

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-000589-MR

HOWARD L. FEINBERG, D.O., PSC AND
HOWARD L. FEINBERG, D.O., INDIVIDUALLY APPELLANTS

v. APPEAL FROM BOYD CIRCUIT COURT
HONORABLE C. DAVID HAGERMAN, JUDGE
ACTION NO. 99-CI-00638

MATHEW SAMUEL, M.D. APPELLEE

OPINION

AFFIRMING

** ** * * * * *

BEFORE: BUCKINGHAM, McANULTY AND PAISLEY,¹ JUDGES.

PAISLEY, JUDGE. This is an appeal from a judgment entered by the Boyd Circuit Court following a bench trial in which the trial court dismissed appellant's claims against appellee, and awarded appellee the sum of \$123,077.00 for his counterclaim. Appellant claims that the court erred by finding that there was an oral modification of the parties' written contract, by

¹ This opinion was prepared and concurred in prior to Judge Paisley's retirement effective December 1, 2003.

failing to find that appellee breached a non-compete clause contained in the contract, and by failing to credit appellant for one-half of the parties' overhead expenses for the months of April and May 1998. For the following reasons, we affirm.

The parties, both of whom are rheumatologists, entered into an agreement in 1994 which provided that appellee would work for appellant for a period of one year, at which time appellee would have the option to purchase fifty percent of the stock in appellant's solely owned corporation. Approximately one year later, in September 1995, the parties began negotiating a buy-in agreement. The final draft, signed in May 1997, contained a standard non-compete clause and a clause which specified that the contract was retroactive to September 1, 1996.

Some time later, the parties agreed to split up their business and go their separate ways. However, in April 1999, when negotiations regarding the split failed, appellant filed an action alleging that appellee had breached the non-compete clause contained in the buy-in agreement resulting in damages, that appellee accidentally had been overpaid and thus owed appellant reimbursement, and that certain pages of the contract between the parties had been substituted and the contract should be reformed to its original state. Appellee filed a counterclaim alleging that appellant owed him compensation under

the terms and conditions of the buy-in agreement. Following a bench trial, the trial court dismissed appellant's claims and awarded appellee \$123,077.00 on his counterclaim. This appeal followed.

First, appellant argues that the court erred by finding that there was an oral modification of the parties' written contract. Specifically, appellant asserts that the buy-in agreement, which was signed in May 1997, is retroactive to September 1, 1996, under the express terms of the agreement and that during the time period from September 1995 to September 1996 appellee simply continued to be appellant's employee under the terms of the original employment contract. However, the court found that due to the actual conduct and practice of the parties, the original employment contract ended in September 1995, and that the parties thereafter operated under an oral agreement until September 1, 1996, when the buy-in agreement became retroactively effective. Appellant argues that both of the parties' agreements were unambiguous, and that the trial court simply disregarded their clear contractual language. We disagree.

"It is well established that construction and interpretation of a written instrument are questions of law for the court." Cinelli v. Ward, Ky. App., 997 S.W.2d 474, 476 (1998). To support his argument, appellant points to a specific

portion of the original employment contract which stated that it would terminate after one year "with the understanding that same will be automatically renewable unless terminated or notice given as is elsewhere provided herein." At the end of the initial one-year employment period, the parties were faced with a choice about how their relationship should proceed. They could either continue with no change, part ways, or proceed with the negotiations of a buy-in agreement. The parties chose the latter, thereby essentially ending their relationship under the terms of the original employment contract. Thus, there was no oral modification of either the original contract or the buy-in agreement. Instead, the parties created a separate oral agreement to cover the one-year period between September 1, 1995, and September 1, 1996, which was left open by the terms of the two written contracts. The trial court acted well within its discretion by filling in this gap and finding that appellee's testimony concerning the parties' oral agreement was credible. This is especially true since various documents created by appellant, including his April 1999 report concerning the amount purportedly owed to appellee after the split, referred to September 1995 as the date on which appellee began sharing directly in the business's profits. Based on this evidence, we cannot find that the court's decision was clearly erroneous.

Next, appellant asserts that the trial court erred by failing to enforce the non-compete clause contained in the parties' buy-in agreement. Appellant argues that he was not willing to waive the non-compete clause unless appellee released him from any further obligations. However, the trial court found that appellant's actions were contrary to this position, as appellant initiated the parties' split and actively participated in dividing the assets. The court also found that appellee had altered his position in reliance on appellant's actions. Based on the evidence that appellant waived the non-compete clause in exchange for getting out of business with appellee, we cannot find that the trial court abused its discretion.

Finally, appellant argues that the trial court erred by failing to credit him for one-half of the overhead expenses incurred for the months of April and May 1998 while he was on a leave of absence from the office. However, appellant has provided no evidence that appellee agreed to this arrangement. The trial court was thus faced with the conflicting testimony of the parties, and it was the court's prerogative to assign the weight to be given the testimony presented to it.

The judgment of the Boyd Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANTS:

Phillip Bruce Leslie
Greenup, Kentucky

BRIEF FOR APPELLEE:

Gordon J. Dill
Ashland, Kentucky