

Commonwealth of Kentucky
Court of Appeals

NO. 2009-CA-000899-MR

DAFFERE LESLIE

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE IRV MAZE, JUDGE
ACTION NO. 08-CI-008921

LCA-VISION, INC. d/b/a
LASIKPLUS VISION CENTER;
AND DR. JASON GREENBERG

APPELLEES

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: ACREE, COMBS, AND WINE, JUDGES.

COMBS, JUDGE: Daffere Leslie appeals from an order of the Jefferson Circuit Court that granted summary judgment to the appellees, Dr. Jason Greenberg and LCA-Vision, Inc., d/b/a Lasikplus Vision Center (“LCA-Vision”) in an action for

medical negligence. The trial court concluded that Leslie's claims were time-barred. We affirm.

The parties agree that Leslie was last treated by Dr. Greenberg at Lasikplus Vision Center in Louisville on February 20, 2007. She then consulted with an attorney. The day before the statute of limitations was to run on her claims, the parties executed a written document styled: Tolling Agreement. In the agreement, the parties acknowledged that Leslie's claims were subject to a period of limitations that "would expire before all of the causes of action, claims, and damages could be fully investigated." Referring to the provisions of Kentucky Revised Statute(s) (KRS) 413.265,¹ the parties declared in paragraph D of the agreement that the limitations period for the filing of Leslie's civil action would be extended until midnight on May 20, 2008.

On May 15, 2008, the parties executed an amendment to the tolling agreement. The amendment was to become effective as of May 20, 2008; it reflected the parties' agreement that the period of limitations would be tolled until midnight on August 20, 2008. The other terms of the agreement were to remain in full force and effect.

On August 27, 2008, Leslie filed a civil action against Dr. Jason Greenberg and LCA-Vision in the Jefferson Circuit Court. Both Greenberg and LCA-Vision moved to dismiss on grounds that Leslie's claims were time-barred.

¹ KRS 413.265 provides that written agreements entered into in good faith and at arm's length to extend limitations period for the filing of civil actions shall be valid and enforceable according to their terms.

In response, Leslie argued that the defendants had expressly waived their limitations defense. She relied on paragraph B of the tolling agreement labeled “Limitations Defense.” The paragraph provides that Greenberg and LCA-Vision “shall not assert, plead, or rely upon any statute of limitations, period of limitations or the equitable doctrine of laches in the defense of . . . any civil action commenced *after* expiration of the period provided in Section D of this Tolling Agreement. . . .” (Emphasis added).

In reply, both Dr. Greenberg and LCA-Vision denied that they had specifically agreed to waive the limitations defense. They argued that Leslie’s written request in May 2008 for a second extension of the limitations period for another ninety-day period directly contradicts her position that the parties’ intended in the initial agreement to extinguish the limitations period altogether. They contended that language suggesting otherwise was nothing more than a scrivener’s error. The trial court agreed, and on April 21, 2009, it granted the motions of Dr. Greenberg and LCA-Vision for summary judgment. This appeal followed.

On appeal, Leslie argues that the trial court erred by concluding that the provisions of the parties’ tolling agreement were ambiguous. She contends that the terms of the agreement plainly demonstrated the intention of Dr. Greenberg and LCA-Vision to relinquish their limitations defense.

In order to be entitled to summary judgment, a movant must show that there is no genuine issue as to any material fact and that the matter can be resolved

as a matter of law. Kentucky Rule(s) of Civil Procedure (CR) 56.03. The construction of a contract, including the determination as to whether there are any ambiguities, is a question of law for the courts to decide and is subject to *de novo* review. *First Commonwealth Bank of Prestonsburg v. West*, 55 S.W.3d 829 (Ky.App. 2000); *Cantrell Supply, Inc. v. Liberty Mut. Ins. Co.*, 94 S.W.3d 381 (Ky.App. 2002).

An unambiguous written contract must be strictly enforced according to the plain meaning of its express terms and without resort to extrinsic evidence. *Allen v. Lawyers Mut. Ins. Co. of Kentucky*, 216 S.W.3d 657 (Ky.App. 2007). Even if the contracting parties may have intended a different result, a contract cannot be interpreted contrary to the plain meaning of its terms. *Abney v. Nationwide Mut. Ins. Co.*, 215 S.W.3d 699 (Ky. 2006). A contract is not ambiguous if a reasonable person would find its terms susceptible to only one meaning. *Cantrell Supply, Inc.*, 94 S.W.3d at 385. However, if the provisions in controversy are reasonably susceptible to different or inconsistent – yet reasonable – interpretations, the contract is deemed to be ambiguous. *Id.* The existence of ambiguity is determined by examining the entire contract; its individual terms must be considered in light of the obligation as a whole. Ambiguities in the agreement may be resolved by recourse to extrinsic evidence. *Stubblefield v. Farmer*, 165 S.W.2d 556 (Ky. 1942). For instance, in order to ascertain the intention of the parties, the court may consider the conditions under which the contract was written. *Whitlow v. Whitlow*, 267 S.W.2d 739 (Ky.1954).

In the case before us, the trial court concluded that the intention of the parties was not readily apparent from the face of the instrument and that it could not be enforced according to its terms. It observed as follows:

The dispute in this case, however, surrounds the interpretation of the tolling agreement. The pertinent language that gives rise to our present difficulty is found in section B and D of both tolling agreements [the original agreement and the amendment of May 15, 2008]. That language states as follows:

B. Limitations Defense

Greenberg and LCA shall not assert, plead, or rely upon any statute of limitations, period of limitations or the equitable doctrine of laches in the defense of any Subject Claim asserted in any civil action commenced **after** expiration of the period provided in Section D of this Tolling Agreement, unless the limitation period asserted, pled, or relied upon expired prior to the effective date of the Tolling Agreement.

D. Tolling Period

The parties hereto agree that the applicable period of limitations for the commencement of litigation with respect to any Subject Claim shall be tolled from the effective date until midnight on May 20, 2008. (Later amended to August 20, 2008).

The time limitations addressed in these paragraphs are mutually exclusive. When read separately, the trial court concluded that each paragraph is reasonable.

However, when read together, the provisions render the agreement essentially nonsensical. We agree with the court's observations and conclude that it did not err by determining that the parties' agreement was ambiguous.

The trial court resolved the ambiguity by considering the conditions under which the agreement was written and by examining the parties' contemporaneous correspondence. An action to recover damages arising from a claim for medical malpractice must be commenced within one year of accrual. KRS 413.140. Leslie's action against the defendants accrued on February 20, 2007. With the *period of limitations* about to expire, the parties executed the tolling agreement to extend the period for approximately ninety days. Then, in May 2008, with the *tolling agreement* again about to expire, Leslie's counsel initiated a series of informal electronic mail transmissions (e-mails).

On May 13, 2008, Leslie's counsel made the following request of defense counsel by e-mail:

Can we get another tolling agreement?

I have been absolutely swamped, but I am bringing in a new legal assistant (sic) and a new associate/co-counsel guy starting next week. My life is about to get a lot easier.

After they get on board, I will have the ability to tender a proper demand, etc. . .

Defense counsel promptly responded as follows:

I will have to check. How long do you want?

Leslie's counsel answered:

30 days, 60 days? whatever. . . .lol

Within a few days, defense counsel sent this response by e-mail:

I have attached an Amended Tolling Agreement signed by Dr. Greenberg and a representative of LCA. We extended the time to file by 90 days (to August 20, 2008).

On July 29, 2008, Leslie's counsel sent defense counsel an extensive proposal for settlement.² Several days later, her counsel followed up the settlement proposal with an e-mail advising defense counsel as follows:

It has been some time since we tendered our settlement offer. In the unlikely event LCA is still interested in trying to resolve this pre-suit, let me know ASAP. Unless I hear otherwise, *I will file suit next week.* (Emphasis added).

On August 8, 2008, defense counsel rejected Leslie's offer of settlement in writing. Three weeks later, Leslie filed a complaint against Dr. Greenberg and LCA-Vision.

Since the underlying material facts were undisputed, construction of the ambiguous contract was properly resolved by the trial court. The court concluded that this correspondence indicated that the parties specifically intended to postpone the commencement of an action against Dr. Greenberg and LCA-Vision by extending the period of limitations. Equally plainly, the correspondence conveyed that the parties *did not intend* that the initial tolling agreement would extinguish the would-be defendants' limitations defense, indicating that a lawsuit would be filed in timely fashion with respect to the termination of the tolling agreement.

The trial court concluded that under the provisions of the parties' agreement, Leslie was required to file her complaint by August 20, 2008.

² The details of the proposal have been redacted and are not part of the record on appeal.

However, the action was not filed until August 27, 2008. The trial court held that Leslie's action was then time-barred.

We cannot conclude that the Jefferson Circuit Court erred in determining that Dr. Greenberg and LCA-Vision were entitled to a judgment as a matter of law. The court determined that the terms of the tolling agreement were ambiguous. With reference to undisputed extrinsic evidence, the trial court properly resolved the ambiguity and interpreted the terms of the agreement. The court rejected Leslie's contention that Greenberg and LCA-Vision had expressly waived their limitations defense. The record supports these conclusions, and we find no error.

For the foregoing reasons, we affirm the opinion and orders of the Jefferson Circuit Court granting the motions for summary judgment.

ALL CONCUR.

BRIEF FOR APPELLANT:

Jasper D. Ward
Louisville, Kentucky

BRIEF FOR APPELLEE LCA-
VISION, INC. d/b/a LASIKPLUS
VISION CENTER:

Bradley A. Case
Jennifer Orr Mitchell
Emily Wang Zahn
Louisville, Kentucky