

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-001254-MR
AND NO. 2002-CA-001329-MR

DAVID AUSTIN WISE

APPELLANT/CROSS-APPELLEE

APPEAL AND CROSS-APPEAL FROM JEFFERSON CIRCUIT COURT
v. HONORABLE STEPHEN K. MERSHON, JUDGE
ACTION NO. 99-CI-001322

ALPHA LEASING COMPANY, INC.

APPELLEE/CROSS-APPELLANT

OPINION

AFFIRMING

** ** * * *

BEFORE: COMBS, GUIDUGLI, AND SCHRODER, JUDGES.

SCHRODER, JUDGE. This is an appeal from summary judgments dismissing claims by a car buyer against the leasing company for breach of contract, breach of fiduciary duty, and breach of warranty based on allegations that the leasing company should have investigated the legitimacy of the company selling the vehicle. The leasing company cross-appeals from a judgment rejecting its counterclaim against the car buyer for unjust

enrichment. Upon review of the record and the applicable law, we adjudge that the trial court properly dismissed the claims of the car buyer and properly found that the leasing company could not succeed on its claim of unjust enrichment. Hence, we affirm.

The facts in this case are largely undisputed. In July of 1997, appellant/cross-appellee David Wise saw an ad in a magazine placed by a company called International Autos ("International") touting the sale of restored exotic cars at bargain prices. Wise contacted International and was told that it could acquire, restore, and sell him a 1995 Ferrari F355 for \$75,000. International later sent Wise photos of the damaged vehicle with an offer to sell it "for \$66,000 as is or \$76,000 finished." Wise negotiated with International and arrived at a \$74,500 finished price. On July 30, 1997, Wise entered into a written purchase agreement with International through its representative Greg Hillen wherein Wise agreed to buy the restored Ferrari for \$74,500. Subsequently, Jim Moore, an attorney and family friend of Wise, referred Wise to Bill Ward of Alpha Leasing ("Alpha"), appellee/cross-appellant herein, to explore financing options for the vehicle. Alpha is an independent company that arranges for leases of vehicles with various banks. Wise contacted Ward and they discussed the various financing options. Wise decided to lease the vehicle as

that offered a substantially lower monthly payment than a conventional bank loan. On July 31, 1997, Wise signed an open-end vehicle lease with Huntington National Bank ("Huntington") which was arranged through Alpha. The relationship between Alpha and Huntington was governed by a 1990 operating agreement whereby Huntington agreed to provide financing for certain leases arranged by Alpha, and Alpha agreed to certain duties in order to protect Huntington's security interest in the vehicles. Thereafter, Wise sent \$7,400 for the down payment directly to International according to the terms of the agreement. In the subsequent days, Wise made several phone calls to Alpha asking them to forward the remaining purchase price funds to International so that International could acquire the Ferrari and begin the restoration process. Thereupon, Alpha wired the money to International. However, the Ferrari was not forthcoming. As time went by without receiving the car, Wise began to worry. In October of 1997, Wise personally drove to International and was assured by Greg Hillen that International would still comply with the terms of the agreement. Some days later, however, Wise received a phone call from another International customer warning Wise that International was on the verge of bankruptcy. This warning proved true when International filed for Chapter 7 bankruptcy before obtaining Wise's Ferrari. Wise filed a proof of claim and a complaint in

an adversary proceeding in the U.S. Bankruptcy Court seeking damages for non-delivery of the automobile sold to Wise, fraud, and conversion.

Because of Alpha's obligation under its dealer operating agreement with Huntington to obtain the car and have it titled in the name of the bank, Alpha began investigating the whereabouts of the Ferrari at issue. Alpha learned that the car was at Astra Motor Cars in New York and that International had arranged to purchase it for \$55,000, of which International had already paid \$10,000. Accordingly, Alpha paid the outstanding \$45,000 plus a \$950 transport fee to have the car, which had not been restored, delivered from New York to Wise in Louisville.

It is undisputed that Greg Hillen of International offered to pay Wise \$7,500 to settle any claims arising from their non-delivery of the vehicle. Wise refused the offer. Ultimately, Wise paid approximately \$12,000 to a Chicago-area company to restore the Ferrari and sold it for \$55,000. Wise thereafter paid off the lease with Huntington, although the lease payoff amount was \$10,583 more than the proceeds of the sale.

On March 5, 1999, Wise filed an action against Alpha and Huntington. The claims against Huntington have been settled and thus are not at issue in this appeal. The basis of the initial claim against Alpha was breach of warranty pursuant to

KRS 355.2A-212 and KRS 355.2A-213, and breach of the lease agreement which Wise maintained obligated Alpha to deliver to him a fully restored, drivable vehicle. On January 26, 2000, Wise amended his complaint against Alpha to allege breach of contract as third-party beneficiary of the contract between Alpha and Huntington and also alleging breach of fiduciary duty. Alpha filed a counterclaim against Wise for unjust enrichment to recover the sums it paid to acquire the vehicle and have it delivered to Wise.

On May 17, 2000, the court entered summary judgment in favor of Alpha on the claims of breach of warranty and breach of contract regarding the lease agreement. The breach of contract claim relative to Wise being a third-party beneficiary of the operating agreement between Huntington and Alpha was dismissed on July 19, 2000. On November 1, 2000, the court entered summary judgment in Alpha's favor on the claim of breach of fiduciary duty. Wise then filed a motion to reconsider the above judgments. In particular, Wise asked the court to reconsider his breach of contract claim relative to an alleged oral service contract between he and Alpha. On February 1, 2001, the court denied the motion to reconsider, except as to the allegation regarding the oral service contract. Later, however, on April 3, 2001, the court dismissed the breach of oral service contract claim.

On October 26, 2001, Wise filed yet another motion to amend his complaint, this time asserting that Alpha willfully misrepresented or failed to disclose the condition of the vehicle prior to delivery. The court denied the motion to amend on November 15, 2001. Wise now appeals from the various judgments dismissing his claims and denying his motion to amend.

The counterclaim by Alpha for unjust enrichment was the only claim tried to the court. On May 22, 2002, the court entered its findings of fact, conclusions of law, and judgment denying Alpha's claim. This cross-appeal by Alpha followed.

Wise first argues that the trial court erred in dismissing his claim for breach of fiduciary duties. Wise maintains that, as his agent in the transaction, Alpha owed him a duty of utmost care and that this duty was breached when Alpha forwarded International the full amount of the lease proceeds without first investigating the financial status/solvency of International.

Before reaching the issue of whether Alpha had a fiduciary duty to Wise, it must be determined what the legal relationship was between Wise and Alpha. The trial court found that there was no contractual relationship between the two, but that Alpha did act as Wise's agent in the transaction. Wise contends that he had a contractual relationship with Alpha, as well as an agency relationship. Alpha denies that it had a

contractual or an agency relationship with Wise and further maintains that the allegation of an agency relationship was never pled in this case.

The lease in the present case was furnished/drafted by Alpha and explicitly states that Alpha "helped to arrange this Lease", but denotes Huntington as the lessor. However, the lease worksheet, which was completed by Alpha and calculated the payments, charges, etc., referred to Alpha as the lessor/dealer. The evidence established that Wise paid no fee/commission directly to Alpha. From the following deposition testimony of William Ward of Alpha, we gather that Alpha was apparently compensated by Huntington by Alpha's assignment of the lease to the lender (Huntington) at a lower interest rate than that established in the lease:

The part in my proceeds with Huntington Bank was the money that I made on the interest of the loan. David [Wise] bought the loan at roughly five percent interest rate and I was able to negotiate a three percent interest rate. That difference is the profit on the financing of the vehicle.

"Agency" is the fiduciary relationship resulting from manifestation of consent by one person to another, that the other shall act on his behalf and subject to his control and consent by the other to so act. McAlister v. Whitford, Ky., 365 S.W.2d 317 (1962). In our view, notwithstanding the fact that Alpha may or may not have had a contractual relationship with

Wise, we agree with the trial court that Alpha, at the very least, was acting as Wise's agent with regard to the financing of the car. Clearly, Alpha was acting on Wise's behalf and subject to his consent and control in attempting to secure financing for him. As to whether an agency relationship was pled, while Wise may not have used the term "agency" in his pleadings, we believe his assertions that Alpha arranged financing on his behalf and his claim of a fiduciary duty on the part of Alpha in securing this financing encompassed a claim of agency and sufficiently gave notice to Alpha of said claim.

We now turn to the issue of whether Alpha breached its fiduciary duty to Wise by disbursing all of the lease proceeds to International without investigating its financial stability. The scope of the duties and responsibilities of an agent to his principal is dictated by "the nature of the particular office which the agent agrees to perform." Deaton v. Hale, Ky., 592 S.W.2d 127, 130 (1979). As stated above, there is no question that Alpha was acting as Wise's agent in securing financing for the Ferrari in question. However, Wise's allegations of malfeasance against Alpha relate not to their actions in arranging the financing for him, but in actually purchasing the vehicle.

There is no evidence that Wise asked Alpha to help him negotiate the purchase of the vehicle. In fact, the evidence

established that Wise had personally negotiated the purchase of the car by himself and had already entered into the agreement with International for said purchase before Alpha became involved in financing the transaction. Although Alpha took it upon itself to run a check on International through the Better Business Bureau, there was no evidence Wise ever asked anyone at Alpha to investigate the financial stability of International before sending it the lease proceeds. On the contrary, Wise called Alpha several times demanding that they send the lease proceeds to International because he was anxious to obtain the car.

Summary judgment is proper where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Isaacs v. Cox, Ky., 431 S.W.2d 494 (1968); CR 56.03. For the above reasons, we adjudge that the trial court properly determined that Alpha was entitled to summary judgment on the breach of fiduciary duty claim.

We next move on to Wise's argument that the trial court erred in dismissing his claim based on his being a third-party beneficiary of the operating agreement between Alpha and Huntington. Wise asserts that as an intended beneficiary under the agreement, he was entitled to receive a Ferrari with a value of at least \$65,000 (instead of the damaged unrestored vehicle he received) since Alpha was required under the operating

agreement to procure and deliver to Wise the vehicle described in the lease agreement between Wise and Huntington. The lease between Wise and Huntington was for a 1995 Ferrari F355, and the estimated value of the car at the buyout of the lease was listed as \$65,000.

Under Kentucky law, before a third person not a party to a contract can derive benefit from that contract, the third person must show that the contract was made and entered into directly or primarily for the benefit of the third person. King v. National Industries, Inc., 512 F.2d 29 (6th. Cir. 1975). In order for a contract for the benefit of a third party to be enforceable, it must be shown that there was consideration flowing to the promisor and that the promisee intended to exact a promise directly benefiting the third party. Simpson v. JOC Coal, Inc., Ky., 677 S.W.2d 305 (1984). Wise argues that he was the intended beneficiary of the provision in the operating agreement requiring that Alpha deliver the vehicle described in the lease to him. We disagree. The purpose of said provision in the operating agreement was clearly to preserve Huntington's security interest in the vehicle, as were the provisions requiring Alpha to verify that the car was insured, licensed, and properly registered and titled in the lessor's name. Hence, Huntington was the intended beneficiary of this provision. We agree with the trial court that Wise was merely an incidental

beneficiary of the operating agreement. Accordingly, the lower court properly dismissed this claim.

Wise's third argument is that the trial court erred in dismissing his breach of warranty claim. Wise alleged that Alpha breached the implied warranty of merchantability and implied warranty of fitness for particular purpose pursuant to KRS 355.2A-212 and KRS 355.2A-213 when it delivered the damaged, unrestored car to him. Both KRS 355.2A-212(1) and KRS 355.2A-213 contain an exception for a "finance lease" which is defined in KRS 355.2A-103(g)1. as a lease wherein "the lessor does not select, manufacture, or supply the goods." The lease in the present case was clearly a finance lease and thus was exempted from the above statutes.

Wise's remaining argument is that the lower court erred in refusing to allow him to amend his complaint on October 26, 2001 alleging misrepresentation and failure to disclose material facts. CR 15.01 provides in pertinent part:

A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within 20 days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires.

The trial court has broad discretion in its decision on whether or not to grant leave to amend, and its ruling will not be disturbed absent an abuse of that discretion. Graves v. Winer, Ky., 351 S.W.2d 193 (1961). The motion to amend at issue was Wise's third such motion and at the time it was filed, a trial date had been set for February 26, 2002. Over the course of the two and a half years the parties had been litigating the case, numerous discovery depositions had already been taken, numerous motions had been filed and ruled on, and all the claims by Wise against Alpha had been disposed of. By the time of Wise's final motion to amend, the only remaining claim, the counterclaim by Alpha, was ready to be submitted to the court. Had the third amended complaint been allowed to proceed, Alpha would have had to again gear up to defend another claim. Under these circumstances, we cannot say that the trial court abused its discretion in not allowing Wise to amend his complaint yet again at that late date. See Lawrence v. Marks, Ky., 355 S.W.2d 162 (1961).

We now turn to Alpha's cross-appeal. Alpha argues that the trial court erred in ruling that it was not entitled to recovery against Wise on grounds of unjust enrichment. The basis of Alpha's counterclaim against Wise was that as a result of Wise's negligence in purchasing the vehicle from International, Alpha was forced to spend \$46,000 to procure the

car for Wise, which Wise has never paid Alpha, and that Wise has therefore been unjustly enriched to this extent. To succeed on a claim of unjust enrichment, the plaintiff must show: that a benefit was conferred on the defendant at the plaintiff's expense; that the defendant took advantage of this benefit; and the inequitable retention of this benefit without payment for its value. Tractor & Farm Supply v. Ford New Holland, 898 F. Supp. 1198 (W.D. Ky. 1995). In denying Alpha's claim, the court found, first, that Wise had not been unjustly enriched by the actions of Alpha in that Wise received far less than what he had bargained for. Secondly, the court adjudged that Alpha could not recover in equity because it did not have clean hands by virtue of its failure to sufficiently investigate the financial stability of International.

In our view, the court correctly found that Wise was not unjustly enriched by receiving the car. As the court pointed out, Wise also lost considerable money on the transaction because he was nevertheless obligated to pay off the lease. It was not as if receipt of the car resulted in a \$46,000 windfall to Wise. Further, Wise's retention of the vehicle was not inequitable. Alpha was contractually obligated to deliver the vehicle to Wise by virtue of its operating agreement with Huntington and it cannot use a court of equity to escape this contractual obligation. The basis of Alpha's claim

of unjust enrichment was that Wise was negligent in failing to investigate the financial stability of International for the protection of Alpha, which would essentially impose a duty from Wise to Alpha. As we held above, Alpha did not owe such a duty to Wise, hence it would be inequitable to impose a like duty on Wise. If Alpha wanted to protect itself, it should have investigated International more thoroughly for its own benefit. Given our ruling above, it is unnecessary for us to address Alpha's contention that the "clean hands doctrine" does not preclude recovery for negligent behavior.

For the reasons stated above, the judgments of the Jefferson Circuit Court are affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Joseph S. Elder, II
Louisville, Kentucky

BRIEF FOR APPELLEE:

Robert M. Klein
Louisville, Kentucky