IN THE COURT OF APPEALS 5/21/96

OF THE

STATE OF MISSISSIPPI

NO. 94-CA-01046 COA

WILBUR O. COLOM AND COLOM COMMUNICATIONS, INC.

APPELLANTS

v.

RADIO WHKW, INC. AND JAMES C. MAULDIN

APPELLEES

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND

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

TRIAL JUDGE: HON. LEE J. HOWARD

COURT FROM WHICH APPEALED: LOWNDES CIRCUIT COURT

ATTORNEY FOR APPELLANTS:

CHRISTOPHER D. HEMPHILL

ATTORNEYS FOR APPELLEES:

P. NELSON SMITH, JR., HUNTER M. GHOLSON

NATURE OF THE CASE: CIVIL - SUMMARY JUDGMENT

TRIAL COURT DISPOSITION: GRANTED SUMMARY JUDGMENT FOR PLAINTIFFS

BEFORE THOMAS, P.J., BARBER, KING, AND SOUTHWICK, JJ.

KING, J., FOR THE COURT:

This appeal arises from the Lowndes County Circuit Court's judgment of June 18, 1993, sustaining

Radio WHKW, Inc. and James C. Mauldin's motion for summary judgment. Finding that summary judgment was improperly granted, we reverse and remand for proceedings not inconsistent with this opinion.

I.

Ben Yarber was employed with WHKW radio station in Fayette, Alabama. After the owners expressed a desire to sell the station, they offered Yarber a finder's fee if he procured a buyer. Jim Mauldin agreed to buy the station on the condition that 1) Yarber remain as general manager, and 2) if Yarber left the station, Yarber would refrain from competing with WHKW for five years. Yarber worked under Mauldin's ownership for approximately eighteen months, and then resigned. In October of 1986, WYS, Inc., of which Yarber served as president, agreed to purchase radio station WZIX of Artesia, Mississippi from Colom Communications, Inc.

In December of 1986, officers of WHKW filed a petition to prevent the transfer of the FCC license of Colom Communications, Inc. to WYS, Inc. On January 7, 1987, James C. Mauldin on behalf of WHKW and Dorothy Colom on behalf of Wilbur Colom and Colom Communications Corporation executed an agreement which provided:

> 1. Opponents will forthwith withdraw the petition to deny entirely and make no further objection to the transfer.
>
> 2. Applicants and all persons in privity with them will take no action to interfere with the broadcast rights of opponents.
>
> 3. Applicants hereby give bond to opponents to pay $20,000 to opponents in the event Ben Yarber shall fail to do all necessary and proper to divest himself of any interest in WZIX within 30 days of any final order (including end of supersedeas appeal) of a court of competent jurisdiction ordering Ben Yarber to cease competition by reason of a management contract between Yarber and opponents.
>
> 4. Each party hereby releases the other parties from any claim of any damage for any action or proceeding heretofore filed anywhere.

In July of 1988, an injunction was granted by the District Court for the Northern District of Mississippi prohibiting Yarber from competing with WHKW. After the District Court for the Northern District of Mississippi found Yarber to be in contempt of court for violating its injunction on February 9, 1989, Mauldin moved it to enforce the agreement between the parties. The district court refused to do so because of lack of jurisdiction. This decision was upheld on appeal.

On January 30, 1991, Mauldin filed a complaint in the Lowndes County Circuit Court to enforce the payment of $20,000, as agreed upon under the January 7, 1987, agreement between the parties. In the complaint, Mauldin alleged that Yarber violated the district court's injunction, was found to be in contempt by the U.S. District Court, and had refused to pay the $20,000 required by the agreement. Mauldin demanded judgment of and from the Defendants in the amount of $20,000 together will all costs.

On February 28, 1991, Colom filed an answer and alleged that 1) the complaint failed to state a claim upon which relief could be granted; 2) Colom was not personally or individually obligated pursuant to section 75-3-403 of the Mississippi Code of 1972; and 3) the court lacked personal jurisdiction over Colom Communications. Colom admitted that the January 7, 1987, agreement existed between the parties. Colom denied that the rulings of the federal courts required the state court to enforce the agreement since the federal courts lacked subject matter jurisdiction over the agreement. Denying that Mauldin was entitled to relief, Colom requested that the cause of action be dismissed.

On August 5, 1991, Mauldin filed a motion for summary judgment. In support of the motion, Maudlin included 1) a copy of the July 14, 1988, order of the District Court for the Northern District of Mississippi, enjoining Yarber from "carrying on any business activities, including any participation in Radio Station WZIX, which compete with his former employer, Radio WHKW, Inc."; 2) the January 7, 1987, agreement between the parties; 3) the February 16, 1989, order of the District Court for the Northern District of Mississippi, filed on February 17, 1989, citing Yarber for contempt for violating the court's order of July 14, 1988; 4) an order denying Yarber's motion for security under Rule 65(c) of the Federal Rules of Civil Procedure; and 5) a per curiam opinion from the Fifth Circuit Court of Appeals affirming the district court's dismissal of WHKW's motion to enforce the agreement between the parties due to lack of subject matter jurisdiction.

On September 20, 1991, Colom filed his response to the motion for summary judgment in which he stated that there were material questions of fact and that Mauldin was not entitled to judgement as a matter of law. The affidavit of Ben Yarber was included with Colom's response to the motion for summary judgment.

Citing the $20,000 amount in controversy, on April 29, 1992, the Lowndes County Circuit Court remanded the case to the County Court of Lowndes County pursuant to section 9-9-21 of the Mississippi Code of 1972. On June 30, 1993, the order of the County Court of Lowndes County sustaining Mauldin's motion for summary judgment was filed. In its order, the county court did not delineate findings of fact relied on to grant the motion for summary judgment. On July 1, 1993, Colom filed his appeal to the Circuit Court of Lowndes County.

On appeal, Colom raised the following two issues: (1) Whether the trial court's failure to make findings of fact requires that the court's order granting summary judgment be overturned and the case remanded to the trial court for the necessary proceedings; and (2) whether the agreement was ambiguous and should have been subjected to a jury to make a factual interpretation of it.

On September 22, 1994, the Circuit Court of Lowndes County affirmed the decision of the county court, which granted summary judgment in favor of Mauldin. In its order sustaining the motion, the circuit court found that (1) there is no mandatory language in Rule 56 of the Mississippi Rules of Civil Procedure requiring the trial court to enter findings of fact and conclusions of law prior to entering an order of summary judgment; (2) if a trial court makes no specific findings of fact, the appellate court assumes that it resolved fact issues, if any, in favor of the Appellee; (3) the appellate court by law can assume the trial judge made determinations of fact sufficient to support its judgment, if there are any factual disputes; and (4) the failure to make findings of fact does not require that the appellate court remand the case for specific findings. The circuit court also found that the January 7, 1987, agreement between the parties was unambiguous.

On October 13, 1994, Colom filed this notice of appeal and raised the two abovementioned issues.

II.

1. WHETHER THE TRIAL COURT'S FAILURE TO MAKE FINDINGS OF FACT REQUIRES THAT THE COURT'S ORDER GRANTING SUMMARY JUDGMENT BE OVERTURNED AND THE CASE REMANDED TO THE TRIAL COURT FOR THE NECESSARY PROCEEDINGS?

Colom contends that because the trial court failed to make findings of fact, the trial court's order granting summary judgment should be reversed and the case remanded to the trial court for further proceedings. Colom argues that a failure to make findings of fact makes it extremely difficult to pursue an appeal because no one other than the judge knows upon what his decision was based. Colom asserts that in the interest of justice, any final judgment which may be appealed, by necessity, requires that a trial judge make findings of fact to clearly set forth the basis for the decision. Colom relies on *United States v. Continental Oil Co.*, 377 U.S. 161, 161 (1964), *Myers v. Gulf Oil Corp.*, 731 F.2d 281, 281 (5th Cir. 1984), and *Heller v. Namer*, 666 F.2d 905, 905 (5th Cir. 1982) to support his position.

This assignment of error is without merit. "[I]n cases of any significant complexity, the trial court generally should find the facts specially and state separately its conclusions of law." M.R.C.P. 52 cmt. (citing *Tricon Metals & Serv., Inc. v. Topp*, 516 So. 2d 236, 239 (Miss. 1987)). However, under Mississippi law, a trial court is not required to enter findings of fact and conclusions of law when granting summary judgment. Moreover, findings of fact and admissions of law are purely discretionary when no party specifically requests them. *See* M.R.C.P. 52(a). In the instant case, Colom failed to request that the trial court enter findings of fact or conclusions of law as provided under Rule 52.

2. WHETHER THE AGREEMENT WAS AMBIGUOUS AND SHOULD HAVE BEEN SUBMITTED TO A JURY TO MAKE FACTUAL INTERPRETATION OF IT?

Here, Colom contends that summary judgment was improperly granted since the terms of the agreement were ambiguous. Colom argues that the intent of the parties is a genuine issue of material fact which prevented a motion for summary judgment from being granted. Colom further argues that because the intent of the parties was not clearly exhibited by the agreement, this issue should have been submitted to the jury. On the other hand, Appellees argue that the trial court properly determined that the agreement was unambiguous since the preliminary question of whether an ambiguity exists is a question of law, not a question of fact.

This Court conducts a de novo review of the record to determine whether the trial court properly granted a motion for summary judgment. *Nationwide Mut. Ins. Co. v. Garriga*, 636 So. 2d 658, 661 (Miss. 1994); *Pace v. Financial Sec. Life*, 608 So. 2d 1135, 1138 (Miss. 1992); *Short v. Columbus Rubber & Gasket Co.*, 535 So. 2d 61, 63 (Miss. 1988). The de novo review includes looking at the

evidentiary matters and viewing them in the light most favorable to the party against whom the motion has been made. *Nationwide Mut. Ins. Co*., 636 So. 2d at 661. The movant has the burden of proving that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. *Daniels v. GNB, Inc*., 629 So. 2d 595, 599 (Miss. 1993).

A review of the evidentiary matters in this case indicates that on January 7, 1987, the parties entered into an agreement. The agreement provided *inter alia* that Colom would pay $20,000 to WHKW in the "event Ben Yarber shall fail to do all necessary and proper to divest himself of any interest in WZIX within 30 days of any final order (including end of supersedeas appeal) of a court of competent jurisdiction ordering Ben Yarber to cease competition by reason of a management contract between Yarber and opponents."

On August 5, 1991, Mauldin filed a motion for summary judgment and alleged that Yarber had violated the agreement between the parties. There were no specific allegations alleged. On September 20, 1991, Colom filed his response to the motion for summary judgment and alleged that there were material questions of fact in that Yarber had taken "all necessary and proper to divest himself of any interest in WZIX."

The county court granted Appellees' motion for summary judgment. The circuit court affirmed the county court's decision. The county court did not make any findings of fact when it ruled from the bench. *Yowell v. James Harkins Builder, Inc.,* 645 So. 2d 1340, 1343 (Miss. 1994). "Likewise, there are no findings of fact contained in the [circuit court's] final order; as such, this Court has nothing more than a naked ruling from which to proceed." *Id.* at 1344.

"[C]ases which involve issues of contractual ambiguity and interpretation . . . generally are inappropriate for disposition at the summary-judgment stage." *Great S. Nat'l Bank v. McCullough Envtl. Servs., Inc*., 595 So. 2d 1282, 1289 (Miss. 1992) (citation omitted). Although there is no dispute over the existence of the agreement between the parties, the instant case involves an issue of contractual interpretation, such as what Yarber did or did not do which caused the Appellees to assert that he violated the agreement, and whether what Yarber did was sufficient under the agreement to keep from violating the agreement.

At the trial level, Colom supported his contention that the terms of the agreement were ambiguous by including an affidavit by Ben Yarber with his response to the motion for summary judgment. In that affidavit, Yarber stated the following:

> Prior to and immediately after (within 30 days) of the Federal Court's July 14, 1988 Order enjoining my competition with Radio WHKW, Inc., I took "all necessary and proper" actions to divest myself of interest in the station by listing my interest in the station for sale, advertising it for sale, listing it with a real estate agent and broker and discontinuing my involvement with the station management. I could not find a buyer for the station, so in July 1989, I traded my interest to Walter B. Simmons, Sr. for a four-bay car wash on 2302 Hwy. 82 East Columbus, Mississippi. Essentially, there was no market to sale the station and eventually my co-owners took huge financial losses and ultimately leased the station when all efforts by them to locate a buyer failed.
>
> Since we never kept corporate minutes or held formal meetings, these efforts at divesting

> myself of an interest were "all necessary and proper" to achieve my divestment. I did not interpret "all necessary and proper" action to divest to include giving away my investment.

We find that the purported establishment of the facts is sufficiently incomplete or inadequate to support a motion for summary judgment. We, therefore, reverse and remand for proceedings not inconsistent with this opinion.

THE JUDGMENT OF THE CIRCUIT COURT OF LOWNDES COUNTY IS REVERSED AND THE CAUSE REMANDED FOR PROCEEDINGS NOT INCONSISTENT WITH THIS OPINION. APPELLEES ARE TAXED WITH ALL COSTS OF THIS APPEAL.

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

PAYNE, J., NOT PARTICIPATING.