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Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-001468-MR
AND
NO. 2003-CA-001543-MR

JOHN DOUGLAS HUBBARD AND
JEFFREY BRETT DAVIDSON,
EXECUTORS OF THE ESTATE
OF JERE BARTON DAVIDSON, SR.;
AND LYSTRA REVISITED, LLC APPELLANTS/CROSS-APPELLEES

v.

APPEALS FROM NELSON CIRCUIT COURT
HONORABLE LARRY D. RAIKES, JUDGE
ACTION NO. 01-CI-00527

TALBOTT TAVERN, INC. APPELLEE/CROSS-APPELLANT

AND: NO. 2004-CA-002184-MR

JOHN DOUGLAS HUBBARD AND
JEFFREY BRETT DAVIDSON,
EXECUTORS OF THE ESTATE
OF JERE BARTON DAVIDSON, SR. APPELLANTS

v.

APPEAL FROM NELSON CIRCUIT COURT
HONORABLE LARRY D. RAIKES, JUDGE
ACTION NO. 01-CI-00527

TALBOTT TAVERN, INC. APPELLEE

OPINION
AFFIRMING APPEAL NO. 2003-CA-001468-MR;
AFFIRMING CROSS-APPEAL NO. 2003-CA-001543-MR;
AND AFFIRMING APPEAL NO. 2004-CA-002184-MR

** ** ** ** **

BEFORE: JOHNSON AND TAYLOR, JUDGES; HUDDLESTON,[1] SENIOR JUDGE.

TAYLOR, JUDGE: John Douglas Hubbard, Executor of the Estate of Jere Barton Davidson, Sr. and Lystra Revisited, LLC (Lystra) bring Appeal No. 2003-CA-001468-MR from a June 13, 2003, judgment of the Nelson Circuit Court; Talbott Tavern, Inc. (Talbott Tavern) brings Cross-Appeal No. 2003-CA-001543-MR from the same June 13, 2003, judgment of the Nelson Circuit Court; and John Douglas Hubbard, Executor of the Estate of Jere Barton Davidson, Sr. brings Appeal No. 2004-CA-002184-MR from a October 4, 2004, order of the Nelson Circuit Court. These appeals stem from a contract between the parties for the purchase of Talbott Tavern. We affirm Appeal No. 2003-CA-001468-MR, affirm Cross-Appeal No. 2003-CA-001543-MR, and affirm Appeal No. 2004-CA-002184-MR.

In June 2001, Lystra entered into a contract with Talbott Tavern to purchase business and real property located in Nelson County known as the Talbott Tavern and the McClean House

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[1] Senior Judge Joseph R. Huddleston sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes 21.580.

for $2,100,000.00. Jere Barton Davidson, Sr. (Davidson) executed the agreement as a guarantor for the partial payment on the purchase price due at closing in the amount of $900,000.00.[2] A closing date was scheduled for September 19, 2001. Apparently, neither Davidson nor any representative of Lystra appeared at the closing; thus, a closing never took place.

Talbott Tavern subsequently filed a complaint in the Nelson Circuit Court on October 12, 2001, alleging breach of contract against Lystra and Davidson. Talbott Tavern filed a motion for summary judgment upon the issue of liability. On August 14, 2002, the circuit court entered an interlocutory summary judgment. Therein, the court concluded that Lystra and Davidson were liable for breaching the contract to purchase Talbott Tavern and the McLean House. The court reserved the issue of damages for later adjudication.

After a hearing upon the issue of damages, the circuit court entered final judgment on June 13, 2003 (June 13, 2003, final judgment). The circuit court determined that specific performance of the contract was not warranted and, instead, ordered damages to be paid to Talbott Tavern in the amount of $405,000.00, representing the difference between the value of the properties on the date of the breach (September 19, 2001) and the contract price of $2,100,000.00. The court rejected

[2] Jere Barton Davidson, Sr. (Davidson) also executed the contract on behalf of Lystra Revisited, LLC (Lystra) as its organizer.

Talbott Tavern’s damage claim for operating losses in the amount of $194,858.19.

The record indicates that neither Lystra, Davidson, nor Talbott Tavern filed a Ky. R. Civ. P. (CR) 59 motion to alter, amend, or vacate the final judgment. Rather, on July 11, 2003, Davidson and Lystra filed a notice of appeal from the June 13, 2003, final judgment (Appeal No. 2003-CA-001468-MR), and on July 23, 2003, Talbott Tavern filed a notice of cross-appeal from the June 13, 2003, final judgment (Cross-Appeal No. 2003-CA-001543-MR).

While the appeal and cross-appeal were pending in the Court of Appeals, Talbott Tavern proceeded to satisfy the judgment. Neither Davidson nor Lystra superseded the judgment. By order entered April 5, 2004 (April 5, 2004, order), the circuit court assigned to Talbott Tavern “Davidson’s membership interests in Parnassus Farms, LLC, Atheneaum Productions, LLC, and Parnassus Air, LLC.” The order also stated that Davidson “shall disassociate from Parnassus Farms, LLC, Atheneaum Productions, LLC, and Parnassus Air, LLC, and he shall cease being a member of all three companies.” This order included CR 54.02 language.

On April 14, 2004, Davidson filed a CR 59 motion to alter, amend, or vacate the April 5, 2004, order. While the CR 59 motion was pending, Davidson also filed a CR 60.02 motion to

amend the June 13, 2003, final judgment. By order entered October 4, 2004, the circuit court denied the CR 60.02 motion to vacate the June 13, 2003, final judgment and also denied the CR 59 motion to amend the April 5, 2004, order.[3]

John Douglas Hubbard and Jeffrey Brett Davidson, as the executors of the estate of Jere Barton Davidson, Sr. (collectively referred to as the Estate), filed a notice of appeal from the October 4, 2004, order (Appeal No. 2004-CA-002184-MR), on October 20, 2004.

Appeal Nos. 2003-CA-001468-MR and 2004-CA-002184-MR

Davidson and Lystra originally filed Appeal No. 2003-CA-001468-MR from the June 13, 2003, final judgment.[4] The final judgment adjudicated liability and damages. The Estate then filed Appeal No. 2004-CA-002184-MR from the October 4, 2004, order. This order denied a CR 60.02 motion to amend the June 13, 2003, final judgment and denied a CR 59 motion to alter the April 5, 2004, order. The April 5, 2004, order "assigned" certain assets to Talbott Tavern.

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[3] On May 29, 2004, Davidson passed away during the pendency of the action. By order entered September 24, 2004, the circuit court revived the action in the name of the executors of his estate, John Douglas Hubbard and Jeffrey Brett Davidson.

[4] Upon the death of Davidson, this Court granted a motion to substitute John Douglas Hubbard and Jeffrey Brett Davidson, as executors of the estate of Davidson as appellants in Appeal No. 2003-CA-001468-MR.

By order entered February 11, 2005, this Court consolidated Appeal Nos. 2003-CA-001468-MR and 2004-CA-002184-MR. The Estate and Lystra (hereinafter collectively referred to as appellants) then filed a consolidated brief for these appeals. In the brief, appellants framed the issues for our review as follows:

> A. Impossibility and CR 60.02
>
> 1. Whether impossibility is a defense to a contract when there is a failure of financing and if so, whether Davidson was personally responsible as a guarantor of Lystra Revisited, LLC (Lystra), the second party in the purchase of Talbott Tavern.
>
> 2. Whether Davidson was responsible for the entire damage amount of $414,040.00. If he were liable, how much would he owe?
>
> B. Motion to Amend, Alter, and Vacate
>
> 1. Whether the plaintiff is a successor in interest to Davidson's interest in Parnassus Farms, LLC, Atheneaum Productions, LLC, and Parnassus Air, LLC.
>
> 2. Whether KRS 275.280 is relevant to the case at bar and operates to disassociate Davidson from and cause him to cease being a member of the LLCs.

Appellants' Brief at 2.

We shall initially address appellants' arguments relating to the denial of the CR 60.02 motion to vacate the June

13, 2003, final judgment and, then, address appellants' arguments relating to denial of the CR 59 motion to vacate the April 5, 2004, order.

It is well-established that a movant must make a substantial showing to be entitled to extraordinary relief under CR 60.02. Ringo v. Commonwealth, 455 S.W.2d 49 (Ky. 1970); Wilson v. Commonwealth, 403 S.W.2d 710 (Ky. 1966). CR 60.02 is not a substitute for a direct appeal. Rather, a CR 60.02 motion is only available to raise allegations of error that could not have been raised by direct appeal. Gross v. Commonwealth, 648 S.W.2d 853 (Ky. 1983); Wimsatt v. Haydon Oil Co., 414 S.W.2d 908 (Ky. 1967).

The issues advanced by appellants are substantive and attack the finding of liability made in the June 13, 2003, final judgment. Appellants argue the circuit court erred by finding that Davidson breached the contract and specifically argues the defense of impossibility of performance. Appellants also maintain that Davidson was not personally liable for the "entire Judgment amount" of $414,040.00. However, appellants fail to explain why these issues were not or could not have been raised on direct appeal of the June 13, 2003, final judgment. These issues do not involve the discovery of new facts, falsified evidence, or fraud, as required under CR 60.02. Simply put, the legal issues presented by appellants could have easily been

advanced on direct appeal. As the above two issues should have been raised on direct appeal of the June 13, 2003, final judgment, we must treat that appeal as having been abandoned and, thus, decline to reach the merits of these issues in the appeal of the CR 60.02 proceeding. Accordingly, there being insufficient grounds presented to warrant relief, the trial court did not abuse its discretion in denying the CR 60.02 motion to modify the June 13, 2003, judgment.

Notwithstanding appellants' failure to properly preserve the issue of impossibility of performance for review on direct appeal of the June 13, 2003, final judgment, we note that appellants raised the issue of impossibility of performance in their answer to the complaint, in their trial brief filed prior to the entry of the June 13, 2003, final judgment, and in their prehearing statement filed in Appeal No. 2003-CA-001468-MR. Accordingly, while appellants failed to properly present this argument on direct appeal, we will nonetheless address the issue as if it were properly before the Court at this time.[5]

Appellants argue that they could not perform under the contract as a result of the tragic events of September 11, 2001,

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[5] The issue of whether Davidson is personally responsible as a guarantor of Lystra for the entire judgment indebtedness was not raised by appellants prior to entry of the June 13, 2003, final judgment and thus will not be addressed by this Court in Appeal No. 2003-CA-001468-MR. Additionally, as noted, the issue likewise will not be addressed in Appeal No. 2003-CA-002184-MR as concern appellants' Ky. R. Civ. P. 60.02 motion for the reasons previously stated in this opinion.

which resulted in appellants' investors being "scared to take any chances with their money, and they backed out of the deal." Appellants' Brief at 4. Essentially, appellants could not close on the date agreed due to their lack of financing to go forward with the deal. Appellants characterize these events as a "supervening impossibility" which was unforeseen and otherwise not the fault of appellants. Appellants further argue they can rely on this doctrine of impossibility by showing that they were initially able to perform the contract but that the circumstances of September 11, 2001, were beyond their control and changed the parameters of the agreement such that it was commercially impractical to perform thereunder.

As a general rule, the impossibility necessary to excuse the performance of a contract must look to the nature of the thing to be done and not the inability or incapacity of the promisor or obligor to do it. 17B C.J.S. Contracts § 522 (1999). Impossibilities that arise from the inability of a promisor to perform an act do not discharge any duties created by the contract. Raisor v. Jackson, 225 S.W.2d 657 (Ky. 1950).

In this case, the subject matter of the contract was not directly affected by the unfortunate events of September 11, 2001. The impossibility of performance alleged as a defense by appellants looks to the performance of third parties, that being the investors who apparently were financing the transaction for

appellants. In Raisor, our highest Court has specifically addressed circumstances surrounding the actions of third parties regarding the impossibility of performance of a contract as follows:

> [T]he inability to control the actions of a third person, whose co-operation is needed for the performance of an undertaking, is ordinarily not to be regarded as an impossibility avoiding the obligation. One who engages for the act of a stranger must procure the act to be done, and the refusal of the stranger without the interference of the other party to the contract is no excuse. The performance of an absolute promise is not excused by the fact that a third person refuses or fails to take action essential to performance.

Id. at 659 (citation omitted).

The refusal of the investors to go forward with the transaction on behalf of appellants did not render appellants' performance of the contract impossible to achieve. Two obvious factors that defeat appellants' argument stand out. First, we note that the performance of the contract was not expressly conditioned upon appellants obtaining financing from a specific investor. The contract makes no mention of any third party financing requirement or condition. Second, there is absolutely no evidence in the record that the investors were disabled or otherwise unable to perform as a result of the events of September 11, 2001, other than the investors being "scared" as alleged by appellants. Of course, had the Talbott Tavern

facility been destroyed during the events of September 11, 2001, then appellants could have validly raised the defense of impossibility since Talbott Tavern could not have performed at the time of closing due to the subject matter of the contract having been destroyed. Unfortunately for appellants, we are not presented with that scenario.

Finally, in review of the contract between the parties, we note that there is no force majeure clause. This type of clause is traditionally used in contracts to allocate the risks between the parties if performance becomes impossible or impractical as a result of some event that the parties did not anticipate or otherwise could not have controlled. For example, force majeure clauses often excuse performance for certain acts of nature, such as floods and acts of individuals, such as strikes or wars. Under the facts of this case, without such a clause being set forth in the agreement, there exists no legal basis to excuse the performance of appellants under the contract.[6] For these reasons, appellants' arguments that performance should have been excused under the doctrine of impossibility are simply without merit.

[6] Upon close examination of the contract, appellants were only obligated to pay $900,000.00 at the closing, while the remaining purchase price of $1,400,000.00 was being financed by Talbott Tavern over a five year period. This alone diminishes the impossibility argument since the entire purchase price was not due at closing.

We shall next address appellants' arguments under the title "Motion to Amend, Alter, and Vacate." Davidson filed a CR 59 motion to amend the April 5, 2004, order. In this order, the court held, in relevant part:

> 1. That pursuant to KRS 275.260, Davidson's membership interest in Parnassus Farms, LLC shall be and it is hereby judicially assigned to the plaintiff, subject to any interest of Beverly Brady, until this Court's judgment of June 13, 2003, has been satisfied.
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> 2. That pursuant to KRS 275.260, Davidson's membership interest in Atheneaum Productions, LLC shall be and it is hereby judicially assigned to the plaintiff, subject to any interest of Elaine Zinser and Sasha, LLC, until this Court's judgment of June 13, 2003, has been satisfied.
>
> 3. That pursuant to KRS 275.260, Davidson's membership interest in Parnassus Air, LLC shall be and it is hereby judicially assigned to the plaintiff, until this Court's judgment of June 13, 2003, has been satisfied.
>
> 4. The plaintiff shall be entitled to sell the above assignments so long as the sales are conducted in a commercially reasonable manner.
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> 5. That pursuant to KRS 275.280(1)(d), Davidson shall disassociate from Parnassus Farms, LLC, Atheneaum Productions, LLC, and Parnassus Air, LLC, and he shall cease being a member of all three companies.

Appellants initially argue that Talbott Tavern "is not a successor in interest to Davidson's interest in Parnassus

Farms, LLC, Atheneaum Productions, LLC, and Parnassus Air, LLC." Specifically, appellants maintains the circuit court erred by ordering Davidson to disassociate himself and to cease being a member of the limited liability corporations. Appellants also question the applicability of KRS 275.280(1)(d).

The record discloses that Davidson filed a petition in bankruptcy on September 12, 2003. Under KRS 275.280(1)(d), a person becomes legally disassociated with a limited liability company and ceases to be a member upon the filing of a petition in bankruptcy. Moreover, under KRS 275.280(1)(f), a person is also disassociated upon death. Thus, under either KRS 275.280(1)(d) or (1)(f), Davidson is no longer a member of the limited liability corporations. As such, we do not reach the issue of whether Davidson was properly disassociated from membership under KRS 275.280(1)(d) because of an assignment to creditors.[7]

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[7] We also do not reach any issues concerning the nature of Davidson's interest in the limited liability corporations upon his death. The issues revolving around the interests Davidson held at his death were not raised before the circuit court and are not properly before this Court.

Cross-Appeal No. 2003-CA-001543-MR

Talbott Tavern claims the circuit court erred by failing to award damages for operating losses in the amount of $194,858.19.[8] Specifically, Talbott Tavern argues:

> Had the defendants performed their obligations under the contract, the plaintiff would not have lost an additional dollar after the closing. As a direct result of the defendant's failure to close, the plaintiff lost an additional $194,858.19 that it would not have lost but for the defendant's failure to close. Accordingly, to place the plaintiff in the position it would have been in had the defendants performed, the Court must award the additional operating losses incurred after the breach.

Talbott Tavern's Brief at 14. The circuit court rejected Talbott Tavern's claim for operating losses and stated:

> As to the balance of the $194,858.19 claim of Talbott Tavern, it must be rejected for the simple reason that Plaintiff was losing business prior to September 19, 2001, and although its co-owner, John S. Kelley Jr. testified that the losses were greater subsequent to September 19, 2001 than they were prior to that date, the Court has no pre-September 19, 2001 loss figures to compare those presented for the post-September 19, 2001 time frame. In other words, the Court would have to indulge in rank speculation to assign a operations damage loss figure attributable to Davidson's breach of the subject contract.

It is well-established that damages for lost profits must be proved with reasonable certainty. Caney Creek Co. v. Ellis, 437

[8] The circuit court did award Talbott Tavern, Inc. $9,040.00, which represented expenses associated with efforts to sell the property.

S.W.2d 745, (Ky. 1969). Upon a review of the record, we are compelled to agree with the circuit court that evidence supporting lost profits was too speculative. Thus, we do not believe the circuit court erred by failing to award damages for lost profits.

For the foregoing reasons, Appeal No. 2003-CA-001468-MR is affirmed, Cross-Appeal No. 2003-CA-001543-MR is affirmed, and Appeal No. 2004-CA-002184-MR is affirmed.

ALL CONCUR.

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