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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-001185-MR

HERBERT J. SMITH

APPELLANT

v. APPEAL FROM WARREN CIRCUIT COURT
HONORABLE PHILLIP R. PATTON, SPECIAL JUDGE
ACTION NO. 06-CI-02001

NATIONAL CITY BANK OF
KENTUCKY AND NATIONAL
CITY BANK

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: COMBS, CHIEF JUDGE; WINE, JUDGE; BUCKINGHAM,¹ SENIOR
JUDGE.

¹ Senior Judge David C. Buckingham 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.

BUCKINGHAM, SENIOR JUDGE: Herbert J. Smith appeals from a summary judgment granted by the Warren Circuit Court to National City Bank.² Smith filed suit in the Warren Circuit Court against National City alleging that it had failed to pay him fees for the management of several trusts. The issue on appeal is whether the trial court erred in granting summary judgment on Smith's breach of contract claim solely as it relates to the management of a group of trusts known as the Uhl Trusts. Because we agree with the circuit court that Smith's claim is entirely refuted by the record, we affirm.

This case has a lengthy history which we will summarize briefly. In 1982, Joseph Ray Gaines executed a Revocable Trust Agreement which created a Marital Trust for the benefit of his wife, Ann C. Gaines. The Trust Agreement provided for the creation of an Advisory Committee. Smith became a member of the Advisory Committee in 2001. Ann C. Gaines also settled separate trusts for her children, grandchildren, and great-grandchildren, the so-called Uhl Trusts.³ At the time of Joseph Ray Gaines's death in 1993, National City had assumed the trusteeship of all these trusts from its predecessor, First Kentucky National Corporation.

² Smith named "National City Bank of Kentucky" and "National City Bank" as appellees in his notice of appeal. The appellee's brief states that there is no such entity as "National City Bank of Kentucky." We will therefore refer to the appellee solely as "National City Bank."

³ The specific trusts are named in the record as follows: Thomas W. Uhl Irrevocable GST Trust; Thomas W. Uhl Trust; James C. Uhl Irrevocable GST Trust; James C. Uhl Trust; Soren Uhl Trust; Anders Uhl Trust; Nieves Uhl Trust; David Uhl Trust; Ann C. Uhl Trust; Carter W. Uhl Trust; Astred Uhl Trust.

By 2000, a dispute had arisen between National City and the Advisory Committee concerning the administration of the Marital Trust. In the opinion of the Advisory Committee, Mrs. Gaines was receiving insufficient income from the trust because National City had invested the corpus of the trust too heavily in stocks. The Advisory Committee also felt that the capital gains resulting from some investments in growth securities should be deemed income and distributed from the Marital Trust to Mrs. Gaines in the amount of \$4.2 million (later revised to \$3.8 million).

Ultimately, National City filed a declaratory judgment action in Warren Circuit Court in order to determine the Advisory Committee's powers and the propriety of its proposed directives. In 2004, the trial court entered a judgment which removed the Advisory Committee and essentially ruled in National City's favor. This judgment was affirmed on appeal in 2006. *See Estate of Ann C. Gaines v. National City Bank*, 2006 WL 2517074 (Ky.App. 2006) (2004-CA-001545; 2004-CA-001610) (disc. rev. denied April 11, 2007). Smith had become a party to this lawsuit in 2001 in his capacity as a member of the Advisory Committee.

Shortly after the appellate opinion was rendered, Smith filed a complaint against National City in which he claimed that he had been hired pursuant to an oral agreement with Wanda Scott, an authorized officer and employee to National City, to manage (1) the Marital Trust that was the subject of the declaratory action and (2) the ten Uhl Trusts set up by Mrs. Gaines. In his

complaint, he stated that he managed these eleven trusts from January 1, 2000, through April 2005. He claimed that National City's failure to pay him management fees for his services constituted a breach of contract, a breach of fiduciary duty, and a breach of an unspecified statutory duty. He requested damages of \$1.5 million.

The circuit court granted summary judgment to National City on all these claims, holding that Smith was taking an untenable position in light of his stance in the earlier litigation. As we noted in our account of the earlier lawsuit, Smith was a member of the Advisory Committee which alleged that the Marital Trust was being mismanaged by National City. The circuit court found that his posture in the earlier case was utterly incompatible with his current claims that he was in fact the manager of the trusts:

If Mr. Smith were simultaneously serving as a member of the Advisory Committee and as Trust Manager as his current action claims, it means that Mr. Smith was paid over \$40,000 for advising himself, and that he is currently seeking additional compensation for taking advice from himself. This is a wholly untenable position.

On appeal, Smith claims that the trial court erroneously assumed that the Uhl Trusts were subject to the same Advisory Committee as the Marital Trust and that summary judgment on the breach of contract claim relating to these trusts was consequently improper because a question of fact remains as to the management of these trusts and whether they had advisory committees.

But the circuit court did address Smith's claims relating to the Uhl Trusts. It relied on two memos that show that Smith was appointed to the advisory committee of the Uhl Trusts. The first memo, dated October 30, 2000, is addressed to Wanda Scott, John Grider, and Mike Buchanon and signed by Herbert Smith. It states:

Ann has asked me to review all of her trust funds at NCC bank and to make changes she and her children would like to see in the management of the trusts.

In reviewing the trusts it is noticed that John D. Grider and Michael O. Buchanon were named to the advisory committee [of] many of the trusts. The advisory committee has never met on any of these trusts.

The trusts provide that that [sic] the member appoint new members. To achieve this objective Ann request[s] John resign and that Michael appoint Frank Hampton Moore, T.J. Smith, and Herbert J. Smith as members of the various trusts, after these members are appointed by Michael Ann request[s] that he resign leaving the three above as members of the various trusts.

The trusts are as follows:

Thomas W. Uhl Irrevocable GST TRUST, Thomas W. Uhl Trust, James C. Uhl GST Trust, James C. Uhl Trust, Soren Uhl Trust, Anders Uhl Trust, Carter W. Uhl Trust, Astred H. Uhl Trusts, Ann Carter Uhl Trust, David T. Uhl Trusts, Nievis Uhl Trust.

The other memo is signed by Michael Buchanon and dated November 13, 2000. In the memo, Buchanon tenders his resignation from the advisory committee of the Uhl Trusts and appoints Smith to the advisory committee.

Several years ago Ann Gaines in setting up trust funds for children, grand children and great grand children, had named Michael Buchanon and John D. Grider as members of the various trusts advisory committee. The committee never acted, now as is called for in the various trusts agreement, a committee with [sic] closer acquainted with the needs and are interested in the welfare of the beneficiaries, a new AC needs to be appointed. John Grider has resigned, leaving Mr. Buchanon as the only member, as provided for in the various trust[s] he must appoint new members.

Therefore I hereby appoint the following members to serve as members to the advisory committee of these trusts Herbert J. Smith, Frank H. Moore T.J. Smith.

The trusts referred to above are as follows: Thomas W. Uhl irrevocable GST trust, Thomas W. Uhl Trust, James C. Uhl GST Trust, Soren Uhl trust, Anders Uhl trust, Carter W. Uhl trust, Ann Carter Uhl trust, Astred Uhl trust, Neves Uhl trust, David Uhl trust, James C. Uhl trust.

As I have completed my duties to these trusts, I here by resign as a member of the advisory committee of the trusts listed above.

These memos show that the Uhl Trusts did have an advisory committee and that Smith was appointed to serve on it on November 13, 2000. In the face of this evidence, the circuit court concluded as follows:

As for the remaining trusts at issue in this litigation, there is a similarly fatal inconsistency. It is undisputed that on October 30, 2000, Mr. Smith requested to be appointed to the advisory committees in order to “make changes . . . in the management of the trusts.” Mr. Smith was in fact a member of the advisory committee of all of the trusts at issue in this case from October 2000 until his removal by this Court in 2005.

Mr. Smith’s request to be on the advisory committees of the trusts settled by Ann Gaines, and his

subsequent service on those committees is entirely inconsistent with his current claim that he was managing those trusts from January, 2000 through 2005. If Mr. Smith was hired in January, 2000 to manage the trusts as he now claims, he would not have requested to be appointed to their advisory committees ten months later in order to make changes in the management of the trusts. Moreover, any advice he provided the trustee was as a member of those advisory committees, not as manager of the trusts.

In reviewing a grant of summary judgment, our inquiry focuses on whether the trial court correctly found that there was no genuine issue 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. “[T]he proper function of summary judgment is to terminate litigation when, as a matter of law, it appears that it would be impossible for the respondent to produce evidence at the trial warranting a judgment in his favor.” *Steelvest v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky. 1991).

Smith has provided no affirmative evidence to refute the evidence of the memos. Presumably, Smith’s purported management of the numerous Uhl Trusts over several years would have generated some documentation. Smith has provided absolutely no indication that such evidence even exists. “A party opposing a motion for summary judgment cannot rely merely on the unsupported allegations of his pleadings, but is required to present some affirmative evidence showing that there is a genuine issue of material fact for trial.” *Godman v. City of*

Fort Wright, 234 S.W.3d 362, 370 (Ky. App. 2007). Moreover, such a showing must be made in a timely fashion:

The curtain must fall at some time upon the right of a litigant to make a showing that a genuine issue as to a material fact does exist. If this were not so, there could never be a summary judgment since “hope springs eternal in the human breast.” The hope or bare belief, like Mr. Micawber’s, that something will “turn up,” cannot be made basis for showing that a genuine issue as to a material fact exists.

Neal v. Welker, 426 S.W.2d 476, 479-80 (Ky. 1968). We conclude that the court properly awarded summary judgment in National City’s favor.

The summary judgment of the Warren Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Christopher T. Davenport
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BRIEF FOR APPELLEE:

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