

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-002370-MR

GOLDEN OAK MINING CO., INC.,
n/k/a BISMARCK COAL, INC.

APPELLANT

v.

APPEAL FROM LETCHER CIRCUIT COURT
HONORABLE EDDY COLEMAN, JUDGE
ACTION NO. 86-CI-005

CARSON HALL; GARY WAYNE HALL;
and JERRY LYNN HALL

APPELLEES

OPINION
AFFIRMING

** ** * * * **

BEFORE: BUCKINGHAM, HUDDLESTON, AND SCHRODER, JUDGES.

SCHRODER, JUDGE: This is an appeal from a judgment in favor of the owner of the surface rights of the mined property in an action against the appellant coal company to enforce a contract wherein appellant agreed to pay appellee for the coal mined therefrom. Upon reviewing the record herein and the applicable law, we reject appellant's arguments and, thus, affirm.

On April 10, 1978, appellee, Carson Hall, entered into a contract with appellant, Golden Oak Mining Co., Inc. ("Golden Oak"), granting Golden Oak "the right to mine under and upon the

lands of . . ." Hall. At that time, Hall, who had a fourth grade education and was a retired coal miner, was the owner of the surface rights of the property in question, but did not own the mineral rights. The contract was prepared and negotiated by Paul Sturgill, vice-president of Golden Oak, and was further signed by Sturgill on behalf of Golden Oak. The contract also granted Golden Oak "the right to . . . haul coal and other mineral product over the lands, . . . whether adjoining the above-described premises or not." The contract stipulated that payments to be made thereunder "shall constitute full payment for all damages which may be incurred by removing the mineral." The agreement was to remain in effect "until all the mineable and merchantable coal has been removed." Golden Oak, in turn, agreed to pay Hall "the sum of \$.45 for each ton mined and sold from the hereinabove described property."

In the Fall of 1978, Golden Oak began surface mining operations upon Hall's property. The surface mining operation lasted approximately one year and a half, for which Hall was paid approximately \$44,000, including a \$20,000 cash advance paid upon execution of the contract.

Following the surface mining on Hall's property, Golden Oak began deep mining operations under the property at issue. Hall maintains that the deep mining began sometime around the early 1980's, whereas Golden Oak contends that the deep mining began in the Fall of 1984 and was completed in the Spring of 1985. It is undisputed that the entries for the deep mining were not on the Hall property but were on the other side of the ridge.

When Golden Oak refused to pay Hall the royalties on the deep mined coal, Hall brought the action herein to enforce the contract on January 6, 1986. It was and still is the position of Golden Oak that pursuant to the contract, Hall was only to be compensated for coal that was mined from the surface. On July 26, 1990, the Letcher Circuit Court entered summary judgment in favor of Golden Oak. The case was then appealed to this Court. On November 11, 1991, this Court reversed the summary judgment and remanded the action to the circuit court "for further proof on the intent of the parties at the time of making the contract." In that opinion, this Court explicitly acknowledged that the lower court had found that the terms of the contract were ambiguous, and, thus, there necessarily existed material questions of fact which precluded summary judgment.

On remand, the parties put on further proof of their intent in entering into the contract, and the case was tried by deposition to the court. On March 18, 1997, the court entered its findings of fact, conclusions of law, and order in which it entered judgment in favor of Hall. In its findings the court stated:

Considering the foregoing testimony, and other testimony of record, and having again reviewed the language of the CONTRACT stating "First Party agrees to pay Second Party the sum of \$.45 for each ton mined and sold from the hereinabove described property", it is the finding of this Court that the CONTRACT meant exactly what the parties intended and what it says -- that GOLDEN OAK would pay \$.45 for each ton of coal mined and sold from the property, without distinction as to surface mined coal or deep mined coal. Looking at the CONTRACT itself, there is no ambiguity whatsoever. Even if there were

doubt in this finding, which there is not, the rules of construction against the drafter of the CONTRACT still demand the finding for the Plaintiff, HALL.

On April 22, 1997, the court vacated the above order of March 18, 1997 and entered amended findings of fact, conclusions of law and order in favor of Hall. In this order, the court stated:

There is no patent ambiguity on the face of the contract. It does not distinguish between surface and deep mining. Therefore, any ambiguity in the contract must be latent, i.e., what each of the parties thought the interpretation of that provision was. After reviewing the testimony of the Plaintiff, Mr. Sturgill, and Thad Duff, the Defendant's original negotiator, the Court finds that the provision covered both surface and deep mining. Particularly persuasive are the Plaintiff's testimony about the conversations he had with Mr. Sturgill regarding payment from deep mining and Mr. Duff's testimony that the contract between the parties was not one of the Defendant's standard surface contracts and that a cash advance to a surface owner of property is unusual.

From the order of April 22, 1997, Golden Oak now appeals.

Golden Oak first argues that the court erred in ignoring the remand instructions of the Court of Appeals to consider "further proof on the intent of the parties at the time of making the contract." Golden Oak maintains that the trial court's finding in the March 18, 1997 order that the contract was unambiguous ignored the law of the case that the contract was ambiguous and the court failed to look at the intent of the parties to resolve said ambiguity. While it is true that the law of the case is that the contract was ambiguous, see Williamson v. Commonwealth, Ky., 767 S.W.2d 323 (1989), the court vacated its order of March 18, 1997 and, thus, cured any error in previously

finding that the contract was unambiguous. The amended order of April 22, 1997 specifically finds there was a latent ambiguity and considers the testimony of Hall, Sturgill, and Thad Duff in finding that the parties intended the contract to encompass deep mined coal as well as surface mined coal. The court was particularly persuaded by Hall's testimony about conversations he had with Sturgill regarding payment from deep mining and Duff's testimony that the contract between the parties was not a standard surface contract and that a cash advance to a surface owner of property was unusual. Thus, Golden Oak's claim that the court did not consider the evidence regarding the intention of the parties in resolving the ambiguity is without merit.

Golden Oak next argues that the trial court erred in failing to apply the rules of contract construction to determine the intent of the parties. Golden Oak presented evidence that coal companies typically do not compensate surface owners for deep mining activities underneath their property unless there is a use of that surface associated with the deep mine. Golden Oak essentially complains that the court did not look at this evidence regarding custom in the industry and ruled that the parties did not intend to include deep mined coal. In determining the intention of the parties, the court should look at the object or purpose of the agreement, the situation of the parties, conditions under which the agreement was made, and the circumstances surrounding execution of the agreement. L.K. Comstock & Co., Inc. v. Becon Construction Co., 932 F. Supp. 948 (E.D. Ky. 1994), affirmed, 73 F.3d 362 (6th Cir. 1995). Thus,

while custom in the industry may be a relevant factor, it is not the only factor that the court could consider in determining the intent of the parties.

A trial court's findings of fact will not be overturned unless they are clearly erroneous. CR 52.01; Alvey v. Union Inv., Inc., Ky. App., 697 S.W.2d 145 (1985). If supported by substantial evidence, the trial court's findings of fact are not clearly erroneous. Faulkner Drilling Co., Inc., v. Gross, Ky. App., 943 S.W.2d 634 (1997). The finder of fact is free to believe part of the evidence and disbelieve other parts. Sroka-Calvert v. Watkins, Ky. App., 971 S.W.2d 823 (1998). From our review of the record, the court properly considered the testimony of Hall, Sturgill, and Duff in seeking to ascertain the situation of the parties and the circumstances surrounding execution of the contract. Further, the conversations between Hall and Sturgill regarding deep mining were certainly relevant. The court was also free to look at the fact that the contract was not a standard surface contract in rejecting the evidence regarding custom in the industry. In sum, we cannot say the trial court's findings of fact regarding the intent of the parties were clearly erroneous.

Golden Oak's remaining argument is that the trial court erred in assigning credibility to the testimony of Hall. Golden Oak maintains that Hall's misrepresentation regarding his interest in the property at issue should preclude the court from assigning any credibility to Hall's testimony. Under CR 52.01, due regard must be given to the trial court to judge the

credibility of the witnesses. Church & Mullins Corp., v. Bethlehem Minerals Co., Ky., 887 S.W.2d 321 (1992), cert. denied, 514 U.S. 1110, 115 S. Ct. 1962, 131 L. Ed. 2d 853 (1995).

Despite the controversy surrounding Hall's interest in the property at issue, upon reviewing the record, we cannot say the trial court abused its discretion in adjudging Hall a credible witness.

For the reasons stated above, the judgment of the Letcher Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE, CARSON
HALL:

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