

RENDERED: SEPTEMBER 1, 2017; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2016-CA-000497-MR

ELIZABETH HASELDEN JOHNSON

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE MITCHELL PERRY, JUDGE
ACTION NO. 04-CI-008256

MELVIN E. JOHNSON

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: DIXON, JOHNSON, AND MAZE, JUDGES.

MAZE, JUDGE: This appeal arises from a judgment of the Jefferson Circuit Court dismissing the claims of the Appellant, Elizabeth Johnson, against the Appellee, Melvin Johnson, for conversion of alimony checks and diversion of proceeds from the sale of a pre-marital home. As the record shows the trial court's findings were not clearly erroneous, we affirm.

Background

Elizabeth and Melvin Johnson met in 1994 and developed a relationship. Melvin, at that time, was a Merrill-Lynch advisor but soon retired in 1995. They were married in 1997. Their marriage was dissolved by a final Order, Judgment and Decree in October 2003. In September 2004, Elizabeth filed a complaint against Melvin. The complaint alleged five counts, including conversion of alimony checks that Elizabeth was to receive from her first husband, James, diversion of proceeds from a non-marital home, conversion of funds from a checking account, and two counts of negligence regarding the alimony checks and home proceeds. The case was inactive for approximately seven years until Elizabeth retained new counsel.

The matter was set for a bench trial on December 22, 2016. The fifth count in the complaint, conversion of funds from a checking account, was dismissed prior to trial. The only issues remaining at trial were whether Melvin converted \$60,000 in alimony checks intended for Elizabeth from her ex-husband James and whether Melvin diverted a portion of the proceeds from the sale of Elizabeth's home in Connecticut. At the December 2016 bench trial, only two witnesses were called, Elizabeth and Melvin. The trial court heard the evidence and ruled in favor of Melvin, dismissing Elizabeth's complaint. The court found that Elizabeth "failed to meet her legal burden by producing proof to satisfy the legal standard by preponderance of the evidence." This *pro se* appeal follows.

Standard of Review

A circuit court's findings of fact will only be disturbed if clearly erroneous. CR¹ 52.01; *Cherry v. Cherry*, 634 S.W.2d 423, 425 (Ky. 1982). A finding of fact is clearly erroneous if it is not supported by substantial evidence. *Hunter v. Hunter*, 127 S.W.3d 656, 659 (Ky. App. 2003). "Substantial evidence is evidence, when taken alone or in light of all the evidence, which has sufficient probative value to induce conviction in the mind of a reasonable person." *Id.* (citing *Owens-Corning Fiberglas Corp. v. Golightly*, 976 S.W.2d 409, 414 (Ky. 1998); *Sherfrey v. Sherfrey*, 74 S.W.3d 777, 782 (Ky. App. 2002)). We review questions of law *de novo*. *Id.*

Analysis

Elizabeth contends that Melvin converted \$60,000 in alimony checks intended for her from her first husband James, and diverted profits from the sale of her Connecticut home. She believes that Melvin's long-time employment as a Merrill-Lynch advisor enabled him to commit the fraud against her, and that he breached his fiduciary duty to her. Elizabeth also contends that it was a violation of the Code of Judicial Conduct for the trial court to incorporate Melvin's counsel's findings of facts and conclusions of law into the final order, and that Melvin's counsel should have to pay her court costs due to counsel making misrepresentations and allowing Melvin to make false testimony.

¹ Kentucky Rules of Civil Procedure.

First, we will address the main issue on appeal: whether the court erred in its findings of fact and conclusion of law that Elizabeth did not meet her burden of proving conversion of alimony checks or sale proceeds from the non-marital Connecticut home; the only two issues before the trial court. Elizabeth had the burden to prove the elements of her claims because “the party holding the affirmative of an issue must produce the evidence to prove it.” CR 43.01(1). Under the UCC², “[t]he law applicable to conversion of personal property applies to instruments.” KRS³ 355.3-420. Conversion of personal property requires proving multiple elements, including that,

(3) the defendant exercised dominion over the property in a manner which denied the plaintiff’s rights to use and enjoy the property and which was to the defendant’s own use and beneficial enjoyment; (4) the defendant intended to interfere with the plaintiff’s possession; . . . (6) the defendant’s act was the legal cause of the plaintiff’s loss of the property[.]

Jasper v. Blair, 492 S.W.3d 579, 582 (Ky. App. 2016) (citing *Jones v. Marquis Terminal, Inc.*, 454 S.W.3d 849, 852 (Ky. App. 2014)).

Here, regarding the alimony checks, the trial court found that “Elizabeth was unable to show any of the alimony checks were in fact diverted by Melvin.” The court supported this finding by explaining that “all of the checks show Elizabeth’s endorsement” and she was unable to prove that the checks were deposited into Melvin’s account. Regarding the sale of the non-marital

² Uniform Commercial Code.

³ Kentucky Revised Statutes.

Connecticut home, the trial court found that Elizabeth “did not produce the check nor an explanation as to her claim that Melvin diverted [\$42,868.35] from her account.” Additionally, the court explained that Melvin “deni[ed] any breach of his fiduciary duties as Elizabeth’s financial consultant, prior to his retirement from Merrill-Lynch.” In support of this, Melvin tendered “his closeout evaluation . . . which supports his testimony that he was a valued employee with no adverse note of any kind”

Because there was no proof that Melvin converted these funds for his own use, or that he in any way denied her use of the money or interfered with her possession, the trial court was correct in concluding that Elizabeth did not meet her legal burden of proving the elements of conversion. As such, the court’s findings of fact were not clearly erroneous and were supported by the trial record.

Elizabeth also contends that it was improper for the trial court to adopt Melvin’s counsel’s proposed findings of fact and conclusions of law. The Kentucky Supreme Court has explained that when a trial court requests “both parties to submit proposed findings of fact . . . [i]t is not error for the trial court to adopt findings of facts which were merely drafted by someone else,” even when there is no correction or change made to the findings. *Prater v. Cabinet for Human Res.*, 954 S.W.2d 954, 956 (Ky. 1997) (citing *Bingham v. Bingham*, 628 S.W.2d 628, 629 (Ky. 1982)). Here, while the court did adopt Melvin’s findings verbatim, both parties submitted findings, and Melvin’s findings were a correct

representation of the evidence at trial. It was therefore not improper for the trial court to adopt these findings.

Lastly, Elizabeth contends that Melvin's counsel should pay trial and court costs for his part in misrepresentations and allowing false testimony by his client, Melvin. She is asserting a claim against opposing counsel that was never before the trial court and is therefore not now before our court for review. Similarly, any other claims Elizabeth is raising in her appeal that were not presented to the trial court are not properly before us and will not be addressed.

Conclusion

As the trial court's findings of fact were not clearly erroneous, we affirm.

ALL CONCUR.

BRIEF FOR APPELLANT:

Elizabeth Haselden Johnson, *Pro Se*
San Antonio, Texas

BRIEF FOR APPELLEE:

Frank Mascagni, III
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