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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-000866-MR

YVON ALLEN; HOWARD CHAD
ALLEN; AND BETTY ALLEN

APPELLANTS

v. APPEAL FROM KNOTT CIRCUIT COURT
HONORABLE FRANK ALLEN FLETCHER, JUDGE
ACTION NO. 09-CI-00015

CANEY CREEK COMMUNITY CENTER,
INC., d/b/a ALICE LLOYD COLLEGE; JUNE
BUCHANAN SCHOOL; AND JOE A. STEPP

APPELLEES

and

NO. 2013-CA-000914-MR

CANEY CREEK COMMUNITY CENTER,
INC.; AND JOE A. STEPP

CROSS-APPELLANTS

v. CROSS-APPEAL FROM KNOTT CIRCUIT COURT
HONORABLE FRANK ALLEN FLETCHER, SPECIAL JUDGE
NO. 09-CI-00015

YVON ALLEN; HOWARD CHAD
ALLEN; AND BETTY ALLEN

CROSS-APPELLEES

OPINION
AFFIRMING IN PART,
REVERSING IN PART,
AND REMANDING

** ** * ** * ** *

BEFORE: CAPERTON, COMBS, AND DIXON, JUDGES.

COMBS, JUDGE: Yvon Allen, Howard Chad Allen, and Betty Allen,¹ appeal from an order of the Knott Circuit Court granting summary judgment in favor of Joe Stepp and Caney Creek Community Center, Inc., and dismissing their employment discrimination and other tort claims. Stepp and Caney Creek cross-appeal the trial court's order granting summary judgment in favor of the Allens and dismissing their counterclaims for breach of contract, intentional interference with a contract, and malicious use of process. We affirm in part, reverse in part, and remand for further proceedings.

Joe Stepp is the President of Caney Creek. Caney Creek is a non-profit corporation that does business both as Alice Lloyd College and as the June Buchanan School. The June Buchanan School is a small, private, college-preparatory school located on the campus of Alice Lloyd College in Pippa Passes.

Yvon Allen served as headmaster of the June Buchanan School during the 2007-2008 academic year. Howard Chad Allen (Chad), his son, was employed by the school as a teacher during the same academic year. Betty Allen is Yvon's wife and Chad's mother.

¹ On appeal, the appellants have presented no argument in support of Betty Allen's claims.

In January 2008, sexual harassment allegations were leveled against Yvon Allen by five of the school's female teachers. Following a discussion with Joe Stepp on January 17, 2008, Yvon was granted administrative leave with pay.

On the evening of January 17, 2008, Chad Allen placed a telephone call to one of his father's accusers. During the discussion that followed between and among Chad and college administrators concerning the nature of that telephone call, Chad was also granted leave with pay.

On January 21, 2008, Yvon Allen tendered a letter of resignation in which he expressed his belief that he could not continue to be an effective headmaster in light of the allegations that had been made against him. He expressed his gratitude for the support that the administration of the college and preparatory school had shown during his tenure as headmaster.

Following Yvon Allen's resignation, his attorney successfully negotiated a severance agreement, which was executed by the parties on January 30, 2008. In the agreement, Yvon acknowledged that he had voluntarily resigned his position as headmaster. The agreement provided that the school would continue to pay Yvon's regular salary and benefits through July 31, 2008, and in exchange, Yvon waived "all claims or potential claims, whether currently known or unknown," that he "may have or may ever have had" against the school and its officers. Yvon also agreed to keep the severance agreement, its contents, and the relevant negotiations confidential. The damages recoverable upon a breach of the confidentiality provision of the agreement were specifically set forth.

The agreement provided that it contained the parties' entire understanding regarding its subject matter and that it superseded any prior agreements or understandings. It included the following provision: "The parties represent to each other that they have not promised one another anything or agreed to anything not expressed in this Severance Agreement."

On January 25, 2008, Chad Allen also tendered a letter of resignation in which he explained that he felt it would be in everyone's best interest if he left the school. Through his resignation, Chad intended to "avoid any conflicts that may occur by my presence . . . where the accusers are employed." Chad also expressed his gratitude for the opportunity that the preparatory school had provided him and his regret "that the many good things that I have experienced at JBS must come to this sad ending."

Chad also negotiated a severance agreement in which he acknowledged that he had also voluntarily resigned his position at the school. The school agreed to continue to pay Chad's regular salary and benefits through July 31, 2008, and in exchange, Chad waived "all claims or potential claims, whether currently known or unknown," that he "may have or may ever have had" against the school and its officers.

Chad also agreed to keep the severance agreement, its contents, and the relevant negotiations concerning it confidential. The damages recoverable upon a breach of this provision of the agreement were similarly set forth. The agreement provided that it contained the parties' entire understanding regarding its subject

matter and that it superseded any prior agreements or understandings between them. The school paid out according to the terms of each of the severance agreements.

On January 9, 2009, the Allens filed a civil action against Caney Creek, Stepp, and each of the five teachers who had made the allegations of sexual harassment. The Allens asserted claims of discrimination, retaliation, loss of consortium, negligence, intentional interference with a contract, and defamation. Yvon Allen and Chad Allen claimed that they had been unlawfully terminated from their employment and that Joe Stepp had damaged their reputations by disseminating information pertaining to the sexual harassment allegations. There was no mention of the letters of resignation or the parties' severance agreements. In a sealed pleading, Caney Creek and Stepp defended on the grounds that the Allens' severance agreements barred the action and that the Allens could not establish the essential elements of any of their claims even if they were not barred.

Caney Creek and Joe Stepp also filed counterclaims including breach of contract, tortious interference with a contract, malicious prosecution, abuse of process, and wrongful use of civil proceedings. The Allens filed a timely answer to the counterclaims, and eventually withdrew their claims for loss of consortium, "familial discrimination," and the age discrimination claim asserted by Chad.

On January 26, 2009, Caney Creek and Stepp filed a motion for summary judgment. They contended that the Allens could not make out a *prima facie* case with respect to any of the claims asserted and, in any event, that those claims had

been extinguished by the express terms of the severance agreements. The Allens resisted the motion, contending that Caney Creek, through Joe Stepp, had fraudulently induced Yvon and Chad to enter into the severance agreements which could not now be enforced against them.

The trial court rejected the fraudulent inducement argument and concluded that through the severance agreements, Yvon Allen and Chad Allen had waived any claims that they might otherwise have asserted against Caney Creek and Joe Stepp. The trial court granted the motion for summary judgment on June 19, 2009, and dismissed the Allens' claims against Stepp and Caney Creek. The Allens appealed. However, since the counterclaims remained undecided, this Court dismissed the Allens' appeal in October 2009.

On September 10, 2012, the teacher defendants filed a motion requesting the court to enter an agreed order of settlement and dismissal of the action against them. On September 17, 2012, the trial court entered an order dismissing the Allens' claims against the individual teachers and granting costs against the Allens' counsel.

On February 12, 2013, Stepp and Caney Creek filed a motion for summary judgment with respect to their counterclaims against the Allens. They argued that Yvon and Chad Allen had not only breached the express terms of their severance agreements by filing an action against Caney Creek and Stepp, but that each had breached his duty of good faith and fair dealing as well. They also contended that each of the Allens had tortiously interfered with the severance agreement of the

other. Finally, Stepp and Caney Creek argued that they were entitled to judgment as a matter of law with respect to their claims for malicious prosecution, wrongful use of civil proceedings, and abuse of process. In response, the Allens moved for a dismissal of the counterclaims.

On April 11, 2013, the trial court granted summary judgment in favor of the Allens. Concluding that there was no legal basis for the counterclaims asserted against the Allens, the court dismissed them. This appeal and cross-appeal followed.

On appeal, the Allens argue that the trial court erred as a matter of law by granting the motion for summary judgment filed by Stepp and Caney Creek in 2009. The Allens contend that genuine issues of material fact precluded the entry of summary judgment. They contend that they could not be bound by the terms of the severance agreements since they were fraudulently induced into signing them. They argue that whether a party made fraudulent representations for the purpose of inducing another to enter into a contract is a question of fact to be decided by a jury.

Stepp and Caney Creek argue that the summary judgment entered in 2009 must be affirmed since the Allens released any claims they might have otherwise asserted. In the alternative, they contend that those claims lack merit. They argue that the Allens have not alleged facts sufficient to make out a claim for fraudulent inducement and, in the alternative, that the merger clauses in the severance agreements defeat the fraud claims.

Upon review of the trial court's decision to grant summary judgment, we must determine whether the trial court correctly concluded that no genuine issue exists as to any material facts, and whether, based upon such facts, the moving party was entitled to judgment as a matter of law. *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky.App. 1996). We review a grant of summary judgment *de novo*. *Lewis v. B & R Corp.*, 56 S.W.3d 432, 436 (Ky.App. 2001). We owe no deference to the trial court's interpretation of the parties' severance agreements because the construction and interpretation of a contract are questions of law to be decided by the court. *Frear v. P.T.A. Industries, Inc.*, 103 S.W.3d 99, 105 (Ky.2003). *Frear* also provides as follows:

A release is a private agreement amongst parties which gives up or abandons a claim or right to the person against whom the claim exists or the right is to be enforced or exercised. In other words, a release is a discharge of a claim or obligation and surrender of a claimant's right to prosecute a cause of action.

Frear, supra at 107 (quoting 66 Am.Jur.2d *Release*, § 1 (2001)). As with any valid contract, a release must be supported by valuable consideration. *Brown v. Kentucky Lottery Corp.* 891 S.W.2d 90 (Ky. App. 1995).

It is undisputed that Yvon Allen and Chad Allen entered into comprehensive written agreements with Caney Creek in which they acknowledged their voluntary resignations and released all claims against Caney Creek and Joe Stepp in exchange for the continuation of their salary and benefits packages. Because Yvon and Chad Allen were unable to produce evidence to show that these agreements

were procured by fraud, we are not persuaded that the trial court erred by concluding that the Allens waived the claims that they now seek to assert against Caney Creek and Joe Stepp.

In support of their argument that the severance agreements are not enforceable against them, the Allens contend that Joe Stepp made material representations to them which were false but that he nonetheless made them in order to induce the Allens to enter into the severance agreements.

To justify rescission of a contract, a parties' factual misrepresentation must concern facts material or essential to the parties' agreement. *Glass Coffee Brewer Corp. v. Embry*, 292 Ky. 483, 166 S.W.2d 818 (1942). To be relevant, the factual misrepresentation cannot be merely collateral to the agreement; it must be essential to the parties' understanding. *Id.*

After carefully examining the parties' briefs, we are persuaded by the observations of Stepp and Caney Creek that the Allens have identified only one alleged misrepresentation underlying their contention that they were each fraudulently induced to execute the severance agreements. According to Yvon Allen, Stepp assured him (Yvon) during a period of negotiation concerning the terms of the severance agreement that he (Stepp) would provide to Yvon the names of his accusers as well as the "substance of all allegations against him." Appellants' brief at 3.

The parties' severance agreements are not complicated documents. As summarized above, they provided in plain language that Caney Creek would

continue to pay the Allens' salaries and benefits through July 31, 2008, in exchange for the Allens' waiver of all claims and potential claims against Caney Creek and/or Joe Stepp. In order to be material, any alleged fraudulent misrepresentation would have had to relate either to the Allens' waiver of claims or to Caney Creek's promise to issue the severance pay and to continue to provide the identified fringe benefits.

Stepp's alleged promise to provide to Yvon Allen the names of his accusers -- as well as the "substance of all allegations against him" -- is not material to the waiver of the Allens' claims and potential claims against Caney Creek and Joe Stepp and to Caney Creek's agreement to continue to pay the Allens' salary and benefits. Nor did the alleged promise to reveal names pertain to the Allens' right to pursue claims against Caney Creek or Stepp or anyone else. Nor did it pertain to Caney Creek's obligation to provide the severance pay and fringe benefit packages to each of the Allens. Assuming, *arguendo*, that Joe Stepp made the misrepresentation as alleged by the Allens, it was not material. And as a matter of law, it had to be material to serve as a basis to justify rescission. Consequently, the agreements cannot be rescinded on this basis.

According to the Allens, the other alleged misrepresentations were made by Stepp in an attempt to secure their resignations. However, there is no indication that the Allens' resignations were conditional in any way. Nor was there any showing that their decisions to release their claims against Caney Creek and Stepp in exchange for the severance packages were not wholly integrated with their

resignation decisions. Thus, these alleged misrepresentations are immaterial as well.

The severance agreements could not be rescinded on a claim of fraudulent inducement. Since any and all claims against Caney Creek and Joe Stepp were extinguished by the express terms of the severance agreements, the trial court did not err by concluding that Caney Creek and Joe Stepp were entitled to summary judgment and dismissal of the claims asserted against them by the Allens.

On cross-appeal, Caney Creek and Joe Stepp contend that the trial court erred by dismissing their counterclaims against the Allens. Each of the counterclaims stems from the commencement and continued litigation of the Allens' civil action. Caney Creek and Stepp argue that Yvon Allen and Chad Allen breached their severance agreements; that each of the Allens tortiously interfered with the contract of the other; and that they each used the judicial system for a malicious purpose. Caney Creek and Stepp contend that they are entitled to judgment on each of the counterclaims as a matter of law and that the trial court erred by failing to grant summary judgment.

The Allens argue that the trial court properly dismissed the counterclaims because Caney Creek, through its representative, Joe Stepp, breached the terms of the severance agreements by disclosing information regarding the terms of the agreements in clear violation of the confidentiality provisions. The Allens contend that this breach of the severance agreements relieved them of their obligations to perform under the contracts. We disagree.

Despite the Allens' contention to the contrary, the agreements do not, by their terms, impose any obligation on Caney Creek or Stepp to keep the severance agreements confidential. The explicit obligations pertain clearly and exclusively to the Allens. Neither Caney Creek nor Stepp was bound by the terms of the severance agreements to keep the agreements, their contents, or the negotiations surrounding their execution confidential. Consequently, even if Stepp disclosed information regarding the contents of the severance agreements as alleged by the Allens, the Allens nonetheless remained obligated by the confidentiality provisions of their severance agreements. The Allens were not entitled to summary judgment. However, Caney Creek and Joe Stepp were entitled to summary judgment with respect to the counterclaim alleging breach of contract, and the trial court erred in denying their motion.

Again, “a party moving for a summary judgment must establish that there is no genuine issue of material fact and that the movant is entitled to judgment as a matter of law.” *Loy v. Whitney*, 339 S.W.2d 164, 166 (Ky. 1960); Kentucky Rules of Civil Procedure (CR) 56.03. Only judgments entered pursuant to a final order may be reviewed on appeal, however. And generally, an order overruling a motion for summary judgment is viewed as interlocutory and non-appealable. *Battoe v. Beyer*, 285 S.W.2d 172 (Ky. 1955). The denial of a motion for summary judgment is not reviewable when the sole question is whether a genuine issue of material fact exists. *Bell v. Harmon*, 284 S.W.2d 812 (Ky. 1955). “[A]n order denying a summary judgment can in no sense prejudice the substantive

rights of the party making the motion since he still has the right to establish the merits of his motion upon the trial of the cause.” *Id.* at 814.

However, in *Gumm v. Combs*, 302 S.W.2d 616, 617 (Ky. 1957), Kentucky’s highest court recognized an exception to the general rule regarding an order denying a summary judgment and held that it may be reviewed on appeal when “the only basis of the ruling is a matter of law.” The circuit court's order denying the motion for summary judgment filed by Caney Creek and Stepp in 2013 was based upon its conclusion that there was no legal basis for the counterclaims.

Presumably, the trial court determined that Caney Creek and Stepp were precluded -- as a matter of law -- from enforcing the terms of the severance agreements because of its perception that a mutuality of the confidentiality provisions of the contracts existed. Since this issue is not one of fact but rather of law, we conclude that the court's order with respect to the counterclaim alleging breach of contract is properly reviewable pursuant to *Gumm, supra*.

As discussed above, the parties’ severance agreements were supported by adequate consideration. In exchange for a release of all claims, Yvon and Chad received a continuation of their salaries and benefits packages. Caney Creek paid out according to the terms of the agreements. Regardless of any disclosures that were made by Joe Stepp, the Allens unilaterally remained obligated by the terms of the severance agreements. Such was their clear and unambiguous agreement.

By executing the severance agreements Yvon Allen and Chad Allen agreed “not to bring claims of any kind against any of the Releasees anywhere, in connection with anything that happened before the date of this Agreement.” The Allens undoubtedly breached the terms of the agreement by filing a complaint for damages against Caney Creek and Stepp (the Releasees) based upon events that occurred before the agreement was executed. Caney Creek (the Releaser) and Stepp have shown that they were damaged as a result of the breaches and are entitled to pursue a recovery of damages in the sum which will put them into the same position that they would have been in had the agreement been performed as expected. *See Perkins Motors, Inc. v. Autotruck Federal Credit Union*, 607 S.W.2d 429, 430 (Ky.App. 1980). Consequently, Caney Creek and Stepp were entitled to judgment as a matter of law with respect to their counterclaim for breach of contract. We reverse the order denying summary judgment to Caney Creek and Stepp on this counterclaim.

Next, we consider the counterclaim of Caney Creek and Stepp that each of the Allens tortiously interfered with the severance agreement of the other. We conclude that the court erred in entering summary judgment in favor of the Allens.

Kentucky follows the Restatement (Second) of Torts § 766, which provides the requirements of a claim of intentional interference with the performance of a contract by a third person as follows:

One who intentionally and improperly interferes with the performance of a contract . . . between another and a third person by inducing or otherwise causing the third person not to perform the contract, is subject to liability to the other for the pecuniary loss resulting to the other from the failure of the third person to perform the contract.

See Harrodsburg Indus. Warehousing, Inc. v. MIGS, LLC, 182 S.W.3d 529, 533-34 (Ky.App. 2005). Thus, in order to prove the claims of tortious interference, Caney Creek and Stepp had to show:

the existence of a contract; (2) Defendant's knowledge of this contract; (3) Defendant intended to cause its breach; (4) Defendant's conduct caused the breach; (5) this breach resulted in damages to Plaintiff; and (6) Defendant had no privilege or justification to excuse its conduct.

Dennison v. Murray State Univ., 465 F.Supp.2d 733, 755 (W.D.Ky. 2006).

The Allens have not directed our attention to any testimony, facts, or circumstances in the record in support of their contention that they are entitled to judgment as a matter of law with respect to the claims of tortious interference with a contract. The burden of proof resides with Caney Creek and Stepp to show that each of the Allens intended to and did cause the other to breach the terms of his severance agreement. However, there is no indication that Caney Creek and Stepp will be unable to marshal the proof to meet that burden. Consequently, the trial court erred by granting summary judgment on this counterclaim.

Finally, the trial court granted summary judgment to the Allens and dismissed the counterclaim asserted by Caney Creek and Stepp for malicious

prosecution, wrongful use of civil proceedings, and abuse of process. Together, these torts require the following elements:

(1) the institution or continuation of original judicial proceedings, either civil or criminal or of administrative or disciplinary proceedings, (2) by, or at the instance, of the plaintiff, (3) the termination of such proceedings in defendant's favor, (4) malice in the institution of such proceeding, (5) want or lack of probable cause for the proceeding, and (6) the suffering of damage as a result of the proceeding.

Raine v. Drasin, 621 S.W.2d 895, 899 (Ky. 1981) (citations omitted). Malice may be presumed from evidence that the litigation was commenced without justification or for an ulterior purpose. *Williams v. Central Concrete Inc.*, 599 S.W.2d 460, 461 (Ky.App. 1979).

Again, the Allens have not directed our attention to any testimony, facts, or circumstances in the record in support of their contention that they are entitled to judgment as a matter of law. Once again, Caney Creek and Stepp bear the burden of showing that the Allens acted with an improper purpose or without justification. However, at this juncture, there is no indication that Caney Creek and Stepp will be unable to produce such evidence. Consequently, the trial court erred by granting summary judgment dismissing these counterclaims as well.

The trial court's denial of summary judgment in favor of Caney Creek and Stepp with respect to the counterclaim for breach of contract is reversed, and summary judgment should be entered accordingly in their favor. However, the dismissal of the other counterclaims asserted by Caney Creek and Stepp is

reversed, and those portions of this case are remanded to the circuit court for additional findings. On all other issues, we affirm.

ALL CONCUR.

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