IN THE COURT OF APPEALS OF TENNESSEE
EASTERN SECTION AT KNOXVILLE

FILED

October 21, 1996

Cecil Crowson, Jr.
Appellate Court Clerk

HAROLD E. ELKINS,	)	
	)	KNOX CIRCUIT
Plaintiff/Appellant	)	
	)	No. 03A01-9607-CV-00227
v.	)	
	)	
JOHN F. MILLER,	)	
	)	AFFIRMED AND REMANDED
Defendant/Appellee	)	

Dudley W. Taylor and David H. Jones, Knoxville, For the Appellant

Edwin L. Treadway and Mark S. Dessauer, Knoxville, For the Appellee

O P I N I O N

INMAN, Senior Judge

This case arises out of the parties' investments, and their investment practice, with Joseph C. Taylor, deceased.

Narrowly drawn, the plaintiff alleges that, in October 1995, he was induced by Taylor to loan to Taylor and the defendant the sum of $181,915.00 which would, post facto, be evidenced by a promissory note and appropriate collateral. To accomplish this, the plaintiff purchased three (3) cashier's checks on October 25, 1996from as many banks, payable to the defendant, and delivered them to Taylor, who delivered them to the defendant. The three checks aggregated $181,915.00

Taylor died November 3, 1995. No promissory note or collateral was delivered to the plaintiff, who brings this action seeking to recover the funds under whatever theory is available to him.

The defendant denied the plaintiff's asserted right to recover the funds. He alleged that the cashier's checks represented obligations of the issuing banks to the

payee-defendant and that the plaintiff had no property interest in them. His motion for summary judgment was granted; the propriety of which is presented for our review, which is *de novo* with no presumption of correctness. *See Presley v. Bennett*, 860 S.W.2d 857 (Tenn. 1993).

The dispositive facts are not in material dispute.

From August 3, 1996 to November 2, 1995, the defendant had 97 investment transactions with Taylor involving millions of dollars.

In October 1995, the defendant invested two million dollars with Taylor, for the purchase of bonds which were anticipated to be called on October 19, 1995 with a premium of 43%. On the call date, Taylor informed the defendant that the bonds had been called but payment would be delayed owing to accounting procedures. On October 21, 1995, Taylor and the defendant met to further discuss the problem, at which time the defendant requested a partial payment from Taylor, who wrote a check drawn on Taylor & Associates payable to the defendant in the amount of $181,915.00. Five days later, Taylor delivered to the defendant the three (3) cashier's checks heretofore referenced to replace his personal check on which he had stopped payment for reasons not explicated in the record.

The plaintiff testified that Taylor requested that he loan Taylor and the defendant $181,915.00, for a short-term business venture. He thereupon purchased the cashier's checks payable to Miller and delivered them to Taylor. He did not know Miller and had never done business with him; he was simply investing with Taylor to make a quick profit, as he had often done before.

The plaintiff and the defendant did not know one another, had no communication and were not in privity. Because the remitter of the cashier's check was Harold Elkins, the defendant asked Taylor "who Elkins was"; Taylor replied that Elkins was his accountant who had been instructed to purchase the checks.

Plaintiff argues that the cashier's checks constituted a loan to the defendant, whose refusal to repay the funds or to deliver a promissory note constituted breach

of contract. We cannot agree, because there is no evidence of a contract between the parties, which can only be created by their acts, *see Johnson v. Central Nat'l Ins. Co. of Omaha*, 356 S.W.2d 277 (Tenn. 1961), and there must be a meeting of minds as to the asserted terms of the contract. *Batson v. Pleasant View Util. Dist.*, 592 S.W.2d 578 (Tenn. Ct. App. 1979) Here, the parties did not know each other, and the unilateral statements of the plaintiff that Taylor told him the funds were a loan to the defendants cannot satisfy the requirement that there be a meeting of minds. The plaintiff was transacting business with Taylor only. He is essentially claiming the right to trace the funds since the investment soured.

Plaintiff next argues that he is entitled to rescind the contract and, thereby, to recover the funds. A short answer to this contention is simply that there is insufficient evidence of a contract between the parties.

Plaintiff next argues that there was a principal-agency relationship between Taylor and the defendant which establishes a basis for the defendant's liability. Even assuming that Taylor was the defendant's broker (and if he was, he was also plaintiff's broker) there is no evidence whatever that the defendant knew or should have known that the cashier's checks somehow constituted a loan to him. The plaintiff argues that the defendant accepted funds and is therefore liable for payment. But there is no evidence that the defendant contracted to borrow these funds.

We have considered the other theories of recovery alleged by the plaintiff and find them to be without merit. The parties extensively briefed the question of the nature of a cashier's check, which we find interesting but essentially irrelevant. Had these parties agreed upon a loan of money, one from the other, we know of no reason why the lender could not, if he chose, purchase a cashier's check for delivery to the borrower in lieu of tendering his personal or certified check. But here, it is evident that Taylor was taking from Paul to pay Peter and recourse is elsewhere.

The judgment is affirmed at the costs of the appellant.

William H. Inman, Senior Judge

Concur:

Herschel P. Franks, Judge

Charles D. Susano, Jr., Judge