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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-001734-MR

SAM GROSS — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE JUDITH E. MCDONALD-BURKMAN, JUDGE
ACTION NO. 07-CI-009597

ADCOMM, INC.
AND CHRIS PEARSON — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: KELLER, MOORE, STUMBO, JUDGES.

KELLER, JUDGE: Sam Gross (Gross) appeals from an order of the Jefferson Circuit Court entered on August 25, 2009, which granted Chris Pearson's (Pearson) Kentucky Rule(s) of Civil Procedure (CR) 59.05 motion to alter, amend, or vacate the trial court's order entered on April 14, 2009. The April 14, 2009,

order granted summary judgment in favor of Gross and ordered Adcomm, Inc. (Adcomm) to be dissolved. For the reasons set forth below, we affirm.

FACTS

Gross and his son-in-law, Pearson, formed Adcomm in April 2001. Gross and Pearson were each fifty-percent shareholders of Adcomm. Additionally, Gross served as the President and Pearson as the Vice President.

Adcomm is engaged in the business of selling prepaid phone cards and services. Specifically, Adcomm sells pre-paid phone cards, which are referred to as "hard-cards." Adcomm also owns and operates numerous "e-coupon" electronic terminals which validate different long distance and cellular phone cards. By resolution dated June 27, 2002, Gross and Pearson agreed to split Adcomm into two divisions, the hard-card division and the e-coupon division. The minutes of the directors' meeting from that day reflect that Gross was to operate the hard-card division and Pearson was to operate the e-coupon division. The minutes also reflect that Pearson agreed not to interfere with the day-to-day operations of the hard-card division, and Gross agreed not to interfere with the day-to-day operations of the e-coupon division. Additionally, Gross and Pearson agreed to set up separate bank accounts for the two divisions.

Over time, the relationship between Gross and Pearson disintegrated. On August 11, 2005, Adcomm filed suit against Gross in Fayette Circuit Court (Case No. 05-CI-03514). That complaint alleged that Gross failed to report the earnings of the hard-card division, converted funds, owed Adcomm the sum of

$44,411.49 plus interest, and breached his fiduciary duty. The action in the Fayette Circuit Court also sought a full accounting of Adcomm's hard-card division.

Gross filed this action on October 1, 2007 in the Jefferson Circuit Court against Adcomm and Pearson. In his complaint, Gross alleged that he and Pearson, as the shareholders of Adcomm, were deadlocked and requested judicial dissolution of Adcomm pursuant to Kentucky Revised Statute(s) (KRS) 271B.14-300(2)(a). The parties filed cross-motions for summary judgment. On April 14, 2009, the trial court entered summary judgment in favor of Gross and ordered Adcomm to be dissolved. Pearson subsequently filed a motion pursuant to CR 59.05 to alter, amend, or vacate the order granting summary judgment. On August 25, 2009, the trial court entered an order granting Pearson's motion and vacating its April 14, 2009, order. On September 8, 2009, the trial court entered an order making the August 25, 2009, order final and appealable. This appeal followed.

STANDARD OF REVIEW

As noted by the Supreme Court of Kentucky in *Gullion v. Gullion*, 163 S.W.3d 888, 891-92 (Ky. 2005), "a trial court has 'unlimited power to amend and alter its own judgments.'" (Quoting *Henry Clay Mining Co. v. V & V Mining Co.*, 742 S.W.2d 566-67 (Ky. 1987)). As such, we review a trial court's ruling pursuant to CR 59.05 for an abuse of discretion. *Id.* at 892.

ANALYSIS

Gross first contends that the trial court erred in vacating its April 14, 2009, order wherein it granted summary judgment in favor of Gross and ordered Adcomm to be dissolved. We disagree.

CR 59.05 authorizes the trial court to "alter or amend a judgment, or to vacate a judgment and enter a new one" on a motion properly filed by a party within ten days after entry of a final judgment. In *Gullion*, the Supreme Court of Kentucky cited favorably the four grounds recognized by the federal courts in construing the federal counterpart of CR 59.05, Federal Rule(s) of Civil Procedure 59(e):

> There are four basic grounds upon which a Rule 59(e) motion may be granted. First, the movant may demonstrate that the motion is necessary to correct manifest errors of law or fact upon which the judgment is based. Second, the motion may be granted so that the moving party may present newly discovered or previously unavailable evidence. Third, the motion will be granted if necessary to prevent manifest injustice. Serious misconduct of counsel may justify relief under this theory. Fourth, a Rule 59(e) motion may be justified by an intervening change in controlling law.

163 S.W.3d at 893. Based on the preceding, we must first determine whether one of the four grounds for granting a CR 59.05 motion existed in this case.

When originally granting summary judgment, the trial court determined that Adcomm should be dissolved pursuant to KRS 271B.14-300(2)(a). As provided in subsection (2)(a), a circuit court may dissolve a corporation in a proceeding by a shareholder if the shareholder establishes that:

> The directors are deadlocked in the management of the corporate affairs, the shareholders are unable to break the deadlock, and irreparable injury to the corporation is threatened or being suffered, or the business and affairs of the corporation can no longer be conducted to the advantage of the shareholders generally, because of the deadlock[.]

KRS 271B.14-300(2)(a).

The trial court determined that Gross was a shareholder and that there was a deadlock between the shareholders of Adcomm, Gross and Pearson. The trial court further determined that irreparable injury would result if the corporation was not dissolved. Specifically, in concluding that irreparable injury would result, the trial court noted Gross's disagreement with Pearson's decisions to spend corporate funds on legal fees for incidents associated with the way Pearson chose to manage Adcomm. These incidents included a number of lawsuits on behalf of Adcomm and against Adcomm, including a sexual harassment lawsuit filed against Adcomm and Pearson by a former employee. The trial court also noted Gross's assertion that he was being taxed on shareholder income that Pearson never distributed to him.

In its August 25, 2009, order vacating the April 14, 2009, order, the trial court stated that there was "no irreparable injury to the parties at present," and noted the following:

> In its previous order, the Court determined that the needless expenditure of legal fees and tax liability without shareholder income constituted irreparable injury. It was not until the instant motion to vacate that the parties addressed whether the issues regarding

> Adcomm's debts with Gross (if any) would be concretely resolved. Gross tendered the Complaint filed in Fayette Circuit Court against him for purposes of seeking summary judgment. At the time this Court rendered its previous decision, it was aware only of the nature of that action. However, it was unaware of the status of the action.
>
> At oral arguments for the instant motion, the parties informed [the Court] that the Fayette County action was ongoing, and issues such as Gross's tax liability had not been resolved. Whether Gross is owed income, Gross stole from the company, and Pearson mismanaged the funds are facts which will be adjudicated and resolved in the Fayette County action. If the Fayette Circuit Court rules that Gross has proven Adcomm owes him money and Adcomm pays the judgment, then there can be no irreparable injury in this case.

Because there were certain errors of fact upon which the April 14, 2009, order was based, the trial court did not abuse its discretion when it vacated the order. *See Gullion*, 163 S.W.3d at 893.

Even though the trial court properly vacated the April 14, 2009, order, Gross still maintains that the trial court was mandated to dissolve Adcomm because he sufficiently established all of the requirements set forth under KRS 271B.14-300(2)(a). As Adcomm correctly points out, KRS 271B.14-300 states that "[t]he Circuit Court *may* dissolve a corporation" under certain circumstances. (Emphasis added). Kentucky courts have repeatedly affirmed that when considering the construction of statutes, "may" is permissive, and "shall" is mandatory. *Alexander v. S & M Motors, Inc.*, 28 S.W.3d 303, 305 (Ky. 2000). Because KRS 271B.14-300 uses the word "may" instead of "shall," we read it to

authorize, but not mandate, the dissolution of a corporation by the trial court. Thus, even if all of the requirements of KRS 271B.14-300(2)(a) were met in the instant case, the decision of whether to dissolve Adcomm was within the discretion of the trial court.

CONCLUSION

For the foregoing reasons, we affirm the order of the Jefferson Circuit Court.

ALL CONCUR.

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