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Commonwealth of Kentucky

Court of Appeals

NO. 2014-CA-001738-MR

CULLMAN SECURITY
SERVICES, INC., individually
and on behalf of all others
similarly situated — APPELLANT[1]

v.

APPEAL FROM MCCRACKEN CIRCUIT COURT
HONORABLE TIMOTHY KALTENBACH, JUDGE
ACTION NO. 14-CI-00331

UNITED PROPANE GAS, INC.
and its subsidiaries and affiliates — APPELLEE[2]

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, KRAMER AND STUMBO, JUDGES.

KRAMER, JUDGE: Cullman Security Services, Inc. ("Cullman") appeals an order of the McCracken Circuit Court dismissing, without prejudice, a breach of

[1] The appellant designated itself in its notice of appeal as "Cullman Security Services, Inc., individually and on behalf of all others similarly situated." However, Cullman is and has always been the only plaintiff in this matter.

[2] Cullman designated the appellee in its notice of appeal as "United Propane Gas, Inc., and its subsidiaries and affiliates." However, the only party specifically named in the notice of appeal is United Propane Gas, Inc.

contract claim it filed against appellee, United Propane Gas, Inc. ("United"). Upon review, we affirm.

FACTUAL AND PROCEDURAL HISTORY

Cullman is an Alabama corporation that contracted to buy 750 gallons of propane gas at the contract price of $1.699 per gallon from United pursuant to a 2013-2014 pre-purchase gas supply agreement. In October of 2013, United delivered 200 gallons of propane gas at the contract price. On January 28, 2014, when Cullman requested a second delivery, United asserted Cullman would have to purchase gas at the rate of $3.599 per gallon. According to the complaint Cullman filed in this matter, Cullman was then forced to buy gas on the open market at the going rate when it was considerably higher than $1.699 per gallon.

Cullman's complaint in this matter alleged that United had violated the implicit covenant of good faith and fair dealing in their agreement and therefore sought damages for breach of contract. Cullman also sought to represent a class of plaintiffs similarly situated pursuant to Kentucky Civil Rule (CR) 23, but no other commercial entity joined Cullman's action. Thereafter, United moved to dismiss Cullman's claim pursuant to CR 12.02 on the basis of subject matter jurisdiction. Specifically, United argued that Cullman had filed a claim for damages not in excess of $5,000, the circuit court's minimum jurisdictional amount. Cullman responded with a number of arguments which will be discussed in the course of our analysis, below. Ultimately, the circuit court granted United's

motion and dismissed Cullman's complaint without prejudice. This appeal followed.

STANDARD OF REVIEW

Our standard for reviewing a circuit court's decision to grant a CR 12.02 motion is as follows:

> The court should not grant the motion unless it appears the pleading party would not be entitled to relief under any set of facts which could be proved in support of his claim. In making this decision, the circuit court is not required to make any factual determinations; rather, the question is purely a matter of law. Stated another way, the court must ask if the facts alleged in the complaint can be proved, would the plaintiff be entitled to relief?

James v. Wilson, 95 S.W.3d 875, 883–84 (Ky. App. 2002) (internal quotations and footnote omitted).

ANALYSIS

Cullman begins its appeal by spending much of its brief urging that circuit courts have jurisdiction over class action lawsuits. It is unnecessary to review the several cases Cullman cites in favor of this proposition because United does not dispute this point and because circuit courts are indeed vested by statute with this type of authority. *See* KRS[3] 23A.010(1) ("The Circuit Court is a court of general jurisdiction; it has original jurisdiction of all justiciable causes not exclusively vested in some other court.").

[3] Kentucky Revised Statute.

From there, however, Cullman reasons that the circuit court consequently erred in dismissing its breach of contract claim for lack of jurisdiction because (1) Cullman hopes to find other plaintiffs who have different breach of contract claims against United, who are willing to join its action; and (2) Cullman anticipates—if and when it finds those potential co-plaintiffs—that all of their respective claims will be combined into a class action.

The flaw of this argument, apart from its speculative nature, is that it ignores the circuit court's minimum jurisdictional amount. In Kentucky, class actions such as the one apparently contemplated by Cullman (*i.e.*, merely involving parties with separate and distinct claims that involve common questions of law or fact)[4] are subject to the rule that each plaintiff in the class must show that its individual claim exceeds the jurisdictional amount. *See Kentucky Dept. Store, Inc. v. Fidelity-Phenix Fire Ins. Co. of N. Y.*, 351 S.W.2d 508, 509 (Ky. 1961) ("The crucial question in this court is whether in a 'spurious'[5] class action the claims of

[4] In this case, Cullman's anticipated class action would apparently involve several plaintiffs, each with different contracts with United, alleging that United breached their respective contracts in the same manner, *i.e.*, by overcharging them for gas in derogation of their respective contractual purchase options.

[5] The difference between "spurious" class actions and "true" class actions was explained in *Lamar v. Office of Sheriff of Daviess County*, 669 S.W.2d 27, 31 (Ky. 1984):

> True class actions were those in which the rights of the different class members were common and undivided; in such cases aggregation was permitted. Spurious class actions, on the other hand, were in essence merely a form of permissive joinder in which parties with separate and distinct claims were allowed to litigate those claims in a single suit simply because the different claims involved common questions of law or fact. In such cases aggregation was not permitted: each plaintiff had to show that his individual claim exceeded the jurisdictional amount. (Quoting *Snyder v. Harris*, 394 U.S. 332, 89 S.Ct. 1053, 1056, 22 L.Ed.2d 319 (1969)).

the members of the suing class may be aggregated in determining jurisdictional amount. They cannot."). Here, Cullman has conceded that its claim against United is for a sum less than the circuit court's $5,000 jurisdictional minimum amount. *See* KRS 24A.120(1).[6] Thus, the circuit court had no jurisdiction to consider Cullman's claim, irrespective of whether Cullman wishes to designate its singular claim as a potential class action.[7]

Nevertheless, Cullman argues that this Court should ignore the aforementioned rule stated in *Kentucky Dept. Store*; hold that aggregation is permitted in every kind of class action; and, in anticipation that Cullman will eventually find other co-plaintiffs to aggregate its damages with, direct the circuit court to allow Cullman's claim to proceed as a potential class action. In support, Cullman cites three cases which it asserts illustrate that this Court and the Kentucky Supreme Court have, on previous occasions, decided to ignore the jurisdictional minimum amount applicable to circuit courts in the context of class action lawsuits.

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[6] As noted, the circuit court's subject matter jurisdiction does not encompass justiciable causes exclusively vested in other courts. KRS 23A.010(1). In turn, KRS 24A.120(1) exclusively vests district courts with jurisdiction over:

> Civil cases in which the amount in controversy does not exceed five thousand dollars ($5,000), exclusive of interest and costs, except matters affecting title to real estate and matters of equity; however, nothing herein shall prohibit execution levy on real estate in enforcement of judgment of District Court.

[7] In a somewhat related vein, Cullman also urges that all class actions fall into the circuit court's "equity" jurisdiction and, as such, are simply exempt from the $5,000 jurisdictional amount requirement. However, Cullman presents no authority in support of this point, nor could he; such a notion runs contrary to *Lamar* and *Kentucky Dept. Store*.

Cullman's argument has no merit for a number of reasons. To begin, it is not the prerogative of this Court to ignore statutes and the precedent of the Kentucky Supreme Court or its predecessor Court. *See* Supreme Court Rule (SCR) 1.030(8)(a); *Fields v. Lexington–Fayette Urban County Gov't*, 91 S.W.3d 110, 112 (Ky. App. 2001); *Buckler v. Mathis*, 353 S.W.3d 625, 631 (Ky. App. 2011).

Moreover, the three cases Cullman relies upon provide its argument with no legal support. The first case Cullman cites is *Schnuerle v. Insight Communications Co., L.P.*, 376 S.W.3d 561 (Ky. 2012). However, in *Schnuerle*, the jurisdictional minimum amount applicable to circuit court actions was never at issue or even discussed. Also, the claims at issue in *Schnuerle* involved alleged violations of the Kentucky Consumer Protection Act, KRS 367.170 *et seq*. *Id*. at 565. Pursuant to statute, such claims are *required* to be filed in circuit court. *See* KRS 367.220(1).

The second and third cases Cullman relies upon are *City of Bromley v. Smith*, 149 S.W.3d 403 (Ky. 2004), and *City of Somerset v. Bell*, 156 S.W.3d 321 (Ky. App. 2005), which respectively involved groups of litigants who individually claimed monetary losses far less than the applicable jurisdictional minimum, but who were nevertheless granted class certification. What Cullman misses in relying upon these cases is (1) both cases involved groups of litigants who were seeking, as a class, refunds of money they had paid pursuant to an allegedly illegal or unconstitutional tax; and, (2) in both cases, it was determined that established legal authority—expressly limited to litigants seeking refunds of money collected as the

result of allegedly illegal or unconstitutional taxes—permitted the class action suits in question to proceed. For example, *Bell* determined that a specific statute, KRS 134.590, provided statutory authority for circuit court jurisdiction. *See Bell*, 156 S.W.3d at 327. *Smith*, on the other hand, reviewed the same statute and, to the contrary, determined that a class action was actually available to aggrieved taxpayers as a matter of "common law." *Smith*, 149 S.W.3d at 406.

As an aside, a brief discussion of the "common law" to which the Kentucky Supreme Court was referring offers an explanation of why *taxpayers*, who typically have monetary claims for refunds far less than the jurisdictional minimum amount, have traditionally been entitled to bring their claims in circuit court as class actions. As explained in *Commonwealth v. Scott*, 23 Ky. L. Rptr. 1488, 65 S.W. 596 (1901),

> Text writers and courts have had frequent occasion to analyze the character of proceeding here involved, and have, with general unanimity, brought it within that ancient rule of equity that [the circuit court's] jurisdiction exists in order to prevent a multiplicity of suits concerning the same subject–matter, as affecting the same litigants or the same title. They find that the subject–matter is the tax levy, or, when collected, the fund arising from such levy. He who has collected or who holds it, or who is asserting the lawful right to collect it, is one of the necessary parties to the controversy; and, when collected, the fund is called and treated as a trust fund, the beneficiaries of which are all who contributed to it. They, consequently, are the other necessary party to the litigation for its recovery. Thus, in this state, in *Blair v. Turnpike Co.*, 4 Bush, 157, it was expressly held that the "sheriff of Nicholas county holds the money collected by illegal taxation on a void

> subscription to turnpikes as a trust fund for the benefit of the taxpayers who contributed to that fund."
> From the foregoing it necessarily follows: *The subject–matter of the litigations is the trust fund, the amount of which determines the question of jurisdiction*.

(Emphasis added.)

Thus, in the context of the claims at issue in *Smith* and *Bell*, the circuit court's minimum jurisdictional amount remained in effect and was not, as Cullman asserts, simply ignored.

Moreover, the common law rule described in *Scott* and applied in *Smith* is the rule that has been traditionally applied to "true" class actions, as opposed to "spurious" class actions such as the one contemplated by Cullman. *See* note 5. That is, it allows a class action to go forward where the separate claims of the different parties to the action are below the jurisdictional amount if (1) such parties have a common or general interest in the subject-matter of the controversy, and the subject-matter of the controversy itself exceeds the jurisdictional minimum amount (as where the subject-matter was held to be a trust fund of which the court had jurisdiction and in which the parties had a joint interest); or (2) where the relief to be granted is such that the parties have a common and general interest in its enforcement (such as an in the case of injunctive or other coercive relief sought to require of a defendant performance of a contract to which numerous parties are jointly entitled). *See Batman v. Louisville Gas & Electric Co.*, 187 Ky. 659, 220 S.W. 318, 320 (1920).

Conversely, this common law rule does not apply merely under the circumstance where, as here and as previously noted, separate claims of different parties for money are or could be presented which involve the same questions of law and fact. *Id*. at 321. This common law rule has also been specifically held inapplicable where, as here, one customer of a gas company sought to sue on his own behalf and behalf of all others who had similar individual monetary claims against the gas company for contractual overcharges. *Id*.

Cullman's third argument is that because it requested in its complaint the "imposition of a constructive trust" for what Cullman alleges is United's breach of contract, its prayer for that particular type of remedy invested the circuit court with "equitable" jurisdiction in this matter. Thus, according to Cullman, the circuit court's minimum jurisdictional amount has no application.

This argument lacks merit because a constructive trust is not a free-standing claim, nor is it a remedy for a breach of contract.[8] As explained in *O'Bryan v. Bickett*, 419 S.W.2d 726, 728 (Ky. 1967),

> [I]nvoking the trust is not enforcing a contract but is providing equitable relief from a fraud or breach of confidence. The trust arises by virtue of the relationship and the cases do not require that the relationship be a legally enforceable one. Otherwise, the remedy of the complaining party would be a simple suit at law for

[8] Cullman's theory in this respect hinges upon the fact that United accepted an approximately $800 pre-payment pursuant to their contract, which United has yet to refund. However, this is not a basis of some form of equitable recovery. It is simply an aspect of the expectation damages Cullman would otherwise be entitled to claim in its breach of contract suit. *See University of Louisville v. RAM Engineering & Const., Inc.*, 199 S.W.3d 746, 748 (Ky. App. 2005) (describing damages for breach of a contract as "that sum which would put an injured party into the same position it would have been in had the contract been performed.")

> breach of contract and there would be no need to resort to equitable forms of relief.

Cullman's final argument, as stated in its brief, is "It is settled law in the Commonwealth that a declaratory judgment is an appropriate vehicle for the determination of legal rights in an action for breach of contract." Stated differently, Cullman believes that all breach of contract actions are declaratory judgment actions; and, that by calling its breach of contract action a declaratory judgment action, it can unilaterally vest the circuit court with jurisdiction over its breach of contract claim, irrespective of the circuit court's jurisdictional minimum amount.

This argument defies both settled law and common sense. To begin, if *all* breach of contract actions were declaratory actions, then district courts would *never* have jurisdiction over *any* breach of contract action. This is because declaratory actions must be filed in circuit court. *Griffiths v. City of Ashland*, 920 S.W.2d 78, 79 (Ky. App. 1995); *see also* KRS 418.040 and KRS 23A.010(1).

Contrary to Cullman's theory, however, breach of contract actions—which necessarily involve the interpretation and enforcement of contractual rights—regularly originate in district court. *See, e.g., Campbell v. Crager*, 167 S.W.3d 669 (Ky. App. 2005); *Prezocki v. Bullock Garages, Inc.*, 938 S.W.2d 888 (Ky. 1997); *Egbert v. Curtis*, 695 S.W.2d 123 (Ky. App. 1985). As to why, the answer is three-fold.

First, breach of contract claims, which are civil in nature, are not exempted from the district court's exclusive jurisdiction over civil claims not exceeding $5,000.

Second, declaratory judgment actions are not a substitute for, and indeed serve a different purpose than, breach of contract actions. Their function is prospective; that is, a declaratory judgment does not decide a present controversy —such as whether a contract has already been breached—but instead resolves justiciable controversies over present rights, duties or liabilities between parties. *See Martin v. Commonwealth of Personnel Bd.*, 711 S.W.2d 866, 868 (Ky. App. 1986); *General Drivers, Warehouseman & Helpers Local Union No. 89 v. Chandler*, 968 S.W.2d 680, 684 (Ky. App. 1998) (explaining an action for a declaratory judgment cannot be instituted to determine an issue presented or to secure a determination of substantive rights involved in a pending suit); *McMillan v. Bailey-Darby Coal Corp.*, 251 S.W.2d 225, 229 (Ky. 1952) ("Any declaratory judgment declaring rights or determining legal relations embodies the concept that the parties will thereafter govern their actions in accordance with the declaration of the judgment—otherwise a declaratory judgment would have no more force or effect than an advisory opinion."). As a side-note, we add that there is nothing prospective about Cullman's action against United because Cullman filed its action after the contract between the two parties had already expired.

Third, the declaratory judgment act is not and has never been a vehicle for circumventing jurisdictional limitations, especially limitations relating

to minimum jurisdictional amounts. *See McLean v. Thurman*, 273 S.W.2d 825, 827 (Ky. 1954) ("declaratory judgment or injunction procedure may not be invoked to circumvent the requirement that a sufficient jurisdictional amount be shown where the actual amount or thing in controversy is of such a tangible nature that its valuation reasonably may be shown." (citations omitted)); *see also St. Matthews Fire Protection Dist. v. Aubrey*, 304 S.W.3d 56, 60 (Ky. App. 2009) ("A litigant may not by the mere expedient of proceeding under the declaratory judgment act obtain relief which would be denied to him in a direct proceeding brought to obtain that particular relief." (Citation and quotations omitted)).

CONCLUSION

Cullman has failed to demonstrate the circuit court erred in dismissing this matter without prejudice based upon lack of subject matter jurisdiction. We therefore AFFIRM.

ALL CONCUR.

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