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NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2009-CA-002403-MR

CHUCK GILBERT

APPELLANT

APPEAL FROM JEFFERSON CIRCUIT COURT
v. HONORABLE CHARLES L. CUNNINGHAM, JR., JUDGE
ACTION NO. 07-CI-004055

BOWLING GREEN MARINE, INC.; AND
THOMAS EDDIE PAYNE

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CAPERTON, COMBS, AND KELLER, JUDGES.

KELLER, JUDGE: Chuck Gilbert (Gilbert) appeals from the trial court's order modifying an agreed judgment. On appeal, Gilbert argues that the court lacked jurisdiction to modify the judgment and that Bowling Green Marine, Inc. and Thomas Eddie Payne (collectively referred to as Payne) had "unclean hands" and were not entitled to any equitable relief. Payne argues that the court's order was

correct because the judgment was unconscionably punitive and his hands were "clean." Having reviewed the record, the parties' briefs, and the arguments of counsel, we affirm.

FACTS

The facts are not in dispute. On June 16, 2004, Payne entered into a five-year lease with Gilbert for a piece of commercial real estate in Bowling Green, Kentucky. The lease called for Payne to pay rent in the amount of \$53,100.00 the first year and approximately 3% more per year in each successive year. In addition to the rental payments, the lease required Payne to pay real estate taxes, utilities, and for liability and casualty insurance. The lease provided that Payne would use the premises for boat and ATV sales and service and that Payne could renew the lease for an additional five years.

In August 2006, Payne defaulted on the lease and vacated the premises, leaving behind some personal property. Thereafter, Gilbert filed a complaint seeking payment for past due and future amounts due under the lease. Gilbert also filed a motion for summary judgment. In his motion, Gilbert noted that he had re-let the premises temporarily to the Tennessee Valley Authority (TVA). Taking the amount paid by the TVA from the amount Payne owed in past due rent, late fees, taxes, court costs, and attorney fees, Gilbert calculated damages of \$49,193.65. The court granted Gilbert's motion and awarded him the amount he sought.

Following entry of summary judgment, which did not address Gilbert's claims to future rent under the lease, the parties entered into an "agreed judgment." That document provided as follows:

1. The [sic] CHUCK GILBERT is granted judgment against the Defendants BOWLING GREEN MARINE, INC. and THOMAS EDDIE PAYNE the compromise amount of \$100,000.000[sic] with interest at the legal rate of 12.00% per annum from the date of entry of the judgment until paid in full with the gross taxable costs of this action. This compromise includes all future claims subject of the lease between the parties and with the entry of this judgment that lease is terminated, settled and superseded by the terms of this judgment.

2. That in consideration and exchange for this agreed judgment terminating this litigation and the Plaintiff, CHUCK GILBERT releasing all garnishments, executions and judgment liens [Defendants will pay any filing fees associated with the releases and will file and serve the releases] currently resulting from enforcement of the December 14, 2007 judgment for accrued [sic] rents and charges due under the lease, the defendants, BOWLING GREEN MARINE, INC. and THOMAS EDDIE PAYNE have agreed to pay a compromise amount in equal monthly installments on or before the due date until the compromised is paid in full.. [sic] This amount due in paragraph 1 of this judgment may be satisfied by compromise if and only if it is paid by the Defendants, as follows [otherwise the full amount is due and execution and enforcement of the full amount due in paragraph 1 may occur]:

A. The Defendants, agree to pay the sum of \$50,000.00 at 12% compounded annually in equal monthly payments for a period of two years on or before January 11, 2008 and by the 11th of the month thereafter for a total of 24 months. That [sic] parties agree that this means that the Defendants agree to pay \$2,353.67 on or before January 11, 2008 and

thereafter payments of \$2,353.67 per month toward payment of the judgment with payments being due on or BEFORE THE 11th of EACH AND EVERY MONTH until paid in full which will mean a total paid at the end of 24 months of \$56,488.08.

. . . .

C. In the event the Defendants fails [sic] to deliver payment of the amount due on any given date, Defendants shall be in default. In the event of default, the entire balance under paragraph 1 above less credit or [sic] any payments made shall become due and payable in full and shall bear interest until paid in full.

D. That in the event of default, it is agreed and understood that the Plaintiff shall have the right to immediate execution, including garnishments, for all sums detailed above including the balance, interest, and court costs.

. . . .

The above terms and conditions are ordered and adjudged and made part of this judgment. This judgment supersedes and merges the previous judgment entered in this Court on December 14, 2007. The above terms and conditions are ordered and adjudged and made part of this judgment

In essence, the agreed judgment called for Payne to make twenty-four monthly payments totaling \$50,000.00 plus interest in exchange for Gilbert's waiver of his claim to entitlement to a total of \$100,000.00 plus interest. Thus, if Payne failed to timely make the monthly payments, he would owe an additional \$50,000.00. The

judge signed the agreed judgment, and it was entered by the clerk on January 22, 2008.

On October 22, 2009, Gilbert filed an affidavit for writ of garnishment stating that Payne owed \$69,871.19 on the January 2008 agreed judgment. The amount listed in that affidavit represented the total amount of the agreed judgment (\$100,000.00) plus interest and minus the monthly payments made by Payne. The court entered an order of garnishment and Payne filed a motion to quash the garnishment and to amend the judgment pursuant to Kentucky Rule of Civil Procedure (CR) 60.02. In his motion, Payne noted that he had made twenty-one of the twenty-four monthly payments under the agreed judgment and that Gilbert had garnished one monthly payment. Therefore, only two payments were due and owing at the time Payne filed his motion. Furthermore, Payne noted that Gilbert had successfully re-let the premises and that permitting him to recover the entire \$100,000.00 from Payne would amount to a double recovery.

In his response to Payne's motion, Gilbert stated that the original lease called for payments totaling \$291,437.27 and that the property had been significantly altered to meet Payne's needs. Gilbert noted that, when Payne vacated the premises and stopped making payments under the lease, the parties negotiated a mutually beneficial compromise settlement, which they reduced to an agreed judgment. Payne did not timely make all of the payments called for in the judgment, and Gilbert argued that he should not be "rewarded" for his failure to do

so. Gilbert did not address whether he had re-let the premises after the expiration of the TVA's temporary lease.

Following a hearing,¹ the court entered an order granting Payne's motion. In doing so, the court characterized the additional \$50,000.00 payment as a penalty. The court noted that the parties can agree to a "seemingly excessive penalty for delay if 'time is of the essence.'" The court noted that the agreed judgment did not recite that time was of the essence. Furthermore, the court noted that Gilbert had previously accepted late payments with no complaint. Based on the preceding, the court found that the \$50,000.00 penalty was inequitable, quashed the garnishment, and ordered Payne to make a \$1,400.00 late penalty payment. It is from this order that Gilbert appeals.

STANDARD OF REVIEW

Gilbert makes three arguments, which have differing standards of review. Therefore, we set forth the appropriate standard below as we address each of Gilbert's arguments.

ANALYSIS

1. Whether the Court Had Jurisdiction Under CR 60.02

Gilbert argues that the court did not have jurisdiction to address Payne's motion under CR 60.02. Whether the trial court has acted outside its jurisdiction is

¹ We note that the parties refer to the hearing in their briefs; however, there is no copy of that hearing in the record. Furthermore, we can find no designation of record indicating what the circuit clerk was to provide to us on appeal. There is a copy of the clerk's certification of record that indicates that the only record to the Court of Appeals was the written record. Having noted the preceding, we do not believe that a transcript or audio or video recording of the hearing would be instructive; therefore, we have not requested one.

a question of law. Therefore, the standard of review is *de novo*. *Grange Mutual Insurance Co. v. Trude*, 151 S.W.3d 803, 810 (Ky. 2004).

CR 60.02 provides that:

On motion a court may, upon such terms as are just, relieve a party or his legal representative from its final judgment, order, or proceeding upon the following grounds: (a) mistake, inadvertence, surprise or excusable neglect; (b) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59.02; (c) perjury or falsified evidence; (d) fraud affecting the proceedings, other than perjury or falsified evidence; (e) the judgment is void, or has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (f) any other reason of an extraordinary nature justifying relief. The motion shall be made within a reasonable time, and on grounds (a), (b), and (c) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this rule does not affect the finality of a judgment or suspend its operation.

Having reviewed the record, we note that Payne alleged entitlement to relief under CR 60.02(e) and/or (f). Gilbert argues that Payne is not entitled to relief under either provision. As to section (e), Gilbert argues that the judgment, although it provides for timed payments and has a contingency, is simply a "judgment for money damages" and has no prospective application. In support of this argument, Gilbert cites to *Alliant Hospitals, Inc. v. Benham*, 105 S.W.3d 473 (Ky. App. 2003). In *Benham*, the parents of a disabled child sued the hospital claiming that the child's disability resulted from negligence during labor and delivery. A jury awarded more than three million dollars in damages, two million

of which was for future medical expenses. After entry of the judgment and while post-trial motions were pending, the child died. The hospital then moved to set aside that portion of the judgment related to future medical expenses, arguing under CR 60.02(e) that it was no longer equitable to enforce the future medical expenses portion of the judgment. This Court held that CR 60.02(e) did not apply because "a simple judgment for money damages, even one not yet enforced, does not have 'prospective application.'" *Id.* at 478. In doing so, this Court adopted the federal court interpretation of its own similar rule as applying primarily to injunctive relief or similar judgments that contemplate "the supervision of changing conduct or conditions [that] are . . . provisional and tentative." *Id.* (Footnote omitted.)

We believe that *Benham* is distinguishable for two reasons. First, the damage award for future medical expenses in *Benham* was not contingent on future developments but was fixed. The damages herein were not fixed but contingent on Payne making timely payments, thus rendering the judgment provisional and tentative. Second, as noted by this Court in *Benham*, the former Court of Appeals held in *Cawood v. Cawood*, 329 S.W.2d 569, 571 (Ky. 1959), that judgments that have not been "satisfied in full" but "remain in whole or in part unenforced . . . are capable of having 'prospective application'" The judgment herein had not been satisfied in full but remained partially unenforced. Therefore, we hold that the circuit court had jurisdiction under CR 60.02(e) to review the agreed judgment.

Although our above holding renders Gilbert's argument regarding CR 60.02(f) moot, we briefly address that argument. In *Benham*, this Court held that CR 60.02(f) only applies when another provision of CR 60.02 does not. As we understand it, Gilbert argues that Payne's motion was based on newly discovered evidence; *i.e.* that Gilbert had continued to lease the property during the intervening years, thus placing Payne's motion within CR 60.02(b). Because a CR 60.02(b) motion must be brought within a year, Gilbert argues that Payne's motion was not timely brought and the circuit court therefore had no jurisdiction.

This argument fails for three reasons. First, the parties agree that Gilbert was able to re-lease the property after Payne defaulted. However, as set forth by Gilbert in his motion for summary judgment, the lease was only for a period of six months. Therefore, the lease would have expired at or near the time the parties entered into the agreed judgment. Any lease entered into after that time would not have been in existence at the time of the judgment and, therefore, could not be newly discovered. *Benham*, 105 S.W.3d at 478-79. Second, there is no evidence of record regarding the existence of any lease after the TVA lease was scheduled to expire. Evidence that does not exist cannot be newly discovered. Third, the circuit court did not make a finding regarding the existence of any subsequent lease and it did not base its order on any such lease. Therefore, we are not persuaded by Gilbert's argument that CR 60.02(b) would apply to this case and act to negate a claim for relief under CR 60.02(f).

For the foregoing reasons, we hold that the circuit court did have jurisdiction under CR 60.02 to rule on Payne's motion.

2. Whether the Circuit Court's Order Was Whimsical

Gilbert argues that the circuit court acted "upon a whim" when it undertook to "re-write" the agreed judgment. We disagree.

“The standard of review of an appeal involving a CR 60.02 motion is whether the trial court abused its discretion.” *White v. Commonwealth*, 32 S.W.3d 83, 86 (Ky. App. 2000); *see also Kurtsinger v. Board of Trustees of Kentucky Retirement Systems*, 90 S.W.3d 454, 456 (Ky. 2002). To amount to an abuse of discretion, the trial court’s decision must be “arbitrary, unreasonable, unfair, or unsupported by sound legal principals.” *Clark v. Commonwealth*, 223 S.W.3d 90, 95 (Ky. 2007) (*citing Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999)). Absent a “flagrant miscarriage of justice,” the trial court will be affirmed. *Gross v. Commonwealth*, 648 S.W.2d 853, 858 (Ky. 1983).

The circuit court determined that: the agreed judgment was not enforceable because the additional \$50,000.00 payment was a penalty; such a large penalty for a late payment might have been supportable if the parties had specified that time was of the essence, which they did not; and Gilbert had, in the past excused a number of late payments. Initially, we note that a court's finding that a payment amounted to a penalty is generally made with regard to a contractual term rather than a judgment. However, we believe the court's finding and analysis herein are

appropriate because the agreed judgment, which provides contingent payment schemes, is contractual in nature.

Kentucky follows the Restatement (Second) of Contracts with regard to determining the difference between acceptable liquidated damages and penalties.

Damages for breach by either party may be liquidated in the agreement but only at an amount that is reasonable in the light of the anticipated or actual loss caused by the breach and the difficulties of proof of loss. A term fixing unreasonably large liquidated damages is unenforceable on grounds of public policy as a penalty.

“Anticipated loss” refers to the time of the making of the contract. “Actual loss” refers to the circumstances upon occasion of the breach. These are two prongs, which apply alternately. If the award of liquidated damages exceeds any reasonable limitation by either one or the other, to such extent it is unenforceable.

Mattingly Bridge Co., Inc. v. Holloway & Son Const. Co., 694 S.W.2d 702, 704-05 (Ky. 1985) (*citing* Restatement (Second) of Contracts § 356(1) (1981)).

Gilbert may have had an argument that the additional \$50,000.00 payment was reasonable at the time the agreed judgment was entered since neither party knew what the actual damages would be. However, at the time of the breach, two months shy of discharge of the debt, the actual damages could easily have been determined. Gilbert did not file any evidence of record to support any claim that the additional \$50,000.00 payment represented his actual losses or any portion of his actual losses. In light of that absence of evidence, it was not unreasonable for the circuit court to conclude that the additional \$50,000.00 payment represented a penalty and that such a large penalty was not enforceable as unconscionable.

We recognize Gilbert's argument that the parties should be permitted to make whatever deal they want no matter how bad that deal may be. However, as noted by the circuit court, there are limits to that maxim. When a contract does not provide that "time is of the essence," the court should not impose such a restriction on the parties. *Farmers Bank and Trust Co. of Georgetown, Kentucky v. Willmott Hardwoods, Inc.*, 171 S.W.3d 4, 8 (Ky. 2005). Gilbert's argument for relief is that Payne failed to timely make a payment. Absent a provision that "time is of the essence," Gilbert had some obligation to show that a delay in payment resulted in \$50,000.00 in damages. Gilbert did not do so and, we suspect, he could not have done so since he had waived the late payment provision a number of times in the past.

Based on the preceding, we hold that the circuit court did not abuse its discretion when it re-formed the agreed judgment.

3. Un-Clean Hands Doctrine

Gilbert argues that Payne was not entitled to equitable relief under the "unclean hands" doctrine because he did not timely make all of the payments called for in the agreed judgment. "The unclean hands doctrine is a rule of equity that forecloses relief to a party who has engaged in fraudulent, illegal, or unconscionable conduct but does not operate so as to 'repel all sinners from courts of equity.'" *Suter v. Mazyck*, 226 S.W.3d 837, 843 (Ky. App. 2007) (*citing Dunscombe v. Amfot Oil Co.*, 201 Ky. 290, 256 S.W. 427, 429 (1923)). Payne's failure to make timely payments amounted to a breach of contract. It did not

amount to fraudulent, illegal, or unconscionable conduct; therefore, the unclean hands doctrine has no application to this case.

CONCLUSION

For the reasons set forth above, we affirm the circuit court.

ALL CONCUR.

BRIEFS AND ORAL ARGUMENT
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BRIEF AND ORAL ARGUMENT
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