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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2017-CA-000509-DG

LOUIS PEEL AND DARLENE PEEL APPELLANTS

ON DISCRETIONARY REVIEW FROM JESSAMINE CIRCUIT COURT
v. HONORABLE C. HUNTER DAUGHERTY, JUDGE
ACTION NO. 16-XX-00002

CAD PROPERTIES, LLC APPELLEE

OPINION
VACATING AND REMANDING

** ** ** ** **

BEFORE: ACREE, COMBS, AND MAZE, JUDGES.

MAZE, JUDGE: This appeal arises from a Jessamine Circuit Court reversing a decision by the Jessamine District Court to deny a motion for summary judgment made by the Appellee, CAD Properties, in the original case. The Jessamine Circuit Court decided that the Appellants, the Peels, were not entitled to maintain a claim for *quantum meruit* because they did not follow the statutory framework of

Kentucky Revised Statute (KRS) 256. The Appellants maintain that they did in fact follow the statutory framework of KRS 256 and are, therefore, able to maintain a claim *for quantum meruit*. After a careful review, we vacate the judgment of the circuit court and remand to the district court.

Background

On May 24, 2014, seven subdivided tracts of the "Breiner Farm" located in Jessamine County were sold pursuant to an absolute auction conducted by Dennis King Real Estate and Auctioneers. Prior to the sale, Mr. King announced that the purchasers of each tract would be required to build a boundary fence between them, sharing equally in the cost. Mr. and Mrs. Peel purchased tract 5 of the land for sale. CAD Properties purchased tracts 1, 2, 3, and 6 of the subdivided farm property. According to the Peels, they attempted to speak with Mr. Dicken, who is the principle for CAD, but he ignored them and walked away. In the contracts signed by each party, there was a clause by which they agreed to be, "bound by all easements, restrictions, and covenants of record . . . as shown on the survey plat of the property." This contract also noted that the boundary line fence was to be constructed "in accordance with KRS 256."

On June 20, 2014, the Peels received a deed conveying ownership of tract 5. There is nothing on record that the Peels attempted to contact CAD or Cyrus Dicken at this time; instead, they immediately began work on clearing

brush, then promptly hired a local fencing company to complete the fencing work. CAD first became aware of this action when it received a bill for half of the fence, totaling $1,382.50. When CAD refused to pay this half of the bill for the fence, the Peels filed an action in small claims court. The complaint was subsequently amended, and the case moved to the regular docket of the Jessamine District Court. The district court denied the motion for summary judgment made by CAD and held that the Peels were entitled to proceed on their *quantum meruit* claim. CAD then appealed to the Jessamine Circuit Court where the court reversed the decision of the district court and ruled that the Peels could not maintain a claim for *quantum meruit* because they did not follow the statutory framework of KRS 256. This appeal follows.

Analysis

The Peels contend that they can bring a claim for *quantum meruit* because they created the fence pursuant to an agreement. The Peels argue that because they made the agreement to build the fence pursuant to KRS 256, only KRS 256.020 is controlling. KRS 256.020(1) states, "[p]ersons owning adjoining lands may agree to erect division fences between them and keep them in repair." The Peels base their argument on the fact that the agreement to follow KRS 256 was the actual agreement to build the fence, rather than an agreement to follow the statute.

However, the district court's order denying summary judgment was inherently interlocutory. The circuit court could not exercise subject matter jurisdiction to review that interlocutory order and, therefore, this Court lacked jurisdiction to grant discretionary review.

"The general rule under CR 56.03 is that a denial of a motion for summary judgment is, first, not appealable because of its interlocutory nature . . . ." *Abbott v. Chesley*, 413 S.W.3d 589, 602 (Ky. 2013) (internal quote marks and cite omitted). No doubt, CAD would say it agreed to a final judgment, so interlocutory orders were re-adjudicated and, pursuant to CR 54.02(2), could be reviewed by appealing that final judgment which it did. That argument is untenable.

The rest of the rule stated in *Abbott* says, "denial of a motion for summary judgment . . . is not reviewable on appeal from a final judgment where the question is whether there exists a genuine issue of material fact." *Id*. By its nature, the "determination of a *quantum meruit* claim requires a factual examination of the circumstances and of the conduct of the parties, which is a task for the trier of fact." 66 Am. Jur. 2d Restitution and Implied Contracts § 89. The district court denied the summary judgment motion because it correctly indicated that a "claim for *quantum meruit* is one that must be decided by a" factfinder.[1] (R.

[1] However, the district court erroneously said the factfinder should be a jury. Notwithstanding *Jackson Lumber & Supply Co. v. Deaton*, our Supreme Court recently was "compelled to repeat our strong admonition that the trial judge is committing 'clear error' if he proceeds with a jury

2); *see Jackson Lumber & Supply Co. v. Deaton*, 209 Ky. 239, 272 S.W. 717, 718 (1925) ("The measure of recovery [on a *quantum meruit* claim] is the benefit received and this will be determined by the jury under all the facts."). The district court's order denying summary judgment was based on the existence of genuine issues of material fact. That order is not reviewable on appeal even after a final judgment. *Abbott*, 413 S.W.3d at 602.

Furthermore, if we lend credence to any reservation in an agreed judgment, we must recognize all its attributes. Such a judgment remains interlocutory because there has *not* been a final "adjudicat[ion of] all the rights of all the parties in an action or proceeding" and, therefore, it is not a final judgment subject to review. CR 54.01. Additionally, "[e]ven the inclusion by the trial court of the 'magic language' of CR 54.02 will not make such an order final" where it merely denies a motion for summary judgment. *Medcom Contracting Services, Inc. v. Shepherdsville Christian Church Disciples of Christ, Inc.*, 290 S.W.3d 681, 684 (Ky. App. 2009).

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trial on a *quantum meruit* claim. The only role a jury could possibly have in this action in equity would be as an advisory jury on issues of fact pursuant to Kentucky Rule of Civil Procedure 39.03." *Spalding-McCauley v. Spalding*, 2016-SC-000462-MR, 2017 WL 2598832, at *4 (Ky. June 15, 2017) (quoting *Daniels v. CDB Bell, LLC*, 300 S.W.3d 204, 210 (Ky. App. 2009) ("Kentucky law recognizes exceptions to the right to a jury, including causes of action at common law that would have been regarded as arising in equity rather than law.")).

The circuit court therefore lacked subject matter jurisdiction to review this issue. While subject matter jurisdiction was not raised by either party, the matter of subject matter jurisdiction can be addressed by this Court at any time. This Court has no discretionary jurisdiction in this case due to the lack of subject matter jurisdiction.

Conclusion

For these, reasons, we vacate the judgment of the circuit court and remand back to district court.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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