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Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-001505-MR

KENTUCKY EMPLOYERS' MUTUAL
INSURANCE CO. APPELLANT

APPEAL FROM FAYETTE CIRCUIT COURT
v. HONORABLE KIMBERLY N. BUNNELL, JUDGE
ACTION NO. 05-CI-02219

WALBERT TRUCKING, INC.;
AND K & L LEASING, INC. APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE AND LAMBERT, JUDGES; HARRIS,[1] SENIOR JUDGE.

ACREE, JUDGE: Kentucky Employers' Mutual Insurance Company (KEMI) appeals an order of the Fayette Circuit Court denying KEMI's motion for summary judgment, granting Walbert Trucking, Inc.'s cross-motion for summary judgment, and dismissing KEMI's complaint against Walbert Trucking. We affirm.

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[1] Senior Judge William R. Harris sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statute (KRS) 21.580.

FACTS AND PROCEDURE

In August 2002, Walbert Trucking, a Kentucky corporation with its principal office in Glasgow, Kentucky, entered into an Employee Leasing Agreement with K & L Leasing, Inc., a Tennessee corporation with its principal office in Gallatin, Tennessee. The Agreement was designed to fulfill Walbert Trucking's workforce needs while freeing the company from the administrative burdens associated with hiring and maintaining employees. Pursuant to the Agreement, Walbert Trucking made a single, lump sum payment each week to K & L Leasing as consideration for the total labor, employee benefit, administrative, and other costs associated with the workforce leased to Walbert Trucking. The following language from the Agreement is particularly relevant to our review.

> K&L shall be responsible for providing its employees with . . . workers compensation . . . . K&L shall furnish to [Walbert Trucking] a Certificate of Insurance concerning K&L's worker's compensation coverage.

Subsequent to executing the Agreement, K & L Leasing, through its president, Ken Brown, worked with a Tennessee insurance agent to secure workers' compensation insurance for the K & L Leasing employees leased to Walbert Trucking and employed in Kentucky. The agent, David London of the Gallatin, Tennessee, insurance brokerage firm of Sirls-London Agency, Inc., provided and completed parts of the application for insurance which is dated May 5, 2003. London acknowledged having no contact with any representative of

Walbert Trucking, but worked only with representatives of K & L Leasing and KEMI.

If the workers' compensation insurance application had been completed in conformity with K & L Leasing's contractual obligations to Walbert Trucking, it would have shown K & L Leasing as the applicant since it was K & L Leasing's employees who were the subjects of the insurance coverage. Unfortunately, it did not.

The application for insurance did identify K & L Leasing's president, Ken Brown, at his Gallatin, Tennessee, address as the contact for accounting and notice purposes. However, Walbert Trucking was identified as the applicant and employer. This was contrary to the Employee Leasing Agreement and entangled Walbert Trucking in personnel matters the Agreement was designed to avoid.

Additionally, the uncontradicted testimony of Walbert Trucking president Thomas Walbert established that his name was forged on the application. The record does not identify the forger. However, the circuit court did find that neither KEMI nor Walbert Trucking was to blame.

Furthermore, on May 5, 2003, when the application was completed, London lawfully could have sold workers' compensation insurance to the Tennessee corporation, K & L Leasing, but not to the Kentucky corporation, Walbert Trucking, since London was not licensed to sell insurance in Kentucky until June 12, 2003.

On the same date as the application, May 5, 2003, K & L Leasing issued a check made payable to KEMI in the amount of $17,998.61, the sum calculated by London as the deposit premium. When KEMI received the application and premium payment from K &L Leasing, KEMI issued the policy of insurance. The record reflects that KEMI received a total of $48,005.00 in premiums, though no monies were ever paid directly by Walbert Trucking.

When Walbert Trucking's president, Thomas Walbert, discovered in December 2003[2] that K & L Leasing was not complying with the Employee Leasing Agreement and had not procured workers' compensation for its own employees in its own name, he contacted insurance broker David London who, at Walbert's urging, canceled the policy initiated by K & L Leasing in the name of Walbert Trucking. He also ended Walbert Trucking's relationship with K & L Leasing. This occurred on or about December 28, 2003. On December 31, 2003, Walbert, on behalf of Walbert Trucking and apparently for the first time in the company's history,[3] procured workers' compensation insurance with a different insurer to protect the individuals who were then engaged in carrying out Walbert Trucking's business.

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[2] Thomas Walbert testified by deposition that just before the KEMI workers' compensation policy was terminated, he received a document entitled "Kentucky Workers Compensation Notice" identifying Walbert Trucking as an insured employer. This appears to be what alerted him to K & L Leasing's failure to comply with the Employee Leasing Agreement. Nothing in the record contradicts this testimony.

[3] For several years prior to initiating its relationship with K & L Leasing, Walbert Trucking had a similar employee leasing arrangement with an Atlanta-based company which, as K & L Leasing was to do, provided workers' compensation insurance for its own employees.

KEMI subsequently conducted an audit of Walbert Trucking's financial records pursuant to a provision of the policy which K & L Leasing had procured in Walbert Trucking's name. This audit revealed an additional $45,697.61 was owed to cover premiums. Walbert Trucking refused to pay.

KEMI filed suit against Walbert Trucking to collect the outstanding amount. Walbert Trucking joined K & L Leasing as a third-party defendant, but K & L Leasing did not respond to the complaint. The trial court entered a default judgment against K & L Leasing.

After substantial discovery, KEMI moved for summary judgment. Walbert Trucking responded and filed its own cross-motion for summary judgment to which KEMI responded. The trial court sustained Walbert Trucking's motion and overruled that of KEMI. This appeal followed.

At the outset, we note that Kentucky Rules of Civil Procedure (CR) requires that an appellant's brief include

> [a]n 'ARGUMENT' conforming to the statement of Points and Authorities, with ample supportive references to the record and citations of authority pertinent to each issue of law and which *shall contain at the beginning of the argument a statement with reference to the record* showing whether the issue was properly preserved for review and, if so, in what manner.

CR 76.12(4)(c)(v). The "Argument" portion of KEMI's brief contains no such statement at its beginning. Under such circumstances, we would be justified in reviewing the record only for manifest injustice. *Elwell v. Stone*, 799 S.W.2d 46, 47 (Ky.App. 1990). However, KEMI does state generally at the end of its

Statement of the Case, without citation there to the record, that it preserved its arguments on appeal by opposing Walbert's Cross-Motion for Summary Judgment. While KEMI has not complied with the letter of the Rule, we will address KEMI's arguments nonetheless. However, we do not intend our willingness to proceed with our review in this instance as establishing any precedent in this regard.

STANDARD OF REVIEW: SUMMARY JUDGMENT

The standard of review on appeal when a trial court grants a motion for 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." *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky.App. 1996); CR 56.03. Whether a trial court erred by denying a summary judgment motion presents the opposite question, *i.e.*, whether the trial court *in*correctly found that there *were* genuine issues of material fact or that the moving party was not entitled to judgment as a matter of law.

In either circumstance, "[t]he trial court must view the evidence in the light most favorable to the nonmoving party, and summary judgment should be granted only if it appears impossible that the nonmoving party will be able to produce evidence at trial warranting a judgment in his favor." *Lewis v. B & R Corp*., 56 S.W.3d 432, 436 (Ky.App. 2001), citing *Steelvest v. Scansteel Service Center, Inc*., 807 S.W.2d 476, 480-82 (Ky. 1991).

"The moving party bears the initial burden of showing that no genuine issue of material fact exists, and then the burden shifts to the party opposing

summary judgment to present 'at least some affirmative evidence showing that there is a genuine issue of material fact for trial.'" *Lewis*, 56 S.W.3d at 436, citing *Steelvest*, 807 S.W.2d at 482. The trial court "must examine the evidence, not to decide any issue of fact, but to discover if a real issue exists." *Steelvest*, 807 S.W.2d at 480. The Kentucky Supreme Court has held that the word "impossible," as set forth in the standard for summary judgment, is meant to be "used in a practical sense, not in an absolute sense." *Lewis*, 56 S.W.3d at 436. "Because summary judgment involves only legal questions and the existence of any disputed material issues of fact, an appellate court need not defer to the trial court's decision and will review the issue *de novo*." *Lewis* at 436.

With this standard as our guide, we review the circuit court's order.

KEMI'S MOTION FOR SUMMARY JUDGMENT WAS PROPERLY DENIED

KEMI presented two arguments to the circuit court as a basis for summary judgment against Walbert Trucking: (1) the existence of a contractual relationship between KEMI and Walbert Trucking; and (2) that Walbert Trucking should be required to pay KEMI on the basis of *quantum meruit*.

A sub-argument presented by KEMI as a premise to establishing liability under both these theories of liability is that Tennessee insurance broker David London was Walbert Trucking's agent. In Kentucky, "the authority of such an agent or broker is a question of fact for the jury[.]" *Stuyvesant Ins. Co. v. Barkett*, 226 Ky. 424, 11 S.W.2d 87, 89 (1928). In sworn testimony, Thomas

Walbert denied any contact with David London before December 2003. To counter that evidence, KEMI points to Walbert Trucking's statement in its cross-motion for summary judgment that "the insurance agent [] had worked with *them* previously." (Emphasis supplied). However, this reference is misleading. It is obvious from its context, and from the remainder of the record, that the pronoun "them" did not refer to Walbert Trucking, but to K & L Leasing and Ken Brown. To the extent KEMI based its own summary judgment motion on the absence of a genuine issue of material fact regarding London's agency, it was destined to, and properly did, fail.

In order for KEMI to have been entitled to summary judgment on the basis of a contract theory, the record would have to be devoid of evidence refuting the existence of the contract; in effect, Walbert Trucking would have to have admitted the existence of the contract. It should be obvious that did not occur and summary judgment could not have been granted in favor of K & L Leasing on its contract claim.

In order for KEMI to be entitled to summary judgment on its *quantum meruit* theory,[4] there would have to be an absence of genuine issues of material fact with regard to each of the theory's four elements. Those elements are:

> 1. that valuable services were rendered, or materials furnished;
>
> 2. to the person from whom recovery is sought;

[4] KEMI did not assert *quantum meruit* in its complaint as a cause of action but only presented it in its motion for summary judgment. We nevertheless review KEMI's argument since, in theory, the circuit court could have allowed the complaint to be amended to include it. CR 15.01.

> 3. which services were accepted by that person, or at least were received by that person, or were rendered with the knowledge and consent of that person; and
>
> 4. under such circumstances as reasonably notified the person that the plaintiff expected to be paid by that person.

Quadrille Business Systems v. Kentucky Cattlemen's Association, Inc., 242 S.W.3d 359, 366 (Ky.App. 2007), citing 66 Am. Jur. 2d *Restitution and Implied Contracts* § 38 (2001). For purposes of our review we will presume the first three elements were established and focus, as KEMI did, on the fourth element. Doing so, we cannot say the record eliminates any genuine issue regarding whether Walbert Trucking was notified that KEMI expected to be paid by Walbert Trucking.

As noted, *supra*, KEMI could not establish that London was Walbert Trucking's agent. Therefore, no notification to London could constitute notification to Walbert Trucking.

But KEMI also claims that Thomas Walbert's receipt of a document entitled "Kentucky Workers' Compensation Notice" constituted notification to Walbert Trucking that KEMI expected premiums to be paid by Walbert Trucking. This argument fails for two reasons.

First, the law requires this document to be posted "where employees customarily report for payroll and personnel matters" so as to "afford every employee the opportunity to become informed about the employer's workers' compensation program." KRS 342.610(6); 803 Kentucky Administrative

Regulations (KAR) 25:200. For K & L Leasing employees who were the subject of the Employee Leasing Agreement, the proper place to post the document was Walbert Trucking's Glasgow, Kentucky, offices. Since K & L Leasing was contractually obligated to secure workers' compensation insurance for such employees, and since the leasing company's Gallatin, Tennessee, address was given to KEMI for purposes of invoicing and notices, and since no invoices were ever sent to Walbert at its Glasgow, Kentucky, offices,[5] it is not reasonable to infer that Thomas Walbert should have thought the "Kentucky Workers' Compensation Notice" was sent for any purpose other than that required by KRS 342.610(6).

Second, Thomas Walbert testified, and that testimony was not met by any contradictory proof, that he did not receive the notice until "right at the end of the policy" in December 2003, immediately before he contacted David London for the first time to see that the policy which he never authorized was canceled. This was after K & L Leasing had made premium payments in excess of $48,000 and before KEMI's audit revealed that an additional $45,697.61 was due. Therefore, the record indicates that when Walbert received what KEMI claims is the notification required by the fourth element of a *quantum meruit* claim, nothing was owed to KEMI.

[5] The insurance documentation initiated by K & L Leasing and completed by David London listed Walbert Trucking with K & L Leasing's Gallatin, Tennessee, address. Walbert Trucking never maintained a Tennessee office.

In view of this evidence of record, KEMI cannot say there was no genuine issue of material fact regarding the fourth element. Therefore, KEMI clearly was not entitled to summary judgment on this theory.

In sum, the Fayette Circuit Court did not err in denying KEMI's motion for summary judgment.

WALBERT TRUCKING'S MOTION FOR SUMMARY JUDGMENT WAS PROPERLY GRANTED AND KEMI'S COMPLAINT PROPERLY DISMISSED

When KEMI urged the circuit court to grant summary judgment in its favor, it viewed the evidence as presenting no genuine issues of material fact. Appealing the grant of summary judgment in favor of Walbert Trucking, KEMI now asserts that such issues do exist. We disagree.

Walbert Trucking sought summary judgment because nothing in the record, considered in a light most favorable to KEMI, established any factual basis to support any legal theory that it was liable to KEMI. The circuit court granted Walbert Trucking's motion on that basis. We agree with the circuit court that summary judgment in favor of Walbert Trucking was warranted.

KEMI's one-paragraph complaint against Walbert Trucking expresses only one simple cause of action – that a sum of money was "due on account." Such a cause of action presumes the existence of an "account" and that means the claim is based upon contract. *M. Livingston & Co. v. Congoleum-Nairn, Inc.*, 244 Ky. 533, 51 S.W.2d 678, 678 (1932)(to recover "balance due on its account[,]" plaintiff was required to establish existence of contract).

KEMI's argument that a contract existed between it and Walbert Trucking totally lacks merit. It was conclusively established that the signature on the application of insurance is not that of Thomas Walbert. Nevertheless, KEMI claims that this fact "does not make it 'impossible' for KEMI to eventually prevail." KEMI asserts that a handwriting expert might provide expert testimony to contradict Walbert's testimony, or that the testimony of other Walbert Trucking employees might "call into doubt Mr. Walbert's recollection," or that a jury might choose not to believe his testimony.

This view reflects a misunderstanding of what our appellate courts mean by their use of the word "impossible" in the context of summary judgment. *Perkins v. Hausladen*, 828 S.W.2d 652, 654 (Ky. 1992). The inability to prevail at trial must be a matter of practical impossibility, not absolute impossibility. *Id.* Consequently, "the focus should be on what is of record rather than what might be presented at trial." *Welch v. Am. Publ'g Co. of Kentucky*, 3 S.W.3d 724, 730 (Ky. 1999). While in the universe of possibilities a jury might reach any number of conclusions about who signed the application, nothing in this record supports any reasonable possibility that Thomas Walbert, or anyone on behalf of Walbert Trucking, entered into an insurance contract with KEMI.

The record does not even create a genuine issue of material fact as to whether the unidentified person who forged the name of "Tom Walbert" was Walbert's agent. As noted above, "the authority of such an agent or broker is a question of fact for the jury[,]" *Stuyvesant Ins. Co.* at 89, *but only "where the*

nature and character of the agency is made an issue by the evidence." *Id.* (emphasis supplied). In this case, agency was not made an issue by the evidence. David London corroborated Walbert's testimony that the two had no contact at the time of or prior to the forgery of Walbert's name on the application. Therefore, on this record, the court would have committed error by allowing a jury to consider whether Walbert's name was written on the application by an agent.

Establishing KEMI's contract cause of action, the only one presented in its complaint, would have been, in a practical sense, "impossible." *Perkins*, 828 S.W.2d at 654. Therefore, the circuit court correctly granted summary judgment and dismissed the case.

On appeal, KEMI makes two additional arguments, one equitable and one statutory. The first, noted above, is that facts were in dispute that, if resolved in favor of KEMI, could justify a finding that Walbert Trucking was liable on a theory of *quantum meruit*. The second is that the circuit court misinterpreted KRS 342.615(4) and relied too much on the Employee Leasing Agreement to absolve Walbert Trucking of its liability to KEMI. We find neither argument persuasive.

We have already made it clear that KEMI could not establish a *quantum meruit* claim because the fourth element of that cause of action, a cause of action not pleaded, could never, in a practical sense on this record, be established.

This leaves KEMI's argument that KRS 342.615(4) operates to override the provision of the Employee Lease Agreement that made K & L Leasing

responsible for securing workers' compensation insurance. This argument is flawed for several reasons.

KRS 342.615(4) specifically states that while Walbert Trucking bears the ultimate "responsibility to secure [workers' compensation] benefits for leased employees[, Walbert Trucking] may fulfill that responsibility by contracting with an employee leasing company to purchase and maintain the required insurance policy." Therefore, the statutory scheme specifically contemplates the Employee Leasing Agreement in this case. By contracting with K & L Leasing, Walbert Trucking satisfied its statutory obligation.[6]

Next, while the obligation imposed by KRS 342.615(4) is a statutory duty, it does not create a private right of action in favor of KEMI. Among the other reasons this is so is that KEMI is not "within the class of persons the statute intended to be protected." *Hargis v. Baize*, 168 S.W.3d 36, 40 (Ky. 2005). That would be the leased employees.

Furthermore, the order granting summary judgment makes no mention of this statute, nor did it need to. The circuit court's ruling was based on the utter absence of a contractual obligation owing from Walbert Trucking to KEMI. The fact that the order and judgment mentioned the persuasive effect of the Employee Leasing Agreement does not bear on any interpretation of KRS 342.615(4). In our

[6] The statute also requires "the lessee to maintain in its files at all times the certificate of insurance, or a copy thereof, evidencing the existence of the required insurance." KRS 342.615(4).

view, it was simply one more bit of evidence that Walbert Trucking did not initiate the contract of insurance with KEMI.

Finally, we are not persuaded by the plea that "[a]dditional discovery could yield information that could strengthen KEMI's case at trial." This is not a case in which discovery was cut off too soon. KEMI filed its complaint on May 19, 2005. There is no order setting a discovery schedule or restricting discovery in any way. After more than three years in which to establish the evidentiary record, summary judgment was properly granted.

For the foregoing reasons, the Fayette Circuit Court's Order and Judgment dated July 17, 2008, is affirmed.

LAMBERT, JUDGE, CONCURS.

HARRIS, SENIOR JUDGE, CONCURS IN PART AND DISSENTS IN PART, AND FILES SEPARATE OPINION.

HARRIS, SENIOR JUDGE, CONCURRING IN PART AND DISSENTING IN PART: I concur in the majority opinion except for the part which affirms dismissal of KEMI's *quantum meruit* claim, from which part I respectfully dissent.

The parties agree that the elements of the *quantum meruit* claim are those outlined in *Quadrille Business Systems v. Kentucky Cattlemen's Association, Inc.*, 242 S.W.3d 359, 366 (Ky.App. 2007), the last of which is that Walbert Trucking be notified that KEMI expected to be paid by Walbert Trucking. It

appears that this is the only disputed element insofar as summary judgment analysis is concerned.

I am persuaded that the KRS 342.610(6) notice which Walbert Trucking admittedly received was sufficient to support a reasonable inference that Walbert Trucking thus knew or reasonably should have known that KEMI expected to have any additional premiums due it paid by Walbert Trucking. Where, as here, conflicting inferences can be drawn from undisputed facts, summary judgment is inappropriate. *Perry v. Motorists Mut. Ins. Co.*, 860 S.W.2d 762, 764 (Ky. 1993).

Accordingly, I would reverse that portion of the judgment under review which affirmed dismissal of KEMI's *quantum meruit* claim and remand that claim for further proceedings. I would affirm the other parts of the judgment.

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