

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-002293-MR

KEVIN SCOTT GENTRY

APPELLANT

v.

APPEAL FROM METCALFE CIRCUIT COURT
HONORABLE PHIL PATTON, JUDGE
ACTION NO. 05-CI-00197

KEVIN COFFEY, EXECUTOR
OF THE ESTATE OF
RAYMOND LEE COFFEY

APPELLEE

OPINION
VACATING AND REMANDING

** ** * ** * ** *

BEFORE: KELLER AND TAYLOR, JUDGES; HENRY,¹ SENIOR JUDGE.

TAYLOR, JUDGE: Kevin Scott Gentry brings this appeal from a September 11, 2006, summary judgment of the Metcalfe Circuit Court in favor of Raymond Lee Coffey upon

¹ Senior Judge Michael L. Henry 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.

the claim of breach of fiduciary duty and for an accounting of business assets.² We vacate and remand.

In October 2005, Gentry and Coffey formed Cumberland Parkway Auto Sales, LLC, for the purpose of operating a used car lot. Pursuant to the LLC's operating agreement, the LLC was to be member managed. The agreement further provided that Gentry would take a more active role in the daily operations, and Coffey would be entitled to vote on matters concerning the business.

Approximately two months after forming the LLC, on December 5, 2005, Coffey filed a complaint against Gentry in the Metcalfe Circuit Court. Therein, Coffey alleged that Gentry breached a fiduciary duty owed to Coffey by converting assets of the LLC to Gentry's personal use and by utilizing Coffey's name in credit transactions unrelated to the LLC. Gentry sought an accounting and a judicial dissolution of the LLC. Kentucky Revised Statutes (KRS) 275.290.

Following a hearing, the court determined that Coffey was entitled to an accounting and essentially rendered an order to account. Therein, the circuit court directed Gentry to “provide a full and complete accounting” to Coffey. Gentry responded and filed an accounting. Coffey subsequently filed a motion for summary judgment. On September 11, 2006, the circuit court granted Coffey's motion for summary judgment. The court concluded that Gentry breached a fiduciary duty owed Coffey and

² Raymond Lee Coffey passed away after the notice of appeal was filed. This Court subsequently granted a motion to substitute Kevin Coffey, Executor of the Estate of Raymond Lee Coffey. Ky. R. Civ. P. 76.24. In this opinion, we shall refer to Kevin Coffey, executor of the Estate of Raymond Lee Coffey, as simply “Coffey.”

that Gentry's accounting was insufficient. The court entered summary judgment in favor of Coffey in the amount of \$46,209.61, plus interest. This appeal follows.

Gentry contends the circuit court erroneously granted summary judgment in favor of Coffey. Summary judgment is proper where there exists no material issues of fact and movant is entitled to judgment as a matter of law. *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476 (Ky. 1991). For the reasons hereinafter stated, we hold that the circuit court may not grant summary judgment after ordering an accounting but, rather, must render a final judgment pursuant to CR 52.01.

An accounting is an equitable remedy and is generally tried by the court without a jury. *Conley v. Hall*, 395 S.W.2d 575 (Ky. 1965) and 1A C.J.S. *Accounting* § 45 (2005). It is defined as an “adjustment of the accounts of the parties and a *rendering of a judgment for the balance ascertained to be due.*” *Privett v. Clendenin*, 52 S.W.3d 530, 531 (Ky. 2001)(quoting 1 Am. Jur. 2d, *Accounts and Accounting* § 52 (1994)). The underlying theory is unjust enrichment – an accounting primarily prevents unjust enrichment by mandating the return of any benefit received as a result of a breach of fiduciary duty. 1A C.J.S. *Accounting* § 6 (2005). To maintain an accounting, the claimant must have a contractual or fiduciary relationship with defendant against whom the accounting is directed and an interest in the monies or property subject to the accounting. 1A C.J.S. *Accounting* § 32 (2005). An action for accounting is generally a two-step process: First, the court determines whether the claimant has a right to an accounting; and second, the court orders and conducts an accounting and; thereafter

renders final judgment pursuant to Ky. R. Civ. P. (CR) 52.01. 1A C.J.S. *Accounting* § 45 (2005).

In this case, the record reveals that Coffey requested an accounting in the complaint and that the circuit court essentially rendered an order to account against Gentry. In response, Gentry filed a response and his accounting. Finding Gentry's accounting inadequate, the circuit court then rendered summary judgment in favor of Coffey in the amount of \$46,209.61, plus interest.

The circuit court erred by entering summary judgment at this stage in the accounting. After rendering an order to account, the court must then conduct the accounting and render final judgment. When conducting the accounting, the court may try the matter by depositions or consider the testimony of witnesses. CR 43.04. As an accounting is tried by the court without a jury, the final judgment must separately set forth findings of fact and conclusions of law as required by CR 52.01. Upon remand, the circuit court shall reconsider the evidence and render final judgment in conformity with CR 52.01. In particular, the final judgment upon the accounting must set forth separate findings of fact and conclusions of law.

Considering our remand of this appeal, we view Gentry's remaining arguments to be moot.

For the foregoing reasons, the summary judgment of the Metcalfe Circuit Court is vacated and and this cause is remanded for proceedings not inconsistent with the opinion.

ALL CONCUR.

BRIEF FOR APPELLANT:

Danny Butler
Greensburg, Kentucky

BRIEF FOR APPELLEE:

Patrick A. Ross
Horse Cave, Kentucky