

Commonwealth Of Kentucky

Court of Appeals

NO. 2001-CA-002203-MR

BRIAN HALE

APPELLANT

v. APPEAL FROM BELL CIRCUIT COURT
HONORABLE JAMES L. BOWLING, JR., JUDGE
ACTION NO. 01-CI-00026

ROBERT W. GREEN

APPELLEE

OPINION
AFFIRMING IN PART,
AND REVERSING AND REMANDING IN PART

** ** *

BEFORE: BARBER AND BUCKINGHAM, JUDGES; AND JOHN D. MILLER,
SPECIAL JUDGE.¹

BARBER, JUDGE: The Appellant, Brian Hale ("Brian"), seeks review of a summary judgment of the Bell Circuit Court entered in favor of the Appellee, Robert W. Green ("Robert"). Brian maintains that genuine issues of material fact exist regarding the date stock was conveyed to him, making summary judgment inappropriate. We affirm the judgment in Robert's favor, and

¹ Senior Status John D. Miller sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution.

reverse, in part, and remand as to the extent of Brian's liability.

On January 19, 2001, Robert filed a complaint in the Bell Circuit Court against Lee Roy Hale, his wife, Mary Hale,² and their son, Brian Hale, seeking to set aside, as fraudulent, the transfer to Brian of 500 shares of stock in Arbor Realty, Inc. According to the complaint:

On May 22, 2000, the Bell Circuit Court entered a default judgment against defendants Hale [Lee Roy and Mary] in favor of plaintiff [Robert] in the amount of \$250,000.00 together with interest at 9½% per annum (simple) from and after January 23, 1998, through the date of judgment together with interest at the legal rate of 12% from and after date of judgment until paid and satisfied in full in civil action styled Robert w. Green vs. Lee Roy Hale and Mary Hale, his wife, and Arbor Realty, Inc., Bell Civil Action No. 00-CI-00047. Such judgment further awarded plaintiff an attorney fee equal to 15% of the outstanding balance due, including prejudgment interest, and ordered defendants Hale to produce and deliver to plaintiff their stock certificate in Arbor Realty, Inc., duly endorsed and blank, as required under the terms of a Security Agreement of January 28, 1998. A copy of such default judgment is attached hereto as Exhibit "1" and incorporated herein by reference.³

On March 6, 2001, the three Hales filed an answer, stating, in part, that:

²Mary Hale is Robert W. Green's sister.

³ No exhibit is attached to the complaint. We have searched the record, and cannot locate a copy of the default judgment from the prior action. Nevertheless, the Hales admit that said judgment was entered against Lee Roy and Mary.

The allegations of Paragraph Four of the Plaintiff's Complaint are admitted to the extent that a judgment was entered in the Bell Circuit Court against Lee Roy Hale and Mary Hale. Said judgment speaks for itself. Furthermore the foregoing does not constitute an admission as to the validity of that judgment.

On July 13, 2001, Robert filed a motion for summary judgment and memorandum of law. Robert explained that Lee Roy and Mary had made a promissory note payable to him in the amount of \$250,000.00, with interest at 9½% per annum, secured by a quitclaim deed conveying their interest in a 95-acre tract of land in Virginia and further secured by the 500 shares of common stock they owned in Arbor Realty, Inc.⁴ On January 26, 1998, Lee Roy and Mary executed a contract and security agreement, evidencing the indebtedness, and granting Robert a secured lien against the stock.

The Hales subsequently defaulted in payment, ultimately resulting in the entry of the above default judgment against them. Thereafter, Robert took depositions in aid of judgment, learning that Lee Roy and Mary claimed to have gifted their 500 shares of Arbor Realty stock to Brian on June 5, 1996, a year and a half before the loan. In their depositions, Lee Roy and Mary were asked why they pledged stock that they did not own to secure the \$250,000 debt. Lee Roy's response was, "I

⁴ Lee Roy and Mary owned 50% (25% each) of the stock in Arbor Realty, Inc.

just did, I guess." Mary testified that she had forgotten that they no longer owned the stock.

Robert maintained that there were no genuine issues of material fact and that he was entitled to judgment, as a matter of law, because the transfer of the stock to Brian was fraudulent under KRS 378.010 or KRS 378.020.

KRS 378.010 provides:

Every gift, conveyance, assignment or transfer of, or charge upon, any estate, real or personal, or right or thing in action, or any rent or profit thereof, made with the intent to delay, hinder or defraud creditors, purchasers or other persons, and every bond or other evidence of debt given, action commenced or judgment suffered, with like intent, shall be void as against such creditors, purchasers and other persons. This section shall not affect the title of a purchaser for a valuable consideration, unless it appears that he had notice of the fraudulent intent of his immediate grantor or of the fraud rendering void the title of such grantor.

KRS 378.020 provides:

Every gift, conveyance, assignment, transfer or charge made by a debtor, of or upon any of his estate without valuable consideration therefor, shall be void as to all his then existing creditors, but shall not, on that account alone, be void as to creditors whose claims are thereafter contracted, nor as to purchasers from the debtor with notice of the voluntary alienation or charge.

Robert disputed that the stock was actually transferred to Brian on June 5, 1996. Robert contended that numerous badges

of fraud indicated a fraudulent transfer; that the motivating purpose was to defeat creditors; that Lee Roy and Mary had continued possession of the stock after it was allegedly given to Brian; that there was no consideration paid for the stock, and that it was an inter-family transfer. Robert noted the deposition testimony of Sharon Warriner, CPA for Arbor Realty, Inc., which established that the corporation's K-1's for the years 1995, 1996, 1997, 1998⁵ reflect that Lee Roy and Mary Hale owned the stock. A 1999 K-1 reflected that Brian Hale owned 50% of the stock; however, that return was not prepared until September 2000. According to Warriner's testimony, it was not until early 2000, that she received a call from Mary Hale to change the shareholder on the K-1. Prior to that, Warriner had not received any notice from Lee Roy or Mary they were no longer shareholders in Arbor Realty, Inc.

On July 23, 2001, the defendants Hale filed a response to the motion for summary judgment, and argued that the date of the transfer was in dispute. Lee Roy and Mary Hale attached their affidavit that they had transferred the stock to Brian, on June 5, 1996 "out of love and affection," and that they were in

⁵ Lee Roy and Mary pledged the stock to Robert in 1998.

excellent financial condition at the time, as evidenced by an October 31, 1996 financial statement.⁶

On August 21, 2001, the trial court entered summary judgment against Brian, as follows:

1. Judgment in the amount of \$250,000.00 plus 9½% interest from and after January 23, 1998, through May 22, 2000, and interest at the rate of 12% per annum from and after May 22, 2000, until the judgment amount is paid and satisfied in full consistent with judgment entered May 22, 2000, in civil action styled Robert W. Green v. Lee Roy Hale, Mary Hale and Arbor Realty, Inc., Bell CA No. 00-CI-00047.

2. Brian Hale shall, within ten (10) days of the entry of this summary judgment, endorse over to plaintiff Stock Certificate No. 5, representing 500 shares of common stock in Arbor Realty, Inc. Should defendant Hale fail to timely endorse over such stock certificate, plaintiff may request the Master Commissioner to execute a Bill of Sale for such stock.

3. Judgment in favor of plaintiff and his counsel for attorney fees equal to fifteen percent (15%) of the judgment amount hereby entered consistent with May 22, 2002 judgment entered in same Robert W. Green v. Lee Roy Hale, Mary Hale and Arbor Realty, Inc., Bell CA No. 00-CI-00047.

This judgment is limited to defendant Brian Hale, and this action is otherwise retained on the docket for further proceeding pending resolution of pro se bankruptcy filing of defendants Lee Roy Hale and Mary Hale.⁷

⁶ Curiously, the financial statement, signed on November 25, 1996, lists ownership of 50% of the shares in Arbor Realty valued at \$250,000, under the heading, "Stocks and Bonds."

⁷ On August 10, 2001, the defendants Hale filed a notice⁷ that Lee Roy and Mary had filed a Petition in the U.S. Bankruptcy Court

Defendant shall be given credit against the full judgment amount for the fair market value of his stock in Arbor Realty, Inc.

As to defendant, Brian Hale, this is a final and appealable judgment, and there is no just cause for delay. Plaintiff shall have immediate execution of this judgment.

On August 27, 2001, Brian filed a motion to alter, amend or vacate, which was denied by order entered September 25, 2001. Brian filed a notice of appeal to this Court on October 10, 2001.

On appeal, Brian argues that the trial court erred in granting summary judgment against him, because issues of material fact exist regarding the date of the stock transfer. Brian maintains that Robert's evidence cannot overcome the testimony of his parents, and the stock certificate itself, reflecting a date of transfer of June 5, 1996.

Brian ignores the effect of the May 22, 2000 (default) judgment ordering Lee Roy and Mary Hale to produce and deliver to Robert their stock certificate in Arbor Realty, Inc. That judgment is necessarily a determination that Lee Roy and Mary owned the stock when they pledged it to secure their indebtedness. See Kimbrough v. Harbett, 110 Ky. 94, 60 S.W. 836 (1901). Brian's attempt to argue otherwise is an impermissible

for the Eastern District of Kentucky, Case Number 01-60994, on July 23, 2001.

collateral attack on that judgment. "A domestic judgment rendered in a court of general jurisdiction may not be attacked collaterally unless want of jurisdiction appears on the record...." Hays v. Adams, 220 Ky. 196, 294 S.W. 1039, 1041 (1927).

Thus, we affirm the summary judgment of the Bell Circuit Court entered August 21, 2001 ordering Brian to endorse over to Robert the subject stock certificate.⁸ Brian argues, and Robert concedes, that the summary judgment is in error, to the extent that the judgment against Brian should have been limited to the value of the stock, not to exceed Robert's judgment against Lee Roy and Mary for debt, interest, and attorney fees. To that extent only, we reverse and remand with direction that Brian's liability should be the value of the transferred stock, not to exceed the current amount of Robert's existing judgment for debt, interest and attorney fees against Lee Roy and Mary Hale.

ALL CONCUR.

BRIEF FOR APPELLANT:

Frank C. Medaris, Jr.
Hazard, Kentucky

BRIEF FOR APPELLEE:

J.P. Cline
Middlesboro, Kentucky

⁸ We have considered Brian's argument that the trial court erred in failing to strike Robert's reply to the response to summary judgment, and find no abuse of discretion there.