

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-000303-MR

AILEEN S. HAMILTON, CO-EXECUTOR OF
THE ESTATE OF JAMES J. HAMILTON, and
JAMES S. HAMILTON

APPELLANTS

v.

APPEAL FROM PIKE CIRCUIT COURT
HONORABLE EDDY COLEMAN, JUDGE
ACTION NO. 95-CI-00383

ALICIA (HAMILTON) HERR

APPELLEE

OPINION
AFFIRMING IN PART,
REVERSING IN PART,
AND
REMANDING

** ** * * *

BEFORE: BUCKINGHAM, McANULTY, AND PAISLEY, JUDGES.

BUCKINGHAM, JUDGE: Aileen S. Hamilton, co-executrix of the estate of James J. Hamilton, and James S. Hamilton appeal from portions of a judgment entered by the Pike Circuit Court. We affirm in part, reverse in part, and remand.

James S. Hamilton and the appellee, Alicia Hamilton Herr, were previously married. On December 11, 1990, they signed a promissory note to Pikeville National Bank & Trust Co. in the principal amount of \$14,500. Alicia operated a vending machine business, and the proceeds of the loan were used to purchase vending machines. The note was secured by a certificate of deposit in the amount of \$110,500.03 held in the names of James S. Hamilton or his father, James J. Hamilton. That certificate of deposit was cashed on February 13, 1991, and a new certificate of deposit in the same amount was issued in the sole name of James J. Hamilton. The new certificate of deposit apparently was substituted as security for the note in place of the old certificate of deposit.

On February 25, 1991, James J. Hamilton cashed another certificate of deposit in his name and used a portion of the proceeds to pay the balance of \$14,771.74 owed on the note. On April 17, 1991, James S. and Alicia were divorced by a decree of the Pike Circuit Court. A final decree disposing of all property rights between James S. and Alicia was entered in the Pike Circuit Court on June 16, 1992. Based on testimony given by James in his deposition prior to the entry of the final decree, the circuit court found that a 1984 Mercedes automobile was sold by James for \$25,000 and that approximately \$14,000 of the proceeds was used to pay the note to the Pikeville bank. In

fact, however, the note had already been paid by James J. Hamilton with the proceeds of a certificate of deposit that he had cashed. The final decree also awarded Alicia the parties' interest in the vending machine business and directed that she be responsible for any indebtedness in connection with the business.

In 1995, James J. Hamilton filed a civil complaint in the Pike Circuit Court against Alicia, his former daughter-in-law, seeking reimbursement for the \$14,771.74 that he had paid to the Pikeville bank on February 25, 1991. Hamilton's complaint also sought prejudgment and post-judgment interest. The circuit court initially dismissed the complaint on the ground that the claim was required to be asserted as a compulsory counterclaim in the prior divorce action.¹ James J. appealed to this court, and in an opinion rendered on July 18, 1997, this court reversed the circuit court's decision and remanded the case for further proceedings by James J. on his complaint.

James J. and Alicia each filed summary judgment motions in late spring of 1998. Prior to a ruling by the circuit court, Alicia successfully moved the court for leave to file a third-party complaint against James S. for

¹ James J. Hamilton had intervened in the divorce action alleging that he owned the marital residence of the parties.

indemnification by or contribution from him for any amounts which James J. might be adjudged to be entitled to recover from her in connection with his complaint. James S. then filed an answer to the complaint and a counterclaim against Alicia.

The circuit court rendered a judgment which was entered on November 28, 2001. The court awarded summary judgment to James J. against Alicia in the amount of \$14,771.74 plus interest at eight percent per year from February 25, 1991, until paid. The court also awarded summary judgment to Alicia against James S. for any amounts paid by her to James J.'s estate.²

As we have noted, James S. testified in his deposition in the divorce case that he sold the 1984 Mercedes automobile for \$25,000 and used approximately \$14,000 of the proceeds to pay off the note to the Pikeville bank. It was later revealed that the note was not paid from the proceeds of the Mercedes but had been paid by James J. years earlier. James J. attempted to explain the confusion by asserting that James S. had sold the Mercedes on payments and that the purchaser had defaulted on the obligation. In short, the Mercedes apparently was never sold, although James S. represented in his deposition in the divorce case that it had been. Further, the circuit court had noted in

² James J. died on May 19, 2001, and his estate was substituted as a party in his place.

the final divorce decree that the Mercedes had been sold and that approximately \$14,000 of the proceeds had been used to pay the debt. Also, the debts of the vending machine business had been assigned in the divorce decree to Alicia.

Concerning its judgment in favor of Alicia on her third-party complaint against James S., the court stated as follows:

If Mr. Scaggs didn't default on paying for the Mercedes, James never paid to Alicia her share of the proceeds so that she could pay off the loan. If Mr. Scaggs did default, James breached his oral contract with Alicia and failed to inform the Court in his divorce action that he repossessed the Mercedes so that the Court could make proper disposition of the full value of the Mercedes. Therefore, James will indemnify Alicia for any amounts owed to Mr. Hamilton.

The remaining issue before the circuit court was James S.'s counterclaim against Alicia for his share of the profits of the vending machine business. Because Alicia was awarded the parties' interest in the vending machine business in the final decree, the circuit court dismissed James S.'s counterclaim on the ground that the issues "were already decided against him in Action No. 91-CI-00182 and are now *res judicata*." James J.'s estate and James S. appealed from portions of that judgment.

James J.'s estate argues that the circuit court erred in awarding it only eight percent post-judgment interest on its judgment against Alicia rather than twelve percent. In support

of its argument, James J.'s estate cites KRS³ 360.040 which states in part that "[a] judgment shall bear twelve percent (12%) interest compounded annually from its date." Alicia argues in response that the statute provides that a judgment may bear less than twelve percent interest.

The language to which Alicia apparently refers states, "that when a claim for unliquidated damages is reduced to judgment, such judgment may bear less than twelve percent (12%) if the court rendering such judgment, after a hearing on that question, is satisfied that the rate of interest should be less than twelve percent (12%)." KRS 360.040. The claim of James J.'s estate is a claim for liquidated damages. Therefore, the statutory provision cited by Alicia is not applicable. Because the statute requires twelve percent post-judgment interest, the circuit court erred in awarding only eight percent. We reverse and remand for the entry of an amended judgment to reflect the proper post-judgment interest rate on the estate's judgment against Alicia.

The remaining arguments of the appellants are raised by James S. First, he contends that the circuit court erred in awarding Alicia a judgment against him because his debts were discharged in a bankruptcy proceeding in 1998. Discharge in bankruptcy is an affirmative defense which must be raised in a

³ Kentucky Revised Statutes.

pleading. CR⁴ 8.03. In the answer filed by James S. to Alicia's third-party complaint, he affirmatively asserted only the defenses of performance and satisfaction, laches and estoppel, and insufficiency of service of process. He did not affirmatively assert the defense of discharge in bankruptcy.⁵ James S.'s failure to affirmatively plead discharge in bankruptcy as a defense amounts to a waiver of the defense. See Gordon v. NKC Hospitals, Inc., Ky., 887 S.W.2d 360, 363 (1994). Thus, we conclude that the circuit court did not err in awarding Alicia a judgment against James S. as there was neither a defense of discharge in bankruptcy nor evidence of such in the record.

Next, James S. argues that the circuit court erred by enforcing an alleged oral contract between Alicia and him that was barred by the statute of limitations. He asserts that the circuit court apparently awarded judgment in favor of Alicia against him on the ground that he and Alicia had orally agreed to sell the Mercedes and apply \$14,000 of the proceeds to pay the note to the Pikeville bank. Alicia argues in response that

⁴ Kentucky Rules of Civil Procedure.

⁵ In a post-judgment motion filed pursuant to CR 59.05, James S. moved the court to alter, amend, or vacate the judgment entered against him. Within that motion, he also asked that he be allowed to file an amended answer asserting various affirmative defenses, including discharge in bankruptcy. The court denied James S.'s request to be allowed to amend his answer after the judgment was entered, and James does not contend that the court abused its discretion or otherwise erred in failing to grant his motion in that regard.

the court did not enforce an oral agreement between the parties. She asserts that the court merely enforced its previous judgment in the divorce case.

We agree that the circuit court's judgment in favor of Alicia against James S. was proper. One of the factors in the property disposition in the divorce case was James S.'s representation that he had taken \$14,000 in proceeds from the sale of the Mercedes and paid the debt to the Pikeville bank. Unbeknownst to Alicia, her debt had not been extinguished but had been transferred from the Pikeville bank to James J. Thus, if James J. is entitled to collect from Alicia the amount he paid the Pikeville bank on the note, she is entitled to have judgment in that amount from James S. based on his misrepresentations and the divorce decree, not based on an oral contract between Alicia and him.

James J.'s final argument is that the circuit court erred in dismissing his counterclaim against Alicia for profits from the vending machine business. As we have noted, the court dismissed James S.'s counterclaim on the ground that Alicia had been awarded the parties' interest in the vending machine business in the divorce case and that James was now precluded from asserting any interest due to the doctrine of *res judicata*. He asserts that it is inconsistent for the court not to allow him any share in the profits from the vending machines and yet

hold him responsible for the debt incurred in connection with the vending machine business.

We agree with the trial court that James S.'s counterclaim is barred due to the doctrine of *res judicata*. Further, we disagree with James that there is any inconsistency in awarding Alicia a judgment against him based on the debt in connection with the purchase of vending machines and yet not allowing him to assert an interest in the profits at this late date. While it is true that the divorce decree assigned all debt in connection with the vending machine business to Alicia, James overlooks the fact that the decree also directed him to pay the \$14,000 indebtedness in connection with the vending machine business from the proceeds of the sale of the Mercedes. James represented to the court in the divorce case that he had done so, and he may not now escape liability to Alicia based on his misrepresentations.

In accordance with the foregoing, we affirm in part, reverse in part, and remand.

ALL CONCUR.

BRIEFS FOR APPELLANTS:

Jonah L. Stevens
James L. Hamilton
Pikeville, Kentucky

BRIEF FOR APPELLEE:

Thomas W. Goodman, Jr.
Pikeville, Kentucky