

Commonwealth of Kentucky
Court of Appeals

NO. 2015-CA-001059-MR

RFK COMMUNICATIONS, LLC

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE JAMES M. SHAKE, JUDGE
ACTION NO. 09-CI-010671

J.I.L. COMMUNICATIONS, LLC

APPELLEE

OPINION
AFFIRMING

** ** * ** * **

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

KRAMER, CHIEF JUDGE: RFK Communications, LLC (RFK), filed a breach of contract action in Jefferson Circuit Court against the appellee, J.I.L.

Communications, LLC (J.I.L.). In sum, RFK asserted that it sold various telecommunications products and services on behalf of J.I.L. to five customers, or “accounts,” which, in turn, contractually obligated J.I.L. to pay it certain

commissions based upon those accounts for an indeterminate period that extended beyond April 2008. However, RFK's theory regarding the nature of J.I.L.'s contractual obligation to pay it commissions varied three times over the course of the litigation below. Following a bench trial in this matter, the circuit court ultimately rejected each of RFK's theories and dismissed RFK's action. This appeal followed and RFK argues that each of its three theories regarding J.I.L.'s contractual liability should have entitled it to a favorable judgment. Upon review, we find no error and affirm.

Proceeding now to our analysis, we will review additional details of this matter as they become relevant. As to RFK's first theory of J.I.L.'s contractual liability, RFK filed its complaint in this matter on October 19, 2009, alleging in relevant part:

3. On or about March 12, 2007 RFK and J.I.L. entered into a contract (Contract), a copy of which is attached hereto, incorporated by reference and marked Exhibit A.
4. Pursuant to the Contract J.I.L. agreed to pay RFK a fee based on RFK's sales of various telecommunications products as outlined in the Contract.
5. Pursuant to the Contract RFK sold telecommunications products yet J.I.L. wrongfully breached the Contract by failing and refusing to compensate RFK as agreed upon and by failing and refusing to provide RFK with information sufficient to accurately calculate the total amounts due and owing RFK under the Contract or to otherwise provide an accounting.
6. J.I.L. has failed and refused to pay RFK the fee due and owing under the Contract after proper demand being

made all to the damage of RFK in an amount that exceeds the jurisdictional minimum requirements of the Circuit Court.

The “Exhibit A,” referenced in RFK’s complaint, was an agreement between J.I.L. and RFK. The agreement stated that it was “effective for a period of one year beginning on the last date signed below,” which was signed as March 12, 2007. In general, it provided that J.I.L. had appointed RFK to serve as its independent sales representative, and that J.I.L. would pay RFK various scheduled commissions for RFK’s sales of assorted telecommunications products and services.

As set forth above, RFK alleged in its complaint that the *only* contract that had been breached by J.I.L.’s failure to pay it commissions on the five accounts beyond April 2008 was the March 12, 2007 written agreement. However, when the circuit court addressed this point in the final judgment it entered following a bench trial in this matter, it determined that the March 12, 2007 written agreement could not, by its plain terms, have applied to those five accounts.

RFK contends the circuit court’s determination was erroneous. We disagree. It is undisputed that (1) if RFK sold the five accounts on behalf of J.I.L., it did so several months *prior* to March 12, 2007; (2) RFK had no interaction with those five accounts (and made no sales of any kind) on or after March 12, 2007; and (3) the plain terms of the March 12, 2007 written agreement only promised commissions for sales made by RFK *on or after* March 12, 2007.¹

¹ To this effect, Section 1(c) of the March 12, 2007 agreement provided in relevant part that “[t]his Agreement will be effective for a period of one year beginning on the last date signed

Second, and over the course of litigating this matter subsequent to filing its complaint, RFK argued that at some point after it brought the five accounts to J.I.L., J.I.L. had made an unwritten promise *collateral* to the March 12, 2007 agreement to pay it commissions on those accounts beyond April 2008. When the circuit court likewise addressed this point in its final judgment, it determined that even if J.I.L. had made such a collateral promise, the promise could not have been contractually binding because it was based upon past consideration.

RFK argues the circuit court erred in this respect. We disagree. As the circuit court correctly observed, performance that has been completed and rendered before an offer has been made relating to it cannot qualify as consideration for a binding contract. *See Sawyer v. Mills*, 295 S.W.3d 79, 86 (Ky. 2009).

Third, RFK argued that at some point *before* it brought the five accounts to J.I.L., J.I.L. had made an unwritten promise collateral to the March 12, 2007 agreement to pay it commissions on those accounts beyond April 2008. The circuit court also rejected this argument, and RFK claims the circuit court erred in this respect as well. Its argument on this point can be summarized as follows: RFK believes it was entitled to judgment because it produced evidence of the

below” (*e.g.*, March 12, 2007). The agreement also included a merger clause, specifying in relevant part that “[t]his Agreement represents the full and final Agreement of the parties with respect to the subject matter hereof and supersedes all prior and contemporaneous oral and written Agreements, discussions and representations.”

existence of this collateral oral contract through the exhibits and testimony it presented during the bench trial of this matter.

We disagree. As discussed, the circuit court's judgment in this matter resulted from a bench trial. Kentucky Rule of Civil Procedure (CR) 43.01 placed the burden of production and risk of non-persuasion upon RFK with respect to whether a collateral contract existed between RFK and J.I.L. *See also Staples' Ex'r v. Barrett*, 242 S.W.2d 996, 998 (Ky. 1951) (explaining that a claimant seeking to enforce any kind of contract has the burden of proving the existence of the contract). The circuit court, as the fact finder, determined that no valid agreement obligated J.I.L. to pay RFK any commissions relative to the five accounts discussed above. CR 52.01 limits our review to the question of whether the circuit court's finding in that respect is clearly erroneous and admonishes us to give due regard to the opportunity of the trial court to judge the credibility of the witnesses.

Accordingly, the issue is not whether RFK produced evidence that might otherwise have supported a finding that a collateral agreement existed between itself and J.I.L. Rather, the issue is whether any evidence was so conclusive as to compel a finding in RFK's favor as a matter of law. *Morrison v. Trailmobile Trailers, Inc.*, 526 S.W.2d 822, 824 (Ky. 1975).

The primary difficulty in reviewing RFK's claim of error in this respect rests with RFK's failure to designate, as part of the certified appellate record, the video recording of the bench trial. Because it is missing, we must

presume that any testimony given during that bench trial *supported*, rather than contradicted, the circuit court’s judgment.² *See Commonwealth, Dep’t. of Highways v. Richardson*, 424 S.W.2d 601, 604 (Ky. 1967).

Moreover, while the exhibits RFK produced during that bench trial *were* included with the appellate record, they do not qualify as evidence so conclusive as to compel a finding as a matter of law that RFK had an agreement with J.I.L. before it brought J.I.L. the five accounts which obligated J.I.L. to pay it commissions beyond April 2008. Only one of the twelve exhibits RFK references in its brief makes mention of *any* agreement between RFK and J.I.L. That exhibit—identified as “Plaintiff’s Exhibit 2”—is a copy of the March 12, 2007 agreement discussed previously.

The remaining eleven exhibits produced by RFK consist of RFK’s own estimate of its contractual damages, which it prepared for trial on a spreadsheet; a chart of the five accounts, which indicates the five accounts were “sold” between December 2006 and January 2007 by an entity referred to as “Strategic;” and emails between Charlie Booth (the sole shareholder of J.I.L.) and Rick Mills (the sole member of RFK, using an email address supplied to him by another entity referred to as “Strategic Communications”) discussing commission

² Rather than citing or relying upon any part of the video record of the bench trial, RFK extensively cites and relies upon several paragraphs the circuit court added to its order that attempt to summarize the testimonies given at the bench trial by various witnesses. However, the circuit court’s summaries of the testimony do not support that any kind of agreement existed between RFK and J.I.L. for commissions to be paid regarding the five accounts beyond April 2008. Furthermore, “[t]he recital by the trial judge of certain isolated statements of the witnesses cannot be considered a substitute for a transcript of the evidence heard.” *Richardson*, 424 S.W.2d at 603-04.

payments J.I.L. was making to either Mills, Strategic, or possibly RFK.³ They demonstrate at most that RFK sold the five accounts prior to March 12, 2007, on behalf of J.I.L.; J.I.L. paid either Mills, Strategic, or RFK various amounts based upon those accounts until April 2008; and, thereafter, Mills, Strategic, or RFK continued to insist further payments were due. Collectively, these exhibits fall short of demonstrating the material terms⁴ of a contract, including whether J.I.L. contractually obligated itself to pay RFK any amount (for any reason) beyond April 2008.

In short, RFK has failed to present any basis of reversible error. We therefore AFFIRM.

ALL CONCUR.

BRIEF FOR APPELLANT:

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³ RFK is only mentioned in one of these emails. That email, which was sent from Booth to Mills (at Mills' "Strategic" email address) on April 9, 2007, listed the five accounts discussed and stated in relevant part: "Rick, attached is a list of the opportunities and [sic] sold. I will need the Fed ID for RFK as we are starting to get some commission [sic] in this month."

⁴ See, e.g., BLACK'S LAW DICTIONARY 991-92 (7th ed. 1999) (defining "material terms" as "[c]ontractual provisions dealing with significant issues such as subject matter, price, payment terms, quantity, quality, duration, or the work to be done").