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Commonwealth Of Kentucky

Court Of Appeals

NO. 2002-CA-001305-MR

DIXIE TRUSS, INC. APPELLANT

v.

APPEAL FROM LAUREL CIRCUIT COURT
HONORABLE LEWIS B. HOPPER, JUDGE
CIVIL ACTION NO. 00-CI-00682

JEFF COREY and DONNA COREY APPELLEES

AND

NO. 2003-CA-000092-MR

JERRY GARLAND APPELLANT

v.

APPEAL FROM LAUREL CIRCUIT COURT
HONORABLE LEWIS B. HOPPER, JUDGE
CIVIL ACTION NO. 02-CI-00257

DIXIE TRUSS, INC. APPELLEE

OPINION

AFFIRMING

** ** ** ** **

BEFORE: GUIDUGLI, MINTON, and VANMETER, Judges.

MINTON, Judge: The issues in these companion cases are whether trusses Dixie Truss designed and built for installation in the home of Jeff and Donna Corey are defective and whether Donna's father, Jerry Garland, is liable for payment owed for those trusses. Though the circuit court erred procedurally in its disposition of the claims, it ultimately reached the correct resolution of the substantive issues of law involved.

Jeff and Donna Corey were building a house using plans obtained from Better Homes and Gardens. However, they wanted an open basement, necessitating the use of trusses to support the floor. Garland contacted Dixie Truss regarding the design and manufacture of the trusses. Dixie Truss manufactured the trusses, which were delivered to and installed in the Corey home. However, neither the Coreys nor Garland paid Dixie Truss.

Thereafter, in January 2000, the Coreys sued Dixie Truss in Knox Circuit Court claiming breach of contract and breach of warranty. They alleged that the trusses were defective and incapable of supporting their house. Following initial discovery, Dixie Truss moved the court in June 2000 to join Garland and his company, G & M Oil Company, Inc., as indispensable parties, to assert a counterclaim against the Coreys and a claim against Garland for the price of the trusses and for a change of venue to Laurel County. Dixie Truss

tendered a copy of its proposed counterclaim and third-party claim along with its motions.

In August 2000, the court entered an agreed order transferring venue to Laurel County. However, there does not appear in the record any action taken on Dixie Truss' other motions. The next relevant entry in the record is on February 15, 2001. In an order by the circuit court denying a motion by the Coreys to reconsider its earlier order denying their motion for summary judgment, the court included the language: "The parties have 30 days from the date hereof to make a motion to add additional parties."

Dixie Truss made no new motion to add additional parties, presumably because there had not been a ruling on its motion filed the previous June. On March 30, 2001, Dixie Truss re-noticed that motion for another hearing to be held on May 4, 2001. On August 1, 2001, the court entered an order granting Dixie Truss' motion to add Garland and G & M Oil as third party defendants.[1] The court granted Dixie Truss thirty days from the entry of the order within which to file complaints against Garland and G & M Oil. However, it did not address the

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[1] We are confused by the language of the court's order assigning the matter for a pretrial conference on August 1, 2001, because the clerk's notation reveals that the order was not signed or entered until August 1, 2001.

complaints against Garland and G & M Oil which Dixie Truss had already tendered along with its original motion in June 2000.

The Coreys moved the court to reconsider its order of August 1, 2001, granting Dixie Truss' motion to add indispensable parties. The Coreys argued that the time for such motions expired on March 16, 2001, thirty days after the order of February 14, 2001, and thirteen days before Dixie Truss re-noticed its motion on March 29, 2001. Dixie Truss responded by correctly noting that it had actually filed that motion many months earlier and that its action on March 29 was simply to re-notice a motion which had been lingering since June 2000. However, for reasons it did not state, the circuit court, on September 7, 2001, granted the Coreys' motion to reconsider its August 1 order and vacated its order allowing Dixie Truss to add Garland and G & M Oil Co.

The action between the Coreys and Dixie Truss proceeded to trial before a jury. The jury rejected the Coreys' contentions, instead returning a verdict in favor of Dixie Truss. The court entered judgment in accordance with the verdict, from which judgment the Coreys have not appealed. However, Dixie Truss has appealed, arguing that the circuit court erred when it refused to allow it to assert claims against Garland and G & M Oil Co., Inc.

On March 13, 2002, Dixie Truss filed a separate complaint against Garland alleging that he owed Dixie Truss roughly $20,300.00 for the trusses which were incorporated into the Coreys' house. The circuit court entered a summary judgment against Garland, ruling that his allegations of defects in the trusses were conclusively disproved in the jury trial on the claim by the Coreys against Dixie Truss. Furthermore, the court relied on Garland's testimony in the first action to reject his argument that he was acting solely as an agent for the Coreys, his disclosed principals, instead finding that his testimony established his individual liability. Garland did not otherwise challenge the debt owed Dixie Truss.

On appeal, Garland argues that Dixie Truss should not have been allowed to assert a claim against him in a subsequent action. Garland posits that Dixie Truss' claim is a compulsory counterclaim with respect to the Coreys' original claim and that by not bringing it as a counterclaim in the first action, Dixie Truss should have been precluded from asserting it later. Garland also argues that his testimony should not have been used against him in a subsequent action because he was not a party to the first action. Finally, Garland argues that he was merely an agent of the Coreys and, as such, cannot be personally liable for the debt owed to Dixie Truss.

Kentucky Rules of Civil Procedure (CR) 13.01 provides in relevant part:

> A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction.

Dixie Truss' claim was, therefore, a compulsory counterclaim in that it arose out of the same transaction or occurrence that is the subject matter of the Coreys' complaint. While Garland was not an "opposing party" at that time, that scenario is contemplated by CR 13.08, which provides:

> When the presence of parties other than those to the original action is required for the granting of complete relief in the determination of a counterclaim or cross-claim, the court shall order them to be brought in as defendants as provided in these rules.

Therefore, we are presented with something of a quandary. Garland is correct in his appeal that Dixie Truss' claim against him was a compulsory counterclaim and, therefore, could not be brought in a subsequent action. However, Dixie Truss is correct in its appeal that the circuit court erred by not making Garland a defendant as contemplated by CR 13.08. Dixie Truss properly moved the court to assert its claim in June 2000, and it was only because of the circuit court's failure to rule on that motion that Dixie Truss was unable to assert its claim against Garland.

> CR 61.01 provides that the court at every stage of the proceeding must disregard any error which does not affect the substantial rights of the parties. While this rule is primarily for the guidance of trial courts, this court, since the adoption of the new rules and before, [] has accepted it as a rule for guidance and will not reverse or modify a judgment except for error which prejudices the substantial rights of the complaining party.[2]

Although the above quotation comes from Kentucky's highest Court, we also have stated that "this Court disregards errors not affecting the substantial rights of the parties."[3]

As stated above, Garland and Dixie Truss are both correct in their respective appeals. We could reverse in both cases and remand the matter with instructions to permit Dixie Truss to add Garland as a third-party defendant in the original action filed by the Coreys and to dismiss Dixie Truss' subsequent action. However, we fail to see how that is necessary because we can discern no prejudice suffered by Garland. He was on notice of Dixie Truss' claim against him as of June 2000, so it is not as if he is the victim of improper "sandbagging." Furthermore, the policy motivation behind the rule regarding compulsory counterclaims is one of judicial economy and efficiency in striving to avoid multiple actions dealing with the same subject. Though the circuit court's error

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[2] Davidson v. Moore, Ky., 340 S.W.2d 227, 229 (1960) (citations omitted).

[3] Blair v. Day, Ky.App., 600 S.W.2d 477, 478 (1979) (citations omitted).

forced Dixie Truss to engage in multiple lawsuits where only one was required, remanding the case for still further proceedings would only compound the error.

Therefore, while we agree that the circuit court erred in its handling of the procedural issues surrounding Dixie Truss' claim against Garland, any such error is ultimately harmless and may be disregarded pursuant to CR 60.01. We affirm the circuit court in allowing the claim by Dixie Truss to proceed against Garland.

We now analyze the merits of the summary judgment entered against Garland. As outlined in CR 56.03, summary judgment is appropriate when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. This Court has said that the standard of review on appeal of a summary judgment is

> whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law.... There is no requirement that the appellate court defer to the trial court since factual findings are not at issue.[4]

Garland's second argument is that it was error for the circuit court, in the second action, to consider his testimony from the first action. However, this argument is not premised on evidentiary considerations of admissibility; rather, Garland essentially restates his arguments regarding collateral estoppel,

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4 Scifres v. Kraft, Ky.App., 916 S.W.2d 779, 781 (1996).

res judicata, and issue preclusion to assert that Dixie Truss should not have been allowed to institute the second action. We have already rejected this contention so we need not revisit it.

The evidentiary question may be easily resolved. Garland's statements are clearly admissible under Kentucky Rules of Evidence (KRE) 801A(b)(1), which provides that the statement of a party may be admitted for the truth of the matter asserted if the statement is offered against a party and is the party's own statement, in either an individual or representative capacity. As such, there can be no question but that the statements were properly considered.

Finally, we must evaluate whether the circuit court was correct in ruling that there was no genuine issue of material fact regarding whether Garland was merely an agent of the Coreys. In reaching this conclusion, the circuit court relied on several statements by Garland, both in his deposition and at the trial of the Coreys' action. We need not reproduce that lengthy testimony here; but we agree with the circuit court that "[p]erhaps the best evidence of Jerry Garland's intent is derived again from his own words when asked on cross examination if he was the head man in charge and if the buck stopped with him, he replied, 'You've got it.'"

It is well established that "[u]nder Kentucky law the right to control is considered to be the most critical element in

determining whether an agency relationship exists."[5] Furthermore, "[t]he burden of proving agency is on the party alleging its existence."[6] In this case, Garland had the burden of proving the existence of the purported agency relationship between himself and the Coreys. However, his unchallenged testimony established that he, not the Coreys, controlled his actions toward Dixie Truss. The circuit court was correct that there was no evidence from which a jury could find Garland to have been an agent of the Coreys. Summary judgment was properly entered in the absence of a genuine question of material fact.

In sum, we conclude that although the circuit court erred in its handling of the procedural aspects of these related cases, its rulings did not affect the substantial rights of the parties and, therefore, amounted to harmless error. Its judgments are affirmed.

ALL CONCUR.

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[5] Reis v. Campbell County Bd. of Educ., Ky., 938 S.W.2d 880, 883 (1996), *citing* Grant v. Bill Walker Pontiac-GMC, Inc., 523 F.2d 1301 (6th Cir. 1975).

[6] Wright v. Sullivan Payne Co., Ky., 839 S.W.2d 250, 253 (1992), *citing* Cincinnati Insurance Company v. Clary, Ky., 435 S.W.2d 88 (1968).

BRIEF ORAL ARGUMENT FOR
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BRIEF AND ORAL ARGUMENT FOR
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BRIEF AND ORAL ARGUMENT FOR
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[7] It does not appear in the record that any party objected to mutual representation despite the parties' potentially adverse interests.