RENDERED: November 21, 2001; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2000-CA-002183-MR

DONALD SALYER APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE GARY D. PAYNE, JUDGE
ACTION NO. 99-CI-03663

HALL ENTERPRISES, INC. APPELLEE

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

BEFORE: BUCKINGHAM, EMBERTON, AND TACKETT, JUDGES.

BUCKINGHAM, JUDGE: Donald Paul Salyer appeals from a summary judgment entered by the Fayette Circuit Court in favor of Hall Enterprises, Inc. We affirm.

Hall Enterprises, Inc. (Hall's), operated a motor home sales business known as Hall's Campers in Lexington, Fayette County, Kentucky. Tommy Hall was the sole shareholder of Hall's. Salyer was employed by Hall's from approximately 1989 through 1995, at which time his employment was terminated.

In 1997, Salyer and Hall began discussions about Salyer returning to work at Hall's. They reached an oral agreement on April 11, 1997, concerning Salyer's return. Salyer testified in his deposition that Hall told him that if he came back to the business he would be given a 20% ownership interest up front and an additional 10% ownership interest per year for the following three years. Hall likewise testified in his deposition that he agreed to give Salyer a 20% ownership interest in the business if he came to work at Hall's, but he testified that the additional transfer of a 10% ownership interest per year for three years was conditional on Salyer's job performance. Salyer further stated that his understanding of the agreement was that he would then be allowed to purchase the remaining ownership portion of the business.

On May 16, 1997, Hall presented Salyer a Shareholder Agreement which contained, among other things, the following provision:

> In the event Donald Paul Salyer, who is currently an employee of the Company ("Employee-Shareholder"), should terminate his employment with the Company, for any reason, either voluntarily or involuntarily, upon the effective date of his termination, he shall be obligated to sell to the Company all of the shares of the Company then held and owned by the Employee-Shareholder, and the Company shall purchase the shares at the value established by the Shareholders as provided in Paragraph (5), <u>except he would not be paid any money for any shares in the company that he did not pay for himself and was given to him free.</u> He still would be obligated to return those shares back to the company within 15 days of termination. (Emphasis added.)

Upon the execution of the agreement by the parties, a stock certificate representing 20% of the outstanding stock of Hall's was issued to Salyer. The certificate stated that it was transferrable in accordance with the terms of the Shareholder Agreement.

Salyer's employment by Hall's was terminated on December 28, 1998. Hall's subsequently demanded the return of the shares of stock in accordance with paragraph three of the Shareholder Agreement. When Salyer refused to return the stock, Hall's instituted a declaratory judgment action in the Fayette Circuit Court. This suit was filed in October 1999.

Hall's complaint sought a declaration that Salyer was required to transfer his shares of stock to Hall's without payment in return and also sought a permanent injunction requiring Salyer to transfer the shares. Salyer filed an answer and counterclaim alleging he had given nonmonetary consideration for the shares and contending that he was entitled to payment in accordance with the value determined under paragraph five of the agreement.

After the parties engaged in discovery, each party filed a motion for summary judgment. On July 6, 2000, the trial court entered an order granting Hall's summary judgment motion and denying Salyer's summary judgment motion. The trial court's order stated as follows:

> The Court finds that the agreement is clear that the Defendant had to give back any stocks that were given to him. The Court finds that the stock in question was given to the Defendant by the Plaintiff. The Court does not find that this was given to him as consideration for the Defendant leaving his job to come to work at Hall Enterprises, Inc.
>
> Therefore the Plaintiff's motion for summary judgment is SUSTAINED, and the

> Defendant's motion for summary judgment is OVERRULED. (Emphasis in original.)

Hall's then filed a motion for the court to enter a final judgment, and Salyer filed a motion to alter, amend, or vacate the prior order. On July 20, 2000, the court entered its final judgment declaring that Salyer was required to transfer his shares of Hall Enterprises, Inc., to Hall's without compensation and directing Salyer to transfer the shares within ten days from the date of entry of the judgment. The judgment also stated that Salyer's counterclaim was dismissed.

On July 31, 2000, Salyer filed another motion wherein he moved the court to vacate its judgment pursuant to CR[1] 59. That motion noted that there was a motion pending to set aside the July 6, 2000 order granting summary judgment to Hall's and denying it to Salyer. Salyer filed other postjudgment motions, but all of Salyer's motions were eventually overruled by the trial court in its order of September 15, 2000. Salyer then filed this appeal.

Salyer raises two arguments in his appeal. First, he argues that the trial court erred when it ordered him to return the stock because the stock provision in the Shareholder Agreement acted as a forfeiture and was an unreasonable restriction. Second, he argues that the evidence is undisputed that he gave consideration for the stock and, therefore, the provision in the agreement did not apply. We decline to address the first argument because Salyer failed to plead illegality as

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[1] Kentucky Rules of Civil Procedure.

an affirmative defense. As to the second argument, we conclude that the trial court did not err in awarding summary judgment to Hall's. We will address each of Salyer's arguments in turn.

Salyer first argues that the stock return provision in the Shareholder Agreement was unenforceable because it acted as a forfeiture and an unreasonable stock restriction. In support of his argument, he cites Man O War Restaurants, Inc. v. Martin, Ky., 932 S.W.2d 366 (1996). In Man O War, Martin was hired as a manager of Man O War's Sizzler Restaurant and was permitted to purchase 25% of the stock in the corporation for $1,000. Id. at 367. According to the terms of his employment contract, however, Martin was required to return the stock in exchange for $1,000 if his employment was terminated by the corporation during the five-year term of his employment contract. Id. Martin was terminated during the term of his contract and demand was made by Man O War for the return of the stock. Id. Adopting the opinion of a panel of this court, the Kentucky Supreme Court held that the stock return provision in the employment contract operated as a forfeiture or penalty for breach of contract and was unenforceable. Id. at 368. The court also stated that once the stock was transferred to Martin, it became his property "and strong public policy against forfeiture protects property from being taken without appropriate compensation." Id. at 369.

In response to Salyer's argument, Hall's argues that Salyer did not properly preserve the issue for our review. Salyer acknowledges that he did not raise the issue concerning the enforceability of the Shareholder Agreement provision until he filed his motion to alter, amend, or vacate the trial court's July 6, 2000 order awarding Hall's a summary judgment. That motion was filed on July 17, 2000, prior to the entry by the trial court of its final judgment on July 20, 2000.

In response to Hall's argument that Salyer did not preserve the issue for our review, Salyer cites Personnel Bd. v. Heck, Ky. App., 725 S.W.2d 13 (1986). In that case, a panel of this court held:

> A judgment which is dispositive of the issues raised in the CR 59 motion readjudicates all prior interlocutory orders and judgments determining claims which are not specifically disposed of in the latter judgment. CR 54.02(2); CR 73.02(1)(e). Therefore, an objection raised in a CR 59.05 motion would be timely, and would not constitute a waiver.

Id. at 18. In light of our holding in Heck, we conclude that the issue was preserved by Salyer for our review.

In further response to Salyer's argument that the stock return provision in the agreement acted as a forfeiture, Hall's asserts that the argument was waived because Salyer failed to plead illegality as an affirmative defense as required by CR 8.03. See also Gordon v. NKC Hospitals, Inc., Ky., 887 S.W.2d 360, 363 (1994). In response, Salyer maintains that his failure to plead illegality did not waive the issue because the requirement that an affirmative defense must be pled is waived when no objection is made to the introduction of the issue to the trial court. In other words, Salyer states that he raised the illegality issue in his motion to alter, amend, or vacate and that Hall's may not now assert that the defense was waived because Hall did not object to the argument before the trial court. In support of his argument, Salyer cites Carney v. Scott, Ky., 325 S.W.2d 343 (1959), and Rockwood v. Huey, Ky., 348 S.W.2d 915 (1961).

We conclude that Salyer waived the illegality defense because he did not raise it in his pleadings as required by CR 8.03. We further conclude that Hall's did not waive the requirement that an affirmative defense must be pled even though it did not object to the introduction of the issue to the trial court in Salyer's motion to alter, amend, or vacate. In our view, Carney and Rockwood are distinguishable and not supportive of Salyer's argument.

In Carney, the court held that the issue of mitigation of damages, even if it should have been pled as an affirmative defense, remained an issue in the case because it was tried before the jury by the consent of the parties. Id. at 345. See also CR 15.02. In Rockwood, the court held that the requirement of CR 8.03 that the statute of limitations be specifically pled in defense was considered waived where the issue "was raised in the complaint and amended complaint, treated by the parties as properly an issue, and settled by a final order entered on that basis." Id. In the case *sub judice*, however, the parties never consented to the illegality issue being determined by the court prior to its ruling. It was only after the trial court had awarded summary judgment in favor of Hall's that Salyer raised the issue.

Furthermore, Salyer's CR 59 motion merely cited KRS[2] 271B.6-270 in support of his illegality argument and neither mentioned his present forfeiture argument nor made reference to the Man O War case. Under these distinguishable circumstances, we conclude that Carney and Rockwood are not applicable and that Salyer's illegality argument based on the Man O War case was waived due to his failure to plead illegality as an affirmative defense to Hall's action.

Salyer additionally argues that he did not claim the stock return provision was illegal but merely that it was unenforceable and invalid. Citing Adkins v. International Harvester Co., Ky., 286 S.W.2d 528 (1956), Salyer maintains that the burden was on Hall to establish his entitlement to have the stock returned without payment and that Hall failed to satisfy an essential element of his claim, that being that the provision was enforceable and valid. We disagree and hold that Salyer was clearly required to plead illegality as an affirmative defense or else be deemed to have waived it.

Salyer's second argument is that it was undisputed that he gave consideration for the stock and, therefore, the stock return provision did not require him to return the stock without being paid for it. When Salyer and Tommy Hall made their oral agreement in 1997 that Salyer would come to work for Hall's, Salyer had been working at Northside RV. Both Salyer and Hall testified in their depositions that Hall's gave Salyer a 20% ownership interest in the business so that he would come to work

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[2] Kentucky Revised Statutes.

for Hall's. Salyer stated that his annual income at Northside RV that year would have been approximately $100,000. His agreement with Hall's provided that he would be paid a salary of $75,000 plus 10% of the net profit. Further, Salyer was required by Hall's to sign a covenant not to compete.[3]

As we have noted, the trial court found in its summary judgment order that the stock was given to Salyer by Hall's but was not given to him as consideration for his leaving his job at Northside RV. As we have also noted, paragraph three of the Shareholder Agreement stated that Salyer would not be paid money for shares "that he did not pay for himself and was given to him free."

We believe the language in paragraph three of the Shareholder Agreement is clear and unambiguous. In fact, Salyer himself stated such in his answer to Hall's complaint. The agreement clearly states that Salyer would not be paid money for shares "that he did not pay for himself[.]"[4] Under these circumstances, we conclude that the trial court correctly ruled as a matter of law that Salyer was required to return the shares of stock to Hall's without payment in return.

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[3] We also note that Hall admitted in his deposition that he had offered Salyer $100,000 for his stock when Salyer was terminated, but Hall maintained that the offer was for purposes of compromise.

[4] In fact, Salyer testified in his deposition that when he signed the Shareholder Agreement, Hall said to him, "Do you realize that that stock that you're not paying for you would have to give back?" Salyer acknowledged that he answered "yes," but he asserts he understood Hall was referring to the other 30% interest he was to received over the next years and not the 20% interest that was transferred to him up front.

The judgment of the Fayette Circuit Court is affirmed.

ALL CONCUR.

BRIEF AND ORAL ARGUMENT FOR APPELLANT:

Barbara Anderson
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BRIEF AND ORAL ARGUMENT FOR APPELLEE:

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