

RENDERED: NOVEMBER 8, 2019; 10:00 A.M.  
NOT TO BE PUBLISHED

**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2018-CA-000530-MR

LAKE CUMBERLAND MARINE HOLDINGS, LLC

APPELLANT

v. APPEAL FROM PULASKI CIRCUIT COURT  
HONORABLE JEFFREY T. BURDETTE, JUDGE  
ACTION NOS. 12-CI-01030 & 17-CI-00072

ABDULAZIZ AL HASSAWI;  
LAKE CUMBERLAND MARINE, LLC; RANDY HARTMANN;  
EVONNE HARTMANN; 1ST TRUST BANK;  
MIKE KAUTZMAN; TRACY KAUTZMAN;  
JOHN LIPEROTE; AND TCF INVENTORY FINANCE, INC. APPELLEES

OPINION  
REVERSING

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BEFORE: MAZE, TAYLOR, AND K. THOMPSON, JUDGES.

MAZE, JUDGE: Lake Cumberland Marine Holdings, LLC (“LCM Holdings”)

appeals the order of the Pulaski Circuit Court granting summary judgment in favor of appellee Abdulaziz Al Hassawi. After careful review, we hold genuine issues of

material fact exist and LCM Holdings was not provided an adequate opportunity to complete discovery. Hence, we reverse.

This case has its genesis in the 2012 bankruptcy of Lake Cumberland Marine, LLC (“LCM”), a boat dealership in Somerset, Kentucky. At the time of its bankruptcy, LCM was in possession of the three boats at the center of this litigation: a 2007 Outerlimits GTX, a 1995 Intrepid Super Hawaii, and a 1989 Wellcraft Scarab.

In December 2013, Robert Leasure, the court-appointed receiver, sold most of LCM’s assets to LCM Holdings. The 2013 purchase agreement specifically excluded the three boats from the sale because Leasure found LCM’s records too disorganized to determine who owned the boats. Al Hassawi, a citizen of Kuwait, intervened in the receivership action, claiming ownership of all three boats. Leasure propounded discovery on Al Hassawi and attempted to take his deposition in order to verify ownership and past transactions with LCM. Al Hassawi objected to personally appearing for a deposition in Kentucky, and communication between Leasure and Al Hassawi eventually ceased. In 2016, Leasure negotiated a supplemental purchase agreement with LCM Holdings in which “Buyer [LCM Holdings] further acknowledges that Seller has informed Buyer that ownership of the Remaining Boats and collectability of the Remaining Boat Receivables have been and continue to be subject to dispute and it is the

intention of the parties that Seller sell, convey, and quitclaim all of Seller's right, title, claim, and interest in and to said assets, *if any*." (Emphasis added.) This sale was approved by the trial court without any objection from Al Hassawi.

In April 2017, Al Hassawi filed an intervening complaint alleging that in 2011 he sent all three boats to LCM, as well as a wire transfer of \$315,000.00 incident to delivery. According to Al Hassawi, the GTX was delivered so it could be brokered and sold by LCM, the company he had purchased it from in 2007. Meanwhile, the Intrepid and Scarab were sent to LCM to receive repairs and refurbishments. LCM counterclaimed for expenses incurred storing, maintaining, and repairing the boats in the event Al Hassawi was found to be the rightful owner.

Nine months later, Al Hassawi moved for summary judgment, which was supported by an affidavit and several documents purporting to evidence his ownership of all three boats. Documents showing Al Hassawi's 2007 purchase of the GTX included: a 2007 purchase order from LCM, a receipt from Fifth Third Bank for a \$970,267.53 wire transfer to LCM, a certificate of origin, and a record showing the GTX registered with the Kuwaiti Ministry of Communications. Al Hassawi's affidavit also included a statement of origin for the Intrepid and its registration with the Kuwaiti Ministry of Communications. Regarding the Scarab, Al Hassawi provided an acceptance of purchase offer from an owner residing in Illinois. To show his delivery of the boats to LCM, Al Hassawi provided a bill of

lading for the GTX and Intrepid. The bill of lading stated the GTX and Intrepid were shipped from Kuwait to a port in Jacksonville, Florida. Al Hassawi also provided invoices from LCM showing LCM picked the GTX and Intrepid up from Jacksonville and the Scarab from Illinois. Finally, Al Hassawi provided a receipt for a December 2011 wire transfer in the amount of \$315,000.00 to LCM, which he alleged was sent for the requested repairs and improvements to the Intrepid and Scarab.

LCM Holdings responded that Al Hassawi waived his right to claim ownership of the boats by failing to object to the 2016 supplemental purchase agreement. In the event the merits of Al Hassawi's motion could be considered, LCM Holdings contended that summary judgment was premature. Although LCM Holdings did not dispute Al Hassawi owned the boats at some time, it contended that it should, at least, have an opportunity to depose Al Hassawi on his business dealings with LCM to assess his claims of current ownership. LCM Holdings also provided an affidavit from a former LCM employee, Amber Fitzgerald, stating that it was her understanding that Al Hassawi's December 2011 wire transfer was for a new engine for a boat not involved in the current litigation. This employee also opined that the signature on the documents submitted in support of Al Hassawi's motion for summary judgment was substantially different than the signature LCM had on file. The trial court granted Al Hassawi's motion for summary judgment.

LCM Holdings then moved to alter, amend, or vacate, arguing that Al Hassawi should be required to post a bond under KRS<sup>1</sup> 376.100 to ensure LCM Holdings could recover damages for alleged repairs and storage costs. The trial court denied the motion. This appeal follows.

At the outset, we must first address LCM Holdings's argument that Al Hassawi waived his right to claim ownership of the three boats by failing to object to the trial court's approval of the 2016 supplemental purchase agreement. "The common definition of a legal waiver is that it is a voluntary and intentional surrender or relinquishment of a known right, or an election to forego an advantage which the party at his option might have demanded or insisted upon." *Barker v. Stearns Coal & Lumber Co.*, 291 Ky. 184, 163 S.W.2d 466, 470 (1942). The party relying on waiver carries the burden of proof, which must be shown by clear and convincing evidence. *Pangallo v. Kentucky Law Enforcement Council*, 106 S.W.3d 474, 479 (Ky. App. 2003). The supplemental purchase agreement explicitly stated that ownership of the boats was the subject of ongoing litigation and purported to transfer whatever interest, "if any," LCM possessed. There was no need for Al Hassawi to object to a purchase agreement that acknowledged LCM Holdings would acquire ownership of the boats only if it were successful in the ongoing litigation. Accordingly, we hold that Al Hassawi's decision not to file an

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<sup>1</sup> Kentucky Revised Statutes.

objection was not a waiver of his right to assert continued ownership of the boats. We must next turn to the trial court's order granting Al Hassawi's motion for summary judgment.

“[T]he proper function of summary judgment is to terminate litigation when, as a matter of law, it appears that it would be impossible for the respondent to produce evidence at the trial warranting a judgment in his favor.” *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky. 1991). Summary judgment is appropriate “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 a judgment as a matter of law.” CR<sup>2</sup> 56.03. The 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*, 807 S.W.2d at 480. Summary judgment is proper only after the non-moving party has been given ample opportunity to complete discovery and then fails to offer controverting evidence. *Suter v. Mazyck*, 226 S.W.3d 837, 841 (Ky. App. 2007). Trial judges are to refrain from weighing the evidence or deciding any issue of fact. *Welch v. American Publishing Co. of Kentucky*, 3 S.W.3d 724, 730 (Ky. 1999). “The

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<sup>2</sup> Kentucky Rules of Civil Procedure.

inquiry should be whether, from the evidence of record, facts exist which would make it possible for the non-moving party to prevail.” *Id.* Since summary judgment involves no fact-finding, this Court’s review is *de novo*. *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996).

Ownership of a motor vehicle is a question of fact. *McKenzie v. Oliver*, 571 S.W.2d 102, 106 (Ky. App. 1978). Although Al Hassawi provided extensive evidence of his current ownership of the boats, Fitzgerald’s affidavit noting the differences in Al Hassawi’s signature made the authenticity of these documents a genuine issue of fact. Fitzgerald also disputed at least one of Al Hassawi’s wire transfers. Moreover, LCM Holdings did not receive an opportunity to depose Al Hassawi or investigate the authenticity of the documents attached to his motion for summary judgment. Based on these circumstances, we hold genuine issues of material fact exist and that LCM Holdings did not receive an adequate opportunity to complete discovery. Hence, the trial court’s order granting Al Hassawi summary judgment must be reversed.

Finally, we must briefly address LCM Holdings’s argument that Al Hassawi should be ordered to post a bond under KRS 376.100, which provides:

The owner or claimant of property against which a lien has been asserted, or any contractor or other person contracting with the owner or claimant of such property for the furnishing of any improvements or services for which a lien is created by this chapter or any subcontractor or other person in privity with the

contractor, may, at any time before a judgment is rendered enforcing the lien, execute before the county clerk in which the lien was filed a bond for double the amount of the lien claimed with good sureties to be approved by the clerk, conditioned upon the obligors satisfying any judgment that may be rendered in favor of the person asserting the lien. The bond shall be preserved by the clerk, and upon its execution the lien upon the property shall be discharged. The person asserting the lien may make the obligors in the bond parties to any action to enforce his claim, and any judgment recovered may be against all or any of the obligors on the bond.

The statute gives a property owner the option to post a bond in order to remove a mechanic's lien encumbering the property. The decision to do so is left to the property owner's discretion. The statute provides no authority for the trial court to order a party to post a bond against the owner's will. The trial court did not err by refusing to order Al Hassawi to post a bond under KRS 376.100.

In conclusion, we hold that Al Hassawi has not waived his right to litigate his ownership of the 2007 Outerlimits GTX, 1995 Intrepid Super Hawaii, and 1989 Wellcraft Scarab. However, the Pulaski Circuit Court's order granting Al Hassawi summary judgment is reversed. On remand, the trial court shall leave it to Al Hassawi's discretion whether to post a bond under KRS 376.100.

TAYLOR, JUDGE, CONCURS.

K. THOMPSON, JUDGE, CONCURS IN RESULT ONLY.

**BRIEFS FOR APPELLANT:**

John S. Talbott, III  
Elizabeth R. Seif  
Lexington, Kentucky

**BRIEF FOR APPELLEE  
ABDULAZIZ AL HASSAWI:**

R. Aaron Hostettler  
London, Kentucky