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Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-001683-MR

BRAMER CRANE SERVICES, LLC — APPELLANT

APPEAL FROM MONTGOMERY CIRCUIT COURT
v. HONORABLE BETH LEWIS MAZE, JUDGE
ACTION NO. 07-CI-90032

STRUCTURE BUILDERS & RIGGERS MACHINERY MOVING DIVISION, LLC; LEXINGTON METAL SYSTEMS, LLC; HOLLINGSWORTH CAPITAL PARTNERS-KENTUCKY, LLC; and TIM HERRICK — APPELLEES

AND NO. 2011-CA-001684-MR

STRUCTURE BUILDERS & RIGGERS MACHINERY MOVING DIVISION, LLC — CROSS-APPELLANT

CROSS-APPEAL FROM MONTGOMERY CIRCUIT COURT
v. HONORABLE BETH LEWIS MAZE, JUDGE
ACTION NO. 07-CI-90032

MORRIS GRIZZLE; NAUTILUS INSURANCE COMPANY; LEXINGTON METAL SYSTEMS, LLC.; and BRAMER CRANE SERVICES — CROSS-APPELLEES

OPINION
AFFIRMING IN PART,
VACATING IN PART, AND REMANDING

** ** ** ** **

BEFORE: COMBS, KELLER, AND LAMBERT, JUDGES.

COMBS, JUDGE: Bramer Crane Services, LLC, and Structure Builders and Riggers Machinery Moving Division, LLC (Structure Builders) appeal the findings of the Montgomery Circuit Court which determined that Structure Builders was liable for the cost of a rental crane. Following our review, we affirm in part, vacate in part, and remand.

This case resulted from work being performed at a Montgomery County manufacturing facility operated by appellee Lexington Metal Systems, LLC. In the summer of 2006, Lexington Metal Systems contracted with Structure Builders to set up a bridge crane at the work site. The bridge crane was damaged while it was being set up. A second bridge crane was rented from Bramer to be used while Structure Builders' crane was being repaired. Bramer submitted an invoice to Structure Builders for the cost of its rental crane, an amount in excess of $132,000. However, Structure Builders claimed that Lexington Metal Systems had incurred the expense. Structure Builders refused to pay Bramer for its rental crane.

This simple set of facts has led to a protracted and confusing procedural history. Structure Builders filed a complaint on February 5, 2007, alleging that it should not be liable for the cost of the rental crane. Bramer and Lexington Metal Systems were both named as defendants. On February 26, 2007, Bramer filed a

counter-claim against Structure Builders and a cross-claim against Lexington Metal Systems. Lexington Metal Systems filed a cross-claim against Bramer on March 6, 2007. On April 17, 2007, Bramer filed an amended third-party complaint in which it sought to enforce a mechanic's lien against the property on which Lexington Metal Systems was located. The property was owned by Hollingsworth Capital Partners-Kentucky, LLC, and Bramer's amended complaint added Hollingsworth as a party.[1]

On June 14, 2007, Bramer filed another amended third-party complaint adding Tim Herrick, who owned Structure Builders, as a defendant. Herrick filed a motion for summary judgment on March 25, 2008. On January 9, 2009, the trial court granted partial summary judgment. It found that Bramer was entitled to receive approximately $185,000, plus interest and attorneys' fees. It also found that Bramer's lien was valid. However, the court determined that an issue of fact remained to be adjudicated at trial: whether the signer of the crane rental agreement was acting as an agent of Lexington Metal Systems or as an agent of Structure Builders.

On January 14, 2009, the court held that all parties were precluded from presenting evidence regarding causation of the crane failure. The straps on the crane no longer existed, and they had never been examined by an expert. Thus, the issue of causation could not be established.

[1] Hollingsworth never responded. Several other parties have been involved throughout the proceedings; however, they have been dismissed at various points in the litigation. Our analysis addresses the remaining parties who are embroiled in this appeal.

On February 6, 2009, Lexington Metal Systems filed a motion requesting the court to cancel the jury trial and to schedule a bench trial. Structure Builders responded by objecting to a bench trial; however, Structure Builders did not object to ***all parties'*** filing summary judgment motions and submitting the case for decision. An order in the record dated February 23, 2009, appears[2] to be in response to the motion of Structure Builders proposing summary judgment motions. That order simply provides, "dispositive motions filed by 30 days concurrent; 15 days to respond."

Structure Builders filed a motion for summary judgment on March 20, 2009. Herrick, its owner, filed a motion to dismiss all claims against him on March 23, 2009. Lexington Metal Systems followed suit four days later with its motion for summary judgment. On December 15, 2010, the court entered an order in which it found that the only issue remaining was who should pay for the rental crane. On January 28, 2011, it found that Structure Builders was liable to Lexington Metal Systems and that Structure Builders should pay Bramer $132,118, plus interest. Bramer and Structure Builders promptly filed motions to alter and to vacate the order, respectively, on February 7.

On March 7, 2011, Bramer filed a motion to enforce the sale of the Montgomery County property on which Lexington Metal Systems was located. Lexington Metal Systems responded by asking the court to set aside the lien on its property because Structure Builders had been found liable. The court set aside its

[2] Despite reference to several hearings before the court, the record does not include a video record.

January 28 order on March 17, 2011. It held that there were "material issues of fact to be tried by a jury as to who has responsibility to pay Bramer Crane and the amount to be paid for rental of the crane and the cost of the operator."

However, in response to a motion by Structure Builders, the court vacated the March 17 order on June 29, 2011. It found that Structure Builders was liable to Lexington Metal Systems and that Structure Builders was responsible for paying Bramer. It also found that Herrick's personal liability had been properly excluded and that all parties had waived a jury trial. The court set aside Bramer's lien on the Montgomery County property of Lexington Metal Systems. These appeals by Structure Builders and Bramer followed. In addition to Lexington Metal Systems, Herrick and Nautilus Insurance[3] were also named as appellees.

We first note that some of the briefs submitted include several serious deficiencies. Kentucky Rule[s] of Civil Procedure (CR) 76.12 sets forth clear requirements on the form and appearance of a properly submitted brief. CR 76.12(4)(c)(iv) and 76.12(4)(d)(iv) both mandate that the arguments in appellant's and appellee's briefs should include "***ample*** references to the specific pages of the ***record***." (Emphasis added). The briefs submitted by Bramer, Herrick, and Lexington Metal Systems include very few cites to the record. Most of the cites provided make reference to exhibits in the appendices, several of which are documents that are not contained in the record. "[M]aterials and documents not included in the record ***shall not be introduced or used as exhibits*** in support of

[3] Neither appellant asserted arguments regarding Nautilus. Its claims were disposed of in federal court; therefore, we have omitted Nautilus's involvement from our analysis.

briefs." CR 76.12(4)(c)(vii). (Emphasis added.) Therefore, we did not consider those portions of the briefs which refer to depositions that were not included in the appellate court record. The appendix for Bramer's brief fails to place as its first exhibit the order from which the appeal is taken. *Id*. This record has been extremely complicated and unwieldy. While we pondered our option to strike the briefs pursuant to CR 76.12(8), we nonetheless elected to search the record and to seek resolution in this matter after more than several years of litigation. Despite the deficiencies, we shall proceed to examine the merits.

The issues presented by Structure Builders are dispositive, and we shall discuss them first. Structure Builders contends that the court erred in granting summary judgment while genuine issues of material fact remained. We agree.

Summary judgment is a device utilized by the courts to expedite litigation. *Ross v. Powell*, 206 S.W.3d 327, 330 (Ky. 2006). It is a "delicate matter" because it "takes the case away from the trier of fact before the evidence is actually heard." *Steelvest, Inc. v. Scansteel Service Center, Inc*., 807 S.W.2d 476, 482 (Ky. 1991). It is also a stringent standard in Kentucky. The movant must prove that no genuine issue of material fact exists and "should not succeed unless his right to judgment is shown with such clarity that there is no room left for controversy." *Id*. The trial court should view the evidence in favor of the non-moving party. *City of Florence v. Chipman*, 38 S.W.3d 387, 390 (Ky. 2001). The non-moving party must present "at least some affirmative evidence showing the existence of a genuine issue of material fact." *Id*.

On appeal, our standard of review is to 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). Because summary judgments do not involve fact-finding, we review *de novo*. *Pinkston v. Audubon Area Community Services, Inc*., 210 S.W.2d 188, 189 (Ky. App. 2006).

Our Supreme Court has cautioned that courts should not use summary judgment as a substitute for trial. *Steelvest, Inc. v. Scansteel*, 807 S.W.2d at 480. "Summary judgment is to be cautiously applied." *Id*. at 483. A motion for summary judgment should not be successful unless "there is no room left for controversy." *Id*. at 482. Again, it is a stringent standard. "Only when it appears ***impossible*** for the nonmoving party to produce evidence at trial warranting a judgment in his favor should the motion for summary judgment be granted." *Id*. (Emphasis added). Summary judgment is a tool for discovering whether factual issues exist that must be decided by bench trial or by a jury. *Id*. at 480.

It is undisputed that Structure Builders and its insurance provider paid the cost of the repair to the crane that was damaged. However, throughout this litigation – beginning with the complaint – Structure Builders has consistently contended ***that it did not authorize*** the contract for the rental crane. The parties agree that the rental agreement with Bramer was signed by Don Bradford and Joe Langfeld, both employees of Lexington Metal Systems. Lexington Metal Systems,

however, contends that Bradford and Langfeld acted as agents of Structure Builders.

In its motion for summary judgment on March 20, 2009, Structure Builders argued that it could not be bound by the contract because no legal agreement authorized Lexington Metal Systems or its employees to act on behalf of Structure Builders. "Agency is the fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act." *Phelps v. Louisville Water Co*., 103 S.W.3d 46, 50 (Ky. 2003) (*quoting CSX Transportation, Inc. v. First National Bank of Grayson*, 14 S.W.3d 563, 566 (Ky. App. 1999)). Whether an agency relationship exists is a question of fact that should be determined by a jury. *Middletown Eng'g Co. v. Main Street Realty, Inc*., 839 S.W.2d 274, 276 (Ky. 1992). If Structure Builders did not authorize Bradford and Langfeld to act on its behalf, it should not be liable for the contract. *See Citizens Fidelity Bank & Trust Co. v. Lamar*, 561 S.W.2d 326, 329 (Ky. App. 1977); Kentucky Revised Statute[s] (KRS) 371.090.

The record is clear that Structure Builders and Lexington Metal Systems never reached an agreement regarding the authorization of Bradford and Langfeld to rent the crane from Bramer. The trial court noted in its order of March 17, 2011, that there remained material issues of fact to be tried by a jury – specifically, who had the responsibility to pay Bramer and the amount to be paid. Though the court later set aside that order, the record does not show that the issues of fact had been

resolved. Because agency is a question of fact, we must conclude that it was improper for the trial court to find summarily that Structure Builders was liable for payment of the crane. Accordingly, we vacate the summary judgment and remand for trial to resolve the matter of agency. *See* CR 39.01 and CR 52.01.

Structure Builders also argues that the trial court erred in finding that it had waived its right to a jury trial. CR 39.01 allows a party to waive its demand for a jury trial either by written or by oral stipulation. The record shows that Structure Builders did demand a jury trial in its complaint. However, in its order of June 29, 2011, the court recited that all parties orally agreed "in open court and on the record" on February 13, 2011, to waive a jury trial. The record does not include a video, audio, or written transcript of the court hearing. Therefore, we "must assume that the [transcript] supports the decision of the trial court." *Commonwealth v. Thompson*, 697 S.W.2d 143, 145 (Ky. 1985). Because of the *Thompson* presumption that a silent record supports the court's ruling, we cannot conclude that it erred on the issue of demand for a jury trial.

We now address Bramer's claims of error. Bramer argues that the trial court erred in finding that its mechanic's lien on the Montgomery County property was invalid. Lexington Metal Systems argues that the trial court was correct because mechanics' liens are not enforceable if they are related to charges for rental equipment.

This issue has been addressed by our court in *Dirt & Rock Rentals, Inc. v. Irwin & Powell Const., Inc*., 838 S.W.2d 412 (Ky. App. 1992). In that case, we

held that mechanics' liens are not enforceable when they are sought for the purpose of securing fees owed for the use of rental machinery – ***unless*** the party who provided the machinery also provided the labor. In this case, Bramer provided both the crane ***and the operator***. In this respect, the court erred in finding that the lien was invalid. However, we recognize that the court found that Lexington Metal Systems was not responsible for the payment of the rental crane to Bramer. Since the lien attaches to the Montgomery County property on which Lexington Metal Systems is located, it cannot be valid if indeed Structure Builders is liable for the rental. Thus, we must remand for a clarification of the lien: *i.e.*, its validity in light of the court's ultimate determination of who is responsible for the debt owed to Bramer.

Bramer next argues that it was error for the court to dismiss Herrick from the case. Again, Herrick was the owner of Structure Builders. In 2004, he signed an agreement that he would personally guarantee obligations of Structure Builders and Riggers. At some point, Herrick either expanded his business or created Structure Builders and Riggers Machinery Moving Division, a second business. It is the second entity that is involved with the underlying case. Bramer contends that Herrick's personal guaranty was the reason that it extended credit for the rental crane used at Lexington Metal Systems.

Bramer added Herrick as a defendant in 2007. On March 13, 2009, Bramer filed a brief detailing its claims against Herrick. On March 23, 2009, Herrick filed

a motion for dismissal and summary judgment. The court did not allude to or address Herrick directly in its orders for the next two years.

On March 28, 2011, Herrick filed a motion to amend the court's order of January 28, 2011. That order had found Structure Builders liable to Bramer for the outstanding debt. Herrick's motion asked to be dismissed from the case simply because the other parties ***had not addressed him*** in their motions of the past two years. The court agreed, and in its order of June 29, 2011, it held that Herrick was properly excluded.

We are not persuaded that a sufficient basis existed for dismissal of Herrick. Herrick offers no legal argument in support of it. Furthermore, questions of fact remain as to Herrick's responsibilities with Structure Builders. A change in the name of his company does not necessarily remove him from liability. *See White v. Winchester Land Dev. Corp.*, 584 S.W.2d 56 (Ky. App. 1979) (overruled on other grounds by *Inter-Tel Technologies, Inc. v. Linn Station Properties, LLC*, 360 S.W.3d 152 (Ky. 2012)). Because we are remanding for proper determination of other facts, we remand on the issue of his accountability – if any – as well.

Bramer's last issue is that the trial court made an erroneous determination of the amount of damages owed. Bramer sought the price of the invoice and late fees, an amount in excess of $134,000 plus interest. At the time of Bramer's motion for summary judgment that was filed in December 2008, the amount claimed was nearly $185,000. The court's final order of September 15, 2011, awarded Bramer $132,118, "plus reasonable attorneys' fees and interest at the applicable contract

rate of 1.5% per month from October 25, 2006 [*sic*] until paid." The record shows that the invoice amount was $132,118. The court's order included full interest. As we can find no error on this issue, we affirm the court's finding in this respect.

To recapitulate, we vacate the summary judgments in favor of Lexington Metal Systems and Herrick and remand for further proceedings – including the validity of Bramer's mechanic's lien. We affirm the court on its determination that all parties waived the right to a jury trial and on its calculation of damages.

ALL CONCUR.

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