RENDERED: DECEMBER 15, 2017; 10:00 A.M.
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Commonwealth of Kentucky

Court of Appeals

NO. 2014-CA-001392-MR

SHELLEY KROHN, UNITED STATES BANKRUPTCY TRUSTEE, ON BEHALF OF THE BANKRUPTCY ESTATE OF ROBERT RAPHAELSON — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE KIMBERLY N. BUNNELL, JUDGE
ACTION NO. 12-CI-02488

MICHAEL D. MEUSER AND MILLER, GRIFFIN & MARKS, PSC — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: NICKELL, STUMBO, AND THOMPSON, JUDGES.

NICKELL, JUDGE: Shelley Krohn, United States Bankruptcy Trustee, on behalf of the Bankruptcy Estate of Robert Raphaelson, ("Krohn") has appealed from the Fayette Circuit Court's grant of summary judgment in favor of attorney Michael D.

Meuser and his employer, the law firm of Miller, Griffin & Marks, PSC ("MGM"). Following a careful review, we affirm.

From approximately 1990 through 2011, Robert Raphaelson engaged the services of MGM to perform a variety of legal services. Meuser was the attorney primarily responsible for handling Raphaelson's business with the firm. Of importance to this appeal, throughout the 1990's and into the early 2000's, Raphaelson was the owner of stallion syndicate shares in two thoroughbred horses. In late 2011, Raphaelson learned of a 2004 Confidential Settlement Agreement ("CSA") entered into between the syndicate manager, Lane's End Farm ("LEF"), and another syndicate owner, Josham Farms Limited ("Josham"), regarding non-payment of amounts due under the syndicate agreement.

Believing he had been improperly excluded from settlement proceeds to which he was entitled, Raphaelson—through his agent, Jerry Jamgochian as president of PJC Investments, LLC ("PJC")—subsequently attempted to obtain information regarding the CSA. On November 3, 2011, Meuser responded to PJC on behalf of Josham alleging PJC's possession, use and distribution of Josham's letter to LEF predating the CSA constituted a breach and invasion of Josham's privacy rights. Meuser contended Josham's business dealings with LEF were confidential and demanded PJC cease and desist from using any information it had obtained related to those dealings.

Upon receipt of the response, Raphaelson was convinced Meuser and MGM had concurrently represented Josham and himself with regard to their

respective syndicate interests, thereby creating a conflict of interest to which he had not consented; had negotiated the CSA without including him although aware of his overlapping interests; and caused him substantial damages by preferring the interests of Josham over his own. By letter dated April 27, 2012, apparently in response to a letter from Raphaelson's counsel seeking a copy of the CSA, Meuser emphatically stated he—nor any member or employee of his firm—had "never seen the CSA to which you refer, have never seen a draft of it, was not involved in negotiating it, have never had any contact with Lane's End concerning it, and am not privy to its terms."

On May 23, 2012, Raphaelson filed suit against MGM and Meuser alleging legal malpractice and fraud. MGM and Meuser moved to dismiss the action, but the trial court denied the requested relief. A period of discovery then commenced. Raphaelson had filed for bankruptcy protection on November 8, 2011, but did not disclose the existence of his potential claim in his filing. Krohn, the bankruptcy trustee, learned of the suit and on October 19, 2012, intervened as the real party in interest. Subsequent negotiations to amicably settle the suit failed and discovery—which had been stayed during the negotiation period—resumed.

On March 31, 2014, MGM and Meuser moved for summary judgment, alleging Krohn had failed to produce even a scintilla of evidence to support her claims. According to MGM and Meuser, all efforts had produced uncontroverted testimony and evidence to the contrary. In response, Krohn contended she had not been given an ample opportunity to complete discovery due

to "extreme" resistance and obstruction by MGM and Meuser to her requests, and indicated the need to take an additional deposition of Ted Burnett, a Canadian resident and attorney alleged by MGM and Meuser to have been the person responsible for negotiating and drafting the CSA on behalf of Josham. She further alleged existence of genuine issues of material fact.

A hearing was finally held on the summary judgment motion on July 11, 2014. Between the filing of the motion and the hearing date, Krohn did not attempt further discovery nor attempt to present any proof that was not already before the court. Rather, she maintained her efforts to obtain discovery had been "thwarted" and "resisted" by Meuser and MGM. At the conclusion of the hearing, the trial court orally granted the motion upon concluding Krohn had failed to produce any evidence of any kind supporting the claims advanced in the complaint in the nearly twenty-six months the case had been pending. A written order comporting with the oral rulings was entered on July 31, 2014, and this appeal followed.

As she argued below, before this Court Krohn contends she was denied ample opportunity to complete discovery prior to the trial court's entry of summary judgment and genuine issues of material fact existed which should have precluded the trial court's ruling. We have carefully reviewed the voluminous record and disagree.

Summary judgment serves to terminate litigation where "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[1] 56.03. It is well-established a party responding to a properly supported summary judgment motion cannot merely rest on the allegations in his pleadings. *Continental Casualty Co. v. Belknap Hardware & Manufacturing Co.,* 281 S.W.2d 914 (Ky. 1955). "[S]peculation and supposition are insufficient to justify a submission of a case to the jury, and . . . the question should be taken from the jury when the evidence is so unsatisfactory as to resort to surmise and speculation." *O'Bryan v. Cave*, 202 S.W.3d 585, 588 (Ky. 2006) (citing *Chesapeake & Ohio Ry. Co. v. Yates*, 239 S.W.2d 953, 955 (Ky. 1951)). "'Belief' is not evidence and does not create an issue of material fact." *Humana of Kentucky, Inc. v. Seitz*, 796 S.W.2d 1, 3 (Ky. 1990); *see also Haugh v. City of Louisville*, 242 S.W.3d 683, 686 (Ky. App. 2007) ("A party's subjective beliefs about the nature of the evidence is not the sort of affirmative proof required to avoid summary judgment.") Furthermore, the party opposing summary judgment "cannot rely on the hope that the trier of fact will disbelieve the movant's denial of a disputed fact, but must present affirmative evidence in order to defeat a properly supported motion for summary judgment." *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 481 (Ky. 1991) (internal citations and quotations omitted).

On appeal, we must consider the evidence of record in the light most favorable to the non-movant and must further consider whether the trial court

[1] Kentucky Rules of Civil Procedure.

correctly determined there were no genuine issues of material fact and the moving party was entitled to judgment as a matter of law. *Scifres v. Kraft*, 916 S.W.2d 779 (Ky. App. 1996). "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 v. B & R Corp.*, 56 S.W.3d 432, 436 (Ky. App. 2001) (footnote omitted).

Our analysis begins with Krohn's argument concerning the timing of summary judgment. She asserts her inability to conduct sufficient discovery necessitated the denial of summary judgment. Krohn explains that throughout discovery, MGM and Meuser refused to respond to most of her discovery requests and "actively stonewalled" or otherwise frustrated her attempts to complete discovery. To this end, she asserts the evidentiary hearing was a "premature showdown of the type prohibited by Kentucky law."

We agree summary judgment should not be granted unless "a party has been given ample opportunity to complete discovery." *Pendleton Bros. Vending, Inc. v. Commonwealth of Kentucky Fin. & Admin. Cabinet*, 758 S.W.2d 24, 29 (Ky. 1988) (citing *Hartford Ins. Group v. Citizens Fid. Bank & Trust Co.*, 579 S.W.2d 628 (Ky. App. 1979)). This holding was recently reiterated by our Supreme Court, cautioning trial courts "not to take up these motions prematurely." *Blankenship v. Collier*, 302 S.W.3d 665, 668 (Ky. 2010).

However, "it is not necessary that litigants be allowed to complete discovery but only that they be granted sufficient time to complete discovery and

then fail to produce any evidence to create a genuine issue of material fact." *Martin v. Pack's Inc.*, 358 S.W.3d 481, 485 (Ky. App. 2011). "The trial court's determination that a sufficient amount of time has passed and that it can properly take up the summary judgment motion for a ruling is reviewed for an abuse of discretion." *Blankenship*, 302 S.W.3d at 668.

> A party "cannot complain of the lack of a complete factual record when it can be shown that the respondent has had an adequate opportunity to undertake discovery." *Cargill v. Greater Salem Baptist Church,* 215 S.W.3d 63, 69 (Ky. App. 2006). "It is not necessary to show that the respondent has actually completed discovery, but only that respondent has had an opportunity to do so." *Hartford Ins. Group v. Citizens Fidelity Bank & Trust Co.*, 579 S.W.2d 628, 630 (Ky. App. 1979) (six months between filing of complaint and granting motion for summary judgment was sufficient opportunity to complete discovery).

Leeds v. City of Muldraugh, 329 S.W.3d 341, 344 (Ky. App. 2010).

As is often the case when the stakes are high and the issues are potentially complex, discovery was not a smooth process. Krohn's discovery requests were met with objections, the majority being based on assertion of the attorney-client privilege. Most of the objections were determined to be justified, while others were not. The trial court was required to intervene, resulting in inevitable delays. In the end, however, we cannot agree that Krohn was forced to take part in a "premature showdown."

Raphaelson filed his complaint in May of 2012. MGM and Meuser answered in July of 2012. Krohn intervened in October of 2012. The summary

judgment hearing did not occur until July of 2014. During that period, Krohn had the opportunity to, and did, take a substantial amount of discovery. Numerous witnesses were deposed and written discovery was exchanged. While Krohn complains of MGM and Meuser's "tactics" of stonewalling and resisting her written discovery requests, she fails to comprehend the objections raised to requested documents were legitimate and sustained by the trial court based on attorney-client privilege. Additionally, Krohn requested to review certain documents—including the CSA—which were not and had never been in the possession of MGM or Meuser, thereby obviously inhibiting the ability to produce said documents. We cannot say fervently representing a client and asserting applicable privileges equates to resistance or obstruction.

Krohn also contends she was denied the opportunity to pursue the deposition of Burnett. She asserts Burnett is a Canadian resident and is unwilling to voluntarily participate, thereby necessitating resort to the complex and lengthy process of securing a subpoena from a foreign court. However, she fails to indicate how her efforts to conduct this discovery deposition were hampered by anyone. A review of the record indicates Krohn took no steps to initiate the foreign subpoena process at any point during the many months she was aware of Burnett's potential involvement in negotiating and drafting the CSA. Further, the record contains no order, ruling or intimation that Krohn was restricted or prohibited from engaging in this line of discovery. Although she now contends the trial court's entry of summary judgment was, in effect, an order preventing her

from conducting this discovery deposition, during the evidentiary hearing, Krohn's counsel conceded a strategic decision was made to not pursue Burnett's deposition until the trial court ruled on the pending summary judgment motion. We discern no impediment to Krohn's ability to conduct discovery other than her own unwillingness to do so. We will not impute fault to the trial court for Krohn's self-inflicted failures.

Furthermore, while Krohn filed various motions to compel along the way, none were pending at the time of the evidentiary hearing. We can find no evidence in the record where Krohn requested additional discovery prior to the start of the evidentiary hearing. Krohn had the opportunity to sufficiently develop the record prior to summary judgment being rendered.[2] Unfortunately for Krohn, all of the evidence and testimony adduced ran completely counter to her theory of the case.

As the trial court correctly noted, throughout the course of the litigation below, Krohn did not produce a shred of evidence substantiating her claims or providing any basis whatsoever to raise a genuine issue of material fact. In addition, after the motion for summary judgment had been filed, Krohn failed to counter MGM and Meuser's claims by showing in some form (*i.e.*, affidavit, etc.) there was, in fact, a genuine issue pertaining to a material fact. As previously discussed above, to withstand the summary judgment motion, it was incumbent on

[2] Krohn's contention that "time" and "opportunity" are not synonymous is unavailing. Our review of the record indicates she had both ample time and opportunity to undertake and complete the desired discovery.

Krohn to present the trial court affirmative proof supporting her position. *See also Neel v. Wagner–Shuck Realty Co.*, 576 S.W.2d 246, 250 (Ky. App. 1978) ("If the appellant had proof that a genuine fact issue existed, it was appellant's duty to tender some proof to the court."). A party who fails to challenge underlying facts presented by the movant in support of the summary judgment risks having the summary judgment granted and then affirmed on appeal. *Kenton County Fiscal Court v. Elfers*, 981 S.W.2d 553, 557 (Ky. App. 1998). As artfully stated in *Neal v. Welker*, 426 S.W.2d 476, 479–80 (Ky. 1968):

> The curtain must fall at some time upon the right of a litigant to make a showing that a genuine issue as to a material fact does exist. If this were not so, there could never be a summary judgment since 'hope springs eternal in the human breast.' The hope or bare belief . . . that something will 'turn up,' cannot be made basis for showing that a genuine issue as to a material fact exists.

Based upon the record at the time of the hearing, we believe the trial court correctly granted summary judgment. No abuse of the trial court's substantial discretion occurred.

Considering the case in its entirety, we must conclude entry of summary judgment was proper. Therefore, the decision of the Fayette Circuit Court is AFFIRMED.

ALL CONCUR.

BRIEF FOR APPELLANT:

Jefferey Ogden Katz
Chicago, Illinois

J. Stephen McDonald
Lexington, Kentucky

BRIEF FOR APPELLEE:

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