

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-000599-MR

DAUGHERTY PETROLEUM, INC.

APPELLANT

v.

APPEAL FROM WHITLEY CIRCUIT COURT
HONORABLE JERRY WINCHESTER, JUDGE
ACTION NO. 96-CI-00619

ROCCO CAMPAGNA

APPELLEE

OPINION
AFFIRMING
** ** * * * * *

BEFORE: COMBS, DYCHE and MILLER, Judges.

COMBS, JUDGE: This is an appeal from a default judgment entered by the Whitley Circuit Court. The appellant contends that the trial court erred by awarding to the appellee a sum representing the amount of attorney's fees incurred in prosecuting the case. We disagree and affirm the trial court.

On October 21, 1996, Rocco Campagna, the appellee, filed his complaint against Daugherty Petroleum, Inc. ("Daugherty Petroleum"). Campagna alleged that as an investor in a certain business venture, he was entitled to receive dividends stemming from Daugherty Petroleum's production and sale of oil and gas. Campagna averred that Daugherty Petroleum had breached its

contractual and fiduciary duties by failing and refusing to pay over the dividends or to provide him with an accounting.

Daugherty Petroleum did not answer the complaint.

On January 6, 1997, Campagna filed a motion for default judgment. The trial court made an entry of default, establishing Daugherty Petroleum's liability, and scheduled a bench trial for proof of damages. In advance of trial, Campagna subpoenaed documents and deposed a Daugherty Petroleum executive. Daugherty Petroleum did not contest the entry of the default judgment.

On December 4, 1997, a bench trial was conducted by the Whitley Circuit Court. While Daugherty Petroleum did not appear, Campagna, through counsel, presented his proof to the court. On January 26, 1998, the trial court entered a default judgment awarding Campagna his unpaid dividends, interest, and attorney fees in the amount of \$7,003.22. The trial court denied Daugherty Petroleum's subsequent motion for new trial. This appeal followed.

Daugherty Petroleum argues that the trial court erred by awarding to Campagna a sum for his attorney fees. It cites the general rule providing that in the absence of a statute or contract expressly providing therefor, attorneys' fees are not allowable as costs nor recoverable as damages. Fleischmann Distilling Corp. v. Maier Brewing Corp., 386 U.S. 714, 87 S.Ct. 1404, 18 L.Ed.2d 475 (1967); Commonwealth of Kentucky, Dept. of Transp., Bureau of Highways v. Knieriem, Ky., 707 S.W.2d 340 (1986); Holsclaw v. Stephens, Ky., 507 S.W.2d 462 (1973); Dulworth v. Burress Tobacco Warehouse Co. v. Burress, Ky., 369

S.W.2d 129 (1963); Nelson Ins. Agency, Inc. v. Famex, Inc., Ky. App., 706 S.W.2d 838 (1986); White v. Sullivan, Ky. App., 667 S.W.2d 385 (1983).

Campagna defends the award of attorney fees by emphasizing that this case falls within an exception to the general rule established in Bolling v. Ford, 213 Ky. 403, 281 S.W.178 (1926). In Bolling, the plaintiff was allowed to recover special damages in the form of attorneys' fees because he was able to show the existence and breach of a fiduciary relationship and actual fraud. Nevertheless, Daugherty Petroleum argues that since the allegations contained in the complaint are insufficient to support a default judgment based on fraud or breach of fiduciary duty, the award of attorney fees is erroneous.

Circumstances inherent in the entry of default and a default judgment require special consideration. The general rule is that all material allegations in the plaintiff's complaint are to be taken as true. 46 Am.Jur.2d Judgments §307 (1994). Relieved of the obligation to offer proof against a defaulting defendant, however, the plaintiff is simultaneously denied an opportunity (particularly where "notice pleading" is accepted) to flesh-out his allegations more fully. As a result, "much leniency should be shown in construing whether a complaint on which a default judgment is based states a cause of action. . . ." Morgan v. O'Neil, 652 S.W.2d 83 (1983); see also Crowder v. Am. Mutual Liability Ins. Co., Ky., 379 S.W.2d 236 (1964).

Daugherty Petroleum was duly served and was properly before the trial court. That it had sufficient notice of the

nature of the claims asserted against it is confirmed by correspondence advising that there were allegations contained in the complaint which "[n]aturally . . . we do not admit."

Daugherty Petroleum was also specifically aware of the various forms of relief – including the payment of attorney fees – to which Campagna claimed to be entitled. Given the state of the law, especially the existence of case law seeming to support Campagna's position, Daugherty Petroleum was under an obligation to respond by some means in order to protect its interests. Short of answering the complaint, Daugherty Petroleum was certainly at liberty to file a motion to dismiss pursuant to CR 12.02(f). After waiving this opportunity as well as opting not to answer the complaint, Daugherty Petroleum still could have challenged the award of attorney fees at the bench trial held specifically for this purpose. Again, having failed to avail itself of this opportunity, Daugherty essentially has waived participation at every phase of the proceedings below – including the requisite preservation for an appeal to this court.

The default judgment in this case was adequately supported by the allegations contained in the complaint. The award of damages was adequately supported by the law. As a result, the trial court did not err by denying the appellant's post-trial motion.

Accordingly, the judgment of the Whitley Circuit Court is affirmed.

DYCHE, JUDGE, CONCURS.

MILLER, JUDGE, CONCURS IN RESULT.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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