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Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-001128-MR

THE NEW LEXINGTON CLINIC, P.S.C.

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE KIMBERLY N. BUNNELL, JUDGE
ACTION NO. 09-CI-06390

GREGORY COOPER, M.D.; JAMES WINKLEY,
M.D.; BAPTIST PHYSICIANS LEXINGTON, INC.;
AND BAPTIST HEALTHCARE SYSTEM, INC.

APPELLEES

AND

NO. 2010-CA-001129-MR

THE NEW LEXINGTON CLINIC, P.L.C.

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE KIMBERLY N. BUNNELL, JUDGE
ACTION NO. 08-CI-01004

MICHAEL MCKINNEY, M.D.;
BAPTIST PHYSICIANS LEXINGTON, INC.;
AND BAPTIST HEALTHCARE SYSTEM, INC.

APPELLEES

AND

NO. 2010-CA-001182-MR

MICHAEL MCKINNEY, MD.;
BAPTIST PHYSICIANS LEXINGTON, INC.;
AND BAPTIST HEALTHCARE SYSTEM, INC. CROSS-APPELLANTS

v. CROSS-APPEAL FROM FAYETTE CIRCUIT COURT
 HONORABLE KIMBERLY N. BUNNELL, JUDGE
 ACTION NO. 08-CI-01004

THE NEW LEXINGTON CLINIC, P.S.C. CROSS-APPELLEE

AND NO. 2010-CA-001183-MR

GREGORY COOPER, M.D.; JAMES WINKLEY, M.D.;
BAPTIST PHYSICIANS LEXINGTON;
AND BAPTIST HEALTHCARE SYSTEM, INC. CROSS-APPELLANTS

v. CROSS-APPEAL FROM FAYETTE CIRCUIT COURT
 HONORABLE KIMBERLY N. BUNNELL, JUDGE
 ACTION NO. 09-CI-06390

THE NEW LEXINGTON CLINIC, P.S.C. CROSS-APPELLEE

OPINION
REVERSING AND REMANDING

BEFORE: CLAYTON, STUMBO AND THOMPSON, JUDGES.

STUMBO, JUDGE: The New Lexington Clinic (“NLC”) appeals from an order and judgment of the Fayette Circuit Court sustaining the summary judgment motion of Dr. Michael McKinney, et al. NLC alleged that Dr. McKinney and other physicians, while serving as board members of NLC, breached their fiduciary duties to the clinic by executing a plan to take their employment and the employment of support staff to Baptist Healthcare System, Inc. and Baptist Physicians Lexington, Inc. (collectively referred to hereinafter as the “Baptist defendants”). NLC also alleged that the Baptist defendants tortiously interfered with NLC’s employment contracts by facilitating and promoting the physicians’ relocation from NLC to the Baptist defendants. In sustaining the summary judgment motion of the multiple defendants, the Fayette Circuit Court determined that NLC improperly prosecuted a defunct common-law claim rather than a statutory claim as set out in Kentucky Revised Statutes (KRS) 271B.8-300. NLC now argues that the circuit court erred in failing to conclude that the common-law breach of fiduciary duty claim is both viable and applicable to the facts herein. We conclude that though the circuit court correctly determined that KRS 271B.8-300 supplanted the common-law claim of breach of fiduciary duty, NLC properly asserted a claim of breach of fiduciary duty in its complaint, it should be availed of additional discovery, and summary judgment was premature. Accordingly, we reverse the summary judgment and remand the matter for further proceedings.

The facts are not in dispute. Dr. Michael McKinney is an internal medicine and pediatric physician who began his employment with NLC on January 6, 1997. NLC is located in Fayette County, Kentucky. In 2003, Dr. McKinney began serving on NLC's board of directors. While serving on the board, Dr. McKinney entered into negotiations with Dr. David Bensema, who was a physician recruiter employed by the Baptist defendants. The negotiations centered on Dr. Bensema's efforts to induce Dr. McKinney and other NLC physicians and staff to end their association with NLC and become employed at a new medical facility to be operated by the Baptist defendants in Jessamine County, Kentucky. The new facility was to be located about 1.5 miles from NLC.

On June 15, 2007, and while serving on NLC's board of directors, Dr. McKinney executed a letter of intent in which he agreed to become employed by the Baptist defendants. The letter provided in relevant part that Dr. McKinney and the Baptist defendants would establish a new primary care clinic in Jessamine County, Kentucky. The following month, Drs. Sibel Gullo, David Gammon and Phillip Hoffman, all NLC employees, also executed letters of intent agreeing in principle to move their association from NLC to the Baptist defendants. On November 21, 2007, the Baptist defendants approved a business plan authorizing the hiring of the four physicians.

While continuing to serve as an NLC director, Dr. McKinney recruited and negotiated for the employment of other NLC employees. In

February, 2008, he gave notice that he was resigning from the NLC board, and he tendered a separate notice to NLC that he intended to resign as an employee.

On February 29, 2008, NLC filed an action against Dr. McKinney alleging that Dr. McKinney, while serving as an NLC director, breached his fiduciary duty to NLC by engaging in negotiations with the Baptist defendants to move the employment of several NLC physicians and staff to the Baptist defendants. By way of amended complaints filed on October 7, 2008, and in November, 2009, NLC alleged that the Baptist defendants tortiously interfered with the employment relationship between NLC and its physicians and staff.

On December 1, 2009, NLC filed a separate action against Drs. James Winkley and Gregory Cooper setting out a similar breach of fiduciary duty claim. Dr. Winkley was the vice president of NLC and a board member in 2007 and Dr. Cooper was a board member. It was alleged that Drs. Winkley and Cooper breached their duties to NLC in the same manner allegedly done by Dr. McKinney, to wit, by engaging in negotiations with Dr. Bensema and the Baptist defendants to the detriment of NLC while serving as NLC board members.

The actions progressed in Fayette Circuit Court until April 22, 2010, when the court sustained the defendants' joint motion for summary judgment. The court found as a matter of law that while such cases as *Steelvest* and *Aero Drapery* (citations below) "may continue to apply in some instances, KRS 271B.8-300 (as opposed to the common law) sets the standard for the present case in which money

damages are sought” based on a claim of breach of fiduciary duty.¹ The court opined that the defendants were entitled to a judgment as a matter of law because the only claims that NLC pursued against the physicians were common-law claims which were no longer viable as a matter of law, having been supplanted by statute.

The court went on to find that the defendants were also entitled to summary judgment because NLC produced insufficient evidence to conclude that the alleged fiduciary breach was the legal cause of the damages claimed by NLC. The court determined that NLC did not articulate or identify any harm to it flowing from or attributable to the alleged fiduciary breach.

As to the Baptist defendants, NLC asserted a claim of improper aiding and abetting, as well as a claim of tortious interference with contract. On the claim of aiding and abetting, the court found that NLC conceded that the claim was contingent on the breach of fiduciary claim which had been dismissed. On the tortious interference claim, the court rejected NLC’s contention that the Restatement (Second) of Torts allowed for the prosecution of such a claim even where the underlying contract had not been breached. This appeal followed.

NLC now argues that the Fayette Circuit Court erred in granting summary judgment in favor of the physicians and the Baptist defendants. Its primary claim of error is that the trial court improperly concluded that KRS 271B.8-300 abrogates or otherwise supplants the common-law claim of breach of

¹ *Steelevest* held in relevant part that a corporate director may not establish or attempt to establish a competing enterprise while serving as a director.

fiduciary duty. NLC maintains that the statute does not establish the duties owed by a corporate director but merely states that, in discharging those duties, the director must act in good faith, on an informed basis and in a manner he honestly believes to be in the best interests of the corporation. Accordingly, NLC contends that the common-law claim of breach of fiduciary duty remains viable, and that KRS 271B.8-300 “does not establish the duties, but merely a standard for performing them[.]”

Citing *James v. Churchill Downs, Inc.*, 620 S.W.2d 323 (Ky. App. 1981), NLC also maintains that a common-law claim may not be repealed by implication, and that the statutory intent to abrogate the common law must be clearly apparent. It contends that because the General Assembly failed to expressly repeal in the statutory language the common-law claim of breach of fiduciary duty, such a claim necessarily remains viable. And, lastly on this issue, NLC argues that, in rejecting the common-law claim of breach of fiduciary duty, the circuit court improperly failed to abide by Kentucky Supreme Court precedent which established or otherwise recognized the common-law claim of breach of fiduciary duty.²

After having heard the oral arguments of counsel, and closely examining the record and the law, we conclude that the circuit court erred in

²These opinions include *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476 (Ky. 1991), and *Aero Drapery of Kentucky, Inc. v. Engdahl*, 507 S.W.2d 166 (Ky. 1974), upon which NLC relied in support of its common-law claim. To avoid confusion, it merits noting that while the circuit court found *Steelvest* not to be applicable on the issue of breach of a fiduciary duty, it is still cited as to the summary judgment standard.

rendering summary judgment in favor of the physicians and the Baptist defendants

on this issue. KRS 271B.8-300 states that,

(1) A director shall discharge his duties as a director, including his duties as a member of a committee:

(a) In good faith;

(b) On an informed basis; and

(c) In a manner he honestly believes to be in the best interests of the corporation.

(2) A director shall be considered to discharge his duties on an informed basis if he makes, with the care an ordinarily prudent person in a like position would exercise under similar circumstances, inquiry into the business and affairs of the corporation, or into a particular action to be taken or decision to be made.

(3) In discharging his duties a director shall be entitled to rely on information, opinions, reports, or statements, including financial statements and other financial data, if prepared or presented by:

(a) One (1) or more officers or employees of the corporation whom the director honestly believes to be reliable and competent in the matters presented;

(b) Legal counsel, public accountants, or other persons as to matters the director honestly believes are within the person's professional or expert competence; or

(c) A committee of the board of directors of which he is not a member, if the director honestly believes the committee merits confidence.

(4) A director shall not be considered to be acting in good faith if he has knowledge concerning the matter in question that makes reliance otherwise permitted by subsection (3) of this section unwarranted.

(5) In addition to any other limitation on a director's liability for monetary damages contained in any provision of the corporation's articles of incorporation adopted in accordance with subsection (2)(d) of KRS 271B.2-020, any action taken as a director, or any failure to take any action as a director, shall not be the basis for monetary damages or injunctive relief unless:

(a) The director has breached or failed to perform the duties of the director's office in compliance with this section; and

(b) In the case of an action for monetary damages, the breach or failure to perform constitutes willful misconduct or wanton or reckless disregard for the best interests of the corporation and its shareholders.

(6) A person bringing an action for monetary damages under this section shall have the burden of proving by clear and convincing evidence the provisions of subsection (5)(a) and (b) of this section, and the burden of proving that the breach or failure to perform was the legal cause of damages suffered by the corporation.

(7) Nothing in this section shall eliminate or limit the liability of any director for any act or omission occurring prior to July 15, 1988.

At issue is whether KRS 271B.8-300 supplants the common-law claim as the circuit court found, or whether the common-law claim remains viable for the reasons articulated by NLC. We must conclude that the General Assembly intended for KRS 271B.8-300 to apply in all circumstances where money damages are sought in a claim of breach of fiduciary duty against a corporate director. The Legislature stated in clear and unambiguous language that “*any action* taken as a director, or *any failure* to take any action as a director, shall not be the basis for

monetary damages . . . unless . . . [t]he director has breached or failed to perform the duties of the director’s office *in compliance with this section*[.]” (Emphasis added). KRS 271B.8-300(5). Using mandatory “shall” language, the General Assembly went on to state in section (6) that a “person bringing an action for monetary damages . . . *shall have the burden of proving by clear and convincing evidence the provisions of subsection (5)(a) and (b) of this section*, and the burden of proving that the breach or failure to perform was the legal cause of damages suffered by the corporation.” (Emphasis added).

In examining whether this language evinces the Legislature’s intent to supplant the competing common-law claim of breach of fiduciary duty, we look to *James, supra*, which held that a common-law claim may not be repealed by implication, and that the statutory intent to abrogate the common law must be clearly apparent. KRS 271B.8-300(5) provides that *any* action taken as a director or *any* failure to take action as a director shall not be the basis for a claim of monetary damages unless the director breached a duty under this section. In enacting this section, the Legislature cast a wide net which addresses *any* claim for monetary damages arising from a director’s alleged breach of fiduciary duty. The conclusion is bolstered by the inclusion of section (6), which sets out the mandatory burden of proving a breach by clear and convincing evidence – a burden which the parties acknowledge is greater than that of the common-law claim. Aside from this heightened burden of proof, KRS 271B.8-300(5) tracks the common law very closely. The Legislature has merely meticulously set forth the

claims and remedies available under common law. We cannot say that the change in the burden of proof indicates an intent to abrogate the common-law claim entirely. Rather, it merely increases the burden of proof.

NLC prosecuted a claim for monetary damages arising from the former directors' alleged breach of fiduciary duty. Such a claim falls within the express scope and purpose of KRS 271B.8-300, and the Fayette Circuit Court properly so found. We are not persuaded by NLC's contention that the facts at bar are distinguishable, nor that the extra-jurisdictional or unreported caselaw cited by NLC compels a different result. Additionally, the claims addressed in *Steelvest* and *Aero Drapery, supra*, occurred prior to the enactment of KRS 271B.8-300. Accordingly, they cannot reasonably be relied upon in support of the contention that the common-law claim survived the statutory enactment.

The question then is whether NLC's action was properly dismissed because, as the circuit court concluded in its Order and Judgment on appeal, "the only claims Plaintiff has pursued against the doctors are common-law claims no longer viable as a matter of law[.]" We cannot conclude that summary judgment was appropriate at this stage of the proceedings. NLC's complaints set out a general claim of breach of fiduciary duty, which placed the defendants on notice as to the scope of the action, the facts giving rise to the claim, and the nature of the damages sought. While NLC's complaints did not refer to KRS Chapter 271B specifically, they were not required to, and the complaints fell well within the liberal policy related to notice pleadings. *See generally Morgan v. O'Neil*, 652

S.W.2d 83 (Ky. 1983). Citing Kentucky Rules of Civil Procedure (CR) 8.01, the Kentucky Supreme Court in *Johnson v. Thoni Oil Magic Benzol Gas Stations, Inc.*, 467 S.W.2d 772 (Ky. 1971), stated that,

‘A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain (1) a short and plain statement of the claim showing that the pleader is entitled to relief and (2) a demand for judgment for the relief to which he deems himself entitled. Relief in the alternative or of several different types may be demanded.’

In 6 Kentucky Practice, Clay, Page 129 it is said:

‘The true objective of a pleading stating a claim is to give the opposing party fair notice of its essential nature, the basis of the claimant’s right, the adverse party’s wrong, and the type of relief to which the claimant deems himself entitled.’

Id. at 773-774.

Having determined that the matter was properly pled, we are persuaded by NLC’s argument that, whether *Steelvest* and *Aero Drapery* or KRS 271B.8-300 apply (though we find it to be the latter), the result is the same: a genuine issue of material fact exists as to NLC’s claim that Drs. McKinney, Cooper and Winkley breached their fiduciary duties to NLC, and that the Baptist defendants aided them in so doing. It is noteworthy that the actions were dismissed in the midst of discovery as to the claim against Dr. McKinney, before any discovery was conducted as to damages arising from Dr. McKinney’s alleged

breach, and before any discovery whatsoever was undertaken as to the claims against Drs. Cooper and Winkley.³

Summary judgment “shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” CR 56.03. “The record must be viewed in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor.” *Steelvest*, 807 S.W.2d at 480. 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. *Id.* “Even though a trial court may believe the party opposing the motion may not succeed at trial, it should not render a summary judgment if there is any issue of material fact.” *Id.* Finally, “[t]he standard of review on appeal of a 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.” *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996).

When viewing the record in a light most favorable to NLC and resolving all doubts in its favor, we conclude that NLC properly prosecuted a claim of breach of fiduciary duty, and that genuine issues of material fact remain for

³ At oral argument, counsel for NLC noted that discovery was bifurcated in an apparent attempt to protect the parties’ financial information, and many discovery items were sealed by mutual consent.

adjudication. The primary distinction between the common law and KRS 271B.8-300 is the heightened burden of proof set out in the latter. If this action proceeds to finality, the burden of proof may be addressed when the law is handed down to the jury via the court's instructions.

On cross-appeal, Dr. Cooper, et al., argue that *Steelvest* and *Aero Drapery* are distinguishable from the instant case and have no application to the matter at bar. They contend that, unlike *Steelvest* and *Aero Drapery*, the instant matter is a medical care case involving other considerations not invoked in a typical commerce case. They maintain that, as opposed to *Steelvest* and *Aero Drapery*, the instant analysis must include the court's recognition that an individual has a right to choose his or her physician and to continue an ongoing professional relationship with that physician. In their view, the added consideration of the physician-patient relationship distinguishes the instant matter from *Steelvest* and *Aero Drapery* and serves to bolster their argument that NLC's action should have been prosecuted, if at all, solely in the context of KRS 271B.8-300.

Though they prosecute this argument as a cross-appeal, Dr. Cooper, et al., do not seek the reversal or remand of any portion of the summary judgment on appeal. Rather, their argument on this issue is additional rebuttal of NLC's contention that *Steelvest* and *Aero Drapery* survived the enactment of KRS 271B.8-300 and are applicable herein. The apparent purpose of the cross-appeal is to assert that, even if *Steelvest* and *Aero Drapery* are applicable herein, as NLC

argues, Dr. Cooper, et al., nevertheless were entitled to summary judgment.

Having concluded that KRS 271B.8-300 does not supplant the common law, this argument is moot.

And finally, the parties have acknowledged that the tortious interference and other claims against the Baptist defendants are contingent upon the underlying breach of fiduciary duty claims against the doctors. That is to say, the claims against the Baptist defendants are viable only so long as the breach of fiduciary duty claims against the doctors are active. Having determined that summary judgment was not warranted in NLC's actions against the doctors, its tortious interference and related claims against the Baptist defendants remain viable.

For the foregoing reasons, we reverse the Order and Judgment of the Fayette Circuit Court granting summary judgment in favor of Drs. McKinney, Cooper and Winkley and the Baptist defendants, and remand the matter for further proceedings.

CLAYTON, JUDGE, CONCURS.

THOMPSON, JUDGE, CONCURS IN RESULT ONLY.

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