

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-001073-MR

DONALD SEAMAN

APPELLANT

v. APPEAL FROM KENTON CIRCUIT COURT
HONORABLE WILLIAM J. WEHR, SPECIAL JUDGE
ACTION NO. 1996-CI-01371

THE DREES COMPANY

APPELLEE

OPINION
AFFIRMING
** ** * * * * *

BEFORE: GUDGEL, CHIEF JUDGE; HUDDLESTON AND KNOPF, JUDGES.

KNOPF, JUDGE: Donald Seaman appeals from a March 26, 1998, summary judgment of Kenton Circuit Court denying his claim for damages allegedly stemming from his former employer's, The Drees Company's, breach of its agreement to pay him a commission. The trial court ruled that Seaman's claim is barred by KRS 371.010, the Statute of Frauds. Seaman maintains that the trial court misapplied the statute and that it abused its discretion by permitting Drees to raise the Statute-of-Frauds defense by way of an amended answer. Finding neither error by the trial court, nor abuse of discretion, we affirm the judgment.

Because Seaman is appealing from the trial court's summary judgment, this Court reviews the record "in a light most favorable" to the party against whom judgment was rendered. Summary judgment is improper unless "it appears that it would be impossible for the respondent to produce evidence at the trial warranting a judgment in his favor" Steelvest, Inc. v. Scansteel Service Center, Inc., Ky., 807 S.W.2d 476, 480, 483 (1991).

Viewed thus in a manner favorable to Seaman, the record indicates that the Drees Company develops and manages real estate on a large scale. It buys, sells, builds, and leases both commercial and residential properties. In 1986 it hired Seaman, a licensed real-estate broker, to work as a commercial marketing manager. In that position Seaman undertook to arrange sales of Drees' commercial properties. In exchange for his efforts, he was to receive a base salary of \$25,000.00 per year, a travel allowance, and a commission of one and one-half percent of his gross sales. In 1988, the company reassigned Seaman to the position of commercial leasing agent. Although he was still involved in some sales, his primary duty changed from arranging sales to arranging and servicing leases of the company's retail and office spaces. His compensation remained the same, except that his commission came to include one percent of his gross leases, which were calculated by multiplying the monthly rent times the number of months in the initial lease term.

Some time prior to 1992, Drees began building a shopping center in Crescent Springs, Kentucky. By early 1992,

the project was far enough advanced to make securing an anchor tenant a high priority. Drees tried to interest Walgreen's, Inc., in the anchor-tenant space, but without success. Seaman then contacted, or renewed contact with, Hooks-SupeRx, Inc. He did that in March 1992. In early July 1992, Hooks-SupeRx executed a lease with Drees for the anchor-tenant space in the new shopping center, and in late 1994 it occupied the premises. In the meantime, on June 22, 1992, Drees terminated Seaman's employment. Seaman maintains that he is entitled to a commission for his work on the Hooks-SupeRx lease. In agreeing with Drees that Seaman is not entitled to such a commission, the trial court, relying on Louisville Trust Co. v. Monsky, Ky. App., 444 S.W.2d 120 (1969), ruled that enforcement of the alleged contract is barred by KRS 371.010(8), a section of the Statute of Frauds.

KRS 371.010(8) provides that

[n]o action shall be brought to charge any person: . . . (8) Upon any promise, agreement, or contract for any commission or compensation for the sale or lease of any real estate or for assisting another in the sale or lease of any real estate . . . unless the promise, contract, agreement, representation, assurance, or ratification, or some memorandum or note thereof, be in writing and signed by the party to be charged therewith, or by his authorized agent. It shall not be necessary to express the consideration in the writing, but it may be proved when necessary or disproved by parol or other evidence.

Seaman maintains that employment contracts such as his are excluded from this statute because the Statute of Frauds does not bear upon contracts for personal services. He purports to derive this rule from the case of Buttorff v. United Electronics

Laboratories, Inc., Ky., 459 S.W.2d 581 (1970). In that case, a salesman of security cameras sought damages against the manufacturer for unpaid commissions. Denying the claim, the trial court applied KRS 355.2-201(1), the Uniform Commercial Code's provision barring enforcement of "contract[s] for the sale of goods for the price of \$500 or more" unless sufficiently evidenced in writing. Our highest Court reversed on the ground that, although the salesman nominally agreed to purchase the cameras from the manufacturer and then resell them to the manufacturer's customers, the agreement between salesman and manufacturer was in fact an employment contract for the salesman's services, not a bona fide sale of goods, and thus it did not come within the statute. KRS 371.010(6) (which precludes enforcement of inadequately memorialized contracts "for the sale of real estate, or any lease thereof for longer than one year") has likewise been construed as not applying to brokerage agreements. Henson v. Arnold, 310 Ky. 742, 221 S.W.2d 662 (1949).

KRS 371.010(8), however, unlike the Statute-of-Fraud provisions just cited, does apply to contracts for personal services. Indeed, it applies to "any" promise or agreement to "assist[] another in the sale or lease of any real estate." Clearly, Seaman's alleged employment contract with Drees was such an agreement, and thus the trial court did not err by subjecting it to the Statute of Frauds. Louisville Trust Co. v. Monsky, Ky. App., 444 S.W.2d 120 (1969); Treacy v. James, Ky., 274 S.W.2d 46

(1954); 20th Century Coal Company v. Taylor, Ky., 275 S.W.2d 72 (1954).¹

Seaman also maintains that Drees waived the Statute-of-Frauds defense. Seaman filed his complaint on July 19, 1996. Drees answered on August 13, 1996. That original answer included three (3) affirmative defenses, but none based upon the Statute of Frauds. Not until November 1997 did Drees, in its motion for summary judgment, assert that the Statute of Frauds bars Seaman's claim. Following that motion, in March 1998, the trial court permitted Drees to amend its answer and thereby to introduce the new affirmative defense into its case. Seaman correctly notes that, without the amendment, Drees would be deemed to have waived its right to assert the Statute of Frauds. CR 8.03; City of Whitesburg v. Bates, Ky., 320 S.W.2d 316 (1959). With the amendment, of course (supposing the amendment proper), the new defense relates back to the original answer and so would not have been waived. CR 15.03. Seaman thus maintains that the amendment was not proper and that the trial court abused its discretion by permitting it. We disagree.

¹The trial court did overstate what the statute requires, which is not that there be a written contract, but only that there be adequate written evidence that a contract exists and that its terms are what the plaintiff claims. Antle v. Haas, Ky., 251 S.W.2d 290 (1952); Purtell v. Bell, 179 Ky. 356, 200 S.W. 644 (1918). No objection was made to this error, however, nor, per force, was there any complaint that the error was prejudicial. The error not having resulted in a patent injustice, we do not believe that it provides a sufficient basis for our *sua sponte* review. Mitchell v. Hadl, Ky., 816 S.W.2d 183 (1991); Regional Jail Authority v. Tackett, Ky., 770 S.W.2d 225 (1989).

The amendment of pleadings is governed by CR 15.01, under which courts are admonished to grant leave to amend freely "when justice so requires." Amendments that are not permitted by right, therefore, are entrusted to the trial court's sound discretion. That discretion is concerned primarily with balancing the movant's interest in having the case decided on the full merits (whether of the claim or the defense) against the non-movant's interest in timely notice. Stout v. Martin, Ky., 395 S.W.2d 591 (1965). As discussed above, the Statute of Frauds applies to this case, and thus Drees has a compelling interest in having the statute's affect considered. Seaman, on the other hand, has not complained that he was denied a fair opportunity to respond. He complains rather that Drees' initial failure to raise the defense led him to spend time and money he otherwise would not have spent. Seaman's protest is certainly understandable, but in ordinary cases, such as this one, where the amounts involved are not egregious, a motion to amend need not be denied merely because resources have already been spent on aspects of the case the amendment renders moot. Stout v. Martin, *supra*. Estes v. Kentucky Utilities Co., 636 F.2d 1131 (6th Cir. 1980).

In sum, we are not persuaded that the trial court abused its discretion by allowing Drees to amend its answer, tardy as that amendment was, to assert a Statute-of-Frauds defense. We agree with the trial court, moreover, that the Statute of Frauds applies to the contract Seaman alleged, and thus precludes enforcement of it unless its existence and terms

be adequately proved by writing. No such writing having been proffered, the trial court did not err by granting summary judgment for Drees.

Accordingly, we affirm the March 26, 1998, judgment of Kenton Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

Jeffrey C. Seaman
Reminger & Reminger Co.,
L.P.A.
Cincinnati, Ohio

BRIEF FOR APPELLEE:

Stephen S. Eberly
Rodney L. Drinnon (*pro hac*
vice)
Vorys, Sater, Seymour and
Pease LLP
Cincinnati, Ohio