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Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-000262-MR

STEVE PINSON — APPELLANT

v. APPEAL FROM PIKE CIRCUIT COURT
HONORABLE STEVEN D. COMBS, JUDGE
ACTION NO. 04-CI-01216

BOBBY THACKER; AND
THACKER AUTO PARTS, INC. — APPELLEES

AND NO. 2007-CA-000282-MR

THACKER AUTO PARTS, INC.;
AND BOBBY THACKER — APPELLANTS

v. APPEAL FROM PIKE CIRCUIT COURT
HONORABLE STEVEN D. COMBS, JUDGE
ACTION NO. 04-CI-01216

STEVE PINSON; SHERRY
PINSON; JAMES L. HAMILTON;
LARRY D. BROWN; AND LARRY D.
BROWN, P.S.C. — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE AND VANMETER, JUDGES; HENRY,[1] SENIOR JUDGE.

VANMETER, JUDGE: The parties filed two related appeals from a judgment entered by the Pike Circuit Court after a jury found Steve Pinson (Pinson) and Sherry Pinson jointly and severally liable to Bobby Thacker (Thacker) and Thacker Auto Parts, Inc. (Thacker Auto). For the reasons stated hereafter, we affirm.

In March 1993, the Pinsons purchased an auto parts business from Thacker Auto for $300,000, secured by a promissory note and mortgage. Pinson leased the business premises from Thacker and continued to operate the business as Nationwide Auto Parts. Eleven years later, in July 2004, the Pike District Court found Pinson guilty of forcible detainer and directed him to vacate the business premises. In August 2004 Thacker Auto filed a mortgage foreclosure action against Pinson. Meanwhile, Pinson and his wife filed several bankruptcy proceedings.

In November 2004, before Pinson finished moving inventory from the premises, which he had been ordered to vacate, the leased building and its contents were destroyed by fire. Thacker then intervened in the foreclosure action, asserting that Pinson had defaulted in his rent payments, and that he had "negligently or otherwise" caused the fire. Further, Thacker Auto amended its

[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.

complaint to name Pinson's casualty insurance provider, Kentucky Farm Bureau (Farm Bureau), as a defendant in the action. That claim was eventually resolved by Farm Bureau's tender to the Pike Circuit Court Clerk of a total of $50,000 for structural loss and $160,000 for inventory loss. In April 2006 the court entered a partial summary judgment awarding Thacker the $50,000 tendered by Farm Bureau for the structural loss.

The civil action went to trial in November 2006, and the jury found that Pinson intentionally started the fire. In accordance with the jury's verdict, the court entered a judgment finding the Pinsons jointly and severally liable to pay (1) Thacker a total of $109,600 plus prejudgment and postjudgment interest relating to unpaid rent and structural damage, (2) Thacker Auto $45,900 plus prejudgment and postjudgment interest relating to the unpaid promissory note, (3) Thacker Auto $19,000 in attorney's fees, and (4) costs to both Thacker and Thacker Auto. The court subsequently amended its judgment to prioritize the various liens, and to reflect that Steve Pinson individually, but not Sherry Pinson, was liable for payment. The court also found that $50,000 of the judgment in favor of Thacker for the destruction of the premises already had been satisfied by the April 2006 partial summary judgment in his favor. The parties' appeals, later designated by this court as an appeal and cross-appeal, followed.

Pinson[2] asserts in Appeal No. 2007-CA-000262-MR that the evidence was insufficient to support the jury's finding that he intentionally set the fire.

[2] Sherry Pinson, who is not a party to Appeal No. 2007-CA-000262-MR but is named as an appellee in Appeal No. 2007-CA-000282-MR, has not filed a brief on appeal.

Further, he contends that the trial court erred by awarding prejudgment interest on the fire loss, by awarding attorney's fees to appellees, by admitting evidence regarding his purchase of an insurance policy, and by admitting evidence regarding his prior bankruptcy.

First, we disagree with Pinson's argument that the evidence did not support the jury's verdict that he intentionally set the fire, and that the court therefore erred by failing to grant a directed verdict or judgment n.o.v. in his favor. As recently reaffirmed by the Kentucky Supreme Court,

> [a]ppellate review of a trial court's denial of a motion for directed verdict is limited to a determination of whether the jury's verdict was palpably or flagrantly contrary to the evidence presented at trial:
>
> > Upon review of the evidence supporting a judgment entered upon a jury verdict, the role of an appellate court is limited to determining whether the trial court erred in failing to grant the motion for directed verdict. All evidence which favors the prevailing party must be taken as true and the reviewing court is not at liberty to determine credibility or the weight which should be given to the evidence, these being functions reserved to the trier of fact. The prevailing party is entitled to all reasonable inferences which may be drawn from the evidence. *Upon completion of such an evidentiary review, the appellate court must determine whether the verdict rendered is "'palpably or flagrantly' against the evidence so as 'to indicate that it was reached as a result of passion or prejudice.'" If the reviewing court concludes that such is the case, it is at liberty to reverse the judgment on the grounds that the trial court erred in failing to [grant] the motion for directed verdict. Otherwise, the judgment must be affirmed.*

Stringer v. Wal-Mart Stores, Inc., 151 S.W.3d 781, 787 (Ky. 2004) (quoting *Lewis v. Bledsoe Surface Min. Co.,* 798 S.W.2d 459, 461-62 (Ky. 1990) (citations omitted and emphasis added)). *See also Denzik v. Denzik,* 197 S.W.3d 108, 110 (Ky. 2006). Similarly, an appellate court must affirm a trial court's denial of a motion for a judgment n.o.v. "'unless there is a complete absence of proof on a material issue in the action, or if no disputed issue of fact exists upon which reasonable men could differ.'" *Disabled Am. Veterans v. Crabb,* 182 S.W.3d 541, 547 (Ky.App. 2005) (quoting *Fister v. Commonwealth,* 133 S.W.3d 480, 487 (Ky.App. 2003)).

Here, the fire investigators indicated at trial that they were unable to conclusively establish the cause of the fire or whether it was intentionally set. However, markings found under a chair and desk were consistent with the use of an accelerant, and testimony addressed whether motor oil found throughout the premises might have been used as an accelerant. Moreover, a Kentucky State Police fire investigator testified regarding the existence of "red flags" which may be indicators of arson. Possible red flags below included evidence that the fire occurred late at night, that the premises bore no signs of forcible entry, that Pinson was involved in protracted bankruptcy proceedings, that Pinson indicated during the bankruptcy proceedings that the store inventory was valued at $48,600 but shortly thereafter he insured the inventory for $250,000, and that during the June 2004 forcible detainer trial Pinson insured the building for an additional $50,000.

We cannot say that the evidence was insufficient to support the jury's finding that "on or about November 5, 2004, Steve Pinson intentionally burned the building owned by Bobby Thacker containing Nationwide Auto Parts[,]" or that the trial court erred by denying Pinson's motions for a directed verdict or judgment n.o.v.

Next, Pinson asserts that the trial court erred by admitting evidence of his purchase of insurance coverage of the building's contents. We disagree.

"Relevant evidence" is defined by KRE[3] 401 as meaning "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Relevant evidence generally is admissible, KRE 402, although it "may be excluded if its probative value is substantially outweighed by the danger of undue prejudice, confusion of the issues, or misleading the jury[.]" KRE 403. KRE 411 in turn provides for the exclusion of evidence regarding liability insurance coverage as follows:

> Evidence that a person was or was not insured against liability is not admissible upon the issue whether the person acted negligently or otherwise wrongfully. This rule does not require the exclusion of evidence of insurance against liability when offered for another purpose, such as proof of agency, ownership, or control, or bias or prejudice of a witness.

Here, over Pinson's objections the trial court admitted evidence of his purchase of casualty insurance covering the contents of the building which later burned. Clearly, such did not constitute evidence of "liability insurance" subject to

[3] Kentucky Rules of Evidence.

exclusion under KRE 411. Instead, the evidence related to the existence of any possible motivation for Pinson to destroy the business by fire in order to collect casualty insurance proceeds which exceeded the actual value of the destroyed property. We cannot say that the trial court erred by admitting such evidence.

Pinson also asserts that the trial court erred by admitting evidence regarding a prior bankruptcy proceeding and the repossession of his truck. We disagree.

The videotape record shows that counsel for Thacker and Thacker Auto (Thacker's counsel) called Pinson as a witness and examined him regarding the bankruptcy proceeding which he filed in December 2000, nearly four years before the fire. Pinson's counsel objected to the relevancy and prejudicial impact of the line of questioning, but the court was persuaded that the inquiry was relevant to demonstrate Pinson's pattern of behavior and delays, including his failure to satisfy his promissory note obligations despite claiming that he made $100,000 per month through a trucking business. In response, Pinson described his efforts to extricate himself from business with a partner, including the filing of a Chapter 13 bankruptcy action.

Subsequently, Thacker's counsel called to the stand a bank CEO who testified regarding a foreclosure action which had been pending against Pinson for some five years. Although Pinson's counsel objected to the testimony's relevancy, the court agreed with Thacker's counsel that Pinson earlier opened the door to the

questioning by initiating testimony about his ability to "use the system" to avoid a foreclosure sale.

Clearly, both lines of questioning were relevant to the jury's consideration of whether Pinson met his outstanding financial obligations. More specifically, given Thacker's denial of Pinson's claim that he satisfied his lease and promissory note obligations by improving the rental property and making a cash payment, evidence regarding Pinson's failure to satisfy other obligations during the same time periods was relevant to the jury's determination of his claimed ability to satisfy the named obligations. The court did not err by admitting the evidence in question. *See Baker v. Kammerer,* 187 S.W.3d 292, 295-96 (Ky. 2006).

Next, Pinson asserts that the trial court erred by awarding Thacker prejudgment interest on the jury's award of damages for the building's destruction. As recently stated in *Univ. of Louisville v. RAM Eng'g & Constr., Inc.,* 199 S.W.3d 746, 748 (Ky.App. 2005),

> [i]nterest can be both prejudgment and postjudgment. When damages are "liquidated," prejudgment interest follows as a matter of course. When the amount is "unliquidated," the amount of prejudgment interest, if any, is a matter for the trial court weighing the equitable considerations. "[E]quity and justice demand that one who uses money or property of another . . . should at least pay interest for its use in the absence of some agreement to the contrary." "This principle applies whether or not the amount owed to another is liquidated or unliquidated."

(Internal citations omitted.) Here, the jury concluded that Pinson intentionally burned Thacker's building, and the record supports Thacker's assertion that Pinson

intentionally delayed the trial. Under such circumstances, the trial court did not abuse its discretion by awarding prejudgment interest on the damages awarded to Thacker for the destruction of the building.

Finally, Pinson contends that the trial court erred in its award of attorney's fees to Thacker Auto. We disagree.

Pinson executed a promissory note and security agreement in favor of Thacker Auto when he purchased the business's collateral. According to the terms, Pinson was obligated to pay attorney's fees arising from any collection or enforcement proceedings. As an award of attorney's fees therefore became payable as damages, *see Cummings v. Covey,* 229 S.W.3d 59, 61 (Ky.App. 2007), it was proper for the trial court to award interest on such fees. *See* KRS 360.010; *Borden v. Martin*, 765 S.W.2d 34, 35 (Ky.App. 1989).

Here, the trial court's amended final judgment awarded Thacker Auto $45,900 due on the promissory note, plus attorney's fees, as follows:

> [P]lus pre-Judgment [sic] interest compounded at the rate of 8% per year from November 2003 until today's date [January 4, 2007], and then interest on that amount ($45,900.00 plus accrued interest) compounded at 12% per year until that amount is paid in full. Thacker Auto Parts, Inc., shall also recover from Steve Pinson attorney fees pursuant to the note and security agreement in the amount of $19,000.00.

Although Pinson does not specifically challenge Thacker Auto's request for attorney's fees amounting to $15,300 or one-third of the $45,900 judgment, he asserts that the court's award of $19,000 exceeded the requested fee by $3,700.

However, as the award of attorney's fees was payable as damages, *Cummings,* 229 S.W.3d at 61, and the addition of 8% annual interest to the base fee of $15,300 results in a figure in excess of $19,000, the court's award of attorney's fees and interest is not excessive and shall not be set aside.

Next, in Cross-Appeal No. 2007-CA-000282-MR, Thacker contends that the trial court erroneously reduced the jury's award in his favor. We disagree.

The record shows that Farm Bureau was permitted to deposit into the court the casualty insurance proceeds paid as a result of the damage to Thacker's building. In April 2006 the court determined that Thacker was entitled to the entire $50,000 "paid for the destruction of the insured structure[.]" Subsequently, the jury found that Thacker was entitled to damages of $100,000, representing the difference in the property's fair market value immediately before and after the fire. The court's initial award of $100,000 was amended to $50,000 since Thacker already had received $50,000.

Thacker now argues that Pinson wrongfully benefited from the insurance proceeds because his obligation to compensate Thacker was reduced by half even though Pinson possessed no insurable interest in the property. However, regardless of whether Pinson misrepresented his interest in the property when purchasing the insurance and subsequently received the benefit of a reduction of the judgment against him, that benefit was merely a consequence of the court-ordered payment to Thacker of the actual insurance proceeds. In fact, the insurance proceeds were treated as if Pinson had purchased coverage on behalf of

Thacker as a condition of the lease agreement. Given that the insurance coverage was purchased by tortfeasor Pinson rather than by Thacker, and the record contains no evidence that Thacker received benefits from collateral sources, we are not persuaded by Thacker's argument that the collateral source rule and principles of subrogation as discussed in *Schwartz v. Hasty,* 175 S.W.3d 621, 626-27 (Ky.App. 2005), compel a different result.

Next, Thacker and Thacker Auto contend that the trial court erred by awarding a share of the insurance proceeds as attorneys' fees to Pinson's attorneys, James L. Hamilton and Larry D. Brown. We disagree.

KRS 376.460 provides:

> Each attorney shall have a lien upon all claims, except those of the state, put into his hands for suit or collection or upon which suit has been instituted, for the amount of any fee agreed upon by the parties or, in the absence of such agreement, for a reasonable fee. If the action is prosecuted to a recovery of money or property, the attorney shall have a lien upon the judgment recovered, legal costs excepted, for his fee. If the records show the name of the attorney, the defendant shall be deemed to have notice of the lien. If the parties in good faith and before judgment compromise or settle their controversy without the payment of money or other thing of value, the attorney for the plaintiff shall have no claim against the defendant for any part of his fee.

Here, the record shows that Hamilton and Brown were involved in the proceedings which led to Farm Bureau's tender of the insurance proceeds to the Pike County Circuit Clerk. Although the proceeds were tendered prior to any court order to do so, and Pinson never had access to them, the fact remains that Pinson benefitted

from Farm Bureau's payment because the distributed proceeds ultimately satisfied a portion of his obligations to creditors. Thus, we are not persuaded by Thacker and Thacker Auto's argument that Pinson recovered no judgment, and that his attorneys therefore were not entitled to attorneys' fees pursuant to KRS 376.460. Moreover, we cannot say that the trial court abused its discretion by awarding attorneys' fees in accordance with a one-third contingency arrangement.

Next, Thacker and Thacker Auto contend that the trial court erred by permitting attorney Brown to collect, on an agreed judgment, from the insurance proceeds on deposit with the circuit court clerk. We disagree.

The record shows that Pinson, both individually and in his business capacity, entered into an agreed judgment to pay Brown $20,000, plus costs and prejudgment and postjudgment interest, for past-due attorney's fees. The judgment was entered by the Floyd Circuit Court[4] in November 2005, and Brown immediately issued a nonwage garnishment on the insurance proceeds held by the Pike Circuit Court Clerk.

Despite Thacker and Thacker Auto's allegations regarding the legitimacy of Pinson's claimed debt to Brown, the fact remains that the debt and agreement were the subject of a judgment of the Floyd Circuit Court, and issues regarding the legitimacy of the underlying claims were not properly before the Pike Circuit Court in this proceeding. Further, although Thacker and Thacker

[4] The cover page of Brown's appellate brief indicates that his office is located in Prestonsburg, which is in Floyd County. *See* KRS 81.010(4).

Auto assert that their judgment against Pinson should be afforded a higher payment priority than Brown's agreed judgment lien,

> Kentucky's rule [is] that an attorney's lien relates back to the time of the commencement of services, and that an attorney's lien takes precedence . . . . Further, . . . the trial court's right to set off one judgment against another is equitable in nature, and thus, the trial court has the power to determine the amount and manner of set-off.

Exch. Bank of Ky. v. Wells, 860 S.W.2d 785, 787 (Ky.App. 1993). Hence, the court's judgment shall not be disturbed.

Finally, attorneys Brown and Hamilton assert that the trial court erred in several respects, including as to the determination of priorities for payment among competing creditors, the award of attorney's fees to Thacker's counsel, the jury instructions, and the exclusion of certain evidence. As neither Brown nor Hamilton raised these issues by direct or cross-appeal, the issues are not properly before this court and will not be considered in this appeal.

The Pike Circuit Court's amended final judgment is affirmed.

ALL CONCUR.

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