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Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-001217-MR
AND
NO. 2011-CA-001256-MR

WILLIAM THOMAS MCELHINNEY APPELLANT/CROSS-APPELLEE

v.

APPEAL AND CROSS-APPEAL FROM CAMPBELL CIRCUIT COURT
HONORABLE JULIE REINHARDT WARD, JUDGE
ACTION NO. 09-CI-01196

DAVID HOSEA APPELLEE/CROSS-APPELLANT

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, CHIEF JUDGE; MOORE AND THOMPSON, JUDGES.

ACREE, CHIEF JUDGE: The questions on appeal concern a jury verdict in favor of William Thomas McElhinney on his claim that David Hosea breached a contract for sale of real property by failing to pay the full purchase price. McElhinney has appealed the judgment to the extent that it does not provide for prejudgment

interest prior to May 12, 2009, and to the extent that the circuit court ordered that prejudgment interest accumulate in simple rather than compound fashion. Hosea filed a cross-appeal, by which he contends McElhinney's claim for breach of contract was barred by the doctrines of laches and accord and satisfaction. We reverse the circuit court's denial of McElhinney's request for prejudgment interest from the date Hosea was contractually obligated to pay the balance of the purchase price and remand for entry of an order consistent with this ruling. In all other respects, we affirm.

I. Background

In August of 1995, the parties entered into a written agreement whereby Hosea agreed to purchase from McElhinney the seventh floor of a building called Campbell Towers in Newport, Kentucky, for $200,000. Hosea agreed to pay $100,000 in installments of $25,000 by March 1996; the parties agreed to "work out" how the remaining $100,000 would be paid within sixty days of the contract's execution. In the event the parties could not reach any further agreement, Hosea was obligated to pay the outstanding $100,000 no later than January 10, 1997.

Hosea paid McElhinney the first $100,000 in accordance with the parties' agreement.

Shortly after entering into this agreement, but on a date otherwise unspecified, McElhinney submitted a proposal to Hosea. Among other business arrangements, McElhinney proposed to purchase a condo from Hosea for a total purchase price of $225,000. The first $100,000 would be offset by the outstanding

$100,000 Hosea had yet to pay McElhinney for the Campbell Towers property, and the remainder would be financed.

No written agreement was ever entered as to the condo property, but McElhinney took possession of the condo in late 1995.[1] In a letter dated August 5, 1997, McElhinney stated that Hosea had paid in full for the remainder of the Campbell Towers property. Apparently that statement referred to the $100,000 credit involved in the condo deal. McElhinney never secured financing for the remaining $125,000 owed on the condo, and he did not make payments to Hosea on the balance. Based on this lack of action, Hosea believed he and McElhinney had never "closed on" the deal.

Title to the condo was never transferred to McElhinney, and Hosea sold the condo to another party sometime in 2000 or 2001. McElhinney wrote a letter to Hosea dated May 12, 2009, in which he claimed Hosea still owed $100,000 for the Campbell Towers property.

On August 17, 2009, McElhinney filed suit claiming Hosea had breached the contract of sale by failing to pay the balance of $100,000.[2] He requested reimbursement plus prejudgment interest.

Hosea filed a motion shortly before trial, requesting that the circuit court "dismiss" McElhinney's claims "with prejudice" because he was not entitled to judgment as a matter of law. He asserted a number of legal principles which he

[1] The parties are unable to identify the specific dates of McElhinney's residence in the condo at issue, but they agree generally on the approximate timeline of their transactions.
[2] The complaint contained an additional count which was resolved separately from the breach of contract matter and which is not at issue on appeal.

believed precluded McElhinney's recovery, two of which have been asserted in his cross-appeal.

First, Hosea argued before the circuit court that the doctrine of accord and satisfaction entitled him to judgment. He claimed McElhinney's letter of August 5, 1997, representing that Hosea had finally paid the balance owed for the Campbell Towers purchase, was evidence that he had fulfilled all his outstanding contractual obligations. McElhinney disagreed, claiming that he had never actually received the remaining $100,000; since the condo had never been transferred to him, he had not enjoyed the benefit of the proposed $100,000 credit.

Hosea also raised the defense of laches, claiming McElhinney's delay in bringing suit was unreasonable and caused him prejudice.

The circuit court did not rule on the motion,[3] but the matter proceeded to a jury trial. The jury found Hosea still owed McElhinney $100,000 on the Campbell Towers sales agreement. The circuit court assessed prejudgment interest on this amount only from May 12, 2009, the date of McElhinney's letter notifying Hosea that he still owed $100,000 on the transaction. The circuit court further ordered that interest would be simple rather than compound.

McElhinney filed an appeal contending the circuit court's assessment of interest was erroneous and inadequate. Hosea filed a cross-appeal. He maintains

[3] Our review of the record, at least, reveals no written order denying Hosea's motion, and neither party has identified one, written or oral.

the doctrines of laches and accord and satisfaction should have barred judgment in favor of McElhinney.

II. Discussion

If we agree with Hosea that McElhinney was not entitled to judgment as a matter of law, then McElhinney's grounds of appeal become moot. Logic dictates, then, that we consider Hosea's arguments on cross-appeal first and continue to McElhinney's arguments only if Hosea is unsuccessful.

a. The cross-appeal

Hosea has raised two reasons he believes the circuit court's judgment was incorrect as a matter of law, laches and accord and satisfaction. The only place he specifically identifies having preserved either of these issues is in his answer. Upon review of the record, the only other place we were able to find that Hosea had brought these matters to the circuit court's attention was in his pretrial motion which he labeled a motion to dismiss and which the circuit court never ruled upon.[4]

Hosea's motion is more properly characterized as a motion for summary judgment, and not for dismissal. *Waddle v. Galen of Kentucky, Inc*., 131 S.W.3d 361, 364 (Ky. App. 2004). He requested that the circuit court look beyond the

[4] We note once again that if the circuit court did rule on Hosea's motion, neither party has identified when or where. This failure is a contravention of Hosea's obligations under Kentucky Rules of Civil Procedure (CR) 76.12(4)(c)(v), (vii): he has neither included in his "Argument" sufficient citations to the record to facilitate our review, nor included in his "Appendix" the order from which he is appealing. We have no obligation to scour a record in search of proof a party is entitled to relief where that party has not deigned to do so himself. *Baker v. Weinberg*, 266 S.W.3d 827, 834 (Ky. App. 2008)(citing *Martin v. Oliver*, 295 Ky. 624, 175 S.W.2d 127 (1943)).

pleadings to the evidence which had been elicited in discovery to reach a conclusion as a matter of law. *Id.*

Hosea's cross-appeal cannot succeed because his motion for summary judgment became moot once the circuit court proceeded to trial. "[O]nce the trial-in-chief commences, an unruled-upon motion for summary judgment is rendered moot by application of waiver." *Transportation Cabinet, Bureau of Highways, Commonwealth of Kentucky v. Leneave*, 751 S.W.2d 36, 38 (Ky. App. 1988). "Thus, once the trial begins, the underlying purpose of the summary judgment expires and all matters of fact and law procedurally merge into the trial phase, subject to in-trial motions for directed verdict or dismissal and post-judgment motions for new trial and/or judgment notwithstanding the verdict." *Id.* To preserve issues raised in an unresolved pretrial motion for summary judgment, the movant is obligated to raise timely motions during and after trial. Hosea has not represented that he made any such in-trial or post-judgment motion, and so the matters he raises on appeal are unpreserved. We will entertain them no further.

b. Prejudgment interest

McElhinney's first basis of appeal is the circuit court's award of prejudgment interest or, more precisely, the date upon which calculation of prejudgment interest is to begin. McElhinney contends interest should have begun to accrue from January 10, 1997, Hosea's contractual deadline for paying the remaining $100,000. The circuit court declined to impose interest as of that date,

choosing instead to award interest from May 12, 2009, the date Hosea was "informed [by letter] that he owed [McElhinney] money for Campbell Towers …."

Kentucky Revised Statutes (KRS) 360.010(1) establishes the prejudgment interest rate at eight percent per annum, absent an agreement to the contrary. *See also Pursley v. Pursley*, 144 S.W.3d 820, 829, n 40 (Ky. 2004). "When the damages are liquidated, prejudgment interest follows as a matter of course." *Nucor Corp. v. General Elec. Co.,* 812 S.W.2d 136, 141 (Ky. 1991). Liquidated damages are those which are "[m]ade certain or fixed by agreement of parties or by operation of law." *Id.* (quoting Black's Law Dictionary 930 (6th ed. 1990)). A classic example of liquidated damages is "an unpaid fixed contract price." *Id.* The award of prejudgment interest upon liquidated damages is not a matter of the trial court's discretion, but follows automatically as a matter of law. *See id.*

The amount owed to McElhinney under the agreement was fixed and determined from the terms of the instrument itself, and so the damages were liquidated. McElhinney was entitled to prejudgment interest as a matter of law.

Prejudgment interest begins to accrue on the date a payment becomes due. *See Pursley,* 144 S.W.3d at 829. Hosea's payment of the outstanding balance became due on January 10, 1997. Interest must accrue from that date. To the extent that the circuit court's judgment did not award interest prior to May 12, 2009, it was erroneous.

c. Compound versus simple interest

The circuit court awarded interest on Hosea's obligation in simple rather than compound fashion. McElhinney concedes that this was a matter of the circuit court's discretion. *See Reliable Mechanical, Inc. v. Naylor Indus. Services, Inc.,* 125 S.W.3d 856, 857 (Ky. App. 2003). He claims, however, the circuit court abused its discretion. We disagree.

In considering McElhinney's request for compound prejudgment interest, the circuit court considered a variety of factors concerning the fairness of such an award. *See id.* Those factors included the parties' long and complicated history of business dealings, their habit of conducting business verbally rather than in writing, and their mistaken – and apparently mutual – belief that Hosea had fulfilled his contractual obligation. Given these considerations, we cannot say the circuit court's application of simple interest was an abuse of discretion.

III. Conclusion

We will not disturb the circuit court's judgment for any of the reasons raised by Hosea on cross-appeal because his arguments are moot or unpreserved or both. Neither will we disturb the circuit court's application of simple prejudgment interest to the amount Hosea was ordered to pay. However, the circuit court erroneously failed to assess prejudgment interest from the date Hosea's final payment became due. We therefore affirm the judgment in all respects except the date of onset of prejudgment interest. For that purpose only, we reverse and remand for entry of an order awarding simple pre-judgment interest beginning January 10, 1997.

ALL CONCUR.

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