RENDERED: October 5, 2001; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2000-CA-000346-MR

MERISEL AMERICAS, INC. APPELLANT

v.

APPEAL FROM NELSON CIRCUIT COURT
HONORABLE LARRY D. RAIKES, JUDGE
ACTION NO. 99-CI-00025

JOSEPH "PAT" KIRTLEY d/b/a PRO-COM APPELLEE

OPINION
AFFIRMING
** ** ** ** **

BEFORE: BARBER, COMBS, and TACKETT, Judges.

COMBS, JUDGE: Merisel Americas, Inc. (Merisel) appeals the summary judgment granted by the Nelson Circuit Court to appellee Joseph "Pat" Kirtley (Kirtley) in Merisel's action to recover a debt allegedly owed to it by Kirtley. We affirm.

Dating from the early 1990's, Kirtley owned and operated a business under the name of Pro-Com, which serviced computers and provided software and computer accessories. In 1996, Kirtley sold Pro-Com to Frank Wilson (Wilson). In January 1999, Merisel filed suit in Nelson Circuit Court against Kirtley for liability on a debt allegedly incurred by Pro-Com to Merisel after June 1, 1996. Kirtley joined Wilson in the suit as a third-party defendant, contending that he had sold Pro-Com to Wilson as of June 1, 1996, and that any debt incurred by Pro-Com after that date was the liability of Wilson rather than Kirtley.

Attached to the motion to join Wilson was a copy of the sales contract between Kirtley and Wilson, stipulating that Wilson — not Kirtley — was to be responsible for all debts incurred by Pro-Com after May 31, 1996. Wilson was duly served with process. He did not respond, and Kirtley was granted a default judgment against Wilson.

In response to Kirtley's discovery requests for documents regarding the alleged debt, Merisel produced documentation for sales that occurred after the sale of Pro-Com to Wilson. Every invoice, with the exception of one invoice lacking the purchaser's name, indicated that the sales were made to Wilson. The Nelson Circuit Court found that Kirtley had sold Pro-Com, that he had notified Merisel of the sale, and that Merisel was unable to present any evidence showing a genuine issue of material fact for trial. Accordingly, the court granted Kirtley's motion for summary judgment.

Our review of a summary judgment requires us to determine whether the trial court correctly found that there were no genuine issues of material fact and whether the moving party was entitled to judgment as a matter of law. *Scifres v. Kraft*, 916 S.W.2d 779 (Ky. App. 1996). A party moving for summary judgment bears the initial burden of convincing the court through evidence of record that no genuine issue of fact is in dispute. *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 482 (1991).

After the movant has satisfied this initial burden, the party opposing the motion bears the burden of presenting "at

least some affirmative evidence showing that there is a genuine issue of material fact for trial." *Steelvest*, 807 S.W.2d at 482. The party opposing the motion cannot simply rely on its pleadings in the face of adverse evidence. *Smith v. Food Concepts, Inc.*, 758 S.W.2d 437 (Ky. App. 1988).

Kirtley satisfied its initial burden by offering credible evidence that Pro-Com had already been sold to Wilson. Merisel made only a bare allegation without any substantiation that Kirtley was liable for debts incurred by Pro-Com after June 1, 1996. Merisel did not dispute the fact that the debts were incurred after June 1, 1996; nor did Merisel dispute that Pro-Com had been sold to Wilson on that date. Merisel offered no basis for liability on Kirtley's part except through Pro-Com, from which he had severed all ties. Accordingly, Kirtley's summary judgment motion, supported by evidence of the sale of Pro-Com, shifted the burden to Merisel to show that there was a genuine issue of material fact in dispute.

Merisel offered no evidence to rebut Kirtley's evidence that the debt at issue was incurred solely by Wilson through Pro-Com. Merisel's discovery evidence indicated that Wilson — not Kirtley — had made the purchases in dispute.

Merisel takes issue with the finding of the court that Kirtley notified Merisel of the sale of Pro-Com, contending that this material fact renders summary judgment inappropriate. However, Merisel has failed to demonstrate that this issue was indeed genuinely disputed after Kirtley's evidence to the contrary. Indeed, the trial court made a specific finding that

Kirtley had given notice of the sale to Merisel. (Summary Judgment, p.2)

Merisel argues that *Steelvest, supra*, and *Paintsville Hosp. Co. v. Rose*, 683 S.W.2d 255 (1985) hold that summary judgment is improper unless it is "impossible for the respondent to produce evidence at trial warranting a judgment in his favor and against the movant." (Emphasis added.) *Steelvest*, 807 S.W.2d at 483. However, the Kentucky Supreme Court has directed that "'impossible' is used in a practical sense, not in an absolute sense." *Perkins v. Hausladen*, 828 S.W.2d 652 (1992). The Kentucky Supreme Court recently re-visited this standard in *Welch v. American Publishing Co. of Kentucky*, 3 S.W.3d 724 (1999). *Welch* holds that *Steelvest* did not apply a standard so stringent as to repeal CR 56; it reiterated forcefully that trial judges are to refrain from weighing evidence at the summary judgment stage and that they are to review the record after discovery has been completed to determine whether the trier of fact could find a verdict for the nonmoving party. *Welch*, 3 S.W.2d at 729.

Our review of the record indicates that the standard was properly applied in the court below. Summary judgment was properly granted, and we find no error.

The judgment of the Nelson Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

James H. Abell
Bardstown, KY

BRIEF FOR APPELLEE:

Michael C. Coen
Bardstown, KY