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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1999-CA-002080-MR

MARCEL AND PAMELA PITTON — APPELLANTS

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE ERNEST A. JASMIN, JUDGE
ACTION NO. 98-CI-003700

J.J. CARTER AND SONS MOVING AND STORAGE, INC.; ALLIED VAN LINES, INC.; AND EHMKE/KENTUCKY MOVERS, INC. — APPELLEES

OPINION
AFFIRMING
** ** ** ** **

BEFORE: HUDDLESTON, JOHNSON AND SCHRODER, JUDGES.

JOHNSON, JUDGE: Pamela and Marcel Pitton have appealed from an order entered by the Jefferson Circuit Court on August 6, 1999, granting summary judgment in favor of Allied Van Lines, Inc.; Ehmke/Kentucky Movers, Inc.; and J. J. Carter & Son Moving and Storage, Inc. Having concluded that there is no genuine issue of material fact and that the defendants were entitled to judgment as a matter of law, we affirm.

On April 21, 1998, Pamela Pitton contacted J. J. Carter to inquire about services to assist her family in its move from Louisville, Kentucky to Dallas, Texas.[1] A few days later, Wes Caudill, a representative of J. J. Carter, came to the Pittons' residence to do an analysis of their house and to provide an estimate for the cost of services. The Pittons informed Caudill that they intended to move on May 22, 1998, and would need J. J. Carter to store their property until they found a home in Dallas. On April 23, 1998, Mrs. Pitton signed a document provided by J. J. Carter entitled "Estimated Cost of Services".[2] According to Mrs. Pitton, she believed this document was the contract which controlled her property being stored in Louisville.

On May 22, 1998, representatives of J. J. Carter arrived at the Pitton home and loaded their property onto a trailer. Mrs. Pitton claims that at the end of the day she was asked to sign numerous documents. One of the documents that Mrs. Pitton signed was entitled "Kentucky Household Goods, Bill of

[1]J. J. Carter & Son was a local representative of the national moving corporation, Allied Van Lines.

[2]The total estimated cost of services was $1,320.00. The estimate listed the following charges: "Pickup or delivery for storage in transit 11000 lbs. @ 7.50 $825.00"; "Storage in transit at 11000 lbs. @ 2.50 $275.00"; "Warehouse handling in storage 11000 lbs. @ 2.00 $220.00"; "[T]ake out of storage $220.00". Obviously, this estimate did not include the delivery to Dallas, Texas.

Lading and Freight Bill."[3] Mrs. Pitton testified in her deposition that she signed the Bill of Lading without reading it.

On the left side of the first page of the Bill of Lading is a section that has a highlighted, enlarged title that reads, "THIS IS A TARIFF LEVEL OF CARRIER LIABILITY: IT IS NOT INSURANCE". This section provides:

> Unless the shipper expressly releases the shipment to a value of 60 cents per pound per article, the carrier's maximum liability for loss and damage shall be either the lump-sum value declared by the shipper or an amount equal to $1.25 for each pound of weight in the shipment, whichever is greater. The shipment will move subject to the rules and conditions of the carrier's tariff.
>
> not exceeding $[/s]45,000
> (To be completed by the person signing below)
>
> The shipper signing this contract must insert in the space above in his own handwriting, either his declaration of the actual value of the shipment, or the words "60 cents per pound per article", otherwise the shipment will be deemed released to a maximum value equal to $1.25 times the actual or constructive weight of the shipment in pounds.
>
> OR
>
> The shipper may declare this shipment released with Full Value Protection (with at least $3.50 per pound minimum value indicated above) by initialing the following:
>
> TARIFF FULL VALUE PROTECTION_____
>
> NOTE: If Full Value Protection is initialed but no value is stated above, then the

[3]The bottom of the front page of the Bill of Lading indicates that it is "Form #KY 110695 Revised 11/95." This is in apparent reference to a Transportation Cabinet form.

shipment will be released with a minimum value of $3.50 per pound.

Signed [/s] Pam Pitton
Shipper

Mrs. Pitton filled in the blank on the form with "45,000" in her own handwriting, and signed the document directly underneath this section. Additionally, the first paragraph of this section has the word "VALUATION" running conspicuously down the left side in large, highlighted letters. Mrs. Pitton claims that she asked one of the movers what this section covered and he responded, "it's getting late. Well, most people put down $45,000." Mrs. Pitton claims that she knew that this was not the correct value of her property, but that she went ahead and put it down with the intention of calling J. J. Carter's office on the next working day to make further inquires about having her property fully insured.

On May 26, 1998, the Tuesday following Memorial Day, Mrs. Pitton contacted J. J. Carter and spoke with its Customer Service Manager, Pamela Tkac. Mrs. Pitton claims that upon asking Tkac about insurance coverage for her property while it was in storage, she was told, "You don't need insurance when it's in storage, because the only thing that can happen would be either a fire or a tornado, and J. J. Carter is fully covered for that."[4] Pitton claims that because of this conversation, she did not pursue insurance coverage any further.

[4]Tkac does not recall making such a statement. But, of course, for the purposes of summary judgment, we must accept Mrs. Pitton's version as fact.

Mrs. Pitton claims that she gave Caudill instructions to store her property in J. J. Carter's warehouse vault. J. J. Carter has admitted that the Pittons' property was never unloaded from the trailer and instead was stored in the trailer. On June 1, 1998, J. J. Carter transferred all of its contractual rights and obligations to Ehkme.[5] On June 7, 1998, the Pittons' property was stolen, and 80% of their property was either damaged or never recovered.

On July 6, 1998, the Pittons filed a complaint against Allied, Ehmke, and J. J. Carter alleging breach of contract, negligence, fraudulent misrepresentation, bailment, and violation of the Kentucky Consumer Protection Act. On August 6, 1999, the Jefferson Circuit Court entered an order granting summary judgment in favor of the defendants, limiting their liability to the $45,000 valuation that Mrs. Pitton had entered on the Bill of Lading. This appeal followed.

Under the law of Kentucky, summary judgment is only proper "where the movant shows that the adverse party could not

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[5]Shortly after the incident, Ehmke attempted to resolve the situation by offering to pay the Pittons the $45,000 that Mrs. Pitton had inserted on the Bill of Lading. J. J. Carter has likewise admitted that it breached a duty owed to the Pittons by failing to adequately store their property, but it has maintained that its breach resulted in no harm to the Pittons since the property was not stolen until after its assets had been transferred to Ehmke. Furthermore, it argues that any claim against it has been discharged by Ehmke's offer to pay the Pittons $45,000. For the purposes of this appeal, it is not necessary to resolve J. J. Carter's and Ehmke's respective liability. But, suffice it to say, we are of the belief that any allocation of liability between these two defendants would have best been addressed by cross-claims.

prevail under any circumstances."[6] "The moving party has the initial burden of showing that no genuine issue of a material fact exists, then the other party must refute the contentions of the moving party. If the moving party does not sustain his burden, or if the opposing party is successful in rebutting, then the summary judgment should not be granted."[7] The circuit court must view the record "in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor."[8] "The trial judge must examine the evidence, not to decide any issue of fact, but to discover if a real issue exists."[9] The standard of review on appeal of a summary judgment is "whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law" [citations omitted].[10]

In order to defeat a properly supported summary judgment motion, the party opposing the motion must present some

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[6]Steelvest, Inc. v. Scansteel Service Center, Inc., Ky., 807 S.W.2d 476, 480 (1991)(reaff'g Paintsville Hospital Co. v. Rose, Ky., 683 S.W.2d 255 (1985).

[7]Roberts v. Davis, Ky., 422 S.W.2d 890, 894 (1967)(citing Robert Simmons Construction Co. v. Powers Regulator Co., Ky., 390 S.W.2d 901 (1965); Conley v. Hall, Ky., 395 S.W.2d 575 (1965); and Spencer, et al. v. Leone, et al., Ky., 420 S.W.2d 685 (1967). See also Hartford Insurance Group v. Citizens Fidelity Bank & Trust Co., Ky.App., 579 S.W.2d 628, 630-31 (1979).

[8]Steelvest, supra (citing Dossett v. New York Mining & Manufacturing Co., Ky., 451 S.W.2d 843 (1970)).

[9]Id. at 480.

[10]Scifres v. Kraft, Ky.App., 916 S.W.2d 779, 781 (1996).

affirmative evidence that a genuine issue of material fact exists for trial.[11] While summary judgment is not to be used to deny litigants their right to trial if they have issues to try, it is appropriate "to terminate litigation when, as a matter of law, it appears that it would be impossible for the respondent to produce evidence at the trial warranting a judgment in his favor."[12]

While there are various factual disputes surrounding this transaction, a factual dispute does not preclude entry of summary judgment, unless it relates to a material fact. From our analysis of the undisputed facts in this case and the questions of law presented, we conclude that there are two questions of law to be decided that will determine whether the trial court's granting of summary judgment in favor of the defendants was correct. First, was the trial court correct in ruling that the Bill of Lading was the controlling document as to the defendants' liability for transit storage? Second, if the Bill of Lading was the controlling document, may Mrs. Pitton as an intrastate shipper avoid the legal consequences of a limitation of liability provision contained in the Bill of Lading issued by the carrier and signed by her on the ground that she did not read the document and therefore did not agree to its provisions?

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[11]Steelvest, supra at 482; and Continental Casualty Company, Inc. v. Belknap Hardware and Manufacturing Company, Ky., 281 S.W.2d 914 (1955).

[12]Steelvest, 807 S.W.2d at 480; see Paintsville Hospital Co. v. Rose, Ky., 683 S.W.2d 255 (1985).

In its opinion, the trial court first addressed Allied's possible liability to the Pittons. The trial court ruled:

> Both EHMKE [sic] and Carter are local representatives of Allied. Allied only collects fees from such representatives upon interstate transfers of goods. Thus, no agency relationship exists as to intrastate matters and Allied can have no liability for the acts of Ehmke or Carter. Further, as argued by Allied, had there actually been an interstate transfer, the liability for loss would have been governed by the Carmack Amendment. While the Plaintiffs contend that the Defendants have not met their burden thereunder, the evidence proves that they have in that Ms. Pitton was shown the Bill of Lading and given a choice as to whether or not to accept the tariff rates or to enter her own valuation of her property. She chose the latter option and was issued the Bill.

The appellees have argued throughout this case that their liability was properly limited pursuant to the terms of the Bill of Lading, which was in compliance with KRS[13] 355.7-309(2), which provides:

> (2) Damages may be limited by a provision that the carrier's liability shall not exceed a value stated in the document if the carrier's rates are dependent upon value and the consignor by the carrier's tariff is afforded an opportunity to declare a higher value or a value as lawfully provided in the tariff, or where no tariff is filed he is otherwise advised of such opportunity; but no such limitation is effective with respect to the carrier's liability for conversion to its own use.

[13]Kentucky Revised Statutes.

The trial court accepted the appellees' argument and ruled that they had met their burden under KRS 355.7-309(2):[14]

> EHMKE's [sic] obligation was to perform the contracts of Carter according to their terms. By failing to store and protect the Plaintiff's goods properly, it clearly breached the Carter contract with the Plaintiffs. However, by offering the $45,000.00 stated value, it complied with the contractual provisions governing in the event of breach. Therefore, it's liability is properly limited as permitted by K.R.S. 355.7-309.

The Pittons are correct that before a carrier can rely upon KRS 355.7-309 to limit its liability, it must first meet several requirements. From the undisputed material facts of record, we hold that all of these requirements were met. The statute requires that the shipper be given an opportunity declare the value of the goods; and Mrs. Pitton was given this opportunity. When Mrs. Pitton was asked in her deposition about the limitation of liability, the following colloquy occurred:

> [F. Larkin Fore Attorney for Allied & Ehmke]:
> Q. This document indicates that you're declaring that the value of the entire shipment is $45,000. That number

[14]The Carmack Amendment is not applicable to this case. In 1906, Congress enacted the Carmack Amendment so as to create a national policy regarding an interstate carrier's liability for property loss. New York, New Haven & Hartford Railroad Co. v. Nothnagle, 346 U.S. 128, 131, 97 L.Ed. 1500, 73 S.Ct. 986 (1953). The Sixth Circuit, along with seven other circuits, have held that the Carmack Amendment preempts state and common law claims and remedies for cargo damaged in interstate transport. W.D. Lawson & Co. v. Penn Central Co., 456 F.2d 419, 421 (6th Cir. 1972). Thus, since the Pittons' property was damaged in intrastate transport, the Carmack Amendment is not applicable to this case. However, KRS 355.7-309 is significantly similar to the Carmack Amendment.

written in there, is that your handwriting?

[Pamela Pitton]
A. It is.

Q. And is that your signature that appears below that?

A. Yes.

Q. Do you know whose signature that is at the bottom of the page?

A. It's Maurice, who was the head driver.

Q. Tell me how you arrived at the number of $45,000.

A. When they were done moving us that day, and I was signing all the paperwork, Maurice said to me: Do you want insurance? And I said to him: You mean what's in storage? And he said, yes. And I said: Wes Caudill did not discuss insurance with me at all in any of the conversations that we had with him. And I said: I don't know anything about insurance for storage. I don't know what it costs. I don't know what it covers. He said: Well — he looks at his watch — it's getting late. He said: Well, most people put down $45,000.

Q. Mr. Sydnor said this to you?

A. Yes, he did. And I stopped — I knew that was not the value of our goods, but because it was late and I didn't have anymore information, I went ahead and I put $45,000 down, and I said to him: I'll call the office on Tuesday — since Monday was a holiday — and I'll find out what I need to do to have the right amount of insurance.

Q. And did you do that?

A. Yes, I did. I called Tuesday morning.

Q. And to whom did you speak?

A. I asked for Wes. Wes was out of the office, so I talked to Pam, who I had had many conversations with prior to this.

Q. Pam?

A. She's the move coordinator.

Q. Do you know what her last name is?

A. I read it in one of the other depositions, but I don't know what it is. Something like Tack.[15]

Q. Oh, okay. And tell me the sum and substance of the conversations with Pam Tack.

A. I told Pam about when we were getting ready to leave that night — I said, I didn't know anything about insurance. I had no previous knowledge of any information about insurance because Wes did not talk about it. I told her that upon Maurice's recommendation I put down $45,000, but I would call and find out what I needed to do to have the right amount of insurance. She said: You don't need insurance when it's in storage, because the only thing that can happen would be either a fire or a tornado, and J. J. Carter is fully covered for that. So I said: So I don't need insurance when it's in storage? She said: Oh, no. Only for your long-haul when you move from Louisville to Dallas.

Q. So at the time of that conversation, what did you conclude from that?

A. That my goods were in storage, and I didn't need insurance, because nothing would happen to my goods except a fire or a tornado, and J. J. Carter would be fully covered.

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[15]The correct spelling is "Tkac."

Q. And Pam Tack is the one who told you this?

A. Yes.[16]

In their brief the Pittons argue:

> In this case, the sworn deposition testimony makes it clear that the Pittons were never given, by any of the Appellees, a choice of liability coverage; nor were they given a reasonable opportunity to choose from available options of liability insurance coverage for their property while in storage. Thus, there was never an agreement made by the Pittons as to their choice of liability coverage on their stored property.

In light of the language in the contract, we cannot accept this argument. The contract provided Mrs. Pitton with five options for coverage: "60 cents per pound per article"; "$1.25 times the actual or constructive weight of the shipment in pounds"; "the lump-sum value declared by the shipper"; "Full Value Protection";[17] "value stated"; or "Full Value Protection" and "no value is stated." Mrs. Pitton chose "the lump-sum value declared by the shipper" by inserting the amount of $45,000 and signing at the bottom of the page.

The back of the Bill of Lading contains a section that has been blocked off with large block letters running vertically

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[16]Mrs. Pitton has not alleged that anyone coerced her into writing in the amount of $45,000.00.

[17]The cost for "Full Value Protection" is not clear from the record. However, the Bill of Lading states that the cost is to be "at least a $3.50 per pound minimum value." The form also states, "If Full Value Protection is initialed but no value is stated above, then the shipment will be released with a minimum value of $3.50 per pound."

down the left side. The heading states: "THIS IS TRANSIT PROTECTION NOT INSURANCE" and provides, in pertinent part, as follows:

> Section 1: The Carrier shall be liable for physical loss of or damage to any articles from external cause while being carried or held in storage-in-transit . . . [emphasis added].
>
> The carrier's maximum liability shall be either:
>
> (1) The amount of the actual loss or damage not exceeding $1.25 times the actual or constructive weight (in pounds) of the shipment, or the lump sum declared value, whichever is greater; or Replacement Value if shipment is released at $3.50 times the actual or constructive weight in pounds of the shipment or;
>
> (2) The actual loss or damage not exceeding sixty (60) cents per pound of the weight of any lost or damaged article when the shipper has released the shipment to carrier, in writing with liability limited to sixty (60) cents per pound per article.

The Pittons claim that Mrs. Pitton did not understand the significance of the document she was signing because she did not read it. In general, a person who has the opportunity to read a contract, but does not do so and signs the agreement anyway, is bound by the contract terms unless there was some fraud in the process of obtaining her signature.[18]

[18] Cline v. Allis-Chalmers Corp., 690 S.W.2d 764, 766 (Ky.App. 1985) citing Prewitt v. Estate Building and Loan Association, 288 Ky. 331, 156 S.W.2d 173 (1941).

Also, it has been held in this state that a person who has the capacity and opportunity to read the contract and is not misled as to its contents, cannot avoid the contract on the ground of mistake.[19] Mrs. Pitton is a college graduate with a master's degree in psychology and a graduate G.P.A. of 3.9 out of 4.0, who, obviously, can competently read and write. She has not argued that she would have unable to have understood the Bill of Lading, if she had read it.

While Mrs. Pitton has consistently tried to justify her failure to read the Bill of Lading by arguing that it was late in the day and that she had to sign multiple documents, we agree with the trial court that these circumstances are of no legal significance. The Pittons have not argued that J. J. Carter coerced Mrs. Pitton into signing the documents, that its employees were purposefully dilatory in their duties in an attempt to give her less time to review the documents, or that its employees acted fraudulently. Accordingly, there is no legal basis for Mrs. Pitton to deny the fact that she made a conscience decision to set the carrier's liability limit at $45,000.00.

In their brief, the Pittons argue that summary judgment should not have been granted because this case involves contractual intent. They are correct in their argument that an issue of contractual intent is usually inappropriate for summary

[19] Amlung v. First National Lincoln Bank of Louisville, 411 S.W.2d 465, 468 (Ky. 1967) citing Clark v. Brewer, Ky., 329 S.W.2d 384 (1959).

judgment.[20] However, Mrs. Pitton's failure to contemplate the legal significance of inserting $45,000 on the Bill of Lading is a direct result of her failure to read the document that she was signing, not some misunderstanding between the parties as to contractual intent. As previously discussed, her failure to read the document does not excuse her from its provisions.

Finally, the Pittons have failed to establish that the document entitled "Estimated Cost of Services" was the controlling document while their goods were in storage. Our research has not revealed any cases where such a document was the controlling contract between the parties. In all the cases that we have reviewed, including the ones cited by the parties, the controlling contract was always a bill of lading. Furthermore, the "Estimated Cost of Services" document also used the phrase "storage-in-transit." This was the same phrase that was used in the Bill of Lading that Mrs. Pitton signed. In reviewing the "Estimated Cost of Services" document, it is clear that this document was intended to be an estimate for the cost of various services and not the controlling contract between the parties as to liability. One clear indication of the purposes of the two documents is that the Bill of Lading had the necessary language to conform with KRS 355.7-309, whereas the estimate did not. Also, the estimate did not contain Mrs. Pitton's self-valuation of her property.

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[20] White v. Winchester Land Development Corp., Ky.App., 584 S.W.2d 56, 63-64 (1979); and River City Development Corp. v. Slemmer, Ky.App. 781 S.W.2d 525, 526 (1989).

Thus, we hold that as a matter of law the Bill of Lading was the applicable contract in this case as to the appellees' liability; and that Mrs. Pitton's valuation of her property at $45,000 limited the appellees' liability to $45,000. For these reasons, the summary judgment of the Jefferson Circuit Court is affirmed.

SCHRODER, JUDGE, CONCURS.

HUDDLESTON, JUDGE, CONCURS IN RESULT ONLY.

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