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Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-000891-MR

RHONDA KEENEY
AND
ROBERT KEENEY

APPELLANTS

v. APPEAL FROM SCOTT CIRCUIT COURT
HON. PAUL F. ISAACS, JUDGE
ACTION NO. 15-CI-00120

BILLY TRENT CONSTRUCTION, LLC

APPELLEE

OPINION
AFFIRMING IN PART AND VACATING IN PART

** ** * * * **

BEFORE: DIXON, SPALDING, AND TAYLOR, JUDGES.

SPALDING, JUDGE: This appeal arises out of a construction and building dispute between the appellants and the appellee. The agreement called for the appellee, Billy Trent Construction, LLC, to construct and remodel the appellants' garage and home. Specifically, the appellee was to provide all materials and work

required to erect a garage and update, expand, and install handicap accessible rooms in the appellants' basement. In consideration thereof, the appellants were to provide the appellee with sixty-five thousand, nine hundred and seventy-one (\$65,971.00) dollars. This amount represents the total to be paid for all needed material and labor required to complete the job.

The project began in March of 2014. It progressed slowly. The appellants claim that, on or about December 11, 2014, the appellee abandoned the project, taking its tools and the material purchased for the job with it. According to the appellants, at this time, much of the job was incomplete and the garage had been constructed improperly.

As a result, the appellants filed suit on February 25, 2015. An answer and accompanying counterclaim were subsequently filed, and, thereafter, the parties engaged in a lengthy period of discovery.

On March 26, 2018, a trial was initiated and counsel for the appellants delivered his opening statement, consisting of the following:

My name is Doug Howard. Briefly introduce myself. We have the opportunity to give you just a short opening statement and then we will get into some witness testimony. As you know, I represent Robert and Rhonda Keeney, they live here in Georgetown, they're hard working individuals, they both work, and at this point they have two children who are, actually three children who are special needs, and you're going to hear from today's testimony, that they decided to either upgrade to a different house, or make their current home more

handicap accessible. You're going to hear how they selected Trent Construction to upgrade their current house, you're going to hear that the relationship was somewhat tumultuous between the parties, you're going to hear what happened, how it happened, and eventually what led to some complications, that led to the parties parting ways. We will let the witnesses and the evidence show you what their damages are to their home, we will let you see the damages, or hear from the witnesses and see from the damages, how much they are owed for the damages, and we just ask that over the course of the next several days you listen attentively. I appreciate your time, I appreciate your willingness to serve this morning on into the next couple of days and look forward to talking with you further. Thank you very much.

After counsel for the appellants delivered his opening statement to the court and jury, opposing counsel moved for a directed verdict. The trial court sustained the appellee's motion and granted the parties a thirty (30) minute recess. During the recess, the appellants came to an agreement to resolve the counterclaim of the appellee. This agreement appears in the record as the agreed order of May 16, 2018. The agreement held that the appellants would pay an undisclosed sum to resolve the counterclaim of appellee in full but preserve its right of appeal in this matter as to appellants' claim.

On April 5, 2018, the appellants filed a motion to alter, amend, or vacate, requesting the court vacate the directed verdict and declare a mistrial. Additionally, the motion requested the court, essentially, vacate the settlement agreement to which the parties had earlier agreed, arguing that said agreement was

entered “under duress.” The appellants’ motion was denied, and this appeal followed.

The appellants raise two (2) issues on appeal. Firstly, they argue that the trial court erred in granting the appellee’s motion for directed verdict. Secondly, they contend that the settlement agreement regarding the appellee’s counterclaim was entered “under duress” and that, “but for th[e] incorrect ruling” made by the trial court on the appellee’s motion for directed verdict, the appellants would have never offered settlement in the first place and the trial court erred in not granting their motion to vacate the settlement.

The first issue on appeal is, broadly speaking, whether a trial court may grant a directed verdict immediately following a party’s opening statement. The appellee argues that the appeal should be dismissed because of the settlement agreement of the parties. However, the agreed order of May 16, 2018, specifically reserves appellants’ right to file an appeal on the issue of directed verdict in paragraph (3). Appellee cites no authority holding that this appeal should be dismissed. Hence, we will continue to the merits of the appeal.

Kentucky Civil Rule (CR) 43.02(a) states a “plaintiff must briefly state his claim and the evidence by which he expects to sustain it.” An opening statement’s “purpose or function is merely to inform the judge and the jury in a general way of the nature of the case and the issues involved, particularly to outline

what the attorney’s client expects to prove.” *Co-De Coal Co. v. Combs*, 325 S.W.2d 78, 79 (Ky. 1959). “The parties are granted wide latitude in making their opening statements, in part, because what is said in opening statements is not evidence.” *Jefferson v. Eggemeyer*, 516 S.W.3d 325, 338 (Ky. 2017).

However, trial courts *are* vested with the authority to direct a verdict on opening statements in limited circumstances. *Argotte v. Harrington*, 521 S.W.3d 550, 554-55 (Ky. 2017) (“[A] directed verdict *may* be properly granted at opening statements before the presentation of any evidence”) (emphasis in original). Indeed, “we agree, that a directed verdict may be granted immediately after an opening statement. However, that summary disposition of a case is proper ‘only when counsel has made admissions that are fatal to his client’s case.’” *Id.* at 554. (Citations omitted). Thus, the issue before us is whether this case presented a scenario in which the limited circumstances alluded to above were present.

A similar scenario was presented in *Riley v. Hornbuckle*, 366 S.W.2d 304 (Ky. 1963). There, like here, the trial court directed a verdict in favor the defendant-appellee following the opening statements of counsel. On appeal, this Commonwealth’s highest court held that “a directed verdict at this stage of the proceedings is never based on the mere insufficiency of the opening statement to support a case, but always upon the presence of admissions that are fatal to the

case.” *Riley*, 366 S.W.2d at 305. “[A] directed verdict on the basis of the opening statement must depend on what it contains, not on what it omits.” *Id.* at 307.

The appellants’ opening argument reveals few details about their case. The appellants opted to provide what may be termed a “barebones” opening statement, without providing the specifics of the issues involved or what counsel expected the evidence to show. However, an omission is not the same as an admission. The opening statement of the appellants did not make fatal admissions to their case. The directed verdict was in error.

Turning to the second issue before us, the appellants argued below – and maintain on appeal – that duress was the sole factor leading them to enter into the agreed order of settlement. They therefore contend that the parties’ settlement agreement must be overturned. We disagree.

The appellants cite to multiple cases to support the proposition that the construction and interpretation of a contract, such as the settlement agreement at issue here, is a question of law that an appellate court must review *de novo*. However, the issue before us does not concern the interpretation of the settlement agreement; rather, the issue presented is whether the appellants were under duress when entering the agreement. It is well-settled that “what constitutes duress is a question of law,” while “whether duress exists in a particular case is a question of fact.” *Wagner v. Wagner*, 563 S.W.3d 99, 105 (Ky. App. 2018) (citations

omitted). Of course, “[q]uestions of fact are reviewed under the abuse of discretion standard.” *Id.* (citing *Mays v. Mays*, 541 S.W.3d 516, 524 (Ky. App. 2018)).

Our review of the record reveals that the appellants failed to supply the trial court with any affidavit, oral testimony, or any other evidence upon which the trial court could rely in finding that the appellants were under duress at the time they entered the settlement agreement. The appellants provided two (2) paragraphs in their motion to alter, amend, or vacate, that asserted that the settlement agreement was the product of duress. Thus, there is no factual basis upon which this Court may review whether duress was a factor leading to the execution of the settlement agreement.

“Duress” means “such violence or threats made by the party or some person acting for or through him, or by his advice or counsel, as are calculated to produce on a person of ordinary intelligence a just fear of great injury to person.” *Wagner*, 563 S.W.3d at 104 (citing *Bond State Bank v. Vaughn*, 241 Ky. 524, 44 S.W.2d 527, 528 (1931)). Thus, even if we were to take the appellants’ assertions as true – that they were under pressure due to the “short period of time” in which to make a determination as to how to proceed – we would remain unconvinced that the agreement at issue was entered under duress since none of these assertions rise

to the level of “fear of great injury to person.” The circuit court did not err by denying the motion of the appellants.

Pursuant to *Harrington* and *Hornbuckle*, we hold that the appellants made no admission that was fatal to their case during oral arguments, and that the directed verdict entered by the Scott Circuit Court must therefore be VACATED. However, we AFFIRM the circuit court’s denial of the appellants’ motion to nullify the settlement of appellee’s counterclaims. Thus, this matter is hereby remanded to the Scott Circuit Court for a trial by jury on the claims of the appellants.

ALL CONCUR

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BRIEF AND ORAL ARGUMENT
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