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Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-000653-MR
&
NO. 2011-CA-000648-MR

VALARIE M. ROBERTS, INDIVIDUALLY
AND AS EXECUTRIX OF THE ESTATE
OF WILLIAM A. ROBERTS, DECEASED;
AND THE ESTATE OF WILLIAM A.
ROBERTS — APPELLANTS

v.

APPEALS FROM DAVIESS CIRCUIT COURT
HONORABLE JAY A. WETHINGTON, JUDGE
ACTION NO. 09-CI-00374

JOHN K. ROBERTS AND
ROBERTS MOTOR SALES, INC. — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CAPERTON, LAMBERT, AND NICKELL, JUDGES.

LAMBERT, JUDGE: This is an appeal from the Daviess Circuit Court's entry of summary judgment in favor of the Appellees, John K. Roberts and Roberts Motor

Sales, Inc. and the court's subsequent denial of a motion for relief under Kentucky Rules of Civil Procedure (CR) 60.02. After careful review of the record, we affirm the rulings of the Daviess Circuit Court.

William A. Roberts (Tony) and John Roberts were brothers and equal owners of Roberts Motor Sales, Inc. On February 28, 1980, Roberts Motor Sales and Tony executed and consummated a contract controlling stock ownership. The relevant portions of the contract (hereinafter the 1980 contract) are as follows:

> (3) In the event of the death of the Stockholder or in the event of his total and permanent disability or upon the termination of his employment for any cause, whether by reason of resignation or discharge or retirement, the Corporation shall purchase and Stockholder shall sell to Corporation all of the capital stock owned by the Stockholder in the Corporation at the happening of any of the foregoing events.
>
> (4)(a) The purchase price to be paid by Corporation to Stockholder for his stock in the Corporation in the event of his death…shall be an amount equal to the book value of the Stockholder's stock as of the close of the corporate fiscal year immediately preceding any such events. "Book value" of the Stockholder's stock shall be determined by using the dollar values set out in the Corporation's Federal Income Tax Return for the corporate fiscal year immediately preceding the date of the Stockholder's death… "Book value" shall be determined by using standard accounting principles and concepts, and shall be computed by certified accountants or accountants who prepared Corporate income tax return for the year prior to Shareholder's departure from the corporation. **There shall be deducted, however, from the amount payable to the Shareholder by the Corporation, any sums of money, if any, which the Stockholder may owe the Corporation.**

> (b) The purchase price to be paid by Corporation to Stockholder for his stock in the Corporation in the event of termination of his employment, if termination is by reason of voluntary resignation…shall be an amount equal to the price paid by the Stockholder to the Corporation for such stock, with no interest or appreciation added, less, however, any sums of money, if any, which the Stockholder may then owe to the Corporation.

(Emphasis added).

On May 3, 2004, Roberts Motor Sales purchased a key employee life insurance policy in the principal amount of $1,000,000.00 for the life of Tony Roberts. Roberts Motor Sales was the owner and beneficiary of the policy.

Tony committed suicide on January 31, 2009. The terms of the above contract require a valuation of the corporation's business by determining "book value" from the Roberts Motor Sales relevant federal tax return (herein 2008, the year preceding Tony's death). Thereafter, the determined value is multiplied by the percentage of the deceased or terminated shareholder's ownership at the time of the respective event. All debt obligation of the deceased or terminated shareholder to the Corporation is then subtracted from the established percentage value in order to determine the amount owed, if any, to the former shareholder for the interest of his respective percentage ownership.

For a period of time beginning in 1994 until his death, Tony took advance draws or disbursements as loans against his ownership in Roberts Motor Sales, either individually, or on behalf of his separate corporations or entities, Transvehicle Leasing or Roberts Leasing, in the combined amount of $586,038.42.

Portions of these advances were used for the benefit or to pay the debts of Appellants. Accounting statements for the indebtedness are within the record, and the record reflects that this amount does not include three stock purchase promissory notes totaling $188,857.60, which predated the 1994 accounting system utilized to compute the above total. Thus, at the time of his death, Tony was indebted to Roberts Motor Sales in the approximate amount of $774,896.02.[1]

Pursuant to the 1980 contract, the "book value" of Roberts Motor Sales as established by the CPA in the corporate 2008 federal income tax return was $1,038.966.00. Assuming Tony actually owned fifty percent of the corporate stock at his death, simple calculations reveal that the gross value of Tony's corporate ownership was $519,483.00[2] (one-half of the $1,038,966.00), which is substantially less than the $774.896.02 he owed the corporation at the time of his death. In fact, these facts would indicate that the Estate of William A. Roberts owed Roberts Motor Sales $255,320.52.[3]

This case began on March 11, 2009, when the Plaintiffs, Valarie M. Roberts, Individually and as Executrix of the Estate of William A. Roberts, Deceased (the Appellants), filed a verified complaint for an *ex parte* restraining order following Tony's death. Initially, the Appellants sought discovery on

[1] The record and briefs indicate this value to be $774.808.52, however the total of Tony's debt, according to what is stated above, is $774.896.02. Thus, we will utilize that calculation for purposes of this opinion.

[2] In the record and briefs, this calculation totals $529,488.00, but one half of $1,038,966.00 is $529,483.00.

[3] This reflects the amount the trial court awarded in its judgment and differs slightly from the calculations made by this Court. No other numbers utilized in arriving at this calculation were provided in the trial court's order, and we will not disturb that judgment on appeal.

whether there was a "Buy/Sell Agreement" between John and Tony Roberts and on the value of Roberts Motor Sales. The Appellants also sought to protect the above-mentioned key-employee life insurance proceeds payable to Roberts Motor Sales. Because of the possible irreparable harm, the trial court granted the requested *ex parte* relief, and the funds were ordered restrictively held until the parties could be heard on the Appellants' motion.

The Appellees filed motions to dissolve the restraining order and dismiss the Appellants' complaint and, on the date of the hearing, the parties agreed to dissolve the court-ordered restraints upon terms holding insurance proceeds in a restrictive account and also agreed to communicate and use the remaining proceeds for operating Roberts Motor Sales and to evaluate the business.

After denial by the Appellees of the existence of a buy/sell agreement between John and Tony and some communication and discovery, the Appellants filed an amended complaint seeking a permanent injunction/restraining order and/or corporate dissolution, requesting, *inter alia*, that Roberts Motor Sales be administratively dissolved pursuant to Kentucky Revised Statutes (KRS) 271B.14-300. On April 27, 2009, the Appellants took the sworn testimony of John Roberts; Kathy Howard, the company comptroller; and Pat McNulty, an expert witness. The Appellees filed an answer and counterclaim on June 15, 2009, alleging they were entitled to $255,320.52 for amounts owed by Tony to Roberts Motor Sales.

Thereafter, the Appellees filed a motion for summary judgment in August 2009, with accompanying corporate records and affidavits of corporate employees and of John Roberts, disputing the existence of the alleged buy/sell agreement between the shareholders. The motion was supported by the 1980 contract. The Appellants opposed the motion for summary judgment, arguing that it was premature because the 1980 contract had only been recently discovered, and reasonable discovery had not been allowed on the validity of the document, the method of share valuation, or the amount of Tony's debt. However, the trial court granted summary judgment in favor of the Appellees on October 21, 2009.

The Appellants then filed a motion to set aside the order of summary judgment, arguing that no reasonable discovery had been allowed. On December 1, 2009, the trial court entered an order setting aside the order of summary judgment to allow the Appellants to inspect Roberts Motor Sales' corporate and financial records but did not allow any other form of discovery to occur. The additional discovery was to be completed by January 1, 2010.

Thereafter, the Appellees presented notice to the Appellants' counsel that the designated records and documents would be made available for inspection at the Appellees' corporate office on Friday, December 11, 2009, at 9:00 a.m. The Appellants' attorney utilized approximately two hours reviewing the records and then left the office to handle another matter. Appellees and their counsel waited until approximately 4:00 p.m. for Appellants' counsel to return, at which time they received a call indicating that Appellants' counsel would not be returning. The

Appellees copied and presented all of the Appellants' marked documents plus all accounting records that were available but not reviewed by Appellants' attorney on the designated date. The Appellants never requested further inspection of documents or corporate records subsequent to December 11, 2009.

After the additional opportunity for discovery, the Appellees renewed their motion for summary judgment on the Appellants' claims and their counterclaim. In opposition, the Appellants argued that the amended bylaws of the corporation adopted by the directors in 1996 and approved by the shareholders that same date rendered summary judgment improper. In support of this argument, the Appellants argued that the doctrine of novation rendered the new 1996 agreement valid and the 1980 contract invalid.

The trial court granted summary judgment by order entered March 10, 2010, holding that the Appellants had failed to establish that the doctrine of novation applied, specifically finding that Appellants did not meet their burden of proof of presenting a clear showing of intent by all parties that the 1996 bylaws were substituted for the 1980 contract. *Kirby v. Scroggins*, 246 S.W.2d 453 (Ky. 1952). The trial court held that there was no showing that the restricted shares of the decedent, Tony, were cancelled by the corporation, re-issued without restriction, or redeemed by the corporation. Instead, the trial court held that there were ample references in the corporate records about the restrictions on the decedent's shares, how these shares were funded and pledged to the corporation,

and then specifically the decedent's agreement with the corporation concerning those restrictions, which are referenced on the face of the shares themselves.

The trial court held that it would be impossible for the Appellants to prevail under any allegations made, in light of the facts contained in the pleadings, and that there were no material issues of fact. It dismissed the Appellants' claims and entered judgment in favor of the Appellees on their counterclaim in the amount of $255,320.52.

The Appellants filed their notice of appeal to this Court on April 2, 2010, and that case is styled 2010-CA-000653-MR. Subsequent to filing a notice of appeal and briefing the issue for this Court, on December 16, 2010, the Appellants filed a motion under CR 60.02(d), alleging perjury, false testimony, fraud, or extraordinary circumstances under CR 60.02(f). A hearing was held in February 2011, and the trial court denied the motion on March 7, 2011. The trial court held that the Appellants did not present any testimony or affidavits from previous witnesses that were intentionally false or misleading to the court and that there was no evidence of fraud or extraordinary circumstances to justify relief under CR 60.02(d) or (f). The Appellants filed a notice of appeal from that judgment on April 4, 2011, and that appeal is styled 2011-CA-000648-MR. The two appeals have been consolidated for review by this Court.

> The proper standard of review in appeals from summary judgments has frequently been recited and is concisely set forth in *Lewis v. B & R Corporation*, 56 S.W.3d 432, 436 (Ky. App. 2001) as follows:

> The standard of review on appeal when a trial court grants a motion for summary judgment is "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." The trial court must view the evidence in the light most favorable to the nonmoving party, and summary judgment should be granted only if it appears impossible that the nonmoving party will be able to produce evidence at trial warranting a judgment in his favor. The moving party bears the initial burden of showing that no genuine issue of material fact exists, and then the burden shifts to the party opposing summary judgment to present "at least some affirmative evidence showing that there is a genuine issue of material fact for trial." (citations omitted).

Suter v. Mazyck, 226 S.W.3d 837, 841 (Ky. App. 2007). There, a panel of this Court went on to caution against the premature entry of summary judgment.

> A summary judgment is a final order and, therefore, should not be entered "as a form of penalty for failure of the plaintiff to prove his case quickly enough." *Conley v. Hall*, 395 S.W.2d 575, 580 (Ky. 1965). It is proper only after the party opposing the motion has been given ample opportunity to complete discovery and then fails to offer controverting evidence. *Pendleton Bros. Vending, Inc. v. Com. Finance & Administration Cabinet*, 758 S.W.2d 24, 29 (Ky. 1988) (citing *Hartford Insurance Group v. Citizens Fidelity Bank & Trust Co.*, 579 S.W.2d 628 (Ky. App. 1979)).
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> In *Roberson v. Lampton*, 516 S.W.2d 838 (Ky. 1974), the court cautioned against the use of summary judgment as a means of luring a party into a "premature showdown" by forcing the opposing party to try his case on the merits. Citing *Conley, supra*, the court stated:

> We think that it should be borne in mind that the motion for summary judgment is not a trick device for the premature termination of litigation. Its function is to secure a final judgment as a matter of law when there is no genuine issue of a material fact. . . . The burden is on the movant to establish the nonexistence of a material fact issue. He either establishes this beyond question or he does not. If any doubt exists, the motion should be denied. *Id*. at 840.
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> The holding in *Roberson* has been given a narrow construction in that the movant does not have to show that the party opposing a motion for summary judgment actually completed discovery but only that the opposing party had the opportunity to do so. *Hartford Ins. Group*, *supra*. Absent a sufficient opportunity to develop the facts, however, summary judgment cannot be used as a tool to terminate the litigation.

Id. at 841-42.

The Appellants' main argument on appeal is that summary judgment was entered before they had an adequate opportunity to verify and validate the Appellees' claims regarding the validity of the 1980 contract, the assets of the parties, and Tony's corporate debts.

A review of the record indicates that this case began on March 11, 2009, when the Appellants filed their original complaint. Summary judgment was granted in October 2009, approximately seven months after initiation of the complaint, but was later set aside to allow an additional month of discovery. In their brief, the Appellants argue that their efforts "to conduct discovery depositions into the subject matter of this lawsuit and the 1980 document were denied by

Appellees and by the Trial Court." However, the record indicates that the Appellants did in fact conduct discovery in the form of depositions and inspections of the corporate records for Roberts Motor Sales. In particular, the Appellants deposed Kathy Howard, the comptroller and bookkeeper for Roberts Motor Sales, John Roberts, and Pat McNulty. Furthermore, in the additional month of discovery, the Appellees made the financial documents and records they utilized to determine Tony's indebtedness to Roberts Motor Sales available for inspection by the Appellants. Rather than utilizing the opportunity to inspect and copy the records, the Appellants' attorney left after two hours and never returned, without letting anyone know whether he would be back to conduct additional discovery.

Given the Appellant's opportunity to conduct discovery and their failure to adequately utilize such discovery methods, it does not appear that summary judgment was premature in this case. The Appellees need not show that the Appellants completed discovery, merely that they had the opportunity to do so. *Hartford Ins. Group*, *supra*. Furthermore, despite the adequate opportunity to conduct discovery, the Appellants did not present any evidence that created a material issue of fact precluding the Appellees from being entitled to judgment as a matter of law.

The Appellants also appeal the trial court's denial of their CR 60.02(d) and (f) motion. It is well-settled under Kentucky law that CR 60.02 addresses itself to the sound discretion of the trial court. *White v. Commonwealth*, 32 S.W.3d 83, 86 (Ky. App. 2000). "Given the high standard for granting a CR

60.02 motion, a trial court's ruling on the motion receives great deference on appeal…." *Barnett v. Commonwealth*, 979 S.W.2d 98, 102 (Ky. 1998) (internal citations omitted). Therefore, on the appeal of a denial of a CR 60.02 motion, the trial court's ruling will not be overturned except for abuse of discretion. *Id*.; *Lawson v. Lawson*, 290 S.W.3d 691, 693-94 (Ky. App. 2009). "The test for abuse of discretion is whether the trial court's decision is arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Lawson, supra*, at 694 (internal citation omitted).

In support of their argument that the trial court improperly denied them CR 60.02 relief, the Appellants argue that discovery in another unrelated case showed a variety of potential discrepancies between Affidavits submitted by the Appellees and the financial documents underlying the claimed debts that resulted in the March 10, 2010, judgment. Specifically, the Appellants note that Kathy Howard and John Roberts were deposed on September 28, 2010, in an unrelated action in Daviess Civil Action No. 10-CI-00642. The Appellants claim that in those depositions, documents were produced and discussed for the first time indicating that a certain Roberts Motor Sales booking account, Account 293, was for shareholder loans to officers, including Tony Roberts. The Appellants citation in support of this statement cites to the original deposition of Kathy Howard, taken in 2009. After careful review, we simply cannot find the transcripts of the subsequent depositions taken in Civil Action No. 10-CI-00642 anywhere in the appellate record. They are not attached to the original CR 60.02 motion, nor are

they located in the record to which the Appellants refer. Without any record to review, we cannot say that the trial court's denial of the Appellant's motion was an abuse of discretion. Furthermore, we agree with the Appellees that while the Appellants claim several times that the depositions and affidavits of Kathy Howard and John Roberts were fraudulent, or that they committed perjury, there is nothing cited by the Appellants in the record indicating that any such testimony or affidavits were false or fraudulent.

Based on the foregoing, we affirm the entry of summary judgment by order dated March 10, 2010, and the denial of CR 60.02 relief entered on March 7, 2011.

NICKELL, JUDGE, CONCURS.

CAPERTON, JUDGE, DISSENTS.

BRIEF FOR APPELLANTS:

Evan Taylor
Owensboro, Kentucky

BRIEF FOR APPELLEES:

Septtimous Taylor
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