

Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-001943-MR

MONA MCCARTHY AND
JAMES MCCARTHY

APPELLANTS

v. APPEAL FROM GRANT CIRCUIT COURT
HONORABLE STEPHEN L. BATES, JUDGE
ACTION NO. 09-CI-00157

ESTATE OF NORA L. MINNING,
DECEASED,
BY AND THROUGH KIMBERLY
MAIUS-STREUTKER, EXECUTRIX

APPELLEE

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: KRAMER, CHIEF JUDGE; ACREE AND CLAYTON, JUDGES.

ACREE, JUDGE: Mona and James McCarthy appeal the Grant Circuit Court's October 31, 2013 Order and Final Judgment finding the McCarthys had breached the parties' agreed-upon settlement agreement, thereby entitling the Appellee,

Estate of Nora L. Minning, deceased, by Kimberly Maius-Streutker, Executrix, to enforce and collect upon the full judgment. We affirm.

In 2000, Minning executed a power of attorney appointing her daughter, Mona McCarthy, as her attorney-in-fact. Minning suffered from numerous medical ailments. Consequently, Mona managed Minning's financial affairs for several years. Minning was eventually declared an adult disabled person by the Grant District Court and a Guardian was appointed.

In 2009, Minning's then-Guardian filed a complaint against Mona, alleging fraud and breach of her fiduciary duties. The Guardian claimed Mona siphoned hundreds of thousands of dollars of Minning's money. Kimberly Maius-Streutker was subsequently appointed to serve as substitute guardian, and an amended complaint filed by the Estate added James McCarthy, Mona's husband, as a party defendant.

Between March 2009 and August 2012, the parties engaged in several bitter discovery disputes, mostly aimed at the McCarthys' failure to timely and fully respond to discovery requests and to comply with the circuit court's discovery orders. The Estate filed four motions to compel discovery and three motions for sanctions. Following the McCarthys' unwillingness to reasonably comply with discovery, the circuit court held the McCarthys in contempt, ordered their pleadings stricken from the record, and entered a default judgment against

them in favor of the Estate. While resolving liability, the circuit court explicitly reserved the determination of damages for later adjudication.¹

The circuit court then scheduled a damages hearing but, before that hearing could commence, the parties entered into a compromise settlement agreement and mutual release fixing their rights. Pursuant to that settlement, the McCarthys were required to file an answer in a separate quiet-title action in Boone Circuit Court no later than March 15, 2013. The McCarthys also agreed that a judgment be entered against them in favor of the Estate for \$200,000.00. To satisfy that judgment, the McCarthys agreed to pay \$2,000.00 plus accrued interest to the Estate beginning March 1, 2013 and each ninety day anniversary thereafter until September 1, 2015, at which time they shall pay to the Estate a sum equal to \$75,000.00 less credit for each \$2,000.00 payment made. Upon payment of the entire \$75,000.00, the Estate agreed to have entered a satisfaction of judgment relieving the McCarthys of any further obligations toward the \$200,000.00 judgment. In the event the McCarthys should fail to comply with any provision of the settlement agreement, they agreed that the \$200,000.00 judgment shall become final and the Estate may pursue collection of the full judgment.

¹ This Court dismissed the McCarthys' subsequent appeal of the circuit court's order, finding the order to be interlocutory and not subject to immediate appeal. *McCarthy v. Maius-Streutker*, 2012-CA-001649-MR, at *1 (Ky. App. 2012) ("The Kentucky Supreme Court has specifically held that an order resolving liability but leaving the determination of the amount of damages for later adjudication is interlocutory and not final and appealable." (citation omitted)).

The parties presented the settlement agreement to the circuit court in the form of an agreed judgment.² The circuit court sanctioned and entered the judgment as its own on March 9, 2013.

Six months later, the Estate filed a motion for entry of final judgment against the McCarthys in the amount of \$198,000.00.³ The Estate claimed the McCarthys had breached material provisions of the settlement agreement when they failed to timely file an answer in Boone Circuit Court, and failed to make timely periodic payments. The circuit court granted the Estate's motion by Order and Final Judgment entered October 31, 2013. This appeal followed.

The McCarthys first argue the circuit court abused its discretion by striking their pleadings and entering a default judgment against them. This argument is a red herring. Prior to entry of a final order⁴ resolving this case, the McCarthys struck a deal with the Estate. That deal resulted in a written settlement agreement purporting to resolve all issues. Upon request, the circuit court entered an agreed judgment incorporating the settlement agreement in full. This procedural posture is significant because Kentucky follows the "general and sensible rule that a judgment by consent or agreement operates as a waiver of all defects or irregularities in the pleading or other proceedings, except such as involve the jurisdiction of the court." *Kentucky Utilities Co. v. Steenman*, 283 Ky.

² While the terms of the settlement agreement were not laid out in the agreed judgment, the judgment incorporated the settlement agreement, in full, by reference.

³ This amount represents the full \$200,000.00 judgment less one \$2,000.00 payment.

⁴ See footnote 1.

317, 141 S.W.2d 265, 269 (1940). Simply put, a settlement renders all that came before it moot. *See id.* The McCarthys cannot now be heard to complain of alleged prior irregularities in the proceedings related to the default judgment.

This brings us to the McCarthys' second argument. They claim the circuit court erred in enforcing the judgment as they did not materially breach the settlement agreement. We are not persuaded.

At its core, this is a contract case. An agreed judgment is essentially a court sanctioned contract of dispute settlement. Black's Law Dictionary JUDGMENT (10th ed. 2014) (an agreed judgment is "[a] settlement that becomes a court judgment when the judge sanctions it"). As a judicial decree, an agreed judgment furnishes judicial approval of a settlement agreement and places the power and weight of the court behind the compromise reached by the parties. *See Little v. Mann*, 302 Ky. 661, 664, 195 S.W.2d 321, 323 (Ky. 1946) ("An agreed judgment is nonetheless a judgment of the court when entered and signed, although it is the consummation of a contract."). Fashioning the settlement agreement in this manner preserved the circuit court's ongoing enforcement authority. *Shelby Petroleum Corp. v. Croucher*, 814 S.W.2d 930, 933 (Ky. App. 1991) ("A court has the authority to enforce its own judgments and to remove any obstructions to such enforcement." (citation omitted)).

Because a settlement agreement is a contract, contract law governs its interpretation. *Island Creek Coal Co. v. Wells*, 113 S.W.3d 100, 103-04 (Ky. 2003). The construction and interpretation of a contract is one of law. *Kentucky*

Employers' Mutual Insurance v. Ellington, 459 S.W.3d 876, 881 (Ky. 2015). Our review proceeds *de novo*. *Id.*

While admitting a delay in performance, the McCarthys assert the delay did not constitute a material breach of the settlement agreement, that the delay was due, in part, to external circumstances, and that they substantially complied with the agreement's terms.

A "material breach" is one that goes to the essence of the contract, such as where "a party fails to perform a substantial part of the contract or one or more of its essential terms or conditions." 23 Williston on Contracts § 63:3 (4th ed.). It is also well-settled that, absent an ambiguity in the contract – which is not claimed here – "a written instrument will be enforced strictly according to its terms, and a court will interpret the contract's terms by assigning language its ordinary meaning and without resort to extrinsic evidence." *Wehr Constructors, Inc. v. Assurance Co. of America*, 384 S.W.3d 680, 687 (Ky. 2012) (citation omitted). To resolve the issue before us, we must turn to the precise language of the settlement agreement.

Paragraph 4 of the settlement agreement provides, in part:

McCarthy agrees that they will cause to be filed in the Quiet Title Action an Answer acknowledging that the relief requested by the Estate in the Quiet Title Action is appropriate and should be granted to the Estate. The Answer shall be filed no later than March 15, 2013. ***It is acknowledged by McCarthy that this provision of the [settlement agreement] is a material condition and that failure to comply with this condition of the [settlement***

agreement] shall constitute a material breach of this [settlement agreement].

(emphasis added). The settlement agreement also provides at paragraph 3(B):

In the event McCarthy fails to timely pay any \$2,000.00 plus interest payment to the Estate, it is agreed that the \$200,000.00 Agreed Judgment (less credit for any previous payments made by McCarthy to the Estate), shall become final. At that time, the Estate may pursue collection of the \$200,000.00 Agreed Judgment as permitted by Kentucky law.

The settlement agreement at paragraph 3(E) further states:

In the event McCarthy shall materially breach or otherwise default in the performance of any terms, condition or covenant set forth in this entire [settlement agreement], it is acknowledged that the \$200,000.00 Agreed Judgment shall become final for which the Estate may forthwith bring execution and collection thereof.

Paragraph 13 of the settlement agreement echoes paragraph 3(E):

In the event McCarthy should default or otherwise breach any material term, condition or covenant set forth herein, it is understood and agreed that the \$200,000.00 Agreed Judgment entered in the Grant Circuit Court in the Civil Proceeding shall immediately become due and payable to the Estate.

It is also worth noting that Paragraph 10 clarifies that:

Each party to this [settlement agreement] acknowledges that they have read same and are familiar with the terms, conditions and covenants. Each party acknowledges that they have had assistance of counsel in reviewing this [settlement agreement] and are familiar with and understand all of its provisions.

The McCarthys admit they did not file their answer in the quiet title action until March 22, 2013. It was due March 15, 2013. The terms of the settlement

agreement are clear: the failure to timely file an answer constitutes a material breach of the contract. The McCarthys are bound by the bargain they brokered, agreed to, and signed. We decline to re-write a contract for any reason but certainly not so as to contradict its plain meaning and plain words. *Wehr*, 384 S.W.3d at 685.

The McCarthys also admit that at least one \$2,000.00 periodic payments was not paid in a timely fashion. The third periodic payment was due August 30, 2013. The payment was posted September 3, 2013 and the Estate did not receive it until September 5, 2013. Under the plain language of paragraphs 3(B), 3(E), and 13 of the settlement agreement, the McCarthys breached the terms of the settlement agreement, and the Estate was entitled to seek enforcement of and collect on the entire \$200,000.00 judgment.

The McCarthys assert these missteps were the result of mistakes of counsel. While perhaps true, this does not excuse their performance under the contract. Again, the language of the settlement agreement is clear and unequivocal. It leaves no room for mistakes, delays, or errors, even unintentional ones. The McCarthys entered into the settlement agreement with the benefit of counsel. They specifically acknowledged that they read the settlement agreement and understood its terms. It is a fundamental tenet of our jurisprudence that “a written agreement duly executed by the party to be held, who had an opportunity to read it, will be enforced according to its terms.” *Conseco Finance Servicing Corp. v. Wilder*, 47 S.W.3d 335, 341 (Ky. App. 2001).

In light of the settlement agreement's plain language, the circuit court's finding that the McCarthys had breached the settlement agreement, thereby entitling the Estate to enforce the judgment and collect upon the full amount owed, will not be disturbed. We affirm the Grant Circuit Court's October 31, 2013, Order and Final Judgment.

ALL CONCUR.

BRIEF FOR APPELLANT:

Ryan M. Beck
Florence, Kentucky

BRIEF FOR APPELLEE:

Thomas R. Nienaber
Florence, Kentucky