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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-000755-MR

ARMSTRONG COAL
COMPANY, INC. APPELLANT

v.

APPEAL FROM CLARK CIRCUIT COURT
HONORABLE WILLIAM G. CLOUSE, JR., JUDGE
ACTION NO. 09-CI-00549

EAST KENTUCKY POWER
COOPERATIVE, INC. APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: VANMETER AND WINE, JUDGES; SHAKE,[1] SENIOR JUDGE.

VANMETER, JUDGE: Armstrong Coal Company, Inc. ("Armstrong") appeals from an order of the Clark Circuit Court denying its motion for summary judgment

[1] Senior Judge Ann O'Malley Shake sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

and granting the motion for summary judgment filed on behalf of East Kentucky Power Cooperative, Inc. ("East Kentucky"). For the following reasons, we affirm.

On October 2, 2007, Armstrong and East Kentucky entered into a coal supply contract. The portion of the contract relevant to this appeal, section 1(b), provides as follows:

> The base monthly delivery rate, beginning October 1, 2008, shall be Thirty Thousand (30,000) Tons. BUYER [East Kentucky] shall have the right, upon at least sixty (60) days notice to SELLER [Armstrong], to increase the actual delivery rate by twenty percent (20%) or any amount up to thirty-six thousand (36,000) tons for any given month or decrease the actual delivery rate by ten percent (10%) or any amount down to twenty-seven thousand (27,000) tons for any given month under this Contract. **BUYER shall have the one-time option to increase the annual tonnage of this contract up to an additional one hundred eighty thousand (180,000) tons.** This option must be exercised by July 31, 2008. The actual annual tonnage amount and the total contract tonnage amount, as provided in Section 1(a) above, shall automatically be amended to conform to the actual monthly delivery rates scheduled by BUYER from time to time pursuant to this Section, so that the total contract tonnage amount at the end of the term of this Contract will reflect the cumulative changes in scheduled deliveries made by BUYER pursuant to this Section 1(b).

(Emphasis added).

In a letter dated June 30, 2008, East Kentucky notified Armstrong as follows:

> Pursuant to Section 1(b) of the subject contract, East Kentucky Power Cooperative, Inc., ("EKPC") does hereby give notice to increase the base monthly delivery rate to 45,000 tons per month effective October 1, 2008. This increase will change monthly deliveries from the

> current level of 30,000 tons per month to 45,000 tons per month. This change will continue until further notice by EKPC.
>
> All other terms and conditions of the subject contract shall remain the same.

Armstrong disputed whether East Kentucky properly exercised the option under the contract. As a result, East Kentucky brought the underlying action seeking a declaration of its rights and duties under the contract: specifically seeking a declaration that Armstrong was required to supply 180,000 additional tons for each year of the contract term for a total of 585,000 tons over the entire contract term.

No factual issues being in dispute, both parties filed cross-motions for summary judgment. The trial court granted summary judgment in favor of East Kentucky, finding that East Kentucky had properly exercised the option to increase the tonnage to be supplied under the contract by an additional 15,000 tons per month (180,000 tons per year) and that Armstrong was therefore obligated to supply East Kentucky an additional 585,000 tons of coal over the term of the contract. This appeal followed.

On appeal, Armstrong claims the trial court erred by denying its motion for summary judgment and by granting summary judgment in favor of East Kentucky because East Kentucky's notice to exercise the option under the contract was insufficient as a matter of law. We disagree.

Summary judgment shall be granted only if "the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR[2] 56.03. The trial 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." *Steelvest, Inc. v. Scansteel Serv. Ctr., Inc.,* 807 S.W.2d 476, 480 (Ky. 1991) (citations omitted). Further, "a party opposing a properly supported summary judgment motion cannot defeat it without presenting at least some affirmative evidence showing that there is a genuine issue of material fact for trial." *Id.* at 482 (citations omitted).

On appeal from a granting of summary judgment, our standard of review 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." *Lewis B & R Corp.*, 56 S.W.3d 432, 436 (Ky.App. 2001) (citations omitted). Because no factual issues are involved and only legal issues are before the trial court on a motion for summary judgment, we do not defer to the trial court and our review is *de novo*. *Hallahan v. Courier-Journal*, 138 S.W.3d 699, 705 (Ky.App. 2004).

Armstrong argues that the exercise of an option must be unqualified, unambiguous, and unequivocal and that fatal ambiguity was created by East

[2] Kentucky Rules of Civil Procedure.

Kentucky's reference in its notice to a tonnage increase in terms of monthly rates (from 30,000 to 45,000), rather than annual rates as provided for in the contract. In other words, Armstrong asserts that the notice was an ineffective exercise of the option because it did not mirror the precise terminology of section 1(b) of the contract. Armstrong further maintains that East Kentucky's use of the phrase "until further notice" created an unacceptable equivocation in the exercise of the option to increase contract tonnage.

The rule is well established that "the construction and interpretation of a contract, including questions regarding ambiguity, are questions of law to be decided by the court[.]" *Frear v. P.T.A. Industries, Inc.*, 103 S.W.3d 99, 105 (Ky. 2003) (citations omitted). Whether an ambiguity exists regarding East Kentucky's rights and duties in exercising the option under the contract will guide our analysis as follows:

> If an ambiguity exists, "the court will gather, if possible, the intention of the parties from the contract as a whole, and in doing so will consider the subject matter of the contract, the situation of the parties and the conditions under which the contract was written," by evaluating extrinsic evidence as to the parties' intentions. However, "[i]n the absence of ambiguity a written instrument will be enforced strictly according to its terms," and a court will interpret the contract's terms by assigning language its ordinary meaning and without resort to extrinsic evidence.

Id. at 106 (internal citations omitted).

In making this determination, we keep in mind that "[a]n ambiguous contract is one capable of more than one different, reasonable interpretation." *Id.* at 108 n12 (quoting *Central Bank & Trust Co. v. Kincaid,* 617 S.W.2d 32, 33 (Ky. 1981)). *See also Transport Ins. Co. v. Ford*, 886 S.W.2d 901, 905 (Ky.App. 1994) ("To determine that an ambiguity exists, the court must first determine that the contract provision is susceptible to inconsistent interpretations."). Further, "[a] contract is to be construed as persons with usual and ordinary understanding would construe them." *Nat'l Ins. Underwriters v. Lexington Flying Club, Inc.*, 603 S.W.2d 490, 493 (Ky.App. 1979) (citing *Washington Nat'l Ins. Co. v. Burke*, 258 S.W.2d 709 (Ky. 1953)). Finally, "[a]n option is not a sale but a right to exercise a privilege, and only when that privilege has been exercised in the manner provided in the agreement does it become a binding contract." *Carter v. Frakes*, 303 Ky. 244, 247, 197 S.W.2d 436, 438 (1946) (quoting *Cawthon v. McAlister*, 217 Ky. 551, 290 S.W. 316 (1927)).

Based on our review of the contract in this case, we are unable to find the existence of ambiguity in regard to East Kentucky's rights and duties in exercising the option. Neither party disputes that 15,000 tons/month multiplied by 12 months yields a figure of 180,000 tons/year; thus, East Kentucky's stated intent to increase the monthly delivery rate by 15,000 tons (from 30,000 to 45,000) results in an annual tonnage increase of the allotted 180,000 tons under the contract. Giving effect to the ordinary meaning of the language contained in the

contract, East Kentucky unambiguously expressed its intent to exercise the option in accordance with the unambiguous terms of the contract.

Regarding Armstrong's assertion that East Kentucky's use of the phrase "until further notice" created an unacceptable equivocation, we note that under sections 1(a) and (b) of the contract, East Kentucky was expressly granted the right to vary the delivery rates according to the contract terms. Section 1(a) of the contract sets forth the agreed upon total contract tonnage (1,170,000) and annual tonnage (360,000), subject to "BUYER'S right to vary the total contract tonnage and annual tonnage amounts through the adjustment of monthly delivery rates, as provided in Section 1(b)[.]" As discussed previously, section 1(b) grants East Kentucky the right to increase the monthly delivery rate by certain percentages, as well as the option to increase the annual tonnage up to an additional 180,000 tons. Therefore, this court finds that East Kentucky's use of the phrase "until further notice" does not create an unacceptable equivocation; rather, the phrase "until further notice" is in conformance with East Kentucky's right to vary delivery rates under the contract.

The order of the Clark Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

Keith Moorman
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