

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-001861-MR

KARL G. BERGKLINT

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE F. CONLIFFE, JUDGE
ACTION NO. 95-CI-04898

FIFTH THIRD BANK OF KENTUCKY

APPELLEE

OPINION
AFFIRMING IN PART - REVERSING IN PART AND REMANDING
** **

BEFORE: COMBS, EMBERTON AND GUIDUGLI, JUDGES.

GUIDUGLI, JUDGE. Karl G. Bergklint (Bergklint) appeals an order of the Jefferson Circuit Court entered on June 25, 1998, granting summary judgment in favor of The Fifth Third Bank of Kentucky, Inc. (Fifth Third) on his wage and hour claim arising under KRS 337.385 and on his claim of fraud. We affirm in part and reverse in part and remand.

Bergklint began working for the Cumberland Federal Savings Bank (Cumberland) on January 29, 1982, as a financial analyst. He worked for Cumberland for the next twelve years until he was terminated on September 1, 1994. In December of 1993, prior to his termination, Fifth Third began merger talks

with Cumberland. On or about August 27, 1994, Cumberland merged with Fifth Third. Bergklint claims that despite repeated assurances that he would "be kept on," Fifth Third terminated his employment on September 1, 1994.

Bergklint claims that throughout 1994, Fifth Third management personnel assured him that his employment would continue with Fifth Third following the merger. Although Bergklint was an at-will employee, he signed an employment agreement with Fifth Third on July 26, 1994, wherein Fifth Third agreed not to terminate his employment prior to publication of financial results covering at least thirty days of post-merger operations. Bergklint contends the publication date of the post-merger operations report was October 14, 1994. Fifth Third paid Bergklint only through October 10, 1994, the date they alleged to be the publication date. In addition, Fifth Third paid Bergklint \$25,089.00 in severance pay. Bergklint never contacted Fifth Third regarding the additional week's pay of \$1,325.00 owed to him.

During the merger talks, Bergklint was one of forty-two applicants for a position as Chief Financial Officer of the Oldham County Public Schools, a position that paid approximately \$50,000.00 per year. After the initial screening process, Bergklint remained as one of five and eventually one of three candidates for the position. However, Bergklint later removed himself from consideration for the position, informing the Oldham County Department of Education (OCDE) that he planned to stay at Fifth Third.

On August 31, 1995, Bergklint filed a complaint in the Jefferson Circuit Court alleging fraud. His claim for fraud sought damages based upon his lost salary with the OCDE. On May 29, 1996, Bergklint filed his First Amended Complaint, adding claims against Fifth Third for a violation of KRS 337.385 and breach of contract. Prior to filing the amended complaint, Bergklint did not seek a hearing through the Labor Cabinet regarding his claim under KRS 337.385. Under his statutory violation claim, Bergklint sought \$2,385.00 for unpaid compensation, the same amount as liquidated damages and reasonable costs and attorney's fees. Under his breach of contract claim, Bergklint sought \$1,325.00 in unpaid severance benefits.

After a lengthy discovery period, both parties moved the trial court for summary judgment. On June 25, 1998, the trial court granted summary judgment in favor of Bergklint on his claim of breach of contract and awarded Bergklint \$1,325.00. However, with regard to the wage and hour claim under KRS 337.385 and the claim of fraud, the trial court granted summary judgment in favor of Fifth Third. The trial court held that pursuant to KRS 337.310(1), it did not have original jurisdiction to hear the wage and hour claim made under KRS 337.385. The trial court found that original jurisdiction for a wage and hour claim under KRS 337.385 lies with the Labor Cabinet. Further, with regard to fraud, the trial court held that Bergklint's claim for damages was merely speculative and that he could not prove actual damages. This appeal followed. On September 14, 1998, and

October 27, 1998, Fifth Third tendered three checks to Bergklint totaling \$2,650.00: \$1,325.00 representing the amount owed to Bergklint for one week's severance pay and an additional \$1,325.00 for five days pay between October 10, 1994, and October 14, 1994.

Bergklint raises two issues on appeal. First, Bergklint argues that the trial court did in fact have original jurisdiction to hear his claim under KRS 337.385. Second, Bergklint argues that the damages under his claim for fraud were not speculative. Fifth Third argues that Bergklint's claim under KRS 337.385 is moot because it has paid the additional week's pay to Bergklint. Moreover, Fifth Third argues that the trial court appropriately granted summary judgment in its favor with regard to this claim because Bergklint did not exhaust applicable administrative procedures as required by law. Finally, Fifth Third argues that Bergklint did not establish the elements of fraud and, specifically, that his claim for damages was speculative thus barring recovery for fraud.

Bergklint claims that he is entitled to recover actual damages, liquidated damages and reasonable costs and attorney's fees associated with Fifth Third's failure to pay him one week's salary from October 10, 1994, through October 14, 1994, as contracted. As such, he filed an original action in circuit court but without first pursuing administrative remedies. However, pursuant to KRS 337.310(1), claimants must generally exhaust all administrative remedies for violations of KRS 337.020

to 337.405 prior to seeking redress in circuit court.

Specifically, KRS 337.310(1) states:

All questions of fact arising under KRS 337.020 to 337.405 except as provided in this section, shall be decided by the secretary. There shall be no appeal from the decision of the secretary on any question of fact, but there shall be a right of review by the circuit court. . . .¹

In interpreting KRS 337.310, we held in Early v. Campbell County Fiscal Court, Ky.App., 690 S.W.2d 398, 399 (1985), that while the circuit court "is a court of competent jurisdiction [to hear wage and hour claims] . . . it is not one of original jurisdiction." We revisited the issue of a circuit court's jurisdiction to address wage and hour issues in Noel v. Season-Sash Inc., Ky.App., 722 S.W.2d 901 (1987), where we significantly clarified the Early decision. In Noel we held that where a claim for earned but unpaid wages stems from the breach of a written contract, a claimant is not required to exhaust administrative remedies prior to filing an action in circuit court. Distinguishing between claims that arise by virtue of the wage and hour statutes and claims that arise by virtue of a written contract, we held:

[I]n those instances where an employee alleges he is not receiving the benefits mandated by the wage and hour chapter, we find no defect in KRS 337.310(1) which requires that he take such a claim to the Commissioner of Labor for a hearing and resolution, subject, of course, to appropriate judicial review. However, where,

¹This statute was amended in 1996 by the Kentucky General Assembly. However, Bergklint filed this action in August of 1995, prior to the amendment. Therefore, we rely on the former language of KRS 337.310 in this decision.

as in the instant case, an employer and employee have contracted for certain wages and benefits, a claim for wages arising from that contract is clearly a matter for which jurisdiction is vested in our trial courts.

Id. at 902 (emphasis in the original).

In the case sub judice, Bergklint claims that Fifth Third failed to pay him a week's salary to which he was entitled by virtue of a written contract. As we held in Noel, the fact that:

he made reference to certain sections of KRS 337 in his complaint did not otherwise destroy the underpinnings of his claim. Furthermore, we believe it appropriate for the appellant to have mentioned these statutory provisions in order to recover double damages, costs and attorney's fees as provided for in KRS 337.385. That one can recover these damages in state court actions for breach of contract in wage-related cases was [decided in]... Healthcare of Louisville v. Kiesel, Ky. App. 715 S.W.2d 246 (1986)....

Id. at 903. We agree with Bergklint that his claim for additional wages is based upon a written contract with Fifth Third. As such, the trial court had original jurisdiction to hear Bergklint's wage and hour claim and award damages pursuant to KRS 337.385.

Fifth Third argues that Bergklint's claim pursuant to KRS 337.385 is moot because it paid Bergklint \$1,325.00 in actual damages after the trial court granted summary judgment. However, Bergklint sought liquidated damages and reasonable costs and attorney's fees as well in his complaint and again raised the issue in this appeal. The trial court below did not consider the issue of liquidated damages and costs and attorney's fees because

it incorrectly held that it lacked jurisdiction to hear the wage and hour claim pursuant to KRS 337.385. In light of our finding that original jurisdiction lies with the trial court in wage and hour claims pursuant to KRS 337.385, which are based upon breach of contract, we must reverse the trial court's decision to grant summary judgment in favor of Fifth Third on the statutory claim and remand this case for further consideration with regard to Bergklint's liquidated damages, costs, and attorney's fees.

Bergklint next argues that the trial court erred in granting summary judgment in favor of Fifth Third regarding his fraud claim. We disagree. "Under familiar principles of law, the findings of fact of a trial judge will not be disturbed on appeal unless found to be clearly erroneous." Mobley v. Armstrong, Ky., 978 S.W.2d 307, 310 (1998) (citations omitted). The law requires Bergklint to prove fraud by clear and convincing evidence. Wahba v. Don Corlett Motors, Inc., Ky.App., 573 S.W.2d 357 (1978). In order to establish fraud, Bergklint must prove:

1. a material misrepresentation;
2. which is false;
3. known to be false or made recklessly;
4. made with inducement to be acted upon;
5. acted in reliance thereon; and
6. causing injury.

Id. at 359.

Bergklint argues that he relied on Fifth Third's assurances of continued employment when he withdrew his name from consideration for the position of Chief Financial Officer with the OCDE. His salary as Chief Financial Officer would have been

approximately \$50,000.00 per year. The trial court held that Bergklint's basis for damages was speculative. We agree. Bergklint was not offered the job of Chief Financial Officer and remained one of three candidates for the position at the time he withdrew his name from consideration. Clearly such a basis for damages is speculative. We held in Johnson v. Cormney, Ky.App., 596 S.W.2d 23, 27 (1979), that:

As a general rule, the measure of damages for fraud is the actual pecuniary loss sustained, and one injured by the commission of fraud is entitled to recover such damages in a tort action as would place him in the same position as he would have occupied had he not been defrauded. 37 Am.Jur.2d Fraud and Deceit s 342; and Sanford Construction Co. [v. S & H Contractors, Inc., Ky. 443 S.W.2d 227 (1969)]. All recoverable damages are subject to some uncertainties and contingencies, but it is generally held that the uncertainty which prevents a recovery is uncertainty as to the fact of damage and not as to its amount. Where it is reasonably certain that damage has resulted, mere uncertainty as to the amount does not preclude one's right of recovery or prevent a jury decision awarding damages. 22 Am.Jur.2d Damages s 23 and s 25; Kellerman v. Dedman, Ky., 411 S.W.2d 315 (1967); and Roadway Express, [Inc. v. Don Stohlman & Assoc., Inc., Ky., 436 S.W.2d 63 (1969)].

(emphasis added).

Bergklint cannot recover damages when he voluntarily withdrew his name from consideration for the position of Chief Financial Officer for the OCDE. There is no evidence that Bergklint would "in fact" have been offered the job by the OCDE if he had not withdrawn. The trial court correctly held that

Bergklint could not recover under a claim for fraud based upon speculative damages.²

For the foregoing reasons, the decision of the trial court granting summary judgment in favor of Fifth Third regarding Bergklint's claim for fraud is affirmed; the decision of the trial court granting summary judgment in favor of Fifth Third regarding Bergklint's statutory wage and hour claim is reversed and this case is remanded for proceedings consistent with this opinion.

ALL CONCUR.

ORAL ARGUMENT FOR APPELLANT:

H. Kevin Eddins
Louisville, KY

BRIEF FOR APPELLANT:

H. Kevin Eddins
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BRIEF AND ORAL ARGUMENT FOR
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J. Mark Grundy
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²We note that the trial court only considered the issue of damages in its opinion and order and did not find that Bergklint had proven any other element of fraud.