

RENDERED: JUNE 6, 2014; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2013-CA-000729-MR

THOMAS ARMISTEAD

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE SUSAN SCHULTZ GIBSON, JUDGE
ACTION NO. 10-CI-004884

WILLIAM J. GRIDER

APPELLEE

OPINION
AFFIRMING

** ** * ** ** *

BEFORE: CLAYTON, COMBS, AND NICKELL, JUDGES.

CLAYTON, JUDGE: This is an appeal from a decision of Division 12 of the Jefferson Circuit Court following a bench trial. Based upon the following, we affirm the decision of the trial court.

BACKGROUND INFORMATION

On November 28, 2007, Jeffrey Cave was involved in an automobile accident in which he sustained injuries. He subsequently hired Appellee, William J. Grider, to represent him in a personal injury claim to pursue damages. Prior to receiving any monetary compensation from the claim, Cave borrowed money from his uncle, Thomas Armistead, the Appellant in this action. Grider drafted a Loan Repayment Agreement for the loan between Cave and Armistead which set forth as follows:

In consideration for loaning me the sum of \$21,000.00, I, Jeffrey Cave, hereby direct my attorney, Jon Grider, to pay the sum of \$21,000.00 to Tom Armistead out of any settlement funds I receive as a result of claims I have pending in connection with a motor vehicle accident which occurred on November 20, 2006.

The Agreement was signed by Cave in the presence of Grider on April 18, 2007.

On November 6, 2007, Grider deposited Cave's settlement proceeds into his escrow account and on November 9, 2007, Cave came to Grider's office for disbursement of the funds. At that time, Grider distributed to Cave all the funds except his fee. Grider asserts that he asked Cave whether he should distribute the funds to Armistead or directly to Cave. He also testified that he suggested Cave give \$10,000.00 of the proceeds immediately to Armistead. Cave, however, testified that he did not want the money to come directly from him and that it was Grider's idea to pay him the entire sum.

Armistead brought an action in Jefferson Circuit Court against Grider asserting that he breached the Loan Agreement. Thereafter, he filed an Amended Complaint alleging that Grider had tortiously interfered with a contract between him and Cave and/or that Grider breached a duty to Armistead as a third-party beneficiary to the Legal Services Contract.

After a bench trial, the trial court found in favor of Grider as a matter of law and dismissed the case with prejudice. This appeal followed.

STANDARD OF REVIEW

We review issues of law *de novo*. *Welch v. Commonwealth*, 149 S.W.3d 407 (Ky. 2004).

DISCUSSION

Armistead first argues that Grider tortiously interfered with the Loan Agreement. He asserts that the trial court misinterpreted Kentucky law when it held Grider had not.

In determining that Grider had not tortiously interfered with the Loan Agreement, the trial court held as follows:

To prevail on a tortious interference of contract claim, Armistead must plead and prove six elements: (1) the existence of a contract; (2) Grider's knowledge of the contract; (3) Grider's intent to cause the breach of the contract; (4) Grider caused one party to the contract to breach the contract; (5) the breach caused damages to the non-breaching party to the contract; and (6) Grider acted with malice toward the non-breaching party to the contract.

Jefferson Circuit Court Findings of Fact and Conclusions of Law, Judgment at p. 3.

These findings by the trial court were based upon the six-part analysis set forth in *Nat'l Collegiate Athletic Ass'n v. Hornung*, 754 S.W.2d 855, 857 (Ky. 1988). Armistead argues that the trial court did not address the first, second, fourth or fifth elements of this analysis in making its determination. Armistead asserts that (1) there was a contract, as found by the trial court; (2) that Grider admitted that he drafted the Loan Agreement, witnessed its execution, and had knowledge of it; (3) that it was implicit in the trial court's findings that Grider caused Cave to breach the Loan Agreement when it accepted as fact that it was his suggestion Cave not abide by it; and (4) the trial court found that Cave was unjustly enriched to Armistead's detriment.

The trial court, however, found that Grider did not breach the Loan Agreement because he asked Cave what he should do with the funds since the settlement was not finished and that he suggested Cave disburse \$10,000.00 to Armistead at that time. The trial court found that this was an oral modification of the Loan Agreement which Cave was permitted to do as a matter of law. We agree.

As set forth above, in order to prove tortious interference of contract, all six of the elements set forth in *Hornung* must be present. Armistead was not successful in proving malice. *Hornung* notes that malice may be inferred in an interference action by proof of lack of justification. *Hornung* quotes from the Restatement (Second) Torts, Section 766 Comment S (1979) ("...[T]he context and the course of the decisions make it clear that what is meant is not malice in the

sense of ill will but merely ‘intentional interference without justification’ ”). *Id.* at 859. Without proof of malice, the tortious interference claim cannot prevail. Thus, since we agree with the trial court that there was an oral modification of the contract, Grider was justified in acting in the manner in which he did. The trial court did not err in making the determination that Grider did not tortiously interfere with the Loan Agreement between Cave and Armistead.

Armistead next asserts that Grider is liable to him as a third-party beneficiary to the Legal Services Contract he had with Cave. In determining that Armistead was not a third-party beneficiary to the Legal Services Contract, the trial court held as follows:

The contract for legal services and the Loan Repayment Agreement are two separate and distinct contracts. Grider and Cave were parties to the contract for legal services. Armistead had no privity in that contract.

Pursuant to the definition set forth in Black’s Law Dictionary 349 (8th Ed. 2004), a third-party beneficiary is “[a] person who, though not a party to a contract, stands to benefit from the contract’s performance.” In Kentucky, “[a] person is a creditor beneficiary if the promisee’s expressed intent is that the third party is to receive the performance of the contract in satisfaction of any actual or supposed duty or liability of the promisee to the beneficiary.” *Sexton v. Taylor County*, 692 S.W.2d 808, 810 (Ky. App. 1985).

Armistead argues that while he was not an initial third-party beneficiary to the Legal Services Contract, he became one upon execution of the Loan Agreement between himself and Cave. We disagree.

The Loan Agreement was a contract entered into after the Legal Services Contract. It did not change the Legal Services Contract and was not made an addendum thereto. Clearly, these parties could have chosen to do so, but they did not. Thus, the trial court correctly concluded that Armistead was not a third-party beneficiary to the Legal Services Contract.

Thus, we affirm the decision of the trial court.

ALL CONCUR.

BRIEF FOR APPELLANT:

Jeremy Jon Nelson
Louisville, Kentucky

BRIEF FOR APPELLEE:

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