

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

William F. Beck, Trustee of
the William F. Beck Living Trust
Dated December 21, 2001

Court of Appeals No. L-11-1219

Trial Court No. CI0200906201

Appellee

v.

Mar Distributors of Toledo, Inc., et al.

DECISION AND JUDGMENT

Appellants

Decided: November 16, 2012

* * * * *

David G. Grude, for appellee.

V. Robert Candiello, for appellants.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} This is an appeal of an August 2, 2011 judgment of the Lucas County Court of Common Pleas, issued after a bench trial, in a civil action for breach of contract. Appellants are Mar Distributors of Toledo, Inc. (“Mar Distributors”), Naqid Hasan, Yazeed Qaimari and Mona Qaimari. Appellee is William F. Beck, Trustee of the

William F. Beck Living Trust, dated December 21, 2001 (“Trust”). The case was tried on May 17, 2011.

{¶ 2} The Trust filed its complaint against appellants on August 13, 2009, alleging breach of contract with respect to a \$264,000 loan. According to the complaint, beginning May 14, 2002 and continuing through December 12, 2002, the Trust lent appellees a total of \$264,000, by installments. The complaint alleges that all appellants were obligated to repay the loan under the terms of a cognovit note executed by them and that the appellants breached the contract when they stopped making payments on the loan, beginning on August 1, 2008.

{¶ 3} The Trust alleged that appellants owed an outstanding indebtedness on the loan of \$159,726.90 as of August 1, 2009, plus interest. Appellee demanded judgment jointly and severally against appellants in the amount of \$159,726.90 plus interest, costs and attorney fees for breach of the loan agreement.

{¶ 4} In its judgment, the trial court found a breach of contract and ruled that appellants were jointly and severally liable to the Trust for the breach. The court ordered appellants to pay damages to the Trust in the amount of \$143,255.08 as of July 1, 2008, with interest at the rate of 8.5 percent per annum from July 1, 2008 through July 11, 2008, and at 10 percent afterwards.

{¶ 5} Appellants argue that the trial court erred by failing to grant a continuance at trial when a witness called by appellants failed to produce documents as required under a subpoena duces tecum served upon the witness.

Assignment of Error

The trial court committed prejudicial and reversible error in failing to grant Appellants' request for a continuance during the course of trial when a subpoena duces tecum was not honored by Dean Beck on behalf of Beck Supply, Inc. for the purpose of showing credits due the appellants on the balance of the note in question.

{¶ 6} The witness in this dispute was Dean Beck, the Secretary-Treasurer of Beck Suppliers, Inc. ("Beck Suppliers"), a petroleum distributor. The witness testified that Beck Suppliers sells gasoline to appellants for resale at 15 different locations. His father is William F. Beck, who made the \$264,000 loan to appellants through his living trust. Dean Beck's brother, Doug, is the president of Beck Suppliers. His brother, Brian, is the company vice president.

{¶ 7} William F. Beck testified at trial. He is a retired, former owner of Beck Suppliers. William F. Beck testified that he retired from the company 15 years before trial, but stated he has had no financial interest in the company since he retired. William F. Beck testified that it has been his practice to make loans (through his trust) to individuals and companies who enter into supply contracts with Beck Suppliers and that he had entered into 15 such loan contracts in the five years prior to trial. The loans have been made to permit the borrowers to purchase or to remodel gas stations. William F. Beck denied that he has been compensated by Beck Suppliers for making loans to

persons with petroleum supply contracts with the company or that he has played any role as to the terms of those agreements.

Subpoena Duces Tecum

{¶ 8} Appellants served Dean Beck with a subpoena duces tecum a few days before trial. The subpoena directed Beck to appear at trial and to bring with him records of Beck Suppliers. The subpoena required production of records setting forth the number of gallons of gasoline sold by Beck Suppliers to NZR Retail of Toledo, Inc. (“NZR”). The subpoena also required production of records showing (1) the net rack price excluding profit and freight and (2) the net rack price including profit and freight on those sales. The subpoena sought production of records extending back until 2008.

{¶ 9} At trial, appellants argued that Beck Suppliers increased the price of gasoline two cents a gallon on gasoline sold by it to NZR on sales made after the dispute over nonpayment of the \$264,000 loan from the Trust arose. Appellants have argued that the subpoenaed records were necessary to calculate the total amount paid by NZR under the price increase and that appellants are entitled to a setoff of that total against any damages awarded to appellee in this case.

{¶ 10} Appellants contend that without the subpoenaed documents requested they have been prejudiced at trial because they were unable to prove credits or setoffs to which they are entitled to be deducted from any damage award in this case. They claim the denial of a continuance of trial constituted a failure of the trial court to take reasonable steps to enforce the trial subpoena.

{¶ 11} Appellee argues that the evidence is irrelevant because it does not concern legal obligations of parties in this case. Appellee argues that the requested documents concern a supply contract between two non-parties, Beck Suppliers and NZR and that the Trust was not a party to those contracts. Appellee also argues that the claim to a setoff is an affirmative defense under Civ.R. 12 and appellants did not assert any right to a setoff before trial either by answer or counterclaim. Additionally, appellee contends that if appellants desired to pursue damages for claimed breach of their supply contract by Beck Suppliers that it should have filed a third party complaint against it.

Setoff

{¶ 12} A setoff is defined as “that right which exists between two parties, each of whom under an independent contract owes a definite amount to the other, to set off their respective debts by way of a mutual deduction.” *Witham v. South Side Bldg. & Loan Ass’n of Lima, Ohio*, 133 Ohio St. 560, 562, 15 N.E.2d 149 (1938); *Tejeda v. Toledo Heart Surgeons, Inc.*, 186 Ohio App.3d 465, 2009-Ohio-3495, 928 N.E.2d 1138, ¶ 53 (6th Dist.). A central element of a right to setoff is the existence of mutuality of obligation. *Witham*, at 562; *Chickerneo v. Soc. Natl. Bank of Cleveland*, 58 Ohio St.2d 315, 318, 390 N.E.2d 1183 (1979); *Kehl Chevy Olds, Inc. v. Huntington Natl. Bank*, 12th Dist. No. CA91-01-001, 1991 WL 160093, *3 (Aug. 19, 1991). Mutuality is lacking where both parties to the transaction on which suit was brought are not also parties to the independent contract on which a right of setoff is claimed. *Id.*

{¶ 13} We agree with appellee that appellants laid no foundation at trial that could support a finding that Beck Suppliers and the William F. Beck Living Trust are one and the same. The record demonstrates that the Trust and Beck Suppliers are separate legal entities, and that the Trust was not a party to the petroleum supply contract on which a right of setoff is claimed. Accordingly, appellants' argument that they are entitled to a setoff based upon breach of the petroleum supply contract by Beck Suppliers fails due to lack of mutuality of obligation.

{¶ 14} Furthermore, a right to a setoff is recognized as an affirmative defense. *Columbus Green Bldg. Forum v. State*, 10th Dist. No. 12AP-66, 2012-Ohio-4244, ¶ 28; *Spano Bros. Constr. Co., Inc. v. Adolph Johnson & Son Co., Inc.*, 9th Dist. No. 23405, 2007-Ohio-1427, ¶ 26. Appellants neither asserted a right to setoff in their answer nor counterclaimed against appellee for a claimed right to setoff due to increased charges for gasoline under the supplier agreement.

{¶ 15} Civ.R. 14 governs third-party practice. Under the rule "a defending party, as a third-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to him for all or part of the plaintiff's claim against him." Civ.R. 14(A). A defendant must obtain leave of court to file a third-party complaint if the third-party complaint is not filed within 14 days after the defendant files the original answer. *Id.* Here appellant neither filed a third-party complaint against Beck Suppliers for the gas supply contract claim nor sought leave of court to do so.

{¶ 16} In our view, due to a lack of mutuality of obligation, no claim for setoff existed under Ohio common law. Even if it did, appellant failed to assert a right of setoff as an affirmative defense in their answer or by way of counterclaim. Appellants also did not seek to join the claim as a third party claim under Civ.R. 14. The case proceeded to trial on the breach of contract claim on the \$264,000 loan alone.

{¶ 17} The trial court concluded that the evidence of claimed additional payments by NZR on a gasoline supply contract with Beck Suppliers was not relevant to the breach of loan contract claim:

THE COURT: Mr. Candiello, other than calculating the amount of the two cents over the gallon, other than calculating that what relevance does it have for the trial going on today other than the offset which you have calculated?

MR. CANDIELLO: Other than the offset it probably doesn't have any relevance * * *.

{¶ 18} The trial court ruled that the documentary evidence was not relevant and stated that it would not have admitted the documents into evidence even had they been produced by Dean Beck at trial.

{¶ 19} A trial court's decision to deny a request for a continuance of trial is reviewed on appeal under an abuse of discretion standard. *State v. Unger*, 67 Ohio St.2d 65, 423 N.E.2d 1078 (1981), syllabus; *State v. Luce*, 6th Dist. No. L-90-091, 1991 WL 154061, *2 (Aug. 9, 1991).

{¶ 20} We agree with the trial court's determination that the subpoenaed documentary evidence was not relevant to the claim in suit and was therefore inadmissible at trial even had documents been produced pursuant to the subpoena. Accordingly we conclude appellants were not harmed by the failure of Dean Beck to produce the subpoenaed documents at trial. We find no abuse of discretion in the trial court's denying appellant's motion for a continuance of trial to permit them to secure the documents for use at trial.

{¶ 21} We find that appellants' assignment of error is not well-taken.

{¶ 22} We find that justice has been afforded the parties complaining and that appellants were not denied a fair trial. We affirm the judgment of the Lucas County Court of Common Pleas. We order appellants to pay the costs of this appeal pursuant to App.R. 24.

Judgment affirmed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J.

JUDGE

Arlene Singer, P.J.

JUDGE

Thomas J. Osowik, J.
CONCUR.

JUDGE

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| <p>This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at: http://www.sconet.state.oh.us/rod/newpdf/?source=6.</p> |
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