RENDERED: MAY 17, 2019; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2016-CA-000717-MR

TERRI LEMASTER; AND PERFORMANCE MEDIA, LLC APPELLANTS

v.

APPEAL FROM JOHNSON CIRCUIT COURT
HONORABLE JOHN DAVID PRESTON, JUDGE
ACTION NO. 14-CI-00420

LYCOM COMMUNICATIONS, INC.;
STEVEN LYCANS; LYCOM AD; AND
SLG MEDIA GROUP, LLC APPELLEES

AND

NO. 2016-CA-000878-MR

LYCOM COMMUNICATIONS, INC;
STEVEN LYCANS; AND LYCOM AD CROSS-APPELLANTS

v.

CROSS-APPEAL FROM JOHNSON CIRCUIT COURT
HONORABLE JOHN DAVID PRESTON, JUDGE
ACTION NO. 14-CI-00420

TERRI LEMASTER, INDIVIDUALLY;
TERRI LEMASTER, D/B/A PERFORMANCE MEDIA;
AND PERFORMANCE MEDIA, LLC CROSS-APPELLEES

OPINION
AFFIRMING IN PART, REVERSING IN PART,
AND REMANDING

** ** ** ** **

BEFORE: LAMBERT, NICKELL, AND L. THOMPSON.

THOMPSON, L., JUDGE: Terri LeMaster and Performance Media, LLC appeal from an order and judgment of the Johnson Circuit Court which enforced an oral settlement agreement. LeMaster argues that the trial court's findings of fact were erroneous and that no agreement had been reached. LeMaster also argues that the agreement violated the statute of frauds. Lycom Communications, Inc.; Steven Lycans; and Lycom AD argue that the oral agreement is enforceable. They also bring a cross-appeal claiming that the trial court erred in denying their motions for sanctions against Appellants. We find that the agreement is not enforceable because it violates the statute of frauds and that the trial court did not err in denying Appellees' motions for sanctions.

Terri LeMaster owns and operates Performance Media, a small advertising company in Belfry, Kentucky. In March of 2008, Lycom Communications, a cable and internet provider owned and operated by Steven Lycans, contracted with LeMaster to take over the sale of local advertising on

Lycom's cable systems. Pursuant to the agreement, Lycom would receive 48% of the gross revenue from the advertising sales and LeMaster would retain the remaining 52% of revenue.

In August of 2014, Appellants filed suit against Appellees for breach of contract and other sundry causes of action. Appellees brought a counterclaim also alleging breach of contract. The parties litigated the case for two years and during that time, Appellees made two motions for sanctions against Appellants for not following through with discovery requests and violating discovery orders. Eventually, on February 18, 2016, LeMaster, through her attorney Jonah Stevens, contacted Appellees for the purpose of negotiating a settlement agreement. Negotiations occurred throughout the day, culminating in a conference call between LeMaster, Mr. Stevens, and counsel for Appellees.

Appellees believed a settlement agreement had been reached and forwarded a written copy of the terms to Mr. Stevens. LeMaster did not think an agreement had been reached and sought out new counsel. LeMaster thereafter refused to honor the settlement agreement and did not sign the written version. On February 25, 2016, Appellees filed a motion to enforce the settlement agreement and for attorney fees and costs. An evidentiary hearing was held on April 12, 2017. LeMaster did not appear for the hearing, but her new counsel, Richard Getty and C. Thomas Ezzell, did appear. A hearing was held where the only witness to

testify was Mr. Lycans, owner of Lycom Communications. He testified that he was listening to the conference call where the settlement agreement was negotiated and believed an agreement had been reached. Counsel for Appellants cross-examined Mr. Lycans but presented no additional evidence.

On April 19, 2016, the trial court entered an order enforcing the settlement agreement finding that a binding oral agreement had been reached during the conference call in February. The court also denied Appellees' motion for attorney fees and costs. On the same day, Appellants entered into the record an alleged recording of the conference call and a transcript of said recording. It is unclear if the trial court was privy to this evidence prior to its entry of the order enforcing the agreement. Appellants then filed a Kentucky Rule of Civil Procedure (CR) 59.05 motion to vacate the judgment, but that motion was denied by the court. This appeal and cross-appeal followed.

On appeal, Appellants raise arguments regarding the sufficiency of the evidence supporting the oral agreement and the statute of frauds. We find that the statute of frauds issue is determinative of the appeal. Kentucky Revised Statute (KRS) 371.010(7) states in pertinent part:

> No action shall be brought to charge any person . . . [u]pon any agreement that is not to be performed within one year from the making thereof . . . unless the promise, contract, agreement, representation, assurance, or ratification, or some memorandum or note thereof, be in

> writing and signed by the party to be charged therewith, or by his authorized agent.

Appellants argue that the agreement is not enforceable because it cannot be completed in a year and LeMaster did not sign the document tendered to her attorney. Appellees argue that this issue is not preserved, or, in the alternative, the agreement could be completed within a year. We agree with Appellants.

As to the preservation issue, Appellees are correct in that Appellants did not specifically raise the statute of frauds before the trial court; however, Kentucky case law is settled that this is not required to preserve the issue. All that is required for a party to preserve the statute of frauds issue is a general denial of the contract. *Hocker v. Gentry*, 60 Ky. 463, 474 (1861); *Williamson v. Stafford*, 301 Ky. 59, 61, 190 S.W.2d 859, 860 (1945). Appellants denied the existence of an oral agreement being reached during the conference call; therefore, the issue is preserved.

We agree with Appellants that the agreement cannot be completed within a year; therefore, the agreement cannot be oral, but must be in writing and signed by Appellants. The alleged agreement states that Appellants will pay Appellees $15,000. A lump sum payment of $5,000 will be required first, then the remaining $10,000 is to be paid in 36 equal monthly installments. The 36 monthly installments show that the agreement cannot be completed in a year, thereby violating the statute of frauds.

Appellees argue that the agreement could be completed in a year because Mr. Lycans testified during the hearing that he had no objection to Appellants making all the payments sooner than 36 months.

> "In construing the Statute of Frauds, the general rule is that, if a contract may be performed within a year from the making of it, the inhibition of the Statute does not apply, although its performance may have extended over a greater period of time." However, "there is a well-recognized exception" to the general rule, "and that is that when it was contemplated by the parties that the contract would not, and could not, be performed within the year, even though it was *possible* of performance within that time, it comes within the inhibition of the Statute." This Court "must look to the evidence to determine whether the contracts in question fall within the rule or the exception."
>
> . . . The appropriate inquiry thus is whether under the evidence of a particular case the parties contemplated that the contract at issue would be performed within a year, and if, by its terms, it could be. It is irrelevant whether performance would be possible under different terms. A contrary rule-that if it is possible to perform a contract within a year even though such completion is not contemplated by the parties-would eviscerate the Statute of Frauds' requirement that agreements not to be performed within one year be in writing.

Sawyer v. Mills, 295 S.W.3d 79, 84 (Ky. 2009) (citations omitted) (emphasis in original).

Here, the written version of the agreement indicates that Appellants are to pay the remaining $10,000 in 36 equal monthly installments. It is clear that the parties contemplated that it would take longer than 1 year to complete the

agreement. Mr. Lycans' personal opinion as to early repayment does not bear upon the statute of frauds issue since the terms of the agreement are clear and unambiguous as to the timeframe for completion. As the agreement cannot be completed within 1 year, it runs afoul of the statute of frauds and cannot be enforced.

As to the cross-appeal, Appellees argue that the trial court erred in denying its motions for sanctions against Appellants. Appellees made three motions for sanctions in this case pursuant to CR 37.02. CR 37.02 states in pertinent part:

> **(2) Sanctions by court in which action is pending.**
> If a party or an officer, director, or managing agent of a party or a person designated under Rule 30.02(6) or 31.01(2) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under Rule 37.01 or Rule 35, the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:
> (a) An order that the matters regarding which the order was made, or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;
> (b) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence;
> (c) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

> (d) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination;
> (e) Where a party has failed to comply with an order under Rule 35.01 requiring him to produce another for examination, such orders as are listed in subparagraphs (a), (b) and (c) of this paragraph (2), unless the party failing to comply shows that he is unable to produce such person for examination.
>
> **(3) Expenses on failure to obey order.**
> In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

The first two motions occurred before the settlement negotiations discussed and the third motion was included in Appellees' motion to enforce the settlement agreement.

In the first two motions, Appellees alleged Appellants were not following court orders regarding discovery and were improperly and vexatiously delaying proceedings. Appellees requested that the trial court enter default judgment in favor of Lycom, order an accounting of Appellants' financial records, and determine appropriate damages. In the alternative, Appellees requested that the trial court prohibit Appellants from opposing Lycom's counterclaim for breach of contract. Appellees did not request the recovery of attorney fees or costs. The

trial court denied these two motions and allowed Appellants to correct the discovery violations.

In the third motion for sanctions, Appellees asked for the recoupment of attorney fees and costs associated with the enforcement action, amounting to over $18,000. In addition, Appellees asked for attorney fees and costs associated with all prior litigation, amounting to over $80,000. Appellees also requested that should the court find the agreement non-binding, that a default judgment be granted in their favor as set forth in the previous two motions.

The trial court denied the request for default because it believed an enforceable settlement agreement had been reached. Furthermore, the court did not grant the motion for $18,000 in attorney fees and costs. The court stated:

> The general rule is that parties are responsible for their own attorney's fees. Only in exceptional or statutorily permitted situations are attorney's fees to be assessed against the other party. Although the Plaintiffs have caused the Defendants to litigate this case further than they perhaps wanted, the Court is of the opinion that the [long-standing] rule is sound and should be applied in this situation.

Finally, the trial court did not make a ruling regarding the $80,000 in attorney fees and costs.

We review a trial court's rulings regarding sanctions for abuse of discretion. *Turner v. Andrew*, 413 S.W.3d 272, 279 (Ky. 2013). We hold that the trial court did not err in denying sanctions for Appellees' first two motions. The

court gave Appellants time to remedy their discovery violations and this was a reasonable decision.

As for the third motion, the court denied granting default judgment at that time because it believed a settlement had been reached; therefore, denying that request was proper. With regard to the attorney fees and costs associated with trying to enforce the settlement agreement, we hold that the trial court did not err, but for other reasons. As set forth above, the agreement is invalid; therefore, Appellants properly fought against its enforcement and Appellants' actions were not frivolous. Finally, as it pertains to the over $80,000 in attorney fees and costs requested, the trial court did not make a ruling on that issue and Appellees did not request additional findings. We decline to rule on issues not addressed by the trial court. CR 52.04; *Vinson v. Sorrell*, 136 S.W.3d 465, 470-71 (Ky. 2004). Appellees are free to raise the issue of sanctions again now that the case is being remanded to the circuit court.

Based on the foregoing, we affirm the trial court's judgment as to the sanctions issue, reverse as to the validity of the settlement agreement, and remand for further proceedings.

LAMBERT, JUDGE, CONCURS.

NICKELL, JUDGE, CONCURS IN RESULT ONLY AND FILES SEPARATE OPINION.

NICKELL, JUDGE, CONCURRING IN RESULT: While I acknowledge the result reached by the majority is correct, I write separately to convey my belief that general principles of contract law mandate reversal and thus, the statute of frauds should not come into play. My review indicates there was never a complete meeting of the minds and the full and complete terms of agreement were not discussed. Instead, I believe these parties engaged in preliminary negotiations, leaving open the probability of future resolution of material terms. Although the parties were objectively willing to settle their dispute and there does appear to have been agreement on some terms, many other terms were simply unresolved or undiscussed.

> Not every agreement or understanding rises to the level of a legally enforceable contract. . . . Under Kentucky law, an enforceable contract must contain definite and certain terms setting forth promises of performance to be rendered by each party. *Fisher v. Long*, 294 Ky. 751, 172 S.W.2d 545 (1943) . . . . Additionally, under Kentucky law the terms of a contract must be sufficiently complete and definite to enable the court to determine the measure of damages in the event of breach. *Mitts & Pettit, Inc. v. Burger Brewing Co.*, Ky., 317 S.W.2d 865 (1958).

Kovacs v. Freeman, 957 S.W.2d 251, 254 (Ky. 1997).

At most, I believe the parties had no more than an "agreement to agree [which] cannot constitute a binding contract. Williston on Contracts (3rd Ed.) Vol. 1, section 45 (page 149); *Johnson v. Lowery*, Ky., 270 S.W.2d 943 [(1954)];

National Bank of Kentucky v. Louisville Trust Co., 6 Cir., 67 F.2d 97." *Walker v. Keith*, 382 S.W.2d 198, 201 (Ky. 1964). Therefore, there could be no legally binding agreement. Discussion of the statute of frauds is, I believe, unnecessary in this context. Thus, I must concur only in the result reached by the majority.

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