

RENDERED: JANUARY 24, 2003; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 1996-CA-001377-MR

BILLIE J. OWENS

APPELLANT

v. APPEAL FROM BELL CIRCUIT COURT
HONORABLE FARMER H. HELTON, JUDGE
ACTION NO. 91-CI-00313

U. WAYNE GREENE AND DANA GREENE,
D/B/A GREENE AND GREENE

APPELLEES

OPINION

AFFIRMING

** ** * * *

BEFORE: BARBER COMBS AND JOHNSON, JUDGES.

JOHNSON, JUDGE: Billie J. Owens¹ has appealed from a judgment entered by the Bell Circuit Court on May 3, 1996, which awarded the accounting firm of Greene and Greene the sum of \$57,732.17 for accounting fees. Having concluded that the claim was filed

¹Billie J. Owens's former husband, Donald Owens, and two corporations owned by the Owens, D.R.O., Inc., and Owens Electrical Contractors and Associates, Inc., were also parties to the action. While Donald Owens filed a notice of appeal in case number 1996-CA-001439-MR, he did not perfect his appeal. Therefore, the only parties to this appeal are Billie J. Owens and Greene and Greene.

within the applicable limitations period and that the factual findings as to the amount of the accounting fees were not clearly erroneous, we affirm.

The present action originated in a proceeding to dissolve the marriage between Billie J. Owens and her husband, Donald R. Owens. When the petition for dissolution of marriage was filed on July 11, 1991, the Owenses were the sole shareholders of Owens Electrical Contractors and Associates, Inc., a Kentucky corporation, and and D.R.O., Inc., a Tennessee corporation.² Since the early 1980's and continuing through 1990, Greene and Greene had been employed to perform accounting and tax services for both corporations as well as for the Owenses personally. According to Greene and Greene, it held an Aopen@account from both corporations and the Owenses which included charges that had accumulated over many years, and upon which periodic payments had been received. Greene and Greene's work for the Owenses and their corporations was terminated in December 1990.

On May 31, 1994, the Bell Circuit Court approved the sale of D.R.O. and its physical assets for \$750,000.00. The trial court further directed that the sale proceeds be used to pay the existing debts of the corporation, effectively removing

²D.R.O. also did business as Claiborne Dock, Inc.

a lien on the marital home held by the First State Bank of Middlesboro, Kentucky. At the time, more than 30 different creditors were paid from the proceeds from the sale. However, Greene and Greene was not among them, and it was not listed by the parties as an existing creditor of D.R.O. The Owenses were also paid \$20,000.00 each from the sale proceeds and the residual proceeds were deposited with the trial court, pending a final distribution of the assets in the dissolution action.

On August 3, 1994, Greene and Greene filed a motion for leave to intervene as a third-party plaintiff in the Owenses= dissolution action. The intervening complaint alleged that the Owenses were indebted to Greene and Greene, and that Greene and Greene had a claim to a portion of the proceeds from the sale of D.R.O. The trial court granted Greene and Greene's motion for leave to intervene on August 23, 1994. However, while Greene and Greene's motion for leave to intervene was pending, the trial court entered a final decree of dissolution of marriage on August 4, 1994. As part of that decree, the trial court approved the Owenses=proposed property settlement agreement. The property settlement agreement awarded Billie the marital home, together with all its furnishings; her personal property and automobile; and \$15,000.00 from the proceeds from the sale of D.R.O. that were still on deposit with the trial court. Donald was awarded the remainder of the marital property,

including the stock in the two corporations and the remainder of the proceeds from the sale of D.R.O. on deposit with the trial court.

Meanwhile, discovery proceeded in the intervenor action for approximately one and a half years. The parties filed various pleadings including a cross-claim by Billie against Donald and the two corporations, which is still pending. On January 22, 1996, Owens Electrical Contractors and Associates filed a petition for bankruptcy in the United States Bankruptcy Court for the Eastern District of Kentucky. On February 28, 1996, the trial court entered an order requiring the parties to submit briefs for final adjudication of ~~A~~the issues set forth in the intervening complaint concerning the underlying obligation, if any, owing to Greene and Greene. @ The trial court stated that ~~A~~once this determination is made the Court shall enter appropriate Orders concerning submission of all remaining issues. @ In its brief, Greene and Greene stated:

There are two primary issues, only the first of which is now under submission by briefs. The issues are: (1) the amount owing to the intervening plaintiffs, Dana Greene and U. Wayne Greene (hereinafter Greene), for accounting services performed for Don Owens, Billie Owens, D.R.O. Inc., d/b/a Clairborne Dock, Inc. and Owens Electrical Contractors and Associates, Inc.; (2) whether Don Owens and Billie Owens may be held personally liable for the debts of their closely held corporations.

Despite the pending bankruptcy proceedings, the Bell Circuit Court on May 3, 1996, rendered a judgment in favor of the intervenors, Greene and Greene.³ The trial court stated:

The intervening plaintiffs shall have and recover judgment against Don Owens and Billie Owens, jointly and severally, in the amount of \$1,377.38 together with 8% interest in the liquidated sum from November 30, 1990 through the date of judgment; against D.R.O., Inc. d/b/a Claiborne Dock, Inc. in the amount of \$40,950.86 together with 8% interest on the liquidated sum from December 31, 1990 through the date of judgment; and against Owens Electrical Contractors and Associates, Inc. in the amount of \$15,403.93 together with 8% interest on the liquidated sum from December 15, 1990 through the date of judgment; and thereafter at the judgment rate until paid in full.

Subsequent to that judgment, Greene and Greene filed a series of motions with the trial court in an attempt to collect the judgment, including one request that the Owens be jailed for contempt for their alleged violation of court orders. Other than the personal judgment against Donald and Billie, Ajointly and severally, in the amount of \$1,377.38@however, the trial court failed to make a final adjudication of the parties= personal liability on the claims against the corporations. The only reference to the personal liability of Billie Owens on the

³On May 7, 1996, the trial court entered a supplemental judgment for the purposes of making the May 3, 1996, judgment final and appealable under Kentucky Rules of Civil Procedure (CR) 54.02. While we have our concerns about this piecemeal approach to this litigation, the judgment appealed from does meet the requirements of CR 54.02.

corporations=debts was a statement in the judgment that A[t]he court continues to exercise jurisdiction over the proceeds of sale which were converted to the personal use of the parties. Therefore, the intervening plaintiffs may satisfy their judgments by the tracing of the proceeds from the sale of Claiborne Dock [D.R.O.] assets through all sources including the levy and attachment of marital property, both real and personal and in any form to which it has been converted.@ The trial court then went on to state that A[i]n the event the intervening plaintiffs are unable to satisfy their judgment from the tracing of these proceeds, the remaining issue concerning personal liability of the individuals for the corporate debts may be submitted to the court on motion of either party.@

Eventually, in response to the numerous collection actions taken by Greene and Greene and the numerous responses by the Owenses, the trial court issued an order on August 6, 1996, directing that A the amount of \$35,000.00 paid to Billie J. Owens and \$63,312.43 paid to Donald R. Owens from proceeds held by the Court to be paid back into Court due to the fact that the said parties obtained this money through fraudulent practices and to the prejudice of judgment creditors.@ A few days later, on August 19, 1996, Billie Owens partially complied with the trial court's order by paying \$1,856.00 in satisfaction of the judgment

for the Owens=personal accounting services.⁴ On August 22, 1996, D.R.O. joined Owens Electrical Contractors and Associates in filing for bankruptcy protection in the United States Bankruptcy Court. No further action was taken in regard to Greene and Greene's collection efforts and Greene and Greene at no time attempted to intervene in the two bankruptcy proceedings. This appeal of the judgment entered on May 3, 1996, was filed on May 9, 1996.

In her brief, Owens sets forth the following issues:

(1) whether by reason of its failure to prosecute its claims in the United States Bankruptcy Court, Greene and Greene is barred from seeking further collection of its judgments; (2) whether the judgment against Owens Electrical Contractors and Associates, Inc. is void due to the discharge in bankruptcy of the underlying debt; (3) whether Billie Owens as a shareholder of the corporations can be held personally liable for the debts incurred by the corporations; (4) whether the trial court erred by refusing to dismiss most of Greene and Greene's claims as time-barred by the applicable statute of limitations; and (5) whether the trial court erred by finding that Greene and Greene was entitled to recover the fees it claimed.

⁴The amount of the judgment had increased due to accumulated interest.

Issues (1) and (2) concerning the discharge of the debts in bankruptcy were not argued before the trial court and thus were not preserved for our review.⁵ Furthermore, Owens has failed to comply with CR 76.12(4)(c)(v) by providing in her brief ~~A~~ statement with reference to the record showing whether the issue was properly preserved for review and, if so, in what manner.⁶ It is clear from our review of the record that these two issues were not properly preserved for our review.

As to issue (3), the trial court repeatedly declined to rule as to whether Owens, as a shareholder, was personally liable for the corporations' debts. The trial court stated in the May 3, 1996, judgment that is the subject of this appeal that ~~A~~ in the event the intervening plaintiffs are unable to satisfy their judgment from the tracing of these proceeds, the remaining issue concerning personal liability of the individuals for the corporate debts may be submitted to the court on motion of either party.⁶ Thus, this claim has not been adjudicated.

As to issue (4) concerning the statute of limitations, Owens argues that many of the invoices submitted by Greene and Greene were dated earlier than five years prior to the filing of the claim, and were thus outside the applicable statute of

⁵See Magic Coal Co. v. Fox, Ky., 19 S.W.3d 88, 94 (2000).

⁶Baker v. Ryan, Ky.App., 967 S.W.2d 591, 593 (1997).

limitations period set forth in KRS⁷ 413.120. In response, Greene and Greene argues that the ten-year statute of limitations period set forth in KRS 413.160 applies to its claim, and that even if a five-year statute of limitations period were to apply, that its claim was timely filed because payments were made on the open account as late as December 1990. While we agree with Owens that Greene and Greene's action is of the type contemplated by KRS 413.120, we also agree with Greene and Greene that its action was filed in a timely manner.

KRS 413.120(1) proscribes a five-year limitations period in which to bring A[a]n action upon a contract not in writing, express or implied.@ Ostensibly, Greene and Greene had an express or implied contract that the Owens and their corporations would pay for accounting services rendered by Greene and Greene. Thus, KRS 413.120(1) is the appropriate statute of limitations for the action filed by Greene and Greene.⁸ While many of the individual invoices, considered in isolation, would indeed fall outside the five-year limitations period, it would be inappropriate to characterize each individual invoice as a separate claim. Rather, the separate

⁷Kentucky Revised Statutes.

⁸See also Varney's Ex'r v. Staton, 310 Ky. 322, 220 S.W.2d 855, 858 (1949) (holding that KRS 413.120 applied to unpaid fees for services rendered by an attorney).

invoices are part of one continuous claim.⁹ The record evidences action on the three accounts as late as December 1990, which would have the effect of tolling the statute up to that period. Thus, the filing of the action on August 3, 1994, would clearly fall well within the five-year period of limitations.

Finally, Owens claims that the trial court erred when it entered a judgment for the full amount claimed by Greene and Greene. Specifically, Owens alleges that many of the fees charged for the services rendered were exorbitant, given that the services were performed by a bookkeeper and not a licensed accountant. Having reviewed the record, we cannot say that the trial court's decision was clearly erroneous.

Since this case was tried before the court without a jury, its factual findings shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses.¹⁰ A factual finding is not clearly erroneous if it is supported by substantial evidence.¹¹ Substantial evidence is evidence of

⁹See id. (holding that the statute of limitations under KRS 413.120 did not bar an action for unpaid fees for services rendered by an attorney for the handling of an estate over a 20-year period because the services were of a continuous nature).

¹⁰CR 52.01. See also Lawson v. Loid, Ky., 896 S.W.2d 1, 3 (1995); and A & A Mechanical, Inc. v. Thermal Equipment Sales, Inc., Ky.App., 998 S.W.2d 505, 509 (1999).

¹¹Owens-Corning Fiberglas Corp. v. Golightly, Ky., 976 S.W.2d 409, 414 (1998); Uninsured Employers-Fund v. Garland, Ky., 805 S.W.2d 116, 117 (1991); Faulkner Drilling Co., Inc. v. Gross, Ky.App., 943 S.W.2d 634, 638 (1997).

substance and relevant consequence sufficient to induce conviction in the minds of reasonable people.¹² It is within the province of the fact-finder to determine the credibility of witnesses and the weight to be given the evidence.¹³

In support of its claim, Greene and Greene produced extensive records of unpaid invoices. Additionally, Donald Owens testified in his sworn deposition that he did not object to the fees being charged:

Q87: Did you expect to pay for these services, or was there an agreement that there would be charges for these services?

A: Certainly I expected sometime to pay for them, but we just don't have the money. We didn't have the money coming in. Still don't have the money.

Q88: Did you at the time you were billed for any of these services dispute the charges or the number of hours?

A: At the time, no.

Therefore, we conclude that the trial court's findings as to the reasonableness of the fees charged was based on substantial evidence, and thus not clearly erroneous and cannot be disturbed on appeal.

¹²Golightly, 976 S.W.2d at 414; Janakakis-Kostun v. Janakakis, Ky.App., 6 S.W.3d 843, 852 (1999) (citing Kentucky State Racing Commission v. Fuller, Ky., 481 S.W.2d 298, 308 (1972)).

¹³Garland, 805 S.W.2d at 118.

For the foregoing reasons, the judgment of the Bell Circuit Court which allowed Greene and Greene to trace the proceeds from the sale of Clairborne Dock assets to the assets of Billie Owens is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Gerald L. Greene
Pineville, Kentucky

BRIEF FOR APPELLEE:

Jeffery W. Helton
Pineville, Kentucky