

Commonwealth Of Kentucky

Court Of Appeals

NO. 1997-CA-002172-MR

LEE SLONE and DOROTHY SLONE

APPELLANTS

v.

APPEAL FROM LAUREL CIRCUIT COURT
HONORABLE LEWIS B. HOPPER, JUDGE
ACTION NO. 97-CI-000352

GEORGE HUMFLEET MOBILE HOMES, INC.

APPELLEE

OPINION
AFFIRMING
** ** * * * * *

BEFORE: BUCKINGHAM, McANULTY AND MILLER, JUDGES.

McANULTY, JUDGE: Lee Slone and Dorothy Slone (hereinafter, appellants) filed a complaint on April 30, 1997, against George Humfleet Mobile Homes, Inc. (appellee), a mobile home dealer, Southern Energy Homes, Inc. (Southern Energy), a mobile home manufacturer, and Bank of America, as the assignee of the note and security agreement executed by appellants in favor of appellee.¹ In their complaint, appellants alleged that appellee sold them a defective mobile home manufactured by Southern

¹Southern Energy and Bank of America are not parties to this appeal.

Energy, and sought recovery of the purchase price and attorney fees pursuant to Kentucky Revised Statute (KRS) 367.710 et seq., the Mobile Home Sales Act.

On May 19, 1997, appellee filed a motion to dismiss the complaint for failure to state a claim upon which relief can be granted. Appellee cited Tallent v. Mobile Home Estates, Inc., Ky., 648 S.W.2d 869, 871 (1983), which held that KRS 367.750 permits an action to recover the purchase price and attorney fees only against the manufacturer. On June 6, 1997, the trial court entered an order dismissing the claim against appellee with prejudice.

On June 13, 1997, appellants filed a motion to alter, amend or vacate pursuant to Civil Rule (CR) 59.05 and claimed that the order of dismissal was erroneous because they could raise a cause of action against appellee under the Uniform Commercial Code (UCC), although they had not cited such a claim in their original complaint. They requested that the trial court set aside the order, or amend the order to allow appellants an opportunity to amend the complaint. Appellee objected to the CR 59.05 motion. The trial court concluded that its order was "sound and based upon existing law," and denied appellants' motion on August 2, 1997. This appeal followed.

On appeal, appellants maintain that it was error for the trial court to dismiss the complaint as they still may raise a claim upon which relief may be granted under the UCC. They further claim it was error to deny them leave to amend their complaint. We find no error in the trial court's dismissal of

the complaint as to appellee. Furthermore, the trial court was not required to allow appellants to amend their complaint. Although CR 15.01 states that leave to amend shall be freely given, the trial court has wide discretion to permit or disallow the amendment of pleadings. Cheshire v. Barbour, Ky., 481 S.W.2d 274 (1972). Following the filing of appellee's motion to dismiss, appellants did not seek leave to amend the complaint or otherwise respond before the trial court's order granting the motion. Appellants did not tender an amended complaint to the trial court for consideration. We will not find an abuse of discretion when appellants did not seek leave to amend before judgment was entered. CR 15.01 does not obligate the trial court to leave the cause of action open when the plaintiffs have not stated a claim. Accordingly, we affirm the order of the trial court denying appellants' motion to vacate, and affirm the order dismissing the complaint with regard to appellee.

BUCKINGHAM, Judge, CONCURS.

MILLER, Judge, DISSENTS BY SEPARATE OPINION.

MILLER, Judge, DISSENTING. I dissent. I believe an action against a seller for breach of implied warranty of merchantability under Ky. Rev. Stat. 355.2-314 is sufficient upon the allegation that merchandise (mobile home) purchased is insufficient in quality and craftsmanship. I am of the opinion that the circuit court erred in dismissing the complaint against George Humfleet Mobile Homes, Inc. Ky R. Civ. Proc. 8.01 and 8.06.

BRIEF FOR APPELLANTS/CROSS-
APPELLEES:

Kenneth A. Smith, Jr.
London, Kentucky

BRIEF FOR APPELLEE/CROSS-
APPELLANT:

Willis C. Cunnagin
London, Kentucky