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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-000429-MR

THOMAS E. NECKEL, SR. APPELLANT

V.

APPEAL FROM PULASKI CIRCUIT COURT
HONORABLE WILLIAM T. CAIN, JUDGE
CIVIL ACTION NO. 97-CI-00345

JAMES E. SHARPE APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; MINTON, JUDGE; AND MILLER, SENIOR JUDGE.[1]

MINTON, JUDGE:

I. INTRODUCTION.

This case arose out of the aftermath of the 1996 sale of Somerset Marine, Inc. (Somerset Marine), d/b/a Sumerset Houseboats,[2] by its sole owner, Appellee, James E. Sharpe, to

[1] Senior Judge John D. Miller sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

[2] Somerset Marine manufactured houseboats.

Envy Houseboats, Inc. (Envy Houseboats), d/b/a Sumerset Houseboats.[3] The Appellant, Thomas E. Neckel, Sr., was then the President and Chief Executive Officer of Envy Houseboats.

Neckel appeals from a December 31, 2003, judgment[4] entered against him and in favor of Sharpe on claims of fraud and conspiracy and as guarantor for a defaulted promissory note. He asserts the following errors with respect to the judgment: the trial judge who entered it improperly presided over the action since he had previously disqualified himself from the action; Neckel did not receive notice of the trial date until one day before; he consented to a default judgment only on the

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[3] Envy Houseboats, subsequently, may have changed its name at least once and may have sold its assets to, yet, another corporation. The record is unclear on this point. For purposes of this opinion, we shall continue to refer to the corporation as Envy Houseboats.

[4] This judgment was later withdrawn and an amended judgment issued in its place on February 2, 2004; but, as will be discussed later, the trial court's order substituting the new judgment stated that "the date of the Original Judgment shall not be affected by the amendment/correction of this judgment, nor shall the time for appeal from the Original Judgment." Hence, we will refer to this judgment as being entered on December 31, 2003.

Curiously, the record in this case shows an order, entered May 22, 2003, which granted default judgment against Neckel on all claims. This order imposed liability but stated that damages were to be determined at a later date. On June 26, 2003, the trial court denied Neckel's motion to vacate this judgment. And there does not appear to be any order in the record rescinding the May 22, 2003, default judgment against Neckel. Nevertheless, Sharpe's counsel stated at oral argument that all of the parties and the trial court treated this judgment and order as if it had been properly rescinded. This is apparent from the record. In this unusual circumstance where all of the parties and the trial court have treated the May 22, 2003, judgment and order as if it were rescinded and no one is seeking to rely upon that judgment, we will also treat that earlier judgment and order as rescinded.

promissory note, but the trial court improperly granted a judgment on the pleadings on the conspiracy and fraud claims as well; there is insufficient factual evidence to support the judgment against Neckel on the fraud and conspiracy claims; and the trial court's February 2, 2004, order amending this judgment improperly stated that the time for appeal would still run from the date of the original judgment.

If any error occurred in the February 2, 2004, order concerning the running of the time for appeal, it was harmless since Neckel filed a timely appeal. And Neckel is barred by the doctrine of equitable estoppel by delay or laches from raising any error concerning the trial judge's disqualification because he did not raise this error in a timely manner. Similarly, he failed to preserve any error concerning inadequate notice by not raising this issue before the trial court. Neckel's remaining points of appeal are disposed of by our conclusion that he consented to a judgment against him on all claims just prior to the December 31, 2003, judgment. For all these reasons, we affirm the judgment of the Pulaski Circuit Court against Neckel.

II. BACKGROUND.

On May 14, 1997, Envy Houseboats filed suit against Sharpe for violation of a non-competition agreement and for tortious interference with a contract. Sharpe responded with a

counterclaim against Envy Houseboats for defaulting on a promissory note which Sharpe had received in partial payment for the sale of Somerset Marine. This counterclaim was later amended to add a claim that Envy conspired with Neckel; Dr. Blair Vermillion, an Envy shareholder; and Lynn Turpin, an accountant employed first by Somerset Marine and then by Envy Houseboats, to defraud Sharpe. According to this amended counterclaim, they defrauded Sharpe by persuading him to reduce the sales price for Somerset Marine by $4,000,000.00 and to agree to accept a non-competition agreement in return for Envy Houseboat's promise to hire Sharpe's two sons and son-in-law in the same capacity that they had worked for Somerset Marine and to provide them with "certain rights, privileges and benefits including valuable interests in the business which survived the purchase and sale transaction."[5] Sharpe also asserted that Envy and Turpin conspired to defraud him and did defraud him of $500,000.00 in corporate funds from Somerset Marine, which he asserts were supposed to go to him in the sale of the business but which went to Envy Houseboats instead. He filed an intervening complaint and amended intervening complaint involving multiple claims against Third-Party Defendants,

[5] Sharpe Amended Counterclaim, Count II, ¶ 5.

Neckel, Vermillion,[6] and Turpin.[7] The claims against Sharpe included conspiracy and fraud claims based on the same facts alleged against Envy Houseboats. There was also a claim against him for liability for the defaulted promissory note since he was an individual guarantor of the note.[8]

Neckel appeals the December 31, 2003, judgment against him, styled a judgment on the pleadings, which adjudged Neckel liable for $2,233,264.95 on the promissory note;[9] $4,500,000.00 for fraud and conspiracy; and $1,000,000.00 in punitive damages.[10] Specifically, all of Neckel's issues on appeal go toward challenging the trial court's finding of liability for the fraud and conspiracy claims.

III. ANALYSIS.

A. Any error in amending the judgment is harmless.

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[6] All claims against Vermillion were dismissed in a December 18, 2003, agreed order.

[7] Turpin was granted summary judgment on all claims against Turpin and dismissed from the case on January 23, 2003.

[8] Vermillion was also a guarantor of the note.

[9] Specifically, the trial court found Envy Houseboats and Neckel jointly and severally liable on the promissory note; but Envy Houseboats has not joined in this appeal.

[10] We note that Neckel has not challenged the issue of punitive damages on appeal, except to challenge liability on the fraud and conspiracy claims supporting the punitive damages. Indeed, he has not challenged the amount of any of the damages.

We begin by disposing of the issue concerning the trial court's amended judgment as entered by the February 2, 2004, order. The trial court entered an order on February 2, 2004, striking the December 31, 2003, judgment and substituting for it, in its entirety, an attached, amended judgment. However, the February 2, 2004, order stated that "the date of the Original Judgment shall not be [a]ffected by the amendment/ correction of this judgment, nor shall the time for appeal from the Original Judgment."

The changes in the amended judgment did not alter the judgment against Neckel in any way.[11] And any effect that the language of the order stating that the time for appeal would still run from the date of the original judgment, December 31, 2003, might have had on Neckel's ability to appeal is moot. It is undisputed that he filed a timely appeal before this Court. Therefore, any error which may have occurred is harmless since Neckel suffered no prejudice as a result.

B. Neckel is estopped from claiming disqualification of the trial judge.

[11] The amended judgment was entered on motion of Lynn Turpin removing certain references implicating Turpin in Neckel's fraud and conspiracy. Turpin had originally been named as a third-party defendant, like Neckel, in an intervening complaint by the Defendant/Third Party Plaintiff, Sharpe, for claims of fraud, conspiracy, and accounting malpractice. However, Turpin previously had been granted summary judgment, dismissing all the claims against Turpin.

Next, we address Neckel's claim that the judgment against him was entered by a trial judge who should not have been presiding over the case because he had previously disqualified himself. The relevant facts are as follows.

The original judge in this action from the time of its May 14, 1997, filing until January 16, 1998, was the Honorable William T. Cain. Then, Judge Cain entered an order certifying the need for the assignment of a special judge because he was disqualified from presiding over the case by reason of KRS 26A.015(2)(a). KRS 26A.015(2) sets forth certain circumstances under which "[a]ny justice or judge of the Court of Justice . . . shall disqualify himself in any proceeding." KRS 26A.015(2)(a) specifically requires a judge to disqualify himself from any proceeding "[w]here 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." Judge Cain did not further specify which of these three grounds of disqualification was applicable.[12]

[12] Neckel theorizes that the basis of the disqualification was a close relationship between Judge Cain's wife and Neckel's then-wife, whom Neckel allegedly divorced or was in the process of divorcing under less than amicable circumstances while this case was ongoing. However, this is purely speculative as there is no evidence in the record to support this theory.

According to the provisions of the Regional Administration Program Charter,[13] the Chief Regional Administrative Judge of the Cumberland Region, the Honorable Lewis B. Hopper, assigned the case to the Honorable Paul Barry Jones, who presided over the case until his retirement in Spring 2000. On April 13, 2000, Judge Hopper re-assigned the case to the Honorable James G. Weddle, who presided over it until May 31, 2000. Then Judge Hopper issued an order reassigning the case to Judge Cain, based on his understanding that this is what Judges Cain and Weddle previously had agreed to.

This reassignment order made no mention of the fact that Judge Cain had already disqualified himself from the case. Likewise, Judge Cain did not address his previous disqualification upon his return to the case. Similarly, none of the parties filed a motion for him to recuse or otherwise objected at that time. Neckel first raised the issue some three and one-half years later in his January 6, 2004, motion to alter, amend, or vacate the December 31, 2003, judgment against him.

In Dotson v. Burchett,[14] Kentucky's highest court declined to establish a per se rule forbidding a judge who has

[13] The Regional Administration Program Charter was adopted pursuant to §§ 110(5)(b) and 112(4) of the Kentucky Constitution to affect regional administration of circuit, district, and family courts, subject to the supervision and control of the Chief Justice of the Kentucky Supreme Court.

[14] 301 Ky. 28, 190 S.W.2d 697 (1945).

recused from a case from ever again presiding over the case,[15] reasoning that "[j]urisdiction to make an order necessarily carries with it the power of revision and of revocation when it has been granted improvidently or erroneously, particularly an interlocutory order."[16] The court was concerned with a situation where a judge might recuse based on an erroneous assumption of facts, such as a mistaken belief of kinship to one of the parties, then discover the error or might recuse for a valid reason which is later eliminated.[17] But, recognizing the dangers inherent in letting a judge who has recused reassume control of a case, the Dotson court required that the facts supporting the judge's remittal of recusal be clearly shown in the record to permit adequate judicial review. The court explained as follows:

> It is not sufficient for the judge to enter an order merely saying he is not disqualified. Since an order refusing to vacate when sufficient grounds have been established is a reversible error, so is an order by which jurisdiction of the case is again assumed if it was not proper to do so. Under such circumstances, we think it should affirmatively appear that there is no disqualifying fact at the time, the

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[15] *Id*. at 699-700.

[16] *Id.* at 699.

[17] *Id*.

> presumption to the contrary existing by reason of the previous action and order.[18]

However, where a judge who has properly recused based on a correct assessment of the facts and who remains disqualified attempts to reassume control over a case, the rule is as set forth in Wedding v. Lair:[19] the judge, "having voluntarily vacated the bench in this particular case, [loses] jurisdiction forever in the absence of an agreement of the parties."[20]

Judge Cain's 1998 recusal created the presumption that he remained disqualified. Thus, when he reassumed control over the case as a result of the Chief Regional Administrative Judge's May 31, 2000, order, Judge Cain had the burden to establish affirmatively that he was no longer disqualified——that his earlier disqualification had been based on erroneous facts or that the reason for it had been eliminated. This never occurred. The record does not even reveal which specific provision of KRS 26A.015(2)(a) Judge Cain's disqualification was based on, much less whether this disqualification was based on

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[18] *Id*. at 700.

[19] 404 S.W.2d 451 (Ky. 1966).

[20] *Id*. at 452-453. The judge in Wedding had disqualified himself for previously assisting in the prosecution of the case. *Id*. at 452. He was not mistaken about this fact; and this is not the type of ground for disqualification which can be, subsequently, eliminated through the passage of time. Therefore, he was permanently barred from presiding over the case.

mistake or the reasons for it later have been eliminated. This should be reversible error according to Dotson.

Yet, Dotson also qualifies when this affirmative showing by the formerly disqualified judge of the elimination of the disqualifying factor is required: "if timely objection is made."[21] Thus, we must consider the effect of Neckel's failure to challenge Judge Cain's resumption of the case on May 31, 2000, until Neckel's January 6, 2003, motion to alter, amend, or vacate the judgment against him. One possibility is that Neckel waived his right to challenge Judge Cain's failure to recuse. But this Court explained in Small v. Commonwealth[22] that the waiver of the right to challenge a judge's failure to disqualify under KRS 26A.015(2)(a) "may be made under proper circumstances, either in writing or on the record, but will not be presumed from silence."[23] Our Supreme Court later acknowledged in Commonwealth v. Carter that Small set forth the proper procedure for waiver concerning violations of KRS 26A.015(2)(a).[24] In

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[21] 190 S.W.2d at 700.

[22] 617 S.W.2d 61 (Ky.App. 1981).

[23] *Id*. at 62.

[24] 701 S.W.2d 409, 410-11 (Ky. 1985) (adding, however, that the burden of demonstrating disqualification is on the defendant to show on the record that the judge in question was aware of his connection with the matter in controversy where the allegation is that the judge previously rendered a legal opinion as an attorney in the matter in controversy in violation of KRS 26A.015(2)(b)). *See also*, Nichols v. Commonwealth, 839 S.W.2d 263, 266 (Ky. 1992) (holding

Abell v. Oliver,[25] the Supreme Court rejected an argument that the defendant/appellant waived the issue of the trial judge's failure to disqualify herself under KRS 26A.015(2)(d); Supreme Court Rule (SCR) 1.10(a); and SCR 4.300, the Kentucky Code of Judicial Conduct, Canon 3E(1)(d)(ii),[26] in part, because the proper procedures for remittal of disqualification found in CR 4.300, Canon 3F,[27] were not followed, including the requirement that the waiver or remittal be in writing.[28]

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that the failure to state whether the question of recusal was properly preserved is not necessarily fatal to judicial review of the issue because of the rule set forth in Small and Carter). *But see* Bussell v. Commonwealth, 882 S.W.2d 111, 113 (Ky. 1994) (stating that "[a] motion for recusal should be made immediately upon discovery of the facts upon which the disqualification rests. Otherwise, it will be waived.") (citations omitted). However, an examination of Bussell suggests that this language with regard to waiver is merely *dicta* because the case did not involve an alleged waiver by silence; the party protesting the trial judge's failure to recuse made a prompt, explicit, oral waiver of the issue of recusal on the record when the issue was first raised by the trial judge which would satisfy Small, Carter, and Nichols. *Id*. at 112. Then the party filed a written motion to recuse five months after his oral waiver of the issue and only six days before trial. *Id*. Therefore, Bussell is more properly considered a case about equitable estoppel by delay or laches, as discussed below, rather than waiver.

[25] 117 S.W.3d 661 (Ky.App. 2003).

[26] The trial judge's husband was an associate or employee of the law firm representing the plaintiff/appellee. *Id*. at 662.

[27] SCR 4.300, Canon 3(F) states as follows:

Remittal of Disqualification. A judge disqualified by the terms of Section 3E may disclose on the record the basis of the judge's disqualification and may ask the parties and their lawyers to consider, out of the presence of the judge, whether to waive disqualification. If following disclosure of any basis for disqualification other than personal bias or prejudice concerning a party, the parties and lawyers, without participation by the judge,

In the instant case, Neckel never waived any disqualification of Judge Cain on the record or in writing. Certainly, there was no remittal of a conflict under the procedures set forth in SCR 4.300, Canon 3F.[29] Under these circumstances, this Court cannot conclude that Neckel waived his right to object to Judge Cain's participation in the case.

But our analysis does not end here. We also must consider whether Neckel is precluded from raising the issue of Judge Cain's disqualification because of equitable estoppel by delay or laches.[30] While a waiver is a voluntary and intentional relinquishment of a known right, an equitable estoppel may arise even absent the estopped party's intention to relinquish or

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all agree that the judge should not be disqualified, and the judge is then willing to participate, the judge may participate in the proceeding. The agreement, signed by all parties and lawyers, shall be incorporated in the record of the proceeding.

[28] Abell, *supra* at 663. The court's holding was also based on the fact that the court declined to impute the knowledge of counsel for the defendant/appellant concerning the judge's conflict to the defendant/appellant. *Id*.

[29] It is noteworthy that one of the three grounds for disqualification included under KRS 26A.015(2)(a), the statutory provision which Judge Cain cited in his initial order seeking the assignment of a special judge, is personal bias or prejudice concerning a party. But SCR 4.300, Canon 3F, specifically excludes the possibility of remittal of a conflict based on personal bias or prejudice concerning a party. Such a conflict cannot be waived, even with the consent of the parties.

[30] Though they once had distinct meanings, the nuances historically separating laches from equitable estoppel by delay largely have been lost such that the two are used virtually interchangeably now.

change an existing right.[31] Equitable estoppel has been defined as "a judicial remedy by which a party may be precluded by [the party's] own act or omission from asserting a right to which [the party] otherwise would have been entitled."[32] One circumstance in which equitable estoppel may be invoked is where a party's unreasonable delay prejudices others such that it would be inequitable to allow that party to reverse an earlier course of action.[33] Or, as Kentucky's highest court has stated on equitable estoppel, "[i]t is often the case that a man may be denied a right which he may have asserted because of his neglect to do something which he should have done at a proper time."[34] Delay without prejudice does not warrant equitable estoppel.[35] But what measure of delay with prejudice merits equitable estoppel is a question of fact to be determined by the circumstances of each case.[36]

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[31] 28 Am.Jur.2d Estoppel and Waiver § 36 (2000). However, the line dividing waiver and equitable estoppel often becomes blurred where the matter concerns implied rather than express waiver. *Id*. at § 37.

[32] *Id*. at § 28.

[33] Colston Inv. Co. v. Home Supply Co., 74 S.W.3d 759, 768 (Ky.App. 2001) (using the term "laches" rather than "equitable estoppel").

[34] P.V. & K. Coal Co. v. Kelly, 301 Ky. 180, 191 S.W.2d 231, 234 (Ky. 1945).

[35] Fightmaster v. Leffler, 556 S.W.2d 180, 183 (Ky.App. 1977).

[36] Weiand v. Board of Trustees of Kentucky Ret. Sys., 25 S.W.3d 88, 91-92 (Ky. 2000).

In the instant case, Neckel waited a little over three and one-half years after Judge Hopper's May 31, 2000, order reassigning the case to Judge Cain before raising the issue of Judge Cain's earlier disqualification from the case. In fact, he waited until his motion to alter, amend, or vacate the judgment was entered against him on December 31, 2003. Meanwhile, Sharpe litigated the case in good faith, attempting to bring it to resolution, expending legal fees in the process. During this time, Neckel filed a continuance less than one month before a scheduled trial,[37] failed to show up on numerous occasions,[38] and made himself unavailable for deposition,[39] delaying the preparation of the case to the detriment of Sharpe. His waiting over three and one-half years until after judgment was rendered against him to argue that Judge Cain was

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[37] This motion, which was subsequently granted, was filed January 29, 2003. Despite the fact that Neckel, apparently, had shared counsel with Envy Houseboats since the case's inception in 1997, Neckel claimed that circumstances had changed and he needed separate counsel. Almost immediately after Neckel obtained separate counsel, his new attorney moved to withdraw from the case in April 2003 because he had been unable to communicate with Neckel since shortly after the hearing in which he was granted a continuance.

[38] Neckel failed to appear at, or send a legal representative to, a pretrial conference on May 16, 2003; a court-ordered deposition on November 24, 2003; a show-cause hearing on December 5, 2003, about the failure to appear at the deposition; the rescheduled court-ordered deposition on December 19, 2003 (notably rescheduled at the request of Neckel's own attorney); and a trial date on December 30, 2003. Each time he pled lack of notice or lack of sufficient notice.

[39] *See* n.38.

disqualified from presiding over the case appears to be, yet, another attempt to delay the resolution of the case. Under these circumstances, we find that Neckel is now barred from raising the issue of Judge Cain's disqualification by the doctrine of equitable estoppel by delay.

C. Neckel waived the issue of any error concerning notice of the December 29, 2003, trial date.

Neckel also challenges the judgment against him on the ground that he had insufficient notice of the December 30, 2003, trial date. The trial, initially scheduled for a later date, was rescheduled for December 30, 2003, in a December 23, 2003, order. This order was entered shortly after Neckel failed to appear for a court-ordered deposition for the second time.[40] The distribution list for the order indicates that a copy was sent to Neckel at his Florida address.[41] On December 29, 2003, Neckel sent a fax to Sharpe's counsel, John G. Prather, and to the trial court, stating that he had just been apprised of the trial date scheduled for the following day by his former attorney.[42]

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[40] *Id*.

[41] Neckel has never disputed that this address is his correct address. Indeed, it is the address listed on his correspondence with the trial court, including a letter, dated December 1, 2003, and the fax of December 29, 2003.

[42] He also claimed to have been unaware of his former counsel's withdrawal until then. This attorney orally was granted permission to withdraw by the trial court on December 19, 2003, as reflected in the trial court's December 23, 2003, order.

He claimed that he had no money and would be unable to travel[43] or attend the trial. He further stated that he lacked the money for an attorney but, regardless, would be unable to find anyone to represent him with less than twenty-four hours' notice. He asserted that even if he could borrow money to pay for an attorney, he would need time to do so and to locate an attorney. Then, he made the following statements: "I have no alternative but to consent to a default judgment regarding this case at this time. I consent to that default judgment, with the understanding there will be no contempt charges and this case is over." As is discussed below, Neckel failed to appear at trial; and a judgment was entered against him on all claims.

Neckel asserts that his due process rights were violated because he did not have sufficient notice of the December 30, 2003, trial date. However, he has waived any error concerning notice which may have occurred.[44] While he complained

[43] Neckel resided at this time in Florida. As for his finances, Sharpe speculated that Neckel was planning to declare bankruptcy; although, there is no evidence in the record to support this.

[44] We make no decision concerning whether or not any error occurred with regard to notice. But we note that some evidence in the record suggests that if Neckel failed to receive actual notice of the trial date prior to December 29, 2003, it may have been due to his own conduct. On December 30, 2003, Sharpe's counsel introduced into evidence a photocopy of an envelope addressed to Sharpe at his Florida address with the return address of Sharpe's counsel.[44] This envelope, which, apparently, was postmarked November 29, 2003, and sent by certified mail, was returned to Sharpe's counsel as unclaimed, despite notations by the post office that attempts to notify Neckel or deliver the letter had been made on 12-01, 12-6, and 12-16. Sharpe's counsel testified that letters sent to Neckel

of receiving short notice of the trial date in his December 29, 2003, fax, Neckel never asked for a continuance. Moreover, in his *pro se* motion to alter, amend, or vacate the December 31, 2003, judgment against him, Neckel raises many issues but makes no mention of any deficiency in notice. "It is a matter of fundamental law that the trial court should be given an opportunity to consider an issue, so an appellate court will not review an issue not previously raised in the trial court."[45] Because Neckel failed to preserve the issue of notice before the trial court, we may not review it now.

D. Neckel fully consented to the judgment.

Next, we address Neckel's claim that he consented to a default judgment only on the promissory note. He asserts that the trial court improperly exceeded the scope of this consent by entering a judgment on the pleadings on all of the claims against Neckel. When Neckel failed to appear at trial,[46] Sharpe's counsel moved for a judgment against Neckel based on

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at his Florida address via certified mail and bearing the return address of the law firm, repeatedly had been returned as unclaimed. However, when they sent Neckel a "ghost" letter, a letter in an unmarked envelope, mailed first-class postage but not certified, to the same address, it was not returned. This suggests that Neckel was intentionally refusing to claim or accept what appeared to be legal correspondence concerning this case.

[45] Marksberry v. Chandler, 126 S.W.3d 747, 753-754 (Ky.App. 2003).

[46] No legal representative appeared on Neckel's behalf because he was, once again, between attorneys.

the fax sent the previous day. When the trial court indicated its willingness to grant a default judgment by consent against Neckel based on this fax, Sharpe requested that the judgment be styled a "judgment on the pleadings" since he did not think that "default judgment" was the appropriate term since Neckel had made an appearance in the case. Sharpe also specifically indicated that he wanted a judgment on the fraud claim because he feared that Neckel was planning to file bankruptcy.[47] The December 31, 2003, judgment states that after finding that Neckel "would consent to a default judgment, 'with the understanding that there will be no contempt charges' and the Defendant/Third Party Plaintiff [Sharpe] having agreed to withdraw [his] Motion for sanctions for contempt," the trial court heard evidence and made the following additional findings:

> 1. That the Third Party Defendant Thomas Neckel has agreed to a default judgment in this matter and that the Court would therefore grant the same to the Third Party Plaintiff [Sharpe];
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> 2. That the Third Party Plaintiff has requested that, in lieu of a default judgment, that the Court deem the defenses of the Third Party Defendant withdrawn and grant a Judgment on the Pleadings to the Third Party Plaintiff, and the Court now **so orders**, and the Third Party Defendant [sic] is granted Judgment against the Third Party

[47] Sharpe's assumption here, rightly or wrongly, is that Neckel would not be able to discharge a judgment based on fraud in bankruptcy.

> Defendant on all causes, and against the Plaintiff [Envy Houseboats] on all issues regarding the promissory note.[48]

Neckel does not object to the judgment against him on the promissory note. But he asserts that the judgment entered against him on the fraud and conspiracy claims exceeded his consent granted in the December 29, 2003, fax. He asserts that he consented only to a judgment against him on the promissory note.

A consent agreement is a type of contract and, as such, is governed by contract law.[49] The trial court's role is merely to determine what the parties agreed upon and enter a judgment encompassing the terms of this consent agreement.[50] The construction and interpretation of a contract are questions of law.[51] Therefore, we apply de novo review to the trial court's interpretation of the consent agreement as contained in the consent judgment.[52] In the absence of ambiguity, a written contract is to be interpreted strictly according to its terms,

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[48] Clearly, the trial court intended to state that the third party plaintiff is granted judgment against the third party defendant and the plaintiff.

[49] Island Creek Coal Co. v. Wells, 113 S.W.3d 100, 103 (Ky. 2003).

[50] 46 Am.Jur. 2d Judgments § 208 (1994).

[51] First Commonwealth Bank of Prestonsburg v. West, 55 S.W.3d 829, 835 (Ky.App. 2000).

[52] Island Creek Coal Co., *supra* at 103.

consistent with the ordinary meaning of language, and without resort to extrinsic evidence.[53]

Neckel asserts that the scope of his consent was limited specifically to a default judgment concerning the promissory note and did not extend to the claims of fraud or conspiracy. But, in his fax, he stated as follows: "I have no alternative but to consent to a default judgment regarding this case at this time. I consent to that default judgment, with the understanding there will be no contempt charges and this case is over."

This agreement is unambiguous and should be interpreted strictly according to its own terms. Nowhere does Neckel limit his consent to the promissory note or state that he does not consent to a judgment concerning the fraud and conspiracy claims. Instead, he twice refers to a judgment in "this case." Based on its ordinary meaning, "this case" means the case as a whole, not an individual claim in a case with multiple claims. This meaning is made even clearer by Neckel's demand that after the judgment is entered that "this case is over." This demonstrates a desire for finality which would not be served by merely consenting to a judgment on one claim while leaving the other claims undecided. Also, he expressly stated his condition that there be no contempt charges. If he wanted

[53] Frear v. P.T.A. Indus., Inc., 103 S.W.3d 99, 105 (Ky. 2003).

to avoid judgment on the fraud and contempt claims, he could have reserved that as an express condition, as well.

Neckel asserts that Sharpe's counsel made a material misrepresentation to him that the default judgment would only be on the promissory note.[54] Thus, he seeks to attack the validity of the consent agreement. However, Neckel never raised the issue of material misrepresentation in his motion to alter, amend, or vacate at the trial level. And he may not raise this issue for the first time before this Court.[55]

Based on the principles of contract law, the trial court correctly interpreted the consent agreement between Neckel and Sharpe to mean that Neckel agreed to have a judgment entered against him on all claims in return for Sharpe's agreement to drop contempt charges and for finality in the case. This is the agreement which the trial court incorporated into its consent judgment. The fact that the trial court called it a "judgment on the pleadings," pursuant to Sharpe's wishes, rather than a consent judgment, does not change the fact that the court properly entered this judgment based on the consent of the parties. Likewise, Sharpe's motivation for seeking a judgment on the fraud claim is irrelevant because Neckel had consented to

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[54] At oral argument, Sharpe's counsel denied ever having any such discussion with Neckel.

[55] *See* Kennedy v. Commonwealth, 544 S.W.2d 219, 222 (Ky. 1976) (stating that "[t]he appellants will not be permitted to feed one can of worms to the trial judge and another to the appellate court").

a judgment against him on all of the claims, including the fraud claim. Therefore, we affirm the trial court's December 31, 2003, judgment as a proper consent judgment.

The disposition of the case on the ground that the trial court entered a valid consent judgment disposes of Neckel's claim that there was insufficient factual evidence to support the judgment against him on the fraud and conspiracy claims. "Consent excuses error and ends all contention or controversy between the parties within the scope of the judgment. It leaves nothing for the court to do, but to enter what the parties have agreed upon, and when so entered, the parties themselves are concluded."[56] Since this judgment was based on the consent of the parties, the factual evidence, or lack thereof, supporting liability on the merits of the fraud and conspiracy claims is not relevant.

IV. DISPOSITION.

For all of the reasons discussed in this opinion, we affirm the judgment of the Pulaski Circuit Court against the Appellant Thomas E. Neckel, Sr.

ALL CONCUR.

[56] 46 Am.Jur. 2d Judgments § 208 (1994).

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