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Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-000481-MR

TIMOTHY A. SPEARS — APPELLANT

v.

APPEAL FROM MADISON CIRCUIT COURT
HONORABLE JEAN CHENAULT LOGUE, JUDGE
ACTION NO. 99-CI-00194

KENTUCKY INSURANCE AGENCY, INC.;
MORGAN J. MOORE; WADE K. MOZINGO;
AND JOHN J. LUDDY — APPELLEES

OPINION
AFFIRMING
** ** ** ** **

BEFORE: ACREE, CHIEF JUDGE; MOORE AND VANMETER, JUDGES.

VANMETER, JUDGE: Timothy Spears appeals the judgment of the Madison Circuit Court granting summary judgment in favor of Kentucky Insurance Agency, Inc., Morgan J. Moore, and John J. Luddy (hereinafter collectively referred to as "Kentucky Insurance"). After a careful review of the record, we affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

The parties' relationship began in November 1998, at which time Spears and Kentucky Insurance began discussing the formation of an insurance agency. Spears, who already operated an insurance agency, was seeking another insurance company with which to affiliate. The parties met in order to discuss the possibility of forging a business relationship. After their initial meeting, Kentucky Insurance tendered a letter confirming its intent to proceed with the formation of an insurance agency. The letter reads in full:

> Dear Tim:
>
> We wish to confirm our intent to form an insurance agency with you as outlined in our November 10 meeting and described in the attached Exhibit "A".
>
> If you agree, we will at the earliest time reduce this outline to a written document and include other items such as (1) Mutual non-piracy or non-compete, (2) An exit agreement fair to both parties using 1.75 X annual commission for value and at least standard arbitration to resolve any disagreement and other minor covenants normal to an insurance agency formation document.
>
> While we may eventually develop separate company contracts for the new agency, you would be authorized to start placing accounts with our agency immediately upon our receipt of a copy of this letter containing your signature of agreement.
>
> Please sign and return a copy of this agreement to us so that we can start operating and pursue the legal document and corporation.

The letter was signed by Morgan Moore, in his capacity as president of Kentucky Insurance Agency. Spears also signed the letter.

The "Exhibit 'A'" referenced in the letter contained detailed information about each party's monetary and work contributions, ownership percentages, and a pro forma.[1] More specifically, the terms were outlined as follows:

> Moore, Luddy, Mozingo[2], & Goodin[3] (MLMG) wish to form a S Corporation along with Tim Spears to purchase the assets of Creech & Stafford Insurance Agency Inc. – Richmond
> Ownership %
> Tim Spear[s] – 50%
> Morgan Moore – 12.5%
> John Luddy – 12.5%
> Ken Mozingo – 12.5%
> Lee Goodin – 12.5%
>
> PURCHASE PRICE:
> Purchase Price One(1) times first year (1999) P & C commissions Times % Ownership Downpayment $10000 Remaining Balance to be paid from Agency Cashflow
> No monies will be paid for Fixed assets, Life Commissions, or Contingency Income
>
> Profit to be 30% to be distributed according to % Ownership

[1] According to Merriam-Webster's Dictionary, a pro forma is "1: made or carried out in a perfunctory manner or as a formality 2: based on financial assumptions or projections: as a: reflecting a transaction (as a merger) or other development as if it had been or will be in effect for a past or future period . . . ."

[2] Although Mozingo was named in the notice of appeal and filed a separate motion for summary judgment at the trial court level, the trial court did not make a ruling on Mozingo's motion. Moreover, Spears appeals only the order granting summary judgment in favor of Kentucky Insurance Agency, Inc., Morgan J. Moore, and John J. Luddy. Accordingly, any claims raised with respect to Mozingo are not before us.

[3] At the time the parties entered discussions, Lee Goodin was also affiliated with Kentucky Insurance Agency. As discussed, *infra*, Goodin played a primary role in implementing the business arrangement between the parties. However, for reasons not relevant to this appeal, Goodin terminated his relationship with Kentucky Insurance Agency prior to the events which allegedly resulted in a breach of the parties' agreement. Therefore, Goodin was not a party to the circuit court action, nor is he party to this appeal.

70% to be paid for overhead, salaries, KIA service fees, and Tim Spears

Tim Spears to provide:
Overseeing local office
Day to day operations
Selling new accounts
Servicing existing accounts

MJMG to provide:
Insurance Markets
Assistance in getting markets
Accounting assistance
Payroll
Management assistance
E&O Insurance
Rating Software
Computer assistance
Cashflow
Budgets
Capital

Effective 11/15/98
KIA fee to be determined by services performed

Thereafter, Lee Goodin and Spears began to work closely together to implement the new business. Spears testified that "[o]n a day-to-day basis or every other day, whatever the scope of business needed be, Lee Goodin and I were arranging an acquisition, trying to transfer the business, actively moving business, writing business, quoting business on a day-to-day basis." Spears began to procure client signatures authorizing transfer of their business. Goodin also accompanied Spears to meet with the company that Spears was currently affiliated with, Creech & Stafford, to inform it of Spears' intention to terminate his relationship with it and begin doing business with Kentucky Insurance. Additionally, Kentucky

Insurance had taken one of Spears' large accounts and assigned it to a Kentucky Insurance employee to fill out applications and obtain quotes and had also contacted a company to discuss block transfers of Spears' clientele.

On December 18, 1998, a little over a month after their initial meeting, Moore and Wade Mozingo informed Spears that they no longer intended to proceed with the business formation. Moore indicated in his deposition that Spears had represented to them that he generated $200,000 of revenue monthly, that this was the basis of their intent to go into business with Spears, and that Spears failed to provide documentation that he in fact generated that much revenue. Moore also indicated that Spears never provided anything explaining exactly what Kentucky Insurance was buying, *i.e.*, what would be delivered to Kentucky Insurance unencumbered by the rights of Creech & Stafford. Spears then instituted this action, claiming that the "Letter of Intent" was a valid and enforceable contract and that Kentucky Insurance had breached it.

After a significant delay due to circumstances not relevant to the issues before us, Kentucky Insurance filed a motion for renewed summary judgment, arguing that no contract existed, or, more specifically, that the letter of intent that Spears presented as a contract between the parties was not enforceable because it left terms to be determined at a later date.[4] In response, Spears argued that the letter contained all material terms and that the parties had agreed to and had been operating pursuant to those terms. He further argued that the mere fact

[4] The trial court denied Kentucky Insurance's initial motion for summary judgment.

that the letter contemplated that other instruments would be drafted to memorialize the parties' agreement did not preclude the letter from constituting an enforceable agreement.

The trial court granted Kentucky Insurance's motion. In doing so, the trial court noted that Kentucky follows the "all or nothing" approach, meaning that "[e]ither the agreement is enforceable as a binding contract to consummate the transaction or it is unenforceable as something less." *Cinelli v. Ward*, 997 S.W.2d 474, 478 (Ky.App. 1998) (citing *Stevens v. Stevens*, 798 S.W.2d 136 (Ky. 1990)). The trial court further noted that because the language of the letter indicated that the parties would enter into a non-compete clause, an exit agreement, and a standard arbitration agreement at a later date, the letter was not an enforceable agreement because it left terms open for negotiation. Spears now appeals.

II. STANDARD OF REVIEW

Summary judgment is appropriate "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[5] 56.03. Summary judgment is appropriate if "it appears that it would be impossible for the respondent to produce evidence at the trial warranting a judgment in his favor." *Steelvest, Inc. v. Scansteel Serv. Ctr., Inc.*, 807 S.W.2d 476, 480 (Ky. 1991). When deciding a motion for summary judgment, the record must be viewed in the light

[5] Kentucky Rules of Civil Procedure.

most favorable to the party opposing the motion. *Id*. "The circuit court's decision to grant summary judgment is reviewed *de novo*." *Harstad v. Whiteman*, 338 S.W.3d 804, 809 (Ky.App. 2011) (citing *Lewis v. B & R Corp*., 56 S.W.3d 432, 436 (Ky.App. 2001)).

Furthermore, "[i]t is well established that construction and interpretation of a written instrument are questions of law for the court." *Cinelli*, 997 S.W.2d at 476 (citing *Morganfield Nat'l. Bank v. Damien Elder & Sons*, 836 S.W.2d 893 (Ky. 1992)). Because we review questions of law *de novo*, we afford no deference to the interpretation of the trial court. *Cinelli*, 997 S.W.2d at 476 (citing *Louisville Edible Oil Products, Inc. v. Revenue Cabinet Commonwealth of Kentucky*, 957 S.W.2d 272 (Ky.App. 1997)).

III. ANALYSIS

On appeal, Spears argues that the trial court erred in determining that the "Letter of Intent" was not an enforceable contract. Kentucky Insurance, which as the movant bore the initial burden of proving that no genuine issue of material fact existed with regard to the existence of a contract, presents two arguments to refute the existence of an enforceable contract. First, Kentucky Insurance argues that Spears' representation regarding his monthly revenue was a material term to the contract, *i.e*., a basis of the bargain, and that Spears' failure to provide information regarding his revenue precluded the formation of an enforceable contract. Second, Kentucky Insurance argues that the letter of intent did not

contain all of the terms necessary for the formation of a final and enforceable agreement. We agree with this second argument.

In *Cinelli v. Ward*, this court stated that if "an agreement leaves the resolution of material terms to future negotiations, the agreement is generally unenforceable for indefiniteness unless a standard is supplied from which the court can supplant the open terms should negotiations fail." *Cinelli*, 997 S.W.2d at 477. "'To be enforceable and valid, a contract to enter into a future covenant must specify all *material and essential terms* and leave nothing to be agreed upon as a result of future negotiations.'" *Id.* at 477 (emphasis added) (quoting *Walker v. Keith*, 382 S.W.2d 198 (Ky. 1964)). Stated simply, "[t]he terms of a contract must be complete and sufficiently definite to enable the court to determine the measure of damages in the event of a breach." *Mitts & Pettit, Inc. v. Burger Brewing Co.*, 317 S.W.2d 865, 866 (Ky. 1958). However, "[i]f all the material terms which are to be incorporated into the contemplated future instrument have been agreed upon, it may be inferred that the instrument is to be a mere memorial of the contract already final by the earlier mutual assent of the parties to those terms." *Dohrman v. Sullivan*, 310 Ky. 463, 468, 220 S.W.2d 973, 976 (1949) (citation omitted).

Specifically, the parties anticipated forming a corporation to run the agency, and negotiating the terms of non-competition, arbitration and exit agreements. These open terms are material, and we have no standard for supplying them. For example, what would be the duration and/or geographic scope of any

non-competition clause? One year? Two years? Madison County? Madison and contiguous counties?

The trial court correctly applied *Cinelli* in granting summary judgment. The Madison Circuit Court's judgment is affirmed.

ACREE, CHIEF JUDGE, CONCURS AND FILES SEPARATE OPINION.

MOORE, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

ACREE, CHIEF JUDGE, CONCURRING: I concur with the majority because I must; *Cinelli v. Ward*, 997 S.W.2d 474 (Ky. App. 1998) is precedent. I write separately, however, because the time has come to revisit the rule established by *Cinelli*.

Our adherence to *Cinelli* is the reason an outdated approach to contract interpretation, once known as the "all-or-nothing" approach, is now known simply as the "Kentucky rule." *Giverny Gardens, Ltd. P'ship v. Columbia Hous. Partners Ltd. P'ship*, 147 Fed.Appx. 443, 446 (6th Cir. 2005) ("The 'modern trend' of *TIAA* [*Teachers Ins. & Annuity Ass'n of America v. Tribune Co.*, 670 F.Supp. 491 (S.D.N.Y.1987) ("*TIAA*")] is contrasted with the 'Kentucky rule,' which is the traditional 'all or nothing' approach to preliminary agreements." (citations omitted)). That "Kentucky rule" is clear at least – preliminary agreements such as the letter of intent in this case are unenforceable.

Cinelli is an opinion of this Court – Kentucky's intermediate appellate court. And while our highest court has cited *Cinelli*, primarily for standard-of-review

purposes, it has neither embraced nor rejected the "Kentucky rule." In light of those circumstances, when presented with facts not unlike those in this case, the Sixth Circuit said:

> While we may refuse to follow intermediate appellate court decisions where we are persuaded that they fail to reflect state law correctly . . . we should not reject a state rule just because it was not announced by the highest court of the state, even if we believe the rule is unsound. Since no Kentucky Supreme Court case has ruled on the issue of preliminary agreements between sophisticated business entities, *Cinelli* is the authoritative Kentucky law on the subject.

Giverny, 147 Fed.Appx. at 447-48 (citations and internal quotation marks omitted).

The Sixth Circuit in *Giverny* recognized the "appeal for the 'modern trend' towards enforceability of comprehensive preliminary agreements executed by sophisticated business entities." *Id.* at 450. Unfortunately, "federal courts are bound to apply state law in diversity cases, even if such law is 'unsound,' [citation omitted], and federal courts should resist the urge to 'modernize' state common law." *Id.* Our Supreme Court can, and should, embrace that urge when, and if, it has the opportunity.

The modern rule, as articulated in the oft-cited *TIAA*, is consistent with the Uniform Commercial Code and the Restatement (Second) of Contracts, and its adoption would assist in unifying Kentucky's contract jurisprudence. *See* Nellie Eunsoo Choi, *Contracts With Open Or Missing Terms Under The Uniform Commercial Code And The Common Law: A Proposal For Unification*, 103 Colum. L. Rev. 50, 69-74 (January 2003).

In 1998, this intermediate appellate court consciously rejected the modern trend articulated in *TIAA*. It is now time for our Supreme Court either to consciously embrace it, or to justify clinging to the minority Kentucky rule.

MOORE, JUDGE, DISSENTING: Respectfully, I dissent as I believe that all of the material terms necessary for the formation of a final and enforceable agreement were contained in the letter of intent. The majority concludes that no contract was formed because the parties failed to execute a non-compete clause, exit agreement, standard arbitration agreement, and other minor covenants normal to an insurance agency formation document.

However, Kentucky Insurance points to no authority supporting its assertion that these "missing" terms are in fact material to the agreement or that the parties actually contemplated additional negotiations regarding those terms, as opposed to the addition of "standard" boilerplate terms. Rather, it is apparent that the parties intended that their business relationship would commence as soon as the letter of intent was signed by Spears, as is indicated by the fact that Spears was authorized to transfer accounts to Kentucky Insurance "immediately" upon receipt of a copy of the agreement containing Spears' signature and that the parties did in fact begin the process of transferring business. Thus, the intention to execute additional documents or agreements was merely ancillary to the parties' objective.

Furthermore, the agreement between the parties contemplated the formation of a business, the finalization of which would have involved the

formality of filing corporate documents. The terms contained in the agreement were sufficient to outline the day-to-day operations of the company and responsibilities of each of the parties and would have been sufficient to allow the parties to complete the corporate paperwork. Where the terms of the agreement are sufficient to achieve this, formal corporate documents would have merely served as a memorial of the already final contract. *See Dohrman*, 310 Ky. 463, 220 S.W.2d at 976. I also do not foresee any difficulty ascertaining any measure of damages under the agreement if the contract were found to have been breached. *See Mitts & Pettit*, 317 S.W.2d at 866. I therefore conclude that all of the material terms were contained in the agreement, resulting in an enforceable contract.

BRIEF FOR APPELLANT:

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