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NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2018-CA-000124-MR

WINFIELD UNDERWOOD

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE CHARLES L. CUNNINGHAM, JUDGE
ACTION NO. 17-CI-003215

DAVID METTS

APPELLEE

OPINION
AFFIRMING

** ** * ** * **

BEFORE: CLAYTON, CHIEF JUDGE; COMBS AND K. THOMPSON,
JUDGES.

CLAYTON, CHIEF JUDGE: Winfield Underwood appeals from the Jefferson
Circuit Court's order dismissing his complaint pursuant to Kentucky Rules of Civil
Procedure (CR) 12.02. Finding no error, we affirm.

BACKGROUND

Underwood was the sole member of a limited liability company, Lost Lodge Properties, LLC (“Lost Lodge”) which operated Bluegrass Indoor Range in Louisville, Kentucky (the “Range”). David Metts was the sole member of a limited liability company, Tactical Guns and Gear, LLC (“Tactical”), which specialized in the sale of merchandise associated with weapons and tactical defense. Beginning in late 2011 and early 2012, Underwood and Metts began discussing, and subsequently entered into, a business arrangement whereby they would both operate separate, but complimentary, businesses at the Range. However, no written contracts or agreements laid out how the two businesses would operate in relation to the other, or any other aspects of the parties’ relationship. The parties initially agreed that the two businesses would use the same point of sale system (“POS System”), with Lost Lodge entering Tactical’s products and services into the POS System and adding Tactical as a separate vendor. Each month, Underwood would pay Tactical for its sales.

Eventually, the parties began to differ concerning the distribution of the profits from and expenses for the two businesses. At various times starting in January 2012, Underwood and Metts discussed Tactical’s purchase of Lost Lodge’s interest in the Range, but no terms were ever agreed upon by the parties. In late May of 2012, Metts called a meeting at which he, Underwood, and other

Range employees were present. At the meeting, Metts informed Underwood that he was taking over the physical operation of the Range, and again offered to buy out Lost Lodge's interest. Metts further advised at the meeting that he had instructed his employees to convert Lost Lodge's current POS System to a system operated and maintained exclusively by Tactical without the permission or consent of Underwood. Further, correspondence from Metts and his counsel to Underwood dated June 22, 2012, informed Underwood that Tactical was again offering to purchase the Range. The offer expired on June 28, 2012, and, because Underwood did not agree with the price that Metts offered, was not accepted by Underwood.

Tactical filed a lawsuit against Lost Lodge and Underwood in Jefferson Circuit Court on August 27, 2012, alleging promissory estoppel, unjust enrichment, and fraud. Lost Lodge filed an answer and counterclaim against Tactical alleging fraud, conversion, tortious interference with business relationships, and unjust enrichment.

The Jefferson Circuit Court held a bench trial on December 8, 2016. At the bench trial, Underwood testified and provided further information about the events that transpired at the May 2012 meeting, stating that Metts had informed Underwood at the meeting that he had installed a new POS System, transferred all of the banking accounts to his name, changed the locks and the security system at the Range, taken control of the credit cards, "and that from then on [Metts] would

be running the [R]ange.” Upon the conclusion of the bench trial, Lost Lodge received a judgment in the amount of \$104,765.00, with the trial court finding that Tactical had converted Lost Lodge’s property.

On June 21, 2017, Underwood filed a complaint against Metts in his individual capacity alleging tortious interference with business relationships, unjust enrichment, and fraud due to “[t]he actions of [Metts] in directing the seizure of [Underwood’s] business by [Tactical], owned by the defendant[.]” Metts filed a motion to dismiss the action pursuant to CR 12.02. The Jefferson Circuit Court granted the motion to dismiss on the grounds of Underwood’s failure to file the complaint within the statute of limitations, failure to file a mandatory counterclaim, and lack of standing to bring the action. Underwood subsequently filed this appeal.

ANALYSIS

The Jefferson Circuit Court dismissed Underwood’s complaint pursuant to CR 12.02 for failure to state a claim. Based upon our review of the record, we gather from the court’s order that it considered matters outside the pleadings in reaching its decision on the motion to dismiss, namely the inclusion by Metts with his motion to dismiss portions of Underwood’s testimony at the bench trial concerning the May 2012 meeting between the parties. A trial court may consider matters outside the pleadings and, if not excluded by the court, such

consideration converts the request for dismissal into a motion for summary judgment. CR 12.02; *McCray v. City of Lake Louisville*, 332 S.W.2d 837, 840 (Ky. 1960).

The applicable 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.” *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996) (citing CR 56.03). Summary judgment “shall be rendered forthwith if 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 judgment as a matter of law.” CR 56.03. The trial court must view the record “in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor.” *Steevest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky. 1991) (internal citations omitted). Summary judgment is proper only “where the movant shows that the adverse party cannot prevail under any circumstances.” *Id.* at 479. However, “a party opposing a properly supported summary judgment motion cannot defeat it without presenting at least some affirmative evidence showing that there is a genuine issue of material fact for trial.” *Id.* at 482.

Since “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 Corporation*, 56 S.W.3d 432, 436 (Ky. App. 2001). With these standards in mind, we turn to the first issue on appeal concerning whether the applicable statute of limitations barred Underwood’s claims.

In his complaint, Underwood alleged claims against Metts in his individual capacity for tortious interference with contractual claims, unjust enrichment, and fraud. Each of those claims must be brought “within five (5) years after the cause of action accrued[.]” Kentucky Revised Statutes (KRS) 413.120. Specifically, KRS 413.120(6) establishes a five-year statute of limitations for actions based on “an injury to the rights of the plaintiff, not arising on contract and not otherwise enumerated.” Additionally, KRS 413.120(11) establishes a five-year statute of limitations for “an action for relief or damages on the ground of fraud ...[.]” Moreover, the general rule in Kentucky is that an action “accrues” on the date of injury. *Caudill v. Arnett*, 481 S.W.2d 668, 669 (Ky. App. 1972). The date upon which the statute of limitations begins to run is “obviously ... the discovery that a wrong has been committed and not that the party may sue for the wrong.” *Conway v. Huff*, 644 S.W.2d 333, 334 (Ky. 1982).

In this case, the only allegation that Underwood asserts in his complaint to support his causes of action for tortious interference with contractual relations, fraud, and unjust enrichment is that “the actions of [Metts] in directing the seizure of [Underwood’s] business by [Tactical]” constituted a tortious interference with ongoing and prospective business relationships, unjust enrichment, and fraud. However, Underwood testified at the bench trial that Metts notified him about both Metts’s physical seizure of the business, as well as his alterations to the POS System at the Range, in May of 2012. Simply put, the only activities upon which Underwood’s causes of action against Metts are founded - the seizure of Underwood’s business and the changes to the POS System - occurred in late May of 2012.

Underwood acknowledged in his response to the motion to dismiss that he was aware of Metts’s physical takeover of the business and the conversion of the POS System in May of 2012, but argues that the statute of limitations did not begin to run until he received Metts’s June 22, 2012 letter setting forth a sale price for the business with which Underwood did not agree. However, under Kentucky law, a cause of action accrues, and therefore the limitations period begins to run, when a party knows that he has been wronged, not when he knows that the wrong is actionable. *Conway*, 644 S.W.2d at 334. As a result, the limitations period for Underwood’s claims expired, at the latest, on May 31, 2017. Underwood filed the

action in the case *sub judice* on June 21, 2017. Therefore, Underwood’s claims are barred by the statute of limitations and “there is no genuine issue as to any material fact and ... the moving party is entitled to judgment as a matter of law.” CR 56.03.

The remaining arguments in the briefs are rendered moot by this Court’s determination that the five-year statute of limitations barred Underwood’s claims against Metts. The judgment of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

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