

Commonwealth of Kentucky
Court of Appeals

NO. 2008-CA-001045-MR

GARY HAGER

APPELLANT

v. APPEAL FROM MARTIN CIRCUIT COURT
HONORABLE JOHN DAVID PRESTON, JUDGE
ACTION NO. 07-CI-00219

CHARLES MILLS

APPELLEE

OPINION
AFFIRMING

** ** *

BEFORE: ACREE AND DIXON, JUDGES; GRAVES,¹ SENIOR JUDGE.

GRAVES, SENIOR JUDGE: Gary Hager appeals from a judgment dismissing his counterclaim in a personal property dispute. On appeal, Hager argues that the trial court erred by denying his right to a jury trial and by denying his motion to extend discovery deadlines. We affirm.

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.

Gary Hager and Charles Mills entered into an oral agreement to purchase a bulldozer for the purpose of performing reclamation work. Following a dispute regarding the division of the proceeds from the joint venture, Hager moved the bulldozer to his home. Mills then filed a complaint alleging a conversion claim in Martin Circuit Court. Hager filed an answer and counterclaim alleging that Mills failed to pay amounts owed him under the joint venture. Neither party requested a jury trial in their respective pleadings. On November 5, 2007, the court entered an order scheduling a bench trial for May 8, 2008. On April 1, 2008, Hager's new counsel filed an entry of appearance. Hager filed a motion for a jury trial and to extend discovery deadlines. The court denied the motions. The court conducted a bench trial on May 8, 2008. Mills dismissed his conversion claim and the only issue at trial was Hager's counterclaim. After hearing the evidence, the court dismissed the counterclaim. This appeal follows.

Hager first argues that the trial court erred by denying his motion for a jury trial. Kentucky Rules of Civil Procedure (CR) 38.02 states:

Any party may demand a trial by jury of any issue triable of right by a jury by serving upon the other parties a demand therefore in writing at any time after the commencement of the action and not later than 10 days after the service of the last pleading directed to such issue. Such demand may be indorsed upon a pleading of the party, and if indorsed on the complaint, the filing of the complaint shall constitute service of the demand.

CR 38.04 states:

The failure of a party to serve a demand as required by this rule and to file it as required by Rule 5.05 constitutes a waiver by him of trial by jury. A demand for trial by jury made as herein provided may not be withdrawn without the consent of the parties.

Hager did not demand a jury trial in his counterclaim. Hager did not demand a jury trial before or after the court entered its order scheduling the bench trial.

Although the record does not demonstrate the circumstances surrounding the withdrawal of Hager's first attorney, the substitution of new counsel at the last hour does not undo the waiver of trial by jury. The trial court did not abuse its discretion by denying the motion for a jury trial.

Hager next argues that the trial court abused its discretion by denying his motion to extend discovery deadlines and to allow his new counsel additional time for trial preparation.

We have reviewed the record. Hager does not set forth with any specificity what evidence he intended to discover if the deadline was extended. Hager's new counsel entered his appearance one month before trial. Further, Hager has not demonstrated any specific prejudice beyond merely preferring more time to prepare for trial. The only disputed issue at trial was the amounts owed to Hager under the contract. We cannot conclude that the trial court abused its discretion.

Accordingly, the judgment of the Martin Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Jonah L. Stevens
Pikeville, Kentucky

BRIEF FOR APPELLEE:

Brian Cumbo
Inez, Kentucky