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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-002233-MR

HYATT CORPORATION OF DELAWARE,
D/B/A HYATT REGENCY LEXINGTON — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE PAMELA R. GOODWINE, JUDGE
CIVIL ACTION NO. 02-CI-02572

YOUNG AND ASSOCIATES, INC.,
D/B/A ANDY FRAIN SERVICES, INC. — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: MINTON, SCHRODER, AND TAYLOR, JUDGES.

MINTON, JUDGE:

I. INTRODUCTION.

Hyatt Corporation of Delaware, d/b/a Hyatt Regency Lexington (Hyatt), appeals from a summary judgment entered in favor of Young and Associates, Inc., d/b/a Andy Frain Services, Inc. (Young). Hyatt and Young are defendants in two consolidated personal injury cases arising out of a motor

vehicle accident. Hyatt filed a third-party complaint against Young alleging that Young was obligated to indemnify Hyatt against any possible loss in the underlying personal injury cases. The trial court granted Young's motion for summary judgment on Hyatt's indemnity claims. We affirm.

II. THE CONTRACT BETWEEN HYATT AND YOUNG.

On January 1, 2000, Hyatt and Young entered into a written contract, the Security Guard Service Agreement, which called for Young "to arrange for the performance of unarmed security service ('Service') at the Hotel, within the hotel and on the hotel's outdoor property."[1] The service agreement had no fixed term but was terminable at-will by either party with some restrictions concerning notice.[2] The service agreement included the following provision:

> 10. Indemnification.
>
> [Young] shall defend, indemnify and hold harmless Hyatt Corporation . . . and [its] employees, officers, directors and agents from and against any and all actions, costs, claims, losses, expenses and/or damages, including attorney's fees, for bodily injury and/or death to [Young's] employees and/or third parties which arise out of or result from the negligent performance or alleged negligent

[1] Service agreement ¶ 2(a) (parentheses, quotation marks, and capitalization in original).

[2] *Id*. ¶ 1 (noting that the contract could be terminated on thirty days' prior written notice without cause or immediately upon written notice with cause).

> performance, the willful misconduct or alleged willful misconduct of [Young] and its employees in connection with the services to be performed by [Young] hereunder.[3]

Young was still providing security guard service for Hyatt under the service agreement two years later when Hyatt approached Young for permission to allow its security guard employees to drive the Hyatt shuttle van to the airport occasionally when no Hyatt employee was available. Hyatt did not offer Young any incentive for it to agree to this proposition. But Henry Wilson, then Director of Operations for Young, stated in his deposition that he was afraid that Hyatt might cancel the security service contract if Young did not cooperate. So Young asserts that it agreed to let its employees occasionally drive the Hyatt shuttle van as long as Hyatt maintained insurance coverage on the van. Hyatt denies that insurance coverage was mentioned as a condition of acceptance. Both parties agree that no mention was made of indemnification related to driving the shuttle van.

[3] *Id*. ¶ 10.

III. THE MOTOR VEHICLE ACCIDENT CLAIMS.

On April 1, 2002, Donald Harmon, a Young security guard, was involved in a motor vehicle accident while driving the shuttle van. James Moore, a motorist who was allegedly injured in the accident, filed a civil action against Hyatt and Harmon. A separate personal injury action was later filed against Hyatt, Harmon, and Young by Arealia Denby, who was a passenger in the shuttle van at the time of the accident. The two cases were consolidated.

IV. HYATT'S INDEMNITY CLAIM AGAINST YOUNG DISMISSED IN CIRCUIT COURT.

Hyatt filed a third-party complaint against Young asserting that it was entitled to indemnity from Young for any possible liability in the underlying personal injury cases. Hyatt asserted several different grounds for indemnification. Young moved for summary judgment against Hyatt on the third party complaint. The trial court granted Young's motion for summary judgment. The trial court's order did not address any of the issues that Hyatt had raised in opposition to the motion for summary judgment, nor did it state the specific basis of the trial court's decision. Hyatt filed a timely appeal.

Summary judgment is only appropriate if the movant's "right to judgment is shown with such clarity that there is no

room left for controversy."[4] Summary judgment must be "cautiously applied," and the trial court should not render a summary judgment "if there is any issue of material fact."[5] A material fact is one which has the power to alter the outcome of the case under the existing law if the controversy surrounding that fact is decided in favor of the nonmovant.[6] The record must be viewed in the light most favorable to the party opposing the summary judgment motion, and any doubts are to be resolved in the nonmoving party's favor.[7]

V. HYATT'S ISSUES ON APPEAL.

Hyatt asserts that the trial court erred by granting summary judgment because there are material issues of fact in controversy concerning each of five alternative theories under which Young might be obligated to indemnify Hyatt: (1) oral modification of Paragraph 2 of the service agreement, (2) oral modification of Paragraph 10 of the service agreement, (3) modification of the service agreement through the course of

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[4] Steelvest, Inc. v. Scansteel Service Center, Inc., 807 S.W.2d 476, 482 (Ky. 1991).

[5] *Id*. at 480.

[6] 73 AM.JUR.2D *Summary Judgment* § 48 (2001). *See also* Absher v. Illinois Central R.R. Co., 371 S.W.2d 950, 953 (Ky. 1963) (holding that a disputed factual issue is not material "because whichever way it might be resolved . . . the judgment must be the same").

[7] *Id*. at 480.

performance, (4) promissory estoppel, and (5) equitable estoppel. Hyatt also asserts that summary judgment was premature because discovery was incomplete.

It is well-established that we will not address issues that were not raised before the trial court nor decided by it.[8] The record shows that the issues of equitable estoppel, promissory estoppel, and oral modification of Paragraph 10 of the service agreement were raised before the trial court; but the issues of modification through the course of performance and the alleged incompleteness of discovery were not raised. So we will not address the latter two issues. Whether the issue of oral modification of Paragraph 2 of the service agreement was raised before the trial court is more difficult to determine.

A. Oral Modification and the Elastic Indemnity Provision.

Hyatt asserts that the agreement to have Young's security guards occasionally drive the Hyatt shuttle van orally modified Paragraph 2 of the service agreement, the provision outlining the scope of services to be provided by Young under the agreement. But Hyatt states that "the indemnity provision [Paragraph 10 of the service agreement] was not orally modified . . . ."[9] Instead, Hyatt's indemnification claim based on oral modification of Paragraph 2 rests on the argument that

[8] Regional Jail Authority v. Tackett, 770 S.W.2d 225, 228 (Ky. 1989).

[9] Appellant's Brief at p. 8 (emphasis added).

the indemnification provision in Paragraph 10 of the service agreement should be construed as sufficiently elastic to apply to any services to be provided under Paragraph 2, even services that were added later through modification of the written contract.

Hyatt bases this argument, in part, on the fact that the service agreement uses slightly different language in Paragraph 2 to define the scope of service to be provided by Young under the agreement and in Paragraph 10 to define the activities for which Young is to indemnify Hyatt. Hyatt reasons as follows:

> By using different language, it is not necessary to modify the indemnity provision so that it covers driving the shuttle van. The plain reading of the indemnity provision clearly shows that more than one service is contemplated. . . . [T]he indemnity provision was not orally modified and the indemnity provision already contemplated the performance of additional services by security guards.[10]

Thus, Hyatt's claim for oral modification of the duties to be provided under the service agreement does not state a claim for indemnification unless the indemnification provision of the service agreement is construed as expansive enough to encompass any services to be provided by Young under the agreement, including services that might be added in the future

[10] *Id*.

through amendment. Hyatt raised the issue below of oral modification of Paragraph 2 of the service agreement, the provision concerning the scope of services to be provided by Young under the contract, before the trial court. But a careful review of the record discloses that it did not raise the issue below concerning the expansive construction of Paragraph 10, the indemnification provision of the service agreement. We may not address the latter claim because it was not properly raised in the trial court. Therefore, we also need not address Hyatt's arguments concerning oral modification of Paragraph 2 since they do not even state a viable claim for indemnification. Any dispute concerning these facts is not material.

B. Oral Modification of the Indemnity Provision Itself.

Hyatt has asserted that there is a material question of fact concerning whether the indemnification provision in Paragraph 10 of the service agreement was orally modified when the parties agreed to let Young's security guard employees drive the Hyatt shuttle van as needed.

A written contract may be modified by a later oral agreement so long as the contract is not one that is required by law to be in writing.[11] This rule holds true even if the contract states that no modification shall be made except in

[11] Cole v. Landrum, 297 Ky. 735, 181 S.W.2d 253 (Ky. 1944).

writing.[12] But no rights will accrue under the oral modification unless it conforms to the principles of law relating to the execution of valid contracts.[13] Oral modification must be proved by clear and convincing evidence.[14] Clear, direct, positive proof of the oral modification is sufficient to satisfy the requirement for clear and convincing evidence, even if the opposing side introduces contradicting evidence, while vague and indefinite evidence is insufficient.[15] The burden of proof is on the party asserting that the contract was orally modified.[16]

The following rules are applicable to indemnity contracts specifically:

> [A]n indemnity contract will be construed to cover only such losses, damages or liability as reasonably appear intended by the parties. A contract of indemnity will not be construed to indemnify the indemnitee against losses resulting from the latter's negligence unless such intention is expressed in unequivocal terms. Such interpretation will not be given a contract unless no other meaning can be ascribed to

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[12] Vinaird v. Bodkin's Adm'x, 254 Ky. 841, 72 S.W.2d 707, 711 (Ky. 1934).

[13] Whayne Supply Co. v. Gregory, 291 S.W.2d 835, 839 (Ky. 1956), *overruled in part on other grounds by* Brown v. Noland Co., 403 S.W.2d 33, 36 (Ky. 1966).

[14] Glass v. Bryant, 302 Ky. 236, 194 S.W.2d 390, 391 (Ky. 1946).

[15] *Id*. at 393-394.

[16] Cassinelli v. Stacy, 238 Ky. 827, 38 S.W.2d 980, 983 (Ky. 1931).

> it and every presumption is against such an interpretation.[17]

Assuming for the sake of argument that the indemnification provision in Paragraph 10 of the service agreement could be validly modified orally, whether or not such modification occurred is largely a question of the parties' intent. "Intent, where different inferences can be drawn from undisputed facts, is a question of fact and not of law."[18] The seldom discussed inverse of this proposition is that where only one inference can be drawn from undisputed facts, there is no question of fact to be decided. One legal encyclopedia explains as follows:

> Where the evidence is sufficient to raise the question of intent, the court must submit the question to the jury, even when the facts are undisputed; but where the intent is undisclosed, proof must be given of acts or words from which the inference may fairly be drawn that such intent existed, before a right to go to the jury upon such question exists.[19]

In the case before us, Hyatt asserts that the indemnification provision in Paragraph 10 of the service agreement was orally modified to cover the Young's security guards' driving the shuttle van. Accordingly, Hyatt claims that

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[17] Employers Mut. Liability Ins. Co. of Wis. v. Griffin Const. Co., 280 S.W.2d 179, 182 (Ky. 1955) (citations omitted).

[18] Perry v. Motorists Mut. Ins. Co., 860 S.W.2d 762, 765 (Ky. 1993).

[19] 75A AM.JUR.2d *Trial* § 761 (2005).

it is indemnified against any possible liability arising out of the shuttle van accident. Considering the record in the manner most favorable to Hyatt as the nonmoving party, we must assume, as Hyatt claims, that there was no mention made of insurance coverage on the van. But this does not assist Hyatt in proving its claim for oral modification of Paragraph 10 of the service agreement. It is undisputed that the parties remained silent about indemnification when addressing the possibility of having the security guards drive the van. Hyatt offers no acts or words from which an inference might fairly be drawn that the parties intended to modify Paragraph 10 of the service agreement orally to cover any potential liability for Hyatt arising out of Young's security guards' driving the shuttle van. We find that Hyatt has not presented any evidence to establish that a question of fact exists concerning whether the indemnification provision in Paragraph 10 of the service agreement was orally modified. This is especially significant in light of the fact that oral modification must be shown by clear and convincing evidence and in light of the prohibition against interpreting a contract for indemnity more broadly than the parties intended. For these reasons, we can only conclude that summary judgment was properly entered against Hyatt on its claim for oral modification of Paragraph 10.

C. Promissory Estoppel.

Hyatt also asserts that the trial court erred by granting summary judgment on the claims of promissory estoppel because estoppel is always a question of fact to be determined by the circumstances of each case. Thus, Hyatt suggests that the trial court usurped the role of the jury. It is true that estoppel is a question of fact to be decided under the circumstances of a particular case.[20] But this Court has stated when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law, summary judgment may be granted in an estoppel case as in any other case.[21] And precedent shows that summary judgment may be properly granted concerning a claim of promissory estoppel[22] or a claim of equitable estoppel.[23] In response to a motion for summary judgment, it is the obligation of the nonmoving party to present some evidence to support his theory of estoppel.[24] In the absence of any evidence to support one or more of the

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[20] McKenzie v. Oliver, 571 S.W.2d 102, 106 (Ky.App. 1978).

[21] Bruestle v. S & M Motors, Inc., 914 S.W.2d 353, 355 (Ky.App. 1996).

[22] *See, e.g.,* Rivermont Inn, Inc. v. Bass Hotels & Resorts, Inc., 113 S.W.3d 636, 643 (Ky.App. 2003) (affirming summary judgment on issues of promissory estoppel and equitable estoppel).

[23] *E.g., id.*; Bruestle, 914 S.W.2d at 354 (affirming summary judgment on the issue of equitable estoppel).

[24] Gailor v. Alsabi, 990 S.W.2d 597, 604 (Ky. 1999).

elements of estoppel, summary judgment on an estoppel claim is appropriate.[25]

The elements of promissory estoppel are as follows:

> A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires.[26]

Hyatt has not established the elements of a viable claim for indemnification based on promissory estoppel. All of Hyatt's arguments concerning promissory estoppel are aimed at showing that Young should be estopped from denying that it agreed to let its employees occasionally drive the Hyatt shuttle van as needed. Even if we accept this as true, this does not establish any basis for indemnification. Again, Hyatt has raised a disputed question of fact, but it is not a material question of fact. Hyatt has not identified any promise or statement made by Young that would be reasonably expected to lead Hyatt to believe that Young would indemnify Hyatt for any liability related to Young's employees' driving the shuttle van

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[25] *Id*.

[26] Lichtefeld-Massaro, Inc. v. R.J. Manteuffel Co., Inc., 806 S.W.2d 42, (Ky.App. 1991) (quoting Restatement (Second) of Contracts § 90(1) (1979)). *See also* Rivermont Inn, Inc., 113 S.W.3d at 642 (stating that "[p]romissory estoppel can be invoked when a party reasonably relies on a statement of another and materially changes his position in reliance on the statement").

and to act accordingly. It is undisputed that neither party ever said anything about indemnification related to driving the shuttle van. And having identified no relevant promise, Hyatt clearly has not shown detrimental reliance based on this promise. Because Hyatt has raised no material question of fact, summary judgment is appropriate for Hyatt's promissory estoppel claim.

D. Equitable Estoppel.

Hyatt also attempts to assert a claim for equitable estoppel. Equitable estoppel is invoked when it would be unconscionable to allow a party to maintain a position inconsistent with the position to which he consented or from which he accepted a benefit.[27]

The elements of equitable estoppel are as follows:

1. Conduct, including acts, language and silence, amounting to a representation or concealment of material facts;

2. The estopped party is aware of these facts;

3. These facts are unknown to the other party;

4. The estopped party must act with the intention or expectation his conduct will be acted upon; and

[27] Kentucky Hosp. Ass'n Trust v. Chicago Ins. Co., 978 S.W.2d 754, 755 (Ky.App. 1998).

5. The other party in fact relied on this conduct to his detriment.[28]

Equitable estoppel may be based on silence or inaction where there is a duty to speak or act.[29] "[B]ut no estoppel arises from mere silence where the facts are equally known to both parties."[30] The party seeking to invoke equitable estoppel must show not only that it lacked knowledge of all of the facts but also that it lacked the means to discover the truth as to the facts in question.[31] As Kentucky's highest court has stated, "one may not omit to avail himself of readily accessible sources of information concerning particular facts, and thereafter plead as an estoppel the silence of another who has been guilty of no act calculated to induce the party claiming ignorance to refrain from investigating."[32]

As with its promissory estoppel claim, all of Hyatt's arguments concerning equitable estoppel are aimed at showing that Young should be estopped from denying that it agreed to let

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[28] McCarthy v. Louisville Cartage Co., Inc., 796 S.W.2d 10, 12 (Ky.App. 1990). *See also* Weiand v. Board of Trustees of Kentucky Retirement Systems, 25 S.W.3d 88, 91 (Ky. 2000) (restating the same elements but in a three-part test rather than a five-part test).

[29] City of Georgetown v. Mulberry, 485 S.W.2d 503, 505 (Ky. 1972); Gailor, 990 S.W.2d at 603.

[30] Mulberry, 485 S.W.2d at 505.

[31] 28 AM.JUR.2D *Estoppel and Waiver* § 40 (2000).

[32] Lingar v. Harlan Fuel Co., 298 Ky. 216, 218-219, 182 S.W.2d 657, 659 (Ky. 1944).

its employees drive the Hyatt shuttle van as needed. Even if we accept this to be true, it does not establish a viable claim for indemnification. Therefore, this question of fact is not material to the resolution of the third-party complaint for indemnification. In order to state a viable claim for indemnification based on equitable estoppel, Hyatt would first have to identify some conduct by Young amounting to a representation or concealment of material fact about indemnification related to driving the shuttle van. Hyatt has not even asserted that any such conduct occurred much less offered any evidence in support of it. Likewise, Hyatt has not addressed any of the other elements of an equitable estoppel claim regarding indemnification nor presented any evidence to support these elements. Therefore, Hyatt's claim for equitable estoppel was properly dismissed by summary judgment.

VI. DISPOSITION.

Finding that Hyatt has asserted no material issue of fact and that Young was entitled to summary judgment of the third-party complaint for indemnification as a matter of law, we affirm the circuit court's order granting summary judgment in favor of Young.

SCHRODER, JUDGE, CONCURS.

TAYLOR, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

TAYLOR, JUDGE: I respectfully dissent. I believe the majority has applied the wrong standard of review in this case, essentially treating this case as having been tried on the merits as opposed to being a summary judgment on appellate review.

The Kentucky Supreme Court has clearly enunciated the standard of review of a summary judgment on appeal:

> The standard of review on appeal of a summary judgment is whether the circuit judge correctly found that there were no issues as to any material fact and that the moving party was entitled to a judgment as a matter of law. Summary judgment is appropriate where the movant shows that the adverse party could not prevail under any circumstances.

Pearson ex rel. Trent v. Nat'l Feeding Sys., Inc., 90 S.W.3d 46, 49 (Ky. 2002). A summary judgment is proper when a movant demonstrates that the opposing party cannot prevail under any circumstance. *Id.* The function of summary judgment, thus, being to terminate litigation when it would be impossible for a responding party to produce evidence at trial warranting judgment in his favor. *Id.*

The disputed issue in this case is whether the parties had amended the service agreement for security guard services, whereupon appellant could assert a third-party claim against appellee for indemnity. The majority goes into an exhaustive discussion of oral modification of the service provision

(paragraph two) of the service agreement and both the oral modification and "elastic" interpretation of paragraph ten of the service agreement. All of these issues look to disputed facts raised by appellant in its pleadings and argument presented to the circuit court in my opinion.

The majority appears to get bogged down on the concept of appellant's purported failure to properly raise certain issues before the circuit court at the time of the motion, which effectively looks to the failure to preserve the error for our review. This would be the proper standard to apply to a bench or jury trial but not the proper standard for a review of summary judgment.[33] Appellant argued before the circuit court

[33] The majority's application and reliance on Regional Jail Authority v. Tackett, 770 S.W.2d 225 (Ky. 1989) is misplaced. In Tackett, a dispute arose among four counties and a jailer regarding the construction and operation of a regional jail pursuant to Kentucky Revised Statutes 441.800. Two separate actions were consolidated for trial, but the trial court concluded that the issues presented were questions of law and issued judgment without an evidentiary hearing. The Court of Appeals reversed on the premise that no valid regional jail authority was even formed under the statute, although that issue was not raised by any pleadings before the trial court. The Kentucky Supreme Court reversed the Court of Appeals and reinstated the judgment of the trial court, holding that the Court of Appeals "is without authority to review issues not raised in or decided by the trial court." *Id.* at 228. In this case, the issues on appeal were raised in the pleadings and appear to have been argued before the circuit court prior to entry of summary judgment. Unfortunately, the circuit court gave no reasons why it entered summary judgment, other than there was no genuine issue of material fact. Presumably, the circuit court considered all issues raised by appellant in this appeal, including pleadings, depositions and the like. However, on appeal, the majority wants to restrict appellate review to the summary judgment motion itself, and not the entire record. This limitation is wrong, in my opinion.

that it "filed a third-party complaint against Young in order to recover by way of contractual and common law indemnity any judgment obtained against it by plaintiffs . . . ." The deposition testimony presented to the circuit court clearly reflects a dispute between the parties as to what was intended in the modification of the service agreement and certainly there is no doubt that the service agreement was amended. Whether the indemnity provision is "elastic" or not is immaterial to this appeal. The issue is did the parties intend to amend the service agreement regarding services and indemnity, which in this case is clearly a disputed question of fact.

There is absolutely no requirement that this Court defer to the circuit court when analyzing a summary judgment motion. Murphy v. Second Street Corp., 48 S.W.3d 571 (Ky.App. 2001). Our inquiry and focus should be what is of record, not what is properly raised or preserved for appeal.

The Court of Appeals, like the circuit court, must consider the facts in the light most favorable to the nonmoving party. Johnson v. Lone Star Steakhouse & Saloon of Ky., Inc., 997 S.W.2d 490 (Ky. 1999). To ascertain disputed facts, we must look at the entire record before this Court on appeal, not what may or may not have been argued before the circuit court when considering the motion for summary judgment. Pleadings, deposition testimony, and arguments presented to the circuit

court clearly reflect disputed issues of fact in this case. Our review is *de novo*; and there is no requirement, as argued by appellee, that a party must "preserve" its claim below as required in a trial. From review of the record as a whole, I do not believe it has been established that it is impossible for appellant to produce evidence at trial that would warrant a judgment in appellant's favor. As such, summary judgment in this case is improper. Paintsville Hosp. Co. v. Rose, 683 S.W.2d 255 (Ky. 1985).

For the foregoing reasons, I would reverse the circuit court and remand this case for trial.

BRIEF AND ORAL ARGUMENT FOR APPELLANT:

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BRIEF AND ORAL ARGUMENT FOR APPELLEE:

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