RENDERED: AUGUST 16, 2013; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-001468-MR

ADAMS AND ZEYSING, INC. APPELLANT

v. APPEAL FROM SCOTT CIRCUIT COURT
HONORABLE PAUL F. ISAACS, JUDGE
ACTION NO. 10-CI-01182

LEXMACK LEASING, INC.;
LEXINGTON TRUCK SALES, INC.;
AND CARTY & CARTY, INC. APPELLEES

OPINION
AFFIRMING

** ** ** ** **

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

MOORE, JUDGE: Adams and Zeysing, Inc. appeals the Scott Circuit Court's order denying its motion to vacate the court's judgment in this case. After a careful review of the record, we affirm because KRS[1] 376.275(1) – (3) applies to

[1] Kentucky Revised Statute.

this case, and appellant failed to comply with the notice requirements set forth in KRS 376.275(2).

I. FACTUAL AND PROCEDURAL BACKGROUND

The circuit court set forth the pertinent facts as follows:

> On or about September 27, 2010 the Kentucky State Police seized trucks and trailers (hereinafter trucks) belonging to [Lexmack Leasing, Inc., Lexington Truck Sales, Inc., and Carty & Carty, Inc.] at weigh scales located on I-75. Trooper [David] Marcum submitted an Affidavit stating the vehicles in question had been impounded by Kentucky Department of Transportation and Kentucky State Police in early September 2010 for failure of the owners to pay road taxes owed to the State of Indiana. Trooper Marcum further states he requested [Adams and Zeysing, Inc.] to remove and store the vehicles and that all vehicles were ordered released on November 29, 2010. . . . Defendants mailed, via certified mail . . ., notices on or about September 30, 2010, that their vehicles had been towed and the consequence of not picking up vehicles is they will be considered abandoned. . . . Plaintiff Lexmack paid a total of $6,576.50, Plaintiff LTS paid a total of $3,288.25, and Plaintiff Carty & Carty paid a total of $3,288.25, under protest. This suit followed.

In their complaint, appellees Lexmack Leasing, Inc., Lexington Truck Sales, Inc., and Carty & Carty, Inc. sought to recover certain amounts they had paid to appellant Adams and Zeysing[2] to release their vehicles. The amounts they sought to recover were the amounts that had accrued after ten business days from the date appellant towed appellees' vehicles. Appellees' complaint was based in part on their allegation that appellant had violated KRS 376.275(2).

[2] At times in the record and in the briefs, Adams and Zeysing is referred to as "A & Z." We will simply refer to them as "appellant" in this opinion.

Appellant initially moved to dismiss the appellees' complaint on the ground that KRS 376.275(4) was applicable because the state government had caused the vehicles to be towed. Therefore, appellant argued that, pursuant to KRS 376.275(4), it was not required to meet the notice requirements set forth in other parts of that statute. With its motion, appellant filed an affidavit from Trooper Marcum stating that he was a Captain with the Kentucky State Police (KSP) on September 30, 2010, and that the vehicles in question

> had been impounded by Kentucky Department of Transportation (KYDOT) and KSP in the early part of September, 2010 for failure of the owners to pay road taxes owed to the State of Indiana. Each state acts as a reciprocal collection agency for other states for which applicable road taxes have not been paid[. . . .] When the vehicles in question had been unclaimed for approximately three weeks, [Trooper Marcum] contacted A & Z Towing and directed Mike Zeysing to remove and store each one of these vehicles[. . . .] All of these vehicles were ordered released by KSP/Division of Motor Carriers (KYDOT) on November 29, 2010, after all past due and applicable road taxes had been paid.

The circuit court reviewed appellant's motion to dismiss as a motion for summary judgment because appellant had filed his own affidavit, as well as Trooper Marcum's affidavit, with the motion to dismiss. The circuit court then denied appellant's motion for summary judgment after finding that there were some issues of material fact in the case.

Subsequently, appellees moved for summary judgment and appellant filed a cross-motion for summary judgment. The circuit court granted appellees' motion for summary judgment and denied appellant's cross-motion for summary

judgment. In doing so, the court found that appellant's interpretation of KRS 376.275(4), *i.e.*, that "towing pursuant to order of the State Police is the same as [the] police caus[ing] a vehicle to be towed," would "render the statutory phrase 'towed or transported pursuant to order of police, or other public authority' [from part (1) of the statute] totally meaningless." The court noted that a court is not permitted to interpret part of a statute in a way that would cause other parts of that statute to be meaningless. Therefore, the court held that the exception provided in KRS 376.275(4) did not apply in this case.

The circuit court also held that appellant had not substantially complied with the notice requirements of KRS 376.275(2) because in the notices it provided to appellees, appellant "did not list the amount of reasonable charges due on the vehicle[s], which the statute specifically requires." Consequently, the court granted appellees' motion for summary judgment and denied appellant's cross-motion for summary judgment. Further, appellant was ordered "to refund all storage fees accrued after ten (10) business days from the date of tow." Specifically, appellant was directed to pay Lexmack Leasing, Inc. the amount of $5,280.93, plus interest at 12% per annum from the date the judgment was entered until paid. Appellant was also ordered to pay to Lexington Truck Sales, Inc. and Carty & Carty, Inc. the amount of $2,640.46 each, plus interest at 12% per annum from the date the judgment was entered until paid.

Appellant moved to vacate and amend the judgment, again asserting that the KSP caused appellees' vehicles to be towed by appellant and, therefore,

that the exception specified in KRS 376.275(4) applied. The court denied appellant's motion, finding that none of the grounds for granting such a motion, as stated in *Gullion v. Gullion*, 163 S.W.3d 888, 893 (Ky. 2005), applied.

Appellant now appeals, contending that: (a) KRS 376.275(4) creates two specific exceptions to the general notice requirement set forth in the remainder of the statute; (b) the obvious purpose of the statute is to give vehicle owners notice that their vehicle has been towed and stored; (c) under the facts of this case, there is no question that state government caused these vehicles to be towed; and (d) appellant is entitled to its reasonable charges for its towing and storage.

II. STANDARD OF REVIEW

"The standard of review on appeal of a summary judgment is 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). "The record must be viewed in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor." *Steelvest, Inc. v. Scansteel Serv. Ctr.*, 807 S.W.2d 476, 480 (Ky. 1991). "Even though a trial court may believe the party opposing the motion may not succeed at trial, it should not render a summary judgment if there is any issue of material fact." *Id*. Further, "the movant must convince the court, by the evidence of record, of the nonexistence of an issue of material fact." *Id*. at 482.

III. ANALYSIS

A. EXCEPTIONS TO NOTICE REQUIREMENT

Appellant first alleges that KRS 376.275(4) creates two specific exceptions to the general notice requirement set forth in the remainder of the statute. Thus, appellant asserts that the circuit court clearly erred in holding that KRS 376.275(4) does not "mean what it plainly says."

Kentucky Revised Statute 376.275, provides, in its entirety, as follows:

> (1) When a motor vehicle has been involuntarily towed or transported pursuant to order of police, other public authority, or private person or business for any reason or when the vehicle has been stolen or misappropriated and its removal from the public ways has been ordered by police, other public authority, or by private person or business, or in any other situation where a motor vehicle has been involuntarily towed or transported by order of police, other authority, or by private person or business, the police, other authority, private person or business shall attempt to ascertain from the Transportation Cabinet the identity of the registered owner of the motor vehicle or lessor of a motor carrier as defined in KRS Chapter 281 and within ten (10) business days of the removal shall, by certified mail, attempt to notify the registered owner at the address of record of the make, model, license number and vehicle identification number of the vehicle and of the location of the vehicle, and the requirements for securing the release of said motor vehicle.
>
> (2) If a vehicle described in subsection (1) of this section is placed in a garage or other storage facility, the owner of the facility shall attempt to provide the notice provided in subsection (1) of this section, by certified mail, to the registered owner at the address of record of the motor vehicle or lessor of a motor carrier as defined in KRS Chapter 281 within ten (10) business days of recovery of, or taking possession of the motor vehicle. The notice

> shall contain the information as to the make, model, license number and vehicle identification number of the vehicle, the location of the vehicle and the amount of reasonable charges due on the vehicle. When the owner of the facility fails to provide notice as provided herein, the motor vehicle storage facility shall forfeit all storage fees accrued after ten (10) business days from the date of tow. This subsection shall not apply to a garage or storage facility owned or operated by a government entity.
>
> (3) Any person engaged in the business of storing or towing motor vehicles, who has substantially complied with the aforementioned requirements of this section, shall have a lien on the motor vehicle, for the reasonable or agreed charges for storing or towing the vehicle, as long as it remains in his possession. If after a period of forty-five (45) days the reasonable or agreed charges for storing or towing a motor vehicle have not been paid, the motor vehicle may be sold to pay the charges after the owner has been notified by certified mail ten (10) days prior to the time and place of the sale. If the proceeds of the sale of any vehicle pursuant to this section are insufficient to satisfy accrued charges for towing, transporting, and storage, the sale and collection of proceeds shall not constitute a waiver or release of responsibility for payment of unpaid towing, transporting, and storage charges by the owner or responsible casualty insurer of the vehicle. This lien shall be subject to prior recorded liens.
>
> (4) The provisions of this section shall not apply when a local government causes a vehicle to be towed pursuant to KRS 82.605 to 82.640 or if state government causes a vehicle to be towed.

This case requires us to engage in a statutory construction analysis. Pursuant to KRS 446.080,

> (1) All statutes of this state shall be liberally construed with a view to promote their objects and carry out the intent of the legislature, and the rule that statutes in

> derogation of the common law are to be strictly construed shall not apply to the statutes of this state.
>
> (2) There shall be no difference in the construction of civil, penal and criminal statutes.
>
> (3) No statute shall be construed to be retroactive, unless expressly so declared.
>
> (4) All words and phrases shall be construed according to the common and approved usage of language, but technical words and phrases, and such others as may have acquired a peculiar and appropriate meaning in the law, shall be construed according to such meaning.

In the present case, the circuit court held that to interpret KRS 376.275(4) to mean that "towing pursuant to order of the State Police is the same as [the] police caus[ing] a vehicle to be towed," would "render the statutory phrase 'towed or transported pursuant to order of police, or other public authority' [from part (1) of the statute] totally meaningless." Therefore, the court held that the KRS 376.275(4) exception does not apply to appellant "because [Trooper] Marcum's request was a police order."

We agree with the circuit court's reasoning. The first section of KRS 376.275 specifically provides that the statute applies "[w]hen a motor vehicle has been involuntarily towed or transported pursuant to order of police." This is a very specific provision, and we must construe it according to the common usage of language. Although KRS 376.275(4) provides that the statute does not apply "if state government causes a vehicle to be towed," we find this provision more general than the provision regarding towing pursuant to order of police. When

there appears to be a conflict between two statutory provisions, "the specific provision take[s] precedence over the general." *Commonwealth v. Phon*, 17 S.W.3d 106, 107 (Ky. 2000). Thus, because KRS 376.275(1) specifically states that the statute applies if *police* have ordered a vehicle to be towed, and that is what occurred in this case, then KRS 376.275(1) – (3) applies to this case. In other words, the exception provided in KRS 376.275(4) is inapplicable here.

B. PURPOSE OF STATUTE

Appellant also contends that the obvious purpose of the statute is to give vehicle owners notice that their vehicle has been towed and stored. Thus, appellant alleges that the corporate entities in this case had notice of the reason for the vehicle seizures, the vehicles' locations, and the amount necessary to obtain the release of the vehicles. Appellant asserts that the appellees had notice through Mr. Kenneth C. Schomp, who is a principal in each of the companies, because Mr. Schomp knew why the vehicles had been seized, where the vehicles were located, and the amount necessary to get them released.[3]

Mr. Schomp testified during his deposition that he was a fifty percent owner of Carty & Carty; he was a sixty-seven percent owner of Lexington Truck Sales, Inc.; and he was the sole owner of Lexmack Leasing, Inc. Mr. Schomp attested that at one point, he went to appellant to try to get his vehicles released, but he was told by one of appellant's employees that appellant was not releasing

[3] However, appellant cites no evidence in the record showing that appellees were told the amount necessary to obtain the release of the vehicles.

any of the vehicles because appellant had been told to hold all Carty & Carty vehicles until further notice.

This oral notice was insufficient to satisfy the requirements set forth in KRS 376.275(2). Pursuant to that statute, the owner of the facility where the towed vehicle is being stored is required to

> attempt to provide the notice provided in subsection (1) [of KRS 376.275], by certified mail, to the registered owner at the address of record of the motor vehicle or lessor of a motor carrier as defined in KRS Chapter 281 within ten (10) business days of recovery of, or taking possession of the motor vehicle. The notice shall contain the information as to the make, model, license number and vehicle identification number of the vehicle, the location of the vehicle and the amount of reasonable charges due on the vehicle.

As the circuit court noted, appellant failed to provide the required written notice to the appellees within the time allotted by statute. Appellant sent some form of written notice to appellees within ten business days, but the notices that were sent concerning the vehicles appellant had towed did not include "the amount of reasonable charges due on the vehicle," as required by KRS 376.275(2). Pursuant to KRS 376.275(2), "[w]hen the owner of the facility fails to provide notice as provided herein, the motor vehicle storage facility shall forfeit all storage fees accrued after ten (10) business days from the date of tow." KRS 376.275(2); *see also Bush v. Commonwealth*, 893 S.W.2d 798, 799 (Ky. App. 1995). Consequently, because appellant failed to comply with the notice requirements set

forth in KRS 376.275(2), appellant must forfeit all storage fees that accrued for the vehicles after ten business days from the date of tow.

C. WHETHER THE STATE CAUSED THE VEHICLES TO BE TOWED

Appellant next asserts that under the facts of this case, there is no question that state government caused the vehicles to be towed. However, as we discussed, *supra*, KRS 376.275(4) is inapplicable to this case. Thus, this assertion lacks merit.

D. CHARGES FOR TOWING AND STORAGE

Finally, appellant claims that it is entitled to its reasonable charges for its towing and storage of the vehicles. However, as we previously discussed, appellant forfeited all storage fees that accrued after ten business days from the date of tow, due to the fact that appellant failed to comply with the notice requirements set forth in KRS 376.275(2). Thus, we have already addressed this claim.

Accordingly, the order of the Scott Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Neil Duncliffe
Georgetown, Kentucky

BRIEF FOR APPELLEE:

Frank T. Becker
Lexington, Kentucky