

Commonwealth Of Kentucky

Court Of Appeals

NO. 2001-CA-001845-MR

OAKWOOD MOBILE HOMES, INC.

APPELLANT

v. APPEAL FROM MERCER CIRCUIT COURT
HONORABLE DARREN W. PECKLER, JUDGE
ACTION NO. 00-CI-00336

DALINE WETHINGTON

APPELLEE

OPINION
AFFIRMING
** **

BEFORE: GUDGEL, JOHNSON AND SCHRODER, JUDGES.

JOHNSON, JUDGE: Oakwood Mobile Homes, Inc., has appealed from an order entered by the Mercer Circuit Court on August 21, 2001, which denied its motion to compel arbitration pursuant to KRS¹ 417.060. Having concluded that the trial court's factual findings are supported by substantial evidence and that it correctly applied the law to those facts, we affirm.

On August 20, 1999, Daline S. Wethington purchased a mobile home from Oakwood at its Stanford, Kentucky, sales center for approximately \$60,000.00. Wethington also paid Oakwood to

¹Kentucky Revised Statutes.

install the mobile home on her Mercer County property. In conjunction with the purchase of the mobile home, the parties entered into an arbitration agreement whereby Wethington agreed to submit any dispute with Oakwood concerning the mobile home to arbitration. According to the arbitration agreement, either party can initiate arbitration procedures by sending written notice of an intent to arbitrate to the other party and to the American Arbitration Association at its Charlotte, North Carolina, office.

In December 1999, Wethington forwarded a letter, via certified mail, to Grant Williams, Oakwood's agent at the Stanford sales center. In her letter, Wethington requested arbitration concerning several deficiencies with the mobile home and its installation. This handwritten letter further stated that pictures of the mobile home have been forwarded to "arbitration and Oakwood Homes N.C." This letter was ultimately returned to Wethington by the postal service because it was never claimed by the Stanford sales center.

On November 3, 2000, approximately 11 months after Wethington sent the letter requesting arbitration to Oakwood, she filed a civil action against Oakwood in the Mercer Circuit Court. Her complaint alleged that Oakwood delivered the mobile home late, in a damaged and unfinished condition, and that it failed to properly install the home. Wethington also alleged that Oakwood made material, fraudulent, deliberate and substantial misrepresentations to her during the course of this transaction. Oakwood denied these allegations.

On June 29, 2001, Oakwood moved the trial court to enforce the arbitration agreement that had been signed by both parties and to compel arbitration pursuant to KRS 417.060. At a hearing held on August 15, 2001, the trial court examined Wethington's unclaimed letter to Oakwood, and found that Wethington had attempted to comply with the notice provision of the arbitration agreement by sending the certified letter to Oakwood, and that Oakwood had refused to accept the letter. The trial court then ruled as a matter of law that Oakwood was estopped from demanding arbitration in this matter, and denied its motion to compel arbitration. This appeal followed.

"[O]ur review of a trial court's ruling in a KRS 417.060 proceeding is according to usual appellate standards. . . . [W]e defer to the trial court's factual findings, upsetting them only if clearly erroneous, [i.e.] if unsupported by substantial evidence, but we review without deference the trial court's identification and application of legal principles."² All of Oakwood's arguments on appeal relate to its claim that Wethington failed to meet her burden of proof in establishing estoppel.³ Since the trial court made factual findings which

²Conseco Finance Servicing Corp. v. Wilder, Ky.App., 47 S.W.3d 335, 340 (2001).

³In Electric & Water Plant Board of Frankfort v. Suburban Acres Development, Inc., Ky., 513 S.W.2d 489 (1974), it is stated:

The essential elements of equitable estoppel are "(1) conduct which amounts to a false representation or concealment of material facts, or, at least, which is calculated to convey the impression that the facts are otherwise than, and inconsistent

(continued...)

supported Wethington's claim of estoppel, the only way Oakwood can prevail on appeal is for this Court to determine that the trial court's factual findings were clearly erroneous.⁴

After reviewing the record on appeal, we conclude that Oakwood cannot prevail since the record on appeal fails to include the hearing held on August 15, 2001. From the record on appeal, all we know for certain concerning that hearing is that the trial court opened Wethington's unclaimed letter and that the trial court subsequently made factual findings concerning Wethington's attempt to give notice to Oakwood. Since no videotape, audiotape or transcript of that hearing has been filed with this Court as part of the record on appeal, we must assume that the evidence presented at the hearing supported the trial court's findings. "It is a rule of universal application in this and all other appellate courts that where all the evidence is not brought up on appeal, every fact necessary to support the finding

³(...continued)

with, those which the party subsequently attempts to assert; (2) the intention, or at least the expectation, that such conduct shall be acted upon by, or influence, the other party or other persons; and (3) knowledge, actual or constructive, of the real facts. And, broadly speaking, as related to the party claiming the estoppel, the essential elements are (1) lack of knowledge and of the means of knowledge of the truth as to the facts in question; (2) reliance, in good faith, upon the conduct or statements of the party to be estopped; and (3) action or inaction based thereon of such a character as to change the position or status of the party claiming the estoppel, to his injury, detriment, or prejudice."

⁴Kentucky Rules of Civil Procedure (CR) 52.01.

or judgment of the lower court must be assumed to have been in favor of the successful party.”⁵

It is the appellant’s responsibility to have the record certified and prepared by the clerk within the time prescribed.⁶ The appellant is also required to designate untranscribed portions of the trial record for inclusion in the record on appeal.⁷ Oakwood failed to designate the untranscribed portions of the record, which included the evidence and arguments before the trial court at the hearing on August 15, 2001. Without having the untranscribed material to review, we must presume that the action of the trial court was correct.⁸

The only claim by Oakwood in this appeal that could possibly be resolved without reference to the record is its claim concerning the alleged inadequacy of the trial court’s factual findings. However, Oakwood has failed to state in its brief how this issue was preserved for review as required by CR 76.12(4)(c)(v); and from our review of the record, we must conclude that it was not preserved. In Cherry v. Cherry,⁹ our Supreme Court held that any failure by the trial court to make adequate findings of fact as required by CR 52.02 or CR 52.04

⁵Commonwealth, Department of Highways v. Richardson, Ky., 424 S.W.2d 601, 603 (1968) (quoting Wilkins v. Hubbard, 271 Ky. 780, 113 S.W.2d 441, 442 (1938)). See also Miller v. Commonwealth, Department of Highways, Ky., 487 S.W.2d 931 (1972).

⁶CR 73.08; CR 75.07(5); Ventors v. Watts, Ky.App., 686 S.W.2d 833, 834 (1985).

⁷CR 75.01; Oldfield v. Oldfield, Ky., 663 S.W.2d 211 (1983).

⁸Richardson, *supra*.

⁹Ky., 634 S.W.2d 423, 425 (1982).

that was not brought to the trial court's attention by an appropriate motion had been waived. While Oakwood claims on appeal that "the trial court failed to find [] any of the elements of estoppel as they related to the conduct of Oakwood complained of by [Wethington]," Oakwood failed to ask the trial court to make these specific factual findings. Thus, any objection to the adequacy of the factual findings has been waived.¹⁰

Accordingly, the Mercer Circuit Court's order denying Oakwood's motion to compel arbitration is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

J. Bradford Derifield
Frankfort, Kentucky

BRIEF FOR APPELLEE:

No brief filed.

¹⁰There is an exception to this rule when the record does not contain sufficient evidence to support a factual finding as to an essential element of this case. But, once again, Oakwood is confronted with the problem of an incomplete record on appeal. Thus, it must be presumed that the evidence before the trial court was sufficient to support the required findings. See CR 52.03; and Rigazio v. Archdiocese of Louisville, Ky.App., 853 S.W.2d 295, 298 (1993).