

IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE

FLEXIBILITY CAPITAL, INC.)	
)	
Plaintiff/Appellee,)	
)	
VS.)	NO. E2023-00335-COA-R3-CV
)	
SABATINO CUPELLI and)	Appeal from the Circuit
DAVID JONATHAN TULIS,)	Court for Hamilton County
D/B/A HOT NEWS TALK RADIO)	
)	
Defendants/Appellants.)	

On Appeal from the
Circuit Court for Hamilton County, Tennessee
Judge Kyle E. Hedrick, Division IV
Trial Court Number 22C429

BRIEF OF PLAINTIFF/APPELLEE,
FLEXIBILITY CAPITAL, INC.

JOHN R. CHEADLE, JR. (6053)
MARY BARNARD CHEADLE (27084)
Attorneys for Plaintiff/Appellee
2404 Crestmoor Road
Nashville, TN 37215
(615) 254-1009 Office
(615) 254-9298 Facsimile
jtheadle@theadlelaw.com
mtheadle@theadlelaw.com

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STATEMENT OF THE ISSUES PRESENTED

- I. THE NOTICE OF APPEAL WAS NOT TIMELY FILED, PURSUANT TO RULE 4(B), TENNESSEE RULES OF APPELLATE PROCEDURE, AND RULE 59.01, TENNESSEE RULES OF CIVIL PROCEDURE.
- II. THE TRIAL COURT HELD THAT CUPELLI AND TULIS FAILED TO RESPOND TO FLEXIBILITY'S SPECIFICATION OF MATERIAL FACTS AS REQUIRED BY RULE 56.03, TENNESSEE RULES OF CIVIL PROCEDURE, AND, THEREFORE, CONCLUDED THAT THERE WAS NO GENUINE ISSUES OF MATERIAL FACT AND FLEXIBILITY WAS ENTITLED TO A JUDGMENT AS A MATTER OF LAW. THE TRIAL COURT PROPERLY GRANTED FLEXIBILITY'S MOTION FOR SUMMARY JUDGMENT.
- III. THE TRIAL COURT PROPERLY DENIED CUPELLI AND TULIS' MOTION TO RECONSIDER AND MOTION TO SET ASIDE JUDGMENT FINDING THAT TIME HAD RUN TO ASSERT THE BELATEDLY ASSERTED NEW DEFENSES RAISED IN THE MOTIONS.

STATEMENT OF THE CASE

On May 21, 2021, plaintiff/appellee, Flexibility Capital, Inc. (hereinafter "Flexibility"), filed suit in the Hamilton County General Sessions Court against defendants/appellants, Sabatino Cupelli (hereinafter "Cupelli") and David Jonathan Tulis (hereinafter "Tulis"), d/b/a Hot News Talk Radio, to recover the balance due on a future receivables sale and purchase agreement. (Vol. I, P. 3). Flexibility advanced future receivables to Cupelli and Tulis. (Vol. I, P. 43-45). Cupelli and Tulis failed to pay as promised and a balance remains due. Id. Cupelli was served with the civil warrant on August 10, 2021. (Vol. I, P. 1). Tulis was served with the civil warrant on August 6, 2021. Id. On March 29, 2022, Cupelli, Tulis and Flexibility's counsel appeared in the Hamilton County General Sessions Court. Id. Judgment was entered in favor of Flexibility against Cupelli and Tulis for \$24,999.99. Id. Cupelli and Tulis consented to the entry of the judgment. Id.

On April 8, 2022, a notice of appeal was filed by Cupelli and Tulis to the Hamilton County Circuit Court (hereinafter "the Trial Court"). (Vol. I, P. 5). On May 16, 2022, Flexibility filed a motion for summary judgment, a supporting brief, a specification of material facts, the affidavit of Flexibility's representative, Gina Monteforte, and Flexibility's attorney's affidavit for attorney's fees, with a hearing date of June 20, 2022. (Vol. I, P. 6-52).

On May 23, 2022, Cupelli and Tulis served upon Flexibility's counsel "Admissions and confessions." On June 3, 2022, Cupelli and

Tulis filed a motion for continuance of the hearing on Flexibility's motion for summary judgment to allow additional time for discovery. (Vol. I, P. 53-54). On June 6, 2022, Cupelli and Tulis filed a "Supplemental Filing" with a "Notice: Validity of alleged debt disputed" and "Discovery request for production of documents & accounting." (Vol. I, P. 55-61). On June 15, 2022, Cupelli and Tulis prematurely filed a motion to compel.¹ Cupelli and Tulis had just served Flexibility's counsel with "Admissions and confessions" on May 23, 2022, and requests for production of documents on June 6, 2022. The parties agreed to continue the hearing on Flexibility's motion for summary judgment to July 18, 2022. On June 23, 2022, Flexibility filed its response to the "Admissions and Confessions." (Vol. I, P. 62-64).

On July 14, 2023, four (4) days prior to the hearing on Flexibility's motion for summary judgment, Cupelli and Tulis filed a motion to dismiss and a motion for Rule 8 sanctions (Vol. I, P. 65-69). Cupelli and Tulis asserted that the filing of a sworn denial was grounds for dismissal, pursuant to T.C.A. § 62-20-124. Id. T.C.A. § 62-20-124 applies to consolidated debts assigned to third parties and is not applicable in this case. Further, Cupelli and Tulis alleged that Flexibility's counsel were "misleading the Court" by using the terms "loan" and "balance due on a future receivables sale and purchase agreement" interchangeably and should be sanctioned. (Vol. I, P. 67-69).

The Trial Court continued Flexibility's motion for summary

¹ The Trial Court's record does not include a copy of the motion to compel.

judgment to be heard on July 25, 2022, with all pending motions. On July 22, 2022, Flexibility filed a motion to continue all pending motions, as counsel for Flexibility was already scheduled to be in another court on July 25, 2022. (Vol. I, P. 70-97). By agreement, all pending motions were continued to be heard August 15, 2022. On July 22, 2022, Flexibility filed a response to Cupelli and Tulis' motion to dismiss, motion for Rule 8 sanctions and motion to compel. (Vol. I, P. 75-90).

On August 10, 2022, Cupelli and Tulis filed a "Motion in opposition to summary judgment motion." (Vol. I, P. 91-93). On August 12, 2022, Cupelli and Tulis filed an "Affidavit and amended answer to motion for summary judgment." (Vol. I, P. 94-137). Cupelli and Tulis admitted that they received the advance future receivables from Flexibility. Id. Cupelli and Tulis admitted that they stopped making payments. Id. Cupelli and Tulis asserted that due to "interference by 3rd parties", namely Governor Lee and other members of government, they were unable to make payments. Id. Essentially, Cupelli and Tulis asserted that they could not pay Flexibility because of the shutdown during the Pandemic. Id. Additionally, Cupelli and Tulis asserted that Flexibility assumed the risk by entering into an agreement with Cupelli and Tulis and, by assuming this risk, the motion for summary judgment should be denied. Id.

At the hearing on August 15, 2022, Cupelli and Tulis struck their motion to dismiss. Cupelli and Tulis' motion for sanctions was denied. (Vol. I, P. 140-141). The Trial Court ordered "that

proceeding forward, the documents underlying this lawsuit shall be referred to as the "Future Receivables Sales and Purchase Agreement." Id. The Trial Court granted in part and denied in part Cupelli and Tulis' motion to compel.² Flexibility's motion for summary judgment was continued to September 26, 2022. On September 9, 2022, the Trial Court properly entered an order denying Cupelli and Tulis' motion for sanctions. (Vol. I, P. 140-141).

On August 25, 2022, Flexibility filed a motion to continue the trial as Flexibility's motion for summary judgment was still pending. (Vol. I, P. 138-139). On September 26, 2022, an order was entered setting this matter for trial on December 9, 2022. (Vol. II, P. 188-189).

On September 13, 2022, Cupelli and Tulis filed a motion for summary judgment and a supporting brief. (Vol. I, P. 142-150; Vol. II, P. 151-155). Cupelli and Tulis' motion for summary was not accompanied by a statement of undisputed facts as required by Rule 56.03, T.R.C.P. Cupelli and Tulis again asserted that the shutdown during the Pandemic made it financially impossible to comply with the terms of the underlying agreement. (Vol. I, P. 151-155). Cupelli and Tulis again asserted that since Flexibility assumed the risk of doing business with Cupelli and Tulis, and because Cupelli and Tulis cannot pay, then the agreement was unenforceable. Id. On September 22, 2023, Flexibility filed a reply to Cupelli and Tulis' amended answer to Flexibility Capital's motion for summary

² The Trial Court's record does not include a copy of the order to compel.

judgment. (Vol. II, P. 156-187). At the time that the underlying agreement was entered into on February 6, 2020, Cupelli and Tulis warranted to Flexibility that Hot News Talk Radio, LLC was a limited liability company in good standing. Id. Hot News Talk Radio was not in good standing and had not been since September 23, 2016. Id. Any assumption of risk by Flexibility was based upon Cupelli and Tulis' misleading information. Id.

At the hearing on September 26, 2022, upon Flexibility's motion for summary judgment, the Trial Court notified Cupelli and Tulis that their motion for summary judgment was not before the Trial Court because it has not been thirty (30) days since the filing of the motion. The Trial Court set both motions for summary judgment to be heard on November 7, 2022. The Trial Court instructed Cupelli and Tulis to review Rule 56, T.R.C.P. (Vol. II, P. 220). On November 1, 2022, Flexibility filed a response to Cupelli and Tulis' motion for summary judgment. (Vol. II, P. 190-196).

At the hearing upon the parties' motions for summary judgment on November 7, 2022, Cupelli and Tulis struck their motion for summary judgment. (Vol. II, P. 221). Flexibility's motion for summary judgment was properly granted. (Vol. II, P. 219-222). On December 5, 2022, an order of summary judgment was entered in favor of Flexibility against Cupelli and Tulis for \$32,032.34. Id. The Trial Court held that Flexibility's motion for summary judgment was accompanied by Flexibility's specification of material facts in compliance with Rule 56, Tennessee Rules of Civil Procedure. Id.

Flexibility's motion for summary judgment had been continued several times, and was pending for almost six (6) months. Id. The Trial Court had instructed Cupelli and Tulis at the hearing on September 26, 2022, to review Rule 56, T.R.C.P. Id. The Trial Court held that Cupelli and Tulis failed to respond to Flexibility's specification of material facts as required by Rule 56.03, T.R.C.P. Id. The Trial Court held that the following material facts were undisputed:

"On February 4, 2020, defendants applied for commercial funding. On February 6, 2020, defendants executed a future receivables sale and purchase agreement with plaintiff. Plaintiff advanced future receivables to defendants. Defendants failed to pay as promised. The amount due plaintiff by defendants was \$21,061.38 as of August 5, 2020. The agreement provides for the continuing accrual of interest and for the payment by defendants of plaintiff's attorney's fees of 25 percent of the balance due. The agreement is secured by a UCC-1 lien. Defendants detain plaintiff's collateral and have declined to turn over possession of the collateral to plaintiff. Pursuant to Rule 56, Tennessee Rules of Civil Procedure, plaintiff is entitled to a summary judgment as a matter of law, there being no genuine issue as to any material fact." Id.

On November 17, 2022, Cupelli and Tulis filed a motion to reconsider, the affidavit of David Jonathan Tulis and a supporting brief. (Vol. II, P. 205-218). Cupelli and Tulis belatedly asserted for the first time that the underlying agreement was "an illegal usury contract." Id. On December 9, 2022, Flexibility filed a response to Cupelli and Tulis' motion to reconsider. (Vol. II, P. 223-226). On December 19, 2022, the day of the hearing on their motion to reconsider, Cupelli and Tulis filed an "Answer to plaintiff response to motion to reconsider, challenge of subject matter jurisdiction." (Vol. II, P. 227-251). This was the first

time that Cupelli and Tulis asserted lack of subject matter jurisdiction. At the hearing on December 19, 2022, the Trial Court denied Cupelli and Tulis' motion to reconsider. (Vol. II, P. 264-265).

On January 18, 2023, the Trial Court entered an order denying Cupelli and Tulis' motion to reconsider. (Vol. II, P. 264-265). The Trial Court held:

"that plaintiff's motion for summary judgment was properly granted and the Court will not disturb its earlier ruling. Defendants failed to respond to plaintiff's specification of material facts as required by Rule 56.03, Tennessee Rules of Civil Procedure, after being provided additional time by the Court to comply. Defendants are now attempting to belatedly assert new defenses, including subject matter jurisdiction. The time has run to assert such defenses. The judgment is final. Defendants' motion to reconsider is denied." Id.

On December 22, 2022, Cupelli and Tulis filed a "Motion to set aside order for intrinsic fraud, & demand for mandatory judicial notice." (Vol. II, P. 252-261). Cupelli and Tulis' motion to set aside the order of summary judgment mirrored their previously filed motion to reconsider that had been denied. Id. Cupelli and Tulis again belatedly asserted that the underlying agreement was an illegal usury contract, that the Trial Court lacked subject matter jurisdiction and demanded that the Trial Court set aside the order of summary judgment. Id. On December 29, 2022, Cupelli and Tulis filed a "Motion to delay clock on notice of appeal." (Vol. II, P. 262-263).

On February 6, 2023, Flexibility filed a response to Cupelli and Tulis' motion to set aside order. (Vol. II, P. 266-268). On February 27, 2023, Tulis filed an "Affidavit and objection to

signing final order." (Vol. II, P. 269-274).

On February 20, 2023, the Trial Court entered an order denying Cupelli and Tulis' motion to delay clock on notice of appeal. (Vol. II, P. 275). On February 15, 2023, the Trial Court entered an order denying Cupelli and Tulis' motion to set aside order for intrinsic fraud and demand for mandatory judicial notice. (Vol. II, P. 288-289). The Trial Court held:

"that the Court has previously addressed and denied defendants' request upon hearing defendants' previously filed motion to reconsider. An order was entered on January 18, 2023, denying defendants' motion to reconsider. Defendants' motion to set aside is also denied."

Cupelli and Tulis filed an untimely appeal to this Court on March 8, 2023.

STATEMENT OF FACTS

Plaintiff/appellee, Flexibility Capital, Inc. (hereinafter "Flexibility"), filed suit against Sabatino Cupelli (hereinafter "Cupelli") and David Jonathan Tulis (hereinafter "Tulis"), to recover the balance due on a future receivables sale and purchase agreement. (Vol. I, P. 3-4). Cupelli and Tulis failed to pay as promised and a balance remains due. (Vol. I, P. 43-45).

As set out in Flexibility's specification of material facts in support of its motion for summary judgment filed on May 16, 2022, Cupelli and Tulis applied for commercial funding with Flexibility on February 4, 2020. (Vol. I, P. 46-48). On February 6, 2020, Cupelli and Tulis executed a future receivables sale and purchase agreement with Flexibility. Id. Flexibility advanced future receivables to Cupelli and Tulis. Id. Cupelli and Tulis failed to pay as promised. Id. The amount due Flexibility by Cupelli and Tulis was \$21,061.38 as of August 5, 2020. Id. The agreement provides for the continuing accrual of interest and for the payment by Cupelli and Tulis of Flexibility's attorney's fees of 25 percent of the balance due. Id. The agreement is secured by a UCC-1 lien. Id. Cupelli and Tulis detain Flexibility's collateral and have declined to turn it over. Id. Also in support of its motion for summary judgment, Flexibility filed the affidavit of its representative, Gina Monteforte, verifying the above material facts. (Vol. I, P. 43-45).

Flexibility properly filed its specification of material facts with its motion for summary judgment in compliance with Rule

56.03, Tennessee Rules of Civil Procedure, setting out each fact in a separate, numbered paragraph supported by specific citation to the record. (Vol. I, P. 46-48). Cupelli and Tulis failed to comply with Rule 56.03, T.R.C.P., and did not file a response to Flexibility's specification of material facts, which were therefore undisputed. Flexibility's motion for summary judgment had been pending for almost six (6) months prior to the Trial Court's ruling. (Vol. II, P. 219-222). The Trial Court had instructed Cupelli and Tulis to review Rule 56, T.R.C.P. Id. Even with this instruction from the Trial Court, Cupelli and Tulis still failed to comply with Rule 56.03, T.R.C.P. On December 5, 2022, the Trial Court properly entered an order of summary in favor of Flexibility against Cupelli and Tulis. (Vol. II, P. 219-222).

On November 17, 2022, Cupelli and Tulis filed a motion to reconsider the Trial Court's ruling on Flexibility's motion for summary judgment. (Vol. II, P. 205-218). On January 18, 2023, the Trial Court properly entered an order denying Cupelli and Tulis' motion to reconsider finding that Cupelli and Tulis were attempting to belatedly assert new defenses, including subject matter jurisdiction. (Vol. II, P. 264-265). On December 22, 2023, Cupelli and Tulis filed a motion to set aside the order of summary judgment which mirrored their previously filed motion to reconsider. (Vol. II, P. 252-261). Cupelli and Tulis' "motion to set aside" was essentially a motion to reconsider the Trial Court's previous denial of their motion to reconsider that was filed on November 17, 2022, and denied on January 18, 2023. The filing of

a second motion to reconsider is "not authorized and will not operate to extend the time for appellate proceedings," pursuant to Rule 59.01, T.R.C.P.

The deadline to file a notice of appeal to this Court was thirty (30) days after the entry of the Trial Court's order denying the motion to reconsider on January 18, 2023. The deadline to file a notice of appeal to this Court was February 17, 2023. Cupelli and Tulis filed their notice of appeal on March 8, 2023. The notice of appeal was not timely filed, and therefore, the appeal should be dismissed.

DESIGNATION OF THE RECORD

The Record in this case consists of two (2) volumes of the technical record. Volumes I and II are comprised of the pleadings, orders and other papers filed with the Circuit Court of Hamilton County, Tennessee (hereinafter "the Trial Court"), consecutively paginated. In this Brief, reference to the papers filed in Volume Nos. I and II are designated by the volume number and page number, *i.e.* (Vol. I, P. 24).

STANDARD OF REVIEW

The Tennessee Appellate Court must first determine if the notice of appeal was timely filed. Pursuant to Rule 4(a), Tennessee Rules of Appellate Procedure, the notice of appeal must be filed with the Appellate Court Clerk within 30 days after the date of entry of the judgment appealed. Rule 4(b), T.R.A.P., allows for an extension of this time if a motion is filed pursuant to Rule 59.04, Tennessee Rules of Civil Procedure. Rule 59.01, T.R.C.P., provides:

"Motions to which this rule is applicable are: (1) under 50.02 for judgment in accordance with a motion for a directed verdict; (2) under Rule 52.02 to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; (3) under Rule 59.07 for a new trial; or (4) under Rule 59.04 to alter or amend the judgment. **These motions are the only motions contemplated under these rules for extending the time for taking steps in the regular appellate process. Motions to reconsider any of these motions are not authorized and will not operate to extend the time for appellate proceedings.** (Emphasis added)."

If the Court finds that the notice of appeal was not timely

filed, then the appeal shall be dismissed.

Tennessee Appellate Courts "review a trial court's ruling on a motion for summary judgment de novo, without a presumption of correctness. Bain v. Wells, 936 S.W.2d 618, 622 (Tenn. 1997); see also Abshure v. Methodist Healthcare-Memphis Hosp., 325 S.W.3d 98, 103 (Tenn. 2010). In doing so, [the Court] make[s] a fresh determination of whether the requirements of Rule 56 of the Tennessee Rules of Civil Procedure have been satisfied." Rye v. Women's Care Center of Memphis, 477 S.W.3d 235, 250 (Tenn. 2015). The Court "must first determine if a factual dispute exists" and, if so, "whether the disputed fact creates a genuine issue for trial." Bailey v. Rain, Inc., 29 S.W.3d 879, 882 (Tenn.Ct.App. 2000). "[I]n Tennessee, as in the federal system, when the moving party does not bear the burden of proof at trial, the moving party may satisfy its burden of production either (1) by affirmatively negating an essential element of the nonmoving party's claim or (2) by demonstrating that the nonmoving party's evidence at the summary judgment stage is insufficient to establish the nonmoving party's claim or defense." Rye at 264.

In Rye the Tennessee Supreme Court overruled its prior holding in Hannan v. Alltel Publishing Co., 270 S.W.3d 1 (Tenn. 2008). The Court held that it has "'a special duty' to correct erroneous rules that have been 'recognized and nurtured' by this Court Because the standard articulated in Hannan is unworkable and inconsistent with the history of Tennessee Rule 56, we take this opportunity to correct course." Rye at 263-264. The

Court overturned the Hannan standard that required Courts to "assume that the nonmoving party may still, by the time of trial, somehow come up with evidence to support her claim." Id at 261. Instead, the Court in Rye held that Tennessee Rule 56 mirrors Federal Rule 56 and affirmed the "put up or shut up" standard established by the United States Supreme Court in the Celotex trilogy. "The focus is on the evidence the nonmoving party comes forward with at the summary judgment stage, not on hypothetical evidence that theoretically could be adduced, despite the passage of discovery deadlines, at a future trial." Rye at 265. Rye sets the standard of review of motions for summary judgment on appeal.

ARGUMENT

I. THE NOTICE OF APPEAL WAS NOT TIMELY FILED, PURSUANT TO RULE 4(B), TENNESSEE RULES OF APPELLATE PROCEDURE, AND RULE 59.01, TENNESSEE RULES OF CIVIL PROCEDURE.

Rule 4(a), Tennessee Rules of Appellate Procedure, provides:

"In an appeal as of right to the Supreme Court, Court of Appeals or Court of Criminal Appeals, the notice of appeal required by Rule 3 shall be filed with the clerk of the appellate court withing 30 days after the entry of the judgment appealed from . . ."

Rule 4(b), T.R.A.P., provides:

"In a civil action, if a timely motion under the Tennessee Rules of Civil Procedure is filed in the trial court by any party: (1) under Rule 50.02 for judgment in accordance with a motion for a directed verdict; (2) under Rule 52.02 to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; (3) under Rule 59.07 for a new trial; (4) under Rule 59.04 to alter or amend the judgment, the time for appeal for all parties shall run from the entry of the order denying the new trial or granting or denying any other such motion."

Rule 59.01, Tennessee Rules of Civil Procedure, provides:

"Motions to which this rule is applicable are: (1) under 50.02 for judgment in accordance with a motion for a directed verdict; (2) under Rule 52.02 to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; (3) under Rule 59.07 for a new trial; or (4) under Rule 59.04 to alter or amend the judgment. **These motions are the only motions contemplated under these rules for extending the time for taking steps in the regular appellate process. Motions to reconsider any of these motions are not authorized and will not operate to extend the time for appellate proceedings.** (Emphasis added)."

On December 5, 2022, the Trial Court properly entered an order of summary in favor of Flexibility against Cupelli and Tulis. (Vol. II, P. 219-222).

On November 17, 2022, Cupelli and Tulis filed a motion to

reconsider the Trial Court's granting of Flexibility's motion for summary judgment. (Vol. II, P. 205-218). On January 18, 2023, the Trial Court properly entered an order denying Cupelli and Tulis' motion to reconsider finding that Cupelli and Tulis were attempting to belatedly assert new defenses, including subject matter jurisdiction. (Vol. II, P. 264-265). On December 22, 2023, Cupelli and Tulis filed a motion to set aside the order of summary judgment which mirrored their previously filed motion to reconsider. (Vol. II, P. 252-261). Cupelli and Tulis' "motion to set aside" was essentially a motion to reconsider the Trial Court's previous denial of their motion to reconsider that was filed on November 17, 2022, and denied on January 18, 2023. The filing of a second motion to reconsider is "not authorized and will not operate to extend the time for appellate proceedings", pursuant to Rule 59.01, T.R.C.P.

The deadline to file a notice of appeal to this Court was thirty (30) days after the entry of the Trial Court's order denying the motion to reconsider on January 18, 2023. The deadline to file a notice of appeal to this Court was February 17, 2023. Cupelli and Tulis filed their notice of appeal on March 8, 2023. The notice of appeal was not timely filed, and therefore, the appeal should be dismissed.

II. THE TRIAL COURT HELD THAT CUPELLI AND TULIS FAILED TO RESPOND TO FLEXIBILITY'S SPECIFICATION OF MATERIAL FACTS AS REQUIRED BY RULE 56.03, TENNESSEE RULES OF CIVIL PROCEDURE, AND, THEREFORE, CONCLUDED THAT THERE WAS NO GENUINE ISSUES OF MATERIAL FACT AND FLEXIBILITY WAS ENTITLED TO A JUDGMENT AS A MATTER OF LAW. THE TRIAL COURT PROPERLY GRANTED FLEXIBILITY'S MOTION FOR SUMMARY JUDGMENT.

Rule 56.03, T.R.C.P., provides:

"In order to assist the Court in ascertaining whether there are any material facts in dispute, any motion for summary judgment made pursuant to Rule 56 of the Tennessee Rules of Civil Procedure **shall be accompanied by a separate concise statement of the material facts** (emphasis added) as to which the moving party contends there is no genuine issue for trial. Each fact shall be set forth in a separate, numbered paragraph. Each fact shall be supported by a specific citation to the record. Any party opposing the motion for summary judgment must, not later than five days before the hearing, serve and file a response to each fact set forth by the movant either (i) agreeing that the fact is undisputed, (ii) agreeing that the fact is undisputed for purposes of ruling on the motion for summary judgment only, or (iii) demonstrating that the fact is disputed. Each disputed fact must be supported by specific citation to the record. Such response shall be filed with the papers in opposition to the motion for summary judgment."

Flexibility properly filed a specification of material facts with its motion for summary judgment setting out each fact in a separate, numbered paragraph supported by a specific citation to the record. (Vol. I, P. 46-48). Flexibility complied with Rule 56.03, Tennessee Rules of Civil Procedure.

Cupelli and Tulis failed to file a response to Flexibility's specification of material fact. "[T]he material facts set forth in the statement of the moving party may be deemed admitted in the absence of a statement controverting them by the opposing party." Holland v. City of Memphis, 125 S.W.3d 425, 428 (Tenn.Ct.App. 2003).

The Trial Court properly held that there were no genuine issues of material fact and Flexibility was entitled to a judgment as a matter of law. The Trial Court properly granted Flexibility's motion for summary judgment.

III. THE TRIAL COURT PROPERLY DENIED CUPELLI AND TULIS' MOTION TO RECONSIDER AND MOTION TO SET ASIDE JUDGMENT FINDING THAT TIME HAD RUN TO ASSERT THE BELATEDLY ASSERTED NEW DEFENSES RAISED IN THE MOTIONS.

Rule 8.03, Tennessee Rules of Civil Procedure, provides:

"In pleading to a preceding pleading, a party shall set forth affirmatively facts in short and plain terms relied upon to constitute accord and satisfaction, arbitration and award, express assumption of risk, comparative fault (including the identity or description of any other alleged tortfeasor), discharge in bankruptcy, duress, estoppel, failure of consideration, **fraud, illegality** (emphasis added), laches, license, payment, release, *res judicata*, statute of frauds, statute of limitations, statute of repose, waiver, workers' compensation immunity, and any other matter constituting an affirmative defense. . ."

Rule 9.06, T.R.C.P., provides:

"In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally."

In Branch Banking and Trust Company v. Hill, 582 S.W.3d 221, 233, (Tenn.Ct.App. 2019), the Tennessee Court of Appeals reiterated that the failure to plead an affirmative defense generally results in a waiver of the defense. In Eledge v. Eledge, 2016 WL 3178537, (Tenn.Ct.App. 2016), the Tennessee Court of Appeals held that defendant waived his affirmative defenses of failing to state a claim and statute of limitations by not setting forth the affirmative defenses in his answer or alternatively failing to filing a Rule 12.02 motion to dismiss.

During the pendency of this case, Cupelli and Tulis elected not raise the affirmative defense of fraud or "illegal usury contract" until after the Trial Court granted Flexibility's motion

for summary judgment. Cupelli and Tulis first raised this defense upon the filing of their motion to reconsider the granting of Flexibility's motion for summary judgment. Fraud and illegality are affirmative defenses, pursuant to Rule 8.03, T.R.C.P., that must be properly asserted, and such an assertion after the granting of a motion for summary judgment is not timely. Cupelli and Tulis waived such defenses. The Trial Court properly held the "[t]he time has run to assert such defenses." (Vol. II, P. 264). The Trial Court properly denied Cupelli and Tulis' motion to reconsider and motion to set aside.

Further, Cupelli and Tulis' assertion that the underlying agreement is usury and illegal is without merit. The parties entered into a future receivables sale and purchase agreement. (Vol. I, P. 25-38). The parties agreed that the purchase price would be \$17,000.00, and the purchase amount would be \$24,140.00. Id. These were set amounts agreed upon the parties. Id. Pursuant to the terms of the future receivables sale and purchase agreement, only upon an event of default and Flexibility deeming the agreement in default, would that trigger interest. Id.

The future receivables sale and purchase agreement provides:

"EVENTS OF DEFAULT AND REMEDIES

21. **Events of Default.** The occurrence of any of the following events shall constitute an "Events of Default" by Merchant:

- a. Merchant shall violate any term, condition or covenant in this Agreement for any reason whatsoever other than as the result of Merchant's business ceases its operations exclusively due to any of the Valid Excuses;

- b. Any representation or warranty by Merchant made in this Agreement shall prove to have been incorrect, false or misleading in any material respect when made;
- c. Merchant shall default under any of the terms, covenants and conditions of any other agreement with Flexibility (if any);
- d. Merchant uses multiple depository accounts without obtaining prior written consent of Flexibility in each instance;
- e. Merchant fails to deposit any portion of its future Receipts into the Approved Bank account;
- f. Merchant changes the Approved Bank Account or Approved Processor without obtaining prior written consent of Flexibility in each instance;
- g. Merchant interferes with Flexibility collection of Daily Installments;
- h. Four (4) or more ACH transactions attempted by Flexibility in one calendar month are rejected by Merchant's bank.

22. **Default under the Agreement.** In case any Event of Default occurs and is not waived by Flexibility, Flexibility may declare Merchant in default under this Agreement by sending a default notice to Merchant, provided, nevertheless, that no default notice is required upon Merchant's default in performance of its obligations under Section 6 of this Agreement.

23. **Merchant's Obligations Upon Default.** Upon receipt of such default notice, Merchant shall immediately pay Flexibility the unpaid portion of the Purchased Amount. In addition, Merchant shall also pay to Flexibility as additional damages, any reasonable expenses incurred by Flexibility in connection with recovering the monies due to Flexibility from Merchant pursuant to this Agreement, including without limitations the costs of retaining collection firms and reasonable attorneys' fees and disbursements (collectively 'Reasonable Damages'). The parties agree that Flexibility shall not be required to itemize or prove its Reasonable Damages and that the fair value of the Reasonable Damages shall be calculated as twenty-five percent (25%) of the unpaid portion of the Purchased Amount. Furthermore, **if the amount of the unpaid portion of the Purchase Amount specified in the default notice is not paid on the fifth (5th) Business Day following the date of the default notice (the 'Default Payment Date'), the entire sum due to Flexibility pursuant to this Section 21 shall bear simple interest from the Default Payment Date until paid in full, at the rate of 12.00% per annum (and such interest shall accrue daily) (Emphasis added).**" Id.

The interest rate upon default, and only upon one of the Events of Default above, is 12 percent per annum. Tennessee Courts have long allowed default interest at the contractual rate of 24 percent per annum and held that such a rate is not usurious. J&B Investments v. Surti, 258 S.W.3d 127, 136-137 (Tenn.Ct.App. 2007). The default interest rate provided in the underlying agreement is not usurious. Cupelli and Tulis' allegation that the agreement provides for interest at the annual rate of 208.05 percent is simply incorrect.

In Chapman v. Davita, Inc., 380 S.W.3d 710, 712 (Tenn. 2012), the Tennessee Supreme Court held:

"Subject matter jurisdiction involves a court's lawful authority to adjudicate a controversy brought before it. Subject matter jurisdiction depends on the nature of the cause of action and the relief sought, and can only be conferred on a court by the constitution or a legislative act."

Circuit Courts in Tennessee have the authority and jurisdiction to hear breach of contract disputes. The Hamilton County Circuit Court had subject matter jurisdiction over this matter. Cupelli and Tulis raised the defense of lack of subject matter jurisdiction the morning of the hearing on their motion to reconsider the Trial Court's granting of Flexibility's motion for summary judgment. The Trial Court properly upheld the order of summary judgment.

Cupelli and Tulis assert that the Trial Court lacked subject matter jurisdiction because of the forum selection clause in the underlying agreement. A forum selection clause has no bearing on a court's subject matter jurisdiction, but rather, is relevant to

venue. In Landers v. Jones, 872 S.W.2d 674, 675 (Tenn. 1994), the Tennessee Supreme Court held:

Subject matter jurisdiction differs fundamentally from personal jurisdiction in that the latter can be conferred by express or implied consent. In other words, subject matter jurisdiction cannot be waived, but a court's lack of personal jurisdiction may be waived by a defendant; and, one method of waiver is by making a voluntary 'general appearance' before the court in order to defend the suit on the merits, rather than a 'special appearance' for the purpose of contesting personal jurisdiction."

Flexibility elected to file suit in Hamilton County where Cupelli and Tulis reside. Cupelli and Tulis made general appearances in this case and waived the defense of lack of personal jurisdiction. Cupelli and Tulis never requested for the forum selection clause to be enforced.

CONCLUSION

Cupelli and Tulis failed to timely file their notice of appeal, and the appeal should be dismissed. The Trial Court properly held that there were no genuine issues of material fact and Flexibility was entitled to a judgment as a matter of law. The Trial Court properly granted Flexibility's motion for summary judgment. The Trial Court properly denied Cupelli and Tulis' motion to reconsider and motion to set aside.

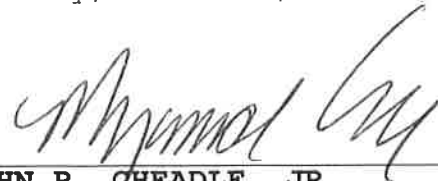
Respectfully submitted,



JOHN R. CHEADLE, JR. (6053)
MARY BARNARD CHEADLE (27084)
Attorneys for Plaintiff/Appellee
2404 Crestmoor Road
Nashville, Tennessee 37215
(615) 254-1009 Office
(615) 254-9298 Facsimile
jcheadle@cheadlelaw.com
mcheadle@cheadlelaw.com

CERTIFICATE

I hereby certify that a copy of the foregoing has been mailed, postage paid, to defendant/appellants, Sabatino Cupelli, at 8665 Summit Creek Way, Chattanooga, TN 37363, and David Jonathan Tulis, at 10520 Brickhill Lane, Soddy Daisy, TN 37379, this 21st day of September, 2023.



JOHN R. CHEADLE, JR.
MARY BARNARD CHEADLE