RENDERED: JULY 17, 2020; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2019-CA-001056-MR

DOUBLE MOUNTAIN MINING, LLC — APPELLANT

v.

APPEAL FROM BELL CIRCUIT COURT
HONORABLE ROBERT V. COSTANZO, JUDGE
ACTION NO. 19-CI-00045

SOLID FUEL, INC., AND
CONTOUR HIGHWALL
MINING, LLC — APPELLEES

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: DIXON, GOODWINE, AND TAYLOR, JUDGES.

TAYLOR, JUDGE: Double Mountain Mining, LLC, (Double Mining) brings this appeal from a June 6, 2019, Summary Judgment of the Bell Circuit Court awarding Solid Fuel, Inc., (Solid Fuel) $141,447.15 and Contour Highwall Mining, LLC, (Contour Mining) $259,222.47 in damages for breach of contract. We reverse and remand.

On February 11, 2019, Solid Fuel and Contour Mining filed a complaint in the Bell Circuit Court against Double Mining. In the complaint, Solid Fuel alleged that Double Mining failed to pay for coal it received from Solid Fuel in accordance with a written agreement entered into with Appolo Fuels, Inc., on July 1, 2012. Presumably, Double Mining was a successor to Appolo Fuels, Inc., under the agreement. Likewise, Contour Mining alleged that Double Mining failed to pay for coal it received from Contour Mining pursuant to a written agreement entered into on March 7, 2017. Solid Fuel and Contour Mining also raised the claims of unjust enrichment, *quantum meruit*, and promissory estoppel.

Double Mining filed an answer on March 8, 2019. Double Mining generally denied the allegations set forth in the complaint and raised affirmative defenses.

On March 22, 2019, Solid Fuel and Contour Mining served upon Double Mining a request for admissions pursuant to Kentucky Rules of Civil Procedure (CR) 36.01.[1] Double Mining failed to timely answer the request; shortly thereafter, on April 25, 2019, Solid Fuel and Contour Mining filed a Motion for Summary Judgment and a memorandum in support thereof. In the motion, Solid Fuel and Contour Mining pointed out that Double Mining failed to answer the

[1] Under Kentucky Rules of Civil Procedure (CR) 36.01(2), an answer or objection to the request for admissions must be served within thirty days, which in this case was due on April 22, 2019.

request for admissions, thus resulting in all requests being conclusively admitted. According to Solid Fuel and Contour Mining, the effect of the admissions was:

> (i) it ratified and assumed the Solid Fuel Contract and that a contract exists between it and Solid Fuel; (ii) Solid Fuel is entitled to payment for its contract mining services as stated in the Complaint; (iii) a contract exists between it and CHM [Contour Highwall Mining, LLC], in its Answer; (iv) CHM is entitled to payment for its contract mining services as stated in the Complaint; (v) it paid Solid Fuel at a rate of $52.00 per "clean" ton of coal mined under the Solid Fuel Contract; (vi) it paid CHM at a rate of $23.50 per "clean" ton of coal mined under the CHM Contract; (vii) it accepted coal mined by the Plaintiffs as stated in the Complaint within the meaning of the Uniform Commercial Code; (viii) it is in breach and default under the Solid Fuel Contract and the CHM Contract; and (ix) it has not paid the Plaintiffs for their contract mining services as stated in the Complaint.

April 25, 2019, Memorandum at 4. As such, Solid Fuel maintained that it was entitled to $141,447.15 in damages, and Contour Mining maintained it was entitled to $259,222.47 in damages for breach of contract.

Thereafter, on April 30, 2019, Double Mining filed a motion for extension of time to file responses to the request for admissions, and Double Mining also filed a response to Solid Fuel and Contour Mining's motion for summary judgment.[2]

[2] Double Mountain Mining, LLC, (Double Mining) also served on April 30, 2019, a response to Solid Fuel, Inc. and Contour Highwall Mining, LLC's discovery requests, including the requests for admissions.

On June 6, 2019, the circuit court rendered summary judgment in favor of Solid Fuel and Contour Mining upon the basis of the admissions. The circuit court denied Double Mining's motion for an extension of time to file responses. Rather, the circuit court viewed the admissions as conclusive and concluded that Solid Fuel and Contour Mining were entitled to judgment based upon such admissions. This appeal follows.

To begin our analysis, we note that summary judgment is proper where there exists no material issues of fact and movant is entitled to judgment as a matter of law. *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky. 1991). All facts and inferences therefrom must be viewed in a light most favorable to the nonmoving party. *Id.*

Double Mining contends that the circuit court abused its discretion by failing to grant an extension of time to respond to the requests for admission. Double Mining asserts that it is uncontroverted that neither Solid Fuel nor Contour Mining would be prejudiced by such extension. Additionally, Double Mining argues that "[j]ustice will be subserved by allowing the retrospective extension of time or amendment or withdrawal of the deemed admissions." Double Mining's Brief at 8. The record on appeal reflects that less than three months had lapsed between the filing of the complaint and the filing of the motion for summary judgment. Double Mining maintains that only very limited discovery had taken

place and that it was not given any opportunity to develop facts crucial to its defense. Double Mining's Brief at 9-11.

Under CR 36.01, a party has thirty days after service of the request for admissions to respond. If a party fails to respond within thirty days, the requests are deemed admitted. CR 36.01(2). And, CR 36.02 states that "[a]ny matter admitted under Rule 36 is conclusively established unless the Court on motion permits withdrawal or amendment of the admission." A court possesses discretion to grant a motion to withdraw deemed admissions or a motion to extend the time period to file a response. *Harris v. Stewart*, 981 S.W.2d 122, 124 (Ky. App. 1998). CR 36.02 provides that a court may allow withdrawal or amendment of admission when (1) "the presentation of the merits of the action will be subserved thereby[,]" and (2) "the party who obtained the admission fails to satisfy the court that withdrawal or amendment will prejudice him in maintaining his action[.]" CR 36.02.

As noted by the circuit court, it was undisputed that neither Solid Fuel nor Contour Mining would be prejudiced by the withdrawal or amendment of the deemed admissions. Thus, our pivotal inquiry is whether the presentation of the merits will be subserved by the withdrawal or amendment of the admissions.

The relevant request for admissions reads as follows:

REQUEST NO. 2:

Please admit that a contract exists between you and Solid Fuel for performance of its Work and Past Work.

REQUEST NO. 3:

Please admit that Solid Fuel has performed the Work, is entitled to payment therefor, but has not been paid by you as set out in the Complaint.

REQUEST NO. 4:

Please admit that CHM has performed the Work, is entitled to payment therefor, but has not been paid by you as set out in the Complaint.

REQUEST NO. 5:

Please admit that you paid Solid Fuel for its Past Work at a rate of $52.00 per "clean" ton of coal mined pursuant to the *Agreement* dated July I, 2012[,] between Solid Fuel and Appolo Fuels, Inc.

. . . .

REQUEST NO. 7:

Please admit that you paid CHM for its Past Work, pursuant to the *Contract Mining Agreement* dated March 7, 2017[,] at the rate of $23.50 per "clean" ton of coal mined.

. . . .

REQUEST NO. 11:

Please admit that you are in breach and or default under the *Contract Mining Agreement* between you and CHM dated March 7, 2017.

. . . .

REQUEST NO. 14:

Please admit that you have not paid Plaintiffs for the Work which forms the basis of their Complaint.

REQUEST NO. 15:

Please admit that you are in breach and or default under the *Agreement* dated July 1, 2012[,] between Solid Fuel and Appolo Fuels, Inc., under which you have assumed the position of Appolo Fuels, Inc.

Response at 11-15.

It is evident that these admissions go to the essence of this case. The existence and terms of a contract between the parties and the performance or breach of any such contract are dispositive of the merits. However, based on the meager record in this case, we cannot determine whether express or implied agreements exist between the parties. *See Vanhook Enterprises, Inc. v. Kay & Kay Contracting, LLC*, 543 S.W.3d 569, 572-74 (Ky. 2018). Also, there is no sworn testimony by affidavit, deposition or verification under oath from Solid Fuel or Contour Mining establishing any allegation in the complaint or amounts owed sufficient to support a legal basis for the judgment. Clearly, genuine issues of material fact exist in this case based on the record before this Court.

Effectively, the merits of this case were decided because of a missed discovery deadline.[3] Under these circumstances, we believe the merits should not be resolved by a sanction, but rather by the court or jury, on the merits, after reasonable discovery.[4]

Upon the whole, we are of the opinion that the presentation of the merits of the action will be subserved by permitting Double Mining to file late responses to the request for admissions, and thus, the circuit court abused its discretion by denying Double Mining's motion for additional time to respond to the request for admissions and rendering a summary judgment for Solid Fuel and Contour Mining.[5] As the summary judgment was based upon deemed admissions only, we reverse and remand.

We view any remaining contentions of error as moot.

For the foregoing reasons, we reverse and remand the Summary Judgment of the Bell Circuit Court for proceedings consistent with this Opinion.

ALL CONCUR.

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[3] The motion for summary judgment was filed three days after the deadline for responding to the request for admissions and 48 days after the answer was filed. No motion to compel was filed pursuant to CR 37.01 nor was there a request for discovery sanctions permitted by CR 37.01(d). As a general rule, summary judgment is not to be used as a sanctioning tool by a trial court. *See Ward v. Housman*, 809 S.W.2d 717, 719 (Ky. App. 1991).

[4] We agree that Double Mining did not have sufficient time for discovery to develop facts central to its defense.

[5] Our ruling does not preclude the entry of summary judgment for either party after sufficient discovery is taken.

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