

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-001399-MR

JERRY RUMMAGE, D/B/A JERRY
RUMMAGE & SONS

APPELLANT

v.

APPEAL FROM SPENCER CIRCUIT COURT
HONORABLE WILLIAM F. STEWART, JUDGE
ACTION NO. 1995-CI-0008

FRANKIE DUVALL AND
ELMO GREER & SONS, INC.

APPELLEES

OPINION
AFFIRMING IN PART, REVERSING IN PART, AND REMANDING
** ** * * * * *

BEFORE: GUDGEL, CHIEF JUDGE; HUDDLESTON, AND KNOPF, JUDGES.

KNOPF, JUDGE: Jerry Rummage, in his capacity as proprietor of Jerry Rummage & Sons, a hauling business, appeals from a March 31, 1998, summary judgment of Spencer Circuit Court ordering him to pay damages and pre-judgment interest to plaintiff/appellee Frankie Duvall. Rummage maintains that the trial court improperly entered summary judgment in the face of material factual disputes. He further maintains that the trial court erred in its manner of enforcing a settlement between Rummage, Duvall, and third-party defendant/appellee, Elmo Greer & Sons,

Inc. (Greer). Although we agree with the trial court that Rummage may summarily be found liable under the parties' settlement, we nevertheless agree with Rummage that the settlement precludes the relief awarded Duvall. Accordingly, we affirm the judgment in part, reverse in part, and remand for additional proceedings.

Because Rummage is appealing from a summary judgment, this Court reviews the record "in a light most favorable" to the party against whom judgment was rendered. Summary judgment is improper unless "it appears impossible for the nonmoving party to produce evidence at trial warranting a judgment in his favor" Steelvest, Inc. v. Scansteel Service Center, Inc., Ky., 807 S.W.2d 476, 482 (1991).

Viewed thus in a manner favorable to Rummage, the record discloses an interesting if somewhat convoluted case stemming from a contract between Greer and the Transportation Cabinet to resurface a portion of Kentucky Highway 44 in Spencer County. Greer subcontracted with Rummage for hauling services, and Rummage, in turn, contracted with Duvall, an independent hauler, to supplement Rummage's capacity and ensure that he could meet Greer's needs. The agreement between Rummage and Duvall included some version of the standard "pay when [or, perhaps, if] paid" clause. A dispute arose among Rummage, Greer, and the Cabinet concerning the amount Rummage was to pay his employees. Apparently, at some point during the dispute, payments to Duvall were suspended. Duvall eventually sued Rummage for the amount allegedly due under their contract (\$2,362.50) plus interest.

Rummage responded by denying that his duty to pay Duvall had arisen because he had not yet been payed by Greer. He also brought a third-party action against Greer for indemnity and additional damages.

In June 1997, while the complaint and third-party complaint were pending, the parties entered a settlement according to which Greer agreed to pay Rummage the full amount of Duvall's underlying claim. Rummage agreed to pass that money along to Duvall within two weeks, and Duvall agreed to forego his claim for interest. Greer and Rummage also agreed to settle Rummage's other claims for a fixed amount subject to a credit in the amount paid to Duvall if an audit revealed that (as Greer claimed) Greer had already paid Rummage for Duvall's services. Promptly following entry of this agreement, Greer tendered to Rummage one check in the amount claimed by Duvall and another check in the amount claimed by Rummage less the amount paid to Duvall. Unwilling to accept this reduction in his claim prior to the audit, Rummage refused the check to himself and refused as well to transfer the other check to Duvall. The audit eventually revealed not only that Greer had failed to pay for Duvall's services, but also that Rummage had underestimated the amount of Greer's indebtedness to him.

In the meantime, when he did not receive his money within two weeks, Duvall moved for summary judgment on his underlying suit for damages and interest. The trial court ruled that Rummage had breached the settlement by failing to pass-on Duvall's check and that the settlement between Duvall and Rummage

could be deemed rescinded. Duvall's action against Rummage was thus reinstated, and on the merits of that claim, including the claim for pre-judgment interest, the trial court ruled that Duvall was entitled to summary judgment. On the other hand, the court further ruled that Rummage had settled its third-party complaint against Greer, and that part of the settlement remained in force. Accordingly, Rummage's claim for indemnity against Greer (as well as his new claim for the additional arrearage discovered during the audit) was denied. This is the judgment from which Rummage appeals. He maintains that Duvall's entitlement to damages and interest is still subject to factual dispute. He also maintains that, in light of the audit and Duvall's withdrawal from the settlement, his settlement with Greer should not have been enforced. Our analysis is slightly different from Rummage's, but we agree that the trial court did not give proper effect to the settlement.

It is a familiar rule of long standing in Kentucky that the voluntary settlement of law suits is to be encouraged. Murphy v. Henry, 311 Ky. 799, 225 S.W.2d 662 (1949); Childs v. Hamilton, 308 Ky. 203, 214 S.W.2d 106 (1948). It is equally fundamental that such agreements are contracts and so receive the full benefit and protection of the law pertaining thereto. Motorists Mutual Insurance Company v. Glass, Ky., 996 S.W.2d 437 (1999); Annotation, *Remedies for breach of valid accord or compromise agreement involving disputed or unliquidated claim*, 94 A.L.R. 2d 504 (1964). Readily avoidable mistakes concerning the value of one's bargain, for example, do not provide a basis for

relief from an ordinary contract, and likewise do not provide Rummage here with a basis for relief from his settlement with Greer. Creason v. Carmody, 310 Ky. 861, 222 S.W.2d 935 (1949); Kane v. Hopkins, 309 Ky. 488, 218 S.W.2d 37 (1949).

By the same token, although rescission is frequently the remedy for the breach of a settlement, 94 A.L.R.2d 504, *supra*, rescission is generally not appropriate where, as here, the parties can not be returned to the *status quo ante*. Lappas v. Barker, Ky., 375 S.W.2d 248 (1963); Meyer's Executor v. Huber, Ky., 280 S.W.2d 157 (1955). Accordingly, although we agree with the trial court that Rummage breached the settlement by failing to pass along Duvall's money in a timely manner, we do not agree that rescission was the proper remedy in this case. Rummage's concurrent settlement with Greer prevented a return to the *status quo ante*, with the result that rescission became patently unfair: Rummage was to be held to his part of the settlement, while Duvall was to be freed from his. Instead, Duvall should be limited to a claim for damages arising from Rummage's breach of the settlement. He will be entitled to interest, for example, from the date payment was due under the settlement, and he may have suffered other consequential losses as well. Such a claim adequately protects Duvall's bargain, and at the same time prevents any injustice to Rummage, a result consistent, we believe, with our duty both to encourage and to enforce settlements.

This disposition makes further discussion of Rummage's assertions of error unnecessary. It remains only to mention two

procedural issues raised by Greer. First, Greer asserts that Rummage's notice of appeal was fatally defective in that it referred not to the March 31, 1998, summary judgment, but to the subsequent order denying Rummage's CR 59.05 motion to alter, vacate, or amend that judgment. The rule of strict compliance upon which Greer relies, however, was modified by the now very familiar 1985 amendment to CR 73.02. Rummage's notice of appeal was proper under the current rules of procedure. Ready v. Jamison, Ky., 705 S.W.2d 479 (1986). Greer also asserts that Rummage's appeal is untimely to the extent that it takes issue with the trial court's order of January 8, 1998, as opposed to the March 31, 1998, summary judgment. The January order, however, dealt with only a portion of a multiple claim and was not expressly made final and appealable. It is therefore deemed to have been readjudicated as part of the summary judgment, and so was properly included in Rummage's appeal. CR 54.02.

In sum, this is a controversy over a few thousand dollars that has continued now for several years. Even the parties' settlement has failed to bring the matter to a close. The trial court correctly ruled that, under the settlement, Rummage has fixed his claim against Greer and thus has waived the additional, post-audit claim he now pursues. The trial court also correctly determined that Rummage breached the settlement by failing promptly to give Duvall his money. We are persuaded, however, that permitting Duvall to rescind the settlement and proceed against Rummage on his underlying claim was an

inappropriate remedy in this case, because Rummage can not similarly be returned to his pre-settlement position.

Accordingly, we affirm the March 31, 1998, judgment of Spencer Circuit Court in all respects except its provision of a remedy for Duvall. We reverse that portion of the judgment and remand for additional proceedings during which Duvall is to be afforded an opportunity to prove the extent of his damages.

ALL CONCUR.

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