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Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-001936-MR

DKM COAL CORPORATION, INC., AND
DEL KERWYN MARTIN, INDIVIDUALLY — APPELLANTS

v.

APPEAL FROM LETCHER CIRCUIT COURT
HONORABLE STEVEN D. COMBS, JUDGE
ACTION NOS. 87-CI-00090 AND 89-CI-00158

ROY CRAWFORD, III;
ODESSA CORPORATION; AND
LAUREL KNUCKLES SWILLEY — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: J. LAMBERT, MAZE, AND TAYLOR, JUDGES.

J. LAMBERT, JUDGE: Del Kerwyn Martin (Martin) and DKM Coal Corporation, Inc. (DKM) appeal from the Letcher Circuit Court's third entry of partial summary judgment in favor of Roy Crawford, III. (Crawford) and Odessa Corporation

(Odessa). After careful review of the parties' briefs, the record, and the extensive history of this case before this Court, we affirm.

We initially note that this case has been before this Court before, and we rendered an opinion on February 10, 2006, affirming in part, vacating part, and remanding in part. Thus, we will utilize the facts from our previous opinion.

> The facts of this case are rather complicated. The underlying dispute revolves around the lease and sublease of a coal tipple facility and railroad side track (hereinafter collectively referred to as "the tipple"). In the early 1980s, Roy Crawford III and Edwin Newell purchased the tipple and financed the acquisition through a $355,000.00 loan from Pikeville National Bank & Trust Company (Pikeville Bank). Crawford and Newell formed Odessa Corporation (Odessa) and were the sole shareholders of the corporation. Crawford and Newell's business plan was to lease the tipple to Odessa, and Odessa would then sublease the tipple to a third-party. The lease payments were intended to pay the indebtedness owed Pikeville Bank.
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> Eventually, Odessa entered into a sublease with DKM on May 1, 1985 (1985 sublease). Del Kerwyn Martin was DKM's sole shareholder. Martin, and his then wife, Laurel Martin, were the officers of DKM. The 1985 sublease was signed by Martin and Swilley (then Martin). Under the 1985 sublease, the original term was for a five-year period and DKM was to make $5,000.00 monthly payments plus an annual adjustment based upon the Consumer Price Index.
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> It appears that after August 1986, DKM failed to make monthly payments under the 1985 sublease. As a result, two separate actions were initiated in the Letcher Circuit Court. In 1987, Crawford, as shareholder and officer of Odessa, filed an action against DKM, Martin, and Swilley. Therein, Crawford sought damages for breach of the 1985 sublease. In 1989, Crawford, individually and as stockholder and officer of Odessa, and Odessa

> brought an action against Martin and Newell. These actions were consolidated by order of the circuit court.
>
> Lengthy litigation then ensued. Eventually, several judgments were entered. On June 11, 1997, the circuit court entered summary judgment in favor of Crawford, finding DKM in default under the sublease, and Martin and Swilley to be personally liable thereon. A motion to alter, amend or vacate was denied by order entered September 12, 1997. On January 9, 2001, the circuit court entered an "Order and Partial Summary Judgment on Question of Liability." This order and accompanying opinion again revisited the issue of Martin and Swilley's personal liability under the sublease and sustained same. On April 4, 2003, the circuit court entered an "Order and Judgment," holding that the sublease was terminated by mutual consent on November 26, 1986, and awarding Odessa and Crawford damages in the amount of $62,908.70, plus 12% post-judgment interest. Motions to alter, amend or vacate were denied by order entered November 5, 2003.

Crawford v. Martin, 2006 WL 305843 (Ky. App. February 10, 2006, Nos. 2003-CA-002494-MR, 2003-CA-002531-MR, and 2003-CA-002570-MR). Crawford, individually and as stockholder, director, and officer of Odessa and Odessa brought Appeal No. 2003-CA-002494-MR, and we affirmed in part, vacated in part, and remanded in part. Martin individually cross-appealed in Appeal No. 2003-CA-002531-MR, and we affirmed. DKM, and Martin and Swilley, individually, brought Cross-Appeal No. 2003-CA-002570-MR, which we also affirmed.

The issues raised in the various appeals and cross-appeals were whether the 1985 sublease was terminated by the mutual consent of Crawford and Martin at a meeting held on November 26, 1986; whether damages for breach of the 1985 sublease should be limited to three months of lease payments, prejudgment

interest, and attorney's fees in the amount of $62,908.70; and whether Martin and Swilley were jointly and severally liable for damages that arose from the breach of the 1985 sublease.

Pertinent to the instant appeal is the fact that in our previous opinion, we found a material issue of fact existed with regard to whether the parties mutually agreed to terminate the sublease, and thus we held that the damages should not be limited to three months' worth of lease payments, as the circuit had previously held. We reversed and remanded for the circuit court to determine the appropriate amount of damages in light of our holding. We then addressed whether Martin and Swilley were individually liable for the damages under the 1985 sublease and found that under the clear language of the sublease, Martin and Swilley were individually liable. Martin and Swilley had also argued that the calculation of attorney's fees and prejudgment interest was incorrect, and this Court found that issue to be moot in light of its remand for a new calculation of damages.

Approximately four years after this Court's opinion in the above- referenced appeal and cross-appeals, Martin, DKM, and Swilley filed a motion for summary judgment and a subsequent motion to dismiss, challenging Crawford's right to be on the property in question and to even enter into the 1985 sublease. On February 7, 2013, the circuit court entered an amended order of summary judgment in favor of Crawford and Odessa (collectively "Crawford") ordering that DKM, and Martin and Swilley, individually, were liable to Crawford for damages in the amount of $134,084.21, plus costs, through and including February 1, 2013. Attorney's fees

and prejudgment interest under the 1985 sublease were included in the court's calculated damages. The circuit court denied Martin, Swilley, and DKM's motion for summary judgment and their motion to dismiss, finding that no genuine issue of material fact existed. On October 11, 2013, the circuit court entered a subsequent order vacating its February 7, 2013, order with regard to Laurel Swilley only. The court further denied DKM and Martin's motion to dismiss for lack of prosecution and various other motions. The court granted Crawford's motion to strike amended and supplemental pleadings filed after February 19, 2013.

DKM and Martin now appeal the Letcher Circuit Court's February 7, 2013, and October 11, 2013, orders. On appeal, they argue that summary judgment was not proper because a material issue of fact existed with regard to ownership of the coal tippling rights. Further, they argue that the United States Supreme Court's decision in *Citizens United v. Federal Election Commission*, 558 U.S. 310, 130 S.Ct. 876, 175 L.Ed.2d 753 (2010), requires that this Court revisit its decision with regard to the individual liability of Martin and Swilley. They also argue that Crawford failed to prosecute his claims and accordingly, prejudgment interest was not proper.

The standard of review of a trial court's entry of summary judgment is well settled in this Commonwealth. "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.'" *Lewis v. B & R*

Corp., 56 S.W.3d 432, 436 (Ky. App. 2001), *quoting Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996); *Palmer v. Int'l Ass'n of Machinists & Aerospace Workers*, 882 S.W.2d 117, 120 (Ky. 1994); CR 56.03. "Because summary judgment involves only legal questions and the existence of any disputed material issues of fact, an appellate court need not defer to the trial court's decision and will review the issue *de novo*." *Lewis*, 56 S.W.3d at 436, citing *Scifres*, 916 S.W.2d at 781; *Estate of Wheeler v. Veal Realtors & Auctioneers, Inc.*, 997 S.W.2d 497, 498 (Ky. App. 1999); *Morton v. Bank of the Bluegrass & Trust Co.*, 18 S.W.3d 353, 358 (Ky. App. 1999).

DKM and Martin argue that a material issue of fact existed with regard to whether Odessa owned the exclusive rights that it purportedly leased and optioned to sell to DKM. In support of this, DKM and Martin contend that a letter from CSX Transportation to Major Elkhorn Coal Company, Inc., indicates that Odessa did not have a valid lease on the land where the coal tipple sat. DKM and Martin contend that they have offered affirmative evidence that there is a genuine issue of material fact with regard to whether a valid agreement existed between Odessa and DKM, and thus they argue that the circuit court improperly awarded damages to Crawford under the 1985 sublease.

Crawford counters that summary judgment was proper because Martin and Swilley admitted in open court that they owed three months' worth of damages at a hearing before the Letcher Circuit Court on December 6, 2002. Crawford contends that these open court statements were judicial admissions that cannot be disputed,

citing *Zapp v. CSX Trans., Inc.*, 300 S.W.3d 219, 223 (Ky. App. 2009) ("A judicial admission is a formal statement concerning a disputed fact, made by a party during a judicial proceeding, that is adverse to that party, and that is deliberate, clear, and uncontradicted.") (Internal citation omitted). Crawford argues that under the Kentucky Rules of Evidence, a judicial admission may be the basis for a summary judgment against a party making the admission. *See* Lawson*, Kentucky Evidence Law Handbook, Fourth Edition,* §8.15.

Crawford further argues that the letter from CSX Transportation to Major Elkhorn Coal first appeared in the record as an attachment to a response filed on or about September 20, 2013, after the circuit court set the matter for trial on September 27, 2013. Crawford points out that in its October 11, 2013, order, the circuit court struck any pleadings by Martin and DKM filed after February 19, 2013, and argues that accordingly, the pleading the letter was attached to was never considered by the circuit court and thus should not be considered on appeal. In the alternative, Crawford argues the chain of title set forth by expert Dale Phillips appropriately sets forth who had rights in the subject property.[1] Crawford contends that he and Odessa had every right to enter into the 1985 sublease with DKM, and that it was a valid and enforceable agreement.

After reviewing the record and the parties' arguments, we conclude that the trial court properly entered summary judgment awarding damages in favor of Crawford as directed by this Court's previous order. A review of the hearing

[1] Crawford has attached an affidavit by Dale Phillips, an attorney, which details the transfer of title and ownership of the property on which the coal tipple was located.

before the Letcher Circuit Court on December 6, 2002, indicates that Martin and Swilley admitted in open court that they owed damages to Crawford. We conclude that such an admission can be used against Martin under the Kentucky Rules of Evidence and *Zapp*, *supra*.

Furthermore, we conclude that this argument was not presented to the circuit court, as the referenced letter Martin and DKM rely on was attached to pleadings which were filed at the last minute and were stricken from the record by order entered October 11, 2013. In general, a party is not permitted to raise an issue for the first time on appeal. "The Court of Appeals is one of review and is not to be approached as a second opportunity to be heard as a trial court. An issue not timely raised before the circuit court cannot be considered as a new argument before this Court." *Lawrence v. Risen*, 598 S.W.2d 474, 476 (Ky. App. 1980). Thus, because this evidence was not before the circuit court, we decline to address it or review it on appeal for the first time.

DKM and Martin next urge this Court to revisit its prior decision regarding the issue of Martin's individual liability with regard to DKM's corporate debt in light of *Citizens United*, *supra*. They argue that in *Citizens United*, the United States Supreme Court extended first amendment protections to corporations, holding that a corporation is a "person." DKM and Martin then argue that because DKM is a person, Martin cannot be held individually liable for the corporate debt.

To be quite frank, Martin's argument in this regard is preposterous. We are not persuaded that *Citizens* is applicable here, where the issue is not whether

political speech should be protected, but instead is whether two officers in a company contracted to be personally liable for a corporate debt. Furthermore, this Court previously addressed this issue in its opinion rendered in Cross-Appeal No. 2003-CA-2531-MR and Cross-Appeal No. 2003-CA-002570-MR when it stated:

> By use of the term personal liability, we believe the parties clearly intended Martin and Swilley to be personally or individually liable for payment of rents under the 1985 sublease. Any other interpretation would be clearly contrary to the intent of the parties as expressed by the language of the lease. *See Parrish v. Newbury*, 279 S.W.2d 229 (Ky. 1955). As such, we hold that Martin and Swilley were individually liable for rents under the 1985 sublease and the circuit court properly entered summary judgment upon this issue.

Crawford v. Martin, No. 2003-CA-002494-MR, 2006 WL 305843, at *4 (Ky. Ct. App. Feb. 10, 2006). As Crawford notes in his brief to this Court, a final decision by this Court is the law of the case. *See Martin v. Frasure*, 352 S.W.2d 817, 818 (Ky. 1961) ("A final decision of this Court, whether right or wrong, is the law of the case and is conclusive of the questions therein resolved. It is binding upon the parties, the trial court, and the Court of Appeals."). This Court rendered its opinion finding that Martin and Swilley were personally liable for damages to Crawford and Odessa, and Martin petitioned the Kentucky Supreme Court for discretionary review. That request was denied, and upon that denial, our holding became the law of the case. Accordingly, we decline to revisit the issue under the guise that *Citizens United* somehow applies.

DKM and Martin next argue that this case should be dismissed for Crawford's failure to prosecute. In support of this, they argue they had no duty to bring this case to trial, and that Crawford and Odessa sat on their laurels for many years. We conclude that the argument is without merit, as the record reflects that Martin and Swilley have been primarily responsible for the delays. An extensive delay occurred when Martin and Swilley appealed the case previously to this Court, and this Court concluded that the order from which they appealed was interlocutory. Another delay occurred when Martin and Swilley requested that they be permitted to brief the question of individual liability, and yet another delay occurred when Martin and Swilley obtained new counsel, and counsel filed a motion to continue the trial due to a personal conflict. Subsequent to the delay that ensued for counsel to acquaint himself with the case, the attorney withdrew, causing further delay.

We find no merit in DKM and Martin's argument that Crawford is responsible for the delays that have occurred in this case, and thus we decline to hold that the trial court erred when it denied the motion to dismiss for failure to prosecute.

DKM and Martin next argue that because Crawford and Odessa delayed the prosecution of this matter, they should not be entitled to prejudgment interest. Crawford contends that Swilley and Martin admitted to the trial court that they owed three months' rent, and that the 1985 sublease clearly and unequivocally includes prejudgment interest in the calculation for damages. We find no error in

the trial court's calculation of damages upon remand based on our previous holding in this regard.

Finding no error, we affirm the Letcher Circuit Court's February 7, 2013, order entering amended summary judgment and awarding Crawford and Odessa damages, including attorney's fees and prejudgment interest, in the amount of $134,084.21. We further affirm the court's February 7, 2013, order denying DKM and Martin's motions to dismiss and motions for summary judgment. Finally, we affirm the court's October 11, 2013, order vacating its February 7, 2013, order with regard to Swilley, denying DKM and Martin's other various motions, and striking the pleadings filed by DKM and Martin after February 19, 2013.

ALL CONCUR.

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