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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2000-CA-001368-MR

SHIRLEY RISEN

APPELLANT

v. APPEAL FROM TAYLOR CIRCUIT COURT
HONORABLE DOUGHLAS M. GEORGE, JUDGE
ACTION NO. 96-CI-00129

JAMES MEDICAL EQUIPMENT, LTD.

APPELLEE

OPINION
AFFIRMING
** ** * * * * *

BEFORE: JOHNSON, KNOPF AND MILLER, JUDGES.

JOHNSON, JUDGE: Shirley Risen has appealed from a final judgment of the Taylor Circuit Court entered on May 2, 2000, which ruled that she was not entitled damages on her claims for breach of contract and constructive discharge. Having concluded that the trial court's findings of fact are supported by substantial evidence, we affirm.

James Medical Equipment, Ltd. (JME) is a Kentucky corporation engaged in the business of providing home health care equipment. Its founder, Donald James, incorporated the company

in 1990 and actively managed it until 1995. On June 30, 1992, Shirley Risen entered into a contractual relationship with JME to perform accounting services. Just one year later, Risen signed a second contract with JME, which superseded the first contract. The second contract named Risen president of JME. This relationship existed until January of 1994, when Risen resigned her position due to what she claimed to be an intolerable work environment created by Donald James. However, apparently satisfied that work conditions had improved, Risen returned to her position in March of 1994. On April 3, 1995, Risen signed yet a third contract with JME, which named her chief operating officer. In a separate contract also dated April 3, 1995, JME granted Risen the option to purchase the assets of JME. The option was never fully exercised.

As Shirley Risen's influence over JME increased, Donald James began to relinquish formal control of the company by setting up an irrevocable trust to receive his ownership interests.¹ Since its inception, the Donald James Irrevocable Trust has had three different trustees. The first was Shirley Risen, who relinquished control to take on a bigger role with the company, the second was Maria Fernandez, the attorney who apparently drafted the initial trust agreement, and the third was Thomas James, the nephew of Donald James.

¹Apparently, Donald James's ownership interest in JME was placed in an irrevocable trust to enable him to avoid a conflict of interest under the Federal Medicare/Medicaid regulations.

The Donald James Irrevocable Trust had little practical effect until April 3, 1995, when Donald James transferred his stock ownership in JME into the trust. Up to that point, Donald James had personally retained his stock ownership in JME and had worked alongside Risen in the day-to-day management of JME. From the record, it is clear that during this period of time there was significant conflict between Risen and Donald James. Animosity between the two continued even after Donald James had transferred his stock interests into the trust and Risen had assumed the position of chief operating officer. Risen described the work environment that Donald James created as "intolerable and abusive." Risen further alleged that "Mr. James belittled [her] and his conduct often caused [her] to become physically sick."

Apparently, a major source of the ongoing conflict between Risen and James involved the payment of notes held by other corporations under James's control. Risen claims that James ordered that those notes be given priority over all other claims against JME except taxes and payroll. Risen argues that this practice financially strapped the corporation and made it difficult for JME to continue its daily operations. Risen alleges that if the notes went unpaid, James would become verbally abusive toward her, creating an intolerable work environment.

By contrast, James claims that the source of tension between the two developed as a result of Risen's financial mismanagement of the company. James alleges that between June of

1995 and February of 1996, Risen wrote 128 bad checks on behalf of JME that were unpaid due to insufficient funds. James points out that during roughly the same time period, 66 checks, which did not bounce, were drawn on the corporation and paid out to either Risen or her husband.

The antagonistic relationship between Risen and James continued. On April 1, 1996, Thomas James, the trustee of the Donald James Irrevocable Trust, appointed Donald James as chairman, secretary and treasurer of JME, and directed him "to immediately assume control of all Corporation business[.]" Although Risen was explicitly retained as chief operating officer of JME, Donald James informed her that she would now be directly accountable to him in his capacity as chairman. Risen claims that she eventually found these new working conditions to be unsatisfactory and, in a letter dated May 14, 1996, informed Donald James that because she had been forced out of her position by "intolerable working conditions" she did not intend to return to work.

On May 2, 1996, JME, through its chairman, Donald Jones, initiated a lawsuit in the Taylor Circuit Court seeking injunctive relief against Risen. The complaint requested access to JME's business premises and records, and sought a restraining order against Risen to prevent the destruction of business information and records. After the filing of the initial action, James has twice amended his complaint. In its final form, the complaint sought injunctive relief to enjoin Risen from competing

with JME, damages for breach of contract, damages for breach of fiduciary duty, damages for breach of professional duty, damages for professional negligence, damages for conversion, and damages for tortious interference with JME's business relations. Shirley Risen's husband, Bradley Risen, was added as a defendant. In Shirley Risen's counterclaim she requested damages for personal property expropriated by JME, damages for unsatisfied debts owed to her and her husband by JME, damages for breach of contract, and damages for constructive discharge.

Following a bench trial on August 12 and 13, 1999, the Taylor Circuit Court entered a final judgment on May 2, 2000. While denying JME relief on the bulk of its claims concerning Risen's alleged negligence and mismanagement, the trial court awarded JME \$3,000.00 for equipment that Risen had failed to return and \$1,500.00 for lost profits due to one instance of Risen's breaching her covenant not to compete. As to Risen's counterclaims, the judgment awarded \$1,000.00 for unpaid accounting services, \$1,000.00 for a computer that she did not recover from JME, and \$2,500.00 for various debts and expenses owed to Risen's husband, Bradley.² The trial court denied Risen any relief on her main allegations of breach of contract and constructive discharge. It was from those denials that Risen filed this appeal.³

²Bradley Risen assigned all of his claims to Shirley Risen.

³Shortly after the judgment had been entered by the Taylor Circuit Court, Risen filed a motion pursuant to Kentucky Rules of
(continued...)

On appeal, Risen argues that the denial of her counterclaims for breach of contract and constructive discharge was "clearly erroneous and manifestly against the weight of the evidence." In other words, Risen claims that there was not substantial evidence of record to support the trial court's findings of fact that were relied upon in denying her claims.

Since this case was tried before the court without a jury, its factual findings "shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses."⁴ A factual finding is not clearly erroneous if it is supported by substantial evidence.⁵ Substantial evidence is evidence of

³(...continued)
Civil Procedure (CR) 52.04 to have the trial court make more specific findings of fact. Before the trial court could rule on the motion, Risen filed this appeal. The trial court then denied the motion. JME argues that Risen's appeal is procedurally flawed. JME claims "she failed to properly bring the deficient findings of fact to the Court's attention and allow the Court adequate time to respond. Mrs. Risen did not properly preserve the error because she deprived the Court of its jurisdiction before it could decide that more specific findings of fact may be appropriate." However, in her reply brief, Risen makes it clear that she is not appealing the denial of her CR 52.04 motion, but rather she is only appealing the issue of the sufficiency of the evidence to support the trial court's findings of fact in the judgment of May 2, 2000. She states: "When Mrs. Risen filed her notice of appeal her motion for specific findings of fact became a nullity and Mrs. Risen is only appealing from the insufficiency of the evidence that supports the trial court's ruling that she is not entitled to be paid under her claim for wrongful discharge because she was not cooperative with Don James."

⁴CR 52.01. See also Lawson v. Loid, Ky., 896 S.W.2d 1, 3 (1995); and A & A Mechanical, Inc. v. Thermal Equipment Sales, Inc., Ky.App., 998 S.W.2d 505, 509 (1999)

⁵Owens-Corning Fiberglas Corp. v. Golightly, Ky., 976 S.W.2d (continued...)

substance and relevant consequence sufficient to induce conviction in the mind of a reasonable person.⁶ "It is within the province of the fact-finder to determine the credibility of witnesses and the weight to be given the evidence."⁷ Thus, absent clear error, this Court cannot set aside the factual findings of the trial court.

The legal standard by which Risen must prove constructive discharge is not so well established.⁸ Nonetheless, in Kentucky, as in the majority of jurisdictions, it appears that the commonly accepted standard for constructive discharge is "whether, based upon objective criteria, the conditions created by the employer's action are so intolerable that a reasonable person would feel compelled to resign."⁹ Thus, in order to prevail on her constructive discharge claim, Risen was required to prove by a preponderance of the evidence that the working conditions at JME were so intolerable that a reasonable person

⁵(...continued)
409, 414 (1998); Uninsured Employers' Fund v. Garland, Ky., 805 S.W.2d 116, 117 (1991); Faulkner Drilling Co., Inc. v. Gross, Ky.App., 943 S.W.2d 634, 638 (1997).

⁶Golightly, 976 S.W.2d at 414; Janakakis-Kostun v. Janakakis, Ky.App., 6 S.W.3d 843, 852 (1999) (citing Kentucky State Racing Commission v. Fuller, Ky., 481 S.W.2d 298, 308 (1972)).

⁷Garland, 805 S.W.2d at 118.

⁸Commonwealth of Kentucky, Tourism Cabinet, Dept. of Parks v. Stosberg, Ky.App., 948 S.W.2d 425, 427 (1997).

⁹Id. (citing Darnell v. Campbell County Fiscal Court, 731 F.Supp. 1309 (E.D.Ky. 1990); and Humana, Inc. v. Fairchild, Ky.App., 603 S.W.2d 918 (1980)).

would feel compelled to resign.

The factual finding of whether Risen was constructively discharged from JME, and thus whether her contract was wrongfully breached, was a matter squarely within the province of the trial court. In its May 2, 2000, judgment, the Taylor Circuit Court found that "[b]ecause of the non-cooperation between ... Shirley Risen and Donald James, and because both were at fault, [Risen] is not entitled to be paid under the contract for her claim of wrongful discharge [from] the employment contract. [Risen] has failed to meet her burden of proof on this issue in her counterclaim." In other words, the trial court determined as a factual matter that based upon objective criteria Risen had failed to prove that work conditions at JME were so intolerable as to compel a reasonable person to resign.

Clearly, dramatically conflicting evidence was presented in this case. If Risen's claims of abusive conduct were believed, it would be reasonable to conclude that Risen was constructively discharged and her contract breached. On the other hand, if James's claims of financial mismanagement were believed, one could reasonably conclude that Risen's actions deserved appropriate criticism and she was not constructively discharged. Our responsibility is not to retry the case from the record but to review the record to determine whether it contains substantial evidence to support the trial court's findings of fact. After hearing all of the conflicting testimony and judging the credibility of the witnesses, the Taylor Circuit Court found

that both Risen and James were at fault for the state of affairs giving rise to this litigation. Since the record contains substantial evidence of Risen's continual financial mismanagement which supports the trial court's findings that Risen was at least partially at fault for the problems between her and James; and accordingly, this factual finding cannot be set aside.

For the foregoing reasons, the judgment of the Taylor Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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