

NEW LIFE CORPORATION OF)
AMERICA,)
)
Plaintiff/Appellant,)
)
VS.)
)
THOMAS NELSON, INC.,)
)
Defendant/Appellee.)

Appeal No.
01-A-01-9606-CH-00275

Davidson Chancery
No. 93-3557-III

FILED

January 31, 1997

Cecil W. Crowson
Appellate Court Clerk

COURT OF APPEALS OF TENNESSEE
MIDDLE SECTION AT NASHVILLE

APPEALED FROM THE CHANCERY COURT OF DAVIDSON COUNTY
AT NASHVILLE, TENNESSEE

THE HONORABLE ROBERT S. BRANDT, CHANCELLOR

MICHAEL L. DAGLEY
G. A. PURYEAR IV
FARRIS, WARFIELD & KANADAY
SunTrust Center, 19th Floor
424 Church Street
Nashville, Tennessee 37219
Attorneys for Plaintiff/Appellant

JAY S. BOWEN
TIMOTHY L. WARNOCK
BOWEN RILEY WARNOCK & JACOBSON, PLC
704 18th Avenue North
Nashville, Tennessee 37203
Attorneys for Defendant/Appellee

AFFIRMED AND REMANDED

BEN H. CANTRELL, JUDGE

CONCUR:
LEWIS, J.
KOCH, J.

OPINION

This is a dispute over the sale of a license to produce and distribute recordings of the King James version of the Bible. The Chancery Court of Davidson County held that the seller failed to satisfy a condition precedent to the buyer's obligation to perform. We affirm.

I.

In the 1950's, Alexander Scourby, a noted actor/narrator, recorded the King James version of the Bible for the American Federation for the Blind (the AFB Narration). In 1974, he repeated the recording for the Episcopal Radio and TV Foundation (the Episcopal Narration).

In 1984, NEVA, Inc., which owned the rights to the AFB Narration, awarded a license to World Bible Society of America (World Bible) to produce and distribute the recordings. In 1986, NEVA attempted to terminate the agreement, claiming that World Bible had failed to pay the required royalties. That dispute progressed through arbitration and finally landed in the United States District Court for the Middle District of Florida.

In 1991, Thomas Nelson, Inc. acquired substantially all of World Bible's assets. Specifically excluded from the purchase, however, was World Bible's license for the AFB Narration. In recognition that the license was the subject of a dispute, the parties entered into a separate agreement that Thomas Nelson would acquire the license if World Bible delivered to Thomas Nelson certain "Scourby Documents" which were defined as:

(I) documentation satisfactory to Buyer and its counsel which reflects the resolution of all pending litigation and claims

relating to World's license agreement described in Exhibit "B" annexed hereto, the result of which resolution is that, in Buyer's reasonable judgment, World's rights under such license agreement are not, and will not be, subject to any limitation, restriction, termination, dissolution, diminution, offset, encumbrance or reduction in value, other than in accordance with or as a result of the terms and conditions of such license agreement as set forth on its face (which, by way of example only and without limitation, shall include any decrease in the remaining term of such license agreement solely as a result of the passage of time)

Upon delivery of the Scourby Documents, Thomas Nelson was obligated to release \$200,000 out of an escrow account established pursuant to the agreement.

On January 1, 1992, Thomas Nelson acquired from International Cassette Corp. (ICC) the right to sell the Episcopal Narration in certain markets. Later that same year, Thomas Nelson acquired ICC itself by acquiring Word, Inc., ICC's parent company. ICC has been renamed T.N.I. Cassette Corp. and is a wholly-owned subsidiary of Thomas Nelson.

In July of 1992, World Bible (now called New Life Corporation of America) and NEVA settled their dispute in the Florida Federal Court. According to the settlement agreement, New Life would pay NEVA \$95,000 of the \$200,000 due from Thomas Nelson by January 15, 1993. If the payment was not made by that date NEVA could terminate the license agreement "without an opportunity to cure or reinstatement." New Life executed an assignment of its license to market the AFB Narration on October 5, 1992. NEVA executed an acknowledgment of the assignment on October 21, 1992.

On January 14, 1993, New Life sent the assignment, acknowledgment of assignment, and a joint stipulation of dismissal of the Florida litigation to Thomas Nelson's vice president and general counsel. On January 27, 1993 Thomas Nelson responded with a concern about its responsibility for outstanding royalties. Because the assignment purported to make it responsible for royalties for the fourth quarter of

1992, Thomas Nelson demanded the removal of that provision and a reduction of the royalties owed for the first quarter of 1993.

In subsequent actions NEVA and New Life executed a new assignment waiving any royalties for the entire first quarter of 1993. According to the plaintiff, the last of the Scourby Documents was mailed to Thomas Nelson on March 1, 1993. The documents, however, did not include the settlement agreement entered into in the Florida litigation that gave NEVA the right to cancel the license if it was not paid by a certain date.¹

At about the same time, New Life began threatening to sue Thomas Nelson for unfair competition arising from an event unconnected with the sale of New Life's assets to Thomas Nelson. Thomas Nelson delayed dispensing the escrow account while it sought the opinion of outside counsel as to whether they had a counterclaim that would provide an offset to the escrow account. Once the lawsuit was actually filed, Thomas Nelson determined that the litigation did not affect the escrow agreement and prepared to disburse the funds.

In July of 1993, Thomas Nelson's general counsel discovered for the first time that New Life owed NEVA \$95,000 out of the escrowed funds in order to resolve the dispute over the AFB Narration. Thomas Nelson then attempted to get NEVA and New Life to agree to accept a check payable to them jointly, but those negotiations fell through when New Life and NEVA could not agree on how the payment should be split. In any event, New Life did not satisfy the obligation to NEVA and NEVA canceled the AFB license on October 14, 1993.

II.

¹The record is not clear by what means NEVA agreed to waive the requirement that it be paid by January 15, 1993, but it apparently consented to an extension of some indefinite duration.

The chancellor dismissed this action at the close of the plaintiff's proof. See Rule 41.02(2), Tenn. R. Civ. P. In his judgment the chancellor found as a fact that Thomas Nelson reasonably concluded that the settlement of the Florida litigation was not complete and that the AFB license was subject to a claim of termination. Therefore, the plaintiff failed to establish a condition precedent to Thomas Nelson's obligation to release the escrow funds. The chancellor's disposition conforms to the required procedure when a motion is made pursuant to Rule 41.02(2):

[I]n the non-jury case, when a motion to dismiss is made at the close of the plaintiff's case under Rule 41.02(2) the trial judge must impartially weigh and evaluate the evidence in the same manner as though he were making findings of fact at the conclusion of all of the evidence for both parties, determine the facts of the case, apply the law to those facts, and, if the plaintiff's case has not been made out by a preponderance of the evidence, a judgment may be rendered against the plaintiff on the merits,

The chancellor's findings of fact are presumed by this court to be correct, unless the evidence preponderates against them. Rule 13(d), Tenn. R. App. P. Although New Life seeks to avoid the presumption by arguing that as a matter of law NEVA could not terminate the license, their argument boils down to an argument that the chancellor erred in finding that Thomas Nelson had a reasonable belief that New Life's ability to transfer the AFB license was subject to termination or to some other limitation or restriction.

In making its point New Life cites portions of the record that tend to show that Thomas Nelson had decided it did not wish to purchase the AFB Narration because it had acquired the Episcopal Narration through Word, Inc. In fact, some internal correspondence from a former officer of Thomas Nelson, then serving as a consultant, expressed an opinion that buying the AFB Narration would be "wasted money". Thomas Nelson's senior officers, however, testified that they still considered the AFB Narration a valuable asset and that they attempted to complete the purchase by making a joint payment to New Life and NEVA after they learned that NEVA was

still due \$95,000. The truth of the matter involves a determination of the credibility of the witnesses, and on that point the chancellor's finding is entitled to great weight. *Town of Alamo v. Forcum-James Co.*, 205 Tenn. 478, 327 S.W.2d 47 (1959). Therefore, we conclude that the evidence does not preponderate against the chancellor's finding that Thomas Nelson's concern about the AFB Narration was reasonable.

III.

With respect to New Life's argument that as a matter of law the AFB license was not subject to termination, even if they are right,² the question is whether Thomas Nelson had a reasonable belief that it might be subject to termination. The arguments New Life makes to establish its position lend weight to Thomas Nelson's defense. New Life asserts that the doctrine of res judicata (based on the settlement of the Florida litigation) would bar NEVA from asserting a defense to the assignment; that NEVA would be equitably estopped from terminating the license after its assignment to Nelson; and that NEVA was judicially estopped from asserting any defense to the assignment (again, based on the settlement of the Florida litigation). While these defenses may be clear to New Life, they involve complicated legal determinations, which Thomas Nelson was not required to make under the escrow agreement.

The fact is that Thomas Nelson learned in the spring of 1993 that NEVA was owed \$95,000 by New Life and that New Life was attempting to get NEVA to accept less than that. What assurance did Thomas Nelson have that New Life would satisfy NEVA out of the escrow proceeds? To satisfy itself Thomas Nelson proposed a joint payment to NEVA and New Life, but, as an indication of their inability to settle their differences amicably, NEVA and New Life could not agree on that arrangement.

²It is harder to argue this point since NEVA did, in fact, terminate the license in October of 1993.

To someone in Thomas Nelson's position it would be a reasonable assumption that without getting a full release from NEVA, Thomas Nelson would be buying into a dispute over the AFB Narration.

The judgment of the lower court is affirmed and the cause is remanded to the Chancery Court of Davidson County for any further proceedings that may become necessary. Tax the costs on appeal to the appellant.

BEN H. CANTRELL, JUDGE

CONCUR:

SAMUEL L. LEWIS, JUDGE

WILLIAM C. KOCH, JR., JUDGE

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THOMAS NELSON, INC.,)	Affirmed
)	and
Defendant/Appellee.)	Remanded

J U D G M E N T

This cause came on to be heard upon the record on appeal from the Chancery Court of Davidson County, briefs and argument of counsel; upon consideration whereof, this Court is of the opinion that in the decree of the Chancellor there is no reversible error.

In accordance with the opinion of the Court filed herein, it is, therefore, ordered and decreed by this Court that the decree of the Chancellor is affirmed. The cause is remanded to the Chancery Court of Davidson County for the enforcement of the decree and for the collection of the costs accrued below.

Costs of this appeal are taxed against New Life Corporation of America, Principal, and Farris, Warfield & Kanaday, Surety, for which execution may issue if necessary.

ENTER _____.

SAMUEL L. LEWIS, JUDGE

BEN H. CANTRELL, JUDGE

WILLIAM C. KOCH, JR., JUDGE