RENDERED: June 4, 2004; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2003-CA-001034-MR

SUSAN DANIEL HENRY — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE REBECCA M. OVERSTREET, JUDGE
ACTION NO. 02-CI-02656

SALAH M. HASSANEIN — APPELLEE

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: EMBERTON, CHIEF JUDGE;[1] GUIDUGLI AND KNOPF, JUDGES.

KNOPF, JUDGE: Susan Henry appeals from a summary judgment of the Fayette Circuit Court, entered May 2, 2003, ordering her to pay Salah Hassanein more than $44,000.00 pursuant to a written contract. Henry contends that the trial court erred either by finding the contract enforceable or by failing to submit to a

[1] Chief Judge Emberton concurred in this opinion prior to his retirement effective June 2, 2004.

jury a question as to whether a condition of the contract had occurred. We agree with Henry that a material fact is in dispute, and therefore we must reverse the trial court's summary judgment.

As the parties acknowledge, summary judgment is inappropriate unless the movant demonstrates that on a dispositive aspect of the case there is no genuine issue of material fact.[2] Both the trial court and this Court assess such motions, not by weighing the evidence, but by reviewing the record in the light most favorable to the opposing party.[3]

The record indicates that some time after 1989 Henry and her two sons inherited from her father a minority interest in the Hazard Compensation Agency, Inc., (HCA) a closely held holding company controlled by L.D. Gorman and his children. Henry's cousin, Neva Hassanein, and Neva's son, Roland Hassanein, are also minority shareholders of HCA. Neva is Salah's ex-wife and Roland is Salah's son.

According to Salah, HCA was formed in 1948. In the 1970's a dispute arose between the then minority shareholders and Gorman over the company's withholding of earnings. In 1975 the parties reached a settlement according to which a special

[2] Steelvest, Inc. v. Scansteel Service Center, Ky., 807 S.W.2d 476 (1991).

[3] *Id.*

class of stock (class A) was created with the power to select one of the company's three directors. It was agreed that, unless all three directors voted otherwise, each year the company would distribute at least 75% of its after-tax earnings. During the period pertinent to this case, Neva owned all of the class-A shares.

Notwithstanding this agreement, by 1978 HCA had again accumulated excessive retained earnings and a second law suit arose between the majority and minority shareholders. Salah was a party to this suit as the director representing the class-A shares. In this suit, attorney Kent Brown represented Salah and the minority shareholders. In 1989 the Federal District Court for the Eastern District of Kentucky entered judgment in favor of the minority. Essentially, the judgment upheld the 1975 agreement and enjoined HCA to abide by it.

In 1996 and 1997, however, the minority owners, at that point Henry, Neva, and their children, among others, again believed that HCA had retained excessive earnings in violation of the 1975 settlement and the 1989 judgment. To address the situation, Salah recommended that Neva elect Roland to the class-A directorship and that the minority owners again bring suit. In September 1997, Salah, on behalf of Neva and Roland, retained attorney Brown to write a demand letter to Gorman and

HCA. That December, after Gorman had refused the demand, Salah made the following proposal to Neva and Henry:

> Dear Neva and Susan, I will pay Kent's [Brown's] legal fees and costs, as well as Roland's transportation to attend the HCA board meetings, if you agree to reimburse me if you are successful. If you are not successful, you owe me nothing. Your shares will be in proportion to your money received. For example: If Susan and her children receive $1000 and Neva and Roland receive $500 Susan will reimburse me 2/3 of the monies I have advanced and Neva will reimburse me 1/3. If you agree, please sign a copy of this letter and send it back to me. To date I have disbursed:-
> Advance to Kent $2500.
> Payment per attached $2656.25.
> [Total] $5156.25.

Neva and Henry signed copies of the letter, returned them to Salah, and in February 1998 Brown filed their complaint against HCA in federal court. The complaint alleged that HCA had failed to pay more than $750,000.00 of the dividends it was required to pay under the 1975 agreement. It sought dispersal of the excess retained earnings, an accounting, and numerous items of injunctive relief. About a year later, the federal court dismissed the suit for lack of jurisdiction. In April 1999, Brown filed an updated version of the complaint in the Circuit Court of Perry County Circuit Court. This complaint added a prayer that HCA be dissolved and its assets distributed.

The case seems promptly to have lapsed into a series of discovery disputes primarily concerning HCA's records. Brown

filed some motions to compel, but he had taken no depositions by March 2001, the last filing in the case until June 2002 when the court entered its own motion to dismiss for lack of prosecution.

In the meantime, according to Roland's affidavit, HCA continued to retain earnings far in excess of the 25% permitted by the agreement until 2001. In that year, apparently, the company began to pay monthly dividends, as opposed to a single annual dividend, and by year's end had paid total dividends of more than $3,000,000.00 (more than $250,000.00 to the Henrys), which payment seems to have satisfied, or very nearly satisfied, the company's obligation under the agreement for the years 1996 through 2001. There was another significant dividend distribution in 2002, derived in part from the sale of Citizens National Bank and Trust Company, shares of which were among HCA's principal assets. Earnings records were not available, however, from which it could be determined whether the 2002 distribution fully complied with the agreement.

In May 2001, apparently after much of the 2001 dividend had been paid and HCA had approved the distribution of the proceeds of the Citizens National Bank sale, Salah sent a letter to Henry in which he declared the litigation a success and demanded that she reimburse him her share (about $104,000.00) of Brown's nearly $142,000.00 fee. Henry had already paid Salah $10,000.00. In June of that year she paid

him an additional $50,000.00, but she declined to pay more. In June 2002, Salah filed the present action seeking from Henry an additional $44,203.53 plus interest. He alleged Brown's fee and Henry's agreement to reimburse him for her share of that fee.

Henry maintained that her duty to reimburse Salah under their December 1999 agreement had not arisen because the litigation had not succeeded: it had not resulted in a favorable judgment or binding settlement, nor was there any evidence that HCA's distribution of dividends in 2001 and 2002 was the result of the litigation as opposed to other, unrelated, circumstances. Henry submitted Gorman's affidavit to the effect that those distributions had had nothing to do with the law suit. As noted above, the trial court summarily ruled in favor of Salah. It is from that ruling that Henry has appealed.

Henry argues that her December 1999 agreement to reimburse Salah for successful litigation expenses should be deemed unenforceable because the key condition of her duty to perform—that the litigation be successful—is indefinite. As Salah correctly notes, Henry did not raise this issue before the trial court and thus it has not been properly preserved.

The December agreement, furthermore, plainly evidences Henry's intention to be bound, and where that is the case courts generally endeavor to give effect to that intention by examining the whole writing, if there is one, and, if the writing is

ambiguous, by considering the subject matter of the agreement, the situation of the parties, and the conditions under which the agreement was made.[4] If there are material factual disputes about these background matters, construction of the ambiguous contract becomes subject to resolution by the fact-finder.[5]

We disagree with Henry's contention that the 1999 agreement is unenforceable. Although the condition that the litigation be "successful" before Henry's duty to reimburse Salah arises is not as clear as it might be, we agree with the trial court's implicit conclusion that "success" can fairly be understood to include not just a favorable judgment or a binding settlement but also the accomplishment of a substantial portion of the desired result because the lawsuit brought about a voluntary change in the company's conduct. We note that the United States Supreme Court has recently rejected this "catalyst" theory of prevailing party for the purposes of the many federal fee-shifting statutes,[6] but we are persuaded that for the purposes of this case, where fee shifting is not the

[4] Island Creek Coal Company v. Wells, Ky., 113 S.W.3d 100 (2003); Louisville & N. R. Company v. David J. Joseph Company, 298 Ky. 711, 183 S.W.2d 953 (1944).

[5] Cantrell Supply, Inc. v. Liberty Mutual Insurance Company, Ky. App., 94 S.W.3d 381 (2002).

[6] Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health and Human Resources, 532 U.S. 598, 149 L. Ed. 2d 855, 121 S. Ct. 1835 (2001).

question, the catalyst theory provides a reasonable guide to the parties' expressed intentions.

To be "successful" under the catalyst theory, however, a party must establish that he has achieved some substantial element of the relief sought and that the suit was a significant cause of the defendant's action providing relief.[7] We agree with Henry that whether the litigation caused the 2001 and 2002 distributions is a question of fact not suitable for summary judgment.[8]

Salah bears the burden of proving that the litigation was successful and thus he must show that the litigation was a material factor prompting HCA's dividend distributions in 2001 and 2002. It is not enough, at least for summary judgment purposes, that the distributions occurred during the litigation. As Gorman has averred, the distributions may nevertheless have had nothing to do with the lawsuit. Because the suit did not reach a conclusion, Salah must convince a jury that the litigation altered the parties' positions in some way reasonably likely to have affected HCA's behavior. Absent such a showing of causation, we agree with Henry that she has no duty under the 1999 agreement to reimburse Salah for his expenditures.

---

[7] *Id.*

[8] Steelvest, Inc. v. Scansteel Service Center, Inc., *supra.*

Accordingly, we reverse the May 2, 2003, judgment of the Fayette Circuit Court and remand for additional proceedings consistent with this opinion.

ALL CONCUR.

BRIEFS FOR APPELLANT:

John S. Talbott III
DeCamp & Talbott, P.S.C.
Lexington, Kentucky

BRIEF FOR APPELLEE:

Charles C. Mihalek
Steven M. McCauley
Charles C. Mihalek P.S.C.
Lexington, Kentucky