

Commonwealth Of Kentucky

Court of Appeals

NO. 2001-CA-001162-MR

CROSS COUNTRY DISTRIBUTING INC.

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE STEPHEN MERSHON, JUDGE
ACTION NO. 97-CI-004909

SAMUEL STINSON; AND
ALBERHASKY BROTHERS INC.

APPELLEES

OPINION

AFFIRMING

** ** * * *

BEFORE: DYCHE, KNOFF, AND McANULTY, JUDGES.

McANULTY, JUDGE: This is an appeal from a summary judgment granted to Samuel Stinson in a contract case seeking recovery of payment owed for materials supplied. We affirm.

In 1997, a nursing home contracted with Alberhasky Brothers Inc. (Alberhasky), a roofing company, to install a new roof for a total contract price of \$31,060.00. On February 20, 1997, the owner of the nursing home paid Alberhasky a partial

payment of \$15,560.00, the remainder to be paid upon completion of the job.

In March of 1997, Alberhasky purchased from Appellant roofing material for a total price of \$8,516.64 for installation in the nursing home job. On April 12, 1997, Alberhasky paid Appellant \$4,000.00 on its account with Appellant. Appellant applied \$3,121.26 of the \$4,000 payment to the new roofing supplies purchased for the nursing home job and the remainder to the balance of Alberhasky's existing account. So, Alberhasky still owed Appellant \$5,395.38.

In August of 1997, the nursing home paid Alberhasky the remaining \$15,500.00 owed for the roofing job. About two weeks after receiving the final payment, Alberhasky filed Chapter 7 Bankruptcy. Consequently, Alberhasky did not pay the debt owed to Appellant.

On August 28, 1997, Appellant filed a complaint against Alberhasky for the total amount owed to Appellant by Alberhasky including the amount remaining on the nursing home job. The trial court initially stayed the action against Alberhasky; and, eventually, the parties advised the trial court that the bankruptcy court discharged Alberhasky's debt to Appellant.

On February 17, 1998, Appellant amended his original complaint to name Samuel Stinson (Stinson), the president and

sole shareholder of Alberhasky, individually on the theory that the law imposed on Stinson, as a trustee for Appellant, the duty to pay from the funds received from the nursing home the amount remaining for the material supplied by Appellant for that particular job.

On January 31, 2001, Stinson filed a motion for summary judgment. On March 22, 2001, the trial court granted Stinson's motion for summary judgment because it found that Stinson did not violate KRS 376.070, the Mechanic's Lien Law, and Appellant did not present any affirmative evidence that Stinson misused the money paid by the nursing home to Alberhasky. On April 4, 2001, Appellant filed a motion pursuant to CR 59 to alter or amend or vacate the order granting summary judgment in favor of Stinson on the ground that there were several errors in the trial court's findings of fact and rulings of law. The trial court denied Appellant's motion on May 2, 2001, precipitating this appeal.

Appellant presents two arguments on this appeal. First, Appellant alleges that a contractor who accepts payment in full from a property owner for the installation of building material and later fails to pay for labor and material used on the job, instead using the money for other liabilities, violates KRS 376.070. Second, Appellant argues that a controlling corporate officer is personally liable in tort to a party

injured directly by his violation of a statute enacted specifically for protection of persons in the class to which the injured party belongs.

The standard of review on appeal of a summary judgment is whether the trial court was correct in finding that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law. See Scifres v. Kraft, Ky. App., 916 S.W.2d 779, 781 (1996). Where the relevant facts are undisputed and the dispositive issue becomes the legal effect of those facts, our review is *de novo*. See Western Ky. Coca-Cola Bottling Co., Inc. v. Revenue Cabinet, Ky. App., 80 S.W.3d 787, 790 (2001). In this case, the relevant facts are undisputed and the dispositive issue is the legal effect of those facts; thus, our review is *de novo*.

In granting Stinson's motion for summary judgment, the trial court held that Alberhasky, not Stinson in his individual capacity, was liable for the debt owed to Appellant. Moreover, the trial court held that there was no evidence that Stinson misused the funds paid to Alberhasky by the nursing home. Specifically, the trial court found that "[u]pon the first partial payment, Mr. Stinson, on behalf of Alberhasky, made a partial payment to Cross Country for the materials. Upon the final payment from the nursing home, Alberhasky was in the bankruptcy timelines and thus, was required to handle the money

in accordance with certain federal requirements." Accordingly, the trial court ruled that any of Appellant's claims against Alberhasky must be pursued through the bankruptcy proceedings.

Essentially, Appellant argues that despite the fact that the bankruptcy court has adjudged Alberhasky bankrupt, Stinson is personally liable pursuant to KRS 376.070, KRS 446.070 and various sections from American Jurisprudence 2d on Corporations. We find no support for Appellant's arguments in these statutes or provisions.

KRS 376.070, entitled, CONTRACTOR OR ARCHITECT TO APPLY PAYMENTS TO CLAIMS; EXCEPTION WHERE LIEN WAIVED is as follows:

(1) Any contractor, architect or other person who builds, repairs or improves the property of another under such circumstances that a mechanic's or materialman's lien may be imposed on the property shall, from the proceeds of any payment received from the owner, pay in full all persons who have furnished material or performed labor on the property.

(2) If any payment by the owner to the contractor, architect or other person is not sufficient to pay in full all bills for material and labor, then such claims shall be paid on a pro rata basis to the amount of payments received, unless otherwise agreed between the contractor, architect or other person and the holder of the claim for material or labor.

(3) This section shall not apply where persons furnishing material or performing

labor have waived in writing their right to file mechanics' or materialmen's liens.

Appellant contends that KRS 376.070 is applicable to both Alberhasky and Stinson, individually. However, as against Alberhasky, KRS 376.070 was of no help to Appellant, because at the time Alberhasky received the final payment from the nursing home for the roofing job, Stinson, as president, had made a decision to file a Chapter 7 bankruptcy action, thus any payments made to creditors, such as Appellant, would have been avoided by the bankruptcy trustee as a preference action. In general terms, a preferential transfer is a transfer made to a creditor as payment on an antecedent debt, which payment is made when the debtor is insolvent and during the 90 days immediately preceding the filing of the bankruptcy petition. See 11 U.S.C. § 547(b). Further, the transfer must enable the creditor to receive a greater percentage of his claim than he would receive under the distributive provisions of the bankruptcy code.

Appellant asserts that Stinson is personally liable under KRS 376.070 because he had a duty to pay as Appellant's statutory trustee. Moreover, the law provides that an officer of the corporation, acting in his official capacity for the corporation, is equally responsible for any tort he commits which causes damage to a third party. In support, Appellant cites 18B Am Jur2d, Corporations, Sec. 1877 which is as follows:

A director or officer of a corporation does not incur personal liability for its torts merely by reason of his official character; he is not liable for torts committed by or for the corporation unless he has participated in the wrong. Accordingly, directors not parties to a wrongful act on the part of other directors are not liable therefor. If, however, a director or officer commits or participates in the commission of a tort, whether or not it is also by or for the corporation, he is liable to third persons injured thereby, and it does not matter what liability attaches to the corporation for the tort. A contrary rule would enable a director or officer of a corporation to perpetrate flagrant injuries and escape liability behind the shield of his representative character, even though the corporation might be insolvent or irresponsible.

We address briefly the latter argument first. We believe Appellant's reliance on the 18B Am Jur2d, Corporations, Sec. 1877 is misplaced because Appellant failed to show that Stinson committed any wrong in acting as he did upon receipt of the final payment from the nursing home.

Appellant maintains that the "wrong" Stinson committed was in failing to perform his statutory duty as trustee. Appellant does not cite any Kentucky cases in support of his theory that KRS 376.070 creates a trust in favor of materialmen and subcontractors. Instead, Appellant relies on the statutory language in KRS 376.070 and another statute, KRS 446.070, which is as follows:

A person injured by the violation of any statute may recover from the offender such damages as he sustained by reason of the violation, although a penalty or forfeiture is imposed for such violation.

We believe the trial court was correct in holding that KRS 376.070 and KRS 446.070 did not provide Appellant with a remedy against Stinson. Further, we believe the trial court was correct in following Riden v. Sigler, (In re Sigler), 196 B.R. 762 (Bankr. W.D. Ky. 1996), a bankruptcy court case that addresses directly the issue of whether KRS 376.070 creates an express trust upon a contractor to hold funds for the benefit of a supplier. Although the bankruptcy court's holding related to the applicability of KRS 376.070 in a bankruptcy case, we find the reasoning persuasive.

In In re Sigler, the debtors were involved in a construction business that was defunct. See id. at 763. The construction company incurred debts to several individuals who eventually filed an adversary proceeding in the bankruptcy court challenging the dischargeability of the debts under a provision of the bankruptcy code that precludes discharge when an individual debtor fails to produce funds entrusted to a fiduciary. See id. at 764. As used in that provision, the term "fiduciary" only applied to express or technical trusts, not implied trusts. See id. Therefore, the plaintiffs had to

establish the existence of an express or technical trust under Kentucky law. See id.

The plaintiffs asserted that the relevant state law which created a trust was found at KRS 376.070. See id. After an extensive discussion on the history of the statute and various federal and bankruptcy court cases that have interpreted it, the court concluded that KRS 376.070 does not create a trust. See id. at 768. In pertinent part, the court reasoned as follows:

This Court finds it extremely persuasive that such language [unequivocal language leaving no doubt with regard to whether a trust has been created] is absent from the materialman statute at issue in this case, K.R.S. 376.070. Kentucky Revised Statute 376.070 simply directs the payment of certain monies. It directs contractors to make payments to subcontractors and materialmen who have performed services or supplied labor from the proceeds of payments made by the landowner. The statute does not require contractors to "hold" funds for the benefit of any person, or that the contractor is to act in a "fiduciary capacity." It does not utilize the term "trust" or even the term "fund." It simply directs the course of payments received, and nothing more. KRS 376.070. While the effect of this statute is extremely unfortunate for the landowner, any relief must come from the Legislature. This Court cannot create an express trust where neither the Legislature nor the parties by contract have designated one to exist.

Id.

In conclusion, KRS 376.070 does not create a trust such that Stinson is individually liable for breach of Alberhasky's duty to pay Appellant. As Alberhasky filed bankruptcy, Appellant's relief must come from the bankruptcy proceedings.

For the foregoing reasons, the order of the Jefferson Circuit Court is affirmed.

DYCHE, JUDGE, CONCURS.

KNOPF, JUDGE, CONCURS IN RESULT.

BRIEF FOR APPELLANT:

Alfred J. Simon, Jr.
Louisville, KY

BRIEF FOR APPELLEE:

Walker C. Cunningham, Jr.
Louisville, KY