

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-001150-MR

MORRIS COSTUMES, LLC

APPELLANT

v. APPEAL FROM BOONE CIRCUIT COURT
HONORABLE JAMES R. SCHRAND II, JUDGE
ACTION NO. 10-CI-00734

CONNIE ROUSE

APPELLEE

OPINION
REVERSING AND REMANDING

** ** * * * * *

BEFORE: COMBS AND MOORE, JUDGES; ISAAC,¹ SENIOR JUDGE.

COMBS, JUDGE: Morris Costumes, LLC, appeals from an order of the Boone Circuit Court of May 21, 2010, that dismissed its action against Connie Rouse.

After reviewing the briefs of counsel, the record, and the pertinent law, we reverse and remand for further proceedings.

¹ Senior Judge Sheila R. Isaac 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.

Rouse was the owner of a company named Lucy & Lu, LLC. Lucy & Lu operated Halloween Express, a costume shop, in Owenton, Kentucky. In June of 2008, Lucy & Lu ordered merchandise valued at more than \$73,000.00 from Morris Costumes, a North Carolina corporation. Rouse personally guaranteed payment for the merchandise, and Morris Costumes undertook no other action to protect its interest in the goods. The merchandise arrived at Halloween Express before October 2008 and was accepted by Lucy & Lu.

On March 4, 2009, Rouse filed a petition for relief in Chapter 7 bankruptcy: *In re: Connie Rouse and Victor Rouse*, Chapter 7, United States Bankruptcy Court for the Eastern District of Kentucky, Covington Division, Case No. 09-20488. Notice of the petition was mailed to Morris at the address of Morris Costumes. It appeared that there was no property available to the trustee to pay Rouse's creditors; therefore, the creditors were instructed not to file a proof of claim. However, a creditors' meeting was scheduled for April 2, 2009. Morris Costumes did not participate in these proceedings.

On October 27, 2009, Rouse's individual obligations were discharged pursuant to an order of the bankruptcy court. A few days later, on November 3, 2009, Lucy & Lu, LLC, was administratively dissolved by the Secretary of State of Kentucky.

On March 19, 2010, Morris Costumes filed this action against Lucy & Lu, LLC, and Connie Rouse -- both individually *and* in her capacity as a member of Lucy & Lu, LLC. Morris Costumes sought to recover more than \$24,000.00 that it

claimed was still owed on the merchandise that it had shipped to Halloween Express in 2008. On April 20, 2010, Rouse filed a motion to dismiss the complaint against her. The trial court granted the motion, and this appeal followed.

On appeal, Morris Costumes concedes that Rouse's individual liability for the debt was discharged pursuant to the order of the bankruptcy court on October 27, 2009. However, it contends that it is proceeding against Rouse under an entirely different theory of liability. Morris Costumes argues that as a result of Rouse's status as a member of Lucy & Lu, LLC, a separate obligation "to pay Morris Costumes" arose on November 3, 2009, the date on which the business entity was formally dissolved. Appellant's brief at 4. Since this new obligation arose only *after* Rouse's personal financial obligations were discharged in bankruptcy, Morris Costumes argues that the obligation is enforceable against her. Morris has conceded that the obligation may ultimately be enforceable only with respect to the company's assets within Rouse's control at the time of dissolution.

The personal guaranty signed by Rouse expressly provided that her personal liability for the debts of Lucy & Lu, LLC, would mature *immediately* upon the insolvency of the debtor; the inability of the debtor to meet its obligations as they become due; the appointment of a receiver, custodian, or trustee for the debtor or any of its property; the filing of a voluntary or involuntary petition for relief in bankruptcy; the calling of a meeting of creditors by the debtor or the occurrence of any of the foregoing events with respect to the guarantor. Morris Costumes was on notice by early October 2008 that Lucy & Lu, LLC, could not meet its financial

obligations as they became due. Pursuant to the express terms of the guaranty agreement, the claim of Morris Costumes against Rouse as guarantor arose at that time -- and not later.

Morris Costumes had a right to pursue Rouse individually on the guaranty *before* her petition for relief in bankruptcy was filed. After that time, the company was informed that any proceedings to enforce the debt would be stayed and that Rouse was seeking to discharge the claim entirely. Morris Costumes was invited by the bankruptcy court to challenge Rouse's petition and to assert any contention that its claim was non-dischargeable. Nevertheless, Morris Costumes chose not to participate in the bankruptcy proceedings.² The trial court did not err by recognizing and honoring that discharge.

Despite the discharge of Rouse's liability as a guarantor, Kentucky Revised Statute[s] (KRS) 275.325 provides that a claim may be enforced against a member of a limited liability company *following* dissolution of the company to the extent of the assets of the company distributed in liquidation to that member. However, "a member's total liability for all claims under this section shall not exceed the total amount of assets, less liabilities assumed or taken subject to, distributed to him." KRS 275.325(4)(b). Thus, a creditor who files a timely claim can proceed directly against a member of a dissolved company to the extent of the

² As an unsecured creditor, Morris Costumes very likely assumed that it had little to gain by participating in a meeting with Rouse's other creditors or by identifying in their presence any assets (even unsold Halloween merchandise) in her possession.

corporate assets received by the member. *See also Bear, Inc. v. Smith*, 303 S.W.3d 137 (Ky.App. 2010).

As a creditor of Lucy & Lu, LLC, Morris Costumes was entitled to proceed against Rouse directly for the company's assets distributed to her. This claim survived dissolution of the company, and it was not discharged by Rouse's individual bankruptcy. Consequently, we conclude that the trial court erred by dismissing the action against Rouse under these circumstances.

We reverse the order of the Boone Circuit Court dismissing this action and remand for further proceedings.

ALL CONCUR.

BRIEF FOR APPELLANT:

James Steven Taylor
Louisville, Kentucky

BRIEF FOR APPELLEE:

C. Ed Massey
Erlanger, Kentucky