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NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2016-CA-001545-MR

DOUGLAS ADKINS

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE ANGELA MCCORMICK BISIG, JUDGE
ACTION NO. 14-CI-005295

KIRBY CONTRACTING, LLC and
ROBERT KIRBY, INDIVIDUALLY

APPELLEES

AND

NO. 2016-CA-001597-MR

KIRBY CONTRACTING, LLC

CROSS-APPELLANT

v. CROSS-APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE ANGELA MCCORMICK BISIG, JUDGE
ACTION NO. 14-CI-005295

DOUGLAS ADKINS

CROSS-APPELLEE

OPINION
AFFIRMING IN PART, REVERSING IN PART,
AND REMANDING

** ** ** ** **

BEFORE: DIXON, GOODWINE, AND MAZE, JUDGES.

GOODWINE, JUDGE: Appellant Douglas Adkins (“Adkins”) appeals three Jefferson Circuit Court orders: (1) granting Appellees Kirby Contracting, LLC (“Kirby Contracting”) and Robert Kirby’s (“Kirby”) motion to dismiss Kirby, individually; (2) denying his motion to amend complaint; and (3) awarding him \$11,913.32 in total damages at trial. Kirby Contracting cross-appeals the trial court’s granting judgment at trial in Adkins’s favor. After thorough review, we affirm in part, and reverse in part, and remand.

BACKGROUND

In 2014, Adkins and Kirby negotiated a contract for Kirby Contracting to construct two additions to Adkins’s home in Louisville, Kentucky. The parties signed a contract on March 26, 2014, which outlined the terms and conditions of the agreement. Per the contract, Kirby Contracting agreed to construct: (1) a 20.75-foot by fifteen-foot room with a smooth, finished concrete floor; and (2) a safe room/shelter for inclement weather, which required the installation of a storm door that met Federal Emergency Management Agency (“FEMA”) specifications. Further, the contract provided for the construction of the

improvements, with Kirby Contracting paying for materials, for a total of \$40,000.00. Within the confines of the contract, the parties did not establish who was to obtain proper work permits for the construction job, but Adkins sought and received approval of the job from his Homeowner's Association.

In July 2014, Kirby Contracting began working on the construction job. During this time, Adkins micromanaged Kirby Contracting and expressed concerns with the workmanship. One month later, Adkins approached Kirby at the job site. At that time, Adkins expressed: (1) concerns about the thickness of the foundation; (2) concerns regarding whether the door Kirby Contracting procured complied with his requests; (3) complaints regarding the finished surface floor; and (4) concerns that Kirby Contracting did not obtain necessary work permits for the job. An argument ensued between the two, with Kirby arguing it was Adkins's responsibility to obtain work permits and vice versa. Aggravated, Kirby walked off the site and did not return. Further, Adkins never received the door Kirby Contracting procured, as Kirby refused to deliver it.

On October 13, 2014, Adkins filed a civil action against both Kirby Contracting and Kirby, individually, alleging (1) breach of contract; (2) negligent work performance; and (3) conversion. Adkins alleged Kirby Contracting, acting through its agent, Kirby, breached their contract by walking off the job site after receiving partial payment.

Further, Adkins alleged Kirby Contracting was negligent in performing the work, which had to be redone by a different contractor, and Kirby Contracting's "careless and incompetent" work led to defects that had to be redone. Also, Adkins alleged Kirby Contracting wrongfully converted \$2,500, which he provided Kirby to purchase a specific storm door that he previously selected. On December 5, 2014, Kirby Contracting and Kirby jointly filed an answer, arguing certain affirmative defenses.

In January 2016—over two years after filing their answer—both Kirby Contracting and Kirby filed a motion to dismiss Kirby, individually, as a party. In their motion, they argued the contract was between Adkins and Kirby Contracting, therefore, all action taken by Kirby was on behalf of Kirby Contracting. In this, they argued the complaint failed to state a cause of action against Kirby, individually, so the action should be dismissed against him. The trial court agreed, granting the motion to dismiss. Furthermore, the trial court denied Adkins's motion to alter, amend, or vacate its prior ruling.

Subsequently, Adkins timely filed¹ a motion to amend his complaint, attempting to incorporate a claim for piercing the corporate veil. Adkins moved to supplement this new allegation because of statements Kirby made during his

¹ The trial court's bench trial order required counsel file any proposed amendment of pleadings fifteen days before trial. Adkins filed his motion to amend his complaint on April 22, 2016, which was 42 days before the bench trial was to occur.

deposition one week earlier. The trial court did not issue an order regarding the amended complaint until May 20, 2016. In its order, the trial court found that allowing Adkins to amend his complaint at that time would “prejudice [Kirby Contracting’s] preparation of the case.” Therefore, it denied Adkins’s motion.

In June, the case proceeded to trial. The trial court found that Kirby Contracting did not have “a sufficient reason to walk off the job,” but by doing so, breached the contract. It found Kirby Contracting liable to Adkins in the amount of \$9,413.32 “for additional monies [Adkins] spent to complete the project,” and awarded damages of \$2,500 for conversion of the door. This appeal followed.

ANALYSIS

“We review the issues raised by the parties using [] different standards. Therefore, as we analyze each issue, we set forth the appropriate standards as necessary.” *Banker v. Univ. of Louisville Athletic Ass’n, Inc.*, 466 S.W.3d 456, 460 (Ky. 2015).

This is a breach of contract dispute. With that in mind, we must decide whether the trial court: (1) applied the correct standard to the motion to dismiss Kirby, individually; (2) abused its discretion in denying Adkins’s motion to amend his complaint; (3) correctly awarded Adkins \$9,413.32 in damages; and (4) correctly found in favor of Adkins at trial.

1. Motion to Dismiss

Motions to dismiss present questions of law. Therefore, we review *de novo*. *James v. Wilson*, 95 S.W.3d 875, 884 (Ky. App. 2002). In its rationale and ruling, a trial court *must* treat a motion to dismiss as a motion for summary judgment under CR² 56, if “matters outside the pleading are presented to and not excluded by the court[.]” CR 12.02. While “[the] trial court is free to consider matters outside the pleadings[,] doing so converts the request for dismissal into a motion for summary judgment.” *Middleton v. Sampey*, 522 S.W.3d 875, 878 (Ky. App. 2017) (citations omitted).

Here, we must determine whether the trial court applied the correct standard granting the motion to dismiss.³ When the trial court considered the motion to dismiss, it should have treated the allegations in Adkins’s complaint as true and viewed said allegations in the light most favorable to him. *Snowden v. City of Wilmore*, 412 S.W.3d 195, 206 (Ky. App. 2013). Also, the trial court should not have granted the motion unless “it appear[ed] [that Adkins] would not be entitled to relief under any set of facts which could be proved in support of his claim.” *Halle v. Banner Indus. of N.E.*, 453 S.W.3d 179, 181 (Ky. App. 2014).

² Kentucky Rules of Civil Procedure.

³ We do not address the substantive merits of the trial court’s ruling, but rather the procedural steps it took to make such a ruling.

After review of the record, we find the trial court fulfilled neither of these requirements.

In his complaint, Adkins alleged

[a]s part of the payments made to defendants, [he] gave defendants \$2,500.00 on defendants' representation that the money would be used to purchase a set of doors that [Adkins] had selected. The money was not so used. [Adkins] was required to pay for a set of doors from another contractor. Defendants refused to return the \$2,500.00 to plaintiff, but rather wrongfully converted the \$2,500.00 for their own use. Said conversion was intentional and malicious, entitling [Adkins] to punitive damages.

R. at 2. Under Kentucky's notice pleading rule, a complaint that sets forth a claim for relief must contain "a short and plain statement of the claim showing that the pleader is entitled to relief[.]" CR 8.01.

As seen from Adkins's complaint, he fulfilled this requirement. Further, "CR 8.01 does not require a claimant to set out all details of the facts upon which he relies[.]" *Smith v. Isaacs*, 777 S.W.2d 912, 916 (Ky. 1989) (Wintersheimer, J., dissenting). On the contrary, the Kentucky Supreme Court held that "[t]he purpose of [CR 8.01] is to assign to pleadings the function of giving notice and formulating true issues without the requirement that they detail every fact which in the past may have been necessary to constitute a formal 'cause of action' or a defense." *Stewart v. Lawson*, 437 S.W.2d 733, 734 (Ky. 1969).

Here, Kentucky law did not require Adkins go in any further detail regarding his claim for conversion against Kirby individually. At this point, Adkins had no burden of proof, but the trial court disagreed. In its order, the trial court: (1) evaluated facts outside the pleadings without properly converting the motion to dismiss to a motion for summary judgment; and (2) improperly shifted the burden to Adkins when he did not bear one at that stage in the litigation.

Specifically, the trial court found that

Adkins' specific allegation is that Kirby was given funds to purchase a door but he instead used that money for his own personal use. Adkins does not specify how the money was spent, but simply states that the door was not purchased. The Court finds that Adkins gave the money to Kirby, who was acting in his capacity as a member of Kirby Contracting, not his individual capacity. Adkins has not made a sufficient showing that Kirby personally took the funds for his own use.

In doing this, the trial court rested on facts not within the four corners of the pleadings. At that point, it should have converted the motion to dismiss to a motion for summary judgment and applied the proper standard and burden accordingly. The trial court's order is devoid of any shift in legal standard, and it treated neither the motion purely as a matter of law nor the allegations in Adkins's complaint as true.

Furthermore, in its finding that Adkins failed to make "a sufficient showing that Kirby personally took the funds for his own use[,]" the trial court

underwent a summary judgment analysis. As previously stated, this is a different legal standard. Under this standard, Adkins would have to produce affirmative evidence in defense against the motion. At that point, the trial court should have withheld its ruling until discovery was complete, particularly until Adkins's attorney deposed Kirby. Instead it found that "Adkins had sufficient time for discovery to be able to *articulate specific factual allegations* of Kirby's individual negligence or wrongdoing." Given the fact that the trial court reviewed the motion under a summary judgment standard, we find its ruling premature.

After our review of the trial court's actions, we find it improperly granted the motion to dismiss. Thus, we reverse and remand for consideration under the proper legal standard.

2. **Motion to Amend Complaint**

When reviewing whether a trial court correctly denied a plaintiff's motion to amend complaint, we review under an abuse of discretion standard. In this, the trial court's ruling will not be disturbed unless it was clearly an abuse.

Graves v. Winer, 351 S.W.2d 193, 197 (Ky. 1961) (citations omitted); *Kenney v. Hanger Prosthetics & Orthotics, Inc.*, 269 S.W.3d 866, 869 (Ky. App. 2007).

Under Kentucky law, leave of court to amend a complaint "shall be freely given when justice so requires." CR 15.01. "[L]iberality in granting leave to amend is desirable, [but] the application is addressed to the sound discretion of

the trial judge.” *Bradford v. Billington*, 299 S.W.2d 601, 603 (Ky. 1957).

Similarly, trial courts should not grant leave to amend a complaint if the amendment would prejudice the opposing party or would work as an injustice.

Shah v. American Synthetic Rubber Corp., 655 S.W.2d 489, 493 (Ky. 1983).

Here, the trial court issued a civil bench trial order, which noted that all proposed amendments of pleadings must be filed at least fifteen days before trial. The court set the bench trial for June 3, 2016. On April 22, 2016—41 days before the trial—Adkins filed a motion to amend his complaint to add a new claim. He filed for leave because of *statements Kirby made during his deposition the week before*. Due to the newly acquired information, Adkins moved to incorporate a claim for piercing the corporate veil.

On May 20, 2016, a mere two weeks before trial, the trial court issued an order denying Adkins’s motion. In its order, the court found that allowing the amendment “weeks from trial would prejudice Defendants’ preparation of the case.” Further, it added that “[t]he Plaintiff had plenty of time in which to depose the Defendant, tender Interrogatories or get other information.”

“[T]he trial court has a broad discretion in granting leave to amend, but *the discretion is not without limitations*.” *Lawrence v. Marks*, 355 S.W.2d 162, 164 (Ky. 1961) (emphasis added). Over the years, this Court, as well as the Supreme Court of Kentucky, have noted factors trial courts should consider when

determining whether to grant leave to amend a pleading. Those factors include “timeliness, excuse for delay, and prejudice to the opposite party[,]”⁴ as well as “failure to cure deficiencies by amendment or the futility of the amendment itself.” *First National Bank of Cincinnati v. Hartman*, 747 S.W.2d 614, 616 (Ky. App. 1988).

From our review, the trial court’s ruling relied solely on timeliness. While it noted “prejudice” to “Defendants” in its order, which is another factor, we find said prejudice hinged on the “timeliness” of the amendment. R. at 163. (“The Court finds that allowing Plaintiff to amend their complaint *at this point, a year and a half from its filing, and weeks from trial* would prejudice Defendants’ preparation of the case.” (emphasis added)). But “delay alone is insufficient reason to deny a motion to amend.” *Farmers Crop Ins. All., Inc. v. Gray*, No. 2009-CA-000969-MR, 2010 WL 5018284, at *4 (Ky. App. Dec. 10, 2010) (quoting *Estes v. Kentucky Utilities Co.*, 636 F.2d 1131, 1134 (6th Cir. 1980)). Furthermore, the “timeliness,” or lack thereof, of the amendment was by the trial court’s own doing. The trial court set deadlines for amendments to pleadings for fifteen days before trial. Adkins filed his motion 41 days before trial, easily complying with the filing deadline. And it took the trial court nearly a month to rule on the motion. If the trial court thought late amendments to the pleadings

⁴ *Id.*

would prejudice parties, it should have set a deadline that was not two weeks before trial.

The trial court did not evaluate, and gave no bearing to, any other factors when making its ruling. If it had, the trial court would have found that newly gained facts from a defendant's deposition would be "excuse for delay." Also, the trial court made no note that Kirby Contracting and Kirby, individually, had ample time to investigate this defense and to prepare a response, and there is no indication from the record that they would have been precluded from asking for additional time to do so. Therefore, any delay resulting solely from Adkins's failure to assert this claim earlier cannot be said to have caused Kirby Contracting or Kirby, individually, any undue prejudice.

To find an abuse of discretion, we must find the "trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999). Given these facts, we find the trial court abused its discretion in denying Adkins's motion to amend complaint.

It was "unfair" to deny Adkins's motion based on "timeliness" when Adkins complied with the court's filing deadline. And its ruling was "unsupported by sound legal principles" because it did not properly evaluate all available factors

this Court, and the Kentucky Supreme Court, look to when determining whether to grant leave. Thus, we reverse and remand.

3. Damages

Finally, we review the trial court's award of \$11,913.32 in damages to Adkins. Following a bench trial, the factual findings of the trial court shall not be set aside unless clearly erroneous, *i.e.*, not supported by substantial evidence. *Moore v. Asente*, 110 S.W.3d 336, 354 (Ky. 2003). Substantial evidence is evidence, when taken alone or considering all the evidence, has sufficient probative value to induce conviction in the mind of a reasonable person. *Id.* When reviewing a trial court's award of damages, the appellate court will give due regard "to the opportunity of the trial court to judge the credibility of the witnesses." CR 52.01.

Here, our review of the record shows Adkins and Kirby Contracting agreed to a \$40,000 contract. Upon starting the job, Adkins paid Kirby Contracting \$11,500 for work it performed up to August. When Kirby Contracting breached the contract in August, Adkins paid other contractors \$37,913.32 to complete the work. Finally, at the close of trial, the trial court found that "the proper damage to make [Adkins] whole [was] \$9,413.32."

From our basic calculations, the trial court subtracted the \$11,500 that Adkins paid Kirby Contracting from the overall contract price of \$40,000. This

leaves a sum of \$28,500.00 ($40,000 - 11,500 = 28,500$). After that, it subtracted the \$28,500 from the price it cost Adkins to re-contract the job, which was \$37,913.32.

Therefore, to award the “sum which would put [Adkins] into the position [he] would have been in if the contract had been performed[,]” the trial court awarded him \$9,413.32. *Univ. of Louisville v. RAM Eng’g Constr., Inc.*, 199 S.W.3d 746, 748 (Ky. App. 2005). This award was the difference between the price left on the original contract and the cost Adkins incurred by hiring additional contractors to finish the job ($37,913.32 - 28,500 = 9,413.32$).

Further, the trial court awarded Adkins \$2,500 for Kirby Contracting’s conversion of the funds received to purchase a storm door. It reached that sum by finding Adkins gave Kirby Contracting \$2,500, earmarked for the purchase of a storm door. Once Kirby Contracting received the money, the trial court found that he bought the door and failed to either give Adkins said door or return the money. Thus, it awarded Adkins the \$2,500 converted by Kirby Contracting. In total, the trial court awarded Adkins \$11,913.32 ($9,413.32 + 2,500 = 11,913.32$).

We agree with the trial court’s calculations. Adkins asserts numerous, conflicting final sums. Over the entirety of the record, Adkins offers *four different calculations* for total damages, including conflicting calculations from his initial

brief before this Court and his reply brief: (1) Adkins Itemized Damages List, \$24,500 (June 1, 2016); (2) Adkins Findings of Fact and Conclusions of Law, \$23,698.00 (July 1, 2016); (3) Brief of Appellant Douglas Adkins, \$23,268.00 (April 3, 2018); and (4) Appellant/Cross Appellee's Combined Brief, \$20,738.00 (August 15, 2018).

After reviewing the voluminous record, including the recorded bench trial, it is clear to us that the trial court's finding of \$11,913.32 in total damages was supported by substantial evidence and was not an abuse of discretion. Therefore, we affirm the trial court's award of damages.

4. Cross-Appeal

We briefly address Kirby Contracting's cross-appeal of the trial court's ruling. From our review of the trial, we hold that the trial court properly ruled in favor of Adkins regarding both the breach of contract and conversion claims. While the contract did not state whether Adkins or Kirby Contracting was to obtain the proper work permits, that was not a sufficient reason for Kirby Contracting to walk off the job. He breached the contract. *Metro Louisville/ Jefferson Cty. Gov't v. Abma*, 326 S.W.3d 1, 8 (Ky. App. 2009) ("To prove a breach of contract, the complainant must establish three things: 1) existence of a contract; 2) breach of that contract; and 3) damages flowing from the breach of contract." (citations omitted)). Also, Kirby Contracting "had no legal basis to

continue to hold the door or demand that [Adkins] settle all claims in this matter for release of the door.” Kirby Contracting converted the funds for the door.

Meade v. Richardson Fuel, Inc., 166 S.W.3d 55, 58 (Ky. App. 2005).

CONCLUSION

For the foregoing reasons, we: (1) reverse and remand the trial court’s order dismissing Kirby, individually; (2) we reverse and remand the trial court’s denial of Adkins’s motion to amend his complaint; and (3) we affirm the trial court’s ruling at trial and its award of \$11,913.32 in total damages for Adkins.

DIXON, JUDGE, CONCURS.

MAZE, JUDGE, CONCURS WITH SEPARATE OPINION.

MAZE, JUDGE, CONCURRING: I fully agree with the reasoning and the result of the majority opinion, but I write separately to add an additional point. In particular, I agree with the majority that the trial court applied the wrong standard in considering the motion to dismiss Kirby individually, and that it abused its discretion by denying Adkins’s motion to amend the complaint asserting a claim to pierce the LLC’s corporate veil. However, I would add that these issues may be moot in light of our conclusion that the trial court properly calculated damages. Even if Adkins prevails on these claims, then, at most, Kirby would be subject to joint and several liability for the judgments. Adkins’s ability to collect the judgment against Kirby individually is relevant only if he cannot collect the

entire judgment against the LLC. If Adkins can collect the entire judgment against the LLC, then the liability is satisfied as to Kirby as well. Obviously, this Court is not in a position to determine whether the current judgment can be enforced. Rather, that is a matter for the trial court to determine upon remand.

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