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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-000130-MR

SHERRILL WELLS — APPELLANT

v.

APPEAL FROM CASEY CIRCUIT COURT
HONORABLE DOUGHLAS M. GEORGE, SENIOR JUDGE
ACTION NO. 05-CI-00175

DELOIS WELLS, INDIVIDUALLY AND AS EXECUTOR OF THE ESTATE OF VERLIN S. WELLS — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

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

CLAYTON, JUDGE: Sherrill Wells appeals from the December 29, 2011, final judgment of the Casey Circuit Court which held that a promissory note addressed to the appellant from his deceased father was not enforceable against the decedent's estate. Because we find no error with the trial court's judgment, we affirm.

On or about July 20, 2004, Verlin Wells, Sherrill's father, attempted to tender to Sherrill a promissory note in the sum of $250,000 payable to Sherrill from Verlin. The promissory note indicated the due date as "after death" and the reverse of the note read:

> For support and school (supplies and clothes), for 2 children.
> Labor and farm work of all types.
> Gates and cash debt.

Sherrill testified that Verlin informed him that the note was meant to get Sherrill's mother and sister "off his back." He also testified that when presented with the promissory note, he examined it and returned it to Verlin. Verlin died on March 6, 2005. Delois Wells, Sherrill's former stepmother, was both the sole beneficiary of decedent's estate and its executor.

Some time after his father's death, Sherrill discovered the promissory note when it fell out of a cigar box which was located in a metal cabinet in a building on Sherrill's property. Thereafter, Sherrill filed a claim against Verlin's estate, attempting to enforce the note. Sherrill's claim was denied. Sherrill then filed a supplemental and amended claim in which he corrected an error relating to the note and added a claim of several personal items in Verlin's possession to which Sherrill claimed an ownership interest. That claim was also denied.

Thereafter, Sherrill filed a complaint against Delois, individually and as executor of Verlin's estate, seeking payment of the promissory note as well as the

return of the items of which he claimed an ownership interest.[1] Following a bench trial, each party filed a memorandum of law outlining their legal arguments. On December 29, 2011, the trial court's final judgment was entered, in which it held that the promissory note was invalid and unenforceable. In support of its decision, the trial court held that Sherrill was not a holder in due course and that under contract law there was no consideration given for the promissory note and Sherrill's rejection of the note resulted in a lack of acceptance. This appeal followed. The trial court's judgment also addressed the ownership of the items to which Sherrill claimed an interest. This appeal, however, concerns only that portion of the judgment pertaining to the promissory note.

Sherrill's first argument on appeal is that he is a holder in due course and therefore not subject to ordinary contract defenses. In order to be a holder in due course, the holder of an instrument must have taken the instrument:

> 1. For value;
> 2. In good faith;
> 3. Without notice that the instrument is overdue or has been dishonored or that there is an uncured default with respect to payment of another instrument issued as part of the same series;
> 4. Without notice that the instrument contains an unauthorized signature or has been altered;
> 5. Without notice of any claim to the instrument described in KRS [Kentucky Revised Statutes] 355.3-306; and
> 6. Without notice that any party has a defense or claim in recoupment described in KRS 355.3-305(1).

[1] Appellant's mother asserted her own claim against the estate. A partial summary judgment was entered against appellant's mother and in favor of appellee, and subsequently affirmed by this Court. *Firari v. Wells*, 2008-CA-000493-MR, 2009 WL 153197 (Ky. App. 2009).

KRS 355.3-302(1)(b). The trial court found that Sherrill was not a holder in due course because he did not take the note for value; he knew that he had rejected the note; knew that decedent was dead at the time of the note's discovery; and knew, or should have known, that Delois had valid defenses and/or claims in recoupment. For the following reasons, we agree.

A trial court's findings of fact "shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." Kentucky Rules of Civil Procedure (CR) 52.01. Findings are clearly erroneous if they are "manifestly against the weight of the evidence." *Acton v. Acton*, 283 S.W.3d 744, 749 (Ky. App. 2008) (citation omitted). Issues of law are reviewed *de novo*. *Nash v. Campbell County Fiscal Court*, 345 S.W.3d 811 (Ky. 2011).

The trial court found that the note was not given for value because there was insufficient consideration. Sherrill argues that the note was given for value under KRS 355.3-303, which reads, in relevant part:

> An instrument is issued or transferred for value if . . .
> [t]he instrument is issued or transferred as payment of, or as security for, an antecedent claim against any person, whether or not the claim is due.

KRS 355.3-303(1)(c). In support of its finding that no value existed, the trial court examined each of the three items listed on the back of the note: support and school supplies for two children, labor and farm work, and Gates and cash debts. The trial court first found, and Sherrill admitted, that he was not owed anything for the

support of two children. Alternatively, that statement referred to amounts allegedly owed to Sherrill's mother for the support of Sherrill and his sister. Sherrill's mother asserted her own claim against the estate, which was denied.

The trial court next found that although Sherrill had performed work for Verlin, there was insufficient evidence to establish how much work had been performed or that there was an agreement between Sherrill and Verlin to compensate for that work. Additionally, as the trial court indicated, there is an established legal presumption that any services rendered for a decedent by a relative are gratuitous unless existence of a contract is shown by clear and convincing evidence. *Stewart v. Brandenburg*, 383 S.W.2d 122 (Ky. 1964). Sherrill's own testimony indicated that he refused the note when it was presented to him and he failed to present any additional evidence that he and Verlin were engaged in a contract for labor compensation. Accordingly, the trial court's finding is supported by the evidence.

Finally, the trial court found that Sherrill had failed to produce evidence that he was owed compensation for a cash debt. The only evidence he presented were two checks made out to Verlin, neither of which indicated their purpose. Additionally, trial testimony indicated that one of the checks had been cashed by Sherrill and the proceeds received by Sherrill. Given the evidence presented to the trial court, we cannot say that the trial court's findings were clearly erroneous, or manifestly against the weight of the evidence. CR 52.01; *Nash*, 345 S.W.3d 811.

Sherrill next argues that he received the note in good faith. Good faith is defined as "honesty in fact and the observance of reasonable commercial standards of fair dealing." KRS 355.1-201(2)(t). The trial court found that Sherrill did not receive the note in good faith because he knew he had rejected it when it had been offered to him and because he knew that Verlin was deceased at the time of discovery and attempted enforcement. Sherrill does not challenge these findings. Instead, he challenges an argument raised by Delois regarding the inability of Verlin's estate to satisfy the note, an argument which is not addressed in the trial court's findings. Because this argument does not appear to form the basis for the trial court's ruling, it does not serve as a basis for our review. *Dever v. Commonwealth*, 300 S.W.3d 198, 202 (Ky. App. 2009).

Sherrill next argues that there was no evidence that he had notice of any defense to enforcement of the note. Sherrill's right to enforce the note as a holder in due course requires that he took the note "[w]ithout notice that any party has a defense or claim in recoupment described in KRS 355.3-305(1)." KRS 355.3-302(1)(b)(6). The trial court held that Sherrill knew, or should have known, that Delois had valid defenses and/or claims in recoupment. Included in the defenses of KRS 355.3-305(1) is "a defense of the obligor that would be available if the person entitled to enforce the instrument were enforcing a right to payment under a simple contract." KRS 355.3-305(1)(b). Sherrill testified at trial that he had rejected the note when it was offered to him and that the purpose of the note, as indicated by Verlin, was to get Sherrill's mother and sister "off [Verlin's] back."

Based on Sherrill's testimony alone, it appears he was, or should have been, aware that Delois had the following defenses of: rejection of offer, lack of consideration, and debt due to someone else. Accordingly, we find no error with the trial court's findings.

In order to be a holder in due course, all of the elements of KRS 355.3-302(1)(b) must be met. The absence of only one element is sufficient to defeat a holder in due course argument. Here, the trial court held that three of those elements did not exist: value, good faith, and lack of notice of any claim upon the note. Although another court may have found differently, Sherrill has failed to show that those findings were clearly erroneous or manifestly against the weight of the evidence. Accordingly, we find no error with the trial court's legal conclusion that Sherrill was not a holder in due course.

Sherrill next addresses several defenses asserted by Delois in her memorandum of law regarding parol agreement modification and nonissuance. However, our review of the trial court's judgment fails to reveal any language relating to either of these defenses. This court "is without authority to review issues not raised in or decided by the trial court." *Dever*, 300 S.W.3d 198. Although the defenses were asserted by Delois, there is nothing to indicate that they had any influence on the trial court's decision to deny relief to Sherrill. Therefore, because we are without a decision by the trial court on these issues, we have nothing to review, and Sherrill's arguments fail.

Sherrill further argues that Verlin acknowledged a moral obligation of indebtedness to Sherrill by creation of the promissory note. Essentially, Sherrill duplicates his argument that the note was given for the value of services rendered. That argument has already been addressed by this Court and we will not address it a second time.

Sherrill next argues that the statutes of limitations relied on by the trial court are not applicable. Sherrill is referring to two specific findings of the trial court. The first is that a claim for compensation of services rendered by Sherrill for decedent more than five years prior to the commencement of the action was barred by the statute of limitations. The second is that the two checks presented by Sherrill as evidence of a cash debt were also barred by the statute of limitations. We have already held that the trial court did not abuse its discretion when it found, based on the evidence, that Sherrill had failed to show that he was owed compensation for services rendered and an outstanding cash debt. Because the evidence alone was sufficient to support the trial court's findings that no debt was owed for services or debt, findings regarding the statute of limitations are extraneous and do not warrant our review.

Sherrill's final argument is that the promissory note constituted a gift from Verlin to Sherrill. However, Sherrill fails to identify, and we cannot locate, where in the record this argument was presented to the trial court. An appellant "will not be permitted to feed one can of worms to the trial judge and another to the appellate court." *Kennedy v. Commonwealth*, 544 S.W.2d 219, 222 (Ky.1976).

Moreover, "[i]t is only to avert a manifest injustice that this court will entertain an argument not presented to the trial court." *Elwell v. Stone*, 799 S.W.2d 46, 48 (Ky. App. 1990) (citing *Massie v. Persson*, 729 S.W.2d 448, 452 (Ky. App. 1987). Sherrill has failed to make an argument of manifest injustice and it is not our duty to make one for him. *See* CR 76.12(4)(c)(iv). Accordingly, this argument fails.

For the foregoing reasons, the December 29, 2011, final judgment of the Casey Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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