

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 1998-CA-001357-MR

ROMAC, INC.

APPELLANT

v. APPEAL FROM FRANKLIN CIRCUIT COURT  
HONORABLE ROGER L. CRITTENDEN, JUDGE  
ACTION NO. 1997-CI-000289

COMMONWEALTH OF KENTUCKY,  
FINANCE AND ADMINISTRATION CABINET;  
AND CREDIT GENERAL INSURANCE COMPANY, INC.

APPELLEES

OPINION  
AFFIRMING

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BEFORE: BUCKINGHAM, HUDDLESTON, AND KNOFF, JUDGES.

KNOFF, JUDGE: This is an appeal from a circuit court order and judgment enforcing a settlement agreement. Finding that the trial court acted within its discretion in denying interest from the date of settlement, we affirm.

A brief discussion of the underlying facts of this action is necessary to a consideration of the merits of the appeal. In March 1996, American Resources, Inc. (ARI), entered into a contract with the Commonwealth of Kentucky to perform construction and renovation work at the Central State Hospital in

Jefferson County, Kentucky. The appellee, Credit General Insurance Company, Inc. (Credit General), provided the performance bond for ARI. ARI later defaulted on its performance obligations under the contract. On August 15, 1996, Credit General entered into a subcontract with the appellant, Romac, Inc., in which Romac agreed to furnish certain labor and materials for asbestos abatement work on the project.

Subsequently, a dispute arose between the parties concerning payments owed to Romac. On December 18, 1996, Romac filed a mechanics and materialmen's lien in the amount of \$155,091.57 against Credit General's contract proceeds then held by the Commonwealth. Credit General protested the lien by letter dated January 21, 1997. On February 20, 1997, Romac filed an action in Franklin Circuit Court against the Commonwealth and Credit General seeking to enforce its lien.

In early April 1997, Romac and Credit General, through counsel, began to discuss settlement. Following the exchange of correspondence, Credit General agreed to settle the dispute for \$162,942.38. The proposed agreed order accompanying the settlement stipulated that this amount would be paid by a direct payment from Credit General to Romac in the amount of \$13,667.28, and by the Commonwealth's dispersal to Romac of \$149,275.10 from Credit General's contract proceeds. Shortly after this agreement was made, Romac argued that it was entitled to additional interest from Credit General due to delay in receiving payment. In response, Credit General asserted that the agreement required Romac to tender the agreed order to the trial court to effectuate

the settlement, and therefore any delay was caused by Romac's failure to have the agreed order entered in court.

Credit General then moved the trial court to find as a matter of law that the case had been settled. Romac denied the existence of a settlement agreement. In the alternative, Romac contended that the settlement agreement was entered into on April 8, 1997, and that Credit General's failure to tender payment within a reasonable time from that date constituted a breach of the agreement. Thus, Romac asserted that it was entitled to interest on the settlement from April 8, 1997, until the date of judgment.

Following briefing by the parties and consideration of the evidence, the trial court sustained Credit General's motion to enforce the settlement agreement. The court found that Romac and Credit General entered into a valid settlement agreement on May 15, 1997. The trial court further found that the agreement contemplated that Romac would have the proposed agreed order entered by the court so that the funds held by the Commonwealth could be dispersed. Because Romac failed to file the agreed order, the trial court concluded that it was not entitled to interest from the date of settlement. Romac now appeals.<sup>1</sup>

On appeal, Romac admits that it had a valid settlement agreement with Credit General. Instead, Romac argues that the trial court erred in finding that the date of the settlement

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<sup>1</sup> The Finance and Administration Cabinet released \$149,275.10 from Credit General's contract proceeds to Romac pursuant to the judgment enforcing the settlement agreement. Although the Cabinet remains a nominal party to this appeal, Romac does not seek any relief against it.

agreement was May 15, 1997. Romac further asserts that the trial court erred in denying it interest on the settlement from April 8, 1997. We disagree with Romac on both points.

As to the date of the settlement, the trial court found as follows:

On April 8, 1997, counsel for Plaintiff [Romac] delivered a handwritten note to the Defendant's [Credit General] counsel outlining the terms of a proposed settlement to the dispute. Counsel for Plaintiff followed this handwritten note with a proposed agreed order to Counsel for the Defendant which apparently was transmitted on May 7, 1997. Counsel for the Defendant filled in the blanks of the Order reflecting the amount to be paid to the Plaintiff and returned the copy to Counsel for the Plaintiff.

Counsel for the Plaintiff did not agree with the numbers provided by the Defendant and on May 15, 1997, submitted another "Proposed Agreed Order Settled" to Counsel for the Defendant with the amounts required to settle the matter. On May 16, 1997, Counsel for the Defendant communicated the Defendant's agreement to settle the action upon the terms demanded by the Plaintiff. At this point in time, it appears that Counsel for the Defendant expected that Counsel for the Plaintiff would transmit an agreed order to Defendant's Counsel in Frankfort to be entered by the Court pursuant to its May 9, 1997, letter to Counsel for Plaintiff.

For whatever reason this did not happen and on May 28, 1997, Counsel for the Plaintiff sent another letter to Counsel for the Defendant demanding an additional amount for interest because of delays. On May 29, 1997, Counsel for the Defendant communicated to the Plaintiff that it was the Defendant's position that the matter had been settled and would not enter into additional payments.

The trial court's factual findings are binding upon this Court unless they are clearly erroneous. CR 52.01. Based upon these findings, we agree with the trial court that Romac and Credit General did not reach a meeting of the minds until May 15,

1997. Since there was an offer and acceptance of the April 8 settlement proposal, either party might have sought enforcement of that agreement. However, both parties demonstrated by their conduct that they intended for the later settlement agreement to supersede the earlier one. Having rejected Credit General's first response to the settlement agreement, and accepting the second response, Romac will not be allowed to obtain enforcement of the first agreement.

Romac also asserts that the trial court erred in denying interest on the settlement from the date of the settlement agreement. We agree with Romac that since the settlement agreement fixed no time for performance, the law will imply a reasonable time. Withers v. Commonwealth, Department of Transportation, Ky. App., 656 S.W.2d 747, 749 (1983). However, the trial court specifically found that the settlement agreement contemplated the entry of an agreed order to pay the settlement. Although this point was vigorously disputed, we find substantial evidence of record to support the trial court's finding in this regard.

It is less clear whether the parties understood who would be responsible for tendering the agreed order and judgment. In any case, the settlement agreement was not payable until the entry of an order directing the Commonwealth to release the contract proceeds to Romac. Under these circumstances, the trial court acted within its discretion in denying prejudgment interest to Romac. See, Nucor Corporation v. General Electric Co., Ky., 812 S.W.2d 136, 144 (1991).

Accordingly, the judgment of the Franklin Circuit Court  
is affirmed.

BUCKINGHAM, JUDGE, CONCURS.

HUDDLESTON, JUDGE, CONCURS WITH RESULT.

BRIEF FOR APPELLANT:

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Parker & O'Connell, PLLC  
Louisville, Kentucky

BRIEF FOR APPELLEE

CREDIT GENERAL INSURANCE  
COMPANY, INC.:

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