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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2017-CA-001787-MR

KINGDOM ENERGY RESOURCES, LLC

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE JAMES D. ISHMAEL, JR, JUDGE
ACTION NO. 17-CI-01157

SARAH KAHN

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: ACREE, JOHNSON AND SMALLWOOD, JUDGES.

SMALLWOOD, JUDGE: Kingdom Energy Resources, LLC appeals from an order of the Fayette Circuit Court that granted summary judgment in favor of Sarah Kahn and awarded her attorney fees. Kingdom Energy argues on appeal that there was a genuine issue of material fact that precluded summary judgment, that

attorney fees should not have been awarded, and that the amount of attorney fees was excessive. Finding no error, we affirm.

Kahn and Kingdom Energy entered into a Stock Purchase Agreement in which Kahn agreed to sell her shares of Cumberland Harlan Exploration Corporation to Kingdom Energy. The agreement set out a purchase price of \$2,361.40 per share. Additionally, the agreement: allowed for any debts Kahn might have to Cumberland to be released and waived; required Kahn not to object to Kingdom Energy and its Asset Purchase Agreement with Black Star Land & Mining, Ltd. and Manalapan Land Company, Ltd.; and required Kahn to deliver any documents to Kingdom Energy that it might need to effectuate the purchase.

Upon the agreed upon closing date, Kingdom Energy failed to pay the amount owed to Kahn. Kahn then brought this underlying suit in which she alleged breach of contract, breach of implied covenant of good faith and fair dealing, and fraud. Kingdom Energy answered the complaint and alleged that Kahn first breached the agreement by failing to deliver business records and by objecting to the Asset Purchase Agreement between Kingdom Energy, Black Star, and Manalapan Land Company.

Some four months later, Kahn filed a motion for partial summary judgment on her breach of contract claim. She claimed that Kingdom Energy had admitted in its Request for Admissions that the Stock Purchase Agreement was

valid and that it did not pay the stock price agreed upon. Kingdom Energy objected to the motion and again alleged that Kahn breached the agreement first. In support of this allegation, Kingdom Energy entered into the record an affidavit from David Schiller, an attorney who manages transactions and litigation for Kingdom Energy. The affidavit stated that despite Kahn's agreement not to object or oppose the Asset Purchase Agreement between Kingdom Energy, Black Star, and Manalapan Land Company, she had "by and through her counsel made numerous efforts to oppose the Asset Purchase Agreement during the lengthy process of consummating the transaction." The affidavit also stated that Kahn had not delivered certain documents to Kingdom Energy.

[Kahn] has interfered with [Kingdom Energy's] rights to access to the records of its business and some of the assets it purchased as part of the Asset Purchase Agreement. In particular, [Kahn] has actively opposed [Kingdom Energy's] ownership and rights to certain promissory notes it purchased, business records purchased, and claims that it purchased pursuant to the Asset Purchase Agreement[] that [Kahn] covenanted not to oppose.

The affidavit concluded by stating that Kahn first breached the purchase agreement and that Mr. Schiller "attended several hearings and have reviewed numerous filings where in [sic] Plaintiff Kahn by and through her counsel violated the no opposition condition of the Stock Purchase Agreement."

The circuit court granted Kahn's motion finding that Kingdom Energy had breached the valid agreement with Kahn in failing to pay the amounts due.

The court stated:

Kingdom's defense rests on a conclusory assertion in an affidavit tendered with its response that [Kahn] sought to interfere with a subsequent Asset Purchase Agreement involving Manalapan Land and/or Blackstar [sic] Land and/or that [Kahn] has not turned over some documents Kingdom alleges it needs. However, Kingdom admits that the transaction contemplated by the Asset Purchase Agreement did eventually close. It offers insufficient detail as to how [Kahn] allegedly breached the Stock Purchase Agreement, how she opposed the Asset Purchase Agreement or how such efforts, if any, caused it damage. As to documents, the Stock Purchase Agreement contains no material terms related to that subject nor could Kingdom's counsel identify at hearing what documents [Kahn] had allegedly withheld to its detriment.

The court found that Kingdom Energy had not produced evidence sufficient to defeat the motion for summary judgment and that Kahn was therefore entitled to judgment on her breach of contract claim. The court awarded Kahn \$634,032 with interest.

The court further held that Kahn was entitled to reasonable attorney fees pursuant to the terms of the agreement. The court allowed Kahn's counsel to submit an itemized calculation of attorney fees. The court found the calculation fair and reasonable and awarded Kahn \$24,641.84 in attorney fees.

Kingdom Energy thereafter filed a motion to alter or amend. It argued that the court misconstrued the terms of the agreement which awarded attorney fees. Kingdom Energy alleged that the provision was for indemnity only. In other words, Kingdom Energy would only be liable to Kahn for attorney fees if she was sued by a third-party. Kingdom Energy also argued that the amount of attorney fees was excessive. The court denied the motion and this appeal followed.

Kingdom Energy's first argument on appeal is that the trial court erred in granting summary judgment. It claims that the affidavit of Mr. Schiller proved there was a genuine issue of material fact which would preclude summary judgment. Kahn argues that the affidavit contains nothing but bare assertions and that the trial court correctly granted summary judgment.

The standard of review on appeal of a 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. . . . "The record must be viewed in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor." Summary "judgment is only proper where the movant shows that the adverse party could not prevail under any circumstances." Consequently, summary judgment must be granted "[o]nly when it appears impossible for the nonmoving party to produce evidence at trial warranting a judgment in his favor[.]"

Scifres v. Kraft, 916 S.W.2d 779, 781 (Ky. App. 1996) (citations omitted).

We agree with Kahn and the trial court that the affidavit was insufficient to defeat the motion for summary judgment. “The party opposing summary judgment cannot rely on their own claims or arguments without significant evidence in order to prevent a summary judgment.” *Wymer v. JH Properties, Inc.*, 50 S.W.3d 195, 199 (Ky. 2001). While the affidavit sets out the defenses and conclusions contained in Kingdom Energy’s pleadings, it fails to provide specific facts in support thereof and whereby the court could conclude that a genuine issue of material facts existed. A party’s objective belief and conclusions about the manner of the evidence is not the sort of affirmative proof required to avoid summary judgment. *Haugh v. City of Louisville*, 242 S.W.3d 683 (Ky. App. 2007). We do not consider the bare, unsupported conclusions of Kingdom Energy’s in-house attorney’s affidavit to be “significant evidence” as is required to defeat a motion for summary judgment. Therefore, we affirm as to this issue.

Kingdom Energy’s next argument on appeal is that the trial court erred in awarding Kahn attorney fees. Kingdom Energy claims that the provision in the agreement that awards attorney fees was intended to only indemnify Kahn in the case she is sued by a third-party. “It is well established that construction and interpretation of a written instrument are questions of law for the court. We review questions of law *de novo* and, thus, without deference to the interpretation afforded

by the circuit court.” *Cinelli v. Ward*, 997 S.W.2d 474, 476 (Ky. App. 1998)
(citations omitted).

The attorney fee provision at issue states:

Indemnification by Buyer and Company. Buyer and Company, jointly and severally, shall indemnify, defend, and hold harmless each Seller and their respective agents, representatives, beneficiaries, and permitted assigns from any and all claims, leases, penalties, damages, fines, and expenses, including, but not limited to, reasonable attorneys’ fees, that Seller may incur or otherwise be required to pay in connection with, or arising out of, any breach of any of Buyer’s or Company’s representations, warranties, covenants, or agreements set forth in this Agreement and any liability, indebtedness, or obligation related to the Company or operation of the Company or Company’s business.

We agree with the trial court that this provision allows Kahn to recover her attorney fees from Kingdom Energy. While the provision does mention indemnification, it also clearly states that Kingdom Energy will “hold harmless” Kahn from attorney fees she “may incur . . . in connection with, or arising out of, any breach” by Kingdom Energy. Here, the trial court held that Kingdom Energy breached the agreement. Therefore, Kahn is entitled to recover reasonable attorney fees.

Kingdom Energy’s final argument on appeal is that the attorney fees awarded were excessive. Prior to the entry of summary judgment, the trial court allowed Kahn’s attorney to submit a document itemizing the hours worked on the

case. Kingdom Energy claims that some of the items in the document are not related to the cause of action at issue, but to a separate cause of action concerning Black Star and Manalapan Land Company, two companies in which Kahn was a limited partner.¹

Kahn admits that a number of hours were listed involving those companies, but were required to oppose Kingdom Energy's claims that Kahn opposed the Asset Purchase Agreement between Kingdom Energy, Black Star and Manalapan Land Company constituting a breach of the agreement.

There was sufficient evidence to support the court's finding that the attorney fees were reasonable. Accordingly, we affirm.

Based on the foregoing, we affirm the judgment of the Fayette Circuit Court.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Thomas W. Miller
Elizabeth C. Woodford
Lexington, Kentucky

BRIEF FOR APPELLEE:

Hal D. Friedman
Louisville, Kentucky

¹ Kingdom Energy does not claim as unreasonable the amount Kahn's counsel charged per hour.