

Commonwealth Of Kentucky

Court Of Appeals

NO. 2002-CA-0000756-MR

ROBERT H. CLARKSON INSURANCE AGENCY, LLC

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE LISABETH HUGHES ABRAMSON, JUDGE
ACTION NO. 01-CI-003550

PROFESSIONALS' PURCHASING GROUP, INC.

APPELLEE

OPINION
AFFIRMING

** ** * * * **

BEFORE: COMBS, KNOPF, AND TACKETT, JUDGES.

KNOPF, JUDGE: Robert H. Clarkson Insurance Agency, LLC

(Clarkson) appeals from an order of the Jefferson Circuit Court granting summary judgment to Professionals' Purchasing Group,

Inc. (PPG) in a matter involving a contract dispute. The trial

court found that a reference contained in a recital clause was

not an essential portion of the contract, and did not create an

exclusive agency relationship between Clarkson and PPG.

Clarkson argues that the trial court failed to give effect to

the contract as a whole. Finding that the trial court correctly

interpreted the contract, we affirm.

The facts of this case are aptly summarized in the trial court's summary judgment order:

Clarkson is an insurance agency in the business of providing insurance and financial services to individuals and businesses primarily in the Louisville and Lexington, Kentucky area. PPG is a group purchasing organization whose members consist of physicians and physician groups. PPG obtains discounts for its members on a variety of goods and services including laboratory services, payroll services, office furniture and medical malpractice insurance. In late 1998 PPG entered into an agreement with Pro National Insurance Company in which PPG agreed to exclusively promote and endorse Pro National's professional liability insurance products to PPG members.

On or about January 1, 1999 Clarkson entered into an agreement with PPG entitled "Distribution Agreement." Clarkson maintains that under the terms of the Distribution Agreement Clarkson is PPG's "exclusive agency representative for Pro National Insurance Company's professional liability products in the state of Kentucky."

In May 2001 Clarkson brought this action against Defendant John Horn, a former employee who worked with PPG members during his tenure at Clarkson, and PPG. The Verified Complaint includes a breach of contract claim and request for injunctive relief against Horn and the breach of contract claim against PPG. As to the latter, Clarkson alleges that PPG breached the Distribution Agreement "by encouraging, allowing and promoting insurance agencies other than Clarkson . . . to sell Pro National Insurance products to PPG's members at the ten percent (10%) member discount and to service Pro National's Insurance products." In its Motion to Dismiss Count II of the Verified Complaint, PPG disputes

that the Distribution Agreement confers exclusive agency status on Clarkson. PPG contends that it simply agreed to "actively promote [Clarkson] as an approved insurance agent/agency to sell and service the Pro National ... products to PPG members. Distribution Agreement, Paragraph 1. (emphasis supplied).

Because PPG's motion to dismiss raised matters outside of the pleadings, the trial court treated it as a motion for summary judgment pursuant to CR 56.02.¹ Clarkson also filed a cross-motion for summary judgment, arguing that the Distribution Agreement clearly made Clarkson PPG's exclusive agent for the sale of Pro National Insurance products. However, the trial court noted that the only reference to Clarkson's "exclusive" status for the sale of Pro National insurance products to PPG members was contained in the "Background Information" portion of the Distribution Agreement. The substantive paragraphs of the Agreement did not confer any exclusive agency status upon Clarkson. Consequently, the trial court granted PPG's motion for summary judgment. Clarkson now appeals.

In order to qualify for summary judgment the moving party must "show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."² The record must be viewed in the

¹ CR 12.02.

² CR 56.03.

light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor.³ Summary judgment should only be used when, as a matter of law, it appears that it would be impossible for the respondent to produce evidence at trial warranting a judgment in his favor and against the movant.⁴ On appeal, the standard of review of a summary judgment is whether the circuit 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.⁵

However, interpretation of contracts is an issue of law for the court to decide.⁶ Thus, we review questions of law *de novo* and without deference to the interpretation afforded by the circuit court.⁷ A contract is to be construed to effectuate the intentions of the parties.⁸ Absent an ambiguity in the contract, the parties' intentions must be discerned from the four corners of the instrument without resort to extrinsic

³ Steelvest, Inc. v. Scansteel Service Center, Inc., Ky., 807 S.W.2d 476, 480 (1991).

⁴ Id. at 483 (citing Paintsville Hospital Co. v. Rose, Ky., 683 S.W.2d 255 (1985)).

⁵ Scifres v. Kraft, Ky. App., 916 S.W.2d 779, 781 (1996).

⁶ Morganfield National Bank v. Damien Elder & Sons, Ky., 836 S.W.2d 893, 895 (1992).

⁷ Cinelli v. Ward, Ky. App., 997 S.W.2d 474, 476 (1998).

⁸ Wilcox v. Wilcox, Ky., 406 S.W.2d 152, 153 (1966); Parrish v. Newbury, Ky., 279 S.W.2d 229, 233 (1955).

evidence.⁹ Any contract or agreement must be construed as a whole, giving effect to all parts and every word in it if possible.¹⁰ The fact that one party may have intended different results is insufficient grounds to permit construction of a contract at variance with its plain and unambiguous terms.¹¹

Clarkson focuses on paragraph B of the "Background Information" section of the Distribution Agreement, which states that Clarkson "is PPG's exclusive agency representative (vendor) for the sale of Pro National Insurance Company's products in Kentucky." Clarkson contends that this language reflects the parties' agreement regarding the exclusivity of their arrangement. Clarkson further contends that this intent is consistent with the purposes and the performance of the Agreement.

Clarkson first asserts that the underlying contracts between it and Pro National and between PPG and Pro National contemplate that Clarkson would be the exclusive distribution channel for Pro National insurance products in Kentucky. The "Background Information" section of the Distribution Agreement refers to these contracts, and the contract between Pro National

⁹ Hoheimer v. Hoheimer, Ky., 30 S.W.3d 176, 178 (2000); L.K. Comstock & Co., Inc. v. Becon Const. Co., 932 F. Supp 948, 964 (E.D.Ky. 1993).

¹⁰ City of Louisa v. Newland, Ky., 705 S.W.2d 916, 919 (1986).

¹¹ Green v. McGrath, 662 F.Supp. 337, 342 (E.D.Ky. 1986).

and PPG was made an attachment to the Distribution Agreement. That contract required PPG to use a licensed, Pro National agency representative to solicit, bind, execute and deliver Pro National insurance policies. At the time, the only such agency in Kentucky was Clarkson.

Furthermore, under the terms of the Distribution Agreement, PPG was required to "actively promote [Clarkson] as an approved insurance agent/agency to sell and service the Pro National (PPG Med-Mal) product(s) to PPG members." In exchange, Clarkson was required to: (1) provide a 10% discount on Pro National products to PPG members; (2) provide administrative services for products sold to PPG members; (3) pay PPG a distribution fee of 30% of the commissions it received from Pro National on every new and renewal policy sold to PPG members; and (4) provide a monthly report detailing the value of all its transactions with each PPG member. The Distribution Agreement expressly prohibited Clarkson from selling policies to PPG members in any arrangement that would circumvent the distribution fees payable to PPG.

The Distribution Agreement set out an initial term of two years. It would be automatically renewed on an annual basis unless either party sent written notice of its intention not to renew prior to the expiration of the term. If Clarkson terminated the Distribution Agreement without the concurrence of

PPG, Clarkson would be obligated to continue to pay distribution fees to PPG for as long as it continued to sell policies to PPG members.

When viewed in the light of the entire contract, Clarkson asserts that the cited language demonstrates the parties' intent for Clarkson to be PPG's exclusive agent for the sale of Pro National insurance products to PPG members in Kentucky. The trial court, however, construed the exclusive-agency language as non-essential because it was set forth in the "Background Information" section of the Agreement. Clarkson argues that the trial court failed to give effect to the intent of the parties as stated in the Distribution Agreement.

In rejecting Clarkson's interpretation, the trial court stated that an introductory or prefatory clause to a contract expresses the reasons for and objects sought to be accomplished by the body of the enactment or agreement. While such recitals may be used as an aid in construction or interpretation, they are not an essential part of the operative portions of the contract.¹² Although the paragraph cited by Clarkson does contain a reference to Clarkson as PPG's "exclusive agency representative", the trial court noted that paragraph 1 of the "Statement of Agreement" section merely

¹² Jones v. City of Paducah, 238 Ky. 628, 142 S.W.2d 365, 367 (1940).

states that "PPG will actively promote [Clarkson] as an approved insurance agent/agency to sell and service the Pro National (PPG Med-Mal Program) product(s) to PPG members." (Emphasis added). The court stated that the use of the word an does not imply that PPG agreed to use Clarkson exclusively. The trial court further noted that the contract between PPG and Pro National, which was attached to the Distribution Agreement, provided that PPG's agency relationship with Clarkson "may change at the discretion of PPG and Pro National." As a result, the trial court concluded that PPG was not required to use Clarkson as its exclusive agent for the sale of Pro National Insurance products.

The inclusion of a portion of the contract in a recital clause does not necessarily render that provision nonessential.¹³ Rather, the contract must be construed as a whole to determine whether the parties intended for the provision to be given effect.¹⁴ Nevertheless, we find the trial court's interpretation to be consistent with a plain reading of the Distribution Agreement as a whole.

Based upon its prior dealings with PPG and Pro National, Clarkson reasonably anticipated that PPG would use it as its exclusive agent for the sale of Pro National insurance

¹³ Ingram v. State Property and Buildings Commission, Ky., 309 S.W.2d 169, 172 (1957).

¹⁴ Id., citing Roberts v. Huddleston, 259 Ky. 595, 82 S.W.2d 469 (1935).

products to PPG members. After all, at the time the Distribution Agreement was executed, Clarkson was the only licensed Pro National agency in Kentucky, and Pro National required PPG to use Clarkson for soliciting and sale of Pro National policies to PPG members. The language of paragraph B in the "Background Information" section of the Distribution Agreement clearly reflects this understanding. However, nothing else in the Distribution Agreement required PPG to maintain that arrangement indefinitely. In the absence of a specific exclusivity clause, we agree with the trial court that the "exclusive agency" reference in the "Background Information" section was not sufficient to impose a contractual obligation which the parties did not articulate.

Accordingly, the judgment of the Jefferson Circuit Court is affirmed.

TACKETT, JUDGE, CONCURS.

COMBS, JUDGE, DISSENTS BY SEPARATE OPINION.

COMBS, JUDGE, DISSENTING: I respectfully dissent because I believe that the facts of this case illustrate the lamentable pitfall of allowing letter to prevail over spirit and intent. The documents comprising this contract, including the "Background Information" which clearly sets forth the exclusivity provision, needed to be construed as a whole in order to ascertain the true intent of the parties. In light of

the totality of those components, there can be no doubt that Clarkson enjoyed exclusivity - regardless of the presence of the article *an* ("an approved insurance agent/agency...") in the body of the actual contract. The contract was a sum and final product of the parts, including the so-called "Background Information." Such a "holistic" interpretation is not a matter of resorting to extrinsic evidence but of giving proper deference to the expressions of intent contained in documents integral to the contract itself.

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