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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2005-CA-002471-MR

WILLIAM MARCUS — APPELLANT

v.

APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE ROGER L. CRITTENDEN, JUDGE
ACTION NO. 04-CI-01277

BART MILLER;
UNIVERSITY OF KENTUCKY; AND
SECOND NATIONAL BANK AND TRUST CO.,
TRUSTEE FOR THE UNIVERSITY OF KENTUCKY
LONG-TERM DISABILITY EMPLOYEE BENEFITS TRUST — APPELLEES

AND: NO. 2005-CA-002593-MR

UNIVERSITY OF KENTUCKY — CROSS-APPELLANT

v.

CROSS-APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE ROGER L. CRITTENDEN, JUDGE
ACTION NO. 04-CI-01277

WILLIAM MARCUS — CROSS-APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: STUMBO, JUDGE; EMBERTON AND PAISLEY, SENIOR JUDGES.[1]

STUMBO, JUDGE: William Marcus appeals from an order and judgment of the Franklin Circuit Court in his ERISA action to clarify his rights arising under contract with the University of Kentucky, and to enjoin the University from recovering money it claims was overpaid to Marcus under its Long Term Disability ("LTD") plan. Marcus contends that the Franklin Circuit Court erred in reforming the LTD plan based on the University's unilateral mistake, and argues that its findings are not supported by the evidence. The University cross-appeals on its claim of entitlement to pre-judgment interest. For the reasons stated below, we affirm the judgment on appeal.

The facts are not in dispute. Marcus began his employment with the University in 1961. He suffered a work-related shoulder injury on June 27, 2001. Marcus then sought and began receiving long-term disability benefits from the University's LTD plan. In October, 2001 he filed a claim for workers' compensation benefits, and in December, 2001 began receiving social security disability benefits. In August, 2003 Marcus was awarded workers' compensation benefits.

Under the terms of the University's LTD plan, the University was entitled to adjust downward any future payments to a beneficiary if the beneficiary's receipts

[1] Senior Judges Thomas D. Emberton and Lewis G. Paisley, sitting as Special Judges by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

from workers' compensation coverage and/or social security disability exceeded a certain amount. That amount was determined by looking to the "single greatest benefit" to which the beneficiary was entitled. Based on this calculation, the University determined that it had inadvertently overpaid Marcus by more than $29,000. When the University learned of its mistake, it notified Marcus by way of a letter that he was required to repay to the University the sum of $35,587.51. It informed him that if he did not repay that sum, it would terminate any additional LTD payments, would terminate his employment and would institute a civil action to recover the overpayment.

On October 13, 2003, Marcus filed the instant action against the University, LTD trustee Second National Bank and Trust Company, and Bart Miller as LTD administrator. Marcus sought a determination under 29 U.S.C. 1132(a)(1)(B) clarifying his rights as to the LTD benefits and declaring that the University was not entitled to recoupment. Marcus's complaint also set forth a due process claim, wherein he argued that the defendants had improperly acted in concert to recover the overpayment without due process in violation of 42 U.S.C. 1983. He sought punitive damages and an order enjoining the University from the threatened action until the court could determine the parties' rights under the LTD plan. At some point Marcus and the University agreed that Marcus would place $35,000 in an interest-bearing escrow account pending final resolution of the action.

The matter proceeded in Franklin Circuit Court, whereupon the defendants filed a motion for summary judgment pursuant to CR 56.02. On September 19, 2005, the

court rendered an order granting the motion and ordering that the University was entitled to recoup the sum of $29,068.27, which the University had mistakenly overpaid to Marcus. As a basis for the ruling, the court found that the University, et al., made a showing that no genuine issue of material fact existed and that they were entitled to a judgment as a matter of law. Specifically, the court found that the LTD plan language addressing the recovery of overpayments was *a* remedy but not the *exclusive* remedy. That language allowed the University to reduce future LTD payments until the overpayment was recouped. The court went on to find that the University benefited from an implied contract or equitable right to recovery, and was entitled to recover the entire overpayment.

Marcus filed a motion to vacate, and the University moved to amend the judgment to include prejudgment interest. On November 7, 2005, an order and judgment was rendered overruling both motions and entering a judgment in the amount of $29,068.27. The judgment was to be paid from the escrow account, with Marcus retaining the excess above the judgment amount. Accrued interest was to be divided between Marcus and the University on a pro rata basis. This appeal followed.

Marcus now argues that the Franklin Circuit Court erred in granting a judgment in favor of the University. Specifically, he maintains that the court improperly reformed the LTD plan and that its findings were not supported by the evidence. He also claims that the court improperly failed to provide him relief on his claim that the University violated 42 U.S.C. 1983 by attempting to take his property without a hearing.

He seeks an order reversing the judgment on appeal, an interlocutory award of attorney fees, and an order remanding the matter for trial on the procedural due process issue.

Marcus first argues that the circuit court erred in finding that the University overpaid him. He maintains that he never admitted to being overpaid, and claims that "not one iota" of evidence exists in the record to support the court's conclusion that an overpayment was made. He argues that he properly applied for and received LTD benefits, workers' compensation benefits and social security benefits, and that any finding of fact to the contrary is not supported by the record.

This issue was disposed of by way of summary judgment. Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, 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." CR 56.03. "The record must be viewed in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor." *Steelvest, Inc. v. Scansteel Service Center*, *Inc.* 807 S.W.2d 476 (Ky. 1991). "Even though a trial court may believe the party opposing the motion may not succeed at trial, it should not render a summary judgment if there is any issue of material fact." *Id.* Finally, "[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." *Scifres v. Kraft,* 916 S.W.2d 779, 781 (Ky. App. 1996).

We are not persuaded by this argument, as the record contains evidence upon which the circuit court reasonably relied in reaching its conclusion on this issue. The University produced evidence in the form of Miller's affidavit that it overpaid Marcus. Relying on the LTD policy and documentation, Miller calculated that it overpaid Marcus in the amount of $29,068.27. Also, as the University properly notes, Marcus appears to have offered nothing before the circuit court to rebut this assertion other than his own personal statement that, "I don't believe I owe money to the University." Even when viewing the record in a light most favorable to Marcus, the circuit court properly found that no genuine issue of material fact existed and that the University, et al., were entitled to a judgment as a matter of law.

Marcus also briefly argues that the circuit court improperly reformed the LTD contract by interpreting it to find that the University's methods of recoupment were not limited to future benefit reduction. Stated differently, he contends that the court erroneously went beyond the contractual terms when it concluded that the University could also seek a lump sum repayment from Marcus.

We have no basis for finding error in the circuit court's conclusion that the reduction in future benefits was not the exclusive remedy. When interpreting contracts in general, and insurance contracts in particular, the circuit court must give to the contract language its plain and ordinary meaning. *Nationwide Mutual Insurance Company v. Nolan,* 10 S.W.3d 129 (Ky. 1999). The language at issue states that the University shall

have the right to implement a particular means of recoupment. It does not state that this remedy is exclusive, and the circuit court properly so found.

Marcus next argues that the circuit court erred in failing to allow him to prosecute a due process claim under 42 U.S.C. 1983 arising from the University's purported attempt to take his property without a hearing. He contends that the University's October 1, 2003, letter to him demanding recoupment constitutes such an attempt and is a form of blackmail entitling him to damages and attorney fees, and that the circuit court erred in failing to so rule.

We find no error. 42 U.S.C. 1983 states that,

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

We agree with the circuit court and the University that Marcus's claim for relief is not supported by the facts and the law. Since we have determined that the University was entitled to recoup the overpayment, Marcus has no property interest in the funds. Equally as important, the University never engaged in conduct depriving Marcus of any right, privilege or immunity secured by the Constitution or the law. That is to say, the University's demand for repayment, taken alone, cannot reasonably be construed as a deprivation of rights. Marcus's claim would be sustainable, if at all, only if the University had actually deprived him of money,

benefits, tenure or the like, without the benefit of procedural due process. Marcus received the due process to which he was entitled by the adjudication of his civil proceeding in Franklin Circuit Court, and the instant appeal arising therefrom.

Similarly, we are not persuaded that Marcus is a "prevailing party" for purposes of entitlement to attorney fees. The November 2003 agreed order on which he relies in support of this argument merely maintained the status quo, and did not result in a material alternation of the legal relationship between the parties sufficient to characterize Marcus as a prevailing party.

The University cross-appeals, arguing that it is entitled to prejudgment interest. Citing *Nucor Corporation v. GE*, 812 S.W.2d 136 (Ky. 1991), it argues that if the breach consists of a failure to pay a definite sum or ascertainable monetary value, interest is due as a matter of course. We are not persuaded by this argument. The funds at issue were held in an interest-bearing escrow account for most of the time period in question, and the interest accrued therefrom was divided between Marcus and the University on a pro rata basis with the University properly receiving the lion's share. While there was a period preceding this time frame during which the funds were not in escrow and therefore not earning interest, we are compelled to recognize the circuit court's discretion on this issue, and have no basis for tampering with its conclusion that "[t]he equities do not warrant an award of prejudgment interest for the University." "The determination as to whether or not to award prejudgment interest is based upon the foundation of equity and justice. It is a determination to be made by the trial court and to

be disturbed by an appellate court only upon a showing of abuse of discretion." *Fields v. Fields,* 58 S.W.3d 464 (Ky.2001), quoting *Church and Mullins Corporation v. Bethlehem Minerals Company*, 887 S.W.2d 321 (Ky. 1992). No abuse of discretion has been shown, and accordingly we find no error.

For the foregoing reasons, we affirm the order and judgment of the Franklin Circuit Court.

ALL CONCUR.

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