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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-000688-MR

GIL DECAMPOS — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE BARRY WILLETT, JUDGE
ACTION NO. 08-CI-007940

NATHAN REED and ERIN REED — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: KRAMER, J. LAMBERT, AND TAYLOR, JUDGES.

LAMBERT, J., JUDGE: Gil DeCampos appeals from the Jefferson Circuit Court's judgment following a bench trial addressing claims for damages, breach of contract, and fraud regarding a septic system inspection, repair, and installation by Nathan Reed, doing business as Five Star Septic and Excavating (with Erin Reed as co-owner of the business), as well as damages awarded to Erin Reed on her

counterclaim against DeCampos for harassment, extortion, and mental anguish. We affirm.

DeCampos had purchased a home and five plus acres in Jefferson County, Kentucky, in July 2005. Prior to closing, DeCampos, through his real estate agent, had employed Reed to inspect the septic system on the property. In his post-inspection report, Reed found the system functional but recommended making certain repairs, such as pumping and cleaning the system. Reed later performed the cleaning and pumping about ten days after DeCampos became the owner. Reed was paid $350.00 for his pre-closing report, and $401.00 to pump and treat the system.

In August of that year, DeCampos hired Reed to remove and replace the original sewage pipe leading from the house and carriage house (which had previously been disconnected from the system) to the septic tank. Reed also created a new in-flow opening in the side of the tank to effect the reconnection of the carriage house to the tank. DeCampos paid Reed a total of $3,788.29 for the excavation and replacement work.

According to DeCampos, he began to smell raw sewage in the house and yard within a couple of weeks after Reed completed his work on the project. DeCampos attempted to contact Reed to get him to correct the issues but claimed

that attempts to reach Reed were unsuccessful. DeCampos ultimately hired two other contractors to remedy the situation.

DeCampos filed his complaint against the Reeds in July 2009, claiming breach of contract, negligence, and fraud for Reed's services of inspection, repair, and installation performed on the septic system. As stated above, Erin Reed counterclaimed. Reed, who was on active military duty at the time the complaint was filed, was permitted to file his answer in April 2010. The parties waived their rights to a jury trial, and the bench trial was heard over three days, namely June 15, September 28, and November 9, 2012.

Final judgment was rendered on July 11, 2014. The circuit court found that Nathan Reed was negligent in his repair and installation of the septic system and that DeCampos had engaged in conduct that caused Erin Reed to suffer severe emotional distress. However, the court also found that DeCampos had failed to prove by a preponderance of the evidence that there had been a breach of contract or any fraudulent behavior by Reed. DeCampos was awarded $1,800.00 on his negligence claim. Erin Reed was awarded $10,000.00 on her claim for emotional distress caused by the behavior of DeCampos. DeCampos filed post-

judgment motions for relief and sanctions which were denied on April 16, 2015. This appeal followed.[1]

DeCampos first argues that the circuit court erred in denying him the opportunity to present rebuttal testimony at the conclusion of the defense case. DeCampos maintains that this denial prevented him from refuting the evidence presented by the defense and that the circuit court was unable to "hear the rest of the story." However, DeCampos fails to argue (much less demonstrate) that the circuit court abused its discretion, which is our standard of review for decisions regarding admission of witness testimony. *Clephas v. Garlock, Inc.*, 168 S.W.3d 389, 393 (Ky. App. 2004). "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Goodyear Tire and Rubber Co. v. Thompson*, 11 S.W.3d 575, 581 (Ky. 2000) (citation omitted). *See also Mary Breckinridge Healthcare, Inc. v. Eldridge*, 275 S.W.3d 739, 742 (Ky. App. 2008). We find no error in this regard.

DeCampos next takes issue with the fact that the bench trial was conducted over three non-consecutive days spanning five months' time. DeCampos insists that the scheduling was "extremely unfair, making its time limited, disjointed, and thus prejudiced the presentation and ultimate decision of

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[1] We note that DeCampos has duly attached a copy of the circuit court's findings of fact, conclusions of law, and judgment in the brief's appendix. Kentucky Rule of Civil Procedure (CR) 76.12(4)(c)(vii). However, the document is missing a total of six pages (namely, pages 4, 7, and 10-13); counsel is cautioned to be aware of this error in future practice.

the Appellant's case." Again, we review for an abuse of the circuit court's discretion:

> The trial court "is vested with a large discretion in the conduct of the trial of causes and an appellate court will not interpose to control the exercise of such discretion by a court of original jurisdiction, unless there has been an abuse or a most unwise exercise thereof." *Transit Auth. of River City (TARC) v. Montgomery*, 836 S.W.2d 413, 416 (Ky. 1992). In exercising that discretion, "a trial court clearly has the power to impose reasonable time limits on the trial of both civil and criminal cases. . . . *See, United States v. Reaves*, 636 F.Supp. 1575 (E.D. Ky. 1986). As long as these trial time limits are not arbitrary or unreasonable we will not disturb the court's decision on review." *Hicks v. Commonwealth*, 805 S.W.2d 144, 151 (Ky. App. 1990). The trial court also has "discretion 'to . . . control . . . the amount of evidence produced on a particular point.' *Washington v. Goodman*, 830 S.W.2d 398, 400 (Ky. App. 1992) (citing *Woods v. Commonwealth*, 305 S.W.2d 935 (Ky. 1957), and *Johnson v. May*, 307 Ky. 399, 211 S.W.2d 135 (1948))." *Branham v. Rock*, 449 S.W.3d 741, 749 (Ky. 2014).

Addison v. Addison, 463 S.W.3d 755, 762 (Ky. 2015). We have reviewed the circuit court record in its entirety and can find no abuse of discretion in the scheduling of this trial.

DeCampos thirdly asserts that he was precluded from taking Nathan Reed's deposition testimony between the first two trial dates. He cites Kentucky Rules of Civil Procedure (CR) 30.01 as authority for his position on this point.[2]

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[2] This Rule states: "After commencement of the action, any party may take the testimony of any person, including a party, by deposition upon oral examination. Leave of court, granted with or

Conversely, the appellees cite CR 30.02(3): "The court may for cause shown enlarge or shorten the time for taking the deposition."

"We review the trial court's decision to stay or suspend discovery for an abuse of discretion. *Rehm v. Clayton*, 132 S.W.3d 864, 869 (Ky. 2004)." *Furlong Dev. Co., LLC v. Georgetown-Scott Cty. Planning & Zoning Comm'n*, 504 S.W.3d 34, 40 (Ky. 2016). DeCampos argues that it was unfair to deny him the right to depose Nathan Reed after trial had begun (since Reed was permitted to depose DeCampos and one of his witnesses mere days before the trial commenced). But DeCampos fails to establish that he had attempted to take Reed's deposition prior to the trial's commencement. Reed, on the other hand, was afforded the extension because he was actively deployed during the discovery period. We find no abuse of discretion in the circuit court's ruling denying appellant's motion to depose Nathan Reed after trial had begun.

DeCampos next finds fault with the circuit court's extension of time to appellees' filing of post-trial proposed findings of fact and conclusions of law. DeCampos asserts that this gave the appellees an unfair advantage since the memoranda were originally ordered to be filed simultaneously. However,

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without notice, must be obtained only if the plaintiff seeks to take a deposition prior to the expiration of 30 days after service of the summons upon any defendant, except that leave is not required (a) if a defendant has served a notice of taking deposition or otherwise sought discovery, or (b) if special notice is given as provided in Rule 30.02(2). The attendance of witnesses may be compelled by subpoena as provided in Rule 45. The deposition of a person confined in prison may be taken only by leave of court on such terms as the court prescribes."

DeCampos does not allege that appellees' proposed findings were adopted by the circuit court. In fact, the Jefferson Circuit Court drafted its own findings, conclusions, and judgment. We find no abuse of discretion in the extension of time afforded the appellees. *Addison*, *supra*.

DeCampos's fifth argument is that the appellees' "unwarranted, post-trial Motion for Contempt was without a legal basis to be heard and was a successful attempt to prejudice the trial court." Here, DeCampos acknowledges that the circuit court had in fact admonished him to refrain from contacting other parties. He admitted that he did attempt to contact a spokesperson for Erin Reed. This was the basis for the Reeds' motion for contempt. Even were we to accept DeCampos's claim that the Reeds had no legal basis, he makes no showing that the filing of the contempt motion prejudiced the circuit court. We find no error in the proceedings in this respect.

We next consider DeCampos's contention that Reed was not properly licensed to perform the work for which he was employed by DeCampos. DeCampos insists that this fact entitles him to judgment on the merits of his claims against the Reeds. We disagree. The Reeds correctly cite the requirements of proving a fraud claim, namely:

> In a Kentucky action for fraud, the party claiming harm must establish six elements of fraud by clear and convincing evidence as follows: a) material representation b) which is false c) known to be false or

> made recklessly d) made with inducement to be acted upon e) acted in reliance thereon and f) causing injury. *Wahba v. Don Corlett Motors, Inc.*, Ky. App., 573 S.W.2d 357, 359 (1978).

United Parcel Serv. Co. v. Rickert, 996 S.W.2d 464, 468 (Ky. 1999). The evidence in this case was clear that Nathan Reed had disclosed his lack of license to DeCampos. The circuit court found that both parties were aware that a plumbing permit was required to install the sewer line, yet DeCampos hired Reed anyway in order to save money on the installation. DeCampos does not deny this. Unable to prove that essential element of fraud, DeCampos cannot credibly argue that he was entitled to judgment on the merits of his claim for fraud.

DeCampos next argues that the circuit court should have granted his motion for a new trial based upon newly discovered evidence (CR 60.02), specifically that the Reeds had failed to disclose (or "actively concealed," according to DeCampos) the whereabouts of a witness that would have provided testimony in support of DeCampos's fraud claim. "Newly discovered evidence is evidence that could not have been obtained at the time of trial through the exercise of reasonable diligence. *Richardson v. Head*, 236 S.W.3d 17, 21 (Ky. App. 2007)." *Commonwealth v. Harris*, 250 S.W.3d 637, 642 (Ky. 2008). DeCampos fails to demonstrate that he was unable to obtain the name or testimony of this witness prior to trial. Furthermore, "the newly discovered evidence at issue must be so significant that it would, with reasonable certainty, change the outcome of

the proceeding." *Furlong*, 504 S.W.3d at 41. We affirm the circuit court's ruling on the motion for a new trial.

DeCampos's eighth assertion of error is that the circuit court erred in failing to find Erin Reed liable as a co-owner of the couples' business. Regardless of Erin Reed's affiliation with the company, DeCampos does not enlighten this Court as to how such affiliation with Tri-Star made her complicitous in her husband's inspection, repair, or installment of the septic system. There was no evidence submitted at trial that Erin Reed was ever on appellant's property or participated in any of the labor performed. The circuit court found that the breach of contract and fraud claims were not supported by sufficient evidence. Thus, there was no error in holding Erin Reed harmless on the negligence claim. CR 52.01; *see Moore v. Asente*, 110 S.W.3d 336, 354 (Ky. 2003) (footnote omitted) (An appellate court may set aside a lower court's findings made pursuant to CR 52.01 "only if those findings are clearly erroneous.").

DeCampos next argues that the circuit court erred in finding that Erin Reed had proven her claim for intentional infliction of emotional distress. We disagree and repeat the circuit court's language: "The Court finds that DeCampos's conduct in repeatedly placing harassing telephone calls to the Reeds, some of which contained threats of violent behavior, is sufficient to expose DeCampos to liability under this intentional tort." The circuit court properly relied

upon *Craft v. Rice*, 671 S.W.2d 247 (Ky. 1984), in making its determination. The Reeds testified to the content of the phone calls, which included threats of decapitation, castration, murder, and the sounds of a gun being cocked and fired. "Conduct such as this constitutes the very essence of the tort of outrage." *Kroger Co. v. Willgruber*, 920 S.W.2d 61, 67 (Ky. 1996).

We are lastly asked by DeCampos to reverse on the grounds that "the cumulative effect of the improper rulings and actions of the trial court created an unfair and biased trial against the Appellant." DeCampos lists fourteen alleged lapses in propriety that, when taken together, amount to reversible error. We cannot agree.

The judgment and order of the Jefferson Circuit Court are affirmed.

ALL CONCUR.

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