

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-001320-MR
and
NO. 1998-CA-001322-MR

RICK WOOLRIDGE

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE KEN COREY, JUDGE
ACTION NO. 97-CI-1325

INDCO, INCORPORATED

APPELLEE

OPINION
REVERSING
** ** * * * * *

BEFORE: DYCHE, MCANULTY, AND MILLER, JUDGES.

DYCHE, JUDGE. Rick Woolridge appeals from the following two orders of the Jefferson Circuit Court: (1) the order entered on November 4, 1997, which granted Indco, Inc.'s motion to dismiss Woolridge's breach of contract claim; and (2) the order entered on May 27, 1998, which denied Woolridge's motion to set aside the court's order of November 4, 1997. After reviewing the record, we reverse.

Prior to his employment with Indco, Woolridge was the building and grounds administrator for the Greater Clark County School District in Indiana. In January 1994, Woolridge left his job as the building and grounds administrator to become the

production manager at Indco's factory in New Albany, Indiana. In September 1996, Woolridge was discharged by Indco for unsatisfactory performance of his job. Woolridge then filed suit in Jefferson Circuit Court for breach of an alleged five year employment contract.

Indco denied the existence of the alleged employment contract and filed a motion to dismiss Woolridge's suit for failure to state a claim upon which relief can be granted. Kentucky Rule of Civil Procedure (CR) 12.02(f). On November 3, 1997, Judge Daniel Schneider, acting pursuant to an appointment as Special Circuit Judge, granted Indco's motion to dismiss. On November 4, 1997, the order was entered on the docket sheet by the Clerk of the Jefferson Circuit Court; however, the clerk failed to note on the docket the service of notice of entry as required by CR 77.04(2).

On December 1, 1997, Woolridge filed his response to Indco's motion to dismiss. On April 24, 1998, Woolridge was informed by Indco that its motion to dismiss had been granted on November 4, 1997. Woolridge then filed a motion pursuant to CR 60.02 to set aside the order dismissing the suit. On May 27, 1998, the circuit court denied Woolridge's CR 60.02 motion. This appeal followed.

First, this Court must consider whether Woolridge timely appealed the November 4, 1997, order dismissing his claim. Indco has raised the issue because Woolridge did not file his notice of appeal until May 28, 1998, more than six months after the order was entered into the docket. CR 73.02(1)(a) states

that a "notice of appeal shall be filed within 30 days after the date of notation of service of the judgment or order under Rule 77.04(2)." Under CR 77.04(2), the time to appeal begins to run either from the date of notation of service of entry of the judgment, or from the date of filing a waiver if made prior thereto. In the present case, the clerk failed to note the service of entry of the judgment in the docket; therefore, the time for filing the notice of appeal as required by CR 73.02(1) began to run when Woolridge filed his waiver of notice on May 26, 1998. Contrary to Indco's assertion, CR 77.04(4) does not address the situation in the case of the clerk's failure to note in the docket the service of entry of the judgment. As expressed in CR 58(1), the clerk's additional notation of service of entry of the judgment is what governs the running of time for an appeal, not the clerk's notation of entry of the judgment.

Next, we are faced with determining whether Indco's motion to dismiss should be treated as a motion to dismiss under CR 12.02(f) or a motion for summary judgment under CR 56.02. CR 12.02 provides, in pertinent part:

If, on a motion asserting the defense that the pleading fails to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given a reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

When Indco's motion to dismiss was filed, there was no evidence of record, by way of depositions, answers to interrogatories, admissions, stipulations or affidavits. Indco did submit a memorandum in support of its motion to dismiss; however, the

statements made therein are not within the category of "matters outside the pleadings." CR 12.02; Spillman v. Beauchamp, Ky., 362 S.W.2d 33 (1962). Thus, this Court views Indco's motion to dismiss as one for failure to state a claim under CR 12.02. Accordingly, we must presume in review that all the factual allegations in the complaint are true and must draw any reasonable inference in favor of Woolridge. Under CR 12.02(f) a claim should be dismissed if "it appears to a certainty that the claimant is entitled to no relief under any state of facts which could be proved in support of the claim." Tucker & Assoc. v. Scott & Ritter, Inc., Ky. App., 842 S.W.2d 873, 874 (1992), citing Spencer v. Woods, Ky., 282 S.W.2d 851 (1955).

Although not clearly stated under the facts averred in his complaint, Woolridge appears to plead the existence of a writing which would support his claim of a promise for a five year employment contract. In addition, the absence of a writing evidencing the contract would not be fatal to relief sought on the theory of promissory estoppel. The circuit court erred in granting Indco's motion to dismiss under CR 12.02.

For the reasons stated above, we reverse the Jefferson Circuit Court order entered on November 4, 1997, which dismissed Woolridge's suit. Because we reverse the November 4, 1997, order, appeal No. 1998-CA-001322-MR is rendered moot.

MILLER, CONCURS.

McANULTY, JUDGE, CONCURS IN RESULT.

BRIEF FOR APPELLANT:

Samuel G. Hayward
Philip C. Kimball
Louisville, Kentucky

BRIEF FOR APPELLEE:

C. Laurence Woods III
Erin M. Roark
Louisville, Kentucky