

Commonwealth of Kentucky
Court of Appeals

NO. 2007-CA-000401-MR

JENKINS FOUNDATION, INC.

APPELLANT

v. APPEAL FROM LETCHER CIRCUIT COURT
HONORABLE SAMUEL T. WRIGHT, III, JUDGE
ACTION NO. 97-CI-00319

GLORIA PARK, AS ADMINISTRATRIX OF
THE ESTATE OF DONALD S. PARK, M.D.

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: COMBS, CHIEF JUDGE; NICKELL, JUDGE; GRAVES,¹ SENIOR JUDGE.

NICKELL, JUDGE: Jenkins Foundation, Inc. (“Foundation”) has appealed from the April 18, 2005, entry of an amended summary judgment against it by the

¹ Senior Judge John W. Graves 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.

Letcher Circuit Court and the February 6, 2007, denial of its motion to alter, amend or vacate same. For the following reasons, we affirm.

Dr. Donald S. Park (“Dr. Park”) was a physician employed by the Jenkins Community Hospital (“Hospital”), in Letcher County, Kentucky. At the time of Dr. Park’s employment, the Hospital was owned by First Health, Inc., a Delaware corporation. Between April and September 1996, Dr. Park did not receive the compensation to which he was entitled by virtue of his employment. Dr. Park was terminated from his employment at the Hospital effective January 4, 1997. Shortly thereafter, Dr. Park suffered a massive heart attack and passed away. On September 12, 1997, Gloria Park, as Administratrix of the Estate of Donald S. Park, M.D. (“the Estate”), filed the instant suit against First Health, Inc., for recovery of Dr. Park’s unpaid wages and set forth a claim for wrongful death.² The complaint was amended in August 1998 to include First Health Jenkins, Inc.,³ a subsequent purchaser of the Hospital, as a defendant in the action.

On August 19, 2003, a default judgment was entered against First Health, Inc., on the issue of liability. On February 12, 2004, the trial court entered a summary judgment against First Health Jenkins, Inc. The trial court specifically found there were no genuine issues of material fact before the court and, pursuant

² The record on appeal indicates the wrongful death claim has not yet been adjudicated. Thus, no arguments related to that claim have been presented to this Court for review.

³ A review of the record reveals all of the outstanding and issued common stock of First Health Jenkins, Inc., was owned by Jenkins Foundation, Inc. Both corporations had the same directors and officers.

to KRS 337.055, the Estate was entitled to payment of Dr. Park's wages in the amount of \$85,443.20, plus interest. The wrongful death claim was to remain pending before the trial court. On February 18, 2004, First Health Jenkins, Inc., moved the trial court to reconsider its ruling and stated it did not owe the debt to the Estate. No ruling on this motion appears in the record.

On January 28, 2005, the Estate moved to amend the judgment to join the Foundation and Betty Hunsaker ("Hunsaker"),⁴ individually, as party defendants in the matter. The motion also requested that the trial court order the judgment payable by Jenkins Foundation, Inc., Hunsaker, and Jenkins Healthcare Company d/b/a Jenkins Community Hospital, jointly and severally. The Estate alleged that investigations completed subsequent to entry of the judgment revealed that the Foundation and Hunsaker had purchased the assets of First Health Jenkins, Inc., and later sold same to Jenkins Healthcare Company. Thus, the Estate alleged these entities were successors in interest to First Health Jenkins, Inc., and liable for the judgment amount. On April 18, 2005, the trial court entered an order amending the earlier judgment to include Jenkins Foundation, Inc. as a judgment debtor.⁵

On April 22, 2005, the Estate caused a writ of non-wage garnishment to issue against the assets of the Foundation. That same date, the Foundation moved the court to alter, amend or vacate the April 18, 2005, order, alleging it

⁴ Hunsaker was a director of the Foundation, as well as a director, treasurer, and co-purchaser of First Health Jenkins, Inc. In addition, it appears Hunsaker was also an employee of the Hospital, although her capacity is unclear.

⁵ Although unclear from the record, it appears Hunsaker was not included in the amended judgment by agreement of the parties.

should not have been made a party to the judgment. In response, the Estate alleged counsel for the Foundation had orally agreed to entry of the amended judgment when the trial court convened the hearing on the motion to amend the judgment. Following briefing by both sides and an unexplained delay of nearly two years, the trial court denied the Foundation's motion by order entered on February 6, 2007. This appeal followed.

First, in contravention of CR 76.12(4)(c)(iv) and (v), the Foundation does not cite to us within the record the factual basis supporting its legal argument. Further, it cites little legal authority supporting its position. The Foundation's brief is also devoid of citation to the record supporting its summary of the factual evidence presented. Although noncompliance with CR 76.12 is not automatically fatal, we would be well within our discretion to strike the Foundation's brief for its omissions and noncompliance. *Elwell v. Stone*, 799 S.W.2d 46 (Ky. 1990).

Next, the record on appeal does not contain recordings or transcripts from any of the numerous hearings held by the trial court without which we are unable to verify many of the assertions made by both parties. It is the responsibility of an appellant to ensure the record on appeal is complete and contains all of the evidence needed to facilitate appellate review, and in the absence of a complete record, we must assume the omitted portions of the record support the rulings of the trial court. *Commonwealth v. Thompson*, 697 S.W.2d 143, 145 (Ky. 1985).

The Foundation's sole argument on appeal is that the trial court erred in granting summary judgment against it because genuine issues of material fact existed. We disagree. Further, we believe the issue on appeal is not whether the trial court properly entered the summary judgment,⁶ but whether the trial court properly amended the judgment to include the Foundation as a judgment debtor. After a careful review, we find no error.

The Foundation asserts the evidence presented to the trial court reflects it "clearly" did not purchase the debts and financial obligations of First Health, Inc., thus making it erroneous to amend the original judgment to make it liable for a debt it never contracted to assume. However, our review of the record reveals that no evidence whatsoever was presented to the trial court regarding the purchase by the Foundation from First Health, Inc., nor the agreement between them regarding the outstanding debts associated with the Hospital. The only evidence presented regarding any of the numerous sales of the Hospital is a copy of the Asset Purchase Agreement between First Health Jenkins, Inc., as seller, and Jenkins Healthcare Company, as purchaser, with the Foundation mentioned only as

⁶ Any claims raised in this appeal regarding the entry of the original summary judgment would be untimely as that order was entered fourteen months prior to the amendment which is the subject of this appeal. Although First Health Jenkins, Inc., challenged the original judgment shortly after its entry by filing a motion to reconsider, the trial court did not issue a written ruling on the matter and thus any deficiencies therein would be unpreserved for our review since it did not press the trial court for a ruling. *Commonwealth, Department of Highways v. Williams*, 317 S.W.2d 482, 484 (Ky. 1958); *Kaplon v. Chase*, 690 S.W.2d 761, 763 (Ky.App. 1985).

the sole owner of First Health Jenkins, Inc. The details of that subsequent transfer were wholly irrelevant to the matters before the trial court.

Further, there is no indication in the record the Foundation contested amendment of the judgment until after same had been entered. In fact, the Estate alleges the Foundation agreed in open court to the amendment. As there is no recording of any hearing in the record before us, we are unable to ascertain the truth or falsity of this claim of agreement. However, the first indication in the record that the Foundation was opposed to the amendment came on the heels of the Estate's collection efforts by garnishment of the Foundation's bank accounts. Even then, the Foundation's position was that it was the least culpable of all of the corporate entities to have had an ownership interest in the Hospital, thus somehow making the amendment improper. The Foundation cited no authority supportive of its position before the trial court and cites none to this Court although it is advancing the identical argument. While there may be issues regarding contribution, indemnification or reimbursement among the several owners and proprietors of the Hospital, such issues do not impact the propriety of the trial court's entry of the amended judgment in favor of the Estate. The Foundation has simply failed to carry its burden in showing reversible error.

Therefore, for the foregoing reasons, the judgment of the Letcher Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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