RENDERED: MAY 12, 2006; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-001022-MR

FRED W. HERTRICH, III;
AND LEWIS ARNO — APPELLANTS

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE JOHN R. ADAMS, JUDGE
ACTION NO. 02-CI-03440

WALNUT HALL LIMITED — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: BARBER AND McANULTY, JUDGES; POTTER, SENIOR JUDGE.[1]

BARBER, JUDGE: This is the second time this matter has appeared before our court. The current appeal deals with the Fayette Circuit Court's interpretation of our opinion in the first appeal. See: Walnut Hall Ltd. v. Hertrich, et al., 2004 WL 1487105 (Ky.App. 2004). Following remand, the circuit court

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

entered judgment[2] on behalf of Appellee, Margaret N. Jewett d/b/a Walnut Hall Limited (Walnut Hall). Appellants, Fred W. Hertrich, III (Hertrich) and Lewis Arno (Arno), promptly appealed the judgment claiming the circuit court improperly interpreted our prior opinion. To begin, we review the first appeal that was before our court.

The first appeal was initiated by Walnut Hall arguing that the circuit court improperly denied its summary judgment motion while granting Hertrich's and Arno's summary judgment motion. The relevant facts were as follows:[3]

Walnut Hall was a standardbred horse farm in Fayette County. Hertrich and Arno were partners who owned and bred horses. They jointly owned numerous stallion shares. In early 2002, they entered into negotiations with Walnut Hall to participate in a stallion syndicate. The stallion, Western Shooter, was two years of age at that time and was still racing. The breeding of the horse was not to begin until he had finished his racing career at the age of three in December 2002.

Two documents governed the formation, financing, and operation of the stallion syndicate: The Purchase Agreement and the Syndicate Agreement. Ownership of Western Shooter was divided into 120 shares costing $40,000.00 each. Under the

[2] Judgment was entered on April 25, 2005.

[3] Facts taken from record and Walnut Hall v. Hertrich, et al., 2004 WL 1487105 (Ky.App. 2004).

terms of the Purchase Agreement, Buyers were required to make a down payment of $10,000 per share at the time that the Purchase Agreement was executed. The down payment was to be followed by annual payments of $10,000 per share plus interest for the next three years. Walnut Hall retained a security interest in each share. The Syndicate Agreement appointed Walnut Hall as the general manager of the syndicate. The breeding of the horse was not to begin until he had finished his racing career at the age of three in December 2002.

Hertrich and Arno decided to purchase two shares in the syndicate for a total of $80,000. Alan J. Leavitt, President and General Manager of Walnut Hall, agreed that Hertrich and Arno would be permitted to cancel their share purchase at any time in the year prior to Western Shooter's retirement. This agreement was memorialized in a letter by Mr. Leavitt dated January 15, 2002. Upon receipt of this letter, Hertrich and Arno made their first installment payment of $20,000 and executed the Syndicate Agreement and Purchase Agreement on February 8, 2002.

The Purchase Agreement contained a provision requiring Buyers to maintain equine mortality insurance on the horse for any unpaid balance owed to Walnut Hall that stated as follows:

> 11. MORTALITY INSURANCE—The Buyer agrees that upon Closing he will obtain and maintain full equine mortality insurance on

> the Horse with the Seller named as loss payee in an amount no less than the amount of the unpaid balance. **In the event of death of the Horse, Seller shall be entitled to receive a sum equal to the unpaid balance of principal.** The aforesaid sum shall be paid to Seller upon receipt from the insuring entity or on the next scheduled principal payment date, whichever is sooner, notwithstanding any absence of or delay in payment for any reason by the insurer. In the event of death and payment by Buyer to Seller pursuant to the foregoing provision prior to payment by an insurer, Seller agrees to assign all right, title and interest Seller has to the aforesaid insurance policy to the Buyer. Buyer will deliver to Seller upon Seller's request, either a fully paid policy or policies of such insurance duly endorsed to reflect Seller's security interest therein or a certificate of such insurance with evidence of such endorsement. Buyer shall provide to Seller on the yearly anniversary date of Closing a certificate from the insurer evidencing the continuation of such insurance. Nothing in this Agreement prohibits the Buyer from obtaining whatever insurance on the Horse he deems appropriate. (Emphasis added.)

Western Shooter died unexpectedly in late March 2002. Hertrich and Arno had not yet obtained the mortality insurance described in the Purchase Agreement.

On April 2, 2002, Mr. Leavitt sent a letter to Hertrich and Arno demanding full payment of the remaining balance due on their shares, which was $60,000. Hertrich and Arno responded with a letter dated April 5, 2000, whereby they cancelled their purchase pursuant to the terms of the January 15

letter, requested the return of their first installment payment, and contended that the January 15 letter released them from the obligation to obtain mortality insurance.

On August 26, 2002, Hertrich and Arno filed suit in Fayette Circuit Court, seeking the refund of their $20,000 down payment. Walnut Hall filed suit two days later. The two cases were consolidated. Each party filed a motion for summary judgment. As stated earlier, the court granted summary judgment for Hertrich and Arno only. We now turn to our opinion from the first appeal.

An appellate court need not defer to the trial court's decision on summary judgment and will review the issue *de novo* because only legal questions and no factual findings are involved. Hallahan v. The Courier Journal, 138 S.W.3d 699, 705 (Ky.App. 2004). As such, our court properly reviewed the construction of the contract *de novo*, because it was a matter of law. Pearson ex rel. Trent v. National Feeding Systems, Inc., 90 S.W.3d 46, 49 (Ky. 2002).

We concluded that the terms of the January 15 letter could not be interpreted to excuse Hertrich and Arno from their obligation to procure insurance under the Purchase Agreement.[4] The documents at issue (i.e. Purchase Agreement, Syndicate Agreement, and January 15, 2002 letter) were wholly separate,

[4] Walnut Hall Ltd. v. Hertrich, et al., 2004 WL 1487105, 4 (Ky.App. 2004).

addressing discrete aspects of the transaction and containing separate sets of rights and obligations with respect to those varying interests.[5] As such, when Hertrich and Arno attempted on April 5, 2002, to exercise their right to cancel their shares after Western Shooter's death, they did not absolve themselves of the obligation to procure the mortality insurance.[6] That obligation had already been incurred by them on February 8, 2002, when they executed the Purchase Agreement.[7] We agreed with Walnut Hall that Hertrich and Arno committed a material breach of the contract in failing to procure the mortality insurance and therefore, they were not entitled to enforce the refund provision.[8] We then vacated and remanded for entry of a judgment consistent with our opinion.

Hertrich and Arno filed a Motion for Discretionary Review with the Kentucky Supreme Court, but said motion was denied March 9, 2005. Hertrich and Arno correctly state in their brief that the "law of the case" doctrine became applicable to their case following the denial and the circuit court was bound to abide by our opinion. See Ranier v. Kiger Insurance, Inc., 998 S.W.2d 515, 518 (Ky.App. 1999).

---

[5] Walnut Hall Ltd. v. Hertrich, et al., 2004 WL 1487105, 6 (Ky.App. 2004).

[6] Id.

[7] Id.

[8] Id.

Upon remand, the Fayette Circuit Court, having considered the briefs and argument of the parties, entered a Judgment, which ordered three things: 1) it set aside the summary judgment in favor of Hertrich and Alto entered April 10, 2003, 2) it ordered Hertrich and Arno to reimburse Walnut Hall $20,000,[9] and 3) it entered judgment on the counterclaim of Walnut Hall in the amount of $60,000.[10] Hertrich and Arno now argue that the circuit court's award of $60,000 to Walnut Hall was an incorrect interpretation of our prior opinion. We disagree.

The first opinion clearly stated that Hertrich and Arno were obligated to purchase the mortality insurance for the remainder of the purchase price (i.e. $60,000) upon execution of the Purchase Agreement. Their failure to do so resulted in a breach. It did not relieve them of their obligation to Walnut Hall for monies due under the contract. As stated earlier, our opinion clearly stated,

> When Hertrich and Arno attempted on April 5, 2002, to exercise their right to cancel their shares after Western Shooter's death, they did not absolve themselves of their obligation to procure the mortality insurance. That obligation had already been

[9] Walnut Hall had already refunded Hertrich and Arno their $20,000 down payment in accordance with the April 10, 2003 summary judgment order.

[10] Walnut Hall was also awarded costs plus interest on the judgments.

> incurred by them on February 8, 2002, when they executed the Purchase Agreement.[11]

Moreover, the mortality insurance provision stated that "in the event of death of the Horse, Seller shall be entitled to receive a sum equal to the unpaid balance of principal." We believe the only logical conclusion to reach from our first opinion was that Hertrich and Arno became personally liable to Walnut Hall under the terms of the Purchase Agreement for their unpaid portion of the purchase price (i.e. $60,000) when they failed to procure any equine mortality insurance before Western Shooter died. The circuit court's order supports this conclusion. Hence, we affirm.

There are many other instances where we have instructed a court upon remand to enter a judgment consistent with our opinion rather than specifically telling it what to order. See, e.g., Renfro Valley Folks, Inc. v. City of Mt. Vernon, 872 S.W.2d 472, 476 (Ky.App. 1994) and Laurel Explosives, Inc. v. First National Bank & Trust Co. of Corbin, 801 S.W.2d 336, 338 (Ky.App 1990). We have faith in the lower courts that they are competent to interpret our opinions and enter appropriate judgments. We believe our faith was not misplaced when we remanded this matter back to the circuit

[11] Walnut Hall Ltd. v. Hertrich, et al., 2004 WL 1487105, 6 (Ky.App. 2004).

court. Based on the foregoing, we affirm the judgment of the Fayette Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

David A. Franklin
Jason Rapp
Lexington, Kentucky

BRIEF FOR APPELLEE:

Frank T. Becker
Lexington, Kentucky