

Commonwealth of Kentucky
Court of Appeals

NO. 2009-CA-001250-MR

KIMBALL LIVESAY, F/K/A STATTS

APPELLANT

v. APPEAL FROM JEFFERSON FAMILY COURT
HONORABLE ELEANORE GARBER, JUDGE
ACTION NO. 06-CI-502466

TIMOTHY SCOTT STATTS

APPELLEE

OPINION
AFFIRMING IN PART
REVERSING IN PART AND REMANDING

** ** *

BEFORE: ACREE, COMBS AND WINE, JUDGES.

ACREE, JUDGE: The appellant, Kimball Livesay, appeals a decision of the Jefferson Family Court. The family court determined that Kimball's interest in stocks and options, as set forth under the marriage settlement agreement between her and her former husband, Timothy Statts, ended when the options were traded

for identical options in another company. Therefore, she no longer maintained an interest. However, because the contract did not contemplate the type of transaction that occurred, remand is necessary for the consideration of additional evidence regarding the parties' intent. The family court also denied Kimball's request for attorney's fees and costs and we affirm. Therefore, the decision of the family court is reversed in part and remanded and affirmed in part.

On March 30, 2007, Timothy and Kimball Statts divorced after three and one-half years of marriage. They subsequently entered into a Marital Settlement Agreement (MSA) setting forth, among other things, the parties' interests in Summit Energy Services, Inc. (Summit) stock and stock options.

Summit is a closely held corporation and is not publicly traded. Tim was an employee of Summit both before and during the marriage. He obtained the stock and options as a result of his employment. Restrictions placed on the stock and options prevented Tim from transferring ownership of the stock to Kim upon their divorce. Therefore, the parties agreed Tim would buy out Kim's interest in the stock and options for \$113,248.77.

Although the MSA provided for Tim to buy out Kim's interest in the stock and options, Kim retained a financial interest that comes to fruition when the stock is sold or redeemed. Specifically, the MSA instructs that "[i]n addition to the payment set forth [above], [Tim] shall make additional payment to [Kim] if, when he ultimately *sells or redeems* the Summit Stock, the sale price exceeds \$20.00 per

share.” (emphasis added). Tim, however, retained the right to receive all dividends and distributions from the stock.

On July 31, 2007, Summit and SWP Holdings, Inc. (SWP) entered into a plan of merger that closed on August 31, 2007. SWP is a privately held and funded corporation formed for the purpose of acquiring 100% of Summit’s outstanding stock. After obtaining a loan, SWP sought to acquire all of Summit’s stock and options. SWP purchased most of the stock. However, some of the Summit options were exchanged for SWP options.

Tim was a minority shareholder of Summit and his name does not appear on any of the merger documents. SWP purchased 31,500 of Tim’s Summit stock and he received \$22.44 per share.¹ In order to maintain his position with the company, Tim exchanged 19,500 Summit stock options for 19,500 SWP stock options with the same strike price. The exchange was a non-taxable event.

Kim’s share of the value received for the 31,500 shares sold to SWP is not at issue and she received compensation for the same. However, Kim also had an interest in 5,066 of the 19,500 Summit options transferred in exchange for the SWP options. Those options are the subject of this controversy.

On August 30, 2007, Tim prepared and provided Kim with an Excel worksheet setting forth the estimated price of the Summit stock, which at the time was \$22.32 per share. Based on that price—which was provided to him by Summit controller Michelle Howard—Tim prepared a spreadsheet calculating

¹ The final price for the Summit stock was \$22.37. However, a working capital adjustment was made later. The parties agree that the fair market value of the Summit stock was \$22.44.

Kim's share of the sell price minus applicable taxes.² However, Kim wanted more information regarding the transaction.

The parties stipulate that on November 21, 2007, Kim received and cashed a check for \$30,422.39 which included payment for the 5,066 options exchanged by Tim. On April 8, 2008, Tim sent a "settle-up" payment³ to reflect a subsequent working capital adjustment. The family court determined that Tim was unaware of the adjustment at the time of his initial calculation. His settle up payment was accompanied by an excel sheet that reflected the adjustment. A letter from Steve Wilhite,⁴ Summit's new president, also accompanied Tim's letter. While Wilhite did not work for Summit at the time of the merger, Wilhite reviewed the transaction documents. In his letter Wilhite advised Kim that "each share of voting common stock and nonvoting common stock of Summit Energy Services, Inc. was converted automatically into the right to receive cash. The total price the shareholders related to this transaction was \$22.44 per share."

In May of 2008, Kim filed a subpoena and notice to take deposition on Summit's chief counsel. However, Summit did not wish to turn over information regarding the transaction for confidentiality reasons. Summit's counsel did not seek a protective order, but objected to the subpoena. Tim's counsel filed a motion

² The extent of Tim's tax liability was disputed at trial, but it was ultimately determined that Tim suffered no immediate tax consequence for the exchange. This is not disputed on appeal.

³ As provided for in the MSA, section D(3)(d) pg. 6.

⁴ The parties and the record below refer to Mr. Wilhite and Mr. Willett. However, Wilhite is correct.

to quash and a motion for protective order. The parties eventually entered into a confidentiality agreement and protective order.

In July, the court entered an order for trial and the parties held an informal discovery meeting. In response to matters sought in the subpoena, Wilhite voluntarily prepared and provided a confidential worksheet styled “Tim Statts’ Sale of Summit Energy Services, Inc. stock and options—Schedule of total Consideration Received.”

The case eventually went to trial and two issues are presented on appeal. First, did Tim “sell or redeem” the Summit options as contemplated by the MSA? Second, is Kim entitled to attorney’s fees and costs as a result of Tim’s alleged breach of the MSA and can she recover attorney’s fees and costs pursuant to Kentucky Revised Statute (KRS) 403.220?

Interpreting the Marriage Settlement Agreement

Interpretation of a marriage settlement agreement is governed by the same rules and provisions applicable to the construction of other contracts. *Richey v. Richey*, 389 S.W.2d 914, 917 (Ky. 1965). The primary object of contract construction is to effectuate the intentions of the parties. *Cantrell Supply, Inc. v. Liberty Mut. Ins. Co.*, 92 S.W.3d 381,384 (Ky. App. 2002). “Any contract or agreement must be construed as a whole, giving effect to all parts and every word

in it if possible.” *Id.* at 384-85 (quoting *City of Louisa v. Newland*, 705 S.W.2d 916, 919 (Ky. 1986)).

Where a contract is ambiguous or silent on a vital matter, a court may consider parol evidence involving the circumstances surrounding execution of the contract, the subject matter of the contract, the objects to be accomplished, and the conduct of the parties. Absent ambiguity in the contract, the parties’ intentions must be discerned from the four corners of the instrument without resort to extrinsic evidence. A contract is ambiguous if a reasonable person would find it susceptible to different or inconsistent interpretations. The fact that one party may have intended different results, however, is insufficient to construe a contract at variance with its plain and unambiguous terms.

Id. at 385 (internal citations omitted).

The interpretation of a contract, including determining if the contract is ambiguous, is a question of law and must be reviewed de novo. *Id.* “However, once a court determines that a contract is ambiguous, areas of dispute concerning the extrinsic evidence are factual issues and construction of the contract become subject to resolution by the fact finder.” *Id.*

Both parties assert that the terms “sell” and “redeem” are not ambiguous. As a result, the family court did not make a finding as to ambiguity and sustained objections to testimony concerning the MSA’s formation. While the court heard a variety of testimony concerning the transaction, the testimony generally concerned the nature of the transaction and the exchange of information that took place subsequent to the transaction. The family court ultimately determined that Tim satisfied his obligation under the MSA by paying Kim her percentage of the fair

market value of the Summit options. The court reached this conclusion by determining that the transaction equated to a sale. On appeal, the parties maintain that the contract is not ambiguous.

Kim avers that the exact terms of the contract require that a sale or redemption take place before Kim's interest is terminated. Therefore, because there was no sale or redemption, she is entitled to a retained interest in either the options exchanged or the options received in exchange.

Tim also argues that the contract language must control. However, Tim asserts that Kim's interest only comes to fruition when the stock is sold or redeemed. Therefore, if Tim disposes of the stock by means other than a sale or redemption, Kim's interest is terminated and she receives nothing. Despite this argument, Tim also accepts the family court's determination that the shares were "disposed of" or "bought back" for the equivalent of \$22.44 per share and is willing to pay Kim her percentage of the stock's fair market value.

In addition to agreeing on the issue of ambiguity, the parties' arguments reveal that neither believes the contract contemplated the type of transaction that occurred. In oral arguments, Kim's counsel suggested that the parties intentionally left out language describing this type of transaction because the parties contemplated that she would retain an interest. Tim's counsel also argued that the contract did not contemplate this type of transaction. However, Tim asserts that Kim is only entitled to payment if a sale or redemption occurs; any other type of

transaction that is not a sale or redemption leaves her with no right to payment and no retained interest.

Under either theory, it appears that the contract did not contemplate the type of transaction that occurred and is silent. As a result, additional evidence must be considered. This consideration is necessary to determine the parties' intent. *Bank of New York v. Janowick*, 470 F.3d 264 (6th Cir. 2006) (Finding when a contract is silent on a vital matter, it is especially appropriate for courts to consider the circumstances surrounding the parties, the object of the contract, and the contract's language, as well as the subject matter of the contract). Therefore, we must remand to the family court which is in a better position to consider the extrinsic and parol evidence necessary to determine the intent of the parties.

Attorney's Fees and Costs

On appeal, Kim attempts to separate her second and third arguments. First, Kim asserts the trial court erred as a matter of law by failing to enforce the information sharing requirements of the MSA and improperly shifted the burden of discovery to her. Second, Kim states that she should receive attorney's fees. However, both issues were combined into a single argument below. Specifically, Kim argued that the failure to comply with the MSA's provisions entitles her to attorney's fees and costs.

Kim is not permitted to give one can of worms to the trial court and another to the appellate court. *Kennedy v. Commonwealth*, 544 S.W.2d 219, 222 (Ky. 1976). Therefore, the alleged breach of contract may only be considered to the

extent it weighs on the determination of attorney's fees and costs. This court must determine whether Kim is entitled to attorney's fees and costs as a result of Tim's alleged breach and whether Kim is entitled to fees and costs under KRS 403.220.

Kim's attempts to seek attorney's fees as special damages of the contract breach are futile. Kim asserts that *Lyon v. Whitsell* provides an exception to the general rule that attorney's fees are not damages. *See Lyon v. Whitsell*, 245 S.W.2d 926 (Ky. App 1952) (citing *Bolling v. Ford*, 213 Ky. 403, 281 S.W. 178 (Ky. App. 1926)). In *Lyon*, property was held in a constructive trust and Whitsell breached his duty as constructive trustee. *Id.* at 927. As a result, Whitsell had to return the property to the beneficiaries. *Id.* However, unlike *Bolling*, there was no "definitively fixed or acknowledged" trust relationship and there were "no clear incidents of actual fraud." *Id.* Therefore, the case was distinguished from *Bolling* and *Lyon* could not collect attorney's fees as damages. *Id.*

In this case, there is a provision in the contract regarding a constructive trust. Kim argues that, as a result of this provision, Tim held the stock and options in a constructive trust and breached his duties by not complying with the information sharing provisions. The MSA states that "[t]he signing of this document by the parties, herein, creates a constructive trust on behalf of any party to whom the property is to be transferred in said property and creates an equitable interest in said property on behalf of the transferee whether or not the party executes any documentation to affect the transfer." The constructive trust language appears to apply to property that will be transferred to the other party. The language does not

create a definitive trust relationship as to the stock and options. Indeed, the contract does not place any restrictions on Tim's use of the stock and entitles him to receive all income and distributions associated with the stock and options.

As for breach of the contract, the family court found that Tim made a good faith effort to comply with the MSA. The circuit court's finding is supported by substantial evidence because Tim immediately notified Kim that the transaction occurred and made good faith attempts to adequately compensate her. The circuit court did not make any findings as to fraud.

There is no definitively fixed trust relationship governing the stock and options, and there are no incidents of actual fraud. Therefore, Kim cannot recover fees under the narrow exception considered in *Lyon*. It is also important to note that the MSA provides that the parties will pay their own attorney's fees and costs.

Moreover, in response to Kim's motion to alter, amend, or correct, the family court stated that "[e]ven if this court did find that [Tim] breached the MSA, [Kim's] attorney's fees were not a result of the alleged breach." The court went on to explain that the litigation primarily concerned whether Kim's interest was transferred to the SWP holdings, which is a matter of contract interpretation.

In addition to determining that Tim did not breach the contract, the family court also considered the appropriateness of attorney's fees under KRS 403.220. The trial court's finding regarding KRS 403.220 may only be overturned if an abuse of discretion occurred. *Sexton v. Sexton*, 125 S.W.3d 258, 272 (Ky. 2004). "The test for abuse of discretion is whether the trial judge's decision was arbitrary,

unreasonable, unfair, or unsupported by sound legal principles.” *Id.* (citations omitted).

The family court considered each of the factors set forth under KRS 403.220 including: the amount and character of the services rendered, the labor time and trouble involved and nature and importance of the litigation or business in which the services were rendered, the responsibility imposed, the amount of money or the value of property affected by the controversy, the skill and experience called for in the performance of the services and professional character and standing of the attorneys, and the results secured. The family court determined that, despite disparity between the parties’ incomes, the other factors weighed in Tim’s favor. The family court noted that even if Tim had produced the information sought by Kim, the litigation would have continued to determine if the options were sold or redeemed.

The family court engaged in a well reasoned analysis of the factors set forth under KRS 403.220. There is no indication that the court’s ruling was arbitrary, unreasonable, unfair, or unsupported by sound legal principles.

For the reasons set forth above, the decision of the family court is reversed in part and remanded and affirmed in part.

ALL CONCUR.

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