery was a mere entrustment of the excavator to Macon for demonstration purposes in hopes of subsequently inducing Macon to purchase it.

This view is in accord with that taken by several commentators:

In a sale of goods it is important to observe whether the fraudulent person induces the defrauded person to assent to a transfer of title or merely assent to a transfer of possession . In the latter case, *the fraudulent person can transfer no better title even to a good faith purchaser for value without notice than any possessor of goods without title.* Otherwise, stated, it is only where the victim of the fraud has passed title, albeit a voidable title, to his transferee that the latter is able to pass good title to a good faith purchaser for value.

Ronald A. Anderson *3 Anderson on the UCC 2-403:27 584-85* (3d edition 1983) (emphasis added); *see also* William D. Hawkland, Uniform Commercial Code Series § 2-403:04 (1992).

II. WHETHER THE COURT ERRED AS A MATTER OF LAW IN HOLDING THAT ROBERT MACON WAS NOT A MERCHANT DEALER CAPABLE OF PASSING GOOD TITLE TO SUBSEQUENT PURCHASERS FOR VALUE.

Even though WMS was not a good faith purchaser under section 75-2-403(1)(d) WMS argues that it was a good faith purchaser under section 75-2-403(2). Section 75-2-403(2) of the Mississippi Code of 1972 provides:

(2) Any entrusting of possession of goods to a merchant who deals in goods of that kind gives him power to transfer all rights of the entruster to a buyer in ordinary course of

business.

Miss. Code Ann. § 75-2-403(2) (1972).

The parties do not dispute whether Murphy's entrusted Macon with the excavator. Their arguments center around the question of whether Macon was a merchant under section 75-2-403(1)(d).

Mississippi law defines a merchant as:

[A] person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction or to whom such knowledge or skill may be attributed by his employment of an agent or broker or other intermediary who by his occupation holds himself out as having such knowledge or skill.

Miss. Code Ann. § 75-2-403(2) (1972). This definition is restricted under section 75-2-403(2) to only those merchants who deal "in goods of that kind." Thus, the question becomes was Macon a merchant who deals in heavy equipment.

WMS and Braswell argue "Macon was a contractor and as such he had familiarity with these pieces of equipment and would meet the statutory requirements as having knowledge or skill peculiar to the practice or goods involved. In other words, he knew how to buy and sell equipment and he knew how to operate these kinds of equipment. As such, he would have the requisite knowledge of a merchant and as such he could deliver good title." This argument finds little support in the record. Nowhere in the record is there any evidence that Macon was a contractor. The affidavits and documentary evidence reflect that Macon represented himself to Murphy's as a contractor. He leased several pieces of equipment from Murphy's prior to selling the excavator and leased equipment to Thomas. There is no evidence in the record to substantiate that Macon was in fact a contractor or knew anything about the equipment except how to sell it.

Even if the record supported the view that Macon was a contractor, that would not qualify him as merchant under 75-2-403(2). In determining whether a person is a merchant under the statute, the central issue is whether that individual is "a person who deals [in heavy equipment]." Certainly a contractor "deals" in heavy equipment for his own use, but "deals" in this definition means something different, as in selling with some degree of regularity. The majority view is that "[t]he requirement that the party 'deals in goods of that kind' is generally interpreted to mean one who is engaged in *regularly selling* goods of the kind in issue." *Prenger v. Baker*, 542 N.W.2d 805, 808 (Iowa 1995) (emphasis added). While the Mississippi Supreme Court has not yet had an opportunity to interpret the phrase merchant who "deals in goods of that kind," it has interpreted a similar phrase. The phrase "merchant with respect to goods of that kind" applies "only to a person who, in a professional status, sells the particular kind of goods." *Vince v. Broome*, 443 So. 2d 23, 26 (Miss. 1983) (interpreting section 75-2-314 of the code, which deals with implied warranties of merchantability). Because of the

similarity of language in the two statutes, we are convinced that a merchant under section 75-2-403(2) must be a person who, in a professional status, sells the particular kind of goods. This interpretation of section 75-2-403(2) of the Uniform Commercial Code is consistent with the majority view on that section of the Code. A contractor does not regularly sell heavy equipment in his professional status; therefore, Macon would not be a merchant of heavy equipment even if WMS's argument that he was a contractor was sustained by the record.

Thus, viewing the evidence in the light most favorable to WMS and Braswell, we cannot say that the trial court erred in finding Macon was not a merchant. Because Macon was not a merchant, he could not be a merchant who dealt in heavy equipment. Macon was not a merchant entrusted with the excavator; therefore, he could not pass good title. The circuit court correctly determined Murphy's was entitled to replevy the excavator.

III. WHETHER THE COURT ERRED IN FINDING WMS WAS NOT ENTITLED TO A LIEN FOR THE REPAIRS AND IMPROVEMENTS MADE BY IT.

At the outset, WMS concedes that a statutory remedy via our mechanics' lien statute is unavailable because the repairs were not made at the request or with the consent of the owner. *See Huntley v. Drummond*, 226 Miss. 753, 758, 85 So. 2d 188, 190 (1956). Instead, WMS contends Murphy's will be unjustly enriched by its repairs to the excavator if WMS is not reimbursed. While WMS couches its claim in terms of unjust enrichment, its claim lies, more specifically, under the quasi-contractual theory of *quantum meruit*. While the two theories are related, they apply in different situations. Unjust enrichment applies in "situations where there is no legal contract but where the person sought to be charged is in possession of money or property which in good conscience and justice he should not retain but should deliver to another." *Koval v. Koval*, 576 So. 2d 134, 136 (Miss. 1991) (citations omitted). "Recovery in *quantum meruit* is measured by the reasonable value of materials or services rendered, while recovery in unjust enrichment is that to which the claimant is equitably entitled." *Id.* (citations omitted). In the case at bar, WMS seeks to recover the value of materials and services rendered to repair the excavator; therefore, we address its claim as one sounding in *quantum meruit*. It is well established that to recover under a *quantum meruit* claim that the services and materials "must be 'rendered with [the] knowledge and approval of the recipient, who either expresses no dissent or avails himself of the service rendered,' or under 'such circumstances as authorize the party performing to entertain a reasonable expectation of payment for them by the party benefited. . . .'" *Redd v. L & A Contracting Co.*, 151 So. 2d 205, 208 (Miss. 1963) (citations omitted).

When viewed in the light most favorable to WMS, the record reflects that Murphy's did not have knowledge of the repairs until after they were made, and Murphy's never ratified the repairs. Further, WMS did not repair the excavator under such circumstances as would authorize it to entertain a reasonable expectation of payment from Murphy's. At the time repairs were made, WMS did not know of Murphy's ownership of the excavator; hence, they could not entertain a reasonable expectation that Murphy's would pay for the repairs. Thus, WMS was not entitled to restitution for repairs to the excavator.

For all of the foregoing reasons, the judgment of the Pike County Circuit Court is affirmed.

THE JUDGMENT OF THE PIKE COUNTY CIRCUIT COURT IS AFFIRMED. COSTS OF THIS APPEAL ARE TAXED TO THE APPELLANTS.

BRIDGES AND THOMAS, P.JJ., BARBER, DIAZ, KING, McMILLIN, PAYNE, AND SOUTHWICK, JJ., CONCUR. COLEMAN, J., NOT PARTICIPATING.