

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 2001-CA-001436-MR

HEALTHESSENTIALS SOLUTIONS, INC.

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE F. KENNETH CONLIFFE, JUDGE  
ACTION NO. 00-CI-006192

KINDRED HEALTHCARE OPERATING, INC.  
(F/K/A VENCOR OPERATING)

APPELLEE

OPINION  
VACATING AND REMANDING  
\*\* \*\*

BEFORE: DYCHE, KNOPF, AND McANULTY, JUDGES.

KNOPF, JUDGE: In February 1999, HealthEssentials Solutions, Inc. purchased 1000 shares of NPPA of America, Inc. preferred stock from Vencor Operating, Inc. Among other consideration, HealthEssentials gave Vencor a promissory note for \$500,000.00. In September 2000, alleging that HealthEssentials had defaulted on its note, Vencor brought suit seeking the full principal plus interest. Almost immediately, the suit was stayed pending Vencor's bankruptcy. Vencor emerged from bankruptcy in April 2001 with a new name, Kindred Healthcare Operating, Inc., and promptly moved to have its suit against HealthEssentials

recommenced. In May 2001, HealthEssentials answered the complaint and asserted counterclaims against Kindred on the grounds, among others, of fraud and mistake.

By order entered June 14, 2001, the Jefferson Circuit Court dismissed HealthEssentials' fraud and mistake-based counterclaims with prejudice. The claims had not been pled, the court explained, with the particularity CR 9.02 requires, and HealthEssentials had failed to respond in time to Kindred's motion to dismiss. The court made the dismissal of the counterclaim final and appealable pursuant to CR 54.02<sup>1</sup> and summarily denied HealthEssentials' motion for reconsideration. HealthEssentials thereupon appealed. It contends that the trial court misapplied CR 9.02's particularity requirement and that it abused its discretion by dismissing the counterclaim with prejudice before HealthEssentials had had an opportunity to be heard. Although we agree with the trial court that HealthEssentials' allegations of fraud and mistake have not been pled with sufficient particularity, we are concerned that its response to Kindred's motion was apparently not tardy, contrary to the court's impression. Dismissal with prejudice in these circumstances, we believe, was an inappropriate sanction. Accordingly, we shall vacate the court's order of dismissal with prejudice and remand to afford HealthEssentials an opportunity to amend its answer and counterclaim.

---

<sup>1</sup>The court's order also struck fraud and mistake-based affirmative defenses from HealthEssentials' answer. That part of the order was not made final, however, and so is not presently subject to review.

CR 9.02 requires that “[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity.” The rule thus creates an exception to the general rule of notice pleading,<sup>2</sup> but it does not require a return to the strict fact pleading that prevailed prior to the adoption of the civil rules.<sup>3</sup> Rather, CR 9.02 requires that enough of the facts constituting the alleged fraud or mistake be pled to give the court some assurance that the claim or defense is substantial<sup>4</sup> and to enable the opponent to respond and prepare for trial.<sup>5</sup> It is often said that the rule requires only that the basic circumstantial facts be pled, the who, what, when, where, and how of the alleged occurrence.<sup>6</sup> The rule requires the pleading of more than mere conclusions but less than evidentiary facts.<sup>7</sup> What is sufficient between these extremes will vary from case to case, depending in part upon what the pleader can be expected to know.<sup>8</sup>

---

<sup>2</sup>CR 8.05.

<sup>3</sup>Scott v. Farmers State Bank, Ky., 410 S.W.2d 717 (1966); Michaels Building Company v. Ameritrust Company, 848 F.2d 674 (6<sup>th</sup> Cir. 1988).

<sup>4</sup>Mardini v. Viking Freight, Inc., 92 F. Supp. 2d 378 (D. N.J. 1999); Bready v. Geist, 83 F.R.D. 432 (D. E.Pa. 1979).

<sup>5</sup>Scott v. Farmers State Bank, *supra*; Michaels Building Company v. Ameritrust Company, *supra*.

<sup>6</sup>Hart v. Bayer Corporation, 199 F. 3d 239 (5<sup>th</sup> Cir. 2000); Woodard v. American Family Mutual Insurance Company, 950 F. Supp. 1382 (N.D.Ill. 1997).

<sup>7</sup>Scott v. Farmers State Bank, *supra*.

<sup>8</sup>Hart v. Bayer Corporation, *supra*; Mardini v. Viking Freight, Inc., *supra*.

We agree with the trial court that HealthEssentials' allegations of fraud and mistake do not meet the particularity standard of CR 9.02. With respect to the alleged mistake, HealthEssentials averred only that at some point during contract negotiations, someone in NPPA's management somehow overstated NPPA's financial condition and that both parties to the note relied, in some sense, on the overstatement. There is no indication of who made the statement, when, or what specific misrepresentation occurred. Such general allegations do not suffice to put Kindred on notice of the alleged mistake, nor do they assure the court that there is any substance to HealthEssentials' claim.

HealthEssentials' allegations of fraud are little better. It averred that at unspecified times during negotiations, unnamed Kindred employees or agents falsely indicated, in some manner, that Kindred would continue and even increase its business with NPPA. Again, there is no indication of particular people, particular times, or particular representations, although presumably HealthEssentials knows most, if not all, of the particular facts. Because fraud may not be predicated on representations of future events, it is crucial to HealthEssentials' claim that Kindred misrepresented a present intention and not merely a hope for the future. HealthEssentials' general allegations, however, do not tend to substantiate the former rather than the latter scenario. The trial court did not err by deeming HealthEssentials' allegations of fraud and mistake insufficiently particular.

However, the trial court did err in when it dismissed HealthEssentials' counterclaim with prejudice. One of the underlying purposes of the civil rules is that cases be decided on their merits, and to that end CR 15.01 provides that leave to amend technically deficient pleadings is to be freely given "when justice so requires."<sup>9</sup> Justice does not so require, of course, if the amendment would be futile or if the pleading party has already had an opportunity to correct the deficiency.<sup>10</sup> Here the trial court entered its ruling on the eleventh day after Kindred certified its motion to dismiss and stated that "[d]efendant has failed to timely file a reply to Plaintiffs' motions, and the time for such filing has long since expired."

If indeed HealthEssentials had missed the deadline for responding, then dismissing its claim with prejudice would have been within the spirit of CR 15 and well within the trial court's discretion. HealthEssentials points out, however, that, under the Jefferson Circuit Court's Local Rule (JRP) 401, it had twenty days in which to respond to a motion to dismiss. Kindred does not dispute that JRP 401 was the pertinent local rule, nor does it offer an explanation other than mistake for the trial court's remark. The trial court itself, although asked to do so, did not address the issue in its summary denial of HealthEssentials motion to reconsider. Because the trial court seems to have based its decision to dismiss with prejudice on an incorrect perception of HealthEssentials' tardiness, we agree with

---

<sup>9</sup>Commonwealth ex rel. Stephens v. Stephenson, Ky. App., 574 S.W.2d 328 (1978).

<sup>10</sup>First National Bank of Cincinnati v. Hartmann, Ky. App., 747 S.W.2d 614 (1988).

HealthEssentials that justice requires that it be given an opportunity to amend its fraud and mistake-based counterclaims to comply with CR 9.02. It may also wish to state more clearly than it has done so far its counterclaims based on grounds other than fraud or mistake. Of course, Kindred will again be free to challenge the sufficiency of any amended pleading.

In sum, we affirm the trial court's conclusion that HealthEssentials has thus far failed to plead either a fraud or a mistake-based counterclaim with the particularity CR 9.02 requires. We are persuaded, however, that it should be given an opportunity to amend its pleading. Accordingly, we vacate the June 14, 2001, order of the Jefferson Circuit Court dismissing HomeEssentials' counterclaim and remand for additional proceedings.

ALL CONCUR.

BRIEFS AND ORAL ARGUMENT FOR  
APPELLANT:

John E. Clontz  
Clontz & Cox, LLC  
Mt. Vernon, Kentucky

BRIEF FOR APPELLEE:

Patrick W. Michael  
Angela Logan Edwards  
Woodward, Hobson & Fulton,  
L.L.P.  
Louisville, Kentucky

ORAL ARGUMENT FOR APPELLEE:

Angela Logan Edwards  
Louisville, Kentucky