

Commonwealth of Kentucky
Court of Appeals

NO. 2019-CA-001311-MR

THC KENTUCKY COAL VENTURE I LLC

APPELLANT

v. APPEAL FROM PIKE CIRCUIT COURT
HONORABLE EDDY COLEMAN, JUDGE
ACTION NO. 13-CI-00310

GARY J. RICHARD;
BANNER INDUSTRIES OF N.E., INC.;
AND PIKEVILLE ENERGY GROUP, LLC

APPELLEES

OPINION
VACATING AND REMANDING

** ** * ** * **

BEFORE: ACREE, GOODWINE, AND JONES, JUDGES.

GOODWINE, JUDGE: THC Kentucky Coal Venture I LLC (“THC”) appeals an opinion and order of the Pike Circuit Court granting Gary J. Richard’s (“Richard”); Banner Industries of N.E., Inc.’s (“Banner”); and Pikeville Energy Group, LLC’s (“PEG”) (collectively “Appellees”) motion for judgment on the pleadings. On

appeal, THC argues the assignment of causes of action to THC was valid and not champertous¹ under KRS² 372.060 and, thus, THC has standing to assert the assigned claims. Finding discernible error, we vacate and remand.

On March 25, 2013, THC filed the instant action in Pike Circuit Court against Richard, Banner, PEG, and three other defendants who are not parties to this appeal. The action arose from a 2007 bankruptcy proceeding in which Alma Energy, LLC (“Alma”) was the original aggrieved party. According to the circuit court’s order, “[a] 2007 Settlement Agreement settled several adversarial proceedings between Alma and [THC] or related entities. In 2009, Alma brought another suit against [THC] while in Bankruptcy Court.” Record (“R.”) at 1233. The 2009 suit resulted from THC’s alleged breach of the 2007 Settlement Agreement. THC entered into a 2009 Settlement Agreement to settle Alma’s claims for THC’s alleged breach of the 2007 Settlement Agreement.

Pertinent to this appeal, the 2009 Settlement Agreement assigned Alma’s claims and causes of action against certain defendants to THC in exchange

¹ “[C]hamperty is defined to be a bargain by the terms of which a person having otherwise no interest in the subject matter of an action undertakes to carry on the suit at his own expense or to aid in so doing in consideration of receiving, in the event of success, some part of the land, property or money recovered or deriving some benefit therefrom.” *Fordson Coal Co. v. Garrard*, 277 Ky. 218, 125 S.W.2d 977, 981 (1939) (citing *Wilhoit’s Adm’x v. Richardson*, 193 Ky. 559, 236 S.W. 1025 (1921)).

² Kentucky Revised Statutes.

for \$500,000. Paragraphs 7 and 8 of the 2009 Settlement Agreement provide as follows:

7. [THC] shall have the right to file an Amended Complaint in the Adversary Proceeding on behalf of [itself] and/or the Trustee, to the extent that [THC] desire[s] to assert claims or causes of action which can only be asserted by a Trustee in bankruptcy on behalf of [Alma] and/or Estate, within thirty (30) business days of the entry by the Bankruptcy Court of a “final order” . . . approving this Agreement.

8. Upon entry by the Bankruptcy Court of an Order approving this Settlement Agreement, THC shall inherit in full all of the claims and causes of action belonging to Debtor and/or Estate arising before and after the date of this Agreement of any kind, character, type, nature and description, in law or in equity, if any, against Darrel K. Williams, Nathan J. Williams, Nathan’s Welding, LLC, Blackberry Energy, LLC, Paul Stewart Snyder, James P. Pruitt, Jr., Pruitt and de Bourbon Law Firm, D. Hayden Fisher, Gary Richard, Brett Morehouse, Edward Green, William S. Deatherage, BSD 1, LLC, Jones, Pack & Associates, Harold Meeks, Paycon Energy, LLC, Charles Hill, Charles J. Lisle, HIGHMAF, LLC, Exigent Leasing Limited Partnership, Exigent Ventures, and Pikeville Energy Group, LLC (collectively, the “Putative Defendants”), whether asserted or unasserted, known or unknown, anticipated or unanticipated, suspected or unsuspected, absolute, fixed, conditional or contingent, matured or unmatured, liquidated or unliquidated in amount, due or to become due and whether arising in contract, tort, or otherwise, all such claims and causes of action shall be deemed to have been assigned to THC.

R. at 1190.

Based on this assignment, THC filed two amended complaints. The first amended complaint named THC and Alma's bankruptcy trustee as plaintiffs and named Richard, PEG, and others named in the 2009 Settlement Agreement as defendants. The second amended complaint filed by THC and the bankruptcy trustee added Banner³ as a defendant.

The defendants to the adversary proceeding filed a motion to dismiss the second amended complaint, arguing the action was a non-core, unrelated proceeding, which must be dismissed for lack of subject-matter jurisdiction. The Bankruptcy Court held it did not have subject-matter jurisdiction over the second amended complaint and dismissed it by order entered January 24, 2012.

This brings us back to the underlying circuit court action. After THC filed its complaint in 2013, Appellees filed a motion to dismiss and three motions for summary judgment over the course of several years, which were all denied by the circuit court. On April 25, 2019, Appellees filed a motion for judgment on the pleadings, arguing Alma's assignment of its claims to THC was a champertous and void agreement under KRS 372.060, and, thus, THC lacked standing to pursue the

³ We note Banner was not listed as a putative defendant in the 2009 Settlement Agreement. However, we believe this omission was an oversight as Appellees never raised the omission at any point during the litigation as a defense to THC's claims against Banner.

claims. The circuit court granted Appellees' motion for judgment on the pleadings by order entered May 22, 2019.

THC filed a motion to alter, amend, or vacate under CR⁴ 59.05, which the circuit court denied by order entered July 29, 2019. This appeal followed.

On appeal, THC argues it (1) received a valid and enforceable assignment of Alma's claims and causes of action and (2) is a real party in interest and has standing. The issues before us are purely matters of law, which we review *de novo*. *Auslander Properties, LLC v. Nalley*, 558 S.W.3d 457, 464 (Ky. 2018).

Kentucky law deems champertous agreements void. KRS 372.060 defines such an agreement as follows:

Any contract, agreement or conveyance made in consideration of services to be rendered in the prosecution or defense, or aiding in the prosecution or defense, in or out of court, of any suit, by any person not a party on record in the suit, whereby the thing sued for or in controversy or any part thereof, is to be taken, paid or received for such services or assistance, is void.

In interpreting this statute, we must follow its clear language "and when 'plain and unambiguous' words are employed, we must apply those terms 'without resort to any construction or interpretation.'" *Smith v. Commonwealth*, 41 S.W.3d 458, 460 (Ky. App. 2001) (citation omitted).

⁴ Kentucky Rules of Civil Procedure.

First, KRS 372.060 has broad reach as it covers “[a]ny contract, agreement or conveyance.” The parties do not dispute that the 2009 Settlement Agreement meets this first requirement.

Next, the statute requires that the agreement be made “in consideration of services to be rendered in the prosecution or defense, or aiding in the prosecution or defense, in or out of court, of any suit, by any person not a party on record in the suit.” *Id.* “By the expression ‘a party on record in such suit’ the statute means the real party in interest, one having a personal and true interest in the subject of the litigation, and does not include one whose name may appear as a ‘party on record in the suit’ only in a representative capacity.” *Wilhoit’s Adm’x*, 236 S.W. at 1027. Furthermore, “[w]here the cause of action is assignable, and the entire cause has been assigned, clearly the assignee has become the owner of the cause and he is the real party in interest.” *Louisville & N. R. Co. v. Mack Mfg. Corp.*, 269 S.W.2d 707, 709 (Ky. 1954) (citing *Works v. Winkle*, 314 Ky. 91, 234 S.W.2d 312 (1950); *United States v. Aetna Casualty & Surety Co.*, 338 U.S. 366, 70 S. Ct. 207, 94 L. Ed. 171 (1949)). In Kentucky all claims are assignable except unliquidated tort claims for personal injury and legal malpractice claims. KRS 411.140; *Associated Ins. Service, Inc. v. Garcia*, 307 S.W.3d 58, 62 (Ky. 2010).

Here, the 2009 Settlement Agreement assigned all Alma's causes of action against PEG and Richard to THC.⁵ THC alleged claims against Appellees for breach of fiduciary duty, conversion, aiding and abetting breach of fiduciary duty, and civil conspiracy. These claims were assignable as they are not unliquidated tort claims for personal injury or legal malpractice claims. Thus, we hold Alma's assignment made THC the beneficial owner of the claims and a real party in interest. Because THC was a party of record in the underlying action, we need not address Appellees' "services or assistance" argument. THC did not provide any "services or assistance" to Alma within the meaning of KRS 372.060.

The portion of the 2009 Settlement Agreement conveying to THC Alma's interest in causes of action against Appellees is not champertous and void. THC became a real party in interest upon valid assignment, so THC has standing to pursue its claims against Appellees. *See City of Ashland v. Ashland F.O.P. No. 3, Inc.*, 888 S.W.2d 667, 668 (Ky. 1994). The circuit court erred in finding otherwise.

For the foregoing reasons, we vacate the judgment of the Pike Circuit Court and remand for further proceedings.

ALL CONCUR.

⁵ *See supra* note 3.

BRIEFS FOR APPELLANT:

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