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# Commonwealth Of Kentucky

# Court of Appeals

NO. 2001-CA-002274-MR
AND
NO. 2003-CA-001023-MR

HAROLD BROOKS LEASURE, JR. — APPELLANT

v.

APPEAL FROM CHRISTIAN CIRCUIT COURT
HONORABLE EDWIN M. WHITE, JUDGE
ACTION NO. 99-CI-00812

COLEMAN AMERICAN COMPANIES, INC. — APPELLEE

OPINION
AFFIRMING IN PART, REVERSING IN PART
AND REMANDING

** ** ** ** **

BEFORE: BUCKINGHAM, JOHNSON, AND KNOPF, JUDGES.

JOHNSON, JUDGE: Harold Brooks Leasure, Jr. has appealed from an order entered by the Christian Circuit Court on September 19, 2001, which granted partial summary judgment to the appellee, Coleman American Companies, Inc., on several issues related to its breach of contract claim, and from an order entered on April 15, 2003, which denied his CR[1] 60.02 motion to set aside the

[1] Kentucky Rules of Civil Procedure.

partial summary judgment.[2] These appeals stem from an agreement between Leasure and Coleman concerning the sale of several moving and storage companies, namely, C & L Moving and Storage, Inc., Pennyrile Moving and Storage, Inc., Hammond-Pennyrile Moving and Storage, Inc., A-1 Pennyrile Moving and Storage, Inc., and Audubon Moving and Storage, Inc.[3] Having concluded that genuine issues of material fact exist with respect to the amount of accounts receivable and to the value of an escrow account Coleman claims were misrepresented on the companies' financial statements, we reverse in part and remand. Having further concluded that no genuine issue as to any material fact exists with respect to the remaining issues raised by Leasure in these appeals, we affirm in part.

On June 2, 1999, James F. Coleman, the president of Coleman American Companies, Inc., entered into a written contract with Leasure, whereby he agreed, inter alia, to purchase the stock of several moving and storage companies owned by Leasure.[4] Pursuant to the contract, the purchase price was to

[2] Anna Leasure is listed as an "intervenor" in the style of both notices of appeal. Anna has not filed a brief in either appeal. The appeals have been consolidated.

[3] As difficult as it may be to believe, the parties are not even in agreement as to how many companies were sold. Leasure refers to five companies, but Coleman only refers to four companies. The agreement and the trial court order list five companies.

[4] Although the contract was signed by both parties on June 2, 1999, the deal did not close until June 9, 1999, due to certain financial concerns raised by Coleman.

be calculated by multiplying the shareholders' equity in the companies by 140%, and adding the additional sum of $320,500.00. The combined balance sheet for the companies involved in the transaction, which was appended to the contract, indicated that as of May 31, 1999, shareholders' equity was valued at $374,164.00, bringing the total purchase price to $849,500.00 ($374,164.00 X 140% + 320,500.00).[5]

On August 11, 1999, Coleman filed a complaint in the Christian Court against Leasure alleging, inter alia, breach of contract, breach of implied covenant of good faith and fair dealing, intentional fraud, and fraudulent concealment. In sum, Coleman alleged that Leasure materially misrepresented the value of the companies he was selling to Coleman.[6] On September 20, 1999, Leasure filed an answer and counterclaim, in which he denied the allegations set forth in Coleman's complaint.[7] On

[5] Both parties agree that the shareholders' equity in the companies was calculated by subtracting the total amount of liabilities listed on the balance sheet ($590,172.00) from the total amount of assets ($968,336.00). The balance sheet was prepared by Stephen E. Turner, a certified public accountant, based upon information provided by Leasure. A list of the companies' accounts receivable was also appended to the contract. In addition, although the balance sheet is dated May 31, 1999, Leasure tendered a "closing certification" on June 2, 1999, in which he stated that the figures listed on the balance sheet "are true, accurate and complete in all respects, [and] have not been the subject of any material changes from the date thereof."

[6] More specifically, Coleman contended, inter alia, that Leasure overstated the amount of assets and understated the amount of liabilities listed on the balance sheet. Coleman did not seek to have the contract rescinded, but instead sought damages.

[7] The basis of Leasure's counterclaim is not relevant to this appeal.

October 12, 1999, Coleman filed a motion for partial summary judgment on its breach of contract, breach of implied covenant of good faith and fair dealing, intentional fraud, and fraudulent concealment claims.

In November 1999 Leasure inspected the accounts receivable files for the purpose of contesting the allegations raised by Coleman.[8] On December 14, 1999, Leasure filed an affidavit from Cindy Barrigan, who was employed by Hammond-Pennyrile Moving and Storage, Inc. from March 28, 1996, to June 11, 1999. In sum, Barrigan stated that she prepared the accounts receivable list for Hammond-Pennyrile and that she was confident that the list was accurate. On January 28, 2000, Coleman filed a motion in limine requesting the trial court to strike Barrigan's affidavit and to exclude any testimony offered by her due to her failure to appear for a scheduled deposition.

In February 2000 the trial court held a hearing on Coleman's motion for partial summary judgment. Several witnesses testified at the hearing on behalf of Coleman.[9] First and foremost, James Coleman testified that shortly after he executed the contract he discovered a $19,000.00 discrepancy in

[8] Coleman claims that shortly thereafter several documents turned up missing from the files Leasure inspected.

[9] In the interest of brevity, we have limited our summary of the testimony elicited at the hearing to those issues relevant to the arguments raised by Leasure on appeal. In addition, during the hearing, Coleman renewed its motion to exclude Barrigan's affidavit and testimony, which was granted.

the amount of cash on hand listed on the balance sheet. James stated that the amount of cash on hand as of May 31, 1999, was a negative $6,886.04, as opposed to the $12,198.00 listed on the balance sheet. James claimed that this discrepancy led him to believe that other misstatements might exist with respect to the companies' financial situation. Consequently, James testified that he instructed his brother, Doug Coleman, to begin a "full scale effort" to collect on the accounts receivable listed on the balance sheet. James contended that a thorough analysis of the accounts receivable files indicated that $245,950.50 of the accounts receivable had been paid prior to June 2, 1999; $43,937.72 represented duplicate accounts; no files existed for $83,876.14; and $56,898.00 represented "shortages."[10] James provided a report setting forth the basis for these figures and he explained how the information contained in the report was compiled.[11]

James further testified that Leasure failed to disclose, inter alia, $34,676.04 in accounts payable and $26,102.96 in tax liabilities that were owed by the companies. James provided a report setting forth the basis for these

[10] According to the balance sheet, $636,176.00 in accounts receivable was owed to the companies involved in the transaction as of May 31, 1999. Coleman claimed that $430,662.36 of this amount represented: (1) accounts that had been paid prior to the closing; (2) duplicate accounts; (3) accounts for which there were no files; or (4) "shortages."

[11] Doug later testified that he was primarily responsible for the report concerning the receivable files and he stated that the figures contained therein were accurate.

figures and he explained how the information contained in the report was compiled. James further testified that Coleman had paid $20,547.24 in payables, $6,581.24 more than the $13,966.00 listed on the balance sheet, since purchasing the companies. In addition, James testified that the $12,383.00 Vanliner insurance escrow account, which was listed as a current asset on the balance sheet, had a negative balance as of June 2, 1999.

English Lacy, a certified public accountant, testified that he reviewed the accounts receivable for the companies involved in the transaction per Coleman's request. Lacy stated that his review of the files indicated that a "substantial amount" of the accounts receivable listed on the balance sheet had been collected prior to June 2, 1999. More specifically, Coleman introduced a report prepared by Lacy, in which Lacy opined that the amount of accounts receivable paid prior to June 2, 1999, "is likely to be in the neighborhood of $210,000 to $260,000." Lacy explained, on cross-examination, that his analysis was based on a "random sampling" of the receivable files. More precisely, Lacy acknowledged that he arrived at his calculations by extrapolating the results from a random sample and projecting them to the entire group. Lacy testified that he discovered "proof of payment" prior to June 2, 1999, in the form of deposit slips, checks or transmittal forms, in the amount of $144,927.00, with respect to the files he actually reviewed.

Lacy further testified that his projections were entirely consistent with the figures contained in the report submitted by Coleman.

Leasure disputed that he had overstated the amount of accounts receivable listed on the balance sheet by the amount alleged by Coleman. Leasure explained that he personally reviewed the receivable files prior to the hearing, after which he concluded that "insufficient evidence" existed to support Coleman's allegations. More specifically, Leasure claimed there was no "proof of payment" with respect to many of the accounts Coleman claimed were paid prior to June 2, 1999.[12] Leasure further testified that "there was not sufficient evidence in th[e] file" to support Coleman's allegation that duplicate entries existed. Leasure also disputed Coleman's allegation that he failed to disclose $34,676.04 of the companies' payables. In addition, Leasure testified that he presented Coleman with two bank certificates from Mercantile Bank in St. Louis, Missouri, indicating that the Vanliner insurance escrow account had a positive balance of $12,383.00.[13] Leasure insisted that it was his understanding the Vanliner account had a

[12] Leasure acknowledged that the files indicated that a small amount ("$2,000.00 or $3,000.00") had been paid prior to June 2, 1999.

[13] Leasure never explained when he presented Coleman with the bank certificates or when the certificates had been issued.

positive balance of approximately $12,000.00, as of June 2, 1999.

Stephen Turner testified concerning the amount of cash on hand listed on the balance sheet. Turner stated that pursuant to the "doctrine of constructive receipt," cash on hand as of June 2, 1999, was $12,198.00, the amount listed on the balance sheet. Turner explained that this figure included checks that had been received during the weekend prior to June 2, 1989, but not deposited.[14] Turner acknowledged that any payments included as cash on hand pursuant to this method would have the effect of reducing accounts receivable by the corresponding dollar amount of the credit to cash on hand. Turner explained that $9,751.62 of the $12,198.00 listed as cash on hand on the balance sheet represented payments that had been "constructively received." Turner further explained, however, that this figure was never deducted from the total amount of accounts receivable listed on the balance sheet, thereby resulting in an overstatement of accounts receivable in the amount $9,751.62.

On March 10, 2000, Leasure filed a brief concerning, inter alia, Coleman's motion for summary judgment, in which he conceded that after further review he agreed that approximately $49,000.00 in accounts receivable had been paid prior to June 2,

[14] Monday, May 31, 1999, was Memorial Day.

1999. Leasure further maintained that he disputed the "remaining $192,825.53" Coleman alleged had been paid prior to the closing "because the deposit ticket 'proof' does not match the accounts receivable amount." In support of this contention, Leasure attached an affidavit from Turner, in which Turner stated that he "was unable to match $192,825.53 of 'paid prior to June 1, 1999' accounts receivables with deposit tickets." Coleman subsequently moved to have Turner's affidavit stricken from the record, which the trial court granted on March 14, 2000.

On May 5, 2000, the trial court entered an order granting partial summary judgment to Coleman on several issues concerning its breach of contract claim. The order provides, in relevant part, as follows:

> The contract exhibits show that $614,460 are listed as accounts receivable.[15] $195,716 have been collected. This leaves $418,744 in dispute. [Leasure] has admitted that $49,000 of those accounts were paid prior to closing and should not have been listed. This alone overstated the purchase price by $68,600 [$49,000.00 X 140%]. This now leaves us with $369,744 in dispute.
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> . . .
>
> The proof showed that $245,950 was paid prior to closing.

[15] As previously discussed, Leasure represented on the balance sheet that $636,176.00 in accounts receivable were owed to the companies involved in the transaction as of May 31, 1999. According to the balance sheet, $21,716.00 of this amount represented "drivers advances," which the trial court treated separately.

The proof from Lacy clearly shows that 168 of the 212 files for C & L Moving and Storage had proof of payment in the amount of $50,927. The Hammond-Pennyrile Moving and Storage files showed proof of payment in 245 of the 316 files for $94,000. . . . The proof shows that $245,950 of the accounts receivable were paid prior to closing. This represents $344,437 of the purchase price [$245,950.00 X 140%].

. . .

In summary as to the accounts receivable, this [c]ourt finds that a breach of contract occurred with respect to duplicate entries ($43,937.72) and files paid prior to closing ($245,950.90) for a total of $289,887.72[.] [Coleman] is entitled to summary judgment for this amount multiplied by the 140 percent factor which reduces the purchase price by $405,841.

[Coleman] is also entitled to summary judgment regarding cash on hand. . . . [Coleman] is entirely correct that a corresponding credit in accounts receivable should be made. The money can only be counted once; either as cash on hand or as an account receivable. The [c]ourt finds that $6,446.83 is cash on hand and must be deducted from accounts receivable.

. . .

Coleman proved that it had paid $20,547.24 on accounts payable not the $13,966 that was listed in the contract. Summary judgment is appropriate on the difference [(]$20,547.24 less $13,966) times 140 percent [$9,213.74]. The payroll items . . . have also been paid by Coleman and it is entitled to summary judgment of $5,380.66 times 140 percent.

. . .

> [T]he Vanlines Insurance escrow did not exist. . . . [I]t is undisputed that the purchase price was overstated because of it. Therefore, this [c]ourt grants summary judgment in the amount of $17,336.20 ($12,383 X 140 percent).
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> The problem concerning taxes is relatively easy to conclude. Tax claims totaling $26,202 were not listed. . . . Leasure represented in the negotiations that all tax claims had been paid. [Coleman] is entitled to a credit of $36, 682.80 on the purchase price.[16]

On July 31, 1999, Leasure filed a Chapter 11 bankruptcy petition in the United States Bankruptcy Court for the Western District of Kentucky. Shortly thereafter, Coleman filed a motion to dismiss the bankruptcy petition, a motion to convert the Chapter 11 proceeding to a Chapter 7 proceeding, and a motion to appoint a trustee for Leasure's assets. In September 2000 the Bankruptcy Court held a hearing for the purpose of addressing the various motions filed by Coleman, after which it entered findings of fact and conclusions law

[16] In addition to the issues referenced above, the trial court granted partial summary judgment to Coleman with respect to several other issues concerning the value of items Leasure allegedly misrepresented in the companies' financial statements. Moreover, the trial court also concluded that genuine issues of material fact existed with respect to many of the issues raised by Coleman. In sum, the trial court granted partial summary judgment to Coleman in the amount of $691,913.88. In the interest of clarity, we have limited our summary of the trial court's order only to those issues relevant to the arguments advanced by Leasure in this appeal.

concerning many of the issues that were pending before the Christian Circuit Court.[17]

On March 8, 2001, the trial court entered an order amending its partial summary judgment to reflect that the $691,913.88 awarded to Coleman was to be treated as a set-off against the purchase price Coleman was required to pay under the terms of the contract. On September 19, 2001, the trial court entered an order rendering its partial summary judgment final and appealable. Leasure subsequently appealed the trial court's ruling to this Court.

On August 20, 2002, while his appeal was pending, Leasure filed a CR 60.02 motion to set aside the partial summary judgment, in which he alleged that Coleman "either intentionally or negligently misrepresented the evidence and facts upon which the Court based its material findings in [its partial summary judgment]." In support of this contention, Leasure attached an affidavit from Robert Cunningham, a certified public accountant, who opined that "the partial summary judgment is in error in several material respects because of inaccurate information provided to the [c]ourt by Coleman[.]"[18] On January 6, 2003, the

[17] For reasons discussed infra, the findings of fact and conclusions of law entered by the Bankruptcy Court are not relevant to this appeal. Although it is unclear from the record, the bankruptcy petition was either withdrawn by Leasure or dismissed at his request.

[18] Cunningham contended, inter alia, that Lacy's analysis of the receivable files was erroneous in several respects.

trial court, sua sponte, entered an order requiring Lacy to review Cunningham's affidavit. On January 30, 2003, Coleman filed an affidavit from Lacy, in which Lacy disputed Cunningham's findings.

On March 21, 2003, Leasure requested Judge Edwin M. White, the presiding judge in the case, recuse himself from ruling on the CR 60.02 motion. In support of his motion, Leasure claimed he recently discovered, for the first time, that Lacy is Judge White's second cousin and that he prepared Judge White's tax returns. On April 15, 2003, the trial court entered an order denying Leasure's CR 60.02 motion, in which Judge White specifically addressed Leasure's request that he recuse himself from the case. The order provides, in relevant part, as follows:

> A[n] . . . issue has arisen concerning English Lacy's business relationship to me. It can be simply stated that English Lacy prepares my income tax return and has done so for a number of years. . . . Lacy's proof was that he performed accounting tasks at the request of counsel for Coleman American. . . . [Lacy] was subjected to cross examination as to his methodology and conclusions. The original counsel for each party in this litigation certainly knew of my relationship to Lacy. This [c]ourt advised the secondary counsel for the parties concerning the relationship with Lacy.
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> . . .

> [D]isqualification is not automatic and since credibility of Lacy is not the issue, disqualification based upon a limited business relationship with Lacy is not necessary.[19]

Leasure subsequently appealed the denial of his CR 60.02 motion. On June 19, 2003, this Court entered an order consolidating Leasure's appeal from the order granting partial summary judgment and his appeal from the order denying his CR 60.02 motion.

Leasure contends (1) that the trial court erred by granting partial summary to Coleman on several issues related to its breach of contract claim; (2) that the trial court abused its discretion by denying his CR 60.02 motion; and (3) that Judge White erred by failing to recuse himself from the case. We will address the arguments advanced by Leasure seriatim.

The standard of review governing an appeal of a summary judgment is well-settled. We must determine whether the trial court erred in concluding that there was no genuine issue as to any material fact and that the moving party was entitled to a judgment as a matter of law.[20] Summary judgment is appropriate "if the pleadings, depositions, answers to

[19] Interestingly, the trial court did not address the issues raised by Leasure in his CR 60.02 motion in its order. In fact, the trial court never stated that it was denying Leasure's CR 60.02 motion. Nevertheless, both parties treated the order as a final and appealable order denying Leasure's CR 60.02 motion. Consequently, we shall do the same.

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

interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."[21] In Paintsville Hospital Co. v. Rose,[22] the Supreme Court of Kentucky held that for summary judgment to be proper the movant must show that the adverse party cannot prevail under any circumstances. The Court has also stated that "the proper function of summary judgment is to terminate litigation when, as a matter of law, it appears that it would be impossible for the respondent to produce evidence at the trial warranting a judgment in his favor."[23] Since factual findings are not at issue, there is no requirement that the appellate court defer to the trial court.[24] "The record must be viewed in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor" [citation omitted].[25]

Leasure first contends that genuine issues of material fact exist with respect to the amount of accounts receivable

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[21] CR 56.03.

[22] Ky., 683 S.W.2d 255, 256 (1985).

[23] Steelvest, Inc. v. Scansteel Service Center, Inc., Ky., 807 S.W.2d 476, 480 (1991).

[24] Goldsmith v. Allied Building Components, Inc., Ky., 833 S.W.2d 378, 381 (1992)("Under no circumstances is a summary judgment entitled to the deference or dignity of a case tried by the trial court").

[25] Steelvest, 807 S.W.2d at 480.

Coleman alleged were paid prior to June 2, 1999.[26] We agree. As previously discussed, James Coleman testified that an analysis of the accounts receivable files indicated that $245,950.50 of the accounts receivable listed on the balance sheet had been paid prior to June 2, 1999. In addition, Lacy testified that he discovered "proof of payment" prior to June 2, 1999, in the form of deposit slips, checks or transmittal forms, in the amount of $144,927.00. Leasure, however, disputed that $192,825.53 of the $245,950.50 had been paid prior to June 2, 1999, on the basis that "insufficient evidence" existed to support such a finding. More specifically, Leasure claimed there was no "proof of payment" with respect to many of the accounts Coleman claimed were paid prior to June 2, 1999. After a thorough review of the record, we were unable to find any "deposit slips, checks or transmittal forms" indicating that $245,950.50 of the $636,176.00 listed as account receivable on the balance was paid

[26] Coleman asserts that Leasure is precluded from raising this issue pursuant to the doctrine of collateral estoppel. In sum, Coleman maintains that this issue was already "litigated and determined" in the United States Bankruptcy Court for the Western District of Kentucky. Coleman, however, has failed to indicate in its brief where this issue was preserved and we were unable to find any portion of the record suggesting that Coleman presented its collateral estoppel argument to the trial court. It is well-established that "[t]he Court of Appeals is without authority to review issues not raised in or decided by the trial court." Regional Jail Authority v. Tackett, Ky., 770 S.W.2d 225, 228 (1989). Moreover, we are under no obligation to scour the record on appeal to ensure that an issue has been preserved. See Phelps v. Louisville Water Co., Ky., 103 S.W.3d 46, 53 (2003); and CR 76.12(4)(d)(iii) and (iv). Perhaps this is an ideal time to mention that the record in this consolidated appeal consists of 17 volumes and well over 2,000 pages, excluding depositions and exhibits.

prior to June 2, 1999.[27] Consequently, we simply cannot conclude that no genuine issue of material fact exists with respect to this issue. Thus, we must reverse the trial court's ruling that Coleman was entitled to a partial summary judgment in the amount of $344,437.00 ($245,950.00 X 140%), with respect to "pre-paid" accounts receivable, and remand the matter, in part, for further proceedings concerning the amount of accounts receivable that were paid prior to June 2, 1999.[28]

Leasure next contends that genuine issues of material fact exist with respect to Coleman's allegation that $43,937.72 of the $636,176.00 listed as accounts receivable on the balance sheet represented duplicate accounts. We agree. Once again, we have not been able to locate, nor does Coleman cite to, any portion of the record which would allow us to conclude that no genuine issue of material fact exists with respect to this

[27] Coleman does not cite to any portion of the record where these items can be found. See CR 76.12(4)(d)(iii) and (iv). We note in passing that while we were able to locate various documents concerning accounts that appear to have been paid prior to June 2, 1999, dispersed throughout the record; the documents are arranged in such a haphazard fashion that we were unable to perform any kind of meaningful review with respect to their contents.

[28] We are constrained to point out what appears to be an error on the part of the trial court in its calculations. As previously discussed, Leasure agreed that approximately $49,000.00 in accounts receivable had been paid prior to June 2, 1999, and the trial court granted Coleman partial summary judgment with respect to the $49,000.00. The trial court, however, subtracted the $49,000.00 from the total amount of accounts receivable listed on the balance sheet. This was error. The $49,000.00 should have been subtracted from the $245,950.00 Coleman claimed was paid prior to June 2, 1999, as the $49,000.00 represented accounts that had been paid prior to that date. Regardless, Leasure only disputes $192,825.53 of the amount Coleman claims was paid prior to June 2, 1999. Thus, on remand, only $192,825.53 of the $245,950.00 in accounts receivable that Coleman claims were paid prior to June 2, 1999, remains in dispute.

issue. In sum, Coleman claims that duplicate accounts exist and Leasure maintains that the evidence does not support Coleman's allegation. It is well-established that "[q]uestions relating to the credibility of witnesses and the weight of the evidence must await trial."[29] We are persuaded that the trial court's conclusion that "a breach of contract occurred with respect to duplicate entries" was based on an improper determination based on credibility of the witnesses. Consequently, we reverse the trial court's ruling that Coleman was entitled to a partial summary judgment in the amount of $61,512.81 ($43,937.72 X 140%), with respect to duplicate accounts, and remand the matter, in part, for further proceedings concerning this issue.

Leasure further complains that the trial court "ignored the terms of the agreement" dealing with accounts receivable in reaching its decision. More specifically, Leasure cites paragraph 9 of the contract, which provides, in relevant part, as follows:

> Seller guarantees that 100% of the [a]ccounts [r]eceivable of the [c]ompanies, as listed in the schedule of accounts receivable, shall be collectible by either the [c]ompanies or [p]urchaser. The parties agree that on the one year anniversary date of the closing they shall meet and agree, in good faith, as to the amount of the accounts receivable that are uncollectible. . . . No account shall be deemed uncollectible except

[29] James Graham Brown Foundation, Inc. v. St. Paul Fire & Marine Insurance Co., Ky., 814 S.W.2d 273, 276 (1991).

> by joint agreement of the parties, in writing.

Leasure contends Coleman failed to comply with this provision. We disagree.

"The language of a business contract should be construed in the light of what intelligent business men would reasonably expect."[30] Put differently, "[business] contracts should be construed according to their plain meaning, to persons of sense and understanding, and not according to forced and refined interpretations which are intelligible only to lawyers and scarcely to them" [footnote omitted].[31] We are of the opinion that the term "uncollectible," as it appears in paragraph 9 of the agreement, was not meant to encompass (1) duplicate accounts; (2) accounts that never existed; or (3) accounts that were paid prior to the date the contract was executed. It would be nonsensical to hold otherwise.

Leasure next claims that pursuant to paragraph 3 of the contract, Coleman waived its right to rely on any of the warranties contained therein.[32] Paragraph 3(q) of the contract, states as follows:

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[30] Thompson-Starrett Co., Inc. v. Mason's Adm'rs, 304 Ky. 764, 771, 201 S.W.2d 876, 881 (1946).

[31] 17A Am.Jur.2d, Contracts, § 405 (1991).

[32] In paragraph 3 of the contract, and elsewhere, Leasure made several warranties concerning the figures contained in the companies' financial statements.

> To the extent that [p]urchaser exercises its right of inspection under section 5 of this agreement,[33] and to the extent that said inspections are of matters covered by these representations and warranties, then the representations and warranties contained in this section shall not become effective and shall be treated as if they had never been made.

Leasure contends that Coleman exercised its right of inspection under paragraph 5 of the contract; however, we conclude that this assertion is immaterial. As previously discussed, Leasure tendered a "closing certification" on June 2, 1999, in which he stated that the figures listed on the balance sheet "are true, accurate and complete in all respects, [and] have not been the subject of any material changes from the date thereof." The "closing certification" is separate and apart from any of the warranties contained in paragraph 3 of the contract, or elsewhere. Moreover, as the trial court pointed out in its May 5, 2000, order granting partial summary judgment to Coleman, "[t]he closing certifications have no limiting liability." Consequently, we hold that the trial court did not err with respect to this issue.

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[33] Paragraph 5 of the contract provides, in relevant part, as follows:

> [Coleman], its attorneys, accountants, or other representatives shall have the right and opportunity to make such examination and investigation as they may deem necessary or desirable for all purposes relating to this [a]greement, and to that end to open its books, records, properties and plants for examination and investigation by [p]urchaser, its representatives, accounts [sic] and counsel.

Leasure further asserts that the trial court improperly excluded Barrigan's affidavit and testimony and Turner's affidavit. As previously discussed, Barrigan stated in an affidavit filed by Leasure that she prepared the accounts receivable list for Hammond-Pennyrile and that she was confident that the list was accurate. The trial court excluded Barrigan's affidavit and testimony due to her failure to appear for a deposition scheduled by Coleman.[34] Turner's affidavit also concerned Coleman's allegation that Leasure misrepresented the value of the companies' accounts receivable. The record, however, does not disclose the basis for the trial court's decision to strike Turner's affidavit. Regardless, we conclude that this issue is moot given our conclusion that genuine issues of material fact exist concerning the amount of accounts receivable Coleman claims were misrepresented on the companies' financial statements. In sum, both parties will have the opportunity on remand to conduct further discovery and to present testimony at any future hearing or trial concerning the value and authenticity of the accounts receivable Leasure is alleged to have misrepresented.

Leasure next claims that he was denied the opportunity "to conduct full and complete discovery prior to the entry of summary judgment." More specifically, Leasure contends that he

[34] We can only assume that Barrigan's testimony at the hearing in this matter would have covered the same topic as her affidavit.

"was only given one opportunity to review the accounts receivable files under constant supervision from Coleman employees." This contention is entirely without merit. Without belaboring the point, we note that a thorough review of the record indicates that Leasure had ample opportunity to review the accounts receivable files for the companies involved in the transaction.

Leasure further complains that genuine issues of material fact exist with respect to the amount of cash on hand listed on the balance sheet. As previously discussed, Turner testified that pursuant to the "doctrine of constructive receipt," cash on hand as of June 2, 1999, was $12,198.00, the amount listed on the balance sheet. Turner explained that $9,751.62 of the $12,198.00 represented payments that had been "constructively received." Turner further explained, however, that this figure was never deducted from the total amount of accounts receivable listed on the balance sheet, thereby resulting in an overstatement of accounts receivable in the amount of $9,751.62. Consequently, the trial court concluded that "a corresponding credit in accounts receivable should be made." Contrary to Leasure's assertion, the trial court never made a ruling concerning the value of the cash on hand account as of June 2, 1999. The trial court simply concluded that Coleman was entitled to a credit representing "the amount of

cash listed both as cash on hand and accounts receivable."[35] Thus, while we agree with Leasure that genuine issues of material fact exist concerning the value of the cash on hand account as of June 2, 1999, we cannot conclude that the trial court erred with respect to this issue. Simply stated, this issue was never resolved; and on remand, it can be addressed at the trial.

Leasure next contends that genuine issues of material fact exist with respect to the value of the Vanliner insurance escrow account. We agree. As previously discussed, James testified that the $12,383.00 Vanliner insurance escrow account, which was listed as a current asset on the balance sheet, had a negative balance as of June 2, 1999. Leasure, on the other hand, testified that he presented Coleman with two bank certificates from Mercantile Bank in St. Louis, Missouri, indicating that the Vanliner insurance escrow account had a positive balance of $12,383.00. We were not able to find, nor does Coleman cite to, any evidence in the record, aside from James's testimony, supporting its contention that the Vanliner

[35] Although the language employed by the trial court in its initial partial summary judgment order is somewhat unclear, the trial court clarified its position on this issue in its March 8, 2001, and September 19, 2001, orders, which both provide, in relevant part, as follows: "[Coleman shall recover of [Leasure] the sum of $9,025.56, which represents 140% of $6,446.83, the amount of cash listed both as cash on hand and accounts receivable" [emphasis added]. We are unclear as to the source of the $6,446.83 figure used by the trial court given Turner's testimony that $9,751.62 of the $12,198.00 listed as cash on hand represented payments that had been "constructively received." Regardless, Coleman has declined to pursue this issue and we need not address it any further.

insurance escrow account had a negative balance as of June 2, 1999. Viewing the record in a light most favorable to Leasure, we simply cannot conclude that no genuine issue of material fact exists with respect to this issue. Consequently, we reverse the trial court's ruling that Coleman was entitled to a partial summary judgment in the amount of $17,336.20 ($12,383.00 X 140%), with respect to the Vanliner insurance escrow account, and remand the matter, in part, for further proceedings concerning the value of this account.

Leasure next asserts that the trial court erred in its determination that Coleman was entitled to partial summary judgment in the amount of $36,682.00 ($26,202.00 X 140%), with respect to undisclosed tax liabilities. In sum, Leasure maintains that the parties stipulated in the contract that the extent of the tax liability for the companies involved in the transaction was $90,074.00.[36] In support of this contention, Leasure cites paragraph 3(f) of the contract, which provides, in relevant part, as follows:

> All returns for any income taxes of the [c]ompanies for all prior periods up to and including December 31, 1997, have been duly prepared and filed in good faith and all taxes shown thereon have been paid or are accrued on the books of [c]ompany. The [c]ompanies have filed all federal, state, local and other tax returns required by law,

[36] Leasure does not dispute that he failed to disclose $26,202.00 in unpaid tax liabilities. He simply contends that his liability in this respect is limited by the terms of the contract.

> or have received the appropriate extensions of time to file said returns. . . . Seller and [p]urchaser stipulate that the amount of $90,074 accrued on the [f]inancial [s]statements as federal and state income tax liability shall be the full extent of [s]eller's liability for any such taxes.

We are of the opinion that a logical interpretation of this provision leads to the conclusion that it simply limits Leasure's liability for the taxes he disclosed on the financial statements, and in the contract, to the amount listed, i.e., $90,074.00. Put differently, paragraph 3(f) of the contract in no way limits Leasure's liability for taxes he failed to disclose. To hold otherwise would require a tortured interpretation of a contractual provision, which on its face lends itself to a plain and simple construction.[37]

Leasure further complains that the trial court erred in its determination that Coleman was entitled to partial summary judgment in the amount of $9,213.74 ($6,581.24 X 140%), with respect to accounts payable. We disagree. Coleman introduced evidence at the hearing in this matter indicating that it had paid $20,574.24 in payables, $6,581.24 more than the $13,966.00 listed on the balance sheet, since purchasing the

[37] Leasure also contends that he should not be held liable for a $11,114.58 "Kentucky tax jeopardy assessment," he failed to disclose. We disagree. In sum, Leasure maintains that because the assessment was dated October 20, 1999, "it would not have been possible . . . to disclose this obligation on May 31, 1999." Simply put, the fact that Leasure did not receive notice of the assessment until October 20, 1999, or sometime thereafter, does not relieve him of liability for taxes incurred prior to June 2, 1999.

companies. Leasure failed to introduce any evidence to rebut Coleman's contention that it had paid $20,574.24 in payables since purchasing the companies. It is well-established that "[a] party opposing a properly supported summary judgment motion cannot defeat that motion without presenting at least some affirmative evidence demonstrating that there is a genuine issue of material fact requiring trial."[38] Consequently, the trial court did not err in its determination that Coleman was entitled to partial summary judgment in the amount of $9,213.74, with respect to accounts payable.

Leasure next contends that genuine issues of material fact exist concerning the amount of payroll items Coleman claims Leasure failed to disclose. We disagree. As previously discussed, the trial court concluded that Coleman was entitled to summary judgment in the amount of $7,532.93 ($5,380.66 X 140%), which represented the amount of payroll items Leasure failed to disclose. Coleman introduced evidence at the hearing in this matter indicating that it had paid $5,380.66 worth of undisclosed payroll items. Leasure did not dispute that he failed to disclose these expenses, nor did he introduce any evidence to rebut Coleman's contention that it had paid $5,380.66 worth of undisclosed payroll items. Consequently, we

[38] Hubble v. Johnson, Ky., 841 S.W.2d 169, 171 (1992).

are unpersuaded that a genuine issue of material fact exists with respect to this issue.[39]

We now turn to Leasure's assertion that the trial court abused its discretion by denying his CR 60.02 motion. As previously discussed, Leasure's CR 60.02 motion was based upon his contention that Coleman "either intentionally or negligently misrepresented the evidence and facts upon which the Court based its material findings in [its partial summary judgment]." In support of this contention, Leasure attached an affidavit from Cunningham, who opined, inter alia, that "the [p]artial [s]ummary [j]udgment is in error in several material respects because of inaccurate information provided to the Court by Coleman[.]" Leasure maintains that the evidence relied upon by Cunningham in reaching this conclusion was "exclusively in Coleman's possession prior to the February 3-4, 2000 hearing, or at the very least, not available to him for a thorough independent review, before the hearing." Thus, Leasure concedes that his CR 60.02 motion was based on CR 60.02(b), which "authorizes relief from a final judgment based upon newly discovered evidence only if: (1) the evidence was discovered

[39] Leasure further asserts that the trial court misconstrued the method by which the purchase price was calculated in awarding partial summary judgment to Coleman. In sum, Leasure maintains that, at worst, the equity in the companies was zero. Thus, he contends that Coleman still owes him $320,500.00, "as this amount is a separate, additional component to the purchase price." We disagree. Logic belies Leasure's argument as it fails to take into account the effect a negative shareholders' equity would have on the value of the companies.

after entry of judgment; (2) the moving party was diligent in discovering the new evidence; (3) the newly discovered evidence is not merely cumulative or impeaching; (4) the newly discovered evidence is material; and (5) the evidence, if introduced, would probably result in a different outcome.[40]

Leasure's argument suffers from two fatal flaws. First, Leasure failed to establish that he could not with reasonable diligence have discovered the evidence which he now claims is material to his case in time to introduce it during the hearing in this matter. Second, Leasure completely failed to establish that the evidence relied upon in his CR 60.02 motion, if admitted, "would probably result in a different outcome."[41] Consequently, the trial court did not err by denying Leasure's CR 60.02 motion.

Leasure next complains that Judge White erred by failing to recuse himself from the case. Leasure's argument is premised upon his contention that Lacy is Judge White's second cousin and that he prepared Judge White's tax returns. In sum, Leasure maintains that Judge White was required to recuse himself from the case pursuant to KRS 26A.015, which provides, in relevant part, as follows:

[40] Hopkins v. Ratliff, Ky., 957 S.W.2d 300, 301-02 (1997).

[41] Id.

> (2) Any justice or judge of the Court of Justice or master commissioner shall disqualify himself in any proceeding:
>
> (a) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceedings, or has expressed an opinion concerning the merits of the proceeding;
>
> . . .
>
> (e) Where he has knowledge of any other circumstances in which his impartially might reasonable be questioned.

First and foremost, Leasure has failed to provide any citations to the record indicating that Lacy and Judge White are in facts cousins.[42] Although Leasure claims Judge White acknowledged Lacy was his second cousin in a hearing that was held on December 18, 2002, we were unable to find any evidence of such a hearing in the record.[43] It is incumbent upon the party appealing an adverse judgment to designate the portions of

[42] See CR 76.12(4)(c)(iv).

[43] While Coleman also fails to make appropriate reference to the record on this issue, it states in its brief that "counsel understands the relationship to be significantly more distant than that of second cousins[.]" Our point is further made when we note the "Motion to Clarify Record on Appeal" filed by Leasure that has been denied. In this motion Leasure indicates that he filed the motion "at the request of the [t]rial [j]udge" "to clarify the record on appeal." The motion contends that "[a]ccording to the [t]rial [j]udge" "Lacy is his 'seventh,' not second cousin[.]" As an appellate court, we do hear evidence of disputed issues of fact, but it is obvious that proper evidence was not presented below to substantiate Leasure's allegation of kinship.

the record which address his or her arguments on appeal.[44] We will not accept conclusory allegations that lack evidentiary support. Consequently, we will not assume for purposes of this appeal that Judge White and Lacy are cousins.

This brings us to Leasure's contention that Judge White was required to recuse himself based on his business relationship with Lacy. "The burden of proof required for recusal of a trial judge is an onerous one."[45] "There must be a showing of facts 'of a character calculated seriously to impair the judge's impartiality and sway his judgment.'"[46] "A party's mere belief that the judge will not afford a fair and impartial trial is not sufficient grounds to require recusal."[47] Moreover, it is well-established that the trial judge is "in the best position to determine whether questions raised concerning his impartiality [are] reasonable."[48]

Leasure has failed to demonstrate that Judge White's limited business relationship with Lacy impaired his impartiality in any way. A judge is permitted to have business

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[44] See Commonwealth v. Roberts, Ky., 122 S.W.3d 524, 529-30 (2003). See also CR 75.01 and CR 75.07.

[45] Stopher v. Commonwealth, Ky., 57 S.W.3d 787, 794 (2001).

[46] Id (quoting Foster v. Commonwealth, Ky., 348 S.W.2d 759, 760 (1961), cert. denied, 368 U.S. 993, 82 S.Ct. 613, 7 L.Ed.2d 530 (1962)).

[47] Webb v. Commonwealth, Ky., 904 S.W.2d 226, 230 (1995).

[48] Jacobs v. Commonwealth, Ky.App., 947 S.W.2d 416, 417 (1997).

and social relations and "'the ordinary results of such associations and the impressions they create in the mind of the judge are not the "personal bias" and prejudice to which [KRS 26A.015] refers.'"[49]

Based on the foregoing reasons, the order entered by the Christian Circuit Court granting partial summary judgment to Coleman is affirmed in part, and reversed in part, and this matter is remanded for further proceedings consistent with this Opinion. The order denying Leasure's CR 60.02 motion and his motion for recusal is affirmed.

ALL CONCUR.

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[49] Pennsylvania v. Local Union 542, International Union of Operating Engineers, 388 F.Supp. 155, 159 (E.D.Pa. 1974)(quoting United States v. Gilboy, 162 F.Supp. 384, 400 (M.D.Pa. 1958)).