

Commonwealth of Kentucky

Court of Appeals

NO. 2017-CA-000286-MR

RICKY A. BARNES

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE PAMELA R. GOODWINE, JUDGE
ACTION NO. 15-CI-03761

LEXMACK LEASING, LLC
and QUALITY FLATBEDS, LLC

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

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

LAMBERT, J., JUDGE: Ricky A. Barnes has appealed from two orders of the Fayette Circuit Court granting summary judgment in favor of Lexmack Leasing, LLC, and Quality Flatbeds, LLC, thereby denying summary judgment in his favor, and awarding Lexmack a judgment in the amount of \$9,380.00, plus post-judgment interest. Finding no error, we affirm.

For our recitation of the underlying facts, we shall rely upon that of the circuit court in its January 30, 2017, order:

Barnes is a professional truck driver with a CDL, Class A license.¹ Barnes submitted an application for employment with Quality to be a truck driver. He was hired by Quality and drove a truck that was provided to him by Quality. Taxes and social security were withheld from Barnes' paychecks and Quality paid all insurance on the truck that was furnished to Barnes. Additionally, Barnes used a company credit card to purchase fuel for that truck. After working for Quality for a period of time, Barnes no longer wanted to travel out of state and wanted more flexibility in order to pursue other business interest. He inquired about becoming an owner/operator. He talked to his supervisor about the idea and was referred to Kenneth Schomp ("Schomp"), who owns Lexmack. Schomp is also the sole member of Quality.

Barnes met with Schomp and discussed with him the idea of becoming an owner/operator. To do so, Barnes wanted to buy the truck that he had been driving for Quality. According to Barnes, he knew that truck. He had taken care of that truck. Schomp [offered] to sell him the truck for \$20,000, which Barnes could pay off over time with periodic payments of \$250 per week. On September 3, 2014, Barnes purchased the truck from Lexmack and signed a promissory note promising to pay for it over time.

Simultaneously with executing the promissory note, Barnes signed a lease agreement with Quality. Barnes lacked the necessary insurance and certifications to operate it independently. As a result, he entered into a lease agreement with Quality in which he agreed to

¹ Barnes also operates a school bus for the Fayette County School system and owns a company called United Charters and Tours, LLC, in which he contracts to conduct tours for Shockey Tours and Toby Travel.

operate his truck under Quality's certification and insurance. Money was deducted from Barnes' settlement check or draw each week and deposited into escrow for the lease of a flatbed trailer. After entering into the agreement with Quality, Barnes considered himself to be an owner/operator. Barnes verified that it was his signature on the promissory note and the lease agreement. As an owner/operator, Barnes hired another driver to operate his truck to generate income. Quality brokered jobs for Barnes but he also found loads to transport on his own.

On April 12, 2015, Schomp called Barnes in to discuss what was going on after learning that he had reneged on an assignment three times in a row. Barnes explained that he had other commitments which prevented him from fulfilling his obligations to Quality. After hearing Barnes' explanations, Schomp told Barnes Quality could no longer work with him. On August 8, 2015, Schomp advised Barnes that his lease was terminated. Even though Quality terminated its lease with Barnes, Schomp told him he was free to do with the truck what he wanted as long as he continued to pay for it and that the title would be transferred to him once he paid the truck off. Schomp testified that at that time Barnes was already getting his own loads. Shortly after his lease with Quality was terminated, Barnes took his truck to Red Eagle, a maintenance shop nearby, for repairs. Barnes failed to pick up the truck from Red Eagle and failed to pay for the repairs.

The owner of Red Eagle called Schomp and advised him that he did not have the space to store Barnes' truck and he asked Schomp whether he could move the truck to his lot until Barnes picked it up. Schomp agreed to let Red Eagle move the truck onto its property where it has remained since August 2015 because Barnes failed to pick it up. It was determined after the lawsuit was filed that Barnes returned to Red Eagle to remove some personal items from the truck and

discovered that it was no longer in the bay area but was parked out on the lot. He entered the truck and removed some personal items but left the truck on the lot. According to Barnes, it was his belief at that time that he did not own the truck. Rather, he believed Lexmack owned the truck because it had failed to transfer the title to him within three days after he executed the promissory note.

Schomp testified that he told Barnes he would hold the title to the truck until Barnes paid off the promissory note. Barnes testified that he did not remember any discussion about the title. He admitted that he did not receive it at the time he signed the promissory note but thought it would be coming in the mail. When it did not come in the mail within a couple of weeks, Barnes never raised the issue of title until he was sued for failure to pay the note. Since purchasing the truck in September 2014, Barnes made payments on the promissory note totaling \$11,250.

Based on the original purchase price of \$20,000, Barnes still owes \$8,750. Because Barnes still owes \$8,750 on the truck, Schomp has not transferred title to Barnes. Lexmack has not repossessed the truck. Barnes left the truck at Red Eagle for repairs in August 2015, failed to pay for said repairs, and Schomp permitted Red Eagle to park the truck on his property since the summer of 2015. Barnes has had access to the truck and testified that he went to retrieve his belongings out of his truck since it has been parked at Quality and he was able to get into the truck. Although he had a key, he did not take possession of his truck at that time or any other time even though he could have done so.

Schomp testified that Quality terminated its lease with Barnes by letter dated August 12, 2015 because Barnes had become unreliable. According to Quality, Barnes failed to pick up loads he had agreed to transport which resulted in angry customers and frequently turned

download assignments because he had to drive a school bus or take care of some other personal matter. After not being available for several runs, Quality refused to dispatch him.

In January, 2015, well after he signed his lease agreement with Quality but before that lease was terminated, Barnes filed a complaint against Quality with the Lexington Fayette Urban County Human Rights Commission. Barnes testified that he filed the complaint because he was not getting any flatbed freight which paid a higher rate and he never saw a black driver leaving with flatbed freight from Quality. On September 23, 2015, the Commission issued a Notice dismissing Barnes' complaint for lack of jurisdiction over the claim and the investigation did not establish any civil rights violations. Barnes never appealed that ruling. Barnes never challenged the termination of his agreement with Quality before the Human Rights Commission and he only alleged the termination was discriminatory after he was sued on the promissory note by Lexmack.

With that background in place, Lexmack filed a complaint against Barnes on October 13, 2015, seeking a judgment from Barnes for the amount he owed on the promissory note, plus late charges and post-judgment interest. At that time, Barnes owed \$8,500.00 of the principal amount and \$500.00 in late fees for a total of \$9,000.00. Lexmark stated that as security for the obligation, Barnes had pledged the title to the truck, and that it "has been and remains ready, willing and able to deliver title and possession of the truck to [Barnes] upon payment of the Promissory Note." Barnes filed an answer and counterclaim against Lexmack in which he stated that he had never received title to the truck and that Quality had

taken possession of the truck from him. In his counterclaim, Barnes alleged claims against Lexmack for breach of contract, conversion, and fraud for failing to transfer legal title to the truck; for unjust enrichment; and for malicious prosecution.

In addition, Barnes moved the court to file a third-party complaint against Quality. He alleged in his motion that Lexmack and Quality worked together to defraud him in regard to the truck; Quality took possession of the truck to which it did not have legal title; and Lexmack took possession of Barnes' payments. In his third-party complaint against Quality, filed November 17, 2015, Barnes alleged causes of action for breach of contract for failing to fully compensate him for work performed, improperly deducting sums from his paychecks, and for failing to exercise good faith and fair dealing in describing him as an independent contractor rather than an employee in an agreement; conversion for deducting Barnes' truck payments from his pay and refusing to transfer possession or title to him; wage and hour violations for misclassifying him as an independent contractor and failing to pay him when he was discharged, which entitled him to compensatory damages, liquidated damages, and costs; fraud for misrepresenting that it would transfer title of the truck to Barnes in exchange for payments; civil rights violations pursuant to Kentucky's Civil Rights Act (KCRA), Kentucky Revised Statutes (KRS) 344.010, *et seq.*, for terminating his lease and

agreement because Barnes was African-American; and unjust enrichment for intentionally misclassifying him as an independent contractor to avoid legal and financial obligations.

After conducting discovery, the parties filed motions for summary judgment on the various claims, pre-trial hearings were held, and a trial date was scheduled. In addition to the motions for summary judgment, the parties filed other pre-trial memoranda and notices, including motions in limine. The court entered a partial summary judgment in August 2016 in favor of Barnes against Quality related to the canceled check that had been a payment for work Barnes had performed. The court entered a judgment for Barnes in the amount of \$1,011.31 for the amount he was owed. It did not address whether Barnes was an employee or an independent contractor when he performed this work and therefore would be entitled to attorney fees and liquidated damages.

The circuit court held a hearing on December 2, 2016, during which the parties discussed the merits of the pending motions. Following the hearing, the court entered an order on January 4, 2017, detailing the rulings it made on the record. It ruled as follows:

- Barnes' Motion for Partial Summary Judgment against Lexmack was denied. The court determined that Barnes owed the remainder of the sum

due pursuant to the promissory note at the time of his termination and when he took the truck to Red Eagle.

- Barnes' Motion for Partial Summary Judgment against Quality was denied in part and granted in part. The court found no genuine issue of material fact related to the funds that had been placed in escrow for the trailer payments and granted a judgment to Barnes with respect to those funds. The court found material issues of fact with respect to whether Quality owed Barnes any other funds.
- Lexmack's Motion for Summary Judgment on its complaint and Barnes' counterclaim. The court found genuine issues of material fact with respect to claims for conversion and denied the motion for summary judgment; it took the remainder of the motion under submission.
- Quality's Motion for Summary Judgment. The court found no genuine issues of material fact to support Barnes' claim that he was an employee and granted summary judgment in favor of Quality on Claims 1, 3, and 5 of the third-party complaint. The court found material issues of fact with respect to conversion and denied the motion on that claim.

The court specifically held that for the conversion claim, whether Barnes abandoned the truck was a factual issue to be decided by a jury. Any motions not ruled on in the order were to remain under submission.

The court heard arguments related to the pending motions in limine on January 6, 2017. On January 18, 2017, the court entered an order ruling on the motions (some were denied, and others were granted) and permitting Lexmack to promptly file an itemization of its damages. And on January 30, 2017, after a hearing a few days before, the court entered an opinion and order ruling on the remainder of the pending motions and issues (“whether or not there was an amount due and owing on the promissory note and whether or not Barnes could maintain claims of conversion against Lexmack or Quality”), which negated the need for a trial. The court found in favor of Lexmack and Quality. The court determined that Barnes had not established the elements of conversion as set forth in *Jones v. Marquis Terminal, Inc.*, 454 S.W.3d 849, 853 (Ky. App. 2014), against either Lexmack or Quality. It cited to KRS 355.2-401(2) of Kentucky’s Uniform Commercial Code to support Lexmack’s retention of the title as security pending payment of the funds owed on the truck. The court went on to state that the language of the lease with Quality did not support Barnes’ argument that his truck had been repossessed. Rather, the court recognized that Quality had “never exercised any dominion or control over the truck” nor had it “prevented Barnes from accessing it.”

The court entered a judgment in favor of Lexmack in the amount of \$9,380.00, plus post-judgment interest as well as on Barnes’ counterclaim. It also

entered a judgment in favor of Quality on Barnes' claims in the third-party complaint. Finally, it ruled that Barnes was entitled to the return of the funds Quality held in escrow in the amount of \$1,550.00, plus post-judgment interest. Barnes moved the circuit court to alter, amend, or vacate its order and recuse, which was denied by order entered February 14, 2017. This appeal now follows.

On appeal, Barnes seeks review of the circuit court's rulings dismissing his breach of contract and conversion claims against Lexmack and dismissing his breach of contract, conversion, wage and hour, fraud, and civil rights claims against Quality. He opted not to appeal the circuit court's dismissal of his fraud and malicious prosecution claims against Lexmack or his unjust enrichment claims against both defendants. In addition, Barnes sought review of the circuit court's rulings on the motions in limine that, he claims, improperly excluded evidence from the scheduled trial and that he should be permitted to submit evidence of his damages and Quality's "post-repossession use" of his truck if the matter were to be remanded for a trial.

Our standard of review in an appeal from a summary judgment is well-settled. "The standard of review on appeal when a trial court grants a motion for summary judgment is 'whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law.'" *Lewis v. B & R Corp.*, 56 S.W.3d 432, 436 (Ky.

App. 2001) (citing *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996); *Palmer v. International Ass'n of Machinists & Aerospace Workers*, 882 S.W.2d 117, 120 (Ky. 1994); Kentucky Rules of Civil Procedure (CR) 56.03).

The trial court must view the evidence in the light most favorable to the nonmoving party, and summary judgment should be granted only if it appears impossible that the nonmoving party will be able to produce evidence at trial warranting a judgment in his favor. The moving party bears the initial burden of showing that no genuine issue of material fact exists, and then the burden shifts to the party opposing summary judgment to present “at least some affirmative evidence showing that there is a genuine issue of material fact for trial.” The trial court “must examine the evidence, not to decide any issue of fact, but to discover if a real issue exists.”

Lewis, 56 S.W.3d at 436 (footnotes omitted). “Because summary judgment involves only legal questions and the existence of any disputed material issues of fact, an appellate court need not defer to the trial court’s decision and will review the issue *de novo*.” *Id.* at 436 (citing *Scifres*, 916 S.W.2d at 781; *Estate of Wheeler v. Veal Realtors and Auctioneers, Inc.*, 997 S.W.2d 497, 498 (Ky. App. 1999); *Morton v. Bank of the Bluegrass and Trust Co.*, 18 S.W.3d 353, 358 (Ky. App. 1999)). We agree with the appellees that there are no disputed issues of material fact to be decided; therefore, we shall review the circuit court’s rulings *de novo*.

For his first argument, Barnes contends that the circuit court erred when it failed to grant his motion for summary judgment on his breach of contract claim against Lexmack. He argues that because Lexmack breached its duty to him

under the promissory note to transfer the title to the truck to him pursuant to KRS 186A.215(1), he should prevail. That statute reads, in pertinent part, as follows: “If an owner transfers his interest in a vehicle, he shall, at the time of the delivery of the vehicle, execute an assignment and warranty of title to the transferee in the space provided therefor on the certificate of title[.]” The circuit court relied upon KRS 355.2-401(2), which, it stated, contemplates the retention of title documents as security, as well as Barnes’ payments over an 11-month period as establishing Lexmack’s retention of the title documents that were agreed upon between the parties. Barnes asserts that the circuit court cited the incorrect statute and that the court should have applied KRS 355.9-303 and, in turn, KRS 186A.215(1), discussed above.

We agree with Lexmack that the circuit court properly granted summary judgment on this issue. Citing *Bale v. Mammoth Cave Production Credit Ass’n*, 652 S.W.2d 851, 854-56 (Ky. 1983), Lexmack argues that any allegation of breach of duty or another wrong does not create a defense on either promissory notes or security interests. Rather, “such a breach may afford the maker of the note a basis for asserting a counterclaim for damages in such an action.” *Id.* at 854. Accordingly, Barnes’ argument that Lexmack breached its duty to him by failing to turn over the title document cannot serve as an affirmative defense to his own breach of the promissory note for his failure to make the agreed upon payments,

regardless of what statutory provision applies. We also reject Barnes' argument that the truck had been repossessed or that Lexmack had denied him possession of the truck after he abandoned the truck at Red Eagle. The circuit court properly held that Lexmack was entitled to a judgment as a matter of law on Barnes' breach of contract claim.

Next, Barnes argues that the circuit court erred in dismissing his civil rights claim against Quality and in excluding evidence of racial discrimination. To answer this question, we must determine whether the circuit court properly held that Barnes was an independent contractor as opposed to an employee. Although he had been an independent contractor, Barnes claims he was an employee for purposes of this claim because he continued to work for Quality a few days after his trailer lease was terminated on August 8, 2015. Therefore, he argues he was subject to the protection of the KCRA and the wage and hour laws. Barnes argues the termination of his lease with Quality resulted in the termination of his independent contractor agreement.

We agree with Quality and the circuit court that Barnes was not subject to the protections of the KCRA or the wage and hour laws based upon his status as an independent contractor. Pursuant to KRS 337.385(1), Barnes would have been entitled to his unpaid wages, an equal amount in the form of liquidated damages, and attorney fees were he to be deemed an employee. However, Barnes

failed to raise a material issue of fact regarding his status with Quality between the date his lease was terminated (August 8, 2015) and August 13, 2015. Quality cites to this Court's opinion in *Steilberg v. C2 Facility Sols., LLC*, 275 S.W.3d 732 (Ky. App. 2008), to support its argument. In that opinion, we listed the common law factors to consider in determining whether a worker is an employee or an independent contractor for purposes of a discrimination suit:

[T]he hiring party's right to control the manner and means by which the product is accomplished; the skill required by the hired party; the duration of the relationship between the parties; the hiring party's right to assign additional projects; the hired party's discretion over when and how to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the hiring party's regular business; the hired party's employee benefits; and tax treatment of the hired party's compensation.

[*Simpson v. Ernst & Young*, 100 F.3d 436, 443 (6th Cir. 1996)] citing *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 323-24, 112 S.Ct. 1344, 117 L.Ed.2d 581 (1992).

Steilberg, 275 S.W.3d at 735-36.

For the reasons set forth in the appellees' brief, we agree that Barnes did not raise any issues of material fact to establish that he was an employee rather than an independent contractor, and he certainly did not provide any legal authority that his status somehow changed because he hauled a load for Quality after his

lease was terminated. This did not mean that Quality was not under a duty to pay Barnes his portion of the income from the load he hauled, which the circuit court recognized and required Quality to pay. However, the fact that Barnes was entitled to be paid these funds did not somehow transform his status from an independent contractor to an employee. Therefore, because Barnes was still an independent contractor, the KCRA and the wage and hour laws cannot apply to him, and we find no error in the circuit court's holding on this issue.

Next, Barnes contends that the circuit court erred in dismissing his breach of contract claim against Quality, arguing that “[a] jury could find that Barnes was restricted and treated as an employee even though his agreement with Quality said that he was an independent contractor.” As Quality argues, Barnes failed to cite any evidence to establish this claim, and his lease agreement with Quality confirms that he was an independent contractor, regardless of whether Quality reprimanded him or not. We find no merit in this argument.

Next, Barnes argues that the circuit court should not have dismissed his claim against Quality for fraud. He states that he was materially misled when he signed the independent contractor/lease agreement with Quality based upon what he described as an “intentionally false representation” that he had been granted full legal title to the truck he purchased from Lexmack. But as the appellees stated in their brief, “Quality cannot be liable for fraud in inducing

Barnes to sign the lease agreement stating he had legal title when Barnes knew he did not have legal title to the truck pending payment of the note on that truck and he signed the lease anyway.” And Barnes continued to work under the lease from September 2014 until August 2015 without having the documentary title to the truck. We find no error in the circuit court’s conclusion that Lexmack could legally hold the title to the truck until Barnes had paid for it. Accordingly, we find no error in the circuit court’s ruling on this issue.

We shall next consider whether Quality or Lexmack converted the truck Barnes had purchased from Lexmack. Barnes spends much of this argument discussing an affidavit from Red Eagle’s owner, which was produced after discovery was complete, related to the circumstances of the truck’s repair, its move to Quality’s lot several days later, and the odometer reading. Barnes wanted to use the affidavit to establish, in part, that Quality had put approximately 20,000 miles on the truck after Red Eagle moved it to Quality’s lot. He maintained that this evidence would establish his conversion claim. The appellees counter that there was no evidence either Quality or Lexmack put the extra miles on the truck.

Conversion is defined as “an intentional tort that involves the wrongful exercise of dominion and control over the property of another.” *Jones v. Marquis Terminal, Inc.*, 454 S.W.3d at 853.

In Kentucky, a claim of conversion consists of the following elements:

- (1) the plaintiff had legal title to the converted property;
- (2) the plaintiff had possession of the property or the right to possess it at the time of the conversion;
- (3) the defendant exercised dominion over the property in a manner which denied the plaintiff's rights to use and enjoy the property and which was to the defendant's own use and beneficial enjoyment;
- (4) the defendant intended to interfere with the plaintiff's possession;
- (5) the plaintiff made some demand for the property's return which the defendant refused;
- (6) the defendant's act was the legal cause of the plaintiff's loss of the property; and
- (7) the plaintiff suffered damage by the loss of the property.

Id. at 853 (citing *Ky. Ass'n of Counties All Lines Fund Trust v. McClendon*, 157 S.W.3d 626, 632 n. 12 (Ky. 2005)).

The circuit court considered the issue of conversion extensively in its January 30, 2017, order, and we hold that it did not err in granting summary judgment as to both Quality and Lexmack. Addressing the elements above, the circuit court stated that as to Lexmack:

The first element fails because Barnes did not have the title papers to the truck, because they were by his agreement, or at the very least, acquiescence, held as security by Lexmack. The other elements fail as well. Lexmack had to have taken possession in a way that was wrongful. With regard to the title papers, Barnes not only never possessed them but Lexmack had the right to possess them until the truck was paid for. Barnes defaulted on the promissory note, leaving a principal balance of \$8,750.

Moreover, Lexmack never took possession of the truck from Barnes. Barnes admits that he left the truck with Red Eagle, which has no relationship to Lexmack. Barnes left the truck at Red Eagle for repairs and never paid for said repairs. After the passage of time, Red Eagle removed the truck from its bay area due to lack of storage space and parked the truck on Quality's lot. Barnes has never made a demand for the truck nor spoken to Lexmack about it. He never finished paying for the truck.

The circuit court went on to cite to *C.L. Flaccus Glass Co. v. Alvey-Ferguson Co.*, 102 S.W. 870, 872 (Ky. 1907), for the proposition a person's "refusal to part with the property until he was repaid is no evidence of a conversion of the property by him." As to Quality, the circuit court concluded that "Quality has never exercised any dominion or control over the truck nor has it prevented Barnes from accessing it." It further recognized Barnes' testimony that "he saw the truck on Schomp's property and accessed it to remove his personal property from the truck." We find no error in the circuit court's conclusion that the appellees are entitled to a judgment as a matter of law on Barnes' claims of conversion.

Next, we find no merit in Barnes' argument that Lexmack did not incur any damages because "Lexmack has title to the truck, payments for the truck, and possession of the truck," which compelled a judgment in his favor. Lexmack certainly incurred damages in the form of the amount of money Barnes owed on the truck at the time he defaulted on the promissory note.

And finally, we reject Barnes' argument that Quality assumed the responsibility for payments on the truck because it had deducted these from his part of the income from the loads Barnes hauled and that, therefore, Lexmack's remedy would be against Quality. Barnes added that Quality had never transferred the funds deducted from his income to Lexmack. As the appellees argue, once the lease ended, Quality could no longer deduct the truck payments from Barnes' portion of the income because he was no longer hauling loads for that company. And Lexmack was not seeking the entire purchase price of \$20,000.00. Rather, it was seeking the remainder of the funds owing on the promissory note, namely, \$8,500.00 of the principal amount and \$500.00 in late fees for a total of \$9,000.00. We find no error in the circuit court's ruling that Lexmack was entitled to recover the unpaid balance due on the promissory note from Barnes.

Based on our holdings above, we need not address the issues Barnes raised concerning the circuit court's rulings on the motions in limine.

For the foregoing reasons, the judgments of the Fayette Circuit Court
are affirmed.

ALL CONCUR.

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