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Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-002023-MR

SAM SMITH — APPELLANT

v.

APPEAL FROM OLDHAM CIRCUIT COURT
HONORABLE KAREN A. CONRAD, JUDGE
ACTION NO. 07-CI-00401

PHOENIX INVESTMENTS, LLC
d/b/a PROSPECT SELF STORAGE — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, DIXON, AND WINE, JUDGES.

DIXON, JUDGE: Sam Smith appeals from an order of the Oldham Circuit Court dismissing his complaint against Phoenix Investments, LLC ("Phoenix"), pursuant to Kentucky Rules of Civil Procedure (CR) 12.02(f). We affirm.

On August 2, 2006, Smith signed a rental agreement to lease a storage unit owned by Phoenix. The agreement included the following paragraph:

> 3. INSURANCE. ALL PERSONAL PROPERTY IS STORED BY OCCUPANT AT OCCUPANT'S SOLE RISK. INSURANCE IS OCCUPANT'S SOLE RESPONSIBILITY. Occupant agrees to indemnify and hold harmless owner from any Loss incurred in any way arising out of Occupant's use of the Premises or the Property.

Smith thereafter stored his personal property in the unit, including oriental rugs, a piano, bookcases, and artwork. On February 17, 2007, Smith discovered that his property was severely damaged by water that had leaked into the unit from the roof. Smith filed a claim with his insurance company, which was denied.

On April 26, 2007, Smith filed a complaint against Phoenix raising several claims, including negligence and breach of contract. Phoenix did not file an answer; instead, it moved to dismiss the complaint because the exculpatory clause in the rental agreement barred Smith's claims. The court accepted written briefs from the parties and ultimately granted the motion to dismiss on August 27, 2007. Smith subsequently filed a motion to reconsider. On September 20, 2007, the court rendered a decision clarifying its prior order and denying Smith's motion to reconsider. This appeal followed.

Smith contends the court erred in dismissing his complaint because the exculpatory clause does not contemplate damages caused by Phoenix's own negligence. Smith alternatively argues that the exculpatory clause is void because it violates public policy.

Dismissal of a complaint for failure to state a claim is appropriate only when "it appears the pleading party would not be entitled to relief under any set of

facts which could be proved in support of his claim." *Pari-Mutuel Clerks' Union of Kentucky v. Kentucky Jockey Club*, 551 S.W.2d 801, 803 (Ky. 1977). Furthermore, "the circuit court is not required to make any factual determination; rather, the question is purely a matter of law." *James v. Wilson*, 95 S.W.3d 875, 884 (Ky. App. 2002).

First, Smith asserts that the exculpatory clause does not clearly exempt Phoenix from liability for its own negligence. Smith relies on two cases, *Hargis v. Baize*, 168 S.W.3d 36 (Ky. 2005) and *Cumberland Valley Contractors, Inc. v. Bell County Coal Corp.*, 238 S.W.3d 644 (Ky. 2007). In *Hargis*, the Court addressed the validity of a pre-injury release purporting to hold an employer harmless for the work-related death of an independent contractor. *Hargis*, 168 S.W.3d at 39-40. The Court noted,

> An exculpatory contract for exemption from future liability for negligence, whether ordinary or gross, is not invalid per se. However, such contracts are disfavored and are strictly construed against the parties relying upon them. The wording of the release must be 'so clear and understandable that an ordinarily prudent and knowledgeable party to it will know what he or she is contracting away; it must be unmistakable.'

Id. at 47 (internal citations omitted). The *Hargis* Court also stated that a pre-injury exculpatory release is valid where:

> (1) it explicitly expresses an intention to exonerate by using the word 'negligence;' or (2) it clearly and specifically indicates an intent to release a party from liability for a personal injury caused by that party's own conduct; or (3) protection against negligence is the only reasonable construction of the contract language; or (4)

> the hazard experienced was clearly within the contemplation of the provision.

Id. (citations omitted).

We also note that the Court's recent decision, *Cumberland Valley*, *supra*, quoted *Hargis* with approval. *Cumberland Valley Contractors, Inc.*, 238 S.W.3d at 649-50. In that case, the Court addressed an exculpatory clause in a contract between a coal mine operator and an independent contractor. *Id*. The Court concluded that the exculpatory provision exempted the mine operator from liability when the mine flooded and damaged the contractor's equipment. *Id*. The Court cited the fourth factor delineated in *Hargis* as a basis for upholding the provision. *Id*. at 650.

Despite Smith's argument to the contrary, we find that the exculpatory provision here is enforceable pursuant to *Hargis*. The inclusive phrasing, "AT OCCUPANT'S SOLE RISK" and "any Loss incurred in any way," falls under the third *Hargis* factor: that "protection against negligence is the only reasonable construction of the contract language." *Hargis*, 168 S.W.3d at 47. The broadly worded language in the agreement clearly manifests the intent of Phoenix to place all risk of loss on the occupant, Smith. Consequently, we conclude the exculpatory provision is enforceable and bars Smith's claim as a matter of law.

Smith alternatively argues that the exculpatory clause is unenforceable because it violates public policy. We disagree.

Our Supreme Court addressed this issue in *Cumberland Valley*, *supra*:

> Recognizing the importance of freedom to contract, the courts of this Commonwealth have traditionally enforced exculpatory provisions unless such enforcement violates public policy. And despite perceived inconsistencies in recent Kentucky case law, the basic principles regarding the enforceability of exculpatory clauses or contracts were set forth over a century ago in *Greenwich Insurance Co. v. Louisville & Nashville Railroad Co.*, [112 Ky. 598, 66 S.W. 411 (1902)]. In deciding to uphold the exculpatory clause at issue there, our predecessors noted that the parties were 'dealing at arm's length and upon an equal footing[,]' and that the contract was entered into voluntarily without either party being compelled to enter into the contract on the basis of necessity. Therefore, the railroad could validly contract away liability for its own negligence 'however gross, short of wantonness or willfulness' toward the brewing company, which leased land located in the railroad's right-of-way and built a cold storage house on the right-of-way.

Cumberland Valley Contractors, Inc., 238 S.W.3d at 650 (internal footnotes omitted). The Court went on to determine that the exculpatory clause was enforceable "as part of an arm's-length transaction between sophisticated parties with equal bargaining power." *Id*.

Smith contends that Phoenix was a more sophisticated party in a superior bargaining position when he signed the agreement. Smith also argues that, as a customer, he was not in a position to inspect the roof of the storage unit or anticipate that Phoenix would fail to maintain the roof.

We are not persuaded by Smith's argument. The terms of the agreement clearly placed all risk of loss on Smith. There is no allegation that Smith was forced to agree to Phoenix's terms out of necessity. In our view, Smith

was free to decline Phoenix's rental agreement and take his business to a different self-storage facility if he was dissatisfied. Although Phoenix was in the business of renting storage units, Smith, as a customer, was on equal footing because he was free to walk away from the deal and patronize one of Phoenix's competitors. We conclude the exculpatory clause does not violate public policy.

For the reasons stated herein, the order of the Oldham Circuit Court is affirmed.

ALL CONCUR.

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