

RENDERED: MAY 16, 2008; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2006-CA-001673-MR

HAROLD BROOKS LEASURE, JR.

APPELLANT

v. APPEAL FROM CHRISTIAN CIRCUIT COURT
HONORABLE EDWIN M. WHITE, JUDGE
ACTION NO. 99-CI-00812

COLEMAN AMERICAN COMPANIES, INC.

APPELLEE

OPINION AND ORDER
AFFIRMING

** ** * * *

BEFORE: CLAYTON AND DIXON, JUDGES: GRAVES,¹ SENIOR JUDGE.

GRAVES, SENIOR JUDGE: This is an appeal from a jury verdict in a case involving claims of breach of contract and fraud.

Appellant, Harold Brooks Leasure, Jr., raises numerous allegations of error. We affirm.

Leasure and appellee, Coleman American Companies, Inc., entered into a purchase and sale agreement. The agreement

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

concerned the purchase by Coleman of five moving and storage companies owned by Leasure. The purchase price was calculated by multiplying the combined net equity of the companies by a factor of 1.4 and then adding additional sums for the value of other assets acquired by Coleman. The net equity of Leasure's companies was determined by the value of the assets and the amount of the liabilities of the companies being sold. The total purchase price amounted to \$849,500.00. Coleman made a down payment of \$63,000.00 and the remaining balance was to be paid over a nine-year period pursuant to two promissory notes signed by Coleman.

Shortly after the agreement was signed, a dispute arose among the parties regarding certain disclosures made by Leasure. Coleman filed suit in Christian Circuit Court alleging claims of breach of contract and fraud. The trial court granted partial summary judgment in favor of Coleman. This Court affirmed in part, reversed in part, and remanded the case for further proceedings. *Leasure v. Coleman American Companies, Inc.*, 2001-CA-002274-MR (Ky.App. rendered October 15, 2004). The case was then tried before a jury. The jury found in favor of Coleman on five of the seven contract claims and four of the eight fraud claims. This appeal followed.

At the outset, we will address Coleman's motion to dismiss a portion of Leasure's appeal relating to an "interim" award of attorney fees after the partial summary judgment in 2001 and an award granted in 2006 after the final judgment.

"No rule is more firmly established in this jurisdiction than the one that the opinion on the first appeal becomes the law of the case not only as to the errors there relied upon for reversal but also as to errors appearing in the first record that might have been but were not there relied upon for a reversal." *Commonwealth v. Schaefer*, 639 S.W.2d 776, 777-8 (Ky. 1982) (quoting *Aetna Oil Co. v. Metcalf*, 300 Ky. 817, 190 S.W.2d 562, 563 (1945)). This issue existed at the time of the first appeal in this case and Leasure chose not to pursue it.

Next, Coleman asserts that the portion of Leasure's appeal dealing with the 2006 award of attorney fees should be dismissed for the failure to name an indispensable party. The requirement that an attorney who is awarded fees to be paid by an opposing party be named in appellate proceedings is well established in Kentucky law. *Franklin Fiscal Court v. Stewart*, 757 S.W.2d 194, 196 (Ky.App. 1988). The trial court's order specifically named the attorneys in connection with the fee awards. It is clear that the awards were made for their benefit and that the attorneys were the real party in interest regarding the awards. We grant Coleman's motion to dismiss the portion of Leasure's appeal dealing with attorney fees.

Leasure first argues that the jury's verdicts on the fraud claims are not supported by the evidence. The Supreme Court of Kentucky stated the pertinent standard of review as follows:

When reviewing a jury verdict, the appellate court is restricted to determining whether the trial judge erred in failing to grant a motion for directed verdict. The reviewing court must consider all evidence favoring the prevailing party as true and is not at liberty to determine the credibility or weight which should be given to the evidence. The reviewing court must draw all reasonable inferences in favor of the claimant, refrain from questioning the credibility of the claimant, and from assessing the weight which should be given to any particular item of evidence. The reviewing court may reverse the verdict of the jury only when it is so flagrantly against the weight of the evidence as to indicate passion or prejudice.

Denzik v. Denzik, 197 S.W.3d 108, 110 (Ky. 2006) (internal citations omitted). Six elements must be proven by clear and convincing evidence in order to prevail upon a claim of fraud: "(1) that the declarant made a material misrepresentation to the plaintiff, (2) that this misrepresentation was false, (3) that the declarant knew it was false or made it recklessly, (4) that the declarant induced the plaintiff to act upon the misrepresentation, (5) that the plaintiff relied upon the misrepresentation, and (6) that the misrepresentation caused injury to the plaintiff." *Radioshack Corp. v. ComSmart, Inc.*, 222 S.W.3d 256, 262 (Ky.App. 2007).

The jury found that Leasure committed four instances of fraud relating to: (1) the availability of money in the Vanliner escrow account, (2) the non-existent accounts receivable, (3) unpaid insurance premiums, and (4) the failure to disclose a loan owed to First United Bank. Leasure argues

that no evidence was presented to establish that he knowingly or recklessly made false statements on each of these matters.

Proof of fraud "may be developed by the character of the testimony, the coherency of the entire case as well as the documents, circumstances and facts presented." *United Parcel Service Company v. Rickert*, 996 S.W.2d 464, 468 (Ky. 1999). Additionally, fraud may be proven by evidence that is "wholly circumstantial." *Id.* The evidence in this case demonstrated that Leasure failed to disclose that two of his companies had guaranteed a \$1,000,000.00 personal loan to himself. Leasure was thoroughly involved in the day to day operations of his companies and had a thorough knowledge of the accounts receivable documentation. Leasure admitted that he misstated the accounts receivable by at least \$215,000.00. Leasure used his daughter to prepare the accounts receivable list rather than the employee who regularly handled these accounts. An independent financial advisor informed Leasure prior to the closing that there were problems with the accounts receivable. The Vanliner policy had been cancelled and Leasure had failed to pay the premiums on other policies, yet failed to disclose these facts. Leasure failed to disclose other outstanding loans. There was also direct testimony that the accounts receivable never existed. We find that there was ample evidence to support the jury's verdicts on the fraud claims.

Leasure next argues that the trial court erred by granting a directed verdict in favor of Coleman on the amount of

damages relating to prepaid accounts receivable. The trial court directed the verdict in the amount of \$195,474.07 at the conclusion of Coleman's case before Leasure had the opportunity to present his own evidence.

The trial court did not err by directing a verdict in Coleman's favor on the amount of damages because the amount owed by Leasure on the prepaid accounts receivable claim was the subject of a judicial admission. The Supreme Court of Kentucky defined a judicial admission as:

a formal act of a party (committed during the course of a judicial proceeding) that has the effect of removing a fact or issue from the field of dispute; it is conclusive against the party and may be the underlying basis for a summary judgment, directed verdict, or judgment notwithstanding the verdict.

Berrier v. Bizer, 57 S.W.3d 271, 279 (Ky. 2001) (quoting Lawson, *The Kentucky Evidence Law Handbook* §8.15, at 385 (3d ed. Michie 1993)).

During the course of the state court proceedings, Leasure filed suit against Coleman and ten other business entities in the United States District Court for the Western District of Kentucky alleging violations of the Racketeering Influenced and Corrupt Organizations Act (RICO). In its opinion granting summary judgment in favor of Coleman and the other defendants, the federal court found that Leasure's counsel directly acknowledged that the \$195,474.07 figure was the amount of which the accounts receivable were misstated. The federal

court concluded that the acknowledgement was a judicial admission. *Leasure v. AA Advantage Forwarders*, No. 5:03-CV-181-R, (W.D.Ky. March 23, 2007). Also, during the course of the state court jury trial, Leasure's counsel conceded that Coleman was entitled to damages in the amount of \$195,474.04 for the accounts receivable. We conclude that the entry of a directed verdict on the issue of damages for the accounts receivable was neither premature nor erroneous.

Leasure raises several allegations of error relating to interest and costs associated with the judgment. He asserts that the trial court erred in its computation of the damages in this case and by entering an affirmative judgment in favor of Coleman. The trial court held a two-week long jury trial in this case. The jury made its findings. Subsequent to the verdict, the trial court held two additional hearings on the amount of damages owed by Leasure under the judgment. We have reviewed these hearings and conclude that the trial court's findings were supported by substantial evidence and will not be reversed. CR 52.01.

Leasure next argues that the trial court erred by awarding Coleman compound prejudgment interest. The rule in Kentucky is that a trial court may award prejudgment interest as a matter of right on claims for liquidated damages while an award of prejudgment interest on unliquidated claims is a matter within the discretion of the court as justice requires. 3D *Enterprises Contracting Corp. v. Louisville and Jefferson County*

Metropolitan Sewer Dist., 174 S.W.3d 440, 450 (Ky. 2005). Liquidated claims are amounts "[m]ade certain or fixed by agreement of parties or by operation of law." *Nucor Corp. v. General Elec. Co.*, 812 S.W.2d 136, 141 (Ky. 1991) (quoting *Black's Law Dictionary* 930 (6th ed.1990)). Prejudgment interest has traditionally been simple interest, however, compound interest may be awarded to accomplish justice in accordance with the principles of equity and the circumstances of each particular case. *Reliable Mechanical, Inc. v. Naylor Indus. Services, Inc.*, 125 S.W.3d 856, 857 (Ky.App. 2003).

We cannot conclude that the trial court abused its discretion by awarding compound prejudgment interest in this case. The jury found that Leasure materially breached the contract by misstating the values of five assets. He also committed four separate instances of fraud. Given the nature and size of Leasure's misrepresentations as well as the significant lapse of time between the contract and the conclusion of litigation, the trial court did not abuse its discretion.

Leasure next argues that the trial court erred by awarding post-judgment interest on the initial partial summary judgment in this case. This issue existed at the time of the first appeal. Leasure is precluded from presenting it now.

Leasure next argues that the trial court's award of costs and expert witness fees were in error. Contrary to

Leasure's argument, the issue of costs and witness fees was provided for in the contract. Paragraph 19 states:

In the event a dispute occurs among the parties concerning this Agreement or any part thereof, the prevailing party in any litigation regarding same shall be entitled to its legal fees, court costs and any witness, deposition or other costs.

There was no error in the award of costs and expert witness fees.

Finally, Leasure argues that he was entitled to his appellate attorney fees from the prior appeal. The prior appeal was affirmed in part and reversed in part. The trial court found that Leasure was not the prevailing party on appeal. Clearly, Leasure was not ultimately the prevailing party in the case. Leasure has not demonstrated any abuse of discretion. Our review of the record indicates that Leasure's argument has no merit.

Accordingly, we affirm the judgment of the Christian Circuit Court and GRANT Coleman's motion to dismiss Leasure's appeal in part.

ALL CONCUR.

ENTERED: May 16, 2008

/s/ John W. Graves
SENIOR JUDGE, COURT OF APPEALS

BRIEF FOR APPELLANT:

Gregory P. Goonan, pro hac
vice
The Affinity Law Group
San Diego, CA

Richard C. Roberts
Whitlow, Roberts, Houston
& Straub
Paducah, Kentucky

BRIEF FOR APPELLEE:

Mark R. Overstreet
Stites & Harbison, PLLC
Frankfort, Kentucky

James R. Wyrsh, pro hac vice
Justin J. Johnson, pro hac
vice

Wyrsh, Hobbs & Mirakian, P.C.
Kansas City, Missouri

James E. Bruce, Jr.
Hopkinsville, Kentucky