RENDERED: MAY 20, 2011; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-000679-MR

JAMES G. HICKS — APPELLANT

v.

APPEAL FROM PULASKI CIRCUIT COURT
HONORABLE JEFFREY T. BURDETTE, JUDGE
ACTION NO. 03-CI-00185

DON MARSHALL NISSAN, LLC; AND
DON MARSHALL CHRYSLER CENTER, INC. — APPELLEES

OPINION
AFFIRMING IN PART,
REVERSING IN PART, AND REMANDING

** ** ** ** **

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

WINE, JUDGE: James G. Hicks appeals from findings of fact and conclusions of law of the Pulaski Circuit Court granting judgment to Don Marshall Nissan, LLC and Don Marshall Chrysler Center, Inc. (hereinafter "Marshall"). While Hicks was employed by Marshall, he acquired a vehicle in Marshall's name and made

[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 KRS 21.580.

personal use of that vehicle. When the employment relationship ended, Marshall sought damages for the diminution of the vehicle's value and the interest which had accrued on the vehicle's debt. Hicks argued that Marshall's claims regarding the vehicle were merged into the agreement which ended their relationship. The trial court disagreed, finding that the agreement did not bar Marshall's subsequent claims. This conclusion is supported by substantial evidence and is not clearly erroneous. However, we agree with Hicks that Marshall had a duty to mitigate its damages once Hicks returned the vehicle. Since the trial court failed to make findings as to whether Marshall acted reasonably in selling the vehicle, the judgment must be set aside. We remand this matter for additional findings of fact, conclusions of law, and an amended judgment.

James Hicks was employed by Marshall from 1996 until January of 2003. Hicks was initially hired as a used car manager for Don Marshall Chrysler and was subsequently promoted to General Manager of Don Marshall Chrysler. During this time, he purchased a 20% membership in a separate entity, Don Marshall Nissan, LLC, and held the positions of Executive Manager and General Manager in this company. During this time, Hicks met and married his wife, Claudia Hicks, who was employed by Don Marshall Chrysler as "special finance manager."

As is customary among car dealerships, Marshall supplied various employees with demonstrator vehicles for personal use. In December 2000, Hicks authorized the purchase of a new 2001 Z06 Chevrolet Corvette, for use as a

demonstrator vehicle. The vehicle was financed on Marshall's floor plan for $49,000.00 plus a $100 shipping fee. Hicks had possession of the vehicle from December 24, 2000 until February 2003.

Hicks's possession of the Corvette did not follow Marshall's standard practice for providing demonstrator vehicles to its employees. At no time before the purchase of the Corvette had any Marshall employee authorized the purchase of a new, non-branded vehicle for stock. After the vehicle was delivered, Hicks and his wife enjoyed exclusive use of the vehicle, but it remained titled in Marshall's name. However, the vehicle was never placed in any of Marshall's advertising, nor was the vehicle present on the car lots on a daily basis. Furthermore, unlike with other demonstrator vehicles, Hicks and his wife paid Marshall $500.00 a month for the use of the vehicle. Finally, Claudia Hicks continued on occasion to drive other demonstrators while the Corvette remained at her home.

In 2002, Hicks expressed an interest to Marshall in becoming an auto dealer in Western Kentucky. He proposed that Marshall purchase Brandon Autoworld in Murray, Kentucky. After Marshall declined to purchase the dealership, Hicks expressed a desire to sell his interest in Don Marshall Nissan to finance an interest in Brandon Autoworld. Hicks and Marshall began negotiating the sale of Hicks's interest. These discussions included the status of the Corvette.

Marshall eventually consented to Hicks selling his 20% interest in Don Marshall Nissan for $120,000.00. After various debts and items in Hicks's

possession were paid (such as a jet ski, a Toyota Land Cruiser, and a $29,998.56 loan), Marshall paid Hicks a total of $88,501.44. The Corvette was listed as both an asset at $49,000.00 and as a debt of $49,000.00, thus having no monetary impact on the transaction.

Hicks's last day of employment at Marshall was January 15, 2003, and he received payment for his interest on January 28, 2003. On February 11, 2003, Marshall's attorney contacted Hicks to request that he return various items. In addition to the items requested, the letter requested that title to the Corvette be transferred to Hicks. Subsequently, Hicks returned all of the requested items, with exception of a red tandem trailer, which he explained was unusable and sold for scrap. Additionally, instead of transferring the Corvette into his own name, Hicks returned it to Marshall.

Thereafter, Marshall brought this action to recover damages for the value of the trailer and for the depreciation on the Corvette. The matter was tried before the court without a jury. On September 14, 2006, the trial court entered findings of fact, conclusions of law, and judgment for Marshall. With respect to the Corvette, the trial court found that Hicks had consistently treated the Corvette as his own vehicle rather than as a demonstrator vehicle. The trial court noted that Hicks's payments of $500 each month for the use of the Corvette were inconsistent with the demonstrator program and were instead consistent with actual possession and ownership. Consequently, the court found Hicks liable for $20,100.00, representing the difference in price paid for the Corvette and the price received for

the vehicle when it was sold following its return. The trial court also awarded Marshall interest in the amount of $9,607.56, less the $9,000.00 which Hicks had paid to Marshall while he was in possession of the Corvette.

On appeal, Hicks argues that the judgment should be vacated and the matter remanded for a new trial due to the absence of a record of the trial. After the filing of a notice of appeal and certification of the record in this case, the parties discovered that there was no audio on the copy or the original videotape of the bench trial. This Court directed the parties to file narrative statements with the trial court for approval and submission to this Court pursuant to Kentucky Rule of Civil Procedure ("CR") 75.13. This appeal was delayed for an extended period while the trial court explored methods to recover the audio recording of the trial. Thereafter, the trial court approved a narrative statement, which was then submitted to this Court as a supplement to the record.

Hicks briefly contends that he is prejudiced by the lack of a record and by the trial court's failure to adopt the narrative statement he tendered. However, the provisions of CR 75.13 provide a complete vehicle for an appellant to remedy the lack of part of a hearing if he or she feels that this would be helpful on appeal. *Harper v. Commonwealth*, 694 S.W.2d 665, 668-69 (Ky. 1985), *overruled on other grounds in Barnett v. Commonwealth*, 317 S.W.3d 49 (Ky. 2010). Furthermore, Hicks does not set out any particular objection to the narrative statement approved by the trial court, nor does he explain exactly how he is prejudiced by the narrative statement filed with this Court. Absent these

showings, we have no basis to conclude that the narrative statement is inadequate. *See Simpson v. Commonwealth*, 759 S.W.2d 224, 228 (Ky. 1988).

Hicks next raises a number of matters challenging the trial court's findings of fact and conclusions of law. As this matter was tried before the circuit court without a jury, our review of factual determinations is under the clearly erroneous rule. CR 52.01. A finding of fact is not clearly erroneous if it is supported by substantial evidence, which is "evidence of substance and relevant consequence having the fitness to induce conviction in the minds of reasonable men." *Owens-Corning Fiberglas Corp. v. Golightly*, 976 S.W.2d 409, 414 (Ky. 1998). In our review, we are mindful that the trial court is in the best position to determine the credibility of witnesses and the weight to be given the evidence. *Uninsured Employers' Fund v. Garland*, 805 S.W.2d 116, 118 (Ky. 1991). On the other hand, the trial court's application of the law to those facts is subject to *de novo* review. *A&A Mechanical, Inc. v. Thermal Equipment Sales, Inc.*, 998 S.W.2d 505, 509 (Ky. App. 1999).

Hicks primarily argues that the trial court failed to properly consider the effect of his agreement with Marshall to sell his 20% interest in Don Marshall Nissan. He notes that the parties discussed the status of the Corvette during their negotiations. In particular, Marshall specifically accounted for the value and debt of the Corvette in its calculation of the total value of Don Marshall Nissan. Consequently, he argues that Marshall's claims regarding the Corvette were merged into the asset assignment agreement and therefore the trial court erred by

failing to find that this agreement precluded Marshall from asserting any additional claims for the Corvette.

The trial court essentially concluded that the parties did not intend to include the Corvette as part of the asset assignment or as payment for Hicks's interest in Don Marshall Nissan. In particular, the trial court found that Hicks had acquired and used the Corvette as his personal vehicle and not as a demonstrator. However, the title and debt to the Corvette remained in Marshall's name. As a result, the buyout negotiations included the value of and debt on the Corvette to determine the value of Hicks's interest. However, the trial court concluded that Hicks's interest in the Corvette was not part of the buyout agreement.

This conclusion is supported by substantial evidence. Hicks continues to assert that he and his wife used the Corvette as part of Marshall's demonstrator program. Their conduct, however, was not consistent with that program but with Hicks's actual possession and ownership of the vehicle. In fact, when Hicks first acquired the vehicle, he told several people that it was a surprise gift for his wife's birthday. They had exclusive use of the Corvette and it was never listed for sale. Furthermore, Hicks made monthly payments to cover the interest Marshall accrued on the Corvette. We agree with the trial court that this conduct demonstrates an agreement between Hicks and Marshall for the purchase of the Corvette. Consequently, Hicks is liable for the diminution of its value and the remaining debt on the vehicle.

Nevertheless, Hicks maintains that Marshall should have included its claims regarding the Corvette in the buyout agreement, noting that the status of the Corvette was discussed during the buyout negotiations. Since the issues relating to the Corvette were not addressed in the buyout agreement, Hicks contends those claims were merged into the written agreement and are waived. *Citing Smith v. Ferguson*, 295 S.W.2d 792, 794 (Ky. 1956); *Childers v. Lucas*, 301 Ky. 763, 192 S.W.2d 714 (1946); and *Jones v. White Sulphur Springs Farm, Inc.*, 605 S.W.2d 38, 42 (Ky. App. 1980). Neither party is claiming that the buyout agreement should be reformed or modified to include the Corvette. Rather, the buyout agreement is silent concerning the Corvette except for listing it as both an asset and a liability of Don Marshall Nissan. The trial court found insufficient evidence to show that the parties had intended the Corvette to be a part of the buyout transaction. This finding is supported by substantial evidence, and the court's conclusion is not clearly erroneous.

Finally, Hicks argues that Don Marshall failed to mitigate its damages and consequently its damages should be limited to the value of the Corvette at the time he returned it. The parties agree that Hicks returned the Corvette to Marshall in February 2003, shortly before Marshall brought this action. On October 10, 2003, the trial court entered an order directing the parties to agree on a method to sell the Corvette within fifteen days. The order further provided that the court would establish the method of sale if the parties could not agree on one. On December 24, 2003, the court entered another order specifying that Marshall could

either sell the vehicle at auction or at retail. Nearly a year later, in November 2004, the court entered another order noting that the Corvette had not yet been sold and directing that it be sold at a private auction conducted by the court on November 22, 2004. The Corvette was sold at that auction for $29,000.00 and this amount was used as a basis to determine Marshall's damages. Hicks argues that Marshall failed to minimize its damages by waiting eighteen months to sell the Corvette.

We agree. It is well settled in this Commonwealth that a party must mitigate his damages. *Davis v. Fischer Single Family Homes, Ltd.*, 231 S.W.3d 767, 780 (Ky. App. 2007). Marshall, as the party claiming injury from Hicks's breach of his agreement to complete the purchase of the Corvette, had a duty to mitigate its damages. *Smith v. Ward*, 256 S.W.2d 385, 388 (Ky. 1953). The trial court did not address whether Marshall had acted reasonably to mitigate its damages. Moreover, the record does not indicate that Marshall took reasonable steps to sell the Corvette.

Marshall had possession of the Corvette from February 2003 until the trial court ordered it to be sold in December 2003. Hicks offered to purchase the vehicle from Marshall for $34,000.00 in late 2003. However, the car was not sold until almost a year later for $29,000.00. The trial court used the latter figure as a basis to calculate the diminution of the Corvette's value. Furthermore, the trial court ordered Hicks to pay interest on the Corvette's debt until the day of sale.

We conclude that the trial court erred by using the sale price of the Corvette as a basis to determine Marshall's damages without addressing whether Marshall had acted reasonably under the circumstances. Marshall may have had a duty to accept Hicks's offer to purchase the Corvette for $34,000.00 in late 2003 and calculate its losses based on that amount. At the very least, Marshall had a duty to make timely and reasonable efforts to sell the Corvette after the trial court entered its December 24, 2003 order. Unless Marshall can show that it took reasonable actions to mitigate its damages, it is not entitled to damages for diminution of the vehicle's value or interest after this time. Since these are issues of fact, we remand this matter to the trial court for additional findings and conclusions of law.

Accordingly, the judgment of the Pulaski Circuit Court is affirmed in part, reversed in part, and remanded for taking of additional proof and entry of findings of fact, conclusions of law, and an amended judgment addressing whether Marshall acted reasonably to mitigate its damages under the circumstances.

ALL CONCUR.

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