

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-000812-MR

DAVID A. WEINBERG

APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE THOMAS L. CLARK, JUDGE
CIVIL ACTION NO. 00-CI-03240

BRIAN P. GILFEDDER

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: GUIDUGLI AND TAYLOR, JUDGES; HUDDLESTON, SENIOR JUDGE.¹

HUDDLESTON, SENIOR JUDGE: David A. Weinberg appeals from an opinion and order of Fayette Circuit Court that dismissed his claim to be declared the legal and equitable owner of a pair of University of Kentucky season football tickets. We affirm.

Weinberg's claim to the football tickets was made against his former friend and law partner, Brian P. Gilfedder. In 1974, Weinberg and Gilfedder, who were then on good terms, each obtained a pair of University of Kentucky (UK) football

¹ Senior Judge Joseph R. Huddleston sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

season tickets from an acquaintance, Joe Smaha. Smaha was able to acquire the tickets through his acquaintanceship with the coach's secretary. The tickets were placed in Smaha's name. In 1977, Smaha left Lexington. Weinberg and Gilfedder agreed to keep their tickets in Smaha's name so that they would not lose priority on the season ticket holder list. Smaha accordingly instructed the UK Athletics Association to forward the tickets to him in care of Gilfedder at his Lexington address. Weinberg and Gilfedder were each responsible for the cost of the tickets, except for the period when they were law partners and the partnership paid for them.

Weinberg and Gilfedder dissolved their law partnership in 1978. Weinberg then began to have trouble getting the football tickets from Gilfedder on time. On August 6, 1980, Weinberg filed a complaint against Gilfedder in Fayette Circuit Court, alleging that Gilfedder had failed to notify him when the tickets arrived, and had in fact sold them to someone else. A restraining order was entered enjoining Gilfedder from delivering or transferring the 1980 season football tickets to anyone other than Weinberg. The suit was dismissed by Weinberg based upon Gilfedder's "oral statement" that Weinberg was indeed the owner of the two season football tickets and that Weinberg would not henceforth encounter any more problems getting the tickets.

Weinberg claims that he nonetheless continued to have difficulties obtaining the tickets from Gilfedder. He further claims that he "tolerated" the situation for a time but ultimately consulted officials at the UK Athletics Association who suggested that Gilfedder sign an authorization allowing Weinberg's tickets to be placed in his name and mailed directly to him. Gilfedder refused to sign such an authorization. Finally, on September 6, 2000, Weinberg filed the action that is the subject of this appeal, seeking to be declared the legal and equitable owner of the tickets.

After conducting a hearing, the circuit court denied Weinberg's request for declaratory relief on the grounds that there was insufficient evidence that he was the owner of the tickets and that the doctrine of laches barred any further action. Relevant portions of the circuit court's opinion are set forth below:

The parties in their testimony differ as to what transpired during the next twenty (20) years [following the dismissal of the first lawsuit in 1980]. Plaintiff [Weinberg] asserts there were substantial and continuing problems each and every year which Defendant [Gilfedder] denies. It does appear from the testimony Plaintiff did receive the tickets each of the years in question.

The difficulty that arises in this case is the claim made by the Plaintiff and the proof offered to assert such a claim. Plaintiff request[s] this court that

Plaintiff "be declared the legal and equitable owner of the University of Kentucky football tickets." The only proof offered by Plaintiff to support this prayer for relief is evidence that he purchased from Defendant each year tickets issued by the University of Kentucky Athletic Association to Mr. Smaha or Defendant. No evidence was offered either from the UKAA, Mr. Smaha or any other credible witness evidencing or supporting Plaintiff's claim that he is the legal and equitable owner of the tickets. Though each party testified the Court finds each lacking credibility due to the apparent and obvious utter dislike each has for the other.

The Court finds the case before it is prejudiced by the two decade delay which occurred between the 1980 action and the present case. It is apparent to this Court, in light of the admissions made in this complaint that the parties agreed and acknowledge Plaintiff was the legal and equitable owner of the tickets in August, 1980, that as of the 1980-81 or 1981-82 football seasons the issue that Plaintiff now wishes to assert would have been ripe for assertion. To delay twenty years to bring such a claim destroys the potential for substantive evidence, including such items as canceled checks, order forms, UK ticket office records, correspondence between the parties, etc., from being submitted to the Court. The Court finds, due to the twenty year delay and the unavailability of substantive evidence occasioned by that delay that Plaintiff's claim is barred by laches.

On appeal, we accept the findings of fact of the circuit court unless they are clearly erroneous.²

² See Ky. R. Civ. Proc. (CR) 52.01; American Interinsurance Exchange v. Norton, 631 S.W.2d 851, 852 (Ky.App. 1982).

Weinberg has argued that the circuit court mistakenly relied on the doctrine of laches in denying him relief. We agree that the necessary elements to invoke the doctrine were not present.

"The basis of the doctrine of laches is that neglect or omission to assert one's rights within a reasonable period of time, where it causes prejudice, injury, disadvantage or a change of position to the other party, will bar enforcement of that claimant's rights."³ In this case, there was no showing of detriment or changed position on Gilfedder's part as a result of Weinberg's inaction.

Although we are not in agreement with the portion of the circuit court's opinion that relied on the doctrine of laches, we find nothing erroneous in its determination that Weinberg has failed to prove his ownership of the tickets. There is simply insufficient evidence to support Weinberg's claim that he has a right to the tickets, beyond his assertion that he dismissed the action in 1980 on the basis Gilfedder's oral statement that Weinberg was the owner of the tickets.

The order from which this appeal is prosecuted is affirmed.

GUIDUGLI, JUDGE, CONCURS.

TAYLOR, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

³ Brumley v. Seabold, 885 S.W.2d 954, 956 (Ky. App. 1994) citing Fightmaster v. Leffler, 556 S.W.2d 180 (Ky.App. 1977).

TAYLOR, Judge: I respectfully dissent.

Notwithstanding the meager record in this case, it appears obvious that the parties have been operating under some type of contractual arrangement regarding the division of the football tickets for over twenty-five years. If an actual controversy exists regarding the existence of a contract or its terms, a party may obtain a declaration of rights under Kentucky Revised Statutes (KRS) 418.040 and KRS 418.045. I would reverse and remand for a hearing on this issue.

I agree with the majority that the doctrine of laches does not apply to this case. However, the majority affirms the circuit court on the premise that the record does not support appellant's claim of ownership to the tickets. In fact, the record also fails to establish appellee's ownership of the tickets. Based on the evidence presented and the acknowledgement by the parties in their respective briefs, the legal owner of the tickets is Joe Smaha, a nonparty to this litigation.

For over twenty-five years it would appear that both parties obtained tickets through Smaha to circumvent UK's rules for season ticket distribution. Otherwise, in 1977 each party's tickets would have been placed in their respective names as owners by UK. Unless ownership can be affirmatively established

by one of the parties, perhaps neither should have the opportunity to attend exciting UK football games via Smaha's tickets.

BRIEF FOR APPELLANT:

David A. Weinberg
Lexington, Kentucky

BRIEF FOR APPELLEE:

Douglas C. Brandon
Lexington, Kentucky