

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-000747-MR

HERITAGE HOUSE FURNITURE, INC.;
SALTSMAN & WILLETT, PSC; AND
JAMES P. WILLETT

APPELLANTS

v. APPEAL FROM NELSON CIRCUIT COURT
HONORABLE LARRY RAIKES, JUDGE
ACTION NO. 97-CI-00226

HOOKER FURNITURE CORPORATION

APPELLEE

OPINION
AFFIRMING
** ** * * * * *

BEFORE: EMBERTON, GUIDUGLI AND MILLER, JUDGES.

GUIDUGLI, JUDGE. This is an appeal by Heritage House, Inc. (Heritage House), Saltsman & Willett, P.S.C. (Saltsman & Willett), and James P. Willett, III (Willett) (Saltsman & Willett and Willett referred to collectively as appellants), from an order of the Nelson Circuit Court denying appellants' motion to quash the garnishment and releasing the funds held by said garnishment to Hooker Furniture Corporation (Hooker) on August 27, 1997. We affirm.

Heritage House retained Saltsman & Willett to represent it in a forcible detainer suit brought by Henderson & Hardy

Company, Inc. (Henderson & Hardy) in March of 1997. Heritage House agreed to vacate the premises but a question remained regarding who would retain two furniture delivery trucks. In lieu of returning the two trucks to Heritage House, Henderson & Hardy agreed to pay \$7,500 for the two trucks. On June 19, 1997, the parties entered into a written agreement entitled "Escrow Agreement and Mutual Release and Settlement" (settlement agreement) by which the Appellants agreed to hold the payment for the trucks in an escrow account for a period of fifteen (15) days. The funds would be released upon Henderson & Hardy's notification to Saltsman & Willett that they could be released.

Contemporaneously, with the execution of the settlement agreement, Dan Garonizk, president of Heritage House, and attorney Janie Asher of Saltsman & Willett, entered into an oral agreement regarding payment of Saltsman & Willett's fee. The parties agreed that the escrow funds would be released to Saltsman & Willett upon their release from escrow for payment of Heritage House's past due debt to Saltsman & Willett in the amount of \$8,226.50 and for payment of attorney fees associated with the forcible detainer proceedings and the recovery of the trucks.

On May 27, 1997, Hooker filed a separate collection action against Heritage House. Hooker sought and obtained a default judgment against Heritage House on or about June 20, 1997, in the amount of \$20,577.05 with interest at 18% per annum. On July 1, 1997, at 9:30 a.m., Henderson & Hardy notified Saltsman & Willett by facsimile that the funds could be released

from escrow. Approximately eighteen minutes later Hooker served an order of garnishment upon attorney Willett of Saltsman & Willett to attach the funds held in the escrow account. Shortly thereafter, Willett filed a motion to quash the garnishment on the basis that matters relating to the account were confidential and protected by the attorney client privilege. On August 1, 1997, the appellee filed a response to the motion and requested that the trial court deny the motion and order Willett to release the funds to appellee.

On August 6, 1997, Willett's motion was heard in the Nelson County Circuit court. The trial court allowed Willett an additional ten days to file a supplemental response to appellee's request for release of the funds. Willett did not file a supplemental response and on August 26, 1997, the trial court issued a judgment denying Willett's motion to quash and ordering him to release the funds in question to the appellee. Subsequently, Willett filed a motion to alter, amend or vacate the judgment. A hearing was held on Willett's motion on October 1, 1997, and, in addition, the trial court allowed the parties to file supporting briefs. Thereafter, the trial court overruled Willett's motion to vacate. This appeal followed.

The appellants raise three (3) issues on appeal. First, that the trial court's findings of fact, conclusions of law and judgment did not conform to the pleadings. Second, that the appellants were improperly prohibited from asserting their lien rights in the case below. Third, that Saltsman & Willett possess lien rights superior to those of the appellee.

Appellants argue that the trial court's options with regard to Willett's motion to quash the garnishment were either to enter the order to quash as requested or to overrule the motion to quash and order Willett to answer the garnishment. They argue that in ruling on the ultimate distribution of the escrow funds, the trial court's decision went beyond the scope of the pleadings. It is a long standing rule in Kentucky that a judgment must conform to the pleadings and may not grant excessive relief beyond that prayed for in the pleadings. Belcher v. Hunt, Ky. App., 248 S.W.2d 717 (1952). Civil Rule of Procedure (CR) 8.01 states that a claim for relief may be made in an original claim, counterclaim, cross-claim or third-party claim. Appellee's response to Willett's motion to quash the garnishment requested a ruling from the trial court regarding entitlement and/or release of the escrow funds. Therefore, the trial court's ruling regarding the ultimate distribution of the escrow funds did not exceed the scope of the pleadings since pursuant to CR 8.01, both issues, the motion to quash the garnishment and entitlement/release of the escrow funds, were properly before the trial court.

The appellants next contend that they were improperly prohibited from asserting their lien rights in the case below. However, a thorough review of the record, civil rules and pertinent case law shows the appellants had every opportunity to assert their lien rights but failed to do so in a timely manner. According to CR 24:

Upon timely application anyone shall be permitted to intervene in an action... (b) when

the applicant claims an interest relating to the property or transaction which is the subject of the action and is so suited that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless that interest is adequately represented by existing parties.

Since appellants claim an interest in the escrow funds subject to the garnishment, the appropriate assertion of their rights was through a motion to intervene. However, despite the appellants' knowledge of the lawsuit filed against Heritage House by the appellee, appellants never sought to intervene.¹ In fact, the appellants never took any action to assert their alleged attorney's lien although they had ample opportunity. They could have asserted it upon notice of the original action, upon receipt of the garnishment, after the hearing on the motion to quash the garnishment, or upon being given an additional ten days by the trial court to file a supplemental brief, which the Appellants never filed. The appellants never raised the issue until it was first mentioned in their motion to alter, amend or vacate. In ruling on the motion to alter, amend or vacate, the trial court aptly stated:

The attorney lien issue was first raised in Heritage and Willett's present motion to alter, amend or vacate. However, Willett still has not moved to intervene in this action for purposes of averring and prosecuting the attorney fee claim, and any motion to intervene at this juncture would be untimely. Dairyland Ins. Co. v. Clark, Ky., 476 S.W.2d 202 (1972).

¹The process agent for Heritage House was Willett whom Hooker Furniture served on May 19, 1997, with the original action that resulted in the default judgment, which led to the garnishment.

Since there exists no legal foundation for consideration of Willett's attorney fee claim, and there being no other entitlement to the garnishment funds other than Hooker's, Heritage and Willett's motion to alter, amend or vacate must be denied.

We agree.

The appellants argue that pursuant to LaBach v. Hampton, Ky. App., 585 S.W.2d 434 (1979), they could assert the attorney's lien either by motion or through intervention. However, their reliance on LaBach is misplaced. In LaBach, the attorney's motion asserting an attorney lien on the judgment funds related directly to services provided by the attorney in the underlying cause of action. Thus, this Court stated that "we see no reason why the matter could not be raised upon proper notice by motion or intervening petition in the original action." Id. at 435. (emphasis added). In the case sub judice, the controversy relating to the appellants' alleged attorney's lien is foreign to the underlying cause of action that gave rise to the default judgment and garnishment. Thus, the appropriate method for the appellants to have asserted their alleged attorney's lien was through intervention in the original action, which did not occur.

The last issue raised by appellants alleges that their attorney's lien is superior to the appellee's judgment lien. However, the trial court did not consider or rule on this issue. As such, this issue is not properly before this Court.

We do not believe that the trial court abused its discretion by ordering the appellants to release the escrow funds

to the appellee. For the foregoing reasons, the decision of the trial court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANTS:

Janie Asher Hite
Bardstown, KY

BRIEF FOR APPELLEE:

Meredith A. Kirklin
Louisville, KY