

Commonwealth Of Kentucky

Court Of Appeals

NO. 1997-CA-002729-MR

SCRUGGS, MILLETTE, LAWSON,
BOZEMAN & DENT, PA

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE GEOFFREY P. MORRIS, JUDGE
ACTION NO. 96-CI-07333

MOBLEY, JOHNSON & ERVIN,
PLLC

APPELLEE

OPINION
AFFIRMING

** ** * * * **

BEFORE: GUDGEL, CHIEF JUDGE; COMBS AND GARDNER, JUDGES.

GARDNER, JUDGE: Scruggs, Millette, Lawson, Bozeman & Dent, PA (Scruggs), a Mississippi law firm, appeals from an order of the Jefferson Circuit Court granting summary judgment for Mobley, Johnson & Ervin, PLLC (Mobley), a Louisville, Kentucky law firm. The dispute in this case focuses upon a letter in which Scruggs agreed to pay Mobley for legal services rendered on behalf of Dr. Jeffrey Wigand (Wigand). After reviewing the record below, this Court affirms the trial court's order.

Wigand was the defendant in Jefferson Circuit Court in a case styled Brown & Williamson Corp. v. Jeffrey Wigand. Mobley

was retained when Wigand's predecessor counsel threatened to file a motion to withdraw. Mobley began representing Wigand, but demanded a written fee agreement. On May 10, 1996, Scruggs faxed a letter to Mobley dated May 9 in which he stated, "[t]his will acknowledge my oral representations to you that my firm will stand good for the fees, expenses and costs of your firm in defending Dr. Jeffrey Wigand in the Kentucky action contemplated by our discussion." He also stated, "[a]s we discussed, it is anticipated that an agreement with CBS will momentarily be reached whereby CBS will undertake these obligations to your firm, and, in such event, you would look to CBS and not me for payment."

Scruggs was simultaneously representing Wigand in negotiations with CBS to obtain an indemnity agreement for Wigand's defense in the Brown & Williamson litigation. On May 8, 1996, Scruggs succeeded in obtaining CBS's signature on an agreement wherein CBS agreed to pay all expenses that would be reasonably incurred by Wigand in defending against the Brown & Williamson claims. On May 10, 1996, Scruggs succeeded in causing Wigand to execute the indemnity agreement. On May 16, 1996, Mobley sent Scruggs an invoice for services rendered through May 10, 1996. Scruggs refused to pay this invoice.

In December 1996, Mobley filed suit against Scruggs in circuit court. In February 1997, Mobley filed a motion for summary judgment, while Scruggs filed a countermotion for summary judgment and reply in March 1997. Mobley responded to the countermotion and filed a motion for sanctions. In July 1997,

the circuit court through a memorandum and order granted summary judgment for Mobley. Scruggs filed a motion for reconsideration and also requested to join CBS as a third party defendant. The court heard oral arguments regarding Scruggs's motion, but in an order in September 1997, denied Scruggs's motion to reconsider and join a third party. Scruggs has now brought this appeal.

Upon appeal, Scruggs argues that the circuit court improperly decided a question of law by granting a summary judgment in favor of Mobley even though numerous undecided genuine issues of material fact existed. Specifically, Scruggs maintains that pursuant to the terms of the indemnity agreement, CBS was liable for payment to Mobley, that the language of Scruggs's letter contained a condition which released Scruggs from liability following execution of the agreement with CBS, that the \$200,000 paid by CBS to Scruggs for attorney fees did not include the \$28,000 in attorney fees which is the subject of this action, that the sworn affidavits of Mobley and Scruggs conflicted regarding the issue of who is liable for payment of Wigand's attorney fees, and that CBS is an indispensable party to this action and pursuant to Kentucky Rule of Civil Procedure (CR) 19, Scruggs should have been allowed to join CBS as a third party defendant. Further, to bolster its argument, Scruggs contends that the circuit court was predisposed to rule in favor of Mobley because of its incorrect perception that the case simply involved default of an agreement of one lawyer to pay another lawyer's fees. He maintains that the circuit court incorrectly characterized the Scruggs letter as an indemnity contract when

according to the Restatement (Second) of Contracts, it was actually a contract subject to a condition. We conclude that the record below and specifically the language of Scruggs's letter refute Scruggs's arguments.

In general, summary judgment should only be used to terminate litigation when as a matter of law, it appears that it would be impossible for the respondent to produce evidence at trial warranting a judgment in his or her favor and against the movant. Steelvest, Inc. v. Scansteel Service Center, Inc., Ky., 807 S.W.2d 476, 483 (1991), quoting Paintsville Hospital Co. v. Rose, Ky., 683 S.W.2d 255 (1985); Farmer v. Heard, Ky. App., 844 S.W.2d 425, 427 (1992). Summary judgment is properly granted only when there is no genuine issue as to any material fact. Mullins v. Commonwealth Life Ins. Co., Ky., 839 S.W.2d 245, 247 (1992). The movant bears the burden of showing there is no genuine issue of material fact. Id. The court must review the record in the light most favorable to the party opposing the motion. Id.; Farmer v. Heard, 844 S.W.2d at 427.

In the case at bar, the primary issue is the legal effect of the Scruggs letter to Mobley. As a general rule, a contract or similar instrument is to be construed according to the strict, plain, common meaning of the words contained therein. Bennett v. Consolidated Realty Co., 226 Ky. 747, 11 S.W.2d 910 (1928); Friction Materials Co. v. Stinson, Ky. App., 833 S.W.2d 388, 391 (1992). See also Interstate Business Men's Accident Ass'n. of Des Moines, Iowa v. Atkinson, 165 Ky. 532, 177 S.W. 254 (1915); Walker v. Economy Preferred Ins. Co., Ky. App., 909

S.W.2d 343 (1995). The language of the letter Scruggs wrote to Mobley is clear. It stated "[t]his will acknowledge my oral representations to you that my firm will stand good for the fees, expenses and costs of your firm in defending Dr. Jeffrey Wigand. . . ." By this language, Scruggs clearly agreed to pay Mobley for its services in representing Wigand in the Kentucky action. Scruggs also wrote in the letter that it was anticipated that an agreement with CBS would momentarily be reached whereby CBS would undertake those obligations to Mobley, and in such event, Mobley would look to CBS and not Scruggs for payment. Shortly thereafter, an indemnity agreement with CBS was executed. As a matter of law, by the plain terms of Scruggs's letter, Scruggs was to pay Mobley for the services it rendered on behalf of Wigand.

The clause regarding CBS has no real bearing in this case. The indemnity agreement entered into by CBS was between CBS, Scruggs and Wigand and was not in effect at the time Scruggs sent his letter. There is nothing in the record to indicate that Mobley was a party to the indemnity agreement or was involved in negotiations. Mobley thus would have no contractual ground for proceeding against CBS.¹ By the terms of the agreement between Mobley and Scruggs, Mobley is entitled to payment from Scruggs for the legal services it performed. After paying Mobley,

¹Mobley has asserted that the \$28,000 in question was for legal work it performed prior to CBS entering into an indemnification agreement. This point, if true, would bolster Mobley's position; however, Scruggs by the terms of his letter is still legally obligated to pay Mobley for the services that it performed for Wigand regardless of this fact.

Scruggs can then proceed against CBS to recover any money it paid Mobley that CBS has not already paid.²

This case does not involve a guaranty agreement pursuant to Kentucky Revised Statute (KRS) 371.065. The trial court correctly noted that the letter from Scruggs did not constitute a guaranty agreement and did not fall under the requirements of KRS 371.065. Further, Section 230 of the Restatement (Second) of Contracts (1981), cited by Scruggs, is also not applicable to the facts of this case. We do not believe that CBS was an indispensable party pursuant to CR 19 since the agreement in dispute in this case was between Scruggs and Mobley. Mobley was not a party to an agreement with CBS.³ The trial court thus did not abuse its discretion by denying the motion to join CBS as a party.

The issue to be decided by the trial court in this case involved a question of law regarding the interpretation of the letter sent by Scruggs showing the agreement between it and Mobley. The alleged factual matters raised by Scruggs simply had no direct bearing on the legal matter to be resolved. Further, we note that Scruggs also moved for a summary judgment but later

²There is apparently a dispute between the parties as to whether CBS paid Scruggs \$200,000 and whether any of this amount included the \$28,000 owed to Mobley. This matter is really not relevant to the dispute between Mobley and Scruggs. This would be a matter to be decided between CBS and Scruggs.

³We also note that the record reflects that Scruggs waited until after the circuit court granted summary judgment for Mobley before it moved the court to allow it to join CBS as a party. The record also reflects that Scruggs failed to provide the circuit court with a satisfactory answer regarding why it had not earlier sought to join CBS as a party.

argued to the court below and now to this Court that summary judgment was inappropriate.

For the foregoing reasons, this Court affirms the Jefferson Circuit Court's order.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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