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Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-002442-MR

ROBERT LYNN

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE KATHLEEN VOOR MONTANO, JUDGE
ACTION NO. 06-CI-002464

DIGITAL LIFESTYLES, LLC

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: LAMBERT AND NICKELL, JUDGES; HENRY,¹ SENIOR JUDGE.

LAMBERT, JUDGE: Robert Lynn appeals the Jefferson Circuit Court's denial of summary judgment regarding personal and subject matter jurisdiction and the court's findings of fact and conclusions of law regarding a breach of contract claim by Digital Lifestyles, LLC. After careful review, we affirm.

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 (KRS) 21.580.

Digital Lifestyles, LLC (hereinafter Digital Lifestyles) installs home theaters and home automation systems and is based out of Louisville, Kentucky. Robert Lynn (hereinafter Robert) is a resident of New Albany, Indiana and owns a development company in Indiana that builds residential neighborhoods. In 2002, Robert attended a Homearama exhibit in Louisville, Kentucky, where Digital Lifestyles was exhibiting. Robert solicited the owner of Digital Lifestyles, Tony Rossini (hereinafter Tony), to do some work on his personal residence being built in Indiana. After this initial meeting, Robert and his wife returned to Louisville to meet with Tony regarding the details of the equipment to be used. Robert's wife then contacted Tony and he came to their residence in Indiana and the parties signed a contract on or around December 19, 2002.

The contract price was \$258,971.72, and Robert paid a deposit of \$3,000 and a first draw payment of \$23,971.72, for a total paid of \$26,971.72. Robert was to pay \$58,000 before the rough-in began, \$58,000 when the rough-in was finished, \$58,000 to start the finishing phase and then \$58,000 as a final payment at the conclusion of the contract. After Lynn paid the deposit and the first draw, Digital Lifestyles began work in 2003 and completed the rough-in process. Robert did not pay the \$58,000 prior to the rough-in, nor did he pay the \$58,000 after completion of the rough-in.

Shortly after Digital Lifestyles completed the rough-in, Robert requested them to stop working in order to wait for other phases of construction to be completed. On December 19, 2005, Robert wrote Digital Lifestyles a letter

stating that although there was nothing wrong with their performance, he had hired another Louisville home theater company to finish the job and requested a fifty percent refund of the initial deposit and first draw.

Apparently Robert breached the contract after learning that a former business partner now owned a home theater system installation business and could do the work for less money. Robert signed a new contract with Phil Deddens, owner of Super Home Systems in Louisville, Kentucky, to install a system that would only cost \$42,000. Digital Lifestyles was ready, willing, and able to complete the contract at the time of Robert's breach.

Prior to the bench trial on March 27, 2007, Robert filed a motion for summary judgment, arguing that the trial court lacked personal and subject matter jurisdiction and therefore the case must be dismissed. The trial court denied Robert's motion in an order entered October 18, 2006, finding that Kentucky's long arm statute, KRS 454.210(2)(a), provided for personal jurisdiction and that because the cause of action arose from in-state activities, there was subject matter jurisdiction as well.

Specifically, the court found that the three step test under *Wilson v. Case*, 85 S.W.3d 589 (Ky. 2002) was satisfied because Robert purposefully availed himself of the privilege of acting within Kentucky and caused consequence in Kentucky; the cause of action arose from activities in Kentucky; and the connections to Kentucky made jurisdiction reasonable.

The trial court found that not only did Robert purchase products in Kentucky; he also purchased services from Digital Lifestyles. Moreover, even assuming Robert did not purposefully avail himself of the privilege of acting in Kentucky, his actions caused consequence in that he shifted a quarter of a million dollars from one business to another within the state.

The court found that the cause of action arose from in-state activities because Robert sought out Digital Lifestyles at a home show in Kentucky, contacted Digital Lifestyles by telephone, and met with Tony, the owner, in Kentucky. The court found that the contract did not result in a one time purchase or order, but instead amounted to a long term contract for goods and services.

Finally, the court found that Robert contracted with Digital Lifestyles for over two hundred and fifty thousand dollars of work and then hired another Kentucky company to complete the work. Thus, it was not unreasonable to think that Robert could be hauled into court in Kentucky over such business dealings.

After the bench trial on March 27, 2007, the court found as a matter of law that Robert breached the contract with Digital and that the remaining issue was the amount of damages to which Digital Lifestyles was entitled. On August 20, 2007, the court entered findings of fact and conclusions of law in favor of Digital Lifestyles. The trial court awarded lost profits in the amount of \$86,635.25 plus eight percent prejudgment interest and twelve percent post-judgment interest. Robert filed a motion to alter, amend, or vacate the order, which was denied. This appeal followed.

Robert now appeals the denial of summary judgment and argues that the trial court did not have personal and subject matter jurisdiction and that the case must be remanded with an order to dismiss with prejudice. Additionally, Robert argues that Digital Lifestyles failed to meet its burden of proof on damages and that the trial court committed reversible error in admitting a document purportedly created for trial. Finally, Robert argues that Digital Lifestyles suppressed evidence and that such spoliation of evidence creates a presumption in favor of him, negating any claim by Digital Lifestyles for lost profits.

As stated in *Transportation Cabinet, Bureau of Highways, Com. of Ky. v. Leneave*, 751 S.W.2d 36, 37 (Ky.App. 1988):

The general rule under CR 56.03 is that a denial of a motion for summary judgment is, first, not appealable because of its interlocutory nature and, second, is not reviewable on appeal from a final judgment where the question is whether there exists a genuine issue of material fact.

An exception permits review where “(1) the facts are not in dispute, (2) the only basis of the ruling is a matter of law, (3) there is a denial of the motion, and (4) there is an entry of a final judgment with an appeal therefrom.” *Id.*

We find that the instant case falls into the exception articulated in *Leneave*. The facts are not in dispute, given that Robert cannot dispute that he came into Kentucky and sought out the contract with Digital Lifestyles. Robert argues that these facts do not justify a Kentucky court exercising jurisdiction, which is a question of law and not of fact. The remaining elements of the

exception are satisfied, given that there was a denial of the motion and entry of a final judgment with an appeal therefrom. Accordingly, we will review the trial court's denial of summary judgment *de novo*.

Robert agrees with the trial court and Digital Lifestyles that KRS 454.210 and the three prong test articulated in *Wilson v. Case*, 85 S.W.3d 589, 593 (Ky. 2002), are the applicable tests for whether a trial court has personal jurisdiction over a defendant. Robert then argues he is simply an Indiana resident who signed a contract in Indiana for work to be performed in Indiana, which entirely ignores the fact that he came into Kentucky and sought out a Kentucky business to perform long term work for him. Further, he argues that in *Tube Turns Div. of Chemetron Corp. v. Patterson Co., Inc.*, 562 S.W.2d 99, 100-101 (Ky.App. 1978), this court distinguished between a non-resident seller and a non-resident buyer, stating, “[u]nlike the nonresident seller who seeks to distribute its products within the forum state, the nonresident buyer enjoys no particular privilege or protection in purchasing products from a resident seller” and then found that “it would be unreasonable and a denial of due process to require [the nonresident buyer] to defend this action in the Kentucky courts.”

We do not necessarily disagree with Robert that a non-resident buyer and non-resident seller can be distinguished for purposes of personal jurisdiction. However, we agree with the trial court's findings that Robert came into Kentucky and sought out Digital Lifestyles for an on-going contract for goods and services and then traveled to Kentucky to renegotiate the contract. Further, the ultimate

contract for the installation of Robert's home theater was with another Kentucky business. Thus, Robert did in fact avail himself of the privilege of acting within the state of Kentucky and even more importantly caused direct consequence within the state by negotiating a contract for a large sum of money which was put into Kentucky's economic market. Thus, whether you consider that Robert purposefully availed himself of the privilege of acting in Kentucky or caused consequence there, prong one of the *Wilson* test is satisfied.

We also agree that this cause of action arises from in-state activities. There would have been no contract between Digital Lifestyles and Robert had Robert not come to Kentucky and solicited business from Digital Lifestyles. Thus, it is clear that in-state activities form the root from which this cause of action arises. While the same might be said for Indiana, that does not preclude the establishment of proper jurisdiction in Kentucky courts.

Finally, we agree that it was reasonable for Robert to expect to be sued in Kentucky courts, given that he ultimately chose another Kentucky business to complete the work on his home theater and that the evidence shows he regularly travels to Kentucky for purposes of finding contractors, etc. Given the fact that New Albany is on the border with Louisville, it is not unreasonable to expect that Robert might be sued in Kentucky, nor is it believable that this was a one-time contract with a Kentucky business given the evidence indicating otherwise. We also agree that "[w]hen the first two elements are met . . . only the unusual case will not meet this third criterion." *Texas American Bank v. Sayers*, 674 S.W.2d 36,

39 (Ky.App. 1984). Thus, because the first two elements of personal jurisdiction were met, this case does not amount to the unusual case whereby the third criterion is not met. The court properly exercised personal jurisdiction over Robert.

We also agree that the court properly had subject matter jurisdiction, given that the cause of action arose out of Robert's in-state activities and their consequences. Thus, the court properly denied Robert's motion for summary judgment and proceeded to a bench trial.

Our standard of review for evidentiary decisions of the trial court is abuse of discretion. *See Tumey v. Richardson*, 437 S.W.2d 201, 205 (Ky. 1969); *Transit Authority of River City (TARC) v. Vinson*, 703 S.W.2d 482, 484 (Ky.App. 1985). The same standard applies under the Kentucky Rules of Evidence, including KRE 702. Both parties agree that the measure of damages when a defendant breaches a contract and prevents a plaintiff from performing the contract is the net profit the plaintiff could have reasonably made. *New v. Kinser*, 115 S.W.2d 1054, 1055 (Ky. 1938).

Robert argues that Digital Lifestyles was unable to present competent evidence of the reasonable cost of performance because it could not estimate the cost of materials, given that most materials were not purchased or ordered because of Robert's breach. Digital Lifestyles argues that it was impossible to produce invoices for equipment that was not purchased as a result of Robert's breach and that it was equally impossible for Digital to produce time sheets and work schedules that would have been created for employees had Robert not breached the

contract. At trial, Digital Lifestyles presented evidence that approximately fifty percent of the contract price was for equipment and thus the other fifty percent would have been profit. Digital Lifestyles estimated that approximately \$101,135 would have been their profit.

The trial court applied the holding in *Johnson v. Cormney*, 596 S.W.2d 23 (Ky.App. 1979)(reversed on other grounds). There, this court held that all recoverable damages are subject to some uncertainties, but that it is generally held that any uncertainty that prevents recovery pertains to whether or not a breach has occurred, not as to the amount of damages. “Where it is reasonably certain that damage has resulted, mere uncertainty as to the amount does not preclude one’s right of recovery or prevent a jury decision awarding damages.” *Id.* at 27. Further, the Kentucky Supreme Court held in *Roadway Exp., Inc. v. Don Stohlman & Associates, Inc.*, 436 S.W.2d 63, 65 (Ky. 1968), that “[i]f it is established with reasonable certainty that damage has resulted from a breach of duty or a wrongful act of defendant, mere uncertainty as to the amount will not preclude recovery.” Thus, Robert’s argument, that because Digital Lifestyles could not prove with certainty the costs of equipment it was not entitled to recover, fails.

The trial court allowed Digital Lifestyles, through Tony’s testimony, to reference a cost spreadsheet created to determine the estimated costs of equipment that would have been used in Robert’s home had the project been completed. Over Robert’s objections, the trial court allowed Tony to reference the document and adopt it as his testimony, given that there were no other documents

in his possession indicating what would have been the equipment costs and overhead, because the project was not actually completed. The court determined that the contract price less the equipment costs would have been \$101,135.25, but that additional labor costs were certain to have been incurred by Digital Lifestyles for completion of the project, and estimated that programming costs of \$14,500.00 would have been incurred to complete the job once the equipment was installed. Because of the breach these costs were not incurred, and the court deducted the \$14,500.00 and awarded damages of \$86,635.23 for lost profits and out of pocket expenses.

We agree with Digital Lifestyles that the trial court's rulings on damages were not arbitrary, unreasonable, unfair or unsupported by sound legal principles. Given the testimony that equipment costs amounted to half of the contract price and Digital Lifestyles' estimations as to what equipment was to be installed on Robert's property based on the original agreement and contract, we find it to be reasonable that the court awarded the remaining half of the contract price, less the programming costs which were not incurred due to the breach. Furthermore, we agree that Robert had access to the cost spreadsheet prior to trial and had adequate opportunity to cross-examine Digital Lifestyles regarding this document and testimony. We find no error.

Robert also argues that Digital Lifestyles suppressed or spoiled evidence and that such suppression or spoliation creates a presumption in favor of him negating any claim for lost profits. He argues that because Digital Lifestyles

did not produce any documents reflecting equipment costs and profit margins during discovery, that it somehow destroyed such evidence or in the alternative, that it was hiding such evidence. We agree with Digital Lifestyles that it did not intentionally destroy evidence, because the evidence did not exist. During discovery, Digital Lifestyles provided Robert with Tony's handwritten notes from meetings with Robert about equipment to be installed; a document entitled "Installed Price Grand Total by Room" dated December 19, 2002, which indicated an installed price for each piece of equipment in each room; and a document entitled "Change Order" dated May 15, 2004, which detailed additional equipment to be installed. The documents indicated the costs of equipment installed and thus had profits built into them. It was impossible for Digital Lifestyles to produce invoices for equipment because such equipment was not purchased because Robert breached the contract. However, given Tony's uncontradicted testimony that the equipment would have amounted to fifty percent of the contract price, it was reasonable for the court to determine that the other remaining portion would have gone to profit, labor, and overhead. As previously stated, we see no error in the court's findings regarding damages, and we decline to find that Digital Lifestyles deliberately suppressed or spoiled evidence given that it had no such evidence to destroy.

Accordingly, we affirm the judgments of the Jefferson Circuit Court.

ALL CONCUR.

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