RENDERED: AUGUST 6, 2010; 10:00 A.M.
NOT TO BE PUBLISHED

# Commonwealth of Kentucky

# Court of Appeals

NO. 2009-CA-000878-MR

STEWART TITLE GUARANTY COMPANY — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE JAMES D. ISHMAEL, JR., JUDGE
ACTION NO. 08-CI-06291

HAYDEN & BUTLER, P.S.C. — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: MOORE AND THOMPSON, JUDGES; WHITE, SENIOR JUDGE.[1]

MOORE, JUDGE: Stewart Title Guaranty Company appeals from the Fayette Circuit Court's order dismissing its breach of contract claim against Hayden and Butler, P.S.C. (H&B). After a careful review of the record, we affirm.

[1] Senior Judge Edwin M. White sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statute (KRS) 21.580.

To begin, we adopt the trial court's succinct statement of the facts relevant to this matter, as stated in its order:

> [O]n or about September 8, 1999, the parties entered into an Agreement whereby H & B was authorized to act as an agent for Stewart Title for the purpose of issuing title policies. At a certain closing that occurred on or about January 19, 2000, H & B issued a title insurance policy on a certain property with an existing mortgage. On or about July 14, 2004 the couple involved in the January 19, 2000 closing filed a Petition pursuant to Chapter 7 in Bankruptcy Court. On or about December 1, 2004 the Bankruptcy Trustee filed an adversary proceeding against the Mortgage Company in the January 19, 2000 closing alleging that the Mortgage Company Lien should be voided for various claimed deficiencies. On or about January 5, 2005 the Bankruptcy Court voided the Mortgage Company Lien at issue reducing the Mortgage Company from a secured creditor with a superior lien on the property in question to that of an unsecured creditor.
>
> Thereafter, the Mortgage Company presented a claim to Stewart Title under the title insurance policy issued by H & B on the subject property. Stewart Title eventually paid the claim of the Mortgage Company in the amount of $55,387.68. Stewart Title's attorney stipulated to the Court at Oral Arguments that Stewart Title paid the Mortgage Company as aforesaid in November 2006. The Court also learned at Oral Arguments from Stewart Title's Counsel that it was first notified by the Mortgage Company in December 2004 of the potential claim. Stewart Title first notified H & B on or about November 21, 2005 of the potential claim against it. This law suit was filed on December 11, 2008.

Subsequent to the filing of this complaint, H&B made a special appearance in this matter solely for the purpose of moving to dismiss it. H&B's motion was based upon the same agreement that Stewart was seeking to enforce

against it. Of particular note, its motion relied upon the same provision in that contract which Stewart cited as the basis of H&B's liability:

> 7. RELATIONSHIPS BETWEEN STEWART AND [H&B]:
>
> DIVISION OF LOSS AND EXPENSE: The term "Loss" shall include the amount paid to or for the benefit of the insured, as well as loss adjustment expense including any cost of defending the claim resulting in the loss.
>
> . . .
>
> (b) The relationship between [H&B] and STEWART under this Agreement is that of Attorney and Client, and the responsibility and liability of each party to the other shall be governed by the law relating to Attorney and Client; however, without limiting liability of [H&B], [H&B] shall be liable to STEWART for any loss which STEWART may sustain or incur under any policy issued pursuant to this Agreement occasioned by any fraud, intentional act, or omission or negligence of [H&B] in the performing of his undertaking hereunder, including but without limiting the generality of the foregoing, any loss resulting from any error in abstracting, any loss resulting from an error in the examination of the title, any loss resulting from any error in closing of the transaction, or any loss resulting from a violation of this Agreement, or a violation of the instructions given by STEWART. [H&B] does not and shall not represent that [H&B] is closing the transaction on behalf of STEWART.

Citing to the phrase, "The relationship between [H&B] and STEWART under this Agreement is that of Attorney and Client, and the

responsibility and liability of each party to the other shall be governed by the law relating to Attorney and Client," H&B interpreted Stewart's claim as one for professional malpractice. Consequently, H&B invoked Kentucky Revised Statute (KRS) 413.245, which mandates that actions for professional service malpractice be filed within one year from the date of occurrence or from the date when the cause of action was, or reasonably should have been, discovered by the party injured. Pursuant to this statute, H&B argued that the date of discovery ran no later than January 5, 2005, making Stewart's December 11, 2008 complaint untimely.

Stewart argued that its complaint did not assert a breach of contract for professional services. Rather, Stewart argued that its complaint asserted causes of action for a breach of contract for non-professional services, a breach of a contractual indemnity provision, and a cause of action for common-law indemnity. If H&B breached a contract for non-professional services, Stewart urged that the proper statute of limitations is fifteen years per KRS 413.090(2). Alternatively, Stewart argued that if H&B breached an indemnity provision contained in a contract or if H&B owed Stewart indemnity under the common law, Stewart urged that the proper statute of limitations is five years per KRS 413.120(7). In any event, Stewart argued that all of its claims against H&B were timely.

In an April 13, 2009 opinion and order, the trial court reviewed the contract between Stewart and H&B and dismissed Stewart's complaint,

interpreting it as an untimely action for professional malpractice. The trial court also held that KRS 413.120 was inapplicable to Stewart's indemnity claims. It is from this order that Stewart appeals.

## STANDARD OF LAW

The subject of our analysis is the trial court's decision to dismiss Stewart's action pursuant to Civil Rule (CR) 12.02(f), *i.e.*, failure to state a claim. In that respect,

> [i]t is well established that a court should not dismiss an action for failure to state a claim unless the pleading party appears not to be entitled to relief under any set of facts which could be proven in support of his claim. In ruling on a motion to dismiss, the pleadings should be liberally construed in the light most favorable to the plaintiff, all allegations being taken as true. Therefore, the question is purely a matter of law. Accordingly, the trial court's decision will be reviewed *de novo*.

*Morgan v. Bird*, 289 S.W.3d 222, 226 (Ky. App. 2009) (internal citations and quotations omitted).

## ANALYSIS

On appeal, Stewart does not contest that a suit for professional malpractice based upon the agreement at issue in this matter would be untimely. Nor does Stewart renew its contention that a fifteen-year statute of limitations would be appropriate for any action based upon this contract. Instead, Stewart's sole contention is that it had a total of five years, following its settlement with the

mortgage company, to file its action for indemnity against H&B pursuant to KRS 413.120(7) based upon either section 7(b) of its contract with H&B or under the common law. We disagree.

To begin, KRS 413.120(7) does not provide a five-year limitations period for contractual indemnity claims; it only governs the applicable limitations period for indemnity actions asserted under common law. *See Degener v. Hall Contracting Corp.*, 27 S.W.3d 775, 782 (Ky. 2000). Indeed, that statute explicitly provides a five-year limitations period for "[a]n action for an injury to the rights of the plaintiff, *not arising on contract* and not otherwise enumerated." KRS 413.120(7) (emphasis added).

As such, Stewart's argument that KRS 413.120(7) allowed it five years to assert its contractual indemnity action against H&B based upon section 7(b) of their retainer agreement is untenable. The language of that very provision, which both Stewart and H&B agreed upon, recites that their rights against each other pursuant to that contract are governed by "the law relating to Attorney and Client." The law relating to attorney and client, in turn, mandates that actions based upon contract in that context be brought "within one (1) year from the date of the occurrence or from the date when the cause of action was, or reasonably should have been, discovered by the party injured." KRS 413.245. In this regard, Stewart's action for contractual indemnity was untimely.

For similar reasons, section 7(b) of the retainer agreement between Stewart and H&B also precludes Stewart from stating a claim for indemnity under the common law.

As a preliminary matter, the right to common-law indemnity stands entirely upon principles of equity. *Brown Hotel Co. v. Pittsburgh Fuel Co.*, 311 Ky. 396, 224 S.W.2d 165, 168 (1949). And, as opposed to contractual indemnity, "common law indemnity is an equitable cause of action that is subject to particular limitations and requires a party invoking it to meet certain standards." *Electric Ins. Co. v. Freudenberg-Nok, General Partnership*, 487 F.Supp.2d 894, 903 (W.D. Ky. 2007).[2]

However,

> [w]hile the circuit court has broad powers in equity to fashion a remedy out of general considerations of right and justice as applied to the relation of the parties and the circumstances of their dealings, *see Gabbard v. Watkins*, 280 Ky. 257, 133 S.W.2d 54 (Ky. 1939), a court should not resort to equitable remedies when adequate legal remedies are available. *See Wunderlich v. Scott*, 242 Ky. 481, 486, 46 S.W.2d 753, 755 (1932) (court stating that "so long as the law provides an adequate remedy, equity has no right to interfere. It must therefore appear that the legal remedy is inadequate before a court of equity will afford relief . . .").

[2] An action for common law indemnity arises "(1) Where the party claiming indemnity has not been guilty of any fault, except technically, or constructively, as where an innocent master was held to respond for the tort of his servant acting within the scope of his employment; or (2) where both parties have been in fault, but not in the same fault, towards the party injured, and the fault of the party from whom indemnity is claimed was the primary and efficient cause of the injury." *Degener*, 27 S.W.3d at 780.

*Bolen v. Bolen*, 169 S.W.3d 59, 65 n. 14 (Ky. App. 2005).

This principle, as stated in *Bolen*, applies equally to a situation in which there is an explicit contract which has been performed. *See Codell Const. Co. v. Commonwealth*, 566 S.W.2d 161, 165 (Ky. App. 1977) (holding unjust enrichment, an equitable cause of action, inapplicable where an explicit contract which has been performed dictated the rights and liabilities of the parties). In that event, the rights of the parties are measured solely by the contract. *Damron v. Stewart & Weir*, 253 Ky. 394, 69 S.W.2d 685, 687 (1934). And, "when the parties have made an express contract which will admit of but one interpretation, the court must give effect to it, since courts cannot make a new contract between the parties but must enforce the one the parties have made." *Schwartz Amusement Co. v. Independent Order of Odd Fellows, Howard Lodge, No. 15*, 278 Ky. 563, 128 S.W.2d 965, 968 (1939); *see also U.S. Fidelity & Guaranty Co. v. Napier Elec. & Const. Co., Inc.*, 571 S.W.2d 644, 646 (Ky. App. 1978) (holding that where the nature of the indemnitor's liability is specified by express contract, the nature of the indemnitor's liability will be determined by the provisions of that express contract).

These principles apply to the case at bar because this matter 1) involves an express contract that has been performed between Stewart and H&B; and 2) involves the assertion of an equitable cause of action, *i.e.*, common law indemnity. Stewart does not argue that its legal right of indemnification provided

under that contract is somehow inadequate. Rather, Stewart simply wishes to assert an equitable cause of action in the alternative based upon exactly the same facts giving rise to its contractual indemnity claim. However, the contract between Stewart and H&B obviated any right to recover under the common law theory of indemnity because their contract was enforceable; it was performed; and, under their contract, Stewart and H&B had already agreed upon how and under what circumstances losses should be allocated and liability for indemnity would arise: not under the common law theory of equitable indemnity, but under "the law relating to Attorney and Client." *See* section 7(b), above. Indeed, section 7(b) explicitly defines "any loss resulting from any error in closing of the transaction" as an event of liability and loss under the agreement, which is exactly what Stewart alleges to form the basis of its complaint.

**CONCLUSION**

For these reasons, the opinion and order of the Fayette Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Jennifer Hatcher
Louisville, Kentucky

BRIEF FOR APPELLEE:

Calvin R. Fulkerson
David A. Trevey
Lexington, Kentucky