

RENDERED: JANUARY 8, 2010; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-001695-MR
AND
NO. 2008-CA-001770-MR

CHRISTINA M. FREITAG

APPELLANT/CROSS-APPELLEE

APPEAL AND CROSS-APPEAL FROM JEFFERSON CIRCUIT COURT
v. HONORABLE CHARLES L. CUNNINGHAM, JR., JUDGE
ACTION NO. 04-CI-007615

BLACK DIAMOND TERMITE
& PEST CONTROL, INC.

APPELLEE/CROSS-APPELLANT

OPINION AFFIRMING

** ** * ** * ** *

BEFORE: FORMTEXT FORMTEXT COMBS, CHIEF JUDGE; TAYLOR,
JUDGE; HENRY, SENIOR JUDGE.

TAYLOR, JUDGE: Christina M. Freitag brings Appeal No. 2008-CA-001695-
MR and Black Diamond Termite & Pest Control, Inc., (Black Diamond) brings
Cross-Appeal No. 2008-CA-001770-MR from a March 23, 2007, summary
judgment of the Jefferson Circuit Court dismissing Freitag's complaint against

Black Diamond. We affirm both Appeal No. 2008-CA-001695-MR and Cross-Appeal No. 2008-CA-001770-MR.

Black Diamond is an Indiana corporation that is engaged in the termite and pest control business and promotes those services in Kentucky. This action arises from pest control services provided by Black Diamond to Freitag. In 1995, Freitag contracted with Black Diamond to treat her home for termite infestation. After Black Diamond initially treated the home, Freitag alleged that termites reinfested the home. Black Diamond then retreated the home for termites at various times during the period of 1995 through 2004. Despite Black Diamond's repeated efforts, the termite infestation persisted, and Freitag became dissatisfied with Black Diamond's services.

Consequently, in September 2004, Freitag filed a complaint against Black Diamond. Therein, she claimed breach of contract, violation of the consumer protection act, breach of warranty, and negligence. Black Diamond filed an answer and, thereafter, filed a motion for summary judgment. Eventually, the circuit court rendered a summary judgment in favor of Black Diamond and dismissed Freitag's complaint in its entirety. These appeals follow.

Freitag contends that the circuit court erred by rendering summary judgment. Specifically, Freitag argues that the circuit court erroneously dismissed her breach of contract claim. We disagree.

Summary judgment is proper where there exist no material issues of fact and movant is entitled to judgment as a matter of law. Kentucky Rules of

S.W.2d 476 (Ky. 1991). In reviewing a summary judgment on appeal, all facts and inferences therefrom are to be viewed in a light most favorable to the nonmoving party. *Id.*

In rendering summary judgment, the circuit court concluded that the relevant terms of the contract between Freitag and Black Diamond were unambiguous and that the facts were undisputed that Black Diamond complied with such terms. In particular, the circuit court reasoned:

During the years that Black Diamond provide[d] termite treatment for Ms. Freitag, they returned repeatedly to her home to re-treat. Ms. Freitag has brought this action contending that Black Diamond did not fulfill its contractual obligation in that her home was not cleared of termite infestation. She asserts that she relied on the business name and the contract in her belief that Black Diamond would rid her home of termites.

The contract between the parties provides, in relevant part, as follows:

WARRANTY: If a live reinfestation is found while this Agreement is in force, BLACK DIAMOND will re-treat the described property without additional costs.

....

In the present action, the contract between the parties is not ambiguous. The plain meaning of the terms of the contract is that Black Diamond will continue to treat re-infestation during the contract period without Ms. Freitag incurring additional costs. There is no dispute that it did so. Consequently, Black Diamond is entitled to summary judgment.

Freitag counters that the circuit court's interpretation of the contractual provisions was "too narrow." In particular, she argues:

The purpose(s) of having "Black Diamond Termite & Pest Control, Inc." provide "pest control" services, for her house, as their business name implies, was to "control" the termites, so as to prevent termite damage to her house. The primary aim of having Black Diamond provide "pest control" was to protect her house from termite damage, not just to have them come out and re-treat every time there was a new termite infestation.

....

If Black Diamond's only responsibility was to re-treat time and time again, then they had no . . . responsibility to kill existing termites or prevent future termites on Ms. Freitag's property, and the contract as a whole would have no real meaning. Under Black Diamond's interpretation of the contract and the warranty provisions, they . . . have no duty to kill existing termites, no duty to prevent future termites, all they have to do is come out and re-treat every time a re-infestation occurs, without regard to whether the treatment kills the termites or prevents future termites. Such an interpretation would be absurd; clearly anyone entering into this contract would expect the purpose of the contract was that the treatments provided would kill the existing termites and help to prevent a re-occurrence of termites, thus providing "pest control" so there would be no damage to their house.

Freitag's Brief at 6-7. Freitag argues that Black Diamond undertook a duty to exterminate existing termites and to prevent future termite infestation of her home. Unfortunately, Freitag fails to cite this Court to any terms in the contract that impose such a duty upon Black Diamond.

The law is well-established that terms of a written contract control in determining the parties' respective duties thereunder. *Geary-Gay Motor Co. v. Chasteen*, 248 Ky. 282, 58 S.W.2d 393 (1933). Moreover, a court may not read words into or add conditions to a contract but is bound to consider the contract as written. *Alexander v. Theatre Realty Corp.*, 253 Ky. 674, 70 S.W.2d 380 (1934). Here, Freitag does not cite this Court to explicit contractual terms that impose a duty upon Black Diamond to eliminate existing termites or to prevent future termite infestation of Freitag's home. Rather, the written terms of the contract merely provide that Black Diamond would treat Freitag's home for termite infestation and would retreat as necessary. We have no doubt that it was the goal of the parties to eliminate termites from Freitag's home. However, it is entirely plausible that some homes cannot be successfully treated for termite infestation. In any event, the written terms of the contract must prevail. *See Chasteen*, 58 S.W.2d 393; *Alexander*, 70 S.W.2d 380. Thus, we do not believe the circuit court erred in this respect.

Alternatively, Freitag asserts that Black Diamond breached the terms of the contract by inadequately performing its duty under the contract to treat her home for termite infestation. Even if Black Diamond did not contract to completely eliminate the termites, she alleges that Black Diamond clearly contracted to treat the home for termites. Freitag believes that a material issue of fact exists as to whether Black Diamond's treatment for termites was substandard, thus breaching its contractual duty to treat her home.

A review of the record reveals that Freitag failed to present any expert opinion upon whether Black Diamond's treatment was substandard. The record does contain Freitag's deposition. Therein, Freitag stated that she was told by a representative from another pest control company that Black Diamond inadequately treated her home for termites. However, we do not think that Freitag's testimony alone is sufficient to create a material issue of fact. To defeat summary judgment, it was incumbent upon Freitag to have filed an affidavit or the deposition of a representative of the pest control company or other qualified expert. Indeed, Freitag is not qualified to express an opinion upon Black Diamond's performance and her recitation of another's opinion in her deposition most likely constituted inadmissible hearsay. Upon the whole, we conclude that no material issue of fact exists and that Black Diamond was entitled to judgment as a matter of law. In sum, we hold that the circuit court properly rendered summary judgment in favor of Black Diamond.

As to Black Diamond's cross-appeal, we assigned no merit to the argument raised therein and view Freitag's direct appeal as timely filed under CR 73.02(1)(d).

For the foregoing reasons, the summary judgment of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

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