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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-000422-MR

HARGUS SEXTON — APPELLANT

v.

APPEAL FROM WOODFORD CIRCUIT COURT
HONORABLE HON. PAUL F. ISAACS, JUDGE
ACTION NO. 01-CI-00215

VICTOR SAMBRANO — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: KELLER, TAYLOR AND THOMPSON, JUDGES.

KELLER, JUDGE: Hargus Sexton (Sexton) appeals from the trial court's orders: denying his request to enforce a settlement agreement; dismissing his claims against Victor Sambrano (Sambrano); assessing to him the entire costs of the proceedings; and denying his motion for reconsideration. On appeal, Sexton argues that there was insufficient evidence to support the trial court's findings and

that the dismissal of all of his claims was "too harsh." Sambrano argues to the contrary. Having reviewed the record, we affirm.

FACTS

Sambrano worked as a farrier for a number of years for Sexton and other horse farm owners in the central Kentucky area. In 2000, Sexton and Sambrano entered into a financial arrangement, the details of which are not pertinent to this appeal. Based on his understanding of that arrangement, Sexton filed a complaint alleging that Sambrano owed him $46,000.[1] Sambrano disputed the validity of the alleged debt, and the parties conducted discovery and motion practice for five years. On May 24, 2006, the day trial was scheduled to begin, the parties reached a settlement. The general terms of that settlement were set forth in a handwritten document that was signed by the parties and their counsel, with the parties agreeing that formal releases and a motion to dismiss would follow.

The terms of the agreement, as set forth in the handwritten document, specified that Sambrano would pay $9,582.00 to Sexton "in cash" within thirty days. Additionally, Sambrano was "to perform $13,418.00 in farrier work for Ben Walden [without] charge to Ben Walden on or before 12/31/06." Finally, the agreement noted that it was "subject to approval by Ben Walden." We note that, although the handwritten document did not state as much, the parties have operated as if Ben Walden (Walden) had agreed to pay $13,418.00 to Sexton in exchange for the work Sambrano had agreed to perform.

[1] We note that Sexton alleged that he lent Sambrano $46,000 and Sambrano alleged that the $46,000 was not a loan but represented the purchase price for a foal he sold to Sexton.

On May 26, 2006, counsel for Sexton (attorney Maclin) sent a letter to counsel for Sambrano (attorney Bohannon) enclosing a formal settlement agreement and release and an agreed order of dismissal. In that letter, attorney Maclin stated that "Ben [Walden] has agreed to his part of the settlement, and I believe has already advanced the $13,418.00 to Mr. Sexton." On May 31, 2006, attorney Bohannon responded and indicated that the release, with one minor change, was acceptable. On June 30, 2006, attorney Bohannon forwarded Sambrano's check for $9,582.00 to attorney Maclin with instructions that the check not be negotiated until Sexton had signed the formal settlement agreement and release.

On June 11, 2007, attorney Maclin sent correspondence to attorney Bohannon stating that he was returning Sambrano's $9,582.00 check, because the terms of the agreement had changed. According to attorney Maclin, Walden had paid the $13,418.00 to Sambrano rather than to Sexton; therefore, Sambrano owed Sexton a total of $24,000.00. It is unclear if this was a mathematical error or if Sexton was including interest because $9,582.00 plus $13,418.00 equals $23,000.00, not $24,000.00. On July 27, 2007, attorney Bohannon responded, stating that it was his understanding that Walden had paid Sexton directly; that Sambrano had performed as required; and that Sexton had been fully compensated.

On August 17, 2007, Sexton filed a motion to enforce settlement agreement. In that motion, Sexton set forth the above exchanges and attached an affidavit from Walden. In his affidavit, Walden stated that

> Subsequent to May, 2006, Mr. Sexton became ill; and because I was uncertain as to the circumstances of Mr. Sexton's and Mr. Sambrano's agreement, I paid and Mr. Sambrano accepted, the $13,418.00 . . . as opposed to making payment of said amount to Mr. Sexton. I trusted that Mr. Sambrano would in turn make payment of said amount to Mr. Sexton as he and Mr. Sexton had agreed.

A week later, Sexton filed a supplemental affidavit from Walden indicating that he had paid Sambrano in excess of $13,418.00 for farrier services since the settlement; that he had not paid Sexton; and that he was leaving it to Sexton and Sambrano to perform their settlement agreement.

On September 7, 2007, Sambrano filed a response, arguing that Sexton had been paid in full. He attached to that response his affidavit and a third affidavit from Walden. In that affidavit, Walden stated that the averments in his first affidavit that he "paid the sum of $13,418.00 to Victor Sambrano pursuant to the settlement agreement between Victor Sambrano and Hargus Sexton are not true." Furthermore, he stated that he had "paid no money to Victor Sambrano with the understanding that it was due to or would be forwarded to Hargus Sexton, but only the sums due Victor Sambrano for farrier work performed for me by him." In his affidavit, Sambrano stated that Walden had not paid him $13,418.00 for Sexton; that he relied on attorney Maclin's May 2006 letter indicating that Walden had paid Sexton directly; and that he believed the settlement had been completely performed.

The parties then proceeded to undertake discovery and the court held two hearings on issues related to performance of the settlement. Sambrano testified at

the hearings that he believed the agreement called for him to perform $13,418.00 of work for Walden; that he would not charge Walden for that work; and that Walden had paid Sexton $13,418.00 in exchange for his work. Furthermore, Sambrano testified that, shortly after reaching the agreement, Walden asked him if the agreement was acceptable to him and Sambrano said that it was. According to Sambrano, he did not keep records of the work that he performed, relying on Walden's employees to do so. Therefore, he asked Walden's farm manager, Joe Dodgen (Dodgen), to withhold payment for approximately thirty-five percent of the work performed in order to effectuate the settlement agreement. Dodgen expressed some concern about the mechanics of doing so, but, according to Sambrano, Dodgen ultimately stated that he would work something out. Finally, Sambrano testified that he did not tell Sexton that the agreement had been cancelled.

As proof that Dodgen was keeping track of the "free" work he performed, Sambrano offered the depositions of James Anthony (Anthony), Javiera DelRio (DelRio), and Billy Rogers (Rogers). Anthony, who cared for Walden's brood mares and foals, testified that he was not aware of the terms of the settlement agreement. Furthermore, he testified that he remembered one occasion when Sambrano had trimmed sixteen horses, but Dodgen had only put the names of ten horses on the list. When Anthony pointed this out to Sambrano, Sambrano said that there must have been a mistake. Another time, Anthony saw that two horses' names had been crossed off the list.

DelRio testified that he cared for mares, foals, and yearlings on Walden's farm. According to DelRio, he saw Dodgen one day with two lists, one list having fewer names than the other. When DelRio told Sambrano that he had apparently missed a few horses from the longer list, Sambrano said that he had trimmed all of the horses on that list.

Rogers testified that he was maintenance manager on Walden's farm. When getting ready for his deposition, Rogers had his office manager review the relevant lists. She indicated that names had been written on some lists and then marked through. He apparently did not see the lists but relied on the office manager's statement.

Sexton testified at both hearings. At the first hearing, Sexton testified that he received the check for $9,582.00 from Sambrano; however, he did not negotiate it because he wanted to wait until he received the entire amount due. Although he had not received the additional $13,418.00, Sexton never asked Walden about it, nor did he ask Walden if Sambrano had performed the work he was required to do. Sexton explained the delay in bringing this matter before the court on serious health issues he had in the fall of 2006 and thereafter.

Walden testified by deposition and at the last evidentiary hearing. In his deposition, Walden testified that he reluctantly agreed to participate in the settlement. The day after the settlement was reached, attorney Maclin called Walden and told him to get the money together to pay Sexton. Walden also testified that, on that same day, he asked Sambrano if the settlement was

acceptable. However, Walden testified that, after that conversation, he spoke with either Sexton, attorney Maclin, or Sambrano and was told that he did not need to be involved because his part of the settlement was not going to take place.

At the March 8, 2010, hearing, Walden initially testified that he believes that attorney Maclin told him that he did not need to participate in any settlement. When advised that Maclin likely did not say that, Walden testified that he did not know who told him that his part of the settlement would not take place. Later, Walden testified that Sexton did not tell him that he did not need to participate in the settlement.

Finally, Walden testified that Sambrano keeps meticulous records and he does not believe that Sambrano did work for which he was not paid. In fact, according to Walden, he discussed the matter a number of times with Sambrano and Sambrano knew that Walden was not withholding money to pay Sexton.

Based on the preceding evidence, the court found in favor of Sambrano. In doing so, the court found that Walden did agree to participate in the settlement. Furthermore, the court found that "if Mr. Walden was actually told to abandon the settlement, Mr. Sexton is the one who told him to" do so. The court noted that this finding was consistent with Sexton's: failure to negotiate the $9,582.00 check from Sambrano; year-long delay before advising attorney Maclin that he had not done so; and year-long delay before advising attorney Maclin that the settlement had not been performed.

Furthermore, the court found that Sambrano had "done everything he could to comply with the settlement agreement." In doing so, the court noted the testimony from Anthony, DelRio, and Rogers that "they personally witnessed the manager omitting from Sambrano's daily sheets horses trimmed by Mr. Sambrano." Finally, the court found that Sexton's actions were unconscionable; therefore, it dismissed all of Sexton's claims against Sambrano.

Sexton filed a motion asking the court to reconsider, which the court denied. In doing so, the court acknowledged that Walden testified that Sexton did not tell him the settlement was not going forward. However, the court stated that it was "certainly a reasonable inference from Waldens [sic] testimony, the testimony of Mr. Sexton, and Mr. Sexton's actions . . . ."

STANDARD OF REVIEW

Although this matter was before the trial court on a motion to enforce a settlement agreement and not for a bench trial, we agree with the parties that the court's findings of fact regarding that motion should be reviewed using the clearly erroneous standard set forth in Kentucky Rule of Civil Procedure (CR) 52.01. Under that standard, this Court cannot disturb the factual findings of the trial court unless those findings are not supported by "evidence of substance and relevant consequence sufficient to induce conviction in the minds of reasonable people." *Cole v. Gilvin*, 59 S.W.3d 468, 473 (Ky. App. 2001).

Furthermore, we agree with Sexton that, despite its caption, his motion for reconsideration should be treated as a motion to alter, amend, or vacate under CR

59.05. As such, we review the court's ruling on that motion for an abuse of discretion. *Bowling v. Kentucky Dept. of Corrections*, 301 S.W.3d 478, 483 (Ky. 2009). We also review the trial court's order regarding costs for an abuse of discretion. *See Brooks v. Lexington-Fayette Urban County Housing Authority*, 332 S.W.3d 85, 90 (Ky. App. 2009). "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Sexton v. Sexton*, 125 S.W.3d 258, 272 (Ky. 2004) (*citing Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999)).

ANALYSIS

We address the issues raised by Sexton on appeal individually, applying the appropriate standards.

1. Whether Sufficient Evidence Supports the Trial Court's Finding that Sexton Advised Walden the Settlement Was Not Going Forward

The court found that, the day after the settlement, Sexton told Walden that the settlement was not going forward. In support of his argument that this finding was in error, Sexton points to the following: Walden's testimony that Sexton never told him the settlement was not going forward; and Sexton's testimony that he did not tell Walden the settlement was not going forward. Sexton's argument is not persuasive for the following reasons.

First, Walden's testimony regarding who told him the settlement was not going forward is, to put it mildly, inconsistent. Walden testified that: he believed either Sexton, Maclin, or Sambrano had told him; he could not remember who told

him; and Sexton definitely did not tell him. Faced with these inconsistencies, the court was free to believe or disbelieve any or all of Walden's testimony.

Second, as noted above, Walden testified that one of three people told him the settlement was not going forward - Sexton, Sambrano, or attorney Maclin. Two of those people acted as if the settlement was going forward. One did not. Within a few days of the settlement, attorney Maclin forwarded formal settlement documents to attorney Bohannon. Within thirty days of the settlement, Sambrano forwarded a check as partial payment for the settlement to attorney Bohannon. Those are the actions of people who believed the settlement was going forward.

On the other hand, while Sexton testified that he believed that Sambrano was going to get a check from Walden the day of the settlement, he did not ask where that check was until nearly a year later. Furthermore, although he received Sambrano's $9,582.00 check within a month of the settlement, Sexton did not negotiate it and, apparently, did not contact attorney Maclin or anyone else regarding what he should have done with it. These actions by Sexton implied that he believed the settlement was not going forward. Thus, the court was free to infer that Sexton apprised Walden of that belief.

We note that Sexton argues that his lack of follow-up on the status of the settlement can be attributed to his health issues. We agree that those issues could explain any dilatoriness on Sexton's part. However, Sexton did not become ill until the early fall of 2006; therefore, his illness does not explain why he failed to

follow-up on the status of the settlement between late May and the early fall of 2006.

A reasonable person, faced with the preceding evidence, could conclude that Sexton told Walden the settlement was not going forward. Therefore, we discern no error in the trial court's finding on that issue.

2. Whether Sufficient Evidence Supports the Trial Court's Finding that Sambrano Attempted in Good Faith to Perform His Part of the Settlement

Sexton argues that the court's finding that Sambrano attempted to perform his part of the settlement was in error, because Sambrano did not keep track of the work he performed and because he "manufactured the purported arrangement" for Dodgen to do so. In support of his argument, Sexton notes that Dodgen testified that he made no arrangement with Sambrano to track what work was being done for free, and Walden testified that no such arrangement existed or was authorized.

However, we note that Sambrano testified that he rarely kept track of what work he did for Walden but rather relied on Walden's employees to do so. Furthermore, Sambrano testified that he did make an arrangement for Dodgen to keep track of the free work, and three of Walden's employees testified that some of Sambrano's work was not being recorded or reported.

The trial court, as fact finder, is free to believe any evidence of substance. *Cole* 59 S.W.3d at 473. Thus, the court was free to choose which witnesses to believe. The evidence the court chose to rely on was substantial; therefore, we

discern no error in the court's finding that Sambrano attempted to follow through with his part of the settlement.

3. Whether the Court Erred in Denying Sexton's Motion for Reconsideration

Sexton argues that the court erred in denying his motion because there was not sufficient evidence of substance to support the court's initial ruling. We discern no error on the trial court's part in denying that motion for the reasons that we discern no error in the court's ultimate findings of fact. Both rulings by the court were supported by evidence of substance, which we will not overturn on appeal.

4. Whether the Court Erred in Dismissing Sexton's Claims and in Taxing the Costs of the Action Against Sexton

The court found that Sexton entered into a settlement agreement with Sambrano; undermined the agreement; waited until Sambrano had performed, or at least in good faith attempted to perform, his part of the agreement; changed the terms of the agreement; then sought judicial assistance to enforce the altered agreement. Sexton argues that, despite these findings, the court lacked the authority to dismiss his claims and/or that the court's dismissal of his claims was "disproportionate." We disagree.

> The Rules of Civil Procedure adopted in 1953 do not provide for a dismissal on the court's own motion. See CR 41. Nor do the statutes. Nevertheless, the absence of specific authorization in the Civil Rules does not mean that a trial court is left without its inherent power and discretion to dismiss sua sponte when a plaintiff unreasonably fails or refuses to prosecute his claim, or

> under other appropriate circumstances when it is necessary to an orderly disposition of the cases pending before it.

City of Hazard v. Baker, 419 S.W.2d 535, 536 (Ky. 1967). Thus, the court had the authority to dismiss Sexton's claims.

Although neither party has cited us to, and we have not found, a case directly on point, we believe that the standard of review on appeal is whether the court abused its discretion. "This discretion, however, is not unbridled, but must rest upon a finding of willfulness or bad faith on behalf of the party to be sanctioned." *Greathouse v. American Nat. Bank and Trust Co*., 796 S.W.2d 868, 870 (Ky. App. 1990). Although we might not have imposed the same sanction as the trial court, based on its finding that Sexton's actions were unconscionable, we cannot say that dismissal was an abuse of discretion.

As to costs, CR 54.04 provides that "[c]osts shall be allowed as of course to the prevailing party unless the court otherwise directs . . . ." Sexton argues that costs are not mandatory, but within the discretion of the court. Furthermore, Sexton argues that the court "appears to have taxed the costs as punishment for purported conduct the existence of which is not supported by the record."

We agree that the taxation of costs is within the discretion of the court; however, as previously noted, we disagree that there was no evidence to support the court's finding that Sexton's behavior was unconscionable. Given the record and the trial court's findings, we cannot say that the court abused its discretion by taxing the costs against Sexton.

CONCLUSION

For the foregoing reasons, we affirm the trial court.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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