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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2001-CA-001718-MR

HENRY TATUM and
MYRNA TATUM — APPELLANTS

v.

APPEAL FROM MUHLENBERG CIRCUIT COURT
HONORABLE DAVID H. JERNIGAN, JUDGE
CIVIL ACTION NO. 95-CI-00532

CANYON COALS, INC.; AUSTIN POWDER COMPANY; ETI EXPLOSIVES TECHNOLOGIES INTERNATIONAL, INC.; and SOUTHERN EXPLOSIVES CORPORATION — APPELLEES

NO. 2001-CA-001839-MR

CANYON COALS, INC. — CROSS-APPELLANT

APPEAL FROM MUHLENBERG CIRCUIT COURT
HONORABLE DAVID H. JERNIGAN, JUDGE
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AUSTIN POWDER COMPANY; ETI EXPLOSIVES TECHNOLOGIES INTERNATIONAL, INC.; and SOUTHERN EXPLOSIVES CORPORATION — CROSS-APPELLEES

OPINION AND ORDER

AFFIRMING APPEAL NO. 2001-CA-001718-MR;

DISMISSING APPEAL NO. 2001-CA-001839-MR

** ** ** ** **

BEFORE: EMBERTON, Chief Judge; DYCHE and HUDDLESTON, Judges.

HUDDLESTON, Judge: Henry and Myrna Tatum appeal and Canyon Coals, Inc. cross-appeals from a Muhlenberg Circuit Court order granting summary judgment in favor of Canyon Coals and Austin Powder Company and granting a motion to dismiss Canyon Coals' third-party complaint against ETI Explosives Technologies International Inc. (formerly Southern Explosives Corporation). In so doing, the court found that "the Subrogation Receipt of May 6, 1995, assigned and transferred each and all of Plaintiffs' claim for loss or damage caused by blasting to the Tatum dwelling to Agway Insurance Company." The Tatums also appeal and Canyon Coals cross-appeals from an order denying the Tatums' motion to alter, amend or vacate that order without a hearing.

The Tatums are the owners in possession of a parcel of land located in Muhlenberg County, Kentucky, on which they reside in a two-story home. Canyon Coals is the owner and operator of a surface coal mine located in the vicinity of the Tatums' property. Allegedly as a result of blasting activities conducted at the mine sites[1] which caused "great vibrations of earth, and air concussions," the Tatums' property sustained damage.

[1] According to Canyon Coals, it operated the Jacobs Creek mine from May 1990 through May 1993 and the Canyon Lake mine from March 1993 through December 18, 1993. At both sites, either Austin Powder or Southern Explosives (now ETI), the blasting contractors, were responsible for and conducted the blasting activities. Canyon Coals was granted leave to file a third party complaint joining the cross-appellees herein as third-party defendants.

In a complaint filed on December 4, 1995,[2] the Tatums alleged that blasting by Canyon Coals violated the provisions of Kentucky Revised Statutes (KRS) Chapter 350 and damaged the foundation of their residence and "whole superstructure, including its floors, foundation, front porch, walls, windows, ceiling and chimney." Citing KRS 350.250, the Tatums claimed entitlement to any and all fees and expenses incurred in litigating their claim. Specifically, they sought a judgment against Canyon Coals compensating them for all losses to their property suffered as a consequence of the blasting and surface coal mining operations, including reduction in value, costs and expenses associated with repairing the damage, incidental expenses such as those incurred by reason of dislocation and loss of use, any additional damages resulting from repairs, out-of-pocket expenses, attorney fees, expert witness, engineering and consulting fees, prejudgment and postjudgment interest on any award and a trial by jury.

On or about May 6, 1995, the Tatums submitted a sworn proof of loss to their homeowners' insurance carrier, Agway Insurance Company. Under the "Time and Origin" section of that statement, the Tatums listed "blasting" as the cause of loss and July 24, 1992, as the date of occurrence, with a notation indicating that the blasting began in 1990 and ended in 1993 but they were "not exactly sure when the damage was first noticed at

[2] In an order entered on March 29, 1996, the court granted the Tatums' motion for leave to file a first amended complaint so as to name Canyon Coals, Inc. as the party defendant rather than Canyon Coal Company.

[that] time." At the time of the loss, the total coverage provided by the policy was $96,000.00.

When attempts to negotiate a settlement failed, the Tatums and Agway each selected an arbitrator pursuant to the terms of the insurance policy who together arrived at the sum of $16,074.00 as the amount of damages sustained by the Tatums. Agway tendered a check for $15,824.00 ($16,074.00 less a $250.00 deductible) — which is the figure listed as the "Amount Claimed" on the proof of loss — to the Tatums along with the proof of loss and a subrogation receipt. According to the proof of loss, $16,074.00 constituted the "Whole Loss and Damage." However, the Tatums drew a line through the "was" which followed that phrase and inserted the following handwritten language, allegedly to preserve their right to pursue a recovery of the balance of their claims in a civil action against Canyon Coals: "as covered by insurance and as settled on in order to effect a compromise, settlement with and payment by Agway Insurance is," along with an arrow pointing to the aforementioned figure. Both of the Tatums signed the proof of loss and it was notarized by their attorney.

As a condition of their settlement with Agway, the Tatums also signed a subrogation receipt acknowledging the receipt of $15,824.00 "in full payment, release and discharge of all claims or demands against [Agway], arising from or connected with any loss or damage on or to [the] Henry Tatum [d]welling caused by [b]lasting. Canyon Coal was conducting the [b]lasting." Consistent with the accompanying proof of loss, said "loss or damage arose or occurred on or about the 24 day of July 1992" according to the receipt. By

way of clarification, the Tatums included the following cross-reference above that language: *see Sworn Statement in Proof of Loss re: date."

In consideration of such payment, the Tatums assigned and transferred to Agway "each and all claims and demands against any such town, county, city, municipality, corporation, person, persons, vessels or property arising from or connected with such loss or damage." Agway was also "subrogated in the place of and to the claims and demands of the [Tatums] against . . . in the premises."

Both the executed subrogation receipt and proof of loss were returned to Agway's property claims examiner under cover of a letter written by the Tatums' counsel. In the letter, counsel began by noting that three changes had been made to the proof of loss and explained the purpose behind each one. First, he commented that, although Agway documented that the blasting damage occurred on or about July 24, 1992, in paragraph 1 and that may very well be correct, the Tatums remain unsure of exactly when the damage was first noticed and "did not want to swear to a date that they could not absolutely verify at this time."

Next, he clarified paragraph 3, confirming that title to the property is held jointly by the Tatums and the bank no longer has an interest in the property. Lastly, he addressed the qualifying language added to paragraph 7, entitled "Whole Loss and Damage," saying:

> [W]e contend that the whole loss and damage was more than shown on the sworn statement and proof of loss, but are

> willing to settle with Agway Insurance for the amount of $15,824.00 at this time in order that we may proceed against [Canyon Coals] for the balance of what we believe to be blasting damages and cost of repair.

With respect to the subrogation receipt, he directed Agway's attention to the fact that it contains two references to the proof of loss (the second one being, "* see above," referring to the initial cross-reference). Also enclosed was a copy of the verified complaint which counsel addressed as follows:

> It is my understanding that the settling of this matter between the Tatums and your company does not preclude[] the Tatums from proceeding against [Canyon Coals]. If this is not the case, please notify me as soon as possible so that we may get this worked out. Also, if this is not the case, then the settlement with Agway will have to be reconsidered.

After acknowledging Agway's subrogation rights, counsel suggested that the Tatums and Agway "consult further" so as to "coordinate [their] efforts," enabling both parties to recover the full amount of their claims. In closing, he specifically requested that Agway inform him if the settlement between Agway and the Tatums "in any way affects the Tatums' right to proceed against Canyon Coal[s]," aside from Agway's right to subrogation for those specific items of damage identified by the engineer as being caused by the blasting. Neither the Tatums nor their counsel received a response.

Accordingly, the Tatums initiated an action against Canyon Coals. Austin Powder, Southern Explosives and ETI were subsequently joined as third-party defendants. Following additional pleading, refining of issues and discovery, Canyon Coals filed a motion for summary judgment which Austin Powder joined, and ETI filed a motion to dismiss the third-party complaint against it. In an order entered on March 30, 2001, the court granted both motions for summary judgment and the motion to dismiss.

The Tatums moved to alter, amend or vacate the order. In denying that motion, the court explained that each of the three notices for rehearing filed by the Tatums afforded it the opportunity to review the record, specifically their "detailed motion and the detailed objection and response to same filed by [Canyon Coals]," rendering a hearing unnecessary.

By virtue of the subrogation receipt, Agway became the real party in interest to the claim being asserted for damage to the Tatum's dwelling. On September 22, 1995, Agway pursued its claim against CIGNA Properties and Casualty, the insurance carrier of Austin Powder Company (the principal contract blaster), in a binding arbitration proceeding. Agway's attempt to recover was unsuccessful, however, as the arbitration panel found that Agway had "failed to prove any damages [were] caused by vibration."

Kentucky Rules of Civil Procedure (CR) 56.03 authorizes summary judgment "if the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a

judgment as a matter of law." Summary judgment is only proper "where the movant shows that the adverse party could not prevail under any circumstances."[3] However, "a party opposing a properly supported summary judgment motion cannot defeat that motion without presenting at least some affirmative evidence demonstrating that there is a genuine issue of material fact requiring trial."[4] The circuit court must view the record "in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor."[5]

On appeal, we review the summary judgment, to determine "whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law."[6] Since factual findings are not at issue, deference to the trial court is not required.[7]

On appeal, the Tatums have framed the issues as follows: "whether [the Tatums] assigned to [Agway] all of their claims for loss or damage caused by blasting and whether [Agway] compromised claims not assigned to it." Answering the former question in the negative, the Tatums argue that the proof of loss and subrogation receipt must be read in conjunction with the letter limiting their terms. In their view, the three documents comprise their agreement

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[3] Steelvest, Inc. v. Scansteel Service Center, Inc., Ky., 807 S.W.2d 476, 480 (1991), reaffirming Paintsville Hospital Co. v. Rose, Ky., 683 S.W.2d 255 (1985).

[4] Hubble v. Johnson, 841 S.W.2d 169, 171 (1992).

[5] Steelvest, supra, n. 3, at 480.

[6] Scifres v. Kraft, Ky. App., 916 S.W.2d 779, 781 (1996).

[7] Id.

with Agway with the necessary implication being that they did not intend to assign nor did Agway acquire all of their claims. According to the Tatums, the "terms and conditions include what was set out in the letter of counsel of May 8, 1995, and the interlineations" on the other two instruments and the "[a]ppellees are not entitled to expand [the documents] to defeat rights the Tatums retained and had not assigned to Agway." Because the present controversy stems from differing interpretations of the proof of loss and subrogation receipt, our analysis must begin there.

In Kentucky, the law governing contract interpretation has been firmly established.

> As a cardinal principle relating to the construction of a contract, it has long been recognized and held in this and other jurisdictions that where the instrument is so clear and free of ambiguity as to be self-interpretive, it needs no construction and will be performed or enforced in accordance with its express terms. Where, however, the language of the contract is ambiguous and the intent and purpose of the parties is expressed in obscure and uncertain terms, courts may resort to established rules of construction. In so doing, it is neither the duty nor province of the court to make a contract for the parties but to so interpret

the language and construe the contract as to carry out its purpose and intent.[8]

Viewing the writings at issue here in light of the foregoing rules and taking into consideration the situation of the parties and the circumstances attending its execution as we are authorized to do,[9] it is clear that the Tatums intended to settle their claim against Agway for the agreed upon amount. In accomplishing that purpose, they signed a sworn proof of loss upon the advice of counsel attesting that the whole loss and damage was valued at $16,074.00, less their $250.00 deductible. As a condition of the settlement, they also signed a subrogation receipt confirming the amount of loss and acknowledging that they received the sum in "full payment, release and discharge of all claims or demands against [Agway]." The receipt also explicitly assigned and transferred all claims "arising from or connected with any such loss or damage" to Agway and unequivocally subrogated Agway "in the place of and to the claims and demands of [the Tatums] . . . ." Rather than redact this language or refuse to sign the document, the Tatums chose to accept the designated amount in full satisfaction of the claim. These terms are unambiguous and must be given effect according to their ordinary meaning.

Accordingly, Agway became the real party in interest as to the damage claim upon execution of the subrogation receipt. Agway, standing in the shoes of the Tatums, then opted to pursue

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[8] Ex Parte Walker's Executor, 253 Ky. 111, 68 S.W.2d 745, 747 (1933)(citations omitted).

[9] Id.

its subrogated claim through binding arbitration rather than join the Tatums' action of which it had full knowledge; why it did so is irrelevant, as is the fact that the Tatums did not have notice of or participate in the arbitration. Such a determination conclusively resolves the second issue, whether Agway compromised claims not assigned to it, for present purposes.

Contrary to the Tatums' assertion, the issue of whether the inserted language and/or the letter conditioning their acceptance of the agreement with Agway on the terms as modified by it accurately represented the parties' understanding is not dispositive here. Arguably, the Tatums' contention concerning the effect of the attempted modification and counsel's letter on the documents in question may have validity, but it goes to questions which are not germane to this appeal since Agway is not a party.

Because the subrogation receipt unquestionably assigned any remaining claims to Agway, no genuine issue as to a material fact exists. Canyon Coals and the other appellees were entitled to judgment as a matter of law. Likewise, ETI was properly dismissed from the action. The order is affirmed.

Given the disposition of this appeal, the cross-appeal is moot and is dismissed.

ALL CONCUR.

Entered: _____ _____
Judge, Court of Appeals

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