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Commonwealth Of Kentucky

Court Of Appeals

NO. 1999-CA-000351-MR

STADIUM STUFF, INC.;
S.D. FABRICS, INC.; AND
SHARON DURHAM — APPELLANTS

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE REBECCA M. OVERSTREET, JUDGE
ACTION NO. 96-CI-02569

HUNTER MANUFACTURING GROUP, INC. — APPELLEE

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

BEFORE: BARBER, JOHNSON, AND SCHRODER, JUDGES.

SCHRODER, JUDGE: S.D. Fabrics, d/b/a Stadium Stuff, and its president, Sharon Durham, individually, appeal the judgment entered by the Fayette Circuit Court following a jury verdict awarding damages and attorney fees to Hunter Manufacturing Group, Inc. (Hunter) on breach of contract claims. Having reviewed the record and applicable law, we affirm in part, reverse in part, and remand.

Appellant, S.D. Fabrics, d/b/a Stadium Stuff (Stadium Stuff), is an Atlanta, Georgia, entity in the business of selling

sports memorabilia and collection pieces. In anticipation of the 1996 Summer Olympics being held in Atlanta, Stadium Stuff's president/owner, Sharon Durham (Durham), viewed an opportunity for Stadium Stuff to expand its ordinary sales volume during the period of time in which the Olympic games took place. To this end, Durham entered into a $2 million dollar contract with Hunter, a corporation doing business in Lexington, Kentucky. This contract called for Hunter to produce various specially manufactured merchandise,[1] the specifics of which had been negotiated by Durham, and to ship quantities of that merchandise in ten (10) separate $200,000 allotments. However, since Stadium Stuff did not have sufficient credit to secure the $2 million order, Hunter required Durham to execute a personal guarantee assuring payment on the account. The contract further required the purchase price of each allotment to be wire-transferred to Hunter's Lexington bank, prior to shipment.

However, when Hunter was ready, willing and able to ship the first allotment, Stadium Stuff repudiated the contract and refused to accept the specially manufactured goods by virtue of failing to make the requisite wire-transfer.

Thereafter, in effort to mitigate its damages, Hunter, on July 25, 1996, entered into a consignment agreement with Stadium Stuff. The terms of this agreement called for Hunter to be permitted to sell its merchandise, including that specially manufactured for Stadium Stuff, through seven (7) Stadium Stuff

[1] The goods produced by Hunter were to bear the Olympic logo and other similar Olympic legends.

outlet stores in downtown Atlanta. In exchange, Stadium Stuff was allocated a credit for Hunter merchandise already in its Atlanta warehouse (prior inventory on an outstanding account), and would receive twenty-percent (20%) of the total sales realized by Hunter. This twenty-percent (20%) would then be applied to an outstanding account balance due Hunter from Stadium Stuff. However, the consignment agreement failed in all respects.

On August 1, 1996, Hunter filed its complaint against appellants alleging, inter alia, a claim for damages arising from the breach of a $2 million contract.[2] Thereafter, Hunter filed an amended complaint claiming further damages on the breach of a July 25, 1996, consignment agreement. A jury trial was held which resulted in the court entering a December 3, 1998, trial verdict and judgment awarding Hunter: (1) $40,011.50 for Stadium Stuff's breach of the consignment agreement; (2) $112,979.50 for breach of the $2 million contract, plus interest at a rate of 18% per annum from July 31, 1996, until satisfied; (3) $112,979.50 for Durham's breach of the $2 million contract, plus interest at 18% per annum from July 31, 1996 until satisfied; and (4) an award of $36,000 against Durham for Hunter's attorney fees. Appellant's subsequent CR 59.01 motion was denied, and this appeal followed.

[2] Count I of Hunter's complaint, addressing Stadium Stuff's outstanding balance on other inventories, was resolved through summary judgment prior to trial and, as such, is not a subject of this appeal.

Before this Court, appellants raise three (3) allegations of error: (1) that the trial verdict and judgment permit double recovery for the same injury; (2) that the judgment against Durham awarding $36,000 to Hunter for attorney fees is against the evidence presented at trial; and (3) that the proof presented at trial evidenced that Hunter's damages, if any, were an unliquidated sum whereby disallowing a rate of 18% per annum for either pre-judgment or post-judgment interest.

The gist of appellants' first argument remains that the jury instructions were flawed in that they failed to instruct the jury on joint and several liability, whereby leading a confused jury panel to award a double recovery on the $2 million contract claim. Appellants further argue that the onus was upon the trial court to recognize the jury's confusion respecting the issue of joint and several liability by virtue of two inquiries submitted to the court during the jury's deliberations.[3]

As a preliminary matter, we believe the jury's verdict was fully supported by the evidence presented at trial. Hunter presented testimony evidencing $225,959 in damages arising from the breach of the $2 million contract. Clearly the jury "split" the difference in assessing its award, that is 50% liability upon the corporate defendants and 50% liability upon Durham, individually.

[3] We note that appellants have interjected an issue regarding the propriety and requirements of "piercing the corporate veil" into the "double recovery" discussion. However, since this argument was never raised before the lower court, we are without authority or inclination to address it now. Kesler v. Shehan, Ky., 934 S.W.2d 254, 256-57 (1996).

Moreover, review of the record reveals that appellants neither tendered nor requested a joint and several liability instruction. Rather, appellants objected to the use of the term "order" in the instructions addressing the $2 million contract. At no time, including that in which the court apprised the attorneys of the jury's inquiries, did appellants request a joint and several liability instruction. As such, the issue is not properly before this Court for consideration and we decline to address it in any further detail. Regional Jail Auth. v. Tackett, Ky., 770 S.W.2d 225, 228 (1989).

Secondly, Durham, individually, asserts that the judgment against her for $36,000 in attorney fees was unsupported by the evidence at trial. Although the only proof regarding attorney fees was presented before the lower court in the form of testimony from James Smith, Hunter's chief financial officer, we are constrained to reverse the court's affirmation of the jury verdict on this point as we believe the award is contrary to law.

The jury was presented numerous interrogatories and instructions. In sum, the jury was first asked to determine the liability of the corporate defendants under the consignment agreement and then again under the $2 million contract. In answering these interrogatories, the jury awarded the amount set forth, supra. Secondly, the jury was asked to ascertain whether they believed that Durham, as a result of her execution of the personal guaranty, "personally guaranteed" either the consignment agreement or the $2 million contract. To this particular set of interrogatories, the jury responded "no." However, when asked

whether Durham had signed the $2 million contract in her personal capacity or as a corporate representative, the jury determined that Durham acted independently of the corporate entities. As a result of this resolution, the jury assessed 50% of Hunter's damages for breach of this contract solely to Durham, i.e. $112,979.50. The jury further assigned Hunter's purported $36,000 in attorney fees solely to Durham.

In order to assess such fees, authority must be derived either by statute or a written instrument. Investors Heritage Life Ins. Co. v. Farmers Bank, Ky. App., 749 S.W.2d 688, 690 (1987). In this case, however, the only provisions for attorney fees were contained in the credit application and the personal guarantee executed by Durham. Clearly, the terms and conditions of the credit application remain applicable strictly to the corporate entities as it was executed on behalf of the corporations by Eleanor Beavers, comptroller. Likewise, the provision permitting the payment of attorney fees contained in the personal guarantee is inapplicable, in that the jury concluded that document was not executed by Durham in her individual capacity. As such, the record is devoid of any writing creating a personal liability upon Durham for the payment of Hunter's attorney fees.

Appellants' final argument is resolved similarly to the above-discussed issues. That is whether or not the court correctly assigned an 18% interest rate upon the various judgments.

With regard to the corporate entities' assignment of damages, as previously discussed, the monetary damages sustained by Hunter as a result of the breach of both contracts was a liquidated sum. Therefore, by virtue of the credit application executed on behalf of the corporations which contained a 1.5% monthly interest assessment on all outstanding sums due, the court's allocation of 18% per annum interest rate from July 31, 1996, was proper. KRS 360.010;[4] KRS 360.040.[5]

However, the jury determined that Durham did not execute the personal guarantee in her "personal" capacity, but, presumably, as a representative in her capacity as corporate president. As such, there is no writing under which Durham, individually, had agreed to pay a higher interest rate than those set forth in KRS 360.010 and KRS 360.040. Accordingly, Durham should have been assigned a pre-judgment interest rate as to the

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[4] KRS 360.010(1), provides, inter alia:

> The legal rate of interest is eight percent (8%) per annum, but any party or parties may agree, in writing, for the payment of interest in excess of that rate . . . .

[5] KRS 360.040 provides, in pertinent part:

> A judgment shall bear twelve percent (12%) interest compounded annually from its date. A judgment may be for the principal and accrued interest; but if rendered for accruing interest on a written obligation, it shall bear interest in accordance with the instrument reporting such accruals, whether higher or lower than twelve percent (12%).

$112,979.50 judgment of no greater than eight percent (8%), and a post-judgment interest rate not in excess of twelve (12%).

In accordance with the foregoing discussion, the judgment and order of the Fayette Circuit Court is affirmed in part, reversed in part, and remanded for entry of an order in conformity with this opinion.

ALL CONCUR.

BRIEF FOR APPELLANTS:

Cecil F. Dunn
Lexington, Kentucky

BRIEF FOR APPELLEE:

Elizabeth Lee Thompson
Daniel E. Danford
Lexington, Kentucky