RENDERED: NOVEMBER 26, 2014; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-001693-MR

UNITED COAL COMPANY, LLC;
SAPHIRE COAL COMPANY;
WELLMORE COAL COMPANY; AND
WELLMORE ENERGY COMPANY — APPELLANTS

v.

APPEAL FROM LETCHER CIRCUIT COURT
HONORABLE SAMUEL T. WRIGHT, III, JUDGE
ACTION NOS. 12-CI-00425, 12-CI-00426, 12-CI-00427
12-CI-00428, 12-CI-00429 AND 12-CI-00430

MARK MULLINS; JAMES CORNETT;
FLOYD JASON REED; TOMMY VANOVER;
MARK SMITH; AND STANLEY MORGAN — APPELLEES

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: COMBS, STUMBO AND THOMPSON, JUDGES.

THOMPSON, JUDGE: United Coal Company, LLC, Sapphire Coal Company, Wellmore Coal Company, and Wellmore Energy Company (the employers) appeal from an order granting summary judgment and the final judgment.[1]

Mark Mullins, James Cornett, Floyd Jason Reed, Tommy Vanover, Mark Smith and Stanley Morgan (the employees) were employed at the Grapevine Mine before being laid off. The employees filed a complaint alleging they were due additional compensation earned through their participation in the employers' loyalty reward plan.

Under the terms of the plan, the employees were entitled to accrue 10% of their pay in a deferred compensation plan. Typically, employees would not receive a cash distribution until they worked for the employers six years. However, they would qualify for an early distribution if laid off "because of a plant closing or mass layoff that is covered by the Worker Adjustment Retraining and Notification Act [(the WARN Act).]"[2] Because the employees did not complete six years at the Grapevine Mine before being laid off, they alleged entitlement to an early distribution through a mass layoff.

The WARN Act defines the term "mass layoff," which requires compliance with the notification requirements of the Act in 29 U.S.C. § 2101(a)(3) as follows:

[1] These are respectively titled Findings of Fact, Conclusions of Law and Summary Judgment, and Supplemental Findings of Fact and Supplemental Summary Judgment.

[2] The employees and employers disagreed as to which document(s) established the loyalty reward program. The employees alleged it was contained in a new employee letter from Mark McCormick, Vice-President of Human Resources for United Coal Company, which they attached to their complaint. The employers alleged it was contained in the loyalty reward plan and supplemental loyalty reward plan they attached to their response to the motion for summary judgment. However, all sources contained equivalent language, quoted above.

a reduction in force which--
(A) is not the result of a plant closing; and
(B) results in an employment loss at the single site of employment during any 30-day period for--
(i)(I) at least 33 percent of the employees (excluding any part-time employees); and
(II) at least 50 employees (excluding any part-time employees); or
(ii) at least 500 employees (excluding any part-time employees)[.]

The employers' answers admitted United Coal Company established the plan, Wellmore Energy Company was a participating employer in the plan, Wellmore Energy Company employed the employees, the employees accrued money in the plan and Wellmore Energy Company laid them off. However, the employers denied the employees were laid off as part of a mass layoff as defined by the WARN Act.

Before any discovery, the employees filed motions for summary judgment alleging they were entitled to a judgment in their favor arguing it was undisputed they were entitled to early payment under the loyalty plan because they were laid off pursuant to a mass layoff covered by the WARN Act. However, the employees failed to provide any evidence to establish that sufficient numbers of employees were laid off to qualify their layoff as part of a mass layoff.

In the employers' responses to the motions for summary judgment, they admitted the employees began working for Wellmore Energy Company at the Grapevine Mine in 2012 and their employment was terminated on August 17, 2012, due to a layoff affecting thirty-seven employees. They denied the employees

qualified for early payment arguing they were not laid off as part of a mass layoff as defined by the WARN Act. The employers also submitted the sworn affidavit of Mark McCormick, Vice-President of Human Resources for United Coal Company, stating he had read the statements contained in the response and they are true.

The circuit court granted summary judgment in favor of each of the employees. The parties entered into a stipulation setting forth the balances in the employees' deferred compensation accounts. Subsequently, the circuit court entered a final judgment awarding the balances of those accounts to the employees. The employers appeal from the final judgment and order granting summary judgment.

Summary judgment should be granted "if the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Kentucky Rules of Civil Procedure 56.03. The party moving for a summary judgment bears the burden of making a *prima facie* showing that he is entitled to summary judgment. *Hill v. Fiscal Court of Warren Cnty.*, 429 S.W.2d 419, 423 (Ky. 1968); *Cont'l Cas. Co. v. Belknap Hardware & Mfg. Co.*, 281 S.W.2d 914, 916 (Ky. 1955). Even if the party opposing summary judgment fails to present any evidence contradicting the moving party, summary judgment may not be granted unless the evidence presented by the moving party establishes there is no genuine issue of

fact remaining despite the allegations in the pleading. *Neal v. Welker*, 426 S.W.2d 476, 479 (Ky. 1968); *Hartford Ins. Grp. v. Citizens Fid. Bank & Trust Co.*, 579 S.W.2d 628, 631 (Ky.App. 1979). Granting of a summary judgment motion "should only be used 'to terminate litigation when, as a matter of law, it appears that it would be impossible for the respondent to produce evidence at the trial warranting a judgment in his favor and against the movant.'" *Steelvest, Inc. v. Scansteel Serv. Ctr., Inc*., 807 S.W.2d 476, 483 (Ky. 1991) (quoting *Paintsville Hospital Co. v. Rose*, 683 S.W.2d 255, 256 (Ky. 1985)).

The employees failed to demonstrate they were entitled to summary judgment because no genuine issue of material fact remained. The pleadings established the employers disagreed with the employees' claim that their layoffs were part of a mass layoff under the WARN Act, the employees failed to present any evidence to establish their layoffs were part of a mass layoff, and the employers provided evidence the layoff of the employees did not qualify as a mass layoff under the WARN Act because only thirty-seven employees were laid off. Therefore, a factual issue remained as to whether the employees were laid off as part of a mass layoff, and the circuit court erred by granting summary judgment and entering a final judgment awarding the balance of the deferred compensation accounts to the employees.

Accordingly, we reverse and remand the Letcher Circuit Court's order granting summary judgment and the final judgment.

ALL CONCUR.

BRIEFS FOR APPELLANTS:

Charles J. Baird
Pikeville, Kentucky

BRIEF FOR APPELLEES:

Daniel F. Dotson
Whitesburg, Kentucky