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Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-000294-MR

BUTLER & ASSOCIATES, P.S.C. APPELLANT

v. APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE PHILLIP J. SHEPHERD, JUDGE
ACTION NO. 96-CI-01651

DAVID R. HARROD; PAUL C. GAINES, III;
EDWIN A. LOGAN; STEWART BURCH; AND
LOGAN AND GAINES APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: STUMBO AND THOMPSON, JUDGES; GUIDUGLI,[1] SENIOR JUDGE.

STUMBO, JUDGE: Butler & Associates, P.S.C., hereinafter Appellant, appeals a summary judgment order granted for David Harrod and an order dismissing the case, without prejudice, against Paul Gaines, III, Edwin Logan, Stewart Burch, and

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

the law firm of Logan and Gaines. Appellant claims that the trial court made evidentiary errors and that summary judgment should have been granted in its favor. Also, Appellant argues that Mr. Gains, Mr. Logan, Mr. Burch and the law firm should not have been dismissed from the case. We find that summary judgment was properly granted in favor of Appellee, Harrod, and that the order dismissing the other Appellees from the case was not timely appealed. As such, we affirm.

Appellant is an accounting firm that was owned by Harold Butler at all times pertinent to the facts of this opinion. Mr. Harrod worked as an accountant for Appellant until November 15, 1995. Mr. Harrod worked for Appellant for approximately 11 years under various employment contracts, the last of which was entered into on October 1, 1990.

In 1989, Mr. Butler sold ownership interests in Appellant to Mr. Harrod and two other employees. In conjunction with the purchase, Mr. Harrod and the other two employees signed an employment contract which included a client list protection provision requiring any accountant who left the firm to pay the firm a sum of money if that accountant performed work for any of the firm's then existing clients. In other words, if the accountant left the firm and took some clients with him, the accountant would have to pay the firm money. This provision applied to any accounting work performed during a period of "three (3) years from the date their employment or ownership interest in the corporation terminates."

Less than one year later, Mr. Butler decided to repurchase the interests he had sold to Mr. Harrod and the other employees. Harrod and one of the other employees sold their interests back to Mr. Butler. As with the previous sale of interests, Mr. Harrod signed a new employment contract on October 1, 1990. This contract also had a client list protection provision. It was worded differently requiring payment to the firm if the accountant took clients and did work for "three (3) years from the date of this contract." (Emphasis added.)

On November 15, 1996, more than five years after signing the 1990 contract, Mr. Harrod ended his employment with Appellant. In a meeting prior to Mr. Harrod's departure, Mr. Butler advised Mr. Harrod that he would need to pay Appellant for any clients he took with him and requested that he sign a promissory note to do so. Mr. Harrod stated that no such payment was required because the client list protection provision had only been effective for three years from the date of the contract and had expired more than two years earlier. This suit followed.

Appellant filed a complaint seeking reformation of the 1990 contract as it pertained to the client list protection provision. Appellant argued that the provision should have been similar to the 1989 provision, which required payment if the employee left, took clients, and did work for those clients during a period of "three (3) years from the date their employment or ownership interest in the corporation terminates." Appellant also asserted a legal malpractice claim against

the law firm Logan and Gaines alleging it and its lawyers, Gaines, Logan, and Burch, were negligent in preparing the contract provision.

Logan and Gaines filed a motion to dismiss alleging that Appellant's damages were speculative and the case should be dismissed as to the law firm and lawyers until the underlying contractual claim against Mr. Harrod had been determined. The trial court agreed and held that until it is determined whether or not the contract provision was mutually agreed upon, the legal malpractice cause of action has not accrued. On April 24, 1997, the law firm and lawyers were dismissed from the case via an interlocutory order. The case then proceeded against Mr. Harrod only.

On November 17, 2003, the case was heard by the trial court without a jury upon the trial judge's determination that this was an equitable action. On December 31, 2003, the trial court found in favor of Appellant, finding that a mutual mistake existed.

Mr. Harrod appealed the trial court's ruling. Appellant took no action against Logan and Gaines or its attorneys. A previous panel of this Court found that the trial court committed reversible error by using affidavits as substantive evidence. In its opinion, the trial court used information gathered from affidavits filed in the record as evidence to find in favor of Appellant, specifically, the affidavit of Harold Butler.[2] Civil Rule (CR) 43.04 states that in any action tried

[2] Harold Butler died while this litigation was pending and his deposition was never taken.

before the court, testimony of witnesses must be presented under oath and orally in open court or by deposition. No provision is made for the consideration of affidavits as evidence. The case was remanded to the trial court for a new trial without consideration of the affidavits as substantive evidence.

Upon remand, Mr. Harrod filed a renewed motion for summary judgment which was granted. The trial court found that there was no ambiguity in the contract provision and therefore no extrinsic evidence could be introduced at trial to refute the provision. It also held that there was no evidence to support a finding of mutual mistake allowing for the reformation of the contract. The trial court also declined to consider the affidavit of Harold Butler in making its decision. This appeal followed.

Appellant's first argument is that the trial court erred in not considering Harold Butler's affidavit in making its decision regarding summary judgment. Appellant argues that CR 56 allows the court to rely on affidavits when deciding if summary judgment is proper. This argument is only partially correct. CR 56.03 states that affidavits may be used to determine if summary judgment is proper, but CR 56.05 says that these affidavits "shall set forth such facts as would be admissible in evidence . . . ." As the previous panel of this Court held, affidavits themselves are not admissible at trial. Since Mr. Butler died prior to trial and no deposition was taken, any evidence contained in his affidavit would not be

admissible at trial. Accordingly, the lower court correctly refused to consider the affidavit when ruling on the motion for summary judgment.

Appellant next argues that the trial court erred in concluding that two letters between the legal counsels for the parties were inadmissible on the issue of reformation because the contract provision is unambiguous and these letters are extrinsic evidence. "In the absence of ambiguity a written instrument will be strictly enforced according to its terms." *Mounts v. Roberts*, 388 S.W.2d 117, 119 (Ky. 1965). Additionally, "a court will interpret the contract's terms by assigning language its ordinary meaning and without resort to extrinsic evidence." *Frear v. P.T.A. Industries, Inc.*, 103 S.W.3d 99, 106 (Ky. 2003). "An ambiguous contract is one capable of more than one different, reasonable interpretation." *Central Bank & Trust Co. v. Kincaid*, 617 S.W.2d 32, 33 (Ky. 1981). Essentially, extrinsic evidence will not be considered absent an ambiguity in the contract.

The provision of the contract in question states in relevant part:

> In the event Harrod leaves the employment of the Corporation during the term of this contract . . . the parties agree that the following conditions and covenants shall automatically become applicable: Should Harrod perform any accounting services, in any manner, including those services normally offered by Certified Public Accountants, for any clients of the Corporation . . . during the period of three (3) years from the date of this contract, Harrod shall pay to the Corporation . . . .

We agree with the trial court's finding that this contract provision is unambiguous. It straightforwardly states that if Mr. Harrod leaves Appellant's employment within three years of signing the contract, then he must compensate Appellant. Since Mr. Harrod left Appellant's employment five years after signing the contract, no payments were necessary. Because the term is unambiguous, the lower court appropriately declined to consider extrinsic evidence, which included the two letters in question.

Similarly, Appellant also contends that the trial court erred in not considering past employment contracts. The trial court did not consider these because they were extrinsic to the contract at issue and, as the contract was unambiguous, inadmissible. We affirm this issue for the same reasons as above.

The crux of Appellant's appeal is that the trial court erred in granting Mr. Harrod's summary judgment and in finding there was no mutual mistake so as to grant reformation of the contract.

> The standard of review on appeal of a summary judgment is whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law. Kentucky Rules of Civil Procedure (CR) 56.03 . . . . "The record must be viewed in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor." *Steelvest, Inc. v. Scansteel Service Center, Inc.,* Ky., 807 S.W.2d 476, 480 (1991). Summary "judgment is only proper where the movant shows that the adverse party could not prevail under any circumstances." *Steelvest,* 807 S.W.2d at 480, *citing Paintsville Hospital Co. v. Rose,* Ky., 683 S.W.2d

> 255 (1985). Consequently, summary judgment must be granted "[o]nly when it appears impossible for the nonmoving party to produce evidence at trial warranting a judgment in his favor . . ." *Huddleston v. Hughes,* Ky. App., 843 S.W.2d 901, 903 (1992).

Scifres v. Kraft, 916 S.W.2d 779, 781 (Ky. App. 1996).

"As a general proposition a court of equity will not reform a written instrument unless it appears there was a valid agreement; that the written instrument failed to express the agreement; and that the failure was due to mutual mistake. These circumstances must be shown by clear and convincing proof." *Berry v. Crisp*, 247 S.W.2d 384, 385 (Ky. 1952). "[A] unilateral mistake is not a ground for reformation." *Id.* "A mutual mistake in respect to reformation is one in which both parties participate, each laboring under the same misconception." *Karrick v. Wells*, 307 S.W.2d 929, 931 (Ky. 1957).

Here, the trial court was correct in granting summary judgment. Mr. Gaines, the attorney who drafted the contract, testified in his deposition that Mr. Butler always read contracts before signing them and Appellant admitted that Mr. Butler specifically read this contract. Mr. Gaines also testified that Mr. Butler was meticulous with his contracts and any provision contained in the contract was one that Mr. Butler intended.

In regard to the change in the terms of the 1990 contract as compared to the 1989 contract provisions, Mr. Gaines testified that

> [a]s far as I'm concerned, these contracts express exactly, both of them, the desires Mr. Butler wanted at the time I prepared the contracts. The two contracts are different, for example, in the payout provision and one is a five year deal, one is not. One says it kicked in three years from the date of the contract, one says three years from the date their employment or ownership interest in the corporation terminates. I believe it's exactly what he wanted and that's what I drafted.

Additionally, Mr. Harrod has vehemently denied that the contract means anything but what it purports to and that there was no mistake. Mr. Harrod explained during his deposition that he believed the less restrictive provision was an inducement for him and the other two employees to sell their stock back to Mr. Butler at a loss. Also, Appellant's response to Requests for Admissions conceded that Mr. Butler read the employment contract before signing it. Finally, since the contract term is unambiguous, no extrinsic evidence is admissible.

There is no evidence in the record indicating a mutual mistake that would permit reformation of this contract. With the unfortunate death of Mr. Butler and testimony of Mr. Gaines and Mr. Harrod that the contract provision is correct as is, there is no clear and convincing evidence of mutual mistake and therefore no possibility that Appellant could prevail at trial. Accordingly we affirm the summary judgment.

Appellant additionally makes a brief argument concerning the dismissal of the Logan and Gaines law firm and its lawyers from the case back in 1997. They were dismissed without prejudice via an interlocutory order because

the trial judge found that until Appellant prevailed against Mr. Harrod, damages for legal malpractice were too speculative. Appellant now claims the 1997 trial judge erred in dismissing these parties.

The trial court dismissed the claim on the grounds that because there were no legally recognizable damages unless Appellant prevailed on the underlying lawsuit, the malpractice claim was not ripe and the statute of limitations did not begin to run. We agree with the trial court's analysis.

As in *Alagia, Day, Trautwein and Smith v. Broadbent*, 882 S.W.2d 121 (Ky. 1994), the legal harm to Appellant could not be determined until the contract claim was resolved. Thus, any damages remained speculative.

For the above reasons we affirm the summary judgment in favor of Mr. Harrod.

ALL CONCUR.

BRIEFS AND ORAL ARGUMENT FOR APPELLANT:

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BRIEF AND ORAL ARGUMENT FOR APPELLEE, DAVID R. HARROD:

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