RENDERED: NOVEMBER 30, 2018; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2017-CA-001431-MR

CERTIFIED CONSTRUCTION CO. OF KENTUCKY, LLC APPELLANT

v.

APPEAL FROM MEADE CIRCUIT COURT
HONORABLE BRUCE T. BUTLER, JUDGE
ACTION NO. 13-CI-00081

KEYSTOPS, LLC APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: J. LAMBERT, MAZE AND SMALLWOOD, JUDGES.

SMALLWOOD, JUDGE: Certified Construction Co. of Kentucky, LLC appeals from a judgment of the Meade Circuit Court which found that it owed Keystops, LLC $23,932.04. Finding no error, we affirm.

Appellant was founded in 2004 after purchasing the assets, licenses, and permits of Certified Construction Co., Inc. (hereinafter referred to as Certified

Inc.), an unrelated corporation. Appellant purchased fuel from Argenbright Oil from 2004 through 2008. Keystops purchased the assets and accounts of Argenbright Oil in 2008. The primary issue in this case revolves around the fuel tax imposed by Kentucky Revised Statute (KRS) 138.220. KRS 138.344(1) allows a person who purchases fuel and pays the fuel tax, but who uses the fuel for agricultural purposes or for use in nonhighway vehicles, to apply for a refund of the tax paid on the fuel. It also allows, in lieu of the refund procedure, a dealer to credit a buyer the cost of the tax. In other words, a dealer can choose this option and not charge the tax to the customer. In order to take advantage of these refund procedures, a purchaser must first obtain a Kentucky Motor Fuels Tax Refund Permit from the Kentucky Department of Revenue. KRS 138.345.

In this case, Certified Inc. had a refund permit. When Appellant purchased Certified Inc.'s assets, the president of Appellant who negotiated for the purchase, believed he was also purchasing Certified Inc.'s refund permit. Argenbright had on file this permit and allowed Appellant to purchase fuel without paying the fuel tax. When Keystops purchased Argenbright, it believed Appellant had a valid refund permit and allowed Appellant to purchase fuel from it without paying the fuel tax.

The Kentucky Revenue Cabinet periodically audits fuel dealer records. In August of 2011, the Revenue Cabinet notified Keystops that Appellant

did not have a valid fuel refund permit and disallowed the tax credits for purchases Appellant made from Keystops for the time period of August of 2008, through May of 2011. The Revenue Cabinet believed Appellant was a restructured form of Certified Inc., and therefore, would need a new permit in the name of Appellant. Even though this was an incorrect assumption, the refund permits are nontransferable and Appellant was erroneously not paying the fuel tax.[1]

Ultimately, the Revenue Cabinet was owed an additional $22,738.06 from Appellant's fuel purchases. Keystops did not notify Appellant of the Revenue Cabinet's findings. Instead, it paid the additional tax owed to the Revenue Cabinet and then invoiced Appellant for $22,738.06. Keystops also billed Appellant for two additional, smaller invoices, making the total due $23,932.09. It was at this time that Appellant learned of the Revenue Cabinet's audit and the issue with the refund permit.

Appellant refused to pay this additional sum, believing that Keystops was responsible for the error. Keystops then filed its complaint alleging Appellant owed it a total debt of $23,932.09. A bench trial was conducted on June 12, 2017, where two witnesses testified, Wendy Woods, an accountant for Keystops, and Allan Buckles, the president of Appellant. The trial court entered a judgment in

[1] The permits state on their face that they cannot be transferred.

Keystops favor on August 7, 2017. The court held that Appellant owed Keystops $23,932.09 plus pre-judgment and post-judgment interest. This appeal followed.

> We begin by noting that this case was tried by the circuit court sitting without a jury. It is before this Court upon the trial court's findings of fact and conclusions of law and upon the record made in the trial court. Accordingly, appellate review of the trial court's findings of fact is governed by the rule that such findings shall not be set aside unless clearly erroneous. A factual finding is not clearly erroneous if it is supported by substantial evidence. Substantial evidence is evidence, when taken alone or in light of all the evidence, has sufficient probative value to induce conviction in the mind of a reasonable person. The trial court's conclusions of law, however, are subject to independent de novo appellate determination.

Gosney v. Glenn, 163 S.W.3d 894, 898-99 (Ky. App. 2005) (citations omitted).

Appellant's first argument on appeal is that the trial court erred by signing Keystops' tendered judgment verbatim. Appellant claims this shows the trial court abdicated its responsibility to make its own independent findings of fact and conclusions of law and is reversible error.

Appellant is correct that the trial court signed Keystops' tendered judgment without making any changes. While this practice is frowned upon by the appellate courts of Kentucky, *Callahan v. Callahan*, 579 S.W.2d 385, 387 (Ky. App. 1979), it is only error if the trial court abdicates "its fact-finding and decision-making responsibility under [Kentucky Rule of Civil Procedure (CR)] 52.01." *Bingham v. Bingham*, 628 S.W.2d 628, 629 (Ky. 1982). "The delegation

of the clerical task of drafting proposed findings of fact and conclusions of law under the proper circumstances does not violate the trial court's responsibility." *Id.* Here, we find the trial court did not commit reversible error. The court ordered both parties to submit a proposed judgment and the trial judge was actively engaged with the bench trial proceedings. *See Prater v. Cabinet for Human Res., Commonwealth of Ky.*, 954 S.W.2d 954, 956 (Ky. 1997). We see no evidence that the trial court abdicated its CR 52.01 responsibilities.

Appellant's second argument on appeal is that the trial court erred in finding that Appellant was the taxpayer who was required to pay the fuel tax at issue. Appellant argues that Keystops is the taxpayer. Keystops argues that this issue was not raised below and is not preserved. In the alternative, Keystops also claims that Appellant was the taxpayer. We agree with both of Keystops' claims.

Appellant did not make the specific argument that it was not the taxpayer which owed the fuel tax until it brought this appeal. It was not mentioned in the motion for summary judgment filed by Appellant or during the opening and closing statements made by Appellant's trial counsel. In addition, at trial, the only testimony provided was that Mr. Buckles, Appellant's president, believed he had a valid refund permit. "The Court of Appeals is without authority to review issues not raised in or decided by the trial court." *Regional Jail Authority v. Tackett*, 770 S.W.2d 225, 228 (Ky. 1989); *see also Shelton v. Commonwealth*, 928 S.W.2d 817,

818 (Ky. App. 1996). "[E]rrors to be considered for appellate review must be precisely preserved and identified in the lower court." *Skaggs v. Assad, by and through Assad*, 712 S.W.2d 947, 950 (Ky. 1986) (citation omitted).

Even if this argument had been raised below, we find no error in the court's determination that Appellant was the taxpayer. It is the purchaser of the fuel who is required to obtain the tax refund permit. Had Keystops not provided the tax credit service, Appellant could have obtained a fuel tax refund from the Revenue Cabinet if it had a valid refund permit. Under this tax and refund scheme, it is clearly Appellant who is the taxpayer. Keystops is only tasked with passing on the tax collected to the Revenue Cabinet.

Appellant's third argument on appeal is that the Revenue Cabinet's audit and assessment for additional taxes owed was made in error because Appellant was not required to have a refund permit in this instance. Appellant is arguing that because Keystops was utilizing the fuel tax credit method, a refund permit was not required. We disagree.

We will first note that Appellant did not attempt to appeal the Revenue Cabinet's decision. Granted, Keystops paid the tax assessment without first notifying Appellant, but once Appellant was notified, it did not contact the Revenue Cabinet. Additionally, the Revenue Cabinet is not a party to this action,

so we cannot see how this argument is relevant to the case at hand; however, out of an abundance of caution, we will examine the issue.

Like the previous issue on appeal, this issue was not preserved below. It was not raised before the trial court and the evidence presented at trial was that Appellant believed it had a valid refund permit. Furthermore, the evidence in the record indicates that both Keystops and the Revenue Cabinet believed Appellant needed a permit. This was not challenged either before the trial court or on appeal to the Revenue Cabinet.

Arguendo, KRS 138.344 and KRS 138.345 require a permit in order to obtain the fuel tax refund. While Appellant was not utilizing the refund method, but was getting the benefit from Keystops' tax credit procedure, it was essentially obtaining the tax refund up front. We find that the tax system at issue requires a purchaser of fuel to have a refund permit before it may benefit from the refund or credit procedure.

Appellant's fourth argument on appeal is that Keystops' complaint failed to state a cause of action against Appellant. Appellant argues that Keystops' did not allege breach of contract, quasi-contract, or unjust enrichment. Appellant claims that the theory of recovery set forth in Keystops' complaint, that it was collecting on a debt, was insufficient. Keystops argues that it was not alleging any contract claim, merely that it was collecting on a debt.

Appellant set forth this argument in the court below in its motion for summary judgment. In the trial court's order denying the motion for summary judgment and setting the case for trial, the court did not mention this argument. Appellant did not raise it again in a motion to dismiss or during the bench trial. While we are not saying Appellant has waived this argument by not asking for specific findings as to this issue or raising it again before the trial court, this Court would have benefited from a decision of the trial court. It seems to this Court that there is a step missing in Keystops' cause of action. Usually, debts arise from contracts or agreements; however, Keystops specifically states that it is not raising a contract claim.

Since we do not have any specific findings from the trial court as to this issue, we can only look to the record and case law for guidance.

> A pleading which sets forth a claim for relief must contain "a short and plain statement of the claim showing that the pleader is entitled to relief and . . . a demand for judgment for the relief to which he deems himself entitled." This Court has clarified that "[t]he true objective of a pleading stating a claim is to give the opposing party fair notice of its essential nature."

Rose v. Ackerson, 374 S.W.3d 339, 343 (Ky. App. 2012) (quoting CR 8.01). We find that Keystops' complaint sufficiently sets forth a claim for relief. Keystops' complaint stated that Appellant owed it a debt. Although it did not mention the

fuel tax issue, Appellant was already aware that this was the reason behind the debt. In addition, the tax issue was further fleshed out during discovery.

The trial court heard both arguments and determined that Appellant was liable for the tax amount. The court had sufficient facts before it to determine that Appellant should have paid the fuel tax and that a debt was owed. It also correctly ruled as to the fuel tax statutory procedures at issue in this case. We find that Keystops' complaint set forth a sufficient cause of action.

Appellant's fifth argument on appeal is that Keystops should have been estopped from obtaining a recovery because its mistakes caused the additional taxes owed. Keystops claims that it was Appellant's responsibility to ensure it had the proper permit required for the fuel tax credit.

> "Estoppel is a question of fact to be determined by the circumstances of each case."
>
> > The essential elements of equitable estoppel are[:] (1) conduct which amounts to a false representation or concealment of material facts, or, at least, which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) the intention, or at least the expectation, that such conduct shall be acted upon by, or influence, the other party or other persons; and (3) knowledge, actual or constructive, of the real facts. And, broadly speaking, as related to the party claiming the estoppel, the essential elements are (1) lack of knowledge and of the means of

> knowledge of the truth as to the facts in question; (2) reliance, in good faith, upon the conduct or statements of the party to be estopped; and (3) action or inaction based thereon of such a character as to change the position or status of the party claiming the estoppel, to his injury, detriment, or prejudice.

Spalding v. Marion Cty. Bd. of Educ., 452 S.W.3d 611, 615-16 (Ky. App. 2014) (citations omitted).

Here, we find that equitable estoppel is not available to Appellant. There was no evidence presented that Keystops intentionally misled Appellant. Further, Appellant could have discovered the fact that its permit was not valid by contacting an attorney or reading the permit, which indicated on its face that it was not transferable. This appears to be a situation where both parties made mistakes based on lack of due diligence. Appellant did not realize the permit was nontransferable even though it stated so and Keystops assumed the records it obtained from Argenbright were correct. The elements for a claim of equitable estoppel are not present in this case.

Appellant's sixth and final argument on appeal is that the two additional invoices Keystops included in its complaint are uncollectable. Keystops claims otherwise. We find the trial court did not err in holding that Appellant was liable for these two smaller debts.

The majority of the evidence in this case pertains to the primary debt of $22,738.06. The little evidence presented concerning these smaller debts was conflicting. Keystops said they were legitimate and Appellant said they were not.

> Regardless of conflicting evidence, the weight of the evidence, or the fact that the reviewing court would have reached a contrary finding, "due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses" because judging the credibility of witnesses and weighing evidence are tasks within the exclusive province of the trial court. Thus, "[m]ere doubt as to the correctness of [a] finding [will] not justify [its] reversal," and appellate courts should not disturb trial court findings that are supported by substantial evidence.

Moore v. Asente, 110 S.W.3d 336, 354 (Ky. 2003) (footnotes and citations omitted). Since this issue could only be determined by the testimony of the witnesses, we will rely on the court's judgment as to witness credibility and find that the court did not err.

Based on the foregoing, we affirm the judgment on appeal.

ALL CONCUR.

BRIEFS AND ORAL ARGUMENT FOR APPELLANT:	BRIEF AND ORAL ARGUMENT FOR APPELLEE:
Douglas E. Miller Radcliff, Kentucky	Denise M. Helline Louisville, Kentucky