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Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-000419-MR

COPPAGE CONSTRUCTION COMPANY, INC. APPELLANT

v.

APPEAL FROM KENTON CIRCUIT COURT
HONORABLE GREGORY M. BARTLETT
ACTION NO. 08-CI-02787

SANITATION DISTRICT NO. 1 AND
DCI PROPERTIES-DKY, LLC APPELLEES

OPINION
AFFIRMING IN PART, REVERSING IN PART,
AND REMANDING

** ** ** ** **

BEFORE: COMBS, SPALDING,[1] AND K. THOMPSON, JUDGES.

SPALDING, JUDGE: In 2005, DCI Properties-DKY, LLC ("DCI"), a privately-owned, one-member Ohio development firm, entered into an agreement with the

[1] Judge Jonathan R. Spalding authored this opinion prior to the expiration of his term. Release of this opinion was delayed by administrative handling.

City of Dayton to develop land along the Ohio River in Dayton, Kentucky. In the latter portion of 2006, DCI approached Sanitation District No. 1 ("SD1"), a public sanitation utility that provides services to Boone, Campbell, and Kenton Counties in Northern Kentucky, with a proposal regarding the relocation of a pipeline in SD1's stormwater network. SD1 viewed DCI's proposal as an opportunity to comply with the terms of a consent decree that SD1 had entered into with both state and federal environmental agencies, and proceeded to enter negotiations with DCI to upsize and improve the district's sewer system. Ultimately, SD1 and DCI entered into an agreement under which SD1 would pay approximately 70% of the total estimated cost of the project and purchase the end result of the work. Subsequently, DCI contracted with Coppage Construction Company, Inc. ("Coppage") for the labor, goods, services, etc., that would be required to construct the new line.

The parties came to disagreements regarding the project, and Coppage, at some point in its and DCI's relationship, notified DCI that their contract had been breached, offering an opportunity to cure. DCI, however, chose to terminate the contract. On September 3, 2008, DCI filed suit against Coppage. Coppage filed a counterclaim, alleging, *inter alia*, breach of contract on the part of DCI, and, via third-party complaint filed in 2010, alleged a plethora of claims against SD1. These claims included a claim made under the doctrine of

respondeat superior, breach of contract, a claim that SD1 and DCI were jointly and severally liable due to the joint nature of the enterprise, partnership by estoppel, a breach of Kentucky statutory law, negligent management, and a claim that it was a third-party beneficiary of the contract that existed between SD1 and DCI. SD1 filed a dispositive motion, which was granted by the trial court on the basis of sovereign immunity principles. The Kentucky Supreme Court reversed, holding that SD1 was not entitled to sovereign immunity and remanding to the trial court for further proceedings.

On remand, the trial court once again awarded summary judgment to SD1, albeit this time as to the merits of the case. Coppage now appeals, arguing that its claims were dismissed in error. We address its arguments hereafter.

Summary judgment is proper 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[2] 56.03. When considering a trial court's grant of summary judgment, "[t]he 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." *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky. 1991) (citations

[2] Kentucky Rules of Civil Procedure.

omitted). 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 (citations omitted). An appellate court reviews a grant of summary judgment *de novo*, with "no deference to the conclusions of the trial court." *Gentry v. Noe*, 545 S.W.3d 323, 326 (Ky. App. 2018) (citation omitted).

The first issue we address concerns the trial court's summary disposition of Coppage's claims based on SD1's alleged violation of KRS[3] 220.290. That statute provides, in pertinent part, as follows:

> All contracts for work, material or supplies that may exceed one thousand dollars ($1,000) shall be advertised for bids by publication pursuant to KRS Chapter 424 within the district where the work is to be done or the materials or supplies used. The contract shall be let to the lowest and best bidder who shall give bond with approved and ample surety for the faithful performance of the contract.

In Coppage's view, because SD1 did not require DCI to post a bond, SD1 is liable, pursuant to statute, to Coppage for the money for which the bond would have stood. Coppage relies upon KRS 446.070,[4] Kentucky's codification of the common law doctrine of negligence *per se*, in making its claim that it is

[3] Kentucky Revised Statutes.

[4] KRS 446.070 provides as follows: "A person injured by the violation of any statute may recover from the offender such damages as he sustained by reason of the violation, although a penalty or forfeiture is imposed for such violation."

entitled to damages for SD1's supposed violation of KRS 220.290. The trial court held that Coppage's claim failed because it was not in the class of persons the statute was designed to protect.

"KRS 446.070 'creates a private right of action under which a damaged party may sue for a violation of a statutory standard of care, provided that three prerequisites are met[.]'" *Hickey v. General Electric Company*, 539 S.W.3d 19, 23 (Ky. 2018) (quoting *Vanhook v. Somerset Health Facilities, LP*, 67 F. Supp. 3d 810, 819 (E.D. Ky. 2014)). Those prerequisites are as follows: "first, the statute in question must be penal in nature or provide no inclusive civil remedy; second, the party [must be] within the class of persons the statute is intended to protect; and third, the plaintiff's injury must be of the type that the statute was designed to prevent." *Id.* at 23-24 (brackets in original) (emphasis and citations omitted) (quoting *Vanhook*, 67 F. Supp. 3d at 819).

Even assuming that this agreement violated KRS 220.290, which is a very debatable point, we find that the trial court was correct in its determination that the intent behind enactment of KRS 220.290 was to protect the public funds and to assure that public funds were being properly spent. In fact, if the statute applied, Coppage itself should have posted the bond, since it was the entity performing the work. Furthermore, its bid for the work should have been conducted in a bidding process for "the lowest and best" bid. This clearly shows

that Coppage was not within the class of persons KRS 220.290 was intended to protect and summary judgment was appropriate.

In addition to the above-described claims, the trial court also dismissed Coppage's claims against SD1 for negligence in SD1's management of the project. On appeal, Coppage argues that SD1 had a common law duty to exercise reasonable care in managing the project and that SD1 breached this duty. In reality, Coppage's negligence claims are based on the contractual dispute between itself and DCI, as evidenced by Coppage's own brief on appeal.[5]

"[A]s a general rule, whenever a wrong is founded upon a breach of contract, the plaintiff suing in respect thereof must be a party or privy to the contract, and none but a party to a contract has the right to recover damages for its breach against any of the parties thereto." *Presnell Const. Managers, Inc. v. EH Const., LLC*, 134 S.W.3d 575, 579 (Ky. 2004) (quoting 17A AM. JUR. 2D, *Contracts* § 425 (1991)). Because Coppage's claims are based on the contractual dispute between itself and DCI, and because there is no privity of contract between itself and SD1, we hold that the summary judgment entered against Coppage by

[5] For example, on page 18 of the appellant's brief, Coppage states that "DCI even directed Coppage to communicate directly with SD1 concerning questions about payments of invoices." Later, Coppage provides that "although SD1 purported to control and approve payments for Coppage and others working on the project, SD1 continued to remit funds to DCI for payment to those parties without taking any steps to monitor DCI's payments or otherwise ensure proper payments were being made."

the trial court as it relates to Coppage's negligence claim against SD1 must stand, and therefore affirm the trial court's decision.

In addition to common law negligence, Coppage argues that KRS 220.135 imposed a statutorily-generated duty upon SD1 and that SD1 breached said duty. Subsection (7)(a) of KRS 220.135, the specific provision upon which Coppage relies, provides as follows: "Effective July 1, 1995, the district shall be responsible for the planning, construction, improvement, operation, and maintenance of all sewer and drainage facilities under its ownership, including combined sewer overflows, and for compliance with all applicable regulations promulgated by the Energy and Environment Cabinet." However, this statute does not provide that SD1 is responsible for contractual relations between the entities who are constructing or improving its sewer and drainage facilities. Further, just as with KRS 220.290, KRS 220.135(7)(a) is designed to protect the public at large, not a party involved in a contract dispute. Therefore, the trial court did not err in granting summary judgment on this claim in favor of SD1.

The final argument advanced by Coppage under a theory of negligence involves the concept of negligent hiring. Specifically, Coppage argues that SD1 "had a common law duty to exercise reasonable care in selecting and vetting DCI, and in ensuring DCI's ability to perform its obligations." Despite Coppage's lengthy discussion concerning this theory of liability, Coppage fails to

explain how a duty to exercise reasonable care in selection and vetting extends from an entity (*i.e.*, SD1) to another entity (*i.e.*, Coppage) that voluntarily contracted with the same allegedly deficient entity. This issue falls under the general rule announced in *Presnell* and reproduced above – that is, a nonparty to a contract may not maintain an action for negligence where the alleged act of negligence consists only of a breach of contract. *Presnell*, 134 S.W.3d at 579 (citations omitted). Therefore, the dismissal of Coppage's claim of negligent hiring must be affirmed.

In a related line of argument, Coppage asserts that the trial court erred in dismissing its agency and *respondeat superior* claim. Coppage points to the degree of SD1's control over DCI and the expansion project; SD1's ability to have "final say" over planning and design; SD1's direct inspections of the worksite and the work performed on the project almost daily; and SD1's unilateral decision and ability to make changes to the design of the project in support of its *respondeat superior* claim. In further support, Coppage maintains that SD1's supervision of DCI's payments, ability to review and approve payment applications by those working on the project, and one instance of DCI instructing Coppage to reach out to SD1 to inquire about delayed payments, illustrate the extensive "control" SD1 exercised over DCI.

Coppage, in directing the Court to a Kentucky Supreme Court case from 1977, asserts that, "in determining whether one is an agent or servant[,]" the "dispositive criterion is whether it is understood that the alleged principal or master has the right to control the details of the work." *United Engineers & Constructors, Inc. v. Branham*, 550 S.W.2d 540, 543 (Ky. 1977). However, "the mere right to inspect, and require, after inspection, the work to be finished according to the requirements of the contract itself, does not change the relationship between the parties into that of merely employer and employee." *Dempster Const. Co. v. Tackett*, 215 Ky. 461, 285 S.W. 191, 192 (1926).

The facts of the case under consideration are very similar to those in *H.H. Miller Const. Co. v. Collins*, 269 Ky. 670, 108 S.W.2d 663 (1937). There, the State Highway Department contracted with H.H. Miller Construction Company ("H.H.") to construct a highway along the bank of a river in Harlan County to the satisfaction of the State Highway Commission. H.H. subcontracted the work to Gilliam & Cooper ("G&C"). Unfortunately, a ledge of rock thirty feet in height laid opposite the appellee's ("Collins") land, and in order to move forward with construction, it was necessary to blast and remove the rock. During the blasting process, "many tons of rock blasted from the bluff were thrown into the river," which resulted in the former flow of the river becoming obstructed to such a degree that it was redirected through a significant portion of Collins' land, which

was subsequently washed away. *Id*. at 663. Collins raised claims against H.H., G&C, and Harlan County. On appeal, the Commonwealth's highest court held that the work at issue "was done by Gilliam & Cooper," and that H.H. "had nothing to do with [construction of the road]" subsequent to the sublet to G&C "except to pay the estimates each month." *Id.* at 664. It was on this basis that the Court reversed the judgment of the trial court in favor of H.H., the appellant.

The principles that undergird *H.H. Miller* are applicable and dispositive here. DCI was chosen by SD1 to expand and improve the pipeline. DCI, in turn, "subcontracted" the work to Coppage. SD1, however, was not responsible for the contractual relationship between DCI and Coppage, and, as noted, the mere fact that SD1 had the authority to guide, inspect, or direct the project "does not change the relationship" between the parties. We are persuaded, therefore, that the trial court was correct to grant summary judgment to SD1 on Coppage's claims of negligent supervision.

Coppage also claims that SD1 violated the Kentucky Fairness in Construction Act, KRS 371.400 *et seq*. Coppage argues that the trial court dismissed the claim based on the erroneous conclusion that there was no contractual relationship between Coppage and SD1. For the same reasons we were unpersuaded by Coppage's agency and *respondeat superior* arguments, we are likewise unconvinced here. SD1 and Coppage never entered a contractual

agreement. This fact forecloses any possibility of recovery under the Act. *See* KRS 371.425(2) (emphasis added) (providing that the Act "shall apply to *construction contracts* entered into after June 26, 2007").

The last issue on appeal concerns the claim of Coppage based on partnership by estoppel. The trial court in the summary judgment order did not provide its reason for dismissing this claim. It did, however, specifically include it as one of the claims which were to be dismissed.

The doctrine of partnership by estoppel has been codified at KRS 362.225. That statute provides as follows:

> (1) When a person, by words spoken or written or by conduct, represents himself, or consents to another representing him to anyone, as a partner in an existing partnership or with one or more persons not actual partners, he is liable to any such person to whom such representation has been made, who has, on the faith of such representation given credit to the actual or apparent partnership, and if he has made such representation or consented to its being made in a public manner he is liable to such person, whether the representation has or has not been made or communicated to such person so giving credit by or with the knowledge of the apparent partner making the representation or consenting to its being made:
>
> > (a) When a partnership liability results, he is liable as though he were an actual member of the partnership.
> >
> > (b) When no partnership liability results, he is liable jointly with the other persons, if any, so consenting to the contract or

> representation as to incur liability, otherwise separately.
>
> (2) When a person has been thus represented to be a partner in an existing partnership, or with one or more persons not actual partners, he is an agent of the persons consenting to such representation to bind them to the same extent and in the same manner as though he were a partner in fact, with respect to persons who rely upon the representation. Where all the members of the existing partnership consent to the representation, a partnership act or obligation results; but in all other cases it is the joint act or obligation of the person acting and the persons consenting to the representation.

"Credit," as defined by Merriam-Webster, is "the provision of money, goods, or services with the expectation of future payment." *Credit*, MERRIAM-WEBSTER ONLINE DICTIONARY, https://www.merriam-webster.com/dictionary/credit (last visited November 21, 2019). In this matter, Coppage maintains that it extended credit, consisting of goods and services, based on the assertion that SD1 was partnering with DCI in the completion of the expansion and improvement project.

Based on the record on appeal, it is our opinion that the lower court could not hold that KRS 362.225 does not apply in this matter as a matter of law. Though the remedy sounds in equity, it is, in fact, a statutory remedy, with defined elements. Because DCI and SD1 were not legally partners, SD1 could only be liable to Coppage if they were partners by estoppel as defined in KRS 362.180(1). *Roethke v. Sanger*, 68 S.W.3d 352, 360 (Ky. 2001). Central to the allegations of

Coppage is that it gave credit to the assurances that SD1 was backing DCI. There is evidence in the record that suggests Coppage may have been misled into relying on SD1's assurances. For instance, it was alleged that SD1 repeatedly assured Coppage that it was backing DCI and would fund most of the project, and, reinforcing this representation, Coppage received payments not just from DCI, but once from SD1.

SD1 argues that it never represented it was in a legal partnership with DCI. However, the statute does not include the word "legal" in relation to partnership. It uses the term "actual or apparent." The appellant's allegation is that the representations by word and conduct that SD1 was partnering with DCI caused Coppage to give credit (extend its goods and services with expectation of payment). If that could be proven, then SD1 would be liable to Coppage for any damage its representations caused. Hence, the court below erred when it granted summary judgment on the claim of partnership by estoppel. It cannot be said that Coppage could not prevail as a matter of law under the language of KRS 362.225.

In sum, we affirm the entirety of the Kenton Circuit Court's judgment, save for its summary disposition of Coppage's partner by estoppel claim. Upon that issue, we reverse the judgment of the trial court and remand for further proceedings consistent with this opinion.

ALL CONCUR.

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