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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2016-CA-000358-MR

LAWWAL L.L.C.; RACERS PITSTOP GRILLE L.L.C; AND MEREDITH L. LAWRENCE — APPELLANTS

v.

APPEAL FROM GALLATIN CIRCUIT COURT
HONORABLE JAMES R. SCHRAND, II, JUDGE
ACTION NO. 14-CI-00066

ROBERT R. WALLACE — APPELLEE

OPINION
AFFIRMING
** ** ** ** **

BEFORE: DIXON, JONES, AND K. THOMPSON, JUDGES.

JONES, JUDGE: Appellants appeal from the February 4, 2016, order of the Gallatin Circuit Court which granted summary judgment in favor of Appellee, Robert Wallace. Having reviewed the record and applicable law, we affirm.

I. BACKGROUND

In September of 1998, Meredith L. Lawrence and Robert R. Wallace formed a limited liability company ("LLC") together. They named the company LAW/WAL LLC. In February of 2000, they formed a second LLC, Racers Pitstop Grill, LLC ("Racers"). Pursuant to the operating agreements, Lawrence and Wallace were the only members of the LLCs with each owning a fifty percent interest in each LLC.

Racers operated a gentlemen's club and a restaurant out of a building it leased from LAW/WAL. LAW/WAL operated a hotel in an adjacent building. LAW/WAL leased both buildings from Lawrence. In the early 2000s, the LLCs secured two loans from First Farmers Bank of Owenton ("Bank"). The first loan was in the amount of $1.2 million. Wallace and Lawrence provided personal guarantees on this loan. The second loan was in the amount of $100,000.

In 2004, Lawrence and Wallace decided to cease doing business together because they could not agree on what type of businesses would be successful at their locations moving forward. Ultimately, Lawrence agreed to buy out Wallace's interests in both LLCs. On November 1, 2004, Wallace and Lawrence executed a written agreement titled "Contract for Sale and Purchase of All Interests of Robert R. Wallace in LAW/WAL, LLC and Racers Pit Stop, LLC" ("Sales Agreement"). Under the terms of the Sales Agreement, Lawrence agreed

to pay Wallace $400,000 for his interests in the businesses. Payment was to be made as follows: 1) $40,000 upon execution of the Sales Agreement; and 2) the remaining $360,000 payable in nine equal installments of $40,000 plus interest at the then-current prime interest rate. The first installment for principal and interest was to be paid on November 1, 2005, with additional payments to be made each succeeding year until paid in full. Section 3 of the Sales Agreement contained a contingency provision. Under this provision, the agreement would become "null and void" if the Bank would not release Wallace's personal guarantees.

Lawrence made the initial $40,000 payment on November 1, 2004, the same day the parties executed the Sales Agreement. At the same time, he executed a promissory note in favor of Wallace for the balance of the purchase price. After receiving the initial payment and promissory note, Wallace relinquished all his ownership interests in the businesses to Lawrence.

Thereafter, Lawrence approached the Bank about releasing Wallace's personal guarantee; it refused to do so. Lawrence told Wallace about the Bank's decision approximately a week after they had signed the Sales Agreement. Wallace allegedly told Lawrence that he trusted Lawrence to make the payments to the Bank and would go through with the sales even without a release from the Bank.

Pursuant to the terms of the Sales Agreement, Lawrence was supposed to make the first of the nine $40,000 installment payments to Wallace on November 1, 2005. He failed to do so. As a result, in February of 2006, Wallace filed a civil lawsuit for breach of contract against Lawrence in Gallatin Circuit Court ("2006 Civil Action"). Lawrence filed an answer and counterclaim. In his counterclaim, Lawrence alleged that Wallace committed fraud in connection with the Sales Agreement by concealing business debts and fabricating assets. He also alleged that Wallace was aware that the manager of the two businesses was going to quit after the businesses were sold to Lawrence, but hid this fact from Lawrence. Lawrence further alleged that Wallace breached the contract by engaging in activities that harmed the two businesses contrary to a specific agreement and understanding between the parties at the time the businesses were organized. Several years of litigation ensued.

In 2007, while the 2006 Civil Action was still ongoing, the larger of the two notes to the Bank came due. Lawrence requested Wallace to assist in refinancing or otherwise renewing the note. Wallace refused on the basis that he no longer had an interest in the LLCs. Lawrence ultimately purchased both notes from the Bank. However, the Bank would not assign Wallace's personal guaranty to Lawrence. This had the practical effect of extinguishing Wallace's personal guarantee.

In March of 2009, as part of the 2006 Civil Action, Lawrence filed an amended counterclaim against Wallace. The amended counterclaim alleged tortious and intentional violation of Wallace's duty of good faith and fair dealing and intentional breach of fiduciary duty, related to Wallace's refusal to remain obligated on the LLCs' loans. The next month, on April 27, 2009, the parties and their counsel conducted a settlement conference at the office of Lawrence's then-attorney. Following day-long talks, the parties and their counsel ultimately executed a document styled "Memorandum of Full and Final Settlement" ("Settlement Agreement"). Therein, the parties agreed to resolve the 2006 Civil Action and modify their prior Sales Agreement. As part of the Settlement Agreement, Lawrence agreed to pay Wallace a total $175,000. The agreement set forth a payment schedule: 1) $100,000 was due by May 7, 2009; and (2) the remaining $75,000 by May 1, 2010. In return, Wallace again agreed to convey all of his interest in the two LLCs to Lawrence, effective November 1, 2004, and Lawrence again agreed to hold Wallace harmless and blameless for any of the businesses' debts. The Settlement Agreement further provided that the parties would file an agreed judgment and agreed order of dismissal in the 2006 Civil Action within sixty days. This clause specified that the agreed judgment "shall contain a full release by Wallace and Lawrence to the other for all claims related to

these LLCs, which have been asserted or that could have been asserted by either party against each other."

Lawrence made the first payment of $100,000 as agreed. However, the parties did not file the agreed order of judgment and dismissal in a timely manner. Instead, according to Wallace, the parties agreed to leave the 2006 Civil Action open so that Lawrence's counsel could move to compel a fact witness, Donna Bond, Lawrence's former employee and bookkeeper, to provide additional deposition testimony. While Ms. Bond had previously been deposed, she had refused to answer some questions. Allegedly, Lawrence wanted the deposition completed with answers to these discreet questions because Ms. Bond had previously testified before a federal grand jury in connection with a criminal investigation of Lawrence's federal income taxes.

Even though the 2006 Civil Action had not been formally dismissed as specified by the Settlement Agreement, on May 1, 2010, Lawrence sent Wallace and his attorney a check for $75,000. The memo line of the check contained the following handwritten notation: "Settlement of Litigation Dispute C/A 06-CI00029 ONLY, Full & Final Payment." Even though Lawrence made the final payment pursuant to the terms of the Settlement Agreement, for reasons that are not entirely clear from the record, the parties failed to seek an agreed judgment and order of dismissal from the trial court.

Although the 2006 Civil Action was technically still on the trial court's active docket, the parties did not make any additional filings. In April of 2011, the 2006 Civil Action came up for review pursuant to CR[1] 77.02(2). As required by the Rule, the trial court sent notices to the parties that the 2006 Civil Action would "be dismissed in thirty days for want of prosecution except for good cause shown." *Id.* The parties did not respond to the trial court's CR 77.02(2) notice. Accordingly, by order entered July 21, 2011, the trial court dismissed the 2006 Civil Action without prejudice; its only option under CR 77.02(2).

Following execution of the Settlement Agreement, Lawrence operated the LLCs without Wallace's involvement or financial assistance. During this time period, Lawrence repeatedly represented that he was the sole owner of the LLCs. This is confirmed in various filings with the Kentucky Secretary of State. Ultimately, Lawrence dissolved Racers in June of 2011. Later that same year, he sold LAW/WAL to Scott Vogeler. Documents associated with sale denote Lawrence as the sole owner. Subsequently, Vogeler filed bankruptcy on behalf of LAW/WAL. Lawrence repurchased LAW/WAL and its remaining assets out of bankruptcy.

Almost a full five years after execution of the Settlement Agreement, on or about April 22, 2014, Lawrence filed a new civil action against Wallace in

[1] Kentucky Rule of Civil Procedure.

Gallatin Circuit Court ("2014 Civil Action"). The new action, like the prior one, involved the sale of Wallace's interests in the LLCs to Lawrence. In his complaint, Lawrence took the position that Wallace was still a part owner of the LLCs. Even though Lawrence acknowledged the existence of the Settlement Agreement, he averred that it ended with only the "interests of Wallace's LLC personal property being purchased" by Lawrence. He further alleged that "no final accounting, settlement, dismissal of the civil suit or full and final releases were ever accomplished." To this end, Lawrence alleged that Wallace breached the LLCs' operating agreements because he failed to make capital contributions to the LLCs. Lawrence also alleged that Wallace was liable for fraud in the inducement, misrepresentation, unjust enrichment, breach of the covenant of good faith and fair dealing, and intentional infliction of emotional distress.

Citing the parties' prior Settlement Agreement, Wallace filed an answer in which he denied that he was liable to Lawrence. Wallace asserted that by virtue of the Settlement Agreement, he sold all his interest in the LLCs to Wallace and was not liable for any of the LLCs expenses or debts. Wallace also asserted a number of affirmative defenses. He also filed counterclaims against Lawrence seeking a declaratory judgment that the Settlement Agreement is an enforceable written document binding on both Wallace and Lawrence that barred

Lawrence's new complaint against him. In the alternative, Wallace alleged related claims grounded in equitable estoppel, fraud, and breach of contract.

On the motion of counsel, the LLCs were permitted to join the 2014 Civil Action as intervening plaintiffs on the basis that their interests could be affected by the outcome of the litigation between Lawrence and Wallace. *See* CR 24.01. At that time, the LLCs did not allege any independent claims against Wallace.[2]

On December 1, 2015, Wallace filed what was styled as a "motion to enforce settlement agreement." Wallace asserted in his motion that the Settlement Agreement was a legally binding contract that precluded Lawrence from pursuing the claims set forth in the 2014 Civil Action. In his response, Lawrence countered that the Settlement Agreement was not enforceable and noted that the 2006 Civil Action was dismissed without prejudice. Lawrence also noted that "[i]nsofar as the motion to enforce may be considered a motion for summary judgment then CR 56 applies and discovery must be permitted." Even though Lawrence represented in his response that additional discovery was necessary before the trial court could treat Wallace's motion to enforce as one for summary judgment, Lawrence filed his own motion for summary judgment on December 30, 2015. Therein, Lawrence

[2] On January 26, 2016, Lawrence and the LLCs filed a joint motion to amend their complaints. In light of its decision on summary judgment, the trial court denied the motion to amend.

requested the trial court to grant him summary judgment on his claims against Wallace on the basis that there were no disputed issues of material fact.

Ultimately, the trial court construed Wallace's motion to enforce the Settlement Agreement as a motion for summary judgment. After reviewing the record, the court determined that there were no material issues of disputed fact with respect to the validity of the Settlement Agreement. The court pointed out that it was undisputed that Lawrence made the two payments required by the Settlement Agreement to Wallace who accepted them, and that Lawrence subsequently represented that he was the sole owner of the LLCs on a purchase contract and on a bankruptcy petition. As a matter of law, the trial court concluded that Lawrence waived any and all claims he could have brought against Wallace in connection with Wallace's ownership and sale of his interests in the LLCs. As a result, the trial court entered a final and appealable summary judgment order in favor of Wallace. This appeal followed.

II. ANALYSIS

As an initial matter, Lawrence asserts that we should vacate and remand the trial court's judgment because its entry of "*sua sponte*" summary judgment in favor of Wallace did not provide Lawrence with notice and an opportunity to conduct discovery. We disagree.

"*Sua sponte*" means "[w]ithout prompting or suggestion; on its own motion." BLACK'S LAW DICTIONARY (10th ed. 2014). The trial court did not act on its own motion without any prompting by the parties. The record clearly indicates that the trial court's judgment was in response to Wallace's motion to enforce the parties' Settlement Agreement. While Wallace's motion was not styled as a motion for summary judgment, the trial court correctly placed substance over form. The motion requested the trial court to dismiss Lawrence's claims based on the Settlement Agreement. It was dispositive in nature.

While the motion sought dismissal, numerous exhibits were attached to the motion that were not a part of the pleadings filed by the parties. As such, the trial court was correct to treat the motion as one for summary judgment. *See McCray v. City of Lake Louisvilla*, 332 S.W.2d 837, 840 (Ky. 1960) ("[M]atters outside the record may be presented in support of a motion to dismiss and, if not excluded by the court, convert the motion to one for summary judgment under CR 56.").

Next, we examine the timing of the trial court's decision on the motion. While a party is permitted to move for summary judgment at any time, trial courts should be cautious not to take up summary judgments motions prematurely. *Blankenship v. Collier*, 302 S.W.3d 665, 668 (Ky. 2010). When a party claims the trial court acted prematurely in issuing summary judgment, a

reviewing court "must . . . consider whether the trial court gave the party opposing the motion an ample opportunity to respond and complete discovery before the court entered its ruling." *Id.* "Whether a summary judgment was prematurely granted must be determined within the context of the individual case." *Suter v. Mazyck*, 226 S.W.3d 837, 842 (Ky. App. 2007).

Lawrence contends that the trial court acted prematurely in granting summary judgment. We disagree. Despite the voluminous record, the issue before the trial court was relatively straightforward. Wallace maintained that the parties' Settlement Agreement was binding on Lawrence and precluded the claims he brought against Wallace in the 2014 Civil Action. Even though Lawrence asserted in blanket fashion that he needed time to conduct additional discovery, he did not identify what additional discovery was necessary for the trial court to determine whether the Settlement Agreement was binding on the parties. Having reviewed the record, we cannot see how any additional discovery was pertinent to this issue. Moreover, we cannot ignore the fact that Lawrence had filed his own motion for summary judgment less than two months earlier. In that motion, Lawrence represented that there were no disputed issues of material fact and asked the trial court to grant summary judgment in his favor.

The trial court did not act without prompting. It properly converted Wallace's pending dispositive motion into a motion for summary judgment.

Having done so, the trial court appropriately moved forward to determine the matter. The validity and enforceability of the Settlement Agreement was dispositive of the pending claims. Additional discovery was not necessary to resolve the issue.

Having determined that the trial court did not err when it converted Wallace's motion into one for summary judgment, we now turn to the propriety of its actual decision. Summary judgment serves to terminate litigation where "the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR 56.03. 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. *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476 (Ky. 1991). Summary judgment is "proper where the movant shows that the adverse party could not prevail under any circumstances." *Id.* at 480 (citing *Paintsville Hosp. Co. v. Rose*, 683 S.W.2d 255 (Ky. 1985)).

On appeal, we must consider whether the trial court correctly determined that there were no genuine issues of material fact and that the moving party was entitled to judgment as a matter of law. *Scifres v. Kraft*, 916 S.W.2d 779 (Ky. App. 1996). "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." *Lewis v. B & R Corp.*, 56 S.W.3d 432, 436 (Ky. App. 2001) (footnote omitted).

Lawrence presents a myriad of alleged errors the trial court made when it determined that Wallace was entitled to judgment as a matter of law. Although postured in various different ways, the brunt of his assertions is that KRS[3] 275.177 and various other sections of KRS Chapter 275 dealing with the formation, operation and winding-up of LLCs prevent Wallace from relying on the Settlement Agreement.

The general rule of contract law is that parties may orally agree to modify a prior agreement even though they previously agreed that all future modifications must be in writing. *See* RESTATEMENT (SECOND) OF CONTRACTS § 283 (1981) ("Even a provision of the earlier contract to the effect that it can be rescinded only in writing does not impair the effectiveness of an oral agreement of rescission. In the absence of statute, such a self-imposed limitation does not limit the power of the parties subsequently to contract."). "[A]s to operating agreements [KRS 275.177] altered this rule and provided for specific enforcement of requirements that amendments be in writing." MARK A SARGENT & WALTER D. SCHWIDETZKY, LIMITED LIABILITY COMPANY HANDBOOK (2018-19 ed.) (Kentucky

[3] Kentucky Revised Statutes.

Manager-Managed LLC Operating Agreement found in Appendix KY-7).

Specifically, KRS 275.177 states:

> If a written operating agreement contains a provision to the effect that any amendment to the operating agreement of the limited liability company shall be in writing and adopted in accordance with the provisions of the operating agreement, then the provision shall be enforceable in accordance with its terms, and any agreement as to the conduct of the business and affairs of the limited liability company which is not in writing and adopted in accordance with the provisions of the operating agreement shall not be considered part of the operating agreement and shall be void and unenforceable.

Id.

Significant to the present dispute, the only requirement imposed by KRS 275.177 is that modifications must be in writing if required by the operating agreement. It does not require modifications be in set forth in any specific type of written document or even technically labeled as such. Therefore, to the extent that KRS 275.177 is implicated, it was complied with in this case. The parties' agreements with respect to the sale and ownership of the LLCs were reduced to writing—first in the original Sales Agreement and later in the Settlement Agreement.

Lawrence next asserts that the Settlement Agreement was never finalized, and therefore, did not resolve ownership of the LLCs. Even though Lawrence included a notation on the final check he sent to Wallace bearing the case number associated with the 2006 Civil Action and noting that it was for

"settlement of litigation dispute," he maintains that the parties never reached a final agreement with respect to "how and when the fixed absolute guaranty and the outstanding capital contributions would be paid." The trial court properly rejected this argument. It is wholly unsupported by fact or law.

"The intention of parties to a written instrument must be gathered from the four corners of that instrument." *Hoheimer v. Hoheimer*, 30 S.W.3d 176, 178 (Ky. 2000). The Settlement Agreement contains definite and certain terms. It references the parties' desire to settle all claims related to the 2006 Civil Action and to release all claims related to the LLCs which had or could be asserted by either party against the other. The counterclaims and amended counterclaims Lawrence filed as part of the 2006 Civil Action make clear that the guaranty issue was a central part of that litigation. Nowhere in the Settlement Agreement do the parties indicate that anything is left open for further discussion. The only further action contemplated by the parties was entry of an agreed order of judgment for the $175,000 Wallace agreed to pay Lawrence along with a waiver and agreed order of dismissal. To this end, there is no dispute that Lawrence paid everything due to Wallace, and that Wallace accepted those payments. While the Settlement Agreement contemplated that the parties would seek an agreed order of dismissal, both appear to have waived this requirement for Lawrence's benefit. The fact that this ministerial requirement was not technically complied with does not invalidate

the parties Settlement Agreement. *Dohrman v. Sullivan*, 310 Ky. 463, 220 S.W.2d 973, 975 (1949) ("Where all the substantial terms of a contract have been agreed on and there is nothing left for future settlement, the fact alone that the parties contemplated execution of a formal instrument as a convenient memorial or definitive record of the agreement does not leave the transaction incomplete and without binding force in the absence of a positive agreement that it should not be binding until so executed.").

Lawrence's other arguments do not merit further discussion. Suffice it to say, none of the statutes, cases, or issues he presents carry the day for him. The Settlement Agreement is a binding, enforceable contract. Under the terms of the Settlement Agreement, Wallace sold all his interests in both LLCs to Lawrence effective November 1, 2004. Wallace ceased all ownership in the LLCs as of that date, and pursuant to the terms of the Settlement Agreement had no managerial, fiduciary or financial past, present or future obligations with respect to the LLCs. Additionally, Wallace and Lawrence agreed to settle and/or waive all claims associated with the 2006 Civil Action and the LLCs that were brought or could have been brought. Those claims sounded in tort and contract and arose out of Wallace's involvement with and sale of his interests in the LLCs. As such, the trial court correctly determined that Lawrence's 2014 Civil Action against Wallace,

which was both legally and factually predicated on same claims and facts, was barred.

IV. CONCLUSION

For the above stated reasons, the February 4, 2016, order of the Gallatin Circuit Court is AFFIRMED.

ALL CONCUR.

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