

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-001351-MR

APPLIED SEALING TECHNOLOGY, INC.

APPELLANT

v. APPEAL FROM BOONE CIRCUIT COURT
HONORABLE ANTHONY FROHLICH, JUDGE
ACTION NO. 05-CI-02014

B&R RUBBER AND SUPPLY COMPANY,
INC.

APPELLEE

OPINION AFFIRMING

** ** * ** * ** *

BEFORE: HOWARD AND WINE, JUDGES; GUIDUGLI,¹ SENIOR JUDGE.

GUIDUGLI, SENIOR JUDGE: Applied Sealing Technology (“Applied”) appeals the Boone Circuit Court judgment awarding \$128,392.00 to B&R Rubber and Sealing Company (“B&R”) in a breach of contract claim. We affirm.

This is a breach of contract case, originating when B&R alleged Applied had failed to pay for product orders that had been delivered and received. Applied is a

¹ Senior Judge Daniel T. Guidugli 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.

Kentucky corporation, engaged in the business of manufacturing and distributing industrial rubber and plastic supplies, with its principal place of business located in Walton, Kentucky. B&R is a Kentucky Corporation, specializing in the wholesale distribution of industrial rubber and plastics, based in Louisville. The two parties have a history of dealings between the years of 1994 and 2005.

Sometime around August 21, 2001, B&R provided Applied with the first of a number of orders which form the basis of the debt in question. The orders continued until approximately December 15, 2001. In the meantime, on October 4, 2001, as a result of their previous business relationship and in an effort to strengthen their position in their industry, Applied and some of the individual owners of B&R created an enterprise known as BRAST Industrial Solutions, LLC (“BRAST”). In anticipation of this joint venture, scheduled to commence on January 1, 2002, the parties began pooling their resources. During and after the creation of the joint venture the two original companies, Applied and B&R, continued to maintain their individual status as separate corporate entities. According to the testimony and pleadings, the debt pertaining to the deliveries made between October and December of 2001 remained unpaid and on the books of both companies.

BRAST continued to do business until 2005, when the business relationship between the parties began to break down. As a result, on August 5, 2005, Applied withdrew itself from the BRAST venture. B&R then sought payment for the August

2001 through December 2001 deliveries and subsequently brought suit to recover those sums. The matter was set for trial on April 20, 2006 before the Master Commissioner.

Prior to the trial date, and after deposing several people and discovering the creation of a new business, AST Sales, LLC (“AST”), B&R filed a motion to amend its original petition to add AST and AST's original owners as defendants under an alter-ego theory of corporate fraud. B&R also filed a motion to bifurcate the fraud issue from the previously alleged issue of breach of contract. The Trial Court sustained both motions and clarified that only the breach of contract issue would be heard by the Master Commissioner on the April 20 trial date.

After the conclusion of the trial, the Master Commissioner issued a Report containing findings of fact, conclusions of law, and a recommended judgment. The report was in B&R's favor, awarding it damages in the amount of \$128,392.00. On June 6, 2006, the Circuit Court adopted and incorporated the report in an Order and Judgment awarding B&R the full recommended amount. Applied filed a motion to alter, amend or vacate the judgment of June 6, 2006. That motion was overruled and this appeal followed.

Before us, Applied raises three arguments: 1) the Circuit Court committed reversible error when it bifurcated the contract issue from the fraud allegation; 2) the Circuit Court committed reversible error by applying the incorrect statute of limitations; and 3) the awarded damages are excessive and contrary to the evidence submitted.

“The trial court is vested with a broad discretion in granting or refusing a new trial, and this Court will not interfere unless it appears that there has been an abuse of discretion.” *Whelan v. Memory-Swift Homes*, 315 S.W.2d 593, 594 (Ky. 1958).

As support for its argument that the Circuit Court bifurcation was reversible error, Applied contends that it denied the newly added defendants (AST and its owners) from participating in discovery and having an opportunity to defend themselves. Applied also argues all defendants, new and original, were prejudiced by the addition of the new parties. We do not believe the Circuit Court abused its discretion when allowing the addition of the new defendants and the bifurcation of the trial. In fact, it appears that the Circuit Court bifurcated the trial specifically to protect the parties. Appellant has failed to establish how the new defendants were negatively affected by the finding that there was a breach of contract between Applied and B&R. The only way in which the judgment may affect them is after the finding of additional facts in the second part of the trial. There is no reason to believe that the Circuit Court will not provide the new defendants with ample time to prepare for this second trial. Therefore, we affirm.

The issue of limitation centers around two sections of KRS, the four year statute KRS 355.2-725(1) and the five year statute KRS 413.120(10). The relevant language of KRS 355.2-725(1) is “An action for breach of any contract for sale must be commenced within four (4) years after the cause of action has accrued.” KRS 413.120(10) allows five years for “an action upon merchant's account for goods sold and delivered, or any article charged in such store account.” The Master Commissioner's

reasons for applying the 5 year statute were that it was more recent, more specific, and provides the longer period of time. We agree.

Our rules of statutory construction are that a special statute preempts a general statute, that a later statute is given effect over an earlier statute, and that because statutes of limitation are in derogation of a presumptively valid claim, a longer period of limitations should prevail where two statutes are arguably applicable.

Troxell v. Trammell, 730 S.W.2d 525,528 (Ky. 1987). Again, we see no abuse of discretion present on this issue and affirm.

Applied next brings forth the issue of damages. CR 59.01(D) states:

A new trial may be granted to all or any of the parties and on all or part of the issues for any of the following causes: . . . Excessive or inadequate damages, appearing to have been given under the influence of passion or prejudice or in disregard of the evidence or the instructions of the court.

Applied's officers admitted, in deposition, that money was owed to B&R. Although the exact amount was never confirmed, it was agreed that it was in excess of \$100,000.00. In his report, the Master Commissioner outlines clearly the manner in which he arrived at the \$128,392.00 figure. In light of the evidence submitted, the award does not appear to be excessive. Applied contends that a portion of the debt was paid to BRAST and BRAST failed to pay it on to B&R. If that is true, it was Applied's duty to join BRAST in the action or, in the alternative, pursue a separate action against BRAST.

As part of its brief, Applied refers to the Master Commissioner's Report that Applied was in an unfortunate situation. The role of the court often requires a disregard of personal feelings and the rendering of unsavory decisions. Failure to

exercise better business practice, as unfortunate as it is, does not relieve Applied of their legal obligations.

For the foregoing reasons, the judgment of the Boone Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Patrick J. Monohan
Florence, Kentucky

Edward S. Monohan
Florence, Kentucky

BRIEF AND ORAL ARGUMENT FOR APPELLEE:

C. Richard Colvin
Brian F. Eviston
Ft. Wright, Kentucky

ORAL ARGUMENT FOR APPELLANT:

Edward S. Monohan
Florence, Kentucky