

Commonwealth of Kentucky
Court of Appeals

NO. 2014-CA-001262-MR

THEODORE LEE FISK

APPELLANT

v. APPEAL FROM SCOTT CIRCUIT COURT
HONORABLE PAUL F. ISAACS, JUDGE
ACTION NO. 13-CI-00112

TOYOTA MOTOR MANUFACTURING
KENTUCKY, INC.

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: COMBS, J. LAMBERT, AND VANMETER,¹ JUDGES.

LAMBERT, J., JUDGE: Theodore Lee Fisk has appealed from two orders of the Scott Circuit Court dismissing several of his claims in his action against Toyota Motor Manufacturing Kentucky, Inc. (TMMK), and Life Insurance of North

¹ Judge Laurance B. VanMeter concurred in this opinion prior to being elected to the Supreme Court of Kentucky. Release of this opinion was delayed by administrative handling.

America (LINA), in which he sought damages related to the cessation of his short term disability benefits and his allegedly forced retirement. Having carefully considered the record and the parties' arguments, we affirm.

In January 2010, Fisk worked full-time as a group leader for TMMK. At that time, Fisk became unable to work due to back pain and underwent spinal fusion surgery. He applied for short term disability benefits, a benefit TMMK provided to its employees. TMMK's short term disability plan is administered by LINA, which reviews and administers claims for benefits pursuant to a Claim Consulting Agreement. Section 6 of the agreement provides that "[t]his is not a contract of insurance and Consultant [LINA] shall not underwrite any risk of the Plan." Fisk's application was granted, and he received short term disability benefits pursuant to the plan from January 20 through September 3, 2010. On September 2, 2010, Fisk received a letter from LINA requesting updated medical documentation to support an extension of his benefits. While Fisk provided documentation from his physician from August, LINA determined that this was not sufficient. Fisk appealed the denial of the extension of his short term disability benefits, which LINA denied in October 2010 based on his job being described as light duty. TMMK informed Fisk that either he had to return to work or he would be terminated. While Fisk asked for reasonable accommodations for his back pain and restrictions imposed by his physician, TMMK did not provide this for him. Fisk ultimately retired from TMMK in December 2010 rather than return to work without accommodations or restrictions in place. He filed a lawsuit in federal

district court against TMMK and LINA for wrongful termination of his short term disability benefits as well as for long term disability benefits. He also alleged a negligence claim against TMMK for failing to provide an accurate job description that included his actual duties and responsibilities. His claim related to long term disability benefits was dismissed because he had not yet applied for such benefits.²

On November 29, 2012, Fisk filed a lawsuit in Grant Circuit Court (Case No. 12-CI-00546), alleging the facts above and claims against TMMK for breach of fiduciary duty as his insurer of short term disability benefits (Claim 1); violations of Kentucky's Unfair Claim Settlement Practices Act, Kentucky Revised Statutes (KRS) 304.12-230 (Claim 2); a violation of KRS 304.12-235 for failing to timely pay his claim for short term disability benefits (Claim 3); bad faith (Claim 4); a violation of Kentucky's Civil Rights Act pursuant to KRS 344.030; wrongful termination; breach of public policy; civil conspiracy with LINA to improperly deprive him of his short term disability benefits and end his employment (Claim 13); and punitive damages based on TMMK's willful, wanton, malicious and/or reckless actions. Against LINA, Fisk alleged causes of action for tortious interference with his disability insurance agreement; breach of fiduciary duty; violations of KRS 304.12-230 and KRS 304.12-235; bad faith; civil conspiracy; and punitive damages. Both TMMK and LINA filed answers to Fisk's complaint. We note that LINA was dismissed from the present appeal in March 2016 pursuant

² It appears from the record that Fisk applied for and received long term disability benefits effective January 2011.

to a joint motion. Therefore, we shall not discuss in any great detail issues related to LINA and shall not address any arguments in Fisk's briefs related to LINA.³

In December 2012, TMMK moved to dismiss the action as barred by a settlement agreement entered into by the parties in November 2012 in the federal action, arguing that Fisk agreed to release TMMK and LINA from all claims of liability for his short term disability benefits. Part II, section 1 of the agreement detailed Fisk's release of claims and provided in relevant part as follows:

In exchange for the Financial Settlement set forth above, Fisk fully and forever releases, acquits, holds harmless and discharges [TMMK] and LINA . . . from any claims of liability for any Short Term Disability benefits, and the negligence and bad faith claims associated with the Short Term Disability Benefits against [TMMK] or LINA in the Civil Action. **Notwithstanding the forgoing, this release agreement will not serve as a release or waiver of any subsequent claims for long term disability benefits. Notwithstanding the forgoing, this release agreement will not serve as a release or waiver of any subsequent claim for negligence or bad faith associated with a claim of wrongful termination, a claim for employment discrimination, a claim for breach of fiduciary duty, any statutory claim under the Americans with Disabilities Act, a claim for interference with Fisk's rights to benefits other than Short Term Disability Benefits, a claim for punitive damages, or any other claim except the claim of negligence specifically raised in Fisk's complaint.** [Emphasis in original.]

An agreed order of dismissal was entered in the federal action on November 21, 2012, the docket sheet noting that “[c]laims of liability for any short Term

³ Fisk's brief and reply brief, which both contained arguments related to LINA, were tendered months before the joint motion to dismiss LINA was filed and granted. The tendered briefs for Fisk and TMMK were filed on March 8, 2016, the date this Court granted the joint motion to dismiss LINA and denied TMMK's motion to dismiss the appeal.

Disability benefits, and the negligence and bad faith claims associated with the Short Term Disability Benefits against [TMMK] or Lina [sic] in the Civil Action are Settled and Dismissed with prejudice[.]” Alternatively, TMMK moved to transfer the action to Scott County, the proper venue for Fisk’s action. Fisk objected to the motion, arguing that summary judgment was not appropriate, that his claims were not barred by the settlement agreement, and that venue was proper because he lived in Grant County. By order entered February 21, 2013, the Grant Circuit Court granted TMMK’s alternative motion and transferred the action to Scott Circuit Court for further proceedings.

Once the case was transferred to Scott County, TMMK filed a motion for partial dismissal/partial summary judgment in March 2013. TMMK argued that claims 1, 2, 3, 4, and 13 of Fisk’s complaint arose from LINA’s partial denial of his short term disability benefits claim in 2010 and were therefore barred by the release in the settlement agreement. TMMK also argued that Fisk’s claims were barred because the short term disability benefits plan was not an insurance policy or contract. TMMK also argued that no special relationship existed between it and Fisk that created a fiduciary relationship between them.⁴ Fisk objected to TMMK’s motion, arguing that his release in the settlement agreement did not bar the claims he raised in the state action. He only released his claims for unpaid short term disability benefits and that TMMK acted negligently or in bad faith by providing the wrong job description to LINA. He also argued that whether

⁴ LINA filed a similar motion addressing the claims Fisk alleged against it, to which Fisk objected.

TMMK's short term disability plan was an insurance plan should not be decided without discovery. Finally, Fisk argued that TMMK was acting as an insurer to him as the party providing disability insurance, which created a special relationship between them.

On June 13, 2013, the circuit court entered an opinion and order ruling on TMMK's and LINA's respective motions to dismiss or for summary judgment.

Addressing TMMK's motion, the court held as follows:

Defendant TMMK has moved to dismiss claims 1-4, and 13. TMMK argues these claims are barred because of a settlement agreement entered by the parties on November 7, 2012. After viewing Part 2 Section 1 of the settlement agreement, the Court believes the Plaintiff is barred from requesting relief under claims 2-4. The settlement agreement does not bar Plaintiff from seeking relief for an alleged breach of fiduciary duty by TMMK, nor does it bar Plaintiff from alleging a civil conspiracy. However, TMMK has also argued it did not owe Plaintiff a fiduciary duty because the STD benefits are not insurance benefits. Plaintiff argues summary judgment of claims 1 and 13 would be premature since discovery has not been taken. . . . Defendant TMMK has produced the contract between TMMK and LINA regarding the administration and dispersal of STD benefits to Toyota employees. The contract is an integrated agreement between TMMK and LINA and any evidence contradicting express terms would be barred under the parol evidence rule. Section 6 of the contract expressly states, "This is not a contract of insurance and Consultant [LINA] shall not underwrite any risk of the Plan." Plaintiff would be barred from presenting any evidence claiming the contract was a contract of insurance. As such, it would be impossible for Plaintiff to produce evidence which would show TMMK owed Plaintiff a fiduciary duty as Plaintiff's insurer. Claim 13 alleges civil conspiracy between TMMK and LINA to deprive Plaintiff of his STD benefits and to unlawfully terminate

Plaintiff's employment. The Court believes the settlement agreement bars Plaintiff from pursuing a civil conspiracy claim to deprive STD benefits, but it does not bar Plaintiff from pursuing a civil conspiracy claim regarding wrongful termination. Because there has not been an ample amount of time for discovery, Plaintiff is entitled to move forward on his allegation of civil conspiracy regarding wrongful termination.

The circuit court made a similar ruling with regard to LINA's motion, and it ultimately dismissed claims 1 through 4 (related to TMMK) and claims 8 through 12 (related to LINA).

In late 2013, TMMK and LINA filed a joint motion for partial summary judgment on claim 13, the civil conspiracy claim related to wrongful termination. They argued that this claim was barred by the one-year statute of limitations period set forth in KRS 413.140(1)(c), noting that Fisk's conspiracy claim accrued on the last day of his employment with TMMK in December 2010. His last day of work was the last act in furtherance of the alleged conspiracy. Because Fisk did not file this claim until almost two years later, it was time-barred. Fisk objected to the motion, arguing that he had five years to file his claim pursuant to KRS 413.120(2) of Kentucky's Civil Rights Act. Alternatively, Fisk argued that the discovery rule acted to extend the time he had to file his conspiracy claim. He stated that he did not know of the alleged conspiracy until he received correspondence between TMMK and LINA in April 2012 in which he claimed the two entities conspired to end his employment. In reply, TMMK and LINA argued that Fisk had not brought his conspiracy claim under the Civil Right Act, but rather had pled this cause of

action as a common law civil conspiracy claim. In addition, they argued that Fisk's discovery of the alleged conspiracy at a later date could not make his claim timely because any acts in furtherance of the conspiracy would necessarily have occurred prior to his retirement date of December 2, 2010.

On May 16, 2014, the court ruled on the motion for partial summary judgment. The court first held that Fisk had alleged a common law civil conspiracy claim and that the one-year statute of limitations applied. The court then rejected Fisk's discovery rule argument:

The discovery rule is implicated in cases wherein the fact of injury or instrumentality thereof is not immediately evident or discoverable with the exercise of reasonable diligence; such is often the case in instances of medical malpractice, latent injuries or illnesses. *Fluke Corp. v. Lemaster*, 306 S.W.3d 55, 60 (Ky. 2010). It is certain that the Plaintiff was aware that his employment ended on December 2, 2010 and there is no evidence on record to indicate the Plaintiff's inability to ascertain information relevant to the disability determinations of his employer through reasonable diligence. Consequently, the discovery rule is herein inapplicable as a toll to the governing statute of limitations.

The law clearly indicates that a civil conspiracy claim accrues upon the commission of the last act in furtherance of the conspiracy. *District Union Local 227 v. Fleischaker*, 384 S.W.2d 68 (Ky. Ct. App. 1964). Therefore, the statute of limitations began to run as of December 2, 2010 because it is the date of the Plaintiff's alleged injury. This Court finds that Plaintiff's claim of civil conspiracy against LINA and TMMK is barred by the statute of limitations set forth in KRS 413.140(1)(c).

Accordingly, the court granted the joint motion for partial summary judgment and dismissed claim 13. As a result of this ruling, all claims against LINA were

dismissed, and the only remaining claims against TMMK related to Fisk's employment and claims for wrongful termination and disability discrimination.⁵

By agreed order entered July 3, 2014, the circuit court made the June 13, 2013, and the May 16, 2014, rulings final and appealable. This appeal now follows.

Our standard of review in an appeal from a summary judgment is well-settled in the Commonwealth. "The standard of review on appeal when a trial court grants a motion for 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.'" *Lewis v. B & R Corp.*, 56 S.W.3d 432, 436 (Ky. App. 2001), citing *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996); *Palmer v. International Ass'n of Machinists & Aerospace Workers*, 882 S.W.2d 117, 120 (Ky. 1994); CR 56.03. "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*, 56 S.W.3d at 436, citing *Scifres*, 916 S.W.2d at 781; *Estate of Wheeler v. Veal Realtors & Auctioneers, Inc.*, 997 S.W.2d 497, 498 (Ky. App. 1999); *Morton v. Bank of the Bluegrass & Trust Co.*, 18 S.W.3d 353, 358 (Ky. App. 1999). With this standard in mind, we shall review the orders on appeal.

⁵ We note that TMMK moved for summary judgment on Fisk's remaining claims on June 17, 2014. Our review of the circuit court's docket sheet does not reflect that the court has ruled on the motion. It does reflect that LINA was dismissed from the action by agreed order entered January 19, 2016.

For his first argument, Fisk contends that the circuit court erred in holding that his breach of fiduciary duty claim against TMMK (Claim 1) was barred by the Claim Consulting Agreement. He argued that TMMK was acting as an insurer under Kentucky law because it was providing disability insurance to him. This constituted a special relationship between Fisk and TMMK, not an ordinary business relationship. Fisk also argued that there was no evidence for the circuit court to consider as to how TMMK treated the short term disability plan or how the plan operated as insurance, meaning the ruling was premature until further discovery could be conducted.

We disagree with Fisk and hold that the circuit court did not err in determining there was no basis for Fisk's fiduciary duty claim because the Claim Consulting Agreement between TMMK and LINA was not a policy of insurance pursuant to the plain and unambiguous terms of that document. Section 6 plainly states that the agreement was not a contract of insurance and LINA was not to underwrite any risk.

The interpretation of a contract is a question of law and thus is subject to *de novo* review. *Cantrell Supply, Inc. v. Liberty Mut. Ins. Co.*, 94 S.W.3d 381, 385 (Ky. App. 2002). "In the absence of ambiguity a written instrument will be strictly enforced according to its terms." *Mounts v. Roberts*, 388 S.W.2d 117, 119 (Ky. 1965). "A contract is ambiguous if a reasonable person would find it susceptible to different or inconsistent interpretations." *Cantrell Supply, Inc.*, 94 S.W.3d at 385. In this case, the Claim Consulting Agreement is unambiguous and

clear in its terms that it is not a policy of insurance. Therefore, any parol or extrinsic evidence contradicting these express terms would not be reviewable by the circuit court or trier of fact. “Under the parol evidence rule, when parties reduce their agreement to a clear, unambiguous, and duly executed writing, all prior negotiations, understandings, and agreements merge into the instrument, and a contract as written cannot be modified or changed by prior parol evidence, except in certain circumstances such as fraud or mistake.” *New Life Cleaners v. Tuttle*, 292 S.W.3d 318, 322 (Ky. App. 2009).

Accordingly, we agree with the circuit court that the Claim Consulting Agreement precludes Fisk’s claim for breach of fiduciary duty against TMMK, and no evidence, if any existed, could be introduced to prove that the agreement was an insurance policy and that TMMK owed Fisk any fiduciary duty.

Next, Fisk asserts that the circuit court erred in concluding that Claims 2, 3, and 4 were precluded by his settlement agreement in the federal action. He contends that he only released his claims for short term disability benefits and for negligence and bad faith on TMMK’s part in the application process for providing an incorrect job description to LINA. The claims he raised in the present action were separate and distinct from the claims he raised and released in the federal action. As with the first argument, this presents a question of law for which our standard of review is *de novo*. *3D Enters. Contracting Corp. v. Louisville & Jefferson Metro. Sewer Dist.*, 174 S.W.3d 440, 448 (Ky. 2005). Again, we agree

with TMMK that the circuit court properly concluded these claims were barred by the settlement agreement in the federal action.

As set forth above, Part II, section 1 of the settlement agreement provides in relevant part as follows:

In exchange for the Financial Settlement set forth above, Fisk fully and forever releases, acquits, holds harmless and discharges [TMMK] and LINA . . . from any claims of liability for any Short Term Disability benefits, and the negligence and bad faith claims associated with the Short Term Disability Benefits against [TMMK] or LINA in the Civil Action.

Our review of the complaint in this action establishes that the three claims at issue all relate directly to Fisk's claim for short term disability benefits. Claim 2 alleges violations of the Unfair Claims Settlement Practices Act and specifically states that TMMK misrepresented facts relating to his short term disability coverage, failed to communicate promptly regarding this coverage, failed to adopt and implement standards for prompt investigation of claims, failed to pay his claim without an investigation, failed to attempt to settle the claim, and failed to promptly settle his claim to influence settlements under other portions of his insurance with TMMK. Claim 3 alleged a violation of KRS 304.12-235 for TMMK's failure to timely pay Fisk's claim for short term disability benefits. And Claim 4 alleged bad faith for TMMK's denial of his claim for short term disability benefits. The agreement plainly and unambiguously released Fisk's claims for liability for any short term disability benefits and any associated negligence and bad faith claims. The agreement did not act to release claims that were not related

to his claim for short term disability benefits, including employment discrimination under Kentucky's Civil Rights Act and wrongful termination, among other possible claims. These claims remained viable.

As a matter of law, the terms of the settlement agreement preclude Fisk from bringing Claims 2, 3, and 4 in the present action.

“An agreement to settle legal claims is essentially a contract subject to the rules of contract interpretation.” *Cantrell Supply, Inc. v. Liberty Mutual Insurance Co.*, 94 S.W.3d 381, 384 (Ky. App. 2002). The primary objective is to effectuate the intentions of the parties. *Id.* When no ambiguity exists in the contract, we look only as far as the four corners of the document to determine the parties' intentions. *Hoheimer v. Hoheimer*, 30 S.W.3d 176, 178 (Ky. 2000). “The fact that one party may have intended different results, however, is insufficient to construe a contract at variance with its plain and unambiguous terms.” *Cantrell*, 94 S.W.3d at 385.

3D Enters., 174 S.W.3d at 448. While it may be Fisk's position that he did not intend to release these claims, the plain language of the settlement agreement says exactly that. And Fisk is not permitted to introduce parol evidence to vary the terms of the agreement because it is unambiguous. Accordingly, the circuit court did not commit any error in dismissing Claims 2, 3, and 4.

Finally, Fisk contends that the circuit court erred in holding that his claim for civil conspiracy for wrongful termination⁶ against TMMK was barred by the one-year statute of limitations pursuant to KRS 413.140(1)(c). Rather, Fisk argues

⁶ Fisk has not contested the circuit court's finding in the June 13, 2013, ruling that his civil conspiracy claim related to his claim for short term disability benefits was barred by the settlement agreement.

that he brought his civil conspiracy claim under Kentucky's Civil Rights Act, for which a five-year limitations period applies pursuant to KRS 413.120(2) ("An action upon a liability created by statute, when no other time is fixed by the statute creating the liability."). Our review of Fisk's complaint confirms that he did not plead this cause of action under Kentucky's Civil Rights Act, but rather he pled this claim under common law, for which a one-year statute of limitations applies.

Pursuant to *Dist. Union Local 227 v. Fleischaker*, 384 S.W.2d 68, 72 (Ky. 1964), "a conspiracy which contemplates a series of overt acts is a continuing conspiracy and the statute does not commence to run until the last overt act performed in compliance with the objective of the conspiracy has been accomplished." Therefore, the alleged conspiracy between TMMK and LINA would have been complete upon Fisk's resignation from TMMK on December 2, 2010, meaning he had one year from that date to allege this cause of action. He did not file his complaint until November 29, 2012.

Fisk goes on to argue that the discovery rule applies to extend the limitations period. He contends that he "did not understand the relationship between TMMK's decision to require him to return to work and LINA's decision to end his short term disability benefits until April 2012 when he was presented with the correspondence between TMMK and LINA regarding his short term disability claim and his return to work during the Federal court litigation[.]"

In *Fluke Corp. v. LeMaster*, 306 S.W.3d 55, 60 (Ky. 2010), the Supreme Court of Kentucky discussed the discovery rule and observed:

“[u]nder the ‘discovery rule,’ a cause of action will not accrue until the plaintiff discovers (or in the exercise of reasonable diligence should have discovered) not only that he has been injured, but also that this injury may have been caused by the defendant's conduct.” But the discovery rule is available only in cases where the fact of injury or offending instrumentality is not immediately evident or discoverable with the exercise of reasonable diligence, such as in cases of medical malpractice or latent injuries or illnesses. [Footnotes omitted.]

Fisk was certainly aware that his employment had ended on December 2, 2010, because he resigned that day. And he was aware of at least some facts related to the conspiracy claim based upon the language of his complaint in which he detailed the reason for filing his federal lawsuit (“28. Facing the threat of termination and the loss of his benefits appurtenant to his employment with Defendant Toyota, Plaintiff filed a federal lawsuit against Defendant Toyota and Defendant LINA for their wrongful denial of Plaintiff’s short term disability benefits.”). Accordingly, we cannot hold that the discovery rule acts to extend the limitations period on Fisk’s conspiracy claim, and the circuit court properly dismissed this cause of action.

For the foregoing reasons, the June 13, 2013, and the May 16, 2014, orders of the Scott Circuit Court are affirmed.

ALL CONCUR.

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