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Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-002494-MR

ROY CRAWFORD III, INDIVIDUALLY;
ROY CRAWFORD III, AS STOCKHOLDER, DIRECTOR
AND OFFICER OF ODESSA CORPORATION;
ODESSA CORPORATION; AND ODESSA
CORPORATION, BY ROY CRAWFORD III, AS
SHAREHOLDER, DIRECTOR AND SECRETARY APPELLANTS

APPEAL FROM LETCHER CIRCUIT COURT
v. HONORABLE CHARLES E. LOWE JR., SPECIAL JUDGE
ACTION NOS. 87-CI-00090 AND 89-CI-00158

DEL KERWYN MARTIN, INDIVIDUALLY; DEL KERWYN
MARTIN, AS STOCKHOLDER, DIRECTOR AND
OFFICER OF ODESSA CORPORATION;
LAUREL KNUCKLES MARTIN (NOW SEATON);
AND DKM COAL CORPORATION, INC. APPELLEES

AND: NO. 2003-CA-002531-MR

DEL KERWYN MARTIN CROSS-APPELLANT

CROSS-APPEAL FROM LETCHER CIRCUIT COURT
v. HONORABLE CHARLES E. LOWE JR., SPECIAL JUDGE
ACTION NOS. 87-CI-00090 AND 89-CI-00158

ODESSA CORPORATION AND
ROY CRAWFORD III CROSS-APPELLEES

AND: NO. 2003-CA-002570-MR

DKM COAL CORPORATION, INC.;
DEL KERWYN MARTIN; AND
LAUREL (KNUCKLES) MARTIN (NOW
SWILLEY), INDIVIDUALLY CROSS-APPELLANTS

CROSS-APPEAL FROM LETCHER CIRCUIT COURT
v. HONORABLE CHARLES E. LOWE JR., SPECIAL JUDGE
ACTION NOS. 87-CI-00090 AND 89-CI-00158

ROY CRAWFORD III, INDIVIDUALLY;
ROY CRAWFORD III, AS STOCKHOLDER,
DIRECTOR AND OFFICER OF ODESSA
CORPORATION; AND ODESSA CORPORATION CROSS-APPELLEES

OPINION
AFFIRMING IN PART AND REVERSING AND REMANDING IN PART
APPEAL NO. 2003-CA-002494-MR;
AFFIRMING CROSS-APPEAL NO. 2003-CA-002531-MR
AFFIRMING APPEAL NO. 2003-CA-002570-MR

** ** ** ** **

BEFORE: JOHNSON, TAYLOR, AND VANMETER, JUDGES.

TAYLOR, JUDGE: Roy Crawford III, individually and as stockholder, director, and officer of Odessa Corporation, and Odessa Corporation bring Appeal No. 2003-CA-002494-MR from an April 4, 2003, order and judgment of the Letcher Circuit Court. Del Kerwyn Martin, individually, brings Cross-Appeal No. 2003-CA-002531-MR from the April 4, 2003, order and judgment of the Letcher Circuit Court. DKM Coal Corporation Inc., Del Kerwyn

Martin, and Laurel Knuckles Martin (now Swilley),[1] individually, bring Appeal No. 2003-CA-002570-MR from the April 4, 2003, judgment of the Letcher Circuit Court. We affirm in part and reverse and remand in part Appeal No. 2003-CA-002494-MR; we affirm Cross-Appeal No. 2003-CA-002531-MR and affirm Appeal No. 2003-CA-002570-MR.

The facts of this case are rather complicated. The underlying dispute revolves around the lease and sublease of a coal tipple facility and railroad side track (hereinafter collectively referred to as "the tipple"). In the early 1980s, Roy Crawford III and Edwin Newell purchased the tipple and financed the acquisition through a $355,000.00 loan from Pikeville National Bank & Trust Company (Pikeville Bank). Crawford and Newell formed Odessa Corporation (Odessa) and were the sole shareholders of the corporation. Crawford and Newell's business plan was to lease the tipple to Odessa, and Odessa would then sublease the tipple to a third-party. The lease payments were intended to pay the indebtedness owed Pikeville Bank.

Eventually, Odessa entered into a sublease with DKM on May 1, 1985 (1985 sublease). Del Kerwyn Martin was DKM's sole shareholder. Martin, and his then wife, Laurel Martin, were the

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[1] We note that Laurel Knuckles Swilley is also referred to in the various pleadings and briefs as "Laurel Knuckles," "Laurel Martin," and "Laurel Seaton."

officers of DKM. The 1985 sublease was signed by Martin and Swilley (then Martin). Under the 1985 sublease, the original term was for a five-year period and DKM was to make $5,000.00 monthly payments plus an annual adjustment based upon the Consumer Price Index.

It appears that after August 1986, DKM failed to make monthly payments under the 1985 sublease. As a result, two separate actions were initiated in the Letcher Circuit Court. In 1987, Crawford, as shareholder and officer of Odessa, filed an action against DKM, Martin, and Swilley. Therein, Crawford sought damages for breach of the 1985 sublease. In 1989, Crawford, individually and as stockholder and officer of Odessa, and Odessa brought an action against Martin and Newell. These actions were consolidated by order of the circuit court.

Lengthy litigation then ensued. Eventually, several judgments were entered. On June 11, 1997, the circuit court entered summary judgment in favor of Crawford, finding DKM in default under the sublease, and Martin and Swilley to be personally liable thereon. A motion to alter, amend or vacate was denied by order entered September 12, 1997. On January 9, 2001, the circuit court entered an "Order and Partial Summary Judgment on Question of Liability." This order and accompanying opinion again revisited the issue of Martin and Swilley's personal liability under the sublease and sustained same. On

April 4, 2003, the circuit court entered an "Order and Judgment," holding that the sublease was terminated by mutual consent on November 26, 1986, and awarding Odessa and Crawford damages in the amount of $62,908.70, plus 12% post-judgment interest. Motions to alter, amend or vacate were denied by order entered November 5, 2003. These appeals follow.

At issue in these appeals is the judgment entered April 4, 2003, adjudicating that:

> (1) the 1985 sublease was terminated by mutual consent of Crawford and Martin effective November 26, 1986;
> (2) the damages for breach of the 1985 sublease should be limited to three months lease payments, prejudgment interest, and attorney's fees in the collective amount of $62,908.70; and
> (3) Martin and Swilley were individually liable for damages flowing from the breach of the 1985 sublease.

A review of this judgment reflects that it is clearly a summary judgment granted pursuant to Ky. R. Civ. P. (CR) 56. We note at the outset that our review of a summary judgment has been articulated in Steelvest, Inc. v. Scansteel Service Center, Inc., 807 S.W.2d 476 (Ky. 1991). Therein, the Court held that summary judgment was appropriate if there existed no material issues of fact and movant was entitled to judgment as a matter of law. Id. Additionally, the facts are to be viewed in a light most favorable to the nonmoving party. Id. Our analysis of these appeals shall proceed accordingly.

Appeal No. 2003-CA-002494-MR

Crawford and Odessa contend the circuit court erred by determining the parties mutually consented to a termination of the 1985 sublease on November 26, 1986. In support of its decision, the circuit court specifically concluded:

> At the November 26, 1986, meeting of Odessa Corporation's stockholders, Mr. Crawford learned that his equal partner in Odessa, Mr. Newell, was in the process of selling his shares to Mr. Martin. However, the sale never went completely through, and both Mr. Newell and Mr. [Martin] have disclaimed any interest in Odessa.
>
> Also discussed at the meeting was Mr. Crawford's desire not to operate the tipple until the overdue payments were made to Odessa and an operator acceptable to Mr. Crawford was found or the tipple was sold. Mr. Martin told Mr. Crawford during the meeting that the overdue payments would not be made under the lease. Mr. Crawford reiterated his desire in the December 18, 1986, letter to Mr. Martin, Ms. Knuckles and Mr. and Mrs. Newell. The payments have not been made at any time since then.
>
> These facts demonstrate that Mr. Martin broke the lease on November 26, 1986. Mr. Crawford's stated wish on November 26, 1986, was not to operate the tipple unless Mr. Martin or DKM Coal made the overdue payments to Odessa. The payments were not made at that time and have never been made. Therefore, the Court believes that the lease was terminated by mutual consent as of November 26, 1986.

It is axiomatic that a lease may be terminated by mutual agreement of the parties. 5 David A. Thomas, Thompson on Real Property § 40.03(k)(1) (1994); 52 C.J.S. Landlord & Tenant § 398 (2003). To mutually terminate a lease, the parties must intend to be discharged from the obligations and rights under the lease. This intent may be evidenced by an express agreement or by conduct implying such agreement.

We view the December 18, 1986, letter from Crawford to Newell, Swilley, and Martin (December letter) as pivotal upon the issue of Crawford's intent. In the December letter, Crawford stated:

> D.K.M. is now more than ninety days in default of its September minimum royalty payment, sixty days in default of its October payment, and thirty days in default of its November payment. In addition, the payment for December 1 has not been received.
>
> . . . .
>
> You have notified me you intend not to have D.K.M. perform on its agreement and you have failed to put in the $7,272.00 (plus $6,000.00 receivable from Tony Blevins) you promised during the shareholders/directors meeting on November 26. . . .
>
> I have not had any inquiries since the November 26 meeting by persons interested in buying the tipple, and I doubt if anyone would want to buy it while you still have an option on it. . . .

In the above letter, Crawford expressed his belief that the tipple would not be sold because DKM still possessed "an option on it." It is reasonable to assume that this "option" was the renewal option found in the 1985 sublease. The 1985 sublease provided for an original lease period of five years with an option to renew for an additional five-year period at the discretion of lessee/DKM. As reflected by Crawford's reference to the "option" in the December letter, Crawford clearly believed that Odessa was still bound by the 1985 sublease. It is also significant that in the December letter Crawford pointed out that the December lease payment "has not been received." Clearly, Crawford assumed that DKM's obligation to make payments under the 1985 sublease continued as of December 1986. To be effective, a mutual agreement to terminate a lease must necessarily terminate the leasee/tenant's obligation to pay rent. 5 David A. Thomas, Thompson on Real Property § 40.03(k)(1) (1994).

Viewing the facts most favorably to Crawford, we think the December letter creates material issues of fact as to Crawford's intent to terminate the 1985 sublease at the November 26, 1986, stockholders' meeting.[2]

[2] This opinion should not be misconstrued as passing upon the issue of whether Crawford had the authority to act for Odessa and terminate the 1985 sublease. We simply decide that material issues of fact remain upon his intent to do so.

In sum, we hold that there exist material issues of fact upon whether the parties mutually agreed to terminate the 1985 sublease at the November 1986 stockholder meeting. Accordingly, we are of the opinion the circuit court also erroneously entered summary judgment limiting damages to three months' lease payments. We, consequently, reverse the judgment entered in favor of Odessa and Crawford and remand for further proceedings on the issues of lease termination and damages.

We view Crawford and Odessa's remaining contentions to be without merit or moot.

CROSS-APPEAL NO. 2003-CA-002531-MR AND

APPEAL NO. 2003-CA-002570-MR

Martin, Swilley, and DKM contend the circuit court erroneously concluded Martin and Swilley were individually liable for damages stemming from DKM's breach of the 1985 sublease. Martin and Swilley argue that they signed the lease in their capacity as officers of DKM only and the circuit court erroneously interpreted the 1985 sublease as imposing individual liability upon them. It is undisputed that Martin and Swilley signed the 1985 sublease on behalf of DKM in their respective positions as president and secretary. The narrow issue before us is whether the language set forth in the 1985 sublease imposed individual liability upon Martin and Swilley.

It is well-established that construction and interpretation of a contract is a matter of law for the court. First Com. Bank of Prestonsburg v. West, 55 S.W.3d 829 (Ky.App. 2000). The pertinent section of the 1985 sublease is found in paragraph 14, which states as follows:

> (14) The term "Lessee" as used herein shall include each and all of the parties of the second part herein, jointly and severally. It is expressly understood and agreed that the party signing hereto as Lessee, or on behalf of Lessee, is personally liable to Lessor for full payment of royalties, rentals, and other payments incurred under this lease. If it becomes necessary for Lessor to institute legal proceedings to collect any amounts owed under this agreement by Lessee, Lessor shall have the right to elect to sue either Lessee, or anyone signing on behalf of Lessee, or both to enforce payment. Lessee further agrees that upon default of Lessee in payment to Lessor of royalties, rentals, and other payments, if it becomes necessary for Lessor to take legal action to enforce payment under this agreement, Lessee shall be liable to pay Lessor's attorney's fees in the amount of fifteen (15) percent of the balance then due and owing.

Under paragraph 14, the lessee "is personally liable to Lessor for full payment of royalties, rentals, and other payments incurred under this lease."

The term "personal liability" is defined as:

> Liability for which one is personally accountable and for which a wronged party can seek satisfaction out of the wrongdoer's personal assets.

BLACK'S LAW DICTIONARY 926 (7th ed. 1999). By use of the term personal liability, we believe the parties clearly intended Martin and Swilley to be personally or individually liable for payment of rents under the 1985 sublease. Any other interpretation would be clearly contrary to the intent of the parties as expressed by the language of the lease. See Parrish v. Newbury, 279 S.W.2d 229 (Ky. 1955). As such, we hold that Martin and Swilley were individually liable for rents under the 1985 sublease and the circuit court properly entered summary judgment upon this issue.

Martin and Swilley also argue the circuit court erred in its award of prejudgment interest and attorney's fees. As we have reversed the underlying award of damages, we consider this argument to be moot.

For the foregoing reasons, Appeal No. 2003-CA-002494-MR is affirmed in part and reversed and remanded in part for proceedings not inconsistent with this opinion; Cross-Appeal No. 2003-CA-002531-MR is affirmed; and Appeal No. 2003-CA-002570-MR is affirmed.

ALL CONCUR.

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