

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-002436-MR

TILFORD CONTRACTORS, INC.

APPELLANT

v. APPEAL FROM MCCRACKEN CIRCUIT COURT
HONORABLE CRAIG Z. CLYMER, JUDGE
ACTION NO. 02-CI-00430

STEWART SERVICES, INC.

APPELLEE

OPINION
AFFIRMING

** ** * * * **

BEFORE: BUCKINGHAM, COMBS, AND TACKETT, JUDGES.

TACKETT, JUDGE: Tilford Contractors, Inc. (Tilford) appeals from an order from the McCracken Circuit Court dismissing with prejudice its petition for a declaration of rights in 02-CI-00430. After a careful review of the procedural history between the parties, we affirm the circuit court's decision.

In order to explain our decision it is necessary to begin with an overview of the long and litigious relationship between Tilford and Stewart Services, Inc. (Stewart). There are three separate pieces of litigation which must be examined: 97-

CI-04170 in the Jefferson Circuit Court, 98-CI-00556 in the McCracken Circuit Court and the subject of this appeal 02-CI-00430 in the McCracken Circuit Court. All three actions arose out of a contract between Tilford and Stewart for the performance of mechanical and plumbing work.

In October 1995, Western Baptist Hospital entered into a twenty-nine million dollar construction contract with Centex Rodgers Construction Company (Centex) for renovation and construction at its hospital facilities in Paducah, Kentucky. Centex entered into a first-tier subcontract with Stewart, whose home offices are located in Louisville, Kentucky, in January 1996. Stewart was in charge of mechanical, plumbing and fire protection work on the project and was to receive approximately 7.2 million dollars for its work. That same month, Stewart entered into a second-tier subcontract with Tilford, a Paducah company, to perform the mechanical and plumbing work for approximately 3.7 million dollars.

Under the terms of the contract, Tilford was required to perform its work in accordance with the designs of Earl Swensson, Architect and Phoenix Design Group Incorporated. Problems arose when Tilford began work only to discover that the electrical contractor had installed in the same location where Tilford plumbing and mechanical work was supposed to be done. In addition, the designs supplied by the architect turned out to

be defective necessitating 1,500 changes and additional costs to Tilford of one million dollars before the work was complete. Tilford requested extra compensation for its additional costs; instead, Stewart withheld a portion of the money due to Tilford under the contract because Tilford refused to sign a release.

In April 1997, Tilford filed an arbitration claim against Stewart in accordance with the provisions of the contract between them. Stewart filed a motion in the Jefferson Circuit Court seeking to stay arbitration on July 25, 1997. This case assigned the number 97-CI-04170. The circuit court first entered an order denying the motion to stay; however, after Stewart filed a motion to vacate the original order, the circuit court reversed itself and granted a stay in the arbitration proceedings. Tilford appealed, and a panel of this court reversed the decision finding that the arbitration clause applied even though Stewart had never issued a change order authorizing changes in Tilford's work. Stewart's petition for rehearing was denied on May 6, 1999, and the Supreme Court denied discretionary review on November 10, 1999.

After the case was remanded back to the Jefferson Circuit Court, Tilford and Stewart signed an agreed order to proceed to arbitration. In September and October 2000, the American Arbitration Association (AAA) held five days of hearings into Tilford's claims against Stewart. The AAA found

that Stewart had breached its contract with Tilford and awarded Tilford \$1,005,894.37 in damages. Stewart's request for modification of the award was denied on January 10, 2001, and Stewart filed a motion in the Jefferson Circuit Court to vacate the award arguing that the arbitrators had exceeded the scope of their authority.

On May 23, 2001, the circuit court issued an opinion and order overruling Stewart's request to vacate the arbitration award. Tilford then filed a motion to confirm the arbitration award which the circuit court granted; however, the circuit court also entered an order stating that the arbitration award was not a judgment upon which Tilford could execute. Apparently, the circuit court believed that the arbitration award established that Tilford was entitled to collect damages due to Stewart's breach of contract, but not from whom Tilford was entitled to collect due to the pass through nature of the claims. The circuit court opined that Tilford would be required to file an additional action in order to collect damages against Tilford. Consequently, Tilford filed a petition for a declaration of rights in the McCracken Circuit Court which was assigned case number 02-CI-00430.

Meanwhile, Tilford had already filed a complaint against Stewart On June 6, 1998, in the McCracken Circuit Court. The complaint, which was numbered 98-CI-00556, was amended to

add Centex and Western Baptist Hospital as defendants on October 9, 1998. In May 2000, the circuit court stayed this case pending the outcome of the arbitration proceedings between Tilford and Stewart. After the arbitration award was entered, Tilford filed a motion in the McCracken Circuit Court to confirm it. The circuit court denied Tilford's motion citing lack of jurisdiction and granted motions for summary judgment in favor of Centex and Western Baptist Hospital. On December 11, 2002, the circuit court granted Tilford summary judgment, in the amount of \$1,005,894.37. Stewart's motion to alter amend or vacate was denied, Stewart filed a notice of appeal with the Kentucky Court of Appeals.

The subject of the present appeal, case number 02-CI-00430, was filed in the McCracken Circuit Court in response to the Jefferson Circuit Court's decision that Tilford could not execute on the arbitration award through 97-CI-04170. The Jefferson Circuit Court based its decision on the fact that it had been asked to determine whether Tilford's claim against Stewart was subject to arbitration, but not who should pay any award arising out of the arbitration. Consequently, Tilford filed a motion for a declaration of rights and then a motion for summary judgment in its favor. Stewart responded by filing a motion to dismiss Tilford's claim arguing that 02-CI-04170 was barred by abatement because the same parties were already

litigating substantially the same matters in 98-CI-0556. On October 25, 2002, the McCracken Circuit Court dismissed 02-CI-04170 with prejudice and denied Tilford's motion for declaratory judgment. This appeal followed.

Tilford argues that the circuit court erred by dismissing its petition and that it was entitled to a declaratory judgment. After its appeal was filed in 02-CI-04170, Tilford obtained judgment from the McCracken Circuit Court in 98-00556. Subsequently, Tilford filed a motion, pursuant to Kentucky Rule of Civil Procedure 60.02, in the Court of Appeals requesting relief from the circuit court's October 25, 2002 order. As grounds, Tilford argued that the judgment in its favor in 98-CI-00556, entered on December 11, 2002, indicated that the circuit court had made a palpable error in dismissing its petition for declaration of rights in 02-CI-04170. This motion was passed to the three-judge panel considering the appeal in the case *sub judice*.

Stewart argues that Tilford was not entitled to a declaratory judgment under the contract, that the circuit court was required to dismiss the complaint under the doctrine of *res judicata*, and that it could not be held a second lawsuit over the same subject matter under the rule of abatement. The McCracken Circuit Court has already made a determination on the merits in favor of Tilford in 98-CI-00556 which Stewart has

appealed. However, that case is not before this panel. Our decision to affirm the trial in the matter *sub judice* court is based on the rule of abatement and in no way should be construed as a review of the merits of Tilford's arbitration claim against Stewart.

The rule of abatement holds that a party to pending litigation cannot bring a declaratory judgment action seeking a determination of issues which are the subjects of the pending litigation. Gibbs v. Tyree, 154 S.W.2d 732 (1941); Pritchett v. Marcel, Ky. App., 375 S.W.2d 253 (1963); City of Paducah v. Electric Plant Board, Ky. App., 449 S.W.2d 907 (1970). At the time Tilford brought this action for a declaration of rights, another action concerning Stewart's obligation to pay for modification of the work ordered on Western Baptist Hospital was already pending in the same court. In fact, the McCracken Circuit Court ultimately determined, under the first complaint which Tilford filed there, that Tilford was entitled to judgment in the amount of \$1,005,894.37. Consequently, under the laws of this Commonwealth, the circuit court was required to grant Stewart summary judgment and Tilford's claim in 02-CI-04170 was properly dismissed with prejudice.

For the forgoing reasons, the judgment of the McCracken Circuit Court is affirmed.

ALL CONCUR.

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