

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
May 3, 2005 Session

SREE, ET AL. v. JACQUBHAI CHAMPANERIA

**Appeal from the Circuit Court for Davidson County
No. 96C-3493 Hamilton Gayden, Jr., Judge**

No. M2004-00613-COA-R3-CV

The plaintiffs appeal the action of the trial court in granting Defendant's Motion for Summary Judgment on the basis of *res judicata*. Specifically, Plaintiffs complain of the action of the trial court in allowing Defendant to belatedly amend his answer in order to assert *res judicata* as a defense. Plaintiffs sought attorney's fees which the trial court denied. We affirm the action of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

WILLIAM B. CAIN, J., delivered the opinion of the court, in which WILLIAM C. KOCH, JR., P.J., M.S., and PATRICIA J. COTTRELL, J., joined.

Phillip Leon Davidson, Nashville, Tennessee, for the appellant, SREE.

David B. Herbert, Julie Bhattacharya Peak, Nashville, Tennessee, for the appellee, Jacqubhai Champaneria.

MEMORANDUM OPINION¹

Plaintiff, SREE, was a Tennessee general partnership which on January 1, 1992, entered into a Franchise Agreement with Econo Lodges International, Inc. relative to the operation of an Econo Lodge Hotel located at 970 Murfreesboro Road, Nashville, Tennessee, 37217. The

¹ Tenn. R. Ct. App. 10 states:

This Court, with the concurrence of all judges participating in the case, may affirm, reverse or modify the actions of the trial court by memorandum opinion when a formal opinion would have no precedential value. When a case is decided by memorandum opinion it shall be designated "MEMORANDUM OPINION," shall not be published, and shall not be cited or relied on for any reason in any unrelated case.

Franchise Agreement was executed on behalf of SREE by its then general partner, Dileep M. Patel, with all individual partners of SREE also executing the Franchise Agreement on behalf of SREE. On July 15, 1993, SREE partners entered into a Management Agreement with Jacobhai (Jack) K. Champaneria. This Agreement was executed on behalf of SREE by Dileep M. Patel, partner. The duties of Champaneria under the Management Agreement included record keeping, repairs on the premises, the employ and discharge of employees, compliance with building codes and regulations, and, of particular significance:

XII. Insurance Coverage - The manager shall remit directly to such providers and carriers the premiums on all existing policies of insurance by which company maintains coverage for the motel premises, including, but not necessarily limited to workman's compensation, fire, contents, public liability insurance, dram shop, fire and extended coverage insurance.

The term of the Contract was for one (1) year unless extended by written agreement of the parties.

While the Contract was in effect and while Champaneria was managing the Econo Lodge Motel, one Jennifer Michelle Jones, a minor and guest of the Motel, was shot to death on January 19, 1994, resulting in a wrongful death action in the United States District Court for the Middle District of Tennessee styled *Anita Stevens, as surviving custodial parent of Jennifer Michelle Jones, a minor plaintiff, v. Choice Hotels International, Inc., Pradeep Kakkad, Krishnalal Patel, Sashan Natarajan, Vijaychandra M. Patel, Chilakammari Yeshwant, Mohammad Ghani, Dileep Patel, Sushil Bagri, both individually and dba a partnership, and SREE, partnership*, case #3-94-0358. On September 24, 1996, SREE filed the present case in the Circuit Court of Davidson County Tennessee charging Champaneria with breach of the Management Agreement for, among other things, failing to maintain proper insurance on the premises which would have covered the wrongful death suit relative to Jennifer Michelle Jones.

The plaintiff is represented in this case by Phillip L. Davidson of the Davidson County Bar.

On December 23, 1996, Champaneria answered with general denials of breach of contract, affirmative defenses and a counter-complaint charging material misrepresentations as to the solvency and condition of the Econo Lodge Hotel. Defendant was represented by Honorable Gail P. Pigg of the Davidson County Bar.

On January 27, 1997, SREE answered the counter-claim with general denials and an affirmative defense to the averments of fraud of the applicable statute of limitations.

From this point in the proceedings, it becomes evident that lines of communication between attorney and client on both sides progressively deteriorate. On March 14, 1997, Plaintiff moved to amend the complaint following the dissolution in Davidson County Chancery Court on March 6, 1997, of the SREE partnership and the discharge of its receiver. The amendment sought to substitute the individual former partners as plaintiffs in succession of the

dissolved partnership. The only former partner not included in the Motion to Amend the Complaint is the former managing partner Dileep Patel.

On May 16, 1997, the trial court entered an order allowing the plaintiff to amend the complaint with an observation in the order that “the court further noted that the absence of Dileep Patel triggers the missing witness rule and opens the door to admissible hearsay. The court specifically found that Dileep Patel’s actions and statements will be admissible. A partner who owned the majority interest in a partnership and served as managing partner cannot hide behind the shield of living in another country to avoid discovery and frustrate the evidence.”

Several motions and further discovery continued until April 5, 1999, when Gail P. Pigg moved to be permitted to withdraw as counsel for the defendant.

On August 26, 1999, David B. Herbert and Todd A. Bricker of the Davidson County Bar, now representing the defendant, moved to amend to assert an estoppel of the plaintiffs to proceed relative to the Jennifer Jones case because of settlements reached in the federal court. On February 17, 2000, Defendant moved for partial summary judgment relative to any claims concerning the Jennifer Jones case.

The battle over partial summary judgment for estoppel because of the federal court litigation continued unabated until June 9, 2000, when Defendant filed a motion under Tennessee Rule of Civil Procedure 12.02(6) to dismiss the entire claim on the basis of *res judicata* relying on the record in the case of *SREE v. Champaneria*, Chancery Court of Davidson County Tennessee case #94-1270-I. Simultaneously, Defendant filed a Statement of Uncontested Facts asserting that the previous suit had been dismissed on May 8, 1995, in the Chancery Court of Davidson County and that the dismissal of that case for failure to prosecute was a dismissal on the merits.

On June 13, 2000, the trial judge denied the defendant’s Motion to Dismiss.

The trial court was troubled by the question of whether or not Defendant had raised *res judicata* as a defense, he not having raised the defense in responsive pleadings. In its memorandum of July 27, 2000, as to this issue, the court stated:

The defendant in its response to plaintiff’s Memorandum in Opposition to Defendant’s Motion to dismiss pursuant to Rule 12.02(6) has alternatively asked to be allowed to amend the pleadings to assert as an affirmative defense the doctrine of *res judicata*. The defendant concedes that the factual basis for supporting the defense of *res judicata* requires a consideration of matters outside the record and suggests that the Motion to dismiss be treated as a motion for Summary Judgment pursuant to T.R.C.P. 56.

The Court rules that the defendant is allowed to amend his answer to assert the affirmative defense of *res judicata*. The Court will take the issue of *res judicata* under advisement pending factual determinations and legal conclusions upon the trial of the cause.

On August 1, 2000, Defendant filed a Motion for Summary Judgment based on *res judicata* relative to the May 8, 1995, dismissal for failure to prosecute the previous case which it is alleged was “on the merits” under Tennessee Rule of Civil Procedure 41.02(3).

On August 1, 2000, the trial judge allowed Defendant to amend his answer to raise the affirmative defense of *res judicata* based upon the previous case.

On December 15, 2000, the trial court granted summary judgment to the defendant on all issues arising from the Complaint and the Responsive Pleadings of the Defendant on the basis of *res judicata*. This Order concluded with “all other matters are reserved until further orders of the court.”

On January 11, 2001, Plaintiff filed a Motion to Alter or Amend the December 15, 2000, Order pursuant to Tennessee Rule of Civil Procedure 59 stating as grounds “the plaintiff would show that this court should grant the plaintiffs’ reasonable attorney’s fees for litigating this case for six years.”

On March 14, 2001, the trial court entered an order denying the Tennessee Rule of Civil Procedure 59 Motion of the plaintiffs again stating in the order that “all other matters are reserved until further orders of the court.”

Thus, it appears that all issues between the parties relative to the Complaint of plaintiffs came to an end on March 14, 2001, and that only the counter-complaint remained to be adjudicated. No further action appears to have been taken by the defendant to prosecute his counter-claim, and on June 21, 2002, the trial court entered an order dismissing the counter-claim for failure of the defendant/counter-claimant to prosecute it. On July 19, 2002, Defendant filed his Motion to Set Aside the Order dismissing his counter-claim and reinstate it on the trial docket. On September 26, 2002, the trial court entered an order reversing its action of June 21, 2002, and reinstating the counter-claim of Champaneria against counter-defendants.

From this point on the record is made up entirely of proceedings on the counter-complaint of Champaneria against the SREE former partners.

Further proceedings finally terminated with an Order of February 18, 2004, granting a voluntary dismissal without prejudice under Tennessee Rule of Civil Procedure 41 as sought by the counter-plaintiff. This Order provided also “the cost of this cause will be assessed upon the ultimate resolution of this case.” The original plaintiff then filed a timely appeal from the February 18, 2004, Order allowing voluntary dismissal of the counter-claim.

Further proceedings occurred on April 20, 2004, in the trial court when counsel for the original plaintiff filed a Motion Pursuant to Tennessee Rule of Civil Procedure 54 to have the costs taxed equally to the parties.

On May 14, 2004, the trial court entered an order taxing the costs of the cause equally to the parties.

Since there has never been a designation of finality under Tennessee Rule of Civil Procedure 54.02 separating the issues made in the Complaint from the issues made by the counter-complaint, the December 15, 2000, Order Granting Summary Judgment to the Defendant as to the Complaint is not a final judgment and appeal from it, and particularly from the trial court's refusal to alter or amend that judgment to allow for recovery of attorney's fees by the plaintiff, must await adjudication of all issues made under the counter-complaint. *Guess v. Maury*, 726 S.W.2d 906 (Tenn.Ct.App.1986); *Louis Dreyfus Corporation v. Austin Company, Inc.*, 868 S.W.2d 649 (Tenn.Ct.App.1993).

Appellant presents two issues for review:

I. Did the Trial Court abuse its discretion by allowing the defendant-counterplaintiff to amend his answer to the Complaint to allege the defense of *res judicata*.

II. Once having granted the amendment to the Appellee's answer and dismissing the appellant's case, did the Trial Court abuse its discretion in denying a request for attorney's fees and cost?

Appellant does not complain that the trial court erred in granting summary judgment on *res judicata* but limits its appeal to abuse of discretion in allowing the defendant to amend his answer and raise the defense of *res judicata* and the further assertion that the trial court having dismissed the case on *res judicata* abused its discretion in denying Plaintiffs' request for attorney's fees and costs.

SREE initially contends that the trial court abused its discretion in granting Champaneria's Motion to Amend his Answer, which asserted the affirmative defense of *res judicata*. The appellate court reviews a trial court's ruling on a motion to amend the pleadings under the abuse of discretion standard. A trial court's discretionary decision must be upheld unless it applies an incorrect legal standard, reaches a decision that is illogical, bases its decision on clearly erroneous assessment of the evidence, or employs reasoning that causes an injustice to the complaining party. *Perry v. Perry*, 114 S.W.3d 465, 467 (Tenn.2003); *Clinard v. Blackwood*, 46 S.W.3d 177, 182 (Tenn.2001); *Overstreet v. Shoney's Inc.*, 4 S.W.3d 694, 709 (Tenn.Ct.App.1999).

The Tennessee Supreme Court has emphasized liberality in permitting pre-trial amendments to pleadings. In *Branch*, the Court stated that Tennessee Rule of Civil Procedure 15 "needs no construction, it means precisely what it says, that 'leave shall be freely given.'" *Branch v. Warren*, 527 S.W.2d 89, 91 (Tenn.1975). A trial court must consider such factors as "undue delay in filing; lack of notice to the opposing party; bad faith by the moving party; repeated failure to cure deficiencies by previous amendments; undue prejudice to the opposing party; and futility of amendment" in determining whether to grant a motion to amend the pleadings. *Merriman v. Smith*, 599 S.W.2d 548, 559 (Tenn.Ct.App.1979). However, if the trial court uses the proper legal standard and refrains from making an illogical decision that promotes an injustice to the parties, the trial court's decision will not be disturbed. *Perry*, 114 S.W.3d at 466.

SREE asserts that Champaneria's knowledge of the April 28, 1994 suit and his failure to plead *res judicata* until four years after his answer in the September 24, 1996, suit constituted undue delay. It is upon this alleged undue delay that SREE claims the trial court abused its discretion in allowing Champaneria to amend his answer. SREE relies on *March v. Levine* in support of its position, where the plaintiffs sought to amend their complaint to include wrongful death, thirty-one months after litigation began. *March*, 115 S.W.3d 892, 909 (Tenn.Ct.App.2003). This Court reversed the trial court's decision to allow the plaintiffs to amend their complaint on the grounds that the unexplained delay as well as other factors constituted an undue delay. *March*, 115 S.W.3d at 909.

However, there is one dispositive difference between *March* and the instant case. Here, SREE had knowledge of the April 28, 1994, suit against Champaneria. Under the principles of agency, the acts of one partner are binding on all the partners. *Conyers v. Fisher*, 4 Tenn.App. 127, 130 (Tenn.App.1926). In *Conyers*, the court laid out the agency principle, which imputes the acts of partners to the partnership, stating:

Under the Uniform Partnership Act of 1917, chapter 140, section 9, every partner is an agent of the partnership for the purpose of its business, and the act of every partner done for apparently carrying on in the usual way [of] the business of the partnership binds the partnership unless the partner so acting has in fact no authority to act for the partnership in the particular matter and the person with whom he is dealing has knowledge of that fact.

Conyers, 4 Tenn.App. at 130.

The record shows that Dileep Patel, managing partner of SREE instituted on behalf of SREE the April 28, 1994, Complaint against Champaneria. This Complaint asserted:

II. The defendant Jacqubhai K. Champaneria is a citizen and resident of Davidson County Tennessee.

III. On or about July 15, 1993, in Nashville, Davidson County, Tennessee the parties entered into a one-year contract for the operation and management of a motel known as the Econo Lodge located at 970 Murfreesboro Road, Nashville, Davidson County Tennessee 37217.

IV. The plaintiff avers that the defendant is in breach of said contract in that he has abandoned the premises, has allowed deterioration of the property, and has removed partnership property, all of which is in contravention of the contract.

Process was issued from the Chancery Court of Davidson County on April 28, 1994, and personally served on Champaneria on April 29, 1994, as established by the return of service by the Sheriff. SREE was represented in the case by Honorable Clark Lee Shaw of the Davidson County bar. Apparently, nobody in the partnership ever informed Philip Davidson about the previous lawsuit and there is no apparent reason for him to go back and search the records of the Chancery Court in Davidson County in order to find it. Apparently, Champaneria never

informed his lawyers that he had been previously sued by SREE. The problem for SREE is that under Principles of Agency all the partners of SREE are bound to know of the April 28, 1994, suit. Possessed of such imputed knowledge, neither the partnership, nor its former partners can establish any manner in which it was prejudiced by Champaneria's delay in raising the *res judicata* defense. As in *March v. Levine*, delay alone in offering the amendment is an insufficient basis for the trial court to reject the amendment. In *March*, 31 months of vigorous litigation, extensive discovery and extensive acrimonious proceedings had occurred before the amendment was offered, and the proffered amendment was based on no newly discovered evidence. Allowing the amendment would have reopened extensive discovery on the same factual situation which had been in issue since the beginning of the case. This was not just delay, but "undue delay." *March v. Levine*, 115 S.W.3d 892, 909 (Tenn.Ct.App.2003). In the case at bar no assertion is made that further discovery would be required nor is any other form of prejudice to the non-moving party disclosed by the record. If Plaintiffs are prejudiced at all, it is because they lacked actual knowledge of the actions of Dileep Patel in circumstances where such knowledge is imputed by the law.

Appellant recognizes that he faces an abuse of discretion standard on appeal in questioning the action of the trial court in granting leave to amend Defendant's answer. In the context of an amendment raising an issue that was conclusive in the case, the Tennessee Supreme Court held:

As to the latter contention of appellant, Rule 15.01 of the Tennessee Rules of Civil Procedure provides that leave to amend pleadings shall be freely given by the trial judge, where the amendment is necessary to do justice. The amendment in the instant case was necessary to bring before the Court an issue which, if found in favor of the pleader, would be conclusive of the case; consequently, we find no abuse of discretion on the part of the trial judge in allowing the amendment. See *Branch v. Warren*, 527 S.W.2d 89 (Tenn.1975); *Derryberry v. Ledford*, 506 S.W.2d 152 (Tenn.App.1973).

Liberty Mutual Insurance Company v. Taylor, 590 S.W.2d 920, 921 (Tenn.1979).

The trial court did not abuse its discretion in allowing Defendant to amend his answer in order to raise the conclusive issue of *res judicata*.

SREE next asserts that the trial court abused its discretion in failing to award it attorney's fees for Champaneria's delay in filing his motion to amend, which raised the *res judicata* defense. In reliance on *Gardiner v. Word*, SREE asserts that conditions may be placed on the granting of amendments, impliedly including attorney's fees and costs, in order to lessen or avoid whatever prejudice might occur to the non-moving party. *Gardiner*, 731 S.W.2d 889, 892 (Tenn.1987). However, before any condition may be placed on the Rule 15 movant, the opposing party must demonstrate that it will incur prejudice in the granting of the motion to amend. *Gardiner*, 731 S.W.2d at 892.

SREE makes no assertion that it was in any way prejudiced to defend against the September 24, 1996, suit by the trial court's decision to grant Champaneria leave to amend his

complaint. Without this showing, it cannot be said that the trial court abused its discretion. The Court, therefore, affirms the trial court's decision to refuse to award SREE attorney's fees and costs.

The judgment of the trial court is in all respects affirmed and costs of appeal are assessed to Appellants.

WILLIAM B. CAIN, JUDGE