RENDERED: DECEMBER 19, 2008; 2:00 P.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-001493-MR

GEORGE KIMBALL — APPELLANT

v.

APPEAL FROM GRAYSON CIRCUIT COURT
HONORABLE SAM H. MONARCH, JUDGE
ACTION NO. 97-CI-00224

LEITCHFIELD DEVELOPMENT CORPORATION — APPELLEE

OPINION
VACATING AND REMANDING

** ** ** ** **

BEFORE: DIXON AND THOMPSON, JUDGES; LAMBERT,[1] SENIOR JUDGE.

DIXON, JUDGE: George Kimball, *pro se*, appeals from a final judgment of the Grayson Circuit Court following a jury trial. Because the final judgment was

[1] Senior Judge Joseph E. Lambert, sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

based on an ambiguous jury verdict, we vacate the judgment and remand for a new trial.

In August 1991, Kimball agreed to purchase a mobile home from Leitchfield Development Corporation (LDC) for $18,194.70. LDC financed the purchase price of the mobile home, and Kimball signed an installment loan contract for 120 payments of $304.89. At that time, LDC was owned and operated by L.T. Fraim. In October 1995, Fraim passed away, and Dan Cann took over the daily business of LDC.

In August 1997, LDC filed a foreclosure complaint against Kimball in Grayson Circuit Court, alleging he owed $22,287.81 on the mobile home contract. Kimball filed an answer and counterclaim, *pro se*, denying the allegations in the complaint and alleging that LDC owed him a refund because he had actually paid more than his contract obligation.

A jury trial was held on November 16, 1998. Cann testified that the records of LDC were in disarray when he took over the business. He acknowledged that it took several months to organize the records and to determine customers' account balances. Cann stated that, based on the records he found in the LDC office, Kimball made only sporadic payments and was significantly behind on his monthly payment obligation.

Kimball, represented by counsel, testified that he had made three large cash payments to Fraim, which nearly eliminated his indebtedness on the note. Kimball claimed he paid Fraim $2,500.00 in October 1993, $10,000.00 in February

1994, and $5,000.00 in January 1995. On each occasion, Fraim visited Kimball's farm, and Kimball paid Fraim with money he had earned selling and breeding horses. Kimball acknowledged that he did not receive a receipt from Fraim to memorialize the cash transactions. Kimball also testified that he and Fraim had a friendly relationship and that Fraim understood Kimball's income from his horse farm fluctuated. Kimball produced one receipt, dated April 1995, where he had made a $1,000.00 payment at the LDC office, and the receipt stated a balance of $1,908.07 remained. Kimball also called three additional witnesses, including his son, to corroborate the details of Fraim's visits to the farm.

LDC produced its accounting report, complied by Cann, showing Kimball owed $22,287.81. Kimball claimed there were errors on Cann's report, and he specifically noted he did not make a $2,000.00 payment in December 1995, shown on the report.

At the close of all evidence, the court instructed the jury, in relevant part:

INSTRUCTION NO. 2

> Do you find from a preponderance of the evidence that the Defendant, George Kimball, paid to Tommy Fraim the sum of $10,000 in cash, the sum of $5,000 in cash, and the sum of $2,500 in cash for which he did not receive credit? Indicate your verdict below.
>
> Yes _____ No _____
>
> If your answer to the above is "No," return to the Courtroom now. If you answered "Yes," then go to the next instruction.

INSTRUCTION NO. 3

> If you answered yes to the above referenced Instruction No. 2, then you shall determine from a preponderance of the evidence the sum of the net payments to be credited to the Defendant, George Kimball. Net payments being the total of all payments actually made for which he did not receive credit less (minus) payments for which he received credit but, in fact, he did not make.
>
> We, the jury, find that the net payment accounting errors for which the Defendant is entitled to credit is $_____ (not to exceed $17,500.00).

After deliberating, the jury returned their verdict, marking "yes" to instruction number two, and "$5,000.00" for instruction number three.

Prior to discharging the jury, the court met with the parties in chambers. LDC argued the verdict was inconsistent. Kimball argued that the verdict entitled him to a credit of $17,500.00 and an additional $5,000.00 credit for overpayment of the note. The judge agreed with LDC, stating that the verdict was defective. The judge explained that the evidence showed Kimball did not remember making a $2,000.00 payment; consequently, the acceptable amount of credit for instruction number three was $17,500.00 or $15,500.00. The judge concluded that the jury could not clarify the defect and discharged the jury.

Following the trial, Kimball moved the court to render final judgment pursuant to the jury's verdict. LDC renewed its objection that the verdict was inconsistent. On December 1, 1998, the court took the matter under submission.

In April 2000, the trial court rendered a judgment finding that Kimball had paid $17,500.00. The judgment also provided Kimball an additional $5,000.00 credit. The judgment, however, stated, "This Order is not a final Order."

A review of the record shows that the case languished on the court's docket. In March 2003, the court ordered both parties to tender proposed judgments, and the parties complied. In January 2007, the case was assigned to Judge Monarch as a senior status judge. In June 2007, Judge Monarch signed the judgment LDC had tendered in 2003. The judgment stated that, after crediting Kimball's account $5,000.00, LDC was entitled to recover $17,126.33, plus interest, from Kimball. After judgment was rendered in favor of LDC, nearly nine years after the trial, this appeal followed.

Kimball contends the jury found he had paid $17,500.00 and was entitled to an additional $5,000.00 credit for payments made to LDC exceeding his indebtedness. Kimball asks this Court to reverse the judgment and instruct the trial court to render judgment in his favor. On the other hand, LDC contends the judgment correctly reflects the jury's verdict that Kimball was only entitled to a $5,000.00 credit against his total indebtedness.

In *Smith v. Crenshaw*, 344 S.W.2d 393 (Ky. 1961), the former Court of Appeals addressed a defective jury verdict. The court stated:

> First, we shall say that we think that in any case where the verdict is incomplete, ambiguous, inconsistent, irregular or otherwise defective the proper procedure should be that the jury be sent back to complete or

> correct the verdict. A motion to that end should be made by the party or parties affected by the defect.

Id. at 395.

In the case at bar, the flawed verdict was brought to the court's attention, albeit by LDC. The court agreed that the verdict was defective, but refused to resubmit the verdict to the jury for clarification. Because the verdict remained ambiguous, "there [was] no basis in the verdict upon which the court [could] enter judgment." *Id*. As a result, the judgment resolving this case was speculative, since the actual meaning of the jury's verdict was unknown. *See Anderson's Ex'x v. Hockensmith*, 322 S.W.2d 489, 491 (Ky. 1959).

After thoroughly reviewing the written record and trial proceedings, it is clear the infirmity herein cannot be resolved by merely affirming or reversing the judgment. The verdict is ambiguous, and the court's decision to render judgment in favor of LDC does not resolve the ambiguity. In light of the conflicting evidence, we also conclude it would be improper for this Court to offer its own interpretation of the verdict. Consequently, the proper course of action is to vacate the judgment and remand the case for a new trial.

For the reasons stated herein, the order of the Grayson Circuit Court is vacated, and this case is remanded for further proceedings consistent with this opinion.

ALL CONCUR.

BRIEFS FOR APPELLANT:

George Kimball, *Pro Se*
Leitchfield, Kentucky

BRIEF FOR APPELLEE:

Donald W. Cottrell
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