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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1997-CA-001633-MR

SAMUEL S. POPE, JR. — APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE ELLEN B. EWING,JUDGE
ACTION NO. 95-CI-005082

JAMES I. MARUNA and
IN-TOUCH INTERACTIVE
DATASYSTEMS, INC. — APPELLEES

OPINION
AFFIRMING

* * * * *

BEFORE: GUDGEL, CHIEF JUDGE; GUIDUGLI and SCHRODER,Judges.

GUIDUGLI, JUDGE. Samuel S. Pope, Jr. (Pope) appeals from a final judgment of the Jefferson Circuit Court in his declaratory judgment action against James I. Maruna (Maruna) and Interactive Datasystems, Inc. (IDS), which denied Pope a declaratory judgment and awarded Maruna and IDS damages on their counterclaim against Pope. For the reasons stated herein, we affirm.

This case involves a computer software license agreement entered into between Pope, the computer programmer, and Maruna, the salesman and president of IDS. Pope initiated this action seeking a declaratory judgment rescinding the Master

License Agreement between the parties. IDS and Maruna counterclaimed alleging breach of contract, fraud in the inducement, and tortious interference with IDS's business relationships. The case was tried to the court without a jury. On June 9, 1997, the trial court entered findings of fact, conclusions of law and judgment. Appellant has failed to show the trial court's findings of fact are clearly erroneous as required by Kentucky Rule of Civil Procedure (CR) 54.02 before same can be set aside. We will summarize the facts relevant to this appeal.

Pope and Maruna met in August, 1993, to discuss the development of a computer touch-screen system to collect data for businesses. They met several times to discuss the project. Pope had previously written a program which would become the foundation for the system Pope and Maruna developed together. They agreed Maruna would market the system while Pope continued to refine the software.

On December 20, 1993, Maruna incorporated IDS in the State of Delaware. Maruna was the sole shareholder of the corporation. Thereafter, on February 14, 1994, Maruna and Pope negotiated the Master License Agreement (license agreement) and Covenant Not to Disclose (covenant) at issue in this case. The contracts together gave Maruna exclusive sales, marketing and distribution rights over Pope's software in exchange for Pope receiving a percentage of sales.

Pope delivered a program to Maruna which Maruna began to sell through IDS. Meetings were held with demonstrations made to prospective buyers. Demonstration copies of the software were sent to potential customers with a time limitation copy protection device or "time bomb." This feature disabled the software after a pre-set amount of time to guard against theft or copying. Paragraph 5.8 of the license agreement provided that Pope warranted that he had no knowledge of any "counters or other devices to limit access to the Software with passage of time...that have not been fully disclosed to the Licensee [Maruna]." Pope's and Maruna's testimony on this issue conflicted - Pope states Maruna knew of the protection and Maruna states he had no knowledge of it at the time the documents were executed. The "time bomb" required customers to obtain quarterly updates or the software would be rendered useless. Pope planned to update the software of each customer personally and intended to include the time bomb in the final saleable version of the software, not just the demonstration copies.

The business proceeded from approximately April, 1994, to August, 1994, when Maruna became aware Pope intended to include the time bomb in the final versions of the software. Maruna demanded Pope remove the time bomb protection from the software. Pope unfortunately believed that he could only protect his proprietary interests in the software by use of the time bomb. Rather than rely on the terms of the license agreement he had signed to protect his interests, Pope breached that agreement

and engaged in a form of self-help which ultimately cause the complete downfall of a promising business venture.

Maruna argued, and the trial court found, that the time bomb rendered the software unmarketable and unfit for its intended use. Maruna then ceased marketing the product and contacted purchasers with the offer of refunds. Every customer except one accepted the refund offer. The one customer that wanted to continue using the software negotiated a deal whereby the $5,000 deposit it had paid IDS as a deposit for purchase would become a two-year rental agreement.

On September 8, 1995, Pope filed a declaratory judgment action seeking to void the license agreement, alleging IDS and Maruna had: repudiated the agreement by failing to make monthly reports to Pope of gross revenues received; not paid Pope any money; and, generally failed to perform their duties under the license agreement.

Prior to the filing of an answer or responsive pleading, Pope filed an amended complaint which was served on IDS's registered agent for service of process in Delaware, by the Kentucky Secretary of State, by certified mail pursuant to KRS 454.210. When no answer or responsive pleading had been filed within 20 days, Pope filed a motion for default judgment on October 20, 1995. Default judgment was granted by order entered October 23, 1995. On November 8, 1995, Maruna and IDS filed a motion to set aside the default judgment. The default judgment was set aside by order entered November 13, 1995.

The first assignment of error in this appeal is that the trial court erred in setting aside the default judgment because the defendants had been properly served and had failed to answer or file a responsive pleading within twenty days. Regardless of the merits of this argument, the order setting aside the default judgment was a final and appealable order under CR 54.02(1) because it contained the recitation, "This is a final and appealable order there being no just cause for delay." Because Pope did not appeal from the order within thirty days as required by CR 73.02, judicial review of the issue has been waived.

After the default judgment was set aside the parties proceeded with discovery. A bench trial was held on September 10 and 11, 1996. Thereafter, the parties submitted post-trial memoranda. On June 9, 1997, the Jefferson Circuit Court entered judgment in favor of this appeal. Pope then filed this appeal.

Pope claims the trial court erred in denying him a declaratory judgment releasing all parties from the Master License Agreement because the agreement was in perpetuity, and it was abandoned by IDS and Maruna. In the June 9, 1997, findings of fact, conclusion of law and final judgment appealed from, the trial court specifically found, "[t]he language of the license agreement unequivocally states that the agreement is in perpetuity without limitation." The language the trial court was referring to is found in paragraph 1 of the Master License Agreement:

> **1. Purchase and Sale of the License.** Upon the terms and subject to the conditions set forth herein, Programmer does hereby grant in perpetuity to Licensee without limitation from the date hereof until the end of time, the sole, exclusive, irrevocable, worldwide marketing rights to the Software, including specifically, but without limitation, all intellectual property rights owned or otherwise assertable by Programmer to the sale, marketing, or distribution of such software in any form or manner whatsoever, the sole and exclusive rights to make copies and grant licenses and sublicenses of the Software and market, promote or make business arrangements for the distribution of such Software or specific modules thereof in whatsoever manner Licensee shall deem fit, and full right, title, and interest to any and all proceeds produced in any way or whatsoever form from the Software.

Based upon the clear, unambiguous language of the document, Pope cannot convince us that the finding of "perpetuity" is clearly erroneous. The trial court then correctly ruled contracts in perpetuity are terminable after a reasonable time not at will. Electric and Water Board v. South Central Bell, Ky. App., 805 S.W.2d 141 (1990). What amount of time is "reasonable", as between the parties to this appeal, is yet to be determined. Pope testified at the hearing that he already had a purchase order for the software, separate from IDS and Maruna. Termination of the Master License Agreement by the trial court would have rewarded Pope for his breach of contract by allowing him to sell the software as his exclusive property. Because the software was clearly developed jointly with IDS and Maruna, the trial court properly refused to terminate the agreement.

Moreover, the trial court's refusal to grant Pope's declaratory judgment was not an abuse of discretion because substantive intellectual property laws, such as copyright laws, are implicated by the Master License Agreement at issue, and copyright law is preempted by federal law. U.S. Art. 1, § 8, cl. 7; see also, Validity, Construction, and Application of Computer Software Licensing Agreements, 38 ALR 5th 1 (1996).

Pope's next assignment of error is the trial court erred in awarding damages to IDS and Maruna. Pope also claims the damages awarded were speculative. The trial court awarded IDS and Maruna judgment against Pope in the amount of $40,589.17, court costs, judgment interest, and attorneys' fees incurred attempting to persuade Pope to remove the time bomb from the software. Pope fails to persuade us this judgment was an abuse of discretion. Further, the damages awarded are not speculative, but are based on the evidence.

The court awarded $20,968.19 for expenditures incurred in 1994. This amount was supported by documents and testimony. The court awarded $17,500 for rescinded sales caused by Pope's breach. This amount was supported by evidence of lost business in the amount of $22,500. The trial court awarded $2,121 for general expenses IDS incurred. This amount was supported by documents and testimony and none of the items were duplicated in the previous awards. The total of these three items is $40,589.19, two cents more than the amount shown on the judgment. IDS and Maruna waive any claim to the additional two cents. Pope

fails to cite any controlling law supporting his argument on damages.

Lastly, Pope claims that because customer refunds were made "voluntarily," the trial court erred in awarding $17,500 for rescinded sales caused by Pope's breach. This argument is contrary to the findings of the trial court. In fact, the refunds to which Pope objects saved him from potential multiple judgments. Had the customers not been notified and the refunds issued when they were, Pope would be required to indemnify IDS and Maruna "...from all losses...relating to or arising out of...any breach or default in the performance of the Programmer..." as set forth in paragraph 7.2 of the license agreement.

For the foregoing reasons, we affirm the judgment of the Jefferson Circuit Court.

SCHRODER, JUDGE, CONCURS.

GUDGEL, CHIEF JUDGE, CONCURS IN RESULT ONLY.

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