

RENDERED: DECEMBER 20, 2019; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2019-CA-000051-MR
AND
NO. 2019-CA-000089-MR

DIXIE FUEL COMPANY, LLC

APPELLANT/CROSS-APPELLEE

APPEAL AND CROSS-APPEAL FROM HARLAN CIRCUIT COURT
v. HONORABLE JOHNNY RAY HARRIS, SPECIAL JUDGE
ACTION NOS. 08-CI-00676 AND 11-CI-00661

HARLAN DEVELOPMENT CORP., N/K/A
SOUTHERN COAL KENTUCKY CORPORATION
AND INFINITY ENERGY, INC.

APPELLEES/CROSS-APPELLANTS

OPINION
AFFIRMING

** ** * * * * *

BEFORE: LAMBERT, MAZE, AND L. THOMPSON, JUDGES.

THOMPSON, L., JUDGE: Dixie Fuel Company, LLC (“Dixie Fuel”) appeals and Harlan Development Corp., n/k/a Southern Coal Kentucky Corporation (“Southern Coal”) and Infinity Energy, Inc. (“Infinity”) cross-appeal from a judgment and

several orders of the Harlan Circuit Court disposing of Dixie Fuel's claim that Straight Creek, LLC¹ ("Straight Creek"), Southern Coal and/or Infinity breached a contract to supply to Dixie Fuel a specific type and quantity of coal. Dixie Fuel argues that the circuit court erred by failing to award damages for more than two months of non-performance, refusing to award consequential damages and attorney fees and expenses, and declining to award prejudgment interest. Southern Coal and Infinity argue that the court erred in granting partial summary judgment in favor of Dixie Fuel, improperly excluded impeachment testimony, and erred in its measure of damages. For the reasons addressed below, we find no error and AFFIRM the summary judgment and orders on appeal.

FACTS AND PROCEDURAL HISTORY

This appeal arises from complex and protracted multi-party litigation in state and federal court spanning eleven years. As the extensive procedural history is memorialized in the record, and in the interest of judicial economy, we will constrain our recitation of the facts and procedural history to that which is relevant to the issues before us.

On March 4, 2008, Dixie Fuel entered into a contract with Straight Creek providing for Dixie Fuel's purchase of 15,000 tons of coal per month through September 2008. The parties referred to the contract as Purchase Order

¹ Straight Creek is not a party to this appeal.

No. 193 or “P.O. 193,” and the coal was to be produced from a mine owned and operated by Straight Creek. The parties initially began conducting their business under the terms of P.O. 193 without issue.

On April 30, 2008, Southern Coal entered into an Asset Purchase Agreement (“APA”) with Straight Creek providing for Southern Coal’s acquisition of Straight Creek’s assets. Southern Coal and Straight Creek also executed an Assignment and Assumption of Coal Purchase Agreement, under which Southern Coal would assume the obligations of Straight Creek as memorialized in P.O. 193. Southern Coal would later argue that the assumption was contingent on Dixie Fuel’s written acquiescence to the assumption, which Dixie Fuel never provided.

Concurrent with Southern Coal’s acquisition of Straight Creek’s assets, Southern Coal and/or Straight Creek stopped supplying coal to Dixie Fuel. According to Dixie Fuel, the stoppage occurred for about three months during a period when rising coal prices benefitted Dixie Fuel. In July, 2008, Southern Coal and/or its subsidiary Infinity (hereinafter collectively “Appellees”) shipped a few thousand tons of coal to Dixie Fuel. When Dixie Fuel sought to make payment with a check or checks made to Straight Creek - the entity with which it had contracted - Appellees refused to ship any more coal and repudiated its purported obligation arising under the assigned P.O. 193 contract.

On September 18, 2008, Dixie Fuel filed an action against Straight Creek in Harlan Circuit Court (“the 2008 litigation”) alleging that Straight Creek breached P.O. 193 by failing to deliver the monthly coal installments. Dixie Coal did not assert a claim against Appellees nor plead that it held any rights under the assignment between Southern Coal and Straight Creek. The action was removed to federal court, where Straight Creek joined Southern Coal as a third-party defendant. Southern Coal defended and asserted a counterclaim against Dixie Fuel alleging that Dixie Fuel breached its obligations by refusing to make payment to Southern Coal for the coal that had been delivered. Dixie Fuel argued that Southern Coal’s liability arose solely by and through its indemnification of Straight Creek. Dixie Fuel later sought leave to amend its complaint to assert a counterclaim against Southern Coal. The federal court denied this motion as untimely.

During the pendency of the action in federal court, Dixie Fuel filed another complaint in Harlan Circuit Court on October 24, 2011 (“the 2011 litigation”) against Appellees asserting successor liability and third-party beneficiary causes of action. Southern Coal moved to dismiss this complaint on grounds of judicial estoppel and *res judicata*, and the Harlan Circuit Court held the matter in abeyance pending resolution of the federal action. A protracted

procedural history followed, resulting in the ongoing federal action being remanded to Harlan Circuit Court and consolidated with the 2011 litigation.

After the 2008 litigation was remanded to state court and the actions consolidated, Dixie Fuel amended its complaint to join both Straight Creek and its investors claiming that the investors had engaged in fraudulent transfers in order to avoid payment under an agreed order. Southern Coal unsuccessfully sought dismissal, and additional discovery continued for about two more years.

After the extensive discovery, the Harlan Circuit Court entered an order on January 9, 2017, 1) denying the motion of Southern Coal and Infinity for summary judgment, 2) granting Dixie Fuel's motion for summary judgment on Southern Coal's counterclaim, and 3) granting in part Dixie Fuel's motion for partial summary judgment. Specifically, the court determined that Dixie Fuel was a third-party beneficiary of the APA, that Southern Coal was a successor obligor under P.O. 193, and that Southern Coal breached P.O. 193 by non-performance. It is from this January 9, 2017 order that Appellees now cross-appeal. Appellees also cross-appeal from a February 1, 2017 pretrial conference order granting Dixie Fuel's motion to exclude certain testimony. Appellees seek to rebut Dixie Fuel's claim that it purchased "cover coal" to mitigate its damages.

The action continued as to the amount of damages to which Dixie Fuel was entitled, and whether Southern Coal was excused from further

performance after July 24, 2008, when it first disputed Dixie Fuel's non-payment.² Trial commenced in April 2017, which resulted in a mistrial after a bailiff was observed recording video of the jury on his cell phone. A new trial was scheduled for May 2018. In the interim, Southern Coal moved for an order clarifying the court's January 13, 2017 pretrial conference order ruling that damages would be calculated using either 1) the market value of clean coal in Harlan or surrounding counties in April 2008, or 2) the market value of clean coal in Harlan or surrounding counties no later than June 2, 2008. That motion was denied, and is at issue in the cross-appeal.

An evidentiary hearing was conducted on May 14, 2018, followed by extensive briefing. The proceedings reached fruition on October 16, 2018, when the Harlan Circuit Court rendered an order awarding damages to Dixie Fuel. The court awarded damages in the amount of \$2,556,712.02, minus \$119,632.52 for coal delivered by Southern Coal but not paid for, for a total damages award of \$2,437,077.50. This order was later confirmed via a December 10, 2018 order overruling Dixie Fuel's motion to alter or amend the judgment. This appeal and cross-appeal followed.

² "Non-payment" in this context refers to Dixie Fuel's attempt to pay Straight Creek rather than Southern Coal and/or Infinity.

ARGUMENTS AND ANALYSIS

Dixie Fuel first argues that Harlan Circuit Court committed reversible error in failing to award damages after July 24, 2008, *i.e.*, the date upon which Dixie Fuel issued its first check to Straight Creek.³ It asserts that the APA provided for Southern Coal's assumption of Straight Creek's liabilities and obligations only, but was not an assumption of rights. The focus of Dixie Fuel's argument on this issue is that its obligation was to Straight Creek alone, as Straight Creek was the only party with which it had contracted. Additionally, Dixie Fuel contends that P.O. 193 could be assigned only with Dixie Fuel's written consent – which was never given. As such, Dixie Fuel argues that it properly sought to make payment to Straight Creek on July 24, 2008, and that its failure to make payment instead to Southern Coal did not breach P.O. 193 nor otherwise terminate Southern Coal's obligation to Dixie Fuel under the APA.

The issues raised by Dixie Fuel and Southern Coal arise from a complex fact pattern and procedural history, the salient elements of which are as follows:

³Appellant has not complied with Kentucky Rule of Civil Procedure (CR) 76.12(4)(c)(v), which requires the appellant to state at the beginning of the written argument if the issue was preserved and, if so, in what manner. We are not required to consider portions of the appellant's brief not in conformity with CR 76.12, and may summarily affirm the trial court on the issues contained therein. *Skaggs v. Assad, By and Through Assad*, 712 S.W.2d 947 (Ky. 1986); *Pierson v. Coffey*, 706 S.W.2d 409 (Ky. App. 1985). As it appears from the record that this matter was raised and addressed below, we will consider the issues now before us.

1) By its terms, P.O. 193 could not be assigned without the written consent of Dixie Fuel. This consent was never given; therefore, P.O. 193 was never assigned. Southern Coal is not a party to P.O. 193, by either its express terms or by way of assignment.

2) The APA between Straight Creek and Southern Coal expressly provided that Southern Coal assumed Straight Creek's obligations as to Dixie Fuel arising under P.O. 193. It was on this basis that the Harlan Circuit Court characterized Dixie Fuel as a third-party beneficiary of the APA.

3) After Southern Coal's acquisition of Straight Creek's assets, it stopped Straight Creek's delivery of coal to Dixie Fuel under P.O. 193. Because the Harlan Circuit Court characterized Dixie Fuel as a third-party beneficiary of the APA, it awarded damages to Dixie Fuel for the non-delivery of coal during this period.

4) Southern Coal subsequently began delivery of coal to Dixie Fuel, which Dixie Fuel accepted.

5) On July 24, 2008, Dixie Fuel sought to pay Straight Creek for the coal that it accepted from Southern Coal. Southern Coal either did not or could not accept Dixie Fuel's check made payable to Straight Creek.

6) The Harlan Circuit Court deducted from its award to Dixie Fuel a sum representing the value of the coal delivered by Southern Coal for which it had not received payment.

The first question for our consideration is whether the Harlan Circuit Court erred in failing to award damages to Dixie Fuel after July 24, 2008. We must answer this question in the negative. While it is uncontroverted that P.O. 193 was not assigned as part of the APA, Southern Coal nonetheless assumed all of Straight Creek's obligations under P.O. 193. Southern Coal's assumption of Straight Creek's obligations under P.O. 193 are separate and distinct from any assignment of the purchase order itself. The Harlan Circuit Court sought to fashion an equitable remedy from a complex factual and legal quagmire, and in so doing characterized Dixie Fuel as a third-party beneficiary to the APA. It found by implication Dixie Fuel's duty to compensate Southern Coal for the benefit. When Dixie Fuel failed to pay Southern Coal for that benefit, the circuit court determined that Dixie Fuel was not entitled to ongoing damages after that date. Though Dixie Fuel properly notes that P.O. 193 was not assigned, reciprocal duties were created by the APA, *i.e.*, Southern Coal's duty to satisfy Straight Creek's obligation to Dixie Fuel and Dixie Fuel's acceptance of coal from Southern Coal. Stated differently, Southern Coal could not reasonably be expected to satisfy the remainder of Straight Creek's obligations under P.O. 193 without remuneration.

The Harlan Circuit Court properly so concluded, and we find no error in the circuit court's determination not to award damages after July 24, 2008.

Dixie Fuel goes on to argue that the circuit court erred in denying consequential damages. It directs our attention to Kentucky Revised Statutes (KRS) 355.2-713(1) in support of its claim of entitlement to consequential damages in the form of lost profits on stoker coal⁴ sales it would have made but for Appellees' breach of contract. Dixie Fuel claims entitlement not only to direct damages, but also to any incidental and consequential damages which might reasonably be calculated. Dixie Fuel's expert calculated these consequential damages, *i.e.*, lost stoker coal profits, by assuming that Dixie Fuel would have sold 30% of the P.O. 193 tonnage as stoker coal at a 30% premium above steam coal market price for those tons, resulting in a consequential damages of \$624,465.

Dixie Fuel properly cites KRS 355.2-713(1) for the proposition that the measure of damages for non-delivery "is the difference between the market price at the time when the buyer learned of the breach and the contract price together with any incidental and consequential damages[.]" In considering this claim for consequential damages, however, the Harlan Circuit Court concluded that it could "only rely on pure speculation as to the amount and price of stoker

⁴ "Stoker coal refers to coal that has been crushed to specific sizes (but not powdered) for burning on a grate in automatic firing equipment." U.S. Energy Information Administration glossary at <https://www.eia.gov/tools/glossary/index.php?id=coal%20grade>.

coal,” and that P.O. 193 did not address if any of the tonnage would be used for stoker coal.⁵ This conclusion is supported by the record and the law.

Consequential damages may be awarded only when they can be accurately estimated, and should not be subject to guesswork. *Nucor Corp. v. General Electric Co.*, 812 S.W.2d 136, 142-43 (Ky. 1991). We find no error on this issue.

Lastly, Dixie Fuel asserts that the Harlan Circuit Court erred in failing to award attorney fees, litigation expenses and prejudgment interest. We find no error on this issue. Dixie Fuel points to P.O. 193, which provides that the buyer shall be entitled to recover from seller all costs and attorney fees incident to any judgment in its favor. Again, we note that Southern Coal was not a signatory to P.O. 193, nor did Dixie Fuel assent to the assignment of the contract. While Southern Coal did enter into the APA with Straight Creek and “step into its shoes” for purposes of making delivery of the purchased coal tonnage, Dixie Creek has not demonstrated that its role as third-party beneficiary under the APA entitles it to enforce the attorney fee language of P.O. 193. Finally, the circuit court did not err in failing to award prejudgment interest. Prejudgment interest is discretionary when the failed performance results in disputed or unliquidated damages. *Nucor Corp.*, 812 S.W.2d at 144 (citing RESTATEMENT (SECOND) OF CONTRACTS, Section 354). We find no abuse of discretion, and thus no error on this issue.

⁵ Order entered October 16, 2018.

In its cross-appeal, Southern Coal argues that the Harlan Circuit Court erroneously granted Dixie Fuel's motion for partial summary judgment entered on January 9, 2017. It maintains that Dixie Fuel's own breach of P.O. 193 excused Southern Coal's performance, that *res judicata* and judicial estoppel bar Dixie Fuel's claims, that Dixie Fuel voided any contractual obligations, and that Dixie Fuel repudiated P.O. 193. Southern Coal argues that a genuine issue of material fact exists as to whether Dixie Fuel had a viable claim for Southern Coal's alleged breaches of P.O. 193 that followed Dixie Fuel's own breach. It asserts that Dixie Fuel was the first to breach P.O. 193, and that it otherwise repudiated the purchase order.

Southern Coal has not complied with CR 76.12(4)(c)(v), which requires the appellant to state at the beginning of the written argument if the issue was preserved and, if so, in what manner. We are not required to consider portions of the appellant's brief not in conformity with CR 76.12, and may summarily affirm the trial court on the issues contained therein. *Skaggs, supra; Pierson, supra*. "In *Elwell v. Stone*, 799 S.W.2d 46, 48 (Ky. App. 1990), we established the principle that, where an appellant fails to comply with CR 76.12(4)(c)(iv), a reviewing court need only undertake an overall review of the record for manifest injustice. We believe that principle applies as well to the failure to comply with CR 76.12(4)(c)(v)." *J.M. v. Commonwealth, Cabinet for Health and Family*

Services, 325 S.W.3d 901, 902 n. 2 (Ky. App. 2010). As in *J.M. v. Commonwealth*, we have chosen the less severe alternative of reviewing the proceeding below for manifest injustice rather than summarily affirming the decision of the trial court. “Manifest injustice is found if the error seriously affected the fairness, integrity, or public reputation of the proceeding.” *Kingrey v. Commonwealth*, 396 S.W.3d 824, 831 (Ky. 2013) (footnote, citation and internal quotation marks omitted).

Though Dixie Fuel also failed to comply with CR 76.12(4)(c)(v) (see Footnote 3), we considered Dixie Fuel’s arguments because the record amply demonstrated that they were raised and considered below. In contrast, Southern Coal has not directed our attention to any portion of the trial record where the circuit court addressed the claim of *res judicata* or judicial estoppel. We may not consider issues raised for the first time on appeal. *Jones v. Livesay*, 551 S.W.3d 47, 52 (Ky. App. 2018).

We do not conclude that these claims of error seriously affected the fairness, integrity, or public reputation of the proceedings, and thus find no manifest error on these issues. *Kingrey, supra*. Further, we are not persuaded that Dixie Fuel was the first to breach P.O. 193 nor that Dixie Fuel voided its contractual obligations prior to July 24, 2008, as the record amply demonstrates the

converse. Partial summary judgment was properly entered in favor of Dixie Fuel. *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996).

Southern Coal next argues that if this matter is reversed and remanded for further proceedings, Dixie Fuel's principal, Joe Bennett, should be allowed to testify for the purpose of impeaching some of his claims. As we are not reversing and remanding, this argument is moot.

In its third argument on cross-appeal, Southern Coal contends that the trial court erred in its May 16, 2018 order regarding the appropriate measure of damages under the Uniform Commercial Code ("UCC"). It argues that Dixie Fuel substantially impaired or repudiated the contract by its actions in either April or June of 2008. The corpus of its argument is that P.O. 193 was an installment contract under the UCC; therefore, the appropriate measure of damages was the market price for clean coal of a similar quality as of the date when Dixie Fuel recognized that the Purchase Order had been breached and was of no further value. Southern Coal asserts that damages for the breach are to be determined as of the time when the buyer learns of the breach, utilizing the market value of the produce where it would have been tendered under the contract at issue.

Having closely examined the record and the law, we find no error in the Harlan Circuit Court's calculation of damages arising under the partial summary judgment. Southern Coal's argument is grounded on its claim that Dixie

Fuel was aware in April, 2008, that P.O. 193 was breached in its entirety. This claim is refuted by the record, as Dixie Fuel continued to make ongoing efforts after April 2008, to receive coal; it did receive coal from Straight Creek and/or Southern Coal in limited quantities; and, Dixie Fuel tendered payment (albeit to Straight Creek) on July 24, 2008. “[I]t is well-settled that an appellate court may affirm a lower court for any reason supported by the record.” *McCloud v. Commonwealth*, 286 S.W.3d 780, 786 n.19 (Ky. 2009) (citing *Kentucky Farm Bureau Mut. Ins. Co. v. Gray*, 814 S.W.2d 928, 930 (Ky. App. 1991)); *see also Emberton v. GMRI, Inc.*, 299 S.W.3d 565, 576 (Ky. 2009). The Harlan Circuit Court’s calculation of damages was grounded on its finding that P.O. 193 was no longer enforceable as of July 24, 2008, when Dixie Fuel offered payment to Straight Creek rather than Southern Coal. This conclusion is amply supported by the record, and as such we find no error on this issue.

Lastly, Southern Coal argues that the circuit court erred in awarding damages in excess of Dixie Fuel’s Federal Rules of Civil Procedure (“FRCP”) 26(a)(1) compliance. When the 2008 litigation was removed to Federal Court, FRCP 26 required Dixie Fuel to provide a computation of estimated damages. Southern Coal asserts that Dixie Fuel’s damages in state court should have been limited to those it claimed in the federal litigation. The focus of its argument is its claim that the Harlan Circuit Court erred in failing to utilize Dixie Fuel’s estimate

of damages in the federal action based on the market price for coal between March and July 2008.

We characterize the question before us as whether the Harlan Circuit Court erred in declining to rely on FRCP 26 disclosures. We answer that question in the negative. Those disclosures were produced almost a decade earlier in a different jurisdiction. An appellate court reviews the circuit court's rulings on evidentiary matters for abuse of discretion. *Goodyear Tire & Rubber Co. v. Thompson*, 11 S.W.3d 575, 577 (Ky. 2000). "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Id.* at 581 (citing *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999)). Applying this standard, we conclude that the Harlan Circuit Court did not abuse its discretion in relying on testimony and documentary evidence adduced in the 2011 litigation rather than the FRCP 26 disclosures produced almost a decade earlier in federal court. We find no error.

CONCLUSION

For the foregoing reasons, we AFFIRM the judgment and orders of the Harlan Circuit Court.

ALL CONCUR.

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