

IN THE COURT OF APPEALS 3/11/97
OF THE
STATE OF MISSISSIPPI
NO. 94-CA-00428 COA

PIKE COUNTY NATIONAL BANK

APPELLANT

v.

DURL WHITE

APPELLEE

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

TRIAL JUDGE: HON. RICHARD T. WATSON

COURT FROM WHICH APPEALED: AMITE COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:

C. ASHLEY ATKINSON

ATTORNEY FOR APPELLEE:

GARY L. HONEA

NATURE OF THE CASE: REPLEVIN

TRIAL COURT DISPOSITION: VERDICT FOR DEFENDANT

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

THOMAS, P.J., FOR THE COURT:

SUMMARY

Pike County National Bank, (PCNB), appeals from a jury verdict in favor of the defendant, Durl White, in a replevin action to recover a 1988 Mitsubishi Sigma, and assigns the following issues as error:

I. DID THE TRIAL COURT ERR IN REFUSING PCNB'S PEREMPTORY INSTRUCTION, P-4, AND IN DENYING ITS MOTION FOR JNOV OR NEW TRIAL; AND

II. DID THE TRIAL COURT ERR IN GRANTING JURY INSTRUCTIONS D-7 AND D-8 REGARDING THE DEFENSE OF ACCORD AND SATISFACTION.

We reverse and render.

FACTS

On September 7, 1988, PCNB lent \$21,942.72 to Durl White in exchange for a security interest in a 1988 Mitsubishi Sigma and approximately seven and one-half acres of land. The security agreement contained an "other security" clause which provided that

any present or future agreement securing any other debt I owe you will also secure the payment of this note. However, property securing another debt will not secure this note to the extent that: (a) you fail to make any disclosure of the existence of a security interest in such property required by law for this transaction; (b) such property is my principal dwelling and you fail to provide (to all persons entitled) any notice of right of rescission required by law for this transaction; (c) this is a "consumer" loan and such property securing the other debt is "household goods" (as those terms are defined in applicable federal regulations governing unfair and deceptive trade practices); or (d) such property is margin stock to the requirements of 12 C.F.R. Section 207 of 221.

The promissory note contained a provision specifying that the security agreement would remain in effect "even if the note is paid and I owe no other debt to you, until discharged in writing."

On June 24, 1989, White and his wife, Annette White, executed an installment note in the amount of \$14,382.24 in favor of PCNB. The 1989 note was payable in forty-eight monthly installments and had a similar "other security" provision which provided that, with certain exceptions, "any present or future agreement securing any other debt I owe you will also secure the payment of this note." PCNB lent White \$17,464.06 in February of 1990. This consumer loan was secured by a deed of trust to a rental house and three acres of land. PCNB lent \$5,031.69 to White on June 14, 1990. This promissory note was additionally secured by car and property under the 1988 note. On June 14, 1990, White executed a consumer loan agreement with PCNB for \$605.00.

During the first few months of 1991, White began falling behind in his payments. On March 12, 1991, Harvey Magee, an assistant vice-president for PCNB wrote White to inform him that his checking

account had been debited to cover delinquent payments. The letter also informed White that he should contact Magee prior to March 15, 1991, and that an acceptable repayment plan needed to be approved or PCNB would continue to find it necessary to initiate legal action against White.

Although he disclaims any knowledge of the letter, White contacted Randy Burris, a vice-president with Trustmark National Bank on March 21, 1991, to get a loan to protect his car from being repossessed. Burris agreed to loan White \$9,200.00 in exchange for title to the car. Burris testified that he contacted an individual with PCNB regarding the payoff value of the car. Trustmark then issued White a cashier's check in the amount of \$9,200.00. Burris, while admitting during trial that he did not follow Trustmark's ordinary business procedures which would require Trustmark to deliver the title itself, testified that he gave White the check and instructed him to bring the Certificate of Title to the car to him.

On March 29, 1991, White went to PCNB and gave the check to the PCNB teller. The teller told him to go to another branch of the bank which housed the loan department in order to get the title, since she had no access to or control over the Certificates of Title. White went to the other branch where he was informed by Magee that PCNB was retaining the funds as well as the car title, as allowed by the 1988 and 1989 promissory notes.

PCNB filed a replevin action to recover the car on May 13, 1991. White filed for Chapter Thirteen bankruptcy on June 25, 1991. Under his bankruptcy plan, White agreed to repay \$16,000.00 over a sixty month period to PCNB. The final agreed order, which was entered on October 3, 1991, also provided that PCNB was to retain its liens against the car and other real property owned by White. At trial, White testified that he repaid some, but not all, of the money. PCNB attempted to recover the car, but White refused to deliver it, even though he was in default under the terms of the promissory notes.

Since White refused to deliver the car, PCNB pursued the instant matter, and the jury awarded possession of the car to White.

ANALYSIS

PCNB asserts that the trial court erred in denying its request for a peremptory instruction and its motions for directed verdict and JNOV since there was no factual dispute to be submitted to the jury. PCNB also asserts that the trial court erred in granting White's jury instruction regarding accord and satisfaction since (1) there was no evidentiary basis for such instructions and (2) White did not plead accord and satisfaction until he filed his second amended answer on the morning of trial. Since PCNB's issues are, in reality, merely parts of a single issue, we will address its assignments of error together.

A motion for a directed verdict, a request for a peremptory instruction, and a motion for JNOV are procedural vehicles for challenging the sufficiency of the evidence supporting the verdict. *James W. Sessums Timber Co. v. McDaniel*, 635 So. 2d 875, 880 (Miss. 1994) (quoting *Weems v. American Sec. Ins. Co.*, 450 So. 2d 431, 435 (Miss. 1984)). Each requires that the court consider all of the evidence before it at the time the motion is offered. *Id.*

Where such a request has been made, the trial court must consider all of the evidence--not

just the evidence which supports the non-movant's case--in the light most favorable to the party opposed to the motion. The non-movant must also be given the benefit of all favorable inferences that may reasonably be drawn from the evidence. If the facts and inferences so considered point so overwhelmingly in favor of the movant that reasonable men could not have arrived at a contrary verdict, granting the motion is required. On the other hand, if there is substantial evidence of such quality and weight that reasonable and fair-minded men in the exercise of impartial judgment might reach different conclusions, the motion should be denied and the jury's verdict allowed to stand.

Id.

In order to commence a replevin action, one must file a complaint setting forth (1) a description of the personal property; (2) the value of the property; (3) the basis of the party's entitlement to immediate possession of the property, including any contracts or documents supporting such claim; (4) that the property is in the defendant's possession; and (5) that the defendant is wrongfully detaining the property. Miss. Code Ann. § 11-37-101 (1972).

The evidence at trial established that the property at issue was the Mitsubishi Sigma automobile, that the property was worth approximately \$8,000.00, and that White retained possession of the car. PCNB also produced the promissory notes entitling it to a security interest in the vehicle, as well as undisputed proof that White was in default on his obligations to PCNB under the original promissory notes and the agreed order in bankruptcy. Under the terms of the notes, PCNB was entitled to any remedy provided by law upon default.

Since it is an affirmative defense, the burden of proof of accord and satisfaction rests on White. The elements of accord and satisfaction must be proven by clear and convincing evidence. *Young v. Southern Farm Bureau Life Ins. Co.*, 592 So. 2d 103, 106 (Miss. 1991). Unless he could prove the affirmative defense of accord and satisfaction, White was wrongfully detaining the car. The elements of accord and satisfaction are (1.) something of value offered in full satisfaction of demand; (2.) accompanied by acts and declarations as amount to a condition that if the thing offered is accepted, it is accepted in satisfaction; (3.) the party offering the thing of value is bound to understand that if he takes it, he takes subject to such conditions; and (4.) the party actually does accept the item. *Austin v. Padgett*, 678 So. 2d 1002, 1003 (Miss. 1996) (quoting *Lovorn v. Iron Woods Prods. Corp.*, 362 So. 2d 196, 197 (Miss. 1978)).

The Mississippi Supreme Court has noted that "a creditor's retention of a check may not support an accord and satisfaction where the debtor fails to unambiguously condition the tendered check as payment in full of the underlying obligation." *Id.* at 1004 (citing *Angle v. USF &G*, 201 Cal. App. 2d 758, 20 Cal. Rptr. 391 (2nd Dist. 1962)).

This case is analogous to the situation in *Singing River Mall Co. v. Mark Fields, Inc.*, 599 So. 2d 938 (Miss. 1992), in which the mall accepted reduced rent payments from a store. The rent payments were unilaterally reduced by the store, but they were not submitted with any condition that the mall's acceptance of these payments constituted full satisfaction of its claim for the entire rent amount under the lease. *Id.* at 947. In *Singing River Mall*, the Mississippi Supreme Court held that the trial court

committed reversible error in submitting accord and satisfaction instructions to the jury since there was no evidence in the record to support such an instruction, noting that

[n]o evidence of record demonstrated that [the store] placed a condition on [its] rent payments that acceptance would constitute satisfaction of his debts, nor could he have legally done so. Since [the store] was legally obligated to pay rent, [it] could not unilaterally fashion an accord and satisfaction by saying, essentially, "If you cash this check, it means you accept my new terms." . . . [Its] action merely constituted delinquency, not accord and satisfaction. No evidence demonstrated that the mall understood anything more than that the store was not paying its full rent. The facts do not reveal the contract essentials required to formalize an accord and satisfaction.

Id. at 948.

Similarly, since White was legally obligated to pay his debt, he could not fashion an accord and satisfaction by saying, "If you cash this check, it means you accept my new terms that the car is no longer collateral for my other delinquent debts." No evidence indicates that the bank did anything other than accept what payment it could get while demanding the remaining shortfall from White. White failed to prove that PCNB accepted the check with an understanding that it was offered in full satisfaction of his debt to PCNB. Even if White paid the entire amount remaining outstanding for the car itself under the 1988 note, the other security clause in the 1988 note, as well as the other security clause in the 1989 note, dragnetted the car as collateral for White's other outstanding debts. Additionally, White's actions in the bankruptcy proceeding indicate that even he did not consider his payment to be accord and satisfaction since he agreed that PCNB retained its lien against the car until he paid the \$16,000.00 under the bankruptcy plan.

Since PCNB proved the elements required for a replevin action, and White, even given the benefit of all favorable inferences from the evidence, utterly failed to prove accord and satisfaction, the trial court erred in allowing the submission of the jury instructions on accord and satisfaction and erred in denying PCNB's motion for JNOV.

THE JUDGMENT OF THE CIRCUIT COURT OF AMITE COUNTY IN FAVOR OF APPELLEE IS REVERSED AND RENDERED. ALL COSTS ARE ASSESSED TO THE APPELLEE.

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