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NOT TO BE PUBLISHED

# Commonwealth of Kentucky

# Court of Appeals

NO. 2007-CA-001423-MR

JAMES D. HAMILTON APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE JO ANN WISE, JUDGE
ACTION NO. 00-CI-03518

ELIZABETH S. HAMILTON (NOW SEEGER) APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CAPERTON AND STUMBO, JUDGES; BUCKINGHAM,[1] SENIOR JUDGE:

STUMBO, JUDGE: This appeal involves post-decree issues arising from a dissolution of marriage action between James D. Hamilton (Appellant) and Elizabeth S. Hamilton (Appellee). The matters involve a division of money that

[1] Senior Judge David W. Buckingham sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

was left after a business that was marital property was sold and the obligations of said business were satisfied. Specifically, Appellant appeals an Opinion and Order entered June 4, 2007, and a denial of a motion to alter, amend, and vacate, and for additional findings of fact entered July 5, 2007. The Opinion and Order awarded Appellee 16.73% of $765,000, less $65,937.08, which she had already received. Appellant argues that the $65,937.08 was all that Appellee was entitled to. This case concerns the meaning of a settlement agreement the parties executed upon the divorce. We find that the trial court properly interpreted the agreement and that Appellee is entitled to the full 16.73% of $765,000.

In September, 2000, the parties sought a divorce. On September 25, 2000, the parties entered into a separation agreement titled "Agreement as to Property Rights, Custody and Support." This agreement was incorporated into the Decree of Dissolution of Marriage entered on January 31, 2001. At issue is the interpretation of paragraph 16 of the agreement which states, in relevant part:

> 16. Business Proceeds. The said Post-Nuptial agreement allocates interests held by the parties in Mas-Hamilton, Inc., a Kentucky corporation (hereinafter: corporation). Said corporation has been sold and disposition has and will be made of the proceeds in the following manner:
>
> a. The Wife has received the sum of One Million Four Hundred Thousand Dollars ($1,400,000), representing 33.64% of the after-tax proceeds received to date by the parties.
> b. Approximately Seven Hundred Fifty Thousand Dollars ($750,000) in additional proceeds has been withheld and is subject to a letter of credit for the benefit of the U.S. Department of Justice with respect to certain patent proceedings now underway. Any amounts

> remaining through said letter of credit after conclusion of said proceedings and after payment of any applicable taxes will be divided 83.27% to the Husband and 16.73% to the Wife.

Later, the "approximately" $750,000 amount was determined to be $765,000. Ultimately, the amount of assets required to secure a $750,000 letter of credit to the Department of Justice was $382,500 in the form of a certificate of deposit ("CD"). Nothing came of the patent proceedings and the $750,000 letter of credit was released.

Following the release of the letter of credit and CD, correspondence between the parties' counsel revealed that Appellant was willing to give Appellee 16.73% of the CD (which had increased in value to approximately $423,000). On October 4, 2004, Appellee filed a Verified Motion to Compel Payment in which she sought payment of 16.73% of the full $750,000.

On November 16, 2004, the trial court ordered Appellant to pay Appellee "the amounts owed to her on an uncontradicted basis respecting paragraph 16(b) of the Agreement between the parties . . . ." Appellant then tendered Appellee a check for $65,937.08.

Then, on August 4, 2006, Appellee filed a motion to reopen the decree of dissolution in order to determine the correct amounts owed to her or, in the alternative, compel Appellant to pay her 16.73% of approximately $750,000. Both parties filed memoranda supporting their respective positions and an opinion and order was entered June 4, 2007.

In this opinion and order, the court held that the agreement was unambiguous. The agreement stated that approximately $750,000 had been withheld from the proceeds of the sale of the business. The trial court held that the Appellee relied on this representation when she agreed to take 16.73% of the remaining proceeds. The court concluded that Appellee was entitled to 16.73% of the actual amount of $765,000, less the $65,937.08 she had already received. It also awarded her attorney fees and costs based on a provision of the settlement agreement stating that in the event of a breach or default of duties set forth in the agreement, the defaulting party shall pay the other party's attorney fees and costs relating to the default.

On June 14, 2007, Appellant filed a motion to alter, amend, vacate and for additional findings. Appellant requested the court rule upon Appellee's CR 60.02 motion and vacate the portion of the opinion awarding Appellee fees and costs. This was promptly followed by Appellee's withdrawal of the CR 60.02 motion. The court then overruled Appellant's motion to alter, amend, or vacate.

Appellant's first argument is that the trial court erred in ruling that the $750,000 subject to the letter of credit was an asset when only a $382,500 CD was used to secure it. Appellant contends that the only amount that should have been distributed to Appellee was 16.73% of the CD value. He wants us to focus on the part of the settlement agreement dealing with the "amounts remaining." He argues that the value of the CD was the only amount remaining after the patent proceedings ended because the full $750,000 was a liability and not an asset or

proceed. As the trial court stated, the agreement represented that approximately $750,000 had been withheld from the business sale proceeds. Appellee relied on this figure. We agree with the trial court that Appellant is bound by the greater figure.

Settlement agreements are contracts governed by contract law. *Frear v. P.T.A. Industries, Inc.*, 103 S.W.3d 99, 105 (Ky. 2003). Absent ambiguity, a contract will be enforced according to its terms, with said terms being given their ordinary meaning. *Id.*

> If an ambiguity exists, "the court will gather, if possible, the intention of the parties from the contract as a whole, and in doing so will consider the subject matter of the contract, the situation of the parties and the conditions under which the contract was written," by evaluating extrinsic evidence as to the parties' intentions. (Citations omitted).

*Id.* at 106.

The settlement agreement is unambiguous and clearly states that approximately $750,000 in additional proceeds had been withheld. Nowhere in the agreement is the $382,500 figure mentioned. The fact that only the $382,500 CD was needed to secure the letter of credit is irrelevant when considering the terms of the contract. Appellee relied on this language in the contract and to deny her the full amount, as the trial court found, would deprive her of the benefit of her bargain. Once the underlying patent dispute ended, with Appellant owing nothing, the full $750,000 amount remained, free from encumbrance and ready to be distributed. As such, Appellee is entitled to receive 16.73% of the full amount,

minus what she has already received. Therefore, we affirm that portion of the June 4, 2007, order of the trial court.

Appellant's second argument is that the trial court erred in granting attorney fees and costs to Appellee. He argues that the dispute regarding the $750,000 was based upon a good faith argument and was not a breach of the agreement.

As mentioned above, the settlement agreement contained a clause that required any breaching party to pay the other's attorney fees and costs. The trial court found that Appellant breached the agreement by not giving Appellee 16.73% of $750,000. It therefore awarded Appellee attorney fees and costs. It is within the discretion of the trial court to determine that this was a breach of the terms of the agreement, and we can not find that the court abused its discretion. We find, as did the trial court did, that Appellee was due more money than she was given. The agreement clearly stated she was to get 16.73% of $750,000, but Appellant refused. This was a breach of the agreement. Accordingly, we affirm the award of attorney fees and costs.

Appellant's final argument is that the trial court erred in failing to dismiss Appellee's CR 60.02 motion rather than permitting it to be voluntarily withdrawn over his objection. Appellant claims that Kentucky law does not permit the withdrawal of a CR 60.02 motion over the objection of the opposing party. He cites *Littlefield v. Commonwealth*, 554 S.W.2d 872, 873 (Ky. App. 1977), in support of this position.

In *Littlefield*, Paul Littlefield entered a guilty plea and was sentenced to twelve months in prison, which was probated for three years. Later, he filed a CR 60.02 motion to set aside the judgment arguing that his plea had been coerced and was involuntary. The trial court set a date for a hearing on the motion.

Littlefield failed to appear at the hearing. His counsel, however, did appear and tried to convert his failure to appear into a voluntary dismissal without prejudice pursuant to CR 41.01(1). The Commonwealth was ready to proceed and objected to the dismissal without prejudice. The trial court postponed its decision, giving Littlefield time to provide to the court the reason for his nonappearance. Littlefield filed affidavits as required by the court, but the trial court found them insufficient.

The trial court later denied Littlefield's motion to set aside judgment and ruled that a CR 41.01(1) dismissal without prejudice would not be appropriate. The court stated "when a motion under CR 60.02 is filed and comes on for a hearing, it cannot be withdrawn by the movant over the objection of the opposing party, but must either be sustained or overruled. . . ." *Littlefield* at 873.

*Littlefield* is distinguishable from the case at hand. In that case, the trial judge ruled that a CR 60.02 motion could not be withdrawn after it is "filed and comes on for a hearing." *Id.* (Emphasis added). Here, Appellee's CR 60.02 motion never came for a hearing. The only motion heard by the trial court was the motion to compel. This was specifically noted multiple times by the court. The

trial court made it clear in orders setting pretrial conferences and requesting memoranda that it was hearing only the motion to compel.

Interestingly, we could find little Kentucky case law that describes the circumstances under which motions in general can be withdrawn over objection. We did find valuable information from secondary sources. For example, 56 Am.Jur.2d Motions, Rules, and Orders §32 states "a party who makes a motion during the course of a trial generally may withdraw it at any time before the court makes an order. . . ." Also, 60 C.J.S. Motions and Orders §41 states "[a] motion may be withdrawn at any time before its submission, or afterwards by consent of the parties and permission of the court. . . A motion may not be withdrawn after submission without the consent of the court, which ordinarily will not be given over objection of the opposing party." "A motion has been 'submitted' to the Court when the movant makes his oral argument or absent an oral argument when he presents his papers to the Clerk after the call of the case on the return day." *Wallace v. Ford*, 44 Misc.2d 313, 314, 253 N.Y.S.2d 608, 610 (Sup.1964). Additionally, in the case of *D'Addario v. McNab*, 73 Misc.2d 59, 342 N.Y.S.2d 342 (Sup. 1973), the court held that a motion could not be withdrawn once the hearing for the motion was called.

From the above sources, we can glean that a motion may be withdrawn by the movant anytime prior to a hearing. This comports with the holding in *Littlefield* wherein counsel attempted to withdraw the motion during the hearing. Since no hearing was held on Appellee's CR 60.02 motion, she was

within her right to withdraw it over the objection of Appellant. Accordingly, we affirm.

For the above reasons, we affirm the trial court's orders in full.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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J. Robert Lyons, Jr.
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ORAL ARGUMENT FOR APPELLANT:

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