

Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-001567-MR

MARK G. CARLOTTA AND
MARK & BARRY FOODS, LLP

APPELLANTS

v. APPEAL FROM CAMPBELL CIRCUIT COURT
HONORABLE FRED A STINE V, JUDGE
ACTION NO. 10-CI-01894

BARRY G. REED

APPELLEE

OPINION
AFFIRMING

** ** * ** * **

BEFORE: KRAMER, CHIEF JUDGE; JONES AND TAYLOR, JUDGES.

TAYLOR, JUDGE: Mark G. Carlotta and Mark & Barry Foods, LLP (collectively referred to as Carlotta) appeal from the Campbell Circuit Court's Findings of Fact, Conclusions of Law and Judgment entered on August 14, 2013, adjudicating a partnership dissolution and allocating the parties respective partnership interests in accordance with Kentucky Revised Statutes (KRS) 362.345. Carlotta contends

that the trial court abused its discretion when it barred testimonial evidence as a sanction for his attorney's failure to comply with discovery orders, and that its final judgment was unsupported by the evidence. For the reasons stated, we affirm.

Mark Carlotta and Barry G. Reed entered into a verbal agreement to open a restaurant in Erlanger, Kentucky in 2010. They agreed to make equal capital contributions to the venture and to divide the profits and losses equally. Although they never executed a formal partnership agreement, they did register a limited liability partnership, called Mark & Barry Foods LLP, with the Kentucky Secretary of State on August 9, 2010. Reed contributed \$20,000 to the capital of the restaurant, which he deposited into the LLP bank account on October 18, 2010. Carlotta paid various expenses associated with the renovation of the restaurant space in 2010 prior to the establishment of the bank account, although these expenses were not documented in the record of this case. Carlotta later deposited in the account the sum of \$10,000 that he had received from a friend.

Disagreements immediately arose between Carlotta and Reed, regarding the business and by December 2010 Reed wanted out of the partnership. Carlotta told Reed that he would try to find someone to take his place and would repay him his initial capital contribution along with an additional \$2,000 as compensation for the use of his money. Carlotta had difficulties finding a replacement partner, however, and on November 19, 2010, Reed withdrew \$6,517.16 from the LLP account. On December 10, 2010, Reed filed this action in Campbell Circuit Court seeking to

dissolve the partnership and to recover the remaining balance of his capital contribution. Carlotta filed an answer and counterclaim alleging breach of fiduciary duty.

On January 14, 2011, Reed served a request for production of documents on Carlotta, including a request for information regarding the debts and liabilities of the LLP. According to Carlotta, his attorney “tried to explain that financial information was on the computer and Carlotta did not know how to obtain the reports.” Carlotta’s counsel did not, however, make a written response to the request for production.

Eventually, on March 11, 2011, Reed filed a motion to compel production of the documents. The trial court entered an order requiring Carlotta to produce the documents by April 8, 2011. Carlotta did not comply.

In September 2011, Reed served a subpoena *duces tecum* on Carlotta, listing the same documents as those in the original request for production. Carlotta filed a motion to limit the time frame of the information he was required to disclose. The trial court denied the motion. Carlotta then directed the accountant for the LLP to obtain the requested information from the computer. He claims that he delivered the resulting file to Reed’s attorney. Apparently, the delivery was not made because Reed subsequently filed a motion to compel production of documents and to enforce the subpoena *duces tecum*.

The trial court ordered Carlotta to produce the documents by November 21, 2011. Its order specified that if Carlotta failed to respond fully and produce the

requested documents by that date, his pleadings would be stricken and the trial court would enter default judgment. The trial court also awarded attorney's fees to Reed in the amount of \$300.

Carlotta filed a motion to reconsider or for additional time. The trial court ordered the production of documents by December 23, 2011. Carlotta's attorney filed a response with an affidavit from the individual who had delivered the file, stating that she had given it to Reed's attorney's receptionist. On February 17, 2012, the trial court entered an order giving Carlotta until March 14, 2012, to produce the requested documents, and warned that if he did not do so, a hearing would be held at which he would have to show cause why he should not be held in contempt of court. Carlotta complied and claims that he gave Reed the only copy of the documents.

The trial court entered an order vacating the show cause hearing and scheduling a status hearing. According to Carlotta, he relied on this order and did not "do anything else" in regard to discovery.

On June 7, 2012, following the status conference held on May 31, 2012, the trial court entered a scheduling order, setting a deadline of August 1, 2012, for the completion of discovery. The order specified that the parties would comply with the Economical Litigation Practice (ELP) Rules and file an Exchange of Information memoranda with the court and opposing counsel before the pretrial date. The order cautioned that failure to file a complete Exchange of Information

within the time set by Kentucky Rules of Civil Procedure (CR) 93.04 might result in the pleadings being stricken.

Reed then filed a motion to appoint a receiver and judicially dissolve the LLP. Carlotta's counsel claimed he did not receive a copy of the motion because he had left his old firm which was not forwarding his mail. The trial court appointed a receiver and scheduled a status conference. Carlotta's counsel was unable to attend a meeting with the receiver for health reasons and he was thereafter hospitalized for about one week. At the status conference, which was eventually held on January 31, 2013, the receiver reported that he had found no assets. In an order entered on February 1, 2013, the trial court discharged the receiver, and ordered the parties to attempt to settle the matter by March 7, 2013. In the event they were unable to reach a settlement, a bench trial was scheduled for March 28, 2013. The court further ordered the parties to file their Exchange of Information memoranda with the Court and opposing counsel by March 14, 2013, again warning that failure to comply could result in sanctions.

On March 20, 2013, Carlotta's counsel, Richard Wentz, filed a motion for a continuance of the trial based on health problems. The motion was granted. On March 22, 2013, the trial court ordered Wentz to associate with another attorney to represent Carlotta within twenty days.

On June 4, 2013, the trial court entered an order stating in part as follows:

By Order of March 22, 2013, the Court vacated the bench trial set for March 28, 2013, at the request of [Carlotta's] attorney . . . for personal reasons. Given the many previous delays in this case, the Court further ordered [Carlotta's attorney] to associate with other counsel to represent defendants in this matter within twenty days of the date of the Order. To date he has not done so. All that remains is a damages trial to the bench, which the Court finds can no longer be postponed without a serious breach of justice.

The order directed that the bench trial would be held on July 8, 2013; for Carlotta to file with the court and serve his mandatory disclosure on opposing counsel by June 24, 2013; and for counsel for both sides to mark all their exhibits and provide a list of exhibits to the trial court no later than June 28, 2013. The order concluded by plainly stating that the court would “not vacate these dates and deadlines.”

Carlotta's counsel failed to timely comply, serving his mandatory disclosures by mail on June 28, 2013.¹ Wentz asserted that he misread the court's order and did not prepare his disclosure until ten days before the trial date, instead of the fourteen days required by the order. He acknowledged that the disclosure was required under the ELP rules and acknowledged that this late disclosure was an error. Wentz also submitted late the names of three witnesses to be called at trial, one of whom was Carlotta's accountant.

Reed then filed a motion requesting sanctions for Carlotta's failure to comply with the court's orders, including the barring of the testimony of any

¹ The disclosures were not filed with the clerk of the circuit court until July 3, 2013, five days before trial.

undisclosed witnesses. At trial, the court refused to allow Carlotta to call any witnesses other than Carlotta himself, including the accountant. The trial court also refused to allow Carlotta to testify regarding the liabilities of the LLP as of the date of dissolution in December 2010, as this information had not been previously provided during the over three-year history of this case.

Following the bench trial, the circuit court found that the partnership had been dissolved *de facto* by the end of November 2010. This was in accordance with the parties' agreement that the date of dissolution of the LLP was December 1, 2010. The court further held that the assets of the LLP at that time totaled \$34,805.31. The court divided the assets under the rules for distribution set forth in KRS 362.345, with the result that Reed received \$15,025.93 and Carlotta received \$19,779.38. This appeal follows.

Carlotta first argues that the trial court abused its discretion in refusing to allow him to call any witnesses at trial, or to testify regarding the LLP's liabilities as of the date of dissolution of the partnership. He further contends that the court's judgment was contrary to the law and that its decision regarding the division of assets was not supported by the evidence presented at trial.

The trial court's limitation on the introduction of evidence at trial was essentially a sanction under CR 37. An appellate court reviews a trial court's decision to issue sanctions pursuant to CR 37.02(2) for an abuse of discretion. The test for abuse of discretion is whether the trial court's decision was "arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Baptist*

Healthcare Sys., Inc. v. Miller, 177 S.W.3d 676, 684 (Ky. 2005) (citation omitted).

Before imposing sanctions, the trial court is directed to consider the following factors and to make findings:

(1) [W]hether [the offending party's] non-compliance was willful or in bad faith; (2) whether [the other party] was prejudiced by [the offending party's] failure to comply with the discovery orders; (3) whether [the offending party] was warned that failure to cooperate could lead to dismissal; (4) whether less drastic sanctions were imposed or considered before the trial court precluded it from presenting its defenses; and (5) whether the sanction imposed bears some reasonable relationship to the seriousness of the non-compliance.

R.T. Vanderbilt Co. v. Franklin, Inc., 290 S.W.3d 654, 662 (Ky. App. 2009).

Carlotta argues that none of these five factors apply to his case because many of the problems and delays were due to his counsel's physical health problems, that the actions were not willful, there was no prejudice shown, that he was not warned of the severity of the sanctions, the trial court did not consider other sanctions, and the sanctions had the extreme result of effectively dismissing his case.

The trial court made findings from the bench to explain its decision to bar the testimonial evidence. The court noted that the case had been on the docket for several years and litigation rules must be followed. The trial court found that the evidence regarding outstanding debts of the partnership at the time of dissolution had been expressly requested on several occasions and was not provided by Carlotta. As to the testimony of the accountant, the trial court stressed that it had

previously entered an order mandating witness disclosure by June 24, 2013, and that the deadline in that order was final. Again, Carlotta failed to comply with the court's order. The trial court's findings are fully supported by the record. As the summary of the procedural history of this case illustrates, the trial court entered numerous orders, over a period of more than two years, giving Carlotta's counsel additional time, warning that sanctions would be imposed, and providing counsel with the opportunity to procure additional assistance.

“Black's Law Dictionary defines a ‘willful’ act as: Proceeding from a conscious motion of the will; voluntary; *knowingly*; deliberate. Intending the result which actually comes to pass; designed; intentional; purposeful; not accidental or involuntary.” *Huddleston By and Through Lynch v. Hughes*, 843 S.W.2d 901, 905 (Ky. App. 1992). The record in this case establishes that the trial court consistently warned Carlotta in specific written orders that he must comply with the ELP requirements for witness and document disclosure. The record contains numerous orders in which the trial court warned that sanctions would be imposed upon a party's failure to comply with discovery deadlines. In this case, Carlotta's counsel repeatedly failed to comply with the court orders and deadlines without any justifiable excuse.² Under the circumstances of this case, it was not an abuse of

² Interestingly, on July 25, 2013, after the bench trial on July 8 but before entry of judgment by the trial court, Attorney Robert Wentz, without leave of court, filed a notice to withdraw as counsel for Carlotta, whereupon attorney Steven Jaeger immediately substituted for Wentz. Simultaneous therewith, attorney Jaeger filed a “Motion to Continue” the proceedings for at least sixty days to allow him to “assess the status” of the case and reopen the trial for additional proof. The trial court denied the motion. Jaeger filed the Notice of Appeal to this Court on September 9, 2013. On September 27, 2013, Jaeger filed a motion with this Court to withdraw as counsel for Carlotta, which was granted on October 18, 2013. On November 21, 2013, attorney Wentz filed a notice of appearance, again assuming the role of counsel for Carlotta in this appeal.

discretion for the trial court to bar the introduction of documents and testimony by the accountant at the trial.

Carlotta next challenges the sufficiency of the evidence supporting the trial court's final judgment as concerns the division of partnership assets, and contends that its findings did not comply with KRS 362.1-806 and KRS 362.1-807, which govern the settlement of liabilities and accounts upon the dissolution of a partnership. Essentially, Carlotta argues that without the excluded evidence, the trial court was without sufficient legal basis to grant judgment for appellee. However, at trial, Carlotta failed to submit an offer of proof by avowal as to the accountant's testimony nor did he seek to introduce by avowal any testimony or records regarding partnership debts, which was excluded at trial. We are thus limited to the record before us on appeal.

Under Kentucky Rules of Evidence (KRE) 103(a)(2), “[e]rror may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected; and . . . [i]f the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked.” The Kentucky Supreme Court has emphasized that this rule is not a mere technicality or trap for the unwary, citing the 1992 Commentary to the Kentucky Rules of Evidence, which noted that offers of proof and avowals serve to “*provide a record sufficient for an appellate court to review decisions concerning the admissibility of evidence.*” *Hart v. Com.*, 116 S.W.3d 481, 483 (Ky. 2003).

“The purpose of an avowal is to permit a reviewing court to have the information needed to consider the ruling of the trial court.” *Underhill v. Stephenson*, 756 S.W.2d 459, 461 (Ky. 1988). Carlotta has not provided us with any information regarding the specific content of the excluded testimony or how it would have affected the outcome of the case. Based on the evidence properly presented at trial, the trial court allocated the partnership property in accordance with applicable law.

For the foregoing reasons, the Campbell Circuit Court’s findings of fact, conclusions of law and judgment are affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANTS:

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BRIEF FOR APPELLEE:

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