RENDERED: May 7, 2004; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-000523-MR

STEWART SERVICES, INC. APPELLANT

v.

APPEAL FROM MCCRACKEN CIRCUIT COURT
HONORABLE CRAIG Z. CLYMER, JUDGE
ACTION NO. 98-CI-00556

TILFORD MECHANICAL CONTRACTORS, INC. APPELLEE

OPINION

AFFIRMING IN PART, REVERSING IN PART

AND REMANDING

** ** ** ** **

BEFORE: GUIDUGLI, McANULTY, AND TAYLOR, JUDGES.

McANULTY, JUDGE. Stewart Services, Inc. ("Stewart") appeals from an order of the McCracken Circuit Court, entered December 11, 2002, granting summary judgment in favor of Tilford Mechanical Contractors, Inc. ("Tilford"). Having carefully reviewed the record, the arguments presented herein by counsel and the applicable law, we affirm in part, reverse in part and remand.

In order to fully decide the arguments presented by Stewart in this appeal, we begin with a careful examination of the long and litigious relationship between Stewart and Tilford. Three separate pieces of litigation involving these two parties must be examined: 97-CI-004170 in the Jefferson Circuit Court, 02-CI-00430 in the McCracken Circuit Court, and the subject of this appeal, 98-CI-00556 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 $29 million construction contract with Centex Rodgers Construction Company ("Centex") for the renovation and construction of 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 agreed to perform all mechanical, plumbing and fire protection work on the contract in exchange for Centex paying it approximately 7.2 million dollars. That same month, Stewart entered into a second-tier subcontract with Tilford, a Paducah company, to perform all of the mechanical and plumbing installation 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 commenced its work only to discover that the electrical contractor had installed electrical conduits at the precise location where Tilford was to install the plumbing and mechanical systems. Moreover, the designs supplied by the architect turned out to be defective, necessitating approximately 1,500 changes. As a result of these numerous design changes, Tilford incurred approximately one million dollars in additional costs before its work was complete. Tilford requested extra compensation from Stewart for its additional costs, which Stewart denied. In response, Stewart withheld a portion of the money due Tilford 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. On July 25, 1997 Stewart filed a motion in Jefferson Circuit Court, assigned case number 97-CI-004170, seeking to stay arbitration. The Jefferson 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. On appeal, a panel of this Court reversed the Jefferson Circuit Court after finding that the arbitration clause applied even though Stewart never issued a change order authorizing any modifications in Tilford's work. Tilford

Contractors, Inc. v. Stewart Services, Ky. App., 1997-CA-003059-MR (not-to-be published opinion rendered March 26, 1999). Stewart's petition for rehearing was denied on May 6, 1999, and the Kentucky Supreme Court denied discretionary review on November 10, 1999.

On remand, Tilford and Stewart executed an agreed order to proceed with 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. On January 10, 2001, the AAA denied Stewart's request to modify this award. Thereafter, Stewart filed a motion in the Jefferson Circuit Court to vacate the award, arguing that the arbitrators exceeded their authority.

On May 23, 2001, the Jefferson Circuit Court issued an opinion and order overruling Stewart's request to vacate the arbitration award. Instead, on July 19, 2001, the trial court granted Tilford's motion to confirm the arbitration award. However, on December 11, 2001, the trial court entered an order stating that the arbitration award was not a judgment upon which Tilford could execute. Apparently, the court believed that the arbitration award established that Tilford was only entitled to collect damages due to Stewart's breach of contract, but did not

specify from whom Tilford was entitled to collect due to the pass-through nature of the claims. The Jefferson Circuit Court opined that Tilford must file an additional action in order to collect damages against Stewart. Consequently, Tilford filed a petition for a declaration of rights and motion for summary judgment in McCracken Circuit Court, case number 02-CI-00430. Stewart responded by filing a motion to dismiss case number 02-CI-00430, arguing that this action was barred by abatement because the same parties were already litigating the same matters before the McCracken Circuit Court in case number 98-CI-00556. On October 25, 2002, the McCracken Circuit Court dismissed 02-CI-00430 with prejudice, thereby denying Tilford's motion for declaratory judgment. A panel of this Court affirmed this decision. Tilford Contractors, Inc. v. Stewart Services, Ky. App., 2002-CA-002436-MR (not-to-be published opinion rendered February 6, 2004).

Meanwhile, as previously mentioned, Tilford had already filed a complaint against Stewart in the McCracken Circuit Court. This complaint, assigned case number 98-CI-00556, was later amended to add Centex and Western Baptist Hospital as defendants. In May 2000, the McCracken 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 this particular

case to confirm the arbitration award. The McCracken Circuit Court denied Tilford's motion citing lack of jurisdiction, but granted motions for summary judgment in favor of Centex and Western Baptist Hospital. On December 11, 2002, the trial court denied Stewart's motion for summary judgment against Tilford and granted Tilford summary judgment in the amount of $1,005,894.37, despite the fact that Tilford never filed a motion for summary judgment against Stewart. The trial court denied Stewart's motion to alter, amend or vacate this judgment. This appeal followed.

On appeal, Stewart presents several arguments for our review supporting its contention that the trial court erroneously granted summary judgment to Tilford. First, Stewart argues that Tilford was not entitled to summary judgment because Tilford failed to file a motion for summary judgment. We find this assertion to be without merit.

The Kentucky Supreme Court addressed this issue in Green v. Bourbon County Joint Planning Commission, Ky., 637 S.W.2d 626 (1982). In Green, the Supreme Court held that Kentucky law permits a trial judge to grant summary judgment in favor of a party who had not requested it. Id., at 629. In reaching this decision, the Supreme Court found Collins v. Duff, Ky., 283 S.W.2d 179, 183 (1955) to be dispositive:

> "Collins raises some procedural objections to the judgment of the Perry Circuit Court. He maintains that, since the Duffs, as plaintiffs, did not themselves move for a summary judgment, but merely opposed his motion for such judgment, the court could not enter summary judgment for the plaintiffs. We do not agree. It is our opinion that in this kind of situation, where overruling the defendant's motion for summary judgment necessarily would require a determination that the plaintiffs were entitled to the relief asked, a motion for summary judgment by the plaintiffs would have been a useless formality. See Hennessey v. Federal Security Administrator, D.C., 88 F.Supp. 664; Hooker v. New York Life Ins. Co., D.C., 66 F.Supp. 313; 3 Moore's Federal Practice, 1st Ed., sec. 56.02, p. 3183."

Green, 637 S.W.2d at 629-30.

Moreover, in Storer Communications of Jefferson County, Inc. v. Oldham County Board of Education, Ky. App., 850 S.W.2d 340, 342 (1993), a panel of this Court held that a trial court has no authority to grant summary judgment to any party without a motion, proper notice and a meaningful opportunity to be heard. Thus, according to Green and Storer, a trial judge having all of the pertinent issues before him at the time a case is submitted on a motion for summary judgment would be justified in considering the propriety in granting summary judgment to the non-moving party so long as all parties were provided with notice and an opportunity to be heard.

In the matter before us, we believe that the trial court did not err in granting summary judgment to Tilford. The

record reveals that Stewart filed its motion for summary judgment on July 3, 2002. Tilford filed a response to this motion on July 26, 2002. The trial court heard oral arguments from both parties on October 30, 2002 and permitted both parties to file supplemental pleadings thereafter. After examining the pleadings and considering oral arguments, the trial court determined that the only issue of material fact was whether Tilford could enforce the arbitration award. In its December 11, 2002 judgment, the trial court determined that Tilford could enforce the arbitration award, making Tilford entitled to judgment against Stewart in the amount of $1,005,894.37 as determined by the AAA. Since Stewart filed the original motion for summary judgment alleging that this was the only issue of material fact being submitted to the court, received notice of Tilford's position and was provided with an opportunity to be heard, the trial court had all of the pertinent issues before it at the time the case was submitted for a decision. We believe that requiring Tilford to submit a formal motion for summary judgment would have been a futile measure. Clearly, we believe the trial court properly granted summary judgment to Tilford.

Next, Stewart argues that the trial court erred in finding that Tilford was entitled to declaratory judgment, sought in case number 02-CI-00430, because the trial court was too late to *sua sponte* reverse itself. A careful review of the

trial court's December 11, 2002 order, however, reveals that the trial court, using hindsight, merely acknowledged that it should have granted Tilford's motion for declaratory judgment in 02-CI-00430. The trial court denied Tilford's motion for declaratory judgment in 02-CI-00430 because that proceeding was dismissed pursuant to the rule of abatement. The rule of abatement holds that a party to a pending litigation cannot bring a declaratory judgment action seeking a determination of issues which are the subjects of another pending litigation. Gibbs v. Tyree, 287 Ky. 656, 154 S.W.2d 732 (1941); Pritchett v. Marcel, Ky. App., 375 S.W.2d 253 (1963); City of Paducah v. Electric Plant Board, 449 S.W.2d 907 (1970). As such, the issue that was the subject of Tilford's motion for declaratory judgment, whether it was entitled to enforce the arbitration award, was never decided on the merits in 02-CI-00430. Accordingly, there is no indication from the record that the trial court entered any order *sua sponte* reversing its final decision in 02-CI-00430. Instead, we perceive that the trial court was merely commenting upon what action it should have previously taken concerning this issue. As such, we find this argument to be without merit.

Third, Stewart believes that the trial court was without jurisdiction to award Tilford summary judgment. In support of this argument, Stewart notes that Tilford filed a notice of appeal on November 22, 2002, to this Court after the

McCracken Circuit Court, in 02-CI-00430, denied Tilford's motion for declaratory judgment and dismissed that action. According to Stewart, this notice of appeal automatically transfers jurisdiction of all matters pending before the trial court from the trial court to this Court. Stewart's assertion is simply contrary to both the facts of this matter as well as Kentucky law. It is well settled in Kentucky that a second action based on the same cause will generally be abated where there is a prior action pending in a court of competent jurisdiction within the same state, between the same parties, involving the same or substantially the same subject matter and cause of action. Brooks Erection Co. v. William R. Montgomery & Associates, Inc., Ky. App., 576 S.W.2d 273, 275 (1979). Upon the abatement of the second action, the court is free to determine and adjudge the rights of the parties in the first action. Id. Here, this Court ruled that the trial court, upon Stewart's urging, properly dismissed 02-CI-00430 pursuant to the doctrine of abatement. As such, it is clear that the trial court was free to consider and finally adjudicate all issues presented by these parties in 98-CI-00556. Therefore, Stewart's argument concerning this issue is completely without merit.

Next, Stewart argues that the trial court erred in granting summary judgment to Tilford because the Jefferson Circuit Court's proceedings and its December 20, 2001 order are

res judicata concerning Tilford's entitlement to a money judgment. Again, we disagree.

In order to fully address this issue, we must again explore the proceedings and orders of the Jefferson Circuit Court. In November 2000, the AAA rendered its arbitration judgment in favor of Tilford. Pursuant to the Kentucky Arbitration Act, Tilford moved the Jefferson Circuit Court to enforce the arbitration award. In an order entered July 19, 2001, the Jefferson Circuit Court stated:

> The Court confirms the arbitration award as it is written. The case *sub judice* was not brought to determine who shall pay the award or when it shall be paid, but simply whether the parties must submit to arbitration. Nothing in the Court of Appeals decision suggests that the Court must make such a determination. Therefore, the Court adopts in its entirety the November 30, 2002 arbitration award, which is attached as an appendix to this Opinion and Order. Pursuant to KRS 417.180, this Opinion and Order shall also serve as an enforceable judgment and is entitled to enforcement just as any other judgment or decree.
>
> WHEREFORE IT IS HEREBY ORDERED AND ADJUDGED that the Motion to Confirm Arbitration Award brought by defendant, Tilford Contractors, Inc., be and is hereby GRANTED and the November 30, 2002 arbitrator's award is adopted in its entirety.

Thus, the Jefferson Circuit Court's July 19, 2001 order confirmed: (i) the AAA award; (ii) declared that the only issue before it was simply whether the parties must submit to

arbitration; (iii) noted that this Court, in its unpublished opinion rendered March 26, 1999, did not require the Jefferson Circuit Court to determine to whom or when the arbitration award should be paid; (iv) adopted the arbitration award in its entirety; and (v) ordered that this award is an enforceable judgment.

Yet, in an order entered December 20, 2001, the Jefferson Circuit Court amended its July 19, 2001 order "to provide that said Opinion and Order is not a judgment for the payment of money against Stewart Services, Inc. upon which Defendant, Tilford Contractors, Inc., may execute." With this order, the Jefferson Circuit Court reinforced its belief that it only possessed jurisdiction to determine if these parties were required to arbitrate their differences. In other words, the December 20, 2001 order appears to absolve the Jefferson Circuit Court from determining whether Tilford could enforce the arbitration award against Stewart.

Eventually, the McCracken Circuit Court addressed the primary issue that dominates this appeal, that being whether Stewart must pay Tilford $1,005,894.37 as determined by the AAA. The trial court, in its December 11, 2002 order, found that the AAA award had been confirmed by the Jefferson Circuit Court and granted Tilford summary judgment for the amount listed in the arbitration award. In essence, the McCracken Circuit Court

found the Jefferson Circuit Court's July 19, 2001 order confirming the arbitration award to be *res judicata*.

Kentucky courts have thoroughly addressed the meaning behind the legal doctrine of res judicata. The doctrine of *res judicata* requires a final adjudication on the merits and identity of parties and subject matter. Vega v. Kosair Charities Committee, Inc., Ky. App., 832 S.W.2d 895 (1992); Haeberle v. St. Paul Fire and Marine Insurance Company, Ky. App., 769 S.W.2d 64 (1989). *Res judicata* is not only applicable "to the issues disposed of in the first action, but to every point which properly belonged to the subject of the litigation in the first action and which in the exercise of reasonable diligence might have been brought forward at the time." Egbert v. Curtis, Ky. App., 695 S.W.2d 123, 124 (1985).

As the orders to the Jefferson Circuit Court clearly reveal, that court specifically refused to determine the question of who must pay the arbitration award. Contrary to Stewart's contentions, the action before the Jefferson Circuit Court was not brought to determine who should pay. Instead, the issues before the Jefferson Circuit Court were whether the parties were required to arbitrate their differences and whether the arbitration award was valid under KRS 417.160(1). The Jefferson Circuit Court confirmed the arbitration award after specifically finding that the award did not conflict with and

was rationally derived from the express terms of the subcontract between these parties. Thus, the decision by the AAA, and the Jefferson Circuit Court's orders of July 19, 2001, and December 20, 2001, each acknowledged that Tilford possessed a judgment against Stewart, but that the Jefferson Circuit Court was the improper forum for Tilford to enforce that judgment. As such, the AAA award and the Jefferson Circuit Court's orders recognizing that judgment are *res judicata*.

As Stewart correctly notes, the Jefferson Circuit Court's decisions only established the amount of money that Tilford is entitled to collect from Stewart. Tilford, pursuant to KRS 417.180, was required to enforce the arbitration award in its original action before the McCracken Circuit Court. In its December 11, 2002 order, the McCracken Circuit Court recognized that the AAA arbitration award was confirmed by the Jefferson Circuit Court, acknowledging that those decisions are res judicata. As such, the arbitration award, as confirmed by the Jefferson Circuit Court, is entitled to deference. Wyandott, Inc. v. Local 227 UFCW, 205 F.3d 922, 929 (6th Cir. 2000). Accordingly, we believe that the trial court herein properly recognized that the arbitration award was, in fact, *res judicata* and correctly determined that it possessed the authority to determine whether Stewart was required to pay damages to Tilford pursuant to that award. Therefore, we believe the trial court

correctly granted summary judgment in favor of Tilford since no genuine issues of material fact ever existed.

Next, Stewart asserts that the trial court erred by failing to apportion these damages between Tilford, Stewart, Centex and Western Baptist Hospital. We reject this assertion because neither Centex nor Western Baptist Hospital were made parties to the arbitration proceedings. Kentucky law clearly provides that fault cannot be apportioned to entities not named as parties to the litigation. Copass v. Monroe County Medical Foundation, Inc., Ky. App., 900 S.W.2d 617, 619-20 (1995). Thus, the trial court correctly refused to apportion damages.

Stewart next argues that the trial court erred by not granting summary judgment in its favor because, under the terms of the subcontract, it owes no obligation to pay Tilford any damages awarded by the AAA. In support of this proposition, Stewart invites us to examine several provisions of the subcontract. We decline this invitation. Since we have upheld the trial court's decision to grant summary judgment in Tilford's favor, Stewart's assertion that it is entitled to summary judgment, along with its supporting arguments, are rendered moot.

Finally, Stewart submits that the trial court improperly awarded Tilford post-judgment interest on the arbitration award. We find this argument to be well taken.

In its December 11, 2002 order, the McCracken Circuit Court awarded Tilford post-judgment interest as follows:

> [Tilford] is further awarded interest on said judgment pursuant to the provisions of KRS 360.040 of twelve (12%) percent compounded annually from the date the Award was confirmed by the Jefferson Circuit Court in its Opinion and Order dated July 19, 2001 until fully paid, for all of which execution may issue forthwith.

In Kentucky, a prevailing party's right to recover post-judgment interest is granted by statute. KRS 360.040 provides that "[a] judgment shall bear twelve percent (12%) interest compounded annually from its date." The language of the statute has been interpreted as requiring the imposition of interest on a judgment unless there are factors which would make an award of interest inequitable. Courtneay v. Wilhoit, Ky. App., 655 S.W.2d 41, 42 (1983). The statute's obvious purpose is to encourage a judgment debtor to promptly comply with the terms of the judgment and to compensate the judgment creditor for the judgment debtor's use of his money. Stone v. Kentucky Insurance Guaranty Association, Ky. App., 908 S.W.2d 675, 678 (1995). Nothing in Kentucky's Uniform Arbitration Act prohibits a court from awarding post-judgment interest on an arbitration award. In fact, KRS 417.180 specifically provides that upon the confirmation of an arbitration award by a circuit court, the prevailing party may enforce that award like a judgment.

In this matter before us, we have noted that the Jefferson Circuit Court confirmed Tilford's arbitration award against Stewart, but later determined that its confirmation of that award was not a judgment that Tilford could execute before it. Instead, Tilford was required to return to its original action before the McCracken Circuit Court and obtain a judgment to enforce the arbitration award. As such, the arbitration award never became due and payable until Tilford sought to enforce the award in the McCracken Circuit Court. It appears to us that, under Kentucky law, the trial court erred by ordering post-judgment interest from July 19, 2001, the date the Jefferson Circuit Court confirmed the arbitration award. Instead, it should have awarded post-judgment interest beginning December 11, 2002, the date that its order granting Tilford summary judgment was entered. Thus, we are compelled to reverse the McCracken Circuit Court's award of post-judgment interest and remand this matter to that court with directions to enter an order awarding Tilford post-judgment interest from December 11, 2002.

For the aforementioned reasons, the judgment of the McCracken Circuit Court is affirmed in part, reversed in part and remanded for proceedings not inconsistent with this opinion.

ALL CONCUR.

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