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Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-000197-MR

JOHN R. MORGAN, M.D. — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE THOMAS L. CLARK, JUDGE
ACTION NO. 07-CI-00361

APPALACHIAN REGIONAL
HEALTHCARE, INC. — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE AND WINE, JUDGES; LAMBERT,[1] SENIOR JUDGE.

[1] Senior Judge Joseph E. Lambert 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.

WINE, JUDGE: John R. Morgan appeals from a judgment and order of the Fayette Circuit Court finding that he had breached a contract with Appalachian Regional Healthcare, Inc. ("ARH") and awarding ARH damages in the amount of $163,511.06 plus interest, attorneys' fees in the amount of $24,183.50, and costs. This action originated when ARH filed a complaint for contract damages arising out of Morgan's failure to pay ARH amounts due and owing under two separate loan agreements entered into while Morgan was in medical school. After our review, we affirm.

Facts and Procedural History

On October 30, 1996, Morgan entered into a tuition repayment program with ARH while he was in his third year of medical school. Under the terms of that loan agreement, ARH agreed to lend Morgan $48,000.00 to assist him with the payment of his tuition and book fees during his final two years of medical school. As consideration for the loan, Morgan agreed to either accept a full-time position with ARH or to practice medicine independently in an area chosen by ARH for a period of at least four years following his graduation from medical school. Morgan also agreed that if he failed to complete his education or to fulfill his employment obligation to ARH, he would repay the loan amount plus interest. He

further agreed to pay an additional penalty of 25% of the loan amount if he completed his education but did not fulfill his employment obligation with ARH.

On April 6, 1998, Morgan and ARH agreed to modify the loan agreement by way of an addendum. Pursuant to the terms of this addendum, ARH agreed to pay Morgan an additional $40,000.00 in order to assist him with his expenses during his residency. In exchange, Morgan agreed to work for ARH or as an independent physician in an area chosen by ARH for an additional period of three years, resulting in a total seven-year employment commitment to ARH. The addendum contained the same penalties for failure to comply as the original agreement.

Consequently, under the terms of both the original loan agreement and the addendum, Morgan was indebted to ARH in the amount of $88,000.00 and was obligated to either begin working at the behest of ARH for seven years immediately following completion of his residency or to immediately begin repayment of his loan. After graduating from medical school in October 2002, Morgan did neither. Morgan and ARH finally entered into an employment agreement in November 2003, and Morgan was assigned to work at ARH's June Buchanan Clinic and Hazard Hospital. However, Morgan worked for ARH for only seven months, which triggered his loan repayment obligations and penalties under the loan agreement and addendum.

After informal efforts to collect on the loan failed, ARH filed a breach-of-contract action against Morgan on January 18, 2007, in the Fayette Circuit Court. ARH sought to recover the sum of $163,511.06[2] plus interest, attorneys' fees, and costs. Morgan subsequently filed a counterclaim seeking his own damages for breach of contract on the grounds that the employment agreement between the parties required ARH to submit the matter to arbitration before filing suit against him. This counterclaim was dismissed by summary judgment after the circuit court found that the loan agreement and addendum did not require arbitration.

Morgan subsequently acknowledged in a deposition that ARH had not violated any of the terms of the loan agreement or addendum. Moreover, Morgan fully acknowledged that he had failed to complete his seven-year employment commitment to ARH, which triggered his repayment obligations under the loan agreement and addendum, and that he had no viable defense to ARH's breach-of-contract claim. In light of these facts, ARH moved for summary judgment.

On December 16, 2009, the circuit court granted ARH's motion for summary judgment after finding that the record was undisputed that Morgan had breached his loan agreements with ARH. However, the court's order only addressed the issue of liability and did not actually resolve the question of damages

[2] This amount represented the outstanding balance owed by Morgan pursuant to the terms of the loan agreement and addendum. It included $80,142.85 in principal, $61,368.21 in interest, and a 25% penalty of $22,000.00. Because of Morgan's seven months of work for ARH, $7,857.15 of the loan amount had been forgiven.

even though the owed amount was essentially undisputed. Despite this fact, the court designated its order as "final and appealable."[3]

On December 22, 2009, counsel for ARH sent a letter to the Fayette Circuit Clerk enclosing an affidavit of legal fees and a proposed amended judgment and order for the trial judge's signature. This judgment and order incorporated the court's earlier summary judgment order and also set forth that ARH was to be awarded "$163,511.06, plus interest at the contract rate from October 31, 2006, until paid; and Plaintiff's attorney's fees in the amount of $24,183.50 and costs incurred herein." No formal motion to amend was filed. The trial judge signed the judgment and order on December 23, 2009, and it was entered on December 29, 2009. This appeal followed.

Analysis

I

On appeal, Morgan first argues that the trial court acted outside of its jurisdiction by amending the summary judgment order of December 16, 2009, thirteen days after it was entered, *i.e.*, after it became "final." Therefore, he

[3] The order's ultimate conclusion and disposition provides as follows: "There are no remaining issues of material fact in this case. Defendant has admitted his breach of the loan agreements between himself and Plaintiff. No evidence has been presented to support Defendant's claims that Plaintiff has waived its rights under the loan agreements or should be estopped from enforcing those rights. Thus, it is hereby ORDERED that Plaintiff's Motion for Summary Judgment is GRANTED. There being no just cause for delay, this is a final and appealable order."

contends, the amended judgment and order is invalid. As noted above, the order of December 16, 2009, addressed only the liability portion of ARH's summary judgment motion; it did not resolve the issue of damages. The amended judgment and order was directed toward this apparent oversight. Morgan argues that the order of December 16, 2009, was not actually amended until it was filed by the circuit court on December 29, 2009. Because this allegedly happened after the ten-day window for amending a final judgment, Morgan asserts, the amended judgment and order is invalid because the trial court had lost jurisdiction over the matter by that point. Morgan's argument ultimately fails, but for reasons not addressed by the parties.

It is true that a judgment generally becomes final ten days after its entry by the trial court. *See* Kentucky Rules of Civil Procedure ("CR") 52.02, 59.04, 59.05. Once a judgment is final, a trial court loses jurisdiction over the matter in question. *Mullins v. Hess*, 131 S.W.3d 769, 774 (Ky. App. 2004). CR 54.01 defines a final judgment as follows:

> A judgment is a written order of a court adjudicating a claim or claims in an action or proceeding. A final or appealable judgment is a final order adjudicating *all the rights of all the parties in an action or proceeding*, or a judgment made final under Rule 54.02. Where the context requires, the term "judgment" as used in these rules shall be construed "final judgment" or "final order."

(Emphasis added). However, "if an order entered in a cause does not put an end to the action, but leaves something further to be done before the rights of the parties are determined, it is interlocutory and not final." *Hubbard v. Hubbard*, 303 Ky. 411, 412, 197 S.W.2d 923, 924 (1946); *see also Hill v. Kentucky Lottery Corp.*, 327 S.W.3d 412, 418 (Ky. 2010); *Harris v. Camp Taylor Fire Prot. Dist.*, 303 S.W.3d 479, 482 (Ky. App. 2009). This point is important since it is dispositive of the issue before us.

In making their arguments, neither party speaks to the fact that the summary judgment order of December 16, 2009, was never a "final" order because it failed to resolve the question of damages. In *Chittum v. Abell*, 485 S.W.2d 231 (Ky. 1972), the then-Court of Appeals explicitly held that when a judgment addressed liability – but not damages – it was not a "final" judgment because it did not fully adjudge the damage claim. *Id.* at 237; *see also Tax Ease Lein Investments 1, LLC v. Brown*, 340 S.W.3d 99, 102 (Ky. App. 2011). As the Court said in *Chittum*, "a determination that adjudicates only part of a claim cannot be made final." *Chittum*, 485 S.W.2d at 237. Consequently, the order of December 16, 2009, was nonfinal and interlocutory and, therefore, subject to amendment at any time prior to "final" adjudication. *See Tax Ease*, 340 S.W.3d at 103; *Bank of Danville v. Farmers Nat. Bank of Danville*, 602 S.W.2d 160, 164 (Ky. 1980); CR 54.02(1).

Federal courts share this same view. "[P]artial summary judgment[s] limited to the issue of petitioner's liability . . . are by their terms interlocutory, *see* Fed. Rule Civ. Proc. [Federal Rules of Civil Procedure] 56(c), and where assessment of damages or awarding of other relief remains to be resolved have never been considered to be 'final[.]' " *Liberty Mut. Ins. Co. v. Wetzel*, 424 U.S. 737, 744, 96 S. Ct. 1202, 1206, 47 L. Ed. 2d 435 (1976).

We further note that the finality language included in the order of December 16, 2009, failed to transform it into a final judgment. "[M]erely adding finality recitations from CR 54.02 will have no effect on an order that 'did not finally fix the rights of any of the parties' as to even one claim." *Tax Ease*, 340 S.W.3d at 101, quoting *Hale v. Deaton*, 528 S.W.2d 719, 722 (Ky. 1975); *see also Liberty Mut.*, 424 U.S. at 742, 96 S. Ct. at 1206 (rejecting the view that the district court's use of the finality recital set forth in Fed. Rule Civ. Proc. 54(b) in entering judgment on the issue of liability made the judgment final and appealable); *Chittum*, 485 S.W.2d at 237.

By definition, then, the order of December 16, 2009, granting summary judgment to ARH on the issue of liability, was not a final judgment because it did not adjudicate the entirety of ARH's claim. Moreover, it was not made final under CR 54.02 even though it included the finality recitations of that rule. "Because the

order failed to fully resolve the rights of the parties as to any claim, 'leaving nothing else to be resolved between them' as to at least one claim, it could not be made final." *Tax Ease*, 340 S.W.3d at 102, quoting *Diaz v. Barker*, 254 S.W.3d 835, 838 (Ky. App. 2008).

In light of this precedent, we hold that no jurisdictional questions were raised by the trial court's amendment of the order of December 16, 2009, to include an award of damages and attorneys' fees. Under CR 52.02, "a court has unlimited power to amend and alter its own judgments" before they become final. *Henry Clay Min. Co., Inc. v. V&V Min. Co., Inc.*, 742 S.W.2d 566, 567 (Ky. 1988). Thus, Morgan's first argument is rejected.

II

Morgan next contends that he was not afforded an opportunity to respond to the amended judgment and order tendered by ARH because he did not receive a copy of that document until after the ten-day period for challenging a final judgment pursuant to CR 59.05 had expired. Morgan blames this failure on the fact that the certificate of service on the amended judgment and order (which was prepared by counsel for ARH) omitted the name of his counsel, Jeremy Morgan, and instead included the name and address of their brother, Jeffrey Morgan.[4] As a

[4] Both Jeremy and Jeffrey Morgan entered their appearances in this action as Morgan's attorneys.

result, Morgan argues, he did not receive notice of the amended judgment and order in a timely fashion and, consequently, was unable to file a response pursuant to CR 59.05.

Morgan seems to suggest, without citation, that he is entitled to reversal as a result of this alleged failure to receive notice. Assuming he is correct regarding the late notice, he has failed to state what new facts he would have provided to the trial court to create a genuine issue of material fact precluding summary judgment on the question of damages. "A party cannot invoke [CR 59.05] to raise arguments and introduce evidence that could and should have been presented during the proceedings before entry of the judgment." *Hopkins v. Ratliff*, 957 S.W.2d 300, 301 (Ky. App. 1997), quoting 7 Kurt A. Philipps, Jr., *Kentucky Practice*, CR 59.05, cmt. 6 (5th ed. 1995). Any objection to ARH's calculation of damages clearly could have and should have been presented to the circuit court before entry of the amended judgment and order.

Moreover, the validity of a judgment or order is not affected by the failure of the party adversely affected to receive notice of entry of the judgment or order. *Commonwealth, Dept. of Highways v. Hatcher*, 386 S.W.2d 262, 263 (Ky. 1965); CR 77.04(4). "It is the responsibility of an interested party to keep a check on the progress of his case." *Hatcher*, 386 S.W.2d at 263. With this said, we note that

despite his alleged failure to receive notice, Morgan was able to file a timely notice of appeal and, as a result, to challenge the amended judgment and order.[5] We further note that CR 60.02 afforded Morgan an avenue to seek relief from the amended judgment and order on the ground asserted. *See Kurtsinger v. Bd. of Trustees of Kentucky Retirement Systems*, 90 S.W.3d 454, 456-57 (Ky. 2002). Morgan failed to do so even though he became aware of the amended judgment and order in time to file a timely notice of appeal.

We also observe from the record that the certificate of service on the amended judgment and order indicates that it was mailed to an address used by Morgan's attorneys of record during the course of this litigation. The record does not contain any notice of a substitution of counsel or a notice of change of address advising the circuit court and ARH that counsel wished to be served at another address. Under these circumstances, we fail to find any sort of reversible prejudice. Therefore, this argument is also rejected.

III

Morgan finally argues that the trial court erred in dismissing his counterclaim for breach of contract, which was predicated on an assertion that ARH was required to pursue alternative dispute resolution, *i.e.*, arbitration, before

[5] Notably, Morgan has not challenged the actual amounts awarded in the amended judgment and order or his liability under the loan agreements. Instead, he raises only the jurisdictional argument rejected above and an issue concerning arbitration, which will be addressed below.

filing legal action. It is undisputed that neither the original loan agreement between the parties nor the subsequent addendum contains a mandatory arbitration provision. Thus, those documents provide no support for Morgan's position.

Morgan instead contends that the parties' employment agreement, which was executed on November 19, 2003, requires that all disputes arising out of *any* of the agreements between him and ARH be submitted to arbitration prior to litigation. However, the arbitration provision of the employment agreement plainly provides that it is limited in applicability to disputes arising solely from that agreement:

> k) **Alternative Dispute Resolution.** Any dispute, controversy or claim, whether in law or in equity, arising out of or related to *this* agreement, or the breach or alleged breach of *this* agreement, or the terms or subject matter of *this* agreement, which the parties cannot resolve between themselves, shall be submitted to mandatory, binding mediation[.]

(Emphasis added).

We further observe that the loan agreement and addendum are not expressly incorporated into the employment agreement. Indeed, the only reference made in the employment agreement to the loan agreement and addendum is a mere acknowledgment that Morgan had "prior service and repayment commitments as set forth in an agreement entered into with ARH on October 30, 1996, and in an

agreement addendum entered into on April 6, 1998." The employment agreement also states that Morgan "further agrees that both shall remain in full force and effect, notwithstanding anything in this agreement which may appear to the contrary." Thus, the loan agreement and addendum remained in effect according to their original terms.

After reviewing the employment agreement, it is clear that it relates solely to the terms of Morgan's employment as a physician with ARH and that it does not incorporate the loan agreement and addendum so as to create a mandatory arbitration requirement as to those documents. The record reflects that ARH sought damages with respect to a breach of their loan agreements with Morgan – not their employment contract. Therefore, Morgan's final argument is also rejected.

Conclusion

For the foregoing reasons, the decision of the Fayette Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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