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Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-001202-MR

MYRTLE ANN LEEDY APPELLANT

v. APPEAL FROM LAWRENCE CIRCUIT COURT
HONORABLE JOHN DAVID PRESTON, JUDGE
ACTION NO. 09-CI-00398

MICHAEL PISTOLE APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, LAMBERT, AND VANMETER, JUDGES.

LAMBERT, JUDGE: This is an appeal from a summary judgment of the Lawrence Circuit Court in an action to recover amounts related to the sale of an ambulance service. Because we agree with the circuit court that Michael Pistole (Pistole) did not personally guarantee the sales contract, we affirm.

In 2001, Larry Leedy (Larry) formed L.I.L., Inc., d/b/a Lifestar Ambulance Service (Lifestar), a Kentucky corporation. He was the sole

shareholder of the company, which operated as an ambulance service in Louisa, Kentucky pursuant to a license obtained in the local fiscal court. In late 2003/early 2004, Larry became ill and was unable to continue operating Lifestar. Due to his illness, Larry sought to sell the business to another provider who would be approved for a license to continue its operation. Negotiations began with Pistole regarding the purchase of Lifestar. To that end, Lifestar, Life Ambulance Service, Inc. (Life Ambulance), and Pistole (who owned Life Ambulance) entered into a confidentiality and non-competition agreement on December 9, 2003, whereby Pistole would be able to evaluate Lifestar for a possible purchase. Pistole signed the agreement both as the president of Life Ambulance and personally.

On January 5, 2004, Larry's son, William Leedy (William),[1] on behalf of Lifestar, and Pistole executed a preliminary purchase agreement whereby Pistole agreed to purchase Lifestar. The agreement reflected that Lifestar, as seller, would transfer all of its assets, liabilities, and management responsibilities to Pistole, as buyer. Pistole also agreed to assume all of the debts of the business outlined in separate documentation. The agreement was to remain effective until the final purchase agreement had been completed. Later that month, William appeared at a fiscal court meeting with Jason Kozee (Kozee), who was associated with Life Ambulance. The fiscal court granted Life Ambulance a license to operate the ambulance service. On February 3, 2004, articles of incorporation for Life

[1] Larry granted William his power of attorney.

Ambulance were filed with the Secretary of State, naming Kozee as the initial registered agent and Pistole as the incorporator.

On March 24, 2004, a final purchase agreement was executed whereby Lifestar sold the company to Life Ambulance. The agreement detailed that all of the assets and liabilities were transferred on January 6, 2004, and indicated that Life Emergency, through its president and secretary, Pistole, would assume all of the business debts as outlined in a separate document. One of the debts listed was to the Internal Revenue Service in an amount of approximately $154,000.00. Furthermore, the name of the company would be changed to Life Emergency following the purchase. The last provision of the agreement states: "This constitutes the entire agreement. There are no other representations or understandings other than those contained herein." The agreement was signed by Pistole as the president of Life Emergency and by William for Lifestar.

On November 29, 2004, L.I.L., Inc. filed a statement with the Secretary of State changing the registered agent to Kozee. Pistole signed the statement as President. On November 1, 2005, both L.I.L., Inc. and Life Emergency were administratively dissolved for failing to file an annual report for 2005.

Larry passed away on August 8, 2004, and his wife, Myrtle Ann Leedy (Leedy), was named as the executrix of his estate. Larry died testate, leaving his property rights to Leedy. On April 14, 2008, the Internal Revenue Service notified Leedy that she was being charged a penalty for not paying

employment taxes for Lifestar employees during four separate tax periods: December 31, 2002 ($12,244.63); March 31, 2003 ($15,522.34); June 30, 2003 ($14,167.30); and September 30, 2003 ($16,379.81). The total amount of the penalty equaled $58,314.08. Leedy paid the IRS the amount of $57,820.54 on July 30, 2008, after unsuccessfully appealing the notices.

On November 6, 2009, Leedy, both individually and as the executrix of Larry's estate, filed suit against Pistole to recover $57,820.54, the amount she paid to the IRS. She claimed this amount was part of the purchase price that was to be paid pursuant to the portion of the purchase agreement whereby the buyer agreed to assume Lifestar's debts. In his answer, Pistole denied that he was either the buyer or that he personally guaranteed the agreement. He also indicated that the company holding the contract had been sold.

Pistole moved for summary judgment, arguing that the obligation inured only to the corporation, as the purchase agreement was signed in the corporate forum, and that he did not personally guarantee the debt. Pistole included an affidavit stating that he was the president of Life Ambulance, that he signed the purchase agreement in a corporate capacity only, and that he did not agree to personally guarantee any corporate debts. In a later reply, Pistole argued that the preliminary purchase agreement would not bind him individually because it was by its terms to remain effective only until the final purchase agreement had been completed.

In response, Leedy argued that Pistole signed and obligated himself in both the corporate capacity and personally in two documents, including the preliminary purchase agreement. By affidavit, William detailed his and Pistole's roles in the sale of Lifestar, and stated that Pistole obligated himself personally both in the confidentiality and non-competition agreement and in the preliminary purchase agreement. In support of her argument, Leedy relied on this Court's holding in *Pierson v. Coffey*, 706 S.W.2d 409 (Ky. App. 1985), for the proposition that one who enters into a contract for the benefit of a corporation that has not yet been formed remains personally liable on the contract after incorporation, absent an agreement to the contrary. Therefore, Leedy argued that summary judgment in favor of Pistole was inappropriate because Pistole personally signed as the buyer on two occasions.

On May 25, 2010, the trial court entered a summary judgment and dismissed Leedy's complaint, concluding that "as a matter of law that the Defendant Michael Pistole is not obligated to the Plaintiff in that the Defendant did not sign any personal obligation for the debt of the corporation." This appeal follows.

In her brief, Leedy raises two issues, the first addressing promoter liability and the second addressing shareholder liability. She continues to cite *Pierson* to argue that as the promoter of a corporation that had not yet been formed, Pistole remained personally liable under the preliminary purchase agreement because there had not been a novation of that obligation. Leedy then

argues that she is entitled to recover pursuant to Kentucky Revised Statutes (KRS) 271B.14-070(4)(b), which permits a creditor of a dissolved corporation to demand payment from shareholders out of corporate assets distributed to them by virtue of a constructive trust. On the other hand, Pistole disputes that promoter liability exists in this case because the preliminary purchase agreement was subsumed by the final purchase agreement, which was signed by him in his corporate capacity only. He also asserts that Leedy's second argument concerning shareholder liability was not preserved for review because it was not raised and argued before the trial court. Rather, the only theory Leedy advanced below was liability under the contract; she never raised the allegation that a constructive trust had been created.

Before we address the merits of the appeal, we must address Pistole's request that we not consider Leedy's brief because she failed to provide any citations to the certified record in her brief as is required by Kentucky Rules of Civil Procedure (CR) 76.12(4)(c)(iv). Because there are no disputed facts in this case, the record is minimal, and the appeal only addresses the propriety of the summary judgment, we decline to enforce this rule and shall consider Leedy's brief. *See Cornette v. Holiday Inn Express*, 32 S.W.3d 106, 109 (Ky. App. 2000) ("We are convinced that the failure to comply with the rule is not fatal in this instance because the record consists only of a few pleadings, a few brief hearings related to the motions for summary judgment, and a few very brief depositions. Reference to the specific portion of this brief record is not essential where the

propriety of summary disposition was clearly joined at every stage of the proceeding.”).

Our standard of review is set forth in *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996):

> The standard of review on appeal of a 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. Kentucky Rules of Civil Procedure (CR) 56.03. There is no requirement that the appellate court defer to the trial court since factual findings are not at issue. *Goldsmith v. Allied Building Components, Inc.*, Ky., 833 S.W.2d 378, 381 (1992).

“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 v. B & R Corp.*, 56 S.W.3d 432, 436 (Ky. App. 2001). Because there are no disputed issues of material fact, we shall consider whether the circuit court properly granted a summary judgment as a matter of law.

Leedy’s first argument addresses whether Pistole is individually liable under the theory of promoter liability. In support of this argument, Leedy relies upon this Court’s opinion in *Pierson v. Coffey*, *supra*, in which we stated the general rule as “one who enters into a contract, for the benefit of a corporation which has yet to be incorporated, remains personally liable on the contract subsequent to incorporation, absent an agreement otherwise.” *Pierson*, 706 S.W.2d at 413. The *Pierson* Court, in turn, relied upon the earlier case of *Kennedy v. Fulton Mercantile Co.*, 108 S.W.

948 (Ky. 1908), in which the former Court of Appeals stated, "[w]here those who propose to form a corporation make a contract in the name of the proposed corporation, they are bound as partners upon the contract when the corporation is not organized[.]" *Id*. at 950. Leedy also cites to several cases from foreign jurisdictions addressing the issue of promoter liability, which we have reviewed.

Having thoroughly reviewed the cases Leedy cited in conjunction with the facts of this case, we must agree with Pistole that none of those cases apply. Unlike the cases cited above, the pre-incorporation contract Pistole signed in a personal capacity was the preliminary purchase agreement entered into on January 5, 2004. The terms of that agreement provided that it would "remain effective pending completion of final purchase agreement." When that agreement was signed, Life Emergency had not yet been incorporated; it was incorporated on February 3, 2004. The final purchase agreement was then entered into on March 11, 2004, subsequent to incorporation. By the terms of the preliminary purchase agreement, it ceased to be binding and effective upon the completion of the final purchase agreement on March 11, 2004. Furthermore, Pistole clearly signed the final purchase agreement in a corporate capacity only, post-incorporation. And the final purchase agreement included the statement that "[t]his constitutes the entire agreement. There are no other representations or understandings other than those contained herein." Therefore, the theory of promoter liability and the accompanying case law is inapplicable in this case. Accordingly, the circuit court

did not commit error in holding that Pistole was not individually liable for any corporate debt as a matter of law.

Next, Leedy contends that she is entitled to recover from Pistole on the theory of shareholder liability pursuant to KRS 271B.14-070(4)(b). While this argument might have some merit, Pistole correctly points out that Leedy failed to raise this issue before the circuit court, which precludes her from raising it before this Court for the first time on appeal.

In *Florman v. MEBCO Ltd. P'ship*, 207 S.W.3d 593, 607 (Ky. App. 2006), this Court addressed a situation where a party failed to first raise a theory at the trial court level:

> CR 8.01 requires that claims to be litigated be plainly stated. The scope of review is limited to the theory or theories upon which the case was tried. The Court of Appeals is one of review and is not to be approached as a second opportunity to be heard as a trial court. An issue not timely raised before the circuit court cannot be considered as a new argument before this Court.

Id. at 607 (internal quotations and footnotes omitted). *See also Raisor v. Raisor*, 245 S.W.3d 807, 808-09 (Ky. App. 2008); *Marksberry v. Chandler*, 126 S.W.3d 747, 753 (Ky. App. 2003) ("It is a matter of fundamental law that the trial court should be given an opportunity to consider an issue, so an appellate court will not review an issue not previously raised in the trial court."). Because Leedy failed to raise the theory of shareholder liability - in the context of a dissolved corporation - before the circuit court, we must decline to address that argument on appeal.

For the foregoing reasons, the summary judgment of the Lawrence Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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