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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-002338-MR

DEBRA GILBERT — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE JUDITH MCDONALD-BURKMAN, JUDGE
ACTION NO. 02-CI-003761

PRIME, INC.; MICHAEL M. BALDANZA; AND NATIONWIDE MUTUAL INSURANCE COMPANY — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: JOHNSON AND WINE, JUDGES; MILLER,[1] SPECIAL JUDGE.

JOHNSON, JUDGE: Debra Gilbert has appealed from two orders of the Jefferson Circuit Court entered on July 26, 2005, which granted summary judgment to Prime, Inc. and Michael M. Baldanza, and Nationwide Mutual Insurance Company. Having concluded that the trial court correctly determined that Gilbert failed to timely file her complaint against Prime and Baldanza, and Nationwide, we affirm.

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

On May 22, 2000, at approximately 7:00 a.m., Nicole Schindler, Gilbert's daughter, was driving Gilbert's vehicle[2] on Interstate 65 in Louisville, Kentucky, when the vehicle was crushed by a tractor trailer owned by Prime and operated by Baldanza[3] which overturned in a curve on the interstate. Gilbert was not involved in the accident. Prime and Baldanza quickly admitted fault and determined that liability was not at issue.

On May 22, 2000, Nationwide, which insured Gilbert's vehicle, was advised of the collision and assigned Pat Duvall as the adjuster to handle Gilbert's property damage claim. Nationwide also assigned Carrie Goff as the adjuster responsible for investigation of subrogation potential if property damage due to the collision was paid to Gilbert under her collision coverage with Nationwide. The next day, Gilbert notified Duvall that Baldanza was at fault and that she wanted to have Prime's insurer handle payment of her vehicle damage. On May 24, 2000, Terry Banta, an adjuster for Reliance Insurance Company, Prime's insurer, advised Duvall that he was arranging an inspection of Gilbert's vehicle. A few days later on May 30, 2000, Banta notified Duvall that Prime had accepted full liability for Gilbert's vehicle damage; that Prime would provide Gilbert a

[2] Gilbert's vehicle was a 1994 Nissan Altima.

[3] Baldanza had worked for Prime since March 3, 2000, and had only been working a few weeks at the time of the accident.

rental vehicle; and that Prime had set up a date to inspect Gilbert's vehicle.

After Banta's inspection of the vehicle, Prime made an offer to Gilbert on June 1, 2000, to settle Gilbert's property damage claim with Prime and Baldanza for the sum of $8,420.64. Records from Banta's file indicate that on June 8, 2000, it was noted that someone would be handling Gilbert's property claim on her behalf and they would be in contact with Banta. At the center of the dispute in this case is whether Gilbert ever accepted this offer. Gilbert argues that Banta led her to believe that the settlement of her property damage claim would be finalized after Schindler's claims were settled. On April 26, 2002, less than one month before the statute of limitations would expire, Banta received a letter from Gilbert's current counsel stating that he would be representing Gilbert regarding her claim for damages arising out of the May 22, 2000, accident. However, the letter made no reference to the alleged statement by Banta to settle Gilbert's claim at a later date, nor did it refer to any pending offer or any agreement reached by Banta and Gilbert regarding settlement matters. To the contrary, the letter requested that an offer of settlement be made on Gilbert's property damage claim.

On May 21, 2002, Schindler timely filed a complaint against Prime, Baldanza, and Nationwide seeking compensation for

her injuries and damages arising out of the May 22, 2000, motor vehicle accident. Depositions of both Schindler and Baldanza were taken. Subsequently, a mediation[4] regarding this claim was held on November 14, 2003, resulting in Prime and Baldanza making an offer to Schindler, which she did not immediately accept. However, on December 2, 2003, Schindler accepted the settlement offer made during the prior mediation and she signed a Release and Settlement Agreement on January 13, 2004.

During the course of Schindler's mediation, Gilbert demanded payment of $8,420.64, as originally offered by Prime, stating that she had agreed to accept this amount in settlement of her claim and had agreed to defer payment until Schindler's personal injury claim was resolved. Payment was refused by Prime and Baldanza, as they claimed the two-year statute of limitations had run on Gilbert's property claim, pursuant to KRS[5] 413.125. After this response from Prime and Baldanza, Gilbert contacted Nationwide and requested that it reopen the collision claim which she had initially opened after the May 22, 2000, accident. Nationwide refused to reopen the collision claim arguing that it had closed its file eight days after the accident when Banta called and advised that Prime and Baldanza had accepted liability for the damage to Gilbert's car and had

[4] Retired Judge Michael O. McDonald acted as mediator.

[5] Kentucky Revised Statutes.

placed Gilbert in a rental car. Further, Nationwide explained that because Gilbert did not reopen her property damage claim within two years of the date of the accident, she forfeited her rights under the policy to proceed with the claim under her collision coverage.

On July 29, 2004, Gilbert filed a motion to intervene in the action previously filed by Schindler against Prime, Baldanza, and Nationwide seeking damages for her crushed vehicle. In this motion, Gilbert moved the trial court to allow her to file a verified intervening complaint against Prime and Baldanza seeking to enforce the June 1, 2000, settlement under two theories of recovery: (1) estoppel; and (2) contract. She also sought to enforce payment from Nationwide of her property damage claim under the collision coverage of her policy. On September 3, 2004, more than four years after the accident, Gilbert was granted leave to file an intervening complaint against Prime, Baldanza, and Nationwide.

In her complaint, Gilbert alleged that Banta advised her that her property damage claim would be paid at the time settlement was reached on Schindler's bodily injury claim. Neither Banta, nor Reliance, was made a party to Gilbert's action through the intervening complaint. At no place in her intervening complaint did Gilbert allege that Banta's statement constituted an offer, nor did she allege that she ever accepted

any offer made by Banta. Rather, she merely claimed that a statement had been made by Banta that her claim would be settled at a later date. Gilbert claimed that she did not file her suit against Prime and Baldanza at the time Schindler filed her suit because of statements made by Reliance employees causing her not to "take any further steps in furtherance of her property damage claim until the mediation date of her daughter's bodily injury claim." However, it is important to note that the mediation in Schindler's case occurred over one year after the statute of limitations on Gilbert's property damages had expired.

In discovery, Gilbert deposed Banta and John Ryan, a Prime employee, Goff, Duval, and another Nationwide employee, Charles Goode. Gilbert's deposition was not taken by Prime, Baldanza, or Nationwide. In Banta's deposition, he denied telling Gilbert that her property damage claim would be settled when Schindler's bodily injury claim was settled. Banta testified that he made an offer in the amount $8,420.64 to Gilbert regarding her property damage on or about June 1, 2000, approximately ten days after the accident occurred. He went on to state that Gilbert rejected the offer and never made a counter-offer. Further, Banta pointed out that the settlement offer was made several years before Schindler's bodily injury action was filed, years before her claims were settled, and

years before any of the parties even knew that Schindler's claims would be settled. Banta went on to testify that there was no reason not to pay the settlement at the time the offer was made if Gilbert had in fact accepted it. A "Claims File Activity Sheet" in Banta's file indicated that on June 8, 2000, Gilbert rejected the offer and indicated that Gilbert advised Banta that an attorney would be calling him to handle her property damage claim.

On November 19, 2004, Prime and Baldanza filed a motion for summary judgment based on the two-year statute of limitations, i.e., May 22, 2002. Upon submitting its answer, Nationwide also filed a summary judgment motion on December 7, 2004, seeking dismissal of Gilbert's property damage collision claim. Nationwide relied upon the following portions of its policy with Gilbert:

> 1. We have the right of subrogation under the:
>
> a) Physical Damage[:]
>
> C. Coverages in this policy.
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> This means that after paying a loss to you or others under this policy, we will have the insured's right to sue for or otherwise recover such loss from anyone else who may be liable. Also, we may require reimbursement from the insured out of any settlement or judgment that duplicates our payments. These provisions will be applied in accordance with state law. Any insured

> will sign such papers, and do whatever else is necessary, to transfer these rights to us, and will do nothing to prejudice them.

In her response to the summary judgment motions, Gilbert argued that the alleged statement by Banta that he would settle her claim at a later date tolled the statute of limitations for her property damage claim. Gilbert filed an affidavit to her sur-reply to the motions for summary judgment, wherein she swore that Banta made an offer of settlement for $8,420.64 on June 1, 2000. She stated, "I accepted the offer." She did not state in the affidavit when she accepted the offer. However, a reference to her response to Prime's motion for summary judgment is revealing. She stated in her response that she accepted the offer on November 14, 2003, at the Schindler mediation with Prime. Further, Gilbert claimed in her brief that accepting the offer more than three years after the offer was made was within a reasonable time period, despite the admitted expiration of the statute of limitations during that period.

Following submission of the summary judgment motions, the trial court reviewed the parties' memoranda, and following oral argument by counsel, the trial court on July 26, 2005, granted, in one order and opinion, summary judgment in favor of Prime and Baldanza, and, in a separate order and opinion,

summary judgment in favor of Nationwide. Gilbert then filed a timely motion to alter, amend, or vacate the orders on August 5, 2005. By separate orders entered by the trial court on October 12, 2005, the trial court denied Gilbert's motions to alter, amend, or vacate the summary judgments against her. This appeal followed.

Gilbert raises two issues before this Court. First, she contends that there existed a genuine issue of material fact as to whether or not there was a settlement of her property damage claim, and thus summary judgment was not appropriate. Gilbert argues that the facts concerning whether or not there was a settlement are in dispute. It is Gilbert's position that Banta made a settlement proposal and that she accepted the offer with the understanding that she would be paid when Schindler's bodily injury claim was settled.

Prime and Baldanza argue before this Court that Gilbert has abandoned all of her unsuccessful estoppel and tolling claims as well as her claims regarding the reasonableness of her alleged acceptance of the offer three and one-half years after it was made. They contend that she now seeks reversal from this Court, representing the case to this Court as a simple contract case based on whether or not there was acceptance on June 1, 2000. Prime and Baldanza argue that

Gilbert should not be allowed to change the facts that she used as basis for objecting to summary judgment.

Under Kentucky law, it is well-settled that "[t]he standard of review on appeal of a summary judgment is whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law."[6] CR 56.03 provides that summary judgment may be rendered "[i]f the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with affidavits, if any, show 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." Summary judgment is improper unless "it would be impossible for the respondent to produce evidence at the trial warranting a judgment in his favor and against the movant" [citation omitted].[7] "The inquiry should be whether, from the evidence of record, facts exist which would make it possible for the non-moving party to prevail. In the analysis, the focus should be on what is of record rather than what might be presented at

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

[7] Steelevest, Inc. v. Scansteel Service Center, Inc., 807 S.W.2d 476, 483 (Ky. 1991).

trial."[8] The term "impossible" is to be applied in a "practical sense, not in an absolute sense."[9]

Prime, Baldanza, and Nationwide, as the moving parties, each had the burden of proving entitlement to summary judgment,[10] which included establishing that there was no genuine issue as to any material fact, and that each had the right to summary judgment with "such clarity that there is no room left for controversy[.]"[11] The trial court must view the record in a light most favorable to Gilbert, the party opposing the motions, and all doubts are to be resolved in her favor.[12] If there is a genuine issue as to any material fact, the trial court should not render a summary judgment, regardless of its belief as to the opposing party's chance of success at trial.[13] If the burden shifts to the party opposing summary judgment, he or she "cannot defeat it without presenting at lease some affirmative evidence showing that there is a genuine issue of material fact for

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[8] Welch v. American Publishing Co. of Kentucky, 3 S.W.3d 724, 730 (Ky. 1999). See also Paintsville Hospital Co. v. Rose, 683 S.W.2d 255, 256 (Ky. 1985)(noting that summary judgment is proper only where the movant shows that the adverse party cannot prevail under any circumstances).

[9] Perkins v. Hausladen, 828 S.W.2d 652, 654 (Ky. 1992).

[10] Christie v. First American Bank, 908 S.W.2d 679, 681 (Ky.App. 1995).

[11] Williams v. City of Hillview, 831 S.W.2d 181, 183 (Ky. 1992).

[12] Dossett v. New York Mining & Manufacturing Co., 451 S.W.2d 843, 845 (Ky. 1970); Puckett v. Elsner, 303 S.W.2d 250, 251 (Ky. 1957).

[13] Puckett, 303 S.W.2d at 251.

trial[,]"[14] but, "[t]he threshold [ ] is quite low[.]"[15] The evidence presented by the moving party in support of its summary judgment "must be of such nature that no genuine issue of fact remains to be resolved."[16] Otherwise, summary judgment is improper even when the party opposing summary judgment presents no contradicting evidence.[17]

"When faced with a motion for summary judgment, the role of the trial [court] is not to decide issues of fact, but instead [it] must determine whether a real issue exists" [citation omitted].[18] "Because summary judgments involve no fact finding, this Court will review the circuit court's decision de novo[,]"[19] since it "involves only legal questions and the existence of any disputed material issues of fact[.]"[20]

In the case before us, the trial court assumed for the purposes of summary judgment proceedings that Banta had made assurances that Gilbert's claim would be settled at a later date, but it properly held pursuant to Kentucky law that under

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[14] Steelevest, 807 S.W.2d at 482.

[15] Commonwealth, Transportation Cabinet, Dept. of Highways v. R.J. Corman Railroad Co./Memphis Line, 116 S.W.3d 488, 498 (Ky. 2003).

[16] Carter v. Jim Walter Homes, Inc., 731 S.W.2d 12, 14 (Ky.App. 1987).

[17] Id.

[18] R.J. Corman Railroad Co., 116 S.W.3d at 497.

[19] 3D Enterprises v. Metro Sewer District, 174 S.W.3d 440, 445 (Ky. 2005).

[20] Lewis v. B & R Corp., 56 S.W.3d 432, 436 (Ky.App. 2001).

the facts and circumstances of this case reliance on the adjustor's statement would not toll the running of the statute of limitations for filing her property damage claim. The trial court assumed for purposes of the summary judgment motions that Gilbert accepted the offer on November 14, 2003, since that was the date that she argued in her brief.

The trial court focused on this Court's Opinion in Brown v. Noland Co.,[21] to determine whether Gilbert was permitted to accept an offer which had been made three and one-half years prior to her claimed acceptance on November 14, 2003. The trial court noted that Gilbert was represented by two attorneys, neither of whom ever indicated prior to the summary judgment proceeding that there was an offer pending by Banta, much less any settlement agreement to be made at some unknown time during the future. The trial court noted that Gilbert was required to exercise reasonable diligence to protect her cause of action and further that there was no evidence that Prime or Baldanza did anything to cause Gilbert to delay filing suit. The trial court ruled that Gilbert's failure to file her property damage claim was not reasonable or justified under either theory posed by her and entered summary judgment in favor of Prime and Baldanza.

It was not until after entry of the summary judgments against her that Gilbert claimed for the first time that she had

[21] 403 S.W.2d 33 (Ky. 1966).

not accepted the offer on November 14, 2003, as she had so strenuously argued in the prior pleadings. Instead, she argued for the first time that she had accepted the offer on June 1, 2000, the same day the offer was made. No explanatory affidavit or clarification was offered by Gilbert as to the change in the meaning of her sworn statement "I accepted the offer" in her prior affidavit. This change came merely from counsel's argument.

Upon review of the findings of the trial court, we conclude that it did not abuse its discretion in granting summary judgment to Prime and Baldanza, as each had met the burden of proof. Even construing all facts in a light most favorable to Gilbert, we do not conclude that she met her low burden of proof that there was any fact in dispute as to whether Prime and Baldanza were not entitled to judgment as a matter of law. In reviewing the trial record in its entirety, it is clear that Gilbert claimed that she accepted the Prime and Baldanza offer on November 14, 2003, the date of Schindler's mediation. The first time that she made a claim of acceptance on June 1, 2003, was in her brief filed on August 5, 2005, to support of her motion to alter, amend, or vacate the summary judgments. Thus, for the reasons set out in the trial court's order, we hold that summary judgment in favor of Prime and Baldanza was proper.

Gilbert next argues that summary judgment in favor of Nationwide was improper. Gilbert argues that in reading her Nationwide policy there was no way she could have known that the statute of limitations on her claim expired after two years. She acknowledges that Nationwide can shorten the statute of limitations, but she claims that it failed to clearly do so in the contract.[22] Nationwide argues that whether the statute of limitations is two years, or 15 years, the point is that under the policy, Gilbert was to do nothing to prejudice Nationwide's right to sue or otherwise recover from anyone else who may be liable for property damage to Gilbert's vehicle. Nationwide argues in its brief as follows:

> In the present case, if Nationwide were to pay [Gilbert's] collision claim, it would clearly not be able to subrogate against Prime, Inc. and/or its driver [Baldanza] to recover payments made. Prime [ ]/Baldanza would raise the same statute of limitations defense on Nationwide's subrogation claim as they raised in [Gilbert's] direct claim against them for property damage.
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> [Gilbert] did not timely file her property damage claim against the tortfeasors [ ]. Even if [Gilbert] had thirty years to sue Nationwide, she can not cure her breach of the contract provision requiring that she do nothing to jeopardize Nationwide's subrogation rights. . . .

The trial court agreed with Nationwide, and in its order granting Nationwide summary judgment stated as follows:

[22] See Elkins v. Kentucky Farm Bureau Mutual Ins. Co., 844 S.W.2d 423 (Ky.App. 1992).

> Regardless of whether the Court finds a two year statute of limitations or a fifteen year statute of limitations (for a contract dispute), the bottom line reveals that Gilbert failed to file suit against the tort-feasor within the two year statute of limitations under KRS 413.125. She is barred from seeking redress therefrom. Gilbert has a duty to avoid prejudice to the subrogation rights of Nationwide . . . .
>
> Nationwide cannot recoup its loss from the tort-feasor due to Gilbert's failure to timely file suit thereon. Remedial System v. New Hampshire Fire Insurance Co., Ky.App., 13 S.W.2d 1005 (1929) supports Nationwide's position. There simply are no genuine issues of material fact and Nationwide is entitled to judgment as a matter of law. Nationwide['s] motion for Summary Judgment is hereby **GRANTED.**

We conclude that the reasoning of the trial court in granting Nationwide's motion for summary judgment is sound and based upon the law of this Commonwealth. There is no dispute that Gilbert's actions clearly prejudiced and prevented Nationwide from recovering from a subrogation claim against Prime and Baldanza and this was clearly a violation of the contract between Gilbert and Nationwide.

For the foregoing reasons, we affirm the Jefferson Circuit Court's orders granting summary judgment to Prime and Baldanza, and Nationwide.

WINE, JUDGE, CONCURS.

MILLER, SPECIAL JUDGE, CONCURS IN PART, DISSENTS IN PART, AND FILES SEPARATE OPINION.

MILLER, SPECIAL JUDGE, CONCURRING IN PART AND DISSENTING IN PART: I concur in the dismissal of Debra Gilbert's claims against Prime, Inc., and Michael M. Baldanza as being barred by limitations.

I am not, however, of the opinion that her claim against Nationwide Insurance Company should be dismissed. Gilbert has breached no contract. Her agreement with Nationwide was an executory contract. She performed her side of the contract when she timely paid her premiums. Nationwide performs their side when loss occurs.

It is true that she may lose her rights under the contract by operation of law, i.e., waiver or estoppel. She may also, of course, lose her rights by release of the tortfeasor, which she did not do.

She cannot, however, lose her rights under the contract by allowing the statute of limitations to run against her subrogee, which has no rights until payment is made.

It would be a strange state of affairs if an insured under a collision contract of insurance were bound to settle with his insurer in time to permit the insurer to prosecute a subrogation claim against the tortfeasor within the time prescribed for limitations of a tort action.

Finally, subrogation claims are creatures of equity, whereas limitations traditionally apply to actions at law. My

notion is that whether a subrogation claim can be prosecuted should be governed by laches, and not by limitation periods prescribed by law.

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