

Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-001935-MR

DAVID TRENT

APPELLANT

v. APPEAL FROM PULASKI CIRCUIT COURT
HONORABLE DAVID TAPP, JUDGE
ACTION NO. 04-CI-00198

LAKE CUMBERLAND RESORT, INC.

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: BARBER AND VANMETER, JUDGES; EMBERTON,¹ SENIOR JUDGE.

BARBER, JUDGE: This matter is before the court regarding a summary judgment order by the Pulaski Circuit Court. The order dismissed a personal injury claim by Appellant, David Trent, against Appellee, Lake Cumberland Resort, Inc., (LCR). The trial court concluded Trent's claim was barred by KRS 342.690(1), the exclusive remedy provision of the Kentucky Workers' Compensation Act (Act).

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

The primary question for our court is whether LCR is a "contractor" for purposes of the Act. If so, LCR is entitled to the protection of KRS 342.690(1). Following a review of the record, we believe LCR was a "contractor." Thus, we affirm.

Background

LCR developed a gated community consisting of more than one hundred homes.² A person would buy a lot from LCR and have it build a home thereon for an established price.³ Individuals were given allowances for certain aspects of the home. If someone exceeded an allowance given, he or she would be required to pay the difference at closing.

Purchasers were given an allowance by LCR for the cabinetry in their home. LCR always recommended Whitis Cabinets for cabinet installation, but individuals were able to use anyone they chose. The majority of purchasers did in fact use Whitis as their cabinet supplier. Cabinetry installed by Whitis was custom-built for the particular home based on purchasers' preferences.

On May 28, 2003, Trent, a Whitis employee, fell into a cold air return hole in the floor while installing cabinets in a home being built by LCR for a third party. The return had been covered by a piece of cardboard. Trent injured his left ankle

² Most of the homes were used as vacation homes.

³ An individual could buy a lot only, but such purchases were rare.

and knee. Trent filed a workers' compensation claim against Whitis and received benefits for his injuries.

Trent then filed a personal injury claim against LCR. Following limited discovery, LCR filed a motion for summary judgment arguing workers' compensation exclusivity. The trial court agreed and granted summary judgment to LCR. Trent now appeals to our court.

Scope of Review

The standard of review on appeal when a trial court grants a motion for summary judgment is whether the trial court correctly found there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law. Hallahan v. The Courier-Journal, 138 S.W.3d 699, 704 (Ky.App. 2004), (citing Palmer v. International Assoc. of Machinists, 882 S.W.2d 117, 120 (Ky. 1994)). The movant bears the initial burden of convincing the court by evidence of record that no genuine issue of fact is in dispute, and then the burden shifts to the party opposing summary judgment to present "at least some affirmative evidence showing that there is a genuine issue of material fact for trial." Id. at 705, (citing Steelvest, Inc. v. Scansteel Service Center, Inc., 807 S.W.2d 476, 482 (Ky. 1991)). The party opposing summary judgment cannot rely on their own claims or arguments without significant evidence in order to prevent summary judgment. Hallahan, supra,

138 S.W.3d at 705. The court must view the record in the light most favorable to the nonmovant and resolve all doubts in his favor. Id., (citing Commonwealth v. Whitworth, 74 S.W.3d 695, 698 (Ky. 2002)).

In order for summary judgment to be proper, the movant must show that the adverse party cannot prevail under any circumstances. Motorists Mutual Insurance Co., supra 149 S.W.3d at 439, (citing Paintsville Hospital Co. v. Rose, 683 S.W.2d 255, 256 (Ky. 1985)). Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits,⁴ 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." Motorists Mutual Insurance Co. v. Grange Mutual Casualty Co., 149 S.W.3d 437, 439 (Ky.App. 2004), (citing CR 56.03). The focus should be on what is of record rather than what might be presented at trial. Hallahan, supra, 138 S.W.3d at 705, (citing Welch v. American Publishing Co. of Kentucky, 3 S.W.3d 724, 730 (Ky. 1999)). Our court need not defer to the trial court's decision on summary judgment and shall review the issue *de novo* because only legal questions are involved. Id.

⁴ "Affidavits" in CR 56.03 includes any other pertinent materials which will assist the court in adjudicating the merits of the motion. Conley v. Hall, 395 S.W.2d 575, 583 (Ky. 1965).

Legal Authority

The exclusivity of liability applicable to workers' compensation is established in KRS 342.690(1), which states, in relevant part:

If an employer secures payment of compensation by this chapter, the liability of such employer under this chapter shall be exclusive and in place of all other liability of such employer to the employee . . . entitled to recover damages from such employer at law . . . on account of such injury or death. For purposes of this section, the term "employer" shall include a "contractor" covered by subsection (2) of KRS 342.610, whether or not the subcontractor has in fact, secured the payment of compensation.

Kentucky Revised Statute 342.610(2)

states, in part:

A contractor who subcontracts all or any part of a contract and his carrier shall be liable for the payment of compensation to the employees of the subcontractor unless the subcontractor primarily liable for the payment of such compensation has secured the payment of compensation as provided for in this chapter. . . . A person who contracts with another to have work performed of a kind which is a regular or recurrent part of the work of the trade, business, occupation, or profession of such person shall for the purposes of this section be deemed a contractor, and such other person a subcontractor.

The purpose of the provision of KRS 342.610 that a contractor is liable for compensation benefits to an employee if a subcontractor who does not secure compensation benefits is to

prevent subcontracting to irresponsible people. Fireman's Fund Insurance Company v. Sherman & Fletcher, 705 S.W.2d 459, 461 (Ky. 1986), (citing Elkhorn-Hazard Coal Land Corp. v. Taylor, 539 S.W.2d 101, 103 (Ky. 1976)).

The Kentucky Supreme Court construed "contractor" as used in KRS 342.610 to mean that a person who engages another to perform a part of the work which is a recurrent part of his business, trade, or occupation. Id. at 462. Even though he may never perform that particular job with his own employees, he is still a contractor if the job is one that is usually a regular or recurrent part of his trade or occupation. Id.

Analysis

We believe Fireman's Fund Insurance Company v. Sherman & Fletcher, 705 S.W.2d 459 (Ky. 1986) is analogous to the matter before us. In that case, John Sherman and Raymond Fletcher, individually and as partners, owned and developed a residential construction complex consisting of twenty-one townhouses. They contracted with others for most of the construction work. Elder, Inc. was a framing subcontractor engaged to do the rough framing carpentry. David H. George was an employee of Elder who was killed when a concrete block wall at the construction site collapsed. Elder paid workers' compensation benefits to the estate of George. It was held that the estate could not seek

recovery for wrongful death against Sherman & Fletcher pursuant to KRS 342.690(1).

Travis states his case is different from Fireman's Fund because cabinet installation is not a regular or recurrent part of the work of LCR. Specifically, he argues that cabinet installation is not necessary to the construction of a home and that LCR never installed cabinetry themselves. We find no merit with either argument.

Travis first claims cabinetry is unnecessary to the building of a home comparing it to appliance installation. Whitis was more than a mere supplier of a product. It provided a professionally installed custom cabinet for homeowners.⁵ Moreover, Lowell Davis, Chief Financial Officer and Controller for LCR, testified that all of the homes within the gated community had cabinetry.⁶ Travis failed to present any evidence of any home that had no cabinetry. As such, we believe cabinet installation is a job that is a regular and recurrent part of LCR's trade, (i.e., home construction).

Travis then argues there was no evidence introduced that LCR ever installed cabinets in any of the homes it constructed so it was not a regular or recurrent part of its

⁵ See Cliff Fuson, Resort's Construction Superintendent, deposition, May 25, 2005, at p.2 and Chester L. Holsomback, former Whitis employee working with Trent on day of injury, deposition, May 25, 2005, at p.2-5.

⁶ Lowell Davis deposition, May 25, 2005, at p.6.

work. As stated earlier, it is not necessary that LCR perform that particular job with its own employees. See Fireman's Fund, supra, 705 S.W.2d at 462.

Additionally, all invoices incurred for work performed on a home were paid by LCR.⁷ LCR ensured that anyone who was not an LCR employee had the appropriate workers' compensation insurance.⁸ LCR provided a one-year builder's warranty on all homes it constructed.⁹ Also, homeowners report any problems with their home to LCR, not the installer. These are all additional factors indicative that LCR is a contractor.

Conclusion

Based on the foregoing, we believe LCR is a "contractor" as defined by KRS 342.610(2) entitled to the protection of KRS 342.690(1), the exclusive remedy provision of the Act. Therefore, we affirm the Pulaski Circuit Court's order granting summary judgment to LCR.

ALL CONCUR.

BRIEF FOR APPELLANT:

Teddy L. Flynt
Salyersville, Kentucky

BRIEF FOR APPELLEE:

Roberta K. Kiser
Lexington, Kentucky

⁷ Invoices listed Resort as the customer/purchaser.

⁸ Lowell Davis deposition, May 25, 2005, at p.8.

⁹ Lowell Davis deposition, May 25, 2005, at p.24.