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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2002-CA-001646-MR

DAVID B. RAMLER — APPELLANT

v.

APPEAL FROM THE KENTON CIRCUIT COURT
HON. PATRICIA M. SUMME, JUDGE
CIVIL ACTION NO. 02-CI-00089

SPARTAN CONSTRUCTION INCORPORATED — APPELLEE

OPINION

AFFIRMING

** ** ** ** **

BEFORE: BARBER, McANULTY, AND TACKETT, JUDGES.

McANULTY, JUDGE: David Ramler appeals from an order of the Kenton Circuit Court granting summary judgment to Appellee Spartan Construction Incorporated (Spartan). Following a work-related injury, Ramler filed a successful workers' compensation claim through his immediate employer, Brossart Materials Recycling, LLC (BMR). Subsequently, Ramler brought a common law negligence action against Spartan, alleging "up-the-ladder" liability. BMR and Spartan are affiliate companies that share various employees and office resources. Following the completion of limited discovery, the Kenton Circuit Court

granted summary judgment on the basis that Spartan is a contractor as defined under Kentucky Revised Statutes (KRS) 342.610, and KRS 342.690, the exclusive remedy provision of the Kentucky Workers' Compensation Act, therefore precludes Ramler from bringing the suit. We affirm.

In September 2001, Ramler was working on a state highway project that arose out of a contract awarded by the Kentucky Transportation Cabinet to Faulkner Construction, LLC. Following award of the contract, Faulkner Construction subcontracted with Spartan to perform recycling of concrete barriers at the site. Subsequently, Spartan entered into an oral agreement with BMR to carry out the recycling. The terms of the agreement are uncontroverted. Spartan was to rent the crusher used to recycle the concrete from BMR, provide other equipment needed for the project, and reimburse BMR for the labor employed to operate the crusher. BMR, in turn, was to crush the concrete barriers and to retain the crushed material for sale.

On September 20, 2001, four of Ramler's fingers were severed in the course of his employment for BMR. Following the accident, Ramler pursued a successful workers' compensation claim through BMR under KRS Chapter 342. Ramler has since been collecting workers' compensation benefits.

On January 11, 2002, Ramler filed a negligence action against Spartan in Kenton Circuit Court. Spartan filed an answer denying liability, and on February 27, 2002, filed a motion for summary judgment. The trial court initially denied the motion and allowed the depositions to be taken of Diane Brossart, owner of 100% of the stock in Spartan, and of Donald Brossart, co-owner with his brother, Doug, of 98% of the stock in BMR.[1]

On July 18, 2002, after the completion of the depositions, the circuit court granted Spartan's summary judgment motion. The circuit court determined that Spartan was entitled to "up-the-ladder" immunity under the exclusive remedy provisions of KRS 342.690 because Spartan was a contractor as defined in KRS 342.610. This appeal followed.

Ramler first notes that "Kentucky courts have given the 'liberal' construction required by the express language of the [Kentucky Workers' Compensation] Act by broadly construing the coverage provisions . . . and narrowly construing the immunity provisions." Boggs v. Blue Diamond Coal Co., 590 F.2d 655, 659 (1979)(citing Bright v. Reynolds Metals Co., Ky., 490 S.W.2d 474 (1973)). Ramler seeks to rely on this rule of construction to avoid Spartan's classification as a contractor.

[1] The remaining 2% of the stock in BMR is owned by Spartan.

However, as discussed below, Spartan qualifies as a contractor under the plain meaning of KRS 342.610(2).

Applying narrow construction principles to the Act, Ramler argues that Spartan should not be recognized as a contractor because of its close affiliation with BMR. Ramler supports this argument on two main grounds: 1) that BMR is a subsidiary of Spartan, which precludes a contractual relationship from being formed under Boggs v. Blue Diamond Coal Co., 590 F.2d 655 (1979); and 2) that the basic contract principles of mutuality of obligation and arm's length dealing are not satisfied because of Spartan and BMR's relationship.

The standard of review on appeal of a summary judgment is, "whether the circuit judge correctly found that there were no issues as to any material fact and that the moving party was entitled to judgment as a matter of law." Pearson ex rel. Trent v. National Feeding Systems, Ky., 90 S.W.3d 46, 49 (2002). This standard reflects the requirements of Rules of Civil Procedure (CR) 56.03. Further, "[t]he record must be viewed in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor." Steelvest, Inc. v. Scansteel Service Center, Inc., Ky., 807 S.W.2d 476, 480 (1991). Finally, on appellate review, "[t]here is no requirement that the appellate court defer to the trial

court since factual findings are not at issue." Barnette v. Hospital of Louisa, Inc., Ky. App., 64 S.W.3d 828,829 (2002).

KRS 342.690 grants immunity from further liability to "employers" and "contractors" as defined by KRS 342.610(2) when workers' compensation payments have been secured. KRS 342.690 states in relevant part as follows:

> (1) If an employer secures payment of compensation as required by this chapter, the liability of such employer under this chapter shall be exclusive and in place of all other liability of such employer to the employee . . .. For purposes of this section, the term 'employer' shall include a "contractor" covered by subsection (2) of KRS 342.610, whether or not the subcontractor has in fact, secured the payment of compensation.

KRS 342.610(2) defines a contractor as:

> A person who contracts with another:
> . . .
> (b) To have work performed of a kind which is a regular or recurrent part of the work of the trade, business, occupation, or profession of such person shall for purposes of this section be deemed a contractor, and such other person a subcontractor.

Based upon the plain language of KRS 342.610(2), Spartan was a contractor and BMR was a subcontractor on the highway project which resulted in Ramler's injury. Specifically, part of the contract between Spartan and BMR was for BMR to perform various concrete crushing activities. It is uncontested that concrete crushing is, for Spartan, work "of a

kind which is a regular or recurrent part of the work of the trade[.] . . .” KRS 342.610(2)(b). The deposition testimony shows that Spartan has contracted for this service many times previously. Although the concrete crushing is generally not carried out by Spartan itself, this still qualifies as a regular or recurrent part of Spartan’s trade. See Fireman’s Fund Ins. Co. v. Sherman & Fletcher, Ky., 705 S.W.2d 459 (1986) (holding a particular category of carpentry usually subcontracted by the defendant still satisfies the statutory definition for a regular or recurrent part of the defendant’s work).

Citing Boggs v. Blue Diamond Coal Co., 590 F.2d 655 (1979), Ramler argues that Spartan should not be deemed a contractor because there is a parent-subsidiary relationship between Spartan and BMR. Ramler contends that Boggs represents a blanket holding that a parent and a subsidiary, because of the nature of their relationship, are incapable of forming legally cognizable contracts. This argument significantly exaggerates the holding in Boggs, however. Under Boggs, a contract between a parent and a subsidiary should not be recognized for purposes of KRS 342.610(2) when the parent company so directs the performance of the subordinate unit that the subsidiary lacks adequate bargaining power to exercise the freedom to disagree with the parent.

Boggs involved an appeal of a summary judgment in favor of the defendant, Blue Diamond Coal Co. (Blue Diamond). The summary judgment dismissed a wrongful death action brought by fifteen widows of miners killed in a methane gas explosion attributed to poor ventilation in the mine shaft. The miners worked for Scotia Coal Company (Scotia), a wholly owned subsidiary of the defendant parent corporation. The Federal District Court determined that Blue Diamond was a contractor under KRS 342.690 and thus exempt from common law liability. On appeal, the Sixth Circuit reversed, holding that the relationship involved was not "contractual either in fact or in theory" and that "[t]he parent should not be characterized as a 'contractor' for the mining services of its wholly owned subsidiary for purposes of the tort immunity provisions of the Act." Boggs, 590 F.2d at 661.

The Boggs court cited a number of factors in the relationship between Blue Diamond and Scotia in support of its conclusion. Among these were that Scotia was a wholly-owned subsidiary of Blue Diamond; that no formal agreement existed between the two companies for the mining work; and that Blue Diamond clearly controlled all aspects of Scotia's business. The Boggs court further cited as factors demonstrating Blue Diamond's control of Scotia's business that Blue Diamond directed the amount of coal Scotia mined and to whom it was

sold; that Blue Diamond retained all money from Scotia's coal sales; that Blue Diamond provided Scotia with money for its operating expenses; and finally, that Blue Diamond made all decisions regarding safety at Scotia's mines.

Turning to the relationship between Spartan and BMR, the two companies do have a number of common connections. Spartan and BMR share an office building and some employees. The safety supervisor for both corporations is Joe Garera, but he is officially employed and paid only by Spartan. Spartan and BMR are further connected through their ownership. Diane Brossart, the mother of Donald Brossart and Doug Brossart, is the president and sole owner of Spartan. BMR is owned by Donald Brossart, his brother Doug Brossart, and Spartan. Donald and Doug Brossart own 98% of BMR and Spartan owns the remaining 2%. A close connection is also demonstrated by the composition of the officers for Spartan and BMR. The officers for the two companies consist of the same three people: Diane Brossart, Doug Brossart, and Donald Brossart.

However, BMR is not a wholly owned subsidiary of Spartan. To the contrary, Spartan owns only 2% of BMR. There is no evidence in the record to support Ramler's allegation that this 2% ownership share represents a controlling interest in BMR. Moreover, there was a specific oral contract between the two companies relating to the highway project. Spartan and BMR

are also distinct corporations individually incorporated under separate articles of incorporation. In addition, the two corporations maintain separate bank accounts, file taxes separately, and maintain their own employees. Most importantly, and unlike the situation in Boggs, Spartan does not dominate BMR's business decisions in a way that denies BMR of all autonomy. Based upon the deposition testimony, BMR and Spartan appear, if anything, to operate as co-equals.

"[A] party opposing a properly documented summary judgment cannot defeat it without presenting at least some affirmative evidence indicating that there is a genuine issue of a material fact." Pearson ex rel. Trent v. National Feeding Systems, Ky., 90 S.W.3d 46, 49 (2002). Spartan's motion is supported with deposition testimony demonstrating that a parent-subsidiary relationship does not exist, that BMR is not dominated by Spartan, and that an agreement did exist between the parties. In opposition, Ramler fails to present any affirmative evidence demonstrating that a genuine issue of material fact exists regarding whether Spartan meets the statutory definition of a contractor or whether Boggs is applicable under these circumstances. Ramler instead relies on speculative assertions that are unsupported by the depositions of Diane and Donald Brossart. Ramler presented no affidavits or deposition testimony to support the application of Boggs, and

the record simply does not demonstrate that Spartan dominated BMR's business activities so as to interfere with BMR's freedom to contract.

In summary, Ramler has failed to demonstrate that there is a genuine issue of material fact regarding Spartan's status as a contractor. Boggs is not applicable to the present case because BMR, in contrast to Scotia, is an autonomous corporation and is not dominated by Spartan. Viewing the relationship between Spartan and BMR in the light most favorable to Ramler, there is nothing more than unsubstantiated assertions by the appellee that the contract between BMR and Spartan was not negotiated on an equal footing.

Ramler next argues that summary judgment should not have been granted because Spartan and BMR's relationship does not satisfy the basic contract doctrines of mutuality of obligation and arm's length dealing. We disagree.

The doctrine of mutuality of obligation implicates many of the concerns involved in the doctrine of consideration. The basic idea can be stated as follows: "Where an agreement is founded solely upon reciprocal promises, unless each party has assumed some legal obligation to the other the contract is wanting in consideration and is lacking in mutuality." David Roth's Sons, Inc. v. Wright and Taylor, Inc., Ky., 343 S.W.2d

389, 390 (1961). If this principle is not satisfied, a legally enforceable contract cannot be formed.

In the present case, the agreement between Spartan and BMR is uncontroverted. Inquiry into the mutuality of obligation requires "analysis of the contract in its entirety." David Roth's Sons, 343 S.W.2d at 391. The agreement between Spartan and BMR required Spartan to pay the rental fee for the crusher and to pay BMR's employees for operating the crusher. BMR, in turn, was to provide the crusher and the employees to operate it. The only other term to the agreement was that BMR was to keep the crushed material for sale.

"If both parties are bound by mutual obligations for even a short period of time, the contract cannot be avoided by either party on [the basis of lack of mutuality of obligation]." David Roth's Sons, 343 S.W.2d at 391. Here, Spartan was required to pay for BMR's services and BMR was required to perform them. As each party assumed legal obligations to the other, the obligations of Spartan and BMR in this agreement satisfy the doctrine of mutuality of obligation.

Additionally, if consideration is found to be present, mutuality of obligation is not required. Restatement (Second) of Contracts § 79 (1981) states: "If the requirement of consideration is met, there is no additional requirement

of . . . (c) 'mutuality of obligation.'" The exchange of promises carrying a legal obligation between Spartan and BMR was sufficient consideration to bind them.

Finally, Ramler argues that the contract between Spartan and BMR was not valid because the parties did not deal at arm's length. Spartan admits in its brief to having a very close relationship with BMR. However, this closeness alone does not make their contract unenforceable. "[T]he formation of a contract requires a bargain in which there is a manifestation of mutual assent to the exchange and a consideration." Restatement of Contracts § 17 (1981). The consideration involved here is adequate and Spartan and BMR, as separate corporations, gave "actual as well as apparent assent" to the contract. Restatement of Contracts § 17 cmt. c (1981). The concern in the requirement for arm's length dealings between parties is to ensure that they may contract freely and effectuate their true intentions. That occurred here and the close relationship of the parties was not a bar, therefore, to the formation of a contract.

For the foregoing reasons, the judgment of the Kenton Circuit Court is affirmed.

ALL CONCUR.

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