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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-000221-MR

ANWAR ALHALABI — APPELLANT

v.

APPEAL FROM BREATHITT CIRCUIT COURT
HONORABLE FRANK ALLEN FLETCHER, JUDGE
ACTION NO. 06-CI-00434

KPS SALES, INC. — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, CLAYTON, AND WINE, JUDGES.

WINE, JUDGE: Anwar Alhalabi appeals from the January 18, 2011, judgment of the Breathitt Circuit Court. That ruling granted summary judgment in favor of KPS Sales, Inc. ("KPS"), in its action against Alhalabi alleging non-payment of a promissory note. We hold that summary judgment was proper and therefore affirm.

The underlying breach of contract action stems from the ownership and operation of a gas station/convenience store ("store") located in Jackson, Kentucky. The property upon which the gas station was located was owned by the Shouses, who are not a party to this lawsuit. In 2006, the property was being leased from the Shouses to KPS Convenient Stores, LLC, which was owned by George Stamper, Eloise Combs, Kenny Mullins, and Tommy Jones. KPS Convenient Stores, LLC then sublet the property to First Class #7, LLC ("First Class"), which was also owned by Stamper, Combs, Mullins, and Jones, and also owned by Basam Alfrouhk. First Class then sublet the property to Pit Stop #1 ("Pit Stop"), which was owned by Wael Sedik. The lease agreement between First Class and Pit Stop provided that Pit Stop would pay rent based on a set percentage of the net profits from the store's sales.

Gasoline was provided to the store by KPS, which was also owned by Stamper, Combs, Mullins, Jones, and Alfrouhk. At some time, Sedik began having problems paying for the gasoline that KPS was providing. Stamper testified, via deposition, that Sedik was in arrears to KPS for $65,000 for gas that had already been delivered to the store. Sedik approached Alhalabi about purchasing Pit Stop and on March 15, 2006, an agreement was entered into in which Alhalabi agreed to purchase Pit Stop for the amount of $65,000, which was to be paid directly to KPS as satisfaction of Sedik's accrued debt. A separate document, entitled "Note," had previously been signed by Alhalabi and witnessed by Alfrouhk and Sedik, on

February 22, 2006, guaranteeing that KPS would continue to supply gasoline to the store in exchange for Alhalabi's $65,000. That document read, in relevant part:

> WHEREAS, KPS Sales, LLC is a supplier of gasoline and diesel fuel to the business known as Pit Stop #1, which is located at 215 Highway 15 North, Jackson, KY 41339;
>
> WHEREAS, Pit Stop #1 owes KPS Sales, LLC an outstanding balance on its account in excess of $65,000;
>
> WHEREAS, Anwar Alhalabi is purchasing part interest in Pit Stop #1;
>
> WHEREAS, KPS Sales, LLC will stop delivering to Pit Stop #1 unless it receives this Note which it believes will assure payment of $65,000 of the amount owed, and in consideration of inducing KPS Sales, LLC to continue to supply gasoline and diesel fuel to Pit Stop #1, Anwar Alhalabi is delivering this Note to KPS Sales, LLC and agreeing to be bound hereby.

The $65,000 was due and payable in full on March 20, 2006.

Alhalabi failed to make payment under the note and KPS subsequently filed a complaint with the Breathitt Circuit Court, alleging delinquency. On January 18, 2011, the trial court entered a judgment granting summary judgment in favor of KPS and ordering that Alhalabi pay the $65,000, plus interest. This appeal followed.

Summary judgment is appropriate when it appears that it would be impossible for the adverse party to produce evidence at trial supporting a judgment in his favor. *James Graham Brown Foundation, Inc. v. St. Paul Fire & Marine Ins. Co.*, 814 S.W.2d 273, 276 (Ky. 1991). When reviewing a trial court's grant of

summary judgment, we must determine "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." *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996). An appellate court must review the record in a light most favorable to the party opposing the motion and must resolve all doubts in his favor. *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky. 1991). "Because summary judgment involves only legal questions and the existence of any disputed material issues of fact, an appellate court need not defer to the trial court's decision and will review the issue *de novo*." *Lewis v. B & R Corporation*, 56 S.W.3d 432, 436 (Ky. App. 2001).

Alhalabi first argues that the trial court erred in granting summary judgment because genuine issues of material fact exist. At some time prior to the March 20 due date, Sedik stopped operation of the store. Upon discovering the store was no longer operating, Alfrouhk took possession and began operating the store himself, with the help of a cousin. On or about March 20, 2006, Alhalabi arrived at the store to take over operations, and was informed by Alfrouhk that the store belonged to him and that Alhalabi had failed to properly purchase any interest in the store. Alhalabi argues that the interference with his ability to take over the store amounted to a failure of consideration due, which therefore excused him from performance under the contract. We disagree.

Alhalabi argues that the language "WHEREAS, Anwar Alhalabi is purchasing part interest in Pit Stop #1," indicates that the note cannot be honored

unless Alhalabi also acquires an interest in the store. However, this language is merely informative in nature and is contained separately from the language in the note indicating consideration. The language of the note is clear that Alhalabi's promise to pay $65,000 was made "in consideration of inducing KPS Sales, LLC to continue to supply gasoline and diesel fuel to Pit Stop #1[.]" KPS maintains that it continued to supply gasoline to Pit Stop and the assertion has not been challenged. Therefore, it appears that the only party who has failed to perform under the note is Alhalabi. While it may be true that Alhalabi has been denied access to the store in violation of his agreement with Sedik, the purchase agreement is a separate agreement which has no bearing upon the note between Alhalabi and KPS. Any claims pertaining to the Alhalabi's inability to gain access to the store should have been pursued as a third-party claim or a separate legal action and are not part of this review. Accordingly, we find no error with the trial court's grant of summary judgment in favor of KPS.

Alhalabi also argues that the trial court erred when it failed to consider his defense. Alhalabi's argument fails for two reasons. First, he has failed to show that the trial court did not, in fact, consider his defense. More importantly, as we have already noted above, Alhalabi's defense is not sufficient to defeat KPS's claim for payment under the note.

We are not unsympathetic to Alhalabi's situation. For reasons that are not entirely clear to this Court, it does appear as though Alhalabi has been denied satisfaction of the agreement between himself and Sedik. Furthermore, depositions

of the parties indicate a potential ethical conflict in the shared interests of First Class, KPS, and their respective owners. Unfortunately, Alhalabi has failed to pursue the appropriate legal remedy or assert a defense or third-party claim in this action which would afford us an opportunity to conclude in his favor.

For the forgoing reasons, the January 18, 2011, judgment of the Breathitt Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Patrick E. O'Neill
Jackson, Kentucky

BRIEF FOR APPELLEE:

Darrell A. Herald
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