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Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-000781-MR
AND
NO. 2012-CA-001026-MR

DAVID H. FENLEY — APPELLANT

CONSOLIDATED APPEALS
FROM JEFFERSON CIRCUIT COURT
v. HONORABLE JAMES M. SHAKE, JUDGE
ACTION NO. 09-CI-001206

JOSEPH K. FENLEY — APPELLEE

OPINION
AFFIRMING IN PART, REVERSING
IN PART, AND REMANDING

** ** ** ** **

BEFORE: CLAYTON, COMBS, AND VANMETER, JUDGES.

VANMETER, JUDGE: This appeal arises from a contract dispute between two brothers, David Fenley (buyer/appellant) and Joseph Fenley (seller/appellee). In December 2007, David and Joe entered into a purchase agreement whereby David agreed to pay Joe certain sums of money in consideration for Joe's sale of his

interests in certain entities and properties to David. Generally speaking, the purchase agreement governed transactions which allowed David to acquire his family's and other outside investor's ownership interests in certain real estate holdings and related operating entities in the Louisville-Metro area. Numerous sellers and entities were party to this purchase agreement.

In April 2008, David and Joe entered into an escrow agreement that supplemented the purchase agreement because they could not agree on the value of the seller's interests in the Fenley Operating Entities and the Fenley Property Entities. Pursuant to the agreement, David was to deposit an escrow amount ($350,000) with a designated escrow agent. Meanwhile, a designated arbiter, Nolen Allen of Cotton & Allen CPA, was to review certain data and materials and submit a report setting forth his calculations for any amount owed by David.[1] However, David never tendered the escrow funds to the escrow agent. Thus, when Joe received Allen's report, dated June 13, 2008, which valued his interests at $272,945, Joe served a demand letter on David requesting that he pay the amount due or face legal action. David failed to pay, so Joe filed the underlying breach of contract suit to collect the amount owed to him.

During the course of the proceedings below, the circuit court found the purchase and escrow agreements to be valid and enforceable and that Joe was entitled to payment pursuant to them. Initially, the court declined to order payment on the basis that Allen's report was not "substantially" in the form of the "Escrow

[1] Jennifer Gomez, a party to the escrow agreement and a plaintiff in the original action, was dismissed as an appellee in this appeal.

Claim Certificate" attached as exhibit A to the escrow agreement. Thereafter, Joe tendered a second report, *i.e.*, "Certificate," signed by Allen, which essentially transferred Allen's initial valuations in 2008 to the proper form, still showing that David owed Joe $272,945. The court heard oral arguments and then entered an order granting Joe's motion for satisfaction and enforcement of order and entry of judgment, as well as Joe's motion for a judgment on the pleadings. The court found that Allen's second Certificate was the "missing link" to its enforcement of the agreements and ordered David to pay Joe $272,945, plus interest, as well as attorneys' fees and costs.

David now appeals from the following orders: (1) February 3, 2012, order which awarded $272,945 to Joe, plus pre-judgment interest at the contractual rate of 6% per annum from June 13, 2008 until February 3, 2012, and post-judgment interest at the statutory rate of 12% per annum; (2) April 3, 2012, order which denied David's motion to alter, amend or vacate the February 3, 2012, order; and (3) May 22, 2012, order granting Joe's motion for attorneys' fees and costs incurred through April 10, 2012, with the exception of $1,809.24 in administrative expenses. For the following reasons, we affirm the court's enforcement of the agreements and its award thereunder. However, because the parties agree that David already paid $74,568 of the $272,945 principal, we reverse and remand with directions for the court to order David to pay Joe $198,377. The court shall further order that Joe is entitled to pre-judgment interest of 6% on the full $272,945 from June 13, 2008 to the date on which David paid the $74,568 in 2011. Thereafter,

and up until the date of the court's judgment (February 3, 2012), the court shall order that Joe is entitled to 6% interest on the outstanding $198,377. Post-judgment interest shall be ordered on the amount of $198,377 at the statutory rate of 12% per annum. *See* KRS[2] 360.040. The court's order with respect to attorneys' fees and costs stands.[3]

A judgment on the pleadings "shall be granted if it appears beyond doubt that the nonmoving party cannot prove any set of facts that would entitle him/her to relief." *City of Pioneer Village v. Bullitt County*, 104 S.W.3d 757, 759 (Ky. 2003) (the purpose of CR 12.03 is to expedite the termination of a lawsuit in which the controlling facts cannot be disputed and only a question of law remains). Here, the circuit court granted judgment in favor of Joe based on its interpretation and application of the purchase and escrow agreements, which are questions of law. Appellate review of a circuit court's decision concerning questions of law is *de novo*. *Edwards v. Hickman*, 237 S.W.3d 183, 189 (Ky. 2007).[4]

[2] Kentucky Revised Statutes.

[3] We note that David's appellate brief fails to comply with Kentucky Rules of Civil Procedure (CR) 76.12(4)(vii) by not placing "the judgment, opinion, or order under review immediately after the appendix list so that it is most readily available to the court." When an appellate brief fails to abide by the rules, our options are: "(1) to ignore the deficiency and proceed with the review; (2) to strike the brief or its offending portions, CR 76.12(8)(a); or (3) to review the issues raised in the brief for manifest injustice only[.]" *Hallis v. Hallis*, 328 S.W.3d 694, 696 (Ky. App. 2010) (citation omitted). In this instance, we choose to ignore the deficiency and proceed with the review, not to reward deviating from the rules, but because this case rests on questions of law which we believe can and should be readily resolved.

[4] Contrary to David's assertion, the fact that he denied certain averments in his answer is of no consequence to the circuit court's review of Joe's motion for a judgment on the pleadings. *See City of Pioneer Village*, 104 S.W.3d at 759 (the basis of a motion under CR 12.03 is "to test the legal sufficiency of claim or defense in view of all the adverse pleadings[]"). And David's claim that Joe's motion for a judgment on the pleadings should be converted into a motion for summary judgment because Mr. Allen's second Certificate is a document "outside the pleadings"

On appeal, David presents numerous grounds upon which he claims the circuit court erred by granting judgment in favor of Joe. David first contends that the escrow agreement was not fully executed since no escrow funds were deposited into the escrow account and the escrow agent did not sign the escrow agreement. Accordingly, he claims the agreement is unenforceable. However, David may not use his failure to comply with the terms of the escrow agreement to challenge his obligation to pay thereunder. Under the terms of the escrow agreement, David was to deliver, simultaneously with the execution of the agreement, the escrow amount ($350,000) to the escrow agent (Old Republic National Title Insurance Company), which was to hold the escrow funds and distribute them in accordance with Section 7 of the escrow agreement which provides that if David, Joe, or Allen delivered to the escrow agent a certificate in substantially the form of Exhibit A ("Escrow Claim Certificate"), fully executed by Allen, then the escrow agent would pay to such party the amount of escrow funds set forth in the Certificate. Notably, David never delivered the escrow funds to the escrow agent and, as a result, the escrow agent never signed the escrow agreement.

Nevertheless, the absence of the escrow agent's signature is not fatal to the agreement, especially because David failed to deliver the escrow funds. Contrary to David's assertion, the escrow agreement did not provide that the signature of the

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is inconsequential because under both standards we review the circuit court's legal determination *de novo*. *See Steelvest, Inc. v. Scansteel Serv. Ctr., Inc.,* 807 S.W.2d 476, 480 (Ky. 1991); *Hallahan v. Courier-Journal*, 138 S.W.3d 699, 705 (Ky. App. 2004). Even under a summary judgment standard, the circuit court's findings with respect to the enforceability of the agreements and Joe's right to payment are sufficient to uphold its decision as a matter of law.

escrow agent was a condition precedent to its effectiveness. Further, the record shows that David, Joe, and Allen assented to the effectiveness of the agreement, without the escrow agent's signature. David demonstrated his assent by signing the escrow agreement and taking ownership of the business interests and properties he obtained from Joe under the purchase agreement. Joe demonstrated his assent by signing the escrow agreement and allowing David to take ownership over his business interests and properties on the condition that David would pay for such interests once Allen determined the amount owed. Allen demonstrated his assent by signing the escrow agreement and fulfilling his duties to determine the amount owed. Thus, David's failure to deliver the escrow funds, so as to trigger the signature of the escrow agent, does not serve as a basis for deeming the agreement unenforceable.

Next, David asserts that, even if the escrow agreement was enforceable, Allen did not satisfy his duties because he failed to submit the Certificate within thirty days as required by the agreement. David also asserts that Mark Knipp of Cotton & Allen, rather than Allen, calculated the valuations without the authority to do so. Yet, the escrow agreement expressly provides that in the event Allen is unavailable, Knipp or his designee shall review all data and materials deemed pertinent with respect to the valuation of the respective ownership interests of the sellers in the Fenley Entities.[5] Hence, Knipp's participation in assessing the

[5] Allen's deposition testimony confirmed that his valuation was performed in accordance with the terms of the escrow agreement. He testified that his business partner, Knipp, CPA, initially reviewed the book values of the companies being purchased by David. Allen then reviewed the data and materials prepared by Knipp and they determined the specific amount David owed to

amounts owed in no way violated the parties' contemplations under the escrow agreement.

With respect to the timeliness of Allen's Certificate, Section 8.1 of the escrow agreement states that the arbiter "shall, within thirty (30) days from the date hereof [April ___, 2008], review all data and materials deemed pertinent by [the] Arbiter with reference to the valuation of the respective ownership interests of Sellers in the Fenley Entities." Section 8.2 of the escrow agreement states that upon completion of the arbiter's review pursuant to Section 8.1, the arbiter shall simultaneously deliver his written valuations to David and Joe and shall immediately execute and deliver to the escrow agent the certifications of such valuations in form and substance as required by the Escrow Claim Certificate. Section 8.3 provides that the arbiter's Certificate, pursuant to Sections 8.1 and 8.2, shall be final and not subject to appeal by either David or Joe.

David argues that Allen's Certificate, dated June 13, 2008, was untimely because Allen did not deliver it within thirty days of the April ___, 2008, escrow agreement. As an initial matter, we do not believe the agreement is entirely clear as to whether the Certificate was to be completed within thirty days, or just the review. Regardless, David's failure to deliver the escrow funds and to obtain the signature of the escrow agent resulted in the time period never beginning to run for purposes of this thirty-day provision. Viewing the escrow agreement as a whole, we find that Allen's Certificate, submitted a month or so after execution of the

Joe. Allen testified that it was customary in the accounting field to review and rely on the work of business partners and that Knipp had worked on Fenley matters in the past.

escrow agreement, was sufficiently timely for purposes of complying with the agreement. *See Taylor v. Williams*, 199 Ky. 154, 156, 250 S.W. 820, 822 (1923) (a contract must be read as a whole in order to determine what the parties intended by the words employed).

Additionally, we do not believe that Allen's second Certificate constituted a "newly-created" document, as argued by David. The second Certificate contains the same valuations as the original Certificate and bears Allen's signature certifying as much. Allen testified that no new calculations were made; the second Certificate simply transposed the valuations as of June 13, 2008 into the proper form.[6]

Next, David argues that no arbiter was appointed under Section C of the purchase agreement, which he claims governed the transaction between him and Joe and, accordingly, Section A.7 of the purchase agreement appointing Allen as arbiter does not apply. In other words, he claims that Allen lacked authority to act as "arbiter" and to determine the amount owed. We disagree.

[6] David also claims that Joe is attempting to treat this second Certificate as a "non-appealable arbitration award" and argues that the Certificate is unenforceable since the escrow agreement did not provide for arbitration to take place in Kentucky pursuant to *Ally Cat, LLC v. Chauvin*, 274 S.W.3d 451 (Ky. 2009). However, the escrow agreement cannot plausibly be interpreted as an agreement to submit disputes to an arbitration hearing presided over by Allen. Instead, the ordinary meaning of the term "arbiter" in the escrow agreement reveals the parties' intent to submit the issue of the amount owed to Allen for determination. *Frear v. P.T.A. Indus.*, 103 S.W.3d 99, 106 (Ky. 2003) (contractual terms are assigned their "ordinary" meaning). Allen's deposition testimony reflects his understanding that his duty under the escrow agreement was to determine the amount owed, not preside over an arbitration hearing. Moreover, in David's answer to Joe's complaint, he admitted that venue and jurisdiction in the Jefferson Circuit Court were proper. Thus, David's contention that this matter should have been subject to an arbitration hearing, the outcome of which would have been unenforceable anyway for violation of *Ally Cat*, clearly contravenes the language and intent of the escrow agreement and is not a basis upon which to reverse the circuit court's judgment.

The preamble to the purchase agreement states that the agreement is between David and certain "sellers" identified in Exhibit A thereto, which includes Joe and contains his signature as a "seller." Thus, the entire agreement, including Section A, applies to the transaction between David and Joe. Section A.7 of the purchase agreement, which designates Allen as "the final arbiter of the determination of the proper amounts of distributions, if any, due of other payments to be made to the Sellers as a result of the transactions contemplated herein[,]" likewise applies. Besides, even if Section A did not apply, the escrow agreement itself expressly designates Allen as arbiter and articulates his duty to calculate any amounts owed.[7] David's attempt to "cherry pick" pieces of the purchase agreement, so as to avoid paying the value determined by Allen, is inappropriate.

Next, David claims that Joe waived his right to any further payment by closing the purchase transaction and accepting the $521,000 payment due to him under the purchase agreement. We disagree.

[7] Since Section A applies to the transaction between David and Joe, we note that Section A.3, which required David to deliver $500,000 as a good faith deposit to an escrow agent, pertained to the transactions contemplated in the purchase agreement. This escrow amount is distinguishable from the $350,000 David was to deliver pursuant to the escrow agreement executed between him and Joe. Indeed, the preliminary statements of the escrow agreement, Section B., expressly state that David and Joe have been unable to agree upon the value of the interests of the sellers in the Fenley Operating Entities and the Fenley Property Entities and have agreed that David shall deposit the amount of $350,000 in escrow with the appointed escrow agent pending resolution of this issue. David's argument that this $350,000 should have been deducted from the $500,000 he deposited in escrow pursuant to the purchase agreement is incorrect and also circular; he argues that Section A does not apply to the transaction between him and Joe for purposes of Allen serving as arbiter, but in the same vein argues that the escrow agreement's escrow funds should be deducted from the escrow funds he deposited pursuant to Section A of the purchase agreement.

Section 11 of the purchase agreement states that "[a]ny provision of this Agreement may be waived only by a written instrument executed by the party to be charged with such waiver." Neither party directs us to a written waiver executed by Joe. In addition, we believe David impliedly assented to the prospect that further payment might be owed by entering into the escrow agreement and designating Allen as arbiter to determine any additional amount owed. The escrow agreement provided that it, together with the purchase agreement, was the final expression of the parties' agreement and David signed the escrow agreement acknowledging as much. As a result, David's argument regarding waiver is without merit.

David also challenges the circuit court's award of $272,945, instead of $198,377. He directs us to Joe's proposed order accompanying his motion for satisfaction and enforcement of the order and entry of judgment which requested judgment against David in the amount of $198,377. In that motion, Joe conceded that David already paid $74,568 of the $272,945 principal amount due, and that David owes an outstanding balance of $198,377. Still, Joe contends that he is entitled to pre-judgment interest of 6% on the full $272,945 from June 13, 2008, to the date on which David paid the $74,568 in 2011. Thereafter, and up until the date of the court's judgment (February 3, 2012), Joe claims he is entitled to 6% interest on the outstanding $198,377. We agree with Joe's argument regarding

interest, and further grant David's request that judgment be entered against him for the lesser amount of $198,377.[8]

Lastly, David avers that the circuit court's award of $82,438.49 in attorneys' fees and $473.00 in costs was unreasonable. We disagree.

We review a circuit court's decision to award attorneys' fees and costs for an abuse of discretion. *Giacalone v. Giacalone*, 876 S.W.2d 616, 620-21 (Ky. App. 1994). "The test for abuse of discretion is whether the [circuit court's] decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999) (citations omitted).

The parties agreed in the purchase agreement that if any litigation arose between them relating to the agreement, or to the transactions contemplated by the agreement, the prevailing party would be entitled to recover all reasonable costs and expenses (including, without limitation, reasonable attorneys', accountants' and other professional fees and expenses). Accordingly, the circuit court ordered David to pay Joe for attorneys' fees and costs incurred through April 10, 2012, with the exception of $1,809.24 in administrative expenses.

The record shows that the circuit court's award was not arbitrary or unreasonable. In awarding attorneys' fees and costs, the court noted that this case has involved approximately 38 months of litigation, twenty pleadings filed by Joe,

[8] David also claims that pre-judgment interest should have only been awarded until Joe was "paid in full," which he claims was the date of closing (April 30, 2008). Clearly, Joe was not "paid in full" at the time of closing; therefore, the court properly ordered pre-judgment interest at the contractual rate of 6% per annum from June 13, 2008, the date Allen determined that David owed Joe additional amounts, until February 3, 2012, and post-judgment interest at the statutory rate of 12% per annum.

discovery, and one deposition. Six different attorneys worked on Joe's case for a total of roughly 340 hours. The affidavit submitted in support of Joe's motion for attorneys' fees reflects an hourly rate that the circuit court found comparable with that of other attorneys of equivalent skill and experience. In light of the circumstances and evidence, and the fact that the purchase agreement expressly provided for the collection of attorneys' fees and costs, the circuit court ordered accordingly and did not abuse its discretion.[9]

In summary, the orders of the Jefferson Circuit Court are affirmed in part, and reversed in part, and this case is remanded with instructions for the court to enter a new judgment ordering David to pay Joe $198,377, instead of $272,945. The court shall further order that Joe is entitled to pre-judgment interest of 6% on the full $272,945 from June 13, 2008, to the date on which David paid the $74,568 in 2011. Thereafter, and up until the date of the court's judgment (February 3, 2012), the court shall order that Joe is entitled to 6% interest on the $198,377 figure. Post-judgment interest shall be ordered on the amount of $198,377 at the statutory rate of 12% per annum. The court's order with respect to attorneys' fees and costs stands.

[9] David posits that if Joe was entitled to an award of attorneys' fees, he should only be allowed to recover his reasonable attorneys' fees and costs from the moment he obtained the second Certificate since up to that point Joe was not the "prevailing party." David has failed to cite any legal authority in support of this novel theory and, in short, we find his argument unpersuasive.

ALL CONCUR.

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