

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-000319-MR

PAUL V. CONLEY and
ELIZABETH CONLEY

APPELLANTS

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE LEWIS G. PAISLEY, JUDGE
ACTION NO. 98-CI-00127

B&R CORPORATION and MORAN FOODS,
INC., d/b/a SAVE-A-LOT FOODS

APPELLEES

OPINION
AFFIRMING

** ** * * * **

BEFORE: COMBS, KNOPF, and TACKETT, Judges.

COMBS, JUDGE. Paul Conley and Elizabeth Conley (the Conleys) appeal from an Opinion and Order of January 28, 2002, of the Fayette Circuit Court which granted summary judgment in favor of the appellees, B&R Corporation and Moran Foods, Inc. They also appeal and from the interlocutory orders of the trial court denying their motions to amend their complaint. Having reviewed the record, we affirm.

In 1989, the Conleys began operating a Save-A-Lot grocery store in Pikeville, Kentucky, pursuant to a license agreement with Moran Foods, Inc., d/b/a Save-A-Lot, Ltd. The grocery store was owned by JMMS, Inc. The stock of JMMS, Inc., was originally owned by the Conleys' children, Jason and Sharmin Conley. Eventually that stock was transferred to the appellants. Although the store was profitable initially, JMMS began to experience financial difficulty by 1994 and was unable to maintain a sufficient inventory in the store. On June 6, 1995, Moran Foods notified JMMS that its license agreement would be terminated effective September 10, 1995.

The Conleys testified that after they received the termination notice, they met with Larry Mitchell, Regional Manager for Moran Foods. According to the Conleys, Mitchell allegedly told them that they could save the store by purchasing five truck loads of food -- approximately \$100,000 worth of merchandise. If they would do so, he would be able to have the termination notice rescinded by the home office. In reliance on Mitchell's alleged representation as well as on a financial forecast prepared by an accounting firm, the Conleys personally borrowed \$100,000 to purchase the inventory for the store.

On September 25, 1995, Moran Foods sent JMMS another termination letter. The Conleys eventually agreed to sell the corporate assets in the Pikeville store to B&R, another Save-A-

Lot licensee in southeastern Kentucky. B&R was also the corporation to whom JMMS had sold its assets in its Elkhorn City Save-A-Lot grocery in 1994. On November 3, 1995, an agreement, entitled Binder for Asset Purchase, was entered into between and among the Conleys, JMMS, and B&R. Its terms required B&R to pay to JMMS immediately the sum of \$50,000. A remaining balance of \$200,000 would be due at the closing.

Problems arose concerning the validity of certain liens against JMMS and the condition of the equipment and inventory. As these issues were not resolved, B&R refused to pay the balance owed under the agreement. Unable to meet its financial commitments, JMMS filed for protection from its creditors in Bankruptcy Court in October 1996.

The Conleys defaulted on their loan with Pikeville National Bank, which held a mortgage on its Elkhorn City property leased by B&R. In an attempt to settle the foreclosure, the Conleys applied for a loan from Citizens National Bank (Citizens). Citizens, which was also a party to the foreclosure action, contemplated making the loan if it could obtain an assignment of the rent paid by B&R to the Conleys. Gil Johnson, attorney for B&R, sent a letter dated March 17, 1997, to the attorney for Citizens, informing the bank that his client would not agree to an assignment of its rental payments and stated its reasons for opposing the assignment. The letter

accused the Conleys and their children of having made misrepresentations during the sale of JMMS's Elkhorn City assets to B&R in 1994. B&R asserted a similar claim by filing a lawsuit against the Conleys in Bell Circuit Court in March 1997.

In January 1998, JMMS and the Conleys (in their individual capacities) filed a lawsuit for the breach of the November 1995 agreement. They also asserted a claim for civil conspiracy based on their belief that B&R and Moran Foods had conspired to drive them out of business for the benefit of B&R. They alleged: that they had been fraudulently induced to borrow money to purchase inventory for the store; that they were defamed in the letter written by B&R's attorney in March 1997; and that the appellees tortiously interfered with their attempt to sell the store to another grocery operator. They attempted -- unsuccessfully -- to amend their complaint to assert a claim for abuse of process relating to the lawsuit filed by B&R in Bell County in 1997.

After considerable discovery was taken, the case was scheduled for trial in August 2001. Prior to trial, both B&R and Moran Foods filed a motion for summary judgment seeking to dismiss several of the claims -- including the claims made by the Conleys in their individual capacities. At the conclusion of the hearing, the trial court orally made preliminary rulings, dismissing all of the Conleys' individual claims with the

exception of their claim for civil conspiracy. The court ordered supplemental briefs to be filed with respect to that claim and re-scheduled the trial for February 2002. Thereafter, JMMS, which was represented by separate counsel retained by the bankruptcy trustee, settled all of its claims against the appellees. On January 28, 2002, the trial court entered its opinion and order incorporating its earlier rulings and summarily dismissing all of the Conleys' claims. It concluded that the Conleys lacked standing to pursue most of the claims asserted in their complaint. Additionally, it determined that the conspiracy claim was barred by the one-year statute of limitations provided in KRS¹ 413.140(1)(c). It also held that the allegedly defamatory statements made by B&R's agent were privileged communications.

The standard of review for a summary judgment is set forth in Steelvest Inc. v. Scansteel Service Center, Inc., Ky., 807 S.W.2d 472 (1991); CR² 56.03. Steelvest holds that it is the function of the appellate court to determine whether the trial court correctly found that there was no genuine issue as to any material fact and that the moving party was entitled to judgment as a matter of law. Scifres v. Kraft, Ky.App., 916 S.W.2d 779,

¹ Kentucky Revised Statutes.

² Kentucky Rules of Civil Procedure.

781 (1996). Since the issue is wholly one of law, our review is *de novo*.

The Conleys first argue that the trial court erred in concluding as a matter of law that they lacked standing to assert any claims arising from the breach of the contract of November 3, 1995, in which B&R agreed to pay \$250,000 for the assets owned by JMMS. In dismissing the Conleys' individual claims for breach of the contract, civil conspiracy, and tortious interference with JMMS's attempt to sell its assets, the trial court relied on Miller v. Paducah, Ky., 551 S.W.2d 241 (1977). Miller explains the difference between corporations versus other types of business arrangements and holds that rights belonging to a corporate entity may not be asserted or pursued by its individual stockholders.

The Conleys contend that they were named as parties to the contract for the sale of the corporate assets. Therefore, they claim that their case is distinguishable from the situation presented in Miller. They maintain that the contract was drafted by B&R and that:

[h]aving chosen to make [them] and their children, individually parties to the contract, B&R should not be permitted to deny them standing now.

The trial court rejected the Conleys' argument and reasoned as follows:

The parties to the contract were JMMS, the Conleys and their children as sellers, and B&R as purchaser. The mutual promises set out in the contract, however, were exclusively between JMMS and B&R. JMMS was the sole owner of all the assets being sold; JMMS was to furnish an inventory of all assets; B&R was to assume the lease; and various other mutual obligations. The Conleys and their children, as individuals, had no duties or obligations under the contract. Their names are mentioned only in the introductory paragraph which sets out the parties, and in the signature area of the document.

At the time of the execution of the contract and its alleged breach, the Conleys were either employees or shareholders of JMMS. It is clear that as such, they have no right to assert claims relating to the breach of that contract. That right belongs to JMMS.

The Conleys rely on Fidelity & Casualty Co. v. Martin, 163 Ky. 12, 173 SW 307 (1915), to support their position that having been named as parties in the contract, they have standing to seek to enforce its terms. Fidelity states the general rule that an action for the breach of a contract can "be brought only by one who is a party to the contract." However, Fidelity concerned the right of a third-party to sue to enforce an insurance contract. Id., 173 SW at 310. Fidelity does not suggest that a party to a contract has standing to sue for its breach absent a breach of a covenant or duty specifically owed to the complaining party.

In order to have standing, a party "must have a judicially recognizable interest in the subject matter of the suit." Yeoman v. Commonwealth Health Policy Bd., Ky., 983 S.W.2d 459, 473 (1998). As noted by the trial court, there is no factual dispute that all of the assets comprising the subject of the contract were owned by JMMS and that all of the consideration that B&R agreed to pay flowed to the corporation - not to the Conleys individually or collectively. The trial court properly ruled that the Conleys were not, therefore, the real parties in interest. The fact that they were shareholders of the corporation and that they personally borrowed money to keep the corporation afloat does not render them real parties in interest under CR 17.01. JMMS is the entity that would have benefited from any judgment on these claims. As stated in Gregory v. Bryan-Hunt Co., 295 Ky. 345, 174 S.W.2d 510, 513 (1943):

It is elementary that title to the property of a corporation is in the corporation itself, not in its employees or stockholders, and hence [the corporation] only could sue for any wrong committed against its property or for damages resulting to its business. The law affords no such right of action to a stockholder or employee of a corporation. It follows, therefore, that plaintiff has no right of action against appellants for any wrong committed against the property or business of the corporation. This rule of law is too well known to the legal profession to

require citation of authority. (Emphasis added.)

We conclude that the trial court did not err in its application of the law pertaining to standing when it dismissed the Conleys' claims.

Next, the Conleys contend that the trial court erred in dismissing their claim for fraud in the inducement against Moran Foods. In dismissing this claim, the trial court accepted as true the Conleys' allegation that they were promised that the notice of June 6, 1995, terminating JMMS's license with Moran Foods would be rescinded if they would re-stock the shelves of the Pikeville Save-a-Lot store. Nevertheless, the trial court concluded that the Conleys' claim was not viable:

First of all, [the Conleys] were not injured. If the funds they borrowed were used to buy groceries, those groceries were either sold by JMMS to the public, or to B&R. The funds were either a loan to JMMS or a contribution to capital. Secondly, the Conleys also make no claim that if they would borrow these funds, Moran [Foods] promised to forbear from exercising its right to terminate the agreement at any time with 30 days notice. Moran was simply exercising its rights under the contract.

The Conleys are particularly aggrieved by the trial court's finding that they were not injured by the alleged promise to rescind the termination agreement. However, there is no factual dispute that the Conleys borrowed the money on behalf

of the corporation. Moran Foods' licensing agreement was with JMMS -- not the Conleys. Regardless of whether the Conleys recouped their investment in the corporation, any injury relating to the termination of the license agreement itself was sustained by the corporation alone (JMMS) and could have been asserted only by JMMS. Id. In settling with the appellees, JMMS precluded the award of any other sums as damages to the business. Thus, the trial court correctly determined that once the Conleys elected to conduct their business as a corporate entity, they were personally barred from recovering damages sustained by the corporation.

The Conleys next argue that the trial court erred in dismissing their claim for defamation. In March 1997, when the allegedly defamatory letter was written, the Conleys, B&R, and Citizens were defendants in a foreclosure action in the Pike Circuit Court filed by the Pikeville National Bank. There was also a lawsuit pending against the Conleys in the Bell Circuit Court that had been filed by B&R for fraud with respect to their 1994 business transaction. The defamatory letter at issue was sent to Citizens in response to its request that B&R assign to it the rents it paid to the Conleys for its lease of the Elkhorn City realty in order to enable the Conleys to settle the foreclosure action.

In light of these factual circumstances, the trial court concluded as follows:

[I]t would be difficult to find a more typical letter written by a lawyer setting out his client's position in a legal controversy.

Although the letter made specific reference to the Pike County lawsuit and set out B&R's desire to settle all pending issues arising from the various dealings between B&R and JMMS, the appellants argue that the letter was "not connected" to any judicial proceeding and was not entitled to the privileged status recognized by the trial court. We cannot agree that the trial court erred in applying the doctrine of privilege to the alleged defamation. See Massengale v. Lester, Ky., 403 S.W.2d 701 (1966).

Finally, the appellants argue that the trial court erred in denying their motion to amend their complaint to assert an additional claim for abuse of process. We review this claim under an abuse-of-discretion standard. Graves v. Winer, Ky., 351 S.W.2d 193 (1961).

The Conleys desired to amend their complaint in order to assert a new theory of liability based on the lawsuit filed by B&R in the Bell Circuit Court in March 1997. They alleged that the action was wrongful and that B&R brought the 1997 Bell Circuit Court action for the ulterior purpose of providing it

with "leverage" for negotiating the claims relating to the 1995 sale of the assets of JMMS's Pikeville store.

The Conleys originally moved to amend their complaint to state a claim for abuse of process on March 29, 2001 -- more than three years after the filing of the lawsuit, after voluminous discovery had been conducted by the parties, and several months after they admittedly became aware of the claim. The trial court denied the motion, noting prejudice to B&R and the fact that the litigation would be delayed. The Conleys renewed their motion in August 2001 -- after the trial court granted a motion to continue the trial until February 2002. The motion was again denied.

The Conleys argue that the appellees would not have been prejudiced by allowing the motion to amend and that CR 15.01 "reflects policy considerations" favoring a litigant's right to amend his pleadings. We agree that the trial court should be liberal in granting motions to amend pleadings and that there must be a sufficient reason for the trial court to reject a motion for leave to amend a pleading. Ashland Oil & Refining Co. v. Phillips, Ky., 404 S.W.2d 449, 450-451 (1966). In making its ruling, the trial court must consider whether the non-moving party would suffer prejudice if the motion were granted and whether there is any evidence of bad faith. Stout v. City of Martin, Ky., 395 S.W.2d 591, 592-593 (1965).

In denying the original motion to amend, the trial court was persuaded by the fact that no new evidence had come to light after the December 2000 scheduling conference setting the matter for trial in August 2001. It noted that the case involved complex litigation for which it had allocated eight days for trial. It stated that additional discovery would have to be undertaken and that it would be compelled to continue the trial. It noted that Moran Foods might move for a separate trial if the new theory against B&R were allowed to be litigated. Since the Conleys were aware of the abuse-of-process claim prior to the setting of the trial date, we are not persuaded that justice mandated that the trial court grant the motion to amend the complaint to assert an additional cause of action. Considering the timing of the motion in the overall context of the litigation, we find no abuse of discretion by the trial court in denying the motion to amend.

The judgment of the Fayette Circuit Court is affirmed.

ALL CONCUR.

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