IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
January 17, 2023 Session

DOVER SIGNATURE PROPERTIES, INC. v. CUSTOMER SERVICE ELECTRIC SUPPLY, INC.

Appeal from the Chancery Court for Knox County
No. 193178-1 John F. Weaver, Chancellor

No. E2022-00461-COA-R3-CV

The appellant, the developer of a senior living facility in Knoxville, appeals the trial court's determination that it breached a joint check agreement that included itself, an electrical subcontractor, and an electrical supplier as signatories. Although the appellant had initially denied executing the joint check agreement and had expressed a lack of awareness of the electrical supplier's involvement with the subcontractor and senior living project, it ultimately acknowledged during litigation that its controller had signed the joint check agreement and that the supplier's materials were incorporated into the project. The proof at trial revealed that, notwithstanding its execution of the joint check agreement, the appellant never issued a joint check that would assure that the supplier received payment. Instead, the appellant paid only the subcontractor who failed to pay the supplier. Herein, we affirm the trial court's judgment awarding the supplier relief against the appellant.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed and Remanded.

ARNOLD B. GOLDIN, J., delivered the opinion of the Court, in which D. MICHAEL SWINEY, C.J., and THOMAS R. FRIERSON, II, J., joined.

William A. Reeves, Knoxville, Tennessee, for the appellant, Dover Signature Properties, Inc.

Frederick L. Conrad, Jr., Knoxville, Tennessee, for the appellee, Customer Service Electric Supply, Inc.

OPINION

BACKGROUND AND PROCEDURAL HISTORY

This case concerns the manner in which an electrical supplier, Customer Service Electric Supply, Inc. ("CSES"), is to be compensated for materials that it supplied to Rutledge Pike Electric Company, Inc. ("Rutledge"), who was an electrical subcontractor for a Knoxville senior living facility project developed by Dover Signature Properties, Inc., f/d/b/a Dover Development Corporation ("Dover"). Following the commencement of litigation by Dover in the Knox County Chancery Court ("the trial court") concerning claims not at issue in this appeal, CSES asserted a counterclaim against Dover regarding a joint check agreement that had been signed by Dover, Rutledge, and CSES in March 2016. This joint check agreement, an executed copy of which was attached by CSES to its pleading, recited that its purpose was "to provide for payment of invoices submitted by CSES on its sales of materials to [Rutledge] for use on the [senior living project]." Specifically, the agreement directed Dover to pay, by joint check, any invoice submitted by CSES to Rutledge covering materials purchased for use on the senior living project. Per the agreement's terms, all joint checks were to be "delivered to CSES and upon presentment, [Rutledge] will endorse said checks and return them to CSES."

According to CSES' allegations, however, Dover had breached the joint check agreement by "failure or refusal to draw any or all checks jointly to [Rutledge] and to . . . CSES" and was indebted to CSES for materials that had been supplied. Later in the litigation, CSES moved to amend its counterclaim to seek alternative recovery under a non-contract theory, namely detrimental reliance/promissory estoppel. Dover did not object, and the trial court subsequently entered an order allowing CSES to pursue the additional avenue for relief outside of breach of contract.

Although, as noted above, CSES had attached the executed joint check agreement in connection with the filing of its counterclaim, Dover began the litigation with a series of denials. Among other representations, in its answer to the counterclaim, Dover denied entering into the joint check agreement. Moreover, through several discovery responses, Dover expressed a lack of awareness of CSES' provision of materials to Rutledge and regarding which materials were incorporated into the senior living project development. For instance, in one interrogatory response, Dover represented that it "had no knowledge of the involvement which CSES claims as a material supplier to Rutledge."

These positions were clearly erroneous and not in accordance with what happened in this case and what Dover itself eventually acknowledged. As a result, these untenable positions were later abandoned. Indeed, eventually Dover acknowledged that its controller, Kim Hodge, had, in fact, signed the joint check agreement and had the authority to do so. Moreover, Dover admitted that the materials covered by CSES' counterclaim were supplied and incorporated into Dover's building. Given Dover's behavior during

discovery, the trial court sanctioned it on more than one occasion, awarding CSES attorney's fees in relation to multiple matters, including, but not limited to, the fees CSES had "incurred in regard to Dover's initial denial of knowledge regarding the joint check agreement, and in regard to its initial denial of the delivery of materials to the [senior living project]."

When the case was tried non-jury, CSES centered its proof through the testimony of Greg Headrick, its owner and vice president. Dover did not call any witnesses. In addition to Mr. Headrick's testimony, the proof at trial consisted of several admitted exhibits, including the joint check agreement, CSES' invoices, emails exchanged regarding the joint check agreement, and evidence of Rutledge's payment applications to Dover.

The proof showed that the preparation of the joint check agreement followed Rutledge's previous failures to pay CSES for materials that CSES had supplied to Rutledge on other prior projects. Indeed, in explaining why CSES would not have supplied further materials to Rutledge without the joint check agreement, Mr. Headrick explained that "Rutledge was behind on other projects and [CSES] had communicated to them the only way [CSES] could proceed . . . would be with a joint check agreement with the general contractor." The joint check agreement, Mr. Headrick noted, would allow CSES to continue to provide materials but "ensure that we'd get paid for the materials." To initiate this arrangement, Mr. Headrick testified that he tendered the joint check agreement document to Leonard Pruitt, Rutledge's controller, who eventually returned the document back to him after it had been signed by Dover. There is no dispute that CSES thereafter provided materials that were incorporated into the project.[1]

According to an email admitted at trial, Dover had been specifically informed prior to executing the joint check agreement that the agreement was "for the switchgear package." Notably, in payment applications submitted by Rutledge to Dover after the joint check agreement was executed, and after CSES had supplied materials, Rutledge sought

[1] As referenced later in this Opinion, although Mr. Headrick signed the agreement after Dover's execution of it and sent it back to Mr. Pruitt for forwarding to Dover (the record reflects that the agreement had also been signed by Rutledge by the time Mr. Headrick signed it and transmitted it back to Mr. Pruitt), Dover maintains it never received a fully signed copy. It also appears to maintain that its receipt of a fully signed agreement was a necessary condition for effective contract formation. As an initial matter, we observe that, although Mr. Headrick stated at one point during his testimony that he could not definitively confirm or deny whether Rutledge had sent the agreement back to Dover's controller after CSES had signed the document, other testimony elicited from him signaled that he was aware of communications from Rutledge back to Dover's controller concerning a fully signed agreement, with Mr. Headrick stating he had "see[n] that email." Upon later questioning from the court directly, he stated, "I did see an e-mail documentation where Rutledge . . . had sent it," although he also provided testimony that he could not answer whether he actually knew if Dover "knew." In any event, as discussed *infra*, the trial court rejected Dover's argument that its receipt of a fully signed agreement was necessary for the establishment of a contract and further found that there had been a manifestation of assent to the joint check agreement by CSES.

reimbursement for, among other things, "SWITCH GEAR EQUIPMENT." Although Dover paid *Rutledge* in response to payment applications, and although Dover's counsel stipulated that "everything that [CSES] is claiming Dover paid to Rutledge," no joint checks were written to reimburse CSES for the materials it had supplied. Mr. Headrick testified that CSES had not received any payment for the invoices generated after the joint check agreement was executed and further stated that, although he had sent a notice of nonpayment to Dover by registered mail subsequent to the last date materials were supplied, he did not recall Dover ever responding to the notice.

Following trial, in July 2021, the trial court entered an order concluding that the joint check agreement was binding and enforceable, while also holding that Dover's "failure to issue checks in the name of both [Rutledge] and [CSES] amounts to a breach of that agreement." In a later order, when specifying the amount owed for materials supplied, the trial court recited that the parties "agreed that the sum of [$88,990.22] was the correct total balance of the invoices the Court found should have been paid by joint checks."

Although the trial court's July 2021 order primarily abstained from addressing CSES' alternative, non-contract theory of recovery,[2] the court endorsed the viability of recovery under a detrimental reliance theory when it entered a subsequent order that adjudicated a motion Dover had filed to amend the judgment and make additional findings. Specifically, when entertaining an argument that Dover had proffered in its post-trial motion concerning the alleged unenforceability of the joint check agreement due to a purported lack of mutuality,[3] the court held that "CSES would be entitled to recover from Dover under the theory of detrimental reliance" even if the court followed the case law Dover had marshalled in support of the alleged absence of an enforceable contractual agreement. This appeal followed.

STANDARD OF REVIEW

In a non-jury case such as the present one, we review findings of fact by the trial court "de novo upon the record of the trial court, accompanied by a presumption of the correctness of the finding, unless the preponderance of the evidence is otherwise." Tenn. R. App. P. 13(d). Our review of a trial court's conclusions on issues of law, such as whether

[2] The trial court initially signaled that it "need not address" detrimental reliance/promissory estoppel given its conclusion that the joint check agreement was binding and enforceable. This initial general pretermitting of CSES' alternatively pursued relief under a non-contract theory was not technically absolute, however, given that the court subsequently stated in its July 2021 order that a detrimental reliance/promissory estoppel argument "would not sustain liability" for certain transactions.

[3] As mentioned in a later footnote in this Opinion, the trial court initially held that such a defense had been waived. Notwithstanding this conclusion, the court also engaged with Dover's argument, ostensibly in anticipation that the waiver holding might be appealed. As it turns out, however, and as discussed *infra*, Dover did not appeal the trial court's conclusion that a defense based on an alleged lack of mutuality was waived.

a contract has been formed, is also de novo but with no presumption of correctness. *See Bowden v. Ward*, 27 S.W.3d 913, 916 (Tenn. 2000) ("Questions of law are reviewed de novo with no presumption of correctness."); *Cadence Bank, N.A. v. The Alpha Trust*, 473 S.W.3d 756, 773 (Tenn. Ct. App. 2015) (noting that the determination of whether a contract has been formed is a question of law).

DISCUSSION

Dover raises three issues on appeal. In addition to contesting the trial court's determination that a contract, i.e., the joint check agreement, was actually formed among itself, Rutledge, and CSES, Dover alternatively argues that the right to joint payments in this case was waived. As a final issue, Dover raises the question of "[w]hether there was a lack of mutuality" in the joint check agreement at issue.

We begin our substantive discussion by turning to Dover's first issue regarding contract formation. Through this issue, Dover specifically complains that contract formation was impeded in this case because "there was no communication of acceptance of [the joint check agreement] to Dover." Dover's position is grounded in its argument that it "had specifically requested that a fully executed contract be returned after the other parties signed it" and that, supposedly, it is undisputed that an executed copy—with all parties' signatures—was not given to Dover. In furtherance of this general argument, Dover relies primarily upon an email that its controller sent to Rutledge after executing the agreement asking for Rutledge to "[p]lease forward complete copy as soon as all signatures are collected."

In the proceedings below, the trial court disagreed with Dover's position that the transmittal email sent by its controller specifically conditioned contract formation on Dover's receipt of an agreement signed by all parties.[4] In relevant part, the trial court observed that the email "does not contain any conditional language whatsoever," noting that the included language was "nothing more than a request." Because the email "[did not] suggest an intent to not be bound by the accompanying agreement without compliance of the request," the trial court correctly reasoned that the "formation of a contract would not be prevented from noncompliance with this request."

In reaching its conclusion that an enforceable agreement had been formed, the trial

[4] As an aside, as far as the proposition that Dover never received a fully signed copy of the joint check agreement is concerned, it is true that Mr. Headrick had testified, as noted in an earlier footnote, that he could not definitively confirm or deny whether Rutledge had sent the agreement back to Dover's controller after CSES had signed the document. With that said, other testimony elicited from him had indicated an awareness on his part of communications from Rutledge back to Dover's controller concerning a fully signed agreement, with Mr. Headrick stating he had "see[n] that email." Moreover, although he stated that he could not answer whether he knew if Dover "knew" he had signed the agreement, he did state upon questioning from the court that he saw an email documentation "where Rutledge . . . had sent it."

court relied in large part on this Court's prior discussion in *Moody Realty Co., Inc. v. Huestis*, 237 S.W.3d 666 (Tenn. Ct. App. 2007). In that case, which involved an action for the recovery of a real estate brokerage commission that was not paid by the purchasers of a farm, the appellant-purchasers argued that they were not bound by a buyer's representation agreement because, among other things, they allegedly did not receive a copy of the contract signed by both parties. *Id.* at 674. This Court held that the record supported a finding of mutual assent "even assuming the [real estate] agents did not sign the agreement in front of [the purchaser husband]." *Id.* at 675. We explained that signatures of parties to a written agreement are not always essential to establish a binding contract and that, "[w]hen only one party signs a written contract that contemplates the signatures of both parties (but does not expressly require it), the law considers it to bind both parties when the non-signing party accepts it." *Id.* at 674-75. Indeed, we noted that, although a signature functions to show the signor's intent to be bound, "other manifestations of assent can serve the same purpose in the absence of signature." *Id.* at 674. Mutuality of assent, we observed, is determined by "assessing the parties' manifestations according to an objective standard," *id.* at 674, and is gleaned "not alone from the words used, but also the situation, acts, and the conduct of the parties, and the attendant circumstances." *Id.* at 675. We ultimately reasoned that the agents in the case had manifested their assent to be bound for several reasons; among other things, we noted that the agents had drafted the very agreement at issue and that they had begun performance under the contract. *Id.* at 675-76.

In reference to the facts in the case at bar, the trial court noted that it was "clear that Dover's signature and transmittal of the agreement" constituted its assent to be bound, and as the case concerned Rutledge and CSES, the court pointed to how their actions indicated acceptance. Indeed, when specifically expounding on CSES' manifestation of assent, the court stated as follows in its July 2021 order:

> First, [CSES] emailed the signed copy of the document to Rutledge on March 22, 2016 with instruction to further transmit that document to Dover. . . . Second, [CSES] also began its performance under the contract. Additional materials were delivered to Rutledge and those materials were incorporated into the construction project. These materials enabled Rutledge to perform its work for Dover.
>
> Third, Dover was also aware of the situation between Rutledge and [CSES]. Indeed, the purpose of the Joint Check Agreement is explicitly stated in the document. The agreement states that "[t]he sole purpose of this Joint Check Agreement is to provide for payment of invoices submitted by [CSES] on its sales of materials to [Rutledge] for use on the Project." [CSES] continued to sell materials to Rutledge in consideration of the Joint Check Agreement. Finally, Dover admitted, during the course of litigation, that the materials delivered by [CSES] were incorporated into the construction

project.

> Thus, the Court further finds and concludes that [CSES], by its performance, also manifested its assent to Dover to be bound by the Joint Check Agreement and that Dover was aware of the manifestation of assent. This conclusion is based on Dover's awareness of the situation, [CSES'] reliance on the agreement, the reasonable inference that [CSES] would not have delivered the materials but for the agreement, [CSES'] continuing to supply the materials to Rutledge, and Dover's admission that the materials were incorporated into the project. Like the offerees in . . . *Moody*, [CSES] manifested its assent by performance. Dover's awareness of such performance completed the mutual assent requirement in the formation of a binding contract.

In light of such conduct and attendant circumstances, even accepting Dover's assertion that it never received a fully signed copy of the agreement, we discern no error in the trial court's conclusion that mutual assent to the joint check agreement was established.

Although Dover had signed the joint check agreement and was aware that materials from CSES were thereafter used by Rutledge on the project, it, as noted earlier, paid *Rutledge* for "everything that [CSES] is claiming," rather than paying with a joint check pursuant to the agreement also naming CSES as a payee. However, by way of its second issue on appeal, Dover endeavors to excuse its lack of performance under the joint check agreement by arguing that "[t]he issue is whether CSES's failure to invoice Dover was a waiver of any right to receive a joint check." There does not appear to be any dispute that CSES did not send any invoices to Dover directly, and Mr. Headrick acknowledged CSES had not done so in his testimony.[5] The trial court did not find this dispositive, nor do we. As the trial court correctly noted, CSES was under no obligation to send an invoice to Dover under the express terms of the agreement. Moreover, in holding Dover liable for its failure to issue joint checks, the trial court rightly emphasized that Dover was aware of the joint check agreement and was aware that CSES was continuing to supply materials to Rutledge. Moreover, the trial court noted that Dover had admitted all of the materials supplied by CSES were incorporated into the construction, with the court further referencing Dover's specific knowledge of the materials' incorporation by way of Rutledge's payment applications to it. Yet, Dover only paid Rutledge for the supplied materials and never issued a joint check to reimburse CSES. We agree with the trial court's holding that Dover is liable to CSES, and we accordingly affirm its judgment and remand

[5] As Mr. Headrick explained, he had sent his invoices to Rutledge and noted that "whenever [Rutledge] would submit for a draw [it] was supposed to provide in that draw invoices for materials that we in turn should have received a check for." As discussed earlier, the clear language of the joint check agreement required Dover to pay any invoice "submitted by CSES to [Rutledge]" covering materials purchased for use on the senior living project.

this case for further proceedings consistent with this Opinion.[6]

CONCLUSION

For the foregoing reasons, we affirm the judgment of the trial court.

s/ Arnold B. Goldin
ARNOLD B. GOLDIN, JUDGE

[6] In defense of the case against it, Dover's last issue on appeal asserts an alleged "lack of mutuality" in the joint check agreement. As we previewed in a footnote included towards the end of the background and procedural history section of this Opinion, the trial court held that Dover had waived any defense based on lack of mutuality. Dover does not appear to raise any issue on appeal asserting that the trial court's conclusion about waiver was inappropriate or in error, nor does it appear to offer any argument concerning same, so any such potential issue is itself waived. *See Childress v. Union Realty Co., Ltd.*, 97 S.W.3d 573, 578 (Tenn. Ct. App. 2002) (providing that an issue is waived when it is not designated as an issue); *see also Bean v. Bean*, 40 S.W.3d 52, 56 (Tenn. Ct. App. 2000) (providing that an issue is waived where it is raised without any argument regarding its merits).

In any event, putting this particular question of waiver aside, we note, as we did earlier, that the trial court did not end its analysis concerning an alleged lack of mutuality at its determination of waiver. It also engaged with the merits of Dover's argument and considered case law Dover had cited to suggest that the joint check agreement was not enforceable in CSES' favor. The trial court obviously ultimately concluded that a valid contract existed and did not disturb its view that recovery for breach of contract was appropriate, but in alternatively entertaining the notion that CSES was not entitled to recover under a contract theory, the trial court opined that "CSES would be entitled to recover from Dover under the theory of detrimental reliance." This alternative holding also does not appear to have been the subject of an appellate challenge by Dover. Thus, even assuming *arguendo* that our analysis herein supporting CSES' right to contractual recovery was somehow in error, Dover has also waived any issue it may have had with the trial court's alternative holding regarding detrimental reliance.