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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2003-CA-001815-MR

GREENWAY, INC. APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE F. KENNETH CONLIFFE, JUDGE
ACTION NO. 02-CI-007056

JEFFREY H. LYNN APPELLEE

OPINION
AFFIRMING IN PART, REVERSING IN PART, AND REMANDING
** ** ** ** **

BEFORE: BARBER, KNOPF, AND TACKETT, JUDGES.

KNOPF, JUDGE: Greenway, Inc., appeals from orders of the Jefferson Circuit Court, entered July 30, 2003, denying its claim for breach-of-contract damages against Jeffrey Lynn, a former employee, and awarding Lynn attorney fees. Greenway contends that both rulings resulted from misconstructions of Lynn's employment contract. We agree with Greenway that Lynn is not entitled to attorney fees and so must reverse in part and remand.

The parties do not dispute the relevant facts. Greenway, which is headquartered in Louisville, designs and installs commercial and residential irrigation systems. It hired Lynn in 1992 as a laborer. By 1999 Lynn had become one of the company's more experienced and valuable workers, so late that year, when the company learned that Lynn was considering a competitor's job offer, it countered by offering to promote him to a supervisory position and to increase his compensation. Lynn accepted Greenway's offer. In December 1999, the parties executed a written employment contract whereby, in addition to his base salary and other bonuses, Lynn received a signing bonus of $7,500.00.

In March 2001, following a heated exchange between Lynn and his manager, Paul Parker, Lynn resigned his position, thus terminating the contract. He was immediately rehired, however, apparently at the same salary but without the incentive bonuses provided for in the contract or its other terms. Lynn remained employed under this arrangement until August 2002, when he left Greenway and began working for Performance Irrigation, LLC, a company Lynn formed with a friend. This company is also in the business of installing irrigation systems.

Thereupon, in September 2002, Greenway brought suit against Lynn. It alleged that he was violating the 1999 contract's non-competition and non-solicitation clauses and that

his March 2001 resignation had breached a contract requirement that he give a ninety-day notice prior to resigning. Greenway sought injunctive relief barring Lynn from working for a competitor and from soliciting Greenway's customers. It also sought the return of Lynn's $7,500.00 signing bonus, the remedy specified in the contract for breach of the ninety-day-notice requirement. In December 2003, Lynn filed a counter-claim seeking a declaration that he had not violated the contract's non-competition clause.

Ultimately, the trial court ordered Lynn not to solicit Greenway's customers for the duration of the non-competition period (Lynn agreed to this order), but otherwise denied Greenway's claims. It also awarded attorney fees to both parties, Greenway for prevailing on the solicitation issue and Lynn for prevailing on the employment issue. When these awards were offset, Lynn's net award came to about $6,800.00. It is from this award of attorney fees to Lynn and from the denial of its claim for the return of Lynn's signing bonus that Greenway has appealed.

The trial court ruled both that Greenway had waived its right to demand the return of Lynn's signing bonus by waiting nearly eighteen months to assert the right and that enforcement of the signing-bonus-return clause would be inequitable. Greenway contends that the trial court erred by

failing to give effect to paragraph 7.2 of the contract, which provides that, notwithstanding any delay in asserting its contract rights, the employer will not be "subjected to the defense of waiver or estoppel."

We need not address the questions of Greenway's waiver and the effect of paragraph 7.2, however, because we agree with the trial court that the signing-bonus-return clause is otherwise unenforceable. Contracts, of course, may provide for liquidated damages in the case of breach, but "terms fixing unreasonably large liquidated damages are unenforceable as against public policy."[1] The contract's forfeiture of Lynn's entire $7,500.00 signing bonus merely for his failure to give the requisite notice of his resignation, at least in the absence of any allegation that Lynn's unplanned departure caused significant damages, is exactly the sort of unreasonable penalty provision public policy does not allow. The trial court did not err, therefore, by refusing to enforce it.

We agree with Greenway, however, that Lynn is not entitled to recover his attorney fees. As the parties note, the rule in Kentucky is that, absent a statutory or contractual provision to the contrary, each party is responsible for his own

[1] Man O War Restaurants, Inc. v. Martin, Ky., 932 S.W.2d 366, 368 (1996).

attorney fees.[2] Lynn maintained, and the trial court agreed, that he is entitled to fees under the contract's paragraph 7.5:

> In the event it is necessary for a party to utilize Court proceedings in order to enforce any of the terms and conditions of this Agreement, and said Court finally determines that the defending party violated any of the terms and conditions of this Agreement, the defending party agrees to pay to the prevailing party any and all of its court costs and reasonable attorneys' fees.

This clause is clearly meant to limit the recovery of fees to a prevailing plaintiff. Although, as the California courts have noted,[3] such one-sided attorney-fee clauses are apt to operate oppressively, we have been referred to no Kentucky authority, like the statutory authority in California, requiring that such clauses not be enforced as written. Lynn argues, however, that his counter-claim seeking declaratory relief made him a plaintiff and thus brought him within the contract's terms. We are compelled to disagree.

As Greenway notes, Lynn's counter-claim merely restated his answer to Greenway's complaint. It raised no new issue, either factual or legal. Such redundant counter-claims are improper, for once the complaint is resolved the redundant

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[2] Holsclaw v. Stephens, Ky., 507 S.W.2d 462 (1973).

[3] M. Perez Company, Inc. v. Base Camp Condominiums Association No. One, 3 Cal. Rptr. 563 (2003).

counter-claim becomes moot.[4] With few exceptions not applicable here, a court does not have jurisdiction to address moot claims.[5] Thus, Lynn did not prevail as a plaintiff, only as a defendant, and, as noted, the contract does not provide for a prevailing defendant's attorney fees. The award of fees to Lynn, therefore, was erroneous.

Accordingly, we reverse the July 30, 2003, order of the Jefferson Circuit Court awarding attorney fees to Lynn and remand for entry of a suitably modified order. In all other respects, we affirm the circuit court's July 30, 2003, orders.

ALL CONCUR.

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[4] Aldens, Inc. v. Packel, 524 F.2d 38 (3rd Cir. 1975) (considering the federal equivalent of CR 13.01); Mille Lacs Band of Chippewa Indians v. Minnesota, 152 F.R.D. 580 (1993).

[5] Commonwealth v. Hughes, Ky., 873 S.W.2d 828 (1994).