Not Designated for Publication

# ARKANSAS COURT OF APPEALS

DIVISION IV
**No.** CA08-873

| | |
|---|---|
| RITA LOWRY and L&R SMOKE SHOP,<br>APPELLANTS<br><br>V.<br><br>GLIDEWELL DISTRIBUTING COMPANY, INC. and BANK OF THE OZARKS,<br>APPELLEES | **Opinion Delivered** MARCH 4, 2009<br><br>APPEAL FROM THE JOHNSON COUNTY CIRCUIT COURT, [NO. CV2006-45]<br><br>HONORABLE JAMES D. KENNEDY, JUDGE<br><br>AFFIRMED |

**KAREN R. BAKER, Judge**

Appellant Rita Lowry challenges a judgment entered against her on an open account held by appellee Glidewell Distributing Company, Inc. asserting two points of error: (1) That the lower court's ruling was clearly against the preponderance of the evidence in that it found that the business in question had not been given as a gift of inheritance and that the appellee had no notice of this fact; (2) That the lower court's ruling was clearly erroneous when it found the business did not transfer, then failed to address the issue of whether there was an agency relationship and if there was, did the appellant's daughter's criminal act sever that relationship to the extent that appellant should not be found liable for this bill as the daughter had pled guilty to theft of property and was paying full restitution to the appellee as ordered in the criminal case. On the record and arguments presented by appellant, we find no error and affirm.

After a bench trial, the circuit court entered judgment against appellant, d/b/a L&R Smoke Shop, finding that she owed a debt in the amount of $16,086.92 to appellee Glidewell Distributing Company, Inc., together with attorney fees in the amount of $500 plus 10% interest per annum together with all costs, if any, incurred for enforcement of the judgment. The order further offset this judgement against any restitution paid by Kristie Diane Vandenberg, appellant's daughter, towards the satisfaction of Ms. Vandenberg's criminal conviction of theft related to this debt. The trial court dismissed with prejudice appellant's third-party complaint against Bank of the Ozarks. On appeal, appellant does not challenge the dismissal of her third-party complaint.

Kristie Diane Vandenberg, the daughter of appellant, pled guilty to theft of property. One of the victims of the theft was Glidewell. The judgment and commitment order in Ms. Vandenberg's criminal case lists the debt amount of $16,002.80 to Glidewell as one to whom she must pay restitution. Counsel for Bank of the Ozarks stipulated that Ms. Vandenberg "pled guilty to theft and forgery–some offense to this court and was placed on probation" with no objection from any counsel.

The circumstances from which this case arose involved two transactions. Ms. Vandenberg placed two orders with Glidewell and wrote checks on the account with Bank of the Ozarks that was used by the shop for the purchase of merchandise. Following the placement of the orders and issuing of the two checks, Ms. Vandenberg then removed all the merchandise from the store. Appellant discovered the merchandise was gone when she arrived at the closed and empty store, obtained the services of a locksmith after finding that

her key no longer opened the lock, and started sorting through the actions taken by her daughter in her absence. The checks were returned to Glidewell by Bank of the Ozarks marked unpaid as written on an account with insufficient funds.

Glidewell filed this civil suit against appellant on March 15, 2006, and appellant filed a document entitled third-party complaint against Ms. Vandenberg, Ms. Vandenberg's significant other Christopher Throneberry, Bank of the Ozarks, and Jane/John Doe Teller No. 34 on March 31, 2006. This pleading alleged that Ms. Vandenberg's plea and order of restitution had been filed in the criminal case, and any judgment against appellant would amount to a double recovery to Glidewell.

At trial, Nick Glidewell testified that he had started an accounts receivable in 2000 for L&R Smoke Shop, but the company had done business with the shop for many years prior to that time. He stated that to his knowledge appellant was the only individual who had owned the shop. Specifically, he testified that there was no communication to Glidewell Distributing that someone other than appellant was responsible for the management or ownership of L&R Smoke Shop.

Appellant testified that she owned the business for twenty years. She explained that in May 2005 she gave the shop to her daughter as her inheritance, but then took the business back in August 2005 because it was not being run properly. Appellant justified her authorization of the locksmith's entry onto the premises by analogizing her actions to a repossession. She explained that she thought that she had a right to go into the business and building in which the shop was located. Appellant confirmed that she did not notify anyone

that she was retiring, but expressed her belief that it was common knowledge that she had left the shop and gone home. She also testified that it was not unusual for her daughter to be running the store for a length of time because her daughter had worked the store for her mother several times due to her mother's health issues. Appellant also confirmed that she had previously authorized her daughter to sign checks for merchandise as it came in. Furthermore, she stated that she had left her checkbook with operating capital in the account for her daughter to use.

With this testimony, the trial court did not err in finding no transfer of appellant's interest in the business. While the court commented from the bench that this was "a very unfortunate situation," sympathy for appellant's circumstances and losses through her daughter's actions cannot negate the sufficiency of the evidence supporting the judgment finding that appellant was liable on the open account. Appellant emphasizes that "everyone involved knew" that it was Ms. Vandenberg who was responsible for the loss. However, the trial court explained from the bench that under these facts, he could not find that an effective transfer of the business took place nor that the vendor Glidewell should have known that it was dealing with a new party.

Given the facts of this case, the trial court's reluctance to find neither a sale nor gift of the business is understandable. Regarding a transfer by sale, no evidence of an exchange of appellant's interest for money or other valuable consideration was presented. As for a transfer by gift, appellant's own testimony provides no clear impression that the trial court's failure to find that the business was a gift to appellant's daughter was clearly erroneous. Arkansas law

is clear that one seeking to sustain an *inter vivos* gift must prove by clear and convincing evidence the following: (1) the donor was of sound mind; (2) an actual delivery of the property took place; (3) the donor clearly intended to make an immediate, present, and final gift; (4) the donor unconditionally released all future dominion and control over the property; and (5) the donee accepted the gift. *Jamison v. Estate of Goodlett*, 56 Ark. App. 71, 938 S.W.2d 865 (1997). The test on appeal is not whether there is clear and convincing evidence to support the trial court's findings, but whether we can say that the trial court's findings are clearly erroneous. *Estate of Sabbs v. Cole*, 57 Ark. App. 179, 944 S.W.2d 123 (1997). In our review, we will defer to the trial court's evaluation of the credibility of the witnesses. *O'Fallon v. O'Fallon,* 341 Ark. 138, 14 S.W.3d 506 (2000); *Bellis v. Bellis*, 75 Ark. App. 213, 216, 56 S.W.3d 396, 398 (2001).

Here, in addition to the above testimony, the record demonstrates appellant's continued use of the store address as her sole place to receive mail, her continued presence in the store on a weekly basis, a key for access, and authority to have the locks accessed and resume operation of the store. Sufficient evidence supports the trial court's refusal to find a transfer of appellant's interest in the store.

Both of appellant's points of error focus on the trial court's failure to find a transfer of appellant's interest. Her second point claims that after failing to find a transfer, the trial court failed to address the issue of agency and whether the criminal act of theft negated appellant's liability as the principal of the business. However, the trial court specifically stated from the bench that under these facts Glidewell could not have known that it was doing business with

a new party. We cannot say the trial court's findings were clearly erroneous when the testimony was that the daughter had assisted her mother through the years in managing the store, had previously been given express authority to write checks for merchandise to the vendors, and appellant had left the checkbook with funds in an account for her daughter's use.

Accordingly, on the facts and arguments presented by appellant, we find no error and affirm.

PITTMAN and GRUBER, JJ., agree.