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Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-001953-MR

NOBLE ROYALTIES ACCESS FUND V LP; NOBLE ROYALTIES ACCESS FUND VI LP; NOBLE ROYALTIES ACCESS FUND VII LP; AND ACCRETIVE ROYALTIES LIMITED PARTNERSHIP, L.L.P. — APPELLANTS

v.

APPEAL FROM FLOYD CIRCUIT COURT
HONORABLE JOHNNY RAY HARRIS, JUDGE
ACTION NO. 13-CI-00581

ELK HORN COAL COMPANY, LLC — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

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

ACREE, CHIEF JUDGE: We must decide whether the Floyd Circuit Court erroneously dismissed the complaint of the Appellants, Noble Royalties Access Fund V LP, Noble Royalties Access Fund VI LP, Noble Royalties Access Fund VII LP, and Accretive Royalties Limited Partnership, L.L.P. (collectively, Noble), for failure to state a claim upon which relief may be granted under Kentucky Rule of Civil Procedure (CR) 12.02(f). Finding no error, we affirm.

I. Facts and Procedure

Because we are obligated to consider the allegations in the complaint as true, we will recount the complaint's contents as if they were undisputed facts.

On May 1, 2008, appellee Elk Horn Coal Company entered into a lease agreement and several companion agreements, including one styled the "Cost Recovery Agreement," with New Vision Energy for coal mine development on Left Beaver Creek in Floyd County, Kentucky.[1] The understanding was that Elk Horn would lease certain real property to New Vision and, in return, New Vision would establish a mining operation on the premises. The lease and the Cost Recovery Agreement, collectively, required New Vision to secure financing to fund several projects related to the proposed mining operation[2] within six months. New Vision failed to do so. The parties amended the Cost Recovery Agreement six times to afford New Vision additional opportunities to obtain the required

[1] The parties entered into a prior lease concerning the same subject matter and containing similar terms in 2006.

[2] The projects included the construction of a Preparation Plant and a Loadout Facility; the completion of a railroad restoration; the construction of mines; and the procurement of equipment to operate the Preparation Plant, Loadout Facility, and the mines.

funding. The sixth, and final, amendment to the Cost Recovery Agreement, entered into on January 26, 2010, extended New Vision's financing deadline to December 31, 2010. If New Vision failed to meet this deadline, Elk Horn was authorized to terminate and/or not renew the lease.

Subsequently, New Vision approached Noble about infusing cash into New Vision to allow it to meet its lease obligations. Noble conducted its due diligence. During this phase, New Vision and Elk Horn represented to Noble that substantial investment in the lease premises, including construction of a new coal preparation facility, was needed to render the mining operation viable, and that the money infused by Noble would be used for those purposes.

Noble ultimately agreed to the infusion. On May 4, 2010, New Vision and Noble entered into four Overriding Royalty Purchase and Sale Agreements. The agreements are identical, with the exception of the amount of money to be paid. Each Purchase Agreement contained the following language:

> <u>Termination of the Lease:</u> If on or before December 31, 2010, the Lease [between New Vision and Elk Horn] is terminated, then [Noble] shall be entitled to reimbursement of the Purchase Price [$5,596,000.00] from [New Vision] within thirty (30) days of its receipt of notice from [Noble] of such termination. This is the sole remedy available to [Noble] for and as a result of any such termination of the Lease.

(R. at 6). In conjunction with the Purchase Agreements, New Vision and Elk Horn entered into a Consent and Partial Subordination Agreement. Paragraph C of the Consent Agreement states:

> New Vision proposes to enter into a transaction or series of transactions (the "Noble Override Royalty Agreement") under and by which it would sell an overriding royalty interest to [Noble] in exchange for an aggregate payment of $5,846,000.00. The entering into of the Noble Override Royalty Agreement with [Noble] will provide such funds to New Vision for use in and relating to the development of its projects and operations.

(R. at 7). Elk Horn signed the Consent Agreement to induce Noble to invest funds which would be used by New Vision to make substantial improvements to Elk Horn's properties. Noble's officers believed that the money would be used in this manner.

In total, Noble paid $5,596,000.00 to New Vision. Solely from this source of funds, New Vision paid $323,944.46 to Elk Horn to cover: past due royalties and cost recovery payments; the 2009 unmined mineral tax; and the April 2010 royalties.

In June 2010, another company acquired two percent of the membership interests in New Vision. By letter agreement dated October 29, 2010, Elk Horn and New Vision amended the terms of the Cost Recovery Agreement. The amendment stated:

> If [New Vision] is unable to close on a financing/sale by December 31, 2010, [Elk Horn] will provide a lease extension to [New Vision] to allow it to close on a sale for which there is a definite executed sales/purchase agreement by December 31, 2010 with a buyer that [Elk Horn] is willing to accept as a Lessee by written consent . . . , meets the criteria expected of a Lessee . . . and meets the following conditions:

> a. [New Vision] has received a non-refundable exclusivity payment in the amount of $100,000 or more from a potential buyer;
>
> b. [New Vision] immediately remits a portion of the exclusivity payment to [Elk Horn] in consideration for the extension in an amount of $100,000. If [New Vision] receives any amount over $100,000 [New Vision] shall remit to [Elk Horn] one half (50%) of the excess to be applied to outstanding obligations of [New Vision].

On December 29, 2010, Elk Horn advised New Vision that it desired to terminate the lease. By letter dated December 31, 2010, New Vision notified Elk Horn that it (New Vision) had entered into a letter of intent to sell the remaining 98% of its membership interests for $10,000,000.00. The letter was accompanied by a $100,000.00 check made payable to Elk Horn. New Vision thought this sufficient to satisfy its obligations under the amended terms of the Cost Recovery Agreement. Elk Horn disagreed and, on January 4, 2011, Elk Horn informed New Vision that it considered the Lease and its companion agreements expired as of December 31, 2010.

Elk Horn then commenced a civil action against New Vision in Fayette Circuit Court to recover all outstanding amounts due. On December 31, 2010, the circuit court entered summary judgment in favor of Elk Horn, finding the lease terminated as of December 31, 2010. Though an appeal was initially taken from that order, the parties abandoned the appeal in favor of a settlement agreement.

On July 1, 2013, Noble brought this unjust enrichment action against Elk Horn in Floyd Circuit Court. Noble alleged in its complaint that it conferred a benefit upon Elk Horn when Elk Horn received $323,944.46 of Noble's money through checks from New Vision. Because this case turns on the precise language of the complaint, we quote it here:

> When [Noble] wire transferred $5,596,000.00 to New Vision on May 7, 2010, they conferred an immediate benefit upon [Elk Horn] (i.e., hundreds of thousands of dollars were funneled through New Vision directly to [Elk Horn] and improvements were made to the property subject to the Lease), resulting in an appreciation of that benefit by [Elk Horn], who consented to the transactions which occurred under the Purchase Agreements.

(R. at 12). Noble also alleged that Elk Horn facilitated the infusion of capital to New Vision as a calculation to rid itself of the lease so as to improve the value, marketability and sale of Elk Horn's properties to a purchaser, Rhino Resources Partner.

Elk Horn filed a motion to dismiss under CR 12.02(f), contending Noble had failed to state a claim upon which relief could be granted. Elk Horn asserted that Noble's unjust enrichment claim must fail as a matter of law because: (i) Noble has an adequate remedy at law – that is, a direct action against New Vision for breach of contract; and (ii) Noble did not, and is unable, to plead either that it conferred a direct benefit on Elk Horn or that Elk Horn's alleged enrichment was unjust, thereby failing to establish two of the three elements for an unjust enrichment claim.

After hearing arguments, the circuit court granted Elk Horn's motion, finding Noble conferred no benefit upon Elk Horn as a matter of law. The circuit court also found that in order for the claim to go forward "Elk Horn's alleged retention of any benefit must also be at [Noble's] expense, and as Noble was contractually entitled to get its money back from New Vision, any retention of funds by Elk Horn was not at Noble's expense." (R. at 6). Noble appealed.

II. Standards Governing Appellate Review

CR 12.02(f) authorizes judgment in favor of a defendant on the basis of the plaintiff's "failure to state a claim upon which relief can be granted[.]" CR 12.02(f). We must affirm the circuit court's grant of the motion to dismiss pursuant to CR 12.02(f) if:

> it appears the pleading party would not be entitled to relief under any set of facts which could be proved in support of his claim. . . . [T]he question is purely a matter of law. Stated another way, the court must ask if the facts alleged in the complaint can be proved, would the plaintiff be entitled to relief?

James v. Wilson, 95 S.W.3d 875, 883-84 (Ky. App. 2002) (internal quotation and citation omitted). "For the purpose of testing the sufficiency of the complaint the pleading must not be construed against the pleader and the allegations must be accepted as true." *Pike v. George*, 434 S.W.2d 626, 627 (Ky. 1968).

Because only legal questions are involved, the standard for review of an order dismissing pursuant to CR 12.02(f) is *de novo*. *Morgan & Pottinger, Attorneys, P.S.C. v. Botts*, 348 S.W.3d 599, 601 (Ky. 2011).

III. Analysis

In Kentucky, "[t]here are three elements that a party must meet in order to prevail on a claim of unjust enrichment: (1) benefit conferred upon defendant at plaintiff's expense; (2) a resulting appreciation of benefit by defendant; and (3) inequitable retention of benefit without payment for its value." *Collins v. Kentucky Lottery Corp.*, 399 S.W.3d 449, 455 (Ky. App. 2012). Beyond the recital of these elements, Kentucky's unjust-enrichment jurisprudence is less concrete and Noble's argument seeks to exploit that indefiniteness.

Noble argues that the circuit court's order granting dismissal should be reversed because it is erroneously premised upon a belief that the benefit conferred in an unjust enrichment case must be alleged and proved to be a *direct* benefit. Noble further argues that its complaint sufficiently alleges an *indirect* benefit conferred upon Elk Horn at Noble's expense, and argues that such an indirect benefit suffices under Kentucky law. Of course, Elk Horn disagrees and relies on the language and analysis of the circuit court's order.

Wading through pages of well-presented argument, we conclude that the circuit court got it right. Like the circuit court, we will consider the direct-indirect benefit analysis, but ultimately we conclude, as did the circuit court, that Elk Horn was not unjustly enriched.

In a well-written opinion that relies on federal interpretation of Kentucky jurisprudence, the circuit court initially concluded that:

> to state a claim for unjust enrichment, the plaintiff must allege that it conferred a benefit on the defendant. To prove this element of unjust enrichment, a plaintiff must show that there is some *direct* relationship . . . between a defendant's enrichment and a plaintiff's impoverishment.

(Memorandum Opinion and Order; R. 122 (emphasis added; quotation marks and citations omitted)). Noble presents a strong argument for the view that even an indirect benefit will suffice under Kentucky law.

While our state appellate courts have hardly touched upon this aspect of an unjust enrichment claim, the federal bench, interpreting Kentucky case law, has divined certain jurisprudential concepts in this area that could have an effect on our analysis.

First, the federal courts have said, "[i]n application, Kentucky courts have consistently found that the first element [of an unjust enrichment claim] not only requires a benefit be conferred upon the defendant, but also that the plaintiff be the party conferring the benefit." *Pixler v. Huff*, No. 3:11-CV-00207-JHM, 2011 WL 5597327, at *11 (W.D. Ky. Nov. 17, 2011); *Dixie Fuel Co. v. Straight Creek, LLC*, CIV. 08-326-GFVT, 2011 WL 845828, at *4 (E.D. Ky. Mar. 8, 2011) ("Although not always expressly stated by courts, the requirement that the benefit be conferred on the defendant by the claimant seems to always be a requirement in practice."). There is support for this concept in Kentucky jurisprudence. *See, e.g., Jones v. Sparks*, 297 S.W.3d 73, 78 (Ky. App. 2009) (plaintiff could not sustain an unjust enrichment claim because the plaintiff conferred no benefit upon the defendant); *Durbin v. Bank of Bluegrass & Trust Co.*, 2005-CA-001292-MR, 2006 WL

1510479, at *3 (Ky. App. June 2, 2006) ("'Unjust enrichment' is based upon an implied contract, creating an obligation from the recipient of the benefits received *to the one bestowing them*" (emphasis added)).

Another aspect of unjust enrichment more thoroughly addressed by the federal judiciary than that of the state builds upon the first: whether an indirect benefit conferred upon the defendant by the plaintiff will suffice to support an unjust-enrichment claim under Kentucky law. The federal courts sitting in Kentucky are split on this issue. *Compare Seye v. Community Yellow Cab*, 10-234-WOB-CJS, 2013 WL 1332430, at *13 (E.D. Ky. Feb. 25, 2013) ("[A]n indirect benefit may satisfy the requirements of a claim for unjust enrichment.") *and Dixie Fuel Co., LLC*, 2011 WL 845828 at *4 (cases from other jurisdictions that "stand for the proposition that a plaintiff need not confer the benefit *directly* on the defendant" are "not at odds" with Kentucky jurisprudence), *with SAAP Energy v. Bell,* 1:12-CV-00098, 2013 WL 4588828, *2 (W.D. Ky. Aug. 28, 2013) ("[T]o meet the first element of a claim for unjust enrichment, a plaintiff must allege that he directly conferred a benefit on the defendant.") *and 2815 Grand Realty Corp. v. Goose Creek Energy*, *Inc.*, 7:08-CV-186, 2010 WL 4313582, *4 (E.D. Ky. Oct. 26, 2010) (unjust enrichment claim failed because plaintiffs did not "allege that *they themselves* conferred any benefit upon the" defendants (emphasis added)). We, of course, "are not bound by the holdings of federal court opinions applying or interpreting state law[,]" and are free to forge our own path through the kindling. *Certain Underwriters at Lloyd's, London v. Abundance Coal, Inc.*, 352 S.W.3d 594, 598 (Ky. App. 2011).

We need not predict and decide which of these views our Supreme Court may ultimately adopt. We will affirm the circuit court on a different basis stated in the order – that Elk Horn was conferred with *no unjust enrichment*, either direct or indirect – and leave Noble's first argument for another day.

We turn now to other language in the circuit court's order where the court said:

> Noble is suing Elk Horn for unjust enrichment based on Elk Horn's alleged breach of its contract with New Vision as Noble alleges that Elk Horn benefitted at their request by breaching that contract. Thus, just as in *Dixie Fuel* [*supra*], Noble did not confer a benefit on Elk Horn; rather, [Noble] bestowed a benefit in the form of an infusion of money on New Vision, not Elk Horn. Indeed, *Noble conferred no benefit to Elk Horn as a matter of law*.

(Memorandum Opinion and Order; R. 123 (emphasis added)).

As the circuit court indicates, Noble infused capital into New Vision totaling $5,596,000 and New Vision used some of that capital to satisfy liabilities it owed to Elk Horn in the amount of $323,944.46. Noble identifies those liabilities and their separate amounts in the complaint. (R. 8). We can infer that New Vision used the balance of the $5,596,000 infusion of capital ($5,272,055.54), or part of it, to satisfy liabilities owed to other creditors.

Noble does not claim in its complaint that New Vision did not owe the sum it paid to Elk Horn or that the payment was a sham. That payment did not afford

Elk Horn some "advantage or privilege" or "[p]rofit or gain" to which it was not lawfully entitled. Black's Law Dictionary, *benefit* (10th ed. 2014). The sum Noble claims from Elk Horn was simply just compensation paid by New Vision for a debt it owed to Elk Horn. It cannot be, simultaneously, unjust enrichment conferred by Noble upon Elk Horn any more than the receipt by New Vision's other creditors of a portion of the capital infusion New Vision received from Noble.

This conclusion is consistent with a principle of unjust enrichment addressed by Kentucky jurisprudence which recognizes that the doctrine of unjust enrichment is an equitable and restitutionary tool designed "to prevent one person from keeping money or *benefits belonging to another*." *Haeberle v. St. Paul Fire and Marine Ins. Co.*, 769 S.W.2d 64, 67 (Ky. App. 1989) (emphasis added). The payments New Vision owed and paid Elk Horn did not belong to Noble. The source of New Vision's payments is neither relevant nor determinative. We agree with the concluding portion of the circuit court's analysis:

> In short, Noble entered into the Purchase Agreements with New Vision, knowing that New Vision needed money from Noble to fulfill its obligations under the Lease, and knowing that the Lease was set to expire on December 31, 2010. The Lease did so expire, and it has been determined in a separate action that Elk Horn was entitled to not renew and/or terminate the Lease. The Purchase Agreements between Noble and New Vision expressly contemplated that in such an event New Vision would reimburse Noble. In this light, there is simply no legal basis through which Noble may transfer New Vision's obligation to the plaintiffs to Elk Horn, so as to

> make Elk Horn liable to return the money it received from New Vision under the terms of the Lease.

(R. at 124).

With this language, the circuit court effectively held that, while Noble's infusion of capital to New Vision made it possible for Elk Horn to be paid, Elk Horn was not thereby *unjustly* enriched. That infusion of capital may have been a bad business decision in retrospect. However, we cannot and do not say that the order dismissing was erroneous as a matter of law, especially in light of the equitable nature of this claim and the analysis performed by the circuit court based on the allegations of the complaint. *See Emerson v. Emerson*, 709 S.W.2d 853, 855 (Ky. App. 1986) (an action based upon unjust enrichment is equitable in nature); *Meyers v. Chapman Printing Co., Inc.*, 840 S.W.2d 814, 819 (Ky. 1992) ("The Kentucky Constitution protects the right to trial by jury except in cases 'of an equitable nature wherein the remedy at law (trial by jury) is inadequate and will not afford justice.'" (citation omitted)); *Snyder v. Hayden*, 360 S.W.2d 212, 213 (Ky. 1962) ("[T]he action sought purely equitable relief and therefore was not one triable of right by a jury within the meaning of CR 38.02.").

IV. Conclusion

We affirm the Floyd Circuit Court's October 14, 2013 Memorandum Opinion and Order dismissing Noble's complaint for failure to state a claim under CR 12.02(f).

ALL CONCUR.

BRIEFS FOR APPELLANT:

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