RENDERED DECEMBER 18, 2009; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-000602-MR

LARRY WHITTLE — APPELLANT

v.

APPEAL FROM PULASKI CIRCUIT COURT
HONORABLE JEFFREY T. BURDETTE, JUDGE
ACTION NO. 03-CI-00470

WARD CORRELL — APPELLEE

AND

NO. 2008-CA-001160-MR

LARRY WHITTLE AND PULASKI
COUNTY RE-BUILDERS AUTO
SALES, INC. — APPELLANTS

v.

APPEAL FROM PULASKI CIRCUIT COURT
HONORABLE JEFFREY T. BURDETTE, JUDGE
ACTION NO. 03-CI-00470 AND NO. 06-CI-01262

WARD CORRELL — APPELLEE

OPINION
AFFIRMING IN PART,
REVERSING IN PART, AND REMANDING

** ** ** ** **

BEFORE: NICKELL AND STUMBO, JUDGES; HENRY,[1] SENIOR JUDGE.

HENRY, SENIOR JUDGE: Appellants Larry Whittle and Pulaski County Re-Builders Auto Sales, Inc. appeal from two separate orders of the Pulaski Circuit Court. The first order dismissed Whittle's assault claim against Appellee Ward Correll on the grounds that the claim was time-barred, and the second granted summary judgment in favor of Correll as to all of Appellants' remaining tort and statutory claims on the grounds that those claims were the subject of a prior release agreement entered into by the parties. Upon review, we reverse as to the trial court's order dismissing Whittle's assault claim and affirm as to the trial court's order granting summary judgment to Correll as to all of Appellants' other claims.

This appeal involves two consolidated cases: 03-CI-00470 (the 2003 action) and 06-CI-01262 (the 2006 action), both of which were filed in the Pulaski Circuit Court. The 2003 action was filed on May 8, 2003, and arose from efforts to collect on a number of promissory notes issued to Appellants in February and December 2002. Cumberland Lake Shell, Inc., d/b/a Tradeway Properties – an entity owned by Correll – filed suit to collect on those outstanding loans and to

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[1] Senior Judge Michael L. Henry sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

assert various other contractual and tort claims against Appellants. There was little activity in this case for a number of years.

Instead of asserting counterclaims to this complaint, Whittle and his company, Pulaski County Re-Builders Auto Sales, Inc., filed a separate action in Franklin Circuit Court on June 11, 2003, in which they asserted a number of claims against Cumberland Lake Shell and Correll, among other defendants. The complaint was ultimately dismissed for a lack of venue, and this dismissal was affirmed on appeal.

On November 16, 2006, Appellants filed the 2006 action in Pulaski Circuit Court against Correll and a number of other defendants. The complaint generally alleged that Correll and others had engaged in a conspiracy to drive Appellants out of business and to appropriate that business for themselves. The complaint set forth a number of causes of action, including conspiracy, forgery, identity theft, conversion, breach of fiduciary duty, and assault. As to the assault claim in particular, Whittle alleged that on April 11, 2003, Correll physically struck him for purposes of intimidation and to further the conspiracy alleged in the complaint. The record reflects that the allegations raised in the 2006 action were virtually identical to those originally presented in the complaint filed by Appellants in Franklin County.

On December 8, 2006, Correll and the other defendants filed a motion to dismiss the 2006 action on the grounds that the claims raised therein were actually compulsory counterclaims to the 2003 action because they "[arose] out of

the transaction or occurrence that is the subject matter of the opposing party's claim[.]" Kentucky Rules of Civil Procedure (CR) 13.01. Correll and the other defendants argued that Appellants should not be allowed to raise compulsory counterclaims more than 3½ years after the original complaint was filed.

On January 23, 2007, the parties entered an agreed order consolidating both cases and treating the claims made in Whittle's 2006 complaint as counterclaims to the 2003 action. In accordance with this agreement, the trial court denied the aforementioned motion to dismiss that had been filed by Correll and the other defendants.

On December 14, 2007, Correll filed a motion to dismiss Whittle's assault claim, arguing that the claim was time-barred when filed in 2006 because the alleged assault had taken place on April 11, 2003. KRS 413.140(1)(a) requires an action for personal injury based on a claim of assault to be filed within one year after the cause of action accrued. Thus, Correll argued, because Whittle had filed his assault claim more than one year after the alleged assault had taken place, that claim merited dismissal. Whittle argued in response that because the alleged assault arose out of the same matters alleged in the complaint, it should proceed as a counterclaim. He also contended that the statute of limitations for the claim should be tolled equitably because of the particular facts of the case. The trial court ultimately agreed with Correll's position and dismissed the assault claim on those grounds.

On March 24, 2008, Correll filed a motion for summary judgment as to all of the remaining claims that were pending against him. Correll alleged that summary judgment was appropriate because on January 20, 2003, Whittle signed a notarized release settling all claims between the two parties that had arisen prior to that date. The release was contained in a document that was stylized as a "Covenant of Agreement" and provided: "All parties consent that this agreement will settle all claims between Larry and Carter Whittle and Ward Correll." Whittle filed only an affidavit in response, asserting that the document in question was ambiguous and that it was lacking for want of consideration.

The trial court agreed with Correll's argument and granted his motion for summary judgment in an order entered on May 6, 2008. The court specifically concluded that since the events leading to all of Whittle's remaining claims had occurred prior to January 20, 2003 – the date the "Covenant of Agreement" was signed and notarized – the release in question validly settled all claims. Appellants filed timely appeals from both orders, and those appeals were eventually consolidated. They now stand ready for our review.

Before addressing the substantive aspects of this appeal, we first briefly address Correll's contention that Appellants' brief fails to adequately comply with CR 76.12(4)(c)(v), which provides that an appellant's brief shall contain "at the beginning of the argument a statement with reference to the record showing whether the issue was properly preserved for review and, if so, in what manner." We agree that Appellants' brief does not contain an adequate statement

regarding how (or if) his arguments were preserved for appellate review. However, sanctions for the absence of such are not automatic. *Baker v. Campbell County Bd. of Educ.*, 180 S.W.3d 479, 481-82 (Ky. App. 2005). In this case, the record before us is neither lengthy nor ponderous, and we believe that Appellants' brief sufficiently demonstrates that the issues pertinent to resolution of this appeal were contested before the trial court. Therefore, we decline to impose any sanctions in this case and turn to consider Appellants' arguments. *See id.*; *Cornette v. Holiday Inn Express*, 32 S.W.3d 106, 109 (Ky. App. 2000).

Appellants first argue that the trial court erred by dismissing Whittle's assault claim against Correll. In response, Correll argues that the trial court acted appropriately because the assault claim was clearly time-barred on its face pursuant to KRS 413.140(1)(a), which requires that such a claim be brought within one year. A motion to dismiss, *i.e.*, a motion for judgment on the pleadings "can be granted only if, on the admitted material facts, the movant is clearly entitled to a judgment." *Archer v. Citizens Fidelity Bank & Trust Co.*, 365 S.W.2d 727, 729 (Ky. 1963). "When a party moves for judgment on the pleadings, he admits for the purposes of his motion not only the truth of all of his adversary's well-pleaded allegations of fact and fair inferences therefrom, but also the untruth of all of his own allegations which have been denied by his adversary." *Id.* Consideration of a motion to dismiss on appeal is a matter of law and therefore subject to *de novo* review. *James v. Wilson*, 95 S.W.3d 875, 883-84 (Ky. App. 2002).

Whittle alleged that Correll physically assaulted him on April 11, 2003; however, he did not file the 2006 action until November 16, 2006 – well beyond the one-year statute of limitations. Thus, at first glance, it would seem that the trial court did not err in dismissing the assault claim. The problem with this conclusion, though, is that it fails to account for the trial court's agreed order of January 23, 2007, which expressly provided – by agreement of the parties – that the claims made by Appellants in the 2006 action, including Whittle's assault claim, would be treated as counterclaims to the 2003 action.

Appellants correctly note that in *Armstrong v. Logsdon*, 469 S.W.2d 342 (Ky. 1971), the then-Court of Appeals of Kentucky addressed a situation in which the plaintiffs filed a motion to dismiss counterclaims that had been filed against them on the grounds that they were barred by the statute of limitations. The counterclaims in question arose out of the events that were the basis of the plaintiffs' original suit. The Court held that "in a tort action, if a claim of a defendant arising out of the same occurrence which is the basis of the plaintiff's claim is not barred by limitation when the suit is brought, it may be asserted by a pleading timely served in such suit even though the limitation period has elapsed between the time of the commencement of the suit and the serving of the counterclaim." *Id.* at 344; *see also Hatfield v. Hatfield*, 417 S.W.2d 218, 220 (Ky. 1967) (Citation omitted) ("[T]he plea of limitations will not prevail against the right of the defendant to assert by way of counterclaim transactions connected with and growing out of the matter that was the basis of the suit.").

Although the agreed order is unclear as to whether Appellants' counterclaims were deemed to be compulsory or permissive in nature, the record as a whole reflects that both parties considered them to be compulsory. For example, Correll argued in a prior motion to dismiss, citing to CR 13.01, that Appellants' claims in the 2006 action were actually compulsory counterclaims to the 2003 action because they "[arose] out of the transaction or occurrence that is the subject matter of the opposing party's claim[.]" Accordingly, per the authority listed above, the fact that Whittle's assault counterclaim was asserted subsequent to the running of the statute of limitations does not bar that claim from proceeding. Thus, we must conclude that the trial court erred in dismissing the claim.

Appellants finally argue that the trial court erred by granting Correll's motion for summary judgment as to all of Appellants' remaining claims on the grounds that those claims were the subject of a prior release agreement entered into by the parties. In reviewing a trial court's decision granting summary judgment, this Court must determine "whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law. *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996); CR 56.03. Our review is conducted pursuant to a *de novo* standard since we analyze questions of law rather than those of fact. *Blevins v. Moran*, 12 S.W.3d 698, 700 (Ky. App. 2000). The record is viewed in a light most favorable to the party opposing summary judgment, and all doubts are to be resolved in his favor. *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky. 1991).

In order to resolve the question of whether the trial court erroneously granted summary judgment, we must determine if the court correctly interpreted the "Covenant of Agreement" that purported to resolve all claims between the parties. "An agreement to settle legal claims is essentially a contract subject to the rules of contract interpretation. It is valid if it satisfies the requirements associated with contracts generally, *i.e.*, offer and acceptance, full and complete terms, and consideration." *Cantrell Supply, Inc. v. Liberty Mut. Ins. Co.*, 94 S.W.3d 381, 384 (Ky. App. 2002). "[T]he construction and interpretation of a contract, including questions regarding ambiguity, are questions of law to be decided by the court[.]" *Frear v. P.T.A. Industries, Inc.*, 103 S.W.3d 99, 105 (Ky. 2003) (Citation omitted).

In this instance, we agree with the trial court that summary judgment was appropriate. After reviewing the "Covenant of Agreement," it is apparent that the document meets the aforementioned standards for a contract. It recites the unambiguous terms of the agreement and the consideration given. It also clearly provides that "[a]ll parties consent that this agreement will settle all claims between Larry and Carter Whittle and Ward Correll." Whittle alleged in his affidavit filed in response to the summary judgment motion that the release agreement was ambiguous and meant only to apply to corporate claims; however, the plain language of the release belies this interpretation. "The fact that one party may have intended different results ... is insufficient to construe a contract at variance with its plain and unambiguous terms." *Cantrell Supply*, 94 S.W.3d at

385. Appellants cannot defeat the clear language of the release agreement simply by asserting that it is unclear.

Whittle further alleged in his affidavit that Correll had failed to satisfy the conditions of the "Covenant of Agreement" in terms of consideration; however, the trial court correctly noted that the remedy for such, if true, was to bring an action to compel Correll to fulfill the terms of the contract. Appellants also argue that they should have been allowed to conduct more discovery on the matter, but they had ample opportunity to do so in the years that this case languished in court. They also provided the trial court with no reasonable grounds – via CR 56.06[2] or otherwise – why the case should be continued for more discovery, especially given the unambiguous language of the "Covenant of Agreement." Therefore, the trial court did not err in denying Appellants' request. *See Hartford Ins. Group v. Citizens Fidelity Bank & Trust Co.*, 579 S.W.2d 628, 630 (Ky. App. 1979). In sum, none of the arguments raised by Appellants create a genuine issue of material fact or defeat the plain language of the "Covenant of Agreement" releasing all of their claims that arose prior to January 20, 2003. Thus, the trial court did not err by granting summary judgment to Correll on these grounds.

For the above reasons we reverse the trial court's order dismissing Whittle's assault claim and affirm the trial court's order granting summary

[2] CR 56.06 provides: "Should it appear from the affidavits of a party opposing the motion [for summary judgment] that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just."

judgment as to all of Whittle's remaining counterclaims. This case is remanded to the Pulaski Circuit Court for further proceedings consistent with this opinion.

NICKELL, JUDGE, CONCURS.

STUMBO, JUDGE, DISSENTS IN PART AND FILES SEPARATE OPINION.

STUMBO, JUDGE, DISSENTING IN PART: Respectfully, I must dissent in part. Mr. Whittle argues that Mr. Correll waived his ability to utilize the release because it is an affirmative defense that must be pled in an answer or a motion to dismiss in lieu of an answer. I agree.

Kentucky Civil Rule (CR) 8.03 states in pertinent part:

> In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, <u>release</u>, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense. (Emphasis added).

If such affirmative defenses are not set forth by a pleading, they are waived. *Vogler v. Salem Primitive Baptist Church*, 415 S.W.2d 72, 74 (Ky. 1967). Here, the issue of the release was not affirmatively pled in an answer to Mr. Whittle's counterclaims. Mr. Correll argues that Mr. Whittle did not preserve the CR 8.03 argument and we should therefore not consider it.

I disagree with Mr. Correll. First, Mr. Whittle did preserve the CR 8.03 argument. On April 18, 2008, the motion for summary judgment was argued

before the court during motion hour. At that time, Mr. Whittle's counsel brought to the court's attention that Mr. Correll had not plead release as an affirmative defense. Further, the purpose of CR 8.03 is to give the opposing party notice of the affirmative defenses and have a chance to respond. *See Smith v. Sushka*, 117 F.3d 965, 969 (6th Cir. 1997) (Addressing Federal Rule of Civil Procedure 8(c) which is comparable to our CR 8.03).

Assuming that this action was perfected in January of 2007, when the agreed order consolidating the cases was entered, Mr. Correll waited over a year before he revealed his defense of release. In fact, a mediation, pretrial conference, and trial date had all been scheduled before this affirmative defense was first brought to the court and Mr. Whittle's attention. I believe that the affirmative defense of release was not affirmatively pled or brought within a reasonable time from the initiation of this action and is therefore waived.

BRIEFS FOR APPELLANTS:	BRIEF FOR APPELLEE:
Richard Clay Danville, Kentucky	Henry E. Kinser Mickey T. Webster Lexington, Kentucky